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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF COMPLAINT OF SPRINT COMMUNICATIONS COMPANY L.P. AGAINST BRANDENBURG TELEPHONE COMPANY AND REQUEST FOR EXPEDITED RELIEF	Case No. 2008-00135
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**SPRINT'S RESPONSE TO BRANDENBURG TELEPHONE COMPANY'S  
MOTION TO STRIKE AMENDMENT TO COMPLAINT**

Sprint Communications Company L.P. ("Sprint"), for its Response to the Motion to Strike ("Motion") filed by Brandenburg Telephone Company ("Brandenburg"), states as follows:

**INTRODUCTION**

On April 10, 2008, Sprint filed its Complaint, alleging, at Paragraph 12, that Brandenburg has been "unlawfully charging Sprint intrastate access rates for terminating jurisdictionally interstate traffic from wireless phones." This jurisdictional billing error has resulted in extremely high charges that should have been billed at the much lower interstate rate. That is Sprint's claim. That remains Sprint's claim. Not even the measure of the relief sought has changed. It is still the difference between the interstate rate and the intrastate rate. On July 21, 2009, however, Sprint amended one paragraph of its Complaint to conform the *calculation* of the relief it requests to the evidence that has been developed in this case. It is now clear that Brandenburg's jurisdictional billing errors go back at least to January 2002 rather than March 2006, the date cited in paragraph 22 of the original complaint. The change of date does not alter Sprint's claim in any way. Nor does it alter the disputes of fact and law that the Commission will adjudicate, or the nature of the relief requested. It merely recalculates the ultimate dollar amount, based on the record that reflects a longer period of error than was originally evident.

Sprint's statement that Brandenburg's billing error began at least as far back as early 2002 comes as no surprise to Brandenburg. Sprint has filed billing disputes with Brandenburg for all of these time periods and explicitly brought these disputes into this case in a pleading filed in this case, nearly six months ago.<sup>1</sup>

Sprint amended its Complaint in an abundance of caution, to ensure that the record is clear. In response, Brandenburg Telephone Company filed an intensely creative yet baseless Motion to Strike.

### ARGUMENT

Brandenburg begins its argument by citing the Kentucky Rules of Civil Procedure, which, under certain situations, requires a party to obtain "leave of court" before amending a Complaint [Motion at 1]. But the Commission does not require a motion to amend; nor does it strictly apply Kentucky's Rules of Civil Procedure. Indeed, Kentucky's highest court said more than forty years ago that the civil rules do not apply to Commission proceedings. See *Inter-County Rural Elec. Co-op. Corp. v. PSC*, 407 S.W. 2d 127, 130 (1966). If the rules did strictly apply, Sprint would point out under CR 15.02, amendments necessary to conform pleadings to the evidence may be made *even after judgment*.

Next, Brandenburg claims that the amendment should be stricken because it "does not comply with the formal complaint requirements of the Kentucky Administrative Regulations." [Motion at 2]. It is not entirely clear what Brandenburg means by this contention. However, Brandenburg appears to be arguing that the Commission must find that the revised amount of the relief that is due Sprint must *itself* state a *prima facie* case. This argument makes no sense. Sprint's *prima facie* case was stated in its initial Complaint. It offers no new causes of action

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<sup>1</sup> See KPSC Case No. 2008-00135, Sprint's Response to Emergency Motion to Compel Payment of Access Charges (filed February 12, 2009), at 4 (explaining that the overbilling issue goes back to "the beginning of 2002").

and no new legal theories.

Next, Brandenburg hurls a barrage of equitable and constitutional arguments against Sprint's conforming amendment, claiming that Sprint has violated the constitutions of both Kentucky and the United States and has waited too long to conform its Complaint officially to the evidence. But there is no due process issue here, and equity is not available to help Brandenburg keep money to which it was never entitled.

Brandenburg's due process claim depends, first, on its erroneous assumptions that Sprint's amendment must itself state a *prima facie* case, that the Commission must so find, and that the Commission must issue a second Order to Satisfy or Answer [Motion at 3-4]. After all these procedures have taken place, Brandenburg estimates that it would "have only a single business day" to conduct discovery, prepare relevant testimony, or research "the new legal claim" [Motion at 3]. This is nonsense. None of these procedures are necessary. Moreover, there *is* no "new legal claim." The legal claim is as it has been from the first: Brandenburg has grossly overcharged Sprint by imposing intrastate rates upon interstate call termination. As for the length of time those overcharges have taken place, Brandenburg was informed that Sprint considers the erroneous billing period to have commenced in early 2002 since February of this year.<sup>2</sup> And, Brandenburg identifies no specific discovery that would be necessary to litigate the same issue for 2002-2006 that it is currently litigating for the time period 2006-forward.

