

BellSouth Telecommunications, Inc.

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October 30, 2006

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602

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OCT 30 2006

PUBLIC SERVICE
COMMISSION

Re: Brandenburg Telecom LLC, Complainant v. BellSouth
Telecommunications, Inc., Defendant
PSC 2006-00447

Dear Ms. O'Donnell:

Enclosed for filing in the above-referenced case are the original and ten (10) copies of BellSouth's Answer and Motion to Dismiss.

Sincerely,


Mary K. Keyer

Enclosures

cc: Party of record

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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OCT 30 2006

PUBLIC SERVICE
COMMISSION

In the Matter of:

BRANDENBURG TELECOM LLC)
)
COMPLAINANT)
)
v.) CASE NO. 2006-00447
)
BELLSOUTH TELECOMMUNICATIONS, INC.)
)
DEFENDANT)

**ANSWER AND MOTION TO DISMISS
OF BELLSOUTH TELECOMMUNICATIONS, INC.**

ANSWER

Defendant BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, files its answer to the Formal Complaint ("Complaint") of Brandenburg Telecom LLC ("Brandenburg"), and states as follows:

FIRST DEFENSE

1. The Complaint fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE

2. BellSouth is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1 of the Complaint and, therefore, denies the same.

3. BellSouth admits the allegations in Paragraph 2 of the Complaint.

4. BellSouth denies the allegations in Paragraph 3 of the Complaint and states that BellSouth is and has been willing to pay the BellSouth switched access rates

as provided for in the Agreement (as defined in the Complaint) between the Parties for BellSouth-originated intraLATA toll traffic delivered to Brandenburg Telecom.

5. BellSouth states that the allegations in Paragraphs 4 and 5 of the Complaint contain statements of law that require no response from BellSouth.

6. BellSouth admits the allegations in Paragraph 6 of the Complaint.

7. Regarding the allegations in Paragraph 7 of the Complaint, BellSouth admits that the Agreement (as defined in the Complaint) contains language that governs BellSouth's provision of transit traffic services for transit traffic between Brandenburg Telecom and third party local service providers. BellSouth states that the provisions of the General Terms and Conditions of the Agreement speak for themselves and no response is needed. BellSouth denies the remaining allegations in Paragraph 7 of the Complaint, and specifically denies that the Agreement states in any way that it governs only "competitive" traffic between the Parties. BellSouth further states that despite Brandenburg Telecom's assertion in Paragraph 7 that the Agreement governs transit traffic between Brandenburg Telecom and third parties, Brandenburg Telecom is charging BellSouth terminating access for that transit traffic in violation of the Agreement.

8. BellSouth denies the allegations in Paragraph 8 and further states that there is nothing in the Agreement that states the Agreement does not apply to exchanges where Brandenburg Telecom does not provide services in competition with BellSouth.

9. BellSouth admits the allegations in the first sentence of Paragraph 9 of the Complaint and states that the quoted provision from the Parties' Agreement in the remaining allegations of Paragraph 9 of the Complaint speaks for itself and contains no

language that limits that provision to those exchanges in which Brandenburg Telecom provides services in competition with BellSouth.

10. BellSouth denies the allegations in Paragraph 10 of the Complaint and states there is no language in the Agreement that limits the Agreement only to those areas where Brandenburg Telecom provides services in competition with BellSouth.

11. In response to the allegations in Paragraph 11 of the Complaint, BellSouth admits that it does claim that Brandenburg Telecom should be charging BellSouth for switched access services at BellSouth switched access rates as set forth in the Agreement between Brandenburg Telecom and BellSouth. Otherwise, BellSouth denies the allegations in Paragraph 11 of the Complaint.

12. BellSouth denies the allegations in Paragraph 12 of the Complaint as written.

13. BellSouth denies the allegations in Paragraphs 13, 14, 15, and 16 of the Complaint.

14. BellSouth reiterates and incorporates by reference its responses to the allegations in Paragraphs 1-16 of the Complaint as if they were fully set forth herein and states that the remaining allegations in Paragraph 17 of the Complaint do not require a response.

15. The allegations in Paragraph 18 of the Complaint state conclusions of law to which no response is required.

16. The allegations in Paragraph 19 of the Complaint state allegations to which no response is required as the Commission's Order dated October 19, 2005, speaks for itself. BellSouth states, however, that the Order cited in Paragraph 19 of the Complaint is inapplicable to this case. Furthermore, BellSouth states that the

Agreement entered into between BellSouth and Brandenburg Telecom was filed with and approved by this Commission and dictates the relationship between the Parties regarding the issues in this case.

