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October 5, 2009

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PUBLIC SERVICE
COMMISSION

Via Hand-Delivery

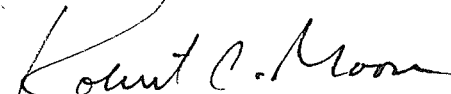
Mr. Jeff R. Derouen
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, Kentucky 40602-0615

Re: Windstream Kentucky East, LLC's ("Windstream") Petition for Arbitration
Case No. 2009-00246

Dear Mr. Derouen:

Please find enclosed for filing in the above referenced case an original and 10 copies of Windstream's Response to AT&T Mobility's Motion For Partial Dismissal. Please call me if you have any questions concerning this matter, and thank you for your attention to same.

Respectfully submitted,


Robert C. Moore

RCM/db
Enclosures

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

OCT 05 2009

**PUBLIC SERVICE
COMMISSION**

In the Matter of:)
)
Windstream Kentucky East, LLC for)
Arbitration of an Interconnection)
Agreement with New Cingular Wireless)
PCS, LLC, D/B/A AT&T Mobility)
) Case No. 2009-00246
)
)

**WINDSTREAM KENTUCKY EAST, LLC'S RESPONSE TO AT&T
MOBILITY'S MOTION FOR PARTIAL DISMISSAL AND BRIEF IN SUPPORT
OF MOTION FOR PARTIAL DISMISSAL**

Comes Windstream Kentucky East, LLC ("Windstream East"), by counsel, and hereby files its Response to AT&T Mobility's Motion for Partial Dismissal and Brief in Support of AT&T Mobility's Motion for Partial Dismissal.

RESPONSE TO MOTION FOR PARTIAL DISMISSAL

Windstream East's Issue 1 on its Exhibit 2 to its Petition for Arbitration is one properly brought before this Commission for consideration. AT&T Mobility sets forth two arguments in its Motion for Partial Dismissal in support of a dismissal, but neither of these arguments are valid. It is necessary to address the issue of whether AT&T Mobility should pay originating access charges to Windstream East for landline-originated traffic that is carried by AT&T Mobility from one Major Trading Area ("MTA") and terminated to an AT&T Mobility customer located in a different MTA in order to properly identify traffic between the parties, so that Windstream East is 1) not being wrongfully deprived of revenues and 2) not wrongfully incurring an expense because of misidentification of originating access traffic as traffic that is subject to reciprocal compensation under Section 252 of the Telecommunications Act of 1934, as amended ("Act"). Furthermore,

and contrary to AT&T Mobility's claims in its Motion for Partial Dismissal, this issue *was* discussed by the parties in their negotiations in this matter.

**I. ORIGINATING ACCESS CHARGES ARE AN ISSUE APPROPRIATE
FOR ARBITRATION UNDER THE ACT**

AT&T Mobility argues that Windstream East's claim that AT&T Mobility should be required to pay originating access for landline-to-mobile traffic dialed to a local number but terminated outside the originating MTA is not governed by Section 251(b) or (c) provisions of the Telecommunications Act of 1934 as amended and should not be subject to this arbitration proceeding. However, one of the obligations of Section 251(b) is that of reciprocal compensation, which is an obligation that is properly arbitrated before state commissions pursuant to Section 252.

If traffic routed over the interconnection facilities was limited to intraMTA traffic, the issue would be moot. However, this is not the case in the issue at hand. In response to Windstream East's First Data Request No. 8, AT&T Mobility admits that "ILEC interMTA traffic is routed to AT&T Mobility through either local interconnection trunks or interexchange carriers, depending upon the called party number." Therefore, the routing of calls that are dialed on a local basis delivered to the interconnection trunks increases the probability that traffic will be wrongly identified as local traffic and subsequently billed at reciprocal compensation rates. It is therefore important that the interconnection agreement between the parties provides a method to identify such traffic. As noted previously, if this is not addressed in the interconnection agreement between the parties, Windstream East and AT&T Mobility both may be wrongfully billed, suffering financial harm as a result.

