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November 23, 2009

**VIA COURIER**

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

**RECEIVED**

NOV 23 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  
KPSC 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 Response to Windstream's Surreply.

Should you have any questions, please let me know.

Sincerely,

Mary K. Keyer

Enclosure

cc: Party of Record

754473

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

NOV 23 2009

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 Mobility )

Case No. 2009-00246

**AT&T MOBILITY'S RESPONSE TO WINDSTREAM'S SURREPLY**

New Cingular Wireless PCS, LLC d/b/a AT&T Mobility, on behalf of itself and its wireless operating affiliates, (collectively "AT&T Mobility"), files its final Response to Windstream's Surreply regarding AT&T Mobility's Motion to Dismiss Issue 1 ("Originating Access issue") from this arbitration docket. While a response is not provided for in the procedural schedule, neither was the surreply. AT&T Mobility, as the moving party, respectfully requests the opportunity to file this Response to Windstream's Surreply to further address Windstream's apparent confusion between access charges under state and federal tariffs and laws, and reciprocal compensation. The former is not a required subject for negotiation and arbitration under Sections 251 and 252 of the Telecommunications Act of 1996, while the latter is. Windstream's claim that the Originating Access issue should be included in this arbitration should be dismissed. If Windstream chooses, it may file a complaint against AT&T Mobility, based on Windstream's applicable access tariffs.

**Windstream's Claimed InterMTA Factor Would Be Used to Compute Access Charges, Not Reciprocal Compensation Charges**

The factor for Windstream-originated calls from one Major Trading Area ("MTA") terminated to AT&T Mobility in another MTA that Windstream seeks to arbitrate in this proceeding would not affect Windstream's reciprocal compensation bills to AT&T Mobility under the Parties' interconnection agreement, nor would the factor be used by AT&T Mobility in billing reciprocal compensation charges to Windstream under the same agreement. The disputed factor would be used only by Windstream to determine *access billings* to AT&T Mobility. Under the Act, access billing is not an appropriate subject for arbitration.

As AT&T Mobility has discussed previously, reciprocal compensation billing between AT&T Mobility and Windstream involves two factors: (1) an intraMTA factor, and (2) an interMTA factor. The intraMTA factor allows *AT&T Mobility* to bill for reciprocal compensation traffic even though it cannot measure traffic received from Windstream. The interMTA factor allows *Windstream* to bill for reciprocal compensation traffic even though it cannot determine what portion of traffic received from AT&T Mobility is intraMTA and what portion is interMTA. Each company, in other words, uses one of the factors for reciprocal compensation billing.

Assume that the intraMTA factor is 70% wireless-originated / 30% landline-originated, the interMTA factor is two percent, and AT&T Mobility sends 500 minutes in one month to Windstream for termination. The billing works as follows:

Windstream will apply the two percent interMTA factor to the 500 minutes and determine that 490 minutes were intraMTA ( $500 - [500 * .2] = 490$ ). Windstream will then bill AT&T Mobility reciprocal compensation charges for 490 minutes. Windstream must apply the factor, because Windstream has no method of determining the location of the cell site at the beginning of any call with AT&T Mobility, and jurisdiction of wireless traffic is based upon the location of the cell site at the beginning of the call.<sup>1</sup>

When AT&T Mobility receives the bill from Windstream for 490 minutes, AT&T Mobility will apply the intraMTA factor of 70/30 to compute a reciprocal compensation bill of 210 minutes back to Windstream. The formula applied by AT&T Mobility is  $(490/.7) * .3 = 210$ . AT&T Mobility must apply the intraMTA factor, because AT&T Mobility does not have a system that can measure the amount of traffic received from Windstream. Moreover, AT&T Mobility does not apply an interMTA factor, because there is no assumption that any portion of Windstream-originated traffic is interMTA.

The above two factors have already been negotiated or otherwise agreed to by AT&T Mobility and Windstream. The Parties have agreed on an intraMTA factor, and in its recent responses to AT&T Mobility's data requests, Windstream has admitted that AT&T Mobility sends no interMTA traffic to Windstream over

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<sup>1</sup> *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 F.C.C.R. 15499 (¶ 1044) (1996), *aff'd in part and rev'd in part on other grounds sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

local interconnection trunks.<sup>2</sup> Thus, as between AT&T Mobility and Windstream in Kentucky, the interMTA factor for AT&T Mobility-originated traffic to Windstream is zero.

