



Dinsmore & Shohl LLP
ATTORNEYS

John E. Selent
502-540-2315
john.selent@dinslaw.com

RECEIVED

October 12, 2009

OCT 12 2009

PUBLIC SERVICE
COMMISSION

Hon. Jeff R. Derouen
Executive Director
Public Service Commission
211 Sower Blvd.
P. O. Box 615
Frankfort, KY 40602-0615

Re: **Re: *In the Matter of: An investigation into the traffic dispute between Windstream Kentucky East, LLC, Brandenburg Telephone Company and MCIMetro Access Transmission Services, LLC d/b/a Verizon Access, Commission Case No. 2008-00203***

Dear Commissioner Derouen:

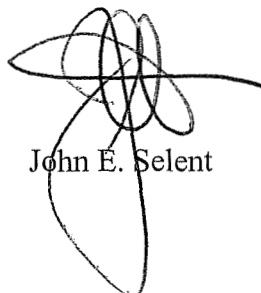
Enclosed herewith for filing is the original and ten copies of Brandenburg Telephone Company's Reply to the (i) Windstream and (ii) MCIMetro briefs, which is being filed in compliance with the Public Service Commission's Order dated August 26, 2009.

Please return a file-stamped copy of this brief with our courier.

Thank you, and if you have any questions with respect to this matter, please call me.

Very truly yours,

DINSMORE & SHOHL LLP



John E. Selent

JES/bmt

1400 PNC Plaza, 500 West Jefferson Street Louisville, KY 40202
502.540.2300 502.585.2207 fax www.dinslaw.com

Hon. Jeff R. Derouen
October 12, 2009
Page 2

Enclosures

cc: All parties of record

RECEIVED

OCT 12 2009

PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

BRANDENBURG TELEPHONE COMPANY'S REPLY TO THE WINDSTREAM AND
MCIMETRO BRIEFS FILED IN RESPONSE TO AN ORDER OF THE KENTUCKY
PUBLIC SERVICE COMMISSION DATED AUGUST 26, 2009

The Order

In its August 26, 2009 Order, the Kentucky Public Service Commission (the "Commission") ordered the parties to file detailed descriptions of the alleged costs owed to Windstream and how these costs should be allocated. (*Investigation Into Traffic Dispute Between Brandenburg Telephone Company, Windstream Kentucky East and Verizon Access*, Ky. P.S.C. Case No. 2008-00203, Order at 23, Appendix A (Aug. 26, 2009) (hereafter "August 26 Order").) The Commission further ordered that "[w]ithin 15 days of receipt of parties' calculation of costs owed, any party may file objections and responses to the same." (*Id.*)

Brandenburg Telephone Company's Response

In accordance with the Order, Brandenburg Telephone Company ("Brandenburg Telephone"), by counsel, hereby files its objections and responses to the September 25, 2009 briefs filed by Windstream Kentucky East, LLC ("Windstream") and MCImetro Access Transmission Services, LLC, d/b/a Verizon Access ("MCImetro").

I. INTRODUCTION.

On August 26, 2009, the Commission instructed the parties to explain how any costs owed to Windstream should be allocated. (August 26 Order, Appendix A.) Windstream and MCImetro argue that Brandenburg Telephone should be at least partly responsible for such costs for three reasons: (1) the "traffic arises from Brandenburg customers"; (2) Brandenburg Telephone "failed to perform the required LNP queries"; and (3) Windstream's transit traffic tariff allocates costs to Brandenburg Telephone as the originating carrier. (*See* Verizon's Comments in Response to August 26, 2009 Order, Ky. P.S.C. Case No. 2008-00203, at 2 (filed Sep. 25, 2009) (hereafter "Verizon's Response"); Response of Windstream Kentucky East, LLC to Order of August 26, 2009, Ky. P.S.C. Case No. 2008-00203, at 1-2 (filed Sep. 25, 2009) (hereafter "Windstream's Response").)

