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April 13, 2010

RECEIVED

APR 15 2010

PUBLIC SERVICE  
COMMISSION

Mr. Jeff DeRouen  
Kentucky Public Service Commission  
P.O. Box 615  
211 Sower Boulevard  
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 are an original and ten copies of MCImetro Access Transmission Services LLC's Supplemental Rebuttal Testimony of Don Price.

Please indicate receipt of this filing by placing your file stamp on the extra copy and returning to me via the enclosed, self-addressed, postage-paid envelope.

Very truly yours,

STOLL KEENON OGDEN PLLC

Douglas F. Brent

DFB:

Enclosures

105138.116493/535497.1

**COMMONWEALTH OF KENTUCKY**

**BEFORE THE PUBLIC SERVICE COMMISSION**

**RECEIVED**

APR 15 2010

PUBLIC SERVICE  
COMMISSION

In the Matter of:

INVESTIGATION INTO TRAFFIC DISPUTE  
BETWEEN BRANDENBURG TELEPHONE  
COMPANY, WINDSTREAM KENTUCKY  
EAST AND VERIZON ACCESS

Case No. 2008-00203

**SUPPLEMENTAL REBUTTAL TESTIMONY OF DON PRICE  
ON BEHALF OF  
MCIMETRO ACCESS TRANSMISSION SERVICES LLC  
d/b/a VERIZON ACCESS TRANSMISSION SERVICES**

**APRIL 13, 2010**

1 **I. INTRODUCTION**

2 **Q. Are you the same Don Price who filed supplemental direct testimony in this**  
3 **case on behalf of MCImetro Access Transmission Services LLC**  
4 **(“MCImetro”)?**

5 A. Yes.

6  
7 **Q. What is the purpose of your supplemental rebuttal testimony?**

8 A. The purpose of my supplemental rebuttal testimony is to respond to the direct  
9 testimony Kerry Smith filed on behalf of Windstream Kentucky East, LLC  
10 (“Windstream”) and Allison T. Willoughby filed on behalf of Brandenburg  
11 Telephone Company (“Brandenburg”) as their testimony relates to potential  
12 claims against MCImetro.

13  
14 **Q. What is the background of this proceeding?**

15 A. In its August 26, 2009 Order (“Order”), the Commission stated that “[t]he record  
16 is not sufficiently specific to support a Commission determination that  
17 Windstream is entitled to the full amount of its requested relief, if it is indeed  
18 entitled to any recovery.” (Order at 22.) The Commission therefore directed that  
19 a separate hearing be held so it could further develop the record to determine the  
20 parties’ proportionate liabilities.

21  
22 **Q. Generally, what claims have Windstream and Brandenburg made?**

23 A. Windstream claims that Brandenburg should be required to pay it approximately  
24 \$1.59 million to compensate it for transiting the traffic in question at the rate of  
25 \$.0045 per minute of use and about \$36,000 for Windstream’s cost of performing

1 LNP queries (plus more than \$8,000 in interest on that amount). Windstream has  
2 not asserted a claim against MCImetro. Brandenburg asserts that it is not liable to  
3 Windstream, but that if it is found liable MCImetro should be required to  
4 reimburse it for the full amount awarded.

5  
6 **II. WINDSTREAM'S CLAIMS**

7 **Q. Does Windstream make clear that it is only seeking compensation from**  
8 **Brandenburg, not MCImetro, in this proceeding?**

9 A. Yes. At page 11 of his supplemental direct testimony, Mr. Smith is asked about  
10 the respective liability of MCImetro and Brandenburg for the compensation  
11 allegedly due to Windstream. Mr. Smith responds that "Brandenburg is the party  
12 responsible for compensating Windstream East for the claimed amounts.  
13 Whether Brandenburg believes it should be reimbursed by [MCImetro] for some  
14 of those amounts is a separate matter that should be handled between those two  
15 parties and without further inconvenience to Windstream East."

16  
17 **Q. What does Windstream assert concerning whether MCImetro should be**  
18 **required to reimburse Brandenburg if the Commission requires**  
19 **Brandenburg to compensate Windstream for the traffic in question?**

20 A. Mr. Smith states at page 10 of his supplemental direct that Windstream can "see  
21 where Brandenburg could make a case" for partial reimbursement.

