COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

MCI COMMUNICATIONS SERVICES, INC., BELL ATLANTIC COMMUNICATIONS, INC., NYNEX LONG DISTANCE COMPANY, TTI NATIONAL, INC., TELECONNECT LONG DISTANCE SERVICES & SYSTEMS COMPANY AND VERIZON SELECT SERVICES, INC.	)	
Complainants	)	
v.	)	CASE NO. 2007-00503
WINDSTREAM KENTUCKY WEST, INC., WINDSTREAM KENTUCKY EAST, INC. - LEXINGTON, AND WINDSTREAM KENTUCKY EAST, INC. – LONDON	)	
Defendants	)	

MOTION TO DISMISS, ANSWER, AND RESPONSE TO MOTION FOR FULL INTERVENTION

Pursuant to the December 21, 2007 Order granting Defendants' Motion for Extension of Time, Windstream Kentucky West, LLC and Windstream Kentucky East, LLC (collectively, "Windstream" and individually as "Windstream West" or "Windstream East") file the following Motion to Dismiss and Answer with respect to the Complaint filed on December 5, 2007 with the Kentucky Public Service Commission ("Commission") by MCI Communications Services, Inc., Bell Atlantic Communications, Inc., NYNEX Long Distance Company, TTI National, Inc., Teleconnect Long Distance Services & Systems Company, and Verizon Select Services, Inc. (collectively, "Verizon" or "Verizon IXCs"). Additionally, Windstream files the following Response to the Motion for Full Intervention submitted by Sprint Nextel on January 14, 2008.

OVERVIEW

1. On December 5, 2007, Verizon filed with the Commission a Petition seeking to force Windstream's intrastate switched access rates to mirror the intrastate switched access rates of the Bell Operating Company ("BOC") serving Kentucky. In its Petition, Verizon asserts that the switched access rates of both Windstream West and Windstream East are "unreasonably high" (Petition at 1) and that the BOC rates would be preferable as the BOC previously has reduced its rates. Verizon fails, however, to allege facts necessary to justify its requested relief and support its contention that Windstream's rates are unjust or unreasonable. For instance, Verizon's Petition fails to allege facts stating how forced mirroring of another company's rates is legally appropriate or required for Windstream or any other carrier in the Commonwealth. Likewise, other than Verizon's comparison of Windstream's intrastate access rates to those of the BOC which is an insufficient test of the reasonableness of those rates, Verizon does not allege facts sufficient to support that any reduction in Windstream's rates is warranted.
2. Further, the allegations set forth in the Petition are incomplete and inaccurate. For instance, Verizon misrepresents that NTSRR charges include equal access costs. Additionally, Verizon omits any discussion that the BOC's prior rate reductions were made contingent in part upon the BOC's corresponding increases to residential local rates. Moreover, Verizon fails to recognize that in the case of Windstream East, the rates which Verizon claims are excessive were established by the former Verizon ILEC in Kentucky. Indeed, while Verizon is quick to compare Windstream's rates only to the BOC and suggest that such a comparison supports its contention that Windstream's rates are unreasonable, Verizon does not acknowledge that Windstream's rates are lower than those of most other incumbent local exchange carriers

("ILECs") in Kentucky. Therefore, under Verizon's asserted analysis, either Windstream's rates should be deemed reasonable based merely on that comparison or virtually every ILEC in Kentucky should reduce its intrastate switched access rates to those of the BOC simply because those rates are higher than those of the BOC. Verizon's asserted analysis is illogical and contrary to Kentucky law.

3. Verizon also makes broad assertions, again without any facts in support thereof, that its proposed access rate decreases would spur competition in what Verizon acknowledges is already a competitive long distance market. Yet, Verizon fails to state facts demonstrating how it or any other interexchange carrier ("IXC") cannot compete at the existing rates or how Verizon's end user customers would see any benefit from the proposed rate reductions. Verizon also completely ignores mechanisms such as local rate rebalancing that are implicit in true access reform (and not just Verizon's brand of "reform" which calls only for rate reductions that financially benefit its IXCs) and how those mechanisms are appropriate under applicable law which deems Windstream's rates just and reasonable and prohibits increases to local rates. Ironically, the most compelling arguments against Verizon's Petition are those made by Verizon's own ILEC affiliates in states such as Pennsylvania where Verizon ILECs are defending similar actions against them by IXCs in that state and have sought and been granted a stay of such action by pointing to access reform efforts pending at the Federal Communications Commission ("FCC").

4. The fact that the Verizon IXCs have initiated this self-serving proceeding in Kentucky is not a complete surprise. Although Verizon affiliates have failed to participate in any meaningful, comprehensive intercarrier compensation reform, Verizon IXC affiliates have opted to initiate these types of piece-meal state proceedings targeted in those locations and only at

those carriers where Verizon's shareholders would bear no risk but would benefit from expense reductions. For instance, Verizon IXC affiliates initiated a similar proceeding to this one in Ohio aimed only at Windstream's Ohio ILEC affiliates and CenturyTel, which proceeding also is being opposed by the Ohio Consumers' Counsel. (See Case No. 07-1100-TP-CSS pending before the Public Utilities Commission of Ohio. "Ohio Proceeding".)[1] In neither the Ohio action nor the Kentucky action has Verizon suggested that it would commit to passing through to its end user customers the expense savings it would receive from the proposed rate reductions or how Verizon's end user customers otherwise would benefit from the proposed rate reductions.

5. Significantly, Verizon's ILEC affiliates have not initiated switched access reductions in other states where the Verizon ILEC affiliates' intrastate switched access rates are substantially higher than their interstate switched access rates or the BOC's rates. In fact, as discussed in greater detail herein, Verizon ILECs vehemently oppose actions against them in states like New York, Virginia, and Pennsylvania, which involve almost identical claims to those advanced by the Verizon IXCs in the Kentucky Petition. (See, *eg*., Docket No. C-20027195 pending before the Pennsylvania Public Utility Commission. "Pennsylvania Proceeding".) For example, the Verizon ILECs noted in the Pennsylvania Proceeding as follows:

> As Verizon and the public parties (Office of Consumer Advocate ("OCA"), Office of Small Business Advocate ("OSBA") and Office of Trial Staff ("OTS")) pointed out, any additional reduction in access rates is premature at this time because the FCC is in the process of completing its proceeding in which it is addressing comprehensive changes to all types of intercarrier compensation. The FCC may well preempt this Commission's jurisdiction over intrastate access rates, but even if it leaves a role for state commissions in this process, the FCC will mandate or at the very least provide guidance on the changes to Verizon's intrastate access rates and the mechanism for rebalancing

[1] Verizon also has pursued a similar action in Minnesota where Verizon maintains no ILEC affiliate. (See, Verizon's Verified Complaint To Reduce the Intrastate Switched Access Charges of Embarq Minnesota, Inc., filed September 15, 2007.)

> the revenue to coordinate with the FCC's overall plan for intercarrier compensation. The FCC's action is thus likely to render the...rebalancing recommendation moot. In fact, this Commission has already stayed its consideration of intrastate access rebalancing for all non-Verizon ILECs to coordinate its actions with the FCC's, and there is no reason why the Commission should adopt a different approach with respect to Verizon's access rates.

(See, Exceptions of Verizon Pennsylvania, Inc. and Verizon North Inc. in the Pennsylvania Proceeding, dated January 9, 2006.) Windstream agrees with the Verizon ILECs that state specific reform is less than prudent and should be stayed pending resolution of federal comprehensive intercarrier compensation reform.