These arguments all fail. As Brandenburg Telephone explained in its September 25, 2009 filing, the facts all indicate that MCImetro should be responsible for any costs because this entire dispute resulted from its actions. MCImetro failed to perform the due diligence necessary to know what traffic exchange agreements it was responsible for executing, either as a calculated attempt to avoid costs or as the result of a hasty and reckless entry into the market.¹ MCImetro's refusal saved it money and caused this entire dispute.

Brandenburg Telephone's position, in contrast, as discussed more fully in its September 25, 2009 filing, left it without any options. Brandenburg Telephone had no knowledge of the issue for years because MCImetro failed to notify Brandenburg Telephone of its market entry, and because both MCImetro and Windstream failed to notify Brandenburg Telephone when MCImetro ported phone numbers. When Brandenburg Telephone finally learned of Windstream's concerns, its attempts to find a resolution repeatedly failed in the face of MCImetro's stubbornness. Windstream

¹ In addition, Windstream is owed nothing because it executed a traffic agreement by which it agreed to deliver the disputed traffic without compensation.

threatened permanent disconnection without hope for negotiation. MCImetro, meanwhile, refused to negotiate an appropriate traffic exchange agreement that would resolve the entire dispute. Brandenburg Telephone took every remedial step available -- it attempted to negotiate with the parties and eventually filed a Complaint with the Commission -- but was ultimately left with no choice but to continue delivering traffic through Windstream and await the Commission's decision.

Windstream's transit traffic tariff is irrelevant because the traffic in question here is not transit traffic, as Windstream readily admits. Brandenburg Telephone's role as the originating carrier is also irrelevant to the dispute. Finally, Windstream's alleged LNP query costs are not only irrelevant to an allocation of costs but also inflated by approximately 450%.

II. MCIMETRO IS RESPONSIBLE FOR ANY COSTS OWED TO WINDSTREAM.

As Brandenburg Telephone explained in its September 25, 2009 filing, any amounts owed to Windstream should be allocated to MCImetro alone. MCImetro is responsible for establishing a dedicated connection to Brandenburg Telephone's network. *See, e.g.*, 47 U.S.C. 251(a)(1); *In the Matter of Petition of Ballard Rural Tel. Coop. Corp., Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement with American Cellular*, Ky. P.S.C. Case No. 2006-00215, 2007 Ky. PUC LEXIS 191, *17 (Order of March 19, 2007). MCImetro refused, and continues to refuse, to fulfill this duty. (*See, e.g.*, Direct Test. of D. Price at 3:55-57 (testifying that MCImetro's refusal to interconnect is "completely appropriate under the circumstances".)) MCImetro was also responsible for conducting due diligence prior to entering the market and porting the affected telephone numbers. *See, e.g.*, 47 U.S.C. 251(a)(1); *Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements Between Telephone Companies*, N.Y. P.S.C. Case No. 00-C-0789 (Order of Dec. 22, 2000). MCImetro further refused to fulfill this duty.

(*See, e.g.*, Test. of D. Price, Aug. 18, 2008, Hearing Transcript at 131:20-132:5, 134:20-135:8, 136:13-24 (testifying that MCImetro had no responsibility to determine what effect its market entry would have on Kentucky customers).) These refusals saved MCImetro a substantial sum of money and directly caused this dispute, and as a result MCImetro should be held responsible for any resulting costs.

Setting aside MCImetro's consistent refusal to comply with its legal obligations, the facts indicate that no amounts are owed to Windstream. Windstream and MCImetro reached a traffic exchange agreement, pursuant to which Windstream agreed to carry the disputed traffic for no charge. *See* Interconnection Agreement Between Kentucky ALLTEL, Inc. & MCImetro Access Transmission Services, LLC, §§ 4.1-4.2 (filed with Commission). Nevertheless, if any compensation is owed, it should be allocated to MCImetro alone, as its refusals to fulfill its duties caused and extended this dispute.