17. The allegations in Paragraph 20 of the Complaint state conclusions of law to which no response is required.

18. BellSouth states the interconnection agreement speaks for itself and denies the remaining allegations in Paragraph 21 of the Complaint. BellSouth specifically denies that the Agreement only governs those areas where Brandenburg Telecom provides services in competition with BellSouth or where such parties exchange “competitive traffic.”

19. BellSouth denies the allegations in Paragraph 22 of the Complaint.

20. BellSouth is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 23 of the Complaint and, therefore, denies the same.

21. BellSouth denies the allegations in Paragraphs 24 and 25 of the Complaint.

22. BellSouth denies all allegations contained in the Complaint that BellSouth has not specifically admitted.

WHEREFORE, BellSouth respectfully requests that this Complaint be dismissed and held for naught and BellSouth be granted any and all other relief to which it may appear entitled.

MOTION TO DISMISS

BellSouth supplements its Answer to the Complaint with this Motion to Dismiss. Brandenburg Telecom LLC's ("Brandenburg Telecom") Complaint should be dismissed for failure to state a claim. Under Kentucky law, a complaint can properly be dismissed for failure to state a claim if the Plaintiff would not be entitled to relief under any facts that could be proven. *Kellerman v. Vaughan*, Ky., 408 SW 2d 415 (1966). In this case, dismissal is appropriate because Brandenburg's case is based upon an implausible, legally unsustainable interpretation of the Interconnection Agreement (as defined in the Complaint and hereinafter referred to as the "Agreement") entered into between BellSouth and Brandenburg Telecom. There simply is nothing in the Agreement that limits its terms and conditions to only those portions of BellSouth's territory in which Brandenburg Telecom is in direct competition with BellSouth, as Brandenburg Telecom alleges.

In the Complaint, Brandenburg Telecom states that it is a competitive local exchange carrier ("CLEC"). Brandenburg Telecom also acknowledges that it has an Agreement with BellSouth that sets the rate for the exchange of traffic between the two companies. Brandenburg Telecom, however, attempts to avoid the plain terms of the Agreement by fabricating a distinction between "competitive" and "noncompetitive" traffic that does not appear on the face of the contract, or, for that matter, anywhere else.

Section 251(c)(2)(a) of the Telecommunications Act states the duty of the incumbent (in this case, BellSouth) to provide interconnection "for the transmission and routing of telephone exchange service and exchange access." Although this section goes on to state other interconnection requirements, there is nothing that creates a

distinction between the routing and transmission of “competitive” traffic versus “noncompetitive” traffic. Instead, the Act clearly contemplates that the ILEC and the CLEC will enter into an interconnection agreement that will govern, among other things, the exchange of all traffic between the Parties. This is precisely what BellSouth and Kentucky Data Link did, and Brandenburg Telecom chose to adopt this Agreement in its entirety without any revisions.

As Brandenburg expressly acknowledges in its Complaint, the Agreement plainly states that each Party shall pay the other Party “terminating switched access tariff rates as set forth in BellSouth’s Access Services Tariff as filed and in effect with the FCC or appropriate Commission.” (*Complaint*, ¶ 9, quoting Agreement, Attachment 3, Section 8.1.6.1) (emphasis added). Nevertheless, Brandenburg Telecom attempts to avoid the plain language of the Agreement by stating that it only applies to what it refers to as “competitive” traffic, and that when the Parties are exchanging noncompetitive traffic, i.e., traffic in the areas in which Brandenburg Telecom does not compete with BellSouth, the Agreement does not apply. The fundamental difficulty with this argument is that there is absolutely nothing in the Agreement to support it. It is well established under Kentucky law that the “intention of the parties to a written instrument must be gathered from the four corners of the instrument.” *Hoheimer v. Hoheimer*, Ky., 30 S.W.3d 176, 178 (2000). Brandenburg Telecom’s attempts to create an intention of the Parties by adding language outside the four corners of the Agreement must be rejected.

The Agreement, again, states that BellSouth’s rates shall apply when the Parties exchange traffic. It does not distinguish between competitive traffic and noncompetitive traffic, nor, in fact, does it even define these terms. Thus, Brandenburg Telecom is

essentially arguing that the Agreement does not apply on the basis of a distinction that it has fabricated for the sole purpose of avoiding the application of the Agreement.¹

The only reference in the Complaint to a part of the Agreement that Brandenburg Telecom relies on for its interpretation is the assertion that the Agreement applies in “BellSouth’s territory.” (*Complaint*, ¶ 7). Of course, BellSouth cannot agree to provide unbundled network elements, to resell telecommunications services, or even to interconnect pursuant to the 1996 Act in a location outside its franchise area. There is no question, however, that when a CLEC exchanges traffic with an ILEC, that exchange is to be governed by interconnection agreements negotiated in accordance with the 1996 Act. (*See generally* U.S.C. § 252.)

