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February 29, 2012

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PUBLIC SERVICE
COMMISSION

VIA HAND DELIVERY

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

**Re: *Windstream Kentucky East, LLC, Brandenburg Telephone Company and
MCI metro Access Transmission Services LLC d/b/a Verizon Access, Case No.
2008-00203.***

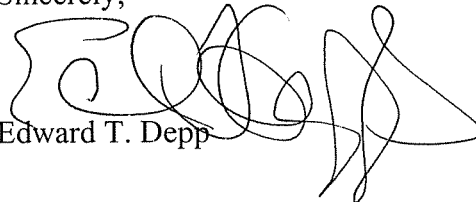
Dear Mr. Derouen:

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

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/kwi
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

FEB 29 2012

PUBLIC SERVICE
COMMISSION

In the Matter of:

AN INVESTIGATION INTO THE TRAFFIC DISPUTE : Case No. 2008-00203
BETWEEN WINDSTREAM KENTUCKY EAST, LLC, :
BRANDENBURG TELEPHONE COMPANY AND :
MCIMETRO ACCESS TRANSMISSION SERVICES, LLC :
D/B/A VERIZON ACCESS :

**BRANDENBURG TELEPHONE COMPANY’S POST-HEARING BRIEF FOR
JANUARY 31, 2012 HEARING**

On January 31, 2012, the Public Service Commission of the Commonwealth of Kentucky (the “Commission”) held a hearing in this matter “for the purpose of determining what compensation, if any, is due Windstream.” (Order, Sep. 15, 2011, App. A.) In response to that hearing, Brandenburg Telephone Company (“Brandenburg Telephone”), by counsel, hereby submits its Post-Hearing Brief in support of an order (i) finding that no compensation is due Windstream Kentucky East, LLC (“Windstream”); and (ii) dismissing Windstream’s request for damages.

INTRODUCTION

The Commission initiated this case to address and resolve a dispute over the delivery of traffic from Brandenburg Telephone to MCImetro Access Transmission Services LLC, d/b/a Verizon Access (“MCImetro”) via Windstream’s network. On January 31, 2012, the Commission held a hearing “for the purpose of determining what compensation, if any, is due Windstream.” (Order, Sep. 15, 2011, App. A.)

Windstream is not entitled to any compensation. Windstream admits that no tariff or agreement provides for any compensation and, even after more than three years of investigation, it has not provided a factual basis for its requested damages. In addition, Windstream agreed

with MCImetro to carry the traffic on a bill-and-keep basis, an arrangement which entitles it to no compensation whatsoever.

In the event Windstream is owed some form of compensation, those costs should be borne by MCImetro, the party that caused and then extended the dispute. MCImetro is the only carrier profiting from the traffic in question, and would have borne the majority of the transit costs had it executed and implemented a traffic exchange agreement in a timely fashion, as shown by the agreement it ultimately executed.

Because the record demonstrates that Windstream is not entitled to any compensation for the traffic in question, Brandenburg Telephone respectfully requests that the Commission find that no compensation is due to Windstream and dismiss this investigation.

FACTS

In 2005, MCImetro ported several telephone numbers associated with its ISP clients from an Elizabethtown switch to a Louisville switch. (Direct Test. of D. Price, pp. 3-4:55-83.) MCImetro executed a traffic exchange agreement with Windstream governing the traffic in question. Although Brandenburg Telephone also had customers affected by MCImetro's porting of telephone numbers, it had no such agreement.

Windstream, in its own words, "agreed to transit the traffic for Brandenburg" while Brandenburg Telephone worked to establish a traffic exchange agreement with MCImetro. (Direct Test. of A. Willoughby, Aug. 13, 2008, p. 5:12-17 (citing Complaint, attached as Exh. 1 of Testimony, and quoting email from Windstream employee to Brandenburg Telephone employee attached as Exhibit 3 to Complaint).) Relying on this agreement, Brandenburg Telephone continued routing the traffic in question over Windstream's network on an interim basis. Windstream's agreement to transit the traffic was especially important during this time

period because it provided the only way for Brandenburg Telephone to route its customers' calls on a non-toll basis until it could reach an agreement with MCImetro and establish a connection that allowed it to deliver this traffic to MCImetro. (Second Supp. Test. of A. Willoughby, p. 7:3-14.)

Unfortunately, MCImetro refused to execute an appropriate agreement with Brandenburg Telephone to handle this traffic. (Test. of A. Willoughby, Jan. 31, 2012, Hearing at 14:56:15 (MCImetro "expected us to carry the traffic beyond our territory boundary, and also they expected us to pay them reciprocal compensation"). *See also* Second Supp. Test. of A. Willoughby, Oct. 4, 2011, pp. 5:17-6:7.) Brandenburg Telephone, with no other non-toll option, continued routing the traffic over Windstream's network.

During that time period, Brandenburg Telephone believed in good faith that there was only a "limited amount" of traffic involved. (Test. of A. Willoughby, Jan. 31, 2012, Hearing at 14:41:21; 15:20:25 (testifying that "[w]e don't do any measurements on EAS trunks" and that Brandenburg Telephone cannot distinguish between ISP traffic and local traffic on these trunks).) As Ms. Willoughby recently testified, Brandenburg Telephone was "not notified of the volume of traffic until notified by Windstream in 2007." (*Id.* at 14:41:11.) Brandenburg Telephone reinitiated negotiations for a traffic exchange agreement with MCImetro in February of 2007. (Direct Test. of A. Willoughby, Aug. 13, 2008, p. 5:18-22.) Shortly thereafter, Windstream reiterated that it would continue to accept the traffic in question as long as Brandenburg Telephone completed all LNP queries prior to routing the call to Windstream's network. (*Id.* at pp. 5:19-6:9.) Brandenburg Telephone complied, and Windstream continued carrying the traffic.

