

Dinsmore & Shohl LLP
ATTORNEYS

Holly C. Wallace
502-540-2309
holly.wallace@dinslaw.com

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MAY 09 2007

PUBLIC SERVICE
COMMISSION

May 9, 2007

Via Hand Delivery

Hon. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Blvd.
Frankfort, KY 40601

Re: In the Matter of: BellSouth Telecommunications, Inc. v. Brandenburg Telephone Company, Case No. 2006-00546

Dear Ms. O'Donnell:

Enclosed for filing in the above-referenced case, please find the original and ten (10) copies of Brandenburg Telephone's Response to BellSouth's April 26, 2007 letter in which it moves to strike Brandenburg Telephone's April 23, 2007 letter and to serve an additional data request.

Thank you, and if you have any questions, please call me.

Sincerely,

DINSMORE & SHOHL LLP



Holly C. Wallace

HCW/rk
Enclosures
cc: All Parties of Record
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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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MAY 09 2007

PUBLIC SERVICE
COMMISSION

In the Matter of:

BELLSOUTH TELECOMMUNICATIONS, INC.)

COMPLAINANT)

v.)

BRANDENBURG TELEPHONE COMPANY)

DEFENDANT)

CASE NO. 2006-00546

BRANDENBURG TELEPHONE'S RESPONSE TO BELLSOUTH'S MOTIONS TO STRIKE AND TO SERVE AN ADDITIONAL DATA REQUEST

Brandenburg Telephone Company ("Brandenburg Telephone"), by counsel, hereby responds to the letter of Mary K. Keyer, General Counsel/ Kentucky to BellSouth Telecommunications, Inc. ("BellSouth") dated April 26, 2007 in which BellSouth moves to strike from the public record the April 23, 2007 letter of John E. Selent, counsel to Brandenburg Telephone, and moves to serve an additional data request. In support of its response, Brandenburg Telephone states as follows.

INTRODUCTION

As an initial matter, Brandenburg Telephone states that it is disappointed that the parties have not made further progress in resolving this matter. As the March 27, 2007 Intra-Agency Memorandum in this matter reflects, the parties agreed during the Informal Conference to attempt to settle this dispute. Accordingly, Brandenburg Telephone drafted two settlement agreements, one for the CMRS traffic billing dispute and one for the ACS traffic billing dispute, and delivered both agreements along with a cover letter to Ms. Keyer via hand delivery on April 23, 2007. The April

23, 2007 cover letter is the subject of BellSouth's Motion to Strike.¹ The two proposed settlement agreements were a good faith effort by Brandenburg Telephone to settle this matter. To date, BellSouth has not responded to Brandenburg Telephone's offers other than to reject them without explanation. Rather, BellSouth moved to strike Brandenburg Telephone's cover letter, and moved to serve an additional data request upon Brandenburg Telephone. Brandenburg Telephone will first address BellSouth's motion to serve an additional data request.

ARGUMENT AND ANALYSIS

I. THE KENTUCKY PUBLIC SERVICE COMMISSION SHOULD DENY BELLSOUTH'S MOTION TO SERVE AN ADDITIONAL DATA REQUEST.

Pursuant to the Kentucky Public Service Commission's (the "Commission") January 24, 2007 procedural order, all data requests were required to be served and filed on or before February 9, 2007. Three months after the deadline, however, BellSouth now seeks to serve an additional data request on Brandenburg Telephone. The time for formal discovery has passed. BellSouth offers no explanation for why it did not serve this request by the February 9, 2007 deadline, nor can it. No new issues have arisen in this matter. There is no reason why BellSouth could not have requested this information within the deadline established by the Commission. BellSouth should not be permitted to circumvent the Commission's procedural order. Accordingly, BellSouth's motion to serve an additional data request on Brandenburg Telephone should be denied.

II. THE COMMISSION SHOULD DENY BELLSOUTH'S MOTION TO STRIKE.

BellSouth's response to Brandenburg Telephone filing the April 23, 2007 letter and accompanying agreements with the Commission is surprising. As discussed below, the Kentucky Rules of Evidence expressly permit disclosure of an offer of settlement so long as it is not for the

¹ BellSouth's Motion to Strike references only the April 23, 2007 cover letter, not the two proposed settlement agreements attached thereto. Nonetheless, Brandenburg Telephone is willing to apply its proposal expressed within this response to both the April 23, 2007 cover letter and the two settlement agreements attached thereto.

purpose of “prov[ing] liability for or invalidity of the claim.” KRE 408. Brandenburg Telephone filed the settlement proposals outside of the context of a formal public hearing, and in any event, Brandenburg Telephone’s settlement proposal could not be the basis for “prov[ing] liability for or invalidity of [BellSouth’s] claim.” KRE 408. For this reason alone, the Commission should deny BellSouth’s motion to strike.

