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JUN 20 2007

PUBLIC SERVICE
COMMISSION

June 19, 2007

VIA FEDERAL EXPRESS

Hon. Beth A. O'Donnell
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40602-0615

Re: *In the Matter of: Brandenburg Telecom LLC v. BellSouth Telecommunications, Inc., before the Public Service Commission of the Commonwealth of Kentucky, Case No. 2006-00448*

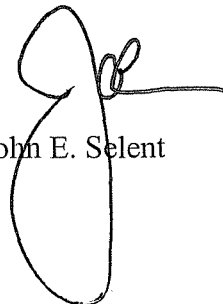
Dear Ms. O'Donnell:

I have enclosed for filing in the above-styled case the original and eleven (11) copies of Brandenburg Telecom's verified motion for summary judgment. Please return a file-stamped copy in the self-addressed, postage prepaid envelope furnished herewith.

Thank you, and if you have any questions, please call me.

Very truly yours,

DINSMORE & SHOHL LLP



John E. Selent

JES
Enclosures

cc: All parties of record

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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JUN 20 2007

PUBLIC SERVICE
COMMISSION

In the Matter of:

BRANDENBURG TELECOM LLC)
Complainant)
v.)
BELLSOUTH TELECOMMUNICATIONS)
INC.)
Defendant)
_____)

Case No. 2006-00447

**BRANDENBURG TELECOM'S
VERIFIED MOTION FOR SUMMARY JUDGMENT**

Pursuant to CR 56.02, Brandenburg Telecom LLC ("Brandenburg Telecom") moves the Kentucky Public Service Commission (the "Commission") for summary judgment on its claims against BellSouth Telecommunications, Inc. ("BellSouth") in Case No. 2006-00447. Brandenburg Telecom's claims are for past due tariffed access charges in the amount of, at this time, \$157,588.57, and for the payment of the future access charges as they become due.

In support of its motion, Brandenburg Telecom states as follows.

INTRODUCTION

BellSouth refuses to abide by the terms of Brandenburg Telecom's access tariff governing the exchange of traffic between BellSouth and Brandenburg Telecom outside of BellSouth's territory. And, despite the clarity of the parties' interconnection agreement ("Agreement") on this point, BellSouth has nevertheless attempted to construe the Agreement as having statewide applicability and, thereby, preempting Brandenburg Telecom's filed and approved access tariff.

The Agreement does not apply to traffic in areas where Brandenburg Telecom and BellSouth do not exchange competitive traffic; the exchange of traffic in those areas is governed by the parties' respective tariffs. Because of its failure to pay Brandenburg Telecom's tariffed access charges, BellSouth owes Brandenburg Telecom \$157,588.57. Therefore, the Commission should grant Brandenburg Telecom's motion for summary judgment and order BellSouth to pay these past due access charges and future access charges as they become due.

VERIFIED STATEMENT OF FACTS

On April 26, 2005, the Commission approved Brandenburg Telecom's adoption of the interconnection agreement between BellSouth and Kentucky Data Link, Inc., dated December 1, 2004. Pursuant to the express terms of the Agreement, it applies only to "BellSouth territory in the state(s) of...Kentucky." (Agreement, General Terms and Conditions, §2.1 (emphasis added.)) In other words, the Agreement only applies where BellSouth is the incumbent local exchange carrier ("ILEC").¹ Brandenburg Telecom does not dispute that, in those exchanges in which BellSouth (as the ILEC) provides services in competition with Brandenburg Telecom, the terminating party charges the originating party BellSouth's switched access tariff rates for terminating intraLATA toll traffic on its network.

This provision is set forth in Section 8.1.6.1 of the Agreement, which reads:

For terminating its intraLATA toll traffic on the other Party's network, the originating Party will pay the terminating Party BellSouth's current

¹Specifically, with regard to access traffic (the subject of the Complaint), the Agreement applies when BellSouth terminates a toll call to a Brandenburg Telecom end-user in an area in which BellSouth is the ILEC. Conversely, the Agreement does not apply when BellSouth terminates a toll call to a Brandenburg Telecom end-user in an area in which Windstream, for example, is the ILEC because the area is outside of BellSouth's territory. Under the latter scenario, the access charges are governed by Brandenburg Telecom's applicable access tariff.

intrastate or interstate, whichever is appropriate, terminating switched access tariff rates as set forth in BellSouth's Access Services Tariffs as filed and in effect with the FCC or appropriate Commission. The appropriate charges will be determined by the routing of the call. Additionally, if one Party is the other Party's End User's presubscribed interexchange carrier or if one Party's End User uses the other Party as an interexchange carrier on a 101XXXX basis, the originating party will charge the other Party the appropriate BellSouth originating switched access tariff rates as set forth in BellSouth's Intrastate or Interstate Access Services Tariff as filed and in effect with the FCC or appropriate Commission.

