

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Application of Windstream Communications, )  
Inc. for a Declaratory Order Affirming that )  
The Interconnection Regimes under KRS 278.530 ) Case No. 2015-00283  
and 47 U.S.C. § 251 are Technology Neutral )

**VERIZON'S SUPPLEMENTAL BRIEF IN OPPOSITION TO  
WINDSTREAM'S REQUEST FOR DECLARTORY ORDER**

In compliance with the Commission's Order entered in this case on August 6, 2018, Intervenor MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services (Verizon) supplements its initial brief by responding to the issues raised in the brief of Windstream Communications, Inc. (Windstream), the successor party to Competitive Carriers of the South, Inc. (CompSouth), and provides updates on relevant, federal law.

**I. THE COMMISSION SHOULD NOT ISSUE A DECLARATORY ORDER**

The Commission should not issue the declaratory order Windstream seeks because there is no practical need for such an order and no legal basis for granting one under 807 KAR 5:001, Section 19.

A. A Declaratory Order Would Serve No Practical Purpose

This case initially was brought by an industry association – CompSouth – that sought a declaratory order that among other things would provide that competitive local exchange carriers (CLECs) are entitled to exchange voice traffic in Internet Protocol (IP VoIP) with an incumbent local exchange carrier (ILEC) on rates, terms and conditions established by the Commission. Earlier this year, the Commission granted CompSouth's motion to substitute Windstream as a party, so the case is now being prosecuted by Windstream on its own behalf, with no other CLECs joining in its request.

Windstream entities<sup>1</sup> already have interconnection agreements with BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (AT&T Kentucky) that permit the parties to exchange traffic.<sup>2</sup> The agreements are in “evergreen” status,<sup>3</sup> which means they remain in effect until terminated by one of the parties. Windstream has not requested IP VoIP interconnection with AT&T Kentucky,<sup>4</sup> nor has it sought to negotiate a new interconnection agreement.<sup>5</sup> Windstream has not alleged that it cannot exchange retail Voice over Internet Protocol (VoIP) traffic with AT&T Kentucky or any other ILEC in the state. That is not surprising, because it is common in the industry for VoIP traffic to be converted to traditional, Time Division Multiplexing (TDM) protocol so it can be exchanged with another carrier.<sup>6</sup>

Windstream complains that it should not have to waste its resources in interconnection agreement negotiations because ILECs will argue that the Commission lacks jurisdiction to address whether it may obtain IP VoIP interconnection under Section 252.<sup>7</sup> But AT&T Kentucky has already stated that if Windstream were to request IP VoIP interconnection in a Section 252 arbitration, AT&T Kentucky would *not* dispute the Commission’s jurisdiction to address that issue.<sup>8</sup> And Windstream acknowledges that even if the Commission were to grant the requested declaratory order, Windstream still would need to proceed with Section 252 arbitration and attempt

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<sup>1</sup> Windstream is not listed on the Commission web site as a local exchange carrier, so it appears that it could not be a substantially interested party. The Commission’s web site lists several Windstream entities as CLECs. For purposes of this brief, Verizon will use the term Windstream to refer collectively to those entities.

<sup>2</sup> AT&T Kentucky’s Initial Brief at 3; Direct Testimony of Scott McPhee (McPhee Direct) at 6; Windstream’s Brief at 47.

<sup>3</sup> *Id.*

<sup>4</sup> AT&T Kentucky’s Initial Brief at 3-4; McPhee Direct at 6.

<sup>5</sup> AT&T Kentucky’s Initial Brief at 3.

<sup>6</sup> Direct Testimony of Paul Vasington (Vasington Direct) at 5.

<sup>7</sup> Windstream’s Brief at 54-55. Windstream also posits the existence of an “IP arrangement” between AT&T Kentucky and AT&T Corporation, but offers no proof that such an arrangement exists. *See* Windstream’s Brief at 55. AT&T Kentucky denies that it has entered into any IP VoIP agreements. *See* AT&T Kentucky’s Supplemental Responses to CompSouth’s Information Requests, Responses 3-5.

<sup>8</sup> AT&T Kentucky’s Initial Brief at 9.

to make a case that it should obtain IP VoIP interconnection.<sup>9</sup> Divorcing the abstract legal question Windstream poses in this proceeding from a review of whether an actual CLEC is entitled to IP VoIP interconnection under an actual set of circumstances will produce no administrative efficiency, and only will prevent the Commission from considering facts relevant to understanding the ramifications of its legal determination.

Windstream also worries that a CLEC might lose an arbitration case because the outcome “could be a function of numerous factors.”<sup>10</sup> While it is indeed true that there are many factual and policy reasons why the Commission should deny Windstream’s request if the merits were reached,<sup>11</sup> Windstream’s lack of confidence is all the more reason not to indulge its request that the Commission answer its question in isolation. Moreover, Windstream’s recognition that the Commission could reject a request for IP VoIP interconnection in an arbitration for factual reasons – and thus without deciding whether IP VoIP interconnection is required in the abstract – is a powerful reason for denying the request for declaratory relief. The Commission should not risk giving an erroneous answer that would be subject to reversal when it may never have to answer the question at all. And Windstream’s assertion that a declaratory proceeding “throws open the opportunity to participate to every utility in affected categories” so it can apply to the entire industry<sup>12</sup> rings particularly hollow now that Windstream is the *only* company seeking relief in this proceeding.

