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September 15, 2009

RECEIVED
SEP 17 2009
PUBLIC SERVICE
COMMISSION

Mr. Jeff DeRouen
Executive Director
Public Service Commission
P.O. Box 615
Frankfort, KY 40602

RE: Case No. 2007-00004--Brandenburg Telephone Company; Duo County Telephone Cooperative Corporation, Inc.; Highland Telephone Cooperative, Inc.; Mountain Rural Telephone Cooperative Corporation, Inc.; North Central Telephone Cooperative Corporation; South Central Telephone Cooperative Corporation, Inc.; and West Kentucky Rural Telephone Cooperative Corporation, Inc. v. Windstream Kentucky East, LLC

Dear Mr. DeRouen:

Enclosed please find an original and ten copies of the brief for Intervenors NuVox Communications, Inc., T-Mobile USA, Inc., Powertel/Memphis, Inc., T-Mobile Central LLC and tw telecom of ky llc. Please indicate receipt of this filing by your office by placing a file stamp on the extra copy and returning to me via the enclosed, self-addressed, stamped envelope.

Sincerely yours,

STOLL KEENON OGDEN, PLLC

Douglas F. Brent

Enc.

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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COMMISSION

In the Matter of:

Brandenburg Telephone Company; Duo County Telephone)
Cooperative Corporation, Inc.; Highland Telephone)
Cooperative, Inc.; Mountain Rural Telephone Cooperative)
Corporation, Inc.; North Central Telephone Cooperative)
Corporation; South Central Telephone Cooperative)
Corporation, Inc.; and West Kentucky Rural Telephone)
Cooperative Corporation, Inc.)

Complainants)

v.)

Windstream Kentucky East, LLC)

Defendants)

CASE NO.
2007-00004

INTERVENORS' BRIEF

NuVox Communications, Inc., T-Mobile USA, Inc., Powertel/Memphis, Inc., T-Mobile Central LLC and tw telecom of ky llc, (hereinafter collectively "Intervenors") submit this brief concerning the formal complaint various rural incumbent carriers brought against the transit traffic tariff filed by Defendant Windstream Kentucky East, LLC. The rural telephone companies have identified a number of concerns with Windstream's "default solution" to indirect interconnection. If the Commission does not require Windstream to withdraw or modify the tariff, it should at least reaffirm that ILEC transit service provided to competitive carriers is subject to Sections 251 and 252 of the Telecommunications Act and that the tariff rate is not an appropriate price floor for future interconnection agreements.

INTRODUCTION

NuVox and tw telecom are among several local exchange carriers that compete with Windstream in Lexington. T-Mobile is a commercial mobile service provider. T-Mobile provides service in wide areas of the state, so it uses indirect interconnection in various cities where Windstream provides local service. Each Intervenor interconnects with Windstream under an agreement, and each agreement provides indirect interconnection to other carriers. T-Mobile also has interconnection agreements with most of the Complainants. Those contracts implement an important right provided by federal law, the right of Intervenor to have *indirect interconnection*. That right derives from a duty imposed on all telecommunications carriers by Section 251(a) (1) of the 1996 Telecommunications Act.

Without indirect interconnection, there would likely be no local competition in Kentucky. It is simply infeasible for all competitive carriers (or, for that matter, all LECs) to establish direct interconnection arrangements with other competitive carriers. While Windstream's transit traffic tariff provides indirect interconnection, it does so in a manner inconsistent with federal law and prior decisions of the Commission. The tariff rate must not be allowed to become the price floor for future negotiations with Windstream. This is especially true given Complainant's testimony that the tariff rates are not consistent with the TELRIC requirements that the Commission has applied to transit services.

ARGUMENT

Under federal law, rates, terms and conditions for transit traffic handled by incumbents-- including traffic originated by competitive carriers-- *must* be negotiated by the parties pursuant

to Sections 251¹ and 252 of the Telecommunications Act of 1996, and priced at total element long run incremental cost (“TELRIC”) under the Act and the Federal Communications Commission’s orders. This Commission has already addressed the issue of whether transit traffic should be priced at TELRIC and has concluded very clearly that the answer is yes. The Commission emphasized this in arbitrating interconnection agreements between two of the Intervenor and AT&T-Kentucky.² The Commission should make the same determination here, as there is nothing in the record to suggest that Windstream can be held to a lesser standard.³ Moreover, the Sixth Circuit Court of Appeals has admonished state commissions that tariffs may not substitute for the federally-mandated process of negotiating and arbitrating an interconnection agreement for inter-carrier facilities and services required to be provided by the Telecommunications Act. Such a tariff supplants the procedure the Act requires. *See Verizon North v. Strand*, 309 F. 3d 935, 940 (2002) (tariffing the provision of network elements “evades the exclusive process required by the 1996 Act, and effectively eliminates any incentive to engage in private negotiation, which is the centerpiece of the Act.”).

Not only does tariffing contradict federal and state determinations that transit services provided by an ILEC be included in agreements, it also carries the risk that non-TELRIC rates

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

² *In the Matter of Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. of Lexington, LLC and Xspedius Management Co. of Louisville, LLC of an Interconnection Agreement with BellSouth Telecommunications, Inc.*, Case No. 2004 - 00044, September 26, 2005 at 15. As the result of merger tw telecom of ky llc is the successor in interest to Xspedius.

³ In its unsuccessful attempt to avoid the Commission’s complaint jurisdiction and in defending its decision to file the transit tariff as an “end user” service Windstream claimed that KRS 278.190 and 278.260 do not apply to Windstream as an “alternatively regulated company. That term is not found in Chapter 278. In any event, since indirect interconnection and transit are not retail services, Windstream’s status as an “electing utility,” *see* KRS 278.541(2), is irrelevant. The Commission’s jurisdiction over arrangements between local carriers is carefully preserved by KRS 278.542.

will become a price floor once they are cemented into a tariff. Intervenors have concerns about the Windstream tariff rates—they are significantly higher than rates in current interconnection agreements.

The high rates do not appear to be justified. In direct and rebuttal testimony that was unchallenged by Windstream at the hearing, Complainants' witness Douglas D. Meredith testified that even if Windstream's transit rates were not subject to TELRIC the cost study offered by Windstream would still not be sufficient to determine a reasonable transit rate. Intervenors note that Complainants were the only party to offer expert testimony about the problems with the cost study. Parties may disagree over whether Windstream produced a competent cost study, but the most telling thing about Windstream's choice for its "cost-justified" tariff rate may be how the proposed rate came about. Under cross-examination by the Commission staff, Windstream witness Smith admitted that the transit rate that Windstream tariffed is one that had been suggested to Windstream by another local exchange company that had been "maybe planning" to file a transit tariff. That is a peculiar starting point for a Windstream pricing decision and hardly instills confidence that the cost study proves anything.

CONCLUSION

Strand mandates that, even if the Commission allows the tariff to remain in effect, it must do so in the clarifying context that (i) the tariff does *not* fulfill Windstream's obligations under federal law, and the issue of transit traffic remains fully subject to negotiation and arbitration under the Act; and (ii) Windstream's transit rates have not been cost justified pursuant to the TELRIC standard that is required by federal law and would be enforced in any future arbitration. Windstream's obligations under federal law must be met in the future.



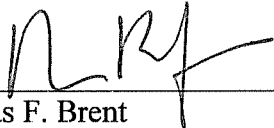
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September 15, 2009

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion for Intervention has been served by U.S. mail on those persons whose names appear below this 15th day of September, 2009.



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