

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CMN-RUS, INC.)	
)	
COMPLAINANT)	
)	CASE NO.
V.)	2018-00157
)	
WINDSTREAM KENTUCKY EAST, LLC)	
)	
DEFENDANT)	

ORDER

On August 27, 2018, Windstream Kentucky East, Inc. (Windstream East) filed a motion, pursuant to 807 KAR 5:001, Section 13 and KRS 61.878, requesting that the Commission grant confidential protection indefinitely to contracts or portions of contracts between Windstream East and pole attachers or pole owners produced in response to Commission Staff's First Request for Information (Staff's First Request), Items 7 and 8. On September 7, 2018, and October 1, 2018, Windstream East produced additional pole attachment contracts and filed supplemental motions for confidential treatment requesting that portions of those contract be kept confidential. On December 4, 2018, following a settlement by the parties, Windstream East and CMN-RUS, Inc. (CMN) filed a joint motion requesting confidential treatment for the Pole Attachment License Agreement between Windstream East and CMN and the First Amendment to Pole Attachment License Agreement, both of which the parties entered into as a result of the settlement resolving the dispute in this matter. On December 28, 2022, Windstream East filed a motion requesting confidential treatment for its Joint Pole Use Agreement Between Kentucky

Utilities Company (KU) and GTE South Incorporated (dated September 1, 1997) that was provided in an un-redacted format with its August 27, 2018 response to Staff's First Request and requested that the unredacted version be removed from the public record. These motions are now before the Commission for a decision.

BACKGROUND

Windstream East produced a number of contracts in response to Commission Staff's First Request for Information, Item 7 and Item 8. In its earlier motions, Windstream East requested that 11 of those contracts be treated confidentially in whole due to confidentiality clauses in the contracts and that the amount of specific fees and charges, or pricing terms, be kept confidential in most of the others regardless of whether they contained a confidentiality provision. In its December 28, 2022 motion, Windstream East requested confidential treatment for the entirety of the Joint Pole Use Agreement Between KU and GTE South Incorporated, which was previously produced publically.¹

The contracts with confidentiality charges for which Windstream East requested confidential treatment for all terms and conditions are:

1. Pole Attachment License Agreement by and between Windstream Kentucky East, LLC and South Central Telecom (WIN1408 through WIN1439);
2. Wireless Attachment Pole Attachment License Agreement by and between Windstream Kentucky East, LLC and KY Backhaul Transmission Networks, LLC (WIN1440 through WIN1472);
3. Wireless Attachment Pole Attachment License Agreement by and between Windstream Kentucky East, LLC and New Cingular Wireless PCS, LLC (WIN1473 through WIN1507);

¹ In its December 28, 2022 motion, Windstream East requested confidential treatment for the agreement bate stamp number WIN0245 through WIN0263, which was produced in response to CMN's first request for information. However, it appears that the same agreement was also produced in response to Staff's First Request at bate stamp number WIN2488 through WIN2506.

4. Pole Attachment License Agreement by and between Windstream Kentucky East, LLC and Fiber Technologies Networks, LLC (WIN1508 through WIN1540);
5. Pole Attachment License Agreement by and between Windstream Kentucky East, LLC and Fiber One I, LLC (WIN1612 through WIN1644);
6. Wireless Attachment Pole Attachment License Agreement by and between Windstream Kentucky East, LLC and Fiber Technologies Networks, LLC (WIN1645 through WIN1677);
7. Pole Attachment License Agreement by and between Windstream Kentucky East, LLC and Bluegrass Network, LLC d/b/a Bluegrass Telecom (WIN1678 through WIN1709);
8. Time Warner Cable Midwest, LLC Attachment/Occupancy License Agreement (WIN2526 through WIN2564);
9. General Agreement for Joint Use of Poles Between Jackson Energy Cooperative and Windstream Kentucky East, LLC (WIN2875 through WIN2910);
10. Joint Use Pole Agreement Between Bluegrass Energy Cooperative Corporation and GTE South Incorporated (WIN7835 through WIN7856); and
11. Agreement between Kentucky Data Link, Inc. and Shelby Energy Cooperative, Inc. (WIN7857 through WIN7871).²

The first seven agreements listed above concern requests by other persons to attach to Windstream East's poles, and based on the title page and table of contents alone, which Windstream East filed publically, they appear to be versions of Windstream East's standard license agreement. The last four contracts are agreements with other pole owners regarding the joint use of poles or Windstream East's attachments to the pole owner's poles.

