

PROCEDURAL HISTORY

On December 14, 2006, AT&T Kentucky filed a formal complaint against Brandenburg with the Commission. Brandenburg filed its Answer and Motion to Dismiss on January 10, 2007, to which AT&T Kentucky filed its Reply on February 2, 2007. The parties engaged in extensive discovery beginning in early February 2007 and ending in June 2009. On April 23, 2007, Brandenburg filed a status update with the Commission to which was attached a proposed settlement agreement. On May 26, 2007, AT&T Kentucky filed a motion to strike the proposed settlement agreement, to which Brandenburg responded on May 9, 2007. Brandenburg subsequently filed two motions for partial summary judgment. On May 12, 2009, the Commission entered an Order granting AT&T Kentucky's motion to strike and denying Brandenburg's motions for partial summary judgment. By the same Order, the Commission scheduled a formal hearing on June 9, 2009.

The June 9, 2009 hearing was cancelled on the joint motion of the parties. A public hearing was held on August 25, 2009 and post-hearing briefs were filed on October 15, 2009. The record is complete and the case is ripe for a decision.

ACS TRAFFIC DISPUTE

ACS traffic, for the purpose of this proceeding, is a generic term that refers to AT&T Kentucky traffic from expanded local calling areas under optional local calling plans, such as Area Plus.² In such an arrangement, AT&T Kentucky's customers can pay an extra monthly fee and calls that were once deemed long-distance or toll can be dialed and billed as local calls. The ACS traffic, however, is sent to Brandenburg as a

² Direct Testimony of Tim Watts at 3, lines 12-22.

toll or long-distance call over the Common Transport Trunk Group (“CTTG”) along with all other toll or long-distance traffic coming from or through AT&T Kentucky to Brandenburg.³

Truly local traffic is exchanged between AT&T Kentucky and Brandenburg via a “Basic Local Trunk Group” which routes traffic directly between the two switches serving the end-users pursuant to Extended Area Service (“EAS”) agreements.⁴

AT&T Kentucky asserts that, from 1985 until 1995, AT&T Kentucky compensated Brandenburg for terminating traffic through a settlement process whereby AT&T Kentucky netted amounts due to Brandenburg and remitted payment to Brandenburg. In 1995, Brandenburg implemented a Carrier Access Billing System (“CABS”) whereby Brandenburg submitted bills for traffic over the CTTG (toll traffic) directly to AT&T Kentucky rather than waiting for AT&T Kentucky to submit payment through the old settlement system.⁵

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 old settlement process 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 2002.⁶

³ Id. at 4, lines 1-2.

⁴ Id. at 3, lines 15-19.

⁵ AT&T Kentucky Complaint at 2.

⁶ Id. at 3-4.

Brandenburg refused to pay AT&T Kentucky but did not protest AT&T Kentucky's cessation of payment for ACS traffic via the settlement process.

AT&T Kentucky asserts that it overlooked the double payment due to an omission by its programmers. Beginning with the offering of ACS service, which took place simultaneously in AT&T Kentucky's (BellSouth's) former nine-state region, AT&T Kentucky instructed its programmers to amend its settlement process and remove ACS traffic from the settlement process when the ILECs to whom AT&T Kentucky was sending ACS traffic began to bill AT&T Kentucky via CABS for ACS traffic. AT&T Kentucky claims that its programmers overlooked Brandenburg and the CABS billing was never input into the system; so, the ACS traffic was not removed from the settlement process.⁷

Brandenburg asserts that it cannot determine whether AT&T Kentucky overpaid because AT&T Kentucky refuses to provide its call detail records ("CDR") for the disputed time period.⁸ (AT&T Kentucky claims that it does not keep its CDRs for longer than 60 days because of the sheer volume of the records.)⁹ However, AT&T Kentucky has provided sample traffic patterns to show Brandenburg the traffic pattern between AT&T Kentucky and Brandenburg, asserting that this information would support its claim for the double billing.¹⁰

⁷ Watts Rebuttal Testimony at 5, lines 18-23, to 6, lines 1-15.

⁸ Willoughby Direct Testimony at 7, lines 6-9.

⁹ TR p. 10, lines 10-14.

¹⁰ Watts Rebuttal Testimony at 3, lines 14-23, to 4, lines 1-6.

