### COMMONWEALTH OF KENTUCKY



BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY FEB 2 8 2007 PUBLIC SERVICE COMMISSION

Communication Workers of America and ) International Brotherhood ) of Electrical Workers' Request To ) Enforce Commission ) Order Regarding Windstream ) Corporation's [*sic*] Compliance with ) Spin-Off Conditions )

P.S.C. Case No. 2007-00069

### Windstream's Response To Petitioners' Motion for Emergency Relief

Windstream Kentucky East, Inc. f/k/a Kentucky Alltel, Inc., Windstream Kentucky West, Inc. f/k/a Alltel Kentucky, Inc., and Windstream Communications, Inc. f/k/a Alltel Holding Corporate Services, Inc. (collectively, "Windstream" and mistakenly identified as Windstream Corporation in Petitioners' Motion) for their Interim Response to the Motion for Emergency Relief filed by the Communication Workers of America and the International Brotherhood of Electrical Workers (collectively, "Petitioners") state:

### **Introduction**

Petitioners' Motion for Emergency Relief fails for three reasons. First, Petitioners' request for emergency relief is premised solely upon the alleged violation by Windstream of a commitment that Windstream not make any changes to its Kentucky workforce. However, this condition was advanced by Petitioners in Case No. 2005-00534 ("Approval Proceeding") but was rejected by the Commission in its May 23, 2006 Order approving the transfer of control of the Windstream ILECs. Second, Petitioners' Motion for Emergency Relief seeks relief with respect to general labor issues that are

not properly before the Commission. Third, Petitioners fail to make the requisite showing to obtain injunctive relief. Petitioners' Emergency Motion should be denied.

### Factual Background<sup>1</sup>

On December 2, 2006, Windstream Communications announced the elimination of a limited number of positions in sixteen of its operating states, including 46 positions in Kentucky, as part of the consolidation of its workforce to meet customer needs and the demands of the market place. Windstream values its employees and did not undertake this initiative without serious consideration of the affected employees and positions.

The Kentucky employees subject to the consolidation worked primarily in the assignment department and were encouraged to apply for other open positions in Windstream. In fact, positions are still available throughout Windstream Communications' operations. Of the 46 Kentucky employees affected, 7 bargaining employees accepted positions in other areas of Windstream's Kentucky operations, and 2 nonbargaining employees applied for and have been offered other positions in Windstream's Kentucky operations. One bargaining employee accepted an employment offer outside of Windstream.

Since the consolidation was announced in December 2006, Windstream has offered outplacement services to interested employees including resume building and tips for online job searching. To date, approximately 19 of the affected Kentucky employees have participated in these services.

<sup>&</sup>lt;sup>1</sup> Although this Response necessarily addresses some of the allegations set forth in the Petitioners' Petition, it is not intended to serve as Windstream's Answer to the Petition. Windstream is working to file its Answer as quickly as possible and certainly will do so within the period provided by the Commission.

Additionally, all Kentucky employees affected by the consolidation were offered severance packages depending on the terms of their bargaining contracts or other employment status. As set forth in more detail in the accompanying affidavit (attached hereto as Exhibit A), all affected employees will receive their final paychecks (including earnings and unused vacation) on March 9, 2007. All affected employees will receive their severance payments no later than March 23, 2007, although Windstream expects these payments to be made prior to this date. Specifically, CWA members will receive severance including an average of 35 weeks of pay, and IBEW members will receive severance including an average of 9.5 weeks of pay. In fact, in its recent contract negotiations, IBEW opened negotiations with a list of demands including that Windstream not close the service activation group ("SAG") center in Elizabethtown. The IBEW negotiations concluded with IBEW having withdrawn that demand and Windstream having agreed to an enhanced severance benefit. With respect to the 8 affected nonbargaining employees, 6 are eligible for severance of 52 weeks of pay, and 2 have applied for and been offered other jobs with Windstream in Kentucky. Significantly, none of the bargaining employees have alleged that any actions by Windstream were taken in contravention of the collective bargaining agreements or have filed a grievance, and Windstream's actions with respect to IBEW members are consistent with the parties' recent collective bargaining negotiations.

Because Windstream is seeking to position itself better to compete, it also has added employees to other areas of its Kentucky operations where additional resources

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were needed. For example, during the same time periods as the consolidation, Windstream has added 14 additional engineering and sales positions in Kentucky.

On December 22, 2006, Petitioners wrote the Commission to object to the proposed employee reductions. Petitioners raised no objection to Windstream's plans to add positions to its Kentucky operations although such additions are still changes to Windstream's workforce which, according to Petitioners' theory, any workforce changes should be presumed to violate the Commission's Order in the Approval Proceeding. By letter dated January 5, 2007, the Executive Director of the Commission directed Windstream to respond to Petitioners' letter. Jeffery R. Gardner, President and Chief Executive Officer of Windstream, did so by letter dated January 12, 2007. In his letter,

Mr. Gardner explained:

Consolidation of the assignment work to three locations yields benefits, such as greater operational consistency, productivity and accountability. Maintaining more employees in fewer locations allows us to better address job responsibilities and have fewer managers oversee more employees. Consolidation of work groups facilitates our ability to standardize processes and train employees. As a result, employees should be more efficient and better able to share work loads and cover absences. Further routine and new technology upgrades are more cost efficient since there are fewer locations over which to install and reconfigure the upgrades. These benefits in turn allow Windstream to be more flexible in responding to customers' needs.<sup>2</sup>

Mr. Gardner's letter also emphasized three times that the consolidation was not the result of the separation/merger transactions.<sup>3</sup> Further, he notes that the restructuring of Windstream's workforce did not violate the Commission's May 23, 2006 Order and, in fact, accomplishes the condition in the Commission's Order that Windstream adequately staff its operations to provide quality service.

<sup>&</sup>lt;sup>2</sup> *Id.* at 1-2.

<sup>&</sup>lt;sup>з</sup> Id.

Petitioners took no further action until February 8, 2007 when they filed their "Petition for Enforcement of Order" (filed a full month after Mr. Gardner's letter and 2 months after the announcement of the workforce changes). Although the restructuring was to take effect on March 2, 2007, Petitioners did not seek any interim relief at that time. Nor did Petitioners seek interim relief from the Commission on February 15, 2007, when the Commission directed Windstream to answer or satisfy the petition within twenty days of the Commission's order (March 7, 2007). Instead, more than a week after the Commission's Order, on the afternoon of February 23, 2007, Petitioners filed their Motion for Emergency Relief, leaving only five working days before the effective date of the consolidation for Windstream to file this Response and for the Commission to act.

