

**COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION  
Case No. 2018-00157**

In the Matter of

**RECEIVED**

CMN-RUS, INC.

**OCT 24 2018**

COMPLAINANT

v.

**PUBLIC SERVICE  
COMMISSION**

WINDSTREAM KENTUCKY EAST, LLC

RESPONDENT

**WINDSTREAM KENTUCKY EAST, LLC'S PREHEARING BRIEF**

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Comes the Respondent, Windstream Kentucky East, LLC ("Windstream Kentucky East"), by counsel, pursuant to the Public Service Commission's Order dated August 7, 2018, and for its Prehearing Brief, hereby states as follows:

**INTRODUCTION**

This matter concerns a Complaint filed by CMN-RUS, Inc. ("CMN") on or about May 15, 2018 against Windstream Kentucky East, LLC. In the Complaint, CMN made three allegations: 1) Windstream Kentucky East imposed material conditions not in its tariff, 2) Windstream Kentucky East's pole processing procedures are unreasonably slow, and 3) Windstream Kentucky East refuses to give CMN pole attachment terms it gives to others. None of these allegations are true.

**STATEMENT OF THE CASE**

**1) Statement of Facts**

The events of this case began around November 22, 2017. On that date, a representative of CMN, Anita Larson, requested a copy of Windstream Communications, Inc.'s ("Windstream Communications") standard pole attachment agreement used in Kentucky from Windstream Kentucky East's representative, Dan King (the "Windstream Kentucky East Standard PAA").

WIN3756.<sup>1</sup> She was directed to Michelle McLaughlin, and was sent the standard pole attachment agreement for attachment to poles owned by Windstream Kentucky East on the same day. One week later, Ms. Larson asked Ms. McLaughlin about the process for attaching to Windstream Kentucky's East's poles through the Windstream Kentucky East's tariff on file with the PSC (the "Tariff"). The Tariff was then forwarded to Ms. Larson. Ms. Larson was requesting the standard pole attachment agreement and the Tariff because CMN had recently signed a Franchise Agreement with the Lexington-Fayette Urban County Government ("LFUCG") to offer cable television services to residential and business customers in the Lexington area (this agreement and the work to be done concerning it are herein referred to as the "CMN-LFUCG Project").

CMN requested a conference call concerning negotiating the terms of the Windstream Kentucky East Standard PAA. A conference call between representatives for CMN and Windstream Kentucky East occurred on December 12, 2017. On that call, CMN's representatives noted that Windstream Kentucky East Standard PAA allows for a prospective attacher to submit applications to attach to up to 300 poles every rolling 30 day period (the "300 Pole Rule"). CMN requested to be allowed to submit applications to attach to 1,500 poles per month in the Lexington area for the CMN-LFUCG Project. At that time, one of the Windstream Communications representatives told CMN that the Windstream Communications would need to discuss making such an amendment with others at Windstream Kentucky East.

Another call was held a week later on December 19, 2017. On that call, CMN again requested to attach 1,500 poles per month. A Windstream Communications representative responded that Windstream Kentucky East wished to work out a resolution to the approximately

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<sup>1</sup> In this brief, all efforts are made to distinguish between the different "Windstream" entities without causing greater confusion for the reader. For that reason, the affiliates, Windstream Kentucky East, LLC and Windstream KDL, Inc. will be referred to as "Windstream Kentucky East" and "Windstream KDL" respectively. The parent company of these (and other affiliates) is "Windstream Communications, Inc."

\$1,000,000.00 in invoices CMN owes Windstream KDL, LLC (“Windstream KDL”) prior to continuing negotiations on the CMN-LFUCG Project. Upon this request, the negotiations between the parties ceased.

On January 12, 2018, Mr. King was contacted again by Ms. Larson concerning CMN’s possible attachment to Windstream Kentucky East poles under the Tariff. On January 18, 2018, Ms. Larson was provided with Windstream Kentucky East’s standard application and pole data sheet.

