ATTACHMENT A

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2009-CA-1973

Appeal from the Franklin Circuit Court
Civil Action No. 2009-CI-00552

WINDSTREAM KENTUCKY WEST, LLC, ET AL. APPELLANTS

vs. **BRIEF FOR APPELLANTS WINDSTREAM KENTUCKY WEST, LLC AND WINDSTREAM KENTUCKY EAST, LLC**

KENTUCKY PUBLIC SERVICE COMMISSION, ET AL. APPELLEES

Submitted by,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was sent by first class mail, postage prepaid, on this the 17th day of September, 2010 to Mr. Jeff R. Derouen, Executive Director, Public Service Commission, 211 Sower Boulevard, P. O. Box 615, Frankfort, Kentucky 40602-0615, Tiffany Bowman and J.E.B. Pinney, Public Service Commission, 211 Sower Boulevard, P. O. Box 615, Frankfort, Kentucky 40602-0615, and Douglas F. Brent and C. Kent Hatfield, Stoll, Keenon Ogden, PLLC, 2000 PNC Plaza, 500 West Jefferson Street, Louisville, Kentucky 40202. Appellants' counsel did not withdraw the record from the Clerk's Office.

Robert C. Moore

INTRODUCTION

This case concerns the construction of KRS 278.541, et. seq , which took effect on July 12, 2006, and whether, as carriers electing under these provisions, Windstream Kentucky East, LLC and Windstream Kentucky West, LLC (together "Windstream") have been denied by the Kentucky Public Service Commission ("PSC") their statutory rights to operate pursuant to these statutes

STATEMENT CONCERNING ORAL ARGUMENT

The Appellants request oral argument to answer any questions the Court may have concerning this case, including as to the controlling statutes, which have not yet been interpreted by the Courts.

STATEMENT OF POINTS AND AUTHORITIES

APPELLANTS' STATEMENT OF THE CASE

This case involves the PSC's jurisdiction over Windstream's intrastate switched access rates, which are rates for services purchased by long distance companies (also known as interexchange carriers or "IXCs") from local exchange carriers, such as Windstream. IXCs purchase such switched access services to allow them to use the networks of local carriers like Windstream in order for their long distance end user customers to place and receive long distance phone calls.[1]

In 2006, the General Assembly significantly revised the law governing telecommunications service, which revisions took effect July 12, 2006. One of the new provisions, KRS 278.543, states "Any telephone utility, at its discretion and without commission approval, may elect to adopt the price regulation plan set forth below." On July 12, 2006, Windstream elected under KRS 278.543 to opt into the full bargain created by the General Assembly. This bargain entails operating under the price regulation plan in KRS 278.543 that "caps" an electing utility's rates for basic local exchange and intrastate switched access services. KRS 278.543(2)-(4). With regard to intrastate switched access services, KRS 278.541(3) specifically states:

> Electing utilities shall retain on file with the commission tariffs for basic local exchange services and intrastate switched-access services. Tariffs filed in accordance with subsection (2) of this section shall be deemed valid and binding upon the effective date stated in the tariff. (Emphasis added.)

KRS 278.543(4) provides that an electing carrier's rates for "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."

[1] The adjective "switched" refers to calls that utilize Windstream's switching network, and "intrastate" refers to calls that originate and ultimately terminate in the same state – in this case, Kentucky.

In establishing the caps on an electing utility's basic local exchange service and intrastate switched access service, the General Assembly at the same time enacted KRS 278.543(6) which provides, "An electing utility's rates, charges, earnings, and revenues shall be deemed just and reasonable under KRS 278.030 and administrative regulations promulgated thereunder upon election." (Emphasis added). Notably, the capped rates deemed just and reasonable by law are the applicable tariffed rates of the electing carrier. Put another way, these are rates previously scrutinized and approved by and on file with the PSC. Windstream elected to operate under the new statutory regime and cap applicable rates in return for being statutorily exempt from certain administrative processes. The Windstream companies accepted the bargain that was offered – the right to encounter fewer administrative costs and less agency scrutiny in return for competing pursuant to market scrutiny at their existing PSC-approved basic and intrastate switched access rates. The PSC's actions, however, in proceeding with the rate investigation denied Windstream its statutory rights.

On December 5, 2007, Appellee Verizon[2] (also "VZ" herein) filed with the PSC its Petition to Reduce Windstream's Switched Access Charges ("VZ Petition") requesting that the PSC reduce Windstream's intrastate switched access rates because the Windstream rates were higher than the intrastate switched access rates of one other Kentucky company (AT&T Kentucky). (VZ Petition p. 3; ROA 13). Verizon cited KRS 278.260 and the administrative regulations promulgated thereunder (807 KAR 5:001, Section 12) as the sole authority for its Petition. (VZ Petition p. 2; ROA 12).

[2] Specifically, MCI Communications Services, Inc., Bell Atlantic Communications, CIN., NYNEX Long Distance Company, TTI National, Inc., Teleconnect Long Distance Services & Systems Company, and Verizon Select Services, Inc. (together, "Verizon").

On January 17, 2008, Windstream filed its Motion to Dismiss, Answer, and Response to Motion for Full Intervention ("Windstream Motion to Dismiss") noting that its intrastate switched access rates were deemed just and reasonable by law, that VZ had failed to set forth a *prima facie* case on which relief could be granted, and that any legitimate access reform must be considered in a comprehensive proceeding and not one targeted only at Windstream (particularly as a carrier operating under KRS 278.543). (Windstream Motion to Dismiss p. 18; ROA 43).

The PSC's March 11, 2009 Order denied Windstream's Motion to Dismiss and set a procedural schedule. (ROA 60-69). The Order failed to address the PSC's lack of jurisdiction over Windstream as an electing carrier statutorily exempt from KRS §278.260 and other statutes establishing the PSC's ratemaking authority. It further failed to address that the mandated outcome of its proceeding is that Windstream's intrastate switched access rates are statutorily deemed just and reasonable. Further, while identifying the PSC's limited administrative resources, the Order set forth no sufficient basis to proceed with an access reform investigation targeted only at Windstream. The Order denied Windstream's right to due process and was unreasonable in finding the VZ Petition to be sustainable despite the lack of sufficient evidence therein to establish a *prima facie* case, which cannot be made by ignoring the provisions of KRS 278.541, et seq, and setting forth an inadequate comparison of Windstream's rates to only one other carrier [3]

[3] Windstream stated in its Motion to Dismiss that its intrastate switched access rates are in fact "lower than most ILECS in Kentucky" and no one has disputed this fact " (Windstream's Motion to Dismiss p 13; ROA 39)

Windstream filed its Petition on Appeal and/or Original Action for Declaratory Relief ("Windstream Petition") with the Trial Court on March 31, 2009, noting that the PSC lacks subject matter jurisdiction because, as an alternatively regulated carrier, Windstream's intrastate switched access rates are deemed just and reasonable under KRS 278.543(6) and that lack of subject matter jurisdiction is sufficient basis alone on which to grant the relief requested. (Windstream Petition p. 6; ROA 6). The Windstream Petition was filed not only pursuant to the provisions of KRS 278.410, but also:

> [O]n the basis that the Commission, by entering its March 11, 2009 Order failing to grant Windstream's Motion to Dismiss filed in Case No. 2007-00503 styled MCI Communications Services, Inc., *et al* v. Windstream Kentucky West, Inc., *et al*, is proceeding: 1) without or beyond its jurisdiction and statutory authority; 2) within its jurisdiction, but erroneously, unlawfully and unreasonably; 3) arbitrarily and capriciously in violation of the Kentucky Constitution and KRS Chapter 238; and 4) in violation of Windstream's due process rights granted by the United States Constitution and the Kentucky Constitution.

(Windstream Petition p. 8; ROA 8). Attached to the Windstream Petition were copies of the VZ Petition, Windstream's Motion to Dismiss, and the PSC's Order.[4]

On April 15, 2009, Windstream filed its Motion to Hold Administrative Proceeding in Abeyance. (ROA 70). On April 16, 2009, even though Windstream had attached to its Petition the documents necessary to this case, out of an abundance of caution, Windstream filed its Motion to File Designation of Record. (ROA 82). The PSC objected asserting incorrectly that KRS 278.420 required a designation of the record to be

[4] The Trial Court recognized Windstream's action is "in the nature of a declaratory judgment action" and not an appeal from a final Commission order (Order Granting Stay p. 3; ROA 266). The action is brought solely to determine whether the Commission acted unconstitutionally when it issued its order denying Windstream's Motion to Dismiss, and only issues of law are presented. Thus, KRS 278.420(2) does not apply. Although not statutorily required, Windstream did designate that part of the record useful to decide its action by attaching to its Complaint VZ's Petition, Windstream's Motion to Dismiss, and the Commission's Order denying Windstream's Motion to Dismiss. The Trial Court found that all documents necessary for its review were attached (Order Granting Stay p. 3; ROA 266)

filed earlier. On May 29, 2009, the Trial Court denied the PSC's Motion to Dismiss, finding this matter to be in the nature of a declaratory judgment action regarding whether the PSC has any authority, as an initial matter, to conduct an administrative hearing in this case. (Order Granting Stay pp. 1 and 3; ROA 264 & 266). The Trial Court also granted Windstream's motion for a stay as "all three prongs of the *Maupin* test are satisfied here and Windstream is entitled to injunctive relief pending a final ruling from this Court on the merits of its claim." (Order Granting Stay p. 2; ROA 265). The Court found that Windstream presented a substantial issue concerning whether an electing utility is statutorily exempt from the PSC's ratemaking authority. The Court directed the parties to brief all of the remaining substantive issues.

On October 9, 2009, the Court issued its final Opinion and Order, stating:

> The sole issue to be decided is whether the Kentucky Public Service Commission (PSC) has jurisdiction to review the rates charged by Windstream to other telecommunications carriers for intrastate switched access service for reasonableness or whether those rates are deemed to be just and reasonable by operation of law pursuant to KRS 278.543(6). For reasons set forth more fully below, this Court finds that KRS 278.543, which allows providers to "opt out" of the PSC's rate-making authority by agreeing to cap their charges at a previously approved rate for five (5) years, applies only to rates for basic local exchange service and does not apply to the rates charged by local exchange carriers (LECs) to interexchange carriers (IXCs) for intrastate switched access service.

(Opinion and Order, p. 1; Appendix 1; ROA 577). In entering its Opinion and Order, however, the Court failed to give effect to all of the provisions of KRS 278.543(3), (4) and (6). The Court's ruling was in error and should be reversed.

