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September 10, 2009

VIA OVERNIGHT MAIL

Mr. Jeff Derouen
Executive Director
Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602

RECEIVED

SEP 11 2009

**PUBLIC SERVICE
COMMISSION**

Re: Petition of Windstream Kentucky East, LLC, for Arbitration of an
Interconnection Agreement With New Cingular Wireless PCS, d/b/a AT&T
Mobility
KSPC 2009-00246

Dear Mr. Derouen:

Enclosed for filing in the above-referenced case are the original and five (5) copies of AT&T Mobility's Motion for Partial Dismissal and Brief in Support of AT&T Mobility's Motion for Partial Dismissal.

Should you have any questions, please let me know.

Sincerely,


Mary K. Keyer

cc: Party of Record

742678

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF WINDSTREAM KENTUCKY EAST,)	
LLC FOR ARBITRATION OF AN)	CASE NO.
INTERCONNECTION AGREEMENT WITH NEW)	2009-00246
CINGULAR WIRELESS PCS, LLC D/B/A AT&T)	
MOBILITY)	

AT&T MOBILITY’S MOTION FOR PARTIAL DISMISSAL

New Cingular Wireless PCS, LLC d/b/a AT&T Mobility and its operating affiliates, (collectively, “AT&T Mobility”), in accordance with Section 252 of the Communications Act of 1934, as amended (“the Act”), hereby file their Motion for Partial Dismissal to dismiss one issue raised in the Petition for Arbitration filed herein on June 29, 2009, by Windstream Kentucky East, LLC (“Windstream”).

Specifically, AT&T Mobility moves the Kentucky Public Service Commission (“Commission”) to dismiss Issue 1 listed on Exhibit 2 to Windstream’s Petition for Arbitration, which issue raises the question whether AT&T Mobility owes originating access charges to Windstream for landline-originated traffic, dialed to a local AT&T Mobility number, that terminates in a Major Trading Area (“MTA”) other than the originating MTA.

This issue should be dismissed from the subject cause for the following reasons:

1. Whether AT&T Mobility owes originating access to Windstream for landline-originated traffic is a matter of state and federal tariff and access law and is not controlled by and has no relationship to any of the services that Incumbent Local

Exchange Carriers ("ILECs") are required to provide under Sections 251(b) and (c) of the Act.

2. This issue was not negotiated by the parties and was raised by Windstream for the first time only immediately before the filing herein of the Arbitration Petition. At no time did AT&T Mobility agree to negotiate this issue.

3. Filed contemporaneously with this motion is a brief in support of the requested relief.

WHEREFORE, AT&T Mobility respectfully requests that its Motion for Partial Dismissal be granted, and that the Kentucky Public Service Commission dismiss Issue 1 in Exhibit 2 to Windstream's Petition for Arbitration.

Respectfully submitted,



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WIRELESS PCS, D/B/A AT&T MOBILITY

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF WINDSTREAM KENTUCKY EAST,)	
LLC FOR ARBITRATION OF AN)	CASE NO.
INTERCONNECTION AGREEMENT WITH NEW)	2009-00246
CINGULAR WIRELESS PCS, LLC D/B/A AT&T)	
MOBILITY)	

BRIEF IN SUPPORT OF AT&T MOBILITY’S MOTION FOR PARTIAL DISMISSAL

New Cingular Wireless PCS, LLC d/b/a AT&T Mobility and its wireless operating affiliates, (collectively, “AT&T Mobility”), in accordance with Sections 251 and 252 of the Communications Act of 1934, as amended (“the Act”), hereby file their Brief in Support of AT&T Mobility’s Motion for Partial Dismissal. AT&T Mobility prays for an order from the Kentucky Public Service Commission (“Commission”), dismissing Issue 1 in Exhibit 2 to the Petition for Arbitration filed June 29, 2009, by Windstream Kentucky East, LLC (“Windstream”).

