COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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

NOTICE OF FILING OF MEMORANDUM OF WINDSTREAM KENTUCKY EAST, LLC IN SUPPORT OF ITS MOTION TO RECONSIDER ORDER GRANTING CLASS CERTIFICATION

Windstream Kentucky East, LLC notifies the Public Service Commission of Kentucky that on November 4, 2011 it filed in the United States District Court for the Western District of Kentucky its "Memorandum in Support of Windstream's Motion to Reconsider Order Granting Class Certification" in *Bowers v. Windstream Kentucky East, LLC*, Civil Action 09-CV-440.

A copy of the memorandum as filed is attached to this notice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing NOTICE OF FILING was served by United States First Class Mail, postage prepaid, on this 8th day of November, 2011 upon:

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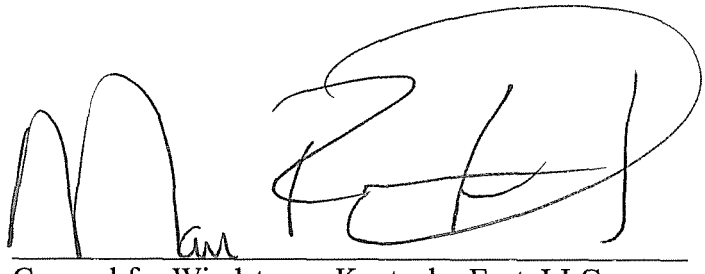

Counsel for Windstream Kentucky East, LLC

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Dana Bowers and Sunrise Children's Services, Inc., on Behalf of Themselves and Others Similarly Situated, PLAINTIFFS v. Windstream Kentucky East, LLC and Windstream Kentucky West, LLC, DEFENDANTS.	CIVIL ACTION NO. 3:09-CV-440 **ELECTRONICALLY FILED**

MEMORANDUM IN SUPPORT OF WINDSTREAM'S MOTION TO RECONSIDER ORDER GRANTING CLASS CERTIFICATION

Defendants Windstream Kentucky East, LLC ("Windstream East") and Windstream Kentucky West, LLC ("Windstream West") (together, "Windstream"), pursuant to the Court's October 20, 2011 Order [DN 81], hereby submit this memorandum in support of their October 24, 2011 motion to reconsider [DN 82] the October 12, 2011 Memorandum Opinion and Order (the "Order" [DN 78]) granting Plaintiffs' motion for class certification. Windstream incorporates by reference all arguments previously made in opposition to Plaintiffs' motion for class certification as grounds to vacate the Order. To avoid repetition, Windstream will focus on several discrete issues here. Windstream also reiterates its previous request for a hearing to address why class certification is improper.

SUMMARY OF THE ARGUMENT

First, the Order violates Rule 23(c)(1)(B) by failing to define the class or the claims, defenses, or issues to be resolved class-wide. It is impossible to know whether class treatment is appropriate if the class is undefined and the issues to be addressed class-wide are unidentified. The Order places the burden on Windstream to speculate as to what class could be defined and then prove that the class should not be certified. This is contrary to law. It is Plaintiffs' burden to demonstrate that any proposed class meets all requirements of Rule 23. Plaintiffs did not even define the class in their motion. Plaintiffs instead relied on conclusory statements that the elements of Rule 23 were satisfied, as opposed to evidence establishing any element. The Order vindicates this inadequate and improper effort by granting Plaintiffs' motion and certifying an undefined class.

Second, Plaintiffs failed to prove that the fundamental feature of a class action exists here, namely, that proof of Plaintiffs' individual claims would necessarily prove the same claims for every other proposed class member. A wide variety of arrangements govern Windstream's relationships with its customers and whether Windstream properly assessed the GRS to any given customer. These variations do not implicate mere questions of individualized damages, but the threshold question of liability. As there is no central issue in this action that can be resolved class-wide, there can be no class.

Third, the entry of partial summary judgment in favor of Plaintiffs, resolving the question of liability against Windstream on Counts I and II of the complaint, prior to certifying a class constitutes an improper resurrection of the long-forbidden principle of one-way intervention. An express purpose of the 1966 amendments to Rule 23 was to eliminate the manifestly unfair situation in which class members have the opportunity to see whether they will prevail before

deciding whether to opt out of the case. Because the Court resolved liability against Windstream before certifying a class, class certification is improper.