Brandenburg claims that, absent the CDRs, it cannot, and should not be required to, calculate whether AT&T Kentucky overpaid for ACS traffic. Brandenburg alleges that it cannot distinguish the type of toll traffic that is delivered to it over the CTTG. One type of toll traffic is indistinguishable from the other absent AT&T Kentucky's providing CDRs to Brandenburg so Brandenburg can decipher the language and properly bill for ACS traffic.¹¹

Brandenburg claims that the dispute is entirely of AT&T Kentucky's making because: (1) AT&T Kentucky made the alleged overpayment for more than six years without identifying a problem; and (2) AT&T Kentucky failed to maintain the records (CDRs) that would have proven its claim. Brandenburg argues that no sound business should be forced to make a refund when a customer does not have the receipts.¹²

Brandenburg argues that AT&T Kentucky cannot provide any evidentiary basis to support its claim for overpayment because AT&T Kentucky destroyed the documents that would support its claim.¹³

CMRS TRAFFIC DISPUTE

AT&T Kentucky provides intermediary tandem switching and transport services to CMRS providers (wireless companies) for the delivery of CMRS traffic to RLECs' networks for termination. Pursuant to the CMRS Agreement, to which most RLECs (including Brandenburg) are signatories, the RLECs are to "accept AT&T Kentucky's

¹¹ Willoughby Direct Testimony at 9, lines 8-11.

¹² Id. at 18, lines 16-24, and at 19, lines 1-6.

¹³ Brandenburg Post-Hearing Brief at 2.

measurement of minutes of use and industry standard call detail records for billing”¹⁴ for the CMRS traffic of CMRS providers that were signatories to the CMRS Agreement. The CMRS Agreement was in effect from May 1, 2004 until December 31, 2006 and has been replaced by newer agreements.

AT&T Kentucky alleges that Brandenburg, by substituting its own billing records for those supplied by AT&T Kentucky, has never complied with the CMRS Agreement. AT&T Kentucky has disputed several charges from Brandenburg but 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.¹⁵ For example, it appeared that Brandenburg was not checking the number pooling database to see if the number had been originally assigned to a non-signatory CMRS provider, then was pooled and assigned to a signatory CMRS provider. Another example would be when the number had been ported from a non-signatory CMRS provider to a signatory CMRS provider but Brandenburg still viewed the number as assigned to a non-signatory CMRS provider when it should be billed as coming from a signatory CMRS provider.¹⁶

AT&T Kentucky submits Exchange Message Interface (“EMI”) records to Brandenburg for the purposes of establishing the CDRs of the CMRS traffic so that Brandenburg can determine the correct minutes of usage for covered CMRS traffic and

¹⁴ Interconnection Agreements Between BellSouth Telecommunications, Inc. and Signatory Commercial Mobile Radio Service providers (“CMRS Agreement”), Section 2.07.

¹⁵ Complaint at 6-8.

¹⁶ TR at 71, line 1, and 71, line 22; see also, AT&T Kentucky Hearing Exhibit 1.

of allowing Brandenburg to submit accurate bills. AT&T Kentucky claims that these are the “industry standard” CDRs and Brandenburg should use them for the purpose of billing.¹⁷

Brandenburg denies AT&T Kentucky’s allegations and alleges that AT&T Kentucky has directed traffic to Brandenburg that appears to be signatory CMRS traffic but is, in fact, AT&T Kentucky traffic, other Competitive Local Exchange Carriers’ (“CLEC”) traffic, or traffic from non-signatory CMRS providers. Brandenburg asserts that AT&T Kentucky has provided CDRs (the EMI records) that do not conform to industry standards and do not contain enough detail for Brandenburg to determine what was, and was not, signatory (“covered”) CMRS traffic.¹⁸

Brandenburg asserts that it accepts AT&T Kentucky’s EMI records but then checks the EMI records for accuracy against Brandenburg’s own records. Brandenburg claims that checking the EMI against Automatic Message Accounting (“AMA”) records showed a discrepancy between what AT&T Kentucky submitted as covered CMRS traffic and what Brandenburg considered to be covered CMRS traffic.¹⁹ Brandenburg asserts that some of the covered CMRS traffic for which AT&T Kentucky bills actually originates from CLECs, non-covered CMRS providers, or AT&T Kentucky.

As discussed, *supra*, AT&T Kentucky alleges that Brandenburg’s AMA records are inaccurate because they do not take into account such problems as number pooling, number porting, or roaming CMRS carrier agreements. AT&T Kentucky claims

¹⁷ TR at 13, line 21, and 14, line 15.

¹⁸ Brandenburg’s Answer at 4.

¹⁹ Willoughby Prefiled Testimony at 13, lines 8-9.

that this leads to the AMA records' inaccuracies. AT&T Kentucky asserts that Brandenburg, if it doubted the accuracy of AT&T Kentucky's EMI records, should have either requested an audit pursuant to the CMRS agreement or filed a complaint with the Commission pursuant to the CMRS agreement.

