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September 12, 2008

Stephanie L. Stumbo
Executive Director
Kentucky Public Service Commission
P.O. Box 615
211 Sower Boulevard
Frankfort, KY 40601

RECEIVED

SEP 15 2008

PUBLIC SERVICE
COMMISSION

*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 Ms. Stumbo:

Enclosed are an original and ten copies of MCImetro Access Transmission Services
LLC's Post-Hearing Brief.

Please indicate receipt of these filings by placing your file stamp on the extra copy and
returning to me via the enclosed, self-addressed, stamped envelope.

Very truly yours,

STOLL KEENON OGDEN PLLC

Douglas F. Brent

DFB:

Enclosures

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

SEP 15 2008

PUBLIC SERVICE
COMMISSION

In the Matter of:

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

BRIEF OF MCIMETRO ACCESS TRANSMISSION SERVICES LLC

The law requires carriers to pay the costs for their originating traffic, and it requires intermediary carriers to transit that traffic to other carriers within a defined local calling area. Carriers also have obligations to complete calls, not block them. The Commission should apply these requirements in this case, to ensure uninterrupted service to the customers of each carrier involved.

INTRODUCTION

MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services (“MCImetro”) is a competitive local exchange carrier (“CLEC”) that provides service in various parts of Kentucky, including Elizabethtown. MCImetro has been offering dial-up service to Internet Service Providers (“ISPs”) in Elizabethtown (directly or through an affiliate of its predecessor) since 1997. In 2003, MCImetro entered into an interconnection agreement with Windstream Kentucky East, LLC (“Windstream”), the incumbent local exchange carrier (“ILEC”) in Elizabethtown. After the agreement was reached, MCImetro established direct interconnection with Windstream in Elizabethtown and began providing service there.¹

¹ Transcript of Evidence, pp. 20, 22, 75.

The traffic at issue in this case (the “disputed traffic”) originates from Brandenburg Telephone Company (“Brandenburg”) customers in Radcliff and Vine Grove, Kentucky, where Brandenburg is the ILEC.² For more than ten years, many of these customers have reached AOL or other ISPs by dialing access numbers in Elizabethtown. Until 2003, the disputed traffic terminated to Windstream’s predecessor, ALLTEL. In 2003, MCImetro established itself as a CLEC in Elizabethtown, interconnected with ALLTEL, and ported several dial up access numbers to its network. Today the disputed traffic is being routed from Radcliff and Vine Grove to Elizabethtown via Brandenburg’s interconnection with Windstream, then from Windstream to MCImetro, and from there to MCImetro’s ISP customers. The ISP numbers have remained within NPA-NXXs to which Brandenburg offers its Radcliff and Vine Grove customers toll-free calling.³ The porting process was transparent to customers.⁴

On June 2, 2008, without advance notice to the Commission or to any carrier or customer, Windstream blocked the transmission of traffic from Brandenburg customers to telephone numbers served by MCImetro; this action denied Brandenburg’s customers access to their AOL service. MCImetro immediately notified the Commission that Windstream was blocking the disputed traffic and asked the Commission to take emergency action. After a telephone conference among the carriers and the Commission staff, Windstream ceased blocking the disputed traffic. The Commission then opened an investigation, ordering that “[t]he traffic arrangements, as they exist on June 30, 2008, shall continue in their current form until this dispute is resolved.” *Order*, July 1. The Commission heard testimony in the matter on August 19, 2008.

² MCImetro does not provide local exchange service in Radcliff, Vine Grove or in any other exchange where Brandenburg Telephone Company is the ILEC. *See* MCImetro’s Response to Brandenburg Telephone Company Data Request No. 12. In addition, no MCImetro local calling area includes any of Brandenburg Telephone Company’s exchanges. Accordingly, MCImetro does not interconnect with Brandenburg Telephone Company, and the companies do not have an interconnection agreement.

³ Radcliff, Vine Grove and Elizabethtown are in LATA 462, as is the City of Louisville.

⁴ Direct testimony of Don Price, p. 5.

