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February 20, 2008

Elizabeth O'Donnell
Executive Director
Kentucky Public Service Commission
P.O. Box 615
211 Sower Boulevard
Frankfort, KY 40601

RE: ***MCI Communication Services, Inc. et al***
v.
Windstream Kentucky West, Inc. et al
Case No. 2007-00503

Dear Ms. O'Donnell:

On behalf of MCI Communications Services, Inc., Bell Atlantic Communications, Inc., NYNEX Long Distance Company, TTI National, Inc., Teleconnect Long Distance Services & Systems Company and Verizon Select Services, Inc. (collectively, "Verizon"), enclosed please find an original and eleven copies of Verizon's Opposition to Windstream's Motion to Dismiss as well as an original and eleven copies of a notice of approval of Kimberly Caswell's application for admission *pro hac vice*.

Please indicate receipt of these filings by placing your file stamp on the extra copies and returning to me via our runner.

Very truly yours,

STOLL KEENON OGDEN PLLC

Douglas F. Brent

DFB:

Enclosures

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the matter of:

MCI Communications Services, Inc., Bell Atlantic Communications, Inc., NYNEX Long Distance Company, TTI National, Inc., Teleconnect Long Distance Service & Systems and Verizon Select Services, Inc.	)	
Complainants	)	Case No. 2007-00503
vs.	)	
Windstream Kentucky West, Inc., Windstream Kentucky East, Inc. – Lexington, and Windstream Kentucky East, Inc. – London	)	
Defendants	)	

VERIZON'S OPPOSITION TO WINDSTREAM'S MOTION TO DISMISS

Verizon filed a Petition to Reduce Windstream's Switched Access Charges ("Petition") on December 5, 2007. On January 17, 2008, Windstream filed a Motion to Dismiss Verizon's Petition, claiming that Verizon failed to make a *prima facie* case to support an inquiry into reducing Windstream's switched access rates.[1] Windstream is wrong, so the Commission should deny its Motion to Dismiss.

[1] Motion to Dismiss, Answer, and Response to Motion for Full Intervention ("Motion"), at 6, 17, 22, 24 (filed Jan. 17, 2008), as amended by Windstream's Notice of Filing of Corrected Page 6 (filed Jan. 29, 2008).

INTRODUCTION

As Verizon explained in its Petition, this Commission has repeatedly emphasized the need to rationalize switched access rates in Kentucky.[2] Windstream itself has recognized the pro-consumer benefits of reducing access rates,[3] and even agrees in its Motion that access reform is necessary (Motion at 7). Windstream does not deny Verizon's allegation that Windstream's switched access charges are up to 2000% higher than BellSouth's,[4] nor does it defend those charges except to suggest that they are reasonable because they were once approved by the Commission (Motion at 5-6) and because some other carriers' rates are even higher (*id.* at 2-3). Instead of engaging the relevant facts and law, Windstream accuses Verizon of taking inconsistent positions on access reform across the Verizon corporate footprint and trying to block comprehensive intercarrier compensation reform. (Motion at 6-16.) Aside from being inaccurate, these accusations have nothing to do with the only question now before the Commission—that is, whether Verizon has adequately alleged that Windstream's switched access rates are unjust and unreasonable under Kentucky law, so that an investigation of those rates is justified. As Verizon explains below, it has made the *prima facie* showing necessary to substantiate its Petition—as the Commission recognized in ordering Windstream to answer that Petition—so the Commission should deny Windstream's Motion to Dismiss.

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[2] *See* Petition at 8, *citing Review of BellSouth Telecomm., Inc.'s Price Regulation Plan*, Order, Case No. 99-434 ("*BellSouth Price Plan Review*") at 9-10 (Aug. 3, 2000); *Tariff Filing of BellSouth Telecomm., Inc. to Mirror Interstate Rates*, Order, Case No. 98-065 (*BellSouth Mirroring Order), at* 4-5 (March 31, 1999); *Cincinnati Bell Telephone*, Case No. 98-292, Order ("*Cincinnati Bell Order.*") at 13-14 (Jan. 25, 1999).

