BEFORE THE COMMONWEALTH OF KENTUCKY

PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION INTO TRAFFIC DISPUTE BETWEEN BRANDENBURG TELEPHONE COMPANY, WINDSTREAM KENTUCKY EAST, LLC AND VERIZON ACCESS	))))	**CASE NO. 2008-00203**

RECEIVED

FEB 29 2012

PUBLIC SERVICE COMMISSION

POST SUPPLEMENTAL HEARING BRIEF OF WINDSTREAM KENTUCKY EAST, LLC

February 28, 2012

R. Benjamin Crittenden
STITES & HARBISON, PLLC
421 West Main Street
P.O. Box 634
Frankfort, Kentucky 40602-0634
Telephone: (502) 223-3477

COUNSEL FOR:
WINDSTREAM KENTUCKY EAST, LLC

TABLE OF CONTENTS

I. INTRODUCTION

Windstream Kentucky East, LLC ("Windstream East") submits this Post Supplemental Hearing Brief pursuant to the Public Service Commission's ("Commission's") scheduling order (as modified at hearing on January 31, 2012) and in response to the investigation initiated by the Commission's Order dated July 1, 2008, which sought "to determine the relative rights of all parties" with respect to the routing and transmission of certain Internet service provider ("ISP") traffic, specifically relating to "determining what compensation is due to Windstream . . ., if any . . . ."[1]

Long ago, the Commission determined that the traffic in dispute, described below, did not belong on Windstream's network. Despite this fact, 312,607,199 minutes of traffic continued to be routed by Brandenburg and Verizon without authorization through Windstream's network, with a substantial portion of such routing taking place after Brandenburg Telephone Company ("Brandenburg") and MCImetro Access Transmission Services, LLC d/b/a Verizon ("Verizon") were ordered to remove such traffic from Windstream's network. For the reasons discussed below, Windstream is due $1,866,393 in compensation, plus attorney's fees. Windstream believes that the Commission should look in the first instance to Brandenburg for payment but has valid reasons to order Verizon to pay its portion of such compensation. Beyond all else, what has been undisputed and made abundantly clear throughout the years this matter has remained pending is that neither Windstream nor any of its customers received any benefit from this traffic routing. Rather, Brandenburg and Verizon benefited from using Windstream's network "for free" to exchange those parties' traffic and delay expending resources to enter into arrangements making themselves financially and operationally responsible for their traffic.

[1] September 15, 2011 Order at 1.

II. STATEMENT OF FACTS

Because Windstream's post-hearing brief filed September 12, 2008 summarized the underlying facts in this dispute prior to such date, this Statement of Facts, in discussing events prior to September 12, 2008, will focus on the facts most pertinent to the current phase of this proceeding – how much Windstream is owed and by whom.

This proceeding concerns traffic originated by end users of Brandenburg in Radcliff and Vine Grove exchanges that is bound for ISPs served by Verizon with local telephone numbers associated with the Elizabethtown exchange in which Windstream serves as the incumbent local exchange carrier ("ILEC") (such traffic being the "traffic in dispute").

Brandenburg admits that it has known about the traffic in dispute since 2002, at which time Brandenburg was apparently performing the queries into the local number portability database ("LNP dips") that were telling Brandenburg to route the traffic directly to MCI rather than through Windstream, but deliberately "discontinued doing the dip so it would continue to flow like it had for years."[2] Put another way, Brandenburg admits that it has known about the traffic for a decade but stopped doing the applicable LNP queries in an attempt to keep the traffic flowing over Windstream's network unbeknownst to Windstream.

In 2005, Brandenburg decided to start performing the LNP dips again, and was forced to contend with the inconvenient fact that the local routing number ("LRN"), the location to which the database and Telcordia's Local Exchange Routing Guide ("LERG") states that calls to the pertinent telephone number were to be delivered, was on Verizon's network.[3] Thus, to the extent

---

[2] Transcript of January 31, 2012 Hearing ("Supp. Tr.") at 164, ll. 2-4. Performing and abiding by the results of LNP dips prevents traffic from being misrouted.

