

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION INTO THE TRAFFIC)
DISPUTE BETWEEN WINDSTREAM)
KENTUCKY EAST, LLC, BRANDENBURG)
TELEPHONE COMPANY AND MCIMETRO)
ACCESS TRANSMISSION SERVICES, LLC)
d/b/a VERIZON ACCESS)

CASE NO. 2008-00203

RECEIVED

FEB 29 2012

BRIEF OF MCIMETRO

PUBLIC SERVICE
COMMISSION

The Commission established this phase of the case to provide Windstream the opportunity to show whether it is due any compensation for traffic carried from Brandenburg Telephone Company (“Brandenburg”) end users to ISPs served by MCImetro from August 2005 to November 2011, and if so, from whom. Windstream has had four years to provide a legal basis for its claims for compensation from MCImetro, and has failed to do so. There is no such legal basis because: (i) the Commission lacks authority to award damages; (ii) establishing a “proxy rate” at this stage would amount to retroactive ratemaking, and (iii) even if Windstream were entitled to damages, they would have to be recovered in court from Brandenburg, not MCImetro. Consequently, the Commission should move to dismiss Windstream’s requests for compensation from MCImetro and finally close this case.

BACKGROUND

On July 1, 2008, the Commission initiated this investigation into a traffic dispute among Windstream, Brandenburg, and MCImetro.¹ In opening this investigation the Commission ordered that “[t]he traffic arrangements, as they exist on June 30, 2008, shall continue in their current form until this dispute is resolved.” July 1, 2008 Order at 4. After hearing and briefing, the Commission issued its August 26, 2009 Order (“2009 Order”) requiring that the disputed traffic “be moved off of Windstream’s network.” 2009 Order at 18. However, the Commission specified that “[b]efore removing the traffic from Windstream’s network, Brandenburg and Verizon must reach an agreement that includes provisions for the exchange of the disputed traffic.” *Id.* at 19. The Commission acknowledged that Brandenburg and MCImetro had attempted to negotiate a traffic exchange agreement, but could not reach agreement as to “the scope of their respective obligations concerning the termination of calls and the cost of facilities and transport.” *Id.* Therefore, “in order to facilitate negotiations,” the Commission provided specific guidelines regarding its policies. *Id.* at 20. In so doing, the Commission expressly stated that:

[a]ny traffic exchange agreement shall 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.

¹ The background of this traffic dispute is outlined in the Commission’s 2009 Order at pages 1-7. The disputed traffic involved calls from Brandenburg end users in Radcliff to Internet Service Providers (“ISPs”) served by MCImetro that Brandenburg routed over extended area service (“EAS”) trunks to Windstream’s Elizabethtown network for completion to MCImetro’s point of interconnection with Windstream in Elizabethtown. Oct. 4, 2011 Testimony of Don Price at 3. As directed by the Commission in a previous phase, the disputed traffic has been removed from Windstream’s network and thus the only issue at stake here is retroactive treatment.

Id. at 21.²

With respect to Windstream’s claims for compensation, the Commission found that “[t]he 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.” *Id.* at 22. The Commission therefore adopted a procedural schedule to “further develop the record” on compensation. *Id.* After several rounds of additional testimony and discovery, a hearing was conducted on January 31, 2012, and the record is now complete.

ARGUMENT

I. Windstream Presents No Cognizable Legal Claim for Damages.

Windstream seeks four categories of damages in this case: (i) compensation for the disputed traffic, (ii) compensation for local number portability (“LNP”) queries Brandenburg failed to conduct, (iii) interest and (iv) attorneys’ fees. *See* 2012 Tr. 48:21-51:4, 64:13-18. However, Windstream’s claim is not based on any existing tariff or contract rate for services provided to Brandenburg or MCImetro. Instead, Windstream appears to seek damages for “trespass” of its network or the establishment of a retroactive rate to apply to the disputed traffic. *See* 2008 Tr. 59. KRS Chapter 278 does not equip the Commission to award either.

