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July 7, 2008

RECEIVED

JUL 08 2008

PUBLIC SERVICE
COMMISSION

Hon. Stephanie Stumbo
Executive Director
Public Service Commission
of the Commonwealth of Kentucky
211 Sower Blvd.
Frankfort, KY 40601

**Re: *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,
Kentucky PSC Case No. 2008-00203***

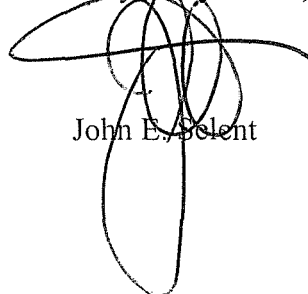
Dear Ms. Stumbo:

Pursuant to the e-mail message from J.E.B. Pinney dated Thursday, July 3, 2008 (attached hereto) in regard to the above-referenced case, enclosed for filing please find one original and eleven (11) copies of the response of Brandenburg Telephone Company to Windstream Kentucky East, LLC's Motion for Emergency Hearing and for Leave to File Prehearing Statement. In addition, a copy of the enclosed response was electronically filed today with the Kentucky Public Service Commission.

Please return a filed stamped in the enclosed envelope with sufficient pre-paid postage.

Thank you, and if you have any questions, please call me.

Very Truly Yours,



John E. Selent

JES/kwi
Enclosures
cc: All Parties of Record

INGLE, KERRY

From: Pinney, Jeb (PSC) [Jeb.Pinney@ky.gov]
Sent: Thursday, July 03, 2008 5:13 PM
To: Clark, Bruce F.; Selent, John; Depp, Tip; douglas.brent@skofirm.com; awilloughby@bbtel.com; Eversole, Deborah
Cc: daniel.logsdon@windstream.com; Kimberly.K.Bennett@windstream.com
Subject: RE: PSC Case No. 2008-00203

Importance: High

Follow Up Flag: Follow up
Flag Status: Red

To all parties: (Please note the time to file a response)

The Commission received Windstream's motion for an emergency hearing and it has been forwarded to the appropriate people. No Commissioners are in the office at this time to address the motion. The earliest that Windstream's motion can be taken up is Monday, 7/7. The Commission will not be available to hear any cases until the week of 7/14 and, if the motion is granted, the date will be ascertained on 7/7. Vice Chairman Garner is recovering from surgery following a vehicular accident and Commissioner Clay is out of town until the week of the 14th. The Commission appreciates your understanding on this matter.

Commission Staff believes that the other parties should have an opportunity to file a response to Windstream's motion. To that end, Brandenburg and Verizon may electronically file a response to the motion, with paper copies to follow, if any, NO LATER THAN NOON ON MONDAY JULY 7th, 2008.

I will be out of the office from 7/7 until 7/20. Any emergency correspondence should not only be sent to my attention, but also to that of David Samford, Amy Dougherty and Tiffany Bowman. Any questions regarding the procedure may also be addressed by the aforementioned Commission Staff members.

Sincerely,

JEB Pinney

-----Original Message-----

From: Clark, Bruce F. [mailto:BCLARK@stites.com]
Sent: Thursday, July 03, 2008 4:10 PM
To: selent@dinslaw.com; tip.depp@dinslaw.com; Pinney, Jeb (PSC); douglas.brent@skofirm.com; awilloughby@bbtel.com
Cc: Clark, Bruce F.; daniel.logsdon@windstream.com; Kimberly.K.Bennett@windstream.com
Subject: PSC Case No. 2008-00203

<<SFX76C.pdf>> Please see attached pleading filed today with the Kentucky Public Service Commission on behalf of Windstream Kentucky East, LLC.