[3] Transcript of August 19, 2008 Hearing ("Tr.") at 169, l. 21 – Tr. at 170, l. 3. Brandenburg describes this as the time that "management became aware of the issues" (to the extent that such distinction between "management" and non-"management" is legally relevant, which it is not) Supp. Tr. at p. 164, ll. 5-6. For a further discussion of Brandenburg's knowledge as of 2005, *see* Smith Further Rebuttal Testimony at 2-4.

that Brandenburg's network was set up to route traffic according to the result of the LNP dips, as Brandenburg admits it should, the traffic did not go through.[4] Brandenburg apparently allowed this situation to persist for at least four months, from September 2005 through at least January 20, 2006.[5] Both Verizon and Brandenburg have described this situation as Brandenburg "blocking" the calls.[6]

Faced with these facts of its own traffic flows, Brandenburg foisted the traffic back on to Windstream's network by turning off the LNP dips (or performing them, but causing its network to ignore the results), causing the traffic to again route inappropriately to Verizon through the Windstream-Brandenburg EAS trunks.[7] In the meantime, to complete the calls that Brandenburg was sending to Windstream without authorization, Windstream was forced to perform LNP dips of its own so that it would know where to deliver the traffic – in this case, to Verizon's Louisville switch – where Brandenburg, itself, should have been routing the traffic.[8]

Windstream, after numerous attempts to make appropriate arrangements with Brandenburg, temporarily ceased delivering the traffic in dispute to Verizon for three days.[9] At that point, on July 1, 2008, following initial voluntary commitments, the Commission issued an order with two pertinent requirements:

---

[4] Tr. at 170, ll. 7-9.

[5] *See*, Verizon Response to Windstream Data Request No. 6 at 126 (January 20, 2006, 2:11 p.m. e-mail from Rick McGolerick, Verizon, to Randall Bradley, Brandenburg ("McGolerick E-Mail"), discussed at Supp. Tr. at 139, l. 11 to 141, l. 8.

[6] *See* McGolerick E-Mail and Supp. Tr. at 169, ll. 16-17 ("MCI said we know, please, please, please don't block the traffic . . . .").

[7] Willoughby Direct (Aug. 13, 2008) at 4; Tr. at 170. Ms. Willoughby explained at hearing that "I'm not an engineer, but my understanding is when our switch does the dip, our switch uses that information to send the traffic. And that is the instructions that the switch uses, so the only way we can get the switch to do something different is to terminate the queries." Supp. Tr. at 166, ll. 15-19.

[8] Supp. Tr. at 16, l. 20 – 17, l. 11.

[9] July 1, 2008 Order at 1-2 ("*Order Enjoining Windstream and Requiring an Accounting*").

1. The traffic arrangements, as they exist on June 30, 2008, shall continue in their current form until this dispute is resolved.
2. All parties shall keep accounts of the traffic exchanged in order to determine amounts owed, if any, for the exchange and transmission of traffic.[10]

The Commission held a hearing on August 19, 2008. Windstream continued to maintain the previous unauthorized arrangements, continuing to route the traffic to Verizon over facilities that were not even appropriate for transit traffic (over EAS facilities and through an end office switch), continuing to keep an account of the traffic.[11]

More than a full year later, the Commission issued an order on August 26, 2009 in this docket. In the order, the Commission held that, "As a threshold matter, **we find that the traffic in dispute must be moved off of Windstream's network**."[12] Further, the Commission ordered: "Within 30 days of the date of this Order, Verizon and Brandenburg, consistent with guidelines contained herein, shall file with the Commission an executed traffic exchange agreement that resolves the outstanding traffic disputes in this case."[13]

Thirty days stretched to 699 days (23 times as long – to July 26, 2011), at which time Brandenburg and Verizon filed their "Facilities-Based Network Interconnection for Exchange of Information Service Provider Traffic" ("Traffic Exchange Agreement"). It was roughly another

[10] *Order Enjoining Windstream and Requiring an Accounting* at 4.

[11] *See, e.g.*, Second Supplemental and Amended Response of Windstream to Brandenburg's Initial Data requests to Windstream and Commission Staff's Data Request to Windstream, Brandenburg, and Verizon (filed Dec. 30, 2008); Response to Brandenburg's Motion for Informal Conference (filed Jul. 28, 2010); Windstream Exhibit 1.

[12] August 26, 2009 Order at 18 ("*Order Requiring Vacating Windstream's Network*") (emphasis added).

[13] *Order Requiring Vacating Windstream's Network* at 23.

five months (November 14, 2011)[14] until Brandenburg and Verizon finally complied with the Commission's *Order Requiring Vacating Windstream's Network* – 810 days later.[15]

Windstream has faithfully maintained "accounts of the traffic exchanged in order to determine amounts owed, if any, for the exchange and transmission of traffic," the most recent account of which was filed at hearing.[16] Windstream's hearing exhibits present Windstream's calculation that it is owed a total of $1,866,393 for network usage, LNP queries, and interest.[17]

III. THERE EXIST SOUND LOGICAL BASES FOR THE COMMISSION AWARDING WINDSTREAM COMPENSATION

A. As a Matter of Fairness, Windstream is Owed Compensation By Either Brandenburg or Verizon.

There is no logical rationale for Windstream not to be compensated. The Commission found in 2009 that "the traffic in dispute must be moved off of Windstream's network."[18] If the traffic did not belong on Windstream's network on August 26, 2009, it never belonged there. Windstream should be compensated for these services it performed for Brandenburg and Verizon – notably at the demand of the Commission to maintain the existing traffic arrangements.

