

---

**BellSouth Telecommunications, Inc.**

601 W. Chestnut Street  
Room 407  
Louisville, KY 40203

Mary.Keyer@BellSouth.com

**Mary K. Keyer**

General Counsel/Kentucky

502 582 8219

Fax 502 582 1573

June 12, 2007

RECEIVED

JUN 13 2007

PUBLIC SERVICE  
COMMISSION

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

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 Response to Brandenburg's Motion for Partial Summary Judgment filed on May 29, 2007.

Sincerely,

  
Mary K. Keyer

cc: Parties of Record

681184

**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	)	

**BELLSOUTH TELECOMMUNICATIONS, INC.'S**  
**RESPONSE TO BRANDENBURG TELEPHONE COMPANY'S MOTION FOR**  
**PARTIAL SUMMARY JUDGMENT**

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, files its Response to Brandenburg Telephone Company's ("Brandenburg") Motion for Partial Summary Judgment filed on May 29, 2007.

There are genuine issues of material fact regarding the CMRS Traffic Dispute as indicated by Brandenburg in its Motion to Schedule a Public Hearing filed with the Commission on April 2, 2007, and in its Motion for Partial Summary Judgment filed on or about May 29, 2007 (hereinafter, "*Motion*"). See *Brandenburg Telephone's Motion to Schedule a Public Hearing*, p 1 ("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 fact that are appropriate for resolution through a formal hearing.*") See also, *Motion*, p. 6 (emphasis added) ("Brandenburg

Telephone has disputed, and continues to dispute, the claim that it owes BellSouth *any* portion of BellSouth's alleged overpayment.")<sup>1</sup> Based on these statements alone, the Commission need read no further and should summarily deny Brandenburg's *Motion*.

Should the Commission choose to read further, summary judgment is precluded because of other genuine issues of material fact, including whether Brandenburg violated Section 2.07 of the CMRS Agreement as claimed by BellSouth and denied by Brandenburg (*Complaint*, ¶¶ 13, 17; *Answer*, ¶¶ 13, 17), whether BellSouth violated Sections 1.05 and 2.04 of the CMRS Agreement as alleged by Brandenburg and denied by BellSouth (*Answer*, ¶ 13, *BellSouth Response to Answer*, p. 8), whether BellSouth overpaid Brandenburg for Covered CMRS Provider Traffic as claimed by BellSouth and denied by Brandenburg (*Complaint*, ¶ 16, *Answer*, ¶ 16), whether Brandenburg must reimburse BellSouth for the full amount claimed by BellSouth and denied by Brandenburg (*Id.*), and whether and what amount of interest is due on the overpaid amount (*Id.*). These disputed issues of material fact between the Parties are evident in the BellSouth Complaint, in Brandenburg's Answer, during the Informal Conference as pointed out in Brandenburg's letter dated April 2, 2007, in which it requested a hearing, and in Brandenburg's own Motion for Partial Summary Judgment. Brandenburg's claim that there are "no genuine issues of material fact," particularly in light of its own pleadings in this case, is an

---

<sup>1</sup> This statement is yet further evidence of Brandenburg's conflicting and contradictory positions taken in this case to date. See Brandenburg's *Motion* where it "acknowledges that it owes" BellSouth a portion of the amount BellSouth claims. *Motion*, p. 3, fn. 1.

unfortunate misuse of the civil rules and the Commission's time and processes, and its *Motion* should be denied.

Additionally, not only has Brandenburg filed its motion with no basis in fact, it has also filed it with no basis in law. The standard for summary judgment cited by Brandenburg in its *Motion* that a "complete failure of proof on an essential element renders all other facts immaterial and the movant is 'entitled to judgment as a matter of law,'" *Motion*, p. 4, was specifically rejected by the Kentucky Supreme Court. See *Steelvest, Inc. v. Scansteel Service Ctr.*, Ky., 807 S.W.2d 476, 482 (1991) (citations omitted) (the new federal standards requiring only that the movant "show that there is an absence of evidence possessed by the respondent to support an essential element of his case" rejected in favor of existing Kentucky law requiring the movant to "convince the court, by the evidence of record, of the nonexistence of an issue of material fact.>").

The law is clear in Kentucky that where there is a genuine issue of material fact, then summary judgment should not be granted. CR 56.03. Summary judgment is "only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest*, 807 S.W.2d at 480 (reaffirming the standard for summary judgment announced in *Paintsville Hospital v. Rose*, 683 S.W.2d 255 (Ky. 1985)). Brandenburg has not made such a showing.

As the court further stated in *Steelvest*, the record "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." 807 S.W.2d at 480 (citations omitted).