In Issue 1, Windstream seeks an order from the Commission, requiring AT&T Mobility to pay originating access charges to Windstream for landline-originated traffic dialed to a local AT&T Mobility number but terminated on a wireless network in a foreign Major Trading Area (“MTA”). This issue should be dismissed from the arbitration because it is not a proper subject for arbitration under the Act. Federal law is clear that state commissions have limited jurisdiction over Section 252 arbitrations. Whether AT&T Mobility should pay Windstream originating access charges is clearly beyond that jurisdiction. For this reason, Issue 1 should be dismissed.

1. Issues Appropriate for Arbitration Under the Act

Not every intercarrier compensation issue is appropriate for negotiation and arbitration under Sections 251 and 252 of the Act. In fact, the Act specifically designates the listed services that incumbent local exchange carriers (“ILECs”) are required to provide telecommunications carriers pursuant to Sections 251(b) and (c) and consequently that may be arbitrated under Section 252. As the United States Eleventh Circuit Court of Appeals put it:

If the FPSC [Florida Public Service Commission] must arbitrate any issue raised by a moving party, then there is effectively no limit on what subjects the incumbent must negotiate. This is contrary to the scheme and the text of that statute, which lists only a limited number of issues on which incumbents are mandated to negotiate. See 47 U.S.C. §§ 251(b), (c) (setting forth the obligations of all local exchange carriers and incumbent local exchange carriers, respectively).¹

In the same Eleventh Circuit case, however, the court acknowledged some statutory latitude - pursuant to Section 252(b)(4)(C) - for state commissions to consider issues that are “required to implement the [interconnection] agreement.”² The court found that a party’s request for a liquidated damages clause fell within that realm, because “[a] schedule for implementation would be potentially meaningless without some mechanism to enforce it; thus, enforcement mechanisms like those desired by MCI are clearly contemplated by the Act and within the FPSC’s authority.”³

Windstream’s claim for originating access payments does not involve an “enforcement mechanism” described above. It does raise for decision, however,

¹ *MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) (“*MCI*”).

² “The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement...” 47 USC 252(b)(4)(C).

³ *MCI*, 298 F.3d at 1274.

whether Issue 1 - Windstream's claim that AT&T Mobility should be required to pay originating access for landline-to-mobile traffic dialed to a local number but terminated outside the originating MTA - is "required to implement" any of the Section 251(b) and (c) provisions of the interconnection agreement with AT&T Mobility. AT&T Mobility contends that it does not.

Following are the Section 251(b) and (c) obligations that are properly arbitrated before state commissions under Section 252 of the Act:

Section 251(b) "Obligations of all Local Exchange Carriers":

1. resale,
2. number portability,
3. dialing parity,
4. access to rights-of-way, and
5. reciprocal compensation.

Section 251(c) "Additional Obligations of Incumbent Local Exchange Carriers":

1. duty to negotiate,
2. interconnection,
3. unbundled access,
4. notice of changes,
5. collocation.

The imposition of originating access charges is not required to implement any of these obligations. The only obligation outlined above that even involves the payment of compensation for the exchange of traffic is Subsection 251(b)(5), which requires ILECs to establish "reciprocal compensation arrangements for the transport and termination of telecommunications traffic." FCC Rule 51.701, however, makes clear that reciprocal compensation is only owed for the transport and termination of "telecommunications

traffic,” which is expressly limited to intraMTA traffic.⁴ Originating access charges do not apply to intraMTA traffic.

Following is how Windstream’s Petition for Arbitration describes Issue 1:

Reciprocal compensation only applies to traffic that is both originated **and** terminated within the MTA. Traffic that Windstream originates and that is terminated to AT&T Mobility customers that are roaming outside of the MTA is not 251(b)(5) traffic and therefore is not subject to reciprocal compensation charges. Such traffic is interMTA traffic carried by AT&T or its affiliate acting as a long distance provider. As such, Windstream is due originating access on such calls, no different than if the calls were landline to landline and carried by an IXC.⁵

Issue 1, therefore, by Windstream’s own admission, involves a claim for interMTA compensation; i.e. that the *terminating* carrier (AT&T Mobility) owes compensation to the *originating* carrier (Windstream) for traffic that originates in one MTA and terminates in another.⁶

Windstream has accordingly admitted that Issue 1 is not in any way involved in the Section 251(b)(5) obligation to negotiate reciprocal compensation arrangements, nor is it “required to implement the [interconnection] agreement” between the parties. Rather, Issue 1 involves a claim by Windstream that AT&T Mobility owes access charges for traffic outside the scope of a Section 251/252 interconnection agreement.

