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July 27, 2009

**VIA HAND DELIVERY**

Jeff Derouen, Executive Director  
Kentucky Public Service Commission  
211 Sower Blvd  
P.O. Box 615  
Frankfort, KY 40602-0615

RECEIVED

JUL 27 2009

PUBLIC SERVICE  
COMMISSION

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

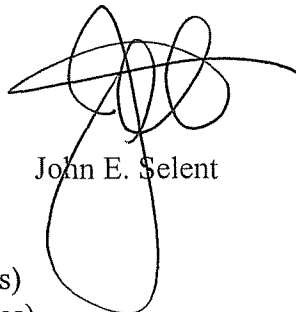
Dear Mr. Derouen:

Enclosed for filing in the above-referenced case, please find one original and eleven (11) copies of the RLECs' motion to strike the prefiled rebuttal testimony of Kerry Smith and the Cost Study attached thereto as Exhibit A. Please file-stamp one copy, and return it to our courier.

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

Very truly yours,

DINSMORE & SHOHL LLP



John E. Selent

JES/bmt

Enclosure

cc: All Parties of Record (w/enclosures)  
Edward T. Depp, Esq. (w/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 Rural Telephone Cooperative Corporation, Inc.)  
and West Kentucky Rural Telephone Cooperative  
Corporation, Inc.**

*Complainants*

v.

**Windstream Kentucky East, Inc.**

*Defendant*

**Case No. 2007-00004**

**MOTION TO STRIKE TESTIMONY OF KERRY SMITH AND THE COST STUDY  
ATTACHED THERETO AS EXHIBIT A AND SUBMITTED AS A SUPPLEMENTAL  
RESPONSE TO COMPLAINANTS' DATA REQUESTS**

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. (collectively, the "RLECs"), by counsel, hereby move the Public Service Commission of the Commonwealth of Kentucky (the "Commission") to strike certain portions of the prefiled rebuttal testimony of Kerry Smith on behalf of Windstream Kentucky East, LLC ("Windstream") that reference an "updated TELRIC cost study," as well as the "updated" TELRIC cost study attached thereto as Exhibit A and submitted as a supplemental response to the RLECs' data requests. In support of their motion, the RLECs state as follows.

## PROCEDURAL AND SUBSTANTIVE BACKGROUND

Windstream's tariffed transit rates are directly at issue in this dispute. In order to contest those rates, the RLECs need access to, and have repeatedly requested from Windstream, the TELRIC cost studies and cost study data that allegedly substantiate them. Yet, after months of tactics designed to frustrate a meaningful review of its transit costs, Windstream now reveals, less than two weeks prior to the formal public hearing scheduled in this matter, that the TELRIC cost study it finally produced in response to the RLECs' data requests was not even its most recent. In fact, the cost study that Windstream now produces as an attachment to the rebuttal testimony of its witness, Kerry Smith, is neither "new" nor "updated," as it claims, but rather has been in existence for over six months.

According to its own date, this TELRIC cost study was updated on January 8, 2009, over one month prior to the date that the RLECs first requested a TELRIC cost study from Windstream on February 19, 2009. From the RLECs' perspective this is just one more attempt by Windstream to delay the discovery process so that the RLECs are unable to respond sufficiently to the new data prior to the formal public hearing. The Commission should, therefore, strike from the record any portion of Kerry Smith's testimony that references the "updated" TELRIC study as well as the TELRIC study itself.

From the date of the RLECs' Initial Data Requests to Windstream on February 19, 2009, wherein it requested "cost support data" and a "TELRIC study . . . in its original electronic form and . . . an electronic Excel copy . . . with all formulae intact,"<sup>1</sup> Windstream has given the RLECs the run-around at every turn. First, Windstream initially produced a PDF version of its TELRIC cost study instead of an Excel spreadsheet as the RLECs requested. Obviously, being in a flat file, it was

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<sup>1</sup> See Complainants' Initial Data Requests to Windstream Kentucky East, LLC, Requests 19, 20, 30, and 31, filed on February 19, 2009.

impossible for the RLECs' expert to review and analyze the data inputs and formulae used by Windstream in support of its tariffed transit rates.

After much discussion, Windstream finally produced the TELRIC study in an electronic Excel spreadsheet as originally requested, but this time with none of the supporting data to substantiate its cost study. As a result, the RLECs requested that the Commission amend its original Procedural Order to allow for a second set of data requests to be served on the parties. The Commission agreed.

**- A Trip to Little Rock -**

On April 23, 2009, the Commission issued a Second Amended Procedural Order allowing for a second round of data requests. With little explanation, however, many of Windstream's responses to the RLECs' second round of data requests stated that it would only make documents available for inspection and copying at its corporate headquarters in Little Rock, Arkansas. Accordingly, the RLECs' expert witness (Douglas Meredith) traveled all the way to Little Rock to inspect the documents. Incredibly, many of the important documents responsive to the second round of requests were unavailable for inspection and review in Little Rock because, so Windstream claimed, the Windstream employee who had access to those responsive documents was in Alaska and could not be reached to locate them.

Nothing in Windstream's responses to the RLECs' data requests indicated that certain documents had actually not been already gathered for inspection. Likewise, Windstream never informed the RLECs that a key employee with sole access to the responsive documents would be out of the office and unreachable during the time the RLECs had arranged for their expert to inspect the documents. Having thus caused the RLECs to bear the considerable cost of a trip by its expert to review documents that were, in fact, not available for inspection, Windstream agreed that the

responsible employee would gather the requested documents and participate in a teleconference with the RLECs' expert witness. With supplemental testimony due to be filed that very same week, Windstream's proposal was insufficient, however, because it did nothing to mitigate the significant testimony-preparation difficulties Windstream had caused.

