

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

DANA BOWERS	)	
	)	
COMPLAINANT	)	
	)	CASE NO.
V.	)	2010-00447
	)	
WINDSTREAM KENTUCKY EAST, LLC	)	
	)	
DEFENDANT	)	

O R D E R

Windstream Kentucky East, LLC (“Windstream”) is hereby notified that it has been named as a defendant in a formal complaint<sup>1</sup> filed on November 16, 2010, a copy of which is attached hereto.

Pursuant to 807 KAR 5:001, Section 12, Windstream shall file a written answer to the complaint within 10 days of the date of service of this Order.

Additionally, the Commission hereby orders Commission Staff to hold a telephonic informal conference in this matter to discuss the substance of the complaint and develop a procedural schedule for this proceeding.

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<sup>1</sup> The Petitioner, Dana Bowers, styled this proceeding as a Petition for Declaratory Ruling. For administrative purposes, the Commission shall treat this matter as a formal complaint. Having reviewed the filing, the Commission finds that a prima facie case has been established, as required under 807 KAR 5:001, Section 12.

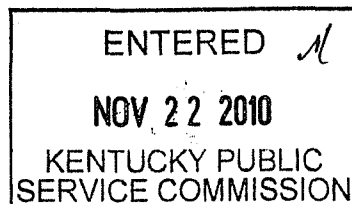
IT IS HEREBY ORDERED that:

1. Pursuant to 807 KAR 5:001, Section 12, Windstream shall file a written answer to the complaint within 10 days of the date of service of this Order.
2. Commission Staff shall hold a telephonic informal conference in this matter on January 11, 2011 at 11:00 a.m., Eastern Standard Time, at the Commission's offices at 211 Sower Boulevard, Frankfort, Kentucky. To participate in the informal conference, the parties to this matter should call (502) 564-3940 and ask to be connected to bridge number 7099.
3. Should documents of any kind be filed with the Commission in the course of this proceeding, the documents shall also be served on all parties of record.
4. In addition to the named parties, the Executive Director shall serve a copy of this Order upon the following:

Hon. Mark Overstreet  
Stites & Harbison, PLLC  
421 West Main Street  
P.O. Box 634  
Frankfort, KY 40602

Hon. Joseph Hamilton  
Hon. Marjorie Farris  
Stites & Harbison, PLLC  
400 West Market Street  
Suite 1800  
Louisville, KY 40202

By the Commission



ATTEST

  
\_\_\_\_\_  
Executive Director

RECEIVED

NOV 16 2010

PUBLIC SERVICE  
COMMISSION

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

Dana Bowers

PETITIONER

v.

Windstream Kentucky East, LLC

CASE NO. 2010- 00447

**PETITION FOR DECLARATORY RULING**

Petitioner Dana Bowers (“Petitioner” or “Plaintiff”), a telecommunications service customer of Windstream Kentucky East, LLC, by counsel, hereby petitions the Commission to declare<sup>1</sup> that Defendant, Windstream Kentucky East, LLC (“Windstream”) violated KRS 278.160 when it charged her, and its other customers, an unfiled rate for telecommunications services provided under tariff. This declaratory ruling is sought with respect to one of several counts of Petitioner’s Complaint currently pending before the United States District Court for the Western District of Kentucky in *Dana Bowers v. Windstream Kentucky East, LLC, et al.*, Civil Action No. 3:09-CV-440 (the “Judicial Proceeding”). That count has been stayed, but not dismissed, by the Court so that the Commission may issue a declaratory ruling.<sup>2</sup> After the

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<sup>1</sup> The Commission has previously considered petitions for declaratory rulings. *See, e.g., East Kentucky Power Cooperative’s Request for a Declaratory Ruling on the Application of Administrative Regulation 807 KAR 5:056 To Its Proposed Treatment of Non-Economy Energy Purchases*, Ky. PSC Case No. 2004-00430 (Order dated Nov. 9, 2004) (docketing a request for legal interpretation as a petition for declaratory ruling).

<sup>2</sup> *Bowers v. Windstream Ky. East*, 709 F. Supp. 2d 526 (W.D. Ky. 2010). A slip copy of the Court’s Order and Memorandum Opinion staying Count III of the Complaint pending ruling by the Commission is attached hereto as Exhibit A. On page 13 of the Memorandum Opinion, the Court explains its reasons for retaining jurisdiction.

Commission has ruled, Petitioner will file a copy of the ruling with the Court so that the portion of the lawsuit that has been stayed pending PSC action can proceed.

\* \* \* \* \*

1. The Commission has ruled that, when a utility has violated KRS 278.160, “customers subject to the billing could initiate administrative or judicial proceedings” for such violation.<sup>3</sup>

2. Petitioner purchases telecommunications services from Windstream, which is governed by tariff P.S.C. Ky. No. 7. Petitioner initiated a judicial proceeding, on behalf of herself and other Windstream customers, upon learning, among other things, that Windstream’s “KY Gross Receipts Surcharge,” equal to as much as 2.6% of the other charges on the bills of Petitioner and Windstream’s other Kentucky customers, does not appear in its Kentucky tariffs. This claim appears as Count III in Petitioner’s Class Action Complaint, attached hereto as Exhibit B.

3. A sample of Petitioner’s bill, which includes the untariffed “KY Gross Receipts Surcharge,” is attached as Exhibit C.

4. KRS § 136.616(2)(b), enacted in 2005 and effective January 1, 2006, imposes a 1.3% gross revenues tax on communications service providers, including Windstream. The tax is *not* imposed upon Ms. Bowers or any other customers of communications service providers. Accordingly, the tax increased Windstream’s cost of doing business.

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<sup>3</sup> *The Harbor at Harrods Creek Condominium Ass’n v. Fourth Avenue Corporation – Long Corporation, Joint Venture d/b/a Shadow Wood Subdivision Sewer Service*, PSC Case No. 2000-379 (Order dated Aug. 14, 2001), at 7.

5. The Commission has determined that a utility's recovery of external expenses, including taxes, from a customer will necessarily be through a "rate."<sup>4</sup>

6. KRS 278.160(2) states, in pertinent part, "No utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules."

7. In 2007, Windstream increased its rates on all customers by adding a line item to its invoices it called the "KY Gross Receipts Surcharge," which appears to be 2.6% of billed revenues. Windstream continues to charge its Kentucky customers the "KY Gross Receipts Surcharge." The charge is being applied to utility services and to non-jurisdictional services like broadband and inside wire protection plans, but this petition is concerned with the unfiled rate Windstream applies to jurisdictional telecommunications services offered under its Kentucky tariffs.<sup>5</sup>

8. Petitioner subscribes to telecommunications services provided under Windstream's federal and Kentucky state tariffs. Windstream amended its federal tariffs to include the KY Gross Receipts Surcharge in August 2008, more than a year after it began

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<sup>4</sup> *Delta Natural Gas Co., Inc. Experimental Alternative Regulation Plan*, PSC Case No. 99-046 (Order dated May 10, 1999) (proposal for additional charges to customers over and above general rates is a "rate" under KRS 278.010(12)). See also *Big Rivers Electric Corp.*, Case No. 95-027 (August 25, 1995) (denying request of Big Rivers to pass through a tax payment via the fuel adjustment clause, explaining that it was Big Rivers' supplier's obligation to pay the tax in question, and the supplier, NRG, should have increased its rates to recover any utility gross receipts license tax); *Local Taxes and/or Fees Tariff Filing of General Tel. of Ky.*, PSC Case No. 7843 (Order dated October 3, 1980); cf. KRS 160.617, which permits a utility to "increase its rates" in any county in which it is required to pay the three per cent school tax imposed by KRS 160.613. The utility's bills must describe the new charge as a "rate increase for school tax."

<sup>5</sup> Petitioner has asserted various common law claims in the Judicial Proceeding concerning Windstream's rate increase for services over which the Commission and FCC do not have jurisdiction.

collecting the rate. Windstream never amended its Kentucky tariffs to add the KY Gross Receipts Surcharge.

9. In response to Plaintiff's Class Action Complaint, Windstream filed a motion asking the Court to dismiss or stay the Complaint, including Count III, pertaining to the violation of KRS 278.160. Windstream contended, among other things, that the Federal Communications Commission and the Kentucky Public Service Commission have primary jurisdiction over the Filed Rate Doctrine issues pertaining to its federal and state tariffs, respectively.

10. The Court denied Windstream's motion as to Plaintiff's claim that Windstream violated federal law when it failed to amend its federal tariff to include its "KY Gross Receipts Surcharge" prior to collecting that surcharge, finding that the Federal Communications Commission had already ruled on the issue in *In the Matter of Irwin Wallace v. AT&T Communications of the Southern States, Inc.*, 6 FCC Rcd 1618 (1991), *on reconsideration*, 7 FCC Rcd 3333 (1992). A copy of that FCC decision is attached hereto as Exhibit D.

11. The Court stayed Count III pertaining to the violation of KRS 278.160, deferring to the Commission as to [a] whether it would rule as the FCC ruled in *Irwin Wallace* that the operating expense resulting from a tax imposed on a carrier could not be passed on to customers unless the amount to be recovered is tariffed; and [b] whether it would find that Windstream's general tariff language in one of its applicable Kentucky tariffs, in the section called "Provision for Certain Local Taxes and Fees," is not sufficient to cover taxes imposed on the carrier by state authorities (the tariff language provides additional line items only for amounts "equal to the proportionate part of any license, occupation, franchise, or other similar fee or tax now or hereafter agreed to or imposed upon the Company by local taxing authorities...") [Memorandum

Opinion, 9-12] (emphasis added). A copy of this section of Windstream's Tariff No. 7 is attached hereto as Exhibit E.

12. Ample precedent supports Petitioner's Petition for Declaratory Ruling. The Commission has repeatedly and consistently ruled, pursuant to KRS 278.160, that no utility may charge or collect for service an amount other than that which is specified in its filed tariffs. It has applied that principle to individual rate components as well. In January 2008, for example, the Commission approved an LG&E tariff amendment adding recovery of a franchise fee, such recovery to begin "on and after February 1, 2008."<sup>6</sup> LG&E had been paying that franchise fee since 2005. Due to oversight, LG&E had not amended the tariff to add the franchise fee recovery, and therefore did not collect any amounts from its customers prior to the date the Commission approved the new tariff.

13. Language in Windstream's Tariff P.S.C. KY. No. 7 providing for recovery of "local" taxes and fees does not include "state" taxes. The tariff does not mention a "KY Gross Receipts Surcharge." Nor does it specify an amount, a percentage, a formula, or a calculation for a "KY Gross Receipts Surcharge." Under Kentucky law general notice language is legally ineffective for any given rate until that rate is added to the tariff. KRS 278.160(2) states that no person shall receive service from "any utility for a compensation greater or less than that *prescribed in such schedules*" (emphasis added). Knowing whether a rate demanded by the utility is "greater or less than" a "prescribed" rate necessarily means that rate must be ascertainable after reading the tariff. Likewise, the Commission's regulations governing tariffs require the utility to file schedules of "*all* its rates." 807 KAR 5:011, Section 2 (emphasis added). Filed rate schedules must include a "clear statement of all rates" and rates must be

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<sup>6</sup> *Application of Louisville Gas & Electric Company for Approval of Revisions to its Tariff Governing Recovery of Franchise Fees*, PSC Case No. 2007-00521 (Order dated Jan. 31, 2008).

“readily ascertainable” from the schedule. *See* 807 KAR 5:011, Section 4. Moreover, the “KY Gross Receipts Surcharge” has been used by Windstream to collect approximately double the amount of the state tax that applies to communications service providers. Obviously, that is not an amount “equal to” the tax rate, and Tariff No. 7 does not cover what Windstream has done with the unfiled “KY Gross Receipts Surcharge.”<sup>7</sup>

14. Windstream Tariff PSC KY. No. 8 is also at issue in the Judicial Proceeding. Windstream Tariff PSC KY. No. 8, a 565 page access services tariff, makes *no* reference even to “local” taxes, much less to the “KY Gross Receipts Surcharge” or to recovery for any other tax expense. Accordingly, Windstream lacks any authority to impose its “KY Gross Receipts Surcharge” on any customer purchasing access services from Tariff PSC KY. No. 8.

15. Petitioner requests that the Commission declare that to the extent that Windstream has applied the “KY Gross Receipts Surcharge” to any services provided under Tariff No. 7, as well as Tariff No. 8, it has violated KRS 278.160.<sup>8</sup>

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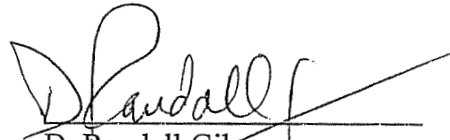
<sup>7</sup> The way to comply with KRS 278.160 and the Commission’s tariffing regulations is to prescribe the rate that a carrier is imposing to recover a tax expense, and then collect only that rate, subject to any restrictions imposed by law. BellSouth Telecommunications, Inc. filed tariff revisions in 2007 to recover some of its expenses associated with the state gross receipts tax. *See* Exhibit F.

<sup>8</sup> Petitioner is not a customer of Windstream Kentucky West or Windstream Communications, Inc. but those sister companies were named as defendants in Petitioner’s class complaint. The Commission should consider in this case whether Windstream Kentucky West’s tariffs P.S.C. No. 4 and P.S.C. No. 5 and Windstream Communications Inc.’s Local Exchange tariff and Tariff No. 3 support the collection of a 2.6% “KY Gross Receipts Surcharge” on tariffed services.



WHEREFORE, Petitioner respectfully requests that the Commission enter its ruling declaring that Windstream violated KRS 278.160 when it increased its rates for tariffed services in order to recover from its customers the state gross receipts tax imposed on it without having amended its Kentucky tariffs to include that rate increase.

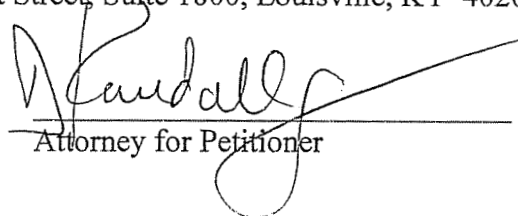
Respectfully submitted,



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*Counsel for Dana Bowers*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been sent, by United States Mail, postage prepaid, to Joseph L. Hamilton, Mark R. Overstreet, and Marjorie A. Farris, STITES & HARBISON, PLLC, 400 West Market Street, Suite 1800, Louisville, KY 40202.



