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September 8, 2009

VIA FEDERAL EXPRESS

RECEIVED

Jeff DeRouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

SEP 09 2009

**PUBLIC SERVICE
COMMISSION**

Re: **Complaint of Sprint Communications Company LP Against Brandenburg Telephone Company and Request for Expedited Relief**
Case No. 2008-00135

Dear Mr. DeRouen:

Enclosed please find Sprint Communications Company, L.P.'s post-hearing brief. The brief includes references to confidential material for which Sprint and/or Brandenburg Telephone Company had previously filed motions for confidential treatment. Those motions were granted from the bench at the start of the August 11, 2009 hearing. Accordingly, one copy of the brief containing confidential information is enclosed. The additional ten copies are marked as PUBLIC and include redactions of confidential material where required.

Sprint hereby withdraws its request for confidential treatment related to pages 28-30 of the direct testimony of Julie A. Walker and page 21 of her rebuttal testimony. Those references all relate to amounts that Sprint was overbilled and the refund amount at issue in this case.

Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copies and return them to me via the enclosed envelope.

Sincerely yours,

Douglas F. Brent

DFB:jms
Enclosures

Jeff DeRouen
September 8, 2009
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cc: Parties of Record
John N. Hughes
Philip R. Schenkenberg

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 COMMUNICATIONS COMPANY L.P.'S
POST-HEARING BRIEF

INTRODUCTION

Sprint Communications Company L.P. (“Sprint”) respectfully requests that the Public Service Commission of Kentucky (“PSC”) grant Sprint its requested relief. The evidence demonstrates that Brandenburg Telephone Company (“Brandenburg”) improperly applied its tariffs by billing calls based solely on the telephone number of the calling party, when the telephone number of the calling party does not determine the jurisdiction. Instead of using calling party number, Brandenburg should have utilized Sprint’s reported percent interstate usage (“PIU”) factors. Sprint reported a PIU factor every quarter in compliance with Brandenburg’s tariffs, and Brandenburg never properly challenged those factors through the audit process. To the extent Brandenburg is allowed to challenge Sprint’s PIUs in this proceeding, the hard data show that the issues Brandenburg complains about would affect Sprint’s PIUs by less than 1 percentage point, while Brandenburg’s methodology is wrong for more than 84% of the key calls and 87% of the key minutes.

The Commission should thus grant Sprint’s requested relief as set forth in its Complaint (as amended) and the Direct Testimony of Ms. Julie Walker, one of Sprint’s two witnesses in this proceeding.

I. FACTUAL BACKGROUND

A. The Access Charge Regime and Sprint's Delivery of Traffic

This is a dispute between Brandenburg, an incumbent local exchange carrier (“incumbent LEC”) and Sprint, a long distance provider or interexchange carrier (“IXC”). All of the calls at issue were originated throughout the United States, carried by Sprint’s long distance network, and delivered via Feature Group D (“FGD”) trunks to Brandenburg for termination to the called party. (FGD trunks are switched access trunks used by IXCs to deliver traffic to LECs.) The charges at issue are terminating switched access charges, which are assessed by a LEC to an IXC when long distance calls are delivered for termination. Interstate terminating switched access charges are billed under interstate tariffs and intrastate terminating switched access calls are billed under intrastate access tariffs. Brandenburg’s interstate switched access tariff is NECA Tariff No. 5 (“NECA Tariff”) and its intrastate access tariff is the Duo County Telephone Coop. Corp., Inc. PSC KY Tariff No. 2A (“Duo County Tariff”). *See* Exhibits. JAW-1 and JAW-2.

Sprint’s wireless affiliates (referred to collectively as “Sprint PCS”) provide wireless service in portions of Kentucky and throughout the country, and Sprint PCS has two local interconnection agreements with Brandenburg. Walker Direct, p. 3. Wireless calls that stay on the wireless network are billed to Sprint PCS under an interconnection agreement, while wireless calls delivered via the Sprint IXC network are subject to the applicable access tariff. Ms. Walker testified, and Brandenburg did not dispute, that the vast majority of intrastate wireless traffic is delivered to Brandenburg via interconnection agreements and never utilizes Sprint’s IXC network. Walker Rebuttal, p. 16. This is because the vast majority of Kentucky is within the

Louisville/Lexington major trading area – MTA 26 – and intraMTA wireless calls are local calls, not long distance calls. Walker Direct, pp. 8-9.¹

B. Brandenburg's Tariffs

Because Sprint delivers interstate and intrastate calls to Brandenburg over the same trunks, including the interMTA wireless calls at the heart of this case, the jurisdiction of any particular call may not be apparent from call data alone. Both the Duo County Tariff and the NECA Tariff contemplate this, and they allow Brandenburg to assign jurisdiction for a call only if the jurisdiction can be accurately determined based on the call data. Walker Direct, p. 9; Wood Rebuttal, pp. 10-11; Hearing Tr. 140-41 (Brandenburg's witness, Ms. Willoughby, agreed that call detail must identify the jurisdiction for Brandenburg to bill based on that information).

