

STATEMENT OF THE CASE

This is a case about time. Time has been taken from CMN by the Respondent, Windstream Kentucky East, LLC (“Respondent,” or “Windstream East”), through caps on the volume of pole-attachment applications and delays in processing those applications. The time taken, and which Respondent continues to take from CMN, cannot be directly refunded. CMN’s Complaint, filed on May 15, 2018, sought the Commission’s regulatory expertise and oversight to determine that there were violations and how best to remedy and prevent further time lost by CMN from Respondent’s setting preconditions for CMN to attach to its poles that are neither in its tariff nor consistent with its utility obligations. On the record as it stands, facts establishing that Respondent’s conduct violates statutory and regulatory standards have been admitted by it or are otherwise undisputed. There is no genuine dispute about any material issue, calling for the Commission to make a decision on the law about violations and the remedy therefor.

1. Procedural history: CMN filed its Complaint against Windstream East with the Commission on May 15, 2018. By Order entered May 22, 2018, the Commission directed Respondent to satisfy or answer the Complaint. Respondent answered on June 1, 2018. After an informal conference among Staff and the parties, the Commission entered a Scheduling Order on August 7, 2018. Pursuant to the Scheduling Order, the parties have responded to two sets of information requests; Respondent has refused to provide some of the information requested of it and has redacted provisions or all but the title page and table of contents from pole-attachment agreements it has provided in response to data requests. The parties have also filed Direct Testimony (on September 5, 2018) and Rebuttal Testimony (on October 12, 2018).

By Order entered October 5, 2018, a hearing has been scheduled to be held on December 11-12, 2018. In connection with its redactions of pole-attachment agreements, Respondent has

filed a Petition (8/24/18), Supplemental Petition (9/7/18), and Additional Petition (10/1/18) for confidential treatment of the redacted portions of the agreements. Those petitions have been fully briefed, and are awaiting the Commission's decision. The only other pending procedural step is an informal conference to discuss settlement (*see* Scheduling Order ¶6), which may be held during the first two weeks of November.

2. Issues: The Complaint alleges three different violations, any one of which would require relief for CMN: (1) Windstream East has imposed material conditions not in its CATV Pole Attachment Tariff P.S.C. KY NO. 11 (“the Tariff”); (2) its processing of pole-attachment requests is unreasonably slow; and (3) Windstream East has refused to give CMN pole-attachment service on terms it gives others. In its Answer, Respondent contests the conclusions that its conduct violates applicable statutes or regulations or that its application-processing speed is unreasonably slow, but admits material facts supporting those conclusions.

Respondent admits that it caps CMN attachment applications at 300 poles per rolling 30-day period (“the 300 Pole Restriction”) and that this limitation is not expressed in its Tariff, but contends that “application of this [300 Pole Restriction] rule does not make the Windstream’s [*sic*] actions unreasonable or unlawful.” Answer ¶11. Respondent also admits that it is a direct competitor of CMN and that it cited invoices from its affiliate Windstream KDL, LLC (“KDL”) about make-ready charges for Duke Energy poles in Indiana as a reason not to agree with CMN to provide pole-attachment service in Fayette County, Kentucky, on the same higher-volume and -speed terms as provided to the Kentucky Information Highway (“KIH”) project. Answer ¶¶ 10, 22, 27. Admitting that it entered into a high-volume agreement with KIH, Respondent asserts that its “relationship with KIH is inherently different” from that with CMN, although “the projects may be similar.” *Id.* ¶27. Testimony and responses to information requests filed on

behalf of Windstream East suggest that it may be attempting to justify or excuse its slow and discriminatory processing of CMN applications. Respondent does not explain the significance or relevance of these contentions or “affirmative defenses” in the light of its Tariff and Kentucky’s standards for categorization or discrimination among service customers.

