Dinsmore&Shohl LLP
ATTORNEYS

Dinsmore&Shohl 100TH 1908 - 2008

Edward T. Depp
502-540-2381
tip.depp@dinslaw.com

September 15, 2009

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PUBLIC SERVICE COMMISSION

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

Re: ***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 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' Post-Hearing Brief.

Please file-stamp one copy and return it to our delivery person.

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

Sincerely,

Edward T. Depp

ETD/lb
Enclosures
cc: All parties of record (w/encl.)
John E. Selent, Esq. (w/encl.)

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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SEP 15 2009
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.	)	ORIGINAL
Complainants	)	
v.	)	**Case No. 2007-00004**
Windstream Kentucky East, Inc.	)	
Defendant	)	

THE RLECS' POST-HEARING BRIEF

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 submit their post-hearing brief in support of an order: (i) rejecting and cancelling Windstream Kentucky East, Inc.'s ("Windstream's") amended transit tariff as unfair, unjust, and unreasonable; and (ii) requiring Windstream to negotiate an intercarrier agreement with the RLECs that addresses the rates, terms, and conditions of terminating transit traffic on their networks.

I. INTRODUCTION.

The RLECs initiated this case as a result of a surprise amendment by Windstream to its General Customer Services Tariff (the "Amended Tariff"). Windstream filed this amendment without any cost support or notice, and it unilaterally imposed rates, terms, and conditions upon any carrier transiting local traffic over Windstream's network to be terminated on a separate, third-party carrier's network. (*See* Amended Tariff, P.S.C. KY. No. 7, Section S.11.1.1B). This also includes local transit traffic terminated to the respective RLECs' networks, even though no agreement to address that traffic is in place between the originating carriers and the RLECs or between Windstream and the RLECs. (*Supra*). Although Windstream ostensibly filed this amendment in response to what it alleges was an unauthorized use of its network by the RLECs, it has since admitted that such unauthorized use is now non-existent.[1] (Direct Test. of K. Smith at 4:12-13 and 7:6-19). Despite this admission, Windstream continues its refusal to withdraw its Amended Tariff. (Test. of K. Smith, Transcript of July 29, 2009 Hearing at 137:23-25). Windstream, instead, holds out its Amended Tariff as a default option for any third-party carrier who might use Windstream's network to transit local traffic to the RLECs or other carriers in lieu of negotiating an appropriate

[1] The only exceptions Windstream notes are those of Brandenburg Telephone Company ("Brandenburg Telephone") and Highland Telephone Cooperative, Inc. ("Highland Telephone"). (Direct Test. of K. Smith at 7:8-17; *see also* Defendant's Response to Hearing Data Request No. 2 (showing that Windstream is not providing records to any of the other RLECs). Yet, as Windstream acknowledges, both of these companies represent unique situations. As for Brandenburg Telephone, Windstream has stated that the traffic of which Windstream complains is not truly transit traffic because it is destined for a carrier that does not subtend Windstream's network. *See, In the Matter of Investigation into Traffic Dispute Between Brandenburg Telephone Company, Windstream Kentucky East and Verizon Access*, Case No. 2008, August 26, 2009, Order, at 11. As for Highland Telephone, it subtends Windstream's tandem and, yet, Windstream has now for approximately nine months refused to respond to Highland Telephone's latest red-lined version of a proposed agreement to address the exchange of traffic for that unique situation. Unfortunately, Windstream continues to use the anomalous and complicated traffic issues associated with Brandenburg Telephone and Highland Telephone as an excuse for not withdrawing its transit service tariff.

interconnection between the relevant interconnecting parties. (Direct Test. of K. Smith at 4:20-21 and 8:16-18).

As a result, Windstream's Amended Tariff creates two significant problems. First, it deprives the RLECs of their ability to measure, control, and verify the amount and nature of traffic being delivered to them by third-party carriers and exposes them to unilateral terms developed by Windstream that do not adequately address the RLECs' rights and interests. By depriving them of this opportunity, the Amended Tariff endangers the RLECs' financial integrity. Additionally, the Amended Tariff creates a significant disincentive for Windstream or other third-party carriers to negotiate appropriate intercarrier agreements with the RLECs because the Amended Tariff discourages any such negotiations. Thus, what should be the subject of negotiated intercarrier agreements as contemplated by the Federal Telecommunications Act of 1996 (the "Telecommunications Act"), has, instead, been imposed on the RLECs by way of Windstream's Amended Tariff without any meaningful opportunity to negotiate appropriate terms and conditions. Aside from these significant problems, Windstream's Amended Tariff is also subject to numerous procedural and substantive defects.

II. STATEMENT OF FACTS.

A. Windstream Amended Its Tariff to Include Transit Rates, Terms, and Conditions, Even Though the Parties Were In the Midst of Fruitful Discussions.

On December 1, 2006, Windstream quietly filed an amendment to its general customer services tariff. (*See* Amended Tariff, P.S.C. KY. No. 7, Section S.11). That Amended Tariff unilaterally established rates, terms, and conditions for the exchange of transit traffic between carriers. (*See Supra*). Windstream filed its Amended Tariff with no cost support data. (*See* RLECs' Formal Complaint at 6). Windstream claims to have filed the Amended Tariff because the RLECs were allegedly transiting traffic over its network to third parties, and "refused to move their traffic away from Windstream's end office [switches or] to negotiate a timely transit agreement" addressing the issues. (Direct Test. of K. Smith at 4:12-17). While "there may have been some of the rural companies that thought they were sending EAS [('Extended Area Service')] traffic to Windstream," that was, in fact, destined for a third-party carrier, it was due to circumstances where "a competitive carrier had entered into the market [and] Windstream had ported their local number to the competitor and the rural company did not know that that call . . . shouldn't go to Windstream." (Test. of W. Magruder, July 29, 2009 Hearing at 92:21-93:2). Those RLECs subsequently "made changes to their networks to ensure they could deliver that traffic to the competitive carrier in another manner, and they took that off of Windstream's network." (*Supra* at 93:4-7).

Despite its claims to the contrary, however, Windstream admits that prior to its filing, Windstream and the RLECs had been in discussions to resolve, through negotiation, whatever issues were being created by third-party transit traffic over Windstream's network. (Direct Test. of K. Smith at 9:18-21). As a result of these negotiations, some of the RLECs, at their own cost, "made network arrangements to . . . start screening traffic before [they] passed it over [the] EAS ("Extended Area Service") [trunk] groups." (Test. of W. Magruder, July 29, 2009 Hearing at 73:20-21). Duo County, for example, performs LNP dips "every second . . . of every day." (*Supra* at 85:18-20). Ultimately, these RLECs "determined there was no traffic flowing over that trunk group to Windstream." (*Supra* 73:24-25). Nevertheless, Windstream proceeded to file an amendment to its tariff whereby it unilaterally imposed the rates, terms, and conditions for local transit traffic. Thereafter, and predictably, all negotiations stalled.

