

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

In the Matter of:

DANA BOWERS )  
COMPLAINANT )  
v. )  
WINDSTREAM KENTUCKY EAST, LLC )  
DEFENDANT )

CASE NO. 2010-00447

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**BRIEF OF PETITIONER**

Dana Bowers (“Petitioner”),<sup>1</sup> by counsel, files the following Brief in support of her  
Petition:

**INTRODUCTION**

Utilities recover their expenses through rates. Under Kentucky law, utility rates are filed with the Commission. Of course, there can be exceptions: telecommunications utilities in some cases can provide service under contracts, and those contracts may include unfiled rates. But this case is not about the exceptions. Instead, this case results from the referral of two specific questions of tariff law to the Commission by the U.S. District Court for the Western District of Kentucky:

“(1) whether the PSC would rule as the FCC did in *Irwin Wallace*<sup>2</sup> on the issue of tariffs and pass-through taxes, and

(2) whether the ‘local taxing authority’ language of Windstream’s tariff encompasses state statutes.”<sup>3</sup>

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<sup>1</sup> The Petitioner is one of two named plaintiffs representing overcharged Windstream customers in *Dana Bowers and Sunrise Children’s Services, Inc., on Behalf of Themselves and Others Similarly Situated v. Windstream East LLC et al.*, 3:09-CV-440 (W.D. Ky.).

<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). See Section IV D, *infra*.

<sup>3</sup> *Dana Bowers et al. v. Windstream Kentucky East, LLC, et al.*, 790 F.Supp.2d 526, 534 (W.D. Ky. 2010).

These questions define the scope of the Court’s referral, and both refer specifically to tariffs and tariffed services. When the two questions are answered,<sup>4</sup> the Court can lift its partial stay and “resolve damages and other issues.” *Bowers*, 709 F.Supp.2d at 535. One of the issues the Court will address, in addition to damages, is whether Petitioner is the proper representative of the class of customers who buy services subject to the tariffs. Regardless of the Court’s determination on this Rule 23 question, the Commission will have provided direction to the Court concerning Windstream’s obligations to all its tariff customers, not just Petitioner.

In this brief, Petitioner will show:

- how the Commission has ruled, and why it will continue to rule, just as the FCC did,<sup>5</sup> that tax expense recovery for a tariffed service requires a filed rate; and
- how Windstream’s filed Kentucky tariffs do not include authorization to collect its Gross Receipts Surcharge to recover for the Kentucky Gross Receipts Tax.

Petitioner will also describe the many ways in which Windstream’s behavior concerning its Gross Receipts Surcharge violated Kentucky law. In fact, when Windstream raised its rates in 2007 without changing its tariffs, it violated three Kentucky statutory prohibitions, not just one:

[1.] The Filed Rate Doctrine, which mirrors the federal Filed Rate Doctrine, and which is codified for utilities generally at KRS 278.160 and specifically for carriers such as Windstream that “elect” alternative regulation at KRS 278.544;

[2.] KRS 278.543 (2)’s sixty-month prohibition on basic service rate increases imposed on carriers such as Windstream that “elect” alternative regulation; and

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<sup>4</sup> It is because the scope of the relief sought is limited to a Commission declaration on these two issues that Petitioner styled her pleading initiating this case as a Petition for Declaratory Ruling. In its Order of November 22, 2010, the Commission determined that, for administrative purposes, it would style the matter as a formal complaint.

<sup>5</sup> In *Irwin Wallace*, the case cited by the federal court, the Federal Communications Commission (“FCC”) enforced the Filed Rate doctrine when, as here, a telecommunications carrier failed to add the new rate to its tariff before it charged its customers a surcharge to recover a tax that had been imposed upon it. The carrier at fault in *Irwin Wallace* was AT&T, which had “flowed through” a Florida gross receipts tax to its customers for approximately ten months before its “gross receipts tax surcharge tariff” went into effect. The FCC held that, “although it was proper for AT&T to flow through the Florida gross receipts tax, it should not have done so until its tariff providing for the GRTS flow through went into effect on April 24, 1986.” 7 FCC Rcd 3333. There is no distinction between the federal Filed Rate Doctrine and Kentucky’s to support a different result here than that reached by the FCC in *Irwin Wallace*.

[3.] KRS 278.543 (4)'s permanent prohibition on switched access rate increases for electing carriers.

The Commission is bound to enforce all of these statutes. It should answer the court's questions with a "yes" and a "no," respectively.

### **BACKGROUND**

The germane, undisputed facts are as follows:

1. In 2005, KRS § 136.616(2)(b) was enacted. Effective January 1, 2006, the statute imposes a 1.3% "gross revenues tax" on providers of "communications service." As Windstream is a provider of communications service, the tax was imposed on Windstream, not on its customers. To recover its tax expense, in June 2007, Windstream began issuing bills imposing a Kentucky Gross Receipts Surcharge ("surcharge") on its customers, applying the surcharge to intrastate and interstate services. The notice in Petitioner's bills for that bill cycle did not describe the amount or rate to be used. See June 22, 2007 Bill [Exhibit 1 hereto]. Neither Windstream's federal or state tariffs included any reference to this new surcharge when Windstream began issuing bills imposing the surcharge.

2. When Windstream began imposing the surcharge, it assessed the charge to customers at a rate of 1.3%. *Id.* In July 2007, only one month after Windstream began imposing the surcharge, Windstream increased the rate, assessing its customers at 2.6%. Windstream provided no notice to customers that it had doubled the surcharge rate. See July 24, 2007 Bill [Exhibit 2 hereto]; WS000939-940 [Confidential Exhibit 3 hereto].

3. On August 16, 2007, Windstream filed proposed revisions to its Kentucky state tariffs that purported to add a charge "equal to" the gross receipts tax, but then inexplicably

withdrew the tariff revisions just three (3) days later, before they could become effective. See August 16, 2007 Tariffs [Exhibit 4 hereto]; August 20, 2007 Withdrawals [Exhibit 5 hereto].

4. About a year later, on July 23, 2008, Windstream amended its federal tariffs to add a surcharge purportedly equal to the tax. *See, e.g.,* Windstream Tariff F.C.C. No. 1, First Revised Page 2-30, effective on August 7, 2008 [Exhibit 6 hereto]. The federal tariff stated that the surcharge would be assessed at 1.31% and stated “that this was amount was ‘equal to’ the surcharge Windstream was charging its customers.” *Id.*

5. Windstream, however, knowingly violated this tariff revision from day one. At the time the federal tariff became effective, all customers were being assessed a surcharge of more than 1.31%. In fact, the surcharge at that time was 2.6%.

6. Beginning with the January 1, 2009 bill cycle, Windstream again changed the surcharge rates. Windstream lowered some customers’ surcharge rates to 0% on intrastate services; it assessed some interstate customers at 1.3%; and – notwithstanding the specific tariff on file with the FCC stating a rate of 1.31% – it assessed many customers a surcharge of 1.75%. A Windstream email explained that the “slightly higher rate on the retail side is to compensate for the money we are not passing through to intrastate wholesale customers.” *See* Caballero Dep. at 87:1 – 88:1 [Exhibit 7 hereto]; Dep. Exhibit 41 [Confidential Exhibit 8 hereto]. Windstream did not revise its federal tariffs, which then included a surcharge provision, to reflect these rate changes. As for Windstream’s Kentucky state tariffs – for Petitioner, for basic local exchange service customers, and for access service customers – Windstream continued to allow its tariffs to remain devoid of any authorization to collect its Kentucky Gross Receipts Surcharge. Again, Windstream did not notify its customers of these changes.

7. It is not just that Windstream's customers were (and still are) charged untariffed amounts so that Windstream could recover what it calls its customers' "share" of Windstream's taxes.<sup>6</sup> The record created in the U. S. District Court proceeding demonstrates that many Windstream customers have been charged more through Windstream's untariffed surcharges than they would have paid if the government had imposed the taxes directly on the customers themselves.<sup>7</sup> This occurred because Windstream overcharged its retail customers routinely and erratically, even as some large and sophisticated customers – who understood the law well enough to complain – were quietly placated by confidential "settlements" whose material terms were carefully redacted before they were produced to Plaintiffs (and after Plaintiffs were forced to obtain a Court Order to have them produced). Windstream ratcheted up its rate on everyone else, ignoring the August 2008 federal tariff limitation of the surcharge to 1.31%, ignoring the statutory percentage of 1.3% imposed on itself, and ignoring the lack of any rate at all filed with this Commission. It billed its current retail customers for what it believed it should have received from the customers it had served in previous years and for what it did not collect from its wholesale customers. Among the many documents illustrating this course of conduct is the Deposition of Windstream C.F.O. Tony Thomas at 62-63 [Exhibit 9]:<sup>8</sup>

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<sup>6</sup> Defendants' Reply in Further Support of Their Motion to Stay Discovery, filed July 12, 2011 by Windstream in *Bowers et al. v. Windstream Kentucky East et al.*, C.A. 3:09-CV-440 (W.D. Ky.), at 6.

<sup>7</sup> See Windstream Kentucky East's Answers to Dana Bowers' Third Set of Interrogatories, Request for Admission No. 1 [Exhibit 10 hereto].

<sup>8</sup> Q By virtue of the way that Windstream imposed the surcharge on Dana Bowers, isn't it true that she actually paid more than the total of 1.3 percent on all of her service, subject services from January 1 up through -- January 1 of 2006 up through June 30 of 2010?

**MS. FARRIS:** Object to the form. You can answer.

**THE WITNESS:** I'm not familiar with her bills to -- to know the -- the details of that.

**BY MR. ROYSE:**

8. Thus, not only have Windstream customers paid their (untariffed) “share” of Windstream’s taxes. They have also paid Windstream additional money to (a) make up for what Windstream believes its customer base of five years ago should have paid to it and to (b) reimburse Windstream for its costs to settle with customers who had sufficient sophistication to complain about the overcharge. In the face of the evidence that this is what has happened, Windstream simply redefines the word “share,” characterizing the surcharge imposed upon Petitioner as one that “recovers her share of [Windstream’s] costs after accounting for all relevant considerations (such as settlements with other customers...).”<sup>9</sup>

9. Petitioner’s lawsuit was filed on June 22, 2009. On August 31, 2009, Windstream moved for dismissal or a stay. On April 30, 2010, the Court entered its Memorandum Opinion and Order, reported at *Dana Bowers et al. v. Windstream Kentucky East, LLC, et al.*, 790 F.Supp.2d 526 (W.D. Ky. 2010).

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Q Yeah. Understood. We know that we've established, you and I have just agreed that the rate was 1.3 for a month and then 2.6 for about 18 19 months?

A Yes.

Q And then it dropped down to 1.75 percent?

A Uh-huh.

Q For that period you know that the total she paid on subject services had to be more than 1.3 percent. Right?

A I think the -- I don't know what time she had services, did she pay her bills in their entirety, were there adjustments. I'm just, I'm not familiar with the details of her account to know if she in fact paid those services or was in fact a customer during that period, I just, I have not reviewed her bills in detail.

Q All right. Then let me give you these assumptions. Assume she was a customer for that entire period, assume she paid her bill in full each month, assume there were no adjustments. **Now, isn't it true that the total amount she paid on the subject services was greater than 1.3 percent for the period January 1, '06 up through June 30, 2010?** (emphasis added)\_

**MS. FARRIS:** Object to the form. You can answer him.

**THE WITNESS:** Yes. (emphasis added)

<sup>9</sup> Defendants’ Reply in Further Support of Their Motion to Stay Discovery, filed July 12, 2011 by Windstream in *Bowers et al. v. Windstream Kentucky East et al.*, C.A. 3:09-CV-440 (W.D. Ky.), at 6 (emphasis added).

10. The Court denied Windstream’s motion to dismiss or stay Plaintiffs’ federal Filed Rate Doctrine claims, together with certain additional claims. The Court ruled that, based on *Irwin Wallace*, the law is so clear that no FCC review of the issue was necessary:

**The plain language of 203(c) and the FCC’s decision in *Irwin Wallace* indicates that Windstream may not pass on a tax imposed directly upon it without first updating its tariff, and may not charge more than its tariff allows after the pass-through tax is added to the tariff.**

*Id.* at 533 (emphasis added).

11. In that same Order, the Court accepted Windstream’s argument that Petitioner’s intrastate rates are governed by Kentucky tariffs filed at the Commission, and therefore referred two questions to the Commission pursuant to the “primary jurisdiction” doctrine: “(1) whether the PSC would rule as the FCC did in *Irwin Wallace*<sup>10</sup> on the issue of tariffs and pass-through taxes and (2) whether the ‘local taxing authority’ language of Windstream’s tariff encompasses state statutes.”<sup>11</sup> Count III of the Complaint was stayed to permit the Commission to address these issues. Windstream now represents to the Commission that the Commission lacks jurisdiction over Petitioner’s claim. *See, e.g.*, Windstream Answer, ¶ 3 (“the gross receipts surcharge is not subject to the Commission’s tariffing jurisdiction”). Contradicting its representations made to the court, Windstream also denies that “Bowers subscribes to telecommunications services provided under Windstream East’s federal and Kentucky state tariffs.” Windstream Answer, ¶ 10.

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<sup>10</sup> *Irwin Wallace v. AT&T Communications of the Southern States, Inc.*, 6 FCC Rcd 1618 (1991), *on reconsideration*, 7 FCC Rcd 3333 (1992).

<sup>11</sup> *Dana Bowers*, 790 F.Supp.2d at 534.

12. Pursuant to the court’s referral to this Commission under the primary jurisdiction doctrine, Petitioner requested that the Commission enter a Declaratory Ruling on the two questions referred by the Court.

13. Windstream offers, essentially, four defenses:

[a] that its surcharge is “not a rate for service required to be tarified” [Windstream Answer, ¶ 1] (even though Windstream’s decision not to pay sales tax on revenue from the Kentucky Gross Receipts surcharge is based on its own determination that the revenue qualified for the sales tax exemption for “rate increases for residential telecommunications customers”<sup>12</sup>) (emphasis added);

[b] that it may tariff incorrect rates for Petitioner (even if not for its “basic services” customers) because her Feature Pack A services are “not subject to the Commission’s tariffing jurisdiction” [Windstream Answer, ¶ 3] (although Windstream successfully argued the exact opposite in convincing the Court that Petitioner’s Kentucky Filed Rate Doctrine claim should be first considered by the Commission because it has “primary jurisdiction”);

[c] that Windstream (and, apparently, any utility) is not accountable for violation of the Filed Rate Doctrine unless its customers spot the violation and complain within thirty days [Windstream Answer, fn. 3]; and

[d] that Windstream East’s current tariff providing for billing of a “proportionate part” of fees or taxes “imposed upon the Company by local taxing authorities” covers its assessment of the surcharge [Windstream Answer, ¶ 1], even though KRS 136.616 imposes a state tax and Windstream’s imposition of 2.6%, and 1.75% in its surcharge is not a “proportionate” part of the 1.3% imposed on it.

14. Windstream flatly denies that “Plaintiff Bowers subscribes to services from Windstream East that are governed by tariff P.S.C. Ky. No. 7” [Windstream Answer ¶ 4]. Previously, Windstream represented to the U.S. District Court that Petitioner purchases “two residential lines with Windstream East’s ‘Feature Pack A.’ (*Id.* ¶ 2). These services are **subject to Windstream East’s local tariff on file with the PSC (the ‘General Customer Services Tariff for the State of Kentucky,’ PSC KY No. 7)** and to any alternative regulation prescribed

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<sup>12</sup> Rhoda Deposition at 70-72; Deposition Exhibit 58 filed under seal pursuant to Windstream’s designation of it as Confidential. Both documents were filed with the Commission as attachments to Petitioner’s Rebuttal Testimony and Materials.



under KRS 278.543.” Memorandum in Support of Defendants’ Motion to Dismiss, Or, In the Alternative, Stay This Action, filed in *Bowers et al v. Windstream Kentucky East, LLC*, Docket No. 3:09-CV-440 (W.D. Ky.)<sup>13</sup>

15. In that same Memorandum to the Court, Windstream cited KRS 278.160(1) (which it now says does not apply), along with 47 U.S.C. § 203(a), and stated, “Pursuant to the applicable statutes, Windstream East has filed tariffs with the FCC and PSC.”

16. On June 22, 2011 Windstream filed a Motion for Summary Judgment with the Court, alleging there is no dispute of material fact in the judicial proceeding. Petitioner and her co-plaintiff, on behalf of Windstream’s similarly situated customers, have filed a Cross-Motion for summary judgment with the Court. It is Petitioner’s position that there are no material facts in dispute as to either the federal or the state Filed Rate Doctrine claims.

17. By Order dated August 11, 2011, the Commission determined that there are no material facts in dispute in this case and ordered the parties to brief the two issues referred by the Court.

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<sup>13</sup> See Attachment 1 to Petitioner’s Rebuttal Testimony and Materials.

## ARGUMENT

### WHEN WINDSTREAM INCREASED ITS RATES FOR TARIFFED SERVICES WITHOUT AMENDING ITS TARIFFS TO INCLUDE THE INCREASE, IT VIOLATED THE FILED RATE DOCTRINE.

#### I. THE KENTUCKY GROSS RECEIPTS SURCHARGE IS A “RATE” AND MUST BE TARIFFED IF APPLIED TO A TARIFFED SERVICE.

It is well established that a utility’s recovery of external expenses, including taxes, from a customer will necessarily be through a “rate.”<sup>14</sup> Accordingly, Windstream’s argument that its Kentucky Gross Receipts Surcharge is not a “rate” for “service” that must be tariffed is a nonstarter. Windstream’s artificial “rate for service” construct is completely at odds with the applicable law. KRS 278.010(12)’s definition of “rate” is very broad:

“Rate” means any individual or joint fare, toll, charge, rental, or other compensation for service rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement, or privilege in any way relating to such fare, toll, charge, rental, or other compensation, and any schedule or tariff or part of a schedule or tariff thereof.

KRS 278.010(12).

Abundant Kentucky precedent makes clear that expense recovery, including for tax expenses, must be through rates. For example, The Kentucky Supreme Court in *Luckett v. Electric and Water Plant Board of the City of Frankfort*, 558 S.W.2d 611 (Ky. 1977) clearly drew the distinction between [1] taxes imposed on the customer when the utility serves merely as a collection agent and [2] taxes imposed on a utility and recovered through rates. In *Luckett*, a

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<sup>14</sup> See, e.g., *Delta Natural Gas Co., Inc. Experimental Alternative Regulation Plan*, Case No. 99-046 (Ky. PSC May 10, 1999) (an additional charge to customer over and above general rates is a “rate” under KRS 278.010(12)); *Big Rivers Electric Corp.*, Case No. 95-027 (Aug. 25, 1995) (tax payment could not be passed through the fuel adjustment clause as it was Big Rivers’ obligation to pay the tax and the supplier should have increased its rates to recover any utility gross receipts license tax); *Local Taxes and/or Fees Tariff Filing of General Tel. of Ky.*, Case No. 7843 (Ky. PSC Oct. 3, 1980) (denying GTE’s proposed tariff that did “not provide for separate itemization of local fees and taxes on customer bills” and requiring a tariff that did so to be filed).

utility availed itself of the provision of KRS 160.617 that allowed it to recover amounts it was required to pay in local school taxes. Subsequently, state tax officials noted that the utility did not include the recovered amounts when it computed its state sales tax obligations. Kentucky's highest court agreed with the state tax regulators that sales tax was owed, because the 3% rate increase (equal to the school tax rate) was "no different from the remainder of the utility bill which constitutes gross receipts to the utility company." *Id.* at 613.

In 1983, the Kentucky Attorney General's Office cited *Luckett* in explaining that a utility customer does not pay the "utility gross receipts license tax, it is paying for utility services" when it pays an increased amount to cover the utility's tax liability. *Ky. OAG 83-445* [Exhibit 11 hereto]. Eighteen years later the Commission applied *Luckett* in its *Big Rivers*<sup>15</sup> decision, affirming the utility's responsibility for its own tax obligations and noting that a utility subject to tax that failed to increase its rates to recover the expense could not "shift responsibility" to its customer.