Fourth, the decision to certify a hybrid class action under both Rule 23(b)(1) and 23(b)(3) raises fundamental due process concerns and is improper in light of the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). A class seeking damages should be certified only under Rule 23(b)(3), assuming certification is proper at all, to protect class members' due process right to receive notice and the opportunity to opt out of the action.

Fifth, the Order ignores Windstream's affirmative defenses. The Rules Enabling Act and due process do not permit the class action device to abridge a defendant's substantive rights. The Supreme Court recently held in *Wal-Mart* that a class could not be certified on a premise that would deprive the defendant of the opportunity to present affirmative defenses. Even if Plaintiffs' federal filed rate doctrine claims were not subject to any defenses, the Court failed to consider the impact of available defenses on Plaintiffs' remaining state law claims.

Sixth, a class action is not the superior means of adjudicating the issues presented in this action, rendering certification improper under Rule 23(b)(3). The Court has acknowledged the complexity of the telecommunications industry and Windstream's varying relationships with its customers. Referral of this matter to the FCC (and to the PSC, which already has been done) to evaluate the complex issues over which they have primary jurisdiction is superior to forcing resolution of the issues in a class action.

BACKGROUND[1]

Plaintiffs focus on the filed rate doctrine (at least when it suits their purposes) and an outdated FCC decision, but this over-simplification of the issues ignores reality. The telecommunications industry today is not what it was fifteen years ago at the federal level[2] and as recently as five years ago in Kentucky. Historically, telecommunications carriers were required to file tariffs with the FCC setting forth all charges for all interstate services, 47 U.S.C. § 203(a), and with the PSC setting forth all charges for all intrastate services in Kentucky subject to the PSC's ratemaking authority. KRS 278.160(1). The concept of the filed rate doctrine arising from these tariff requirements ensured that both carriers and customers would be bound by a clear set of non-discriminatory terms and conditions deemed reasonable by regulatory authorities. *See AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222–23 (1998).

The wisdom of the filed rate doctrine, which may have served a purpose when AT&T held a monopoly over the industry, eroded as the telecommunications industry became subject to increased competition among carriers. *See, e.g., MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 233–34 (1994); *Fax Telecommunicaciones, Inc. v. AT&T*, 138 F.3d 479, 491 (2d Cir. 1998). Carriers no longer have the ability to name their price, subject only to what a regulatory body might consider reasonable, as competition is plentiful. (*See* Rhoda Af. ¶ 19.) Because of this increasingly competitive environment, the telecommunications industry is now characterized by substantial administrative deregulation. Congress recognized the increasingly competitive nature of the industry in enacting the Telecommunications Act of 1996, which gave the FCC the power to relax and/or eliminate many federal tariffing requirements for telecommunications carriers,

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[1] Windstream incorporates by reference the facts set forth in its response to Plaintiffs' motion for class certification [DN 51], its memorandum supporting its motion for summary judgment [DN 58], and its response to Plaintiffs' motion for partial summary judgment [DN 74].

[2] Notably, *In re: Irwin Wallace v. AT&T Communications of the Southern States, Inc.*, 6 FCC Rcd 1618 (1991), previously relied upon in this action by the Court and Plaintiffs, was decided twenty years ago.

and the FCC has exercised this power. *See Castro v. Collecto, Inc.*, 634 F.3d 779, 786 (5th Cir. 2011). In 2006, the Kentucky General Assembly enacted KRS 278.541 to 278.544, which established an alternative regulation regime for all telecommunications carriers in the Commonwealth under which carriers are no longer required to tariff all of their intrastate services previously subject to the PSC's ratemaking authority.