Regards,

Bruce Clark
(502) 209-1214

Peggy Jo Tipton
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NOTICE: This message is intended only for the addressee and may contain information that is privileged, confidential and/or attorney work product. If you are not the intended recipient, do not read, copy, retain or disseminate this message or any attachment. If you have received this message in error, please call the sender immediately at (502) 209-1213 and delete all copies of the message and any attachment. Neither the transmission of this message or any attachment, nor any error in transmission or misdelivery shall constitute waiver of any applicable legal privilege.

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

JUL 08 2008

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

**BRANDENBURG TELEPHONE COMPANY’S RESPONSE TO WINDSTREAM
KENTUCKY EAST, LLC’S MOTION FOR EMERGENCY HEARING FOR
JULY 9, 2008 AND FOR LEAVE TO FILE PREHEARING STATEMENT**

INTRODUCTION

[O]ur entire jurisprudence runs counter to the notion of court [or administrative agency] action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute.

Granny Goose Foods, Inc., et al. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County, etc., 415 U.S. 423, 438 (1974).

* * * * *

Brandenburg Telephone Company (“Brandenburg”), by counsel, hereby submits its response to the motion for emergency hearing and for leave to file prehearing statement (the "Motion") of Windstream Kentucky East, LLC (“Windstream”). Brandenburg’s response is being filed and served in compliance with an e-mail, dated July 3, 2008, at 5:13 p.m., from J.E.B. Pinney, Esq. of the Kentucky Public Service Commission’s (the “Commission’s”) legal staff directing all parties desiring to respond to Windstream’s so-called emergency motion to do so by 12:00 Noon on Monday, July 7, 2008.

At the outset, it should be noted that Brandenburg has already filed a complaint (*see* Case No. 2008-00239) (“Complaint”) against Windstream and MCImetro Access Transmission Services, LLC d/b/a Verizon Access (“MCImetro”) requesting that the Commission resolve the precise issues presented by this matter. On July 1, 2008, the Commission issued an order directing Windstream and MCImetro to satisfy or answer the matters complained of in Brandenburg’s Complaint. Windstream’s motion represents an attempt to do an end-run, without any basis in law or fact, around the orderly processes of the Commission, which the Commission obviously contemplated when it issued the order directing Windstream and MCImetro to satisfy or answer Brandenburg’s Complaint within ten days, that is, by July 14, 2008.

This unorthodox attempt by Windstream to short-circuit the orderly processes of the Commission should be denied. Instead, the orderly processes of the Commission should be allowed to run their course. This is the best way to assure that all the parties are afforded procedural due process and that the Commission renders a decision in this matter that fully and fairly comports with applicable law.

Moreover, any possibility of injury to the public, or to Windstream is precluded by the Commission’s July 1, 2008 order preserving the status quo:

It is therefore ordered that:

1. The traffic arrangements, as they exist on June 30, 2008, shall continue in their current form until this dispute is resolved.
2. All parties shall keep account of the traffic exchanged in order to recover amounts owed, if any, for the exchange and transmission of traffic.

Id. at 4.

As the cliché goes “haste makes waste.” To this end, Brandenburg invites Windstream to consider whether its motion practice in this case should be normalized, and more productively directed at MCImetro.

STATEMENT OF FACTS

The "status quo" at issue in the Complaint, and which Windstream contests in its Motion, has existed since late 2005. (*See* Complaint, Ex. 1, at paras. 11-19.) At or around that time – and unbeknownst to Brandenburg – MCImetro began providing its ISP customers(s) with telephone numbers (for dial-up internet access) that appeared to be local to Brandenburg's exchanges pursuant to a long-standing EAS agreement with Windstream. (*See id.*) Brandenburg believes that these numbers were ported from Windstream to MCImetro. (*See id.*) Regardless of how MCImetro began serving these numbers, however, it did so without entering into a traffic exchange agreement with Brandenburg. (*See id.*) In fact, MCImetro did not contact Brandenburg even to make interim arrangements for the exchange of traffic on a local basis. (*See id.*) Thus, when a small number of Brandenburg's end-users began complaining that they were unable to complete local calls to their ISP (served by MCImetro), Brandenburg terminated what it believed to be the de minimis amount of traffic at issue to MCImetro. (*See id.*) It did so by delivering the traffic through Windstream, just as it had when the now-MCImetro telephone numbers were still associated with Windstream. (*See id.*) This seemed more prudent as an interim solution than redirecting the traffic as toll and potentially creating problems for MCImetro customers. Brandenburg then promptly notified MCImetro that it needed a traffic exchange agreement.