A. The Parties Discussed Settlement of the ACS Traffic Dispute at the Informal Conference.

Brandenburg Telephone did not reveal confidential information to the Commission in its April 23, 2007 cover letter. Settlement proposals are not inherently confidential. *See* KRE 408. Moreover, comparison of the April 23, 2007 cover letter and the March 27, 2007 Intra-Agency Memorandum of the parties' Informal Conference reveals that, with one possible exception, the information contained in the April 23, 2007 letter was discussed at the Informal Conference in the presence of Commission staff. Therefore, BellSouth’s motion to strike should be denied.

BellSouth has not and cannot cite to any law that provides that settlement proposals are inherently confidential. Pursuant to KRE 408, settlement proposals are protected from disclosure to a trier of fact *only if the proposal is being offered for the purpose of proving liability or the invalidity of a claim.*

- (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 also 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.

KRE 408 (emphasis added). Brandenburg Telephone did not offer its settlement proposal into evidence during a formal proceeding, nor did it provide the Commission with a copy of the proposal “to prove liability for or invalidity of the claim or its amount.” KRE 408. Rather, Brandenburg Telephone provided the Commission with a copy of its own settlement proposal in an effort to update the Commission, as requested, on the progress of the parties’ settlement negotiations. Such a disclosure does not run afoul of KRE 408, especially in light of the fact that Brandenburg Telephone’s proposal could not prove anything with regard to BellSouth’s liability or claim.

Moreover, BellSouth has not identified any specific information in the April 23, 2007 letter and accompanying settlement agreements it considers confidential or otherwise privileged.² BellSouth simply makes an unsupported, blanket statement that “it was inappropriate” to send the settlement proposal to the Commission. As already stated, settlement proposals are not inherently confidential. KRE 408. Even if BellSouth did identify specific information it considers confidential or otherwise privileged, BellSouth could not assert the privilege because it waived any privilege when it entered into settlement negotiations in the presence of Commission staff.

[T]he court is not unmindful of the fact that privileges cannot be used as both a sword and a shield. A party cannot choose to disclose only so much of allegedly privileged matter as is helpful to his case. Once the party begins to disclose any confidential communication for a purpose outside the scope of the privilege, the privilege is lost for all communications relating to the same matter.

Order, *In the matter of Big Rivers Electric Corporation's Notice of Changes in Rates and Tariffs for Wholesale Electric Service and other Financial Workout Plan*, Case No. 9613, October 29, 1986, p. 5 (citing *Burlington Industries v. Exxon Corporation*, LEXSEE 65 F.R.D. 26 (D. MD. 1974) (internal citation omitted). As is discussed below, the parties discussed every element of

² Brandenburg Telephone notes that to the extent BellSouth believes the cover letter and settlement agreements contain confidential information, the proper course of action is for BellSouth to move for confidential treatment pursuant to 807 KAR 5:001, section 7.

Brandenburg Telephone's settlement proposal during the Informal Conference, with the exception of the specific dollar figure. BellSouth cannot unilaterally pick and choose which elements of a settlement negotiation remain confidential. Once BellSouth engaged in settlement negotiations in front of Commission staff it waived its right, if any, to assert a privilege of confidentiality. Therefore, BellSouth has waived the privilege with regard to all elements of Brandenburg Telephone's settlement proposal, inclusive of the monetary amount.

Brandenburg Telephone's settlement offer is comprised of four elements. First, Brandenburg Telephone offered to pay BellSouth []. In disclosing this amount to the Commission, Brandenburg Telephone did not violate the confidence of BellSouth. BellSouth has not alleged, nor can it, that this dollar figure is confidential, proprietary information of BellSouth or that it is subject to a privilege. Moreover, Brandenburg Telephone did not disclose this dollar figure to the Commission to "prove liability or the invalidity of the claim." KRE 408. Therefore, the specific dollar figure Brandenburg Telephone proposed as part of its settlement offer is not protected from disclosure.

