

**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**

**MAR 15 2012**

**PUBLIC SERVICE  
COMMISSION**

**POST SUPPLEMENTAL HEARING REPLY BRIEF OF  
WINDSTREAM KENTUCKY EAST, LLC**

March 15, 2012

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## I. INTRODUCTION

Windstream Kentucky East, LLC (“Windstream”) submits this Post Supplemental Hearing Reply 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. Brandenburg Telephone Company (“Brandenburg”) and MCImetro Access Transmission Services, LLC d/b/a Verizon (“Verizon”) have presented no persuasive reason for the Commission to deny Windstream full compensation in this proceeding. Brandenburg, having already admitted that its practices were wrong and supporting that a carrier should be compensated for use of its network, incorrectly primarily hides behind the lack of a current-applicable tariff applicable to the traffic that it caused to be routed over Windstream’s network, as well as incorrect claims about supposed agreements of Windstream to carry the traffic without compensation. In sum, contrary to its position when its own network is used, Brandenburg continues to assert that it should be allowed to use Windstream’s network free of charge to route traffic that has absolutely nothing to do with any Windstream end user customer. Verizon’s chief argument is merely that Brandenburg, rather than Verizon, should have to pay Windstream. Neither position is remotely compelling. And each position very clearly is intended to continue thwarting the obligation these carriers have for being economically responsible for their own traffic arrangements.

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

As a matter of fairness and logic, Windstream should certainly be compensated for the use of its network by two carriers who began using Windstream’s network in the first place to avoid resolving their own traffic dispute. Windstream was performing extraordinary services for Brandenburg and Verizon that, but for the July 1, 2008 order in this docket (“*Order Enjoining*

*Windstream and Requiring an Accounting*”), Windstream would not have been required to perform and should never have been in the middle. The Commission in its August 26, 2009 order in this docket ( “*Order Requiring Vacating Windstream’s Network* “) has acknowledged that this traffic did not belong on Windstream’s network, as has Brandenburg.<sup>1</sup> Windstream derived absolutely no benefit from its carriage of the traffic, unlike Brandenburg, which had its traffic delivered to Verizon (and without performing local portability database queries (“LNP dips”). Similarly, Verizon, avoided for years bearing the cost of transport facilities from the Brandenburg service territory boundary to Louisville (the arrangement to which it ultimately agreed – 699 days after being ordered to enter into an agreement with Brandenburg).

Brandenburg makes three unpersuasive claims that are best characterized as fairness arguments as they are legally irrelevant. First, Brandenburg claims that Windstream voluntarily agreed to carry the traffic in late March of 2007.<sup>2</sup> This claim/argument is misleading at best. As an initial matter, Windstream only offered to maintain the inappropriate arrangement in which the traffic was routed through Windstream’s end office on a temporary basis.<sup>3</sup> Such offer – made prior to Windstream learning the exact nature of the traffic - was also conditional on Brandenburg performing its own LNP dips,<sup>4</sup> an obligation which Brandenburg met in only a titular sense as it nevertheless manipulated its routing tables so that the traffic would nevertheless

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<sup>1</sup> Transcript of January 31, 2012 Hearing (“Supp. Tr.”) at 190, ll. 3-7 (“The traffic was supposed to be – was supposed to be handed off to circuits that MCI established to receive its traffic. And so, you know, there wasn’t any better place to put it. It had been on these trunks for 20 years . . .”).

<sup>2</sup> Brandenburg March 1, 2012 brief (Brandenburg Post Supplemental Hearing Brief) at 2-3, 8.

<sup>3</sup> Per the e-mail chain discussed at hearing which forms Brandenburg’s primary basis for this statement, “Per our discussion, Windstream will temporarily continue to route the call from the Elizabethtown end office to the CLEC that owns the LRN.” Verizon Cross-Examination Exhibit 1 (Steven G. Williams e-mail of March 27, 2007, 3:24 p.m.).

<sup>4</sup> *Id.*

flow through Windstream's Elizabethtown end office switch.<sup>5</sup> Windstream certainly did not believe at that time or any time thereafter that it should have to route traffic between Brandenburg and Verizon's customers through its network for free – otherwise, it would not have filed its transit traffic tariff provisions which proceeding led to Windstream's discovery of the real nature of the Brandenburg-Verizon traffic.<sup>6</sup> Further, as noted, Windstream's statement that it would continue the routing temporarily was made prior to the time that Windstream learned its network was being used by Brandenburg to circumvent Brandenburg's traffic dispute with Verizon.<sup>7</sup> In addition, even if Windstream could have been said to have initially committed to route the traffic without compensation, which it most definitely did not, that temporary commitment certainly had ended by the end of May 2008<sup>8</sup> – leaving 42 more months in which Brandenburg's traffic continued to route over Windstream's network. Following the Commission's July 1, 2008 *Order Enjoining Windstream and Requiring an Accounting*, Windstream was maintaining the inappropriate network arrangements under legal compulsion.

