

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

COMMUNICATION WORKERS OF AMERICA	)	
AND INTERNATIONAL BROTHERHOOD OF	)	CASE NO.
ELECTRICAL WORKERS' REQUEST TO	)	2007-00069
ENFORCE COMMISSION ORDER REGARDING	)	
WINDSTREAM COMMUNICATIONS, INC.'S	)	
COMPLIANCE WITH SPIN-OFF CONDITIONS	)	

O R D E R

This matter is now before the Commission to address the February 12, 2007 petition filed by the Communication Workers of America (“CWA”) and the International Brotherhood of Electrical Workers (“IBEW”) (collectively “Petitioners”) requesting that the Commission enforce a portion of its May 23, 2006 Order (“May 23 Order”).<sup>1</sup>

BACKGROUND

CWA and IBEW alleged that Windstream Communications, Inc. (“Windstream”) violated that May 23 Order by seeking to reduce a portion of its Kentucky work force. The May 23 Order approved the spin-off and merger of Alltel Corporation and Valor

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<sup>1</sup> This Order was issued in Case No. 2005-00534. That matter concerned the application for approval of the transfer of control of Alltel Kentucky, Inc. and Kentucky Alltel, Inc. The Commission approved the application in the May 23, 2006 Order.

Communication Group's wireline businesses to Windstream.<sup>2</sup> The Commission outlined several requirements and conditions to be met by Windstream and its predecessors in relation to the Commission's approval. CWA and IBEW argue that, within the Order, the Commission found that the applicants specifically agreed that no reduction in employee headcount in Kentucky would occur as a result of the spin-off and merger, if approved by the Commission. CWA and IBEW contend that Windstream violated this portion of the Commission's Order when it planned to end the employment of 46 employees on March 2, 2007.<sup>3</sup> CWA and IBEW have requested that the Commission initiate an action in Franklin Circuit Court to enforce its Order.

The Attorney General, through his Office of Rate Intervention, filed a motion in support of the CWA's and IBEW's petition for enforcement of the May 23 Order. The Attorney General was an intervening party in the original case concerning the spin-off and merger. In his motion, the Attorney General requested that the Commission exercise its authority under KRS 278.390 and compel Windstream to comply with the conditions in Case No. 2005-00534. Alternatively, the Attorney General requested that

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<sup>2</sup> Windstream Kentucky East, Inc. was formerly known as Kentucky Alltel, Inc. Windstream Kentucky West was formerly known as Alltel Kentucky, Inc. Windstream Communications, Inc. was formerly known as Alltel Holding Corporate Services, Inc. Collectively, the new corporations are now known as Windstream Communications. The Commission notes that in sending out its initial Order for this case on February 15, 2007, the Commission mistakenly referred to Windstream as Windstream Corporation in the title of this matter. The Commission finds that none of the companies concerned in Case No. 2005-00534 are named "Windstream Corporation." The companies may also be referred to as "the Applicants" within the body of this Order.

<sup>3</sup> The March 2, 2007 lay-offs in Windstream's Kentucky market occurred as scheduled. The lay-offs included employees who were forced to take retirement with reduced or no benefits, as well as employees who lost their employment and were ineligible for retirement status. Kentucky was one of 16 states wherein Windstream planned to make changes to its work force levels. See Commission Order, March 1, 2007 at 3, footnote 5 in this matter.

the Commission revoke or otherwise render void the Commission's approval of the transfer of control of Alltel's wireline business to Windstream.

On February 15, 2007, the Commission ordered Windstream to submit a response to the petition within 20 days. The Commission also ordered that the record in the spin-off and merger proceeding be incorporated into this matter.

On February 23, 2007, CWA and IBEW filed a Motion for Emergency Relief, requesting that the Commission take all necessary and immediate steps to keep Windstream from going forward with the March 2, 2007 lay-offs. The movants asked the Commission to seek an injunction against Windstream to prevent the March 2 lay-offs and to maintain the status quo while the movants' original petition, as filed on February 12, 2007, was pending before the Commission. The movants argued that, based on the Commission's February 15, 2007 Order through which Windstream was given 20 days to respond to the February 12, 2007 petition, the date of the lay-offs would occur before the response was due. The movants argued that irreparable harm would occur once the Windstream employees were permanently separated from the company. Windstream filed a response to this motion and the movants filed a reply. On March 1, 2007, the Commission issued an Order denying the movants' request for emergency relief.

On March 8, 2007, in conjunction with its response to the February 12, 2007 petition, Windstream moved for dismissal of the complaint, arguing that CWA and IBEW failed to establish a prima facie case in filing an original action, as required under 807 KAR 5:001, Section 12. Windstream contends that the Petitioners' request "is

based on an asserted condition which is not found in the Commission's Order."<sup>4</sup> Specifically, Windstream states that it was not required to abstain from changes to the Kentucky work force. Windstream contends that the Petitioners have not substantiated their assertions and have tried to "shift the burden of proof in this matter to Windstream to prove the nonexistence of [the] [p]etitioners' inferences."<sup>5</sup>

#### DISCUSSION

In consideration of the pleadings and the record, the Commission finds that the Petitioners have raised a significant question on the interpretation of the Commission's statements on the work force level as presented in the May 23 Order. Therefore, the Commission shall deny Windstream's motion for dismissal.