Brandenburg has admitted more than once in this proceeding that it knew that not performing the LNP dips and routing traffic according to the same, rather than routing the traffic over direct trunks to Verizon was wrong.[19] As Brandenburg's witness put it, "The traffic was supposed to be – was supposed to be handed off to circuits that MCI established to receive its

---

[14] Supp. Tr. at 95. Windstream notes that the traffic reflected on Windstream Exhibit 1 (presented at hearing) most likely represents the differences between dates of service and dates of billing.

[15] In his November 14, 2011 Supplemental Rebuttal Testimony, Mr. Price provides administrative excuses for part of this delay, which are of no relevance to compliance with the *Order Requiring Vacating Windstream's Network* (at 1-2).

[16] Windstream Ex. 1. *See* Supp. Tr. at 8-10.

[17] *Id.*

[18] August 26, 2009 Order at 18 ("*Order Requiring Vacating Windstream's Network*") (emphasis added).

[19] *See, e.g.*, Tr. 167, ll. 13-17; Supp Tr. 168, l. 18 – 169, l. 10; 190, l.

traffic. And so, you know, there wasn't any better place to put it. It had been on these trunks for 20 years . . . ."[20] Brandenburg continued knowingly to route this traffic incorrectly through November 2011. Brandenburg made promises to its customers in its local tariff regarding how their calls would be handled, and it was Brandenburg's responsibility to figure out how to make that happen – including rerating the calls to its end users as local calls even if Brandenburg had to properly route the calls as long distance calls through AT&T's Louisville tandem switch.

While Windstream believes Brandenburg is the more culpable party because it controlled the routing of the traffic, it would be reasonable for the Commission to look to Verizon, as well. The e-mails previously produced on the record demonstrate that both carriers participated in the scheme to route this traffic through Windstream's network to avoid their responsibility for the exchange of their own traffic. With regard to the period prior to the *Order Requiring Vacating Windstream's Network*, Windstream will leave to Brandenburg and Verizon to work out whether Verizon should indemnify Brandenburg for Brandenburg's unauthorized use of Windstream's network without compensation. For the period following the *Order Requiring Vacating Windstream's Network*, however, both Brandenburg and Verizon were under a Commission-ordered obligation to find a way to remove the traffic from Windstream's network immediately. The Commission, therefore, should hold each of them accountable.

B. <u>The Commission Has Committed to Seeing This Matter to the End</u>.

In its July 1, 2008 *Order Enjoining Windstream and Requiring an Accounting*, the Commission enjoined Windstream without conducting a hearing or providing Windstream an opportunity to present evidence in a written record. Windstream acquiesced in this state of affairs because the Commission appeared at that time committed to resolving the matter quickly.

[20] Supp Tr. 190, ll. 3-7.

In fact, the Commission held a hearing less than two months later. Briefing concluded on September 23, 2008. The docket lingered over the months, with Windstream faithfully updating its data request responses and continuing to keep an accounting of what it was owed for the unauthorized traffic that it was processing at the Commission's instruction. The Commission's *Order Requiring Vacating Windstream's Network* was issued on August 26, 2009. Brandenburg and Verizon did not get around to complying with that order until November 14, 2011.

Windstream recognizes the complexity of issues raised in the proceeding. At the same time, however, for the Commission to choose to continue to allow Brandenburg and Verizon to abuse Windstream's network for free for well more than three years while simultaneously enjoining Windstream and requiring Windstream to keep an accounting of the use of its network creates foreseeable and reasonable expectations that the Commission will, among other things, see this matter to the end.

Windstream will not be the last carrier caught in the middle of a dispute between two parties that cannot find a way to comply with what they knew was right from the beginning and the Commissioned later ordered them to do. The Commission should demonstrate that such third parties cannot be ignored at the convenience of two other carriers which, for more than three years, could not seem to comply with a Commission order.

