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October 15, 2009

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PUBLIC SERVICE
COMMISSION

VIA HAND DELIVERY

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

Re: *In the Matter of BellSouth Telecommunications, Inc. v. Brandenburg Telephone Company; Case No. 2006-00546*

Dear Mr. Derouen:

Enclosed for filing in the above-referenced case, please find:

1. one original and eleven (11) copies of Brandenburg Telephone's Post-Hearing Brief; and
2. one original and one copy of Brandenburg Telephone's Petition for Confidentiality regarding certain information contained in its Post-Hearing Brief for which BellSouth has requested confidential treatment.

Please file-stamp one copy of each and return them to our delivery person.

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

Sincerely,

Edward T. Depp

ETD/sdt

Enclosures

cc: All parties of record (w/encl.)
John E. Selent, Esq. (w/encl.)

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

PUBLIC SERVICE
COMMISSION

In the Matter of:

BELLSOUTH TELECOMMUNICATIONS, INC.)	
)	
COMPLAINANT)	
)	
v.)	CASE NO. 2006-00546
)	
BRANDENBURG TELEPHONE COMPANY)	
)	
DEFENDANT)	

PETITION FOR CONFIDENTIAL TREATMENT OF CERTAIN INFORMATION
CONTAINED IN BRANDENBURG TELEPHONE COMPANY'S
POST-HEARING BRIEF

Brandenburg Telephone Company ("Brandenburg Telephone"), by counsel, and pursuant to 807 KAR 5:001 §7 and KRS 61.878(1)(a) and 61.878(1)(k), move the Public Service Commission of the Commonwealth of Kentucky (the "Commission") to accord confidential treatment to certain highlighted information contained in Brandenburg Telephone Company's post-hearing brief regarding the amount of alleged overpayments for ACS traffic, including interest, that BellSouth Telecommunications, Inc. ("BellSouth") has claimed in its Formal Complaint submitted to the Commission on December 13, 2006, and as to which BellSouth has filed a Motion for Confidentiality ("Motion") currently pending before the Commission. In support of its Petition, Brandenburg Telephone state as follows.

I. Applicable Law.

807 KAR 5:001 §7(2) sets forth a procedure by which certain information filed with the Commission may be treated as confidential. Specifically, the party seeking confidential treatment of

certain information must “[set] forth specific grounds pursuant to KRS 61.870 et seq., the Kentucky Open Records Act, upon which the commission should classify that material as confidential.” 807 KAR 5:001 §7(2)(a)(1).

The Kentucky Open Records Act, KRS 61.870 et seq., exempts certain records from the requirement of public inspection. See KRS 61.878. In particular, KRS 61.878(c)(1) provides as follows:

[r]ecords confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would present an unfair commercial advantage to competitors of the entity that disclosed the records.

Id. In addition, KRS 61.878(1)(k) exempts “[a]ll public records or information the disclosure of which is prohibited by federal law or regulation.” *Id.*

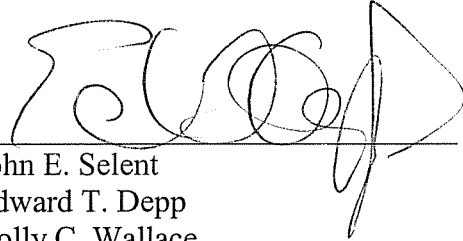
II. BellSouth's Petition for Confidential Treatment of Formal Complaint and Exhibits.

As BellSouth argues in its Motion, the information contained in its Formal Complaint and Exhibits would result in an unfair commercial advantage to its competitors resulting in a compromised competitive position for BellSouth. BellSouth also asserts that the information for which it seeks confidential treatment is not known outside of BellSouth, and within BellSouth is known only by those of its employees who have a legitimate business need to know and act upon the information.

Therefore, Brandenburg Telephone petitions the Commission, if the Commission finds that BellSouth's Motion is meritorious and should be granted, to accord confidential treatment to the highlighted references contained in Brandenburg Telephone's post-hearing brief. Again, these highlighted references would be the same information that the Commission would treat as

confidential if it grants BellSouth's Motion for Confidential Treatment. In short, if the Commission grants BellSouth's Motion, it should also grant this Petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'John E. Selent', written over a horizontal line.

John E. Selent
Edward T. Depp
Holly C. Wallace

DINSMORE & SHOHL LLP

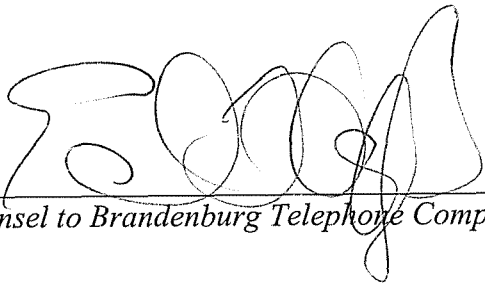
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Counsel to Brandenburg Telephone Company

CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing was served by first-class United States mail on the following individuals this 15th day of October, 2009.

Mary K. Keyer
General Counsel / Kentucky
601 W. Chestnut Street, Room 407
Louisville, KY 40203
*Counsel for BellSouth Telecommunications, Inc.
d/b/a AT&T Kentucky*



Counsel to Brandenburg Telephone Company

REDACTED

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

In the Matter of:

BELLSOUTH TELECOMMUNICATIONS, INC.)

COMPLAINANT)

v.)

BRANDENBURG TELEPHONE COMPANY)

DEFENDANT)

CASE NO. 2006-00546

BRANDENBURG TELEPHONE COMPANY'S POST-HEARING BRIEF

Brandenburg Telephone Company ("Brandenburg Telephone"), by counsel, hereby submits its post-hearing brief in support of an order: (i) denying BellSouth Telecommunications, Inc.'s ("BellSouth's") claim that Brandenburg Telephone should reimburse it, including interest, for alleged overpayments for Area Calling Plan ("ACS") traffic; (ii) denying BellSouth's claim that Brandenburg Telephone should reimburse it, including interest, for alleged overpayments for Commercial Mobile Radio Services ("CMRS") traffic; and (iii) order BellSouth to pay Brandenburg Telephone all amounts that it owes for inappropriately withheld payments for CMRS traffic.

I. INTRODUCTION.

BellSouth initiated this case against Brandenburg Telephone as the result of two separate billing disputes – one relating to a particular type of intrastate access traffic that BellSouth designates internally as ACS traffic, and the other relating to BellSouth's delivery of CMRS traffic to Brandenburg Telephone pursuant to a now expired agreement. In both disputes, BellSouth alleges that it overpaid Brandenburg Telephone and has demanded reimbursement. While these two

disputes have no common factual basis, they do share an underlying theme. They are both the result of two very different styles of business management – one rooted in recklessness, the other in prudence.

The ACS billing dispute is a direct result of BellSouth's own negligence. BellSouth contends that its negligence caused it to make what it alleges were double payments for ACS traffic for nearly seven years. BellSouth was certainly negligent when it ignored Brandenburg Telephone's effort from the outset to ascertain the impetus behind its payment. And, BellSouth was negligent when it destroyed the call detail records that could substantiate its claims even after it became aware of the alleged overpayment. Ultimately, BellSouth has failed to provide any evidentiary basis to substantiate its claim for overpayment. Indeed, it cannot. BellSouth has admittedly destroyed the very documents in its exclusive control that would have provided such a basis. Simply put, BellSouth's own negligent actions are the sole cause for the ACS dispute, and now BellSouth asks this Commission to force Brandenburg Telephone to resolve the problem by reimbursing it for entirely unsubstantiated overpayments, including interest, adding insult to injury.

Likewise in the CMRS payment dispute, BellSouth complains that Brandenburg Telephone has refused to conduct its business recklessly by demanding that Brandenburg Telephone accept BellSouth's call detail records ("CDRs") at face value. As such, BellSouth has consistently attempted to frame the CMRS billing dispute as one regarding Brandenburg Telephone's decision to verify BellSouth's CDRs. The real issue, however, is whether Brandenburg Telephone should be forced to give BellSouth credits for traffic that is either not covered under the CMRS Agreement or that was never billed to BellSouth in the first place. Rather, BellSouth would have Brandenburg Telephone accept its CDRs without question or verification of their accuracy.

In any event, the CMRS dispute has since become moot. The underlying CMRS Agreement has expired. And, due to its continued underpayment for CMRS traffic, BellSouth has more than recouped the amount it alleges Brandenburg Telephone owed it, and it now actually owes money to Brandenburg Telephone. As a result, there is simply no agreement or amount left to dispute.

Accordingly, the Commission should not reward BellSouth's recklessness, but should, instead, validate Brandenburg Telephone's prudence by denying BellSouth's claims.

II. STATEMENT OF FACTS

A. Background of the ACS Payment Dispute.

The ACS billing dispute concerns alleged overpayments made by BellSouth to Brandenburg Telephone for the termination of BellSouth originated ACS traffic. (Direct Test. of T. Watts at 2:20-21). Specifically, BellSouth claims to have paid Brandenburg Telephone twice for the same ACS traffic – once through its own self-initiated settlement process and once through the payment of CABS invoices sent by Brandenburg Telephone. (*Supra.* at 2:23-3:6). The veracity of BellSouth's claim, however, is undermined by numerous factors, including: (i) the invisible nature of the ACS traffic; (ii) the facilities available to deliver that traffic; (iii) BellSouth's choice of payment for that traffic; and (iv) BellSouth's decision to destroy the only direct evidence that would verify its claim.

