

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:)
)
Dana Bowers, Complainant)
v.)
Windstream Kentucky East, LLC, Defendant)

Case No. 2010-00447

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**PUBLIC SERVICE
COMMISSION**

INITIAL BRIEF
OF
WINDSTREAM KENTUCKY EAST, LLC

Filed August 29, 2011

INTRODUCTION

Dana Bowers (“Mrs. Bowers” or “Plaintiff”) filed a Petition for Declaratory Ruling on November 16, 2010 (“Complaint”) with the Public Service Commission (“Commission”) asserting that Windstream East’s assessment of a gross receipts surcharge (“GRS”) 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 is the moving party to the Complaint but argued to the Commission that a hearing was not required. (Petitioner’s July 11, 2011 Response to Request for Hearing.) The Commission granted her request on August 11, 2011. Through her “testimony” filed on June 10 and June 24, 2011, Mrs. Bowers submitted scarce evidence in support of the claims in her Complaint and maintained that this case is solely about whether the Commission would mimic the FCC’s decision in *Irwin Wallace v. AT&T Communications of the Southern States, Inc.*, 6 FCC Rcd 1618 (1991) and summarily conclude that the GRS is a rate component that must be tariffed, as the FCC concluded with respect to a surcharge imposed by AT&T.¹ On June 10 and June 24, 2011, Windstream East submitted extensive testimony through its witness Stephen Weeks (“Weeks Direct Testimony” and “Weeks Rebuttal Testimony,” respectively). Pursuant to Kentucky law, as supported by the evidence in this record which is largely unrefuted by Plaintiff, Mrs. Bowers’ claims in the Complaint are wholly without merit. She requests the Commission to find that the GRS is a rate for service

¹ Plaintiff’s reliance on *Irwin Wallace* is misplaced on multiple levels. First and foremost, Windstream East’s GRS arises from a gross revenues tax that replaced municipal franchise fees, which does not appear to be the case with the Florida tax at issue in *Irwin Wallace*. The Commission should evaluate the nature of the GRS in light of Kentucky law. Additionally, *Irwin Wallace* predates the extensive deregulation of the telecommunications industry at the federal level following the passage of the Telecommunications Act of 1996, and thus was rendered at a time when telecommunications carriers were required to include all interstate charges in their tariffs filed with the FCC. By contrast, as will be discussed herein, telecommunications services in Kentucky have been largely deregulated under KRS 278.541, *et. seq.*, and, in fact, Plaintiff purchases no tariffed services from Windstream East. (Weeks Direct Testimony p.5, lines 7-9.) Again, the Commission should conduct its analysis of the GRS under Kentucky – not federal – law and the pertinent Kentucky statutes and regulatory scheme. Such a path also is consistent with the federal court’s referral order and Count III of Mrs. Bower’s Complaint.

required to have been tariffed with the Commission – namely that the GRS is an “unfiled rate” under KRS 278.160. However, Plaintiff overlooks the fact that her services are exempt from KRS 278.160, suggests no reasonable excuse for her failure to comply with applicable timely dispute provisions (even those under the tariff she seeks to enforce), and otherwise ignores language already in Windstream East’s tariff which addresses the GRS. Under any analysis, the GRS is not, as Mrs. Bowers contends, an unfiled rate for service that was required to be tariffed under KRS 278.160.

STATEMENT OF THE CASE

A. Background

This proceeding arises from a class action lawsuit filed on Plaintiff's behalf two years after the implementation of the GRS asserting that the GRS is an "illegal rate" that was required to be tariffed. (Class Action Complaint ("lawsuit"), Paragraph 1.) As a part of the lawsuit, the federal court referred one of Plaintiff's claims to the Commission. (4/30/10 Op., at 12–13 (noting that the court would need to decide whether the Commission would rule as the FCC did in *Irwin Wallace* and whether Windstream East's state tariffs permit the GRS if it is a charge that must be tariffed, and concluding that these questions should be answered by the Commission).) That claim, as Mrs. Bowers filed it in her Complaint with the Commission, pertains to whether Windstream East was required to have tariffed the GRS in its local tariff before applying the GRS to Mrs. Bowers' intrastate services she purchases from Windstream East. (Complaint Para. 1-2.)

B. Deregulation Of Telecommunications Services

Plaintiff is a residential customer of Windstream East who purchases nonbasic services from Windstream East. (Weeks Direct Testimony p.7, lines 6-23. See also, KRS 278.541 and 278.544.) She does not purchase any access services from Windstream East under Tariff No. 8 (Plaintiff's Response to Requests for Admission Nos. 1-6) and at no time has she been a customer of Windstream Kentucky West, LLC or Windstream Communications, Inc. (*Id.*) During all relevant time periods, Mrs. Bowers has purchased Windstream East's "Feature Pack A" telephone service, DSL Ultra broadband services, and DSL Protection Plus wire maintenance plan. (Weeks Direct Testimony p. 5, lines 7-9. See also the partial June 14, 2010 invoice attached as Exhibit C to Plaintiff's Complaint.) She purchases local service that is packaged or bundled

with other products and services like broadband and/or calling features. (Weeks Direct Testimony p. 6, lines 11-14; Plaintiff's Responses to Requests for Admission Nos. 7 and 8; Complaint at Exhibit C.) She does not purchase stand-alone basic local exchange service, and her services include functions beyond those that comprise only basic local exchange service. (*Id.*) The services Mrs. Bowers purchases from Windstream East are nonbasic and are not stand-alone basic local exchange service. (Weeks Direct Testimony p. 7, lines 1-2.)

The vast majority of Windstream East's customers in today's competitive environment purchase nonbasic, nonjurisdictional services primarily in the form of bundled services. (*Id.* at p. 7, lines 17-20.) Nonjurisdictional services were deregulated in 2006, and Windstream East also detariffed its bundled services in December 1, 2008 by filing with the Commission to remove the bundles from its local tariff. (*Id. See* also, KRS 278.541, *et. seq.*) Certain nonbasic packaged service components, like the residential lines and Feature Pack A calling options ordered by Mrs. Bowers, are deregulated and continue to be identified in Windstream East's Tariff No. 7. (Weeks Direct Testimony pp. 8-9. KRS 278.541, *et. seq.*) The deregulation of nonbasic services came about because as far back as 2006, the General Assembly recognized that telephone utilities were subject to significant marketplace competition that mitigated the need to continue the traditional administrative oversight, including exemption from tariffing requirements. (Weeks Direct Testimony pp. 9-10.)

As a result of the General Assembly's actions, all telephone utilities in Kentucky obtained rate and tariffing flexibility for nonbasic, nonjurisdictional services. (KRS 278.544.) As a result, Windstream East provides nonbasic services to customers like Mrs. Bowers pursuant to its own company terms and conditions. (*Id.*) The terms and conditions of service between Windstream East and its customers include, in part, the requirement that the customer, including

Mrs. Bowers, be responsible for applicable taxes, surcharges, fees, and assessments. (Weeks Direct Testimony p.14, lines 10-13.) One such surcharge is the GRS, which is not assessed on all items on Plaintiff's monthly invoices but instead only those items for which Windstream East is levied a tax on the corresponding revenues from those items. (*Id.* at p. 23, lines 18-21.) Windstream East assesses the GRS to its customers on the same services and charges on which Windstream East's revenues are taxed. (*Id.*) For example, Mrs. Bowers is assessed the GRS on her Feature Pack A, Protection Plus services. The GRS is not assessed on broadband service.² (Weeks Direct Testimony p. 12, lines 3-4 and Exhibit B.)

