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

**PUBLIC SERVICE
COMMISSION**

Re: *Sprint Communications Company LP v. Brandenburg Telephone Company*
Case No. 2008-00135

Dear Mr. DeRouen:

Enclosed please find an original and ten copies of Sprint Communications Company, L.P.'s ("Sprint") Response to Brandenburg Telephone Company's Motion for Rehearing and Clarification.

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 our runner.

Sincerely yours,

Douglas F. Brent

DFB:jms
Enclosures

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

**SPRINT COMMUNICATIONS COMPANY L.P.'S
RESPONSE TO MOTION FOR REHEARING AND CLARIFICATION**

INTRODUCTION

Sprint Communications Company L.P. (“Sprint”) respectfully responds to Brandenburg Telephone Company’s (“Brandenburg”) Motion for Rehearing and Clarification (“Motion”) filed in the above matter. Brandenburg’s arguments should be rejected – the Public Service Commission of Kentucky’s (“PSC”) November 6, 2009, Order (“*Order*”) is fully supported by the applicable tariffs, facts and law. Rehearing is not warranted, and clarification is not needed.

I. STANDARD OF REVIEW

KRS 278.400 allows a party to seek rehearing of a PSC Order. The PSC regularly denies motions made pursuant to KRS 278.400 where “there is no new evidence” and the movant “presents merely a rehash of its old arguments.” *Brandenburg Telecom, LLC v. BellSouth Telecomms., Inc.*, Ky. PSC Case No. 2006-00447, Order (Feb. 15, 2008); *see also In the Matter of: Petition of Bellsouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Ky. PSC Case No. 2004-00427, 2008 WL 294292 (Jan. 18, 2008); *In the Matter of: Joint Application for Approval of the Indirect Transfer of Control Relating to the Merger of AT&T Inc. and Bellsouth Corporation*, Ky. PSC Case No. 2006-00136, Order (Aug. 21, 2006) (“Intervenors have raised no evidence or arguments not previously considered by the Commission. Thus, the Commission

will not grant rehearing”). Here, Brandenburg’s Motion is nothing more than an attempt to take a second bite of the apple, and should be denied on that basis alone.

ARGUMENT

II. THE PSC’S ORDER IS WELL REASONED AND SOUND AS A MATTER OF FACT AND LAW

A. The PSC Properly Interpreted Brandenburg’s Tariffs

In Section II.A and II.B of its Motion Brandenburg argues that the PSC improperly interpreted Brandenburg’s tariffs, which it claims require Brandenburg to utilize calling party number (“CPN”) rather than physical location to assess access charges. Motion, pp. 3-8. In other words, Brandenburg still argues that the jurisdiction of a call is determined by CPN rather than physical location, and that the PSC’s decision is therefore arbitrary.

Brandenburg’s Motion contains no new arguments on this point and relies on no new facts. It is simply a rehash of an argument made previously by Brandenburg and properly rejected by the PSC. There is no doubt that calls originating and terminating in different states are subject to the FCC’s jurisdiction, while calls originating and terminating in Kentucky are subject to the PSC’s jurisdiction. *See La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 360 (1986) (“The Act establishes, among other things, a system of dual state and federal regulation over telephone service. . .”); *Robert V. Strother v. AT&T Communications of the South Central States, Inc.*, Ky. PSC Case No. 2007-00415, Order, pp. 3-4 (Feb. 28, 2008). Therefore, Brandenburg’s state tariff can lawfully apply only to calls originated and terminated in Kentucky – something Brandenburg’s witness admitted. Hearing Tr. 127-29.

Despite this clear law, Brandenburg argues that the PSC should have interpreted the following parenthetical phrase in the Duo Tariff to make intrastate access charges applicable to calls dialed from another state using a wireless phone with a Kentucky number:

For originating access minutes, the projected interstate percentage will be developed on a monthly basis by end office where the Feature Group C or Feature Group D 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. (emphasis added).

Motion, p. 4. The PSC properly rejected Brandenburg's proposed interpretation of this tariff section and read those words in a manner consistent with law, finding that the phrase "the calling number is in one state" refers to the geographic location of the caller, not the state of the exchange where the number is assigned. *Order*, p. 10.

