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March 15, 2012

Mr. Jeff DeRouen
Kentucky Public Service Commission
P.O. Box 615
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Frankfort, KY 40601

RE: 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

Dear Mr. DeRouen:

Enclosed for filing in the above-referenced matter are an original and ten copies MCIMetro's Reply Brief.

Please indicate receipt of this filing by placing your file stamp on the extra copy and returning to me via our runner.

Very truly yours,

STOLL KEENON OGDEN PLLC

Douglas F. Brent

DFB:

Enclosures

105138.116493/535497.1

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

REPLY BRIEF OF MCIMETRO

In its opening brief, Windstream Kentucky East LLC ("Windstream") continues to fail to provide any meritorious legal or factual basis for the compensation it seeks in this proceeding from Brandenburg Telephone Company ("Brandenburg") or MCImetro Access Transmission Services LLC d/b/a Verizon Access ("MCImetro").[1] The Commission can only enforce existing rates for services provided by utilities; here there are no contract, tariff, or Commission-ordered rates governing the disputed traffic. With prospective issues resolved, and the Commission lacking authority to establish a rate to govern the disputed traffic terminated in the past, Windstream's claim must be dismissed.

I. WINDSTREAM'S LATEST THEORY FAILS TO PROVIDE A LEGAL BASIS FOR ANY COMPENSATION.

In the initial phase of this proceeding, Windstream argued that Brandenburg's routing of the disputed traffic over its network constituted a "trespass."[2] Faced with the Commission's

[1] Throughout this proceeding, the Commission and the parties have referred to MCImetro and Verizon interchangeably. For the sake of clarity, this brief refers to MCImetro exclusively.

[2] Windstream 2008 Brief at 8. Windstream stated that it was prepared to "file suit" as necessary to collect compensation in court for the "unauthorized use" of its network. *Id.* Windstream never filed such a lawsuit; instead, it unilaterally blocked the disputed traffic, instigating this regulatory proceeding. Even if Windstream had filed a lawsuit for trespass in state court, the facts do not support an intentional trespass damages claim against Brandenburg, let alone the extraordinary amount of money Windstream claims it is due. In 2007, Kentucky's

lack of jurisdiction over trespass claims, Windstream reframes its theory in this phase of the proceeding, seeking compensation on equitable grounds "as a matter of fairness" and logic. *See* Windstream Brief at 5-7. However, the Commission lacks the authority to award money to Windstream as a matter of law, equity or "fairness." Instead, any remedy in this case must be grounded strictly in Chapter 278. Against that high bar, Windstream provides no cognizable legal basis for the compensation it seeks.

Windstream has admitted repeatedly that it has no effective rate—contractually or through a tariff—governing the disputed traffic or LNP queries.[3] *See* 2008 Tr. 14:18-21, 24:8-15; 2012 TR. 38:22-39:11. As outlined in the opening briefs of MCImetro and Brandenburg, the Commission can only adjudicate complaints as to a utility's ***existing*** rates or service, not damages claims. *See Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126 (Ky. App. 1983); Ky. Const. § 14; KRS 278.260(1). Nor can the Commission retroactively establish a rate to govern the disputed traffic.[4] As the Eight Circuit Court of Appeals explained in *Qwest Corp. v. Koppendrayer,*

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highest court held that to be awarded actual damages for intentional trespass a property owner must show an unreasonable interference with the property owner's "possessory *use*" of the property. *Smith v. Carbide and Chemicals Corp.*, 226 S.W. 3d 52, 57 (Ky. 2007) (emphasis in original). Mere damage to the reputation of realty does not entitle one to recovery, as that injury is more imaginary than real. *Id.* at 56 (citation omitted). Windstream has not claimed it lost the use of its property, only that its network was used in a way that Windstream believed to be inappropriate. *See* Windstream 2008 Brief at 15-16 (claiming the use of Windstream's end office as a tandem was like taking a "well-made" sedan on a cross country "four-wheeling" trip that resulted in "wear and tear" but no failure). At hearing, Commission staff asked Windstream's witness to identify any actual costs incurred in connection with the traffic, but none were identified. *See* 2012 Tr. 13:15-15:23.