### <u>Argument</u>

### A. The Proposed Work Force Consolidation Does Not Violate The Commission's May 23, 2006 Order.

### 1. <u>The May 23, 2006 Order</u>.

The May 23, 2006 Order Petitioners seek to enforce and upon which they premise their Motion arose in connection with the application by various Alltel Corporation ("Alltel") subsidiaries and Valor Communications Group ("Valor") seeking approval for the separation of Alltel's wireline and wireless operations and merger of the separated wireline operations with Valor. Petitioners sought and were granted full intervention in the Commission proceedings. Petitioners focused their opposition to the approval application based upon claims, rejected by the Commission, that the terms of the separation and merger would leave Windstream financially unable to provide adequate, efficient and reasonable service. Nevertheless, Petitioners also requested the

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Commission to premise any approval of the proposed separation and merger on the condition there would be no reduction in the Kentucky workforce. Indeed, in their posthearing Brief, Petitioners proposed the following condition:

The Kentucky ILECs *shall be required to maintain employees currently working at AKI*, with no reduction in compensation and full respect of union status and collective bargaining agreements.<sup>4</sup>

The employment level freeze proposed by Petitioners was rejected by the Commission. Indeed, nowhere in its Order does the Commission even address, much less adopt, Petitioners' request that an employment freeze be implemented. Instead, the Commission first noted that Windstream had agreed in the Approval Proceeding there would be "[n]o reduction in the employee headcount in Kentucky ... *as a result of this transaction*."<sup>5</sup> Nothing in Windstream's statements presents a conflict, therefore, with Windstream's workforce changes so long as any such changes are not the result of the separation and merger transactions (which the recent Kentucky workforce consolidation is not). The only other mention of employment in the Commission and accepted by Windstream that Windstream "shall employ and continue to employ adequate resources to meet the quality of service standards established by the Commission." Neither Petitioners nor the Attorney General allege Windstream has failed to satisfy this requirement.

<sup>&</sup>lt;sup>4</sup> Post-hearing Brief of the Communication Workers of America and the International Brotherhood of Electrical Workers at 23 (emphasis supplied).

<sup>&</sup>lt;sup>5</sup> Order, *In the Matter of: Application for Approval of the Transfer of Control of Alltel Kentucky, Inc. and Kentucky Alltel, Inc.*, P.S.C. Case No. 2005-00534 at 4 (May 23 2006). Although the Commission Order quotes the hearing transcript, the same representation – no employee reductions as a result of the transaction – was made by the applicants in their responses to data requests.

2. <u>Petitioners' Petition And Emergency Motion Conflates Their</u> <u>Rejected Condition With Windstream's Agreement Not To Reduce</u> <u>Employee Head Count As A Result Of The Separation/Merger</u> <u>Transactions</u>.

Throughout their Petition<sup>6</sup> Petitioners treat Windstream's agreement not to reduce Kentucky employment **as a result of the separation/merger transactions** as the equivalent of Petitioners' rejected condition that there be no reduction in employee head count in Kentucky under any circumstances. Thus, Petitioners suggest that the Attorney General's proposed condition for approval of the separation and merger, which, like Windstream's, was limited to reductions "as a result of the transaction,"<sup>7</sup> is indistinguishable from Petitioners' rejected condition that the ILECs "be required to maintain employees currently working at AKI."<sup>8</sup> Indeed, Petitioners go so far to suggest "there could be no doubt in the minds of the Commission, or the Parties, that employment levels in Kentucky would be protected from reduction as a condition to approval of the application."<sup>9</sup> This inference simply is not supported by the record in the Approval Proceeding or the Commission's Order.

Although Windstream is without knowledge as to what the Petitioner's believed, the Commission's understanding of the testimony and discovery is reflected clearly in its Order. In its May 23, 2006 Order approving the separation and merger transactions, the Commission expressly acknowledged Windstream's clarifications that employee reductions in Kentucky would not be a result of the transactions:

<sup>&</sup>lt;sup>6</sup> The Petitioners' Motion simply incorporates "the arguments and proof contained in the original petition..." with respect to the question of whether work force consolidation violates the Commission's Order. Petitioner's Memorandum in Support of Emergency Relief at 5.

<sup>&</sup>lt;sup>7</sup> Petition for Enforcement of Order at 4.

<sup>&</sup>lt;sup>8</sup> Id.

<sup>&</sup>lt;sup>9</sup> *Id.* at 5.

### "[n]o reduction in the employee headcount in Kentucky would occur *as a result of this transaction*."<sup>10</sup>

As evidenced by the condition proposed in its post-hearing brief, the Attorney General likewise understood that Windstream was agreeing only that reductions as a result of the separation/merger transactions would not occur: "The Kentucky ILECs will not reduce their levels of employees *as a result of the transaction,* if approved."<sup>11</sup> Within the limits of the English language, nothing could have been clearer. It is within Windstream's managerial discretion to manage its business responsibly including making changes to employment levels through the ordinary course of business so long as the actions were not occasioned by the separation/merger transactions.

Petitioners were free to disagree with the Commission's determination and seek rehearing or appeal the Order approving the transactions. Petitioners did not do so and now are bound by the express language of the Commission's Order. Indeed, there is probably nothing more telling about Petitioners' contention that Windstream allegedly violated the Commission's May 23, 2006 Order than the fact that Petitioners premise their argument not on the language of the Order but their inaccurate speculation concerning what was in "the minds of the Commission ... [and] the parties...."<sup>12</sup>

In summary, the Commission's Order acknowledged that no Kentucky workforce reductions would arise as a result of the separation/merger transactions and required

<sup>&</sup>lt;sup>10</sup> Order, *In the Matter of: Application for Approval of the Transfer of Control of Alltel Kentucky, Inc. and Kentucky Alltel, Inc.*, P.S.C. Case No. 2005-00534 at 4 (May 23 2006). Although the Commission Order quotes the hearing transcript, the same representation – no employee reductions as a result of the transaction – was made by the applicants in their responses to data requests.

<sup>&</sup>lt;sup>11</sup> Post-Hearing Brief of Attorney General at 29 (emphasis supplied.)

