

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BELLSOUTH TELECOMMUNICATIONS, INC.)	
)	
COMPLAINANT)	
)	
V.)	CASE NO.
)	2006-00546
BRANDENBURG TELEPHONE COMPANY)	
)	
DEFENDANT)	

O R D E R

On December 14, 2006, BellSouth Telecommunications, Inc.¹ filed a formal complaint against Brandenburg Telephone Company (“Brandenburg Telephone”). AT&T Kentucky is an incumbent local exchange carrier (“ILEC”) providing local telecommunications service in 78 counties. Brandenburg is a rural local exchange carrier (“RLEC”) providing local telecommunications in Breckinridge, Hardin, Larue, Hart, and Meade counties.

AT&T Kentucky alleges two separate billing disputes, the first for overpayments by AT&T Kentucky to Brandenburg for terminating Area Calling Service (“ACS”) traffic and the second for overpayments by AT&T Kentucky to Brandenburg for certain Commercial Mobile Radio Service (“CMRS”) minutes of use delivered to Brandenburg.

¹ Now doing business as AT&T Kentucky (“AT&T Kentucky”).

Also pending are two motions for partial summary judgment, a motion to strike, a motion to schedule a public hearing, a motion for leave to file additional data requests, and a request for oral argument.

BACKGROUND

ACS Traffic Dispute

AT&T Kentucky asserts that, from 1985 until 1998, AT&T Kentucky compensated Brandenburg for terminating ACS traffic through a settlement process whereby AT&T Kentucky netted amounts due to Brandenburg and remitted payment to Brandenburg. In 1998, Brandenburg implemented a Carrier Access Billing System (“CABS”) whereby Brandenburg submitted bills directly to AT&T Kentucky rather than waiting for AT&T Kentucky to submit payment through the former settlement system.

Brandenburg billed AT&T Kentucky through CABS, and AT&T Kentucky paid the bills while also continuing to pay for the same traffic through the former settlement system until discovering the alleged double payment in April 2004. AT&T Kentucky immediately ceased paying Brandenburg through the settlement process and in May 2004 requested an adjustment in the amount of the alleged overpayment since 2002. (The exact amount is confidential.) Brandenburg refused to pay AT&T Kentucky.

Brandenburg alleges that it began billing through CABS in January 1995, almost three years prior to December 1997. Brandenburg asserts that it cannot determine whether AT&T Kentucky overpaid because AT&T Kentucky refuses to provide its call detail records (“CDRs”) for the disputed time. (AT&T Kentucky claims that it does not keep its CDRs for that long a period of time because of the sheer volume of the records.) However, AT&T Kentucky has offered to show Brandenburg its traffic pattern,

proposing that it would support its claim for the double billing. Brandenburg has declined AT&T Kentucky's offers and the parties are at an impasse.

CMRS Traffic Dispute

AT&T Kentucky provides intermediary tandem switching and transport services to CMRS providers for the delivery of CMRS traffic to RLECs' networks for termination. Pursuant to the CMRS Agreement in effect from May 1, 2004 until December 31, 2006, to which most RLECs are signatories (including Brandenburg), the RLECs are to "accept AT&T Kentucky's measurement of minutes of use and industry standard call detail records for billing."

AT&T Kentucky alleges that Brandenburg has never complied with the CMRS Agreement and has substituted its own billing records for those supplied by AT&T Kentucky. AT&T Kentucky has disputed several charges from Brandenburg and alleges that, before it began disputing the charges, it overpaid Brandenburg. AT&T Kentucky claims that its records, compared to Brandenburg's, reveal several errors in Brandenburg's billing process.

Brandenburg denies AT&T Kentucky's allegations and alleges that AT&T Kentucky is directing traffic to Brandenburg that appears to be CMRS traffic but is, in fact, AT&T Kentucky traffic, other CLECs' traffic, or traffic from non-signatory CMRS providers. Brandenburg asserts that AT&T Kentucky has provided CDRs that do not conform to industry standards and do not contain enough detail for Brandenburg to determine what was, and was not, CMRS traffic. The parties have reached no settlement on this claim.

Motion for Leave to File Additional Data Request

AT&T Kentucky, in response to the April 2, 2007 informal conference, requests that the Commission grant leave for it to issue a second data request to Brandenburg. AT&T Kentucky requests that Brandenburg provide the terminating switch CDRs used to bill AT&T Kentucky via Brandenburg's CABS billing for calls originating with AT&T Kentucky ten-digit telephone numbers and being transported over the Common Transport Trunk Group for the period of March 23, 2007 through March 29, 2007. Brandenburg filed its response in opposition to this motion on May 9, 2007.