[3] Petition at 10-11, *citing* Windstream Petition for Conversion to Price Cap Regulation and for Limited Waiver Relief ("Windstream FCC Petition"), WC Docket No. 07-171, at 2 (Aug. 6, 2007).

[4] *See* Petition at 5 & Confidential Ex. 1.

DISCUSSION

I. VERIZON MADE A *PRIMA FACIE* CASE TO SUSTAIN ITS PETITION

Windstream asks the Commission to find that Verizon has failed to make the *prima facie* case necessary to sustain its Petition. To support this argument, Windstream initially cited an incorrect legal standard, then amended its Motion to remove this reference,[5] leaving it silent as to any relevant legal authority. In fact, the Commission has already determined that Verizon alleged facts sufficient to establish a *prima facie* case.

Under the Commission's Rules of Procedure governing formal complaints, the Commission will issue an order to satisfy or answer a complaint only after it has examined the complaint and concluded that it "does establish a prima facie case."[6] Therefore, when the Commission issued its December 17, 2007 Order to Satisfy or Answer, it had already determined that Verizon had alleged facts sufficient to make out a *prima facie* case. [7] The Commission would have dismissed the complaint or given Verizon the opportunity to amend it if Verizon had not made a *prima facie* case that it is entitled to the requested relief. Windstream offers nothing to justify reversing the Commission's finding that Verizon adequately supported its request.

Windstream's claim that Verizon's "mere comparison" between AT&T's and Windstream's rates cannot support its Petition ignores most of the facts and law Verizon cited. Verizon did not simply present Windstream's and AT&T's respective switched access rates and

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[5] *See* Notice of Filing of Corrected Page 6, *supra*.

[6] 807 KAR 5:001, § 12(c)(4)(a) ("Upon the filing of such complaint, the commission will immediately examine the same to ascertain whether it establishes a prima facie case and conforms to this administrative regulation."); *id.*, § 12(c)(4)(b) ("If the commission is of the opinion that such complaint, either as originally filed or as amended, does establish a prima facie case and conforms to this administrative regulation, the commission will serve an order upon such corporations or persons complained of...requiring that the matter complained of be satisfied, or that the complaint be answered in writing....").

[7] *See, e.g., Kenergy Corp. v. Kentucky Util. Co.*, Case No. 2002-00008, Order, at 3 n. 3 (March 21, 2002) ("While we made no express finding that the complaint establishes a *prima facie* case, our action implies such finding. Administrative Regulation 807 KAR 5:001, Section 12(a), requires the Commission to examine a formal complaint upon its filing 'to ascertain whether it establishes a *prima facie* case and conforms to this administrative regulation.'")

ask the Commission to conclude, without any other facts or explanation, that Windstream's rates should be reduced. Rather, Verizon explained that this Commission has identified a need for access reform and has found that removing subsidies from switched access rates and pricing services more closely to their costs is in the public interest.[8] Verizon, likewise, discussed the FCC's repeated admonitions that economically efficient competition and the consumer benefits it yields cannot be achieved as long as carriers seek to recover a disproportionate share of their costs from other carriers, rather than from their own end users. (*See* Petition at 8-9.) Verizon pointed out that while BellSouth has eliminated any charge based on a non-traffic sensitive revenue requirement and substantially reduced its switched access rates to a level the Commission deems just and reasonable, Windstream has made no similar structural changes to its rates, let alone rate reductions, even though it is an able, well-financed competitor that has fully entered the interexchange business and that can and should compete on the same playing field with other large telecommunications companies. (Petition at 9-11.)

