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October 27, 2009

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OCT 27 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 Mr. Derouen:

Enclosed herewith for filing is the original and eleven copies of Brandenburg Telephone Company's Response to Windstream Kentucky East, LLC's Motion for Leave to File a Surreply.

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

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

Sincerely,

DINSMORE & SHOHL LLP

Edward T. Depp

ETD/bmt
Enclosures
cc: All parties of record

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

OCT 27 2009

PUBLIC SERVICE
COMMISSION

In the Matter of:

AN INVESTIGATION IN 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

**BRANDENBURG TELEPHONE COMPANY'S RESPONSE TO WINDSTREAM
KENTUCKY EAST, LLC'S MOTION FOR LEAVE TO FILE A SURREPLY**

Brandenburg Telephone Company ("Brandenburg Telephone"), by counsel, hereby files its response to Windstream Kentucky East, LLC's ("Windstream") Motion for Leave to File a Surreply in Response to the Reply Brief Filed by Brandenburg Telephone Company ("Motion for Leave" and attached "Proposed Surreply"), and sets forth the reasons why Windstream's allegations are unfounded and why its Motion for Leave should be denied.

INTRODUCTION

Brandenburg Telephone filed its Reply to the Windstream and MCImetro Briefs Filed in Response to an Order of the Kentucky Public Service Commission Dated August 26, 2009 ("Reply") in an attempt to take a reasonable step forward in helping to resolve this dispute. Windstream seeks to turn this reasonableness into a weapon by distorting Brandenburg Telephone's arguments and factual analysis into confessions of fact that are not true. Windstream's allegations that Brandenburg Telephone misstated facts and relied on evidence not of record in its Reply are incorrect and contradicted by the record.

First, Windstream mischaracterizes Brandenburg Telephone's arguments and assertions when it claims that the Reply contains "factual declarations and assertions that are directly contradictory"

to previous testimony. As set forth in more detail below, the facts as set forth in the Reply are consistent with the facts Brandenburg Telephone set forth in previous filings and testimony.

Second, Windstream's allegation that the Reply inappropriately references traffic studies not of record seemingly ignores the Kentucky Public Service Commission's (the "Commission") August 26 Order, in which the Commission explicitly stated it seeks to "further develop the record in order to determine the proportionate liabilities and responsibilities of the parties." (*Investigation Into Traffic Dispute Between Brandenburg Telephone Company, Windstream Kentucky East and Verizon Access*, Ky. P.S.C. Case No. 2008-00203, Order, p. 22 (Aug. 26, 2009) (hereafter "August 26 Order").)

Third, the surreply Windstream tendered to "clarify" the record contains serious mischaracterizations of critical facts, and its filing would consequently (and ironically) only serve to confuse the record. The facts establish that MCImetro Access Transmission Services, LLC, d/b/a Verizon Access ("MCImetro") is responsible for this conflict and should be held accountable.

ARGUMENT

I. WINDSTREAM MISCHARACTERIZES THE FACTS AND ARGUMENTS SET FORTH IN BRANDENBURG TELEPHONE'S REPLY.

Despite Windstream's allegations, the facts as set forth in Brandenburg Telephone's Reply are consistent with its previous filings and testimony. For this reason, the entire premise of Windstream's Motion for Leave is faulty and the motion should be denied.

Windstream conflates two separate issues when it argues that Brandenburg Telephone's knowledge of a potential traffic issue in 2005 proves it must have also known of the necessity of LNP queries for the MCImetro traffic in 2005. Brandenburg Telephone's knowledge of one does not indicate knowledge of the other, particularly when, as the record shows is the case here, MCImetro and Windstream both withheld material facts from Brandenburg Telephone.

In 2005, Brandenburg Telephone was conducting LNP queries due to the presence of its CLEC in Elizabethtown. After receiving complaints from "a small number" of its end user customers, Brandenburg Telephone discovered that its performance of LNP queries was apparently causing calls to fail for unknown reasons. (*See, e.g.*, Prefiled Direct Test. of A. Willoughby, p. 4:8-17 (Brandenburg Telephone received "complaints from a small number of its own end-users"); Test. of A. Willoughby, Aug. 19, 2008, Transcript p. 169-170 ("when we implemented these LNP queries, calls that had been flowing over these trunks began not being terminated".))

