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DEC 23 2008

PUBLIC SERVICE  
COMMISSION



December 23, 2008

**VIA HAND DELIVERY**

Hon. Stephanie Stumbo  
Executive Director  
Public Service Commission  
211 Sower Blvd.  
Frankfort, KY 40601

**Re: *Brandenburg Telephone Company, et. al. v. Windstream Kentucky East, LLC,*  
Case No. 2007-00004**

Dear Ms. Stumbo:

Enclosed for filing in the above-referenced case, please find one original and eleven (11) copies of RLEC's Response to Windstream Kentucky East, LLC's Motion to Dismiss. Please file-stamp one copy, and return it to our courier.

Thank you, and if you have any questions, please call.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Depp".

Edward T. Depp

MMH/lb  
Enclosures

cc: Eileen Bodamer  
Steven E. Watkins  
John E. Selent, Esq.

**COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

Brandenburg Telephone Company; )  
Duo County Telephone Cooperative )  
Corporation, Inc.; Highland Telephone )  
Cooperative, Inc.; Mountain Rural )  
Telephone Cooperative Corporation, )  
Inc.; North Central Telephone )  
Cooperative Corporation; South )  
Central Rural Telephone Cooperative )  
Corporation, Inc.; and West Kentucky )  
Rural Telephone Cooperative )  
Corporation, Inc. )  
)  
Complainants )  
)  
v. )  
)  
Windstream Kentucky East, Inc. )  
)  
Defendant. )  
)

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Case No. 2007-00004

**RESPONSE TO MOTION TO DISMISS**

Brandenburg Telephone Company ("Brandenburg"), Duo County Telephone Cooperative Corporation, Inc. ("Duo County"), Highland Telephone Cooperative, Inc. ("Highland"), Mountain Rural Telephone Cooperative Corporation, Inc. ("Mountain Rural"), North Central Telephone Cooperative Corporation ("North Central"), South Central Rural Telephone Cooperative Corporation, Inc. ("South Central"), and West Kentucky Rural Telephone Cooperative Corporation, Inc. ("West Kentucky") (collectively, the "RLECs"), by counsel, for their response in opposition to the Motion to Dismiss filed by Windstream Kentucky East, LLC ("Defendant"), hereby state as follows.

## INTRODUCTION

On December 1, 2006, Windstream issued and filed revisions to its general customer services tariff that purported to set forth rates for local traffic that Windstream receives from one carrier and terminates to another carrier. This proceeding, the Commission has explained, "will determine whether such rates, if deemed reasonable, can be placed into a tariff or, as argued by the RLECs, if such arrangements should be individually negotiated between carriers, placed into written agreements, and then filed for review and approval by the Commission." (November 13, 2007 Order in Case 2007-00004, at 4.)

On December 8, 2008 Windstream filed a motion to dismiss premised on the argument that the current dispute between the parties is moot. This is inaccurate, and the Commission should deny Windstream's motion to dismiss.

Dismissal for mootness is only appropriate where "no purpose is served" by continuing the examination. (*See* March 31, 2008 Order in Case No. 2007-00421, at 1.) For example, the Commission's examination of a proposed rate filed by Gasco Distribution Systems, Inc. was found to be moot only after the initial rate was suspended and Gasco substituted new rates. (*Id.*) Similarly, a finding of mootness was justified when the Commission accepted the parties' Settlement Agreement in which the parties explicitly addressed the proper rate for a disputed surcharge. (*See* Nov. 1, 2007 Order in Case No. 2007-00154.)

These scenarios, in which the purposes of the parties' disputes were rendered null by later action by the Commission and the parties themselves, are not similar to the scenario in the case before us. Here, there are three reasons why a "purpose is served" by continuance of this action.

First, the charges involved remain an inappropriate subject for a tariff. In addition, even if the tariff was appropriate in these circumstances, its proposed rates are baseless, and its terms are

ambiguous and unnecessarily onerous. So long as the tariff remains in place, the RLECs as the purported targets of that tariff have standing to challenge it.

Second, although Windstream argues the tariff "applies only to those parties without an agreement with Windstream" and could therefore be rendered moot, the mere existence of the tariff causes at least two continuing injuries. The tariff serves as a disincentive to third parties who might otherwise approach the RLECs for an interconnection agreement, because third-parties can now simply route traffic through Windstream without such an agreement. In addition, even if all the parties to the present action reached agreements, future negotiations will be hampered if Windstream can hold this inappropriate tariff over the head of any RLEC that wishes to obtain more favorable terms.

