

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

In the Matter of:

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

Answer

On November 16, 2010, Dana Bowers (“Plaintiff” or “Plaintiff Bowers”) filed a Petition for Declaratory Ruling which the Commission, in its November 22, 2010 Order, treated as a formal complaint under 807 KAR 5:001, Section 12 (promulgated pursuant to KRS 278.310) (“Complaint”). Windstream Kentucky East, LLC (“Windstream East”) files the following in support of its Answer to Plaintiff’s Complaint:

1. Affirmatively, Windstream East states that the crux of Plaintiff’s Complaint before the Commission is that Windstream East violated KRS 278.160 “when it charged her, and its other customers, an unfiled rate for telecommunications services provided under tariff.” (Complaint p. 1) Plaintiff Bowers essentially seeks a ruling that the gross receipts surcharge charged by Windstream East to her was a rate for service that should have been tariffed. Plaintiff Bowers, however, is incorrect, and her analysis ignores the fact that the gross receipts surcharge is authorized by law and is not a rate for service required to be tariffed (similar to 911 surcharges or franchise fees). Indeed, even if the surcharge in question could be considered a rate for service, which it is not, Plaintiff Bowers overlooks the fact that the rate would be one for

nonbasic services not covered under KRS 278.160, that she has no jurisdictional services to which KRS 278.160 applies, and otherwise that Windstream East has tariff language on file that encompasses the gross receipts surcharge.¹

2. Windstream East denies the allegations set forth in the introductory paragraph, including the footnotes, on page 1 of the Complaint. With respect to the legal arguments and citations set forth in the introductory paragraph of the Complaint, Windstream East states that neither is a factual allegation to be admitted or denied.

3. Windstream East states that the statute and case cited in Paragraph 1 of the Complaint are documents which speak for themselves and do not require an admission or denial, and Windstream East denies all allegations inconsistent with their terms. Affirmatively, Windstream East states that KRS 278.160 requires that a utility file with the Commission its rates and conditions *for service*, that a utility charge compensation *for services* rendered no greater or less than the service rates prescribed in its schedules, and that special contract rates generally do not need to be tarified. (KRS 278.160.) Further, Windstream East states that it maintains tarified rates for services subject to KRS 278.160, consistent with KRS 278.544, that Plaintiff Bowers does not subscribe to any services subject to KRS 278.160, that the gross receipts surcharge is not a rate for service, that the gross receipts surcharge is not subject to the Commission's tariffing jurisdiction, and that even if same was deemed a rate for service it is provided for in Windstream East's tariff.

4. To the extent she alleges that all of the services she purchases from Windstream East are governed by tariff, Windstream East denies the allegation in Paragraph 2 of the

¹ Windstream East notes that because Plaintiff's Complaint was styled originally as a Petition for Declaratory Ruling it contained legal argument. However, because the Commission has ordered that Plaintiff's action be treated as a Complaint, Windstream East refrains in its Answer from countering much of Plaintiff's legal argument and case citations and reserves its argument for later briefing phases of this proceeding.

Complaint that Plaintiff Bowers subscribes to services from Windstream East that are governed by tariff P.S.C. Ky. No. 7. More accurately, Plaintiff Bowers subscribes to high speed internet services that are not subject to the Commission's jurisdiction and have been deregulated and detariffed by the Federal Communications Commission. Plaintiff Bowers also subscribes to two residential lines provided under Windstream East's "Feature Pack A." Plaintiff's Feature Pack A services are described in Windstream East's tariff No. 7. By Kentucky law, the Feature Pack A services are nonbasic services subject to discretionary and not mandatory tariffing requirements. (KRS 278.541 and 278.544.) Windstream East admits that Plaintiff Bowers is a plaintiff in the judicial proceeding as set forth in Paragraph 2 of the Complaint. Windstream East is without information sufficient to admit or deny the allegations contained in the second sentence of Paragraph 2 of the Complaint and therefore denies the same. Windstream East states that prior to the lawsuit being filed, Plaintiff Bowers had filed no disputes or complaints with Windstream East – informal or formal – regarding the gross receipts surcharge. Windstream East admits that the subject of Plaintiff's Complaint was set forth in Count III of the judicial proceeding.

