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OCT 13 2006

PUBLIC SERVICE
COMMISSION

October 13, 2006

via Hand Delivery

Hon. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Blvd.
Frankfort, KY 40601

Re: *In the Matter of Mountain Rural Telephone Cooperative Corporation, Inc. v. Kentucky Alltel, Inc.; Case No. 2006-00198*

Dear Ms. O'Donnell:

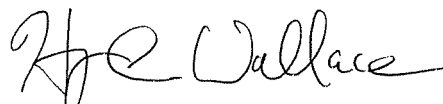
We are counsel to Mountain Rural Telephone Cooperative Corporation, Inc. ("Mountain Rural"). In that capacity, we have been requested to file Mountain Rural's response to Windstream Kentucky East, Inc's Motion to Compel and Motion to Hold Procedural Schedule in Abeyance in the above-referenced case.

Accordingly, please accept for filing in Case No. 2006-00198 the attached original and ten copies of Mountain Rural's Response to Windstream Kentucky East, Inc's Motion to Compel Responses to the First Set of Data Requests and Motion to Hold the Procedural Schedule in Abeyance.

Thank you, and if you have any questions, please call me.

Very truly yours,

DINSMORE & SHOHL LLP



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**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

**MOUNTAIN RURAL TELEPHONE)
COOPERATIVE CORPORATION, INC.)
) **Complainant**)
))
v.))
))
KENTUCKY ALLTEL, INC.))
) **Defendant**)
_____)**

Case No. 2006-00198

**MOUNTAIN RURAL'S RESPONSE TO WINDSTREAM KENTUCKY EAST, INC.'S
MOTION TO COMPEL RESPONSES TO THE FIRST SET OF DATA REQUESTS AND
MOTION TO HOLD THE PROCEDURAL SCHEDULE IN ABEYANCE**

Mountain Rural Telephone Cooperative Corporation ("Mountain Rural"), by counsel, and in response to the motion to compel of Windstream Kentucky East, Inc. f/k/a Kentucky Alltel, Inc. ("Windstream") states as follows.

INTRODUCTION

From the outset of this case, Windstream has claimed that it did not owe Mountain Rural for unpaid, undisputed charges. In its Answer filed May 30, 2006, Windstream denied the existence of any unpaid charges. Again, during a teleconference on June 20, 2006, counsel for Windstream advised Mountain Rural and staff to the Kentucky Public Service Commission (the "Commission") that it did not owe Mountain Rural payment for undisputed charges.

On September 19, 2006, however, after advising the Commission for almost four months that it did not owe payments for undisputed charges, Windstream suddenly reversed itself and paid Mountain Rural for undisputed facilities and traffic-sensitive charges. Specifically, Windstream paid for two charges it had formerly denied owing: (1) facilities charges incurred from December 2005 through September 2006, and (2) traffic-sensitive charges incurred from July 2006 through

September 2006. It is no coincidence that Windstream *finally* paid the undisputed charges one week before its responses to Mountain Rural's data requests were due. Clearly, Windstream paid the charges so that it could maintain its previously fictitious position that it did not owe Mountain Rural for undisputed charges.

As evidenced above, Windstream has habitually acted in bad faith in its dealings with Mountain Rural. Windstream's motion to compel is just the latest step in Windstream's continuous pattern of bad faith. At no time prior to filing its motion did Windstream contact Mountain Rural to attempt to resolve the discovery dispute. It is axiomatic that the party seeking discovery act in good faith to settle a discovery dispute before seeking to compel a response. Windstream made no such attempts to resolve the dispute over these data responses before resorting to the cudgel-like device that is a motion to compel. For this reason alone, Windstream's motion to compel should be denied.

