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MAY 09 2007

PUBLIC SERVICE
COMMISSION

May 9, 2007

Via Hand Delivery

Hon. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Blvd.
Frankfort, KY 40601

**Re: In the Matter of: Brandenburg Telecom LLC v. BellSouth
Telecommunications, Inc., Case No. 2006-00447**

Dear Ms. O'Donnell:

Enclosed for filing in the above-referenced case, please find one original and ten (10) copies of Brandenburg Telecom's Response to BellSouth's April 30, 2007 letter in which it moves to strike Brandenburg Telecom's April 23, 2007 letter .

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

Sincerely,

DINSMORE & SHOHL LLP



Holly C. Wallace

HCW/rk

Enclosure

cc: All Parties of Record

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MAY 09 2007

PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

Case No. 2006-00447

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

Brandenburg Telecom LLC ("Brandenburg Telecom"), by counsel, hereby submits its response to the April 30, 2007 letter of Mary K. Keyer, General Counsel/Kentucky of BellSouth Telecommunications, Inc. ("BellSouth") in which BellSouth moves to strike the April 23, 2007 letter of John E. Selent, counsel to Brandenburg Telecom. In support of its response, Brandenburg Telecom states as follows.

INTRODUCTION

As an initial matter, Brandenburg Telecom states that it is disappointed that the parties have not made further progress in resolving this matter. In a good faith effort to resolve this dispute, Brandenburg Telecom drafted a settlement proposal and delivered it along with a transmittal letter to Ms. Keyer via hand delivery on April 23, 2007. To date, BellSouth has not responded to Brandenburg Telecom's offer. Rather, BellSouth moved to strike Brandenburg Telecom's transmittal letter.¹

¹ BellSouth has moved to strike the April 23, 2007 letter of John E. Selent filed on behalf of Brandenburg Telecom. Mr. Selent's letter is merely a transmittal letter for the proposed Addendum to the Interconnection Agreement between BellSouth and Brandenburg Telecom. The letter contains no substantive information. Accordingly, Brandenburg Telecom construes BellSouth's Motion to Strike the April 23, 2007 letter as a motion to strike the proposed Addendum to the Interconnection Agreement.

ARGUMENT AND ANALYSIS

BellSouth's response to Brandenburg Telecom filing the April 23, 2007 letter and accompanying agreement with the Kentucky Public Service Commission (the "Commission") is surprising. As discussed below, the Kentucky Rules of Evidence expressly permit disclosure of an offer of settlement so long as it is not for the purpose of "prov[ing] liability for or invalidity of the claim." KRE 408. Brandenburg Telecom filed the settlement proposal outside of the context of a formal public hearing, and in any event, Brandenburg Telecom's settlement proposal could not be the basis for "prov[ing] liability for or invalidity of [Brandenburg Telecom's] claim." KRE 408. For this reason alone, the Commission should deny BellSouth's motion to strike.

I. SETTLEMENT PROPOSALS ARE NOT INHERENTLY CONFIDENTIAL.

BellSouth has not and cannot cite to any law that provides that settlement proposals are inherently confidential. Pursuant to KRE 408, settlement proposals are protected from disclosure to a trier of fact *only if the proposal is being offered for the purpose of proving liability or the invalidity of a claim.*

- (1) Furnishing or offering or promising to furnish; or
- (2) Accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

KRE 408 (emphasis added). Brandenburg Telecom did not offer its settlement proposal into evidence during a formal public hearing, nor did it provide the Commission with a copy of the

proposal “to prove liability for or invalidity of the claim or its amount.” KRE 408. Rather, Brandenburg Telecom 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. Such a disclosure does not run afoul of KRE 408, especially in light of the fact that Brandenburg Telecom’s proposal could not prove anything with regard to BellSouth’s liability or Brandenburg Telecom’s claim. Therefore, BellSouth’s motion to strike should be denied.

II. BELLSOUTH WAIVED ITS RIGHT, IF ANY, TO CONFIDENTIALITY.

BellSouth has not identified any specific information in the April 23, 2007 letter and accompanying settlement agreement it considers confidential or otherwise privileged.² BellSouth simply makes an unsupported, blanket statement that “it was inappropriate” to send the settlement proposal to the Commission. As already stated, settlement proposals are not inherently confidential. KRE 408. Even if BellSouth did identify specific information it considers confidential or otherwise privileged, BellSouth could not assert the privilege because it waived any privilege when it entered into settlement negotiations in the presence of Commission staff.

[T]he court is not unmindful of the fact that privileges cannot be used as both a sword and a shield. A party cannot choose to disclose only so much of allegedly privileged matter as is helpful to his case. Once the party begins to disclose any confidential communication for a purpose outside the scope of the privilege, the privilege is lost for all communications relating to the same matter.