22  
23 **Q. Has Windstream pointed to any specific requirement that MCImetro must**  
24 **compensate Brandenburg for the traffic in question?**

1 A. No. In response to MCImetro’s discovery requests, Windstream did not identify  
2 any tariff, contract, statute, rule or order that would require MCImetro to  
3 reimburse Brandenburg. (See Windstream’s response to MCImetro Interrogatory  
4 No. 18 in Exhibit A, which is attached to my testimony.)  
5

6 **Q. Does Mr. Smith provide any new factual information to support**  
7 **Windstream’s suggestion that MCImetro might be responsible to**  
8 **Brandenburg for some portion of an amount Brandenburg might be**  
9 **required to pay to Windstream?**

10 A. No. At pages 10 and 11 of his testimony, Mr. Smith makes a few passing  
11 statements about MCImetro that add nothing new to the record.  
12

13 First, he claims MCImetro may have some responsibility because it has not  
14 entered into a traffic exchange agreement with Brandenburg, an allegation I will  
15 address in detail later in my testimony.  
16

17 Second, he states that MCImetro acted “erroneously” in June 2008 when it  
18 requested that Windstream “should be ordered to endure the misrouting through  
19 its network.” What Mr. Smith is referring to is MCImetro’s request that the  
20 Commission order Windstream to stop blocking dial-up Internet calls from  
21 Brandenburg’s customers to Internet Service Providers (“ISPs”) served by  
22 MCImetro, something Windstream did without advance notice to the  
23 Commission. The Commission has described “Windstream’s unilateral blocking  
24 of the ISP-bound traffic” as “an extreme measure,” has stated it was disconcerted  
25 by Windstream’s actions, and has ordered further proceedings to investigate the

1 incident. (Order at 11.) MCImetro had a responsibility to bring the blocking of  
2 this traffic to the Commission's attention and acted properly in doing so.

3  
4 Third, Mr. Smith suggests that MCImetro may bear some responsibility because it  
5 assigned telephone numbers from Windstream's rate center to ISPs not physically  
6 located in that rate center (thus potentially resulting in different rating and routing  
7 points). Mr. Smith does not state that this practice violates any legal or industry  
8 standard and does not otherwise explain his criticism. In fact, it is permissible  
9 and common in the industry to assign telephone numbers in this way, and  
10 beneficial to businesses and consumers alike. It is not correct to suggest that there  
11 is anything wrong with this practice or that it could establish the basis for any  
12 liability in this case.

13  
14 **Q. Do you have any comments concerning Windstream's claims against**  
15 **Brandenburg?**

16 A. Windstream's claims against Brandenburg are generally a matter to be addressed  
17 by those parties, but because the only potential claim against MCImetro in this  
18 case – Brandenburg's indemnity claim – derives from Brandenburg's potential  
19 liability to Windstream, there are a couple of points I will make about  
20 Windstream's claims. First, Windstream does not point to a specific requirement  
21 (such as a tariff, contract or Commission order) that Brandenburg must  
22 compensate Windstream, so it is not clear why Windstream believes the  
23 Commission could require payment. Second, Windstream has provided no  
24 authority for the rate it proposes to charge Brandenburg and the rate it proposes  
25 appears to be excessive under the circumstances. The Commission pointed out in

1 the Order at page 17 that MCImetro and Windstream had agreed to a reciprocal  
2 compensation rate of \$.0009 per minute of use for ISP-bound traffic.  
3 Windstream's proposed rate for transiting ISP-bound traffic – \$.0045 per minute  
4 of use – is five times that much. Thus, not only has Windstream failed to support  
5 its claim of liability, but it has tried to turn a mole hill into a mountain by  
6 charging an unsupported and excessive transit rate, given the wide disparity  
7 between the reciprocal compensation and transit rates.

