

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

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

SEP 06 2011

PUBLIC SERVICE
COMMISSION

CASE NO. 2010-00447

RESPONSE BRIEF OF WINDSTREAM KENTUCKY EAST, LLC

Introduction

This proceeding requires the Commission to rule on a single issue: Did Winstream Kentucky East, LLC (“Windstream East”) violate KRS 278.160 when it included a gross receipts surcharge (“GRS”) on invoices to Dana Bowers for nonbasic telecommunications services without including the GRS in its Kentucky Tariff No. 7? Windstream East’s initial brief establishes that Kentucky law compels the Commission to answer “No” to this question because Mrs. Bowers purchases only nonbasic services from Windstream East, and KRS 278.544(4) expressly exempts nonbasic services from regulation under KRS 278.160. Nothing in Mrs. Bowers’ brief supports a conclusion to the contrary. Rather, Mrs. Bowers’ brief seeks to distract the Commission both from the real issue in this proceeding and the nature of services Mrs. Bowers purchases from Windstream East.

Implicitly recognizing the nonbasic services she purchase from Windstream East are expressly excluded from regulation under KRS 278.160, Mrs. Bowers ignores the import of KRS 278.544(4) and asks the Commission to rule in her favor on the basis of inapplicable legal authority and arguments that fall outside the scope of her Complaint. Specifically, Mrs. Bowers

presents two affirmative arguments in her brief: (1) the GRS is a “rate” for “service” that Windstream East was required to tariff; and (2) Windstream East violated the Filed Rate Doctrine by assessing the GRS.¹ Both of these arguments should be rejected by the Commission for the reasons explained in detail in Windstream East’s initial brief, the most significant of which is that KRS 278.544(4) expressly exempts Mrs. Bowers’ nonbasic services from regulation under KRS 278.160, the statute that serves as the cornerstone of her Complaint.

I. Mrs. Bowers Misapprehends the Scope of this Proceeding.

A. The Applicability Of KRS 278.160 To Windstream East’s Collection Of A Gross Receipts Surcharge from Mrs. Bowers Is The Sole Statutory Issue Before The Commission.

Mrs. Bowers’ Complaint concerns Windstream East’s alleged violation of but one statute: KRS 278.160. Not only is KRS 278.160 the only provision of Chapter 278 even recited in her Complaint,² the very first sentence of her Complaint seeks only a declaratory ruling that Windstream “violated KRS 278.160 when it charged her, and its other customers, an unfiled rate for telecommunications service....” Similarly, the relief requested in paragraph 17 of the Complaint, as well as the Prayer for Relief seek a declaratory ruling only with respect to Windstream East’s alleged violation of KRS 278.160. Therefore, Mrs. Bowers’ unproven and unprovable allegations in her brief, for example, that Windstream East violated KRS 278.543 and the “regulatory bargain,” as well as other claimed “bad acts” by Windstream East included as part of Mrs. Bowers’ efforts to vilify Windstream East in apparent hopes of convincing the Commission to lash out at Windstream East by ruling in her favor, are irrelevant and should be rejected by the Commission.

¹ These arguments are set forth at pp. 10-16 of Mrs. Bowers’ Brief of Petitioner.

² Complaint at ¶¶ 1, 6, 9, 11, 12, 13.

B. Mrs. Bowers Lacks Standing To Assert The Claims Of Other Customers As Well As Claims With Respect To Services To Which She Does Not Subscribe.

Mrs. Bowers efforts to assert the claims of other Windstream East customers, as well as her effort to assert claims with respect to services to which she does not subscribe, are not an appropriate issue before the Commission and ignore the fundamental requirement of standing.

At a minimum, standing:

is composed of three well-settled requirements.... First, the complaining party must have suffered an "injury in fact," i.e., "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." ... Second, a causal relationship must exist between the complaining party's alleged injury and the challenged conduct. Finally, there must be a likelihood that a favorable decision will redress the injury, meaning that "the 'prospect of obtaining relief from the injury as a result of a favorable ruling' is not 'too speculative.'"³

Mrs. Bowers has not, and cannot, meet this burden with respect to the alleged claims of other customers, or with respect to services she does not receive. Mrs. Bowers' attempt to assert claims on behalf of other customers is merely a red herring that distracts from the undeniable point that her claims fail under any analysis of the services she actually purchases from Windstream East – facts of which are curiously lacking from her filings before the Commission.

Illustrative of the Commission's standing jurisprudence is *McGinnis v. GTE South Incorporated*.⁴ There, the sole shareholder of a corporation that apparently was a customer of GTE attempted to bring a formal complaint on behalf of the corporation and himself alleging both were harmed as a result of GTE's actions. The Commission dismissed the complaint because McGinnis "lacked standing to bring his complaint against GTE," despite the fact he was the sole shareholder of the corporation. *Id.* at 1-2. If the sole shareholder of a corporation lacks

³ *Natural Resources & Environmental Protection Cabinet v. Kentec Coal Co., Inc.*, 177 S.W.3d 718, 731 (Ky. 2005).

⁴ Case No. 99-495 (Ky. P.S.C. February 14, 2000).

standing to assert the claims of the corporation, or even his own claims in his capacity as sole shareholder, Mrs. Bowers indisputably lacks standing to seek a declaratory ruling with respect to other customers, or in connection with services she does not receive.⁵

More broadly – standing, and the requirement under Kentucky law that there be “a logical nexus between the status asserted and the claim sought to be adjudicated,”⁶ and that the complainants’ injuries be concrete and particularized,⁷ – are necessary “to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of ...” difficult issues.⁸ Such a nexus is particularly important here given the fundamental distinction under KRS 278.544(4) between basic and nonbasic service.

Any ruling by the Commission in this case must be limited to Mrs. Bowers, and then, only with respect to the services she receives. Mrs. Bowers has no standing to bring a claim other than her own, and certainly lacks standing to litigate before this Commission on behalf of other customers who contracted with Windstream East to purchase services different than those purchased by Mrs. Bowers, or, who, like Mrs. Bowers, remain free to purchase telecommunications services from other carriers.

C. Nothing In Chapter 278 Of The Kentucky Revised Statutes Authorizes Class Action Practice Before The Commission.

No class has been certified by the United States District Court for the Western District of Kentucky in Mrs. Bowers’ federal action. Further, nothing in Chapter 278 of the Kentucky Revised Statutes provides for class action practice before the Commission, despite that the brief

⁵ See also, *Quarles v. Peaks Mill Water District*, Case No. 2005-00437 (Ky. P.S.C. May 22, 2006) (dismissing complaint following hearing where complainant sold property and was no longer seeking the services in issue.)

