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BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

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

POST HEARING BRIEF OF WINDSTREAM KENTUCKY EAST, LLC

September 12, 2008

Bruce F. Clark
STITES & HARBISON, PLLC
421 West Main Street
P.O. Box 634
Frankfort, KY 40602-0634
Telephone: (502) 223-3477

COUNSEL FOR WINDSTREAM
KENTUCKY EAST, LLC

I. INTRODUCTION

This Brief is submitted on behalf of Windstream Kentucky East, LLC (“Windstream”) pursuant to the “Investigation” initiated by the Commission’s Order dated July 1, 2008, which sought “to determine the relative rights of all parties” with respect to the routing and transmission of certain Internet service provider (“ISP”) traffic. The ISP traffic in question originates from end user customers of Brandenburg Telephone Company (“Brandenburg”) in the Radcliff and Vine Grove exchanges, routes through Windstream’s Elizabethtown end office, and terminates to MCImetro Access Transmission Services, LLC d/b/a Verizon (“Verizon”). The evidence in this matter supports the following two conclusions:

- (1) Because Brandenburg’s ISP traffic has been erroneously routed through Windstream’s end office, contrary to established industry routing protocols, and in volumes that exceed those appropriate for indirect interconnection, the misrouting should cease immediately.
- (2) Because it is undisputed that Windstream’s network has been utilized – albeit in an unauthorized manner – from at least as early as 2005, Windstream should be compensated fully for the use of its network as well as its costs in having to defend an action that has involved Windstream only as a result of Brandenburg and Verizon failing to otherwise properly route the traffic between them.

Windstream’s network has been used by Brandenburg and Verizon to delay their own financial responsibility for the exchange of their traffic (including establishment of direct interconnection) and to the financial detriment of Windstream. Until such time as Verizon and Brandenburg can agree on how to establish direct interconnection between them, the traffic in question should be immediately rerouted to Louisville and away from Windstream’s end

office, either as toll or non-toll, and Windstream should be fully compensated for the use of its network.

II. STATEMENT OF FACTS

Windstream and Brandenburg are incumbent local exchange carriers ("ILECs") authorized by the Commission to provide telecommunications services in various exchanges in Kentucky. In 2002, Windstream and Brandenburg formalized extended area service ("EAS") between Brandenburg's Radcliff and Vine Grove exchanges and Windstream's Elizabethtown exchange. (Smith Transcript at p. 40.) Brandenburg and Windstream entered into an EAS agreement and established EAS trunks between them solely for the purpose of exchanging traffic either originated by Brandenburg's customers and terminated to Windstream's customers, or *vice versa*. (See, EAS Agreement attached to Windstream's Response to Commission Staff Data Request No. 4.) The EAS trunks were not sized to accommodate other parties' traffic (in this case, the Brandenburg/Verizon traffic). (Willoughby Transcript at p. 206.) Brandenburg proposed that more than 50% of the current traffic being delivered over the EAS trunks is not EAS traffic but instead is the Brandenburg/Verizon ISP traffic. (Price Transcript at p. 138.) Additionally, the EAS traffic delivered over the Windstream/Brandenburg EAS trunks was intended to be rated as local to end user customers of Windstream and Brandenburg and was not recorded. (Willoughby Transcript at p. 183.)

The ISP traffic at issue in this proceeding is not EAS traffic between Windstream and Brandenburg and does not involve any Windstream customer in any capacity. (Smith Transcript at pp. 23 and 61; Price Transcript at pp. 104-105.) Rather, the traffic is comprised

of calls by Brandenburg's customers to dial-up ISPs served by Verizon. (Price Transcript at p. 131.)

Brandenburg and Verizon operate competitive local exchange carriers ("CLECs") in Kentucky, and both provide competing service in Windstream's Elizabethtown exchange. Brandenburg's own CLEC began operating in Windstream's Elizabethtown exchange on or around 2002 and began porting numbers from Windstream. (Willoughby Transcript at pp. 181, 182, and 193.) Brandenburg's CLEC and ILEC operations share personnel who have responsibilities for both operations. (Willoughby Transcript at p. 183.) At the time that its CLEC began porting numbers from Windstream in Elizabethtown, Brandenburg ILEC would have been aware of the need to perform LNP dips as Brandenburg ILEC would have had to perform LNP dips in order to distinguish between Windstream numbers and those which had been ported to Brandenburg's CLEC. (Willoughby Transcript at p. 194.) Carriers such as Windstream and Brandenburg are responsible for accessing the appropriate authority for updated LNP information. (Price Direct Testimony at p. 7.)

Verizon also operates as a CLEC in Windstream's Elizabethtown exchange and serves certain ISPs that were formerly Windstream customers. (Price Transcript at p. 104.) In 2003, Verizon's predecessor leased facilities from Windstream so that when an end user in Brandenburg's territory placed a call to an ISP served by Verizon's predecessor, the call was routed to the leased facility and then delivered to the appropriate ISP. (Price Direct Testimony at p. 3). Under this arrangement, Verizon's predecessor compensated Windstream for the use of Windstream's network. (*Id.*) Thereafter, Verizon's predecessor cancelled the leased equipment and ported the telephone numbers from Windstream. (*Id.*) With respect to the ISP telephone numbers that Verizon ported from Windstream in Elizabethtown, Verizon designated its routing point for that traffic as being in AT&T's ILEC territory in Louisville,

Kentucky. (Price Transcript at p. 105.) Thus, Verizon, through its designation in the Local Exchange Routing Guide (“LERG”), instructed carriers to deliver traffic destined to these ISPs in Elizabethtown to Verizon at the AT&T tandem in Louisville, Kentucky. (Price Direct Testimony at p. 8.) Louisville is wholly outside of Windstream's ILEC network. (Smith Direct Testimony at p. 5.) A carrier like Verizon may designate more than one routing point in a LATA, but in this case Verizon designated only Louisville in the LERG for this ISP traffic. (Windstream's Hearing Exhibit and Price Direct Testimony at p. 8.) The LERG is the mechanism all wireless, wireline, and inter/intraexchange carriers rely upon for proper routing of their traffic. (Price Direct Testimony at p. 8.)