In June of 2008, despite having voluntarily carried the traffic in question for years, Windstream unilaterally stopped the traffic. (*Id.* at p. 7:3-7.) This action triggered an emergency teleconference with Commission staff, after which Windstream agreed to continue delivering the traffic on an interim basis while a permanent solution was worked out. (*See* Order, July 1, 2008, p. 2.) Since then, Brandenburg Telephone and MCImetro executed and implemented an interconnection agreement and resolved the “going forward” portion of this investigation. (*See* Agreement for Facilities-Based Network Interconnection for Exchange of Information Service Provider Traffic Between MCI Access Transmission Services, LLC and Brandenburg Telephone Company, July 27, 2011.) As of November of 2011, all of the traffic in question has been removed from Windstream’s network. (Second Supp. Rebuttal Test. of A. Willoughby, Nov. 14, 2011, p. 9:1-7.)

Windstream now seeks damages in four categories: (1) compensation for LNP queries, at a rate of \$0.0035 per query; (2) compensation for transit, at a rate of \$0.0045 per minute; (3) interest on both of those categories of compensation; and (4) attorneys’ fees. (Test. of K. Smith, Jan. 31, 2012, Hearing at 10:56:21.) However, after more than three years of investigation, Windstream still has not provided any authority or basis for its requested damages.

Windstream admits that its damages requests are not based on any tariff or agreement:

Q: Okay. So [a contract or agreement] is not the basis of your actual claim for damages?

A: Right. There is nothing supporting the traffic at question here. We don’t have a tariff; we don’t have a contract for this service.

(*Id.* at 11:12:56.) Instead, Windstream has based its requests for “compensation based upon a proxy rate of a tariff that would have been in place, should have been in place” (Objection

of Mr. Clark, Transcript of Aug. 19, 2008 Hearing, p. 11:4-10. *See also* Test. of K. Smith, Jan. 31, 2012, Hearing at 10:57:30.)

Windstream admits its alleged \$0.00305/query LNP cost is nothing more than a proxy from its interstate tariff. (Test. of K. Smith, Jan. 31, 2012, Hearing at 10:53:03.) Worse, Windstream admits that the cost study that allegedly supports this rate was only created to justify the rate it had already put in place: “you know, originally, we came up with a rate and then we supported it with a cost study.” (*Id.* at 11:32:21. *See also id.* at 11:05:31 (“We had to come up with a cost that would support a rate that we were doing in case we needed it . . .”).) In its most recent attempt to “clarify” its LNP query costs in response to Vice Chair Gardner’s January 31, 2012 data request, Windstream once again failed to justify its stated rate. Instead, it cited its total monthly costs for its “allocated portion of the shared LNP database administration costs” and made no attempt to calculate its per query cost. (*See* Response to the Commission’s January 31, 2012 Data Request to Windstream Kentucky East, LLC, Feb. 10, 2012.) Nor has Windstream provided an accounting showing its actual costs for the actual number of LNP queries performed. The closest Windstream comes to providing authority for its arbitrary query rate is when it cites an interstate tariff that it admits does not even apply to the traffic in question. (*Id.*)

Windstream’s alleged transit rate is similarly unsupported. Windstream admits it “used as a proxy the end office transit rate of \$0.0045 set forth in its tariff dated December 1, 2006.” (Windstream’s Responses to Commission Staff’s Data Request, July 31, 2008, Response to Commission Staff Data Request 1.a.) As Windstream admits, this “proxy” rate is not set forth in any applicable tariff or agreement; rather, it corresponds exactly with the \$0.0045/minute rate set forth in Windstream’s cancelled Transit Tariff.

The Transit Tariff, however, cannot authorize the rate Windstream seeks to impose. In fact, the Commission has cancelled the Transit Tariff, and Windstream admits the Transit Tariff does not apply to the traffic in question. (*See* Order, Case No. 2007-00004, Aug. 16, 2010; Test. of K. Smith, Transcript of Aug. 19, 2008 Hearing, pp. 23:14-24:15.) Windstream’s only apparent authority for its stated \$0.0045/minute rate is that it is “compensation based upon a proxy rate of a tariff that would have been in place, should have been in place” (Objection of Mr. Clark, Transcript of Aug. 19, 2008 Hearing, p. 11:4-10.) In testimony in a related case, Windstream’s witness admitted the Transit Tariff rate was adapted from a rate proposed to it by another RLEC for use in a tariff that the other RLEC would “maybe file,” and that Windstream adopted the rate “strictly as a deterrent” (Direct Test. of K. Smith, Case No. 2007-0004, at 6:21 (emphasis in original).)

Except for Windstream’s vague assertions that it is using unrelated and cancelled tariff rates as “proxies” for what it believes it is owed, Windstream has repeatedly failed to provide any evidence justifying its requests for compensation. (*See* Willoughby First Supp. Test., pp. 6:9-8:2; Responses and Objections to Brandenburg’s Supplemental Initial Data Requests to Windstream, No. 14, Ex. DR #14 (March 30, 2010) (refusing to provide documentation to support its claimed 0.0045 “Proxy Rate”); Direct Test. of D. Price on Behalf of MCImetro, March 2, 2010, p. 3:13 (Windstream has not “state[d] the source of that rate”).) In addition, Windstream already agreed with MCImetro to carry the traffic on a bill-and-keep basis. (*See* Windstream/MCImetro Interconnection Agreement, Attachment 4: Network Interconnection Architecture, Attachment 12 (“Compensation”), § 4 (traffic originated by a non-party like Brandenburg Telephone “will be classified and treated as Meet-Point Billing Traffic”), § 1.3 (“all minutes of ISP Bound traffic are to be exchanged on a bill and keep basis between the

Parties . . . , such that neither Party owes the other Party any compensation for the origination, transport, or termination of such traffic”).

