

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

O R D E R

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 Brandenburg’s customers located in Brandenburg’s calling territories near Radcliff and Vine Grove, Kentucky who subscribed to America Online (“AOL”) dial-up internet service. The purpose of this proceeding was to address the traffic dispute and to fashion a remedy that allows AOL customers’ service to continue without interruption as well as to ensure that the proper traffic arrangements are completed so that the parties are receiving and paying proper compensation.

BACKGROUND

Windstream and Brandenburg are Incumbent Local Exchange Carriers (“ILECs”).¹ Verizon is a Competitive Local Exchange Carrier. Windstream provides

¹ 47 U.S.C. § 251(h)(1) defines an ILEC as a local exchange carrier (or successor to the local exchange carrier) that “on February 8, 1996, provided telephone exchange service in such area; and . . . [on that same date] was deemed to be a member of the exchange association pursuant to section 69.601(b).”

local telephone exchange service² in and around Elizabethtown. Brandenburg provides local telephone exchange service in and around Brandenburg, including Vine Grove and Radcliff. Windstream and Brandenburg exchange local traffic (i.e., without either's customers incurring toll charges) between Elizabethtown, Vine Grove, and Radcliff through an Extended Area Service ("EAS") arrangement. Verizon provides local telephone exchange service in Windstream's calling area but not in Brandenburg's calling area.

Verizon acts as a portal for AOL dial-up customers. AOL dial-up customers dial phone numbers assigned to Verizon, and, when the calls are terminated to Verizon, Verizon then carries the traffic on to AOL. Verizon has maintained its own facilities in Louisville since 2003.

Verizon, prior to 2005, 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. Calls from Brandenburg's customers in Radcliff and Vine Grove were routed to Windstream's end office in Elizabethtown over the EAS trunk groups. Brandenburg and Windstream do not bill one another for traffic exchanged over the EAS trunk groups, utilizing, instead, a "bill and keep" arrangement. Under this configuration, Verizon compensated Windstream for the use of Windstream's network. Importantly, the calls from the

² 47 U.S.C. § 153 (47) defines telephone exchange service as:

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

Brandenburg customers in Radcliff and Vine Grove to those Elizabethtown numbers on Windstream's network (that Verizon eventually ported to its own network) were rated as local calls to Brandenburg's customers pursuant to the EAS arrangement and as required by Brandenburg's tariff.³

In 2005, Verizon established an interconnection point with Windstream utilizing its own facilities and ported the numbers from Windstream's network to its own. Upon this change in network configuration with Windstream, the Local Exchange Routing Guide ("LERG") was updated to include a local routing number for ported numbers that instructed carriers to deliver calls to the numbers ported to Verizon through BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky's ("AT&T Kentucky") tandem in Louisville. Verizon also entered into an interconnection agreement with Windstream for the exchange of traffic routed through Windstream's Elizabethtown tandem to the point of interconnection with Verizon, rather than being routed through AT&T Kentucky's tandem in Louisville.

Beginning in 2003, the ISPs served by Verizon began to provide Brandenburg's customers in the Radcliff and Vine Grove exchanges with the Elizabethtown numbers used to access the ISPs via dial-up. Among those numbers provided were the numbers that Verizon had ported from Windstream.

Unaware of the network changes made between Verizon and Windstream, Brandenburg continued to route the ISP-bound calls over the EAS trunk to Windstream's end office. Windstream would then transport the calls to its tandem in Elizabethtown, where the traffic would be exchanged with Verizon at Windstream's and Verizon's point of interconnection. Although the volume of traffic going over the EAS

³ Tariff of Brandenburg Telephone Company, Ky. PSC No. 2, Sheets 20, 21.

trunk group was not recorded, it is estimated that the volume of traffic was 10 million minutes of use per month in 2005 and 2006. Over the intervening years, the traffic volume has decreased substantially. As of August 2008, it was estimated to be three million minutes per month and is expected to continue to decline.⁴

In late December 2006, Windstream, after discovering that other ILECs were, in its opinion, improperly routing transit traffic through its end office to other carriers, filed with the Commission a transit tariff effective December 1, 2006. The tariff established an end office transit traffic rate that was higher than the tandem transit traffic rate to create an incentive to the ILECs to route the transit traffic through the tandem rather than the end office.⁵ Several companies objected to the implementation of the tariff in Case No. 2007-00004.⁶ During the course of Case No. 2007-00004, Windstream became aware that Brandenburg was routing an excessive volume of traffic through its end office, 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 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.

