



STOLL · KEENON · OGDEN  
P L L C

2000 PNC PLAZA  
500 WEST JEFFERSON STREET  
LOUISVILLE, KY 40202-2828  
MAIN: (502) 333-6000  
FAX: (502) 333-6099  
www.skofirm.com

**C. KENT HATFIELD**  
DIRECT DIAL: (502) 568-5745  
DIRECT FAX: (502) 562-0945  
kent.hatfield@skofirm.com

June 24, 2011

RECEIVED

JUN 24 2011

PUBLIC SERVICE  
COMMISSION

**VIA HAND DELIVERY**

Jeff DeRouen  
Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
Frankfort, KY 40601

**RE: PSC Case No. 2010-00447**

Dear Mr. DeRouen:

Enclosed for filing in this case please find an original and ten copies of Petitioner's Objections to Windstream's Testimony, Motion for Confidential Treatment and Petitioner's Rebuttal Testimony and Materials. Please place your file stamp on the extra copies and return them to me via our office runner.

If you have any questions concerning this filing, please do not hesitate to contact me. Thank you very much for your attention to this matter.

Sincerely yours,

C. Kent Hatfield

CKH: jms  
Enclosures  
cc: Parties of Record

112694 134900/673234.1

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED  
JUN 24 2011  
PUBLIC SERVICE  
COMMISSION

In the Matter of:

DANA BOWERS )  
COMPLAINANT )

v. )

WINDSTREAM KENTUCKY EAST, LLC )  
DEFENDANT )

CASE NO. 2010-00447

**PETITIONER'S OBJECTIONS TO WINDSTREAM'S "TESTIMONY"**

Dana Bowers ("Petitioner"), by counsel, files the following objections to the "testimony" of Stephen Weeks, Director of Wholesale Services for Windstream Communications, Inc., filed with the Commission on June 10, 2011. Because this case results from the referral of two questions of law to the Commission by the U.S. District Court for the Western District of Kentucky, an evidentiary hearing may not be held in this matter. For this reason, Petitioner submits these written objections to the testimony of Windstream's Stephen Weeks.

**OBJECTIONS**

1. Petitioner objects to Windstream's characterization of its legal arguments as "testimony." Mr. Weeks' arguments encompass, among other things, whether Windstream's filed tariffs are legally binding pursuant to Kentucky statutes; whether the Filed Rate Doctrine is affected by a customer's decision when to pursue relief from overcharges; and whether the Commission has "jurisdiction" over tariffs filed by Windstream with the Commission. Mr. Weeks is not an attorney and his mere argument about subjects on which he is not qualified is not competent legal evidence. The Commission should afford his testimony no weight at all.

These, and Windstream's other legal arguments, should be presented in briefs. This objection is no mere technicality. Permitting legal arguments to be filed and considered without

the citation to legal authority that would necessarily accompany a brief deprives the Commission and opposing counsel of the opportunity to subject those arguments to rigorous examination. If briefs are filed, the cited authorities can be read to determine whether their use is accurate. If there is no authority cited for a particular proposition, it is probable that that there is no such authority. By offering legal arguments as “testimony,” Windstream attempts to turn legal argument into evidence to justify the need for a hearing which will delay further the relief due to Windstream’s customers from the GRS overcharge.

2. Petitioner objects to the witness’s characterization of KRS 278.544 and its alleged legislative history which, according to Mr. Weeks, was driven by certain “concerns.”<sup>1</sup> There is no citation to anything to support this alleged legislative history. Mr. Weeks, who works in Little Rock, Arkansas, cannot claim any direct knowledge of the reasoning or motives of even a single member of the Kentucky General Assembly. Again, the “testimony” is not competent and is entitled to no weight.

3. Windstream argues one thing to the Court, something else to the Commission. Petitioner objects to Windstream’s attempt to use lay witness testimony to argue legal issues that are before the Court in *Bowers et al v. Windstream Kentucky East, LLC*, Docket No. 3:09-CV-440, including the argument that even though Windstream’s subscriber line charge is *federally tariffed*, it nonetheless is “subject to the telephone utility’s local billing arrangements with that customer.”<sup>2</sup> As unsupported and unsupportable as this argument is, it is not within the legal issues referred by the Court to the Commission, and should not be considered here. Moreover,

---

<sup>1</sup> Weeks Testimony at 10.

<sup>2</sup> Weeks Testimony at 11. In the Court action Windstream has candidly stated that Petitioner is assessed Windstream’s “FCC access charge, also known as a subscriber line charge,” and that the charge is “subject to the Windstream Telephone System Tariff FCC No. 6 filed with the FCC.” Affidavit of Cesar Caballero, Vice President of Regulatory Strategy for Windstream Communications, Inc., filed in *Bowers et al v. Windstream Kentucky East, LLC*, Docket No. 3:09-CV-440 (W.D. Ky.) Unlike Mr. Weeks, Mr. Caballero is a lawyer. The affidavit quoted here is filed as Attachment 2 to Petitioner’s Rebuttal Testimony and Materials filed contemporaneously herewith.

the fact that Petitioner is not a telecommunications provider is completely irrelevant as the Commission considers Windstream's legal obligations to *all* Kentucky customers. The Court will determine if Petitioner is a proper class representative.

4. Petitioner objects to Windstream's claim that Petitioner lacks Kentucky-based tariff claims and "does not purchase any jurisdictional service from Windstream East."<sup>3</sup> **Windstream is estopped from taking that position** (which is erroneous in any event) before this Commission. Windstream successfully argued that Petitioner's Kentucky claims should be referred to this Commission as a matter of primary jurisdiction precisely *because* her services are "subject to Windstream's local tariff on file with the PSC,"<sup>4</sup> and Windstream has, moreover, represented in sworn testimony to the Court that her services are subject to its Kentucky tariff. And in response to Plaintiff's "truth-in-billing" claim related to bill format and presentation, Windstream claimed its billing presentation that included the bold heading "REGULATED" was accurate because the services (including Feature Pack A) listed under that heading on Bowers' bill were all *classified* as regulated. The district court was persuaded, partially dismissing one claim, after Windstream implored it to look at the "plain and unambiguous language contained in every bill describing the surcharge" and reminded the court that the surcharge is assessed in *both* the "REGULATED" and "DEREGULATED" portions of the billing statements.<sup>5</sup> When appearing before the PSC in this phase of the dispute, Windstream is bound by its assertions to the court. *Valentine-Johnson v. Roche* 386 F.3d 800, 811-812 (6<sup>th</sup> Cir. 2004). The PSC must hold Windstream to those assertions to protect the integrity of its own proceeding. *See Zurich*

---


<sup>3</sup> Weeks Testimony at 7-8.

