

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

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JAN 28 2011

PUBLIC SERVICE  
COMMISSION

DANA BOWERS,

COMPLAINANT

v.

CASE NO. 2010-00447

WINDSTREAM KENTUCKY EAST, LLC,

DEFENDANT

**WINDSTREAM KENTUCKY EAST, LLC'S MOTION FOR ENTRY OF A PROPOSED  
SCHEDULING ORDER SETTING DEADLINES FOR THE FILING OF DISCOVERY  
REQUESTS, DIRECT AND REBUTTAL TESTIMONY, AND BRIEFS**

The Defendant, Windstream Kentucky East, LLC ("Windstream East"), pursuant to the direction offered by Commission Staff at the informal conference held in this matter on January 11, 2011, moves the Commission to enter a scheduling order that affords the parties the opportunity to submit limited discovery requests and, at a minimum, develop a factual record through the filing of direct and rebuttal testimony, before filing briefs addressing the factual and legal issues presented in the Petition for Declaratory Ruling filed by the Complainant, Dana Bowers ("Ms. Bowers").

At the informal conference, Windstream East proposed a reasonable procedural schedule containing one round of discovery, an opportunity to take any necessary depositions, and the filing of simultaneous direct and rebuttal testimony. Windstream East advised Commission Staff that limited discovery and the filing of testimony were necessary both because there are factual allegations made by Ms. Bowers that are in dispute in this proceeding and because Windstream East needed to develop facts, especially through testimony, to support its legal positions. Ms. Bowers objected to Windstream East's proposal and took the position that no discovery or testimony should be required. Consistent with her position, Ms. Bowers contended that the

Commission should resolve this matter solely on the basis of simultaneously filed legal briefs.<sup>1</sup> Ms. Bowers did not address the fact that there are facts in dispute that each party should be permitted to develop and examine to support their respective legal positions in this matter.<sup>2</sup> Ms. Bowers did offer to narrow the scope of the parties' dispute by stipulating to facts not in dispute. However, after receiving Windstream East's proposed stipulated facts, Ms. Bowers refused to work with Windstream East to reach an agreement as to the undisputed facts, instead summarily denying Windstream East's proposed stipulations merely as irrelevant.

Specifically, Windstream East attempted in good faith to identify all facts known to it at this time that it believes may be necessary to support its anticipated legal positions in this matter or otherwise to refute the factual allegations already set forth by Ms. Bowers in her complaint. To this end, Windstream East provided 37 concise, proposed stipulations, some of which were only a sentence.<sup>3</sup> Based on statements by Ms. Bowers at the parties' informal conference with Commission Staff, Windstream East understood that the point of this exchange was to try to accommodate Ms. Bowers' request to expedite the development of any factual matters. However, Ms. Bowers' response to Windstream East's proposed stipulations was to deny categorically Windstream East's stipulations as irrelevant.<sup>4</sup> Notwithstanding Ms. Bowers' response, Windstream East's proposed stipulations included facts such as Ms. Bowers being a

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<sup>1</sup> In offering this proposal, Ms. Bowers failed to identify what facts the Commission should rely upon in ruling upon the merits of the complaint. In the absence of discovery and, at a minimum, the filing of testimony, there is no obvious answer to this question. The only "facts" presently before the Commission are the allegations set forth in Ms. Bowers Petition for Declaratory Ruling or any she may subsequently put forth in her brief without the opportunity for verification by Windstream East. Windstream East has denied a number of the allegations Ms. Bowers set forth in her complaint.

<sup>2</sup> This is not a case where the parties are taking opposing positions merely on the reading of statutory language. Instead, this is a case where the parties are disputing the applicability of certain statutes to a set of factual scenarios.

<sup>3</sup> A copy of Windstream East's proposed stipulations along with the transmittal e-mail from R. Benjamin Crittenden to Douglas F. Brent is attached as Exhibit B. A copy of Ms. Bowers' proposed stipulations along with the transmittal e-mail from Douglas F. Brent to R. Benjamin Crittenden is attached as Exhibit C.

<sup>4</sup> See Letter of January 20, 2011 from Douglas F. Brent to R. Benjamin Crittenden, which Ms. Bowers filed with the Commission. A copy of the letter is attached as Exhibit D.

customer only of Windstream East, the types of services Windstream East offers to Ms. Bowers, the manner in which it offers service to customers not similarly situated to Ms. Bowers, the historical treatment of municipal franchise fees (now collected through the GRS) by the Commission, and Windstream East not deriving a profit from the assessment of the GRS. These stipulations in particular speak directly to allegations in Ms. Bowers' complaint that she receives jurisdictional services subject to KRS 278.160, that the gross revenues tax is not for the benefit of local municipalities, and that Windstream East has used the GRS to collect more than its cost of the gross revenues tax. Ms. Bowers should not be permitted to propose factual allegations and then deny categorically as irrelevant allegations needed by Windstream East to refute her statements.

In support of this motion, Windstream East submits that limited discovery requests and, most significantly, the filing of direct and rebuttal testimony are necessary for Windstream East to challenge the factual allegations offered by Ms. Bowers and also to develop the facts the Commission should consider when addressing the merits of Ms. Bowers' claims. Windstream East is entitled to this factual development under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Section 2 of the Kentucky Constitution.<sup>5</sup> Accordingly, Windstream East moves the Commission to enter the proposed scheduling order attached to this motion as Exhibit A.

