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SEP 09 2009
PUBLIC SERVICE
COMMISSION

September 9, 2009

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 Sprint Communications Company L.P. v. Brandenburg Telephone Company; Case No. 2008-00135*

Dear Mr. Derouen:

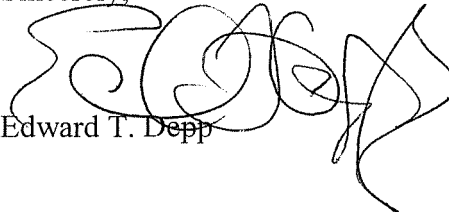
Enclosed for filing in the above-referenced case, please find one original and eleven (11) copies of Brandenburg Telephone Company's:

1. Post-Hearing Brief; and
2. Petition for Confidentiality.

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/lb

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

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SEP 09 2009

PUBLIC SERVICE
COMMISSION

In the Matter of:

COMPLAINT OF SPRINT COMMUNICATIONS)
COMPANY L.P. AGAINST BRANDENBURG)
TELEPHONE COMPANY FOR THE UNLAWFUL) Case No. 2008-00135
IMPOSITION OF ACCESS CHARGES)

BRANDENBURG TELEPHONE COMPANY'S POST-HEARING BRIEF

Brandenburg Telephone Company ("Brandenburg Telephone"), by counsel, hereby submits its post-hearing brief and respectfully requests that the Commission:

- (i) order Sprint to pay all outstanding access charges (currently \$ [REDACTED]);
- (ii) approve Brandenburg Telephone's method for jurisdictionalizing traffic as consistent with its tariffs;
- (iii) order Sprint to timely pay on a prospective basis (consistent with that tariffed method) or risk disconnection for nonpayment (provided Brandenburg Telephone complies with applicable regulations for same); *and*
- (iv) deny Sprint's claims for relief.

I. INTRODUCTION.

Brandenburg Telephone is an independent rural Local Exchange Carrier that terminates access traffic for Sprint, an interexchange carrier. Charges for terminating this traffic are set forth in Brandenburg Telephone's filed and approved tariffs, and the rates charged depend in part on whether the traffic is "interstate" or "intrastate."

Sprint's Complaint alleges that Brandenburg Telephone is overcharging for access traffic because it incorrectly classifies some interstate access traffic as "intrastate," which is subject to a higher rate. In addition to monetary relief, Sprint seeks to have this Commission replace Brandenburg Telephone's entire billing methodology with its own. Brandenburg Telephone's

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methodology, however, is the same that it has used (and the same Sprint has paid under) for many years. More importantly, its methodology is explicitly endorsed by its filed and approved tariffs and it is consistent with longstanding industry practice.

To determine whether call traffic is “interstate” or “intrastate” (a process known as “jurisdictionalization”), Brandenburg Telephone compares the originating and terminating calling party number (“CPN”). Pursuant to this method, a call is classified as “interstate” when the originating CPN and terminating CPN are assigned to different states. Conversely, a call is classified as “intrastate” when the originating CPN and terminating CPN are assigned to the same state.

In November of 2007, Sprint for the first time formally disputed Brandenburg Telephone’s access charges. (Prefiled Direct Testimony of Julie A. Walker on Behalf of Sprint Communications Co., L.P., Ky. P.S.C. Case No. 2008-135, at 21 (filed August 5, 2009) (hereafter “Walker Direct Testimony”).) In the ensuing dispute, Sprint insisted that Brandenburg Telephone abandon its historically-applied jurisdictionalization method and instead defer entirely to Sprint’s own demonstrably false traffic estimates. (*Id.* at 21-25.) Brandenburg Telephone, fully aware that its method was approved by its tariffs and skeptical of Sprint’s methods, refused. (*Id.*)

In response to Brandenburg Telephone’s resistance, Sprint halted all payments for all access traffic services, even those it acknowledges were billed properly. To date, Sprint has withheld \$ [REDACTED] in payments as a set-off in order to financially intimidate Brandenburg Telephone into accepting its preferred methodology. Prefiled Direct Testimony of Allison T. Willoughby on Behalf of Brandenburg Telephone Company, Ky. P.S.C. Case No. 2008-135, at 12 (filed Aug. 5, 2009) (hereafter “Willoughby Direct Testimony”).) In short, Sprint gave Brandenburg Telephone an ultimatum: accept Sprint’s flawed traffic estimates, or Sprint would continue to withhold all payment for access services it was receiving. (*See, e.g.*, Prefiled Rebuttal Testimony of Allison T.

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Willoughby on Behalf of Brandenburg Telephone Company, Ky. P.S.C. Case No. 2008-135, at 3 (filed Aug. 5, 2009) (hereafter “Willoughby Rebuttal Testimony”).)

These tactics of financial intimidation have apparently served Sprint well in the recent past. Although Sprint claims it has addressed similar issues with other LECs, its testimony suggests that Sprint’s relative size and power allowed it to impose its flawed jurisdictionalization methods with impunity.¹ (See Hearing Transcript at 79; Walker Direct Testimony at 6-7.) Much to Sprint’s chagrin, however, Brandenburg Telephone did not respond by accepting Sprint’s methodology without question. (Walker Direct Testimony at 25.) Instead Brandenburg Telephone issued a notice of disconnection, which is the lawful remedy for nonpayment of access charges. See 807 K.A.R. 5:006 § 14(f). In response, Sprint filed the present Complaint and claimed that Brandenburg Telephone was unlawfully imposing access charges. (See, Complaint of Sprint, Ky. P.S.C. No. 2008-135 (filed April 10, 2008).) To this day, Sprint receives access services from Brandenburg Telephone, despite having made not a single payment since February of 2008. (Willoughby Direct Testimony at 3.)

Ultimately, this is a simple dispute, despite Sprint's attempts to confuse this matter with mischaracterizations and allegations of inaccuracy. Brandenburg Telephone’s jurisdictionalization method is approved by its filed and approved tariffs, and both Brandenburg Telephone and Sprint are bound to comply with that method. Brandenburg Telephone asks only that this Commission

¹ After the hearing in this matter, Sprint revealed to the Commission for the first time that it litigated a similar issue before the Texas Public Service Commission. In that case, Commission Staff warned that "to the extent that Sprint has engaged in self-help measures in withholding monies that are lawfully due Sage for the termination of intrastate switched access minutes, Sprint would be in violation of Commission rules." (See Complaint of Sage Telecom Texas, L.P. Against Sprint Communications Co., P.U.C. Texas Docket No. 26112, Commission Staff's Supplemental Response to the Hearing Examiner's Request for an Opinion Statement, at 2 (filed Oct. 11, 2002) (attached to Letter from Philip R. Schenkenberg to Jeff Derouen (Sep. 1, 2009)) (attached as Exhibit A).)

recognize these facts, endorse the method Brandenburg Telephone has used without complaint for years, and order Sprint to pay its bills.

II. STATEMENT OF FACTS.

A. Brandenburg Telephone's Tariffs Explicitly Contemplate Jurisdictionalization by the Use of CPN.

Brandenburg Telephone's provision of switched access services is governed by tariffs that have been filed with and approved by the Kentucky Public Service Commission (the "Commission") and the Federal Communications Commission (the "FCC"). When access traffic is intrastate, it is governed by the Duo County Cooperative Corp., Inc. Tariff, P.S.C. Ky. No. 2A ("Duo County Tariff"); when it is interstate, it is governed by the NECA F.C.C. Tariff Number 5 ("NECA Tariff"). These tariffs are a matter of public record, and they bind both parties to their terms. *See Baraga Tel. Co. v. Am. Cellular Corp.*, Case No. 2:05-CV-242, 2006 U.S. Dist LEXIS 46983, *21 (W.D. Mich. July 12, 2006) ("the filed tariff is the contract between" the parties).