<sup>4</sup> Windstream's Memorandum in Support of Defendant's Motion to Dismiss or, in the Alternative, Stay this Action, at 7., filed in *Bowers et al v. Windstream Kentucky East, LLC*, Docket No. 3:09-CV-440 (W.D. Ky.), at 7 [Relevant Portions filed as Attachment 1 to Petitioner's Rebuttal Testimony and Materials filed contemporaneously herewith.]

<sup>5</sup> Windstream Reply Memorandum in support of Motion for Reconsideration, Document 22, p. 9 (emphasis in original) (attached hereto).

*American Insurance Co. v. Journey Operating*, 323 S.W. 3d 696, 702 (Ky. 2010) (upholding ALJ's estoppel against regulated entity that initially misrepresented its true position). Windstream cannot change its position to meet the exigencies of the moment and cannot cover its tracks by changing witnesses.

Respectfully submitted,



---

C. Kent Hatfield  
Douglas F. Brent  
Deborah T. Eversole  
STOLL KEENON OGDEN PLLC  
2000 PNC Plaza  
500 West Jefferson Street  
Louisville, Kentucky 40202  
Ph: (502) 333-6000  
Fax: (502) 333-6099

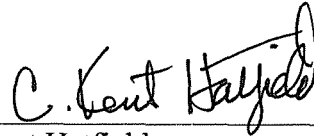
*Counsel for Petitioner*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing has been served by first class mail on those persons whose names appear below this 24<sup>th</sup> day of June 2011:

Mark R. Overstreet  
Benjamin R. Crittenden  
Stites & Harbison  
421 West Main Street  
P.O. Box 634  
Frankfort, KY 40602-0634

Jeanne Shearer  
Windstream Kentucky East, LLC  
4139 Oregon Pike  
Ephrata, PA 17522



---

C. Kent Hatfield

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION

Dana Bowers, on Behalf of Herself and  
Others Similarly Situated,

PLAINTIFFS

v.

Windstream Kentucky East, LLC, et al.

DEFENDANTS.

CIVIL ACTION NO. 3:09-CV-440

**ELECTRONICALLY FILED**

**REPLY IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO RECONSIDER  
PORTIONS OF THE COURT'S APRIL 30, 2010 OPINION AND ORDER**

In arguing against Defendants' motion to reconsider the April 30, 2010 Opinion declining to dismiss portions of this action, Plaintiff literally ignores dispositive United States Supreme Court precedent and the undisputed language of the bills assessing the gross receipts surcharge at issue in this action. There is a clear and unambiguous provision in the governing tariff that requires challenges to billed items to be brought within thirty days of the due date of the bill, and federal law requires that it be enforced as part of the tariffed rate. The Court, therefore, should dismiss the untimely portions of the complaint. Plaintiff's bills also clearly describe the gross receipts surcharge and the fact that it is not a government-imposed charge. Accordingly, because the bills are not misleading as a matter of law, the Court also should dismiss the Truth-in-Billing claim (Count IV) in its entirety.

**I. THE COURT SHOULD ENFORCE THE TARIFF LIMITATIONS PERIOD.**

Plaintiff's response consists largely of rhetoric and hyperbole without legal support. First, Plaintiff ignores completely the Supreme Court's decision in *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U.S. 566 (1921). Further, Plaintiff continues to ignore the crucial and directly applicable holding of *AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998),

Plaintiff scrupulously continues to avoid citation to the actual language contained in the bills that describes the gross receipts surcharge. While Plaintiff claims that Windstream East has structured its bill so that the gross receipts surcharge is listed alongside government-required or authorized charges, she continues to ignore the plain and unambiguous language contained in every bill describing the surcharge: “In the case of gross receipts surcharges, **they are not government mandated charges.**” (6/22/07 Stmt., at 2 (emphasis added).) Plaintiff also complains that Windstream East juxtaposes the surcharge with the word “REGULATED.” Once more, Plaintiff asks the Court to close its eyes to what actually appears on the bill and instead accept Plaintiff’s word for what is there, as the gross receipts surcharge is assessed in *both* the “REGULATED” and “DEREGULATED” portions of the list of charges on the billing statement. (*Id.* at 3.) Nothing in the bills states, implies, or even remotely suggests that the gross receipts surcharge is required by the government; indeed, the bills expressly state just the opposite. The bills describe the surcharge to the customer as just that, a surcharge, and not as a “tax” on the customer. The crux of Plaintiff’s Truth-in-Billing claim is a demonstrably false assertion. Plaintiff cannot rewrite her bills in order to manufacture a claim that the bills are misleading. Quite simply, the bills themselves defeat Plaintiff’s Truth-in-Billing claim as a matter of law.

### CONCLUSION

Respectfully, Defendants believe that the Court erred in failing to enforce the thirty-day limitations period contained in the governing tariff and in failing to dismiss Plaintiff’s Truth-in-Billing claim on the merits for failure to state a claim on which relief can be granted. Defendants ask the Court to apply a century of precedent holding that tariff limitations provisions are part of the filed rate that must be enforced and look beyond Plaintiff’s smokescreens to the actual language on the billing statements at issue to conclude that they are not misleading as a matter of law. Defendants ask the Court to reconsider its decision, and dismiss the untimely portions of



RECEIVED

COMMONWEALTH OF KENTUCKY

JUN 24 2011

BEFORE THE PUBLIC SERVICE COMMISSION

PUBLIC SERVICE COMMISSION

In the Matter of:

DANA BOWERS	)	
COMPLAINANT	)	
v.	)	CASE NO. 2010-00447
	)	
WINDSTREAM KENTUCKY EAST, LLC	)	
DEFENDANT	)	

**MOTION FOR CONFIDENTIAL TREATMENT**

Petitioner Dana Bowers, through counsel, for her Motion for Confidential Treatment for portions of rebuttal materials filed in response to the direct testimony of Stephen Weeks, pursuant to 807 KAR 5:001, Section 7 and KRS 61.878(1)(k), states as follows:

**BACKGROUND**

Petitioner and Windstream are parties in *Bowers et al v. Windstream Kentucky East, LLC*, Docket No. 3:09-CV-440, filed in the U.S. District Court for the Western District of Kentucky. That lawsuit includes claims arising under KRS Chapter 278. The District Court has stayed, but not dismissed, Petitioner’s Chapter 278 claims in order that the Commission may rule on legal issues arising from Count III of the lawsuit. Those issues are described in a Petition for Declaratory Ruling filed at the Commission on November 16, 2010.