ARGUMENT

Kentucky Rule of Civil Procedure 34.02 permits a party to serve requests upon another party to produce or make available documents "which constitute or contain matters within the scope of Rule 26.02." CR 26.02 defines the scope of discovery as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is **relevant to the subject matter involved in the pending action**, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . **if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.**

CR 26.02(1)(emphasis added). While the scope of discovery is more broadly defined under this rule than for relevancy of evidence at trial, nevertheless the discovery sought must, at a minimum, have "substantial relevancy to a sensible investigation." *Carpenter v. Wells*, 358 S.W.2d 524, 526 (Ky. Ct. App. 1962)(quoting *Foremost Promotions v. Pabst Brewing Co.*, 15 F.R.D. 128, 130 (N.D. IL.

1953)). Windstream's data requests do not seek information that has "substantial relevancy to a sensible investigation."

Despite Windstream's persistent and intentional efforts to conflate the nature of this case with that of a rate case, **this is not a rate case**. This is a simple collections case seeking recovery for tariffed charges. Pursuant to the filed rate doctrine and KRS 278.160, "[n]o 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 schedule**" (emphasis added). The filed rate doctrine prohibits Mountain Rural from charging, and Windstream from paying, any rate other than that stated in the filed tariff. Windstream's brazen attempt at retroactive ratemaking is clearly prohibited.¹

Furthermore, KRS 278.170 provides "[n]o utility shall, as to **rates** or service, **give any unreasonable preference or advantage to any person**" (emphasis added). Hence, Windstream's attempt to reexamine the methods by which the tariff amounts were calculated, with its ultimate goal of paying less than the tariff rate, is merely an effort to garner an "unreasonable preference." As such, it is prohibited. Any effort to transform this simple collections case into a retroactive ratemaking case is prohibited by the filed rate doctrine, the prohibition against retroactive ratemaking, and the protection against "unreasonable preferences." Likewise, any attempts at discovering information for that same end is outside the scope of discovery and therefore prohibited.

A close examination of each of the data requests that are the subject of Windstream's motion to compel reveals that they seek information outside the scope of discovery. For these reasons,

¹ KRS 278.260 specifically provides that "No order affecting rates or service complained of shall be entered by the commission without a formal public hearing[.]" Moreover, 807 KAR 5:001 Section 12 requires the Commission to make a "prima facie" determination before any complaint against a utility may proceed. These requirements are hardly met by the circumstances of this case—a collection proceeding.

Windstream's motion to compel and motion to hold procedural schedule in abeyance should be denied.

DATA REQUESTS NO. 1: Provide full 210 character usage EMI records for one current month's time period and include, at a minimum, the following fields with respect to each record.

- a. All carrier usage and not just that usage that is specific to Windstream;
- b. "From" telephone number (Positions 15 through 24 of an 11-01-01 EMI Record);
- c. "To" telephone number (Positions 30 through 39 of an 11-01-01 EMI Record);
- d. Date of call (Positions 7 through 12 of an 11-01-01 EMI Record);
- e. Minutes (Positions 61 through 67 of an 11-01-01 EMI Record);
- f. Carrier Identification Code ("CIC") (Positions 46 through 49 of an 11-01-01 EMI Record);
- g. "From" Local Routing Number ("LRN") (Positions 157 through 166 of an 11-01-01 EMI Record);
- h. "To" LRN (Positions 172 through 181 of an 11-01-01 EMI Record);
- i. Method of Recording Field (Positions 68 and 69 of an 11-01-01 EMI Record); and
- j. Connect Time (Positions 55 through 60 of an 11-01-01 EMI Record).

RESPONSE: Mountain Rural objects on the grounds that the request is overbroad, unduly burdensome, not relevant to the subject matter involved in the present action, and not reasonably calculated to lead to the discovery of admissible evidence. Mountain Rural further objects on the grounds that the data request seeks confidential and proprietary information.