Both tariffs require Brandenburg Telephone to jurisdictionalize access traffic based on actual call detail records whenever possible. The Duo County Tariff requires Brandenburg Telephone to bill "according to actuals by jurisdiction." Duo County Tariff at § 2.3.11 (C)(1). Similarly, the NECA Tariff provides that:

[w]hen [Brandenburg Telephone] receives sufficient call detail to permit it to determine the jurisdiction of some or all originating and terminating access minutes of use, [Brandenburg Telephone] will use that call detail to render bills for those minutes of use and will not use PIU factor(s) . . . to determine the jurisdiction of those minutes of use.

NECA Tariff at § 2.3.11 (C)(1)(b).

Both tariffs also stress the importance of relying on actual call detail records rather than estimates by explicitly forbidding Brandenburg Telephone from relying on any customer-provided

numbers except in the absence of call detail records. *See* Duo County Tariff at § 2.3.11(C)(1) (customer-provided PIU may not be used “where [Brandenburg Telephone] is billing according to actuals by jurisdiction”); NECA Tariff at § 2.3.11(C)(1)(b) (when Brandenburg Telephone jurisdictionalizes by actual call detail records, it “will not use PIU factors ... to determine the jurisdiction of those minutes of use”) (emphasis added.)

Although the tariffs do not set forth a detailed jurisdictionalization process, the Duo County Tariff defines "interstate" as "minutes where the calling number is in one state and the called number is in another state." Duo County Tariff at § 2.3.11 (C)(3). This definition unambiguously contemplates the use of CPN to determine whether access traffic is interstate or not and it is consistent with the FCC's acknowledgement that "[t]elecommunications carriers typically compare the telephone numbers of the calling and called party to determine the geographic end points of a call, which may be relevant for jurisdiction and compensation purposes." *See In the Matter of Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking*, FCC 05-33 (March 3, 2005) (hereafter "Intercarrier Compensation FNPRM").

B. Brandenburg Telephone's Jurisdictionalization Method.

Brandenburg Telephone jurisdictionalizes access traffic by relying on actual detail records. Specifically, it compares the originating and terminating calling party number ("CPN"). Brandenburg Telephone classifies a call as "interstate" when the originating CPN is assigned to one state and the terminating CPN is assigned to a different state. For example, a call from a cell phone assigned a 212 NPA (New York) to Brandenburg, Kentucky's 270 area code would be rated as "interstate." Conversely, this method would rate calls between CPN assigned to the same state as "intrastate." For example, a call from a cell phone assigned an 859 NPA (Covington, Kentucky) to

the 270 area code in Brandenburg, Kentucky would be rated as "intrastate." (*See, e.g.*, Willoughby Rebuttal at 4.)

As Sprint admits in its testimony, “[d]ue to the very nature of wireless calls, it is impossible to accurately determine the exact physical location of every caller placing a call.” (*See, e.g.*, Prefiled Rebuttal Testimony of Julie A. Walker on Behalf of Sprint Communications Co., L.P., Ky. P.S.C. Case No. 2008-135, at 2 (filed August 5, 2009) (hereafter “Walker Rebuttal Testimony”).) Therefore, the use of CPN – like every other possible method for jurisdictionalization – “will result in some small inaccuracies.” (Willoughby Rebuttal Testimony at 5.) For example, if a Sprint wireless customer with a Kentucky phone number goes on vacation to Disney World and calls home, Brandenburg Telephone would likely rate this as an intrastate call based on the matching CPN information. (Willoughby Rebuttal Testimony at 6.) However, if a Sprint wireless customer with a Florida phone number goes on vacation to northern Kentucky and places a call from the Creation Museum to a family member in Brandenburg Telephone’s service area, Brandenburg Telephone would likely rate this as an interstate call. (*Id.*) Thus, while Brandenburg Telephone's methodology is not 100% accurate in determining the location of the caller, the inaccuracies do not favor either intra- or interstate jurisdictions; instead, the inaccuracies tend to cancel themselves out. (*Id.*) In any event, as will be discussed below, the relevant tariffs do not demand 100% accuracy from a LEC’s jurisdictionalization method.

It is equally important that Sprint accepted access charges based on Brandenburg Telephone’s methodology for many years without complaint. Although Sprint claims it noticed discrepancies between its estimates and its bills “[i]n the late 1990's," Sprint never disputed a single bill until November 2007. (Walker Direct Testimony at 7, 21-22.) It is no coincidence that after years of undisputed payments, Sprint has claimed it is overpaying for access traffic only when it is widely

reported to be in financial straits. (*See generally* Emergency Motion to Compel Payment of Access Charges, Ky. P.S.C. Case No. 2008-135 (filed Feb. 2, 2009).)

C. A PIU Is "a Report Showing the Interstate and Intrastate Percentage of Use."

For those rare instances in which there are insufficient call detail records to jurisdictionalize access traffic, Brandenburg Telephone must rely on a customer-provided "Percent Interstate Use" (PIU) estimate. Duo County Tariff at § 2.3.11 (C)(1); NECA Tariff at § 2.3.11 (C)(1)(b). A PIU is defined as a "report showing the interstate and intrastate percentage of use" and as "a projected estimate of [a customer's] traffic, split between the interstate and intrastate jurisdictions." Duo County Tariff at § 2.3.11(C)(1); NECA Tariff at § 2.3.11(C). Pursuant to the Duo County Tariff, a PIU must:

be developed as though every call that enters a customer network at a point within the same state as that in which the called station (as designated by the called station telephone number) is situated is an intrastate communication and every call for which the point of entry is a state other than that where the called station (as designated by the called station telephone number) is situated is an interstate communication.

Duo County Tariff at § 2.3.11 (C)(1). Similarly, the NECA Tariff provides that:

[a customer] shall consider every call that terminates to a called party within the same state as the state where the calling party is located to be intrastate communications. The manner in which a call is routed through the telecommunications network does not affect the jurisdiction of a call, i.e., a call between two points within the same state is an intrastate call even if it is routed through another state.

NECA Tariff at § 2.3.11 (C)(1)(a). These provisions establish that the most fundamental requirement for a PIU is that it be able to distinguish between interstate and intrastate access traffic.

D. Sprint's Proposed Method of Jurisdictionalization.

To replace Brandenburg Telephone's method of jurisdictionalization, Sprint demands that Brandenburg Telephone adopt Sprint's own unilateral and factually-unsupported method and "use

alternate logic to determine the originating point for wireless-originated calls.” (Walker Direct Testimony at 18.) This “alternate logic” would require Brandenburg Telephone to jurisdictionalize based on the Jurisdictional Information Parameter (“JIP”) field, which is populated with the NPA-NXX of the originating wireless switch (this method will hereafter be referred to as “Sprint’s Proposed Method”).² (Sprint’s Supplemental Response to Data Request No. 7; Hearing Transcript at 15-16, 20-21.) However, any credibility that Sprint’s Proposed Method had was eradicated when Sprint’s numerous mischaracterizations were peeled back to reveal that Sprint’s Proposed Method cannot distinguish between interstate and intrastate traffic.

1. Sprint’s Proposed Method Deceptively Inflates the Calculation of Interstate Access Traffic.

Sprint’s Proposed Method is inaccurate and non-authoritative. By relying on it, Sprint systematically misjurisdictionalizes “intrastate” calls as “interstate” calls in a way that favors Sprint 100% of the time.

