

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BRANDENBURG TELEPHONE COMPANY;	)	
DUO COUNTY TELEPHONE COOPERATIVE	)	CASE NO.
CORPORATION, INC.; HIGHLAND	)	2007-00004
TELEPHONE COOPERATIVE, INC.; MOUNTAIN	)	
RURAL TELEPHONE COOPERATIVE	)	
CORPORATION, INC.; NORTH CENTRAL	)	
TELEPHONE COOPERATIVE CORPORATION;	)	
SOUTH CENTRAL RURAL TELEPHONE	)	
COOPERATIVE CORPORATION, INC.; AND	)	
WEST KENTUCKY RURAL TELEPHONE	)	
COOPERATIVE CORPORATION, INC.	)	
	)	
COMPLAINANTS	)	
	)	
V.	)	
	)	
WINDSTREAM KENTUCKY EAST, INC.; and	)	
WINDSTREAM KENTUCKY WEST, INC.	)	
	)	
DEFENDANTS	)	

O R D E R

On January 2, 2007, Brandenburg Telephone Company, Duo County Telephone Cooperative Corporation, Inc., Highland Telephone Cooperative, Inc., Mountain Rural Telephone Cooperative Corporation, Inc., North Central Telephone Cooperative Corporation, South Central Rural Telephone Cooperative Corporation, Inc., and West Kentucky Rural Telephone Cooperative Corporation, Inc., collectively rural incumbent local exchange carriers ("RLECs"), filed a formal complaint against Windstream Kentucky East, Inc. ("Windstream East") and Windstream Kentucky West, Inc. ("Windstream West").

The RLECs allege that on December 1, 2006, Windstream East filed revisions to its general customer services tariff which consist of unfair, unjust, and unreasonable local transit traffic service rates.<sup>1</sup> The RLECs also allege that, on the same day, Windstream West filed similar revisions to its general customer services tariff.<sup>2</sup>

The Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention; Sprint Communications Company, L.P., Sprint Spectrum L.P. and SprintCom, Inc. d/b/a Sprint PCS, Nextel West Corp., Inc., and NPCR, Inc. d/b/a Nextel Partners (collectively "Sprint/Nextel"); NuVox Communications, Inc.; Xspedius Management Switched Services LLC d/b/a Xspedius Communications; and T-Mobile USA, Inc., Powertel/Memphis, Inc., and T-Mobile Central LLC have intervened in this proceeding.

In response to the complaint, Windstream West contends it did not file the transit traffic tariff revision, as alleged by the RLECs. For this reason, Windstream West requests dismissal from the proceedings. Windstream East states, however, that it did file the tariff revision and that those rates<sup>3</sup> are applicable to providers who have not specifically negotiated price arrangements with the company, including the RLECs

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<sup>1</sup> Complaint at ¶ 3. The RLECs' complaint is filed pursuant to KRS 278.030, KRS 278.040, KRS 278.190, KRS 278.260, KRS 278.270, KRS 278.280, 807 KAR, Section 5:001, 807 KAR, Section 5:011, and 47 U.S.C. § 151 et al.

<sup>2</sup> Complaint at ¶ 11.

<sup>3</sup> Windstream East states that a \$.0045 end office transit charge will apply to providers incorrectly utilizing Windstream East's end offices as tandems, as stated in the December 16, 2006 tariff. It also states that a \$.0030 tandem transit charge will apply to non-negotiating parties, such as the RLECs, to transit local traffic that they deliver to Windstream East's tandems, as stated in the December 16, 2006 tariff. See *also* Motion for Dismissal and Temporary Suspension and Answer, filed January 26, 2007, at 4-5. A copy of the new tariff which denotes the new rates for transit traffic service was included as an exhibit with the RLECs' complaint.

named in the complaint. Windstream East requests that the Commission temporarily suspend the tariffed rates to give it and the RLECs an opportunity to negotiate agreements regarding local transit traffic service.

In response to the motion for temporary suspension, the RLECs contend that Windstream East's tariff filing contained a number of deficiencies and, as a result, it is a legal nullity and not capable of being suspended. As to the allegation that no such tariff filing was submitted on behalf of Windstream West, the RLECs argue that the company fails to provide proof on the issue and it is therefore inappropriate to dismiss it from the proceedings.

#### DISCUSSION

Having reviewed the tariff filing records for Windstream West, the Commission finds that there are no official records documenting the filing of a tariff submitting local transit service rates for the company on or after December 1, 2006. The Commission is satisfied that, given its official records do not reflect such a filing, no such filing was actually submitted by the company. Accordingly, Windstream West's motion to be dismissed from the proceeding is granted.

