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November 25, 2009

RECEIVED
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PUBLIC SERVICE COMMISSION

VIA HAND DELIVERY
Hon. Jeff R. Derouen, Executive Director
Kentucky Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, KY 40602-0615

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

Dear Mr. Derouen:

Enclosed for filing in the above-referenced case, please find one original and eleven (11) copies of Brandenburg Telephone Company's motion for rehearing and clarification in the above-referenced case.

Please file-stamp one copy and return it to our delivery person.

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

Sincerely,

Edward T. Depp

ETD/lb
Enclosures
cc: All parties of record

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. 2008-00135**

BRANDENBURG TELEPHONE COMPANY'S
MOTION FOR REHEARING AND CLARIFICATION

Pursuant to the Telecommunications Act of 1996 (the "Act"), KRS 278.400, and 807 KAR 5:001, Brandenburg Telephone Company ("Brandenburg Telephone"), by counsel, moves the Public Service Commission of the Commonwealth of Kentucky (the "Commission") for rehearing and/or clarification of its November 6, 2009 Order (the "Order") in the above-captioned matter. Specifically, Brandenburg Telephone seeks: (i) rehearing on the issue of whether Brandenburg Telephone's use of CPN to jurisdictionalize access traffic is appropriate under its tariffs; (ii) rehearing on the issue of retroactive compensation that would violate Brandenburg Telephone's due process rights; and (iii) clarification of the intended effect of the "compensation" portions of the Order. In support of its motion, Brandenburg Telephone states as follows.

I. STANDARD OF REVIEW.

A party aggrieved by a Commission order may move for rehearing under KRS 278.400. Upon a proper showing, the Commission may change, modify, vacate, or affirm its previous order and enter such orders as it deems necessary. *See* KRS 278.400. The statute does not set forth specific grounds for relief from an order; however, the Commission has ruled that rehearing may be sought pursuant to KRS 278.400 where a party "believes there has been a misunderstanding, misinterpretation, or miscalculation of certain information . . . ." *In the Matter of General*

Adjustment of Electric Rates of East Kentucky Power Coop., Inc., Ky. P.S.C. Case No. 2006-00472, 2007 Ky. PUC LEXIS 978, *54 (Dec. 5, 2007). In an analogous judicial forum, a motion to alter, amend, or vacate an order will be granted to correct errors of law or fact or to prevent injustice, among other reasons. *See, e.g., Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005). On this authority, Brandenburg Telephone is entitled to rehearing because the Order is premised on fatal errors of law and fact, and Brandenburg Telephone will suffer great harm if the Order is left undisturbed. In addition, the Commission should clarify the scope and meaning of its Order to avoid any confusion between the parties, now or in the future, particularly with respect to the compensation-related provisions of the Order.

To withstand constitutional scrutiny by a reviewing court, an administrative decision must be supported by evidence sufficient for its conclusions to not be "arbitrary." *See Am. Beauty Homes Corp. v. Louisville & Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964). Pursuant to long-established Kentucky law, "[t]here is an inherent right of appeal from orders of administrative agencies where constitutional rights are involved, and section (2) of the Constitution prohibits the exercise of arbitrary power." *Id.* Thus, an administrative ruling may be ruled unconstitutional by a reviewing court if it involves any of the following: "(1) action in excess of granted powers, (2) lack of procedural due process, and (3) lack of substantial evidentiary support . . . ." *Id.* The Order fails all three of these standards, and its effects are therefore unconstitutional unless corrected by rehearing and/or clarification.

II. THE ORDER REQUIRING USE OF SPRINT'S PERCENT INTERSTATE USAGE ("PIU") IS UNCONSTITUTIONALLY ARBITRARY.

Brandenburg Telephone is entitled to rehearing because: (1) the Order's analysis of the critical threshold issue – the appropriateness of utilizing Sprint's PIU to jurisdictionalize access

traffic – was unsupported by discussion or any citation to legal authority; (2) the evidence of record, including the tariff, directly contradicts the Order's determination that Brandenburg Telephone should not jurisdictionalize traffic by using call detail records showing the calling party number ("CPN"); (3) the relative accuracy of the parties' methodologies is irrelevant; (4) Brandenburg Telephone will be greatly harmed if the Order is left undisturbed; and (5) the admission of Sprint's last-minute amendment of its claims violated Brandenburg Telephone's due process rights.

