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September 17, 2010

**VIA HAND DELIVERY**

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

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

Dear Mr. Derouen:

Enclosed for filing in the above-referenced case, please find one original and eleven (11) copies of the RLECs' Response to Windstream Kentucky East, LLC's Motion for Reconsideration. Please file-stamp one copy, and return it to our courier.

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

Very truly yours,

DINSMORE & SHOHL LLP

Edward T. Depp

ETD/sdt
Enclosure
cc: All Parties of Record (w/enclosures)

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**COMMONWEALTH OF KENTUCKY**
**BEFORE THE PUBLIC SERVICE COMMISSION**

**In the Matter of:**

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| **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.** | ) | **Case No. 2007-00004** |
| **Windstream Kentucky East, Inc.** | ) | |
| *Defendant* | ) | |

**THE RLECS' RESPONSE TO WINDSTREAM KENTUCKY EAST, LLC'S MOTION FOR RECONSIDERATION**

Brandenburg Telephone Company, Duo County Telephone Cooperative Corporation, Inc., Highland Telephone Cooperative, Inc., Mountain Rural Telephone Cooperative Corporation, Inc., North Central Telephone Cooperative Corporation, South Central Rural Telephone Cooperative Corporation, Inc., and West Kentucky Rural Telephone Cooperative Corporation, Inc. (collectively, the "RLECs"), by counsel, hereby submit their response to Windstream Kentucky East, LLC's ("Windstream's") Motion for Reconsideration (the "Motion"). For the reasons explained more fully below, the Public Service Commission of the Commonwealth of Kentucky (the "Commission") should deny Windstream's Motion. In support of their response, the RLECs state as follows.

## INTRODUCTION

In its August 16, 2010 Order (the "Order") in this case, the Commission ordered Windstream to cancel its transit traffic tariff because it was filed in violation of federal law. (Order at 19.) The Commission also found that, because Windstream's transit tariff was void *ab initio*, the tariff could not be applied to the RLECs and, likewise, that Windstream is prohibited from collecting those tariffed rates either retroactively or prospectively. (Order at 15.) In support of its Order, the Commission cited extensively to the record as well as to both state and federal law. Pursuant to KRS 278.400, Windstream has now requested a rehearing of the Commission's Order. The Commission should deny Windstream's motion for the following reasons.

First, Windstream's Motion fails to meet the standard required to justify a rehearing under KRS 278.400 as it presents "no additional evidence that could not with reasonable diligence have been offered on the former hearing." KRS 278.400. Second, Windstream wrongly argues that the Commission's Order, which prohibits Windstream from collecting past amounts under its now cancelled transit tariff, runs afoul of the prohibition against retroactive rate-making. Windstream, however, confuses retroactive rate-making – something the Commission did not do in this case – with the Commission's actual decision to void the amended tariff *ab initio* because it was in violation of federal law. The Commission's decision to do so is well-founded in the law. Third, Windstream creates a straw man argument by asserting that the Commission's Order is overly-broad regarding the requirements for negotiated interconnection.[1] Not only does Windstream mischaracterize the Commission's analysis and fail to cite any relevant case law, but Windstream's position is directly at odds with the great weight of Federal law in support of negotiated interconnection agreements. The Commission should deny Windstream's Motion.

[1] It is worth noting that Windstream's Motion fails, in nearly seven pages of argument, to cite to a single portion of the Commission's Order. (Windstream Motion at 6-12.) Windstream has, instead, reframed the Commission's Order in a way that ultimately misrepresents it.

## RESPONSE

### I. Windstream's Motion Fails to Satisfy the Standard for Rehearing as Required Pursuant to KRS 278.400.

In order for the Commission to grant a motion for rehearing pursuant to KRS 278.400, the party making the motion must demonstrate that it has "additional evidence that could not with reasonable diligence have been offered on the former hearing." KRS 278.400. The Commission has consistently denied motions made pursuant to KRS 278.400 where the movant failed to present "new evidence or arguments which were not previously considered by the Commission." *In the Matter of: Petition of Bellsouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Case No. 2004-00427, 2008 Ky. PUC LEXIS 65 at 2, January 18, 2008; *see also In the Matter of: Joint Application for Approval of the Indirect Transfer of Control Relating to the Merger of AT&T Inc. and Bellsouth Corporation*, Case No. 2006-00136, 2006 Ky. PUC LEXIS 697 at 3, August 21, 2006 ("Intervenors have raised no evidence or arguments not previously considered by the Commission. Thus, the Commission will not grant rehearing").