<sup>&</sup>lt;sup>12</sup> Petition for Enforcement of Order at 5.

Windstream to maintain adequate staffing to support service quality. Windstream is in compliance with all aspects of the Commission's Order.

### 3. <u>The Work Force Consolidation Does Not Violate The Commission's</u> <u>May 23, 2006 Order</u>.

Petitioners offer no evidence that the workforce consolidation was the result of the separation of Alltel's wireless and wireline operations and merger of the wireline operations with Valor. As Petitioners and Movants, CWA, IBEW, and the Attorney General bear the burden of proving that the workforce changes directly resulted from the transactions approved by the Commission in the Approval Proceeding.

Notwithstanding this burden, Petitioners offer no evidence (and cannot offer any evidence) indirectly, much less directly, tying Windstream's workforce changes to the separation/merger transactions. Instead, they content themselves almost entirely with excerpts from the testimony and discovery from the Approval Proceeding. Yet, because the excerpts do not address the changes at issue and necessarily cannot address them as the statements were made prior to the determinations made regarding the workforce changes, Petitioners by definition do not and cannot demonstrate that the changes are the result of the separation/merger transactions. Indeed, the statements relied upon by Petitioners were given in the course of the Approval Proceeding during early to mid 2006; Windstream personnel did not begin investigating the potential for the workforce consolidation until at least a month after the separation/merger transactions closed on July 17, 2006.

Equally important, the excerpts make clear that Windstream unambiguously limited its commitment concerning employment levels to agreeing there would be no reduction as a result of the transactions. For example, at page two of the Petition,

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Petitioners excerpt Mr. Gardner's response to the Chairman's question concerning work force reductions as a result of the separation:

- Q. Would the applicants be willing to accept a condition that there would be no employee headcount [reduction] in Kentucky **as a result of this transaction being approved**?
- A. There will be no reduction in the employee headcount in Kentucky *as a result of this transaction*.<sup>13</sup>

Other excerpts offered by the Petitioners go one step further and make clear Windstream candidly disclosed the possibility there could be work force changes in Kentucky unrelated to the separation/merger transactions. For example, the possibility of workforce reductions unrelated to the transactions being considered by the Commission was underscored in Petitioners' excerpt of Mr. Gardner's response to a guestion by Commission staff at the hearing:

- Q. Do you see that you might have a goal of reducing these [employment] levels through attrition as opposed to laying off people?
- A. We don't have any specific plans in Kentucky. *I mean over a long period of time, in the land line business, we've tried to get more efficient, and, when we do that and it affects people, we try to do that first through attrition, because that's what makes most sense*, but, as [of] today, there are no current plans on doing anything with the work levels in Kentucky.
- Q. So that would include an increase or a decrease?
- A. Right. We have no plans as part of this transaction or any other immediate plans to change the workforce levels here in Kentucky.<sup>14</sup>

Most telling is Petitioners' failure to mention,<sup>15</sup> much less address, Mr. Gardner's

assurances in his January 12, 2007 letter to the Executive Director of the Commission

<sup>&</sup>lt;sup>13</sup> Transcript of Hearing at 116.

<sup>&</sup>lt;sup>14</sup> Petition for Enforcement of Order at 4-5 (emphasis supplied).

affirming that there was no relation between the transactions approved by the Commission in its May 23, 2006 Order and the workforce reduction announced in December 2006. Three times in his letter, Mr. Gardner explained the absence of any relationship between the two:

- "The elimination of the assignment positions was not a result of the Alltel's separation/Valor merger transactions."
- "The actions taken were not the result of the recent separation/merger transactions."
- "There is no contradiction between the recent consolidation efforts and my prior testimony before the Commission because these reductions were unrelated to the separation/merger transactions."<sup>16</sup>

Petitioners likewise ignore Mr. Gardner's explanation that, without the synergies achieved by the separation and merger, "it is conceivable that Windstream would have been faced with other, more pressing challenges related to its operations," including presumably, additional reductions.<sup>17</sup>

At the end of the day, Petitioners fail to produce any evidence of any relationship between the Alltel/Valor separation and merger transactions and Windstream's workforce consolidation. Absent such evidence, and Petitioners provide none, they are not entitled to any relief, including the extraordinary remedy of an injunction.

<sup>&</sup>lt;sup>15</sup> Petitioners do present one comment made by Mr. Gardner in the letter. As discussed below, Petitioners' interpretation of Mr. Gardner's statement not only is incorrect but, if it were accurate, would undermine further, not help, their clam.

<sup>&</sup>lt;sup>16</sup> January 12, 2007 letter from Jeffery R. Gardner to Beth O'Donnell, Executive Director, at 1-2. <sup>17</sup> *Id*. at 2.

### 4. <u>Mr. Gardner's January 12, 2007 Letter Is Not Contrary To His</u> <u>Testimony Nor The Evidence Presented By Windstream In</u> <u>Connection With The Approval Proceeding</u>.

Petitioners' reliance upon Mr. Gardner's statement in his January 12, 2007 letter that the workforce reductions were "a continuation of workforce optimization efforts involving the closing and consolidation of various assignment groups that began as early as 2001"<sup>18</sup> is particularly puzzling. If read as Petitioners seemingly suggest, that Windstream planned the 2007 workforce consolidation prior to the hearing but failed to disclose it to the Commission and the parties, it still would not permit the Petitioners to demonstrate, as they are required to do, that the employee reductions were related to the separation/merger transactions. To the contrary, it would only further underscore the lack of causal relationship between the separation/merger transactions and the employee changes since the plans would have been made in 2001, more than four years prior to the conception of the transactions and the filing of application for its approval. Moreover, it should be emphasized that Petitioners' inference is not only unsubstantiated but is false. The facts of the workforce changes announced in December 2006 were not disclosed during the Approval Proceeding because they did not exist at the time of that proceeding.

