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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000534-MR

SPRINT COMMUNICATIONS COMPANY, L.P. APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE PHILLIP SHEPHERD, JUDGE
ACTION NO. 10-CI-00019

BRANDENBURG TELEPHONE COMPANY
AND PUBLIC SERVICE COMMISSION OF
KENTUCKY APPELLEES

AND NO. 2017-CA-000555-MR

PUBLIC SERVICE COMMISSION OF
KENTUCKY APPELLANT

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ACTION NO. 10-CI-00019

BRANDENBURG TELEPHONE COMPANY AND
SPRINT COMMUNICATIONS COMPANY, L.P. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

ACREE, JUDGE: These parties are before this Court for a second time, and they are aligned in this second appeal just as they were in the first. *See Public Serv. Comm'n of Kentucky v. Brandenburg Tel. Co., et al.*, No. 2013-CA-001625-MR, 2015 WL 1880787 (Ky. App. April 24, 2015) (hereafter *Brandenburg I*). The case originated as an administrative action in the Public Service Commission of Kentucky (PSC). Specifically, it involves the PSC's application of law to existing tariff agreements between carriers—Sprint Communications Company, LP, and Brandenburg Telephone Company. Generally speaking, the PSC entered an order on November 6, 2009, favorable to Sprint and unfavorable to Brandenburg. Prior to the first appeal to this Court, the Franklin Circuit Court reversed that decision.

In the first appeal, this Court addressed three issues. First, this Court could not determine whether the circuit court applied the proper deferential standard and reversed and remanded the case with instructions to apply the

standard of review set forth in KRS[1] 278.410(1) authorizing reversal only when an agency order is unlawful or unreasonable.[2]

Second, the Court reversed the circuit court's order to the extent it reversed the PSC's prospective application of its interpretation of the tariff because "[n]o finding was made that the PSC's interpretation of the tariff was unlawful or unreasonable when applied prospectively, nor would either determination have been supported by the record." *Brandenburg I*, at *8. Because this Court, in the first instance, had remanded the case to apply the correct standard of review, it neither affirmed nor reversed the circuit court's order reversing the PSC's retroactive application of its November 6, 2009 order.

Third, the Court reversed the circuit court's *sua sponte* order that the PSC "update 'the applicable tariffs to reflect the changing reality of electronic communications.' " *Id.* This Court found "no authority supporting [the circuit court's] decision to impose this affirmative duty upon the PSC where none had previously existed . . . . [T]he PSC is a creature of statute and only has those duties

[1] Kentucky Revised Statutes.

[2] Judge Maze dissented regarding remand. He believed the record was "sufficiently clear to allow this Court to determine [the circuit court's] basis and holding . . . [and] conclude[d] that it clearly erred in finding that the PSC's interpretation of the tariff was unreasonable, at least when applied prospectively. . . . I would reverse the circuit court's decision insofar as it sets aside the PSC's interpretation of the tariff . . . ." *Brandenburg I*, at *9, *11 (Maze, J., dissenting).

and responsibilities imposed by the General Assembly . . . [and t]hey simply cannot be enlarged nor restricted by judicial fiat." *Id.*

Upon remand, the same administrative record was under review. For that reason, and for the sake of consistency and judicial economy, much of the next several and numerous paragraphs describing that record are taken directly from this Court's previous opinion in this case.

Sprint is an Interexchange Carrier ("IXC") that carries wireless telephone traffic for Sprint PCS and Nextel, two Commercial Mobile Radio Service Providers ("CMRS Providers").[3] Wireless calls placed by the CMRS Providers' customers are carried over the long-distance network owned and operated by Sprint. Calls made by Sprint's customers to customers of other service providers must be "handed off" to another carrier before reaching their final destination or termination point – the called party.