Since about 2005, the ISPs served by Verizon have been providing telephone numbers for Brandenburg's customers' use in accessing dial-up Internet service. (Willoughby Direct Testimony at pp. 3-4.) Since 2005, Brandenburg has routed the ISP traffic to Verizon through the Windstream/Brandenburg EAS trunks and Windstream's Elizabethtown end office. (*Id.* at p. 4.) Again, the traffic over those EAS trunks was not recorded, and Windstream was unaware of the extent of the traffic activity. (*Supra.*) However, Brandenburg became aware of the activity as early as late 2005, when Brandenburg temporarily performed local number portability (“LNP”) dips on the ISP traffic and learned that the ISP traffic was not destined to Windstream end users but rather to ISP customers who had ported to Verizon. (Willoughby Direct Testimony at p. 4.) Brandenburg did not notify Windstream of this development. (Willoughby Transcript at p. 184.) Although Brandenburg proposed a traffic exchange agreement to Verizon (Willoughby Direct Testimony at p. 4 and Transcript at p. 170) after making this discovery, Brandenburg nevertheless ceased performing LNP dips and disabled its switch's capability as to the ISP traffic in question in order to continue routing the traffic to Windstream's end office over the EAS trunks. (*Id.*) Brandenburg stated that it believed the ISP

traffic delivered to Verizon was de minimis. (Willoughby Direct Testimony at p. 4 and Transcript at p. 170.) Verizon demonstrated that the ISP traffic was likely in greater volumes of as much as 10,000,000 minutes per month in 2005. (Verizon Data Request Responses and Price Transcript at pp. 137-138.) Currently, the ISP traffic between Brandenburg and Verizon is at a DS3 level, which is the equivalent of 28 DS1s. (Smith Direct Testimony at p. 8.)

In 2006, after discovering that a group of ILECs was using Windstream's network, particularly its end offices, improperly to transit traffic to other providers with routing locations on Windstream's network, Windstream filed a transit tariff on December 1, 2006. (Case No. 2007-0004.) The transit tariff contains a tandem transit rate of \$0.0030 per minute and a higher end office rate of \$0.0045 per minute as incentive for the ILECs to cease misusing Windstream's end offices as tandems. (*Id.* and Smith Direct Testimony at p. 9.) Unlike a tandem, an end office is designed "only to switch calls to end users and not switch calls between carriers." (Smith Direct Testimony at p. 9.)

A group of ILECs, including Brandenburg, opposed Windstream's transit tariff. (*Id.* at p. 10.) At the time that Windstream believed Brandenburg, like the other ILECs, was sending transit traffic through Windstream's Elizabethtown end office to carriers with routing locations on Windstream's network, Brandenburg still refused to compensate Windstream under the transit tariff for its use of Windstream's network. (*Id.*) Through the course of the transit tariff proceeding, Windstream notified Brandenburg that the traffic, believed to be transit traffic, was terminating improperly to an end office and was in excessive volumes. (Case No. 2007-00004.) Windstream also contacted Brandenburg in February 2007 regarding Brandenburg's failure to perform the required LNP dips on its traffic which Windstream had performed for the months of August 2005 through March 2007. Windstream worked extensively with Brandenburg to at least perform this function which Brandenburg finally did

on April 3, 2007. (Smith Direct Testimony at p. 12.) During this time that Windstream was working with Brandenburg on the LNP dips for what Windstream still believed was transit traffic, Windstream stated that it "will temporarily continue to route the call from the Elizabethtown end office to the CLEC (i.e., Verizon) that owns the LRN." (Willoughby Direct Testimony at p. 6, citing to email in Exhibit 1 from Windstream employee Steven Williams.) Windstream did not agree to route the traffic indefinitely or to route the traffic without compensation. (*Id.* at Exhibit 1.) To the contrary, Windstream was actively pursuing compensation from Brandenburg through the transit tariff case. (Smith Rebuttal Testimony at p. 10.) Further, Windstream's statement to continue the routing temporarily was made prior to the time that Windstream learned its network was being used by Brandenburg to circumvent Brandenburg's traffic dispute with Verizon. (*Id.* at pp. 8-9.)

Through the course of the transit tariff proceeding, Windstream rendered some billing invoices to Brandenburg inadvertently at the tandem transit rate (instead of the end office rate) of \$0.0030. (Windstream's Supplemental Data Request Response to Commission Staff dated September 12, 2008.) The invoices did not include amounts owed for the LNP dips which Windstream had to perform during the time that Brandenburg failed to do so. (Smith Direct Testimony at p. 12.)

Through Windstream's attempts to resolve the transit tariff case, Windstream recorded some of the traffic in order to provide records to the opposing ILECs, including Brandenburg, and investigated the records more thoroughly. (Smith Direct Testimony at p. 10.) Through these efforts, on or after April 2008, Windstream discovered that Brandenburg's traffic was not transit traffic and instead was traffic destined for a carrier (Verizon) without a LERG routing point associated with Windstream's network. (Smith Direct Testimony at pp. 9-10.) Consequently, Windstream contacted Brandenburg to demand immediate payment with

respect to the ISP traffic and to demand removal of the traffic from Windstream's network. (Smith Transcript at p. 79.) Allison Willoughby with Brandenburg informed Windstream that it had imposed a date of Friday, May 30, 2008 for Brandenburg and Verizon to establish direct connections. (*Id.*) Brandenburg also made clear that Brandenburg was not going to remit to Windstream any compensation related to this issue. (*Id.*)

On Monday, June 2, 2008, Brandenburg had not rerouted the unauthorized traffic and instead continued to route the ISP traffic to Verizon through the use of Windstream's Elizabethtown end office. (Windstream's Letter Dated June 2, 2008 to the Commission.) Windstream believed this to be a trespass on its network as Windstream maintains no agreement or tariff that provides for compensation for the unauthorized routing of traffic through its network. (Smith Transcript at p. 59.) Although Brandenburg and Verizon's negotiations had continued since 2005, neither had filed a complaint or arbitration with the Commission to reach resolution on the issue of direct interconnection between them. (Willoughby Transcript at p. 182.) Indeed, neither Brandenburg nor Verizon had incentive to reach alternative arrangements for their traffic so long as they continued to defer their expense by routing their traffic through Windstream's network at Windstream's expense. (Smith Rebuttal Testimony at pp. 8, 9, and 11.)