Here, KRS 136.616 imposes a tax on Windstream, not on Windstream's customers, as Windstream admits [Answer to Complaint, ¶ 6]. And that tax becomes just another cost of business to Windstream, comparable to its costs for spools of wire, electricity, janitorial service or call center payroll. Windstream's customers are not separately paying for Windstream's various costs of business, including its tax obligations. They are "paying for utility services." The utility's charge for its services is a "rate." Windstream admitted as much in this docket when it demanded that Petitioner "[a]dmit that the services you receive from Windstream East and the rates charged by Windstream East for those services are set forth on your monthly billing invoices" [Request 10 for Admissions, filed May 13, 2011 (emphasis added)]. Of course, the "rates...for those services" on Petitioner's monthly invoices include the surcharge. The

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<sup>15</sup> See n. 15.

surcharge Windstream's customers pay to receive telecommunications services is obviously a "rate." Windstream's invoices to Petitioner during 2009 even described it as "REGULATED," perhaps so that customers would see the increase as inevitable, or even as an increase added by regulators like the Commission.

But motivation is beside the point. Both logic and law dictate that the term "rate" includes amounts added to cover a utility's gross receipts taxes, as well as locally-imposed franchise fees and other governmental obligations imposed directly on a utility. It is pointless to emphasize, as Windstream does, the fact that these taxes and fees are "authorized by areas of Kentucky law outside of the chapter of the Kentucky law establishing the scope of the Commission's jurisdiction" [Windstream Answer, ¶ 7]. The source of law that "authorizes" taxes and fees has absolutely nothing to do with the Commission's authority to require tariffs to state accurately all amounts to be recovered by a carrier for tariffed services. The source of the law imposing the gross receipts tax on AT&T was the state of Florida – but that did not mean that the FCC's lack of jurisdiction over Florida foreclosed its jurisdiction over AT&T's tariff. Instead, the FCC properly held that the tax was "one of the many expenses affecting the carrier's charges to its customers. Accordingly, AT&T has not supplied any basis for not tariffing its gross receipts surcharge." *Irwin Wallace*, 6 FCC Rcd at ¶ 6. That is the necessary outcome of this case under Kentucky law as well.

**II. WINDSTREAM VIOLATED KENTUCKY'S FILED RATE DOCTRINE AS SURELY AS IT VIOLATED THE FEDERAL FILED RATE DOCTRINE: THEY ARE IDENTICAL.**

In *Irwin Wallace* – the holding relied upon by the United States District Court in this matter – the FCC expressly held that when a carrier passes through a tax imposed on it, that pass-through is a rate to its customers, and must be tariffed. Precisely the same is true here, and the

Commission should so rule.<sup>16</sup> In *Irwin Wallace*, the FCC had no trouble concluding that a surcharge to recover a tax expense was a charge that had to be tariffed: “[T]he tax is not “extrinsic” to the communications services regulated by this Commission, as argued by AT&T, but is one of many expenses affecting the carrier’s charges to its customers.” 6 FCC Rcd 1618, ¶ 6 (emphasis added). Consequently, the FCC enforced the Filed Rate Doctrine when, as here, the carrier failed to add the new rate to its tariff before it charged its customers. The FCC held that, “although it was proper for AT&T to flow through the Florida gross receipts tax, it should not have done so until its tariff providing for the GRTS flow through went into effect on April 24, 1986.” 7 FCC Rcd 3333. That is the law in Kentucky too, and the courts and the Commission have uniformly so held.

The reasoning of *Irwin Wallace* is unassailable, and applies to state as well as federal law. There is no “gap” in the Filed Rate Doctrine that allows a rate increase to go untariffed, no matter which of its expenses a utility wishes to cover. Indeed, the courts of this Commonwealth echo the federal courts in holding that the filed rate is ““for all purposes, the legal rate....The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.”” *Commonwealth v. Anthem Ins. Cos., Inc.*, 8 S.W.3d 48, 51 (Ky. App. 1999) (emphasis added), quoting *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 163 (1922). See also *AT&T v. Central Office Telephone*, 524 U.S. 214, 227 (1998) (quoting *Keogh* seventy-six years later and holding that the Filed Rate Doctrine is to be strictly enforced). In *Daleure v. Commonwealth*, 119 F.Supp.2d 683, 689 (W.D. Ky. 2000), U.S. District Judge Heyburn addressed Kentucky telephone rates for collect calls from prison inmates, concluding that “the filed rate is the only legal rate,” citing *Keogh* and *Central Office Telephone*, and noting that “the

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<sup>16</sup> The term “rate” under KRS 278.010 is, if anything, *broader* than the term “charges” as defined under Section 202 of the Federal Communications Act. See 47 U.S.C. § 202 (b).

Supreme Court seems to have refused every opportunity to change or qualify the filed rate doctrine”). As the Court held in *Daleure*, the filed rate is the “legal rate ... whether the regulating agency conducted 10 days of hearings or approved a requested rate routinely.” *Id.* at 689.

The U.S. District Court for the Western District of Kentucky has ruled that *Irwin Wallace* controls Petitioner’s federal tariff claim, ruling that the FCC “has already clearly answered the claims here.” *Dana Bowers*, 790 F.Supp.2d at 534. Petitioner submits that the issue before this Commission is equally clear.

**III. KENTUCKY LAW AND COMMISSION PRECEDENT MANDATE A FINDING THAT WINDSTREAM HAS VIOLATED THE FILED RATE DOCTRINE.**

KRS 278.160 prohibits a utility from charging or collecting “a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules.” KRS 278.544, applicable to telephone utilities that have “elected” the price regulation plan set forth in KRS 278.543, is equally clear and unwavering:

Telephone utilities may file with the commission schedules or tariffs reflecting the rates, terms and conditions for nonbasic services that are generally available to all subscribers qualifying for the rates, terms and conditions. The rates, terms, and conditions for basic and nonbasic services shall be valid upon the effective date stated in the schedule. Tariffs for nonbasic services in effect on July 12, 2006, shall continue to be effective as binding rates, terms, and conditions until withdrawn or modified by the telephone utility.

KRS 278.543 (emphasis added).

Thus, an “electing carrier” such as Windstream “may” (or may not) file tariffs reflecting rates for nonbasic services. But the “rates, terms, and conditions” are “valid” and “binding” if they are filed. As a result, Windstream’s tariffs, including the tariffs at issue here, are as “valid” and “binding” as they ever were.

If this Commission has ever refused to enforce the Filed Rate Doctrine, Petitioner is unaware of it. In *In the Matter of Leslie County Telephone Co., Inc., Investigation into the Alleged Violations of KRS 278.160*, KPSC Docket No. 95-517 (Order of June 21, 1996) [Order attached hereto as Exhibit 12], the Commission demonstrated that it is as steadfast in its enforcement of the Filed Rate Doctrine as the FCC is.

In *Leslie County*, the Commission found that a small Kentucky telephone company had charged its customers for, among other things, directory listings and touchtone service, when those services were not included in its tariff. There was no problem with the services rendered. There was no problem with the amount of the rates charged (indeed, they were accepted by the Commission as the proper charges for the service going forward). Nevertheless, because those rates had not been included in the tariff until two years after the company had begun charging them, Leslie County Telephone Company was found to be in violation of the Filed Rate Doctrine. The Commission noted that “[c]ourts interpreting the filed rate doctrine have consistently held ... that the utility or common carrier was entitled to collect only the filed rate.” *Id.* at 5 (citing cases). It rejected the argument that lack of willful intent was relevant; held that ruling otherwise is “contrary to the literal language” of the statute; and declared that refusal to enforce the doctrine would “represent a dereliction of the Commission’s statutory duty.” *Id.* at 7. The Commission concluded by stating that the legislature had not created a “flexible standard,” but instead had “fashioned a hard and fast rule which must be applied in *all* cases.” *Id.* at 8 (emphasis in original).

Similarly, in *Barkley Lake Water District*, Case No. 2008-00047 (June 20, 2008), the Commission described the Filed Rate Doctrine as “inflexible” and “sometimes harsh,” but made it clear that “neither equitable considerations nor a utility’s negligence may serve as a basis for

departing from the filed rate schedules.” *See also Application of U.S. Digital Network Limited Partnership for a Certificate to Resell Telecommunications*, Case No. 93-479 (April 22, 1994) (ordering refund of all untariffed amounts collected); *The Harbor at Harrods Creek Condominium Ass’n v. Fourth Avenue Corporation – Long Corporation, Joint Venture d/b/a Shadow Wood Subdivision Sewer Service*, Case No. 2000-379 (Aug. 14, 2001) (ordering refund of untariffed amounts).

The Commission should enter its Order upholding the Filed Rate Doctrine.

#### **IV. WINDSTREAM’S DEFENSES OF ITS UNTARIFFED RATE INCREASE ARE LEGALLY UNTENABLE.**

Windstream illogically contends that its own filed tariffs are not legally binding upon it because it elected alternative regulation pursuant to KRS 278.543; because its Gross Receipts Surcharge is not a “rate for service” and therefore need not be tariffed; because the Commission lacks “jurisdiction” over tariffs that Windstream itself filed with the Commission; and because the application of the Filed Rate Doctrine depends on whether, and when, a particular customer complains. It supports these legal arguments with alleged “testimony” of a lay witness who was not even identified by Windstream as a person with knowledge of the claims and defenses in the case.<sup>17</sup> Such “testimony” is entitled to no weight at all. Windstream also characterizes the state tax paid under KRS 136.616 as a “local” tax and, on this illogical basis, claims that the Surcharge is covered by its tariff language concerning “local” tax recovery (thus solving the tariff problem it claims it does not have). Each argument fails.

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<sup>17</sup> *See* Windstream Response to Plaintiff’s Interrogatory No. 18, attached to Petitioner’s Response to Request for Hearing, filed July 11, 2011.



**A. THE COMMISSION HAS CONSISTENTLY REQUIRED UTILITIES TO RECOVER EXTERNAL EXPENSES THROUGH THEIR FILED RATES.**

This Commission has never defied the Kentucky Supreme Court's decision in *Luckett*. Instead, it has repeatedly held, just as the FCC did in *Irwin Wallace*, that a pass-through of a utility's fee or tax obligation is a rate for service that must be tariffed. For example, eleven years ago the Commission confirmed that when the legal incidence of a tax is on the utility and recovery from the customer is not required by statute, the only way for the utility to pass through the expense is through its rates. *See Review of the Tariff of GTE South*, Case No. 2000-260 (December 15, 2000) (rejecting attempt by BellSouth to "flow-through" its own expense arising from newly enacted sales tax on access services it purchased from GTE without a rate increase, but as an offset to other reductions). The rule applies to all utilities, not just to telecommunications providers. *See Taylor County Rural Elec. Coop.*, Case No. 89-054 (April 10, 1989) (approving recovery of franchise fee expense imposed on utility by a community and requiring a tariff and separate listing of the resulting charge). More recently, LG&E was not permitted to recover franchise fees until it remedied its "oversight in amending its tariff," upon which it could "begin prospectively collecting the franchise fee from customers" who lived in the city that assessed the fee upon LG&E.<sup>18</sup> LG&E was unable to recover the cost of this franchise fee until the effective date of that tariff amendment, February 1, 2008, even though it had been paying that franchise fee since 2005.<sup>19</sup>

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<sup>18</sup> *Application of Louisville Gas and Electric Company for a Certificate of Public Convenience and Necessity to Apply for a Franchise from the City of Pleasureville*, Case No. 2005-00173 (Ky. PSC May 5, 2005).

<sup>19</sup> *Id.*

Contrary to Windstream’s arguments here, telecommunications utilities are not exempt from the rule that tariffs must accurately state the rates for service, including the fees and taxes that a carrier is assessed and then passes on to customers. The Commission rejected a GTE tariff precisely because it did not include the “itemization of local fees and taxes” billed to customers.<sup>20</sup> Nor has the recent relaxation of certain regulations applicable to telecommunications companies changed the rule that duly filed tariffs must be accurate. In 2007 BellSouth Telecommunications, d/b/a AT&T Kentucky – certainly not known for its desire to broaden Commission jurisdiction unnecessarily – promptly tariffed its Kentucky Gross Receipts Surcharge after successfully challenging a state law that allegedly interfered with the ways in which a carrier might recover the tax expense.<sup>21</sup> Any telecommunications utility intending to recover tax expenses on tariffed services is required to do the same. Windstream’s failure to have done so is fatal to its claim that it is entitled to keep the surcharge amounts it collected.

Windstream’s arguments fly in the face of all Commission precedent. They must be rejected.

**B. KRS 278.544 APPLIES THE FILED RATE DOCTRINE TO TARIFFS FILED BY “ELECTING” CARRIERS SUCH AS WINDSTREAM.**

Windstream contends that its having elected alternative regulation pursuant to KRS 278.543 and KRS 278.544 freed it from its traditional responsibility to comply with its own tariffs. Windstream is wrong. Far from granting carriers blanket permission to tariff one rate and charge another, KRS 278.544 expressly preserves the Filed Rate Doctrine as to tariffs the carriers file:

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<sup>20</sup> *Id.*

<sup>21</sup> BellSouth PSC KY Tariff 2A, First Revised Page 14, eff. June 1, 2007, attached as Exhibit F to Petitioner’s Petition for Declaratory Ruling.

. . . The rates, terms and conditions for basic and nonbasic services shall be valid upon the effective date stated in the schedule. Tariffs for nonbasic services in effect on July 12, 2006, shall continue to be effective as binding rates, terms, and conditions until withdrawn or modified by the telephone utility.

KRS 278.544(1).

The statutory language is perfectly clear. Any “rates, terms and condition” that appear in Windstream’s tariff are “valid” and “effective” and “binding.” Windstream did not acquire the authority to tariff one rate and charge a higher one simply because it elected alternative regulation. Its having elected alternative regulation does, however, have an impact on this case, for it brings into play yet another statute that Windstream has violated: KRS 278.543. Windstream’s increase in its basic local exchange service rates to “recover” from its customers the tax the General Assembly imposed on it is in direct defiance of the sixty-month rate cap imposed on electing carriers by KRS 278.543: “The rate for basic local exchange service for an electing utility ... shall be capped for a period of sixty (60) months from the date of the election.” Windstream elected to accept that rate cap, and when it did so it also elected to bear the associated risk that its costs – including its taxes – would increase. In candid testimony a Windstream witness acknowledged that regulatory bargain, and its own assumption of that risk, approximately one year ago in another case:

When a carrier elects alternative regulation, it chooses to have its rates governed by price caps, which, after the election, do not necessarily track costs. The whole point of such regulation is to offer an alternative to traditional ratemaking jurisdiction and to create incentives for carriers to operate efficiently in a competitive marketplace. At the same time, the carrier bears the risk of costs increasing.... This was part of the regulatory bargain created by the Legislature.”<sup>22</sup>

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<sup>22</sup> Direct Testimony of Cesar Caballero filed July 15, 2010 in *MCI Communications Services, Inc. et al. v. Windstream Kentucky West, Inc., Windstream Kentucky East, Inc.-Lexington and Windstream Kentucky East, Inc. – London*, Case No. 2007-00503 [Excerpt Attached as Exhibit 14 hereto].

Indeed. Windstream bore “the risk of costs increasing,” including the cost of state taxes, when it accepted the rate cap in return for alternative regulation.<sup>23</sup>

Windstream cannot avoid its regulatory bargain with the Legislature any more than it can avoid the Filed Rate Doctrine. It violated that bargain – and the statute itself – when it raised its rates to “recover” its gross receipts tax expense from its customers.

**C. NEITHER THE EXISTENCE NOR THE TIMING OF CUSTOMER COMPLAINTS RELIEVES A UTILITY FROM COMPLYING WITH THE TERMS OF ITS FILED TARIFFS.**

Windstream argues that because Petitioner did not personally complain in a “timely” way it cannot be held accountable for overcharging its entire customer base. Such a proposition clearly runs afoul of both logic and the law: if the Filed Rate Doctrine means anything, it means that a single customer’s behavior (or, indeed, all customers’ behavior) cannot affect a utility’s obligation to comply with its own tariff. The Filed Rate Doctrine means that utilities answer to regulators for violations of their filed tariffs. Regulators exist to enforce laws and to protect consumers, who cannot reasonably be expected to police utilities on an individual basis.

Nor can Windstream reasonably argue that it was entitled to impose upon its customers a shorter limitations period by tariff, and thus to keep all unlawfully collected monies received more than 30 days prior to a customer’s complaint. Statutes of limitations, not tariffs, control the issue. A tariff cannot supersede a statute. Judge Heyburn, in the parties’ federal court proceeding, has already rejected Windstream’s argument on this point twice, expressly ruling that the limitations statute, not a shorter period allegedly imposed by the carrier, governs Filed Rate Doctrine claims. *Bowers*, 790 F.Supp.2d at 539 (“[t]hrough the tariff has the force of statute

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<sup>23</sup> Windstream cannot claim to have been disadvantaged by the chronology of passage of the tax and its election for alternative regulation. When Windstream elected its regulatory bargain in July 2006 the new Kentucky Gross Receipts Tax was already in effect, so it is not even a matter of costs increasing. They already had. Windstream willingly chose a plan that required it to forego the expense recovery.

in the absence of congressionally mandated rates, its force cannot possibly be so absolute in the face of an existing and conflicting statute”). The court affirmed its original opinion in its Order on Reconsideration, 3:09-CV-440-H (Dec. 2, 2010), at 2, explaining that a thirty-day limitation on customer complaints is a “drastic shortening” that “disrespects” the statute.

The FCC recently confirmed these opinions in *Sprint Communications Co. L.P. v. Northern Valley Communications, LLC*, FCC 11-111 (July 18, 2011) (Exhibit 13 hereto). At ¶ 14 of that Order, the FCC invalidated a tariff provision that would require the customer to “dispute the bills within 90 days or waive ‘any and all rights and claims with respect to the bill and the underlying dispute.’” Such a provision is void, because it contravenes the statutory limitations period, and “purports unilaterally to bar a customer from exercising its statutory right to file a complaint within that limitations period.” *Id.* As the court in *Telco Communications Group, Inc. v. Race Rock of Orlando, LLC*, 57 F.Supp.2d 340, 345 (E.D. Va. 1999), put it in a closely related context, to permit a tariff to supersede the law would allow utilities “to contract around important consumer protections simply by filing tariffs.”

Kentucky state law certainly is not to the contrary. As this Commission has ruled, there is a state statutory limitations period that applies in File Rate Doctrine cases. *See, e.g., The Harbor at Harrods Creek Condominium Ass’n v. Fourth Avenue Corporation – Long Corporation, Joint Venture d/b/a Shadow Wood Subdivision Sewer Service*, Case No. 2000-379 (Aug. 14, 2001), at 7 (holding that refund of amounts collected in violation of the Filed Rate Doctrine are governed by KRS 413.120(2), specifying five years and that the date a complaint is filed “stop[s] the running of the statute of limitations.”). Kentucky law no more permits a utility to bar a customer from exercising his or her right to file a complaint within the statutory limitations period than federal law does. Petitioner is aware of no Commission rulings that even

suggest that the date upon which a customer complains affects a utility's responsibility to charge only its filed rate.

There is no such ruling. There is only Windstream's specious argument that the customer's behavior controls. The argument must be rejected.

**D. THE KENTUCKY GROSS RECEIPTS TAX IS A STATE TAX, NOT A "LOCAL" ONE.**

Windstream also is wrong as a matter of law in claiming that the Kentucky Gross Receipts Surcharge is tariffed by means of its KY No. 7 tariff provision for recovery of "local" franchise fees and taxes.<sup>24</sup> No legal degree is required to know the difference between taxes and fees imposed by "local taxing authorities" and those imposed by the state - particularly when the tariff alleged to apply to a statewide tax states that the local tax involved will be imposed on customers within the "territorial limits" of the local government imposing the tax. Windstream Kentucky East LLC PSC Ky. No. 7, Original Page 27 (Eff. July 17, 2006). The wording of the tariff itself defeats Windstream's contention that it applies to a tax imposed by the state and therefore applies statewide. In addition, there is clear legal authority to buttress the common-sense conclusion that a "state" tax is not subsumed by the term "local tax."