Freed from the archaic strictures of tariffs with respect to most services, Windstream provides services pursuant to various types and combinations of arrangements, such as: (1) individually-negotiated contracts; (2) Windstream's general terms and conditions of service; (3) negotiated and/or arbitrated interconnection agreements filed with, and sometimes arbitrated before, the PSC; (4) commercial wholesale agreements and arrangements; and (5) other arrangements, including tariffs and price lists filed with the FCC and the PSC. (Rhoda Af. ¶¶ 3–19.) Windstream provides these services to several broad categories of customers: wholesale customers, retail business customers, and retail residential customers. (*See id.*) Many wholesale customers (particularly those purchasing special access service) and retail business customers purchase services pursuant to individually negotiated contracts with Windstream. (*See id.* ¶¶ 6, 13.) Many other retail business customers and most retail residential customers receive services pursuant to Windstream's terms and conditions of service. (*See id.* ¶¶ 16–17.) A relatively small number of customers (primarily wholesale customers purchasing only switched access service and retail residential customers purchasing only basic service) receive service pursuant to tariff. (*See id.* ¶¶ 7, 15.) A customer also may receive services pursuant to various combinations of the foregoing. (*See id.*¶¶ 3–19.) These are but a handful of possible scenarios. Plaintiffs offer no proof to the contrary and offer no basis to disregard these critical factual distinctions, which bear on liability even under the Court's summary judgment. Since Plaintiffs bear the burden of

proving that a class should be certified, *Wal-Mart*, *supra*, 131 S. Ct. at 2551, this failure in and of itself militates in favor of refusing to certify a class.

ARGUMENT

I. THERE IS NO DEFINED CLASS, AND THE COURT HAS ERRONEOUSLY SHIFTED THE BURDEN OF PROOF ON CLASS CERTIFICATION TO WINDSTREAM.

Plaintiffs bear the burden of *proving* that a class should be certified. As recently held by the Supreme Court, the Rule does not establish a "mere pleading standard," and "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, *supra*, 131 S. Ct. at 2551 (emphasis original). The Court then must conduct a "rigorous analysis" to ensure that Plaintiffs have satisfied their burden. *See Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982). A prerequisite to meeting their burden is that Plaintiffs must define the proposed class and must identify the claims, issues, and defenses to be litigated class-wide. Any order certifying a class must meet these requirements. Fed. R. Civ. P. 23(c)(1)(B).

Contrary to the burden of proof that they bear, Plaintiffs rely on a bare recitation of Rule 23's elements.[3] Plaintiffs have posed different descriptions of what class they would like to certify at different times, but they did not propose a class definition in their motion, nor did they identify the claims, issues, or defenses to be resolved class-wide. Plaintiffs should not be permitted a do over now. By granting Plaintiffs' motion for class certification, the Order inverts the burden of proof. Windstream is being forced to show that no hypothetical class could ever be certified while having to guess at the scope of whatever class might be proposed. Such a result is

[3] For example, Plaintiffs offered no proof of numerosity, but said that it must exist and that Windstream would know whether this was so. Windstream does not concede numerosity, and Windstream cannot be compelled to concede any element of class certification.

contrary to precedent.

While it is unclear what class Plaintiffs seek to certify, it appears from their proposed order tendered in support of their motion that they seek two classes (one for Windstream East and one for Windstream West) of *all* customers who have been assessed the GRS. Such classes would be facially over-broad.

First, any customers who have settled their GRS claims with Windstream should be excluded from any class. *See Cole v. Asurion Corp.*, 267 F.R.D. 322, 332 (C.D. Cal. 2010). This would include the multitude of wholesale customers that enter into routine disputes and "stakedate" settlements designed to resolve all issues between the parties existing prior to the date of the settlement. (*See* Rhoda Af. ¶¶ 10–11, 25.)

Second, customers who purchase services pursuant to negotiated contracts or other arrangements that require the customer to pay any surcharges should be excluded from any class. Many Windstream customers do not purchase tariffed services at all, and others purchase services pursuant to a combination of contracts and tariffs. (*See* Rhoda Af. ¶¶ 3–19.) Many wholesale customers (especially those purchasing special access service) and retail business customers enter into individually negotiated contracts that govern the terms of service. (*See id.* ¶¶ 6, 13.) These contracts routinely require the customer to pay all surcharges. (*See id.*) Additionally, many retail customers (both business and residential), including both Sunrise and Mrs. Bowers, purchase services governed by Windstream's terms and conditions of service, which require the customer to pay all surcharges. (*See* Rhoda Af. ¶ 16.) The propriety of the GRS for these types of customers would be governed by these contracts, or by the terms and conditions of service, not by any tariff requirements. Such persons cannot be included in any class, as they cannot suffer injury from Windstream's assessment of the GRS. *See O'Neill v.*

Gourmet Sys. of Minn., Inc., 219 F.R.D. 445, 451 (W.D. Wis. 2002) (refusing to allow persons who had not suffered and were not at risk of suffering the same injury as the named plaintiffs in a class); *Pop's Pancakes, Inc. v. NuCO2, Inc.*, 251 F.R.D. 677, 680 (S.D. Fla. 2008) (refusing to certify a class that would include uninjured persons).