1. The Nature of ACS Traffic, the Facilities Available, and BellSouth's Method of Payment.

At the heart of the ACS payment dispute lies the nature of the ACS traffic, the method by which BellSouth remitted payment to Brandenburg Telephone for it, and the facilities over which it was delivered. ACS traffic is a "generic term" used by BellSouth "that refers to traffic included in [BellSouth's] expanded local calling areas under optional local calling plans." (Dir. Testimony of T. Watts at 3:12-14). BellSouth implemented these local calling plans in or around July 1, 1996. (*Supra* at 3:19-20). "ACS" is nothing more than "a retail designation used by BellSouth to identify

intrastate access traffic originated by its customers who subscribe to its Area Calling Service Plan [(also called "Area Plus")] and delivered to Brandenburg Telephone." (Dir. Testimony of A. Willoughby at 4:21-23). Because ACS is an internal retail designation used solely by BellSouth, ACS traffic is, from Brandenburg Telephone's perspective, "completely indistinguishable from any other type of intrastate traffic it receives from BellSouth." (*Supra* 4:20-21; see also Testimony of T. Watts, Aug. 26, 2009 Hearing Transcript 63:23-64:1). As such, Brandenburg Telephone is entirely dependent upon BellSouth: (i) to identify which intrastate traffic is ACS traffic; (ii) to identify over which facilities it was delivered; and (iii) to self-invoice when appropriate and pay for it accordingly.

When BellSouth delivers traffic to Brandenburg Telephone, whether ACS traffic or otherwise, it has the option of doing so over two basic facilities: BellSouth's Toll Group ("BTG") trunk (also called by BellSouth the "Common Transport Trunk Group" or the "CTTG"), or one of two Extended Area Service ("EAS") trunk groups. (Dir. Testimony of M. Neinast at 3:16-4:2; *see also* BellSouth's Answer to Data Request #4). Moreover, the facility used to deliver this traffic will, at least ostensibly, determine the method by which BellSouth remits payment to Brandenburg Telephone as part of its settlement process for access traffic. "If BellSouth were to deliver ACS traffic to Brandenburg Telephone over the EAS facilities, it should remit payment by way of a settlement process." (Dir. Testimony of A. Willoughby at 4:14-16). Conversely, if BellSouth were to deliver that traffic over the BTG, then "BellSouth would be billed by Brandenburg Telephone as part of its Carrier Access Billing System ("CABS")" and remit payment accordingly. (Dir. Testimony of A. Willoughby at 4:14-16).

Because Brandenburg Telephone is unable to distinguish ACS traffic from any other intrastate traffic, it has no choice but to rely on BellSouth's method of payment in order to identify which facility was being used for the delivery of that traffic. (*Supra* at 5:1-3). The only definitive

way to prove otherwise would be for BellSouth to present Brandenburg Telephone with the CDRs for that traffic. (See Testimony of M. Neinast, Aug. 26, 2009 Hearing Transcript 106:7-9 ("it would be great, in hindsight, to have those CDRs. [They] could prove without a doubt that . . . the CABS billing system and the settlement process would be identical for those types of calls"); see also Dir. Testimony of A. Willoughby at 8:6-7). These are the very CDRs Brandenburg Telephone requested from the outset when BellSouth first presented its claim. (Dir. Testimony of A. Willoughby at 7:4-6).

In this case, BellSouth admits that it "compensated Brandenburg Telephone for ACS Traffic via the [BellSouth] settlement process" suggesting that it delivered that traffic over the EAS trunk group. (Dir. Testimony of M. Neinast at 5:1-3). If it did not, then BellSouth would need to produce the CDRs for that traffic in order to substantiate its claim. Yet, BellSouth admits that it no longer has the CDRs for this ACS traffic, including its destruction of at least "a few days of call detail records that would [have been] available" after it recognized "that there could be a problem." (Testimony of T. Watts, Aug. 26, 2009 Hearing Transcript at 46:13-16). To date, BellSouth has provided no evidence to substantiate that this is true.¹

Therefore, when BellSouth claims to have inadvertently paid for what it alleges is the same ACS traffic through both the settlement process and CABS, Brandenburg Telephone has no way of determining whether that is true without access to BellSouth's CDRs – the same CDRs that

¹ While BellSouth alleges that it has "verified with AT&T Kentucky Trunk Planning and Engineering personnel" and "reviewed the Translations Work Instruction records" in order to show that ACS traffic was not routed over the EAS trunk groups, these assurances fail to meet the substance of its claim in this matter. (Dir. Testimony of M. Neinast at 4:13-20). In particular, BellSouth has offered no testimony or evidence that would support the accuracy of its "Translations Work Instruction records" or the diligence with which these records are kept. Nor does BellSouth appear to recognize the obvious conflict of interest that its own trunk planning and engineering employees would have in giving the "correct" answer. In essence, BellSouth asks the Commission to act as though two wrongs make a right.

BellSouth destroyed. In fact, BellSouth's claims raise questions as to whether its CDRs reflected, in fact, that it should have been paying for ACS traffic via both the Settlement Process and CABS because it was actually delivering that traffic over either or both the BTG and EAS facilities.

2. The History of the ACS Payment Dispute.

For years, BellSouth compensated Brandenburg Telephone for terminating intrastate access traffic pursuant to an Agreement for the Provision of Telecommunications Services and Facilities ("ICO Agreement"), effective January 1, 1985. (*See* ICO Agreement attached as Exhibit 1 to BellSouth's Formal Complaint). Pursuant to this ICO Agreement, BellSouth compensated Brandenburg Telephone through a settlement process whereby BellSouth "nett[ed] out amounts due to and from Brandenburg [Telephone] for various services and remitt[ed] any balance due to Brandenburg [Telephone] after the netting process [(the "Settlement Process")]." (Dir. Testimony of T. Watts at 5:1-3). This Settlement Process was "based solely on BellSouth's records ... consequently, le[aving] Brandenburg Telephone entirely at the mercy of BellSouth for determining amounts payable to Brandenburg Telephone." (Dir. Testimony of A. Willoughby at 5:19-22).

In order to address this untenable situation, Brandenburg Telephone worked with BellSouth to implement Brandenburg Telephone's CABS process beginning in January 1995. (Dir. Testimony of A. Willoughby at 5:23-6:1). "The CABS process enabled Brandenburg Telephone to identify and bill intrastate access traffic that enters its network over the BTG trunks." (*Supra* at 6:1-3). Brandenburg Telephone implemented the CABS system nearly two years before it received payment from BellSouth for ACS traffic in December of 1997, first alerting it to the existence of ACS traffic. (*Supra*).

However, because BellSouth's ACS traffic is an internal retail designation for that particular subset of intrastate access traffic, Brandenburg Telephone's CABS process is unable to identify this

traffic even if it were delivered over the BTG trunks. Moreover, "the CABS were not implemented for the EAS trunks, meaning that if BellSouth were to continue to deliver traffic, ACS or otherwise, to Brandenburg Telephone over the EAS trunks, Brandenburg Telephone would continue to be dependent upon BellSouth to remit payment through the Settlement Process for that traffic." (*Supra* at 6:4-7). Consequently, Brandenburg Telephone is wholly dependent upon the method by which BellSouth remits payment for ACS traffic in order to determine which facility it used to deliver that traffic.

In December of 1997 (two years after the implementation of CABS on the BTG), Brandenburg Telephone first received from BellSouth a payment through the Settlement Process for what BellSouth labeled as ACS traffic.² (*Supra* at 6:9-11; see also Dir. Testimony of T. Watts at 5:14-17 (BellSouth "compensated Brandenburg for the termination of ACS Traffic through . . . the Settlement Process . . . from at least December 1997 through March 2004"). Upon receiving this payment from BellSouth for ACS traffic through the settlement process, "Brandenburg Telephone called Charlotte Lord . . . at BellSouth to inquire into the nature of the traffic and the purpose of the payment. BellSouth did not respond to the inquiry." (Dir. Testimony of A. Willoughby at 6: 12-14). As a result, Brandenburg Telephone was left to assume that BellSouth was paying Brandenburg

² BellSouth alleges that its Settlements Process was a nine-state program designed to capture ACS traffic and, then, apply the appropriate rate for compensation. However, BellSouth also alleges that "if a carrier started billing us that directly, through a CABS bill, like Brandenburg did . . . that should have been a zero rate. The usage is still being captured and tracked, but the rate should have been zeroed out so there was no compensation." (Testimony of T. Watts, Aug. 26, 2009 Hearing transcript at 59:23-60:4). This assertion would be more believable if Brandenburg Telephone had not already implemented CABS two years before BellSouth started delivering ACS traffic, and before it instituted its ACS settlements program. There is simply no reason why BellSouth would have had an occasion to enter a rate for Brandenburg Telephone. This is especially true in light of Brandenburg Telephone's attempt to contact BellSouth regarding its initial ACS payment. BellSouth offers no explanation as to why a rate would ever have been entered for Brandenburg Telephone in the first place. That is, unless BellSouth were, in fact, routing the ACS traffic over the EAS facilities.

Telephone for terminating the ACS traffic over the EAS trunks.³ (*Supra* at 6:14-16). Otherwise, BellSouth would have had no reason to make payment for ACS traffic through the Settlement Process.

BellSouth continued this practice until March 2004 – for nearly seven years. (Dir. Testimony of T. Watts at 5:14-17 (BellSouth "compensated Brandenburg for the termination of ACS Traffic through . . . the Settlement Process . . . from at least December 1997 through March 2004")). In doing so, it presumably reviewed its CDRs, generated an invoice to itself, and paid Brandenburg Telephone through the Settlement Process. Then, sometime in April 2004 BellSouth claims to have "discovered that it was compensating Brandenburg for ACS traffic" through both the settlement process and CABS, and thereby was allegedly paying twice for the same service. (Dir. Testimony of T. Watts at 7:10-11). Even though it made this alleged discovery, BellSouth took no actions to keep the records that could have substantiated its claim from being destroyed. (Testimony of T. Watts, Aug. 26, 2009 Hearing Transcript at 46:13-16).