A. The Commission Lacks Jurisdiction to Award Compensatory Damages and Associated Interest and Attorneys’ Fees.

The Commission’s original jurisdiction is limited to “complaints as to rates or service of any utility,” *See* KRS 278.260(1). Windstream has no effective rate—contractually or through a

²MCImetro and Brandenburg entered into a traffic exchange agreement on July 27, 2011.

state approved tariff—governing the disputed traffic or LNP queries. Thus, Windstream’s claims are essentially claims for damages for unapproved use of its network. However, it is well settled in Kentucky that the Commission lacks the power to adjudicate damages claims. *See Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126 (Ky. App. 1983); Ky. Const. § 14.

In *Carr*, a customer brought an action in Kenton Circuit Court seeking, among other things, compensatory damages for tortious breach of contract for telephone service. The circuit court dismissed the suit, holding that the Commission had exclusive jurisdiction over the matter. Reversing the circuit court's ruling, the Court of Appeals stated:

[A]ppellant seeks damages for breach of contract. 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 requirements.

Carr, 651 S.W.2d at 128 (Ky. App. 1983)(citing Ky. Const. § 14). Based on *Carr* and Section 14 of the Kentucky Constitution (regarding the “[r]ight of judicial remedy for injury”), the Commission has repeatedly dismissed damages claims for lack of jurisdiction. For example, in 2010, the Commission dismissed claims, among others, for fraud, breach of contract, breach of good faith and fair dealing and unjust enrichment, stating that:

[f]or each of these claims, Complainant seeks compensatory and punitive damages, attorney's fees, other litigation costs and expenses, and trial by jury. The Commission, however, is without jurisdiction to award the relief requested by Complainant. Pursuant to KRS 278.040, the Commission has jurisdiction of only the "rates" and "service" of utilities as defined by KRS 278.010. Complainant's request for class certification, damages, costs, expenses, and jury trial fall under neither category.

Bulldog's Enterprises, Inc. d/b/a Bulldog's Road House v. Duke Energy Kentucky, Case No. 2010-00404, 2010 Ky. PUC LEXIS 1308 (November 15, 2010)(“*Bulldog's Enterprises*”) at *2-

3. Similarly, in *Strother v. AT&T Communications of the South Central States, Inc.*, the Commission ruled that it is:

without jurisdiction to award compensatory and punitive damages. Pursuant to KRS 278.040, the Commission has jurisdiction of only the “rates” and “services” of utilities...Complainant’s request for compensatory and punitive damages falls under neither category.”

Strother, Case No. 2007-00415, 2008 Ky. PUC LEXIS 263 at *5-6 (Ky. PSC, Feb. 28, 2008).

See also Stauffer v. Brandenburg Tel. Co., Case No. 2007-003999, 2007 Ky. PUC LEXIS 931, at *4-5 (Ky. PSC Nov. 21, 2007); *Callihan v. Grayson Elec. Coop. Corp.*, Case No. 2005-00280, 2005 Ky. PUC LEXIS 663 at *5-6 (Ky. PSC, Aug. 1, 2005); *Yarbrough v. Kentucky Util. Co.*, Case No. 2004-00189, 2005 Ky. PUC LEXIS 609, at *5-6 (Ky. PSC, July 13, 2005). Thus, Windstream’s attempt to have the Commission award damages here must be rejected.

B. Neither Windstream Nor The Commission Can Retroactively Create a Rate to Govern the Disputed Traffic.

In an apparent attempt to avoid the Commission’s lack of jurisdiction to award damages, Windstream essentially asks the Commission to apply a “proxy rate” based on its tariffed transit rate to the disputed traffic and any applicable interest.³ (2008 Tr. 11:6-9); (2012 Tr. 15:24-16:11). However, the Commission has ruled that tariff invalid and unenforceable. *Brandenburg Tel. Co. et al. v. Windstream Ky. East*, Case No. 2007-00004 (August 16, 2010).