[3] Brandenburg argues that if anything, the disputed traffic is governed by the interconnection agreement between Windstream and MCImetro, in which the parties agreed to carry the disputed traffic on a bill-and-keep basis. Brandenburg Brief at 18. However, that interconnection agreement expressly governs traffic originated by Windstream and MCImetro, not traffic originated by Brandenburg or any other third party. *See* Nov. 14, 2011 Further Rebuttal Testimony of Kerry Smith at 5-6; 2012 Tr. 74:14-75:12.

[4] The Commission need not establish a prospective rate, since the traffic was removed from Windstream's network in November 2011. *See* Tr. 44:21-25; 42:2-43:9; 88:2-13; 95:7-21.

> [t]he rule against retroactive ratemaking prohibits a commission from prescribing rates to recoup a utility's past losses for transactions that have already taken place. The purpose of the rule against retroactivity, and the closely related filed rate doctrine, is to ensure predictability.

436 F.3d 859, 863-864 (8th Cir. 2006) (internal citations omitted).

Windstream tries to circumvent the black letter law by relying on *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066 (D.C. Cir. 1992), a case where the rule against retroactive rates and the filed rate doctrine simply did not apply, because the regulator had merely adjusted ***existing***, ***interim*** rates that were subject to true-up:

> The filed rate doctrine simply does not extend to cases in which buyers are on adequate notice that resolution of some specific issue ***may cause a later adjustment to the rate being collected at the time of service***. . . . [I]t is not that notice relieves the Commission of the bar on retroactive ratemaking, but that it "changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset ***that the rates being promulgated are provisional only and subject to later revision***."[5]

That is not the case here, as there was no interim rate subject to true-up or any notice that the Commission would retroactively apply any rate to the disputed traffic.[6] To the contrary, the

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[5] *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992)(emphasis added)(quoting *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791 (D.C. Cir. 1990). Indeed, in *Natural Gas Clearinghouse v. FERC,* there were actually filed tariffs for which the FERC had established an interim rate, subject to true-up:

> Here, of course, the 16.88-cent rate the Commission ultimately allowed Tarpon to collect ***was stated in tariff sheets it filed*** on November 23, 1987 when it sought authority to provide open-access transportation. ***The Commission accepted the filings "subject to" the pending rate challenge***, but then, after deciding against Tarpon, in March 1988 required it to file revised tariff sheets reflecting the 4.02-cent rate that the Commission had found just and reasonable. As counsel for the open-access shippers rightly acknowledged at oral argument, there could be no violation of the filed rate doctrine so long as users of Tarpon's service received adequate notice that the rate stated in Tarpon's 1987 filing might replace the Commission-ordered rate even for service originally provided under the latter.

Id. (emphasis added).

[6] The other cases cited by Windstream also involved review of ***existing or interim*** rates that were subject to true-up. In *Qwest Corp. v. Koppendrayer*, *supra*, the Minnesota Public Utility Commission ("MPUC") issued an order declaring that Qwest's unbundled network elements ("UNE") rates would be reviewed and be subject to true-up payments. The Eighth Circuit Court of Appeals found that the MPUC's order:

Commission made clear in its 2009 Order that Windstream may not be entitled to ***any*** compensation at all:

> "[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***."

2009 Order at 22 (emphasis added). Thus, the Commission established this phase to determine "the amount of money due Windstream, ***if any***." *Id.* at 23.

Windstream consistently has claimed that the disputed traffic is not transit traffic. *See* 2008 Tr. 12:8-10, 13:23-14:17, 23:15-21; 2012 Tr. 11:22-13:30. As a result, Windstream's now

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> expressly put Qwest and all other interested parties on notice that the ***existing UNE rates were under review and subject to true-up payments*** when MPUC adopted permanent rates. ***Rates collected prior to April 4, 2002, are not subject to true-up payments***. With these considerations in mind, the April 4 Order "changed what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated [were] provisional only and subject to later revision." Therefore, the April 4 Order does not violate the rule against retroactive ratemaking.