The Kentucky Supreme Court drew a bright line distinction between state and local taxes in *Board of Education of Russellville Ind. Schools v. Logan Aluminum*, 764 S.W. 2d 75 (1989) in holding that Title XI, "Revenue and Taxation," including Chapters 131-143A of the Kentucky Revised Statutes, collectively deals with taxes imposed by the state government. "Taxes

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<sup>24</sup> Windstream Kentucky East, Inc., PSC KY No. 7, Original Page 27, S2.4.5.c reads as follows:

"There shall be added to the customer's bills, as a separate item, an amount equal to the proportionate part of any license, occupation, franchise, or other similar fee or tax now or hereafter agreed to or imposed upon the Company by local taxing authorities, whether imposed by ordinance, franchise or otherwise, and which fee or tax is based upon a percentage of the gross receipts, net receipts, or revenues of the Company. Such amount shall be added to bills of customers receiving service within the territorial limits of the taxing authority. Where more than one such fee or tax is imposed, each of the charges or taxes applicable to a customer shall be added to the customer's bill as separately identified items." (emphasis added)

imposed solely by local entities, be they city, county or special district, are dealt with elsewhere.” *Id.* at 78. KRS 136.616(2)(b), the tax statute at issue here, is imposed by the state government, not by “local entities” including “cit[ies], count[ies] or special district[s].”

AT&T Kentucky understands the distinction, and therefore added its own state gross receipts surcharge to its tariff.<sup>25</sup> Windstream understands the distinction as well, and acted on it in New York. Windstream New York, Inc.’s (“Windstream-NY”) tariff on file with the New York Public Service Commission provides for recovery, by surcharge, of expenses for “Local Utility Gross Revenue Taxes” imposed on Windstream-NY by various cities and villages. The tariff discloses the local tax rate to which Windstream is subject, and separately states the surcharge rate. In a separate section of the same tariff Windstream-NY describes a “Gross Revenue Surcharge” that Windstream adds to its rates and charges for telephone services that “are subject to New York State revenue taxes.” [excerpts included as Exhibit 15 hereto] (emphasis added). The state tax recovery tariff also shows the tax rate and the surcharge rate. Any customer reviewing this tariff (in contrast to any customer reviewing the Kentucky tariff) would actually understand the rates being assessed by Windstream. That is what the Filed Rate Doctrine requires.

The “state” government is not the “local” government, and a tariff provision dealing with fees imposed by the latter does not put a customer on notice that the carrier will assess the customer for taxes imposed by the former. Windstream’s KY Tariff No. 7 does not include the state gross receipts tax. Nor does Windstream KY Tariff No. 8, its access services tariff. In fact, Windstream’s access services tariff does not even include recovery for “local” taxes.

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<sup>25</sup> See Exhibit F to Petition for Declaratory Ruling.

Once again, Windstream knows better. When its employees were asked directly whether the Kentucky Gross Receipts Tax is a “local” or “state” tax, they did not hesitate and answered unequivocally:

Q As I think you probably know, we're here to talk to a large extent about the Kentucky Gross Receipts Tax and the surcharge imposed by Windstream. Do you have a general understanding of what the Kentucky Gross Receipts Tax is?

A High level.

Q Okay. Tell me if that high level, who the Kentucky Gross Receipts Tax is imposed on?

A It is imposed on carriers.

Q Okay. And is it a federal, state, or local tax?

A **My understanding is that it is a state tax.** (emphasis added)

[Deposition of Cesar Caballero, Windstream V.P. of Regulatory Strategy, at 17:13-22, Exhibit 16 hereto].

Q. I want to ask you some basic questions about the Kentucky gross receipts tax with respect to telecommunications providers. And again, Mr. Logsdon, all I'm seeking here is your best understanding. First of all, on whom is that tax imposed?

A. A telecommunications -- local telecommunications providers, ILEC's, incumbent local exchange carriers.

Q. ILEC, I-L-E-C?

A. Yeah. And I think CLEC's as well, but I don't know that.

Q. Okay. And is that a federal, a state, or a local tax?

A. **I believe it's a state tax.** (emphasis added)

[Deposition of Dan Logsdon, Windstream V.P. of External Affairs for Kentucky, at 31:21-32:9, Exhibit 17 hereto].

Q Is the Kentucky gross receipts tax a local, state, or federal tax?

A **It would be considered a state tax.** (emphasis added)

[Deposition of Jennifer Marchal, Windstream Corporate Tax Supervisor, at 7:9-11, Exhibit 18 hereto].



Finally, even if the “local” tax section relied on by Windstream could be stretched to cover state taxes (and it cannot), it still would not be sufficient to support the surcharge. It not only fails to set forth a rate, but the terms and conditions on which even a vague surcharge will be imposed have been directly contradicted. The tariff states that each local tax will be imposed on customers within the respective “territorial limits” of the local government imposing the tax – and that those customers will pay a “proportionate part” of the tax. *Windstream Kentucky East LLC PSC Ky. No. 7*, Original Page 27 (Eff. July 17, 2006). But Windstream admits that Petitioner has actually paid more to Windstream through the surcharge than she would have paid had the tax been imposed directly by the government upon her.<sup>26</sup>

Windstream’s surcharge is not tariffed. It is not related to a “local” “tax” or “fee.” It has not been charged “proportionately” to anything. And its only “territorial limits” have been those of the Commonwealth of Kentucky. Windstream violated the Filed Rate Doctrine when it added the surcharge to tariffed services without tariffing the rate increase. The Commission should so find.

**E. WINDSTREAM IS ESTOPPED FROM ARGUING THAT PETITIONER LACKS KENTUCKY-BASED TARIFF CLAIMS THAT ARE WITHIN THE JURISDICTION OF THIS COMMISSION.**

The Commission ruled in its August 11 Order, at 3, that the contradictory positions Windstream has taken before the U.S. District Court “do not bear directly on the issues presented” to the Commission. The issues here are straightforward ones involving Kentucky Filed Rate Doctrine law and tariff construction. However, it is still worth pointing out that as a matter of equity and as a matter of concern for the integrity of its own proceedings, the Commission should find that Windstream is estopped from exploiting contradictory positions

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<sup>26</sup> Windstream Response to Request for Admission No. 1 [Exhibit 10 hereto].

before the Court and the Commission. Windstream tells this Commission it lacks jurisdiction over the filed tariff that contains rates for Petitioner's services. But before the U.S. District Court for the Western District of Kentucky, Windstream contended (successfully) that Petitioner's Kentucky claims should be referred to this Commission as a matter of primary jurisdiction precisely because her services are subject to Windstream's local tariff on file with the PSC, and that those services include:

...two residential lines with Windstream East's "Feature Pack A." (Id. ¶ 2). These services are subject to Windstream East's local tariff on file with the PSC (the "General customer Services Tariff for the State of Kentucky," PSC KY No. 7) and to any alternative regulation prescribed under KRS 278.543.<sup>27</sup>

(Emphasis added.)

Windstream's sworn testimony to the Court is that Petitioner's services are subject to its FCC and Kentucky tariffs, stating that the subscriber line charge she pays is "subject to the Windstream Telephone System Tariff FCC No. 6 filed with the FCC," and that "[a]ll other services Plaintiff receives in connection with her residential phone lines that are subject to federal or state tariff requirements are governed by the terms of Windstream East's General Customer Services Tariff for the State of Kentucky, PSC KY No. 7." (Emphasis added.)<sup>28</sup> Moreover, in a deposition taken in the U.S. District Court proceeding, Windstream's Senior Vice President of Government Affairs admitted outright that a filed tariff is binding even if it is not required to be filed in the first place: "...whether a tariff is required or not is – is one issue, but

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<sup>27</sup> Windstream's Memorandum in Support of Defendant's Motion to Dismiss or, in the Alternative, Stay this Action, at 7, filed in *Bowers et al v. Windstream Kentucky East, LLC*, Docket No. 3:09-CV-440 (W.D. Ky.) [Relevant Portions filed as Attachment 1 to Petitioner's Rebuttal Testimony and Materials filed previously with the Commission.]

<sup>28</sup> Affidavit of Cesar Caballero, Vice President of Regulatory Strategy for Windstream Communications, Inc., filed in *Bowers et al v. Windstream Kentucky East, LLC*, Docket No. 3:09-CV-440 (W.D. Ky.) and filed by Petitioner with this Commission as Attachment 2 to her Rebuttal Testimony and Materials.

having something in a tariff, whether you believe it's required or not, doesn't give you the ability to depart.”<sup>29</sup>

Next, in response to Plaintiff's “truth-in-billing” claim related to bill format and presentation, Windstream insisted to the Court that its billing presentation that included the bold heading “REGULATED” was accurate because the services (including Feature Pack A) listed under that heading on Bowers' bill were all classified as regulated. Petitioner's Windstream bill demonstrates that Petitioner's “Feature Pack A” services and two “Residential Line(s)” are listed as “REGULATED” charges.<sup>30</sup>

Had Windstream told the Court what it is saying to the Commission now – that the Commission lacks jurisdiction over Petitioner's services and that its Kentucky tariff is essentially meaningless – it would not have been able to establish that primary “jurisdiction” justified referral to this Commission at all. Windstream's attempts to jettison its own arguments once they have outworn their usefulness cannot be permitted. They compromise the integrity of these proceedings. Windstream should be bound by its assertions to the court. *Valentine-Johnson v. Roche*, 386 F.3d 800, 811-812 (6th Cir. 2004). The PSC must hold Windstream to those assertions to protect the integrity of its own proceeding. *See Zurich American Insurance Co. v. Journey Operating*, 323 S.W. 3d 696, 702 (Ky. 2010) (upholding ALJ's estoppel against regulated entity that initially misrepresented its true position).

Windstream's argument that Petitioner lacks a tariff-based claim is erroneous in any event; but under the circumstances here, Windstream should be barred even from making it.

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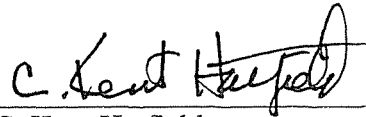
<sup>29</sup> Deposition of Michael Rhoda, at 25, Attachment 4 to Petitioner's Testimony and Materials.

<sup>30</sup> Attachment 3 to Petitioner's Rebuttal Testimony and Materials.

## CONCLUSION

The questions before the Commission are simple and straightforward, despite the complexities Windstream has tried so desperately to create. Petitioner urges the Commission to enter its Order finding that the legal principles explained so clearly in *Irwin Wallace* apply to Kentucky law as well as to federal law, and that Windstream violated Kentucky's Filed Rate Doctrine when it billed and collected an additional surcharge without having amended its filed tariffs to add that surcharge.

Respectfully submitted,



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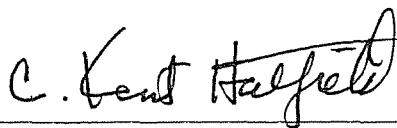
*Counsel for Petitioner*

**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 29th day of August 2011:

Mark R. Overstreet  
Benjamin R. Crittenden  
Stites & Harbison  
421 West Main Street  
P.O. Box 634  
Frankfort, KY 40602-0634

Jeanne Shearer  
Windstream Kentucky East, LLC  
4139 Oregon Pike  
Ephrata, PA 17522



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C. Kent Hatfield



Mail Date: JUNE 22, 2007  
Billing Number: 270-765-4830  
Account Number: 161 175 603 222

PO BOX 800  
MAYFIELD KY 40361-0800  
ADDRESS SERVICE REQUESTED

Thank you for selecting  
**Windstream**  
as your communications  
partner!

161175603222222  
#BVRKCCG 034863 01 AV 6.572 5121  
W16117560322222  
DIANA BOWERS  
284 RAVENSWOOD DR  
ELIZABETHTOWN KY 42701-8435

161175603222222

For local billing inquiries  
please call  
1-800-347-1991

MONDAY THROUGH FRIDAY 7:00 A.M. TO 7:00 P.M. (EST)  
SATURDAY 8:00 A.M. TO 4:00 P.M. (EST)  
See page 2 for your service providers.

If you are paying for  
multiple Windstream  
accounts with one  
check, please include  
the remittance slip for  
each account and note  
the account numbers  
on the memo line  
of your check.  
Thank you.

Windstream now offers  
online billing at  
[www.windstream.com](http://www.windstream.com)  
Your PIN to  
register is:  
118266100

**WINDSTREAM SERVICE AT-A-GLANCE**

Previous Bill  
Payments/Adjustments thru 06/19 \$ 138.14  
Amount Previously Due \$ 138.14 CR  
\$ .00

**SUMMARY OF CURRENT CHARGES**

 LOCAL \$ 139.80

CURRENT CHARGES DUE JULY 11, 2007 \$ 139.80  
**TOTAL AMOUNT DUE \$ 139.80**

Please detach here and return with remittance  
(Note checks payable to: WINDSTREAM KENTUCKY EAST LLC )

Yes! I am interested  
in Windstream Broadband.  
Please contact me.

KEEP  
SEND

windstream.

DANA BOWERS  
284 RAVENSWOOD DR  
ELIZABETHTOWN KY 42701-8435

Account Number 161 175 603 222  
Mailed Date JUNE 22, 2007  
Total Amount Due 139.80  
Due Date JULY 11, 2007  
Amount Paid \$

219 270-765-4830 060804 222 161175603 & 19

Check here for address change or comments.  
Please write on reverse side.

161175603222222  
**Windstream**  
P O BOX 8001908  
LOUISVILLE, KY 40280-1908  
161175603222222

70002220000000161175603007061190000001393084

BOWERS-WKE 000001

**GENERAL INFORMATION**

Payments that you have made but do not appear on this bill as a credit should be deducted from the "Total Amount Due" before you make the payment. The identification slip should always accompany your payment. When paying in person, please bring your reference slip. The "Amount Due" date on this bill refers to the current month's charges and does not extend any previous billing due dates or payment arrangements. An explanation of the various charges, rate schedules, and instructions on how to verify the accuracy of this bill can be obtained at a local Windstream retail location or by calling Windstream Customer Service toll-free at the number on the front page of this bill. All federal, state and local taxes are computed in accordance with the appropriate tax laws.

Usage or service questions or complaints should be referred to Windstream Customer Service. Discrepancies should be reported within 30 days of the date of the bill to allow necessary adjustments to be made before the next bill cycle. If a portion of your bill is incorrect or disputed, that amount only may be deducted from your payment. All other charges must be paid to avoid interruption of your service. Please call Windstream Customer Service toll-free to report the error.

If your amount due is less than \$2.01, you may not receive a billing statement.

A "Late Payment Charge" may apply to each customer bill when the previous month's bill has not been paid in full, leaving an unpaid balance carried forward. This charge is applied to the total amount carried forward and is included in the amount due on the current bill. Service and equipment are billed one month in advance. If you begin service or make any additions or changes to existing service in the middle of the billing period, your bill will show a PRO-RATION. This amount represents the partial month charge or credit from the date of the addition or change to the next bill date. The minimum service period is 30 days. "CR" next to a charge denotes a credit. If "CR" appears next to the "Total Amount Due", do not pay.

Check authorization: 42701 By entering this 5-digit code when paying by phone, I hereby authorize Windstream and the financial institution designated by me to charge the account I have specified for payment of my Windstream services. I understand that a fee will be charged to my Windstream account for each request returned unpaid. If two attempts are returned unpaid, I will be excluded from this option. In addition, I understand that Windstream and the financial institution reserve the right to terminate this payment option. This authorization can be revoked by notifying Windstream at the customer service number listed on my bill prior to 4:00 P.M. CST on my specified payment date.

**EXPLANATION OF CALL CODES**

- Long Distance Class of Call
- P = Person to Person
- S = Station to Station
- Long Distance Rate Periods
- D = Day
- E = Evening
- N = Night
- DM = Day Multiple
- EM = Evening Multiple
- NM = Night Multiple
- ID = International Call Rate Period

**TAXES, SURCHARGES AND FEES**

9-1 Service: This fee is charged to recover the costs incurred by Federal Universal Service Fund (USF) and Windstream associated with construction, maintenance and upgrades of 911 services and related facilities. This fee also recovers the costs of local government providing 911 services in states that have imposed a flat surcharge, in which case the amount of the fee is set in accordance with state law.

Access Charge per FCO Order/CLEO Network Access: This charge also applies to the Federal Universal Service Fund (USF). It is a FCC regulated fee that enables local telephone companies to recover a portion of the costs of connecting residential homes or businesses to the telephone network so these customers may receive service to state-to-state calls.

Federal Tax: A federal excise tax paid to the Federal Government, which is a wireless customer.

State Tax: A state tax levied on all wireless customers. The tax usually applies only to local monthly service charges and usually takes the form of a state tax. The application of this tax may vary by state.

County Tax: A county tax levied on all wireless customers. The tax usually applies only to local monthly service charges and usually takes the form of a sales tax. The application of this tax may vary by county.

City Tax: A city tax levied on all wireless customers. The tax usually applies only to local monthly service charges and can be a sales tax, a license fee tax, or both. The application of this tax may vary by city.

Interstate Toll Tax / Equalization Surcharge: A usage-based tax levied by most individual states on long distance calls made in the state.

Green Receipts Surcharge: This charge accounts for a tax fee imposed either on Windstream or on customers directly by various states for the provision of communications services. In the case of green receipts surcharges, they are not government mandated charges.

State USF Fee: Some states have implemented a State Universal Service Fund (SUSF) similar to the federal USF. In those states, telecommunications companies must contribute a percentage of billed revenues to the SUSF. The states, in turn, allow telecommunications companies to recover their mandatory contribution to SUSF from their customers.

Relay Service Surcharge: The Americans with Disabilities Act requires all companies offering voice service to provide access to a Telecommunications Relay Service (TRS) and to contribute to a shared fund to support this service. This service enables an individual who is hearing or speech impaired to communicate with others through access to a Telecommunications Device for the Deaf (TDD).

Local Number Portability (LNP) Fee: Where available, LNP allows a customer to keep his or her current local telephone number when changing telephone service providers. In order to provide this service, local telephone companies must make investments and upgrades to their local telephone network. The FCC has determined that the local telephone company may recover certain costs for providing LNP.

Interstate Service Fee: The Interstate Service Fee helps recover costs associated with providing interstate long distance service including, for example, interstate and international connection charges.

Keep this portion for your records. Send RETURN this portion with your payment. WSO11298 596990

Change of Address Effective Date  /  /

Name

Attention

New Address  Apt / Suite #

City  State  Zip

Business Phone  Home Phone

Comments





Page 1 of 3  
 Mail Date: JULY 24, 2007  
 Billing Number: 270-765-4830  
 Account Number: 181 178 603 222

PO BOX 828  
 MATTHEVA, MO 20105-0828  
 ADDRESS SERVICE REQUESTED

*Thank you for selecting  
 Windstream  
 as your communications  
 partner!*

181178603222  
 #BWRK003  
 094711 01 AV 0312 0120  
 DANA BOWERS  
 204 RAVENSWOOD DR  
 ELIZABETH TOWN KY 42701-4436

*For local billing inquiries  
 please call*  
 1-800-347-1981

**WINDSTREAM SERVICE AT-A-GLANCE**

Previous Bill Payments/Adjustments thru 07/19 \$ 139.80  
 Amount Previously Due \$ 139.30 CR  
 \$ .00

MONDAY THROUGH FRIDAY 7:00 A.M. TO 7:00 P.M. (EST)  
 SATURDAY 8:30 A.M. TO 5:00 P.M. (EST)  
 See page 3 for your service provider.

