COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BRANDENBURG TELEPHONE COMPANY; DUO COUNTY TELEPHONE COOPERATIVE CORPORATION, INC.; HIGHLAND TELEPHONE COOPERATIVE, INC.; MOUNTAIN RURAL TELEPHONE COOPERATIVE CORPORATION, INC.; NORTH CENTRAL TELEPHONE COOPERATIVE CORPORATION; SOUTH CENTRAL RURAL TELEPHONE COOPERATIVE CORPORATION, INC.; AND WEST KENTUCKY RURAL TELEPHONE COOPERATIVE CORPORATION, INC. COMPLAINANTS V. WINDSTREAM KENTUCKY EAST, INC. DEFENDANT	)	CASE NO. 2007-00004

ORDER

On December 8, 2008, Windstream Kentucky East, LLC ("Windstream") submitted a motion to dismiss this complaint.[1] Windstream contends that significant progress has been made with respect to a majority of the complainants,[2] as those

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[1] A reply was also submitted on January 9, 2009.

[2] All of the complainants are rural local exchange carriers ("RLECs"): Brandenburg Telephone Company ("Brandenburg"); Duo County Telephone Cooperative Corporation, Inc.; Highland Telephone Cooperative, Inc. ("Highland"); Mountain Rural Telephone Cooperative Corporation, Inc.; North Central Telephone Cooperative Corporation; South Central Rural Telephone Cooperative Corporation, Inc.; and West Kentucky Rural Telephone Cooperative Corporation, Inc.

carriers have either removed transit traffic[3] from Windstream's network or they are currently engaged in negotiations for an agreement to be applied in lieu of the tariff revisions filed by Windstream on December 1, 2006.[4] Windstream also contends that dismissal is appropriate in regard to the Intervenors in this matter, as all of the Intervenors have agreements with Windstream with respect to transit traffic and, therefore, the tariffed rates have no application to them. Windstream argues that, without regard to the request for dismissal of the complaint, Windstream is entitled to maintain the existing transit tariff revisions in the event that other originating carriers use Windstream's network to carry local traffic to a party that is homed behind a Windstream tandem without having entered into a separate agreement for such a traffic arrangement. Windstream contends that, as the traffic routing issues have been

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[3] Transit traffic service is defined as a switching and transport function usually provided over the network of an incumbent carrier, such as Windstream, to allow other carriers to indirectly interconnect with one another.

[4] The tariff was effective on December 16, 2006. The Commission has previously ordered that all tariffs submitted by incumbent local exchange carriers and competitive local exchange carriers shall be filed on 15 days' notice to the Commission and may, if the Commission orders, be suspended or rejected any time within the 15-day window. See Case No. 2002-00276, Petition of BellSouth Telecommunications, Inc. for Presumptive Validity of Tariff Filings ("Order on the Validity of Tariff Filings"), Order dated April 28, 2005.

resolved with the RLECs, with the exception of Highland and Brandenburg,[5] the current complaint has been rendered moot. Windstream states that questions of settling retroactive payments due under the tariff are best resolved through direct negotiations between Windstream and each individual complainant.

The RLECs are in opposition to the motion.[6] The RLECs argue, namely, that the tariff revisions are inappropriate as they will serve as a dis-incentive to third-party carriers who may seek to rely solely on the charges outlined in Windstream's tariff by default, rather than enter into interconnection agreements with the RLECs. The RLECs contend that the existence of this local transit traffic tariff reduces the amount of reciprocal compensation the RLECs would be entitled to receive from third-party carriers who transit over Windstream's network. Additionally, the RLECs argue that the existence of this tariff would hinder the RLECs' ability to negotiate for their own prospective agreements wherein transit charges would be included. The RLECs also

