

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

O R D E R

By this Order the Commission shall issue decisions on four pending motions. New Cingular Wireless PCS, LLC d/b/a AT&T Mobility and its operating affiliates (collectively, "AT&T Mobility") has three motions pending: (1) a Motion to Strike; (2) a Motion for Partial Dismissal; and (3) a Motion to Suspend the Procedural Schedule. Windstream Kentucky East, LLC ("Windstream") currently has pending a Motion to Suspend Procedural Schedule.

MOTIONS TO SUSPEND THE CURRENT PROCEDURAL SCHEDULE

The parties separately have moved the Commission to suspend the current procedural schedule. As grounds for their motions, both parties state that, due to disputes arising out of the discovery process, the parties will be unable to file a joint issues matrix by November 18, 2009, as required by the Commission's September 30, 2009 Order ("September 30 Order") that established the current procedural schedule. Both parties also state that they will be unable to meet the November 24, 2009 deadline for filing direct testimony. In lieu of the current procedural schedule, the parties have proposed the following to suspend the current procedural schedule and establish

milestones by which the discovery disputes are either to be resolved or the parties are to file motions to compel. The parties have also proposed dates by which they would file proposed amended procedural schedules with the Commission.

The parties agree on the suspension of all dates except that, where AT&T Mobility moves to suspend the entire procedural schedule, Windstream moves the Commission to suspend all procedural dates except for the date by which the Commission is to rule on AT&T Mobility's Motion to Strike and Motion for Partial Dismissal.¹ As grounds for this, Windstream states that AT&T Mobility's Motion for Partial Dismissal is ready for a decision and resolution of it would assist the parties in narrowing the issues.

The Commission will grant the motions in part and suspend the procedural schedule. The parties shall abide by the procedural schedule in this Order's ordering paragraphs. However, the Commission, in order to move this process along, will go forward and address the other motions pending before it.

OTHER PENDING MOTIONS

AT&T Mobility moves for dismissal of Issue 1, which concerns whether AT&T Mobility owes originating access charges to Windstream for landline-originated traffic which is dialed to a local AT&T Mobility number that terminates in a Major Trading Area ("MTA") other than the originating MTA. This motion was filed on September 11, 2009. AT&T Mobility and Windstream have each filed replies and sur-replies in support of their positions.

¹ Windstream's Motion to Suspend Procedural Schedule at 2.

AT&T Mobility's second motion is a request to have the Commission strike and delete from the public record Exhibit 1 of Windstream's Response to AT&T Mobility's motion for partial dismissal. As both the motion for dismissal and the motion to strike have been fully briefed and argued by the parties, they are now ready for Commission decision.

A. Motion for Partial Dismissal

Windstream and AT&T Mobility have entered into negotiations to reach an agreement for the purposes of routing and exchanging traffic and establishing compensation. Upon failing to agree to all terms and conditions, Windstream has petitioned the Commission for arbitration of the issues on which the parties were not able to reach an agreement. Windstream has identified one of those issues as: should access charges or reciprocal compensation charges apply to traffic that does not both originate and terminate within the MTA? Windstream has also identified a related issue: what is the proper percentage to use to determine inter-MTA traffic?

AT&T Mobility has objected to the inclusion of Issue 1 as being an issue that was not negotiated between the parties and asserts that it therefore should not be included as an issue for arbitration. AT&T Mobility also claims that applicable law prohibits AT&T Mobility from owing originating access charges to the traffic in question and that it is unaware of any existing traffic originated by Windstream. AT&T Mobility also objects to Issue 2 for the same reasons.

AT&T Mobility argues that Issue 1 is outside the scope of any of the obligations of Section 251(b) and (c) and is, therefore, prohibited as an issue to be arbitrated. AT&T Mobility argues that the payment of access charges is subject to state and federal

access charge regulations and, therefore, should not be arbitrated. AT&T Mobility further argues that the issue was not properly raised as an issue for negotiation between the parties and, therefore, should not be included as an issue for arbitration. AT&T Mobility claims that Windstream first made the claim for payment of originating access charges to Windstream on June 1, 2009. AT&T Mobility admitted that it responded to Windstream's claim on June 24, 2009 and would not agree to negotiate the issue. The petition for arbitration was filed on June 29, 2009.

Windstream claims that Issue 1 is a proper issue for arbitration because the exchange of traffic between the parties is not limited to intra-MTA (local) traffic. Local traffic is clearly governed by reciprocal compensation. Windstream also states that certain of its customers may place calls on a local basis but the called party may be outside the MTA and, therefore, the call would not be subject to reciprocal compensation nor would it receive any compensation from an interexchange carrier ("IXC") because the call would not be carried by an IXC but, rather, the call would be carried by AT&T Mobility on its local trunks. Windstream also states that, even if AT&T Mobility did not agree to negotiate Issue 1, it was discussed between the parties and no agreement was reached and, therefore, the issue should be arbitrated by the Commission. Windstream also points out that New Cingular Wireless PCS, LLC, which is a party to this matter, has entered into other interconnection agreements that contain similar provisions for origination access charges.

The Commission finds that Windstream has established that the parties did have discussions concerning Issue 1 and the issue is proper for arbitration. Additionally, the

traffic to be exchanged between the parties will be a mix of inter- and intra-MTA traffic and, therefore, the interconnection agreement must account for both.

