

SEP 14 2018

PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of

CMN-RUS, Inc.

Complainant

v.

Windstream Kentucky East, LLC

Respondent

No. 2018-00157

**CMN Response to Windstream Supplemental Petition
Confidential Treatment of Rates and Confidential Contracts**

Complainant CMN-RUS, Inc. (“CMN”) hereby responds to the Supplemental Petition – Confidential Treatment of Rates and Confidential Contracts, filed and served by Respondent Windstream Kentucky East, Inc. (“Windstream”) on September 7, 2018.¹ As established in the CMN Response in Opposition to Windstream for Confidential Treatment, Windstream has not made a case for confidential treatment either for the rates it has redacted from among the more than 2000 pages of documents it produced in response to Commission Staff Requests Nos. 7 and 8 or for the contracts from which it has redacted all but a few of the pages. The same conclusion applies to the Supplemental Petition’s request for (broadened) confidential treatment of a contract Windstream filed and served on August 27, 2018, as WIN 1473-1507 (“the Contract”), with only 4 “spot” redactions of \$ rates on WIN 1503.

1. Windstream only explanation for why it did not treat the Contract as confidential is as follows: “In the course of providing to the PSC more than 7,000 [pages of] documents with

¹ The undersigned counsel was served by email on September 7, 2018; the Supplemental Petition’s certificate of service mistakenly gives September 6th as the date of service.

only two weeks to respond, Windstream inadvertently disclosed one contract that contained a confidentiality clause and should have been held confidential....” Supplemental Petition p.1. Windstream does not acknowledge that CMN’s Response (p.4) identified the Contract as an example of a contract with a confidentiality clause that had been produced in response to Staff Request No. 7 generally unredacted, the implications of how this assertedly-confidential contract was “inadvertently disclosed,” or the lack of confidentiality evident on the face of the document.

2. None of the assertedly confidential contracts has a prominent stamp, header, or footer designating it as confidential. The contracts for which confidential treatment has been sought by Windstream (in its initial Motion or the Supplemental Petition) are not segregated or grouped within the production in response to Staff Request No. 7 or 8; they were “Bates stamped” mixed in with other contracts for which confidential treatment has not been sought. These contracts simply had no prior treatment as confidential within Windstream, *e.g.*, special handling, separate location, or warning designation. If they were treated and maintained as confidential by Windstream, then they would not have been intermixed with non-confidential material at the risk of disclosure.

3. In its Reply to the CMN Response opposing its Motion, Windstream does not address the language of the confidentiality clause for such contracts. The “Confidentiality” provision attached to CMN’s Response (WIN 1593) was taken from another disclosed contract; however, the Confidentiality provision in the Contract (WIN 1494, also ¶24) is substantively the same.² Windstream has not shown that the Contract has not previously been disclosed or why its disclosure in response to the Staff Request is not allowed under the very terms of the Contract.

² This is unsurprising since both contracts are marked as the same form version: “WIN ILEC vrs 2.1.14 (*Poles only*).” The Confidentiality provision in the subject Contract is also substantively the same as the one on p.21 of the Pole Attachment License Agreement — marked “WIN ILEC vrs 9.23.15 (*Poles only*)” — that Windstream provided CMN and was attached as Appendix A to CMN’s Complaint.

4. Windstream also does not distinguish the Contract from the CMN Response's other example of a disclosed contract with a confidentiality clause (WIN 1573-1607) — and for which the Supplemental Petition does not seek confidential treatment. In its Reply (p.3), Windstream states that it disclosed that contract “in full as Windstream realizes that CMN’s filing of it with the Complaint means it must already be in the public domain.” This “realization” is mistaken. CMN did not file WIN 1573-1607 as part of its Complaint; its Appendix C to the Complaint consists only of a First Amendment modifying the main contract.