B. Windstream's Tariff Filing was Procedurally and Substantively Flawed.

From the outset Windstream's tariff filing was plagued with problems, both procedural and substantive. Procedurally, Windstream's tariff filing failed to comply with the regulatory requirements set forth in KAR 5:011 for the filing of tariffs. Windstream filed its Amended Tariff without providing any notice to the RLECs, the Commission, or the public. (*See* Direct Test. of W. Magruder at 4:20-5:3). It also failed to file any cost support data to support the rates it sought to charge. In addition, the Amended Tariff, by its own terms, "purported to be effective immediately" on the same day it was filed. (Direct Test. W. Magruder at 4:23; *see also* Amended Tariff, P.S.C. KY. No. 7, Section S.11). Inexplicably, Windstream's amendment was to its "general customer services tariff, which is historically an end-user tariff" that would not typically apply to carrier-to-carrier services. (Direct Test. W. Magruder at 4:14-15). Thus, "the RLECs had no reason to be aware that – on December 1, 2006 – Windstream filed an amendment to its general customer services tariff" that would unilaterally impose costs and obligations on them as carriers. (*Supra* at 4:20-21). In short, the RLECs "had no reasonable way of knowing that Windstream had done anything that purported to affect [their] rights until the tariff had already been approved." (*Supra* at 5:2-3).

The Amended Tariff was not just procedurally defective. Substantively, Windstream's Amendment improperly established rates, terms, and conditions to be unilaterally imposed upon the RLECs and third-party carriers for the transiting of local exchange traffic over Windstream's network. (*See* Amended Tariff, P.S.C. KY. No. 7, Section S.11.1.1B). These rates, terms, and conditions should be rejected as unfair, unjust, and unreasonable for at least the following four reasons.

1. Windstream's Amended Tariff Undermines the RLECs' Statutory Right to Negotiate Appropriate Intercarrier Agreements.

Windstream's Amended Tariff substantially undermines the RLECs' statutory right to negotiate appropriate intercarrier agreements for the exchange of local traffic. As Mr. Magruder testified, "[a] carrier who seeks to exchange local traffic with another carrier needs to negotiate the terms of an agreement for the exchange of that traffic." (Direct Test. of W. Magruder at 8:6-7). If there is a tariff like Windstream's Amended Tariff in place "it gives an easy default mechanism for carriers not to have to enter into negotiations and agreements, [and] they're not going to do it, and it is going to create some severe problems concerning trunking, billing, collection, all of the things that we're discussing" in this case. (Test. W. Magruder, July 29, 2009 Hearing at 77:17-23).

As Windstream's witness, Kerry Smith, admitted in his testimony, the RLECs had "indicated they would negotiate with Windstream." (Direct Test. of K. Smith at 9:18-21). Yet, the presence of Windstream's Amended Tariff has had the very practical effect of killing the discussions between the RLECs and Windstream to resolve transit traffic issues. Highland Telephone, for example, has been stonewalled in its attempt to negotiate a transit agreement with Windstream. Specifically, it "has now waited more than five months for a substantive response to its most recent redlines of a proposed agreement to supersede the terms of Windstream's tariff." (Direct Test. of W. Magruder at 7:13-15). Unfortunately, so long as Windstream's Amended Tariff forms the backdrop of the negotiation, there will simply be no incentive for negotiation. If the Amended Tariff is impeding negotiations between the RLECs and Windstream, there is no reason to assume that the result would be any different between the third-party carriers and the RLECs.

2. Windstream's Amended Tariff Improperly Requires the RLECs to Pay for Interconnection Services Provided Outside of the RLECs' Networks.

Windstream's Amended Tariff improperly "impose[s] upon the RLECS an obligation to pay Windstream for interconnection services provided outside the RLECs' networks." (Direct Test. of W. Magruder at 10:2-4). Specifically, the Amended Tariff states that its provisions "shall apply to those Telecommunications Service Providers that do not have an interconnection agreement with [Windstream] providing for payment for Transit Traffic Service." (Amended Tariff, Section S11.1.2A). Windstream's Amended Tariff would also require the RLECs to "reimburse"

Windstream in the event that the "terminating Telecommunications Service Provider imposes on [Windstream] any charges or costs for the delivery of Transit Traffic." (Amended Tariff, Section S11.1.2D).

Yet as the RLECs testified, they are, by law, not responsible for any "costs beyond the boundaries of their own network." (Test. W. Magruder, July 29, 2009 at 96:16-17). Although the RLECs do not now originate local transit traffic on Windstream's network, if they were to so choose,

> according to the terms of Windstream's tariff, [the RLECs] would pay transit costs not only up to the point in which [they] connect with Windstream, but [the RLECs] would be paying the transit costs for that call to be carried all the way to the competitive local carrier. That is a cost that the large carriers do not incur today.

(*Supra* at 96:21-97:2). Simply put, the transit charges assessed by Windstream's Amended Tariff relate to services performed outside of the RLECs' networks. As such, the RLECs are, by law, under no obligation to pay for those services. Windstream's Amended Tariff cannot impose an obligation that federal and state law forbids.

3. Windstream's Amended Tariff Forces the RLECs to Rely on Windstream's Records for Identification, Measurement, and Billing.

The Amended Tariff forces "the RLECs to rely upon Windstream for the identification and measurement of the traffic that Windstream delivers to [the RLECs'] networks" without Windstream accepting any liability for the difficulties or failures it may thereby cause. (Direct Test. of W. Magruder at 8:10-11). Specifically, the Amended Tariff states that Windstream will "generate and deliver to the terminating Telecommunications Service Provider industry standard call detail records, <u>where available</u>, for its use in billing the originating Telecommunications Service Provider." (Amended Tariff, Section S11.1.2E (emphasis added)). According to the language of the Amended

Tariff, the RLECs would be forced to rely on Windstream's records for billing purposes even in the event that the RLECs could identify and measure the traffic themselves.[2]

As a result of other problems with Windstream's Amended Tariff, the likelihood that the RLECs would actually be able to measure, control, and verify the amount of traffic Windstream delivers to them is small. Windstream's Amended Tariff, for example, does not include any provisions that identify what facility Windstream will use in terminating transit traffic on the RLECs' networks. As a result, it leaves the RLECs guessing as to what kind of traffic is being delivered, by whom, and over what facilities. (Test. of W. Magruder, July 29, 2009 Hearing at 69:9-70:10). Such unqualified dependency on Windstream is unacceptable.

In some instances, Windstream's Amended Tariff would actually force the RLECs to rely on the data of the originating carrier. Specifically, the Amended Tariff allows carriers originating transit traffic on Windstream's network to elect, in lieu of "Actual Measurements," to provide Windstream a "percent local usage factor (PLU) estimating the percentage of total minutes of use delivered to [Windstream]." Windstream would then have the option of passing on this "estimated" PLU to the RLECs for billing purposes. As unacceptable as it is to force the RLECs to rely on Windstream's records, it is all the more so unacceptable that the RLECs should be forced to rely upon the PLU estimates of third-parties.

Even so, the Amended Tariff absolves Windstream of any liability if call detail records are for any reason not available. (Amended Tariff, Section S11.1.2E; "Notwithstanding the foregoing, unavailability of such call detail records does not . . . create any liability . . . on the part of [Windstream]."). Considering the level of dependency Windstream's Amended Tariff requires, the

[2] See, for example, Amended Tariff S11.1.2E ("[U]navailability of [Windstream's] . . . call detail records does not relieve the originating Telecommunications Service Provider of its obligations to pay."); and S11.1.2H ("In the event a dispute arises . . . , Company will continue to bill based upon information provided by the [originating carrier]").

disclaimer of Windstream's liability is not fair, just, or reasonable. Needless to say, a reasonably and fairly negotiated intercarrier agreement would not contain such a one-sided provision, absolving one party of liability for its erroneous billing records.