III. WINDSTREAM AND MCIMETRO'S ARGUMENTS ARE INCORRECT AND IRRELEVANT.

A. Windstream's Transit Tariff Is Not Relevant to the Traffic in Question.

Although it remains uncertain if Windstream is owed anything, any existing right to compensation would not, as MCImetro claims, "arise[] from [Windstream's] transit tariff." (MCImetro's Response at 1. *See also* Windstream Kentucky East P.S.C. No. 7 ("Transit Tariff").) The Transit Tariff, discussed more fully in Brandenburg Telephone's October 1, 2009 Response to MCImetro's Motion for Correction and Rehearing, is inapplicable for two primary reasons. First, the Transit Tariff is arguably invalid and is actively disputed in another matter before the Commission, Case No. 2007-0004. Second, even setting aside the Transit Tariff's invalidity, it would not apply to the traffic disputed in this matter because Windstream — the only party with a financial stake in applying the tariff — admits the traffic in question is not transit traffic.

Windstream's Transit Tariff can provide no answer in this matter because it is invalid. The tariff filing involved numerous procedural irregularities and it violates federal law by improperly imposing rates, terms, and conditions that are required under the Telecommunications Act of 1996 to be negotiated. (47 U.S.C. § 251, *et seq.* (hereinafter the "Telecommunications Act").) In addition, the Transit Tariff purports to require carriers like Brandenburg Telephone to interconnect outside of their networks. This requirement is further contradicted by the Telecommunications Act and the Commission's recognition that incumbent carriers are generally "not responsible for costs incurred outside of" their networks. (*See* 47 U.S.C. 251(a)(1); Ky. P.S.C. Case No. 2008-00203, Order at 20 (Aug. 26, 2009).) Finally, the tariffed rates are not fair, just, or reasonable, and Windstream's only hope for justifying those rates rests with a *post hoc* cost study that -- incredibly -- confirms the chosen rate (initially proposed by a different carrier) down to 1/10,000 of a cent. (*See* Ky. P.S.C. Case No. 2008-00203, Brandenburg Telephone Company's Response to MCImetro's Motion for Correction and Rehearing at 7-9 (Oct. 1, 2009).)

Even still, the Transit Tariff is inapplicable because this Commission recognized that "Brandenburg's traffic was not what [Windstream] considered 'transit traffic.'" (August 26 Order at 5, 11 ("Windstream initially argued that . . . the traffic was not transit traffic").) As Windstream's witness testified, the tariff was always intended to apply to traditional wireline-to-wireline calls transiting its network and terminating to a network "homed" behind its tandem. (Test. K. Smith, Aug. 19, 2008, Hearing Transcript at 13:28-14:3.) Moreover, MCImetro has admitted the traffic in question here "is very different from traditional wireline-to-wireline calls because there's really not a simple point that you can talk about the termination of the call." (Test. D. Price, Aug. 19, 2008, Hearing Transcript at 84:16-19.) MCImetro's argument that the Transit Tariff resolves this matter is, therefore, incorrect because the Transit Tariff is invalid and inapplicable.

B. Brandenburg Telephone's Role as the Originating Carrier Is Irrelevant.

Without so much as the citation of even a single legal authority, Windstream argues that Brandenburg Telephone is "the principal party responsible for these amounts, as the traffic arises from Brandenburg customers." (Windstream's Response at 1.) It further argues that "Verizon also shares responsibility because it has benefited from the unauthorized routing of this traffic." (*Id.* at 2.) Windstream does not indicate how much of the responsibility MCImetro should "share," nor does it explain why Brandenburg Telephone's role as the originating carrier is determinative, whereas MCImetro's malfeasance is not.