Brandenburg's tariffs recognize that Brandenburg may not be able to determine the correct jurisdiction from the call data. In that case Brandenburg must use the "percent interstate usage" or "PIU" factor provided by the IXC to apportion the undetermined traffic between the two jurisdictions. Walker Direct, pp. 10, 12-13; Wood Rebuttal, p. 10. Section 2.3.11(C) of the Duo County Tariff states:

When originating call details are insufficient to determine the jurisdiction for the call, the [IXC] shall supply the projected interstate percentage or authorize the Telephone Company to use the Telephone Company developed percentage. This percentage shall be used by the Telephone Company as the projected interstate percentage for originating and terminating access minutes. (emphasis added).

If Brandenburg disputes an IXC's PIU factor, it can invoke its right to conduct an audit of the data on which PIU factor was based. Duo County Tariff § 2.3.11(D); NECA Tariff

¹ Exhibit JAW-3, which is attachment A hereto, shows the area in Kentucky covered by MTA 26.

§ 2.3.11(c)(4). An independent auditor then decides whether the IXC's methodology produced an accurate PIU consistent with law. *Id.*

C. Brandenburg Incorrectly Claims It Can Determine The Jurisdiction By Looking at the Calling Party Number

Brandenburg's position is that it can determine the actual jurisdiction of all calls by comparing the phone number of the calling party to the phone number of the called party. Hearing Tr. 143; Walker Direct, pp. 15-16. In assigning jurisdiction in this way Brandenburg does not determine which calls were made from wireless phones, but instead treats wireless- and wireline-originated calls in the same way. Hearing Tr. 149-50.² Brandenburg relies solely on calling party number even though it admits that the proper jurisdiction of a call is determined by comparing the physical location of the calling party to the physical location of the called party. Hearing Tr. 127-29.

The problem with Brandenburg's methodology is that calling party number does not identify the location of a caller using a wireless phone. Even Brandenburg's Ms. Willoughby admitted that for wireless calls, calling party number "doesn't tell you where the phone is located." Hearing Tr. 132. In fact, as we all know, a wireless subscriber with a Kentucky number may be located anywhere in the nation when making a call. Wireless service is, by its nature, mobile. *See* Walker Rebuttal, p. 17 ("[Calling party number] is clearly an incorrect way to determine the location of a wireless caller. Anyone who has received a call from a person on a cell phone and asked 'Where are you?' should understand this issue."). Sprint witness Mr. Wood explained:

² Although call detail information is transmitted that would identify a call as being either wireless or wireline (Walker Direct, p. 16), Brandenburg is either unable or unwilling to analyze that particular portion of the call data. Hearing Tr. 149-50.

Brandenburg is not using the “*actual*” location of the calling party to *determine* jurisdiction; *it is making a guess about where that customer might be located* based on a flawed assumption that in every case, at the time the call is made the customer will be at the geographic location corresponding to the number assigned to the wireless handset.

Wood Rebuttal, p. 11.

D. Sprint’s PIU Methodology

Brandenburg’s tariffs direct an IXC like Sprint to calculate and report a PIU that represents the percentage of calls originated and terminated in different states. Duo County Tariff § 2.3.11(C)(1) provides that:

Pursuant to Federal Communications Commission Order FCC 85-145 released April 16, 1985, interstate usage is to be developed as though every call that enters a customer network at a point within the same state as that in which the called station (as designated by the called station telephone number) is situated is an intrastate communication and every call for which the point of entry is a state other than that where the called station (as designated by the called station telephone number) is situated is an interstate communication.

See also NECA Tariff § 2.3.11(c)(1)(a). Sprint follows this methodology in developing and reporting its PIUs. First, Sprint separates out wireline-originated traffic from wireless-originated traffic. Wireline-originated traffic is separated into interstate and intrastate portions based on the calling and called phone numbers. Walker Direct, pp. 17-18. Sprint analyzes wireless traffic differently because the calling party number does not identify the physical location of the caller. *Id.* at 18-19. Because Sprint cannot know the exact location of a wireless caller, it uses the NPA-NXX associated with the originating serving wire center for the wireless switch that first picks up a wireless call. Walker Direct, p. 18.³

The NPA-NXX associated with the originating wireless switch is known as the “Jurisdiction Information Parameter,” or “JIP.” Walker Direct, p. 18. The Alliance for

³ The NPA-NXX is the first 6 digits of a 10-digit telephone number.

Telecommunications Industry Solutions (“ATIS”) Network Interconnection Interoperability Forum (“NIIF”) has adopted a recommendation that JIP be transmitted by wireless carriers in this manner, where technically feasible. Walker Direct, p. 16. Moreover, Brandenburg itself advocated for the delivery of the JIP factor for wireless calls in the recent CMRS-LEC consolidated arbitration. Wood Rebuttal, pp. 21-22. So, Sprint is relying on an industry standard supported by Brandenburg when it uses the originating serving wire center to calculate its PIUs. And, as Ms. Walker testified, the methodology has been used for years across the nation. Hearing Tr. 95-96.