4. Windstream's Local Transit Rates are Unfair, Unjust, and Unreasonable.

The local transit service rates included in the Amended Tariff are unfair, unjust, unreasonable and unsubstantiated by appropriate cost support data. For instance, the per minute of use ("MOU") charge for what Windstream's Amended Tariff calls "Tandem Transit Traffic Service" is $0.0030, while the MOU charge for what it calls "End Office Transit Traffic Service" is $0.0045. (Amended Tariff, Section S11.1.3). In either case, these rates are considerably higher than the rate Windstream charges many CLECs who have had an opportunity to negotiate an interconnection agreement with Windstream prior to the filing of this Amended Tariff.[3] In some cases, the negotiated rate is as low as $0.0008209. (*See* Windstream's Response to Commission Staff's Data Request No. 1). Notwithstanding this, Windstream's Amended Tariff imposes a charge more than three and a half times higher than this negotiated rate for the exact same service.[4] (Test. of K. Smith, Transcript of July 29, 2009 Hearing at 121:7-13 (answering "yes" to the question "the service that [the RLECs]

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[3] Interestingly, NuVox Communications, Inc., Sprint Communications Company, L.P., Sprint Spectrum, L.P., SprintCom, Inc. d/b/a Sprint PCS, Nextel West Corp., Inc., tw telecom, and T-Mobile USA, Inc. (the "Intervenors") in this case, represent some of these CLECs. Even though they already have negotiated agreements in place with Windstream, the Intervenors appear to share the RLECs' concern for the negative effects that Windstream's decision to include rates, terms, and conditions for local transit services will have on future negotiations once the current agreements expire. The Intervenors "don't want [the Tariff] to be the default solution in terms of pricing for future agreements. The Intervenors all agree that these arrangements should be negotiated . . . and placed in interconnection agreements, not locked in place with tariffs." (Opening Statement of D. Brent, Counsel for the Intervenors, July 29, 2009 Hearing at 38:4-10).

[4] $0.0030 = $0.0008209 x 3.665; $0.0045 = $0.0008209 x 5.482.

would be paying about three times as much for under the tariff would be that much higher than [a CLEC] would be paying under its contract with Windstream for the same service?").

In any event, when Windstream filed its Amended Tariff, it did so with absolutely no cost-support data to justify or substantiate the rates contained in the Amended Tariff. (*See* RLECs' Formal Complaint at 6; *see also* Direct Test. of K. Smith at 5:23-24 (admitting that Windstream did not file a cost study until "December 2007")). Because of this deficiency, the Commission subsequently ordered Windstream to:

> file a cost-support study, which shall include outlining the justification for the traffic rates and detailing the costs specifically incurred in the provisions of the services, as well as any other costs and factors contributing to those rates, as published in the tariff.

(*See* Order of Nov. 13, 2007 in this matter at 5-6). After a number of false starts, Windstream finally filed its full cost-support study.[5]

Upon review, the RLECs' expert, Douglas Meredith, identified a number of significant flaws in Windstream's cost support study, including "four major areas of concern that suggest . . . that Windstream's transit rates are not reasonable and not supported by the study it provided." (Test. D. Meredith, July 29, 2009 Hearing at 101:24-101:2). The four major areas of concern with Windstream's cost study that Mr. Meredith determined to be "unreasonably deficient" are: (i) Windstream's reliance on outdated tandem switch technology in determining future switch investment; (ii) Windstream's complete failure to recognize operational efficiencies; (iii) Windstream's failure to update costs from 2004 to the 2006 study; and (iv) Windstream's

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[5] Initially, Windstream filed its "cost-support" study as a flat file without any of the underlying data that would have allowed the Commission or the RLECs to perform a meaningful review of Windstream's transit costs. (*See* Direct Test. of D. Meredith at 5:20-27 and 10:22). After many frustrating attempts at resolving this problem, the RLECs finally received the data inputs and formulae used by Windstream in support of its Tariffed rates in or about June 2009. (*See* Supp. Direct Test. of D. Meredith at 2:23-4:8).

inappropriate forecasting and assignment of termination costs which, if corrected, would alone reduce Windstream's transit rate by over 30 percent. (Suppl. Test. of D. Meredith at 5:1-4).

Mr. Meredith did not realize at the time how accurate his statement was, until Windstream's witness, Mr. Smith, testified that the rates set forth in Windstream's Amended Tariff, initially, were not the result of a TELRIC cost-support study.[6] Instead, Mr. Smith testified that Windstream had settled upon its rates after discovering that another large ILEC was considering filing a similar transit tariff. (Test. of K. Smith, Transcript of July 29, 2008 Hearing at 197:3-11). In short, Windstream decided to "adopt" the proposed rates of the other carrier as its own. (*Supra*). It was not until sometime after its decision to adopt those rates that Windstream decided to conduct a so-called "TELRIC cost study" purporting to "make sure" (to the seventh decimal point) that its Amended Tariff rates were fair, just and reasonable. (Test. of K. Smith, Transcript of July 29, 2008 Hearing at 158:10-16). In addition, Mr. Smith admitted that Windstream's "End Office Transit Tariff" rate is based not on cost, but on "deterrence." (Dir. Test. of K. Smith at 6:21 ("Windstream included an end office transit rate strictly as a deterrent to the RLECs.") (emphasis in original). In either case, Windstream does not have legitimate cost support for either its tandem or end office transit traffic service rates. Typically, cost studies drive rates; here, however, Windstream's rates appear to have driven its cost study.

In the end, the RLECs have asked only for their right to negotiate – free from the shadow of a filed tariff – the rates, terms, and conditions of an appropriate intercarrier agreement addressing

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[6] In fact, up until the July 29, 2009 Hearing, Windstream had unequivocally and repeatedly asserted that its transit rates are the result of a TELRIC cost study. For instance, in response to Commission staff information requests, Windstream stated that its rates "were developed using forward looking,(or, TELRIC) . . . costs." (Windstream's Response to Commission Staff's Request for Information Response No. 3). Mr. Smith had also stated in his Direct Testimony that "the rates in the transit tariff are . . . TELRIC-based." (Direct Test. of K. Smith at 5:12-17). Obviously, nothing could be further from the truth.

transit traffic issues with Windstream or any other third-party carrier seeking to terminate such traffic on the RLECs' networks. Not only does such a process conform to the mandates of the Telecommunications Act, but it would also ensure the application of fair, just, and reasonable rates and terms for all parties.

III. ARGUMENT AND ANALYSIS.

The Commission should resolve this dispute with a two-part order. First, the Commission should cancel or reject Windstream's Amended Tariff as unjust, unfair, and unreasonable pursuant to KRS 278.190 and 260 because: (i) the rates, terms, and conditions for local transit services should be addressed in negotiated intercarrier agreements, rather than unilaterally dictated tariffs; and (ii) the rates in Windstream's Amended Tariff are not appropriately cost-based. Second, the Commission should require Windstream to negotiate an intercarrier agreement (as contemplated by the Telecommunications Act) that addresses the rates, terms, and conditions by which it proposes to terminate carrier-to-carrier local transit traffic on the RLECs' respective networks.