⁴ Transcript at 137-138.

⁵ Kerry Smith Direct Testimony at 9.

⁶ 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. (filed Dec. 28, 2006).

During the course of the proceeding in Case No. 2007-00004, Windstream recorded some of the traffic transiting over its network and, in April 2008, discovered that Brandenburg's traffic was not what it considered "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 requested 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 dedicated 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 via Windstream's network. Windstream alleged that Brandenburg was intentionally misusing Windstream's Elizabethtown end office to route the traffic to Verizon and that Brandenburg should route the traffic through AT&T Kentucky's tandem in Louisville. Windstream alleged that Brandenburg could easily resolve this issue by simply changing the coding at its switches.⁷

On June 4, 2008, counsel for Verizon sent a letter to the Commission's Executive Director requesting that the Commission issue an emergency order to stop the blocking of internet access traffic by Windstream. On June 5, 2008, representatives from Brandenburg, Verizon, and Windstream participated in a teleconference with Commission Staff, reaching no resolution on the traffic dispute. Commission Staff

⁷ July 1, 2008 Order at Appendix A.

informed the parties that Staff would recommend to the Commission that an emergency hearing be convened on June 6, 2008.

On June 5, 2008, Commission Staff informed the parties that the Commission had tentatively scheduled a hearing for 10:00 a.m. on June 6, 2008. Through a series of e-mails on the evening of June 5, 2008, Windstream agreed to cease blocking the traffic and asked that the Commission cancel the emergency hearing. Windstream maintained, however, that it had the right to block the traffic if Brandenburg and Verizon did not reach an agreement regarding the exchange of the traffic. Commission Staff informed the parties that the hearing had been cancelled.

On June 18, 2008, Windstream sent an e-mail to all parties and Commission Staff.⁸ In the e-mail, Windstream informed the parties that, if the traffic dispute had not been resolved by July 3, 2008, Windstream would again block the traffic from Brandenburg to Verizon. Windstream requested that the Commission order Brandenburg to take all steps necessary to cease the improper use of Windstream's facilities.

On June 20, 2008, Verizon informed the Commission via e-mail⁹ that it had proposed a 50/50 split of the total expense for interconnection and a bill-and-keep arrangement for the traffic originating from Brandenburg's customers in Radcliff and Vine Grove. Verizon stated that Brandenburg had refused the offer.

⁸ July 1, 2008 Order at Appendix E.

⁹ July 1, 2008 Order at Appendix F.

Subsequently, on June 20, 2008, Brandenburg informed Commission Staff via e-mail¹⁰ that Brandenburg and Verizon had been unable to resolve the traffic dispute. Brandenburg informed Verizon that, if a traffic exchange agreement was signed by July 3, 2008, Brandenburg would begin routing the traffic from its customers to Verizon in accordance with the local routing number. The effect would be that Brandenburg's customers' calls to Verizon would now be treated and billed as toll (long-distance) calls, since the calls would now be routed through AT&T Kentucky's Louisville tandem.

On July 1, 2008, the Commission, on its own motion, initiated this action for the purpose of resolving the traffic dispute.

On July 3, 2008, Windstream filed with the Commission a Motion for an Emergency Hearing and for Leave to File a Prehearing Statement. As grounds for its motion, Windstream stated that this was simply a traffic dispute between Brandenburg and Verizon and that Windstream was caught in the middle. Windstream reasserted that Brandenburg was improperly sending traffic over its network and requested damages in the amount of \$216,682 plus attorney's fees plus \$500 per day as long as the unauthorized routing continued. Windstream subsequently amended its request for compensation to also include interest and costs associated with performing LNP queries on behalf of Brandenburg.

On August 19, 2008, the Commission held a formal hearing in this case. All parties submitted simultaneous post-hearing briefs on September 15, 2008. Supplemental filings were made by the parties until August 12, 2009. The case stands ready for a decision.

¹⁰ July 1, 2008 Order at Appendix G.

Windstream's Position

Windstream argues that it is an innocent party caught between Brandenburg and Verizon because Verizon and Brandenburg cannot reach a traffic agreement.¹¹ Windstream asserts that the Commission must resolve two issues: (1) whether the Commission should order an immediate rerouting of the traffic from Brandenburg to Verizon off of Windstream's network because the traffic is non-tariffed, unauthorized, and in violation of established routing protocol procedures;¹² and (2) to what extent the Commission should direct Brandenburg and Verizon to pay compensation for the use of Windstream's network.

