

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

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. )

SEP 08 2010

PUBLIC SERVICE  
COMMISSION

COMPLAINANTS )

Case No. 2007-0004

v. )

Windstream Kentucky East, Inc. )

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DEFENDANT )

SEP 08 2010

PUBLIC SERVICE  
COMMISSION

MOTION FOR RECONSIDERATION OF WINDSTREAM  
KENTUCKY EAST, LLC

September 8, 2010

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Pursuant to KRS 278.400, Windstream Kentucky East, LLC (“Windstream East”) applies for rehearing of the Kentucky Public Service Commission’s (“Commission’s”) August 16, 2010 Order in this proceeding (“*Order*”). A copy of the Order is attached as Exhibit 1.

For the reasons discussed below, Windstream East respectfully requests that the Commission reconsider two holdings from the *Order*: (1) that negotiation pursuant to Sections 251/252 of the Communications Act of 1934, as amended (“Act”), supposedly is or should be the exclusive means of establishing the rates, terms, and conditions for the interconnection of telecommunications networks, particularly (on a lesser included basis, if the Commission deems necessary), between two incumbent local exchange carriers (“ILECs”); (2) that Windstream East is prohibited from collecting past-due amounts under the tariff provisions that were the subject of this formal complaint proceeding, particularly where Windstream East sought the Commission’s assistance at the initiation of this matter in negotiating agreements with the RLECs after making it known that the applicable rural ILECs (“RLECs”) after making it known that the RLECs had refused to negotiate agreements providing for compensation.

### **I. BACKGROUND**

This proceeding concerns the practical ability of a common carrier in Kentucky to obtain compensation for use of its network, particularly inappropriate use. Four years ago, Windstream East discovered that some rural incumbent local exchange carriers (“RLECs”) had arranged to inappropriately send telecommunications traffic bound for third parties through Windstream East’s network (“transit traffic”) without compensating Windstream East. Hearing Transcript at p. 190. Windstream East attempted to negotiate network connection and compensation arrangements with these carriers and was rebuffed. Kerry Smith Direct Testimony at p. 4.

Faced with intransigent carriers that would not negotiate an agreement for appropriate use, including compensation, of Windstream East's network, on December 1, 2006, Windstream East filed a revision to Windstream East Tariff P.S.C. KY. No. 7 ("General Customer Services Tariff") (such newly-added language hereinafter referred to as the "Transit Tariff Provision"). This Transit Tariff Provision established the rates, terms, and conditions under which telecommunications carriers may send and receive local transit traffic through Windstream East's network, but only in the absence of a negotiated agreement. Tariffing this type of service is not unlike, for example, providing pole attachments in such local tariff – a practice that is not only common in Kentucky but supported by this Commission.

The Transit Tariff Provision established one rate for transit traffic originated by or bound for parties subtending Windstream East's tandem switch.<sup>1</sup> Windstream East's Transit Tariff Provision also established a higher rate for traffic improperly routed through Windstream East's end office switches, which are not appropriate points through which to route transit traffic due to their "Class 5" operational capability status. Kerry Smith Direct Testimony at p. 6.

The end office transiting rate in the Transit Tariff Provision was higher than the tandem switching rate to discourage such inappropriate use, particularly where some RLECs refused to properly reroute their traffic away from Windstream East's end offices. Kerry Smith Direct Testimony at p. 5. When transit traffic is delivered to a Windstream East end office, Windstream East bears the cost of routing traffic "up" to a tandem switch that is capable of delivering the traffic to the outside world. As explained by Windstream East witness Kerry Smith at hearing:

The end office should never be used as a tandem, and that is what the RLECs are making . . . happen when they were routing the

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<sup>1</sup> The primary functions of tandem switches in an telecommunications network is to provide hubbing functions for telecommunications traffic between different "end offices" connected, directly or indirectly, to such tandem switch, as well as to typically serve as an aggregation point for traffic of other telecommunications carriers, such as long distance and wireless carriers.

traffic through our end office. Our end office has to look at it and say, “Where is this call destined to? What end user is it destined to?” and it looks on there and says, “This NPA-NXX is not even associated with a customer on this switch.” So it has to forward it to the tandem; thus making the switch do more work than what it’s required to. It’s forwarding it on up to the tandem. The tandem then takes the call and says, “Who is this destined to?” and then forward it on to . . . the third party in this case.

Hearing Transcript at p. 188. These costs of inappropriate delivery by RLECs of transit traffic to Windstream East end offices are real and, prior to the filing of the Transit Tariff Provision, were not being recovered by Windstream East from the cost causer – the originating carriers. *See, e.g.,* Kerry Smith Direct Testimony, p. 4. When it came to the cost support for the Transit Tariff Provision requested by the Commission, the RLEC criticisms were based on the operation of the study, not that the costs measured by the study were completely nonexistent – in fact, the RLECs never actually proposed an alternative study outcome.

Notably, the Transit Tariff Provision only applied in the absence of negotiated agreements. Because competitive local exchange carriers (“CLECs”) and wireless carriers with which Windstream East directly interconnects have such negotiated arrangements, Windstream East has ensured that it will be compensated for transit traffic originated by such carriers and that such traffic will be delivered to Windstream East’s tandem, as opposed to end office, switches. Kerry Smith Direct Testimony, p. 9; Windstream East’s Response to Commission Data Request No. 1 (filed Mar. 29, 2009). Thus, despite the fact that the Transit Tariff Provision was available to all telecommunications carriers on a nondiscriminatory basis, the only parties that actually would be purchasing service under the Transit Tariff Provision would be RLECs that had earlier rebuffed Windstream East’s attempts to resolve the issue or any other carrier that desired to purchase pursuant to tariff in lieu of negotiating an agreement (again, not unlike the analogous situation with pole attachments). As discussed in the record, one carrier has, in fact, chosen to

continue to purchase transit service pursuant to the Transit Tariff Provision. Kerry Smith Direct Testimony, p. 8.

Windstream East filed the Transit Tariff Provision with the Commission in accordance with Kentucky statute on December 1, 2006. No objections were filed, the revision was never suspended, and the Transit Tariff Provision became effective as a matter of law. The RLECs' complaint was later filed on December 28, 2006.

Most of the RLECs misusing Windstream East's network acted to reroute their transit traffic away from Windstream East's end offices after implementation of the Transit Tariff.<sup>2</sup> 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 to no avail with just one exception, a carrier not similarly situated to the other RLECs in this proceeding.

In fact, on January 26, 2007, less than one month after the complaint was filed, Windstream East, expressly sought the help of the Commission in establishing an expedited schedule for Commission-supervised negotiations in a motion in this docket and offered to suspend the Transit Tariff Provision while such expedited negotiations took place. No order remotely relating to this request was issued until November 13, 2007. In that order, the Commission denied Windstream East's offer to suspend the Transit Tariff Provision. The Commission did, however, require a status report which included, among other things, details on the outstanding payments owed by each RLEC. November 13, 2007 *Order* at 6.

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<sup>2</sup> 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 use of an end office.

After a series of fruitless attempts at negotiation, in which the RLECs refused to compensate Windstream East for any transit costs (Kerry Smith Rebuttal Testimony, p. 5), the Commission issued a schedule for the proceeding on February 13, 2009, more than two years after Windstream East's Transit Tariff Provision became effective, a schedule that ultimately ended in post-hearing briefs being filed in September 2009.