In a May 11, 2004 letter to Randall Bradley of Brandenburg Telephone, BellSouth formally requested that Brandenburg Telephone make an adjustment for the alleged overpayments occurring for the period of April 2002 through May 2004 in the amount of [REDACTED]. (See Letter to Randall Bradley Attached as Exhibit 3 to Rebuttal Testimony of T. Watts). It made this request without providing any proof to substantiate its claim. Thus, during a conference call with BellSouth,

³ This assumption was reasonable. During this same time period, Brandenburg Telephone also "began receiving similar payments from GTE for its ACS traffic." (Rebuttal Testimony of A. Willoughby at 6:11-17) Just as Brandenburg Telephone had requested more information from BellSouth regarding its ACS traffic, it "called GTE to inquire into the nature of the traffic for which GTE was paying Brandenburg Telephone." (*Supra*). Ultimately, "a GTE representative confirmed to Brandenburg Telephone that the payments were accurate and no double billing occurred." (*Supra*). Having not received a return call from BellSouth, Brandenburg Telephone "reasonably assumed that the same was the case for it." (*Supra*).

"Brandenburg Telephone requested call CDRs from BellSouth to verify BellSouth's claim that it had been double paying for this traffic." (Dir. Testimony of A. Willoughby at 7:4-6).

According to BellSouth, the process for obtaining access to CDRs before they were destroyed would have been fairly simple. It would have only required "going to our billing people and I would say, 'I need to retrieve this date of call detail records for this particular company,' and I have to give them this information to . . . go out and pull those [CDRs] and set them aside." (Testimony of T. Watts, Aug. 26, 2009 Hearing Transcript at 66:19-24). This is all that BellSouth would have needed to do, and, then, Brandenburg Telephone could have easily verified whether or not this ACS traffic was embedded in the CABS bills issued by Brandenburg Telephone to Bellsouth. Yet, BellSouth failed to do so. BellSouth did not take steps to preserve the records in April 2004, when it claims to have discovered the alleged issue and when it would have still possessed relevant CDRs; BellSouth also failed to preserve or provide the records when Brandenburg Telephone first requested them. (Testimony of T. Watts, Aug. 26, 2009 Hearing Transcript at 46:13-16).

Then, after several unsuccessful further attempts to resolve the issue, BellSouth sent an e-mail (on April 6, 2005) to Randall Bradley at Brandenburg Telephone containing a "traffic study" allegedly showing that BellSouth made duplicate payments. (See Traffic Study attached as Exhibit E to Dir. Testimony of A. Willoughby). The "traffic study," however, was nothing more than a BellSouth-generated summary of its claims based upon a different time period and which varied by as much as 5.5% from the number of MOUs contained in Brandenburg Telephone's CABS bills for that corresponding time period. (Dir. Testimony of A. Willoughby at 7:15-17). This "traffic study" contained absolutely no call detail with respect to the actual dispute period.

After a year and a half of failed attempts at resolution, BellSouth filed its Formal Complaint against Brandenburg Telephone on December 13, 2006, seeking reimbursement for alleged overpayment for ACS traffic from April 2002 through March 2004, plus interest. (*See* BellSouth's Formal Complaint). During the nearly three-year pendency of this dispute, Brandenburg Telephone has made numerous requests for, and BellSouth has had numerous opportunities to provide Brandenburg Telephone with some type of proof to substantiate its claim.⁴ At each opportunity, BellSouth failed to do so. (*See* Rebuttal Testimony of A. Willoughby at 3:21-5:17). Then, on July 24, 2009, only one month prior to the formal public hearing in this matter, BellSouth filed its direct testimony wherein it claimed to have "reviewed the Translations Work Instruction records back to February 2000, and validated that there were no subsequent orders to change the routing of ACS traffic." (Dir. Testimony of M. Neinast at 4:16-18). While such "records" were responsive to Brandenburg Telephone's data request, BellSouth offered no testimony or other evidence that would support the accuracy of these "Translations Work Instruction records" or the diligence with which these records are created, maintained, and stored.

In any event, the CDRs were admittedly the best and indisputable evidence available to resolve this dispute. In the end, resolution was rendered impossible, because, as BellSouth admits, it has destroyed the CDRs that would show whether its claim is true or not.

⁴ *See* Rebuttal Testimony of A. Willoughby at 3:21-5:17 for a detailed recounting of these numerous requests. Suffice it to say that Brandenburg Telephone requested that BellSouth produce supporting evidence no less than four separate times by telephone, during an informal conference with Commission staff, and through data requests.

3. BellSouth's Own Testimony in the ACS Billing Dispute Undermines the Credibility of Its Claim.

At numerous times during the hearing in this matter, BellSouth's testimony underscored the degree of its recklessness regarding the ACS billing dispute. For instance, BellSouth cannot explain how it first discovered what it alleges to be a "billing error" of nearly half a million dollars:

Q. I've reviewed the testimony, all three witnesses' testimony here, direct and rebuttal, and is it correct that I don't see a single bit of testimony that addresses the issue of how the error was ever discovered in the first place; is that correct?

A. No. I mean, the answer is yes, that's correct, that there's nothing in here to say specifically how it was caught.

(Testimony of T. Watts, Aug. 26, 2009 Hearing Transcript at 52:10-17).

Nor is BellSouth able to say which of its employees caused the alleged overpayments, whether that employee was ever disciplined for the alleged half-million dollar error, or if there were any measures in place to make sure the ACS Settlement program is accurately implemented:

Q. Did BellSouth ever identify the programmer who made this error?

A. No. I never asked that.

...

Q. Do you know whether or not anyone was ever disciplined for that error?

A. Not to my knowledge.

Q. Are you able to – is there any redundancy or failsafe system in [place] whereby BellSouth can check to determine whether or not the program that you describe in your testimony I just read to you is done accurately.

A. I can't answer that. There must have been to some degree because we caught it.

(*Supra* at 51:18-52:9). While BellSouth may consider catching an alleged half-million dollar billing error seven years later as an example of internal procedures for accuracy, it is, instead, merely one more example of its reckless approach to business and other people's money.

Similarly, when asked about its document retention policies and whether its destruction of the CDRs relevant to the ACS dispute were consistent with those policies, BellSouth alleges, incredibly, that it was not certain it would need them for its nearly half-million dollar claim:

Q. Do you know whether or not the destruction of whatever CDRs were then extant at the time BellSouth discovered this alleged claim would have been consistent with BellSouth document retention policies?

A. The records, call detail records, as I have stated, roll off every 60 days.

...

That is the retention period for the call detail records. They roll – a day comes in and a day rolls off, and they keep a running total of 60 days at any one time.

Q. Well, what I am asking you is I assume that BellSouth has document retention policies; is that correct?

A. Yes.

Q. Okay, and I am asking you whether or not BellSouth allowing those particular call detail records, which could substantiate at least some part of its claim, was consistent with BellSouth's document retention policies.

A. Sure, because you only retain documents if you know that you need to.

Q. You don't think BellSouth should have know that it might need to retain those documents to document at least part of an almost half a million dollar claim?

A. Not at that time, no.

(*Supra* 48:7-49-8). Ultimately, this so-called document retention policy is an internal business decision the negative consequences of which BellSouth now wishes to impose on Brandenburg Telephone.

Taken together, BellSouth's imprudent business decisions and mismanagement leaves its credibility in tatters. This is especially true when it comes to BellSouth asking, essentially, that it be trusted as the party that "knows," without supporting evidence, that it paid twice for ACS traffic.

B. Background of the CMRS Traffic Dispute.

BellSouth also claims that it overpaid Brandenburg Telephone for CMRS traffic that it delivered to Brandenburg Telephone pursuant to a now-expired CMRS Agreement. BellSouth argues that Brandenburg Telephone was obligated to accept BellSouth's CDRs and MOUs – without question or verification for accuracy – as the basis for credits Brandenburg Telephone would issue to BellSouth for CMRS traffic on BellSouth's bill. However, Brandenburg Telephone has no obligation to accept BellSouth's measurement of MOUs and its CDRs for CMRS traffic without question as to their accuracy. BellSouth appears to suggest that Brandenburg Telephone has no recourse, other than to request an expensive formal audit, to verify whether the CDRs sent to it by BellSouth are accurate. Yet, Brandenburg Telephone always has a right to verify whether or not it owes what a bill says that it owes; Brandenburg Telephone does not need to be granted that right.

Indeed, Brandenburg Telephone's actions regarding the CMRS traffic in question amounted to nothing more than a simple verification process to ensure that the traffic for which BellSouth claimed it should be compensated was in fact traffic covered by the CMRS Agreement. Thus, what BellSouth would like to frame as a dispute over whether Brandenburg Telephone impermissibly audited BellSouth's MOUs and CDRs is really a dispute over whether Brandenburg Telephone should be forced to compensate BellSouth for traffic that is not covered by the CMRS Agreement or was never billed by Brandenburg Telephone to BellSouth in the first place. Unquestionably, it should not.

1. The Relevant CMRS Agreement Provisions.

To some extent, the CMRS billing dispute revolves around the now-expired CMRS Agreement pursuant to which BellSouth provided "intermediary tandem switching and transport services to Covered CMRS Providers for the delivery of Covered CMRS Provider Traffic to Rural

LEC networks" like Brandenburg Telephone's. (Dir. Testimony of A. Willoughby at 12:19-21; *see also* Dir. Testimony of T. Watts at 12:4-7; and the CMRS Agreement, Recitals). Accordingly, a number of provisions of the CMRS Agreement should be reviewed.

