

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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OCT 27 2014

PUBLIC SERVICE
COMMISSION

In the Matter of:

APPLICATION OF WINDSTREAM
KENTUCKY EAST, LLC AND
WINDSTREAM KENTUCKY WEST, LLC (1)
FOR A DECLARATORY RULING THAT
APPROVAL IS NOT REQUIRED FOR THE
TRANSFER OF A PORTION OF THEIR
ASSETS; (2) ALTERNATIVELY FOR
APPROVAL OF THE TRANSFER OF
ASSETS; (3) FOR A DECLARATORY
RULING THAT COMMUNICATIONS SALES
AND LEASING, INC. IS NOT SUBJECT TO
KRS 278.020(1); AND (4) FOR ALL OTHER
REQUIRED APPROVALS AND RELIEF

CASE NO. 2014-00283

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COMMISSION

**WINDSTREAM'S RESPONSE IN OPPOSITION TO COMMUNICATIONS WORKERS
OF AMERICA'S MOTION TO INTERVENE**

Windstream Kentucky East, LLC and Windstream Kentucky West, LLC (collectively, "Windstream") oppose the motion to intervene filed by Communications Workers of America ("CWA") because it fails to satisfy the requirements of 807 KAR 5:001, Section 4(11):

(1) CWA's motion is untimely; (2) CWA has not identified a special interest in the proceeding; (3) CWA's proposed intervention will not aid the Commission; and (4) CWA's intervention will disrupt the proceeding. Accordingly, the Commission should deny CWA's motion to intervene.

A. CWA's Motion is Untimely.

CWA's motion to intervene was filed with the Commission on October 24, 2014, or 78 days after Windstream filed its application in this proceeding.¹ Even more concerning is that

¹ The transaction was widely publicized beginning a week prior to the filing of Windstream's application in Kentucky. See <http://www.bloomberg.com/news/2014-07-29/windstream-to-spin-off-telecom-assets-into-publicly-traded-reit.html> ; <http://online.wsj.com/articles/windstream-to-spin-off-assets-into-reit-1406637025> ;

CWA delayed until only 42 days prior to the expiration of the period for the Commission's consideration of the Company's application. CWA offers no explanation for its delay in seeking intervention or how its motion is timely in light of such delay. CWA's failure to timely seek intervention is particularly striking in this instance for two reasons. First, a Windstream representative notified the CWA of the transaction on July 28, 2014. Second, on September 24, 2014, CWA moved to intervene in a similar proceeding initiated by Windstream in Pennsylvania.² The issues raised by CWA in that Pennsylvania filing are substantively identical to those presented in its proposed intervention here, and co-counsel for CWA in this action also represented CWA in the Pennsylvania matter. CWA offers no explanation for why it waited an additional month to seek intervention in this action.

The Commission's regulations allow that "a person who wishes to become a party to a proceeding before the commission may, **by timely motion**, request that leave to intervene be granted."³ CWA's motion is not timely. A more than two-month delay without explanation is not "timely" by any definition of the word. To the extent CWA possesses some special interest in this proceeding—and it does not as addressed below—that interest has existed from the date Windstream filed its Application and it has not changed since then.

CWA offers no reason why it waited more than two months after the date Windstream filed its Application to seek full intervention in this proceeding. Moreover, the fact CWA's motion was filed *after* the expiration of the original 60-day deadline for the Commission to act

http://markets.on.nytimes.com/research/stocks/news/press_release.asp?docTag=201407290700PRIMZONEFULLF&EED10091524&feedID=600&press_symbol=22015529

² A copy of CWA's relevant filing in Pennsylvania is attached as Exhibit 1.

³ 807 KAR 5:001, Section 4(11)(a) (emphasis added).

on Windstream's Application under KRS 278.020(6) if the Commission determined that approval was required⁴ only underscores the untimeliness of its request.

Although the Commission's regulation, 807 KAR 5:001, Section 11(4)(a), does not define "timely," waiting until the last possible moment to move to intervene does not meet any reasonable definition of the term. This is particularly the case where the Commission may be facing a statutory deadline for action. Accordingly, the Commission should deny CWA's motion as untimely.

B. CWA has not Identified a Special Interest in this Proceeding.

Even those persons making timely motions to intervene must demonstrate that they have "a special interest in the proceeding not otherwise adequately represented."⁵ CWA maintains that it is the "authorized collective bargaining representative for more than 250 employees of Windstream Kentucky and its various subsidiaries" and it argues that intervention is appropriate to protect the interests of its members.⁶ CWA's motion is without merit.