Sprint’s Proposed Method relies exclusively on the NPA-NXX of the originating wireless switch. And yet, Sprint admits it has no wireless switches in four of five Kentucky MTAs.

Q. Is it correct that Sprint has no CDMA switch or iDEN switch located in the Commonwealth of Kentucky outside of the Louisville MTA? Is that correct?

A. That is correct.

...

Q. . . . Sprint has no wireless switch located in MTA 18 . . . in that part of MTA [sic] which is Kentucky?

² Notably, Sprint has failed to present any witness who can competently testify regarding the Sprint wireless carrier's population of the JIP field. Ms. Walker, for example, is an employee of Sprint Communications, and her "job responsibility is related to IXC access, long-distance access . . . not the wireless entity" who populates the JIP field. (Hearing Transcript at 70:4-21.) Mr. Wood, alternatively, is an economic and financial consultant. (Wood Rebuttal Testimony at 1:10-11.) Neither one, then, has any competent evidence regarding the cornerstone of Sprint's case: the population of the JIP field by the Sprint wireless carrier.

- A. That is correct.
- Q. . . And, MTA 44, there is no Sprint wireless switch in any Kentucky county in MTA 44; is that correct?**
- A. That is correct.
- Q. Okay, and there is no Sprint wireless switch in any Kentucky county in MTA 43; is that correct?**
- A. That is correct.
- Q. And there is no Sprint wireless switch in any Kentucky county in MTA 28; is that correct?**
- A. That's correct.
- Q. Okay. So that the only place that Sprint has a switch or switches in Kentucky would be in the MTA 26 that is the Louisville-Lexington-Evansville MTA?**
- A. That's correct.

(Hearing Transcript at 60-64.) As a result of this network architecture, Sprint's Proposed Method misjurisdictionalizes interMTA intrastate access traffic terminated to Brandenburg Telephone 100% of the time:³

- Q. And so, then, there is no instance, when I, for example, am in MTA 18 and I am placing a Sprint-originated call with a Kentucky NPA-NXX back to another number in Kentucky, that Sprint would classify that as anything other than an interstate call; is that correct?**
- A. It is correct in those few cases.
- Q. And that would be true with respect to MTA 44 and MTA 43; is that correct?**
- A. That is correct.

³ Sprint's Proposed Method misjurisdictionalizes all interMTA, intrastate traffic terminated not just by Brandenburg Telephone, but also by any other LEC located inside the Louisville MTA. Moreover, Sprint's misjurisdictionalization occurs not just when a Sprint caller roams into the Kentucky portions of MTA's 18, 28, 43, and 44 (that is, the Kentucky MTA's other than the Louisville MTA). Sprint's misjurisdictionalization also occurs when a Sprint wireless subscriber lives in places like northern Kentucky or at Murray State University, which are within the Kentucky portions of MTA's 18, 28, 43, and 44.

(Hearing Transcript at 67.) Thus, by Sprint's own admission, its Proposed Method cannot distinguish between interstate and intrastate traffic when a wireless call destined for Brandenburg Telephone originates in four of the five Kentucky MTAs. Given this flaw in its methodology, Sprint has repeatedly mischaracterized critical facts in an effort to mislead Brandenburg Telephone into accepting Sprint's Proposed Method.

2. Sprint Repeatedly Mischaracterized the Authoritativeness of its Proposed Method.

Although Sprint repeatedly claims its Proposed Method is "industry standard," all available evidence refutes this claim. (*See, e.g.*, Walker Direct Testimony at 16; Hearing Transcript at 96.) For its sole documentary support, Sprint cites the "Rules for Populating JIP" set forth in the June 2009 ATIS "Network Interconnection Interoperability (NIIF) Reference Document." *Id. See also*, ATIS-0300011, *NIIF Reference Document, Part III, Installation and Maintenance Responsibilities for SS7 Links and Trunks, Formerly NIIF 5018* (June 2009) (Hearing Exhibit No. 1) (hereafter the "ATIS Document"). Sprint neglected to mention, however, that these rules only relate to the development of standard "SS7 protocol requirements" for populating JIP and make no representation that a specific use of JIP data – such as for jurisdictionalization – is "industry standard." *Id.* at 25. In fact, the document provides that "[t]he concerns regarding the generic usefulness of JIP for billing and other operational procedures remain unresolved." *Id.* The ATIS Document also includes the following disclaimer:

NO REPRESENTATION OR WARRANTY IS MADE THAT THE INFORMATION IS TECHNICALLY ACCURATE OR SUFFICIENT OR CONFORMS TO ANY STATUTE, GOVERNMENTAL RULE OR REGULATION ATIS EXPRESSLY ADVISES THAT ANY AND ALL USE OF OR RELIANCE UPON THE INFORMATION PROVIDED IN THIS DOCUMENT IS AT THE RISK OF THE USER.

Id. at 1. Finally, the ATIS Document warns that its proposed method "does not replace or supersede Tariffs, Contracts or any other legally binding documents." *Id.* at 4 (emphasis added). This is not language that describes an "industry standard." The ATIS Document simply does not say what Sprint claims it says. In fact, it directly contradicts Sprint's claim that the use of JIP is an "industry standard" method of jurisdictionalization.

Sprint has even participated in lobbying efforts that directly contradict its argument that the use of JIP is an industry standard. Sprint Nextel is a member of the Cellular Telephone Industry Association ("CTIA"),⁴ which in December of 2006 filed a comment in the FCC's Unified Intercarrier Compensation Regime inquiry. *See In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comment of CTIA - The Wireless Association (Dec. 7, 2006) (hereafter "the CTIA Comment") (attached as Exhibit B). In that comment, CTIA stated:

CTIA, for example, continues to oppose *mandatory* population of the Jurisdiction Information Parameter (JIP), which is not required under industry standards and often will not identify the jurisdiction of a wireless call.

CTIA Comment at 3, n. 8 (italicized emphasis in original, underlined emphasis added).

Sprint's "industry standard" claim is further undermined by the fact that Sprint itself seems unfamiliar with its Proposed Method. In its original response to Data Request Number Three, Sprint stated it relied on a comparison of originating and terminating LATAs to jurisdictionalize traffic:

[Sprint's Proposed Method] compares the MPS fields Orig. LATA and State to the Term. LATA and State fields. If those two are equal, the call is marked as intrastate. Otherwise the call is classified as interstate.

⁴ See "CTIA Membership," CTIA - The Wireless Association, available at http://www.ctia.org/membership/ctia_members/ (last accessed Sep. 3, 2009) (comprehensive list of "CTIA Member Organizations," including Sprint Nextel Corporation) (attached as Exhibit C).

(Sprint Communications Co., L.P.'s Objections and Responses to Brandenburg Telephone Company's Data Requests, Ky. P.S.C. Case No. 2008-135, Response to Data Request No. 3 (served August 29, 2008) (emphasis added). *See also* Hearing Transcript at 31-33 (Ms. Walker acknowledging this response).)

Such a method would clearly be inaccurate – “LATA” and “state” are not synonymous – and Brandenburg Telephone’s counsel raised its concerns about this method in a letter to Sprint in December of 2008. (*See* Letter from John E. Selent to Joseph P. Cowin (Dec. 30, 2008) (Hearing Exhibit No. 3).) Less than a month later, Sprint amended its response to “clarify” that its Proposed Method only compares “the Orig. State field and Term. State field.” (*See* Letter from John N. Hughes to Jeff R. Derouen (Jan. 26, 2008) (Hearing Exhibit No. 2). *See also* Hearing Transcript at 36 (Ms. Walker testifying that letter was sent in 2009, not 2008).) It makes little sense that a well-established “industry standard” would be so grossly mischaracterized by a major company that relies on it. Nor does it make sense that Sprint would not notice or correct its mischaracterization of such an “industry standard” until Brandenburg Telephone explained the obvious problems with jurisdictionalizing calls on an inter-/intraLATA basis.