Windstream asserts that routing the traffic through its network is improper for four reasons: (1) the routing of the traffic over the EAS trunks violates the EAS agreement because the traffic is not destined to a Windstream customer; (2) Windstream's end office is improperly used as a tandem; (3) the LERG provides that the traffic should be routed to AT&T Kentucky's tandem in Louisville; and (4) the traffic is voluminous enough to require direct interconnection between Brandenburg and Verizon.¹³ Windstream further stated that, if requested to do so, it would not be willing to function as an intermediary party to transit the ISP-bound traffic because the volume of traffic would cause congestion on its network.¹⁴

¹¹ Post-hearing Brief of Windstream at 14.

¹² Id. at 11.

¹³ Id. at 15.

¹⁴ Id. at 19.

Brandenburg's Position

Brandenburg claims that it has consistently attempted to negotiate a traffic exchange agreement with Verizon but that Verizon insists that Brandenburg must establish trunking facilities to a point of interface located outside Brandenburg's network and that Verizon is entitled to compensation for the transport and termination of the ISP-bound traffic.¹⁵ Brandenburg argues that Verizon is incorrect on both counts and requests that the Commission order Verizon to establish dedicated trunking facilities between the two of them for the purpose of exchanging the ISP-bound traffic.¹⁶

Brandenburg asserts that: (1) there currently are no facilities through which Brandenburg could route the ISP-bound traffic that would not be rated as toll (long-distance); (2) Verizon could remedy the situation by establishing direct trunking facilities to Brandenburg; and (3) Verizon currently has a traffic exchange agreement with South Central Telephone Cooperative Corporation, Inc. that, if a similar agreement with Brandenburg were executed, would resolve the issues.¹⁷

Brandenburg asserts that the Commission must resolve seven issues: (1) whether Verizon can avoid entering into a traffic exchange agreement defining the rights and obligations associated with the exchange of traffic with Brandenburg; (2) whether Brandenburg is obligated to establish dedicated traffic exchange facilities to a point of interface located outside of Brandenburg's incumbent network; (3) whether Brandenburg is required to pay Windstream for the transport and termination of EAS

¹⁵ Direct Testimony of Allison Willoughby at 6-7, lines 20-1.

¹⁶ Id. at 7, lines 15-17.

¹⁷ Id. at 10, lines 1-13.

traffic; (4) whether Brandenburg is required to pay Verizon for the transport and termination of traffic destined for ISPs served by Verizon; (5) whether Brandenburg is required to pay Verizon for the transport and termination of traffic destined for ISP modems located outside of Kentucky; (6) whether the Commission has the authority to award Windstream the damages (including claims for attorneys' fees) it seeks to recover; and (7) whether Brandenburg is obligated to pay the untariffed charges that Windstream believes are appropriate reimbursement for the estimated expenses it alleges it has incurred in delivering Brandenburg-originated traffic to Verizon. Brandenburg asserts that, if Windstream is entitled to recover damages, any recovery should be made from Verizon, not from Brandenburg.¹⁸

Verizon's Position

Verizon states that it is under no obligation to enter into any traffic exchange agreement with Brandenburg, although it is not opposed to entering into a reasonable and appropriate agreement. Verizon argues that Brandenburg, in its tariff, has designated the numbers at issue as being located in a toll-free calling zone and that Verizon has no control over how Brandenburg controls or directs its traffic or establishes tolls or toll-free zones or EAS arrangements.¹⁹

Verizon claims that it does not provide local service within Brandenburg's exchanges and does not provide toll-free calling from Radcliff and Vine Grove to Elizabethtown. Verizon argues that, given these circumstances, it is not obligated or required to enter into a traffic exchange agreement with Brandenburg. Verizon asserts

¹⁸ Brandenburg Telephone Company, Prehearing Issues Statement at 1-2.

¹⁹ Prehearing Memorandum of MCIMetro Access Services, LLC at 3.

that, because it does have interconnection with Windstream in Elizabethtown, Verizon could accept traffic from Brandenburg in Elizabethtown just as it does from Windstream.²⁰

Verizon asserts that the Commission must determine: (1) the routing obligations of Windstream and Brandenburg related to the ISP-bound traffic; and (2) the manner in which Brandenburg should compensate Windstream if Brandenburg continues to route traffic over Windstream's network.