In this data request, Windstream requests information regarding "all carrier usage." By asking for all carrier usage, Windstream seeks information pertaining to the calculation of the tariff rate itself. In fact, Windstream readily admits in its motion to compel that it seeks this information to review "Mountain Rural's rate calculation." This is not a rate case. Moreover, pursuant to the filed rate doctrine and KRS 278.160, Mountain Rural cannot retroactively alter its tariffed rates. The information sought by Windstream is not relevant to whether Windstream has paid Mountain Rural's tariffed rates, nor is it reasonably calculated to lead to the discovery of admissible evidence. Therefore, the request seeks information outside the scope of discovery.

DATA REQUEST NO. 2: With respect to usage records prior to June 2004, identify where and how you obtained all minutes for such usage and provide all supporting documentation showing, at a minimum, the source of the data, the time periods covered, and the type of minutes included (e.g., area calling service minutes, toll minutes, etc.).

RESPONSE: Mountain Rural objects on the grounds that the request is overbroad, unduly burdensome, not relevant to the subject matter involved in the present action, and not reasonably calculated to lead to the discovery of admissible evidence.

This request seeks usage records for periods prior to June 2004. This case involves a dispute over charges between June 2004 and the present. Thus, usage records prior to 2004 are neither relevant to this collection case nor reasonably calculated to lead to the discovery of admissible evidence relevant to this dispute.

DATA REQUEST NO. 3: Provide the detail and all supporting documentation of your billing and collection with respect to carrier common line ("CCL") charges by month from 2000 to 2005. With respect to your billing detail, provide the following carrier:

- a. Rate charge;
- b. Billing minutes-of-use; and
- c. Revenue collected.

RESPONSE: Mountain Rural objects on the grounds that the request is overbroad, unduly burdensome, not relevant to the subject matter involved in the present action, and not reasonably calculated to lead to the discovery of admissible evidence.

This request is another attempt to find information pertaining to the establishment and calculation of a previously established and filed tariff rate. The rate is established, and its amount cannot be retroactively altered or recalculated pursuant to the filed-rate doctrine, KRS 278.160 and KRS 278.170. Thus, such information is neither relevant nor reasonably calculated to lead to admissible evidence. Moreover, data concerning amounts prior to June 2004, is not relevant to the present action. Again, this dispute concerns amounts owed from June 2004 to the present. Any prior rate information, as is requested here, simply has no relevancy and is beyond the scope of discoverable information.

DATA REQUEST NO. 4 Provide the access line counts you used to calculate your CCL revenue requirement for each year from 2000 to 2005.

RESPONSE: Mountain Rural objects on the grounds that the request is overbroad, unduly burdensome, not relevant to the subject matter involved in the present action, and not reasonably

calculated to lead to the discovery of admissible evidence. Subject to these objections, and without waiving same, Mountain Rural states see attachment for access line counts in 2004, 2005 and 2006.

Data Request No. 4 seeks access line counts used to calculate the CCL from 2000 to 2005. This request does not seek supporting documentation as alleged by Windstream in its motion to compel. The present action concerns unpaid charges from June 2004 to the present; thus, access line counts from 2000 through 2003 are not relevant to the subject matter of the dispute and are outside the scope of discovery. In addition, the request is objectionable under the filed-rate doctrine to the extent it seeks information regarding Mountain Rural's calculation of an established tariff rate. Nonetheless, subject to these objections, Mountain Rural provided Windstream with access line counts from 2004 to 2006. Therefore, Mountain Rural fully complied with the data request.

DATA REQUESTS NOS. 5 and 6

DATA REQUEST NO. 5 Explain in detail and provide all supporting documents related to how you calculated your CCL per minute rate for each year from 2000 to 2005. Identify the type of minutes you included in your per minute CCL calculation and the sources thereof (*e.g.*, a BellSouth report, your CAB report, etc.), specifically whether the minutes were ACS, ITORP, or some other kind of minutes, and provide all supporting documents.

RESPONSE: Mountain Rural objects on the grounds that the request is overbroad, unduly burdensome, not relevant to the subject matter involved in the present action, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections, and without waiving same, Mountain Rural states see attachment for CCL-related information for 2004, 2005 and 2006.