3. Sprint Repeatedly Mischaracterized the Accuracy of Its Proposed Method.

Even more significant than Sprint’s mischaracterization of its Proposed Method as an “industry standard” is its gross mischaracterization of the Proposed Method’s accuracy.

In a 2008 letter to the Commission, counsel for Sprint stated that its Proposed Method “can identify the appropriate originating NPA and state, even in cases where it differs from the originating NPA and state of the switch site itself.”⁵ (Letter from John N. Hughes to Stephanie L. Stumbo (Aug.

⁵ When Ms. Walker was asked if “[t]hat sentence reflects that, no matter the NPA-NXX of the

29, 2008.) (Hearing Exhibit No. 4.) Brandenburg Telephone subsequently filed testimony confronting Sprint with empirical data proving that Sprint misjurisdictionalized 100% of calls made from Covington, Kentucky to Brandenburg Telephone's service area. (See Willoughby Direct Testimony at 10.) On the heels of this filing, and mere weeks before the hearing, Sprint sent the Commission a letter indicating that it was providing "additional information and clarification to [its] discovery responses because Sprint has become aware that its original responses were either incomplete or require clarification with regard to wireless-originated traffic." (Letter from John N. Hughes to Jeff Derouen (July 31, 2009) (Hearing Exhibit No. 5).) Counsel to Sprint further stated:

When Sprint originally filed its responses to these data requests on August 29, 2008, the final paragraph on the second page of the cover letter was a response to a letter filed with the Commission on August 14, 2008, by Ms. Holly Wallace. To minimize confusion the Commission disregard [sic] that paragraph and refer instead to the enclosed supplemental response [to Data Request No. 22] and the testimony of Julie Walker, which contain a complete description of the methodology applied to generate PIUs for wireless-originated traffic.

(*Id.*)

In Data Request Number Twenty-Two, Brandenburg Telephone had asked about the routing and jurisdictionalization of not just wireline, but -- given Sprint's allegations in this matter -- also wireless calls. Specifically, it asked:

Is Sprint's network configured in a manner that would permit it to route a wireline or wireless call originating in Kentucky and terminating to an end-user physically located in Kentucky through a switch located outside of Kentucky so that the call would appear to be interstate in nature?

Sprint initially answered:

switch, Sprint can determine the location of the originating wireless caller," she replied "[y]es." (Hearing Transcript at 50-51.) She then testified that Sprint "sent a correction to actually this paragraph as well." (Hearing Transcript at 50-51.)

No, Sprint's nationwide network is interconnected such that calls from/to similar geographic locations can take differing routes across the network to achieve successful call completion. Regardless of the intermediate routing across Sprint's network, the information representing geographic call origination and termination locations (data used to determine jurisdiction) is not changed.

(Hearing Exhibit No. 5 (emphasis added).)

Given Ms. Willoughby's testimony that Sprint's answer cannot be true (because it repeatedly misjurisdictionalized calls from Covington to Brandenburg as interstate), Sprint filed its July 31, 2009 supplement, stating:

To clarify Data Request response #22, for wireless-originated calls only, as detailed in Julie Walker's testimony, cell sites can be connected to switches in other states. The call detail information created when the call is made and transmitted in an SS7 record will identify the location of the switch, not the location of the cell site. In no case does Sprint's long distance network change or strip the call detail information populated by the originating carrier.

(Hearing Exhibit No. 5.)

According to Ms. Walker's testimony, Sprint's initial data request response of "No" -- despite the lack of any qualifying language to reflect this -- was accurate only as to wireline traffic that has never been the subject of great dispute in this matter. (Hearing Transcript at 54.) If that is true, then Sprint grossly mischaracterized its wireless jurisdictionalization method until the eve of the hearing in this matter. Even then, Sprint never explained that its previous statements were 100% inaccurate; it simply tried to mischaracterize its "correction" (Hearing Transcript at 51) as a "clarification" designed to "minimize confusion." (Hearing Exhibit No. 5.)

III. ARGUMENT AND ANALYSIS.

Sprint's claim for unfair imposition of access charges is unsupported by the facts. Brandenburg Telephone's method is explicitly contemplated by its filed and approved tariffs. It is

consistent with Brandenburg Telephone's historical practice. It has long been accepted by Sprint without dispute. Sprint's Proposed Method, in contrast, does not meet the tariffs' basic requirements for a Percent Interstate Use estimate, and it errs in Sprint's favor 100% of the time.

A. Brandenburg Telephone's Jurisdictionalization Method Is Appropriate and Approved.

This matter is ultimately a dispute about tariff interpretation. As explained by Sprint's expert:

this dispute should be decided based on the clear language of the applicable Brandenburg tariffs. Arguments regarding the merits of the two approaches are ultimately irrelevant to the issue before the Commission.

(Wood Direct Testimony at 21.) By this measure, the dispute becomes quite straightforward. Brandenburg Telephone's method is explicitly approved by its tariffs; it is in line with traditional industry practice as described by the FCC, and it has long been accepted by Sprint itself.

1. Brandenburg Telephone's Method Is Explicitly Approved by Its Tariffs.

Brandenburg Telephone's tariffs require it to jurisdictionalize access traffic based on actual call detail records whenever possible. The Duo County Tariff requires Brandenburg Telephone to bill "according to actuals by jurisdiction." Duo County Tariff at § 2.3.11 (C)(1). Similarly, the NECA Tariff provides that:

[w]hen [Brandenburg Telephone] receives sufficient call detail to permit it to determine the jurisdiction of some or all originating and terminating access minutes of use, [Brandenburg Telephone] will use that call detail to render bills for those minutes of use

NECA Tariff at § 2.3.11 (C)(1)(b).

Sprint's expert attempts to argue that "actuals by jurisdiction" does not refer to "actual call detail records" but rather "the '*actual*' location of the calling party." (Wood Direct Testimony at 11 (emphasis in original).) This utterly ignores the FCC's acknowledgement that "[t]elecommunications carriers typically compare the telephone numbers of the calling and called party to determine the

geographic end points of a call, which may be relevant for jurisdiction and compensation purposes." *See* Intercarrier Compensation FNPRM (emphasis added). Even ignoring that traditional acceptance, which will be discussed more in the section below, Sprint's expert's interpretation is untenable. Because, in Sprint's words, "it is impossible to accurately determine the exact physical location of every caller placing a call," Sprint's expert acknowledges that his interpretation would require Brandenburg Telephone to make "a determination [that] cannot be made." (Walker Direct Testimony at 7; Wood Direct Testimony at 14.)

The argument that "actuals by jurisdiction" refers to anything other than "actual call detail records," therefore, would dictate the nonsensical result that any LEC that concurs in the Duo County Tariff is unable to jurisdictionalize and must defer to a customer-provided PIU 100% of the time. This result defies common sense and is contradicted by the terms of the tariffs, both of which stress the importance of relying on a PIU only as a last resort. *See* Duo County Tariff at § 2.3.11(C)(1) (customer-provided PIU may not be used "where [Brandenburg Telephone] is billing according to actuals by jurisdiction"); NECA Tariff at § 2.3.11(C)(1)(b) (when Brandenburg Telephone jurisdictionalizes by actual call detail records, it "will not use PIU factors ... to determine the jurisdiction of those minutes of use.") (emphasis added.)

