**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Petition of Windstream Kentucky East, LLC | ) | |
| for Pricing Flexibility | ) | WCB/Pricing No. 08-17 |
| as Specified in Section 69.727 | ) | |
| of the Commission's Rules for the | ) | |
| Lexington, Kentucky MSA and | ) | |
| Ashland, Kentucky MSA | ) | |

# ORDER

**Adopted: October 6, 2008** **Released: October 6, 2008**

By the Chief, Wireline Competition Bureau:

## I. INTRODUCTION

1. On June 13, 2008, Windstream Kentucky East, LLC (Windstream) filed a petition for pricing flexibility[1] in the Lexington, Kentucky and Ashland, Kentucky Metropolitan Statistical Areas (MSAs) pursuant to sections 1.774 and 69.701 *et seq*. of the Commission's rules.[2] Specifically, Windstream seeks Phase I relief for dedicated transport and special access services, other than channel terminations between its end offices and end user "customer premises," in the Ashland, Kentucky MSA. Windstream also requests Phase II relief for dedicated transport and special access services, other than channel terminations between its end offices and end user "customer premises," in the Lexington, Kentucky MSA. Further, Windstream asks for Phase I Relief for channel terminations between its end offices and end user "customer premises" in the Lexington, Kentucky MSA.[3] On June 30, 2008, the Commission issued a public notice seeking comment on the Petition.[4] As detailed below, the Commission established the rules for granting pricing flexibility for special access and dedicated transport services in its *Pricing Flexibility Order*.[5] In doing so, the Commission recognized the importance of

[1] *See* Petition of Windstream Kentucky East, LLC for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the Lexington, Kentucky MSA and Ashland, Kentucky, MSA (filed June 13, 2008) (Petition); A list of the specific services for which Windstream seeks pricing flexibility can be found in the Appendix to this order.

[2] 47 C.F.R. §§ 1.774, 69.701 *et seq*.

[3] Petition at 1.

[4] *Pleading Cycle Established for Windstream Petition for Pricing Flexibility Pursuant to Section 69.727 of the Commission's Rules,* WCB/Pricing No. 08-17, Public Notice, DA 08-1548 (Wireline Comp. Bur. rel. June 30, 2008). No comments in opposition to Windstream's Petition were filed.

[5] *See Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order*), *aff'd*, *WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

granting pricing flexibility to incumbent local exchange carriers (LECs) as competition develops in the market for interstate access services "to ensure that our own regulations do not unduly interfere with the operation of these markets."[6] For the reasons that follow, we grant Windstream's Petition.

## II. BACKGROUND

2. To recover the costs of providing interstate access services, incumbent LECs charge interexchange carriers (IXCs) and end users for access services in accordance with the Commission's Part 69 access charge rules.[7] In the *Access Charge Reform First Report and Order*, the Commission adopted a market-based approach to access charge reform, pursuant to which it would relax restrictions on incumbent LEC pricing as competition emerges.[8] At that time, the Commission deferred resolution of the specific timing and degree of pricing flexibility to a future order.[9] Subsequently, in the *Pricing Flexibility Order*, the Commission provided detailed rules for implementing the market-based approach.[10]

3. The framework the Commission adopted in the *Pricing Flexibility Order* grants progressively greater flexibility to LECs subject to price cap regulation as competition develops, while ensuring that price cap LECs: (1) do not use pricing flexibility to deter efficient entry or engage in exclusionary pricing behavior; and (2) do not increase rates to unreasonable levels for customers that lack competitive alternatives.[11] In addition, the reforms are designed to facilitate the removal of services from price cap regulation as competition develops in the marketplace, without imposing undue administrative burdens on the Commission or the industry.[12]

4. In keeping with these goals, the Commission established a framework for granting price cap LECs greater flexibility in the pricing of interstate access services once they make a competitive showing, or satisfy certain "triggers," to demonstrate that market conditions in a particular area warrant

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[6] *Pricing Flexibility Order*, 14 FCC Rcd at 14224, para. 1.

[7] 47 C.F.R. Part 69. Part 69 establishes two basic categories of access services: special access services and switched access services. *Compare* 47 C.F.R. § 69.114 *with* 47 C.F.R. § 69.106. Special access services employ dedicated facilities that run directly between the end user and an IXC point of presence (POP), the physical point where an IXC connects its network with the LEC network. Charges for special access services generally are divided into channel termination charges and interoffice facility charges. Channel termination charges (which can include a flat-rated charge and a mileage component) recover the costs of facilities between the customer's premises and the LEC end office and the costs of facilities between the IXC POP and the LEC serving wire center. *See* 47 C.F.R. § 69.703(a). Interoffice facility charges recover the costs of facilities between the LEC serving wire center and the LEC end office serving the end user. *See Pricing Flexibility Order*, 14 FCC Rcd at 14226-27, paras. 8-10. For the interoffice facility, carriers often have separate termination and mileage charges.

