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COMMONWEALTH OF KENTUCKY

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BEFORE THE PUBLIC SERVICE COMMISSION

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. 2008-00135
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RESPONSE OF SPRINT COMMUNICATIONS COMPANY L.P. TO EMERGENCY MOTION TO COMPEL PAYMENT OF ACCESS CHARGES

Sprint Communications Company L. P. (“Sprint”) responds to the Emergency Motion to Compel the Payment of Access Charges (“Brandenburg Motion”) filed by Brandenburg Telephone Company (“Brandenburg”) in the above captioned matter on February 2nd, 2008.

I. INTRODUCTION

1. Brandenburg’s Motion to Compel Payment of Access Charges must be denied because Sprint already has paid all undisputed amounts as well as most of the disputed amounts associated with the instant complaint proceeding. Brandenburg fails to acknowledge the underlying substance of the dispute. What Sprint is entitled to and is seeking in this proceeding is a refund of unlawful overcharges imposed by Brandenburg over an extended period of time. As of January of 2009 the total amount in dispute is \$1,949,234.14. Of this amount Sprint holds roughly \$619,996 and Brandenburg holds \$1,329,238.¹ Notwithstanding the fact that Brandenburg is aware of this overpayment and the ongoing nature of the dispute, Brandenburg continues to demand additional overpayment. If any relief is to be granted, that relief should be

¹ These numbers have changed over the course of the proceeding as Sprint continues to receive services and bills from Brandenburg. If Sprint undertakes further investigation prior to 2002 these numbers could increase.

granted to Sprint and order Brandenburg to repay to Sprint (or place in escrow) an amount equal to Sprint's existing overpayment pending the outcome of this case.

2. Contrary to Brandenburg's claims, Sprint is in full compliance with 807 KAR 5:006, Section 11 because its customer account with Brandenburg is current. In fact, the account is more than current and includes substantial positive balances. Since November 2007 Sprint has attempted to seek reconciliation with Brandenburg over the payment of intrastate switch access charges. Brandenburg has failed to take any action to attempt to reconcile the differences between the parties or to engage in meaningful discussion. All Brandenburg has done is demand payment. Brandenburg has demanded the payment of its extraordinarily high 18-cents-per-minute intrastate access charges² to terminate traffic that is interstate and should be billed at its interstate rate of roughly 1.5 cents per minute.³

3. Sprint paid the excessive charges over an extended period of time. So long as Sprint paid Brandenburg, Brandenburg kept billing the same inappropriate rate and refused to come to an understanding on how the process should work. In doing so, Sprint overpaid the account by approximately \$1.9 million. As a result Sprint stopped paying the excessive rates. Brandenburg's reaction was simple. By letter dated March 28, 2008, a copy of which is attached to Sprint's original Complaint filed in this proceeding, Brandenburg threatened to terminate services to Sprint, which would have resulted in substantial harm to Sprint's operations and customers in Kentucky and throughout the nation. This notice to discontinue service is what prompted Sprint to file the instant Complaint.

² Intrastate Rates per Duo County Telephone Cooperative Corp., Inc, PSC KY #2A. Most of the claims in this proceeding are based on the 18 cent per minute rate. This rate was recently changed to 14 cents per minute with a reduction in CCL.

³ Interstate Rates per NECA FCC #5.

4. To divert attention from the lack of merits of its “Emergency Motion” filed long after this dispute arose, Brandenburg has included baseless and irrelevant claims regarding Sprint’s economic condition as well as hyperbole regarding “loans” Brandenburg contends it is making to Sprint. The facts show precisely the opposite. It is Brandenburg that is being subsidized by Sprint’s large overpayment of access charges involved in this Complaint, which more than covers the amounts claimed in Brandenburg’s Emergency Motion.

5. The fact that Brandenburg waited until this point in the proceeding to file its Emergency Motion is confusing and undermines its dramatic claim of a need for emergency relief. Sprint has been consistently clear throughout this proceeding as to the amount owed by Brandenburg to Sprint and what steps Sprint was taking to address it. If Brandenburg was concerned that this was an issue, it could have been addressed much earlier in the proceeding.⁴ In addition, Brandenburg’s position is contrary to Brandenburg’s own tariffs, which allow for claims to be withheld pending resolution.