The remaining three elements of Brandenburg Telephone's settlement proposal were all discussed with Commission staff present as reflected in the March 27, 2007 Intra-Agency Memorandum. For example, Brandenburg Telephone proposed that BellSouth provide it with call detail records ("CDR") of ACS traffic. The Intra-Agency Memorandum, which has been filed and made a part of the public record, provides: "The parties tentatively agreed to review how BellSouth records ACS traffic to see if Brandenburg Telephone would be more amenable to BellSouth's position. BellSouth proposed to give Brandenburg Telephone its records for generic ACS traffic and show that BellSouth never changed its definition of ACS traffic and allowed Brandenburg to check this definition against its records." Intra-Agency Memorandum, *In the matter of BellSouth Telecommunications vs. Brandenburg Telephone Company, Case No. 2006-00546*, March 27, 2007,

p. 1. Although BellSouth contended in its comments to the Intra-Agency Memorandum that BellSouth suggested that Brandenburg Telephone provide BellSouth with Brandenburg Telephone's recorded AMA records, rather than BellSouth providing Brandenburg Telephone with its CDR, both the Intra-Agency Memorandum and BellSouth's comments thereto reflect that the parties discussed exchanging records to verify how BellSouth is *currently* transporting and terminating ACS traffic to Brandenburg Telephone. Therefore, Brandenburg Telephone's proposal that BellSouth submit sample CDR of ACS traffic to Brandenburg Telephone is not confidential.

Similarly, Brandenburg Telephone's proposal that the sample CDR be fully industry compliant is not confidential. BellSouth is expected in the normal course of business to provide Brandenburg Telephone and other carriers with industry compliant CDR. Moreover, BellSouth contended during the Informal Conference that the CDR it normally provides to Brandenburg Telephone is industry compliant. Therefore, this element of Brandenburg Telephone's proposal is not confidential.

The fourth and final element of Brandenburg Telephone's settlement proposal simply provides that Brandenburg Telephone analyze the CDR from BellSouth to determine whether BellSouth *currently* delivers ACS traffic over the access toll trunks (also known as the Common Transport Trunk Group ("CTTG")) and to determine whether Brandenburg Telephone *currently* captures and bills BellSouth for the ACS traffic. Again, this element of the proposal is mentioned in the Commission's March 27, 2007 Intra-Agency Memorandum and BellSouth's April 6, 2007 comments thereto. Both the Intra-Agency Memorandum and BellSouth's comments reveal that the purpose of exchanging records (be it BellSouth providing Brandenburg Telephone with CDR or Brandenburg Telephone providing BellSouth with AMA records) is to determine whether BellSouth

currently delivers ACS traffic to Brandenburg Telephone over the CTTG. Therefore, this element of Brandenburg Telephone's settlement proposal is not confidential.

As indicated above, three of the four elements of Brandenburg Telephone's settlement proposal were discussed in the presence of Commission staff during the Informal Conference and are reflected in the Commission's Intra-Agency Memorandum and BellSouth's comments, both of which are part of the public record. "Once the party begins to disclose any confidential communication for a purpose outside the scope of the privilege, the privilege is lost for all communications relating to the same matter." *Big Rivers*, p. 5. Given BellSouth openly discussed three of the four elements of Brandenburg Telephone's settlement proposal in front of Commission staff, it cannot have a reasonable expectation of confidentiality with regard to Brandenburg Telephone's settlement offer. Nonetheless, in a spirit of cooperation, and in an attempt to advance the parties' efforts at settling this dispute, should BellSouth file a motion for confidential treatment of the specific dollar figure cited in the April 23, 2007 cover letter and the ACS traffic settlement agreement, Brandenburg Telephone would not oppose it.

B. The Parties Discussed Settlement of the CMRS Traffic Dispute at the Informal Conference.

Fully half of the April 23, 2007 letter summarizes the CMRS traffic dispute and contains information that is already disclosed in documents filed with the Commission. The remainder of the letter presents Brandenburg Telephone's settlement offer. As discussed above, settlement proposals are not confidential. *See* KRE 408.

The proposal is comprised of four elements, all of which were discussed before Commission staff during the Informal Conference with the exception of specific dollar amounts. The first element of the proposal provides for Brandenburg Telephone to pay [] amount to BellSouth to settle unpaid balances for the period of June 1, 2004 through the November 8, 2005 bill. During the

Informal Conference, the parties openly discussed that Brandenburg Telephone did not provide BellSouth with a credit under the CMRS state-wide agreement for traffic that appeared to be other than CMRS signatory traffic. As Commission Staff noted in the March 27, 2007 Intra-Agency Memorandum, "Apparently, occasionally Brandenburg Telephone's records don't reflect CMRS traffic that BellSouth records do reflect." Intra-Agency Memorandum, *In the matter of BellSouth Telecommunications vs. Brandenburg Telephone Company, Case No. 2006-00546*, March 27, 2007, p. 2. Thus, the fact that Brandenburg Telephone has not provided BellSouth with a credit for traffic that, according to BellSouth is CMRS signatory traffic and according to Brandenburg Telephone is not, is not confidential; in fact, it is the very basis of BellSouth's CMRS traffic claim against Brandenburg Telephone. Although Brandenburg Telephone believes that this element of the settlement proposal was discussed, as indicated above, before Commission staff, once again, in a spirit of cooperation, should BellSouth file a motion for confidential treatment of the specific dollar figure cited in the April 23, 2007 cover letter and the CMRS traffic settlement agreement, Brandenburg Telephone would not oppose it.