Second, Brandenburg claims that Windstream somehow agreed in its interconnection agreement with Verizon ("Windstream-Verizon ICA") to route and deliver Brandenburg's third-party-originated traffic to Verizon without compensation. Even if Brandenburg's claim were true, which, as discussed below, it is not, it is legally irrelevant. The Windstream-Verizon ICA pertains to Windstream's relationship with Verizon, not with third parties such as Brandenburg,

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<sup>5</sup> See August 8, 2008 Direct Testimony of Kerry Smith at 12.

<sup>6</sup> Although such provisions technically would not apply to the completely unauthorized Brandenburg traffic, this is a distinction without a difference in terms of ascertaining Windstream's intent in maintaining a merely temporary arrangement with Brandenburg.

<sup>7</sup> August 8, 2008 Direct Testimony of Kerry Smith at 8-10.

<sup>8</sup> See, e.g., August 26, 2008 order ("*Order Requiring Vacating Windstream's Network*") at 5.

which in this case, is the immediate cost-causer and the party to which the intermediate carrier would look for compensation.<sup>9</sup>

Even if it would make sense for the Windstream-Verizon ICA to have anything to do with Brandenburg's compensation obligations to Windstream, which it would not, the Windstream-Verizon ICA simply does not say what Brandenburg claims. To make its argument, Brandenburg must perform significant contortions to avoid the plain language of the Windstream-Verizon ICA. Section 2.3 of Attachment 4 of the Windstream-Verizon ICA states as follows:

Neither Party shall provide an intermediary or transit function for the connection of the end users of a third party telecommunications carrier to the end users of the other Party and without the establishment of mutually agreeable terms and conditions governing the provision of the intermediary function . . . .<sup>10</sup>

The notion that other provisions of the Windstream-Verizon ICA might nevertheless provide for the “mutually agreeable terms” is nonsensical.<sup>11</sup> If the Commission really accepted the claim that the Windstream-Verizon ICA provides for the network and compensation arrangements

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<sup>9</sup> This is not to say, however, that the Commission in this particular instance cannot look to Verizon for compensation given the unique facts presented by the instant case – the six-year period in which Verizon did not enter into a direct traffic arrangement with Brandenburg as it should have while benefiting from the lack thereof, as discussed above.

<sup>10</sup> Windstream-Verizon ICA, Att. 4, § 2.3.

<sup>11</sup> Nevertheless, Brandenburg attempts to argue otherwise, claiming that Windstream and Verizon have, in fact, made compensation arrangements for traffic like Brandenburg's by supposedly treating it, pursuant to Attachment 12, Section 4.2, as “Meet-Point Billing Traffic” because it is traffic “other than Local Traffic, that transits a tandem.” (Such traffic is clearly not “Local Traffic” because, pursuant to Section 1.2 of Attachment 12, “Local Traffic” is “Calls originated by MCI's end users and terminated to ALLTEL's end users (or vice versa)”). What Brandenburg inexplicably fails to explain, however, is how “Meet-Point Billing Traffic” means that traffic is exchanged without compensation. Indeed, Section 6 of Attachment 12, the provision of the compensation attachment that discusses Meet-Point Billing Traffic describes the billing arrangements for the joint provision of switched access service, the provision of which, by the terms of the Windstream-Verizon ICA, is governed by Windstream and Verizon's tariffs, not the Windstream-Verizon ICA. Thus, even the provisions relating to Meet-Point Billing Traffic provide no “mutually agreeable terms and conditions” for the exchange of non-switched-access third-party-originated traffic like Brandenburg's. Brandenburg also attempts to argue that because the provision of Attachment 12 governing ISP-bound traffic (Section 1.3) states that such traffic will be exchanged on a bill-and-keep basis, such provisions also must apply to Brandenburg-originated ISP-bound traffic. This provision does not apply to third-party originated ISP-bound traffic because other sections of the Windstream-Verizon ICA already prohibit the exchange of such traffic.

between Windstream and Verizon pertaining to the traffic in dispute, it never would have ordered the traffic to be removed from Windstream's network.