AT&T Mobility quotes the United States Eleventh Circuit Court of Appeals in the case of *MCI Telecomms. Corp. v. BellSouth Tellcomms. Inc.*, 298 F. 3d 1269 (11th Cir., 2002), noting that the Circuit Court pointed out that 47 U.S.C. § 251 sets forth a limited number of issues on which the Florida Public Service Commission would be required to arbitrate and that enforcement mechanisms related to an interconnection agreement would be included in the scope of the Florida Public Service Commission's authority. AT&T Mobility says that the originating access payment issue in this matter is not an "enforcement mechanism". A further reading of the case cited by AT&T Mobility shows, however, that AT&T Mobility's claim is invalid. The Circuit Court gave the Florida Public Service Commission the ability to resolve arbitration issues "by imposing appropriate conditions as required to "implement" the arbitrated agreement".¹ The Circuit Court immediately continued, saying "Clearly, enforcement *and compensation provisions* (emphasis added)...fall within the realm of "conditions...required to implement" the agreement."²

Without a doubt, the wrongful treatment of traffic as being subject to reciprocal compensation under the interconnection agreement between Windstream East and AT&T Mobility is a matter of compensation, and as such, falls within the scope of the arbitration proceeding in this matter.

II. ORIGINATING ACCESS CHARGES IS AN ISSUE THAT WAS NEGOTIATED BY THE PARTIES

AT&T Mobility again only tells part of the story when it claims that originating access was not negotiated by the parties, and that it refused to negotiate the issue when it was raised by Windstream East. William H. Brown states in his Affidavit attached to

¹ *MCI Telecomms. Corp. v. BellSouth Tellcomms. Inc.*, 298 F. 3d 1269, 1274 (11th Cir., 2002).

AT&T Mobility's Motion for Partial Dismissal that on June 24, 2009 he responded to Windstream East's claim for originating access charges by refusing to negotiate the issue. What AT&T Mobility neglects to point out is that Mr. Brown and Mr. Scott Terry, negotiator for Windstream East, agreed on June 10, 2009 to set up a call to discuss this very issue (see attached email string dated Wednesday, June 10, 2009 marked as Exhibit A). That call was held on June 15, 2009. During that call, AT&T Mobility's counsel asked detailed questions regarding the originating access provisions proposed by Windstream and how they would apply to the traffic between the parties and received answers from Mr. Terry (see Affidavit of Scott Terry attached herein as Exhibit 2). As Mr. Brown did note, on June 24, 2009 AT&T Mobility stated that it did not feel that access charges were within the scope of negotiations—*after* the issue was already put on the table *and* discussed by the parties. Mr. Brown was a party to the June 15, 2009 call and at no time during that call did he or any other AT&T Mobility representative object to the discussion of access charges as being outside the scope of the parties' negotiations.

Furthermore, AT&T Mobility has no issue with addressing access charges for traffic it originates, as evidenced by the language in Part C-Interconnection and Reciprocal Compensation for Authorized Services, Section 2, Exchange of Traffic, subsection 2.2 of the proposed interconnection agreement between the parties. That language reads as follows:

“When traffic is not segregated according to traffic types, the Parties have agreed to use a traffic factor to estimate the amount of traffic that is InterMTA. Based upon the unique MTA geography of the areas served by the Parties the InterMTA traffic factor will be as specified in Attachment 1, which will be applied *only on minutes of use terminating from Carrier to Windstream* (emphasis added) at the rate specified in Attachment 1.”

² *Ibid.*

AT&T Mobility never altered or struck out this language in the course of negotiations, indicating its acceptance of it in the interconnection agreement. Mr. Brown's explanation in his Affidavit for the acceptance of this language as a proper subject for negotiation assumes that the balance of traffic between the parties is limited to intraMTA traffic. Windstream East contends that the traffic routed over the interconnection facilities consists of both intraMTA traffic and interMTA traffic. In that case, it is discriminatory to allow language identifying and addressing compensation for interMTA traffic originated by AT&T Mobility but not identifying and addressing compensation for interMTA traffic originated by Windstream East.