The second element of the settlement proposal provides for BellSouth to repay Brandenburg Telephone [] amount for short pays from the November, 2005 usage through the April 8, 2007 bill. BellSouth admitted in its Complaint that "BellSouth began withholding payment of the disputed amount effective with the July, 2005 billing . . .;" therefore, the fact that BellSouth has short paid Brandenburg Telephone is not confidential. Nonetheless, solely for the purpose of advancing settlement of this dispute, should BellSouth file a motion for confidential treatment of the specific dollar figure Brandenburg Telephone proposes BellSouth pay, as reflected in the April 23, 2007 cover letter and the CMRS traffic settlement agreement, Brandenburg Telephone would not oppose it.

The remaining two elements of the proposal state only that: 1) Brandenburg Telephone will audit the records BellSouth provides to Brandenburg Telephone by comparing them to its own records; and that 2) Brandenburg Telephone will continue to work with BellSouth to identify the source of the discrepancies. The fact that Brandenburg Telephone will continue to audit BellSouth's records is not confidential. As the Commission staff noted in the Intra-Agency Memorandum:

The parties agreed that the agreement existing between the parties allowed either party to request an audit to determine the proper billing for CMRS minutes. The parties, however, disagreed over which party was to bear the cost of the audit. Apparently, occasionally Brandenburg Telephone's records don't reflect CMRS traffic that BellSouth's records do reflect. The parties also disagreed over what constituted the proper records to be used to determine the proper billing for CMRS minutes.

Counsel for Brandenburg Telephone suggested that Brandenburg Telephone look at BellSouth's CDRs and work with BellSouth to compare those records to Brandenburg Telephone's.

Intra-Agency Memorandum, *BellSouth Telecommunications, Inc. v. Brandenburg Telephone Company*, Case No. 2006-00546, p. 2. Thus, Brandenburg Telephone's proposal to continue auditing BellSouth's CDRs by comparing them to its own records, and to continue working with BellSouth to isolate and identify the source of discrepancies in the parties' respective records, was openly discussed at the Informal Conference and does not constitute confidential information subject to protection from public disclosure.

CONCLUSION

In sum, Brandenburg Telephone's April 23, 2007 cover letter and the attached settlement proposals are not confidential. Settlement proposals are admissible for any purpose other than "prov[ing] liability or invalidity of a claim." KRE 408. Brandenburg Telephone did not file its settlement proposals for the purpose of "prov[ing] [BellSouth's] liability or invalidity of [BellSouth's] claim." KRE 408. Such a filing could not prove anything about BellSouth's claim.

Moreover, BellSouth has not identified any specific information in the letter or proposed agreements that is confidential. Even if it could do so, BellSouth waived its right to assert confidentiality when it engaged in settlement negotiations in the presence of Commission staff, and discussed the very elements of Brandenburg Telephone's proposals. Nonetheless, in a spirit of cooperation, Brandenburg Telephone would not oppose a motion for confidential treatment of the specific dollar amounts proposed in the April 23, 2007 cover letter and the settlement agreements attached thereto, should BellSouth choose to file one. Accordingly, Brandenburg Telephone respectfully requests that the Commission: 1) deny BellSouth's motion to serve an additional data request on Brandenburg Telephone; and 2) deny BellSouth's motion to strike.

Respectfully submitted,



John E. Selent
Holly C. Wallace
Edward T. Depp
DINSMORE & SHOHL LLP
500 West Jefferson Street
1400 PNC Plaza
Louisville, Kentucky 40202
(502) 540-2300 (tel.)
(502) 585-2207 (fax)

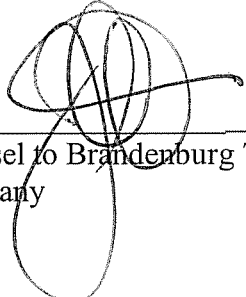
**COUNSEL TO BRANDENBURG
TELEPHONE COMPANY**

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing was served by mailing a copy of the same by First Class United States mail, postage prepaid, this 9th day of May, 2007, to the following:

Mary K. Keyer
General Counsel/Kentucky
601 W. Chestnut Street
P.O. Box 32410
Louisville, KY 40232
Counsel for BellSouth Telecommunications, Inc.

J. Philip Carver, Senior Attorney
Suite 4300
675 West Peach Tree Street, NW
Atlanta, GA 30375
Counsel for BellSouth Telecommunications, Inc.



Counsel to Brandenburg Telephone
Company

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