The PSC's tariff interpretation is correct, and is exactly the kind of interpretation an administrative agency has the discretion to make. *See, e.g., Global Naps, Inc. v. FCC*, 247 F.3d 252, 258 (C.A.D.C. 2001) (agency is responsible for interpreting its tariffs, and interpretations are to be upheld when they are reasonable and based on factors within its expertise). Here, the PSC's interpretation makes sense of the federal jurisdictional scheme as well as other tariff provisions that recognize geographic location is the key to jurisdictionalization. *See, e.g., Duo Tariff* § 2.3.11(c)(1) (PIUs must be developed based on the geographic "point of entry" of a call into the network).

Brandenburg's reliance on snippets of other tariff sections (Motion, pp. 6-7) is also unavailing. It is utterly unreasonable to suggest that the use of certain terms in irrelevant tariff sections implicitly undermines the decades-old rules on jurisdictional separations. Moreover, the parenthetical Brandenburg relies on must first be read in context. As reflected in the final clause, that paragraph applies only "when the call detail is adequate to determine the appropriate jurisdiction." Under Brandenburg's theory, such an inquiry would be unnecessary once CPN is known because CPN would "determine" the appropriate jurisdiction. Because the paragraph's meaning is clear when read in context, there is no need to look to the other tariff sections cited by

Brandenburg. The PSC's interpretation is sound, internally consistent, and in compliance with law.¹

B. Brandenburg's Claim of Harm is of No Consequence

Brandenburg's next argument is that it will be "greatly harmed" if the order is left undisturbed. Motion, p. 8. That implies violation of a legal right. Yet the PSC's order ensures that Brandenburg will receive full compensation for all access services provided at its lawfully tariffed rates. Brandenburg has no right to receive excess compensation, nor can it suffer harm when it is fully paid. The legal rights of Brandenburg in respect to a rate are measured by the published tariff. *Com. ex rel. Chandler v. Anthem Ins. Companies, Inc.* 8 S.W. 3d 48, 51 (Ky. Ct. App. 1999), citing *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 163 (1922). Harm would result only if the PSC were to compel Sprint to pay more than filed tariff rates for access services.

C. Brandenburg's Due Process Arguments Must be Rejected

Brandenburg's complaint about "violations of Brandenburg Telephone's due process rights" (Motion, p. 9) also fails to provide a basis for rehearing. Brandenburg cobbles together an argument that rehearing is required because of supposed due process violations by taking isolated quotes from two decades-old cases, neither of which had anything to do with a request for rehearing. Motion, p. 9 (citing *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964); *Somsen v.*

¹ Brandenburg's citation to cases regarding contract interpretation and the "intention of the parties" is puzzling. Motion, p. 6. None of its cited cases involved tariffs, and none arose from PSC proceedings. Tariffs are not negotiated contracts – they are rates and classifications that are unilaterally filed, and subject to review and oversight by the PSC. Tariffs are more comparable to Legislative acts, with the PSC having responsibility to interpret and apply the terms it approved, see *In the Matter of Ballard Rural Telephone Coop. Corp.*, Ky. PSC Case No. 95-518, Order at 7 (June 21, 1996), than to arms-length contracts negotiated between private parties.

Sanitation Dist. of Jefferson County, 197 S.W.2d 410 (Ky. 1946)).²

Moreover, Brandenburg was certainly afforded meaningful and appropriate procedural due process with respect to the time periods covered by Sprint's amendment. Sprint formally disputed overcharges for the earlier period in July 2008 (Hearing Tr. p. 11), more than a year before the hearing, and before the first round of discovery requests was served. Then Sprint formally advised the PSC in February 2009 that it was seeking a refund for prior periods. See Sprint's Response to Emergency Motion to Compel Payment of Access Charges (filed Feb. 12, 2009), at 4. This was six months before the hearing, and prior to the second round of discovery requests. Brandenburg clearly had notice and an opportunity to obtain discovery with respect to these time periods.

In addition, Sprint's amendment did not add a new legal claim; the amendment's only change was to conform the calculation of the relief to the time periods covered by Sprint's formal dispute. Brandenburg's defense – that it properly used CPN to bill access charges – was the same as to all time periods. Brandenburg has never identified any type of evidence it might have relied on had the amendment come at an earlier time or had the hearing been delayed. Nor did it ask for a continuance once its motion to strike was denied.