Third, even if the various continuing injuries were somehow resolved, Windstream refuses to commit to waiving charges for companies billed under the inappropriate tariff.

Accordingly, the issues raised by the RLECs' Complaint are not moot, and Windstream's motion to dismiss should be denied.

## **ARGUMENT AND ANALYSIS**

### **I. The Charges Involved Are An Inappropriate Subject For A Tariff, And The Tariff Terms Are Improper.**

Nothing in Windstream's Motion to Dismiss addresses the central concern raised by the RLECs' Complaint: that Windstream's "Transit Traffic Service" is an inappropriate subject for a tariff, and that the filed tariff suffers from fatal substantive flaws. The service description and rate classifications in the tariff are vague and ambiguous. To the extent the rates and terms are not ambiguous, they are unnecessarily onerous upon the RLECs

Windstream's position is that the Commission does not need to determine if the rates are reasonable or justified, or if any of the tariff's other failings are problematic. Instead, Windstream

argues for dismissal largely because the RLECs have attempted to mitigate damages by routing around Windstream or are negotiating an appropriate agreement with Windstream. This argument again ignores the Commission's November 13, 2007 Order, in which the Commission stated that if "Windstream East wishes to pursue negotiations with the RLECs to establish agreements regarding transit service costs, **the company can voluntarily withdraw the tariff before the Commission renders a decision** on the merits of the RLECs' complaint." (Nov. 13, 2007 Order in Case No. 2007-00004, at 5 (emphasis added).) In other words, Windstream's pursuit of these agreements cannot be a grounds for dismissal, and actually supports the RLECs' claim that the tariff should not even be in place. So long as the tariff remains, the RLECs as the purported targets of that tariff may challenge it as a matter of right.

Pursuant to KRS 278.040, the Commission has jurisdiction "over the regulation of rates and service of utilities." This includes the power to "hold a hearing concerning the reasonableness of" new rates filed by a utility. (KRS 278.190(1).) Finally, KRS 278.260 vests the Commission with jurisdiction over complaints claiming "that any rate in which the complainant is directly interested is unreasonable or unjustly discriminatory."

Nothing in Windstream's motion resolves the substance of the Complaint or explains why these basic jurisdictional provisions do not control the case before us. The RLECs believe the filed tariff is inappropriate and unreasonable, and the Commission has jurisdiction over these concerns. In light of the Federal Communications Commission's "stated desire to move away from tariffs and toward negotiation and arbitration in order to facilitate market competition,"<sup>1</sup> it would be very strange to refuse to even examine a challenged tariff on the grounds that some of the parties have taken temporary measures to reduce their injuries.

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<sup>1</sup> *Iowa Network Services, Inc. v. Qwest Corp.*, 466 F.3d 1091, 1098 (8th Cir. 2006) (numerous internal citations omitted).

These concerns all remain unaddressed by Windstream. Therefore a "purpose is served" by continuing these proceedings, the Complaint is not moot, and Windstream's motion to dismiss should be denied.

## **II. The Tariff Causes Continuing Injury To The RLECs Regardless Of The Existence Of Additional Agreements.**

Although Windstream's Motion to Dismiss argues that the current action is moot, the mere existence of the tariff in question causes at least two continuing injuries to the RLECs.

First, if Windstream's inappropriate tariff is left in place, it will serve as a disincentive to third parties who might otherwise seek interconnection agreements with the RLECs. Rather than negotiate with the RLECs for such agreements, as intended by the law, third parties may opt for the predictability of Windstream's filed tariff. This would have the direct effect of reducing the RLECs' revenue by making the RLECs unable to assess appropriate reciprocal compensation against originating third party carriers. Reciprocal compensation is to be determined by negotiated agreement rather than by tariff.<sup>2</sup> The existence of Windstream's inappropriate tariff, however, effectively robs the RLECs of the practical ability to recover reciprocal compensation from third parties transiting Windstream's network.