436 F.3d at 864.

In *Verizon California Inc. v. Peevey*, 2006 U.S. Dist. LEXIS 41748 (N.D. Cal. June 13, 2006), the Northern District of California Court had previously vacated a 2003 California Public Utilities Commission ("CPUC") establishing interim UNE rates subject to true-up, reinstating prior interim rates that had been established in 1997, subject to true-up once permanent UNE rates are established. In denying Verizon's reconsideration of the reinstatement of the 1997 rates subject to true-up, the Court found that the CPUC's consideration of a true-up on remand was not retroactive ratemaking:

> . . . Verizon . . . cannot dispute that the 2003 rate order notified all parties that whatever permanent rates were ultimately set by the CPUC would be effective as of the date of the 2003 rate order. Thus, regardless of the actual rates charged during the interim period, all parties were on notice that those rates were subject to revision as soon as permanent rates were set, and imposing a true-up on remand on the reinstated 1997 rates would therefore appear to be "functionally prospective," rather than "purely retroactive."

Id. at 21.

Qwest Corporation v. Arizona Corporation Commission invalidated a 2002 Arizona Corporation Commission ("ACC") order retroactively applying UNE rates established in a 1998 arbitration proceeding to the period between the 2002 order and the establishment of permanent rates. The Court rejected the ACC's arguments that an exception to the general rule against retroactive ratemaking applied because the rate set in the 2002 order "was not interim, but permanent," and thus provided no notice that it could be changed. 349 F. Supp. 2d 1228, 1230-1232 (D. Ariz. 2004).

voided tariffed transit rate never applied to the disputed traffic, even on an interim or temporary basis. In addition, Windstream has repeatedly admitted that no contract or tariff applies to the disputed traffic. *See* 2008 Tr. 14:18-21; 24:8-15; 2012 Tr. 30:24-31:13, 38:22-39:11; 50:1-7; 63:20-64:5. Thus, neither Brandenburg nor MCImetro were subject to any form of interim rate, or on notice that any revised rates could be imposed retroactively to the disputed traffic.

At any time after it discovered Brandenburg had routed the disputed traffic over its facilities, Windstream could have sought to negotiate an agreement or file a tariff to govern the disputed traffic or asked the Commission to establish a rate.[7] Even in the first phase of this case, Windstream could have asked the Commission to establish an interim rate subject to true-up. It did not. Having failed to do so, Windstream cannot now claim it seeks anything other than retroactive ratemaking.[8]

II. WINDSTREAM FAILS TO PROVIDE A FACTUAL BASIS FOR ANY COMPENSATION.

The record does not support the amount of compensation sought by Windstream. As outlined in Brandenburg's Brief, Windstream fails to provide any factual support for the

[7] Windstream seemingly did that in the context of transit traffic when it filed its Transit Traffic Tariff. Once Windstream discovered in 2006 that "some RLECs were inappropriately using its network to transit their traffic to third parties without compensating Windstream, and that some RLECs were misusing Windstream's end-offices as tandems," Windstream attempted to negotiate transit agreements with the RLECs. Failing to do so, Windstream filed a revised "General Customer Services Tariff" to include new rates for transit traffic. *In the Matter of Brandenburg Telephone Company et. al v. Windstream Kentucky East,* Case No. 2007-00004, Order (Aug. 16, 2010) at 3-4. Windstream has made clear that it does not believe the disputed traffic in this case to be transit traffic governed by the tariff. However, just as it established a transit traffic rate, it could have sought to establish a rate to govern the disputed traffic.

[8] Windstream also cites *New Valley Corporation v. Pacific Bell*, 8 FCC Rcd 8126, 1993 FCC LEXIS 5687 (1993) for the proposition that the filed rate doctrine does not preclude an award of compensation for past services provided by a utility. However, that case did not involve a claim for the award of compensation for past services rendered, but a claim by New Valley Corporation for a ***refund*** of payments made under a tariff for circuits that the FCC subsequently ruled were not governed by the tariff. Pacific Bell argued the filed-rate doctrine did not apply to this situation. The FCC rejected New Valley's claims, finding that it had failed to satisfy its burden of establishing that it was entitled to a refund.