A. The Standard for Review Is Whether Windstream's Amended Tariff is Fair, Just, and Reasonable.

Pursuant to KRS 278.030, 190 and 260, the Commission should determine whether the rates, terms, and conditions of Windstream's Amended Tariff as filed are fair, just, and reasonable. KRS 278.030 allows a utility like Windstream to receive compensation for its services only where such compensation is "fair, just and reasonable." *Id.* KRS 278.190(1) provides that:

> Whenever any utility files with the commission any schedule stating new rates, the commission may, upon its own motion, or upon complaint as provided in KRS 278.260, and upon reasonable notice, hold a hearing concerning the reasonableness of the new rates.

Id. KRS 278.190(3) requires that the burden of proof to show that the new terms of the tariff are "just and reasonable shall be upon the utility."[7] *Id.* Moreover, pursuant to KRS 278.260, the Commission is explicitly granted "original jurisdiction over complaints as to rates or services of any utility" and to make an investigation as to whether such rates are unreasonable or unjust. *Id.* Therefore, the analytical standard that this Commission should apply, as set forth by statute, is to determine whether Windstream's Amended Tariff is fair, just, and reasonable. For the following reasons, Windstream's Amended Tariff is not fair, just, and reasonable, and it should be rejected.

B. Transit Traffic Rates Should Be Determined Through Negotiation.

Windstream's Amended Tariff effectively hijacks the goals of the Telecommunications Act. It does so by setting up default rates, terms, and conditions for interconnection between third-party CLECs and the RLECs. In effect, the Amended Tariff holds Windstream out as the default transit services provider, allowing third-party local exchange carriers that desire to exchange local traffic with the RLECs to forego the duty, mandated by the Telecommunications Act, to request and negotiate appropriate intercarrier agreements with the RLECs for the exchange of such traffic. Moreover, the presence of Windstream's Amended Tariff destroys any incentive on the part of the CLECs to seek or request interconnection with the RLECs because Windstream purports to already provide these services pursuant to its Amended Tariff. Windstream's Amended Tariff also improperly obligates the RLECs to pay the costs for interconnection services outside of their

[7] The RLECs respectfully note that the Commission in a prior Order in this case stated that the RLECs as the "complaining party bear[] the burden of proof." (Commission Order, Nov. 13, 2007). The Commission cited *Energy Regulatory Comm'n v. Kentucky Power Co.*, 605 S.W.2d 46, 50 (Ky. App. 1980) in support of its finding. However, KRS 278.190(3) places that burden on the party seeking to get approval of its rates. Likewise, in *Energy Regulatory Comm'n*, the entity that had filed the application for a certificate of public convenience and necessity bore the burden of proof before the Commission. In this case, that would be Windstream.

respective networks. And finally, the Amended Tariff forces the RLECs to be dependent upon Windstream for billing records. Such "interconnection by fiat" should not be allowed.

1. Federal Law Requires That Windstream, the RLECs, and the CLECs Negotiate Intercarrier Agreements for the Delivery of Local Exchange Traffic.

"[T]he over-arching purpose of the Telecommunications Act is to . . . promote competition in local telephone markets." *Quick Communications, Inc. v. Mich. Bell Tel. Co.*, 515 F.3d 581, 585 (6th Cir. Mich. 2008) *citing Mich. Bell Tel. Co. v. MCIMetro Access Transmission Servs.*, 323 F.3d 348, 351-52 (6th Cir. 2003). To that end, "[t]he [Telecommunications] Act sets forth detailed requirements for the development of an interconnection agreement between an incumbent and a provider seeking to enter the market." *GTE Northwest v. Nelson*, 969 F. Supp. 654, 656 (W.D. Wash. 1997). As such, the Telecommunications Act requires local exchange carriers who desire to interconnect with other local exchange carriers to negotiate or, where necessary, to arbitrate, agreements for the exchange of that local traffic. *See generally* 47 U.S.C. §§ 251-252. State action "is preempted if it interferes with the methods by which the federal statute was designed to reach [its] goal." *Verizon North v. Strand*, 309 F.3d 935, 940 (6th Cir. Mich. 2002). Windstream's Amended Tariff, unilaterally dictating the terms of what the Telecommunications Act requires be reached through negotiation, would result in "an interconnection agreement by fiat. Such a result is inconsistent with the elaborate statutory framework of § 252." *Verizon North v. Strand*, 367 F.3d 577, 585 (6th Cir. 2004). As such, it is preempted by federal law.

The Sixth Circuit recently addressed, and rejected, a carrier's attempt to tariff crucial terms and conditions of interconnection arrangements. *Verizon North v. Strand*, 367 F.3d 577, 585 (6th Cir. 2004). Specifically, the *Verizon North* court addressed whether a state public service commission properly approved a CLEC's tariff imposing reciprocal compensation terms on an ILEC without negotiation or arbitration. The Sixth Circuit held that a carrier cannot unilaterally tariff the rights and obligations reserved by the Telecommunications Act as the subject of intercarrier agreements. *Verizon North*, 367 F.3d at 584-85 Specifically, the court held that to allow the imposition of rights and obligations by tariff "eliminates the virtues of *negotiated* competition ensconced in § 252." *Id.* at 585 (emphasis in original). Furthermore, it would "frustrate[] Congress's intent by eviscerating its chosen mechanism for increasing competition in the local telephony market and by upsetting the intricate balance between competitors and incumbents." *Id.* In making this determination, the court noted that "[t]he state's role in assisting the process of interconnection agreement formation is clearly bounded by the plain language of § 252 of the Act." *Id.*

Throughout the *Verizon North* opinion, the Sixth Circuit emphasized the integral role that negotiation and competition play under the Telecommunications Act. It criticized the Michigan Public Service Commission ("MPSC") in that case for allowing a carrier to circumvent those processes by allowing a tariff to unilaterally dictate the relationships of the carriers. Specifically, the Sixth Circuit emphasized that:

> the MPSC's order here permits the MPSC to bypass the federal statutory process for reaching an interconnection agreement and to create a competitive relationship via the filing of a unilateral tariff. Instead of achieving a reciprocal compensation agreement via the negotiation and arbitration mechanism provided in the Act, <u>the MPSC permitted the institution of an interconnection agreement by fiat. Such a result is inconsistent with the elaborate statutory framework of § 252</u>.

Id. at 585 (emphasis added).

Verizon North is strikingly similar to the case presented by Windstream. Here, Windstream's Amended Tariff has unilaterally imposed the rates, terms, and conditions for local transit services by which third-party carriers and the RLECs would exchange local traffic. Yet, Windstream, and the third-party CLECs are bound by Section 251 of the Telecommunications Act to negotiate appropriate agreements with the RLECs addressing these very services. *Id.* (ILECs and CLECs have a "duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of [intercarrier] agreements"). As a result, Windstream's Amended Tariff effectively sidesteps the negotiation and arbitration requirements of the Telecommunications Act.

Windstream's Amended Tariff in this case, if allowed to stand, would likewise constructively impose an interconnection agreement for local transit services by "fiat." In the Sixth Circuit's words, it "eviscerate[s] any incentive to engage in private negotiation, which is the centerpiece of the [Telecommunications] Act." *Quick Communs., Inc. v. Mich. Bell Tel. Co.*, 515 F.3d 581, 585 (6th Cir. Mich. 2008) (commenting on the *Verizon North* opinion). Apparently unaware of this governing law, Windstream admits as much by testifying that the effect and purpose of its Amended Tariff is to provide third-party carriers with a default option "in the event that they choose to subscribe to tandem transit service from Windstream via tariff in lieu of a negotiated transit agreement." (Direct Test. of K. Smith at 8:16-18.)

