

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

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COMMISSION

MOTION FOR LEAVE TO FILE A SURREPLY IN RESPONSE TO THE REPLY
BRIEF FILED BY BRANDENBURG TELEPHONE COMPANY

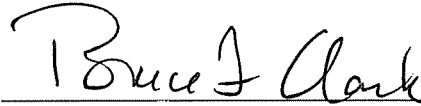
Comes Windstream Kentucky East, LLC ("Windstream East") and moves the Kentucky Public Service Commission ("Commission") for leave to file the attached Surreply to "Brandenburg Telephone Company's Reply to the Windstream and MCImetro Briefs Filed in Response to an Order of the Kentucky Public Service Commission Dated August 26, 2009."

The bases for filing the requested Surreply are:

- (1) Brandenburg Telephone's Reply makes factual declarations and assertions that are directly contrary to the testimony of Brandenburg Telephone's witness in this proceeding;
- (2) Brandenburg Telephone's Reply includes reference to traffic studies that are not in the record; and
- (3) The effect of these inaccurate and unsupported assertions, if not addressed and explained by Windstream East, would be to prevent the Commission from being presented with those factual circumstances necessary for a reasoned and lawful decision to be made.

For these reasons, as set forth in detail in the Surreply attached hereto, Windstream East respectfully requests the Commission to allow the Surreply to be filed of record in this proceeding.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served by first class mail on those persons whose names appear below this 16th day of October, 2009.

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**WINDSTREAM KENTUCKY EAST, LLC'S SURREPLY IN RESPONSE TO THE
REPLY BRIEF FILED BY BRANDENBURG TELEPHONE COMPANY**

INTRODUCTION

Windstream Kentucky East, LLC ("Windstream East") files this Surreply with respect to certain aspects of the September 12, 2009 filing by Brandenburg Telephone Company ("Brandenburg Telephone") in this case styled "Brandenburg Telephone Company's Reply to the Windstream and MCImetro Briefs Filed in Response to an Order of the Kentucky Public Service Commission Dated August 26, 2009" ("Brandenburg Telephone's Reply"). Brandenburg Telephone's Reply contains factual misrepresentations which could erroneously influence the Commission's decision in this proceeding regarding compensation owed to Windstream East by Brandenburg Telephone and/or MCImetro Access Transmission Services, LLC ("Verizon"). Further, Brandenburg Telephone's Reply erroneously relies on traffic studies that are not in the record in this case and which have not been subject to cross-examination. Accordingly, Windstream East files this Surreply to ensure that the record before the Commission is accurate.

I. BRANDENBURG TELEPHONE WAS AWARE OF THE NEED FOR LNP QUERIES FOR THE MISROUTED TRAFFIC IN 2005, NOT 2007.

Brandenburg Telephone's Reply brief makes the following false statements:

(1) "MCImetro failed to notify Brandenburg Telephone of its entry into the market.

Brandenburg Telephone therefore never knew of the necessity of LNP queries." (Reply, p. 7.)

(2) "The problem caused by MCImetro was exacerbated by Windstream's failure to bill Brandenburg Telephone for any LNP queries it may have performed." (*Id.*)

(3) "Without a request for an exchange agreement or an invoice for LNP queries arriving, Brandenburg Telephone could have only known about the need for queries if its subscribers' calls failed to the lack of a query. That never happened here." (*Id.* at pp. 7-8.)

(4) "As a result, Brandenburg Telephone did not know that LNP queries were being performed until approximately two years later [*i.e.*, 2007]. Had MCImetro performed its duties at the outset, Brandenburg Telephone would have been alerted to the necessity of the queries and would have performed them itself, saving Windstream any associated costs." (*Id.* at p. 8.)

(5) "It is clear Brandenburg Telephone did not take an issue to performing this function, as it began conducting the LNP queries itself in early 2007 at a fraction of the cost charged by Windstream." (*Id.* at p. 8.)

The assertions in Brandenburg Telephone's Reply that it did not begin performing LNP queries until 2007 and did not have knowledge of the nature of the traffic prior to that time are troubling, as they directly contradict the statements of its witness. Specifically, Brandenburg Telephone's witness stated that her company began performing the LNP queries in 2005 (not 2007), realized at that time that the calls were to be routed to Louisville, and learned also that the calls were failing in Brandenburg Telephone's switch as the routing was incorrect. As she further explained, Brandenburg Telephone then sent a request to Verizon in 2005 to establish an

interconnection agreement but also decided to continue routing the calls to Windstream East - all without knowledge to Windstream East. In other words, Brandenburg Telephone's witness established that her company performed some queries in 2005, learned of the routing problem on its own accord, and then unilaterally stopped doing the LNP queries in order for the traffic to route over Windstream East's network.