Now that the parties have spent more than three years arguing these matters before the Commission, it is safe to say that Windstream has no factual basis for its claim.

ARGUMENT AND ANALYSIS

The Commission’s January 31, 2012 hearing was held “for the purpose of determining what compensation, if any, is due Windstream.” With more than three years of testimony and investigation behind us, Brandenburg Telephone believes there is no longer any valid dispute on this point. Windstream is owed no compensation.

Brandenburg Telephone therefore respectfully requests that the Commission find that no compensation is due Windstream. Further, because the “going forward” concerns have also been resolved, Brandenburg Telephone respectfully requests an order terminating this investigation.

I. The Investigation Should Be Dismissed Because Windstream Is Owed No Compensation.

Windstream is not entitled to any compensation from any party for the traffic in question. Windstream agreed to carry the traffic in question. Windstream admits no tariff or agreement applies. Windstream has provided no competent proof of damages, and Windstream admits its claimed rates of compensation are borrowed as “proxies” from inapplicable tariff rates.

A. Windstream Repeatedly Agreed to Carry the Traffic in Question Before Unilaterally Stopping It.

Although Windstream now seeks significant damages for a purported “trespass” on its network, the record undisputedly shows that Windstream voluntarily agreed to carry the traffic in question for almost the entire relevant time period. In fact, Windstream’s unilateral blocking of the traffic resulted in an emergency intervention by the Commission, after which Windstream

continued to carry the traffic in question. Windstream cannot now demand compensation for the actions it took voluntarily and without demand for payment.

Windstream, in its own words, “agreed to transit the traffic for Brandenburg” while Brandenburg Telephone worked to “establish direct trunks” with MCImetro. (Direct Test. of A. Willoughby, Aug. 13, 2008, p. 5:12-17 (citing Complaint, attached as Exh. 1 of Testimony, and quoting email from Windstream employee to Brandenburg Telephone employee attached as Exhibit 3 to Complaint).) Brandenburg Telephone relied on Windstream’s promise and continued routing the traffic in question through Windstream’s network throughout its negotiations with MCImetro. Even after MCImetro’s intransigence extended those traffic exchange negotiations into 2007, Windstream reaffirmed its promise to carry the traffic in question.

Brandenburg Telephone had no reason to question that promise because until 2007 it believed in good faith that there was only a “limited amount” of traffic involved. (Test. of A. Willoughby, Jan. 31, 2012, Hearing at 14:41:21; 15:20:25 (“We don’t do any measurements on EAS trunks” and testifying that Brandenburg Telephone cannot distinguish between ISP traffic and local traffic on these trunks).) Even after the volume of traffic in question became clear, Windstream reiterated that it would continue to accept the traffic in question as long as Brandenburg Telephone completed all LNP queries prior to routing the call to Windstream’s network. (Direct Test. of A. Willoughby, Aug. 13, 2008, pp. 5:19-6:9.) Brandenburg Telephone complied, and Windstream continued carrying the traffic in question without demand for compensation.

In June of 2008, despite having voluntarily carried the traffic in question for years, Windstream unilaterally stopped the traffic. (*Id.* at p. 7:3-7.) This action triggered an emergency

teleconference with Commission staff, after which Windstream agreed to continue delivering the traffic on an interim basis while a permanent solution was worked out. (*See Order*, July 1, 2008, p. 2.) The Commission has made it clear that it disapproved of Windstream's unilateral decision to interrupt service to Brandenburg Telephone's customers:

“We are disconcerted by Windstream's unilateral action in blocking the traffic and only informing us *after* the traffic was blocked. Although we acknowledge that the complex and novel nature of this dispute could lead to differing interpretations of the Commission's jurisdiction, we believe that it would have been prudent to have informed the Commission of the dispute *before* blocking the traffic.”

(*Order*, Aug. 26, 2009, p. 12.) Windstream cannot demand compensation after agreeing to carry the traffic. Nor can Windstream use its wrongful and unilateral service interruption as evidence that it should be awarded damages. Kentucky courts have relied on the unclean hands doctrine to preclude equitable relief where the party seeking relief has “engaged in fraudulent, illegal, or unconscionable conduct” with respect to “the matter in litigation.” *Suter v. Mazyck*, 226 S.W.3d 837, 843 (Ky. App. 2007) (citing *Eline Realty Co. v. Foeman*, 252 S.W.2d 15, 19 (Ky. 1952)). Accordingly, Windstream cannot rely on its own wrongful behavior in order to demand compensation.

Windstream could have sought relief from the Commission at any point between the beginning of the potential dispute and its unilateral termination of the traffic in 2008. Instead, Windstream voluntarily transited the traffic in question for years without making demand for payment.

Windstream is due no compensation because it voluntarily accepted the traffic it now claims was a “trespass.” It is inequitable for Windstream to demand damages after voluntarily transiting the traffic in question for years and refusing to seek the Commission's intervention

during that time. For these reasons, Brandenburg Telephone respectfully requests an order finding that Windstream is owed no compensation and dismissing this investigation.

