

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

COMMUNICATION WORKERS OF AMERICA)	
AND INTERNATIONAL BROTHERHOOD OF)	CASE NO.
ELECTRICAL WORKERS' REQUEST TO)	2007-00069
ENFORCE COMMISSION ORDER REGARDING)	
WINDSTREAM CORPORATION'S)	
COMPLIANCE WITH SPIN-OFF CONDITIONS)	

O R D E R

On February 12, 2007, the Communication Workers of America ("CWA") and the International Brotherhood of Electrical Workers ("IBEW") filed a petition requesting that the Commission initiate injunctive action in Franklin Circuit Court to enforce its May 23, 2006 Order ("May 23 Order") in Case No. 2005-00534.¹ In the May 23 Order, the Commission approved the application for spin-off and merger of Alltel Corporation's and Valor Communications Group's wireline businesses, which resulted in the creation of Windstream Kentucky East, Windstream Kentucky West, and Windstream Communications (collectively "Windstream"). Within that Order, the Commission outlined several requirements and conditions to be met by Windstream and its predecessors in relation to the Commission's approval. In their petition of February 12, 2007, CWA and IBEW contend that Windstream has violated a term of the May 23 Order by seeking to reduce a portion of its work force in Kentucky. CWA and IBEW allege that the reduction is directly related to the spin-off and merger and, therefore,

¹ Case No. 2005-00534, Application for Approval of the Transfer of Control of Alltel Kentucky, Inc. and Kentucky Alltel, Inc.

violates the Commission's Order, which required that Windstream maintain current employment levels after Commission approval.

The Attorney General, by and through his Office of Rate Intervention, filed a motion in support of CWA's and IBEW's petition. Windstream also filed its response to the motion for emergency relief.² Windstream makes several arguments against CWA's and IBEW's request. Namely, Windstream contends that the Commission's May 23 Order did not state that Windstream was prohibited from making changes to its Kentucky work force level. Additionally, Windstream states that CWA's and IBEW's motion for emergency relief concerns general labor issues, which are not properly before the Commission. CWA and IBEW also filed a reply to Windstream's response.

On February 15, 2007, the Commission issued an Order in response to the February 12 petition in which it gave Windstream 20 days from the date of service of the Order to respond to the petition. On February 23, 2007, CWA and IBEW filed a motion for emergency relief, requesting that the Commission "take all necessary steps to grant or secure appropriate injunctive relief to prevent the layoff of a group of Kentucky employees."³ CWA and IBEW contend that the due date for Windstream's response to the original petition would occur beyond the date of termination for the employees. The layoff in the Kentucky market is scheduled to occur on March 2, 2007.⁴ Approximately

² This response concerns only the Motion for Emergency Relief. As discussed in a separate portion of this Order, the Commission has given Windstream 20 days to respond to CWA's and IBEW's original petition for enforcement of the May 23 Order. Windstream's response is due March 7, 2007.

³ Motion for Emergency Relief by CWA/IBEW at 1.

⁴ Affidavit of CWA, ¶ 4.

46 employees within Windstream's Kentucky market will be affected.⁵ CWA and IBEW assert that a prima facie case of Windstream's violation of the Commission's final Order in Case No. 2005-00534 has been demonstrated. In seeking emergency relief, CWA and IBEW have requested that the Commission issue an emergency order to keep the parties in status quo, pending the resolution of the legal issues, as outlined in the February 12 petition. CWA and IBEW contend that irreparable harm will occur once the employees are permanently separated from Windstream. Specifically, CWA and IBEW have requested that the Commission order Windstream to continue the regular employment of all Kentucky employees affected by the announcements and allow each employee who has elected retirement to revoke such election, without diminishment of such benefits.

The Commission has reviewed the May 23 Order in Case No. 2005-00534 and finds no mandate that the spin-off and merger be subject to the specific condition that Windstream not terminate or lay off any portion of its work force. Neither has the Commission found any portion of the Order specifically stating that Windstream was required to maintain employment levels at a certain level as a part of Commission approval of the spin-off and merger application.

KRS 278.410(3) states "injunctive relief may be granted by the Circuit Court in the manner and upon the terms provided by the law." The procedural requirements for

⁵ CWA and IBEW state that a portion of this number includes employees who have been forced to take retirement with reduced or no benefits, as well as employees who will lose employment and are ineligible for retirement status. See Motion for Emergency Relief at 3-6. Additionally, Kentucky is only one of 16 states wherein Windstream is seeking to make changes to its work force level. The work force change plans were announced by Windstream in December 2006. See Windstream's Response to Petitioners' Motion for Emergency Relief at 14.

seeking an injunction are outlined in CR 65. Although CWA and IBEW have asked the Commission to seek an injunction in Franklin Circuit Court against Windstream to temporarily prohibit it from going forward with the March 2 lay-offs, the Commission has not found a sufficient basis under which to proceed with such a request.⁶

In order for the Circuit Court to issue an injunction, the following factors must be considered: (1) whether the plaintiff has shown an irreparable injury; (2) whether there are equities in the plaintiff's favor, when considering the public interest, the harm to the defendant, and whether the injunction will merely preserve the status quo; and (3) whether the complaint presents a substantial question.⁷ The motion for emergency relief has not raised a substantial question, as there is no evidence that Windstream directly violated any specific term of the Commission's May 23 Order. Although the issue of the maintenance of employment levels was discussed in several instances throughout the April 25, 2006 hearing and in the Order, the Commission did not specifically mandate within the final ordering paragraphs that the applicants preserve employment levels in Kentucky at a specific level for a set period of time. The Commission cannot issue a status quo order or seek to enjoin Windstream from doing an act which it did not prohibit Windstream from doing originally.⁸

⁶ The Commission's decision as to injunctive relief is without prejudice to any rights which may be possessed by the movants in relation to or independent of KRS 278.410.

⁷ See Maupin v. Stansbury, 575 S.W.2d 695 (Ky. App. 1978). See also Rogers v. Lexington-Fayette Urban County Government, 175 S.W.3d 569 (Ky. 2005).

⁸ The ordering paragraphs of the Commission are located on pages 6-7 of the May 23, 2006 Order for Case No. 2005-00534.

The issue, as presented in the motion for emergency relief, is whether the Commission will stop Windstream from going forward with the planned lay-offs as of March 2, 2007 due to alleged violations of the May 23 Order. Although the Commission noted the applicants' statements on this issue within the body of the Order, the Commission did not definitively outline such a requirement to Windstream in granting final approval. At this juncture, the Commission shall decline CWA's and IBEW's emergency request that it issue a status quo order or that it seek emergency injunctive action in circuit court.

IT IS HEREBY ORDERED that the petitioners' motion for emergency relief is denied.

Done at Frankfort, Kentucky, this 1st day of March, 2007.

By the Commission

ATTEST:

Executive Director