Eleven months after post-hearing briefs were filed, the Commission issued an order on August 16, 2010, holding as follows:

1. Windstream East's transit traffic tariff is cancelled and shall not be applied to any carrier.
2. Windstream East shall withdraw its General Customer Services tariff containing the transit traffic service rates no later than 10 days from the date of this Order and shall file a revised General Customer Services tariff no later than five days thereafter.
3. The parties shall negotiate the necessary rates, terms, and conditions for the facilitation of transit traffic arrangements in accordance with the Commission's findings outlined within this Order.

*Order*, p. 19. Although not among the ordering clauses in the *Order*, the Commission also held that "Windstream East [be] prohibited from collecting past-due amounts from carriers billed pursuant to th[e] transit traffic rates." *Order* at 17.

The Commission reached its conclusions in the *Order* through holding that Section 251 of the Act applies to the transit traffic at issue and that the Transit Traffic Provision should not have been included in Windstream East's General Customer Services Tariff because tariffing such services violates Sections 251 and 252 of the Act.

As required by the *Order* and under protest, Windstream East withdrew its General Customer Services Tariff containing the transit traffic service rates on August 25, 2010 and simultaneously revised its General Customer Services Tariff despite the fact that said tariff is

commonly used for purposes of selling other services to carriers including pole attachments and certain services to resellers operating under Section 251/252 of the Act to resell Windstream East local services.

**II. NEGOTIATION PURSUANT TO SECTIONS 251/252 OF THE ACT NEITHER IS NOR SHOULD BE THE EXCLUSIVE MEANS OF ESTABLISHING THE RATES, TERMS, AND CONDITIONS FOR THE INTERCONNECTION OF TELECOMMUNICATIONS NETWORKS, PARTICULARLY BETWEEN TWO ILECS**

Negotiation pursuant to Sections 251/252 of the Communications Act of 1934, as amended (“Act”), neither is nor should be the exclusive means of establishing the rates, terms, and conditions for the interconnection of telecommunications networks, particularly between two ILECs.

The Commission’s conclusions requiring Windstream East to engage in the Section 251/252 negotiation process as an exclusive means of establishing rates, terms, and conditions of the use of Windstream East’s network by all connecting carriers, particularly other ILECs, were overbroad, most likely because they were based on an overly-generalized presentation of the potentially pertinent case law. Windstream East therefore respectfully requests reconsideration of the application of such precedent. Further, even if the Commission had concerns with Windstream East’s originally-filed Transit Tariff Provision, as originally filed, tariffs can be an appropriate means of providing network interconnection, particularly in the limited circumstances that are truly at the heart of the instant dispute. Windstream East requests that the Commission, at minimum, reconsider its *Order* so as not to apparently categorically rule out tariff-based interconnection between two ILECs.

Windstream East emphasizes that the reconsideration discussed in this Section concerns certain of the underlying premises of the Commission’s holding ordering Windstream East to withdraw the Transit Tariff Provision, not the application of the *Order* to the particular Transit

Tariff Provision filed by Windstream East or the manner in which such tariff revision was filed. With reconsideration of the faulty premise that negotiation pursuant to Sections 251/252 of the Act is the exclusive means of establishing connections and compensation arrangements relating to the same between telecommunications carriers, the groundwork can be laid for a path forward for the issues raised in this proceeding.

Without doubt, Windstream East is owed compensation for the transiting services that it provides and did provide at times in the nearly four years that this proceeding remained pending before the Commission. As discussed above, Windstream East incurs real and significant cost in providing transit service, particularly when such traffic is inappropriately delivered to Windstream East's end offices. Nowhere in Kentucky law or statute is the Commission granted the authority to deny Windstream East compensation for services rendered, making a decision to the contrary beyond the scope of the Commission's authority and an arbitrary deprivation of Windstream East's property (in violation of Section 2 of the Kentucky Constitution) and, due to acting beyond the power delegated to the Commission by the General Assembly, a failure to recognize the distribution of powers within Kentucky government (in violation of Section 27 of the Kentucky Constitution) and an invalid usurpation of the role of the General Assembly (in violation of Section 28 of the Kentucky Constitution). Further such an action would violate the takings clause of the Fourteenth Amendment to the U.S. Constitution ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.")

As discussed above in Section I of this motion, CLECs and wireless carriers that compete with Windstream East already have interconnection arrangements with Windstream East under



which Windstream East provides direct interconnection and transiting services, respectively. Because the Transit Tariff Provision only applies in the absence of negotiated rates, Windstream East's Transit Tariff Provision will rarely, if ever, apply to traffic bound for RLEC networks.

This is in stark contrast to the factual scenario in the FCC decision that seems to provide the basis for the Commission's conclusion regarding federal law. *See Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, Declaratory Ruling and Report and Order*, FCC 05-42, 20 FCC Rcd 4855 (2005) (“*Wireless Termination Tariff Order*”). In the *Wireless Termination Tariff Order*, the FCC was primarily focused on the application of its rules pertaining to Commercial Mobile Radio Service (47 C.F.R. Part 20, implementing the 1993 revisions to Section 332 of the Act), not Sections 251/252. In fact, the rule revisions enacted by the FCC in the *Wireless Termination Tariff Order* were, in fact, made to Part 20 of the FCC's rules, not Part 51, which pertains to Sections 251/252.

Windstream East has been able to negotiate transit traffic arrangements with CLECs and wireless carriers because it has done so at the time of establishing initial or replacement interconnection agreements governing, among other things, direct interconnection with those CLECs and wireless carriers. Thus, absent such interconnection agreements, no interconnected traffic would be flowing. These carriers are required to come to the table and negotiate and there are statutory and regulatory provisions governing the negotiation of many elements of such agreements.<sup>3</sup>

ILEC-ILEC interconnection, particularly when pre-existing interconnection exists via typically decades-old Extended Area Service (“EAS”) agreements, creates a different set of

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<sup>3</sup> Sections 251 and 252 of the Act, as well as FCC rules implementing the same (47 C.F.R. Part 51).

incentives, which may explain why the RLECs rebuffed Windstream East's attempts at negotiation. There is nothing technically limiting the type of traffic that RLECs might deliver to Windstream East on EAS trunks, and now the Commission's order permits unscrupulous RLECs to simply refuse to pay for their traffic. Such EAS agreements provide for connections directly to Windstream East's end offices because there is no tandeming function to perform – the trunks are established to deliver traffic to Windstream East end users in the Windstream East exchange adjacent or near the RLEC exchange. With regard to the traffic currently at issue, traffic originated by RLECs, however, the pertinent EAS arrangements between Windstream East and the RLECs are built on the assumption that Windstream East will not be having to route RLEC-originated traffic up to Windstream East's tandem for connection to third parties that have, in fact, connected properly to Windstream East for indirect interconnection purposes, as discussed above. Thus, RLECs are under no incentive to alter their inappropriate practice of attempting to use Windstream East end offices as transiting tandem switches (thereby imposing the additional costs on Windstream East described above) because traffic is already flowing.

The factual scenario underlying the dispute in this proceeding differs from the facts of the FCC's *Wireless Termination Tariff Order* in another significant respect. The sole issue faced by the RLECs that were seeking to impose termination rates on wireless carriers with which they indirectly connected in that case was compensation. Traffic was already being routed to such RLECs through industry standard BOC transiting arrangements. In the instant case, as discussed at length in Section I, the issue here is not entirely compensation but the manner in which carriers interconnect. As discussed above, Windstream East's primary concern was the unauthorized and uncompensated use of Windstream East's network by the RLECs which

insisted on continuing to inappropriately interconnect transit traffic at Windstream East end offices.