Second, even if all the parties to the present action reached separate agreements with Windstream and thus avoided paying any charges pursuant to the filed tariff, the fact that the tariff remains in place will affect all future negotiations between the parties. Windstream, with full knowledge that the RLECs object to the tariff, will have an inordinate amount of leverage in future

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<sup>2</sup> Section 251 (b)(5) of the Telecommunications Act of 1996 plainly states that local exchange carriers have a duty to "establish reciprocal compensation *arrangements*." 47 U.S.C. 251(b) (emphasis added). Incumbent local exchange carriers also have a "duty to *negotiate* in good faith . . . the particular terms and conditions of *agreements* to fulfill" its duty to establish reciprocal compensation agreements. 47 U.S.C. 251(c)(1) (emphasis added). This language is unequivocal: reciprocal compensation is to be determined by agreements that are negotiated in good faith between the parties.

renegotiations of those agreements simply by threatening to cancel the agreement altogether and default to the inappropriate tariff.

Windstream's tariff, whether or not the RLECs are currently paying charges according to its terms, has a continuous and negative impact on the RLECs, both on their current abilities to negotiate agreements with third parties and their prospective abilities to negotiate agreements with Windstream. These injuries indicate that a "purpose is served" by continuing these proceedings to determine "whether such rates, if deemed reasonable, can be placed into a tariff or, as argued by the RLECs, if such arrangements should be individually negotiated between carriers, placed into written agreements, and then filed for review and approval by the Commission." (November 13, 2007 Order in Case 2007-00004, at 4.) Therefore, the Complaint is not moot and Windstream's motion to dismiss should be denied.

### **III. Windstream Refuses To Commit To Waiving Charges For Companies Billed Under the Inappropriate Tariff.**

Despite Windstream's arguments that the current dispute is moot, its motion does nothing to resolve the improper charges that have already been incurred pursuant to its inappropriate tariff. Windstream notes merely that "[c]ertain of the identified parties are discussing any outstanding balances that may be owed for the prior use of Windstream's network to transit traffic." (Windstream's Mot. to Dismiss at 2, n. 1.) This admission alone proves a "purpose is served" by continuing these proceedings and refutes Windstream's claim that the Complaint is moot.

Windstream's tariff is inappropriate, unreasonable, and filed improperly, and the RLECs have the right to challenge any improper charges incurred under the tariff. Windstream acknowledges that there are "outstanding balances," but apparently does not believe such claims are relevant to the question of whether the dispute is moot. The RLECs disagree. These outstanding balances represent improper charges that were brought against the RLECs pursuant to an inappropriate tariff; without a

guaranteed waiver of these charges, the damage already done by the tariff will remain unaddressed unless this action is permitted to continue.

Windstream's consistent refusal to commit to waiving charges for companies billed under the inappropriate tariff proves a "purpose is served" by continuing these proceedings. Therefore, the Complaint is not moot, even if the RLECs stop transiting traffic through Windstream's network and even if the tariff's presence causes no continuing harm. Windstream's motion to dismiss should be denied.

### **CONCLUSION**

The Commission has clearly-defined jurisdiction to hear the RLECs' complaint and determine "whether such rates, if deemed reasonable, can be placed into a tariff or, as argued by the RLECs, if such arrangements should be individually negotiated between carriers, placed into written agreements, and then filed for review and approval by the Commission." (November 13, 2007 Order in Case 2007-00004, at 4.) The tariff's continued existence damages the RLECs' current abilities to negotiate agreements with third parties and their prospective abilities to negotiate agreements with Windstream. In addition, Windstream acknowledges that there is a dispute over "outstanding balances" related to the tariffs yet refuses to waive the improper charges.

For all these reasons, a "purpose is served" by the current proceedings and the RLECs' Complaint has not been rendered moot either by action of the Commission or the parties. Therefore, the RLECs respectfully request that this Commission deny Windstream's motion to dismiss.



Respectfully submitted,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

---

John E. Seibert  
Edward T. Depp  
Holly C. Wallace

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**COUNSEL TO THE RLECs**

**CERTIFICATE OF SERVICE**

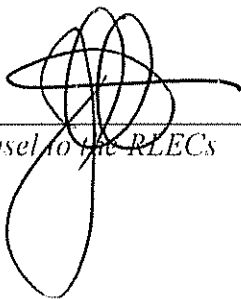
23<sup>rd</sup> I hereby certify that a copy of the foregoing was served by first-class U.S. Mail on this day of December, 2008, to the following individuals:

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