

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

APPLICATION OF WINDSTREAM KENTUCKY EAST, LLC AND WINDSTREAM KENTUCKY WEST, LLC (1) FOR A DECLARATORY RULING THAT APPROVAL IS NOT REQUIRED FOR THE TRANSFER OF A PORTION OF THEIR ASSETS; (2) ALTERNATIVELY FOR APPROVAL OF THE TRANSFER OF ASSETS; (3) FOR A DECLARATORY RULING THAT COMMUNICATIONS SALES AND LEASING, INC. IS NOT SUBJECT TO KRS 278.020(1); AND (4) FOR ALL OTHER REQUIRED APPROVALS AND RELIEF

CASE NO.
2014-00283

**PETITION FOR REHEARING IN THE FORM OF CLARIFICATION OF
WINDSTREAM KENTUCKY EAST, LLC AND
WINDSTREAM KENTUCKY WEST, LLC**

Pursuant to KRS 278.400, Windstream Kentucky East, LLC and Windstream Kentucky West, LLC (collectively, "Windstream") petitions the Commission for rehearing in the form of clarification of the Order entered by the Commission in this proceeding on December 4, 2014 ("Order"). The subject of this request concerns two of the Commission's findings with respect to the operations of Communications Sales and Leasing, Inc. ("CSL"). Clarification is warranted in this instance to properly identify the appropriate entity to register as a utility and to characterize properly the nature of the income that will be received by CSL. In requesting this relief, Windstream is not asking the Commission to reconsider any of the substantive rulings set forth in its Order.

**A. A Certificate of Public Convenience and Necessity Should be Issued to CSL
Kentucky Realty, LLC Instead of CSL.**

The Order includes a finding that CSL falls within the scope of the "utility" definition under KRS 278.010(11):

The statute only requires that a person own, control, operate or manage any facility to be a utility under Kentucky law. Based on the facts set forth in the application, the Commission finds that CSL is a person that intends to own a facility for the transmission or conveyance over wire, in air, or otherwise, of any message by telephone or telegraph for the public, for compensation.¹

The Commission also found that CSL will be providing “service” as that term is defined in KRS 278.010(13) because its ownership of the facilities at issue is related to a “product used or to be used for or in connection with the business of any utility.”² Based on these findings, the Commission determined that CSL will be required to obtain a Certificate of Public Convenience and Necessity (“CPCN”) before acquiring the facilities from Windstream.³ The Commission found that it is in the public interest to grant the CPCN to CSL, and that CSL should register with the Commission as a utility.⁴

Windstream is not asking for reconsideration of the Commission’s determination that the entity holding the assets to be transferred from Windstream is required to register as a utility. Rather, Windstream requests that the Commission clarify its Order to find that the CPCN is granted to CSL Kentucky System, LLC. (“CSL Kentucky”⁵) and it is CSL Kentucky that is obligated to register with the Commission as a utility. This clarification is appropriate because it is CSL Kentucky, and not CSL, that will own the assets that are being transferred as a result of this proceeding.⁶ CSL Kentucky will be a wholly-owned subsidiary of CSL.⁷ It is consistent

¹ Order at 12.

² *Id.* at 16.

³ *Id.* at 17.

⁴ *Id.* The Commission also included this finding in Paragraph 3 of the ordering language, set forth on page 19 of the Order, as follows: “CSL is granted a certificate of public convenience and necessity to provide service in the Commonwealth, contingent upon CSL’s registering as a utility with the Commission.”

⁵ CSL Kentucky has yet to be formed. It will be formed prior to the transfer contemplated by this transaction and the appropriate information provided the Commission.

⁶ Transcript at 26-28.

with the Commission's established precedent for CSL Kentucky to be the entity to obtain the CPCN and register as a utility, and for its parent, CSL, not to be required to obtain a CPCN or register as a utility.⁸ Thus, Windstream asks that the Commission clarify its Order to specify that CSL Kentucky, and not its parent CSL, is awarded the CPCN and is obligated to register as a utility.