Although Windstream suggests that the access reductions Verizon seeks will not benefit consumers or competition, Windstream itself touted these benefits in its FCC petition for authority to convert its remaining rate-of-return properties to price cap regulation.[9] There, Windstream stressed the positive action it had already taken in eliminating its carrier common line charges in the interstate jurisdiction. Here, Windstream's carrier common line charges, including the so-called non-traffic-sensitive revenue requirement ("NTSRR"), make up over half to nearly three-quarters of the Windstream companies' switched access rates—another fact Windstream did not deny. This fact alone, coupled with the Commission's proposed elimination

[8] Petition at 8, *citing BellSouth Price Plan Review*, at 9-10; *BellSouth Mirroring Order*, at 4-5; *Cincinnati Bell Order*, at 13-14.
[9] *See* Petition at 10-11, *quoting* Windstream FCC Petition, at 2.

of non-traffic-sensitive rate elements for all carriers as early as *ten years ago*, justifies an investigation into reducing Windstream's switched access rates.[10]

Instead of defending its non-traffic-sensitive charges, Windstream criticizes Verizon for stating that the NTSRR includes intraLATA toll equal access costs, when it was instead intended to cover the local loop plant. (Motion at 2, 20-21.) Although the NTSRR did have its genesis in the transition to intraLATA equal access, the 1994 Order Windstream cited clarifies that the Commission did not, in fact, include equal access conversion costs in the NTSRR, "because a charge per switched access minute would increase the non-traffic sensitive revenue requirement ***when such charges should be decreased or eliminated to promote competition.***"[11] What was true well over a decade ago is certainly more compelling today. Windstream's intrastate non-traffic-sensitive charges—which appear to lock in ***1991*** revenue streams[12]—could not be more contrary to contemporary efforts to remove uneconomic subsidies from access rates. Verizon's Petition will allow the Commission to investigate whether any justification remains for Windstream's NTSRR charges, which are supposed to be cost-based.[13]

The Commission will not dismiss a complaint that raises genuine issues of disputed fact, once it has found—as it has in this case—that the complaint makes out a *prima facie* case.[14] Whether Windstream's switched access rates are unjust and unreasonable is a fact question to be

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[10] Petition at 8, *citing Inquiry into Universal Service and Funding Issues*, Adm. Case No. 360, Order (June 18, 1997).

[11] *Inquiry into IntraLATA Toll Competition, etc.*, Adm. Case No. 323, Phase I, Order, at 17-18 (Dec. 29, 1994) (emphasis added).

[12] *See, e.g.*, Motion at 21; Windstream Kentucky West Intrastate Access Services Tariff, § 3.9.2 ("During 1991, the Telephone Company will determine its monthly NTS Revenue Requirement by multiplying the NTS Revenue Requirement per access line per month rate, as set forth in Section 17.1.2 following, by the number of Telephone Company access lines in service on June 30, 1999.") It would have been impossible to use 1999 lines in service in a calculation done "during 1991," as the tariff contemplates. Windstream's application of the tariff provision will be a fact issue for development in this case.

[13] *See Inquiry into IntraLATA Toll Competition, etc.*, Adm. Case no. 323, Phase I, Order, at 31(May 6, 1991).

[14] *See, e.g., Touchstone Comm., Inc. and ALEC, Inc. v. Windstream Kentucky East, Inc.*, Case No. 2005-00482, Order (Jan. 18, 2007); *Mountain Rural Tel. Coop. Corp., Inc. v. Kentucky Alltel, Inc.*, Case No. 2006-00198, Order (Sept. 1, 2006).

resolved by the Commission on the record that will be developed further through discovery and a hearing.

Verizon's Petition is not "incomplete" because it allegedly "completely ignores mechanisms such as local rate rebalancing that are implicit in true access reform." (Motion at 3.) On the contrary, Verizon explicitly acknowledged that Windstream can and should be able to recover legitimate network costs through rates for the services it provides its own retail customers and that Commission intervention should not be necessary for any rate rebalancing to occur. (Petition at 14.) Verizon also pointed out that Windstream already has total retail pricing flexibility for its nonbasic local and toll services, and for its broadband offerings. *Id.* Verizon had no obligation to set forth a rebalancing plan for Windstream in its Petition; if Windstream believes such a plan is appropriate, it can pursue one. If the Commission determines the means of rebalancing is to be addressed now, that is a fact question that can be resolved during the proceeding.

