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May 25, 2007

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602

RECEIVED

MAY 29 2007

**PUBLIC SERVICE
COMMISSION**

Re: BellSouth Telecommunications, Inc., Complainant v. Brandenburg
Telephone Company, Defendant
PSC 2006-00546

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned case are the original and ten (10) copies of BellSouth's Reply to Brandenburg's Response to BellSouth's Motions to Strike and Motion to Serve Additional Data Request.

Sincerely,



Mary K. Keyer

cc: Parties of Record

679254

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

In the Matter of:)	
)	MAY 29 2007
BELLSOUTH TELECOMMUNICATIONS, INC)	PUBLIC SERVICE
)	COMMISSION
Complainant)	
)	
v.)	Case No. 2006-00546
)	
BRANDENBURG TELEPHONE COMPANY)	
)	
Defendant)	

BELLSOUTH'S REPLY TO BRANDENBURG'S RESPONSE TO BELLSOUTH'S MOTIONS TO STRIKE AND MOTION TO SERVE ADDITIONAL DATA REQUEST

BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky ("BellSouth"), by counsel, replies to Brandenburg Telephone Company's ("Brandenburg") Response to BellSouth's Motions to Strike and to Serve an Additional Data Request (hereinafter, "*Brandenburg Response*").

The Informal Conference was held in this matter on March 15, 2007. As a result of that conference, Brandenburg indicated it would provide BellSouth with a settlement proposal that BellSouth expected would have come shortly after the conference and would be something that would at least move the Parties closer toward resolution than they were when BellSouth felt compelled to file its complaint. Brandenburg met neither expectation. It was not until more than a month after the Informal Conference, and following several inquiries from BellSouth, that Brandenburg finally submitted a proposal to BellSouth – and then it was just three days before the Parties were to report to the Commission on the status of settlement negotiations. Additionally, the proposal

appeared to be nothing more than posturing by Brandenburg, which was evident on reading through the proposal and seeing that the Commission had been copied. BellSouth did not respond to Brandenburg's proposal because BellSouth did not and does not view the proposal as a good faith proposal that was intended to get the case resolved. Suffice it to say that BellSouth is also disappointed that the Parties have not made further progress in resolving this matter.

I. Motion to Strike Selent's Settlement Proposal.

Brandenburg's filing of its settlement proposal containing specific amounts that it alleges the Parties offered each other in settlement of the claims at issue totally ignores the discussions the Parties had both before and during the Informal Conference regarding the confidentiality of the Parties' negotiations. Brandenburg Telephone's own counsel acknowledged Brandenburg's understanding of the confidentiality of this information in her remarks during the Informal Conference. Brandenburg and its counsel knew that the settlement discussions were considered confidential and that the information not shared in the Informal Conference was confidential, as made clear both prior to and during the Informal Conference. For Brandenburg to feign surprise at BellSouth's motion to strike and to claim that BellSouth somehow waived its claim to confidentiality of this information is disingenuous.

Moreover, the Kentucky Rules of Evidence clearly state that evidence of compromise or an offer of compromise is not admissible to prove liability for or invalidity of the claim *or its amount*. KRE 408. "Evidence of conduct or statements made in compromise negotiations is likewise not admissible." KRE 408. There is compelling public policy behind this rule that encourages and favors settlements between adverse parties. Without some expectation of confidentiality and non-admissibility of settlement

negotiations to a trier of fact, parties would be discouraged from engaging in meaningful negotiations. Brandenburg could easily have updated the Commission on April 26 on the status of the negotiations by informing the Commission that it had just provided an offer of settlement to BellSouth on April 23 and was awaiting a response. Instead, Brandenburg, without consulting with or informing BellSouth, arbitrarily filed with the Commission the settlement proposal sent from Brandenburg's counsel to BellSouth's counsel. BellSouth is aware of no other case in which a party has arbitrarily and without consultation with the other party *filed with the Commission* a proposal of settlement *addressed to the other party*.

There can be only one reason for Brandenburg to have filed its settlement proposal with the Commission and that is for the purpose of attempting to prove the invalidity of BellSouth's claims or the *amounts* of the claims. This is clearly inadmissible under Rule 408 of the Kentucky Rules of Evidence. *See Brandenburg Response* at 2-3.

