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July 17, 2007

By Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WRITTEN EX PARTE PRESENTATION
July 1, 2007 Annual Access Charge Tariff Filings, WCB/Pricing No. 07-10

Dear Ms. Dortch:

Pursuant to Section 1.206(b) of the Commission's rules, Windstream Standard, Inc. and Windstream Communications Kerrville, L.P. (collectively, "Windstream") provide additional information to assist in the Bureau's review in the above-referenced proceeding of Windstream's annual access tariff, Tariff F.C.C. No. 1, Transmittal No.6, filed June 26, 2007 ("Windstream Tariff").¹ As this *ex parte* demonstrates, the Bureau's decision in the Suspension Order to suspend and investigate the Windstream Tariff should be set aside and the Windstream Tariff should be deemed lawful under Section 204(a)(3) of the Communications Act of 1934, as amended (the "Act").² As demonstrated below, the Windstream Tariff was needlessly and erroneously included in the Bureau's investigation into whether certain local exchange carriers ("LECs") leaving the NECA traffic-sensitive tariff pool may be engaging in access stimulation practices (often called "traffic pumping"), resulting in unjust and unreasonable access rates.³ Because there is no evidence or

¹ See *July 1, 2007 Annual Access Charge Tariff Filings*, WCB/Pricing No. 07-10, DA No. 07-2862 (rel. June 28, 2007) ("Suspension Order") (suspending for one day and setting for investigation the switched access rates contained in Windstream's Tariff F.C.C. No. 1, Transmittal No. 6).

² See 47 U.S.C. § 204(a)(3).

³ See Suspension Order at ¶¶ 6-7.

allegation that Windstream was or is engaged in such practices, there was no reason to suspend the Windstream Tariff.

Exiting the NECA traffic-sensitive pool and offering lower access service rates than those set forth in NECA's tariff should be encouraged, not discouraged, to promote competition in the marketplace.⁴ This is particularly true in the absence of comprehensive intercarrier compensation reform. Consistent with the letter and intent of Section 61.38 of the Commission's rules, Windstream exited the NECA traffic-sensitive pool and filed the Windstream Tariff.⁵ Indeed, the Windstream Tariff's access service rates are more than 20 percent lower than those offered by the NECA tariff rates, significantly benefiting Windstream's access customers. Moreover, affiliates of Windstream or its predecessor companies regularly have been exiting the NECA traffic-sensitive pool since 1993, and none have reentered the NECA pool.⁶ Windstream does not intend at this time to have any of its affiliates that have left the NECA traffic-sensitive pool reenter that pool.

In addition, the concerns regarding traffic pumping that serve as the basis for the Suspension Order are not applicable in Windstream's case. No party has alleged any illicit action or intent by Windstream. There is absolutely no allegation or evidence that any Windstream affiliate has or is engaged in traffic pumping schemes. No party requested the suspension of the Windstream Tariff, much less the suspension of any other recently filed Section 61.38 tariff. In fact, the carriers that filed petitions seeking to suspend and investigate several tariff filings, or other carriers that filed comments in this docket, raised absolutely no concerns about, or even mentioned, the Windstream Tariff.⁷

⁴ When establishing NECA in 1982, the Commission discussed whether there should be compulsory or voluntary common tariffs and noted:

We believe that our power to compel participation in such arrangements should be used sparingly. A carrier should not be prohibited from pursuing a course that its management believes to be in its best interests unless the public interest requires such a prohibition. A carrier obviously should not be precluded from filing separate access charge tariffs that reflect the costs of that carrier if such a prohibition would produce results that are less consistent with Communications Act goals than results that the filing of a separate tariff would produce.

See MTS and WATS Market Structure, 93 F.C.C.2d 241, 329 (1982). The Commission then concluded that traffic sensitive elements should not be subject to a compulsory common tariff.

⁵ 47 C.F.R. § 61.38.

⁶ Windstream New York, Inc. – Jamestown, Windstream New York, Inc. – Fulton, Windstream New York, Inc. – Red Jacket, Windstream North Carolina, Inc. and Oklahoma Windstream, Inc. 1993 (TR8); Windstream Florida, Inc., Windstream Kentucky West, Inc. and Windstream Pennsylvania, Inc. in 1994 (TR25); Windstream Georgia, Inc., Windstream Mississippi, Inc., Windstream Missouri, Inc., Windstream Oklahoma, Inc., Windstream South Carolina, Inc. and Windstream Western Reserve, Inc. in 1995 (TR36); Windstream Alabama, Inc., Texas Windstream, Inc. in 1996 (TR43); Windstream Arkansas, Inc. in 1998 (TR61).

⁷ *See* Suspension Order at ¶¶ 1, 4-5.