Further, Brandenburg Telecom appears to be arguing that if the actual exchange point is not within BellSouth’s territory, then this provides a basis to avoid the Agreement, and to charge the higher tariffed rate for terminating traffic. (*Complaint*, ¶ 12) Thus, under Brandenburg Telecom’s theory, a CLEC could simply manipulate the point of interconnection to place it outside of BellSouth’s service territory and thereby have the ability to avoid the negotiated rate for traffic termination and to substitute a higher rate. This, however, is a clear violation of the Agreement.

Consistent with Section 251(c)(2)(b) of the Act, Attachment 3, Section 3.2 of the Agreement states that the point of interconnection may be established at any technically feasible point “within BellSouth’s network.” Further, Attachment 3, Section 3.2.1 of the Agreement states that the interconnection point “must be located within BellSouth’s serving territory in the LATA in which traffic is originating.” Thus, per the Agreement,

¹ It is noteworthy that Brandenburg Telecom did not negotiate an interconnection agreement, but rather adopted the Interconnection Agreement between BellSouth and Kentucky Data Link, a company that has never advanced the implausible interpretation of the Agreement argued herein by Brandenburg Telecom.

Brandenburg Telecom must establish an interconnection point within BellSouth's network in each LATA where traffic to be exchanged between the Parties originates. In addition, Attachment 3, Section 4.2 of the Agreement states that "BellSouth and [Brandenburg Telecom] shall establish an interconnection trunk group(s) to at least one BellSouth access tandem within the LATA for the delivery of [Brandenburg Telecom's] originated Local Traffic, ISP-Bound Traffic and IntraLATA Toll Traffic *and for the receipt and delivery of Transit Traffic.*" (*Emphasis added*). Thus, even if Brandenburg Telecom and BellSouth do not compete for local customers in certain LATAs, if one of the Parties originates traffic in that LATA, to deliver to the other Party, or if transit traffic is being exchanged in the LATA, an interconnection point is required. Brandenburg Telecom, in manufacturing its meritless argument that the Agreement only applies to competitive traffic, has in fact violated the Agreement by failing to interconnect at a point on BellSouth's network in a LATA where it receives intraLATA toll traffic as well as transit traffic from BellSouth.²

Clearly, there is nothing in the Agreement negotiated between BellSouth and Kentucky Data Link to support the argument that the interconnection attachment to the Agreement does not apply where, in any particular LATA, the CLEC does not compete for local customers. Moreover, Brandenburg Telecom admits that the Agreement governs the exchange of transit traffic, and there is no question that the transit function does occur in BellSouth's territory. That is, BellSouth utilizes its network in its territory

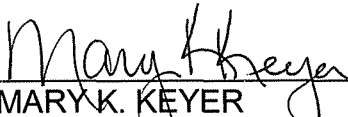
² Brandenburg Telecom has simply opened NPA-NXX codes in its ICO affiliate's switch, and has instructed all carriers, by notation in the Local Exchange Routing Guide ("LERG"), to deliver its traffic to its ICO affiliate. While BellSouth utilizes this LERG designation to deliver traffic to Brandenburg Telecom in the absence of an available interconnection facility, Brandenburg Telecom has provided no explanation for its failure to abide by the terms of the Agreement to establish an interconnection point for its exchange of intraLATA traffic and transit traffic in each LATA where it sends or receives traffic.

to carry traffic that ultimately terminates on Brandenburg Telecom's network so that
Brandenburg Telecom's customers can receive calls.

If BellSouth were to unilaterally refuse to perform this transit function, Brandenburg Telecom would no doubt appear before the Commission in record time to complain. Yet when BellSouth provides the transit function, under the terms and conditions that Brandenburg Telecom chose to adopt, Brandenburg Telecom responds by engaging in a disingenuous attempt to circumvent the language of the Agreement, and to impose upon BellSouth terminating access charges when the Agreement clearly states in Attachment 3, Section 8.6.1, that for transit traffic, BellSouth will not pay any compensation to Brandenburg Telecom. Again, the difficulty with Brandenburg Telecom's stratagem is that it is completely unsupported by the language of the Agreement.

For the reasons stated above, the Complaint should be dismissed with prejudice.

Respectfully submitted,



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COUNSEL FOR BELL SOUTH
TELECOMMUNICATIONS, INC.

CERTIFICATE OF SERVICE FOR 2006-00447

It is hereby certified that a true and correct copy of the foregoing was served on the following individual by mailing a copy thereof on the 30th day of October, 2006.

John E. Selent
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Mary K. Keyer