5. With respect to Paragraph 3 of the Complaint, Windstream East denies that what is attached as Exhibit C to the Complaint is a "sample of Petitioner's bill." Plaintiff's Exhibit C contains only select portions of a typical monthly billing invoice and omits in particular the billing descriptions of the surcharge in question. Affirmatively, Windstream East states that in its Memorandum and Order dated December 2, 2010, the Court granted in part Windstream East's motion to dismiss and dismissed with prejudice Plaintiff's claim that her invoices contained misleading descriptions of the surcharge.²

6. Windstream East admits the allegation in Paragraph 4 of the Complaint that the gross revenues tax is a tax imposed on Windstream East and not directly on its customers and

² Windstream East reserves its complete arguments on this point for briefs in this matter.

states affirmatively that its messaging of the surcharge to its customers at all times has reflected the same consistent with the court orders governing and providing for the line-item gross receipts surcharge. Windstream East further states that the statute cited in Paragraph 4 of the Complaint is a written document which speaks for itself. Windstream East is without information sufficient to admit or deny the allegations contained in the final sentence of the paragraph because the term “cost of doing business” has different meanings and therefore denies the same. Windstream East states that the gross revenues tax changed the collection basis for municipal franchise fees from an individual municipal basis to a state basis but that franchise fees were always directly passed through to end users and treated outside the Commission’s ratemaking jurisdiction.

7. Windstream East states the decisions referenced by the Plaintiff in Paragraph 5 of the Complaint speak for themselves and denies all allegations contrary to the decisions. Windstream East further denies that the gas and electric cases cited by Plaintiff Bowers have any bearing on the communications surcharge at issue in this matter. Affirmatively, Windstream East states that certain add-on end user surcharges such as municipal franchise fees (now collected through the gross receipts surcharge) and 911 fees are not treated as part of a telecommunications utility’s tariff regime and are authorized by areas of Kentucky law outside of the chapter of the Kentucky law establishing the scope of the Commission’s jurisdiction. In prior cases approving utility franchise bids, the Commission consistently has recognized that its authority in such matters is limited by statute to finding only whether there is a demand for the service sought to be rendered and that it makes no finding as to the manner in which any franchise fee is to be treated for rate purposes.

8. With respect to Paragraph 6 of the Complaint, Windstream East states that KRS 278.160 speaks for itself and denies all allegations inconsistent with its terms.

9. With respect to Paragraph 7 of the Complaint, Windstream East admits that it began assessing its customers the gross receipts surcharge in 2007, including for a time, in amounts above 1.3% but denies all other allegations therein, including specifically that the surcharge is an “unfiled rate.” Affirmatively, Windstream East states that its assessment of the gross receipts surcharge was initiated only after those portions of KRS 136.616 prohibiting a line item surcharge were declared unconstitutional by the United States District Court for the Eastern District of Kentucky. Windstream East states further that its surcharge was assessed only in amounts to recover its costs of the gross revenues tax assessed to it by the Kentucky Revenue Cabinet. Windstream East states that Plaintiff Bowers does not subscribe to any jurisdictional services subject to the tariffing requirements of KRS 278.160.

10. Windstream East denies the allegation in Paragraph 8 of the Complaint that Plaintiff Bowers subscribes to telecommunications services provided under Windstream East’s federal and Kentucky state tariffs. Additionally, while Windstream East admits the allegation in Paragraph 8 of the Complaint that it amended its federal tariffs to include the gross receipts surcharge, Windstream East denies any claim by Plaintiff Bowers that an amendment to its Kentucky tariff (which is all that is at issue before this Commission) was required. Further, Windstream East reserves its arguments regarding the status of its federal tariffs for the judicial proceeding pending before the court.

11. With respect to Paragraphs 9, 10, and 11 of the Complaint, Windstream East denies that issues pertaining to its federal tariffs are matters appropriately before this Commission. Windstream East further states that the Orders and Opinions referred to in the paragraph speak for themselves, refers to them for their terms, and denies all allegations inconsistent with their terms. Windstream East states affirmatively that the language in its tariff

referenced by Plaintiff Bowers in Paragraph 11 of the Complaint expressly authorizes the surcharge at issue.³ The gross revenues tax (the costs of which give rise to the gross receipts line item surcharge) is a tax imposed by and for the benefit of local taxing authorities. (See, *e.g.*, KRS 136.650 providing that each political subdivision shall relinquish its right to enforce the portion of any agreement that requires the payment of a franchise fee or tax on communications services, regardless of whether the tax or fee is imposed on the provider or its customers and KRS 136.660 requiring any political subdivision demanding payment of a franchise fee to forego receipt of any share of the proceeds of the tax levied by KRS 136.604 or 136.616 and also for credits thereunder to any communications service provider who actually pays such a franchise fee.) To the extent that any such surcharge were to fall under the Commission's tariffing regime (which it does not), Windstream East's tariff nevertheless provides for such a surcharge.