The traffic continued to flow through Windstream for several months while Brandenburg and MCImetro exchanged comments on a traffic exchange agreement to address this otherwise

customer-affecting issue. (*See id.* at paras. 17-19.) Ultimately, those negotiations stalled, and MCImetro did not further pursue its obligation to enter into a traffic exchange agreement. (*See id.*)

Then, in February of 2007, Windstream contacted Brandenburg about this traffic. (*See id.* at paras. 20-29.) Windstream threatened to block the traffic unless Brandenburg began completing the local number portability ("LNP") query for the traffic and routing the call based upon the local routing number ("LRN"). (*See id.*) Brandenburg completed the work necessary to complete the LNP query, and Windstream agreed – contrary to established industry routing protocols – that it would continue to route the traffic in question from Brandenburg to MCImetro. (*See id.*) It did so notwithstanding the fact that Brandenburg was delivering this traffic to Windstream's end office. (*See id.* at para. 29 ("Windstream further notified Brandenburg that 'Windstream is receiving the LRN's for locally ported numbers over the Elizabethtown end office trunk groups, and [Windstream] continues to pass the traffic to the carriers'") (emphasis added).)

With Windstream's agreement to continue routing calls in this manner, Brandenburg once again reinitiated traffic exchange agreement negotiations with MCImetro. (*See id.* at paras. 30-61.) Yet again, after some initial negotiations, negotiations stalled later that year. (*See id.*) And yet again, MCImetro failed to reinitiate negotiations for the traffic exchange agreement it needed by virtue of its entry into service territories with local calling to Brandenburg. (*See id.*)

As the Commission and the parties are well aware, the next factual development occurred on June 2, 2008. On that date, Windstream began blocking the traffic that – for now more than two years – it had previously been delivering to MCImetro. (*See* July 1, 2008 Order in Case No. 2008-00203.) MCImetro complained. (*See generally id.*) The Commission's staff convened a conference call to address the matter. (*See id.*) Windstream refused to stop blocking the traffic. (*See id.*) Windstream later thought better of its refusal, and it soon recontinued routing the traffic as it had for

the previous two-and-a-half years. (*See id.*) It asked the Commission to cancel an emergency hearing scheduled for the next day. (*See id.*) The Commission canceled its emergency hearing, and Brandenburg and MCImetro continued discussions for a traffic exchange agreement that should remedy the entire dispute. (*See id.*)

Once those discussions once more reached an impasse, Brandenburg quickly set to work drafting its Complaint. The Complaint seeks a Commission order providing the following relief: (i) MCImetro must, at no cost to Brandenburg, establish dedicated trunking facilities to an interconnection point on Brandenburg's network; (ii) MCImetro must maintain those dedicated interconnection facilities unless and until the volume of traffic exchanged between Brandenburg and MCImetro falls below a DS-1 level of traffic; (iii) MCImetro shall not collect reciprocal compensation with respect to any traffic originated by Brandenburg's end-user customers and destined for MCImetro's ISP customer(s); (iv) MCImetro shall pay any charges or other costs that Windstream may seek to impose on Brandenburg for exchanging traffic with MCImetro; and (v) Brandenburg shall not be required to establish new trunking facilities and deliver traffic to MCImetro at Windstream's Elizabethtown tandem. (*See Complaint, Ex. 1.*) The Complaint was filed promptly on June 25, 2008.