6. Moreover, this Commission has appropriately recognized that a state utility regulatory Commission is not the proper forum in which a utility should seek to obtain a judgment for an unpaid claim, which is essentially what Brandenburg is trying to do through its “Emergency Motion”. Tellingly, Brandenburg itself seems to recognize this because, concurrently with the filing of Brandenburg’s “Emergency Motion”, Brandenburg also filed an action in Meade Circuit Court seeking to collect the debt that Sprint allegedly owes. Accordingly, this Commission should deny the “Emergency Motion”, proceed to a determination on the merits of Sprint’s PIU Complaint, and leave it to a court to enter a money judgment.

⁴ Brandenburg’s request is more like a request for a deposit, however, Brandenburg has not even attempted to comport to the requirements in its tariff for a deposit.

II. NATURE OF CURRENT DISPUTE

7. For the period initially covered by this Complaint, the period beginning in March 1, 2006 through April 2008, Brandenburg's unlawful charges amounted to approximately \$926,250. This amount is based upon the application of Sprint's Percent of Interstate Use ("PIU") factor which accurately accounts for the jurisdiction of wireless calls carried over Sprint's long distance network and delivered to Brandenburg for termination. Sprint has previously notified Brandenburg that it has implemented adjustments to Brandenburg's account to reflect the fact that Brandenburg has been overbilling Sprint since at least the beginning of 2002. Once the Complaint became necessary, Sprint continued to investigate its historic information and made additional adjustments going back to the beginning of 2002. As noted above, as of January of 2009, the total amount in dispute is \$1,949,234.14. Of this amount Sprint holds roughly \$619,996 and Brandenburg holds \$1,329,238. These amounts will continue to fluctuate until a determination is made in this proceeding as to the amounts owed for past billing and a prospective determination as to how Brandenburg should bill on a going forward basis.

8. Sprint has provided to Brandenburg two recent traffic studies. The data supporting these studies are complete and accurate. These studies absolutely prove the accuracy of the PIU factors Sprint has been reporting to Brandenburg. Brandenburg has not provided Sprint any specific data flaws, or even presented Sprint with any questions about the way specific calls were classified. The same type of studies have been conducted for the traffic delivered to Brandenburg over a period of years and the results provided to Brandenburg. Brandenburg has completely ignored this information and billed excessive rates nonetheless. This process is outlined in Brandenburg's tariff which provides that if a billing dispute arises concerning the projected interstate

percentage, the Telephone Company will ask the customer to provide the data the customer uses to determine the projected interstate percentage.

9. Brandenburg boldly states that Sprint is intentionally withholding payment on undisputed charges.⁵ This is simply false. What Brandenburg is alluding to is the process whereby Sprint has established a debit balance associated with the payable account for Brandenburg to reflect the unlawful charges Brandenburg has levied against and collected from Sprint over an extended period of time. This is simply an accounting mechanism whereby Sprint tracks and notifies Brandenburg of the amount of the ongoing dispute between the parties. Each month there is a recalculation of the amount owed based on the proper application of jurisdiction to the traffic for that month which reduces by that amount the total refund owed by Brandenburg.

10. Brandenburg's position on the nature of the complaint is without merit. Brandenburg seeks to have the Complaint and the dispute viewed as a series of disputes rather than a continuum of a method of practice. This is one dispute on a single account for intrastate access charges that Brandenburg seeks to collect from a single company. Brandenburg has overcharged and collected access charges from Sprint for an extended period without any true-up or recognition of the overcharge.⁶ Brandenburg expects Sprint and this Commission to forget about the amount Brandenburg has over-collected and accede to letting Sprint's overpayment in the same dispute remain in Brandenburg's hands while it is permitted overpayment by collecting further payments on a prospective basis. This results in an unlawful windfall to Brandenburg,

⁵ Brandenburg Motion p.3.

⁶ Brandenburg itself previously acknowledged and argued that a dispute with BellSouth should be viewed as a single dispute on a single account. In a dispute with BellSouth in which BellSouth alleged it had overpaid Brandenburg for ACS traffic and in which BellSouth withheld prospective payment when it discovered the overpayment, Brandenburg argued that "BellSouth's damages for the alleged overpayment for ACS traffic may be set off by BellSouth's underpayment for ACS traffic to Brandenburg since May, 2004 when BellSouth admits it stopped paying for ACS traffic through the settlement process". (See Brandenburg Telephone's Answer dated January 9, 2007 *In the Matter of: BellSouth Telecommunications, Inc. v. Brandenburg Telephone Company, Case No. 2006-00546.*)

which violates its tariffs and applicable law. To allow this conduct would create an incentive for carriers to overbill intrastate access charges, delay settling and then settle only prospectively, thus reaping a windfall for the period of time the dispute was pending.

