STOLL·KEENON·OGDEN
PLLC

2000 PNC PLAZA
500 WEST JEFFERSON STREET
LOUISVILLE, KY 40202-2828
MAIN: (502) 333-6000
FAX: (502) 333-6099
www.skofirm.com

C. KENT HATFIELD
DIRECT DIAL: (502) 568-5745
DIRECT FAX: 502-562-0945
kent.hatfield@skofirm.com

January 28, 2010

VIA FEDERAL EXPRESS

Jeffrey DeRouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40601

RE: PSC Case No. 2010-00447

Dear Mr. DeRouen:

Enclosed for filing in this case please find an original and ten copies of Dana Bowers, Complainant's Motion for Procedural Schedule Consisting of Briefing Only. Please place your file stamp on the extra copy and return to me in the enclosed envelope.

If you have any questions concerning this filing, please do not hesitate to contact me. Thank you very much for your attention to this matter.

Sincerely yours,

C. Kent Hatfield

CKH: jms
Enclosures

112694.134900/673234.1

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

DANA BOWERS	(	
COMPLAINANT	(	
v.	(	CASE NO. 2010-00449
WINDSTREAM KENTUCKY EAST, LLC	(	
DEFENDANT	(	

MOTION FOR PROCEDURAL SCHEDULE CONSISTING OF BRIEFING ONLY

Dana Bowers, Petitioner/Complainant in this Action, pursuant to the directive of Commission Staff at the Informal Conference of January 11, 2011, for her Motion for Procedural Schedule Consisting of Briefing Only, states as follows:

INTRODUCTION

This case concerns legal and policy issues referred to the Commission by the United States District Court for the Western District of Louisville when it stayed (but did not dismiss) Count III of Plaintiff's case involving Windstream's obligations under Kentucky's Filed Rate Doctrine. The Court rejected Windstream's arguments regarding the federal Filed Rate Doctrine, and this and other aspects of the case will continue to be litigated pending the Court's receipt of the Commission's response to the Count III legal issues that have been referred to it.

The procedural schedule in this case should consist of simultaneous primary briefs on the merits to be filed by the parties within two to four weeks of the Commission's Order resolving this procedural dispute, followed by reply briefs filed within two weeks thereafter. There are absolutely no disputed facts material to the issues framed by the Court, and therefore there is absolutely no need for discovery, prefiled testimony, or an evidentiary hearing.

The Court framed the issues it sent to the Commission as follows:

> 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*[1] 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 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.... 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.*[2]

Both of these questions depend for their resolution on facts that are of record and that are not subject to dispute:

- There are Windstream tariffs on file with the Commission.
- The tariffs ***do not state*** that Windstream will charge a 1.3% "Kentucky Gross Receipts" surcharge.
- One tariff states that Windstream will charge a "proportionate part of any license, occupation, franchise, or other similar fee or tax now or hereafter agreed to or imposed ... by local taxing authorities."
- Windstream charged its customers a "Kentucky Gross Receipts Surcharge."
- The Kentucky gross receipts tax in KRS 136.616(2)(b) is imposed by the state government upon Windstream, not upon its customers.

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[1] The Federal Communications Commission in *Irwin Wallace v. AT&T Communications of the Southern States, Inc.*, 6 FCC Rcd 1618 (1991), *on reconsideration,* 7 FCC Rcd. 3333 (1992) enforced the Filed Rate Doctrine when, as here, a telecommunications carrier charged its *customers* a surcharge to recover a tax that had been imposed on the telecommunications carrier rather than on the customer and failed to tariff the surcharge. AT&T had "flowed through" a Florida gross receipts tax to its customers for approximately ten months before its "gross receipts tax surcharge tariff" went into effect. The FCC 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." *See* 7 FCC Rcd. 3333.

[2] *Dana Bowers v. Windstream Kentucky East, LLC,* 790 F.Supp.2d 526, 534 (W.D. Ky. 2010) (emphasis added).

During the informal conference, Windstream attempted in three ways to create the perception that a time-consuming, full-scale factual investigation is required: [1] it characterized questions of law as questions of fact (*i.e.*, characterizing as "factual" the legal dispute as to whether the surcharge is "rate for service" or something – *anything* – else); [2] it argued that because it "denied" "allegations" contained in Plaintiff's Petition for Declaratory Ruling, there *must* be relevant facts in dispute; and [3] it attempted to create the appearance of a relevant factual dispute by raising facts that are immaterial. These arguments fail. There are no genuine disputes of material fact here, and no reason to conduct a time-consuming inquiry into any "facts." The Commission should render its ruling based on briefs alone and on oral argument if it deems necessary.

ARGUMENT

I. AN ADMINISTRATIVE AGENCY NEED NOT HOLD AN EVIDENTIARY HEARING WHEN THERE IS NO DISPUTE AS TO ANY MATERIAL FACT.

It is well-settled that, when there is no dispute of any material fact, an administrative agency is not required by any concept of due process to hold an evidentiary hearing or otherwise to conduct proceedings to inquire into factual disputes that do not exist. In *Flint v. Executive Branch Ethics Com'n,* 981 S.W.2d 132 (Ky. App. 1998), the court made short work of an argument to the contrary presented in an appeal by a former state employee who had been found, without a hearing, to be in violation of Kentucky's Executive Branch Code of Ethics, KRS Chapter 11A:

> Petitioner was not deprived of due process. Under KRS Chapter 11A as well as any other administrative procedure, the purpose of a hearing is to allow the hearing officer a full review in order to make findings of fact from the whole of

> the disputed allegations. There were no disputed allegations of material fact in this case.

