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AUG 27 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

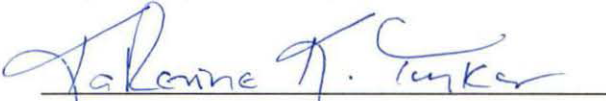
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**Response by CMN-RUS, Inc. to  
Windstream Kentucky East, Inc.'s First Requests for Information**

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CMN-RUS, Inc. ("CMN"), herewith submits its responses to Windstream Kentucky East, Inc.'s First Requests for Information, in accordance with the Commission's scheduling Order issued August 7, 2018 (the "8/7/18 Order"). Signed, notarized verifications of their respective responses by the Response witnesses — Anita Larson and John Greenbank — appear after the Certificate of Service, and before the 1st tab of this Response. The undersigned counsel is responsible for any objections noted for a particular response.

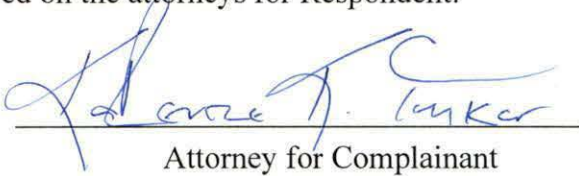
Respectfully submitted,



Katherine K. Yunker  
[kyunker@mmlk.com](mailto:kyunker@mmlk.com)  
MCBRAYER, MCGINNIS, LESLIE &  
KIRKLAND PLLC  
201 East Main Street; Suite 900  
Lexington, KY 40507-1310  
859-231-8780, ext. 1137  
*Attorney for CMN-RUS, Inc.*

CERTIFICATE OF SERVICE


I hereby certify that on August 27, 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

**VERIFICATION**  
**on behalf of Petitioner, CMN-RUS, Inc.**

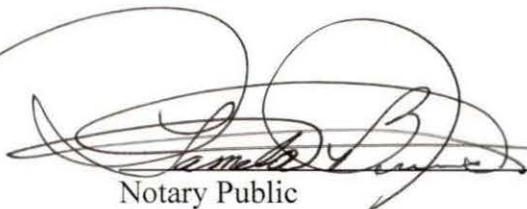
STATE OF KANSAS   )  
   )  
COUNTY OF JOHNSON   )

I, Anita Larson, Vice President and Senior Counsel of CMN-RUS, Inc., being duly sworn, state that I prepared or supervised the preparation of each of the following responses for which I am identified as a witness, and that the matters and things set forth in each such response are true and correct to the best of my knowledge, information, and belief formed after reasonable inquiry.

  
\_\_\_\_\_  
Anita Larson

Subscribed and sworn to this 22<sup>nd</sup> day of August, 2018, before me, a Notary Public in and before said County and State.

  
(SEAL)

  
\_\_\_\_\_  
Notary Public

My Commission expires:

**VERIFICATION**  
**on behalf of Petitioner, CMN-RUS, Inc.**

STATE OF INDIANA                     )  
   )  
COUNTY OF VANDERBURGH         )

I, John Greenbank, Executive Vice President of CMN-RUS, Inc., being duly sworn, state that I prepared or supervised the preparation of each of the following responses for which I am identified as a witness, and that the matters and things set forth in each such response are true and correct to the best of my knowledge, information, and belief formed after reasonable inquiry.



\_\_\_\_\_  
John Greenbank

Subscribed and sworn to this 23<sup>rd</sup> day of August, 2018, before me, a Notary Public in and before said County and State.

  
\_\_\_\_\_  
Notary Public

(SEAL)

My Commission expires: 7-27-25



DENISE L. UTLEY  
Resident of Vanderburgh County, IN  
Commission Expires: July 27, 2025  
Commission # 703332

## Request

1. In ¶ 8 of the Complaint, CMN states the Lexington Fayette Urban County Government ("LFUCG") franchise project (the "LFUCG Project") must be completed by the end of 2021. If, as stated in ¶ 7 of the Complaint, access to a total of 12,500 Windstream poles is needed for the project and attachment has already begun (attachment began, at the latest, by July 1, 2018), by Windstream's calculations, at a rate of 300 poles per month, CMN will have time to attach to all needed poles by the end of 2021 and successfully fulfill its obligations. As such, upon what facts does CMN allege, as stated in ¶ 8 of the Complaint, that attachment to only 300 poles per month is a "serious economic and regulatory challenge for CMN"?

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## Response

As stated in its complaint, CMN is investing close to \$100,000,000 in the Lexington and surrounding area market (the "LFUCG Market"). An investment of this magnitude requires a long time period to produce an acceptable return on investment. Therefore, CMN's business case requires the acquisition of customers as the fiber network is being deployed throughout the city to create revenue as early as possible in the project.