B. Windstream Admits No Tariff or Agreement Applies to the Traffic in Question.

Even if Windstream's voluntary agreement to transit the traffic in question was not sufficient to dismiss this investigation, Windstream's request for damages should be denied because there is no tariff or agreement that entitles Windstream to any compensation.

Windstream admits that its damages request is not based on any tariff or agreement:

Q: Okay. So [a contract or agreement] is not the basis of your actual claim for damages?

A: Right. There is nothing supporting the traffic at question here. We don't have a tariff; we don't have a contract for this service.

(Test. of K. Smith, Jan. 31, 2012, Hearing at 11:12:56.) There is no dispute on this point. There is no tariff or agreement that entitles Windstream to any compensation for the traffic in question.

Although Windstream initially cited its Transit Tariff as the source of its transit "proxy rate" and has more recently cited its interstate tariff as the source of its LNP query proxy rate, Windstream has repeatedly admitted that no tariff applies to the traffic in question. (*See, e.g., id.*; Test. of K. Smith, Transcript of Aug. 19, 2008 Hearing, pp. 23:14-24:15.) The Commission, too, has recognized Windstream's admission that the Transit Tariff does not provide it the authority to charge MCImetro or Brandenburg Telephone for the traffic in question. (*See Order, Aug. 26, 2009* ("Brandenburg's traffic was not what [Windstream] considered 'transit traffic.'") ("Windstream initially argued that . . . the traffic was not transit traffic.")) In addition, the

Commission has already ruled in a different case that the Transit Tariff provisions should be cancelled. (*See* Order, Case No. 2007-00004, Aug. 16, 2010.)¹

Windstream's admissions on this point are dispositive, because they make it clear that Windstream's requests for compensation violate the filed-rate doctrine. Pursuant to that doctrine, "the filed rate defines the legal relationship between the regulated utility and its customer with respect to the rate that the customer is obligated to pay and that the utility is authorized to collect." *Cincinnati Bell. Tel. Co. v. Ky. P.S.C.*, 223 S.W.3d 829, 837 (Ky. 2007). Kentucky statutory law explicitly states: "[n]o utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered than that prescribed in its filed schedules" KRS 278.160 (2). Yet Windstream admits there are no filed schedules, tariffs, or agreements that apply to the traffic in question. Its request for any compensation is consequently barred by the filed-rate doctrine. Even if the "proxy" rates were somehow determined to be proper rates, any attempt to enforce them would violate the rule against retroactive ratemaking, which stresses the prospective nature of the Commission's ratemaking power and prohibits the Commission from retroactively altering rates. The Commission has acknowledged the rule against retroactive ratemaking as "a generally accepted principle of public utility law." *Kentucky v. Atmos Energy Corp.*, Case No. 2005-00057, 2007 Ky. PUC LEXIS 109 at *4 (Order of Feb. 9, 2007).

¹ Even if the Transit Tariff had not been cancelled, and even if Windstream had not admitted it does not apply to the traffic in question, the Transit Tariff would not authorize the compensation Windstream seeks. The Transit Tariff was allegedly effective only as of December 1, 2006, more than a year after the traffic began flowing. (Second Supp. Test. of A. Willoughby, p. 3:16-18; Windstream Kentucky East, Inc. General Customer Services tariff, P.S.C. KY. No. 7 ("Issued: December 1, 2006") ("Effective: December 1, 2006").) Moreover, the Sixth Circuit has held that tariffs are not an appropriate method for determining compensation for this kind of traffic, and that an attempt to establish tariffed rates is tantamount to a "fist slamming down on the scales" of negotiation required by the Telecommunications Act. *Verizon North v. Strand*, 367 F.3d 57, 584-85 (6th Cir. 2004).

Because Windstream admits there is no tariff or agreement entitling it to compensation for the traffic in question, Brandenburg Telephone respectfully requests an order finding that Windstream is owed no compensation and dismissing this investigation.

C. Windstream Has No Competent Proof of Damages.

In the absence of any tariff or agreement entitling Windstream to compensation, and despite its unclean hands in demanding compensation after voluntarily agreeing to deliver traffic and then attempting to unilaterally stop it, Windstream apparently relies on an equitable argument that it is entitled to damages. This argument fails because Windstream has produced no competent evidence of damages it allegedly sustained as a result of transiting the traffic in question.

As set forth above, no tariff or agreement applies to the traffic in question. Windstream instead bases its requests for “compensation based upon a proxy rate of a tariff that would have been in place, should have been in place” (Objection of Mr. Clark, Transcript of Aug. 19, 2008 Hearing, p. 11:4-10.) Windstream offers no authority for why such a proxy rate should be imposed, particularly for traffic it carried voluntarily, or how such a rate can legally be imposed without violating the filed-rate doctrine.