As Brandenburg's self-imposed date of May 30, 2008 came and went and believing this to be a trespass over which the Commission had no jurisdiction, Windstream took immediate action to cease the unlawful routing of traffic through its network on June 2, 2008. (Windstream's Letter Dated June 2, 2008 to the Commission.) Windstream also verified in advance that there would be no impacts to 911 emergency services and provided a courtesy notice of its action to the Commission. (*Id.*) Windstream prepared to file suit against Brandenburg and/or Verizon as necessary to collect compensation for the unauthorized use of

its network. (Smith Transcript at p. 59.) Over the next two days, no action was taken by Brandenburg or Verizon to respond to Windstream's action. On Wednesday, June 4, 2008, Verizon filed a letter with the Commission requesting an emergency conference call. (Verizon's Letter dated June 4, 2008 to the Commission.)

In response to Verizon's request, Commission Staff conducted an emergency telephonic conference on June 5, 2008. Windstream had five representatives present, and Verizon had 3 representatives present. Brandenburg had two attorneys and no business contacts present on the call. (Kentucky Public Service Commission Intra-Agency Memorandum July 1, 2008.) The sole focus of the conference was Windstream's notice and not the substantive routing issues. (*Id.*) Faced with an emergency hearing on June 6, 2008 directed at its notice, Windstream performed the necessary nine or ten minutes of translations necessary to again allow the unauthorized routing of the traffic through its network with the understanding that it would hold all responsible parties accountable. (Exhibits to Commission Order dated July 1, 2008.)

For Brandenburg to have properly rerouted the traffic during the time that Windstream took action to stop the unauthorized routing, Brandenburg could have accomplished proper rerouting with approximately ten to fifteen minutes of translations work. (Smith Rebuttal Testimony at p. 5.) Brandenburg's end user customers would not have experienced any downtime in their dial-up Internet service had Brandenburg acted after its self-imposed deadline of May 30, 2008 to reroute the traffic properly to Louisville. Brandenburg could have routed the traffic to Louisville and rated it as non-toll so that there would be no impacts to Brandenburg's end user customers. (Smith Direct Testimony at p. 12; Smith Rebuttal Testimony at pp. 11-12; Price Rebuttal Testimony at pp. 5-6; Price Transcript at pp. 96, 97, 100, and 101.) Although Brandenburg sympathized with the action taken by Windstream

(Willoughby Transcript at p. 165) and Verizon similarly acknowledged the complexity of the issues (Price Transcript at p. 153), they continue to route their traffic through Windstream's Elizabethtown end office.

Brandenburg and Verizon subsequently represented that they would make alternative routing arrangements, time passed without them properly resolving the routing of their traffic. (Exhibits to Commission Order dated July 1, 2008.) Brandenburg subsequently represented that it would reroute the traffic to Louisville "in conformity with established industry routing protocols" but would do so as toll traffic to its end users. (*Id.*) Thereafter, the Commission issued its Order dated July 1, 2008, asserting jurisdiction in this matter and requiring Windstream to remain in the middle of the traffic exchange between Verizon and Brandenburg. (*Id.*) The Order further directed all parties to keep accounts of the traffic exchanged in order to determine amounts owed. (*Id.*)

In response to the Commission's Order, Windstream filed its Motion for Emergency Hearing for July 9, 2008 and for Leave to File Prehearing Statement ("Windstream's Statement") on July 3, 2008. Verizon and Brandenburg filed responses to Windstream's Statement and primarily set forth separate issues concerning the negotiation of direct interconnection between them. (Responses by Brandenburg and Verizon dated July 7 and 8, 2008.) These tangential issues regarding direct interconnection between Brandenburg and Verizon are being addressed in separate Case No. 2008-00239 initiated by Brandenburg on July 1, 2008.

On July 11, 2008, the Commission granted a procedural schedule in this matter. Through Verizon's discovery responses in this matter, Windstream learned that the ISP traffic in question may have been exchanged through its network as early as August 2003 and in volumes as high as, if not higher than, 10,000,000 minutes per month during the early months

of this traffic exchange. (Verizon Data Request Response No. 1 to Windstream; Verizon Data Request Response No. 14 to Brandenburg.) Thus, Windstream's Statement as amended on August 15, 2008 requested revised compensation in the total amount of \$1,268,641.00 plus attorneys' fees and costs. (Windstream's Motion for Leave to Amend Position Statement dated August 15, 2008.) A hearing was held on August 19, 2008 after which supplemental data requests were filed on August 29, 2008 and again by Windstream on September 12, 2008.

As of the date of the filing of this Brief, the large volume of ISP traffic between Brandenburg and Verizon continues to be routed through Windstream's end office. Both Verizon and Brandenburg (each citing different reasons) agree that Windstream should be compensated. Yet, more than two and a half years have passed since Brandenburg first contacted Verizon to establish interconnection between them, and during that time, Windstream's end office has handled more than 206,285,939 minutes of traffic just from November 2005 through June 2008. Put another way, even this partial volume of minutes translates into 3,438,099 hours; 143,254 days; or 392 years. Windstream to date has received no compensation for this use of its network.

