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October 16, 2009

VIA COURIER

Mr. Jeff Derouen
Executive Director
Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602

Re: Petition of Windstream Kentucky East, LLC, for Arbitration of an Interconnection Agreement With New Cingular Wireless PCS, d/b/a AT&T Mobility
KPSC 2009-00246

Dear Mr. Derouen:

Enclosed for filing in the above-referenced case are the original and five (5) copies of Reply Brief in Support of AT&T Mobility's Motion for Partial Dismissal.

Should you have any questions, please let me know.

Sincerely,

Mary K. Keyer

Enclosures

cc: Party of Record

745049

COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF WINDSTREAM KENTUCKY EAST, LLC, FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH NEW CINGULAR WIRELESS PCS, D/B/A AT&T MOBILITY	)))))	CASE NO. 2009-00246

REPLY BRIEF IN SUPPORT OF AT&T MOBILITY'S MOTION FOR PARTIAL DISMISSAL

New Cingular Wireless PCS, LLC d/b/a AT&T Mobility on behalf of itself and its wireless operating affiliates (collectively, "AT&T Mobility"), in accordance with Sections 251 and 252 of the Communications Act of 1934, as amended ("the Act"), hereby files its Reply Brief in Support of AT&T Mobility's Motion for Partial Dismissal. AT&T Mobility prays for an order from the Kentucky Public Service Commission ("Commission"), dismissing Issue 1 in Exhibit 2 to the Petition for Arbitration filed June 29, 2009, by Windstream Kentucky East, LLC ("Windstream").

In Issue 1, Windstream seeks an order from the Commission, requiring the interconnection agreement between the parties to contain a provision mandating that AT&T Mobility pay originating access charges to Windstream for landline-originated traffic dialed to a local AT&T Mobility number but terminated on AT&T Mobility's wireless network in a different Major Trading Area ("MTA"). This issue should be dismissed from the arbitration because it does not qualify under federal law for a section 252 arbitration; *i.e.*, it does not in any way affect the payment of reciprocal compensation between the parties, nor does it affect any other obligations arising

pursuant to 47 U.S.C. §§ 251 (b) and (c). Additionally, at no time did AT&T Mobility agree that this issue was a proper subject for negotiation and/or arbitration under the Act, nor did it engage in negotiation of this issue with Windstream. In any event, even if such had occurred, it would have been irrelevant, since the Commission lacks subject matter jurisdiction under the Act to decide this issue.

1. Originating Access Traffic Is *Not* Involved in Reciprocal Compensation Billing

Windstream alleges that it is entitled to originating access charges for Windstream-originated traffic dialed to local numbers but terminated to AT&T Mobility customers in MTAs other than the MTA where the originating landline wire center is located (the "Originating Access" issue). In arguing that this claim is a proper subject for arbitration, Windstream specifically alleges:

> ... the routing of [Windstream-originated] calls that are dialed on a local basis delivered to the interconnection trunks increases the probability that traffic will be wrongly identified [by AT&T Mobility] as local traffic and subsequently billed [by AT&T Mobility] at reciprocal compensation rates. It is therefore important that the interconnection agreement between the parties provides a method to identify such traffic.[1]

This statement, however, is misguided and inaccurate. It discloses a fundamental misunderstanding of what the parties have already agreed to regarding how AT&T Mobility will bill Windstream for reciprocal compensation traffic under provisions of the interconnection agreement that is before the Commission. Under these terms, AT&T Mobility will bill Windstream for reciprocal compensation traffic solely pursuant to a

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[1] Windstream Response, p. 2.

percentage of *AT&T Mobility-originated traffic*, not Windstream-originated traffic.[2] Accordingly, whether Windstream-originated traffic is initially routed over local trunks and is thus potentially confusing for reciprocal compensation purposes is wholly irrelevant. That hypothetical confusion has already been negotiated out of the interconnection agreement.

The misunderstanding is explained in the Affidavit of William H. Brown filed in support of AT&T Mobility's Motion for Partial Dismissal:

> The issue of originating access, for traffic originated by Windstream, also does not affect the amount of traffic originated by Windstream that is subject to AT&T Mobility's reciprocal compensation charges, because that amount of Windstream traffic is determined, under already agreed-to portions of the interconnection agreement being negotiated, by the amount of AT&T Mobility-originated traffic, not the amount of Windstream-originated traffic.[3]

Windstream seems to assume that AT&T Mobility will bill Windstream for reciprocal compensation traffic based on the amount of traffic sent by Windstream to AT&T Mobility over the local interconnection trunks. Since the originating access traffic in question is locally dialed, it will be sent from Windstream to AT&T Mobility over those same local trunks. Consequently, Windstream expresses concern that if the interconnection agreement does not provide "a method to identify such traffic," then "traffic will be wrongly identified [by AT&T Mobility] as local traffic and subsequently billed [by AT&T Mobility] at reciprocal compensation rates" rather than higher access rates.