A. Sprint's PIU Is Irrelevant Unless the Use of Calling Party Number Is Inconsistent with the Provisions of the Tariffs.

Although much of the hearing and the Order focused heavily on the relative accuracy of the jurisdictionalization methods employed by Brandenburg Telephone and Sprint, the question of whether CPN is permissible under Brandenburg Telephone's tariffs is a critical threshold issue. The Order does not resolve this issue.

Both the NECA Tariff and the Duo County Tariff forbid Brandenburg Telephone from deferring to Sprint's PIU unless specific conditions are met. First, the Duo County Tariff requires Brandenburg Telephone to bill "according to actuals by jurisdiction," and the NECA Tariff similarly requires Brandenburg Telephone to bill according to "sufficient call detail." (*See* Duo County Tariff § 2.3.11(C)(1); NECA Tariff § 2.3.11(C)(1)(b).) Only when Brandenburg Telephone is unable to do so may it utilize a customer-provided PIU. (*See* Duo County Tariff § 2.3.11(C)(1) (customer-provided PIU may not be used "where [Brandenburg Telephone] is billing according to actuals by jurisdiction"); NECA Tariff § 2.3.11(C)(1)(b) (when Brandenburg Telephone can jurisdictionalize by actual call detail records, it "will not use PIU factors . . . to determine the jurisdiction of those minutes of use").)

These provisions unambiguously prohibit Brandenburg Telephone from deferring to a PIU

unless it is unable to jurisdictionalize in a manner contemplated by its tariffs. The question of whether the use of CPN is contemplated by the tariffs is, therefore, a critical threshold issue, and consideration of the merits of Sprint's PIU is appropriate only after a determination that Brandenburg Telephone's use of CPN is inappropriate under its tariffs.

The Order, however, relied entirely on a comparison of Sprint's PIU methodology and Brandenburg Telephone's actual CPN methodology. The threshold determination regarding the use of CPN was barely an afterthought, based entirely on a supposition that the tariffs somehow "clearly" use "calling number" and "called number" to mean "geographic location where the wireless call is made." There was no discussion, nor was there any citation to legal authority supporting this conclusion. Brandenburg Telephone is consequently entitled to a rehearing because the Order's resolution of this critical threshold issue was unconstitutionally arbitrary insofar as it directly contradicts the language of the tariffs and is unsupported by any legal authority or other analysis.

B. Brandenburg Telephone's Tariff Requires the Use of Calling Party Number.

The Duo County Tariff is a contract, and therefore subject to basic principles of contract interpretation. *See Baraga Tel. Co. v. Am. Cellular Corp.*, Case No. 2:05-CV-242, unreported, 2006 U.S. Dist. LEXIS 46983, *21 (W.D. Mich. July 12, 2006) ("the filed tariff is the contract between" the parties). Chief among these principles is that where the contractual language is unambiguous, it "'will be enforced strictly according to its terms,' and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." *Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99, 106 (Ky. 2003) (*quoting O'Bryan v. Massey-Ferguson, Inc.*, 413 S.W.2d 891, 893 (Ky. 1966); *citing Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000)). An unambiguous contract, therefore, is "not susceptible to any reformation or other rewriting" by a

decision-maker. *Codell Const. Co. v. Commonwealth*, 566 S.W.2d 161, 164 (Ky. App. 1977). *See also* 17A AM. JUR. 2D, *Contracts* § 337 (1991) ("where the terms of a writing are plain and unambiguous, there is no room for construction, since the only purpose of judicial construction is to remove doubt and uncertainty").

This case presents the Commission with just such unambiguous contract language. Section 2.3.11(C) of the Duo County Tariff defines the "interstate originating access minutes" as "the access minutes where the calling number is in one state and the called number is in another state . . . ." (Duo County Tariff § 2.3.11(C) (emphases added).) Without reference to extrinsic evidence, the "ordinary meaning" of "calling number" and "called number" is the "phone number" of the calling and called party, respectively. In other words: calling party number, or "CPN." The Duo County Tariff therefore unambiguously contemplates that the billing phone company will compare the Calling Party Number of the calling and called party to determine the "interstate originating access minutes." The Commission's inquiry should have ended there.