Brandenburg's Settlement Offer

On April 23, 2007, Brandenburg filed with the Commission a proposed Settlement Agreement that it simultaneously submitted to AT&T Kentucky. In the Settlement Agreement, Brandenburg reiterated its offer to pay AT&T Kentucky a sum for settlement of the ACS dispute contingent upon action by AT&T Kentucky in regard to providing certain billing records and other data. Additionally, Brandenburg proposed several areas of settlement to address the CMRS traffic dispute.

On April 26, 2007, AT&T Kentucky filed a motion with the Commission to strike the proposed Settlement Agreement. Brandenburg filed its response to the motion to strike on May 9, 2007 and AT&T Kentucky filed a reply to Brandenburg's response on May 29, 2007.

Motions for Partial Summary Judgment

On May 15, 2007, Brandenburg filed with the Commission a Motion for Partial Summary Judgment ("First Motion for Partial Summary Judgment") on AT&T Kentucky's ACS traffic claim. As grounds for its motion, Brandenburg alleges that AT&T Kentucky

admitted that it had destroyed the relevant CDRs, the only evidence that could prove its case. Brandenburg argues that the Commission should enter partial summary judgment based on the doctrine of spoliation.²

On May 29, 2007, Brandenburg filed a Motion for Partial Summary Judgment (“Second Motion for Partial Summary Judgment”) requesting that the Commission enter summary judgment in its favor regarding the dispute over CMRS traffic. As grounds for its motion, Brandenburg alleges that there are no facts in dispute regarding Brandenburg’s action under the parties’ interconnection agreement.³ Brandenburg argues that, because it acted as it was supposed to in conducting an audit under the interconnection agreement, there are no genuine issues of material fact and summary judgment should be granted.

AT&T Kentucky, in its Response to the First Motion for Partial Summary Judgment (“Response to First Motion”), argues that genuine issues of fact still exist regarding the ACS traffic dispute and summary judgment would be inappropriate.⁴ AT&T Kentucky alleges that Brandenburg has created genuine issues of material fact by disputing that AT&T Kentucky had made double payments for ACS traffic and by also assuming that AT&T Kentucky was sending ACS traffic over the Extended Area Service (“EAS”) trunk groups.⁵ AT&T Kentucky argues that, pursuant to the standard established in *Steelvest v. Scansteel Service Ctr.*, 807 S.W.2d 476 (Ky. 1991),

²First Motion for Partial Summary Judgment at 1.

³ Second Motion for Partial Summary Judgment at 5.

⁴ Response to Brandenburg’s Motion for Partial Summary Judgment at 1.

⁵ Response to First Motion at 2.

Brandenburg's motion should be denied because Brandenburg has not proven that AT&T Kentucky could not prevail under any circumstances.⁶

AT&T Kentucky, in its response to the Second Motion for Partial Summary Judgment ("Response to Second Motion"), alleges that, regarding the CMRS traffic dispute, Brandenburg has already conceded that there are genuine issues of material fact in its May 29, 2007 Motion to Schedule a Public Hearing.⁷

DISCUSSION

Motion to Strike

AT&T Kentucky moves the Commission to strike the proposed Settlement Agreement that Brandenburg filed with the Commission and provided to AT&T Kentucky.

AT&T Kentucky filed a letter with the Commission objecting to the filing of the proposed Settlement Agreement, asserting that AT&T Kentucky "considered settlement negotiations and discussions to be confidential," and calling the filing of the Settlement Agreement a "blatant disregard of the confidentiality of such settlement discussions."⁸ AT&T Kentucky requested, because the proposed Settlement Agreement allegedly

⁶ *Id.*

⁷ Response to Second Motion at 2, *citing*, Brandenburg Telephone's Motion to Schedule a Public Hearing ("A hearing is appropriate in this matter because . . . the parties attended an informal conference before Commission staff on March 15, 2007 wherein the parties identified *genuine issues of material fact that are appropriate for resolution through a formal hearing.*" Response to Second Motion at 1.

⁸ Letter from Mary Keyer to Beth O'Donnell, May 26, 2007, at 1.

contained confidential information, that the Commission not include the proposed Addendum in the case record and remove and destroy all copies.⁹

Brandenburg argues that settlement proposals are not inherently confidential, citing KRE 408.¹⁰

KRE 408 states:

- (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 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.

Brandenburg argues that, because it did not offer the proposed Settlement Agreement during a formal hearing and did not file the proposed Settlement Agreement “to prove liability of the claim or its amount,” the filing of the proposed Settlement Agreement was reasonable and allowable.¹¹ Brandenburg asserts that the sole

⁹ *Id.*

¹⁰ Brandenburg Telephone’s Response to BellSouth’s Motions to Strike and to Serve an Additional Data Request at 3.