Attorney for Petitioner



UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
AT LOUISVILLE

CIVIL ACTION NO. 3:09-CV-440-H

DANA BOWERS

PLAINTIFF

V.

WINDSTREAM KENTUCKY EAST, LLC., *et. al.*

DEFENDANTS

**MEMORANDUM OPINION**

Plaintiff, Dana Bowers (“Bowers”) brings this putative class action lawsuit alleging that Defendants Windstream Kentucky East, LLC (“Windstream East”), Windstream Kentucky West, LLC (“Windstream West”), and Windstream Communications, Inc. (“Windstream Communications”) (collectively, “Windstream” or “the Windstream companies”), overcharged her for monthly telecommunications services and included misleading statements on her bills, in violation of various federal and state statutes and common law. The matter is before the Court on Defendants’ Motion to Dismiss or Stay.

On April 20, 2010, the Court conducted an hearing to discuss the various issues and to clarify certain arguments the briefs presented. This case raises interesting questions about the proper forum for resolving disputes over regulated utility tariffs. These questions are crystalized in the Court’s application of the judicial doctrine of primary jurisdiction. For the reasons set forth below, the Court will partially grant Defendants’ motion by staying Count III. The Court

will deny the remainder of Defendant's Motion to Dismiss or Stay.<sup>1</sup>

I.

Plaintiff Bowers is a residential customer of Windstream East, a telecommunications company.<sup>2</sup> Windstream East is affiliated with telecommunications companies Windstream West and Windstream Communications.<sup>3</sup> Collectively, the Windstream companies provide services to hundreds of thousands of Kentucky customers in forty-plus counties. Plaintiff filed this putative class action in June 2009, alleging that for the two years prior to the Complaint, the Windstream companies overcharged her and other customers and used misleading descriptions of certain charges on their bills. Specifically, Bowers alleges that the Windstream companies charged customers for a tax imposed by Kentucky statute without updating their "tariffs," or schedules of rates on file with the Federal Communications Commission ("FCC") and the Kentucky Public Service Commission ("PSC"). Furthermore, Bowers claims that even after the Windstream companies updated their tariffs, they charged more than those tariffs allowed. Bowers also alleges that the manner in which the Windstream companies described and applied their charges was misleading and violated federal and state law.

This case involves a regulatory system established to govern telecommunications company charges. The Court will address that broad regulatory framework next.

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<sup>1</sup> If it becomes clear, at a later point in this litigation, that a stay is appropriate because of new facts or legal questions, the Court will revisit its decision at that time.

<sup>2</sup> For the purposes of this motion, the Court assumes the truth of Plaintiff's factual allegations. *Minger v. Green*, 239 F.3d 793, 797 (6th Cir. 2001), citing *Gao v. Jenifer*, 185 F.3d 548, 552 (6th Cir. 1999).

<sup>3</sup> The Windstream Defendants are "affiliates" within the meaning of 47 U.S.C. § 153(1).

A.

Windstream East, Windstream West and Windstream Communications provide various interstate and intrastate telecommunications services. As such, The Federal Communications Act of 1934 (“the Communications Act”), 47 U.S.C. § 151 *et seq.*, regulates some of their interstate services. Section 203(a) of that Act requires that the companies file schedules with the Federal Communications Commission, (“FCC”), describing, among other things, all of the rates and charges for their services. These schedules, commonly called tariffs, are public documents “that set[] forth the services offered by a telecommunication carrier, the fees charged for those services, and the terms on which those services are offered.” *AT&T Commn'cs of S. States, Inc. v. BellSouth Telecomm., Inc.*, 268 F.3d 1294, 1296 n. 4 (11th Cir. 2001). The FCC tariffs control the rights and liabilities for interstate services between the Windstream companies and their customers. Section 203(c) of the Communications Act states that “no carrier shall (1) charge, demand, collect or receive a greater or less or different compensation ... than the charges specified in the schedule then in effect.” 47 U.S.C. § 203(c).

The Windstream companies also provide intrastate telecommunications services. The Kentucky Public Service Commission (“PSC” or “Kentucky PSC”) regulates the rates for some of those services. Like federal tariffs, PSC tariffs for intrastate services control the rights and liabilities between the Windstream companies and their customers. KRS § 278.160(2) states that “[n]o utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules... .”

B.

To give proper context to the Complaint, the Court will describe the events predating the disputed charges. In 2005, Kentucky's legislature enacted a statute that imposed a 1.3% tax on the gross revenues of telecommunications providers, including the Windstream companies. *See* KRS § 136.616. As originally passed, the statute prohibited telecommunications providers from collecting the tax directly from the customer or separately stating the tax on the customer's bill. KRS § 136.616(3). No one challenged Kentucky's right to impose the tax or the providers' right to pass it on to their customers. The telecom companies did object, however, to the provision prohibiting them from adding a line item to their bills explaining why they had raised prices. *Id.*

In short order, the telecom companies challenged the constitutionality of the provision in federal court. In February 2007, the Eastern District of Kentucky struck down the no-stating-the-tax provision, after finding that it prohibited more speech than necessary and thus violated the First Amendment's free speech protections. *Bellsouth Telecomm., Inc. v. Farris*, 2007 U.S. Dist. LEXIS 13993 (E.D. Ky. 2007), *aff'd in part and reversed in part* by 542 F.3d 499 (6th Cir. 2008). The Sixth Circuit later affirmed that decision. *Id.*

On June 22, 2007, after the courts invalidated the Kentucky statutory provision, the Windstream companies began adding the pass-through tax, which they called the "Kentucky Gross Receipts Surcharge" (hereinafter "Surcharge" or "Kentucky Surcharge"), to their customers' bills.<sup>4</sup> A one-time statement on the June 22 bill said that "[e]ffective with this billing statement, the Kentucky Gross Receipts Surcharge will begin appearing on your bill. This

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<sup>4</sup> The exhibits to the pleadings only show the Windstream East statements. The Court presumes, for the purposes of its analysis here, that the Windstream West and Windstream Communications bills used the same language.

surcharge recovers a tax imposed by the state of Kentucky on all communications and entertainment providers.” On the June 22 bill and all future bills, Windstream listed some portion of the Surcharge as a “Regulated” cost, and another portion of the Surcharge as a “Deregulated” cost. A recurring note labeled “Gross Receipts Tax/Surcharge” in the “Taxes, Surcharges and Fees” Section of each bill stated: “This charge recovers for a tax that is imposed either on Windstream or on customers directly by various states for the provision of communications services. In the case of gross receipts surcharges, they are not government mandated charges.”

Irrespective of the disclosures on the customer bills, Plaintiff notes that the pertinent federal and state tariffs did not give Defendants the authority to charge the taxes to customers under any circumstances. Though the Windstream companies added the Surcharge to customers’ bills in June 2007, they did not list the Surcharge on their federal tariffs until August 7, 2008.<sup>5</sup> The Windstream companies never added the Surcharge to their Kentucky tariffs.

Additionally, Plaintiff claims that even after the Windstream companies added the Surcharge to their federal tariffs, the companies charged their customers more than the 1.3% imposed upon them by the state of Kentucky. Plaintiff also alleges that Windstream’s bills added the Surcharge to services that were not taxed under the Kentucky statute, including internet and cable services.

Thus, on June 22, 2009 Plaintiff filed her Complaint seeking (1) damages in the amount

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<sup>5</sup> When it was added, the Kentucky Surcharge was provided for in Section 2.4.1 of Windstream’s FCC tariffs, under “Taxes, Fees and Surcharges.” It reads: “There shall be added to the customer’s bills, as a separate item, an amount equal to the proportionate part of any license, occupation, franchise, or other similar fee or tax or cost of a tax not or hereafter imposed upon the Telephone Company’s interstate revenues by a taxing jurisdiction, and which fee or tax is based upon a percentage of the interstate receipts of the Telephone Company. Where more than one such fee or tax is imposed, each of the charges or taxes applicable to a customer shall be added to the customer’s bill as separately identified items. Such taxes or fees will not be applied to the Federal Universal Service Fee or Lifeline services. The taxing jurisdiction and applicable factors are as follows: Kentucky (Gross Revenues Tax Surcharge) 1.31%.”

of the overcharge, (2) an injunction against the Windstream companies and (3) an award of attorney's fees.

## II.

The parties dispute whether Defendants Windstream West and Windstream Communications are properly before the Court. As noted above, Plaintiff asserts claims against Windstream East, Windstream West and Windstream Communications; even though she is only a customer of Windstream East and has no relationship with the other companies. She contends that the "juridical link" doctrine allows her to join the other Defendants, especially where, as here, the companies are affiliated and operate under the same billing policy. Defendants argue that the doctrine does not apply and that the Court should dismiss claims against Windstream West and Windstream Communications.

To have standing, Plaintiff must (1) have suffered an actual, concrete and particularized "injury in fact" that (2) has a causal connection with Defendant's action and (3) is redressable in court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Though Plaintiff fails the second and third prongs of the test, she asserts that the "juridical link doctrine," discussed in *Thompson v. Board of Education of the Romeo Community Schools*, serves as an exception to the typical rules of standing. 709 F.2d 1200, 1204-05 (6th Cir. 1983). The *Thompson* case involved gender discrimination claims by 22 female school teachers against various school boards based on the boards' treatment of pregnancy leave. *Id.* at 1200. There, the Sixth Circuit cited two limited exceptions to the rule requiring each plaintiff in a class to have a cause of action against each defendant:

- (1) Situations in which all injuries are the result of a conspiracy or concerted schemes between the defendants at whose hand the class suffered injury; and



(2) Instances in which all defendants are *juridically related* in a manner that suggests a single resolution of the dispute would be expeditious.

*Id.* (emphasis in original) citing *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 462 (9th Cir. 1973). The Court went on to say that the juridical link doctrine is most often applied “[w]here all the members of the defendant class are officials of a single state and are charged with enforcing or uniformly acting in accordance with a state statute, or common rule or practice of state-wide application, which is alleged to be unconstitutional.” *Id.* at 1205 (citing *Mudd v. Busse*, 68 F.R.D. 522, 527-28 (N.D. Ind. 1975)). Ultimately, the *Thompson* court refused to apply the juridical link doctrine because the facts of its case did not involve a state statute or uniform policy being applied statewide by defendants. *Id.* at 1205. Outside of the *Thompson* case, the Sixth Circuit has not addressed the juridical link doctrine at length.<sup>6</sup>

Rather than apply the seemingly narrow juridical link doctrine to circumstances in which the Court has little information, the Court will address the standing issue in a more straightforward fashion. Plaintiff will have until July 1, 2010, to find and join additional Plaintiffs who are customers of Windstream West and Windstream Communications. In the interim, the Court will only address Plaintiff’s claims against Windstream East.

### III.

Defendants’ first argue that the doctrine of primary jurisdiction requires the Court to stay the action or dismiss Plaintiff’s claims. The Complaint warrants a stay or dismissal, Defendants say, because it implicates matters that should be decided in the first instance by either the FCC or

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<sup>6</sup> Both parties reference *Fallick v. Nationwide Mutual Insurance Co.*, 162 F.3d 410, 421. *Fallick* is dissimilar to the case at hand because it involved only one defendant, Nationwide, against whom the plaintiff had a cause of action. Here, Bowers seeks to maintain a cause of action against affiliated companies, when she is only a customer of one.

the PSC.

“The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.” *U.S. v. W. Pac. R.R. Co.*, 352 U.S. 59, 63 (1956). Primary jurisdiction “applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which under a regulatory scheme, have been placed within the special competence of an administrative body.” *Id.* at 64. The Supreme Court has said there is no defined formula for when a court should apply the doctrine. It stated:

In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. These reasons and purposes have often been given expression by this Court. In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. *See Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed. *See Far East Conference v. United States*, 342 U.S. 570.

*Id.*

In the context of tariffs, the Supreme Court has said that courts should not make tariffs, but may, in certain circumstances, construe them. *Id.* at 66. Specifically, a court may construe a tariff if doing so is solely an issue of law. *Id.* Where construction requires factual determinations and discretion in technical matters, a court should defer to the appropriate agency. *Id.*, citing *Great N. R. Co. v. Merchants Elevator Co.*, 259 U.S. 285-91. The Supreme Court went on to say that “[c]ertainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has

clarified the factors underlying it.” *Id.* at 69, citing *Crancer v. Lowden*, 315 U.S. 631.

Thus, the Court will consider whether the relevant regulatory agencies have already spoken on the issues raised in each of Plaintiff’s claims, and if not, whether the questions presented here require deferral for some other reason, such as the need to promote uniformity or to have the question heard by a decision maker with specialized knowledge.

A.

In Count I, Plaintiff asserts that Windstream East overcharged her for telecommunications services in violation of 47 U.S.C. § 203(c). She claims that: (1) prior to August 2008, Windstream East overcharged her because its FCC tariffs did not include a provision for the Kentucky Surcharge; and (2) after August 2008, Windstream East overcharged her by charging more than the 1.3% that its federal tariff allowed for the Kentucky Surcharge. Each of Plaintiff’s overcharge claims are premised on the “Filed Rate Doctrine” which says that a telecommunications carrier’s filed tariff contains the only lawful rate that a carrier may charge for a service. Specifically, 47 U.S.C. § 203(c), reads “no carrier shall ... charge, demand, collect or receive a greater or less or different compensation for such communication or for any service in connection therewith” other than “the charges specified in the schedule then in effect.”

Plaintiff argues that primary jurisdiction should not apply because the FCC tariff is unambiguous and because the FCC, in *In the Matter of Irwin Wallace v. AT&T Communications of the Southern States, Inc.*, has already determined that a telecommunications company may not pass along a tax until the company’s tariff actually authorizes the pass-through tax. 6 FCC Rcd 1618 (1991), *on reconsideration*, 7 FCC Rcd 3333 (1992). The *Irwin Wallace* opinion distinguished taxes imposed directly on the customer and taxes that are imposed on the

telecommunications carrier, but are permitted to be passed onto the customer. 6 FCC Rcd 1618 (1991) at ¶ 6. The utility can apply the former without any mention in a tariff; it cannot pass along its own taxes, however, without specific tariff authority. *Id.* The *Irwin Wallace* opinion concluded that a tax applied to a telecommunications carrier was not “extrinsic,” but rather was “one of the many expenses affecting the carrier’s charges to its customers.” *Id.* Accordingly, the FCC found that “imposition of a gross receipts tax surcharge on the end use before the tariff authorizing such a charge became effective was a violation of Section 203 of the Act.” *Id.* (footnotes omitted).

