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March 15, 2012

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 MCImetro 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 Rebuttal 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.)

RECEIVED
MAR 15 2012
PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

BRANDENBURG TELEPHONE COMPANY'S POST-HEARING REBUTTAL BRIEF FOR THE JANUARY 31, 2012 HEARING

Brandenburg Telephone Company ("Brandenburg Telephone"), by counsel, hereby submits its Post-Hearing Rebuttal Brief in response to the briefs filed by Windstream Kentucky East, LLC ("Windstream") and MCImetro Access Transmission Services, LLC, d/b/a Verizon Access ("MCImetro").

The facts of this case are well-established. It is telling that Windstream has resorted to misrepresenting those facts in its last-ditch effort to force this Commission to award it compensation it is not owed. As just a sample of these misrepresentations: Windstream falsely claims it was taken advantage of (when in fact it voluntarily directed the use of its network for the traffic in question), falsely claims that Brandenburg Telephone violated the Commission's order to execute an exchange agreement (when in fact the record is clear that Brandenburg Telephone complied), and falsely accuses Brandenburg Telephone of "blocking" the traffic in question (when in fact Windstream itself is the only party that blocked the traffic in question).

The record in this case demonstrates that Windstream is not entitled to any compensation for the traffic in question. Windstream repeatedly agreed to carry the traffic, even after it learned of the

volume of traffic involved. It cannot now demand compensation "as a matter of fairness" simply because it regrets its decision. (Post Supplemental Hearing Brief of Windstream Kentucky East, LLC, Feb. 29, 2012 ("Windstream Brief"), p. 5.) In addition, there is no legal basis for Windstream's damages claim. Years into the case, Windstream still resorts to arguing that the Commission should rely on "proxy" rates based on inapplicable and invalidated tariffs. (*Id.* at 14 (arguing that its tariffed rates "should be instructive in constructing what would be a rate that would appl[y] to the services").)

In the event the Commission concludes that Windstream is owed any kind of compensation, it should hold MCImetro liable for all amounts due because MCImetro caused and extended this dispute.

I. Windstream Voluntarily Carried the Traffic in Question

Brandenburg Telephone was, from the start, between a rock and a hard place. MCImetro ported the telephone numbers for its ISP clients without warning Brandenburg Telephone or making any arrangements for the exchange of traffic. Brandenburg Telephone was consequently forced to choose between two options: either allow all the calls to fail, or continue to route the traffic on an interim basis across Windstream's network where it had been carried for many years. Brandenburg Telephone chose the latter option, and initiated traffic exchange negotiations with MCImetro shortly after its management became aware of the nature of the traffic in question.[1]

[1] Brandenburg Telephone's initiative is an important fact that is omitted from Windstream's and MCImetro's briefs. The record establishes that Brandenburg Telephone was more proactive than any other party in attempting to resolve this dispute. Brandenburg Telephone initiated traffic exchange negotiations with MCImetro in 2005, 2007, and again in 2008, each time to no avail. Brandenburg Telephone also filed a complaint seeking resolution of this matter even before the Commission opened its investigation. (*See* Formal Complaint, Ky. P.S.C. Case No. 2008-239, filed June 24, 2008 (consolidated into the present case, *see* Order, Ky. P.S.C. Case No. 2008-239, Feb. 1, 2011).) Brandenburg Telephone's requested relief spoke directly to the issues involved in this matter: "Brandenburg Telephone respectfully requests that the Commission take the following actions. A. Order MCImetro to, at no cost to Brandenburg, establish dedicated trunking facilities to an interconnection point on Brandenburg's network; B. Order MCImetro to maintain those dedicated interconnection facilities unless and until the volume of traffic exchanged between Brandenburg and MCImetro falls below a DS-1 level of traffic; C. Order that MCImetro shall not collect

Brandenburg Telephone made this decision at a time it believed in good faith that there was only a "limited amount" of traffic involved. (Test. of A. Willoughby, Jan. 31, 2012 Hearing, Tr. At 14:41:21; 15:20:25.) Moreover, at the time Brandenburg Telephone made this decision, Windstream (in its own words) "agreed to transit the traffic for Brandenburg." (Direct Test. of A. Willoughby, Aug. 13, 2008, p. 5:12-17 (*citing* Compl., attached as Exh. 1 of Test., and *quoting* email from Windstream employee to Brandenburg Telephone employee attached as Exh. 3 to Compl.).)