Although Windstream has argued (incorrectly) that Verizon has not made out a *prima facie* case sufficient to go forward, it has not argued that the Commission cannot proceed with the Petition. Deep into its Motion, Windstream suggests, almost in passing, that "as an alternatively regulated carrier," it is "exempt from KRS 278.260" (which gives the Commission jurisdiction over complaints about unreasonable utility rates), and that its "rates, charges, earnings, and revenues are deemed to be just and reasonable under KRS 278.030." (Motion at 18.) Windstream does not, however, provide any citations or explanation to support this claim, and, in fact, appears to acknowledge that an access rate complaint may proceed if it establishes a sufficient foundation. *Id.*

Nothing in the law deems Windstream's switched access rates perpetually just and reasonable, despite complaints about those rates. As the Commission made clear just three months ago in a rate complaint brought by several other carriers against Windstream, it can and will investigate Windstream's rates upon complaint that they are unfair, unjust, and unreasonable: "[P]ursuant to KRS 278.260, the Commission has original jurisdiction over complaints as to the rates of any utility. Once an individual or a corporation files a complaint against a utility alleging that a rate in which the complainant is directly interested is unreasonable or unjustly discriminatory, the Commission shall proceed to make such investigation as it deems necessary."[15] Moreover, Windstream's suggested alternative to proceeding against just Windstream—a generic proceeding considering "access reform for all carriers in the Commonwealth" (Motion at 22) —assumes that the Commission may revise the rates of "alternatively regulated" carriers.

Windstream has offered the Commission no reason to reverse its conclusion that Verizon's Petition presents a *prima facie* case to support investigation of Windstream's switched access rates. Verizon has not asked the Commission to reduce Windstream's switched access rates simply because they are higher than BellSouth's. Verizon's Petition explains *why* they should be reduced, relying on the Commission's own policy conclusions, and demonstrates that BellSouth's rate—which has been subject to the most regulatory scrutiny and competitive pressure—is the most appropriate benchmark. The Commission will determine the final level of reductions after development of a complete record.

[15] *Brandenburg Tel. Co., et al. v. Windstream Kentucky East, Inc. and Windstream Kentucky West, Inc.*, Case No. 2007-00004, Order (Nov. 13, 2007) (requiring Windstream to produce cost support for its transit rates, upon carriers' complaint that they are unfair, unjust, and unreasonable).

II. WINDSTREAM'S "PUBLIC INTEREST" ARGUMENT CLAIMS ARE IRRELEVANT AND INACCURATE

Windstream's Motion is composed mostly of accusations that Verizon opposes comprehensive access reform and has taken inconsistent positions on access reform across the states. Windstream urges the Commission to conclude that Verizon's Petition is not in the public interest based on extensive out-of-context excerpts from Verizon pleadings in other states and rate comparisons from other states. None of this has anything to do with whether Verizon has made allegations sufficient for the Commission to investigate whether *Windstream's* switched access rates *in Kentucky* are unreasonable. Because all of this discussion is irrelevant, there is no need for a point-by-point response. The Commission should at least know, however, that Windstream's allegations about Verizon's positions elsewhere are not accurate.

Verizon *does* support comprehensive intercarrier compensation reform—it just doesn't support the same brand of "reform" Windstream advocates. Windstream asserts that Verizon is against comprehensive access reform because it opposes the Missoula Plan before the FCC. (Motion at 8.) It is no surprise that Windstream supports the Missoula Plan, because it would insulate rural and mid-sized carriers from competition by maintaining high rural access rates and creating unnecessary benefits and implicit subsidies for such carriers. Windstream neglects to tell the Commission that Verizon has proposed a set of principles the FCC should follow to implement true intercarrier compensation reform and that would avoid the anti-consumer, anti-competitive effects of the Missoula Plan.[16]

The existence of the FCC's intercarrier compensation rulemaking does not mean, however, that this Commission should sit on its hands—as Windstream recommends—awaiting a decision in a docket that has been dormant for over seven years (the last substantive order was

[16] *See, e.g., Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92, Comments of Verizon on the Misssoula Plan (filed Oct. 25, 2006)..