⁶ *Fish v. Elliot*, 554 S.W.2d 94, 97 (Ky. App. 1997),

⁷ *Kentec Coal Co., Inc.*, 177 S.W.3d at 731 (Ky. 2005) (Recognizing that standing only lies when a plaintiff establishes a concrete injury in fact capable of redress through a favorable ruling); See also, *Rosen v. Tenn. Comm’r of Finance & Administration*, 288 F.3d 918, 928 (6th Cir. 2002) (Finding that a plaintiff cannot manufacture standing by purporting to represent others that might have been injured by a defendant’s conduct).

filed by Mrs. Bowers makes clear that she considers herself the self-appointed representative of Windstream East’s “entire customer base.”⁹ Mrs. Bowers erroneously invites the Commission to rule on abstract legal issues that might have some hypothetical relevance to other Windstream East customers¹⁰ who are not parties to this action, who have not appointed Mrs. Bowers their legal representative, and whose claims, if any, may be fundamentally different from those Mrs. Bowers .¹¹ The Commission should and must reject this invitation and focus on the single issue before it – to determine whether the claims in Mrs. Bowers’ Complaint under KRS 278.160 have any validity with respect to the specific services that she purchases from Windstream East .

The Commission is a “creature of statute.”¹² As such, it “has only such powers as have been granted to it by the General Assembly,”¹³ including the procedures employed by the Commission.¹⁴ Nothing in Chapter 278 purports to provide for the sort of yet to be defined or certified class-wide relief Mrs. Bowers seeks in her brief. Certainly, Mrs. Bowers does not cite any such statutory basis for class action practice before the Commission. Indeed, the chapter stands mute concerning Mrs. Bowers’ ability to maintain, or the Commission to hear, the class action she seeks here. Moreover, because there is no provision for class actions in Chapter 278, the chapter not surprisingly also lacks the sort of protections embodied in CR 23 and Fed. R. Civ.

⁸ *Id.*

⁹ Brief of Petitioner (“Bowers Brief”) at 20.

¹⁰ See Complaint at 1 (Alleging that Windstream East charged Mrs. Bowers, “and its other customers,” an unfiled rate for telecommunications services in violation of KRS 278.160); See also Bowers Brief, p. 1 (Framing this proceeding as a referral from the United States District Court for the Western District of Kentucky for the Commission to address abstract legal issues rather than as a Petition filed by Mrs. Bowers).

¹¹ Indeed, even under federal class action law, a class representative’s claims must be just that – representative of the claims of the members of the putative class she purports to represent. Fed. R. Civ. P. 23(a)(4)

¹² *Kentucky Public Service Commission. v. Commonwealth ex rel. Conway*, 324 S.W.3d 373, 377 (Ky. 2010).

¹³ *Boone County Water and Sewer District v. Public Service Commission*, 949 S.W.2d 588, 591 (Ky. 1997).

¹⁴ *South Central Bell Tel. Co. v. Utility Regulatory Commission*, 637 S.W.2d 649, (Ky. 1982). (Commission lacks authority to use rate proceeding to penalize a utility for inadequate service).

P. 23, including notice where appropriate or required,¹⁵ commonality,¹⁶ typicality¹⁷ and adequacy of the class representative,¹⁸ designed to protect putative class members.

The Commission should not, and respectfully, cannot, afford Mrs. Bowers the class-wide relief she seeks here nor is the Commission required to do so. Mrs. Bowers has not been granted such relief in the federal proceeding, where there is no express authority for considering such relief.¹⁹ Accordingly, the Commission's review is limited to the application of Kentucky law to the services purchased by Mrs. Bowers, and any declaration must be limited to her alone.

II. Mrs. Bowers' Recitation of "Undisputed Facts" Includes Allegations that are Disputed, Erroneous, and Irrelevant to the Issue Before the Commission.

Throughout this proceeding, Mrs. Bowers has maintained that this action involves simple and straightforward facts, that there are no facts in dispute between the parties, and that a hearing was unnecessary to resolve the issue of Windstream East's purported obligations under KRS 278.160.²⁰ Having convinced the Commission that no hearing was required, Mrs. Bowers now levies numerous unfounded and inflammatory claims against Windstream East under the guise of "undisputed facts." Numerous statements and arguments set forth in the Background section of her brief as "undisputed facts" are without question neither fact nor undisputed. Moreover, even the most salacious of Mrs. Bowers' allegations should be rejected both because they lack support in the record and because they have no bearing on the issue before the Commission.

¹⁵ *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 881 (7th Cir. 2000).

¹⁶ *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n. 13 (1982).

¹⁷ *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1083 (6th 1996).

¹⁸ *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 796 (3rd Cir. 1995). (adequacy of representative requirement under Fed. R. Civ. P. 23(a)(4) is designed to protect due process rights of absent class members).

¹⁹ As set out in Windstream East's response to the motion for class certification in the federal action, Mrs. Bowers' claims do not satisfy the requirements under Fed. R. Civ. P. 23 for maintaining a class action.

A. In The Deregulated Kentucky Telecommunications Market Windstream East's Tariff Filings are Not At Issue In This Proceeding.

Mrs. Bowers devotes significant attention to Windstream East's decision to file, and subsequently withdraw, proposed revisions to its Kentucky tariffs pertaining to the recovery of its costs incurred through the gross revenues tax imposed by KRS 136.616.²¹ Mrs. Bowers also misstates that Windstream East amended a federal tariff to account for the tax, and argues that Windstream "knowingly violated" the revised tariff by imposing the GRS at an amount that purportedly exceeded that identified in the tariff.²² These allegations are argument – not fact – and most certainly disputed by Windstream East. Further, they are irrelevant to the questions before the Commission and have no place in this proceeding whatsoever.

Windstream East's decisions to file and withdraw the tariff revisions offer no evidence about whether such filing was required by KRS 278.160. Further, it is improper for Mrs. Bowers to argue that Windstream East "inexplicably" withdrew the tariffs given Mrs. Bowers' arguments to the Commission that no hearing was needed in this matter to test the facts of this proceeding. To the extent she believed this purported fact was important to her case, then Mrs. Bowers should have subjected herself to a hearing to explore the basis of her position and the related circumstances. Mrs. Bowers should not be permitted to argue that no facts are in dispute and then rely upon numerous disputed factual allegations in her brief. In any event, Kentucky law is clear that such a tariff filing is permissive for the reasons explained in detail in Windstream East's initial brief.²³ Moreover, Windstream East's practices with respect to any of its federal

²⁰ See, e.g., Petitioner's Response to Request for Hearing; See also, Letter of Douglas F. Brent to R. Benjamin Crittenden of January 20, 2011 (A copy of this letter was filed with the Commission on January 24, 2011).