One fact from the discrimination issue deserves particular note. In its Answer, Respondent affirmatively pleaded: “In all circumstances, except for the Kentucky Information Highway (‘KIH’) Amendment, Windstream has included the 300-pole rule in its pole attachment agreements.” Answer ¶5 (emphases added). The single stated exception was for the KIH Amendment, which had been attached to CMN’s Complaint. As it turns out, however, this Answer statement is indisputably false. A cap on applications to 300 poles in any 30-day period does appear in the initial (or underlying) KIH Agreement and the agreement form provided to CMN in November/December 2017 as Windstream’s “standard” agreement. There is no 300-pole rule, however, in other pole attachment agreements between Respondent and, for example, New Cingular (dated 9/15/17, WIN 1473-1507), Wild Communications (dated 9/18/13, WIN 900-34), Crown Castle (dated 9/3/14, WIN 1541-72), and AT&T (dated 9/4/96, WIN 1362-99; dated 6/18/08, WIN 2598-47). In its Request No. 35, CMN gave Respondent the opportunity to correct the false statement in its Answer; however, Respondent not only refused to admit what is on the face of the New Cingular agreement (that it has no cap), but also denied that it has any obligation to identify other agreements that do not cap application volume. *See* Response to 2 CMN 35(a), (b). Instead, Respondent leaves it to CMN to “sort through” the agreements to figure out which lack the 300 pole cap or which contain enforceable commitments to prompt time frames (*id.* 2 CMN 35(b), 36(b), 37(b)) — despite that Respondent has fully redacted most of the recent agreements it has produced in this proceeding.

3. Relief. On the record made by the parties' pleadings, responses to information requests, and direct and rebuttal testimony, there is no dispute about any material fact. Most of the facts presented by a party in this proceeding are admitted by the other, undisputed, or disputed only as to their characterization or conclusion applied to the facts (*e.g.*, what is "reasonable"). As a matter of law, Windstream's pole-attachment service to CMN and its terms and conditions therefor violate KRS ch. 278 mandates and Commission requirements. CMN should be granted relief on its Complaint.

In its Complaint, CMN requested expedited relief requiring Windstream East to process a higher volume of pole-attachment applications more quickly, and suggested standards, terms, and conditions to which it could be held. To put a stop to Respondent's delays, CMN asks for a timely, enforceable Commission mandate that Respondent give CMN reasonable, nondiscriminatory pole attachment service without preconditions not contained in its Tariff.

LIST OF WITNESSES

The witnesses who have presented direct or rebuttal testimony on behalf of CMN or who have been listed as the witness on a response to an information request by Commission Staff or Respondent, with a brief description of their relevant testimony, are listed below. CMN notes that there is no need for an evidentiary hearing because there is no genuine dispute about any material fact. However, if such a hearing is held: (1) CMN would present Mr. Greenbank and Ms. Larson as witnesses; (2) might present information through cross-examination of witnesses presented by Respondent; and, (3) reserves the right to present additional witnesses or testimony in response to or rebuttal of issues raised or information disclosed or otherwise produced by Respondent after the deadline for responding to the second set of information requests.

1. John Greenbank, Executive Vice President, CMN and its MetroNet affiliates, with responsibility, *inter alia*, for overseeing construction efforts, including the overbuilding of Fayette County with a 100% FTTP network in accordance with CMN's franchise from LFUCG. Mr. Greenbank has provided information about CMN, its LFUC Project, negotiations with Windstream representatives, CMN's experience with applications and attachment to Respondent's poles and its contrasting experience with other pole owners, especially Kentucky Utilities Company ("KU"); the capability of CMN, its MetroNet affiliates, and their contractors to fulfill the functions and responsibilities of an attacher to poles; the effect on CMN of Respondent's restrictions and delays; and the feasibility of higher and quicker processing rates by Respondent. He has provided information on these and other topics in verified testimony and responses to information requests as follows:

- Direct Testimony, filed September 5, 2018
- Rebuttal Testimony, filed October 12, 2018
- CMN responses to information requests on which Mr. Greenbank was listed as a witness:
 - 1 PSC 2-5, 9-15, 17
 - 1 WIN 1, 4-8, 10-14, 17, 18
 - 2 PSC 4, 6, 7, 8, 9, 11
 - 2 WIN 1, 2, 3, 4

2. Anita Larson, Vice President and Senior Counsel for CMN and its MetroNet affiliates, with responsibility, *inter alia*, for providing legal support to MetroNet's construction group. Ms. Larson has provided information about: feasibility and requirements for Respondent to process attachment requests at a higher volume and rate than it provides to CMN; negotiations and communications with Windstream representatives; contracts (including the LFUCG Franchise) to which CMN or a MetroNet affiliate is a party or which CMN has produced in

response to information requests; FCC regulations and orders; and, Windstream Group positions taken in FCC proceedings. She has provided information on these and other topics in verified testimony and responses to information requests as follows:

- Rebuttal Testimony, filed October 12, 2018
- CMN responses to information requests on which Ms. Larson was listed as a witness:
 - 1 PSC 1, 6-9, 16
 - 1 WIN 2, 4, 8, 9, 15, 16
 - 2 PSC 2(a), 3, 5-7, 9-11
 - 2 WIN 2

3. Kevin Stelmach, Executive Vice President and General Manager, CMN and its MetroNet affiliates. CMN does not anticipate calling Mr. Stelmach as a witness at any evidentiary hearing that might be held. Mr. Stelmach was named as the witness responsible for responding to questions related to information provided by CMN in response to 2 PSC 2(b)-(c) about communications of CMN or MetroNet with Duke Energy relating to a dispute about invoices for attachment to Duke Energy poles in Indiana.

LIST OF EXHIBITS

CMN anticipates that verified testimony and responses to information requests are part of the record and will be available for use at any hearing in this matter. It also anticipates that it would not present any document, compilation of data, etc. at an evidentiary hearing that has not already been filed and served by one of the parties. CMN reserves the right to use any exhibit listed by Respondent and to present at hearing exhibits that are demonstrative or are in response to or rebuttal of (a) issues raised by Respondent or (b) exhibits or other information disclosed or produced by Respondent after this point.

Among the documents produced or exhibits attached by the parties to testimony or information responses, the ones likeliest to be referred to, relied upon, or otherwise presented by CMN at an evidentiary hearing are the following:

1. Windstream East's CATV Pole Attachment Tariff P.S.C. KY NO. 11
2. form Pole Attachment License Agreement, WIN ILEC vrs 9.23.15 (*Poles only*), sent by Windstream to CMN in November 2017 (CMN 00387-418)
3. Greenbank Rebuttal Testimony Exhibits 1 (CMN 00611-14) and 2 (CMN 00615)
4. Larson Rebuttal Testimony Exhibit 1 (CMN 00618-20)
5. Lathan Direct Testimony Exhibits 1 (WIN 0872) and 2 (WIN 0873-79)
6. Windstream press releases dated 5/19/18 (CMN 00185-86) and 9/24/18 (CMN 00419-21)
7. Windstream East-KIH Pole Attachment License Agreement and First Amendment (WIN 00268-302, 0264-67)
8. other examples of attachment contracts, drawn from those produced by Windstream East (WIN 0882-3013, 7835-71)
9. emails by Windstream employees dated 9/5/17 (CMN 00178-80), 1/18/18 (CMN 00321-23), 2/14/18 (CMN 00329-31), 3/20-21/18 (CMN 00337-38), and 4/11/18 (CMN 00344-47)
10. examples of Windstream East make-ready (estimated charge) invoices (CMN 00183-84)

QUESTIONS OF LAW

CMN does not anticipate that any unresolved legal issues will arise at a hearing or be involved in the determination of this case. The legal principles involved have been established by statute, regulation, and Commission order; the task at hand is to apply those principles to the facts of this case, and to identify which facts are (or are not) material. On the material facts

(which are undisputed), Respondent's conduct has been and continues to be in violation of its Tariff and laws that proscribe (1) enforcement of terms and conditions that are not in its Tariff, (2) providing CMN pole attachment services that are unreasonable, insufficient, and inadequate, and (3) subjecting CMN to an unreasonable prejudice or disadvantage, that concomitantly subsidizes Respondent's nonregulated activities, affiliates, or other customers. With supporting authority cited, the basic legal principles are:

1) Commission jurisdiction:

a) rates and service, generally: The Commission has exclusive jurisdiction over the regulation of utility rates and service. KRS 278.040(2); *Simpson County Water Dist. v. City of Franklin*, 872 S.W.2d 460, 463-64 (Ky. 1994). The Commission's implementing rules and regulations adopted pursuant to KRS 278.040(3) have the force and effect of law. *Union Light, Heat & Power Co. v. PSC*, 271 S.W.2d 361, 364 (Ky. 1954). It has original jurisdiction over "complaints as to rates and services." KRS 278.260(1).

