STOLL · KEENON · OGDEN
PLLC

2000 PNC PLAZA
500 WEST JEFFERSON STREET
LOUISVILLE, KY 40202-2828
MAIN: (502) 333-6000
FAX: (502) 333-6099
www.skofirm.com

DOUGLAS F. BRENT
DIRECT DIAL: 502-568-5734
douglas.brent@skofirm.com

September 17, 2010

Jeff Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40601

RE: Brandenburg Telephone Company, et al v. Windstream Kentucky East LLC
Case No. 2007-00004

Dear Mr. Derouen:

Enclosed herewith is an original and ten copies of T-Mobile's Response to Motion for Reconsideration in the above referenced case.

Please acknowledge receipt by returning a stamped copy of this filing via our runner.

Sincerely yours,

Douglas F. Brent

DFB: jms
Enclosures

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 Telephone Cooperative Corporation, Inc.; and West Kentucky Rural Telephone Cooperative Corporation, Inc.	)	
Complainants	)	CASE NO. 2007-00004
v.	)	
Windstream Kentucky East, LLC	)	
Defendants	)	

T-MOBILE'S RESPONSE TO MOTION FOR RECONSIDERATION

T-Mobile USA, Inc., Powertel/Memphis, Inc., and T-Mobile Central LLC ("T-Mobile"), by counsel, hereby respond to the Motion of Windstream Kentucky East, Inc. ("Windstream") for reconsideration of the Commission's Final Order entered on August 16, 2010 (the "Final Order"), insofar as the Commission's Final Order and the Windstream Motion relate to the federally-protected right of competing carriers, including wireless carriers, to obtain transit services from incumbents by means of an interconnection agreement rather than a tariff.

INTRODUCTION

Windstream's motion should be denied as a matter of procedural as well as substantive law. First, Windstream offers nothing that "could not with reasonable diligence have been offered on the former hearing." KRS 278.400. The Motion offers only a warmed-over version

of arguments it has already made. Second, the Commission in its Final Order correctly determined that the rates, terms and conditions for transit traffic handled by incumbent local exchange carriers--including traffic originated by competitive carriers-- *must* be negotiated by the parties pursuant to Sections 251[1] and 252 of the Telecommunications Act of 1996 and included in interconnection agreements. The ability of competing carriers to obtain indirect interconnection pursuant to the procompetitive processes prescribed by the Telecommunications Act of 1996 is vital.

ARGUMENT

The Sixth Circuit Court of Appeals has made it abundantly clear that a tariff such as Windstream's improperly supplants the federally-mandated process of negotiation and arbitration of interconnection agreements for inter-carrier facilities and services required to be provided by the Telecommunications Act of 1996. In *Verizon North v. Strand*, 309 F. 3d 935, 940 (2002), the court explained that providing by general tariff, rather than by individually negotiated interconnection agreements, for terms and conditions upon which network elements are provided to competitors, is unlawful: it "evades the *exclusive* process required by the 1996 Act, and effectively eliminates any incentive to engage in private negotiation, which is the centerpiece of the Act."

"Exclusive" is as clear as any word in the English language. Dictionary definitions of the word include "not admitting of something else," "limited to the object or objects designated," and "shutting out all others from a part or share."[2] The court's rationale for excluding alternate

---

[1] *See Qwest Corp. v. Cox Nebraska Telcom*, LLC, No. 4:08CV3035, 2008 U.S. Dist. LEXIS 102032 (D. Neb. Dec. 17, 2008) (upholding state commission decision requiring the provision of transit service as a Section 251 (c)(2) obligation subject to TELRIC rates).

[2] *See http://dictionary.reference.com.*

means of setting rates for ILEC-supplied services to competing carriers is just as clear. If an ILEC can simply set a rate by tariff, there is no "incentive to engage in private negotiation." *Strand,* 309 F.3d at 940. The Sixth Circuit thus put its collective finger directly on the practical problem of permitting such a service to be tariffed. The very existence of such a tariff – particularly a tariff containing the inflated rates at issue here – would not only free Windstream from any incentive to negotiate; perversely, it would give Windstream every incentive to *avoid* negotiations for as long as possible to avoid the TELRIC standard mandated by federal law. Moreover, as T-Mobile and other intervenors have previously noted, permitting an ILEC to tariff these services introduces the risk that non-TELRIC rates will become a price floor once they are cemented into a tariff; and the tariff rates at issue here are significantly (and apparently unjustifiably) higher than rates in current interconnection agreements.

Strand is explicit; and even if it were less so, Windstream's dispute with *another ILEC* would provide no reason for the PSC to abandon its well-settled policy determination that transit arrangements between ILECs and any competitive carriers, including wireless carriers, must be included in interconnection agreements pursuant to 47 U.S.C. §§ 251 and 252.

Windstream offers nothing to rebut the legal mandates underlying the Commission's decision, much less to weaken the policies that underlie them. Windstream does attempt to argue that, because it tariffs other services, including pole attachments, it can also legitimately tariff its terms and conditions for competing carrier indirect interconnection. The analogy does not work. Pole attachment service, for example, is offered by different types of utilities for different types of customers (including each other). It was tariffed and regulated by the Commission long before passage of the 1996 Act and for purposes entirely unrelated to promoting telecommunications competition. *See Kentucky CATV Ass'n v. Volz,* 675 S.W.2d 393 (Ky. App.

1984) (affirming Commission jurisdiction over pole attachment rates in a controversy involving the cable television and electric industries as well as telecommunications carriers).

CONCLUSION

Strand is dispositive, and the Commission has correctly interpreted it. However, if the Commission should reconsider its decision and find that Windstream's tariff was ever effective, or allow Windstream's transit tariff to apply to any of the ILECs that challenged it, it cannot do so without clarifying that the tariff does not fulfill Windstream's obligations to its competitors under federal law, and that the issue of transit traffic remains fully subject to negotiation and arbitration under the Act, including the statutory time frames and TELRIC standard prescribed by the Federal Communications Commission.

Kendrick R. Riggs
Douglas F. Brent
Deborah T. Eversole
STOLL KEENON OGDEN PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202
(502) 333-6000

September 17, 2010

Counsel for T-Mobile USA, Inc., Powertel/Memphis, Inc. and T-Mobile Central LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion for Intervention has been served by U.S. mail on those persons whose names appear below this 17th day of September, 2010.

Douglas F. Brent

Mark R. Overstreet
STITES & HARBISON, PLLC
421 West Main Street
Frankfort, KY 40602-0634

Jeanne Shearer
Vice President External Affairs
Windstream Kentucky East, LLC
130 West New Circle Road
P.O. Box 170
Lexington, Kentucky 40505

Holly Wallace
Dinsmore & Shohl, LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202

Dennis G. Howard II
Assistant Attorney General
Office of the Attorney General
Utility & Rate Intervention Division
1024 Capital Center Drive
Suite 200
Frankfort, Kentucky 40601-8204

John N. Hughes
124 West Todd Street
Frankfort, Kentucky 40601

Ms. Carolyn Ridley
tw telecom of kentucky, llc
233 Bramerton Court
Franklin, TN 37069

Susan Berlin
Nuvox Communications Inc.
Two North Main Street
Greenville, SC 29601