III. LEGAL POSITIONS

While the facts of this matter as set forth above are extensive and span years, the legal issues regarding indirect interconnection through Windstream's network appear relatively simple. Windstream notes that it confines its discussion to the issues in this proceeding only as to continued use of Windstream's network and associated compensation and does not address the more complex issues of direct interconnection between Brandenburg and Verizon which are the subject of Brandenburg's separate complaint case. The evidence in this current proceeding supports two findings. First, the Commission should order the immediate re-

routing of the traffic from Brandenburg to Verizon away from Windstream's network and through the Louisville tandem consistent with established LERG routing protocols. Second, Windstream should be fully compensated for the use of its network.

A. Windstream ceased the unauthorized routing.

Based on the questions posed at the hearing by Commission Staff, Windstream understands that the Commission believes that Windstream's notice regarding the cessation of the unauthorized routing through its network was insufficient. Windstream now understands the Commission's perspective and hopes that the Commission, nevertheless, has some appreciation that Windstream acted swiftly to cease what it viewed as an unlawful activity with the expectation that the two parties responsible for the routing of service for their customers - Brandenburg and Verizon - would have responded in an immediate manner that resulted in no impacts to their end users.

Windstream acted swiftly, as it believes it is required to do, to cease what it learned was a trespass on its network. As an initial matter, Windstream took no any action without first confirming that the subject traffic did not impact 911 emergency service. Shortly prior to the time that Windstream stopped the use of its network by Brandenburg to deliver this traffic to Verizon, Windstream discovered that the misuse of its network had been ongoing for years and was likely to continue since neither Verizon nor Brandenburg had any incentive to resolve their traffic dispute as long as they could continue misusing Windstream's network to exchange their traffic for free. Indeed, the issue had failed to garner any measurable action by Brandenburg or Verizon over the last several years until Windstream took action.

When Windstream contacted Brandenburg to discuss what it now knew was unauthorized traffic, Windstream was informed that Brandenburg had established Friday,

May 30, 2008 as the deadline by which it would resolve its traffic issue with Verizon and also that Brandenburg did not intend to remit any compensation to Windstream for the misuse of its network. That deadline passed, and on Monday, June 2, 2008, the traffic continued to route through Windstream's end office. Because the end user customers impacted were not those of Windstream, Windstream had no way of providing notice to end users. Nevertheless, the carriers that served the impacted end users (Brandenburg and Verizon) certainly were on notice for well over two years that they needed to take action to correct the misrouting of their customers' traffic.

After the time that Windstream acted to stop the unlawful routing, it acknowledges that Brandenburg customers were unable to call dial-up Internet service providers served by Verizon in Elizabethtown. It is not known whether Brandenburg used that opportunity to market its broadband service to dial-up customers calling Brandenburg to report service problems. Regardless, neither Brandenburg nor Verizon took action to remedy the routing.

Windstream believes it is critical to understand that its actions did not have to be and were not expected to be impacting to end users. To the contrary, Windstream anticipated that Brandenburg would perform the applicable translations to properly reroute the traffic to Louisville. As that translations can be performed literally in minutes, there need not have been any end user without dial-up Internet service. Brandenburg could have rerouted the traffic to Louisville, rated the calls to its end users as non-toll, and then pursued any amounts with respect to the lost toll charges from Verizon. Yet, Brandenburg did not do so. Moreover, Verizon could have acted within that time also to finally resolve the interconnection issues with Brandenburg by executing the same agreement with Brandenburg that it executed with South Central Telephone Company. Neither company took any such action.

At the hearing, Brandenburg's witness sympathized with Windstream's predicament, and Verizon's witness likewise stated that he understood the situation was complex. Nevertheless, Windstream continues to be held in the middle of a desperate and seemingly interminable position from which it had attempted to remove itself. Windstream can only hope that the Commission, like Brandenburg and Verizon, sympathizes with its actions and understands the unfair position in which Windstream has been placed.

Windstream's network is not on the call path for this traffic, and the traffic has nothing to do with Windstream's customers. Windstream receives no retail or wholesale revenues for the misuse of its network and believes that this proceeding risks exposing Windstream to having to subject itself to future incidents of routing contrary to established LERG routing protocols. Windstream admits that it does not fully understand on what basis the Commission asserted jurisdiction in this matter in its order initiating this investigation. Notwithstanding, Windstream pleads that the Commission invoke the same jurisdiction which the Commission used to order the continued routing through Windstream's network to remove Windstream from the Brandenburg / Verizon traffic dispute as Windstream previously attempted to do and also award Windstream full compensation for the use of its network based on the proxy rates that Windstream has provided.

B. Windstream should be removed from the middle of the traffic dispute between Verizon and Brandenburg.

The exchange of ISP traffic at issue in this proceeding concerns traffic between Brandenburg and Verizon and has nothing to do with any Windstream end user customer. However, because Brandenburg and Verizon have been unable to agree on direct interconnection between them, they continue to exchange their traffic on an indirect and improper basis through Windstream's end office in Elizabethtown. The indirect exchange of

traffic through Windstream's network is improper for several reasons. First, Brandenburg is misusing EAS trunks to deliver traffic to Windstream that is not EAS traffic destined to any Windstream customer. Second, Brandenburg is improperly utilizing Windstream's end office as a tandem. Third, Windstream's network is not on the call path for this traffic as Verizon's designated routing point for this traffic is Louisville. Fourth, the traffic is in such volumes that it necessitates direct connection between Brandenburg and Verizon.

The large volume of ISP traffic being routed by Brandenburg through the Windstream/Brandenburg EAS trunks to Windstream's end office is improper and unauthorized. The parties' EAS Agreement provides very clearly that the EAS trunks are only to be used for local calls between Windstream's Elizabethtown customers and Brandenburg's Radcliff and Vine Grove customers. The Windstream / Brandenburg EAS trunks were not sized to carry traffic of other parties such as Verizon. According to Brandenburg's estimates, more than 50% of the traffic delivered by Brandenburg over the EAS trunks is the ISP traffic to Verizon. Thus, were the EAS trunks not being burdened with this ISP traffic, arguably, the EAS trunks could be resized at a lower cost to Windstream and Brandenburg. Windstream notes also that as the applicable ISPs are not Windstream customers and are Verizon's customers, Windstream receives no corresponding EAS revenues from end users to defray this increased expense it is having to endure.