C. Implementation Of The GRS.

Windstream East first began applying the GRS to customers' invoices, including those of Mrs. Bowers, in their June 2007 invoices. (Weeks Direct Testimony p.20, lines 22-23.) The GRS is not a direct pass-through of a tax on customers and instead is a surcharge designed to help recover Windstream East's costs of the gross revenues tax that is levied on Windstream East. (*Id.* at pp. 22-23.) The GRS assessed to Mrs. Bowers has varied in amounts to enable Windstream East to recover its underlying costs of the tax. (*Id.* at p. 12, lines 9-10.) At no time has Windstream East used the GRS to recover more than its costs of the gross revenues tax levied on it. (Weeks Direct Testimony p.24, line 1.) There was also a significant period of time during which Windstream East's costs of the tax went unrecovered as a result of it (and other providers) being unconstitutionally precluded from collecting their costs of the tax in the form of a line item surcharge. (*Supra.*) Windstream has used the GRS to attempt to recover the costs of the gross revenues tax paid during that time period.

² The parties appear to agree that broadband service is a nonjurisdictional service and, therefore, not appropriate for consideration by the Commission. Nevertheless, Windstream East includes this fact for purposes of clarifying the record given that Plaintiff erroneously suggests in her Complaint to the Commission that the GRS is assessed to her broadband service. (Complaint at Para. 7.)

Some customers questioned the new surcharge at the time that Windstream East implemented the GRS in 2007. (Weeks Direct Testimony p.13, lines 5-13 and Exhibit A.) For example, at least two residential customers reviewed their monthly invoices and filed timely inquiries and disputes with Windstream East regarding the GRS. (*Id.*) By contrast, Plaintiff did not file any dispute or make any inquiry with Windstream East for two years, when a lawsuit was filed on her behalf on June 22, 2009. (Weeks Direct Testimony p.13, lines 15-17. *See also*, Plaintiff's Responses to Requests for Admission Nos. 12 and 14.)

D. Customers' Obligation To Dispute Charges In A Timely Fashion

Mrs. Bowers – like all customers – is notified of the terms of her service including the obligation to file timely disputes regarding charges on her monthly invoices in a variety of ways. (Weeks Testimony pp. 14-16 and Exhibits B-D.) Most importantly, since before the time that Windstream East began assessing the GRS, Mrs. Bowers received written instructions with each of her monthly invoices instructing how to verify the rates and charges on her bill and advising of her obligation under the terms of service to report any discrepancies in the bills within twenty days to assure prompt attention to the issue. (*Id.*) Mrs. Bowers did not follow any of these instructions with respect to the GRS. (*Id.*)

Mrs. Bowers also received a bill message in her June 2007 invoice stating: “Effective with this billing statement, the Kentucky Gross Receipts Surcharge will begin appearing on your bill. This surcharge recovers a tax imposed by the State of Kentucky on all communications and entertainment providers.” (*Id.* at p. 15, lines 13-16.) The message instructed Mrs. Bowers to call Windstream East's customer service representatives if she had any questions about the surcharge, which Mrs. Bowers did not do. (*Id.* at lines 17-18.) Additionally, in filings made in the federal lawsuit, Mrs. Bowers represented that she and her attorneys discussed her

Windstream East bill in February 2009. (*See* Pls.’ Reply in Support of Mot. for Class Cert., at 12.) Mrs. Bowers failed to dispute the GRS until four months later when the lawsuit was filed on her behalf. (Weeks Direct Testimony p. 17, lines 3-8.) Prior to the lawsuit being filed, Mrs. Bowers continued paying her monthly invoices to Windstream East in full and without dispute. (*Id.*)

Windstream East’s Tariff No. 7 contains both a provision requiring timely disputes to be filed within thirty days of the invoice and language notifying customers of line item surcharges that recover for gross receipts fees imposed by local taxing authorities. (Windstream East’s Tariff No. 7 at Sections S2.4.3 and S2.4.5(c).) The language in Tariff No. 7 addresses the GRS particularly given that the GRS is the successor to local municipal franchise fees and helps recover for Windstream East’s costs of the gross revenues tax collected by the Commonwealth and used for the benefit of local Kentucky municipalities. (*Id.* Weeks Direct Testimony pp. 26-27. KRS 136.660, *et. seq.*)

SUMMARY OF ARGUMENT

The cornerstone of Plaintiff’s allegations 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) The purported “unfiled rate for telecommunications services” to which she refers is the GRS. Mrs. Bowers contends erroneously that the GRS is a rate for service that was required to have been but was not tariffed in Windstream East’s local tariff. (KRS 136.660, *et. seq.* and 278.541, *et. seq.*) This simply is not the case. First and most significantly, Mrs. Bowers does not purchase any jurisdictional services from Windstream East that are subject to KRS 278.160. (*Id.*) Second, even without regard to whether Mrs. Bowers purchases jurisdictional or nonjurisdictional services from Windstream East, she failed to comply

with any of the applicable timely dispute provisions in the terms and conditions governing either jurisdictional or nonjurisdictional service. (*See, e.g.*, Windstream East’s Tariff No. 7 at Sections S2.4.3.) Third, Mrs. Bowers’ claims wholly ignore the fact that regardless of whether the GRS is required to be tariffed with the Commission (which it is not), Windstream East’s tariff already sets forth language addressing the GRS. (*Id.* at Section S2.4.5(c).) By all accounts, the GRS is not an unfiled rate for service that was required to be filed in Windstream East’s local tariff, and Plaintiff’s claims are wholly without merit.

ARGUMENT

I Mrs. Bowers Bears The Burden Of Proof In This Proceeding.

It is black letter law that as the complainant in this proceeding, Ms. Bowers bears the burden of proof. *In the Matter of: Office of Attorney General, Commonwealth of Kentucky v. Atmos Energy Corporation*, Case No. 2005-00057 (Ky. P.S.C. February 9, 2007) (citing *Energy Regulatory Commission v. Kentucky Power Company*, 605 S.W.2d 46, 50 (Ky. App. 1980).)

II. Mrs. Bowers does not purchase any jurisdictional service from Windstream East that is subject to the mandatory utility tariffing requirements of KRS 278.160, nor is the GRS itself a rate for telecommunications service subject to the Commission’s tariff oversight under KRS 278.160.