Brandenburg is a Local Exchange Carrier ("LEC") that provides switched access telephone service and "terminates" or delivers access traffic for Sprint. An IXC – such as Sprint – is obligated to pay fees to compensate a LEC for use of necessary local facilities in delivering a call to the recipient. These

[3] Although Sprint carries both wireless and wireline (also known as "landline") traffic, these appeals pertain exclusively to wireless calls because cellular phones are, by their very nature, mobile and allow their users to initiate and receive telephone calls from around the world, unlike wireline phones whose location is by necessity static.

charges, known as "switched access charges," are contained within and governed by state and federal access tariffs.[4] Calls originating and terminating in different states are regulated by the Federal Communications Commission ("FCC") and are billed under the federal tariff. Purely intrastate calls are regulated by the PSC and are billed under the state tariff. Traditionally, interstate rates were much lower than intrastate rates.[5] The issue in this case is not whether Sprint must pay Brandenburg for its services, but rather, is centered on how much should be paid.

Brandenburg has traditionally determined the jurisdiction – *i.e.*, the interstate or intrastate nature – of Sprint's access traffic by comparing the calling party number ("CPN") and the called number. It has done so based on its understanding of the language of the tariff it wrote, which defines "interstate access minutes" as "the access minutes where the calling number is in one state and the called number is in another state." *Brandenburg I*, *2. It is undisputed that

[4] In general terms, and as applied in the instant appeals, a tariff is a document setting forth the rates a utility will charge its customers in exchange for services. Tariffs are prepared by each individual utility although, on occasion, multiple utilities may adopt the same or substantially similar tariffs. After an administrative review and approval process, tariffs are filed with the PSC. The rates listed in a tariff are charged to all customers and may only be changed upon petition and approval by the PSC. Thus, entities using a utility's services have no bargaining power to negotiate different rates from those listed in the applicable tariff.

[5] Federal guidance issued after the trial court rendered its initial decision in this matter eliminated this disparity. *See In re Connect Am. Fund, et al*., 26 F.C.C. Rcd 17663, 17677 (F.C.C. Nov. 18, 2011) (requiring carriers to bring intrastate and interstate termination rates into parity by July 2013). Thus, this case has no prospective application after July 2013. This makes moot the PSC's concern, expressed in one of its arguments on appeal, that the effect of the circuit court's order is to "award[] the PSC jurisdiction over interstate calls – calls that are exclusively within the province of the federal government."

in the era of modern wireless mobile telephony, a caller from Kentucky may initiate a phone call from nearly any point on the planet. Consequently, the CPN does not always accurately reflect whether a specific phone call is interstate or intrastate.

In 2007, Sprint requested Brandenburg cease using the CPN to "jurisdictionalize" Sprint's access traffic. Sprint believed the CPN was an ineffective way to identify the location of wireless callers, resulting in improper billing of interstate calls under the higher intrastate rate.[6] Instead of utilizing the CPN, Sprint asked Brandenburg to use an estimated calculation – known as a Percent of Interstate Use ("PIU") – as called for under the appropriate tariff[7] to allocate charges as interstate or intrastate for billing purposes. Sprint admitted this method was not always accurate but contended the margin of error was significantly less than using the CPN to determine the caller's geographic location.

[6] Sprint alleged Brandenburg incorrectly rated interstate calls as intrastate calls approximately 87% of the time.

[7] Specifically regarding the use of the PIU, Brandenburg's tariff acknowledges the jurisdictional nature of calls cannot always be determined and states:

> [w]hen originating call details are insufficient to determine the jurisdiction for the call, the [IXC] shall supply the projected interstate percentage or authorize the Telephone Company to use the Telephone Company developed percentage. This percentage shall be used by the Telephone Company as the projected interstate percentage for originating and terminating access minutes.

Brandenburg insisted its reliance on the CPN to jurisdictionalize calls was proper and complied with the plain language of its tariff regarding the rating of interstate and intrastate calls. Brandenburg maintained the CPN contained "sufficient call detail" to determine the jurisdiction of a call and, therefore, resort to the PIU was not required. Further, Brandenburg contended the tariff does not require a determination of the geographic location of the calling number – indeed, such information is not even mentioned in the provision regarding interstate originating access minute charges but is mentioned in other provisions of the tariff dealing with different matters. Based on its understanding of the tariff language, Brandenburg refused to comply with Sprint's request to cease using the CPN for rating purposes.[8]

By February of 2008, Sprint began withholding payments for access traffic. Brandenburg informed Sprint that if payment of the past due amounts was not forthcoming, it would cease terminating Sprint's switched access traffic. Shortly thereafter, in April of 2008, Sprint filed a complaint with the PSC alleging Brandenburg had misapplied its tariff and wrongfully billed certain wireless calls at the higher intrastate rate.