Moreover, Brandenburg is routing the large volume of ISP traffic to Windstream's end office and forcing the end office to function as a tandem. An end office is not designed to perform this type of tandeming function. Indeed, Brandenburg has not suggested in this proceeding that it would allow its own end offices to be used in such a fashion. The situation may be likened to a situation where someone takes a sedan four-wheeling cross country. If the sedan is well-made, it may be able to sustain the tough ride, but the wear and tear certainly

would jeopardize the integrity of the sedan. Likewise, Windstream's end office is being forced not only to provide a tandeming function which it is not designed to do but also to do so for an extremely large volume of traffic.

Additionally, Verizon established the proper routing point for this ISP traffic in the LERG as the Louisville AT&T tandem switch, which is outside of Windstream's network. Verizon does not dispute that it established its routing designation as Louisville. (Price Direct Testimony at pp. 8-9.) Yet, Brandenburg decided instead to deliver the traffic through Windstream's end office in Elizabethtown contrary to the clear industry routing protocols. If Brandenburg had an issue with Verizon's designated routing point, then Brandenburg and Verizon should have worked together to resolve that issue. However, it is inappropriate for them to defer that dispute by placing Windstream's network on the call path contrary to established LERG routing protocols. The LERG is the industry standard for establishing all carriers' designated routing points, and this case is no exception.

Finally, the volume of traffic being delivered through Windstream's network is at a DS3 level. A DS3 is the equivalent of 28 DS1s. A DS1 equates to approximately 250,000 minutes. As recently as 2008, the Commission affirmed a DS1 as an appropriate threshold at which point direct interconnection is necessitated. (Commission Orders in the Wireless Arbitration Proceedings.) Despite Verizon's estimates that the volumes of this ISP traffic were as high as 10,000,000 minutes per month as early as 2005, Verizon and Brandenburg failed to establish direct interconnection between them or to timely seek Commission resolution with respect to any unresolved negotiations between them. It was not until after Windstream took action to stop the routing through its network and the events that followed that Brandenburg filed a complaint against Verizon.

These points support Windstream's position that it should be removed from the middle of the Brandenburg/Verizon traffic dispute and have largely been conceded by Brandenburg in this proceeding. In a 2002 Commission proceeding involving Brandenburg's CLEC and Windstream's predecessor ("Verizon South"), *Brandenburg Telecom, LLC v. Verizon South, Inc.*, Case No. 2002-00143, Brandenburg took a position similar to that of Windstream in this proceeding – a position that was affirmed by the Commission in an Order dated May 23, 2002. In that case, Brandenburg's CLEC sought an order directing Verizon South to transit Brandenburg traffic, and Brandenburg's CLEC agreed in return that it was obligated to pay for the transit services provided by Verizon South. Although the facts of that case are partially distinguishable from this proceeding, it is nevertheless indicative that Brandenburg's CLEC recognized its obligation to compensate Windstream's predecessor for the use of its network in providing indirect interconnection – an obligation which Brandenburg's ILEC has refuted both in this proceeding and in the transit tariff proceeding. Further, in that 2002 proceeding, Brandenburg's CLEC acknowledged that once the traffic reached a DS1 level (a level which the traffic volumes in the current proceeding have far exceeded), direct interconnection would be required. In granting the requested relief to Brandenburg's CLEC, the Commission declared (at p. 5):

Our decision today will not negatively affect Verizon. It will be fairly compensated. Pursuant to the instant agreement, once Brandenburg's transit traffic exceeds a DS 1 level (300,000 min./mo.), Brandenburg will necessarily have to make alternative arrangements for transport of its traffic, thereby limiting any impact on Verizon's network.

Moreover, in its July 17, 2002 Memorandum Opinion and Order in CC Docket Nos. 00218, 00-249, and 00-251 (DA 02-1731), the Federal Communications Commission ("FCC") addressed the issue of transit service provided to AT&T and WorldCom by a Verizon ILEC

and also upheld a DS1 threshold as a reasonable level at which to require direct interconnection. In that matter, the FCC largely adopted the Verizon ILEC's proposal which allowed the Verizon ILEC to terminate its tandem transit service to the other parties once it reached a DS1 threshold and also required the other parties to pay additional charges for Verizon's tandem transit service during the transition period.

In this case, neither Brandenburg nor Verizon has agreed to pay for their use of Windstream's network or have secured the removal of the traffic from Windstream's network. Although Brandenburg realized the magnitude of its problem in late 2005 and pursued negotiations with Verizon for direct interconnection, it then took inadequate action to notify Windstream as to the true nature of the traffic, to compensate Windstream, or to resolve its negotiations with Verizon. Brandenburg did not file any complaint against Verizon until July 1, 2008, after Windstream took action to cease the routing through its network. Consequently, the parties sit here today, almost three years later, without Brandenburg having made the required "alternative arrangements" of the sort its own CLEC recognized in the 2002 Commission case. Although Windstream has not been a party to the Brandenburg/Verizon "negotiations," it is clear that had Brandenburg and Verizon entered into an appropriate traffic exchange agreement in 2005, 2006, or 2007, Windstream would not continue to be held in the middle of this dispute.

C. The traffic between Brandenburg and Verizon should not continue to be routed on an indirect basis.

At the hearing, the Commission questioned whether Windstream's network could be a part of a long-term solution, by having the Elizabethtown end office continue to handle the ISP traffic exchanged between Brandenburg and Verizon. Windstream does not believe this

approach is appropriate given the high volumes of traffic well in excess of a DS1 and also given the implications described previously to Windstream's end office.

No party disputes that the traffic is well in excess of a DS1, or 250,000 minutes per month. Currently approximately three million minutes per month are being exchanged between Brandenburg and Verizon, which is an extremely large volume – namely, a DS3 level. A DS3 is equal to 28 DS1s. Put another way, the traffic currently routing indirectly through Windstream's network is approximately 28 times greater than the level at which prior Commission decisions and the FCC have determined that direct interconnection is appropriate.