As a final note before turning to legal basis for awarding Windstream the compensation that it is due, Windstream observes that another reason for the Commission to ensure a just conclusion to this case is that the Commission made a commitment in the *Order Enjoining Windstream and Requiring an Accounting* to resolve these issues, as it did in the *Order Requiring Vacating Windstream's Network.*

IV. THE LEGAL BASIS FOR AWARDING WINDSTREAM THE COMPENSATION THAT IT SEEKS

A. General Authority to Award the Compensation that Windstream Seeks.

As an initial matter, as discussed above, for the Commission to have enjoined Windstream in 2008 while this proceeding continued until now, the Commission must believe it has a basis to award Windstream compensation, if the facts support such a conclusion (which they do). Pulling the rug out from Windstream after leaving Windstream in regulatory limbo for more than three years by concluding that the Commission turns out not to have jurisdiction would be an unreasonable result. Ironically, after getting a free ride on Windstream's network for years and avoiding any responsibility for the exchange of their own traffic, Brandenburg and Verizon have attempted throughout this proceeding to shift the burden to Windstream to show that it has a basis for compensation. During the informal conference between the parties leading to the *Order Enjoining Windstream and Requiring an Accounting* both Brandenburg and Verizon alleged that Windstream was required to continue routing their traffic – statements which led directly to the Commission's order. The Commission should not now allow them to take advantage of Windstream's network and then walk away from that arrangement without compensating Windstream.

Beyond compensation, Windstream observes that the Commission's jurisdiction to award compensation is supported by KRS 278.030(1), which states that "Every utility may demand, collect and receive fair, just and reasonable rates for the services rendered or to be rendered by it to any person." Further, "the authority granted to Commission under KRS 278.040 to 'regulate utilities and enforce the provisions of this chapter,' and to 'have exclusive jurisdiction over the regulation of rates and service of utilities,' does not embrace the authority to compel a utility to

furnish service without compensation, or to provide service over and above what is adequate and reasonable or to forego the use of reasonable classifications as to service and rates."[21]

Effective July 1, 2008, the Commission required Windstream to furnish services that directly benefited Brandenburg and Verizon and that were unauthorized uses of Windstream's network (such illegitimacy was later recognized in the *Order Requiring Vacating Windstream's Network*) without a means for Windstream to be compensated.[22] By its terms, the *Order Enjoining Windstream and Requiring an Accounting* committed the Commission to establishing what, if any, rate applies to services that Windstream was providing to Brandenburg for which there was at the time no contracted or tariffed rate.[23] Windstream provided the Commission the rate that it expected no later than July 17, 2008 – $0.0045 per minute.[24] Brandenburg and Verizon have been on notice for years of the stakes involved in their continuing abuse of Windstream's network and, in addition, the Commission's *Order Requiring Vacating Windstream's Network.* Indeed, they were the parties directly able to mitigate any compensation owed to Windstream – that is, they could have made appropriate arrangements years ago to reroute their traffic, but they never did. They cannot now be allowed to avoid responsibility for their actions – or more accurately their inaction.

---

[21] *Marshall County v. South Central Bell Tel. Co.,* 519 S.W.2d 616, 618 (Ky. App. 1975) ("*Marshall County*").

[22] Compounding matters, the Commission invalidated Windstream's transit tariff provision on August 16, 2010, retroactive to the filing of such provisions, although Windstream believes that such tariff provision would not have applied to the traffic in dispute in this matter because such transit tariff provision presume an authorized use of Windstream's network. *See* Brandenburg Telephone Company, et al., v. Windstream Kentucky East, LLC, Case No. 2007-0004, "Order." Windstream notes that such matter is currently on appeal in Windstream Kentucky East, LLC v. Public Service Commission of Kentucky, et al., Civil Action No. 10-CI-1641 (Franklin Cir. Ct.). Such provisions would at least have provided a proxy tariff-based option for recovery if the Commission determined that such tariff nevertheless applies (as Verizon argued previously in this proceeding (*see, e.g.*, Verizon Motion for Correction and Rehearing (filed Sept. 18, 2009)).

[23] This is in contrast to Case No. 2007-0004, in which Windstream's tariff provision were never suspended.

[24] Windstream's Responses to Commission Staff's Data Request to Windstream, Brandenburg, and Verizon, Data Request No. 1 (filed Jul. 17, 2008). *See also* Smith Direct (Aug. 8, 2008) at 10 (explaining proxy for $0.0045).