DISCUSSION

Windstream's Actions

Windstream's unilateral blocking of the ISP-bound traffic was an extreme measure. Windstream blocked the traffic after what it believed to be a reasonable amount of time given to Brandenburg to divert the traffic from its network. The result of the blocking was that Brandenburg customers in the Radcliff and Vine Grove exchanges could not reach their ISPs on Verizon's network. Following prompt Commission action, Windstream ceased blocking the traffic and the customers could once again access their ISPs.

Windstream initially argued that, because the traffic was not transit traffic and was, in fact, traffic that should never have been on its network, this constituted a trespass on its network and did not involve a service that would fall under the Commission's jurisdiction. Hence, Windstream did not believe it was required to provide advance notice of the blocking to the Commission, even though it had provided advance notice to Brandenburg of the impending blocking.

²⁰ Id. at 3.

Windstream has now acknowledged that the Commission has jurisdiction over the matter and has invoked the Commission's jurisdiction to request compensation for the traffic that was sent over its network.²¹ Windstream has also represented that, if a similar situation should arise in the future, it would notify the Commission before taking any unilateral action.²²

We are disconcerted by Windstream's unilateral action in blocking the traffic and only informing us *after* the traffic was blocked. Although we acknowledge that the complex and novel nature of this dispute could lead to differing interpretations of the Commission's jurisdiction, we believe that it would have been prudent to have informed the Commission of the dispute *before* blocking the traffic. We are somewhat mollified by Windstream's subsequent acknowledgement of the Commission's jurisdiction and Windstream's pledge that it would give the Commission advance notice prior to taking similar action in the future.

This, however, does not address the reasonableness of Windstream's unilateral actions. The initial purpose of this proceeding was to address the traffic dispute between the parties and to avoid further disruptions of ISP service.²³ The reasonableness of Windstream's actions was neither thoroughly addressed nor reviewed and the record is not currently sufficient to support a conclusion as to whether or not Windstream's actions were reasonable. Therefore, further proceedings pursuant to KRS 278.280 are necessary to review Windstream's past actions for reasonableness

²¹ Transcript at 12-13, Windstream Post-hearing Brief at 14.

²² Transcript at 68, line 13.

²³ See July 1 Order at 4.

and whether such actions resulted in a provisioning of unreasonable service in violation of KRS 278.030(2).

Extended Area Service

The complications experienced by the parties in this dispute result primarily from the existence of an EAS arrangement between Brandenburg and Windstream. EAS calls “are inter-exchange calls billed as local calls, rather than toll calls.”²⁴ EAS arrangements “arose over time under state regulatory auspices, [and] are intended to provide local calling routes and rates within nearby local exchanges.”²⁵ This EAS arrangement was established decades ago²⁶ as a mandatory²⁷ expansion of the calling areas for subscribers in specifically identified exchanges of each company. Both Brandenburg and Windstream acknowledge that their subscribers may place phone calls between Windstream’s Elizabethtown exchange and Brandenburg’s Radcliff and Vine Grove exchanges without incurring any additional charges. This arrangement is defined in each carrier’s tariff where the local calling areas for the companies’ subscribers are specified and the associated rates are established.

Brandenburg’s tariff explains that the rates for the Radcliff exchange “entitle the subscribers of this exchange to call, without additional charge, subscribers with the NPA

²⁴ Berkshire Tel. Corp. v. Sprint Comm’n Co., 2006 WL 3095665 at 2 (W.D.N.Y. 2006).

²⁵ U.S. v. Western Elec. Co., 569 F.Supp. 990, 1002 n. 54 (D.C. 1983).

²⁶ Neither Brandenburg nor Windstream produced original documentation of the EAS arrangement between the companies, but both admit the arrangement has been in place for as long as the parties can recall.