Windstream therefore confuses the issue when it claims:

AT&T Mobility's arguments in support of its Motion for Partial Dismissal are based on flawed assumptions. The first flawed assumption is that the balance of traffic between the parties encompasses only local traffic, which is governed by reciprocal compensation.<sup>3</sup>

The second (and largest) incorrect assumption AT&T Mobility makes is that the balance of traffic between the parties consists *only* of local, intraMTA traffic.<sup>4</sup>

AT&T Mobility does not claim that interMTA traffic is never exchanged between the Parties and that the balance of traffic between the Parties is only local, intraMTA traffic. Nor does AT&T Mobility claim that the two factors described above – the interMTA and intraMTA factors - have nothing to do with interMTA traffic. Rather, AT&T Mobility explains that the two factors are what are used (one by each Party) for the purpose of computing reciprocal compensation billing for intraMTA traffic. Because both factors are necessary to be able to compute billing under Section 251(b)(5) for reciprocal compensation, both factors are appropriate subjects for negotiation and arbitration under the Act.

The most recent negotiation between these companies, in Oklahoma, demonstrates this. The following chart is taken directly from the Parties'

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<sup>2</sup> See Windstream Response to AT&T Data Request 62, filed herein: "Windstream therefore is willing to agree that zero percent of traffic originated by AT&T Mobility and sent to Windstream should be subject to Windstream's terminating access charges."

<sup>3</sup> Windstream Surreply, p. 1.

<sup>4</sup> *Id.*, p. 2.

Oklahoma interconnection agreement that was publicly filed.<sup>5</sup> The bold type is included in the original.

<b>Reciprocal Compensation</b>	
2A Rate per MOU)	\$0.0076829
2B Rate (per MOU)	\$0.0060453
Indirect Rate (per MOU)	\$0.0072993
<b>Traffic Factors</b>	
Carrier-originated	65%
Windstream-originated	35%
<b>InterMTA Factor (Applies only to traffic originating from Carrier and terminating to Windstream)</b>	0%
Windstream InterMTA Rate:	\$0.0137

The language expressly states that the interMTA factor “**applies only to traffic originating from Carrier [AT&T Mobility] and terminating to Windstream.**”

Only Windstream applies the interMTA factor - to determine how to bill for intraMTA traffic under Section 251(b)(5).

And only AT&T Mobility applies the intraMTA ratio - 65%/35% in this case - again to determine how to bill for Section 251(b)(5) traffic.

Thus, Windstream is wrong to claim that “AT&T Mobility must also use jurisdictional factors to determine the calls that should be rated as local and billed to Windstream East.”<sup>6</sup> AT&T Mobility does not make use of the interMTA factor. Only Windstream does. AT&T Mobility uses the intraMTA ratio. Windstream does not.

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<sup>5</sup> Publicly filed interconnection agreements are not available on-line in Oklahoma. If the Commission desires, AT&T Mobility will provide a complete copy of the filed interconnection agreement.

<sup>6</sup> Windstream Surreply, p. 2.

What Windstream is trying to do in this proceeding is add a *third factor* that would apply only to *Windstream-originated* traffic and would determine what portion of such traffic is dialed to local numbers but terminates in a different MTA. This factor would not be used by Windstream to compute reciprocal compensation bills to AT&T Mobility. Instead, this third factor would be used by Windstream solely to compute *access charges* to AT&T Mobility for Windstream-originated traffic.

Such access billing issues are not part of the reciprocal compensation agreements required by Section 251(b)(5) of the Act, and therefore are not proper subjects for arbitration in this proceeding. If Windstream believes that it is entitled to recover originating access from AT&T Mobility, and that a factor is necessary to aid in such access billing, then Windstream should file an appropriate access tariff containing such a factor. AT&T Mobility could then choose to challenge the tariff, or not.