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<sup>5</sup> Windstream East also notes that while KRS 278.260 may not be directly applicable, it is instructive and otherwise representative of the Commission's standard practice in addressing complaints, which is to provide for the submission of evidence and a right to a hearing when there are matters of law and fact at issue such as they are in this instant proceeding.

**I. THIS MATTER IS BEFORE THE COMMISSION FOR A RULING ON THE FACTUAL AND LEGAL ISSUES PRESENTED IN COUNT III OF THE FEDERAL COURT LITIGATION AND THE PETITION FOR DECLARATORY RELIEF FILED BY MS. BOWERS IN THIS ACTION.**

This action arises from a lawsuit filed by Ms. Bowers against Windstream East in the United States District Court for the Western District of Kentucky. The core complaint in that action, as here, is that Windstream East allegedly included a gross receipts surcharge (“GRS”) on the bills of Ms. Bowers, which it was not permitted to do without tariffing the surcharge. Ms. Bowers asserted federal law claims for alleged violations of 47 U.S.C. § 203(c) (Count I) and 47 U.S.C. §§ 201(b) and 207 (Count II). Ms. Bowers also asserted a state law claim for alleged violations of KRS 278.160(2) (Count III). It is Count III that forms the basis of this action.<sup>6</sup>

Windstream East moved to dismiss or stay the federal action. The District Court denied the motion with respect to Counts I and II and declined to refer those claims to the FCC. In reaching its decision on Counts I and II, the District Court relied on the FCC’s previous decision in *In the Matter of Irwin Wallace v. AT&T Communications of the Southern States*,<sup>7</sup> in which the FCC held that a carrier cannot surcharge a pass-through tax under federal law without first including the tax in the appropriate federal tariff filings.<sup>8</sup> Ms. Bowers has asserted incorrectly to the Commission that this federal case is presumptively indicative of the outcome in this Kentucky proceeding and that essentially the District Court is looking to the Commission to issue a legal finding identical to that in *Irwin Wallace*. Specifically, Ms. Bowers’ suggestion fails to address that, while the District Court did not refer Counts I and II to the FCC, it reached a very different conclusion as to Count III pertaining to Ms. Bowers’ state tariffing claim.

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<sup>6</sup> Ms. Bowers also asserted common law tort claims and a claim under the Kentucky Consumer Protection Act. Those claims are not pertinent to this proceeding, and portions of Ms. Bowers’ claims regarding truth in billing have been dismissed by the District Court.

<sup>7</sup> *In the Matter of Irwin Wallace v. AT&T Communications of the Southern States, Inc.*, 6 FCC Rcd 1618 (1991).

<sup>8</sup> Memorandum Opinion, April 30, 2010, (“Memorandum Opinion”), pp. 9-11.

The District Court stayed Count III in its entirety “to allow the PSC to address the dispute.”<sup>9</sup> In reaching this conclusion, the District Court held that the resolution of Count III involved two issues not applicable to the analysis of the federal claims included in Counts I and II. First, the District Court would have to determine “whether the PSC would rule as the FCC did in *Irvin* [sic] *Wallace* on the issue of tariffs and pass-through taxes.”<sup>10</sup> The District Court found that this question “implicates *a policy issue* that the PSC should decide and apply uniformly to all carriers.”<sup>11</sup> Second, the District Court noted that the resolution of Count III would require a finding as to “whether the ‘local taxing authority’ language of Windstream’s tariff encompasses state statutes.”<sup>12</sup> While the District Court found that resolution of the second issue was a matter of tariff interpretation that it could resolve, the issue was “clearly within the PSC’s area of expertise.”<sup>13</sup> Thus, the District Court determined that it would be appropriate for the Commission to resolve the issue.<sup>14</sup> The District Court chose to stay Count III rather than dismiss it only “because the Court may need to resolve damages and other issues at a later date.”<sup>15</sup>

Contrary to the mischaracterization of this matter by counsel for Ms. Bowers at the January 11, 2011 informal conference and in the letter filed with the Commission on January 20, 2011, the Commission cannot fulfill the purpose of the District Court’s Order staying Count III

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<sup>9</sup> *Id.*, p. 13.

<sup>10</sup> *Id.*, p. 12.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* The applicable Windstream East tariff provides, in pertinent part, that Windstream East will add to its customers bills a line item surcharge to collect “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.” PSC Ky. No. 7, Original Page 27.

<sup>13</sup> *Id.*, pp. 12-13.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*, p. 13.

merely by considering in the abstract whether KRS 278.160(2) contemplates including a pass-through tax in a filed tariff. For instance, the interpretation of and policy surrounding Kentucky law is rooted in the types of services being offered as well as the nature and treatment of the surcharge in question. Further, and contrary to representations made by Ms. Bowers at the informal conference, the District Court plainly contemplated that the Commission would analyze the legal *and* factual matters necessary to resolve the questions of whether Windstream East was required to include the GRS in its Kentucky tariff before including it on its customers' bills and whether the existing tariff language in PSC Ky. No. 7 encompassed the GRS.

Just as the FCC evaluated the facts surrounding AT&T's assessment of a pass-through tax and the federal policies implicated by the pass-through in *Irwin Wallace*, the Commission should engage in a thorough review and analysis of the nature and origin of the GRS and how it should be recovered in light of public policy concerns. The nature and origin of the GRS cannot be evaluated without considering the factual circumstances under which the gross revenues tax was implemented and imposed by the Kentucky General Assembly and the types of services to which the GRS is applied. Likewise, factual and legal analysis is necessary to answer the question of whether the language in PSC Ky. No. 7 encompasses the GRS in light of the origins of both that tariff provision and the gross revenues tax created by KRS 136.616. Pertinent to the resolution of these questions will be a factual examination of the relationship between the gross revenues tax and the municipal franchise fees previously imposed on telecommunications carriers such as Windstream East.