In fact, fairly read, Mr. Gardner's statement makes clear the absence of any relationship between the Kentucky employee changes and the separation/merger transactions. Mr. Gardner's statement simply referred to the fact that similar workforce closings and consolidations have been occurring since 2001. As such, he was providing independent corroboration of the absence of any relationship between the transactions

<sup>&</sup>lt;sup>18</sup> Petition for Enforcement of Order at 3-4.

and the workforce consolidation. Nothing in Mr. Gardner's letter fairly can be read to suggest there was an existing workforce consolidation plan on the drawing board at the time of the Approval Proceeding. Indeed, Windstream and Mr. Gardner consistently explained at the hearing and in discovery that no such plans currently existed at that time but that workforce changes were always a consideration in responsibly managing a business.<sup>19</sup>

Mr. Gardner's recognition in his letter of similar assignment workforce closings and consolidations predating the one announced on December 2, 2006 is likewise consistent with the testimony and discovery in the Approval Proceeding. For instance, Mr. Gardner at least twice explained the ongoing need to achieve greater efficiencies – that would exist without regard to whether the separation/merger transactions were approved – and the possible effect on employment levels. Thus, he testified as set forth previously that efforts of the landline business to increase efficiencies do affect employees.<sup>20</sup> Even more significant is Mr. Gardner's explanation of the requirements of the marketplace and the inability of any company to agree to the sort of absolute workforce freeze the Petitioners seek to impose in this proceeding:

Q: All right, and the next one about maintaining employment levels, we've talked about that, but what about specifically employment levels of call centers and about compensation packages, and that sort of thing?

<sup>&</sup>lt;sup>19</sup> Joint Applicants' Response to CWA/IBEW Data Request No. 20 ( "There are no plans to change either the number or types of employees currently working at AKI or KAI if the transaction is approved."); Transcript of Hearing at 155-156 ("We do not have any specific plans in Kentucky... there are no current plans on doing anything with the work levels in Kentucky."); Transcript of Hearing at 162-163 ("We have no plans as a part of this transaction or any other immediate plans to change the workforce levels here in Kentucky."); Transcript of Hearing at 69-70 ("So, relative to the employee base in Kentucky, our statements all along have been we expect no changes. Operationally, nothing is going to change in Kentucky in our day-to-day operations.")

<sup>&</sup>lt;sup>20</sup> Transcript of Hearing at 162-163.

A I think what we can commit to, as a part of this transaction, is that we will not change the employment levels as a part of this deal. *No company in this country can make a commitment that we will not - that employment levels will be unaffected over a five-year period of time.* I can't make that commitment because I don't - I'll do my best - we'll do our best to manage this business in a way that precludes that, but we can't give assurances there. I don't think any public company could, and, you know, I think the market *forces us to compete and pay our people properly.*<sup>21</sup>

At the hearing and in discovery, Windstream candidly disclosed that while there would be no workforce reductions in Kentucky as a result of the separation/merger transactions, it could not commit to a freeze of Kentucky employment levels in response to demands unrelated to the transactions. To the contrary, Windstream made clear it would remain subject to a marketplace-driven need to obtain greater efficiencies.

B. The Commission's Injunctive Powers Lie In Petitioning The Franklin Circuit Court For Relief.

Petitioners ask the Commission to enter a temporary injunction enjoining Windstream from carrying out the Kentucky workforce consolidation (which was just one part of a larger workforce optimization plan across sixteen states) that was announced in early December 2006. Petitioners premise their request for such extraordinary relief based on their unsupported claim that the consolidation violates the Commission's May 23, 2006 Order. Yet, as Petitioners concede in their Petition, the Commission may obtain an injunction only by initiating an action in the Franklin Circuit Court to enforce its orders.<sup>22</sup>

<sup>&</sup>lt;sup>21</sup> Transcript of Hearing at 163 (emphasis supplied). See also, Joint Applicants' Response to Lexington-Fayette Urban County Government Data Request No. 21 (In response to the inquiry whether the Applicants would agree to some form of employment freeze, the Joint Applicants responded they "cannot accept unreasonable or severely limiting conditions that treat it differently from its competitors.")

<sup>&</sup>lt;sup>22</sup> Petition for Enforcement of Order at 1, 5. *See also*, Petitioners' Memorandum in Support of Emergency Relief at 1

Kentucky Revised Statute 278.390 provides that "[t]he Commission may compel obedience to its lawful orders by mandamus, injunction or other proceedings *in the Franklin Circuit, or any other court of competent jurisdiction*...." Thus, if the Commission believes Windstream has violated the May 23, 2006 Order, and Windstream notes that there is no reasonable factual basis for such a belief, the Commission may file an action in the Franklin Circuit to enforce the order. Indeed, like any other administrative agency, the Commission is a creature of statute<sup>23</sup> and any exercise of authority by it must be grounded in statute.<sup>24</sup> Any reasonable doubts concerning an agency's authority to exercise a power must be resolved against its existence.<sup>25</sup> By the same token, the Commission may not employ administrative remedies not granted it by statute.<sup>26</sup> Yet, Petitioners ask the Commission to do just that.

The specific relief sought by Petitioners in connection with their Emergency Motion raises three additional obstacles to their request. First, by waiting until the eleventh hour to file their emergency motion opposing changes that were announced to Petitioners three months ago, Petitioners have placed the Commission in the position of having to act without a hearing and without affording Windstream an opportunity even to file its Answer to their Petition. Kentucky Revised Statute 278.260(1) expressly affords Windstream an opportunity for hearing. Similarly, the statute provides that no such

<sup>&</sup>lt;sup>23</sup> Public Service Commission v. Jackson Rural Electric Cooperative, Inc., 50 S.W.3d 764, 767 (Ky. App. 2000); Department for Natural Resources and Environmental Protection v. Stearns Coal & Lumber Company, 563 S.W.2d 471, 473 (Ky. 1978).

<sup>&</sup>lt;sup>24</sup> South Central Bell Telephone Company v. Utility Regulatory Commission, 637 S.W.2d 649, 653 (Ky. 1982).

<sup>&</sup>lt;sup>25</sup> United Sign Ltd. V. Commonwealth, 44 S.W.3d 794, 798 (Ky. App. 2000).

