

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

O R D E R

On November 16, 2010, Dana Bowers, on her behalf and other similarly situated customers, filed with the Commission a Petition for Declaratory Judgment. Ms. Bowers requests that the Commission declare that Windstream Kentucky East, LLC ("Windstream") violated KRS 278.160 when it charged her 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 a civil action in the United States District Court for the Western District of Kentucky. The Court stayed one of Ms. Bowers' counts so that the Commission may resolve the dispute.

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. Commission Staff proposed that the parties file competing procedural schedules and allow the Commission to rule.

This case is before the Commission by Order of the United States District Court for the Western District of Kentucky. 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 et al., Civil Action No. 3:09-CV-440 ("court action" or "judicial proceeding"). Ms. Bowers objected to the imposition of the charge under KRS 136.616 that imposed a 1.31 percent tax on gross revenues of telecommunication providers 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 1.31 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.

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 Wallace¹ 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 carriers. 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.²

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

Ms. Bowers' Position

Ms. Bowers argues that there are no disputed material facts for the Commission to decide and, therefore, there is no need for discovery, prefiled testimony or an evidentiary hearing. Ms. Bowers advances four primary arguments: (1) a hearing is not necessary to protect due process rights when there are no material facts in dispute; (2) the resolution of the questions sent to the Commission from the Court are not dependent upon any dispute of material fact; (3) Windstream's denials in its answer do not indicate a genuine dispute of material fact; and (4) Windstream's dispute of irrelevant facts does not create a genuine issue of material fact.

¹ In the Matter of Irwin Wallace v. AT&T Communications of the Southern States, Inc., 6 FCC Rcd 1618 (1991) ("Irwin Wallace").

² Bowers v. Windstream Kentucky East, LLC, 709 F. Supp. 526, 534 (W.D.K.Y. 2010).

Ms. Bowers has proposed to stipulate to facts that Windstream believes to be material. Ms. Bowers argues that the following are not in dispute:

1. There are Windstream tariffs on file with the Commission.
2. The tariffs do not state that Windstream will charge a 1.3 percent "Kentucky Gross Receipts" surcharge.
3. One tariff states that Windstream will charge a "proportionate part of any license, occupation, franchise, or other similar fee or tax now or hereafter agreed to or imposed . . . by local taxing authorities."
4. Windstream charged its customers a "Kentucky Gross Receipts Surcharge."
5. The Kentucky gross receipts tax in KRS 136.616(2)(b) is imposed by the state government upon Windstream, not upon its customers.³

Ms. Bowers alleges that, because these facts are stipulated and there are no other material facts in dispute, due process does not require the taking of evidence or holding of a hearing.⁴

Windstream's Position

Windstream argues that a review of the facts is necessary if the Commission is to make a policy determination regarding the surcharge, particularly the factual circumstances under which the surcharge tax was implemented by the General Assembly and the types of service to which the surcharge applies. Windstream argues that any determination by the Commission will affect the manner in which Windstream

³ Bowers Motion for Procedural Schedule Consisting of Briefing Only at 2.

⁴ Id. at 3.

recovers its costs associated with the gross revenue tax and, therefore, due process requires that Windstream be given the opportunity to be heard and introduce testimony in support of its position to refute Ms. Bowers' allegations.⁵

Windstream argues that it has a significant private interest that could be affected by a Commission determination relating to the surcharge. Windstream asserts that it intends to establish that the collections are lawful and consistent with its obligations under KRS Chapter 278. Windstream also argues that Kentucky courts have found that utilities have an interest in their rates and charges sufficient to trigger due process protection. See Utility Regulatory Commission v. Kentucky Water Service Company, 642 S.W.2d 591, 593 (Ky. App. 1982) ("Due process requires, at a minimum, that persons forced to settle their claims of right and duty through the judicial process be given a meaningful opportunity to be heard.")⁶

Windstream further argues that adopting its proposed procedural schedule would reduce the risk of an erroneous deprivation of Windstream's interest in collecting the surcharge from its customers. Windstream alleges that the pleadings establish a number of factual disputes. Windstream provides the following as examples of factual disputes that the Commission needs to resolve:

(1) Ms. Bowers alleges that she purchases service from Windstream, which is governed by tariff P.S.C. Ky. No. 7. Windstream denied this allegation in part, asserting

⁵ Motion for Entry of a Proposed Scheduling Order Setting Deadlines for the Filing of Discovery Requests, Direct and Rebuttal Testimony and Briefs, at 2.

⁶ Id. at 9.

that some of the services to which Ms. Bowers subscribed were deregulated services under KRS 278.541-544.

(2) Ms. Bowers claims that the gross revenue tax increased Windstream's cost of doing business. Windstream denied this and stated affirmatively that some fees, including franchise fees, are passed on to the customer and not assessed to Windstream.⁷

Windstream provides several more examples of factual disputes, arguing that the Commission should deny Ms. Bowers' procedural schedule because: (1) Ms. Bowers offered a number of factual allegations that she believes are relevant to the Commission's determination of these matters; and (2) there is no basis for the contention that the Commission should decide the matter based on Ms. Bowers' factual assertions without giving Windstream the opportunity to present its side of the story through testimony and depositions.⁸

Conclusion

Both parties raise legitimate arguments concerning the proper procedure to follow in this case. However, upon a review of the pleadings in the record, the Commission concludes that there are material facts in dispute that Windstream should have the chance to further develop. Additionally, because the possible outcome of this case could involve a significant refund, the Commission will err on the side of caution in order to protect due process interests. Therefore, the Commission finds that Ms. Bowers' motion should be denied and Windstream's motion should be granted.

⁷ Id. at 11.

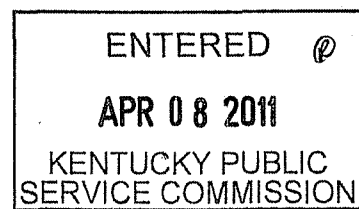
⁸ Id. at 12.

Furthermore, the Court's decision stated that the Commission's conclusion in this matter should apply to all carriers,⁹ which implicates a policy issue for the Commission that could impact how the gross receipts tax is collected by the other incumbents in the Commonwealth. Therefore, the Commission finds that a copy of this Order shall be served on all incumbent local exchange carriers in Kentucky and that the incumbents should be afforded an opportunity to file comments in this case and/or seek intervention.


IT IS THEREFORE ORDERED that:

1. Ms. Bowers' motion is denied.
2. Windstream's motion is granted in part and denied in part.
3. The parties shall follow the schedule attached as the Appendix to this Order.

By the Commission



ATTEST:


Executive Director

⁹ Bowers, 709 F. Supp. at 534.

APPENDIX

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2010-00447 DATED **APR 08 2011**

PROCEDURAL SCHEDULE

- Motions for intervention and/or comments to be filed April 22, 2011
- Parties shall file and serve discovery requests no later than April 29, 2011
- Answers to discovery requests to be filed May 13, 2011
- Simultaneous prefiled direct testimony to be filed May 27, 2011
- Supplemental discovery requests to be filed June 10, 2011
- Response to supplemental discovery requests to be filed June 24, 2011
- Simultaneous prefiled rebuttal testimony to be filed July 15, 2011
- Request for hearing, if any, to be filed July 22, 2011
- Simultaneous initial briefs 14 days after receipt of hearing
transcript, if a hearing is granted;
otherwise due August 12, 2011
- Simultaneous post-hearing reply briefs 7 days after receipt of initial briefs
or August 19, 2011 if no hearing is held

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