COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

O R D E R

This case is before the Commission by Order of the United States District Court for the Western District of Kentucky. The Commission is to resolve the question as to whether or not Windstream Kentucky East, LLC ("Windstream") violated KRS 278.160 by charging, and failing to include in its tariffs, a charge for a "gross receipts surcharge." The Court directed the Commission to resolve the following questions: (1) do carriers, including Windstream, have to file a tariff containing a "gross receipts surcharge" before they can collect it from their customers; and (2) does Windstream's current tariff language, allowing it to pass on taxes assessed by "local taxing authorities," also include the ability to pass on taxes assessed by the Commonwealth?[1] As discussed more fully below, we conclude that the surcharge, under certain circumstances, should be filed in a tariff with the Commission. We also conclude that Windstream's current

[1] Bowers v. Windstream Kentucky East, LLC., 709 F.Supp.3d 526, 534 (W.D. KY. 2010).

tariff language does not allow it to pass on the costs of taxes assessed by the Commonwealth.

BACKGROUND

The Court Action

In 2005, the General Assembly enacted KRS 136.616 that imposed a 1.3 percent tax on gross revenues of telecommunications providers. As originally enacted, KRS 136.616 forbade the utilities from collecting the tax directly from the customer or separately stating the tax on the customer's bill. The telecoms objected to the prohibition on adding a line item on their bill explaining why prices may have increased. Eventually, the United States District Court for the Eastern District of Kentucky struck down this prohibition, finding that it prohibited more speech than necessary and thus violated the First Amendment.[2] The Sixth Circuit later affirmed this decision.

On June 22, 2007, after the courts had invalidated the prohibition on listing the surcharge on the bill, Windstream began adding the pass-through tax, which it referred to as the "Kentucky Gross Receipts Surcharge," to its bills. On the June 22, 2007 bill, Windstream informed its customers that the surcharge "recovers a tax imposed by the state of Kentucky . . . ." Windstream lists a portion of the surcharge as "regulated" and the other portion as "deregulated." Windstream includes the following language regarding the surcharge in its monthly bills: "[t]his charge recovers for a tax that is imposed either on Windstream or on customers directly by various states for the

[2] BellSouth Telecomm., Inc. v. Farris, 2007 WL 647561, 2007 (E.D. Ky. 2007), aff'd in part and reversed in part by 542 F.3d 499 (6th Cir. 2008).

provision of communications service. In the case of gross receipts surcharges, they are not government mandated surcharges."

Subsequently, Ms. Bowers, on her behalf and other similarly situated customers, filed a complaint with the United States District Court for the Western District of Kentucky in Dana Bowers v. Windstream Kentucky East, LLC at al., Civil Action No. 3:09-CV-440 ("court action"). Ms. Bowers objected to the imposition of the surcharge on the grounds that the federal and state tariffs did not give Windstream the authority to charge the tax to its customers. Windstream did not list the charge in its federal tariff until August 2008 and has not included it in its tariffs in Kentucky. Ms. Bowers also alleges that the surcharge exceeds the 1.3 percent tax imposed by Kentucky because Windstream added the surcharge to services, such as cable and internet, that were not to be taxed under KRS 136.616.

For the first two counts in the court action, Ms. Bowers noted that the Federal Communications Commission ("FCC") has previously not allowed a telecommunications provider to collect a pass-through tax unless the tax was included in its tariff.[3] The FCC differentiated between taxes that were assessed directly on the customer, and taxes imposed on the utility, that were permitted to be passed on to the customer. The FCC held that the former need not be included in its tariff but that the latter must be included in a tariff before it could be recovered. Ms. Bowers argued that Windstream violated federal law by recovering the surcharge prior to including it in its federal tariff.

[3] In the Matter of Irwin Wallace v. AT&T Communications of the Southern States, Inc., 6 FCC Rcd 1618 (1991) ("Irwin Wallace").