As an initial matter, Section 1.05 of the CMRS Agreement defines "Covered CMRS Provider Traffic" as:

CMRS Provider Traffic of a Signatory CMRS Provider for which BellSouth generates and delivers to the terminating Rural LEC accurate industry standard call detail records identifying the originating CMRS Provider and minutes of use for such CMRS Provider Traffic.

Id. (emphasis added). Thus, the CMRS Agreement obligates BellSouth to give Brandenburg Telephone accurate CDRs that include only Signatory CMRS Provider Traffic. Brandenburg Telephone is, therefore, not obligated to give BellSouth credit for any CDRs that include calls outside of the scope of Section 1.05.

Section 2.07 of the CMRS Agreement addresses the invoicing and payment terms between the parties. Section 2.07 provides in pertinent part that:

Subject to the audit provisions set forth below in this subsection, the Signatory CMRS Providers and the Rural LECs agree to accept BellSouth's measurement of minutes of use and industry standard call detail records as the basis for the billing from and compensation to the Rural LECs for Covered CMRS Provider Traffic as set forth in this Section. Notwithstanding the foregoing, any party may request an audit of such measurements within twelve months of the applicable billing date.

Id. (emphasis added).

Although the CMRS Agreement was expressly created to provide terms and conditions for the exchange of Covered CMRS Provider Traffic, Section 2.09 of the CMRS Agreement clearly contemplates that BellSouth may deliver certain other traffic, further indicating that the Rural LECs

would be warranted to try and verify that the CDRs BellSouth provided were accurate. Specifically, Section 2.09 states that:

This Agreement applies solely to the Telecommunications traffic specifically defined within the scope of this Agreement. As such, the terms of this Agreement do not apply to any other facilities, any other traffic that is switched or transported over any other facilities, or to any traffic that is not a CMRS Provider. For any other CMRS Provider Traffic BellSouth delivers to a Rural LEC for termination that is not covered under Sections 2.04 and 2.07 of this Agreement (i.e., traffic from a CMRS Provider that is not a signatory to this Agreement), BellSouth agrees to compensate the Rural LECs for such traffic during the term of this Agreement under the same terms and conditions as traffic terminated by BellSouth under the KRSP.

Id. Unless (and, perhaps, even if) BellSouth were to self-identify this "other traffic" that is not Covered CMRS Provider Traffic, it would be incumbent upon Brandenburg Telephone to review the CDRs BellSouth delivered as any prudent business or person would do to ensure that the bill was owed.

Section 2.12 of the CMRS Agreement identifies the circumstances under which a party to the Agreement may seek interest in the event an undisputed amount owed is not timely paid. Specifically, Section 2.12 provides that:

Any undisputed charges incurred pursuant to this Agreement that are not timely paid by BellSouth to the Rural LECs, or are not timely paid by a Signatory CMRS Provider to BellSouth, will accrue interest from the date such amounts were due at the lesser of (i) one and one-half percent (1-1/2%) per month or (ii) the highest rate of interest that may be charged under applicable law.

Id. (emphasis added). Although BellSouth has requested interest pursuant to this section as part of its claim, the terms of Section 2.12 do not provide for interest to be charged by BellSouth against a Rural LEC like Brandenburg Telephone.

Furthermore, Section 3.01 of the CMRS Agreement makes abundantly clear that the CMRS Agreement itself has expired, relieving all parties of any obligations under it. Section 3.01 provides in pertinent part that:

This Agreement has an absolute termination date of December 31, 2006 regardless of, and in addition to, any other provisions herein under which this Agreement may be terminated by any party. Therefore, all duties, rights, and obligations hereunder terminate on December 31, 2006.

Id. As both Brandenburg Telephone and BellSouth agree, the CMRS Agreement has expired. (*See* Dir. Testimony of S. McPhee at 3:17-18 ("The CMRS Agreement . . . expired December 31, 2006"); Testimony of T. Watts, Aug. 26, 2009 Hearing Transcript at 85:19 ("Yes, [the CMRS Agreement] has expired")).

Finally, Section 3.03 underscores the voluntary and limited nature of the parties' responsibilities under the CMRS Agreement. Specifically, Section 3.03 provides that the:

Parties agreement to the terms and conditions of this Agreement related to the network arrangement for CMRS Provider Traffic, including specifically . . . [the] compensation arrangements between and among the Parties for the Rural LEC's termination of such CMRS Provider Traffic, is a voluntary arrangement and represents a compromise between and among the Parties for the limited purpose of this Agreement and does not create and should not be construed to create any obligations that do not otherwise apply to a Party.

Id. (emphasis added).

Taken together, the relevant provisions of the CMRS Agreement indicate that the agreement should not be construed in a way as to create any additional obligations among the parties that are not specifically addressed. As such, the CMRS Agreement cannot bear the weight that BellSouth's overbroad interpretation would require.

2. The History of the CMRS Payment Dispute.

On April 24, 2004, certain rural independent local exchange carriers ("Rural LECs"), including Brandenburg Telephone, and certain Commercial Mobile Radio Services providers ("CMRS Providers") entered into a CMRS Agreement with BellSouth (the "CMRS Agreement"). (See CMRS Agreement attached as Exhibit 6 to BellSouth's Formal Complaint). The CMRS Agreement addressed BellSouth's provision of "intermediary tandem switching and transport services to Covered CMRS Providers for the delivery of Covered CMRS Provider Traffic to Rural LEC networks" like Brandenburg Telephone's. (Dir. Testimony of A. Willoughby at 12:19-21; *see also* Dir. Testimony of T. Watts at 12:4-7; and the CMRS Agreement, Recitals). Under the CMRS Agreement, BellSouth was to act as the interconnection intermediary between the Covered CMRS Providers and the Rural LECs, and the Rural LECs were in turn required to give BellSouth credits on their bills for that amount of Covered CMRS Provider traffic for which BellSouth acted as intermediary.

In June 2004, Brandenburg Telephone and BellSouth implemented the CMRS Agreement, and BellSouth began delivering its initial CMRS traffic to Brandenburg Telephone for which it was to be reimbursed under the CMRS Agreement. From the very beginning, however, "the volume of traffic claimed by BellSouth to be Covered CMRS Traffic was higher than Brandenburg Telephone expected." (Dir. Testimony of A. Willoughby at 13:16-18). At least partially, as a result, Brandenburg Telephone reviewed the detail of BellSouth's CDRs in order to verify their accuracy.

As part of its verification process, Brandenburg Telephone discovered that the MOUs and CDRs supplied by BellSouth did not correspond with its own records. In particular, Brandenburg Telephone identified what it believed were CDRs that were for minutes of use not covered by the CMRS Agreement as well as CDRs for minutes of use that Brandenburg Telephone had never billed

to BellSouth in the first place, and for which BellSouth was not therefore entitled to a credit. (Dir. Testimony of A. Willoughby at 13:12-14; *see also* Testimony of A. Willoughby, Aug. 26, 2009 Hearing Transcript at 124:11-16). In every case, Brandenburg Telephone was not contractually or otherwise obligated to give BellSouth credit for these calls. After reconciling the CDRs supplied by BellSouth with its own records, Brandenburg Telephone provided BellSouth with CMRS credits accordingly. (Dir. Testimony of A. Willoughby at 13:20-21).

"Between June 2004 and June 2005, Brandenburg Telephone sent to BellSouth the CABS bills based on its verified usage reports." (Dir. Testimony of A. Willoughby at 13:22-23). BellSouth, in turn, "paid these bills in full without dispute, even though it should have been clear that the amount billed was different than what the records BellSouth sent to Brandenburg Telephone would have required." (Dir. Testimony of A. Willoughby at 13:23-14:1). In fact, BellSouth, itself, claims to have noticed "discrepancies" between its own records and the invoices that Brandenburg Telephone sent to it. Yet, BellSouth continued to pay the bills as calculated by Brandenburg Telephone for an entire year without once requesting an audit. (Testimony of T. Watts, Aug. 26, 2009 Hearing Transcript at 44:18-20 ("Q. [D]id BellSouth ever request an audit? A. No").

Then, in July 2005, BellSouth began withholding amounts owed to Brandenburg Telephone for Covered CMRS Traffic billed to it. BellSouth alleges that it did so because Brandenburg Telephone "fail[ed] to deduct the appropriate levels of CMRS minutes from their CABS bill to [BellSouth]." (Dir. Testimony of T. Watts at 11:20-21). BellSouth further alleged that "by signing the CMRS Agreement, Brandenburg agreed to use [BellSouth's] records to determine the CMRS minutes of use that Brandenburg would deduct from its CABS bills to [BellSouth]." (*Supra* at 12:14-17). As a result, BellSouth began underpaying Brandenburg Telephone based upon BellSouth's own MOUs as opposed to the amount reflected on the CABS bill rendered to BellSouth

by Brandenburg Telephone. (Dir. Testimony of A. Willoughby at 14:5-6). To date, "due to BellSouth's continued withholding of payments from Brandenburg Telephone for the amounts of Covered CMRS Traffic billed to it, BellSouth actually owes Brandenburg Telephone a large amount in underpayments." (Dir. Testimony of A. Willoughby at 17:22-24).