Windstream has made it clear throughout this proceeding that the proposed transfer will have no impact upon Kentucky employees. This issue was addressed most directly in Windstream's responses to the Commission Staff's September 23, 2014 data requests:

11. As a result of the proposed transaction, do the Applicants expect an increase or decrease in the number of Applicants' employees in Kentucky? Explain your answer.

RESPONSE: There will be no reduction or decrease to the number of employees in Kentucky as a result of the transaction. The transaction is not a merger or consolidation, and therefore there will be no elimination of duplicate positions or

⁴ KRS 278.020(6) provides, in pertinent part, that "[t]he commission shall grant, modify, refuse, or prescribe appropriate terms and conditions with respect to every such application within sixth (60) days after the filing of the application therefor, unless it is necessary, for good cause shown, to continue the application for up to sixty (60) additional days." The original 60-day period was to expire on October 6, 2014, or three days *before* KCTA's filing. By Order dated September 30, 2014, the Commission extended the deadline for a ruling by an additional 60 days.

⁵ 807 KAR 5:001, Section 4(11)(a).

⁶ Motion of Communications Workers of America for Full Intervenor Status ("CWA Motion"), pp. 1-2.

employees as a result of combined operations. Under the terms of the Master Lease, Applicants will continue to provide service to all their customers and will continue to be subject to all existing regulatory obligations. Therefore, Applicants will retain their existing employees in Kentucky.⁷

Accordingly, CWA has no special interest in this proceeding because its members will not be impacted by the proposed transfer.

CWA also asserts that it should be permitted to address a broad range of additional issues not directly related to the interests of its members—*e.g.*, CWA’s baseless suggestion that the proposed transfer might somehow result in unsafe operational practices or financial difficulties for Windstream.⁸ These issues fall squarely within the Commission’s jurisdiction in reviewing the Application under KRS 278.020(5) and (6), and CWA’s involvement is unnecessary for the Commission to ensure that Windstream will possess the requisite financial and operational capabilities following the proposed transfer.

In light of these representations, CWA and its members have no interest in this proceeding other than to conduct an eleventh hour fishing expedition.

C. CWA’s Proposed Intervention is not Likely to Present Issues or Develop Facts that will aid the Commission.

A timely motion to intervene, which CWA’s is not, may also be granted where the entity seeking intervention is “likely to present issues or develop facts that assist the commission in fully considering the matter . . .”⁹ CWA represents a number of Windstream employees, and Windstream has made it clear in this proceeding that the proposed transfer will have no impact

⁷ Windstream’s Response to Staff’s September 23, 2014 Data Requests, *In the Matter of: The Application of Windstream Kentucky East, LLC and Windstream Kentucky West, LLC for (1) a Declaratory Ruling that Approval is not Required for the Transfer of a Portion of their Assets; (2) Alternatively for Approval of the Transfer of the Assets; (3) for a Declaratory Ruling that Communications Sales and Leasing, Inc. is not Subject to KRS 278.020(1); and (4) for All Other Required Approvals and Relief*, Case No. 2014-000283 (Ky. P.S.C. Filed October 1, 2014) (“Windstream’s Response”).

⁸ Memorandum in Support of CWA Motion to Intervene, p.3.

⁹ 807 KAR 5:001, Section 4(11)(b).

on those employees. Accordingly, CWA's participation in this proceeding for the purpose of protecting its members will be of no benefit to the Commission, and CWA's motion should be denied.

D. CWA's Intervention will Unduly Complicate and Disrupt the Proceeding.

CWA's proposed intervention comes at a time when substantial progress has been made toward a resolution of this case and limited time remains for the Commission to rule on Windstream's Application. As set forth above, Windstream has responded to the Commission Staff's first set of data requests and the case is moving forward. Pursuant to KRS 278.020(6), well less than two months remain for the Commission to rule on Windstream's Application.

CWA attempts to downplay the disruptive impact its proposed intervention will have on this proceeding, maintaining that "[t]he Applicants have not yet filed testimony or any supporting exhibits and no procedural schedule has yet issued."¹⁰ However, on October 23, 2014, the Commission entered a procedural schedule that includes aggressive deadlines for issuing and responding to data requests, filing direct and rebuttal testimony, and conducting a hearing. The first of these deadlines, which calls for parties to submit data requests to each other, is only a few days out from this filing. By seeking to intervene so late in the proceeding, CWA will unduly burden the Commission's ability to reach a resolution in the time provided it by statute if it concludes approval is required. Accordingly, the Commission should deny CWA's motion to intervene.