The plain language of 203(c) and the FCC’s decision in *Irwin Wallace* indicates that Windstream may not pass on a tax imposed directly upon it without first updating its tariff, and may not charge more than its tariff allows after the pass-through tax is added to the tariff. The Court can resolve this issue on its own. Consequently, the Court finds no reason to stay or dismiss on primary jurisdiction grounds.

B.

Count II is similar. Plaintiff asserts that, based on the same factual allegations as Count I, Windstream East imposed on Plaintiff an unlawful charge in violation of 47 U.S.C. § 201(b) and 47 U.S.C. § 207. The language of 47 U.S.C. § 201(b) says: “All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful.”<sup>7</sup> The analysis under Count I applies equally to

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<sup>7</sup> 47 U.S.C. § 207 addresses recovery of damages. It reads “Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction, but such person shall

Count II. The Court concludes that this Count is also properly before the Court.

Defendants point to language in *In re Long Dist. Telecomms. Litig. v. ITT-U.S. Transmission Sys., Inc.*, where the Sixth Circuit concluded that a plaintiff's 201(b) claims were within the primary jurisdiction of the FCC. 831 F.2d 627, 631. The Court said "[s]ection 201(b) speaks in terms of reasonableness, and the very charge of Count I is that defendants engaged in unreasonable practices. This is a determination that 'Congress has placed squarely in the hands of the FCC.'" *Id.* citing *Consolidate Rail Corp. v. National Ass'n of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981). However, a closer look at this case reveals that its facts are materially different than those here. The *Long Distance* case dealt with claims related to defendants' practice of charging for uncompleted calls, ring time and holding time and failing to inform customers of this practice. 831 F.2d at 627. Determining whether that practice was reasonable under 201(b) was a novel question, unlike the one presented and already answered in Count I. It required the expertise of regulators, who could offer a uniform solution. Because the FCC has already clearly answered the claims here, the Sixth Circuit's language in *Long Distance* is not applicable.

C.

In Count III, Plaintiff asserts that, based on its Kentucky tariff, Windstream East overcharged for intrastate services in violation of KRS 278.160(2). Plaintiff alleges that the relevant PSC tariffs did not authorize Windstream East to pass along the Kentucky Surcharge to its customers. The language of the Kentucky statute is similar to that of the federal statute.<sup>8</sup> The

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not have the right to pursue both such remedies.

<sup>8</sup> KRS 278.160(2) states, in part: "No utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules..."

applicable state tariff provision is not so clear as its federal counterpart. The “Provision for Certain Local Taxes and Fees” reads:

There shall be added to the customer’s bills, as a separate item, an amount equal to the proportionate part of any license, occupation, franchise, *or other similar fee or tax now or hereafter agreed to or imposed upon the Company by local taxing authorities*, whether imposed by ordinance, franchise or otherwise, and which fee or tax is based upon a percentage of the gross receipts, net receipts, or revenues of the Company. Such amount shall be added to bills of customers receiving service within the territorial limits of the taxing authority.

P.S.C. Ky. No. 7, Original Page 27 (emphasis added).

The parties dispute the meaning of this section. Plaintiff points to the phrase “local taxing authorities” and asserts that because the charge at issue is a tax imposed by state authorities, this provision does not apply. Defendants argue that the “local taxing authorities” language includes the state, especially considering the origins of the Kentucky gross revenues tax. Defendants say KRS 136.616 was adopted at the same time as KRS 136.660, a statute that terminated the ability of political subdivisions of Kentucky to levy directly on carriers franchise fees or taxes on communications services. Now, political subdivisions, or local taxing authorities, share in the revenues KRS 136.616. Thus, Windstream argues, the local franchise fees are now collected through the state tax, and that tax is covered by the above tariff language.

To resolve this dispute, this Court would need to address two issues not present in its analysis under Counts I and II: (1) whether the PSC would rule as the FCC did in *Irvin Wallace* on the issue of tariffs and pass-through taxes and (2) whether the “local taxing authority” language of Windstream’s tariff encompasses state statutes. The first question implicates a policy issue that the PSC should decide and apply uniformly to all carriers. The second question

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is likely within the Court's discretion, as courts are permitted to construe tariffs to the extent that they raise issues of law. All things considered, however, the Court believes that these matters are best left to the PSC at this time. The first question suggests deference to the PSC. The second question is also clearly within the PSC's area of expertise. Plaintiff did offer a 2008 PSC decision in which a utility applied to amend its tariff to include a franchise fee and local tax rider. *See In the Matter of Application of LG&E for Approval of Revisions to Its Tariff Governing Recovery of Franchise Fees*, KPSC Docket No. 07-521 (Order of Jan. 31, 2008). Though this opinion may be informative as to the Court's second question, it does not resolve the critical first question about whether the PSC would require a carrier to update its tariff before charging a pass-through tax.

The Court will stay Count III to allow the PSC to address the dispute. A stay is more appropriate than a dismissal, because the Court may need to resolve damages and other issues at a later date. *See Long Distance*, 831 F.2d at 632 (noting that a district court erred in dismissing a count rather than staying it).

D.

Count IV alleges that, pursuant to 47 U.S.C. § 201(b) and 47 C.F.R. § 64.2401, Defendants's bills violated federal "Truth-in-Billing" rules by (1) describing the Kentucky Surcharge as "regulated" and listing it with government mandated taxes and fees on its bills and (2) imposing a surcharge that was higher than the Kentucky surcharge rate imposed on Windstream.

The first prong of Count IV raises questions different than those implicated in Count III, because they require the Court to interpret Defendants' bills, rather than Defendants' tariffs. As

discussed below, they also involve an area of law in which the FCC has published extensive commentary.

As noted in Count I and Count II, Section 201(b) mandates that all charges be “just and reasonable.” Additionally, 47 C.F.R. § 64.2401(b) requires that “charges contained on phone bills must be accompanied by a brief, clear, non-misleading description of the service or services rendered.” A 2005 FCC opinion explains in more detail what practices are misleading. *In the Matter of Truth-in-Billing and Billing Format*, Second Report and Order, 20 FCC Rcd 6448 (2005). For instance, the FCC said “it is misleading to represent discretionary line item charges in any manner that suggests such line items are taxes or charges required by the government.” *Id.* at ¶ 1 (2005). The opinion went on to say:

Consistent with the Commission's prior findings, we reiterate that it is a misleading practice for carriers to state or imply that a charge is required by the government when it is the carriers' business decision as to whether and how much of such costs they choose to recover directly from consumers through a separate line item charge. Consumers may be less likely to engage in comparative shopping among service providers if they are led to believe erroneously that certain rates or charges are unavoidable federally mandated amounts from which individual carriers may not deviate. This prohibition includes not only misleading statements or descriptions, but also placement of the charge on the bill in such a way as to lead a reasonable consumer to believe that the charge has been mandated by the government. *For example, because placing a discretionary charge in a section or subsection of the bill that otherwise contains only government required charges or taxes may mislead a reasonable consumer into believing that such charge also is required, such placement is not allowed.* We also are concerned that some carriers may be labeling certain non-regulatory line item charges in such a way as to create confusion with regulatory programs. *As a result, carriers should take great caution in using terms that are most commonly associated with governmental programs to describe other charges that are unrelated to those programs.*

*Id.* at ¶ 27 (emphasis added). Plaintiff cites this language in support of her argument that Windstream's placement of the Kentucky Surcharge in the “Regulated” section of its bill is misleading, especially since before the Surcharge, Defendant listed only government mandated



fees in the “Regulated” Section of its bill. In response, Defendant points to language in the “Taxes, Surcharges and Fees” Section of its bill that explicitly states “[i]n the case of gross receipts surcharges, they are not government mandated charges.” As with the other federal claims, the Court finds that the statutory language and the previous FCC opinions offer sufficient guidance to allow this Court to determine the issue. Thus, the primary jurisdiction doctrine does not require either dismissing or staying the first prong of Count IV.

The *Truth-in-Billing* opinion also addresses the second prong, stating that “the burden rests upon the carrier to demonstrate that any line item that purports to recover a specific governmental or regulatory program fee conforms to the amount authorized by the government to be collected.” *Id.* at ¶ 1 (2005).

[W]e reiterate that it is unreasonable and misleading for carriers to include administrative and other costs as part of ‘regulatory fees or universal service charges’ or similar line item labels that imply government mandated charges. Although the Commission focused primarily on the universal service charge, we reiterate here that, as the language in that order indicates, this prohibition applies to all regulatory fees. It is our view that these costs are no different than other costs associated with the business of providing telecommunications service and may be recovered through rates or other line item charges. *Thus, it is an unreasonable practice for carriers to include any costs that do not accurately reflect the carrier's actual obligation to the specific governmental program that the line item purports to recover.* For example, carriers that elect to recover their universal service contribution costs through a separate line item may not mark up the line item above the relevant contribution factor established by the Commission. *As a result, a regulatory line item charge should never exceed any maximum amount or cap established by the government to recover for that specific program.*

*Id.* at ¶ 28 (emphasis added). If Plaintiff proves its allegations – that Windstream East charged its customers more than it paid the state and led those customers to believe that the charges were required – this FCC opinion is on point. Thus, the FCC has offered this Court sufficient guidance

to allow it to determine the second prong of Count IV.<sup>9</sup>

There are other reasons that Count IV is not appropriate for a primary jurisdiction referral. Plaintiff's claims in Count IV are based primarily on Defendants' individual bills and whether they are misleading. Thus, the questions raised are intensely fact specific and their resolution would not likely impact other carriers. Such questions may be precisely the ones that district courts should answer, to allow the relevant agencies to focus on broader issues that impact all carriers. At the very least, these issues are ones that agencies and district courts are equally equipped to hear. Upon careful consideration and for all of these reasons, the Court declines to stay or dismiss Count IV on the basis of primary jurisdiction.

#### IV.

In Counts V, VI and VII, Plaintiff claims that Defendants improperly applied the Kentucky Surcharge to cable and internet services, upon which Defendant paid no taxes whatsoever. Plaintiff asserts that doing so constitutes a violation of the Kentucky Consumer Protection Act (Count V), negligent misrepresentation (Count VI) and conversion (Count VII). As with the other Counts, Defendants argue that these allegations raise issues properly addressed in the first instance by the FCC or the Kentucky PSC. Additionally, Defendants argue that if the Court determines that primary jurisdiction does not apply, Counts V, VI and VII are barred by the "Terms and Conditions" Plaintiff was subject to as a purchaser of Windstream East's services. The Court will address each argument in turn.

Unlike telecommunications services, cable and internet services are not subject to state or

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<sup>9</sup> Defendants also argue, as they do in Count II, that Count IV should be dismissed or stayed pursuant to the primary jurisdiction doctrine because of language in a Sixth Circuit opinion indicating that Section 201(b) claims should be decided by the FCC. *In re Long Distance*, 831 F.2d at 631. As noted in the analysis of Count II, the Court does not read that language as a flat ban on district courts hearing any claims that arise under Section 201(b).

federal tariffs. Thus, Defendants have more freedom to set cable and internet rates. Common law or certain consumer protection statutes, rather than agency rules or decisions, govern the propriety of the rates. Nonetheless, Defendants argue that the Court should stay or dismiss these Counts so that the FCC or PSC may determine whether cable and internet services are “communications services” under Kentucky law.

This argument seems to miss the point. The question presented here is whether Windstream East is charging customers more for the Kentucky Surcharge than it is paying. This issue is likely to turn on the facts of the case, and will probably be resolved when discovery shows how much Windstream East is collecting versus how much it is paying the state of Kentucky. Though it is possible that the ultimate issue will be whether the state is collecting more than it is supposed to under KRS § 136.616, that is still not an issue that the PSC or the FCC would decide. Because these questions are not those typically decided by an agency, the Court declines to stay or dismiss them.

Finally, Defendants assert that Counts V, VI and VII must fail because Windstream East applied the Kentucky Surcharge only to items for which it has paid Kentucky's gross revenues tax, and the claims ignore the Terms and Conditions to which Plaintiff agreed when purchasing services from Windstream East. Both of these assertions involve disputed issues of fact that would make resolution impossible at this point in the litigation. To the extent that Defendants argue that, as a matter of law, Plaintiff is subject to Terms and Conditions she never agreed to, the Court disagrees. Basic contract law provides that a party to a contract must accept the contract to be bound by it. *Whitaker v. Associated Credit Services, Inc.* 946 F.2d 1222, 1226 (6th Cir. 1991).

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V.

Defendants also contend that limitations periods in their tariffs bar large portions of Plaintiff's Complaint. Windstream East's federal tariff provides a specific procedure for addressing "billing disputes." Section 2.4.1 (D) reads:

A valid billing dispute consists of written documentation specifically listing the total dollar amount of the dispute, specific rate elements being disputed and their dollar amounts. The dispute must be received in writing within 30 days after the due date of the bill. At least one of the seven following reasons must be given for the dispute to be considered valid. 1. Incorrect Rate ...

Defendants argue that this provision, which as a tariff carries the weight of law, limits Plaintiff's damages to those sustained in the 30 days prior to filing her Complaint. Plaintiffs respond that the federal limitations period for refunds of untariffed charges is two years, pursuant to 47 U.S.C. § 415. Thus, the Court must determine whether Plaintiff's tariff can effectively amend the statutory limitations period. Only a few courts have addressed this issue. These opinions are neither particularly persuasive nor binding on this Court.

Defendants cite two district court opinions in support of their position. The first, *MFS International, Inc. v. International Telecom, Ltd.*, addressed a carrier's argument that contractual provision in its service agreement prevented customers from bringing claims more than a year after their claims accrued. 50 F.Supp. 517, 522-23 (E.D. Va. 1999). There, the district court found that the contractual provision barred the defendant-customer's counterclaim, despite the longer limitations period of 415(b), concluding that "there is no justification for disallowing the relevant contractual provision simply because an explicit federal statute of limitations exists when that statute does not prohibit such shortening, either explicitly or by clear implication." *Id.* at 523. Our case does not concern a contractual provision as directly addressed in *MFS*

*International*.<sup>10</sup>

In the second case, *Powers Law Offices v. Cable & Wireless USA*, a district court in Massachusetts enforced a provision in the carrier's tariff that required customers to bring billing disputes to the carrier's attention within 45 days. 326 F.Supp. 2d 190, 192-93 (D. Mass. 2004). In *Powers*, a class action, the Plaintiffs alleged that the Defendant charged more than allowed under its filed tariffs. The court noted that "the tariff governs 'not only the nature and extent of [the provider's] liability, but also the nature and extent of the [customer's] right of recovery.'" *Id.* at 192, quoting *N. Am. Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229, 233 (2d Cir. 1978). In finding that the tariff's 45-day-provision limited Plaintiffs' claims, the court made no mention of the federal statute setting the limitations period at two years.<sup>11</sup> In short, the Court finds little helpful guidance from these cases.