Courts have recognized that when parties are on notice of the rate that they may be expected to pay, the ordinarily applicable filed rate doctrine is not applicable and that a regulating agency that has authority to set rates and order refunds can apply rate changes retroactively (or, in this case, simply a retroactive rate). The U.S. Court of Appeals for the District of Columbia Circuit concluded in *Natural Gas Clearinghouse v. FERC* as follows:

> The filed rate doctrine simply does not extend to cases in which buyers are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service. . . . [I]t is not that notice relieves the [Federal Energy Regulatory] Commission of the bar on retroactive ratemaking, but that it "changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision."[25]

This is a right exercised by state regulatory commissions, such as this Commission, that would seem otherwise not to have the authority to award "damages."[26]

The fact that Windstream had no tariff or contract applicable to the traffic in dispute at the time is irrelevant for at least two reasons. First, as discussed above, the Commission has an obligation to ensure that Windstream can collect a just and reasonable rate for the services provided pursuant to KRS 278.030, and legal precedent permits it to establish this rate retroactively in the circumstances presented in this case. Second, the Federal Communications Commission, which has an organic statute that provides it with jurisdiction similar to that of this

---

[25] *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992)(internal citation omitted)("*Natural Gas Clearinghouse*").

[26] *See, e.g., Qwest Corp. v. Koppendrayer*, 436 F.3d 859 (8th Cir. 2006) (Minn. Pub. Utils. Comm'n); *Verizon Cal. Inc. v. Peevey*, 2006 U.S. Dist. LEXIS 41748 (N.D. Cal. June 13, 2006) (Cal. Pub. Utils. Comm'n); *Qwest Corp. v. Ariz. Corp. Comm'n*, 349 F. Supp. 2d 1228 (D. Ariz. 2004) (Ariz. Corp. Comm'n). Windstream notes that although all three of these examples pertain to setting the rates for unbundled network elements, none rely for their pertinent conclusions on what Brandenburg and Verizon may allege to be special circumstances of 47 U.S.C. § 252. In each case, the regulatory commissions had a statutory standard to apply in setting a rate, just like this Commission has in the instant case. Windstream also acknowledges that the statute under consideration in *National Gas Clearinghouse* did not permit the regulatory agency to increase rates retroactively, but that is merely an artifact of such statute and is not relevant to KRS 278.030 and 278.040.

Commission, has ordered compensation to be paid by a customer that used a carriers' service, even if such carrier's service was not properly tariffed:

> After careful review of the arguments and evidence presented by the parties, we find that New Valley has failed to satisfy its burden of establishing that it is entitled to an award of damages from PacBell. New Valley relies on the court's decision in *Maislin* to support its principal claim that it is entitled to a refund of all charges paid for the circuits at issue because PacBell's tariff did not authorize PacBell to charge and collect for the circuits. We find no basis in *Maislin* or any other court or Commission decision for the conclusion that a customer may be exempt from paying for services provided by a carrier if those services were not properly encompassed by the carrier's tariff.[27]

B. The Equitable Doctrine of "Unclean Hands" is Not Relevant to the Instant Case.

The equitable doctrine of "unclean hands" is not relevant to the instant case for three reasons. First, such doctrine only applies to claims in equity.[28] Windstream's claim, as discussed above, is in law – KRS 278.030. Windstream is seeking in pertinent part a money award, not injunctive relief. Indeed, the potentially applicable incident leading to such an inquiry led to injunctive relief against Windstream. Had Windstream caused the calls not to complete and then sought injunctive relief of its own, the injunctive inquiry might be different.

Second, once Windstream complied with the *Order Enjoining Windstream and Requiring an Accounting*, which it already had prior to the issuance of such order, Windstream's actions were the proverbial water under the bridge. Brandenburg's continuing knowing misuse of Windstream's network without compensation on a going-forward basis is a completely different matter.

---

[27] *New Valley Corporation v. Pacific Bell*, 8 FCC Rcd 8126, 1993 FCC Lexis 5687, ¶ 8 (1993).

[28] *See, e.g., Parris' Adm'r v. John W. Manning & Sons*, 144 S.W.2d 490, 491 (Ky. 1940) ("*Parris' Administrator*") ("It is doubtful that the maxim [of "unclean hands"] can be invoked in such a situation as this, for the litigant was not seeking relief accorded by equity but the enforcement of a common law right in a proceeding pending in a chancery court, the reason therefor being his inability to proceed in a court of law because of a specific injunction." *Id.* (internal citation omitted).

Finally and most significantly, to suggest that Windstream may have unclean hands for taking action (after it had exhaustively attempted to work with the parties) to cease the unauthorized traffic flowing through its network for a matter of a few days ignores the facts introduced in this matter. Specifically, the facts show that Brandenburg previously had ceased routing the traffic to Verizon (at the time when Windstream still had not discovered this traffic) for a period of many months. Yet, the facts show that neither Brandenburg nor Verizon went to the Commission regarding that event – in contrast to their seeking immediate intervention later when they had reason to try to team up to force Windstream to bear the burden of their routing scheme.