²¹ Bowers Brief, pp. 3-4.

²² *Id.*, p. 4.

²³ See KRS 278.544(1) ("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.") (Emphasis added).

tariffs have no bearing on this proceeding. Mrs. Bowers' Complaint before the Commission is founded solely upon state – not federal – law. Her repeated efforts to conflate the two displays a fundamental misunderstanding of Kentucky law, and, at a minimum, the deregulated telecommunications market created by the 2006 General Assembly's overhaul of Chapter 278 with respect to nonbasic telecommunications services.

B. The Amount of the GRS Charged by Windstream East is Irrelevant and Mrs. Bowers' Attempted Inflammatory Representations on the Issue Ignore the Fact that the GRS is not a Direct Pass-Through of the Kentucky Gross Revenues Tax.

Mrs. Bowers insists that certain Windstream East customers have been charged more through the GRS “than they would have paid if the government had imposed the taxes directly on the customers themselves.”²⁴ Mrs. Bowers boldly claims that Windstream East overcharged its customers through the GRS, that it assessed the GRS “erratically,” that it “placated” certain “large and sophisticated customers” through confidential agreements and “ratcheted up” the amount of the GRS on everyone else, and that 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.”²⁵ Mrs. Bowers' hyperbolic allegations, like her attempts to conflate the deregulated Kentucky marketplace with the federal market, employ fiery rhetoric to compensate for their fundamental lack of substance. The argumentative statements are most certainly not “undisputed facts” and should be disregarded by the Commission.

There is nothing secretive or nefarious about the manner in which Windstream East has assessed the GRS. Windstream East repeatedly has stressed that the GRS is not a direct pass-through of the Kentucky gross revenues tax.²⁶ Rather, it is a surcharge implemented to enable

²⁴ Bowers Brief, p. 5.

²⁵ *Id.*

²⁶ Direct Testimony of Stephen Weeks (“Weeks Direct Testimony”), pp. 22-23.

Windstream East to recover its costs of compliance with the law.²⁷ The amount of the GRS has varied over time with Windstream East's costs of compliance.²⁸ Notwithstanding Mrs. Bowers' argument to the contrary, at no time has Windstream East recovered through the GRS more than its costs of compliance with the tax – a point with respect to which Mrs. Bowers failed to introduce any evidence.²⁹ The amount of the GRS collected from Mrs. Bowers has no bearing on the issue of whether KRS 278.160 required Windstream East to include the GRS in Tariff No. 7 before assessing it to Mrs. Bowers' services, and Mrs. Bowers' allegations appear to be nothing more than an attempt to cast Windstream East in an unfavorable light before the Commission.

III. Remarkably, Mrs. Bowers Ignores the Legal Issue Before the Commission by Avoiding Any Discussion of KRS 278.544(4) in Her Brief.

Mrs. Bowers contends that Kentucky law and Commission precedent support a finding that Windstream East violated the filed rate doctrine by assessing the GRS without first including the surcharge in its Kentucky tariff.³⁰ In advancing this argument, Mrs. Bowers uniformly relies upon inapplicable statutes and decisions. Mrs. Bowers compounds her flawed analysis by hiding from the statutes and Commission decisions that compel a finding that KRS 278.160 did not require Windstream East to tariff the GRS before including it on Mrs. Bowers' invoices.

In support of her argument that Windstream East violated Kentucky's filed rate doctrine, Mrs. Bowers relies primarily upon KRS 278.160,³¹ which forms the statutory basis of Kentucky's filed rate doctrine, and KRS 278.544(1), which permits telephone carriers that have elected to be governed under Kentucky's alternative regulatory framework to continue filing

²⁷ *Id.*

²⁸ *Id.*, p. 12.

²⁹ *Id.*, p. 24.

³⁰ Bowers Brief, p. 14.

³¹ KRS 278.160(2) provides: "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."

tariffs reflecting their rates, terms and conditions for nonbasic service. Mrs. Bowers insists that the “rates, terms, and conditions” set forth in Windstream East’s Kentucky tariff continue to be valid and binding because Windstream East has not withdrawn the tariff.³² In advancing this argument, Mrs. Bowers ignores express provisions of Kentucky law that compel the Commission to reject her position.

A. KRS 278.544(4) Requires that Nonbasic Telecommunications Services be Governed by the Competitive Marketplace and not be Subject to KRS 278.160.

KRS 278.544(4) makes clear that the provision of nonbasic services such as those purchased by Mrs. Bowers is governed by the competitive marketplace for telecommunications services, and not by tariffs Windstream East might have had on file at the time of deregulation. KRS 278.544(4) deregulates the provision of nonbasic services by exempting such services from those statutes that form the Commission’s regulatory backbone :

Notwithstanding any provision of law to the contrary, nonbasic services offered pursuant to the provisions of this section shall be set by the marketplace and are not governed by KRS 278.030 and administrative regulations promulgated thereunder. The nonbasic services are exempt from action or review by the commission under KRS 278.160, 278.170, 278.180, 278.192, 278.200, 278.230(3), 278.250, 278.255, 278.260, 278.270, 278.280, 278.290, and 278.300 and administrative regulations promulgated thereunder, except as specifically stated in KRS 278.541 to 278.544.³³

The significance of this statute is clear: the nonbasic services purchased from Windstream East by Mrs. Bowers are regulated only by the competitive marketplace and not by the Commission’s historical regulatory tools – including most specifically KRS 278.160.

³² Bowers Brief, p. 14.

³³ KRS 278.544(4) (Emphasis supplied). The legislative history of KRS 278.544 is extensive and well-known to the Commission. It is also irrelevant in this proceeding because the language of KRS 278.544(4) clearly and unambiguously provides that nonbasic services are exempt from regulation under KRS 278.160. *See, e.g., City of Vanceburg v. Plummer*, 122 S.W.2d 772, 774 (Ky. 1938); and *Cowherd v. Million*, 380 F.3d 909, 913 (6th Cir. 2004).