III. DISCUSSION

11. Simply put, Sprint can demonstrate that the traffic at issue originates in one state and terminates in another state and is thus interstate traffic.⁷ Brandenburg relies on a comparison of the calling party number (“CPN”) to the called number to assign the jurisdiction of all traffic, including wireline and wireless calls. But such comparison cannot be relied upon to accurately determine the jurisdiction of a wireless call. This is so because although a wireless customer’s telephone number is usually based on the location of the customer’s home or business, the mobility afforded by wireless phones and the fact that wireless carriers have built nationwide networks enable wireless subscribers to make calls from virtually anywhere in the United States. The CPN used by Brandenburg for a call from a Sprint subscriber to one of Brandenburg’s customers represents the geographic location of the NPA-NXX originally assigned to the phone itself, and does not represent the physical location of the subscriber and the phone at the time a call is made.

12. It is unlawful for Brandenburg to bill interstate traffic at intrastate rates under the purported authority of its intrastate tariffs. The Duo County Telephone Cooperative Corp., Inc. PSC KY NO. 2A tariff is inapplicable to the traffic at issue because it is interstate traffic. The appropriate tariff is National Exchange Carrier Association, Inc., Tariff F.C.C. No. 5. Thus the intrastate access charges imposed by Brandenburg on Sprint for the traffic at issue pursuant to the Duo County Telephone Cooperative Corp., Inc. PSC KY NO. 2A tariff are not valid. K.R.S. Section 278.160 (2) requires that:

⁷ See Complaint at 5.

No utility shall charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for compensation greater or less than that prescribed in such schedules.

The statute requires that the utility bill a customer for the service rendered to that customer based on its filed rates and indicates that a utility is prohibited from providing service at a rate other than that set forth in its tariffs on file with the Commission.⁸ In this case Brandenburg has been overcompensated for services rendered by billing excessive amounts at the intrastate rate.

13. In *South Central Bell*, the Kentucky Commission interpreted this statute in the resolution of a PIU dispute. The Commission determined that South Central Bell was obligated to collect all arrearages not previously collected and went so far as to suggest that a utility may be required to bill arrearages that extend over a 10-year period even though the arrearages were caused by the utility's own negligence. This determination was under the authority of K.R.S. Section 278.160(2) noted above, which applies equally to overbilling as well as underbilling. Thus Sprint is justified in seeking refunds of all amounts previously erroneously billed and paid by Sprint in the past. Sprint's current calculation only goes back to 2002; however, Sprint would be justified in going back further to seek additional damages.

14. Brandenburg's position on the nature of the complaint is without merit. Brandenburg seeks to have the complaint and the dispute viewed as a series of disputes (e.g. each new billing period) rather than a continuum of a method of practice and one dispute on a single account for all intrastate access charges that Brandenburg seeks to recover from a single company.

Brandenburg wants to wait to address the amount it has overbilled and over-collected at some future point while it collects money for current activity. This provides Brandenburg a windfall

⁸ See, e.g., *In the Matter of: Long Distance Management and TMC of Southern Kentucky vs. South Central Bell Telephone Company*, Kentucky Public Service Commission, Case No. 91-315; Order dated October 19, 1992. ("South Central Bell")

and should not be tolerated. Sprint would be willing to pay on a current basis if Brandenburg refunded the previous excessive amount it has collected and held while this action and dispute have been pending. Brandenburg will not do this.

15. In *South Central Bell* this Commission determined that the relationship between the carriers involved must be viewed as a continuum and that past under-charges must be corrected even if there is no current dispute on the application of the prospective PIU. There was apparent agreement between the parties regarding a PIU to be applied on a going forward basis but a dispute over the past charges. This Commission required that the parties go back and reconcile the amounts for the back period as well.