Even if Verizon designated a routing point behind Windstream's tandem and Windstream was granted compensation, the traffic in this case should not continue to be exchanged through Windstream's network due to the excessively large volume of ISP traffic that is being exchanged between Verizon and Brandenburg. Traffic of this volume can cause congestion and justifies establishment of direct interconnection between Verizon and Brandenburg. While indirect interconnection may be appropriate in some instances where traffic volumes may not justify the expense of direct connections, that is certainly not the case here. The current volume of this ISP traffic is 28 times greater than a DS1 level. Thus, the ultimate solution for the dispute between Brandenburg and Verizon should be one of direct connection between them and not one of indirect connection through a third-party carrier's network.

D. Prior to establishment of direct facilities between Brandenburg and Verizon, the ISP traffic originated by Brandenburg should be routed to Verizon in Louisville immediately.

During the time that Brandenburg and Verizon continue their dispute with respect to direct interconnection, there is no lawful basis on which to continue the indirect exchange of

their traffic through Windstream's network. As established above, delivery of the traffic to Windstream is inappropriate including for the reasons that it violates the Windstream / Brandenburg EAS agreement and established LERG routing protocols. If the traffic continues to be exchanged on an indirect basis, then Brandenburg should perform the necessary ten to fifteen minutes of translations to re-route the traffic appropriately to the Louisville tandem.

This rerouting may be accomplished either on a toll or non-toll rating basis, and Windstream has no preference for either option. Specifically, Brandenburg may route the traffic to Louisville as toll and rate the traffic as non-toll to its end users. Brandenburg stated that it is unwilling to rate the traffic as non-toll because that course of action "would take an awful lot of money". (Willoughby Transcript at p. 206.) Yet, Brandenburg also acknowledges that it has the lowest local rates in Kentucky (Willoughby Transcript at pp. 197-198.) Thus, it is more reasonable to expect Brandenburg (especially considering this is its customers' traffic) to incur the obligation to remedy the problem and seek a rate increase so that its customers are paying the costs of the services they receive rather than transferring those costs to Windstream and requiring Windstream to continue to endure routing that is wholly inapplicable to any Windstream customer or carrier with a routing point on Windstream's network. Brandenburg could rate the traffic as non-toll and separately pursue any reimbursement from Verizon to which Brandenburg believes it is entitled.

In the alternative, Brandenburg may immediately route the traffic to Louisville as toll and also rate the traffic as toll to end users. Brandenburg has stated that it is willing to take this action. While Verizon initially indicated that it would view that issue as a matter between Brandenburg and Brandenburg's customers, Verizon later stated in its supplemental data requests that it would oppose the traffic being rated as toll. This position seems somewhat disingenuous on the part of Verizon considering that Verizon is the party that established the

virtual NXX by designating separate rating and routing points for its traffic. In other words, Verizon established the rating point as being in Elizabethtown but designated the routing point for this traffic as being in Louisville. As established at the hearing, Verizon is not required to establish only one routing point but rather chose to establish only the one point in Louisville for the ISP traffic at issue in this proceeding.

In addressing the issue of a virtual NXX ("VNXX"), the United States Court of Appeals for the Second Circuit stated in its July 5, 2006 decision in *Global Naps, Inc. v. Verizon New England, Inc. et. al.* (454 F.3d 91) as follows:

Even if prohibiting virtual NXX would be fatal to Global, it is not clear to us that Global's view must prevail. Global wants to use virtual NXX to disguise the nature of its calls – that is, to offer its customers local telephone numbers that cross Verizon's exchanges instead of the traditional long-distance numbers attached to such calls. Virtual NXX is not the only way to accomplish this end although in light of economic realities, it may be the only practical way. But where a company does not own the infrastructure and is not willing to pay for using another company's infrastructure, we see no reason for judicial intervention. Congress opened up the local telephone markets to promote competition, not to provide opportunities for entrepreneurs unwilling to pay the cost of doing business.

Global also argues that virtual NXX is functionally equivalent to FX service and must be treated identically under the North American Numbering Plan (NANPA). Under 47 C.F.R. §52.9(a), when a state does not authorized numbering resources, it may do so only in a manner that does not discriminate against carriers or technologies or block interstate access. But, although virtual NXX and FX share some similarities, there is one fundamental difference: retail customers using FX service purchase a foreign exchange line, paying the costs both of installation of the line and of transportation of bulk traffic between the two points of communication. Virtual NXX customers, on the other hand, do not purchase any lines or pay transportation costs, but rely on the terminating carrier to provide the service without cost. The prohibition of virtual NXX does not necessarily prevent users from obtaining nongeographically correlated numbers, the ban simply requires that someone pay Verizon for use of its infrastructure.

(*Id.* at 31-32.) Like the carrier held accountable to the Verizon affiliate in the case above, the Verizon affiliate in this current proceeding should not be permitted to evade its

responsibilities in this matter associated with its establishment of different rating and routing points (*i.e.*, a VNXX) for the traffic in question.

In any case, it should not be Windstream that continues to endure the responsibility for this traffic. Rather, the traffic should be immediately rerouted to Louisville (Verizon's designated routing point for this traffic) and either rated as non-toll with Brandenburg bearing the responsibility or as toll with Verizon bearing the responsibility. The traffic should not continue to route through Windstream's network contrary to established LERG routing protocols with Windstream – an innocent third party – bearing responsibility for other parties' traffic.

E. Assertions by Brandenburg and Verizon that they are not responsible to compensate Windstream are without merit.

Verizon and Brandenburg suggest that they are not responsible for the traffic in question. Such arguments are without merit, and it should go without saying that as the traffic is not originated by or terminated to any Windstream customer that Windstream certainly should not continue to be held responsible for the traffic. In fact, Windstream believes that the only reason it is involved in this matter is that its network was used to disguise large volumes of ISP traffic over unrecorded EAS trunks so that Brandenburg and Verizon could defer their financial disputes with respect to the traffic.