To the extent Windstream suggests that Brandenburg Telephone's role as the originating carrier subjects it to the Transit Tariff, the argument fails for the reasons discussed in Section III.A, above. In any event, Windstream's focus on Brandenburg Telephone's role as the originating carrier fails to recognize that MCImetro (not Brandenburg Telephone) caused this dispute. MCImetro failed to conduct due diligence and refused to execute the necessary traffic exchange agreement with Brandenburg Telephone, even though it entered an appropriate agreement with another RLEC (South Central Rural Telephone Cooperative Corporation). When Brandenburg Telephone proposed that MCImetro execute a substantively identical agreement, MCImetro still refused to execute it.² Even now that the Commission ordered MCImetro to enter into an agreement, *see* August 26 Order at 23, MCImetro is still refusing and has filed a Motion for Rehearing contesting the need for an agreement because if it signs an agreement it will have to pay for facilities it should have paid for since entering the market.³ In short, this dispute was caused solely by MCImetro, and it is being perpetuated solely

² As a result, Brandenburg Telephone was forced to file a formal complaint at the Public Service Commission on June 25, 2008. *In the Matter of: Brandenburg Telephone Company v. MCImetro Access Transmission Services, LLC and Windstream Kentucky East, Inc.*, Ky. P.S.C. Case No. 2008-00239.

³ This Motion should be denied for reasons described in Brandenburg Telephone's October 1 Response.

by MCImetro. Windstream itself exacerbated the problem by failing to bill Brandenburg Telephone (thereby notifying it of the MCImetro problem) for any LNP queries it may have performed. Although Brandenburg Telephone is originating the traffic, none of the disputes involved in this matter result from that role. Therefore, if anyone is responsible to Windstream for anything, it is MCImetro.

Brandenburg Telephone's role as the originating carrier is, consequently, irrelevant to the question of how costs owed to Windstream, if any, should be allocated.

C. In Any Event, Windstream's Estimated "Amount Due for LNP Queries" is 450% Higher than the Actual Amount.

Windstream argues that it is owed \$36,299 for LNP queries performed from August 2005 through March 2007. (Direct Test. of K. Smith, Aug. 8, 2008, at 13:22-14:4 ("Windstream performed LNP queries for the months of August 2005 through March 2007"); MCImetro's Responses to the Public Service Commission's Data Requests, Attachment A ("MCImetro's Data Responses, Attachment A") (estimated number of relevant minutes).)⁴ As with other costs, to the extent any LNP query costs are owed, they should be borne by MCImetro alone.

As explained in Section II above, MCImetro had a duty to investigate the market before entering it and porting numbers. It refused to fulfill that duty. In addition, MCImetro failed to notify Brandenburg Telephone of its entry into the market. Brandenburg Telephone therefore never knew of the necessity of the LNP queries. The problem caused by MCImetro was exacerbated by Windstream's failure to bill Brandenburg Telephone for any LNP queries it may have performed. Without a request for an exchange agreement or an invoice for LNP queries arriving, Brandenburg

⁴ $196,350,000$ [alleged total # of minutes] / 16.5 [alleged minutes/call] = $11,900,000$ [alleged total # of calls]

$11,900,000$ [alleged total # of calls] * $\$0.00305$ [LNP charge/call] = $\$36,295$ [alleged total amount due]

Telephone could have only known about the need for queries if its subscribers' calls failed due to the lack of a query. That never happened here.

As a result, Brandenburg Telephone did not know the LNP queries were being performed until approximately two years later. Had MCImetro performed its duties at the outset, Brandenburg Telephone would have been alerted to the necessity of the queries and would have performed them itself, saving Windstream any associated costs. It is clear Brandenburg Telephone did not take an issue to performing this function, as it began conducting the LNP queries itself in early 2007 at a fraction of the cost charged by Windstream. MCImetro should therefore be liable for any LNP query costs, because its refusal to meet its legal obligations directly caused Windstream to incur the LNP costs.

Setting aside the issue of MCImetro's liability, Windstream's calculations rely on incorrect numbers for the total number of minutes and the estimated minutes-per-call. Consequently, the total amount allegedly due is inflated.

