COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BRANDENBURG TELECOM, LLC	)	
	)	
COMPLAINANT	)	
	)	
V.	)	CASE NO. 2006-00447
	)	
BELLSOUTH TELECOMMUNICATIONS, INC.	)	
	)	
DEFENDANT	)	

O R D E R

On October 12, 2006, Brandenburg Telecom, LLC ("Brandenburg"), a Competitive Local Exchange Carrier ("CLEC"), filed a complaint against BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T") alleging that AT&T wrongfully refused to pay Brandenburg's switched access tariff rates. Brandenburg requested that the Commission declare AT&T liable for all past and future switched access services incurred pursuant to Brandenburg's tariff and order AT&T to pay all unpaid, tariffed charges due to Brandenburg.

AT&T filed its Answer and Motion to Dismiss on October 30, 2006. In its Answer, AT&T denied that it was paying the incorrect rates for switched access services. AT&T asserted that it was paying the proper rate for switched access services--the rate contained in the interconnection agreement ("Agreement") between the parties. AT&T also moved the Commission to dismiss Brandenburg's complaint arguing that the complaint failed to state a claim upon which relief may be based, because the

interconnection agreement between the parties governed the billing for switched access services.

In addition to the Motion to Dismiss, still pending are a Motion to Strike filed by AT&T and a Motion for Summary Judgment filed by Brandenburg. As discussed below, the Commission finds that the Motion for Summary Judgment should be denied and the Motion to Dismiss and the Motion to Strike should be granted.

BACKGROUND

The gravamen of Brandenburg's complaint is that the Agreement between it and AT&T is limited to AT&T's "territory" and does not apply because the traffic exchanged occurs outside of AT&T's territory and, therefore, AT&T must pay the rate for switched access listed in Brandenburg's tariff. Brandenburg asserts that pursuant to the Agreement, in the exchanges where Brandenburg "provides services in competition with AT&T Kentucky, each party charges the other party AT&T Kentucky's switched access tariff rates for terminating intraLATA toll traffic."[1]

Brandenburg, however, argues that the Agreement does not "govern the parties' relationship in exchanges where Brandenburg Telecom does not provide service in competition with AT&T Kentucky."[2] Brandenburg further asserts that "[i]n those exchanges in which Brandenburg Telecom does *not* provide services in competition with AT&T Kentucky, each party charges the other its existing switched access tariff rates . . . for the provision of switched access services on either an interLATA or

[1] Complaint at 2.

[2] Id.

intraLATA basis."[3] Brandenburg accuses AT&T of "attempting to convert the Agreement" into a statewide agreement and alleges that AT&T owes $160,539.66 as of July 8, 2007 in unpaid switched access tariff charges.[4]

The Agreement at issue in this complaint is the one between Kentucky Data Link, Inc. and AT&T. On April 26, 2005, the Commission approved Brandenburg's adoption of the Agreement, pursuant to 47 U.S.C § 252(i). From that point forward, the Agreement governed the relationship between Brandenburg and AT&T regarding the exchange of traffic.

Section 2.1 of the General Terms and Conditions of the Agreement provides that the Agreement applies to: "the AT&T Kentucky territory in the state(s) of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee." The agreement lacks a definition of the word "territory." However, Brandenburg argues that AT&T's "territory" is defined and limited to those places wherein "AT&T Kentucky provides local exchange service,"[5] and that AT&T is "attempting to convert the parties' interconnection agreement into a statewide access agreement."[6]

AT&T contends that Brandenburg argues an "implausible, legally unsustainable interpretation of the Interconnection Agreement"[7] and that Brandenburg is merely

---

[3] Id. at 3.

[4] Id.

[5] Brandenburg's Response to AT&T's Motion to Dismiss at 2.

[6] Id. at 3.

[7] Answer and Motion to Dismiss at 5.

fabricating a distinction between "competitive" and "noncompetitive" traffic that does not appear anywhere in the Agreement. AT&T argues that if Brandenburg's argument is accepted, a CLEC requesting interconnection could simply manipulate the point of interconnection to place it outside of AT&T's service territory and avoid the pricing obligation in an interconnection agreement for terminating traffic.