6. In summary, Verizon's Petition should be dismissed as it fails to allege facts necessary to substantiate its claims. For the reasons set forth herein, Verizon's Petition is factually and legally unsubstantiated, does not serve the public interest, and should be dismissed.

MOTION TO DISMISS

7. The crux of Verizon's Petition is that the intrastate switched access rates of Windstream West and Windstream East are unreasonable and should mirror the intrastate switched access rates of BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T") simply because the Windstream rates are higher than those of AT&T and as the AT&T rates previously have been reduced. (Petition at 3.) Despite Verizon's mere rate comparison between Windstream and AT&T, Verizon fails to plead facts necessary to support its Petition and its conclusion that Windstream's rates are unreasonable.

8. Verizon's simple comparison of Windstream's rates to AT&T's rates, or any other carrier in Kentucky for that matter, cannot operate to shift the burden of proof in this matter from Verizon to Windstream. Windstream's rates were lawfully approved by the Commission and deemed just and reasonable pursuant to Kentucky law, and Verizon bears the burden to prove

otherwise. (See, *e.g.*, KRS 278.430.) Verizon cannot shift the burden to Windstream to prove that its rates are reasonable merely by alleging, without any factual basis other than that Windstream's rates are higher than another carrier, that Windstream's rates are unreasonable. Rather, Verizon bears the burden of setting forth facts, which if taken as true, would establish a prima facie case that Verizon is entitled to the relief it requests. Yet, Verizon failed to do so.

9. For instance, Verizon alleged no facts, which if assumed to be true for summary judgment purposes, would demonstrate that Windstream's rates were not established according to applicable law. Verizon did not assert that it is unable to do business or successfully compete at the existing Windstream access rates, and to the contrary, Verizon acknowledged that Kentucky's long distance market is competitive. (Petition at 9 stating "Indeed, there is no debate that Kentucky's long distance market is competitive.") The allegations which Verizon does set forth in its Petition, even if taken as true, support little more than the conclusion that the Verizon IXC affiliates are competitors of Windstream and stand to gain financially from the requested access reductions. As discussed in greater detail below, Verizon's Petition is not in the public interest, fails to establish a prima facie case that the requested relief should be granted, and should be dismissed.[2]

A. The Petition Is Not in the Public Interest.

[2] In applying the standard set forth in *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978), Windstream's Motion to Dismiss demonstrates that Verizon should be enjoined from proceeding with its Petition. First, Verizon set forth no facts verifying or even alleging that it would suffer a non-pecuniary, irreparable injury without the requested relief. To the contrary, Verizon's Petition seeks only monetary relief in the form of rate reductions which serve only to offer the Verizon IXCs expense savings. As further evidence that Verizon's Petition makes no claim of an irreparable injury, Verizon affirmed that Kentucky's long distance market is competitive and that it is competing today at the existing access rates about which it complains. (Petition at 9.) Second, Verizon's Petition sets forth no substantial question on the merits. Indeed, Verizon's Petition in total sets forth little more than the notion that its IXCs would benefit from the expense savings realized from reductions to Windstream's access reductions. Third, the equities weigh in favor of not allowing the Petition to proceed. As set forth extensively herein, Verizon's Petition is not in the public interest. For these reasons, applicable Kentucky law supports dismissal of the Petition.

10. Verizon's Petition is not in the public interest and should not be allowed to proceed. In particular, the Petition sets forth an ill advised piece-meal approach to access reform that also is being resisted by Verizon ILECs in other states where they are being challenged to make similar reductions to intrastate switched access rates that the Verizon IXCs are advocating Windstream make in Kentucky. Verizon's Petition is intended merely to obtain financial benefits in Kentucky for its IXC affiliates in the form of targeted expense savings without any framework for comprehensive access reform and without corresponding pass-through rate reductions for Verizon end user customers.

11. As noted previously, Verizon IXCs filed a similar complaint in the Ohio Proceeding against Windstream ILEC affiliates operating in Ohio and CenturyTel. As is the case with Verizon's Petition in Kentucky, Verizon's actions in the Ohio Proceeding do not seek comprehensive intercarrier compensation reform and instead seek only one-sided access rate reductions targeted at those carriers from whom Verizon would obtain the maximum expense savings. Thus, it would seem that Verizon has established a pattern of seeking so-called access "reform" only in certain locations where its IXC affiliates serve to benefit from expense savings without any corresponding risk that its ILEC affiliates would be required to make the same type of access rate reductions that Verizon advocates for ILECs such as Windstream.

12. As Windstream recognized in the Ohio Proceeding, existing intercarrier compensation mechanisms are outdated, unsustainable, and in need of **comprehensive reform**. As the existing mechanism is a patchwork of inconsistent compensation methods resulting in disparate compensation rules for similar traffic, it is unwise to continue to proceed with reform in a similar patchwork fashion which is exactly the net result of the Verizon entities' action or inaction in the various states such as Kentucky, Ohio, Minnesota, Pennsylvania,

New York, and Virginia. Rather, the prudent solution is comprehensive intercarrier compensation reform offering stability and certainty in the marketplace. Yet, Verizon has failed to support this type of meaningful, comprehensive reform like that offered by the Missoula Plan. In contrast, Windstream supports the Missoula Plan which comprehensively would reduce intercarrier compensation rates, including those that Verizon seeks to reduce in its Petition, provide for minimal increases in end user rates and provide universal service support necessary to ensure consumers in high-cost areas continue to receive high quality services at affordable prices. The Missoula Plan, however, would not result in a patchwork of targeted rate reductions aimed only at gaining certain expense savings for select interexchange carriers.[3]

13. Verizon's piece-meal approach to reform is anything but consistent and comprehensive and instead is targeted only in select states where Verizon affiliates would receive a net benefit. More specifically, Verizon entities seek intrastate switched access reductions only in those states where Verizon's ILEC revenues are not affected such as Ohio or where Verizon does not maintain an ILEC affiliate such as Kentucky and Minnesota. Moreover, even within the targeted states, the Verizon entities pursue the requested reductions only as to targeted carriers. As discussed below, where Verizon ILECs in Pennsylvania have been challenged to reduce access rates, Verizon ILECs oppose such action on the basis that such action is not representative of comprehensive reform and should be stayed pending further action by the FCC for intercarrier compensation reform.

[3] The Ohio Consumers' Counsel ("OCC") also opposes Verizon's actions in the Ohio Proceeding. Among other things, the OCC has noted that when Verizon reduced its own intrastate access charges, it did so by also adopting monthly rate increases for residential customers of $1.25 and for business customers of $3.00. (See, OCC's Memorandum in Support and Initial Comments, Ohio Proceeding, dated November 7, 2007.)

14. Significantly, in states such as Florida, North Carolina, and New York, Verizon ILECs have not reduced their intrastate access rates in the manner in which the Verizon IXCs assert that Windstream must do in Kentucky (*i.e.*, either reduce to the BOC's intrastate access rates or mirror its own interstate access rates). Specifically, the originating intrastate access rates for the Verizon ILECs in Florida, North Carolina, and New York are 453%, 546%, and 394% higher, respectively, than the Verizon ILECs' originating interstate access rates in those states. Likewise, the terminating intrastate access rates for the Verizon ILECs in those same states are 595%, 1638%, and 394% higher, respectively, than the Verizon ILECs' terminating interstate access rates in those states.