In order to serve any customer in the LFUCG Market, a fiber connection from that customer's premises all the way back to CMN's equipment hub must be established.

This architecture requires the deployment of hundreds of feeder routes throughout CMN's coverage footprint. Almost all of CMN's feeder routes necessarily require access to the public right of way for underground construction and access to both Windstream's and Kentucky Utilities Company's ("KU") utility poles. Therefore, without the ability to deploy fiber on Windstream's utility poles in a timely fashion, CMN cannot sell services to a material number of homes and businesses. Moreover, the capital utilized on those portions of a feeder route that are buried or located on KU utility poles becomes stranded investment without the ability to produce revenue until fiber can be deployed on

Windstream's utility poles, further hurting the business model. CMN anticipated the critical nature of having access to Windstream's utility poles, and so requested a high volume plan (*i.e.* the terms of the KIH Amendment) that would allow CMN to execute its business plan while at the same time eliminating the burden of Windstream's having to expend additional money and resources to accommodate CMN's buildout schedule.

Windstream's unilaterally imposed 300-pole restriction has additional problematic consequences for CMN. Pursuant to its video franchise with the LFUCG, CMN is required to complete the fiber network in its initial service footprint by December 2021. Having to wait on the availability of Windstream's utility poles when, under the proposed high volume plan, they would be available in a more timely manner, will artificially extend the length of the project. Due to the number of variables in such a complex project, this delay, coupled with any other unanticipated occurrence such as a vendor or material shortage, could result in CMN's missing its LFUCG deadline. Additionally, the LFUCG has conveyed its hope that CMN can complete the buildout as soon as possible. The construction of a ubiquitous fiber network throughout a community the size of LFUCG Market is necessarily invasive and disruptive. Having timely access to Windstream's utility poles will shorten CMN's construction timelines and minimize the need to construct duplicative facilities.

Finally, by unnecessarily delaying CMN's access to its utility poles, Windstream is preventing a competitor from coming into the market and denying Lexington consumers the ability to choose another provider. There is evidently a pent-up demand among

Lexington consumers for a reliable, high-speed network (*see* attached Windstream 5/9/18 press release, CMN 00185-86), and Windstream's restriction of CMN's ability to initiate service presents the risk of consumer disappointment and loss of confidence in CMN as a service provider.

*See also* CMN's response to Request No. 1 of the Commission Staff's First Request for Information to CMN-RUS, Inc. (1 PSC-CMN 1).

**Request**

2. Please provide a full and complete copy of the Franchise Agreement with LFUCG referenced in ¶ 3 of the Complaint.

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**Response**

*See the response to 1 PSC-CMN 1 (CMN 00001-44).*



# Windstream invests \$2 million in high-speed internet network in Lexington

## Investment to help enhance community connections and local infrastructure

LEXINGTON, Ky., May 09, 2018 (GLOBE NEWSWIRE) -- Windstream (Nasdaq:WIN), a leading provider of advanced network communications and technology solutions, today announced an investment of \$2 million in high-speed Kinetic Internet services for Lexington. With Kinetic Internet, Windstream is improving network speeds to approximately 30,000 households, bringing the number of households receiving 50Mbps or higher in Lexington to 80,000 households.

“Windstream is committed to investing back into the communities in which we live and serve,” said Phillip McAbee, president of state operations at Windstream. “With nearly 150 employees in the area, we’re proud to make this investment to help enhance the level of connectivity and network stability, bringing faster speeds to the people of Lexington.”

etic by Windstream’s expansion in Kentucky increases the services that are available to local customers including Kinetic Internet with lightning-fast downloads, as well as TV services on a fiber-backed network.

To learn more about Kinetic by Windstream and its service areas, visit [Windstream.com](http://Windstream.com).

## About Windstream

Windstream Holdings, Inc. (NASDAQ:WIN), a FORTUNE 500 company, is a leading provider of advanced network communications and technology solutions. Windstream provides data networking, core transport, security, unified communications and managed services to mid-market, enterprise and wholesale customers across the U.S. The company also offers broadband, entertainment and security services for consumers and small and medium-sized businesses primarily in rural areas in 18 states. Services are delivered over multiple network platforms including a nationwide IP network, our proprietary cloud core architecture and on a local and long-haul fiber network spanning approximately 150,000 miles. Additional information is available at [windstream.com](http://windstream.com) or [windstreamenterprise.com](http://windstreamenterprise.com). Please visit our newsroom at [news.windstream.com](http://news.windstream.com)

or follow us on Twitter at @Windstream or @WindstreamBiz.