Brandenburg also seems to claim that because it supposedly did not know of the volume of the traffic in dispute until 2007, it should not be held accountable for the traffic that was inappropriately routed through Windstream's network from before 2007.<sup>12</sup> Brandenburg supposedly entered into discussions with Verizon in 2005 to establish direct trunks between the two carriers.<sup>13</sup> If Brandenburg had been serious about negotiating such arrangements, the matter of the quantity of traffic should have come up at some point, and as evidenced by the early e-mails between Brandenburg and Verizon as well as the live testimony by Brandenburg's own witness, Brandenburg was in fact well aware of the traffic volumes which is precisely the reason it arguably worked so diligently to conceal the traffic from Windstream.<sup>14</sup>

### **III. THE LEGAL BASIS FOR AWARDING WINDSTREAM THE COMPENSATION THAT IT SEEKS**

Windstream explained in its Post Supplemental Hearing Brief why the Filed Rate Doctrine does not prevent the Commission from establishing applicable rates that would form the basis of awarding Windstream compensation at least retroactive to July 1, 2008 and therefore comply with the mandate of KRS 278.030(1).<sup>15</sup> Neither Brandenburg nor Verizon present persuasive reasons to reject such analysis, particularly given the jurisdiction that the Commission already exercised in the *Order Enjoining Windstream and Requiring an Accounting*.

Windstream respectfully refers the Commission to its Post Supplemental Hearing Brief, and

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<sup>12</sup> Brandenburg Post Supplemental Hearing Brief at 3, 8.

<sup>13</sup> Supp Tr. at 167, ll. 13-19.

<sup>14</sup> 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.

<sup>15</sup> See Brandenburg Post Supplemental Hearing Brief at 8-11.

notes that Brandenburg has been on notice since at least December 1, 2006, when Windstream filed its transit tariff provisions, that Windstream expects to be compensated for providing intermediary carrier functions for 19 months prior to the Commission issuing its *Order Enjoining Windstream and Requiring an Accounting* in the instant docket. Windstream similarly refers the Commission to such brief regarding Brandenburg's incomplete and unpersuasive argument regarding the unclean hands doctrine.<sup>16</sup>

Brandenburg's repeated criticism of Windstream for seeking compensation without an applicable contract or tariff is particularly hypocritical when Brandenburg's attempt to obtain compensation for network usage from Halo Wireless, Inc. ("Halo") are considered.<sup>17</sup> In the Brandenburg Halo letter, Brandenburg sought compensation for past network usage at "the rate approved by the Kentucky PSC (\$.005040/MOU)."<sup>18</sup> Despite Brandenburg's claims to the contrary,<sup>19</sup> \$.005040/MOU is not from Brandenburg's "access tariff." Rather, \$.005040/MOU is the reciprocal compensation rate approved by the Commission for Brandenburg.<sup>20</sup> To the extent that Brandenburg thought that it was entitled to an interim reciprocal compensation rate pursuant to 47 C.F.R. § 51.715, such rate would have only been applicable on a going-forward

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<sup>16</sup> Brandenburg Post Supplemental Hearing Brief at 9. See Windstream Post Supplemental Hearing Brief at 11-13.

<sup>17</sup> See August 8, 2008 Direct Testimony of Kerry Smith, Ex. 1 ("Brandenburg Halo Letter").

<sup>18</sup> *Id.* at 1.

<sup>19</sup> Supp. Tr. at 173, ll. 8-15.

<sup>20</sup> See Petition of Brandenburg Telephone Company for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement with Celco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Case No. 2006-00288, "Order," App. A (Dec. 22, 2006).

basis, not retroactively.<sup>21</sup> Thus, Brandenburg was seeking to receive compensation based on a proxy rate rather than an applicable contract or tariff, just as Windstream is here.<sup>22</sup>

#### **IV. SUPPORT FOR SPECIFIC TYPES OF COMPENSATION**

As an initial matter, both Verizon and Brandenburg appear to be overly focused on the idea that Windstream did not have a contract or applicable tariff governing Windstream's permitted unauthorized misuse for the routing of the traffic in dispute – misuse that the Commission ordered Windstream to continue to permit for over three years. Windstream's legal theory for recovery and award of compensation from the Commission does not presume the pre-existence of applicable contract or tariff. And it is telling that these two carriers seek to “get off on a technicality” as an excuse to ultimately avoid financial responsibility for the traffic that they concealed from Windstream and further committed to the Commission would be moved years before they in fact got around to doing so.

Windstream also observes that the time for Brandenburg and Verizon to dispute Windstream's computed quantities of MOUs and LNP dips has long passed. Windstream provided current information in its October 4, 2012 pre-filed Supplemental Direct Testimony (to which Brandenburg and Verizon had the opportunity to respond in pre-filed testimony), as well as at hearing (subject to cross-examination). At this point, it would be unreasonable for the Commission to accept critique of such numbers via reply briefs.