¹¹ *Id.*

purpose for filing the proposed Settlement Agreement was to update the Commission on the progress of the settlement negotiations.¹²

Brandenburg also asserts that AT&T Kentucky waived any right to confidentiality when it entered into settlement negotiations with Brandenburg in the presence of Commission Staff. Brandenburg argues that, even if AT&T Kentucky could identify specific confidential material in the proposed Settlement Agreement, AT&T Kentucky could not assert the privilege.¹³

Brandenburg relies largely on a Commission Order in Case No. 9613¹⁴ in which the Commission found that Big Rivers Electric Corporation (“Big Rivers”) could not assert a privilege of confidentiality for the documents and discussions used to reach a financial workout plan with its bankruptcy creditors (that were not parties to the rate case) prior to filing its rate case before the Commission. Big Rivers submitted the financial workout plan as part of its justification for a rate increase, and an Intervenor in the rate case sought discovery of the documents used in reaching the settlement that formed the financial workout plan. Big Rivers refused to provide the documents, claiming that they were privileged because they had been used during settlement negotiations.

The Commission found that no privileges of confidentiality were available to block discovery and ordered Big Rivers to provide the documents sought by the Intervenor.

¹² *Id.*

¹³ *Id.* at 4-5.

¹⁴ Case No. 9613, *Big Rivers Electric Corporation’s Notice of Changes in Rates and Tariffs for Wholesale Electric Service and Other Financial Workout Plan* (Ky. PSC Oct. 29, 1986).

The Commission reasoned that Big Rivers had waived any privilege of confidentiality when it disclosed privileged information to other parties.

The issue before the Commission is readily distinguishable from the Commission's decision in Case No. 9613. In Case No. 9613, Big Rivers submitted a previously confidential document into the official record as part of the basis for a requested rate increase. Neither the Intervenor in the rate case nor the Commission was a party to the financial workout plan or was privy to the underlying justification for the plan and, therefore, neither could accept the reasonableness of the financial workout plan without knowing the details that led to the formation of the plan.

In the case before the Commission, AT&T Kentucky has not entered into the record any confidential information such as Big Rivers did. Brandenburg has simply filed an unsigned proposed settlement document that does not have any probative or evidentiary value and does not appear designed in any way to assist the Commission in making a determination on the issues before it.

In *Kentucky-American Water Company v. Commonwealth of Kentucky, ex. rel J. Cowan*, 847 S.W.2d 737 (Ky. 1993), the Kentucky Supreme Court held that the Commission erred by allowing a non-unanimous settlement agreement into the official record and affording it evidentiary weight. The Supreme Court also noted that the filing of contested proposed settlement agreements "may actually increase the amount of hearing time."¹⁵ Such is the case here, where the Commission, AT&T Kentucky, and even Brandenburg have had to devote an extraordinary amount of time to litigating and reviewing this one issue.

¹⁵ *Id.* at 741.

As discussed above, AT&T Kentucky has waived no privilege of confidentiality. Traditionally, settlement negotiations before the Commission, unless otherwise specifically agreed upon, are kept confidential. The Commission agrees with AT&T Kentucky's assertion that 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."¹⁶

Moreover, the proposed Settlement Agreement has no probative value and is not "relevant evidence."¹⁷ Despite assertions to the contrary, it appears that the only purpose of filing the proposed Addendum was to sway the Commission by making AT&T Kentucky appear to be acting unreasonably. Therefore, AT&T Kentucky's Motion to Strike should be granted and the proposed Settlement Agreement should not be placed in the public record.

Motions for Summary Judgment

Taken as a whole, Brandenburg's First Motion for Partial Summary Judgment and Second Motion for Partial Summary Judgment, asking for summary judgment on the ACS traffic dispute and the CMRS traffic dispute, respectively, are the equivalent of a single motion for summary judgment on all of the issues contained in the complaint.

¹⁶ AT&T Kentucky's Motion to Strike at 4 *citing Green River Elec. Corp. v. Nantz*, 894 S.W.2d 643, 646 (Ky. App. 1995.)

¹⁷ KRE 401 states:

"Relevant evidence" means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

As discussed below, we find that both Motions for Partial Summary Judgment should be denied.

As grounds for its First Motion for Partial Summary Judgment on the ACS traffic dispute, Brandenburg alleges that AT&T Kentucky failed to properly preserve the CDRs, which it states is the only evidence which could prove or disprove AT&T Kentucky's claim of double payment. Therefore, Brandenburg argues that the doctrine of spoliation should apply in this case, since AT&T Kentucky did not preserve the records which Brandenburg could have used to dispute the double payment claims.

