



Edward T. Depp
502-540-2347
tip.depp@dinslaw.com

January 14, 2009

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Via Hand Delivery

Hon. Jeff Derouen, Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40601

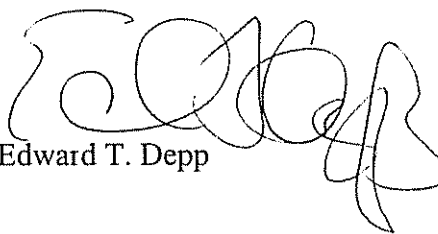
Re: *In the Matter of: Brandenburg Telephone Company, et al. v. Windstream
Kentucky East, Inc., et al., Case No. 2007-00004.*

Dear Executive Director Derouen:

I have enclosed for filing in the above-styled case the original and eleven (11) copies of the RLECs' surreply to the motion to dismiss of Windstream Kentucky East, Inc. This surreply is submitted by 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.

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

Sincerely,



Edward T. Depp

Enclosure

cc: All Parties of Record (w/enclosure)
John E. Selent, Esq. (without enclosure)
Holly C. Wallace, Esq. (without enclosure)

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INTRODUCTION

Windstream premised its Motion to Dismiss on the alleged mootness of the entire dispute. It now advances a ripeness argument in an attempt to deny some of the RLECs' ongoing injuries. Both arguments are refuted by the facts and the law, and Windstream continues to fail to address the substance of the RLECs' central arguments.

Windstream's response to the RLECs' central claim that the charges involved are an inappropriate subject for a tariff is relegated to a single footnote, which contains no authority. The RLECs stand by their earlier arguments and the cited law on this point.¹

Windstream also does not refute the RLECs' claim that Windstream has refused to waive improper charges brought under the inappropriate tariff. This omission is particularly notable because Windstream's central mootness argument is that "no purpose is served by continuing the Complaint as *none of the claimed injuries have in fact occurred.*" (Windstream's Reply at 7.)

Finally, Windstream dismisses as "hypothetical 'what ifs'" the RLECs' concerns that the tariff corrupts the negotiation processes between the RLECs and third parties and between the RLECs and Windstream. (Reply of Def. at 1 ("Windstream's Reply").) In fact, these injuries are occurring right now. Windstream has corrupted the negotiation process with its tariff, and now attempts to block all remedy by claiming the RLECs have no choice but to engage in that corrupted process or acquiesce to the improper tariff. This circular reasoning is divorced from reality.

In short, Windstream's Reply fails to refute any of the arguments raised by the RLECs' response to its motion to dismiss. The charges in question are an inappropriate subject for a tariff, the tariff's continued existence injures the RLECs' abilities to operate and negotiate, both presently

¹ Windstream also makes much of its adoption of a price regulation plan and its status as an "alternatively regulated company." (Windstream's Reply at 8-9.) The RLECs would simply note that this status is subject to KRS 278.542 (1)(k), which states that "[n]othing in [the electing utility provisions] shall affect the commission's jurisdiction with respect to: . . . (k) Tariffs, except as expressly provided for in [the electing utility provisions]."

and prospectively, and outstanding balances resulting from the inappropriate tariff remain unresolved. For these reasons, a purpose is served by the current proceedings, and Windstream's motion to dismiss should be denied.

ARGUMENT AND ANALYSIS

I. Windstream's Reply Does Not Refute The Inappropriateness Of Its Tariff.

Windstream's Reply does little to address the RLECs' main concern--that the "Transit Traffic Service" is an inappropriate subject for a tariff--except to suggest without authority that other companies have similar tariffs in Tennessee and South Carolina. Even assuming Windstream's characterization of these tariffs are accurate, Tennessee and South Carolina are not Kentucky.

This Commission has written that "[t]he Telecom Act of 1996 ("Telecom Act") clearly intends that *reciprocal compensation arrangements apply to 'local' traffic exchanged between carriers.*" (Dec. 22, 2006 Order in Cases No. 2006-00215, 2006-00217, 2006-00218, 2006-00220, 2006-00252, 2006-00255, 2006-00288, 2006-00292, 2006-00294, 2006-00296, 2006-00298, 2006-00300, 2006 Ky. PUC LEXIS 1050 at *6-7 (emphasis added).)² Tariffs are inappropriate in this context, and Windstream's tariff is an attempt to circumvent both law and public policy favoring reciprocal agreements. Although Windstream complains that the RLECs' use of tariffs for certain access related charges is not "equitable," the RLECs' tariffs are irrelevant in this case. (Windstream's Reply at 4.) Long distance exchange access is explicitly referenced in the Code of Federal Regulations as traffic not subject to reciprocal compensation. *See* 47 C.F.R. 51.701 (b)(1).

² *See also, e.g.*, 47 C.F.R. 51.703 (requiring LECs to "establish reciprocal compensation arrangements for transport and termination of telecommunications traffic"); 47 C.F.R. 51.701 (b)(1) (defining "telecommunications traffic" subject to reciprocal compensation as, in part, "traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access"); 47 U.S.C. 251 (c)(1) (imposing "duty to negotiate in good faith" reciprocal compensation agreements).

While Windstream may not feel this distinction between local and long distance traffic is "equitable," it is the law.

Windstream has not addressed the inappropriateness of tariffing reciprocal compensation arrangements in any meaningful way, yet it requests dismissal. So long as this tariff remains, a purpose is served by continuing these proceedings. This position is reinforced by this Commission's previous order in this matter, which explained that the purpose of this action is to "determine whether such rates, if deemed reasonable, can be placed into a tariff or . . . if such arrangements should be individually negotiated." (Nov. 13, 2007 Order in Case 2007-00004, at 4.) This determination has not yet occurred; therefore the Complaint is not moot, and Windstream's motion to dismiss should be denied.