Windstream East should not be required to endure the Section 251 and, as applicable, Section 252 process, with regard to ILEC-ILEC interconnection, which, as discussed above, is the practical scope of the Transit Tariff Provision, in order to remedy the misuse of Windstream East's network by the RLECs. Indeed, negotiating agreements are a better way to handle intercarrier matters than tariffs, as Windstream East has said in the record in this proceeding. Kerry Smith Direct Testimony, p. 8. But while negotiated agreements may be ideal, that does not mean that they must be the exclusive means of providing for interconnection, particularly when the RLECs have no incentive to negotiate because they are currently using Windstream East's facilities for free or where they otherwise simply refuse to negotiate such agreements, a matter not addressed in the *Order*.

The concept of tariff-based interconnection, particularly for wireline interconnection, is well-established. Windstream East itself has longstanding tariff provisions relating to two Section 251 obligations – collocation for local services (Section 251(c)(6) and pole attachments (Section 251(b)(4)). *See* Windstream East General Customer Services Tariff and Tariff P.S.C. KY. No. 8, Section 17 (“Intrastate Access Tariff”),<sup>4</sup> respectively. Further, Section 17.1 of Windstream East's Intrastate Access Tariff makes explicit reference to such section fulfilling responsibilities with regard to Section 251 of the Act and, just like the Transit Tariff Provision, provides for deviation in the event of different negotiated rates, terms, or conditions. This Commission is well familiar with the potential contentiousness of pole attachment disputes. Collocation rates, terms, and conditions are frequently the subject of extremely complex

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<sup>4</sup> In particular, Section 17.1 of Windstream's Intrastate Access Tariff makes explicit reference to such section fulfilling responsibilities with regard to Section 251 of the Act.

negotiations and/or arbitrations, as well as litigation regarding the implementation of already-agreed-upon provisions. *See, e.g., McLeodUSA Telcomms. Servs. v. Iowa Utils. Bd.*, 550 F. Supp. 2d 1006 (S.D. Iowa 2008)(remand pending); *Complaint of TDS Metrocom, LLC Against Wisc. Bell, Inc., d/b/a SBC Wisconsin*, Docket No. 6720-TI-185, “Order for Dismissal of Claims” (Wisc. Pub. Serv. Comm’n Nov. 10, 2004); *Broadview Networks, Inc. v. Verizon Tel. Cos. and Verizon New York, Inc.*, DA 04-3569, 19 FCC Rcd 22216 (Enforcement Bur. 2004). There is no evidence in the record indicating that creating a means for compensation in the absence of an agreement for RLEC-originated transit traffic is any more complex or contentious. In addition to pole attachments and collocation, resellers purchase service from Windstream East’s General Customer Services Tariff, which is relevant to Windstream East’s resale obligations under Section 251.<sup>5</sup>

Further, the Telecommunications Act of 1996 permitted BOCs to comply with certain of the requirements for entry into the in-region interLATA toll market by creating “Statements of Generally Available Terms” (“SGATS”), as described in Section 271(f), implementing the BOC’s Section 251 obligations. In fact, in the Commission’s order approving BellSouth’s SGAT, the Commission explicitly required BellSouth to include the SGAT in BellSouth’s tariff. *Investigation Regarding Compliance of the Statement of Generally Available Terms of BellSouth Telecommunications, Inc. of Section 251 and 252(d) of the Telecommunications Act of 1996*, Case No. 1998-00348, *Order*, p. 3 (Mar. 15, 2002).

As a final note, Windstream East stresses that once the red herring of local transit traffic bound for RLECs is eliminated due to the fact that all the potential originators of such traffic already have transit provisions in their interconnection agreements, the issues at hand are not

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<sup>5</sup> While Windstream’s obligation to provide a wholesale discount (Section 251(c)(4)) is included in interconnection agreements, such agreements ultimately entail the CLEC actually making the purchase from the General Customer Services Tariff.

competitive issues, but, instead, RLEC attempts to unreasonably avoid their financial obligations. CLEC and wireless carriers that compete against Windstream East in Windstream East's Kentucky exchanges have interconnection agreements with Windstream East and have made reasonable industry-standard arrangements for transit traffic routed through Windstream East to mandatory extended local calling areas in which such CLECs and wireless carriers do not have their own operations. These CLEC and wireless carriers' customers have the benefit of EAS.<sup>6</sup>

CLECs and wireless carriers operating in Windstream East markets also expect to have the inbound benefits of the two-way EAS routes between the Windstream East markets and the RLEC markets. Windstream East is perfectly willing to provide tandem transit service pursuant to negotiation, for carriers willing to negotiate (as the RLECs have proven not to be) or by tariff, as a necessary default.

### **III. WINDSTREAM EAST SHOULD NOT BE PRECLUDED FROM COLLECTING RETROACTIVE AMOUNTS OWED FOR SERVICES IT PROVIDED TO THE RLECS**

The Commission's decision to preclude Windstream East from collecting retroactive amounts for services that it provided to the RLECs was unreasonable and unlawful. Given the uncontroverted facts, the Transit Tariff Provision became effective in December 2006 and was never suspended, before or after its effective date. In fact, as recently as August 15, 2010, the Transit Tariff Provision was on the books, effective, and applicable to carriers using Windstream East's transit services (unless, as the Transit Tariff Provision states, the carrier negotiates different arrangements). Windstream East therefore requests that the Commission reconsider its holding that Windstream East is prohibited from collecting past-due amounts from carriers billed

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<sup>6</sup> Of course, given typical wireless national calling plans, outbound EAS is of questionable relevance for many wireless customers.

pursuant to the Transit Traffic Provision as the decision is not supported by the uncontroverted facts of this case.

Kentucky law provides for a tariff process. The Commission has a limited authority to invalidate certain tariff under particular conditions, but can only exercise such authority on a prospective basis. Thus, for example, if the Commission wishes to prevent a tariff revision from becoming effective, it can reject such revision before it becomes effective. Similarly, the Commission, on its own or acting at the reasonable request of a third party, may suspend the tariff prior to its effective date pending investigation. None of these alternatives was used by the Commission until the released of the August 16, 2010 Order.

Despite the means available to them, the RLECs never requested that the Transit Tariff Provision be stayed pending their complaint – not once in the nearly four years that this proceeding has been pending. Even though Windstream East volunteered to suspend the Transit Tariff Provision while the Commission supervised expedited negotiations, no one requested a stay without such condition. As discussed above in Section I of this motion, the Commission refused Windstream’s offer without discussion.

To the contrary, as this proceeding dragged on, the RLECs continued to avail themselves of Windstream East’s transit services – and in a particularly inappropriate manner by delivering transit traffic to Windstream East’s end offices. This went on for nearly four years, despite Windstream East’s best efforts. The RLECs, of course, had no incentive to come to the bargaining table because they were (and still are) obtaining transit service free of charge, despite the fact that one RLEC (not a party to this proceeding) avails itself of the Transit Tariff Provision and continues properly to pay Windstream East on a monthly basis. Windstream East is fully within its rights to collect the transit rates that it was owed, particularly as the Commission

noticed all parties that Windstream East is to keep records of the amounts that it believes were owed.