Plaintiff cites an unpublished opinion from the Eastern District of Virginia reaching the opposite conclusion. In *MCI-Worldcom Network Services, Inc. v. Paetec Communication, Inc.*, the court addressed a tariff provision that required a plaintiff to dispute overcharges on a bill within 90 days. No. 04-1479 (E.D. Va. Mar. 16, 2005) (not reported in F. Supp.), *aff'd*, 204 Fed. Appx. 271 (4th Cir. 2006) (unpublished). The defendant argued that the 90-day-notice period in the tariff, and not the federal statute, applied to Plaintiff's challenge that certain charges it paid

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<sup>10</sup> A footnote in the *MFS International* opinion does suggest that even if there had been no 30-day provision in the contract, a similar provision in the company's tariff would serve to shorten the limitations period. 50 F.Supp. 2d at 523 n. 14. The court makes no effort to distinguish or explain any differences between a direct contractual provision and a tariff provision.

<sup>11</sup> After the hearing, Defendants supplied additional cases in which various courts noted that "tariffs conclusively and exclusively control the rights *and liabilities* of the parties." This Court does not dispute that assertion. However, the present case involves a conflict not directly faced in those cases, because the tariff here potentially conflicts with a federal statute.

were unsupported by defendant's tariff. *Id.* at 1. The court acknowledged that parties can contract to shorten a statute of limitations, but noted that "[t]he terms of a tariff, however, are set unilaterally by the service provider and not negotiated like a contract. If this Court were to find that the tariff takes priority over a federal statute, it would allow service providers to unilaterally void federally codified consumer protections simply by filing a tariff." *Id.*, citing *Telco Communications Group, Inc. v. Race Rock of Orlando, LLC*, 57 Supp. 2d. 340, 345 (E.D. Va. 1999) (rejecting the argument that a filed tariff can supercede Regulation Z, the federal regulation that implements the Truth in Lending Act, because a tariff cannot change a "statutorily imposed liability cap" and that to hold otherwise would allow utility companies "to contract around important consumer protections simply by filing tariffs"). The court ultimately found that federal statute of limitations, rather than the tariff, governed Plaintiff's claim. *Id.* The Fourth Circuit affirmed that ruling without discussion based on the reasoning of the district court. 204 Fed. Appx. at 272. While these cases do not bind this Court, at least they properly address the issues in play.

This Court has similar concerns about the unilateral imposition of a 30-day limitations period upon consumers, particularly in these circumstances. This is not a garden-variety billing dispute. Rather, Plaintiff claims she was overcharged based on a rate she knew nothing about and could not determine from the face of her bill. Additionally, one of Plaintiff's core complaints is that Defendants took affirmative steps to mislead her by representing that the charges on her bill were authorized or required government fees. If these allegations are true, it would be unfair

to require Plaintiff to discover the overcharge and contest it, all within a single billing cycle.<sup>12</sup>

This Court believes that unilaterally imposing a short limitations period in a tariff is materially different than mutually agreeing to a shorter period by contract. To the extent that *MFS International* or *Powers* come to a different conclusion, the Court disagrees with their reasoning. The federal tariff operates as a statute in the absence of contrary or conflicting federal statutes. As a general rule, however, a unilateral tariff should not operate to void a federal statute which is directly opposed to the tariff.

This Court concludes that Congress did not intend to establish a two-year statute of limitations which could be overridden by a unilaterally approved tariff. Though the tariff has the force of statute in the absence of congressionally mandated rates, its force cannot possibly be so absolute in the face of an existing and conflicting statute. The Court concludes that the two year limitations period provided for in 47 U.S.C. § 415 will govern Plaintiff's claims in this case.

The Court will issue an order consistent with this Memorandum Opinion.



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<sup>12</sup> Though the FCC has not officially ruled on this issue in the context of end users, it has discouraged use of short limitations periods in tariffs based upon similar considerations. *In the Matter of AT&T Co. to Petition To Rectify Terms and Conditions of 1985 Annual Access Tariffs*, 3 FCC Rcd 5071, n. 50 (1988). It said:

In addition to denying customers equal treatment, tariff provisions that place short time limits on the claims process may be inconsistent with Congressional intent embodied in Section 415(c) of the Communications Act, 47 U.S.C. § 415(c), which provides a two-year statute of limitations for actions at law to recover overcharges. The Section 415(c) limitation on legal actions for damages does not directly control tariffed limitations on the right of access customers to avail themselves of informal dispute resolution procedures provided by the LECs. Nevertheless, we believe the two-year limitations period specified in the Act evinces a Congressional belief that customers should have a reasonable period in which to seek relief from overcharges, and, to that extent, is generally instructive regarding the reasonableness of the dispute resolution procedures provided in tariffs.

*Id.*

April 29, 2010

  
  
**John G. Heyburn II, Judge**  
**United States District Court**

cc: Counsel of Record



UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
AT LOUISVILLE

CIVIL ACTION NO. 3:09-CV-440-H

DANA BOWERS

PLAINTIFF

V.

WINDSTREAM KENTUCKY EAST, LLC., *et. al.*

DEFENDANTS

**ORDER**

Plaintiff, Dana Bowers, brings this putative class action lawsuit alleging that Defendants, Windstream Kentucky East, LLC, Windstream Kentucky West, LLC, and Windstream Communications, Inc., overcharged her for monthly telecommunications services and included misleading statements on her bills, in violation of various federal and state statutes and common law. This matter is before the Court on Defendants' Motion to Dismiss or Stay.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss Windstream Kentucky West, LLC, and Windstream Communications, Inc., is DENIED. Plaintiff shall have until July 1, 2010, to find and join additional Plaintiffs who are customers of Windstream Kentucky West and Windstream Communications.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss or Stay is DENIED as to Counts I, II, IV, V, VI and VII.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss or Stay is

SUSTAINED as to Count III of the Complaint and that Count is stayed pending a ruling by the Kentucky Public Service Commission.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss parts of Plaintiff's claims as barred by the thirty (30) day limitation periods in the federal tariffs is DENIED.

This is NOT a final order.

April 29, 2010



**John G. Heyburn II, Judge  
United States District Court**

cc: Counsel of Record



UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION  
CIVIL ACTION NO. \_\_\_\_\_

Dana Bowers, on Behalf of Herself and  
Others Similarly Situated,  
204 Ravenswood Dr.  
Elizabethtown, KY 42701

PLAINTIFF

vs.

CLASS ACTION COMPLAINT  
*ELECTRONICALLY FILED*

Windstream Kentucky East, LLC  
Windstream Kentucky West, LLC  
Windstream Communications, Inc.,

Serve, for each defendant:  
C T CORPORATION SYSTEM  
4169 WESTPORT ROAD  
LOUISVILLE, KY 40207

DEFENDANTS

Plaintiff, Dana Bowers, individually and on behalf of all others similarly situated, by counsel, for her complaint against the defendants, Windstream Kentucky East, LLC, Windstream Kentucky West, LLC, and Windstream Communications, Inc. (collectively, "Windstream"), alleges as follows:

**NATURE OF ACTION**

1. This case involves illegal rates Windstream has charged and continues to charge to hundreds of thousands of its telecommunications services customers in Kentucky. Since June 2007, if not earlier, Windstream's monthly bills sent to Plaintiff and other customers have

systematically included inconspicuous charges equal to as much as 2.6% of the other charges on the bill, which Windstream labeled "KY Gross Receipts Surcharge."

2. The charges applied to telecommunications services violate the Filed Rate Doctrine, the bedrock of utility regulation for over a century, which absolutely prohibits a common carrier from charging rates other than its legal rates, *i.e.*, the tariff rates filed with the regulatory agency designated by law. The majority of the claims in this complaint here relate to telecommunications services provided under federal and state tariffs filed, respectively, with the Federal Communications Commission ("FCC") and the Kentucky Public Service Commission ("KPSC"). Windstream has imposed charges on Plaintiff and others similarly situated that were required to be included in Windstream's filed schedules of rates, but were not in fact so filed. By demanding and collecting the unfiled rates from Plaintiff and the members of the class she represents Windstream has violated federal and state law. Plaintiff and the members of the class she represents were never legally obligated to pay the unfiled rates and are entitled to refund of all monies so paid. Upon information and belief Windstream also applied the charges to non-telecommunications services, including Internet access service and inside wire maintenance plans. With respect to those charges, Windstream supplied false information about the charges, violating its public duty to Plaintiff and members of the Class who purchased such services.

3. Windstream buried most of the illegal charges among numerous other charges it groups together and describes as "REGULATED" on its monthly bills. The adjective "REGULATED" may be used on telecommunications carrier invoices only to describe charges that are either government mandated (*e.g.*, charges to fund emergency 911 service) or government approved (*e.g.*, the rate for a particular service provided by Windstream). In fact,

the “KY Gross Receipts Surcharge” was neither government mandated nor government approved. Windstream’s misleading use of the word “REGULATED” to describe the unlawful charges violates Section 201(b) of the Communications Act of 1934 and the “Truth-in-Billing” rules promulgated by the Federal Communications Commission and codified at 47 C.F.R. § 64.2401.

4. Plaintiff seeks damages on behalf of herself and all others similarly situated. Plaintiff brings this action on behalf of a class consisting of all Windstream customers who subscribed to tariffed telecommunications services in Kentucky provided by Windstream and were billed a “Kentucky Gross Receipts Surcharge.” Upon information and belief, the damages suffered by the class began on or about June 23, 2007 and continue through the present. On behalf of herself and the class, Plaintiff seeks to recover the full amount of damages sustained in consequence of Windstream’s violations of law, together with reasonable counsel or attorneys’ fees.

5. Upon information and belief, the illegal rates being charged by Windstream were imposed in a scheme to recover certain operating expenses Windstream incurred as a result of a Kentucky tax statute, KRS § 136.616(2)(b), enacted in 2005 and effective January 1, 2006. That statute imposes a 1.3% “gross revenues tax” on providers of “communications service,” including Windstream. The legal incidence of that tax is on Windstream, not on its customers. Accordingly, a carrier like Windstream may not shift the legal incidence of the tax to its customers, nor may it engage in conduct that misleads its customers into thinking that the tax is imposed on the service they buy rather than on Windstream. Rather, Windstream may only recover the corresponding tax expense through the rates it charges its customers. For

telecommunications services, these rates are included in schedules of rates, referred to as tariffs, filed with regulatory agencies like the FCC and KPSC. Windstream's filed rates include surcharges to recover its costs from other taxes and similar expenses, but not the costs associated with KRS § 136.616(2)(b).

6. With respect to its "KY Gross Receipts Surcharge," Windstream did not modify its filed schedules, as it would be required to do to raise its rates. Windstream did, however, raise its rates by 2.6%, disobeying statutory tariffing requirements.

7. Tariffs for interstate services filed with the FCC conclusively and exclusively control the rights and liabilities for interstate services between Windstream and its customers. Section 203(c) of the Communications Act states "no carrier shall (1) charge, demand, collect or receive a greater or less or different compensation . . . than the charges specified in the schedule then in effect." 47 U.S.C. § 203(c).

8. Likewise, tariffs for intrastate services filed with the KPSC conclusively and exclusively control the rights and liabilities for intrastate services between Windstream and its customers. KRS 278.160(2) states, in pertinent part, "No utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules . . ."

9. A filed tariff has the force of law, and a carrier violates the law when it violates its own tariff.

10. A carrier's ability to collect money from customers is premised upon complying with the federal and state statutory tariffing requirements. Windstream's failure to adhere to its tariffs requires it to return to its customers any rates it failed to include in its filed schedules.

11. This lawsuit involves Windstream's failure to charge the legal rates for interstate and intrastate telecommunications services, for which the remedy under law is a refund to every customer who was overcharged. Neither Windstream's ability to recover operating expenses through future legal rates nor Windstream's ability to collect legal charges contained in duly filed schedules of rates is being challenged by this lawsuit.

#### **JURISDICTION AND VENUE**

12. Plaintiff contends that Windstream violated the Communications Act of 1934, 47 U.S.C. § 151 et seq. and breached its federal tariffs. Thus, this action arises under the laws of the United States and the Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1337.

13. Jurisdiction over this action is also based on Section 207 of the Communications Act, 47 U.S.C. § 207, authorizing any person claiming to be damaged by a common carrier subject to the provisions of the Communications Act to bring suit for the recovery of such damages.

14. Under 47 U.S.C. § 415(c), Plaintiff's overcharge claims are subject to a two year statute of limitations. Plaintiff asserts claims for each overcharge that occurred within two years of the filing of this Complaint.



15. For the state law claims in Count III, V, VI and VII this Court has supplemental jurisdiction under 28 U.S.C. § 1367 because the claims in Counts I, II and IV form part of the same case or controversy under Article III of the United States Constitution.

16. Venue is proper in this judicial district under 28 U.S.C. § 1391(a)(2), as a substantial part of the events or omissions giving rise to the claims occurred in this district.

#### **PARTIES**

17. Plaintiff Dana Bowers is a resident of Elizabethtown, Kentucky. She is a customer of Windstream Kentucky East, LLC (“Windstream-KYE”), including for telecommunications services provided under Windstream’s federal and state tariffs.

18. Windstream-KYE is a Delaware limited liability company and is a common carrier as defined by 47 U.S.C. § 153(10) providing local telephone service, other telecommunications services, and other services, in Kentucky. Windstream-KYE’s principal place of business is 4001 Rodney Parham Road, Little Rock, AR 72212.

19. Windstream Kentucky West, LLC (“Windstream-KYW”) is a Kentucky limited liability company and is a common carrier as defined by 47 U.S.C. § 153(10) providing local telephone service, other telecommunications services, and other services, in Kentucky. Windstream-KYW’s principal place of business is 4001 Rodney Parham Road, Little Rock, AR 72212.

20. Windstream Communications, Inc. (“Windstream Communications”) is a Delaware corporation and is a common carrier as defined by 47 U.S.C. § 153(10) providing local telephone service, other telecommunications services, and other services, in Kentucky.

