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FEB 02 2009

PUBLIC SERVICE
COMMISSION



February 2, 2009

VIA HAND DELIVERY

Hon. Jeff Derouen
Executive Director
Public Service Commission
of the Commonwealth of Kentucky
211 Sower Blvd.
Frankfort, KY 40601

***Re: In the Matter of: Complaint of Sprint Communications Company L.P.
against Brandenburg Telephone Company for the Unlawful Imposition of
Access Charges, Case No. 2008-00135***

Dear Mr. Derouen:

Enclosed for filing in the above-referenced case, please find one original and eleven (11) copies of Brandenburg Telephone Company's Emergency Motion to Compel Payment of Access Charges in the above-referenced case. Please file-stamp one copy, and return it to our courier.

Please note that this is an emergency motion, the grounds for which are stated therein.

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

Very Truly Yours,

DINSMORE & SHOHL LLP

John E. Selent

JES/ki
Enclosures
cc: All Parties of Record
Edward T. Depp, Esq.

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PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF COMPLAINT)
OF SPRINT COMMUNICATIONS)
COMPANY L.P. AGAINST)
BRANDENBURG TELEPHONE)
COMPANY FOR THE UNLAWFUL)
IMPOSITION OF ACCESS CHARGES)

Case No. 2008-135

EMERGENCY MOTION TO COMPEL PAYMENT OF ACCESS CHARGES

Brandenburg Telephone Company ("Brandenburg Telephone"), by counsel, hereby moves the Public Service Commission of the Commonwealth of Kentucky (the "Commission") for an order directing Sprint Communications Company L.P. ("Sprint") to promptly pay all outstanding and undisputed access charges.

INTRODUCTION

Brandenburg Telephone is a small, Kentucky rural incumbent local exchange carrier – the provider of last resort in its service territory – whose financial integrity is severely threatened by Sprint's refusal to pay \$370,976 in undisputed access charges it has incurred from Brandenburg Telephone. Brandenburg Telephone requires these monies to operate. Moreover, Sprint owes the money; it does not dispute that it owes the money; the money has been "authorized for payment;" and yet, Sprint refuses to pay the money. So long as Sprint continues this tactic, Brandenburg Telephone and its customers and employees are forced to bear the risk associated with this "loan," including the risk that Sprint may not survive its current economic difficulties. This is not a risk that the Commission should require Brandenburg Telephone to bear. Accordingly, Brandenburg Telephone respectfully requests that the Commission order Sprint to pay the \$370,976 in undisputed access charges that Sprint owes, at once.

I. Statement of Facts.

This case involves Sprint's ongoing refusal to pay Brandenburg Telephone's tariffed access charges. Sprint mistakenly claims that Brandenburg Telephone has improperly jurisdictionalized certain traffic that is allegedly interstate in nature as intrastate. This motion, however, does not involve the traffic affected by that jurisdictionalization issue; this motion concerns only the traffic (the "Undisputed Traffic") that Sprint concedes has been properly jurisdictionalized pursuant to Brandenburg Telephone's filed and approved switched access tariffs. Currently, Sprint owes \$370,976 in access charges in connection with this Undisputed Traffic. Sprint has not disputed these charges. The amount grows monthly, and in order to safeguard Brandenburg Telephone's financial integrity in these dangerous economic times, it is imperative that Sprint be ordered to pay those charges at once.

Immediate payment of these unpaid and uncontested charges becomes particularly important in light of the financial difficulties Sprint faces. The Sprint family of companies has experienced three straight quarters of declining earnings -- that translates to hundreds of millions of dollars in lost sales.¹ This earnings shortfall has been exacerbated by the many billions of dollars of debt incurred by the 2004 acquisition of Nextel.² In January 2009, Sprint Nextel announced it will lay off 8,000 jobs -- 14% of its entire workforce -- and The New York Times reported that the company is "facing some tough restructuring decisions as it continues to hemorrhage subscribers."³ As a result of these numerous problems, many investors "have placed bets that the company will be sold or broken up."⁴

In light of these financial difficulties, there are three possible outcomes if Sprint is permitted to refuse payment of its undisputed balance. First, if Sprint survives, it will have had a substantial,

¹ See, e.g., Crayton Harrison and Amy Thomson, "Sprint, Qwest Revenues Drop as Competition Heats Up (Update 1), BLOOMBERG.COM, Aug 6, 2008, *available at* http://www.bloomberg.com/apps/news?pid=20601103&sid=a1XK2q_jiLq0&refer=us; Amol Sharma, "Sprint Cancels Stock Sale That Was to Tackle Debt Load," THE WALL STREET JOURNAL, Aug 8, 2008, *available at* <http://online.wsj.com/article/SB121816450030023219.html> (hereafter "WSJ article").

² See, e.g., "Business this week," THE ECONOMIST, Aug 14, 2008, *available at* http://www.economist.com/business/displaystory.cfm?story_id=11922152 (hereafter "Economist article"); WSJ article, *supra*.

³ Catherine Rampell, "Layoffs Spreads to More Sectors of the Economy," N.Y. Times, A1, Jan. 27, 2009.

⁴ Economist article, *supra*.

interest-free loan from Brandenburg Telephone, not coincidentally at a time when Sprint is in dire need of money.

