COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BRANDENBURG TELECOM, LLC	)	
	)	CASE NO.
COMPLAINANT	)	2006-00447
	)	
V.	)	
	)	
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 Agreement between the parties governed the billing for switched access services.

On January 7, 2008, the Commission entered an Order granting AT&T's motion to dismiss and motion to strike and denying Brandenburg's motion for summary judgment. On January 30, 2008, Brandenburg filed a motion for rehearing of the Commission's decision to grant AT&T's motion to dismiss.

BACKGROUND

The gravamen of Brandenburg's original complaint was that the Agreement between it and AT&T is limited to AT&T's "territory" and for traffic exchanged occurring outside of AT&T's territory, AT&T must pay the rate for switched access listed in Brandenburg's tariff. Brandenburg asserted 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 argued that the Agreement did not "govern the parties' relationship in exchanges where Brandenburg Telecom does not provide service in competition with AT&T Kentucky."[2] Brandenburg further asserted 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 intraLATA basis."[3]

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[1] Complaint at 2.

[2] Id.

[3] Id. at 3.

AT&T contended that Brandenburg argued an "implausible, legally unsustainable interpretation of the Interconnection Agreement"[4] and that Brandenburg was merely fabricating a distinction between "competitive" and "noncompetitive" traffic that does not appear anywhere in the Agreement.

AT&T asserted, consistent with 47 U.S.C. § 251(c)(2)(b), that Section 3.2 in Attachment 3 of the Agreement required that the parties interconnect at a point "within AT&T Kentucky's serving territory in the LATA in which the traffic is originating."[5] Furthermore, AT&T argued that the original parties to the Agreement, Kentucky Data Link and AT&T's predecessor, never intended for it to be construed in the manner now attempted by Brandenburg. AT&T asserted that when it originally entered into the Agreement with Kentucky Data Link, the parties anticipated that the agreement would cover all traffic, and this was the same interconnection agreement that Brandenburg adopted in whole.

In its January 7, 2008 Order, the Commission found Brandenburg's interpretation of the scope of the Agreement unpersuasive. The Commission stated that:

> 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

[4] Answer and Motion to Dismiss at 5.

[5] Id. at 7.

> 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.[6]

The Commission also found that although Brandenburg only had 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. Alternatively, the Commission noted, Brandenburg could have adopted any other AT&T agreement that had more advantageous or desirable terms than this Agreement.

MOTION FOR REHEARING

In its motion for rehearing, Brandenburg asserts that the Commission erred by granting AT&T's motion to dismiss because there are still genuine issues of material fact[7] and that it is not a foregone conclusion that Brandenburg would not be able to prove that it is entitled to some relief. Brandenburg's motion for rehearing consists of two arguments: (1) the Agreement only applies within AT&T's territory; and (2) AT&T's territory is limited to those areas in which AT&T operates as an incumbent local exchange carrier. Because these are the very same arguments that Brandenburg presented in its complaint and motion for summary judgment, the arguments need not be discussed in any more detail.

[6] January 7, 2008 Order at 9-10.

[7] This is at odds with Brandenburg's earlier assertions: "There are no genuine issues of material fact. The only issues in dispute are of a legal nature which the Commission may resolve on a motion for summary judgment." Brandenburg's Motion for Summary Judgment at 4.

KRS 278.400 expressly authorizes the Commission to rehear "any of the matters" determined in any hearing. KRS 278.400 provides only that "[u]pon the rehearing any party may offer additional evidence that could not with reasonable diligence have been offered on the former hearing."[8] (Emphasis added.) No provision is made for presenting arguments that had previously been rejected.

Here, Brandenburg has not offered any new evidence or even hinted at what evidence may exist that it could introduce that would persuade the Commission to reverse its previous determinations. Additionally, Brandenburg does not advance any new arguments; it just presents the same arguments that the Commission entertained and dismissed in its January 7, 2008 Order granting BellSouth's motion for summary judgment.

Because there is no new evidence and Brandenburg presents merely a rehash of its old arguments, we are unconvinced that we should revisit our previous Order in this case.

IT IS THEREFORE ORDERED that Brandenburg's motion for rehearing is denied.

Done at Frankfort, Kentucky, this 15th day of February, 2008.

By the Commission

ATTEST:

Executive Director

[8] KRS 278.400.