8  
9 **III. BRANDENBURG'S INDEMNITY CLAIM**

10 **Q. Has Brandenburg pointed to any specific requirement that MCImetro must**  
11 **compensate Brandenburg for the traffic in question?**

12 A. No. Ms. Willoughby did not point to any specific provision (whether in a tariff,  
13 contract, statute or Commission order) that would require MCImetro to indemnify  
14 Brandenburg for any of Windstream's claims. Likewise Brandenburg did not  
15 identify any specific authority in response to MCImetro's discovery requests.  
16 (See Brandenburg's response to Interrogatory No. 18 in Exhibit B, which is  
17 attached to my testimony.)

18  
19 **Q. Please respond to Ms. Willoughby's contention that MCImetro must**  
20 **reimburse Brandenburg because it did not have a traffic exchange agreement**  
21 **with Brandenburg before it began providing facilities-based service in**  
22 **Elizabethtown.**

23 A. To my knowledge, the Commission has never required a CLEC to establish traffic  
24 exchange agreements with all local exchange carriers in a LATA before it can  
25 begin to offer service, and Ms. Willoughby does not point to any such

1 requirement. As a practical matter, since 1997 MCI metro or its predecessor has  
2 been providing service to ISPs (initially through leased facilities) that have served  
3 Elizabethtown and the only change in 2003 was that MCI metro began providing  
4 service to ISPs using its own facilities. If Brandenburg had been performing LNP  
5 queries as it should have, it would have been aware immediately that MCI metro  
6 was providing facilities-based service in 2003. As it was, Brandenburg requested  
7 a traffic exchange agreement in 2005, and MCI metro then entered into  
8 negotiations with Brandenburg. Unfortunately, as I will discuss in a moment,  
9 Brandenburg demanded patently unreasonable terms that prevented the parties  
10 from reaching agreement.

11  
12 **Q. Has either MCI metro or Brandenburg requested that the parties enter into**  
13 **an interconnection agreement under section 251 of the Telecommunications**  
14 **Act of 1996?**

15 A. No. MCI metro has not made such a request because it does not have any  
16 customers in Brandenburg's service territory. Likewise, Brandenburg has never  
17 requested negotiations under section 251. The parties only have sought to  
18 negotiate a commercial agreement, rather than an interconnection agreement that  
19 would be subject to arbitration under section 252.

20  
21 **Q. Please describe MCI metro's efforts to reach a traffic exchange agreement**  
22 **with Brandenburg before Windstream blocked its traffic in June 2008.**

23 A. The parties initially attempted to negotiate a traffic exchange agreement in  
24 September 2005 after Brandenburg started blocking some of MCI metro's traffic.  
25 The parties held several negotiating sessions and exchanged a number of drafts



1 between then and April 2006, when it became clear that Brandenburg was  
2 demanding that ISPs served by MCImetro had to be physically located in  
3 Brandenburg's service territory. MCImetro serves ISPs using centralized  
4 facilities, so installing duplicative facilities in Brandenburg's service territory  
5 would have made no operational or financial sense. As a practical matter,  
6 Brandenburg's proposal would have excluded the only traffic that MCImetro was  
7 receiving from Brandenburg's network, so it was obviously unacceptable to  
8 MCImetro. Negotiations petered out shortly after Brandenburg made its proposal.  
9 MCImetro requested that Brandenburg put its proposal in the form of a red-lined  
10 draft, but according to MCImetro's records Brandenburg never provided one.

11

12 The parties restarted negotiations in February 2007, when Windstream threatened  
13 to stop routing the traffic in question over EAS trunks. The parties exchanged  
14 drafts and again Brandenburg proposed that ISPs served by MCImetro would  
15 have to be physically located in Brandenburg's service territory. This proposal  
16 was unacceptable to MCImetro for the reasons I just explained. MCImetro  
17 responded to the proposal with a redline draft on March 15, 2007 to which  
18 Brandenburg never responded. As a result, negotiations again fell through.

