

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

SEP 04 2018

PUBLIC SERVICE
COMMISSION

In the Matter of

CMN-RUS, Inc.

Complainant

v.

Windstream Kentucky East, LLC

Respondent

No. 2018-00157

**CMN Response in Opposition to
Windstream Motion for Confidential Treatment**

Complainant CMN-RUS, Inc. (“CMN”) hereby responds in opposition to the Motion for Confidential Treatment of Rates and Confidential Contracts filed by Respondent Windstream Kentucky East, Inc. (“Windstream”) on August 27, 2018. Windstream has not specifically identified what or where it has redacted material from documents produced in response to Commission Staff Requests Nos. 7 and 8, or whether it seeks to avoid disclosure and consideration of redacted material altogether, to deny access by CMN representatives, or only to prevent the redacted material from being available to others through the Open Records Act. Nonetheless, it has not made a case for whatever level of confidential treatment it requests.

1. CMN gathers from the Motion that Windstream has redacted material from the more than 2000 pages of documents it produced in response to Commission Staff Requests Nos. 7 and 8. On the copy produced to CMN, all but a few pages from each of eight (8) contracts that allegedly “contain confidentiality clauses requiring the parties to the contracts to keep their terms confidential” (Motion p.3) have been completely blacked out. The range of pages for each contract — six from the response to No. 7; two from No.8 — are provided, but the contracts cannot

all be matched to the summary information given for each response at WIN 0882 and WIN 2161, respectively. No listing is given of the pages on which rates have been blacked out. CMN has found redactions at, *e.g.*, WIN 927, 1503, and 1714, but cannot be expected to hunt out every instance.

2. Windstream has not offered (and does not offer in the Motion) to provide CMN with any of the redacted information subject to a confidentiality agreement or order from the Commission. Windstream cannot provide documents or other information to the Commission decisionmakers or Staff in this proceeding without making it available to CMN so that it has a meaningful opportunity to be heard about it. Similarly, anything to which CMN has not been given access is the functional equivalent of *ex parte* contact with the Commission, and neither it nor its Staff may consider any such material in deciding the case.

3. In Request No. 7 and 8, Commission Staff asked for “all current agreements ... regarding the procedure for processing applications for pole attachments and [/or the procedure for] completing related make-ready work.” In the Motion (p.2), Windstream seeks “confidential treatment, for an indefinite period,” of rates at which it allows others (or is allowed by others) to attach to poles, asserting that (1) the rates are exempt from public disclosure under KRS 61.878(1)(c) and (2) this case “does not concern rates paid for attachment to poles at all.” Neither assertion is correct.

4. Rates that Windstream charges others for pole attachments are plainly relevant in a case in which CMN has charged that Windstream “refuses to give CMN pole attachment terms it gives to others,” in violation of KRS 278.170(1). Complaint p.9. In addition, given that rates, terms, and conditions for CMN are supposed to be those under the Tariff filed with and approved by the Commission, different terms for others (a) implicate the prohibitions in KRS 278.2201 –

.2213 and 278.514 against subsidizing nonregulated or exempted pole attachment service by nonexempted, regulated service, *see* CMN Response to 1 WIN 3, (b) could lead to mis-allocation of pole space, and (c) may be undercutting Windstream resources for providing KRS 278.030(2) “adequate, efficient and reasonable service” to CMN (including timely processing of applications and make-ready). Furthermore, at least some of the rates redacted — *e.g.*, fees for “request documentation” (WIN 927, 1284, 1354, 2092), “agreement” (WIN 1503, 2158), “pole attachment request” (WIN 962), and “application for pole license” (WIN 1503, 2158)— on their face refer to “the procedure for processing applications for pole attachments and completing related make-ready work” no matter how narrowly Staff Requests No. 7 and 8 might be interpreted.

5. The rates in the contracts are not “records ... generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records” as described in KRS 61.878(1)(c)(1). Pole attachment is a utility service regulated by the Commission since the 1980s; the pole networks in Fayette County and throughout the Commonwealth in general were built up by traditional utilities under full regulation (like Windstream’s predecessor, General Telephone) and still retain attributes of a natural monopoly. Windstream does not identify any of its competitors or how knowledge of its fees (or other terms and conditions) relating to pole attachments would permit them “an unfair commercial advantage.” In Fayette County, Windstream’s main “competitors” for providing pole attachment service are Kentucky Utilities Company and Blue Grass Energy Coop. Corp. which remain fully-regulated by the Commission. All three entities have publicly-filed tariffs for pole attachment service, and Windstream has pole-sharing arrangements with the other two (*see, e.g.*, WIN 2488-506) by which they attach to each other’s poles. They thus

already have first-hand knowledge or access to information about each other's pole attachment procedures, costs, and charges.

6. In addition, pole-attachment contracts and the rates, terms, and conditions therein are not "generally recognized as confidential or proprietary." Pole-attachment tariffs and special agreements have been subject to filing with the Commission and to public access through 807 KAR 5:011, §§ 2, 13). Most of the contracts provided by Windstream in response to Staff Requests No. 7 and 8 are with other utilities and apparently do not contain confidentiality clauses; furthermore, there has been no showing that they have been kept confidential by Windstream or the other parties.

7. As discussed in ¶¶ 5 and 6 above, providing pole attachments is not "a competitive field" as contended by Windstream (Motion p.4) and nothing establishes that the pole-attachment agreements have been kept confidential, even the ones that Windstream asserts "contain confidentiality clauses requiring the parties to the contracts to keep their terms confidential" (*id.* p.3). Windstream thus has not established that these contracts are entitled to "confidential treatment, for an indefinite period" under the KRS 61.878(1)(c)(1) exclusion.