After the discovery of this potential traffic issue, as Brandenburg Telephone has consistently testified, "[r]ather than block this traffic . . . [Brandenburg Telephone] used its existing EAS trunk group to the Windstream Elizabethtown switch to terminate the traffic" (Direct Test. of A. Willoughby, p. 4:12-14.) Brandenburg Telephone's sole recourse to stop the blocking of this traffic was to manually disable queries on the very small amount of telephone numbers it was able to identify based on its customer complaints. To this end, LNP queries were discontinued on the handful of numbers identified as failing because the queries themselves appeared to be the source of the problem for these numbers. (*See* Test. of A. Willoughby, Aug. 19, 2008, Transcript p. 169-170 (believed traffic in question to be "very few minutes"); Direct Test. of A. Willoughby, p. 4:12-13 (traffic was routed "believing the volume of traffic to be de minimis").)

Only when the problem surfaced again did MCImetro contact Brandenburg Telephone and identify itself as the owner of the traffic in question. At this time, in 2005, MCImetro was the only party capable of providing notice of the breadth and scope of the potential traffic issue. That notification would have alerted Brandenburg Telephone to the (unbeknownst to Brandenburg Telephone) huge volume of traffic destined for MCImetro and warned Brandenburg Telephone that it was not querying a large number of calls, and not just the two to three calls per month as it

believed. (Test. of A. Willoughby, Aug. 19, 2008, Transcript p. 183:8-13 (neither Windstream nor Brandenburg Telephone knew of the traffic).) That did not happen. Instead, MCImetro stayed silent in order to enjoy the delivery of its traffic for free. And, Brandenburg Telephone never received any information from MCImetro sufficient to alert Brandenburg Telephone to the magnitude of the traffic and the "necessity of the LNP queries." (Reply, p. 7.)

Windstream's Motion for Leave seeks to elevate Brandenburg Telephone's 2005 LNP queries into a slew of admissions, including that Brandenburg Telephone "knew of the necessity of LNP queries in 2005" and was attempting "to allow the traffic to be concealed." These arguments either misunderstand or misstate the nature of Brandenburg Telephone's 2005 LNP queries. As stated above, Brandenburg Telephone was conducting LNP queries in 2005 for the sole reason that it had traffic exchange agreements with certain CLEC's located in Elizabethtown. The traffic destined for those CLEC's is not at issue in this proceeding, nor are the LNP queries Brandenburg Telephone was conducting for those calls in dispute. Brandenburg Telephone does not claim it never performed any LNP queries whatsoever. Rather, Brandenburg Telephone disputes Windstream's accusation that Brandenburg Telephone allegedly knew it should have performed LNP queries specifically for MCImetro-bound traffic from 2005 to 2007. To be clear, it is with that MCImetro-bound traffic that Brandenburg Telephone "never knew of the necessity of the LNP queries." (Reply, p. 7.)

Two significant facts contributed to Brandenburg Telephone not knowing of the necessity of the LNP queries for the MCImetro-bound traffic. First, Brandenburg Telephone firmly believed that the potential traffic issue was a temporary problem, as it approached MCImetro with a reasonable request for a traffic exchange agreement as soon as it learned MCImetro was the source of the problem. (Test. of A. Willoughby, Aug. 19, 2008, Transcript p. 170 ("We're going to continue to send these,' what we thought, 'very few minutes to Windstream for a limited period of time"); Direct

Test. of A. Willoughby, p. 4:18-23 (routing was “meant to be only an interim arrangement” and Brandenburg Telephone “promptly sent MCImetro a proposed traffic exchange agreement in late 2005 to address this issue”).) Brandenburg Telephone therefore never had reason to establish regular and ongoing practices to handle what it realistically believed was a transient situation. As established in Brandenburg Telephone's Response to the August 26 Order, the traffic in question became an ongoing issue only because MCImetro refused to negotiate a traffic exchange agreement in good faith. (*See* Ky. P.S.C. Case No. 2008-00203, Brandenburg Telephone Company's Response to the August 26 Order (filed Sep. 25, 2009).)