It is undisputed that Brandenburg has never invoked its right under its tariffs to conduct an audit of data used by Sprint to develop a PIU, and has never formally communicated any objection to Sprint’s filed PIUs. Walker Direct, p. 14; Willoughby Tr. 148-49. Instead, Brandenburg accepted Sprint’s PIUs and applied those PIUs, every month, to some traffic it acknowledged it could not jurisdictionalize. *Id.*⁴

E. Sprint’s Disputes

Sprint initiated the formal dispute process with Brandenburg in November, 2007. Walker Direct, p. 22. In a conference call in December 2007, Sprint’s Ms. Walker explained that by relying on calling party number, Brandenburg was charging too many access minutes at

⁴ Brandenburg has attempted to suggest that Sprint has “changed its story” with respect to its PIU methodology. Willoughby Rebuttal, p. 14. The evidence shows this to be a red herring. Ms. Walker testified that the methodology and data have never changed over the course of this dispute, and she explained that Sprint told Brandenburg from the beginning that wireless-originated traffic was jurisdictionalized based on the serving wire center of the wireless switch. Hearing Tr. 85, 95 (corrections made by Sprint were changes in articulation, not changes to methodology). For example, Ms. Walker testified about a PowerPoint presentation Sprint prepared that was attached to the July 30, 2008, Staff Memorandum filed of record in this case. Hearing Tr. 85. Page 7 of that PowerPoint states that Sprint “Uses Serving Wire Center NPA/NXX for wireless originated calls to populate the Originating state and LATA codes.” The Commission should reject any claim by Brandenburg that Sprint’s methodology has changed.

intrastate rates, and not enough access minutes at interstate rates. Walker Direct, p. 22. Ms. Walker offered to discuss the issues, proposed several options, and offered to provide Brandenburg with any necessary data. Walker Direct, p. 23. Brandenburg refused to acknowledge any problem with its billing methodology, did not ask for any data, and had no interest in working towards a solution. *Id.* A second conference call, initiated by Sprint, produced no further action by Brandenburg.

Following these initial exchanges Sprint filed disputes for bills rendered starting January 2002 and continuing to the present. Walker Direct, p. 25. Exhibit JAW-7 outlines the billing adjustments that would need to be made through the June 2009 bill to ensure that that the right portion of traffic is billed at interstate rates and the right portion of traffic is billed at intrastate rates.

F. The Traffic Studies

The parties in this case had access to two data sets containing calls from Sprint to Brandenburg. The first study was from May 2008 and produced results fully consistent with Sprint's reported PIU. Walker Direct, pp. 25-26. Sprint determined that approximately **[Begin Sprint Confidential]** ■% of terminating wireline traffic was interstate, and ■% of wireless traffic terminated over its long distance network was interstate, leading to a combined PIU of ■%. *See* JAW-4. Brandenburg's "calling party number" methodology matched Sprint's for landline traffic, but identified only ■% of wireless calls as interstate, bringing down the combined PIU to ■%. *Id.* **[End Sprint Confidential]** Sprint's analysis of the data set confirmed what it knew from the start – Brandenburg's use of calling party number resulted in far too much traffic being billed at intrastate rates.

The second data set was collected by Sprint after Brandenburg served a discovery request seeking call detail records for a five-day period in August 2008. *See* Brandenburg Data Request

No. 15 (Aug. 8, 2008). Sprint complied, and both parties had access to the same set of call data records. Walker Rebuttal, p. 12; Hearing Tr. 165 (Willoughby testimony). As with the May data, the August data show that Sprint's methodology is accurate, and Brandenburg's calling party number methodology is not.

Brandenburg performed no analysis whatsoever on either the May or the August data set. Nor did Brandenburg criticize Sprint's data or suggest the data had been analyzed incorrectly. Instead, Brandenburg pointed out that Sprint's PIU methodology is not 100% accurate because calls from Kentucky cell sites connected to wireless switches in other states would appear to be interstate. Willoughby Rebuttal, p. 10. Yet, at no time in this case has Brandenburg made any attempt to quantify the extent to which this issue would impact the overall PIU. *Id.* ("it is impossible [for Brandenburg] to determine what percentage ... is attributable to Covington traffic"). Sprint, however, did conduct such an analysis and (as described in more detail below) demonstrated that this issue is not the mountain Brandenburg claims, and is instead a molehill that impacts the PIU by a fraction of one percentage point. Wood Rebuttal, pp. 26-27; Hearing Tr. 102 ("The reason I said 'the small amount' is, of the traffic studies I've provided Brandenburg, we can determine how much traffic even went to that Cincinnati switch and, of that traffic that went there, of all the traffic that came from all over the rest of the United States and terminated to Brandenburg, it was less than 1 percent of the traffic. On top of that, there are also cell towers in Ohio that home to that switch in Cincinnati and that caller could have very well been in MTA 18 on the Ohio side.").

II. ARGUMENT

A. Brandenburg Improperly Assigned Jurisdiction Based on Calling Party Number

The first question before the Commission is quite simple – did Brandenburg comply with its tariffs when it assigned jurisdiction based solely on calling party number? If not, then its bills to Sprint were erroneous, and Sprint was justified in refusing to pay the bills.

This first question can be answered very easily with reference to Brandenburg’s filed tariffs. Brandenburg can bill based on “actual” jurisdiction only where Brandenburg can determine the jurisdiction of the call based on the call data. *Supra*, pp. 8-10. Yet, if all that is known is a calling party number, Brandenburg has not determined the jurisdiction, it has guessed that a caller with a Kentucky phone number is located in Kentucky. *See* Wood Rebuttal, p. 11. Even Brandenburg’s Ms. Willoughby admits this, as she must:

- Q: [D]oes Brandenburg acknowledge that, for wireless calls, the telephone number assigned to the phone, to the handset, doesn't tell you where the phone is located?
- A: Nor does the cellular switch tell you where it's located.
- Q: Is the answer to my question yes?
- A: Yes. We have acknowledged that in all our testimony.