In order to resolve this dispute, the two companies worked together, between July 2005 and October of that same year, to improve the process by which Brandenburg Telephone was verifying the CMRS records. As a result of that process, Brandenburg Telephone gave Bellsouth a credit for a large number of the minutes that were in dispute and the parties reached a financial agreement to resolve all amounts in dispute through October 2005. As an additional result of that process, Brandenburg Telephone, for the past 19 months has credited BellSouth for 98.7 percent of the MOUs for which BellSouth has claimed a credit. (Dir. Testimony of A. Willoughby at 15:16-18). The remaining 1.3 percent represents traffic that Brandenburg Telephone disputes is either not Covered CMRS Traffic or traffic for which Brandenburg Telephone never billed BellSouth in the first place, and, thus, for which no credit is due. (*See* Testimony of A. Willoughby, Aug. 26, 2009 Hearing Transcript at 124:11-14 ("All that we can tell is the call detail records that [BellSouth] send[s] us that they're expecting to get credit for are not call details that we have included for billing in our CABS bill"). At no time during this process did BellSouth mention or request an audit. (Testimony of A. Willoughby, Aug. 26, 2009 Hearing at 129:3-7 ("In that period of time no one at . . . BellSouth, ever said, 'You need to request an audit to do this.' Not one time until this case was filed did the word 'audit' or 'You should audit' come up in this case").

On October 31, 2005, Brandenburg Telephone and BellSouth finally "reached a settlement agreement, or so Brandenburg Telephone thought, that would result in Brandenburg Telephone making a payment to BellSouth for much of the traffic in question." (Dir. Testimony of A.

Willoughby at 14:8-10). When it was time to document the settlement terms, however, "BellSouth demanded that Brandenburg waive all its rights to verify traffic delivered to its network and execute a contract whereby Brandenburg Telephone would agree to be bound solely to BellSouth's reported usage amounts on a going forward basis." (*Supra* 14:11-13). Accordingly, the settlement discussions broke down. (Dir. Testimony of T. Watts at 16:11-19).

Then, when BellSouth filed its Formal Complaint against Brandenburg Telephone, it echoed this sentiment as part of its request for relief, requesting that the Commission order:

Brandenburg Telephone Company to abide by the CMRS Agreement . . . and properly bill BellSouth for the Covered CMRS Provider Traffic by using BellSouth's measurement of minutes of use and industry standard call detail records as the basis for the billing from and compensation to Brandenburg.

(BellSouth's Formal Complaint at 9, Paragraph 3). This relief is phrased on an ongoing basis, and if granted, would conceivably force Brandenburg Telephone to abide by the terms of the now-expired CMRS Agreement.⁵

In an effort to respond to this ongoing threat, Brandenburg Telephone included as part of its Answer to BellSouth's Formal Complaint an affirmative defense that

BellSouth's damages for the alleged overpayment for CMRS traffic may be set off by BellSouth's underpayment for CMRS traffic for which BellSouth did not provide accurate industry standard call detail records.

⁵ Counsel for Brandenburg Telephone objected at the August 26, 2009 hearing on this basis, noting that "BellSouth's Complaint . . . seeks to order Brandenburg Telephone Company to abide by the CMRS Agreement . . . That is phrased on an ongoing basis. Now, if BellSouth is willing to concede that, as of December 31, 2006, that issue went away, that may be one thing, but that's not been our understanding to date, and our understanding has been that BellSouth is seeking to apply that practice . . . on an ongoing basis." (Aug. 26, 2009 Hearing Transcript at 37:1-12).

(Brandenburg Telephone's Answer at 6, Paragraph 25). Although BellSouth erroneously asserts that its ongoing unilateral underpayment for CMRS traffic is not a part of the present dispute, Brandenburg Telephone's Answer did, in fact, clearly make it part of this dispute.⁶

III. ARGUMENT AND ANALYSIS

The Commission should resolve these two billing disputes with an order denying BellSouth's claims for reimbursement.

In the ACS billing dispute, BellSouth has failed to substantiate its claim for reimbursement, and has, in essence, admitted to acting negligently, including destroying evidence, that is, BellSouth's CDRs. The Commission should not allow BellSouth to shift the costs of its careless business practices onto Brandenburg Telephone.

In the CMRS billing dispute, Brandenburg Telephone acted reasonably and well within its permissible business judgment, whether under the now expired CMRS Agreement or otherwise, by verifying the CMRS traffic for which BellSouth claimed credit. In any event, BellSouth has unilaterally withheld money on a going forward basis in excess of whatever amounts it claims to have overpaid for CMRS traffic. It should be ordered to pay Brandenburg Telephone those monies forthwith.

⁶ In fact, Counsel for BellSouth went so far as to argue that "there's no evidence in this record about what was withheld, or why it was withheld, or any of that, and I think it's inappropriate and irrelevant to this proceeding." (Aug. 26, 2009, Hearing Transcript at 82:20-24). As Brandenburg Telephone's Answer (*see* Paragraph 25), its direct testimony, and rebuttal testimony make clear, BellSouth's ongoing withholding of amounts owed to Brandenburg Telephone for CMRS traffic are squarely within the scope of this proceeding and is an appropriate subject for the Commission to address. (*See* Dir. Testimony of A. Willoughby at 17:21-18:2; and Rebuttal Testimony of A. Willoughby at 12:12-15).

A. BellSouth Has Failed to Substantiate Its Claim that It Overpaid for ACS Traffic.

1. BellSouth's Destruction of Evidence Should Lead to a Negative Presumption As to the Veracity of its Claim.

a. Spoliation.

As an initial matter, BellSouth's destruction of critical – indeed, the best – evidence in the ACS traffic dispute should lead to a negative presumption as to the veracity of its claim.⁷ The destruction or spoliation of evidence is no trifling matter.⁸ This is all the more true where, as here,

⁷ Brandenburg Telephone previously filed a motion for summary judgment with the Commission based upon BellSouth's spoliation of evidence, (*see* Brandenburg Telephone's Verified Motion for Partial Summary Judgment, filed May 29, 2007), and the Commission, at that time, denied the same, (*see* Commission Order issued on May 12, 2009). As it was a motion for summary judgment, however, the Commission was not required to, and did not, address the substantive merits of Brandenburg Telephone's spoliation argument there, but rather only the very low bar of whether BellSouth had presented "a genuine issue of material fact." (Order at 12). Therefore, it is appropriate for Brandenburg Telephone to renew its spoliation argument at this time so that the Commission may consider the substantive merits of the issue and its impact on this case. Moreover, since the time of Brandenburg Telephone's original motion, much discovery has been had and testimony given underscoring the degree to which BellSouth knew it had what it alleges was an overpayment issue and, yet, still allowed the CDRs to be destroyed. In addition, since that time, BellSouth has also admitted that the CDRs were, in fact, the best evidence available to prove its claim, making Brandenburg Telephone's initial spoliation argument all the more decisive as it is further substantiated by the "best evidence rule" discussed below. (*See* Testimony of M. Neinast, Aug. 26, 2009 Hearing Transcript at 105:20-106:12).

⁸ Numerous cases make clear that BellSouth cannot rely on its switch-recording retention policy to claim that its destruction of the records did not constitute spoliation. *See Stevenson v. Union Pacific R. Co.*, 354 F.3d 739, 750 (8th Cir. 2004) (noting that "[a]fter the specific document request for track maintenance records, Union Pacific cannot rely on its routine document retention policy as a shield" and that "a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.") (quoting *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988)). Moreover, a presumption that the evidence destroyed would have been harmful to the spoliator's claim can be appropriate regardless of the fact that documents were destroyed pursuant to a document-retention policy. *See, e.g., Powell v. Town of Sharpsburg*, 591 F.Supp.2d 814, 820 (E.D.N.C. 2008) (collecting cases which support this proposition and concluding that "destruction under a records retention policy can support an adverse inference instruction"). Additionally, courts have held that dismissal can be an appropriate sanction where, as here, the plaintiff's intentional destruction of evidence makes it impossible for the defendant to mount a complete defense. *See, e.g., Moyers v. Ford Motor Co.*, 941 F.Supp. 883, 885 (E.D.Mo.1996) (holding that dismissal of the plaintiff's claim was

the evidence that BellSouth destroyed was, as both parties agree, the best evidence available to definitively resolve this dispute. Without these CDRs, BellSouth itself cannot know for sure whether the calls it contends it overpaid for through its CABS bills were even included in the CABS bills in the first place.

"Spoliation is the destruction or significant alteration of evidence, or the failure to properly preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 778 (2nd Cir. 1999) (emphasis added); *see also Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky. 1997). Destruction of critical documents can lead to "manifest unfairness and injustice" because it increases the "risk of an erroneous decision on the merits" and increased litigation costs related to the development of substitute evidence. *West*, 167 F.3d at 778. "Once spoliation has been established, the sanction chosen must achieve the deterrence, burden the guilty party with the risk of an incorrect determination and attempt to place the prejudiced party in the evidentiary position it would have been in but for the spoliation." *Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277, 287 (E.D. Va. 2001); *see also Monsanto*, 950 S.W.2d at 815 (Kentucky courts address issues of destroyed or missing evidence "through evidentiary rules and 'missing evidence' instructions").

Here, BellSouth had evidence in its possession, in the form of CDRs, that would have definitively resolved the ACS traffic billing dispute. BellSouth admits that it first discovered the alleged overpayments in April of 2004. (BellSouth's Formal Complaint at 3). It further admits that "[a]t the period of time that we actually saw that there could be a problem, there were a few days of call detail records . . . that would be available." (Testimony of T. Watts, Aug. 26, 2009 Hearing

appropriate in a product-defect suit where the plaintiff had destroyed the allegedly defective product prior to the commencement of litigation). Ultimately this is a business decision the consequences of which should be placed squarely on BellSouth's shoulders.