**Windstream Contact:**

Scott Morris, 501-748-5342

scott.l.morris@windstream.com




Source: Windstream Holdings, Inc.

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**Request**

3. Please provide a copy of or citation to any statute, regulation, or other law which CMN believes Windstream has violated.

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**Response**

Objection: CMN objects and declines to answer the request as it is phrased. Among things:

(1) a corporate entity, such as CMN, does not have “beliefs”; and (2) the opinions of individuals within the corporation about Windstream violations are likely to be inseparable from privileged attorney-client communications. Without waiver of the objection, CMN (through counsel) answers the request as if it were a contention interrogatory seeking legal bases for the pleadings.

Answer:

CMN contends that Windstream’s conduct has violated the following statutes, regulations, and other standards enforced by the Commission:

1. KRS 278.030, 278.160, 278.170, 278.2201–.2213, 278.514
2. 807 KAR 5:006, 5:011, 5:061
3. PSC orders and other requirements relating to pole attachments (*e.g.*, orders in Adm. Case No. 251)

Windstream’s conduct may also violate other laws that are outside the authority or enforcement of the Commission, for example: KRS 367.110 – .360 and LFUCG ordinances setting restrictions and obligations on cable television and telecom franchisees.

### **Request**

4. Please identify all representatives from CMN had with representatives from Windstream prior to the filing of the Complaint concerning the LFUCG Project and the need for pole attachment. "Identify" means provide the name, address, and phone of any CMN representative(s) who were party to the contact and the name of the Windstream representative who was a party to the contact. If any of the identified contacts were made in a reproducible format (*i.e.* in writing or other recorded medium), please produce copies of said contacts.

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### **Response**

Objection: CMN objects and declines to answer the request as it is phrased; for one thing, it is missing words. To the extent that the request is for information about each and every contact between CMN and Windstream representatives, it is overly broad and unduly burdensome. CMN does not track every such contact, and Windstream has equivalent internal access to the requested information (since its representatives were party to the contacts). CMN also objects to the request for its individual staff members' or other representatives' contact information and to any direct contact by Windstream counsel or other representatives seeking to interview or question CMN representatives on matters at issue in these proceedings. Without waiver of the objection, CMN answers the request as follows.

### Answer:

*See* the correspondence provided in CMN's response to the Commission Staff's First Request for Information to CMN-RUS, Inc., *esp.* the attachments to 1 PSC-CMN 16.

In addition, CMN provides the following information about conversations representatives of CMN had with representatives of Windstream or an affiliate thereof (for the purposes of this response, collectively “Windstream”):

December 12, 2017. Anita Larson, John Greenbank, Daniel King, James Lloyd, and Michelle McLaughlin participated in a conference call, during which pole attachments were discussed. During the conversation, representatives of CMN asked Windstream to amend the Windstream License Agreement to contain substantially the same terms and conditions as Windstream had entered into in connection with the Kentucky Information Highway project (the “KIH Amendment”). CMN acknowledged that the KIH Amendment required KIH to pay for additional resources to process applications for 1500 poles per month and John Greenbank and Anita Larson both stated that Metronet was willing to pay for resources. Representatives of Windstream stated that they needed to discuss the matter internally.

December 19, 2017. Anita Larson, John Greenbank, Daniel King, James Lloyd, and Michelle McLaughlin participated in another conference call on the subject of pole attachments. During this call, Mr. King reported that Windstream was not willing to negotiate any provision of the License Agreement with Metronet. Mr. King stated that there were two invoices outstanding to Windstream, and that while the invoices were outstanding, Windstream was not willing to negotiate any provisions with Metronet. Ms. Larson reminded the Windstream participants that the invoices were disputed in good faith and the valid reasons that Metronet was unwilling to pay the invoices. Ms. Larson

also stated that Metronet continued to communicate with Duke to resolve the invoices and to get Windstream out of the middle. Mr. King reiterated Windstream's position that until the invoices were paid, Windstream was not willing to negotiate.

Bi-weekly conference calls held every other Thursday between Lauren Sandifer and Tom Osborne as representatives for CMN and Ashley Sanders, Sarah Hayes, Brandi McGee, Nicole Hodges as representatives of Windstream with respect to pole applications priority and time frames.

**Request**

5. Please state in detail the "obvious business reasons" referred to in ¶ 3 of the Complaint.

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**Response**

*See the response to Windstream Request No. 1.*

**Request**

6. How many pole attachment applications does CMN expect to submit to Windstream for the LFUCG Project in a rolling 30 period?

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**Response**

CMN expects to submit applications for up to 1500 poles in a 30-day period.