Windstream explained the validity of using \$0.0045 per minute as the rate applicable to minutes of use (“MOUs”) in its Post Supplemental Hearing Brief.<sup>23</sup> Brandenburg and Verizon raise no arguments that Windstream has not already addressed.<sup>24</sup>

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<sup>21</sup> See 47 C.F.R. § 51.715(a).

<sup>22</sup> Further, because Brandenburg, by its own admission has caused traffic to be delivered over the EAS trunks to Windstream that should not have been placed on such trunks, thus breaching the EAS agreement between Windstream and Brandenburg.



Similarly, Windstream also explained the validity of its LNP dip rate of \$0.00305 per query, both with reference to its FCC tariff, for which it submitted the cost support in a post-hearing data request response, as well as a functionally-equivalent 8YY database query rate approved by this Commission in Windstream's tariff.<sup>25</sup> These are rates approved by the Federal Communications Commission and this Commission, respectfully, as just and reasonable. Contrary to assertion by Brandenburg, Windstream's ability to demonstrate its current out-of-pocket cost is irrelevant to the computation of compensation owed to Windstream for services provided.

Brandenburg's argument regarding Windstream's proposed interest rate makes even less sense than its other rate-based arguments. Here, there could be absolutely no doubt that Windstream's proposed rate is reasonable as it is already the Commission-approved rate for late payment of intercarrier compensation.<sup>26</sup>

Finally, Windstream continues to believe that it is entitled to attorney's fees given the degree to which 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, through the direct actions (or rather inaction) of Brandenburg and Verizon, Windstream has been held in the middle of a dispute which has nothing to do with it and for which it has had to spend resources to employ counsel. Windstream attempted to

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<sup>23</sup> Windstream Post Supplemental Hearing Brief at 14-16.

<sup>24</sup> If for some reason the Commission is unwilling to apply this rate, which it should not be, Windstream respectfully suggests at a minimum, functionally-equivalent rate elements (such as End Office Switching, Tandem-Switched Transport-Termination, and Tandem Switching). See *Windstream Kentucky East, Inc. – Lexington, Tariff P.S.C. Ky. No. 8 – §§ 4.6.3(B) (p. 141) (End Office Switching (Premium)), § 4.6.2.(B) (p. 139) (Tandem-Switched Transport-Termination), 4.6.2(C) (p. 139) (and Tandem Switching)*.

<sup>25</sup> Post Supplemental Hearing Brief at 16-17.

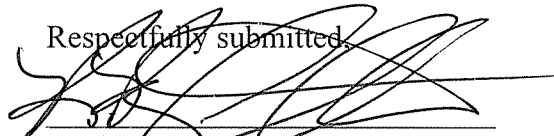
<sup>26</sup> Windstream discusses this matter at greater length in its Post Supplemental Hearing Brief at 18.

remove itself from the Brandenburg-Verizon traffic dispute years ago to mitigate the harm being done to it,<sup>27</sup> but at the direct insistence of both Brandenburg and Verizon, Windstream was held in the middle of their dispute, and they should be financially responsible for such actions.

## V. CONCLUSION

For the reasons stated herein, Windstream respectfully requests that it be awarded the full \$1,866,393 in compensation, plus attorney's fees, that Windstream requests be paid, and order such amount to be paid to Windstream forthwith.

Respectfully submitted,



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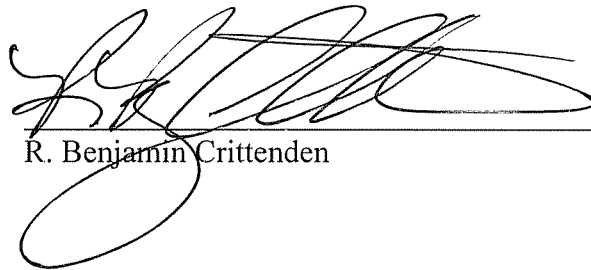
<sup>27</sup> Windstream reiterates that any action it took to mitigate the harm being done to it was done so in a manner far less obtrusively than when Brandenburg itself had previously blocked the traffic to Verizon for months – a scenario which neither Brandenburg nor Verizon took to the Commission. It was only when Windstream tried to remove itself from their traffic scheme (by ceasing the unauthorized routing of the internet traffic which did not include any emergency/911 traffic) that Brandenburg and Verizon went to the Commission to demand that Windstream remain in the middle of their routing scheme. They did so even considering that Brandenburg could have performed the necessary translations within a matter of a few minutes to initiate correct routing of its traffic. *See* Rebuttal Testimony of Kerry Smith at 5, ll. 6-10 (filed Aug. 15, 2008).

**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, on this the 15<sup>th</sup> day of March, 2012, upon:

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