Even though this issue clearly was discussed by the parties, AT&T Mobility desires to have the issue dismissed because it claims it refused to negotiate the issue. Such a defense should be dismissed on its face. Allowing a carrier to prevail based on the claim that the carrier unilaterally chooses not to negotiate a particular issue (especially when the issue has been brought up and actually discussed between the parties) would set an untenable precedent. Such a broad definition of "negotiation" would bring the process of negotiation of interconnection agreements to a halt, solely because of one party's refusal to "negotiate" the issue. Moreover, neither carrier would then be able to seek arbitration for the issue, creating an unending, unresolved argument regarding what was and was not negotiated. In that situation, the parties lose, as well as the customers who would benefit from the negotiation of an interconnection agreement.

In conclusion, Windstream East's claim for originating access charges is a proper subject for arbitration, and is a subject that was discussed by the parties. Issue 1 in

Windstream's Petition for Arbitration should be allowed to stand, and AT&T Mobility's Motion for Partial Dismissal should be dismissed.

Date: 10/5/09

Respectfully Submitted,

By:

Robert C. Moore

Robert C. Moore
Hazelrigg & Cox, LLP
P.O. Box 676
415 West Main Street
Frankfort, KY 40602-0676
502-227-2271

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was sent via hand delivery on this the 5th day of October, 2009 on Jeff R. Derouen, Executive Director, Public Service Commission, 211 Sower Boulevard, P.O. Box 615, Frankfort, Kentucky 40602-0615 and by first class mail, postage pre-paid and electronic mail on Mary K. Keyer, General Counsel/AT&T Kentucky, 601 West Chestnut Street, Room 407, Louisville, Kentucky 40203, on Paul Walters, Jr., 15 East 1st Street, Edmond, Oklahoma 73034, and on Tiffany Bowman, Public Service Commission, 211 Sower Boulevard, P.O. Box 615, Frankfort, Kentucky 40602-0615.

Robert C. Moore

Robert C. Moore

Robert Moore

From: Terry, Scott A [Scott.A.Terry@windstream.com]
Sent: Thursday, October 01, 2009 10:24 AM
To: Majors, Stacy
Subject: FW: Negotiation Involving Windstream Kentucky East

-----Original Message-----

From: BROWN, BILL (ATTCINW) [mailto:WB9254@att.com]
Sent: Wednesday, June 10, 2009 9:26 AM
To: Terry, Scott A
Cc: ASHBY, MARK (Legal); VAN ECKHARDT, MICHAEL (Legal); MANHEIM, CYNTHIA J (Legal); pwalters@sbcglobal.net; SMITH, BARBARA ANN (ATTSI)
Subject: RE: Negotiation Involving Windstream Kentucky East

Scott,

We are available for a call Thursday between 9:00 and 11:00 EDT or between 1:00 EDT and 2:00 EDT, or Monday between 9:00 and 11:00 EDT or after 1:00 EDT. We will have an attorney on the call, so please include a Windstream attorney. In addition, we would like to discuss all other pending issues including Windstream's proposed interMTA factors, and the negotiations we have requested in all Windstream states where we exchange traffic. We do not agree with your comment that we have the burden of proof for Windstream-proposed interMTA factors. Please let me know what day and time of those suggested herein that you would like to have the call.

Thanks,
 Bill

From: Terry, Scott A [mailto:Scott.A.Terry@windstream.com]
Sent: Wednesday, June 10, 2009 9:47 AM
To: BROWN, BILL (ATTCINW)
Cc: ASHBY, MARK (Legal); VAN ECKHARDT, MICHAEL (Legal); MANHEIM, CYNTHIA J (Legal); pwalters@sbcglobal.net; SMITH, BARBARA ANN (ATTSI)
Subject: RE: Negotiation Involving Windstream Kentucky East

Bill,

Windstream is still waiting for New Cingular to provide some dates and times for a call. The clock is still ticking. If we are to avoid arbitration, New Cingular needs to provide the dates and times quickly.

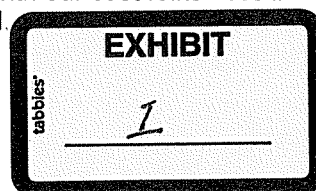
I am concerned that it is taking so long for New Cingular to follow through on this request.