As to Windstream East's motion for a temporary suspension of its tariff, the Commission shall deny the request. The Commission has previously ordered that *all tariffs* submitted by incumbent local exchange carriers and competitive local exchange carriers shall be filed on 15 days' notice to the Commission and may, if the Commission orders, be suspended or rejected any time within the 15-day window.<sup>4</sup> The RLECs are

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<sup>4</sup> Case No. 2002-00276, Petition of BellSouth Telecommunications, Inc. for Presumptive Validity of Tariff Filings ("Order on the Validity of Tariff Filings"), Order dated April 28, 2005.

incorrect in their claim that the Commission specifically excluded carrier-to-carrier services from the 15-day tariff notice requirement. As stated in the Order on the Validity of Tariff Filings, KRS 278.512 permits the Commission to adopt alternative requirements for establishing rates and charges for any service by a method other than that which is specified in the chapter. Windstream East's tariff was submitted on December 1, 2006 and went into effect on December 16, 2006. The RLECs' complaint was submitted to the Commission on January 3, 2007, after the effective date of the tariff. The Commission's power to suspend the effective date of new rates can only be used prior to the effective date of a tariff. However, pursuant to KRS 278.260, the Commission has original jurisdiction over complaints as to the rates of any utility. Once an individual or a corporation files a complaint against a utility alleging that a rate in which the complainant is directly interested is unreasonable or unjustly discriminatory, the Commission shall proceed to make such investigation as it deems necessary.

Having reviewed the substance of the RLECs' complaint and Windstream East's response thereto, the Commission finds that an investigation into the reasonableness of Windstream East's tariffed rates for tandem transit traffic service and end office transit traffic service is necessary. This proceeding will determine whether such rates, if deemed reasonable, can be placed into a tariff or, as argued by the RLECs, if such arrangements should be individually negotiated between carriers, placed into written agreements, and then filed for review and approval by the Commission.<sup>5</sup> In

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<sup>5</sup> See Complaint at 7.

administrative proceedings, the complaining party bears the burden of proof.<sup>6</sup> As the RLECs contend that tariffed rates are unjust and unreasonable, they are required to provide substantial evidence and argument to support these claims.

Under KRS 278.260(1), the Commission may not enter an order affecting the rates that are the subject of a complaint without holding a formal public hearing. A hearing will allow the presentation of evidence by the parties concerning the reasonableness of the rates before finding whether a change or adjustment to Windstream East's tariff should be ordered.<sup>7</sup> The Commission also notes that if Windstream East wishes to pursue negotiations with the RLECs to establish agreements regarding transit service costs, the company can voluntarily withdraw the tariff before the Commission renders a decision on the merits of the RLECs' complaint.

As to the RLECs' claims that Windstream East's tariff filing was a "conglomeration of fatal errors" and "legal nullity," the Commission finds that the company substantially complied with filing requirements and, therefore, such arguments will not be considered.<sup>8</sup> However, the exception to this finding is the RLECs' argument that Windstream East was obligated to submit a cost-support study. The Commission finds that the RLECs have presented a legitimate argument as to the need for such information. For this reason, the Commission shall require Windstream East to file a

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<sup>6</sup> See Energy Regulatory Comm'n v. Kentucky Power Co., 605 S.W.2d 96, 50 (Ky. App. 1980) ("Applicants before an administrative agency have the burden of proof.")

<sup>7</sup> See KRS 278.190(4).

<sup>8</sup> Response To: (i) Motion for Dismissal; and (ii) Motion for Temporary Suspension. Filed February 9, 2007.

cost-support study,<sup>9</sup> which shall include outlining the justification for the traffic rates and detailing costs specifically incurred in the provision of the services, as well as any other costs and factors contributing to those rates, as published in the tariff.

IT IS HEREBY ORDERED that:

1. Windstream West's motion for dismissal is granted.
2. Windstream East's motion for a temporary suspension of its tandem transit rate and the end office transit rate, as provided in the December 16, 2006 tariff filing, is denied.
3. Within 20 days of the date of this Order, Windstream East shall provide a cost-support study for the new local transit traffic rates, as provided in this Order.
4. Within 20 days of the date of this Order, Windstream East shall provide a status report to the Commission. The status report shall contain the following information: (a) details on the alleged outstanding payments owed by each RLEC for tandem transit rates and end office transit rates, for costs accumulated since December 16, 2006; and (b) details on any negotiated agreements reached or pending between the parties regarding local transit traffic service.
5. Within 10 days after Windstream East submits the status report, the RLECs shall provide a response to Windstream East's allegations as to the outstanding payments owed, as referenced above.

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<sup>9</sup> In ¶¶ 11 and 22 of its Motions for Dismissal and Temporary Suspension and Answer, Windstream East states that its cost support evidences that its approved transit rates are just and reasonable. Based on these statements, the Commission presumes such information is readily available and can be submitted by Windstream East to the complainants and to the Commission for review.

6. The date for an informal conference and the date for a formal hearing in this matter shall be set by the Commission after the parties have submitted the information requested in this Order.

Done at Frankfort, Kentucky, this 13<sup>th</sup> day of November, 2007.

By the Commission

Commissioner Clark Abstains

ATTEST:

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

Executive Director