Because the Commission is a creature of statute,³⁴ and because the Filed Rate Doctrine as it applies to public utilities in the Commonwealth is codified at KRS 278.160,³⁵ there is no inchoate body of law, or other basis for her Filed Rate Doctrine claim, beyond the express terms of the statute.³⁶ Stated otherwise, absent the applicability of KRS 278.160 to the nonbasic services to which she subscribes, Mrs. Bowers' claims fail.

And fail they must. KRS 278.544(4) expressly lists KRS 278.160, which is the sole statutory provision of Chapter 278 upon which Mrs. Bowers premises her claims in her Complaint. Thus, KRS 278.160 is the sole basis of her ability to invoke the Filed Rate Doctrine and is expressly identified among the statutes not applicable to the provision of her nonbasic telecommunications services.

The fact that Windstream East contends that KRS 278.544(4) is dispositive of her claims cannot be a surprise. Yet, remarkably Mrs. Bowers nowhere addresses KRS 278.544(4) in her Brief, or even hazards an explanation of how in the face of its express exemption of nonbasic services from the provisions of KRS 278.160 (along with the other statutes listed), she can premise her claim against Windstream East on the basis of that statute. Whether employed as a litigation tactic, or as a result of her inability to respond to KRS 278.544(4), Mrs. Bowers' silence in her Brief with respect to that statute condemns her claims.

Since July 12, 2006, nonbasic services have been offered in the Commonwealth "in accordance with the marketplace."³⁷ KRS 278.160 has no applicability to the services Mrs. Bowers receives from Windstream East or her claims.

³⁴ *Boone County Water and Sewer District v. Public Service Commission*, 949 S.W.2d 588, 591 (Ky. 1997).

³⁵ *Id.*

³⁶ Any doubt regarding the lack of an additional body of law implementing the Filed Rate Doctrine is dispelled by KRS 278.544(4), which expressly provides that its provisions apply "notwithstanding any provision of law to the contrary...."

³⁷ KRS 278.544(4).

B. Commission Precedent Confirms that KRS 278.160 Does Not Apply to the Provision of Nonbasic Services Such As Those Purchased by Mrs. Bowers.

This fundamental fact regarding the provision of nonbasic services in the Commonwealth has been affirmed by the Commission. The Commission recently considered the significance of KRS 278.544(4) in an administrative case in which it examined the practice employed by certain telecommunications carriers of marketing telecommunications service as being “unlimited” when it appeared that limitations on use were imposed by the carriers.³⁸ In examining this issue, the Commission recognized limitations upon its jurisdiction to act upon practices employed by telecommunications carriers:

[T]he Commission’s jurisdiction over telecommunications service providers was limited upon the effective date, July 12, 2006, of legislation enacted by the General Assembly and codified as KRS 278.541, KRS 278.542, KRS 278.543, and KRS 278.544. These statutes reduced the regulatory oversight of the telecommunications industry in Kentucky, except for “basic service” and other, very limited, circumstances.³⁹

The Commission recognized that KRS 278.160 traditionally required all utilities to keep on file a tariff that included its terms, rates, and conditions of service.⁴⁰ However, the enactment of KRS 278.544(1) made that filing requirement permissive for telecommunications carriers, rather than mandatory, and KRS 278.544(4) now exempts any such filing from Commission review under KRS 278.160.

The Commission reached the same conclusion concerning the applicability of the statutes listed in KRS 278.544(4) to a telecommunications carrier’s provision of nonbasic services in

³⁸ *In the Matter of: An Inquiry Into Limitations of Use for Tariffed Services Designated or Otherwise Referred to as Unlimited*, Administrative Case No. 2005-00186, 2007 Ky. PUC LEXIS 441 (June 1, 2007).

³⁹ *Id.* at *6-7.

⁴⁰ *Id.* at *10.

other decisions.⁴¹ This conclusion is fatal to Mrs. Bowers' claims in this proceeding. Despite her efforts to avoid discussion of same, Mrs. Bowers purchases only nonbasic services from Windstream East.⁴² KRS 278.544(4) requires that the provision of nonbasic services be governed by the competitive telecommunications market, and expressly exempts the provision of such services from the Commission's jurisdiction under KRS 278.160. Accordingly, the Commission should declare that Windstream East was not required to include the GRS in its Kentucky tariff before including it on Mrs. Bowers' invoices.

In contrast, the Commission decisions relied upon by Mrs. Bowers offer no support for her insistence that KRS 278.160 required Windstream East to tariff the GRS even after the deregulation of the telecommunications industry. Mrs. Bowers fails to cite a single Commission decision applying KRS 278.160 in the post-deregulation, telecommunications context. None of the decisions cited by Mrs. Bowers address the interplay between KRS 278.544(4) and KRS 278.160, and none provide any support for the contention that KRS 278.160 remains applicable to the provision of nonbasic services. Indeed, of the four cases cited by Mrs. Bowers in support of her argument that Kentucky law and Commission precedent support a finding that Windstream East has violated the filed rate doctrine, only two address filed rate issues with

⁴¹ See, e.g., *In the Matter of: Complaint Pursuant to KRS 278.260 and Emergency Motion for an Investigation of Buzz Telecom, Corp. with a Hearing to Revoke the Certificate of Public Convenience and Necessity to Provide Telephony Services of Buzz Telecom, Corp. and to Impose Civil Penalties Pursuant to KRS 278.990*, Case No. 2007-00068, 2007 Ky. PUC LEXIS 447 (June 1, 2007) ("It is clear from the foregoing language that the exemptions set forth in KRS 278.544(4) apply to all telephone utilities; no election or adoption is necessary. Buzz's practices and services, which are quite plainly 'nonbasic' in nature, are exempt from Commission review under KRS 278.030 and the other statutes exempted in KRS 278.544(4).").

⁴² Weeks Direct Testimony, p. 7.

telecommunications carriers, and those were decided prior to deregulation.⁴³ The other two do not even address service by telecommunications carriers.⁴⁴

C. KRS 278.544(1) Provides No Support For Mrs. Bowers' Claims.

While Mrs. Bowers did not address KRS 278.544(4) in her brief, she does maintain that KRS 278.544(1) required Windstream East to tariff the GRS before assessing it on invoices.

KRS 278.544(1) imposes no such requirement. It provides:

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.⁴⁵

The statute expressly makes any such tariff optional and must be read in conjunction with the remaining provisions of KRS 278.544 – provisions that Mrs. Bowers simply ignores. Likewise, Mrs. Bowers ignores the evidence introduced by Windstream East demonstrating that it detariffed bundled nonbasic services as allowed by the very provision Mrs. Bowers cites, and that it also left identified in the tariff the packaged nonbasic service components as required under KRS 278.544(3).