[8] It appears from the record that Brandenburg's billing practices result in wireless calls from handsets assigned a Kentucky-based telephone number always being billed at intrastate rates—regardless of the initiating caller's physical location.

Sprint requested an order from the PSC requiring Brandenburg to accept Sprint's PIU and utilize it for all wireless traffic terminated across Brandenburg's access facilities. In addition, Sprint sought a refund of all amounts it alleged had been improperly billed between March 1, 2006, and April 10, 2008. Brandenburg answered and filed a counterclaim demanding payment for amounts Sprint had withheld during the fee dispute. A lengthy period of thorough discovery ensued. On July 22, 2009, approximately three weeks prior to a scheduled final hearing, Sprint amended its initial complaint to assert it had discovered Brandenburg's overbilling began in January 2002 and requested the refund period be extended back in time to include the period of January 1, 2002 through June of 2009. Over Brandenburg's objection, the PSC permitted the amendment without comment at the formal hearing conducted on August 11, 2009.

On November 6, 2009, the PSC entered an order finding in favor of Sprint after concluding the CPN does not determine the jurisdiction of a call. After setting forth the various positions and arguments of the parties, the PSC found:

> [b]ased on the foregoing, the Commission finds that Brandenburg's reliance on only the CPN to assign the jurisdiction of a wireless call unreasonably allocates substantial amounts of interstate traffic to the intrastate jurisdiction, resulting in the application of access charges that are not in compliance with Section 2.3.11(C) of Brandenburg's tariff. Brandenburg admits that the use of the CPN is not always reliable, yet it makes an unsubstantiated claim that, because the use of the CPN may result in rating an intrastate call as an interstate call,

> the errors cancel each other out. The Commission is not convinced that Brandenburg's reliance on the CPN to determine the jurisdiction of wireless calls is more objective or accurate than the methodology applied by Sprint. More importantly, Brandenburg's usage of the CPN directly conflicts with the provision of its tariff that defines an interstate call as one "where the calling number is in one state and the called number is in another state." The language clearly contemplates that the geographic location where the wireless call is made determines the jurisdiction of the call.
>
> . . . .
>
> [W]e agree with Sprint. Brandenburg's tariff requires it to consider the geographic location of a wireless call, not the calling party's number in order to determine the jurisdiction of a wireless call. We also conclude the use of Sprint's [Jurisdictional Information Parameter ("JIP")] field and PIU is the most accurate method by which to assign the jurisdiction of a wireless call.

(Internal footnotes omitted).

Brandenburg timely sought review of the PSC's decision in Franklin Circuit Court. As noted above, the first appeal to this Court resulted in a remand of the circuit court decision. After remand, one issue persists – whether the PSC's order interpreting the language of the Brandenburg tariff was improper to the extent it affected the tariff rate prior to the entry of the November 6, 2009 order. To fully consider that issue, we apply additional hindsight to the circuit court's original decision and this Court's instructions on remand.

In its order reversing the PSC's decision, the circuit court held "that while the PSC has authority to prospectively adopt new standards or regulations to address new concerns or factual situations – such as advances in technology – the PSC had, in this case, engaged in retroactive rulemaking, a practice condemned in KRS 446.080(3)." *Brandenburg I*, at *3. The PSC argued it had "simply applied the existing law to the unique facts presented, but it had not attempted to change the law as the trial court had concluded." *Id.* at *4. The agency disagreed with the circuit court's "conclusion that it had engaged in retroactive rulemaking, positing instead that it was exercising proper and exclusive jurisdiction over the rates and conditions of utilities as provided for in KRS Chapter 278, and it was simply reviewing Brandenburg's practices in light of the factual situation presented." *Id.*