Despite apparently needing to connect to thousands of poles owned by Windstream Kentucky East as expediently as possible, CMN’s representatives did not try to reach a compromise resolution to the conflict between the parties (perhaps by suggesting a lesser or more feasible number of poles that the company might agree to submit applications for per month) and did not even contact any representative from any Windstream affiliate concerning this connection again until Windstream Kentucky East again prior to the filing of the Complaint on May 15, 2018.

A point of contention between CMN and Windstream Kentucky East, is the debt owed by CMN to Windstream KDL. This debt stems from an agreement reached between CMN, Windstream KDL, and Duke Energy, Inc. (“Duke”) for CMN to attach to poles owned by Duke in Lafayette and Hanover, Indiana. As part of a pole attachment and maintenance agreement to which Windstream KDL is a signatory, Windstream KDL can attach to poles owned by Duke in Indiana on favorable terms (the “Fiber Agreement”). WIN3137-3151. As CMN wished to take advantage of those terms, on February 7, 2005, Windstream KDL and CMN entered into a pole attachment and fiber rights agreement (“CMN/Duke PAA”) allowing CMN to attach to Duke poles through the Fiber Agreement. WIN3152-3219. Pursuant to the CMN/Duke PAA, Windstream KDL acts as an intermediary between Duke and CMN, submitting CMN’s applications and payment for pole

attachment to Duke. CMN utilized the CMN/Duke PAA to attach to poles in Lafayette, IN and Hanover, Indiana in 2014. As part of that process, Windstream KDL applied to attach to certain poles, Duke provided an estimate for make ready charges, CMN paid the make ready charges, and Duke performed the make ready work. Around November 2016, Duke billed Windstream for the difference between the estimated charges and the actual amounts claimed to be expended for make-ready (called a “true-up”). WIN3025-3051. However, CMN did not pay the true up because it disputes the amount owed and the delay in billing. These disputed amounts total approximately \$1.3 million dollars in unpaid charges.

The problem is that since Windstream KDL had the original contract with Duke, Windstream KDL is contractually obligated to pay the true up invoices. On September 5, 2017, a Windstream Communications representative contacted Duke regarding the disputed invoices and asked Duke to reissue the invoices to CMN. Duke refused to do so and further stated that “any invoices to Windstream KDL should be paid upon receipt and not held up due to a side agreement between Windstream KDL and Metronet.”<sup>2</sup> WIN4005-4006. *See* Direct Testimony of Dan King 3:1-4:8.

These invoices continue to be outstanding, and CMN, by its own admission in this litigation, has not taken any substantial steps to try to resolve the dispute between CMN and Duke. Instead, CMN’s attempts to resolve a million dollar dispute have been limited to two telephone calls and an email. *See* CMN Response to PSC’s Second Set of Requests for Information, Response to Request 2.b; CMN00548-49.<sup>3</sup> Moreover, it has become clear that this inaction is part of CMN’s strategy in that matter; when a representative from Windstream Communications

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<sup>2</sup> CMN is doing business in Lexington as “Metronet.”

<sup>3</sup> Windstream Kentucky East does not consider the second email on CMN00548 to be an earnest attempt at resolution as it only addresses whether or not this issue will slow down CMN’s ability to attach to Duke’s poles.

contacted CMN's representative, Ms. Larson, regarding getting the dispute resolved, she remarked that CMN preferred to "let sleeping dogs lie." WIN4039. Windstream Communications let Ms. Larson know on June 1, 2017 that this was unacceptable to the company, as Windstream KDL continues to be liable for these invoices. WIN4039. Despite this, according to documentation produced in this litigation, CMN did not contact Duke about the dispute again until Spring 2017. CMN Responses to PSC's Second Requests for Information, Response to Request 2.b.

In the Complaint, CMN makes three allegations: 1) Windstream Kentucky East imposed material conditions not in its tariff, 2) Windstream Kentucky East's pole processing procedures are unreasonably slow, and 3) Windstream Kentucky East refuses to give CMN pole attachment terms it gives to others. None of these allegations are true and complete factual or legal descriptions of the conflict between the parties.