At the heart of Mrs. Bowers’ Complaint lies her allegation 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) The purported “unfiled rate for telecommunications services” to which she refers is the GRS. However, the GRS is not an unfiled rate for telecommunications service that is required to be tariffed under KRS 278.160, nor does Mrs. Bowers actually purchase any jurisdictional service subject to Windstream East’s local tariff. (Weeks Direct Testimony p. 7, lines 1-13. KRS 278.541, *et. seq.*) Very simply, Plaintiff cannot sustain any claim under KRS 278.160 as the general utility tariffing requirements

set forth therein are wholly inapplicable to the services Plaintiff purchases from Windstream East. (*Id.*) It is well-settled that Plaintiff must have standing to assert any claim against Windstream East, meaning that she must have proven a concrete injury in fact, which is caused by Windstream East's conduct, and a likelihood that the injury can be redressed through a favorable ruling. (*Com. Natural Resources & Environmental Protection Cabinet v. Kentec Coal Co., Inc.*, 177 S.W.3d 718, 731 (Ky. 2005).) It is equally well-established that a plaintiff cannot manufacture standing by purporting to represent others who may have been injured by the defendant. (*E.g., Rosen v. Tenn. Comm'r of Fin. & Admin.*, 288 F.3d 918, 928 (6th Cir. 2002); *Thompson v. Bd. of Educ. of the Romeo Community Schools*, 709 F.2d 1200, 1202 (6th Cir. 1983); *Bowen v. First Family Fin. Servs. Inc.*, 233 F.3d 1331, 1339 (11th Cir. 2000).) Thus, the Commission should consider only whether Plaintiff herself has a viable claim against Windstream East based on the assessment of the GRS. As will be established, she does not.

A. Mrs. Bowers does not purchase any jurisdictional service subject to Windstream East's local tariff or the tariffing requirements of KRS 278.160.

Setting forth the general tariff requirements for all utilities subject to the Commission's jurisdiction, KRS 278.160 was established decades ago and provides as follows:

Utilities to file and display general schedules of rates and conditions for service -- Adherence to schedules -- Exclusion from disclosure of confidential or proprietary provisions in special contracts.

(1) Under rules prescribed by the commission, each utility shall file with the commission, within such time and in such form as the commission designates, schedules showing all rates and conditions for service established by it and collected or enforced. The utility shall keep copies of its schedules open to public inspection under such rules as the commission prescribes.

(2) 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.

(3) The provisions of this section do not require disclosure or publication of a provision of a special contract that contains rates and conditions of service not filed in a utility's general schedule if such provision would otherwise be entitled to be excluded from the application of KRS 61.870 to 61.884 under the provisions of KRS 61.878(1)(c)1.

(KRS 278.160.) Thus, as a general matter, rates for utility service that fall under the Commission's purview historically have been subject to the requirement that they be tariffed on file with the Commission. (*Id.*) This "filing of rates" served as the foundation to the Commission's prior ratemaking oversight and provided that once the Commission accepted a utility's rates for filing the utility was then bound to continue charging those rates that remained on file with the Commission (*See, e.g., Cincinnati Bell Tel. Co. v. Ky. P.S.C.*, 223 S.W.3d 829 (Ky. App. 2007).)

In arguing only the general tariff requirements of KRS 278.160 and the historical general utility tariff requirements, however, Plaintiff's Complaint ignores the provisions of KRS 278.544, which expressly exempt certain telecommunications services from the tariff requirements imposed generally on all jurisdictional utilities under KRS 278.160 – an omission that is fatal to Plaintiff's allegations in her Complaint. (*See, Complaint, Para. 5-7.*) Specifically, the General Assembly recognized years ago that the competitive environment in which telecommunications utilities operate had changed drastically from other utility environments and necessitated the need to replace certain historical administrative Commission regulation with market oversight. (Weeks Direct Testimony p. 9, lines 8-15. KRS 278.541-544.) As a result, the General Assembly enacted KRS 278.544 effective July 12, 2006. It provides as follows:

278.544. Provisions applicable to all telephone utilities.

The following provisions of this section *shall apply and be enforced equally to all telephone utilities*, unless otherwise specifically stated in this section.

(1) Telephone utilities *may file* with the commission schedules or tariffs reflecting the rates, terms, and conditions *for nonbasic services* that are generally available to all subscribers qualifying for the rates, terms, and conditions. The rates, terms, and conditions for basic and nonbasic services shall be valid upon the effective date stated in the schedule. *Tariffs for nonbasic services in effect on July 12, 2006, shall continue to be effective as binding rates, terms, and conditions until withdrawn or modified by the telephone utility.*

(2) *A telephone utility offering a package that includes any optional telephone features tariffed as of February 1, 2006, shall maintain schedules or tariffs on file with the commission for each such optional telephone feature available on a stand-alone basis to residential customers who purchase basic local exchange service from that telephone utility.*

(3) *Notwithstanding the terms of any adopted regulation plan or any provision of law to the contrary, telephone utilities may provide nonbasic services pursuant to terms and conditions provided to the customer.* Telephone utilities shall not be required to file nonbasic contracts with the commission. Telephone utilities shall permit a residential customer with nonbasic service to purchase basic local exchange service and any optional telephone feature on file in a schedule or tariff at the commission at the current rates, terms, and conditions without incurring termination charges, unless the customer has entered into an agreement containing termination charges and the customer is given thirty (30) days from receipt of the terms and conditions to cancel the agreement. If a customer cancels the agreement within thirty (30) days from receipt of the terms and conditions, termination charges are limited to the price of unreturned equipment or services, including installation, received at that point. Telephone utilities that provide services pursuant to this subsection shall provide customers with notice, as part of the terms and conditions of such services, that basic local exchange service and any optional telephone feature on file in a schedule or tariff with the commission may be purchased separately at the price posted on the company's Web site or on file with the commission.

(4) *Notwithstanding any provision of law to the contrary, nonbasic services offered pursuant to the provisions of this section shall be set by the marketplace and are not governed by KRS 278.030 and administrative regulations promulgated thereunder. The nonbasic services are exempt from action or review by the commission under KRS 278.160, 278.170, 278.180, 278.190, 278.192, 278.200, 278.230(3), 278.250, 278.255, 278.260, 278.270, 278.280, 278.290, and 278.300 and administrative regulations promulgated thereunder, except as specifically stated in KRS 278.541 to 278.544.*

(KRS 278.544; emphasis supplied.) Effective July 12, 2006, nonbasic services were deregulated and removed from the Commission's jurisdiction including most significantly from the Commission's general utility tariff oversight under KRS 278.160. (KRS 278.544(4).) The services purchased by Mrs. Bowers from Windstream East are no exception – they are nonjurisdictional services exempt from KRS 278.160. (Weeks Direct Testimony p. 8, lines 1-4 and Exhibit B; Plaintiff's Responses to Requests for Admission Nos. 7-8. Complaint at Exhibit C. KRS 278.541, *et. seq.*)

As a result of the change in Kentucky law in 2006 with respect to telecommunications services, it is now necessary to determine first whether a customer purchases basic local exchange service (*i.e.*, jurisdictional service) or whether she purchases nonbasic services (*i.e.*, nonjurisdictional services) before determining what administrative requirements, if any, apply to the service.³ Basic local exchange service is defined by law as follows:

(1) "Basic local exchange service" means a retail telecommunications service consisting of a primary, single, voice-grade line provided to the premises of residential or business customers *with the following features and functions only*:

- (a) Unlimited calls within the telephone utility's local exchange area;
- (b) Dual-tone multifrequency dialing; and
- (c) Access to the following:
 - 1. Emergency 911 telephone service;
 - 2. All locally available interexchange companies;
 - 3. Directory assistance;
 - 4. Operator services;

³ Windstream East notes that in some circumstances, further analysis is also needed to determine, for example, whether the utility providing such service has elected alternative regulation under KRS 278.543. However, as Mrs. Bowers' services do not survive even the first step in the analysis and are clearly nonbasic services exempt from KRS 278.160, it is not necessary to discuss those further steps in the context of this proceeding.