Id.

In all other exchanges - that is, exchanges outside BellSouth's territory - each party is expected to charge the other its own existing switched access rates for the provision of switched access services on either an interLATA or intraLATA basis. BellSouth, however, refuses to pay Brandenburg Telecom the appropriate switched access tariff rates for services in exchanges where BellSouth is not the ILEC. Accordingly, Brandenburg Telecom filed the present complaint with the Commission on October 12, 2006 in an effort to collect the tariffed charges owed by BellSouth. As of the time of this filing, BellSouth owes Brandenburg Telecom in excess of \$157,588.57 for switched access services provided by Brandenburg Telecom. This amount increases daily, as long as BellSouth refuses to abide by Brandenburg Telecom's tariffs outside of BellSouth's territory.

ARGUMENT AND ANALYSIS

I. SUMMARY JUDGMENT STANDARD.

Pursuant to KRS 278.310, "[a]ll hearings and investigations before the Commission or any commissioner shall be governed by rules adopted by the Commission, and in the conduct thereof, neither the Commission nor the commissioner shall be bound by the technical rules of legal evidence." Although proceedings before

the Commission are governed by rules adopted by the Commission, the standard utilized by Kentucky courts in determining whether to grant a motion for summary judgment is persuasive. *In the Matter of: Ballard Rural Telephone Cooperative Corporation, Inc. v. Jackson Purchase Energy Corporation*, Case No. 2004-00036, 2005 Ky. PUC LEXIS 277 *11 (March 23, 2005) (“The Commission has not established a rule that explicitly governs summary judgment; therefore, in determining whether to summarily dispose of this proceeding, we are guided by Civil Rule 56 and the principles established by the courts resolving motions for summary judgment.”)

Just as the courts, for purposes of judicial economy, seek to resolve cases on summary judgment where no issue of material fact exists, the Commission, for purposes of administrative economy, seeks to summarily resolve cases where the circumstances so warrant. The circumstances so warrant in this case. There are no genuine issues of material fact. The only issues in dispute are of a legal nature which the Commission may resolve on a motion for summary judgment.

In *Steelvest, Inc. v. Scansteel Service Center*, 807 S.W.2d 476 (Ky. 1991), the Kentucky Supreme Court held that “the proper function for summary judgment...” is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.” *Id.* at 482 (citations omitted). Shortly thereafter, the court clarified its ruling in *Steelvest* and noted that “‘impossible’ is [to be] used in a practical sense, not in an absolute sense.” *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). Given *Perkins*’ pragmatic standard, summary judgment is appropriate in “any case where the record shows that there is no real issue as to any material fact with respect to a particular

claim or part thereof or defense thereto." *Continental Casualty Co. v. Belknap Hardware and Mfg. Co.*, 281 S.W.2d 914, 916 (Ky. 1995) (*Steelvest*, 807 S.W.2d at 482, reaffirmed this standard). Under this standard, Brandenburg Telecom is entitled to summary judgment as a matter of law. There are no genuine issues of material fact requiring a public hearing.

II. BY ITS VERY TERMS, THE AGREEMENT IS LIMITED IN SCOPE TO AREAS IN WHICH BELL SOUTH AND BRANDENBURG TELECOM EXCHANGE COMPETITIVE TRAFFIC.

The scope of the Agreement is specifically limited to "BellSouth territory in the state(s) of...Kentucky." (Agreement, General Terms and Conditions, §2.1.) The Agreement, therefore, only applies in areas in which BellSouth provides local exchange service. If the Agreement were truly intended to apply to the entire Commonwealth of Kentucky, as BellSouth contends, the Agreement would have stated that it shall apply in "the Commonwealth of Kentucky." It does not.

Instead, the Agreement provides that it "shall apply to BellSouth territory in the state(s) of . . . Kentucky." *Id.* (Emphasis added.) "It is well settled that the interpretation of contracts is an issue of law for the court to decide. The intention of the parties to a written instrument must be gathered from the four corners of that instrument." *Equitania Ins. Co. v. Slone & Garrett, P.S.C.*, 191 S.W.3d 552, 556 (Ky. 2006) (internal citations omitted). And, "in the absence of ambiguity, a written instrument will be enforced strictly according to its terms." *O'Bryan v. Massey-Ferguson, Inc.*, 413 S.W.2d 891, 893 (Ky. 1966). The four corners of the Agreement unambiguously provide that its applicability is limited to BellSouth territory.