In Response to the Petition for Declaratory Ruling Windstream asked the Commission to schedule a full-blown administrative proceeding to include discovery and testimony. On April 8, 2011 the Commission established a procedural schedule in response to Windstream’s request, stating that Windstream should have a chance to develop any “material facts in dispute.” Meanwhile, discovery has progressed in accordance with the Court’s January 13, 2011 Order establishing discovery deadlines, and in accordance with the Commission’s April 8, 2011

Procedural Schedule. Petitioner and Windstream have each taken depositions and exchanged documents. On April 1, 2011 the District Court entered a Protective Order related to all Discovery Materials to be used for prosecuting or defending claims in the litigation.

### **GROUND FOR PETITION**

1. KRS 61.878(1)(k) protects from disclosure “information the disclosure of which is prohibited by federal law or regulation[.]”

2. The April 4, 2011 Protective Order, attached hereto, permits a party to the federal court action to designate materials as “Confidential” or “Attorneys’ Eyes Only.”

3. Parties to the action are permitted to use such materials to prosecute and defend claims in the litigation, including in examination of any witness.

4. As the Commission is aware, some of the claims arise under state law, including claims in Count III of the lawsuit arising from KRS Chapter 278, and the district court stayed Count III to allow the PSC to address the dispute. Thereafter, Petitioner sought a ruling from the Commission on issues related to Windstream’s state tariffs.

5. Windstream’s prefiled testimony includes Discovery Materials disclosed in the litigation that have been marked “Confidential” and are subject to the Protective Order. Windstream filed a Motion for Confidential Treatment on June 10, 2011.

6. Petitioner is filing a number of documents that rebut Windstream’s legal arguments in its prefiled testimony. Windstream has marked these documents as Confidential and they are Discovery Materials subject to the Protective Order.

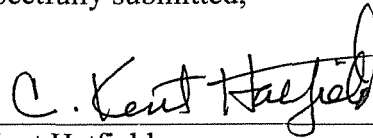
7. Specifically, Discovery Materials filed confidentially include Windstream documents describing the various charges imposed on its customers at various times for the “Kentucky Gross Receipts Surcharge” and explaining why the amounts were not uniform and why Windstream changed the rates throughout the relevant timeframe. As Windstream has

designated these documents as “Confidential” pursuant to the Protective Order, these documents are filed with the Commission under seal.

8. Although Petitioner does not agree the filed documents are inherently confidential, they have been so designated by Windstream and, accordingly, are filed with the Commission under seal. Petitioner states that Windstream should have an opportunity to state any additional grounds that it believes warrant confidential treatment for the Discovery Materials being filed.

For the reasons stated above, Petitioner asks that this Motion for Confidential Treatment be granted.

Respectfully submitted,



---

C. Kent Hatfield  
Douglas F. Brent  
Deborah T. Eversole  
STOLL KEENON OGDEN PLLC  
2000 PNC Plaza  
500 West Jefferson Street  
Louisville, Kentucky 40202  
Ph: (502) 333-6000  
Fax: (502) 333-6099

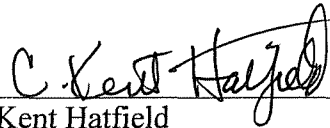
*Counsel for Petitioner*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing has been served by first class mail on those persons whose names appear below this 24<sup>th</sup> day of June 2011:

Mark R. Overstreet  
Benjamin R. Crittenden  
Stites & Harbison  
421 West Main Street  
P.O. Box 634  
Frankfort, KY 40602-0634

Jeanne Shearer  
Windstream Kentucky East, LLC  
4139 Oregon Pike  
Ephrata, PA 17522

  
\_\_\_\_\_  
C. Kent Hatfield

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED  
JUN 24 2011  
PUBLIC SERVICE  
COMMISSION

In the Matter of:

DANA BOWERS )  
COMPLAINANT )  
v. )  
WINDSTREAM KENTUCKY EAST, LLC )  
DEFENDANT )

CASE NO. 2010-00447

**PETITIONER’S REBUTTAL TESTIMONY AND MATERIALS**

Dana Bowers (“Petitioner”), by counsel, files the following in rebuttal to the “testimony” of Stephen Weeks, Director of Wholesale Services for Windstream Communications, Inc., filed with the Commission on June 10, 2011:

\* \* \*

1. Excerpts from Windstream’s Memorandum in Support of Defendants’ Motion to Dismiss, Or, In the Alternative, Stay This Action, filed in *Bowers et al v. Windstream Kentucky East, LLC*, Docket No. 3:09-CV-440 (W.D. Ky.), stating, among other things, that Ms. Bowers’ intrastate services include

“two residential lines with Windstream East’s ‘Feature Pack A.’ (*Id.* ¶ 2). These services are **subject to Windstream East’s local tariff on file with the PSC (the ‘General Customer Services Tariff for the State of Kentucky,’ PSC KY No. 7)** and to any alternative regulation prescribed under KRS 278.543.” (Emphasis added.)

Windstream’s court filing also cites KRS 278.160(1) along with 47 U.S.C. 203(a), and states, “Pursuant to the applicable statutes, Windstream East has filed tariffs with the FCC and PSC.” (Attachment 1 hereto.)

2. Affidavit of Cesar Caballero, Vice President of Regulatory Strategy for Windstream Communications, Inc., filed in *Bowers et al v. Windstream Kentucky East, LLC*,

Docket No. 3:09-CV-440 (W.D. Ky.), stating that the subscriber line charge paid by Plaintiff (Ms. Bowers) is “subject to the Windstream Telephone System Tariff FCC No. 6 filed with the FCC,” and that “[a]ll other services Plaintiff receives in connection with her residential phone lines that are subject to federal or state tariff requirements are **governed by the terms of Windstream East’s General Customer Services Tariff for the State of Kentucky, PSC KY No. 7.**” (Emphasis added.)<sup>1</sup> (Attachment 2 hereto.)

3. Page 3 of Petitioner’s Windstream bill filed by Windstream in *Bowers et al v. Windstream Kentucky East, LLC*, Docket No. 3:09-CV-440 (W.D. Ky.) as an exhibit to its Motion to Reconsider Portions of the Court’s April 30, 2010 Opinion and Order, showing that Ms. Bowers’ “Feature Pack A,” “Access Charge per FCC Order,” and two “Residential Line(s)” are **listed as “REGULATED” charges.** (Attachment 3 hereto.)