15. In fact, Verizon ILECs' tariffed intrastate switched access rates in Florida, North Carolina, South Carolina, and Texas all exceed those of the BOC in those states by 49% to 1274% as demonstrated in the following chart:

State	Verizon Rate	BOC Rate	% Difference
Florida			
Originating	0.0342164	0.010578	223%
Terminating	0.0429705	0.016436	161%
North Carolina			
Originating	0.0256135	0.005015	411%
Terminating	0.0689135	0.005015	1274%
South Carolina			
Originating	0.0149952	0.01004	49%
Terminating	0.0149952	0.01004	49%
Texas			
Originating	0.0176608	0.010149	74%
Terminating	0.0176608	0.009219	92%

In Texas, the Verizon ILEC intrastate access rates remain higher than those of the BOC after those rates have been subject to prior reductions in that state's ongoing universal service proceedings. Nevertheless, if one uses the analysis by the Verizon IXCs in their Petition, the

Verizon ILEC rates should be considered unreasonable, and the Verizon ILECs in Florida, North Carolina, South Carolina, New York, and Texas automatically should reduce their intrastate switched access rates based merely on this simple rate comparison. As discussed herein, Windstream does not support any claim by any IXC that a mere rate comparison is sufficient to establish a prima facie case regarding the reasonableness of a rate. However, Windstream believes that the actions (and inaction) of the Verizon entities in the various states demonstrate a new phenomena that can best be described as "reform arbitrage" but which in reality is self-serving and not in the public interest.

16. The Verizon ILECs' pleadings in the Pennsylvania Proceeding provide a strong foundation in support of the fact that the Verizon Petition in Kentucky is not in the public interest and should be dismissed or at a minimum stayed pending further federal access reform. In Pennsylvania, the Verizon ILECs face demands to reduce their intrastate switched access rates based on grounds that are virtually identical to those advanced by Verizon IXCs against Windstream in Kentucky. The following are excerpts from just one of the Verizon ILECs' pleadings in the Pennsylvania Proceeding demonstrating the need to avoid proceeding with access reform in this piece-meal fashion:

> The FCC is considering whether to preempt this Commission's jurisdiction over intrastate access charges entirely. At the very least, the FCC's decision will provide guidance to the states as to whether and how they should alter intrastate access rates. In fact, interexchange carriers ("IXCs"), Qwest, AT&T and MCI - the same parties that are asking this Commission to forge ahead with access rate reductions and retail rate increases now, and to ignore the FCC proceeding - are at the same time urging the FCC to preempt this Commission's jurisdiction over intrastate access charges.
>
> If there was any doubt that the best course for Pennsylvania customers is to defer any substantive consideration of further intrastate access rebalancing for the Verizon companies until the FCC completes its open proceeding addressing the same subject, that doubt was laid to rest last week with the Commission's [determination] to stay that investigation...Not only has the Commission now

issued clear direction that its intrastate access rulings must wait for and be "coordinated" with the FCC proceeding, but the record developed in this remand also demonstrates ***no*** offsetting benefit to end user customers in Pennsylvania from precipitously rushing to implement access reductions and end-user rate increases now and without waiting for the FCC to rule, as the IXCs demand. **While it may advance the IXCs' own corporate financial interest to vigorously litigate to reduce their own access costs, these companies do not represent the best interests of Pennsylvania consumers, and it is this public interest that the Commission must consider in deciding what to do at this stage of the proceeding**...

In favor of immediate rate rebalancing, Qwest, AT&T and MCI raise their same time-worn arguments: they vaguely claim that reducing their own intrastate access costs will somehow result in lower toll rates for end-users or enhance competition in the toll market - a market that the Commission has already recognized as highly competitive. But there is no concrete evidence on the record in this proceeding to show that toll rates in Pennsylvania have decreased as a result of the last rebalancing, or will decrease if access rates are lowered again. **Also, no party has produced any evidence to contradict what this Commission itself found years ago- that "IXCs are setting their rates on a national level using flat rates that have *no relationship with the access rates of any specific ILEC*," so that access reductions are not necessary to spur toll competition...**The suggestion that the Commission should simply implement more access reductions and end user rate increases immediately, without recognizing the impact of this simultaneous FCC proceeding, is plainly contrary to the Commission's own holdings and **is not in the public interest**...

In support of their arguments that the Commission should rush ahead and reduce Verizon's intrastate rates without waiting for the FCC**, the IXCs contend that the level of Verizon's intrastate rates is impeding their ability to compete for toll customers against carriers providing bundled plans, including wireless carriers...Even if these claims had some merit, however – which they do not – as Verizon explained in its comments to the FCC, only a comprehensive solution by that agency that covers both interstate and intrastate rates nationally will remedy the concerns over the disparity in intercarrier compensation rates for different types of traffic subject to different jurisdictions.** A limited reduction to intrastate rates in Pennsylvania isolated from the FCC's comprehensive solution will not. Accordingly, this Commission should await FCC action or guidance.

(See, Main Brief on Remand of Verizon Pennsylvania, Inc. and Verizon North Inc., Pennsylvania Proceeding in Docket No. C-20027195, dated August 17, 2005. Emphasis in bold and underline added and citations omitted.) The Verizon ILECs then add that the

"Commission should wait for the FCC to act even if it requires some time for the FCC to complete a thorough review of this complex issue of intercarrier compensation." (*Id.* at 17.) The Verizon ILECs in Pennsylvania also advance a compelling argument demonstrating that efforts such as that by the Verizon IXCs in Kentucky are not in the public interest: "The IXCs' testimony is long on rhetorical claims of amorphous 'benefits' from immediate access reductions, but notably short on any details establishing precisely how immediate access rate reductions will actually benefit Pennsylvania end users, or demonstrating any specific harm that would result from leaving rates at current levels until the FCC completes its intercarrier compensation proceeding." (*Id.*) Such insight is particularly relevant to this Petition in Kentucky which is utterly lacking in any factual allegations suggesting how Kentucky end users would benefit from the actions being demanded by Verizon.

17. Most notably, two days after the Verizon IXCs filed their Petition in Kentucky on December 5, 2007, Verizon ILECs in Pennsylvania filed on December 7, 2007 a status report and motion to extend the stay, asserting as follows in support of their plea that the Pennsylvania Public Utility Commission further stay the Pennsylvania Proceeding:

> The Commission recognized that, while the record was being assembled in this case, the FCC had opened a proceeding to address more comprehensive intercarrier compensation issues- including matters that only the FCC can address, such as alterations in both intrastate and interstate access pricing, universal service, reciprocal compensation and potential preemption of state authority over intrastate rates. The Commission wished to adopt a coordinated approach rather than getting ahead of the FCC...While the FCC proceeding has not progressed as quickly as Verizon wished or anticipated, the proceeding is still pending, and the FCC should and is still expected to address the interrelated issues of intercarrier compensation and universal service in a comprehensive fashion."

(Verizon's Status Report and Motion to Extend the Stay at 4, Pennsylvania Proceeding, dated December 7, 2007.)