Reviewing the first appeal, this Court noted "the trial court's order on this matter is internally inconsistent." We pointed out that, after labeling the agency action "retroactive rulemaking," the circuit court:

> acknowledged the PSC's inherent ability to interpret tariffs and provide prospective guidance and relief. In spite of this explicit acknowledgment, the trial court reversed the PSC's decision *in toto*, including any provision for prospective relief . . . . No finding was made that the PSC's interpretation of the tariff was unlawful or unreasonable when applied prospectively, nor would either determination have been supported by the record. It is undisputed the PSC has jurisdiction to regulate all utilities within the Commonwealth, KRS 278.040, along with the authority – either upon complaint or on its own motion – to investigate, proscribe and

> enforce rates and services of such utilities. KRS 278.260-280.

Brandenburg I, at *8. Perhaps this Court's opinion remanding could have been more explicit. However, it goes further than simply implying disagreement with the circuit court; it agrees with the PSC that this was not rulemaking, retroactive or otherwise. The action taken by the PSC was lawful rate adjustment conducted pursuant to the statutes cited in the first opinion—KRS 278.260-.280.

When this Court remanded the case, it instructed the circuit court to apply the correct standard of review to the PSC's application of these governing statutes in making that rate adjustment. This was the circuit court's opportunity to do what it had not done in its earlier orders – identify legal authority that the PSC's application of Sprint's methodology for interpreting the Brandenburg tariff so as to adjust the tariff rate retroactively was unreasonable or unlawful.

On remand, the circuit court said, "to the extent that this Court's two initial opinions were unclear, this decision only prohibits the retroactive application of the PSC's decision." (Order on remand, March 1, 2017, p. 7). The circuit court said no more about retroactive application and no citation to authority was offered to support the ruling. Instead, the circuit court went on to repeat what this Court had already ruled regarding *prospective* rate adjustment – "that the PSC has jurisdiction to set rates and conditions of utility services, as well as original jurisdiction over rate complaints. KRS 278.260." *Id*.

This Court already referenced the applicable legal authority in its previous opinion when it cited KRS 278.260-.280. All now agree that what occurred was rate adjustment. The statute applicable to rate adjustment is KRS 278.270. It says:

> Whenever the commission, upon its own motion or upon complaint as provided in KRS 278.260, and after a hearing had upon reasonable notice, finds that any rate is unjust, unreasonable, insufficient, unjustly discriminatory or otherwise in violation of any of the provisions of this chapter, the commission shall by order prescribe a just and reasonable rate *to be followed in the future*.

KRS 278.270 (emphasis added). As used in this statute, the word "rate" means "tariff." KRS 278.010(12) (" 'Rate' means . . . any schedule or tariff or part of a schedule or tariff thereof.").

Sprint brought a complaint to the PSC under KRS 278.260 claiming, among other arguments, that Brandenburg's tariff interpretation was unjust and unreasonable because it overcharged Sprint (and therefore Sprint customers). Pursuant to KRS 278.270, the PSC conducted a hearing on to consider that complaint. The PSC effectively found Brandenburg's interpretation of its tariff to be unjust and unreasonable. It adjusted the rate by utilizing the methodology urged by Sprint and "by order prescribe[d] a just and reasonable rate to be followed in the future." KRS 278.270. This statute can only be understood as authorizing only prospective, and not retroactive, rate adjustment.

"Because this is a review of a public service commission's order, the judiciary is limited to determining whether the Commission's decision is unreasonable or unlawful. KRS 278.410(1)." *Citizens for Alternative Water Solutions v. Kentucky Pub. Serv. Comm'n*, 358 S.W.3d 488, 489-90 (Ky. App. 2011). Retroactive application of the PSC's adjustment of the tariff is unlawful because it exceeds the PSC's legislative authority for rate making and rate adjustment. For this reason, we affirm the Franklin Circuit Court's March 1, 2017 order on remand, reversing the PSC's November 6, 2009 administrative order adjusting the Brandenburg tariff rate to the extent it applies prior to that date.

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