b) pole attachments: Commission jurisdiction extends to utilities' poles and to the "rates" and "services" relating to others' attachment to those poles. *Kentucky CATV Ass'n v. Volz*, 675 S.W.2d 393, 396 (Ky. App. 1983); Adm. Case No. 251, *The Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments*, 8/26/81 Initiating Order (asserting jurisdiction over rates, terms, and conditions for pole attachment space). The Commission has exercised that jurisdiction, particularly with respect to *Kentucky CATV*, 675 S.W.2d at 396-97; Adm. Case No. 251, 9/17/82 Amended Order on Rehearing p.3 ("[A]s a tariff customer, each qualified CATV operator must have the right to receive service (make pole attachments)."). See also Case No. 2004-00036, *Ballard Rural Tel. Coop. v. Jackson Purchase Energy Corp.*, 8/2/04

Order (ruling that if unable to agree on rates for telephone-service-provider pole attachments, a pole owner or attacher may petition the Commission for a determination of rates).

2) Tariff requirement: In this proceeding and in its dealings with CMN, Respondent treats its Pole Attachment Tariff as a superfluous document rather than a schedule “showing all rates and conditions for service established by it and collected or enforced.” KRS 278.160(1); *see also* 807 KAR 5:006 §22(2) (“tariffs of the utility shall establish the rates, terms, and conditions under which the utility's facilities may be used” for cable television pole attachments). “A utility shall not establish a special rule or requirement without first obtaining the approval of the commission.” 807 KAR 5:006 §6(1). Unless otherwise authorized by Commission regulation, “a utility shall not deny or refuse service to a customer who has complied with all conditions of service established in the utility’s tariff on file with the commission.” 807 KAR 5:006 §6(2) (emphasis added).

3) Reasonable/adequate service. “Every utility shall furnish adequate, efficient and reasonable service, and may establish reasonable rules governing ... the conditions under which it shall be required to render service.” KRS 278.030(2). Adequate service requires that a utility “have sufficient capacity to meet [a customer’s] maximum estimated requirements ... [and] the maximum estimated requirements of other actual customers to be supplied from the same lines or facilities...” KRS 278.010(14) (emphases added). Utility customer complaints expressly recognized by statute may be for “unreasonable” rates, service that is “inadequate or cannot be obtained,” or services, practices, or acts that are “unreasonable” or “insufficient.” KRS 268.260(1). Time frames and other standards for the extension or provision of service by a telephone utility are specified in 807 KAR 5:061 §§ 8 and 10. Commission regulations do not permit the refusal

or termination of service to a customer for disputing a bill or for a claimed debt to an affiliate. See 807 KAR 5:006 §§ 11(6), 12, 15.

4) Discrimination/subsidization: A utility is not to “subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service....” KRS 278.170(1); *see also* KRS 278.030(3) (permitting “suitable and reasonable classifications of its service, patrons and rates”). Free or reduced rates may be given only to the narrow categories and on the conditions expressly provided in KRS 278.170(2) and (3). There are, additionally, prohibitions and regulations to prevent subsidization by regulated utility services of a utility’s nonregulated activities and affiliates. *See, e.g.*, KRS 278.2201, 278.2213(11), 278.514(1). “Utility customer complaints expressly recognized by statute may be for rates, services, practices, or acts that are “unjustly discriminatory.” KRS 278.260(1). “The manifest purpose of the Public Service Commission is to require and insure fair and uniform rates, [and] prevent unjust discrimination....” *Simpson County*, 872 S.W.2d at 464.

QUESTIONS OF FACT

CMN does not anticipate that any questions of material evidentiary fact are disputed or that an evidentiary hearing is needed to support Commission findings of violations by Windstream East. Substantial, undisputed evidence — including admissions and facts presented by Respondent — establishes that Respondent is imposing terms, rates, and preconditions on CMN for pole-attachment service that are not in its Tariff and in violation of applicable statutory and regulatory standards. The disputes between the parties are not about “basic evidentiary facts,” but are over “a conclusion of law or a recitation of an ultimate fact” that merely parrots the

language of the statute. *See Marshall County v. South Central Bell Tel. Co.*, 519 S.W.2d 616, 619 (Ky. 1975) (distinguishing between evidentiary and legal findings).

