

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

In the Matter of:)	
)	
DANA BOWERS)	
)	
COMPLAINANT)	
)	CASE NUMBER 2010-00447
v.)	
)	
WINDSTREAM KENTUCKY EAST, LLC)	
)	
DEFENDANT)	

WINDSTREAM KENTUCKY EAST, LLC’S REPLY IN SUPPORT OF MOTION TO AMEND PROCEDURAL SCHEDULE AND RESPONSE TO PETITIONER’S CROSS MOTION TO ABBREVIATE PROCEDURAL SCHEDULE

Windstream Kentucky East, LLC’s (“Windstream”) motion to amend the procedural schedule entered by the Commission in this matter sought to modify certain deadlines by a period of two weeks to avoid conflicts with deadlines previously set by the United States District Court for the Western District of Kentucky in the ongoing federal litigation between the parties. It is a modest request and there is no reasonable basis for Dana Bowers to contend that she will be prejudiced by the requested modification. However, Ms. Bowers has seized upon Windstream’s filing as an opportunity to further mischaracterize the nature of this proceeding and the District Court’s expectations of the Commission. For the reasons set forth below and in Windstream’s previous filing, the Commission should reject the arguments made by Ms. Bowers—along with her request to abbreviate the procedural schedule—and grant Windstream’s motion.

A. Ms. Bowers’ Response Mischaracterizes the Nature of this Proceeding and the District Court’s Expectations of the Commission.

Ignoring the language of the District Court’s Order, her own Complaint in this matter, and the Commission’s Procedural Order, Ms. Bowers continues to insist that this matter is

nothing more than “a referral by the U.S. District Court for the Western District of Kentucky to the Commission for its views on matters of state tariff law.”¹ This simply isn’t so. The District Court stayed Count III of the federal action to afford the Commission the opportunity to address both the legal and factual issues necessary to resolve whether Windstream was required to include the gross receipts surcharge in its Kentucky tariff before including it on its customers’ bills and whether the existing tariff language in PSC Ky. No. 7 encompassed the surcharge.² In its Procedural Order, the Commission recognized that this proceeding isn’t limited to the resolution of abstract legal questions, but that there are important questions of fact at issue that Windstream is entitled to develop.³ Ms. Bowers’ continued assertions to the contrary are without merit and should be rejected by the Commission.

Similarly unavailing is Ms. Bowers’ contention that an extension of certain deadlines by a period of two weeks will somehow delay or disrupt the federal action involving these parties. This contention also is factually incorrect. Ms. Bowers notes that the procedural schedule entered by the Commission will cause these proceedings to continue past the August 1, 2011 discovery deadline and the September 13, 2011 dispositive motion deadline in the federal action. However, Ms. Bowers fails to mention the fact that the pendency of this proceeding has no bearing upon the progress of the federal action. Discovery is ongoing in the federal action and no dispositive motions have been filed. If dispositive motions are filed then they’ll be ruled upon by the District Court in due course. Going forward, the District Court’s only potential

¹ Petitioner’s Response to Windstream East, LLC’s Motion to Extend Procedural Schedule and Cross Motion to Abbreviate Procedural Schedule (“Petitioner’s Response”), p. 1, n. 1.

² Windstream addressed the District Court’s Order in detail in its Motion for Entry of a Proposed Scheduling Order Setting Deadlines for the Filing of Discovery Requests, Direct and Rebuttal Testimony, and Briefs, pages 4-7. Rather than repeating its argument here in response to Ms. Bowers’ baseless assertion that the District Court only referred Count III to the Commission to address questions of law within the scope of its expertise, Windstream incorporates its previous filing by reference.

³ Order, p. 6 (“However, upon a review of the pleadings in the record, the Commission concludes that there are material facts in dispute that Windstream should have the chance to further develop.”).

involvement with the matters now before the Commission will be to resolve any damages issues that arise from the Commission's ruling.⁴ The Commission should not be swayed by

Ms. Bowers' misplaced "concerns" about this proceeding causing delays in the federal action.