-----Original Message-----

From: BROWN, BILL (ATTCINW) [mailto:WB9254@att.com]
Sent: Thursday, June 04, 2009 9:56 AM
To: Terry, Scott A
Cc: ASHBY, MARK (Legal); VAN ECKHARDT, MICHAEL (Legal); MANHEIM, CYNTHIA J (Legal); pwalters@sbcglobal.net; SMITH, BARBARA ANN (ATTSI)
Subject: RE: Negotiation Involving Windstream Kentucky East

Scott,

I just called and left you a voice message, so this e-mail will just confirm what I told you in that message. We appreciate the explanation you provided as to the purpose of a call with our cost folks. We'll get some proposed dates together as soon as possible. We're glad to have the call.



10/5/2009

We did not anticipate doing an interMTA study in this case because Windstream had agreed to a zero percent (0 %) factor for mobile-originated interMTA traffic. We thought that Windstream would provide support for the 5% factor it proposed for Windstream-originated interMTA traffic, as well as an explanation as to why ATT Mobility would owe anything for such traffic.

You mention in your message below that intrastate for facilities is one of the remaining issues. I don't recall that one. Please refresh my memory with an explanation of what that's about.

We are glad to continue to negotiate in an effort to resolve any and all issues. I appreciate your cooperation, and look forward to hearing from you.

Thanks,
Bill

From: Terry, Scott A [mailto:Scott.A.Terry@windstream.com]
Sent: Wednesday, June 03, 2009 10:09 AM
To: BROWN, BILL (ATTCINW)
Cc: ASHBY, MARK (Legal); VAN ECKHARDT, MICHAEL (Legal); MANHEIM, CYNTHIA J (Legal); pwalters@sbcglobal.net
Subject: RE: Negotiation Involving Windstream Kentucky East

Bill,

The purpose of the call should be obvious. New Cingular does not agree with Windstream's changes and Windstream does not agree with New Cingular's proposed changes. The experts will have an opportunity to better explain their reasoning to each which New Cingular did not adequately do via the summary provided. Plus there are calculation errors in New Cingular's adjustments which need to be addressed. Getting the cost experts on a call could very well resolve the whole issue of the rate and Windstream, as part of good faith negotiations, is willing to try.

If New Cingular is not willing to participate in such a call, it would appear that arbitration is the only resort and one which Windstream is prepared for. At this point, there are now three issues open: recip comp rate, intrastate for facilities and how much Windstream-originated traffic is subject to originating access charges.

New Cingular has yet to provide a study regarding interMTA traffic, which was requested in January. Does New Cingular accept Windstream's proposed interMTA percentages? If not, when will New Cingular provide the detailed traffic study with cell site information that Windstream requested in January?

Please let me know if New Cingular is refusing to negotiate at this point. If New Cingular is willing to negotiate, please provide dates and times that your cost experts are available next week for a call.

-----Original Message-----

From: BROWN, BILL (ATTCINW) [mailto:WB9254@att.com]
Sent: Wednesday, June 03, 2009 7:29 AM
To: Terry, Scott A
Cc: ASHBY, MARK (Legal); VAN ECKHARDT, MICHAEL (Legal); MANHEIM, CYNTHIA J (Legal); pwalters@sbcglobal.net
Subject: RE: Negotiation Involving Windstream Kentucky East

Scott,

Thank you for your offer of June 1st. AT&T Mobility is not willing to accept this offer. You asked about times for a call with our cost experts and Windstream's cost experts. We have already provided an analysis of the cost study you provided. In light of Windstream's position on the costs and rates, what would be the purpose of the call? Please explain.

Thanks,
Bill

From: Terry, Scott A [mailto:Scott.A.Terry@windstream.com]

Sent: Monday, June 01, 2009 3:53 PM
To: BROWN, BILL (ATTCCINW)
Subject: Negotiation Involving Windstream Kentucky East

Bill,

Windstream, in a continuing effort to reach a compromise regarding this specific negotiation, offers the following:

Recip Comp at \$0.0075/MOU, interconnection circuits at intrastate rates, terms and conditions since the vast majority of the traffic carried by the circuits is local and Windstream to be paid originating access for 5% of the traffic it originates that terminates to New Cingular.