Both Brandenburg Telephone's prefiled testimony and the testimony of its witness at the hearing establish precisely the opposite of what Brandenburg Telephone now has submitted in its Reply. First, the prefiled testimony declares:

In late 2005, Brandenburg began receiving complaints from a small number of its own end-users. These Brandenburg end-users complained that they were unable to complete local calls to their ISP. Brandenburg investigated these complaints, and it discovered that MCImetro had ported telephone numbers from Windstream and was the underlying carrier serving the ISP(s) in question. Rather than block this traffic to these former Windstream numbers, Brandenburg – believing the volume of traffic to be de minimis – used its existing EAS trunk group to the Windstream Elizabethtown switch to terminate the traffic to Windstream on an interim basis. In fact, given that MCImetro had not established trunking facilities or a traffic exchange agreement with Brandenburg, this was the only means by which Brandenburg could continue to route the calls without causing its own end-users to incur toll charges.

To seek a long-term solution to what was meant to be only an interim arrangement, Brandenburg promptly sent MCImetro a proposed traffic exchange agreement in late 2005 to address this issue. Brandenburg and MCImetro exchanged comments regarding this agreement during the next few months. Discussion ultimately stalled, however, and MCImetro did not reinstate traffic exchange agreement negotiations with Brandenburg.

Prefiled Test. of Allison Willoughby, p. 4, ll. 8-22. This testimony establishes without question that certain of Brandenburg Telephone's customers had indeed complained in 2005 about being unable to complete their calls – two years prior to the year 2007 alleged in Brandenburg Telephone's Reply. Moreover, this prefiled testimony further establishes that Brandenburg

Telephone was aware, through the complaints of its customers, that the ISP traffic in question was being misrouted on to Windstream East's network and that Brandenburg Telephone approached Verizon about the problem as early as 2005. Tellingly, neither Brandenburg Telephone nor Verizon ever mentioned the problem to Windstream East. Instead, Brandenburg Telephone kept sending the ISP traffic over the Windstream East/Brandenburg EAS trunk without notice to Windstream East.

The testimony of Ms. Willoughby at the hearing is even more compelling with respect to the misstatements in Brandenburg Telephone's Reply. In it, she admits that in 2005 Brandenburg Telephone knew that there was an issue with these calls, and that in fact Brandenburg Telephone began performing LNP queries in 2005 (and not in 2007, as asserted in the Reply). Ms.

Willoughby's testimony reads as follows:

At the point in time 2002, approximately, when these numbers were ported from Windstream to MCImetro, Brandenburg had never received an LNP -- a bona fide request for LNP. So we were not doing the LNP database queries. I am not aware -- and, again, I'm not an engineer; I'm not a lawyer -- but I have never been aware of any requirement -- you know, I've never seen anybody that says, "Okay, company, you have to start doing LNP queries on such and such date," and you can do the LNP queries without having Local Number Portability, without porting numbers, but you can't port numbers without having that. So, in 2002, we were not doing the LNP queries. We had not had a bona fide request and we had not implemented LNP queries, and I know of nothing that made -- that gave us the requirement to do that. In 2005, we did start doing the LNP queries. At that point was when we recognized that there was an issue with these calls, and what happened, when we implemented these LNP queries, calls that had been flowing over these trunks began not being terminated, because our switch did go out and look and get the LRN, and it said, "Go to Louisville." We don't have any trunks to Louisville that we can put this over. So our switch just said, "I don't have anything to do with it. I don't have any place to do it," and it would not complete the call. When we were getting complaints from our customers, we did some research to determine that that's what had happened. MCI had taken these numbers and moved

them basically to Louisville, and that was when we contacted MCImetro and said, “You need a traffic exchange agreement. **We’re going to continue to send these, what we thought, “very few minutes to Windstream for a limited period of time,”** and provided them an agreement, a traffic exchange agreement, very similar to the one they have with South Central Rural. This was in 2005.