Instead, the Windstream Tariff was suspended on the Bureau's own motion apparently based on concerns about the actions of *other* Section 61.38 LECs that previously exited and then reentered the NECA traffic-sensitive pool.⁸ As noted above, however, Windstream's affiliates over the past 14 years have exited the NECA traffic-sensitive pool without reentering. Thus on its face, the specific LECs that the Commission concluded may have engaged in access stimulation could not include Windstream because Windstream affiliates that have left the NECA pool have never reentered.

Likewise, the implication of the Bureau's conclusion that its review of minutes of use data for Section 61.38 carriers reentering the NECA pool indicates the likelihood that some of those carriers purposefully misforecasted their access minutes is inapplicable to Windstream. In fact, Windstream utilized the same forecasting techniques in setting the Windstream Tariff rates as it has used for many years. In 2004 AT&T had challenged that forecasting methodology, which was used by Windstream's predecessor (Alltel), based upon allegations that it was designed to achieve earnings in excess of the authorized rate-of-return.⁹ Windstream's predecessor, however, demonstrated that its forecasting techniques were sound and reasonably estimated its future demand and costs.¹⁰ Based on that demonstration, the Bureau denied AT&T's petition and allowed the tariffs of Windstream's predecessor to take effect without suspension or investigation.¹¹

As shown above, in suspending and investigating the Windstream Tariff, the Suspension Order relies on evidence that has no rational relationship to that tariff. Because the reasons set forth in the Suspension Order are inapplicable on their face to Windstream's Tariff, they do not provide under Section 204(a)(1) of the Act "a statement in writing of its reasons for such a suspension."¹² The facts support only the conclusion that Windstream has not engaged in the illicit activity of concern to the Bureau and that the Windstream Tariff should not have been suspended. Rather, the Windstream Tariff advances the Commission's goal of promoting competition through significant reductions in access service rates that will only benefit interexchange carriers and their customers. Moreover, the Suspension Order also could set the arbitrary and illogical precedent that no tariff filed by a Section 61.38 LEC exiting the NECA traffic-sensitive pool can be deemed lawful under Section 204(a) of the Act without being suspended and investigated, even when a tariff, like the Windstream tariff, is entirely consistent with Section 204(a) of the Act and the Commission's tariffing rules.

⁸ *See id.* at ¶ 6 ("[R]eview of the access minutes of use data for Section 61.38 carriers reentering the NECA pool indicates a likelihood that some of those carriers have participated in access stimulation activities.").

⁹ *See* Petition of AT&T Corp., July 1, 2004 Annual Access Charge Tariff Filings, WCB/Pricing No. 04-18 (June 23, 2004).

¹⁰ *See* Reply Comments of Alltel Communications, Inc. to the Petition of AT&T Corp. to Suspend and Investigate Alltel Telephone Systems, Inc. Annual Filing, July 1, 2004 Annual Access Charge Tariff Filings, WCB/Pricing No. 04-18 (June 29, 2004).

¹¹ *See July 1, 2004 Annual Access Charge Tariff Filings*, 19 FCC Rcd 12211, 12214 (WCB, PPD 2004).

¹² 47 U.S.C. § 204(a)(1).

Windstream has publicly opposed traffic pumping schemes and fully supports the Commission's commitment to policing such activities.¹³ However, the Windstream Tariff should not be suspended and investigated merely based upon unsubstantiated allegations that certain LECs may be engaging in traffic pumping, particularly absent any evidence or even allegation that Windstream is engaged in access stimulation. As demonstrated above, Windstream acted well within the bounds of the letter and the spirit of the Commission's rules, and no Windstream access customer or other party objected to the Windstream Tariff. Windstream should not be penalized for the behavior of other LECs that may have exited and reentered the NECA tariff-sensitive pool in order to improperly maximize their earnings. For these reasons, the Bureau's decision in the Suspension Order to suspend and investigate the Windstream Tariff should be immediately set aside and the Windstream Tariff should be deemed lawful under Section 204(a)(3) of the Act.¹⁴

Please do not hesitate to contact me if you have any questions or comments.

Very truly yours,

/s/ Eric N. Einhorn
Eric N. Einhorn

cc: Thomas J. Navin
Donald Stockdale
Albert Lewis
Deena Shetler

¹³ See Letter from Windstream, EpicTouch Co., The Rainier Group, Southwest Texas Telephone, Embarq, Smart City, Western New Mexico Telephone Co., Iowa Telecom, D&E Communications, Inc., Guadalupe Valley Telephone Cooperative, Inc., Consolidated Communications, CT Communications, Inc., Silver Star Communications, Surewest Communications, and Puerto Rico Telephone Co., Inc. to Kevin J. Martin, FCC Chairman, and Deborah Taylor Tate, Robert M. McDowell, Michael J. Copps, and Jonathan Adelstein, FCC Commissioners (April 30, 2007).

¹⁴ See, e.g., *Virgin Islands Telephone Corp. v. FCC*, 444 F.3d 666, 671-73 (D.C. Cir. 2006).