E. Conclusion.

CWA is not entitled under 807 KAR 5:001, Section 4(11) to intervene and its motion should be denied.

¹⁰ CWA Motion, p. 2.

Respectfully submitted,



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COUNSEL FOR WINDSTREAM KENTUCKY
EAST AND WINDSTREAM KENTUCKY WEST

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by United States First Class Mail, postage prepaid, on this 27th day of October, 2014 upon:

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Counsel for Windstream

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Joint General Rule Application of Cavalier	:	Docket No. A-2014-2440493
Telephone Mid-Atlantic, LLC, Intellifiber	:	Docket No. A-2014-2440526
Networks, Inc., LDMI Telecommunications, Inc.,	:	Docket No. A-2014-2440527
McLeodUSA Telecommunications Services,	:	Docket No. A-2014-2440528
LLC, PAETEC Communications, Inc., Talk	:	Docket No. A-2014-2440529
America, Inc., US LEC of Pennsylvania, LLC,	:	Docket No. A-2014-2440530
Windstream Communications, Inc., Windstream	:	Docket No. A-2014-2440531
D&E Systems, Inc., Windstream KDL, Inc.,	:	Docket No. A-2014-2440532
Windstream Norlight, Inc. and Windstream NTI,	:	Docket No. A-2014-2440533
Inc. for approval of the transfer of telephone	:	Docket No. A-2014-2440534
system assets of Transferors to Communications	:	Docket No. A-2014-2440535
Sales and Leasing, Inc.	:	Docket No. A-2014-2440536

PROTEST
OF
COMMUNICATIONS WORKERS OF AMERICA

Pursuant to 52 Pa. Code §§ 5.51, *et seq.*, Communications Workers of America ("CWA") hereby protests the above-captioned Joint Application. In support of this Protest, CWA states as follows:

1. On August 29, 2014, Cavalier Telephone Mid-Atlantic, LLC, Intellifiber Networks, Inc., LDMI Telecommunications, Inc., McLeodUSA Telecommunications Services, LLC, PAETEC Communications, Inc., Talk America, Inc., US LEC of Pennsylvania, LLC, Windstream Communications, Inc., Windstream D&E Systems, Inc., Windstream KDL, Inc., Windstream Norlight, Inc. and Windstream NTI, Inc. (collectively "Windstream Companies") submitted a Joint Application seeking approval of the transfer of certain unspecified assets to Communications Sales and Leasing, Inc. ("CSL").

2. CWA is the authorized bargaining representative for approximately 80 employees of Windstream Companies and their affiliates in Pennsylvania, some of whom are residential customers of Windstream Companies and/or one of their affiliates in Pennsylvania.

3. CWA will be represented in this case by, and all documents should be served upon, its attorney:

Scott J. Rubin
333 Oak Lane
Bloomsburg, PA 17815-2036
Voice: 570-387-1893 / Fax: 570-387-1894
Email: scott.j.rubin@gmail.com

4. Pursuant to 52 Pa. Code § 1.54(b)(3), the undersigned counsel consents to the electronic service of all documents at the e-mail address shown above.

5. Initially, CWA notes that the Joint Application contains very little substantive information. The Joint Application does not identify the property the Windstream Companies propose to transfer; does not provide a copy of the lease under which the Windstream Companies will allegedly retain the right to use the property; does not identify the consideration the Windstream Companies will receive for the proposed transfer; and does not provide any meaningful information about any alleged benefits to the public from the proposed transaction. Thus, given the paucity of information contained in the Joint Application, CWA can provide only its initial understanding of, and concerns with, the proposed transaction. As more information is provided about the details of the transaction, CWA's reasons to protest the proposed transaction may be modified.

6. The Joint Application is one of a series of inter-related, complex transactions that raise important issues of public policy and legal interpretation. As such, they do not qualify for treatment as "General Rule" applications under the Commission's regulations. 52 Pa. Code

§ 63.321, *et seq.* Indeed, those regulations specifically provide for the reclassification of a transaction when a protest is filed or when the proceeding "involves an acquisition, merger or other transaction that raises novel or important issues." 52 Pa. Code § 63.324(j).