Windstream admits its alleged \$0.00305/query LNP cost is nothing more than a proxy based on its interstate tariff, which does not apply to the traffic in question. (Test. of K. Smith, Jan. 31, 2012, Hearing at 10:53:03.) In response to Vice Chair Gardner’s January 31, 2012 data request, Windstream attempted to “clarify” its LNP query costs by providing generalized assertions about costs and additional unrelated tariffs. Windstream cited its total monthly costs for its “allocated portion of the shared LNP database administration costs,” but made no attempt to calculate its per query cost. (See Response to the Commission’s January 31, 2012 Data Request to Windstream Kentucky East, LLC, Feb. 10, 2012.) Windstream also has not provided

an accounting showing its actual costs for the actual number of LNP queries performed. In short, Windstream has provided no evidence documenting its alleged LNP query costs or identifying those costs attributable to the traffic in question. The closest Windstream comes to providing authority for its arbitrary query rate is when it cites an interstate tariff that it admits does not even apply to the traffic in question. (*Id.*)

Windstream's alleged transit rate is similarly unsupported. Windstream admits it "used as a proxy the end office transit rate of \$0.0045 set forth in its tariff dated December 1, 2006." (Windstream's Responses to Commission Staff's Data Request, July 31, 2008, Response to Commission Staff Data Request 1.a.) As Windstream admits, this "proxy" rate is not established by any applicable tariff or agreement; rather, it corresponds exactly with the \$0.0045/minute rate set forth in Windstream's Transit Tariff. As Windstream's counsel explained, Windstream's requested transit rate is "compensation based upon a proxy rate of a tariff that would have been in place, should have been in place" (Objection of Mr. Clark, Transcript of Aug. 19, 2008 Hearing, p. 11:4-10.) In testimony in a related case, Windstream's witness admitted the Transit Tariff rate was adapted from a rate proposed to it by another RLEC for use in a tariff that RLEC would "maybe file," and that Windstream adopted the rate "strictly as a deterrent" (Direct Test. of K. Smith, Case No. 2007-0004, at 6:21 (emphasis in original).)

Windstream's proposed six percent interest rate is also not set forth in any applicable tariff or agreement. At the January 31, 2012 hearing, Windstream's witness admitted that "[w]e used a proxy" from a tariff that does not apply to the traffic in question in order to determine the requested interest rate. (Test. of K. Smith, Jan. 31, 2012, Hearing at 10:38:24.) Windstream also admitted that it had not sent a bill for any interest charges, but simply "submitted the financial information each time in this case." (*Id.* at 10:39:02.)

Although Windstream seeks attorneys' fees, it has provided no justification for such an extraordinary award. Windstream voluntarily agreed to carry the traffic in question, and its unclean hands in unilaterally stopping the traffic it had agreed to carry make it clear that no award of fees should be granted. In addition, Brandenburg Telephone has worked in good faith to resolve this dispute since 2005 when it learned of the traffic and initiated traffic exchange negotiations with MCImetro. In light of these facts, granting Windstream an award for its attorneys' fees would be inappropriate, particularly since such an award is outside of the Commission's jurisdiction.

For three and a half years, Windstream has failed to produce any credible evidence supporting its damage claims. Windstream admits its demands for compensation are based on nothing but "proxies" of tariffed rates that do not apply to the traffic in question, yet it has offered no authority for why the Commission should be compelled to enforce such an arbitrary "proxy" rate. (*See* Willoughby First Supp. Test., pp. 6:9-8:2; Responses and Objections to Brandenburg's Supplemental Initial Data Requests to Windstream, No. 14, Ex. DR #14 (March 30, 2010) (refusing to provide documentation to support its claimed 0.0045 "Proxy Rate"); Direct Test. of D. Price on Behalf of MCImetro, March 2, 2010, p. 3:13 (Windstream has not "state[d] the source of that rate").)

Because Windstream has not supported its damages claims with credible evidence, Brandenburg Telephone respectfully requests an order finding that Windstream is owed no compensation and dismissing this investigation.

II. Any Compensation Due Windstream Should Be Paid by MCImetro.

In the event the Commission determines that Windstream is owed any kind of compensation, those costs should be borne by MCImetro. MCImetro should be liable for two reasons: first, it caused and then extended the dispute; and second, MCImetro is the only carrier

profiting from the traffic in question, and had MCImetro fulfilled its duties in a timely fashion it would have borne most of the costs involved in transiting the traffic in question.

MCImetro caused this dispute by porting telephone numbers without conducting an appropriate investigation for the effect such an action would have on Kentucky's telecommunications customers. As Brandenburg Telephone made clear at the January 31 hearing, there were many simple ways MCImetro could have found out the exchanges to which it needed to have a calling arrangement. As an initial matter, Ms. Willoughby testified, "[t]he phone book says what the obligations are, where – where any customer in that area can call and can receive information from and can receive calls from." (Test. of A. Willoughby, Jan. 31, 2012, Hearing at 15:08:55.) Or, Ms. Willoughby testified later, MCImetro could have just looked at the public tariffs or asked any of the parties:

Q: And if he were to ask you [if MCImetro could have asked Windstream], what would the answer to that be?

A: I think he could have asked Windstream.

Q: You think Windstream knew there was EAS calling to Vine Grove and Radcliff?

A: Yes, I do.

Q: . . . Could MCImetro have checked the tariff to see what EAS calling arrangements were available?

A: Yes.

Q: Both for Brandenburg or Windstream, correct?

A: Yes.

Q: Okay. And he even posed a hypothetical that asked you if you were aware whether MCImetro had ever asked Brandenburg who Brandenburg's customers could call. Did MCImetro ever ask Brandenburg?

A: No.

Q: They could have, couldn't they?

A: Yes.

(*Id.* at 15:27:58.) MCI chose not to do those things. It failed to conduct a basic investigation of how its actions would affect other companies' customers, and its failure to investigate was the root cause of this dispute.