Determining the propriety and role of a transit service provider, including whether, when, and by whom the transit service provider should be paid, is a crucial aspect of intercarrier negotiations between an ILEC (such as the RLECs here) and a CLEC desiring to exchange local traffic. Allowing an intermediary transiting party like Windstream to make such decisions by "fiat" eliminates the incentive for the parties who are required to negotiate intercarrier agreements to actually do so. It also disregards the underlying policies and purposes of the Telecommunications Act.

The Sixth Circuit is not alone in rejecting the tariffing of intercarrier arrangements for the exchange of local traffic. Recent changes to Federal Communications Commission ("FCC") regulations have further discouraged the tariffing of local traffic in general. For instance, in a February 2005 Order, the FCC changed the language of 47 CFR §20.11 to clarify that local exchange carriers cannot use tariffs to impose compensation obligations on wireless carriers for local traffic. It stated that:

> precedent suggests that the Commission intended for compensation arrangements to be negotiated agreements and we find that negotiated agreements between carriers are more consistent with the pro-competitive process and policies reflected in the [Telecommunications] Act. Accordingly, we amend section 20.11 of the Commission's rules to prohibit LECs from imposing compensation obligations for non-access traffic pursuant to tariff.

In the Matter of Developing a Unified Intercarrier Compensation Regime T-Mobile et al., FCC Docket No. 01-92, 20 FCC Rcd. 4855, PP 14 (Feb. 24, 2005) (emphasis added).

The Eighth Circuit has interpreted the FCC's change to 47 CFR §20.11 as part of a "move [by the FCC] away from tariffs and toward negotiation and arbitration in order to facilitate market competition." *Iowa Network Services v. Qwest,* 466 F.3d 1091, 1098 (8th Cir. 2006). Likewise, the Eighth Circuit noted that "no provision of the Communications Act except 203(a) requires tariffing, and no provision gives a carrier a positive right to file a tariff." *Id., citing MCI WorldCom, Inc. v. Fed. Comm. Comm'n,* 209 F.3d 760, 764 (D.C. Cir. 2000).

Because the FCC and Federal Circuits have rejected the rigidity of tariffs in favor of the negotiation and arbitration requirements set forth in 47 U.S.C. §§ 251 and 252 of the Telecommunications Act, this Commission should find that Windstream's Amended Tariff is preempted by federal law, and, as such, is unjust, unfair, and unreasonable.

2. Windstream's Amended Tariff Disincentivizes Negotiated Intercarrier Agreements.

The very presence of Windstream's Amended Tariff also eliminates Windstream's and third-party carriers' incentive to negotiate appropriate intercarrier agreements for the termination of transit traffic on the RLECs' networks. As the Sixth Circuit explained, allowing a telecommunications provider to tariff the rates, terms, and conditions of a crucial network element as an alternative to obtaining interconnection rights is tantamount to "a fist slamming down on the [negotiating] scales." *Verizon North*, 367 F.3d at 585; *citing also Wis. Bell v. Bie*, 340 F.3d 935, 941 (7th Cir. 2003) (tariffs unfairly alter negotiations by "plac[ing] a thumb on the scales" and requiring only one of the parties to fully participate in the negotiation). Indeed, such action does:

> not just slightly unbalance the negotiations by forcing the [party upon whom the tariff is imposed] to show its hand. It instead completely forestalls the need for negotiations. Rather than just forcing the [party upon whom the tariff is imposed]to reveal the rates it wants to charge, which clearly disrupts the negotiations, this [action] completely obviates the need for negotiations by allowing [the party imposing the tariff] to establish its own rate without any interaction between the [two parties].

Id. (emphasis added).

Consequently, the Telecommunications Act envisions that CLECs, as the new entrants into the local calling area, will request interconnection with ILECs in order to exchange local traffic. 47 U.S.C. § 251(c)(1) and (2); *see also GTE South v. Morrison*, 957 F. Supp. 800, 802 (E.D. Va. 1997) ("The Act directs the incumbent telephone companies to negotiate purchase and interconnection agreements with the new entrants"). Windstream's Amended Tariff cuts this process off at the knees. By holding its Amended Tariff out as a self-described "default" option, Windstream creates a significant disincentive for CLECs to ever seek or request interconnection agreements with the RLECs in the first place. (Test. of K. Smith, July 29, 2009 Hearing at 113:25-114:2). If these services are already being provided by Windstream pursuant to its Amended Tariff, then the CLECs would have no reason to contact the RLECs and negotiate appropriate terms and conditions for the exchange of traffic.

Likewise, Windstream, because of its Amended Tariff, has no incentive to seek an appropriate agreement with the RLECs for the delivery of transit traffic. As Mr. Magruder testified:

> Windstream's tariff disincentivizes productive negotiation and undermines the RLECs rights. As I understand it, Windstream offers the RLECs the option of signing Windstream's proposed transit agreement, or else Windstream claims to hold that carrier to the tariff. By tariffing transit services, Windstream has nothing to lose.

(Direct Test. of W. Magruder at 7:8-11). Mr. Smith claims that Windstream's own "experience, and preference for that matter, is that most carriers negotiate an agreement providing for . . . tandem transit services." (Direct Test. K. Smith at 8:21-22). However, if this were true, then only one thing stands in the way of such agreements occurring – Windstream's Amended Tariff. That Amended Tariff, however, has a serious chilling effect on any intercarrier negotiations addressing these transit arrangements.

There is no better example of this chilling effect than the currently long-stalled negotiations between Windstream and Highland Telephone, one of the RLEC complainants. Highland Telephone "is the only rural carrier in the state that subtends a Windstream tandem." (Test. of W. Magruder, July 29, 2009 Hearing at 83:6-8).[8] Because of this, Highland Telephone indicated to Windstream that it was "conceptually agreeable" to the terms of a proposed intercarrier agreement for transit traffic.[9] (Test. of K. Smith, July 29, 2009 Hearing at 124:7-13; *see also* email exchange between E.

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[8] Practically speaking, this means that Highland Telephone is highly dependent upon a Windstream tandem switch for the vast majority of traffic originating from and terminating to Highland Telephone's customers. (Test. of W. Magruder, July 29, 2009 Hearing at 83:6-8). This is a decades-old mutually-beneficial network relationship that dates back to when General Telephone provided service in the state. Windstream should not be allowed to take advantage of Highland Telephone's situation. This relationship is one that should only be defined within the context of a negotiated agreement, not imposed by tariff.

[9] Mr. Smith initially testified that the negotiations between Windstream and Highland Telephone "broke down because Highland Telephone continued to insist that it should not be required to compensate Windstream under an agreement." (Rebuttal Test. of K. Smith at 6:14-17). However, when presented with the contents of the email exchange between Mr. Depp, counsel for Highland, and Ms. Bennett, counsel for Windstream, establishing Highland Telephone's willingness to pay for transit traffic, Mr. Smith was forced to recant his prior testimony. (Test. of K. Smith, July 29, 2009 Hearing at 123:7-10 ("Q. Would you agree with me that, with respect to

Depp and K. Bennett entered as Exhibit 2, July 29, 2009 Hearing). Given Windstream's Amended Tariff unilaterally establishing a rate of $0.0030 for tandem transit traffic rates, however, the negotiations reached an impasse. As Mr. Magruder testified, "Highland Telephone . . . has now waited more than five months for a substantive response to its most recent redlines of a proposed agreement to supersede the terms of Windstream's tariff." (Direct Test. of W. Magruder at 7:11-15). Ostensibly, the only reason the parties have been unable to reach an agreement is because Windstream has insisted upon receiving its tariffed transit rate as opposed to a rate that is more consistent with what many CLECs have been able to negotiate for the exact same services.