B. The Commission May Not Issue the Declaratory Order Windstream Requests

Verizon, AT&T Kentucky and Cincinnati Bell Telephone Company LLC (CBT) in their initial briefs explained that the Commission may not issue a declaratory order based on KRS

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<sup>9</sup> Windstream’s Brief at 58.

<sup>10</sup> Windstream’s Brief at 55.

<sup>11</sup> See Verizon’s Initial Brief at 6-7; Vasington Direct at 10-12.

<sup>12</sup> See Windstream’s Brief at 56.

278.530 because Windstream already has interconnection agreements with AT&T Kentucky and has established interconnection under those agreements.<sup>13</sup> Windstream attempts to respond by arguing that it does not have IP VoIP interconnection agreements with Kentucky ILECs.<sup>14</sup> But Windstream does not claim that it cannot exchange VoIP traffic under its current interconnection agreements. The only issue it raises is *how* the traffic should be exchanged (with or without protocol conversion), not whether it can be or is in fact being exchanged today. Windstream thus fails to present a state law issue that could provide the basis for a declaratory order, because state law only requires a carrier to interconnect upon request in order to exchange traffic; it does not entitle a requesting carrier to exchange traffic in any particular way. And because 807 KAR 5:001, Section 19 does not authorize the Commission to interpret federal law,<sup>15</sup> there is no applicable law for the Commission to construe in this case.

## **II. WINDSTREAM'S CLAIM SHOULD BE REJECTED AS A MATTER OF LAW AND PUBLIC POLICY**

In its initial brief, Verizon explained why the Commission may not require IP VoIP interconnection under federal law, and why such a requirement would conflict with public policy. Windstream failed in its brief to rebut Verizon's legal arguments and did not even address the public policy issues raised by Verizon witness Paul Vasington.

### **A. The Commission May Not Require IP VoIP Interconnection**

In its initial brief, Verizon explained that the FCC has directed providers to negotiate IP VoIP interconnection agreements in good faith pending its decision on whether such interconnection is required under the federal Communications Act.<sup>16</sup> Since then, the FCC has

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<sup>13</sup> See Verizon's Initial Brief at 4; AT&T Kentucky's Initial Brief at 15-18; CBT's Initial Brief at 5-8.

<sup>14</sup> Windstream's Brief at 61.

<sup>15</sup> See Verizon's Initial Brief at 4; AT&T Kentucky's Initial Brief at 4-15; CBT's Initial Brief at 8-11.

<sup>16</sup> Verizon's Initial Brief at 4-5.

repeatedly stated that the IP VoIP interconnection issue remains before it,<sup>17</sup> and it has not changed that position since the initial briefs were filed in this case. Windstream does not dispute this point. As a threshold matter, therefore, the Commission should deny Windstream’s request in compliance with the FCC’s direction that providers negotiate IP VoIP interconnection in good faith pending the FCC’s resolution of this issue. In the meantime, Windstream may continue to exchange retail VoIP traffic with AT&T Kentucky and other ILECs via protocol conversion. If Windstream wishes to exchange VoIP traffic in IP format, it should comply with the FCC’s direction and request commercial negotiations for that purpose.

Verizon explained in its initial brief that under federal law a CLEC does not have a right to obtain IP VoIP interconnection in a Section 252 interconnection agreement. That is so because the duty in Section 251(c)(2) is limited to interconnection with a “requesting telecommunications carrier” that is “for the transmission and routing of telephone exchange service and exchange access” – that is, for telecommunications services.<sup>18</sup> And because retail VoIP services are information services, not telecommunications services, ILECs are not required to provide IP VoIP interconnection under Section 251(c)(2). Windstream does not offer any textual argument that Section 251(c)(2) requires the exchange of information services traffic, nor does it contend that the FCC has ever interpreted Section 251(c)(2) to require the exchange of such traffic. Instead, it argues (i) that FCC rulings on other subsections of Section 251, or on Section 251 in general, support Windstream’s position; and (ii) that VoIP traffic is not an information service. Neither argument holds water.

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<sup>17</sup> *Id.*

<sup>18</sup> 47 U.S.C. § 151(c)(2).