Windstream Communications' principal place of business is 4001 Rodney Parham Road, Little Rock, AR 72212.

21. All Windstream defendants are "affiliates" of one another within the meaning of 47 U.S.C. § 153(1). Windstream-KYE, Windstream-KYW and Windstream Communications are jointly referred to as "Windstream."

22. All Windstream defendants are "utilities" as defined by KRS 278.010(3)(e).

23. Windstream provides telecommunications services in more than forty Kentucky counties, including counties within this District.

## **BACKGROUND**

### **The Tariff Regime for Telecommunications Services**

24. This action centers on Windstream's decision in 2007 to begin adding a new charge to the bills of its Kentucky customers without filing the charge in its federal and state tariffs as required by law. The class members affected by this new charge purchased Windstream services from these tariffs and are obliged to pay the rates therein but no more.

25. Telecommunications services provided in Kentucky by Windstream include intrastate and interstate services. Some services provided by Windstream fall under both classifications. For example, one component of local telephone service is jurisdictionally interstate and this component is subject to the Communications Act administered by the FCC and is federally tariffed.

26. Under Part 69 of the FCC's rules, local exchange carriers (LECs) are able to recover some portion of the non-traffic sensitive costs of providing interstate access to long-

distance carriers by charging end users an End User Common Line (“EUCL”) charge. Windstream has such a EUCL charge and applies it using the descriptor End User Access Service. Windstream provides End User Access Service to end users, including Plaintiff, who obtain local exchange service from Windstream under its general and/or local exchange tariffs. This End User Access Service is defined by Windstream Telephone System Tariff F.C.C. No. 6, Section 4. According to Windstream’s tariff, End User Access Service provides for the use of an End User Common Line. An End User Common Line is the physical facility, *i.e.* a telephone line, that connects a local customer to Windstream’s network and, among other things, gives the customer the ability to reach a long distance carrier.

27. The rates and charges for End User Access are set forth in the same federal tariff.

28. Windstream provides other interstate services under its federal tariffs, including switched access service and special access service.

29. Windstream-KYE and Windstream-KYW provide End User Access Service, switched access service and special access service to customers in Kentucky. Portions of each of these three service types are provided under Windstream’s federal tariffs.

30. Windstream-KYE and Windstream-KYW have billed an untariffed “KY Gross Receipts Surcharge” to customers for End User Access Service, switched access service, and special access service. Thus, the Class claims include the unfiled “KY Gross Receipts Surcharge” applied to all of these telecommunications services.

31. Windstream also provides part of its local telephone service under its state tariffs. The rates for Windstream’s local services vary, but are filed in tariffs at the KPSC. Thus, the

Class claims include the unfiled "KY Gross Receipts Surcharge" applied to all of these telecommunications services.

32. Upon information and belief, Windstream has also applied its KY Gross Receipts Surcharge to information services, including its "DSL Ultra" service to which Plaintiff subscribes, despite the fact that KRS 136.602(2)(b) excludes information services from the definition of "Communications services."

33. Upon information and belief Windstream has also applied its KY Gross Receipts Surcharge to inside wire maintenance plans including the "Protection Plus Plan" to which Plaintiff subscribes.

34. The "Protection Plus Plan" is not a "Communications service" within the meaning of KRS 136.602(2).

35. Upon information and belief Windstream has also applied its KY Gross Receipts Surcharge to the "Deregulated Administration Fee" on bills it sent to Plaintiff.

36. The "Deregulated Administration Fee" is not a "Communications service" within the meaning of KRS 136.602(2).

#### **CLASS ACTION ALLEGATIONS**

37. Plaintiff brings this action on behalf of herself and all other similarly situated persons as members of a proposed plaintiff Class initially defined as:

All persons and entities who, on or after June 22, 2007 were billed or assessed a "KY Gross Receipts Surcharge" in connection with any tariffed telecommunications service provided by Windstream.

This action may properly be maintained as a class action under Rule 23(a)(1)-(4) and Rule 23(b)(1) or(2) or (3) of the Federal Rules of Civil Procedure.

**Numerosity of the Class  
(Fed. R. Civ. P. 23(a)(1))**

38. Members of the Class are so numerous that their individual joinder is impracticable. Plaintiff estimates that the Class includes more than one hundred thousand members. The exact number of Class members and their addresses can be ascertained from Windstream's records. Class members may be notified of this action by published notice and, if necessary, by mail.

**Existence and Predominance of Common Questions of Fact and Law  
(Fed. R. Civ. P. 23(a); 23(b)(3))**

39. Common questions of law and fact exist as to all members of the Class, predominating over any questions affecting only individual Class members.

**Typicality of Claims  
(Fed. R. Civ. P. 23(a)(3))**

40. Plaintiff's claims are typical of the claims of the Class because Plaintiff, like all other class members, was assessed unfiled rates on tariffed services provided by Windstream. Plaintiff's claim arises from the same practice or course of conduct that gives rise to the claims of other Class members, and all the claims are based on the same legal theory.

**Adequacy of Representation  
(Fed. R. Civ. P. 23(a)(4))**

41. Plaintiff is an adequate representative of the Classes, because her interests do not conflict with the interests of the class members she seeks to represent. Plaintiff has retained counsel with experience in complex class actions involving telecommunications carriers. The

interests of the Class members will be fairly and adequately protected by Plaintiff and her counsel.

**Superiority of the Class Action  
(Fed. R. Civ. P. 23(b)(3))**

42. A class action is superior to any other means to adjudicate this dispute. The damages suffered by individual Class members will vary, and some may be small, but the claims all arise from the same conduct. It is highly unlikely that individual class members could obtain effective redress for the wrongs done to them by Windstream. Individualized litigation would increase costs to all concerned, including the Court, and would greatly delay the relief being requested.

**COUNT I**

**Overcharge and Refund  
Violation of 47 U.S.C. § 203 (c)**

43. Plaintiff incorporates by reference as though fully set forth herein the allegations of the preceding paragraphs of this Complaint.

44. Rates and terms for interstate services of Defendants Windstream-KYE and Windstream-KYW are set forth in Windstream Telephone System Tariff F.C.C. No. 6, issued December 19, 2008 and effective January 3, 2009.

45. At all times during the Class Period prior to January 3, 2009, rates and terms for interstate services of Defendant Windstream-KYE were set forth in Windstream Telephone System Tariff F.C.C. No. 3.

46. At all times during the Class Period prior to January 3, 2009, rates and terms for interstate services of Defendant Windstream-KYW were set forth in Windstream Telephone System Tariff F.C.C. No. 1.

47. These tariffs contained the lawful interstate rates for Windstream-KYE and Windstream-KYW.

48. On July 23, 2008, Windstream-KYW or its agent issued 1<sup>st</sup> Revised Page 2-30 to Windstream Telephone System Tariff F.C.C. No. 1. This revised page became effective August 7, 2008.

49. 1<sup>st</sup> Revised Page 2-30 added, at Section 2.4.1 (I), a Gross Revenues Tax Surcharge.

50. On July 23, 2008, Windstream-KYE or its agent issued 1<sup>st</sup> Revised Page 2-50 to Windstream Telephone System Tariff F.C.C. No. 3. This revised page became effective August 7, 2008.

51. 1<sup>st</sup> Revised Page 2-50 added, at Section 2.4.1 (G), a Gross Revenues Tax Surcharge.

52. In these two tariffs, the Gross Revenues Tax Surcharge rate for Kentucky is 1.31%.

53. The same 1.31% Gross Revenues Tax Surcharge rate for Kentucky is set forth at Original Page 2-30 of Windstream Telephone System Tariff F.C.C. No. 6.

54. Rates and terms for interstate services of Defendant Windstream Communications are set forth in Windstream Communications Tariff F.C.C. No. 3.

55. Upon information and belief, Windstream Communications Tariff F.C.C. No. 3 does not include a Gross Revenues Tax Surcharge.

56. For all days in the Class Period before August 7, 2008, there was no Gross Revenues Tax Surcharge included in any Windstream interstate tariff applicable to members of the class.

57. If Windstream filed a valid interstate tariff revision, then upon the effective date of such interstate tariff Windstream could legally assess a "KY Gross Revenues Tax Surcharge." Thereafter, Windstream could collect the "KY Gross Revenues Tax Surcharge," if at all, only at the tariffed rate of 1.31%.

58. Upon information and belief, after August 7, 2008 Windstream has charged its customers for interstate services a "KY Gross Receipts Surcharge" higher than the federally-tariffed rate for the "KY Gross Revenues Tax Surcharge."

59. The imposition of a gross receipts tax surcharge on a customer before the tariff authorizing such charge became effective is a violation of Section 203 of the Communications Act.

60. By demanding and collecting unfiled interstate rates, or rates higher than a filed rate, Windstream violated its own tariffs and Section 203(c) of the Communications Act.



61. Plaintiff and the Class she represents have been damaged in an amount to be determined at trial.

62. Windstream is liable to Plaintiff and the Class under § 206 of the Communications Act for the full amount of damages sustained in consequence of Windstream's violation of § 203(c) of the Act, together with reasonable counsel or attorneys' fees.

## COUNT II

### **Unlawful Charge Violation of 47 U.S.C. § 201(b) and 47 U.S.C. § 207**

63. Plaintiff incorporates by reference as though fully set forth herein the allegations of the preceding paragraphs of this Complaint.

64. All charges, practices, classifications, and regulations for the communication services provided by Windstream are required to be just and reasonable.

65. To the extent that Windstream has billed and collected charges that were required to be included in its filed schedules but were not, Windstream's conduct has been unjust, unreasonable, and unlawful under Section 201(b) of the Communications Act.

66. Windstream is liable to Plaintiff and the Class under § 206 of the Communications Act for the full amount of damages sustained in consequence of Windstream's violation of § 201(b) of the Act, together with reasonable counsel or attorneys' fees.

**COUNT III**

**Overcharge for Intrastate Services  
Violation of KRS 278.160(2)**

67. Plaintiff incorporates by reference as though fully set forth herein the allegations of the preceding paragraphs of this Complaint.

68. The rates and terms for the intrastate services of Defendant Windstream-KYE are set forth in its tariffs P.S.C. No. 7, P.S.C. No. 8, and P.S.C. No. 9.

69. The rates and terms for the intrastate services of Defendant Windstream-KYW are set forth in its tariffs P.S.C. No. 4 and P.S.C. No. 5.

70. The schedule of charges for the intrastate local services of Defendant Windstream Communications is set forth in its Local Exchange tariff filed with the KPSC, at Section 13. For access services, Windstream Communications, Inc. concurs in the Windstream-KYE Tariff P.S.C. KY. No. 8.

71. The schedule of charges for the intrastate long distance services of Defendant Windstream Communications are set forth in its Tariff No. 3 filed with the KPSC.

72. These tariffs establish the lawful rates for each of the Windstream defendants.

73. These tariffs do not include a "KY Gross Receipts Surcharge."

74. The imposition of a rate on a customer before the tariff authorizing such rate became effective is a violation of KRS 278.160(2).

75. By demanding and collecting unfiled intrastate rates, Windstream violated its own tariffs and KRS 278.160(2).

76. Plaintiff and the Class she represents have been damaged in an amount to be determined at trial.

#### COUNT IV

##### **Violation of 47 U.S.C. § 201(b) and 47 § C.F.R. § 64.2401 Federal "Truth-in-Billing" Rules**

77. Plaintiff incorporates by reference as though fully set forth herein the allegations of the preceding paragraphs of this Complaint.

78. Windstream provides interstate and intrastate interexchange long distance service to customers in Kentucky.

79. Windstream is subject to the "Truth-in-Billing" rules promulgated by the FCC and codified at 47 C.F.R. § 64.2401.

80. 47 C.F.R. § 64.2401(b) requires that "charges contained on phone bills must be accompanied by a brief, clear, non-misleading description of the service or services rendered."

81. The FCC has concluded that a carrier's provision of misleading or deceptive billing information is an unjust and unreasonable practice in violation of section 201(b) of the Communications Act.

82. Windstream has billed, charged and collected monies from Plaintiff and the Class using a description that is unclear and misleading. By describing the "KY Gross Receipts Surcharge" as "REGULATED" and grouping it with lawful rates and taxes on its billing

statements, Windstream sought to create the impression that the "KY Gross Receipts Surcharge" is similarly lawful or required.

83. By falsely describing the "KY Gross Receipts Surcharge" as "REGULATED" Windstream has purposely created the impression that the charge is required or approved by the government.

84. Windstream-KYE and Windstream-KYW have filed a rate described as the "Gross Revenues Tax Surcharge" in their FCC tariffs, but are billing a "KY Gross Receipts Surcharge" instead.

85. Windstream has labeled the surcharge to disguise the fact that Windstream is attempting to pass off its own tax obligation to its customers as a "Regulated" charge.

86. The FCC has determined that it is an unreasonable practice for carriers using discretionary line items to include any costs that do not accurately reflect the carrier's actual obligation to the specific governmental program that the line item purports to recover.

87. By omitting the word "Tax" from its line item surcharge Windstream misleads its customers to keep them from discovering that the rate Windstream is collecting has a connection to a statutory obligation of Windstream that is far less than the amount Windstream is charging its customers.

88. The FCC has also found that it is unreasonable to describe a surcharge as a "regulatory fee" when the amount of the surcharge varies from the amount of the expense being recovered.

89. By imposing a surcharge that was higher than the rate imposed by the tax statute that created a governmental obligation for Windstream, Windstream violated the Truth-in-Billing rules and § 201(b) of the Communications Act.

90. By paying Windstream bills that included a "KY Gross Receipts Surcharge" Plaintiff and the Class were injured by Windstream's violation of the FCC rule and § 201(b) of the Communications Act, in an amount to be determined at trial.

91. Windstream is liable to Plaintiff and the Class under § 206 of the Communications Act for the full amount of damages sustained in consequence of Windstream's violation of § 201(b) of the Act, together with reasonable counsel or attorneys' fees.

#### **COUNT V**

##### **Violation of the Consumer Protection Act Violation of KRS § 278.160(2)**

92. Plaintiff hereby incorporates by reference as though fully set forth herein the allegations of the preceding paragraphs of this Complaint.

93. Plaintiff purchased Windstream "DSL Ultra" and "Protection Plus Plan" service at her residence and suffered an ascertainable loss.

94. "DSL Ultra" is an Internet access service.