REQUEST NO. 6 Explain in detail and provide all supporting documents related to the process you use to calculate your annual CCL true-up.

- a. If you perform the calculation monthly, provide supporting documents for twelve (12) months; or
- b. If you perform the calculation annually, provide supporting documents for three (3) years.

RESPONSE: Mountain Rural objects on the grounds that the request is overbroad, unduly burdensome, not relevant to the subject matter involved in the present action, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections, and without waiving same, Mountain Rural states see response to Data Request Number 5.

Data Request Nos. 5 and 6 seek information outside the scope of discovery. Documents related to the method used to calculate Mountain Rural 's CCL per minute rate for each year from 2000 to 2005, and the process used to calculate Mountain Rural's annual true up are all part of Windstream's attempt to discover information pertaining to the calculation of a filed, tariff rate. Pursuant to the filed-rate doctrine, the prohibition against retroactive ratemaking, and the protection against "unreasonable preferences," the rate is established and not subject to retroactive review. Thus, such information is neither relevant nor reasonably calculated to lead to admissible evidence.

Moreover, the data concerning CCL rates prior to June 2004 is not relevant for an additional reason. As stated previously, this dispute concerns amounts owed from June 2004 to the present. Information regarding 2000 through 2003 is of no relevance and is beyond the scope of discoverable information. Nonetheless, subject to these objections, Mountain Rural provided Windstream with responsive data for the years 2004 through 2006. Therefore, Mountain Rural fully complied with these data requests.

DATA REQUEST NO. 7: Provide all data you supplied to the Kentucky Public Service Commission ("Commission") or otherwise relied upon to satisfy the Commission's 1990 Supplement to the Joint Motion of a Coalition of Local Exchange Companies and Interchange Carriers in Administrative Case 323 to establish your per line CCL rate. Indicate which of those data have changed since 1990 and identify what the current values of those data are:

RESPONSE: Mountain Rural objects on the grounds that the request is overbroad, unduly burdensome, not relevant to the subject matter involved in the present action, and not reasonably calculated to lead to the discovery of admissible evidence.

This request is clearly outside the scope of permissible discovery. Data supplied to the Commission in 1990 for the purpose of establishing Mountain Rural's per line CCL rate is irrelevant to a collection proceeding for charges incurred from June 2004 to the present. The filed-rate doctrine specifically excludes retroactive examination of the reasonableness of a previously established rate. The relief sought here, both payments and a declaratory judgment, has no effect on

this result. The information sought is not relevant to a collection case concerning tariffed rates nor is it reasonably calculated to lead to admissible evidence.

DATA REQUEST NO. 8: Provide all data indicated on Attachment A, including the following for years ending 2000, 2001, 2002, 2003, 2004, and 2005:

- a. 32.5000 Basic Area Revenue;
- b. 32.5081 End User Revenue;
- c. 32.5082 Switched Access Revenue - intrastate;
- d. 32.5082 Switched Access Revenue - interstate;
- e. 32.5083 Special Access Revenue - intrastate;
- f. 32.5083 Special Access Revenue - interstate;
- g. 32.5100 Long Distance Message Revenue - intrastate;
- h. 32.5100 Long Distance Message Revenue - interstate;
- i. 32.5200 Miscellaneous Revenue - intrastate;
- j. 32.5200 Miscellaneous Revenue - interstate;
- k. 32.5230 Directory Revenue;
- l. 32.5300 Uncollectible Revenue - intrastate;
- m. 32.5300 uncollectible Revenue - interstate;
- n. Plant specific Operations Expense;
- o. Plant non-specific Operations Expense;
- p. Customer Operations Expense;
- q. Corporate Operations Expense;
- r. Depreciation & Amortization;
- s. Other Operating Income/Expense;
- t. 36.631 Expense Adjustment;
- u. 32.2001 Telecom Plant in Service;
- v. 32.2002 Property Held for Future Use;
- w. 32.2003 Telecom Plant Under Construction;
- x. 32.2005 Telecommunications Plant Adjustment;
- y. 32.2001 TPIS Additions (per general ledger);
- z. 32.2001 TPIS Retirements (per general ledger);
- aa. 32.2001 Broadband Specific Property Additions;
- bb. 32.1120 Cash & Equivalents;
- cc. 32.1170 Account Receivables;
- dd. 32.1406 Nonregulated Investments;
- ee. Message toll - intrastate;
- ff. Message toll - interstate;
- gg. Private line - intrastate;
- hh. Private line - interstate; and
- ii. Exchange.