Second, and more critically, Brandenburg Telephone believed that the traffic at issue was de minimis. (Test. of A. Willoughby, Aug. 19, 2008, Transcript p. 169-170; Direct Test. of A. Willoughby, p. 4:12-14.) By definition, “de minimis” means “so insignificant that a court may overlook it in deciding an issue or case.” (BLACK'S LAW DICTIONARY, 8th Ed., p. 464.) Brandenburg Telephone therefore never had reason to believe that there was such a volume of traffic that LNP queries for the traffic in question would be necessary.

In any event, even if Brandenburg Telephone knew of the need for LNP queries for the MCImetro traffic at this time, as Windstream claims, it would have no reason to know that the need was anything other than de minimis. These facts, as set forth in its prior testimony and filings, establish precisely what Brandenburg Telephone asserts in its Reply -- that it "never knew of the necessity of the LNP queries" until Windstream made contact in February of 2007. (Reply, p. 7.) As established in Brandenburg Telephone's Response to the August 26 Order, MCImetro stayed silent in order to continue to enjoy the free termination of its traffic, rather than provide Brandenburg Telephone with the information necessary to determine the volume of traffic involved. (*See* Ky.

P.S.C. Case No. 2008-00203, Brandenburg Telephone Company's Response to the August 26 Order (filed Sep. 25, 2009).)

Windstream now claims it suffered significant damages from performing LNP queries from 2005 to 2007, yet, it never billed Brandenburg Telephone for these queries. (*See, e.g.*, Direct Test. of K. Smith, Aug. 19, 2008, Transcript p. 3:22-14:4 (claiming Windstream is owed \$36, 299 for LNP queries performed).) Windstream did not contact Brandenburg Telephone about the LNP queries until February of 2007, when it threatened to block the traffic. (Direct Test. of A. Willoughby, p. 5:1-8.) It was not until the following year, in "early 2008, [that] Windstream informed Brandenburg . . . that MCImetro was terminating more than three million (3,000,000) minutes of traffic per month to its ISP customers. (Direct Test. of A. Willoughby, p. 6:12-14.)¹ In fact, as established above, Brandenburg Telephone believed during this time period that the traffic at issue was de minimis. (Test. of A. Willoughby, Aug. 19, 2008, Transcript p. 169-170; Direct Test. of A. Willoughby, p. 4:12-14.) Therefore, as set forth in Brandenburg Telephone's Reply, in the absence of MCImetro abiding by its obligation to enter a traffic exchange agreement with Brandenburg Telephone (as it has now been ordered to do by the Commission), or Windstream billing Brandenburg Telephone for the LNP queries performed (as it now seeks to), or Windstream blocking the traffic (as it later did), Brandenburg Telephone did not know "of the necessity of the LNP queries" and "did not know the LNP queries were being performed" by Windstream until 2007. (*See Reply*, p. 7-8.)

After Windstream's February 2007 communication to it, Brandenburg Telephone "subsequently implemented the changes necessary to query the traffic in question" (or, as

¹ It is especially odd that Windstream stayed silent for two years, given that the traffic at issue has consistently declined every year since 2005. (*See MCImetro's Responses to the Public Service Commission's Data Requests, Attachment A* (estimated number of relevant minutes).) It would be logical for Windstream to raise its concerns when the alleged problem was at its worst, but instead Windstream waited until the traffic was significantly diminished before raising the issue.

Brandenburg Telephone states in its Reply, it “began conducting the LNP queries itself in early 2007”). (Direct Test. of A. Willoughby, p. 5:6-9; Reply, p. 8.) This voluntary implementation of the LNP queries for the MCImetro traffic, upon notice from Windstream, indicates that the only reason Brandenburg Telephone did not perform the LNP queries itself was that it did not know until February of 2007 that the queries were necessary, or that such a volume of queries was being performed by Windstream. Earlier notice by Windstream would likely have led to Brandenburg Telephone’s earlier implementation of the LNP queries for the MCImetro traffic. Consequently, Windstream’s alleged damages for LNP queries conducted from 2005 to 2007 were “exacerbated by Windstream’s failure to bill Brandenburg Telephone for any LNP queries it may have performed.” (Reply, p. 7.)