Kentucky law provides for a tariff process for applicable service – including tariffing of carrier to carrier services like pole attachments and collocation. KRS 278.160(1) provides, among other things, that “each utility shall file with the commission, within such time and in such form as the commission designates, schedules showing all rates and conditions for service established by it and collected or enforced and KRS 278.180(1) provides a process for changing rates upon 30 days written notice, a period of time which can be shortened by the Commission.<sup>7</sup> Further, KRS 278.270 states as follows:

Whenever the commission, upon its own motion or upon complaint as provided in KRS 278.260, and after a hearing had upon reasonable notice, finds that any rate is unjust, unreasonable, insufficient, unjustly discriminatory or otherwise in violation of any of the provisions of this chapter, the commission shall by order prescribe a just and reasonable rate to be followed in the future.

Kentucky courts have invalidated Commission orders in which the Commission attempted to apply decisions on unsuspended tariffs retroactively as is the case here. For example, in 2007, the Court of Appeals held that the Commission unlawfully attempted to apply retroactively a decision regarding lawfully-filed tariffed rates relating to payphone service. *Cincinnati Bell Tel. Co., et al., v. Kentucky Pub. Serv. Comm’n*, 223 S.W.3d 829 (Ky. Ct. App. 2007)(“*Cincinnati Bell*”). The Court specifically held that:

In light of the General Assembly’s comprehensive rate-making scheme, including only a narrowly defined circumstance under which refunds can be ordered, the filed rate can only be lawfully altered prospectively. KRS 278.270, *supra*. Under the requirements of the statutes, the rate that the PSC authorized BellSouth to charge payphone service providers remained in full

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<sup>7</sup> The Commission has, in fact, shortened such period of time to 15 days. *See Order*, n.8. Windstream East also notes that said tariffing processes are not applicable to certain service rates, such as for nonbasic services.

force and effect until the Commission modified it by its order of May 2003.

*Cincinnati Bell*, 223 S.W.3d at 829.

In this proceeding, the Commission freely admits that the Transit Tariff Provision has been in effect for nearly four years: “Pursuant to established Commission policy, the [Transit Tariff Provision] became effective 15 days after being submitted, as the Commission did not suspend the tariff nor were any objections raised prior to the expiration of the 15 days.” *Order*, p. 6. As discussed above, the Transit Tariff Provision was never suspended pending investigation – neither the RLECs nor the intervenors even proposed such action by the Commission.

As discussed above, an *ultra vires* attempt to unreasonably take Windstream East’s property, in this case, depriving Windstream East from attempting to collect payment for services rendered over the nearly four-year period since the Transit Tariff Provision became effective, even by the Commission’s admission, would violate the Fourteenth Amendment to the U.S. Constitution and Sections 2, 27, and 28 of the Kentucky Constitution.

The Commission’s apparent logic in not recognizing the validity of the Transit Tariff Provision while this proceeding has been pending is apparently the claim that “allow[ing] Windstream East to collect money from the RLECs for transit traffic traversing Windstream East’s network after the implementation date of the tariff through the individual dates by which each RLEC re-directed the transit traffic would be unlawful under the Telecom Act.” *Order*, p. 17. The *Order* also contained discussion of the Transit Tariff Provision not appearing to be topically appropriate for Windstream East’s General Customer Services Tariff. *Order*, p. 14.

To be sure, to the extent that the Commission has jurisdiction over the rate in question and has legally-valid substantive justifications, the Commission may exercise its right under



statute to grant prospective relief. A belated substantive judgment about the justness and reasonableness of the Transit Tariff Provision, however, is not permitted under Kentucky law.

Regarding the particular tariff in which the Transit Traffic Provision appeared, however, Windstream East's other intrastate tariff (its intrastate access tariff) would not have been an appropriate place to locate the Transit Traffic Provision because the Transit Traffic Provision applies only to local, not exchange access traffic. The record reflects that the RLECs were, in fact, aware of such filing at an early stage at which they could have either completely avoided application of the Transit Traffic Provision by seeking suspension of the revision prior to it becoming effective, or at least seeking a stay of the effectiveness of the revision once they filed their complaint. Even better, the RLECs could have avoided the issue altogether had they properly routed their transit traffic away from Windstream East's end offices.

Ultimately, however, if the Commission did not like the substance or form of Windstream East's Transit Tariff Provision filing, the Commission should have suspended the filing prior to it becoming effective. Furthermore, if the Complainants did not like the provision, they should have objected by the Commission-established deadline. Not only did this not occur, but the Commission never even suspended the tariff during the now nearly four years this proceeding has been pending.

Further, the Commission provides no explanation of or citation to a legal distinction under which the statutory prohibition against retroactive relief in matters such as the instant proceeding would not apply when the regulatory agency believes that the tariff provision was supposedly in the "wrong tariff," as the Commission essentially attempts to explain in the *Order* as a means of avoiding the prohibition of retroactive invalidation of an unsuspended tariff provision. *Order*, p. 14. No Kentucky statute or precedent voids a tariff provision merely due to

the fact that the provision was supposedly not germane to the general subject matter of the pertinent tariff. Even if such law or precedent existed, or the reasons discussed above, Windstream East believes that a tariff provision deterring unauthorized use of an end office switch for transiting purposes is reasonably associated with Windstream East's General Customer Services Tariff. The RLECs have been obtaining end office transit service from such tariff for over four years and should be expected to compensate Windstream East for such network usage.

#### IV. CONCLUSION

For the reasons stated above, Windstream East respectfully requests that the Commission reconsider two holdings from its *Order*: (1) that Windstream East should be precluded from collecting retroactive amounts owed for services it provided to the RLECs; and (2) that negotiation pursuant to Sections 251/252 of the Act supposedly is and should be the exclusive means of establishing connections telecommunications networks for the exchange of local traffic and compensation arrangements relating to the same between telecommunications carriers, particularly (on a lesser included basis, if the Commission deems necessary), two ILECs.

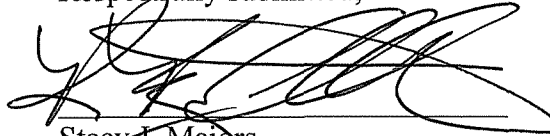
WHEREFORE, Windstream Kentucky East, LLC, respectfully requests that the Commission grant rehearing:

(1) To modify its order to recognize that tariffs may be used to establish the rates, terms, and conditions for the interconnection of telecommunications networks, particularly (on a lesser included basis, if the Commission deems necessary, between two ILECs);

(2) Recognizing Windstream's right to receive compensation for the transit services provided since the Transit Tariff Provision became effective and requiring the RLECs to pay such compensation at the tariffed rates;

(3) Such further relief as Windstream may be entitled.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Motion for Reconsideration has been served via United State Postal Service, First Class Mail, postage prepaid, upon:

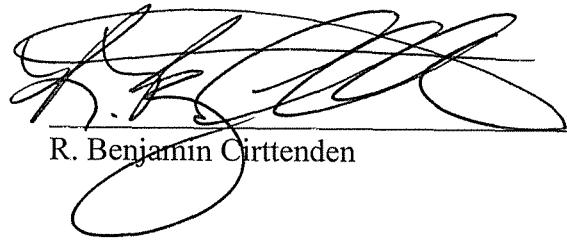
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on this the 8<sup>th</sup> day of September, 2010.



