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February 9, 2007

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PUBLIC SERVICE
COMMISSION

VIA HAND-DELIVERY

Hon. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Blvd.
P. O. Box 615
Frankfort, KY 40601

Re: In the Matter of: Brandenburg Telephone Company; Duo County Telephone Cooperative Corporation, Inc.; Highland Telephone Cooperative, Inc.; Mountain Rural Telephone Cooperative Corporation, Inc.; North Central Telephone Cooperative Corporation; South Central Telephone Cooperative Corporation; and West Kentucky Rural Telephone Cooperative Corporation, Inc. v. Windstream Kentucky East, Inc. and Windstream Kentucky West, Inc. before the Public Service Commission of the Commonwealth of Kentucky, Case No. 2007-00004

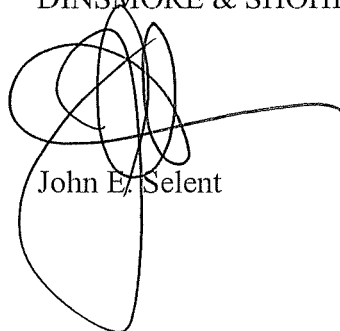
Dear Ms. O'Donnell:

I have enclosed for filing in the above-styled case the original and eleven (11) copies of the Response to: (i) Motion for Dismissal; and (ii) Motion for Temporary Suspension in the above regard. Please file-stamp one copy and return it to our delivery person.

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

Very truly yours,

DINSMORE & SHOHL LLP



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JES/bmt

Enclosures

cc: Holly C. Wallace, Esq. (w/enclosure)
Edward T. Depp, Esq. (w/enclosure)

by Windstream Kentucky East, Inc. ("Windstream East") and Windstream Kentucky West, Inc. ("Windstream West") (collectively, "Windstream"), hereby state as follows.

I. Response to Motion for Dismissal.

Windstream West's Motion for Dismissal claims that it "did not file" a purported tariff revision similar to the purported tariff revision filed by its affiliate Windstream East. Windstream West provides no affidavit to prove this fact; it relies merely upon the representation of its attorney in the matter. Absent any proof from Windstream West regarding this issue, it is inappropriate to dismiss it from this proceeding.

Furthermore, Windstream West makes no attempt to explain why Windstream East would have filed such documentation, while Windstream West did not. After all, given Windstream East's claim that it filed its purported tariff revision to "ensure that its network may not be subject to potential arbitrage opportunities and that it is compensated for transiting local traffic for providers who do not have agreements..." it would seem that Windstream West intended to take the same action. Conversely, if Windstream West did not intend to take the same action as Windstream East, it casts doubt upon the alleged rationale for Windstream East's filing. In either case, the filing(s) raise significant intercarrier issues that will have applicability to both Windstream entities. Accordingly, the Commission should not dismiss Windstream West from this matter.

II. Response to Motion for Temporary Suspension.

Windstream's Motion for Temporary Suspension should also be denied for the simple reason that its purported tariff "filing" was a legal nullity, and there is nothing for the Commission to suspend. Paragraph 5 of Windstream's Motion for Temporary Suspension baldly claims that "the Commission had approved [Windstream's] tariff revisions on December 16, 2006." *Id.* This claim appears to be, at best, a creative attempt to disguise the fact that Windstream paid absolutely no heed

to the applicable tariff filing provisions of the Kentucky Revised Statutes and the Kentucky Administrative Regulations when it "filed" its purported revisions to its general customer services tariff (the "Tariffs").

A. Applicable Law.

The RLECs' complaint in this matter stems directly from the fact that Windstream has abjectly failed to comply with Kentucky law regarding the tariffing of proposed utility services. Kentucky law provides, "Under rules prescribed by the commission, each utility shall file with the commission, within such time and in such form as the commission designates, schedules showing all rates and conditions for service established by it and collected or enforced...." KRS 278.160(1).

Moreover:

No 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 schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.

Id. at subsection (2). Therefore, if a utility does not file – in the manner and form prescribed by the Commission's regulations – an appropriate tariff governing the specific services for which that utility seeks compensation, that utility may not charge or receive compensation for that service. *Id.*

807 KAR 5:011 ("Tariffs") governs the filing of utility tariffs. That section sets forth a number of tariff-filing requirements that Windstream ignored in this particular case. Section 3(5)(c) of this regulation provides that "[t]he second and succeeding pages [of a tariff] shall contain... [the] [s]ignature of the officer of the utility authorized to issue tariffs." *Id.* Section 6(2)(a) of the regulation provides that any new rates included in a tariff "shall contain a [(N)] symbol in the margin indicating the change made." *Id.* Section 6(3) of the regulation further provides that:

New tariffs stating changes in any provision of any effective tariff may be issued and put into effect by either of the two (2) following methods:

(a) By order of the commission upon formal application by the utility, and after hearing, as provided by Section 7 of this administrative regulation[; or]

(b) By issuing and filing on at least twenty (20) days' notice to the commission and the public a complete new tariff (or revised sheet of an existing tariff) stating all the provisions and schedules proposed to become effective as provided by Sections 7 and 9 of this administrative regulation.