Windstream has failed to meet this standard. With the exception of raising the unfounded specter of retroactive rate-making, addressed more fully below, Windstream has not presented any new evidence or arguments in its Motion that were not previously considered by the Commission. Windstream's Motion is furthermore conspicuously devoid of any relevant case law. Instead, Windstream attempts to substantiate its Motion by citing to its own witness' direct testimony and the hearing transcript in this matter. (Windstream Motion at 1-5, 10.) The Commission has already heard this evidence and rejected Windstream's arguments regarding the rationale underlying its amended tariff filing. The Commission decided against Windstream, finding 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." (Order at 15).

Windstream clearly prefers a different result, but it has failed to provide any additional evidence or legal support to substantiate its Motion. Accordingly, the Commission should deny Windstream's Motion for failing to meet the threshold standard required under KRS 278.400.

## II. Windstream Confuses the Prohibition Against Retroactive Rate-Making With the Commission's Authority to Void a Legally Deficient Tariff *ab initio*.

Windstream erroneously asserts that the Commission acted beyond its statutory authority when it found that Windstream was prohibited from collecting the transit traffic rates set forth in its legally deficient, now-cancelled transit traffic tariff. (Windstream Motion at 12-17.) In short, Windstream accuses the Commission of exceeding its authority by engaging in retroactive rate-making. Windstream, however, confuses the prohibition against retroactive rate-making (also referred to as the filed-rate doctrine)[2] with a finding, like the Commission's action here, that the tariff itself was legally void *ab initio*. The Commission did not order any adjustment whatsoever to the rates in Windstream's tariff – whether retroactively or prospectively. Indeed, the Commission's Order does not discuss the reasonableness of Windstream's rates (though clearly unjust and unreasonable) because the Order, finding that Windstream's transit tariff was in violation of federal law at the moment it was filed, did not need to reach this issue. The transit tariff itself was void *ab initio*.

The irony of Windstream's argument is that, if the Commission lacks any authority, it would have been the authority to approve a tariff that is in direct violation of relevant law. The

[2] *See Chandler v. Anthem Ins. Companies, Inc.*, 8 S.W.3d 48 (Ky. App. 1999) (concluding that the filed rate doctrine "prohibits a ratepayer from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue").

Commission implicitly recognizes this in its Order.[3] The import of the Commission's Order is that, because Windstream's transit tariff was "in violation of federal law" at the moment it was filed (in both substance and manner), Windstream's transit tariff was never effective regardless of the Commission's previous actions.[4] As the Commission noted in its Order, such action is well within the Commission's authority and has previously been upheld by Kentucky courts. (Order at 15, *citing City of Russellville v. Public Service Comm'n*, Case No. 2003-CA-002132-MR (Ky. App. 2005) (upholding the Commission's Order to void a utility's tariff retroactively because, even though the Commission allowed a utility's tariff to go into effect as a matter of law, that error cannot allow a utility to circumvent "compl[iance] with its statutory and regulatory obligations").[5]

Windstream cites *Cincinnati Bell Tel. Co. v. Kentucky Public Service Comm'n*, 223 S.W.3d 829 (Ky. App. 2007) in support of its argument that the Commission improperly engaged in retro-active ratemaking, but *Cincinnati Bell* is easily distinguishable.[6] In *Cincinnati Bell*, the Commission examined the rates of a lawfully-filed tariff and improperly found those rates to be unjust and unreasonable on a retroactive basis. *Id.* at 837-39. In contrast with the case at hand, the Commission in the *Cincinnati Bell* case did not find that the tariff itself was legally deficient and, therefore, void. As such, *Cincinnati Bell* is inapposite. This is a legally significant distinction that

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[3] Order at 14.

[4] The Commission found that "[a]lthough, as of December 16, 2006, the tariff was approved by the Commission . . . 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. As the method has been found to be unlawful, Windstream cannot be permitted to collect the rates . . . as provided in the tariff." (Order at 14-15 (emphasis added).)

