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April 25, 2011

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APR 26 2011

PUBLIC SERVICE  
COMMISSION

**VIA FEDERAL EXPRESS**

Jeffrey DeRouen  
Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
P.O. Box 615  
Frankfort, KY 40601

RE: PSC Case No. 2010-00447

Dear Mr. DeRouen:

Enclosed for filing in this case please find an original and ten copies of Dana Bowers, Complainant's Response to Windstream East, LLC's Motion to Extend Procedural Schedule and Cross Motion to Abbreviate Procedural Schedule. Please place your file stamp on the extra copy and return to me in the enclosed envelope.

If you have any questions concerning this filing, please do not hesitate to contact me. Thank you very much for your attention to this matter.

Sincerely yours,

C. Kent Hatfield

CKH: jms  
Enclosures

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APR 26 2011

PUBLIC SERVICE  
COMMISSION

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

DANA BOWERS  
COMPLAINANT

v.

WINDSTREAM KENTUCKY EAST, LLC  
DEFENDANT

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( CASE NO. 2010-00447  
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**PETITIONER’S RESPONSE TO WINDSTREAM EAST, LLC’S  
MOTION TO EXTEND PROCEDURAL SCHEDULE AND  
CROSS MOTION TO ABBREVIATE PROCEDURAL SCHEDULE**

Dana Bowers (“Petitioner”)<sup>1</sup>, by counsel, for her Response to Windstream East, LLC’s (“Windstream”) motion to extend and delay the procedural schedule and for her Cross Motion to abbreviate the procedural schedule, states as follows:

**INTRODUCTION**

Windstream continues to collect an unapproved rate from Petitioner and from thousands of other Windstream customers in Kentucky. Windstream’s motion does not mention that the delay it seeks would further damage those customers. Accordingly, Petitioner objects to any extension of the procedural schedule and hereby files her cross-motion to simplify and shorten it.

The procedural schedule is already unnecessarily lengthy for purposes of responding to the Court’s referral of legal issues to the Commission. This lengthy schedule, in fact, will cause Commission proceedings on the two narrow questions of state tariff law referred to it by the Court to continue past the August 1, 2011 cutoff date for discovery set in the much broader

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<sup>1</sup> In its Order of November 22, 2010, “[f]or administrative purposes” the Commission styled this proceeding a “complaint.” It is, of course, a referral by the U.S. District Court for the Western District of Kentucky to the Commission for its views on matters of state tariff law. It was placed of record before the Commission by Petitioner’s filing on November 16, 2010 of her Petition for Declaratory Ruling.

federal court proceeding. Indeed, the court has specified that September 13, 2011 is the deadline for dispositive motions in that case, and the current Commission schedule all but guarantees that the questions Judge Heyburn referred to it will still be undecided when the motions are due to the court. As the procedural schedule stands, it is highly likely to result in delay of the court case. It is unfathomable that the district court assumed the Commission would not have answered the legal questions put to it *last year* well before the cutoff dates it set at the beginning of *this year*. Such a result cannot be the Commission's intention.

### ARGUMENT

Petitioner seeks to obtain from the Commission the legal ruling that will enable the federal court to complete the lawsuit filed almost two years ago: whether Windstream violated KRS 278.160, a statute that codifies the filed rate doctrine, by charging customers for tariffed services an unfiled rate (the "gross receipts surcharge") that boosted their bills by up to 2.6%. As the Court found, the Federal Communications Commission ("FCC") has already ruled that the *federal* statute that codifies the filed rate doctrine does not permit a carrier to do so.<sup>2</sup> Like the FCC, this Commission has repeatedly addressed analogous filed rate doctrine questions and has required that tax expense recovery occur through rates subject to Commission review. The Court has sought the Commission's view on whether it would rule as the FCC did in *Irwin Wallace*.<sup>3</sup> Consequently, the Court referred this limited issue to the Commission for input, along with a secondary question – whether the Commission would interpret Windstream's tariff providing for recovery of "local" taxes to encompass the subject tax imposed by the Commonwealth. The Court stayed *only* Count III of the class action complaint, and only to give the Commission a chance to apply state law and weigh in on a question of tariff interpretation:

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<sup>2</sup> *Irwin Wallace v. AT&T Communications of the Southern States, Inc.*, 6 FCC Rcd 1618 (1991), *on reconsideration*, 7 FCC Rcd. 3333 (1992) (Illegal collection of unfiled rate to "recover" a state gross receipts tax applied to AT&T).