R. Benjamin Cirtenden

# **Exhibit 1**

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	)	CASE NO.
WEST KENTUCKY RURAL TELEPHONE	)	2007-00004
COOPERATIVE CORPORATION, INC.	)	
	)	
COMPLAINANTS	)	
V.	)	
	)	
WINDSTREAM KENTUCKY EAST, INC.	)	
	)	
DEFENDANT	)	

O R D E R

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") filed a formal complaint on December 28, 2006 in response to Windstream East, LLC's ("Windstream") 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 ("transit tariff"). The RLECs seek a Final Order from the Commission which: (1) rejects and cancels Windstream's amended transit tariff as unfair, unjust, and unreasonable; and (2) requires Windstream to negotiate an inter-carrier agreement with each of the RLECs that addresses the rates, terms, and conditions of terminating transit traffic on their networks.

In response, Windstream requests that the Commission find that: (1) Windstream's transit tariff is an appropriate and lawful means for Windstream 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 allowing them to route their traffic exchanged indirectly with third parties through Windstream's network; (3) the RLECs are not authorized to use Windstream's end-offices to transit their traffic to third parties; (4) Windstream's transit tariff rates for tandem and end-office transit traffic services are just and reasonable and not discriminatory; and (5) Windstream is entitled to payment pursuant to the transit tariff from each RLEC routing traffic through Windstream'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.

A formal hearing was held for this proceeding on July 29, 2009. The parties submitted simultaneous briefs on the issues on September 15, 2009. Having heard the arguments of the parties and having reviewed the record, the Commission finds that this matter is now ripe for decision.

## BACKGROUND

Windstream 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. The RLECs have service territories posited throughout various Kentucky counties. Windstream states that, in 2006, it discovered that some RLECs were inappropriately using its network to transit their traffic to third parties without compensating Windstream and that some RLECs were misusing Windstream's end-offices as tandems.<sup>1</sup> Windstream states that, prior to filing the transit tariff, its translation engineers approached certain RLECs to notify them that their use of Windstream's network was not authorized and Windstream attempted to work directly with these RLECs to establish alternate arrangements. The company states that the RLECs refused to move the traffic and failed to negotiate a timely transit agreement with Windstream to use Windstream's tandems to transit the RLECs' local traffic to a third party.<sup>2</sup> In response to these occurrences, Windstream states that it filed a revised "General Customer Services Tariff" and within that tariff included new rates for transit

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<sup>1</sup> Hearing Testimony of Mr. Kerry Smith at 190. ("Hearing Testimony" refers to the hearing transcript filed into the record of this proceeding on August 13, 2009.)

<sup>2</sup> The "third parties" are competitive local exchange carriers ("CLECs") providing service to end-users within Windstream's territory. As CLECs do not have defined service territories like the RLECs and Windstream, they are able to provide service anywhere in the state. The specific names of the third-party CLECs are not relevant in this proceeding, although three CLECs and a wireless carrier intervened to express their concerns about the effect of Windstream's tariff. The intervenors are NuVox Communications, Inc., Sprint Communications Company, L.P. and its associated companies, Xspedius Management Co. (now d/b/a tw telecom of ky, llc) and T-Mobile USA, Inc. and its associated companies. The Attorney General is also an intervenor in this proceeding.



traffic to provide carriers such as the RLECs an alternative to negotiating an agreement.<sup>3</sup>

On December 1, 2006, Windstream filed a revision to its General Customer Services tariff, outlining costs for telecommunications service providers to send and receive local transit traffic through a Windstream tandem and indirectly connect with a third party subtending Windstream's tandem.<sup>4</sup> The two rates included in the transit tariff are \$0.0030 for tandem-routed transit traffic and \$0.0045 for end-office routed transit traffic.<sup>5</sup> Windstream states that these rates were established based on proposed rates from another, larger carrier who had considered filing a similar tariff.<sup>6</sup> Windstream states that the end-office rate is included in the transit tariff strictly as a deterrent to carriers attempting to use Windstream's end-office as a tandem, as it believes end-offices are not designed to function as tandem facilities.<sup>7</sup> Windstream contends that the transit tariff provisions apply only if a telecommunications service provider uses Windstream's network to transit its traffic to third parties in the absence of an agreement with Windstream. Pursuant to established Commission policy, the tariff became

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<sup>3</sup> Direct Testimony of Kerry Smith at 4.

<sup>4</sup> On December 1, 2006, Windstream filed an Amended General Customer Services Tariff, P.S.C. KY. No. 7. The transit tariff provisions are contained in Section 11 of that tariff.

<sup>5</sup> Direct Testimony of Kerry Smith at 5.

<sup>6</sup> Hearing Testimony of Kerry Smith at 186.

<sup>7</sup> Direct Testimony at Kerry Smith at 6.

effective 15 days after being submitted, as the Commission did not suspend the tariff nor were any objections raised prior to the expiration of the 15 days.<sup>8</sup>

The RLECs filed this formal complaint with the Commission on December 28, 2006.<sup>9</sup> Windstream filed Motions for Dismissal and Temporary Suspension and Answer on January 29, 2007. Several carriers, as well as the Kentucky Attorney General's Office of Rate Intervention, moved for intervention in this proceeding, which was granted by the Commission by Orders dated February 26, 2007 and January 23, 2007, respectively.<sup>10</sup> On November 13, 2007, the Commission issued an Order denying Windstream's motion for temporary suspension of the tariffed rates.<sup>11</sup> An informal conference was held on February 28, 2008; however, from March 2008 to December 2008, the RLECs and Windstream provided written status updates to the Commission each month indicating that they were actively engaging in settlement negotiations and requested time to continue in those negotiations prior to being required to come back to the Commission for another informal conference. In December 2008, Windstream moved for dismissal of the proceeding, arguing that Windstream and several of the

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<sup>8</sup> Case No. 2002-00276, Petition of BellSouth Telecommunications, Inc. for Presumptive Validity of Tariff Filings (Ky. PSC Apr. 28, 2005). In this Order, the Commission held that all tariffs submitted by incumbents and competitive carriers shall be filed on 15 days' notice to the Commission and may, if the Commission orders, be suspended or rejected at any time within that 15-day window. This Order applies to tariffs affecting carrier-to-carrier services.

<sup>9</sup> The RLECs' complaint is filed pursuant to KRS 278.030, KRS 278.040, KRS 278.190, KRS 278.260, KRS 278.270, KRS 278.280, 807 KAR 5:001, 807 KAR 5:011, and 47 U.S.C. § 151, et al.

<sup>10</sup> See fn. 2, *supra*.

<sup>11</sup> Windstream Kentucky West, Inc. was originally named as a defendant; however, in the November 13, 2007 Order, the Commission granted the request to dismiss this defendant because it did not file transit traffic rates within its tariff.

RLECs were engaged in negotiations, *inter alia*, for establishing written agreements and, as of the date of the motion, most of the RLECs had re-directed the transit traffic so that it no longer traversed Windstream's network. Therefore, Windstream argued that no issues remained in the proceeding requiring a decision by the Commission. After receiving responses from the RLECs and intervenors objecting to the dismissal, the Commission denied the motion to dismiss and scheduled the case for a hearing by Order dated January 26, 2009, despite the parties' representations that they had been engaged in negotiations for a period of at least 10 months to establish written interconnection agreements addressing transit traffic compensation.