**SUMMARY OF CURRENT CHARGES**

*If you are paying for  
 multiple Windstream  
 accounts with one  
 check, please include  
 the remittance slip for  
 each account and note  
 the account numbers  
 on the memo line  
 of your check.  
 Thank you.*



LOCAL \$ 140.41



Windstream now offers  
 online billing at  
[www.windstream.com](http://www.windstream.com)  
 Your PIN is  
 Register at  
 118266100

CURRENT CHARGES DUE AUGUST 13, 2007 \$ 140.41

**TOTAL AMOUNT DUE** \$ 140.41

KEEP  
 SEND

Please detach here and return with remittance  
 (Date and city please use WINDSTREAM KENTUCKY EAST 00 )

Yes, I am interested  
 in Windstream Eyeglasses.  
 Please contact me.

windstream.

DANA BOWERS  
 204 RAVENSWOOD DR  
 ELIZABETH TOWN KY 42701-4436

Account Number 181 178 603 222  
 Mail Date JULY 24, 2007  
 Total Amount Due 140.41  
 Due Date AUGUST 13, 2007  
 Account Paid \$

219 270-765-4830 050604 222 181178603 & 18

Check here for address change or comments.  
 Please write on reverse side.

Windstream  
 P O BOX 8001908  
 LOUISVILLE, KY 40290-1908

700022200000016317560300707190000001404129

**GENERAL INFORMATION**

Payments that you have made but do not appear on this bill as a credit should be deducted from the "Total Amount Due" before you make the payment. The remittance slip should always accompany your payment. When paying in person, please bring your remittance slip. The "Amount Due" date on this bill refers to the current month's charges and does not extend any previous billing due dates or payment arrangements. An explanation of the various charges, rate schedules, and instructions on how to verify the accuracy of this bill can be obtained at a local Windstream retail location or by calling Windstream Customer Service toll-free at the number on the front page of this bill. All federal, state and local taxes are computed in accordance with the appropriate tax laws.

Billing or service questions or complaints should be referred to Windstream Customer Service. Discrepancies should be reported within 30 days of the date of the bill to allow necessary adjustments to be made before the next bill cycle. If a portion of your bill is incorrect or disputed, that amount only may be deducted from your payment. All other charges must be paid to avoid interruption of your service. Please call Windstream Customer Service toll-free to report the error.

If your amount due is less than \$2.01, you may not receive a billing statement.

A "Late Payment Charge" may apply to each customer bill when the previous month's bill has not been paid in full, leaving an unpaid balance carried forward. The charge is applied to the total amount carried forward and is included in the amount due on the current bill. Service and equipment are billed one month in advance. If you begin service or make any additions or changes to existing service by the middle of the billing period, your bill will show a PRO-RATA. This amount represents the partial month charge or credit from the date of the addition or change to the bill due date. The minimum service period is 30 days. "CR" next to a charge, denotes a credit. If "CR" appears next to the "Total Amount Due", do not pay.

Check authorization: 42701 By entering this 6-digit code when paying by check, I hereby authorize Windstream and the financial institution designated by me to charge the account I have specified for payment of my Windstream services. I understand that a fee will be charged to my Windstream account for each request returned unpaid. If two requests are returned unpaid, I will be excluded from this option. In addition, I understand that Windstream and the financial institution reserve the right to terminate this payment option. This authorization card is revoked by notifying Windstream at the customer service number listed on my bill prior to 4:00 P.M. CST on my specified payment date.

**EXPLANATION OF CALL CODES**

- Long Distance Charge of Call
- P = Person to Person
- S = Station to Station
- Long Distance Rate Periods
- D = Day
- E = Evening
- N = Night
- DM = Day Minitel
- EM = Evening Minitel
- NM = Night Minitel
- IC = International Call Rate Period

**TAXES, SURCHARGES AND FEES**

9-1-1 Service: This fee is charged to recover the costs incurred by Windstream associated with construction, maintenance and upgrades of 911 services and related facilities. This fee also recovers the costs of local government providing 911 services in states that have enacted a 911 surcharge, in which case the surcharge is set in accordance with state law.

Access Charge per FCC Order/ILEC Network Access: This charge, also known as the Federal Universal Service Fund (USF) Fee, is an FCC mandated fee that enables local telephone companies to recover a portion of the costs of connecting customer homes or businesses to the long distance network, so that customers may receive and/or initiate interstate calls.

Federal Tax: A federal excise tax paid to the Federal Government, which is all wireless customers.

State Tax: A state tax levied on all wireless customers. The tax usually applies only to local monthly service charges and usually takes the form of a sales tax. The application of this tax may vary by state.

County Tax: A county tax levied on all wireless customers. The tax usually applies only to local monthly service charges and usually takes the form of a sales tax. The application of this tax may vary by county.

City Tax: A city tax levied on all wireless customers. The tax usually applies only to local monthly service charges and can be a sales tax, a franchise tax, or both. The application of this tax may vary by city.

Interstate Toll Tax / Equalization Surcharge: A usage-based tax levied by some individual states on long distance calls made in the state.

Access Fee/Surcharge: This charge recovers for a tax that is imposed either on Windstream or on customers directly by various states for the provision of communications services. In the case of direct surcharges, they are not government associated charges.

Established by the FCC to ensure that telecommunications services are available for customers with low incomes and customers living in rural areas where the cost of providing service is high. The fund also provides universal telecommunications services to schools, libraries and rural health care providers. Through this fee, Windstream recovers the cost of its mandated contribution to the USF as mandated by the FCC.

State USF Fee: Some states have implemented a State Universal Service Fund (SUSF) similar to the federal USF. In those states, telecommunications companies must contribute a percentage of their revenues to the SUSF. The states, in turn, allow telecommunications companies to recover their mandatory contribution to SUSF from their customers.

Relay Service Surcharge: The Americans with Disabilities Act requires all companies offering voice service to provide access to a telecommunications Relay Service (TRS) and to contribute to a shared fund to support this service. This service enables an individual who is hearing or speech impaired to communicate with others through access to a Teleprinter (TTY) and/or Telecommunications Device for the Deaf (TDD).

Local Number Portability (LNP) Fee: Where available, LNP allows a customer to keep his or her current local telephone number when changing telephone service providers. In order to provide this service, local telephone companies must make investments and upgrades to their local telephone network. The FCC has determined that the local telephone company may recover certain costs for providing LNP.

Interstate Service Fee: The Interstate Service Fee helps recover costs associated with providing interstate long distance service including, for example, interstate and international connection charges.

Keep this portion for your records. Return this portion with your payment. W3011198 602736

Change of Address Effective Date  /  /

Name

Attention

New Address  Apt / Suite #

City  State  Zip

Business Phone  Home Phone

Comments

**SERVICE PROVIDER(S)**

Your **InterLATA** long distance carrier(s) are:  
**AT&T** 1-800-222-0360

Your **IntraLATA** long distance carrier(s) are:  
**AT&T** 1-800-322-0300

Your **Local** carrier is:  
**Windstream** 1-800-347-1691

\* If you have multiple telephone numbers, either residential or business long distance carrier assignments for those numbers must be on record with your local business office.

**SUMMARY OF PAYMENTS AND ADJUSTMENTS**

PAYMENTS	150.00 CR	
<b>TOTAL PAYMENTS AND ADJUSTMENTS</b>		<b>150.00 CR</b>

**SUMMARY OF CURRENT CHARGES**

<b>REGULATED</b>		
WINDSTREAM	100.00	
<b>TOTAL</b>		<b>100.00</b>
<b>DEREGULATED</b>		
WINDSTREAM	10.21	
<b>TOTAL</b>		<b>10.21</b>
<b>CURRENT CHARGES DUE 08/14/07</b>		<b>110.21</b>

Nonpayment of the **TOTAL** of Regulated amounts shown above could result in discontinuation of these services including basic local service and may be subject to collection actions.

Nonpayment of the **TOTAL** of Deregulated amounts shown above could result in discontinuation of these services and may be subject to collection actions, but will not result in discontinuation of basic local service.

If not paid on time, a late fee penalty of 2.0% will apply to any unpaid balance over \$25.00 after 08/14/07.

**WINDSTREAM SUMMARY OF CURRENT CHARGES**

Send to 6000 GLENVIEW in DENVER  
 Toll charge inquiries call 1-800-347-1691

<b>REGULATED</b>		
<b>SERVICES AND PRODUCTS</b>		<b>101.00</b>
911 SERVICE	3.20	
ACCESS CHARGE PER FOC ORDER	13.50	
FEDERAL TAX	2.64	
STATE TAX	3.00	
SCHOOL TAX	1.66	
KY GROSS RECEIPTS SURCHARGE	2.87	
THEFT/AB SURCHARGE	.16	
FEDERAL UNIVERSAL SERVICE FEE	1.52	
KENTUCKY WIRELINE SUPPORT	.18	
<b>TOTAL REGULATED</b>		<b>130.23</b>
<b>DEREGULATED</b>		
PROTECTION PLUS PLAN	0.45	
KY GROSS RECEIPTS SURCHARGE	.25	
<b>TOTAL DEREGULATED</b>		<b>10.71</b>
<b>TOTAL WINDSTREAM CHARGES</b>		<b>140.94</b>

**DETAIL OF LOCAL SERVICE CHARGES**

The following detail shows your current billing as required by your state regulatory agency. These charges are included on your regular monthly bill. There are several monthly charges we not included.

Quantity	Service Description	Monthly Charge
	<b>REGULATED</b>	
1	DSL UPFRONT FEE	34.33
2	FEATURE PACK A	32.00
1	ACCESS CHARGE PER FOC ORDER	0.67
2	RESIDENTIAL LINE	31.14
1	FOC ACCESS CHARGE NON PRAMAITY RES	7.00
	<b>DEREGULATED</b>	
1	DSL PROTECTION PLUS	0.45

**WINDSTREAM CUSTOMER MESSAGE**

Important information for customers paying by check: Windstream may convert your payments by check to an electronic Automated Clearinghouse (ACH) debit transaction. The debit transaction will appear on your next statement, although your check will not be presented to your financial institution or returned to you. This ACH debit transaction will not affect you in any Windstream automatic debit process and will only occur each time a check is received. Any transactions due to insufficient funds may also occur simultaneously. Please be sure that all checking transactions will remain yours, and payment by check constitutes acceptance of these terms. We value your business and appreciate you selecting Windstream as your telecommunications provider.

Windstream's Great Calling Features are Available on a Pay-Per-Min Basis:  
 \*99 - CALL RETURN: If you missed a call, just dial '99 (1155 for rotary phones) to reach your last caller.  
 \*95 - RETURN DIALING: If you keep getting a busy signal, just press '95 (1155 for rotary phones) and your phone will automatically redial the number for 30 minutes until it gets through.  
 Contact the number on this billing statement for more information on Windstream's other great calling features.

To help us serve you better, please bring your entire billing statement with you when paying in person at one of our payment center locations.



**EXHIBIT NO. 3**

**FILED UNDER**

**CONFIDENTIAL SEAL**



Windstream Communications, Inc.  
150 West New Circle Road, Suite 170  
Lexington, Kentucky 40505 (40286)

Daniel E. Logsdon  
Vice President, External Affairs

t: 659-357-8125 (659-357-8125)  
e-mail: [daniel.logsdon@windstream.com](mailto:daniel.logsdon@windstream.com)



Date: August 16, 2007

Ms. Elizabeth O'Donnell  
Executive Director  
Kentucky Public Service Commission  
211 Sewer Boulevard  
P.O. Box 615  
Frankfort KY 40602-0615

Dear Ms. O'Donnell:

On behalf of Windstream Kentucky East, Inc., I have enclosed for filing with the Kentucky Public Service Commission an original of the following revised tariff sheet for its General Customer Services Tariff:

Section	Title	Revision	Page
2	General Regulations	First	27

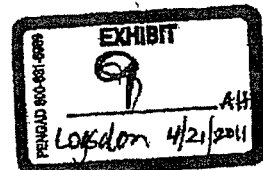
This filing clarifies and broadens the language allowing the Company to pass through taxes, surcharges, and fees imposed on the Company by governmental authority.

Please call me at 659-357-8125 if you have any questions regarding this filing.

Sincerely,

Daniel Logsdon

Attachments



WS001021



GENERAL CUSTOMER SERVICES TARIFF

WINDSTREAM KENTUCKY EAST, INC.

P.S.C. KY. No. 7  
First Revised Page 27  
Cancels Original Page 27

ISSUED: August 16, 2007  
BY: Vice President  
Lexington, Kentucky

EFFECTIVE: August 16, 2007

92. GENERAL REGULATIONS

92.4 Payment Arrangements and Credit Allowances (Continued)

92.4.6 Provision for Certain Local Taxes and Fees

- a. Effective July 1, 1980, the Company, pursuant to authority conferred by KRS 139.210 commenced and will continue to add to the bills of customers as a separate item the Kentucky Veterans' Bonus Sales and Use Tax levied by KRS 139.200.
- b. When the Company is required to pay the 3 percent utilities gross receipts license tax for schools, authorized by KRS 160.013, the Company will increase its rates in any such county in which it is required to pay such school tax by 3 percent. This tax will be added to customer bills as a separate item.
- c. Company shall add to the customer's bill, as a separate line item, an amount equal to any tax or any surcharge, fee, or cost of a tax imposed by the Commonwealth or other governmental authority with proper jurisdiction upon the Company or upon customer through the Company, whether imposed by ordinance, franchise or otherwise. Company shall add such amount to bills of customers receiving service within the territorial limits of the taxing or other governmental authority.

(C)

(C)

WS001022

Windstream Communications, Inc.  
130 West New Circle Road, Suite 170  
Lexington, Kentucky 40505 (40588)

t: 859-357-6125 f: 859-357-8163  
e-mail: [daniel.logsdon@windstream.com](mailto:daniel.logsdon@windstream.com)

Daniel E. Logsdon  
Vice President, External Affairs



Date: August 16, 2007

Ms. Elizabeth O'Donnell  
Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
P.O. Box 615  
Frankfort KY 40602-0615

Dear Ms. O'Donnell:

On behalf of Windstream Kentucky West, Inc., I have enclosed for filing with the Kentucky Public Service Commission an original of the following revised tariff sheets for its General Subscriber Services Tariff:

<u>Section</u>	<u>Title</u>	<u>Revision</u>	<u>Page</u>
4	Establishment and Furnishing of Service	2 <sup>nd</sup>	7
4	Establishment and Furnishing of Service	Original	7.1

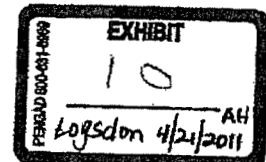
This filing includes language allowing the Company to pass through taxes, surcharges, and fees imposed on the Company by governmental authority.

Please call me at 859-357-6125 if you have any questions regarding this filing.

Sincerely,

Daniel Logsdon

Attachments



WS001015

4. ESTABLISHMENT AND FURNISHING OF SERVICE (Continued)

4.3 Payment for Service (Continued)

G. Miscellaneous Fees Associated with Payments

1. Payment Convenience Fee for Payment Made Via Telephone Call

A fee will apply for each instance of payment of outstanding charges when authorized by the residence subscriber by telephone (whether such telephone call was initiated by the subscriber or by the company) and when the method of payment would allow the payment to be immediately credited to the subscriber's account, such as payment via a credit card, an electronic check (eCheck), or any other discretionary type payment that may be accepted by the Company through such telephone contacts. This fee will not apply for payments taken directly by subscribers to authorized Company payment locations, payments made in, automatic funds transfer, and other conventional methods of payments. The subscriber will be informed of any applicable charges prior to processing the subscriber's request and given the opportunity to be transferred to the automated payment system to avoid the payment convenience fee charge.

Rates and Charges

Per Telephone Request

Rate  
\$1.50

H. Company shall add to the customer's bills, as a separate line item, an amount equal to any tax or any surcharge, fee, or cost of a tax imposed by the Commonwealth or other governmental authority with proper jurisdiction upon the Company or upon customer through the Company, whether imposed by ordinance, franchise or otherwise. Company shall add such amount to bills of customers receiving service within the territorial limits of the taxing or other governmental authority.

(H)  
|  
(H)

4.3.1 Special Promotions

A. Upon occasions, the Company may elect to offer special promotions of new or existing services or products for limited periods as approved by the Public Service Commission. These promotions are a temporary waiver of certain recurring and non-recurring charges. Prior to the Company's promotional offering, the offering, along with the promotional period's estimated revenue effect shall be filed with the Kentucky Public Service Commission for approval.

(M)  
|  
(M)

(M) Material previously found on this sheet can now be found on Section 4, Sheet 7.1.

ISSUED: August 16, 2007  
ISSUED BY: Vice President  
Shepherdsville, Kentucky

EFFECTIVE: August 16, 2007  
ISSUED BY AUTHORITY OF P.S.C.  
Order No.:

WS001016





Windstream Communications  
130 West New Circle Road  
Suite 170  
Lexington, KY 40505

Daniel E. Logsdon  
Vice President, External Affairs  
daniel.logsdon@windstream.com  
c/o. 959-357-6125  
fx. 959-357-5163

August 30, 2007

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

RE: TFS2007-00667

Dear Ms. O'Donnell:

Windstream Kentucky East is hereby notifying the Commission of the withdrawal of its tariff filing referenced above, TFS2007-00667.

If you have any questions, please contact me at 959.357.6125.

Sincerely,

Daniel Logsdon



WS001024



Windstream Communications  
130 West New Circle Road  
Suite 170  
Lexington, KY 40505

Daniel E. Logsdon  
Vice President, External Affairs  
[daniel.logsdon@windstream.com](mailto:daniel.logsdon@windstream.com)  
o/a. 859-357-6125  
f/a. 859-357-6163

August 20, 2007

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

RE: TFS2007-00668

Dear Ms. O'Donnell:

Windstream Kentucky West is hereby notifying the Commission of the withdrawal of its tariff filing referenced above, TFS2007-00668

If you have any questions, please contact me at 959.357.6125.

Sincerely,

Daniel Logsdon



WS001018



ACCESS SERVICE

2. General Regulations (Cont'd)

2.4 Payment Arrangements and Credit Allowances (Cont'd)

2.4.1 Payment of Rates, Charges and Deposits (Cont'd)

(H) Rounding of Charges

When a rate as set forth in this tariff is shown to more than two decimal places, the charges will be determined using the rate shown. The resulting amount will then be rounded to the nearest penny (i.e., rounded to two decimal places).

(I) Taxes, Fees and Surcharges

(N)

There shall be added to the customer's bills, as a separate item, an amount equal to the proportionate part of any license, occupation, franchise, or other similar fee or tax or cost of a tax now or hereafter imposed upon the Telephone Company's interstate revenues by a taxing jurisdiction, and which fee or tax is based upon a percentage of the interstate receipts of the Telephone Company. Where more than one such fee or tax is imposed, each of the charges or taxes applicable to a customer shall be added to the customer's bill as separately identified items. Such taxes or fees will not be applied to the Federal Universal Service Fee or Lifeline services. The taxing jurisdiction and applicable factors are as follows:

Jurisdiction	Tax Factors
Kentucky (Gross Revenues Tax Surcharge)	1.31%

(N)

2.4.2 Minimum Periods

The minimum period for which services are provided and for which rates and charges are applicable is one month except for the following, or as otherwise specified:

- Switched Access usage rated services
- Directory Assistance usage rated services
- Switched Access High Capacity DS3 Entrance Facility and Direct Trunked Transport.
- Switched Access Synchronous Optical Channel OC3 and OC12 Entrance Facility and Direct Trunked Transport.
- Special Access Part-Time Video
- Special Access Program Audio
- Special Access Synchronous Optical Channel Service
- Frame Relay Service

The minimum period for which service is provided and for which rates and charges are applicable for a Specialized Service or Arrangement provided on an individual case basis as set forth in Section 12. following, is one month unless a different minimum period is established with the individual case filing.

When a service is discontinued prior to the expiration of the minimum period, charges are applicable, whether the service is used or not, as follows:

Information previously found on this page now found on Page 2-31.

(TR16)

Issued: July 23, 2008

Effective: August 7, 2008

4001 Rodney Parham Rd.  
 Little Rock, Arkansas 72212





IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION

Dana Bowers, On Behalf of Herself and

Others Similarly Situated,

And

Sunrise Children's Services, Inc.,

on

Behalf of Itself and Others Similarly

Situated

PLAINTIFFS,

vs.