Finally, no class should be certified with respect to Count III of the amended complaint, which involves Plaintiffs' claim for alleged violations of KRS 278.160. The Court stayed Count III and referred it to the PSC. The Court should not effectively lift this stay by certifying a class to resolve this claim until the PSC completes its review. *See Gentry v. Cellco P'ship*, 2006 U.S. Dist. LEXIS 97876, at *28–30 (C.D. Cal. Mar. 22, 2006). *See also Schall v. Joyce*, 885 F.2d 101, 114 (3d Cir. 1989).

It is improper to disregard Plaintiffs' burden of proof simply because they apparently are unable or unwilling to make the effort to satisfy it. The Court should not indulge Plaintiffs' half-hearted effort to obtain class certification by accepting their conclusory allegations and formulaic recitation of Rule 23. The Court should hold Plaintiffs to their burden of proof under the "rigorous analysis" required by Rule 23. The Court also should not give Plaintiffs a second chance to argue for class certification after Windstream points out the errors in the Order.

II. THE PROPRIETY OF THE GRS CANNOT BE DETERMINED CLASS-WIDE.

The Court describes the "central and common issue" as "whether and to what extent Defendants improperly charged and collected the GRS." (10/12/11 Op., at 4.) The Court also states that: "Adjudication of this action consists solely of determining whether Defendants' billing of the GRS was proper." (*Id.* at 8.) Because of the myriad arrangements and agreements by which Windstream provides services to its customers, the determination of whether Windstream "improperly charged and collected the GRS" simply cannot be made as to Plaintiffs and then extrapolated to all other Windstream customers.

A class action is a unique procedural device in which the named plaintiffs litigate the claims of potentially thousands of similarly situated persons who will never come before the Court and may never even know that their rights are being adjudicated. Accordingly, the hallmark feature of a class action is that the claims must be such that the named plaintiff can stand in the place of, and litigate on behalf of, the class as a whole. *See Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998). The named plaintiff must be part of the class, must share the same interests as the class, and must have suffered the same injury as the class. *Wal-Mart, supra*, 131 S. Ct. at 2550. Proper application of Rule 23 is critical to ensure that any class is appropriately limited to "those fairly encompassed by the named plaintiff's claims." *See id.* (quotation omitted).

As the Supreme Court recently held in *Wal-Mart*, Rule 23(a)(2) (commonality) requires Plaintiffs to prove that they have suffered the same injury, not merely a violation of the same provision of the law. *Id.* at 2551. The question must be a substantive one (as it is simple to craft questions that would literally be common to a class) that it is "capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *See id.* Similarly, "[t]he premise of the typicality requirement [Rule 23(a)(3)] is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998). Plaintiffs must prove that "in pursuing [their] own claims, [they] will also advance the interests of the class members." *In re: Am. Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996).

The determination that these (and other) class certification requirements were satisfied appears to rest on the premise that the GRS is a charge that must be listed in Windstream's federal tariffs. (*E.g.*, 10/12/11 Op., at 3 ("Defendants' argument [concerning numerosity]

assumes that the GRS itself is not subject to federal tariffing. As the Court has already ruled on the issue and concluded otherwise, Defendants' argument must fail.").) Presumably, the reference is to the October 3, 2011 Memorandum Opinion and Order granting partial summary judgment in favor of Plaintiffs, which, in turn, relied on *Irwin Wallace*, *supra*, as establishing that surcharges must be set forth in a carrier's federal tariffs. Reliance on *Irwin Wallace* is misplaced in light of the critical differences between this action and *Irwin Wallace*.