Whether AT&T Mobility does in fact owe the claimed access payments will be determined by (1) Windstream’s state and federal access tariffs, and (2) state and federal access law. Neither has anything to do with the requirements of Sections 251(b)

⁴ “For purposes of this subpart, telecommunications traffic means . . . traffic exchanged between a LEC and a CMRS [wireless] provider that, at the beginning of the call, originates and terminates within the same Major Trading Area...” 47 C.F.R. § 51.701(b)(2).

⁵ Petition for Arbitration, Exhibit 2, p. 1 (emphasis in original).

⁶ Section 252(d)(2)(A)(i) of the Act makes clear that reciprocal compensation is paid by the *originating carrier* for the termination of its traffic on another carrier’s network.

and (c) or the interconnection agreement being arbitrated in this proceeding.

Accordingly, the Commission is without authority to decide Issue 1 in this arbitration, and the issue should be dismissed.

Dismissal will not leave Windstream without a forum within which to resolve its claim, assuming that the issue is not resolved before filing. Windstream may bring a complaint case, based upon its filed access tariffs, in any judicial or regulatory forum with appropriate jurisdiction. By attempting to raise the issue in this arbitration, Windstream would circumvent the normal legal process and attempt to vest the Commission with jurisdiction that it does not possess under the Act.

2. Issue Not Negotiated by the Parties

In the present case, Windstream's claim for originating access was not negotiated by the parties. Windstream did not even raise the issue until shortly before filing its Petition for Arbitration. When Windstream raised the issue, AT&T Mobility refused to negotiate it. Attached hereto as Exhibit 1 is the Affidavit of William H. Brown, AT&T Mobility's negotiator, stating:

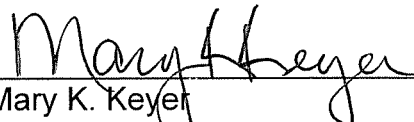
1. Negotiations with Windstream started on or about January 6, 2009.
2. During the course of negotiations, Windstream did not raise the issue of originating access.
3. On June 1, 2009, Windstream, for the first time, made a claim that AT&T Mobility owed originating access charges to Windstream for Windstream-originated traffic dialed to local AT&T Mobility numbers and terminated in foreign MTAs.
4. On June 24, Mr. Brown responded to the June 1 claim. Mr. Brown's response stated that Windstream's originating access claim was not a proper subject for negotiations, and that AT&T Mobility would not agree to negotiate that issue.
5. Windstream filed its Petition for Arbitration June 29, 2009.

In sum, not only is Windstream's claim for originating access not a proper subject for arbitration; the issue was not even negotiated by the parties. An issue not negotiated by the parties can never be the proper subject of arbitration, because the Act allows a party to seek arbitration only of "any open issues."⁷ By definition, an issue that has not been negotiated cannot be "open."

3. Conclusion

For the reasons discussed above, the Commission should dismiss Issue 1 in Windstream's Petition for Arbitration.

Respectfully submitted,



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742642

⁷ 47 U.S.C. § 252(b)(1).

Before the Kentucky Public Service Commission

In the Matter of the Petition of Windstream)	
Kentucky East, LLC, for Arbitration of an)	
Interconnection Agreement with New)	
Cingular Wireless PCS, d/b/a AT&T)	Docket No. C-2009-00246
Mobility)	
)	
)	

Affidavit of William H. Brown

BEFORE ME, the undersigned authority, on this 6th day of September, 2009, personally appeared William H. Brown, who being by me duly sworn on oath deposed and said:

1. My name is William H. Brown. My position with New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility (“AT&T Mobility) is Senior Contract Manager. In this position, I participated in the negotiations between AT&T Mobility and Windstream Kentucky East, LLC (“Windstream”). I am familiar with those negotiations and make this affidavit upon personal knowledge.