Civil Action No. 3:09-CV-440

Windstream Kentucky East, LLC, et al.

DEFENDANTS.

VIDEOTAPED ORAL DEPOSITION OF CESAR CABALLERO

TAKEN WEDNESDAY, MAY 18, 2011

A P P E A R A N C E S:

ON BEHALF OF THE PLAINTIFFS:

DAVID T. ROYSE, ESQ.  
Stoll Keenon Ogden  
300 West Vine Street, Suite 2100  
Lexington, Kentucky 40507

DOUGLAS F. BRENT, ESQ.  
Stoll Keenon Ogden  
200 PNC Plaza 500 West Jefferson Street  
Louisville, Kentucky 40202-2828

1           The FCC doesn't mandate that that SLC be passed along to a  
2 customer. Right?

3       A     It does not mandate, no.

4       Q     Does your work, Cesar, ever involve various state taxes  
5 that Windstream is either subject to or has to pass along to  
6 its customers?

7       A     No.

8       Q     Okay. Have you ever been registered as a lobbyist for  
9 Windstream?

10      A     I have not.

11      Q     Okay. Who does Windstream's federal lobbying?

12      A     Clint Highfield.

13      Q     As I think you probably know, we're here to talk to a  
14 large extent about the Kentucky Gross Receipts Tax and the  
15 surcharge imposed by Windstream. Do you have a general  
16 understanding of what the Kentucky Gross Receipts Tax is?

17      A     High level.

18      Q     Okay. Tell me if that high level, who the Kentucky Gross  
19 Receipts Tax is imposed on?

20      A     It is imposed on carriers.

21      Q     Okay. And is it a federal, state, or local tax?

22      A     My understanding is that it is a state tax.

23      Q     Okay. Do you know whether there are some revenues or  
24 receipts that are excluded from the tax or does it apply to  
25 every single dollar that comes in the door?

1           Okay. "Subject: Reduce rates charged to customers for KY  
2 GRT effective 1/9/09." And it says, "Janann, Tim, Effective  
3 1/9/09 we need to change the rates charged to our retail and  
4 wholesale customers to pass through the Kentucky gross receipts  
5 tax to the following rates: Interstate wholesale 1.3;  
6 intrastate wholesale 0.0; retail," and it says "1.55," and then  
7 that's later struck through in handwriting and changed to  
8 "1.75." It says, "The slightly higher rate on the retail side  
9 is to compensate for the money we are not passing through to  
10 intrastate wholesale customers."

11           So a business decision was made not to pass through a  
12 gross receipt surcharge on intrastate wholesale customers.  
13 Correct?

14           MS. FARRIS: Object to the form.

15           You can answer.

16           THE WITNESS: Yes.

17 BY MR. ROYSE:

18 Q       And a business decision was made to charge a rate in  
19 excess of 1.3 to retail customers in order to make up for the  
20 revenues missing from that intrastate wholesale piece?

21           MS. FARRIS: Object --

22 BY MR. ROYSE:

23 Q       Is that accurate?

24           MS. FARRIS: Object to the form.

25           You can answer.

1 THE WITNESS: Yes.

2 BY MR. ROYSE:

3 Q The response up above from Angela to the whole group is,  
4 or she corrects herself, "One slight change. The CAMS rate  
5 should be 1.75 percent, not 1.55 percent."

6 Do you know why that was?

7 A I can only infer that they miscalculated.

8 Q How much they needed --

9 A That's --

10 Q -- to charge --

11 A That's --

12 Q -- to make up?

13 A That's correct.

14 Q Okay. Were you involved in this decision?

15 A No.

16 Q Okay. You would have been vice president of regulatory  
17 strategy in December of 2008. Right?

18 A Yes.

19 Q Do you feel like it's a decision you should have been  
20 involved in?

21 A Relative to surcharges, I don't get involved that often  
22 with the ability of -- if the -- if the decision has been made  
23 that they have the ability to make changes to the surcharge,  
24 then I don't need to get involved every single time they change  
25 their -- the surcharge rate. No.



**EXHIBIT NO. 8**

**FILED UNDER**

**CONFIDENTIAL SEAL**





IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION

Dana Bowers, On Behalf of Herself and

Others Similarly Situated,

And

Sunrise Children's Services, Inc.,

on

Behalf of Itself and Others Similarly

Situated

PLAINTIFFS,

vs.

Civil Action No. 3:09-CV-440

Windstream Kentucky East, LLC, et al.

DEFENDANTS.

VIDEOTAPED ORAL DEPOSITION OF ANTHONY THOMAS

TAKEN THURSDAY, MAY 26, 2011

A P P E A R A N C E S:

ON BEHALF OF THE PLAINTIFFS:

DAVID T. ROYSE, ESQ.  
Stoll Keenon Ogden  
300 West Vine Street, Suite 2100  
Lexington, Kentucky 40507

DOUGLAS F. BRENT, ESQ.  
Stoll Keenon Ogden  
200 PNC Plaza 500 West Jefferson Street  
Louisville, Kentucky 40202-2828

1 June 30th of 2010, let's say. That's obviously a  
2 hypothetical. That's not what happened.

3 A Yes. I -- so what's the question?

4 Q I'm getting there.

5 A Okay.

6 Q By virtue of the way that Windstream imposed the surcharge  
7 on Dana Bowers, isn't it true that she actually paid more than  
8 the total of 1.3 percent on all of her service, subject  
9 services from January 1 up through -- January 1 of 2006 up  
10 through June 30 of 2010?

11 MS. FARRIS: Object to the form.

12 You can answer.

13 THE WITNESS: I'm not familiar with her bills to --  
14 to know the -- the details of that.

15 BY MR. ROYSE:

16 Q Yeah. Understood.

17 We know that we've established, you and I have just agreed  
18 that the rate was 1.3 for a month and then 2.6 for about 18  
19 months?

20 A Yes.

21 Q And then it dropped down to 1.75 percent?

22 A Uh-huh.

23 Q For that period you know that the total she paid on  
24 subject services had to be more than 1.3 percent. Right?

25 A I think the -- I don't know what time she had services,

1 did she pay her bills in their entirety, were there  
2 adjustments. I'm just, I'm not familiar with the details of  
3 her account to know if she in fact paid those services or was  
4 in fact a customer during that period, I just, I have not  
5 reviewed her bills in detail.

6 Q All right. Then let me give you these assumptions.  
7 Assume she was a customer for that entire period, assume she  
8 paid her bill in full each month, assume there were no  
9 adjustments. Now, isn't it true that the total amount she paid  
10 on the subject services was greater than 1.3 percent for the  
11 period January 1, '06 up through June 30, 2010?

12 MS. FARRIS: Object to the form.

13 You can answer him.

14 THE WITNESS: Yes.

15 BY MR. ROYSE:

16 Q That mathematically has to be true, right?

17 A Yes. With the very small --

18 MS. FARRIS: Object to the form.

19 You can answer.

20 THE WITNESS: Yes, to the period where she was  
21 charged in theory from January 1, 2006 until the rate was  
22 changed on January 1st, I forget the -- of 2009, I believe, I  
23 would have to check my year. But it was basically she was  
24 charged nothing, and then charged 2.6 percent. So from  
25 January 1, 2006, so that period most likely the tax would



### REQUEST FOR ADMISSION

**ADMISSION NO. 1:** Admit that the total amount of Gross Receipts Surcharges WKE charged to Dana Bowers between June 1, 2007 and June 30, 2010 was greater than 1.3% of the total charges to Dana Bowers for which WKE was required to pay the Kentucky Gross Receipts Tax between June 1, 2006 and June 30, 2010.

**RESPONSE:** Windstream East objects to this request as being vague and ambiguous. Subject to and without waiving its objections, Windstream East admits that, from June 1, 2007 to June 30, 2010, it assessed a GRS to Mrs. Bowers in each of her monthly billing statements, that the GRS assessed each month was calculated based on the potential revenues derived from certain charges in Mrs. Bowers' bills that were subject to the Kentucky gross revenues tax, and that the total GRS assessed to Mrs. Bowers over the time period June 1, 2007 to June 30, 2010 was in an amount greater than 1.3% of the total amount of the potential revenues derived from certain charges in Mrs. Bowers' bills that were subject to the Kentucky gross revenues tax over the time period June 1, 2006 to June 30, 2010.



1983 Ky. Op. Atty. Gen. 2-536, Ky. OAG 83-445, 1983 WL 166209 (Ky.A.G.)

\*1 Office of the Attorney General  
Commonwealth of Kentucky  
OAG 83-445

November 17, 1983

Mr. James Monroe  
Executive Director  
Providence Housing Authority  
434 Center Ridge Drive  
Providence, Kentucky 42450

Dear Mr. Monroe:

In your letter to the Attorney General you ask whether the Providence Housing Authority, a tax exempt organization, should be required to pay the utility gross receipts license tax levied by KRS 160.613.

In Lockett v. Electric and Water Plant Board of the City of Frankfort, Ky., 558 S.W.2d 611 (1977), the Kentucky Supreme Court held that the utility gross receipts license tax is levied on the utility company, not its customers. The utility company may raise its rates under KRS 160.617 to compensate for the tax, but this does not make it a tax levied on the customers. It remains the utility company's liability.

Consequently, the Providence Housing Authority is not paying the utility gross receipts license tax, it is paying for utility services.

Sincerely,

Steven L. Beshear  
Attorney General

By: Alex W. Rose  
Assistant Attorney General

1983 Ky. Op. Atty. Gen. 2-536, Ky. OAG 83-445, 1983 WL 166209 (Ky.A.G.)

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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

LESLIE COUNTY TELEPHONE COMPANY, )  
INC. )  
 )  
\_\_\_\_\_ ) CASE NO. 95-517  
 )  
INVESTIGATION INTO THE ALLEGED )  
VIOLATIONS OF KRS 278.160 )

O R D E R

Background

During July and August 1995, Telephone and Data Systems ("TDS") performed a billing audit of Leslie County Telephone Company, Inc. ("Leslie"), and found that its wholly owned subsidiary had underbilled customers in its Dwarf exchange \$.10 per month for an undetermined period. In addition, investigations by TDS revealed that Leslie was charging some rates that were not contained in Leslie's tariff. These rates included \$1.50 per month for touchtone, \$0.50 per month for directory listings, and \$3.50 for the first quarter mile and \$1.20 for each additional quarter mile for extension and tie line mileage.

TDS informed the Commission of the tariff discrepancies and an informal conference was held August 23, 1995. On September 15, 1995, Leslie filed a letter detailing the untariffed charges. On September 18, 1995, Leslie filed tariffs for these services, which were approved and effective on October 18, 1995. On November 17, 1995, the Commission found a prima facie showing had been made that Leslie failed to file a schedule for certain rates prior to collecting compensation for those services in

violation of KRS 278.160. A hearing date was set and subsequently cancelled on the motion of Leslie for an informal conference with Commission Staff. The informal conference was held at the Commission's offices on December 15, 1995. At the informal conference Leslie asked that its case be submitted for Commission decision and waived its right to a formal hearing.

#### Decision

The Commission finds that Leslie improperly charged its customers for touchtone service, directory listings, and extension and tie line mileage. On October 18, 1995, Leslie's tariff was updated to include charges for these services. Leslie has also been underbilling its customers in the Dwarf exchange \$.10 per month for an indeterminate time frame.

All revenue collected from these customers is in violation of KRS 278.160. Leslie shall identify the customers who paid touchtone, extension and tie line mileage, and directory listing charges for the two-year period proceeding the date of the new tariff. These customers shall be entitled to a refund of any rate paid that was not in Leslie's tariff for the period of two years prior to the application of its updated filed tariff on October 18, 1995. For current customers of Leslie the refund due may be accomplished through bill credits over a period not to exceed five (5) years. Should a customer disconnect service prior to receiving the entire refund due, Leslie shall issue a credit for the remaining portion on the customer's final bill. Customers owed refunds that are not currently receiving service shall be paid by a lump sum refund. Leslie shall notify these customers at the last known address by certified mail that they are due a refund. Customers will be responsible for notifying Leslie to arrange payment, in writing or in

person at Leslie's office. Leslie will establish an escheats account for customers it cannot locate and prescribed procedures for handling escheatable funds shall be followed subsequent to the initial notification. The estates of deceased customers shall be entitled to refunds upon showing proper proof of entitlement.

Pursuant to KRS 278.225, Leslie must backbill its Dwarf customers for the \$.10 per month it undercollected. Leslie only needs to backbill for a two-year period. It may collect the monies over two years.

This proceeding concerns alleged violations of KRS 278.160. Leslie admits violating this statute but opposes refunding any amounts collected unlawfully. At issue is whether Leslie must refund or credit unlawfully collected rates which were not set forth in any filed tariff and whether Leslie must backbill the customers who were charged \$.10 per month less than the tariffed rate. Finding in the affirmative, the Commission orders Leslie to refund or credit all amounts illegally collected and backbill amounts uncollected, and assesses a penalty of \$25 against it.

#### Discussion

KRS 278.160 codifies the "filed rate doctrine." It requires a utility to file with the Commission "schedules showing all rates and conditions for service established by it and collected or enforced." KRS 278.160(1). It further states:

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. KRS 278.160(2).

Interpreting similarly worded statutes from other jurisdictions, courts have held that utilities must strictly adhere to their published rate schedules and may not, either by agreement or conduct, depart from them. Corporation De Gestion Ste-Foy v. Florida Power and Light Co., 385 So.2d 124 (Fla. Dist. Ct. App. 1980).<sup>1</sup> A similar rule applies to the published rate schedules of common carriers. See, e.g., Sallee Horse Vans, Inc. v. Pessin, Ky.App., 763 S.W.2d 149 (1988).

Failure to file with the Commission a rate schedule for its regulated services deprives a utility of the right to charge or collect those rates. A utility "can claim no rate as a legal right that is other than the filed rate." Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251 (1951). See also GTE North Inc. v. Pub. Serv. Comm'n, 500 N.W.2d 284, 289 (Wis. 1993) ("[I]f the service provided for in this case was not tariffed, GTE had no authority to charge any money, and violated the filed rate doctrine by receiving monies for services other than those properly filed with the appropriate regulatory authority."); Popowsky v. Pennsylvania Public Utility Comm'n, 647 A.2d 302 (Pa. Comwlth. 1994).

This inflexibility is, in part, the result of a strong public policy to ensure rate uniformity, to "have but one rate, open to all alike, and from which there could be no departure." Boston & M.R.R. v. Hooker, 233 U.S. 97, 112 (1914). Equality among customers cannot be maintained if enforcement of filed rate schedules is relaxed. For

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<sup>1</sup> See also, Haverhill Gas Co. v. Findlen, 258 N.E.2d 294 (Mass. 1970); Laclede Gas Co. v. Solon Gershman, Inc., 539 S.W.2d 574 (Mo. App. 1976); Capital Properties Co. v. Pub. Serv. Comm'n, 457 N.Y.S.2d 635 (N.Y. App. Div. 1982); West Penn Power Co. v. Nationwide Mut. Ins. Co., 228 A.2d 218 (Pa. Super. Ct. 1967); Wisconsin Power & Light Co. v. Berlin Tanning & Mfg. Co., 83 N.W.2d 147 (Wis. 1957).

this reason, neither equitable considerations nor a utility's negligence may serve as a basis for departing from filed rate schedules. Boone County Sand & Gravel Co. v. Owen County Rural Elec. Co-op. Corp., Ky.App., 779 S.W.2d 224 (1989).

The doctrine is also intended to preserve the Commission's "primary jurisdiction over reasonableness of rates and . . . ensure that regulated companies charge only those rates of which the agency has been made cognizant." City of Cleveland, Ohio v. Fed. Power Comm'n, 525 F.2d 845, 854 (D.C. Cir. 1976). Filed rates have been reviewed and found reasonable by the Commission. Prior to becoming effective, they are examined and questioned. This scrutiny is the principal reason for the Commission's existence.

Neither the voluntary nature of the relationship between Leslie and its customers nor the absence of any monopoly power is relevant to the issue of refunds. KRS 278.160 expressly limits a utility's right to collect compensation for utility services to that prescribed in its filed rates. Courts interpreting the filed rate doctrine have consistently held that a voluntary agreement to deviate from filed rates was unlawful and that the utility or common carrier was entitled to collect only the filed rate. See, e.g., Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951), Louisville & Nashville R. Co. v. Central Iron & Coal Co., 265 U.S. 59 (1924). These holdings have involved transactions where the exercise of monopolistic power was absent.<sup>2</sup> See, e.g.,

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<sup>2</sup> The Commission's holding in Harold Telephone Co., Case No. 10170 (Ky. P.S.C. July 29, 1988), should not be followed. To the extent that Harold Telephone Co. holds that the assessment and collection of non-tariffed fees are permissible because "the affected customers, of their own volition, requested and received the service in exchange for payments," it is contrary to KRS 278.160.

Louisville & Nashville R. Co. v. Mead Johnson & Co., 737 F.2d 683, 690 n.5 (7th Cir. 1984).

The Commission finds no evidence that strict enforcement of KRS 278.160 will impede competition within the telecommunications industry. All telecommunications utilities are currently required to file their rates with the Commission. Several have been required to refund unlawfully collected rates which they collected.<sup>3</sup> The only means of ensuring a level playing field for all and thus promoting competition is the uniform enforcement of existing statutes. The strict enforcement of the filed rate doctrine and competition, moreover, are not mutually exclusive. In other industries which were once heavily regulated and which are now being deregulated, the filed rate doctrine has continued to be strictly enforced. See Rene Sacasas, The Filed Rate Doctrine: Casualty or Survivor of Deregulation?, 29 Duquesne Law Rev. 1 (1990).

Assuming arguendo that the filed rate doctrine impedes competition, a telecommunications utility may either petition the Legislature to amend KRS 278.160 or to petition the Commission, pursuant to KRS 278.512, for prospective exemption from KRS 278.160. The Commission, however, cannot unilaterally and retroactively dispense with the doctrine.

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<sup>3</sup> See, e.g., Affinity Network Inc., Case No. 92-025 (Ky. P.S.C. Mar. 24, 1992); Business Choice Network, Inc., Case No. 92-026 (Ky. P.S.C. Mar. 24, 1992); CTG Telecommunications, Inc., Case No. 92-042 (Ky. P.S.C. Apr. 3, 1992); Affinity Fund, Inc., Case No. 92-069 (Ky. P.S.C. Aug. 27, 1992); Phoenix Network Inc., Case No. 92-172 (Ky. P.S.C. July 22, 1992); Telenational Communications Limited Partnership, Case No. 92-173 (Ky. P.S.C. May 27, 1992); Working Assets Long Distance, Case No. 93-172 (Ky. P.S.C. June 10, 1993); U.S. Digital Network Limited Partnership, Case No. 93-479 (Ky. P.S.C. Apr. 22, 1994); Executone Information Systems, Case No. 94-057 (Ky. P.S.C. Mar. 29, 1994); Westinghouse Electric Corp., Case No. 94-312 (Jan. 30, 1995).

Finally, the Commission finds no merit in the contention that the lack of a conscious violation of KRS 278.160 precludes the refunding of unlawfully collected rates. Assuming arguendo that Leslie did not willfully violate KRS 278.160, the lack of any willful intent does not create a legal right to assess the unfiled rates. Leslie may only assess and collect its filed rates. As the rates in question were not on file, Leslie may not assess or collect them.

The Commission, moreover, finds that a willful violation of KRS 278.160 occurred in this case. Leslie should have charged rates from its approved tariff and taken steps to prevent the provision of unauthorized services. Its failure to take such action constitutes a willful violation of KRS 278.160.

