

**BEFORE THE COMMONWEALTH OF KENTUCKY**

**PUBLIC SERVICE COMMISSION**

In the Matter of:

AN INVESTIGATION INTO THE INTRASTATE	)	ADMINISTRATIVE
SWITCHED ACCESS RATES OF ALL	)	CASE NO.
KENTUCKY INCUMBENT AND COMPETITIVE	)	2010-00398
LOCAL EXCHANGE CARRIERS	)	

**COMMENTS OF WINDSTREAM KENTUCKY EAST, LLC, WINDSTREAM KENTUCKY WEST, LLC, AND US LEC OF TENNESSEE L.L.C. D/B/A PAETEC BUSINESS SERVICES**

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Windstream Kentucky East, LLC (“Windstream East”), Windstream Kentucky West, LLC (“Windstream West”), and US LEC of Tennessee L.L.C. d/b/a PAETEC Business Services (“PAETEC”) (collectively, “Windstream”) respectfully submit these Comments in response to the Kentucky Public Service Commission (“Commission”) Order entered on March 22, 2012 (“Commission Order”). As discussed below, pursuant to KRS 278.541-278.543, this Commission continues to have no jurisdiction to re-assess the justness and reasonableness of Windstream East and Windstream West’s intrastate switched access charges, originating or terminating, or to prescribe reductions in such charges. Further, in light of the FCC USF/ICC Transformation Order,<sup>1</sup> the Commission should close this docket with respect to all incumbent local exchange carriers (“ILECs”) and competitive local exchange carriers (“CLECs”).

**THE COMMISSION’S LACK OF JURISDICTION OVER WINDSTREAM EAST AND WINDSTREAM WEST’S INTRASTATE SWITCHED ACCESS RATES**

Windstream East and Windstream West (together, the “Windstream ILECs”) explained multiple times in this docket (particularly when considering the record of Docket No. 2007-

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<sup>1</sup> *Connect America Fund*, FCC USF/ICC Transformation Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, FCC 11-161, (Nov. 18, 2011) (“*FCC USF/ICC Transformation Order*”).

00503, which has been incorporated into this docket), how the alternative regulation provisions of KRS 278.541-278.543, when combined with the Windstream ILECs' election of such alternative regulation, remove the Commission's jurisdiction to re-assess the justness and reasonableness of the Windstream ILECs' intrastate switched access charges, originating or terminating as such rates are deemed just and reasonable as a matter of law, or to prescribe reductions in such charges.<sup>2</sup> Windstream is attaching to these comments relevant judicial pleadings on this point.<sup>3</sup> The Windstream ILECs should be immediately dismissed from this proceeding along with other applicable alternatively regulated carriers.

Out of an abundance of caution, Windstream notes that the Windstream ILECs' implementation of the Federal Communications Commission's ("FCC's") mandated reductions in terminating intrastate switched access rates in no way affects the applicability of KRS 278.541-278.543 to the Windstream ILECs, as the pertinent provision, KRS 278.543(4) provides that "intrastate switched-access service shall not exceed its rates for this service that were in effect on the day prior to the date the utility filed its notice of election."<sup>4</sup>

#### **THE FUTURE OF THIS PROCEEDING GIVEN JURISDICTIONAL CONCERNS ASIDE FROM ALTERNATIVE REGULATION CONCERNS**

Notwithstanding the fact that the Commission lacks jurisdiction over the Windstream ILECs' intrastate switched access rates, this Commission's jurisdiction over terminating intrastate switched access rates is otherwise limited by the *FCC ICC/USF Transformation Order*.

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<sup>2</sup> See, e.g., Motion to Dismiss, Answer, and Response to Motion for Full Intervention, Case No. 2007-00503 (filed Jan. 17, 2008); Reply to Verizon's Opposition to Windstream's Motion to Dismiss, Case No. 2007-00503 (Mar. 20, 2008).

<sup>3</sup> See Attachment A, Brief of Appellants Windstream Kentucky West, LLC and Windstream Kentucky East, LLC and Appellants' Reply Brief filed in Windstream Kentucky West, LLC, et al. v. Kentucky Public Service Commission, et al., Kentucky Court of Appeals, Case No. 2009-CA-00552.

<sup>4</sup> KRS 278.543(4) (emphasis added).

More importantly, however, given the adoption of such order and the fact that the first of two steps in reducing terminating intrastate switched access rates to interstate levels is due to take place in less than ten weeks, Windstream respectfully suggests that the Commission terminate its investigation into intrastate carrier access reform so that all stakeholders can focus their resources on the significant efforts required to implement the current reforms.

The Commission initiated this administrative case for the purpose of investigating intrastate carrier access reform. Because the *FCC USF/ICC Transformation Order* accomplishes much of the intrastate switched access reform that has been the subject of the Commission's investigation, the limited resources of the Commission, its Staff and the carriers should be focused on the work required to begin the transition to the bill-and-keep compensation regime established in the *FCC ICC/USF Transformation Order*.