4. Excerpts from Deposition of Michael Rhoda, Windstream’s Senior Vice President of Government Affairs and designated Corporate Witness in *Bowers et al v. Windstream Kentucky East, LLC*, Docket No. 3:09-CV-440 (W.D. Ky.), and Deposition Exhibit No. 58,<sup>2</sup> stating:

a. That “whether a tariff is required or not is – is one issue, but having something in a tariff, whether you believe it’s required or not, doesn’t give you the ability to depart.”<sup>3</sup>

b. That a “rate” “absolutely” must be in the tariffs, and that Windstream has not paid sales tax on revenue from the Kentucky Gross Receipts surcharge because Windstream

---

<sup>1</sup> Mr. Cabellero, unlike Mr. Weeks, is an attorney.

<sup>2</sup> Pursuant to Windstream’s designation of Exhibit No. 58 as “confidential” pursuant to the Protective Order in the litigation, it is filed under seal.

<sup>3</sup> Rhoda Deposition at 95.

personnel determined that the revenue qualified for the sales tax exemption for “*rate* increases for residential telecommunications customers.”<sup>4</sup> (Emphasis added.)

c. That Windstream initially assessed a 1.3% surcharge to all customers; then increased it to 2.6% for all customers; then dropped it to zero for some customers while increasing it to 1.75% for others, so that the “shortfall” resulting from discontinuation of the surcharge for one group would be recovered from “those customers that we were continuing to assess the cost recovery to.”<sup>5</sup>

d. That the increase in the surcharge was not communicated to customers by bill message because “you can overcommunicate to your customers.” However, Mr. Rhoda admitted that an increase in the “deregulated administrative fee” *was* included in a customer bill message.<sup>6</sup>

The relevant excerpts from Mr. Rhoda’s deposition are attached hereto as Attachment 4.

5. Additional Windstream documents describing the various charges imposed on its customers at various times for the “Kentucky Gross Receipts Surcharge;” explaining why the amounts charged to different customer classifications changed over time (although the tax rate on Windstream never changed); and showing why and when some customer classifications were assessed a larger percentage than others. As Windstream has designated these documents as “confidential” pursuant to the Protective Order in the litigation, these documents are filed under seal as Confidential Attachment 5.

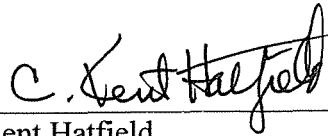
---

<sup>4</sup> Rhoda Deposition at 70-72; Deposition Exhibit 58. Exhibit 58 has been designated “confidential” by Windstream and therefore appears along with the other documents filed under seal in this filing.

<sup>5</sup> Rhoda Deposition at 81-84.

<sup>6</sup> Rhoda Deposition at 83-86.

Respectfully submitted,

A handwritten signature in black ink, reading "C. Kent Hatfield". The signature is written in a cursive style and is positioned above a horizontal line.

---

C. Kent Hatfield  
Douglas F. Brent  
Deborah T. Eversole  
STOLL KEENON OGDEN PLLC  
2000 PNC Plaza  
500 West Jefferson Street  
Louisville, Kentucky 40202  
Ph: (502) 333-6000  
Fax: (502) 333-6099

*Counsel for Petitioner*

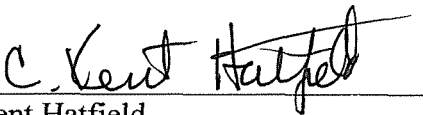


**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing has been served by first class mail on those persons whose names appear below this 24<sup>th</sup> day of June 2011:

Mark R. Overstreet  
Benjamin R. Crittenden  
Stites & Harbison  
421 West Main Street  
P.O. Box 634  
Frankfort, KY 40602-0634

Jeanne Shearer  
Windstream Kentucky East, LLC  
4139 Oregon Pike  
Ephrata, PA 17522

  
\_\_\_\_\_  
C. Kent Hatfield

# **ATTACHMENT 1**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION

Dana Bowers, on Behalf of Herself and  
Others Similarly Situated,

PLAINTIFFS

v.

Windstream Kentucky East, LLC, et al.

DEFENDANTS.

CIVIL ACTION NO. 3:09-CV-440

ELECTRONICALLY FILED

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, OR, IN  
THE ALTERNATIVE, STAY THIS ACTION**

Defendants, Windstream Kentucky East, LLC ("Windstream East"), Windstream Kentucky West, LLC ("Windstream West"), and Windstream Communications, Inc. ("Windstream Communications"), by counsel, submit this memorandum in support of their Motion to Dismiss the complaint against them, or, in the alternative, stay these proceedings and refer the matters presented in the complaint to the appropriate regulatory authority.

First, Plaintiff has no standing to assert any claim of any nature whatsoever against Windstream West or Windstream Communications. She is a customer of Windstream East only and has no direct or indirect relationship or dealings with Windstream West or Windstream Communications. As neither Windstream West nor Windstream Communications could have caused any injury to Plaintiff as alleged in the complaint, Plaintiff has no standing to sue either of these Defendants, and they must be dismissed from this case.

In addition to dismissing the claims against Windstream West and Windstream Communications outright, with prejudice, the Court should dismiss or stay the remainder of the action so that the issues raised in the complaint may be considered first by the Federal

imposed either on Windstream or on customers directly by various states for the provision of communications services. In the case of gross receipts surcharges, they are not government mandated charges.” (*Id.*) Plaintiff never questioned the addition of the surcharge, and instead continued to pay her bills regularly and without complaint to Windstream East.

**D. Windstream East’s Tariffs Filed With the FCC and PSC.**

Subject to certain exceptions, telecommunications service providers are subject to regulation at both the federal and state levels and must file tariffs setting forth rates and charges for interstate and intrastate services, respectively. *See* 47 U.S.C. § 203(a); KRS 278.160(1).<sup>3</sup> Pursuant to the applicable statutes, Windstream East has filed tariffs with the FCC and PSC.

Based on the types of services Plaintiff receives from Windstream East and the time period at issue, there are only three tariffs (two federal and one state) relevant to her individual claims. Specifically, during the periods at issue in the complaint, Plaintiff has been assessed only one type of charge subject to FCC tariff requirements—the FCC access charge, also known as a subscriber line charge. (*See* Affidavit of Cesar Caballero ¶ 3, attached hereto.)<sup>4</sup> Since January 3, 2009, this charge has been subject to Windstream Telephone System Tariff FCC No. 6. (*Id.* ¶ 3.) Prior to January 3, 2009, this charge was subject to Windstream Telephone System Tariff FCC No. 3. (*Id.*)

<sup>3</sup> The general regulatory framework, including the tariff requirements, is subject to various exceptions. For example, Kentucky permits some telecommunications providers to subject themselves to alternate regulations that exempt the electing companies from numerous other regulatory requirements. *See* KRS 278.541 *et seq.* Windstream East has elected to follow this alternate regulation. Similarly, pursuant to power granted to it by 47 U.S.C. § 160(a), the FCC has ordered the detariffing of certain services for certain types of carriers. *See, e.g., MCI Worldcom, Inc. v. FCC*, 209 F.3d 760, 765–66 (D.C. Cir. 2000) (discussing detariffing).