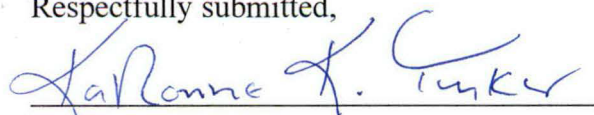
8. CMN cannot check whether Windstream has somehow "given the other parties to these contracts the expectation that their terms would remain confidential" (Motion p.4) or the claim that public disclosure "would constitute a breach" (*id.*) — Windstream has redacted even the purported confidentiality clauses of these agreements. Nonetheless, there is some evidence that these documents are not as confidential as Windstream suggests, even if never disclosed to third parties before now. First, Windstream has produced other contracts with confidentiality clauses; examples within the documents produced in response to Staff Request No. 7 are found at WIN 1494 and 1593. Second, the presence of a confidentiality clause does not necessarily make

the agreement itself confidential. Some of the unredacted contracts contain a clause which provides confidential treatment for what each party receives in the course of performance and “knows or has reason to know is the trade secret or confidential information of the other” — without purporting to make the agreement itself confidential. *See, e.g.*, 10/1/00 Fiber Agreement ¶34 (WIN 3147-48), produced in response to Staff Request No. 11.

9. Third, many of the redacted contracts appear to be form agreements used by Windstream, with standardized terms and conditions. This makes it less likely that the contract terms are actually proprietary or secret or that public disclosure will “permit an unfair commercial advantage to competitors” within the meaning of KRS 61.878(1)(c)(1). In addition, many of the redacted contracts are likely to contain a confidentiality clause that is already in the public record. An excerpt (WIN 1593) from a pole attachment agreement is attached hereto; at the lower left it is marked “WIN ILEC vrs 2.1.14 (*Poles only*).” This version and a 2015 one contain a confidentiality provision at ¶24; many of the redacted contracts are from the 2014 or 2015 Windstream version and list a confidentiality clause at ¶24. The attached confidentiality clause contains a number of allowances for disclosure, including “to respond to any requests by governmental or judicial authorities.” It also allows the Licensor (Windstream) to unilaterally “provide the text of all or part of this Agreement to any other party,” under certain conditions.

WHEREFORE, for the reasons stated, CMN requests that the Commission deny Windstream’s Motion for Confidential Treatment.

Respectfully submitted,



Katherine K. Yunker

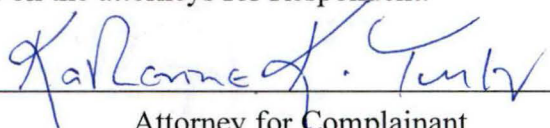
kyunker@mmlk.com

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 31, 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

24. CONFIDENTIALITY

Except as required by the Kentucky Open Records Act (KRS 61.870 to 61.884), neither party shall at any time disclose, provide, demonstrate or otherwise make available to any third party any of the terms or conditions of this Agreement or any materials provided by either party specifically marked as confidential, except upon written consent of the other party, or as may be required by applicable law or governmental authorities. Notwithstanding the foregoing, nothing in this Section shall prevent disclosure to a party's authorized legal counsel who shall be subject to this confidentiality section, nor shall it preclude the use of this Agreement by the parties to obtain financing, to make or report matters related to this Agreement in any securities statements, or to respond to any requests by governmental or judicial authorities; provided, however, that any such disclosure shall be limited to the extent necessary, and shall be made only after attempting to obtain confidentiality assurances. Notwithstanding the foregoing, prior to making any disclosure in response to a request of a governmental authority or legal process, the party called upon to make such disclosure shall provide notice to the other party of such proposed disclosure sufficient to provide the other with an opportunity to timely object to such disclosure. Notwithstanding the foregoing, Licensor may, without notice to Licensee: (i) negotiate or enter into any agreement with any other person(s) or entity(ies) that is identical or similar to this Agreement; and (ii) provide the text of all or part of this Agreement to any other party, so long as Licensor shall redact therefrom all references to Licensee and shall not associate such text with Licensee or identify Licensee as having agreed to such text or terms.

25. DISPUTE RESOLUTION

A. Except in the case of:

1. A suit, action, or proceeding by one party to compel the other party to comply with its obligation to indemnify the other party pursuant to this Agreement, or
2. A suit, action or proceeding to compel either party to comply with the dispute resolution procedures set forth in this section, the parties agree to use the following procedure to resolve any dispute, controversy, or claim arising out of or relating to this Agreement or its breach.

B. In accordance with the provisions of KRS Chapter 45A, at the written request of a party, each party shall designate a knowledgeable, responsible representative to meet and negotiate in good faith to resolve any dispute, controversy, or claim arising under this Agreement. The parties intend that these negotiations be conducted by non-lawyer, business representatives. The substance of the negotiations shall be left to the discretion of the representatives. Upon mutual agreement, the representatives may utilize other alternative nonbinding dispute resolution procedures such as mediation to assist in the negotiations. Discussions and correspondence between the representatives for the purposes of these negotiations shall be treated as confidential, undertaken for purposes of settlement, shall be exempt from discovery and production, and shall not be admissible in any subsequent proceeding without the concurrence of all parties. Documents identified in or provided during such negotiations, which are not prepared for purposes of the negotiations, shall not be so exempt and may, if otherwise admissible, be admitted as evidence in any subsequent proceeding.

C. If a resolution of the dispute, controversy or claim is not reached within ninety (90) days of the initial written request referred to in this Section 25, the dispute, controversy, or claim may be filed with