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March 2, 2009

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PUBLIC SERVICE
COMMISSION

VIA FEDERAL EXPRESS

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

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

Dear Mr. Derouen:

I have enclosed for filing in the above-referenced case an original and eleven (11) copies of Brandenburg Telephone Company's Reply to Sprint Communications Company's Opposition to Brandenburg Telephone's Motion to Compel Payment. Please file-stamp one copy and return it to us in the stamped, self-addressed envelope furnished herewith.

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

Sincerely,

Edward T. Depp



ETD/lb

Enclosures

cc: John N. Hughes, Esq. (w/encl.)
William R. Atkinson, Esq. (w/encl.)

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MAR 03 2009

**PUBLIC SERVICE
COMMISSION**

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

**IN THE MATTER OF COMPLAINT)
OF SPRINT COMMUNICATIONS)
COMPANY L.P. AGAINST)
BRANDENBURG TELEPHONE)
COMPANY FOR THE UNLAWFUL)
IMPOSITION OF ACCESS CHARGES)**

Case No. 2008-135

**BRANDENBURG TELEPHONE COMPANY'S REPLY TO SPRINT
COMMUNICATIONS COMPANY'S OPPOSITION TO BRANDENBURG
TELEPHONE'S MOTION TO COMPEL PAYMENT**

Sprint Communications Company L.P.'s ("Sprint's") Response to Brandenburg Telephone Company's Emergency Motion to Compel Payment of Access Charges ("Response") fails to address the substance of Brandenburg Telephone Company's ("Brandenburg Telephone's") Motion to Compel. Sprint concedes it simply decided to stop paying the amounts it owed, yet it fails to establish any legal justification for doing so. This admission makes the proper course of action clear: the Public Service Commission of the Commonwealth of Kentucky (the "Commission") should grant an order directing Sprint to promptly pay all outstanding and undisputed access charges. And, this is exactly what the Commission should do. Sprint has not paid Brandenburg Telephone for any of the monies it admittedly owes Brandenburg Telephone for over twelve months now. And, Sprint has not even paid Brandenburg Telephone for monies it owes Brandenburg Telephone for services rendered before Sprint disputed Brandenburg Telephone's jurisdictionalization of Sprint's traffic. Moreover, Brandenburg Telephone's resort to the Meade Circuit Court to collect these monies is no reason for which the Commission should not act; the Commission is the most efficient arbitrator of this dispute and should act now to prevent grievous financial injury to Brandenburg Telephone. Brandenburg Telephone's lawsuit in Meade County is not a reason for which the Commission should not act; it is only a measure of Brandenburg Telephone's desperation.

Introduction

Sprint, like many companies in the United States, is suffering from serious and well-documented financial difficulties. Without prompt action by the Commission, Sprint may leave Brandenburg Telephone with a substantial and uncollectible debt. The Commission should not allow this to happen.

As Brandenburg Telephone argued in its Motion to Compel Payment of Access Charges (“Motion to Compel”), Sprint conceded that \$370,976 of its outstanding charges are not in dispute.¹ Although Sprint admitted these undisputed charges had been internally authorized for payment, it has withheld payment because of its ongoing and mistaken belief that Brandenburg Telephone has overcollected \$1,329,238.² This is a clear example of an unlawful set-off; Sprint is withholding amounts it lawfully owes to off-set the amounts it believes it was overbilled.

Sprint’s recent description of this set-off as, “a debit balance associated with the payable account,”³ is of no consequence except for accounting purposes, merely recharacterizes its attempt at a set-off without using the word “set-off.” It is, at the very least, a bold attempt to revise history (particularly since its admissions at the informal conference were made in front of Commission staff).⁴ The fact is that, upon its unilateral determination that it had been overbilled, Sprint stopped *all* payments to Brandenburg Telephone, even where there was no dispute as to the determination of call jurisdiction. Sprint argues, incorrectly, that to require it to continue to pay its bills would be “to forget about the amount Brandenburg Telephone has over-collected and accede to letting Sprint’s overpayment in the same dispute remain in Brandenburg Telephone’s hands.”⁵ In other words, Sprint is arguing that it should not have to pay anything to Brandenburg Telephone until the two

¹ Brandenburg Telephone’s Emergency Motion to Compel Payment of Access Charges at 3 (hereafter “Motion to Compel”).

² Sprint’s Response to Emergency Motion to Compel Payment of Access Charges at ¶1 (hereafter, “Sprint’s Response”).

³ Sprint’s Response at ¶9.