[8] *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982 (1997) (*Access Charge Reform First Report and Order*), *aff'd, Southwestern Bell Tel. Co. v. FCC,* 153 F.3d 523 (8th Cir. 1998).

[9] *Access Charge Reform First Report and Order*, 12 FCC Rcd at 15989, para. 14.

[10] *Pricing Flexibility Order*, 14 FCC Rcd at 14225, para. 4.

[11] *Id*. at 14225, para. 3. The Commission instituted price cap regulation for the Regional Bell Operating Companies (RBOCs) and GTE in 1991, and permitted other LECs to adopt price cap regulation voluntarily, subject to certain conditions. *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6818-20, paras. 262-79 (1990). The *Pricing Flexibility Order* applies only to LECs that are subject to price cap regulation. *Pricing Flexibility Order,* 14 FCC Rcd at 14224, para. 1 n.1.

[12] *Pricing Flexibility Order*, 14 FCC Rcd at 14225, para. 3.

the relief they seek. Pricing flexibility for special access and dedicated transport services[13] is available in two phases, Phase I and Phase II, based on an analysis of competitive conditions in individual MSAs or non-MSA parts of the study area.[14] Pricing flexibility for channel termination services[15] is also available in two phases, based on an analysis of competitive conditions in individual MSAs or non-MSA parts of the study area.[16]

5. Phase I Pricing Flexibility. A price cap LEC that obtains Phase I relief is allowed to offer, on one day's notice, contract tariffs[17] and volume and term discounts for qualifying services, so long as the services provided pursuant to contract are removed from price caps.[18] To protect those customers that may lack competitive alternatives, a price cap LEC receiving Phase I flexibility must maintain its generally available, price cap-constrained, tariffed rates for these services.[19] To obtain Phase I relief, a price cap LEC must meet triggers designed to demonstrate that competitors have made irreversible, sunk investments in the facilities needed to provide the services at issue.[20] In particular, to receive pricing flexibility for dedicated transport and special access services (other than channel terminations to end users), a price cap LEC must demonstrate that unaffiliated competitors have collocated in at least 15 percent of the LEC's wire centers within an MSA, or have collocated in wire centers accounting for 30 percent of the LEC's revenues from these services within an MSA.[21] In both cases, the price cap LEC also must show, with respect to each wire center used to satisfy the trigger, that at least one collocator is relying on transport facilities provided by an entity other than the incumbent LEC.[22]

6. Higher thresholds apply for obtaining Phase I pricing flexibility for channel terminations between a LEC's end office and an end user customer. A competitor collocating in a LEC end office

[13] For purposes of pricing flexibility proceedings, "dedicated transport services" refer to services associated with entrance facilities, direct-trunked transport, and the dedicated component of tandem-switched transport. *Id*. at 14234, para. 24 n.54. These services are defined in 47 C.F.R. § 69.2(oo) (direct-trunked transport), § 69.2(qq) (entrance facilities), and § 69.2(ss) (tandem-switched transport).

[14] *See* 47 C.F.R. § 22.909(a) (definition of MSA). *See also Pricing Flexibility Order,* 14 FCC Rcd at 14261, para. 76 (pricing flexibility will be granted to price cap LECs within the non-MSA parts of a study area if they satisfy the applicable triggers throughout that area).

[15] For purposes of pricing flexibility proceedings, a channel termination between a LEC end office and a customer premises is defined as a "dedicated channel connecting a LEC end office and a customer premises, offered for purposes of carrying special access traffic." 47 C.F.R. § 69.703(a)(2).

[16] *See supra* note 13.

[17] A contract tariff is a tariff based on an individually negotiated service contract. *See Competition in the Interstate Interexchange Marketplace,* CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, 5897, para. 91 (1991) (*Interexchange Competition Order*); 47 C.F.R. § 61.3(o). *See also* 47 C.F.R. § 61.55 (describing required composition of contract-based tariffs).

[18] *Pricing Flexibility Order,* 14 FCC Rcd at 14287-88, para. 122.

[19] *Id.* at 14234-35, para. 24.

[20] *Id.* at 14234-35, 14274, paras. 24, 94.

[21] *Id.* at 14274-77, paras. 95-98; 47 C.F.R. § 69.709(b).