Thus, because of its significant detrimental effect on intercarrier negotiations, Windstream's Amended Tariff must be rejected so that carriers can (as necessary) effectively negotiate appropriate arrangements for the exchange of local traffic.

3. Windstream's Amended Tariff Improperly Requires the RLECs to Pay the Costs of Interconnection Services Provided Outside of Their Respective Networks.

Windstream's decision to tariff local transit services results directly in requiring the RLECs to pay the costs of interconnection services provided outside of their respective networks. In doing so, "the tariff seeks to obtain what no carrier has any right to obtain: RLEC payment for traffic exchange costs incurred outside of the RLEC network as a result of networking decisions forced upon them by Windstream and / or certain third-party carriers." (Direct Test. of W. Magruder at 3:22-4:2).

47 U.S.C. § 251(c)(2)(B) makes clear that RLECs' responsibilities for interconnection cannot extend, in any case, beyond a point on the RLECs' respective incumbent networks. Specifically, 47 U.S.C. § 251(c)(2)(B) provides that it is the duty of an ILEC (for example, the RLECs) "to provide,

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the non-CMRS traffic, however, Highland was indicating its willingness to pay for Highland transit traffic? A. According to this email, that would appear so.").

for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . at any technically feasible point within the carrier's network." *Id.* (emphasis added). Likewise, the Commission as recently as two weeks ago reaffirmed its position that ILECs generally are "not responsible for costs incurred outside of" their networks. *In the Matter of Investigation into Traffic Dispute between Brandenburg Telephone Company, Windstream Kentucky East and Verizon Access*, Case No. 2008-00203, *Order*, Aug. 26, 2009, at 20.

Yet, here, the terms and conditions of Windstream's Amended Tariff directly contravene applicable law by forcing the RLECs to pay for transiting services provided outside the RLECs' respective networks. In particular the Amended Tariff provides that its provisions "shall apply to those Telecommunications Service Providers that do not have an interconnection agreement with [Windstream] providing for payment for Transit Traffic Service." (Amended Tariff, Section S11.1.2A). In this instance, this provision would apply to the RLECs because they do not have such an agreement with Windstream. Moreover, although the RLECs do not now originate local transit traffic on Windstream's network, if they were to so choose, the Amended Tariff would obligate the RLECs to pay for transit costs even though those costs would be incurred outside of their networks.

The Amended Tariff would also require the RLECs to "reimburse" Windstream in the event that the "terminating Telecommunications Service Provider imposes on [Windstream] any charges or costs for the delivery of Transit Traffic." (Amended Tariff, Section S11.1.2D). Federal law does not impose this obligation on the RLECs, and it is unreasonable for Windstream to suggest that its Amended Tariff can impose what federal law forbids. 47 U.S.C. §251(c)(2) (ILECs have a "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . at any technically feasible point within the carrier's network" (emphasis added)). Therefore, the Amended Tariff is unfair, unjust, and unreasonable and should be rejected.

Any such requirement that the RLECs reimburse Windstream for interconnection costs incurred outside of their respective networks would be in direct conflict with the Commission's previous orders, and federal law. *Id.* In fact, because the RLECs are not required to bear the costs of exchanging local traffic outside of their networks, it seriously calls into question whether a transit agreement between the RLECs and Windstream is even necessary, even though the RLECs continue to be open to that potential compromise. Windstream, however, clearly intends to use its Amended Tariff as a means of "placing its thumb on the scales" of negotiations in order to coerce a different resolution than it could otherwise achieve. *Wis. Bell,* 340 F.3d at 941. After all, as long as the Amended Tariff remains in place, Windstream suffers practically no consequences from insisting on an agreement that effectively mirrors the terms of its Amended Tariff. In fact, by so doing, Windstream has everything to gain, and nothing to lose, unilateral terms and unilateral rates.

4. Windstream's Amended Tariff Impermissibly Forces the RLECs to Depend Upon Windstream for the Identification and Billing of Traffic.

Windstream's Amended Tariff also impermissibly forces the RLECs to depend upon Windstream for the identification and measurement of the traffic that Windstream delivers to the respective RLECs' networks. It does so in at least three ways. First, Windstream's Amended Tariff glaringly omits any provisions setting forth how Windstream would terminate transit traffic on the RLECs' respective networks and what facilities it would use to do so. (Test. K. Smith, Transcript of July 29, 2009 Hearing at 144:3-23). Because Windstream's Amended Tariff does not identify what facilities would be used to terminate transit traffic on the RLECs' networks, it would be impossible for the RLECs to know or prepare for "the kinds of traffic or trunking arrangements Windstream would be proposing." (Test. of W. Magruder, July 29, 2009 Hearing at 70:2-4).

As Mr. Magruder testified, the facilities Windstream will use to terminate this traffic matter greatly because:

> if [transit] traffic were terminated over facilities, over trunk groups, that we are aware of, and we put in place the ability to measure and record that traffic, we are certainly in the position to be able to do so and would be able to verify how much a particular carrier owes us for terminating certain traffic on our networks; but an example of why [not knowing which facility will be used] would be a big problem, would be, for instance, if Windstream were to terminate traffic over our EAS trunk groups where neither of our companies have ever had to put recording and measuring capability on those trunk groups, and there is an extremely large amount of traffic on those groups, then we would have no way of knowing whether that traffic appeared or not. We wouldn't know who to bill.

(*Supra* at 69:9-23). Moreover, the RLECs also fear that this will open up their networks to other carriers who will use Windstream's transit service to deliver what is, in fact, <u>access</u> traffic without any way for the RLECs to identify or otherwise bill for that traffic. Thus, the lack of provisions in Windstream's Amended Tariff identifying what facilities it would use to terminate transit traffic makes the RLECs' networks vulnerable to the delivery of unidentified and unmeasured traffic over its EAS trunk groups.[10] This is simply unacceptable for the reasons Mr. Magruder explains above.

Second, the very terms of the Amended Tariff force the RLECs to be dependent upon Windstream for billing records, even in the event the RLECs were able to identify and measure that traffic on their own. Specifically, the Amended Tariff states that Windstream will "generate and deliver to the terminating Telecommunications Service Provider industry standard call detail records,

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[10] Also absent from Windstream's Amended Tariff is any provision defining an appropriate threshold at which point dedicated facilities for the traffic would be more appropriate. Instead, Windstream's Amended Tariff would presumably allow the termination of traffic on the RLECs' networks at <u>any</u> volume, no matter how high. See, e.g., *In the Matter of Investigation into Traffic Dispute Between Brandenburg Telephone Company, Windstream Kentucky East and Verizon Access*, Case No. 2008, August 26, 2009, Order, at 20; ("The Commission . . . has established DSI as a minimum traffic threshold before requiring dedicated trunks for the exchange of local traffic").

where available, for its use in billing the originating Telecommunications Service Provider." (Amended Tariff, Section S11.1.2E (emphasis added)).[11] Thus, even if Windstream's Amended Tariff were to specify the facilities used, and the RLECs had the capability of identifying and measuring that traffic, the RLECs would still be required to rely upon Windstream's billing records.