5. Relay services; and

6. A standard alphabetical directory listing that includes names, addresses, and telephone numbers at no additional charge.

With respect to local exchange carriers, basic local exchange service also shall include any mandatory extended area service routes accessible as a local call within that exchange area on or before July 12, 2006. *Basic local exchange service does not include any features or functions other than those listed in this subsection, nor any other communications service, even if such service should include features and functions listed herein...*

(KRS 278.541(1); emphasis supplied.) In contrast, nonbasic services (which include packages and optional features) are defined as follows:

"Nonbasic service" means all retail telecommunications services provided to a residential or business customer, *all arrangements with respect to those services, and all packages of products or services; provided, however, nonbasic service includes basic local exchange service only if the customer chooses to purchase a package that includes basic local exchange service as a component of the package;*

"Optional telephone feature" means any of those central office-based features that were tariffed by a local exchange carrier on or before February 1, 2006, that, where available:

- (a) Are available to a line-side connection in a telephone switch;
- (b) Are available on a stand-alone basis separate from a bundled offering; and
- (c) Enhance the utility of basic local exchange service.

The term includes but is not limited to call forwarding, call waiting, and caller ID;

"Package" means combinations of retail products or services offered, whether at a single price or with the availability of the price for one (1) product or service contingent on the purchase of others...

(KRS 278.541(5)-(7); emphasis supplied.) Simply stated, KRS 278.544(4) exempts nonbasic services from the requirements of 278.160. This exemption for nonbasic services specifically includes packaged and bundled services (including basic local exchange service purchased as

part of a package like Mrs. Bowers' Feature Pack A) and services that provide functions beyond those comprising basic local exchange service. (KRS 278.541(5)-(7).)

A review of Mrs. Bowers' partial invoice attached as Exhibit C to her Complaint makes clear that she does not purchase stand-alone basic local exchange service providing only the functions set forth in KRS 278.541(1). (Complaint at Exhibit C.) Mrs. Bowers offered no facts sufficient either to support her contention that her services are subject to KRS 278.160 or to refute the detailed facts offered by Windstream East's witness showing that Mrs. Bowers' services with Windstream East are nonbasic, nonjurisdictional services. (*See*, Plaintiff's Direct Testimony and her June 24 filing represented to be rebuttal "testimony," offering no discussion as to the type of services she purchases from Windstream East or how they provide only the functions of stand-alone basic local exchange service.)

At all relevant times, Mrs. Bowers purchased Windstream East's "Feature Pack A" telephone service, which includes residential local service. (Weeks Direct Testimony p. 5, lines 7-9 and Exhibit B. Complaint Exhibit C.) But as Mrs. Bowers acknowledged in her discovery responses, the "Feature Pack A" that she purchases also includes additional services, including packaged calling options, broadband service, and Protection Plus. (Plaintiff's Responses to Requests for Admission Nos. 7 and 8.) These packaged calling features permit her residential phone lines to perform functions well beyond those for basic local exchange service, including anonymous call rejection, automatic busy redial, call return, call block, call forwarding, call waiting, Caller ID, selective call acceptance, and three-way calling. (Weeks Direct Testimony pp.6-7.) Even the partial June 14, 2010 invoice Mrs. Bowers attached to her Complaint demonstrates that she purchases more than just a stand-alone basic local telephone line from Windstream East. (Complaint at Exhibit C.) There simply can be no doubt that the services Mrs.

Bowers purchases from Windstream East are nonbasic, nonjurisdictional services. (KRS 278.541(1) and (5)-(7).) Consequently, there can be no doubt that Mrs. Bowers purchases no service from Windstream East that is subject to the tariff requirements of KRS 278.160 which provides the sole basis for her Complaint. (KRS 278.544, particularly (4).)

Given today's competitive telecommunications environment, most of Windstream East's residential and business customers purchase nonbasic services primarily in the form of bundled services that are deregulated and/or detariffed. (Weeks Direct Testimony p. 7, lines 17-20.) With the recognition of such competition and the passage of KRS 278.544 in 2006, all nonbasic services provided by Windstream East (and by all other telephone utilities in Kentucky) were deregulated. (KRS 278.544.) Additionally, Windstream East further filed with the Commission on December 1, 2008 to remove bundles from its local tariff. (Weeks Direct Testimony p. 7, lines 19-20.) Although Mrs. Bowers refused to admit that she purchases nonbasic services from Windstream East – a fact that is fatal to her tariff claims against Windstream East – she offered no facts to refute Mr. Weeks' detailed explanation of the nonbasic services that she purchases from Windstream East. (Plaintiff's Response to Request for Admission No. 5; *see also* the June 10 and June 24, 2011 filings submitted as testimony on behalf of Mrs. Bowers.) But by virtue of her own admissions and partial invoice attached as Exhibit C to her Complaint as well as her failure even to challenge Windstream East's detailed testimony, it is without question that Mrs. Bowers purchases no service from Windstream East treated under Kentucky law as stand-alone basic local exchange service.⁴ (*Supra.*) Consequently, there is no provision in Kentucky law that

⁴ Mrs. Bowers errs in contending that Windstream's inclusion in Windstream East Tariff No. 7 of certain of the service components she purchases somehow transforms those services into basic services subject to the full requirements of KRS 278.160. (Complaint at para. 2 and 8.) Such services are required by KRS 278.544(2) to be listed in the tariff, but the statutes also expressly provide that the services fall under the definition of "nonbasic service" provided by KRS 278.541(5) and under that portion of KRS 278.544(4) exempting nonbasic services from the provisions of KRS 278.160. "[T]he General Assembly "intends an Act to be effective as an entirety. No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that significance

supports her claim that she purchases jurisdictional service from Windstream East subject to the Commission's ratemaking jurisdiction and the general utility tariff requirements of KRS 278.160.⁵ (See, e.g., KRS 541(1) and 278.544(4).) As KRS 278.160 is the cornerstone of Plaintiff's Complaint, the fact that she purchases no services from Windstream East subject to KRS 278.160 is fatal to her Complaint. (KRS 278.544(4).)

B. The GRS is not an unfiled rate for telecommunications service, nor is it a surcharge subject to the Commission's tariff authority under Chapter 278 of the Kentucky Revised Statutes.

Inherent in Plaintiff's claims is the misguided notion that the GRS is itself an "unfiled rate" for telecommunications service and further that it is a rate required to have been filed with the Commission prior to being assessed to Windstream East's customers. (Complaint para. 1. See also, Plaintiff's June 10 Direct Testimony alleging incorrectly that the GRS is to be considered for purposes of the rate caps on basic local exchange service in KRS 278.543.) The GRS is neither.