<sup>4</sup> This affidavit does not contest any of Plaintiff’s factual allegations. It merely explains the nature of the services already reflected in Plaintiff’s billing statements and clarifies which of the numerous tariffs cited in the complaint apply to services obtained from Windstream East by Plaintiff, as opposed to other types of services purchased by other customers from other entities and/or subject to different tariffs. As the applicable tariffs and the actual services purchased by Plaintiff are integral to the complaint, the Court may consider this affidavit without converting this motion into a motion for summary judgment. *See Wyser-Pratte*, 413 F.3d at 560; *Latimer v. Robinson*, 338 F. Supp. 2d 841, 843 (M.D. Tenn. 2004) (stating that a court need not convert a motion to dismiss into a motion for summary judgment if materials tendered with the motion do not rebut, challenge, or contradict the allegations of the complaint).

With respect to intrastate or local services, Plaintiff has subscribed to DSL Ultra-renewal service and the DSL Protection Plus plan during the period at issue in the complaint. (*See id.* ¶ 2; *see also, e.g.*, 6/22/07 Stmt., Ex. A, at p.3.) These two services are detariffed, and they are billed pursuant to Windstream East's Terms and Conditions of service (which are attached as Ex. B).<sup>5</sup> (*See Caballero Af.* ¶ 6.) The only other local or intrastate services Plaintiff receives from Windstream East are two residential lines with Windstream East's "Feature Pack A." (*Id.* ¶ 2.) These services are subject to Windstream East's local tariff on file with the PSC (the "General Customer Services Tariff for the State of Kentucky," PSC KY No. 7) and to any alternative regulation prescribed under KRS 278.543. (*Id.* ¶¶ 4-5.) At no time during the period set forth in the complaint has Plaintiff subscribed to any services subject to Windstream East's intrastate switched access tariffs. (*See id.* ¶ 5.) Thus, the only tariffs that could have any bearing on Plaintiff's claims are Windstream Telephone System Tariffs FCC Nos. 3 and 6 and PSC KY No. 7.<sup>6</sup>

## ARGUMENT

### **I. PLAINTIFF LACKS STANDING TO ASSERT ANY CLAIM AGAINST WINDSTREAM WEST OR WINDSTREAM COMMUNICATIONS.**

To invoke the jurisdiction of this Court, Plaintiff must have standing to do so. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To have standing, Plaintiff must establish three elements: (1) that she has suffered an "injury in fact" that is "concrete and particularized," not "conjectural or hypothetical;" (2) "that the injury is fairly traceable to the challenged action

---

<sup>5</sup> The Terms and Conditions to which Plaintiff has agreed that govern her non-tariffed services from Windstream East are integral to the complaint and may be considered without converting this motion to a motion for summary judgment. *See Wyser-Pratte*, 413 F.3d at 560.

<sup>6</sup> The complaint references Windstream Telephone System Tariff FCC No. 1, (Compl. ¶ 46), the two intrastate switched access tariffs filed with the PSC by Windstream East (PSC KY Nos. 8 and 9), (*id.* ¶ 68), and tariffs filed with the PSC by Windstream West and Windstream Communications, (*id.* ¶¶ 69, 71), but she does not receive any services subject to these tariffs. Presumably, she includes them in her allegations as part of her improper effort to pursue a class action on behalf of individuals who may receive services from one or more Defendants that are subject to those tariffs (even though she does not).

# **ATTACHMENT 2**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION

Dana Bowers, on Behalf of Herself and  
Others Similarly Situated,

PLAINTIFFS

v.

Windstream Kentucky East, LLC, et al.

DEFENDANTS.

CIVIL ACTION NO. 3:09-CV-440

**AFFIDAVIT OF CESAR CABALLERO**

The Affiant, Cesar Caballero, after first being duly sworn, states and deposes for his affidavit as follows:

1. My name is Cesar Caballero, and I am the Vice President – Regulatory Strategy for Windstream Communications, Inc. In this capacity, I am familiar with Windstream East LLC's (Windstream East) service and product offerings to customers in Kentucky, including the services purchased by the plaintiff in this action, Dana Bowers. I am also familiar with Windstream East's tariffs filed with the Federal Communications Commission (FCC) and the Kentucky Public Service Commission (PSC). I am familiar with which services offered by Windstream East are subject to federal or state tariffs, and I am familiar with which tariff applies to each service.

2. As reflected in her billing statements, during the time period at issue in this litigation, Plaintiff has received local telephone service for two residential telephone lines (with Windstream East's Feature Pack A) from Windstream East. She also subscribes to Windstream East's DSL Ultra broadband service and the DSL Protection Plus Plan. Plaintiff does not receive any long distance telephone services from Windstream East. Plaintiff does not receive any

services of any nature from Windstream Communications, Inc. or Windstream Kentucky West, LLC.

3. In connection with her residential telephone lines, Plaintiff is assessed a “subscriber line charge” or “SLC” for each telephone line. These SLCs are reflected on the third page of Plaintiff’s billing statements as “Access Charge Per FCC Order” and “FCC Access Chg Non Primary Res.” Each SLC is subject to the Windstream Telephone System Tariff FCC No. 6 filed with the FCC. Prior to January 3, 2009, the SLC’s were subject to the Windstream Telephone System Tariff FCC No. 3. The SLC’s are the only aspects of the services Plaintiff receives from Windstream East that are subject to FCC tariffs.

4. All other services Plaintiff receives in connection with her residential telephone lines that are subject to federal or state tariff requirements are governed by the terms of Windstream East’s General Customer Services Tariff for the State of Kentucky, PSC KY No. 7.

5. There are no other state or federal tariffs filed by or on behalf of Windstream East that apply to the services Plaintiff receives from Windstream East other than those described in paragraphs 3 and 4 above.

6. Plaintiff’s DSL Ultra service and her DSL Protection Plus Plan are not subject to federal or state tariff requirements and are not included in Windstream East’s tariffs. The Deregulated Administration Fee assessed to Plaintiff likewise is not subject to any state or federal tariff requirements. These services and charges are subject only to Windstream East’s “Terms and Conditions” of service.