³ The Commission expressly ruled that “Windstream cannot collect those tariffed rates either retroactively or prospectively.” *Id. at 15*.

Moreover, even if the transit tariff were in effect, Windstream has argued repeatedly that such a tariff would not apply. For example, Windstream went to great lengths to distinguish the disputed traffic from transit traffic, referring to it throughout the hearing as “misrouted traffic” that should never have been routed to Windstream’s network. *See* 2008 Tr. 12:8-10, 13:23-14:17, 23:15-21; 2012 Tr. 11:22 – 13:30. However, Windstream has no tariff or protocol to govern “misrouted” traffic, and no tariffed rate applies. *See* 2008 Tr. 14:18-21, 24:8-15; 2012 TR. 38:22-39:11. And if no tariffed rate applies, Windstream cannot reasonably ask the Commission to apply a “proxy” rate based on the same tariff Windstream has repudiated.

Thus, Windstream essentially asks the Commission to establish a *new* rate to apply retroactively to the disputed traffic. Doing so would violate the rule against retroactive ratemaking.⁴ As the Commission has noted:

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 278.270 give the Commission authority to investigate existing rates and establish new rates, this power is limited to prospective rate changes.

In the Matter of Big Rivers Electric Corporation’s Proposed Mechanism to Credit Customers Amounts Recovered in Judicial Proceedings Involving Fuel Procurement Contracts, Case No. 94-453, 1997 Ky. PUC LEXIS 16, at *5-6 (Ky. PSC Feb. 21, 1997)(footnote omitted)(citing

⁴ Moreover, there is insufficient evidence in the record to justify a prospective rate, and doing so would be moot since the disputed traffic is no longer carried on Windstream’s network.

Public Service Commission v. Diamond State Telephone Co., 468 A.2d 1285 (Del. 1983); *Commonwealth ex rel. Stephens v. South Central Bell Telephone Co.*, Ky., 545 S.W.2d 927, 931 (1976); and *Claridge Apartments Co. v. Commissioner of Internal Revenue*, 323 U.S. 141 (1944)). See also *Kentucky v. Atmos Energy Corp.*, Case No. 2005-00057, 2007 Ky. PUC LEXIS 109 at *4 (Feb. 9, 2007)(referring to the rule against retroactive rate-making as “a generally accepted principle of public utility law.”). Accordingly, Windstream’s request that the Commission engage in retroactive ratemaking must be rejected.

C. If the Commission Were To Find That Windstream Is Due Compensation, The Compensation Must Come From Brandenburg.

1. MCImetro Was Not Unjustly Enriched, and the Commission Lacks Authority To Award Relief for Unjust Enrichment.

Windstream suggests that while Brandenburg is the primary party responsible for the compensation, MCImetro shares responsibility because it benefited from the unauthorized routing of the disputed traffic. See Nov. 14, 2011 Testimony of Kerry Smith at 7. Windstream essentially makes an equity claim of “unjust enrichment.” However, the Commission does not have the power to award such relief. See *Bulldog’s Enterprises, supra*, at *2-3 (rejecting a claim for unjust enrichment on the same jurisdictional grounds as it rejected a claim for compensatory damages).

Moreover, MCImetro has not been unjustly enriched. To support an unjust enrichment claim, Windstream must show not only that MCImetro received and appreciated a benefit, but that it did so at Windstream’s expense. *Bogan v. Finn*, 298 S.W.2d 311, 314 (Ky. 1957). Windstream has not shown any expense. Windstream was not forced to incur additional network

costs to transport the traffic long distances to reach MCImetro's interconnection points within Windstream territory. Rather, Windstream was inconvenienced by Brandenburg sending traffic to a Windstream end office switch rather than to the Windstream tandem switch *located in the same Windstream building*. See 2012 TR. 36:5. Moreover, even if the Commission could factor in equitable considerations, it must balance any benefit MCImetro received against any burden it bore with respect to the traffic. Specifically, the Commission must consider that MCImetro has an interconnection agreement with Windstream and has always borne the costs of transporting **all** traffic from its points of interconnection with Windstream, all of which fall **within** Brandenburg's self-defined calling scope. See 2012 TR. 175:9-14. Nothing about MCImetro's conduct suggests an inequity or unfairness.