During the course of this proceeding, Windstream has contended that it filed the tariff because numerous CLECs have entered the marketplace without properly investigating the markets in which they compete and identifying all local calling patterns. Additionally, Windstream alleges that some RLECs were not consulting the centralized local number portability switch databases<sup>12</sup> to properly determine where local calls were being terminated. Windstream, in its attempt to provide for compensation for the exchange of local traffic, put this tariff in place to account for situations where an interconnection or Extended Area Service ("EAS") agreement is not present.

According to the RLECs, Windstream's transit 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.<sup>13</sup> The RLECs argue that, by depriving them of this

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<sup>12</sup> Also known as performing local number portability inquiries or "LNP DIPs."

<sup>13</sup> RLEC Post-Hearing Brief at 3.

opportunity, the tariff endangers the RLECs' financial integrity. Additionally, the tariff creates a significant disincentive for Windstream or other third-party carriers to negotiate appropriate inter-carrier agreements with the RLECs because the tariff discourages any such negotiations. Thus, the RLECs contend that what should be the subject of negotiated inter-carrier agreements as contemplated by the Telecommunications Act of 1996 ("Telecom Act") has, instead, been imposed on the RLECs by way of Windstream's transit tariff without any meaningful opportunity to negotiate appropriate terms and conditions.

#### DECISION

Procedurally, the tariff was filed in accordance with Commission rules for incumbent and competitive carriers, as noted in the Order of November 13, 2007. However, now that the Commission has had the advantage of a formal hearing, briefing by the parties, and the opportunity to review the full scope of the federal law and court decisions applicable to the issue of transit traffic, the Commission finds that Windstream's tariff is in violation of federal law and cannot be allowed to stand. As will be discussed in this portion of the Order, the rates, terms and conditions for the facilitation of transit traffic cannot be placed into a tariff, especially a tariff devoted to rates and terms for retail telephone customers; rather, they must be individually negotiated between carriers, placed into written interconnection agreements, and then filed for review and approval by the Commission.

Transit traffic results from indirect interconnection. All carriers, including Windstream, have the duty to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."<sup>14</sup> Section 251(c)(2) requires

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<sup>14</sup> 47 U.S.C. § 251(a)(1).

incumbents such as Windstream to provide for interconnection with the local exchange carrier's network for the transmission and routing of telephone exchange service and exchange access. The "transiting" of traffic occurs when telephone calls are originated by an end-user of a first telephone company and are sent over the network of a second telephone company in order to reach another end-user who is a customer of a third telephone company. This form of carrying the telephone call is called "indirect interconnection" because the first telephone company and the third telephone company do not have facilities directly connecting each other's networks. In the complaint at bar, Windstream has been serving in the role of the second telephone company. "Transiting" has become more common in telephone markets when competitive companies have entered a specific market and acquired new telephone customers who likely were former telephone customers of the incumbent telephone company in that area (i.e., Windstream). As Windstream and each of the named RLECs are old, well-established incumbents, they established "meet-points" with one another many years ago to interconnect each other's networks in order to send telephone calls back and forth. New competitors have now entered Windstream's market and now also need to send traffic from their customers into the market of individual RLECs. However, as new companies, they tend not to have an extensive physical network consisting of their own facilities and, as an alternative, the new competitors rely on Windstream's network to help send calls from the competitor into an RLEC's territory. As stated previously, the Telecom Act places an affirmative duty upon Windstream to facilitate this telephone arrangement, known as "transit traffic." The impetus leading to the RLECs' complaint was Windstream's unilateral decision that it should be reimbursed for facilitating transit traffic based on rates it decided to put into a tariff. Tariffs are public documents

detailing the services, equipment, and pricing offered by a telecom company to all potential end-users, including business and residential customers and "other telecommunications providers."<sup>15</sup> However, the Commission finds Windstream's actions to be in violation of federal law.

Transit traffic terms, conditions and rates, as local traffic issues, fall within the category of services and traffic arrangements that, by industry standards, are placed within negotiated agreements and not within tariffs.<sup>16</sup> The Telecom Act provides that this traffic exchange be memorialized and outlined through interconnection agreements, which are negotiated between carriers pursuant to 47 U.S.C. §§ 251 and 252. In Qwest Corp. v. Cox Nebraska Telecom, LLC, No. 08-3035, 2008 WL 5273687, 2-3 (D. Neb. 2008), the District Court held that the incumbent is required to provide transiting under Section 251(c)(2). In Mich. Bell Tel. Co. v. Chappelle, 222 F.Supp.2d 905, 917-18 (E.D. Mich. 2002), the Court held that state commissions were not preempted by federal law from imposing a mandatory transiting obligation.

The Commission agrees with the Arkansas Public Service Commission that transit service qualifies as an essential network service that, if withheld:

[C]ould deprive competitors of the economies of scale and scope inherent in a ubiquitous network, a network largely paid for by captive ratepayers. The incumbent could substantially raise rivals' costs by forcing them to choose between paying supra-competitive prices for the service or

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<sup>15</sup> Hearing Testimony of Mr. Kerry Smith at 142. Windstream goes further and states that it considers its general customer services tariff to qualify as "a local tariff that handles the local type of situations, and that's what this transit traffic is, is local traffic. So we put it in the local tariff."

<sup>16</sup> Hearing Testimony of Bill Macgruder at 44, 45.

constructing direct trunking connections with other carriers that cannot be economically justified by the anticipated volumes of traffic.<sup>17</sup>

Local transit arrangements for CLEC-originated traffic, under the most ideal circumstances, cannot be the subject of tariffing. The use of inter-carrier facilities and services belongs under the domain of carrier-to-carrier negotiation, as provided under the Telecom Act.<sup>18</sup> The Commission finds that, as transit traffic involves the transmission of local traffic which, as a carrier-to-carrier service, belongs within the boundaries of negotiated interconnection agreements or EAS agreements, tariffs are not the proper venue for transit traffic arrangements and should not be used by Kentucky carriers for denoting the costs and terms for those arrangements. The holding is consistent with the Commission's prior Orders on this issue.<sup>19</sup>

Windstream has previously noted that it has negotiated transit traffic arrangements with other carriers and placed such arrangements *within the confines of interconnection agreements*, including the competitor affiliates and subsidiaries of some of the RLECs.<sup>20</sup> Based on this admission, the Commission finds that Windstream is cognizant that written agreements are the proper venue for outlining these arrangements. Under 47 U.S.C. § 251(c) of the Telecom Act, incumbent carriers have a

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<sup>17</sup> Telcove Inv., LLC Petition for Arbitration, Docket No. 04-167-U at 37-38 (Arkansas Pub. Serv. Comm'n Memorandum and order Sept. 15, 2005).

<sup>18</sup> Verizon North, Inc. v. Strand, 309 F.3d 935, 940 (Sixth Cir. 2002) (citations omitted).

<sup>19</sup> Case No. 2004-00044, Joint Petition for Arbitration of NewSouth Communications Corp., et al. of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended (Ky. PSC Sept. 26, 2005 and Mar. 14, 2006).