ARGUMENT

I. STANDARD OF REVIEW.

At issue is the proper interpretation of KRS 278.541, et seq, and the Kentucky Supreme Court has held as follows with respect to the standard of review:

> [A]ny "interpretation of a statute is a matter of law." *Commonwealth v. Gaitherwright,* 70 S.W.3d 411, 413 (Ky. 2002). Thus, the construction and application of statutes are interpreted "de novo without deference to the interpretations adopted by lower courts." *Wheeler & Clevenger Oil Co. v. Washburn,* 127 S.W.3d 609, 612 (Ky.2004)

Southside Real Estate Developers, Inc v. Pike County Fiscal Court, 294 S.W.3d 453, 456 (Ky.App., 2009). Accordingly, this Court should interpret the statutes without deference to the interpretation adopted by the Trial Court.

II. WINDSTREAM'S TARIFFED INTRASTATE SWITCHED ACCESS RATES ARE DEEMED JUST AND REASONABLE BY LAW.

A. KRS 278.543 DEEMS THE RATES JUST AND REASONABLE.

The issue of whether the PSC has jurisdiction to review Windstream's intrastate switched access rates to determine whether they are just and reasonable is governed primarily by the provisions of KRS 278.543. Windstream includes as Appendix 2 to its Brief the entirety of KRS 278.541-544. In particular, KRS 278.543 provides that a telephone utility "at its discretion and without commission approval, may elect to adopt the price regulation plan set forth below":

(1) The election is "effective immediately upon written notification from the electing utility to the commission." (KRS 278.543(1));
(2) The rate for basic local exchange service "shall be capped for a period of sixty (60) months from the date of the election." (KRS 278.543(2));
(3) The electing utility is to retain on file at the PSC "tariffs for basic local exchange services and intrastate switched-access services" and tariffs filed in accordance with KRS 278.543(2) "shall be deemed valid and binding upon the effective date stated in the tariff." (KRS 278.543(3));
(4) An electing utility's rates for intrastate switched access service cannot exceed its rates in effect on the date of election. (KRS 278.543(4));
(5) The PSC has original jurisdiction over complaints as to basic local exchange service, "except the commission shall not have jurisdiction to set, investigate,

or determine rates as to any electing telephone utility other than as set forth in this section . . .." (KRS 278.543(5)); and

(6) An electing utility's rates, charges, earnings and revenues "shall be deemed to be just and reasonable under KRS 278.030 and administrative regulations promulgated thereunder upon election." Further, with limited exception, an electing utility shall be exempt from various statutes including KRS 278.260. (KRS 278.543(6)).[5]

It is intuitive and Kentucky Supreme Court precedent that in interpreting a statute, the plain meaning should govern. As the Kentucky Supreme Court has held:

> [A court's] goal in construing a statute is to give effect to the intent of the General Assembly, and we derive that intent, if at all possible, from the plain meaning of the language the General Assembly chose. We presume, of course, that the General Assembly intended for the statute to be construed as a whole and for all of its parts to have meaning. We also presume that the General Assembly did not intend an absurd statute or an unconstitutional one.

King Drugs, Inc. v. Com., 250 S.W.3d 643, 645 (Ky., 2008)(internal citations omitted) Further, when a statute is clear and unambiguous and express legislative intent, there is no room for construction or interpretation, and the statute must be given effect as written. *McCracken County Fiscal Court v. Graves*, 885 S.W.2d 307 (Ky., 1994).

There is no ambiguity in the above-quoted language of KRS 278.543, which states that the capped basic local exchange and intrastate switched access rates of an electing utility are deemed valid and binding upon the effective date stated in the tariff and are deemed to be just and reasonable under KRS 278.543. Said Windstream rates, therefore, are valid and binding and statutorily deemed just and reasonable under KRS 278.030.

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[5] KRS 278.543(6) also provides that the utility "shall also be exempt from any rules, orders, or regulations of the commission requiring the retention or filing of financial reports, classifications, depreciation or other schedules, or any other information not required by the Federal Communications Commission." By proceeding with VZ's Petition without regard to KRS 278.543(6), the effect of the PSC's Order is to subject Windstream to such requirements in violation of this provision

Despite the explicit identification in KRS 278.543 of intrastate switched access services in two separate paragraphs, the Trial Court erroneously found that KRS 278.543 was intended to address only retail services and that wholesale intrastate switched access rates are not exempted by the statute and are subject to continued PSC oversight. The statutory provisions on their face do not provide for such an illogical result -- particularly where the General Assembly twice explicitly referenced intrastate switched access rates which are wholesale rates paid by long distance carriers to local exchange carriers. There can be no doubt that the General Assembly was aware of the specific wholesale rates mentioned in the statute; indeed, had it intended, the General Assembly could have stated that electing utilities include utilities only with respect to their retail local service offerings and omitted references to intrastate switched access rates from KRS 278.543 altogether, but it did not do so. The Trial Court, ignoring the plain language of KRS 278.543, substituted its own judgment regarding a regulatory scheme that the General Assembly could have created but did not. The Trial Court's determination that the General Assembly did not intend KRS 278.543 to address wholesale access service is not supported by the express terms used by the General Assembly in the statute.

Further review of the express words used by the General Assembly demonstrates clearly that KRS 278.543 on its face encompasses wholesale rates for intrastate switched access service. KRS 278.543(2) provides for rate caps as to "basic local exchange service" – not generically as to "retail rates". KRS 278.543(3) requires electing utilities "to retain on file with the commission tariffs for ***basic local exchange services and intrastate switched access services***" and KRS 278.543(4) thereafter provides that "an electing utility's rates for ***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." (Emphasis added). The General Assembly did not use a generic term such as "retail service rates." Nor did the General Assembly remain silent as to any wholesale service and instead expressly referred to intrastate switched access service. The General Assembly established tariffing obligations on specific types of services – "basic local exchange services" and "intrastate switched access services." The former term refers to retail local service (generally, basic "dial tone"), and the latter refers to wholesale service (generally, rates paid by long distance carriers to access the networks of local carriers). To suggest that the General Assembly did not include wholesale intrastate switched access service within the provisions of KRS 278.543 is nonsensical.[6]

Further, KRS 278.543(5) expressly states that "the commission shall not have jurisdiction to set, investigate or determine rates as to any electing utility" with the exception of complaints only as to basic local exchange service (and not also as to intrastate switched access service). Where the General Assembly otherwise chose twice to use the term "intrastate switched access rates" it cannot reasonably be argued that KRS 278 543 was intended to prohibit only PSC review of retail rates. This is particularly true where KRS 278.543(6) states:

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[6] A comparison of KRS 278 543 and 278 544 demonstrates further that the General Assembly has a clear understanding of retail and wholesale rates KRS 278 543 expressly refers to and makes provisions for both basic local exchange service (retail service) and intrastate switched access service (wholesale service) KRS 278 544, however, provides for revised treatment of nonbasic services -- a separate category of retail service from basic local exchange service Unlike basic local service, nonbasic service is deemed to be so competitive by the General Assembly that it is provided detariffed and nonregulated treatment for all carriers and not just those carriers electing alternative regulation under KRS 278 543 Clearly, the General Assembly considered the different retail and wholesale services, the market forces applying to each, and the appropriate regulatory treatment of each It is illogical to suggest that the General Assembly intended to encompass only retail services in KRS 278 543 given that it mentions by name wholesale intrastate switched access service and also as it sets forth a completely separate regulatory scheme for nonbasic retail services in KRS 278 544 If, as the Trial Court and PSC suggest, KRS 278 543 were intended to apply only to retail services, then there would have been no reason for the specific inclusion of KRS 278 544

> An electing utility's ***rates...and revenues*** shall be deemed to be just and reasonable under KRS 278.030 and administrative regulations promulgated thereunder upon election. Except as set forth in KRS 278.542(1)(a) and (b), an electing telephone utility ***shall be exempt*** from KRS 278.190, 278.192, 278.200, 278.230(3), 278.255, 278.260, 278.270, 278.280, 278.290, 278.300 and administrative regulations promulgated thereunder.

(Emphasis added). There is absolutely no language in KRS 278.543(6) indicating that the determination of rates and revenues as just and reasonable and exempt from PSC review is limited to retail rates and does not apply to the intrastate switched access rates expressly included in KRS 278.543(3) and (4).

The Trial Court referred to Section 199 of the Kentucky Constitution in finding that the capping of basic retail rates by electing utilities was constitutional because the retail telephone market is highly competitive, but the capping of intrastate switched access rates raised a question of unconstitutional discrimination because the wholesale telecommunications market is not competitive.[7] The relevant language of Section 199 of the Kentucky Constitution states:

> Telephone companies operating exchanges in different towns or cities, or other public stations, shall receive and transmit each other's messages without unreasonable delay or discrimination. The General Assembly shall, by general laws of uniform operation, provide reasonable regulations to give full effect to this section.

KRS 278.543 is clearly not discriminatory as to intrastate switched access rates, as "Any telephone utility, at its discretion and without commission approval, may elect to adopt the price regulation plan" set forth in said statute. (Emphasis added.) Windstream's tariffed intrastate switched access rates also are not unconstitutionally discriminatory as they apply equally to all entities purchasing these services from Windstream

[7] The Trial Court's conclusion is inconsistent with VZ's Petition which states that the Kentucky long distance market is competitive and VZ is competing in that market at Windstream's existing access rates.

Windstream's intrastate switched access rates were approved by the PSC as being just and reasonable prior to being capped under KRS 278.543, and as noted previously, VZ's Petition recognizes that the long distance market is competitive and it is competing in that market at existing intrastate switched access rates. (VZ Petition, p. 9; ROA p. 19). Any finding that the application of KRS 278.543 to intrastate switched access rates would render the statute unconstitutional is without merit.

The Trial Court also opposed the General Assembly's legislation of an irrebuttable presumption that an electing utility's rates shall be deemed to be statutorily just and reasonable. (Opinion and Order p. 7; ROA 583.) The Court then asserted that permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments, citing to the case of *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed2d 63 (1973). However, as stated by the Kentucky Supreme Court in *Kentucky Harlan Coal Company v. Holmes*, 872 S.W. 2d 446, 455 (Ky., 1994), "The power of the legislature to prescribe what shall constitute conclusive evidence, however, in particular instances, has been upheld in a number of cases." Accordingly, the General Assembly can legally create what the Trial Court acknowledged was an irrebuttable presumption. Such legislative action is particularly appropriate in the case of KRS 278.543 which deems as just and reasonable rates that were previously approved by and tariffed on file with the PSC. The presumption is even more appropriate given that VZ's Petition readily admits that VZ is competing in the competitive long distance market at those rates. The Trial Court erred in construing the plain language of KRS 278.543 to somehow preserve the PSC's rate investigation jurisdiction over the intrastate switched access rates of an electing utility.