Most remarkably, at any point in time during the few days that Windstream was attempting to extract itself from the fraudulent routing scheme, all Brandenburg needed to do was perform a few minutes of translations work to reroute the calls properly through the AT&T tandem switch in order to resolve the issue. At the same time, Brandenburg could have rerated the calls as local calls to its end users so there was no disruption to end users. Instead of bearing this responsibility for its own traffic, Brandenburg chose instead to continue its efforts to route through Windstream's network, thereby shifting the interim financial responsibility for the traffic to Windstream.

Even if Windstream's claim were to be considered one entirely in equity and even if Windstream's claim for a monetary award were considered to be logically related to its actions over a particular three-day period, the U.S. Court of Appeals for the Sixth Circuit has held that the doctrine of unclean hands must be applied proportionately, when applied (which it should not be applied at all in this case).

> [T]he rule is not inexorable that a plaintiff, who comes into court with unclean hands, is always to be denied relief, regardless of

> other circumstances in the case, for "the maxim should not be applied where an inequitable result would be reached." If a defendant has been guilty of conduct more unconscionable and unworthy than that of the plaintiff, the rule may be relaxed.[29]

Indeed, as the Kentucky Supreme Court has held, "Though the operation of the maxim is broad, there is a reasonable limitation, and the principle is not applicable to all misconduct or to every act smacking of inequity or deceit in relation to the matter in which relief is sought."[30]

In this case, Windstream's hands were potentially unclean for, at most, three days – although the actions during those few days should be viewed in the applicable context as noted above which involved Windstream trying to extract itself from the fraudulent routing scheme when it became apparent that Brandenburg and Verizon were refusing to correct their behavior. Brandenburg, the party that would theoretically be raising such a defense, was blocking traffic for over four months. While Windstream's actions were those of merely three days which pale in comparison to Brandenburg's four months of blocking by deliberate omission. Even worse, Brandenburg's has admitted that it knew that routing traffic through Windstream's network was wrong and did this for perhaps as long as nine years, many of these years facilitated by deliberately manipulating its equipment, such as failing to perform LNP dips and deliberately altering routing tables. Meanwhile, Verizon, which also sat on its hands and watched as Windstream's network was abused and even participated in the e-mail exchanges with Brandenburg which discussed the continuation of the routing outside of Windstream's knowledge, also allowed this situation to persist.

---

[29] *Goodyear Tire & Rubber Co. v. Overman Cushion Tire Co.*, 95 F.2d 978, 983 (6th Cir. 1938) (citations omitted).

[30] *Parris' Administrator*, 144 S.W.2d at 492 (Ky. 1940).

V. SUPPORT FOR SPECIFIC TYPES OF COMPENSATION

As a general matter, Windstream believes that the appropriate measure of its compensation is the price that would ordinarily be charged for the service being measured. KRS 278.030(1) states that Windstream is to be provided with a "just and reasonable rate." Windstream is unaware of any precedent supporting the concept that out-of-pocket expense alone is sufficient to reach the lower bounds of what would be just and reasonable.

Windstream believes that the Commission, in the first instance, should look to tariffed rates for like services that have been approved as just and reasonable. By suggesting consideration of these tariffed rates, Windstream is not admitting that the Commission has jurisdiction to consider the justness and reasonableness of each of such tariffed rates – merely that such rates should be instructive in constructing what would be a rate that would applicable to the services that Windstream was required to provide for which, in the form provided, there has not been a tariffed rate.

A. Usage

As discussed above, Windstream does not have an established rate for the traffic in dispute because, as recognized by the Commission, it should not have been delivered to Windstream in the first place. Put another way, carriers like Windstream do not, as a matter of normal course, tariff or contract for the universe of potential fraudulent or unauthorized uses and abuses of their networks. Thus, also as discussed above, the Commission is charged with determining what such rate should be so as to award Windstream the compensation that it seeks.

Windstream believes that $0.0045 per minute is the appropriate "usage" rate for the reason that the traffic was routed inappropriately through its end office switches which were forced to function as tandems switches. Windstream arrived at this rate by using the rate that had

previously been tariffed by Windstream for local end office "transit" service as a proxy. Windstream believes that such service is roughly analogous to the service that the Commission required Windstream to continue providing to Brandenburg pursuant to the *Order Enjoining Windstream and Requiring an Accounting* (although, as discussed below, Brandenburg's method of delivering the traffic in dispute required Windstream to perform additional services for Brandenburg to accommodate such inappropriate traffic (such as LNP dips).[31]

Although the Commission never investigated Windstream's tariffed transit rates, the Commission did not reject them either. Windstream provided a cost study supporting such rate in that proceeding, and entered such cost study into the record of the current case in response to a Verizon data request.[32] Brandenburg and Verizon had full opportunity to discuss the cost study in their rebuttal testimony and failed to do so. Nor did they introduce evidence to support any other rate, opting instead only to argue that they should bear no financial responsibility in this matter for their traffic.