7. A true and accurate copy of Plaintiff’s June 22, 2007 billing statement is attached as Exhibit A.

8. A true and accurate copy of Windstream East’s Terms and Conditions of service



is attached as Exhibit B.

9. True and accurate copies of pages from Windstream Telephone System Tariff FCC No. 6 that are cited in Defendants' motion to dismiss are attached as Exhibit C.

10. True and accurate copies of pages from Windstream Telephone System Tariff FCC No. 3, at 2-50 (effective 8/7/08) that are cited in Defendants' motion to dismiss are attached as Exhibit D.

11. True and accurate copies of pages from Windstream Kentucky East General Customer Services Tariff, PSC KY No. 7 that are cited in Defendants' motion to dismiss are attached as Exhibit E.

Further, the Affiant sayeth naught.

*Cesar Caballero*

Cesar Caballero

STATE OF ARKANSAS )

COUNTY OF PULASKI )

The foregoing instrument was subscribed, sworn to, and acknowledged before me this 27th day of August, 2009, by Cesar Caballero.

My commission expires:

September 1, 2011

*Sandra Jean Griffin*  
NOTARY PUBLIC



# **ATTACHMENT 3**

**REDACTED**

Mail Date:  
Billing Number:  
Account Number:

**SERVICE PROVIDER(S)**

Your InterLATA long distance carrier(s) are\*:

AT&T 1-800-222-0300

Your IntraLATA long distance carrier(s) are\*:

AT&T 1-800-222-0300

Your Local carrier is\*:

Windstream 1-800-347-1991

\* If you have multiple telephone numbers, further information concerning long distance carrier assignments for those additional lines are on record with your local business office.

**SUMMARY OF PAYMENTS AND ADJUSTMENTS**

PAYMENTS	138.14 CR
<b>TOTAL PAYMENTS AND ADJUSTMENTS</b>	<b>138.14 CR</b>

**SUMMARY OF CURRENT CHARGES**

<b>REGULATED</b>	
WINDSTREAM	129.22
<b>TOTAL</b>	<b>129.22</b>
<b>DEREGULATED</b>	
WINDSTREAM	10.08
<b>TOTAL</b>	<b>10.08</b>
<b>CURRENT CHARGES DUE 07/11/07</b>	<b>139.30</b>

Nonpayment of the TOTAL of Regulated amounts shown above could result in disconnection of those services including basic local service and may be subject to collection actions.

Nonpayment of the TOTAL of Deregulated amounts shown above could result in disconnection of those services and may be subject to collection actions, but will not result in disconnection of basic local service.

If not paid on time, a late pay penalty of 2.0% will apply to any unpaid balance over \$25.00 after 07/18/07.



**WINDSTREAM  
SUMMARY OF CURRENT CHARGES**

Service from 06/19/07 to 07/16/07  
Toll charge inquiries call 1-800-347-1991

<b>REGULATED</b>	
SERVICES AND PRODUCTS	101.00
911 SERVICE	3.20
ACCESS CHARGE PER FCC ORDER	13.50
FEDERAL TAX	2.54
STATE TAX	3.98
SCHOOL TAX	1.98
KY GROSS RECEIPTS SURCHARGE	1.03
TRSTAP SURCHARGE	.18
FEDERAL UNIVERSAL SERVICE FEE	1.58
KENTUCKY LIFELINE SUPPORT	.16
<b>TOTAL REGULATED</b>	<b>129.22</b>
<b>DEREGULATED</b>	
PROTECTION PLUS PLAN	9.95
KY GROSS RECEIPTS SURCHARGE	.13
<b>TOTAL DEREGULATED</b>	<b>10.08</b>
<b>TOTAL WINDSTREAM CHARGES</b>	<b>139.30</b>

**DETAIL OF LOCAL SERVICE CHARGES**

The following detail itemizes your current billing as required by your state regulatory agency. These charges are reflected on your regular monthly bill. Taxes and prorated monthly charges are not included.

Quantity	Service Description	Monthly Charges
<b>REGULATED</b>		
1	DSL ULTRA-RENEWAL	34.85
2	FEATURE PACK A	32.00
1	ACCESS CHARGE PER FCC ORDER	8.50
2	RESIDENTIAL LINE	34.14
1	FCC ACCESS CHG NON PRIMARY RES	7.00
<b>DEREGULATED</b>		
1	DSL-PROTECTION PLUS	9.85

**WINDSTREAM CUSTOMER MESSAGE**

**Important Information for Customers Paying by Check**

Windstream may convert your payments by check to an electronic Automated Clearinghouse (ACH) debit transaction. The debit transaction will appear on your bank statement, although your check will not be presented to your financial institution or returned to you. This ACH debit transaction will not enroll you in any Windstream automatic debit process and will only occur each time a check is received. Any resubmissions due to insufficient funds may also occur electronically. Please be aware that all checking transactions will remain secure, and payment by check constitutes acceptance of these terms. We value your business and appreciate you selecting Windstream as your telecommunications provider.

Windstream's Great Calling Features are Available on a Pay-Per-Use Basis  
\*69 - CALL RETURN: If you missed a call, just dial \*69 (1168 for rotary phones) to redial your last caller.

\*66 - REPEAT DIALING: If you keep getting a busy signal, just press \*66 (1168 for rotary phones) and your phone will automatically redial the number for 30 minutes until it gets through.

Contact the number on this billing statement for more information on Windstream's other great calling features.

Effective with this billing statement, the Kentucky Gross Receipts Surcharge will begin appearing on your bill. This surcharge recovers a tax imposed by the State of Kentucky on all communications and entertainment providers.

If you have any questions about this surcharge, please call Windstream Customer Service at 1-800-347-1991 (residential customers) or 1-800-843-9214 (business customers). Thank you for being a valued Windstream customer. We appreciate your business.

To help us serve you faster, please bring your entire billing statement with you when paying in person at one of our payment center locations.

Would you like to have one bill for all of your phone services? Windstream Long Distance has the answer! We have various options to best fit your needs. Please call customer service at 1-800-347-1991 (residential customers) and 1-800-843-9214 (business customers) for details.



# **ATTACHMENT 4**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION

Dana Bowers, On Behalf of Herself and  
Others Similarly Situated,  
And  
Sunrise Children's Services, Inc.,  
on  
Behalf of Itself and Others Similarly  
Situated

PLAINTIFFS,

vs.  
Windstream Kentucky East, LLC, et al.

DEFENDANTS.