II. Windstream's Reply Does Not Refute Its Refusal To Waive Charges For Companies Already Billed Under the Inappropriate Tariff.

Windstream acknowledges there are 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.) Windstream now claims the injury caused by charging parties inappropriate rates pursuant to an inappropriate tariff is not ripe. (Windstream's Reply at 8, n.4.)

Windstream's focus on active collections and its secondary argument that "charges are not currently accruing" do not change the fact that improper charges have already been leveled; the injury has already occurred. Moreover, Windstream's admission of this dispute directly contradicts its ultimate assertion that "no purpose is served by continuing the Complaint as *none of the claimed injuries have in fact occurred.*" (Windstream's Reply at 7.) For this reason, the Complaint is not moot, and Windstream's motion to dismiss should be denied.

III. Windstream's Ripeness Arguments Are Unsupported By The Facts.

Windstream dismisses as "hypothetical 'what ifs'" the RLECs' concerns that the tariff corrupts the negotiation processes between the RLECs and third parties and between the RLECs and Windstream. (Windstream's Reply at 1.) These arguments, however, devolve into circular reasoning, and ask the court to ignore the practical reality of the situation the RLECs find themselves in.

As argued in the RLECs' response to Windstream's Motion to Dismiss, the tariff's existence causes two continuing injuries: first, it interferes with the RLECs' ability to negotiate with third parties; and, second, it interferes with the RLECs' ability to negotiate with Windstream.

Windstream dismisses these concerns as "hypothetical 'what-ifs.'" Windstream suggests the RLECs aren't negotiating with anyone, so these injuries cannot yet occur. In the same breath, Windstream *also* cites the RLECs' ability to negotiate an agreement as a reason why the action is moot. It then proceeds to suggest, somewhat ominously, that the tariff's very existence may "encourage RLECs to negotiate with Windstream regarding transit service." (Windstream's Reply at 6.)

This concept of the tariff-as-encouragement supports the RLECs' argument that the tariff has poisoned and will continue to poison the negotiation process, not at some hazy distant time, but right now, at this moment. Indeed, it is this effect of the tariff that is the primary purpose for this action in the first place. The RLECs would have no need to be concerned about a tariff, however inappropriate, if it did not interrupt their abilities to operate and negotiate in good faith. Windstream is, in effect, arguing that any injuries resulting from negotiating at the end of a gun are unripe because it has not yet pulled the trigger. The RLECs have already been injured; they are suffering ongoing injury; and in response, Windstream merely points to the false choice between the inappropriate tariff and negotiations where it has now given itself inappropriate leverage over the

RLECs. In the meantime, the RLECs have been forced to route traffic around Windstream, a fact Windstream pounces on to suggest, unreasonably, that no dispute remains. (*See, e.g.*, Windstream's Reply at 1.)

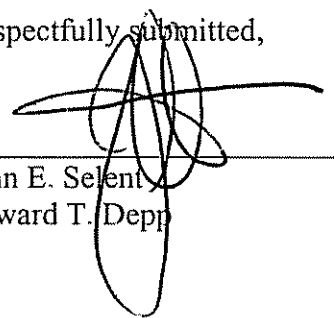
The RLECs' concerns in this regard were reinforced last year when the Commission stated that if "Windstream East wishes to pursue negotiations with the RLECs to establish agreements regarding transit service costs, the company can voluntarily withdraw the tariff before the Commission renders a decision on the merits of the RLECs' complaint." (Nov. 13, 2007 Order in Case No. 2007-00004, at 5.) This proposition directly cuts against Windstream's attempt to frame negotiations as a remedy, rather than an alternative, to the tariff. Read in conjunction with the reciprocal compensation rules, the Commission's statement also supports the RLECs' arguments that the tariff should be withdrawn in favor of good faith negotiations for reciprocal compensation arrangements.

The reality is that Windstream seeks to put the RLECs in a no-win situation. It argues that the issues are not justiciable simply because the RLECs have not yet lost. To the contrary, the circumstances show the RLECs' concerns about ongoing injuries related to the negotiation process are valid and ripe. Windstream's motion to dismiss should therefore be denied.

CONCLUSION

Windstream's Reply fails to respond to the substance of the RLECs' arguments, as set forth in their Response to Windstream's Motion to Dismiss. For the reasons argued in that response and in this surreply, Windstream's motion to dismiss should be denied.

Respectfully submitted,



John E. Selent
Edward T. Depp

Holly C. Wallace
DINSMORE & SHOHL LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202
(502) 540-2300 (telephone)
(502) 585-2207 (facsimile)

COUNSEL TO THE RLECs

CERTIFICATE OF SERVICE

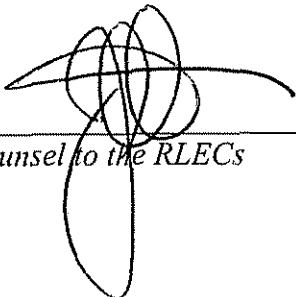
14th I hereby certify that a copy of the foregoing was served by first-class U.S. Mail on this day of January, 2009, to the following individuals:

Mark R. Overstreet
STITES & HARBISON PLLC
421 West Main Street
P.O. Box 634
Frankfort, KY 40602-0634

Kendrick R. Riggs
C. Kent Hatfield
Douglas F. Brent
Stoll, Keenon & Ogden PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202

John N. Hughes
124 W. Todd Street
Frankfort, KY 40601

Dennis G. Howard, II
Kentucky Attorney General's Office
Suite 200
1024 Capital Center Drive
Frankfort, KY 40601



Counsel to the RLECs