Brandenburg first suggests that it is not responsible for the traffic for the reason that it did not receive notice that certain telephone numbers had been ported from Windstream to Verizon. As a threshold matter, Brandenburg's arguments are misguided as Brandenburg is responsible for performing its own LNP dips to identify any ported telephone numbers. Moreover, Brandenburg's position is belied by its own admission that it began performing

LNP dips as early as 2005 and discovered at that time the true nature of this ISP traffic. However, Brandenburg readily acknowledges that it did not in turn provide any notice to Windstream and further recognizes that it delivered the traffic to Windstream over EAS trunks which did not record the traffic, such that the extent and nature of the traffic was unknown to Windstream. Brandenburg readily admits that its own CLEC was operating in Windstream's Elizabethtown exchange as early as 2002 and was porting numbers from Windstream at that time. Thus, this begs the question that Brandenburg had to have been performing the LNP dips necessary to determine which calls from its Brandenburg ILEC should be routed to Windstream or to numbers ported to Brandenburg's CLEC, so why then was Brandenburg not performing similar LNP dips on its other traffic. Brandenburg knew of porting activity in the Elizabethtown exchange as early as 2002 and is responsible for performing its own LNP dips. The suggestion that Brandenburg is not responsible for the reason that it did not have knowledge that Verizon had ported certain numbers away from Windstream simply is not logical.

Likewise, Verizon denies any responsibility for its actions in establishing a virtual NXX with a routing point for this traffic in Louisville and a rating point in Elizabethtown. Verizon acknowledges that the LERG protocol "shows the AT&T tandem in Louisville as an industry standard default routing point" (Price Testimony, pp. 8-9), but Verizon then contends that Brandenburg is responsible for the traffic under Windstream's transit service tariff which Verizon asserts provides an established "alternate routing arrangement" that makes the LERG standards inapplicable. Nothing in Windstream's transit tariff implies that Windstream will endure routing contrary to established industry routing protocols. Further, the Brandenburg / Verizon EAS agreement recognizes that the parties will observe industry standard routing. Nevertheless, Windstream agrees with Verizon to the extent that the rates set forth in

Windstream's transit tariff offer a close and reasonable approximation of an appropriate proxy rate to be applied in this matter to determine compensation due to Windstream.

Interestingly, at the time that Windstream believed this ISP traffic to be transit traffic subject to its transit tariff, Brandenburg still denied compensation to Windstream. Brandenburg asserted that the Commission's recent decisions in several wireless arbitrations relieved it of any responsibility for the traffic, although Brandenburg did not refute that transit traffic is not appropriately delivered to an end office. Those Commission arbitration decisions apply to wireless traffic with intra-MTA implications and do not address ISP traffic – particularly ISP traffic routed contrary to LERG protocols and over unrecorded EAS trunks. Thus, even if one considers the ISP traffic in this matter to be transit traffic, then Windstream believes Brandenburg is the responsible party to compensate it under its transit tariff. In any event, Brandenburg is the party that chose to route this ISP traffic over unrecorded EAS trunks to Windstream's end office for delivery to a carrier without a routing point on Windstream's network and to do so without notice to Windstream of the nature or the extent of the traffic. Brandenburg did not dispute Windstream's cost studies submitted in the transit tariff proceeding supporting its end office transit tariff rate and also has not demonstrated in this current proceeding why the end office transit tariff rate is an insufficient proxy to be applied to the ISP traffic in this proceeding.

While each denies its responsibility, neither Verizon nor Brandenburg disputes that Windstream's network has been used to exchange their traffic or that their traffic has any relevance to any Windstream end user. It is clear that the current "freeloading" of Windstream's network exists solely as a result of the inability or unwillingness of Brandenburg and Verizon to reach an agreement as to which of them should bear financial responsibility for their traffic. At the same time, Verizon gained the benefits of the use of

Windstream's network by avoiding the costs of direct interconnection with Brandenburg. Likewise, Brandenburg benefited from the use of Windstream's network but also denied compensation to Windstream both under the prior transit tariff invoices and under Windstream's compensation claims in this proceeding using the transit tariff rate as a proxy.

Although Brandenburg and Verizon have injected their contractual issues into the current investigation (over Windstream's objections), these issues should not detract from the fact that Windstream is entitled to full compensation during the time that its network has been and continues to be misused by Brandenburg and Verizon. Indeed, Windstream's compensation claims are ongoing as neither party is incented to resolve their dispute so long as they can continue using Windstream's network for free. Windstream takes no position on the resolution of the disputes between Brandenburg and Verizon, except to say, that the Commission should take action in the separate complaint proceeding to hold their feet to the fire to reach an agreement. Based on the prior events, it seems apparent that if left to their own accord, Brandenburg and Verizon will never reach an appropriate agreement for the exchange of their traffic on a direct basis.

Thus, based on the foregoing, there should be little room for doubt that either Brandenburg or Verizon or both should be financially responsible for compensating Windstream for their ISP traffic. Windstream should no longer have to suffer at the hands of two regulated telecommunications companies obviously unwilling to do the right thing – at Windstream's expense. While Windstream sympathizes with the parties' efforts to reach an interconnection agreement between them, that matter does not provide a sufficient basis on which to continue holding Windstream in the middle of the dispute without compensation. There are two culpable parties in this matter – Brandenburg and Verizon – and one or both

should bear responsibility. The relative liabilities between them are questions for the Commission.¹

F. Windstream should be awarded its requested compensation.

For the reasons set forth in the foregoing sections, Windstream should be awarded its requested compensation and the use of its transit tariff end office rate to award such compensation is appropriate. Brandenburg and Verizon have utilized Windstream's end office to exchange their ISP traffic on an indirect basis for years. In doing so, Brandenburg and Verizon have collected retail revenues associated with their ISP traffic and have further benefited from the use of Windstream's network to defer the costs associated with their financial dispute over direct interconnection. The evidence suggests that Brandenburg misrouted the traffic through the unrecorded EAS trunks to avoid its dispute with Verizon or to avoid imposing toll calls on its customers. Either way, it is disingenuous for Brandenburg to attempt to evade responsibility for its traffic both in the transit tariff proceeding and now in this proceeding. Further, it is disingenuous for Verizon to dismiss this proceeding as a financial dispute merely between Brandenburg and Windstream. Verizon's actions in establishing a virtual NXX for its ISP traffic and its failure to timely enter into an interconnection agreement with Brandenburg lie at the heart of the disputes between Brandenburg and Verizon.