Hearing Tr. 132; *see also* Willoughby Direct, p. 5 (describing calling party number as a “proxy” for caller location).⁵ And, as noted by Sprint witness Mr. Wood, the Commission has already determined in the CMRS-LEC arbitration that for interMTA wireless calls, “there is currently no way to determine whether a call is interstate or intrastate for billing purposes.” Wood Rebuttal, p. 12.

⁵ Ms. Willoughby’s admission contradicts her later statement that calling party number gives Brandenburg “the right answer all of the time.” Hearing Tr. 143.

Brandenburg has thus not determined the jurisdiction, and so has not followed its tariffs by billing in this manner. In fact, because Brandenburg does not even determine which calls are wireless and which calls are wireline it is always guessing when it relies solely on calling party number. Hearing Tr. 149-50. Brandenburg's tariffs are clear – it cannot assign jurisdiction by guessing. While Brandenburg may prefer to guess, the filed rate doctrine requires that it follow its tariffs, not its preferences. *See* KRS 278.030; KRS 278.160(2); *Boone County Sand & Gravel Co. v. Owen County Rural Elec. Coop. Corp.*, 779 S.W.2d 244 (Ky. Ct. App. 1989); (recognizing policy behind strict application of tariffs in Kentucky); *Americonnnect Inc.*, PSC Case No. 95-220 (June 26, 1996) (requiring telecommunications carrier to refund “unlawfully collected revenue” not set forth in any filed tariff). The Commission should find as a threshold matter that none of Brandenburg's bills during the dispute period were based on “actual” jurisdiction information pursuant to its state and federal tariffs.

Ms. Willoughby suggested that a provision in the Duo County Tariff authorizes the use of calling party number to assign jurisdiction. Willoughby Rebuttal, p. 5. As Staff pointed out on cross, however, the referenced language simply does not do that. Hearing Tr. 177-78. Ms. Willoughby relied on § 2.3.11(C)(3) of the Duo County Tariff, which is on pages 2-22 and 2-23 within Exhibit JAW-1. The reference is as follows: “...Switched Access Service access minutes are measured by dividing the measured interstate originating access minutes (the access minutes where the calling number is in one state and the called number is in another state) by the total originating access minutes, when the call detail is adequate to determine the appropriate jurisdiction.” Staff pointed out that this language does not refer to where a calling number is rated, but instead to where the calling number is. Hearing Tr. 178. Consistent with law, then, this tariff provision must be read to look to the actual physical location of the caller. Moreover,

the final clause in the sentence further makes clear that this applies only where “the call detail is adequate to determine the appropriate jurisdiction.” As shown above, calling party number is not adequate to determine jurisdiction for wireless calls. Any reliance Brandenburg places on this tariff provision should be rejected.

B. Brandenburg Was Obligated to Use Sprint’s PIUs

Because Brandenburg could not and did not “determine” call jurisdiction from the call detail, Brandenburg’s tariffs require that it accept and utilize Sprint’s reported PIUs to determine the amount of interstate versus intrastate traffic. And, because Brandenburg never exercised its right to audit Sprint’s PIUs, its attempt to challenge those PIUs in this case must fail. The Commission should order that Brandenburg must apply the Sprint PIUs reported to Brandenburg for all time periods at issue in this case.

In his expert testimony, Sprint witness Mr. Wood explained that Brandenburg’s tariffs establish a definitive mechanism to allow billing to occur when, as here, Brandenburg cannot accurately determine call jurisdiction using call detail. Wood Rebuttal, pp. 12-13. This mechanism requires: 1) that Sprint calculate a PIU factor by looking at where calls enter the network (not calling party number); 2) that Sprint report the PIU to Brandenburg; and 3) that Brandenburg apply the PIU. *Id.* No tariff language allows Brandenburg to simply disregard a reported PIU, nor do the tariffs allow Brandenburg to substitute its own PIU for that reported by an IXC. *Id.*, at 14 (noting that tariff does not allow Brandenburg to “unilaterally reject the reported PIU and substitute a proxy method of its choosing”). While Ms. Willoughby suggested that a customer’s PIU must be considered a “last resort” (Willoughby Direct, p. 7), that is simply not how Brandenburg’s tariffs work.

As noted above, it is undisputed that Brandenburg did not choose to exercise its right to have an independent audit of Sprint’s PIUs. Instead, it relied on its demonstrably flawed belief

that it can “determine” jurisdiction by looking solely at calling party number. Brandenburg’s failure to abide by its tariffs, followed by its choice not to utilize the audit process at any time, bars it from challenging any specific PIU reported during the dispute period. As Mr. Wood explained, this proceeding is not the correct forum to make decisions regarding the accuracy of Sprint’s reported PIU. Wood Rebuttal, p. 16-17.

Not only did Brandenburg fail to invoke audit rights provided in the tariffs, it failed to negotiate in any way with Sprint to resolve this issue. It is undisputed that Sprint reached out to Brandenburg nearly two years ago to explain the problem and begin a dialog that might have led to a solution. Walker Direct, pp. 21-23. Brandenburg wanted nothing to do with such discussions and made clear it would take no action whatsoever in response to Sprint’s claims. *Id.* Brandenburg’s position in 2007 and early 2008 was the same as that expressed by Ms. Willoughby in testimony: “Brandenburg stated it was going to continue to bill the way it was, because that’s what it always had done.” *Id.* at 24. Had Brandenburg not taken this unreasonable and untenable position, these issues would likely have been negotiated to resolution without need for a formal audit, much less a contested complaint case.