For the third count in the court action (the one referred to the Commission), Ms. Bowers argued that Windstream violated KRS 278.160(2) by imposing the surcharge because it had not included the surcharge in its tariff. Windstream, however, argues that it already has language in its tariff that allows it to impose the surcharge on its customers. The tariff language states that:

> 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 . . . such amount shall be added to bills of customers receiving service within the territorial limits of the taxing authority.

The parties disputed the meaning of "local taxing authorities" and whether or not it included the Commonwealth. Ms. Bowers argues that, because the surcharge is imposed by the state, it is not a "local taxing" authority. Windstream argues that, by enacting the gross revenues surcharge, the Commonwealth transferred to itself the ability of the local authorities to impose a franchise fee or surcharge on the gross receipts of a telecom provider.

In denying a motion to dismiss from Windstream, the Court found that to resolve Count III of Ms. Bowers complaint, it would have to address two issues: (1) whether the Commission would rule as the FCC did in Irwin Wallace on the issue of tariffs and pass-through taxes; and (2) whether the "local taxing authority" language in Windstream's tariff includes state statutes. The Court stated that:

> [T]he first issue implicates a policy issue that the PSC should decide and apply uniformly to all characters. The second question is likely within the Court's discretion, as courts are permitted to construe tariffs to the extent they raise issues of

> law. All things considered, however, the Court believes that these matters are best left to the PSC at this time.[4]

The Court stayed Count III of Ms. Bowers' complaint to allow the Commission to address the issue.

On October 3, 2011, the Court issued a Memorandum Opinion and Order in which it entered Summary Judgment in Ms. Bowers' favor on Counts I and II.[5] The Court concluded that Windstream should have filed the gross receipts surcharge ("GRS") in its federal tariffs under the FCC's holding in Irwin Wallace. The Court further concluded that Windstream would be liable to Ms. Bowers for the GRS that Windstream collected prior to filing the GRS in its federal tariff. The Court also subsequently certified the class for Ms. Bowers' class action suit against Windstream.

The Commission Action

On November 16, 2010, Ms. Bowers, on her behalf and other similarly situated customers, filed with the Commission a Petition for Declaratory Ruling. Ms. Bowers requests that the Commission declare that Windstream violated KRS 278.160 when it charged her (and other customers) an unfiled rate for telecommunications services provided under a tariff filed with the Commission. Ms. Bowers seeks a declaratory ruling on this issue, as it is one of several issues she is litigating in the court action. The count brought to the Commission has been stayed by the Court so that the Commission may issue a declaratory ruling.

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[4] Bowers at 534.

[5] Bowers v. Windstream Kentucky East, LLC., 2011 WL 4601032 (W.D. Ky. 2011).

Windstream filed its answer on December 17, 2010. In its answer, Windstream did not respond specifically to Ms. Bowers' legal arguments except to deny them in general. Windstream alleges that the complaint contains several factual allegations, in addition to legal arguments, which Windstream should be entitled to rebut by creating a factual record.

The parties participated in an informal conference which Commission Staff had scheduled for the purpose of discussing settlement or, in the alternative, a procedural schedule. The parties agreed on neither. Ms. Bowers suggested a briefing schedule be established. Windstream suggested that an abbreviated schedule, including discovery and the filing of testimony, would be appropriate to protect its rights. The Commission issued a procedural schedule allowing for limited discovery and the filing of testimony. The Commission subsequently denied Windstream's request for a hearing and directed the parties to file simultaneous briefs and response briefs. The matter is ripe for a decision.

Ms. Bowers' Argument

Ms. Bowers first argues that the surcharge is a rate and must be tariffed if applied to a tariffed service. Ms. Bowers relies upon previous Commission precedent finding that the recovery of any external expense, including a tax, will be a rate for service that must be tariffed.[6]

[6] Bowers' Initial Brief at 10, citing, Case No. 99-046, Delta Natural Gas Co., Inc. Experimental Alternative Regulation Plan, (Ky. PSC May 7, 1999); Case No. 95-027 Big Rivers Electric Corp., (Ky. PSC Aug. 25, 1995); Case No. 7843, Local Taxes and/or Fees Tariff Filing of General Tel. of Ky., (Ky. PSC Oct 3, 1980).