It is clear that the District Court intended for the Commission to engage in whatever review is necessary to resolve these issues and to take sufficient time in so doing. Ms. Bowers should not be permitted to circumvent Windstream East's right to a fair review of these issues

simply because she asserts that her claims are correct and should be effectively “rubber-stamped” by the Commission. She should be required to produce for examination the factual bases underlying her legal claims, including those set forth in her complaint such as that the gross revenues tax increased Windstream East’s cost of doing business or that Windstream East used the GRS to collect more than its cost of the gross revenues tax.<sup>16</sup> The District Court has stayed Count III simply to make certain that any question of damages or other issues not resolved in this proceeding can be addressed, as necessary, when this proceeding concludes. The Commission should ensure that this matter receives a thorough factual and legal review before rendering its decision, and, in so doing, should afford Windstream East the opportunity to develop the factual record through testimony at a minimum, as well as limited discovery.

**II. DEVELOPMENT OF THE FACTUAL RECORD AS PROPOSED BY WINDSTREAM EAST IS REQUIRED BY DUE PROCESS.**

Ms. Bowers initiated this action by filing her Petition for Declaratory Relief, alleging that Windstream East “violated KRS 278.160 when it charged her, and its other customers, an unfiled rate for telecommunications services provided under tariff.”<sup>17</sup> A number of these factual allegations are in dispute as a result of denials included in Windstream East’s Answer.<sup>18</sup> Seeking to avoid any development of the facts giving rise to this action, Ms. Bowers now argues that the facts in dispute are “largely irrelevant” and that the Commission should resolve this matter solely on the basis of five purportedly “essential facts” identified by Ms. Bowers.<sup>19</sup> Such action by the Commission would be inconsistent with the Commission’s standard practice as well as the plain

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<sup>16</sup> Windstream East notes that it included in its proposed stipulations items to correct the facts surrounding these allegations set forth by Ms. Bowers, but these stipulations were included in the items summarily dismissed as “irrelevant” by Ms. Bowers despite the fact that they pertained directly to items set forth in her own complaint.

<sup>17</sup> Petition for Declaratory Ruling, p. 1.

<sup>18</sup> The specific facts in dispute and the significance of the dispute is addressed in detail in Section II(B)(2) of this Motion.

<sup>19</sup> See Letter of January 20, 2011 from Douglas F. Brent to R. Benjamin Crittenden.

requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Section 2 of the Kentucky Constitution. Indeed, practice before this Commission and the law are well-established. Regardless of whether that factual record is developed in part through discovery obtained from Ms. Bowers or independently by Windstream East, Windstream East is entitled to develop the factual record of this case and be heard by the Commission before any determination is made on the merits of Ms. Bowers' Petition.

Ms. Bowers filed her Petition for Declaratory Ruling challenging the composition of the rates charged by Windstream East.<sup>20</sup> Specifically, Ms. Bowers requested "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."<sup>21</sup> Such a determination by the Commission necessarily will affect the manner in which Windstream East recovers its costs associated with Kentucky's gross revenues tax.<sup>22</sup> Accordingly, the Commission should afford Windstream East the opportunity to be heard and introduce testimony in support of its position to refute Ms. Bowers' allegations. Windstream East simply is seeking the opportunity to conduct limited discovery and present direct and rebuttal testimony before filing briefs addressing the factual and legal issues that are before the Commission through the complaint filed by Ms. Bowers.

Due process requires that Windstream East be afforded a meaningful opportunity to be heard in this matter. The law is well-established that "[p]rocedural due process imposes

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<sup>20</sup> The Commission's Order of November 22, 2010 noted that Ms. Bowers styled her filing a Petition for Declaratory Ruling, and that the Commission was treating it as a formal complaint subject to the regulations of 807 KAR 5:001, Section 12.

<sup>21</sup> Complaint, p. 7.

<sup>22</sup> See Memorandum Opinion, pp. 5-6 (Noting that Ms. Bowers filed her federal court complaint seeking damages in the amount of the alleged overcharge of the GRS, a ruling that would have the effect of depriving Windstream East of that portion of its surcharges previously collected from Ms. Bowers and its other Kentucky customers).



constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendment.”<sup>23</sup> In the context of proceedings before the Commission, the Kentucky Court of Appeals recognized that “[d]ue process requires, at a minimum, that persons forced to settle their claims of right and duty through the judicial process be given a meaningful opportunity to be heard.”<sup>24</sup> This hearing right has been held to include: “(1) the right to seasonably know the charges; (2) the right to meet such charges by competent evidence; and (3) the right to be heard by counsel upon the probative force of the evidence adduced by both sides, and upon the law applicable thereto.”<sup>25</sup> This constitutional hearing requirement is independent of Kentucky’s statutory provision of the same right.<sup>26</sup> In cases where a due process right is asserted, Kentucky courts look to the three factors identified by the United States Supreme Court in *Matthews v. Eldridge* to determine the actual process that is due.<sup>27</sup> One Kentucky court described the process as follows:

That test requires consideration of the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through procedures used, the probable value, if any, of additional or substitute procedural safeguards; and the government’s interest that any additional procedural safeguards would entail.<sup>28</sup>

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<sup>23</sup> *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976).