7. In particular, this transaction is part of a series of transactions that Windstream Companies and their affiliates have or will be proposing in Pennsylvania and throughout the United States. The purposes of the proposed transactions are three-fold: (1) for Windstream Companies and their affiliates to transfer real estate and related assets to a new company (CSL) that will be organized as a Real Estate Investment Trust ("REIT") and then spun off to Windstream shareholders; (2) for Windstream Companies to lease back those same facilities from CSL; and (3) for Windstream Companies to transfer Competitive Local Exchange Carrier ("CLEC") and Interexchange Carrier ("IXC") residential customers to a new company that will be a subsidiary of CSL, but that will not own any physical facilities.

8. In Pennsylvania, Windstream Companies and their affiliates have chosen to file applications for approval of these actions in a piecemeal fashion. This proceeding involves the transfer of real estate and related assets by the CLECs and IXCs. A second proceeding already has been filed concerning the transfer of residential customers of three of the Windstream Companies to a new company. Docket Nos. A-2014-2441823, A-2014-2441825, and A-2014-2441826 (filed Sept. 5, 2014). A third proceeding has been filed seeking a certificate of public convenience and necessity for the new residential CLEC/IXC (Talk America Services, LLC). Docket Nos. A-2014-2441956 and A-2014-2441958 (filed Sept. 5, 2014). Further proceedings are expected that would involve the transfer of real estate and related assets by Windstream's four ILEC companies in Pennsylvania (Windstream Pennsylvania, Windstream D&E, Windstream Buffalo Valley, and Windstream Conestoga).

In other jurisdictions, however, Windstream has chosen to initiate a comprehensive, consolidated proceeding to address these issues for all Windstream companies at the same time. See, for example, Application of Windstream Subsidiaries for Approval, to the Extent Required by Law, of Certain Corporate Transactions and Grant of Certificate of Public Convenience and Necessity to Talk America Services, LLC, Alabama Public Service Commission Docket No. 32244 (filed July 31, 2014).

9. CWA and its members will be directly and adversely affected by the proposed transaction. In particular, Windstream Companies propose to transfer certain unspecified assets, allegedly amounting to more than 20% of the assets of Windstream Companies, to a new company (CSL) that will not be regulated as a public utility. Windstream Companies state that they will lease those same assets back from CSL. Yet, as set forth more fully below, there is no mention of the ability of CSL, which will not be a public utility or otherwise certificated by this Commission, to occupy public rights of way, hold utility easements, occupy space on poles or in conduits, or otherwise provide access to such facilities so that CWA members may safely operate, maintain, repair, and replace those facilities.

10. Windstream Companies state that they propose to transfer the following assets to CSL: "certain fixed assets of the Transferors, including copper, fiber, real estate and other network assets." Joint Application ¶ 5. No other information is provided about the assets proposed to be transferred.¹

11. To the extent that Windstream Companies propose to transfer poles or conduits, or copper and fiber placed on poles or in conduits, CWA questions whether Windstream Companies

¹ CWA discusses the insufficient specificity of the Joint Application in Preliminary Objections being filed contemporaneously with this Protest.

have the legal right to transfer such assets to an entity that does not hold a certificate of public convenience and necessity from this Commission. CWA further questions whether it is in the public interest to permit an uncertificated entity to own or control such assets.

12. In particular, under the pole attachment regulations of the Federal Communications Commission ("FCC"), only certain entities have rights to attach to poles or place facilities in conduits. Those entities are limited to "utilities," "cable television systems" and "providers of telecommunications service." 47 C.F.R. §§ 1.1401, *et seq.*

13. The FCC defines a "utility" as "a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." 47 C.F.R. § 1.1402(a).

14. CSL would not be a "utility" under the FCC's regulations.

15. CSL would not be providing any television or telecommunications services and, therefore, would not be a "cable television system" or "provider of telecommunications service" under the FCC's regulations.

16. As such, CSL would not have the ability to own poles and conduits, or attach to poles and conduits owned by utilities. It is neither lawful nor in the public interest, therefore, for Windstream Companies to transfer such assets to CSL.

17. To the extent that Windstream Companies propose to transfer easements or rights of way, CWA questions whether Windstream Companies have the legal right to transfer such assets to an entity that does not hold a certificate of public convenience and necessity from this Commission. CWA further questions whether it is in the public interest to permit an uncertificated entity to own or control such assets.

18. CWA is concerned for the safety of its members in their ability to obtain unfettered and safe access to facilities located on easements or rights of way that are not held by a public utility, when the original purpose of the easement or right of way may have been limited to the provision of service by a public utility.