In addition to the filed rate doctrine, other policy considerations mandate the refund of the unlawfully collected rates. As KRS 278.160(2) prohibits the collection of the fees in question, permitting their retention is contrary to the literal language of that statute and would represent a dereliction of the Commission's statutory duty to enforce KRS Chapter 278. See KRS 278.040(1). Failure to order a refund would permit Leslie to profit from its violation of the law and encourage other utilities to imitate its conduct. Acquiescence by the Commission would undermine the long held and widely accepted public policy supporting the filed rate doctrine.

Permitting Leslie's retention of the unlawfully collected fees would also violate the judicial prohibition against retroactive rate-making. It is a fundamental rule of utility rate-making that rates are exclusively prospective in application because rate-making is a legislative act. As such it is subject to the rules of statutory construction. See Public Service Comm'n v. Diamond State Tele. Co., 468 A.2d 1285 (Del. 1983). As the

Commission had not approved Leslie's fees when assessed, permitting it to retain them now would amount to retroactive Commission approval. See Sunflower Pipeline Co. v. State Corp. Comm'n, 624 P.2d 466 (Kan. App. 1981).

The Commission recognizes that its decision today may be viewed as inflexible and dogmatic. That, however, is the very nature of the filed rate doctrine. When enacting the file rate doctrine, the Legislature "did not create a flexible standard for the courts [or this Commission] to apply in accordance with the facts, equities, and economic realities of the particular case." Western Transportation Co. v. Wilson and Co., Inc., 682 F.2d 1227, 1231 (7th Cir. 1982). It instead fashioned a hard and fast rule which must be applied in all cases.

#### Summary

Having considered the evidence of record and being otherwise sufficiently advised, the Commission finds that:

1. Leslie collected fees for untariffed intrastate telecommunication services within Kentucky.
2. At the time Leslie billed for these services, it did not have a published tariff for these services on file with the Commission.
3. Leslie underbilled its Dwarf exchange customers and now must backbill them pursuant to KRS 278.225.
4. For its violation of KRS 278.160, Leslie should be assessed a penalty of \$25.

IT IS THEREFORE ORDERED that:



1. Leslie is assessed a penalty of Twenty-Five Dollars (\$25) for its willful violation of KRS 278.020 and 278.160.

2. Within 30 days of the date of this Order, Leslie shall pay the assessed penalty. This payment shall be in the form of a cashier's or certified check made payable to "Treasurer, Commonwealth of Kentucky" and shall be mailed or delivered to: Office of General Counsel, Public Service Commission of Kentucky, 730 Schenkel Lane, Post Office Box 615, Frankfort, Kentucky 40602.

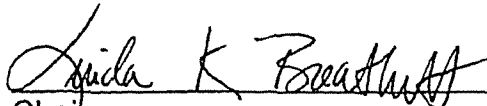
3. Within 60 days of the date of this Order, Leslie shall begin refunding or crediting all fees collected for the last two years for services for which it did not have an approved tariff. The refunding or crediting shall be concluded within five years from the date of this Order.


4. Over a two-year period, Leslie shall backbill its Dwarf exchange customers for uncollected rates.

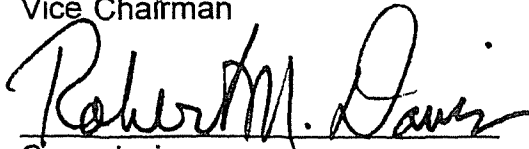
5. Within 120 days of the date of this Order, Leslie shall file with the Commission a list of all persons to receive refunds or credits and backbills, and the amount for each account.

Done at Frankfort, Kentucky, this 21st day of June, 1996.

PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ATTEST:

  
Executive Director

100% Recycled 30% PCW



Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Sprint Communications Company L.P.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. EB-11-MD-003
	)	
Northern Valley Communications, LLC,	)	
	)	
Defendant.	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 18, 2011**

**Released: July 18, 2011**

By the Commission:

**I. INTRODUCTION**

1. This Memorandum Opinion and Order grants in part and denies in part a formal complaint<sup>1</sup> filed by Sprint Communications Company L.P. (“Sprint”) against Northern Valley Communications, LLC (“Northern Valley”) under section 208 of the Communications Act of 1934, as amended (“Act”).<sup>2</sup> The Complaint alleges that Northern Valley’s interstate switched access service tariff (“Tariff”)<sup>3</sup> violates section 201(b) of the Act, and it requests that the Commission declare the Tariff void *ab initio* or, in the alternative, find that the Tariff’s access rates are unreasonable and, therefore, unlawful.<sup>4</sup> As discussed below, we find that the Tariff violates Commission rule 61.26, as clarified by the *CLEC Access Charge Reform Reconsideration Order*;<sup>5</sup> that the Tariff is not “clear and explicit” as

<sup>1</sup> Formal Complaint of Sprint Communications Company L.P., File No. EB-11-MD-003 (filed Feb. 18, 2011) (“Complaint”).

<sup>2</sup> 47 U.S.C. § 208.

<sup>3</sup> See Complaint Ex. 1 (Northern Valley Communications, LLC Access Service Tariff No. 3, effective July 23, 2010) (“Tariff”).

<sup>4</sup> Complaint at 35-37, ¶¶ 73-81 (Count I) (citing 47 U.S.C. §§ 201(b) (prohibiting “unjust and unreasonable practices”) and 205 (authorizing Commission to “prescribe just and reasonable charges”)); *id.* at 37-38, ¶ 82 (Prayer for Relief). Sprint states that it “is not requesting damages,” Complaint at 4, ¶ 5, but adds that it “reserves the right to seek damages at a later time,” *id.* at 4 n.8. Sprint’s conflicting statements fail to comply with the requirements of Commission rule 1.722(d) regarding requests for damages in a subsequent proceeding. See 47 C.F.R. § 1.722(d) (requiring that requests for damages be “clear and unequivocal”).

<sup>5</sup> 47 C.F.R. § 61.26; *Access Charge Reform, Reform of Access Charges Imposed by Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108 (2004) (“*CLEC Access Charge Reform Reconsideration Order*”).

required by Commission rule 61.2(a),<sup>6</sup> and that the Tariff contains a number of unreasonable payment and billing provisions. Accordingly, we grant the Complaint to the extent we find that the Tariff violates section 201(b) of the Act, and we direct Northern Valley to revise its Tariff within ten days of release of this Order. We decline, however, to declare the Tariff void *ab initio* or to set aside its rates.

## II. BACKGROUND

### A. Factual Background

2. Sprint is an interexchange carrier (“IXC”) providing interstate telecommunications service throughout the United States.<sup>7</sup> Northern Valley is a competitive local exchange carrier (“CLEC”) serving residential and business customers in South Dakota.<sup>8</sup> In addition, Northern Valley terminates calls to conference calling companies.<sup>9</sup> Northern Valley provides interstate switched exchange access services to IXCs such as Sprint pursuant to tariffs filed with the Commission.<sup>10</sup>

3. On July 8, 2010, Northern Valley filed the Tariff on 15 days’ notice, and it became effective on July 23, 2010.<sup>11</sup> Northern Valley states that it filed the Tariff because it believed that the Commission’s decision in *Qwest v. Farmers II*<sup>12</sup> created “doubt” as to whether Northern Valley could impose access charges for terminating calls to conference calling companies under its prior, existing tariff.<sup>13</sup>

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<sup>6</sup> 47 C.F.R. § 61.2(a) (“In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.”).

<sup>7</sup> Complaint at 4, ¶ 7; Answer of Northern Valley Communications, LLC, File No. EB-11-MD-003 (filed Mar. 21, 2011) (“Answer”) at 4, ¶ 7.

<sup>8</sup> Sprint’s Proposed Findings of Fact and Conclusions of Law, Ex. 1 (Stipulations of Fact), File No. EB-11-MD-003 (filed Feb. 18, 2011) (“Stipulations”) at 1, ¶ 1, 3, ¶¶ 14-16; Complaint at 5, ¶ 8; Answer at 4, ¶ 8; Answer, Legal Analysis at 4.

<sup>9</sup> Answer, Ex. 1 (Tariff); Stipulations at 1, ¶ 1, 2-3, ¶¶ 11-12; Answer, Legal Analysis at 4-5.

<sup>10</sup> Complaint, Ex. 1 (Tariff); Answer, Ex. 1 (Tariff); Stipulations at 3, ¶¶ 17, 19.

<sup>11</sup> Complaint at 8, ¶ 17 & Ex. 1 (Tariff); Answer at 5, ¶ 17 & Ex. 1 (Tariff).

<sup>12</sup> *Qwest Communications Corp. v. Farmers and Merchants Mut. Tel. Co.*, Second Order on Reconsideration, 24 FCC Rcd 14801 (2009) (“*Qwest v. Farmers II*”).

<sup>13</sup> Answer, Legal Analysis at 5. In *Qwest v. Farmers II*, the Commission granted a section 208 complaint against Farmers and Merchants Mutual Telephone Company of Wayland, Iowa (“Farmers”), a rural LEC that was engaged in access stimulation. Farmers’ tariff imposed access charges for transporting calls to or from an “end user’s premises” and defined “end user” as “any customer of an interstate or foreign telecommunications service other than a carrier.” *Qwest v. Farmers II*, 24 FCC Rcd at 14801, ¶ 1, 14805, ¶ 10. The Commission concluded that, because the conference calling companies did not purchase any services from Farmers, they were not “end users” within the meaning of Farmers’ tariff. Accordingly, the Commission found that Farmers had violated sections 201(b) and 203(c) of the Act because it had imposed charges that were inconsistent with its tariff: “[N]othing in the contracts [between Farmers and the conference calling companies] suggests that the conference calling companies would subscribe to any tariffed Farmers’ service or pay Farmers for their connections to the interexchange network, as would ordinary end-user customers under the tariff.” *Id.* at 14801, ¶ 1, 14806, ¶ 12.

## B. Legal Background

4. Since 1997, CLECs have been allowed to assess interstate switched exchange access service charges upon IXCs either by filing tariffs with the Commission or by negotiating contracts with the affected IXCs. (In contrast, incumbent local exchange carriers (“ILECs”) may assess interstate switched exchange access charges only by filing federal tariffs.)<sup>14</sup> Section 204(a)(3) of the Act provides that LEC tariffs are “deemed lawful” unless suspended by the Commission within certain time periods.<sup>15</sup>

5. In 2001, the Commission found that CLEC access rates were, on average, “well above the rates that ILECs charge for similar service” and noted that some CLECs “refused to enter meaningful negotiations on access rates, choosing instead simply to file a tariff and bind IXCs ... to the rates therein.”<sup>16</sup> Accordingly, the *CLEC Access Charge Reform Order* promulgated rule 61.26, which provides that a CLEC may tariff access charges only for services that are the “functional equivalent” of ILEC access services, and only if the rates are no higher than those of the ILEC serving the same geographic area in which the CLEC is located.<sup>17</sup> In this way, CLEC access rates are “benchmarked” against ILEC access rates. If a CLEC wishes to impose higher rates, it may do so only by negotiating with the affected IXCs.<sup>18</sup> Subsequently, in the *CLEC Access Charge Reform Reconsideration Order*, the Commission clarified that a CLEC may assess tariffed switched access charges at the appropriate benchmark rate only for calls to or from the CLEC’s own end users.<sup>19</sup>

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<sup>14</sup> See *Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596, 8596, ¶ 1 (1997) (“*Hyperion Forbearance Order*”) (granting “permissive detariffing for provision of interstate exchange access services by providers other than the incumbent local exchange carrier”).

<sup>15</sup> 47 U.S.C. § 204(a)(3) (“A [LEC] may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action ... before the end of that 7-day or 15-day period ...”).

<sup>16</sup> *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9931, ¶ 22, 9934, ¶ 28 (2001) (“*CLEC Access Charge Reform Order*”). The Commission declared further that its goal was “ultimately to eliminate regulatory arbitrage opportunities that previously have existed with respect to tariffed CLEC switched access services.” *Id.* at 9925, ¶ 3. The Commission expressed concern that CLECs were using high access rates to shift a substantial portion of their costs onto long distance carriers and subscribers who chose an access provider with lower rates. *Id.* at 9948, ¶ 59. Recently, moreover, the Commission sought comment on revisions to the CLEC benchmarking rule for CLECs engaging in revenue sharing agreements. See *Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554 (2011) (“*Connect America Fund*”).

<sup>17</sup> 47 C.F.R. § 61.26. See *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9925, ¶ 3, 9938, ¶¶ 40-41 (describing the “bright line” that a “benchmark” would provide). The Commission made an exception for those small rural CLECs whose rates would otherwise be benchmarked against those of larger ILECs serving both rural and more urban communities. The Commission permitted these “rural CLECs” to benchmark their rates against the significantly higher rates found in the tariff to which small, generally rural ILECs subscribe. *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9953, ¶ 73; 47 C.F.R. § 61.26 (e) (rural exemption).

<sup>18</sup> *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9925, ¶ 3, 9938, ¶ 40; 47 C.F.R. § 61.26.

<sup>19</sup> *CLEC Access Charge Reform Reconsideration Order*, 19 FCC Rcd 9114, ¶ 13, 9115, ¶ 15.

6. Very recently, the Commission found that the Tariff at issue here violated rule 61.26, as clarified by the *CLEC Access Charge Reform Reconsideration Order*.<sup>20</sup> The Commission reasoned that, to the extent the Tariff purported to charge for providing access to individuals or entities to whom Northern Valley offered its services for free, it impermissibly charged for services that were not being offered to “end users” and thus were not the “functional equivalent” of ILEC services. The Commission explained:

[U]nder the Commission’s ILEC access charge regime, an “end user” is a customer of a service that is offered for a fee. The Commission provided no alternative definition for “end user” when stating, in the *CLEC Access Charge Reform Reconsideration Order*, that a CLEC provides the functional equivalent of ILEC services [within the meaning of rule 61.26] only if the CLEC provides access to its “own end users.” Accordingly, that order establishes that a CLEC’s access service is functionally equivalent only if the CLEC provides access to customers to whom the CLEC offers its services *for a fee*.<sup>21</sup>

The Commission ordered Northern Valley to “file tariff revisions ... to provide that interstate switched access service charges will apply only to the origination or termination of calls to or from an individual or entity to whom Northern Valley offers telecommunications services *for a fee*.”<sup>22</sup>

### III. DISCUSSION

#### A. The Tariff Violates Section 201(b) of the Act.

##### 1. The Tariff Violates Commission Rule 61.26.

7. In its Complaint, Sprint contends that the Tariff violates Commission rule 61.26 because it purports to charge IXCs for calls to or from individuals or entities to whom Northern Valley offers its services for free.<sup>23</sup> Sprint is correct. As the Commission explained in finding the Tariff unlawful in *Qwest v. Northern Valley*, rule 61.26 (as clarified by the *CLEC Access Charge Reform Reconsideration Order*) establishes that a CLEC may assess tariffed access charges at the appropriate benchmark rate only for calls that are to or from an individual or entity to whom the CLEC offers its services for a fee.

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<sup>20</sup> *Qwest Communications Company, LLC v. Northern Valley Communications, LLC*, Memorandum Opinion and Order, 2011 WL 2258081 (June 7, 2011), *petition for recon. filed* (“*Qwest v. Northern Valley*”).

<sup>21</sup> *Qwest v. Northern Valley* at ¶ 9.

<sup>22</sup> *Qwest v. Northern Valley* at ¶ 17 (emphasis added). On June 14, 2011, Northern Valley filed revisions to the Tariff, which the Pricing Policy Division of the Wireline Competition Bureau rejected on June 28, 2011. See *Northern Valley Communications, LLC Revisions to Tariff No. 3*, Memorandum Opinion and Order, 2011 WL 2577786 (WCB/PPD rel. June 28, 2011). Northern Valley again filed revisions to the Tariff on July 7, 2011. Letter from G. David Carter, Counsel for Northern Valley Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, Transmittal No. 7 (filed July 7, 2011). Sprint’s Complaint, and this order, address the Tariff that took effect on July 23, 2010, and do not address any Tariff revisions attempted or effected after that date.

<sup>23</sup> Complaint at 1-2, ¶ 2, 10, ¶ 21, 16-20, ¶¶ 34-41, 23-26, ¶¶ 49-52; Complaint, Legal Analysis at 10-12; Sprint Communications Company L.P.’s Reply in Support of Formal Complaint, File No. EB-11-MD-003 (filed Apr. 4, 2011 (“Reply”)) at 17-20.

Therefore, we grant Sprint's claim that the Tariff violates rule 61.26,<sup>24</sup> and, accordingly, violates section 201(b) of the Act.<sup>25</sup>

## 2. The Tariff Terms Are Not Clear and Explicit.

8. Commission rule 61.2(a) requires that tariffs contain "clear and explicit explanatory statements regarding rates and regulations."<sup>26</sup> The Complaint asserts that the Tariff violates the rule 61.2(a) stricture in a number of ways, most significantly with respect to its definition of "End User."<sup>27</sup> We agree.

9. The Tariff defines "End User" in a contradictory manner. On the one hand, the first sentence of the "End User" definition states that an "End User" is "any Customer of an Interstate or Foreign Telecommunications Service that is not a carrier."<sup>28</sup> Under the Act, "telecommunications service" is the "offering of telecommunications for a fee."<sup>29</sup> Thus, according to the first sentence of the

<sup>24</sup> In an effort to defeat Sprint's rule 61.26 claim, Northern Valley repeats many of the same arguments it made in *Qwest v. Northern Valley*. Thus, Northern Valley argues here, as in *Qwest v. Northern Valley*, that the question of whether the Tariff purports to charge for providing access to users who have purchased services from Northern Valley is irrelevant as a matter of law and logic; that the Commission should evaluate the Tariff solely on the basis of the definitions contained therein, not in the light of Commission orders and rules; that Sprint has not alleged that Northern Valley has in fact imposed charges for entities that have not purchased services from Northern Valley; and that the Wireline Competition Bureau did not act on various IXC petitions to reject or suspend the Tariff. See Answer, Legal Analysis at 12-26. We reject these arguments for the same reasons we rejected them in *Qwest v. Northern Valley*. See *Qwest v. Northern Valley* at ¶¶ 10-14.

<sup>25</sup> The *CLEC Access Charge Reform Reconsideration Order* was promulgated pursuant to, among other provisions, section 201 of the Act, see *CLEC Access Charge Reform Reconsideration Order*, 19 FCC Rcd at 9166, ¶ 136, in furtherance of the Commission's obligation to ensure that "[a]ll charges, practices, classifications, and regulations for and in connection with ... communication service [are] just and reasonable." 47 U.S.C. § 201(b).

<sup>26</sup> 47 C.F.R. § 61.2(a). This rule was promulgated pursuant to, among other provisions, section 201 of the Act, 47 U.S.C. § 201. See *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9975, ¶ 145; *id.* at 9931, ¶ 21 ("section 201 gives us the authority to ensure that CLEC rates are just and reasonable.").

<sup>27</sup> See Complaint at 11-12, ¶ 24, 13, ¶ 28; Complaint, Legal Analysis at 8-10; Reply at 11-13.

<sup>28</sup> Tariff, Original Page No. 8, Definitions.

<sup>29</sup> 47 U.S.C. § 153(53). See *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3312-13, ¶ 10 (2004) ("In order to be a telecommunications service, the service provider must assess a fee for its service."). The Act's definition of "telecommunications service" applies to our construction of the Tariff's "end user" definition. 17A Am. Jur. 2d *Contracts* § 359 (2004) ("where words or terms having a definite legal meaning and effect are knowingly used in a contract or other instrument, the parties thereto will be presumed to have intended such words or terms to have their proper legal meaning and effect ..."). See also *id.* at § 371 ("Contracting parties are presumed to contract in reference to the existing law, and to have in mind all the existing laws relating to the contract ..."). These principles apply with particular force here, because the Tariff adopts the precise definition of "end user" found in Commission rules and orders governing ILEC tariffs. See 47 C.F.R. § 69.2(m) (defining "end user" as "any customer of an interstate or foreign telecommunications service that is not a carrier ..."); *Investigation of Access and Divestiture Related Tariffs*, Memorandum Opinion and Order, 97 FCC 2d 1082, 1192, § 2.6 (1984) ("*ECA Tariff Order*") (requiring that the Exchange Carriers' Association tariff, as the model tariff for exchange access tariffs, so define "end user"); *Access and Divestiture Related Tariffs (Non-ECA Filings)*, Memorandum Opinion and Order, 55 Rad. Reg. 2d 869, 870, ¶ 2 (1984) (requiring Bell Operating Companies and independent LECs "to implement the directives of the *ECA Tariff Order* ...").