<sup>24</sup> *Utility Regulatory Commission v. Kentucky Water Service Company, Inc.*, 642 S.W.2d 591, 593 (Ky. App. 1982).

<sup>25</sup> *Mayfield Gas Co. v. Public Service Commission*, 259 S.W.2d at 10-11.

<sup>26</sup> See *Mayfield Gas Co. v. Public Service Commission*, 259 S.W.2d at 10 (“Aside from the provisions of our own statutes on the subject, constitutional due process requires a fair and open hearing as prerequisite to an order reducing rates of a public utility.”).

<sup>27</sup> *Abul-Ela v. Kentucky Board of Medical Licensure*, 217 S.W.3d 246, 251 (Ky. App. 2006) (Quoting *Matthews v. Eldridge*, 424 U.S. at 333-335).

<sup>28</sup> *Id.*

Consideration of these factors compels a finding that due process requires the Commission to afford Windstream East the opportunity to develop the factual record of this case through limited discovery and the filing of direct and rebuttal testimony.

1. Windstream East has a Private Interest Implicated in this Proceeding.

Windstream East has a significant private interest that will be affected by the Commission's resolution of this matter. The gravamen of Ms. Bowers' complaint 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."<sup>29</sup> Ms. Bowers requests a generic finding from the Commission that Windstream East improperly increased its rates to recover the GRS without first amending its Kentucky tariffs to include the rate increase.<sup>30</sup> Moreover, the Complaint filed by Ms. Bowers in the federal court proceeding seeks damages in the amount of the GRS collected by Windstream East from Ms. Bowers and all of its other Kentucky customers along with attorney's fees.<sup>31</sup> Windstream East has an interest in the GRS collected from Ms. Bowers and its other Kentucky customers. Windstream East intends to establish in this proceeding that these collections were lawful and consistent with its obligations under KRS Chapter 278 and other applicable law. Moreover, Kentucky courts have implicitly recognized that utilities have an interest in their rates and charges sufficient to trigger due process protection.<sup>32</sup> Windstream East's interest in this proceeding is sufficiently significant that the Commission should afford it the opportunity to conduct limited discovery and at a minimum file

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<sup>29</sup> Complaint, p. 1. Ms. Bowers' complaint focuses on KRS 278.160(2), which provides: "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, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules."

<sup>30</sup> *Id.*, p. 7.

<sup>31</sup> Memorandum Opinion, pp. 5-6.

<sup>32</sup> See, e.g., *Utility Regulatory Commission v. Kentucky Water Service Company*, 642 S.W.2d at 593 (Due process rights applied in rate case proceeding for water utility); *Mayfield Gas Co. v. Public Service Commission*, 259

testimony developing the factual record both to establish the facts Windstream East deems pertinent to support its legal positions but also to test the veracity of the factual allegations already set forth by Ms. Bowers in her complaint and her letter to the Commission on January 20, 2011.

2. The Procedural Schedule Proposed by Windstream East will Reduce the Risk of an Erroneous Deprivation of Windstream East's Interest in the GRS it has Collected from its Customers.

Absent an opportunity to develop the factual record of this case through limited discovery and the filing of testimony, the risk of the Commission reaching an erroneous resolution is significant. The pleadings filed by the parties establish a number of factual disputes. For example, all of the following are “facts” alleged by Ms. Bowers in her complaint that Windstream East denied in its Answer:

- Ms. Bowers alleges in Paragraph 2 of the Petition that she “purchases telecommunications services from Windstream, which is governed by tariff P.S.C. Ky. No. 7. Windstream East denied the allegation to the extent Ms. Bowers claimed all of the services she receives from Windstream East are governed by tariff P.S.C. Ky. No. 7. As set forth in Windstream East’s Answer, Ms. Bowers receives some services that have been deregulated and detariffed, and other services that are nonbasic services subject to the discretionary, and not mandatory, tariffing requirements of KRS 278.541 and 278.544.<sup>33</sup>
- Ms. Bowers claims in Paragraph 4 of the Petition that the gross revenues tax imposed by KRS 136.616(2)(b) “increased Windstream’s cost of doing business.” In response, Windstream East stated affirmatively 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.<sup>34</sup>

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S.W.2d at 10 (Due process rights applied in proceeding arising from a case brought by a customer of a gas utility to reduce rates charged for gas service).

<sup>33</sup> Answer, ¶ 4.

<sup>34</sup> *Id.*, ¶ 6.

- Ms. Bowers contends that she “subscribes to telecommunications services provided under Windstream’s federal and Kentucky state tariffs.” Windstream East denied this allegation.<sup>35</sup>
- Ms. Bowers maintains that Windstream East used the GRS surcharge “to collect approximately double the amount of the state tax that applies to communications service providers.” Windstream East denied this claim and stated affirmatively “that it has used the gross receipts surcharge to collect only the amounts of its gross revenues tax which it is assessed.”<sup>36</sup>

Despite that the factual disputes arise from allegations made in her own complaint before the Commission, Ms. Bowers would have the Commission ignore these factual disputes as “largely irrelevant” and determine whether Windstream East violated KRS 278.160 solely on the basis of a limited set of “essential facts” she has identified.<sup>37</sup> The Commission should reject the invitation to follow this course of action for at least two reasons. First, Ms. Bowers offered a number of factual allegations in her Petition that she clearly believed were relevant to the Commission’s determination of this matter. Windstream East should be permitted to test the basis of those allegations and offer evidence to the Commission that certain of those allegations are baseless. Second, there is no basis for Ms. Bowers’ contention that the Commission should decide this matter solely on the basis of alleged facts offered by Ms. Bowers, without giving Windstream East the opportunity to present any testimony or otherwise tell its side of the story. Ms. Bowers has initiated an action premised on specific factual allegations. To avoid ruling on the basis of a grossly one-sided presentation of the facts, the Commission should permit Windstream East to develop the factual record through limited discovery and testimony. Windstream East’s requested course of action is particularly reasonable considering that the District Court referred all of Count III – including issues of fact and law – to the Commission for

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<sup>35</sup> *Id.*, ¶ 10.