18. In their motion to extend the stay in the Pennsylvania Proceeding, the Verizon ILECs suggest that the stay is appropriate as the Verizon ILECs' rates already are low but that the commission should proceed with investigation of the rates of smaller rural ILECs. Specifically, the Verizon ILECs noted that the more pressing issue is the "inequity" of some carriers being allowed to charge "intrastate access rates of 4 to 6 cents a minute – and in some cases much higher – while Verizon and many other members of the industry are charging rates of 1.8 cents per minute or lower." (*Id.* at 5.)[4] The Verizon IXCs in their Kentucky Petition, however, fail to state any facts demonstrating a thorough comparison of rates for all Kentucky ILECs. To the contrary, Verizon alleges only that Windstream's intrastate switched access rates are higher than AT&T's intrastate switched access rates. If Verizon had undertaken a more thorough comparison of intrastate switched access rates in Kentucky, it should have concluded that Windstream's intrastate switched access rates are lower than most ILECs in Kentucky. To be clear, Windstream suggests only that the meager comparison Verizon did undertake is lacking at best. Notwithstanding, even had Verizon alleged facts asserting a more thorough comparison of rates, a mere comparison of rates is insufficient basis to establish that any rate is unreasonable. Ultimately, Verizon's selective rate comparison is irrelevant as to whether Windstream's rates may be considered unreasonable and provides further support that state commissions should not engage in piece-meal access reform at the factually hollow requests of IXCs like Verizon.

19. The inconsistencies in Verizon's approach to access "reform" in the various jurisdictions demonstrate very clearly why Verizon's "reform arbitrage" is unacceptable and not in the public interest. Indeed, the targeted access rate reductions sought by the Verizon IXC

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[4] As a reminder, the Verizon ILEC tariffed rates set forth in the preceding chart show that Verizon ILEC terminating intrastate switched access rates in Florida and North Carolina exceed 4 cents and 6 cents, respectively.

affiliates in the Kentucky Petition are not tantamount to "reform" and are merely attempted financial gains for certain Verizon IXC affiliates. As Verizon ILECs have observed, rhetorical claims of benefits to end users without any supporting detail to establish precisely how such reductions will actually benefit end users are not meaningful reform and do not serve the public interest. (*Supra.*) Intercarrier compensation reform is not appropriately exacted by individual carriers in targeted jurisdictions where those carriers financially have the most to gain. Rather, intercarrier compensation reform will only be effective if implemented in a meaningful and comprehensive fashion.

20. Not only does Verizon's Petition fail to serve the public interest by operating in contravention of existing efforts by the FCC to implement meaningful, comprehensive reform for all carriers in all states, but Verizon's Petition also fails to establish a framework for meaningful access reform within the Commonwealth. Specifically, although Verizon's Petition preaches "reform", it seeks only access rate reductions for two Kentucky carriers without consideration of all carriers or corresponding mechanisms such as rate rebalancing. What Verizon truly seeks are expense savings which may serve to improve Verizon's bottom line but do little to further intercarrier compensation reform or to benefit Kentucky end users.

21. In the event that the Commission were to determine that it is appropriate to proceed with a review of any carrier's (including Windstream) intrastate switched access rates - which Windstream believes is improper for reasons set forth herein - it is appropriate that the Commission do so only in the context of a generic proceeding which considers all aspects of comprehensive reform (including necessary mechanisms such as local rate rebalancing as well as pending and potentially preemptive reform efforts by the FCC) and which includes all Kentucky ILECs. This position is similar to that advanced by the Verizon ILECs in the

Pennsylvania Proceeding that any true access reform must be comprehensive in nature and should also be coordinated with any federal reform efforts.

22. The Minnesota Department of Commerce employed a similar approach in reviewing the appropriateness of intercarrier compensation reform in its state. Although the Minnesota Department of Commerce maintains ongoing rulemakings, its findings on October 20, 2004 (attached as Exhibit A) demonstrate that after years of considering access reform, its telecommunications director concluded that it was contrary to the interests of local service ratepayers to mandate that ILECs reduce switched access rates charged to IXCs for a variety of reasons. The reasons included that such reductions would result in higher local telephone rates, there were no assurances that end user customers in Minnesota would derive any benefit from the access rate reductions to IXCs, creation of a universal service fund to address such reductions was not acceptable and unrealistic, and new technologies allowed consumers to bypass access charges thereby extinguishing the need for the Department to mandate access reductions.

23. Again, while any access reform action should be undertaken by this Commission in a similar manner (*i.e.*, one which involves all carriers and investigates all aspects and mechanisms of reform), the more prudent course of action (adopted previously by states such as Ohio and Pennsylvania) is to await further action and guidance by the FCC. As noted by the Verizon ILECs in the Pennsylvania Proceeding, this is the preferred course of action even if the federal reform is taking longer than anticipated. (*Supra.*) In any event, no proceeding should be allowed to proceed in Kentucky (either in the form of a generic proceeding or in the form of self-serving actions like the Verizon Petition) until such time as moving parties like Verizon establish factually and legally that such investigation is warranted and proper. For all

of the reasons set forth above, the Petition is not in the public interest or otherwise supported by sound public policy and should be dismissed.

B. The Petition Is Not Supported in Law or in Fact.

24. Despite the fourteen pages of rhetoric in its Petition, Verizon fails to state facts sufficient to establish a prima facie case in support of its requested relief. To begin, Verizon makes broad assertions that Windstream's intrastate switched access rates are "unreasonably high" and "excessive" (Petition at 1, 5, and 6), that Windstream's rates are not "fair, just and reasonable" (Petition at 3), and that Windstream should mirror AT&T's intrastate switched access rates (Petition at 3). Yet, Verizon fails to state any facts, which even if taken as true, actually would support Verizon's broad assertions. As noted previously, Verizon bears the burden of proof to state facts sufficient to establish a prima facie case. It may not simply allege, without any factual or legal foundation, that Windstream's rates are unreasonable and then shift the burden to Windstream to state facts establishing that Windstream's rates are reasonable.

25. Further, the primary factual allegations that Verizon includes in its Petition are insufficient (and in many instances wholly irrelevant) to Verizon's contention that Windstream's rates are unreasonable. These facts include that AT&T has reduced its intrastate access rates over time (Petition at 3); that Windstream's intrastate switched access rates are higher than those of AT&T (Petition at 3 and 5); that AT&T, Verizon, and Windstream compete in the intrastate toll market (Petition at 6); that Windstream's IXC affiliate has benefited from AT&T's access rate reductions (Petition at 7); that Windstream offers bundles including long distance

services (Petition at 7);[5] that NTSRR-based charges were imposed as a mechanism to transition to "equal access" (Petition at 7); that Kentucky's long distance market is competitive (Petition at 9); that Windstream's parent company recently petitioned the FCC for authority to convert its remaining rate-of-return exchange properties to federal price-cap regulation (Petition at 10);[6] and that Windstream has an "unfair advantage" competitively over Verizon in the long distance market (Petition at 11). When taken as a whole and if, for argument's sake, assumed to be true, such allegations support only the conclusions that Windstream's rates are higher than the largest carrier/BOC in Kentucky, that Windstream and Verizon compete in the long distance market which is deemed competitive, and that Verizon benefits if Windstream reduces its intrastate access rates. However, **none** of these allegations establishes a prima facie case that Windstream's rates are unreasonable and that Verizon is entitled to the relief it seeks.

26. In particular, with respect to Verizon's broad assertions that Windstream's intrastate switched access rates are unjust and unreasonable, the only factual allegation advanced by Verizon in support of this assertion is that Windstream's rates are higher than the BOC. Yet, this fact is irrelevant to whether Windstream's rates are reasonable or whether they were established in accordance with applicable law. Verizon did not allege that Windstream's rates were not established in accordance with applicable law. Such an allegation would have been particularly precarious with respect to Windstream East since Verizon may recall that the

[5] Verizon's allegations on this point are astounding given the bundles offered on Verizon's website, including the Freedom Calling Plan which offers unlimited local calling, unlimited long distance, and features such as Home Voice Mail and Caller ID. (See, www22.verizon.com/Residential/VZPackages.) It is unclear how bundle availability has any relevance to Verizon's requested relief in its Petition.