AT&T Kentucky argues that there are genuine issues of fact regarding the ACS traffic dispute, including whether AT&T Kentucky made double payments for the ACS traffic and whether AT&T Kentucky sent ACS traffic over the EAS trunk groups. AT&T Kentucky further states that Brandenburg acknowledged there are genuine issues of fact in Brandenburg's request for a public hearing. AT&T Kentucky argues that Brandenburg introduced an issue of material fact by disputing that AT&T Kentucky had made double payments and that Brandenburg assumed that AT&T Kentucky was sending ACS traffic over the EAS trunks.

As grounds for its Second Motion for Partial Summary Judgment, Brandenburg claims that it did not breach the CMRS Agreement and that AT&T Kentucky has no legitimate basis to claim that it did. Brandenburg states that it is obligated to accept AT&T Kentucky's measurement of minutes of use and the CDRs to support the billing and compensation of CMRS provider traffic. Brandenburg states that it did accept AT&T Kentucky's measurements, but that it conducted its own audit of the records, which Brandenburg states it was entitled to do according to the CMRS Agreement, and

that Brandenburg did not have to have AT&T Kentucky's permission to conduct the audit. Brandenburg states that it then billed AT&T Kentucky according to the information obtained from these audits. Brandenburg further claims that the CMRS Agreement does not provide for interest to accrue on amounts owed by an RLEC to AT&T Kentucky but only from AT&T Kentucky to an RLEC. Brandenburg also states that the agreement allows for interest accrual only on undisputed charges, which is not the case in this matter, since Brandenburg is disputing that it owes any money to AT&T Kentucky.

AT&T Kentucky, in its response to the Second Motion for Partial Summary Judgment, states that there are issues of material facts regarding the existence of a breach of the CMRS Agreement. AT&T Kentucky alleges that Brandenburg did not accept any of AT&T Kentucky's measurements of minutes of use or the CDRs because Brandenburg would supplement the measurements and records with its own automatic message accounting records. AT&T Kentucky also states that the CMRS Agreement requires that any party may request an audit within 12 months of the billing date and that Brandenburg never requested an audit.

CR 56.03 states that summary judgment should not be granted where there is a genuine issue of material fact. The controlling case on summary judgment is *Steelvest*. *Steelvest* states that the record in a case "must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."¹⁸ The Commission agrees with AT&T Kentucky and finds that there are issues of material fact in this case, that summary judgment is not appropriate in this

¹⁸ *Steelvest v. Scansteel Service Ctr.*, 807 S.W.2d at 476.

matter, and that, therefore, Brandenburg's two motions for partial summary judgment should be denied.

Motion for Leave to File Additional Data Request

On April 2, 2007, AT&T Kentucky filed a motion for leave to file an additional data request. AT&T Kentucky states that the additional data request is based on a discussion which took place at the informal conference held in this matter and is a direct result of statements made by Brandenburg during the conference.

Brandenburg states that the time for formal discovery has passed and that AT&T Kentucky should not be allowed an additional data request for something it could have asked for prior to the discovery deadline.

The Commission finds that AT&T Kentucky should be allowed to serve the additional data request upon Brandenburg, since this issue arose during the informal conference in this matter, and the Commission does not find that it would be unduly burdensome on Brandenburg to supply the information requested.

Motion for Public Hearing

On April 2, 2007, Brandenburg filed a motion for public hearing, stating that genuine issues of material fact were identified during the informal conference in this matter and a formal hearing is appropriate to resolve this matter. AT&T Kentucky requested that the matter be set for an oral argument rather than a formal hearing.

The Commission agrees with Brandenburg. As discussed above, material issues of fact are present in this matter and, therefore, a formal hearing is the appropriate venue to resolve these issues.

IT IS THEREFORE ORDERED that:

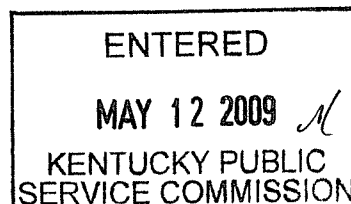
1. Brandenburg's motion for a public hearing is granted.
2. AT&T Kentucky's motion for additional data requests is granted.
3. AT&T Kentucky's motion for oral arguments is denied.
4. AT&T Kentucky's motion to strike is granted.
5. Brandenburg's motions for partial summary judgment are denied.
6. Additional written requests for information shall be filed with the Commission and served on all parties no later than 10 days from the date of this Order.
7. Responses and all objections to the additional requests for information shall be filed with the Commission and served on all parties no later than 10 days from the date of receipt of the additional requests for information.
8. Direct testimony of all witnesses shall be filed with the Commission and served on all parties no later than May 22, 2009.
9. Rebuttal testimony shall be filed with the Commission and served on all parties no later than June 2, 2009.
10. A public hearing shall begin on June 9, 2009 at 10:00 a.m., Eastern Daylight Time, in Hearing Room 1 of the Commission's offices at 211 Sower Boulevard, Frankfort, Kentucky and shall continue until concluded.

By the Commission

ATTEST:



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