The FCC decided *Irwin Wallace* five years prior to the enactment of the Telecommunications Act of 1996 and well before it began exercising its authority under the Act to implement de-tariffing. When *Irwin Wallace* was decided, all charges (at least for interstate telecommunications services) were required to be set forth in a carrier's tariffs filed with the FCC. As discussed above, *supra* pp.4–5, that is no longer the case, and Windstream provides services to many customers pursuant to individually negotiated contracts or other arrangements. (*See* Rhoda Af. ¶¶ 3–19.) Many of these arrangements include provisions by which the customer agrees to pay surcharges assessed by Windstream. (*See id.* ¶¶ 6, 13, 16.) Assuming *arguendo* that Plaintiffs purchase services governed by Windstream's federal tariffs, any conclusion that Windstream violated its tariffs by assessing the GRS to Plaintiffs would have no bearing on whether the GRS was proper under the terms of another Windstream customer's contract or other arrangement. Thus, while Windstream disagrees with the Court's conclusion that Windstream violated its tariffs by assessing the GRS to Plaintiffs, even that conclusion cannot be extrapolated to a class of "all Windstream customers" or even "all Windstream customers assessed the GRS."

Irwin Wallace cannot be read to hold that the GRS must be included in a carrier's federal tariffs. Instead, the decision should be read to mean exactly what it says: if a carrier must tariff all charges for all interstate services (which was true in 1991, but, as discussed above, is no

longer the case today), then a pass-through charge assessed for interstate services should be included among all other charges for interstate services in the federal tariffs. *Irwin Wallace* does not address the propriety of the GRS or any comparable surcharge in the context of a carrier's general terms and conditions governing the services such as those Plaintiffs purchased, a carrier's contractual relationship with other customers, or other non-tariff relationships. To read *Irwin Wallace* as broadly as Plaintiffs urge this Court to do would effectively abrogate the FCC's implementation of the Telecommunications Act of 1996 by precluding carriers from entering into any relationship with a customer other than through a filed tariff. That is not the law.

III. ENTERING PARTIAL SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS PRIOR TO CERTIFYING A CLASS REINSTATED THE IMPERMISSIBLE PRINCIPLE OF ONE-WAY INTERVENTION.

In 1966, Rule 23 was amended, in part, to eliminate the heavily-criticized and unfair situation of "one-way intervention" that existed under the former rule, in which class members could await a judgment before deciding whether to join, thus providing the opportunity to class members to benefit from favorable judgments but avoid unfavorable ones. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974). The modern rule "assure[s] that members of the class [will] be identified before trial on the merits and [will] be bound by all subsequent orders and judgments." *Id.* Accordingly, it is improper to establish liability against the defendant and then subsequently certify a class, not only as a matter of basic fairness to the defendant, but also to prevent an inequitable pressure to settle (as class members have far less incentive to opt out of the case). *E.g.*, *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681–82 (7th Cir. 2001).

Here, the Court granted Plaintiffs' motion for partial summary judgment, establishing liability in their favor on Counts I and II of their amended complaint, on October 3, 2011. The Court then granted Plaintiffs' motion for class certification on October 12, 2011. Although Windstream requested that the Court rule on *Windstream's* motion for summary judgment prior

to ruling on class certification, it is well-established that resolving liability in favor of the defendant prior to class certification is proper. *See, e.g., J&R Mktg. v. GMC*, 549 F.3d 384, 390 (6th Cir. 2008); *Thompson v. County of Medina, OH*, 29 F.3d 238, 241 (6th Cir. 1994). If the defendant is willing to have liability established only with respect to the named plaintiffs and risk subsequent litigation, it is free to do so, and no putative class members will be bound by the pre-certification resolution of the named plaintiffs' claims. The converse is not true. By entering summary judgment in favor of Plaintiffs, the Court impermissibly reinstated one-way intervention by giving class members a "preview" of the favorable outcome of the action. There is no way to remedy this situation, as, even if the Court were to vacate the summary judgment solely to address this problem, it obviously is part of the record, and it would take little deductive reasoning to expect the Court to enter the same judgment again.

IV. THE ORDER ERRONEOUSLY CERTIFIED A HYBRID CLASS UNDER BOTH RULE 23(B)(1) AND RULE 23(B)(3).

The Order erroneously certified a class under *both* Rule 23(b)(1) and (b)(3), thereby creating a hybrid class action. Hybrid class actions have long been criticized as creating due process and manageability problems.[4] More significantly, however, the Supreme Court's recent decision in *Wal-Mart* confirms that such hybrid certification is impermissible when, as here, Plaintiffs seek monetary damages.