[22] 47 C.F.R. § 69.709(b).

continues to rely on the LEC's facilities for the channel termination between the end office and the customer premises, at least initially, and thus is more susceptible to exclusionary pricing behavior by the LEC.[23] As a result, a price cap LEC must demonstrate that unaffiliated competitors have collocated in at least 50 percent of the LEC's wire centers within an MSA, or have collocated in wire centers accounting for 65 percent of the LEC's revenues from these services within an MSA.[24] Again, the LEC also must demonstrate, with respect to each wire center used to satisfy the trigger, that at least one collocator is relying on transport facilities provided by an entity other than the incumbent LEC.[25]

7. Phase II Pricing Flexibility. A price cap LEC that receives Phase II relief is allowed to offer dedicated transport and special access services free from the Commission's Part 69 rate structure and Part 61 price cap rules.[26] The LEC, however, is required to file, on one day's notice, generally available tariffs for those services for which it receives Phase II relief.[27] To obtain Phase II relief, a price cap LEC must meet triggers designed to demonstrate that competition for the services at issue within the MSA is sufficient to preclude the incumbent from exploiting any individual market power over a sustained period. To obtain Phase II relief for dedicated transport and special access services (other than channel terminations to end users), a price cap LEC must demonstrate that unaffiliated competitors have collocated in at least 50 percent of the LEC's wire centers within an MSA, or have collocated in wire centers accounting for 65 percent of the LEC's revenues from these services within an MSA.[28] The LEC also must demonstrate, with respect to each wire center used to satisfy the trigger, that at least one collocator is relying on transport facilities provided by an entity other than the incumbent LEC.[29]

8. Higher thresholds apply for obtaining Phase II pricing flexibility relief for channel terminations between a LEC end office and an end user customer. To obtain such relief, a price cap LEC must demonstrate that unaffiliated competitors have collocated in at least 65 percent of the LEC's wire centers within an MSA, or have collocated in wire centers accounting for 85 percent of the LEC's revenues from these services within an MSA.[30] To obtain Phase II relief for channel terminations to end users, the LEC also must demonstrate, with respect to each wire center used to satisfy the trigger, that at least one collocator is relying on transport facilities provided by an entity other than the incumbent LEC.[31]

9. Competitive Showing. Pricing flexibility may be granted upon the satisfaction of certain competitive showings. An incumbent LEC bears the burden of proving that it has satisfied the applicable triggers for the pricing flexibility it seeks for each MSA.[32] For special access and dedicated transport

[23] *Pricing Flexibility Order*, 14 FCC Rcd at 14278-79, paras. 102-103.

[24] *Id*. at 14280-81, paras. 105-06; 47 C.F.R. §§ 69.711(a), (b).

[25] 47 C.F.R. §§ 69.711(a), (b).

[26] *See Pricing Flexibility Order*, 14 FCC Rcd at 14301, para. 153.

[27] *Id.*; 47 C.F.R. § 69.727(b)(3).

[28] *Pricing Flexibility Order*, 14 FCC Rcd at 14299, paras. 148-49; 47 C.F.R. § 69.709(c).

[29] 47 C.F.R. § 69.709(c).

[30] *Pricing Flexibility Order*, 14 FCC Rcd at 14235, 14299-300, paras. 25, 150; 47 C.F.R. § 69.711(c).

[31] 47 C.F.R. § 69.711(c).

[32] *Pricing Flexibility Order*, 14 FCC Rcd at 14309, para. 172.

services, and channel termination services, the incumbent must identify: (1) the total number of wire centers in the MSA; (2) the number and location of the wire centers in which competitors have collocated; and (3) in each wire center on which the incumbent bases its petition, the name of at least one collocator that uses transport facilities owned by a provider other than the incumbent to transport traffic from that wire center.[33] In addition to these three requirements, the petitioner must show either: (A) that the percentage of wire centers in which competitors have collocated and use competitive transport satisfies the trigger the Commission adopted with respect to the pricing flexibility sought by the incumbent LEC;[34] or (B) that the percentage of total base period[35] revenues that are attributable to the wire centers upon which the petitioner relies satisfies the applicable pricing flexibility triggers.[36]

## III. DISCUSSION

10. Windstream seeks Phase I relief for dedicated transport and special access services, other than channel terminations between its end offices and end user "customer premises," in the Ashland, Kentucky MSA. Windstream also requests Phase II relief for dedicated transport and special access services, other than channel terminations between its end offices and end user "customer premises," in the Lexington, Kentucky MSA. Further, Windstream asks for Phase I relief for channel terminations between its end offices and end user "customer premises" in the Lexington, Kentucky MSA.[37] As noted above, pricing flexibility may be granted upon the satisfaction of certain competitive showings. An incumbent LEC bears the burden of proving that it has satisfied the applicable triggers for the pricing flexibility it seeks for each MSA.[38]

11. Windstream has demonstrated compliance with the requirements for Phase I and Phase II pricing flexibility. Windstream has provided sufficient information to demonstrate that it meets the applicable pricing flexibility triggers for the relief it has requested. As explained in greater detail below, to make this showing, Windstream assigned wire centers to individual MSAs and identified wire centers within each MSA where service providers have obtained collocation with alternative facilities other than Windstream-provided transport.[39] Windstream also gathered revenue data and assigned it either to dedicated transport and special access services (other than channel terminations to end users), or to channel terminations between an end user's premises and the Windstream end offices.[40]

12. Windstream demonstrated that it qualifies for pricing flexibility in the MSAs at issue by: (1) identifying wire centers within each MSA; (2) identifying wire centers within each MSA where

[33] 47 C.F.R. § 1.774(a)(3)(i)-(iii).