16. Contrary to Brandenburg's assertions, there is no obligation on Sprint to pay any amounts pending resolution of the dispute. As noted previously this is one dispute and Brandenburg is actually holding money that Sprint is entitled to rather than the other way around. In addition, Brandenburg's tariff, which it is bound to follow, contemplates that during the pendency of the dispute a customer does not have an obligation to pay. This is the case whether the Commission is considering the payment of the undisputed portion of the charges or all of the charges. The Duo County Telephone Cooperative Corp., Inc. PSC KY NO. 2A, for intrastate access services tariff provides:⁹

2.4 Payment arrangements and Credit Allowances (Cont'd)

2.4.1 Payment of Rates, Charges and Deposits (Cont'd)

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(D) Billing Disputes Resolved in Favor of the Telephone Company

Late payment charges will apply to amounts withheld pending settlement of the dispute. Late payment charges are calculated as set forth in (C) (2)

⁹ Duo County Telephone Cooperative Corp., Inc. PSC KY NO. 2A, Original Page 2-31, Section 2.4.1 (D), Issued: September 20, 1999 Effective: November 1, 1999.

preceding except that when the customer disputes the bill on or before the payment date and pays the undisputed amount on or before the payment date, the penalty interest period shall not begin until 10 days following the payment date.

The only difference in effect where the customer pays the undisputed portion as opposed to withholding the undisputed portion is the calculation of interest. The tariff clearly contemplates both scenarios. As discussed above, Sprint has provided significant overpayment and is not withholding any undisputed amounts based on the amounts that are included in this dispute. Nevertheless, even assuming Sprint was withholding an undisputed portion, it would be entitled to do so under Brandenburg's tariff. Brandenburg is required to follow this tariff in the provision of service.

17. This conclusion is consistent with other provisions in Brandenburg's tariff.

Correspondingly, the Duo County Telephone Cooperative Corp., Inc. PSC KY NO. 2A, for intrastate access services tariff provides:¹⁰

2.4 Payment arrangements and Credit Allowances (Cont'd)

2.4.1 Payment of Rates, Charges and Deposits (Cont'd)

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(E) Billing Disputes Resolved in Favor of the Customer

If the customer pays the total billed amount and disputes all or part of the amount, the Telephone Company will refund any overpayment. In addition, the Telephone Company will pay to the customer penalty interest on the overpayment. When a claim is filed within 90 days of the due date, the penalty interest period shall begin on the payment date. When a claim is filed more than 90 days after the due date, the penalty interest period shall begin from the date of the claim or the date of overpayment, whichever is later.

¹⁰ Duo County Telephone Cooperative Corp., Inc. PSC KY NO. 2A, Original Page 2-32, Section 2.4.1 (E), Issued: September 20, 1999 Effective: November 1, 1999.

This section contemplates that a claim may be filed at any time in the process even once a bill has been paid. The tariff contemplates a flexible process up until the point where the claim is settled.

18. The Brandenburg Access Tariff clearly contemplates refunds of overbilled amounts and the right of a carrier such as Sprint to withhold payment. This concept is also set forth in Brandenburg's General Exchange Tariff. If Brandenburg overbilled \$1,000 to an end user and the end user paid the \$1,000, that end user would be entitled to a refund as set forth in the General Exchange tariff. The Brandenburg tariff provides as such:¹¹

Part I, General Rules and Regulations

C. Obligation and Liability of Telephone Company

7. Adjustment of Charges.

In the adjustment of charges for overbilling by the Telephone Company, a refund will be made of the full amount of excess charges when such amount can be determined; when the period during which overbilling has been effective cannot be fixed or the exact amount of overbilling determined from available records, the maximum refund will not exceed an estimated amount equal to such overbilling for a three year period.

This provision requires retroactive treatment of the refund process. What Brandenburg is suggesting, however, is that the application of the above provision would be independent of the continuing obligation of the customer to pay charges. Thus, if a consumer were overbilled the \$1,000 and paid the \$1,000 and then were billed appropriately \$50 for successive months, the customer could not seek to have the \$50 obligation covered by the \$1,000 credit that should be on the customers account. Under Brandenburg's position, until Brandenburg determines the

¹¹ Brandenburg Telephone Company P.S.C. Ky. No. 2, Original Sheet 8, Part I, General Rules and Regulations, C. Obligation and Liability of Telephone Company, 7. Adjustment of Charges, Issued April 12, 196, Effective March 24, 1961.

timing of the refund, the customer is not entitled to any credit or any recognition of the previous \$1,000 overpayment.