Brandenburg Telephone is a small, Kentucky local exchange carrier, and this sort of "loan" impermissibly and – more importantly – dangerously shifts Sprint's financial risks onto Brandenburg Telephone. First, and particularly in this time of economic crisis, such a shift could carry serious repercussions for Brandenburg Telephone (and its customers and employees) due to Brandenburg Telephone's small size. Second, if Sprint becomes insolvent prior to settling this dispute, Brandenburg Telephone's ability to recover these uncontested charges will be eliminated or, at least, severely jeopardized. Third, Brandenburg Telephone will have been deprived of substantial operating revenues that the undisputed charges represent.

At the July 17, 2008 informal conference among Brandenburg Telephone, Sprint, and the staff of the Commission, Sprint conceded that a substantial portion its outstanding access charges are not in dispute. The amount of these undisputed charges currently totals \$370,976. Sprint further admitted these uncontested charges had been internally "authorized for payment." Pursuant to 807 KAR 5:006 Section 11, a customer account is only current during a billing dispute "as long as a customer continues to make undisputed payments and stays current on subsequent bills." As of the filing of this motion, Sprint has not paid Brandenburg Telephone for these uncontested charges that have been "authorized for payment" and their account is consequently no longer current. At the informal conference, Sprint acknowledged that it has withheld these authorized payments, but it argues that it is allowed to do so as a set-off against the amount it believes it has been overbilled. And again, just this week, during a brief teleconference on January 29, 2009, Sprint has again refused to pay these undisputed charges. Thus, for twelve straight months now, Sprint has not paid the first penny for access services received from Brandenburg Telephone.

II. Argument and Analysis.

A. Sprint's Withholding of Authorized Payments Is Contrary to Kentucky Law.

Sprint's claim that it possesses a right of set-off against the disputed charges is an unlawful attempt at self-help. In a 1994 access charge dispute, the Sixth Circuit rejected the same type of set-

off attempt as contrary to the purpose of filed tariffs. The Court held that "parties are bound by the lawfully filed tariff" until a final determination of the rate dispute, and that, more specifically, "set-offs should be discouraged in rate disputes because . . . the equities favor allowing the carrier's rate to control pending decision by the Commission." *Cincinnati Bell Tel. Co. v. Allnet Comm'n Svcs.*, 17 F.3d 921 (6th Cir. 1993).

This presumption against set-offs is valid where, as here, there is no explicit agreement between the parties authorizing such self-help. Absent that agreement, the parties must remain bound by the filed tariff and are responsible for paying all fees imposed by the carrier until the Commission resolves the dispute. This conclusion is reinforced by the Kentucky Administrative Regulation's provisions that explicitly state that a customer account is not current, even in the midst of a billing dispute, if the customer refuses to make "undisputed payments."⁵ Sprint's claim that it has the authority to ignore the filed tariff for as long as this dispute is pending is therefore without authority, and its attempt to withhold payment for charges that even it admits were appropriately calculated under the lawfully filed tariffs must be rejected.

Sprint has no legitimate basis to refuse to pay charges it acknowledges are valid. Furthermore, its refusal to pay these uncontested charges because of the ongoing dispute between the parties confuses the issue before the Commission, and is an abuse of the Commission's process. These uncontested charges are, by Sprint's own admission, not part of the dispute between the parties, and payment should not be permitted to be withheld.

B. Sprint's refusal to pay is an abuse of this Commission's proceedings. In light of Sprint's dire financial situation, allowing it to avoid payments of undisputed amounts threatens any hope of eventual remedy.

As explained above, Sprint's dire financial situation creates an urgent need to resolve this portion of the dispute quickly. Faced with billions in debt, diminishing subscriber numbers, massive layoffs, and hundreds of millions of dollars in lost sales in 2008 alone, Sprint is improperly attempting to use these proceedings to delay payment for undisputed charges. This delay would

⁵ 807 KAR 5:006 Section 11.

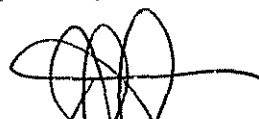
allow Sprint to shift its financial risk to Brandenburg Telephone in a time of economic turmoil with no lawful justification for doing so. From Sprint's perspective, a long enough delay will either allow the outstanding balance to be included in bankruptcy or allow it to use Brandenburg Telephone's money, interest-free, to help stave off bankruptcy.

Neither of these goals are a proper reason for withholding payment of undisputed charges, and allowing Sprint to do so only further confuses the issues presently before the Commission. Sprint has no dispute with respect to \$370,976 of Brandenburg Telephone's access charges, and Sprint has authorized those charges for payment. Accordingly, its inclusion of these charges in the present dispute serves only to confuse the issues before the Commission and to delay payment to Brandenburg. The Commission should therefore instruct Sprint to pay these sums immediately.

III. Conclusion and Request for Relief.

For the above-stated reasons, Brandenburg Telephone respectfully requests that the Commission order Sprint to immediately pay Brandenburg \$370,976, including late payment fees incurred pursuant to the Brandenburg Telephone's filed and approved switched access tariffs.

Respectfully submitted,



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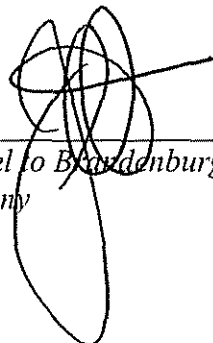
*Counsel to Brandenburg Telephone
Company*

CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing was served on the following,
via first-class U.S. Mail, on this 7th day of February, 2009:

John N. Hughes
Attorney at Law
124 West Todd Street
Frankfort, KY 40601

Counsel for Sprint Communications Company L.P.



*Counsel to Blountdenburg Telephone
Company*

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