D. The Federal Filed Rate Doctrine has no Bearing on the Issue of Whether KRS 278.160 Required Windstream East to Tariff the GRS.

⁴³ Bowers Brief, pp. 15-16 (Citing *In the Matter of Leslie County Telephone Co., Inc., Investigation into the Alleged Violations of KRS 278.160*, KPSC Docket No. 95-517 (June 21, 1996) and *Application of U.S. Digital Network Limited Partnership for a Certificate to Resell Telecommunications*, Case No. 93-479 (April 22, 1994)).

⁴⁴ *Id.* (Citing *Barkley Lake Water District*, Case No. 2008-00047 (June 20, 2008) and *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 (August 14, 2001)).

⁴⁵ KRS 278.544(1).

Although she ignores the express provisions of applicable Kentucky statutes, Mrs. Bowers attempts to distract the Commission by claiming that the FCC's decision in *Irwin Wallace v. AT&T Communications of the Southern States, Inc.* holds that "when a carrier passes through a tax imposed on it, that pass-through is a rate to its customers, and must be tariffed."⁴⁶ She goes on to argue, without offering a single citation to supporting authority, that this "is the law in Kentucky too, and the courts and the Commission have uniformly so held."⁴⁷ This simply is not so. The *Irwin Wallace* decision predates the deregulation of the telecommunications industry on both the federal level, through the Telecommunications Act of 1996, and in Kentucky, through KRS 278.541 through 278.544. The decision was rendered at a time when telecommunications carriers were required to include all interstate charges in their tariffs filed with the FCC. The regulatory environment in Kentucky during the period at issue in Mrs. Bowers' Petition was and remains fundamentally different. Telecommunications carriers in Kentucky are not required to tariff nonbasic services, and Mrs. Bowers purchases no basic services from Windstream East.⁴⁸ Accordingly, by enacting KRS 278.544(4) the General Assembly directed that the Commission unambiguously answer "No" to the federal court's question of whether *Irwin Wallace* applies under Kentucky law.

The Kentucky cases Mrs. Bowers contends follow the reasoning of *Irwin Wallace* suffer from the same flaw in that they do not address the current regulatory framework for telecommunications providers in Kentucky. Specifically, none of the cases identified by

⁴⁶ Bowers Brief, p. 12 (Citing *Irwin Wallace*, 6 FCC Red 1618 (1991)).

⁴⁷ Bowers Brief, p. 13.

⁴⁸ Weeks Direct Testimony, p. 5.

Mrs. Bowers supports her contention that telecommunications providers are required to tariff all charges even after the enactment of KRS 278.544(1) and (4).⁴⁹

IV. Mrs. Bowers Offers No Applicable Authority to Support Her Claim that the GRS is a “Rate” for “Service” that Windstream East was Required to Tariff.

Mrs. Bowers’ claim that the GRS is a “rate” for “service” that Windstream East was required to include in its Kentucky tariff also rests on a faulty premise. On this point,

Mrs. Bowers argues:

It is well established that a utility’s recovery of external expenses, including taxes, from a customer will necessarily be through a “rate.” 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.⁵⁰

But the limitation of the definition of “rate” to only those “individual or joint fare[s], toll[s], charge[s], rental[s] or other compensation” imposed for “services or to be rendered by any utility” is not a bolt of whole cloth woven by Windstream. It is a limitation imposed by the General Assembly, and never addressed by Mrs. Bowers other than through the flip characterization of the limitation as a “nonstarter,” and the citation of wholly inapposite authority. Nowhere in her brief does Mrs. Bowers explain how the Gross Revenues Tax, which by statute is imposed on Windstream East and not Mrs. Bowers, and recovered by Windstream East through the GRS, was for service rendered or to be rendered by Windstream as required by

⁴⁹ Bowers Brief, p. 13. Mrs. Bowers argues as follows: “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.” None of the cases cited by Mrs. Bowers address telecommunications carriers obligations under Kentucky law following the deregulation of nonbasic service. To the contrary, All of the cases cited by Mrs. Bowers in support of this assertion also predate Kentucky’s deregulation of the telecommunications industry. In addition, *AT&T v. Central Office Telephone*, 524 U.S. 214 (1998) and *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922) address federal tariff claims instead of claims arising under Kentucky law, while *Commonwealth v. Anthem Insurance Cos.*, 8 S.W.3d 48, 51 (Ky. App. 1999) and *Keogh* do not involve utilities regulated pursuant to Chapter 278 of the Kentucky Revised Statutes or KRS 278.160. Accordingly, none of these cases support Mrs. Bowers’ position that Kentucky law required Windstream East to tariff the GRS.

⁵⁰ *Id.*, p. 10.

KRS 278.010(12). Just as she fails to address the legal support for her contention, Mrs. Bowers offers no evidence to challenge the decades of Commission practice in treating such surcharges as rate additives and not actual rates for services.

In any event, Mrs. Bowers' argument assumes that Windstream East is required to recover all of its external expenses, if at all, through a tariffed rate – a premise that is not supported by the extensive evidence on record in this proceeding. This evidence establishes that such expenses are often recovered through additives and surcharges and not tariffed rates for service. Mrs. Bowers' assumption is both bold and incorrect.⁵¹ Mrs. Bowers ignores other external expenses incurred by Windstream East and other telecommunications carriers that fall outside the scope of the Commission's tariffing authority. These expenses include the 911 surcharge and the municipal franchise fees that were the predecessor to the current gross revenues tax.⁵² The Commission has never required Windstream East or all local exchange carriers to tariff 911 fees or municipal franchise fees.⁵³ Accordingly, Mrs. Bowers' argument that Windstream East is required to file a tariff to recover all of its external expenses is without merit.

Similarly unavailing is Mrs. Bowers' reliance upon the Kentucky Supreme Court's decision in *Lockett v. Electric and Water Plant Board of the City of Frankfort*.⁵⁴ It is unclear why Mrs. Bowers attributes such great significance to a case decided nearly thirty years before

⁵¹ Similarly unfounded is Mrs. Bowers' non-serious argument that Windstream East somehow "admitted" that all a utility's charges are part of its rate when it submitted a request for admission to Mrs. Bowers asking her to "[a]dmit that the services you receive from Windstream East and the rates charged by Windstream East for those services are set forth in your monthly billing invoices." Bowers Brief, p. 11 (Quoting Windstream East's Request for Admission #10). Windstream East did not admit anything in submitting this request to Mrs. Bowers, and Mrs. Bowers' attempt to twist the request into a binding admission lacks merit.