With respect to MCImetro, this case involves two issues: (1) whether Brandenburg has a duty to deliver the disputed traffic to MCImetro without charge; and (2) whether Windstream has a duty to transit the disputed traffic to MCImetro through the parties' interconnection. The answer in both cases is "yes." As discussed below, the Commission has consistently determined that wireline carriers are responsible for paying for traffic originated by their customers over their own networks that is bound for the customers of another carrier in the same LATA. Originating carriers recover those expenses through rates paid by the customers who originate the calls. The Commission also has consistently required ILECs who operate tandem switches to provide transit services in order to promote efficient network use by all carriers. And of course the Commission has required carriers to honor their tariffs, including transit tariffs, they file with the Commission.

What should not be at issue is whether Brandenburg may block traffic originated by its customers until it enters a traffic exchange agreement with MCImetro. Although MCImetro is willing to enter into such an agreement, and has offered to do so on reasonable terms, to date the parties have been unable to resolve their differences. Brandenburg should not be allowed to block its customers from originating traffic to MCImetro's customers as a means of wringing concessions from MCImetro in those negotiations. Such conduct would violate the interests of its own customers as well as be anticompetitive.

ARGUMENT

MCImetro, its ISP customers, and the ISPs' own subscribers are innocent bystanders harmed as a result of a traffic dispute between Windstream and Brandenburg. The Commission's prompt initiation of this proceeding persuaded Windstream to cease blocking the disputed traffic, ending the emergency. To conclude this matter the Commission should confirm that Brandenburg is responsible for transporting its traffic to MCImetro's customers within Brandenburg's tariff-defined

local calling area and that Windstream is responsible for transiting that traffic to MCI metro through the parties' interconnection.

I. AS THE ORIGINATING CARRIER FOR THE DISPUTED TRAFFIC, BRANDENBURG IS RESPONSIBLE FOR DELIVERING TRAFFIC TO MCIMETRO WITHOUT CHARGE.

At the hearing, Brandenburg's witness Ms. Willoughby testified that Brandenburg has maintained local calling between Radcliff and Elizabethtown for more than fifty years.⁵ This has been a reciprocal arrangement whereby Elizabethtown customers have been able to call Radcliff on a local basis. Thus, Brandenburg customers have always been able to reach ISPs via access numbers rated locally to Elizabethtown. This was of course true even before MCI metro interconnected with Windstream. That interconnection, which was necessary for MCI metro to better compete in Elizabethtown, allowed AOL to port its local numbers from Windstream's predecessor to MCI metro. Once the numbers were ported, Brandenburg continued to route traffic to these numbers in the same way it always had, using a trunk group it established with Windstream's predecessor for the mutual exchange of local traffic. Although the volume of traffic has been in steady decline, and in spite of the fact that the routing has been in place for five years, recently Windstream claimed this routing is improper, and that Brandenburg should "establish a business relationship with [MCI metro] for the termination of this ISP traffic" instead of routing the traffic to Windstream.⁶ Windstream's claim requires the Commission to address Brandenburg's obligations as an originating carrier.

⁵ Transcript of Evidence, p. 166.

⁶ To its credit, Windstream appears to have made proposals more than a year ago to discuss with Brandenburg Telephone Company how to *re-utilize existing facilities* to more efficiently handle the disputed traffic by establishing direct trunking between Windstream's Elizabethtown tandem and Brandenburg Telephone Company's tandem in Elizabethtown. See Windstream's Responses to MCI metro Data Requests No. 8 and 9; see also Exhibit 3 to Brandenburg Telephone Company's Complaint in Case No. 2008-00239 (Windstream's February 21, 2007 proposal to George Lewis of Brandenburg Telephone Company). These proposals, combined with the fact that all of the MCI metro bound traffic is currently flowing without blocking, see Transcript of Evidence at pp. 188-189, puts to rest Brandenburg Telephone Company's exaggerated claims that MCI metro is trying to force Brandenburg Telephone Company to "pay for another 30 miles of fiber to get our traffic to Elizabethtown...." See Transcript of Evidence, p. 178.