B. The Commission Should Reject Ms. Bowers' Attempt to Downplay the Need for Discovery in this Action.

Ms. Bowers insists that there is no need for discovery in this proceeding, and that as a result, Windstream should face no burden complying with the conflicting procedural deadlines in this action and the federal action.⁵ Ms. Bowers' position on this issue is nothing more than a rehashing of the arguments she raised in her Motion for Procedural Schedule Consisting of Briefing Only—arguments that were rejected by the Commission in its Procedural Order when it determined that there are material facts in dispute, and that Windstream is entitled to develop those facts through discovery. The Commission has determined that the parties should have the opportunity to develop the factual record of this case through discovery and the filing of testimony. Ms. Bowers has the option to seek no discovery from Windstream and to file minimal testimony, as she has indicated in her response to Windstream's motion to amend the procedural schedule.⁶ To the contrary, Windstream intends to take advantage of its opportunity to conduct discovery and file testimony. The current procedural schedule will make this unduly burdensome for Windstream because of conflicting deadlines in the federal action, deadlines which were agreed to or proposed in many instances by Plaintiff. Amending the schedule to extend deadlines by only two weeks will alleviate the associated burdens.

⁴ *Dana Bowers v. Windstream Kentucky East, LLC*, 790 F.Supp.2d 526, 534 (W.D. Ky. 2010) ("A stay is more appropriate than a dismissal, because the Court may need to resolve damages and other issues at a later date.").

⁵ Petitioner's Response, pp. 3-4.

⁶ *Id.*

C. Ms. Bowers Will Not be Prejudiced by a Two-Week Extension of the Procedural Schedule.

Ms. Bowers claims that “Windstream continues to collect an unapproved rate from Petitioner and from thousands of other Windstream customers in Kentucky” and that “the delay it seeks would further damage those customers.”⁷ Windstream denies the allegation that its gross receipts surcharge is an “unapproved rate” or that Ms. Bowers has suffered any harm as a result of having the surcharge included on her bills. This is the very issue for the Commission to decide in this proceeding. Plaintiff may not use her conjecture on this point as conclusory evidence to support her position on the procedural schedule. In any event, there is no reasonable basis for Ms. Bowers to contend that she will be prejudiced or harmed if the Commission extends the scheduling deadlines in this proceeding by two weeks.

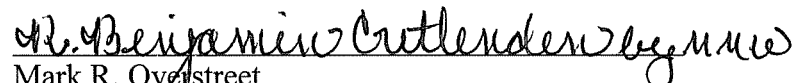
Similarly, Ms. Bowers’ request to abbreviate the procedural schedule, by eliminating at least one round of testimony and one round of discovery, should be rejected by the Commission. Besides the fact that the Commission established this schedule after rejecting Plaintiff’s initial claims on this point, it is customary for the Commission to afford parties the right to develop the factual record in cases through discovery and testimony, and the Procedural Schedule entered by the Commission in this matter is abbreviated in comparison to the Commission’s ordinary practice. This is an important matter to Windstream and it should be afforded a full opportunity to develop the facts pertinent to Ms. Bowers’ claims. Eliminating at least one round of testimony and one round of discovery will deprive Windstream of that opportunity.

⁷ Petitioner’s Response, p. 1.

D. Conclusion.

Based on the foregoing and on Windstream's previous motion, Windstream respectfully requests that the Commission uphold its initial decision on the procedural issues, grant its Motion to Amend Procedural Schedule and deny Ms. Bowers' Cross Motion to Abbreviate Procedural Schedule.

Respectfully submitted,

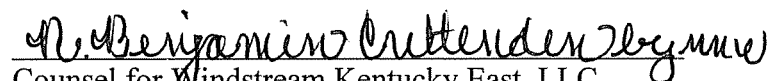

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CERTIFICATE OF SERVICE

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

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