⁵² This issue is addressed in greater detail in the Initial Brief of Windstream Kentucky East, LLC ("Windstream East Brief"), pp. 17-23.

⁵³ Weeks Direct Testimony, p. 22.

⁵⁴ 558 S.W.2d 611 (Ky. 1977).

the enactment of the gross revenues tax, and in which the sole issue before the Court was whether utility gross receipts license tax revenues recovered by an electric and water utility constituted “gross receipts” for purposes of calculating the utility’s sales tax obligation.⁵⁵ At no point did the *Lockett* Court address KRS 278.160 or the authority of a telecommunications utility to collect a charge outside the context of a filed tariff. If *Lockett* represents the strongest legal authority Mrs. Bowers can muster – and she apparently believes it does – it speaks volumes about the weakness of her position on this issue.⁵⁶

V. Mrs. Bowers’ Reliance Upon KRS 278.543 -- Which has No Bearing on this Proceeding – is Mistaken.

Despite exceeding the scope of the declaratory relief she sought in her Complaint, Mrs. Bowers claims that Windstream East violated both subsections (2) and (4) of KRS 278.543. Mrs. Bowers is wrong on both counts, and this statute has no bearing on the fundamental claim in her Complaint that Windstream East violated KRS 278.160. KRS 278.543(2) provides in pertinent part:

The rate for basic local exchange service for an electing utility, other than an electing small telephone utility as defined in KRS 278.516, shall be capped for a period of sixty (60) months from the date of the election.⁵⁷

By its terms, KRS 278.543(2) applies to basic local exchange service. As the Commission is aware, Windstream East believes that KRS 278.543 also applies to intrastate switched access

⁵⁵ *Id.* at 612-613.

⁵⁶ Mrs. Bowers’ reliance on inapplicable legal authority plagues her argument that Windstream East was required to tariff the GRS as a “rate” for “service.” In addition to her confounding reliance on *Lockett*, Mrs. Bowers cites to a number of other decisions that have no bearing on the issue of whether Windstream East, a telecommunications carrier providing nonbasic service to Mrs. Bowers, was somehow obligated to tariff the GRS before assessing it against Mrs. Bowers. Bowers Brief, p. 10 n. 14 (Citing *Delta Natural Gas Co., Inc. Experimental Alternative Regulation Plan*, Case No. 99-046 (Ky. P.S.C. May 10, 1999); *Big Rivers Electric Corp.*, Case No. 95-027 (Ky. P.S.C. August 25, 1995); *Local Taxes and/or Fees Tariff Filing of General Tel. of Ky.*, Case No. 7843 (Ky. P.S.C. October 3, 1980)). None of these cases can be read to support Mrs. Bowers’ unsupportable claim that utilities recover their expenses only through “rates.” Moreover, none of the cases cited by Mrs. Bowers address the issue before the Commission in this proceeding or even touch on regulatory issues in the context of the deregulated telecommunications industry.

rates. However, as the evidence in this proceeding establishes very clearly, Mrs. Bowers purchases no wholesale access services from Windstream East⁵⁸ and further purchases only retail nonbasic services from Windstream East.⁵⁹ Accordingly, the relevant statute at issue is KRS 278.544 – and not KRS 278.543, which provides no support for Mrs. Bowers’ claims.⁶⁰ It is unnecessary for the Commission to reach any determination with respect to KRS 278.543 in the context of this proceeding.

VI. The Commission Should Reject Mrs. Bowers’ Effort to Avoid the Timely Dispute Requirements in Her Contract with Windstream East and in the Windstream East Tariff She Seeks to Enforce.

Tacitly recognizing that she failed to timely dispute Windstream East’s assessment of the GRS under the applicable dispute provisions in both the terms and conditions of her contract and in Windstream East’s Kentucky tariff, Mrs. Bowers attempts to shift attention away from her failure and onto her characterization of Windstream East’s obligations with respect to its “entire customer base.”⁶¹ Mrs. Bowers argues as follows:

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.

⁵⁷ KRS 278.543(2).

⁵⁸ Response to Requests for Admission, Nos. 1-6.

⁵⁹ See Windstream Brief, pp. 10-17. Windstream addressed this issue in detail in its initial brief. Rather than belaboring the point here, Windstream East incorporates the argument from its initial brief by reference.

⁶⁰ *Supra* Sections I(A) and (B) of this Brief..

⁶¹ Bowers Brief, p. 20.

Notably absent from Mrs. Bowers' hyperbole concerning the "Filed Rate Doctrine," and the role of "regulators" charged to protect consumers, is any supporting legal authority. This comes as no surprise considering the fact that Mrs. Bowers' argument fundamentally is premised upon her blindness to the 2006 deregulation by the Kentucky General Assembly of the provision of nonbasic services in Kentucky.

KRS 278.544 is clear on this point. The General Assembly has directed that the provision of nonbasic services is to be regulated by market forces and not through filed tariffs. If Mrs. Bowers objected to Windstream East's assessment of the GRS, or the timely dispute provisions contained in her contract, she was free to contact Windstream East or strike a more favorable bargain with a competing carrier.

Equally important, Mrs. Bowers cites no Kentucky authority prohibiting telecommunications carriers in a deregulated market from prescribing a limitations period other than that which would apply in the absence of such a provision. The sole Kentucky state law authority cited by Mrs. Bowers, *The Harbor at Harrods Creek Condominium Ass'n v. Fourth Avenue Corporation – Long Corporation d/b/a Shadow Wood Subdivision Sewer Service*, Case No. 2000-379 (Ky. P.S.C. August 14, 2001), did not involve a tariffed limitations provision, and certainly did not hold that such a provision was unenforceable, particularly in a deregulated marketplace. Like all of the inapposite authority upon which Mrs. Bowers seeks to bolster her claim, her reliance upon *The Harbor at Harrods Creek Condominium Ass'n*, is a bridge too far.

Mrs. Bower's federal court authority is no more availing. Although Windstream East respectfully disagrees with the initial refusal of the United States District Court for the Western District of Kentucky in Mrs. Bowers' federal action to apply the tariffed limitations period to Mrs. Bowers' federal claims, that decision has no bearing upon her claims under state law

governing a deregulated marketplace. Nor does *Telco Communications Group, Inc. v. Race Rock of Orlando, LLC*, 57 F.Supp.2d 340 (E.D. Va. 1999) advance her cause. First, that case presented a direct conflict between a federal regulation limiting consumer liability for unauthorized credit card charges to \$50, and a tariff provision that would have made the consumer liable for \$92,000 in unauthorized charges.⁶² Here there is no such conflict, direct or otherwise, as nothing in KRS 413.120(1) prohibits a shorter limitations period. Second, enforcing the tariffed limitations period will in no sense undermine consumer protections. Limitations periods protect defendants – not plaintiffs such as Mrs. Bowers – from stale claims, lost evidence and cloudy memories.⁶³ Finally, *Telco Communications* was decided in a regulatory context far different from that that has existed in Kentucky since 2006 with respect to nonbasic services.