²⁷ The arrangement is mandatory because the expanded calling area applies to all subscribers in the affected exchanges. A “community of interest” would have necessarily been found to exist within the expanded local calling area for such an inter-company arrangement to have been implemented.

of 270 and the NXX of 323, 360, 735, 737, 739, 763, 766, 769, 877, and 982²⁸ and provide similar terms for the Vine Grove exchange for subscribers “. . . with the NPA of 270 and the NXX of 219, 272, 323, 351, 352, 360, 735, 737, 739, 763, 765, 766, 769, 828, 862, and 982.”²⁹

Likewise, Windstream’s tariff states that “the rates specified herein, entitle customers to an unlimited number of messages to all stations bearing the designation of central offices within the serving exchange and additional exchanges shown in Local Calling Area³⁰ and further prescribes the local calling area for the Elizabethtown exchange to include the additional exchanges of “. . . Cecilia, Hodgenville, Radcliff #, South Hardin, Vine Grove #.”³¹

Based on the tariff language of both carriers, the EAS arrangement is clearly reciprocal between and among Windstream’s Elizabethtown exchange and Brandenburg’s Radcliff and Vine Grove exchanges. Furthermore, neither tariff makes any distinctions with regard to the selected local service provider of the called subscriber. Windstream and Brandenburg jointly maintain the facilities necessary to exchange traffic among their subscribers. Because of the mandatory nature of the EAS arrangement, the costs associated with the EAS facilities are borne by the entire

²⁸ Brandenburg Telephone Company, Ky. PSC No. 2, Part III, Ninth Revision Sheet 11, Section I.B. Date-stamped “Effective” on 5/4/2005. (NPA refers to “Numbering Plan Area” and NXX refers to “Central Office Code”.)

²⁹ Brandenburg Telephone Company, Ky. PSC No. 2, Part III, Ninth Revision Sheet 12, Section I.B. Date-stamped “Effective” on 5/4/2005.

³⁰ Windstream Kentucky East, Inc., Ky. PSC No. 7, Original Page 1, Section S3.1a. Date-stamped “Received” on 7/17/2006.

³¹ Windstream Kentucky East, Inc. Ky. PSC No. 7, Original Page 12, Section S3.5. Date-stamped “Received” on 7/17/2006. (# denotes exchanges other than Windstream Kentucky East, Inc.)

subscriber base in the local calling areas of each carrier and recovered through filed monthly exchange rates. These rates have presumably been sufficient to cover the costs of both carriers' EAS facilities since the inception of the arrangement.

The introduction of competition into the local telecommunications market, as prescribed by the Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("Telecom Act"), requires ILECs, such as Brandenburg and Windstream, to interconnect upon request with competing local service providers, such as Verizon. These competitive arrangements have understandably stressed the historical relationships relied upon by carriers for the exchange of local traffic and may, at times, jeopardize long-standing public policy measures. Nevertheless, this Commission remains obligated and committed to ensuring that the benefits of competition are experienced by all consumers while preserving the interests of the public generally.

The instant dispute is troublesome because it highlights the incentive for specific competitive interests to, at times, frustrate the conveniences and benefits expected by the public at large. EAS arrangements like the one between the Elizabethtown exchange of Windstream and the Radcliff and Vine Grove exchanges of Brandenburg are just such public interest benefits that, if the Commission were to permit it, could be obscured to the point of irrelevance. The subscribers of local telephone service in the Radcliff and Vine Grove exchanges expect and have been promised a local calling area that includes those telephone numbers assigned in the Elizabethtown exchange. Although of less significance in this particular case, Windstream's subscribers have been similarly promised a local calling area to include the Radcliff and Vine Grove exchanges.

The fact that a competitor of Windstream, through a competitive arrangement, has now asserted control over such telephone numbers is immaterial to Brandenburg's subscribers. And it would seem to be an absurd outcome for local competition to require a subscriber to incur the costs of a toll call for a call that always had been considered a local call simply because of the called party's choice of a competitive alternative.

The Commission has been unable to find any federal rules that specifically address the preservation of existing EAS arrangements between local providers with the introduction of a competitor, but similar tenets are protected by the Telecom Act. For example, a subscriber's right to choose an available alternative local service provider includes the right of the competitor to maintain local dialing parity with the services of an incumbent carrier. 47 C.F.R. § 51.207 specifically preserves local dialing parity by requiring that "[a] LEC shall permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call notwithstanding the identity of the customer's or the called party's telecommunications service provider." As an analogy, it is reasonable to conclude that a customer's ability to "dial" on a local basis is protected regardless of the service providers involved, and so should the local calling area be preserved regardless of the service provider.