<sup>&</sup>lt;sup>26</sup> Revenue Cabinet v. Cherry, 803 S.W.2d 570, 572-573 (Ky. 1990).

hearing may be held on less than twenty days notice.<sup>27</sup> Finally, by statute Windstream is "entitled to be heard in person or by an attorney and to introduce evidence."<sup>28</sup> Petitioners' Motion for Emergency Relief would require the Commission (without good cause and based on no reasonable substantiation of Petitioners' false assumptions) to abandon each of these statutory protections.<sup>29</sup>

Second, Petitioners' reliance upon CR 65 is misplaced. By their terms, the rules of Civil Procedure are applicable to proceedings in the courts.<sup>30</sup> Indeed, the civil rules do not apply in administrative proceedings until after jurisdiction has been transferred to the Court of Justice by the perfection of an administrative appeal.<sup>31</sup> Also problematic is that KRS 13A100(1), (4) provide that administrative agencies may enact rules that affect private rights only by means of administrative regulation promulgated in accordance with Chapter 13A of the Kentucky Revised Statutes. Unwritten policy, such as the Petitioners claim exists, is prohibited.<sup>32</sup> KRS 13A.130(2) in turn provides that any administrative action that is required to be the subject of a duly promulgated regulation is "null, void and unenforceable" in the absence of such a regulation. Even if it was statutorily authorized to grant injunctive relief, the Commission may do so only pursuant to a duly promulgated regulation. There being no such regulation, Petitioners' request to the Commission is improper.

Third, even if Petitioners were entitled to invoke CR 65 in this proceeding they are not free to pick and choose those portions of the rules that will apply. Specifically,

<sup>&</sup>lt;sup>27</sup> KRS 278.260(2).

<sup>&</sup>lt;sup>28</sup> KRS 278.206(3).

<sup>&</sup>lt;sup>29</sup> Public Service Commission v. Attorney General, 860 S.W.2d 296, 298 (Ky. App. 1993).

<sup>&</sup>lt;sup>30</sup> CR 1(1).

<sup>&</sup>lt;sup>31</sup> Board of Adjustment of the City of Richmond v. Flood, 581 S.W.2d 1, 2 (Ky. 1978).

CR 65.05 requires that a party seeking an injunction post a bond, with surety, "in such sum as the court or the officer to whom application is made deems proper, for payment of such costs and damages as may be incurred by any person who is found to be wrongfully restrained or enjoined,"<sup>33</sup> Unless and until such a bond is posted the temporary injunction cannot take effect.<sup>34</sup>

"The concept of risk-free injunctive relief is unheard of,"<sup>35</sup> so that the party seeking a temporary injunction bears the risk the injunction is improperly granted. Where an injunction is wrongfully issued, the costs and damages recoverable against the bond, and which the bond must be set high enough to cover, include compensatory damages and costs.<sup>36</sup> These include "lost profits, costs and attorneys' fees" that are ascertainable with reasonable certainty.<sup>37</sup> At a minimum, here they would include the salaries and benefits paid to the affected employees during the period they remain employed pursuant to the injunction, Windstream's attorneys fees and costs and the other costs and expenses incurred by Windstream.

Nowhere in their Motion or Memorandum do Petitioners offer to post a bond with surety if a temporary injunction is granted. More fundamentally, nothing in Chapter 278 authorizes the Commission to require or hold such a bond, much less to sit as a trial

<sup>34</sup> Id.

<sup>36</sup> Id.

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<sup>&</sup>lt;sup>32</sup> KRS 13A.130.

<sup>&</sup>lt;sup>33</sup> CR 65.05(1).

<sup>&</sup>lt;sup>35</sup> National Collegiate Athletic Association v. Lasege, 53 S.W.3d 77, 88 (Ky. 2001).

<sup>&</sup>lt;sup>37</sup> Pharo Distributing v. Stahl, 782 S.W.2d 635, 637 (Ky. App. 1989).

court and determine the amount of damages sustained by the issuance of the injunction, including attorneys fees and costs.<sup>38</sup>

By their Motion for Emergency Relief, Petitioners invite the Commission (based on false inferences and an utter lack of proof) to exceed its jurisdiction, deprive Windstream of its procedural rights and act contrary to Kentucky law. It is an invitation that can and should be declined.

C. Petitioners Have Not And Cannot Demonstrate The Requisites For The Issuance of A Temporary Injunction.

Even if the Commission were empowered to grant injunctive relief, Petitioners fail to make the necessary showing to obtain such relief. The issuance of temporary injunctive relief is governed by CR 65.04(1), which provides as follows:

> A temporary injunction may be granted during the pendency of an action on motion if it is clearly shown by verified complaint, affidavit, or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual.

In applying this standard, Kentucky courts require a moving party to show three elements: (1) absent the injunction, they will suffer some irreparable injury; (2) a substantial question on the merits is present; and (3) the equities weigh in favor of issuing the injunction.<sup>39</sup>

First among equals is the requirement that the moving party show it will suffer

immediate and irreparable injury absent the grant of the requested injunction. "A mere

<sup>&</sup>lt;sup>38</sup> South Central Bell Telephone Company v. Utility Regulatory Commission, 637 S.W.2d 649, 653 (Ky. 1982).

<sup>&</sup>lt;sup>39</sup> Maupin v. Stansbury, 575 S.W.2d 695, 699 (Ky. App. 1978).

allegation that irreparable injury will result is insufficient."<sup>40</sup> Rather, irreparable injury must be "clearly demonstrate[d] either by verified complaint, affidavit or other proof."<sup>41</sup> Petitioners bear the burden, at a minimum, or proving by evidence—rather than mere allegation or conjecture—"the probability of irreparable injury."<sup>42</sup> In sum, the injunctive relief sought by Petitioners is appropriate "only where absolutely necessary to preserve a party's rights pending a trial on the merits."<sup>43</sup>

### 1. <u>Petitioners Fail to Show a Probability of Immediate And Irreparable</u> Injury.

Petitioner's Memorandum and the supporting affidavit of Mike Garkovich, President of IBEW Local 33272, set forth injuries Petitioners allege will result from the planned layoffs. Petitioners' alleged injuries include both the impairment of certain retirement benefits accrued through employment with Windstream and the loss of certain insurance benefits afforded to Windstream employees. Nothing in these allegations indicate that these purported injuries are either immediate or irreparable.

As an initial matter, these claims are made against the background of IBEW's recent contract negotiations, in which IBEW withdrew its demand in the negotiations that Windstream not consolidate certain positions in Elizabethtown and in which Windstream agreed to enhanced severance benefits. Notwithstanding other facts referenced herein that show that Petitioners cannot demonstrate irreparable injury, it is more than significant that IBEW just concluded labor negotiations in which it withdrew its opposition to the consolidation in Elizabethtown.

<sup>&</sup>lt;sup>40</sup> *Id.* at 698.