<sup>3</sup> *Irwin Wallace* involved a referral from a federal district court in Florida.

A stay is more appropriate than a dismissal, because the Court may need to resolve damages and other issues at a later date.<sup>4</sup>

Petitioner contended that a briefing schedule would be sufficient “process” at the Commission to address these questions of law so that the Court could proceed. Windstream claimed that development of facts was necessary. The Commission issued a procedural schedule containing two rounds of discovery, both direct and rebuttal prefiled testimony, and initial and post-hearing briefs. Respectfully, this is far more process than is either legally required or appropriate, given the nature of the Court’s referral. It is not Petitioner’s intention to re-argue here that only legal briefs are required. Windstream’s motion, however, plumbs the depths of irony by pleading that it has been unduly burdened by the Commission’s procedural schedule.

Firstly, and most obviously, the “burden” of which Windstream complains is precisely what it asked for. It asked for two proceedings instead of one when it moved the Court to refer the issue to the Commission in the first place rather than to decide the question in the single lawsuit that already existed. (In fact, Windstream asked the Court for *three* parallel proceedings – at the Commission, at the Court, and at the FCC. The Court denied Windstream’s motion for a third proceeding at the FCC.) Windstream then compounded the complexity inherent in a two-forum inquiry by urging this Commission to set a full procedural schedule including testimony and discovery, even though the questions referred to the Commission concern only the law, not factual disputes. Now Windstream requests additional time, citing the burden the two schedules have placed on its counsel, and not mentioning the ongoing damage to its customers which increases with each day’s delay. No such argument should be entertained by the Commission.

Secondly, no “burden” at all is going to be imposed upon Windstream by the existing procedural schedule. The facts that will resolve this case – the bills and the tariffs -- are already

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<sup>4</sup> *Dana Bowers v. Windstream Kentucky East, LLC*, 790 F.Supp.2d 526, 534 (W.D. Ky. 2010).

of record. At this time, Petitioner anticipates seeking no discovery from Windstream in this proceeding, since discovery has been on-going now in the federal court case for some time. Moreover, Windstream should have no need to serve discovery in this proceeding, much less two rounds of discovery, since it has already deposed Ms. Bowers and has every one of her bills.

As for Windstream's allegedly onerous obligation to file "rebuttal" testimony with the Commission – it will have very little to "rebut." Petitioner's direct testimony likely will not extend much beyond her name, a statement that she is a customer receiving several services of Windstream, and the attachment of her Windstream bills showing the illegal untariffed rates. Petitioner is not an attorney. The legal arguments as to whether the gross receipts surcharge added to those bills violated Chapter 278 and that those bills were, as a matter of law, issued in violation of the filed rate doctrine will be made by her attorneys. Windstream will have little, if anything, factually to "rebut."

The burden Windstream complains about as a result of this procedural schedule is illusory. To the extent the schedule Windstream argued for is a "burden," it will be one it has imposed wholly upon itself. Its motion to obtain further delay should be denied.

### **CONCLUSION**

At Windstream's urging, and over Petitioner's objections, the Commission entered, on April 8 of this year a lengthy and detailed procedural schedule. Now *Windstream* claims it will be unduly burdened if it is required to comply with the schedule, and seeks to extend that schedule an additional two weeks. In the interest of Windstream's Kentucky customers, Petitioner urges the Commission to *shorten* and *simplify*, rather than to extend, the procedural schedule in this matter, deleting at least one round of "testimony" and one round of discovery and shortening the schedule by at least one month so that the primary proceeding in Federal

Court is not delayed by the Court's referral of these limited issues to the Commission. Alternatively, should the Commission grant Windstream additional time to serve discovery, it should take that much time out of the rest of the schedule so that the final decision will not further be delayed to the detriment of Windstream's thousands of customers.

Respectfully submitted,



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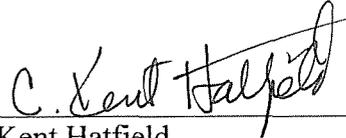
*Counsel for Petitioner*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing has been served by First Class Mail on those persons whose names appear below this 25<sup>th</sup> day of April, 2011.

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