In an effort to address this problem by agreed motion, the RLECs contacted Windstream the day after the RLECs' expert witness returned from the mostly unfruitful trip to Little Rock. The RLECs indicated that review of the documents Windstream failed to produce in Little Rock would necessitate a brief extension of the deadline for filing testimony. The RLECs also noted that under the existing procedural schedule, there currently existed a month between the date that rebuttal testimony was due and the date for which the hearing was scheduled. Thus, the RLECs proposed that supplemental and rebuttal testimony each be due two weeks after their current, respective due dates. Doing so would have allowed the RLECs sufficient time to obtain and review the documents that Windstream claimed were available for inspection in Little Rock and to file supplemental testimony addressing those documents, which are central to the issue of whether Windstream's transit rates are fair, just, and reasonable. This amendment to the procedural schedule would have also avoided a continuance of the then scheduled hearing date, as rebuttal testimony would still be due two weeks prior to the hearing. Windstream indicated it would "get back with" the RLECs, yet it was so slow in doing that the RLECs were forced to file a motion to amend the procedural order. Windstream objected to that motion, even though it was the sole, direct cause for the delay.

Ruling on the motion, the Commission issued a Third Amended Procedural Schedule on June 15, 2009. Finally, after over four months of obstacles and expense, Windstream delivered for the RLECs' review what the RLECs understandably believed to be the final pieces of Windstream's alleged TELRIC study and cost support data. As part of that review, the RLECs expended additional

time and money on its, and its expert's, review of the data provided, in order to address the TELRIC study in its witness testimony.

Now, less than two weeks prior to the formal public hearing scheduled for July 29 and 30, 2009, the RLECs discover, upon Windstream's filing of its rebuttal testimony on July 17, 2009, that Windstream had failed to provide the RLECs, and its expert, with this "updated" study. While Windstream claims in its rebuttal testimony and supplementation to data requests that the TELRIC study is an "updated" version, its claim is belied by the fact that this "updated" study is dated January 8, 2009, over two months prior to the RLECs' first set of data requests to Windstream wherein it first requested the TELRIC cost study.

### **ARGUMENT**

Windstream's acts have frustrated any meaningful review of its transit costs, and its last minute production of vital data – data that the RLECs requested over five months ago (*see* Windstream's Supplemental Data Response to RLECs' Data Requests 19, 20, 30, and 31) – on the eve of a formal public hearing has resulted in the RLECs' unnecessary and avoidable surprise. Consequently, the "updated" TELRIC study and any testimony relying upon it should be stricken from the record and not allowed as part of this dispute. This is so for at least four reasons.

First, the RLECs will be significantly prejudiced at the public hearing if the so-called "updated" TELRIC study is allowed to be presented as part of Windstream's case. It will be impossible for the RLECs to satisfactorily compare and analyze the new data within such a short period of time. As a cursory review of the "updated" TELRIC model by the RLECs' expert reveals, the model includes new worksheets, line items, and other critical changes that cannot be analyzed without a side-by-side, cell-by-cell comparison of the former and current models that would be thoroughly time consuming. More important, perhaps, is the fact that the "updated" model relies

upon input data that is once again not documented, which is the same problem the RLECs experienced with the original, outdated TELRIC study produced by Windstream. Presumably, the RLECs' expert would need to take another plane ride to Little Rock in order to get the data underlying this hidden study.

Second, Windstream's decision to spring the "updated" TELRIC study on the RLECs at the last minute has, in effect, deprived the RLECs of procedural due process. At the very heart of due process is a party's right to be adequately informed of the underlying facts in dispute. The formal public hearing is, as of the time of this motion, now mere days away. Discovery, for all practical purposes, is closed. Allowing Windstream to rely upon facts and data in a TELRIC study it has had since January 8, 2009, yet failed to produce until less than two weeks prior to the hearing, will result in the RLECs' inability to adequately present and defend their interests before the Commission. *American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Com.*, 379 S.W.2d 450, 456 (Ky. 1964) ("In the interest of fairness, a party to be affected by an administrative order is entitled to procedural due process.") This is particularly true where, as here, the data in question go to a central issue in the case – Windstream's alleged justification for its tariffed transit rates.

Third, though the Commission is not bound by the civil rules of procedure, CR 26 imposes a duty upon parties to a legal dispute to supplement prior discovery responses. Specifically, CR 26 requires that, "[a] party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made, or (ii) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." *Id.* (emphasis added). Windstream's responses to the RLECs' data requests in question were "incorrect when

made." Producing the correct and most recent version of the TELRIC study over six months after it was performed, over five months after it was requested, and less than two weeks prior to the formal hearing on the matter also fails any reasonable construction of the meaning of "seasonably amend" as required by CR 26.

Fourth, and finally, as a simple matter of fundamental fairness and public policy, the Commission should not allow a party to a dispute before it to withhold documents that go to the heart of a central issue in a case. This is especially true where, as here, the concealment led to considerable expenditure of the RLECs' time and money to review and analyze data that Windstream apparently knew or should have known to be outdated.

### CONCLUSION

Accordingly, the RLECs respectfully request that the Commission strike from the record all references to the "updated" TELRIC study in the prefiled rebuttal testimony of Windstream's witness, Kerry Smith, as well as the TELRIC study itself.

Respectfully submitted,



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*Counsel to the RLECs*



**CERTIFICATE OF SERVICE**

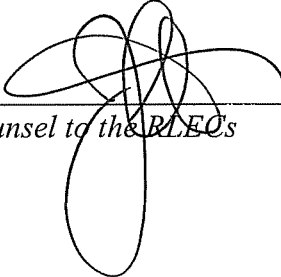
I hereby certify that a copy of the foregoing was served by electronic mail and United States First Class Mail, sufficient postage prepaid, on this 21<sup>st</sup> day of July, 2009 upon:

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