

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ORDER

On July 1, 2008, the Commission initiated an investigation into a traffic dispute between Windstream Kentucky East, LLC ("Windstream"), Brandenburg Telephone Company ("Brandenburg"), and MCIMetro Access Transmission Services, LLC d/b/a Verizon Access ("Verizon"). The primary rationale for the investigation was to prevent the disruption of Internet service for America Online ("AOL") dial-up customers located in Brandenburg's calling territory near Radcliff.

On August 26, 2009, the Commission issued an Order that required Brandenburg to remove the AOL/Verizon bound traffic from Windstream's network.¹ The Order divided the procedure into three phases. First, Verizon and Brandenburg were to execute a traffic exchange agreement that would allow for the exchange of traffic and for removing the traffic from Windstream's network.² Second, upon completion and filing of the traffic exchange agreement, the Commission would determine what

¹ Case No. 2008-00203, *Investigation Into Traffic Dispute Between Brandenburg Telephone Company, Windstream Kentucky East, and Verizon Access* (Ky. PSC Aug. 26, 2009).

² *Id.* at 18-20.

compensation, and from whom, was due Windstream, if any.³ Lastly, the Commission would investigate the reasonableness of Windstream's actions in unilaterally blocking the AOL-bound traffic.⁴

Brandenburg and Verizon filed a traffic exchange agreement that became effective in August 2011. The Commission held a formal hearing to determine what money, if any, is due Windstream. As discussed below, the Commission finds that Windstream is entitled to no compensation and that the Commission need not conduct any further investigation into Windstream's actions in blocking Brandenburg's AOL-bound traffic.

BACKGROUND

Windstream is an Incumbent Local Exchange Carrier ("ILEC"), Brandenburg is a Rural Local Exchange Carrier ("RLEC"), and Verizon is a Competitive Local Exchange Carrier ("CLEC"). Windstream provides local exchange service in and around Elizabethtown. Brandenburg provides local exchange service in and around Brandenburg and Radcliff. Verizon provides competitive local exchange service in Windstream's calling area, but not in Brandenburg's.

Verizon acts as a portal to AOL dial-up customers. AOL dial-up customers dial phone numbers assigned to Verizon, and, when the call is underway, Verizon routes the customer's call to AOL. Verizon has maintained its own facilities at a switch located in Louisville since 2003.

³ *Id.* at 22.

⁴ *Id.* at 23.

Prior to 2003, Verizon leased facilities and numbers from Windstream so that when a customer from Brandenburg placed a call to an Internet Service Provider ("ISP") served by Verizon, the call was routed to the Verizon number and then to the ISP. The calls from Brandenburg's customers in Radcliff were routed to Windstream over an Extended Area Service ("EAS") trunk group pursuant to an EAS agreement between Brandenburg and Windstream. Pursuant to the EAS arrangement, Brandenburg and Windstream did not bill one another for traffic that was sent over the EAS trunk group. Under this configuration, however, Verizon compensated Windstream for the use of Windstream's network. Importantly, the calls from the Brandenburg customers in Radcliff to those Verizon numbers on Windstream's network were billed as local calls to the customers and are described as local calls in Brandenburg's tariff.

In 2003, Verizon established its own facilities within BellSouth Telecommunications LLC d/b/a AT&T Kentucky's ("AT&T Kentucky") territory and ported the numbers that it utilized on Windstream's network to its own. In so porting, Verizon also, through the Local Exchange Routing Guide ("LERG"), designated a Local Routing Number ("LRN") for its numbers that instructed carriers to deliver ISP-bound traffic to Verizon at AT&T Kentucky's tandem in Louisville. Verizon also entered into an interconnection agreement with Windstream that allowed Windstream-originated calls to be routed through Windstream's Elizabethtown tandem to a point of interconnection with Verizon, rather than be routed through AT&T Kentucky's tandem in Louisville.

The ISPs served by Verizon, starting in 2005, provided their customers in Brandenburg's Radcliff calling area with numbers used to access the ISPs via dial-up. Of those numbers provided were those numbers that Verizon had previously ported

from Windstream's network to its own facilities in Louisville. Those numbers contained an LRN directing Brandenburg to route the ISP-bound calls through the AT&T Kentucky's tandem in Louisville, where it would then be routed to Verizon.