[34] 47 C.F.R. § 1.774(a)(3)(iv)(A).

[35] For price cap LECs, the "base period" is the 12-month period ending six months before the effective date of the LECs' annual access tariffs. 47 C.F.R. § 61.3(g).

[36] The revenues applicable to this requirement are those generated by the services for which the incumbent seeks relief. 47 C.F.R. § 1.774(a)(3)(iv)(B).

[37] *See* Petition at 1.

[38] *Pricing Flexibility Order*, 14 FCC Rcd at 14309, para. 172.

[39] Petition, Attach. C, D.

[40] *Id.*

service providers have obtained collocation with alternative facilities other than Windstream-provided transport; (3) identifying revenue attributable to qualifying dedicated transport and special access services (other than channel terminations to end users) for each wire center within the MSAs; (4) identifying revenue attributable to channel terminations between an end user's premises and the Windstream end offices for each wire center within the MSAs; and (5) calculating the percentage of such revenues earned in the collocated wire centers in the individual MSA areas.[41]

13. To identify wire centers with collocation, Windstream examined its internal records to determine which wire centers located in the relevant MSAs were wire centers with collocation.[42] Windstream field engineers then performed physical inventories of the applicable wire centers to validate the accuracy of the billing information and to confirm that the collocation was operational.[43] These engineers then physically identified and validated that the competitors listed in each wire center were using transport facilities owned by a transport provider other than Windstream.[44] In accordance with the Commission's rules, Windstream served a copy of its Petition on each of the collocating carriers upon which it relied, including, for each collocator, the information about that party upon which Windstream relied in its Petition.[45] We note that no party disputed the data that Windstream used in support of its petition.

14. To ascertain revenue associated with dedicated transport and special access services, as well as channel termination services, Windstream gathered data for the twelve-month period ending December 31, 2006 from its internal databases.[46] Windstream states that the "information was at the Universal Service Order Code (USOC) level of detail to assign individual revenue elements to the proper pricing flexibility revenue category for each wire center."[47] With respect to its revenue calculations for Interoffice Channel Mileage (CM) and Direct Trunk Transport (DTT) mileage, Windstream states that it "conservatively assigned 50 percent of all CM and DTT in collocated wire centers to other non-collocated wire centers within the same MSA."[48]

15. Windstream explains that it reviewed the following elements when attributing revenues to the wire centers within each MSA: (1) USOC, the unique identifier associated with a service element, which is used to identify the service being provided; (2) total billed interstate revenue attributable to each USOC; (3) the wire center location of the service element identified by the USOC; and (4) "end user

[41] *Id.* at Attach. D at 1-4.

[42] *Id*. at 1.

[43] *Id.* at 2.

[44] *Id.*

[45] *Id*. at Attach. E; *see also* 47 C.F.R. § 1.774(e)(1)(ii).

[46] The billing system used for this process was the Windstream Carrier Access Billing System (CABS), which contains specific billing codes for collocation. The database also includes the names of the collocators, the wire centers, and in-service dates. Petition, App. D at 1.

[47] *Id.* Windstream also states that it included individual case basis arrangements for term plans in the data files. It excluded special assembly arrangements, expanded interconnection, and miscellaneous revenues. *Id.*

[48] *Id.* Windstream further asserts that "[t]his methodology represents CM and DTT revenue that could be attributed to other wire centers at the two ends of each circuit." *Id.* at 2-3.

customer" information, which identifies the circuit location with a numeric field.[49] Next, Windstream identified the 2006 annual revenue from each attributable USOC for dedicated transport and special access services for each wire center in the relevant MSA. The rate elements for these services were as follows: (1) channel terminations and entrance facilities; (2) channel mileage terminations; (3) channel mileage facility; (4) channel facility assignment (multiplexed hierarchy facility); and (5) other recurring charges. Windstream assigned revenues for each rate element to the specific wire center based on the CABS billing record, which identified the exchange to which the revenue was assigned.[50] Finally, to ascertain revenue associated with channel terminations between an end user's premises and the Windstream end offices, Windstream used information in the billing system that identifies the USOC by carrier type.[51] This information allows it to segregate relevant channel termination revenue from revenue for channel terminations between Windstream end offices and another carrier's POP.[52]

16. After reviewing Windstream's verification method as described in the Petition and the data provided in the public and confidential versions of the Petition, we find that Windstream has met the applicable triggers in section 1.774 and Part 69, Subpart H of the Commission's rules.[53] