COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Brandenburg Telephone Company, et. al.	)	
	)	
Complainants	)	
	)	
v.	)	**Case No. 2007-00004**
	)	
Windstream Kentucky East, LLC	)	
	)	
Defendant	)	

REPLY

Windstream Kentucky East, LLC ("Windstream"), by counsel, hereby submits this Reply to the responses to the Motion to Dismiss filed by the Complainants ("RLECs")[1] and Intervenors:

INTRODUCTION

The arguments set forth by the RLECs and Intervenors do not provide sufficient basis on which to deny Windstream's Motion to Dismiss. Despite the hypothetical "what if's" asserted in the responses to the Motion to Dismiss, the filing of Windstream's transit tariff has led to the RLECs rerouting their traffic that they were improperly transiting through Windstream's end offices. As for the Intervenors, they continue to have agreements with Windstream providing for transit rates, terms, and conditions either comparable to or less than the tandem transit tariff rates. Ironically, the responses to the Motion to Dismiss lend support to Windstream's position that neither the RLECs nor the Intervenors currently have standing to pursue a complaint against the transit tariff and further

[1] For purposes of this filing, Windstream notes that in pertinent parts the term "RLECs" does not reference Highland Telephone Cooperative ("Highland"). As noted on the record herein, Windstream is Highland's tandem provider, and the RLECs recognize that Highland is situated differently than the other RLECs pursuing the Complaint and that Highland has been working to reach an appropriate transit traffic agreement with Windstream. Additionally, while the term "RLECs" includes Brandenburg Telephone Company ("Brandenburg") and although Brandenburg may not be considered to have transit traffic routing through Windstream's network at this time, Brandenburg continues to misroute certain traffic to Verizon through Windstream's end-office in Elizabethtown as set forth in detail in Case No. 2008-00203.

establish very clearly that any potential concern these parties have with Windstream's transit tariff is not ripe for action before this Commission. Windstream's transit tariff should continue, and the Complaint should be dismissed without prejudice in order to allow any of the RLECs or Intervenors to pursue a complaint at some point in the future if their claims about the transit tariff about which they currently only are speculating then have come to fruition.

REPLY TO RLECS' RESPONSE

The RLECs object to the continued existence of Windstream's transit tariff primarily on the grounds that the transit tariff would deny them reciprocal compensation or present the possibility of some harm to them in the future. These assertions, as well as other general unsubstantiated statements in their response, do not provide sufficient basis to deny the Motion to Dismiss.

1. The transit tariff does not operate to deny the RLECs of reciprocal compensation.

The RLECs argue that the continuation of the transit tariff "*will* serve as a disincentive to third parties who might otherwise seek interconnection agreements with the RLECs" and also "*would have* the direct effect of reducing the RLECs' revenue by making the RLECs unable to assess appropriate reciprocal compensation against originating third party carriers." (RLEC response p. 5. Emphasis supplied.) These protests by the RLECs are based purely on speculative concerns about events which may or may not happen but which in fact have not happened. Further, the notion that Windstream's transit tariff would operate to "rob" them of reciprocal compensation is without basis. The only party that in fact has been "robbed" is Windstream through the RLECs' misuse of Windstream's end offices to provide transit services without compensation.

More accurately, any transit charge (whether it is assessed via a tariff or an agreement) has no bearing on a local exchange carrier's assessment of reciprocal compensation. Under the Federal

Telecommunications Act of 1996, two parties interconnecting to exchange their traffic have an obligation to negotiate in good faith for the exchange of their traffic and may do so, generally speaking, either through direct or indirect interconnection. Reciprocal compensation would apply in either scenario for the exchange of local traffic. The only fact that arises from the existence of Windstream's transit tariff is that *if* the two parties chose to exchange their local traffic indirectly through the use of Windstream's network, a tandem transit charge would apply to the carrier routing its local traffic through Windstream's tandem in the absence of a transit agreement. However, this fact in no way negates the RLECs' ability to assess reciprocal compensation for termination of that local traffic. The RLECs' conjecture about the continuance of Windstream's transit tariff in no way mitigates or otherwise alleviates the RLECs' obligation under the Act to exchange traffic indirectly or directly with other interconnecting telecommunications companies.

The RLECs state that Windstream's transit tariff would be a disincentive to third parties in such a scenario. (RLECs' response p. 3)[2] Again, these claims are not supported by any facts currently in existence. It is equally as likely that the transit tariff *would* not serve as a disincentive but rather *could* provide a basis of certainty through which the negotiating parties could better evaluate potential direct and indirect interconnection options. Indeed, Windstream's transit tariff actually *could* be an incentive for third parties to establish direct connections with the RLECs, or Windstream's transit charges *could* also incent the RLECs to establish their own local tandems. The hypothetical scenarios as to the potential impact of a transit tariff on future RLEC negotiations appear endless at this point as no facts underlying the RLECs' arguments have actually transpired at

[2] The RLECs misrepresent, "The tariff serves as a disincentive to third parties who might otherwise approach the RLECs for an interconnection agreement, because third-parties can now simply route traffic through Windstream without such an agreement." (RLECs' response p. 3) The statement is disingenuous when made by Brandenburg given its actions to misroute and conceal unauthorized traffic through Windstream's end office in Elizabethtown instead of negotiating or arbitrating an agreement with Verizon for the appropriate exchange of those two parties' traffic. That matter is being considered in a separate proceeding, but the hypocrisy of the statement in this proceeding should be noted.

this time. One fact known at this time is that the RLECs' ability to assess reciprocal compensation for the exchange of local traffic with third parties is wholly without regard to any transit charges that apply if the parties choose to exchange their traffic indirectly through Windstream's network.

Curiously, despite their objections to tariffed transit charges, some of the RLECs have established their own tandems for the origination and termination of long distance traffic and have included in their Kentucky intrastate access tariffs a "tandem switching" rate to recover for the use of their tandem by long distance carriers. Windstream's transit rate is established to assess the charges for the same type of use, *i.e.*, the use of Windstream's tandem switch.[3] So to be clear, the RLECs' are allowed to maintain tariffs to charge for the use of their tandem switch when a long distance call occurs. Yet, they seek to preclude Windstream from maintaining a tariff to charge for the same use of a tandem switch when a local call (instead of a long distance call) is delivered using the tandem switch. This position hardly seems equitable.

The RLECs' assertions are mere conjecture and are without merit. Windstream's transit tariff has not operated to deny the RLECs of reciprocal compensation, and it is highly unlikely it could ever do so.

2. The RLECs' assertion that the transit tariff "will affect all future negotiations" is speculative and not justiciable.

Second, the RLECs misconceive the fact that the continuation of the transit tariff and the dismissal of their Complaint "causes at least two *continuing* injuries." (RLECs' response p. 3. Emphasis supplied.) No injury in fact to the RLECs (or the Intervenors for that matter) has been proven, only proposed, and certainly is not "continuing." The first purported injury (the claimed

[3] The fact that the RLECs themselves maintain tariffs seeking to recover for the same type of tandem use flies in the face of their unsubstantiated statements that "the charges involved remain an inappropriate subject for a tariff." (RLEC response p. 2) Additionally, their bare assertion ignores the fact that transit tariffs are common, and AT&T Communications maintains transit tariffs in at least Tennessee and South Carolina. Finally, their objections to a tariff seem self-serving considering their refusal at the same time to negotiate separate transit agreements.

concern about denial of reciprocal compensation) was discussed in part above. That claim as well as the second claim about the transit tariff impacting all *future* negotiations are not justiciable for the reason that they have not occurred, are speculative, and are not ripe for action by the Commission.

A claim is justiciable only if it is ripe for review which requirement avoids premature litigation and "entangling" the courts from abstract "debates that may turn out differently in different situations." (*North American Deer Farmers Ass'n, et. al., v. Jonathan W. Gassett, et. al.*, 2008 U.S. Dist. LEXIS 66946, citing to *Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008) ("Warshak") and *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003).) Indeed, a claim is not fit for the judicial process when it is filed too early or too late or when the complaining party lacks a sufficiently concrete and redressable interest. (Warshak at 525.) The test is first whether the claim arises in a concrete factual context and concerns a dispute that is likely to occur and second whether there is a hardship to the parties if consideration of the claim is withheld. (*Id.*) The RLECs' claims fail on both accounts.

The RLECs' arguments for continuing the Complaint do not arise from a concrete factual context. To the contrary, the RLECs conjure a host of contingent future events that they anticipate may occur, but which in reality may never occur at all. They assert that their Complaint should not be dismissed as the continuation of the transit tariff "will" serve as a disincentive to third parties, "may" encourage third parties to forego negotiations with the RLECs, "would" reduce the RLECs' ability to assess reciprocal compensation, "will affect all future" negotiations, and "will" grant Windstream leverage in "future" renegotiations. (RLECs response pp. 5-6) None of these scenarios have occurred and by their very phrasing are merely speculations about some future possibilities.

Yet, there remain other just as likely, if not more probable, scenarios that may arise in the future. For example, the presence of the transit tariff could provide incentive for the RLECs to avoid

future misrouting of their transit traffic through Windstream's end offices or encourage RLECs to negotiate with Windstream regarding transit service. The transit tariff could provide some certainty to and actually aid in the RLECs' interconnection negotiations with third parties or even encourage the RLECs to establish tandems to collect their own transit revenues from third parties using their networks to transit local traffic.

The RLECs' claims at this juncture remain mere possibilities and seem less likely to occur than the alternatives set forth in the preceding paragraph. The facts known to date include the following: (1) Prior to the establishment of the transit tariff, Windstream had negotiated with all of the Intervenors transit rates terms and conditions at least comparable to or more favorable than those in the transit tariff; (2) Windstream has taken no action to terminate or impair those agreements; (3) Windstream has attempted to negotiate transit agreements with the RLECs; (4) The RLECs (but for Highland) have not negotiated transit agreements with Windstream; (5) Prior to the establishment of the transit tariff, the RLECs were misusing Windstream's end offices to transit their local traffic and also were not compensating Windstream for this use of Windstream's network; (6) The RLECs did not dispute that this is an inappropriate use of an end office and since the establishment of the transit tariff have rerouted their local traffic away from Windstream's network; and (7) The RLECs now for the first time in their response describe the rerouting of their traffic as "temporary" (RLECs' Response p. 4). Thus, the known facts suggest that the RLECs' claims about the potential negative impacts of the transit tariff are far less likely to occur than the positive impacts of the continuation of the tariff proposed by Windstream. Regardless, the RLECs' conjecture does not comprise a claim ripe for decision before the Commission.

The actual facts suggest that there is little or no hardship to either the RLECs or the Intervenors by continuing a tariff service which does not currently apply to them for the reason

either that they have separate transit agreements or they are not currently routing transit traffic through Windstream's network. Yet, the known facts create a very real hardship to Windstream if the tariff is not in place and the RLECs commence reusing Windstream's network without negotiating a transit agreement and without compensating Windstream. Moreover, Windstream should not be made to incur the expense of defending hypothetical claims that may or may not transpire at some point in the future.

The RLECs' speculative claims may not be considered ripe or justiciable by law. Accordingly, they provide no basis on which to deny Windstream's Motion to Dismiss. Windstream suggests that the Complaint may be dismissed without prejudice in order to provide assurance to the RLECs and Intervenors that if their hypothesized claims ever were realized - no matter how unlikely that result may be - they would not be denied a forum for the dispute.

3. The RLECs' remaining various assertions are also without merit.

The RLECs' remaining general arguments for denying Windstream's Motion to Dismiss also are in error. For example, the RLECs assert that the Complaint can only be moot where "no purpose is served" by continuing the examination. (RLECs' response p. 2) As set forth above, correct application of what facts are known reveals that no purpose is served by continuing the Complaint as none of the claimed injuries have in fact occurred. Likewise, no purpose is also served by continuing a tariff complaint by parties to whom the tariff currently does not apply. The known facts demonstrate that there is a real purpose to continuing the tariff at the very least to ensure that the RLECs do not commence rerouting their local traffic through Windstream's network (particularly the end offices) without entering into an appropriate agreement or compensation arrangement with Windstream.