C. Sprint’s Methodology is Accurate to Within a Percentage Point

As explained above, Brandenburg was obligated by its tariffs to apply Sprint’s PIUs. As a result, the Commission need not evaluate whether Sprint’s methodology or Brandenburg’s methodology is more accurate. However, as Mr. Wood testified, if this case is to be decided based on a “horse race,” then it is clear that Sprint has the better horse. Wood Rebuttal, p. 21. Sprint’s methodology is accurate to within a percentage point, while Brandenburg’s methodology gets the key calls wrong more than 84% of the time. The only statistically valid analysis that was performed demonstrates that granting Sprint’s requested relief will achieve an accurate and equitable result.

Brandenburg's only challenge to Sprint's PIU methodology is that the use of the JIP factor (*i.e.*, the originating serving wire center of the switch) causes calls originated from Kentucky cell sites near state boundaries and connected to out-of-state switches to be jurisdictionalized as interstate, *i.e.*, the "Covington" issue. Willoughby Rebuttal, pp. 8-9. Ms. Walker identified the Covington issue in her Direct Testimony and explained why this is part and parcel of the industry standard that exists. Walker Direct, pp. 20-21. The important question, however, is whether this issue impacts the filed PIU in a material way, and Sprint's witnesses demonstrated definitively that it does not.

Sprint delivers to Brandenburg landline- and wireless-originated calls from switches all over the country. The Covington issue can occur for wireless-originated calls switched in Cincinnati, which borders Covington, and a similar issue may exist for some wireless-originated calls switched in Tennessee. Walker Rebuttal, pp. 8-10. Sprint not only recognized the issue, but showed how little it could affect the overall PIU calculation.

[Begin Sprint Confidential] Ms. Walker determined that wireless-originated calls from switches in Ohio were █% of the sample. Because only █% of cell sites connected to Ohio switches are located in Kentucky, the expected error rate is █% of █%, which is only █%. Walker Rebuttal, pp. 8-9. Ms. Walker then did a similar calculation for Tennessee and found an expected error rate of only █%. *Id.* at 9-10. Together, the errors associated with the Covington issue amounted to approximately ██████████. **[End Sprint Confidential]** Brandenburg conducted no quantitative analysis, and simply describes the problem as "significant" without doing any math. Willoughby Rebuttal, p. 7. In addition, Brandenburg chose not to cross-examine Ms. Walker on her analysis.

Ms. Walker also produced a random sample from the August data set that demonstrates how often Brandenburg “guesses” wrong about the jurisdiction of call made from wireless phones with Kentucky numbers. Walker Rebuttal, pp. 12-13 and Exhibit JAW-10. Again, this sample was produced from data collected at Brandenburg’s request. **[Begin Sprint Confidential]** Ms. Walker produced a statistically valid random sample of ■■■ call records representing calls made from wireless handsets with Kentucky telephone numbers. *Id.* **[End Sprint Confidential]** It is undisputed that every one of these calls is jurisdictionalized by Brandenburg as “intrastate,” because they all were made by phones with Kentucky numbers. Because one can view the originating serving wire center for the wireless switch – it is the column labeled “orig SWC state” – Mr. Wood was able to analyze the sample and determine how often Brandenburg is wrong when it guesses about the jurisdiction of these calls. The Covington issue can exist only where the “orig SWC state” is Ohio or Tennessee, and that is the case only for 16% of the calls and 13% of the minutes. This means that 84% of the calls and 87% of these calls were positively interstate and could not have been affected by the Covington issue. Of the remaining 16% of calls and 13% of minutes, a small portion of these calls will have been originated in Kentucky, but we know from the cell site analysis done by Ms. Walker that only a very small percentage of wireless calls switched in Ohio and Tennessee were originated from cell sites in Kentucky. Walker Rebuttal, pp. 9-10.

Based on the hard data, Sprint’s methodology is accurate to within a percentage point, and Brandenburg’s guesses about the jurisdiction of calls from wireless phones with Kentucky numbers are almost always wrong.

D. Brandenburg's Contrived "Study" Does Not Provide Reliable Data, and Demonstrates That Brandenburg's Guesses are Wrong

The Commission should reject Brandenburg's attempt to rely on its contrived "traffic study" to prove anything that supports its position in this case. Brandenburg made a series of test calls from predetermined locations that were designed to highlight the Covington issue. Willoughby Direct, pp. 9-10; Hearing Tr. 169. Ultimately, only 18 of those calls were delivered to Brandenburg by Sprint's IXC network. Walker Rebuttal, p. 18. This is not a statistically valid random sample of the [Begin Sprint Confidential] ██████████ [End Sprint Confidential] call records that are part of the entire data set, and thus cannot be extrapolated to contradict the facts as shown by Sprint's random sample. *See* Wood Rebuttal, pp. 25-26 (Brandenburg's "study" is "based on a set of essentially equivalent data points . . . [and] is in no way indicative of the frequency of error in Sprint's analysis"); Hearing Tr. 109 (Willoughby admits these test calls do not constitute a random sample).

