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August 17, 2010

**VIA COURIER**

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

RECEIVED

AUG 17 2010

PUBLIC SERVICE  
COMMISSION

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

Dear Mr. Derouen:

Enclosed for filing in the above-referenced case are the original and ten (10) copies of Motion of AT&T Mobility to Amend Response to Arbitration Petition and to File Amended Issues Matrix, or in the Alternative, Motion to Strike, and Brief in Support.

Should you have any questions, please let me know.

Sincerely,

Mary K. Keyer

Enclosures

cc: Parties of Record

839918

COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION

In the Matter of:

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

**MOTION OF AT&T MOBILITY TO AMEND RESPONSE TO ARBITRATION  
PETITION AND TO FILE AMENDED ISSUES MATRIX, OR IN THE  
ALTERNATIVE, MOTION TO STRIKE, AND BRIEF IN SUPPORT**

New Cingular Wireless PCS, LLC d/b/a AT&T Mobility, on behalf of itself and its wireless operating affiliates (collectively "AT&T Mobility"), files its Motion to Amend Response to Arbitration Petition and to File Amended Issues Matrix, or in the Alternative, Motion to Strike, and Brief in Support. An amended Response and revised Issues Matrix are necessary and proper in this case due to Windstream's having filed a revised cost study materially different from its originally filed study. Since AT&T Mobility's original Response was based on Windstream's original cost study, to the extent the Commission accepts a new Windstream cost study in this arbitration, AT&T Mobility must be allowed to amend the original Response and Issues Matrix to address the new issues raised by Windstream's filing.

Windstream filed its Arbitration Petition in this matter June 29, 2009. AT&T Mobility filed its Response July 25, 2009. In that Response, AT&T Mobility raised several arbitration sub-issues related to the cost study produced by Windstream in

support of its proposed transport and termination rate. Windstream filed that cost study with the Commission August 11, 2009. The Joint Issues Matrix was filed by the Parties February 26, 2010, based on the record in the case at the time of filing, and included the sub-issues AT&T Mobility had identified at that time.

In April 2010, Windstream notified AT&T Mobility that it had prepared a revised cost study that Windstream intended to substitute for the original cost study in this case. Windstream filed that revised cost study with the Commission May 27, 2010.

The revised cost study contains substantial changes and differences from the original cost study. Moreover, the revised study raises several new issues not raised by the original study. For example, the minutes of use calculated for determining end office switching costs have been reduced in the revised study by over 50 percent, which has a significant and material upward effect on claimed, per-minute, end office switching costs. Calculation of Windstream's claimed minutes of use has therefore become an important issue in this arbitration. Before the filing of the revised cost study, calculation of minutes of use was not a disputed sub-issue, and AT&T Mobility therefore did not raise it in its Response.

There appear to be a number of other new cost sub-issues raised by the revised cost study. Discovery is ongoing, and AT&T Mobility cannot create a complete list of all newly raised issues until the completion of discovery.

AT&T Mobility has suggested to Windstream that, after completion of discovery, the Parties file a revised issues matrix to include the issues newly raised by the revised cost study. Windstream has refused to agree to file a revised matrix, claiming that the Commission is limited by statute to considering only the issues raised in the previous

issues matrix filed herein.<sup>1</sup> Accordingly, AT&T Mobility has been forced to file this Motion, requesting leave to amend its Response herein and to file a revised Issues Matrix.

Under federal law, the Commission may decide in this proceeding those issues raised in Windstream's Petition and AT&T Mobility's Response. 47 U.S.C. § 252(b)(4)(A). There is, technically, no provision in the Telecommunications Act that allows Windstream to file an amended cost study, because the Commission is limited to a consideration of issues raised in Windstream's Petition. AT&T Mobility does not, however, object *per se* to Windstream's filing a cost study *dehors* the statute. But if Windstream is to be allowed to amend its cost study in ways that implicate new issues not previously raised between the Parties, then, as a matter of equity and due process, AT&T Mobility must be allowed to raise those new issues as part of this proceeding. Otherwise, a party can "game the system" simply by waiting to file its final cost study or other documents until after the filing of the Response.