Despite the clear and unambiguous language of the Agreement, BellSouth claims that the Agreement governs the exchange of all traffic throughout Kentucky.

Specifically, BellSouth contends that the Agreement “does not distinguish between competitive traffic and non-competitive traffic, nor, in fact, does it even define (those) terms.” (BellSouth's motion to dismiss, p. 6.) BellSouth further claims that, if the parties had intended to make a distinction between access services in competitive and non-competitive areas, “language would have been added to Attachment 3 [of the Agreement] to make that clear.” (BellSouth's reply to Brandenburg's response to BellSouth's motion to dismiss, p. 5.) However, such a “clarification” would have been redundant and unnecessary. As already noted, the Agreement's restriction to “BellSouth territory” effectively limits the Agreement's application to areas in which BellSouth and Brandenburg Telecom compete. Therefore, no further clarification was necessary.

Furthermore, while Brandenburg Telecom was not a party to the negotiations between BellSouth and Kentucky Data Link, it certainly had an understanding of the terms and conditions it was agreeing to when it adopted the Agreement. Knowing that interconnection agreements are not required to address the exchange of access traffic², Brandenburg Telecom adopted the Agreement, which governs the exchange of traffic between BellSouth and Brandenburg Telecom in those areas in which they compete. Brandenburg Telecom did not enter a statewide access agreement and will not allow BellSouth to unilaterally convert a limited interconnection agreement into such.

BellSouth's characterization of the scope of the Agreement is flawed. The Agreement, by its very terms, is limited to “BellSouth territory” and “BellSouth territory” alone. Accordingly, the Commission should grant Brandenburg Telecom's Motion for Summary Judgment.

²Section 251(b)(5)'s "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications" does not apply to "interstate or intrastate access." See 47 CFR 51.701(b)(1).

III. BELLSOUTH IS MISTAKEN IN ITS ASSERTIONS THAT INTERCONNECTION AGREEMENTS ARE REQUIRED AND THAT ACCESS CHARGES ARE AUTOMATICALLY GOVERNED BY THE INTERCONNECTION AGREEMENT BETWEEN BELLSOUTH AND BRANDENBURG TELECOM.

The Telecommunications Act of 1996 (47 USC § 151 *et seq.*; "the Act") restructured local telephone markets and prohibited states from enforcing laws that would impede competition in the local markets. *Id.* at 685. Under the Act, ILECs are required to provide any requesting telecommunications carrier interconnection to the ILEC network. *Competitive Telecommunications Ass'n v. F.C.C.*, 117 F.3d 1068, 1071 (8th Cir. 1997) ("Among the obligations assigned incumbent LECs is '[t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [LEC's] network.'") As part of the interconnection process, a telecommunications carrier can request the negotiation of an interconnection agreement between itself and an ILEC. *See* 47 USC § 251(c)(1). Upon that request, the ILEC has a duty to negotiate in good faith the particular terms and conditions of the interconnection agreement. *Id.*

BellSouth, however, mistakenly claims that traffic exchanged between a CLEC and an ILEC must be governed by interconnection agreements. (BellSouth's Answer and Motion to Dismiss, p. 7.) BellSouth is also incorrect when it contends that ILECs are required to enter into interconnection agreements that include arrangements "for the transmission and routing of telephone exchange service and exchange access." (BellSouth's Answer and Motion to Dismiss, p. 5) (Emphasis added.) Although parties may agree to include negotiated terms regarding access traffic in their interconnection agreement, they are not required to do so. *See* 47 CFR 51.701(b)(1) ("Interstate or

intrastate exchange access" traffic is not "telecommunications traffic," and therefore, is not subject to the duty to establish reciprocal compensation arrangements.)

The Act was intended to foster local competition and provide CLECs with an opportunity to compete with the ILECs in local markets. Because the Act is primarily aimed at fostering local competition, it need not and does not set forth requirements for exchange carriers to address access traffic in interconnection agreements. Furthermore, tariffs that effectively address access traffic already exist. Accordingly, the Act does not impose a duty to include provisions regarding the exchange of access traffic in interconnection agreements on any carrier.

Because the interconnection agreement between BellSouth and Brandenburg Telecom does not address access traffic outside of BellSouth's territory, BellSouth must pay the tariffed rates for access traffic terminated on Brandenburg Telecom's network. To allow BellSouth to circumvent the tariff and unilaterally expand the interconnection agreement from one addressing the exchange of traffic in BellSouth's territory to one addressing access traffic statewide would defeat the pro-competitive purpose of the Act and negatively impact the ability of CLECs to compete effectively.