First, the GRS is not a rate for telecommunications service. KRS 278.010(12) defines the term "rate" to include "any individual or joint fare, toll, charge rental, or other compensation for

and effect shall, if possible, be accorded to every part of the Act." *Cosby v Commonwealth*, 147 S.W.3d 56, (Ky. 2004) (quoting *George v. Scent*, 346 S.W.2d 784, 789 (Ky. 1961)). As a result, and contrary to Mrs. Bowers' proffered construction, the Commission must harmonize any conflicting provisions to give effect to all three. *DeStock No. 14, Inc. v. Logsdon*, 993 S.W.2d 952, 957 (Ky. 1999). To the extent there is a conflict, treating the listed services as nonbasic services otherwise exempt from KRS 278.160 as provided by the express language of KRS 278.541(5) and KRS 278.544(4) does just that. Mrs. Bowers' proffered definition by contrast would render KRS 278.544(4) and KRS 278.541(5) meaningless in violation of fundamental principles of statutory construction. *Schoenbachler v. Minyard*, 110 S.W.3d 776, 783 (Ky. 2003).

⁵ Because they are no longer subject to the tariffing requirements of KRS 278.160, Mrs. Bowers' nonbasic services are governed by marketplace pricing and contractual arrangements she has with Windstream East, specifically the terms and conditions of her service. (KRS 278.544(3) and (4).) Those terms include the condition that fees, surcharges, and assessments – which include the GRS – may apply to her services and also the obligation that she timely dispute her charges within a month of receiving her invoice. (Weeks Direct Testimony p. 14, lines 10-13.) Windstream East's terms and conditions of service with Mrs. Bowers sufficiently place her on notice both that certain fees, surcharges, and assessments like the GRS apply to her service and also that she has a responsibility to question those charges within a timely manner. Very simply, the crux of Mrs. Bowers' Complaint is that she was charged an "unfiled rate" by Windstream East, but her terms and conditions of service put her on notice that her service is subject to certain fees, surcharges, and assessments which include the GRS.

service rendered or to be rendered by any utility....” (Emphasis supplied.) The GRS is not a charge, rental, or other compensation paid to Windstream East “for service rendered or to be rendered” by Windstream East. Rather, the GRS is a monthly surcharge to recover costs of the gross revenues tax levied on Windstream East by the Kentucky Department of Revenue. (Weeks Direct Testimony pp. 20-21.) Although Windstream East has used the GRS only to help recover its costs of the gross revenues tax, Windstream East has collected less in the GRS than it has paid in gross revenues tax – a fact that Plaintiff offers no evidence to refute, but which she nevertheless misrepresents. (*Id.* at p. 24, line 1.)

In suggesting that the GRS itself may be considered an “unfiled rate” for telecommunications service, Plaintiff overlooks that even if the GRS could somehow be construed as an actual rate for a telecommunications service (which it cannot), it necessarily would be considered a nonbasic, nonjurisdictional service for the reason that it provides none of the functionalities in KRS 278.541(1) for basic local exchange service. Consequently, it would not be required by law to be set forth in Tariff No. 7 for the same reasons set forth above for nonbasic services. (*See*, KRS 278.544(4), exempting nonbasic services from certain statutory requirements including those in KRS 278.160 regarding tariffs.)

Even as to jurisdictional service, assessments like the GRS are not treated as rates for the underlying basic local exchange service to which they are applied. (Weeks Direct Testimony p.25, lines 8-10.) For example, Windstream East’s Tariff No. 7 does not include taxes, fees, and surcharges among the rates for basic local exchange service identified in Section S3. Similarly, nor does the Commission include such fees and assessments among the actual service rate for basic local exchange service in the Commission’s annual request to Windstream East pertaining to basic telephone bills. (Weeks Direct Testimony p. 24, lines 8-11 and Exhibit F.) This is true

for service rate components like Feature Pack A that are deregulated but required under KRS 278.544(2) to still be identified in Windstream East's tariff. For example, the actual service rates for the Feature Pack A package components identified in Tariff No. 7 are the \$17.07 and \$16.00 service rates which are consistent with the service rates reflected on Mrs. Bowers' monthly invoices. (Weeks Direct Testimony p. 8, lines 14-22 and Exhibit B. Complaint at Exhibit C.) Under the Commission's historical rate-of-return ratemaking methodologies and even during the time that the tariff requirements of KRS 278.160 applied more broadly to telecommunications services, such fees and surcharges were not included in a telephone utility's rate base for purposes of determining the underlying service rate. (Weeks Testimony pp.21-22.) For example, 911 fees are surcharges that vary in amount by the municipality imposing the fee, and certain Lifeline credits which also may vary are not identified as specific tariffed rate amounts. (*Id.*) Instead, these types of assessments and surcharges were treated as "additives" and not themselves an actual rate for service. (*Id.*) Plaintiff's notion that the GRS is itself an "unfiled rate" is not supported by the evidence in this proceeding or by the Commission's historical tariffing regimes even at the time that those tariffing provisions (including those under KRS 278.160) applied generally to telecommunications services.

Second, Plaintiff is misguided in asserting that the GRS had to be filed with the Commission prior to it being assessed to Windstream East's customers. Even under the Commission's historical tariff regime (which as established above has been significantly revised by the General Assembly), such a statement would have been true only if the charge fell within the Commission's tariff oversight authority as set forth in KRS 278.040:

278.040. Public Service Commission -- Jurisdiction -- Regulations.

(1) The Public Service Commission shall regulate utilities and enforce the provisions *of this chapter*. The commission shall be a body corporate, with power

to sue and be sued in its corporate name. The commission may adopt a seal bearing the name "Public Service Commission of Kentucky," which seal shall be affixed to all writs and official documents, and to such other instruments as the commission directs, and all courts shall take judicial note of the seal.

(2) The jurisdiction of the commission shall extend to all utilities in this state. The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities, *but with that exception nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political subdivisions.*

(3) The commission may adopt, in keeping with KRS Chapter 13A, reasonable regulations to implement the provisions of *KRS Chapter 278* and investigate the methods and practices of utilities to require them to conform to the laws of this state, and to all reasonable rules, regulations and orders of the commission not contrary to law.

(KRS 278.040; emphasis supplied.) Consequently, the Commission's tariffing authority is expressly limited to enforcing the provisions of "this chapter," or more specifically Chapter 278 of the Kentucky Revised Statutes. The courts have long recognized that the Commission is an administrative body only, not a lawmaking body, and therefore that its powers and duties are limited to those granted it by the General Assembly. (*South Central Bell Tel. Co. v. Utility Regulatory Commission*, 637 S.W.2d 649, 653 (Ky. 1982) ("Commission's powers are strictly statutory...."); *Smith v. Raceland*, 258 Ky. 671, 80 S.W.2d 827 (Ky. 1935).)

The GRS is not a surcharge arising under or required to be tariffed pursuant to Chapter 278. (KRS 136.660, *et. seq.* See also, Ky. Const. §163 *et. seq.*, establishing municipals' authority to manage their public rights-of-way.) Like municipal 911 fees and the predecessor franchise fees, the GRS is separately authorized under Kentucky law outside of Chapter 278, and Plaintiff may not infer that tariffing authority exists where it is not otherwise provided expressly to the Commission in Chapter 278. (See, *e.g.*, *Boone County Water and Sewer District v. Public Service Commission, et. al.*, 949 S.W. 2d 588, noting the Commission's acknowledgment of the

limitations on its authority through its acts to disclaim jurisdiction over sanitation districts under the provisions of KRS Chapter 220.) In reviewing a matter involving regulations pertaining to cellular antenna towers and the Commission's authority under KRS 278.665 to "fill the jurisdictional vacuum" between the Commission's stated authority and that of the local planning commissions under separate provisions of the law, the Kentucky Supreme Court determined that jurisdiction rested with the planning commission and not the Commission and that the Commission could not substitute its own regulations where no others existed. (*Kentucky Public Service Commission v. L. Glenn Shadoan*, 325 S.W. 3d 360 (Ky. 2010).) Similarly, Plaintiffs may not do so now by suggesting that the Commission require the tariffing of a surcharge authorized outside of the Commission's tariffing authority in Chapter 278 and which is not required by other provisions of law to be tariffed with the Commission.