Hybrid class actions purport to unite fundamentally different types of class actions. On the one hand, "[c]lasses certified under (b)(1) and (b)(2) share the most traditional justifications

[4] Hybrid certification creates needless complication and confusion, in addition to posing due process and Seventh Amendment concerns. *See, e.g. In re: Allstate Ins. Co.*, 400 F.3d 505, 506 (7th Cir. 2005) (such class actions "would be complicated and confusing—unnecessarily so, given the ready availability of the 23(b)(3) procedure"); *Allison v. Citgo Petroleum Corp.* 151 F.3d 402, 419 (5th Cir. 1998) (hybrid certification would implicate Seventh Amendment concerns and create efficiency and manageability problems); *Love v. Veneman*, 224 F.R.D. 240, 245 (D.D.C. 2004) (noting the due process implications if a 23(b)(2) class is settled and an absent class member then brings a claim for damages).

for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class, or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class." *Wal-Mart*, *supra*, 131 S. Ct. at 2558 (note omitted).[5] Because of their nature, classes certified under Rule 23(b)(1) or (b)(2) are "mandatory" classes in which class members have no right to opt out of the class and in which the district court is not even required to notify class members of the action. *Id.* Rule 23(b)(3), on the other hand, is an "adventuresome innovation," in which class treatment is permitted when common questions of law or fact predominate and a class action would be superior to other available methods to fairly and effectively adjudicate the controversy. *Id.* (quotation omitted). Because of the broader reach of Rule 23(b)(3), the rule establishes greater procedural protections, including class members' rights to receive the best notice practicable of the action and to opt out of the action. *Id.*

After analyzing the structure of Rule 23(b), the Supreme Court in *Wal-Mart* held that "individualized monetary claims belong in Rule 23(b)(3)." *Id.* The Court's holding is unsurprising, as it held some time ago that there is "at least a substantial possibility" that classes seeking monetary damages can be certified only under Rule 23(b)(3). *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994). As with the Rule 23(b)(2) class at issue in *Wal-Mart*, a Rule 23(b)(1) class does not afford the procedural protections established by Rule 23(b)(3) because it is self-evident that common issues would predominate and a class action would be superior in such cases, and the notice and opt-out rights are not needed in such classes to comport with due process. *See Wal-Mart*, 131 S. Ct. at 2558–59. When the class seeks individual monetary damages, however, it is critical for the Court to ensure that predominance and superiority exist

[5] As noted by the Supreme Court, Rule 23(b)(1) permits certification when separate actions would create a risk of establishing incompatible standards of conduct for the party opposing the class, as when the defendant is obliged by law to treat all members of the class alike, or when separate actions would, as a practical matter, dispose of the claims of non-parties or substantially impair or impede their ability to protect their interests, as in a case involving a limited fund. *Wal-Mart*, 131 S. Ct. at 2558 n.11.

and to ensure that class members are not deprived of their due process right to notice and the opportunity to opt out of the action.[6] *See id.*

Here, the Court has recognized that Plaintiffs seek monetary relief, which will, at a minimum, present individualized damages issues. (*See* Order, at 4, 7–8.) For the reasons discussed in Section II, above, individualized issues exist not only with respect to damages, but to the threshold question of liability (*e.g.*, without a determination that the GRS was improperly assessed to a particular customer, there can be no liability to that customer). In any event, because Plaintiffs seek individual monetary relief, certification under Rule 23(b)(1) is improper. This is not a case involving a limited fund, as contemplated by Rule 23(b)(1)(B), in which claims for damages obviously would be permissible. Indeed, for the reasons discussed above, Rule 23(b)(1) certification is entirely inappropriate here because there is no risk of incompatible standards of conduct, nor is Windstream obliged to treat all of its customers in the same way in light of the multitude of different arrangements that govern Windstream's relationships with individual customers. Even if certification under Rule 23(b)(1) were theoretically possible for some claims, the presence of Plaintiffs' individual damages claims dictates that certification occur under Rule 23(b)(3) only, if at all.

V. THE COURT DID NOT CONSIDER WINDSTREAM'S AFFIRMATIVE DEFENSES IN CERTIFYING A CLASS.

A defendant has a due process right to present affirmative defenses, and a class cannot be certified in a manner that would abridge its right to do so. *E.g.*, *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). *See also* 28 U.S.C. § 2072(b) (prohibiting the Federal Rules of Civil Procedure from "abridg[ing], enlarg[ing], or modify[ing]" substantive rights). The Supreme Court recently

[6] In addition to due process concerns, damages claims in a class action implicate the Seventh Amendment. *Coleman v. GMAC*, 296 F.3d 443, 448 (6th Cir. 2002).

reiterated the impermissibility of certifying a class in a manner that disregards the defendant's right to present affirmative defenses in *Wal-Mart*, *supra*. 131 S. Ct. at 2561. The Order appears to overlook the undisputed evidence offered in support of Windstream's affirmative defenses.