19. This is the position being applied to Sprint. Sprint was and currently is being overbilled by Brandenburg. For a period of time Sprint paid the overcharges submitted by Brandenburg, either because Brandenburg's billing excesses had not yet been indentified, were not as significant as other matters being attended to, or there was an effort underway to reach an agreement with Brandenburg on how the companies were to operate. Brandenburg has taken full advantage of the situation. To condone this conduct would act as an incentive for carriers to overbill intrastate access charges, delay settling and then settle only prospectively thus reaping a windfall for the period of time the dispute was pending.

20. On page 4 of its motion Brandenburg argues that the KSA provides that a "customer account is not current, even in the midst of a billing dispute, if the customer refuses to make "undisputed payments" This is not actually what the section provides which states as follows:

Section 11. Status of Customer Accounts During Billing Dispute. With respect to any billing dispute to which Section 10 of this administrative regulation does not apply, customer accounts shall be considered to be current while the dispute is pending as long as a customer continues to make undisputed payments and stays current on subsequent bills.

Although one could argue that it might be inferred that Brandenburg's interpretation is the intent of the section, this is clearly not what the section says. Sprint also notes that the section refers to a customer's account and not a single bill. Contrary to Brandenburg's claims, Sprint is in full compliance with 807 KAR 5:006, Section 11 because its account with Brandenburg is current on all undisputed charges. The account actually reflects a balance in Sprint's favor.

21. Moreover, Brandenburg's "Emergency Motion" is essentially a debt collections action, and this Commission has previously found that a state utility regulatory Commission is not the

proper forum for utilities to pursue their debt collections efforts. See, e.g., Case No. 10205, *In the Matter of Green River Electric Corporation Application for an Order Approving Proposed Resolution of Underbilling to Town and Country Mobile Home Park*, Order (issued January 19, 1990), at 5:

The Commission readily concedes that a utility's debt collection practices are primarily managerial concerns. The exact manner or method in which a debt is collected is not within a utility regulatory commission's prerogative. As the United States Supreme Court has declared, [W]hile the state may regulate, with the power to enforce reasonable rates and services, it is not clothed with the general power of management incident to ownership (citing *Missouri v. Southwestern Bell Tel. Co.*, 262 U.S. 276, 289 (1923)).

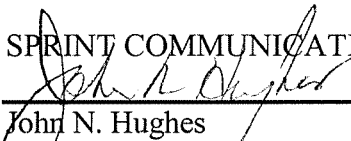
22. Brandenburg tacitly concedes that the Commission is not the appropriate forum in which to obtain the relief requested in the "Emergency Motion" because on or about the same time as it filed the Motion with this Commission, Brandenburg also filed a debt collection action against Sprint in Meade Circuit Court (Case No: CIV. 09-CI-00039). Accordingly, this Commission should deny the "Emergency Motion", proceed to a determination on the merits of Sprint's PIU Complaint, and leave it to a court to address any collection efforts should this Commission find that Sprint in fact owes any unpaid charges to Brandenburg.

CONCLUSION

WHEREFORE, Sprint respectfully requests that the Commission take the following actions:

1. Deny Brandenburg’s Emergency Motion.
2. Establish a procedural schedule for a hearing to effectuate resolution of matters set fort in this proceeding.
3. Grant to Sprint such other and further relief as the Commission deems just and proper.

Submitted this 12th day of February, 2009.

SPRINT COMMUNICATIONS COMPANY L. P.


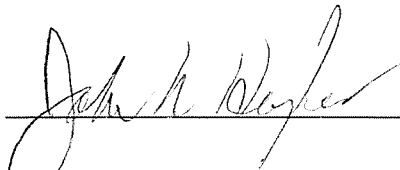
John N. Hughes
Attorney at Law
124 West Todd Street
Frankfort, Kentucky 40601
(502) 227-7270 (o)
(502) 875-7059 (fax)

Attorney for Sprint

CERTIFICATE OF SERVICE

I certify that this pleading has been served this day by mailing to John Selent, Dinsmore & Shohl, 1400 PNC Plaza, Louisville, KY 40202, counsel for Brandenburg.

This 12th day of February, 2009.



John N. Hughes
Attorney at Law
124 West Todd Street
Frankfort, Kentucky 40601
(502) 227-7270 (o)
(502) 875-7059 (fax)
Attorney for Sprint