B. KRS 278.543(6) PROVIDES THAT THE PSC DOES NOT HAVE RATEMAKING JURISDICTION OVER AN ELECTING UTILITY.

KRS 278.543(6) clearly and unambiguously exempts electing utilities from certain laws and regulations as follows:

> Except as set forth in KRS 278.542(1)(a) and (b), an electing telephone utility ***shall be exempt*** from KRS 278.190, 278.192, 278.200, 278.230(3), 278.255, 278.260, 278.270, 278.280, 278.290, and 278.300 and administrative regulations promulgated thereunder. The utility ***shall also be exempt*** from any rules, orders, or regulations of the commission requiring the retention or filing of financial reports, classifications, depreciation or other schedules, or any other information not required by the Federal Communications Commission.

(Emphasis added.) The statutes and corresponding regulations from which electing utilities are exempt pertain to the following, among other things:

(1) procedures before the PSC for a telephone utility to file new rate schedules and the PSC's determination of their reasonableness (KRS 278.190);
(2) a telephone utility's application to the PSC for test periods for proposed rate increases to justify the reasonableness of the proposed rate. (KRS 278.192);
(3) the PSC's power to regulate a telephone utility's rates or service standards fixed by agreement with a city (KRS 278.200);
(4) the PSC's jurisdiction over complaints of a telephone utility's rates or service (KRS 278.260);
(5) orders by the PSC as to a telephone utility's rates, including whether the rate is reasonable (KRS 278.270); and
(6) the PSC's valuation of a telephone utility's property in connection with rates or service (KRS 278.290).

These provisions concern or relate to the PSC's rate making authority, including the PSC's determination of the reasonableness of a rate.

As held by the Court in *Georgetown Municipal Water and Sewer Service v. Bur-Wal, Inc.*, 242 S.W.3d 661, 667 (Ky App., 2007), "The first principle of statutory construction is to use the plain meaning of the words used in the statute." (Citations omitted.) Given these express statutory exemptions, there can be no doubt that the

General Assembly intended to exempt electing utilities from the historical ratemaking authority of the PSC (including the costly and time consuming rate investigations typical of historic ratemaking proceedings, like that requested by Verizon).

Particularly notable is the fact that the General Assembly specifically did not draft KRS 278.543(6) to allow for retention of jurisdiction in cases where a party asks the PSC to order rate reductions (which VZ is attempting to do, as opposed to objecting to a carrier's proposed rate increases). If the General Assembly had intended to carve out rate reductions as an exception to the limitations it placed on the PSC's jurisdiction in KRS 278.543(6), then it would have done so. But it did not. Instead the statutes very clearly provide for rate caps in return for which the electing utility receives immunity from the statutes and regulations establishing the PSC's traditional ratemaking jurisdiction.[8]

The only stated caveat to the legislative limitations on the PSC's jurisdiction in KRS 278.543(6) is any applicable exception in KRS 278.542(1)(a) and (b), which state, among other things, that the statutory alternative regulation provisions do not affect the PSC's existing jurisdiction over agreements or arrangements between incumbent local carriers ("ILECs") and between ILECs and other competitive local exchange carriers ("CLECs"). (KRS 278.542(1)(a) and (b).) However, as stated in VZ's Petition, Verizon brought the Petition in neither an ILEC nor CLEC capacity but rather in the sole capacity as an interexchange or long distance carrier. (VZ Petition p. 2; ROA 12.) Therefore, the exception in KRS 278.542(1)(a) and (b) does not apply to this case. Generally, KRS

[8] As discussed above, KRS §278 543(6) states expressly that an "electing utility's rates, charges, earnings, and revenues ***shall be deemed to be just and reasonable*** under KRS §278.030 and administrative regulations promulgated thereunder upon election,"(emphasis added), which should make this matter moot

278.542 otherwise provides that an election of alternative regulation does not limit the PSC's existing authority over certain consumer complaints, none of which applies here.

As explained above, nothing in KRS 278.542 applies to this case or operates as a limitation on the list of statutory exemptions provided to electing carriers in KRS 278.543(6), particularly in light of tariffs filed in accordance with KRS 278.543(2) being deemed valid pursuant to KRS 278.543(3). There simply has been no assertion on the record that Windstream is not in compliance with the statutory requirements for alternatively regulated companies. Accordingly, the rate findings and statutory exemptions in KRS 278.543(6) apply to Windstream and include in particular an exemption from KRS 278.260 which is the sole basis for VZ's Petition.

In light of the express statutory exemptions and irrebuttable presumption set forth in KRS 278.543(6), it is clear that the General Assembly restricted the PSC's authority and did not intend to allow the PSC to continue applying its previous regulatory regime to conduct investigations of the alternatively regulated rates (which include expressly the intrastate switched access rates) of any electing utility, including Windstream. This is particularly true where VZ's Petition requested such a rate investigation solely on the basis of KRS §278.260 from which electing utilities are expressly exempt. This Court should reverse the Trial Court's decision and find that as a utility electing alternative regulation, Windstream is statutorily exempt from the PSC's rate making jurisdiction and the underlying Complaint filed by Verizon.

C. THE PSC'S INTERPRETATION OF KRS 278.543 SHOULD NOT BE GIVEN DEFERENCE.

The issue in this case is solely an issue of law. The Court in *Com , Cabinet for Human Resources v. Jewish Hosp Healthcare Services, Inc.*, 932 S.W.2d 388, 390 (Ky.App., 1996) stated, "statutory construction is a matter of law for the courts, and a reviewing court is not bound by an administrative body's interpretation of a statute." (Citation omitted.)

In issuing its Opinion and Order, however, the Trial Court improperly gave the PSC's illogical and unreasonable interpretation of KRS 278.543 deference. While courts generally give deference to an agency's interpretation of the statutes governing it, "that does not rise to an abdication of the court's responsibility to finally construe the same statute...In matters of statutory construction, the courts have the ultimate responsibility..." *Delta Air Lines Inc. v. Com Revenue Cabinet,* 689 SW2d. 4, 20 (Ky., 1985). (See also *Gilbert v Com , Cabinet for Health and Family Services*, 291 S.W.3d 712 (Ky. App., 2008)). "Moreover, an administrative construction arrived at in an uncontested proceeding is not entitled to great weight." *Id* at 20. (Citing 2A Sutherland §45.05 and *Kentucky Board of Tax Appeals v. Citizens Fidelity Bank and Trust Company*, 525 SW2d 68 (Ky., 1975). The Court, in *White v Check Holders, Inc.*, 996 SW2d 496, 498 (Ky., 1999) stated "this court limits the deference shown to informal agency interpretations that have been arrived at without rulemaking or an adversarial proceeding..." The court then held that because the administrative agency (DFI) did not promulgate administrative regulations nor formally construe the act at issue in the case by any adjudicative procedure "the DFI's interpretation of the 1992 Act" was not given any

significant weight." *Id.* at 498. Furthermore, "The rule of contemporaneous construction by an administrative agency is not binding on the courts if it is erroneous and if the statute is not ambiguous. *Delta Air Lines Inc.* at 20.

Here, the Trial Court erroneously gave the PSC's interpretation of KRS 278.543 deference where the statute was of recent vintage and where the PSC had not promulgated any regulations construing the statute and had not construed the statute by any adjudicative procedure. This Court should not make the same mistake by giving the PSC's interpretation of same any significant weight, particularly where such interpretation defies the express and unambiguous language of the statutes. Instead, this Court should reject the Trial Court's interpretation of KRS 278.543 and apply the clear and unambiguous language of the statute in holding that Windstream's intrastate switched access tariffed service rates are deemed just and reasonable by law.

D. THE PSC'S ORDER FAILED TO ESTABLISH ITS AUTHORITY TO INVESTIGATE VZ'S PETITION.

The crux of VZ's Petition is that Windstream's intrastate switched access rates are not reasonable. Yet, neither Verizon nor the PSC in its Order allowing the VZ Petition to stand sets forth any basis by which the PSC has authority under Kentucky law to circumvent the provisions of KRS 278.543. The PSC's Order does not address the KRS 278.543(6) exemptions. The Order cites only to KRS §278.543(3) and (4) and offers the conclusory remarks that "the Commission has the authority to review the equitable and reasonable nature of these charges and, therefore will act accordingly" and that the "Commission has authority, pursuant to state law, to order electing telephone companies, such as Windstream to adjust any portion of their intra-state access charges." (Order p. 6;

ROA 65.) The sections on which the PSC relies require that electing utilities file with the PSC tariffs for basic local exchange and intrastate switched access services and cap the latter at the rates in effect on the day prior to the utility's election of alternative regulation. However, these sections also expressly state that tariffs filed in accordance with KRS 278.543(2) are deemed valid and binding as a matter of law as discussed previously. Kentucky law provides that statutes are "to be construed as a whole" and "all of its parts [are] to have meaning." *King Drugs, Inc v. Com.* 250 S.W.3d 643, 645 (Ky., 2008) (quoting *Lewis v. Jackson Energy Cooperative Corporation,* 189 S.W.3d 87 (Ky., 2005)). Thus, these subsections cannot be read in a vacuum without also considering the clear statutory exemptions for electing utilities or the statutory provisions deeming an electing utility's tariffs that are on file with the PSC to be just and reasonable as a matter of law.

When read in conjunction with the entire alternative regulations provisions, the two subsections to which the PSC's Order cites (KRS §278.543(3) and (4)) only support an investigation by the PSC into whether Windstream's tariffs are on file and contain the applicable rates capped. That cursory review, however, is not the scope of VZ's Petition nor what the PSC's Order provides. The PSC's reliance only on KRS §278.543(3) and (4) does not support its continued application of its traditional ratemaking processes to electing utilities to investigate and reduce their statutorily capped intrastate switched access rates, and the PSC's Order failed to establish its applicable authority.

III. THE PSC'S ORDER VIOLATES WINDSTREAM'S DUE PROCESS RIGHTS.

The PSC's Order denying Windstream's Motion to Dismiss is unlawful for the reason that it violates Windstream's right to due process. The Trial Court's failure to rule on this argument is further evidence of error.