Third, Windstream's Amended Tariff would, in some instances, actually force the RLECs to rely on the PLU estimate provided to Windstream by the originating carrier. Specifically, the Amended Tariff allows carriers originating transit traffic on Windstream's network to elect, in lieu of "Actual Measurements," to provide Windstream a "percent local usage factor (PLU) estimating the percentage of total minutes of use delivered to [Windstream]." Windstream would then have the option of passing on this "estimated" PLU to the RLECs for billing purposes. As unacceptable as it is to force the RLECs to be reliant upon Windstream's records, it is all the more so that the RLECs should be forced to stake their financial well-being upon the PLU estimates of third-parties who have every incentive to underreport the volume of traffic being delivered because it saves them money to do so.

And, in every case, the Amended Tariff **absolves** Windstream of any liability in the event call detail records are not available or the RLECs cannot collect compensation properly owed them. (Amended Tariff, Section S11.1.2E). There is quite simply no reason to force the RLECs to rely upon the availability (or lack thereof) of Windstream's records when the RLECs could, if appropriate facilities were established, measure and identify the traffic themselves.

Moreover, as Mr. Magruder testified, many of the RLEC "service territories have some of the lowest per capita income areas in the Commonwealth." (Direct Test. of W. Magruder at 8:22). In

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[11] See for example Amended Tariff S11.1.2E ("[U]navailability of [Windstream's] . . . call detail records does not relive the originating Telecommunications Service Provider of its obligations to pay."); and S11.1.2H ("In the event a dispute arises . . . , Company will continue to bill based upon information provided by the [originating carrier]").

order to continue to provide reasonable service, the RLECs "depend heavily on . . . terminating revenues to keep [their] rates at a level that [their] customers can afford to pay." (*Supra* at 9:1-3). As Mr. Magruder further testified, the RLECs should not be forced:

> to place the continued viability of [their respective networks] in the hands of Windstream. We have no way to assure the completeness or accuracy of Windstream's identification and measurement methods. Moreover, because we would have no way of auditing or verifying Windstream's records, Windstream also has no accountability for errors in its data. Windstream does not serve our customers. Windstream will not have to explain to our customers why we cannot properly address the traffic entering our network or collect charges based on our own billing records. Windstream does not answer to our customers about our rates. And, Windstream is not responsible for ensuring that we continue to provide affordable, state-of-the-art services to the most rural parts of the Commonwealth. Windstream, in short, has no incentive to protect the interests of our customers.

(*Supra* at 9:8-12).

Finally, the terms of the Windstream Amended Tariff create significant operational inefficiencies. The RLECs have invested a substantial amount of money in their networks to be able to control, bill, and collect, using the functionalities of their switches, for traffic entering their networks. The terms of Windstream's Amended Tariff eviscerate these efforts by making the RLECs unnecessarily dependent upon Windstream for this very information. If third-party carriers want to exchange local traffic with the RLECs, then those third-party carriers should request an intercarrier agreement as contemplated by the Telecommunication Act wherein the parties negotiate appropriate terms by which the traffic exchanged can be measured and monitored. The RLECs have a statutory right to negotiate these terms, and they should not be forced to accept them as unilaterally imposed by Windstream's Amended Tariff.

C. Windstream's Transit Tariff Rates Are Unfair, Unjust, and Unreasonable.

Notwithstanding all of the previously discussed legal defects of Windstream's Amended Tariff, the actual transit rates set forth in the tariff are unfair, unjust, and unreasonable. When Windstream initially filed its Amended Tariff, it failed to include any cost support for the transit rates contained therein. This failure alone should have been grounds for rejecting Windstream's Amended Tariff. (*See In the Matter of Notice of Intent of North Central Telephone Coop. Corp. to File Rate Application*, Case No. 2007-00162, *Order*, July 27, 2007, at 2-3 (finding that proposed rates "must be accompanied by sufficient data to support the prices sought to be charged," and that failure to do so means that the tariff filing "must be rejected")).

Yet, throughout these proceedings Windstream has consistently maintained that it is not obligated to support its transit rates by producing TELRIC cost studies. And, in fact, Windstream's transit rates are not supported by a cost study. To the contrary, Windstream's transit rates were "chosen" by adopting another ILEC's "proposed" (and, thus, not approved) rates. It was not until sometime later that Windstream "backed into" these rates (to the <u>seventh</u> decimal point) by producing what it calls a "TELRIC cost study." Yet, as the RLECs' expert witness (Douglas Meredith) makes clear, even Windstream's *post hoc* study falls well short of the applicable federal regulations and requirements for TELRIC methodology. As a result, the Commission should reject Windstream's Amended Tariff because it contains unfair, unjust, and unreasonable rates.

1. By Its Own Admission, Windstream's Transit Service Rates Were Not Developed Nor Supported by Appropriate Cost Support Data.

It is abundantly clear that the transit service rates in Windstream's Amended Tariff were <u>not</u> developed or supported by appropriate cost support data; as a result, Windstream's Amended Tariff is not just, fair and reasonable. Instead, Windstream admits that it borrowed its transit rate from another ILEC and, only then, created a so-called "TELRIC" cost study to allegedly support its transit rates. When asked by Commission staff whether Windstream developed its transit rates first or performed a cost study first, Mr. Smith responded that:

> the rate was developed first and then a cost study was run to make sure that that rate was cost based so that it was covering our cost, and I think that the rate that we came up with was a rate proposed to us by another big RLEC [*sic*] that they had been planning to maybe file a tariff as well.

(Test. of K. Smith, Transcript of July 29, 2009 at 185:22-186:3 (emphasis added); *see also* 197:17-20). When pressed further on the issue, Mr. Smith testified that Windstream "chose the rate because we thought that, with this big ILEC, . . . if they had come up with that rate, then we felt that that was a good rate for us as well." (Test. of K. Smith, Transcript of July 29, 2008 Hearing at 186:25-187:3 (emphasis added)).

As for the higher end office transit rate listed in Windstream's Amended Tariff, Mr. Smith consistently and adamantly states that the rate was chosen "strictly as a deterrent" to force carriers not to use Windstream's end office switches for transiting purposes. (Direct Test. of K. Smith at 6:21). And, even though Windstream claims that its tandem transit rate is not being so used, (*see Supra* at 8:16), it is apparent from Mr. Kerry's testimony that the underlying purpose of the entire transit tariff is, in fact, for the purpose of deterrence. As Mr. Smith testified, Windstream "filed its transit tariff in part because many of the RLECs were inappropriately using Windstream's network." (*Supra* at 4:12-13). When asked if the tariff was successful in forcing the RLECs to reroute their traffic, Mr Smith testified that it was, noting that the "RLECs in this matter . . . have since worked to reroute their transit traffic . . . away from Windstream's network altogether." (*Supra* 7:17-19). Such a rationale has absolutely no relevance, or place, in determining the rates that will be imposed upon other carriers for the provision of transit services. Thus, neither of Windstream's tandem or end office transit rates are supported by appropriate cost support. Consequently, Windstream's Amended

Tariff should be rejected; the rates it specifies are "deterrent." As a matter of law a deterrent rate is not fair, just, or reasonable.