Perhaps most fundamentally, Mrs. Bowers’ seeks in the same action to rely upon the Filed Rate Doctrine, while in the next breath asking the Commission to abandon the doctrine in the case of a tariff provision that defeats that very same claim. Nothing in the law supports Mrs. Bowers’ request that the Commission take a “Heads she wins; tails Windstream East loses” approach to this proceeding. Either the tariff applies in toto, in which case her claim is barred by the limitations period, or it does not, in which case her claim also fails.

VII. The GRS is a Local Tax in Character and Application.

Windstream East is not required to tariff the GRS because KRS 278.160, the only statutory provision that could impose such a requirement, does not apply to the nonbasic services Mrs. Bowers purchased from Windstream East. However, even if the express provisions of

⁶² *Id.* at 344.

⁶³ See *Liter v. Hoagland*, 204 S.W.2d 219, 220 (Ky. 1947) (“The statute of limitation is intended to close the door of the courts to the bringing of suits on *stale claims*. It is intended to be used as a blanket to smother any faint

Kentucky law in KRS 278.544 did not exist and even if Kentucky law required Windstream East to provide for the GRS in its Kentucky tariff, Windstream satisfied this obligation through the express language of the tariff in question. The tariff provision at issue provides 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.⁶⁴

The GRS falls squarely within the scope of this provision. It is a monthly surcharge assessed by Windstream East to recover its costs associated with the Kentucky gross revenues tax. The gross revenues tax is the successor to the municipal franchise fees and revenues collected from telecommunications carriers are distributed to municipalities for their benefit based on their historical franchise fee collections.⁶⁵ Accordingly, it is precisely the type of tax envisioned by Windstream East's tariff language.

Mrs. Bowers claims that the GRS does not fall within the scope of Windstream East's tariff because the gross revenues tax is a "state" tax as opposed to a "local" tax.⁶⁶ Mrs. Bowers argues that "clear legal authority" supports her position, claiming that the Kentucky Supreme Court's decision in *Board of Education of Russellville Ind. Schools v. Logan Aluminum*⁶⁷ establishes a "bright line distinction" for determining whether a tax is "state" or "local" in

respiration of moribund claims of plaintiffs in regular causes of action or those of defendants asserted by counterclaims.").

⁶⁴ Windstream East Tariff No. 7, Section S2.4.5(c).

⁶⁵ KRS 136.616 and 136.650.

⁶⁶ Bowers Brief, p. 22.

character. *Logan Aluminum* presents no such bright line rule. The case was decided sixteen years before the enactment of the gross revenues tax and cannot offer any insight into whether the General Assembly intended for the tax to be “state” or “local” in character. Moreover, the Court’s opinion addressed only whether the Kentucky Board of Tax Appeals was the proper forum to litigate a dispute concerning the utility gross receipts license tax, or whether the action should proceed in a local circuit court.⁶⁸ The Court certainly did not address the meaning or significance of any of the terms included in Windstream East’s tariff. It is unclear how a case that addresses neither the tax nor tariff language at issue in this proceeding can be read to offer any insight into whether Windstream East’s tariff includes the GRS.

Similarly confounding is Mrs. Bowers’ insistence that some significance be attributed to the facts that AT&T Kentucky apparently elected to include its gross revenues surcharge in a tariff, and that Windstream New York, Inc. includes surcharges of expenses arising from certain taxes in a tariff on file with the New York Public Service Commission. The practices of neither of these companies have any bearing on the issue of whether Windstream East was required to tariff the GRS, particularly those of another state that maintains a different regulatory environment than that provided in Kentucky. Kentucky law permits, but does not require, telecommunications carriers to tariff cost recovery surcharges. The fact that AT&T Kentucky elected to do so with its gross revenues surcharge while Windstream East did not is proves nothing about whether Windstream East was required to tariff the GRS. Indeed, Mrs. Bowers’ argument does the opposite and reinforces the point that the Kentucky Commission was well aware of the gross revenues tax and the fact that some carriers were passing through their costs

⁶⁷ 764 S.W.2d 75 (Ky. 1989).

⁶⁸ *Id.* at 77.

of the underlying tax in the form of a gross receipts surcharge.⁶⁹ The purported link between Windstream East and Windstream New York, Inc. is even more strained. The entities are distinct corporate entities, and Windstream New York, Inc. operates under different laws than those applicable to Windstream East. No conclusions about what Windstream East was required to do under Kentucky law can be drawn from actions taken by distinct companies addressing different facts and laws. Again, Mrs. Bowers appears to be grasping for straws for something to support the claims in her Complaint.

VIII. Mrs. Bowers' Estoppel Argument Fundamentally Misunderstands the Nature of Windstream East's Arguments to the Commission and the United States District Court for the Western District of Kentucky And The Law of Estoppel

Mrs. Bower's final argument underscores the fundamental weakness of her claim. Indeed, having ignored KRS 278.544(4) in her brief, Mrs. Bowers doubles down by imploring the Commission to turn a blind eye to the statute; "Windstream is estopped from arguing that Petitioner lacks Kentucky-based tariff claims that are within the jurisdiction of this Commission."⁷⁰ Mrs. Bowers' mastery of the record, the law of primary jurisdiction, and Windstream's arguments is as lacking as is her understanding of KRS 278.544(4).

Mrs. Bowers first correctly notes that Windstream East argued that the doctrine of primary jurisdiction counseled referral to the Commission of all state law matters at issue in her federal action.⁷¹ At that point, her argument breaks down. Simply stated, primary jurisdiction to declare that Kentucky law does not require Windstream East to tariff the GRS in no way equates to a representation that the GRS is subject to the requirements of KRS 278.160, or that the

⁶⁹ Interestingly, AT&T Kentucky is also an alternatively regulated carrier under KRS 278.543. However, Mrs. Bowers fails to rationalize this fact with her earlier erroneous argument that a gross receipts surcharge is an increased rate for service in violation of the rate caps in KRS 278.543. Again, while KRS 278.543 is irrelevant to the claims in Mrs. Bowers' Complaint, it is noteworthy that her citation to AT&T Kentucky's surcharge undermines her earlier argument with respect to rates for services.