These facts establish that Brandenburg Telephone’s Reply is entirely consistent with its prior testimony and filings (and is in some cases almost a verbatim duplication). Windstream’s claim that the “Reply makes factual declarations and assertions that are directly contrary to the testimony of Brandenburg Telephone’s witnesses” is nothing more than a mischaracterization of Brandenburg Telephone’s arguments and a conflation of two separate issues. Windstream’s Motion for Leave should therefore be denied.²

² Brandenburg Telephone notes with some amazement that Windstream consistently points the finger at Brandenburg Telephone as the responsible party despite MCImetro's consistent refusals to meet its legal duties. The responsible party is MCImetro. MCImetro admits it ported numbers without conducting the research necessary to determine how the calls would be transported and terminated, and failed to seek the necessary traffic exchange agreements. MCImetro further claims it had no obligation to determine how its porting of numbers would impact Kentucky customers, a position directly contradicted by persuasive authority finding that a company porting numbers is responsible for establishing traffic exchange agreements prior to the porting to avoid this exact situation. (See Ky. P.S.C. Case No. 2008-00203, Brandenburg Telephone Company's Response to the August 26 Order, p. 9-11 (filed Sep. 25, 2009).)

II. BRANDENBURG TELEPHONE'S DISCUSSION OF EVIDENCE NOT YET OF RECORD IS IN DIRECT RESPONSE TO THE COMMISSION'S REQUEST FOR MORE INFORMATION.

Windstream's concerns about Brandenburg Telephone's references to traffic studies are similarly unfounded, because additional evidence was contemplated by the Commission. In its August 26 Order, the Commission explicitly stated that it "must further develop the record in order to determine the proportionate liabilities and responsibilities of the parties." (August 26 Order, p. 22.) To that end, the Commission ordered Brandenburg Telephone to file a "detailed description of how it believes the costs owed to Windstream (if any) should be allocated among the parties." (August 26 Order, Appendix A.) The Commission is therefore clearly contemplating that Brandenburg Telephone's "detailed description" of cost-allocation may contain additional evidence, since the Commission believes the current record is "not sufficiently specific to support a Commission determination" on the issue. (*See* August 26 Order, p. 22.)

Windstream's complaint, therefore, appears to be that Brandenburg Telephone complied with the Commission's August 26 Order. Brandenburg Telephone's compliance with that Order, it goes without saying, does not justify Windstream's Motion to file a surreply. Therefore, Windstream's Motion should be denied.

III. WINDSTREAM'S PROPOSED SURREPLY MISREPRESENTS CRITICAL FACTS.

Windstream's Motion for Leave is primarily based on its allegation that Brandenburg Telephone's Reply misrepresents the time at which Brandenburg Telephone was aware of "the misuse of Windstream East's system to transport the ISP traffic." (Proposed Surreply, p. 5.) As established above, this allegation is baseless. Instead, and ironically, Windstream's surreply proposing "to ensure that the record before the Commission is accurate" contains significant and self-serving misrepresentations of facts. (Proposed Surreply, p. 1.)

Setting aside Windstream's misrepresentations of Brandenburg Telephone's prior testimony and filings, as described above, Windstream makes the serious allegation that its "network has knowingly been misused by Brandenburg Telephone and Verizon for over four (4) years" (Proposed Surreply, p. 6.) This statement is false.

