

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE  
COMMISSION

In the Matter of:

The Application Of Windstream Kentucky )  
East, LLC And Windstream Kentucky West, )  
LLC 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

**KENTUCKY CABLE TELECOMMUNICATIONS  
ASSOCIATION'S BRIEF**

Intervenor KCTA, the non-profit organization representing the interests of cable operators serving cable customers throughout Kentucky, hereby files its post-hearing brief.

**INTRODUCTION**

Just as state-of-the-art telecommunications is an essential element to the Commonwealth's initiatives to improve lives, create investment and promote economic growth,<sup>1</sup> fair pole attachment rules and rates are essential to "reduce the potentially excessive costs of deploying telecommunications, cable and broadband networks, in order to accelerate broadband buildout,<sup>2</sup>" including in Kentucky. These principles are well-established. The Commission has asserted jurisdiction over pole attachment rates since 1981<sup>3</sup> and has applied a formula rate for

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<sup>1</sup> See KRS 278.546(1) (legislative finding in support of Kentucky's 2004 broadband deregulation Act).

<sup>2</sup> *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864 (2010).

<sup>3</sup> *Regulation of Rates, Terms and Conditions for the Provision of Pole Attachment Space to Cable Television Companies*, Case Nos. 8040 and 8090 (October 28, 1981) ("Pole Attachment Jurisdiction Order").

those regulated pole attachments since 1982.<sup>4</sup> KCTA has represented its members in almost every pole attachment case that has arisen during that period. And throughout those three decades, KCTA members have continued to depend on regulated access to poles. Therefore, if the Commission issues any order permitting Windstream to shift critical infrastructure like poles, ducts and conduit to a Real Estate Investment Trust, it should require Windstream and the trust to guarantee future compliance with the Commission's established regulatory requirements for just and reasonable access to infrastructure.

### BACKGROUND

More than sixty cable operators, local exchange carriers and electric utilities attach their facilities to the more than 180,000 utility poles in Kentucky owned and controlled by Windstream Kentucky East, LLC and Windstream Kentucky West, LLC (collectively, "Windstream").<sup>5</sup> Windstream proposes to sell these poles, along with 4.7 million feet of underground conduit and other real property, to Communications Sales and Leasing, Inc., ("CSL"). This property will then be leased back to Windstream Holdings, Inc., as described in the August 7, 2014 application. Windstream's General Counsel John Fletcher testified that "every one of these assets is completely and wholly exclusively leased back to Windstream."<sup>6</sup> Because Windstream claims it will have "retained title" and will have a "beneficial interest" (for 35 years) in these properties after the sale and leaseback, Mr. Fletcher further reassured the Commission that pole attachment customers like the members of KCTA "will continue to deal with Windstream as you do today."<sup>7</sup> Despite these statements as well as others made by the

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<sup>4</sup> *The Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments*, Adm. Case No. 251 (August 12, 1982) ("Rate Methodology Order").

<sup>5</sup> Windstream's Response to KCTA data requests 8 and 9.

<sup>6</sup> T.E. at 156, lines 16-17.

<sup>7</sup> T.E. at 191, lines 12-22.

Applicants in their responses to data requests, it is still not 100% clear whether Windstream's proposal could affect, even unintentionally, legal rights KCTA members will have to attach their facilities to the poles currently owned and controlled by Windstream at reasonable rates if the proposed transaction is permitted. That said, KCTA believes the Commission should note the assurances that Windstream has provided, and make them part of its order if the CSA transaction is permitted.

### ARGUMENT

Whatever Windstream's interest in achieving favorable federal tax treatment of its proposed transaction, it must not be allowed to diminish the Commission's jurisdiction to regulate the Windstream pole attachment rates that have been tariffed and subject to complaint jurisdiction for more than thirty years.

In the 1981 *Pole Attachment Jurisdiction Order* the Commission declared that providing space on utility poles by utilities regulated by this Commission for cable television pole attachments is a "service" within the meaning of KRS 278.010(13). The Commission found that once its jurisdiction over a pole owner had been established, it could regulate pole attachments without determining whether the activity (permitting attachments) is a "utility" function.<sup>8</sup> That determination was upheld on appeal, and is the law today.<sup>9</sup> Accordingly, Windstream cannot vitiate its obligation to provide these tariffed, regulated services by entering into a private contractual relationship with CSL.<sup>10</sup> And once existing utility poles are transferred to CSL, the trust itself could be required to assume the regulatory obligations imposed by the *Rate*

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<sup>8</sup> *Pole Attachment Jurisdiction Order* at 7.

<sup>9</sup> *Kentucky CATV Association v. Volz*, 675 S.W.2d 393 (Ky. App. 1983)

<sup>10</sup> See *Santa Fe P. & P. R. Co. v. Grant Bros. Construction Co.*, 228 U.S. 177, 185, (1913) (common carrier is "not permitted to drop its character and transmute itself by contract"); *Akron, C. & Y. R.R. v. Interstate Commerce Comm'n*, 611 F.2d 1162, 1167 (6th Cir.1979) (same).