The *Somsen* case Brandenburg cites does not compel a different result. There the court found that due process is satisfied when a party has notice – including constructive notice – and an opportunity to make its defense. 197 S.W.2d at 411. Here, Brandenburg had explicit notice,

² *American Beauty Homes* considered the constitutionality of *de novo* review of agency orders by courts. 379 S.W.2d at 456-57. Its reference to due process was made in the context of the court's analysis of what grounds can provide permissible bases for judicial review of an agency order. *Id.* *Somsen* considered the constitutionality of a Sanitation District Law and determined that it was not unconstitutional because the party had a right, under the law, to be heard, and received, under the law, constructive notice of all proposed proceedings involving their property. 197 S.W.2d 410, 411.

and was provided the opportunity to conduct discovery and present witnesses at a hearing before all Commissioners. This is more than enough “process” to satisfy constitutional requirements. *See Danville-Boyle County Planning and Zoning Comm’n v. Prall*, 840 S.W.2d 205, 207-08 (Ky. 1992) (due process standard is “flexible” in agency proceedings). And, because Brandenburg has failed to explain how the result would have been different had a different process been followed, any error would be viewed as harmless under these circumstances.

D. The PSC Properly Decided That Brandenburg Was Obligated to Bill Under its Intrastate Tariff Based on Sprint’s Reported PIU

On pages 10-11 of its Motion, Brandenburg claims that the PSC has improperly calculated compensation for interstate traffic pursuant to the NECA tariff. This is a red herring, and nothing more than an attempt to confuse the issues. The overbillings in this case were made under Brandenburg’s state tariff. Brandenburg’s failure to use Sprint’s reported PIU resulted in intrastate access bills that were too high. Walker Direct, p. 4. When those billings are adjusted, that necessarily changes the amount due under interstate tariffs – using Sprint’s PIU will decrease the number of minutes billed as intrastate and increase the number of minutes billed as interstate. This does not mean that the PSC has improperly adjudicated issues under the interstate tariff. In fact, Brandenburg argued explicitly that the PSC should review and construe the Duo Tariff and the NECA Tariff in resolving the issues raised in the complaint and counterclaim. *See* Brandenburg’s Post Hearing Brief, pp. 4, 5, 6, 15, 16, 22, 23, 24, 26, 27. Brandenburg’s argument should be rejected.

E. No Clarification is Necessary

Finally, Brandenburg argues that the order’s impact on retroactive compensation must be “clarified,” and it claims the PSC did not and cannot adjudicate retroactive compensation issues. To the contrary, the PSC found that Brandenburg violated the Duo Tariff during all applicable

billing periods by billing Sprint based solely on CPN and failing to use Sprint's reported PIU. *Order*, pp. 10-11. By issuing this order, the PSC compelled Brandenburg to refund all amounts it improperly received, which is an action clearly within its jurisdiction. KRS 278.030(1); KRS 278.040(2); KRS 278.260. Even Brandenburg must concede that the PSC can issue an order for payment related to jurisdictional services, as it asked for such an order repeatedly in this proceeding. *See* Brandenburg's Emergency Motion to Compel Payment (Feb. 2, 2009) (requesting that a PSC "order Sprint to immediately pay Brandenburg \$370,976 . . ."). In the event Brandenburg refuses to make the payments required by the *Order*, a court of competent jurisdiction can certainly enter judgment in Sprint's favor for the amount owed.³

³ Brandenburg cites cases on pages 12-13 of its Motion regarding the PSC's ability to modify rates only prospectively. Those cases are inapplicable because the PSC did not set rates in this proceeding, it interpreted and applied existing tariff language.

CONCLUSION

Brandenburg fails to offer any arguments or evidence that would justify a grant of rehearing under KRS 278.400. The PSC should deny Brandenburg's Motion.

SPRINT COMMUNICATIONS COMPANY L.P.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Response to Motion for Rehearing and Clarification was served upon the following persons by first class United States mail, postage prepaid, on the 7th day of December, 2009:

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