A fair trial in a fair tribunal is a basic requirement of due process (*Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955).) This obligation applies to administrative agencies that adjudicate as well as to courts. (*See, Utica Packing Co v. Block*, 781 F.2d 71 (6th Cir., 1986)); *Withrow*, 421 U.S at 46-47; *Jaguar Cars v. Cottrell*, 896 F. Supp. 691, 693 (E.D. Ky., 1995)). When this obligation is applied to the PSC's Order denying the investigation of any intrastate access reform in the context of a comprehensive proceeding aimed at the investigation of all Kentucky carriers, and not one targeted only at Windstream (an electing utility), the PSC's Order must be deemed to violate established due process standards. While the outcome of such a global proceeding would remain legally questionable with respect to alternatively regulated carriers if the PSC were to continue to ignore the provisions of KRS 278.541, et seq it would nevertheless be a more reasonable pursuit than the current proceeding which was instigated and has been pursued based on Verizon's inadequate comparison of Windstream's rates to only one other carrier in Kentucky. The PSC declined to evaluate the intrastate switched access market as a whole in Kentucky, including an evaluation of the multiple providers and their respective rates and regulatory status. Instead, the Order

opted to pursue an investigation targeted against only one market participant who is exempt from the PSC's rate making authority.[9]

In the well-established case of *Powhatan Mining Co. v. Ickes*, 118 F.2d 105, 110 (6th Cir., 1941), the Sixth Circuit Court of Appeals held as follows:

> One who has been denied access to information or deprived of the privilege of cross-examination on pertinent matters is not in a position to make an offer of proof as to those matters. Likewise, a reviewing court cannot know what a full hearing might have shown and for that reason is not free to speculate as to the prejudice involved in such an erroneous ruling.

(*See also, Interstate Commerce Comm'n v. Louisville & N.R. Co.*, 227 U.S. 88 (1913)) In VZ's Petition, Verizon suggests merely that Windstream's intrastate switched access rates are higher than those of AT&T Kentucky and must be reduced. (VZ Petition p. 3; ROA 13.) VZ's Petition does not and truthfully could not have alleged that Verizon is unable to compete in the marketplace at current Windstream rate levels. (See, VZ Petition p. 9, affirming that Kentucky's long distance market is competitive and that Verizon is competing today at Windstream's existing access rates about which Verizon complains; ROA 19.) Verizon also asserts, without substantiation and in contradiction of its own representations that the long distance market in Kentucky is competitive, that its Petition is needed because Windstream's intrastate switched access rates are manifestly unjust and unreasonable. (VZ Petition pp. 4 & 5; ROA 14 & 15). To consider the actual perspective of Windstream's intrastate switched access rates, assuming for argument sake only that the PSC had jurisdiction to do so, it is essential to consider Windstream's rates in the context of the full scope of the Kentucky marketplace and the rates/rate structures

[9] Discovery on general marketplace issues, therefore, such as the reasonableness of rates and availability of access service from all providers is precluded as a result of the Order

and regulatory status of all Kentucky carriers and to allow Windstream the access to all such information in order to defend against VZ's Petition.

Indeed, the PSC recognized as much in its Order. For example, the PSC noted that it "has contemplated potentially establishing a larger administrative proceeding involving all 18 Kentucky ILECs who currently charge intra-state switched access charges" (Order pp. 6&7; ROA 65&66) and that the "need for a comprehensive review of intra-state access charges has been a looming specter over this Commission for a significant period of time." (Order at p. 5; ROA 64). Similarly, the PSC stated as follows:

> The Commission affirmatively states that an investigation into the issue of intercarrier compensation reform is necessary, but believes the most responsible decision would be to allow Verizon's complaint to go forward on its own merits and allow the Commission to reach a properly framed legal conclusion which could potentially be applied to individual, future carrier-to-carrier access charge complaints. The Commission finds that the best method by which to conduct an evaluation of Windstream's switched access rates is to allow this complaint to move forward with the current roster of parties, while being mindful that the decisions rendered in this proceeding will likely be applied to future complaints by switched access customers who are similarly situated to Verizon in their allegations and pricing concerns.

(Order at p. 8. Emphasis added. Footnote omitted; ROA 67). In other words, the PSC recognized that a proper investigation is a comprehensive one but decided that it would proceed instead in a manner that essentially requires Windstream East and Windstream West to be "guinea pigs" for intrastate switched access "reform." Like the foregoing issue regarding Windstream's electing utility status, the Order fails to provide any lawful basis for denying Windstream's right to due process in this manner, and it should be noted that even under such a global proceeding, the PSC nevertheless would need to contend with the alternatively regulated status of Windstream and other similarly situated carriers.

The Kentucky Court of Appeals has upheld the premise that administrative proceedings must be undertaken in conformity with the fairness and integrity integral to due process (*Hilltop Basic Resources, Inc. v. County of Boone,* 180 SW3d 464 (Ky. 2005)). The fact that the Order recognizes the necessity of a comprehensive proceeding but at the same time denies the benefit of that right to Windstream (particularly without regard to Windstream's status as an electing utility) is contrary to the court's notion of the foundations of due process. Consequently, this Court should also hold the PSC's Order unlawful for the reason that it denies Windstream's right to due process.

IV. THE PSC'S ORDER IS UNREASONABLE.

The PSC's Order also is unreasonable because it allowed VZ's Petition to proceed despite Verizon's failure to state a *prima facie* case on which the requested relief could be granted. The Kentucky Court of Appeals has determined that an order is unreasonable if it is unsupported by substantial evidence which leaves no room for difference of opinion among reasonable minds. *National-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 SW2d 503, 510 (Ky.App., 1990). The Trial Court's Opinion and Order failed to rule on this issue as well.

The PSC's Order did not address that VZ's Petition failed to allege sufficient facts (as well as any sufficient legal authority applicable to Windstream) to support the requested relief. The factual allegations set forth in VZ's Petition are insufficient and in many instances wholly irrelevant to whether Windstream's rates are unjust and unreasonable under Kentucky law. VZ's Petition set forth only broad intrastate switched access pricing policy arguments, all relating to matters over which the PSC no longer has jurisdiction, as well as various competition policy arguments relating to the same. The

fact that VZ's Petition was allowed to proceed based on such unsubstantiated policy arguments is particularly egregious in the case of an electing company like Windstream East whose capped tariffed intrastate switched access rates were previously subject to significant Commission-ordered reductions (prior to the time it elected alternative regulation), unlike most other carriers in Kentucky. Verizon's inadequate rate comparison of the Windstream rates to those of AT&T Kentucky (essentially the sole factual basis for its Petition) could have been easily discredited by the Commission's own cursory review of all the tariffed rates it has on file. Yet, the Commission erroneously determined that the VZ Petition presented a *prima facie* case.[10]

When taken as a whole and assumed to be true only for argument sake, these allegations support only that Windstream's intrastate switched access rates are higher than AT&T Kentucky's rates (which is the largest carrier in Kentucky), that Windstream and Verizon both compete in the long distance market which is competitive, that Verizon brought the Petition in its capacity solely as a long distance carrier, and that Verizon gains targeted operational expense reductions if Windstream reduces its intrastate switched access rates. Yet, **none** of the allegations set forth in VZ's Petition establishes a foundation that Windstream's intrastate switched access rates are unjust, unreasonable, or subject to the PSC's ratemaking authority. In short, all VZ's Petition establishes is that Windstream's intrastate switched access rates are higher than the rates of one other carrier in Kentucky and that Verizon is competing in the marketplace at those existing

[10] Arguably, the PSC's Order may have been intended simply to provide a party like Verizon its "day in court" so to speak. However, the General Assembly recognized the real and tangible harm to traditionally regulated carriers of subjecting them to such costly administrative action and offered them the right to elect to be alternatively regulated – a right which Windstream has been denied

rates. It is also notable that no one has disputed Windstream's assertion that its intrastate switched access rates are lower than the rates of most ILECs in Kentucky.

Despite the scarcity of any sufficient or relevant factual or legal assertion, VZ's Petition was found by the PSC to be "compelling." (Order at 8; ROA 67). The Order also found that VZ's Petition "has raised sustainable questions regarding the reasonableness of the compensation which Windstream currently receives for its access service." (Order at 6; ROA 65). Again, the Order issued such findings without any explanation of how Verizon's mere comparison of Windstream's rates to those of the largest carrier in Kentucky reasonably can be considered compelling or sustainable. Such a finding is particularly unreasonable considering that the Order does not address the fact that VZ's Petition is wholly without support either in law or in fact in strangely claiming that Kentucky law requires unaffiliated companies with varying cost structures to maintain equal rates. Such a finding is even more unreasonable considering that the Order does not address the fact that Verizon relied solely on a provision of Kentucky law from which Windstream is expressly exempt. The end result is an arbitrary and capricious ruling devoid of sufficient evidence or legal basis. This Court should find that the PSC's Order denying Windstream's Motion to Dismiss was unreasonable and therefore unlawful as was the Trial Court's Order which failed to rule on this issue.

CONCLUSION

As set forth above, because Windstream elected to cap its rates and operate under the alternate regulation provisions afforded to it by the General Assembly, its intrastate switched access rates are valid and binding and are deemed to be just and reasonable under KRS 278.543. Windstream is statutorily exempt from the PSC's traditional

ratemaking regime, and this Court should require the PSC to dismiss VZ's Petition. The PSC should also be required to dismiss VZ's Petition on the basis that the proceeding below is a violation of Windstream's due process rights and as Verizon failed to state a *prima facie* case.

Respectfully Submitted,

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INDEX OF APPENDICES

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 09-CI-00552

WINDSTREAM KENTUCKY WEST, LLC, ET AL. PLAINTIFFS

V. **OPINION AND ORDER**

KENTUCKY PUBLIC SERVICE COMMISSION DEFENDANT

*** *** *** ***

Introduction

This matter is before the Court on a Petition for Declaratory Relief filed by Plaintiffs Windstream Kentucky West, LLC, and Windstream Kentucky East, LLC. The sole issue to be decided is whether the Kentucky Public Service Commission (PSC) has jurisdiction to review the rates charged by Windstream to other telecommunications carriers for intrastate switched access service for reasonableness or whether those rates are deemed to be just and reasonable by operation of law pursuant to KRS 278.543(6). For reasons set forth more fully below, this Court finds that KRS 278.543, which allows providers to "opt out" of the PSC's rate-making authority by agreeing to cap their charges at a previously approved rate for five (5) years, applies only to rates for basic local exchange service and does not apply to the rates charged by local exchange carriers (LECs) to interexchange carriers (IXCs) for intrastate switched access service. Accordingly, the Court finds that the PSC has jurisdiction to conduct a hearing for the purpose of determining whether Windstream's switched access charges are reasonable.