[6] Verizon is correct that Windstream Corporation made such a price cap filing. Nevertheless, Verizon fails to allege facts demonstrating how that filing has any relevance to the issues in this proceeding. Further, Verizon omits any discussion of the fact that the FCC itself has recognized that carriers such as Windstream should not be required to adopt BOC-like rates. In fact, Windstream's price cap filing seeks a target access rate different than that of the BOC target rate and also requests to be allowed to maintain universal service support.

rates of Windstream East were established by the former Verizon ILEC in Kentucky. As part of Windstream East's acquisition of the Kentucky properties from the former Verizon ILEC (Case No. 2001-399), Windstream agreed to adopt the Verizon ILEC rates which were deemed just and reasonable by the Commission.

27. Additionally, while Verizon alleges that Windstream's rates should be compared to AT&T, Verizon omits discussion of critical facts surrounding the context of AT&T's prior intrastate access rate reductions, namely that AT&T accomplished the reductions prior to the passage of the Commonwealth's alternative regulation legislation and that AT&T offset the majority of the reductions with corresponding increases to residential local rates in all rate groups. (See, Case No. 99-434.) While Verizon asserts, incorrectly and again without facts in support, that Windstream could recover any forced access rate reductions through increases to nonbasic rates, Verizon does not set forth any basis to demonstrate that such increases to rates for nonbasic services are appropriate or sufficient given applicable market demand. Moreover, Verizon cites to KRS 278.260 and KRS 278.030 as support for its Petition but fails to recognize that, as an alternatively regulated carrier, Windstream is exempt from KRS 278.260 and that Windstream's rates, charges, earnings, and revenues are deemed to be just and reasonable under KRS 278.030 and administrative regulations promulgated thereunder. Verizon alleges no foundation sufficient to demonstrate how Windstream's intrastate access rates are not deemed just and reasonable under applicable Kentucky law. The fact that Verizon would benefit financially if Windstream reduced its intrastate access rates and Verizon's assertion that Windstream's rates are higher than the BOC are irrelevant and do not substantiate Verizon's claim that Windstream's rates are unreasonable.

28. As acknowledged above, Verizon's Petition sets forth several allegations regarding the long distance market in Kentucky, including that AT&T, Windstream and Verizon compete in the intrastate toll market, that Windstream has an unfair advantage over Verizon in the long distance market, and that Kentucky's long distance market is competitive. However, these allegations, even if taken as true for purposes of this Motion to Dismiss, do not support Verizon's requested relief for intrastate access rate reductions. Indeed, as the Verizon ILECs noted in the Pennsylvania Proceeding, such assertions by the IXCs are "time-worn." (*Supra.*) Regarding the specific allegation that Windstream's IXC affiliate has an unfair advantage over Verizon in the long distance market, Verizon's ILEC affiliate in New York explained the fallacy of such a claim when faced with a similar allegation against it by Sprint:

> Sprint's Petition is premised in large part on the notion that contributory access rates - no matter how reasonable - somehow undermine competition between Verizon's affiliated toll providers (referred to here collective as "VZ-LD") and unaffiliated carriers such as Sprint. **Of course, VZ-LD pays precisely the same tariffed access charges to Verizon as unaffiliated providers pay**.

(Verizon New York Inc.'s Response to the Petition, Case 07-C-0347 before the New York Public Service Commission, dated April 23, 2007. Emphasis added.) Likewise, Verizon did not dispute in its Petition the fact that Windstream's IXC affiliate pays the same access charges that Verizon pays. Additionally, the Verizon ILECs in Virginia, responding to a similar allegation by Sprint that Verizon ILECs' level of access rates impairs the long distance market, noted the same as their New York counterpart as follows:

> Even if it were assumed - incorrectly - that switched access is a necessary "bottleneck" input to toll service, and that Verizon is a monopoly provider of that service, Verizon and its affiliates could exploit that monopoly in order to gain an unfair advantage in the toll market only if Verizon included more above-cost contribution per-minute in its access charges than VZ-LD included in its toll charges. This, among other things, is the minimum requirement for a prize "squeeze." But if such a contribution disparity did exist, then it would be more

profitable for the Verizon companies if VZ-LD simply stopped providing toll services.

(Verizon's Post Hearing Brief, Case No. PUC-2007-00008 before the Virginia Commission, dated September 14, 2007.) For that matter, Verizon's Petition failed to allege any basis demonstrating that Verizon or any other IXC is unable to successfully compete in Kentucky's long distance market at existing rates.

29. Additionally, Verizon alleges that NTSRR charges were imposed as a mechanism to transition to "equal access". Verizon's allegations on this point are false. Specifically, Verizon asserts incorrectly that the NTSRR charges assessed by Windstream were established over 15 years ago as a transition mechanism to "equal access" and a competitive intraLATA toll market. Verizon further alleges that "there is no reason for any company to be paying this anachronistic charge." (Petition at 7.) Contrary to Verizon's assertions, NTSRR charges permit ILECs like Windstream to recover costs associated primarily with loop costs rather than equal access recovery. The Commission itself explained that the purpose of the NTSRR charge is "to recover the revenue requirement associated with the NTS [non-traffic sensitive] plant."[7] NTS plant includes all the local loop plant needed to connect a customer to the public switched network rather than an "equal access transition" as Verizon contends. The Commission included the following revenue streams in the initial development of the NTSRR charge: interLATA and intraLATA carrier common line revenue, universal local access revenue and the revenue impact associated with changes to interLATA access rates and toll settlement rates to mirror interstate access rates.[8] In essence,

[7] *In the Matter of BellSouth Telecommunications, Inc's Application to Restructure Rates*, Case No. 97-074, Order (released October 4, 1997) at 2.

[8] *In the Matter of An Inquiry into intraLATA Toll Competition, an appropriate compensation scheme for completion of intraLATA calls by interexchange carriers, and WATS and Jurisdictionality,* Administrative Case No. 323 Phase I, Order (released May 6, 1991) at 28. ("May 1991 Order")

the NTSRR charge was developed from then existing revenue streams designed to recover NTS costs and, despite Verizon's assertions, none of the revenues streams were associated with equal access transitions.

30. Moreover, costs associated with equal access conversions were addressed after the NTSRR charge was implemented. In the May 1991 Order, which established the NTSRR rates, the Commission also established an intraLATA Presubscription Task Force ("Task Force") to examine, among other things, the costs of implementing intraLATA equal access.[9] Based on the Task Force's recommendation and comments from interested parties, the Commission issued an order on December 29, 1994 addressing equal access implementation schedules, cost recovery and monitoring issues.[10] In the December 1994 Order, the Commission concluded that cost recovery for equal access should be based on presubscribed lines and that all toll market participants, including ILECs, should share in cost recovery.[11] The Commission determined that costs associated with equal access implementation were to be recovered over a five-year period through a separate cost recovery pool and a single cost recovery tariff administered by BellSouth (now known as AT&T).[12]

31. Clearly, Verizon's allegations regarding the NTSRR charges are false as these charges do not include any equal access costs and were designed to recover solely NTS costs. Even if Verizon's allegations on this issue were taken as true solely for purposes of this Motion to Dismiss, such allegations are irrelevant and do not establish a basis for Verizon's contention that Windstream's rates are unreasonable.