Yet, after Brandenburg Telephone recognized the problem and confronted MCImetro about executing the traffic agreement necessary to resolve the problem, MCImetro refused to execute an appropriate agreement with Brandenburg Telephone. Brandenburg Telephone explained at the recent hearing that there were two primary issues that prevented a final agreement: MCImetro "expected us to carry the traffic beyond our territory boundary, and also they expected us to pay them reciprocal compensation." (Test. of A. Willoughby, Jan. 31, 2012, Hearing at 14:56:15.) Approximately six years later, MCImetro executed and implemented a traffic exchange agreement that established a point of connection within Brandenburg Telephone's territory boundary and made MCImetro financially responsible for everything on its side of the point of connection. In other words, after six years and an order from the Commission, MCImetro executed and implemented a traffic exchange agreement that contained provisions almost identical to those proposed by Brandenburg Telephone in 2005. (*See Agreement for Facilities-Based Network Interconnection for Exchange of Information Service Provider Traffic Between MCI Access Transmission Services, LLC and Brandenburg Telephone Company*, July 27, 2011, sections 3.3, 4.1.1.)

The final result of the traffic exchange agreement makes it clear that MCImetro was primarily responsible for the slow and unsuccessful traffic exchange negotiations prior to the Commission's intervention. Even Windstream acknowledges that the final exchange arrangement, which closely follows Brandenburg Telephone's initial proposed agreement, is

“typical in a traffic exchange agreement.” (Test. of K. Smith, Oct. 4, 2011, p. 5:3-11. *See also* Test. of K. Smith, Jan. 31, 2012, Hearing at 10:51:00 (testifying that such an arrangement is an industry standard).)

To the extent that Windstream claims its costs were caused by slow negotiations between MCImetro and Brandenburg Telephone, it is appropriate to examine which party would have borne those costs had the traffic exchange agreement been executed in 2005 when Brandenburg Telephone first proposed it. As Windstream notes, MCImetro bears the bulk of those costs because “Verizon is financially responsible for establishing its own facility to the POC [within Brandenburg Telephone’s territory] and hauling the ISP-bound traffic from the POC to Louisville.” (*Id.* at p. 5:17-21.) In particular, the transit charges at issue in this matter are imposed on MCImetro’s side of the point of connection, and MCImetro is consequently financially responsible for those charges. Therefore, it is appropriate to assign any costs to MCImetro because it was the primary beneficiary of the extended negotiations. MCI metro is also the only carrier profiting from the traffic in question.

Because MCImetro’s lack of investigation caused this dispute and its failure to negotiate in good faith extended it, MCImetro should be liable for any compensation due Windstream. Further, MCImetro should be liable because, had it fulfilled its duties in a timely fashion, it would have borne the majority of the costs for transiting the traffic in question. For these reasons, if the Commission finds that Windstream is owed any compensation, Brandenburg Telephone respectfully requests an order finding MCImetro solely responsible for paying that compensation.

III. Windstream Agreed in Its Interconnection Agreement with MCImetro That It Would Carry the Traffic Without Compensation.

Windstream is also not entitled to any compensation because, in its interconnection agreement with MCImetro, Windstream agreed that the traffic in question would be treated as bill-and-keep, and that it would receive no compensation for carrying it.

The MCImetro-Windstream interconnection agreement establishes that traffic originated by a non-party like Brandenburg Telephone, whether categorized as transit traffic or ISP traffic, will be treated as bill-and-keep traffic for which neither Windstream nor MCImetro will receive any compensation. (See Interconnection Agreement, Attachment 4: Network Interconnection Architecture, Attachment 12 (“Compensation”), § 4.2 (transit traffic originated by a non-party like Brandenburg Telephone “will be classified and treated as Meet-Point Billing Traffic”), § 1.3 (“all minutes of ISP Bound traffic are to be exchanged on a bill and keep basis between the Parties . . . , such that neither Party owes the other Party any compensation for the origination, transport, or termination of such traffic”). Windstream cannot now ignore its agreement and demand compensation for traffic it agreed to carry without compensation.

Because Windstream agreed to carry the traffic in question without compensation, its request for damages is baseless and should be dismissed.

IV. The Case Should Be Dismissed Because the Commission Does Not Have Jurisdiction to Award the Damages Windstream Requests.

Windstream's claim for damages should be dismissed for lack of jurisdiction, pursuant to KRS 278.260 and the rule against retroactive ratemaking.

Pursuant to KRS 278.260, the Commission has “original jurisdiction over complaints as to rates or service of any utility.” KRS 278.260(1). Services are “any practice or requirement in any way relating to the service of any utility, [such as] the quality [or] quantity of any commodity or product used or to be used for or in connection with the business of any utility.”

KRS 278.010(13). Rates are “any individual or joint . . . compensation for service rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement, or privilege in any way relating to such . . . compensation.” KRS 278.010(12). Actions for damages, such as the case in question, do not meet this rate/service jurisdiction requirement and are therefore outside the Commission’s jurisdiction. *See Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126 (Ky. 1983).