² See Windstream East's Response to Staff's First Request, Items 7 and 8, Confidential Attachments WIN1408-WIN1439, WIN1440-WIN1472, WIN1473-WIN1507, WIN1508-WIN1540, WIN1612-WIN1644, WIN1645-WIN1677, WIN1678-WIN1709, WIN2526-WIN2564, WIN2875-WIN2910; Windstream East's supplemental response to Staff's First Request, Item 8, Confidential Attachment, WIN1473-WIN1507; Windstream East's Second Supplemental Response to Staff's First Request, Item 8, Confidential Attachment, WIN7835-7871.

The contracts for which Windstream East only requests confidential treatment for specific charges or fees are primarily contracts governing attachments to Windstream East's poles or contracts governing the joint use of poles between Windstream East and other regulated utilities,³ but the contracts also include joint use agreements with cities and Tennessee Valley Authority (TVA) electric cooperatives.⁴ The specific charges and fees for which Windstream East requests confidential treatment, include annual rental rates for pole attachments and conduit access, Pole Attachment Request Fees, Application Fees, Request Documentation Fee, Transfer of Attachment Fee, and Agreement Fees.⁵

Windstream East argued that all of the terms and conditions in the contracts with confidentiality clauses must be kept confidential, because it entered into those contracts in a competitive field based on the promise that they would be kept confidential. Windstream East argued that public disclosure of those contracts would constitute a breach and that would subject Windstream East to damages and possibly result in a loss of business to Windstream East. It indicated that confidential treatment was necessary for the terms and conditions in those contracts to protect its business and proprietary

³ See Windstream East's Response to Staff's First Request, Items 7 and 8, Confidential Attachments WIN900-WIN1408, WIN1540-WIN1612, WIN1709-WIN2526, WIN2564-WIN2875, WIN2911-3013.

⁴ See, e.g. Windstream East's Response to Staff's First Request, Items 7 and 8, Confidential Attachments WIN2303-WIN2330, WIN2359-WIN2381, WIN2509-WIN2525, WIN2780-WIN2821, WIN2872-WIN2874.

⁵ See, e.g. Windstream East's Response to Staff's First Request, Items 7 and 8, Confidential Attachments WIN0927, WIN1045, WIN1094, WIN1129, WIN1167, WIN1210, WIN1248, WIN1284, WIN1319, WIN2354, WIN2360, WIN2363, WIN2388, WIN2408, WIN2428, WIN2446, WIN2464.

interests. Thus, Windstream East argued that the contracts should be treated confidentially pursuant to KRS 61.878(1)(c) indefinitely.⁶

Windstream East argued that the specific charges and fees in the various pole attachment contracts are generally treated as confidential and that disclosure of the charges and fees would place it at a competitive disadvantage. Windstream East also asserted that information regarding rates charged are irrelevant to this case, because it relates only to the reasonableness of its procedures for reviewing pole attachment applications. Thus, Windstream East argued that the specific charges and fees for pole attachments should be exempt from disclosure pursuant to KRS 61.878(1)(c)1 regardless of whether the contract contains a confidentiality clause.⁷

CMN responded to Windstream East's motions for confidential treatment, and among other things, argued that pole attachments are a utility service regulated by the Commission since the 1980s and that Windstream East 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."⁸ CMN noted that Windstream East's main "competitors" for providing pole attachment service in Fayette County are Kentucky Utilities Company and Blue Grass Energy, both of which, along with Windstream East, have publically filed tariffs and contracts with Windstream East such

⁶ Windstream East's Motion for Confidential Treatment of Rates and Confidential Contracts (filed Aug. 27, 2018); *see also* Windstream East's Supplemental Petition Confidential Treatment of Rates and Confidential Contracts (filed Sept. 7, 2018); Windstream East's Petition for Confidential Treatment of Additional Confidential Contracts (filed Oct. 1, 2018).

⁷ Windstream East's Motion for Confidential Treatment of Rates and Confidential Contracts (filed Aug. 27, 2018); *see also* Windstream East's Supplemental Petition Confidential Treatment of Rates and Confidential Contracts (filed Sept. 7, 2018).