## **2) ARGUMENT**

### **A) Windstream Kentucky East has not imposed material conditions not in its tariff.**

Pursuant to KRS 278.160 and 807 KAR 5:011, utilities are required to file tariffs with the Kentucky Public Service Commission ("PSC") disclosing the utility's rates and conditions for service. Windstream Kentucky East complied with these provisions by filing its CATV Pole Attachment Tariff with the PSC on July 2, 2016 with an effective date of July 17, 2016 (this document has previously been identified as the "Tariff").

CMN complains that Windstream Kentucky East has not properly complied with Tariff as Windstream Kentucky East applies the 300 Pole Rule to attachments under the Tariff. CMN argues that the Rule is not specifically delineated in the Tariff and cannot therefore be applied. However, the Tariff states that it does not cover each and every possible circumstance for attachment, nor could this logically be the case for any utility's filed tariff.

As initial matter, it is impossible for a utility to account for every possible attachment scenario in one document. As such, no company could be expected to write a tariff that satisfied the needs and questions of all possible prospective attachers. There are simply too many discrete situations for one document of limited length to cover. As such, every tariff will end up with a number of implied provisions and these must logically be reasonable for all parties. Perhaps the most outrageous part of CMN's argument is that since the Tariff does not specify the number of pole attachment applications Windstream Kentucky East will process each month for a given attacher, the number should automatically be whatever number is chosen by CMN as if this is some sort of punitive measure for Windstream Kentucky East's failure to include this detail in the Tariff. Logically, this would create an untenable and unsafe situation. The parties should ideally, come to some agreement on this matter, however, CMN was unwilling to discuss any number of applications lower than 300 per month.

Even beyond the common sense requirement that attachment, even under the Tariff, must include only reasonable provisions, two provisions of the Tariff account for allow for the application of the 300 Pole Rule. First, the Tariff states that a prospective attacher should make application for attachment "on the form prescribed" by Windstream Kentucky East. WIN3792, ¶ S1.4. Second, the Tariff also accounts for this impossibility at ¶ S1.10 Limitations. This section specifies:

The Company reserves to itself, its successors and assigns the right to maintain its poles and conduit and to locate and operate its facilities in such manner as will best enable it to fulfill its other public service requirements.

WIN3803, ¶ S1.10.

It is pursuant to these sections that Windstream Kentucky East implements the 300 Pole Rule as part of its application process. These provisions leave open the terms upon which

attachment will be approved and allow Windstream Kentucky East to impose reasonable requirements prior to approval to make sure its poles are utilized in a safe and efficient manner. Windstream Kentucky East believes it can only receive applications, approve paperwork, and complete engineering review on applications from each prospective attacher for to up to 300 poles in a rolling 30 day period.

Furthermore, KRS 278.160 does not require the level of specificity in a tariff that CMN argues. KRS 278.160 requires that utilities file tariffs that include “rates and conditions for service.” KRS 278.160(1). “Rate,” as used in KRS 278.160, is defined by KRS 278.010 to mean “any individual or joint fare, toll, charge, rental, or other compensation for service rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement, or privilege” related to the fares, tolls, charges, rentals, or other compensation. KRS 278.010(12). “Service” is defined as “any practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units and pressure of gas, the purity, pressure, and quantity of water, and in general the quality, quantity, and pressure of any commodity or product used or to be used.” KRS 278.010(13). Together “rates and conditions for service” refers to a monetary amount to be paid to the utility for services and what services will be provided and does not cover something like the 300 Pole Rule.

It should also be noted that CMN was never forced to attach to Windstream Kentucky East’s poles via the Tariff. CMN originally sought to attach to Windstream Kentucky East’s poles by working out a pole attachment agreement with Windstream Kentucky East. *See* WIN3756. Windstream Kentucky East sent CMN the company’s standard pole attachment agreement, which included the 300 Pole Rule. CMN executed exactly three calls to try to negotiate the agreement in which it demanded concessions Windstream Kentucky East was not willing to make and then

stopped all negotiations. Windstream Kentucky East would have gladly tried to come to an agreement that would have worked for both parties, but CMN's lack of negotiation made this impossible. CMN simply made demands, and when those demands were not met, CMN filed this lawsuit.