19. An easement's purpose or scope cannot be unreasonably expanded beyond its original purpose. *Leistner v. Borough of Franklin Park*, 771 A.2d 69, 75 (Pa. Commw. Ct. 2001) ("A fundamental principle is that an easement for the benefit of a particular piece of ground cannot be enlarged and extended.... The purpose of this rule is to prevent an increase of the burden upon the servient estate, and it applies whether the easement is created by grant, reservation, prescription, or implication."). See also *Slater v. Shell Oil Co.*, 39 Cal. App. 2d 535; 103 P.2d 1043 (1940) holding that a public utility cannot transfer an easement acquired under threat of eminent domain to a private, non-utility company.

20. CWA is concerned that Windstream Companies may be attempting to transfer to a non-utility real estate interests that were acquired solely for public utility purposes. If such a transfer were to occur, CWA members who enter onto the property to operate, maintain, repair or replace facilities could be threatened with legal action, or otherwise prohibited from safely performing their duties, because the property was no longer owned by an entity with the legal status of a public utility.

21. The Joint Application's failure to identify the specific property proposed to be transferred is also important because Windstream Companies and their affiliates received grants totaling more than \$20 million in Pennsylvania under the American Recovery and Reinvestment Act ("ARRA"). CWA understands that there are significant restrictions concerning the transfer of such property. Joint Applicants should be required, therefore, to specifically identify the

property financed with ARRA grants and explain in detail how such property will be segregated from the property proposed to be transferred to CSL.

22. CWA does not know, and the Joint Application does not mention, whether Windstream Companies have received other grants or public funding that may restrict their ability to transfer property. Joint Applicants should be required to specifically identify any such restricted property and explain in detail how such property will be segregated from the property proposed to be transferred to CSL.

23. Windstream Companies state that the proposed transaction "will enable Holdings [their parent company] and its operating subsidiaries, including Transferors, to invest more capital in strategic initiatives." Joint Application ¶ 5. No information is provided, however, about whether any such investment will be made in Pennsylvania. CWA is concerned that if the transaction is approved, it should include a binding commitment for specific, additional capital investments in Pennsylvania by Windstream Companies and their affiliates.

24. CWA also is concerned about the proposed transfer of residential CLEC and IXC customers to a new company that has no assets and no expertise in providing such services to the public. That transfer is part and parcel of the same transaction under which Windstream Companies and their affiliates seek to reorganize their operations. This issue is addressed in greater detail in a separate protest being filed contemporaneously in Docket Nos. A-2014-2441823, A-2014-2441825, and A-2014-2441826.

25. CWA also is concerned that the proposed transfer of public utility real estate to a non-utility company could have significant fiscal implications. Under Pennsylvania law, many utility real estate assets (excluding easements, rights of way, and poles) are subject to taxation by the Commonwealth, and not by local governments. See Public Utility Realty Tax Act, 72 P.S.

§§ 8101-A, *et seq.* ("PURTA"). PURTA specifically defines utility realty as certain types of real estate interests "owned by a public utility or its affiliate either directly or by or through a subsidiary." 72 P.S. § 8101-A(3).

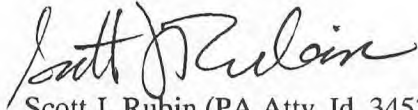
26. According to the Joint Application, CSL would not be a public utility and would not be an affiliate of Windstream Companies.

27. CWA is concerned, therefore, that the proposed transaction would exempt certain assets of Windstream Companies and their affiliates from PURTA, thereby creating fiscal implications for the Commonwealth and/or local taxing authorities. CWA would note that when significant asset transfers to non-utilities occurred in the electric utility industry (transferring generating assets to non-utility companies), PURTA was amended to address the new industry structure. See Act No. 4 of 1999, amending (*inter alia*) the definition of "utility realty" in 72 P.S. § 8101-A. Such a significant change in fiscal policy should not be made as an unintended consequence of a Commission decision on an asset transfer; but should be made by the General Assembly after careful consideration of all relevant factors.

WHEREFORE, Communications Workers of America respectfully requests that the Pennsylvania Public Utility Commission fully investigate the Joint Application and related

transactions to determine whether they are consistent with the public interest and otherwise in accordance with law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Scott J. Rubin". The signature is fluid and cursive, with the first name "Scott" and last name "Rubin" clearly distinguishable.

Scott J. Rubin (PA Atty. Id. 34536)

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Counsel for:

Communications Workers of America

Dated: September 24, 2014

VERIFICATION

I, Edward Mooney, the Vice President of Communications Workers of America District 2/13, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief, and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date:

9-24-14

Edward A. Mooney