<sup>36</sup> *Id.*, ¶ 12.

<sup>37</sup> *See* Letter of January 20, 2011 from Douglas F. Brent to R. Benjamin Crittenden.

its consideration, and the Commission should establish a procedural schedule that meets this expectation. Windstream East also notes that it is not seeking a protracted or unreasonable schedule. Instead, it is seeking a schedule consistent with the Commission's standard procedural practice and that otherwise is reasonable to allow the Commission a sufficient basis to thoroughly consider Count III.

3. Windstream East's Proposed Scheduling Order will Effectuate the Commission's Interest in Arriving at the Correct Resolution of this Matter and will Result in No Burden to the Commission or the Parties.

It is the Commission's role in the formal complaint process to make such investigation as it deems necessary or convenient. The approach advocated by Ms. Bowers would short circuit this process by effectively precluding the Commission from making any investigation at all into the facts giving rise to the complaint. Indeed, by objecting to discovery and the filing of testimony, Ms. Bowers is advocating for the Commission to resolve this matter solely on the basis of factual allegations contained in the complaint and in her subsequent filing of January 20, 2011. There is no basis for the Commission to arrive at such a hasty determination of this matter, without first affording Windstream East the opportunity to develop the factual record. In statements made at the informal conference conducted on January 11, 2011 and in her subsequently filing of January 20, 2011, Ms. Bowers has expressed her position that discovery and the filing of testimony are unnecessary in this case. However, at no point has Ms. Bowers even alleged that it would be unduly burdensome for her to comply with a procedural schedule that allows for such factual development. Simply stated, there is no reason for the Commission to deny Windstream East the opportunity to take limited discovery and most importantly offer testimony in support of its defense against the claims made by Ms. Bowers.

Windstream East has made a good faith effort to limit the scope of the facts in dispute between the parties. As noted previously, on January 14, 2011, Windstream East provided Ms.

Bowers with a set of proposed stipulated facts. Ms. Bowers offered her proposed stipulated facts to Windstream East on the same day. Before the parties had an opportunity to confer in an effort to arrive at a list of mutually agreeable stipulated facts, Ms. Bowers advised that she believed the process of doing so would “unnecessarily complicate and prolong” this proceeding and categorically denied Windstream East’s proposed stipulations.<sup>38</sup> As a result of Ms. Bowers’ refusal, the parties did not stipulate to even the most straightforward and unobjectionable of facts.<sup>39</sup> In the absence of stipulated facts, Windstream East’s only opportunity to challenge any of the allegations made by Ms. Bowers and develop the facts necessary for it to support its own position will be through discovery and the filing of testimony. Accordingly, Windstream East asks the Commission to enter a proposed scheduling order that properly provides for this factual development so that the parties may provide the necessary support for their legal positions in this matter.

### **III. CONCLUSION**

Based on the foregoing, Windstream East respectfully requests the Commission to enter the proposed scheduling order that allows for limited discovery and the filing of direct and rebuttal testimony.

Respectfully submitted,



Mark R. Overstreet  
R. Benjamin Crittenden  
STITES & HARBISON, PLLC  
421 West Main Street

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<sup>38</sup> See Letter of January 20, 2011 from Douglas F. Brent to R. Benjamin Crittenden.

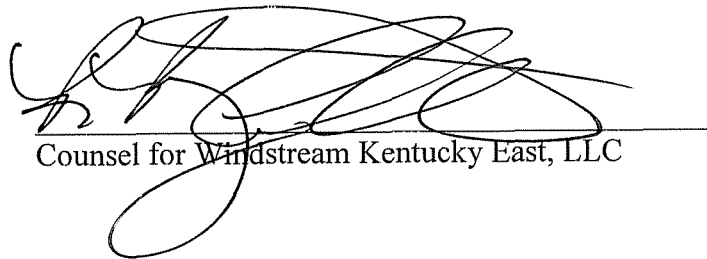
<sup>39</sup> For example, Windstream East’s proposed stipulations included such undisputable facts as “Plaintiff Bowers is a residential customer of Windstream East,” “At no time has Plaintiff Bowers subscribed to services from or been a customer of Windstream Kentucky West, LLC or Windstream Communications, Inc.,” and “Plaintiff Bowers has paid and continues to pay the Gross Receipts Surcharge assessed on her monthly billing invoices.”

P.O. Box 634  
Frankfort, Kentucky 40602-0634  
Telephone: (502) 223-3477  
COUNSEL FOR WINDSTREAM KENTUCKY  
EAST, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by United States First Class Mail, postage prepaid, on this 28th day of January, 2011 upon:

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



Counsel for Windstream Kentucky East, LLC



ALL-STATE LEGAL 500-222-0510 EDS11 RECYCLED



COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

DANA BOWERS,

COMPLAINANT

v.

