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PUBLIC SERVICE  
COMMISSION

August 11, 2006

**VIA HAND DELIVERY**

Hon. Beth O'Donnell  
Executive Director  
Public Service Commission  
211 Sower Blvd.  
Frankfort, KY 40601

**Re: *In the Matter of Brandenburg Telecom LLC v. Global Crossing  
Telecommunications, Inc.; Case No. 2006-00339***

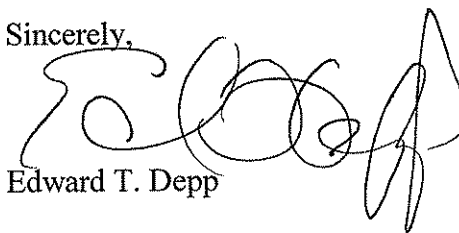
Dear Ms. O'Donnell:

I have enclosed for filing in the above-styled case the original and eleven (11) copies of Brandenburg Telephone Company's response to Global Crossing Telecommunications, Inc.'s motion to dismiss in the above-referenced matter. Please file stamp one (1) copy of the motion and return it to our deliveryperson.

Thank you, and if you have any questions, please contact me at (502) 540-2300.

Sincerely,

Edward T. Depp



ETD/lb

cc: Douglas F. Brent, Esq. (Counsel to Global Crossing)  
John E. Selent, Esq.

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BRANDENBURG TELEPHONE )  
COMPANY )  
Complainant )  
v. )  
GLOBAL CROSSING )  
TELECOMMUNICATIONS, INC. )  
Defendant )

Case No. 2006-00341

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PUBLIC SERVICE  
COMMISSION

RESPONSE TO MOTION TO DISMISS

Brandenburg Telephone Company ("Brandenburg Telephone"), by counsel, hereby responds in opposition to the motion to dismiss ("Motion") of Global Crossing Telecommunications, Inc. ("Global Crossing"), and states that the Motion should be overruled for the following reasons.

**I. Brandenburg Telephone's Complaint Relates to the Service of Global Crossing.**

Global Crossing's Motion may be reduced to the proposition that the Public Service Commission of the Commonwealth of Kentucky ("Commission") has no jurisdiction to consider a complaint by one utility against another utility regarding nonpayment for tariffed services. This proposition has no support in the law.

The Commission has jurisdiction over Brandenburg Telephone's complaint against Global Crossing. KRS § 278.040(2) provides the Commission with "exclusive jurisdiction over the regulation of rates and service of utilities." *Id.* KRS § 278.260 further provides that:

The commission shall have original jurisdiction over complaints as to rates or service of any utility, and upon a complaint in writing made against any utility by any person that any rate in which the complainant is directly interested is unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in

connection therewith is unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with or without notice, to make such investigation as it deems necessary or convenient...

*Id.* (emphasis added).

Accordingly, the first issue is whether Brandenburg Telephone's complaint was made against "any utility." *Id.* Clearly, it was. As of August 8, 2006, Global Crossing is listed in the "Utility Information" section of the Commission's website as a long distance carrier having "Utility ID" 5129500 and having "Utility Status" of active. (See Utility Information Webpage, attached hereto as Exhibit 1.) The "Utility Information" webpage further indicates that Global Crossing serves "all counties" within the Commonwealth. (See *id.*) Global Crossing neglected to identify these facts in its Motion, and it also neglected to mention that these facts meaningfully distinguish the *Kentucky Power Co.* case (*In the Matter of the Tariffs of Kentucky Power Co.*, 2000 Ky. PUC LEXIS 1337 (2000)) – which involved a complaint against a non-utility (AK Steel) – cited in its Motion. The *Kentucky Power Co.* case is, consequently, inapposite.<sup>1</sup>

The second issue is whether Brandenburg Telephone's complaint asserted "that any ... practice or act affecting or relating to the service of the utility or any service in connection therewith is unreasonable, unsafe, insufficient or unjustly discriminatory[.]" KRS § 278.260 (emphasis added). Again, the complaint clearly made such an assertion. Brandenburg Telephone complains that Global Crossing (as a utility) has "slipped back into its pre-bankruptcy nonpayment practices." (Complaint at para. 9.) Given this allegation, only two determinations need be made: (i) does Global Crossing's refusal to pay its access charges relate to its offering of long distance services; and

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<sup>1</sup> In the *Kentucky Power Co.* case, AK Steel never claimed, and the Commission never held, that KRS 278.040(2) and KRS 278.260(1) exclude non-paying utilities from the scope of the Commission's jurisdiction. Presumably, this is because such a claim would run expressly counter to the Commission's clear jurisdiction over "utilities" and their "rates and service." See KRS 278.040(2) and KRS 278.260(1).

if so, (ii) is that practice "unreasonable, unsafe, insufficient or unjustly discriminatory[.]" KRS § 278.260(1).