$0.0035/query LNP charge and the $0.0045/minutes transit charges it seeks to impose in this proceeding. Brandenburg Brief at 4-7. Indeed, Windstream admitted in the hearing that no cost study or other support for those rates was ever filed into evidence in this proceeding. *See* 2012 Tr. 66:9-67:12 (Windstream witness Kerry Smith admitting to Vice Chair Gardner that Windstream has not provided support to the Commission to justify the LNP query rate); 2012 Tr. 13:7-14, 15:8-12, 67:13-68:1 (Windstream witness Kerry Smith explaining that the minutes of use transit rate is based on the cost study filed with the transit tariff, but not in this case). And while Windstream has a federally tariffed LNP query charge, Windstream has not asserted its federal access tariff actually governs the disputed traffic. *See* 2012 Tr. 29-30.

What evidence Windstream did provide is unreliable. Based on its summary of minutes of use it claims traversed its network from August 2005 to January 2012, Windstream seeks approximately $1.8 million in transit compensation. Windstream 2012 Hearing Exhibit 1. However, Windstream cannot even identify how much—if any—of the minutes identified for November 2011 through January 2012 even include the disputed traffic:

> Q. As far as you know, it's correct, isn't it, that the traffic since approximately November of last year 2011, has been removed from the EAS trunk group between Brandenburg and Windstream?
>
> A. Not according to the information that we updated today. There was still a small amount of traffic that appears to be still the ISP, but it looks like it is gone as of somewhere around January for sure.
>
> Q. Right. But my question pertains only to the traffic that's at issue with the Commission's investigation, which involves traffic to MCImetro. Is there traffic to MCImetro running across that trunk group as of, I believe, November 11, 2011?
>
> A. That, I'm not aware of for sure.

> Q. Because the traffic that you're referring to is traffic that you said, I believe, if I recall, was originated by Brandenburg Telecom in some cases?
>
> A. No, they're -- on the trunk group that what we're seeing today, the traffic that we're seeing is we see the EAS traffic from Brandenburg destined to Windstream. Then we're also seeing some extra traffic on there that probably has been there all along, but who knows, I didn't go back and look, that is originated from Brandenburg Telecom that's destined to Windstream customers, and then there's some wireless traffic that's coming from some various wireless carriers coming over there, but I am not seeing any more of the traffic that's been in dispute at this time.

2012 Tr. 42:6-43:9. Most telling in this exchange between Staff and the Windstream witness is that Windstream Exhibit 1 "probably" includes not just the disputed traffic, but "some extra traffic on there that has been there all along, but who knows." MCImetro certainly does not. *See* 2012 Tr. 137:7-139:4; 144:20-145:6. The record establishes that contrary to Windstream's exhibit, the disputed traffic was removed from Windstream's network in November 2011. *See* 2012 Tr. 44:21-25; 88:2-14; 95:11-16. Therefore, Windstream Exhibit 1 is not reliable evidence for compensation due from November 2011 to January 2012. And the evidence strongly suggests that it is no more reliable for the traffic prior to November 2011.

III. IF ANY COMPENSATION WERE DUE, IT WOULD BE OWED FROM BRANDENBURG, NOT MCIMETRO.

Although Windstream considers Brandenburg "the more culpable party because it controlled the routing of the traffic," it suggests "it would be reasonable for the Commission to look to [MCImetro], as well." Windstream Brief at 6. The record does not support such a result.[9]

[9] Both Windstream and Brandenburg suggest that because MCImetro could "benefit," or "profit" from the disputed traffic, it should pay any compensation due to Windstream. See Windstream Brief at 1, Brandenburg Brief at 2. The Commission can only establish and enforce prospective rates to compensate Windstream for costs it incurs to

A. As the Originating Carrier, Brandenburg is Responsible for Any Compensation Due to Windstream.

In an effort to justify its claims for compensation, Windstream seeks to paint Brandenburg and MCImetro as co-conspirators in a scheme to exchange traffic over Windstream's network. Windstream contends that despite the fact that the Commission "determined that the traffic in dispute . . . did not belong on Windstream's network," traffic continued to be routed by Brandenburg and MCImetro "without authorization" through Windstream's network. Windstream Brief at 1. The record makes clear that there was no two-way "exchange" of traffic between MCImetro and Brandenburg, rather 100% of the disputed traffic was originated by Brandenburg's end-user customers. Aug. 15, 2008 Rebuttal Testimony of Don Price at 3.