Pursuant to the terms of these tariffs, Brandenburg Telephone jurisdictionalizes access traffic by comparing the originating and terminating CPN whenever it is available in actual call detail records. Although Brandenburg Telephone has used this method for many years, its continued use of the method is not mere habit. Rather, the use of CPN is expressly contemplated by Brandenburg Telephone's filed and approved tariffs.

The Duo County Tariff defines "interstate" as "minutes where the calling number is in one state and the called number is in another state." Duo County Tariff, at § 2.3.11 (C)(3). In line with

this definition, Brandenburg Telephone classifies a call as "interstate" when the originating CPN is assigned to one state and the terminating CPN is assigned to a different state. For example, a call from a cell phone assigned a 212 NPA (New York) to Brandenburg, Kentucky's 270 area code would be rated as "interstate." Conversely, this method would rate calls between CPN assigned to the same state as "intrastate." For example, a call from a cell phone assigned an 859 NPA (Covington, Kentucky) to the 270 area code in Brandenburg, Kentucky would be rated as "intrastate." (*See, e.g., Willoughby Rebuttal at 4.*)

Brandenburg Telephone therefore bills according to call detail records as required by its filed and approved tariffs, and its use of CPN is explicitly approved by its intrastate tariff. Sprint is a legal party to these tariffs, and it is, thus, bound to their terms. *See Baraga Tel. Co. v. Am. Cellular Corp.*, Case No. 2:05-CV-242, 2006 U.S. Dist LEXIS 46983, *21 (W.D. Mich. July 12, 2006) ("the filed tariff is the contract between" the parties).

2. Brandenburg Telephone's Method Is in Accordance with Traditional Industry Practice.

Even absent the Duo County Tariff's explicit approval for using CPN when it is available in actual call detail records, Brandenburg Telephone's method would still be in accordance with its tariffs. The use of CPN as a proxy for jurisdictionalization purposes has been -- and continues to be -- a traditional and accepted practice in the industry.

Call traffic jurisdiction is, in theory, based on the "parties' locations at the beginning of the call." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C. Rcd. 15499, at ¶ 1043. Sprint acknowledges this basic fact in its Complaint. (Sprint's Complaint at ¶ 13.) Due to the difficulty of accurately identifying every originating and terminating caller's precise location, however,

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determining the jurisdiction of calls has long been understood to be a necessarily imprecise undertaking.

Sprint is therefore wrong to argue that Brandenburg Telephone's jurisdictionalization is just a "guess" because it is based on a proxy. Sprint even acknowledges that "it is impossible to accurately determine the exact physical location of every caller placing a call." (Walker Direct Testimony at 7.) Its argument, then, requires this Commission to determine that Brandenburg Telephone can never "determine the jurisdictionalization of a call originated by a caller on Sprint PCS/Nextel's network and delivered to Brandenburg by Sprint via FGD trunks," and therefore must always rely on a customer-provided PIU. (See Wood Direct Testimony at 14 (emphasis in original).) Such a determination would nullify almost every jurisdictionalization provision in both tariffs.⁶

Moreover, the FCC addressed this exact issue and acknowledged the continued use of CPN to jurisdictionalize:

As noted in the *Intercarrier Compensation FNPRM*, the emergence of wireless and IP-based calling options makes it less likely that a comparison of telephone numbers will provide meaningful information on the geographic end points of a call. Nevertheless, for now carriers continue to rely on telephone numbers as a proxy for geographic location.

See *In the Matter of Regulation of Prepaid Calling Card Services*, 211 F.C.C. Rcd. 7290, 7302 n.89 (June 1, 2006) (emphasis added). Although Sprint's expert testifies that CPN has "never been particularly reliable," this testimony only serves to underscore his own testimony that the "merits of

⁶ The nullification of these provisions would extend well beyond this dispute to affect every LEC that concurs in the Duo County Tariff. In testimony, Ms. Walker even admitted that the issue Sprint presents to this Commission will affect every single LEC in Kentucky that "determine[s] jurisdiction in the same manner as Brandenburg." (Hearing Transcript at 71.) If the testimony of Sprint's expert is taken at face-value, however, this admission extends to every LEC that relies on actual call detail records, which Sprint's expert claims can never be used to determine caller location. (Wood Direct Testimony at 14.) Quite simply, Sprint's complaint is not directed at just Brandenburg Telephone, but rather, "its now years-long campaign" to attack the entire access charge system. (Walker Direct at 7:15-16.)

the two approaches are ultimately irrelevant to the issue before the Commission." (Wood Direct Testimony at 21.) Mr. Wood implies that CPN has been an unacceptable proxy since "the increasing popularity of special access and private line services in the late 1980s and early 1990s . . . and the increasing popularity of foreign exchange or 'FX' services in the early 1990s," yet the FCC acknowledged as recently as 2005 that "[t]elecommunications carriers typically compare the telephone numbers of the calling and called party to determine the geographic end points of a call, which may be relevant for jurisdiction and compensation purposes." (Wood Direct Testimony at 8-9.) *See* Intercarrier Compensation FNPRM (emphasis added). It is therefore well-established that precise identification of caller location is unnecessary (indeed, often impossible) and that the industry's traditional use of CPN as a proxy for jurisdictionalization continues to be accepted practice. *Id.*

Sprint is well aware of the regulatory acceptance of proxies. Even as Sprint decries Brandenburg Telephone's use of a long-accepted proxy, its suggested solution is merely the application of a different proxy. In fact, Sprint's Proposed Method relies on a proxy of a proxy -- it relies on the wireless switch data to approximate the cell site data to approximate caller location. (Walker Direct Testimony at 18; Hearing Transcript at 15-16, 20-21.) Sprint's argument that reliance on proxies is disallowed is therefore disingenuous and simply wrong, particularly when Brandenburg Telephone's proxy is explicitly approved by the relevant tariff. *See* Duo County Tariff § 2.3.11(C)(3) (defining "interstate" as "minutes where the calling number is in one state and the called number is in another state") (emphasis added).)

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3. Sprint Has Previously Approved Brandenburg Telephone's Method and Admits Its Present "Accuracy" Argument Is "Ultimately Irrelevant."

The appropriateness of Brandenburg Telephone's jurisdictionalization method is further supported by Sprint's actions. According to its own testimony, Sprint first noticed discrepancies between its traffic factor estimates and its actual bills "[i]n the late 1990's," yet it took absolutely no action for nearly a decade. (Walker Direct Testimony at 7.) If Sprint had a good faith dispute with Brandenburg Telephone's jurisdictionalization methods, it would have filed this action ten years ago. It did not. Nor did it bring the discrepancies to Brandenburg Telephone's attention and ask for clarification. Nor did it dispute a single bill until November 2007. (Walker Direct Testimony at 7, 21-22.)

Faced with these facts, Sprint ignores its decade-long ratification of the use of CPN, ignores the tariff's explicit approval of the use of CPN, ignores the longstanding industry acceptance of the use of CPN, and instead relies on mischaracterizations and confusion to make its case. To this end, Sprint's primary argument is simply that reliance on CPN is not always accurate -- an argument that even Sprint acknowledges is "ultimately irrelevant." (*See, e.g.*, Walker Testimony at 15; Wood Direct Testimony at 21.)