95. Internet access service is an information service and is not subject to the Kentucky gross receipts tax.

96. The "Protection Plus Plan" is not a "Communications service" and is not subject to the Kentucky gross receipts tax.

97. The "Deregulated Administration Fee" is not a "Communications service" and is not subject to the Kentucky gross receipts tax.

98. Upon information and belief Windstream applied a "KY Gross Receipts Surcharge" to the charges for "DSL Ultra," the "Protection Plus Plan" and the "Deregulated Administration Fee."

99. On bills to Plaintiff Windstream stated that the "KY Gross Receipts Surcharge" "recovers for a tax that is imposed either on Windstream or on customers directly by various states for the provision of communications services."

100. Windstream's statement was calculated to lead customers to believe that the charge was required by law or otherwise lawful when applied to "DSL Ultra," the "Protection Plus Plan" and the "Deregulated Administration Fee" and that payment of this charge was required in order for customers, including members of the Class, to continue to receive service.

101. The conduct of Windstream was unfair, false, misleading, deceptive and unlawful within the meaning of KRS § 367.170.

102. Plaintiff and other Class members who are residential customers using those Windstream services are entitled to have their money refunded by order of this Court, together with reasonable attorneys' fees.

**COUNT VI**

**Negligent Misrepresentation**

103. Plaintiff hereby incorporates by reference as though fully set forth herein the allegations of the preceding paragraphs of this Complaint.

104. In the course of its business Windstream supplies information on its monthly billing statements, including "General Information" that is intended as guidance for persons transacting business with Windstream.

105. Windstream is under a duty to provide only truthful information on its monthly billing statements.

106. With respect to non-telecommunications services it provided to Plaintiff and the Class, Windstream failed to exercise reasonable care or competence in describing the application of the "KY Gross Receipts Surcharge."

107. With respect to non-telecommunications services it provided to Plaintiff and the Class, Windstream provided false information in describing the application of the "KY Gross Receipts Surcharge."

108. Plaintiff and members of the Class justifiably relied on the false information, and suffered a pecuniary loss thereby in an amount to be determined at trial.

109. Plaintiffs and Class members who purchased these service are entitled to recover the full amount of damages sustained as a result of Windstream's illegal and wrongful actions together with reasonable attorneys' fees.

**COUNT VII**

**Conversion**

110. Plaintiff hereby incorporates by reference as though fully set forth herein the allegations of the preceding paragraphs of this Complaint.

111. By charging Plaintiff and the members of each Class a “KY Gross Receipts Surcharge” on services that are not “Communications services,” Windstream illegally converted monies belonging to Plaintiff and members of the subclasses.

112. Plaintiffs and Class members who purchased these services were injured as a result of Windstream’s conversion in an amount to be determined at trial.

113. Plaintiffs and Class members who purchased these service are entitled to recover the full amount of damages sustained as a result of Windstream’s illegal and wrongful actions together with reasonable attorneys’ fees.

**REQUEST FOR RELIEF**

WHEREFORE, Plaintiff, on behalf of herself and the members of the Class, requests the following relief:

A. An order certifying the Plaintiff as representative of the class described herein and the undersigned counsel as class counsel, and an order that this action is properly brought and maintainable as a class action under Fed. R. Civ. P. 23;

B. An award of damages to Plaintiff and each member of the Class resulting from Defendants’ wrongful collection of rates described as the “KY Gross Receipts Surcharge”;

C. An order enjoining Windstream’s unlawful conduct;



D. An award of pre-judgment and post-judgment interest to Plaintiff and the Class;

E. An award of reasonable attorneys' fees, including the attorney's fee and costs incurred by Plaintiff and the Class in this action, including expert-witness fees; and

F. Such other relief as the Court may deem just and proper.

A trial by jury is demanded.

DATED: June 22, 2009

Respectfully submitted,

/s Douglas F. Brent  
D. Randall Gibson  
Douglas F. Brent  
STOLL KEENON OGDEN PLLC  
2000 PNC Plaza  
500 West Jefferson Street  
Louisville, Kentucky 40202  
Phone: (502) 333-6000  
Facsimile: (502) 333-6099

*Counsel for Dana Bowers*

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
Darr... owners, for herself and Others Similarly Situated
(b) County of Residence of First Listed Plaintiff Hardin
(c) Attorney's (Firm Name, Address, and Telephone Number)
D. Randall Gibson, Douglas F. Brent, Stoll Keenon Ogden, PLLC
2000 PNC Plaza, 500 West Jefferson Street, Louisville, Kentucky 40202

DEFENDANTS
Windstream Kentucky East, LLC
Windstream Kentucky West, LLC
Windstream Communications, Inc.
County of Residence of First Listed Defendant Pulaski, Arkansas
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 1
2 2
3 3
Incorporated or Principal Place of Business In This State
Incorporated and Principal Place of Business In Another State
Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 main columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Real Estate, Personal Injury, etc.

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from another district (specify)
6 Multidistrict Litigation
7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
47 U.S.C. Section 207
Brief description of cause:
Overcharge

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMAND \$
CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY
(See instructions): JUDGE DOCKET NUMBER

SIGNATURE OF ATTORNEY OF RECORD
Douglas F. Brent
Date: 06/22/2009

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

## INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

## Authority For Civil Cover Sheet

JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

**I. (a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

**II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

**III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

**IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

**V. Origin.** Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

**VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. Do not cite jurisdictional statutes unless diversity.

Example: U.S. Civil Statute: 47 USC 553  
Brief Description: Unauthorized reception of cable service

**VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

**VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.

UNITED STATES DISTRICT COURT

for the

Western District of Kentucky

Dana Bowers, on behalf of herself  
and Others Similarly Situated

Plaintiff

v.

Windstream Kentucky East, LLC

Defendant

Civil Action No.

3:09-CV-440-H

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Windstream Kentucky West, LLC  
c/o C T Corporation  
4169 Westport Road  
Louisville, Kentucky 40202

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

D. Randall Gibson, Esq.  
Douglas F. Brent, Esq.  
STOLL KEENON OGDEN PLLC  
2000 PNC Plaza  
500 West Jefferson Street  
Louisville, Kentucky 40202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

JEFFREY A. APPERSON

Signature of Clerk or Deputy Clerk

Date:

6/23/09

John Sparking

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* Windstream Kentucky West, LLC  
was received by me on *(date)* \_\_\_\_\_

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* Phyllis Farmer ✓  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* Windstream Kentucky West, LLC, who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the summons unexecuted because \_\_\_\_\_ ; or

Other *(specify)*: \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00

I declare under penalty of perjury that this information is true.

Date: 6-24-09

John Johnson  
\_\_\_\_\_  
*Server's signature*  
John Johnson  
\_\_\_\_\_  
*Printed name and title*

500 West Jefferson St Lou Ky 40202  
\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT

for the

Western District of Kentucky

Dana Bowers, on behalf of herself  
and Others Similarly Situated

Plaintiff

v.

Windstream Kentucky East, LLC

Defendant

Civil Action No.

3:09-CV-440-H

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c/o C T Corporation  
4169 Westport Road  
Louisville, Kentucky 40202

A lawsuit has been filed against you.

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D. Randall Gibson, Esq.  
Douglas F. Brent, Esq.  
STOLL KEENON OGDEN PLLC  
2000 PNC Plaza  
500 West Jefferson Street  
Louisville, Kentucky 40202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date: 6/23/09

CLERK OF COURT

JEFFREY A. APPERSON

Signature of Clerk or Deputy Clerk

John Spaulding

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* Windstream Communications, Inc.  
was received by me on *(date)* \_\_\_\_\_

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* Phyllis Farmer  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* Windstream Communications, Inc., who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the summons unexecuted because \_\_\_\_\_ ; or

Other *(specify)*: \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00

I declare under penalty of perjury that this information is true.

Date: 6-24-09

John Johnson  
\_\_\_\_\_  
*Server's signature*

John Johnson  
\_\_\_\_\_  
*Printed name and title*

500 West Jefferson st Lou Ky 40202  
\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT

for the

Western District of Kentucky

Dana Bowers, on behalf of herself  
and Others Similarly Situated

Plaintiff

v.

Windstream Kentucky East, LLC

Defendant

Civil Action No.

3:09-CV-440-H

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Windstream Kentucky East, LLC  
c/o C T Corporation  
4169 Westport Road  
Louisville, Kentucky 40202

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

D. Randall Gibson, Esq.  
Douglas F. Brent, Esq.  
STOLL KEENON OGDEN PLLC  
2000 PNC Plaza  
500 West Jefferson Street  
Louisville, Kentucky 40202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 6/23/09

JEFFREY A. APPERSON

Signature of Clerk or Deputy Clerk

John Sparling



Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* Windstream Kentucky East, LLC  
was received by me on *(date)* \_\_\_\_\_

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* Phyllis Farmer  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* Windstream Kentucky East, LLC, who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

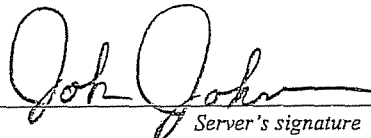
I returned the summons unexecuted because \_\_\_\_\_ ; or

Other *(specify)*: \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00

I declare under penalty of perjury that this information is true.

Date: 6-24-09

  
Server's signature

John Johnson  
Printed name and title

500 West Jefferson St Lou Ky 40202  
Server's address

Additional information regarding attempted service, etc:







**H**  
68 Rad. Reg. 2d (P & F) 1650, 6 F.C.C.R. 1618, 6 FCC Rcd. 1618, 1991 WL 638366 (F.C.C.)

FCC 91-64

FEDERAL COMMUNICATIONS COMMISSION (F.C.C.)

**\*\*1** In the Matter of  
**IRWIN**

**WALLACE**

d/b/a WALLACE  
COMMUNICATIONS  
CONSULTANTS, and  
DREW METAL  
CORPORATION,  
Complainants,

v.

AT&T COMMUNICATIONS  
OF THE SOUTHERN  
STATES, INC.,  
and AMERICAN  
TELEPHONE AND  
TELEGRAPH COMPANY,  
Defendants.

File No. E-88-116

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1991; Released: March 22, 1991

**\*1618** By the Commission:

1. **Irwin Wallace**, d/b/a Wallace Communications Consultants, and Drew Metal Corporation (hereinafter, collectively 'Wallace'), filed the above-captioned complaint against AT&T Communications of the Southern States, Inc. and American Telephone and Telegraph Company (hereinafter, collectively 'AT&T'). Wallace alleges that AT&T violated Sections 203(a), (b), (c), and 205(a) of the Communications Act<sup>[FN1]</sup> by charging other than the published interstate tariff rates for a 10-month period from June 1, 1985, to April 24, 1986.<sup>[FN2]</sup> The complaint was filed as a result of a court referral, based on primary jurisdiction, by the United States District Court, Middle District of Florida, Tampa Division (Case No. 87-1093-Civ-T-15(c), July 14, 1988). For the reasons discussed below, we find that AT&T's actions violated the Act.<sup>[FN3]</sup>

BACKGROUND AND CONTENTIONS OF THE PARTIES

2. Plaintiffs allege that on March 10, 1986, defendants filed a revision to interstate tariffs F.C.C. Nos. 1 and 2 providing for a gross receipts tax surcharge (GRTS) of 1.5 percent on the total interstate telecommunications services provided and billed by AT&T to its Florida customers. According to Wallace, although this tariff did not go into

effect until April 24, 1986, AT&T began charging and collecting the surcharge about June 1, 1985. Wallace contends that Section 203(a) of the Communications Act, 47 U.S.C. >> SS\ 203(a), requires AT&T to include within its FCC tariffs all charges for interstate communication service, that Section 203(b) prohibits AT&T from changing any of the charges in its tariff without proper notice to the Commission and the public, that Section 203(c) prohibits AT&T from charging customers a different amount than the charges specified in its tariff, and that Section 205(a) provides that when the FCC has prescribed charges for defendants, defendants are prohibited from publishing, demanding, or collecting any charge other than the one prescribed by the Commission and are required to adhere to the rates and charges prescribed. Wallace concludes that by charging its customers the GRTS prior to the date the revised tariff became effective, AT&T violated all of the above sections of the Communications Act. Therefore, Wallace asserts, AT&T is liable to plaintiffs for injuries caused by the violations, which consist of the amounts paid for the GRTS as well as other damages, including reasonable attorney fees and costs of the case.<sup>[FN4]</sup>

3. AT&T argues that it did not violate the Communications Act. It states that the Florida utility gross receipts tax statute expressly permits AT&T to pass on the tax to its Florida customers as a line item and that the tax is a fixed percent of the amount billed to end users. Therefore, concludes AT&T, 'for purposes of the Communications Act, the Florida tax has the same effect as the federal excise tax and the many state sales and excise taxes that are measured by AT&T's interstate gross receipts and imposed directly on the customer (with AT&T under a collection duty).' Answer at 7. AT&T asserts that such excise and sales taxes can be collected without tariff authority. In addition, AT&T argues that there is no reason to require federal tariffing before it may flow through taxes to customers in accordance with state of federal laws that impose the tax. It maintains that to require carriers to tariff each state and local tax and to revise the tariff each time the tax is changed would unnecessarily burden both carriers and the Commission. Moreover, according to AT&T, Section 203 does not require tariffing of activities which are extrinsic to the communications services regulated by the Commission, such as the collection of a tax which Florida allocated to its own residents. In answer to complainants' reliance on the fact that AT&T later tariffed the Florida gross receipts tax flow through, AT&T explains that although the tariff was not required, it filed an interstate tariff detailing its treatment of the gross receipts tax imposed by Florida in conjunction with its general flow through tariff, dealing with those states that did not provide specific flow through authority, to avoid any confusion as to whether the Florida tax was covered. Finally, AT&T argues that the Communications Act does not authorize the Commission to award attorneys' fees and that plaintiffs' request for such damages must be denied.<sup>[FN5]</sup>

\*\*2

4. Complainants counter that the Florida gross receipts tax is a tax on AT&T, not a tax on its customers, the end users: as to the customers, it is a surcharge imposed by AT&T.<sup>[FN6]</sup> Complainants argue that the fact that AT&T can recover (flow through) the effects of the tax from the Florida end users does not change the character of the tax to that of an excise or state sales tax. They contend that because the flow through provision of the Florida statute is permissive, not mandatory, 'it inherently provides for compliance with any other limitations -- practical, legal, regulatory or other -- which might supersede or otherwise impair the service provider's ability to recover the tax burden using the optional flow-through method.' Reply

at 7-8. According to complainants, both FCC policy and

\*1619 the Communications Act are potential impediments to the optional flow through provision. They argue that the flow through provision of the Florida statute does not supersede the FCC's tariff policies, it just makes them compatible. An examination of a Florida telephone bill shows that the gross receipts tax surcharge is itself subject to state sales and federal excise taxes. These and other factors lead complainants to conclude that the Florida gross receipts tax surcharge does not resemble state and federal end user taxes. Finally, complainants argue that the surcharge is not 'extrinsic' to the communications services regulated by the FCC, 'but is one element of many rate regulated expenses 'affecting the charges' for AT&T's tariffed services.' Reply at 11.