<sup>&</sup>lt;sup>41</sup> Commonwealth ex rel. Cowan v. Wikinson, 828 S.W.2d 610, 612 (Ky. 1992).

<sup>&</sup>lt;sup>42</sup> *Id.* at 613.

<sup>&</sup>lt;sup>43</sup> *Id.* at 611.

(a) Petitioners' Claimed Injuries Do Not Constitute Immediate Injury.

In any event, to demonstrate that their rights will be immediately impaired absent the requested injunctive relief, Petitioners must demonstrate "an urgent necessity for the requested relief."<sup>44</sup> Delay in seeking enforcement of claimed rights, as Petitioners have engaged in here by waiting three months before filing their motions, cannot be used to manufacture the required showing of immediacy.<sup>45</sup> At a minimum, Petitioners' delay in seeking injunctive relief and IBEW's withdrawal of its demand pertaining to the Elizabethtown consolidation significantly undercuts Petitioners' claim for injunctive relief.<sup>46</sup>

(b) Loss of Employment Claims Do Not Give Rise To Irreparable Injury.

Even if Petitioners could demonstrate, which they cannot, an immediate need for the requested relief they have failed to demonstrate they will be irreparably injured in the absence of such relief. Kentucky law is clear that an injury is not irreparable, and cannot give rise to injunctive relief, where it can be satisfied through the payment of money.<sup>47</sup>

In Cypress Mountain Coal Corporation v. Brewer<sup>48</sup> the trial court entered a temporary injunction enjoining a coal hauling firm from terminating 25 individual coal

<sup>&</sup>lt;sup>44</sup> Maupin v. Stansbury, 575 S.W.2d 695, 699 (Ky. App. 1978).

<sup>&</sup>lt;sup>45</sup> Greene v. Eversole, 177 S.W.2d 559, 560 (Ky. 1944) (two month delay without protest precluded injunctive relief).

<sup>&</sup>lt;sup>46</sup> *Citibank, NA v. Citytrust*, 756 F.2d 273, 276 (2<sup>nd</sup> Cir. 1985) ("Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action.")

<sup>&</sup>lt;sup>47</sup> United Carbon Company v. Ramsey, 350 S.W.2d 454 (Ky. 1961) (injury only irreparable if "there exists no certain pecuniary standard for the measurement of the damages").

<sup>&</sup>lt;sup>48</sup> Cypress Mountain Coal Corporation v. Brewer, 828 S.W.2d 642, 644, 644-645 (Ky. 1992) ("A dollar amount derived from records concerning the coal tonnage hauled by owner/operators during the alleged contractual breach could certainly provide an accurate gauge with which to calculate a precise dollar amount.").

haulers who claimed they had a permanent right to provide coal hauling services to Perry Transport. On review by the Kentucky Supreme Court, the Court held that "extraordinary cause" had been demonstrated and dissolved the injunction.<sup>49</sup> In so doing, the Court explained that the injuries claimed by the coal haulers were measurable and compensable in damages and hence were insufficient to support the grant of a temporary injunction.<sup>50</sup> The Windstream Kentucky affected employees' claimed injuries are indistinguishable in kind from those at issue in *Cypress Mountain* and hence are equally incapable of supporting a temporary injunction.

Courts in other jurisdictions have expressly held that the loss of employment and consequent loss of salary and fringe benefits and the incurrence of adverse tax consequences—injuries upon which Petitioners rely in this case—are not irreparable.<sup>51</sup> Indeed, the United States Supreme Court has made clear that only in extraordinary employment termination cases will the injuries be deemed irreparable.<sup>52</sup> Such a showing, at a minimum, requires the movant to demonstrate losses different in kind from that suffered by terminated employees generally.<sup>53</sup>

Petitioners cannot overcome these two hurdles in attempting to demonstrate the irreparable nature of the injuries they claim. First, the injuries alleged in the

<sup>&</sup>lt;sup>49</sup> *Id.* at 645.

<sup>&</sup>lt;sup>50</sup> *Id.* at 645-646.

<sup>&</sup>lt;sup>51</sup> See Ciechon v. City of Chicago, 634 F.2d 1055, 1057-1058 (7th Cir. 1980) (Reversing the district court's injunction issued in favor of employees who suffered "loss of wages, employee benefits, and opportunities for promotion" as a result of government action alleged to be unconstitutional); *D'Aquisto v. Washington*, 640 F.Supp. 594, 626 (N.D. III. 1986) (loss of income, depletion of savings and difficulty finding other employment are remediable by damages and thus do not constitute irreparable injury.) *Hunt v. Bankers Trust Company*, 646 F.Supp. 59, 63 (N.D. Tex. 1986) (unfavorable tax consequences "represent losses which can be reduced to specific figures, for which damages provide a complete remedy").

 <sup>&</sup>lt;sup>52</sup> Sampson v. Murray, 415 U.S. 61, 92 & n. 68 (1974).
<sup>53</sup> Id. at 92.

Memorandum and supporting affidavit from Mr. Garkovich do not differ in kind from the losses suffered by discharged employees generally. For example, in *Sampson v. Murray*, the Supreme Court held that loss of income, absence of savings, difficulty in finding employment and damage to reputation did not constitute the type of irreparable injury upon which an injunction may be premised.<sup>54</sup> Yet, these are the only types of considerations advanced by Petitioners in support of their Motion. Additionally, Petitioners' Motion and claimed injuries are factually incorrect in many instances (such as on the issue of 401K plans and availability of health insurance). Exhibit A attached hereto establishes the accurate circumstances for the affected Kentucky bargaining and nonbargaining employees.

Second, not only does the Windstream Affidavit of Susan Bradley (Windstream Senior Vice President of Human Resources) cast considerable doubt on Petitioners' claims, Petitioners can seek remedies including back pay and reinstated benefits if they prevail on the merits. Thus, with respect to both the alleged impairment of the retirement benefits and alleged loss of insurance benefits provided by Windstream, Petitioners could seek an award of damages such that they cannot claim to suffer irreparable harm in the absence of injunctive relief.

(c) Petitioners' Impairment of Retirement Benefits Claims Do Not Constitute Irreparable Injury.