Tariff's "End User" definition, an "End User" is a user to whom Northern Valley offers its services *for a fee*. On the other hand, the last sentence of the Tariff's "End User" definition states that "[a]n End User need not purchase any service provided by [Northern Valley]." <sup>30</sup> Unlike the first sentence, this last sentence seems to define "End User" as an individual or entity to whom Northern Valley offers its services *free of charge*. <sup>31</sup> Thus, the Tariff's "End User" definition is internally inconsistent and therefore is not "clear and explicit" as required by rule 61.2(a).

10. Moreover, other Tariff provisions repeatedly use the term "End User," or define other terms with reference to "End User." Thus, for example, the Tariff defines "Access Charge" as "Charges assessed to the Buyer," and defines "Buyer" as an IXC "utilizing [Northern Valley's] Access Service to complete a call to or from *End Users*." <sup>32</sup> Similarly, the Tariff purports to charge IXCs for originating or terminating traffic to "Volume *End Users*." <sup>33</sup> In short, the lack of clarity in the "End User" definition has a significant impact upon the entire Tariff. Accordingly, we find that the Tariff is not "clear and explicit" as required by rule 61.2(a), and, therefore, that the Tariff violates section 201(b) of the Act. <sup>34</sup>

### 3. The Tariff's Payment and Billing Provisions Are Unreasonable.

11. Sprint contends that several provisions of the "Payment and Billing" section of the Tariff violate section 201(b). <sup>35</sup> We review these provisions to determine whether they are reasonable in compliance with the requirements of section 201 of the Act and the Commission's rules. <sup>36</sup>

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<sup>30</sup> Tariff, Original Page No. 8, Definitions.

<sup>31</sup> Similarly, the Tariff defines "Customer of an Interstate or Foreign Telecommunications Service" as "any person or entity who sends or receives an interstate or foreign Telecommunications service transmitted to or from a Buyer across the Company's network, *without regard to whether ... payment is tendered to ... [Northern Valley]*." Tariff, Original Page No. 7, Definitions (emphasis added).

<sup>32</sup> Tariff, Original Page No. 7, Definitions (emphasis added).

<sup>33</sup> Tariff, Original Page No. 46, § 7.2.2 (emphasis added). *See also, e.g.*, Tariff at Original Page No. 8 ("*End User Designated Premises*") (emphasis added); *id.* (defining "Minutes of Use" as "the number of minutes for which a *Buyer* is billed" while, as noted, defining "Buyer" as an IXC that completes a call to *End Users*") (emphasis added); *id.* at Original Page 36, § 5.1 (stating that "Switched Access Service" will "enable a *Buyer* to utilize [Northern Valley's] network") (emphasis added).

<sup>34</sup> *See 1998 Biennial Regulatory Review – Part 61 of the Commission's Rules and Related Tariffing Requirements*, Report and Order and First Order on Reconsideration, 14 FCC Rcd 12293, 12326, ¶¶ 98-99 (1999) (adopting rule 61.2 pursuant to section 201, among other provisions); *Halprin, Temple, Goodman & Sugrue v. MCI Telecomm. Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 22568, 22574-76, ¶¶ 8-13 (1998) (finding that "the Tariff is not clear and explicit as required by section 61.2 of the Commission's rules, which renders the Tariff unreasonable in violation of section 201(b) of the Act"). Sprint argues that additional Tariff provisions, which also purport to charge for calls to entities that do not purchase services from Northern Valley, violate rule 61.2(a). *See* Complaint at 11-16, ¶¶ 23-33; Complaint, Legal Analysis at 4-14; Reply at 7-14. We do not address these provisions here, because our finding that the Tariff must be revised to make "clear and explicit" that it imposes access charges only for providing access to Northern Valley's own, paying end users will afford Sprint all the relief to which it is entitled.

<sup>35</sup> *See* Complaint at 31-35, ¶¶ 64-72.

<sup>36</sup> Contrary to Northern Valley's contention (*see* Answer, Legal Analysis at 49), the Commission has determined that CLEC access tariffs are subject to the just and reasonable standard of section 201. *See In the Matter of Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 16141, ¶ 363 (1997); *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9929, ¶ 15; *CLEC Access Charge Reform Reconsideration Order*, 19 FCC Rcd at 9117, ¶ 18 (continued...)



12. Sprint alleges that Northern Valley's "Jurisdictional Reporting Requirements"<sup>37</sup> are unreasonably vague and violate section 201(b) of the Act.<sup>38</sup> Under those provisions, when the jurisdiction of a call is indeterminate, Northern Valley *may* request a percent of interstate use factor ("PIU Factor")<sup>39</sup> from its IXC customer. Northern Valley is not obligated to use the PIU Factor supplied by the IXC, however, and "at its sole discretion, may use a different PIU Factor."<sup>40</sup> Northern Valley contends that the Tariff reserves Northern Valley's right to use a different PIU Factor than that provided by the IXC only when Northern Valley believes the IXC's PIU Factor is inaccurate.<sup>41</sup> But the Tariff language is not so limited. It gives Northern Valley unfettered discretion to use a different PIU Factor and, therefore, the ability to rely on unspecified and potentially arbitrary and discriminatory factors to establish the jurisdiction of the traffic. This may result in a PIU Factor that bears no relationship to the actual percentage of the Buyer's interstate and intrastate traffic, and allows Northern Valley to manipulate the PIU Factor so as to maximize its access charges by choosing the jurisdiction with higher rates for most or all of the traffic. Accordingly, the Jurisdictional Reporting Requirements provisions are unreasonable under section 201(b) of the Act.

13. Sprint further challenges the "Deposit" provisions in the Tariff, which provide in part that "[t]o safeguard its interests, the company may require a Buyer to make a deposit to be held as a guarantee for the payment of charges. A deposit may be requested prior to providing Service(s) or at any time after the provision of service to a Buyer."<sup>42</sup> These provisions establish no standard as to when a deposit will be required.<sup>43</sup> Such unconstrained ability to impose deposit obligations is susceptible to potentially discriminatory application. Consequently, we conclude that the provisions are unreasonable under section 201.<sup>44</sup>

14. In addition, Northern Valley's "Billing Disputes" provision requiring carriers to dispute bills within 90 days or waive "any and all rights and claims with respect to the bill and the underlying

(Continued from previous page) \_\_\_\_\_

& n.61. *See, e.g.*, 47 C.F.R. § 61, Subpart A (General), Subpart C (General Rules for Nondominant Carriers), Subpart F (Specific Rules for Tariff Publications of Dominant and Nondominant Carriers), Subpart G (Concurrences), and Subpart J (Suspensions).

<sup>37</sup> *See* Tariff, Original Page No. 29, §§ 3.1.4.1 & 3.1.4.2 ("Jurisdictional Reporting Requirements").

<sup>38</sup> Complaint at 34-35, ¶ 72.

<sup>39</sup> The Tariff describes the PIU Factor as a projected estimate by the Buyer of the split between the Buyer's interstate and intrastate traffic. *See* Tariff, Original Page 29, § 3.1.4.1.

<sup>40</sup> *See* Tariff, Original Page No. 29, § 3.1.4.2.

<sup>41</sup> Answer, Legal Analysis at 50.

<sup>42</sup> Tariff, Original Page No. 30, § 3.1.5.1. *See* Complaint at 34, ¶ 71; Complaint, Legal Analysis at 44-45; Reply at 32.

<sup>43</sup> Tariff, Original Page No. 30, § 3.1.5.

<sup>44</sup> The Commission has determined that deposit requirements should be "narrowly tailored" to address specific risks of nonpayment and to eliminate broad authority to require deposits without objective criteria, which "are particularly susceptible to discriminatory application." *In re Verizon Petition for Emergency Declaratory and Other Relief*, Policy Statement, 17 FCC Rcd 26884, 26894, ¶¶ 21-22 (2002) ("*Verizon Declaratory Policy Statement*") (tariffs are not properly drafted when they provide LECs a "great deal of discretion in determining which customers will or will not be subjected to these [deposit] burdens"). Because we find Northern Valley's deposit provisions unreasonable, we also find the deposit provisions in section 3.2.3.1 to be unreasonable. *See* Tariff, Original Page No. 35, § 3.2.3.1 ("Service may be suspended or terminated for nonpayment of any bill or deposit until such bill or deposit is paid."). *See also Investigation of Access and Divestiture Related Tariffs*, Phase I Order, 97 FCC 2d 1082, 1169 (1984).

dispute” is unreasonable.<sup>45</sup> This provision contravenes the two-year statute of limitations in the Communications Act,<sup>46</sup> and, by its terms, purports unilaterally to bar a customer from exercising its statutory right to file a complaint within that limitations period.<sup>47</sup> Similarly, the Tariff provision that requires all disputed charges to be paid “in full prior to or at the time of submitting a good faith dispute” is unreasonable.<sup>48</sup> As written, this provision requires everyone to whom Northern Valley sends an access bill to pay that bill, no matter what the circumstances (including, for example, if no services were provided at all), in order to dispute a charge. Further, the Billing Disputes provision states that Northern Valley is “the *sole judge* of whether any bill dispute has merit.”<sup>49</sup> This provision is unreasonable, because it conflicts with sections 206 to 208 of the Act, which allow a customer to complain to the Commission or bring suit in federal district court for the recovery of damages regarding a carrier’s alleged violation of the Act.<sup>50</sup>

15. In contrast, however, we conclude that Northern Valley’s “Late Payment Fee” provision regarding “Adjustments or Refunds to the Buyer” is reasonable.<sup>51</sup> Sprint maintains that the Tariff imposes late fees on withheld amounts even if it is ultimately decided that Northern Valley’s billing is erroneous.<sup>52</sup> We read the challenged Tariff provision, however, to require Northern Valley to refund and pay simple interest on *all* disputed amounts paid pursuant to the Tariff, including any associated late payment fees.<sup>53</sup>

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<sup>45</sup> See Tariff, Original Page No. 32, § 3.1.7.1(a) (the “Buyer shall be deemed to have waived any and all rights and claims ... if a good faith dispute is not timely filed”).

<sup>46</sup> 47 U.S.C. § 415.

<sup>47</sup> See 47 U.S.C. § 415. Northern Valley’s contention that the dispute notice provision does not modify the statute of limitations period is inconsistent with the waiver language of the provision. See Answer, Legal Analysis at 45. Indeed, this tariff language is indistinguishable from tariff language that a federal district court recently invalidated. See *Paetec Communications, Inc. v. MCI Communications Services, Inc.*, 712 F. Supp. 2d 405, 416-17 (E.D. Pa. 2010) (construing identical tariff language and finding that “the 90-day dispute resolution provision in Paetec’s tariff could not preempt the federal statute of limitations in the context of a tariff because the terms of a tariff are not negotiated like the terms of a contract. If a term in the tariff could supersede the statute of limitations, it would mean that a carrier could unilaterally void federally codified consumer protections simply by filing a tariff.”). See also *MCI WorldCom Network Services, Inc. v. Paetec Communications, Inc.*, 204 Fed.Appx. 271, 272 (4<sup>th</sup> Cir. 2006) (“a party could not use a tariff to shorten unilaterally the two-year statute of limitations”). None of the cases cited by Northern Valley involved a challenge to the reasonableness of a tariff provision under section 201(b) of the Act. See Answer, Legal Analysis at 43-45.

<sup>48</sup> See Tariff, Original Page No. 32, § 3.1.7.1(b) (“Any disputed charges must be paid in full prior to or at the time of submitting a good faith dispute and failure to tender payment for disputed invoices ... is sufficient basis ... to deny a dispute ....”).

<sup>49</sup> See Tariff, Original Page No. 33, § 3.1.7.1(d) (emphasis added).

<sup>50</sup> 47 U.S.C. §§ 206-208.

<sup>51</sup> See Tariff, Original Page No. 33, § 3.1.7.1(c) (“Buyer will incur a Late Payment Fee on the unpaid amount at the rate of 1.5% per month on the total unpaid balance”). See also Tariff, Original Page No. 33, § 3.1.7.3 (“Adjustments or Refunds to the Buyer”).

<sup>52</sup> Reply at 31.

<sup>53</sup> See Tariff, Original Page No. 33, § 3.1.7.3(a) (“In the event that the Company resolves the billing dispute in favor of a Buyer who has paid the total amount of the disputed bill as required by this Tariff, the Company will credit the Buyer’s account for any overpayment by the Buyer, together with Simple Interest”). See also Tariff Original Page No. 33, § 3.1.7.3.(b).

16. Finally, we conclude that Northern Valley's "Attorneys' Fees" provision is unreasonable because it permits Northern Valley to recover its attorneys' fees regardless of whether Northern Valley prevails on a claim.<sup>54</sup> A Buyer who successfully demonstrates in litigation that Northern Valley improperly billed should not be obligated to pay Northern Valley's attorneys' fees.

#### B. We Deny Sprint's Remaining Claims.

17. Citing the Tariff's numerous flaws, Sprint requests that the Commission declare the Tariff void *ab initio*.<sup>55</sup> We decline to do so. Pursuant to section 204(a)(3) of the Act, the Tariff is "deemed lawful" until found otherwise by this Commission or a court of law.<sup>56</sup> Sprint argues that "there are limits to the scope of the deemed lawful provision," and that a "deemed lawful" tariff may be declared void *ab initio* in a section 208 complaint proceeding.<sup>57</sup> Even if Sprint is correct, Sprint has not established that Northern Valley engaged in furtive concealment, or any other deceptive conduct that might justify removing the protection afforded by section 204(a)(3).<sup>58</sup>

18. In the alternative, Sprint requests that, if the Commission does not declare the Tariff void *ab initio*, it find that the Tariff's rates are excessive and prescribe lower rates "on a going-forward basis."<sup>59</sup> We deny this request. As Sprint admits, the Tariff's rates are no higher than the ILEC rates against which they are benchmarked pursuant to rule 61.26.<sup>60</sup> The Commission has emphasized that tariffed rates within the rule 61.26 benchmark are accorded a "conclusive presumption of reasonableness."<sup>61</sup> This Order requires Northern Valley to revise the Tariff to state "clear[ly] and explicit[ly]" that charges will be imposed only for providing access to individuals or entities to whom

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<sup>54</sup> See Tariff Original Page No. 34, § 3.1.7.4 ("In the event that [Northern Valley] pursues a claim in Court or before any regulatory body ... Buyer shall be liable for the payment of [Northern Valley's] ... attorneys' fees").

<sup>55</sup> Complaint at 37, ¶ 82 (Count I); Complaint, Legal Analysis at 3-4; Reply at 23-26.

<sup>56</sup> See *Qwest Communications Corp. v. Farmers and Merchants Mut. Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 17973-80, ¶¶ 26-27 & n.52 (2007) ("*Qwest v. Farmers I*"); *Virgin Islands Tel. Co. v. FCC*, 444 F.3d 666, 673 (D.C. Cir. 2006).

<sup>57</sup> Reply at 34. See generally Reply at 33-36.

<sup>58</sup> See *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 412 (D.C. Cir. 2002) (the court, in reversing a Commission decision finding that a tariff did not qualify for "deemed lawful" status, notes that it was not addressing "the case of a carrier that furtively employs improper accounting techniques in a tariff filing, thereby concealing potential rate-of-return violations").

<sup>59</sup> Complaint, Legal Analysis at 33. *Accord id.* at 30-39. See also Complaint at 27-31, ¶¶ 56-64, 36, ¶ 77; Reply at 22-26. A tariff's rates may not be set aside during the time that the tariff enjoyed "deemed lawful" status under section 204(a)(3). *Qwest v. Farmers I*, 22 FCC Rcd at 17978 n.52 ("Since the passage of section 204(a)(3) of the Act, the Commission cannot award refunds in connection with tariffs that are 'deemed lawful.'").

<sup>60</sup> Complaint, Legal Analysis at 32 ("Northern Valley has set its new rates below the benchmark rate in 47 C.F.R. § 61.26 ....").

<sup>61</sup> *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9948, ¶ 60. *Accord id.* at 9938, ¶ 40 (stating that the order "establish[es] a benchmark level at which CLEC access rates will be *conclusively presumed* to be just and reasonable ...") (emphasis added).

Northern Valley offers its services for a fee. As so revised, the Tariff will comport with rule 61.26, and its rates will therefore be conclusively presumed reasonable.<sup>62</sup>

19. Sprint disagrees with this analysis, arguing that Northern Valley's rates may be challenged in a formal complaint proceeding.<sup>63</sup> We need not decide whether Sprint is correct, because Sprint has not shown in this proceeding that Northern Valley's rates will prove to be unreasonable after Northern Valley revises its Tariff.<sup>64</sup> Sprint asserts that Northern Valley's rates are excessive given Northern Valley's high traffic volumes.<sup>65</sup> Yet Sprint has not established that Northern Valley's traffic volume will remain high after the Tariff is revised, in accordance with this Order, to impose access charges only for calls to or from paying end users. Indeed, Sprint alleges that Northern Valley's traffic volume is elevated precisely because the Tariff charges for providing access to entities that do not pay Northern Valley for its services.<sup>66</sup>

### C. Northern Valley's Affirmative Defenses Lack Merit.

20. Northern Valley asserts as an affirmative defense that Sprint has "unclean hands," alleging that Sprint has not paid Northern Valley amounts owing under Northern Valleys' tariffs.<sup>67</sup> Even if this defense were available in a section 208 formal complaint proceeding,<sup>68</sup> it would fail in this case. The unclean hands doctrine does not apply unless the alleged misconduct relates directly to the

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<sup>62</sup> Sprint's argument that the Tariff's rates are not presumed reasonable because the Tariff violates rule 61.26 therefore does not succeed. See Complaint, Legal Analysis at 32-34; Reply at 26. Northern Valley filed Tariff revisions on June 14, 2011, which the Pricing Policy Division of the Wireline Competition Bureau rejected on June 28, 2011. Northern Valley then filed Tariff revisions on July 7, 2011. See n.22, *supra*.

<sup>63</sup> See Complaint, Legal Analysis at 32-33; Reply at 22-26 (citing *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9955, ¶ 77 (the Commission "will be able to address, on a case-by-case basis, the improper exploitation of [the rural exemption]..."); *CLEC Access Charge Reform Reconsideration Order*, 19 FCC Rcd at 9143-44, ¶ 72) (if a carrier "believes that any particular LEC rate or practice is unlawful, it may bring a challenge under section 208 of the Act").

<sup>64</sup> A complainant in a section 208 complaint proceeding must show a violation of the Act "by a preponderance of the evidence." *Contel of the South, Inc. v. Operator Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 548, 552, ¶ 10 (2008). See, e.g., *Consumer.Net v. AT&T Corp.*, Order, 15 FCC Rcd 281, 284-85, ¶ 6 (1999); *Consumer.Net, LLC and Russ Smith v. Verizon Communications, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 2737, 2740, ¶ 10 (Enf. Bur. Apr. 1, 2010).

<sup>65</sup> See Complaint, Legal Analysis at 35-39; Reply at 22-26.

<sup>66</sup> Sprint alleges that Northern Valley's traffic volume is elevated because Northern Valley enters into "traffic-pumping schemes" with providers of high-volume services such as a conference calling companies and chat lines (collectively "CCCs") that direct large volumes of interstate traffic to Northern Valley. Northern Valley allegedly uses the Tariff to force IXCs to pay excessive access charges for terminating this traffic, and then pays a portion of its concomitantly increased access revenues to the CCCs. See Complaint at 2-3, ¶ 3, 5-7, ¶¶ 10-15; Complaint, Legal Analysis at 1-2, 31-32, 35, 39; Reply at 25. Thus, the arrangements described by Sprint require that Northern Valley be able to impose charges upon IXCs by tariff rather than negotiation, and that those charges are for terminating calls to entities (*i.e.*, the CCCs) to which Northern Valley offers its services for free.