5. In its complaint, Wallace also requests that the Commission rule that no part of the claim is barred by the

statute of limitations, AT&T states that although the complaint alleges that AT&T started charging and collecting the GRTS about June 1, 1985, complainants did not file the complaint in the United States District Court until July 31, 1987, more than two years later. AT&T concludes that, depending on the billing dates, Section 415(b) of the Act, 47 U.S.C. \SS\415(b), bars all or part of the claims. AT&T rejects complainants' arguments that Section 415(d) extends the statutory period from two years to two years and ninety days.<sup>[FN7]</sup> AT&T interprets Section 415(d) to insure that a party has at least ninety days to bring suit after a carrier has begun an action or collected overdue charges. According to AT&T, since complainants had considerably more time than that to bring an action, Section 415(d) is inapplicable.

#### DISCUSSION

6. We do not agree with AT&T's contention that the Florida gross receipts tax need not be tariffed because it 'has the same effect as the federal excise tax and the many state sales and excise taxes . . . imposed directly on the customer . . .'. Answer at 7.<sup>[FN8]</sup> To the contrary, the \*\*3 Florida statute makes it clear that its gross receipts tax is a tax on the telecommunications carrier, not on the enduser.<sup>[FN9]</sup> Therefore, the tax is not 'extrinsic' to the communications services regulated by this Commission, as argued by AT&T, but is one of many expenses affecting the carrier's charges to its customers.<sup>[FN10]</sup> Accordingly, AT&T has not supplied any basis for not tariffing its gross receipts tax surcharge, and we find that its imposition of a gross receipts tax surcharge on the end user before the tariff authorizing such a charge became effective was a violation of Section 203 of the Act.<sup>[FN11]</sup>

7. Turning to the statute of limitations argument, we agree with AT&T that the purpose of Section 415(d) of the Communications Act, 47 U.S.C. \SS\415(d), is to ensure that a customer have at least ninety days to bring suit after a carrier has begun an action or collected charges. Section 415(d) does not automatically extend the statutory period to two years plus ninety days. It extends the filing period 'to include ninety days from the time (the) charges are collected by the carrier.' AT&T collected the charges complained of for approximately ten months beginning about June 1985. The ninety days from the time AT&T collected the unlawful charges had passed long before the end of the two-year statutory period provided for in Section 415(b) and (c).<sup>[FN12]</sup> Therefore the two-year period is not extended by Section 415(d). As a result, the complainants' claims for damages are barred to the extent they seek to recover charges alleged to have occurred beyond the two-year period of limitations specified in Section 415. See, e.g., *Aetna Life Insurance Company v. AT&T*, 3 FCC Rcd 2126 (Com. Car. Bur. 1988).

#### CONCLUSION AND ORDERING CLAUSES

8. For the reasons discussed above, we conclude that although it was proper for AT&T to flow through the Florida gross receipts tax to its Florida customers,<sup>[FN13]</sup> it should not have done so until its tariff providing for the GRTS flow through went into effect. Therefore, its flow through of the GRTS from about June 1, 1985 until the appropriate tariff became effective on April 24, 1986, was unlawful. However, any damages that might have accrued for charges imposed by AT&T beyond the two-year period of limitations specified in Section 415 are barred.

9. Accordingly, IT IS ORDERED that the complaint filed August 22, 1988, by **Irwin Wallace**, d/b/a Wallace Communications Consultants, and Drew Metal Corporation IS GRANTED to the extent indicated above and IS DENIED in all other respects.

10. IT IS FURTHER ORDERED that the motions listed in footnote 3 ARE DENIED.

11. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order be mailed forthwith to the Honorable William J. Castagna, Judge, United States \*\*4 District Court, Middle District of Florida, Tampa Division.

#### FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Secretary

FN1 47 U.S.C. §§ 203(a)-(c) & 205(a).

FN2 It is undisputed that, effective April 24, 1986, the subject charges were published pursuant to AT&T's Tariffs F.C.C. Nos. 1 and 2.

FN3 Plaintiffs have filed various motions involving discovery or admissions (Motion to Compel Complete Response to Plaintiffs' First Set of Interrogatories, Motion of Complainants for Leave to Serve Document Requests and Request for Admission, Motion for Leave to Serve a Second Set of Requests and a Post-Discovery for Admissions Brief Containing Proposed Findings of Fact and Conclusions of Law) as well as a letter dated October 5, 1990, enclosing a copy of an AT&T pleading in another matter, and citing recent decisions, which, according to plaintiffs have a bearing on the instant matter. AT&T has responded to all of these pleadings. We deny these motions and will not consider the additional arguments contained in the October 5, 1990, letter. After a status conference on December 20, 1988, AT&T agreed to supply certain information to plaintiffs. If there are any unanswered interrogatories or requests for admission still pending, the requested information is unnecessary for our resolution of the case, since only the legal implications, but not the facts, surrounding AT&T's actions are in dispute. In a footnote in its Reply to Answer, complainants also 'urge the Commission to investigate the motivation underlying AT&T's defenses and, if found to have been made in bad faith and in breach of its candor obligations to this Commission, access fines and forfeitures pursuant to Section 205(b).' Reply at 5, n. 13. We will not consider this request since it was first raised in complainants' reply. Although ordinarily a complainant would not be in a position to attack the motivation behind defendants' defenses until after the answer to the complaint was filed, in this instance the parties have filed numerous pleadings in the court action and were aware of the main arguments of the other party. Absent compelling evidence of misconduct, which Wallace has failed to introduce, we will not consider this new issue raised in the reply.

FN4 Plaintiffs, who originally brought this action as a private class action suit in the United States District Court, Middle District of Florida, Tampa Division, are looking to that court, which retained jurisdiction, for the award of damages and costs.

FN5 Since plaintiffs are relying on the court for the award of all damages, we will not reach this issue.

FN6 In support, Wallace cites an article by Dr. Robert Self which criticizes AT&T's tariffs for referring to a gross receipts tax surcharge as a tax. According to Dr. Self, such a charge is not a tax, but a surcharge. Taxes, according to Dr. Self, are not subject to the federal excise tax, whereas surcharges are.

FN7 Section 415 provides, in pertinent part:

(b) All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section.

(c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section . . . .

(d) If on or before the expiration of the period of limitation in subsection (b) or (c) a carrier begins action under subsection (a) for recovery of lawful charges in respect of the same service, or without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.



FN8 Federal excise taxes and sales taxes are taxes on the end user, not on the carrier. As a result, those taxes are not an expense of the carrier in doing business in the state, and are not tariffed.

FN9 Pertinent parts of 203.63 of the Florida Utility Code, Gross Receipts Taxes, provide as follows:

FN203.63 Tax on interstate and international telecommunication services.

(1) The tax imposed pursuant to this part relating the provisions of any telecommunications services . . . at the option of the person supplying the taxable services may be separately stated as Florida gross receipts tax on the total amount of any bill, invoice, or other tangible evidence of the provision of such services and may be added as a component part of such charge. . . .

(2) The tax is imposed upon every person for the privilege of conducting a telecommunication business, and each provider of the taxable services remains fully and completely liable for the tax, even if the tax is separately stated as a line item or component of the total bill.

FN10 AT&T's argument that it would unnecessarily burden both carriers and the Commission to require them to tariff each state and local tax and to revise the tariff each time the tax is changed is misplaced. As noted above, carriers are not required to tariff all state and local taxes, but only those levied directly on them as an expense of doing business. Filing a revised tariff in this instance is no more burdensome than revising any other tariff when expenses change.

FN22 Complainants also allege that defendants violated Section 205(a) of the Act, 47 U.S.C. \SS\205(a), by demanding and collecting a charge other than that prescribed by the Commission. Complainants, however, provide no evidence to show that the Commission has, in fact, prescribed any rate or rates at issue in the instant complaint. Thus, there is no basis for a finding that AT&T's collection of a gross receipts tax surcharge prior to tariffing it violated any outstanding Commission prescription pursuant to Section 205(a).

FN12 Section 415(b) establishes a two-year limitation period for the recovery of damages not based on overcharges. Section 415(c) establishes a two-year limitation period for the recovery of damages based on overcharges. Although AT&T states that Section 415(b) applies in this instance, it would appear that the appropriate section is Section 415(c).

FN13 See, e.g., Connecticut Office of Consumer Counsel v. AT&T Communications, 4 FCC Rcd 8130(1989), aff'd sub nom. Connecticut Office of Consumer Counsel v. FCC, 915 F.2d 75 (2nd Cir. 1990).

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FCC

68 Rad. Reg. 2d (P & F) 1650, 6 F.C.C.R. 1618, 6 FCC Rcd. 1618, 1991 WL 638366 (F.C.C.)  
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GENERAL CUSTOMER SERVICES TARIFF

WINDSTREAM KENTUCKY EAST, INC.

P.S.C. KY. No. 7  
Original Page 27

ISSUED: July 17, 2006  
BY: Vice President  
Lexington, Kentucky

EFFECTIVE: August 1, 2006

S2. GENERAL REGULATIONS

S2.4 Payment Arrangements and Credit Allowances (Continued)

S2.4.5 Provision for Certain Local Taxes and Fees

- a. Effective July 1, 1960, the Company, pursuant to authority conferred by KRS 139.210 commenced and will continue to add to the bills of customers as a separate item the Kentucky Veterans' Bonus Sales and Use Tax levied by KRS 139.200.
- b. When the Company is required to pay the 3 percent utilities gross receipts license tax for schools, authorized by KRS 160.613, the Company will increase its rates in any such county in which it is required to pay such school tax by 3 percent. This tax will be added to customer bills as a separate item.
- c. There shall be added to the customer's bills, as a separate item, an amount equal to the proportionate part of any license, occupation, franchise, or other similar fee or tax now or hereafter agreed to or imposed upon the Company by local taxing authorities, whether imposed by ordinance, franchise or otherwise, and which fee or tax is based upon a percentage of the gross receipts, net receipts, or revenues of the Company. Such amount shall be added to bills of customers receiving service within the territorial limits of the taxing authority. Where more than one such fee or tax is imposed, each of the charges or taxes applicable to a customer shall be added to the customer's bill as separately identified items.



H  
7 F.C.C.R. 3333, 7 FCC Rcd. 3333, 1992 WL 689806 (F.C.C.)

FCC 92-216

\*\*1 IN THE MATTER OF  
IRWIN WALLACE, D/B/A WALLACE COMMUNICATIONS CONSULTANTS, AND DREW METAL  
CORPORATION, COMPLAINANTS,  
v.  
AT & T COMMUNICATIONS OF THE SOUTHERN STATES, INC., AND AMERICAN TELEPHONE AND  
TELEGRAPH COMPANY, DEFENDANTS.

File No. E-88-116

Adopted: May 14, 1992; Released: May 29, 1992

MEMORANDUM OPINION AND ORDER

\*3333 By the Commission:

#### I. INTRODUCTION AND BACKGROUND

1. AT & T Communications of the Southern States, Inc., and American Telephone and Telegraph Company (hereinafter, collectively, "AT & T") have petitioned for reconsideration of the Commission's decision in this proceeding.<sup>[FN1]</sup> In the Order, the Commission held that AT & T violated Section 203 of the Act by flowing through the gross receipts tax to its Florida customers for approximately ten months before its gross receipts tax surcharge (GRTS) tariff went into effect (from about June 1, 1985 until April 24, 1986). The Commission determined that although it was proper for AT & T to flow through the Florida gross receipts tax, it should not have done so until its tariff providing for the GRTS flow through went into effect on April 24, 1986. However, the Commission agreed with AT & T that any damages that might have accrued for charges imposed by AT & T beyond the statutory two-year period of limitations specified in Section 415 of the Communications Act, 47 U.S.C. § 415, are barred.<sup>[FN2]</sup>

2. In its petition for reconsideration, AT & T argues that the Commission erred in its holding that AT & T violated Section 203 of the Act. AT & T contends, moreover, that even if the Commission properly found a Section 203 violation, it erred in concluding that the Federal District Court in Florida, rather than the Commission, "has jurisdiction to decide whether and to what extent complainants are entitled to recover damages for a technical Section 203 violation that did not result in unreasonable or discriminatory charges." Petition at ii (emphasis in original).

#### II. DISCUSSION

3. We find that AT & T has not advanced any new arguments which would persuade us to modify our decision, and accordingly we deny the petition for reconsideration. AT & T's arguments that the Commission erred in finding a violation of Section 203 of the Act were, without exception, fully considered and rejected in the underlying order and require no further discussion here. However, AT & T's petition does raise for the first time the issue whether the Commission should decide whether and to what extent complainants may recover damages as a consequence of the violations.

4. AT & T argues that the Commission declined to reach the damages issues because it concluded that those issues had not been referred to the Commission and were matters for the United States District Court to decide. It argues that to the contrary, "the District Court referred the entire case to the Commission, including the issue of damages." Petition at ii (emphasis in original). According to AT & T, the "District Court retained jurisdiction only to the extent necessary to protect complainants' rights in the event that the Commission were 'unable to fashion an appropriate remedy' after deciding the issues of violation and damages."<sup>[FN3]</sup> Moreover, AT & T maintains that complainants suffered no injury as a consequence of AT & T's actions and are therefore not entitled to recover damages.<sup>[FN4]</sup> AT & T requests that if the Commission does not vacate its Section 203 holding, it require complainants to produce evidence of losses suffered because of AT & T's conduct and decide the issue of damages itself.