Cross-examination at hearing on the transit cost study was devoted to two red herring topics. The first was whether the cost study was performed before or after the rate was initially set. As an initial matter, this is a logically meaningless topic because if the cost study supports the rate, it supports the rate. Further, Windstream's transit tariff provision actually contained two rates – a $0.0030 per minute rate for tandem connections and a $0.0045 rate for end office connections. This tandem rate matches exactly the $0.0030 rate for transit service in the pre-existing interconnection agreement between Windstream and Verizon for traffic that one party

[31] Windstream speaks in terms of a rough analogy because the service described in Windstream's transit tariff provision assumed that LERG-established routing for the third-party bound traffic entailed use of Windstream's switch to route the traffic to a third party "homed" off of Windstream's tandem switch. In the case of the traffic in dispute, the LERG provided for routing to Verizon's Louisville switch – meaning that the traffic, even by Brandenburg's admission (discussed above), never should have been on Windstream's network.

[32] *See* Windstream response to Brandenburg Oct. 14, 2011 Data Request No. 1, Conf. Att. 1 (filed Oct. 28, 2011).

originates and routes through the other for delivery to a third party.[33] Windstream explained that it was forced to develop an additional end office rate to provide appropriate price signals to originating carriers regarding Windstream's increased costs when the originating carrier delivers transit traffic to Windstream's end office for termination to a third-party directly homed off of Windstream's network (unlike Verizon).[34]

The second topic of cross-examination at hearing regarding Windstream's cost study concerned whether the Commission ever evaluated it. As an initial matter, as discussed above, the Commission has already approved Windstream's interconnection agreement with Verizon, which contains a $0.0030 transit rate (that would be technically inapplicable to Brandenburg's traffic but nevertheless serves as a reasonable proxy). A mere $0.0015 premium for the additional services provided by Windstream when traffic is delivered to a Windstream end office is appropriate and is fully supported by Windstream's cost study, as is the $0.0030 rate for tandem connections. Neither Verizon nor Brandenburg offered testimony to the contrary.

B. LNP Dips

Windstream has explained in this proceeding that when Brandenburg routed the traffic in dispute over EAS trunks to Windstream, Windstream was required to perform an LNP query ("dip") to determine how to route the traffic[35] – a fact that has not been in dispute. Brandenburg

[33] *See* Attachment 12, Section 4.1.3.

[34] The connotations of the word "deterrent" that Brandenburg's attorney attempted to invoke at hearing are misleading because a cost-supported rate can be a "deterrent" – Windstream's decision to create a rate structure that differentiated between delivery of traffic to Windstream's tandem switches versus its end office switches. *See, e.g.*, Supp. Tr. at 80, ll. 6-21. For more detail contrasting the network arrangements of Brandenburg and the other RLECs, *see, e.g.*, Tr. at 207, l. 22 – 208, l. 10 (explanation provided by Windstream Kerry Smith to Vice Chairman Gardner).

[35] Smith Direct (Aug. 8, 2008) at 12; Smith Supp. Test. (Mar. 2, 2010) at 6-8.

has admitted that it should have been performing LNP dips all along, but elected not to so as to cause the traffic to be routed through Windstream rather than directly to Verizon.[36]

The only question that remains is at what rate should Windstream be compensated for performing such dips. As is the case with the usage rate, Windstream does not have an established rate for performing LNP dips for local traffic delivered to Windstream over EAS trunks. As discussed above, pursuant to KRS 278.030, the appropriate standard is "just and reasonable," which is a rate above Windstream's out-of-pocket cost. Windstream has explained that the $0.00305 that it seeks per LNP query that Brandenburg required it to perform is based on Windstream's interstate access tariff.[37] While such rate has not been approved by this Commission, it has been approved by the FCC. Windstream provided the cost support provided to the FCC in its February 10, 2012 response to the Commission's post-hearing data request.