The Commission has carefully reviewed the May 23, 2006 Order in Case No. 2005-00534. There is no specific mandate that the transfer of Alltel Kentucky, Inc. and Kentucky Alltel, Inc. be subject to the condition that Windstream not terminate or lay-off any portion of its work force after the spin-off and merger were approved. As noted within the body of the May 23 Order, during the course of the April 25, 2006 formal hearing, under cross-examination, the spin-off and merger applicants agreed that there would not be a reduction in the labor force of the incumbent local exchange carriers in

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<sup>4</sup> Motion to Dismiss and Response to Petition at 3, ¶ 6.

<sup>5</sup> Id. at 3, ¶ 6.

Kentucky.<sup>6</sup> The Commission notes that later in the proceeding, when asked if the applicants were making changes in the employment levels of operating companies in Kentucky as a result of the spin-off and merger, Mr. Gardner, as a witness for the applicants, replied:

[The Applicants] don't have any specific plans in Kentucky. I mean, over a long period of time, in the landline business, we've tried to get more efficient, and, when we do that and it affects people, we try to do that first through attrition, because that's what makes the most sense, but, as today, there are no current plans on doing anything with the work levels in Kentucky.<sup>7</sup>

When asked if the work level plans included either an increase or decrease, Mr. Gardner stated:

Right. We have no plans as a part of this transaction or any other immediate plans to change the workforce levels here in Kentucky.<sup>8</sup>

Additionally, during his testimony on behalf of the applicants, Mr. Gardner noted:

I think what we can commit to, as a part of this transaction, is that we will not change the employment levels as part of this deal. No company in this country can make a commitment that we will not – that employment levels will be unaffected over a five-year period of time. I can't make that commitment because I don't – I'll do my best — we'll do our best to manage this business in a way that precludes that, but we can't give assurances there. I don't think any public company could, and, you know, I think the market forces us to compete and pay our people properly.<sup>9</sup>

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<sup>6</sup> April 25, 2006 Hearing for Case No. 2005-00534. Transcript of Evidence (“T.E.”) at 116. The witness representing the applicants during this portion of the hearing was Jeffrey Gardner, President and CEO of Windstream Communications, which was formed in 2006. Mr. Gardner formerly served as the Executive Vice-President and Chief Financial Officer for Alltel. See Windstream Communications, <http://www.windstream.com/about/overview.aspx> (accessed April 3, 2007).

<sup>7</sup> T.E. at 155, lines 22-25 and T.E. at 156, lines 1-3.

<sup>8</sup> T.E. at 156, lines 5-7.

<sup>9</sup> T.E. at 163, lines 11-22.

The Commission finds, as evidenced by the transcript, that the issue of the maintenance of employment levels was discussed in several instances throughout the April 25, 2006 hearing and the applicants' statements on this issue were noted within the body of the related Order. In consideration of the overall intent and purpose of the May 23 Order, at best, the Commission's statements were basic references to the record. But, ultimately, the Commission did not condition final approval on such a requirement.<sup>10</sup>

However, the Commission will note that there may be a question of whether Windstream and its predecessors have acted in good faith in leveraging the CWA, IBEW, and the Attorney General's agreement to the applicants' request for spin-off and merger for approval by the Commission. The Commission also notes that there may be a question as to whether Windstream has harmed a portion of the goodwill it maintained with a portion of its Kentucky customer base by choosing to institute the March 2, 2007 lay-offs. But this will be an issue for the customers to decide in time. Nevertheless, as stated in the March 1, 2007 Order regarding the Petitioners' motion for emergency relief, the Commission cannot hold Windstream accountable for acts it did not explicitly prohibit originally.

The Commission shall deny CWA's and IBEW's petition for enforcement of the Commission's May 23 Order. The Commission finds that Windstream committed no violation of that Order. Therefore, the Commission shall decline the request by CWA

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<sup>10</sup> The ordering paragraphs of the Commission are located on pages 6-7 of the May 23, 2006 Order for Case No. 2005-00534. The ordering paragraphs define the explicit terms for the Commission's approval of merger and spin-off.

and IBEW to initiate an action in Franklin Circuit Court to enforce any portion of the May 23 Order.

IT IS HEREBY ORDERED that:

1. Windstream's motion to dismiss the petition is denied.
2. The February 12, 2007 Petition for Enforcement of the May 23, 2006 Order in Case No. 2005-00534 is denied.
3. With all issues having been resolved, this matter is closed and shall be removed from the Commission's docket.
4. This Order is final and appealable.

Done at Frankfort, Kentucky, this 3<sup>rd</sup> day of May, 2007.

By the Commission

ATTEST:



Executive Director