12. Paragraphs 12 and 13 of the Complaint contain allegations of law to which no response is required. To the extent a response is required, Windstream East denies the allegations, except with respect to any order, regulation, or statute Windstream East refers to them for their terms and denies all allegations inconsistent therewith. Further Windstream East denies so much of Paragraph 13 as alleges that Windstream East collected more than its costs of the total gross revenues tax. Windstream East affirms that it has used the gross receipts surcharge to collect only the amounts of its gross revenues tax which it is assessed.

13. With respect to Paragraph 14 of the Complaint, Windstream East denies that Tariff PSC KY. No. 8 (Windstream Kentucky East's tariff for intrastate access facilities) is also

³ It should also be noted that while Windstream East denies Plaintiff's primary claim that the gross receipts surcharge is an unfiled rate required to be tariffed, it also notes that to the extent that Plaintiff Bowers is seeking to enforce the tariff in this context, then she also must accept all portions of the tariff including those provisions which require her to have timely filed any dispute of a charge within thirty days. (See, *e.g.*, PSC KY No. 7 §2.4.3(a) providing that if Windstream East does not receive an objection from a customer within 30 days after the bill is rendered the account is deemed correct and binding on the customer.)

at issue for the reason that Plaintiff Bowers does not subscribe to any access services pursuant to this tariff. Plaintiff Bowers is not a carrier, is an end user customer, and has not been even a long distance customer of Windstream East for any period of time at issue in the judicial proceeding. Windstream East denies the remainder of the allegations in Paragraph 14 of the Complaint, alleging that it lacks authority to impose the gross receipts surcharge.

14. Windstream East denies the allegations set forth in Paragraph 15 of the Complaint, except Windstream East admits that Plaintiff Bowers is not a customer of Windstream Kentucky West, LLC (“Windstream West”) or Windstream Communications, Inc. (“WCI”). Neither Windstream West nor WCI have been named as parties to this action, and Plaintiff Bowers is not entitled to litigate any claims against them or receive any relief with respect to them in this forum. Windstream East states that prior attempts by Plaintiff Bowers to pursue claims against Windstream West and WCI were disallowed by the Court. Claims by Plaintiff Bowers against WCI were dismissed in the judicial proceeding, are not part of the referral to this Commission of Count III of Plaintiff’s action, and are not appropriate for consideration herein by the Commission.

15. Windstream East denies that the relief requested by Plaintiff Bowers is appropriate.

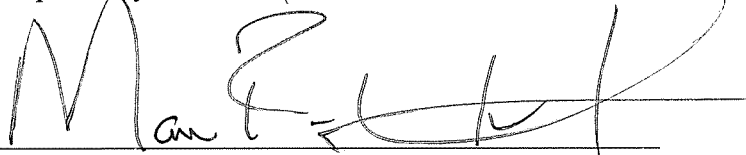
16. Windstream East denies all other allegations in the Complaint unless specifically admitted herein and reserves the right to plead further in this matter as it deems necessary.

WHEREFORE, Windstream East requests that the Commission deny Plaintiff’s claims set forth in the Complaint consistent with this Answer, deny all claims by Plaintiff which reach beyond Count III of the judicial action giving rise to this Complaint, find that Plaintiff does not subscribe to any jurisdictional services which are subject to KRS 278.160, find that Plaintiff

Bowers is not entitled to assert claims against carriers not named in her Complaint, issue an order determining that the gross receipts surcharge itself is not a rate for service subject to the tariff requirements of KRS 278.160, and grant all other appropriate and necessary relief.

DATED this 17th day of December, 2010.

Respectfully submitted,

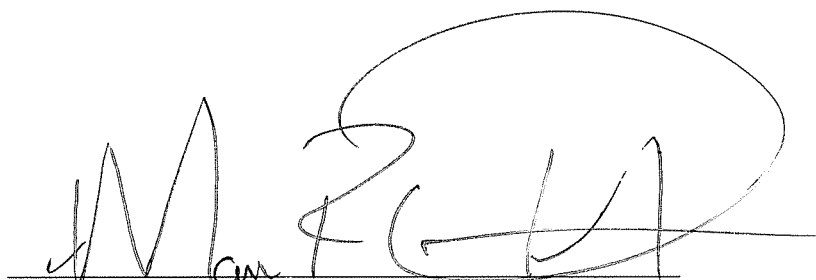


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ANSWER was served by United States First Class Mail, postage prepaid on this 17th day of December 2010 upon:

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