Brandenburg continued to route the ISP-bound calls over the EAS trunk to Windstream's end office, which would then hand off the calls to the Windstream tandem in Elizabethtown so that they could be exchanged with Verizon at the utilities' point of interconnection. Although the volume of the traffic going over the EAS trunk group was not recorded, it was estimated that in 2005 and 2006 the volume of traffic was 10 million minutes of use per month. As of the end of 2011, the traffic was estimated to be less than 400,000 minutes a month.

In late December 2006, Windstream, after discovering that other ILECs were routing transit-traffic through its end office to other carriers, filed with the Commission a "transit-traffic" tariff effective December 1, 2006.⁵ The tariff established an end office transit-traffic rate that was higher than the tandem transit-traffic rate as an incentive to the ILECs to route the transit-traffic through the tandem rather than the end office. During the course of the tariff proceeding, Windstream became aware that Brandenburg was routing what Windstream deemed to be an excessive volume of traffic through its end office and notified Brandenburg of this and requested that Brandenburg compensate it for the use of its network. Windstream also requested that Brandenburg perform Local Number Portability ("LNP") queries to determine if the numbers to which

⁵ Case No. 2007-00004, *Brandenburg Telephone Company; Duo County Telephone Cooperative Corporation, Inc.; Highland Telephone Cooperative, Inc.; Mountain Rural Telephone Cooperative Corporation, Inc.; North Central Telephone Cooperative Corporation; South Central Rural Telephone Cooperative Corporation, Inc.; and West Kentucky Rural Telephone Cooperative Corporation, Inc. v. Windstream Kentucky East, Inc. and Windstream Kentucky West, Inc.* (Ky. PSC Aug. 16, 2010). The Commission found the tariff void *ab initio* for failing to comply with the 1996 Telecommunications Act.

Brandenburg was routing traffic had been ported or were still on Windstream's network. Brandenburg denied that it had a responsibility to compensate Windstream for the transiting of the traffic and also did not perform the LNP queries. Windstream consented to temporarily allow the traffic to continue as it was then routed.

During the course of the proceeding in Case No. 2007-00004, Windstream recorded a portion of the traffic transiting over its network and, in April 2008, discovered that Brandenburg's traffic was not transit-traffic but was instead traffic destined for Verizon, despite the traffic having no LERG routing point associated with Windstream's network. Windstream allegedly contacted Brandenburg and demanded payment for the traffic and also requested the immediate removal of the traffic from its network. Allison Willoughby of Brandenburg informed Windstream that Brandenburg had established May 30, 2008, as the final date by which it would establish direct interconnection with Verizon.

On June 2, 2008, via letter, Dan Logsdon, on behalf of Windstream, informed the Commission that as of 9:00 a.m. on June 2, 2008, Windstream had blocked the transmission of traffic from Brandenburg to Verizon. Windstream alleged that Brandenburg was intentionally misusing Windstream's Elizabethtown end office to route the traffic and that Brandenburg should route the traffic through AT&T Kentucky's tandem in Louisville, Kentucky. Windstream alleged that Brandenburg could easily resolve this issue.

After receiving the letter and a complaint from Brandenburg on July 1, 2008, the Commission initiated this action.

On August 19, 2008, the Commission held a formal hearing in this case, issuing an Order on August 26, 2009 requiring Brandenburg and Verizon to remove the traffic from Windstream's network. The Commission now focuses on the potential liability of Brandenburg and Verizon to Windstream and the reasonableness of Windstream's actions.

DISCUSSION

Windstream's Argument

Windstream argues that as a matter of fairness, it must be compensated by either Verizon or Brandenburg for the ISP-bound traffic that was routed over its network from when it was first monitored in June 2007 until the traffic was removed from Windstream's network in November 2011. Windstream asserts that because the Commission previously determined that the traffic must be moved off of Windstream's network, it never should have been routed on its network, and it is illogical that Windstream not be compensated for the traffic.⁶ Windstream notes that Brandenburg admits to not having performed the necessary LNP queries, and, when it did perform the LNP queries, did not route the traffic to where the queries directed it be sent. If Brandenburg had routed the calls as the LNP queries indicated, this proceeding would have been avoided.

