

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)

RECEIVED

SEP 15 2009

**PUBLIC SERVICE
COMMISSION**

Case No. 2007-0004

POST HEARING BRIEF OF WINDSTREAM KENTUCKY EAST, LLC

September 15, 2009

Counsel to Defendant:

Stacy J. Majors
Windstream Communications, Inc.
4001 Rodney Parham Road
Little Rock, AR 72212
(501) 748-6873

Mark R. Overstreet
STITES & HARBISON PLLC
421 West Main Street
P.O. Box 634
Frankfort, Kentucky 40602-0634
(502) 223-3477

I. INTRODUCTION

Windstream Kentucky East, LLC (“Windstream East”) submits this Brief pursuant to the Commission’s scheduling order and in response to the formal complaint filed December 28, 2006 by certain rural local exchange carriers (“RLECs”) in response to Windstream’s revision of its General Customer Services Tariff to include rates and charges for usage of transit traffic services (tandem and end office) on Windstream’s network by some RLECs without benefit of an interconnection agreement or any other agreement governing compensation for such use (“Transit Tariff”). The evidence in this matter supports the following conclusions:

- (1) Windstream East’s Transit Tariff is an appropriate and lawful means for Windstream East to establish rates for the use of its network by third parties which have either refused or failed to provide for such compensation arrangements via agreement.
- (2) The RLECs do not have an agreement with Windstream East allowing them to route their traffic exchanged indirectly with third parties through Windstream East's network;
- (3) The RLECs are not authorized to use Windstream East's end offices to transit their traffic to third parties.
- (4) Windstream East’s Transit Tariff rates for tandem and end office transit traffic services are just and reasonable and not discriminatory.
- (5) Windstream East is entitled to payment pursuant to the Transit Tariff from each RLEC routing traffic through Windstream East’s network between December 16, 2006 and the date that the RLEC removed its traffic from Windstream’s tandem or end-office or entered into a transit agreement with Windstream East.

II. STATEMENT OF FACTS

Windstream East is an incumbent local exchange carrier (“ILEC”) authorized by the Commission to provide telecommunications service in various exchanges throughout Kentucky. The RLECs are also ILECs authorized by the Commission to provide telecommunications service in Kentucky. In 2006 Windstream East discovered that some RLECs were inappropriately using its network to transit their traffic to third parties without compensating Windstream East and that some RLECs were misusing Windstream East’s end offices as tandems. (Hearing Testimony at p. 190) None of the RLECs has or would enter into an agreement with Windstream East providing for the RLEC to compensate Windstream East for the RLEC's use of Windstream East's network to transit the RLEC's local traffic to a third party.¹ (Kerry Smith Direct Testimony at p. 4) Windstream East's translations engineers approached certain RLECs to notify them that their use of Windstream East’s network was not authorized and attempted to work directly with these RLECs to establish alternate arrangements; however, these RLECs, at that time, refused to move their traffic away from Windstream East’s end offices, to negotiate a timely transit agreement with Windstream East to utilize Windstream East’s tandems, or to otherwise compensate Windstream East for the RLECs' use of Windstream East’s network. (Kerry Smith Direct Testimony at p. 4)

On December 1, 2006, Windstream East filed a revision to its General Customer Services tariff providing for telecommunications service providers to send and receive local transit traffic through a Windstream East tandem and indirectly connect with a third party subtending Windstream East’s tandem. Windstream East also included a rate to discourage those RLECs or

¹ NuVox Communications, T-Mobile USA, Inc., T-Mobile Central LLC, tw telecom of ky llc, Powertel/Memphis, Inc., Sprint Communications Company, L.P., Sprint Spectrum, L.P., SprintCom Inc. d/b/a Sprint PCS, Nextel West Corp., Inc., and NPCR, Inc. d/b/a Nextel Partners have all intervened in this case, and all have transit traffic agreements with Windstream East or are negotiating transit traffic agreements with Windstream East.

other parties who misuse Windstream East's end offices to transit traffic. The two rates included in the Transit Tariff are: \$0.0030 for tandem routed transit traffic and \$0.0045 to discourage end office routed transit traffic. (Kerry Smith Direct Testimony at p. 5) These rates were established based on proposed rates from another, larger carrier who had considered filing a similar tariff. (Hearing Testimony at p. 186). The end office rate is included in the Transit Tariff strictly as a deterrent to carriers attempting to use Windstream East's end office as a tandem, since end offices are not designed to function as tandem facilities - a point not disputed by the RLECs in this proceeding. (Kerry Smith Direct Testimony at p. 6) The Transit Tariff provisions apply *only* if a telecommunications service provider uses Windstream East's network to transit its traffic to third parties in the absence of an agreement with Windstream East.

