BELLSOUTH

**BellSouth Telecommunications, Inc.**
601 W. Chestnut Street
Room 407
Louisville, KY 40203

Mary.Keyer@BellSouth.com

**Mary K. Keyer**
General Counsel/Kentucky

502 582 8219
Fax 502 582 1573

June 6, 2007

RECEIVED
JUN 07 2007
PUBLIC SERVICE COMMISSION

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

Re: Brandenburg Telephone Company, Complainant v. BellSouth Telecommunications, Inc., Defendant
PSC 2006-00447

Dear Ms. O'Donnell:

BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky hereby submits for filing its Reply to Brandenburg Telephone Company's Response to BellSouth's April 30, 2007, letter requesting that the Commission strike and delete from the record and from the file in this case the settlement letter from Brandenburg's counsel, John Selent, to the undersigned counsel dated April 23, 2007.

The original and ten (10) copies of this letter are enclosed for filing.

Sincerely,

Mary K. Keyer

Mary K. Keyer

cc: Parties of Record

680207

**COMMONWEALTH OF KENTUCKY**

**BEFORE THE PUBLIC SERVICE COMMISSION**

| | | |
|---|---|---|
| **In the Matter of:** | ) | |
| | ) | |
| **BELLSOUTH TELECOMMUNICATIONS, INC** | ) | |
| | ) | |
| **Complainant** | ) | |
| | ) | |
| **v.** | ) | **Case No. 2006-00447** |
| | ) | |
| **BRANDENBURG TELEPHONE COMPANY** | ) | |
| | ) | |
| **Defendant** | ) | |

**BELLSOUTH'S REPLY TO BRANDENBURG TELECOM'S RESPONSE TO BELLSOUTH'S MOTION TO STRIKE**

BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky ("BellSouth"), by counsel, replies to Brandenburg Telecom LLC ("Brandenburg") Response to BellSouth's Motion to Strike (hereinafter, "*Brandenburg Response*").

The Informal Conference in this case was held on March 21, 2007. BellSouth had notified Mr. Selent before, and notified Mr. Selent and Commission Staff during, the Informal Conference, that BellSouth considered settlement negotiations between the Parties to be confidential and inappropriate for discussion during the Informal Conference. Although the Parties did agree to have some limited general discussion during the Informal Conference about what the Parties may be able to accept to get this case resolved, and Brandenburg agreed to provide BellSouth with some proposed language, there was no expectation or requirement by the Commission Staff that Mr. Selent copy the Commission on any such proposal and that the proposal would be filed

as a matter of public record in the case. There was no request by the Commission staff for such information. Counsel for Brandenburg, by filing such proposal with the Commission, totally disregarded the Parties' discussions about and acknowledgement of the confidentiality of settlement negotiations. Additionally, were the Commission to allow such filings, it would set a precedent for other parties to begin filing settlement proposals in cases before the Commission. Such a result does not comport with existing law and public policy.

The "'law has long fostered voluntary dispute resolution by protecting against the possibility that a compromise or offer of compromise might be used to the disadvantage of a party in subsequent litigation.'" *Green River Elec. Corp. v. Nantz*, 894 S.W.2d 643, 646 (Ky. App. 1995) (citations omitted). The Kentucky Rules of Evidence clearly state in part that evidence of compromise or an offer of compromise is not admissible to prove liability for or invalidity of the claim or its amount. KRE 408. In addition, KRE 408 specifically states that "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible." Mr. Selent's proposal sent to AT&T Kentucky's counsel[1] purports to contain such evidence and, as such, is inadmissible and should be stricken from the case.

In accordance with KRE 408, such evidence would be admissible if it were to prove "bias or prejudice of a witness, negativing [sic] a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." None of these reasons is present in this case nor has any such reason been given by Brandenburg for filing with the Commission its purported settlement proposal to BellSouth's counsel.