Windstream now falsely claims that Brandenburg Telephone "foist[ed] the traffic" onto Windstream's network, that MCImetro and Brandenburg Telephone "took advantage of Windstream's network", and even appears to accuse the Commission of being complicit by "requir[ing Windstream] to continue routing their traffic." (Windstream Brief, pp. 3, 8.) Windstream makes these false accusations without once mentioning that it repeatedly and voluntarily agreed to carry the traffic in question.

Even in 2007, when Windstream first notified Brandenburg Telephone that a large amount of traffic was involved, Windstream reiterated that it would continue to accept the traffic in question on an interim basis. (Direct Test. of A. Willoughby, Aug. 13, 2008, pp. 5:19-6:9.) Relying on Windstream's voluntary acceptance of the traffic, Brandenburg Telephone continued routing the traffic in question to Windstream's network while it initiated a new round of negotiations with MCImetro. (*Id.* at pp. 5:18-22.)

During these years, Windstream could have taken many different corrective actions. If it felt it was owed compensation, it could have generated invoices or otherwise alerted MCImetro and

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reciprocal compensation with respect to any traffic originated by Brandenburg's end-user customers and destined for MCImetro's ISP customer(s); D. Order MCImetro to pay any charges or other costs that Windstream may seek to impose on Brandenburg for exchanging traffic with MCImetro; E. Order that Brandenburg shall not be required to establish new trunking facilities and deliver traffic to MCImetro at Windstream's Elizabethtown tandem; F. Schedule an informal conference or conferences to facilitate efficient resolution of this matter; and G. Grant Brandenburg Telephone any and all other legal and equitable relief to which it is entitled." (*Id.* at pp.11-12.)

Brandenburg Telephone to that claim. If Windstream believed that the traffic was "foisted" on it, it could have demanded that MCImetro and Brandenburg Telephone find a different interim solution. If Windstream believed that it was being taken advantage of, it could have requested assistance from the Commission.

Windstream did none of these things. Instead, it agreed to carry the traffic, without demand for compensation.

In June of 2008, after voluntarily carrying the traffic in question for years, Windstream unilaterally stopped the traffic. (Direct Test. of A. Willoughby, Aug. 13, 2008, p. 7:3-7.) The Commission, forced to organize an emergency teleconference, ordered Windstream to continue carrying the traffic. (Order, July 1, 2008.) The Commission later made it clear that it was "disconcerted by Windstream's unilateral action in blocking the traffic." (Order, Aug. 26, 2009.) Windstream now accuses the Commission of "choos[ing] to allow Brandenburg and Verizon to abuse Windstream's network for free . . . ." (Windstream Brief, p. 7.) This characterization is inaccurate. The Commission's order was simply for Windstream to honor its prior agreement to continue carrying the traffic until a permanent traffic exchange agreement could be executed.