AT&T asserts, consistent with 47 U.S.C. § 251(c)(2)(b), that Section 3.2 in Attachment 3 of the Agreement requires that the parties interconnect at a point "within AT&T Kentucky's serving territory in the LATA in which the traffic is originating."[8] Furthermore, AT&T argues that the original parties to the Agreement, AT&T and Kentucky Data Link, never intended for it to be construed in the manner now attempted by Brandenburg.

AT&T argues that the 1996 Telecommunications Act ("Act") clearly anticipates that incumbent local exchange carriers, like AT&T, and CLECs, like Brandenburg, will enter into interconnection agreements, but there is no language in the Act that suggests parties enter into agreements that limit the type of traffic governed by interconnection agreements. AT&T asserts that when it entered into the Agreement with Kentucky Data Link, the parties anticipated that the agreement would cover all traffic, and this is the same Agreement that Brandenburg adopted in whole.

Brandenburg has also filed with the Commission a copy of a proposed addendum to the Agreement between AT&T and Brandenburg that it sent to AT&T while conducting settlement negotiations. AT&T protested, arguing that the filing of the proposed amendment was a "blatant disregard of the confidentiality of such settlement

[8] Id. at 7.

discussion."[9] AT&T asserted that the proposed amendment contained confidential information that should not be filed with the Commission or be put in the public record. AT&T requested that the Commission remove from any public files and destroy all copies of the proposed agreement.

Brandenburg asserts that it had made a good faith effort to resolve the dispute and its filing of the proposed amendment was "an effort to update the Commission on the progress of the parties settlement negotiations,"[10] and argues that such disclosure is allowed by the Kentucky Rules of Evidence.

DISCUSSION

Motion to Strike

AT&T moves the Commission to strike the proposed addendum to the Agreement that Brandenburg filed with the Commission and provided to AT&T. The proposed addendum would amend the Agreement between AT&T and Brandenburg to include, *inter alia*, that for the termination of intraLATA toll traffic, the originating party would pay the terminating party the terminating party's switched access tariff rate set forth in the applicable tariff. The proposed addendum also included a provision requiring AT&T to pay Brandenburg $150,982.96.

AT&T filed a letter with the Commission, objecting to the filing of the proposed addendum, calling it a "blatant disregard of the confidentiality of such settlement discussions."[11] Because the proposed addendum allegedly contained confidential

[9] Letter from Mary Keyer to Beth O'Donnell, April 30, 2007.

[10] Brandenburg's Response to AT&T's Motion to Strike at 3.

[11] Letter from Mary Keyer to Beth O'Donnell, May 1, 2007 at 1.

information, AT&T requested that the Commission not include the proposed addendum in the case record and remove and destroy all copies.

Brandenburg argues that settlement proposals are not inherently confidential citing KRE 408.

KRE 408 states:

> (1) Furnishing or offering or promising to furnish; or
> (2) Accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Brandenburg argues that because it did not offer the proposed addendum during a formal hearing and it did not file the proposed addendum "to prove liability of the claim or its amount," the filing of the proposed addendum was reasonable and allowable. Brandenburg asserts that the sole purpose for filing the proposed addendum was to update the Commission on the progress of the settlement negotiations.

Brandenburg also asserts that AT&T waived any right to confidentiality when it entered into settlement negotiations with Brandenburg in the presence of Commission Staff. Brandenburg argues that even if AT&T could identify specific confidential material in the proposed addendum, AT&T could not assert the privilege.

Brandenburg relies largely on a Commission Order in Case No. 9613[12] in which the Commission found that Big Rivers Electric Corporation ("Big Rivers") could not assert a privilege of confidentiality for the documents and discussions used to reach a financial workout plan with its bankruptcy creditors (that were not parties to the rate case) prior to filing its rate case before the Commission. Big Rivers submitted the financial workout plan as part of its justification for a rate increase. An intervenor in the rate case sought discovery of the documents used in reaching the settlement that formed the financial workout plan. Big Rivers refused to provide the documents, claiming that they were privileged because they had been used during settlement negotiations.

The Commission found that no privileges of confidentiality were available to block discovery and ordered Big Rivers to provide the documents sought by the intervenor. The Commission reasoned that Big Rivers had waived any privilege of confidentiality when it disclosed privileged information to other parties.

The issue before the Commission is readily distinguishable from the Commission's decision in Case No. 9613. In Case No. 9613, Big Rivers submitted a previously confidential document into the official record as part of the basis for a requested rate increase. Neither the intervenor in the rate case nor the Commission were parties to the financial workout plan and were not privy to the underlying justification for the plan and, therefore, could not accept the reasonableness of the financial workout plan without knowing the details that led to the formation of the plan.