Further, the RLECs state without any substantiation that the tariff is vague and ambiguous and otherwise onerous. (*Id.* p. 3) The transit tariff is a written document which speaks for itself but hardly can be said to be fatally vague or ambiguous. It is clear on its face that charges apply when a party chooses to direct its local traffic to Windstream's network to transit Windstream's tandem and when that party fails to otherwise negotiate an agreement with Windstream to provide that service. Finally, there is nothing onerous about expecting the RLECs to compensate another carrier for their decision to use that carrier's network. Indeed, as discussed above, it is a matter of the public record of the RLECs' access tariffs that they certainly expect to charge long distance carriers for the similar use of their RLEC network.

The RLECs also suggest that their Complaint should not be dismissed due to their lack of standing based on what they describe as their attempt "to mitigate damages." (*Id.* p. 4) It is curious that they use the phrase "damages" in this context as the only party that has been shown to be harmed under the known facts is Windstream who was not receiving compensation from the RLECs for their use of Windstream's network. Notwithstanding, the RLECs rerouted their traffic away from Windstream's end offices and currently are not using Windstream's network for transit. Accordingly, they have no standing to pursue the Complaint at this time.[4]

Finally, the RLECs suggest that their Complaint is supported by KRS 278.190 and 278.260. (*Id.*) Neither of these statutes applies to Windstream as an alternatively regulated company. It is

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[4] The RLECs suggest that they have standing as "Windstream Refuses to Commit to Waiving Charges for Companies Billed Under the Inappropriate Tariff." (RLECs' response p. 6) This is a red herring. Only one RLEC remains in discussions with Windstream regarding a limited, retroactive balance. All of that RLEC's transit traffic has been moved, and charges are not currently accruing. Windstream has not initiated collection proceedings for that balance. Thus, this one retroactive balance does not provide all of the RLECs with a claim of standing sufficient to provide a justiciable basis to dispute the tariff. Rather, Windstream may have standing to pursue collections of the outstanding balance, only at which time would the one RLEC in question have standing to dispute the applied tariffed rate to the retroactive transit usage.

interesting to note, however, that even if KRS 278.260 were applicable, it still would not support continuation of the RLECs' Complaint. As recognized by the RLECs, KRS 278.260 vests jurisdiction over rates "in which the complainant is *directly* interested." (*Id.* Emphasis supplied.) Neither the RLECs nor the Intervenors have any direct interest in the transit tariff rates at this time. The transit tariff rates are wholly inapplicable to the Intervenors who all have transit agreements with Windstream that apply in lieu of the transit tariff rates. Likewise, the transit tariff rates are inapplicable to the RLECs who are not using Windstream's network to transit their local traffic. While Windstream has noted separately in case 2008-00203 that the transit tariff may serve as a proxy for calculation of compensation due to Windstream by Brandenburg for its unauthorized use of Windstream's network, this would not be a direct application of the transit tariff and would fall outside KRS 278.260.

In summary, the RLECs' response sets forth no justiciable claim sufficient to deny the Motion to Dismiss and to allow the Complaint to proceed based on speculative concerns. The Complaint should be dismissed without prejudice.

REPLY TO INTERVENORS' RESPONSE

Windstream incorporates herein its reply to the RLECs' response above. In their response, the Intervenors suggest primarily that the Motion to Dismiss should be denied and that the Complaint should continue at this time for the following reasons: (1) Availability of transit service is critical to the competitive market; (2) Transit tariff rates should be priced at TELRIC; and (3) The transit tariff could impact future negotiations between the Intervenors and Windstream. Like the claims set forth by the RLECs, the claims by the Intervenors are not justiciable and do not provide sufficient basis for denying the Motion to Dismiss.

First, no events have transpired which would indicate that the continuation of the transit tariff in its current form would jeopardize the continued availability of transit service in Kentucky. Indeed, the continuation of the transit tariff helps ensure such continued availability.