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[9] *Id.* at 34.

[10] *In the Matter of An Inquiry into intraLATA Toll Competition, an appropriate compensation scheme for completion of intraLATA calls by interexchange carriers, and WATS and Jurisdictionality,* Administrative Case No. 323 Phase I, Order (released December 29, 1994) at 1. ("December 1994 Order")

[11] *Id.* at 17-18.

[12] *Id.* at 19-20.

32. For the reasons set forth herein, Verizon's Petition is not in the public interest, fails to state necessary and critical facts in support thereof, and is without merit. Windstream requests that the Commission dismiss the Petition in its entirety as it does not establish any basis for relief and otherwise is not in the public interest. Despite Verizon's failure to establish a prima facie case for its requested relief, if the Commission nevertheless determines that the Petition may proceed, Windstream requests that the Commission do so only in the proper context of a generic proceeding aimed at meaningful, comprehensive access reform for all carriers in the Commonwealth.

ANSWER

33. Paragraphs 1 through 32 above in the Overview and Motion to Dismiss are incorporated herein by reference.
34. Windstream denies all allegations in the Petition unless specifically admitted herein.
35. Windstream is without information sufficient to admit or deny Verizon's allegations as to its business and affiliates in Paragraphs 1 and 3 of the Petition and, therefore, denies the allegations.
36. Windstream denies the allegations in Paragraph 2 of the Petition. Windstream affirms that the companies are LLCs and that Windstream East has two study areas (Lexington and London) but is one operating entity. Further, Windstream affirms that neither Windstream East nor Windstream West provides interLATA toll services.
37. Windstream denies the allegations in Paragraphs 4 and 7 of the Petition and states affirmatively that the Commission proceedings addressing prior access rate reductions by AT&T are written documents which speak for themselves.

38. Windstream denies the allegations set forth in Paragraphs 5, 8, 9, 10, 11, 12, 14, 15, 16, 19, 21, and 25 of the Petition and states that these paragraphs set forth Verizon's opinions or asserted legal conclusions none of which necessitate an admission or denial but which Windstream states affirmatively are unsubstantiated or false. Specifically, Verizon's allegations regarding the NTSRR charge and that Windstream has an unfair competitive advantage are false as explained in the Motion to Dismiss. With respect to any cited tariffed rates or terms or state commission or FCC authorities, Windstream states affirmatively that such authorities are written documents which speak for themselves. With respect to Paragraph 20, Windstream admits Verizon's statement, as Windstream understands it, that negotiated intercarrier compensation agreements are the preferred long-term solution.

39. Windstream denies the allegations in Paragraph 6 of the Petition and states generally that inclusion of confidential negotiations in a complaint is inappropriate. In order to respond to Verizon's allegations, Verizon's communications did not pertain to switched access, and Windstream did not state that it was not interested in meaningful negotiations but rather was not interested in Verizon's proposal.

40. Windstream denies the allegations in Paragraph 13 of the Petition and states affirmatively that Verizon's characterization of the NTSRR charges is false for the reasons set forth in the Motion to Dismiss. Additionally, any cited orders are written documents which speak for themselves.

41. With respect to the allegations in Paragraph 17 of the Petition, Windstream states that any cited authorities are written documents which speak for themselves. Windstream denies that there are three ILECs in Kentucky and that Lexington is "Windstream's largest wireline market in the country" for the reason that Verizon's criteria are unknown. Further,

Windstream states affirmatively that the data cited by Verizon are wholly irrelevant to the issues in this proceeding and do not state facts sufficient to support a prima facie case that Verizon is entitled the relief it is seeking.

42. With respect to the allegations in Paragraph 18 of the Petition, Windstream states that the price cap filing of Windstream Corporation is a public, written document which speaks for itself, is wholly irrelevant to this proceeding for the reasons footnoted in the Motion to Dismiss, and is mischaracterized by Verizon. Further, the FCC's CALLS Order is a written document which speaks for itself.

43. With respect to Paragraph 20 of the Petition, Windstream admits Verizon's statements, as Windstream understands it, that negotiated intercarrier compensation agreements are the preferred long-term solution but states that KRS 278.546(4) speaks for itself, and Windstream denies the remaining allegations of said paragraph.

44. Windstream denies the allegations and opinions in Paragraphs 22 and 26 of the Petition. Windstream states affirmatively that the Legislature's policy with respect to the rates of alternatively regulated carriers like Windstream is that said rates are just and reasonable and that the Kentucky statutes are written documents which speak for themselves.

45. With respect to Paragraphs 23 and 24 of the Petition, the FCC's CALLS Order is a written document which speaks for itself. Although Verizon also includes in Paragraph 24 an allegation regarding the Commission's action, Verizon does not provide a citation, and Windstream states that any Commission order is a written document which speaks for itself.

46. Windstream denies that Verizon's requested relief in Paragraph 27 of the Petition is appropriate or justified and affirmatively requests that the Commission deny all such relief and dismiss the Petition.

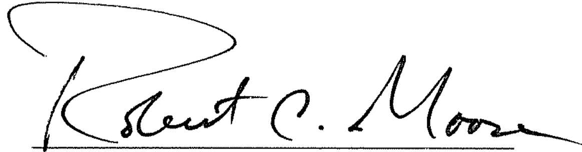
47. Windstream reserves the right to plead further in this case as it may deem necessary.

REQUESTED RELIEF

WHEREFORE, Windstream requests that the Commission dismiss Verizon's Petition in its entirety and grant all other necessary and proper relief to which Windstream may be entitled.

Respectfully submitted,

WINDSTREAM KENTUCKY EAST, LLC
WINDSTREAM KENTUCKY WEST, LLC



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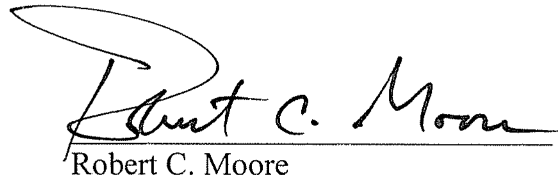
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon Douglas F. Brent and C. Kent Hatfield, Stoll, Keenon Ogden, PLLC, 2000 PNC Plaza, 500 West Jefferson Street, Louisville, Kentucky 40202 and Dulaney L. O'Roark III Vice President and General Counsel - Southern Region, Verizon, 5055 North Point Parkway, Alpharetta, Georgia 30022, by placing same in the U.S. Mail, postage pre-paid, this the 17th day of January, 2008.



Robert C. Moore

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October 20, 2004

Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, Minnesota 55101-2147

Re: Access Reform Proceedings, Docket Nos. P-999/CI-98-674 and
P-999/CI-04-852

Dear Dr. Haar:

Six years ago the Commission opened the access reform docket (P-999/CI-98-674). The ultimate goal of this docket is to mandate that Minnesota's incumbent local exchange carriers (ILECs) reduce any above cost charges they impose on interexchange carriers (IXCs) for originating and terminating calls. At the time, and throughout much of the proceedings, the Department supported this approach. However, for the reasons outlined below and discussed in the attached paper, the Department believes that this is no longer the best approach and is, perhaps most importantly, contrary to the interests of Minnesota's local service ratepayers.