In addition, "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible." KRE 408. Mr. Selent's letter sent to AT&T Kentucky's counsel¹ purports to contain such evidence and, as such, is inadmissible and should be stricken from the case. In accordance with KRE 408, such evidence would be admissible if it were to prove "bias or prejudice of a witness, negating [sic] a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." KRE 408. None of these reasons is present in this case nor has any such reason been given by Brandenburg for filing with the Commission its purported settlement proposal to BellSouth's counsel. The "law has long fostered voluntary

¹ AT&T Kentucky is moving to strike Mr. Selent's letter of April 23, 2007, to AT&T Kentucky's counsel and all accompanying attachments to the letter. Brandenburg Telephone alleges in footnote 1 of its response that AT&T Kentucky referenced only the cover letter.

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.” *Green River Elec. Corp. v. Nantz*, 894 S.W.2d 643, 646 (Ky. App. 1995) (citations omitted). The settlement proposal as written and submitted *for filing in this case* could only have been filed for the purpose of attempting to influence the Commission regarding the invalidity of BellSouth’s claims or their amounts and inserting into the record statements purportedly made during compromise negotiations. As such, it must be stricken from the record under KRE 408.

Brandenburg admits that it disclosed specific dollar amounts that were not discussed in the Informal Conference. See *Brandenburg Response* at 5. Brandenburg’s defense regarding the disclosure of these amounts is that “Brandenburg did not disclose this dollar figure to the Commission to ‘prove liability or the invalidity of the claim.’ KRE 408.” What Brandenburg conveniently failed to include in its citation of KRE 408 are the final words of that phrase – “or its amount,” which is also an inadmissible purpose. Brandenburg further failed to address the sentence in KRE 408 that states, “Evidence of conduct or statements made in compromise negotiations is likewise not admissible.” Yet, Brandenburg’s purported settlement proposal is full of this type evidence – statements it claims were made by Brandenburg or by BellSouth, offers of settlement *amounts* allegedly made by either or both Parties, and finally Brandenburg’s statements of alleged offers to settle. Such evidence of conduct or statements made in compromise negotiations is simply not admissible and should not be included in the record of this case.

Brandenburg’s reliance on a 1974 Maryland case, *Burlington Industries, Inc. v. Exxon Corp.*, 379 F. Supp. 754, 1974 U.S. Dist. LEXIS 7794, 183 U.S.P.Q. (BNA) 729

(D. Md. 1974) to support its position that BellSouth somehow waived a privilege to confidentiality is misplaced for two reasons. First, that case involved a discovery dispute and the attorney client privilege and work product privilege, neither of which is at issue here. Second, as admitted by Brandenburg, there was no confidential information disclosed during the Informal Conference so there can be no waiver of a privilege. *Brandenburg Response* at 5-6. BellSouth and Brandenburg did not engage in any specific settlement discussions regarding any confidential information during the Informal Conference.

In addition to the fact that such evidence is not admissible under the Kentucky Rules of Evidence unless there is some legitimate purpose such as those specified in KRE 408, none of which is present in this case, and the public policy behind that rule, there is a further compelling public policy reason for the Commission to not allow settlement proposals to be arbitrarily filed in cases by a party. If the Commission allows this proposal to remain in the record, it would open the floodgates for all parties to begin filing a barrage of settlement proposals back and forth between the parties in an effort to get their positions in front of the Commission and would place the Commission in the middle of these negotiations.

Based on the Parties' clear understanding of the confidentiality of the settlement negotiations and any amounts that may have been offered, the Kentucky Rules of Evidence and Kentucky law as cited herein, and the public policy considerations outlined herein, the Commission should grant BellSouth's motion to strike from the record and destroy Brandenburg's filing of its settlement proposal to BellSouth.

II. Additional Data Request.

BellSouth's request to file an additional data request is based on a discussion that was held during the Informal Conference. In response to Brandenburg's statement during the conference that BellSouth may have routed Area Calling Service (ACS) traffic to Brandenburg via a trunk group other than the CTTG trunk group, BellSouth suggested that Brandenburg provide to BellSouth, Brandenburg's recorded AMA records for BellSouth originated traffic over the CTTG trunk group for a certain recent period. BellSouth could then check Brandenburg's records against BellSouth's records for that same period to identify which calls are BellSouth-originated Area Calling Service calls that are in fact routed to Brandenburg over the CTTG trunk group. BellSouth's request to serve on Brandenburg an additional data request for such records was a direct result of statements made by Brandenburg during the Informal Conference and should be allowed.

Respectfully submitted,



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CERTIFICATE OF SERVICE -- KPSC 2006-00546

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by U.S. mail this 25th day of May, 2007.

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