In *Carr v. Cincinnati Bell, Inc.*, Kentucky’s highest court held that the Commission has not been delegated the power to adjudicate damages claims, and that the Commission is not “empowered or equipped to handle such claims consistent with constitutional requirement.” *Id.* at 128 (citing Ky. Const. § 14). The Commission has routinely relied on *Carr* and Section 14 of the Kentucky Constitution (regarding the “[r]ight of judicial remedy for injury”) to dismiss damages claims for lack of jurisdiction. *See, e.g., Strother v. AT&T Communications of the South Central States, Inc.*, Case No. 2007-00415, 2008 Ky. PUC LEXIS 263, at *5-6 (Ky. PSC, Feb. 28, 2008); *Stauffer v. Brandenburg Tel. Co.*, Case No. 2007-00399, 2007 Ky. PUC LEXIS 931, at *4-5 (Ky. PSC, Nov. 21, 2007); *Callihan v. Grayson Rural Elec. Coop. Corp.*, Case No. 2005-00280, 2005 Ky. PUC LEXIS 663, at *5-6 (Ky. PSC, Aug. 1, 2005); *Yarbrough v. Kentucky Utils. Co.*, Case No. 2004-00189, 2005 Ky. PUC LEXIS 609, at *5-6 (Ky. PSC, July 13, 2005). As the Commission held earlier this year:

The Commission is . . . without jurisdiction to award compensatory and punitive damages. Pursuant to KRS 278.040, the Commission has jurisdiction of only the ‘rates’ and ‘services’ of utilities . . . Complainant’s request for compensatory and punitive damages falls under neither category.”

Strother v. AT&T Communications of the South Central States, Inc., 2008 Ky. PUC LEXIS 263, at *5-6 (Ky. PSC, Feb. 28, 2008).

Windstream's counsel has acknowledged that "the question of damages raises a jurisdictional issue," and so has attempted to avoid the unconstitutional nature of this claim by characterizing the requested remedy as "compensation based upon a proxy rate of a tariff that would have been in place, should have been in place...." (Objection of Mr. Clark, Transcript of August 19, 2008 Hearing at 11:4-10.) Put more directly, Windstream attempts to reframe its requested remedy as a "rate" subject to the Commission's jurisdiction under § 278.260.

Despite these attempts, it is clear that Windstream's requested remedy is a request for damages (including punitive damages and attorney fees). Windstream has repeatedly referred to its request for relief as one for "damages" or "compensation." Even in his clarification, Windstream's counsel characterizes the remedy as "compensation." (*See id.*) Windstream witness Kerry Smith also uses variations on the word "compensate" eighteen separate times in his rebuttal testimony. (*See Rebuttal Test. of K. Smith.*) Mr. Smith further states that his attorneys have repeatedly questioned this Commission's jurisdiction because the action was "tantamount to a trespass or encroachment [action] rather than a provision of service." (*Id.* at 11:15-16.) Similarly, Mr. Smith states that compensation should be awarded "based on the benefits Verizon has derived from the use of Windstream's network." (*Id.* at 11:23, 12:1 (emphasis added).)

The nature of the requested relief, as well as Windstream's consistent characterization of this relief as "compensation" based on benefits received, establish that Windstream is asking for damages in this case. Therefore, this Commission is without jurisdiction to award the requested relief under *Carr* and Section 14 of the Kentucky Constitution. *See Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126 (Ky. 1983); Ky. Const. § 14.

Even if the money demanded by Windstream is determined to be a “rate,” as defined in KRS 278.010 (12), the remedy requested is beyond the Commission’s power to grant. The Commission has acknowledged the rule against retroactive ratemaking as “a generally accepted principle of public utility law.” *Kentucky v. Atmos Energy Corp.*, Case No. 2005-00057, 2007 Ky. PUC LEXIS 109 at *4 (Order of Feb. 9, 2007). This rule stresses the prospective nature of the Commission’s ratemaking power and prohibits the Commission from retroactively altering rates. *See id.*

As Windstream’s semantic acrobatics suggest, requests for retroactive rate changes are, in effect, requests for damages. The rule against retroactive ratemaking prevents parties from dodging KRS 278.260’s rate/service jurisdiction requirement by merely reframing their damages requests. In its attempt to dodge the jurisdictional ban on damages actions, Windstream explicitly stated it was seeking “recovery of compensation based upon a proxy rate of tariff that would have been in place, should have been in place” at the time traffic was routed through Windstream’s network. (Objection of Mr. Clark, Transcript of August 19, 2008 Hearing at 11:6-9.) Put more concisely, Windstream acknowledges it is requesting that the Commission establish a “rate” that “should have been in place” and apply it retroactively. This is retroactive ratemaking, and it is prohibited by law..

Therefore, if the Commission characterizes Windstream’s requested remedy as damages, as it should, this action is barred by KRS 278.260’s rate/service jurisdictional requirement. If the Commission instead embraces the only other option and characterizes Windstream’s requested remedy as a rate, this action is barred by the rule against retroactive ratemaking. Therefore, Windstream’s damages claim should be dismissed.

V. The Traffic in Question Was Properly Removed from Windstream’s Network After Brandenburg Telephone and MCImetro Finalized a Traffic Exchange Agreement.

Vice Chairman Gardner raised a concern during the January 31, 2012 hearing that the Windstream traffic should have been removed immediately after the Commission’s 2009 Order:

“Well, when we say – on page 18 of the order, we say, as a threshold matter, we find that the traffic in dispute must be moved off of Windstream’s network. So you viewed that language as meaning you didn’t have to move it until you got a negotiated agreement with Verizon; is that correct?”

(Hearing of Jan. 31, 2012, Hearing at 15:24:56.)

The Commission did indeed find that “the traffic in dispute must be moved off of Windstream’s network.” (Order, Aug. 26, 2009, p. 18.) However, on the next page of the Order, the Commission clarified that “[b]efore removing the traffic from Windstream’s network, Brandenburg and Verizon must reach an agreement that includes provisions for the exchange of the disputed traffic.” (*Id.* at p. 19.) The final ordering paragraphs are equally clear that Brandenburg Telephone had no obligation to remove the Windstream traffic before finalizing a traffic exchange agreement with MCImetro:

“1. Within 30 days of the date of this Order, Verizon and Brandenburg, consistent with the guidelines contained here, shall file with the Commission an executed traffic exchange agreement that resolves the outstanding traffic disputes in this case.