[12] Case No. 9613, Big Rivers Electric Corporation's Notice of Changes in Rates and Tariffs for Wholesale Electric Service and Other Financial Workout Plan, (Ky. PSC Oct. 29, 1986).

In the case before the Commission, AT&T has not entered into the record any confidential information comparable to Big Rivers'. In fact, in this proceeding and with the exception of the proposed addendum, no privilege of confidentiality has been raised. Brandenburg has simply filed an unsigned proposed settlement document that does not have any probative or evidentiary value and does not appear designed in any way to assist the Commission in making a determination on the issues before it.

In Kentucky American Water Company v. Commonwealth of Kentucky, ex. rel J. Cowan, 847 S.W.2d 737 (Ky. 1993), the Kentucky Supreme Court held that the Commission erred by allowing a non-unanimous settlement agreement into the official record and affording it evidentiary weight. The Supreme Court also noted that filing contested proposed settlement agreements "may actually increase the amount of hearing time."[13] Such is the case here where AT&T and Brandenburg have devoted an extraordinary amount of time to litigating and reviewing this one issue.

As discussed above, AT&T has waived no privilege of confidentiality. Traditionally settlement negotiations before the Commission, unless otherwise specifically agreed upon, are kept confidential. The Commission agrees with AT&T's assertion that the "law has long fostered voluntary dispute resolution by protecting against the possibility that a compromise or offer of compromise might be used to the disadvantage of a party in subsequent litigation." [14]

[13] Id. at 741.

[14] AT&T's Motion to Strike at 2 citing Green River Elec. Corp. v. Nantz, 894 S.W.2d 643, 646 (Ky. App. 1995.)

Moreover, the proposed addendum has no probative value and is not relevant evidence. Despite assertions to the contrary, it appears that filing the proposed addendum serves no substantive purpose. Based on the foregoing facts, the Commission finds that AT&T's Motion to Strike should be granted and that the proposed addendum should not be placed in the public record.

Motion to Dismiss

The Commission finds Brandenburg's interpretation of the scope of the Agreement unpersuasive. First, Brandenburg can point to no controlling definition of AT&T's "territory." The term "territory," in the context of the Agreement, does not connote a particular geographic limitation and is not specific enough to support Brandenburg's argument. There simply is nothing to show that the Agreement applies only to the areas in which AT&T and Brandenburg directly compete.

Second, and more importantly, the section of the Agreement that governs payment for terminating intraLATA toll traffic on the other's network is quite specific regarding what prices prevail. Section 8.1.6.1 of Attachment 3 to the Agreement states that regarding terminating intraLATA toll traffic "the originating Party will pay the terminating Party AT&T Kentucky's current intrastate or interstate . . . terminating switched access tariff rates as set forth in AT&T Kentucky's Access Services Tariffs . . . ." Judging from the plain text of the Agreement, the rates found in AT&T's Access Services Tariffs are to be charged for terminating toll traffic, regardless of where the termination occurs.

Although Brandenburg only adopted the Agreement and did not enter into its own agreement with AT&T, it could have negotiated for a different rate to apply to

terminating toll traffic. Or, in the alternative, Brandenburg could have adopted any other AT&T agreement that had more advantageous or desirable terms than this Agreement. Yet, Brandenburg opted to adopt the Agreement between AT&T and Kentucky Data Link. Until Brandenburg and AT&T amend the current Agreement or enter into a new interconnection agreement, the current Agreement controls and Brandenburg must pay AT&T's rates for terminating toll traffic. Any billing disputes should be addressed through the mechanisms contained in the Agreement, applying AT&T's switched access rates. If the parties are unable to reach agreement on the amounts due, if any, they may request an informal conference with Commission Staff.

Because the Commission grants AT&T's Motion to Dismiss, Brandenburg's Motion for Summary Judgment is moot and, therefore, should be denied.

IT IS THEREFORE ORDERED that:

1. Brandenburg's Motion for Summary Judgment is denied.
2. AT&T's Motion to Strike is granted.
3. AT&T's Motion to Dismiss is granted.
4. This case is dismissed with prejudice.

Done at Frankfort, Kentucky, this 7th day of January, 2008.

By the Commission

ATTEST:

Deputy Executive Director