Ms. Bowers also cites to Luckett v. Electric Water Plant Board of the City of Frankfort, 558 S.W.2d 611 (Ky. 1977) where the Court drew the distinction between (1) taxes imposed when the utility serves as a collection agent and (2) taxes imposed on a utility and recovered through rates. In Luckett, a utility utilized KRS 160.617, which allowed it to recover amounts it was required to pay in local school taxes. State tax officials noticed that the utility did not include the recovered amounts when computing its sales tax obligations. The court concluded that sales tax was due on the recovered amount because the rate increase due to the recovered tax was no different from the remainder of the utility bill that constitutes a utility's gross receipts.

Ms. Bowers argues that gross receipts tax imposes a tax on Windstream, and not on Windstream's customers, and is just another cost of Windstream's doing business. Ms. Bowers argues that Windstream's customers are not separately paying for Windstream's various costs of doing business but are paying for utility services, the charge for which is called a "rate." That "rate" must be tariffed, regardless of the law allowing for its recovery.

Ms. Bower's second argument is that Windstream violated the "filed rate doctrine" in Kentucky, just as AT&T violated the federal filed rate doctrine in Irwin Wallace when it sought to recover a gross receipt tax from Florida without tariffing the charge. In Irwin Wallace, the FCC concluded that the Florida gross receipts tax, "is not 'extrinsic' to the communications services regulated by this Commission . . . but is one of many expenses affecting the carrier's charges to its customers." 6 FCC Rcd 1618 ¶ 6. The FCC held that, "although it is proper for AT&T to flow through the Florida gross receipts tax, it should not have done so until its tariff providing for the GRTS flow though

went into effect . . . ." 7 FCC Rcd 3333. Ms. Bowers asserts that the filed rate doctrine applies similarly in Kentucky.

Ms. Bowers also rebuts Windstream's arguments that because Ms. Bowers receives nonbasic services from Windstream, the surcharge need not be tariffed pursuant to KRS 278.544. Ms. Bowers argues that KRS 278.544 expressly preserves the filed rate doctrine, quoting in part from KRS 278.544:

> . . . 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.

Ms. Bowers argues that KRS 278.544 does allow Windstream to charge any rate for nonbasic services, as long as it has on file with the Commission tariffs that contain those charges for nonbasic services. Likewise, Ms. Bowers argues that Windstream must also file the surcharge in its tariffs for basic services.

Ms. Bowers' last argument is that, for the purposes of applying Windstream's tariff, the gross receipts tax is a state tax, and not a local one. Currently, Windstream's tariff allows it to recover for "local taxes." Ms. Bowers argues that this definition of local does not include a state tax, such as the gross receipts tax.

Windstream's Argument

Windstream's first defense is that Ms. Bowers receives nonbasic services, and that those services are non-jurisdictional to the Commission and exempt from the filed rate doctrine. Windstream argues that Ms. Bower's complaint ignores the provisions of KRS 278.544, which exempts certain telecommunications services from tariff requirements and the Commission's jurisdiction.

Windstream argues that, under the deregulation regime, it is first necessary to determine whether a customer purchases basic local exchange service as defined in KRS 278.541(1). If a customer purchases stand-alone basic local exchange service, then those services are subject to KRS 278.160. If the basic service is part of a package making them nonbasic services, then the services are exempt from KRS 278.160. Windstream asserts that Ms. Bowers purchases solely nonbasic services and any rates she pays need not be tariffed. This, Windstream argues, is fatal to Ms. Bower's complaint.

Windstream's second defense is that the gross receipt surcharge is not a rate under KRS 278.010(12) and, therefore, does not have to be tariffed with the Commission. Windstream asserts that the surcharge is not an, "individual or joint fare, toll, charge, rental, or other compensation for service rendered or to be rendered by any utility. . ." under KRS 278.010(12). If it is not a rate, Windstream argues, it does not have to be filed with the Commission.