\*\*2 5. Section 1.722(b) of the Commission's rules, 47 C.F.R. § 1.722(b), provides that damages will not be awarded upon a complaint unless specifically requested. In the instant case, complainants are not requesting that the Commission determine damages. Indeed, complainants specifically stated that they "will look to the court for the award of damages and fees, if any, following resolution by this Commission...."<sup>[FN5]</sup> Complainants' Reply to Answer at 12. Accordingly, we reject AT & T's suggestion that the damages issue is properly before us. AT & T will have a full opportunity before the District Court, which specifically retained jurisdiction over the complaint, to present its argument that no damages should be awarded.<sup>[FN6]</sup>

#### \*3334 III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, that the petition for reconsideration filed by AT & T IS DENIED.<sup>[FN7]</sup>

7. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order be mailed forthwith to the Honorable William J. Castagna, Judge, United States District Court, Middle District of Florida, Tampa Division.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Secretary

FN1. 6 FCCRcd 1618 (1991) (Order).

FN2. The complaint was filed at the Commission as a result of a referral by the United States District Court, Middle District of Florida, Tampa Division (Case No. 87-1093-Civ-T-15(c)) (July 14, 1988). Complainants did not file the complaint in the United States District Court until July 31, 1987, more than two years after AT & T imposed the surcharge. The record reflects that AT & T charged and collected the gross receipts tax surcharge beginning about June 1, 1985, and ending April 24, 1986.

FN3. Petition at 12, citing the court's Order of April 4, 1988 (emphasis added).

FN4. AT & T's pleadings contain a lengthy argument to support its contention that complainants' theory of damages due them is wrong. Because of our action today, we need not summarize these arguments or complainants' opposition thereto.

FN5. To the extent there was any ambiguity in Count 5 of the complaint, this statement resolved it.

FN6. We note that both parties read more into footnote 5 of the Order than is warranted. Contrary to the parties' assertions, the Commission did not conclude that it did not have jurisdiction to decide whether and to what extent complainants are entitled to recover damages (AT & T's Petition at ii) nor did it "[rule] that Complainants are entitled to recover the overcharge" (Complainants' Opposition at 11). The Commission left to the District Court an issue that was not before the Commission and over which the court retained jurisdiction.

FN7. Among the pleadings in this case is complainants' unopposed Motion for Leave to File Reply in Excess of Page Limitations. We grant that motion.

7 F.C.C.R. 3333, 7 FCC Rcd. 3333, 1992 WL 689806 (F.C.C.)  
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GENERAL CUSTOMER SERVICES TARIFF

WINDSTREAM KENTUCKY EAST, INC.

P.S.C. KY. No. 7  
Original Page 27

ISSUED: July 17, 2006  
BY: Vice President  
Lexington, Kentucky

EFFECTIVE: August 1, 2006

S2. GENERAL REGULATIONS

S2.4 Payment Arrangements and Credit Allowances (Continued)

S2.4.5 Provision for Certain Local Taxes and Fees

- a. Effective July 1, 1960, the Company, pursuant to authority conferred by KRS 139.210 commenced and will continue to add to the bills of customers as a separate item the Kentucky Veterans' Bonus Sales and Use Tax levied by KRS 139.200.
- b. When the Company is required to pay the 3 percent utilities gross receipts license tax for schools, authorized by KRS 160.613, the Company will increase its rates in any such county in which it is required to pay such school tax by 3 percent. This tax will be added to customer bills as a separate item.
- c. There shall be added to the customer's bills, as a separate item, an amount equal to the proportionate part of any license, occupation, franchise, or other similar fee or tax now or hereafter agreed to or imposed upon the Company by local taxing authorities, whether imposed by ordinance, franchise or otherwise, and which fee or tax is based upon a percentage of the gross receipts, net receipts, or revenues of the Company. Such amount shall be added to bills of customers receiving service within the territorial limits of the taxing authority. Where more than one such fee or tax is imposed, each of the charges or taxes applicable to a customer shall be added to the customer's bill as separately identified items.







Ernie Fletcher  
Governor



Teresa J. Hill  
Secretary

Commonwealth of Kentucky  
Environmental and Public Protection Cabinet  
Public Service Commission  
211 Sower Blvd.  
P.O. Box 615  
Frankfort, Kentucky 40602-0615  
Telephone: (502) 564-3940  
Fax: (502) 564-3460

May 30, 2007

Joan Coleman  
AT&T  
Regulatory and External Affairs  
601 West Chestnut Street  
Louisville, KY 40203

RE: Filing No. **TFS2007-00400**  
KY2007-035 – This tariff introduces a surcharge to recover the cost of the Kentucky  
Gross Revenues Tax (GRT) that is imposed on communications providers by  
KRS136.616.

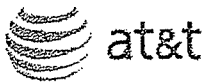
Dear Joan Coleman:

The above referenced filing has been received and reviewed. An accepted copy is enclosed for your files. You may also use the following link to access documents related to this filing.

<http://psc.ky.gov/trf/TRFListFilings.aspx?ID=TFS2007-00400>

Sincerely,

  
Dennis Brent Kirtley  
Tariff Review Branch Manager



Joan Coleman  
President - Kentucky

AT&T  
601 W. Chestnut Street  
Room 408  
Louisville, KY 40203

T: 502-582-8601  
F: 502-582-1547  
joan.coleman@att.com  
www.att.com

May 16, 2007

Elizabeth O'Donnell  
Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
P. O. Box 615  
Frankfort, Kentucky 40602

Dear Ms. O'Donnell:

Pursuant to the rules governing tariffs effective August, 2005, I hereby certify that I am the State President-Kentucky of AT&T, Inc., a utility furnishing telephone service within the Commonwealth of Kentucky, which on the 16<sup>th</sup> day of May, 2007, issued revised sheets of its Intrastate Tariffs to be effective June 1, 2007, and canceling the previously effective sheets as follows:

General Subscriber Services Tariff

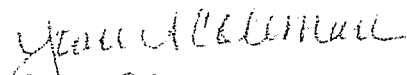
Section A2 Contents	Sixth Revised Page 2 Cancels Fifth Revised Page 2
Section A2	Tenth Revised Page 13.1 Cancels Ninth Revised Page 13.1
Section A2	First Revised Page 14 Cancels Original Page 14

Access Services Tariff

Section E2 Contents	Ninth Revised Page 2 Cancels Eight Revised Page 2
Section E2	Eighth Revised Page 18.2.1 Cancels Seventh Revised Page 18.2.1

On the sixteenth day of May, 2007, notice to the public of the issuing of same is being given in all respects. Given under my hand this sixteenth day of May, 2007.

Very truly yours,

  
Joan A. Coleman



Attachment

Bill Insert Language:

Effective 06/01/2007, AT&T will begin applying a surcharge on all communications services provided in Kentucky in order to recover from those customers the cost of a Kentucky gross revenues tax that is imposed on AT&T at the rate of 1.3% of its gross revenues from providing communications services in Kentucky. This surcharge will appear on your bill as "KY GRT Surcharge." If you have any questions, please call the Billing Questions contact number on the first page of your bill. Thank you for choosing AT&T.

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## A2. GENERAL REGULATIONS

### A2.4 Payment Arrangements And Credit Allowances (Cont'd)

#### A2.4.3 Payment For Service (Cont'd)

- H. A late payment charge of \$3.00 and an interest charge of 1.50 percent of the unpaid balance will apply to each residence subscriber's bill with a balance greater than \$6.00 for regulated charges (including amounts billed in accordance with the tariff dealing with the Billing and Collection Services) when any undisputed portion of a previous month's bill has not been paid in full prior to the next billing date. A late payment charge of \$15.00 and an interest charge of 1.50 percent of the unpaid balance will apply to each business subscriber's bill with a balance greater than \$6.00 for regulated charges (including amounts billed in accordance with the tariff dealing with the Billing and Collection Services) when any undisputed portion of a previous month's bill has not been paid in full prior to the next billing date. The 1.50 percent interest charge is applied to all new charges on a subscriber's previous month's bill which were not paid prior to the next billing date. State Agencies subject to KRS 45.454 shall be assessed late payment charges in accordance with that statute. Additional penalty charges shall not be assessed on unpaid penalty charges. Federal Government customers are exempt from late payment and/or interest charges.
- I. Residence subscribers with overdue bill balances for their existing service, which has been temporarily suspended for nonpayment, who are unable to pay the charges in full may be allowed to retain their local service if they elect to have a full toll restriction placed on their existing service, at no charge, until the charges are paid. These subscribers may arrange to pay the outstanding balance in up to twelve (12) monthly installment payments. An Installment Billing Service Fee may apply as specified in Section A.4.
- J. Miscellaneous Fees Associated With Payments

1. Payment Convenience Fee for Payment Made Via Telephone Call

A fee will apply for each instance of payment of outstanding charges when authorized by the residence subscriber by telephone (whether such telephone call was initiated by the subscriber or by the Company) and when the method of payment would allow the payment to be immediately credited to the subscriber's account, such as payment via a credit card, an electronic check (eCheck), or any other discretionary type payment that may be accepted by the Company through such telephone contacts. This fee will not apply for payments taken directly by subscribers to authorized Company payment locations, payments mailed in, automatic funds transfer, and other conventional methods of payments. The subscriber would be informed of any applicable charges prior to processing the subscriber's request.

a. Rates and Charges

(1) Per Telephone Request

(a) Residence

Rate	USOC
\$3.95	NA

#### A2.4.4 Allowance For Interruptions

When the use of service or facilities furnished by the Company is interrupted due to any cause other than the negligence or willful act of the subscriber or the failure of the facilities provided by the subscriber, a pro rata adjustment of the fixed monthly charges involved will be allowed, upon request of the subscriber, for the service and facilities rendered useless and inoperative by reason of the interruption during the time said interruption continues in excess of twenty-four hours from the time it is reported to or detected by the Company, except as otherwise specified in this Tariff. For the purpose of administering this regulation, every month is considered to have thirty days.

#### A2.4.5 Provision For Certain State And Local Taxes And Fees

- A. When the Company is required to pay the three percent utilities gross receipts license tax for schools, authorized by KRS 160.613, the Company will increase its rates in any such county in which it is required to pay such school tax by three percent.

(C)

## A2. GENERAL REGULATIONS

### A2.4 Payment Arrangements And Credit Allowances (Cont'd)

#### A2.4.5 Provision For Certain *State And Local Taxes And Fees* (Cont'd)

- B. Effective July 1, 1960, the Company, pursuant to authority conferred by KRS 139.210 commenced and will continue to add to the bills of subscribers as a separate item the Kentucky Veterans' Bonus Sales and Use Tax levied by KRS 139.200. (C)
- C. Effective June 1, 2007, the Company will add to the bills of subscribers a surcharge to recover the KY Gross Revenues Tax (GRT) imposed by KRS 136.616. This will appear as a separate line item on the customer's bill and will read: KY GRT Surcharge. (N)

#### A2.4.6 Reserved For Future Use

#### A2.4.7 Reserved For Future Use

#### A2.4.8 Variable Term Payment Plan

##### A. General

1. The Variable Term Payment Plan (VTPP) is a payment plan which allows customers to pay a fixed rate for service over one of several optional payment periods. A different monthly rate applies for the duration of each period. The monthly rate varies inversely with the length of the payment period e.g., the monthly rate for a short period is greater than that for a long period.
2. The only payment period for software (versions) is the one-month period, except where other terms are specified in service tariffs.
3. The minimum period is one month, unless otherwise specified in service tariffs.
4. During the effective term of a customer-selected optional payment period, the monthly rate is not subject to Company-initiated change for payment periods longer than one month.
5. Unless specifically exempted, services furnished under the Variable Term Payment Plan are subject to all general regulations applicable to the provision of service by the Company as stated elsewhere in this Tariff.

##### B. Definitions

###### ADDITION

Provision of supplementary equipment to a customer's installed system up to the capacity of the system; addition of equipment not classified as an upgrade.

###### CONVERSION

Removal of a customer's installed system and replacement with a different system, under terms specified in service tariffs.

###### DOWNGRADE

Tariff-enumerated changes to an installed system generally resulting in a decrease in capacity, capability and/or a lower monthly charge.

###### EXTENSION

A tariff enumerated period of time over which the customer agrees to pay a specified rate for a service upgrade.

###### LICENSE FEE

A monthly recurring charge, the payment of which gives a customer license to use an identified software service.

###### MINOR EQUIPMENT MODIFICATIONS

Alterations to an item or items of service installed, as specified in service tariffs.

###### PAYMENT PERIOD

A period of time selected by the customer from among those currently offered by the Company, over which the customer agrees to pay a specified rate for a service.

## E2. GENERAL REGULATIONS

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## E2. GENERAL REGULATIONS

### E2.4 Payment Arrangements And Credit Allowances (Cont'd)

#### E2.4.10 Service Installation Guarantee

- A. The Company assures that orders for services to which the Service Installation Guarantee applies will be installed and available for customer use no later than the Service Date as specified in E5.2.4.B following. The Service Installation Guarantee is applicable only as specified in E6.7.1.C and E7.4.1.A following.
- B. The failure of the Company to meet this commitment will result in the credit of an amount equal to the nonrecurring charges associated with the individual service having the missed Service Date being applied to the customer's bill. The credit will include only nonrecurring charges associated with the services specified in E6.7.1.C and E7.4.1.A following for which nonrecurring charges are applicable. The nonrecurring charges will be credited at the rate at which they were billed. The credit will not be provided if a credit of the same nonrecurring charge for the same service is provided under any other provisions of this Tariff.
- C. Service Installation Guarantees do not apply: (T)
1. when failure to meet the Service Date occurs because of:
    - a. any act or omission, which shall include an accurate and complete service order from this customer, any other customer or any third party, or of any other entity providing a portion of a service,
    - b. labor difficulties, governmental orders, civil commotions, criminal actions against the Company, acts of God, war, or other circumstances beyond the Company's control,
    - c. unavailability of the customer's facilities and/or equipment,
  2. to service requiring Special Construction as set forth in Section E14 following,
  3. to Specialized Service or Arrangements or Individual Case Basis filings,
  4. for jointly provisioned services except as stipulated in 5 following (T)
  5. to BellSouth SWA or Special Access (a.k.a. BellSouth SPA) installation, moves and arrangements of service with an agreed upon service date interval of four business days or less following the Application Date of the service order.
- In addition, Service Installation Guarantees will not apply during a declared National Emergency. Priority installation of National Security Emergency Preparedness (NSEP) telecommunications services shall take precedence.

#### E2.4.11 Provision For Certain State And Local Taxes And Fees (N)

- A. Effective June 1, 2007, the Company will add to the bills of subscribers a surcharge to recover the KY Gross Revenues Tax (GRT) imposed by KRS 136.616. This will appear as a separate line item on the customer's bill and will read: KY GRT Surcharge. (N)



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