2. Windstream, Not MCImetro, Originated the Traffic and Failed To Conduct LNP Queries.

If the Commission finds – incorrectly – that Windstream is entitled to any compensation in this case, it must come from Brandenburg, not MCImetro. The Commission recognizes a “well-established” principle that carriers must pay the costs of traffic **originated** on their networks.⁵ The Commission reiterated that principle in its 2009 Order when it identified as one of its “current policies of interconnection” the guideline that “[t]he originating carrier pays for

⁵*Petition of Level 3 Communications for Arbitration with BellSouth Telecommunications*, Case No. 2004-00404 (March 14, 2001)(“Level 3 Order”); *Petition of Brandenburg Telecom for Arbitration with Verizon South*, Case No. 2001-00224 (May 16, 2001)(applying *Level 3 Order*, accepting Brandenburg Telecom's argument that “each party should be financially responsible for delivering its traffic to the other party's point of interconnection,” and finding that Brandenburg had the right to establish a minimum of one point of interconnection per LATA); *Petition of South Central Telecom for Arbitration with Verizon South*, Case No. 2001-00261 (January 15, 2002)(applying *Level 3 Order* and again requiring interconnecting carriers to comply with the standards set forth by the FCC's rule (47 CFR § 51.703(b)), which stated that “[a] LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originate on the LEC's network.”).

the cost of transporting a call to the point of interconnection.” 2009 Order at 19. The disputed traffic in this case originated on Brandenburg’s network, not MCImetro’s. Thus, any compensation for carrying that traffic must be paid by Brandenburg.⁶

Moreover, it was Brandenburg – not MCImetro – that failed to perform LNP queries on the disputed traffic. Such queries enable a local exchange carrier to determine which carrier “controls” a particular telephone number and to which carrier’s network the call should be routed. North American Numbering Council guidelines adopted by the FCC establish the requirements for LNP queries.⁷ If the originating carrier does not perform the LNP query before it routes the call, a downstream carrier may make the query and charge the originating carrier.⁸ Windstream’s federal access tariff incorporates these principles, which in this context could imply an obligation for Brandenburg to reimburse Windstream for the query expenses. Since Brandenburg failed to perform the queries, Windstream did so, and can charge the Brandenburg as the originating carrier. As the terminating carrier, MCImetro had no reason (or responsibility) to query the traffic.

3. There is No Legal Basis for MCImetro to Indemnify Brandenburg.

⁶ Indeed, under the (invalidated) transit tariff that Windstream claims is a proxy for the rate it seeks for transporting the “misrouted” traffic, the originating carrier, not the terminating carrier, pays the transit traffic rate. *See* Windstream KY East Tariff P.S.C. No. 7, Original Pages 1-2, S11.1 (describing transit service); March 2, 2010 Testimony of Don Price at 4.

⁷ *See* 47 C.F.R. § 52.26(a) (stating that the “[l]ocal number portability administration shall comply with the recommendations of the North American Numbering Council (NANC) as set forth in the report to the Commission prepared by the NANC’s Local Number Portability Administration Selection Working Group, dated April 25, 1997 (*Working Group Report*) and its appendices, which are incorporated by reference pursuant to 5 U.S.C. § 552(a) and 1 C.F.R. part 51.”).

⁸ *See In re Telephone Number Portability*, Second Report and Order, 12 FCC Rcd 12281, 12324 (1997).