19

20 Subsequently, in May 2008, Brandenburg's attorney sent a letter to MCImetro  
21 requesting that MCImetro enter into a traffic exchange agreement that was  
22 substantively identical to a traffic exchange agreement that MCImetro had with  
23 South Central Rural Telephone Cooperative ("South Central"). MCImetro

1           responded that it was willing to discuss entering a similar arrangement, but noted  
2           that the terms of the South Central agreement reflected the circumstances of the  
3           two parties' networks. In fact, South Central and MCImetro had facilities in the  
4           same building, so it was possible for the parties to interconnect at a meet point  
5           there, and MCImetro had access to spare trunking from its IXC affiliate in South  
6           Central's exchange territory, which enabled MCImetro to accept traffic from that  
7           point. These factors, and South Central's cooperation, allowed a quick resolution.  
8           Because MCImetro was able to interconnect without building out its facilities, it  
9           agreed to exchange traffic with South Central on a bill-and-keep basis.

10  
11   **Q.    During these negotiations with Brandenburg, what was MCImetro's basic**  
12    **position?**

13    A.    MCImetro presented two alternative solutions. MCImetro stated that it would  
14    interconnect with Brandenburg on its network if Brandenburg would agree to pay  
15    reciprocal compensation on the traffic MCImetro terminated. Alternatively,  
16    MCImetro was willing to exchange traffic on a bill-and-keep basis if the parties  
17    could establish an interconnection point that did not require MCImetro to build  
18    out its network. I explained this position in my 2008 testimony in this case.

19  
20    **Q.    Has MCImetro been able to reach agreement with other carriers on this**  
21    **basis?**

22    A.    Yes, MCImetro has many interconnection agreements nationwide under which  
23    carriers have agreed to pay reciprocal compensation for ISP-bound traffic.

1 MCImetro also has entered into several agreements in which MCImetro is not  
2 required to build out its facilities and as a *quid pro quo* exchanges traffic on a bill-  
3 and-keep basis.

4

5 **Q. Did MCImetro seek to reach a compromise in 2008 based on the South  
6 Central agreement to bridge the gulf between the parties' positions?**

7 A. Yes, MCImetro proposed a variation of the South Central approach that took into  
8 account the different circumstances presented by Brandenburg's network. Unlike  
9 the South Central situation, MCImetro did not have access to sufficient spare  
10 capacity from its IXC affiliate to achieve the same solution. As an alternative,  
11 MCImetro offered Brandenburg a compromise: split the cost of trunking between  
12 the two networks and exchange traffic on a bill-and-keep basis. Brandenburg  
13 rejected that offer.

14

15 **Q. Since the Order was issued, has MCImetro renewed its efforts to reach a  
16 traffic exchange agreement with Brandenburg?**

17 A. Yes. MCImetro has complied with the Order by again attempting to negotiate a  
18 traffic exchange agreement with Brandenburg and by filing a joint matrix of  
19 disputed issues.

20

21 **Q. Has MCImetro recently made another proposal to settle this matter?**

1 A. Yes. In the interest of resolving this dispute, in February 2010 MCImetro offered  
2 to pick up the full cost of trunking between its network and Brandenburg's  
3 network.

4  
5 **Q. Has Brandenburg accepted this offer?**

6 A. No. MCImetro initially proposed that once traffic falls below a level of 250,000  
7 minutes of use per month (less than a DS1's worth of traffic), the parties would  
8 exchange traffic indirectly. Brandenburg rejected that proposal and MCImetro  
9 then proposed alternative language providing that as a condition precedent  
10 Brandenburg must have met a certain average traffic level over the previous two  
11 years. Brandenburg rejected this alternative proposal, too, but stated it would  
12 reconsider it if MCImetro explained its business reason for the request.

13 MCImetro has since explained to Brandenburg that the purpose of this language is  
14 to make clear that MCImetro is willing to enter this agreement based in part on  
15 the volume of traffic involved, so that carriers with low traffic volumes cannot  
16 claim that they are similarly situated and should receive the same arrangement.  
17 MCImetro also has informed Brandenburg that it is willing to adjust the traffic  
18 level stated in the proposal to ensure that Brandenburg meets the condition  
19 precedent. MCImetro is still awaiting a response from Brandenburg.