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[5] Windstream states that the complaint can also be dismissed as to Highland and Brandenburg. These carriers are the only RLECs that have not removed transit traffic from Windstream's network. However, Windstream states that the parties are all aware that Highland has a traffic situation involving wireless traffic that is substantially different from the traffic issues of other RLECs. Brandenburg and Windstream are currently engaged in Commission proceeding 2008-00203, *An Investigation into the Traffic Dispute between Windstream Kentucky East, LLC, Brandenburg Telephone Company and MCIMetro Access Transmission Services, LLC d/b/a Verizon Access*, which concerns questions of transit traffic through Windstream's end-office in Elizabethtown and the application of the proper rate using the current Windstream transit tariff that is the subject of this case. Windstream states that Windstream and Highland are currently working to develop an appropriate agreement and that any unresolved unpaid amounts could be resolved under a new and separate complaint. Windstream also states that the Brandenburg issue, including compensation due to Windstream, should be resolved under Case No. 2008-00203. For these reasons, Windstream contends that the motion to dismiss this complaint can also apply to Highland and Brandenburg.

[6] See RLECs' Response and Sur-reply, filed December 23, 2008 and January 14, 2009, respectively.

note that, despite the fact that several RLECs have removed certain transit traffic off of Windstream's network, the parties have not resolved the issue of what costs may be owed by the RLECs, if any, to Windstream for charges accrued since the tariff was put into place in December 2006. The RLECs argue that they still contest the enactment of tariffed rates and the charges associated with Windstream's measurement of "local transit traffic." The RLECs state that Windstream has refused to waive those charges and, in its motion, Windstream also admits that billing issues remain for the time period since the tariff revisions have become applicable.[7]

The Intervenors in this proceeding are also in opposition to Windstream's motion.[8] The Intervenors agree with Windstream's statement that they currently have agreements with Windstream that cover transit traffic and, therefore, the rates placed in the December 2006 tariff do not apply to them. However, the Intervenors follow the RLECs' argument that Windstream's current tariffed rates could establish a price floor for future negotiations between Windstream and other carriers who need transit service but do not have an interconnection agreement. Interestingly, in considering the current interconnection agreements the individual Intervenors have with Windstream concerning transit traffic, the Intervenors note that Windstream has not offered transit rates that are more favorable than those in the current tariff. The Intervenors argue that

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[7] Windstream's Motion to Dismiss, at fn. 1, as filed on December 8, 2008.

[8] NuVox Communications, Inc., Sprint Communications Company, L.P., Sprint Spectrum, L.P., SprintCom, Inc. d/b/a Sprint PCS, Nextel West Corp., Inc. and NPCR, Inc. d/b/a Nextel Partners, tw telecom of ky, llc, and T-Mobile USA, Inc., Powertel/Memphis, Inc., and T-Mobile Central LLC (collectively, "Intervenors"). The Intervenors' Response and Sur-reply were filed on December 22, 2008 and January 14, 2009, respectively. The Office of the Attorney General is also an Intervenor but did not participate in the response and did not reply to the motion to dismiss.

this fact gives them a basis for believing that the current tariff foreshadows the position Windstream may take when negotiating agreements with competitors in the future.[9] As to the rate to be applied to transit traffic, the Intervenors state that the Commission has previously determined that transit service is an element under 47 U.S.C. § 251 and is subject to total element long-run incremental cost ("TELRIC").[10] The Intervenors also note that the Commission has the discretion to determine if local transit traffic arrangements, as originated by competitive carriers, can be placed within tariffs or belong solely within the purview of interconnection agreements.

DISCUSSION

In its November 13, 2007 Order in this matter, the Commission determined that an investigation into this tariff was necessary. As of the date of this Order, Windstream's December 1, 2006 tariff, wherein the transit rates are outlined, is still effective and operable and has not been withdrawn by Windstream. Although the RLECs note that they have removed their transit traffic from the Windstream network[11] on a self-described temporary basis, the underlying question of whether Windstream's tariffed rates for tandem transit traffic service and end-office transit traffic service are

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[9] Intervenors' Sur-reply at 4.