⁸ CMN Response in Opposition to Windstream Motion for Confidential Treatment (CMN Response to Motion for Confidential Treatment) (filed Sept. 4, 2018) at 3.

that they have access to information regarding pole attachment practices.⁹ CMN also noted that pole attachments are not a competitive field and that nothing establishes that pole-attachment agreements have been kept confidential. CMN asserted that many of the contracts with confidentiality clauses appear to be form agreements with standardized terms and conditions, which weighs against finding that their disclosure will permit an unfair commercial advantage to competitors, and that the confidential clause in the Windstream East's publically available form contract allows disclosure "to respond to any requests by governmental or judicial authorities."¹⁰ Thus, CMN argued that 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).¹¹

Windstream East argued in reply, among other things, that the redactions it made outside of the contracts with confidentiality provisions were not substantial and only included charges on 79 out of about 2,000 pages and noted that it redacted only specific monetary rates (i.e. rates with specific dollar amounts). Windstream East noted that the rates are not publically available and are all rates charged to other private parties. Windstream East argued that if it was required to disclose a contract subject to a confidentiality clause that it would prevent it from being able to promise confidentiality in

⁹ CMN Response to Motion for Confidential Treatment at 3-4.

¹⁰ CMN Response to Motion for Confidential Treatment at 4-5.

¹¹ CMN Response to Motion for Confidential Treatment at 4-5.

the future, which it argued would place it at a serious business and financial disadvantage.¹²

Both Windstream East and CMN requested confidential treatment for the Pole Attachment License Agreement between Windstream East and CMN and the First Amendment to Pole Attachment License Agreement, which the parties entered into as a result of the settlement resolving the dispute in this case. They assert that agreements represent a unique agreement between the parties, which differs from any other contract for pole attachment into which Windstream East has entered. For that reason, they argued that they have a substantial interest in holding the contracts confidential. They request confidential treatment for an indefinite period to protect business and proprietary interests.¹³

On December 28, 2022, Windstream East filed a motion requesting confidential treatment for its Joint Pole Use Agreement Between KU and GTE South Incorporated that was provided in an un-redacted format with its August 27, 2018 response to Staff's First Request and CMN's first request for information, and requested that the unredacted version be removed from the public record. Windstream East argued that providers of the services offered by Windstream East, including wireless, retail and wholesale telephone services and telephone-related services, operate in a highly competitive marketplace where confidential information such as that contained in joint use agreements is closely

¹² Windstream East's Reply of CMN-RUS, Inc.'s Response to Windstream East's Motion for Confidential Treatment of Rates and Confidential Contracts (filed Sept. 7, 2018); Windstream East's Reply of CMN-RUS, Inc.'s Response to Windstream East's Supplemental Petition Confidential Treatment of Rates and Confidential Contracts (filed Sept. 19, 2018).

¹³ Joint Motion of CMN and Windstream East for Confidential Treatment for Pole Attachment Agreement and Amendment (filed Dec. 4, 2018).

guarded to insure it is not disclosed to competitors. Windstream East argues that continued disclosure of the KU and GTE South contract would “result in significant or irreparable harm to Windstream East and its vendors” and serves no public purpose.¹⁴ Windstream East argued that confidential treatment had been granted for similar contracts in Case No. 2014-00371 and Case No. 2016-00371.¹⁵

LEGAL STANDARD

The Commission is a public agency subject to Kentucky's Open Records Act, which requires that all public records “be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884.”¹⁶ KRS 61.878(1)(c)1 exempts records that are “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.” KRS 278.160(3) also specifically exempts from public disclosure special contract terms containing rates and conditions of service that are not filed in a utility’s general schedule and would otherwise be entitled to confidential treatment under KRS 61.878(1)(c)(1). The party requesting that materials be treated confidentially has the burden of establishing that one of the exceptions is applicable.¹⁷

¹⁴ Petition for Confidential Treatment of Windstream East's Answers to First Set of Requests for Information from CMN Request No. 13 (filed Dec. 28, 2022) at 2-4.

¹⁵ Petition for Confidential Treatment of Windstream East's Answers to First Set of Requests for Information from CMN Request No. 13 (filed Dec. 28, 2022) at 3.

¹⁶ KRS 61.872(1).

¹⁷ 807 KAR 5:001, Section 13 (2)(c).