The FCC's initial reforms focus on reducing terminating switched access rates because that is the "principle source of arbitrage problems today."<sup>5</sup> The FCC also capped originating switched access rates for federal price cap regulated LECs and is seeking comment on whether those rates should be eliminated.

Windstream affiliates operate as local exchange carriers throughout the United States.<sup>6</sup> The FCC recognized the inherent problems of state-by-state investigations for national carriers such as Windstream:

The lack of certainty and predictability for the industry without a uniform framework is a significant concern. Carriers and investors need predictability to make investments and deployment decisions and lack of certainty regarding intrastate access rates or recovery hampers these efforts. In addition some parties warned that it would be "extremely costly" to participate in "the multitude" of state commission proceedings that would follow from an approach

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<sup>5</sup> *FCC USF/ICC Transformation Order* at ¶ 35.

<sup>6</sup> These statistics include Kentucky.

relying on dozens of different state transitions and recovery frameworks.<sup>7</sup>

Therefore, obligating carriers to engage in state access proceedings at this point would be, at best, extremely duplicative with the reforms outlined in the *FCC ICC/USF Transformation Order* (which is focused on terminating access reform) and with the FCC's Notice of Proposed Rulemaking (which is focused on originating access reform) diverting limited resources from productive customer-focused activities, and leading to potential state-by-state variability and unpredictable outcomes that would be extremely difficult and costly to manage. Even more concerning would be any decisions reached through a state access proceeding that create conflict with the current reform or that result in additional burdens to end-users.

#### **EFFECT OF THE FCC ICC/USF TRANSFORMATION ORDER ON THE NTSRR**

The Commission has also sought comment on how the FCC ICC/USF Transformation Order affects the Non-Traffic Sensitive Revenue Requirement ("NTSRR").<sup>8</sup> Insofar as it pertains to terminating traffic, the NTSRR is subject to the FCC's newly-adopted Transitional Access Service Pricing rules (51 C.F.R. Subpart J), including related calculation of Eligible Support, as discussed below.

The Commission has described the NTSRR as "the sum of interLATA and intraLATA carrier common line revenue, [Universal Local Access Service] revenue, and the revenue impact of changing interLATA access services rates and intraLATA toll settlement rates to mirror current interstate access services rates."<sup>9</sup> The vast majority, if not all, of the pertinent revenue is

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<sup>7</sup> *FCC USF/ICC Transformation Order* at ¶794.

<sup>8</sup> *Order* at 4.

<sup>9</sup> *An Inquiry Into IntraLATA Toll Competition, An Appropriate Compensation Scheme for Completion of IntraLATA Calls by Interexchange Carriers, and WATS Jurisdictionality*, Administrative Case No. 323, Phase I, *Order*, at 23 (1991).

common line revenue that would be the equivalent of “End Office Access Services” as defined by the new FCC rules.<sup>10</sup>

Given the administrative difficulty of determining what small portion of the NTSRR does not represent common line service, Windstream recommends treating the NTSRR entirely as the intrastate equivalent of the former federal carrier common line (“CCL”) charge. Because there is no federal CCL, the NTSRR (which only applies to terminating traffic) would be reduced by 50% effective July 1, 2012 and to zero effective July 1, 2013, both for price cap and rate-of-return carriers.<sup>11</sup>

Because the NTSRR would be subject to the intrastate switched access charge reductions prescribed by the FCC, revenue associated with such reductions would be included in calculations of both price cap and rate-of-return carriers’ “eligible recovery.”<sup>12</sup> As such, lost NTSRR revenue would be part of the basis for determining permitted Access Recovery Charge (“ARC”)<sup>13</sup> and CAF ICC Support.<sup>14</sup>

### **THE WINDSTREAM ILECS’ INTENTIONS REGARDING IMPLEMENTATION OF THE ARC**

The Windstream ILECs are still evaluating to what extent they will implement the ARC.<sup>15</sup>

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<sup>10</sup> 47 C.F.R. § 51.903(d).

<sup>11</sup> 47 C.F.R. §§ 51.907(b),(c), 51.909(b),(c).

<sup>12</sup> 47 C.F.R. §§ 51.915(c), 51.917(c).

<sup>13</sup> 47 C.F.R. §§ 51.915(e), 51.917(e).

<sup>14</sup> 47 C.F.R. §§ 51.915(f), 51.917(f).

<sup>15</sup> The Commission Order correctly states that a carrier may increase the ARC by \$0.50 annually. Windstream notes that these permissive \$0.50 annual increases are applicable to Residential and Single Line Business customers. The *FCC ICC/USF Transformation Order* also permits carriers to increase the ARC for Multi-line business customers by \$1.00 annually, so long as the Multi-Line business customer total ARC and federal Subscriber Line Charge do not exceed \$12.20. Also, the Commission Order correctly states the ARC cannot be assessed on customers paying

## CONCLUSION

For the foregoing reasons, Windstream respectfully suggests that the Commission terminate its investigation into intrastate carrier access reform at this time.

Respectfully submitted,

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