VIDEOTAPED ORAL DEPOSITION OF MICHAEL RHODA  
TAKEN THURSDAY, MAY 19, 2011

A P P E A R A N C E S:

ON BEHALF OF THE PLAINTIFFS:

DAVID T. ROYSE, ESQ.  
Stoll Keenon Ogden  
300 West Vine Street, Suite 2100  
Lexington, Kentucky 40507

DOUGLAS F. BRENT, ESQ.  
Stoll Keenon Ogden  
200 PNC Plaza, 500 West Jefferson Street  
Louisville, Kentucky 40202-2828

1 A P P E A R A N C E S (Continued):

2 ON BEHALF OF THE DEFENDANTS:

3 MARJORIE A. FARRIS, ESQ.  
4 Stites & Harbison  
400 West Market Street, Suite 1800  
5 Louisville, Kentucky 40202-3352

6 CHADWICK A. MCTIGHE, ESQ.  
7 Stites & Harbison  
400 West Market Street, Suite 1800  
8 Louisville, Kentucky 40202-3352

9 KRISTI M. MOODY, ESQ.  
10 Windstream Communications, Inc.  
4001 Rodney Parham Road, Mailstop 1170-B1F03-71A  
11 Little Rock, Arkansas 72212

12 ALSO PRESENT:

13 Michael Whitson, Videographer

14 Vicki Olsen, Paralegal, Windstream Communications, Inc.

15 ---o---

16

17

18

19

20

21

22

23

24

25

## MICHAEL RHODA, 5/19/2011, Bowers v. Windstream

- 1 A That's correct.
- 2 Q Why did that not impact the imposition of the Gross  
3 Receipts Surcharge?
- 4 A Because we did not view and do not view the surcharge as a  
5 rate element.
- 6 Q So the surcharge is not a rate or an element of a rate?
- 7 A Correct.
- 8 Q That's Windstream's position?
- 9 A That's our position.
- 10 Q And that is crucial to your position that this doesn't  
11 need to be tariffed, right?
- 12 A The two go hand in hand.
- 13 Q If it was a rate it would have to be in the tariffs,  
14 right?
- 15 A Absolutely.
- 16 Q Okay. Give me just a second here. I'm --
- 17 A Sure.
- 18 Q -- skipping some things.
- 19 Do you know, Mr. Rhoda, whether Windstream East pays sales  
20 tax on the revenue it collects by virtue of the Gross Receipts  
21 Surcharge?
- 22 A We do.
- 23 Q Okay. On all revenue?
- 24 A On all revenue generated from the surcharge?
- 25 Q Yes, sir.

## MICHAEL RHODA, 5/19/2011, Bowers v. Windstream

1 A Yes.

2 Q And you're sure about that?

3 A I'm certain that that's true.

4 Q Okay.

5 (WHEREUPON, Deposition Exhibit No. 58 was marked  
6 for identification.)

7 BY MR. ROYSE:

8 Q I'll hand you what we'll mark as Exhibit 58 to your  
9 deposition. Starts on the second page if you want to review it  
10 chronologically.

11 A Okay. Thank you. Okay.

12 Q Isn't it true that Windstream has not paid sales tax on  
13 surcharge revenue for residential customers? Is that true?

14 A From this email it appears that the advice of our tax  
15 people was that it was not due on residential customers.

16 Q And that is because it is viewed as a sales tax exemption  
17 for rate increases for residential telecommunication customers.  
18 Correct?

19 A Correct. That's what's in the email.

20 Q Okay. To your knowledge -- well, strike it. You've told  
21 me what you know. Good enough.

22 Is it fair to say that if you go back today and learn that  
23 sales tax has not been paid on the residential surcharge  
24 revenue, that would be a surprise to you, in light of what you  
25 testified a few minutes ago?



## MICHAEL RHODA, 5/19/2011, Bowers v. Windstream

1 A Sure.

2 Q Mr. Rhoda, were you familiar with, in around June or July  
3 of 2007, a discovery within Windstream that it was not paying  
4 Gross Receipts Tax or had not paid Gross Receipts Tax on  
5 everything that the Commonwealth thought it should have been  
6 paying?

7 A Yes.

8 Q What was it that hadn't been paid?

9 A I don't know specifically. There were a number of  
10 elements and there was an underpayment that was found and  
11 reported.

12 Q Okay. So you're not familiar with what -- what it was  
13 that led to the underpayment?

14 A Correct.

15 Q Hmm. Okay. Who would know that? Willis Kemp?

16 A Willis, certainly. You know, either Willis or someone in  
17 his department.

18 Q Okay. Somebody in tax ought to know that, right?

19 A Yes.

20 Q Okay. Okay. You do know, though, that there was an  
21 underpayment. And I presume Windstream paid that to the state  
22 at that time. Right?

23 A Correct.

24 Q Did they have to pay any penalties on it?

25 A I don't know.

## MICHAEL RHODA, 5/19/2011, Bowers v. Windstream

1 A I don't believe so.

2 Q Okay. Why not?

3 A Well, whether a tariff is required or not is -- is one  
4 issue, but having something in a tariff, whether you believe  
5 it's required or not, doesn't give you the ability to depart.

6 Q So once you file it in a tariff, even if it's not  
7 required, you've got to abide by the tariff, right?

8 A (Nodding head up and down.)

9 Q You have to say yes so she --

10 A Yes.

11 Q So you would certainly be surprised if you learned that  
12 anything in excess of 1.3 percent was charged on access after  
13 the filing of that tariff?

14 A This access tariff.

15 Q Yeah. You would?

16 A I would recognize the conflict. I don't -- to be  
17 surprised in this particular instance, you know, that -- I'll  
18 say that.

19 Q Well, don't -- are you going to tell me you would have  
20 expected it?

21 A We don't typically not comply with tariffs, so surprised  
22 from that perspective, yes.

23 Q Okay. So if it was, something was amiss?

24 A Yes.

25 Q Okay. Was -- did there come a time in around September of

MICHAEL RHODA, 5/19/2011, Bowers v. Windstream

1 something through and the rate had gone up, which would have  
2 been in direct conflict with the -- the law.

3 Q When -- all right. We talked about the initial percentage  
4 that was charged, we talked about who it applied to, we talked  
5 about that changing to some extent initially with the  
6 percentage changing and then with some customers and their  
7 services, the -- the application changing. Did there also come  
8 a time when Windstream decided to charge different customers  
9 different percentages for the GRS?

10 A Yes.

11 Q And why was that?

12 A When we ceased charging wholesale customers we looked to  
13 recover the remaining shortfall from those charges that we  
14 were -- those customers that we were continuing to assess the  
15 cost recovery to.