Background

In 2006, the Kentucky Legislature passed HB 337, amending KRS Chapter 278 to allow telephone utilities to elect to cap their rates for particular services in return for certain

exemptions from regulation, including immunity from the Commission's ratemaking authority Windstream elected to take advantage of the newly-promulgated "opt out" provisions now codified in KRS 278.541, et seq.

On December 5, 2007, Verizon filed a Petition to Reduce Windstream's Switched Access Charges with the PSC. Verizon's petition requested that the PSC review Windstream's intrastate switched access rates and order a reduction thereof.

Switched access services are services provided by one telecom carrier to another and come into play when a long distance call placed in one local exchange must be carried by an interexchange (long distance) carrier to the recipient of the call in another local exchange. When a caller places an interexchange call, the caller's local exchange carrier or "LEC", such as Windstream, often provides originating switched access service by transporting the call from the caller within its local exchange to a long distance carrier such as Verizon. The long distance carrier then carries the call across its own network to a location nearer the call recipient. The long distance carrier then transfers the call to another local exchange carrier, which provides terminating switched access service by delivering the call from the long distance provider's network to the call recipient within its exchange.

A long distance carrier ordinarily cannot choose whom its customers call or what local exchange carrier serves the calling or called party, and under existing legal and regulatory requirements, the long distance company generally must carry and complete any call a customer places and pay the switched access rates the local exchange carrier assesses for the call. At issue in this case are the rates charged by Windstream to other carriers for completing these calls,

specifically, whether those rates are capped and are outside the ratemaking jurisdiction of the PSC pursuant to House Bill 337, as codified at KRS 278.541 *et seq.*

On January 17, 2008, Windstream moved to dismiss Verizon's petition before the PSC arguing, among other things, that its intrastate switched access rates were deemed just and reasonable by operation of law, and that Verizon had failed to set forth a *prima facie* case on which the requested relief could be granted. The Commission denied Windstream's Motion to Dismiss and Windstream then filed this lawsuit seeking to enjoin the Commission from taking any action on Verizon's administrative complaint, alleging that the PSC lacked jurisdiction to review those matters.

On May 29, 2009, the Court issued an Order finding that Windstream had presented a substantial question concerning whether, as an electing utility, it is statutorily exempt from the Commission's ratemaking authority and staying the proceedings before the Commission pending resolution of the issues in this Court.

Oral argument was held in this matter on October 12, 2009 and this Opinion and Order follows.

Standard of Review

A review of a Commission Order is a statutory proceeding in which the party seeking to set aside such an Order bears the burden of showing that the Order is unreasonable or unlawful. With regard to matters of law, "great deference is always given to an administrative agency in the interpretation of a statute which is within its specific province." *Com. ex rel. Beshear v. Kentucky Utilities Co.*, 648 S.W.2d 535, 537 (Ky. App. 1982). The Kentucky Supreme Court has held that "an appellate court must defer to an administrative agency's interpretation of its

own regulations" absent a showing that the agency's interpretation is arbitrary or beyond the scope of its statutory authority. *Camera Center, Inc. v. Revenue Cabinet,* 34 S.W.3d 39, 41 (Ky. 2000). This principle applies with special force to highly complex matters related to the regulation of the telecommunications industry, which requires specialized technical expertise in the application of an intricate web of both state and federal regulations. Here the Commission has determined that it retains jurisdiction to regulate wholesale charges imposed upon one telecommunications carrier by another pursuant to KRS Chapter 278 and the Commission's decision is entitled to great deference.

While Plaintiff Windstream styled its complaint "Petition on Appeal and/or Original Action for Declaratory Relief," this case clearly involves a question of statutory construction and whether various provisions of KRS Chapter 278 limit the authority of the PSC to review the rates charged by incumbent local exchange carriers ("ILECs") to interexchange carriers (ILECs) for intrastate switched access service. As such, principles of statutory construction are applicable here.

When interpreting a statute, no single word or sentence determines its meaning. *Lexington Fayette County Food v. Urban County Gov.,* 131 S.W.3d 745, 750 (Ky. 2004). Rather, the Court is to presume that the General Assembly intended for the statute to be construed as a whole and for all of its parts to have meaning. *Lewis v. Jackson Energy Coop. Corp.*, 189 S.W.3d 87 (Ky. 2005). In other words, the Court must "view it as a whole, looking to the letter and the spirit of the statute." *Bowling v. Lexington-Fayette Urban County Government,* 172 S.W.3d 333, 341 (Ky. 2005), *cert. denied,* 548 U.S. 909 (2006). Here, both the letter and the spirit of the Act demonstrate that the Act was intended to apply only to retail rates

KRS 278.543 provides that:

> Any telephone utility, at its discretion and without commission approval, may elect to adopt the price regulation plan set forth below:
>
> (1) An election under this section shall be effective immediately upon written notification from the electing utility to the commission. The election shall remain effective until withdrawn by the electing utility.
>
> (2) The ***rate for basic local exchange service*** for an electing utility, other than an electing small telephone utility . . . shall be capped for a period of sixty (60) months from the date of the election. Subject to the limitations in Section 1 to 4 of this Act, an electing utility may seek a rate adjustment for basic local exchange services according to the terms of regulation applicable to the basic local exchange services of any ILEC on June 30, 2006, or a previously approved or new price regulation proposal for basic services pursuant to KRS 278.512. These rate adjustments may become effective on, or after the day following the end of the sixty (60) months.
>
> (3) Electing utilities shall retain on file with the commission tariffs for basic local exchange services and intrastate switched access services. Tariffs filed in accordance with subsection (2) of this section shall be deemed valid and binding upon the effective date stated in the tariff.
>
> (4) An electing utility's rates for 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.

Viewed as a whole, the purpose of the Act appears to be to allow Kentucky local exchange carriers to elect to adopt a price regulation plan that caps the rates it charges consumers for retail basic local exchange services at a certain level and in exchange to have those rates deemed to be just and reasonable going forward and not subject to review by the PSC. Windstream asserts that the Legislature intended the cap to apply equally to rates charged to other carriers in a non-competitive environment for intrastate switched access service. This Court does not agree.

Read in its entirety, KRS 278 543 is intended to apply to retail telecommunications services and not wholesale services provided by one carrier to another carrier, particularly in a non-competitive market where competing long distance carriers are forced to use Windstream to complete the long distance calls it is required by law to transmit to the end user. Verizon and other similarly situated long distance carriers have no choice as to which local exchange carrier they must use to complete the phone calls of their own retail customers. In these circumstances, it is abundantly clear that the legislature intended its "opt out" provision to apply to the highly competitive retail market, and not to the still captive monopolistic market prevailing for intrastate switched access service.

If the argument of Windstream is accepted, this Court would have to find that as a matter of law the PSC has no jurisdiction to regulate the charges of common carriers who "opt out" of regulation by freezing their rates for a period of 60 months, even though the "opt out" carriers continue to maintain a monopoly over a significant portion of the market, the market for intrastate retail switched access service. In the administrative complaint at the PSC, Verizon has alleged that Windstream's charges for this service are unreasonable. Verizon has further raised questions as to whether Windstream's wholesale rate structure results in discriminatory treatment in the marketplace, and whether Windstream has subsidized lower rates to its retail customers by shifting costs to its captive wholesale customers (who are its competitors).

Such discrimination is prohibited under Section 199 of the Kentucky Constitution. Moreover, Section 199 of the Kentucky Constitution further provides that "[t]he General Assembly shall, by general laws of uniform operation, provide reasonable regulations to give full effect to this section." Here, there is a very real question as to whether House Bill 377, with its

selective exemption of "opt out" carriers from regulation, meets this requirement of regulation by "general laws of uniform operation." *See also Kentucky Milk Marketing Commission v. Kroger,* 691 S.W.2d 893, 899 (Ky. 1985) ("Unequal enforcement of the law, if it rises to the level of conscious violation of the principle of uniformity violates this Section." [Ky. Const., Sec. 2])

An equally troubling constitutional problem with the General Assembly's enactment here is the attempt to legislate an irrebuttable presumption that an electing utility's rates "shall be deemed to be just and reasonable under KRS 278.030 and the administrative regulations promulgated thereunder upon election." KRS 278.543(6). While the legislature may have had a rational basis to find that the rates of electing utilities are "just and reasonable" in the highly competitive retail marketplace, the record here is void of any rational basis to support such an irrebuttable presumption with regard to the monopolistic market for intrastate switched access service. As the U.S. Supreme Court has noted "[s]tatutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Vlandis v. Kline,* 412 U.S. 441, 446, 93 S.Ct. 2230, 2233, 37 L.Ed.2d 63 (1973). In these circumstances, if the Court can reasonably construe the statute in such a way as to avoid the constitutional problem, it should adopt the construction that prevents a conflict under the constitution. *Spees v. Kentucky Legal Aid,* 274 S.W.3d 447, 450 (Ky. 2009); *Stephenson v. Woodward,* 182 S.W.3d 162 (Ky. 2005).

Here, the most reasonable and logical interpretation of the statute is that the legislature intended to allow electing carriers to avoid rate regulation in the competitive retail market, in which consumers are protected through price competition among a wide array of carriers, but to retain PSC jurisdiction over the rates charged by all utilities in the non-competitive markets.

This intent on the part of the legislature is further evidenced by the specific language of the Act retaining PSC jurisdiction regarding "any agreement or arrangement between or among ILECs" or "any agreement or arrangement between or among ILECs and other local exchange carriers." That language retaining PSC jurisdiction, even for electing utilities, was codified at KRS 278.542(1)(a) and (b). The PSC and Verizon have convincingly argued that the wholesale rates charged that are the subject of Verizon's PSC complaint are exactly the kind of dispute over which the PSC retains jurisdiction under this provision of the law. The Commission therefore retains its authority over Windstream's wholesale charges. In fact, the PSC asserts, and no party has disputed, that it has conducted similar hearings with regard to the switched access rates of other carriers, and has required utilities similarly situated to Windstream to reduce their rates. The Court can find no basis in the law to grant Windstream the absolute immunity from wholesale rate review it seeks. Nor is there any basis to deny Windstream's captive customers for intrastate switched access service the protection of PSC review of its rate structure.