issued in January 2001) and that might or might not eventually affect intrastate access rates. Windstream points to Verizon Pennsylvania filings to suggest that Verizon itself has cited the FCC rulemaking as a reason to delay state investigation of access charges. But Windstream fails to tell the Commission that the Verizon ILECs in Pennsylvania have reduced their intrastate access revenues by nearly **$866 million** since 2000, so that they are now recognized as "well below the national average" for ILEC intrastate access rates.[17] Windstream also neglects to disclose that the Pennsylvania Commission had already stayed further investigation of Verizon's access rates because the FCC intercarrier compensation rulemaking was pending. Where the RBOCs have *already* slashed their intrastate access rates, as the Verizon ILECs have in Pennsylvania, the FCC proceeding is just one more reason to defer *another* examination of RBOC rates in favor of investigating the much higher rates of other carriers that have made little progress in reducing their access rates, to correct that imbalance and reduce those rates to the level of the RBOC.

Verizon's advocacy across the states has been consistent in this regard. Typically, the RBOCs (and sometimes other large carriers) have already been compelled to substantially reduce their switched access rates. It is now time to consider reducing the unduly high switched access rates of other carriers that have not been required to make similar reductions, rather than further reducing the largest carriers' rates at this time. There is no justification for allowing capable carriers, like Windstream in Kentucky, to continue to recover so much of their expenses from their competitors, rather than from their own end users.

Verizon has, likewise, consistently recommended the RBOC rate as the appropriate benchmark for a just and reasonable intrastate access rate—and not just where Verizon has

[17] *See AT&T Comm. of Pennsylvania, LLC v. Verizon North Inc.*, Docket No. C-20027195, Recommended Decision on Remand (Nov. 30, 2005) at 64 & Verizon's Status Report and Motion to Extend the Stay (filed Dec. 7, 2007) at 1-2.

nothing to lose from access reform, as Windstream incorrectly contends. For instance, Verizon has supported recent efforts to limit CLEC switched access rates in Virginia and Ohio, even though the decisions in those cases required the Verizon CLECs to reduce their own access rates.[18] Moreover, the Verizon ILECs have already substantially reduced their own access rates in a number of states that are considering access reform. Verizon expects to initiate additional access reform proceedings across the country. In any event, there is no need for the Commission to try to familiarize itself with parties' positions or the legal and factual background in other states' dockets before denying Windstream's Motion to Dismiss in this case.

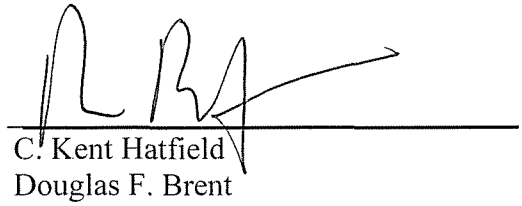
Windstream suggests that if the Commission finds (and it already has) that Verizon has made out a *prima facie* case to support its Petition, the Commission should proceed only in the context of a "generic proceeding aimed at meaningful, comprehensive access reform for all carriers in the Commonwealth." (Motion at 23.) However, in Verizon's experience, Commissions have usually undertaken access reform in more manageable proceedings involving individual carriers or similar groups of carriers. The Kentucky Commission is an example, having undertaken first to consider access rates for BellSouth. Proceeding logically, the Commission may consider Windstream's rates next. Verizon's Petition explained the ways in which Windstream, the second largest exchange carrier in Kentucky, is similar to other large telephone companies like AT&T Kentucky. (*See* Petition at 9-11.) And like AT&T Kentucky, Windstream is a non-rural LEC with a broad portfolio of retail services from which to recover its expenses. The possibility of a generic case does not, in any event, support Windstream's arguments that Verizon has not made a *prima facie* case to proceed against Windstream.

* * *

[18] *See Amendment of Rules Governing the Certification and Regulation of Competitive Local Exchange Carriers*, Case No. PUC-2007-0003, Final Order (Va. S.C.C. Sept. 28, 2007); Establishment of Carrier-to-Carrier Rules, Entry on Rehearing, Case No. 06-1344-TP-ORD, at 17-18 (Oct. 17, 2007).

For all these reasons, Verizon asks the Commission to deny Windstream's Motion to Dismiss.

Respectfully submitted on February 20, 2008.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Opposition to Motion to Dismiss has been served by First Class Mail on those persons whose names appear below this 20th day of February, 2008.

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