The Department reaches this conclusion for these reasons:

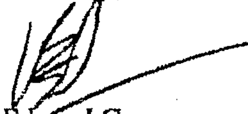
- Reductions in access charges will result in higher local telephone rates.
- There are no assurances that Minnesotans will derive any corresponding benefit from lower long distance rates from access reductions.
- It is not acceptable or realistic to expect that a universal service fund can or should be created to address the adverse local rate consequences of access reductions.
- IXCs, the primary beneficiaries of any reductions in access charges, have already taken a number of unilateral steps to address the issue.
- New technologies, providers and offerings allow consumers to bypass access charges, extinguishing the consumer or marketplace need for the Commission to aggressively mandate access reductions.
- By reinforcing market and consumer-based forces, the Commission can achieve its desired results with limited adverse consequences while ensuring that the benefits accrue directly to Minnesotans.

Accordingly, the Department urges the Commission to update its approach to access reductions. This can best be done by first closing the current access reduction dockets (P-999/CI-98-674 and P-999/CI-04-852). The Commission can then adopt a market-based approach to address this issue. One market-based idea is to allow IXCs to limit the areas that they wish to serve in Minnesota, rather than forcing them to serve the entire state. Another idea is for terminating and originating access charges to be equal.

If the Commission does not agree that this approach is superior and continues on the path it set out six years ago, the Department believes that the welfare of Minnesota's local ratepayers requires concrete and binding assurances that any and all access reductions be returned to Minnesotans. Further, this "flow-back" assurance must be given before determining what access charge reductions can and should be mandated. While the "flow-back" issue is among the issues pending before the presiding ALJ, it needs to be decided in advance of any decision to mandate access reductions. Accordingly, the Department urges the Commission to suspend the proceedings until an appropriate "flow-back" mechanism has been established.

Given the importance and impact of pursuing access reductions and the impending litigation deadlines in the current dockets, the Department would appreciate this matter being put on the Commission's agenda as quickly as possible. We look forward to the Commission's prompt and thoughtful action on this matter.

Sincerely,



Edward Garvey
Deputy Commissioner, Energy and Telecommunications

c: LeRoy Koppendrayer, Chair
Kenneth Nickolai, Commissioner
Phyllis Reha, Commissioner
R. Marshall Johnson, Commissioner
Thomas W. Pugh, Commissioner

Reasons to Re-visit the Current Approach for Access Reductions

More than six years have elapsed since the Commission issued its June 4, 1998 Notice Soliciting Comments on Access Charge Reform. Much has happened since then and the Department is no longer confident that the benefits achievable through mandated access charge reductions are greater than the cost of doing so. As a result, the Department believes the Commission should step back and ask itself whether the access reduction path it started down, with the rate increases that inevitably lie at the path's end, is still the correct path. Or, whether, given the intervening changes in the telecommunications marketplace, there might be a more appropriate path to achieve the same goal.

It is clear to the Department, after years of examination and analysis, and months of negotiations with parties, that if local exchange carrier (LEC) access charges are reduced, local rates will increase. But, it is uncertain whether there would be any corresponding reduction in long distance rates. While we may anticipate the likely local rate impact of access reform, there is no information from the interexchange carriers (IXCs) to demonstrate the impact on toll rates. Supposedly, the solution to the potential for higher basic local rates is for the state to create a "universal service fund" to mitigate the retail rate impacts of the access reductions. But this is a solution that the Department views as worse than the cure. Increasing everyone's telephone rates through a tax is not a viable solution in the current regulatory scheme where the Commission no longer regulates the earnings of telephone companies. Further, to the extent there are costs to create and administer such a program, consumers will be paying more in the aggregate for a program that is supposed to keep their telephone rates low.

If the Commission proceeds with access reform and decides to achieve one-size-fits-all target access rates, the impact on the LECs and their ratepayers will vary widely. The LECs come from many different starting points in terms of the level of their existing local rates. There are also differences between LEC residential rates, business rates, extended area service (EAS) rate additives and the manner in which those additives were developed, access rates and the percent of overall revenues received from access versus local rates.

Market events and individual consumer activities in the form of expanded wireless coverage, the decrease in EAS petitions, statutory incentives to create expanded local calling areas, IXC "self-help," as well as the rise of Voice over Internet Protocol (VoIP) technologies, have all muted the marketplace's call for access reduction.

For these reasons, the Department no longer believes pursuing government mandated LEC access reductions is necessary or desirable.

The Current Access Reduction Path May Not Be the Correct One.

The access reform path the Commission is currently pursuing is to achieve access charge reductions by government mandate. This is the traditional manner in which government accomplished policy objectives in a monopolistic environment. This was the environment

six years ago, but not today. As a result, the first question the Commission may want to ask itself is whether setting rates through government mandates is appropriate in today's increasingly competitive telecommunications market. The Commission does not mandate rates for local service, custom calling features, directory assistance, or many other services offered by local providers. Why is it necessary for the Commission to mandate rates for access when it declines to do so for these other services?

Even if the Commission decides that the market, on its own, cannot adequately address this issue, a second question the Commission may wish to ask itself is whether the path it chose in 1998 is still the proper path or whether there might be a more appropriate direction for Commission action. Will any Commission mandated access reform taken under the direction of the 1998 path be sustainable in the market or will it be only another Band-Aid approach, ensuring that access reform will need to be addressed again and again in the future, while creating its own market anomalies? For example, unless the Commission eliminates the carrier common line charge (CCLC), if permissible to do so under law, there will be parties continuing to argue that elimination of the charge is necessary. (Of course, the more the CCLC is reduced, the greater the impact on local rates.) To reduce local switching and local transport access charges to cost will also result in local rate increases. Further, the costs of local switching and local transport are also likely to change over time. If the Commission issues a mandate that access charges must equal cost, proceedings will be necessary to determine if there should be increases or decreases in the rates. Parties will continue to argue over the appropriate rates, assuring the Commission's journey down this path far into the foreseeable future.

The path is even more difficult than it appears because there is not a simple, across-the-board fix. The LECs, because of their different local rates, local rate design, EAS rate additives, level of access rates, and reliance on access revenues versus local revenues, will all experience different rate and revenue pressures.

A better solution to mandating access reductions is to establish appropriate market incentives that allow companies to compete on fair and equal terms. Isn't it better to create a regulatory environment where it is not necessary for the government to determine what the rates for each company should be because market forces serve this role? Such a framework is more sustainable than a Band-Aid approach that will lead to perpetual regulatory proceedings before the Commission.

MARKET CHANGES HAVE OVERTAKEN THE NEED FOR ACCESS REDUCTIONS

- The decline in EAS petitions is indicative of satisfaction with current options for making toll calls

When the access reform docket was opened, the Commission was at a peak in receiving petitions for EAS. Extended area service is a service that, if approved by a majority of those voting in the exchange(s), replaces toll calling with a flat monthly fee for unlimited calling over the EAS route. Large numbers of EAS petitions could be viewed as

dissatisfaction with the toll rates. In 1993, the Commission received 28 EAS petitions. In 1996 there were 33 petitions for EAS and in 1997 there were 30 petitions for EAS. (In 1994-95, the legislature had implemented a moratorium on the EAS process while the Commission worked out a new procedure for EAS.) However, since that time, the number of EAS petitions has dropped significantly to twelve in 1998, five in 1999, nine in 2000, three in 2001, six in 2002, one in 2003 and two in 2004. Obviously, fewer people across the state are dissatisfied with the cost of making a toll call to a nearby exchange or have found an alternative.