Transcript at 46:13-16). Yet, it destroyed those records. If those records could have substantiated its claim that it overpaid Brandenburg Telephone for ACS traffic, even for just a "few days," then BellSouth would have had every incentive to keep them. That it did not preserve these records undermines its contention that that the CDRs would have substantiated its claim. BellSouth admits it destroyed the only direct evidence that would substantiate or refute BellSouth's claim. For this reason alone, the Commission should enter judgment in favor of Brandenburg Telephone on BellSouth's ACS traffic claim.

BellSouth failed "to properly preserve [CDRs] for [Brandenburg Telephone]'s use as evidence in pending or reasonably foreseeable litigation." *West*, 167 F.3d at 778. The burden of proving overpayments rightfully belongs with BellSouth. When BellSouth realized in April of 2004 that it had been making alleged overpayments, BellSouth should have immediately begun preserving and recovering the records in its possession that would prove or disprove that it had overpaid Brandenburg Telephone for terminating ACS traffic. Had BellSouth taken appropriate action at that time, it would have had up to 60 days of relevant CDRs/switch recordings and 6 months of ICO EMI records.⁹ Even if BellSouth did not preserve the records until Brandenburg Telephone specifically requested CDRs in May 2004, BellSouth would still have approximately one month of relevant CDRs. In the face of even this explicit request for CDRs, however, BellSouth neglected to preserve the records necessary to prove or disprove its claim. This is spoliation.

Nonetheless, BellSouth now requests Brandenburg Telephone pay more than \$800,000 (including, audaciously, interest) based solely on an unsupported summary of minutes of use that

⁹ In its Answer to Brandenburg Telephone's Data Request No. 10, BellSouth stated that full AMA (Automatic Message Accounting) switch recordings are kept for 60 days and ICO EMI (Electronic Messaging Interface) records are kept for 6 months. BellSouth also stated in its comments to the Intra-Agency Memorandum of the Informal Conference that "it normally keeps the CDRs for a rolling 60-day period." (Mary Keyer's letter of April 6, 2007 to Ms. Beth O'Donnell, p. 1 (attached as Exhibit A.))

BellSouth generated after-the-fact in 2005. BellSouth's failure to preserve relevant CDRs in 2004, when litigation was reasonably foreseeable and when Brandenburg Telephone specifically requested the records, significantly increases the "risk of an erroneous decision on the merits" in this matter. *West*, 167 F.3d at 778. Destruction of the CDRs has resulted in Brandenburg Telephone being unable to present evidence in a formal public hearing that could refute BellSouth's claim of double payment. Accordingly, BellSouth's destruction of the CDRs has manifestly and irreversibly prejudiced Brandenburg Telephone and its ability to defend against BellSouth's claim.

It is BellSouth's responsibility to provide Brandenburg Telephone and this Commission with reliable proof of the overpayments alleged. Because of the spoliation of the critical CDRs, BellSouth has not and cannot produce reliable records establishing double-payment. Moreover, Brandenburg Telephone has been prevented from presenting the only direct evidence in defense of BellSouth's claim.

b. Best Evidence.

In addition, BellSouth's attempt to present "other" evidence to support its claim runs afoul of the longstanding "best evidence" rule. The Kentucky Supreme Court in *Goddard v. Commonwealth*, 1990 Ky. LEXIS 6, 4 (Ky. 1990), has stated the rule this way: "When attempting to prove the contents of a writing, a party must introduce the 'original' of that writing unless there is a satisfactory explanation for its nonproduction." In that case, the Commonwealth was attempting to prove the contents of a piece of mail by presenting testimony concerning its contents, but was not able to produce the mail itself. The Court found that:

[w]ithout production of the writing, the envelope itself, testimony as to its content constituted a violation of the best evidence rule. This case is a perfect illustration of the reason the rule exists. . . . The Commonwealth was seeking to prove the contents of the records, and the records themselves were the best evidence of what they contained.

Id. at 5 (emphasis added) (citing *Castle v. Commonwealth*, 463 S.W.2d 120, 122 (Ky. 1971)). As a result, this evidence should have been excluded. *Id.* at 6.

Likewise, here, BellSouth is attempting to present "other evidence" in the form of testimony and "Network Translations Instruction records" to prove the content of the CDRs when the CDRs "themselves were the best evidence of what they contained." *Id.* BellSouth's destruction of the CDRs, especially after it was aware of a potential dispute, does not constitute a "satisfactory explanation" for not producing them. Moreover, BellSouth itself admits that the CDRs would have been the best evidence to support its claim in the ACS dispute. In response to questioning by Commissioner Borders as to what evidence would have best supported its claim, BellSouth stated that:

the CDR is the actual bill record for a given call. . . . You know, I think . . . it would be great, in hindsight, to have those CDRs. I think we could prove without a doubt that, within a given time frame, say, you know, March 1st to march 31st, the CABS billing system and the settlement process would be identical for those types of calls.

(Testimony of M. Neinast, Aug. 26, 2009 Hearing Transcript at 105:20-106:12 (emphasis added)).

Under both the doctrine of spoliation and the best evidence rule, the Commission should deny BellSouth's use of "other evidence" to replace that of the CDRs it destroyed, as well as institute a negative presumption that BellSouth destroyed the CDRs because they would have failed to substantiate its claim.

2. BellSouth Has Failed to Provide Substantive Evidence that Would Support Its Claim.

As a direct result of its decision to destroy the applicable CDRs, BellSouth is now incapable of providing direct, substantive evidence in support of its alleged overpayment for ACS traffic. Moreover, because of BellSouth's recklessness, Brandenburg Telephone is also left in the untenable

position of not having access to the best evidence to definitively resolve this dispute. It must, instead, rely on whatever other evidence is available.

The only other available evidence as to how the ACS traffic was routed indicates that BellSouth properly remitted payment for ACS traffic through the Settlement Process. By causing itself to make payment through the Settlement Process for traffic that is otherwise unidentifiable to Brandenburg Telephone's network, BellSouth has created a significant question, daresay a presumption, that the ACS traffic in question was routed over the EAS trunks. Given Brandenburg Telephone's undisputed inability to distinguish ACS traffic from any other intrastate access traffic, it has no other option than to rely on the fact that BellSouth, of its own volition, properly paid for the traffic through the Settlement Process.

Even if, however, the Commission were to rely on BellSouth's "other evidence" in this proceeding – which, for the reasons stated above, it should not – that evidence would still fail as substantive proof. In support of its claim, BellSouth alleges that "in lieu of providing the CDRs, [BellSouth] validated through its network records that its ACS Traffic routing translations did in fact send the ACS traffic to Brandenburg Telephone via the CTTG trunk group." (Dir. Testimony of M. Neinast at 5:14-17). This assurance, however, fails to meet the substance of BellSouth's claim in this matter. In particular, BellSouth has offered no testimony or evidence that would support the accuracy of its "network records," the diligence with which these records are created, maintained, and stored, or whether there are internal safeguards in place to ensure the reliability of these network records.

In essence, BellSouth's argument – given the absence of any competent documentary evidence – is simply, "Trust me." If, however, BellSouth's reckless actions with respect to the ACS

dispute are any indication as to its ability to maintain accurate, diligent, and reliable network records, then there is hardly any reason to trust that these internal "records" substantiate BellSouth's claim.

3. BellSouth Is Not Entitled to Interest in the ACS Dispute.

BellSouth has included as part of its Complaint a request for interest on the disputed ACS billing amount at the daily rate of .05%. To be clear, BellSouth is seeking interest even though this dispute is solely a result of its own mistake. Setting aside, for the moment, the sheer audacity of such a claim, BellSouth asserts that it is entitled to interest pursuant to a provision of the ICO Agreement between it and Brandenburg Telephone. However, a close examination of the ICO Agreement provision in question makes clear that it does not apply in this instance, and certainly does not contemplate the particular facts of this case.

The ICO Agreement includes a "Monthly Compensation" provision that protects, in essence, the billing party in the event that the party being billed disputes the amount that it owes but cannot substantiate its dispute. Specifically, the ICO Agreement provides that "[i]f a dispute is substantiated in favor of the exchange carrier, the fund will return the disputed amount plus interest (.05 percent per day)." ICO Agreement, Annex 1, Section VIII, "Monthly Compensation" at 5 (emphasis added). An "exchange carrier" is defined elsewhere under the ICO Agreement as "a telecommunications carrier providing local telecommunications services within a franchised geographic area." *Id.* Section III, "Definitions" at 7. Clearly, Brandenburg Telephone would be the "exchange carrier" in the ACS billing dispute, as it was the carrier providing access and termination services to BellSouth and rendering a monthly bill to BellSouth for the cost of these services. Thus, the "Monthly Compensation" provision would serve to protect Brandenburg Telephone (as the billing carrier), and not BellSouth, in the event a dispute arises. BellSouth, therefore, under the terms of the ICO Agreement, does not have recourse to this interest provision.

Moreover, in order for the interest provision to apply, the ICO Agreement requires that BellSouth "keep adequate records of all collections, payments and other transactions hereunder." (ICO Agreement, Annex 1, Section VIII, "Monthly Compensation"). Needless to say, BellSouth's destruction of the CDRs in this case falls well short of meeting this requirement. If BellSouth is unable to meet the requirements of this provision, it should not be allowed to seek refuge under it by requesting interest. Such a claim for interest is the epitome of audacity.