<sup>67</sup> See Answer at 19, ¶ 4 (Affirmative Defenses); *id.*, Legal Analysis at 7-9.

<sup>68</sup> See *Marzec v. Power*, Order, 15 FCC Rcd 4475, 4480 n.35 (2000) ("the Commission has expressed doubt that the unclean hands defense is available in section 208 proceedings") (citing *AT&T Corp. v. Bell Atlantic-Pennsylvania*, Memorandum Opinion and Order, 14 FCC Rcd 556, 598 & n.233 (1998) (same)).

transaction that is the subject of the complaint.<sup>69</sup> Northern Valley has not established that Sprint refuses to pay amounts invoiced pursuant to the Tariff at issue here, as opposed to prior Northern Valley tariffs.<sup>70</sup>

21. Northern Valley further argues that Sprint failed to negotiate in good faith because the pre-complaint letter that Sprint sent Northern Valley pursuant to Commission rule 1.721(a)(8) stated that a complaint would not be filed if Northern Valley withdrew the Tariff.<sup>71</sup> Northern Valley views this statement as a “precondition” that is inconsistent with “good faith negotiations.”<sup>72</sup> This defense also fails. Before filing the Complaint, Sprint informed Northern Valley that it was “willing to listen” to “other idea[s] of how the issues we raise can be resolved.”<sup>73</sup> Further, Sprint’s letter complied with rule 1.721(a)(8), because it outlined the allegations that form the basis of the Complaint and gave Northern Valley a reasonable opportunity to respond.<sup>74</sup>

22. In conclusion, Northern Valley’s Tariff violates Commission rule 61.26, as clarified by the *CLEC Access Charge Reform Reconsideration Order*, because it purports to charge for providing access to individuals or entities to whom Northern Valley offers its services for free. Moreover, the Tariff’s terms are not “clear and explicit” as required by Commission rule 61.2(a). Finally, the Tariff contains a number of unreasonable payment and billing provisions. Accordingly, we conclude that the Tariff violates section 201(b) of the Act,<sup>75</sup> and Northern Valley must revise it to make “clear and explicit” that Northern Valley will charge IXCs for providing access only to individuals or entities to whom Northern Valley offers its services for a fee, and to remove the Tariff’s unreasonable payment and billing provisions.<sup>76</sup>

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<sup>69</sup> See, e.g., *Marzec*, 15 FCC Rcd at 4480 (rejecting unclean hands defense because the complainant’s alleged misconduct was “irrelevant” to the defendant’s violations); *Wolff v. Westwood Management, LLC*, 558 F.3d 517, 521 (D.C. Cir. 2009) (assertion of unclean hands as defense against claim that dispute is subject to arbitration cannot succeed where “[t]here is no allegation that appellees have unclean hands with respect to the agreement to arbitrate itself”); *Sellar Agency Council, Inc. v. Kennedy Center for Real Estate Education, Inc.*, 621 F.3d 981, 986 (9<sup>th</sup> Cir. 2010) (“It is fundamental to the operation of the [unclean hands] doctrine that the alleged misconduct by the party relate directly to the transaction concerning which the complaint is made.”) (citations and brackets omitted).

<sup>70</sup> See Answer, Legal Analysis at 8 (stating that Sprint began paying Northern Valley’s invoices “at the end of 2010”); *id.* at 25 (arguing that Sprint has not shown that Northern Valley has charged Sprint for calls to entities that do not purchase services from Northern Valley). In any event, Sprint’s alleged “unclean hands” may not defeat a challenge to a tariff that applies to an entire industry, not just to Sprint. See *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 361 (1995) (unclean hands doctrine does not apply “where a private suit serves important public purposes”) (quoting *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 138 (1968)).

<sup>71</sup> See Answer, Legal Analysis at 10 (citing 47 C.F.R. § 1.721(a)(8), which requires that complaints include “certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement,” as well as a statement that the complainant mailed a letter to the defendant outlining the allegations of the complaint).

<sup>72</sup> Answer, Legal Analysis at 10.

<sup>73</sup> Complaint, Ex. 12 (email from counsel to Sprint to counsel to Northern Valley sent Jan. 5, 2011).

<sup>74</sup> See Complaint, Ex. 10 (outlining the allegations that form the basis of the Complaint).

<sup>75</sup> See, e.g., *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 52-55 (2007) (citations omitted) (“The FCC has long implemented § 201(b) through the issuance of rules and regulations”). See also nn. 25 & 34 above.

<sup>76</sup> Because this Order provides Sprint all the relief to which it would be entitled if we were to grant Sprint’s claim that Northern Valley violates sections 251 and 252 of the Act, 47 U.S.C. §§ 251-252, we need not address that (continued...)

**IV. ORDERING CLAUSES**

23. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 203, 204, 205, 206, 208, and 415 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 204, 205, 206, 208, and 415, and sections 61.2 and 61.26 of the Commission's rules, 47 C.F.R. §§ 61.2 and 61.26, that the Complaint is GRANTED in part and DENIED in part.

24. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 203, 204, 205, 206, 208, and 415 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 204, 205, 206, 208, and 415, and sections 61.2 and 61.26 of the Commission's rules, 47 C.F.R. §§ 61.2 and 61.26, that Northern Valley Communications, LLC SHALL FILE tariff revisions consistent with this Order within ten days of the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

(Continued from previous page) -----  
claim. See Complaint at 16-17, ¶ 34, 26, ¶ 55, 36, ¶ 76, Complaint, Legal Analysis at 29-30; Reply at 20-22 (arguing that, to the extent that the Tariff purports to charge IXCs for providing access to entities that are not Northern Valley's end users, it violates the reciprocal compensation requirements of sections 251 and 252).



COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

**RECEIVED**

JUL 15 2010

In the Matter of:

MCI COMMUNICATIONS SERVICES, INC., BELL )  
ATLANTIC COMMUNICATIONS, CIN., NYNEX LONG )  
DISTANCE COMPANY, TTI NATIONAL, INC., )  
TELECONNECT LONG DISTANCE SERVICES & )  
SYSTEMS COMPANY AND VERIZON SELECT )  
SERVICES, INC. )

**PUBLIC SERVICE  
COMMISSION**

Complainants

) CASE 2007-00503

v.

WINDSTREAM KENTUCKY WEST, INC., )  
WINDSTREAM KENTUCKY EAST, INC. – LEXINGTON )  
AND WINDSTREAM KENTUCKY EAST, INC. – LONDON )

Defendants

DIRECT TESTIMONY  
OF  
CESAR CABALLERO  
- PUBLIC REDACTED VERSION -

---

ON BEHALF OF WINDSTREAM KENTUCKY EAST, LLC AND  
WINDSTREAM KENTUCKY WEST, LLC

---

Dated July 14, 2010



1           complaining party in this proceeding and bears the burden of proof – not Windstream.  
2           Further, the intrastate switched access rates of Windstream East and Windstream West  
3           are not only deemed just and reasonable as a matter of law but further were initially  
4           tariffed and approved by the Commission and remain capped at those previously  
5           approved levels. Additionally, when Verizon’s ILEC affiliate sold its Kentucky assets to  
6           Windstream East in 2002, those rates were ordered to be adopted by Windstream East  
7           without regard to Windstream East’s particular costs as I discussed above.

8   **Q.   Are the rates of alternatively regulated companies like Windstream East and**  
9   **Windstream West required to be cost-based?**

10  A.   No. Alternative regulation breaks the linkage between costs and rates. As alternatively  
11  regulated companies, Windstream East and Windstream West are not required to  
12  maintain switched access rates that are cost-based.

13  **Q.   Please explain a bit further the significance of electing alternative regulation on**  
14  **Verizon’s indication that Windstream East and Windstream West should submit a**  
15  **cost-study to support the reasonableness of their intrastate switched access rates.**

16  A.   When a carrier elects alternative regulation, it chooses to have its rates governed by price  
17  caps, which, after the election, do not necessarily track costs. The whole point of such  
18  regulation is to offer an alternative to traditional ratemaking jurisdiction and to create  
19  incentives for carriers to operate efficiently in a competitive marketplace. At the same  
20  time, the carrier bears the risk of costs increasing, particularly on a per-minute basis.  
21  This was part of the regulatory bargain created by the Legislature and precisely why the  
22  statutes deem the rates of Windstream East and Windstream West to be just and  
23  reasonable without reference to costs. It is worth mentioning again, that with particular



SECTION 10 - LOCAL EXCHANGE SCHEDULE (Cont'd.)

C. LOCAL EXCHANGE SCHEDULE - RATE TABLE (Cont'd.)

5. Surcharge Percentage for Local Utility Gross Revenue Taxes

In addition to the rate and charges shown in P.S.C. NO. 1-TELEPHONE the Surcharge Percentage for Local Utility Gross Revenue Taxes (Section C. 6.) applies to the cities and villages shown below:

Rates and charges that apply to the provision of telephone service are subject to New York State revenue taxes. The surcharge percentage that applies to monthly local service charges is as follows:

<u>Locality</u>	<u>Tax District Code</u>
<u>Cities</u>	
Fulton	001/002/004
Jamestown	117
<u>Villages</u>	
Cazenovia	011
Central Square	549
Manchester	002
Marcellus	810/010
Manlius	764
Phoenix	011
Sinclairville	095/111
Shortsville	001

6. Surcharge Percentage for Local Utility Gross Revenue Taxes

In addition to the rates and charges shown in P.S.C. NO. 1-TELEPHONE the following surcharge percentage applies to the cities and villages listed above.

<u>Tax Rate</u>	<u>Surcharge Percentage</u>
1.0%	1.01%

SECTION 10 - LOCAL EXCHANGE SCHEDULE (Cont'd.)

C. LOCAL EXCHANGE SCHEDULE - RATE TABLE (Cont'd.)

7. State Revenue Taxes

Rates and charges that apply to the provision of telephone service are subject to New York State revenue taxes.

The applicable Gross Revenue Surcharge rates are shown on a statement which is attached to this tariff. Any changes to these rates will be filed on 15 days' notice to customers and the Commission, and as directed by the Commission. Whenever the state levies a new tax on the company's gross revenues, repeals such a tax, or changes the rate of such tax, the Commission may approve new surcharge factors, and the company will file revised surcharges as directed by the Commission.

(M)

(M)

(M) Information previously found on this page has been moved to Section 3, Paragraph O.2.f.

Issued by: Vice President, Little Rock, Arkansas



IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION

Dana Bowers, On Behalf of Herself and

Others Similarly Situated,

And

Sunrise Children's Services, Inc.,

on

Behalf of Itself and Others Similarly

Situated

PLAINTIFFS,

vs.

Civil Action No. 3:09-CV-440

Windstream Kentucky East, LLC, et al.

DEFENDANTS.

VIDEOTAPED ORAL DEPOSITION OF CESAR CABALLERO

TAKEN WEDNESDAY, MAY 18, 2011

A P P E A R A N C E S :

ON BEHALF OF THE PLAINTIFFS:

DAVID T. ROYSE, ESQ.  
Stoll Keenon Ogden  
300 West Vine Street, Suite 2100  
Lexington, Kentucky 40507

DOUGLAS F. BRENT, ESQ.  
Stoll Keenon Ogden  
200 PNC Plaza 500 West Jefferson Street  
Louisville, Kentucky 40202-2828

SUSAN B. WHITSON, CCR, INC. (501) 455-1170

36050679-6f8a-435d-b0bb-8e0021dfa7d3

1           The FCC doesn't mandate that that SLC be passed along to a  
2 customer. Right?

3       A     It does not mandate, no.

4       Q     Does your work, Cesar, ever involve various state taxes  
5 that Windstream is either subject to or has to pass along to  
6 its customers?

7       A     No.

8       Q     Okay. Have you ever been registered as a lobbyist for  
9 Windstream?

10      A     I have not.

11      Q     Okay. Who does Windstream's federal lobbying?

12      A     Clint Highfield.

13      Q     As I think you probably know, we're here to talk to a  
14 large extent about the Kentucky Gross Receipts Tax and the  
15 surcharge imposed by Windstream. Do you have a general  
16 understanding of what the Kentucky Gross Receipts Tax is?

17      A     High level.

18      Q     Okay. Tell me if that high level, who the Kentucky Gross  
19 Receipts Tax is imposed on?

20      A     It is imposed on carriers.

21      Q     Okay. And is it a federal, state, or local tax?

22      A     My understanding is that it is a state tax.

23      Q     Okay. Do you know whether there are some revenues or  
24 receipts that are excluded from the tax or does it apply to  
25 every single dollar that comes in the door?

1           Okay. "Subject: Reduce rates charged to customers for KY  
2 GRT effective 1/9/09." And it says, "Janann, Tim, Effective  
3 1/9/09 we need to change the rates charged to our retail and  
4 wholesale customers to pass through the Kentucky gross receipts  
5 tax to the following rates: Interstate wholesale 1.3;  
6 intrastate wholesale 0.0; retail," and it says "1.55," and then  
7 that's later struck through in handwriting and changed to  
8 "1.75." It says, "The slightly higher rate on the retail side  
9 is to compensate for the money we are not passing through to  
10 intrastate wholesale customers."

11           So a business decision was made not to pass through a  
12 gross receipt surcharge on intrastate wholesale customers.

13 Correct?

14           MS. FARRIS: Object to the form.

15           You can answer.

16           THE WITNESS: Yes.

17 BY MR. ROYSE:

18 Q       And a business decision was made to charge a rate in  
19 excess of 1.3 to retail customers in order to make up for the  
20 revenues missing from that intrastate wholesale piece?

21           MS. FARRIS: Object --

22 BY MR. ROYSE:

23 Q       Is that accurate?

24           MS. FARRIS: Object to the form.

25           You can answer.



1 THE WITNESS: Yes.

2 BY MR. ROYSE:

3 Q The response up above from Angela to the whole group is,  
4 or she corrects herself, "One slight change. The CAMS rate  
5 should be 1.75 percent, not 1.55 percent."

6 Do you know why that was?

7 A I can only infer that they miscalculated.

8 Q How much they needed --

9 A That's --

10 Q -- to charge --

11 A That's --

12 Q -- to make up?

13 A That's correct.

14 Q Okay. Were you involved in this decision?

15 A No.

16 Q Okay. You would have been vice president of regulatory  
17 strategy in December of 2008. Right?

18 A Yes.

19 Q Do you feel like it's a decision you should have been  
20 involved in?

21 A Relative to surcharges, I don't get involved that often  
22 with the ability of -- if the -- if the decision has been made  
23 that they have the ability to make changes to the surcharge,  
24 then I don't need to get involved every single time they change  
25 their -- the surcharge rate. No.



1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF KENTUCKY  
3 LOUISVILLE DIVISION  
4 CIVIL ACTION NO. 3:09-CV-440

4 Dana Bowers, on Behalf of Herself  
and Others Similarly Situated,

) DEPOSITION TAKEN ON  
) BEHALF OF PLAINTIFFS  
) BY: NOTICE

5 And

6 Sunrise Children's Services, Inc.,  
7 on Behalf of Itself and Others  
8 Similarly Situated,

9 PLAINTIFFS,

**COPY**

10 V.

11 Windstream Kentucky East, LLC, et al.,

) WITNESS:

12 DEFENDANTS.

) DAN LOGSDON

13 \* \* \* \* \*

14 The deposition of **DANIEL LOGSDON, JR.**, was taken  
15 before April Huizar, Court Reporter and Notary Public in and  
16 for the State of Kentucky at Large, and by videotape  
17 recording, at the offices of Stites & Harbison, PLLC, 421  
18 West Main Street, Frankfort, Kentucky, on Thursday, April 21,  
19 2011, commencing at the approximate hour of 1:08 P.M. Said  
20 deposition was taken pursuant to Notice, heretofore filed, to  
21 be used for all purposes allowed by the Federal Rules of  
22 Civil Procedure.

23 \* \* \* \* \*

1 Alltel to Windstream?

2 **A.** In the summer of 2006. I think legal day one was  
3 something like July 17, 2006.

4 **Q.** From 2004 until that transition in 2006, your duties  
5 were still the same in Lexington, right?

6 **A.** Yes, sir.

7 **Q.** And you would have still been dealing with the same  
8 people in Little Rock, just a different company,  
9 right?

10 **A.** Yes, sir.

11 **Q.** Okay. In your role as vice president of external  
12 affairs at Windstream, were you involved in  
13 monitoring the litigation that was brought involving  
14 the GRT?

15 **A.** No.

16 **Q.** Did you participate in any way in that litigation?

17 **A.** No.

18 **Q.** Do you know if Windstream stayed apprised of that  
19 litigation while it was going on?

20 **A.** I do not.

21 **Q.** I want to ask you some basic questions about the  
22 Kentucky gross receipts tax with respect to  
23 telecommunications providers. And again,  
24 Mr. Logsdon, all I'm seeking here is your best  
25 understanding. First of all, on whom is that tax

1 imposed?

2 **A.** A telecommunications -- local telecommunications  
3 providers, ILEC's, incumbent local exchange carriers.

4 **Q.** ILEC, I-L-E-C?

5 **A.** Yeah. And I think CLEC's as well, but I don't know  
6 that.

7 **Q.** Okay. And is that a federal, a state, or a local  
8 tax?

9 **A.** I believe it's a state tax.

10 **Q.** Okay. And are some -- what does it tax? Generally,  
11 what does it tax?

12 **A.** I don't know.

13 **Q.** Okay. Do you have an understanding by the name of it  
14 that it -- that it taxes, in some form or another,  
15 the gross receipts of a telecommunications provider  
16 from certain sources?

17 **MS. FARRIS:** Object to the form, asked and answered. You  
18 can answer.

19 **A.** Yes, but I don't know what services are incorporated  
20 in that.

21 **Q.** I will get to that next. I was just asking generally  
22 first. Do you know one way or the other whether  
23 Internet service is subject to that tax, Internet --  
24 revenues from Internet service?

25 **A.** I do not.



IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION

Dana Bowers, On Behalf of Herself and

Others Similarly Situated,

And

Sunrise Children's Services, Inc.,

on

Behalf of Itself and Others Similarly

Situated

PLAINTIFFS,

vs.

Civil Action No. 3:09-CV-440

Windstream Kentucky East, LLC, et al.

DEFENDANTS.

ORAL DEPOSITION OF JENNIFER MARCHAL

TAKEN FRIDAY, MAY 27, 2011

A P P E A R A N C E S:

ON BEHALF OF THE PLAINTIFFS:

DAVID T. ROYSE, ESQ.  
Stoll Keenon Ogden  
300 West Vine Street, Suite 2100  
Lexington, Kentucky 40507

DOUGLAS F. BRENT, ESQ.  
Stoll Keenon Ogden  
200 PNC Plaza 500 West Jefferson Street  
Louisville, Kentucky 40202-2828

1 those same type of taxes, and approve journal entries as well  
2 as payments for those type of taxes.

3 Q Okay. And Windstream has certain revenue streams that can  
4 be subject to federal, state, or local taxes. Correct?

5 A That is correct.

6 Q The -- which one of those is the Kentucky gross receipts  
7 tax?

8 A I'm sorry. I'm not sure I understand that.

9 Q Is the Kentucky gross receipts tax a local, state, or  
10 federal tax?

11 A It would be considered a state tax.

12 Q Okay. And what is your understanding of what the Kentucky  
13 gross receipts tax applies to?

14 A Any telecommunications service.

15 I -- off the top of my head, without looking at the  
16 statute, I can't get into details, but primarily  
17 telecommunication services.

18 Q Okay. And do you know the rate of that tax?

19 A It's 1.3 percent.

20 Q Okay. And Windstream applies a gross receipts surcharge  
21 to certain of its Kentucky customers to recoup the cost of that  
22 gross receipts tax. Correct?

23 A That is correct.

24 Q All right. And right now what is the rate or percentage  
25 rate of that gross receipts surcharge, if you know?