2. The negotiations between AT&T Mobility and Windstream began on or about January 6, 2009, when I received an e-mail from Windstream’s negotiator, Scott Terry.

3. On January 12, 2009, Mr. Terry sent me a draft interconnection agreement for review and negotiation. That agreement did not contain any provision that would have required AT&T Mobility to pay access charges to Windstream for Windstream-originated traffic. On the contrary, the draft agreement clearly stated that access charges, if any, would apply only to traffic originated by AT&T Mobility.

4. From January 6, 2009, through the end of May 2009, Mr. Terry and I

participated in negotiations to establish an interconnection agreement between AT&T Mobility and Windstream. Windstream's draft agreement formed the basis of those negotiations.

5. On June 1, 2009, Mr. Terry sent an e-mail containing a claim that AT&T Mobility owed originating access charges to Windstream for Windstream-originated traffic dialed to local AT&T Mobility numbers but terminated in a different Major Trading Area ("MTA").

6. This June 1 e-mail was the first time that Windstream had made the claim that AT&T Mobility owed originating access to Windstream for landline-originated traffic.

7. AT&T Mobility and Windstream had negotiated the issue whether AT&T Mobility owed access charges to Windstream for AT&T Mobility-originated interMTA traffic. In fact, as I described above, such a provision was contained in Windstream's draft interconnection agreement.

8. I believe that this issue of "terminating" access, for traffic originated by AT&T Mobility, is a proper subject for negotiation under the Telecommunications Act, because any amount of interMTA traffic sent by AT&T Mobility to Windstream through local interconnection trunks will decrease the amount of traffic subject to Windstream's reciprocal compensation charges under Section 251(b)(5) of the Telecommunications Act.

9. Thus, I agreed to negotiate the issue of terminating access for traffic originated by AT&T Mobility.

10. The issue of originating access, however, for traffic originated by

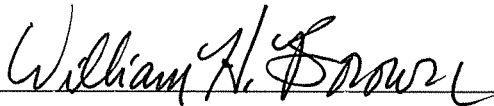
Windstream, does not affect the amount of local traffic originated by AT&T Mobility and subject to Windstream's reciprocal compensation charges.

11. The issue of originating access, for traffic originated by Windstream, also does not affect the amount of traffic originated by Windstream that is subject to AT&T Mobility's reciprocal compensation charges, because that amount of Windstream traffic is determined, under already agreed-to portions of the interconnection agreement being negotiated, by the amount of AT&T Mobility-originated traffic, not the amount of Windstream-originated traffic.

12. By e-mail of June 24, 2009, I replied to Mr. Terry's June 1 e-mail, stating that AT&T Mobility's position was that the originating access issue, for traffic originated by Windstream, was not a proper subject of negotiation, and that AT&T Mobility would therefore refuse to negotiate the issue.


13. Windstream filed its Arbitration Petition June 29, 2009.

Further Affiant sayeth not.



William H. Brown

Sworn to and subscribed to before me this 6th day of September, 2009, to certify which witness my hand and seal.



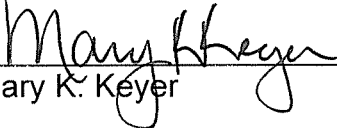
My Commission Expires:

ANGELA ANGEL NOTARY PUBLIC Cobb County State of Georgia My Comm. Expires September 14, 2009

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following individual by mailing a copy thereof, this 10th day of September 2009.

Honorable Robert C. Moore
Attorney At Law
Hazelrigg & Cox, LLP
415 West Main Street
P.O. Box 676
Frankfort, KY 40602



Mary K. Keyer