Windstream intentionally glosses over the fact that it explicitly consented to route the traffic from at least April of 2007 to June of 2008, at which point it unlawfully blocked the traffic without notice or warning to the Commission, or to any of the affected carriers or customers. (Direct Test. of A. Willoughby, p. 5:22-7:7 (quoting, in relevant part, an email from Windstream employee Steven G. Williams as saying "Windstream agreed to transit the traffic for Brandenburg" with certain conditions).) Windstream cannot now attempt to characterize traffic routed through its network with its explicit permission as a "misuse" of that network. Subsequent to Windstream's unilateral blocking of the traffic, Windstream again consented to temporarily carrying the traffic in question. (See *Investigation Into Traffic Dispute Between Brandenburg Telephone Company, Windstream Kentucky East and Verizon Access*, Ky. P.S.C. Case No. 2008-00203, Order, Appendices D-E (Jul. 1, 2008).) Then, on July 1, 2008, the Commission ordered that "[t]he traffic arrangements . . . shall continue in their current form until this dispute is resolved." (*Investigation Into Traffic Dispute Between Brandenburg Telephone Company, Windstream Kentucky East and Verizon Access*, Ky. P.S.C. Case No. 2008-00203, Order, p. 4 (Jul. 1, 2008).) Thus, from July of 2008 to the present, the traffic in question has been routed through Windstream's network pursuant to an unambiguous order of the Commission; use of a network in compliance with a Commission Order cannot be characterized as "misuse" of that network.

Therefore, only from 2005-2007 was there use of Windstream's network that was not either consented to or ordered. With respect to those years, Brandenburg Telephone has consistently

testified that it believed the traffic at issue was de minimis until Windstream finally contacted it in February of 2007. (Test. of A. Willoughby, Aug. 19, 2008, Transcript p. 169-170; Direct Test. of A. Willoughby, p. 4:12-14.) It has also testified that it believed that routing this de minimis traffic through Windstream was the only option available to it, and that it believed the arrangement to be temporary. (Direct Test. of A. Willoughby, p. 4:14-20.)

Windstream's claim that its "network has knowingly been misused by Brandenburg Telephone and Verizon for over four (4) years" is contradicted by the record. From 2005 to 2007, Brandenburg Telephone had no knowledge of "misuse," nor did it have any knowledge of any appropriate "use" other than a de minimis amount of traffic. From 2007 to 2008, traffic was routed through Windstream's network either with Windstream's explicit consent or at the Commission's explicit command (or was, for a short period, blocked by Windstream and therefore not routed through Windstream at all). Windstream's misrepresentation of Brandenburg Telephone's knowledge of the alleged "misuse," along with the misrepresentations set forth above, indicate that Windstream's purported attempt to clarify the record is itself a mischaracterization of the record. Windstream's Motion for Leave should therefore be denied.

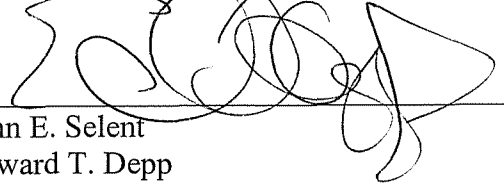
CONCLUSION

Windstream is purportedly concerned that Brandenburg Telephone's Reply will "prevent the Commission from being presented with those factual circumstances necessary for a reasoned and lawful decision to be made." (Motion for Leave, p. 1.) As established above, this concern is completely baseless.

The alleged factual inaccuracies of Brandenburg Telephone's Reply are consistent with and supported by prior testimony, and the alleged improper evidence was explicitly contemplated by the Commission. For these reasons, Brandenburg Telephone respectfully requests that the Commission

deny Windstream's Motion for Leave to File a Surreply in Response to the Reply Brief Filed by
Brandenburg Telephone Company.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'John E. Selent', written over a horizontal line.

John E. Selent

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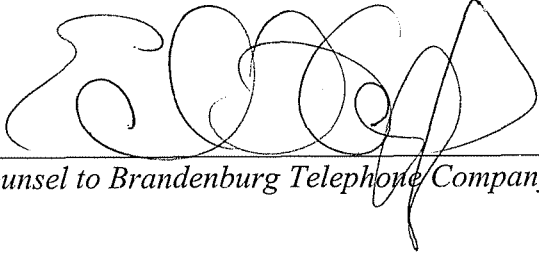
Counsel to Brandenburg Telephone Company

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 27th day of October, 2009.

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