



2008-00438

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October 8, 2008

Stephanie L. Stumbo
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

RECEIVED
OCT 10 2008
PUBLIC SERVICE
COMMISSION

RE: Application of tw telecom of Kentucky, llc Under KRS 278.020(4) for a Certificate of Convenience and Necessity Showing a Demand and Need for Telecommunications Service in Fayette County Kentucky

Dear Ms. Stumbo:

Enclosed please find an original and eleven copies of tw telecom of kentucky, llc's Application for a Certificate of Convenience and Necessity. This Certificate will enable tw telecom to apply for a local franchise under an ordinance to be adopted soon by the Lexington-Fayette Urban County Government. Given the *pro forma* nature of this application and the need for the Certificate as soon as the ordinance is adopted, we request that the Commission provide expedited treatment for this filing.

Please confirm your receipt of this filing by placing the stamp of your office with the date received on the enclosed additional copies and return them to me in the enclosed self-addressed stamped envelope.

Should you have any questions please contact me at your convenience.

Very truly yours,

STOLL KEENON OGDEN PLLC


Douglas F. Brent

Enclosures

cc: Carolyn Ridley

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

OCT 10 2008

PUBLIC SERVICE
COMMISSION

In the Matter of:

APPLICATION OF tw telecom of kentucky llc)
UNDER KRS 278.020(4) FOR A)
CERTIFICATE OF CONVENIENCE AND)
NECESSITY SHOWING A DEMAND AND)
NEED FOR TELECOMMUNICATIONS)
SERVICE IN FAYETTE COUNTY)
KENTUCKY)

CASE NO. 2008- 00438

APPLICATION FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY

tw telecom of kentucky llc (“tw telecom”), for its application pursuant to KRS 278.020(4) for a certificate of convenience and necessity to apply for a franchise with the Lexington-Fayette Urban County Government (“LFUCG”), states:

1. tw telecom, a Delaware limited liability company, is a utility as defined by KRS 278.010(3)(e). tw telecom provides telecommunications services in various parts of Kentucky, including within Fayette County. tw telecom is a competitive local exchange carrier (“CLEC”) providing only “nonbasic service” as defined in KRS 278.541(5). To comply with 807 KAR 5:001, Sections 8(3) and 9(1), a copy of the Amended Certificate of Formation for tw telecom is attached as Exhibit 1.

2. tw telecom’s operations in Fayette County include fiber optic facilities occupying public rights-of-way. This occupation is pursuant to existing authorization granted by LFUCG.

3. LFUCG intends to adopt an ordinance requiring “communications service” providers to apply for and obtain a non-exclusive franchise to provide service within Fayette County. Upon information and belief this ordinance will be adopted as early as October 23, 2008.

4. Once the ordinance is approved and effective, tw telecom intends to apply for a franchise.

5. KRS 278.020(4) states: “[n]o utility shall apply for or obtain any franchise, license, or permit from any city or other governmental agency until it has obtained from the commission, . . . a certificate of convenience and necessity showing that there is a demand and need for the service sought to be rendered.”

6. On August 19, 2008, Windstream Kentucky East, LLC was granted a certificate of convenience and necessity in Case No. 2008-00325 (the “*Windstream Order*”), enabling it to apply for a franchise in Fayette County. In its order granting the certificate, the Commission stated: “under the provisions of KRS 278.020(4), *no utility* may enter into a franchise agreement with any governmental agency until it has obtained a CPCN from this Commission based on our finding that there is a need and demand for the services to be rendered.” (emphasis added).

7. In 1998, the Commission determined, pursuant to KRS 278.512, that it was unnecessary to require an initial operations certificate for CLECs.¹ At that time, there were apparently no Kentucky CLECs occupying public rights of way, and no Kentucky city had adopted an ordinance requiring CLECs to obtain local franchises.

8. In eliminating entry barriers for local competition, including the requirement to obtain an initial operations certificate, the Commission did not specifically address whether CLECs occupying public rights nevertheless would be required to seek a certificate of convenience and necessity if, in the future, they might be required to obtain local franchises.