[1] AT&T Kentucky is moving to strike Mr. Selent's letter of April 23, 2007, to AT&T Kentucky's counsel and all accompanying attachments to the letter. Brandenburg Telephone alleges in footnote 1 of its response that AT&T Kentucky referenced only the cover letter.

Brandenburg claims that it "provided the Commission with a copy of its own settlement proposal in an effort to update the Commission on the progress of the parties' settlement negotiations." *Brandenburg Response, p.* 3. This reasoning is incredulous for two reasons: first, there was no request by the Commission for an update on the progress of settlement negotiations in this case, and second, Brandenburg could easily have updated the Commission on the progress of settlement negotiations, were it so inclined to do so on its own, by informing the Commission that it was providing or had provided an offer of settlement to BellSouth on April 23 and was awaiting a response.

There is compelling public policy behind the rule of not admitting evidence of settlement negotiations that encourages and favors settlements between adverse parties. Without some expectation of confidentiality and non-admissibility of settlement negotiations to a trier of fact, parties would be discouraged from engaging in meaningful negotiations. Brandenburg, without consulting with or informing BellSouth, arbitrarily submitted *for filing in this case with the Commission* the settlement proposal sent from Brandenburg's counsel to BellSouth's counsel for no apparent legitimate reason.

Based on Kentucky law and compelling public policy, Mr. Selent's letter and attachment containing settlement negotiations information should not be placed in the Commission file or in the public record. The settlement proposal as written and submitted *for filing in this case* could only have been filed for the purpose of attempting to influence the Commission regarding Brandenburg's claims and the value of such claims. As such, it must be stricken from the record under KRE 408, and should not be included as a part of the file in this case subject to public disclosure.

Brandenburg's reliance on a 1974 Maryland case, *Burlington Industries, Inc. v. Exxon Corp.*, 379 F. Supp. 754, 1974 U.S. Dist. LEXIS 7794, 183 U.S.P.Q. (BNA) 729 (D. Md. 1974) to support its position that BellSouth somehow waived a privilege to confidentiality is misplaced. That case involved a discovery dispute and the attorney client privilege and work product privilege, neither of which is at issue here.

Moreover, in addition to the fact that evidence of settlement negotiations is not admissible under the Kentucky Rules of Evidence unless there is some legitimate purpose such as those specified in KRE 408, none of which is present in this case, and the public policy behind that rule, there is a further compelling public policy reason for not allowing settlement proposals to be arbitrarily filed by a party in cases before the Commission. If the Commission allows this proposal to remain in the record, it would open the floodgates for all parties to begin filing a barrage of settlement proposals back and forth between the parties in an effort to get their positions in front of the Commission and would place the Commission in the middle of these negotiations.

Based on the foregoing, the Commission should grant BellSouth's motion to strike from the record and remove and destroy Brandenburg's filing of its settlement proposal, and all copies of it, from the Commission's files.

Respectfully submitted,

Mary K. Keyer
601 W. Chestnut Street, Room 407
Louisville, Kentucky 40203
(502) 582-8219
mary.keyer@bellsouth.com

J. Phillip Carver
Suite 4300, BellSouth Center
675 W. Peachtree Street, N.E.
Atlanta, GA 30375
(404) 335-0747
j.carver@bellsouth.com

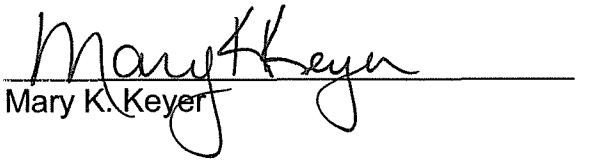
COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC.
d/b/a AT&T KENTUCKY

680184

**CERTIFICATE OF SERVICE -- KPSC 2006-00447**

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by U.S. mail, this 6th day of June, 2007.

John E. Selent
Holly C. Wallace
Dinsmore & Shohl, LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202
John.Selent@dinslaw.com
Holly.Wallace@dinslaw.com



Mary K. Keyer