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January 14, 2009

Jeff Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40601

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

Dear Mr. Derouen:

Enclosed herewith is an original and ten copies of Intervernors' Sur-reply to Windstream's Motion to Dismiss in the above referenced case.

Please acknowledge receipt by returning a stamped copy of this filing via the enclosed, self-addressed stamped envelope.

Sincerely yours,

Douglas F. Brent

DFB: jms
Enclosures

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 Telephone Cooperative Corporation, Inc.; and West Kentucky Rural Telephone Cooperative Corporation, Inc.	)	
Complainants	)	CASE NO. 2007-00004
v.	)	
Windstream Kentucky East, LLC	)	
Defendants	)	

INTERVENORS' SUR-REPLY TO WINDSTREAM'S MOTION TO DISMISS

NuVox Communications, Inc., Sprint Communications Company, L.P.; Sprint Spectrum, L.P. and SprintCom, Inc. d/b/a Sprint PCS; Nextel West Corp., Inc.; and NPCR, Inc., d/b/a Nextel Partners ("Sprint Nextel"), T-Mobile USA, Inc., Powertel/Memphis, Inc., T-Mobile Central LLC and tw telecom of ky llc, (hereinafter collectively "Intervenors") submit this sur-reply to the memorandum in support of the motion to dismiss filed January 2, 2009 by Defendant Windstream Kentucky East, LLC.

In their previous response to the motion to dismiss, Intervenors demonstrated that the complaint is not moot and should not be dismissed unless, at a minimum, the tariff the complaint challenges is withdrawn. That tariff unlawfully sets the terms and conditions for transit traffic--including traffic originated by competitive carriers--which, under federal law, *must* be negotiated

by the parties pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, and priced at total element long run incremental cost ("TELRIC") under the Act and the Federal Communications Commission's orders. In its reply, Windstream admits that it is statutorily obligated to negotiate interconnection arrangements for transit traffic. [Windstream Reply at 3] Nonetheless, Windstream suggests that unless it takes action to "terminate or impair" existing contractual arrangements, any claims about future harm are so speculative that the Complainants and Intervenors--transit customers of Windstream--lack not only justiciable claims, but "standing" even to complain. [Windstream Reply at 6].

Windstream is wrong.

Intervenors are not in a position to comment on whether the individual Complainants have concrete claims. However, it is abundantly clear that Windstream fails to show that judicial or administrative "economy" weighs in favor of dismissing the complaint in favor of permitting the allegedly "hypothesized concerns" to return to the Commission as *multiple* disputes in the future. The RLECs have, moreover, offered a number of reasons why this case is not moot, and Intervenors presume that if the RLECs currently using the tariffed transit services decide their concerns have been addressed, they will make their own decision about whether to ask for dismissal of the complaint.

Next, nothing about Windstream's relationship with Intervenors has changed in any way that could justify Windstream's about-face with regard to the Intervenors' presence in this case. A little over a year ago, Windstream welcomed the intervention of the CLECs and T-Mobile. Now Windstream claims they lack standing because they are not customers under the tariff and do not have a "direct interest" in the tariff. Irony aside, standing is a red herring in any event: the Commission has previously addressed and rejected Defendant's contention that only a

current customer for a tariffed service can be considered a "directly interested" person. *See Constellation New –Energy-Gas Division v. Columbia Gas of Kentucky*, Case No. 2005-00184 (July 12, 2006, citing *Power Development Systems, Inc. v. Kentucky Utilities Co.*, Case No. 9456 (Feb. 27, 1986) at 2 (holding that KRS 278.260(1) does not require that "complaints be made only by customers"). Of course, the Commission already found that the Intervenors have an interest in this case when it granted their motions to intervene. Windstream's argument contradicts the Commission's own order.

Regardless, in light of Windstream's obligations under Section 251 of the Act[1] to provide transit service to competitive carriers, the Commission can certainly proceed on its own, with or without the Intervenors' presence, to determine if local transit arrangements for CLEC-originated traffic should ever be the subject of tariffing rather than negotiation.[2] As a matter of law, they cannot.

The Sixth Circuit has admonished state commissions that tariffs may not substitute for the federally-mandated process of negotiating and arbitrating an interconnection agreement for inter-carrier facilities and services required to be provided by the Telecommunications Act. Such a tariff supplants the procedure the Act requires. *See Verizon North v. Strand*, 309 F. 3d 935, 940 (2002) (tariffing the provision of network elements "evades the exclusive process required by the 1996 Act, and effectively eliminates any incentive to engage in private

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1 *See Qwest Corp. v. Cox Nebraska Telcom*, LLC, 2008 U.S. Dist. LEXIS 102032 (D. NE December 17, 2008) (upholding state commission decision requiring the provision of transit service as a Section 251 (c)(2) obligation subject to TELRIC rates).

2 Without support and almost in passing, Windstream claims that KRS 278.190 and 278.260 do not apply to Windstream as an "alternatively regulated company. That term is not found in Chapter 278. In any event, since indirect interconnection and transit are not retail services, Windstream's status as an "electing utility," *see* KRS 278.541(2), is irrelevant. The Commission's jurisdiction over arrangements between local carriers is carefully preserved by KRS 278.542.

negotiation, which is the centerpiece of the Act."). *Strand* mandates that, even if the Commission dismisses this case, it must do so in the clarifying context that (i) the tariff does *not* fulfill Windstream's obligations under federal law, and the issue of transit traffic remains fully subject to negotiation and arbitration under the Act; and (ii) Windstream's transit rates have not been cost justified pursuant to the TELRIC standard that is required by federal law and that would be enforced in any future arbitration. A simple dismissal, even one without prejudice, will not end the controversy, and will constitute the antithesis of administrative economy. Windstream's obligations under federal law must be met.

Finally, Intervenors must point out that ***none*** of Windstream's contractual arrangements with the Intervenors for transit service were in fact negotiated with Windstream. Windstream in its Reply, at 10, claims they were ("the known facts demonstrate that Windstream has negotiated with the Intervenors rates, terms and conditions for transit service that are comparable to or more favorable than those set forth in the transit tariff."). The statement is incorrect. The agreements in place involved negotiations with other incumbents (*e.g.*, GTE, Verizon) who later sold their exchange properties to a predecessor in interest of Windstream.[3] Moreover, Windstream has not offered transit rates that are more favorable than those it has tariffed. In consequence, Intervenors have every reason to believe that the tariff presages a future negotiating position.

In light of the clear edict of the federal Telecommunications Act, the FCC's Orders, and the Sixth Circuit's opinion in *Strand, t*he Commission should ensure that the tariff, even if it is not stricken, will not be used as an instrument to undercut Intervenors' rights under the Telecommunications Act and Commission precedent, including the Commission's determination in Case No. 2004-00044 that ILEC transit rates in Kentucky must be priced at TELRIC.

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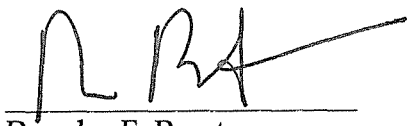
[3] NPCR Inc.'s and Sprint Communications Company, L.P.'s agreements were negotiated with AllTel prior to the spin-off of the Kentucky exchange properties.

For the reasons stated above, Intervenors respectfully request that this Motion to Dismiss be denied.



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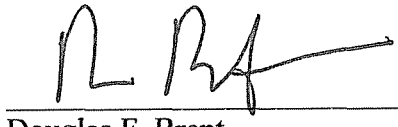
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion for Intervention has been served by U.S. mail on those persons whose names appear below this 14th day of January, 2009.



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