CASE NO. 2010-00447

WINDSTREAM KENTUCKY EAST, LLC,

DEFENDANT

**SCHEDULING ORDER**

The parties to this proceeding, Windstream Kentucky East, LLC and Dana Bowers, have submitted competing motions offering proposed scheduling orders for the Commission to adopt. Having considered the motions and being sufficiently advised, IT IS HEREBY ORDERED that:

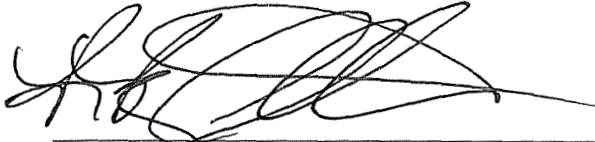
- (1) The motion submitted by Windstream Kentucky East, LLC is GRANTED;
- (2) The motion submitted by Dana Bowers is DENIED;
- (3) The parties shall file and serve discovery requests within five (5) days of the date of service of this Scheduling Order;
- (4) The parties shall file and serve their answers to the discovery requests within thirty (30) days of the date the discovery requests are due to be filed and served;
- (5) The parties shall file and serve direct testimony within ten (10) days of the date their answers to the discovery requests are due to be filed and served;
- (6) The parties shall file and serve rebuttal testimony within fourteen (14) days of the date their direct testimony is due to be filed and served; and
- (7) Following the completion of these procedural matters, the Commission shall enter an Order setting this case for hearing or establishing a briefing schedule.

By the Commission

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Executive Director

Tendered By:



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Mark R. Overstreet  
R. Benjamin Crittenden  
STITES & HARBISON, PLLC  
421 West Main Street  
P.O. Box 634  
Frankfort, Kentucky 40602-0634



ALL-STATE LEGAL 800-322-0510 EDS11 RECYCLED

## Crittenden, R. Ben

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**From:** Crittenden, R. Ben  
**Sent:** Friday, January 14, 2011 3:47 PM  
**To:** 'Brent, Douglas'  
**Cc:** 'Bennett, Kimberly K'; McTighe, Chadwick; Overstreet, Mark R.; Farris, Marjorie  
**Subject:** Windstream Proposed Stipulations  
**Follow Up Flag:** Review  
**Flag Status:** Flagged  
**Attachments:** FRANKFORT-#20706-v1-Windstream\_-\_Bowers\_PSC\_Stipulations.doc

Doug,

Here are Windstream's proposed stipulations for the Bowers PSC proceeding. We look forward to hearing from you.

Ben

**R. Benjamin Crittenden**

*Direct: (502) 209-1216, Cell: (859) 576-6057*

*Fax: (502) 223-4388, [bcrittenden@stites.com](mailto:bcrittenden@stites.com)*

**STITES & HARBISON** PLLC

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421 W. Main Street | P.O. Box 634  
Frankfort, KY 40602

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1/28/2011

## STIPULATED FACTS

The parties having conferred and agreed, the following stipulated facts are submitted to the Commission for the use in briefing the matters set forth in the Complaint:

1. At no time has Plaintiff Bowers subscribed to services from or been a customer of Windstream Kentucky West, LLC or Windstream Communications, Inc.
2. Plaintiff's services provided by Windstream Kentucky East, LLC ("Windstream East") and the rates for those services are set forth on her monthly billing invoices.
3. Plaintiff Bowers' intrastate services are subject to a monthly term.
4. Windstream East does not derive a profit from the assessment of the Gross Receipts Surcharge.
5. With respect to her intrastate services, Plaintiff does not subscribe to and is not charged any fee for any stand-alone, unbundled service provided by Windstream East that provides only the following features and functions: unlimited calls within Windstream East's local exchange area, dual-tone multifrequency dialing, and access to emergency 911 telephone service, all locally available interexchange companies, directory assistance, operator services, relay services, and a standard alphabetical directory listing.
6. The Gross Receipts Surcharge is not a rate for an intrastate telecommunications service.
7. Plaintiff Bowers is a residential customer of Windstream East.
8. Plaintiff does not subscribe to any business service from Windstream East and does not purchase services from Windstream East pursuant to Windstream East's standard business sales contract.
9. Plaintiff Bowers purchases no services subject to PSC KY No. 8.
10. The Gross Receipts Surcharge is not an intrastate telecommunications service
11. Plaintiff Bowers is not a telecommunications carrier and does not purchase intrastate services pursuant to an interconnection agreement. Windstream East's interconnection terms provide that the interconnecting telecommunications carrier is responsible for all sales, use, excise, gross receipts, transaction or similar taxes, fees, or surcharges levied against or upon it.
12. Approximately 23% of Windstream East's residential and business customers subscribe to regulated basic service.