- Wireless and other technologies are replacing the traditional way consumers make long distance telephone calls

Wireless pricing plans are a second reason why access reductions may be unneeded or too late. In 1994, the national penetration rate for cellular service was ten percent. In 1998 it was nearly 26 percent. Today the penetration rate for cellular service nationally is 54 percent. Furthermore, 97 percent of the total U.S. population lives in counties with access to three or more different providers offering mobile telephone service. Customers that make a significant number of intrastate telephone calls clearly can choose to make those calls over a wireless telephone and avoid any toll charges. Cellular service is also not the only alternative available to subscribers. Customers can choose to communicate using bundled local/toll plans, via email, via voice between two computers with service such as Skype, or for those with high speed internet service, via VoIP.

- Law change allows local telephone companies to offer expanded local calling

A recent legislative change also gives companies greater ability to meet customer demands for less toll and more local calling: the expanded local calling area provisions under Minn. Stat. 237.414. A telephone company that wants to offer an enlarged local calling area is free to negotiate the rates for terminating calls with companies serving the expanded calling area. The law is too new to have seen any filings yet, but the small LECs vigorously supported it so one could reasonably anticipate implementation of expanded calling areas. For example, the Minnesota Independent Coalition stated, "A number of MIC members are considering the possibility of providing calling plans that offer: 1) various blocks of minutes of usage; and 2) local calling areas of varying sizes within the state. The number of minutes of use and the scope of the calling scope are each on a continuum, the maximum scope of which would involve: 1) unlimited usage; and 2) statewide calling scope."[1]

- IXCs (the primary beneficiaries of any access reduction) have already addressed the access charge matter themselves, negating the need for the Commission to do so

The Commission has recognized and approved a mechanism whereby toll providers can and do explicitly recover the costs of access charges they pay to local telephone companies for carrying in-state long distance calls. In approving the proposals of several

[1] See MIC comments in docket P-999/CI-04-842, (In the Matter of a Commission Report to the Legislature Regarding Statewide Calling Plans).

toll companies to charge a monthly fee to certain customers for explicit recovery of intrastate access charges, the Commission stated,

> The Commission will accept the proposals by the Companies herein to charge a monthly fee to certain customers for explicit recovery of intrastate access charges.
>
> The Commission finds that not charging the intrastate access fee to customers who take both local and long distance service from the same company is not unduly discriminatory. Providers are increasingly offering bundled long distance and local services that provide for a lower total price than the sum of the individual parts. Waiving the intrastate access fee to long distance customers who also take local service is a variation on this bundling concept and is not unreasonably discriminatory.
>
> Similarly, the Commission finds that it is not unreasonable for the Companies herein to charge a monthly intrastate access charge to residential customers in certain circumstances and to exempt business customers from this charge. These two groups are not necessarily similarly situated, in regards to access fees. The business customers utilize more minutes than residential customers and because of the higher volume are not limited to service only through switched access lines. Residential customers, on the other hand, tend to buy fewer services, generate lower volume and present fewer alternatives to developing a separate rate design.
>
> Further, the proposed charge applies only to a competitive service, and given the competitive environment for long distance service, there is clearly the opportunity for the consumer to find another long distance carrier if the consumer so desired.[2]

Further, in Docket P-442 et.al./C-04-235, the Department makes clear that certain IXCs have made inappropriate arrangements with certain providers to get lower access charges.

In short, the elapsed time and the competitive marketplace have made, and continue to make, corrections for the mismatch of access costs and access rates.

A STATE USF IS NOT THE ANSWER

In all of the years that the issue of access reform has been on the table, it has been conventional thinking that Commission mandated access rate reductions would result in increases in basic local telephone rates. In fact, if this were not so, the Commission would not have struggled with this issue through an open proceeding for over six years. In looking at the individual LEC data, the Department believes that conventional thinking was and remains correct: access reform will result in higher local rates for the majority of the companies.

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[2] See pp. 6-7 of Commission's November 5, 2003 ORDER ALLOWING INTRASTATE RECOVERY CHARGES in Docket Nos. P-442/EM-02-539, et. al.

The Department would note that some believe that the way to address the local rate increases is to establish a state universal service fund (USF). The Department disagrees. A USF is not acceptable or realistic.

A state USF, funded by a tax on all ratepayers in the state, is just another substitute for the existing cross-subsidizations. Furthermore, establishment of a state USF would not be simple or cheap. Many difficult choices would need to be made regarding what services are funded, who receives funding, how the fund is administered, and whether the fund payments are being spent as intended. The USF administrative and audit functions would have to be funded. The current debate over the federal USF programs is an example of the controversy that can surround a public fund. Finally, a state USF must be implemented through a Commission rulemaking which will follow its own path separate from any access reform and over which the Commission does not have final control. The uncertainty surrounding the possibility of a state USF cannot be used as the guarantee to mitigate the local rate impacts of Commission-ordered access reform.

SAFEGUARDS MUST BE ESTABLISHED BEFORE ANY GOVERNMENT MANDATED ACCESS REDUCTIONS

If the Commission believes that government mandates can better correct the market than competition and wishes to continue down its current access reform path, then certain safeguards are required to ensure that access reform is in the public interest.

First, as part of any mandate that the LECs reduce their access rates, IXCs must also be mandated to return back to Minnesotans 100 percent of those access reductions in the form of lower toll rates or fees. Without such a requirement, every ratepayer in the state could be forced to pay higher monthly local rates with little or no reduction in the price of toll service. Without such a "flow-back" requirement, Minnesota ratepayers would be better off with no access reductions and seeking out competitive alternatives to toll service, or paying slightly higher toll rates for the toll calls that they do make, rather than paying a higher monthly local rate.

Second, the Commission must monitor how fast and how far it requires access rates to be reduced. Most of the independent LECs in the state are regulated under alternative forms of regulation or AFORs. They, therefore, have the ability to raise their local rates to offset any Commission-ordered access reductions with no oversight by the Commission as to how high those rates can go unless there are a significant number of ratepayers who can quickly respond with a complaint. In a perfectly competitive market, price would equal cost. However, we don't have a perfect market. The price of most services (local; custom calling features such as caller ID, voicemail, call waiting; directory assistance) is not directly related to the cost of the service. Mandating the movement of price to cost for only access service requires careful consideration of the impact on rates for other services.

CONCLUSION

The Commission should close its access reform dockets, P-999/CI-98-674 and P-999/CI-04-852, and instead rely on the competitive market to handle the cost/price disparity that exists for access charges.

Should the Commission determine that a better path may be to focus on market incentives and a government framework, then the Commission may wish to initiate a proceeding that builds on the incentives that already exist in the marketplace to achieve the desired results. Under this alternative, the Commission should close the dockets dealing with access charge reform and engage itself in a proceeding that builds on the incentives that already exist in the marketplace to achieve the desired results. One such incentive or parameter that could be applied under a regulatory framework would be that terminating access fees may be no higher than originating access fees. The Commission could also permit companies to exit a market or reduce their service offerings in those areas where a LEC exceeds some level of access charges. There are many possible parameters that the Commission may use to craft the right set of incentives to make the market function appropriately without the government mandating rate levels.

If the Commission determines that the path it chose in 1998 is still the correct path, then the Department believes that the Commission must also, along with mandating appropriate access rates, 1) obtain concrete commitments from toll carriers that they will reduce their long distance rates in an equal amount and 2) closely monitor the impact of access reductions on local rates. If the Commission mandates access reductions without also issuing mandates on the impacts of access reform, there is no guarantee that the Commission action is in the public interest. Clarification by the Commission that mandated access rates will be accompanied by a mandated flow back from the benefiting IXCs and close monitoring of local rates would greatly assist the parties in forming their positions on exactly how access reform should occur by government mandate.