B. CSL Will Not Provide Utility Service and Will Receive Only Rental Income as a Result of Its Ownership of the Assets.

In finding that CSL is required to obtain a CPCN and register as a utility as a result of the transaction at issue in this proceeding, the Commission addressed whether CSL will be providing "service," as that term is defined at KRS 278.010(13). In that regard the Commission found:

The Commission must determine if the transaction will result in CSL's providing a service as defined by KRS 278.010(13) in order to determine if approval is necessary under KRS 278.020(1) for CSL to acquire assets from the Applicants. We find that CSL's owning facilities *used for providing service* for the public qualifies as service under KRS 278.010(13) because the ownership is related to a "product used or to be used for or in connection with the business of any utility."⁹

Windstream understands the Commission's Order to find that although ownership of assets used for the provision of service by a third party to the public constitutes a service for purposes of KRS 278.010(13), it did not find that the rental payments made by Windstream to CSL were payments for telecommunications or any other type of utility service. More particularly, it is Windstream's understanding that the Commission did not purport to re-characterize the rental payments to be made by Windstream and received by CSL as anything other than lease payment

⁷ Windstream Kentucky East, LLC and Windstream Kentucky West, LLC Responses to the Kentucky Cable Telecommunication Association's Requests for Information, No. 1.

⁸ For example, neither Windstream Holdings, Inc. or Windstream Communications, Inc., both of which are parents of the two Windstream applicants in this proceeding, are deemed utilities or required to register.

⁹ Order at 16.

made by Windstream Holdings, Inc. (“Windstream Holdings”) under the exclusive lease to the parent of the owner of the transferred real estate.

The clarification is required because CSL will be unable to maintain its status as a REIT if it is deemed to provide telecommunications services to the public. Under the Internal Revenue Code, a REIT must receive at least 95 percent of its revenue from dividends and rents, and the revenues generated from the provision of telecommunications services to the public will not qualify as such.¹⁰ Accordingly, with limited exceptions not applicable here, a REIT can only own real estate and receive income in the form of rent, and cannot engage in any other activities.¹¹

The transaction is dependent on CSL maintaining its status as an REIT.¹² CSL’s only activities in the Commonwealth will be conducted through CSL Kentucky, which will own the Subject Assets and lease them back to Windstream Holdings for the exclusive, long-term use by the Windstream Operating Companies.¹³ Simply stated, CSL will not be providing any telecommunications services and will not receive revenue for the provision of telecommunications services. Windstream asks that the Commission clarify that the only “services” CSL will be providing pursuant to KRS 278.010(13) will be the ownership of the real estate to be used by its exclusive lessees to provide telecommunications service. Further, Windstream seeks clarification that the Commission’s findings concerning CSL were not intended to re-characterize the nature of the rental payments as anything other than lease payment made under the exclusive lease to the owner of the transferred real estate.

¹⁰ Direct Testimony of John P. Fletcher at 8.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

C. Conclusion

Windstream respectfully requests that the Commission grant rehearing to clarify its December 4, 2014 Order by:

- (1) Declaring CSL Kentucky, and not CSL, is awarded a CPCN and is the entity required to register as a utility;
- (2) Declaring that the rental payments received by CSL will be rental income from the lease of the real estate assets to Windstream Holdings and not income from the provision of telecommunications services;
- (3) Extending until ten days after the date of the Commission's order granting the clarifications requested in this petition for rehearing the date for Windstream to accept the conditions imposed by the Commission in its December 4, 2014 order; and
- (4) Granting such further relief as necessary for the transaction to close.

Respectfully submitted,



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CERTIFICATE OF SERVICE

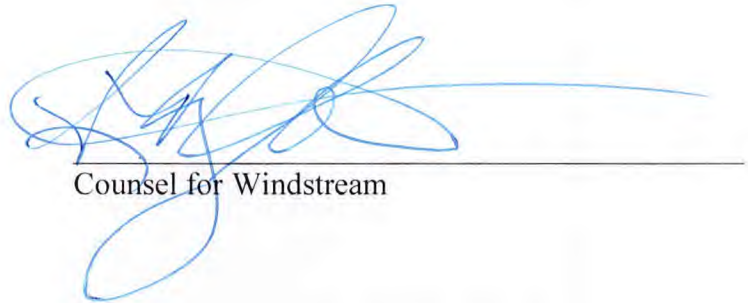
I hereby certify that a copy of the foregoing was served by United States First Class Mail, postage prepaid, on this 12th day of December, 2014 upon:

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