Even setting aside the fact that the Duo County Tariff, effective in 1999, likely did not contemplate the jurisdictionalization of wireless technology that was not widespread at the time of issuance, the Order's finding is fatally flawed. Should a clarification of the Order suggest that "calling number" cannot mean "phone number" because the use of CPN is disfavored in the modern environment, this finding is premised on extrinsic evidence such as the relative accuracy of JIP for wireless jurisdictionalization. Consideration of such extrinsic evidence, however, is also improper when the language is unambiguous, as it is here. *See, e.g.*, *Frear*, 103 S.W.3d at 106 (court must interpret unambiguous contract by "assigning language its ordinary meaning and without resort to extrinsic evidence").

Even if a clarification of the Order were to find that the provision is ambiguous, it could not

set forth an interpretation just because that interpretation may be deemed appropriate in light of the impact of wireless telephony. Rather, if the language is ambiguous, a fact finder must interpret it according to "the intention of the parties from the contract as a whole, and in doing so will consider the subject matter of the contract, the situation of the parties and the conditions under which the contract was written." *Frear*, 103 S.W.3d at 106. In considering the "contract as a whole," other provisions of the Duo County Tariff support the conclusion that "calling number" and "called number" refer to CPN, and that the tariff contemplated the use of CPN to jurisdictionalize access traffic. This support comes in two forms.

First, Section 2.6 of the Duo County Tariff explicitly states that "NPA codes [which are part of the CPN] are normally used for identifying specific geographical areas . . . ." (Duo County Tariff § 2.6.) That is, the CPN is used to determine specific geographical areas.

Second, multiple provisions of the Duo County Tariff prove that when the tariff intends to refer to determining the actual "geographic location" of a caller, it does so in unambiguous language. For example, the tariff repeatedly uses unambiguous references to a caller's geographical location, such as "physical location,"[1] "[t]he point of termination,"[2] "the customer designated premises,"[3] "specific geographical areas,"[4] and "the customer location."[5] Similarly, where the Duo County

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[1] "A move involves a change in the physical location of one of the following:

- The point of termination at the customer designated premises
- The customer designated premises"

(Duo County Tariff § 6.4.4, "Moves".)

[2] *Id.*

[3] *Id.*

[4] "The term 'Service Access Code' denotes a 3 digit code in the NPA format which is used as the first three digits of a 10 digit address and which is assigned for special network uses. Whereas NPA codes are normally used for identifying specific geographical areas, certain Service Access Codes have been allocated in the North American Numbering Plan to identify generic services or to provide access capability. Examples of Service Access Codes include the 800 and 900

Tariff intends to refer to the location of the initial switch, which is the location relied on by Sprint's jurisdictionalization method, it uses the specifically defined term "First Point of Switching" to do so.[6] (*See* Duo County Tariff § 2.6; Sprint's Supplemental Response to Data Request No. 7 (Sprint jurisdictionalizes a "call by assigning it on jurisdiction information parameter (JIP) that represents the location of the wireless switch"); Hearing Transcript at 15-16, 20-21 ("**Q. ... [W]hat Sprint does is utilize, as your testimony reflects, the NPA-NXX of the switch that is switching the wireless-originated call; is that correct?** A. That is correct.").)

The presence of such terminology establishes that the Duo County Tariff drafters intentionally used the terms "calling number" and "called number" instead of any of the geographically-focused terms used elsewhere in the tariff in order to distinguish them. Interpreting the "contract as a whole," therefore, requires that this differing language be ascribed their differing meanings. That is, when the Duo County Tariff says "calling number," it means CPN, just like when it says "location of the wireless switch," it means geographic location.

Consideration of the contractual language in light of "the conditions under which the contract was written," as required by Kentucky law, suggests similar results. *See Frear*, 103 S.W.3d at 106. In 1999, the use of wireless telephony was not widespread and the magnitude of jurisdictionalization issues introduced by mobile telephones had not yet developed. The Order's statement that the tariff

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codes." (Duo County Tariff § 2.6, "Service Access Code".)

[5] "Should the customer choose to upgrade either a portion of, or the entire DS1 Service under the Term Discount plan to a DS3 Service and move the service to a new customer location(s) within the same state and LATA, and when service is provided by the same telephone company, discontinuance charges will not apply." (Duo County Tariff § 7.2.8(a)(1)(b), "Upgrades in Capacity (DS1 to DS3)".)