DISCUSSION

Windstream East seeks to have all terms and conditions of 11 contracts treated confidentially based on the inclusion of a confidentiality clause in the contracts. However, as exceptions in the various confidentiality clauses recognize, the inclusion of a confidentiality clause in a contract will not shield it from disclosure if disclosure is required by law. Thus, while the Commission may consider the confidentiality clause in its analysis, the contracts should only be treated confidentially if Windstream East established that they are exempt from disclosure pursuant to KRS 61.878(1)(c)1, which was the basis for the request for confidential treatment.

Here, as noted by CMN based the publically filed cover page and table of contents, the bulk of the contracts for which Windstream East seeks to keep all terms and conditions confidential are based on or are versions of the Pole Attachment License Agreement Windstream provided to CMN when it was considering making an attachment request.¹⁸ Windstream East described the contract it gave to CMN, which is attached to the Complaint in this matter, as its “standard Pole Attachment License Agreement,”¹⁹ and it is apparent that Windstream East sought to have all attachers sign a version of its standard attachment contract, to which a confidentiality provision as added at some point. However, the fact that Windstream East provides the current version of its standard contract to potential attachers when requested raises questions regarding whether the general terms of the contracts are treated as confidential.

¹⁸ The title pages and the table of contents of the contracts were publically produced and are largely consistent with the form standard contract that was publically produced. The pages produced publically also include notations at the bottom similar to the standard contract attached to the complaint.

¹⁹ Windstream East’s Answer at paragraph 15 (filed Jun 1, 2018).

More importantly, there was no evidence presented with respect to any contract with a confidentiality clause that the disclosure of a specific term, other than the rates discussed below, would place Windstream East or CMN at a competitive disadvantage. In fact, Windstream East's primary argument seemed to be that the failure to honor a confidentiality clause in a contract would place Windstream East at a competitive disadvantage, because it would make it more difficult for Windstream East to contract in the future if parties could not obtain confidentiality. There was no evidence presented that the information in the contracts that Windstream East and CMN sought to keep confidential could actually place Windstream East or its counter parties at a competitive disadvantage (e.g. some highly technical term related to a proprietary technology or processes). Further, Windstream East publically produced every contract related to pole attachments that did not include a confidentiality provision, except for certain pricing terms, such that disclosure of additional similar contracts are unlikely to place the parties at a competitive disadvantage. Thus, the Commission finds that Windstream East, and CMN with respect to the settlement and license agreement in this case, failed to establish that all of the terms and conditions of the contracts with confidentiality clauses should be granted confidential treatment.

There is similarly no evidence that disclosure of the Joint Pole Use Agreement Between KU and GTE South Incorporated would place Windstream East or any other party at a competitive disadvantage. The terms of the agreement appear to be broad and generic like those of the other pole attachment agreements that have been disclosed publically, and while Windstream East broadly stated that disclosure of the agreement as a whole would place it and its venders at a competitive disadvantage, it did not identify any

specific term for which the disclosure would place Windstream East or any other party at a competitive disadvantage. Further, while the Commission did grant confidential protection to certain pole attachment agreements in Case No. 2016-00371, the Order provided little description of the agreements to compare to the agreement at issue here and the grant of confidential protection was limited to 5 years, with the exception of critical infrastructure system materials.²⁰ The KU and GTE agreement at issue is from 1997, was publically disclosed about four and half years before a request for confidential treatment was even made, and there has been no evidence that it contains critical infrastructure or other information the disclosure of which could place a party at a competitive disadvantage. Finally, since the decision in the cases referred to be Windstream East, the Commission adopted a more comprehensive pole attachment regulation such that the types of generic terms often applicable to pole attachments in Kentucky are widely available.²¹ Thus, the Commission finds that Windstream East failed to establish that the KU and GTE agreement should be granted confidential treatment.

Conversely, as noted by Windstream East, the Commission has granted confidential treatment to certain financial information and pricing terms special contracts pursuant to KRS 61.878(1)(c)1 based on the premise that its disclosure could place the

²⁰ Case No. 2016-00371, *Electronic Application of Louisville Gas and Electric Company for an Adjustment of its Electric and Gas Rates and for Certificates of Public Convenience and Necessity* (Ky. PSC Dec. 10, 2018), Order.