[5] Though the Commission does not address the issue in its Order, Windstream's failure to include any cost support for its transit traffic rates when it filed its transit tariff should alone have been sufficient grounds for rejecting Windstream's tariff *ab initio*. *See In the Matter of Notice of Intent of North Central Telephone Coop. Corp. to File Rate Application*, Case No. 2007-00162, *Order*, July 27, 2007, at 2-3 (finding that proposed rates "must be accompanied by sufficient data to support the prices sought to be charged," and that failure to do so means that the tariff filing "must be rejected"); *see also American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Com.*, 379 S.W.2d 450 (Ky. 1964).

[6] Notably, this is the only case law Windstream cites as part of its nearly six-page argument in support of its position.

cannot be overlooked. Indeed, Windstream appears inadvertently to recognize this distinction in its Motion when it described the *Cincinnati Bell* case as one involving "lawfully-filed tariffed rates." (Windstream Motion at 14 (emphasis added).) By Windstream's own description of the case, *Cincinnati Bell* does not apply.

Thus, Windstream's claim that the Commission exceeded its authority is without merit or support. The Commission's Order has not denied Windstream compensation or deprived it of property. If anything, the Commission's Order simply recognized that the Commission lacks the authority to enforce a tariff that was in violation of law at the moment it was filed. The Commission should reject Windstream's Motion to the contrary.

## III. Windstream's Position Regarding the Use of Tariffs for Dictating the Terms of Section 251 / 252 Interconnection Has No Support in Law.

Though Windstream appears to concede that the application of Section 251 / 252 of the Act is appropriate for the particular transit traffic arrangements at issue in this case,[7] Windstream nevertheless proceeds to take issue with what it describes as the "Commission's 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." (Windstream Motion at 6 (emphasis in original).) Windstream calls the Commission's conclusions "overbroad" and "based on an overly-generalized presentation of the potentially pertinent case law." (*Id.*)

Windstream's characterization and criticism of the Commission's Order in Part II of its Motion, however, fails to cite or quote a single portion of the Order, as well as fails to cite a single relevant case that would undermine the Commission's analysis. The result is that Windstream's

[7] Windstream emphasizes that its request for reconsideration as discussed in Part II of its Motion does not concern "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." (Motion at 6-7 (emphasis added).)

characterization of the Commission's Order is nearly a fiction that Windstream then proceeds to rebut.

For instance, the brunt of Windstream's argument in Section II of its Motion relates to the Commission's brief reference to a Federal Communications Commission ("FCC") decision regarding local exchange carrier obligations vis-à-vis interconnection with commercial mobile radio service providers.[8] Windstream criticizes the Commission for what it claims to be the Commission's near wholesale reliance on this allegedly irrelevant "FCC decision that seems to provide the basis for the Commission's conclusion regarding federal law." (Windstream Motion at 8). This is a misrepresentation of the Commission's analysis. In fact, the Commission's Order cites to the *Wireless Termination Tariff Order* only once, and it does so for the sole purpose of analogy. The Commission noted that, although the FCC has failed to directly address the issue of transit traffic (which is a form of non-access traffic), the FCC has addressed the issue of interconnection as it relates to other forms of non-access traffic, such as CMRS traffic, concluding that prior FCC precedent "intended compensation arrangements to be negotiated agreements" consistent with the pro-competitive policies of the Act. (Order at 11.) The Commission makes abundantly clear that its reference to the *Wireless Termination Tariff Order* is for the sole purpose of providing an indication as to the "FCC's reasoning" regarding other forms of non-access traffic.

Regardless, the fact remains that Windstream's position falters under the great weight of relevant case law. As the RLECs explained at length in their post-hearing brief,[9] and as the Commission appears to have adopted in its Order, all relevant federal law points to one conclusion: a rejection of the rigidity of tariffs in favor of the negotiation and arbitration requirements set forth in

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[8] *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) ("*Wireless Termination Tariff Order*").

[9] *See* RLECs Post-Hearing Brief at 13-25.

Sections 251 and 252 of the Act. Thus, the rates, terms, and conditions of interconnection should be the result of negotiated agreements. This holds true for all carriers regardless of type (ILEC, RLEC, CLEC or CMRS). As the Sixth Circuit has explained, allowing a telecommunications provider to tariff the rates, terms, and conditions of a crucial network element as an alternative to obtaining interconnection rights is tantamount to "a fist slamming down on the [negotiating] scales." *Verizon North v. Strand*, 367 F.3d 577, 585 (6th Cir. 2004); *citing also Wis. Bell v. Bie*, 340 F.3d 935, 941 (7th Cir. 2003).