5. In its Reply (p.2), Windstream contends that the “redacted documents ... are not essential to the case at hand,” and that “[t]he issue in this matter is the quickness with which CMN will be allowed to submit applications and attach to Windstream’s poles....” CMN disputes the narrowness of that description, but notes that the Contract is different from the disclosed contract (WIN 1573-1607) — despite being marked as the same version of the agreement (*see* fn. 2 above) — in ways that even Windstream says go to the heart of this case. The disclosed contract and the Pole Attachment License Agreement sent to CMN by Windstream at the start of their negotiations (attached to the Complaint as Appendix A) contain identical language imposing the 300 Pole Rule:

Each Exhibit B Application for Pole License shall contain no more than twenty-five (25) Poles and Licensee may submit up to twelve (12) Exhibit B, Application for Pole License within a rolling thirty (30) day period.

Section 8.A (WIN 1579; Complaint Apx.A, page 7 of 32).³ In contrast, the Contract’s section 8 (“Attachment Request and License Process,” WIN 1479-80) **does not contain the 300-pole limitation**. The corresponding sentence in section 8.A is: “Each Exhibit B Application for Pole

³ At the maximum 25 poles per application and maximum 12 applications in a 30-day period, the limit is 300 poles in a rolling 30-day period (12x25=300).

License shall contain no more than twenty-five (25) Poles.” WIN 1479.⁴ In addition, in section 8.B, the Contract gives a 45-day time frame for Windstream to provide an estimate of charges for make-ready work and affirmatively provides a self-help remedy to the licensee to enforce the time frame: “If Licensor does not complete its survey work within forty-five (45) days, Licensee shall have the option to utilize contractors to complete the surveys.” WIN 1480. No similar time frame, deadline, or licensee remedy is given in Section 8 of the disclosed contract (WIN 1579-80) or the Agreement offered to CMN (Complaint Apx.A, pages 7-8 of 32).

6. The discrimination in favor of the Contract licensee and against CMN is evident only because CMN has access to the text of the Contract. This example makes it all the more critical that CMN be given the same access as the Commission has to the text of the other redacted contracts that were the subject of Windstream’s initial Motion. Despite the undersigned counsel’s raising the question of confidential treatment prior to the deadline for the response to the first set of requests⁵ and the point being noted in CMN’s Response (p.2 ¶2), Windstream still has not offered to provide CMN with any of the redacted information subject to a confidentiality agreement or order from the Commission. It has been difficult to respond to the Windstream requests for confidential treatment when CMN has been kept in the dark about the significance of the redacted material and even the claimed confidentiality clauses. If the Commission nonetheless decides to grant all or part of Windstream’s requests for confidential treatment, due

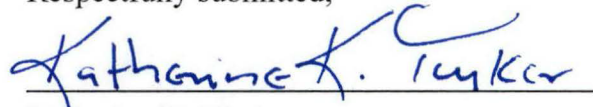
⁴ The maximum of 25 poles per application is implicit in the Form Application for Pole License, attached as Exhibit B to the Contract (WIN 1500-01), the disclosed contract (WIN 1599-1602), and the Pole Attachment License Agreement sent to CMN (Complaint Apx.A pages 27-28 of 32).

⁵ In an email sent 8/23/18 ca. 1:53 P.M., the undersigned notified Windstream counsel that CMN was not planning to ask for confidential designation of anything it would produce, and did so in order that “you can **alert me** if there’s something in the parties’ communications or agreements which Windstream thinks must be kept confidential or for which it plans to seek confidential treatment.” In a response sent 8/24/18 ca. 9:39 A.M., maybe interpreting the reference to be to the parties’ agreements with each other, Windstream counsel stated: “We are not seeking confidential treatment of any of those documents either.”

process requires that CMN be provided access to the material protected from general public disclosure so that it can use the material as relevant.

WHEREFORE, for the reasons stated, CMN requests that the Commission deny Windstream's Supplemental Petition for Confidential Treatment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, pursuant to the Commission's 8/7/18 Order ¶2, a conformed copy of the foregoing has been served on the attorneys for Respondent by electronic mail or by hand-delivery to: Casey C. Stansbury <cstansbury@mrrlaw.com>, Tia J. Combs <tcombs@mrrlaw.com>; MAZANEC, RASKIN & RYDER CO.; 230 Lexington Green Circle, Suite 605; Lexington, KY 40503. I will also provide PSC Staff Counsel Benjamin Bellamy with a courtesy copy of this Response in the form served on the attorneys for Respondent.



Attorney for Complainant