<sup>20</sup> See Windstream's Motions for Dismissal and Temporary Suspension and Answer at 2. Filed January 26, 2007.

duty to negotiate the terms and conditions of interconnection, in addition to the duty of facilitating the basic acts of interconnection for local exchange service on, among other things, a non-discriminatory basis. Incumbents are required to provide transit service to carriers in Kentucky, and the Commission finds that there is no difference in this obligation when an incumbent provides this service for competitors or other incumbents and negotiated agreements must be established outlining the rates, terms, and conditions for facilitating this traffic. Therefore, the Commission finds that Windstream acted inappropriately in filing a revised General Customer Services Tariff that outlined rates for the transmission of transit traffic across its network,

The Commission notes that the Federal Communications Commission ("FCC") has routinely refused to decide this specific issue, stating that "[t]o date, the [FCC]'s rules have not required incumbent LECs to provide transiting."<sup>21</sup> However, the FCC amended its rules to prohibit local exchange carriers ("LECs") from imposing compensation obligations for non-access traffic pursuant to tariff, stating that "precedent suggests that the Commission intended for compensation arrangements to be negotiated agreements" and finding that "negotiated agreements between carriers are more consistent with the pro-competitive process and policies reflected in the 1996

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<sup>21</sup> Review of the Section 251 Unbundling Obligations of Incumbent Local Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 F.C.C.R. 19020, ¶ 534, n. 1640 (2003); see also Petition of Worldcom, Inc. Pursuant to Section 252(E)(5) of the Comm. Act for Preemption of the Jurisdiction of the Va. State Corp. Comm'n, Order on Reconsideration, 19 F.C.C.R. 8467, ¶ 3 (2004); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order on Remand and Further Notice of Proposed Rulemaking, 18 F.C.C.R. 16978, ¶ 534, n. 1640 (2003).



Act.”<sup>22</sup> Transit traffic is a non-access form of traffic and, by the FCC’s reasoning, those compensation arrangements cannot be proffered by tariff.

Having reviewed the evidence in the record and the law applicable to these issues, the Commission finds that Windstream’s transit tariff will create a significant disincentive for Windstream to conduct individual negotiations for interconnection or EAS agreements that incorporate transit traffic compensation rates. If the Commission were to allow Windstream’s tariff to remain on file and keep those rates in place, the Commission would be allowing Windstream to act *pro interesse suo* without fair consideration to the overall goal of the Telecom Act, which is to have a multitude of carriers compete in the market and allow for the use of another’s facilities for fair remuneration outlined within negotiated agreements.

Interconnection is the physical linking of two networks for the mutual exchange of traffic.<sup>23</sup> Interconnection agreements implement an important right provided by federal law—the right of CLECs to have indirect interconnection, as outlined in Section 251(a)(1). These agreements outline the ongoing obligations related to a facility or equipment used in the provision of telecommunications service.<sup>24</sup> Without indirect interconnection, there would likely be no local competition in Kentucky. It is, simply, economically infeasible for all competitive carriers (or, for that matter, all LECs) to

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<sup>22</sup> In the Matter of Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, CC Docket No. 01-92, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855, 19-21 (2005).

<sup>23</sup> Qwest Corporation v. Public Utilities Commission of Colorado, 479 F.3d 1184, 1192 (Tenth Cir. 2007).

<sup>24</sup> Id. at 1193.

establish direct interconnection arrangements with every other competitive carrier. Windstream's transit traffic tariff provides indirect interconnection; however, it does so in a manner inconsistent with prior decisions of the Commission and in violation of federal law.

Because the RLECs are serving as the terminating carriers for an increasingly large amount of traffic delivered to them by Windstream but the traffic in question is originated by the end-users of third-party CLECs, RLECs have the same right to measure, control, and verify the amount and type of traffic sent to them as does Windstream. Windstream has clearly recognized the importance of measuring and controlling third-party traffic. The record for this proceeding demonstrates that Windstream has entered into interconnection agreements with at least 59 carriers for tandem rates applied to transit traffic.<sup>25</sup> Windstream has the right to have originating carriers pay for the transiting of their traffic. It is a fact of being in a competitive telephone marketplace that incumbents will lose customers to CLECs providing service within their incumbent service territories. This fact is not new to Windstream, as it is an established incumbent carrier and is well aware that third-party traffic exists. The Commission finds, however, that Windstream's action of creating tariffed rates is neither a practical nor a lawful solution for addressing the costs and use of facilities for carrying transit traffic.

Tariffs are general in nature; particularly, a general customer services tariff does not contain terms, costs, and conditions applicable to other carriers. Those tariffs are, pursuant to telephone industry standards, typically venues for terms and rates for retail

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<sup>25</sup> See Windstream's Responses to Commission Staff Data Request, Response 1, filed March 20, 2009. End-office rates are not placed in Windstream's agreements.

end-users. Conversely, access tariffs are used by carriers to outline the terms, rates, and conditions for the facilitation of intra-state, long-distance (access) traffic with other carriers. Transit traffic concerns only the exchange of local traffic, which is a creature of the industry not properly falling into either category of traffic created by retail end-users or access traffic created by other carriers. The terms and conditions of transit traffic exchange belong within an interconnection agreement, as those written, negotiated agreements will be specific to the local traffic and network issues of carriers providing service across an incumbent's network. Agreements creating ongoing obligations pertaining to interconnection must be filed pursuant to Sections 251 and 252 of the Telecom Act. Section 252 does not limit the type of agreements that must be submitted to state commissions.<sup>26</sup>

As the record demonstrates, the RLECs have used Windstream's facilities to originate transit traffic and to have transit traffic terminated on their networks without agreements specifically addressing use of and compensation for such traffic. Although, as of December 16, 2006, the tariff was approved by the Commission, we find that the rates, terms, and conditions were improperly and unreasonably applied to services that were not general in nature and are, therefore, unenforceable and cannot be applied. The method by which Windstream acted to put the tandem and end-office rates into place does not follow Commission precedent or the tenets of the Telecom Act.<sup>27</sup> As the

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<sup>26</sup> Qwest Corporation, *supra*, 479 F.3d at 1189, 1190.

<sup>27</sup> The record does not demonstrate whether the CLECs are paying Windstream for transiting their originating traffic for termination to the RLECs. The Commission assumes that such compensation arrangements are outlined within the various CLEC-Windstream interconnection agreements. If, after the RLECs and Windstream develop interconnection agreements (if so desired) which result in Windstream's receiving double payment for transiting third-party traffic, the affected CLECs would need to formally bring their individual concerns to the Commission for resolution.

method has been found to be unlawful, Windstream cannot be permitted to collect the rates of \$0.0030 for tandem-office routed transit traffic and \$0.0045 for end-office routed transit traffic, as provided in the tariff.

The Commission finds that Sections 251 and 252 of the Telecom Act require that the terms, rates, and conditions for interconnection between carriers be memorialized in a negotiated agreement, and this includes the terms, rates, and conditions applied to transit traffic. Transit traffic is an essential function of interconnecting telephone networks, and the compensation and conditions for that interconnection simply cannot be outlined within a tariff. For this reason, the Commission finds that Windstream's tariff violated the tenets of the Telecom Act and cannot be applied to the RLECs or any other carrier and is void *ab initio*. Windstream cannot collect those tariffed rates either retroactively or prospectively.<sup>28</sup> The Commission finds that the transit tariff itself will not be allowed to remain on file and, if Windstream desires to charge for the indirect facilitation of traffic, Windstream must negotiate written agreements that include such terms and rates. Negotiating parties are free to agree to any transit traffic rates they desire, as long as no portion of the agreement discriminates against any telecommunications carriers not parties to the agreement and the implementation of the agreement is consistent with the public interest, convenience, and necessity.