This is not a novel concept, and the Commission has observed such limitations on its tariffing authority with respect to surcharges and fees like 911 fees and municipal franchise fees for many years. In fact, Windstream East is not aware that the Commission has ever required that it tariff each franchise fee imposed directly by a municipality in Kentucky. (Weeks Direct Testimony p.22, lines 7-12.) To the contrary, the Commission's orders permitting Windstream East to bid on a municipal franchise contained language identical to or similar to the following which made clear the Commission's intent not to review the corresponding franchise fees to be assessed to Windstream East's customers due to statutory restrictions on the Commission's authority:

The Commission determines that there is evidence of a need and demand for telecommunications service in the above-mentioned city. *Since the Commission's authority in such matters is limited by statute to finding only whether there is a need and demand for the service sought to be rendered, no finding or determination is made as to the qualifications of the bidder, the validity of the any*

of the provisions of the franchise offered by said city, or the manner in which any franchise fee is to be treated for rate purposes.

(In the Matter of: Application of Kentucky Alltel, Inc. for a Certificate that Public Convenience and Necessity Require the Acquisition by it of a New Franchise for the Use of Public Rights-of-Way in the Territorial Limits of the City of Ashland, Kentucky, Case No. 2005-00202; emphasis supplied. See also, KRS 278.136.660, et. seq.) Consistent with the Commission's practice and precedent at the time, Windstream East did not include each proposed franchise fee in an individual tariff. This precedent offers no support for Plaintiff's baseless claim that Windstream East should have taken such action with respect to the GRS – the successor to the franchise fees.

Similarly, Windstream East is aware that many of the local exchange carriers in Kentucky do not tariff every (or any) 911 surcharges, authorized under provisions of Kentucky law outside of Chapter 278, that may be imposed by various municipalities and assessed by them to their customers. (KRS 65.760(3), requiring that a telephone service provider “shall collect and remit the subscriber charge to the local government.”) For example, the Commission's records reflect that some rural exchange carriers such as Brandenburg Telephone Company, Duo County Cooperative, Foothills Telephone Cooperative, Highland Telephone Cooperative, Leslie County Telephone, Lewisport Telephone, and Logan Telephone Cooperative do not have specific 911 surcharges set forth in their tariffs. Nor are they required to as such 911 fees, like the GRS in this proceeding, are authorized outside of Chapter 278 and are not subject to the Commission's tariff oversight in KRS 278.160.

In summary, telephone companies like Windstream East are not required to tariff with the Commission all taxes, fees, and surcharges that may apply to their customers' bills, particularly fees and surcharges that are imposed outside the Commission's tariff authority in Chapter 278. (See, e.g., KRS 278.544(4), KRS 65.760(3), and KRS 136.616 as enjoined by *BellSouth*

Telecommunications, Inc. v. Farris, 542 F.3d 499 (6th Cir. 2008). *See also*, KRS 136.990, placing jurisdiction with respect to enforcement related to the gross revenues tax with the Franklin Circuit Court and not the Commission under its administrative oversight in Chapter 278.)⁶ Most significantly, Plaintiff erroneously claims that she has jurisdictional service subject to the Commission’s historical tariff requirements in KRS 278.160. There is simply no evidence and no provision of law to support Plaintiff’s claims.

III. Regardless of whether she purchases jurisdictional or nonjurisdictional services, Mrs. Bowers did not comply with the applicable timely dispute provisions pertaining to either.

The evidence in this proceeding establishes that Mrs. Bowers purchases only nonbasic, nonjurisdictional services from Windstream East that are not subject to the Commission’s tariff oversight in KRS 278.160. (*Supra*, including KRS 278.544(4).) Even without regard to that fact, the claims in her Complaint fail for the reason that she did not abide by the timely dispute provisions governing her services nor did she even abide by the terms of the tariff which she alleges applies to her local services. (Weeks Testimony pp. 18-19.) The terms and conditions governing Mrs. Bowers’ nonbasic services (including those stated on each of her monthly invoices) expressly require that she submit timely disputes of the charges on her bills (*i.e.*, within one month). (*Id.* at pp. 14-15.) The tariff that she seeks to enforce also contains a requirement

⁶ The Commission’s July 1, 2005 – June 30, 2007 Biennial Report is further evidence of this point. In the October 19, 2009 cover letter to Governor Beshear accompanying the report, the Commission notes that its mission is to foster safe and reliable service at reasonable prices for jurisdictional utilities while providing for the financial stability of those utilities by setting fair rates and supporting operational competence *by overseeing regulated activities*. At page 9 of the report, the Commission states that it performs its regulatory functions following procedures outlined in Chapter 278 and administrative regulations promulgated thereunder. Significantly, the report spans the time during which the General Assembly implemented the gross revenues tax. Yet, the Commission’s report (while discussing various electric surcharge developments) does not address as part of the Commission’s functions any activities related to overseeing surcharges like the GRS arising as a result of the gross revenues tax. Instead, with respect to telecommunications, the Commission notes only the substantial deregulation efforts of the General Assembly and states, “In 2006, the legislature deregulated most aspects of telephone service, with the exception of basic service and some wholesale transactions. The PSC retained its jurisdiction over consumer complaints.” Thus, even the Commission’s own report of its activities supports Windstream East’s position that the GRS falls outside the tariff oversight of KRS 278.160.

that customers dispute charges within thirty days.⁷ (Windstream East's Tariff No. 7, Section S2.4.3.) Yet, as the testimony offered by Windstream East established, Mrs. Bowers failed to comply with any of these provisions. (Weeks Direct Testimony, p. 19, lines 6-8.) And, she did not do so by a matter of days or even weeks but rather by a matter of *years* without any reasonable basis for doing so. (*Id.* at p. 19, lines 13-17.) Mrs. Bowers does not and cannot refute these facts.