Order, *In the matter of Big Rivers Electric Corporation's Notice of Changes in Rates and Tariffs for Wholesale Electric Service and other Financial Workout Plan*, Case No. 9613, October 29, 1986, p. 5 (citing *Burlington Industries v. Exxon Corporation*, LEXSEE 65 F.R.D. 26 (D. MD. 1974) (internal citation omitted) (“*Big Rivers*”). As is discussed below, the parties entered into settlement

² Brandenburg Telecom notes that to the extent BellSouth believes the transmittal letter and settlement agreement contain confidential information, the proper course of action is for BellSouth to seek confidential treatment pursuant to 807 KAR 5:001, section 7.

negotiations during the Informal Conference. BellSouth cannot unilaterally pick and choose which elements of a settlement negotiation remain confidential. Once BellSouth engaged in settlement negotiations in front of Commission staff it waived its right, if any, to assert a privilege of confidentiality. Therefore, BellSouth has waived the privilege with regard to Brandenburg Telecom's settlement proposal.

During the March 21, 2007 Informal Conference, Commission staff inquired as to whether they should leave the room during the parties' settlement discussions. Both Brandenburg Telecom and BellSouth agreed that the Commission staff could remain. Therefore, the parties' settlement negotiations were conducted in the presence of Commission staff and as such the contents of the parties' settlement negotiations are not confidential.

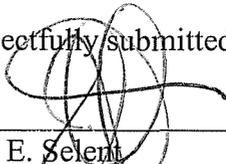
During the Informal Conference the parties discussed whether, on a going forward basis, BellSouth would be willing to pay Brandenburg Telecom's intrastate access tariff rates. To the best of Brandenburg Telecom's recollection and belief, Ms. Keyer stated during the Informal Conference that BellSouth would be willing to pay the rates in Brandenburg Telecom's intrastate access tariff, but would not be willing to be bound by the terms of the tariff because BellSouth does not believe that it is an interexchange carrier. By referencing Brandenburg Telecom's intrastate access tariff rates, the parties discussed in the presence of Commission staff the specific rate BellSouth would be willing to pay to terminate access traffic to Brandenburg Telecom. "Once the party begins to disclose any confidential communication for a purpose outside the scope of the privilege, the privilege is lost for all communications relating to the same matter." *Big Rivers*, p. 5. By indicating in the presence of Commission staff some of the terms under which it was willing to compensate Brandenburg Telecom for terminating intrastate access traffic, BellSouth disclosed confidential information for a purpose outside the scope of the privilege. *Id.* Therefore, BellSouth cannot now

claim a privilege with regard to the confidentiality of the parties' settlement negotiations. Nonetheless, in a spirit of cooperation, should BellSouth file a motion for confidential treatment of the specific dollar figure cited in the settlement proposal, Brandenburg Telecom would not oppose it.

CONCLUSION

Brandenburg Telecom's April 23, 2007 transmittal letter and the attached settlement proposal are not confidential. Settlement proposals are admissible for any purpose other than "prov[ing] liability or invalidity of a claim." KRE 408. Brandenburg Telecom did not file its settlement proposal for the purpose of "prov[ing] [BellSouth's] liability or invalidity of claim." KRE 408. Such a filing could not prove anything about BellSouth's liability or Brandenburg Telecom's claim. Moreover, BellSouth has not identified any specific information in the letter or proposed agreement that is confidential. Even if it could do so, BellSouth waived its right to assert confidentiality when it engaged in settlement negotiations in the presence of Commission staff. Nonetheless, in a spirit of cooperation, Brandenburg Telecom would not oppose a motion for confidential treatment of the specific dollar amount proposed in the settlement agreement attached to the April 23, 2007 transmittal letter, should BellSouth choose to file one. Accordingly, Brandenburg Telecom respectfully requests that the Commission deny BellSouth's motion to strike.

Respectfully submitted,



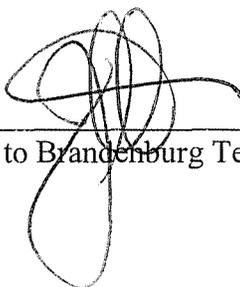
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**COUNSEL TO BRANDENBURG
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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was sent via U.S. Mail, postage prepaid, this 9th
_____ day of May, 2007 to:

Mary K. Keyer
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601 W. Chestnut Street, Room 407
P.O. Box 32410
Louisville, KY 40203

Jay Philip Carver
BellSouth Telecommunications, Inc.
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Atlanta, GA 30375



Counsel to Brandenburg Telecom, LLC

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