According to Petitioners, the alleged impairment of retirement benefits arises because a number of employees affected by the consolidation have elected to retire. Specifically, Petitioners allege several potentially adverse consequences for these individuals: (1) the reinvestment of 401K proceeds with other vendors will result in fees

<sup>&</sup>lt;sup>54</sup> *Id.* at 91-92 & n. 68.

that diminish the value of the accounts; (2) the premature "invasion" of 401K plans will result in a tax penalty; (3) the receipt of retirement proceeds in lump sum payments will impair the cash value of their retirement funds; and (4) the fees and charges incurred through consultations with independent investment brokers.<sup>55</sup>

Petitioners fail to show, however, how any of these alleged injuries are irreparable or even accurate. To the contrary, to the extent that any of Petitioners' asserted injuries may be taken as accurate (which Windstream's Affidavit addresses in more detail), the injuries associated with the alleged impairment of retirement benefits are all economic in nature and capable of precise measurement. Accordingly, Petitioners can seek an award of money damages to compensate them for the alleged impairment of retirement benefits should the Petitioners prevail on the merits.

> (d) Petitioners' Impairment of Insurance Benefits Claims Likewise Do Not Constitute Irreparable Injury.

This conclusion holds true with respect to the loss of insurance benefits alleged by the Petitioners. Again, Petitioners set forth a number of potentially adverse (and wholly unsubstantiated) consequences for the affected individuals: (1) retiring employees will not be entitled to COBRA benefits and will be forced to pay increased premiums for health care benefits; (2) all affected employees who have company-paid life insurance will lose that coverage and suffer a financial loss in procuring new coverage; (3) all affected employees who carry optional life insurance will lose the benefit of group premiums and be required to pay more for the same coverage; and (4) long-term disability benefits will require higher premiums than afforded through the

<sup>&</sup>lt;sup>55</sup> Motion for Emergency Relief at 3-4.

Windstream group rate.<sup>56</sup> Basically, Petitioners contend that they will be harmed because they will have to pay increased premiums for a variety of different insurance coverage. In fact, CWA members receive as part of their severance packages (to be paid on or before March 23, 2007) "grossed up" medical insurance premiums for 6 months. This means that they receive, as cash, 100% of their medical insurance premiums and the associated taxes for 6 months. All employees - bargaining and nonbargaining - receive insurance coverage (with Windstream continuing its portion of the premium) through March 31, 2007.

Notwithstanding their inaccurate assertions concerning lost insurance benefits, Petitioners fail to show why the increased COBRA premiums amount to irreparable harm. Indeed, a potential measure of the harm for these alleged injuries simply would be the difference between the cost of the coverage provided through Windstream and the cost of obtaining that same coverage without the benefit of the Windstream group rates, and Petitioners can seek an award of money damages should they prevail on the merits. Accordingly, there is no irreparable harm, and Petitioners are not entitled to an injunction.

### 2. <u>There is No Substantial Question on the Merits</u>.

Petitioners likewise have failed to raise a substantial question on the merits of their claim. Indeed, as discussed above, their Petition seemingly is premised upon a condition for approval of the transactions they advanced but this Commission rejected, is not borne out by the evidence they cite, is contradicted by the record evidence and seeks relief that is beyond the Commission's authority.

<sup>&</sup>lt;sup>56</sup> *Id.* at 4-5.

### 3.. <u>The Balance of the Equities Precludes Issuance of the Injunction.</u>

Injunctive relief is disfavored under Kentucky law, and the Supreme Court has recognized its potential for harm when misapplied:

Injunctive relief . . . has great potency for harm when misapplied, and for this reason courts consider every application for its employment in the light of its consequences to both parties, and to that end consider the "balance of inconvenience," frequently withholding the granting of an injunction when the benefit to the plaintiff will be small in comparison to the injury to the defendant.<sup>57</sup>

Here, this balance of inconvenience weighs against issuance of the injunction.

In describing the magnitude of harm they contend will result if the requested relief is not granted, Petitioners fail to address a critical deficiency in their argument. The layoffs being implemented by Windstream are consistent with the terms of the Collective Bargaining Agreements, and the affected employees have no right to continued employment with the company. Indeed, IBEW members concluded recent contract negotiations having withdrawn their demand regarding opposition to the Elizabethtown consolidation and with Windstream having agreed to enhanced severance packages. Moreover, Petitioners cannot successfully prosecute the argument that equity somehow favors affording the requested relief when Windstream is abiding by the terms of the agreements negotiated by Petitioners and when there is gainful employment outside of Windstream. (See, Exhibit B which contains classified advertisements showing examples of available employment outside of Windstream in both the Elizabethtown and Lexington, Kentucky locations.)

This is especially so in this case because of the impact that the requested relief will have upon Windstream and its Kentucky customers. The Kentucky workforce

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reductions were undertaken as part of a larger consolidation effort that spanned Windstream's 16 states and sought to increase Windstream's operational efficiencies and responsiveness, thereby also improving customer service. "Undoing" just the Kentucky piece of the larger plan (as Petitioners seek to do) results in harm to Windstream in the form of redundancies in costs and positions which hinders Windstream's efforts to increase its efficiencies and customer responsiveness.

For example, one consideration of the overall plan was to bring Windstream's employee to supervisor ratio more in line with Windstream's peer counterparts. While the peer average is approximately 18.33 employees to 1 supervisor, Windstream's average was 11.4 employees to 1 supervisor prior to the consolidation. After the consolidation becomes effective on March 2, 2007, Windstream hopes to achieve an improved average of 14.2 employees to 1 supervisor. Such consolidation, for example, allows supervisors to manage employees more efficiently and provides opportunities for Windstream to standardize its policies and procedures. The public interest is served by allowing Windstream to proceed with its plans to responsibly manage the company in a way that gains operational efficiencies, allows Windstream to better compete in the marketplace, and to be more responsive to its customers. The equities, therefore, should be balanced in favor of Windstream.

For the reasons set forth herein, Petitioners have not and cannot demonstrate that they will suffer irreparable injury. Their asserted injuries, even if taken as true which they are not, may be made whole by monetary damages which by law cannot be said to be irreparable. Additionally, Petitioners cannot succeed on the merits as they have offered no proof (other than their false assumptions) that Windstream has acted in

<sup>&</sup>lt;sup>57</sup> Bartman v. Shobe, 353 S.W.2d 550, 554 (Ky. 1962).

violation of the Commission's Order in the Approval Proceeding. The public interest is better served by denying Petitioners' requested relief and allowing Windstream to proceed within its managerial discretion to operate its business responsibly and efficiently in order to continue providing quality service to its customers in the Commonwealth.