First, Windstream acknowledges that the Court has held that the thirty-day billing dispute provision contained in the federal tariffs is unenforceable against Mrs. Bowers based on a comparison of the federal statute of limitations for tariff claims to consumer protection laws that cannot be altered by tariffs. However, even though Windstream does not agree with that conclusion as to Mrs. Bowers, Windstream has many customers that occupy very different positions than "consumers." Windstream has many wholesale customers with entire billing departments that are intimately familiar with the tariffs under which they purchase services, and that regularly comply with billing dispute provisions contained in the tariffs. (*See* Rhoda Af. ¶¶ 7–11.) Some larger retail business customers similarly have personnel devoted to billing matters who raise questions in compliance with tariff or contractual billing dispute provisions. (*See id.* ¶ 14.) Thus, even if the billing dispute provision of the tariffs is unenforceable as to some customers, this conclusion does not extend to all customers.

Second, Plaintiffs do not dispute the following facts: (1) the GRS was first included in customers' bills in June 2007—two full years before this action was commenced—and both Plaintiffs were customers of Windstream at that time; (2) the first bill assessing the GRS identified the new surcharge in two separate places; (3) every bill that includes the GRS describes the GRS and assesses it as a separate line item in the bill; (4) numerous wholesale and retail customers questioned the GRS when it appeared on their bills; and (5) neither Plaintiff challenged the GRS until they were recruited by counsel to serve as class action plaintiffs. Indeed, although Plaintiffs' counsel represent that they discussed the GRS with Mrs. Bowers in

February 2009, she apparently continued to pay her Windstream bills, including the GRS, for four more months before commencing this action (coincidentally, as the statute of limitations was about to expire on the federal tariff claims). These facts implicate a host of affirmative defenses, including the voluntary payment doctrine, waiver, estoppel, laches, and the failure to mitigate damages. (*See* Defs.' Resp. to Pls.' Mot. for Class Cert., at 22–25.) Even assuming that affirmative defenses do not apply to the filed rate doctrine, they unquestionably apply to Plaintiffs' remaining state law causes of action, and Plaintiffs have offered no authority to the contrary.

VI. A CLASS ACTION IS NOT SUPERIOR.

Finally, the Court's own recognition of the complex regulatory issues presented by this action and its reliance on *Irwin Wallace* demonstrate that a class action is not the superior means of adjudicating the issues presented, as required by Rule 23(b)(3).[7] Administrative channels are often superior to attempting to aggregate claims into a class action. *E.g.*, *Ostrof v. State Farm Mut. Auto Ins. Co.*, 200 F.R.D. 521, 532 (D. Md. 2001). Here, the Court has relied heavily on a 1991 FCC decision in resolving liability against Windstream, and, in turn, relied on that conclusion in certifying a class. (*See* 10/12/11 Op., at 3.) The regulatory world has changed substantially for telecommunications carriers since *Irwin Wallace* was decided, at both the federal and state levels (including in Kentucky), and the tariffing requirements in 1991 are not the same as they are now. The Court acknowledges the complexity of tariffing law. (*Id.* at 6.) Allowing the FCC and the PSC the opportunity to address Plaintiffs' claims and apply their regulatory expertise to resolve such complex matters is superior to a purported class action cobbled together in an improper attempt to resolve a wide range of disparate claims.

[7] Although the Order references the superiority requirement of Rule 23(b)(3) in its class certification Opinion, there is no analysis.

CONCLUSION

While Windstream believes that the Court erred in certifying a class for all of the reasons set forth in its previous memoranda and filings, the deficiencies identified above are among the most critical that warrant immediate reconsideration by the Court. Windstream requests that the Court vacate and remand the Order, and enter an order denying Plaintiffs' motion for class certification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via the ECF system for the United States District Court for the Western District of Kentucky, on this 4th day of November, 2011, which will send an electronic notice to:

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