Brandenburg's test calls demonstrate three things, none of which supports its cause. First, its test calls show that the Covington issue exists, which is not in dispute. Second, the vast majority of the test calls were delivered via local Sprint PCS trunks, not IXC trunks, which proves a point Sprint made – intrastate wireless calls generally do not utilize the IXC network. Walker Rebuttal, pp. 15-17. This explains why almost all wireless calls delivered over IXC trunks are, in fact, interstate in nature. *Id.* Third, Brandenburg's test calls further demonstrate the problem associated with Brandenburg's methodology of guessing location based on calling party number. On page 10 of Ms. Willoughby's Direct Testimony, she lists 12 test calls and criticizes the way that Sprint's methodology would jurisdictionalize those calls. Yet the bottom 8 calls on the list are from a phone with an 812 area code (Indiana), and would be

jurisdictionalized by Brandenburg as having been made in Indiana when they were not. Even Brandenburg's contrived test calls demonstrate its methodology to be patently unreliable.⁶

The Commission should find that Sprint's methodology is more reliable and more accurate than Brandenburg's use of calling party number.

E. Federal Law Preempts Brandenburg From Billing Intrastate Access Charges For All Calls From a Kentucky Number

Sprint has demonstrated that Brandenburg's tariffs do not allow it to assign jurisdiction based on calling party number. This is not only the right result based on the plain language of the tariffs, it is a result required by federal law.

1. The Commission Could Not Take Jurisdiction Over Interstate Calls Made by Handsets with Kentucky Phone Numbers

By using calling party number, Brandenburg is attempting to subject all calls from Kentucky telephone numbers to Brandenburg's state tariff, and thereby bring all such calls within the Commission's jurisdiction. Because some (and in this case almost all) of such calls are physically interstate, this would violate decades of settled federal and state law.

Calls that are physically interstate – made in another state and delivered to Kentucky for termination – are interstate calls beyond the Commission's jurisdiction. 47 U.S.C. §§ 152(a), 153(22), 203. In fact, the Commission recently affirmed this when it dismissed on jurisdictional grounds a complaint relating to physically interstate calls. *Robert S. Strother v. AT&T Communications of the South Central States, Inc.*, Ky. PSC Case No. 2007-00415, Order (Feb. 28, 2008). There, the Commission said plainly:

⁶ Presumably Brandenburg used an Indiana phone in Covington to show that its methodology errs in both directions. But any claim that the errors cancel out is counterintuitive and unsupported by the full data set. The Commission should not simply assume that two wrongs make a right.

Although the Commission has jurisdiction to investigate rates relating to long-distance phone calls made within the state of Kentucky, Mr. Strother's allegations relate only to interstate long-distance rates.... Pursuant to 47 U.S.C. § 152(a), the FCC has jurisdiction over those interstate calls.

Id. at 3-4.

The same principle applies here. Just as the Commission could not assert jurisdiction over physically interstate calls in the *Strother* case, it cannot approve or enforce a state tariff that reaches over state lines to regulate and bill physically interstate calls. Yet that is what Brandenburg proposes, as it ignores physical location and relies solely on calling party number. As a matter of federal preemption, then, the Commission must reject Brandenburg's proposed calling party number method of jurisdictionalization.

2. Brandenburg's Methodology Violates the MTA Rule and the Federal District Court's Recent Decision in the Consolidated Arbitration

Brandenburg's billing methodology, if allowed, would also violate the FCC's prohibition on charging access for intraMTA wireless traffic (the "MTA Rule"), and put the Commission at odds with the recent federal court decision in the CMRS-LEC consolidated arbitration. Assuming (without conceding) that Brandenburg was correctly identifying the location of callers by using calling party number, then all callers with phone numbers rated within MTA 26 would be deemed to be located within the MTA. However, if the calls are within the MTA, access charges cannot apply. Brandenburg is using the calling party number to determine location, but is then failing to apply the MTA Rule. This is yet another reason to reject Brandenburg's flawed calling party number methodology.

The FCC has mandated that wireless calls that originate and terminate in the same MTA are subject to reciprocal compensation instead of access charges. *In the Matter of Implementation of the Local Competition Provisions of the Telecomms. Act of 1996*, CC Docket No. 96-98, 11 F.C.C.R. 15499, First Report and Order, ¶ 1043 (1996) ("*First Report & Order*")

(“We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties’ locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.”). In the recent CMRS-LEC consolidated arbitration, the issue on appeal was whether intraMTA wireless calls delivered over long distance facilities were subject to access charges, or instead subject to reciprocal compensation payments. The Court held that an IXC’s involvement did not affect the application of the MTA Rule, and that wireless traffic delivered over an IXC network remains subject to reciprocal compensation, not access. *T-Mobile USA, Inc. v. Armstrong*, Civil Action No. 3: 08-36-DCR, 2009 WL 1424044, at *8 (E.D. Ky. May 20, 2009). It is beyond dispute, then, that wireless calls properly identified as intraMTA are subject to reciprocal compensation, not access.

Brandenburg’s billing methodology puts it in a “Catch-22”. If it is inaccurately determining location by relying on calling party number (as Sprint argues), then it has improperly billed large amounts of interstate traffic at intrastate rates. However, if Brandenburg were accurately determining location based on calling party number, then the MTA Rule would be in force and intrastate access rates would not apply to any traffic identified as intraMTA. In either case it has dramatically and unlawfully overbilled Sprint by applying intrastate access charges that are simply not due. Ms. Willoughby’s only “explanation” for this was that Brandenburg believes the MTA Rule does not apply to calls on long distance facilities. Hearing Tr. 155, 157. Yet this is the same argument the federal court just rejected.