2. Windstream's *Post Hoc* Cost Study Is Seriously Flawed.

Nevertheless, the *post hoc* cost study Windstream finally filed in support of its transit rates is seriously flawed and fails to establish Windstream's transit rates as fair, just, and reasonable, even after the fact. The RLECs' expert witness, Douglas Meredith, reviewed the cost support data provided by Windstream and concluded that "the transit rate is not supported by Windstream's filed cost support and that the filed transit rate is not reasonable when judged against standard cost methodology." (Test. of D. Meredith, July 29, 2009 Hearing at 103:9-14). In making this determination, Mr. Meredith identified four major areas where Windstream's cost study was "not reasonable regardless of the cost methodology used," leading to an unfair, unjust, and unreasonable rate. (Supp. Test. of D. Meredith at 4:25-5:1).

First, Mr. Meredith identified "several problems with how Windstream modeled its switch and calculated its switch investment used to develop transit rates." (Supp. Test. of D. Meredith at 5:7-8). In particular, Windstream's cost study is based upon outdated switch "technology that is not 'forward-looking least cost,' which is required by FCC regulation." (*Supra* at 5:12-6:9; *citing* 47 CFR § 51.505(b)(1)). He characterizes this as a "major failure of the study because the study is not using least-cost forward-looking technology available in 2006 [(the year of the study)] and certainly not using least-cost forward-looking technology in 2009." (*Supra*). In fact, "deployment of softswitch [technology] can reduce by half the cost of traditional switch deployment." (Test. of D. Meredith, July 29, 2009 Hearing at 102:10-12). Because soft-switch technology can be "approximately one-half the cost of the older technology" Windstream's rate development is significantly over-priced. (Supp. Test. of D. Meredith at 6:4-9).

Second, Mr. Meredith observed that in 2006-2007 Windstream "revised its allocation of joint/shared and common switching costs . . . greatly increasing the assignment of those costs to tandem functionality." (Supp. Test. of D. Meredith at 6:11-13). In fact, "Windstream . . . used an allocation of joint/shared and common switching costs of 47 percent without proving that this does not lead to double recovery of costs for other services." (Test. of D. Meredith, July 29, 2009 Hearing at 102:14-17). Mr. Meredith concluded that such a revision is "highly suspect because it has the effect of increasing transit service rates without reducing other TELRIC rates offered by Windstream" thus producing a "double recovery of allowable costs." (Supp. Test. of D. Meredith at 6:14-17). This single change in allocation had the practical result of raising Windstream's purported tandem equipment investment costs by 124 percent. (*Supra* at 6:24-25).

Third, Mr. Meredith explained "that some switching costs were incorrectly assigned to the tandem transit function" when they should have been "assigned exclusively to end office switching and should not be part of a transit rate." (Test. of D. Meredith, July 29, 2009 Hearing at 102:22-25). "The approach suggested by Windstream is unfair, unreasonable, and simply wrong in that it assigns investment cost related to end-user connections to the tandem switching function." (Supp. Test. of D. Meredith at 7:20-22). Windstream's own witness, Mr. Smith, agrees with Mr. Meredith's analysis of the switching costs stating that "all . . . of the joint assignments identified by Mr. Meredith could have been incorrectly assigned to the tandem portion of the calculation." (Rebuttal Test. of K. Smith at 9:7-9).

Fourth, Mr. Meredith discovered that Windstream's cost study:

> overstates the cost of terminations by failing to recognize that, in the transit arrangement, there will only be one termination on . . . Windstream's network. The model appears to reflect two terminations for interexchange fiber facilities.

(Test. of D. Meredith, July 29, 2009 Hearing at 103:1-6). In short, "if the model does not properly account for the number of terminations then the cost per minute for transport termination functionality derived from the model is inflated by a factor of two." (Supp. Test. of D. Meredith at 12:20-22). This error alone has significant ramifications for the overall transit rate. Specifically, Mr. Meredith concluded that "[w]hen the model is corrected, for example, for this single termination issue, the transit rate would be reduced by approximately 30 percent." (Test. of D. Meredith, July 29, 2009 Hearing at 103:7-8 (emphasis added)).

Taken separately, each of Mr. Meredith's conclusions raises serious doubts as to the reasonableness of Windstream's methodology for supporting, even *post hoc*, its transit rates. Taken together as a whole, however, his conclusions are crushing. Mr. Meredith summarized his review with the conclusion that "the transit rate is not supported by Windstream's filed cost support and . . . the filed transit rate is not reasonable when judged against standard cost methodology principles." (*Supra* at 103:11-14). Even though Windstream has had every opportunity to rebut Mr. Meredith's findings, with the sole exception of the softswitch technology component, it has failed to do so. Instead, Windstream appears to rest squarely upon its continued assertion that it "does not believe that a TELRIC cost study ultimately has any relevance to the final transit tariff rates in this proceeding." (Rebuttal Test. of K. Smith at 9:21-22). Such reliance, as discussed above, is simply legally unfounded.

Windstream's *post hoc* cost support study fails to establish the transit rates contained in its Amended Tariff as fair, just, and reasonable. Therefore, Windstream's Amended Tariff should be rejected.

IV. CONCLUSION.

For all of the foregoing reasons, the Commission should find that Windstream's Amended Tariff is unfair, unjust, and unreasonable. It imposes a one-sided, untenable, unreasonable "solution" to issues associated with traffic exchanged by parties other than Windstream. In so doing, Windstream's Amended Tariff unilaterally dictates the rates, terms, and conditions by which those other parties (RLECs and CLECs) will exchange this traffic. It has undermined the negotiation provisions of the Telecommunications Act. *See generally* 47 U.S.C. 251-252. It has deprived the RLECs of their ability to measure, control, and verify the amount and nature of traffic being delivered to them. It has eliminated any incentive on the part of Windstream or third-party CLECs to negotiate appropriate intercarrier agreements with the RLECs. All of this, and, yet, the very rates Windstream seeks to impose upon the RLECs remain unsubstantiated by any reasonable cost support, and are admittedly not fair, just, or reasonable because they are a "deterrent." For these reasons, Windstream's Amended Tariff is not fair, just, and reasonable. *See* KRS 278.030, 190 and 260.

Therefore, the Commission should take the following actions:

1. The Commission should cancel or reject Windstream's Amended Tariff as unjust, unfair, and unreasonable pursuant to KRS 278.190 and 260 because: (i) the rates, terms, and conditions for local transit services should be addressed in negotiated intercarrier agreements, rather than unilaterally dictated tariffs; and (ii) the rates in Windstream's Amended Tariff are not appropriately cost-based; and

2. The Commission should require Windstream to negotiate an intercarrier agreement (as contemplated by the Telecommunications Act) that addresses the rates, terms,

and conditions by which it proposes to terminate carrier-to-carrier local transit traffic on the RLECs' respective networks.

Respectfully submitted,

John E. Selent
Edward T. Depp
Stephen D. Thompson
DINSMORE & SHOHL LLP
1400 PNC Plaza
500 West Jefferson St.
Louisville, Kentucky 40202
Tel: (502) 540-2300
Fax: (502) 585-2207

Counsel to Brandenburg Telephone Company

CERTIFICATF OF SERVICE

I hereby certify that a copy of the foregoing was served by United States First Class Mail, sufficient postage prepaid, on this 15th day of September, 2009 upon:

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

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

Mark R. Overstreet
Stites & Harbison PLLC
421 West Main Street
P.O. Box 634
Frankfort, Kentucky 40602

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

Counsel to the RLECs