Windstream also states that it is reasonable that the Commission look to Verizon as well for compensation for Windstream. Windstream asserts that both Verizon and Brandenburg schemed to keep the traffic on Windstream's network after the

⁶ Post Supplemental Hearing Brief of Windstream at 5.

Commission ordered the traffic be removed from Windstream's network in its August 26, 2009 Order.

Windstream argues that it has no source of revenue to recover the costs of handling traffic that should not even be on its network. Windstream claims that Brandenburg was trespassing on its network, and benefited from the free service because Brandenburg did not have to pay transit fees. Verizon also benefited because it did not have to absorb the cost of building out its network to meet Brandenburg, as long as it was free-riding on Windstream's system.

Windstream acknowledges that it does not have a tariff that applies to the disputed traffic; however, it argues that the rate in the transit tariff should be applied as a proxy.⁷ Windstream states that it filed in this proceeding the cost-of-service study that it used to develop the transit-traffic rate. Windstream argues that, although the Commission voided the transit-traffic tariff, it did not investigate or reject the rate contained in the transit tariff and that the Commission could use that to establish a rate to be charged for the disputed traffic.⁸

In addition to compensation for the disputed traffic, Windstream also claims that it should be reimbursed for performing the LNP queries that Brandenburg should have performed, as well as interest on such compensation. Windstream seeks a total of \$1,866,393.00 in addition to legal fees.⁹

⁷ Post Supplemental Hearing Brief of Windstream at 14.

⁸ *Id.* at 15.

⁹ *Id.* at 19.

Brandenburg's Argument

Brandenburg argues that Windstream is owed nothing in compensation from Brandenburg or Verizon. First, Brandenburg argues that the Windstream/Verizon interconnection agreement does not provide for compensation to Windstream because in the agreement, Windstream agrees to serve, at no cost, as the intermediary carrier for non-local traffic originated by a third-party carrier like Brandenburg. Second, Brandenburg argues that Windstream's transit tariff cannot be applied as a proxy because: (1) the Commission has declared it void; and (2) it was effective on December 1, 2006, which is after the date on which the disputed traffic began flowing.¹⁰

Brandenburg asserts that Windstream has admitted that no tariff or agreement applies to the traffic at issue and argues that a proxy rate from an inapplicable tariff cannot be used to calculate any damages.¹¹ Brandenburg also notes that, when asked by the Commission to provide proof of costs of the LNP queries, Windstream could not produce any actual costs; instead Windstream relied on the LNP query rate in its interstate tariff, which did not prove that Windstream had incurred any additional expense in performing the LNP queries.¹²

Brandenburg asserts that any compensation due Windstream should be borne by Verizon. Brandenburg claims that it had consistently attempted to negotiate a traffic exchange agreement, but Verizon refused to come to an agreement to handle the traffic

¹⁰ Brandenburg Telephone Company's Post-Hearing Brief for January 31, 2012 Hearing at 10-11 (filed Feb. 29, 2012).

¹¹ *Id.*

¹² *Id.* at 12.

and, but for that, Brandenburg would not have continued to route the traffic over Windstream's network.¹³

Brandenburg argues that Verizon was under an obligation, when it began operating in Windstream's territory, to search out and reach traffic exchange agreements with all other LECs in Windstream's territory, including Brandenburg. Because Verizon did not do this, Brandenburg argues, any expenses or costs incurred by Windstream should be paid by Verizon.¹⁴

Brandenburg claims that the traffic exchange agreement that Verizon and Brandenburg executed in 2011 is almost identical to the one that Brandenburg proposed to Verizon in 2005. Therefore, because it is nearly identical, Brandenburg argues that the fault for the delay in reaching an agreement lies solely with Verizon, as does any financial responsibility.