¹ *Exemptions for Providers of Local Exchange Service Other Than Incumbent Local Exchange Carriers*, PSC Admin. Case No. 370 (Jan. 8, 1998) (“*January 1998 CLEC Order*”).

9. A CLEC like tw telecom is, by definition, providing services for which another provider (the incumbent) may be available. Moreover, under law CLECs may generally enter any market they choose, even if there are other CLECs present.² Therefore, it is implicit that since the *January 1998 CLEC Order* the Commission has presumed that the public convenience and necessity require competitive entry and, where it occurs, there is demand and need for the service sought to be rendered.

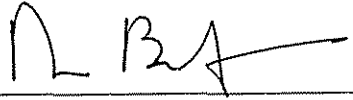
10. Logically, there appears to be no need for the Commission to make findings in individual cases that there is a demand and need for the service that a CLEC intends to provide. That is particularly true in present circumstances, where tw telecom is already providing service in *Fayette County, competing against Windstream and other carriers*. However, given the *dicta* in the *Windstream Order*, tw telecom requests a certificate of convenience and necessity.

11. When LFUCG awards a franchise to tw telecom, tw telecom will file a copy thereof with the Commission, as required by 807 KAR 5:001, Section (9)(1)(d).

² Section 253(a) of the *Telecommunications Act* expressly preempts state laws that prohibit "the ability of any entity to provide any interstate or intrastate telecommunications service." Thus, federal law has eliminated exclusive local franchises.

Wherefore, tw telecom of kentucky llc requests that the Commission issue an order showing that there is a demand and need for the service it seeks to render in Fayette County Kentucky.

Respectfully submitted,

By: 

Douglas F. Brent
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500 West Jefferson Street
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Telephone: (502) 333-6000

Counsel for tw telecom of kentucky llc

EXHIBIT ONE
AMENDED CERTIFICATE OF FORMATION FOR tw telecom of kentucky llc

Delaware

PAGE 1

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THAT THE SAID "TIME WARNER TELECOM OF KENTUCKY LLC", FILED A CERTIFICATE OF AMENDMENT, CHANGING ITS NAME TO "TW TELECOM OF KENTUCKY LLC", THE TWELFTH DAY OF MARCH, A.D. 2008, AT 10:45 O'CLOCK A.M.

3532245 8320

080311156

You may verify this certificate online
at corp.delaware.gov/authver.shtml



Harriet Smith Windsor
Harriet Smith Windsor, Secretary of State
AUTHENTICATION: 6455944

DATE: 03-17-08

State of Delaware
Secretary of State
Division of Corporations
Delivered 10:45 AM 03/12/2008
FILED 10:45 AM 03/12/2008
SRV 080311156 - 3532245 FILE

**CERTIFICATE OF AMENDMENT
TO CERTIFICATE OF FORMATION OF
TIME WARNER TELECOM OF KENTUCKY LLC**

This Certificate of Amendment to Certificate of Formation of Time Warner Telecom of Kentucky LLC (the "LLC") has been duly executed and is being filed by the LLC pursuant to Title 6, Section 18-202 of the Delaware Limited Liability Act, to amend the Certificate of Formation of the LLC filed with the Secretary of State of Delaware on September 29, 2003.

FIRST: The name of the limited liability company is Time Warner Telecom of Kentucky LLC.

SECOND: The Certificate of Formation of the limited liability company is hereby amended as follows by striking out Paragraph 1 thereof and by substituting in lieu of said Paragraph 1 the following new Paragraph:

1. "The name of the limited liability company formed hereby is **tw telecom of kentucky llc.**"

THIRD: The sole member is Time Warner Telecom Management Co. LLC whose name has been changed to **tw telecom management co. llc** by an amendment to its Certificate of Formation.

FOURTH: The effective date of this Certificate of Amendment is immediate.

IN WITNESS WHEREOF, the undersigned has executed this Certificate on the 11th day of March, 2008.

tw telecom of kentucky llc
By: tw telecom management co. llc,
its sole member

By: Tina Davis
Tina Davis
Senior Vice President and
Deputy General Counsel