On July 1, 2008, the Commission ordered the parties to maintain the status quo from the previous two-and-a-half years, and it scheduled an informal conference for July 9, 2008. On July 2, the Commission ordered Windstream and MCImetro to satisfy or answer Brandenburg's Complaint.

Apparently angered by one or both of the Commission's orders, Windstream served its Motion on counsel of record just minutes before the Fourth of July holiday weekend began. The Motion makes no mention of any harm – other than alleged monetary harm – that it will suffer as a result of continuing the long-standing status quo. Instead, Windstream claims that neither

Brandenburg nor MCImetro are "incented to resolve [this dispute] so long [as] Windstream is forced to endure the continued misuse of its network without appropriate compensation." (Motion at para. 2.) Given the Commission's order that Windstream and MCImetro must satisfy or answer Brandenburg's complaint, it is difficult to fathom why Windstream might question Brandenburg's incentive to resolve the dispute. In fact, Brandenburg has been attempting to resolve this matter for more than two years now. Aside from its allegations of purely monetary damage, the Motion provides no further explanation regarding the "necessity" for an emergency hearing -- without any opportunity for discovery or refinement of the implicated issues -- on the merits of the Complaint.

ARGUMENT AND ANALYSIS

A. Windstream Has No Basis for Emergency Relief Against Brandenburg.

Although Windstream's Motion accuses Brandenburg of wrongdoing and seeks an order declaring Brandenburg liable for more than \$250,000 in alleged monetary damages (plus attorneys' fees), there is no basis for any emergency relief against Brandenburg. MCImetro is the party at fault in this matter. (*See* Complaint at paras. 39-61.)

Since entering the service territory, MCImetro's ISP customer(s) have generated approximately three million minutes per month of traffic volume destined for MCImetro. (*See id.*) And yet, MCImetro has steadfastly refused to enter into an appropriate traffic exchange agreement that would remove the traffic at issue from Windstream's network. (*See id.*) It refuses to establish trunking at an interconnection point within Brandenburg's network, and it refuses to exchange its ISP-bound traffic on a bill-and-keep basis. (*See id.*) This refusal is directly contrary to established federal law and the precedent of this Commission. (*See id.*) Moreover, this refusal is directly contrary to MCImetro's own traffic exchange agreement with Windstream, as well as its traffic

exchange agreement with another rural incumbent local exchange carrier in the Commonwealth, South Central Rural Telephone Cooperative Corporation, Inc. (*See id.*)

1. MCImetro Refuses to Establish an Interconnection Point on Brandenburg's Network.

Given the approximately three million minutes of traffic being exchanged each month, MCImetro has not contested the appropriateness of exchanging traffic with Brandenburg by means of dedicated facilities. Instead, MCImetro takes issue with bearing the cost of those dedicated facilities on its side of a point of interconnection on Brandenburg's network.

As telecommunications carriers under the Communications Act of 1934, as Amended by the Telecommunications Act of 1996 (the "Act"), both MCImetro and Brandenburg are obligated "to interconnect directly or indirectly with the facilities and equipment" of each other. 47 U.S.C. 251(a)(1). However, as an ILEC, Brandenburg's interconnection obligations do have some limitation. Specifically, "[t]he Act is careful to explain that an ILEC's obligation to interconnect ... extends only to a 'point within the carrier's network.'" *In the Matter of: 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, Kentucky Public Service Commission Case No. 2006-00215, 2007 Ky. PUC LEXIS 191, *9-10 (Order of March 19, 2007) (hereinafter CMRS-RLEC Arbitrations).*

While the Commission certainly encourages carriers to interconnect their facilities in an efficient manner, it also "recognizes that an RLEC, as an ILEC, cannot be required to establish interconnection points beyond its network." *Id.* at *24.¹ No reasonable interpretation of any federal

¹ The Commission also recognizes that it is appropriate for carriers to interconnect with RLECs on a dedicated basis once the volume of traffic being exchanged exceeds the threshold of a DS-1

or state law, however, permits MCImetro to indefinitely exchange traffic with Brandenburg without entering a traffic exchange agreement defining the parties' rights and obligations with respect to that relationship. Likewise, no reasonable interpretation of any federal or state law permits MCImetro to exchange more than three million minutes of traffic per month with Brandenburg without establishing dedicated facilities to Brandenburg's network to do so.

