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November 13, 2006

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PUBLIC SERVICE  
COMMISSION

**Via Federal Express**

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. before the Kentucky Public Service Commission,  
Case No. 2006-00447***

Dear Ms. O'Donnell:

I have enclosed for filing in the above-styled case the original and eleven (11) copies of Brandenburg Telecom LLC's Response to BellSouth Telecommunications, Inc's Motion to Dismiss.

Please file-stamp one copy and return it to me in the enclosed, self-addressed, pre-paid envelope. Thank you, and if you have any questions, please call me.

Sincerely,

DINSMORE & SHOHL LLP



Holly C. Wallace

HCW/rk  
Enclosure

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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

ORIGINAL

In the Matter of:

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

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COMMISSION  
PUBLIC SERVICE  
Case No. 2006-00447  
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RESPONSE TO BELLSOUTH TELECOMMUNICATIONS, INC.'S  
MOTION TO DISMISS

Brandenburg Telecom LLC ("Brandenburg Telecom"), by counsel, hereby files its response to the motion to dismiss of BellSouth Telecommunications Inc. ("BellSouth"). In support of its response, Brandenburg Telecom states as follows.

INTRODUCTION

This matter concerns BellSouth's refusal to pay Brandenburg Telecom for switched access services. Brandenburg Telecom's switched access services are governed by its tariff, specifically, Section 2, Rates and Charges, of its PSC KY Tariff No. 2 entitled "Regulations and Schedule of Intrastate Access Charges Within the Commonwealth of Kentucky." Pursuant to the filed-rate doctrine and KRS 278.160, Brandenburg Telecom is required to provide access services only in accordance with its filed tariff, or in accordance with special contracts filed with the Commission. Brandenburg Telecom has not executed a contract with BellSouth governing access traffic outside of BellSouth's service territory. Therefore, pursuant to KRS 278.160, Brandenburg Telecom must charge BellSouth its tariffed rates, to do otherwise would violate Kentucky law. Nonetheless,

BellSouth refuses to pay Brandenburg Telecom's tariffed rates, forcing Brandenburg Telecom to file the complaint that gave rise to this action.

### ARGUMENT

A motion to dismiss is a blunt instrument that should be used sparingly. "[T]he moving party is not entitled to judgment unless it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him to relief." *Henderson v. Thomas*, 129 S.W.3d 853, 855 (Ky. App. 2004). Moreover, "the allegations contained in the complaint shall be liberally construed in a light most favorable to the non-moving party, and all allegations taken in the complaint shall be deemed true." *Kidd v. Board of Education*, 29 S.W.3d 374, 376 (Ky. App. 2000).

In the present case, BellSouth has not, and cannot, establish beyond doubt that there is no set of facts under which Brandenburg Telecom is entitled to relief. Rather, BellSouth's motion to dismiss highlights the genuine issue of material fact in dispute between the parties—whether Brandenburg Telecom's provision of switched access services in exchanges outside of BellSouth's territory is governed by Brandenburg Telecom's tariff or the parties' interconnection agreement.

On April 26, 2005 the Commission approved Brandenburg Telecom's adoption of the interconnection agreement between BellSouth and Kentucky Data Link, Inc. (the "Agreement"). In the Agreement, BellSouth is defined as a "local exchange telecommunications company" and Brandenburg Telecom is defined as a competitive local exchange company ("CLEC"). (Agreement, General Terms and Conditions, p.1.) The scope of the Agreement is expressly limited to "BellSouth territory." (Agreement, General Terms and Conditions, §2.1.) Thus, the Agreement only applies to territory in which BellSouth provides local exchange service. Nonetheless, BellSouth now contends that the Agreement governs the provision of access services *outside* of BellSouth's territory. In

effect, BellSouth is attempting to convert the parties' interconnection agreement into a statewide access agreement. There is no legal or factual basis for BellSouth's untenable position.

For three years prior to the execution of the Agreement, Brandenburg Telecom provided BellSouth with switched access services pursuant to Brandenburg Telecom's tariff. The parties did not require an interconnection agreement to exchange access traffic. Therefore, BellSouth's claim that "there is no question . . . that when a CLEC exchanges traffic with an ILEC that exchange is to be governed by interconnection agreements" is wholly without merit. The parties' course of business is evidence that access traffic does not have to be exchanged pursuant to an agreement. Thus, BellSouth's effort to convert the parties' interconnection agreement into a statewide access agreement is nothing less than a self-serving attempt to gain a competitive advantage. If BellSouth is permitted to unilaterally impose its own favorable access terms, BellSouth will not only gain an unfair competitive advantage vis a vis other carriers who purchase access services pursuant to approved state tariffs, but unreasonably disadvantage Brandenburg Telecom in violation of KRS 278.170 by imposing a lower rate on Brandenburg Telecom than BellSouth pays to any other carrier in the market. The Commission should not permit BellSouth to engage in such blatantly anti-competitive behavior.

Moreover, BellSouth cannot point to any contractual provisions that support its strained interpretation of the Agreement. BellSouth relies primarily on section 8.1.6.1 of Attachment 3 of the Agreement which provides that each party shall charge the other party BellSouth's switched access tariff rates for terminating intraLATA toll traffic. The problem with BellSouth's interpretation of this provision is that it requires the Commission to view it in isolation. The Commission cannot do so. "Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible." *City of Louisa v. Newland* , 705 S.W.2d 916, 919 (Ky. 1986). Thus, the

provision must be viewed within the context of the entire Agreement, including section 2.1 of the General Terms and Conditions which limits the scope of the Agreement to BellSouth's territory. Therefore, section 8.1.6.1 is of no support to BellSouth.

BellSouth's reliance on the point of interconnection ("POI") provisions is similarly misguided. First, whether traffic constitutes access traffic is determined by the location of the end users, not the POI. Second, and more importantly, the location of the POI is wholly irrelevant to the question before this Commission, namely, whether the Agreement applies to access traffic outside of BellSouth's territory. If the Agreement does not govern switched access services outside of BellSouth's territory, as Brandenburg Telecom contends, then the POI provisions are irrelevant and of no support to BellSouth.

### CONCLUSION

BellSouth has failed to establish beyond doubt that there is no set of facts under which Brandenburg Telecom is entitled to relief. Rather, BellSouth's motion clearly demonstrates that there is a genuine issue of material fact regarding whether the Agreement governs the exchange of access traffic outside of BellSouth's territory. If the Agreement does not govern such traffic, as Brandenburg Telecom contends, then Brandenburg Telecom would be entitled to the relief requested. For these reasons, the Commission should deny BellSouth's motion to dismiss.

Respectfully submitted,



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Edward T. Depp

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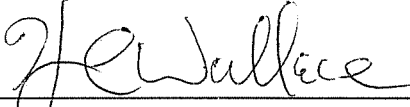
**COUNSEL TO BRANDENBURG  
TELECOM LLC**

**CERTIFICATE OF SERVICE**

I hereby certify a copy of the foregoing was sent via U.S. Mail, postage prepaid, this 13<sup>th</sup>  
\_\_\_\_\_ day of November, 2006 to:

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