There is not a single provision in any relevant tariff that demands 100% accuracy. Rather, as explained above, the tariffs require that Brandenburg Telephone jurisdictionalize based on actual call records -- and not customer estimates -- whenever they exist. Duo County Tariff, at § 2.311 (C)(1); NECA Tariff, at § 2.311 (C)(1)(b). Sprint's "inaccuracy" argument is particularly disingenuous given its admission that "it is impossible to accurately determine the exact physical location of every caller placing a call," not to mention the factual inaccuracies of its own Proposed Method. (Walker

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Direct Testimony at 7.) Sprint's own expert disavows the red herring "inaccuracy" argument when he testifies that:

this dispute should be decided based on the clear language of the applicable Brandenburg tariffs. Arguments regarding the merits of the two approaches are ultimately irrelevant to the issue before the Commission.

(Wood Direct Testimony at 21.)

With respect to wireless-originated calls, the FCC has acknowledged that common methods of jurisdictionalization pose industry-wide difficulties. The FCC has responded not by supporting *ad hoc* dispute resolution, as Sprint seeks here, but by issuing several notices of proposed rulemaking related to the development of a unified intercarrier compensation regime that would eliminate many rate disputes. *See* FCC Docket No. 01-92. Until such rules are finalized, the telecommunications industry must do its best to jurisdictionalize in good faith, based on incomplete and occasionally inaccurate information, in accordance with existing filed and approved tariffs.⁷

B. Sprint's Proposed Method is Not a "Percent Interstate Use" as Required by Brandenburg Telephone's Tariffs.

Not only is Sprint's attempt to impose its own self-serving jurisdictionalization standard improper as a matter of law and procedure, it is also undermined by the significant failings of the standard itself.

⁷ This is especially true because, as discussed in Brandenburg Telephone's pleadings, imposition of Sprint's Proposed Method could create significant complications with the non-traffic sensitive revenue ("NTSR") component of Brandenburg Telephone's intrastate access charges. Specifically, the imposition of Sprint's Proposed Method could result in a prospective and retrospective increase in the intrastate charges for every interexchange carrier terminating calls to Brandenburg Telephone's network.

1. Sprint's Proposed Method Is Not a PIU as Required by Brandenburg Telephone's Tariffs.

For those rare instances in which there are insufficient call detail records to jurisdictionalize access traffic, Brandenburg Telephone must rely on a customer-provided "Percent Interstate Use" (PIU) estimate. Duo County Tariff at § 2.3.11 (C)(1); NECA Tariff at § 2.3.11 (C)(1)(b). A PIU is defined as a "report showing the interstate and intrastate percentage of use" and as "a projected estimate of [a customer's] traffic, split between the interstate and intrastate jurisdictions." Duo County Tariff at § 2.3.11(C)(1); NECA Tariff at § 2.3.11(C). The Duo County Tariff requires the customer-provided PIU to:

be developed as though every call that enters a customer network at a point within the same state as that in which the called station (as designated by the called station telephone number) is situated is an intrastate communication and every call for which the point of entry is a state other than that where the called station (as designated by the called station telephone number) is situated is an interstate communication.

Duo County Tariff at § 2.3.11 (C)(1). Similarly, pursuant to the NECA Tariff:

[a customer] shall consider every call that terminates to a called party within the same state as the state where the calling party is located to be intrastate communications. The manner in which a call is routed through the telecommunications network does not affect the jurisdiction of a call, i.e., a call between two points within the same state is an intrastate call even if it is routed through another state.

NECA Tariff at § 2.3.11 (C)(1)(a).

These provisions establish that the most fundamental requirement for a PIU is that it be able to distinguish between interstate and intrastate access traffic. Sprint's own expert agreed in testimony that "[i]n order to calculate a percent interstate usage, Sprint must of course identify which calls are jurisdictionally interstate." (Wood Direct Testimony at 13.) Yet Sprint admits that its Proposed Method misjurisdictionalizes interMTA intrastate access traffic terminated to Brandenburg Telephone 100% of the time. (Hearing Transcript at 67.)

This admission came only on the heels of Sprint's repeated mischaracterizations about the accuracy of its Proposed Method. As a result of this failing, any traffic estimates developed pursuant to Sprint's Proposed Method are not "report[s] showing the interstate and intrastate percentage of use" or "a projected estimate of [a customer's] traffic, split between the interstate and intrastate jurisdictions" and cannot be considered PIUs according to the tariffs. Duo County Tariff at § 2.3.11(C)(1); NECA Tariff at § 2.3.11(C).

First, Sprint was forced to admit that with respect to wireless-originated traffic its network is "configured in a manner that would permit it to route a . . . call originating in Kentucky and terminating to an end-user physically located in Kentucky through a switch located outside of Kentucky so that the call would appear to be interstate in nature." (*See* Sprint's Amended Response to Data Request No. 22 (Hearing Exhibit No. 5).) Second, Sprint was forced to admit it has no wireless switches in four of five Kentucky MTAs, yet still relies exclusively on the NPA-NXX of the originating wireless switch to jurisdictionalize traffic. (Sprint's Supplemental Response to Data Request No. 7; Hearing Transcript at 15-16, 20-21.)

Q. Okay. So that the only place that Sprint has a switch or switches in Kentucky would be in the MTA 26 that is the Louisville-Lexington-Evansville MTA?

A. That's correct.

(Hearing Transcript at 60-64.) As a result of this network architecture, Sprint's Proposed Method misjurisdictionalizes interMTA intrastate access traffic terminated to Brandenburg Telephone 100% of the time:⁸

Q. And so, then, there is no instance, when I, for example, am in MTA 18 and I am placing a Sprint-originated call with

⁸ As a result, Sprint's Proposed Method misjurisdictionalizes all interMTA, intrastate traffic terminated not just by Brandenburg Telephone, but by any other LEC located inside the Louisville MTA.

a Kentucky NPA-NXX back to another number in Kentucky, that Sprint would classify that as anything other than an interstate call; is that correct?

A. It is correct in those few cases.

Q. And that would be true with respect to MTA 44 and MTA 43; is that correct?

A. That is correct.

(Hearing Transcript at 67.)

Sprint's admission demonstrates that its Proposed Method cannot distinguish between interstate and intrastate traffic for wireless-originated calls from four of five Kentucky MTAs. Therefore, traffic estimates developed pursuant to Sprint's Proposed Method are not "report[s] showing the interstate and intrastate percentage of use" or "a projected estimate of [a customer's] traffic, split between the interstate and intrastate jurisdictions" and cannot be considered PIUs within the meaning given to that term in the applicable tariff(s). Duo County Tariff at § 2.3.11(C)(1); NECA Tariff at § 2.3.11(C). Brandenburg Telephone therefore has no obligation under its tariffs to ever defer to Sprint's traffic estimates.

2. Sprint's Proposed Method Has No Authoritative Support.

In an attempt to overcome the fatal flaws of its Proposed Method, Sprint repeatedly mischaracterizes its Proposed Method (and the use of JIP specifically) as an "industry standard." (*See, e.g.*, Walker Direct Testimony at 16; Hearing Transcript at 96.) However, the very document it cites for support disagrees. The ATIS document warns readers that "[t]he concerns regarding the generic usefulness of JIP for billing and other operational procedures remain unresolved." ATIS Document at 25. The same document warns that its proposed methods relate only to developing protocols for populating the JIP field and not any particular use of that data. *Id.* Finally, the ATIS Document warns that its proposed methods may not "[conform] to any statute, governmental rule or

regulation" and "does not replace or supersede Tariffs, Contracts or any other legally binding documents." ATIS Document at 1, 4 (emphasis added). Sprint Nextel is a member of an industry group that stated, in a Comment filed with the FCC, that it opposes "*mandatory* population of the Jurisdiction Information Parameter (JIP), which is not required under industry standards and often will not identify the jurisdiction of a wireless call." CTIA Comment, Ex. B, at 3, n. 8 (italic emphasis in original; underline emphasis added).