But access charge issues, and the contents of access tariffs, are not proper subjects for arbitration under the Act.

In Kentucky, Windstream (very late in the negotiations, only a few weeks before Windstream filed its Petition for Arbitration) began claiming that the interconnection agreement should contain this third factor. AT&T Mobility resisted, and continues to resist, inclusion of such a third factor in the interconnection agreement, because such a factor *is not necessary for reciprocal compensation billing purposes, and the only federal requirement applicable in this case, pursuant to 47 U.S.C. § 251(b)(5), is that the interconnection*

*agreement contain provisions allowing proper billing for reciprocal compensation (local) traffic.*

Windstream actually admits that the requested third factor is not needed by either AT&T Mobility or Windstream to bill reciprocal compensation charges:

The proper identification of calls and compensation to Windstream East for Windstream East-originated interMTA traffic carried by AT&T Mobility to its customer is an issue between the parties that should be resolved in this proceeding.<sup>7</sup>

The requested third factor is needed by Windstream *to bill access charges to AT&T Mobility for interMTA traffic*. Whether Windstream is entitled to recover access charges for such traffic is an issue currently not before the Commission. The issue to be decided at present is whether a provision applying only to access (non-reciprocal compensation) traffic is required to be negotiated and included in an interconnection agreement pursuant to 47 U.S.C. § 251 *et seq.*

The Parties can certainly agree to such an additional factor. The Parties can likewise agree to include such a factor in their interconnection agreement, just as the Parties can agree to include a myriad other terms and provisions that are not required to be included in such an agreement. However, nothing in the Act allows one Party (Windstream) to **force** another Party (AT&T Mobility) to include such a factor in an interconnection agreement. Windstream's access tariffs, plus other applicable state and federal law, will determine whether Windstream has the right to assess access charges against AT&T Mobility for

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<sup>7</sup> Windstream Surreply, p. 4.



Windstream-originated traffic. But that is an issue for another day - and another proceeding.<sup>8</sup>

A party "is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act."<sup>9</sup> Otherwise, Windstream could force AT&T Mobility to arbitrate *any issue Windstream might choose*. But that is not the law. AT&T Mobility has refused to include the issue in question within the scope of this arbitration, which is AT&T Mobility's right. Windstream is free to pursue its claim in a separate proceeding in a court or regulatory body. Windstream may not, however, force AT&T Mobility to arbitrate an issue that the Act does not require to be included in an interconnection agreement.

### **Conclusion**

The issue discussed herein is of extreme importance to AT&T Mobility, a company required to negotiate (and sometimes arbitrate) interconnection agreements across all 50 states. If landline companies such as Windstream can force AT&T Mobility to negotiate and then arbitrate provisions outside those required by the Act, then the business of interconnection will become very contentious and expensive indeed.

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<sup>8</sup> Windstream is incorrect in claiming that AT&T Mobility has agreed with AT&T Kentucky, in a filed interconnection agreement, to pay access charges for landline-to-mobile, interMTA traffic. The contract does not allow such charges. Even if the contract did, however, the claim would be irrelevant. Parties are free to agree to whatever provisions they choose in an interconnection agreement, and the Commission must approve all such agreements unless they discriminate against a third-party carrier, or unless they are found to be inconsistent with the public interest, convenience and necessity. 47 U.S.C. § 252(e)(2)(A)(i and ii). That does not give Windstream the right to force AT&T Mobility to include in an interconnection agreement provisions that the Act does not require to be in the agreement.

<sup>9</sup> *Coserv LLC v. Southwestern Bell Tel. Co.*, 350 F.3d 482, 488 (5<sup>th</sup> Cir. 2003).

AT&T Mobility is not suggesting that Windstream be denied a hearing for its claim. AT&T Mobility is simply asking the Commission to enforce the Act as written - so that arbitrations of interconnection agreements remain manageable and cost-effective.

Respectfully submitted,

  
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COUNSEL FOR NEW CINGULAR  
WIRELESS PCS, D/B/A AT&T  
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following individual by mailing a copy thereof via U.S. Mail, this 23rd day of November 2009.

Honorable Robert C. Moore  
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