Most of the RLECs misusing Windstream East's network acted to reroute their transit traffic away from Windstream's end offices after implementation of the Transit Tariff.² One RLEC in Kentucky, not a party to this proceeding, operates under the terms of the Transit Tariff. (Kerry Smith Direct Testimony at p. 8) Windstream East has attempted to negotiate transit agreements with the RLECs in this proceeding, but the RLECs either conditioned negotiations with Windstream East upon the completion of their negotiations with AT&T Kentucky for transit service or, in the case of one RLEC, conditioned an agreement on the RLEC not being responsible for compensation to Windstream East. (Kerry Smith Direct Testimony at p. 9, 10) In the instance of the RLECs' claims with respect to transit negotiations with AT&T Kentucky, Windstream East subsequently learned that there were no active negotiations between the RLECs and AT&T Kentucky. (Kerry Smith Direct Testimony at p. 9) Although negotiations for an

² An exception is Brandenburg Telephone, which continues to unlawfully misroute traffic through Windstream's end office in Elizabethtown without any compensation to Windstream. As noted in Case No. 2008-00203 before this Commission, Brandenburg's traffic is not directed to a carrier subtending Windstream's network and, therefore, may not be properly considered transit traffic but instead is improper and unlawful usage of an end office.

agreement have occurred between Highland Telephone and Windstream East as Highland Telephone is situated differently from the other RLECs because Windstream East is its tandem provider, the negotiations were unsuccessful. (Kerry Smith Direct Testimony at p. 10) Windstream East is at an impasse with the RLECs with respect to the rates, terms, and conditions providing for the RLECs' past and, in some instances, continuing use of Windstream East's network.

III. LEGAL POSITIONS

The burden of proof in this proceeding is upon the complaining party - in this case the RLECs. (Commission Order dated November 13, 2007 at page 5). The RLECs have not met their burden. Specifically, the RLECs (and the Intervening Parties for that matter) have failed to demonstrate that the Transit Tariff is unlawful or inappropriate or that it sets forth unjust or unreasonable rates. Both the RLECs and the Intervening Parties have broadly asserted that Windstream East's Transit Tariff presents some harm to them. Yet, none of them has demonstrated any actual harm. Indeed, the evidence presented shows that Windstream East is the only party being harmed in this matter through the undeniable use of its network by the RLECs without just compensation to Windstream East. The evidence also revealed that the RLECs that were misusing Windstream East's end offices as tandems did not reroute their traffic away from the end offices until the filing of Windstream East's Transit Tariff. Similarly, the RLECs and Intervening Parties suggested that the presence of the Transit Tariff would negatively impact future negotiations for transit agreements. However, the evidence does not support that contention either (Kerry Smith Direct Testimony, p. 11, Windstream East General Customer Services Tariff, S.11.1.2(A)), as evidenced by the fact that Windstream East and T-Mobile entered into an Interconnection Agreement effective in August, 2009. Finally, the RLECs

and Intervening Parties have argued erroneously that the rates in the Transit Tariff are unjust and unreasonable. The evidence demonstrates that the rates were established according to a viable TELRIC model, even though the law does not require transit rates to be TELRIC based. At best, by their assertions and actions in this matter, the RLECs have proven only that they do not want to take financial responsibility for their use of Windstream East's network in transiting traffic to third parties.

A. Windstream East's Transit Tariff is an appropriate means for Windstream East to collect proper compensation for use of its tandems for local transit traffic services and to discourage misuse of its end offices for same.

Throughout these proceedings, the RLECs have claimed that Windstream East's Transit Tariff serves as a disincentive to any carrier to enter into transit agreements, with either Windstream East or the RLECs. The facts belie this claim. Windstream East has made clear on the record in this proceeding that it prefers negotiated agreements. (Motion for Dismissal and Temporary Suspension and Answer at p. 6, Kerry Smith Direct Testimony at p. 9, Kerry Smith Rebuttal Testimony at p. 4). The tariff at issue *only* applies in the absence of an agreement. In fact, the Transit Tariff explicitly provides that it applies only in the absence of such an agreement, and the evidence has shown that the Transit Tariff was filed only after the RLECs refused to enter into meaningful negotiations with Windstream East. Additionally, it is undisputed that Windstream East has agreements providing for transit with the Intervening Parties in this proceeding; one such agreement was renewed with T-Mobile during the time that this proceeding has been pending. The facts simply do not support the assertion that the Transit Tariff serves as a disincentive to negotiated transit agreements.³

³ Windstream East notes again that the Transit Tariff provides an alternative for a carrier who may not wish to enter into an agreement such as one RLEC in Kentucky (not a party to this proceeding) which has chosen to operate under the Transit Tariff in lieu of an agreement.