[6] "First Point of Switching" is defined as "the first Telephone Company or centralized equal access provider location at which switching occurs on the terminating path of a call proceeding from the customer designated premises to the terminating end office and, at the same time, the last Telephone Company or centralized equal access provider location at which switching occurs on the originating path of a call proceeding from the originating end office to the customer designated premises." (Duo County Tariff § 2.6.)

"clearly contemplates that the geographic location where the wireless call is made determines the jurisdiction of the call" is therefore erroneous. (Order at 10.)

At the time the tariff was drafted, the provision was simply intended to set forth how to calculate interstate access minutes. CPN was the standard, and there was no reason to believe it would not remain that way. Thus, the Duo County Tariff eschewed the geography-specific language used in other provisions in favor of an explicit reference to "calling number" and "called number." The potential reasons for this decision are myriad. It may well be the drafters sought to avoid the exact problem now before the Commission – parties squabbling over the appropriate proxy for geographic location – by dictating the use of CPN, rather than including a reference to geography that would be a lightning rod for disputes as technology evolved. Regardless of the reasoning, the outcome should remain the same. In light of the circumstances at the time of drafting, there is no reason to believe the Duo County Tariff means other than what it says: that calling number (CPN) should be used to jurisdictionalize access traffic.

Because rehearing may be granted to correct errors of law and fact, *General Adjustment of Electric Rates of East Kentucky Coop. Inc.*, Ky. P.S.C. Case No. 2006-00472, *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005), Brandenburg Telephone is entitled to a rehearing.

C. Brandenburg Telephone Will Be Greatly Harmed if the Order Is Left Undisturbed.

A decision to alter, amend, or vacate an order may also be premised on the prevention of injustice. *See Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005). In the present case, the Order will have the effect of potentially making Brandenburg Telephone liable for hundreds of thousands of dollars in damages (although much of this lies outside the applicable statute of limitations), and it would also significantly reduce Brandenburg Telephone's access revenues into the indefinite future.

Faced with the errors of law and fact detailed in the subsections above, the imminent harm to Brandenburg Telephone should further establish that Brandenburg Telephone is entitled to rehearing.

D. Brandenburg Telephone's Rights to Due Process Were Violated.

In addition to the errors of law and fact and the imminent harm to Brandenburg Telephone established above, rehearing is also appropriate in light of the violations of Brandenburg Telephone's due process rights.

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*, 379 S.W.2d 450, 456 (Ky. 1964). Due process requires that a party be given "sufficient notice and opportunity to make [its] defense." *Somsen v. Sanitation Dist. Of Jefferson County*, 197 S.W.2d 410 (Ky. 1946).

On July 21, 2009, more than fifteen months after the filing of its initial Complaint and less than three weeks prior to the hearing, Sprint filed an amendment to its Complaint. (*See* Amendment to Complaint filed by Sprint Communications Co. L.P. (July 21, 2009) ("Amendment").) This Amendment purportedly inflated Sprint's alleged refund period from the March 1, 2006 date identified in the initial Complaint to a January 2002 date specified in the Amendment. (*Id.*) Brandenburg Telephone promptly filed a Motion to Strike based on the Amendment's lack of compliance with formal complaint requirements of the Kentucky Administrative Regulations, 807 KAR 5:001 § 12(4)(a)-(b), as well as violations of due process, laches, and the applicable statute of limitations.[7] (*See generally* Brandenburg Telephone Company's Motion to Strike (Aug. 3, 2009).)

[7] "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 . . . ." 47 U.S.C. § 415(c) (emphasis added). These causes of action accrue "at the time the customer receives a bill for services" containing the alleged overcharge.

At the beginning of the August 11, 2009 hearing, Brandenburg Telephone's Motion to Strike was denied, allowing Sprint to extend its claimed damages period back an additional four years without any meaningful opportunity for Brandenburg Telephone to research the issue, conduct discovery, or respond appropriately by recalibrating its defense given the substantial increase in the scope of Sprint's claim. Thus, for the entire time period of January 2002 to March 2006 purportedly added by the Amendment, Brandenburg Telephone was not given "sufficient notice and opportunity to make [its] defense" as required by Kentucky law. *Somsen v. Sanitation Dist. Of Jefferson County*, 197 S.W.2d 410 (Ky. 1946). Consequently, Brandenburg Telephone is entitled to a rehearing in order to exercise its constitutional due process right to defend itself against Sprint's claims, if – and this remains unclear, as discussed in Section III.A, below – the Commission intended to order compensation back to January 2002.