⁴ Motion to Compel at 3.

⁵ Sprint’s Response at ¶10.

parties “break even” for the non-existent overbilling. This is a set-off, whatever Sprint chooses to call it.

What this argument – and, indeed, almost every argument in Sprint's Response – fails to recognize is that *there has been no determination that Sprint has overpaid*. Sprint repeatedly bootstraps its arguments on the unfounded claim that it has been overbilled, but the Commission has made no such determination. In sum, Sprint’s Response is nothing more than a poorly disguised admission that it refuses to pay \$370,976 of *undisputed* access charges as a result of its dispute of other charges. There is no legal justification for Sprint's undisputed refusal.

Argument & Analysis

I. The Issue Before the Commission on This Motion Is Simply Whether Sprint Must Pay the Money It Admittedly Owes Prior to the Commission's Final Determination of the Action.

There is only one question at issue with respect to Brandenburg Telephone's Motion to Compel: may Sprint unilaterally decide it is being overcharged and simply “[stop] paying” its bills?

Sprint musters a number of arguments, but few are relevant to that basic question. Its arguments about improper windfalls⁶ and assertions that the point of Brandenburg Telephone's Motion to Compel is simply to continue “to demand additional overpayment”⁷ are failed attempts to miscast Brandenburg Telephone as a corporate extortionist. Other arguments, such as Sprint's tangential foray into proper methods to determine call jurisdiction and the propriety of Sprint's PIU,⁸ have nothing to do with the continuance of Sprint's duty to pay its bills pending resolution of the dispute. Sprint is, once again, trying to confuse the issues. For example, it attempts to make its unlawful set-off look more reasonable by offering to place certain funds in escrow, but in doing so reveals that its primary concern in its Response is ensuring that Brandenburg Telephone's assets

⁶ Sprint's Response at ¶10, 19. It bears mentioning that this reasoning applies equally well in reverse. Allowing a subscriber to withhold all payments for the duration of a rate dispute could create an incentive for subscribers to delay the action until they have recovered all of their alleged damages, and consequently have significantly greater leverage to reach a more beneficial settlement. Sprint’s argument about the fears of improper windfalls is irrelevant, however, as the law is already clear on the matter.

⁷ Sprint's Response at ¶1.

⁸ Sprint's Response at ¶7-8, 11.

remain tied up in this proceeding for as long as possible, thus forcing Brandenburg Telephone to negotiate for even the payment of *undisputed* charges being withheld. There is no legal justification for Sprint to withhold undisputed charges, in escrow or otherwise, and the escrow argument is just another example of Sprint trying to confuse the issues with irrelevant arguments.

Worse, those arguments that are relevant rely entirely on a false consensus that Sprint was overbilled and that it consequently overpaid. Sprint well knows that this is only its characterization of the facts. It further knows that Brandenburg Telephone has and continues to dispute this mischaracterization.

In paragraph 3 of its Response, for example, Sprint argues that "Sprint overpaid the account . . . [and a]s a result Sprint stopped paying the excessive rates."⁹ With this "fact" established, Sprint then expresses dismay that Brandenburg Telephone would respond to nonpayment with a notice to disconnect service. However, this "fact" is not established; to the contrary, it lies at the very heart of the present dispute. Paragraph 3 of the Response, seen from Brandenburg Telephone's perspective, is: "Sprint unilaterally decided it was being overbilled for some of its traffic and decided to resolve the dispute by no longer paying *any* of its bills." A disconnection notice for lack of proper payment is not an outrageous response. It is explicitly authorized by the applicable laws and tariffs.

In short, Sprint's Response requires the Commission to first assume that Sprint has been overbilled. This determination would be inappropriate given the ongoing nature of the dispute.

Sprint admits it was billed for access charges by Brandenburg Telephone,¹⁰ that it decided to "[stop] paying" as a result of the dispute,¹¹ and that it holds "roughly \$619,996" it admits it was billed for and has withheld.¹² Of that amount, *\$370,976 was admitted to be unpaid amounts on undisputed charges*, to be withheld until this dispute is resolved.

There is no disputing that Sprint is withholding money as a form of self-help. There is also no need, for the purposes of this motion, to decide the ultimate question of whether Sprint was

⁹ Sprint's Response at ¶3.

¹⁰ Sprint's Response at ¶2.

¹¹ Sprint's Response at ¶3.