Furthermore, the RLECs have tried to deflect the Commission's attention away from the RLEC's actions to avoid financial responsibility for their use of Windstream East's network by making specious arguments about direct connection with third parties and vague assertions of unsubstantiated harm stemming from the Transit Tariff. The RLECs even go so far as to suggest that Windstream East cannot initiate termination of traffic going over its network from a third party to the RLECs' networks. (Hearing Testimony at p. 63, 64) However, any issues between the RLECs and third parties regarding termination of third party traffic to the RLECs are solely between those parties and are the subject of separate negotiations, arbitrations or complaints between the RLECs and the third parties. The RLECs' arguments are clearly a red herring that the Commission should not take into consideration in this proceeding; *this is an issue between the RLECs and the third parties*. Windstream East's agreements with third parties do not govern the relationship between the RLECs and the third parties, and are irrelevant here. The Transit Tariff applies only to the use of Windstream East's network to transit the RLECs' traffic to third parties. Attempts to divert the Commission's attention by arguing that the Transit Tariff does not address issues between the RLECs and third parties should be ignored by the Commission.

The RLECs even contend that they are not required to bear the cost of routing their transit traffic to third parties (William W. Magruder Direct Testimony at p. 7), a statement contradicted by the United States District Court, Eastern District of Kentucky as recently as May, 2009. The RLECs cannot simply route their transit traffic through Windstream East's network for free in order to avoid any issues with third parties.

Again, the facts bear no support for these RLEC assertions. In particular, the RLECs' claims of harm are contradicted by: (i) the fact that another RLEC (not a party to this proceeding) has chosen to transit its traffic to third parties over Windstream East's network

pursuant to the provisions of the Transit Tariff (Windstream Response to RLEC Data Requests at p. 12); (ii) the fact that nothing in the Transit Tariff in any way prohibits the RLECs from approaching third parties to establish direct connections for the transport of the RLECs' traffic; and (iii) the fact that Windstream East's Transit Tariff is directly analogous to the RLECs' own interexchange tariffs which allow the RLECs to be compensated for use of their networks for tandem switching functions, with the only difference being that Windstream East's Transit Tariff applies to local traffic instead of interexchange traffic. Very simply, the Transit Tariff prevents fraudulent or unauthorized use of Windstream East's network, discourages improper routing of traffic through Windstream East's end offices, and provides a means for Windstream East to be compensated for the use of its networks by any party routing local transit traffic to a third party through Windstream East's network without an agreement, as held in *Marshall County v. South Central Bell Telephone Company*, Ky., 519 S.W.2nd 616, 618 (1975).

In summary, the RLECs' contentions that the Transit Tariff is not an appropriate means for Windstream East to establish rates and collect compensation for the use of its network is misguided and without merit. The facts support that the Transit Tariff is reasonable, appropriate, and even necessary for Windstream East to be able to pursue compensation from carriers using its network while otherwise refusing or failing to enter into agreements to provide for such financial compensation.

B. Windstream East's Transit Tariff rates for tandem and end office transit traffic services are just and reasonable and not discriminatory.

The Federal Communications Commission has refused to require that transit service providers provide interconnection at TELRIC rates; transit rates need only be based on forward-looking costs. (FCC Memorandum Opinion and Order, DA 02-1731 (rel. Jul. 17, 2002) at

paragraph 117) Nonetheless, although the law on this point is clear, the Commission need not rule on that particular issue in this proceeding as Windstream East used a TELRIC model to establish its Transit Tariff rates. Specifically, Windstream East use an available TELRIC model to establish the rates based on forward-looking economic costs, consistent with 47 CFR § 51.501. The only decision the Commission must reach on this issue is that the RLECs failed to show that Windstream East's model was not viable or that the rates its produced were unreasonable or unjust. In fact, while the RLECs made broad assertions with respect to the rates, they failed to provide any alternative rates for the Commission's consideration. (Hearing Testimony at p. 110)

For instance, the RLECs assert that Soft-switch technology is the standard for the most efficient least cost technology and must be used in TELRIC studies. As Windstream East did not incorporate Soft-switch technology in its original cost study, the RLECs claim that Windstream East's original cost study was flawed. (Douglas Duncan Meredith Supplemental Testimony at p. 5) Yet, there is no law or regulation that supports the RLECs' assertion that the use of Soft-switch technology is required for TELRIC models (assuming for argument sake only that TELRIC was even required in this instance to establish transit rates, which the FCC has established it is not). Additionally, Soft-switch technology does not create operational efficiencies for Windstream East, contrary to the RLECs' implications (Kerry Smith Rebuttal Testimony at p. 8, 9) Specifically, Windstream East established that the cost for Soft-switch presented by Douglas Duncan Meredith was a bare minimum cost, not including the software and hardware redundancy required to connect to the Soft-switch network. Installation costs and recurring maintenance fees negate any cost savings or operational efficiencies that Mr. Meredith

claims that Soft-switch technology has over older technology. (Kerry Smith Rebuttal Testimony at p. 8, 9)