*Methodology Order.* The Commission made clear in the *Pole Attachment Jurisdiction Order* that “the service of providing space on *existing* utility poles (and the rates charged therefor) are “rates” and “services” within the purview of the Commission under KRS 278.040.”<sup>11</sup> CSL’s “exclusive” contractual relationship with Windstream does not place it beyond the Commission’s reach.<sup>12</sup>

Despite anything to the contrary expressed during the hearing, these regulatory requirements should not be news to Windstream, whose former corporate parent, Alltel Corporation, owned a Kentucky ILEC before the Commission established the uniform methodology for pole rates for cable television attachments.<sup>13</sup> That methodology is the one established in Administrative Case No. 251. Windstream has had a long standing obligation to comply with the Commission’s pole attachment order, including its accounting requirements for the embedded costs of poles, a fundamental element of the pole rate. Any conveyance of Windstream poles to CSL must not create an opportunity for avoiding this long-standing and essential requirement. In other words, the sale/leaseback of essential facilities cannot become a barrier against an investigation of Windstream’s pole attachment rates in the future. Nor should

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<sup>11</sup> See *Pole Attachment Jurisdiction Order* at 5. (underlining in original, italics added).

<sup>12</sup> CSL’s SEC Form 10 (at p. 76) concedes the possibility of utility regulation for its activities, explaining “if any such regulation is required, we believe that we will be able to operate in compliance with such regulations without any material impact. . .” The Form 10 was filed with the Commission November 21 in response to a staff data request.

<sup>13</sup> Windstream was created after the Commission approved the ALLTEL/Valor merger/spinoff transaction in Case No. 2005-00534. Windstream Kentucky West is the successor entity to Allied Telephone of Kentucky, Inc. which changed its name to ALLTEL Kentucky, Inc. in 1983. Although counsel for Windstream and Windstream’s witness Mr. Fletcher implied at hearing that Windstream entered the Kentucky market solely as a result of the 2002 sale of Verizon’s exchange properties to ALLTEL, see T.E. 90-92 (Overstreet) and 103 (Fletcher), those statements were inaccurate. When ALLTEL bought from Verizon South the former GTE and Contel exchange territories that became Windstream Kentucky East, it was already operating as a Kentucky ILEC. See exhibit 4 to ALLTEL’s Application for Approval of Transfer filed December 22, 2005 in Case No. 2005-00534 (tracing history of ALLTEL Kentucky, Inc.).

such a transaction be a means to hide regulatory accounting information from the Commission or customers, or to result in any changes to the underlying information as a result of the transaction.

Windstream's primary witness, Mr. Gunderman, stated it is the operating companies' intention that the Public Service Commission will retain full jurisdiction over the operating companies' rates, terms and conditions for the use of poles, conduits and rights-of-way.<sup>14</sup> But he refused to agree that the operating companies should request the Commission to state in any order related to this matter that it will retain full jurisdiction over the operating companies' provision of pole attachments, conduits, and rights-of-way after the transaction closes.<sup>15</sup>

Thus, while Windstream concedes the Commission should continue to assert jurisdiction over its poles, Windstream's intentions regarding the pole rate methodology are not so clear. And when KCTA asked for "baseline" regulatory accounting information in support of the existing tariff rates, Windstream's counsel objected.<sup>16</sup>

Whether or not KCTA is granted baseline rate support data now, the transaction must not be an excuse for non-compliance with the Commission's existing rate formula for regulated poles. KCTA explored this topic at hearing and was not reassured. Under cross examination, Windstream's treasurer and interim chief financial officer said the pole depreciation practices that Windstream has will not change as a result of the transaction, but he was non-committal about any changes to the cost of money element for pole rates.<sup>17</sup>

### **CONCLUSION**

While KCTA takes no position on the Windstream REIT proposal itself, KCTA's members and other tariff customers for Windstream's considerable deployment of regulated

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<sup>14</sup> T.E. at 72, lines 1-7.

<sup>15</sup> T.E. at 73, line 11.

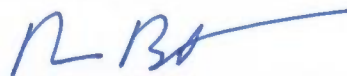
<sup>16</sup> T.E. at 87.

<sup>17</sup> T.E. at 77-79.

utility poles must be assured of just and reasonable rates, and must have the opportunity to avail themselves of the Commission's complaint process should any issues occur in the future. For those reasons, any order granting Windstream's petition should specifically retain jurisdiction over the poles, require full compliance with the pole rate methodology, and require Windstream (and CSL) to fully acknowledge those requirements as a condition to closing. Any order should also require that none of the elements of Windstream's calculations of maximum just and reasonable pole attachment rates under the Commission's rate methodology set forth in Administrative Case 251 should be altered as a result of this transaction, including embedded costs of poles, accumulated depreciation or cost of money. Without such assurances, KCTA sees no reason the Commission should place its *imprimatur* on Windstream's plan to sell regulated property to a trust that Windstream intends to be beyond the Commission's reach.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing motion has been served by first class mail on those persons whose names appears below this 26th day of November, 2014.

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