Id. at 133-34.

The court was not impressed by Petitioner's claim that there was a "factual dispute as to the communications between the Commission's staff and appellant Flint." *Id.* at 133. Those communications were not relevant, because the "assertions of others" had "no bearing" on culpability under the statute. The facts that did have bearing were not disputed, as the former employee had "admitted to the entire substance of the illegal conduct." *Id.*. Exactly the same is true here.

The law as explicated in *Flint* applies when there are no material facts to develop even if the governing statute states that opportunity for a hearing is required. *See Weinberger v. Hynson, Westcott & Dunning,* 412 U.S. 609, 620-21 (1973) (approving the FDA's summary procedures in denying a drug application despite a statute requiring an "opportunity for a hearing," because the Court would not "impute to Congress the design of requiring, nor does due process demand, a hearing when it appears conclusively from the applicant's 'pleadings' that the application cannot succeed"). Similarly, the court in *Contini v. Board of Education of Newark,* 668 A.2d 434, 441-442 (N.J. App. 1995) held that denial of a hearing abridges no rights when the administrative action does not "turn[] on disputed adjudicatory facts." The court explained that, "'[j]ust as summary judgment is not in conflict with the right to trial by jury because it is available only when there is nothing for the jury to decide,'" summary disposition in administrative proceedings is not improper when there is no genuine dispute of material fact. *Id.* at 442 (internal citations omitted).

The Commission should enter its Order finding that there are no material facts in dispute and set a procedural schedule consisting of a briefing, followed by oral argument if such argument would assist the Commission in making its decision.

II. THE QUESTIONS SENT BY THE COURT TO THE COMMISSION ARE NOT DEPENDENT UPON ANY DISPUTE OF MATERIAL FACT FOR THEIR RESOLUTION.

The Court referred to the Commission only questions of law and policy, not disputes of fact. The first question referred is whether the Commission would "rule as the FCC did in *Irvin Wallace*." If the essential facts had not been understood by the Court to be the same as those addressed by the FCC in *Irwin Wallace* – i.e., that a tariff is on file; that the tariff does not include the surcharge; that the surcharge passes to the customers the cost of a tax imposed upon the carrier and not upon its customers; and that customers have nevertheless been billed a surcharge – it could not have framed the question as it did.

The Court discussed *Irwin Wallace* as follows:

> 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 user before the tariff authorizing such a charge became effective was a violation of Section 203 of the Act." *Id.*

Id. at 532.

In short, the legal result depends upon whether it was the government or the carrier that imposed the obligation on the customer. If the government imposed it on the customer, it's a tax to the customer and need not be tariffed. If the carrier imposed it on the customer, it is a rate to the customer and must therefore be tariffed. Kentucky law on this question is identical to federal

law, and judicial and Commission precedents so establish. *See, e.g., Luckett v. Electric and Water Plant Bd.,* 558 S.W.2d 611, 613 (Ky. 1977) (utility responsible for paying gross receipts tax may "raise its *rates* to alleviate the burden") (emphasis added); *Delta Natural Gas Co., Inc. Experimental Alternative Regulation Plan*, Case No. 99-046 (Ky. P.S.C. May 10, 1999) (a utility-designed mechanism resulting in additional charges to a utility's customers is a "rate" in addition to existing general service rates).

Windstream admits (and, of course, cannot deny) that the Kentucky gross receipts tax was imposed on it and not on its customers [Answer, ¶ 6]. However, it contends that it may in turn increase its prices to its customers to pass on this tax expense without tariffing the price increase because the surcharge is not a "rate for service." This is a dispute of law, not a dispute of fact. Applicable legal authority is not "evidence," *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925 (Ky. 2002), and the Commission does not need to develop an evidentiary record to perform the task delegated by the Court. The Commission may interpret the law. Indeed, the Court wishes it to do exactly that, while retaining for itself jurisdiction over the dispute between the parties "to resolve damages and other issues at a later date." *Bowers*, 709 F. Supp. 2d at 535.

As for the second question referred – whether Windstream's tariffed language enabling it to pass through taxes imposed by "local" authorities also applies to taxes imposed by the "state" – there is no dispute as to the wording of the tariff. The question is the legal effect of that wording. The Court explicitly states that this is a question of tariff construction. The principle that tariff construction is a matter of law is, of course, well-settled. *Great Northern Ry. Co. v. Merchants' Elevator Co.,* 259 U.S. 285, 479 (1922) ("Every question of the construction of a tariff is deemed a question of law"). Rather than construe the tariff itself, the Court decided that, as the matter is "within the PSC's area of expertise," it should be referred to the Commission

along with the related state law question: "whether the PSC would require a carrier to update its tariff before charging a pass-through tax." *Bowers,* 709 F.Supp.2d at 534.