Sprint's attempt to characterize its Proposed Method as more authoritative under the law is similarly wrong. Sprint's expert suggests that the FCC has mandated relying on "the initial cell site when a call begins," but omits the FCC's language clarifying that this method is one of "administrative convenience." (Wood Direct Testimony at 7 (quoting FCC 96-325, ¶ 1044).) The FCC does not state that cell site location is identical to caller location, as Sprint's expert claims, but rather that the cell site location could be an acceptable proxy for caller location. Because Brandenburg Telephone already relies on an explicitly-approved and tariffed proxy, the presence or absence of other acceptable proxies is immaterial.

Moreover, although Sprint attempts to cloak its Proposed Method with FCC authority, Sprint itself does not even rely on the initial cell site proxy because it is not "convenient." (Wood Direct Testimony at 23.) Instead, it relies on the originating wireless switch as a proxy for the initial cell site, which is yet another proxy for caller location. (Walker Direct Testimony at 18; Hearing Transcript at 15-16, 20-21.) Not only is the wireless switch never mentioned in the FCC language Sprint cites as authority, but both Sprint's witnesses admit it is less accurate than reliance on the initial cell site location. Sprint's expert testified that it "is not always the case" that the wireless switch location reflects the cell site location. (Wood Direct Testimony at 23.) Even worse, Sprint admits it does not even have wireless switches in four of the five Kentucky MTAs. (Hearing

Transcript at 60-64.) Consequently, its method is always wrong where a Kentucky-located Sprint caller anywhere in MTA's 18, 28, 43, or 44 places a call to a Brandenburg Telephone end-user. (Hearing Transcript at 67.) In short, Sprint's "proxy for a proxy" is imbued with neither the industry nor legal authority that Sprint claims.

3. Even if Sprint's Proposed Method Was Deemed to Be a PIU, Brandenburg Telephone Is Not Obligated to Defer to It.

Sprint's Proposed Method is not a "PIU" sufficient to meet the requirements of Brandenburg Telephone's tariffs. However, even if it was found to be a PIU, it could be applied only as a last resort when Brandenburg Telephone does not have actual call detail records. As established above, however, Brandenburg Telephone relies on actual call detail records. It is therefore not obligated to defer to Sprint's Proposed Method, whether or not it is determined to be a PIU.

Brandenburg Telephone is obligated by its lawfully filed and approved tariffs to jurisdictionalize according to call detail wherever possible. Brandenburg Telephone's intrastate tariff does not allow use of PIU factors when Brandenburg Telephone is able to bill "according to actuals by jurisdiction." Duo County Tariff at § 2.3.11 (C)(1). Similarly, where Brandenburg Telephone has "sufficient call detail" to jurisdictionalize, its interstate tariff provides that Brandenburg Telephone "will not use PIU factors" to jurisdictionalize. NECA Tariff at § 2.3.11 (C)(1)(b).

As established above, Brandenburg Telephone jurisdictionalizes access traffic whenever it has sufficient call detail records to apply the well-established CPN proxy discussed above. (*See, e.g.*, Willoughby Rebuttal Testimony at 4.) Sprint has recognized Brandenburg Telephone's use of this proxy, but claims without basis that Brandenburg Telephone must ignore the call detail it has and instead defer to Sprint's flawed Proposed Method for all access traffic. (*See, e.g.*, Complaint at ¶ 22

("Sprint requests that Commission [sic] find that Brandenburg is required to accept Sprint's PIU factor".)

Brandenburg Telephone's tariffs include no provision for deferring to a customer-provided PIU for all access traffic. Sprint's Proposed Method, if found to be a PIU, could be deferred to only when Brandenburg Telephone does not have actual call detail records by which to jurisdictionalize certain traffic. Duo County Tariff at § 2.3.11 (C)(1); NECA Tariff at § 2.3.11 (C)(1)(b). Therefore, because Brandenburg Telephone has properly used CPN to jurisdictionalize the call traffic at issue, it is not obligated to defer to Sprint's Proposed Method.⁹

C. Sprint Has Consistently Violated the Law and the Rules of This Commission.

Throughout this proceeding, Sprint has made many misrepresentations about the acceptability of CPN as a proxy, the use of proxies generally, the alleged industry standard status of its Proposed Method, and the alleged accuracy of its Proposed Method. These mischaracterizations are problematic enough on their own, but seen in light of Sprint's wider conduct in these proceedings

⁹ Sprint argues that Brandenburg Telephone has only two proper remedies for Sprint's nonpayment: (i) call and explain its concerns with Sprint, and then (ii) "[i]n the event that we still couldn't agree . . . then I think the next step would be if they wanted a formal audit." (Hearing Transcript at 96.) What Sprint again fails to recognize is that, pursuant to its tariffs, Brandenburg Telephone is properly jurisdictionalizing traffic according to actual call detail records and is under no obligation to defer to Sprint's Proposed Method. It therefore would have no reason to invoke the formal audit process.

Sprint is, in effect, claiming that Brandenburg Telephone's sole remedies for non-payment of a tariffed rate are: (i) settlement; or (ii) a costly audit of an irrelevant jurisdictionalization method (essentially, an audit of Sprint's own manner of billing). In fact, the Kentucky Administrative Regulations clearly set forth disconnection as the appropriate and lawful remedy for nonpayment. 807 K.A.R. 5:006 § 14(f). A PIU audit is not itself a remedy, in any event. It is a formal process for obtaining information in order to find a remedy. Even if Brandenburg Telephone had initiated the formal audit process as Sprint now demands, the parties would be in precisely the same position they are in today: Sprint disagreeing that Brandenburg may jurisdictionalize traffic on the basis of whether that traffic involved "minutes where the calling number is in one state and the called number is in another state." Duo County Tariff, at § 2.3.11 (C)(3) (emphasis added).

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they strongly suggest that Sprint's primary motive has been to force Brandenburg Telephone into an unfavorable settlement (as Sprint suggests it has done with LECs across the country).

Sprint has withheld (and continues to withhold) payment for access charges it eventually admitted were undisputed. Pursuant to 807 KAR 5:006 § 11, a customer account is only current during a billing dispute "as long as a customer continues to make undisputed payments and stays current on subsequent bills." Brandenburg Telephone had every right to collect these undisputed payments during the pendency of these proceedings, but its efforts were blocked by Sprint's mischaracterization of material facts. When Brandenburg Telephone filed its Emergency Motion to Compel Payment before this Commission, Sprint raised two primary arguments: (1) no charges were undisputed,¹⁰ and (2) amounts that would otherwise be due to Brandenburg Telephone were being withheld as a set-off. The first of these arguments was false. The second is unlawful.

In its February 12, 2009 filing with this Commission, Sprint stated that it "already has paid all undisputed amounts." (Response of Sprint Communications Company L.P. to Emergency Motion to Compel Payment of Access Charges, at 1 (filed Feb. 12, 2009) (hereafter "Sprint's Response").) In testimony filed just days before the hearing, Sprint's witness testified:

To be quite clear, Sprint is not withholding any payments from Brandenburg for valid access charges. All monies withheld to date result from formal billing disputes calculated on Brandenburg's access charges, and presented to Brandenburg in detail.