If the Commission is unwilling to accept the LNP query rate from Windstream's federal tariff, it also has available Windstream's 8YY database query rate in a Windstream tariff approved by this Commission – a rate of $0.0067 per query.[38] Windstream explained at hearing that the 8YY database query function entails similar functions to the LNP queries that Windstream was required to perform to route the Brandenburg-originated traffic that Windstream was required to accept and route pursuant to the *Order Enjoining Windstream and Requiring an Accounting.*[39]

---

[36] *See, e.g.*, Tr. 167, ll. 13-17; Supp Tr. 168, l. 18 – 169, l. 10; 190, l.

[37] *See* Windstream Response to Verizon Data Request No. 22 (filed Oct. 28, 2011) (includes the pertinent tariff page – Windstream Telephone System, Tariff F.C.C. No. 6, Page 17-147, § 17.4.4(M)), discussed at hearing at, among other places, Supp. Tr. at 66, l. 9 – 66, l. 11.

[38] *See* Windstream Kentucky East, Inc. – Lexington, Tariff P.S.C. Ky. No. 8, Page 141, § 4.6.3.

[39] Supp. Tr. at 81, ll. 4-14.

C. Interest

Windstream, of course, does not have a tariffed rate for non-payment of compensation for unauthorized network usage. This does not mean that Windstream should not be compensated for the time value of the money of which it has been deprived for the last several years. Windstream already has a Commission-approved method of performing such a calculation for unpaid wholesale network usage charges - 0.059% per day, compounded daily,[40] which yields a monthly rate of 1.78%, which more than justifies the 0.50% per month used by Windstream.

D. Attorney's Fees

Windstream believes that it has been unusually prejudiced by the instant case, having to constantly attempt to force Brandenburg and Verizon along so as to do what they know is appropriate and the 811 days it took for Brandenburg and Verizon to comply with the *Order Requiring Vacating Windstream's Network.* In short, Windstream has had to expend not only vast internal resources to defend this matter despite it not having any interest in the traffic other than making sure it is properly routed away from its network but also the costs for outside counsel. Again, Brandenburg and Verizon could have mitigated these costs but resolving their traffic dispute and properly rerouting their traffic years ago. Neither did and instead took action to ensure that Windstream remained in the middle of their dispute. In light of this, Windstream suggests that compensation for Windstream's attorney's fees is more than appropriate.

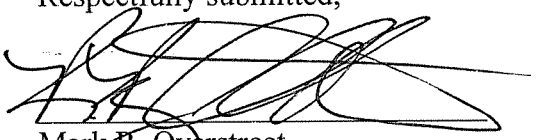
VI. CONCLUSION

On July 1, 2008, the Commission required Windstream to continue to allow Brandenburg and Verizon to route their unauthorized traffic through Windstream's network without compensation to Windstream (but subject to an accounting) while the matters in this proceeding were addressed. Neither Brandenburg nor Verizon acted timely to correct the routing and

[40] *See* Windstream Kentucky East, Inc. – Lexington, Tariff P.S.C. Ky. No. 8, Page 10, § 2.4.1(D)(1)(b).

instead took action to make sure that Windstream remained in the middle of their dispute. Through no fault of Windstream's, but substantial fault of both Brandenburg and Verizon, this matter lingered for 1,231 days until, according to Verizon, the traffic finally left Windstream's network. Roughly two-thirds of this time was after the Commission determined that the traffic did not belong on Windstream's network and should be immediately removed. It is logically and legally appropriate to require the full $1,866,393 in compensation, plus attorney's fees, that Windstream requests be paid to Windstream forthwith.

Respectfully submitted,



Mark R. Overstreet
R. Benjamin Crittenden
STITES & HARBISON, PLLC
421 West Main Street
P.O. Box 634
Frankfort, Kentucky 40602-0634

COUNSEL FOR:
WINDSTREAM KENTUCKY EAST, LLC

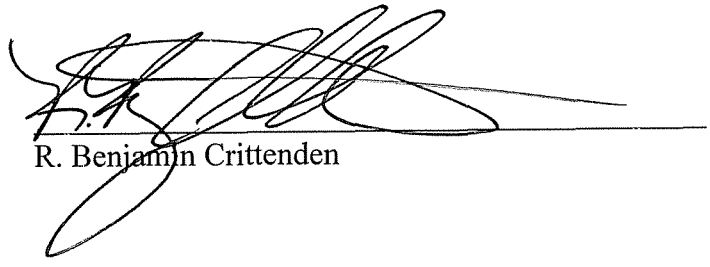
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served by United States Postal Service, First Class Mail, postage prepaid, upon:

C. Kent Hatfield
Douglas F. Brent
Deborah T. Eversole
Stoll Keenon Ogden, PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202

John E. Selent
Dinsmore & Shohl, LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202

on this the 29th day of February, 2012.



R. Benjamin Crittenden