

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF WINDSTREAM KENTUCKY	)	
EAST, LLC AND WINDSTREAM KENTUCKY	)	
WEST, LLC: (1) FOR A DECLARATORY RULING	)	
THAT APPROVAL IS NOT REQUIRED FOR	)	
THE TRANSFER OF A PORTION OF THEIR	)	
ASSETS; (2) ALTERNATIVELY FOR APPROVAL	)	CASE NO. 2014-00283
OF THE TRANSFER OF ASSETS; (3) FOR	)	
A DECLARATORY RULING THAT	)	
COMMUNICATIONS SALES AND LEASING,	)	
INC. IS NOT SUBJECT TO KRS 278.020(1); AND	)	
(4) FOR ALL OTHER REQUIRED APPROVALS	)	
AND RELIEF	)	

ORDER

On August 7, 2014, Windstream Kentucky East, LLC and Windstream Kentucky West, LLC (collectively "Applicants") filed with the Commission, an application ("Application") requesting a Declaratory Order that approval of a transfer of assets is not required by Kentucky Law. The Applicants alternatively requested that, if approval is required for the transfer, the Commission approve the transfer under KRS 278.020. The Applicants further requested a Declaratory Order that Communications Sales and Leasing, Inc. ("CSL"), the company acquiring the assets from the Applicants, is not required to obtain a certificate of public convenience and necessity ("CPCN") for said acquisition.

On December 4, 2014, the Commission issued an Order finding, *inter alia*, that the transfer required Commission approval pursuant to KRS 278.020(5) and that CSL, after the transfer, would be a utility under KRS 278.010(3)(e). The Commission, *sua*

*sponte*, granted CSL a CPCN to provide service in the Commonwealth, directed CSL to register with the Commission as a utility, and required the Applicants and CSL to commit to several conditions in order for the Commission to approve the transfer.

On December 12, 2014, the Applicants filed a Petition for Rehearing of the December 4, 2014 Order.<sup>1</sup> In the petition, the Applicants do not seek the Commission to reconsider any of the substantive rulings in the December 4, 2014 Order.<sup>2</sup> The Applicants, however, do request that the Commission clarify two issues in the December 4, 2014 Order: (1) that the CPCN should be granted to CSL Kentucky System, LLC, ("CSL Kentucky"),<sup>3</sup> not to CSL, and that CSL Kentucky should be the entity to register as a utility; and (2) that the Commission clarify that the rental payments that CSL would receive for the leasing of the poles and lines to the Applicants would not be considered payments for the provision of telecommunications service.

The Applicants request that the Commission clarify its December 4, 2014 Order to find that the CPCN is granted to CSL Kentucky and that CSL Kentucky is obligated to register with the Commission as a utility. The Applicants assert that this clarification is appropriate because CSL Kentucky, a wholly owned subsidiary of CSL, will be the entity that will own the transferred assets, not CSL. The Applicants also request that CSL neither be granted the CPCN nor required to register as a utility with the Commission.<sup>4</sup>

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<sup>1</sup> Petition for Rehearing in the Form of Clarification of Windstream Kentucky East, LLC and Windstream Kentucky West, LLC, filed Dec. 12, 2014 ("Petition for Rehearing").

<sup>2</sup> *Id.* at 1.

<sup>3</sup> CSL Kentucky was not registered as an entity to do business in Kentucky until November 21, 2014.

<sup>4</sup> Petition for Rehearing at 2.

The Applicants also request the Commission clarify that, although CSL will be providing “service” in Kentucky as defined in KRS 278.010(13), the rental payments CSL receives from the Applicants are not payments made for the provisioning of telecommunications service. The Applicants state that they understand that the Commission, in the December 4, 2014 Order, did not re-characterize the rental payments received by CSL as anything other than lease payments made by Windstream Holdings, Inc. (“Windstream Holdings”).

The Applicants state that this clarification is required because CSL will be unable to maintain its status as a real estate investment trust (“REIT”) if it is deemed to provide telecommunications services to the public. The Applicants assert that under the Internal Revenue Service Code, a REIT, such as CSL, must receive at least 95 percent of its revenue from dividends and rent, and that revenues for the provision of telecommunications service to the public would not qualify for this type of revenue.<sup>5</sup> The Applicants state that the transfer is dependent upon CSL’s status as a REIT, and CSL will not be considered a REIT if the rental payments from Windstream Holdings are considered payment in exchange for the provision of telecommunications service. The Applicants assert that, because CSL’s only activity in Kentucky will be conducted through CSL Kentucky, and this activity is merely the leasing of the transferred assets back to the Applicants, CSL is not providing telecommunications service in Kentucky.<sup>6</sup>

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<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Id.*

On December 19, 2014, the Kentucky Cable Telecommunications Association (“KCTA”) filed a response to the Applicants’ Petition for Rehearing.<sup>7</sup> The KCTA notes that the Commission’s December 4, 2014 Order found that CSL would not be providing service for the public, but, by acquiring assets currently used to provide utility service, CSL would be a utility under Kentucky law.<sup>8</sup> The KCTA states that it has no objection to the Commission clarifying its December 4, 2014 Order by stating that “CSL’s utility status under KRS Chapter 278 is not a finding that CSL will be providing telecommunications services to anyone, or utility services to the public.”<sup>9</sup>

The Commission acknowledges that it is CSL Kentucky, and not CSL, that will be the entity that owns the subject assets of the transfer and will lease those assets back to the Applicants. Accordingly, it is CSL Kentucky that should be granted the CPCN and register as a utility with the Commission, and the December 4, 2014 Order should be amended to reflect this.

The Commission, in the December 4, 2014 Order, did not intend to find that rental payments that CSL will receive are for the provision of telecommunication service for the public. The payments from Windstream Holdings are only rental payments paid for the leasing of the transferred assets, not payment for the provisioning of telecommunications service. It was not the Commission’s intention to jeopardize CSL’s or CSL Kentucky’s status as a REIT. The December 4, 2014 Order should be amended

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<sup>7</sup> Kentucky Cable Telecommunications Association’s Response to Windstream’s Motion for Rehearing, filed Dec. 19, 2014 (“KCTA’s Response”).

<sup>8</sup> *Id.* at 2, *citing* the Commission’s December 4, 2014 Order at 14.

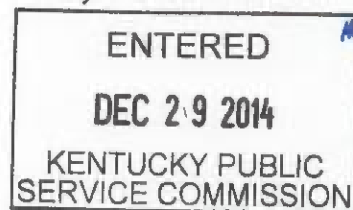
<sup>9</sup> KCTA’s Response at 2.

to find that CSL will not be a utility as defined under KRS Chapter 278 as a result of receiving rental payments for the lease of assets used by the Applicants.

IT IS THEREFORE ORDERED that:

1. The Applicant's Petition for Rehearing is granted.
2. The Commission's December 4, 2014 Order is amended to provide that CSL Kentucky, not CSL, is granted a CPCN pursuant to KRS 278.020.
3. The Commission's December 4, 2014 Order is amended to provide that CSL Kentucky is a utility under KRS Chapter 278 and shall register as a utility with the Commission.
4. The Commission's December 4, 2014 Order is amended to provide that CSL is not a utility under KRS Chapter 278 and will not be providing telecommunications services to or for the public in Kentucky.

By the Commission



ATTEST:

  
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