Windstream mistakenly relies on the FCC's discussion of subsections 251(a) and 251(b) in the *ICC Reform Order*,<sup>19</sup> and its statement that Section 251 is technology neutral, for the proposition that Section 251 applies to VoIP traffic.<sup>20</sup> Windstream ignores the open question the FCC has raised "on whether the provisions of section 251 interconnection are . . . service neutral," or instead whether "they vary with the particular services (e.g., voice vs. data, telecommunications services vs. information services) being exchanged."<sup>21</sup> It also fails to note that the FCC "recognize[d] that the scope of the interconnection requirements of sections 251(a)(1) and 251(c)(2) are tied to factual circumstances or otherwise circumscribed in various ways."<sup>22</sup> The FCC's subsequent, repeated statements that it has not decided the IP VoIP interconnection issue underscore the point: Windstream misleads the Commission and misstates the law when it contends that the FCC has resolved the issue.

In arguing that VoIP is a telecommunications service, Windstream fails to call the Commission's attention to the extensive federal judicial precedent that contradicts its position. To date, at least five federal district courts have found that VoIP services are information services.<sup>23</sup>

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<sup>19</sup> See Windstream's Brief at 38-42 (citing Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663 (2011) ("*ICC Reform Order*"), *petitions for review denied, In re FCC 11-161*, Nos. 11-9900 *et al.*, 2014 WL 2142106 (10th Cir. May 23, 2014).

<sup>20</sup> See Windstream's Brief at 38-39.

<sup>21</sup> *ICC Reform Order* ¶ 1381.

<sup>22</sup> *Id.* Windstream also attempts to confuse matters by referring to the FCC's "IP-in-the-Middle" Order, which ruled that a call originating and terminating in TDM format will not be treated as a VoIP call just because an intermediate carrier transmits it in IP format. Windstream's Brief at 39 & n.79 (citing Order, *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephone Services are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004). As noted in Verizon's Initial Brief, retail VoIP service offers customers the capability of a *net* protocol conversion, i.e., one that originates in one format (IP or TDM) and terminates in the other. The FCC's "IP-in-the-Middle" Order thus has no bearing here.

<sup>23</sup> See *PAETEC Commc'ns Inc. v. CommPartners*, 2010 U.S. Dist. Lexis 51926, \*2 (D.D.C. 2010); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1081-83 (E.D. Mo. 2006), *aff'd on other grounds*, 530 F.3d 676 (8th Cir. 2008), *cert. denied*, 129 S.Ct. 971 (2009); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 999-1001 (D. Minn. 2003), *aff'd on other grounds*, 394 F.3d 568 (8th Cir. 2004); *Vonage Holdings Corp. v. New York State Pub. Serv. Comm'n*, No. 04 CIV. 4306 (DFE), 2004 WL 3398572, at \*1 (S.D.N.Y. July 16, 2004) (citing solely to the *Vonage district court opinion* as authority for finding that Vonage was likely to succeed on the merits of its preemption claim); *Charter Advanced Servs. (MN), LLC v. Lange*, 259 F. Supp. 3d 980 (D. Minn. 2017) (concluding that Charter's VoIP service was an information service "because inherent in its operation is the ability to engage in protocol conversion").

No federal court has reached the opposite conclusion. While ignoring these cases, Windstream relies primarily on a resolution by the California Public Utilities Commission that arose out of its imposition of a merger condition.<sup>24</sup> That resolution did not address the federal case law finding that VoIP is an information service and relied heavily on the FCC's Open Internet Order,<sup>25</sup> which the FCC has since reversed, so the resolution is of no precedential value. Thus, Windstream has the law wrong. It has no answer to the relevant federal authority, which overwhelmingly demonstrates that VoIP is an information service – and therefore not subject to Section 251(c)(2).

B. The Requested Declaratory Order Would Conflict with Sound Public Policy

As outlined in Verizon's initial brief and the Direct Testimony of Paul Vasington, IP VoIP interconnection agreements are established most effectively through commercial negotiations because they provide flexibility needed to arrange network configurations, establish interconnection points, and coordinate the migration of traffic from TDM to IP VoIP interconnection.<sup>26</sup> Imposing TDM interconnection rules on IP VoIP interconnection through the Section 252 arbitration regime could undermine the benefits of these commercial arrangements and negotiations and undo the efficiencies created by the new technology. Windstream does not even address these points,<sup>27</sup> avoiding discussion of the unintended consequences of its requested relief. The serious policy concerns raised by Mr. Vasington provide yet another reason for the Commission to deny Windstream's Application.

For the foregoing reasons, Windstream's request for a declaratory order should be denied.

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<sup>24</sup> Resolution T-17546 (Cal. P.U.C. Mar. 23, 2017).

<sup>25</sup> See Report and Order on Remand, Declaratory Ruling and Order, *In the Matter of Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015). The FCC restored the classification of broadband Internet access service as an information services earlier this year. See Declaratory Ruling, Report and Order, and Order, *In re Restoring Internet Freedom*, 33 FCC Rcd 311 (2018).

<sup>26</sup> Vasington Direct at 10; Verizon's Initial Brief at 6-7.

<sup>27</sup> Vasington Direct at 11-12; Verizon's Initial Brief at 7.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the same document being sent for filing in paper medium with the Commission, that the electronic filing was transmitted to the Commission on September 5, 2018, and that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

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