Brandenburg argues that any compensation due to Windstream should be paid by MCImetro because it (i) entered the Elizabethtown market without a traffic exchange agreement with Brandenburg and (ii) its “refusal to negotiate in good faith” caused the parties to fail to reach a traffic exchange agreement for four years. *See* Oct. 4, 2011 Testimony of Allison Willoughby at 5-6. This claim is baseless. As a threshold matter, the Commission lacks the authority to award damages for “breach of good faith.” *See Bulldog’s Enterprises, supra*, at *2-3 (rejecting a claim for breach of good faith on the same jurisdictional grounds as it rejected a claim for compensatory damages). Moreover, until the Commission’s 2009 Order, MCImetro had no reason to enter into an agreement with Brandenburg. Finally, MCImetro negotiated in good faith at every stage of the negotiations.

Understanding MCImetro’s objective good faith requires consideration not only of the law that informed negotiations, but also the course of dealing between the parties. It bears repeating that MCImetro has no obligation to enter into an agreement with Brandenburg under sections 251 and 252 of the Telecom Act, unless it enters the telecommunications market in Brandenburg’s exchange territory. Likewise, Brandenburg never requested such an agreement from MCImetro. However, as early as 2005, the parties attempted to negotiate a commercial agreement not subject to arbitration under section 252 of the Act. April 13, 2010 Testimony of Don Price at 6; Oct. 4, 2011 Testimony of Don Price at 5-6. The parties held several negotiating sessions and exchanged a number of draft agreements between September 2005 and April 2006. However, the draft agreement proposed by Brandenburg would have excluded the traffic from Brandenburg’s end user customers to MCImetro’s ISP customers. April 13, 2010 Testimony of Don Price at 6; Oct. 4, 2011 Testimony of Don Price at at 6-7; 2012 Tr. 141:24-143:6.

Specifically, Brandenburg's proposed definition of extended area service ("EAS") required the ISPs to be physically located within Brandenburg's service territory, even though the ISPs were not so located. *See* 2012 Tr. 141:24-143:6. *See* also 2012 Tr. 100:7-12; Oct. 4, 2011 Testimony of Don Price at 6-7. Thus, even if MCImetro had signed Brandenburg's proposed EAS agreement in 2005 or 2006, the agreement would not have governed the disputed traffic. 2012 Tr. 141:24-143:6.

Negotiations between the parties then stalled for 10 months after MCImetro requested, but was never provided, a redline proposal from Brandenburg. 2012 Tr. 143:7-12. Negotiations began again in February 2007, when Windstream threatened to stop routing the traffic over its EAS trunks. Brandenburg provided the same language it had previously proposed, which excluded the traffic to MCImetro's ISP customers from the definition of EAS. 2012 TR. 143:14-18; April 13, 2010 Testimony of Don Price at 7. MCImetro provided a counterproposal in March 2007, to which Brandenburg never responded. 2012 Tr. 143:19-21; April 13, 2010 Testimony of Don Price at 7.

In May 2008, Brandenburg requested that MCImetro enter into a traffic exchange agreement that it claimed was substantively identical to an agreement negotiated between MCImetro and South Central Telephone, even though the facts surrounding the two arrangements were different. *See* 2012 Tr. 143:23-144:19. Specifically, at the time it signed its agreement with South Central, MCImetro had an existing point of presence ("POP") in South Central's territory and believed it had spare capacity over an affiliate's trunks to transport traffic

from that POP without building new facilities.⁹ *Id.* See also 2012 Tr. 104:6-14; April 13, 2010 Testimony of Don Price at 7. Indeed, South Central and MCImetro had facilities *in the same building*, permitting them to interconnect at a meet point without building new facilities. April 13, 2010 Testimony of Don Price at 8. In contrast, MCImetro had neither a POP in Brandenburg's territory or spare capacity in May 2008, and thus would have had to build or lease new facilities under Brandenburg's proposal. See 2012 Tr. 144:16-19.