Therefore, because the ICO Agreement does not apply, and because the disputed amount is solely a result of BellSouth's own mistake, the Commission should deny BellSouth's claim for interest in the ACS billing dispute.¹⁰

B. Brandenburg Telephone Owes BellSouth Nothing in the CMRS Billing Dispute.

BellSouth's complaint in this matter also alleges, in part, that Brandenburg Telephone has failed to abide by the terms of the parties' 2004 CMRS Agreement for the transit of CMRS Provider Traffic to Brandenburg Telephone. Specifically, BellSouth alleges that Brandenburg Telephone failed to accept BellSouth's measurement of MOUs and industry standard CDRs as the basis for billing and compensation, and failed to properly request an audit pursuant to the CMRS Agreement.

In fact, Brandenburg Telephone did use BellSouth's CDRs as the basis for billing and compensation, accepting BellSouth's measurement of MOUs and CDRs, after it properly verified whether those CDRs were accurate, and billed BellSouth accordingly. Moreover, a review of the CMRS Agreement makes clear that it should not be applied in the absurd manner BellSouth claims. In any event, the dispute between the parties has been rendered moot by the confluence of the CMRS

¹⁰ In any event, the Commission should dismiss BellSouth's claim for interest because it is, in essence, a claim for damages against Brandenburg Telephone. The Commission has consistently acknowledged that damage claims are within the constitutional province of the Commonwealth's courts, and, as such, it has recognized that these claims lie outside of its jurisdiction. *See Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126 (Ky. 1983).

Agreement's expiration in December of 2006 and BellSouth's subsequent, unilateral decision to offset the amount it claims it is owed by underpaying Brandenburg Telephone on an ongoing basis for the termination of CMRS traffic. As a result, BellSouth actually now owes Brandenburg Telephone a substantial amount for CMRS traffic.

1. BellSouth Is Not Entitled to Credits for Traffic Not Covered by the CMRS Agreement or Never Billed to It by Brandenburg Telephone.

While BellSouth has continually attempted to frame the CMRS dispute in terms of whether Brandenburg Telephone is capable of verifying the accuracy of the MOUs and CDRs BellSouth delivers to it, the real question is whether BellSouth is entitled to credits for traffic that either: (i) was not covered by the CMRS Agreement; or (ii) was never billed to BellSouth in the first place. The answer is clear. Under no circumstances, pursuant to the CMRS Agreement or otherwise, should BellSouth be entitled to receive credits for traffic that either was not covered under the CMRS Agreement or was never billed to it by Brandenburg Telephone in the first place. To decide otherwise would grant BellSouth a windfall.

Section 2.07 of the CMRS Agreement does not require Brandenburg Telephone to accept BellSouth's call detail records as the sole basis for its billing where those records were not billed by Brandenburg Telephone, were inaccurate, or included traffic for non-covered, non-signatory CMRS traffic. Brandenburg Telephone never agreed to accept, without question, whatever call detail records BellSouth sent to it as the sole basis for its billing. As with the ACS traffic dispute, BellSouth apparently believes that Brandenburg Telephone should have simply taken its word for whether its records were accurate. Except here, BellSouth argues that Brandenburg Telephone was contractually obligated to do so. Such a reading of the CMRS Agreement is absurd.

The problem with BellSouth's interpretation of the CMRS Agreement, and of Section 2.07, in particular, is that it ignores the word "accurate" in the Section 1.05's definition for CMRS Provider

Traffic. If Brandenburg Telephone is obligated to accept BellSouth's call detail records, BellSouth is no less obligated to make certain that those records are accurate. Moreover, BellSouth's interpretation of the CMRS Agreement would completely obviate Brandenburg Telephone's ability to manage its business in a way that would safeguard the financial well-being of the company, for its shareholders and customers alike.

Simply put, Brandenburg Telephone is not obligated under the CMRS Agreement or otherwise to use call records for traffic that is not covered under the CMRS Agreement or has not been billed by Brandenburg Telephone as the basis for its billing. Section 1.05 of the CMRS Agreement requires BellSouth to deliver to Brandenburg Telephone "accurate" CDRs. Moreover, Section 2.09 acknowledges that BellSouth may deliver "traffic that is not from a CMRS Provider" and that "the terms of this Agreement do not apply" to such traffic. The only way Brandenburg Telephone could know whether BellSouth had included this traffic in its CDRs is by verifying them upon receipt – a reality that Section 2.09 anticipates. And, finally, Section 3.03 makes absolutely clear that the CMRS Agreement between Brandenburg Telephone and BellSouth is a "voluntary arrangement . . . for [a] limited purpose . . . and does not create and should not be construed to create any obligations that do not otherwise apply to a Party." Therefore, just as Brandenburg had the right to verify its bills before it entered into the CMRS Agreement it continued to have that right afterward. The CMRS Agreement nowhere circumscribed that ability.

Thus, BellSouth is neither entitled to credits for traffic not covered by the CMRS Agreement nor calls not billed to it in the first place by Brandenburg Telephone, and Brandenburg Telephone acted well within its reasonable business judgment to verify the CDRs accordingly.

2. The CMRS Agreement Is Not as Restrictive as BellSouth Would Suggest.

Ultimately, the CMRS Agreement does not lend itself to such a rigid construction as BellSouth would like. For instance, Section 3.03 makes clear that the scope of the CMRS Agreement is quite limited and should not be construed to create any additional obligations. Specifically, Section 3.03 provides that the:

Parties agreement to the terms and conditions of this Agreement related to the network arrangement for CMRS Provider Traffic, including specifically . . . [the] compensation arrangements between and among the Parties for the Rural LEC's termination of such CMRS Provider Traffic, is a voluntary arrangement and represents a compromise between and among the Parties for the limited purpose of this Agreement and does not create and should not be construed to create any obligations that do not otherwise apply to a Party.

Id. (emphasis added). The CMRS Agreement places no explicit restrictions on Brandenburg Telephone's ability to verify the accuracy of BellSouth's CDRs, nor does it require Brandenburg Telephone to give credit to BellSouth for CMRS traffic that it never billed BellSouth for in the first place. Thus, it should not be construed to create such restrictions.

Moreover, the audit provision is not a mandatory provision in the event a party would like to verify BellSouth's CDRs. Instead, Section 2.07 of the CMRS Agreement states that "any party may request an audit." *Id.* As such, there is nothing in the CMRS Agreement itself that would forbid Brandenburg Telephone from stopping shy of the expense and time-consuming burden of a full-blown audit to, instead, simply verify that the CMRS traffic for which BellSouth sought credit was actually billed by Brandenburg Telephone in the first place or delivered by a Covered CMRS Provider.

Therefore, BellSouth's attempt to force Brandenburg Telephone to accept its CDRs and MOUs – whether or not they are accurate – misconstrues the language and nature of the CMRS Agreement.

3. The CMRS Billing Dispute is Moot.

In any event, the CMRS billing dispute has been made mooted for at least two reasons. First, pursuant to Section 3.01 of the CMRS Agreement, the "Agreement has an absolute termination date of December 31, 2006 Therefore, all duties, rights, and obligations hereunder terminate on December 31, 2006." *Id.* This is at least one issue upon which Brandenburg Telephone and BellSouth agree. (*See* Testimony of T. Watts, Aug. 26, 2009 Hearing Transcript at 85:19 (in response to Vice Chairman Gardner's question "on the CMRS issue . . . you acknowledge that the Agreement is expired?" Mr. Watts answered, "Yes, it has expired"). As such, BellSouth's request that the Commission "[o]rder Brandenburg Telephone Company to abide by the CMRS Agreement" is no longer an appropriate or available remedy. Brandenburg Telephone, therefore, is no longer bound by the terms of the CMRS Agreement to use BellSouth's measurement of MOUs and industry standard CDRs as the basis of its providing credit to BellSouth for CMRS traffic.

In addition, BellSouth has, since the genesis of this dispute, already offset the amount of money that it claims to have overpaid Brandenburg Telephone for CMRS traffic. BellSouth has been underpaying Brandenburg Telephone since as early as October of 2005, and as of today has exceeded the amount it claims it overpaid Brandenburg Telephone. (*See* Dir. Testimony of A. Willoughby at 17:1-18:2).

Therefore, the two requests for relief that BellSouth seeks from the Commission in relation to the CMRS billing dispute (that Brandenburg Telephone abide by the CMRS Agreement and that it be reimbursed for alleged overpayments) have, since the filing of its Formal Complaint, become moot. The Commission should, thus, deny BellSouth's claim for reimbursement in the CMRS billing dispute accordingly.

4. Brandenburg Telephone is Entitled to Reimbursement for the Amount BellSouth Has Underpaid on a Going Forward Basis for CMRS Traffic in Excess of Its Claim.

Because BellSouth has underpaid Brandenburg Telephone for CMRS traffic on a going forward basis since November 1, 2005, it actually now owes Brandenburg Telephone a substantial amount. BellSouth has argued that this aspect of the ongoing dispute is "irrelevant to this case," (Counsel for BellSouth, Aug. 26, 2009 Hearing Transcript at 34:13), that its "withholding is not for the time period that's being claimed in this case, (*Supra* at 82:6-7), and that "there's no evidence in the record about what was withheld, or why it was withheld, (*Supra* 82:20-22).

However, nothing could be further from the truth. As the Commission recognized at the hearing, Brandenburg Telephone included this aspect of the dispute as an affirmative defense in its Answer to BellSouth's Formal Complaint. (Commissioner Gardner, Aug. 26, 2009 Hearing Transcript at 82:12-13).¹¹ Moreover, both its direct testimony and its rebuttal testimony address the ongoing withholding in which BellSouth has engaged. (*See Dir. Testimony of A. Willoughby at 17:22-18:2; and Rebuttal Testimony of A. Willoughby at 10:16-18*). BellSouth's assertions to the contrary are nothing more than wishful thinking.