**Request**

7. Please describe what is meant by the term "competitive necessity" in ¶ 8 of the Complaint.

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**Response**

Any delay in CMN's completing its network works to the advantage of Windstream and CMN's other competitors.

- While Windstream delays CMN's entry into the market, Windstream is able to update its network infrastructure and blanket the area with target marketing to capture additional market share. *See, e.g.*, Windstream 5/9/18 press release (CMN 00185-86, attached to the response to Windstream Request No. 1), announcing "investment to help enhance community connections and local infrastructure," <http://news.windstream.com/news-releases/news-release-details/windstream-invests-2-million-high-speed-internet-network> (last visited Aug. 24, 2018).
- While CMN is unable to fully serve the LFUCG Market, Windstream and CMN's other competitors are able to sell business services to subscribers, in some instances locking the subscriber into contracts with terms of three years or more.
- While CMN's network is still under construction, Windstream and CMN's other competitors are able to respond to requests for proposals that require near term delivery of services dates that CMN may be unable to meet due to Windstream delays.

- Major construction in the right of way is necessarily invasive and can be disruptive to the public. By needlessly delaying CMN's network deployment, Windstream is extending the time CMN needs to spend in the right of way which can detrimentally impact the initial goodwill it will receive from consumers as a new market entrant.
- When CMN goes through a neighborhood during initial construction, there is an initial buzz where potential customers get excited about having a new provider; when CMN not able to capitalize on this enthusiasm, its penetration levels suffer.

**Request**

8. Please describe specifically the "good faith basis" upon which CMN refuses to pay the invoices referenced in ¶ 10 of the Complaint.

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**Response**

*See the response to 1 PSC-CMN 7 and the response to Windstream Request No. 9.*

**Request**

9. Please describe the "good faith negotiations" referenced in ¶ 24 of the Complaint.
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**Response**

*See* the response to 1 PSC-CMN 7. CMN has asked Duke to provide an explanation and documentation of the charges. CMN has informed Duke that it is willing to pay the charges if the charges are valid and reasonably documented. CMN has also asked that Duke cancel the invoices issued to KDL and issue the invoices directly to CMN until such time that the dispute has been resolved. In conversations, Duke has stated that it would endeavor to research the invoices for additional support; however, currently, it has not provided sufficient explanation of the charges to justify payment of the invoices.

**Request**

10. Please state the amount of time in which Windstream has accepted each application for pole attachment CMN has made to Windstream since January 1, 2018. Please identify which of these applications CMN considers to have been "accepted in an unreasonably slow time frame" as alleged in ¶ 12 of the Complaint.

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**Response**

*See* the response to 1 PSC-CMN 17. Nearly every application submitted to Windstream before the date CMN filed its complaint against Windstream with the Commission was "accepted in an unreasonably slow time frame." For example, in March 2018, CMN submitted 15 applications for a total of 322 poles with an average application processing time of 88 days, almost twice the time allotted under FCC rules.

**Request**

11. Please identify all contractors CMN proposes to use to complete make ready construction on the LFUCG Project. "Identify" means provide the name, address, and phone of the contracting company or employee in charge and the names of each individual worker who will assist with the make ready.

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**Response**

Objection: Other than to refer to its response to 1 PSC-CMN 10, CMN objects to the request as overly broad, unduly burdensome, and possibly posing an inadequately-specified hypothetical or counterfactual. Without waiver of the objection, CMN answers the request as follows.

Answer:

Windstream performs make-ready work on its own poles. If CMN were authorized to perform make ready work on Windstream poles, CMN proposes to use available contractors that (i) are on Windstream's list of approved contractors qualified to perform make ready work or (ii) if Windstream does not maintain such a list, CMN proposes to use contractors that meet the key safety and reliability criteria recommended by the Broadband Deployment Advisory Committee (BDAC)<sup>1</sup>, *i.e.*, contractors that (1) follow published safety and operational guidelines of the utility, if available, but if unavailable, follow the NESC guidelines; (2) read and follow licensed-engineered pole designs for make ready work, if required by the utility; (3) follow all local, state and federal laws and regulations including, but not limited to, the rules regarding Qualified and Competent Person under the requirements of the OSHA rules;

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<sup>1</sup>Third Report and Order and Declaratory Ruling at ¶39 and Appendix A.

(4) meet or exceed any uniformly applied and reasonable safety and reliability thresholds set and made available by the utility, *e.g.*, that the contractor cannot have a record of significant safety violations or worksite accidents; and (5) be adequately insured or be able to establish an adequate performance bond for the make ready work it will perform.