For this reason, even if the Commission were to find that Brandenburg properly used calling party number to determine location, it would still need to find that Brandenburg overbilled Sprint in violation of federal law.

F. Sprint Has Valid Claims for Refund Back to 2002, and Has Properly Accounted For Amounts it Believes Should Have Been Billed

At pages 5-6 of its Motion to Strike Sprint's Amendment to Complaint (a motion the Commission denied), Brandenburg argued that Sprint was barred in part by the two-year statute of limitations in 47 U.S.C. § 415(c). As Sprint pointed out in its August 10, 2009, response, the two-year statute of limitations on claims for damages under the Federal Communications Act simply does not apply here. Sprint is complaining of improperly billed intrastate access charges. If any statute of limitations applies – a point Sprint does not concede – at worst it could be the five-year statute of limitations provided by KRS 413.120(2), which would be calculated from the date the Complaint was filed.

Brandenburg has also criticized Sprint for the way it has accounted for amounts that would have been due if Brandenburg had billed correctly. Brandenburg has said, over and over again, that these are undisputed amounts due, and should be paid over to Brandenburg despite the ongoing dispute. *See, e.g.*, Brandenburg's Emergency Motion to Compel Payment (Feb. 2, 2009), which the Commission denied. Contrary to Brandenburg's arguments, Sprint has acted appropriately, and is not in violation of 807 KAR 5:006, Section 11. Sprint will seek to make the record clear on this issue by explaining its actions with reference to the 6/16/2009 bill, which was disputed as set forth on the bottom line of Exhibit JAW-7.

On June 16, 2009, Brandenburg issued a bill in the amount of **[Begin Sprint Confidential]** \$ [REDACTED] based on its flawed calling party number billing methodology. If it had applied Sprint's PIU it would have billed the amount of \$ [REDACTED], meaning that Brandenburg overbilled Sprint by \$ [REDACTED]. Sprint disputed the bill, remitted no payment to Brandenburg, but reduced the receivable associated with Brandenburg's prior overbilling by \$ [REDACTED]. Hearing Tr. 68. Because Sprint is still owed approximately \$1,200,000 for prior

dispute periods, Sprint has every right to withhold all amounts and reduce the receivable while it waits for the Commission to issue an order in its favor. There is nothing in Brandenburg's tariffs that prevents this kind of accounting. In fact, while the application of late payment charges may differ based on how undisputed amounts are handled (*see* Duo County Tariff, § 2.4.1) there is no prohibition on withholding payment altogether. And, as Sprint explained in its February 12, 2009 response to Brandenburg's Emergency Motion, Sprint is in full compliance with 807 KAR 5:006, Section 11, because its account is more than current and includes substantial positive balances. Sprint has already overpaid during the dispute period, and cannot be obligated to overpay by an even greater amount during the pendency of this case.

Moreover, the amount of \$ [REDACTED] can hardly be called an undisputed charge. **[End Sprint Confidential]** Brandenburg has not billed that amount, does not believe that amount is due, and would not accept that amount for payment of access services rendered. The amounts that are truly undisputed – amounts billed under the Sprint PCS interconnection agreements – are being paid in full. Walker Rebuttal, p. 16.

The Commission should reject Brandenburg's arguments that Sprint was somehow obligated to issue checks to Brandenburg while this case was proceeding.

G. Brandenburg's Remaining Arguments Miss the Mark

Brandenburg has made numerous other arguments in this case in an attempt to confuse the issues and take the Commission's attention off of the plain language of its tariffs. Sprint's brief responses to those remaining issues are set forth below.

First, Ms. Willoughby made it a point in her pre-filed testimony to argue that Sprint's PIU must be wrong because so little wireless traffic on long distance trunks was jurisdictionalized by Sprint as intrastate. Willoughby Direct, p. 8. She concluded that this would require the Commission to believe that no Kentucky wireless customers and no out-of-state

roamers ever made wireless calls from within Kentucky. *Id.* This statement is, of course, factually inaccurate – wireless calls from within Kentucky are part of the over **[Begin Sprint Confidential]** [REDACTED] **[End Sprint Confidential]** minutes of use per month delivered by Sprint to Brandenburg pursuant to the Sprint PCS interconnection agreements and billed through a separate arrangement. Walker Rebuttal, p. 16 and JAW-11. Thus, the Commission need not believe that there are no intra-Kentucky wireless calls, but need only understand that such calls generally never utilize Sprint’s IXC network.