Windstream attempts to minimize the severity of its unilateral blocking by accusing Brandenburg Telephone of "blocking" the calls. (Windstream Brief, p. 3.) This is false. Brandenburg Telephone never blocked any of the traffic in question.[2] In fact, Windstream's entire complaint throughout this action is that Brandenburg Telephone did not block the traffic in question, and instead let it continue across Windstream's network, with Windstream's permission, on an interim basis. Windstream appears to be referring to a short period of time in which a small number

[2] Windstream also falsely claims that Brandenburg Telephone has referred to its own behavior as "blocking". Windstream's apparent support for this claim is an email from MCImetro, as well as testimony by Brandenburg Telephone's witness in which the witness described MCImetro's position as "please, please, please don't block the traffic . . . ." (*See* Windstream Brief, p. 3, n. 6.) At no point did Brandenburg Telephone block the traffic, and at no point did Brandenburg Telephone refer to its actions as "blocking".

of calls were failing because MCImetro did not make network arrangements to receive the calls when it entered the market, and Brandenburg Telephone had not yet taken all steps necessary to ensure that the traffic could route to Windstream's network on an interim basis (which, again, was done with Windstream's consent at a time when Brandenburg Telephone believed there to be a "limited amount" of traffic). Windstream's false accusation of Brandenburg Telephone's "blocking" has no basis in fact, and serves only to highlight the fact that Windstream itself is the only party in this action that blocked the traffic in question.

Similarly, Windstream tries to downplay its voluntary acceptance of the traffic by painting a conspiratorial picture of MCImetro and Brandenburg Telephone as engaged in a "scheme", and accuses both carriers of "not get[ting] around to complying with [the Commission's August 26, 2009] order until November 14, 2011." (Windstream Brief, pp. 6-7.) However, as discussed in Brandenburg Telephone's previous brief, both Brandenburg Telephone and MCImetro complied with the Commission's order within 45 days, as specified in the order. (*See* Brandenburg Telephone Company's Post-Hearing Brief for January 31, 2012, pp. 22-24.) The Commission ordered Brandenburg Telephone and MCImetro to execute a traffic exchange agreement within 30 days or jointly file a description of "each specific area of contention" within 45 days. (Order, Aug. 26, 2009, p. 23.) Brandenburg Telephone and MCImetro filed their joint Issues Matrix within 45 days of the Commission's Order, exactly as the Commission required. (*See* Issues Matrix of Brandenburg Telephone and MCImetro, filed Oct. 12, 2009.) Although Windstream apparently disagrees with the Commission's order, it cannot use its disapproval to falsely accuse either Brandenburg Telephone or MCImetro of disobeying the Commission. (*See* Windstream Brief, p. 7 ("Brandenburg and Verizon did not get around to complying with that order until November 14, 2011." Windstream also argues

that Brandenburg Telephone and MCImetro, "for more than three years, could not seem to comply with a Commission order".)

Windstream was not taken advantage of or abused. Windstream voluntarily permitted the use of its network to exchange the traffic in question for years without demanding payment from either MCImetro or Brandenburg Telephone. It now attempts to deflect attention from that fact by casting false accusations on Brandenburg Telephone, MCImetro, and the Commission. Given the facts clearly established in the record, it would be inequitable to permit Windstream to reach back and retroactively demand payment for its voluntary provision of services. This reason alone is sufficient to reject Windstream's baseless claims for compensation. Therefore, Brandenburg Telephone respectfully requests that the Commission find that Windstream is owed no compensation and dismiss this investigation.

II. Windstream Still Has Not Provided a Legal Basis for or Evidence Supporting Compensation

Even if the facts supported Windstream's claim for compensation, which they do not, Windstream has not provided a legal basis for its claim, nor has it supported its claimed damages with competent evidence. Windstream even attempts to shift its burden to justify its requested compensation onto the Commission, and presumes to inform this Commission that "the Commission must believe it has a basis to award Windstream compensation." (Windstream Brief, p. 8 (arguing that the Commission must have considered this issue prior to issuing its order in 2008 directing Windstream to continue carrying the traffic as it had agreed to do).)

Windstream is seeking four separate categories of damages: (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 Tr. at 10:56:21.) Windstream has failed to support its requested damages for all four of these categories.