⁷⁰ Bowers Brief at 25-28.

⁷¹ *Id.* at 25-26.

Commission has jurisdiction to enforce such a non-existent requirement. To the contrary, under both federal⁷² and state⁷³ law the doctrine of primary jurisdiction is limited to the recognition that sound judicial policy dictates that matters within the special competence of an administrative agency first be decided by the agency. Neither federal nor state law equates a referral in accordance with the doctrine of primary jurisdiction to, as Mrs. Bowers would have it, a confession of judgment with respect to the questions referred.

Nor are Mrs. Bowers' other efforts to impugn the integrity of Windstream East and its employees any more availing. She first suggests Mr. Caballero's testimony by affidavit that "***[a]ll other services in connection with her residential phone service 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"⁷⁴ is somehow inconsistent with Windstream East's position in this proceeding that the GRS is not subject to the requirements of KRS 278.160. Mr. Caballero was clear that he was testifying only to those services "that are subject to state or federal tariff requirements...."

Similarly, Mr. Rhoda's comment regarding a carrier's ability to depart from the terms of its filed tariff is irrelevant to Mrs. Bowers' claims, which are wholly premised on Windstream East's alleged ***failure*** to tariff the GRS. Indeed, Mr. Rhoda made just that point by his caveat in the testimony quoted by Mrs. Bowers: "whether a tariff is required to be filed or no is – is one

⁷² *Daleure v. Commonwealth*, 119 F.Supp.2d 683, 687 n. 10 (W.D. Ky. 2000) ("The doctrine of primary jurisdiction counsels that a court having original jurisdiction over a case should stay proceedings the proceedings or order dismissal ***pending determination of one or more issues by the regulatory agency.***") (emphasis supplied).

⁷³ *Preston v. Meigs*, 464 S.W.2d 271, 274-275 (Ky. 1971) ("The doctrine of 'primary jurisdiction' clearly recognizes that the court has subject-matter but as a matter of judicial policy should not exercise it in instances where proper judicial administration requires that action be deferred by the court until the agency has acted and the court may then review its action.")

⁷⁴ Bowers Brief at 26 (emphasis different from original.)

issue.....”⁷⁵ Mrs. Bowers’ efforts to construe Mr. Caballero and Mr. Rhoda’s testimony otherwise border on willful obtuseness.

Nor is there any merit in Mrs. Bowers’ suggestion that Windstream East should be estopped from arguing that the GRS is not subject to the requirements of KRS 278.160 because of any arguments Windstream East raised to Mrs. Bowers’ federal “truth-in-billing” claim in the federal court litigation.⁷⁶ Mrs. Bowers offers no citation to any position taken by Windstream East on this issue in the federal court litigation and the precise nature of her claimed inconsistency in positions taken by Windstream East is unclear. However, nothing Windstream East argued on the truth-in-billing issue in another action can be construed by the Commission to bar Windstream East from challenging the applicability of KRS 278.160 in this proceeding. Truth-in-billing in an FCC requirement that has no bearing on the applicability of KRS 278.160 or KRS 278.544.

Most egregious of Mrs. Bowers’ arguments is her suggestion that Windstream East has acted in a fashion to compromise the integrity of these proceedings.⁷⁷ There is no inconsistency between those portions of Mr. Caballero’s affidavit testimony, Mr. Rhoda’s deposition testimony, and the billing statement identified by Mrs. Bowers in her Brief on the one hand, and the position Windstream East is taking in this proceeding on the other. Absent such inconsistency, Mrs. Bowers’ claims that the federal court would have refused to refer the state law claims to this Commission is not only speculative, but baseless speculation at that. To the extent the integrity of these proceedings have been compromised, it has not been as a result of the actions, representations or positions taken by Windstream East. Rather, such compromise

⁷⁵ *Id.* at 26.

⁷⁶ Bowers Brief at 27.

⁷⁷ *Id.* at 27.

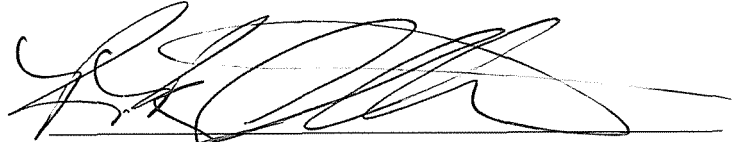
has resulted from Mrs. Bowers arguing that no hearing is necessary, on the one hand, while couching numerous, unsupported, argumentative statements as “undisputed facts,” on the other. Indeed, to discern the lack merit in Mrs. Bowers’ argument the Commission need look no further than her statement in connection with Mr. Caballero’s affidavit (and the other statements discussed above) that “[h]ad 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.”⁷⁸ Mrs. Bowers’ argument reflects a profound misunderstanding of both the primary jurisdiction doctrine and the position taken by Windstream East with respect to question at issue in this proceeding.

Conclusion

Windstream East has established that the GRS was not required to be tariffed, including specifically for the reason that KRS 278.544(4) expressly exempts the nonbasic services purchased by Mrs. Bowers from Windstream East from regulation under KRS 278.160. Mrs. Bowers offers no argument to the contrary and also fails to offer any argument challenging the remaining points set forth in more detail in Windstream East’s initial brief. Accordingly, Windstream East respectfully requests that the Commission enter an order denying Mrs. Bowers’ Complaint including finding that Windstream East did not violate KRS 278.160 when it included the GRS on Mrs. Bowers’ invoices.

⁷⁸ *Id.*

Respectfully submitted,

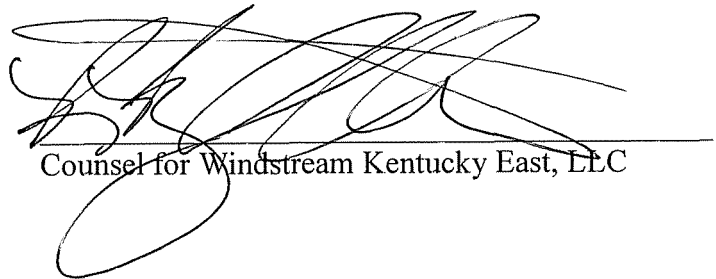


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing RESPONSE BRIEF OF WINDSTREAM KENTUCKY EAST, LLC was served by United States First Class Mail, postage prepaid, on this 6th day of September, 2011 upon:

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