Furthermore, as suggested by the RLECs through their discovery questions and given the passage of time that this case had been pending, Windstream East subsequently updated its TELRIC study using some modifications proposed by the RLECs, even though Windstream East was not required to do so. The updated cost study (filed in this matter on July 22, 2009) not only provided continuing support for Windstream East's Transit Tariff rates but actually supported even higher rates than those in the Transit Tariff. (Kerry Smith Rebuttal Testimony at p. 9, 10) For instance, compared to the Transit Tariff tandem rates of \$0.0030 and \$0.0045, the updated cost study produced rates of \$0.0041 and \$0.0055.

Despite the RLECs' claim that Windstream East's Transit Tariff rates are unjust or unreasonable, the facts showed unequivocally that the rates in the Transit Tariff are *lower* than the ones supported by the calculations advocated by the RLECs. Moreover, the Transit Tariff on its face applies equally to any carrier choosing to use Windstream East's network for local transit service in the absence of an agreement. Notwithstanding their unsubstantiated claims to the contrary, the RLECs failed to prove that the Transit Tariff rates are unjust or unreasonable, and their contention that transit rates must be established pursuant to TELRIC is legally flawed. The evidence and the law clearly support the rates set forth in the Transit Tariff.

C. Windstream East is entitled to payment from each RLEC routing traffic through Windstream East's tandem or end office between December 16, 2006 and the date that the RLEC removed its traffic from Windstream East's tandem or end office or entered a transit agreement with Windstream, in accordance with the rates in Windstream East's Transit Tariff.

Windstream East is entitled to collect fair, just and reasonable rates for services rendered to any person pursuant to Ky. Rev. Stat. §278.030. "Person" includes corporations under the

definitions applicable to this statute. (Ky. Rev. Stat. §278.010(2)). The Kentucky courts have recognized this concept. *Marshall County v. So. Central Bell Tel. Co.*, Ky., 519 S.W.2d 616 (1975). Allowing the RLECs, or any other carrier, to use Windstream East's network without a mechanism for compensation is clearly in violation of Kentucky law. Windstream East should be granted the amounts filed on March 20, 2009 in this proceeding in Windstream East's Responses to RLEC Data Requests, Request No.9, as those may be updated. Windstream East also is entitled to payment of the rates in its transit tariff on an ongoing basis from the RLECs that still are not operating under a transit traffic agreement with Windstream East.

IV. CONCLUSION

The RLECs bear the burden of proof to show that Windstream East's Transit Tariff is an unjust, unreasonable and discriminatory method for compensation to Windstream East for use of its network by carriers not maintaining a transit agreement with Windstream East. The RLECs wholly failed to meet this burden. Neither the RLECs nor the Intervening Parties demonstrated anything other than speculative claims of harm. Further, the facts support that Windstream East's Transit tariff rates are lawful and appropriate. Indeed, the facts suggest that the opposition to the Transit Tariff is more likely the result of the RLECs not wanting to be financially responsible for their own transit traffic that they route over Windstream East's network to third parties. Windstream East has the right to be compensated for the use of its network, and the rates it established in its Transit Tariff as the basis of that compensation are lawful and appropriate. The Commission should affirm Windstream's Transit Tariff and order the RLECs to pay to Windstream East the appropriate compensation due and owing thereunder.

Respectfully submitted,


Stacy J. Major

Windstream Communications, Inc.
4001 Rodney Parnham Road
Little Rock, AR 72212

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

COUNSEL FOR WINDSTREAM KENTUCKY
EAST, LLC

CERTIFICATE OF SERVICE

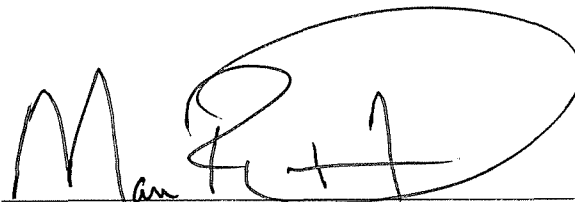
I hereby certify that a copy of the foregoing was served by United States First Class Mail, postage prepaid, on this 15th day of September, 2009 upon:

John E. Selent
Edward T. Depp
Holly C. Wallace
DINSMORE & SHOHL LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202

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

Dennis G. Howard, II
Kentucky Attorney General's Office
Suite 200
1024 Capital Center Drive
Frankfort, KY 40601
dennis.howard@ag.ky.gov

John N. Hughes
124 W. Todd Street
Frankfort, KY 40601
jnhughes@fewpb.net



Mark R. Overstreet