To the extent Windstream is owed any compensation for the carrying the disputed traffic over its network, the Commission should follow its "well-established" principle that ***originating*** carriers pay for the cost of transporting a call "dialed as a local call by the calling party" to the point of interconnection.[10] The disputed traffic in this case originated on Brandenburg's network, not MCImetro's, and MCImetro assumed financial responsibility for the traffic at a geographic location—Elizabethtown—that is within Brandenburg's self-defined local calling area. As the originating carrier, Brandenburg alone controlled the routing of the calls. Absent a traffic agreement with MCImetro governing the traffic, Brandenburg had two choices for routing the traffic: (i) through an AT&T tandem serving the LATA or (ii) over EAS trunks to

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provide a service. As explained in MCImetro's Brief, the Commission lacks the authority to award damages for "unjust enrichment," and even if it did, MCImetro has not been unjustly enriched. *See* MCImetro Brief at 7-8.

[10] *See Petition of Level 3 Communications*, Case No. 2000-00404 (March 14, 2001).

Windstream's Elizabethtown exchange. Aug. 15, 2008 Rebuttal Testimony of Don Price at 1, 5. Brandenburg, not MCImetro, controlled which choice to make.

The principle that the originating carrier is responsible for the cost of the calls its customers originate is also borne out in the industry's Local Number Portability ("LNP") standards. Those standards suggest Brandenburg should have routed the traffic through the AT&T tandem. Specifically, the Local Exchange Routing Guide ("LERG") identifies the AT&T tandem as an industry standard default routing point for calls originating within LATA 462 (which includes Radcliff and Elizabethtown) and dialed as a local call to a number that is native to or has been ported to MCImetro. *See* Aug. 8, 2008 Direct Testimony of Don Price at 8-9. Brandenburg did not follow this industry standard, but chose to route the traffic through Windstream's network.

Of course, MCImetro was also prepared to accept the traffic at other points within LATA 462, specifically, in Elizabethtown, where Windstream's tandem is located. *See* Aug. 8, 2008 Direct Testimony of Don Price at 9-10. Initially, Windstream agreed to accept the disputed traffic from Brandenburg on the condition that Brandenburg perform the LNP queries and send the traffic to Elizabethtown "post query." Aug. 8, 2008 Direct Testimony of Don Price at 9-10; 2012 Tr. at 22:23-26:19; MCImetro Cross Examination Exhibit 1. This condition was consistent with North American Numbering Council guidelines adopted by the FCC governing LNP queries,[11] which provide that if the originating carrier does not perform the LNP query before it

[11]*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.").

routes the call, a downstream carrier may make the query and charge the originating carrier.[12] Since Brandenburg failed to perform the queries, Windstream did so. The guidelines allow Windstream to charge the Brandenburg as the originating carrier, but not MCImetro, the terminating carrier.

B. MCImetro's Post 2009 Order Actions Do Not Justify Liability to Windstream.

Windstream claims that the Commission should hold Brandenburg and MCImetro equally liable for compensation due post August 2009 because they "were under a Commission-ordered obligation to find a way to remove the traffic from Windstream's network immediately," and failed to do so. Windstream Brief at 6. Windstream's attempts to characterize the actions of MCImetro and Brandenburg since August 2009 to the contrary, Brandenburg and MCImetro did not defy the 2009 Order.

The Commission never ordered the disputed traffic to be removed "immediately" from Windstream's network. Instead, the Commission rebuffed Windstream's efforts to unilaterally achieve such a result by ordering that "[t]he traffic arrangements, as they existed on June 30, 2008, shall continue in their current for until this dispute is resolved."[13] In the 2009 Order, the Commission reiterated that Windstream must continue carrying the traffic pending final resolution, stating that "***[b]efore removing the traffic from Windstream's network***, Brandenburg and [MCImetro] must reach an agreement that includes provisions for the exchange of the disputed traffic." 2009 Order at 19 (emphasis added). Contrary to Windstream's claim that MCImetro and Brandenburg "were under a Commission-ordered obligation to find a way to

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

[13] July 1, 2008 Order Initiating Investigation at 4.

remove the traffic from Windstream's network immediately,"[14] the Commission recognized that resolution of this issue would take time, and provided a mechanism for resolving any stalemate between Brandenburg and MCImetro:

> [MCImetro] 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 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 [MCImetro].