**Request**

12. Will the LFUCG Project require CMN to attach to poles belonging to any other utility?

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**Response**

*See the response to 1 PSC-CMN 9.*



**Request**

13. If the answer to Request 12 is in the affirmative, please identify all such utilities by business name, name of an individual employee with whom CMN has worked with on the LFUCG Project at that utility, and the business address and business phone number of the named individual.

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**Response**

The answer to Windstream Request No. 12 is in the affirmative; however, other than to refer to its response to 1 PSC-CMN 10, CMN objects and declines to provide information equally available to Windstream or, if not equally available, information about a third party's individual employee.

**Request**

14. Please identify all contractors the utilities named in Request 13 are using to complete make ready construction on the LFUCG Project. "Identify" means provide the name, business address, and business telephone number of the contracting company or employee in charge and the names of each individual worker who will assist with the make ready.

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**Response**

Other than to refer to its response to 1 PSC-CMN 10, CMN objects and declines to provide information equally (or better) available to Windstream or, if not equally available, information about a third party's contractors or such third party's contractors' individual employees and workers.

**Request**

15. Please provide any agreements or tariffs under which CMN is attaching to poles belonging to utilities named in the answer to Request 13.

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**Response**

*See the response to 1 PSC-CMN 9 (CMN 00132-49).*

**Request**

16. Please provide the High Volume Pole Attachment Application Plan referred to in ¶ 4 of the Complaint.

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**Response**

*See the response to 1 PSC-CMN 9 (CMN 00135-46).*

**Request**

17. As previously disclosed in WIN0001, CMN contractors damaged Windstream facilities in March and April 2018 due to negligent construction practices. Does CMN plan to continue to use these contractors for make ready? Does CMN contend that it is reasonable for Windstream to continue to allow these same contractors to preform make ready on Windstream poles?

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**Response**

Objection: CMN objects to the form and declines to answer the request as it is phrased. Among other things, it is unduly argumentative and assumes matters that are incorrect and that the subject “these [same] contractors” are used for pole/aerial make-ready work. Without waiver of the objection, CMN provides the following answer.

Answer:

None of the contractors named on WIN0001 perform aerial make ready work; they perform underground excavation. *See* information provided in response to 1 PSC-CMN 10 and the response to Windstream Request No. 18.

With respect to the incidents listed on WIN0001, *see* cease and desist letter Metronet received from Windstream in April of this year (CMN 00342-43) and Metronet’s response (CMN 000348-54) attached as part of the response to 1 PSC-CMN 16. Metronet’s response includes evidence supporting the position that Metronet contractors were not at fault. As requested in its letter to Windstream, Metronet continues to ask that Windstream provide prompt notice of any utility strikes so that Metronet can investigate the incident. Except for the three incidents reported to Metronet in April 2018 and one other incident listed in WIN0001, Metronet received no contemporaneous report from

Windstream, has no record of the listed incidents, and due to the passage of time is unable to adequately investigate them.

**Request**

18. Produce any market research done by CMN concerning its ability to complete the LFUCG Project by the end of 2021.

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**Response**

Objection: CMN objects and declines to produce any of its market research for the LFUCG Project, on grounds of lack of relevance and because Windstream is a direct competitor in the Lexington-Fayette County market. Without waiver of the objection, CMN provides the following answer as if the request were for a factual description of what CMN did to consider ability to complete the LFUCG Project buildout by the end of 2021.

Answer:

To determine the construction schedule for the LFUCG market, CMN and its affiliate Metro Fibernet, LLC (collectively "MetroNet") considered the composition of aerial and underground footage in the market, expected make ready work and the LFUCG's permitting process.

Aerial footage for the market was determined through a manual process whereby Metro-net personnel studied Google GIS maps on a street by street basis to determine where utility poles are located and the approximate length of utility pole lines. Make ready estimates were formulated by studying data obtained from Kentucky Utilities Company and multiple trips to Lexington where field personnel walked utility pole lines.

The LFUCG permitting process was determined through negotiations with the City.

**Request**

19. Please describe the "process Windstream has unilaterally adopted" referenced in ¶ 17 of the Complaint.

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**Response**

Objection: CMN objects and declines to answer the request as it is phrased; the request appears to be for a more definite statement of an allegation in the Complaint (*see* CR 12.05), rather than a data or discovery request. Without waiver of the objection, CMN (through counsel) answers the request as if it were for a more definite statement of the pleading.

Answer:

The quoted phrase is part of the following sentence toward the end of Complaint ¶ 17:  
“The federal regulations do not allow the utility to reject applications using the process Windstream has unilaterally adopted.” This is a reference to Windstream’s 300 Pole Restriction, a condition/rule/term not set forth in its tariff nor to which CMN has agreed.