2. If no such agreement is executed, the parties shall jointly file, within 45 days of this Order, information that describes, individually, each specific area of contention and fully sets out the positions of each party, including specific language suggested. The Commission will review the supplied information and establish the relative duties and responsibilities of the parties.”

(Order, Aug. 26, 2009, p. 23.) In other words: Brandenburg Telephone and MCImetro were ordered to finalize an agreement or, if that failed, report back to the Commission.

When negotiations failed to yield a final agreement within the 30-day window established by the Commission, both Brandenburg Telephone and MCImetro complied with paragraph 2 of the Order and jointly filed a matrix detailing all outstanding issues. (*See* Issues Matrix of Brandenburg Telephone and MCImetro, filed Oct. 12, 2009.) The Commission's next order did not require Brandenburg Telephone to redirect the Windstream traffic immediately, despite the lack of interconnection agreement; instead, the Commission ordered an informal conference to determine a procedural schedule for moving forward with the case. (*See* Order, Jan. 22, 2010.) It is also worth noting that the Commission, Windstream, and MCImetro all appear to have shared Brandenburg Telephone's interpretation of the August 2009 Order, as no one claimed that the continued presence of traffic on Windstream's network during this time period violated the Order.

Moreover, there was a good reason the Order required the parties to finalize a traffic exchange agreement before moving the traffic. If Brandenburg Telephone had removed the traffic in question from Windstream's network before finalizing an agreement with MCImetro, the traffic would have been treated—and billed—as toll traffic. Brandenburg Telephone's customers relying on dial-up internet services (presuming they could reprogram their computers to complete these calls as toll) would have consequently been burdened with paying toll rates for 1,808,717 minutes in the month following the Commission's order. (*See* Summary of Minutes of Use Work Sheet Aug-2005 to Jan 5th, 2012, Windstream Hearing Ex. 1 (Jan. 31, 2012).) The rate billed would have varied widely based on the customer's chosen long distance carrier; however, using \$0.10/minute as a realistic rate, that amount of traffic would result in toll charges of approximately \$180,871.70 in that month alone in long distance charges to these dial-up customers. From the time of the Commission's August 2009 order to the final implementation of

the Brandenburg Telephone/MCImetro traffic exchange agreement, Brandenburg Telephone's customers would have been slammed with approximately \$2,603,389.60 in toll charges for the 26,033,896 minutes of use. (*See id.*) Such an unexpected billing increase would create a significant (and unfair) financial burden upon the few Brandenburg Telephone customers relying on dial-up ISP service. It would also create a serious risk of disputes between Brandenburg Telephone's customers and the long distance carriers billing such traffic. Moreover, this enormous burden would all be for the benefit of MCImetro, the only carrier to profit from the traffic destined for its ISP clients. It would also appear to sanction MCImetro's continued avoidance of the costs associated with implementing facilities it should have had in place from the beginning. The Commission surely did not intend or demand such an inequitable result for residents in Brandenburg Telephone's service territory.

Accordingly, Brandenburg Telephone believes that it complied with the Commission's August 26, 2009 Order by negotiating with MCImetro and submitting the disputed issues to the Commission for resolution.

CONCLUSION

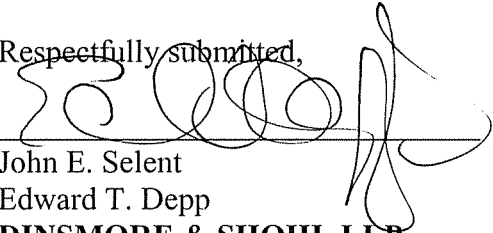
The Commission's January 31, 2012 hearing was held "for the purpose of determining what compensation, if any, is due Windstream." With more than three years of testimony and investigation behind us, Brandenburg Telephone believes there is no longer any valid dispute on this point. Windstream is not entitled to any compensation for the traffic in question from any party.

Windstream agreed to carry the traffic in question. Windstream admits no tariff or agreement applies. Windstream has also provided no competent proof of damages, and even admits its claimed rates of compensation are borrowed as "proxies" for inapplicable tariff rates. Finally, Windstream agreed with MCImetro to carry the traffic on a bill-and-keep basis.

In the event Windstream is owed some form of compensation, those costs should be borne by MCImetro, the party that started and extended the dispute and that would have borne the majority of the transit costs had it executed a traffic exchange agreement with Brandenburg Telephone upon entering Windstream's territory.

For these reasons, Brandenburg Telephone respectfully requests that the Commission issue an order (i) finding that no compensation is due Windstream; and (ii) dismissing Windstream's request for damages.

Respectfully submitted,


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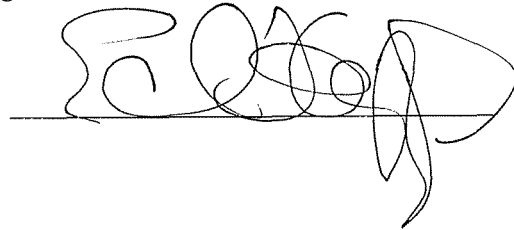
*Counsel to Brandenburg Telephone
Company*

CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing was served on the following by first-class U.S. Mail, on this 29th day of February, 2012:

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A handwritten signature in black ink, appearing to read "D. Brent", is written over a horizontal line. The signature is stylized and cursive.