Id. (emphasis added).

Of course, each of these regulatory requirements only matter insofar as the tariffing of transit services is not "unreasonable" as that term is used in KRS 278.260(1). Kentucky has never previously recognized a carrier's right to tariff transit services. Kentucky has likewise never previously recognized that a carrier may tariff a carrier-to-carrier charge in an end-user retail tariff. And, it has certainly never recognized that a carrier could do so without complying with the applicable administrative regulations cited above. *See* 807 KAR 5:011.

B. Facts, Discussion, and Analysis.

Windstream's Motion for Temporary Suspension nevertheless rests upon the implicit assumption that a carrier can, in fact, tariff carrier-to-carrier services in its end-user tariffs despite an abject failure to comply with applicable administrative regulations.¹ Initially, when it filed the Tariffs on December 1, 2006, Windstream claimed that the Tariffs were effective on that same day. (Complaint at para. 12.) Aside from this mistake, the Tariffs were not signed by a Windstream officer authorized to issue tariffs; the purported revisions to the general end-user tariff were not clearly identified as required; the services being tariffed were not end-user services; the terms were

¹ The RLECs use the word "assumption" in this case because Windstream makes not the first substantive argument whatsoever to explain how the "filing" of its Tariffs was a legally cognizable event. On this ground alone, then, the Commission should deny Windstream's self-conclusory motion.

unreasonably vague and ambiguous; there was no accompanying cost support to justify any proposed rates; and there was no notice to the Commission, any other carriers, or the public. (*Id.* at paras. 12-17; *see also* 807 KAR 5:011 and KRS 278.260.) From a legal and regulatory perspective, therefore, the initial "filing" was a conglomeration of fatal errors.

Then, upon being ordered to answer or satisfy the complaint, and after having requested an additional week during which it decided upon a strategy for doing so, Windstream – apparently recognizing the nullity of its original "filing" – began claiming that the Tariffs were effective on December 16, 2006. Windstream references no Commission order to this effect, and in fact, its own "filing" belies this very assertion insofar as it purported to make the tariff revision effective on December 1, 2006. So, in the absence of any explanation from Windstream, the parties to this case are left wondering exactly why Windstream now believes that its filing was effective (not upon filing, but) fifteen days after filing. Windstream certainly offers no clarification on this point; it merely assumes its own conclusion.

Unfortunately for Windstream, the law does not support its assumption. The RLECs have already noted (in footnote 1 of the Complaint) that the Tariffs could not have been filed as nonbasic services pursuant to KRS 278.544 (formerly part of HB337). Transit traffic service is a carrier-to-carrier service, and not a nonbasic service as that term is defined in KRS 278.541. Accordingly, the new, reduced-notice tariff filing provisions of KRS 278.544 are not applicable, and standard tariff filing notice provisions (such as those identified in the Complaint) apply to the Tariffs in question.

Moreover, there is no Commission order permitting the filing of noncompetitive carrier-to-carrier services on (as Windstream now, inexplicably, claims) fifteen days prior notice to the Commission. The only orders granting carriers a reduced, fifteen day review period for tariffs come in the context of competitive local exchange services, and similar intermodal alternative services

such as wireless and voice over internet protocol ("VOIP") services. *See generally In the Matter of Petition of BellSouth Telecommunications, Inc. for Presumptive Validity of Tariff Filings*, Kentucky Public Service Commission Case No. 2002-00276 at 5; *In the Matter of Petition by Kentucky ALLTEL, Inc. for Tariff Approval and Revised Tariff Sheets for Its General Customer Services Tariff*, Kentucky Public Service Commission Case No. 2005-00153 at 1-2. Transit services, however, are not competitive local exchange services, nor are they a form of intermodal alternative to the same. They are, undeniably, carrier-to-carrier services. Accordingly, Kentucky Public Service Commission Cases No. 2002-00276 and 2005-00153 have no relevance to this matter, and there is no fifteen day approval period that was applicable to the Tariffs.

In short, the Tariffs are a legal nullity. The Tariffs were not signed by a Windstream officer authorized to issue tariffs. *See* 807 KAR 5:011. The Tariffs do not indicate the authority pursuant to which they were allegedly issued. *See id.* The Tariffs do not contain specific notations to all of the revisions contained therein. *See id.* The Tariffs inappropriately purported to become effective immediately upon the day they were "filed." *See id.* The Tariffs were not supported by any cost studies. *See id.* Windstream did not notify the RLECs, any other carriers, or the public of its filing of the Tariffs. *See id.* The service descriptions and rate classifications in the Tariffs are unreasonably vague and ambiguous. *See* KRS 278.260 And, transit services are not appropriate for tariff filing, in any event. *See id.* The number and scope of "filing" deficiencies are simply staggering.

Consequently, the Commission should deny Windstream's motion because the Tariffs are not legally cognizable documents capable of being suspended.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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