Viewed as a whole, the purpose of the Act is to protect the interests of retail consumers – not to protect the competitive interests of providers. Under House Bill 377's opt-out provisions, if a Kentucky local exchange carrier elects to adopt a price regulation plan that caps the rates it charges consumers for retail basic local exchange services at a certain level, those retail local exchange rates will be deemed to be just and reasonable going forward for a period of five years. *See* KRS 278.543. Windstream takes the position that this opt-out provision also immunizes its wholesale rates from Commission review. This Court does not agree.

In the opinion of the Court, the intent of the legislature is to limit the Commission's authority over rates charged for retail services in exchange for an agreement by the carrier to

lock in pre-approved rates for a five (5) year period. However, read in its entirety, the intent of the Act does not appear to be to provide a windfall to a local exchange carrier in a non-competitive market for providing "intrastate" or wholesale switched access service for completing a call to a residential or business customer of the intrastate carrier.

Windstream's rates for intrastate switched access may be just and reasonable. However, that determination cannot be made by legislative fiat in the absence of any findings of fact or support in the record. Here, the PSC merely seeks the opportunity to conduct a hearing and make findings of fact on this issue. Windstream seeks to avoid the cost and expense of a proceeding at the PSC through a "pre-emptive strike" attacking the Commission's jurisdiction, a strategy that has been generally rejected by the Kentucky Supreme Court absent circumstances not present here. *See Executive Branch Ethics Commission v. Stephens,* 92 S.W.3d 69, 72-73 (Ky. 2002).

CONCLUSION:

For the reasons stated above, the motions for summary judgment filed by the PSC and the intervening defendants are GRANTED and the motion for summary judgment filed by Windstream is DENIED. Windstream's motion for permanent injunctive relief under CR 65 is DENIED, and the Temporary Injunction previously entered by this Court is hereby DISSOLVED. This is a final and appealable order and there is no just cause for delay.

SO ORDERED this 19th day of October, 2009.

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division 1

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278.541 Definitions for KRS 278.541 to 278.544.

In addition to the definitions set forth in KRS 278.010 and 278.516(2), the following definitions shall apply to KRS 278.541 to 278.544:

(1) "Basic local exchange service" means a retail telecommunications service consisting of a primary, single, voice-grade line provided to the premises of residential or business customers with the following features and functions only:

(a) Unlimited calls within the telephone utility's local exchange area;

(b) Dual-tone multifrequency dialing; and

(c) Access to the following:

1. Emergency 911 telephone service;
2. All locally available interexchange companies;
3. Directory assistance;
4. Operator services;
5. Relay services; and
6. A standard alphabetical directory listing that includes names, addresses, and telephone numbers at no additional charge.

With respect to local exchange carriers, basic local exchange service also shall include any mandatory extended area service routes accessible as a local call within that exchange area on or before July 12, 2006. Basic local exchange service does not include any features or functions other than those listed in this subsection, nor any other communications service, even if such service should include features and functions listed herein;

(2) "Electing utility" means a telephone utility that elects to operate under KRS 278.543;

(3) "Local exchange carrier" or "LEC" has the same meaning as defined in 47 U.S.C. sec. 153(26);

(4) "Incumbent local exchange carrier" or "ILEC" has the same meaning as defined in 47 U.S.C. sec. 251(h);

(5) "Nonbasic service" means all retail telecommunications services provided to a residential or business customer, all arrangements with respect to those services, and all packages of products or services; provided, however, nonbasic service includes basic local exchange service only if the customer chooses to purchase a package that includes basic local exchange service as a component of the package;

(6) "Optional telephone feature" means any of those central office-based features that were tariffed by a local exchange carrier on or before February 1, 2006, that, where available:

(a) Are available to a line-side connection in a telephone switch:

(b) Are available on a stand-alone basis separate from a bundled offering; and

(c) Enhance the utility of basic local exchange service.

The term includes but is not limited to call forwarding, call waiting, and caller ID;

(7) "Package" means combinations of retail products or services offered, whether at a single price or with the availability of the price for one (1) product or service contingent on the purchase of others; and

(8) "Telephone utility" includes local exchange carriers and telecommunications carriers as those terms are defined in 47 U.S.C. sec. 153 and any federal regulations implementing that section, except that the definition shall not include commercial mobile radio service providers as defined in 47 U.S.C. sec. 332 and the Federal Communications Commission's lawful regulations promulgated thereunder.

Effective: July 12, 2006

History: Created 2006 Ky. Acts ch. 239, sec. 1, effective July 12, 2006.

278.542 Effect of KRS 278.541 to 278.544 on commission's jurisdiction -- Filing by telephone utilities required.

(1) Nothing in KRS 278.541 to 278.544 shall affect the commission's jurisdiction with respect to:

(a) Any agreement or arrangement between or among ILECs;

(b) Any agreement or arrangement between or among ILECs and other local exchange carriers;

(c) Consumer complaints as to compliance with basic local exchange service obligations, and the quality of basic voice-grade service transmission for basic and nonbasic services, consistent with accepted industry standards for telecommunications services;

(d) The emergency 911 telephone service as set forth in KRS 65.750 to 65.760 or wireless enhanced emergency 911 systems as set forth in KRS 65.7621 to 65.7643;

(e) Accuracy of billing for telecommunications services, in accordance with the truth-in-billing regulations prescribed by the Federal Communications Commission;

(f) Assessments as set forth in KRS 278.130, 278.140, and 278.150;

(g) Unauthorized change of telecommunications providers or "slamming" under KRS 278.535;

(h) Billing of telecommunications services not ordered by or on behalf of the consumer or "cramming" to the extent that such services do not comply with the truth-in-billing regulations prescribed by the Federal Communications Commission;

(i) The federal Universal Service Fund and Lifeline Services Program and any Kentucky state counterpart;

(j) Any special telephone service programs as set forth in KRS 278.547 to 278.5499;

(k) Tariffs, except as expressly provided for in KRS 278.541 to 278.544;

(l) Setting objectives for performance as to basic local exchange service; except that the objectives shall not exceed existing commission standards or associated penalties as of July 12, 2006;

(m) Prohibiting price differences among retail telecommunications customers to the extent that such differences are attributable to race, creed, color, religion, sex, or national origin; or

(n) Ensuring that a telephone utility furnishes safe, adequate, and reasonable basic local exchange service to customers within that utility's service area.

(2) Telephone utilities operating pursuant to KRS 278.541 to 278.544 shall file with the commission a form containing:

(a) The complete name of the telephone utility;

(b) The physical address of its principal office; and

(c) The name, title, and telephone number of the person responsible for answering consumer complaints on behalf of the telephone utility.

(3) No telephone utility shall engage in predatory pricing as defined by the United States Supreme Court in Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

(4) Nothing in KRS 278.541 to 278.544 shall affect the alternative regulation process for small telephone utilities as set forth in KRS 278.516.

Effective: July 12, 2006

History: Created 2006 Ky Acts ch 239, sec. 2, effective July 12, 2006.

278.543 Adoption of price regulation plan -- Rate caps and adjustments -- Jurisdiction of commission -- Exemptions -- Withdrawal from regulation under KRS 278.541 to 278.544.

Any telephone utility, at its discretion and without commission approval, may elect to adopt the price regulation plan set forth below.

(1) An election under this section shall be effective immediately upon written notification from the electing utility to the commission. The election shall remain effective until withdrawn by the electing utility.

(2) The rate for basic local exchange service for an electing utility, other than an electing small telephone utility as defined in KRS 278.516, shall be capped for a period of sixty (60) months from the date of the election. Subject to the limitations in KRS 278.541 to 278.544, an electing utility may seek a rate adjustment for basic local exchange services according to the terms of regulation applicable to the basic local exchange services of any ILEC on June 30, 2006, or a previously approved or new price regulation proposal for basic service pursuant to KRS 278.512. These rate adjustments may become effective on or after the day following the end of the sixty (60) months.

(3) Electing utilities shall retain on file with the commission tariffs for basic local exchange services and intrastate switched-access services. Tariffs filed in accordance with subsection (2) of this section shall be deemed valid and binding upon the effective date stated in the tariff.

(4) An electing utility's rates for 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.

(5) The commission shall have original jurisdiction over complaints as to basic local exchange service of any electing telephone utility, except that the commission shall not have jurisdiction to set, investigate, or determine rates as to any electing telephone utility other than as set forth in this section. Upon a complaint in writing made against any electing telephone utility by any person stating that basic local exchange service in which that complainant is directly interested is unreasonable, unsafe, insufficient, or unjustly discriminatory, or that basic local exchange service is inadequate or cannot be obtained, the commission shall proceed, with or without notice, to make such investigation as it deems necessary or convenient. The commission may also make such an investigation on its own motion. No order concerning a complaint shall be entered by the commission without a formal public hearing. A person may intervene in accordance with commission administrative regulations. The commission shall fix the time and place for the hearing and shall provide notice to the electing telephone utility and the complainant not less than twenty (20) days in advance. The commission may dismiss any complaint without a hearing if it decides that a hearing is not necessary, in the public interest, or for the protection of substantial rights. The complainant and the electing telephone utility shall be entitled to be heard in person or by an attorney and to introduce evidence.

(6) An electing utility's rates, charges, earnings, and revenues shall be deemed to be just and reasonable under KRS 278.030 and administrative regulations promulgated

thereunder upon election. Except as set forth in KRS 278.542(1)(a) and (b), an electing telephone utility shall be exempt from KRS 278.190, 278.192, 278.200, 278.230(3), 278.255, 278.260, 278.270, 278.280, 278.290, and 278.300 and administrative regulations promulgated thereunder. The utility shall also be exempt from any rules, orders, or regulations of the commission requiring the retention or filing of financial reports, classifications, depreciation or other schedules, or any other information not required by the Federal Communications Commission.

(7) An electing small telephone utility, as defined in KRS 278.516, may withdraw from being so regulated by providing written notice of withdrawal to the commission.

(8) Under the following circumstances, any electing utility may withdraw from being so regulated by providing written notice to the commission:

(a) Upon the approval pursuant to KRS 278.512 of a company-specific alternative regulation plan; or

(b) Upon filing notice with the commission of its adoption of the applicable provisions of any alternative regulation plan previously approved by the commission. The adoption shall become effective upon filing of the notice.