Additionally, for the three years immediately prior to Brandenburg Telecom's adoption of the Agreement with BellSouth, Brandenburg Telecom provided BellSouth with switched access services pursuant to Brandenburg Telecom's tariff. Never in that time did the parties require an interconnection agreement to exchange access traffic. The fact that the parties later executed an interconnection agreement to govern the exchange of local traffic did not affect the prior course of business with respect to access traffic.

Interconnection agreements are simply not required to exchange access traffic and BellSouth cannot credibly claim otherwise.

IV. BECAUSE THE INTERCONNECTION AGREEMENT DOES NOT APPLY TO TRAFFIC EXCHANGED BETWEEN BELLSOUTH AND BRANDENBURG TELECOM IN AREAS IN WHICH THEY DO NOT COMPETE, BRANDENBURG TELECOM'S TARIFF APPLIES.

As noted earlier, the Act does not automatically apply to the exchange of access traffic between telecommunications carriers. Therefore, because BellSouth and Brandenburg Telecom did not, in the Agreement, address the exchange of access traffic in areas in which they do not compete, Brandenburg Telecom is required to bill the rates it has on file with the Commission in accordance with the filed-rate doctrine. *See* KRS 278.160. There are no exemptions or special treatments allowed under this doctrine.

The filed-rate doctrine requires that "no utility...charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules." KRS 278.160. Additionally, "no utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions." KRS 278.170(1). In its appellate brief in *BellSouth Telecommunications, Inc. v. Public Service Commission of Kentucky, et al.* (Kentucky Court of Appeals Case No. 2005-CA-001459), BellSouth, citing *Daleure v. Kentucky*, 119 F.Supp.2d 683, 689 (W.D. Ky. 2000), noted that "the heart of the filed rate doctrine...is that it is the only *legal rate*."

Compensation for those interLATA and intraLATA access services not addressed in the Agreement are governed by the respective parties' switched access tariffs approved by and on file with the Commission. The applicable tariff rates are the only legal rates. *Id.* As a result, BellSouth must pay Brandenburg Telecom's switched access tariff rates in areas outside the scope of the Agreement.

CONCLUSION

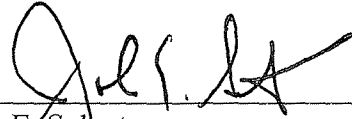
BellSouth is attempting to exert its market power (as indicated by the substantial number of its access lines in Kentucky) to stifle competition. It is attempting to convert a limited interconnection agreement into a statewide access agreement.

Interconnection agreements are not required to address tariffed access services. The Agreement does not address switched access services provided in exchanges in which BellSouth and Brandenburg Telecom do not exchange competitive traffic. Finally, the filed-rate doctrine requires BellSouth to pay Brandenburg Telecom's tariffed access charges and the Agreement does not provide any avenues by which BellSouth can avoid paying those tariffs. Because of its failure to pay for these charges, BellSouth now owes Brandenburg Telecom \$157,588.57, and additional access charges are accruing monthly.

BellSouth's legal claims are baseless. There are no genuine issues of material fact and Brandenburg Telecom is entitled to judgment as a matter of law. Therefore, the Commission should grant Brandenburg Telecom's verified motion for summary judgment against BellSouth and order BellSouth to pay Brandenburg Telecom the charges it owes

for the access services provided by Brandenburg Telecom (\$157,588.57) and charges for future access services as they become due.

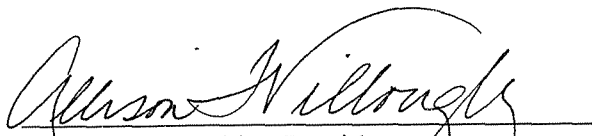
Respectfully submitted,



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VERIFICATION

I, ALLISON T. WILLOUGHBY, having first been duly sworn, state that I have read the foregoing Verified Motion for Summary Judgment. I state that the allegations and statements contained in the Verified Statement of Facts are true and correct to the best of my knowledge, information, and belief.




Allison Willoughby, President
Brandenburg Telecom LLC

COMMONWEALTH OF KENTUCKY)
) SS:
COUNTY OF JEFFERSON)

Sworn to before me and subscribed in my presence by ALLISON T. WILLOUGHBY this 18th day of June, 2007.

My Commission expires: Jan. 25, 2010
_____.



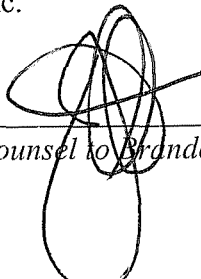
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing was served on the following this 19th day of June, 2007:

Mary K. Keyer
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