E. The Order's Application to Interstate Traffic Is Uncertain.

As established above, the crux of this dispute is what methodology should be used to distinguish interstate access traffic from intrastate traffic. By ordering the adoption of Sprint's PIU to determine compensation, the Order appears to embrace the PIU's estimate of what volume of traffic is rightly designated "interstate." The Order thus appears to calculate and order compensation, whether retrospectively, prospectively, or both (as discussed in Section III, below), for interstate traffic pursuant to the NECA Tariff.

If this interpretation of the Order is correct, the Order purports to provide a remedy outside the scope of this Commission's jurisdiction and should be reconsidered. Although the Commission has jurisdiction over intrastate traffic, jurisdiction over interstate traffic lies exclusively with the

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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

Federal Communications Commission. *See* 47 U.S.C. sec. 152(a) (federal Communications Act "applies to *all* interstate and foreign communication by wire") (emphasis added). *See also, e.g., In re Vonage Holdings Corp.*, 199 FCC Rcd. 22404, 22412, par. 16 (2004) (FCC has "exclusive jurisdiction over all interstate and foreign communication"); *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 127 S. Ct. 1513, 1516-17 (FCC has "broad authority to regulate interstate telephone communications" including power to "determine a rate's reasonableness"); *Crockett Tel. Co. v. FCC*, 963 F.2d 1564, 1566 (D.C. Cir. 1992) ("The FCC has exclusive jurisdiction to regulate interstate common carrier services including the setting of rates."). Therefore, to the extent the Order is intended to calculate and order compensation for interstate access traffic rather than merely interpret the intrastate tariff, it is invalid for want of jurisdiction, and a rehearing is required.

II. THE COMMISSION SHOULD CLARIFY THE ORDER.

Brandenburg Telephone also respectfully requests that the Commission clarify certain compensation-related provisions of its Order, specifically the intent of the order to settle and the implications of the Order for retroactive damages.

As the record reflects, there are two separate disputes between the parties. The first involves the issue of how to resolve the retroactive claims of both parties – Sprint claims it has been overcharged, and Brandenburg Telephone claims it is been underpaid. The second involves the issue of how to jurisdictionalize the traffic in question on a prospective basis. The Order, however, does not appear to distinguish between retroactive compensation (*i.e.*, damages) and prospective compensation (*i.e.*, how the tariff should be interpreted from now on). As a result, Brandenburg Telephone is unclear of the Order's effect on future discussions about retroactive compensation, and

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considered a series of individual claims, each affected by the two year limitations period.

is concerned the ambiguity will result in an unnecessary continuance of the legal struggle regarding such compensation.

The Order requires that "Sprint's methodology for determining the PIU should be applied for calculating compensation" but does not specify whether it means retroactive compensation, prospective compensation, or both. (Order at 11.) Similarly, the Order stayed the application of the PIU in order for the parties to "reach an agreement on the amount of compensation" but again does not specify whether this agreement between the parties must address retroactive compensation, prospective compensation, or both. (*Id.*)

As has been established in numerous prior filings, Sprint has – due to its unilateral determination that it was overcharged by Brandenburg Telephone – set-off hundreds of thousands of dollars in access traffic payments, some of which were for traffic that was undisputedly jurisdictionalized correctly. (*See, e.g.*, Emergency Mot. to Compel Payment of Access Charges, p. 3 (Feb. 2, 2009).) If the Commission intends for the PIU to apply retroactively, the Order gives no indication of the time period to which the PIU should apply, the effect of Sprint's set-off, or the method of repayment.

Moreover, such retroactive compensation would be considered damages, which the Commission is not "empowered or equipped to handle . . . consistent with constitutional requirement." *Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126, 128 (Ky. 1983) (*citing* Ky. Const. § 14); *see also* KRS 278.270 ("Whenever the commission... upon complaint as provided in KRS 278.260, and after a hearing had upon reasonable notice, finds that any rate is unjust, unreasonable, insufficient, unjustly discriminatory or otherwise in violation of any of the provisions of this chapter, the commission shall by order prescribe a just and reasonable rate to be followed in the future" (emphasis added)); *see also Cincinnati Bell Telephone Company v. Kentucky Public Service*

Commission, et al, 223 S.W.3d 829, 837-840 (Ky.App. 2007) ("Under the requirements of the statutes, the rate that the PSC authorized [a carrier] to charge [other carriers] remained in full force and effect until the Commission modified it by its order []. Consequently, as a matter of law, [the charging carrier] was never overpaid; no credits accrued; and no refunds were owed.")