The rates in question were placed into the General Subscriber Services Tariff, which, by common industry practice, is to contain rates that apply to retail customers, not other telephone carriers. As these rates were placed within a retail services tariff,

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<sup>28</sup> See generally City of Russellville v. Public Service Commission of Kentucky, 2005 WL 385077 (Ky. App. 2005) (The Court held that, although the Commission erred in allowing a utility's tariff to go into effect as a matter of law, that error cannot be used to allow a utility to avoid compliance with its statutory and regulatory obligations requiring notice to wholesale customers of those new rates).

the complainants would have no reasonable basis to be aware that it would unilaterally impose costs and obligations on them as carriers. The Telecom Act intends that reciprocal compensation arrangements apply to local traffic exchanged between carriers. Windstream's tariff serves as a method of circumventing the Telecom Act and the public policy supporting it, which favors written and negotiated reciprocal agreements. FCC regulation 47 C.F.R § 51.703, requiring LECs to establish compensation arrangements for transport and termination of telecommunications traffic, and 47 U.S.C. § 251(c)(1) specifically impose a duty upon carriers to negotiate reciprocal compensation arguments in good faith. In the event that, in seeking negotiations with other carriers on transit rates, Windstream finds that other carriers are not acting in good faith or refuse to negotiate in any meaningful way, Windstream should invoke the authority of the Commission for the creation of an agreement, pursuant to KRS 278.542(1)(a) and (b), and not seek the self-help measure of improperly tariffing new rates which belong solely within the confines of a written agreement. The state's role in assisting in the process of forming interconnection agreements is well-established.<sup>29</sup> Such unilateral tariffing and circumventing of the negotiation process obliterates the outlined mechanics in the Telecom Act to preserve the benefits of competition through mandated negotiation of the rights and obligations of network interconnection.<sup>30</sup>

The Commission finds that Windstream's transit traffic service rates cannot be allowed to stand, because they clearly violate the intent and the letter of the Telecom Act. To allow the tariff to be applied on a going-forward basis would lead to an

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<sup>29</sup> Verizon North v. Strand, 367 F.3d 577, 584-5 (Sixth Cir. 2004).

<sup>30</sup> Id.

unreasonable result, as the Commission would then be sanctioning Windstream's violation of the intent of the Telecom Act requiring negotiations and written agreements outlining the terms and costs for interconnection. Additionally, to allow Windstream to collect money from the RLECs for transit traffic traversing Windstream's network after the implementation date of the tariff through the individual dates by which each RLEC re-directed the transit traffic would be unlawful under the Telecom Act.

Therefore, by this Order, the Commission finds that Windstream's transit traffic tariff is to be withdrawn as of the date of this Order and Windstream is prohibited from collecting past-due amounts from carriers billed pursuant to those transit traffic rates. If the third-party traffic arrangements have not been resolved, Windstream and each complainant should begin negotiations for the establishment of an interconnection agreement that specifically addresses the rates, terms, and conditions for the origination and termination of transit traffic traversing portions of Windstream's network. If the parties fail to reach a negotiated agreement on this issue, they should invoke the authority of this Commission through the filing of a petition for arbitration of the rates, terms, and conditions for the origination and termination of transit traffic that are to be included in an interconnection agreement.

HIGHLAND TELEPHONE COOPERATIVE, INC.  
AND BRANDENBURG TELEPHONE COMPANY

The parties have repeatedly asserted that the transiting circumstances within the territory of Highland Telephone Cooperative, Inc. ("Highland") differ greatly than those of

the other RLEC complainants.<sup>31</sup> Windstream is the tandem provider for Highland, and the transit traffic at issue in Highland's service area concerns a wireless provider. Windstream and the RLECs have repeatedly asserted that, due to the wireless nature of the transit traffic, the Commission's findings and decisions in this proceeding may not be easily applied to Highland for the resolution of the reciprocal compensation questions.<sup>32</sup> Therefore, Highland and Windstream are specifically instructed to separately negotiate an interconnection agreement specific to the local traffic issues for Highland, in accordance with this Order. If the parties determine that there are unique facts and unresolved legal questions regarding the Highland-Windstream traffic exchange that cannot be addressed by the findings and conclusions outlined within this Order, the Commission encourages the parties to submit these matters to the Commission for investigation and resolution. The parties shall submit the Highland-Windstream dispute as a new complaint or petition which shall be assigned a new case number by the Commission.

Additionally, the dispute between Brandenburg and Windstream centers on the facilitation of Internet Service Provider traffic to Verizon originating with Brandenburg's customers and transited through Windstream's end-office in Elizabethtown (Hardin County). The dispute is being addressed within Commission Case No. 2008-00203.<sup>33</sup>

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<sup>31</sup> The parties assert that Highland subtends Windstream's tandem, which means that Highland has an end-office that provides the dial tone point of interconnection for end-users and has a trunk directed to Windstream's tandem office. The design directly helps Highland's end-users reach a variety of long-distance carriers. Hearing Testimony at 28-29, 33-34, 71, 83, 125.

<sup>32</sup> Windstream Motion to Dismiss at 2. Filed December 8, 2008.

<sup>33</sup> Case No. 2008-00203, Investigation into Traffic Dispute between Brandenburg Telephone Company, Windstream Kentucky East, LLC, and Verizon Access, filed July 1, 2008.

The Commission finds that it has already rendered decisions and shall render more decisions as to the Brandenburg-Verizon-Windstream traffic and compensation issue exclusively within Case Number 2008-00203. Therefore, this action need not remain open solely for the purpose of addressing the Hardin County issue. All final decisions in that traffic arrangement shall be exclusively decided within Case Number 2008-00203.

#### CONCLUSION

The Commission finds that, in determining that negotiated agreements shall serve as the sole venue for the placement of transit rates, Windstream's tariff goes against the public interest of maintaining a healthy and fair competitive environment for Kentucky telephone companies and violates the letter and tenets of the Telecom Act. The tariff is found to be unlawful, unreasonable, and unjust and, by this Order, cannot be applied retrospectively or prospectively and is hereby cancelled. Windstream shall withdraw its current tariff and file a revised tariff that eliminates references to transit traffic rates.

IT IS HEREBY ORDERED that:

1. Windstream's transit traffic tariff is cancelled and shall not be applied to any carrier.
2. Windstream shall withdraw its General Customer Services tariff containing the transit traffic service rates no later than 10 days from the date of this Order and shall file a revised General Customer Services tariff no later than five days thereafter.
3. The parties shall negotiate the necessary rates, terms, and conditions for the facilitation of transit traffic arrangements in accordance with the Commission's findings outlined within this Order.

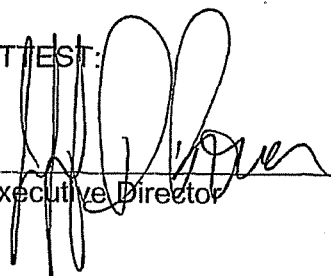


4. This matter is closed and removed from the Commission's docket.

By the Commission

ENTERED *SW*  
AUG 16 2010  
KENTUCKY PUBLIC  
SERVICE COMMISSION

ATTEST:

  
\_\_\_\_\_  
Executive Director

Case No. 2007-00004