(9) The rates for basic local exchange service for an electing small telephone utility as defined in KRS 278.516 shall be capped for a period of twelve (12) months from the date of the election. Annually thereafter, an electing small telephone utility may not increase rates for an individual basic local exchange service by more than the increase in the annual average of the Consumer Price Index for all urban consumers for the most recent calendar year as published by the United States Department of Labor, Bureau of Labor Statistics.

Effective: July 12, 2006

History: Created 2006 Ky. Acts ch. 239, sec. 3, effective July 12, 2006.

278.544 Provisions applicable to all telephone utilities.

The following provisions of this section shall apply and be enforced equally to all telephone utilities, unless otherwise specifically stated in this section.

(1) Telephone utilities may file with the commission schedules or tariffs reflecting the rates, terms, and conditions for nonbasic services that are generally available to all subscribers qualifying for the rates, terms, and conditions. The rates, terms, and conditions for basic and nonbasic services shall be valid upon the effective date stated in the schedule. Tariffs for nonbasic services in effect on July 12, 2006, shall continue to be effective as binding rates, terms, and conditions until withdrawn or modified by the telephone utility.

(2) A telephone utility offering a package that includes any optional telephone features tariffed as of February 1, 2006, shall maintain schedules or tariffs on file with the commission for each such optional telephone feature available on a stand-alone basis to residential customers who purchase basic local exchange service from that telephone utility.

(3) Notwithstanding the terms of any adopted regulation plan or any provision of law to the contrary, telephone utilities may provide nonbasic services pursuant to terms and conditions provided to the customer. Telephone utilities shall not be required to file nonbasic contracts with the commission. Telephone utilities shall permit a residential customer with nonbasic service to purchase basic local exchange service and any optional telephone feature on file in a schedule or tariff at the commission at the current rates, terms, and conditions without incurring termination charges, unless the customer has entered into an agreement containing termination charges and the customer is given thirty (30) days from receipt of the terms and conditions to cancel the agreement. If a customer cancels the agreement within thirty (30) days from receipt of the terms and conditions, termination charges are limited to the price of unreturned equipment or services, including installation, received at that point. Telephone utilities that provide services pursuant to this subsection shall provide customers with notice, as part of the terms and conditions of such services, that basic local exchange service and any optional telephone feature on file in a schedule or tariff with the commission may be purchased separately at the price posted on the company's Web site or on file with the commission.

(4) Notwithstanding any provision of law to the contrary, nonbasic services offered pursuant to the provisions of this section shall be set by the marketplace and are not governed by KRS 278.030 and administrative regulations promulgated thereunder. The nonbasic services are exempt from action or review by the commission under KRS 278.160, 278.170, 278.180, 278.190, 278.192, 278.200, 278.230(3), 278.250, 278.255, 278.260, 278.270, 278.280, 278.290, and 278.300 and administrative regulations promulgated thereunder, except as specifically stated in KRS 278.541 to 278.544.

Effective: July 12, 2006

History: Created 2006 Ky. Acts ch. 239, sec. 4, effective July 12, 2006.

Robert Moore

To: Krachmer, Edward
Subject: RE: Windstream's 2010-00398 Comments

Ed, Do you want to add a footnote indicating the documents that were included in the email to me are being attached to the Comments as Attachment A? I think it would be footnote 3. I would rather identify the three documents that are being attached in a footnote rather than just mentioning that relevant documents are being attached. What do you think? Rob Moore 042312

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From: Krachmer, Edward [mailto:Edward.Krachmer@windstream.com]
Sent: Monday, April 23, 2012 10:50 AM
To: Robert Moore
Subject: Windstream's 2010-00398 Comments

Please see attached. It calls for attaching our Circuit Court and Court of Appeals merits briefs (I assume either three or four in total - just not sure if we had a reply brief in Circuit Court). I assume that you have all of those, but I'm attaching what I have anyway. Please let me know if you have any questions. Thanks.

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2009-CA-1973

Appeal from the Franklin Circuit Court
Civil Action No. 2009-CI-00552

WINDSTREAM KENTUCKY WEST, LLC, ET AL. APPELLANTS

vs

APPELLANTS' REPLY BRIEF

KENTUCKY PUBLIC SERVICE COMMISSION, ET AL. APPELLEES

Submitted by,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was sent by first class mail, postage prepaid, on this the 21st day of June, 2011 to Mr. Jeff R. Derouen, Executive Director, Public Service Commission, 211 Sower Boulevard, P. O. Box 615, Frankfort, Kentucky 40602-0615, Helen C. Helton, J.E.B. Pinney, L. Alyson Honaker, Kentucky Public Service Commission, 211 Sower Boulevard, P. O. Box 615, Frankfort, Kentucky 40602-0615, Douglas F. Brent and C. Kent Hatfield, Stoll, Keenon Ogden, PLLC, 2000 PNC Plaza, 500 West Jefferson Street, Louisville, Kentucky 40202 and Judge, Phillip Shepherd, Franklin Circuit Court, 669 Chamberlin Avenue, Frankfort, Kentucky 40601.

Robert C. Moore

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

The Kentucky Public Service Commission ("Commission") and Verizon[1] seek to create ambiguity where none exists. Yet, nothing in their briefs can overcome the plain reading of the law. So long as Windstream Kentucky East, LLC and Windstream Kentucky West, LLC (together, "Windstream") comply with the terms of their alternative regulation plan, which no party has alleged they have not done, Kentucky law clearly treats all of Windstream's rates as set forth in KRS 278.543 as just and reasonable and exempts Windstream from proceedings that would have the result of requiring a reduction in any of Windstream's rates thereunder. Such was the case under the Kentucky law in 2006 when Windstream elected the alternative regulation offered by the General Assembly in light of its recognition of the competitive status of the industry, in 2007 when Verizon brought its complaint pursuant to KRS 278 260 without regard for that alternative regulation, and in 2010 when Windstream was forced to begin expending resources participating in the type of administrative proceeding before the Commission from which the General Assembly exempted alternatively regulated carriers. Indeed, it remains true in 2011 while the Commission, as freely admitted by Verizon in its brief to this Court, continues consideration of the record developed in Verizon's 2007 complaint.[2]

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[1] Specifically, MCI Communications Services, Inc., Bell Atlantic Communications, CIN , NYNEX Long Distance Company, TTI National, Inc., Teleconnect Long Distance Services & Systems Company, and Verizon Select Services, Inc. (together, "Verizon").

[2] Verizon Brief at 5-6. In a recent filing with the FCC, Verizon noted that it "filed a complaint in 2007 before the Kentucky commission requesting adjudication of the reasonableness of Windstream's intrastate switched access rates." Verizon then acknowledged that the "commission ultimately closed the case . . . folding that individual complaint proceeding into a broader, industry-wide investigation of intrastate switched access rates" and that the "broader proceeding is still in the discovery stage and no hearing date has been set." Reply Comments of Verizon and Verizon Wireless, FCC CC Docket No. 01-92 (among others), at 60-61 (filed May 23, 2011)(available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021651118> Thus, Verizon's motion to dismiss – including its representation to this Court that the subject matter of Verizon's complaint is moot – remains suspect at best. Moreover, the assertion of Appellees that this matter is moot now that the Commission has opened a generic proceeding ignores the full request of Windstream – that is, that the Commission consider access reform only in a generic proceeding but one which necessarily considers the status and exemption of alternatively regulated carriers, something the Commission has yet to do. Again, Appellee's assertions on this point mischaracterize the actual record before the Court.

In their briefs, Verizon and the Commission attempt a variety of scare tactics intended to paint not only a tortured interpretation of the law but also a false picture of the status of competition in the Commonwealth, the General Assembly's intent with respect to that competition, and a variety of other issues including Windstream's intent with respect to this appeal. For example, just as Verizon's motion to dismiss misrepresented that the issues herein were moot and ignored that the Commission incorporated fully the record of Verizon's complaint into another ongoing proceeding, Verizon's brief mischaracterizes the reasonableness of Windstream's applicable access rates as discussed herein. While these extraneous issues are ultimately irrelevant as this case turns strictly on statutory interpretation, it is worth noting that the assertions are in error and seemingly intended to discolor the Court's perspective. All things considered, Windstream's detailed analysis is most consistent with the clear and unambiguous law, and its requested relief should be granted by the Court.

I. THE COMMISSION'S AND VERIZON'S ARGUMENTS REGARDING THE STANDARD OF REVIEW AND APPROPRIATE MANNER OF STATUTORY INTERPRETATION FALSELY CONTEND THAT AMBIGUITY EXISTS.

Windstream explained in its initial brief how the Kentucky Supreme Court has concluded as recently as 2009 that regulatory agencies are owed no deference on matters of statutory interpretation. To the extent that any cases cited by the Commission or Verizon are relevant, they, at best, stand for the proposition that when ambiguity exists or the statute is silent, regulatory agencies are owed deference. However, that is not the case here. For the reasons discussed in Windstream's initial brief and this reply brief, there is no statutory ambiguity or silence. The Kentucky General Assembly has explicitly spoken to the Commission's lack of jurisdiction over Windstream's intrastate switched access rates, so long as Windstream is in compliance with its alternative regulation plan, which it is.

The Commission also presents an internally contradictory picture of how statutory interpretation works. After arguing that the plain language of the statute takes precedence over all other means of interpretation, the Commission states that legislative intent is relevant when the statute is ambiguous, and then skips directly to discussing what it perceives to be the legislative intent, conveniently leaving out any analysis of how the statute is supposedly vague.

Even if this Court were to consider legislative intent to be relevant, it should not rely on the Commission's and Verizon's portrayal of such intent which mischaracterizes the legislative history references as including generically all "wholesale" rates. As Appellees are well aware, the partial recordings of the legislative proceedings on which they rely make clear that the type of wholesale rates being discussed are those paid between local exchange carriers and do not include intrastate switched access rates which pertain primarily to long distance carriers. Indeed, this is directly evidenced by the fact that the legislative discussions to which Appellees cite culminated in an amendment to the legislation to add KRS 278.542 (1)(a) and (b) which explicitly apply only to rates and agreements among local service providers.