20

21 **Q. Why did MCImetro offer this compromise?**

22 A. It has become clear that Brandenburg is unwilling to accept any compromise and  
23 that the only way to resolve this dispute short of another Commission hearing, and

1 additional litigation costs, is for MCImetro to absorb the cost of the facilities.  
2 Moreover, the level of ISP-bound traffic has been decreasing and it is now  
3 roughly half what it was in mid-2008. As a result, MCImetro is now agreeing to  
4 pay roughly the same amount it would have paid had Brandenburg accepted  
5 MCImetro's proposed compromise in 2008.

6

7 **Q. Please summarize your testimony concerning Brandenburg's claim against**  
8 **MCImetro.**

9 A. Although I am not a lawyer, it does not appear to me that Brandenburg has  
10 pointed to any specific requirement that MCImetro must indemnify Brandenburg.  
11 Moreover, MCImetro has made more than reasonable efforts to enter into a  
12 commercially reasonable traffic exchange agreement with Brandenburg. In  
13 contrast, Brandenburg made completely unreasonable demands that frustrated  
14 negotiations from 2005 to mid-2008 and then refused to entertain any reasonable  
15 compromise that would have resolved the dispute. The dispute is now close to  
16 resolution only because MCImetro has been willing to "go the extra mile" and  
17 absorb the full cost of interconnection trunks between the parties' networks.  
18 Based on the parties' conduct in this matter, MCImetro should not be required to  
19 reimburse Brandenburg for any amounts it may be required to pay to Windstream.

20

21 **Q. Does this conclude your rebuttal testimony?**

22 A. Yes.



18. Does Windstream East contend that MCImetro must reimburse Brandenburg Telephone Company (“Brandenburg”) for any amounts that Brandenburg is ordered to pay Windstream? If so:
- a. If this contention is based on one or more tariff provisions, please identify each such provision, the basis for Windstream's claim that it requires MCImetro to pay Brandenburg, the amount Windstream asserts MCImetro should be required to pay, and how that amount was calculated.
  - b. If this contention is based on one or more statutory provisions, please identify each such provision, the basis for Windstream's claim that it requires MCImetro to pay Brandenburg, the amount Windstream asserts MCImetro should be required to pay, and how that amount was calculated.
  - c. If this contention is based on one or more FCC or Commission rules or regulations, please identify each such rule or regulation, the basis for Windstream's claim that it requires MCImetro to pay Brandenburg, the amount Windstream asserts MCImetro should be required to pay, and how that amount was calculated.
  - d. If this contention is based on one or more FCC or Commission orders, please identify each such order, the basis for Windstream's claim that it requires MCImetro to pay Brandenburg, the amount Windstream asserts MCImetro should be required to pay, and how that amount was calculated.
  - e. If this contention is based on one or more contractual provisions, please identify each such provision, the basis for Windstream's claim that it requires MCImetro to pay Brandenburg, the amount Windstream asserts MCImetro should be required to pay, and how that amount was calculated.
  - f. If this contention is based on any other legal theory, please identify each such theory, the basis for Windstream's claim that it requires MCImetro to pay Brandenburg, the amount Windstream asserts MCImetro should be required to pay, and how that amount was calculated.

**RESPONSE:** Windstream East objects to these questions as Windstream East already addressed this issue in its prior filings and further as the information sought should be obtained from Brandenburg and otherwise is publicly available to Verizon. Without waiving the foregoing, Windstream East reiterates that it believes it is conceivable that Brandenburg could assert a claim against Verizon for some or all of the amounts that Brandenburg may be required to pay to Windstream East but that any such claim is a matter by and between Brandenburg and Verizon. For example, Windstream East believes that it is reasonable that Brandenburg could assert that Verizon is responsible for partial reimbursement to Brandenburg based on the fact that Verizon benefited equally from the avoidance of the expense of direct interconnection between them despite the very high traffic volumes of their traffic that they exchanged indirectly through Windstream East’s network in a manner contrary to the Commission’s clear precedent. Regardless, as Windstream East has explained, any such claims for reimbursement are Brandenburg’s to assert and pursue against Verizon.

