

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

On August 16, 2010, the Commission issued a final Order in this matter and held that Windstream Kentucky East, LLC's ("Windstream") inclusion of rates, terms and conditions for the facilitation of transit traffic service within a tariff violates prior Commission decisions requiring transit traffic service arrangements to be placed within a negotiated interconnection agreement. The Commission also held that Windstream can neither apply the transit traffic portion of its tariff to any carrier on a going forward basis nor can it collect the rates from the complainants for previous transit traffic facilitated over Windstream's network after the tariff became effective.

On September 8, 2010, Windstream moved for reconsideration of the Order pursuant to KRS 278.400. Windstream asks the Commission to reconsider two holdings: (1) agreements negotiated pursuant to 47 U.S.C. §§ 251 and 252 are the exclusive means for establishing interconnection rates, terms and conditions between two incumbent carriers; and (2) Windstream is prohibited from collecting previous charges for rates under the transit traffic tariff.¹ Windstream claims it is entitled to the requested relief because: (1) the Commission's invalidation of the tariff and prohibition against Windstream in collecting charges due pursuant to the tariffed rates constitutes retroactive rate-making; (2) the Commission should not prohibit the placement of transit rates in a tariff, as the Commission already allows the collection of certain local service rates, such as pole attachments, in tariffs; and, (3) the Commission's Order violates Sections 2, 27 and 28 of the Kentucky Constitution as the agency acted beyond the scope of its powers and acted to deprive Windstream of property and compensation and the Order violated the 14th Amendment to the United States Constitution by depriving Windstream of property and compensation without due process of law.

On September 17, 2010, the Commission ordered that any responses to Windstream's motion must be filed no later than September 17, 2010. Responses were

¹ Motion for Reconsideration at 1.

filed by the RLECs², Sprint Nextel³, T-Mobile⁴ and tw telecom.⁵ The responding parties argue, essentially, that Windstream has failed to submit any new evidence substantiating its position of error by the Commission, as required under KRS 278.400. The RLECs, T-Mobile and tw telecom all generally agree that Windstream failed to rebut the discussion in the Order as to the interconnection agreement requirements outlined in the 1996 Telecommunications Act or by the 6th Circuit Court of Appeals cases relied upon by the Commission. T-Mobile particularly notes that Windstream's attempt to analogize pole attachment rates to transit traffic arrangements does not succeed, as pole attachment rates were tariffed and regulated by the Commission long before the passage of the 1996 Telecommunications Act and were established for purposes entirely unrelated to promoting telephone competition, and moreover, are rates that are charged by different types of utilities for different types of customers.⁶ In their responses, the RLECs and Sprint specifically note that the Commission committed no action qualifying as retroactive rate-making, as Windstream's tariff was void *ab initio*,

² 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, "RLECs").

³ Sprint Communications Company L.P.; Sprint Spectrum, L.P. and SprintCom, Inc. d/b/a Sprint PCS; Nextel West Corp., Inc.; and NPCR, Inc., d/b/a Nextel Partners (collectively, "Sprint").

⁴ T-Mobile USA, Inc., Powertel/Memphis, Inc., and T-Mobile Central LLC ("T-Mobile").

⁵ tw telecom of ky llc ("tw telecom").

⁶ T-Mobile's Response at 3.

thereby prohibiting any collection of rates based on a tariff that never should have existed under the law.⁷

On September 21, 2010, Windstream moved for leave to file a reply to the responses and submitted a reply simultaneously with the request for leave. Having reviewed the motion and in consideration of the number of responses submitted by the other parties, the Commission finds the motion for leave to file the reply should be granted and is hereby accepted for filing.

KRS 278.400 provides that “[u]pon . . . rehearing any party may offer additional evidence that could not with reasonable diligence have been offered on the former hearing.” The statute is intended to provide closure to Commission proceedings by limiting rehearing to new evidence not readily discoverable at the time of the original hearing. The Commission has carefully reviewed Windstream’s motion for rehearing, as well as arguments contained within the responses and the reply, but finds that Windstream offers no evidence not previously considered by the Commission. Accordingly, pursuant to KRS 278.400, rehearing is denied.

IT IS THEREFORE ORDERED that:


1. Windstream’s motion for leave to file a reply is granted.
2. Windstream’s motion for rehearing is denied.
3. This proceeding is hereby closed and removed from the Commission’s docket.

⁷ RLECs’ Response at 4, 5; Sprint’s Response at 2, 3.

By the Commission

ENTERED *M*
SEP 27 2010
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:



Executive Director

Honorable Douglas F Brent
Attorney at Law
Stoll Keenon Ogden, PLLC
2000 PNC Plaza
500 W Jefferson Street
Louisville, KY 40202-2828

Edward T Depp
Dinsmore & Shohl, LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202

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

Honorable John N Hughes
Attorney at Law
124 West Todd Street
Frankfort, KY 40601

Honorable Mark R Overstreet
Attorney at Law
Stites & Harbison
421 West Main Street
P. O. Box 634
Frankfort, KY 40602-0634

Honorable John E Selent
Attorney at Law
Dinsmore & Shohl, LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202

Honorable Holly C Wallace
Attorney at Law
Dinsmore & Shohl, LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202