BellSouth not only *could* prevail on the evidence it has already provided in this case when viewed in a light most favorable to it, BellSouth *should* prevail. A summary judgment should not be granted if there is any issue of material fact, as in this case, even though the trier of fact may believe the party opposing the motion may not succeed at trial. *Id.*, citing *Puckett v. Elsner*, Ky., 303 S.W.2d 250 (1957). Finally, under Kentucky law, “summary judgment is to be cautiously applied and should not be used as a substitute for trial.” *Steelvest*, 807 S.W.2d at 483.

Regardless of the standard under which Brandenburg’s *Motion* is reviewed, the *Motion* fails. Brandenburg’s only arguments to support its *Motion* are conclusive statements that there are “no genuine issues of material fact” and that BellSouth “has no legitimate basis” for its claim that Brandenburg breached the Agreement. *Motion*, pp. 1, 4. Brandenburg then proceeds to set forth its baseless arguments as to why it believes it did not violate the Agreement and why BellSouth is not entitled to interest,<sup>2</sup> none of which is enough to sustain the granting of Brandenburg’s *Motion*.

In fact, the undisputed facts in this case not only successfully defeat Brandenburg’s *Motion*, but could on their own support a summary judgment in favor of BellSouth. There is no dispute that BellSouth and approximately 25 other carriers, *including Brandenburg*, executed the Agreement attached as Exhibit 5 to the Formal Complaint agreeing that they would “*accept BellSouth’s*

---

<sup>2</sup> The appropriate amount of interest is just one more issue in dispute that precludes summary judgment. If the appropriate interest rate is not that set forth in Section 2.12 of the Parties’ Agreement, as Brandenburg claims, then it is the legal rate allowed by law. This disputed issue must be decided by the Commission, not by summary judgment.

*measurement of minutes of use and industry standard call detail records as the basis for the billing from and compensation to the Rural LECs for Covered CMRS Provider Traffic...*,” and that they would “deduct the minutes of use for Covered CMRS Provider Traffic described in this Section from the total KRSP facility minutes of use which is billed to (or due through settlements), and due from, BellSouth.” Sec. 2.07 of the Agreement.

There is no dispute that the Agreement was effective May 1, 2004, and that BellSouth provided Brandenburg with its measurements of minutes of use and the industry standard call detail records (often referred to as “EMI Records”) every week since the Agreement was signed. There is no dispute that EMI Records are industry standard records that are accepted by carriers throughout the nation. There is no dispute that Brandenburg, when it received these records from BellSouth, *never* accepted them as the basis for billing and compensation for Covered CMRS Provider Traffic, as agreed to in the Agreement, but instead beginning immediately in June 2004, admittedly “*supplemented* the measurement of MOUs and CDRs supplied by BellSouth with its own automatic message accounting (“AMA”) records.” *Motion*, p. 2 (emphasis added). There is no dispute that Section 2.07 of the Agreement provides that any party may “*request* an audit of such measurements within twelve months of the applicable billing date.” (Emphasis added). There is no dispute that Brandenburg did not request any such audit. *Motion*, p. 4 (“By juxtaposing its own switch records with the accepted records provided by BellSouth, Brandenburg was able to audit the records provided by BellSouth.”) These undisputed facts lead to one conclusion:

Brandenburg entered into this Agreement with no intention of complying with its terms.

BellSouth has shown there are genuine issues of material fact, while Brandenburg has failed to show that BellSouth cannot prevail under any circumstances when considering the evidence in a light most favorable to BellSouth. Therefore, based on the foregoing and Kentucky law, Brandenburg's Motion for Partial Summary Judgment on the CMRS Traffic Dispute should be denied.

Respectfully submitted,

  
\_\_\_\_\_  
MARY K. KEYER  
General Counsel/Kentucky  
601 W. Chestnut Street  
P.O. Box 32410  
Louisville, KY 40232  
(502) 582-8219  
[mary.keyer@bellsouth.com](mailto:mary.keyer@bellsouth.com)

J. Phillip Carver  
Senior Attorney  
Suite 4300, 675 W. Peachtree St., NW  
Atlanta, GA 30375  
(404)335-0710  
[j.carver@bellsouth.com](mailto:j.carver@bellsouth.com)

COUNSEL FOR BELLSOUTH  
TELECOMMUNICATIONS, INC.

**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 12th day of June, 2007.

John E. Selent  
Holly C. Wallace  
Dinsmore & Shohl, LLP  
1400 PNC Plaza  
500 West Jefferson Street  
Louisville, KY 40202  
John.Selent@dinslaw.com  
Holly.Wallace@dinslaw.com

  
\_\_\_\_\_  
Mary K. Keyer