Respectfully submitted,

Windstream Kentucky East, Inc., Windstream Kentucky West, Inc., and Windstream Communications, Inc.

Mark R. Overstreet R. Benjamin Crittenden STITES & HARBISON, PLLC 421 West Main Street P.O. Box 634 Frankfort, KY 40602-0634 Telephone: (502) 223-3477

### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by United States First Class Mail, postage prepaid and by e-mail, on this 28<sup>th</sup> day of February, 2007 upon:

Dennis Howard Office of the Attorney General Suite 200 1024 Capital Center Drive Frankfort, Kentucky 40601 e-mail: <u>dennis.howard@ag.ky.gov</u> Don Meade Priddy, Cutler, Miller & Meade, PLLC 800 Republic Building 429 West Muhamad Ali Louisville, Kentucky 40202 e-mail: <u>dmeade@pcmmlaw.com</u>

Mark R. Overstreet

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### EXHIBIT A

### AFFIDAVIT OF SUSAN BRADLEY IN SUPPORT OF WINDSTREAM'S RESPONSE TO PETITIONERS' MOTION FOR EMERGENCY RELIEF

- 1. The consolidation announced in December 2006 did not result from the Alltel separation/Valor merger transactions.
- 2. Windstream did not begin reviewing the potential for consolidation efforts until at least one month after the close of the separation/merger transactions on July 17, 2006.
- 3. Windstream first announced these consolidation efforts in December 2006. Since the announcement, Windstream has been transitioning, training and hiring employees at the consolidated centers. If the Windstream corporate consolidation plan is altered by Kentucky-specific delays or changes, Windstream will incur duplicate expenses and encounter operational redundancies.
- 4. A total of 46 employees in Kentucky were initially affected by the reduction in force. Of these 46 Kentucky employees, 26 are represented by CWA, 12 are represented by IBEW, and 8 are non-bargaining.
- 5. Windstream began negotiating a new collective bargaining agreement with IBEW on January 22, 2007. Those negotiations opened with a list of demands from IBEW, which included a demand that Windstream not close the service activation group in Elizabethtown. The negotiations concluded with IBEW having withdrawn that demand and Windstream having agreed to an enhanced severance benefit. As a result, certain IBEW members in the service activation group with less than 10 years of service received enhanced severance packages, which essentially doubled their severance package. Four IBEW members were eligible and will receive enhanced severance packages in accordance with the new collective bargaining agreement.
- 6. Kentucky employees affected by the consolidation have the opportunity and were encouraged to pursue other available positions with Windstream. Positions are currently open at Windstream's facilities in Cornelia, Georgia, Charlotte, North Carolina, and Export, Pennsylvania. Export, Pennsylvania is a bargaining location.
- 7. Windstream has offered outplacement services to all affected employees. Approximately 19 of the affected Kentucky employees have taken advantage of these outplacement services.
- 8. All actions by Windstream have been consistent with the collective bargaining agreements in Kentucky. Neither CWA nor IBEW has filed a grievance to the contrary.
- 9. During the same time periods as the consolidation, Windstream has added 14 positions to its Kentucky operations in engineering and sales.

- 10. Two non-bargaining employees affected in Kentucky have applied for openings in other areas of Windstream's Kentucky operations. Both have been offered positions, and as of this date, one employee has accepted.
- 11. Severance for non-bargaining employees includes:
  - Receipt of regularly scheduled paychecks plus unused vacation on March 9, 2007;
  - Receipt of 52 weeks of severance pay to be distributed on or before March 23, 2007 (with the exception of a single individual who has applied for and been offered another position with Windstream in Kentucky); and
  - Retention of current health benefits through March 31, 2007 and COBRA eligibility through September 2008.
- 12. Of the 26 affected Kentucky employees represented by CWA, 2 employees applied for and accepted other employment with Windstream, 1 employee left voluntarily for employment outside of Windstream, and 23 are eligible for severance.
- 13. Severance for employees represented by the CWA includes:
  - Receipt of regularly scheduled paychecks plus unused vacation on March 9, 2007;
  - Receipt of an average of 35 weeks of severance pay to be distributed no later than March 23, 2007;
  - Retention of current health benefits through March 31, 2007 and COBRA eligibility through September 2008;
  - Receipt of cash payment (pursuant to the CWA collective bargaining agreement) representing 6 months of "grossed-up" medical insurance premiums (100% of the premium plus applicable taxes) to be paid on or before March 23, 2007; and
  - Windstream pension plan.
- 14. Of the 12 affected Kentucky employees represented by IBEW, 5 elected to accept the severance package. The remaining 7 affected IBEW members "bumped" *i.e.*, claimed other bargaining unit IBEW positions. This action by the 7 IBEW members resulted in 2 IBEW members receiving severance packages. Consequently, only 7 of the initial 12 IBEW members were affected by the consolidation, and all 7 received severance benefits.
- 15. Severance for employees represented by the IBEW includes:
  - Receipt of regularly scheduled paychecks plus unused vacation on March 9, 2007;
  - Receipt of an average of 9.5 weeks of severance pay to be distributed no later than March 23, 2007;
  - Retention of current health benefits through March 31, 2007 and COBRA eligibility through September 2008; and
  - Windstream pension plan.

Jusan Bull Susan Bradley, Senior Vice President of Human Resources

### COUNTY OF PULASKI ) ) STATE OF ARKANSAS )

### AFFIDAVIT OF SUSAN BRADLEY

Before me, the Undersigned Authority, on this 27<sup>TH</sup> day of February, 2007, personally appeared Susan Weeks, who, upon being by me duly sworn on oath deposed and said the following:

My name is Susan Bradley. I am over the age of twenty-one (21), of sound mind, and competent to testify to the matters stated herein. I am employed by Windstream Communications as Senior Vice President of Human Resources. I have personal knowledge of the enumerated items set forth below and believe them to be true and correct to the best of my information, knowledge, and belief.

Further, Affiant sayeth not.

Susan Bradley, Senior Vice President of Human Resources

SWORN AND SUBSCRIBED TO BEFORE me this 27<sup>th</sup> day of February, 2007, to certify which witness my hand.

ia) Janne



My Commission Expires:

8-10-16

### EXHIBIT B





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