13. Prior to the filing of her federal lawsuit, at no time did Plaintiff Bowers file or submit any formal or informal complaint with Windstream East (or any Windstream East affiliate) regarding the Gross Receipts Surcharge.
14. Since 2006, the majority of Windstream East's new or additional multi-line business services have been provisioned pursuant to business sales contracts and not tariffed offerings. Approximately 85% of Windstream East's business services are provided pursuant to business sales contracts which state that the customer is responsible for taxes, surcharges, fees, and assessments that apply to the sale and use of the provisioned services and any changes in such taxes, surcharges, fees, and assessments. Windstream East's practice is not to waive this term/condition from its standard business sales contract.
15. For intrastate services required to be or otherwise tariffed, the practice in Kentucky is that customers are subject to the tariff terms and conditions by virtue of the customers subscribing to the tariffed services.
16. Plaintiff Bowers has paid and continues to pay the Gross Receipts Surcharge assessed on her monthly billing invoices.
17. Since 2006, there have been no additions to or substantial changes other than price descriptions or grandfathering status updates to the tariff descriptions of Windstream East's single-line packages of services. Packages are defined as a group of nonbasic services sold and priced at one price point. Windstream East does not actively market or promote the sale of single-line packages like the grandfathered Feature Pack A provisioned to Plaintiff Bowers. Windstream East's primary service offerings to single-line end user customers are bundled services, which are not regulated services and which Windstream East does not provide pursuant to tariff.
18. Windstream East has detariffed its bundled services and provides other nonbasic service packages described in its tariffs pursuant to online terms and conditions. Unlike bundled nonbasic services, nonbasic packages are not part of Windstream East's core business, and many are offered only on a grandfathered basis.
19. Windstream East's online terms and conditions provide that taxes, fees, surcharges, assessments and other charges apply to all services and equipment in addition to the monthly recurring and usage-based charges.
20. Plaintiff Bowers' monthly invoices contain citations to Windstream East's online terms and conditions, website, and customer service contact information.
21. Plaintiff Bowers purchases no services from Windstream East that are subject to KRS 278.160.
22. With respect to its tariffed services, at no time to its knowledge has Windstream East or its predecessor been required by the Public Service Commission to have customers

affirmatively accept the intrastate tariff terms and conditions. This is not a common practice among utilities who maintain tariffs with the Public Service Commission.

23. Windstream East's assessment of the Gross Receipts Surcharge recovers only the costs of the Gross Revenues Tax collected from Windstream East by the Kentucky Revenue Cabinet under KRS 136.616(2).
24. With the levy of the Gross Revenues Tax, the Commonwealth consolidated the collection of municipal franchise fees previously collected on an individual locality basis.
25. Prior to the enactment of the Gross Revenues Tax legislation, Windstream East encountered a flurry of requests by municipalities seeking to implement franchise fees prior to the statutory deadline in order to preserve the amounts received by them under the new collection system.
26. Windstream East began collecting the Gross Receipts Surcharge from Plaintiff Bowers in her June 22, 2007 billing statement, and collections have continued for each monthly service term thereafter.
27. Franchise fees are not now and at no time were assessed pursuant to the Public Service Commission's ratemaking or tariffing authority.
28. Prior to the implementation of the Gross Revenues Tax, Windstream East remitted franchise fees directly to individual municipalities and passed through the cost of the municipal franchise fees directly to end user customers in the form of a line item surcharge.
29. Following the implementation of the Gross Revenues Tax, Windstream East began remitting the tax directly to the Kentucky Revenue Cabinet, through which municipalities receive their proportionate share of municipal franchise fees. Windstream East resumed the practice of passing through its cost of such fees after the United States District Court for the Eastern District of Kentucky declared that the statutory provision preventing carriers from separately stating the Gross Revenues Tax in a line-item charge was unconstitutional.
30. Plaintiff Bowers' DSL and Protection Plus Plan services are detariffed and/or deregulated services and are not subject to the Kentucky Commission's ratemaking and/or tariffing jurisdiction.
31. Windstream East has collected less in Gross Receipts Surcharges from its customers than what it has been assessed in Gross Revenues Taxes by the Kentucky Revenue Cabinet.
32. Municipal franchise fees, the Gross Revenues Tax, Gross Receipts Surcharge, and 911 surcharges are not provided for, assessed, and/or levied pursuant to Chapter 278 of the Kentucky Revised Statutes.

33. Historically, the Kentucky Commission's ratemaking jurisdiction established tariffed rates for regulated services pursuant to traditional rate-of-return costing methodologies. Under such costing methodologies, municipal franchise fees and 911 surcharges were not included in a utility's rate base calculation used to determine permitted tariffed service rate increases. Instead, such franchise fees and 911 surcharges were considered "additives" and were added to any resulting calculation as a straight pass through amount.
34. Windstream East has assessed the Gross Receipts Surcharge on those services (regulated and deregulated, tariffed and untariffed) for which the Kentucky Revenue Cabinet has instructed that Windstream East should be paying the Gross Revenues Tax.
35. The only intrastate services that Plaintiff Bowers purchases from Windstream East are Feature Pack A and Protection Plus Plan. Plaintiff Bowers also purchases DSL service which is an interstate service.
36. The Gross Revenues Tax did not increase Windstream East's cost of doing business.
37. Plaintiff Bowers received and continues to receive monthly billing statements, beginning with her June 22, 2007 statement, that identify and reflect the collection of the Gross Receipts Surcharge.

Moreover, Windstream East states that each party may present evidence in support of its position through affidavits, testimony, or other appropriate means, including introduction of the text and contents of Plaintiff Bowers' monthly billing invoices. Windstream East states further that the foregoing is not intended as an exhaustive list and that it reserves all rights and opportunity to develop additional facts as they become known or made available. In particular, Windstream East anticipates that although specific facts may not be known at this time for purposes of stipulation, it may require additional factual investigation into franchise fees and other similar assessments, treatment of nonbasic services, and comparative assessments by other companies.