16 Q So rather than 1.3 percent, something higher was charged  
17 to compensate or make up for what was not being charged to  
18 those wholesale customers?

19 A Yes.

20 Q And did you put that in a billing message to explain to  
21 the customers who were paying that higher amount?

22 A I don't know.

23 Q Would you expect --

24 MS. FARRIS: I'll --

25 BY MR. ROYSE:

SUSAN B. WHITSON, CCR, INC. (501) 455-1170

MICHAEL RHODA, 5/19/2011, Bowers v. Windstream

1 Q -- to have put it in one.

2 MS. FARRIS: I just wanted to object to the last  
3 question. His answer is fine. Go ahead.

4 Sorry.

5 BY MR. ROYSE:

6 Q Do you know, would you have expected to see a bill message  
7 to that effect?

8 A Not necessarily.

9 Q Why not?

10 MS. FARRIS: And I guess let me just make my  
11 form objection to be a little more clear here. Which is the  
12 percentage actually I believe that those customers are talking  
13 about, and we're talking generalities here, would have actually  
14 gone down rather than up, and that was the basis for the form  
15 objection.

16 So subject to that, you can keep on with that  
17 line of questioning, but I thought in line of my objection I  
18 should make that point.

19 MR. ROYSE: Thanks.

20 BY MR. ROYSE:

21 Q Let's -- let's ferret this out.

22 The rate from 1.3 on everybody increased to 2.6 on  
23 everybody because Windstream wanted to recover what it had paid  
24 in Gross Receipts Tax before it could recover. Right?

25 A Correct.

SUSAN B. WHITSON, CCR, INC. (501) 455-1170

## MICHAEL RHODA, 5/19/2011, Bowers v. Windstream

1 Q It also included the amount that it had underpaid in that  
2 initial year and a half. Correct?

3 A I believe so.

4 Q Okay. The idea was and it was expressly communicated that  
5 once that initial payment had been caught up --

6 A Sure.

7 Q -- so to speak, that it would drop back to 1.3, right?

8 A That's correct.

9 Q Okay. So when that time frame finally hit and that catch  
10 up had occurred, if everyone was still paying the rate, the  
11 surcharge, it would have been 1.3. Correct?

12 A If everyone -- that's a reasonable assumption.

13 Q Okay. And that's not what happened?

14 A Correct.

15 Q What happened was some customers who would have paid  
16 1.3 percent at that point actually paid more, like 1.5 or 1.75,  
17 because certain customers at that point weren't charged the  
18 surcharge at all. Correct?

19 A Correct.

20 Q Okay. I think that clears up what we were talking about.

21 So in light of that, would you have expected to see some  
22 bill message to the customers who were now paying more than 1.3  
23 as to why?

24 A No.

25 Q Okay. Why not?

## MICHAEL RHODA, 5/19/2011, Bowers v. Windstream

1 A Because typically customers don't really care about that  
2 level of detail.

3 Q Okay.

4 A If they have a question on the surcharge, they will call  
5 the call center.

6 Q Okay.

7 A So the fact that we imposed and, in my belief, in our  
8 belief properly messaged the surcharge to begin with while the  
9 rates were changing, that -- that doesn't always -- and quite  
10 often surcharge rates change, that most oftentimes doesn't  
11 necessitate a bill message because it's just incidental, people  
12 expect it. And you have to be sensitive about, you can  
13 overcommunicate to your customers.

14 Q What's the deregulated or deregulation administrative fee  
15 or deregulated administrative fee?

16 A That is a surcharge on the bill that seeks to recover  
17 other types of costs that Windstream incurs, in some cases  
18 maybe similar to the Gross Receipts Surcharge but not always.  
19 That could individually be added on to the bill but typically  
20 we do it in bulk so as to make the bill cleaner.

21 Q So these are increased costs that Windstream has suffered  
22 as a result of deregulation for which it's trying to recoup  
23 some of the costs from customers?

24 MS. FARRIS: Object to the form.

25 You can answer.

MICHAEL RHODA, 5/19/2011, Bowers v. Windstream

1           THE WITNESS: The -- the fee itself is a  
2 deregulated fee. The costs that it recovers are various and  
3 sundry, and it would include things like certain surcharges  
4 that are added to our bill from other entities, you know,  
5 municipalities, states, counties, the federal government. You  
6 know, they -- they -- they like to come to telecom carriers and  
7 put some type of charge on us. They see it as a way to  
8 increase revenues without going directly to their constituents,  
9 or at least their consumer constituents.

10 BY MR. ROYSE:

11 Q     And that's happened as a result of deregulation?

12 A     No. No. This is just a -- what I'm saying is the fee  
13 itself is deregulated, but I don't know that it's -- it's not  
14 meant to recover just deregulated costs.

15 Q     Oh, okay. Yeah. Because I totally agree with you, it's  
16 deregulated, I know that.

17 A     Right.

18 Q     What I'm getting at is I thought that a deregulated  
19 administrative fee had to do with something to do with the fact  
20 that deregulation had occurred?

21 A     No.

22 Q     Okay.

23 A     The reason it's called a deregulated fee is to comply with  
24 truth in billing. We would not want the customer to think that  
25 the fee itself is a regulated charge because it's not.

SUSAN B. WHITSON, CCR, INC. (501) 455-1170

## MICHAEL RHODA, 5/19/2011, Bowers v. Windstream

1 Q Right.

2 Okay. Now, when that was rolled out at 65 cents per month  
3 in January 1, on January 1 of 2008, there was a bill message  
4 about it. Right?

5 A Yes.

6 Q Now, to your -- in your mind that would not have been  
7 overcommunication to the customer, right?

8 A No.

9 Q Okay. When the deregulated administrative fee went up  
10 from 65 cents to \$1.55, there was a bill message about that,  
11 right?

12 A Uh-huh.

13 Q And that wasn't overcommunication?

14 A Right.

15 Q The belief was that that was something that the consumer  
16 would be interested in, right?

17 A Yes. Because what you try to do with bill message is you  
18 try to -- you try to anticipate what customers might have  
19 questions about. And so if you can avoid inconveniencing them  
20 to have to call your call center or write an email to ask a  
21 question and you can answer it in the form of a bill message,  
22 that's a good way to do it. And going from 65 cents to the  
23 amount that we went to, which was a flat percentage, was seen  
24 as something that could drive some call volume, and so let's  
25 try to head that off.



**CONFIDENTIAL  
ATTACHMENT 5**

**Filed Under Seal  
Motion for Confidential Treatment  
Dated June 24, 2011**