Verizon's Argument

Verizon argues that Windstream is not entitled to any compensation because: (1) the Commission does not have the jurisdiction to award damages; (2) the Commission cannot retroactively create a rate; and (3) Windstream's claim is not based on an existing tariff.¹⁵

Verizon states that it is not liable to any party for any compensation. Verizon argues that it is not obligated to actively seek out and enter into interconnection agreements with all LECs in an area because the Commission has never required any

¹³ *Id.* at 15-16.

¹⁴ *Id.* at 15.

¹⁵ Brief of MCIMetro (filed Feb. 29, 2012) at 1.

carrier to do so. Verizon also states that it need not have formed an interconnection agreement with Brandenburg because Verizon has no customers in Brandenburg's called area.¹⁶

Verizon argues that had Brandenburg been performing LNP queries as it should have, then it would have realized in 2003 that Verizon had started providing service in 2003. Verizon also alleges that any delay in reaching a traffic exchange agreement is Brandenburg's fault.¹⁷

COMMISSION FINDINGS

1. The Nature of the Telephone Traffic.

All telephone calls placed by Brandenburg customers located in the Radcliff and Vine Grove exchanges to telephone numbers assigned in Windstream's Elizabethtown Exchange are to be rated in a manner consistent with Brandenburg's tariff. The "rating" of customer/call includes rate-center assignment, dialing arrangement (e.g., 7-digit dialing), local calling area scope (including EAS), exchange rate, exchange geographic boundary, and other provisioning elements specific to the rate-center of an assigned customer or call.

Brandenburg's tariff¹⁸ reflects that Brandenburg customers in the Radcliff and Vine Grove Exchanges are entitled to call the numbers (including NXX 270-769) assigned to the Elizabethtown Exchange "without additional charge," pursuant to a

¹⁶ *Id.* at 10.

¹⁷ *Id.* at 9.

¹⁸ P.S.C. KY. NO. 2, Part III, Sheet 11 and 12.

mandatory EAS agreement. Windstream's tariff contains reciprocal provisions for the rating of local traffic.¹⁹

The EAS agreement between Brandenburg and Windstream in effect as of August 1, 2002, provides for the exchange of local and EAS traffic based on the "calling scopes and tariffs per the Kentucky Public Service Commission."²⁰ Windstream and Brandenburg also agreed to "accept traffic from the other Party pursuant to the terms of the aforementioned calling scopes and tariffs."²¹ Most importantly, Paragraph 4 further states that "[e]ach party shall individually be responsible for insuring that it has sufficient facilities in place to perform in accordance with the terms of this Agreement and shall have no liability to the other Party or any third parties with regard to the provisioning of facilities on behalf of the other or on behalf of third parties."

It is undisputed that the phone calls which are the subject of this dispute originated in the Radcliff and/or Vine Grove exchanges of Brandenburg and were placed to numbers assigned to the Elizabethtown exchange of Windstream (NXX 270-769). Although the telephone numbers were ultimately ported from Windstream to Verizon, the "rating" of the calls — the assignment of those numbers to the Elizabethtown exchange — was not affected and the traffic remained subject to the calling scopes contained in the underlying carrier's tariffs.

Brandenburg remained obligated, on all occasions under dispute, to rate calls as local from customers within its Radcliff and Vine Grove Exchanges to Windstream's

¹⁹ Windstream's Tariff P.S.C. KY. No. 7 at page 12.

²⁰ EAS Agreement at Paragraph 1.

²¹ *Id.* at paragraph 2.

Elizabethtown Exchange pursuant to the EAS agreement regardless of the arrangements entered into between Verizon and Windstream. The EAS Agreement between Brandenburg and Windstream further provides for the transport of EAS traffic and implies that such facilities may be provisioned “on behalf of third parties” but declares that neither party shall be liable for such arrangements.

Because Brandenburg had to rate the calls as local, it had to send the calls over Windstream’s network. The EAS agreement also put the financial responsibility on each carrier for the provisioning of their own facilities. Based on this, there is no basis for Brandenburg to be held financially responsible for delivering authorized, local-rated traffic to Windstream pursuant to Brandenburg’s tariff on file with the Commission and consistent with the traffic exchange agreement between the two parties.