Indeed, the Commission has repeatedly dismissed damages claims for lack of jurisdiction, and has explicitly acknowledged it is "without jurisdiction to award compensatory and punitive damages." *Strother v. AT&T Communications of the South Central States, Inc.*, Order, Ky. P.S.C. Case No. 2007-00415, 2008 Ky. PUC LEXIS 263, at *5-*6 (Feb. 28, 2008). *See also, e.g.*, *Stauffer v. Brandenburg Tel. Co.*, Ky. P.S.C. Case No. 2007-00399, 2007 Ky. PUC LEXIS 931, at *4-*5 (Nov. 21, 2007); *Callihan v. Grayson Rural Elec. Coop. Corp.*, Ky. P.S.C. Case No. 2005-00280, 2005 Ky. PUC LEXIS 663, at *5-*6 (Aug. 1, 2005); *Yarbrough v. Kentucky Utils. Co.*, Ky. P.S.C. Case No. 2004-00189, 2005 Ky. PUC LEXIS 609, at *5-*6 (July 13, 2005).

Mindful of the Commission's jurisdictional limits, Brandenburg Telephone interprets the Order to apply to prospective compensation only. If, on the other hand, the Order's reference to "compensation" is intended to incorporate retroactive compensation as well, Brandenburg Telephone believes the Order exceeds the well-recognized limits of the Commission's authority. *See Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126, 128 (Ky. 1983) (*citing* Ky. Const. § 14); *Strother v. AT&T Communications of the South Central States, Inc.*, Order, Ky. P.S.C. Case No. 2007-00415, 2008 Ky. PUC LEXIS 263, at *5-*6 (Feb. 28, 2008). In addition, if retroactive damages are implicated in any way by the Order, this further establishes a reversible violation of Brandenburg Telephone's due process rights due to the admission of Sprint's last-minute Amendment, as established in Section II.A.4 above. *See American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964) ("a party to be affected by an administrative

order is entitled to procedural due process"); *Somsen v. Sanitation Dist. Of Jefferson County*, 197 S.W.2d 410 (Ky. 1946) (due process requires that a party be given "sufficient notice and opportunity to make [its] defense").

Moreover, if the Order was intended to encompass retroactive compensation, it does not provide for how to calculate such compensation (and for what period) in the event the parties are unable to reach an agreement pursuant to Order Paragraph 2(b). Finally, any attempt to award retroactive compensation to Sprint would have the further effect of increasing other interexchange carriers' non-traffic sensitive revenue (NTSR) payments to Brandenburg Telephone for the same period, notwithstanding the fact that Sprint failed to join those parties (who would be indispensable parties if Brandenburg Telephone were ordered to compensate Sprint on a retroactive basis) to this dispute.

For these reasons, Brandenburg Telephone respectfully requests that the Commission clarify the Order's impact on any potential retroactive compensation, its intentions for the potential agreement between the parties, and the consequence of the potential inability of the parties to reach such an agreement.

IV. CONCLUSION.

Brandenburg Telephone is entitled to rehearing because the Order is premised on fatal errors of law and fact, and Brandenburg Telephone will suffer great harm if the Order is left undisturbed. In addition, the Commission should clarify the scope and meaning of its Order to avoid any confusion between the parties with respect to the effect of the compensation-related rulings.

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 by first-class U.S. Mail, on this 25th day of November, 2009.

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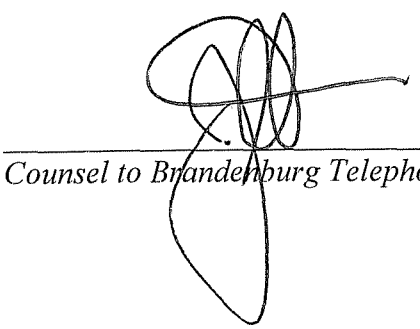

Counsel to Brandenburg Telephone Company

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