²¹ See 807 KAR 5:015; see, e.g. Case No. 2022-00105, *Electronic Investigation of the Proposed Pole Attachment Tariffs of Investor Owned Electric Utilities* (Ky. PSC Dec. 28, 2022), Order. The Commission recognizes that the GTE and KU agreement is a joint use agreement as opposed to the type of pole attachment service that would be taken pursuant to a tariff. However, Windstream East is requesting confidential treatment for the full GTE and KU agreement, despite most of the terms being generic and similar to those in other pole attachment agreements.

utility at a competitive disadvantage.²² While there are questions regarding how the disclosure of regulated pricing terms in a special contract could place the utility at a competitive disadvantage, and it may be appropriate to revisit those decisions in the future, there application does justify granting Windstream East's request for confidential treatment as to the rates in the pole attachment agreements. Thus, the Commission finds that Windstream East's motions and CMN's joint motion with Windstream East should be granted with respect to the pricing terms for which confidential treatment was sought in the contracts that do not contain a confidentiality provision and with respect to similar pricing terms in the contracts for which confidential treatment was sought for the full agreement.

IT IS THEREFORE ORDERED that:

1. Windstream East's motions for confidential treatment and Windstream East and CMN's joint motion for confidential treatment are granted in part and denied in part.
2. Windstream East's motions for confidential treatment are granted for the pricing terms for which confidential treatment was sought in the agreements for which confidential treatment was not sought for the full agreement, and Windstream East's motions for confidential treatment and Windstream East and CMN's joint motion for confidential treatment are granted with respect to similar pricing terms in the contracts for which confidential treatment was sought for the full agreement.

²² See Case No. 2019-00124, *Electronic Application of Kentucky Power Company for Approval of Contract for Electric Service with MC Mining, LLC* (Ky. PSC Aug. 23, 2019), Order; Case No. 2016-00052, *The Filing of Seven (7) Special Industrial Contracts by Atmos Energy Corporation* (Ky. PSC Jul. 27, 2017), Order; Case No. 2014-00368, *Valley Gas, Inc. Request for Approval of a Special Contract With Mago Construction Company and a Deviation From the Gas Cost Adjustment Clause* (Ky. PSC Oct. 28, 2014), Order.

3. Windstream East's motions for confidential treatment and Windstream East and CMN's joint motion for confidential treatment are denied for any terms other than the pricing terms.

4. Windstream East's motion for confidential treatment is denied for the KU and GTE agreement.

5. The designated material granted confidential treatment by this Order shall not be placed in the public record or made available for public inspection for an indefinite period or until further order of this Commission.

6. Use of the designated material granted confidential treatment by this Order in any Commission proceeding shall comply with 807 KAR 5:001E, Section 13(9).

7. Windstream East, or for the joint motion, Windstream East and CMN shall inform the Commission if the designated material granted confidential treatment becomes publicly available or no longer qualifies for confidential treatment.

8. If a nonparty to this proceeding requests to inspect the material granted confidential treatment by this Order and the period during which the material has been granted confidential treatment has not expired, Windstream East or CMN shall have 30 days from receipt of written notice of the request to demonstrate that the material still falls within the exclusions from disclosure requirements established in KRS 61.878. If Windstream East or CMN is unable to make such demonstration, the requested material shall be made available for inspection. Otherwise, the Commission shall deny the request for inspection.

9. The Commission shall not make the requested material for which confidential treatment was granted available for inspection for 30 days from the date of

service of an Order finding that the material no longer qualifies for confidential treatment in order to allow Windstream East or CMN to seek a remedy afforded by law.

10. If Windstream East or CMN objects to the Commission's determination that certain material not be granted confidential treatment in this Order, it must seek either rehearing pursuant to KRS 278.400 or judicial review of this Order pursuant to KRS 278.410. Failure to exercise either of these statutory rights will be deemed as agreement with the Commission's determination of which materials shall be granted confidential treatment.

11. Other than the GTE and KU agreement, which was publically filed by Windstream East, the designated material for which confidential treatment has been denied shall neither be placed in the public record nor made available for inspection for 30 days from the date of service of this Order to allow Windstream East or CMN to seek a remedy afforded by law.

12. If neither party requests rehearing or appeals this Order, Windstream East, or Windstream East and CMN for the joint motion, shall file a revised version of the designated material for which confidential treatment was denied and which was filed with redactions, reflecting as unredacted the information that has been denied confidential treatment.

PUBLIC SERVICE COMMISSION


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ATTEST:


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