2. MCImetro Incorrectly Demands Reciprocal Compensation for ISP-Bound Traffic.

Similarly, MCImetro may not demand that Brandenburg pay reciprocal compensation to MCImetro with respect to the ISP-bound traffic at issue in this dispute. Paragraph 81 of the April 27, 2001, Order on Remand and Report and Order of the Federal Communications Commission ("FCC") in CC Docket No. 96-98 (*In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*) and CC Docket No. 99-68 (*In the Matter of Intercarrier Compensation for ISP Bound Traffic*) (hereinafter "ISP Order") provides:

Finally, a different rule applies in the case where carriers are not exchanging traffic pursuant to interconnection agreements prior to adoption of this Order (where, for example, a new carrier enters the market or an existing carrier expands into a market it previously had not served). In such a case, as of the effective date of this Order, carriers shall exchange ISP-bound traffic on a bill-and-keep basis during this interim period. We adopt this rule for several reasons. First, our goal here is to address and curtail a pressing problem that has created opportunities for regulatory arbitrage and distorted the operation of competitive markets. In so doing, we seek to confine these market problems to the maximum extent while seeking an appropriate long-term resolution in the proceeding initiated by the companion *NPRM*. Allowing carriers in the interim to expand into new markets using the very intercarrier compensation mechanisms that have led to the existing problems would exacerbate the market problems we seek to ameliorate. For this reason, we believe that a standstill on any expansion of the old compensation regime into new markets is the more appropriate interim answer. Second, unlike those

facility. *Id.* at *17. A monthly volume of 300,000 minutes of use per month satisfies this DS-1 threshold. *Id.* (Order of November 9, 2007 at *16.))

carriers that are presently serving ISP customers under existing interconnection agreements, carriers entering new markets to serve ISPs have not acted in reliance on reciprocal compensation revenues and thus have no need of a transition during which to make adjustments to their prior business plans.

Id. (emphasis added).

Even though the FCC subsequently determined that certain local ISP-bound traffic is subject to reciprocal compensation at a rate of \$0.0007 per minute of usage ("MOU"), *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Order*, WC Docket 03-171 (October 18, 2004) (hereinafter, *Core Forbearance Order*), this determination does not affect the essentially non-local ISP-bound traffic that MCImetro has, in this case, homed behind AT&T's Louisville tandem. That is, the ISP-bound traffic in question here is not actually local traffic; it is, instead, traffic that MCImetro (through the use of a virtual NXX or some other practice) has made to appear local to Brandenburg, even though it is not.

MCImetro and Windstream effectively acknowledge this conclusion by agreeing to exchange this type of traffic on a bill-and-keep basis, rather than the \$0.0007 MOU rate that the FCC applied in the *Core Forbearance Order*. Specifically, in Section 1.3 of Attachment 12 ("Compensation") of their November 14, 2005 interconnection agreement (which was executed after the *Core Forbearance Order*), MCImetro and Windstream agreed:

The Parties agree to exchange ISP Bound Traffic in accordance with the Order on Remand by the Federal Communications Commission ("FCC") in CC Docket No. 96-98 on April 27, 2001. Specifically, ALLTEL has not offered or adopted the FCC's rate caps as set forth in that Order; pursuant to paragraph 81 of that Order, ALLTEL is required to pay interCarrier compensation for ISP Bound Traffic on a bill and keep basis. Further, the Parties acknowledge that because they did not exchange any ISP Bound Traffic pursuant to an interconnection agreement prior to the date of the above-referenced Order, all minutes of ISP Bound traffic are to be exchanged on a bill and keep basis between the Parties in accordance with paragraph 81 of the Order, such that neither party owes the other Party any

compensation for the origination, transport or termination of such traffic.