**B) Windstream Kentucky East's pole processing procedures are not unreasonably slow.**

In the Complaint, CMN alleges that Windstream's pole processing procedures are unreasonably slow because of the 300 Pole Rule. However, there are no previously adopted legal standards in Kentucky for the number of applications a utility must accept per month.

CMN explains FCC rules for pole attachment application at length in its Complaint and responses to Requests for Information. However, even CMN fully admits that those rules do not apply in Kentucky. Furthermore, CMN's primary contention in this lawsuit has been that Windstream Kentucky East will only accept applications for attachment to up to 300 poles per month, however, the FCC rule, 47 CFR 1.1411(g)<sup>4</sup> referenced by CMN refer only to the length of time a utility has to process applications, not how many pole applications must be accepted in a given time period. In addition, 47 CFR 1.1411(h) allows a utility to deviate from the timelines established in an appropriate circumstance. Furthermore, as the FCC rules do not apply in Kentucky, Windstream Kentucky East has logically not employed the staff necessary to comply with these rules.

CMN has pointed out that Windstream Kentucky East did not write the 300 Pole Rule into an agreement with New Cingular Wireless.<sup>5</sup> But, agreements concerning the installation of

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<sup>4</sup> In its prior filings CMN has referred to 47 CFR 1.1411(g) as "47 CFR 1.1420." This was correct at the time of CMN's filings as the codification of this rule was changed on October 15, 2018. The substance of Section g was not affected by this change.

<sup>5</sup> This agreement is the subject of the Supplemental Petition for Confidential Treatment.



wireless attachments are so different from the attachment sought in the CMN Project that the two cannot be reasonably compared. A wireless attachment is simply the attachment of equipment, usually a plastic box, near the bottom or top of a utility pole. The attachment of this equipment does not usually require make ready because there is already room for the installation. Additionally, there are no wire strands that must be hung from pole to pole, making attachment faster, cheaper, and easier. Rebuttal Testimony of James Lloyd, 2:10-19.

CMN is also critical that Windstream Kentucky East is accepting and processing fewer applications per month from CMN than Kentucky Utilities (“KU”). Rebuttal Testimony of John Greenback 3:5-4:4. However, this is not a fair comparison as KU is a much larger company than Windstream Kentucky East.

As there are no previously established standards for the number of applications for pole attachment that a utility in Kentucky must accept per month, Windstream Kentucky East has determined it can safely and reasonably accept applications for up to 300 poles in each rolling 30 day period from each attacher. This is not an unreasonable number in light of the resources Windstream Kentucky East has at its disposal and the risk it is willing to incur.

**C) Windstream Kentucky East has not illegally refused to give CMN pole attachment terms it gave to others.**

Pursuant to KRS § 278.170(1), a utility may not give "unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage , or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions." CMN claims that Windstream Kentucky East has previously given preferential treatment to the Commonwealth of Kentucky for the Kentucky Information Highway project (the “KIH Project”) because Windstream Kentucky East now refuses to grant CMN the exact terms given to the

Commonwealth in the KIH project that Windstream Kentucky East has impermissibly prejudiced and disadvantaged CMN.

CMN's main contention regarding the KIH Project is that KIH was allowed to submit applications to attach to up to 1,500 poles per rolling 30 day period while CMN has only been offered the opportunity to submit applications to attach to up to 300 poles per rolling 30 day period. CMN claims that this is an example of Windstream Kentucky East disadvantaging CMN. However, by comparing the CMN-LFUCG Project to the KIH Project, CMN is unfairly trying to equate two separate and wholly disparate business situations. The KIH Project is so materially different from the CMN Project that the two cannot be compared.