Second, Brandenburg’s suggestion that Sprint’s proposed result is inequitable because Brandenburg is receiving no intrastate access charge payments for wireless-originated calls (Hearing Tr. 66-67) is simply wrong. Under the applicable CMRS interconnection agreements Brandenburg is applying a billing factor so that it collects intrastate access on 5% of all traffic delivered under those agreements. *See* Walker Direct, p. 28. This added up to almost **[Begin Sprint Confidential]** \$ [REDACTED] **[End Sprint Confidential]** for the June 2009 bills attached as Exhibit JAW-11. Through the CMRS interconnection agreements and application of Sprint’s PIUs, Brandenburg will receive all the compensation to which it is entitled. In addition, Brandenburg’s equitable defenses and its argument that Sprint waived claims by accepting Brandenburg’s billings prior to 2007 are without merit. The Commission’s focus must be on Brandenburg’s tariffs and the relevant statutes, not baseless equitable arguments. *See Boone County Sand and Gravel v. Owen County Rural Elec. Coop. Corp.*, 779 S.W. 2d 224, 225 (Ky. Ct. App. 1989) (noting that statutes like KRS 278.160(2) requiring rigid adherence to rate schedules preclude the interposition of equitable claims.); *South Central Bell Telephone Co. v. Utility Regulatory Comm’n*, 637 S.W 2d 649, 653 (Ky. 1982) (in rate matters the Commission should not consider things other than normal, time-tested factors that go into the determination of

the proper rate); *Callihan v. Grayson Rural Elec. Coop Corp.*, PSC Case No. 9246 (March 1, 1985) (disclaiming authority to order equitable relief in billing dispute).

Third, Ms. Willoughby accused Sprint of engaging in “improper routing” where its Kentucky cell sites were connected to out-of-state switches. Willoughby Rebuttal, pp. 8, 12. In fact, there is nothing improper or unusual about this kind of efficient network configuration. Ms. Willoughby backtracked on that testimony on cross-examination, “clarifying” that Brandenburg challenged the jurisdictionalization of such traffic, not the routing. Hearing Tr. 158-60.⁷ And, she admitted that Sprint’s routing of interMTA traffic to an IXC network instead of to local trunks was actually preferable to Brandenburg. Hearing Tr. 158. Claims of misrouting should be disregarded.

Fourth, Brandenburg’s suggestion that the Commission should authorize Brandenburg to jurisdictionalize based on calling party number until the FCC acts to reform intercarrier compensation should be rejected as contrary to law and tariff. As Mr. Wood explained, the FCC has never authorized the use of calling party number, the fact that the FCC might act at some time in the future does not absolve Brandenburg from the obligation to comply with its tariffs, and the Commission has historically refused to delay intercarrier compensation decisions based on possible FCC action. Wood Rebuttal, pp. 15-16 (*citing* March 11, 2009 Order in Case No. 2007-00503).

Finally, Brandenburg’s rhetoric about Sprint’s motives, and its claim that Sprint is pursuing a “scheme” to “game the system” by creating errors that fall in its favor are baseless. As was demonstrated at the hearing, Sprint has sought a consistent application of a widely-used

⁷ Counsel for Brandenburg noted this “clarification” on the record at page 159 of the transcript.

industry standard, even for months where its reported PIU was lower than what Brandenburg billed. Hearing Tr. 171-72. As is reflected on the first two pages of JAW-7, by disputing months where Brandenburg's error was in Sprint's favor, Sprint actually reduced its own recovery by approximately [Begin Sprint Confidential] \$[REDACTED]. [End Sprint Confidential] The great weight of the evidence supports what Sprint has said since day one of this dispute – Sprint wants its payments to be correct and accurate. Unsupported claims of improper motives should be disregarded, especially coming from a company that refused to engage in any meaningful dialog during this dispute.

III. SPRINT'S REQUESTED RELIEF

For the above reasons, Sprint seeks the following relief:

First, Sprint requests a Commission order that Brandenburg's use of calling party number to assign jurisdiction on all calls delivered by Sprint is in violation of its tariffs because the calling party number does not identify the location of callers.

Second, the Commission should order that because Brandenburg did not accurately determine jurisdiction based on call detail information, Brandenburg was obligated under its intrastate access tariff to issue bills based on Sprint's reported PIU. And, because Brandenburg did not separate out wireless-originated traffic, it was required to apply Sprint's combined PIUs to all combined traffic for all periods.

Third, because Brandenburg never challenged Sprint's reported PIUs, and never engaged in an audit of Sprint's PIUs, Sprint's PIU factors (set forth in Attachment JAW-7) are binding for all time periods within the scope of this action.

Fourth, the Commission should find that based on the hard data made available by Sprint in this case, Sprint's PIUs were accurate to within one percentage point, and there is no basis for their modification.

Fifth, the Commission should find that for traffic routed over Sprint's long distance network Brandenburg's calling party number methodology guesses wrong about the calls from Kentucky wireless numbers for more than 84% of calls and more than 87% of minutes.

Sixth, the Commission should order that Sprint was overbilled by Brandenburg for terminating access charges through the June 2009 bill in the amount of \$2,069,576.56 as set forth in Attachment JAW-7.

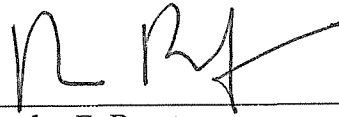
Seventh, Sprint requests a Commission order requiring Brandenburg to issue a credit to Sprint's access billing account in the amount Sprint has withheld to date, and to submit a refund to Sprint to account for its collection of excess charges, plus interest as calculated under terms of the Duo County Tariff.

Finally, Sprint requests that the Commission order that Brandenburg may not follow through on its threats to discontinue service to Sprint.

CONCLUSION

For the above reasons, Sprint respectfully requests the Commission grant its requested relief.

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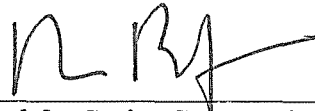
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Post-Hearing Brief was served upon the following persons by first class United States mail, postage prepaid, on the 9th day of September, 2009:

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MTA Boundary Influence on Brandenburg Traffic Study Results