AT&T Kentucky and Brandenburg did work together to check Brandenburg's billing information against AT&T Kentucky's. AT&T Kentucky was able to identify some mistakes in Brandenburg's information. As a result, Brandenburg now agrees with AT&T Kentucky's EMI records for 98.7 percent of the billed minutes of use.²⁰

DISCUSSION

ACS Traffic

There is no dispute that AT&T Kentucky paid Brandenburg for ACS traffic through both the "settlement process" and CABS from 1997 until March of 2004, when AT&T Kentucky stopped paying Brandenburg through the settlement process. The billing records submitted by AT&T Kentucky support this conclusion.²¹

When AT&T Kentucky first began making the ACS payments in 1997, Brandenburg inquired as to why the payments were being made. This indicates that Brandenburg believed it was already being compensated for the ACS traffic through the CABS billing, or it would have had no reason to make such an inquiry. When AT&T Kentucky ceased making payments through the settlement system, Brandenburg did not challenge the cessation of payments or make any other inquiries of AT&T Kentucky. Such behavior is puzzling if Brandenburg believed it was entitled to payment through

²⁰ Willoughby Prefiled Testimony at 15, lines 16-18.

²¹ See Exhibits 2, 3 and 4 to AT&T Kentucky's Complaint.

the settlement process. Moreover, Brandenburg does not deny that it received payment for ACS traffic from both the settlement process and the CABS billing from 1997 until March 2004. Brandenburg's behavior indicates that it knew (or should have known) that it was receiving double payment for the ACS traffic.

Brandenburg alleges that it cannot know the accuracy of AT&T Kentucky's claims because AT&T Kentucky knowingly destroyed the CDRs that would have, allegedly, proven AT&T Kentucky's claims. It appears, however, that the CDRs are not necessary to resolve the issue. First, the record supports the conclusion that the ACS traffic has always been routed over the CTTG, and it is not necessary to have the CDRs to prove this. There are three trunk groups between AT&T Kentucky and Brandenburg: (a) the CTTG which handles all toll traffic, CMRS traffic, and interexchange carrier traffic; and (b) two EAS local trunk groups for the exchange of seven-digit dialing in certain contiguous areas. Neither of the EAS trunks can be used for the ACS traffic. The first, in Rose Terrace, does not have the capacity to handle such larger levels of traffic, and the other EAS trunk group is in the Owensboro intraLocal Access Transport Area ("LATA"), and federal law prohibits AT&T Kentucky from routing traffic across this LATA from the Louisville LATA. Moreover, had AT&T Kentucky attempted to route the ACS traffic over the EAS trunks, it would have resulted in blocked calls and service outages in several communities.

Second, Brandenburg admits that it bills AT&T Kentucky for all the minutes of use terminated to Brandenburg over the CTTG. All calls placed over the CTTG are tracked because they are billed, whereas traffic over the EAS trunks is treated on a "bill and keep" basis between Brandenburg and AT&T Kentucky and neither money nor bills

are exchanged between the two. Therefore, any and all ACS traffic must have gone over the CTTG and must have been billed through CABS to AT&T Kentucky.

The evidence of record supports AT&T Kentucky's claims that it overpaid Brandenburg for ACS traffic from April 2002 until March 2004. AT&T Kentucky should be entitled to a refund of those overpayments.

CMRS Traffic

The CMRS agreement language, found in Section 2.07 of the CMRS Agreement, appears to be quite clear regarding Brandenburg's obligation to accept AT&T Kentucky's EMI billing records. Brandenburg must accept the billings and, if it objects, it may request an audit of AT&T Kentucky's billing records.

The relevant section provides that Brandenburg would:

[A]ccept [AT&T Kentucky's] measurement of minutes and use and industry standard call details as the basis for the billing from and compensation to the Rural LECs for Covered CMRS Provider traffic.

Despite being a signatory to the CMRS Agreement, Brandenburg did not accept AT&T Kentucky's EMI records and, instead, substituted its own. Brandenburg introduced no evidence to prove that AT&T Kentucky's EMI records were not "industry standard" and why they should not be accepted and, additionally, provided no evidence as to why its records were superior to AT&T Kentucky's. At no point did Brandenburg request an audit as allowed by Section 2.07 of the CMRS Agreement ("Notwithstanding the foregoing, any party may request an audit of such measurements within twelve months of the applicable billing date"), instead opting to withhold payment in a manner of "self-help" enforcement. Nothing allows Brandenburg to substitute its own records for those submitted by AT&T Kentucky.

The plain language of the CMRS Agreement supports AT&T Kentucky's claims that Brandenburg must accept AT&T Kentucky's EMI records for billing purposes. Moreover, the evidence of record supports AT&T Kentucky's claims that the EMI records are "industry standard." Accordingly, AT&T Kentucky is entitled to a refund of those overpayments.