In fact, the recently amended interconnection agreement between Windstream and Verizon contains language specifically addressing EAS arrangements. The agreement explains that ISP-bound traffic includes calls between the carriers if the call:

[O]riginates and terminates from and to, respectively, NPA
NXXs assigned to rate centers within different Exchanges

that share a common mandatory local calling area, e.g., mandatory Extended Area Service (EAS), mandatory Extended Local Calling Service (ELCS), or other like types of mandatory expanded local calling scopes as ordered by the Commission or as specified or defined by Windstream's tariffs as approved by the Commission."³²

Although the language in the agreement applies to Windstream and Verizon, it has previously been established that the "expanded local calling scopes" between Windstream's Elizabethtown exchange and Brandenburg's Radcliff and Vine Grove exchanges are specified in each carrier's tariff.

The question becomes, how should the Commission require the handling of EAS traffic from a "third party"? Interestingly, Windstream and Verizon have made further amendments to their interconnection agreement, including establishing a reciprocal compensation rate of \$.0009 per minute of use for ISP-bound traffic.³³ Before the amendment, ISP-bound traffic was compensated strictly on a bill-and-keep basis, i.e., with no monies exchanged between the parties, which placed Windstream in a financially neutral position with regard to such traffic. But now, depending on the level of traffic exchanged between the parties to the agreement, compensation provided by either party would be measured and could become more significant.

Facilities extend between the Elizabethtown exchange of Windstream and the Radcliff/Vine Grove exchanges of Brandenburg for the mutual exchange of local EAS traffic. Verizon has established a point of interconnection at the same Elizabethtown central office for the exchange of local traffic with Windstream. It therefore appears to

³² Interconnection Agreement between MCIMetro Access Transmission Services, LLC and Windstream Kentucky East, et al., at 2, Section 1.2.2. (effective November 1, 2008). Received by the Commission on February 9, 2009. (Emphasis added.)

³³ *Id.* at 3, Section 1.2.2.

the Commission that Windstream's transiting of traffic between Verizon and Brandenburg would involve the hand-off of such traffic from the jointly maintained EAS facilities, or trunks, terminating in the Elizabethtown exchange to the interconnecting facilities of Verizon. Compensation due Windstream, if any, and if not already accounted for in the interconnection agreement between Windstream and Verizon, would likely have to be considered in light of such a close proximity of Brandenburg and Verizon facilities.

Resolving the Traffic Dispute

As a threshold matter, we find that the traffic in dispute must be moved off of Windstream's network. Windstream's reluctance to enter into an agreement to allow the ISP-bound traffic to transit over its network forces the Commission to consider alternative arrangements.³⁴ Verizon has not contested Windstream's application of the interconnection agreement between the two carriers and, thereby, appears to concede that the agreement does not govern the disputed traffic. Absent an arrangement between Windstream and Verizon to utilize the existing interconnection point located in Elizabethtown for exchange of the disputed traffic, an interconnection arrangement will need to be established between Brandenburg and Verizon for the exchange of local traffic. Moreover, it is the practice of the Commission to encourage negotiated

³⁴ It is not unreasonable to conclude that Windstream, when entering into its interconnection agreement with Verizon, should have known that the numbers that Verizon was porting to its own switch in Louisville were subject to the EAS agreement with Brandenburg. However, Windstream's obligation to include those numbers in an interconnection agreement in order to keep the local dialing characteristics of the ported numbers is unclear. Given a slightly different set of facts presented to the Commission, it is possible that a different conclusion could have been reached regarding Windstream's obligations in this matter and Windstream would have been charged with amending its agreement with Verizon to account for the ISP-bound traffic.

arrangements for the interconnection of telecommunications providers rather than impose arrangements that may be less than ideal for the parties involved.

Before removing the traffic from Windstream's network, Brandenburg and Verizon must reach an agreement that includes provisions for the exchange of the disputed traffic. Brandenburg remains obligated to originate calls from its customers to Verizon's customers. Because Windstream refuses to act as an intermediary, the only other option apparently available that utilizes existing facilities is to send the traffic as toll calls through AT&T Kentucky's tandem in Louisville, and Brandenburg would have to absorb the costs of routing such traffic to a point well beyond its network.

We find that, in order to resolve this dispute, Brandenburg and Verizon must enter into an interconnection agreement pursuant to Sections 251 and 252 of the Telecom Act.³⁵ Furthermore, the Commission retains authority to resolve disputes between the carriers pursuant to KRS 278.542(1)(b).