Global Crossing's refusal to pay for access services rendered by Brandenburg Telephone clearly relates to its offering of long distance services because Global Crossing must purchase access services in order to provide long distance services. And, this practice is certainly "unreasonable, unsafe, insufficient or unjustly discriminatory" because it could compel Brandenburg Telephone to terminate Global Crossing's access services, thereby disrupting long distance services to Global Crossing's Kentucky customers.<sup>2</sup> Therefore, the Commission must have jurisdiction over Brandenburg Telephone's complaint.

Global Crossing's own argument unwittingly compels this very same conclusion. This can be shown by assuming (strictly for purposes of argument) the two essential assertions of Global Crossing's argument: (i) that it has merely "customer" status with respect to Brandenburg Telephone; and (ii) that the Commission, therefore, cannot order Global Crossing to pay Brandenburg Telephone's tariffed and approved access charges.

Taking these assumptions as true, Brandenburg Telephone would clearly be within its rights to disconnect Global Crossing's access services for nonpayment as expressly permitted by 807 KAR 5:006 § 14 ("Refusal or Termination of Service"). Brandenburg Telephone has occasionally been forced to take this action with respect to other nonpaying customers, and if Global Crossing wants to be treated as an ordinary, non-paying customer, then Brandenburg Telephone would have no choice but to rely upon the express authorization of 807 KAR 5:006 § 14 to terminate Global Crossing's

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<sup>2</sup> This is, in fact, a significant reason why Brandenburg Telephone has brought this matter before the Commission.

service for nonpayment. Of course, the natural effect of this action would be, at a minimum, a significant service interruption to residents of the Commonwealth.<sup>3</sup>

Global Crossing's suggestion, then, is that it be permitted to place the adverse consequences of its own payment delinquencies upon the shoulders of the Commonwealth's bill-paying residents. KRS 278.260 cannot be so interpreted. Global Crossing's "practice" of failing to pay for access services from Brandenburg Telephone is "unreasonable, unsafe, insufficient or unjustly discriminatory" to Kentucky residents. Thus, the Commission possesses jurisdiction over Brandenburg Telephone's complaint.

Furthermore, Global Crossing's practice of withholding payment for access services rendered by Brandenburg Telephone is "unreasonable [and] unsafe" for Brandenburg Telephone and its own customers. As noted in the complaint:

Global Crossing's nonpayment tactics have forced Brandenburg Telephone to underwrite nearly \$100,000 of potentially bad debt, thereby endangering the viability and quality of services Brandenburg Telephone (as an incumbent rural local exchange carrier and provider of last resort) must provide to its Kentucky end-user subscribers. Moreover, these tactics have foisted additional administrative, legal, and temporal costs upon Brandenburg Telephone, further undermining Brandenburg Telephone's ability to concentrate on its principal goal: the provision of high-quality, low-cost, reliable telecommunications services to its end-user subscribers.

Consequently, Global Crossing's tactics not only deprive Brandenburg Telephone of its rightful compensation for services rendered, they endanger service quality and service availability to Kentucky residents.

(*Id.* at paras. 16-17.) It is difficult to conceive of a more "unreasonable [and] unsafe" condition than – as described above – such practice would create. Therefore, the Commission possesses jurisdiction over Brandenburg Telephone's complaint.

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<sup>3</sup> It is worth noting that the affected residents would have no culpability in their loss of service because it was not they who caused the service disruption. For purposes of this argument, the culpability would lie solely with Global Crossing, the "customer" who refused to pay the bill.

Finally, and perhaps most obviously, Global Crossing's practice of nonpayment for tariffed access services is unjustly discriminatory with respect to other utilities receiving and – as required by tariff – paying for access services from Brandenburg Telephone. If the Commission has no jurisdiction to consider Brandenburg Telephone's complaint, then, Global Crossing will gain a significant competitive advantage over other long distance carriers attempting to compete in the Commonwealth. Thus, Commission consideration of the complaint is necessary to avoid such unjust discrimination, and the Commission possesses jurisdiction over Brandenburg Telephone's complaint pursuant to KRS § 278.040(2) and KRS § 278.260(1).

## **II. No Access Tariff Dispute Exists.**

Global Crossing also attempts to dismiss Brandenburg Telephone's complaint on the grounds that "an interstate access tariff dispute exists." (Motion at 2.) This argument bears no merit for two reasons.