¹⁰ Incredibly, Sprint also misinformed the United States District Court for the Western District of Kentucky (in *Brandenburg Telephone Company v. Sprint Communications Co., L.P.*, Case No. 3:09-CV-109-R) that "Sprint's filings in the case before the PSC could not be clearer -- Sprint initially alleged that Brandenburg had assessed over \$ [REDACTED] in unlawful charges, and Sprint is now withholding disputed amounts as specifically allowed by the applicable intrastate tariff and Kentucky law." (Sprint's April 1, 2009 Reply Memorandum in Support of Motion to Dismiss at 1 (emphasis in original).) That action related solely to Brandenburg Telephone's attempt to compel payment of the undisputed charges, and -- as we now know -- Sprint's own witness clearly testified that Sprint has, in fact, been withholding undisputed charges, as well as disputed charges. To this date, Sprint has yet to correct its misstatement to the federal court.

(Walker Rebuttal Testimony at 20.) Yet, when questioned by the Commission during the hearing in this matter, that same witness admitted that no payments were being made and that some charges were undisputed:

Q: Are they -- and, right now, are there any monies at all going back and forth with respect to the Sprint IXC calls and Brandenburg?

A: At this time, no.

Q: And there -- so that would include clear intrastate calls as well?

A: Yes.

* * *

Q: Okay. Is there some block of calls, both intrastate and interstate, that truly are not in dispute between the two companies?

A: Yes, absolutely.

Q: So there's just a small . . .

A: Yes.

Q: . . . amount that is in dispute as to whether it's intra- or interstate?

A: Correct. Each month there's just an amount of the monthly billing that's disputed, not of the entirety.

* * *

Q: You stated there are some uncontested calls . . .

A: Yes.

Q: . . . in terms of jurisdiction, and we're talking about wireless calls that go over the IXC?

A: Yes.

Q: Could you describe what's not contested? . . .

A: . . . There would be some calls that are wireless originated that we would not be disputing.

Sprint's defense that "no charges were undisputed" was therefore knowingly untrue, and ultimately contradicted by the testimony of its own witness.

Sprint's proposed second defense -- that payments were being withheld as a set-off -- is a direct violation of the law. A "setoff" is "[a] debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor." (BLACK'S LAW DICTIONARY, 8th Ed., p. 1404.) Pursuant to the filed rate doctrine and Sixth Circuit precedent, it is not lawful to set-off undisputed amounts owed pursuant to a telecommunications provider's filed and approved tariff. See *Cincinnati Bell Tel. Co. v. Allnet Comm. Services*, 17 F.3d 921, 924-25 (6th Cir. 1993) (in filed tariff context, setoffs are inappropriate; instead, "the filed rate should be paid first and then relief from an unreasonable rate sought as a separate claim"). Knowing this, Sprint mischaracterized its set-off as an inconsequential "accounting mechanism." However, its testimony in the hearing establishes that it was setting-off payments:

Q: What you're describing there is a setoff; is that correct?

...

A: Because of the amounts of money that Sprint overpaid in access to Brandenburg . . . Sprint's accounts payable to Brandenburg have effectively turned into an accounts receivable from Brandenburg; therefore, the monthly approved credits accumulate on Brandenburg's liability to Sprint until such time as the overpaid access is recovered against subsequent billing months.

* * *

Q: Okay, and therefore no wireless calls are being paid for at this time?

A: Correct. Any incorrectly billed access is not being paid.

Q: Well, are correctly billed access being paid now?

A: Correctly billed access is being approved, but, because of the retroactive disputes for the time periods where intrastate access was largely overpaid, those monies are being used to credit the liability back to Sprint.

(Hearing Transcript at 68, 97-99.)

Such conduct and misrepresentation of material facts strongly suggests that Sprint was well aware its legal grounds were lacking, and supports Brandenburg Telephone's concerns that Sprint's primary motivation for withholding payment for all access charges was to financially intimidate Brandenburg Telephone into accepting Sprint's Proposed Method without question. That conduct should not be tolerated.

IV. CONCLUSION.

This dispute is ultimately about Sprint's dissatisfaction with Brandenburg Telephone's filed and approved tariffs. Although Brandenburg Telephone's method is explicitly approved by tariff and Sprint's own expert states that this is the controlling question, Sprint expends the vast majority of its efforts trying to convince this Commission that there are better ways to jurisdictionalize than those contemplated by the tariffs. For Sprint, of course, the "better way" saves Sprint (and costs Brandenburg Telephone) hundreds of thousands of dollars in access charges per year.

Although Sprint has apparently succeeded in strong-arming other LECs by withholding undisputed access charge payments and mischaracterizing the fallibility of its "alternate logic," it has no legal basis for its claim. Sprint's constant mischaracterization of the alleged accuracy and authority of its Proposed Method suggest it knows its legal position is untenable.

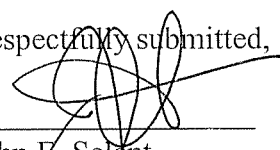
The simple facts are that Brandenburg Telephone's method of jurisdictionalization is explicitly approved by tariff and consistent with approved practice, whereas Sprint's suggested replacement (or, "alternate logic") is fatally flawed due to Sprint's intentional routing of intrastate calls to out-of-state switches.

For all of the foregoing reasons, Brandenburg Telephone respectfully requests that the Commission:

- (i) order Sprint to pay all outstanding access charges (currently \$ [REDACTED]);

- (ii) approve Brandenburg Telephone's method for jurisdictionalizing traffic as consistent with its tariffs;
- (iii) order Sprint to timely pay on a prospective basis (consistent with that tariffed method) or risk disconnection for nonpayment (provided Brandenburg Telephone complies with applicable regulations for same); *and*
- (iv) deny Sprint's claims for relief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

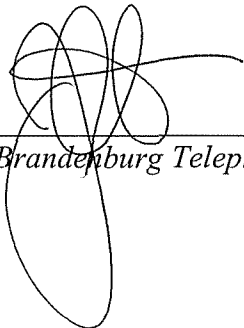
I hereby certify a true and accurate copy of the foregoing was served on the following by first-class U.S. Mail, on this 9th day of September, 2009.

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**PUBLIC SERVICE
COMMISSION**

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

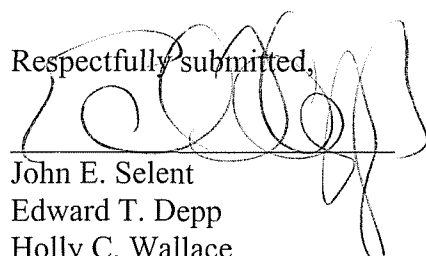
**COMPLAINT OF SPRINT COMMUNICATIONS)
COMPANY L.P. AGAINST BRANDENBURG)
TELEPHONE COMPANY FOR THE UNLAWFUL) Case No. 2008-00135
IMPOSITION OF ACCESS CHARGES)**

PETITION FOR CONFIDENTIALITY

Petitioner Brandenburg Telephone Company ("Brandenburg Telephone"), by counsel, and pursuant to 807 KAR 5:001, Section 7, hereby petitions the Public Service Commission of the Commonwealth of Kentucky (the "Commission") to accord confidential treatment to certain highlighted information contained in the post-hearing brief of Brandenburg Telephone. This same information was contained in the July 21, 2009 Prefiled Direct Testimony of Allison T. Willoughby on behalf of Brandenburg Telephone Company (the "Testimony"). The Commission approved the petition for confidential treatment of this information at the Hearing held on August 11, 2009.

WHEREFORE, pursuant to 807 KAR 5:001, Section 7, Brandenburg Telephone requests the highlighted material contained in its post-hearing brief be afforded confidential treatment pursuant to the rules and regulations of the Commission.

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 by

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