[10] See Intervenors' Response, December 23, 2008 at 2, citing Case No. 2004-00044, *In the Matter of Joint Petition for Arbitration of NewSouth Communications Corp., Nuvox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. of Lexington and Xspedius Management Co. of Louisville, LLC of an Interconnection Agreement with BellSouth Telecommunications, Inc.* (September 25, 2005 Order). TELRIC pricing is a methodology which the FCC requires incumbents to use in determining how much competitors should pay to lease elements or facilities from the incumbent's network. See generally Verizon Communications, Inc. v. F.C.C., 535 U.S. 467 (2002).

[11] With the exception of Highland and Brandenburg. See fn. 5.

unreasonable or unjustly discriminatory has not been resolved. Additionally, questions remain as to the amounts to be paid by the RLECs for transit traffic routed through Windstream after the effective date of the tariff up to the time that each RLEC removed that traffic from the network. Windstream may be owed money for facilitating that traffic for the RLECs; yet, based on a review of the parties' positions in this matter, they have not agreed on the amounts to be paid. Intertwined into the issue of billing is a critical question as to the proper pricing methodology to be applied to transit traffic that is not subject to an interconnection agreement. For instance, the Intervenors have raised a question as to whether TELRIC is the proper methodology for such traffic scenarios.

In addition to possibly weighing an application of TELRIC, the Commission must also determine whether Windstream is entitled to create any tariffed rate it deems to be an equitable form of compensation for carrying such traffic or whether any provisions concerning local transit arrangements belong exclusively in an interconnection agreement. Additionally, the Commission finds that the RLECs and the Intervenors have raised a legitimate question as to whether the rates in the transit tariff could potentially cause harm toward any competitive carrier in Kentucky seeking to negotiate transit traffic arrangements traversing Windstream's network.

Having considered all of these issues and the arguments of the parties, the Commission will deny the motion to dismiss and finds that, pursuant to KRS 278.260(2), a hearing will be necessary to resolve this complaint. A number of relevant questions need to be resolved to address this complaint. Windstream has failed to persuade the Commission that the central issues on billing, local transit pricing, and the proper context for local transit traffic arrangements (i.e., tariff versus a Section 252 agreement) have been resolved or "rendered moot." Under KRS 278.260(1), the Commission may not enter an Order affecting the rates that are the subject of a complaint without holding a formal public hearing. A hearing will allow the presentation of evidence by the parties concerning the reasonableness of the rates and will enable the Commission to render a finding on whether a change or adjustment to Windstream's tariff should be ordered. The Commission will need to determine if it will order Windstream to set just and reasonable rates to be followed in the future if it finds that the current, tariffed rates in question are unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any provision of KRS Chapter 278.[12] After the hearing, the Commission will also render determinations on the money owed to Windstream by the individual RLECs for carrying RLEC transit traffic after the transit tariff became effective.

The Commission finds that a formal hearing is necessary in this matter, given the significant question raised by the complainants and Intervenors on the issue of the reasonableness of the transit tariff and the rates contained therein, the unresolved billing questions between the RLECs and Windstream in relation to this tariff, and the need to determine the effect that the tariff could have upon Windstream's competitors in Kentucky.

IT IS THEREFORE ORDERED that:

1. Windstream Kentucky East, LLC's motion to dismiss is denied.

2. A formal hearing shall be held in this matter.

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[12] See KRS 278.270.

3. The Commission's November 12, 2008 Order wherein the parties were instructed to submit a status report every 30 days is hereby suspended until further Order of the Commission.

4. An informal conference shall take place on February 6, 2009 at 1:30 p.m., Eastern Standard Time, at the Commission's Offices at 211 Sower Boulevard, Frankfort, Kentucky. The purpose of the conference will be: (1) to develop a consensus on potential formal hearing dates; (2) to develop a schedule for the submission of data requests and responses; (3) to develop a schedule for the submission of prefiled direct testimonies prior to the formal hearing; and (4) to develop other prehearing scheduling items, as necessary.

Done at Frankfort, Kentucky, this 26th day of January, 2009.

By the Commission

ATTEST:

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