Windstream East began applying the GRS to customers' invoices, including those of Mrs. Bowers, in June 2007. (*Id.*) Unlike Mrs. Bowers, some Windstream East customers (including two residential customers) promptly reviewed their monthly invoices and questioned the GRS. (*Id.* at Exhibit A.) The first customer filed an inquiry with Windstream on July 21, 2007 regarding charges he noticed on his invoice for the GRS and the universal service fee. (*Id.*) A second customer used the Commission's informal complaint procedures to question Windstream East's authority to collect the GRS. (*Id.*) In that instance, the Commission referred the informal complaint to Windstream East for resolution. (*Id.*)

There is no evidence even to suggest that Mrs. Bowers filed a timely dispute of the GRS. In fact, the evidence shows that prior to her attorneys filing the lawsuit on her behalf on June 22, 2009, Mrs. Bowers had not filed any dispute or made any inquiry with Windstream East regarding the GRS even though it had been implemented two years prior. (Weeks Direct

⁷ As noted previously, this Commission should decide the Complaint based solely on Kentucky law. The FCC's recent review of a tariff dispute between Sprint Communications Company and Northern Valley Communications (File No. EB-11-MD0003; adopted July 18, 2011) does not counsel to the contrary. Indeed, the FCC's review was specific to the tariff provisions of the carrier in question. In its order, the FCC determined that the carrier's specific dispute provisions (which sought to forever bar an action not raised in 90 days) were unreasonable and in contravention of the applicable statute of limitations although the FCC did not reach a decision regarding whether the requirement to timely raise a billing dispute (as is the case with Tariff No. 7) as a condition to later sustaining an action would be unreasonable. Most significantly, the FCC declined to deny the tariff "deemed lawful" status (which operates to prohibit retroactive application) since even though portions were determined to be unreasonable, the FCC found no evidence of deceptive behavior. Such is the case with Mrs. Bowers' complaint, particularly in light of the fact that Windstream East expressly notified her of the GRS and instructions for disputing the GRS on each of her monthly invoices.

Testimony, p. 13, lines 15-17.) Mrs. Bowers does not dispute this fact. (Plaintiff's Response to Request for Admission No. 14.) She also acknowledges that Windstream East began assessing the GRS in June 2007, two years prior to the filing of the lawsuit. (Plaintiff's Response to Request for Admission No. 12.)

Likewise, Mrs. Bowers offered no evidence to suggest any reasonable basis for her failing to file a timely dispute – particularly when the tariff that she incorrectly claims applies to her local service required her to do so. (*See, e.g.*, Plaintiff's filings on June 10 and June 24 submitted as her “testimony” in this proceeding.) For instance, she offered no evidence to reasonably distinguish her from the other Windstream East customers who filed timely disputes. (*Id.*) In her discovery responses, she stated that she believes that if she “fails to pay her bill from Windstream, which is issued monthly, Windstream will terminate her telephone service.” (Plaintiff's Response to Request for Admission No. 9.) However, she failed to offer any evidence reconciling that statement with the express instructions in her monthly invoices from Windstream East which contain specific instructions for disputing charges on the invoice. (*Id.*) Most significantly, Mrs. Bowers offered no evidence or explanation why she failed to file any dispute with Windstream East for many months after discussing this issue with her attorneys in February of 2009. (*See* Pls.' Reply in Support of Mot. for Class Cert., at 12.)

Windstream East's experience is that most residential customers in today's environment are knowledgeable about telecommunications charges and terms, and many shop offers among competitors. (Weeks Direct Testimony, p. 17, lines 19-21.) This is supported by Windstream East's evidence showing that other residential customers did timely dispute the GRS. (*Id.* at lines 11-12.) Therefore, customers such as Mrs. Bowers –who herself is an established entrepreneur and the founder of a multi-million dollar internet business that operated pursuant to contracts

with its own customers – should not be allowed to pursue claims in total disregard for certain other terms and conditions of their service that preclude those claims. (Weeks Direct Testimony at Exhibit E.) Windstream East’s position is not only supported by the overwhelming weight of the evidence in this proceeding and the express contractual provisions governing Mrs. Bowers’ service, but also is entirely reasonable considering that the GRS appeared on every one of Mrs. Bowers’ monthly invoices for a matter of years without a single inquiry from her until her attorneys filed the lawsuit on her behalf.⁸

Windstream East’s position is also reasonable when the Commission considers the numerous ways in which Mrs. Bowers was notified of the GRS and the terms and conditions governing her service. For example, certain terms are included with every monthly invoice Mrs. Bowers receives from Windstream East. (Weeks Direct Testimony at Exhibit B.) Since before the time that Windstream East began assessing the GRS, Mrs. Bowers has received notice with each of her monthly invoices stating that explanations of her rates and charges and information about how to verify the accuracy of a bill may be obtained by calling Windstream East’s toll-free number or from a Windstream retail location. (*Id.*) The instructional terms appear directly above the explanations on the bill for various fees and surcharges like the GRS and advise on a monthly recurring basis of the need for Mrs. Bowers to report any discrepancies in her bills within twenty days to assure prompt attention to the issue. (*Id.*) Indeed, Mrs. Bowers even received a bill message in her June 2007 invoice stating: “Effective with this billing statement, the Kentucky Gross Receipts Surcharge will begin appearing on your bill. This surcharge recovers a tax imposed by the State of Kentucky on all communications and entertainment providers.” (*Id.* at p. 15, lines 14-18.) The message also instructed her to call Windstream East’s customer service if

⁸ Although the terms and conditions governing Mrs. Bowers’ nonbasic services are outside the Commission’s authority (KRS 278.544), the discussion is useful to demonstrate that under any analysis, Mrs. Bowers’ claims fail.

she had any questions about the surcharge, which Mrs. Bowers did not do. (*Id.*) Each monthly invoice also references Windstream's website where the complete set of Mrs. Bowers' terms and conditions of service are located. (*Id.* at lines 20-22.) Had Mrs. Bowers (herself a founder of an internet billing company) referred to the website, she also could have accessed the terms and conditions of her service directly. (*Id.* at Exhibit E.) In June 2010, Mrs. Bowers' invoices also added language reminding her that her use of the services provided by Windstream East constitutes her agreement to Windstream's terms and conditions. (*Id.* at p. 15, lines 7-9.) Despite the forgoing, Mrs. Bowers failed to take *any* action at all regarding the GRS until years after it first began appearing on her monthly invoices.

Ironically, in incorrectly arguing that she purchases jurisdictional service from Windstream East, Mrs. Bowers ignores the dispute provisions in Windstream East's Tariff No. 7 and her failure to comply with those provisions, which is fatal to her Complaint. Windstream East's Tariff No. 7, Section S2.4.3 – Payment for Services provides that if a written or verbal objection is not received by Windstream East within *thirty days* after the bill is rendered, *the customer's account shall be deemed correct and binding upon the customer.* To the extent that she claims incorrectly to purchase jurisdictional service, Mrs. Bowers failed to follow the provisions of Tariff No. 7. Nevertheless, she focuses her Complaint on the Filed Rate Doctrine but otherwise fails to consider the terms and conditions of the tariff on which she relies. The Filed Rate Doctrine does not and should not be used to permit a complaining party like Mrs. Bowers to ignore certain tariff or statutory provisions simply because those provisions preclude her claims.

In this instance, Windstream East had customers who honored their applicable terms of service and filed timely disputes, although Mrs. Bowers did not. (Weeks Direct Testimony, p. 17,

lines 11-22.) There is no evidence in the record of this proceeding to suggest that Mrs. Bowers is entitled to be excused from or otherwise acted reasonably in not complying with the dispute provisions governing her service, including the terms of the tariff which she asserts governs her services. In fact, the unrefuted evidence on the record establishes just the opposite. (*Supra*, including specifically Tariff No. 7 Section S2.4.3 which tariff Mrs. Bowers alleges applies to her services.) Under any analysis, Mrs. Bowers is precluded from pursuing the claims about the GRS in her Complaint brought by her attorneys years after Windstream East's implementation of the GRS.