Id. Its traffic exchange agreement with South Central Rural Telephone Cooperative Corporation, Inc., likewise, provides for the exchange of traffic such as that in dispute here on a bill and keep basis.

3. If Windstream Is Entitled to Relief, It Is Entitled to Relief Against MCImetro.

MCImetro, it seems, has since 2005 remained intent upon freeloading upon the administrative and networking costs of carriers like Brandenburg and Windstream. It can end this dispute by simply signing an agreement that comports with the established legal principles described above: principles that it has voluntarily included in its traffic exchange agreements with Windstream and South Central Rural Telephone Cooperative Corporation, Inc. Accordingly, Windstream, if it is entitled to any relief, is entitled to relief only against MCImetro, who should pay for the free service it has been receiving for the past two-and-a-half years. Brandenburg is merely the innocent victim of MCImetro's intransigence and Windstream's prior, long-standing agreement to transit the traffic in question.

B. The Emergency Relief Requested by Windstream Would Violate Section 2 of The Kentucky Constitution Prohibiting The Exercise of Arbitrary Power of The Kentucky Constitution.

Section 2 of the Kentucky Constitution provides as follows: “Absolute and arbitrary power over the lives, liberty and property of free men exist no where in a republic, not even the large majority.” Section 2 of the Kentucky Constitution. In *American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission, Ky.*, 379 S.W. 2nd 450, at 456 (1964), Kentucky’s then highest court held that in order to avoid invalidation on the grounds of

arbitrariness within the meaning of the Kentucky Constitution, the actions of the administrative agency must satisfy the following tripartite test:

- [1] Obviously within the scope of a proper review the court may determine whether the agency acted in excess of its statutory powers. *Henry v. Parrish*, 307 Ky. 559, 211 S.W.2d 418 (1948). Such action would be arbitrary within the prohibition of section (2) of the Kentucky Constitution. See 2 Am.Jur.2d, Administrative Law, section 617 (page 4601).
- [2] In the interest of fairness, a party to be affected by an administrative order is entitled to procedural due process. *Kentucky Alcoholic Beverage Control Board v. Jacobs*, Ky., 369 S.W.2d 189 (1963). Administrative proceedings affecting a party's rights which did not afford an opportunity to be heard could likewise be classified as arbitrary.
- [3] Unless action taken by an administrative agency is supported by substantial evidence it is arbitrary. *Thurman v. Meridian Mutl. Ins. Co.*, Ky., 345 S.W.2d 635 (1961).

In this case, Windstream's request for attorney's fees would violate the first part of this tripartite standard. If the Commission were to award attorneys fees it would be acting outside of its statutory powers. Windstream's cites absolutely no authority which would authorize the Commission to award attorney fees to anybody. There is no such authority.

Windstream's request for monetary damages at this stage of these proceedings would also violate procedural due process, the second part of the *American Beauty Homes* tripartite standard. In the case of *Utility Regulatory Commission v. Kentucky Water Service Company, Inc.*, 642 S.W.2nd 591 at 593 (1982), it was held that:

Due process requires, at a minimum, that persons forced to settle their claims of right and duty through the judicial process be given a meaningful opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L. Ed. 2d 113 (1971). It has been said that no hearing in the constitutional sense exists where a party does not know what evidence is considered and is not given an opportunity to test, explain or refute. 16 Am.Jur.2nd Constitutional Law § 848. In *Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S.

281, 287, 95 S. Ct. 438, 442, 42 L. Ed. 2d 447 (1974) the Supreme Court of the United States stated:

A party is entitled, of course to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids any agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation. *Ohio Bell Telephone Company v Public Utilities Commission*, 301 U.S. 292, 81 L. Ed. 1093, 57 S. Ct. 724 (1937).