If New Cingular has evidence to show that less than 5% of the traffic originated by Windstream is terminated to New Cingular customers that may be roaming outside of the MTA, please provide such evidence for Windstream to review and analyze. Such documentation must identify the last cell site used in the transmission of the call.

Assuming New Cingular agrees to the interMTA percentage regarding Windstream-originated traffic, Windstream is willing to accept 0% interMTA for traffic originated by New Cingular.

Attached is the revised draft ICA including these proposals. I am aware that New Cingular has recently agreed to similar terms with other carriers in Kentucky, so hopefully this proposal will allow us to finalize this negotiation and move on.

Although this is a very fair offer, should New Cingular decide not to accept it, please provide dates and times that you and your cost experts are available for a call with Windstream's cost experts.

If you have any questions, please let me know.

The information contained in this message, including attachments, may contain privileged or confidential information that is intended to be delivered only to the person identified above. If you are not the intended recipient, or the person responsible for delivering this message to the intended recipient, Windstream requests that you immediately notify the sender and asks that you do not read the message or attachments, and that you delete them without copying or sending them to anyone else.

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Exhibit 2

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:)
)
Windstream Kentucky East, LLC for)
Arbitration of an Interconnection)
Agreement with New Cingular Wireless)
PCS, LLC, D/B/A AT&T Mobility)
) Case No. 2009-00246
)
)

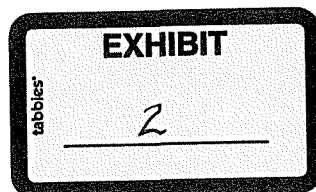
AFFIDAVIT OF SCOTT TERRY

BEFORE ME, the undersigned authority, on this 5th day of October, 2009, personally appeared Scott Terry, who being by me duly sworn on oath deposed and said:

1. My name is Scott Terry. My position with Windstream Kentucky East, LLC ("Windstream East") is Staff Manager, Wholesale Services. In this position, I participated in the negotiations between AT&T Mobility and Windstream East. I am familiar with those negotiations and make this affidavit upon personal knowledge.

2. A telephone conference was held between AT&T Mobility and Windstream East on June 15, 2009 to discuss open issues between the parties in their interconnection agreement negotiations. William H. Brown, Barbara Smith, and Paul Walker were all on the conference representing AT&T Mobility.

3. During the conference, Mr. Walker asked detailed questions regarding Windstream East's proposal regarding the originating access charges, including questions about how the traffic and charges would be calculated.



4. I answered Mr. Walker's questions, presenting two different options regarding the methods for calculating the charges.

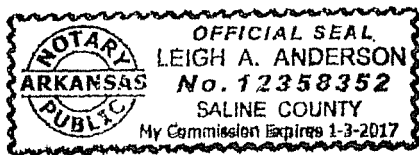
5. At no time in during that conference call did Mr. Brown, Ms. Smith or Mr. Walker state that Windstream East's proposal regarding originating access charges was beyond the scope of negotiations between the parties, nor did they refuse to discuss this issue; In fact, the issue was initially raised in the conference call by AT&T Mobility.

Further Affiant sayeth not.

Scott Terry
Scott Terry

STATE OF Arkansas)
COUNTY OF Saline)

Sworn and subscribed to me this 5th day of October, 2009, to certify which witness my hand and seal.

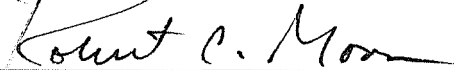


Leigh A. Anderson
Notary Public

My Commission Expires: 1-3-2017
(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was sent via hand delivery on this the 5th day of October, 2009 on Jeff R. Derouen, Executive Director, Public Service Commission, 211 Sower Boulevard, P.O. Box 615, Frankfort, Kentucky 40602-0615 and by first class mail, postage pre-paid and electronic mail on Mary K. Keyer, General Counsel/AT&T Kentucky, 601 West Chestnut Street, Room 407, Louisville, Kentucky 40203, on Paul Walters, Jr., 15 East 1st Street, Edmond, Oklahoma 73034, and on Tiffany Bowman, Public Service Commission, 211 Sower Boulevard, P.O. Box 615, Frankfort, Kentucky 40602-0615.



Robert C. Moore