**Answer prepared by counsel for Windstream East**





COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

**COPY**

*In the Matter of:*

AN INVESTIGATION INTO THE TRAFFIC )  
DISPUTE BETWEEN WINDSTREAM ) Case No. 2008-00203  
KENTUCKY EAST, LLC, BRANDENBURG )  
TELEPHONE COMPANY AND MCIMETRO )  
ACCESS TRANSMISSION SERVICES, LLC )  
D/B/A VERIZON ACCESS )

**BRANDENBURG TELEPHONE COMPANY'S RESPONSES TO  
MCIMETRO'S SUPPLEMENTAL REQUESTS FOR INFORMATION  
TO BRANDENBURG TELEPHONE COMPANY  
AND REQUESTS FOR PRODUCTION OF DOCUMENTS**

Brandenburg Telephone Company ("Brandenburg"), by counsel, and pursuant to the July 11, 2008 procedural order entered by the Public Service Commission of the Commonwealth of Kentucky (the "Commission") in this matter, hereby files its responses to MCImetro Access Transmission Services, LLC d/b/a Verizon Access ("MCImetro") Supplemental Requests for Information to Brandenburg Telephone Company. In response to those requests, Brandenburg states as follows.

**INTERROGATORIES**

18. Does Brandenburg claim that MCImetro must indemnify it for any amounts Brandenburg is ordered to pay Windstream Kentucky East LLC ("Windstream") in this proceeding? If so:
- a. If the indemnity claim is based on one or more tariff provisions, please identify each such provision, the basis for Brandenburg's claim that it requires MCImetro to pay Brandenburg, the amount claimed, and how that amount was calculated.
  - b. If the indemnity claim is based on one or more statutory provisions, please identify each such provision, the basis for Brandenburg's claim that it requires MCImetro to pay Brandenburg, the amount claimed, and how that amount was calculated.
  - c. If the indemnity claim is based on one or more FCC or Commission rules or regulations, please identify each such rule or regulation, the basis for Brandenburg's

claim that it requires MCImetro to pay Brandenburg, the amount claimed, and how that amount was calculated.

- d. If the indemnity claim is based on one or more FCC or Commission orders, please identify each such order, the basis for Brandenburg's claim that it requires MCImetro to pay Brandenburg, the amount claimed, and how that amount was calculated.
- e. If the indemnity claim is based on one or more contractual provisions, please identify each such provision, the basis for Brandenburg's claim that it requires MCImetro to pay Brandenburg, the amount claimed, and how that amount was calculated.
- f. If the indemnity claim is based on any other legal theory, please identify each such theory, the basis for Brandenburg's claim that it requires MCImetro to pay Brandenburg, the amount claimed, and how that amount was calculated.

**Responsible Witness:** None. See objection.

**RESPONSE:** Brandenburg objects to this interrogatory on the grounds it requires the production of attorney/work product and, in any event, counsel's theory of the matter may change as further facts emerge. Moreover, Brandenburg has fully explained its legal position to date in this matter in its briefs.

19. Does Brandenburg assert claims against MCImetro in this proceeding other than for indemnification? If so, please state each such claim.

**Responsible Witness:** None. This is a legal question.

**RESPONSE:** As set forth in Brandenburg's Complaint in Kentucky Public Service Commission Case No. 2008-00239, in addition to indemnification, Brandenburg seeks the following forms of injunctive relief against MCImetro:

- "A. Order MCImetro to, at no cost to Brandenburg, establish dedicated trunking facilities to an interconnection point on Brandenburg's network;
- B. Order MCImetro to 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; [and]
- C. Order that 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)[.]"

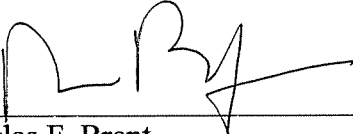
20. With respect to each claim stated in response to Interrogatory No. 2 [sic]:

**CERTIFICATE OF SERVICE**

I hereby certify a true and correct copy of the foregoing was served, by first-class United States mail, on the following individuals this 13<sup>th</sup> day of April, 2010.

Bruce F. Clark, Esq.  
Mark R. Overstreet, Esq.  
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\_\_\_\_\_  
Douglas F. Brent