ALL STATE LEGISLATION 800-222-0510 EDS11 RECYCLED



**Crittenden, R. Ben**

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**From:** Brent, Douglas [Douglas.Brent@skofirm.com]  
**Sent:** Friday, January 14, 2011 5:55 PM  
**To:** Crittenden, R. Ben  
**Cc:** Bennett, Kimberly K; McTighe, Chadwick; Overstreet, Mark R.; Farris, Marjorie; Gibson, Randall; Eversole, Deborah  
**Subject:** RE: Windstream Proposed Stipulations  
**Attachments:** LOUISVILLE-#671462-v2-2010-00447\_Crittenden\_Ltr\_-\_Proposed\_Stipulated\_Facts.pdf

Ben,

Thank you. We will review and talk to you next week. Attached is our list.

Doug

Douglas F. Brent  
Stoll Keenon Ogden PLLC  
2000 PNC Plaza  
500 West Jefferson Street  
Louisville, KY 40202  
502 333 6000  
502 568 5734 direct  
[douglas.brent@skofirm.com](mailto:douglas.brent@skofirm.com)  
[www.skofirm.com](http://www.skofirm.com)

---

**From:** Crittenden, R. Ben [mailto:BCrittenden@stites.com]  
**Sent:** Friday, January 14, 2011 3:47 PM  
**To:** Brent, Douglas  
**Cc:** Bennett, Kimberly K; McTighe, Chadwick; Overstreet, Mark R.; Farris, Marjorie  
**Subject:** Windstream Proposed Stipulations

Doug,

Here are Windstream's proposed stipulations for the Bowers PSC proceeding. We look forward to hearing from you.

Ben

**R. Benjamin Crittenden**  
*Direct: (502) 209-1216, Cell: (859) 576-6057*  
*Fax: (502) 223-4388, [bcrittenden@stites.com](mailto:bcrittenden@stites.com)*

**STITES & HARBISON** PLLC

ATTORNEYS

About Stites & Harbison

Bio

V-Card

421 W. Main Street | P.O. Box 634  
Frankfort, KY 40602

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**S T O L L · K E E N O N · O G D E N**  
P L L C

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

**DOUGLAS F. BRENT**  
DIRECT DIAL: 502-568-5734  
DIRECT FAX: 502-333-6099  
douglas.brent@skofirm.com

January 14, 2011

***VIA ELECTRONIC MAIL***

R. Benjamin Crittenden  
Stites & Harbison PLLC  
421 W. Main Street  
P.O. Box 634  
Frankfort, KY 40602

***RE: Kentucky Public Service Commission Case No. 2010-00447***

Dear Ben:

The only issues referred to the Commission by the Federal District Court are matters of law. The following facts of record are relevant:

1. Dana Bowers subscribes to service in Elizabethtown Kentucky and is billed the local "flat rate service" rate listed on Original Page 3 of Windstream Kentucky East Tariff P.S.C. KY. No. 7.
2. Windstream Kentucky East Tariff P.S.C. KY. No. 7 was originally filed July 17, 2006, is currently on file with the Commission and states rates for basic and nonbasic services.
3. Dana Bowers is billed for "Feature Pack Calling Service Option A."
4. Rates for "Feature Pack Calling Service Option A" appear on Windstream Kentucky East Tariff P.S.C. KY. No. 7, on Original Page 20, filed July 17, 2006.
5. Windstream Kentucky East has added or changed rates, terms, conditions and restrictions in Tariff P.S.C. KY No. 7 since July 17, 2006.
6. Windstream Kentucky East has filed tariff revisions to increase rates for one or more nonbasic services during 2007 and 2008.

R. Benjamin Crittenden  
January 14, 2011  
Page 2

We reserve all rights and opportunities to revise this list.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Douglas F. Brent". The signature is stylized with a long horizontal stroke extending to the right.

Douglas F. Brent

DFB: jms





STOLL · KEENON · OGDEN  
P L L C

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

**DOUGLAS F. BRENT**  
DIRECT DIAL: 502-568-5734  
DIRECT FAX: 502-333-6099  
douglas.brent@skofirm.com

January 20, 2011

*VIA ELECTRONIC MAIL*

R. Benjamin Crittenden  
Stites & Harbison PLLC  
421 W. Main Street  
P.O. Box 634  
Frankfort, KY 40602

**RE: Kentucky Public Service Commission Case No. 2010-00447**

Dear Ben:

We have read the thirty seven paragraphs of proposed stipulated facts you provided by email last Friday. Most of the assertions of “fact” relate to legal disputes or to matters that are irrelevant to the legal issues referred to the Commission by the Federal District Court. Others simply restate facts that are beyond dispute, *e.g.*, that Dana Bowers is a customer of Windstream Kentucky East. In our view, jointly filing a long statement of largely irrelevant “facts” to which the parties do, or do not stipulate will unnecessarily complicate and prolong what should be a straightforward dispute of the law that applies to Windstream’s addition of the “Kentucky Gross Receipts” surcharge to its customer bills.

As we explained at the informal conference, we believe that the essential facts are already of record and are beyond dispute, as follows:

- 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”.

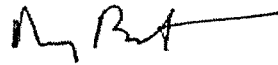
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R. Benjamin Crittenden  
January 20, 2011  
Page 2

- The gross revenues tax in KRS 136.616(2)(b) is imposed by the state government upon Windstream, not upon its customers.

As requested by the Commission's counsel, we will file a procedural motion on or before January 28. Please let me know if there are any questions.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Douglas F. Brent", with a long horizontal stroke extending to the right.

Douglas F. Brent

DFB: jms

cc: Kentucky Public Service Commission