The KIH Project had a different geographic scope than the CMN Project. The CMN Project is limited to attachment to poles located in and around the Lexington area. Windstream Kentucky East has explained that engineering resources are assigned to a specific geographic area and cannot be relocated or borrowed. *See generally* Windstream Kentucky East's Response to PSC's Second Set of Requests for Information Request No. 17. Windstream Communications has more resources in throughout the state than Windstream Kentucky East does in just Lexington. There is more than one Windstream Communications affiliate in the state even. On the KIH Project, this allowed Windstream Communications to spread out the engineering responsibilities for the KIH Project. Rebuttal Testimony of James Lloyd 2:20-3:6. This will not be possible on the CMN Project because it is only in Lexington.

Also, the KIH Project was for a government entity, not a private cable provider. There was a lot of pressure for Windstream Kentucky East and other Windstream affiliates to make the project move faster for that reason. Rebuttal Testimony of James Lloyd 3:7-9.

Also, as previously described here and in other filings in this litigation, CMN has a sorted history with Windstream affiliates. For example, it has a history of paying Windstream affiliates late or not at all. CMN has previously relied on 807 KAR 5:006 Section 11(6) for the proposition that a “good faith” dispute regarding a billing matter is not an appropriate reason to deny service. *See* Complaint at ¶ 24. While Windstream Kentucky East disputes that it has actually denied service to CMN, 807 KAR Section 11(6) is inapplicable here as it states that it applies only to “Bill Adjustment for *Gas, Electric, or Water* Utilities,” and it is undisputed that Windstream Kentucky East has not provided any of these sort of services to CMN (nor has Windstream KDL or, to the best of Windstream Kentucky East’s knowledge, Duke). In addition, as discussed at length in Windstream Kentucky East’s Responses to Requests for Information filed in this case, CMN has a history of damaging Windstream Kentucky East’s facilities.

Together all of these things made the KIH Project substantially different from the CMN-LFUCG Project, rendering the different terms Windstream Kentucky East has offered to CMN a matter of reasonable differentiation between disparate circumstances, not discrimination.

**D) Windstream Kentucky East has not violated KRS §§ 278.2201-2213 and 278.514.**

As an initial matter, when asked to explain how Windstream Kentucky East has violated KRS 278.2201-2213 and 278.514 in the PSC’s Second Requests for Information Response to Request 1, CMN admitted it doesn’t actually have sufficient information to claim that Windstream Kentucky East violated provisions of these statutes concerning “sharing of information, databases, and other resources between a regulated utility and affiliates or employees involved in the marketing or provision of unregulated activities.” Instead, CMN states weakly that Windstream Kentucky East “has given no indication” that it does these things. As CMN never asked Windstream Kentucky East this question directly or specifically referenced this issue prior to this

response, Windstream Kentucky East had indeed not addressed this issue. Its representative James Lloyd has addressed this issue in his rebuttal testimony and has verified that Windstream Kentucky East does not engage in these illegal activities. Rebuttal Testimony of James Lloyd 4:7-10.

CMN has also claimed that Windstream Kentucky East has violated KRS 278.2201 and 278.2213(11) by giving more favorable terms for attachment to other Windstream affiliates than it is willing to give CMN. Unfortunately, CMN made this assertion without even asking what terms Windstream Kentucky East would give to an affiliate wishing to attach to its poles. If CMN had bothered to investigate this matter before making wholly baseless claims, it would have found that there are no Windstream affiliates attached to any Windstream Kentucky East pole. The only Windstream-affiliated company attached to poles owned by Windstream Kentucky East is Windstream Kentucky East. As such, there is no possibility for “subsidizing” or “advantaging” as CMN erroneously claims. There is no subsidizing of other Windstream affiliates.

CMN also claims that fees charged by Windstream Kentucky East must subsidize other Windstream affiliates. This is also an issue addressed by Mr. Lloyd’s rebuttal testimony. He explains that in the case of the \$75.00 application fee, \$4.03 of that fee goes to the Permitting Team to process the application, \$4.03 goes to the Invoicing Team to process and send the make ready invoice, and the remainder of the fee is for engineering labor spent in reviewing the application, pole data sheet, and maps. Rebuttal Testimony of James Lloyd at 4:11-19.