Windstream's relevant arguments (and some of its irrelevant ones) are legal, not factual. *See Irwin Wallace*, 6 FCC Rcd 1618, n. 3 (denying motions for discovery against carrier that collected untariffed tax surcharge). Even if the Commission were faced with an original Complaint (rather than with legal and policy questions referred to it by a Court that has retained jurisdiction over the Complaint), there would be no relevant facts in dispute. The Commission need look only to its own records – Windstream's tariffs – to find the tariff language at issue, and to Windstream's bills to find the surcharge.

III. WINDSTREAM'S "DENIALS" IN ITS ANSWER FILED WITH THE COMMISSION DO NOT INDICATE A GENUINE DISPUTE OF MATERIAL FACT.

Leaving aside for the moment Windstream's confusion of questions of law with questions of fact, a review of the specific "allegations" that Windstream has "denied" demonstrates that those "denials" are simply not to be taken seriously. For example, in its Answer, at ¶ 2, Windstream "denied" *all* of the "allegations set forth in the introductory paragraph, including the footnotes, on page 1 of the Complaint." Among those denied "allegations" are the following:

- that the case is brought "with respect to one of several counts of Petitioner's Complaint currently pending before the District Court";
- that the count in question "has been stayed, but not dismissed, by the Court";
- that the "Commission has previously considered petitions for declaratory rulings;" and
- that the Court explained its reasons for retaining jurisdiction on page 13 of its Memorandum Opinion.

Windstream's denial of these allegations is meaningless. A blanket denial of the obvious does not create a genuine dispute of fact. That these events occurred is beyond dispute. Windstream may, and does, dispute Plaintiff's legal conclusions drawn from the facts; but dispute as to the law must be done through legal argument, not through discovery, testimony, and hearing.

IV. WINDSTREAM'S DISPUTE OF IRRELEVANT FACTS DOES NOT CREATE A GENUINE ISSUE OF MATERIAL FACT.

Not content with denying the obvious, Windstream also attempts to make an issue of irrelevant facts. For example, it argued at the informal conference that there is a factual dispute as to whether the Kentucky gross receipts tax increased Windstream's "cost of doing business." In its Answer, Windstream "denied" that it did, "because the term 'cost of doing business' has different meanings and [Windstream] therefore denies the same." [Answer, ¶ 6]. With all due respect, Plaintiff sees absolutely no sense in this statement. However, there is no reason to waste anyone's time with this "dispute," such as it is. It *does not matter* whether Windstream has a "different meaning" for the term "cost of doing business" (whatever that meaning may be). Windstream imposed the surcharge on its customers. In the end, Windstream's reason for imposing the surcharge is immaterial. It does not matter whether the surcharge was collected to recover an increase in the costs of doing business or simply to increase Windstream's profit.

Nor does it matter which of Windstream's many thousands of Kentucky customers filed a petition asking the Commission to address the district court's request for a ruling on the law. The relevant *fact* is that Windstream imposed the surcharge on *all of its customers*, including the Petitioner. The legal question is whether it violated Kentucky's Filed Rate Doctrine in doing so, and that is the question referred to the Commission by the Court. Windstream's legal

obligations are at issue here. Petitioner's are not. The relevant questions forwarded to the Commission by the Court can be addressed without a pointless investigation of the petitioner or her service history.

The Court sent two questions of law to the Commission, posed in the abstract, and retained jurisdiction to deal with "damages" and "other issues." The Commission should require briefs – and *only* briefs – to assist it in resolving these questions. If Windstream wishes to renew its arguments that Plaintiff lacks "standing" (although the Court has already rejected Windstream's motion to dismiss for lack of standing), or to dispute any facts that may be relevant to the extent of its own liability, it may do so in Court.[3]

CONCLUSION

Windstream seeks to obfuscate the straightforward questions of law before the Commission and further to delay resolution of the suit Plaintiff filed in Federal Court in June 2009. But the two legal questions presented are neither complicated nor dependent upon resolution of any factual dispute. A drawn-out process of developing irrelevant "facts" and arguing law through non-attorney witnesses is a waste of time and resources. Plaintiff urges the Commission to set a briefing schedule so that the legal questions sent to the Commission can be fairly argued and resolved, and the decision given to the Court so that the lawsuit may proceed.

[3] The Court has already set a schedule for discovery on class certification issues, and Windstream's counsel has already indicated it intends to challenge Plaintiff's standing as class representative.

Respectfully submitted,

C. Kent Hatfield
D. Randall Gibson
Douglas F. Brent
Deborah T. Eversole
STOLL KEENON OGDEN PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202
Ph: (502) 333-6000
Fax: (502) 333-6099

Counsel for Petitioner/Complainant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served by First Class Mail on those persons whose names appear below this 28th day of January, 2011.

Mark R. Overstreet
Benjamin R. Crittenden
Stites & Harbison
421 West Main Street
P.O. Box 634
Frankfort, KY 40602-0634

Jeanne Shearer
Windstream Kentucky East, LLC
4139 Oregon Pike
Ephrata, PA 17522

C. Kent Hatfield