A focus on the basic (vs. ultimate) facts shows the lack of a dispute between the parties about (a) what the actual terms, rates, and conditions of Respondent's pole-attachment service have and continue to be for CMN, and (b) Respondent's capability and agreement(s) to provide — and actual provision of — pole-attachment service more rapidly and on more favorable terms and conditions to its nonregulated activities, its affiliates, and others than to CMN. In contrast, any dispute about what is “unreasonable” or “inadequate” (for example) is over a legal conclusion or ultimate fact to be determined by the Commission.

Undisputed Facts

1. Windstream East is imposing terms, rates, and preconditions on CMN for pole-attachment service that are not in its Tariff.

CMN is receiving pole attachment service from Respondent under the Tariff. The Tariff (a) does not restrict the number of poles to which a tariff customer may apply within a 30-day period, (b) has the sole timing precondition that the customer apply for attachment no less than 45 days “prior to the time the CATV company desires to attach its equipment to [Respondent's] poles” (Tariff S1.4), and (c) requires (pre)payment of make-ready charges, but not any per-application or per-pole fee. Undisputed evidence establishes that Respondent has capped CMN applications at 300 poles per 30-day period, takes more than 45 days from the submission of CMN applications to have poles ready for attachment, and requires CMN to pay \$75 per application and \$50 per pole applied-for.

2. Windstream East is capable of (and agreeable to) providing pole-attachment service without the 300-Pole Restriction and in a shorter period between application and attachment.

On a similar project, in Kentucky, Respondent provided rapid, high-volume attachment application processing for KIH — processing applications for 8597 poles from August 2016 to May 2017 — and did so without hiring additional Kentucky-based employees. Respondent has pole attachment agreements with others, including current attachers in the Fayette County area, that do not cap applications and contain provisions for more rapid processing. The Windstream Group owns or controls poles in 15 states to which the FCC time frames for low- and high-volume applications apply. Windstream-prepared documents diagramming and explaining the processing of pole applications (including for Kentucky poles) specify the FCC time frames. In July 2018, Windstream Group expressly supported the FCC's adoption of the even faster, more streamlined One-Touch-Make-Ready process for pole attachments.

3. Windstream has provided pole-attachment services to others on more favorable terms and conditions than to CMN.

As noted in point 2 above, Respondent has entered into contracts with other attachers that do not cap their applications and contain standards for more rapid processing, and it has actually provided such high-volume processing to KIH under such an agreement. CMN's December 2017 inquiry about entering into an agreement with the KIH high-volume terms was rebuffed, and the reason given was that there were outstanding invoices to CMN involving a Windstream affiliate. Respondent's nonregulated activities or affiliates do not apply for (or, apparently, pay rent for) attachment, but simply use Windstream East facilities which get the priority and prerequisites of pole ownership and the joint-use arrangement with KU. Respondent provides service

under the Tariff to two other current attachers in Fayette County, Charter Communications and Spectrum Cable (*see* Response to 2 CMN 19(b)); if it is adhering to its Tariff with them, then it is disadvantaging CMN relative to them as well. In addition, all the evidence that CMN has yet to come across is that Respondent extracts a \$50/pole fee in the application process from no attacher other than CMN.

Immaterial “Facts”

Some of Respondent’s assertions in this case are not about basic evidentiary facts, but are characterizations or generalizations. For example, testimony on behalf of Respondent asserts that CMN “struggles” to submit complete and satisfactory applications to Windstream East. *See* Daniel King Direct Testimony p.6 *ll.*22-3. This characterization is based on four applications rejected by Duke Energy that CMN submitted in 2017 for poles located in Indiana. These instances are not about Kentucky poles or Windstream East, and are few and remote enough (in time and place) to be inapposite. Furthermore, it is completely irrelevant whether CMN “struggles” to submit acceptable applications if — as evidence shows — it actually does submit complete and satisfactory applications to Windstream East. Even more important, the point is immaterial. The issue here is not whether Respondent is rejecting CMN applications for being incomplete or “unsatisfactory,” but whether Respondent is violating its Tariff and regulatory mandates by rejecting applications for being too numerous.