Windstream's alleged $0.00305/query LNP cost is not an actual measurement of any alleged damages. (Test. of K. Smith, Jan. 31, 2012 Tr. at 10:53:03 (admitting the alleged cost is a proxy based on Windstream's access tariff which does not apply to the traffic in question).) When asked by Vice Chairman Gardner to clarify its basis for these damages, Windstream could only cite its total monthly costs for its "allocated portion of the shared LNP database administration costs." (*See* Response to the Commission's Jan. 31, 2012 Data Request to Windstream Kentucky East, LLC, Feb. 10, 2012.) Windstream did not even attempt to calculate its per query cost, its actual total costs, or even the actual number of LNP queries performed with respect to the traffic in question. (*Id.*) In short, Windstream has provided no evidence of actual damages related to LNP queries upon which this Commission could rely, even if it were inclined to award damages.

Similarly, Windstream's alleged $0.0045/minute end office transit rate is nothing but a "proxy" rate that corresponds with the rate set forth in a tariff that does not apply to the traffic in question and that this Commission has invalidated. (*See* Windstream's Responses to Commission Staff's Data Request, July 31, 2008, Response to Commission Staff Data Request 1.a; Test. of K. Smith, Jan. 31, 2012 Tr. at 10:38:24 ("[w]e used a proxy").) Windstream even admits the invalidated Transit Tariff rate was not intended to be paid by anyone, but was adopted "strictly as a deterrent . . . ." (Direct Test. of K. Smith, Case No. 2007-0004, p. 6:21 (emphasis original).) In short, Windstream has provided no evidence of actual damages related to transit rates upon which this Commission could rely, even if it were inclined to award damages.

As legal support, Windstream appears to cite generally to the Commission's authority to determine a "just and reasonable rate" pursuant to KRS 278.030. However, Windstream admits it

"does not have an established rate for the traffic in dispute . . . ." (Windstream Brief, p. 14.) It has previously admitted that "[t]here 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 Tr. at 11:12:56.) Moreover, Windstream admits it never even billed for the traffic in question. (Test. of K. Smith, Jan. 31, 2012 Tr. at 10:38:24.) A fair conclusion, therefore, would be that even if Windstream is entitled to a "just and reasonable" rate, this Commission should find that a "just and reasonable" rate is the same rate Windstream demanded during its years of voluntarily carrying the traffic: nothing.

Windstream certainly cannot argue in good faith that its $0.0045/minute "deterrent" rate is "just and reasonable" because, except in this specific action, Windstream is arguing in public filings that such a high transit rate is unreasonable and unacceptable. On February 24, 2012, Windstream filed comments with the Federal Communications Commission arguing that "the commission should mandate that transit service be made available at rates no higher than $0.0007 per minute of use." (Comments of Windstream Communications, Inc. on Sections XVII.L-R, *In the Matter of Connect America Fund et al.*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208 ("Windstream Comments"), p. 11 (Feb. 24, 2012).) In other words, except when Windstream is trying to justify its proxy "deterrent" rate to this Commission, it is arguing that a transit rate of $0.0007/minute (which is just 15% of Windstream's claimed rate in this case) "would be a just and reasonable cap on the rates RBOCs may charge for the provision of transit." (*Id.*) Even then, Windstream argues, "$0.0007 likely would far exceed an RBOC's transit costs . . . ."[3] (*Id.*) Windstream cannot have it both ways. This Commission should take Windstream at its word that its requested $0.0045 proxy "deterrent" rate is not "just and reasonable."

[3] Windstream argues that such a cap is necessary because otherwise, certain carriers may "assess above-cost transit rates and can be unwilling to negotiate acceptable rates . . . ." (*Id.* at 9.)