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[2] The applicable language is contained in Part C, paragraph 6.1 of the interconnection agreement: "Carrier [AT&T Mobility] will bill Windstream based on the traffic ratio provided in Attachment 1."

[3] Affidavit of William H. Brown, p. 3.

However, as Mr. Brown's affidavit indicates, under already negotiated provisions of the subject interconnection agreement, the parties have agreed that AT&T Mobility will not measure the traffic sent to it by Windstream over local interconnection trunks, because AT&T Mobility does not have a billing system in place that allows measurement of such traffic. Instead, it is AT&T Mobility standard practice - and the practice agreed between these parties - to use "intraMTA percentages" to establish in advance the relative amounts of traffic sent by each party to the other. Using those percentages, AT&T Mobility will base its reciprocal compensation billings to Windstream upon the number of *AT&T Mobility-originated minutes* billed each month by Windstream.

For example, assume that the interMTA percentages are 70% wireless-originated traffic, and 30% landline-originated. If Windstream bills AT&T Mobility for 70 minutes of use in a given month, AT&T Mobility will calculate its bill back to Windstream for that same month by application of the following formula applied to those 70 minutes of AT&T Mobility-originated traffic: (70 / 70%) x 30% = 30 minutes of use. In other words, as Mr. Brown's affidavit indicates, AT&T Mobility's intraMTA billings to Windstream are based upon AT&T Mobility-originated traffic, not upon Windstream-originated traffic sent to AT&T Mobility over local interconnection trunks. Thus, there is no need for the interconnection agreement to attempt to identify locally-dialed, Windstream-originated, interMTA traffic sent to AT&T Mobility over local interconnection trunks, because under

the interconnection agreement, this information is wholly unnecessary and irrelevant. Thus, Windstream's concern is misplaced.[4]

2. Terminating Access Traffic *Is* Involved in Reciprocal Compensation Billing

Windstream correctly notes that the interconnection agreement between the parties will include a factor to determine the amount of wireless-originated, interMTA traffic. However, it is misplaced to argue that such a conclusion necessitates a finding that landline-originated interMTA traffic is also properly included within a section 251 interconnection agreement. According to Windstream:

> [I]t 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.[5]

This argument again seems to reflect a misunderstanding or misconstruction of already agreed upon terms of the instant interconnection agreement between Windstream and AT&T Mobility. As discussed above, Windstream will bill AT&T Mobility based upon Windstream's *actual recordings* of traffic sent from AT&T Mobility to Windstream over local interconnection trunks for termination. Thus, any minutes identified as interMTA traffic that are sent by AT&T Mobility to Windstream over local interconnection trunks would, in fact, *reduce the minutes for which AT&T Mobility owes reciprocal compensation to Windstream.*[6] This is confirmed in Mr. Brown's affidavit:

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[4] When intraMTA traffic ratios are figured, AT&T Mobility excludes all landline-originated, interMTA traffic from the calculations.

[5] Windstream Response, p. 5.

[6] These wireless-originated, interMTA minutes would be subject to Windstream's terminating access rates, however, and the charges would be paid by the carrier transporting the traffic across MTA boundaries. AT&T Mobility routes all such traffic through an interexchange carrier. Thus, the interexchange carrier would owe the access charges to Windstream.

> I believe that this issue of "terminating" access, for traffic originated by AT&T Mobility, is a proper subject for negotiation under the Telecommunications Act, because any amount of interMTA traffic sent by AT&T Mobility to Windstream through local interconnection trunks will decrease the amount of traffic subject to Windstream's reciprocal compensation charges under Section 251(b)(5) of the Telecommunications Act."[7]

The key point is that Windstream bills from its own generated actual records of AT&T Mobility traffic, but since AT&T Mobility is unable to generate actual billing records, it does not and cannot likewise bill from actual records of Windstream traffic. It uses instead the traffic factors (*i.e.*, 70-30) based on the Windstream records discussed above as a proxy. AT&T Mobility-originated interMTA traffic therefore does affect Windstream's reciprocal compensation billing to AT&T Mobility, but Windstream's originating access traffic does not affect AT&T Mobility's billing to Windstream.

3. An Interconnection Arbitration is Not the Proper Forum for Determining if Windstream's Originating Access Tariffs Apply to AT&T Mobility

Windstream's Response assumes, without stating directly, that AT&T Mobility owes originating access charges whenever a Windstream-originated, locally-dialed call is terminated to an AT&T Mobility subscriber located in a different MTA. However, even if a substantive federal obligation were to exist, Windstream would not be allowed to charge AT&T Mobility access for such traffic if Windstream's state and/or federal access tariffs do not apply to locally-dialed, Windstream-originated traffic routed to AT&T Mobility.

Whether Windstream's **intra**state access tariffs allow such charges in Kentucky is the proper subject of a separate tariff proceeding, not an interconnection arbitration.

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[7] Affidavit of William H. Brown, p. 2.