In various orders, the Commission has said it will not deviate from the “well-established” principle that carriers must pay the costs of traffic originated on their own networks.⁷ The Commission has applied this principle in arbitration proceedings in which CLECs sought interconnection to enable the *exchange* of traffic with an ILEC. The current traffic dispute is different in one respect—MCImetro has not sought interconnection with Brandenburg because it is not originating local traffic bound for that ILEC’s exchanges. Nevertheless, the principle that the originating carrier is responsible to pay for traffic originated by its own customers applies with equal force to all originating carriers. Although Brandenburg may try to graft the Commission’s Joint RLEC/CMRS orders⁸ onto this case, claiming they stand for the proposition that rural ILECs are afforded a special status and are never required to transport traffic beyond their “network boundary,” those cases are not relevant here. This is primarily because Elizabethtown is within the boundary of Brandenburg’s self-defined local calling area and, for that reason, MCImetro is not asking Brandenburg to bear costs beyond its local calling area. Further, those arbitrations involved mutual traffic exchange between wireline and wireless carriers whose local calling areas are vastly different in size. In addition, the record in this case suggests there would be little if any burden to Brandenburg to transport its customers’ traffic a few miles from Radcliff to Elizabethtown. Thus, regardless of traffic volumes, and in light of the fact that the volume of disputed traffic is diminishing, this is not a case in which there is a “potential for abuse” related to MCImetro’s

⁷ *Petition of Level 3 Communications for Arbitration with BellSouth Telecommunications*, Case No. 200-00404 (March 14, 2001) (“*Level 3 Order*”); *Petition of Brandenburg Telecom for Arbitration with Verizon South*, Case No. 2001-00224 (May 16, 2001) (applying *Level 3 Order*, accepting Brandenburg Telecom’s argument that “each party should be financially responsible for delivering its traffic to the other party’s point of interconnection,” and finding that Brandenburg had the right to establish a minimum of one point of interconnection per LATA); *Petition of South Central Telecom for Arbitration with Verizon South*, Case No. 2001-00261 (January 15, 2002) (applying *Level 3 Order* and again requiring interconnecting carriers to comply with standards set forth by the FCC’s rule (47 CFR § 51.703(b)) which states that “[a] LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originate on the LEC’s network.”).

⁸ *E.g.*, *Petition of Ballard Rural Telephone Cooperative for Arbitration with American Cellular*, Case No. 2006-00215.

business decision to compete against Windstream, not against Brandenburg, and to establish POIs within Elizabethtown, but not in Radcliff.⁹

II. WINDSTREAM'S TRANSIT TARIFF PERMITS BRANDENBURG TO USE WINDSTREAM'S NETWORK TO DELIVER TRAFFIC TO ANY CARRIER DIRECTLY INTERCONNECTED TO WINDSTREAM.

Windstream should not be permitted to block the disputed traffic because it is required by law, including its tariff, to provide transit service. KRS 278.520 states, in pertinent part:

Telephone companies operating exchanges in different cities shall receive and transit each others messages without delay. . . It is the intention of this section to compel the connecting up and usage of toll wires through the *various intervening exchanges* between the exchange in which the messages originate and the point of destination. . .

(emphasis supplied).

The Commission has also ruled that an ILEC must transit its competitor's traffic to *all telephone numbers within the same local calling area*, even if some of that traffic will terminate to a third party's network that is interconnected directly with a different ILEC's tandem in the same LATA.¹⁰ In other words, the Commission has required tandem-to-tandem transiting *within a local calling area*. That ruling is obviously broad enough to cover a scenario, like this one, under which the terminating CLEC, MCImetro, is *directly interconnected* to the transit provider's tandem and within the local calling area of the originating carrier.

Finally, having filed a tariff offering transit service, Windstream holds itself out as ready and willing to transit ILEC to CLEC traffic. Windstream's transit tariff applies for any traffic routed

⁹ See *Level 3 Order* at p. 2 ("fewer POIs per new entrant will encourage competitors to solicit customers throughout the LATA...." noting the desired efficiencies to be gained by (1) not requiring new entrants to deploy a POI in every local calling area and (2) preserving the incumbent's interest in paying minimal originating traffic costs.

¹⁰ *Brandenburg Telecom, LLC v Verizon South, Inc*, Case No. 2002-00143 (May 23, 2002)(ordering Windstream's predecessor to transit CLEC traffic to a wireless carrier interconnected with BellSouth, as a matter of enforcing the incumbent's dialing parity obligations under the Act.)

over Windstream's network to another carrier directly interconnected with Windstream.¹¹ There is no disputing that Windstream and MCImetro are directly interconnected.¹² Therefore, the tariff applies here. And Windstream admits it has billed Brandenburg under the tariffed tandem transit rate.¹³

Windstream's offering to provide tariffed transit traffic service is consistent with the Commission's view that transit service provided by major ILECs is essential to the provision of service to rural Kentucky.¹⁴ Brandenburg's current usage of Windstream's network, described as "misrouting" by Windstream, appears to be precisely the type of usage contemplated by the tariff, and is completely consistent with Commission policy, including prior orders addressing transit traffic between Brandenburg's CLEC affiliate and Windstream's predecessor. A remaining issue is whether the traffic should be handed off at an end office or tandem in Elizabethtown (and thus which tariffed transit rate should apply), an issue on which MCImetro takes no position.