First, MCImetro's usage estimate of 196,350,000 minutes (MCImetro's Data Responses, Attachment A) is artificially high. In 2007, Brandenburg Telephone conducted an internal traffic study that showed that MCImetro's usage estimates were consistently 10% higher than Brandenburg Telephone's calculations. In addition, the veracity of MCImetro's estimates is doubtful because, in the course of a consistent downward trend of 12,000,000 or fewer minutes per month, the estimates include a bizarre 30,000,000-minute spike in August of 2005. The reason for this fluctuation, and for the consistent 10% inflation, is uncertain. Nevertheless, correcting for MCImetro's consistent 10% inflation indicates that a more accurate estimate of the number of total minutes relevant to this dispute is 178,500,000.

Second, based on its study of current usage, Brandenburg Telephone determined that its call duration averaged 68 minutes of hold time per call to the numbers served by MCImetro, not 16.5 minutes as Windstream claims.⁵ In performing its study, Brandenburg Telephone only looked at the hold times of MCImetro traffic. It disregarded hold times for voice traffic, which are irrelevant to this case and which would have the effect of improperly deflating the minutes-per-call estimate (an effect which may account for the 51.5 minute difference between Brandenburg Telephone's and Windstream's numbers). Based on this methodology, Brandenburg Telephone's estimate appears consistent with bills rendered to companies in the state by MCImetro itself. Substituting the appropriate numbers for total minutes and minutes-per-call into the calculation, even allowing for MCImetro's inexplicable 30,000,000-minute one-month spike, yields a total amount due of \$8,006.25.⁶

Of course, Windstream's alleged costs for conducting LNP queries, like any other costs in this matter, were directly caused by MCImetro's failure to fulfill its legal duties when entering the market. Thus, if Windstream is entitled to any compensation for LNP queries, it is only entitled to collect the \$8,006.25 from MCImetro, who is solely at fault for causing Windstream to conduct these queries.

⁵ Windstream claims its number is based on "a current estimate," but it provides absolutely no support for this "estimate."

⁶ $178,500,000$ [total # of minutes] / 68 [minutes/call] = $2,625,000$ [total # of calls]
 $2,625,000$ [total # of calls] * $\$0.00305$ [LNP charge/call] = $\$8006.25$ [total amount due]

IV. CONCLUSION.

Neither Windstream's Transit Tariff nor Brandenburg Telephone's role as originating carrier are relevant to the cost-allocation question posed by the Commission. Any costs owed to Windstream were caused by MCImetro's refusal to conduct the legally required due diligence before entering the market and its continued refusal, in contempt of the August 26 Order, to negotiate an appropriate traffic exchange agreement. Brandenburg Telephone therefore respectfully requests the Commission order that the costs, if any, owed to Windstream be borne exclusively by MCImetro.

Respectfully submitted,



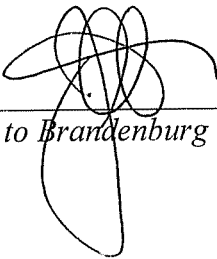
John E. Selent
Edward T. Depp
Holly C. Wallace
DINSMORE & SHOHL LLP
1400 PNC Plaza
500 West Jefferson St.
Louisville, Kentucky 40202
Tel: (502) 540-2300
Fax: (502) 585-2207
*Counsel to Brandenburg Telephone
Company*

CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing was served, by first-class United States mail, sufficient postage prepaid, on the following individuals this 12th day of October, 2009.

Bruce F. Clark, Esq.
Stites & Harbison, PLLC
421 West Main Street
P.O. Box 634
Frankfort, KY 40602-0634
Counsel to Windstream

C. Kent Hatfield, Esq.
Douglas F. Brent, Esq.
Stoll Keenon Ogden, PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202
Counsel to MCImetro



Counsel to Brandenburg Telephone Company