¹² Sprint's Response at ¶1, 7.

overbilled. The issue before us on this Motion to Compel is not "will Sprint ultimately be determined to have overpaid or not," but simply "is it an appropriate remedy for Sprint to simply stop paying its undisputed bills for the duration of a dispute." The relevant laws and tariffs make it clear that Sprint's continued refusal to pay is inappropriate¹³ and that Brandenburg Telephone's Motion to Compel should be granted.

II. Sprint's Admitted Withholding of Undisputed Payments Constitutes an Unlawful Attempt at Self-Help and Is Contrary to Kentucky Law and Brandenburg Telephone's Lawfully Filed and Approved Switched Access Tariffs.

Sprint's attempts to muster authority under the relevant tariffs or regulatory law suffer the same flaw as the rest of its Response: the unfounded and uncorroborated assumption that Sprint has been overbilled. Some of the cited authority may be relevant to the disputed charges, but the sole question at issue in this Motion to Compel is whether Sprint may unilaterally decide it is being overcharged and simply "[stop] paying" its undisputed bills. The relevant authorities answer a resounding "no."

A. Sprint's Withholding of Undisputed Charges Is Contrary to Law.

As explained in Brandenburg Telephone's Motion to Compel, the Sixth Circuit has explicitly held that set-offs "should be discouraged in rate disputes because . . . the equities favor allowing the carrier's rate to control pending decision by the Commission."¹⁴ Sprint never addresses this case in its Response, nor does Sprint dispute its applicability. Rather than respond substantively to this authority, Sprint has gone to great lengths to recharacterize its set-off as an inconsequential "accounting mechanism." It is not "inconsequential" to Brandenburg Telephone because Sprint has

¹³ Sprint points to a 2007 Answer filed by Brandenburg Telephone in a different proceeding in an attempt to demonstrate that its positions on this question have been inconsistent. Sprint misreads the Answer, however. In 2007, Brandenburg Telephone wrote that "BellSouth's damages for the alleged overpayment for ACS traffic may be set off by Bell South's underpayment for ACS traffic to Brandenburg since May, 2004 when BellSouth . . . stopped paying for ACS traffic through the settlement process." (Answer of Brandenburg Telephone, *In the Matter of BellSouth Telecommunications, Inc. v. Brandenburg Tel. Co.*, Case No. 2006-00546 (Jan. 9, 2007).) Sprint reads that as Brandenburg Telephone giving permission – that BellSouth "is allowed to" set-off payments. However, that paragraph was in reference to Brandenburg Telephone's uncertainty of BellSouth's calculation of its alleged damages, and was not written to convey permission but rather to indicate that BellSouth's overpayments "might be" set-off by its underpayments, but we have insufficient information to know. It is therefore inapplicable to this Motion.

¹⁴ *Cincinnati Bell Tel. Co. v. Allnet Comm'n Svcs.*, 17 F.3d 921 (6th Cir. 1993).

refused to pay the substantial monies it owes to Brandenburg Telephone, while continuing to receive Brandenburg Telephone's services for free.

The Kentucky regulatory provision on "Status of Customer Account During Billing Dispute" is similarly clear: "customer accounts shall be considered to be current while the dispute is pending *as long as a customer continues to make undisputed payments and stays current on subsequent bills.*"¹⁵ As we have made clear above, however, there have been undisputed access charges billed, and Sprint has refused to pay them. Sprint's account, therefore, cannot be considered "current" under Kentucky law.

In short, Sprint's claims that it has a "right to withhold" and that its account is current have absolutely no foundation in law. Brandenburg Telephone's Motion to Compel payment of the undisputed access charges should therefore be granted

B. Sprint's Withholding of Undisputed Payments Is Contrary to Brandenburg Telephone's Lawfully Filed and Approved Tariffs.

Also without merit are Sprint's arguments that Brandenburg Telephone's tariffs establish that "during the pendency of the dispute a customer does not have an obligation to pay."¹⁶ Sprint is unable to cite a single section of any of Brandenburg Telephone's tariffs that states this, because no section of any of Brandenburg Telephone's tariffs does so. Instead, Sprint resorts to quoting provisions that govern remedies *after* the final determination of a dispute.

Sprint cites Section I.C.7 of Brandenburg Telephone's General Exchange tariff as supporting the "concept" that there is a recognized "right of a carrier . . . to withhold payment."¹⁷ The Section says no such thing. It merely provides for a full refund of excess charges *once it has been determined that a customer has been overbilled.*¹⁸ Sprint's ensuing argument about the retroactive applicability of the refunds provision is also irrelevant because -- it bears repeating -- there has been

¹⁵ 807 KAR 5:006, Section 11.