¹ Windstream notes that during the hearing, parties were questioned with respect to federal decisions regarding treatment of ISP traffic. While such decisions could have implications to the separate issues of compensation between Brandenburg and Verizon with respect to their ISP traffic, those decisions have no impact on and should not operate to deny Windstream relief in this proceeding. Very simply, the nature of the traffic is not relevant to Windstream's claim for compensation as the only key point is that its network has been used to exchange whatever traffic between Brandenburg and Verizon. Windstream acknowledges that the federal decisions regarding treatment of ISP traffic likely contributed to the breakdown of negotiations between Brandenburg and Verizon.

Brandenburg and Verizon have misused and continue to misuse Windstream's network in a manner that has forced Windstream's end office to perform transit-like functions. While Windstream does not maintain a tariff or agreement providing for the misuse of its network in this manner, the similarity of functionalities being performed by Windstream's network in this matter to that in a transit traffic scenario support Windstream's use of the rate set forth in its transit tariff for end office transit.

Factoring in the information from Verizon's data request responses demonstrating high volumes of traffic as early as August 2005 and applying Windstream's end office transit tariff rate of \$0.0045, compensation due Windstream is calculated in the amount of \$1,161,809.00. This transit tariff end office rate was supported by a cost study submitted by Windstream in the transit tariff proceeding and was not rebutted by Brandenburg either in the transit tariff proceeding or this current proceeding. While initial billings rendered by Windstream to Brandenburg in the transit tariff proceeding were in lower amounts, Windstream was not aware at that time of the nature and extent of the volume of traffic being exchanged through its network between Brandenburg and Verizon. Using current average volumes, the compensation increases approximately \$500 for every day that Windstream continues to be held in the middle of this dispute. Windstream also seeks interest in the amount of \$68,316.00, which Windstream believes is appropriate considering the prolonged period of time which its network has been used without its knowledge and with the refusal of both Verizon and Brandenburg to reach an agreement as to their respective financial responsibility for their traffic. Consequently, Windstream requests compensation plus interest in the amount of \$1,230,125.00.

Windstream also seeks reimbursement from Brandenburg for the LNP dips that Windstream had to perform during the time that Brandenburg failed to do so. Using a current

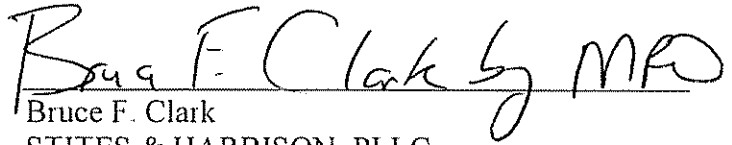
estimate of 16.5 minutes per message (for a total of 11.9 million calculated messages) and applying a rate of \$0.00305, Windstream requests \$36,299.00 plus interest in the amount of \$2,217.00 for performing the required LNP queries between August 2005 and March 2007.

Finally, Windstream has had to incur significant expenses to defend this matter as it continues to be held in the middle of a traffic dispute that should never have involved Windstream's network. Windstream requests that Verizon or Brandenburg or both be ordered to reimburse Windstream for its attorneys' fees and costs it has incurred as a result of the parties' continuing efforts to involve Windstream to evade their separate direct interconnection dispute.

IV. CONCLUSION

Windstream appreciates the Commission's initiating this investigation and providing an escalated procedural schedule. The evidence has demonstrated that Windstream has been taken advantage of by both Brandenburg and Verizon for years and is desperately seeking assistance from the Commission to stop the routing through its network and compensation for the prior use of its network. The failure by Brandenburg and Verizon to exchange their traffic in a commercially reasonable manner should not relieve them of their responsibility for their traffic. As they have, to date, deferred that responsibility to the detriment of Windstream, they should be ordered to immediately cease the routing through Windstream's network and to fully compensate Windstream. Windstream requests that the Commission use the same jurisdiction that it asserted in its order initiating this proceeding to award the relief Windstream seeks herein.

Respectfully submitted,

Handwritten signature of Bruce F. Clark in black ink, written over a horizontal line. The signature is cursive and includes the initials 'MFO' at the end.

Bruce F. Clark
STITES & HARBISON, PLLC
421 West Main Street
P.O. Box 634
Frankfort, KY 40602-0634
Telephone: (502) 223-3477

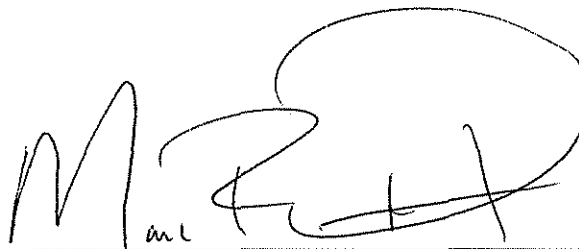
COUNSEL FOR WINDSTREAM KENTUCKY
EAST, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served by first class mail, postage prepaid, on those persons whose names appear below this 12th day of September, 2008.

John E. Selent
Edward T. Depp
Holly C. Wallace
DINSMORE & SHOHL, LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202

Douglas F. Brent Esq.
Stoll Keenon Ogden PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202-2874

A handwritten signature in black ink, appearing to read 'M. Brent', with a large, stylized flourish above the name.

Counsel for Windstream Kentucky East, LLC