Whether Windstream's **inter**state access tariffs allow such charges is a matter for the FCC, not this Commission. Simply put, a section 252 interconnection arbitration is not the proper forum for determining whether Windstream's state and federal access tariffs apply to the Originating Access issue.[8]

4. "Discussing" An Issue Does Not Constitute an Enforceable Agreement

Windstream also believes that the Originating Access issue is a proper subject of negotiation because the issue of originating access was "discussed "by the parties on a June 15 conference call.[9] Windstream states:

> 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.[10]

Windstream raised the Originating Access issue for the first time on the June 15 call. AT&T Mobility discussed the issue to find out exactly what Windstream was proposing. AT&T Mobility then, by an immediately subsequent communication, notified Windstream that originating access was not a proper subject for interconnection negotiations, and that AT&T Mobility would not agree to include the issue in the interconnection agreement.

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[8] There is no dispute that the interexchange carrier transporting AT&T Mobility-originated traffic across MTA boundaries owes terminating access charges to Windstream.

[9] AT&T Mobility has filed a motion to strike Windstream East's Exhibit 1 to its Response since it contains information considered confidential under the Parties' Information Exchange Agreement and contains a settlement offer and negotiations which are inadmissible under Kentucky law.

[10] Windstream Response, p. 4 (emphasis in original).

"Discussing" an issue, particularly in an attempt to understand the proposal, does not constitute an agreement to negotiate the issue. It is hornbook law that an enforceable agreement requires an offer and acceptance. Windstream made the offer and explanation to negotiate the originating access issue, but AT&T Mobility did not accept it. There was simply no agreement to negotiate this issue.

5. Parties Cannot Confer Subject Matter Jurisdiction By Agreement

Even if AT&T Mobility had agreed to negotiate the Originating Access issue, the parties could not by agreement confer upon this Commission subject matter jurisdiction to arbitrate an issue outside the scope of the Act. Where subject matter jurisdiction does not exist, the parties cannot by agreement allow a tribunal to proceed.[11]

The alleged agreement of the parties to negotiate the Originating Access issue, which AT&T Mobility strongly disputes, is therefore irrelevant.

6. Refusal to Negotiate Inappropriate Subjects Will Not Frustrate the Arbitration Process

According to Windstream:

> 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.

This exaggeration is wrong. Federal law ensures that such a distortion will not occur. For example, FCC regulations provide:

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[11] *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) ("Lack of federal jurisdiction cannot be waived or overcome by an agreement of the parties.").

> (a) An incumbent LEC shall negotiate in good faith the terms and conditions of agreements to fulfill the duties established by sections 251(b) and (c) of the Act.
>
> (b) A requesting telecommunications carrier shall negotiate in good faith the terms and conditions of agreements described in paragraph (a) of this section.[12]

In this proceeding, AT&T Mobility is a "requesting telecommunications carrier" and is required by federal law to negotiate in good faith "the duties established by sections 251(b) and (c) of the Act." If AT&T Mobility were to refuse to negotiate any of those duties, it would not "bring the process of interconnection negotiations to a halt." On the contrary, it would subject AT&T Mobility to significant sanctions and penalties for failing to negotiate in good faith.

As AT&T Mobility's initial brief pointed out, however, Windstream's claim that AT&T Mobility owes Windstream originating access is in no way connected to any of the duties of sections 251(b) and (c). Just as important as the duty to negotiate is the principle that a telecommunications carrier cannot be forced to negotiate some claimed duty *not required under the Act*. This is exactly what Windstream is trying to do in the present case. Windstream is attempting to force AT&T to negotiate and arbitrate an issue that is not required under sections 251 and 252 of the Act and is, from AT&T Mobility's viewpoint, simply an unwarranted attempt to gain negotiating leverage.[13]

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[12] 47 C.F.R. § 51.301(a) and (b).

[13] Suppose AT&T Mobility claimed that Windstream owed charges to AT&T Mobility for the leasing of automobiles. The claim, even if valid, would not be a proper subject of negotiation/arbitration between the parties, because it would not involve any duties of sections 251(b) and (c). AT&T would be able to bring the claim in a proper forum with subject matter jurisdiction, which would not be an interconnection arbitration before this Commission. Thus, AT&T Mobility would not be able to use the claim to gain leverage in this arbitration. Windstream should be subject to the same prohibition.

7. Conclusion

As discussed in AT&T Mobility's original brief, Windstream's claim for originating access is not without a remedy. Windstream may bring a complaint case, based upon its filed access tariffs, in any judicial or regulatory forum with appropriate jurisdiction. But Windstream may not prosecute this claim in an arbitration pursuant to section 252 of the Act. Accordingly, the Commission should dismiss Issue 1 in Windstream's Petition for Arbitration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served on the following individual by mailing a copy thereof, this 16th day of October 2009.

Honorable Robert C. Moore
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Hazelrigg & Cox, LLP
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Mary K. Keyer