Second, while Windstream disputes the Intervenors' contention that transit service is necessarily priced at TELRIC, Windstream notes that this point is wholly irrelevant to the continuation of the transit tariff and dismissal of the Complaint. The known facts demonstrate clearly that Windstream has negotiated with the Intervenors rates, terms, and conditions for transit service that are comparable to or more favorable than those set forth in the transit tariff. Windstream also clearly has acknowledged on the record in this matter its preference for private negotiation of such agreements and its frustration with the RLECs' refusal to engage in such negotiations. Thus, the Intervenors' speculation that the transit tariff could diminish Windstream's incentive to negotiate such agreements in the future is unlikely based on the known facts. In fact, while the Intervenors suggest that the transit tariff rates "could" become a price floor for transit service, it is just as likely that the rates could become a price ceiling. Both scenarios are speculative at this juncture and not justiciable.

Third, the Intervenors claim that the tariff "could" establish a price floor or may provide disincentive to Windstream producing a result that "would" be undesirable and "would" undermine Commission policy. (Intervenors' response p. 2) In applying the same test as applied above to the RLECs' claims, these hypotheticals are mere speculation, appear unlikely based on the known facts, are not ripe, and are not justiciable.

Again, under Kentucky law, for a claim to be justiciable, the complaining parties also must have standing. (*Supra.*) The Intervenors readily admit that the tariff rates do not apply to them today. (Intervenors' response p. 2) This fact is fatal to their standing in this matter despite their attempts to

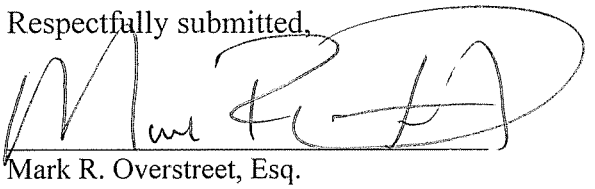
argue that the Complaint should continue, nevertheless, based on their speculations as to possible negative impacts of the continuation of the tariff. It remains that they have no direct interest in the transit tariff which rates, terms, and conditions are wholly inapplicable to them for the reason that they all maintain transit agreements with Windstream that apply in lieu of the tariff. This is hardly different from a scenario where a customer in AT&T's exchange would have no standing to dispute a rate in Windstream's tariff simply because that customer was concerned that the rate could be unreasonable and that AT&T could adopt that rate at some point in the future. Just as that claim is nonjusticiable for lack of standing and ripeness, so are the Intervenor's claims.

The Intervenors' also suggest incorrectly that the RLECs have moved their traffic away from Windstream's network on the basis of the tariff pricing. Intervenors are incorrect. As recognized on the record herein, the RLECs did not dispute that their use of Windstream's end offices to transit traffic is an inappropriate use of an end office. It is these network considerations that have in fact led the parties' discussions as to the rerouting of the traffic to date. The RLECs (but for Highland) and Windstream otherwise have not negotiated any rates, terms, or conditions for transit service.

CONCLUSION

None of the claims asserted by the RLECs or Intervenors provides a justiciable claim sufficient to deny the Motion to Dismiss. In the interest of judicial economy, the Complaint should be dismissed without prejudice with leave for the parties to refile if an when any of the hypothesized concerns actually comes to fruition. Continued action with respect to the Complaint in this docket would be burdensome, counterproductive, an inefficient use of resources, and contrary to governing law on justiciable claims.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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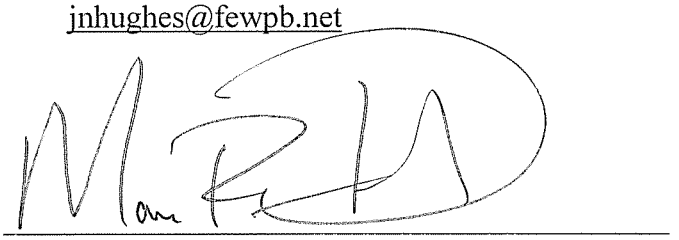

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