Windstream also argues that, because the surcharge arises outside of KRS Chapter 278, then it falls outside of the Commission's jurisdiction. Windstream posits that KRS Chapter 278.040 gives the Commission jurisdiction over matters arising under Chapter 278 and that the surcharge arises under KRS Chapter 136. Therefore, the Commission has no authority to require that it be tariffed.

Windstream's third defense is that Ms. Bowers did not make a timely dispute of the surcharge. Windstream asserts that, regardless of whether Ms. Bowers purchases non-jurisdictional services, the tariff that Ms. Bowers seeks to enforce requires that any billing disputes be brought within 30 days of a bill being rendered. Windstream argues

that Ms. Bowers was notified through monthly billing inserts of her ability to question the surcharge.

Windstream's last defense is that existing language in its Tariff Number 7, Section S2.4.5(c) currently allows it to recover charges for fees and taxes imposed by local taxing authorities. The applicable provision reads:

> 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 . . . such amount shall be added to bills of customers receiving service within the territorial limits of the taxing authority.

Windstream argues that "local taxing authorities" necessarily includes state taxing entities. Windstream asserts that the term "local" is used to differentiate between intrastate and interstate matters. Windstream further argues that there is no distinction between state and local, at least in regard to the gross receipts tax, because the tax merely replaced the local tax with a state tax that is designed to accomplish the same goal.

DISCUSSION

The United States District Court for the Eastern District of Kentucky asked that the Commission resolve two questions. The questions are:

1. Whether the Commission would rule as the FCC did in Irwin Wallace on the issue of tariffs and pass-through taxes; and,

2. Whether the "local taxing authority" language in Windstream's tariff includes state statutes.

The determination of the first issue will apply to all carriers in Kentucky. (All local exchange carriers were allowed an opportunity to comment on the issue and none, save for Windstream, replied.) Our decision on the second question will apply solely to Windstream.

Before addressing basic and nonbasic, jurisdictional and non-jurisdictional services, the Commission must first determine if the gross receipts surcharge is a "rate" under KRS 278.010.[7] KRS 278.010(12) defines a rate as:

> [A]ny individual or joint fare, toll, charge, rental, or other compensation for service rendered by any utility, and any rule, regulation, practice act, requirement, or privilege in any way relating to such fare, toll, charge, rental, or other compensation, and any schedule or tariff or part of a schedule or tariff therefor.

The gross receipts tax is akin to a franchise fee or other tax assessed by a governing body in that the fee is assessed directly against the utility and not the utility's customers. This is different than the assessment of 911 or local school taxes where the tax or fee is assessed directly to the customer and the utility merely acts as a collection agent for the local authority, receiving the funds from the customer and passing them on to the taxing authority. Another distinction is that, while a utility is authorized to recover the gross receipts tax as a separate surcharge, it is not obligated to recover the costs at all. As the Court of Appeals noted in an analogous circumstance:

> The fact that KRS 160.617 permits the utility company to raise its rates to alleviate the burden on the utility company does not convert the tax into one levied upon the customers in which the utility company merely acts as collection agent.

[7] AT&T Kentucky filed to amend its tariffs to include a gross receipts surcharge prior to its imposing the charge to its customers. Windstream made a similar filing in 2007, but withdrew it before it went into effect.

Luckett at 613.

Like in Luckett, recovery of the gross receipts tax is purely voluntary on the part of the utility and is not a tax levied directly on the customers. If the utility so choses, it could recover through general rates or a surcharge.

The gross receipts tax is a cost of doing business that a utility must pay. The tax increases the cost of doing business, equivalent to higher gas or equipment or labor prices. Similarly, a surcharge to recover the tax increases the cost of service, however, it is labeled. If the cost of service increases to customers, then it is difficult to view the increase as anything but a rate. A utility's customers are not separately paying for the utility's taxes, they are paying for utility service; and what a utility charges for service is a rate.