¹⁶ Sprint's Response at ¶16.

¹⁷ Sprint's Response at ¶18.

¹⁸ Brandenburg Telephone Company P.S.C. Ky. No. 2, Original Sheet 8, Part I, General Rules and Regulations, C. Obligation and Liability of Telephone Company, 7. Adjustment of Charges, Issued April 12, 1960, Effective March 24, 1961.

no determination that Sprint was ever overbilled. More applicable is section I.E.4 of the tariff which provides that "[t]he subscriber is *required to pay all charges for exchange services . . . in accordance with provisions contained elsewhere in these General Rules and Regulations.*"¹⁹ Noticeably missing from this section and everywhere else in the General Rules is any kind of provision authorizing nonpayment of undisputed charges for the duration of a rate dispute.

Sprint's reliance on the Duo County Tariff fares no better as, once again, the sections provide for remedies following the final disposition of an action. Section 2.4.1 (E) provides for repayment of any overpayment *if the dispute is resolved in favor of the customer*, and calculates interest according to the date the claim was filed.²⁰ The Opposition makes much of the fact that this section indicates a claim may be filed "even once a bill has been paid,"²¹ but this section does nothing but support Brandenburg Telephone's position that the proper course of action would have been for Sprint to pay its bills prior to filing any claim. Moreover, this section once again merely provides for a remedy to the customer once it has been determined to have overpaid.

The final cited tariff section, Duo County Section 2.4.1 (D), applies late charges "to amounts withheld pending settlement of the dispute,"²² which Sprint claims "clearly contemplates" a scenario where a customer withholds payment during a dispute.²³ Sprint then argues that this language provides for the *rightful* withholding of payment during a dispute -- something the provision is entirely silent on. The operation of this section must be understood in context. An earlier provision in the tariff allows a provider to assess a late payment fee "if no payment is received by the [scheduled] payment date or if a payment of *any portion of a payment is received*" late.²⁴ In this context, it becomes clear that Section 2.4.1 (D) merely asserts that payments withheld during a good

¹⁹ Brandenburg Telephone Company P.S.C. Ky. No. 2, Original Sheet 8, Part I, General Rules and Regulations, E. Establishment and Furnishing or Service, 4. Payment for Service, Issued April 12, 1960, Effective March 24, 1961.

²⁰ Duo County Telephone Cooperative Corp., Inc., PSC KY NO. 2A, Original Page 2-32, Section 2.4.1 (E), Issued September 20, 1999, Effective November 1, 1999.

²¹ Sprint's Response at ¶17.

²² Duo County Telephone Cooperative Corp., Inc., PSC KY NO. 2A, Original Page 2-32, Section 2.4.1 (D), Issued September 20, 1999, Effective November 1, 1999.

²³ Sprint's Response at ¶16.

²⁴ Duo County Telephone Cooperative Corp., Inc., PSC KY NO. 2A, Original Page 2-32, Section 2.4.1 (C)(2), Issued September 20, 1999, Effective November 1, 1999.

faith dispute are not excepted from the late fee provisions of the tariff if the dispute is resolved in favor of the provider. Providing for the possibility that a customer would withhold payments during a dispute is simply not the same thing as providing for a right to withhold undisputed payments. Most certainly, the tariff does not permit the withholding of *undisputed* charges.

These tariff sections relied on by Sprint merely provide for the proper calculation of remedies *once the dispute is resolved*. They are therefore inapplicable to the question at issue in Brandenburg Telephone's Motion to Compel.

III. Brandenburg Telephone's Meade County Complaint Is Immaterial to the Resolution of This Motion.

At approximately the same time Brandenburg Telephone filed its Motion to Compel with this Commission, it filed a related Complaint in Meade County court. Contrary to Sprint's assertions, this is not an admission of anything but rather a reflection of Brandenburg Telephone's urgent need for immediate resolution of these undisputed charges. Numerous sources indicate Sprint may be headed for bankruptcy, and Brandenburg Telephone is concerned about being left with significant, uncollectible debt as a result, particularly in this depression. Consequently, Brandenburg Telephone finds it necessary to exercise all possible avenues of relief to ensure the fastest resolution possible. To this end, Brandenburg Telephone respectfully requests the Commission to promptly grant its Motion to Compel, undistracted by Sprint's attempts to confuse the simple question at hand, and order Sprint to pay its undisputed charges.