### WITNESS LIST

Windstream Kentucky East, hereby gives notice, that it may call any or all of the following witnesses at the hearing of this matter:

1. **James Lloyd**, Litigation Counsel for Windstream, will testify consistently with his Direct Testimony, filed on September 5, 2018 and his Rebuttal Testimony filed on October 1, 2018.
2. **Dan King**, Senior Counsel, Commercial Contracts Team, Windstream, will testify consistently with his Direct Testimony, filed on September 5, 2018.
3. **Ashley Sanders**, Manager of OSP Engineering-KY, Windstream, will testify consistently with her Direct Testimony, filed on September 5, 2018 and her Rebuttal Testimony filed on October 1, 2018.
4. **Joyce Latham**, Senior Director of Network Operations for Windstream, will testify consistently with her Direct Testimony, filed on September 5, 2018.
5. Any and all witnesses needed for rebuttal.
6. Windstream Kentucky East reserves the right to amend this list based on evidence presented by CMN in its case in chief.

### EXHIBIT LIST

Windstream Kentucky East, hereby gives notice, that it may use as an exhibit any or all of the following documents at the hearing of this matter:

1. Documents produced by Windstream East Kentucky previously identified as WIN0001 - WIN8853.
2. Documents produced by CMN previously identified as CMN00001 - 00610.

3. Any and all documents other filed in response to Requests for Information in this matter.
4. Any and all testimony filed in in this matter.
5. Any and all pleadings filed in this matter.
6. Any and all documents needed for rebuttal.
7. Windstream Kentucky East reserves the right to amend this list based on evidence presented by CMN in its case in chief.

### **QUESTIONS OF FACT**

1. What is an adequate number of applications for attachment to poles to be accepted by Windstream Kentucky East, LLC from CMN-RUS, Inc. in a given period and what is a reasonable timeframe for those applications to be processed?

### **QUESTIONS OF LAW**

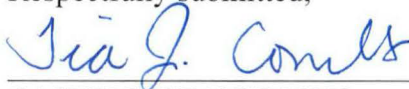
1. Has Windstream Kentucky East, LLC violated its tariff filed on July 7, 2016, with an effective date of July 17, 2016, by accepting from CMN-RUS, Inc. applications for only 300 pole attachment applications per rolling 30 day period?
2. Is Windstream Kentucky East, LLC required to describe its timelines for application, survey, and make ready processing in its tariff?
3. Are Windstream Kentucky East, LLC's stated reasons for not offering CMN-RUS, Inc. the same terms it offered the Commonwealth of Kentucky in the Kentucky Information Highway agreement nondiscriminatory under KRS 278.160?

### **CONCLUSION**

In the Complaint, CMN made three allegations: 1) Windstream Kentucky East imposed material conditions not in its tariff, 2) Windstream Kentucky East's pole processing procedures are

unreasonably slow, and 3) Windstream Kentucky East refuses to give CMN pole attachment terms it gives to others. However, review of the facts and circumstances of this matter show these allegations to be groundless and false. Windstream Kentucky East's tariff contains all required and reasonable information; the company cannot be faulted for failing to include every possible circumstance. The pole processing procedures used by Windstream Kentucky East are reasonable in light of the fact that there are no previously established standards in Kentucky for pole processing timelines. Finally, Windstream Kentucky East cannot be expected to give CMN the same deal it gave the Commonwealth of Kentucky in the KIH Project as it had circumstances wholly different from the CMN-LFUCG Project. As such, Windstream Kentucky East is entitled to a ruling in its favor on all allegations asserted in the Complaint.

Respectfully submitted,



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CASEY C. STANSBURY

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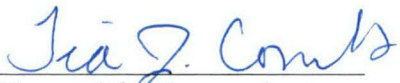
*Counsel for Respondent,*

*Windstream Kentucky East, Inc.*

**CERTIFICATE OF SERVICE**

This is to certify that a true and accurate copy of the foregoing was served via email on  
October 24, 2018 upon the following:

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WINDS-18K034/WIN Prehearing Brief