The record reflects that Brandenburg and Verizon have sought to enter into a traffic exchange agreement, but one or both sides have expressed objections to the scope of their respective obligations concerning the termination of calls and the cost of facilities and transport. In order to facilitate negotiations, the Commission provides the following guidelines regarding its current policies of interconnection:

1. The originating carrier pays for the cost of transporting a call to the point of interconnection.

³⁵ 47 U.S.C. §§ 251, 252.

2. An ILEC generally is not responsible for costs incurred outside of its network (except for reciprocal compensation, notwithstanding different treatment for ISP-bound traffic or Commercial Mobile Radio Services traffic).

3. Although Brandenburg's network is technically extended by the EAS agreement to Windstream's local calling area in and around Elizabethtown, absent an arrangement with Windstream, Verizon and Brandenburg cannot utilize their respective points of interconnection established with Windstream. The Telecom Act requires ILECs to permit interconnection at any "feasible" point within an ILEC's network, and Windstream has accommodated such interconnection with Verizon.³⁶ However, if Windstream continues to refuse to allow the ISP-bound traffic to transit the interconnection between Verizon and Windstream, then the traffic cannot reach Verizon.

4. The level of traffic exchanged between Brandenburg and Verizon is declining. The Commission, in the past, has established DS1 as a minimum traffic threshold before requiring dedicated trunks for the exchange of local traffic.³⁷

Verizon and Brandenburg shall have 30 days from the date of this Order to establish a traffic exchange arrangement that resolves the current dispute. If no agreement is reached, the parties shall have 45 days from the date of this Order to jointly file information that describes, individually, each specific area of contention and

³⁶ 47 USC § 251(c)(2)(B).

³⁷ See Case No. 2000-00404; *The Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996* at 3 (Ky. PSC Apr. 23, 2001). See also Case No. 2006-00215, *Petition of Ballard Rural Telephone Cooperative Corporation, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement with American Cellular f/k/a ACC Kentucky License LLC, Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996* at 9 (Ky. PSC Dec. 22, 2006), 13-16 (Mar. 19, 2007), and 12 (Nov. 9, 2007). *Aff'd in part and reversed in part, T-Mobile USA, Inc. v. Armstrong*, 2009 WL 1424044 (E.D. Ky. May 20, 2009).

fully sets out the positions of each party, including suggested specific language. The Commission will review the information supplied by the parties and, if necessary, establish the terms and conditions of traffic exchange between Brandenburg and Verizon. Any traffic exchange agreement will be prospective only and shall not affect or be used to prove the liability of any party for monies owed, if any, to Windstream for the ISP-bound traffic that crossed its network.

Payment to Windstream for the Disputed Traffic

Based upon a review of the record, it appears that Windstream has been carrying the disputed traffic in the absence of an applicable agreement and may be entitled to compensation for transport of the traffic routed over its network. The interconnection point established between Windstream and Verizon provides for the exchange of local traffic originated and terminated within Windstream exchanges that share a common mandatory local calling area, including EAS arrangements.³⁸ If, as alleged by Windstream, the interconnection agreement with Verizon does not govern the disputed traffic and the existing EAS arrangement with Brandenburg is insufficient, then it appears that another arrangement must apply or be put in place. The traffic appears to be somewhat analogous to transit traffic, for which Windstream does have a tariff (the rate of which is currently being disputed), and is also covered in the interconnection agreement between Windstream and Verizon. Windstream used the tariffed transit traffic rate as a proxy rate to determine what compensation may be owed.³⁹ Windstream, through October 2008, alleged that it was due \$1,294,361 for the traffic,

³⁸ Interconnection Agreement Between Kentucky ALLTEL, Inc. and MCIMetro Access Transmission Services LLC, Attachment 12, Section 1.2.

³⁹ Direct Testimony of Kerry Smith at 13, lines 11-14.

interest, and attorney's fees and claimed that the amount increases approximately \$300 each day.⁴⁰

The record is not sufficiently specific to support a Commission determination that Windstream is entitled to the full amount of its requested relief, if it is indeed entitled to any recovery. The Commission must further develop the record in order to determine the proportionate liabilities and responsibilities of the parties. Therefore, a separate hearing must be held to make these determinations.

Verizon's Motion for Confidential Treatment

On August 6, 2008, Verizon filed with the Commission a Motion for Confidential Treatment, pursuant to 807 KAR 5:001, Section 7, requesting that certain portions of its response to question 10 of Brandenburg's data requests served on Verizon be granted confidential treatment. Verizon states that its response to question 10 contains the physical addresses of several Windstream communications facilities and asserts that this information is exempted from the Open Records Act by KRS 61.878(1)(m), which seeks to protect critical infrastructure, including communications systems, from terrorist attack. No party has objected to this motion.