T.E., pp. 169-170 (Emphasis supplied). This testimony could not be more clear. It establishes, contrary to Brandenburg Telephone’s Reply: (1) Brandenburg Telephone was aware in 2005, not 2007, that indeed calls had failed; (2) Brandenburg Telephone knew of the necessity of LNP queries in 2005 – and performed them at that time; (3) Brandenburg Telephone learned in 2005 that the ISP calls were being misrouted into and across Windstream East’s system; (4) Brandenburg Telephone knew in 2005 that the ISP calls were outside its EAS agreement with Windstream East; (5) As early as 2005, Brandenburg Telephone did not need a request for an exchange agreement from Verizon, or a bill from Windstream East, to learn of the issue; and (6) Brandenburg Telephone again stopped performing the LNP queries in 2005 to allow the traffic to be concealed over Windstream East's network while Brandenburg Telephone attempted to reach an agreement with Verizon.

The misstatements in Brandenburg Telephone’s Reply should be corrected so that they are not allowed to unfairly influence and adversely prejudice the issue of the appropriate amount of compensation due Windstream East. Its witness acknowledged that Brandenburg Telephone knew of the misrouting and misuse of Windstream East’s system in 2005 and that instead of disclosing this to Windstream East, Brandenburg Telephone continued the misrouting of the traffic while it sought an agreement with Verizon. Brandenburg Telephone's testimony also establishes that Verizon also knew as early as 2005 about the misuse of Windstream East’s system to transport the ISP traffic exchanged between end users of Brandenburg Telephone and Verizon. Yet neither Brandenburg Telephone nor Verizon elected to tell Windstream.

Contrary to Brandenburg Telephone's Reply, the misuse of Windstream East's network has been occurring with direct knowledge of both Brandenburg Telephone and Verizon since as early as 2005. The record in this matter demonstrates as much through the testimony of Brandenburg Telephone's witness. Therefore, Windstream East's network has knowingly been misused by Brandenburg Telephone and Verizon for over four (4) years, and under the Commission's July 1, 2008 Order for the past eighteen (18) months. These are the facts which the Commission should consider in determining the compensation due Windstream.

II. THE COST STUDIES REFERENCED IN BRANDENBURG TELEPHONE'S REPLY SHOULD NOT BE CONSIDERED AT THIS TIME.

Brandenburg Telephone's Reply first references a 2007 "internal traffic study" to estimate Verizon's usage.¹ (Reply, p. 8.) Brandenburg Telephone later references another "study of current usage" which has not been disclosed to Windstream East or made a part of the record. (Reply, p. 9.) The Commission should disregard the assertions contained in Brandenburg Telephone's Reply about these two studies because they have not yet been introduced into the record.²

CONCLUSION

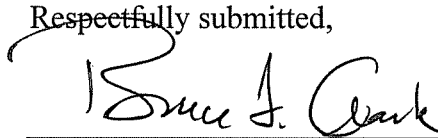
Contrary to the assertions contained in Brandenburg Telephone's Reply, the record establishes that both Brandenburg Telephone and Verizon knew about this issue in 2005, and, instead of arbitrating an interconnection agreement or bringing it to the attention of Windstream East, both did nothing. To date, these two parties continue the misrouting over Windstream East's network and have failed to enter into an interconnection agreement to provide for the

¹ This fact is telling, since it shows that Brandenburg Telephone was fully aware of the ISP issue long before Windstream East discovered the problem.

² The Commission's Order of August 26, 2009, at p. 22, directs that the issue of compensation will be the subject of a future hearing. The results of the "internal traffic study," and their effect on the issues in this case, should await that hearing.

proper routing of their traffic. The factual inaccuracies in Brandenburg Telephone's Reply and its reliance on unknown traffic studies should not operate to amend the record before the Commission. The record before the Commission demonstrates that Windstream East should be awarded full, fair and reasonable compensation, based on a fair rate, from Brandenburg Telephone and/or Verizon for their misuse of, and profit from, Windstream East's network.

Respectfully submitted,

A handwritten signature in black ink that reads "Bruce F. Clark". The signature is written in a cursive style with a large, sweeping initial "B".

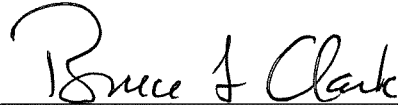
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The undersigned hereby certifies that a copy of the foregoing has been served by first class mail on those persons whose names appear below this 16th day of October, 2009.

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