Because Windstream can point to no legal mechanism for recovering compensation, it continues to argue that it should be awarded damages "as a matter of fairness" and that its tariffed rates "should be instructive in constructing what would be a rate that would appl[y] to the services . . . ." (Windstream Brief, pp. 5, 14.) In other words, as Windstream has previously argued, it wants "compensation based upon a proxy rate of a tariff that would have been in place, should have been in place . . . ." (Objection of Mr. Clark, Aug. 19, 2008 Tr. p. 11:4-10.) Such an award would be a clear violation of the filed rate doctrine. *See, e.g.*, KRS 278.160(2) ("[n]o utility shall charge, demand, collect, or receive from any person a great or less compensation for any service rendered than that prescribed in its filed schedules"); *Cincinnati Bell Tel. Co. v. Ky. P.S.C.*, 223 S.W.3d 829, 837 (Ky. 2007) ("the filed rate defines the 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").

In addition, because only past damages are at issue in this case now, such an award would also violate the rule against retroactive ratemaking. (*See* Brandenburg Telephone Brief, p. 21; MCImetro Brief, pp. 5-7.)[4] The Commission has recognized that the rule against retroactive ratemaking is "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). Windstream attempts to argue that, despite this "generally accepted principle of public utility law," retroactive ratemaking is just fine in this case because "when parties are on notice of the rate that they may be expected to pay, the ordinarily applicable filed rate doctrine is not applicable . . . ." (Windstream

[4] This fact is a critical distinction between this case and *New Valley Corp. v. Pacific Bell*, 8 FCC Rcd. 8126 (1993), on which Windstream relies to argue that "[t]he fact that Windstream had no tariff or contract applicable to the traffic in dispute at the time is irrelevant . . . ." (Windstream Brief, pp. 10-11.) In *New Valley Corp.*, the FCC refused to award a refund where services were not properly encompassed by the carrier's tariff. In this case, Windstream is asking the Commission to retroactively apply a rate. That action is unlawful, regardless of whether, in some circumstances, a tariff rate could be appropriately applied to non-tariffed services on a prospective basis.

Brief, p. 10.) However, the case on which Windstream relies does not stand for such a broad proposition.

In *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066 (D.C. Cir. 1992), FERC's original order had been appealed and rejected by a court of law for a lack of "reasoned decisionmaking," which remanded the case back to the agency. Despite the Court's loose dicta about "notice," the Court found that FERC "had authority to order retroactive rate adjustments when its earlier order reversed on appeal improperly disallowed a higher rate." 965 F.2d at 1074. In other words, FERC may order "the retroactive recoupment of refunds that were found on judicial review to have been improperly ordered." *Id.* This limited reading of *Natural Gas Clearinghouse*—as permitting "retroactive" ratemaking only after a judicial reversal—has been reinforced by later decisions by the D.C. Circuit Court of Appeals. *See, e.g., Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1111 (D.C. Cir. 2001) (characterizing *Natural Gas Clearinghouse* as "reading *Callery* to embody the 'general principle of agency authority to implement judicial reversals'"). In fact, in at least one case in which a company sought to force FERC to retroactively apply a surcharge when there had been no prior judicial ruling, the Court held that the action was barred by the rule against retroactive ratemaking. *See City of Anaheim v. FERC*, 558 F.3d 521, 525 (D.C. Cir. 2009) (distinguishing *Natural Gas Clearinghouse* as "not on point" because "[i]n this case, FERC was not responding to a court decision when it imposed retroactive surcharges.").

Here, as in the *City of Anaheim* case, Windstream is not asking the Commission to implement a judicial decision. Rather, it is asking the Commission to engage in textbook retroactive ratemaking, contrary to "generally accepted principles 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).

Therefore, Windstream has no basis in law for its requested compensation, nor has it presented competent evidence of the damages it has allegedly sustained. Brandenburg Telephone respectfully requests that the Commission find that Windstream is not entitled to any compensation, and dismiss this investigation.

III. Brandenburg Telephone Negotiated in Good Faith with MCImetro

In the event the Commission finds that Windstream is owed some form of compensation, MCImetro should be liable for that compensation.