Windstream's calculation of minutes of use and the question of why the value has decreased by over 50 percent are now major issues in this case. Prohibiting AT&T Mobility from raising these and other issues implicated by Windstream's revised cost study will, effectively, prevent the Commission from deciding all the new issues raised by Windstream. Such a result would allow Windstream to make wholesale changes to its cost study with impunity, without fear that such changes would be subject to Commission scrutiny.

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<sup>1</sup> Windstream even refused to include dates in the revised procedural schedule for the filing of AT&T Mobility's Motion to Amend, Windstream's response, and a Commission ruling on the motion even after being notified that AT&T Mobility planned to file such a motion.

Federal courts have ruled that issues directly relating to those raised in the Petition and Response may be considered by state commissions. For example, in *BellSouth Telecommunications, Inc. v. Cinergy Communications Co.*, 297 F. Supp. 2d 946, 951-952 (E.D. Ky. 2003), BellSouth argued that this Commission (the Kentucky Public Service Commission) was without authority to decide an issue that BellSouth claimed was not raised in the Petition or Response. The opposing party, Cinergy:

. . . takes the position that the Act does not require precise pleadings and, once an issue is open, the PSC has the discretion to review related issues. Relying on *TCG Milwaukee, Inc. v. Public Service Com'n of Wisconsin*, 980 F. Supp. 992 (W.D. Wis. 1997), Cinergy states that once the parties create an open issue, the PSC has considerable latitude to resolve the related issues necessary to finalize the interconnection agreement and make it a working document.

*Id.* at 951.

The federal district court agreed with Cinergy, ruling that this Commission has broad power to resolve issues related to those raised in the Petition and Response.

The very issue in dispute in this proceeding, whether this Commission has the authority to decide sub-issues related to rate determinations, has been directly decided:

For example, under the act's arbitration and pricing standards, state commissions "shall" establish rates for interconnection. 47 U.S.C. § 252(c). Thus, state commissions are accorded considerable latitude to resolve issues within the compass of the pricing and arbitration standards, even if these matters are not specifically identified by parties as open issues in their petitions for arbitration. An issue as broad and important to an interconnection agreement as what parties will charge one another ***necessarily will include sub-issues that must be addressed by the arbitration panel in order to decide the larger matter***. This is a common sense notion.

*TCG Milwaukee, Inc. v. Public Service Com'n of Wisconsin*, 980 F. Supp. 992, 1000 (W.D. Wis. 1997) (emphasis added).

Thus, it is clearly within the authority of this Commission to decide sub-issues (related to the determination of Windstream's transport and termination rate) implicated by the revised cost study, even if those sub-issues were not raised, and in fact could not possibly have been raised, in AT&T Mobility's original Response.

The Commission has already ruled in this proceeding that it will decide an issue that AT&T Mobility believes was never negotiated between the Parties -- Windstream's claim that AT&T Mobility owes Windstream access charges for *landline-originated* traffic dialed to a local Windstream number but terminating in a different Major Trading Area ("MTA"). See Commission Order, November 24, 2009. Denying AT&T Mobility the opportunity to raise additional sub-issues based upon the newly revised cost study would be entirely inconsistent with the Commission's previous assertion of broad authority.

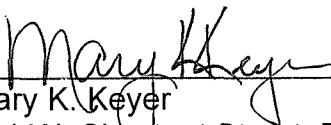
If, on the other hand, the Commission feels that AT&T Mobility should not be allowed to amend its Response and raise new sub-issues implicated by the revised cost study, then AT&T Mobility respectfully requests that Windstream's revised cost study be stricken from the record, because it raises issues not contained in Windstream's Petition, and that the Parties proceed to hearing based upon the original cost study filed by Windstream.

WHEREFORE, AT&T Mobility requests an Order from the Commission, allowing AT&T Mobility, after the completion of discovery, to file an amended Response, raising new sub-issues limited to the revised cost study filed herein by Windstream. AT&T Mobility further requests an Order requiring the Parties to file an amended Issues

Matrix, also after the close of discovery, including any new sub-issues raised by AT&T Mobility.

IN THE ALTERNATIVE, AT&T Mobility requests an Order striking from the record the revised cost study filed by Windstream and requiring the Parties to proceed to hearing based upon Windstream's original cost study.

Respectfully submitted:

  
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COUNSEL FOR NEW CINGULAR  
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following individuals by mailing a copy thereof, this 17th day of August 2010.

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