B. Motion to Strike

As to the motion to strike, AT&T Mobility seeks to “strike and delete from the record and from the file in this case Exhibit 1 to [Windstream’s] Response to AT&T Mobility’s Motion for Partial Dismissal . . . which contains several email exchanges from June 1 to June 10, 2009, between the negotiators for AT&T Mobility and [Windstream], including an offer of settlement.”² To support its arguments, AT&T Mobility relies upon Kentucky Rule of Evidence (“KRE”) 408, which provides that evidence of compromise or an offer of compromise is not admissible to prove liability for or invalidity of the claim or its amount. AT&T Mobility argues that settlement negotiations and discussion between parties are to be kept confidential and should not be made available in the public record.

The Commission finds that, while the Kentucky Rules of Civil Procedure, including the accompanying Rules of Evidence, are at times cited in our proceedings, the applicability of those rules is limited to actions in the Court of Justice. KRS 278.310 clearly states that the Commission is not bound by the technical rules of legal evidence in hearings and investigations. The Rules of Civil Procedure and the Rules of Evidence are advisory in nature to the proceedings of the Commission. The Commission retains discretion for determining the level of their application, if at all. Inter-County Rural Elec. Co-op Corp. v. Public Service Commission, 407 S.W.2d 127, 130 (Ky. 1966).

Furthermore, the Commission finds that the prohibitions in KRE 408 which prevent parties from presenting evidence of statements made in compromise

² Motion to Strike at 1.

negotiations cannot be applied to this proceeding because the tenets of that rule are adverse to the overall purpose and mandates of the arbitration section of the 1996 Telecom Act. The Commission's jurisdiction over telecom arbitrations is strictly defined by 47 U.S.C. § 252. Section 252 expressly requires carriers to engage in open negotiations with one another prior to seeking to use a state commission as a forum for arbitrating those issues upon which they cannot agree. In fact, Section 252 sets forth a specific timeline to be followed by the parties in moving toward resolution and settlement before they even notify a state commission that they are filing a request for a dispute resolution. When that arbitration filing is made with the state commission, Section 252(b)(2) provides that the petitioning party shall provide the state commission with the following:

- All **relevant** documentation concerning –
- (i) the unresolved issues;
- (ii) the position of each of the parties with respect to those issues; and
- (iii) any other issues discussed and resolved by the parties.

(Emphasis added.)

Additionally, 47 U.S.C. § 254(b)(4)(A) states that state commissions must limit their consideration of any arbitration petitions to issues set forth in the petition and the response thereto. Windstream included the question of originating access payments within its petition, as provided in Exhibit 2 to the petition. As this issue was set forth in the petition, the Commission is allowed to review and address it during the course of the entire arbitration proceeding. Windstream's presentation of the e-mail exchange on the access charge issue, as it relates to AT&T Mobility's Motion for Partial Dismissal, was proper procedure and relevant to the substantive question being presented by AT&T

Mobility. The information contained in the documented e-mail exchanges between personnel for AT&T Mobility and Windstream is germane to the larger question of whether AT&T Mobility should be required to pay access charges to Windstream pursuant to an interconnection agreement. The Commission declines to follow AT&T Mobility's argument that the details contained within the e-mails are inadmissible. Windstream's presentation of the e-mail information is a reasonable use of evidence to rebut claims and present facts necessary to identify issues that had been negotiated prior to the filing of the arbitration petition.

Lastly, AT&T Mobility argues that, if the Commission were to allow such filings, a precedent would be established for other parties to begin filing settlement offers in cases before the Commission. Such arguments are distinguished by the unique facts of this case, since the U.S. Congress has mandated that such discussions and details are to be made part of the arbitration record, as provided under Section 252. The 1996 Telecom Act was specifically constructed to overcome evidentiary limitations. The Commission finds that the e-mail attachment provided by Windstream shall remain a part of the record and the motion to strike is denied, since such information falls squarely within the requirements of 47 U.S.C. § 252. The Commission has reviewed the content of the June 1 to June 10, 2009 e-mails in Exhibit 1 and finds that the content is directly on point to the overall question of whether originating access payments by AT&T Mobility were the subject of pre-arbitration negotiations by the parties. Although the substance of the e-mails reveals a level of disagreement between the parties on the questions of costs and traffic measurement, nonetheless, the content firmly establishes the existence of pre-arbitration negotiations on this topic. As provided under Section

252(b)(2), this exhibit qualifies as relevant documentation of an unresolved issue and shall remain in the record of this proceeding.

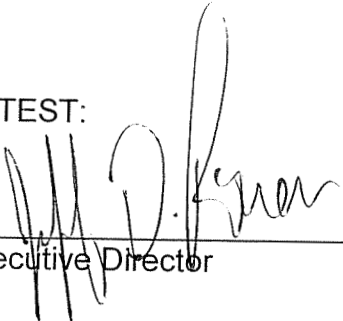
IT IS HEREBY ORDERED that:

1. AT&T Mobility's Motion for Partial Dismissal is denied.
2. AT&T Mobility's Motion to Strike is denied.
3. AT&T Mobility's Motion to Suspend Procedural Schedule is denied in part and granted in part.
4. Windstream's Motion to Suspend Procedural Schedule is granted.
5. The Commission's September 30, 2009 Order in this case is suspended.
6. The formal hearing scheduled for January 20, 2010 and January 21, 2010 is continued generally.
7. The parties shall comply with the following procedural schedule:
 - a. If the parties are unable to resolve the disputes by December 10, 2009, the parties shall file motions to compel, if any, by December 18.
 - b. The Commission will rule on any motions to compel within 30 days of their filing.
 - c. Within 10 business days of the Commission's ruling on motions to compel, the parties shall file with the Commission a proposed amended procedural schedule.
 - d. In the event that the parties are able to resolve their discovery disputes and do not file motions to compel, the parties shall file with the Commission a proposed amended procedural schedule by January 8, 2010.

By the Commission

ENTERED
NOV 24 2009 *M*
KENTUCKY PUBLIC
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