The Commission finds that the information sought to be treated as confidential should be given such treatment. The public revelation of the physical location of these communications facilities could allow individuals who seek to induce public harm to critically injure the Commonwealth's communications infrastructure. Therefore, the

⁴⁰ Letter from Bruce Clark, Stites and Harbison, PLLC, to Stephanie Stumbo, Executive Director, Kentucky Public Service Commission, at 1 (Dec. 30, 2008) (cover letter to Second Supplemental and Amended Response of Windstream Kentucky East, LLC to Brandenburg Telephone Company's Initial Data Requests to Windstream Kentucky East, LLC, and Commission Staff's Data Requests to Windstream Kentucky East, LLC, Brandenburg Telephone Company, and MCI Metro Access Transmission Services, LLC d/b/a Verizon Access).

information shall be withheld from public inspection pursuant to KRS 61.8788 and 807 KAR 5:001, Section 7.

CONCLUSION

This case arose because of Windstream's blocking of ISP-bound traffic from Brandenburg to Verizon. Initially, it appeared that Windstream was the sole responsible party for the blocking; but, after discovery and a hearing, it appears that actions and omissions of other parties may also have contributed to the circumstances surrounding this dispute. This proceeding has revealed multiple issues that must be resolved separately before this proceeding can draw to a close. The Commission has resolved some issues presented in this proceeding but requires that further action be undertaken on the remaining issues. To that end, the proceeding will now be trifurcated to address: (1) the interconnection arrangements between Verizon and Brandenburg; (2) the amount of money due Windstream, if any; and (3) the reasonableness of Windstream's actions and whether such action resulted in unreasonable service.

IT IS THEREFORE ORDERED that:

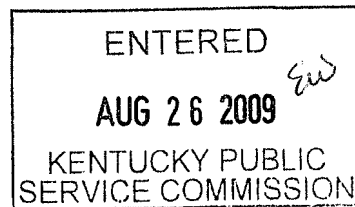
1. Within 30 days of the date of this Order, Verizon and Brandenburg, consistent with guidelines contained herein, shall file with the Commission an executed traffic exchange agreement that resolves the outstanding traffic disputes in this case.

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

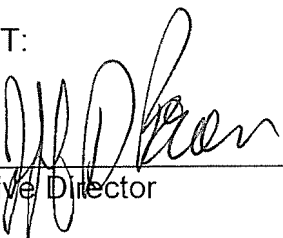
3. Regarding payment to Windstream, if any, the parties shall abide by the procedural schedule attached as Appendix A.

4. Regarding the reasonableness of Windstream's actions, Windstream shall abide by the procedural schedule attached as Appendix B.

By the Commission



ATTEST:



Executive Director

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2008-00203 DATED **AUG 26 2009**

Within 30 days of the date of this Order, Windstream shall file with the Commission, and serve on all parties, a detailed description of its alleged costs only for the disputed traffic.

Within 30 days of the date of this Order, Brandenburg shall file with the Commission, and serve on all parties, a detailed description of how it believes the costs owed to Windstream (if any) should be allocated among the parties.

Within 30 days of the date of this Order, Verizon shall file with the Commission, and serve on all parties, a detailed description of how it believes the costs owed to Windstream (if any) should be allocated among the parties.

Within 15 days of receipt of parties' calculation of costs owed, any party may file objections and responses to the same.

APPENDIX B

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2008-00203 DATED **AUG 26 2009**

Within 30 days of the date of this Order, Windstream shall file with the Commission copies of all correspondence, including but not limited to, e-mails, letters, internal documents or communications, in which Windstream and its employees discuss the origins of the traffic dispute with Brandenburg.

Within 30 days of the date of this Order, Windstream shall file with the Commission copies of all correspondence, including but not limited to, e-mails, letters, internal documents or communications, in which Windstream and its employees discussed the propriety of unilaterally blocking the disputed traffic.

Within 30 days of the date of this Order, Windstream shall file with the Commission copies of all documents, including but not limited to, e-mails, letters, internal documents, memoranda or other communications, in which Windstream and its employees discussed Verizon's possible liability in the current dispute.

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