2. Calculation of Damages.

Assuming, *arguendo*, that Windstream was injured as a result of the volume of traffic traveling over the EAS trunks, and the traffic was not EAS traffic, Windstream is still not entitled to compensation.

Windstream admits, and it is uncontested, that no tariff addresses the traffic that is at issue (where EAS traffic is handed off to a number that is subtended to a different tandem).²² Windstream, when calculating its supposed damages, used its transit-traffic tariff as a proxy. Notwithstanding that the tariff does not apply to the traffic at issue, it also has been found void *ab initio*, in a separate action, by the Commission for failing to

²² Testimony of K. Smith, Jan. 31, 2012 Hearing at 11:12:56.

comply with the 1996 Telecommunications Act.²³ The Franklin Circuit Court recently vacated its Order²⁴ in which it had overturned the Commission's determination that the transit tariff was void *ab initio*. Consequently, under KRS 278.390, the Commission's Order is in full force and effect and the transit tariff is void *ab initio*.

KRS 278.160 codifies the "filed rate doctrine," which requires a utility to file with the Commission "schedules showing all rates and conditions for service established by it and collected and enforced."²⁵ It further states:

No utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.²⁶

The Court of Appeals has explained that the "filed rate defines the legal relationship between the regulated utility and its customer with respect to the rate that the customer is obligated to pay and that the utility is authorized to collect."²⁷ Neither

²³ Case No. 2007-00004, *Brandenburg Telephone Company; Duo County Telephone Cooperative Corporation, Inc.; Highland Telephone Cooperative, Inc.; Mountain Rural Telephone Cooperative Corporation, Inc.; North Central Telephone Cooperative Corporation; South Central Rural Telephone Cooperative Corporation, Inc.; and West Kentucky Rural Telephone Cooperative Corporation, Inc. v Windstream Kentucky East, Inc. and Windstream Kentucky West, Inc.* (Ky. PSC Aug. 16, 2010). The Commission found the tariff void *ab initio* for failing to comply with the 1996 Telecommunications Act.

²⁴ *Windstream Kentucky East, LLC v. Public Service Commission of Kentucky*, Civil Action No. 10-CI-001641 (Franklin Cir. Ct. May 29, 2013).

²⁵ KRS 278.160(1).

²⁶ KRS 278.160(2).

²⁷ *Cincinnati Bell Telephone Co. v. Kentucky Public Service Com'n*, 223 S.W.3d 829, 837 (Ky. App. 2007) citing *Big Rivers Elec. Corp. v. Thorpe*, 921 F.Supp. 460 (W.D.Ky.1996).

equitable considerations nor a utility's negligence may serve as a basis for departing from the filed rate schedules.²⁸

Therefore, in the absence of an applicable and valid tariff, Windstream cannot charge Brandenburg for the disputed traffic and the Commission cannot calculate compensation based on the amount of traffic that Windstream sent from Brandenburg to Verizon.

Windstream, lacking a valid rate to enforce, cannot now request the Commission to fashion a rate to apply retroactively to the disputed traffic because doing so would violate the prohibition against retroactive ratemaking. The Commission has previously noted that:

A pervasive and fundamental rule underlying the utility rate-making process is that "rates are exclusively prospective in application." Rate-making is a legislative function. As rate-making orders have statutory effect, they are subject to the rules ordinarily applied in statutory construction. To accord a rate order retroactive effect requires "the clearest mandate."

KRS Chapter 278 contains no such mandate. While KRS 278.260(1) and KRS 278.270 give the Commission authority to investigate existing rates and establish new rates, the power is limited to prospective rate changes.²⁹

Kentucky Courts have also held that changes in rates cannot be applied retroactively. In reversing an Order in which the Commission sought to retroactively apply a decision of the Federal Communications Commission changing the rates of several telephone companies, the Court of Appeals held that "it was neither reasonable

²⁸ See *Boone County Sand & Gravel Co. v. Owen County Rural Elec. Coop. Corp.*, 779 S.W.2d 944 (Ky. App. 1989).