MCImetro caused this entire dispute by porting telephone numbers without conducting even a basic investigation of how its actions would affect other companies' customers. (*See, e.g.*, Test. of A. Willoughby, Jan. 31, 2012 Tr. at 15:08:55, 15:27:58.) MCImetro was the only party that could have avoided the genesis of this dispute, by executing a traffic exchange agreement with Brandenburg Telephone at the outset, yet it chose not to do so. Not coincidentally, MCImetro also had the most to gain financially from an extended dispute. As even Windstream has recognized, once MCImetro was forced to execute a traffic exchange agreement under the watchful eyes of the Commission, MCImetro became "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." (Test. of K. Smith, Jan. 31, 2012 Tr. at 10:51:00.) By refusing to execute an exchange agreement for years, MCImetro effectively dodged these costs.

Brandenburg Telephone, in contrast, proactively sought a resolution. Brandenburg Telephone initiated traffic exchange negotiations with MCImetro in 2005 (when its management first learned of the traffic), in 2007 (when it first learned of the volume of traffic), and in 2008 (when Windstream unilaterally blocked the traffic). Before the Commission started its investigation, Brandenburg Telephone also filed a formal complaint seeking, among other relief, an "[o]rder [for]

MCImetro to, at no cost to Brandenburg, establish dedicated trunking facilities to an interconnection point on Brandenburg's network; [and an] [o]rder that MCImetro shall not collect reciprocal compensation with respect to any traffic originated by Brandenburg's end-user customers and destined for MCImetro's ISP customer(s)." (Compl., 2008-239, pp. 11-12.) In each of these rounds of negotiations, the parties failed to finalize an agreement for two primary reasons: MCImetro expected Brandenburg Telephone to exceed its legal obligations and "carry the traffic beyond our territory boundary, and also they expected us to pay them reciprocal compensation." (Test. of A. Willoughby, Jan. 31, 2012 Tr. at 14:56:15.)

MCImetro's own brief establishes its preoccupation with avoiding costs, and imposing additional, unreasonable burdens on Brandenburg Telephone:

> "Due to the economic burden such an arrangement with Brandenburg would impose, MCImetro provided a counterproposal to interconnect on Brandenburg's network if Brandenburg would agree to pay reciprocal compensation on the traffic MCImetro terminates. Alternatively, MCImetro was willing to exchange traffic on a bill-and-keep basis if the parties could establish an interconnection point that did not require MCImetro to build new facilities."

(Brief of MCImetro, Feb. 29, 2012 ("MCImetro Brief"), p. 12.)

Six years after Brandenburg Telephone first proposed a traffic exchange agreement that provided for bill-and-keep treatment and a point of connection within Brandenburg Telephone's territory, MCImetro executed a traffic exchange agreement that provided for bill-and-keep treatment and a point of connection within Brandenburg Telephone's territory. (*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.) MCImetro's dismissive attitude toward the traffic exchange agreement throughout this time period is perhaps best summed up by its recent assertion that "until the Commission's 2009

Order, MCImetro had no reason to enter into an agreement with Brandenburg." (MCImetro Brief, p. 10.)[5]

MCImetro's profiteering caused this dispute, and its unreasonableness extended it. Consequently, MCImetro should be liable for any compensation due to Windstream.

IV. Windstream's Requested Remedy Is Either Damages Outside the Commission's Jurisdiction or an Unlawful Retroactive Rate

Although Brandenburg Telephone believes this issue is most easily resolved by the Commission issuing a finding of fact that Windstream is not entitled to any compensation, it also bears repeating that Windstream's requested monetary compensation is either: (i) damages, which are outside the scope of the Commission's jurisdiction, (*See* Brandenburg Telephone Brief, pp. 18-21; MCImetro Brief, pp. 3-5; *Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126 (Ky. 1983)); or (2) the retroactive application of a rate, which is unlawful. (*See* Brandenburg Telephone Brief, p. 21;

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[5] Earlier in this case, MCImetro's witness testified that "I don't believe it was incumbent on us in any way, shape, or form to try to ferret out every agreement that existed between Windstream and all of the other carriers in the area and what they did, and how they did it, and what the compensation was for that." (Test. of D. Price, Hearing Transcript at 131:20-132:5.)