III. MCIMETRO HAS NOT REQUESTED INTERCONNECTION WITH BRANDENBURG AND BRANDENBURG MAY NOT BLOCK TRAFFIC TO LEVERAGE FUTURE NEGOTIATIONS.

What should not be at issue is whether Brandenburg may block the disputed traffic before Brandenburg and MCImetro enter into a traffic exchange agreement.¹⁵ The calls at issue are originated by Brandenburg's customers and placed to telephone numbers that Brandenburg has

¹¹ Windstream Kentucky East P.S.C. No. 7, S11.1.2 C.: "Company offers Transit Traffic Service only for Transit Traffic that is intended to terminate to a Telecommunications Service Provider *whose network is directly interconnected with Company's network.* (emphasis added).

¹² Indeed, Windstream, MCImetro and Brandenburg Telephone Company's CLEC affiliate have all established POIs in the same building, at 111 South Main Street, Elizabethtown, Kentucky. See Windstream's Response to MCImetro's Data Requests No. 6 and 7.

¹³ Windstream's Response to MCImetro Data Request No. 2.

¹⁴ *E.g., Petition of NewSouth, NuVox, et al. for Arbitration with BellSouth Telecommunications*, Case No. 2004-00044 (March 14, 2006) (noting that requiring third party transiting promotes efficient network usage).

¹⁵ MCImetro is amenable to entering into a reasonable and appropriate agreement with Brandenburg Telephone, but the parties have not yet been able to reach such an agreement. Brandenburg Telephone has rejected various alternatives offered by MCImetro and instead chose a heavy-handed alternative, filing a formal complaint against MCImetro and Windstream.

designated as toll free to its customers. MCImetro has no control or influence over how Brandenburg defines its local or toll free calling area or establishes its Extended Area Service arrangements. Moreover, MCImetro does not provide local service anywhere within Brandenburg's exchanges and thus does not provide toll free calling from Elizabethtown to Radcliff.¹⁶ Under these circumstances MCImetro has not been obligated to establish an interconnection agreement with Brandenburg—there is no traffic that goes from MCImetro's network to Brandenburg. Of course, as Mr. Price testified, if MCImetro were to actually exchange traffic with Brandenburg, MCImetro would have obligations as an originating carrier.¹⁷ Until that happens, Brandenburg cannot use threats of blocking to leverage its positions in negotiations with MCImetro over an EAS or similar "traffic exchange" agreement.

¹⁶ Transcript of Evidence, p. 151. Not surprisingly, no CLEC competes for local exchange service with Brandenburg given its heavily subsidized local rates that are the lowest rates of any LEC in Kentucky. *See* Transcript of Evidence, pp. 197-198. An irrational rate structure such as Brandenburg Telephone Company's reduces incentives for local entry by firms that might be able to provide service more efficiently than the LEC. Radcliff and Brandenburg Kentucky are examples. No carrier has entered the Kentucky market to compete with Brandenburg's heavily subsidized local rates. Ironically, Brandenburg Telecom's local rates in Elizabethtown (where there is CLEC competition) are considerably *higher* than the local rates in Brandenburg Telephone Company's exchange territory. *Id.*

¹⁷ *Id.* Mr. Price testified that if MCImetro originated traffic in Elizabethtown bound for Brandenburg, MCImetro would have responsibility for the cost of sending the traffic, and would "have an obligation to negotiate with Brandenburg for an agreement that would allow us to exchange that traffic."

CONCLUSION

Call blocking has severe and immediate effects on carriers and their customers. As Chairman Armstrong reminded the parties to this investigation, any time a community loses communication, the Commission has serious concerns.¹⁸ Given those concerns, the Commission should order that the current traffic arrangements are permitted as a matter of law and must remain in place indefinitely.

Respectfully submitted,



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¹⁸ Transcript of Evidence, p. 5.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served on the following by first-class United State mail, sufficient postage prepaid, this 12th day of September, 2008.

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