2009 Order at 20-21.

MCImetro and Brandenburg did exactly what the Commission instructed. After unsuccessfully attempting to reach an agreement, they filed with the Commission the specified information regarding the dispute. After two status conferences with Staff, MCImetro and Brandenburg entered into an agreement. Once the agreement was executed and deemed approved by the Commission, the parties quickly implemented the agreement and removed the traffic from Windstream's network. *See* Tr. 148:7-150:6; Nov. 14, 2011 Testimony of Don Price at 2-3.

C. MCImetro Did Not Cause or Extend this Dispute.

Brandenburg seeks to avoid paying any compensation due to Windstream by claiming that MCImetro "caused and then extended the dispute." Brandenburg Brief at 14. That claim is unsupported in the record.

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[14] Windstream Brief at 6.

Brandenburg claims MCImetro "caused this dispute by porting telephone numbers without conducting an appropriate investigation for the effect such action would have on Kentucky's telecommunications customer." *Id.* at 15. This claim constitutes a misplaced attempt by Brandenburg to shift its own responsibility to MCImetro. For example, Brandenburg even imputes knowledge to MCImetro that it lacks itself. Brandenburg contends that MCImetro should have known from the outset that Brandenburg lets its customers in Radcliff call any customer in Elizabethtown without a toll charge, even though Elizabethtown is a different exchange and is served by a different incumbent carrier. Brandenburg then implies MCImetro had a corresponding legal obligation to change its interconnection arrangements with Windstream to accommodate calls from the Radcliff customers served by Brandenburg. However, when Brandenburg's witness was asked to specify when the Commission had required her company to include Elizabethtown within its local calling area, the response was simple: "I wouldn't have any idea." 2012 Tr. 176:1. Yet, Brandenburg argues as a legal matter that MCImetro should have known of Brandenburg's arrangements in this regard.

Brandenburg's witness was similarly unable to identify any signed EAS agreement, let alone a filed one, respecting traffic from Radcliff to Elizabethown. 2012 Tr. 179-180. Yet Brandenburg essentially charges MCImetro with constructive knowledge of such an agreement even though Brandenburg cannot even prove it exists now, four years into this investigation. Brandenburg's attempt to impute knowledge to MCImetro that it lacks itself as a way to shift responsibility is not tenable.

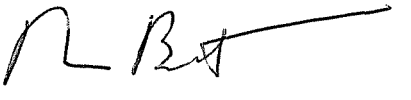
Brandenburg next claims that MCImetro extended the dispute because it "refused to execute an appropriate agreement with Brandenburg Telephone to handle this traffic."

Brandenburg Brief at 3, 16. This is simply not true. As outlined in MCImetro's Opening Brief, MCImetro was under no legal obligation to enter into an interconnection agreement with Brandenburg because it never sought to provide service to end-users in Brandenburg's service territory. MCImetro Brief at 10. Nonetheless, MCImetro attempted to negotiate a commercial agreement with Brandenburg governing the disputed traffic as early as 2005. Despite MCImetro's best efforts, those negotiations proved unproductive. Once the Commission ordered MCImetro and Brandenburg to enter into an agreement, negotiations restarted. When the parties again reached an impasse, they followed the procedure outlined by the 2009 Order for Commission-facilitated resolution, and ultimately reached an agreement.

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,



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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 15th day of March, 2012.

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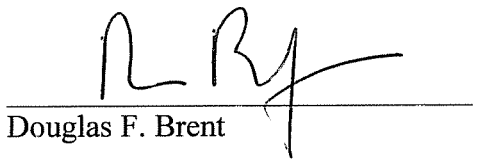

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