RESPONSE: Mountain Rural objects on the grounds that the request is overbroad, unduly burdensome, harassing, not relevant to the subject matter involved in the present action, and not reasonably calculated to lead to the discovery of admissible evidence.

The eighth data request is overbroad, unduly burdensome, harassing, and ultimately irrelevant. This substantial request concerning years 2001 thru 2005 has little connection to a dispute concerning the amount Windstream owes Mountain Rural for tariffed charges from June 2004 to the present. In addition, information regarding Mountain Rural's revenues, expenses, and other proprietary information is not relevant to whether Windstream has paid Mountain Rural's tariffed rates nor is it reasonably calculated to lead to the discovery of admissible evidence. The purpose of this data request is simply to harass Mountain Rural.

DATA REQUEST NO. 9: Provide a copy of all agreements, releases, exhibits, memoranda, records, or other documents between you and BellSouth or prepared internally by you that relate to the dispute referenced in Paragraphs 14 and 15 of your Formal Complaint received by the Commission on May 12, 2006 and also identify all payments or other compensation received by you from BellSouth related to such agreements or documents.

RESPONSE: Mountain Rural objects on the grounds that the request is overbroad, unduly burdensome, not relevant to the subject matter involved in the present action, and not reasonably calculated to lead to the discovery of admissible evidence. Mountain Rural further objects on the grounds that the data request seeks confidential information. Subject to these objections and without waiving same, Mountain Rural states it will comply with any Commission order requiring it to produce relevant, confidential information.

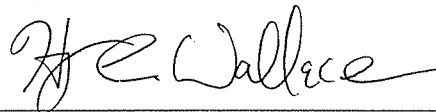
This data request seeks information regarding BellSouth's relationship with Mountain Rural. Any information concerning the relationship between Mountain Rural and BellSouth is not relevant to the issue of whether Windstream has paid Mountain Rural's tariffed rates, nor is it reasonably calculated to lead to the discovery of admissible evidence. Windstream either has or has not paid Mountain Rural's tariffed rates. BellSouth's relationship with Mountain Rural has no bearing on that central issue. In short, the requested information is outside the scope of discovery.

CONCLUSION

Windstream has consistently acted in bad faith by: 1) informing Mountain Rural and the Commission for over four months that it did not owe any undisputed charges and then paying the

charges just before it had to respond to data requests regarding the same; 2) attempting to impermissibly turn a collection case into a rate case; and 3) failing to make a good faith effort to resolve this discovery dispute. Windstream's motion to compel is simply more of the same. As explained above, the data requests seek information outside of the scope of discovery. Accordingly, Windstream's motion to compel and motion to hold the procedural schedule in abeyance should be denied.

Respectfully submitted,



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**COUNSEL TO MOUNTAIN RURAL
TELEPHONE COOPERATIVE
CORPORATION, INC.**

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing was served by mailing a copy of the same by First Class United States mail, postage prepaid, to Daniel Logsdon, Esq., Alltel Kentucky, Inc., 229 Lees Valley Road, Shepherdsville, KY 40165 and Mark R. Overstreet, Esq., Stites & Harbison, 421 W. Main Street, P.O. Box 634, Frankfort, KY 40602-0634, this 13th day of October, 2006.



**COUNSEL TO MOUNTAIN RURAL
TELEPHONE COOPERATIVE
CORPORATION, INC.**