Interest Payments

The Independent Telephone Company ("ICO") Agreement and the CMRS Agreement govern the billing relationship between the parties, and any interest to be recovered on any overpayments will be recovered only if it is allowed by the various agreements. AT&T Kentucky argues that it is entitled to .05 percent per day interest on the overpayments for the ACS traffic. It claims this based on Section VIII of Annex 1 to the ICO Agreement, which was attached to the complaint. AT&T Kentucky also claims that it is entitled to 1 1/2 percent per month on the CMRS traffic pursuant to Section 2.12 of the CMRS Agreement.

The ICO Agreement between Brandenburg and AT&T Kentucky includes a "Monthly Compensation" provision that protects, in essence, the billing party in the event that the party being billed disputes the amount that it owes but cannot substantiate its dispute. Specifically, the ICO Agreement provides that "[i]f a dispute is substantiated in favor of the exchange carrier, the fund will return the disputed amount plus interest (.05 percent per day)."²² (An "exchange carrier" is defined elsewhere under the ICO Agreement as "a telecommunications carrier providing local telecommunications services within a franchised geographic area.")

²² ICO Agreement, Annex 1, Section VIII, "Monthly Compensation."

Brandenburg would be the “exchange carrier” in the ACS billing dispute, as it was the carrier providing access and termination services to AT&T Kentucky and rendering a monthly bill to AT&T Kentucky for the cost of these services. Thus, the “Monthly Compensation” provision would serve to protect Brandenburg (as the billing carrier), and not AT&T Kentucky, in the event a dispute arises. AT&T Kentucky, therefore, under the terms of the ICO Agreement, does not have recourse to this interest provision. Based on the foregoing, the Commission will not grant AT&T Kentucky’s request that interest be paid pursuant to the ICO Agreement.

Section 2.12 of the CMRS Agreement identifies the circumstances under which a party to the Agreement may seek interest in the event an undisputed amount owed is not timely paid. Specifically, Section 2.12 provides that:

Any undisputed charges incurred pursuant to this Agreement that are not timely paid by BellSouth to the Rural LECs, or are not timely paid by a Signatory CMRS Provider to BellSouth, will accrue interest from the date such amounts were due at the lesser of (i) one and one-half percent (1 - 1/2%) per month or (ii) the highest rate of interest that may be charged under applicable law.

Although AT&T Kentucky has requested interest pursuant to this section as part of its claim, the terms of Section 2.12 do not provide for interest to be charged by AT&T Kentucky against an RLEC like Brandenburg Telephone. The CMRS Agreement calls for interest to be paid only by AT&T Kentucky to the RLEC or by the CMRS provider to AT&T Kentucky. Nowhere does it have a provision for the interest to be paid by the RLEC to AT&T Kentucky. Accordingly, the Commission will not grant AT&T Kentucky’s request that interest be paid pursuant to Section 2.12 of the CMRS Agreement.

CONCLUSION

The record supports a conclusion that AT&T Kentucky doubly paid Brandenburg fro ACS traffic through CABS billing and the settlement process from 2002 until 2004. The record also supports the determination that Brandenburg, under the CMRS Agreement, was to accept AT&T Kentucky's EMI records for the purpose of billing and that, if Brandenburg disagreed with the billing, Brandenburg must request an audit. Brandenburg did neither of these and, therefore, it must refund the overpayments from AT&T Kentucky.

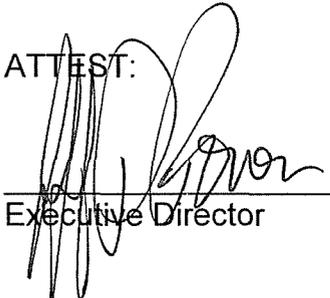
The record also supports a conclusion that the two agreements between the parties do not provide for AT&T Kentucky to receive interest on its overpayments.

Based on the foregoing IT IS HEREBY ORDERED that:

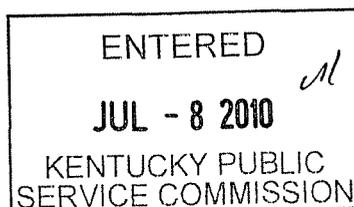
1. Brandenburg shall refund all overpayments for ACS traffic as calculated by AT&T Kentucky.
2. Brandenburg shall accept AT&T Kentucky's EMI records as "industry standard" billing records for billing of CMRS traffic.
3. Brandenburg shall refund the overpayments to AT&T Kentucky for the CMRS traffic.
4. AT&T Kentucky is not entitled to interest for its overpayments under either the ICO or the CMRS Agreement.

By the Commission

ATTEST:



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