As Windstream has explained to the circuit court, there are two types of wholesale services. The first type of wholesale rates are those paid by competitive local exchange carriers ("CLECs") to incumbent local exchange carriers ("ILECs"), such as Windstream (CLECs and ILECs collectively being "LECs"), for interconnecting to such ILECs, leasing portions of their networks, and obtaining their services for resale at a wholesale discount. *See* 47 U.S.C. §§ 251(b),(c), 252(d). The Federal Communications Commission ("FCC") has established rules for setting such prices that state regulatory commissions, such as the Commission, are charged by statute with implementing. *See* 47 U.S.C. § 252. Switched access rates, the rates that long distance carriers such as Verizon pay ILECs and CLECs for use of their local networks to carry long distance calls, are the second type of wholesale rates (with the Commission's jurisdiction

over Windstream's intrastate switched access rates being the subject of the instant matter). The distinction between these two types of wholesale rates has been well-settled law for more than 14 years and well-known to those who develop telecommunications policy. *See Competitive Telcoms. Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997). State (and federal) regulatory regimes regarding switched access services differ dramatically from those implementing 47 U.S.C. §§ 251 and 252. Verizon's complaint makes abundantly clear that it was brought through Verizon's role as an interexchange (long distance) carrier.[3] Contrary to the Commission's claim in its brief (Commission Brief at 17-18), today's competing local telecommunications networks provide more than one means by which long distance carriers can transmit their customers' calls.[4]

The General Assembly demonstrated its extensive knowledge of this interplay and of the competitive telephone industry by providing in KRS 278.542 that the Commission retains jurisdiction generally over the rates between and among LECs which recognizes the Commission's federal obligations noted above. Indeed, this fact is even memorialized in the legislative discussion cited by the Commission noting the General Assembly's consideration of "relationships between your telephone companies that have the large infrastructure and your competitive local exchange carriers . . . ." *See* Commission Brief at 13 (citing Rep. Brinkman, HB 337 Testimony, February 2, 2006)(emphasis added). However, what is utterly lacking in the legislative history cited by both the Commission and Verizon is any discussion regarding continued Commission jurisdiction over wholesale access rates paid by long distance carriers.

At the same time that it demonstrated in KRS 278.542 a detailed understanding of the Commission's continuing federal obligations with respect to wholesale rates between and among

[3] Verizon Petition at 1-3 (describing Verizon solely in terms of providing long distance service); ROA 11-13 Nevertheless, Verizon attempts weakly to discount its status as a long distance carrier (Verizon Brief at 15-16) and references a toll agreement which is irrelevant and nothing more than a red herring intended to try to contort Verizon's complaint as a long distance carrier within the parameters of KRS 278.542(1)(a) and (b)

[4] Ultimately, however, the accuracy of the Commission's claim is irrelevant to the jurisdictional considerations before this Court.

LECs, the General Assembly did not make any similar accommodation for the wholesale switched access rates paid by long distance companies. Instead, the General Assembly explicitly included intrastate switched access rates within the confines it placed on the commission's jurisdiction in KRS 278.543. Additionally, the General Assembly was careful to define and distinguish the nonbasic rates subject to KRS 278.544 from the basic local exchange rates subject to KRS 278.543. Unlike intrastate switched access rates which refer only to the rates long distance carriers pay to access a LEC's network, the terms "basic" and "nonbasic" are subject to varying definitions within the industry. To suggest, as Verizon and the Commission do, that the General Assembly did not intend to address wholesale rates defies all logic given that the General Assembly expressly referenced intrastate switched access rates paid by long distance carriers in KRS 278.543, did not reference switched access rates in KRS 278.542, and at the same time made appropriate accommodations for other wholesale rates between and among LECs in KRS 278.542. The General Assembly demonstrated a detailed understanding of the interplay between certain retail and wholesale rates and provided for appropriate Commission jurisdiction over each, and it is illogical to argue that the General Assembly simply did not intend to address wholesale rates in any fashion.[5]

II. THE STATUTE PLAINLY STATES THAT *ALL* WINDSTREAM RATES EXCEPT THOSE IN KRS 278.542 ARE OUTSIDE THE JURISDICTION OF THE COMMISSION.

Windstream's interpretation of the statute is plain and direct while that of the Verizon, and also the Commission, is tortured and defies common sense. As Windstream has previously

[5] Windstream agrees with the Commission (*see* Commission Brief at 6) that this case is one of first impression and will have long lasting effects A decision that ignores the General Assembly's clear instruction in KRS 278.542-278.544 threatens to roll back the General Assembly's efforts to pave the way for electing carriers to be regulated by the marketplace and not by historical administrative regulation The General Assembly crafted the provisions after extensive review of the competitive status of the telecommunications industry and an acknowledgment that the intrastate switched access rates that were to be capped and removed from Commission jurisdiction were both: (a) already approved as just and reasonable by the Commission; and (b) already permitting long distance carriers such as Verizon to participate in a thriving and intensely competitive long distance market

discussed, there is simply no ambiguity in KRS 278.543(6) which states, in pertinent part, "An electing utility's rates, charges, earnings, and revenues shall be deemed just and reasonable under KRS 278.030 and administrative regulations promulgated thereunder upon election." (emphasis added). There is no parsing between "wholesale" intrastate switched access rates and "retail" basic local exchange rates as Verizon would have this Court believe. Indeed, there is no reason for the General Assembly to have explicitly included intrastate switched access rates in KRS 278.543 if it intended, as Verizon argues, not to address such wholesale rates therein. Similarly, there is no ambiguity regarding the meaning of "just and reasonable."

Although the quoted language from KRS 278.543(6) is sufficiently clear, the General Assembly went even further. KRS 278.543(6) specifically exempts an electing utility such as Windstream from, among other statutory provisions, KRS 278.260 ("Jurisdiction over complaints as to rates or service – Investigations – Hearing) and 278 270("Orders by commission as to rates") with the exception of the Commission's authority under KRS 278.542(1)(a) and (b), neither containing any relevant provision.[6] Yet, Verizon's brief fails to address that KRS 278.260 is the sole basis cited in its complaint to the Commission as the basis for its claims.

Further, KRS 278.543(5) prohibits Commission proceedings regarding electing carriers' (such as Windstream's) rates unless expressly authorized: "the commission shall not have jurisdiction to set, investigate, or determine rates as to any electing telephony utility other than as set forth in this section . . ." There is no express authority for the Commission to conduct any examination of Windstream's intrastate switched access rates, so long as Windstream continues

[6] KRS 278.542(1)(a) and (b), which state, among other things, that the statutory alternative regulation provisions do not affect the Commission's jurisdiction over agreements or arrangements between ILECs and between ILECs (KRS 278.542(1)(a) and other local exchange carriers (KRS 278.542(1)(b)) are inapplicable here. Verizon brought its Petition not as a LEC, but solely as an interexchange (or long distance) carrier. (Verizon Petition p. 2.) Therefore, the exception in KRS 278.542(1)(a) and (b) does not apply to this case. Generally, KRS 278.542 otherwise provides that an election of alternative regulation does not limit the Commission's jurisdiction over certain consumer complaints, none of which is the subject of Verizon's Petition.

to comply with its alternative regulation plan. Even if this Court accepts Appellee's tortured statutory theories that KRS 278.543(6) somehow does not negate any remaining administrative authority over Windstream's intrastate switched access rates, it is still difficult to conclude that continuing authority is actually authorized rather than not explicitly negated by KRS 278.543(6).

The Commission and Verizon present convoluted reasons for why the plain language of the statute should be ignored. For example, Verizon asserts that the Commission's jurisdiction over Windstream's intrastate switched access rates should continue because such rates are, in Verizon's opinion, inordinately higher than the largest carrier in Kentucky. Verizon Brief at 19. Although Verizon later acknowledges that such assertions are irrelevant to the issue of statutory construction, the record reflects that Windstream's applicable rates were previously approved as reasonable by the Commission, are lower than all other ILECs in Kentucky, and permit Verizon to compete in an intensely competitive long distance market (this latter point acknowledged by Verizon in its Petition). Verizon Petition at 9; ROA 19.

Moreover, the Appellees rely on definitions of types of "basic local exchange service" and "non-basic local exchange service" generally.[7] Under their reasoning, because no other sort of telecommunications service was defined, no other telecommunications service could be affected by KRS 278.543(6). This notion is illogical. As noted above, the General Assembly defined such terms because the distinction between "basic" and "non-basic" local exchange service is pertinent in KRS 278.542(1)(c), (l), and (m) as well as KRS 278.543(3), (5), and (9). There is no need to define the entire class of telecommunications service in KRS 278.543 because the Commission's jurisdiction is completely confined by KRS 278.543(5), among other

[7] The Commission implies that the statute includes a definition of "local exchange service," generally (Commission Brief at 9), but no such definition exists. The quoted language from the Commission's citation is part of the definition of "basic local exchange service."

provisions, but for the certain exceptions listed in KRS 278.542 -- none of which provide for continuing jurisdiction over intrastate switched access rates paid by long distance companies.

As Windstream has previously discussed, certain provisions of KRS 278.543 remind those interpreting the statute that KRS 278.543 pertains not only to "basic local exchange service" and "non-basic local exchange service," but also to intrastate switched access, such as KRS 278.543(3) ("tariffs for basic local exchange services and intrastate switched-access services") and KRS 278.543(4) ("An electing utility's rates for 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."). Such provisions provide further support for the conclusion that the general scope of the applicability of KRS 278.543 includes intrastate switched access and that, therefore, any provision of the section that does not distinguish within the categories of service to which KRS 278.543 applies clearly applies to all such services. If intrastate switched access rates were not part of the price cap "agreement," as the Commission claims they are not, then provisions relating to intrastate switched access tariffs and rates would be completely unnecessary.

Finally, Verizon's attempts to gloss over the infirmities in its statutory interpretation argument with citations to judicial opinions regarding broad Commission jurisdiction over intrastate switched access rates (Verizon Brief at 2-3) are off the mark. The most recent of the cases cited by Verizon was decided almost five years before the General Assembly enacted KRS 278.541, et. seq. Such legislative provisions, combined with Windstream's election of the alternative regulation contained therein, fundamentally changed the Commission's jurisdiction over Windstream's intrastate switched access rates.

CONCLUSION

The plain language of KRS 278.541, et. seq. is clear – Windstream's existing intrastate switched access rates previously approved by the Commission remain just and reasonable so long as Windstream complies with its alternative regulation plan, which it has. Proceedings to subject Windstream's intrastate switched rates to further administrative scrutiny are explicitly and implicitly prohibited. Appellees' arguments are intended to distract from and ignore the plain language of the statute and should therefore be rejected.

Respectfully Submitted,

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