In Irwin Wallace, the FCC differentiated between taxes that were assessed directly on the customer and taxes imposed on the utility but permitted to be passed onto the customer. The FCC held that the former need not be included in its tariff but the latter must be included in a tariff before it could be recovered. The FCC concluded that the Florida gross receipts tax "is not 'extrinsic' to the communications services regulated by this Commission . . . but is one of many expenses affecting the carrier's charges to its customers." 6 FCC Rcd 1618 ¶ 6. The FCC held that, "although it is proper for AT&T to flow through the Florida gross receipts tax, it should not have done so until its tariff providing for the GRTS flow though went into effect . . . ." 7 FCC Rcd 3333. The Florida surcharge and the Kentucky gross receipts tax seem quite similar in nature, as are the federal and Kentucky requirements for the filing of rates in tariffs. We agree with the FCC's reasoning and conclusion in Irwin Wallace.

Therefore, based on the foregoing, we find that the gross receipts surcharge is a rate and, therefore, subject to the restrictions unique to telephone utilities discussed below, must be included in a utility's tariff pursuant to KRS 278.160.

A second issue is raised due to the deregulated nature of telecommunications. In 2006, the General Assembly deregulated certain aspects of local telecommunications service in Kentucky. In doing so, it differentiated between basic service, better known as plain voice service with no features, and nonbasic service, which is basic service "bundled" with other optional services and offered at a single price. Basic service was, and still is, subject to tariffing requirements and Commission rate oversight. Nonbasic services need not be tariffed, but may be tariffed at the discretion of the utility. If a tariff for nonbasic services was on file with the Commission on July 12, 2006, it remained in full force and effect unless subsequently withdrawn or modified by the utility. KRS 278.544(1) provides, in pertinent part, that:

> 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 service 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. (Emphasis added.)

After July 12, 2006, the filing of tariffs for nonbasic services was purely voluntary. If a utility, however, has a tariff on a file with the Commission, and the tariff was on file on or before July 12, 2006, the utility must abide by the terms and rules in the tariffs. Likewise, if a utility chooses to maintain a tariff for nonbasic services, even if filed after July 12, 2006, it is deemed valid upon filing.

Because tariffs on file before July 12, 2006 are deemed valid and binding, if a customer is receiving service under a package listed in that tariff, the customer cannot be charged the surcharge unless it is included in that tariff. To allow otherwise would lead to a rate increase, which would render KRS 278.544(1) meaningless in that those tariffs would not be binding. For tariffs filed after July 12, 2006, the Commission, generally, is exempt from reviewing those filings or reviewing the contents contained therein. KRS 278.544(4).[8] Therefore, because the tariffs for nonbasic services filed after July 12, 2006 are non-binding, the gross receipts surcharge need not be included in those tariffs in order for it to be collected.

Based on the forgoing, we find that, if a utility offers nonbasic services that are contained in a tariff filed before July 12, 2006, the utility must include the gross receipts surcharge in its tariff in order for it to recover the surcharge.

The second issue the District Court requests that the Commission determine is if the language in Windstream's tariff already encompasses recovering charges from state entities. The language is 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 . . . such amount shall be added to bills of customers receiving service within the territorial limits of the taxing authority.[9]

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[8] It is undisputed that Ms. Bowers receives nonbasic services. Windstream admits that the service she receives, "Feature Pack A," was included in pre-July 12, 2006 tariffs on file with the Commission but was removed by Windstream on December 1, 2008. (Weeks Direct testimony pp.8-9.)

[9] Windstream's Tariff Number 7, Section S2.4.5(c)

Windstream asserts that the term "local" is used to differentiate between the charges associated with interstate services, which is under federal jurisdiction, and charges for intrastate services, which fall under state jurisdiction. The argument, however, ignores traditional telecommunications industry understanding of what is deemed to be local.

Local, in telecommunications, is typically used to describe a call made within a certain geographic area, typically the territory of a telephone utility. The location and the territorial limits are important to determining whether a call is local in nature. If it exceeds those boundaries, then it is no longer local, but is long-distance. It is all based on territorial limits. It is difficult to think that Windstream would use the term local in any regard other than to describe numerous entities within territorial boundaries.