Even if Brandenburg had not already been made aware that 2002, and not 2006, as originally estimated in the Complaint, is the beginning of the overbilling period, there would be no due process violation in amending the Complaint to clarify the record now. Due process requires only that a party have "sufficient notice and opportunity to make [its] defense."

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<sup>2</sup> See Sprint's Response to Emergency Motion to Compel Payment of Access Charges (filed February 12, 2009), at 4 (the overbilling issue goes back to "the beginning of 2002").

*Somesen v. Sanitation District of Jefferson County*, 197 S.W.2d 410 (Ky. 1946). Brandenburg's defense is that its access billing practices with regard to termination of wireless-originated traffic are lawful. That defense will not change based on the number of months those practices have been in effect.

As for Brandenburg's insistence that Sprint has waited too long to be permitted to set the record straight, and that unlawful charges contrary to the tariffs must therefore be allowed to stand if they occurred prior to March 2006, the very argument is absurd. KRS 278.160 gives the Commission no leeway to approve charges that are contrary to the tariff. *See Boone County Sand and Gravel v. Owen County Rural Elec. Coop. Corp.*, 779 S.W. 2d 224, 225 (noting that statutes like KRS 278.160(2) requiring rigid adherence to rate schedules preclude the interposition of equitable claims.) If anyone's "due process" rights are put at stake in this controversy, the rights are those of Sprint, the party with the statutory right to pay tariffed charges, and tariffed charges only. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (interests protected by due process are defined by independent sources "such as state law").

Brandenburg has been on notice for far more than a year that this case concerns whether its intrastate access charges are properly assessed. It has been on record notice for approximately six months that the access charge problem arose as early as 2002, and on actual notice based on billing disputes since 2006. Its claim that that it has somehow been unfairly treated by the one paragraph amendment that merely conformed the Complaint to the case record is nonsense. Brandenburg's Motion to Strike should be denied.

Finally, Brandenburg's discussion of the statute of limitations is plain wrong. 47 U.S.C. § 415(c), the federal statute of limitations cited<sup>3</sup> by Brandenburg, might apply to an overcharge complaint filed at the Federal Communications Commission but it most certainly does not apply

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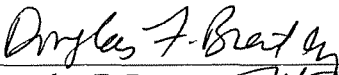
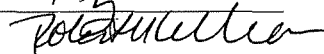
<sup>3</sup> Brandenburg's motion actually cited 17 U.S.C. § 415(c). There is no such statute.

to Sprint's claims before the Commission. Sprint's claims that Brandenburg has violated its own state tariff arise under state law. If there is any statute of limitations that applies—a point that Sprint does not concede—at worst it is the five year statute of limitations provided by KRS 413.120(2). Sprint tolled any statute of limitations when it filed its Complaint.

### CONCLUSION

Sprint alleges, as a matter of fact, that Brandenburg's overcharges at issue in this case began well before March 1, 2006. Sprint as Complainant assumes the burden of showing the history of the overcharges. If the Commission grants all relief to which Sprint is entitled as a result of Brandenburg's jurisdictional billing error, the refund period will be from January 2002 to the present. Brandenburg is no more entitled to have Sprint's amendment stricken than it is entitled to get rid of any fact that is relevant to this case. Sprint respectfully requests that Brandenburg's motion be denied.

SPRINT COMMUNICATIONS COMPANY L. P.

  
Douglas F. Brent   
STOLL KEENON OGDEN PLLC  
2000 PNC Plaza  
500 West Jefferson Street  
Louisville, Kentucky 40202  
(502) 333-6000  
(502) 333-6099 (fax)

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

Philip R Schenkenberg  
(admitted *pro hac vice*)  
Briggs and Morgan, P.A.  
2200 IDS Center  
Minneapolis, MN 55402  
(612) 977-8246  
(612) 977-8650 (fax)

Attorneys for Sprint

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing Petition was served upon the following persons by first class United States mail, postage prepaid, on the 10th day of August, 2009:

John E. Selent (with copy by email)  
Dinsmore & Shohl, LLP  
1400 PNC Plaza  
500 West Jefferson Street  
Louisville, KY 40202  
*Counsel for Brandenburg Telephone Co.*

J. D. Tobin, Jr.  
President / Manager  
Brandenburg Telephone Company, Inc.  
200 Telco Road  
P. O. Box 599  
Brandenburg, KY 40108

  
Counsel for Sprint Communications Co. L.P.