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AUG 03 2009

PUBLIC SERVICE
COMMISSION

August 3, 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:

We have enclosed for filing in the above-styled case an original and eleven (11) copies of Brandenburg Telephone Company's Motion to Strike.

Please return a file stamped copy to our courier.

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

Sincerely,



Edward T. Depp

Enclosures

cc: All Parties of Record

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AUG 03 2009

**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

**BRANDENBURG TELEPHONE COMPANY'S
MOTION TO STRIKE**

ORIGINAL

Brandenburg Telephone Company ("Brandenburg Telephone"), by counsel, requests that the Public Service Commission of the Commonwealth of Kentucky (the "Commission") to strike the Amendment to Complaint filed by Sprint Communications Company L.P. ("Sprint") on July 21, 2009. As grounds for its motion, Brandenburg Telephone states the following.

PROCEDURAL POSTURE

On July 21, 2009, more than 15 months after the filing of its initial Complaint and less than three weeks prior to the hearing in this matter, Sprint filed an Amendment to Complaint ("Amendment") purporting to extend its alleged refund period back to January of 2002. At no point did Sprint seek the Commission's consent to file this Amendment. It seems to assume it may amend by right without warning at any time, despite the well-established law to the contrary. *See, e.g., Ky. Civ. R. 15.01* (after a responsive pleading is served, "a party may amend his pleading only by leave of court or by written consent of the adverse party").

Brandenburg Telephone has defended itself for a year and a half based upon Sprint's representation that "the period covered by this complaint" is "the period beginning March 1, 2006 to the present. (Complaint at 8.) Both parties have completed all discovery deemed necessary to

resolve the Complaint and have filed all direct testimony in this matter. This matter is in its very final stages, and it is too late for Sprint to change its mind about the relief it is requesting.

ARGUMENT & ANALYSIS

Based on these facts, the Amendment should be rejected by the Commission for the following reasons.

I. The Amendment does not comply with the formal complaint requirements of the Kentucky Administrative Regulations.

II. Brandenburg Telephone would have insufficient time to defend itself against the amended claim, constituting a violation of its due process rights.

III. By its unreasonable delay, Sprint has waived its right to amend.

IV. Sprint's Amendment is barred by the relevant statute of limitations and is futile.

I. The Amendment Does Not Comply with the Formal Complaint Requirements of the Kentucky Administrative Regulations.

Pursuant to the formal complaint requirements set forth in the Kentucky Administrative Regulations, upon the filing of a complaint the Commission must first "ascertain whether it establishes a prima facie case and conforms" to regulation. 807 KAR 5:001 § 12(4)(a)-(b). A utility may not respond to a complaint filed until the Commission orders it to answer or satisfy. *Id.* "A complaint establishes a prima facie case when it sets forth on its face sufficient allegations that, if not contradicted by other evidence, would entitle the complainant to the relief requested." *In the Matter of South Central Telcom, LLC v. Windstream Kentucky East, Inc.*, Case No. 2008-00126, 2008 Ky. PUC LEXIS 460, at *2-3 (Order, April 17, 2008). In this case the Commission has made no such determination that the Amendment establishes such a prima facie case, nor has it issued an order to Brandenburg Telephone to answer or satisfy. Therefore, the proposed Amendment should constitute no part of the case.

Moreover, Sprint's Amendment fails to establish a prima facie case and cannot meet the formal complaint requirements of 807 KAR 5:001 § 12(4)(a)-(b). As explained below, Sprint's amended claims are entirely foreclosed by the Due Process clause of the Constitution of the United States and Section 2 of the Kentucky Constitution, the doctrine of waiver, and the applicable statute of limitations. Therefore the amended claims do not set forth allegations that "would entitle [Sprint] to the relief requested." *In the Matter of South Central Telcom, LLC v. Windstream Kentucky East, Inc.*, Case No. 2008-00126, 2008 Ky. PUC LEXIS 460, at *2-3 (Order, April 17, 2008). The Commission should, therefore, strike Sprint's Amendment.

II. Brandenburg Telephone Would Have Insufficient Time to Defend Itself Against the Amended Claim, Constituting a Violation of Its Due Process Rights.

Sprint's Amendment comes less than three weeks before the hearing, with the full knowledge that Brandenburg Telephone will not be able to conduct any relevant discovery, prepare any relevant testimony, or even have sufficient time to research the new legal claim.

In Kentucky, "a party to be affected by an administrative order is entitled to procedural due process." *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission* (Ky. 1964), 379 S.W.2d 450, 456. Due process requires that a party be given "sufficient notice and opportunity to make [its] defense." *Somsen v. Sanitation Dist. of Jefferson County*, 303 Ky. 284, 286, 197 S.W.2d 410 (Ky. 1946). If the Commission allows the Amendment, Brandenburg Telephone would be unable to defend itself properly because there is no time left in the procedural schedule to do so.

Even if the Commission could review the Amendment, determine prima facie validity¹ and compliance with Kentucky regulations, and issue an order to answer or satisfy by August 7,

¹ As explained in this motion, Sprint has not established (nor can it establish) a prima facie case for the 2002 through March 2006 period in question.

Brandenburg Telephone would have only a single business day to fully research the claims, answer the Amended Complaint, and prepare to address the claims at the hearing. Even on that impossible timeline, Brandenburg Telephone would be able to conduct no discovery on this issue, would be able to obtain no relevant documents, and would be able to prepare no relevant testimony. This would violate Brandenburg Telephone's due process rights under the federal and state constitutions. The Commission should therefore strike Sprint's Amendment.