Brandenburg Telephone included an affirmative defense in its Answer that would allow for an offset of any amount BellSouth underpaid Brandenburg Telephone on a going forward basis. Specifically, Brandenburg Telephone's Answer stated that "BellSouth's damages for the alleged overpayment for CMRS traffic may be set off by BellSouth's underpayment for CMRS traffic." (Brandenburg Telephone's Answer at 6, Paragraph 25). Now that BellSouth, with the passage of

¹¹ Specifically, Commissioner Gardner asked Counsel for Brandenburg Telephone, "Did you all include this as an affirmative defense in your Answer?" Counsel for Brandenburg Telephone responded, "Yes, it is listed as an affirmative defense, and, frankly, I would view it as a counterclaim now, you know, but, yes, it is listed as an affirmative defense." (Aug. 26, 2009 Hearing Transcript at 82:12-18).

time, has withheld an amount in excess of its original claim, Brandenburg Telephone's affirmative defense should be more appropriately construed as a counterclaim.

While the Commission is not bound by Kentucky's Rules of Civil Procedure, CR 8.03 provides for this construction of an affirmative defense. CR 8.03 provides that "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." *Id.* Here, Brandenburg Telephone included BellSouth's underpayments as an affirmative defense to what amount it may owe BellSouth, if anything at all.

With this in mind, the Commission should construe, "as justice requires," Brandenburg Telephone's affirmative defense in this matter as a counterclaim. Brandenburg Telephone has consistently made BellSouth's continued underpayments of amounts due for CMRS traffic a part of this dispute. Ms. Willoughby in both her prefiled direct and prefiled rebuttal testimony has clearly set forth Brandenburg Telephone's position on BellSouth's underpayments. For example, in response to the question "[d]oes Brandenburg Telephone owe BellSouth any money for alleged overpayments of CMRS traffic?" Ms. Willoughby responded:

No. In fact, as of July 2009, due to BellSouth's continued withholding of payments from Brandenburg Telephone for the amounts of Covered CMRS Traffic billed to it, BellSouth actually owes Brandenburg Telephone a large amount in underpayments. While Brandenburg Telephone was willing to pay BellSouth for the amount agreed to in their October 2005 settlement negotiations, BellSouth has since that time continued to withhold payments greatly exceeding that amount.

(Dir. Testimony of A. Willoughby at 17:22-18:2).

BellSouth apparently would rather force Brandenburg Telephone to institute an entirely new case before the Commission to collect amounts BellSouth has admittedly underpaid, that are directly related to the facts in this case, and have been thoroughly addressed herein. In essence, BellSouth is

asking the Commission to ignore the fact that it has, by its own admission, been withholding money from Brandenburg Telephone. Setting aside the unnecessary waste of extra time and expense it will impose upon the parties, it is also an inefficient use of the Commission's time and resources. The amount BellSouth owes Brandenburg Telephone in this regard can be ascertained either by an order from the Commission that BellSouth advise the Commission of this amount, or, the Commission may refer to Brandenburg Telephone's avowal exhibit which reflects that the amount is \$91,920.00. (See Brandenburg Avowal Exhibit 1 to the Aug. 26, 2009 Hearing; *see also* Chairman Armstrong, Aug. 26, 2009 Hearing Transcript at 139:6-8). In either event, the amount is easily ascertainable.

Therefore, because Brandenburg Telephone has, from the commencement of this matter, put into issue BellSouth's decision to underpay for CMRS traffic and has consistently addressed this issue throughout the proceedings, BellSouth cannot now, with a straight face, claim surprise or lack of fairness. Instead, the Commission should, pursuant to CR 8.03, and as justice requires, construe Brandenburg Telephone's affirmative defense as a counterclaim, and award Brandenburg Telephone the amount BellSouth has inappropriately withheld.

5. BellSouth Is Not Entitled to Interest in the CMRS Dispute.

BellSouth has also included as part of its Formal Complaint a claim for interest in the CMRS billing dispute. Specifically, BellSouth claims that the "interest [should be] calculated at one and one-half percent per month in accordance with Section 2.12 of the CMRS Agreement." (Dir. Testimony of T. Watts at 17:14-16; *see also* BellSouth's Formal Complaint at 7, 8). However, Section 2.12 of the CMRS Agreement makes no such interest allowance for BellSouth.

Section 2.12 of the CMRS Agreement provides that:

Any undisputed charges incurred pursuant to this Agreement that are not timely paid by BellSouth to the Rural LECs, or are not timely paid by a Signatory CMRS Provider to BellSouth, will accrue interest from the date such amounts were due at the lessor of (i) one and one-

half percent (1-1/2%) per month or (ii) the highest rate of interest that may be charged under the applicable law.

Id. (emphasis added). Section 2.12 sets forth two scenarios in which interest will be applied to amounts "not timely paid." Neither of those scenarios involve a Rural LEC like Brandenburg Telephone. Additionally, the CMRS Agreement only allows interest accrual in the event of undisputed charges. Brandenburg Telephone has disputed, and continues to dispute, the claim that it owes BellSouth any portion of BellSouth's alleged overpayment.

Though somewhat evasively, even Mr. Watts (one of BellSouth's own witness) appeared to testify that Section 2.12 does not make provision for interest to be charged by BellSouth against Brandenburg Telephone. (Testimony of T. Watts, Aug. 26, 2009 Hearing Transcript at 55:5-9 (answering "It says what it says," when asked if he agreed that "Section 2.12 does not make provision for interest to be charged by BellSouth against . . . Brandenburg Telephone"). Mr. Watts admitted that Section 2.12 is "talking about billing and paying" as opposed to Brandenburg Telephone's process for applying credits. (*Supra.* 54:17). Mr. Watts also admitted that BellSouth's reliance upon Section 2.12 of the CMRS Agreement was "the only way [BellSouth] had to say that interest applied." (*Supra.* 54:21-22). This is simply a case of BellSouth attempting to pound a square peg into a round hole. It just does not fit.

Therefore, by the very terms of Section 2.12 of the CMRS Agreement between BellSouth and Brandenburg Telephone, interest charges cannot be added to BellSouth's claim. Instead, BellSouth admits that Section 2.12 "was the only way [it] had to say that interest applied." (*Supra.*) The Commission should, accordingly, deny BellSouth's claim for interest in the CMRS billing dispute as it has no basis.¹²

¹²In any event, the Commission should dismiss BellSouth's claim for interest because it is, in essence, a claim for damages against Brandenburg Telephone. The Commission has consistently

IV. CONCLUSION

For all of the foregoing reasons, the Commission should deny BellSouth's claims for reimbursement.

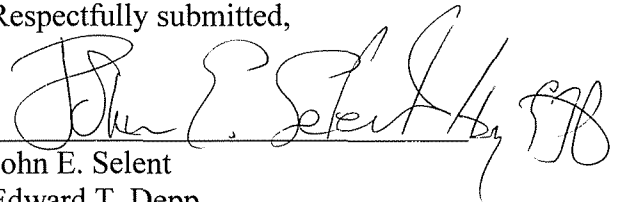
The ACS billing dispute is one entirely of BellSouth's own making. It caused itself to make the payments it now disputes. It recklessly destroyed the very evidence that would have allowed the parties to definitively resolve the dispute, even after it discovered the alleged issue. Brandenburg Telephone even went out of its way to inquire about the initial ACS payment – something it was under no obligation to do – but BellSouth failed to respond. Now seven years later, BellSouth comes to the Commission asking it to cover BellSouth's multitude of sins, with interest. The Commission should not absolve BellSouth of its responsibility for its actions.

As for the CMRS dispute, Brandenburg Telephone owes BellSouth nothing. Brandenburg Telephone should not be required to give BellSouth credits for CMRS traffic that was not covered under the CMRS Agreement or was otherwise not billed to it in the first place. Such a requirement would result in a windfall to BellSouth. Moreover, the CMRS Agreement did not create the billing and verification straight-jacket that BellSouth suggests. Brandenburg Telephone was free to exercise its reasonable and prudent business judgment to make certain that what it credited BellSouth was accurate. In any event, the CMRS Agreement has expired, and BellSouth has recouped whatever money it says Brandenburg Telephone owes it by underpaying for CMRS traffic on a going forward basis. As a result of these underpayments, BellSouth now actually owes Brandenburg Telephone a substantial amount.

acknowledged that damage claims are within the constitutional province of the Commonwealth's courts, and, as such, it has recognized that these claims lie outside of its jurisdiction. See Carr v. Cincinnati Bell, Inc., 651 S.W.2d 126 (Ky. 1983).

Therefore, the Commission should: (i) deny BellSouth's claim that Brandenburg Telephone should reimburse it, including interest, for alleged overpayments for ACS traffic; (ii) deny BellSouth's claim that Brandenburg Telephone should reimburse it, including interest, for alleged overpayments for CMRS traffic; and (iii) order BellSouth to pay Brandenburg Telephone for all amounts it has withheld for CMRS traffic over and above the amount in dispute by either (a) ordering BellSouth to identify that amount under oath or (b) determining that amount by reference to Brandenburg Telephone's Avowal Exhibit 1.

Respectfully submitted,



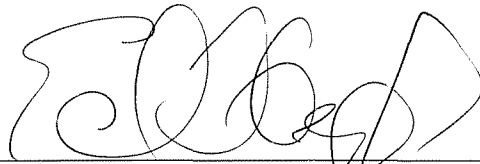
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CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing was served by first-class United States mail on the following individuals this 15th day of October, 2009.

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