(*Id.*) In the absence of discovery, Brandenburg will be denied the opportunity "to test, explain or refute" the evidence to be used against it to hold it liable for more than a quarter of a million dollars, *id.*, which is far in excess of even Windstream's own bills to Brandenburg. This would not constitute due process and would therefore violate §2 of the Kentucky Constitution. See *also Public Service Commission v. Warren County Water District*, Ky. 642 S.W.2d 594, 595 (1982).

C. Windstream is Not Entitled to an Emergency Relief Because it Has Not Sustained Irreparable Injury.

In its Motion, Windstream appears to seek a final adjudication on the merits of this case, along with various intermediate relief. However, under Kentucky law, Windstream cannot meet even the threshold for intermediate adjudication, much less an adjudication on the merits. Though this Commission is not required to follow the Kentucky Rules of Civil Procedure or the Rules of Evidence (except to the extent that they are constitutionally based), Kentucky law with respect to the requirements for injunctive relief are analogous to this case. As such, Brandenburg urges the Commission to find that Windstream is not entitled to emergency relief because it admits its damages are purely monetary. (Motion at para. 12.)

Specifically, Windstream requests that the Commission "issue an order requiring Brandenburg immediately to remit current damages to Windstream," along with attorney's fees, costs

and interest. (*Id.*) Under Kentucky law, requests for injunctive relief cannot be sustained where only monetary damages are at stake.

Maupin v. Stansbury sets forth Kentucky's standard for injunctive relief. 575 S.W.2d 695 (Ky. App. 1978). Under *Maupin*, injunctive relief is warranted only where three elements are met:

[1] ... it is clearly shown that one's rights will suffer immediate and irreparable injury pending trial. The purpose of these requirements is to insure that the injunction issues only where absolutely necessary to preserve a party's rights pending the trial of the merits.

...

[2] A clear showing that [a personal right] will be immediately impaired.

...

[3] In any temporary injunctive relief situation the relative benefits and detriments should be weighed. (Citation omitted.) Obviously, this entails a consideration of whether the public interest will be harmed by the issuance of the injunction or whether its effect will merely be to maintain the status quo.

Id. at 698.

It has been repeatedly held that monetary damages do not constitute "irreparable injury" under Kentucky law. *United Carbon Co. v. Ramsey, Ky.*, 350 S.W. 2d 454, 456 (Ky. App. 1961) (an injury is irreparable if "there exists no certain pecuniary standard for the measurement of damages"); *see Rogers v. Lexington-Fayette Urban County Gov't*, 175 S.W.3d 569, 571 (Ky. 2005) (holding that appellant has shown irreparable injury, at least in part, because its damages cannot be recouped by money damages on appeal); *Cyprus Mountain Coal Corp. v. Brewer*, 828 S.W.2d 642, 645 (Ky. 1992) (holding that respondents could not meet the irreparable injury burden when breach of contract damages could make them whole). Because Windstream's claimed damages do not meet the threshold of irreparable injury under Kentucky law, its Motion should be denied.

CONCLUSION

For all the above-stated reasons, Windstream's Motion for emergency relief of any kind should be denied in its entirety.

Respectfully submitted,



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Edward T. Depp (tip.depp@dinslaw.com)
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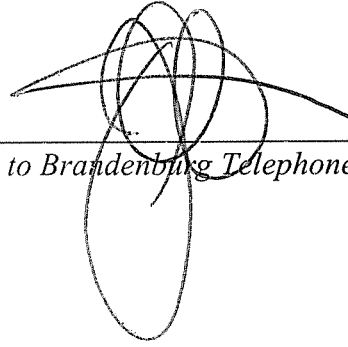
Counsel to Brandenburg Telephone Company

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served on the following by electronic mail this 7th day of July, 2008.

Bruce F. Clark Esq.
Stites & Harbison, PLLC
421 West Main Street
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A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right. The signature is positioned above a horizontal line.

Counsel to Brandenburg Telephone Company