Due to the economic burden such an arrangement with Brandenburg would impose, MCImetro provided a counterproposal to interconnect on Brandenburg's network if Brandenburg would agree to pay reciprocal compensation on the traffic MCImetro terminates. Alternatively, MCImetro was willing to exchange traffic on a bill-and-keep basis if the parties could establish an interconnection point that did not require MCImetro to build new facilities. April 13, 2010 Testimony of Don Price at 8. Both of these proposals reflect provisions included in agreements MCImetro has signed with other carriers nationwide. Oct. 2, 2011 Testimony of Don Price at 8-9. However, Brandenburg rejected those proposals.

Negotiations recommenced once the Commission ordered MCImetro and Brandenburg to enter into an agreement, after MCImetro asserted its right to a rehearing. The parties filed a joint matrix of disputed issues and held an informal status conference with Commission Staff in an attempt to resolve their disputed positions on the proposed agreement. By February 2010, the volume of disputed traffic had decreased to the point where MCImetro was willing to make an

⁹ After executing the agreement with South Central, MCImetro discovered that it did not have the excess capacity it had expected, but honored its agreement and was able to lease facilities to carry the traffic rather than build new facilities. 2012 Tr. 144:9-15.

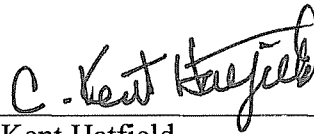
exception to its practices regarding network arrangements in an effort finally to resolve the dispute by bearing the full trunking costs under certain circumstances. *See* Tr. 147:2-18; Oct. 4, 2011 Testimony of Don Price at 10 and Exhibit B; April 13, 2012 Testimony of Don Price at 10-11; Staff Memorandum of February 2, 2010 Informal Conference. Brandenburg rejected that offer, and rather than making a counter proposal, requested another status conference. Oct. 4, 2011 Testimony of Don Price at 11. Finally, on June 9, 2011, the parties reached an agreement substantially similar to the one MCImetro offered four months earlier. *See* 2012 Tr. 146:14-148:2. Once the agreement was executed and deemed approved by the Commission, the parties quickly implemented the agreement, and by November 14, 2011, the disputed traffic was no longer on Windstream's network. *See* Tr. 148:7-150:6; Nov. 14, 2011 Testimony of Don Price at 2-3.

In summary, while negotiations between MCImetro and Brandenburg were long and difficult, MCImetro negotiated in good faith through each phase. Indeed, negotiations were difficult in part because both parties were concerned about the precedential impact any agreement would have on their business relationships with other carriers. *See* 2012 Tr. 151:17-152:13. For example, Brandenburg's initial insistence that the parties enter into an agreement substantially similar to one between MCImetro and South Central Telephone, even with substantially different factual circumstances, illustrates the impact that entering into special agreements can have on other negotiations. Considering such factors in negotiations is good business sense, not bad faith.

CONCLUSION

Windstream has had ample time since this investigation began to provide a legal basis for its claims for compensation from MCImetro for the disputed traffic in this case. Despite several rounds of testimony, discovery, and two hearings, it has failed to do so. Thus, the Commission must dismiss Windstream's claims and finally close this case.

Respectfully submitted,



Jennifer L. McClellan
admitted under SCR 3.030
Assistant General Counsel
Verizon Communications
703 East Grace Street, 7th Floor
Richmond, VA 23219
(804) 772-1512
(804) 772-2143 (fax)


C. Kent Hatfield
Douglas F. Brent
STOLL KEENON OGDEN, PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202
(502) 333-6000
(502) 333-6099

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing brief has been served by first class mail on those persons whose names appear below this 29th day of February, 2012.

Benjamin Crittenden
STITES & HARBISON, PLLC
421 West Main Street
P.O. Box 634
Frankfort, Kentucky 40602-0634

Edward T. Depp
John E. Selent
Dinsmore & Shohl, LLP
101 South Fifth Street
Suite 2500
Louisville, KY 40202



C. Kent Hatfield