Despite its dismissive attitude throughout these proceedings, MCImetro has known of this kind of problem since at least 2000. MCImetro was operating in New York when that state's Public Service Commission held, in a dispute factually similar to this one, that CLECs must perform necessary due diligence to ensure that all residents with non-toll dialing to the CLECs' new telephone numbers could continue to call those numbers on a non-toll basis:

> "Prior to activating an NXX code that can be accessed on a local basis by an independent telephone company's customer, CLECs must enter into an arrangement establishing fundamental network and service arrangements. CLECs must make arrangements for interconnection facilities to a meet-point designated as the Independent Telephone Company boundary. . . . Because Independent responsibility is limited to delivering traffic to its service area borders, CLECs must either provide their own interconnection facilities or lease facilities to the meet-point."

(Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements Between Telephone Companies, Case No. 00-C-0789, Order of Dec. 22, 2000, attached as Exhibit 1 to Brandenburg Telephone Company's Post-Hearing Brief, Sep. 12, 2008; *Ordinary Tariff Filing of MCImetro Access Transmission Services, Inc. to Add New NPA/NXX's*, N.Y. P.S.C. Case No. 99-C-0866, a true and accurate copy of which is attached hereto as Exhibit A (displaying record of MCImetro filing tariff in New York in 1999).) MCImetro was therefore aware of the problems that could arise when it ported the phone numbers in question, yet decided to ignore those risks in order to save money.

MCImetro Brief, pp. 5-7; *Kentucky v. Atmos Energy Corp.*, Case No. 2005-00057, 2007 Ky. PUC LEXIS 109 at *4 (Order of Feb. 9, 2007).)

In either scenario, the Commission lacks the authority to grant the requested relief and this investigation should be dismissed.

V. Conclusion

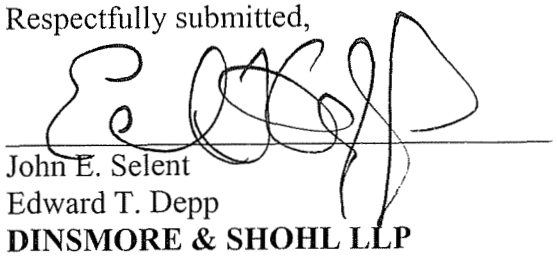
The Commission's January 31, 2012 hearing was held "for the purpose of determining what compensation, if any, is due Windstream." There is no longer any valid dispute on this point. Windstream is not entitled to any compensation for the traffic in question from any party.

Windstream agreed to carry the traffic in question for years, without demanding compensation. Windstream admits no tariff or agreement applies. Windstream has also provided no competent proof of damages, and even admits that its claimed rates of compensation are borrowed as "proxies" for inapplicable tariff rates.

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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CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing was served, by first-class United States mail, sufficient postage prepaid, on the following individuals this 15th day of March, 2012.

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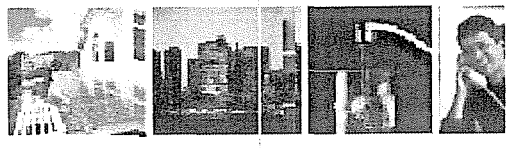

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- Matter Master: *99-00866/99-C-0866*

Matter Number: 99-00866
Industry Affected: Communication
Matter Type: Tariff
Title of Matter/Case: Ordinary tariff filing of MCImetro Access Transmission Services, Inc. to add new NPA/NXX's. Expand

Case Number: 99-C-0866
Company/Organization: MCImetro Access Transmission Services

Matter Subtype: Revision
Related Matter/Case No:

Filed Documents (0) | Public Comments (0) | Party List (0) | Calendar (0)

Document Type: [All \/]Â Â

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No documents exist of the selected Document Type or for this Matter/Case.

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