IV. Windstream East's Tariff No. 7 has precautionary language addressing the GRS.

Mrs. Bowers overlooks the fact that even if her claim otherwise had merit, Tariff No. 7 addresses the GRS. Specifically, Tariff No. 7 provides as follows:

There shall be added to the customer's bills, as a separate item, an amount equal to the proportionate part of any license, occupation, franchise, or other similar fee or tax now or hereafter agreed to or imposed upon the Company by local taxing authorities, whether imposed by ordinance, franchise or otherwise, and which fee or tax is based upon a percentage of the gross receipts, net receipts, or revenues of the Company. Such amount shall be added to bills of customers receiving service within the territorial limits of the taxing authority. Where more than one such fee or tax is imposed, each of the charges or taxes applicable to a customer shall be added to the customer's bill as separately identified items.

(Tariff No. 7, Section S2.4.5(c); emphasis supplied.)

Mrs. Bowers ignores the significance of this language by trying to claim that the reference to "local" excludes the gross revenues tax which is a "state tax." (Complaint, para. 13.) Plaintiff offered no evidence, however, to suggest that a "local" tax cannot include one assessed by the Commonwealth of Kentucky or that there is significance to the purported distinction. (*See* Plaintiff's June 10 and June 24 filings submitted as her "testimony" that lack any factual

discussion on this point.) Meanwhile, Windstream East's witness testified that in the telecommunications industry the term "local" may be used often to distinguish intrastate matters from interstate matters. (Weeks Direct Testimony, pp. 26-27.) There is no significance in the context of the Complaint to the distinction that Mrs. Bowers seeks to create.⁹

Mrs. Bowers' argument about the purported distinction between "local" and "state" crumbles completely in light of the actual nature of the GRS. The GRS is a monthly surcharge assessed by Windstream East to recover costs of a gross revenues tax levied on Windstream East by the Commonwealth and administered by the Department of Revenue. (KRS 136.616.) On January 1, 2006, Kentucky eliminated franchise fees imposed directly on certain providers like Windstream East by individual municipalities. (*Id.*) The municipal franchise fees were replaced with a tax, now levied on a statewide basis, on Windstream East's gross revenues from certain communications services.¹⁰

Prior to the change in the law, municipalities were allowed to directly establish and collect franchise fees from Windstream East to recover for burdens to the municipal public rights-of-way. With the new law in 2006, that method of direct collection⁹ changed, and the General Assembly precluded the municipalities from continuing to collect franchise fees directly from communications providers like Windstream East. Instead, the Commonwealth began imposing the gross revenues tax on Windstream East, the funds from which are used to help benefit municipalities. (See, KRS 136.616 as enjoined by *BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008).) With the gross revenues tax, the General Assembly

⁹ Mrs. Bowers' contention that the tariff language calling for "local" gross receipts charges failed to provide her adequate notice of "state" charges also rings hollow in light of her two-year failure to act on the notice regarding bill dispute provisions.

¹⁰ Because the statute as originally enacted unconstitutionally barred Windstream East from passing through the costs of the tax in the form of a line item surcharge (as was previously permitted with the municipal franchise fees), Windstream East's costs of the gross revenues tax went unrecovered. In 2007, when the court struck down the unconstitutional provision, Windstream East implemented the GRS to begin recovering its costs of the tax that had gone unrecovered for more than a year.

prohibited political subdivisions from levying and collecting franchise fees on and from communication service providers and further provided that if any subdivision did so then the communications provider was entitled to a credit against the amount of gross revenues tax it remits to the Commonwealth. (KRS 136.660(1) and (5).) Further, KRS 136.650 makes clear that the funds from the gross revenues tax are distributed to the municipalities for their benefit based on their 2005 historical franchise fee collections (designated as “hold harmless” amounts intended to replace the base revenues previously collected directly by municipalities via franchise fees and taxes).

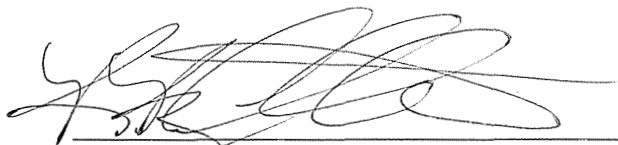
When one considers that the gross revenues tax levied on Windstream East is used to benefit Kentucky municipalities, that the assessment of the GRS is intended to help recover Windstream East’s cost of that tax, and that the GRS is the successor to the prior municipal franchise fees (over which the Commission repeatedly acknowledged it lacked certain oversight), Plaintiff can sustain no credible argument that the language in Tariff No. 7 does not address Windstream East’s assessment of the GRS.¹¹ Again, this is even without regard to the facts that the GRS is not required under Chapter 278 to be tarified with the Commission and that Tariff No. 7 does not govern Mrs. Bowers’ services. Nevertheless, standing alone, the language in Tariff No. 7 defeats Plaintiff’s claims in her Complaint in their entirety.

¹¹ It is also noteworthy that the Commission was aware through multiple sources that Windstream East was assessing the GRS and has been since 2007. The Commission reviewed a customer complaint on the issue, and also once a year asks Windstream East to provide information regarding its basic local exchange service rate and the various fees and surcharges that apply to that service through which Windstream East identifies the GRS as part of that filing. (Weeks Testimony, Exhibit F.) Finally, the Commission is aware that Windstream East submitted a proposed cautionary tariff amendment to the Commission in August 2007 to update tariff language pertaining to the GRS and that Windstream East then withdrew the proposal. Yet, in suggesting erroneously that the GRS is an “unfiled rate” that was required to have been tarified with the Commission, Plaintiff overlooks the fact that the Commission did not question Windstream East’s assessment of the GRS or issue an order requiring a tariff to be filed and/or updated.

CONCLUSION

For the foregoing reasons any one of which on its own provides a sufficient basis for denial, the Commission should deny the claims in Mrs. Bowers' Complaint and should find specifically that the GRS is not an "unfiled rate" for a telecommunications service subject to KRS 278.160 and that Mrs. Bowers does not purchase any jurisdictional service from Windstream East subject to KRS 278.160. Even as to jurisdictional service, the overwhelming evidence supports Windstream East's position that the assessment of the GRS is not required to be tarified with the Commission and that the language in Tariff No. 7 sufficiently addresses the GRS. Finally, the Commission should find that Plaintiff was required to have complied with all timely dispute provisions applicable to her services rather than filing the lawsuit some two years after the GRS first appeared on her monthly invoices. Mrs. Bowers' claims are without merit and not supported by the evidence in this matter, and the Commission should deny them in their entirety for any one of the reasons explained herein.

Respectfully submitted,

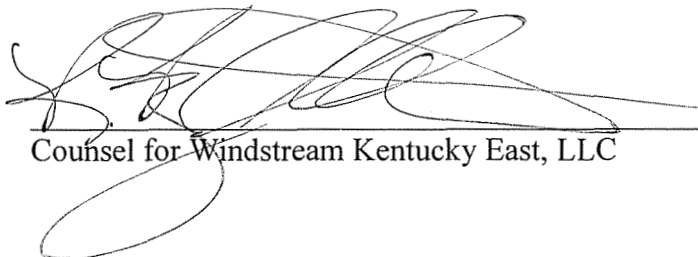


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing INITIAL BRIEF OF WINDSTREAM KENTUCKY EAST, LLC was served by United States First Class Mail, postage prepaid, on this 29th day of August, 2011 upon:

C. Kent Hatfield
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