Though Windstream continues to claim that it was rebuffed by the RLECs in its attempts at negotiating appropriate interconnection agreements, the record reflects that this is simply not true. In fact, the RLECs impeached Windstream's witness on this very issue at the July 29, 2009 public hearing. Windstream testified then, as it continues to claim now, that the negotiations between Windstream and one of the RLECs "broke down because [the RLEC] continued to insist that it should not be required to compensate Windstream under an agreement." (Rebuttal Test. of K. Smith at 6:14-17). However, when presented with the contents of an email exchange between the RLEC's legal counsel and counsel for Windstream, establishing the RLEC's willingness to pay for transit traffic, Windstream's witness was forced to recant his prior testimony.[10]

In any event, even if Windstream's unfounded claims were true – namely, that the RLECs have no incentive to negotiate interconnection because traffic is already flowing – Windstream is afforded but one appropriate and adequate recourse: to seek redress from the Commission. The Commission's Order puts it well:

> 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

[10] "Q. Would you agree with me that, with respect to the non-CMRS traffic, however, Highland was indicating its willingness to pay for Highland transit traffic? A. According to this email, that would appear so." (Test. of K. Smith, July 29, 2009 Hearing at 123:7-10.)

> 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.

(Order at 16.)

Because the FCC and Federal Circuits have rejected the rigidity of tariffs in favor of the negotiation and arbitration requirements set forth in Sections 251 and 252 of the Act,[11] the Commission properly found that interconnection should be the result of negotiated agreements. Windstream's request for reconsideration on this issue should, therefore, be rejected.

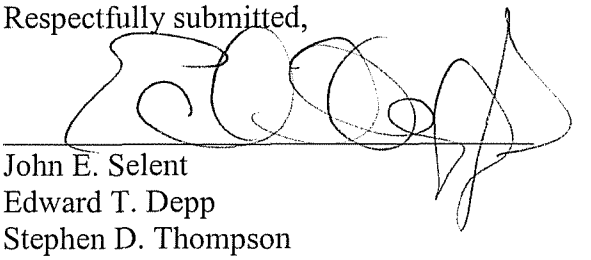
## CONCLUSION

For all of the reasons above, the Commission should deny Windstream's Motion for Reconsideration. By failing to present any additional evidence or new arguments not previously considered by the Commission, Windstream's Motion fails to meet the threshold standard for rehearing as set forth in KRS 278.400. Moreover, Windstream has confused retroactive rate-making – something the Commission did not do in this case – with the Commission's actual decision to void Windstream's amended tariff *ab initio*. The Commission did so because Windstream's tariff was filed in violation of relevant law. Ultimately, Windstream's position is directly at odds with the

[11] *See, for example, Verizon North v. Strand*, 367 F.3d 577, 585 (6th Cir. 2004); *Quick Communs., Inc. v. Mich. Bell Tel. Co.*, 515 F.3d 581, 585 (6th Cir. 2008); *Wis. Bell v. Bie*, 340 F.3d 935, 941 (7th Cir. 2003); *Iowa Network Services v. Qwest*, 466 F.3d 1091, 1098 (8th Cir. 2006); *MCI WorldCom, Inc. v. Fed. Comm. Comm'n*, 209 F.3d 760, 764 (D.C. Cir. 2000); *In the Matter of Developing a Unified Intercarrier Compensation Regime T-Mobile et al.*, FCC Docket No. 01-92, 20 FCC Rcd. 4855, PP 14 (Feb. 24, 2005). *See also, 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*, Case No. 2004-00044 (Ky. PSC Sept. 26,2005 and Mar. 14,2006).

overwhelming weight of federal and state law in support of negotiated interconnection agreements, and should be denied accordingly.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by United States First Class Mail, sufficient postage prepaid, on this 17th day of September, 2010 upon:

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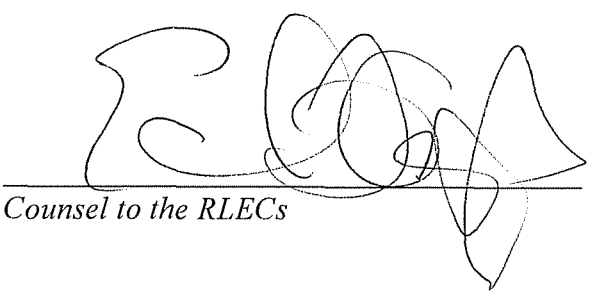

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