III. By Its Unreasonable Delay, Sprint Has Waived Its Right to Amend.

Sprint has been aware of this potential amendment since the filing of its initial complaint and has even made oblique references to it during these proceedings. However, Sprint chose not to pursue it until the very last minute, and it has previously identified "the period covered by this complaint" as "beginning March 1, 2006 to the present." (Complaint at 8.) As recently as its last data request on July 13, 2009, Sprint did not ask for documents relevant to the stale timeperiod that constitutes the basis of its amendment. In fact, in its recent testimony, Sprint repeatedly stresses its deliberate decision to not pursue retroactive relief, and claims it "explained [to Brandenburg Telephone] that it was Sprint's intention to work with Brandenburg to correct its billing FROM THAT POINT ON." (*See* Direct Testimony of Julie A. Walker on Behalf of Sprint Communications Company, L.P., at 22 (filed July 21, 2009) (emphasis in original).) Sprint's witness emphasized that "[i]t's worth repeating, that at the time Sprint was not pursuing any retroactive relief." (Testimony of Walker at 23.)

Brandenburg Telephone should not be subjected to a last minute change with such significant implications without any way to defend itself, particularly when both parties have completed all preparations and arguments for the case and have worked to frame the issues for almost one-and-a-half years. Sprint knew of this issue and had every opportunity to include it in its initial complaint or

by a timely amendment to its complaint. Instead, it has chosen to make a substantial amendment to its complaint at the very last minute in order to either force Brandenburg Telephone to proceed on an incomplete defense or force a continuance that will delay this proceeding. As Brandenburg Telephone has repeatedly found cause to argue, Sprint has embraced every opportunity for delay in the apparent hope that increasing its now hundreds of thousands of dollars in unpaid access charges will give it some leverage to force Brandenburg Telephone's acquiescence to Sprint's flawed traffic jurisdictionalizations.

Having consciously decided not to amend its complaint for more than 15 months since the filing of its initial complaint, Sprint has now waived any right to claim the alleged refund period should run from January of 2002. Moreover, Brandenburg Telephone should not be forced to bear the harm of continued nonpayment as a result of Sprint's strategic decision to assert this claim on the eve of the formal hearing. The Commission should therefore strike Sprint's Amendment and order that the parties continue to refer only to Sprint's initial complaint.

IV. Sprint's Amendment Is Barred by the Statute of Limitations and Is Consequently Futile.

Finally, Sprint's Amendment should be rejected on the basis that it is barred by the statute of limitations and is futile. Although Sprint's Amendment purports to extend the refund period to January of 2002, this is directly contradicted by the statute of limitations applicable to interstate traffic overcharge claims. The Telecommunications Act places "a burden of prompt detection of overcharges on the party with the greatest incentive to do so" -- in this case, Sprint -- and penalizes "dilatatory detection." *Tele-Valuation, Inc. v. AT&T*, 73 F.C.C.2d 450, 452 (1979). Pursuant to this provision, actions to recover alleged interstate traffic overcharges are subject to a strict two year period of limitations:

For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include two years from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

17 U.S.C. § 415 (c) (emphasis added). These causes of action accrue "at the time the customer receives a bill for services" containing an alleged overcharge. *American Cellular Corp. v. BellSouth Telecomm., Inc.*, 22 F.C.C. Rcd. 1083, 1091 (2007). When, as is alleged here, the overcharges result from "periodic continuing conduct," a new claim accrues upon receipt of each allegedly erroneous bill. *APCC Services, Inc. v. NetworkIP, LLP*, 22 F.C.C. Rcd. 4286, 4309 (2007). This billing dispute is therefore properly considered a series of individual claims, each affected by the two year limitations period.

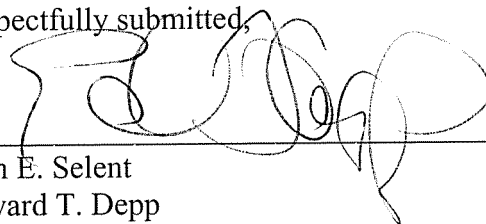
Sprint's Amendment contains a demand for damages going back to January of 2002, more than six years before its complaint was filed. Pursuant to Section 415(c), any of Sprint's overcharge claims based on bills that Sprint received prior to March 2006 are barred by the statute of limitations. Not coincidentally, Sprint's initial complaint requested damages dating back to this exact same month and year, March of 2006, demonstrating that Sprint already determined its backdated claims are time-barred. (Complaint at 8 ("the period covered by this complaint, i.e., the period beginning March 1, 2006 to the present".))

All overcharge claims Sprint seeks to add between January 2002 and March 2006 are barred by the statute of limitations. The Commission should therefore strike Sprint's Amendment and order that the parties continue to refer only to Sprint's initial complaint.

CONCLUSION

For the reasons stated above, Brandenburg Telephone requests that the Commission grant Brandenburg Telephone's motion to strike Sprint's Amended Complaint.

Respectfully submitted,



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CERTIFICATE OF SERVICE

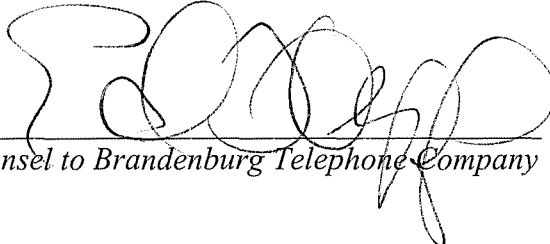
I hereby certify a true and accurate copy of the foregoing was served on the following, via email and first-class U.S. Mail, on this 3rd day of August, 2009.

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