IV. Brandenburg Telephone's Emergency Filing Was Precipitated By Sprint's Continued Financial Struggles in a Time of Unparalleled Economic Uncertainty.

Brandenburg Telephone and its counsel are fully aware that emergency motions should be submitted only under great need; however, its submission of the present motion at the current time in no way undermines its arguments.

Sprint claims Brandenburg Telephone should have filed this Motion "much earlier in the proceeding,"²⁵ but the timing of this Motion has largely been determined by Sprint's actions.

²⁵ Sprint's Response at ¶4-5.

Brandenburg Telephone has made every effort to resolve the undisputed charges at an earlier time without resorting to moving the Commission for relief. On July 17, 2008, Brandenburg Telephone met with Sprint and Commission staff to discuss Sprint's admitted errors in its statement of the alleged facts surrounding the case, and to discuss a resolution of the undisputed charges. Sprint has been unwilling to relent in its legally baseless set-off argument, and because of this Brandenburg Telephone is forced to choose between asking the Commission for immediate relief or the possibility of failing to ever collect undisputed charges.

Sprint also derides Brandenburg Telephone's economic concerns as "baseless and irrelevant."²⁶ However, it is precisely *because* of these economic concerns that Brandenburg Telephone did not previously file this Motion. As Brandenburg Telephone argued in its Motion to Compel (with significant supporting authority), Sprint has incurred billions of dollars of debt and suffered a significant and steady decline in subscribers and earnings at a time when the economic conditions of this country are in turmoil. *Sprint's own CEO* admitted to the New York Times in February of 2009 that the company has "yet to turn the corner" on its financial problems.²⁷ Numerous investors have grown concerned that Sprint may be broken up or go bankrupt.²⁸ As recently as February 19, 2009, Sprint-Nextel's financial condition has been described in the press as a "nightmare," with a loss of more than 5 million postpaid customers over five quarters, and a year-earlier net loss of \$29.45 billion.²⁹ In the fourth quarter of 2008 alone, Sprint Nextel reported losses of \$1.62 billion and 1.3 million customers.³⁰

As Sprint's financial problems deepened and the nature of the current national depression became increasingly clear, Brandenburg Telephone became increasingly concerned that it may find

²⁶ Sprint's Response at ¶4-5.

²⁷ Jenna Wortham, "For Sprint Nextel, a Drop in Customers and Earnings," NEW YORK TIMES, Feb. 19, 2009, p. B2 (hereafter "NY Times article").

²⁸ See Motion to Compel at 2-3.

²⁹ Jason Ankeny, "Sprint loses 1.62B and 1.3M subs in Q4," FIERCEMOBILECONTENT, Feb. 19, 2009, available at <http://www.fiercemobilecontent.com/story/sprint-loses-1-62b-and-1-3m-subs-q4/2009-02-19>. See also NY Times Article (Sprint "reported a net loss of \$1.6 billion, or 57 cents a share, in the fourth quarter. A year ago, the company lost \$29.3 billion, or \$10.31 a share, which included a \$29 billion write-down of Sprint's 2005 purchase of Nextel").

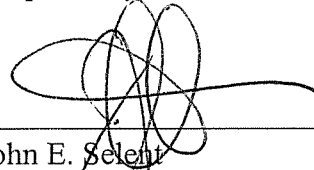
³⁰ *Id.*

itself unable to collect a judgment on this matter. Although this motion may not have been warranted a year ago, circumstances have changed, and Brandenburg Telephone assures the Commission that its filing of the present motion was done with respect for the emergency nature of the relief requested.

Conclusion and Request for Relief.

For the above-stated reasons, Brandenburg Telephone respectfully requests that the Commission order Sprint to immediately pay Brandenburg \$370,976, including late payment fees incurred pursuant to Brandenburg Telephone's filed and approved switched access tariffs.

Respectfully submitted,



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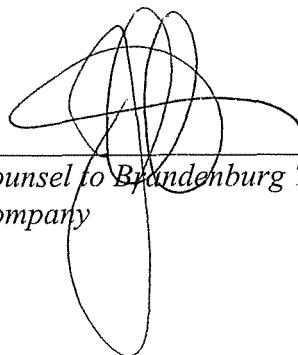
CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing was served on the following,
via first-class U.S. Mail, on this 2nd day of ~~February~~, 2009:



John N. Hughes
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124 West Todd Street
Frankfort, KY 40601

Counsel for Sprint Communications Company L.P.



*Counsel to Brandenburg Telephone
Company*

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