²⁹ Case No. 94-453, *In the Matter of Big Rivers Electric Corporation's Proposed Mechanism to Credit Customers Amounts Recovered in Judicial Proceedings Involving Fuel Procurement Contracts* (Ky. PSC Feb. 21 1997) at 5-6. (footnote omitted)(citations omitted).

nor legal for the PSC to order a retroactive rate change based upon an arguable state policy. . . ."³⁰ Accordingly, the Commission cannot establish a rate that should have been charged to the traffic.

The Commission even considered the possibility that if Windstream could prove that it had incurred expenses due to the higher volume of traffic, it might be entitled to some recompense. However, Windstream, when asked whether the high volume of traffic caused it to either build additional facilities or repair the existing network, answered in the negative.³¹ Windstream contends that it incurred the additional expense of performing LNP queries because Brandenburg refused to do so. The Commission requested that Windstream provide the amount that it paid for the additional queries. In the post-hearing response to the question, Windstream could only provide the monthly total that it pays for all LNP queries, and could not single out any charges for the additional LNP queries.³² The Commission's decision ordering Brandenburg and Verizon to remove the ISP-bound traffic from Windstream's network was based, in large part, on Windstream's assertion that it was being injured as a result of the trespass on its network. However, Windstream cannot show that it incurred any expense, whether for additional LNP dips or from having to expand facilities to accommodate, at one point, the voluminous ISP-bound traffic.

³⁰ *Cincinnati Bell Telephone Co. v. Kentucky Public Service Com'n*, 223 S.W.3d 829, 837 (Ky. App. 2007).

³¹ Testimony of K. Smith, Jan. 31, 2012 Hearing at 10:16:17.

³² Response to the Commission's Jan. 30, 2011 Requests for Information to Windstream Kentucky East, LLC (filed Feb. 10, 2012).

Windstream could not be entitled to damages for any of its claims, including attorney's fees, interest, or damages for a trespass of its network because the Commission is prohibited from awarding damages. In *Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126, 128 (Ky. App. 1983), the Court of Appeals found that:

Nowhere in Chapter 278 do we find a delegation of power to the PSC to adjudicate contract claims for unliquidated damages. Nor would it be reasonable to infer that the Commission is so empowered or equipped to handle such claims consistent with constitutional requirement. Kentucky Constitution § 14.

In the absence of an applicable tariff, Windstream's requested relief can only be considered damages. Accordingly, the Commission cannot award Windstream any of the damages that it requests.

Windstream's claims for compensation, as discussed above, all fail. If the Commission were to order any payment to Windstream, the payment would violate: (1) the filed rate doctrine; (2) the prohibition against retroactive ratemaking; and (3) the Commission's lack of jurisdiction to award damages. Based on the foregoing, we find that Windstream is not entitled to any compensation.

3. Investigation of Windstream's Actions.

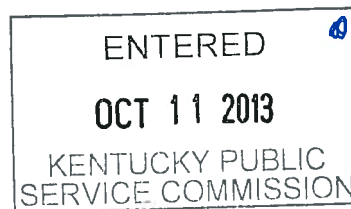
The Commission, in its 2009 Order in this matter, also established an investigation into the reasonableness of Windstream's actions in blocking Brandenburg's ISP-bound traffic. The investigation was to begin upon resolution of the compensation issue. The Commission concludes that no further investigation is necessary and that Windstream should not be subject to any penalties for its actions. Windstream's actions were unreasonable, rash and inadvisable, but at the time no

Commission rule, statute or regulation prohibited Windstream's actions and the Commission cannot retroactively apply a rule or regulation to Windstream's conduct. However, the Commission also finds that, pursuant to KRS 278.280, Windstream must first seek Commission approval before unilaterally blocking a carrier's traffic in the future.

IT IS THEREFORE ORDERED that:

1. Windstream is entitled to no compensation from either Verizon or Brandenburg.
2. In the future, Windstream must seek and receive Commission approval before blocking the traffic of another carrier.
3. This case is closed and removed from the Commission's docket.

By the Commission



ATTEST:



Executive Director

Case No. 2008-00203

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