Likewise, because of concurrent jurisdiction between the FCC and the Commission, it is not necessary for Windstream to have to differentiate between interstate and intrastate services in its tariff. Everything associated with interstate service is included in its federal tariff; everything associated with intrastate service is in its tariff on file with the Commission. The delineation is clear—no federal charges appear in state tariffs. If no federal charges appear in state tariffs, it is not necessary to distinguish between interstate and intrastate by using the term "local." Thus, it appears that the local taxing authority in Windstream's tariff does not encompass state taxing authorities.

The Court noted that Windstream had argued that "local taxing authority" includes the state, particularly because the gross revenue tax eliminated the political

subdivisions' ability to assess franchise fees on telecommunications carriers.[10] Windstream argued before the Court that, because the local taxing authorities share in the revenue of the gross receipts tax and the fees are collected by the state, the gross receipts tax is covered by its current tariff language.[11]

This argument also fails to support Windstream's defense. Local, in its traditional sense, refers to a defined political area, smaller than a state. The Kentucky Revised Statutes are replete with references to local matters. (See generally KRS Chapters 65 to 109.) These and other statutes make clear the distinction between what is considered local and what is rendered to the state, always tying the distinction to a geographically and politically defined area. "Local" option refers to the election in a particular territory where the people in the geographically and politically defined territory vote on whether to allow the sale of alcoholic beverages. KRS Chapter 242. A "local public agency" is defined as, "a city, county, urban-county, consolidated local government, school district, special district, or an agency formed by a combination of such agencies . . . ." KRS 45A.345(11). Even the FCC applies a definition that draws a clear distinction between local taxes and state taxes. ("The term 'local taxing jurisdiction' means any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State." Pub.L. 104-104, Title VI, § 602(b)(3).) (Emphasis added.)

Based on the foregoing, we find that Windstream's tariff does not allow it to recover for taxes issued under state statutes.

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[10] Bowers, 709 F.Supp.2d. at 535.

CONCLUSION

There are only two issues that the Commission needs to address—those that the District Court wants answered. The Commission need not address the other defenses that Windstream raises, such as timeliness of the dispute.

For the first issue, we agree with the FCC in Irwin Wallace that a surcharge to recover a tax must be filed in a tariff before a utility can recover the charge. However, we add the caveat that this requirement applies only to basic services and nonbasic services that are in tariffs filed with the Commission prior to July 12, 2006. If a utility files a subsequent tariff for nonbasic services, or does not maintain tariffs for nonbasic services with the Commission, then the surcharge need not be tariffed. This would mean that, for customers like Ms. Bowers served under Feature Pack A, the surcharge needed to be in a tariff up to December 1, 2008 (when Windstream withdrew the tariff), but did not need to be in a tariff subsequent to that date.

For the second issue, we find that the "local taxing authority" in Windstream's tariff does not include state statutes or taxes. If Windstream wishes to recover state taxes under its tariff, it should file to amend the language to include state taxes.

IT IS THEREFORE ORDERED that:

1. Telecommunication carriers in Kentucky that seek to recover the gross revenues tax on basic services via a surcharge must file the surcharge in their basic services tariff on file with the Commission.

2. Telecommunication carriers in Kentucky that seek to recover the gross revenues tax on nonbasic services via a surcharge must file the surcharge in those tariffs if the nonbasic services were on file with the Commission prior to July 12, 2006.

3. Windstream's tariff language in Windstream's Tariff Number 7, Section S2.4.5(c) does not allow it to recover the costs of the gross revenues tax from the consumer as a separate surcharge.

By the Commission

ENTERED
MAY 04 2012
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:

Executive Director

D. Randall Gibson
Stoll Keenon Ogden, PLLC
2000 PNC Plaza
500 W Jefferson Street
Louisville, KENTUCKY 40202-2828

Honorable Mark R Overstreet
Attorney at Law
Stites & Harbison
421 West Main Street
P. O. Box 634
Frankfort, KENTUCKY 40602-0634

Jeanne Shearer
VP - State Government Afairs
Windstream Kentucky East, LLC
130 W New Circle Road, Suite 170
Lexington, KY 40505