First, a motion to dismiss is only appropriate when the pleading party would not be entitled to relief under any set of facts that could be proved in support of the claim. *Commonwealth ex rel. Chandler v. Anthem Insurance Companies, Inc.*, Ky. App., 8 S.W.3d 48, 51 (1999). Even assuming (again, strictly for purposes of argument) the truth of Global Crossing's blatantly unsupported allegations that "the amounts due relate primarily to interstate, and therefore non-jurisdictional, access services," this bald allegation does not begin to show that Brandenburg Telephone would be unable to prove any facts in support of its request for relief. As Global Crossing itself admits in a statement that must be fatal to its own Motion, at least some part of Brandenburg Telephone's proposed relief relates "to intrastate services provided under a state tariff." (Motion at para. 3.) Therefore, Global Crossing cannot show that Brandenburg Telephone "would not be entitled to relief

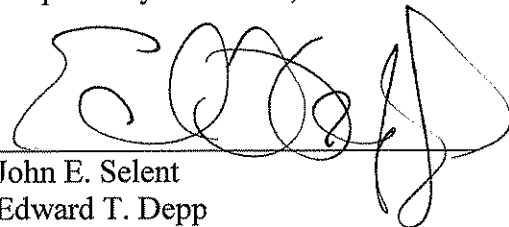
under any set of facts which could be proved in support of the claim," *Commonwealth ex rel. Chandler, infra*, and its Motion should be denied.

Second, the percentage of interstate and intrastate access revenues at issue in the complaint is irrelevant to the Commission's jurisdiction under KRS § 278.260.<sup>4</sup> Pursuant to KRS § 278.260, the Commission's jurisdiction over this complaint is based on Global Crossing's unreasonable, unsafe, insufficient, and unjustly discriminatory practice of not paying access service bills incurred in relation to the long distance services it offers. Interstate and intrastate considerations play no part in that determination, as described in section I of this response. Therefore, Global Crossing's secondary argument in support of its Motion should be rejected, and the Motion should be overruled.

### **III. The Commission Should Overrule Global Crossing's Motion.**

For the foregoing reasons, Global Crossing's Motion should be overruled, and the Commission should schedule a prompt prehearing conference to establish a procedural schedule for the expedited resolution of this matter.

Respectfully submitted,



John E. Selent  
Edward T. Depp  
Holly C. Wallace  
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1400 PNC Plaza  
500 West Jefferson Street  
Louisville, Kentucky 40202  
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(502) 585-2207 (facsimile)

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<sup>4</sup> True to form, and as noted in Brandenburg Telephone's complaint, Global Crossing has asserted that there is an existing dispute between the parties with respect to the amount of access service charges due to Brandenburg Telephone. This allegation is misleading. The only pending Global Crossing "disputes" are those it has attempted to make in response to Brandenburg Telephone's rightful, final denial of an original dispute. Clearly, Global Crossing may not repeatedly dispute a bill after the dispute has been denied; otherwise, it could (as it attempts to do here) interminably forestall payment by undertaking such dubious tactics.

**COUNSEL TO BRANDENBURG  
TELEPHONE COMPANY**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Response to Motion to Dismiss was served upon the following parties by first-class United States mail, sufficient postage prepaid, this 11<sup>th</sup> day of August, 2006.

Douglas F. Brent, Esq.  
Deborah T. Eversole, Esq.  
Stoll Keenon Ogden, PLLC  
2000 PNC Plaza  
500 West Jefferson St.  
Louisville, Kentucky 40202

*Counsel to Global Crossing  
Telecommunications, Inc.*

  
\_\_\_\_\_  
**COUNSEL TO BRANDENBURG  
TELEPHONE COMPANY**





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# KY Public Service Commission

## Utility Information

| General                      | Address   | Comments                                 | Counties | Groups |
|------------------------------|---|--|----------|--------|
| <b>Utility ID</b><br>5129500 | <b>Company</b><br>Global Crossing Telecommunications,<br>Inc. |  |          |        |
| <b>Utility Type</b><br>510   | Long Distance Carriers  |  |          |        |
| <b>Utility Status</b><br>A   | <b>Utility Inactive Date</b>                                  | <b>Total Customers</b>                   |          |        |
| <b>Class</b><br>A            | <b>Report Required</b><br>Y                                   |  |          |        |
| <b>Mult Service</b>          | <b>Mult Service Type</b><br>Not a Multi Service Company       | <b>Default Address</b><br>Correspondence |          |        |
| Last Changed: 3/31/2006      |   |  |          |        |

|            |         |       |         |      |          |
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# KY Public Service Commission

## Utility Information

| General  | Address | Comments | Counties | Groups |
|--|---------|----------|----------|--------|
| <b>Counties Served by Utility ID: 5129500 Global Crossing Telecommunications, Inc.</b> |         |          |          |        |
| All Counties   |         |          |          |        |
| Last Changed: 4/29/2002  |         |          |          |        |