There are other factual disputes that are immaterial because the conclusion is the same no matter whether the Commission finds in CMN’s or Respondent’s favor on the point. For example, Respondent has expressed concern that CMN will not promptly and fully pay make-ready cost estimates or other charges. A “concern” or other speculation about what might happen in the future is not a basic evidentiary fact, and Respondent’s concern is not relevant since it does

not provide any evidence that protections built into its Tariff (*e.g.*, prepayment, a bond requirement) are insufficient measures to limit the risks from non-payment. Similarly, although the evidence is that both CMN and Windstream KDL have disputed the Duke Energy invoices, Respondent asserts that CMN's non-payment of those invoices is somehow unjustified. But even if there were evidence that it was unjustified (and CMN has provided evidence to the contrary), an unpaid debt to an affiliate or other third party could not make it acceptable under Kentucky law for Respondent to refuse service to CMN or to provide it with service on disadvantaged terms and conditions. Another example of an immaterial dispute is the one over Respondent's claims that MetroNet contractors' negligence caused damage to Windstream facilities during underground installation of cable fiber. Respondent has not provided any evidentiary facts of damage to its facilities or those of other attachers from MetroNet contractors' work on its poles, or of any accident, injury, or claim arising from such work. Furthermore, Respondent has not shown how any such incidents or damage that might occur in the future would allow it to process CMN's applications more slowly today or to otherwise add non-Tariff preconditions for receiving pole attachment service.

A rate, term, or condition regarding pole-attachment service or its application might be unreasonable or unjustly discriminatory even though it is in a filed tariff. But it is always wrong for a utility to enforce a rate or condition for service to a tariff customer that is not in the tariff. KRS 278.160; 807 KAR 5:006 § 22(2), §6. The lack of any defense by Respondent grounded in its Tariff makes practically all of the issues it raises irrelevant — and disputes about its contentions, assertions, and facts immaterial.

CONCLUSION

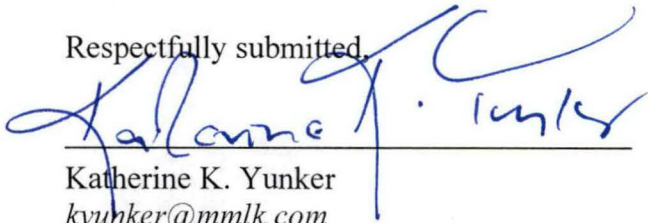
The 300 Pole Restriction and the long lags between CMN's submittal of an application and the license to attach to Windstream poles are "rates and conditions for service" not in the Tariff. The relative simplicity of that conclusion also simplifies remedial considerations, permitting a straightforward injunction to Respondent to accept applications without capping the number and process them in no more than 45 days and to not charge CMN fees that are not in its Tariff. To give CMN the expedited relief it has requested, and to best remedy and prevent further time losses, however, may require something more than to order Respondent to comply with its Tariff and stop setting *ad hoc* or special preconditions for CMN to attach to its poles that are neither in its Tariff nor consistent with its utility obligations.

CMN respectfully suggests that there must be clear, definite, and unavoidable standards for Respondent to meet in processing applications in a timely manner. The FCC standards from the 2011 Order have been applicable to the Windstream Group in many of the jurisdictions in which it has poles, are part of the Windstream Group's internal time frames for processing applications (including for Kentucky), and are included in Windstream East agreements with current pole-attachers in Fayette County. The FCC standards thus would be workable as a benchmark for Windstream East's timely performance of its service obligations.

Respondent has been charging CMN a \$75 per application fee and a \$50 per pole fee — neither of which are in the Tariff. To expedite this matter and effective relief, CMN respectfully suggests that the issue of a refund be left for CMN to raise (if it chooses) in a separate, later proceeding. Similarly, rather than attempt *a priori* to determine what charges to CMN might be consistent with the Tariff for a higher rate and throughput of applications, the Commission could reserve that issue to be determined on the basis of what actually happens, if the issue is raised by

Windstream East in a separate, later proceeding. Either party could raise a claim for refund or further payment as an offset or counterclaim in a proceeding brought by the other, to “balance the books” on the entire LFUC project.

Respectfully submitted,



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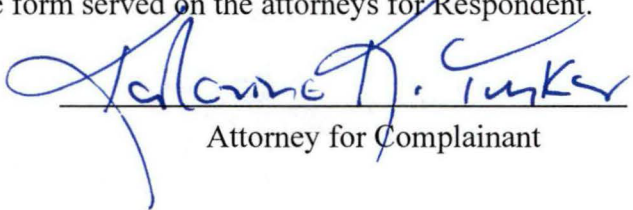
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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 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 Prehearing Brief in the form served on the attorneys for Respondent.



Attorney for Complainant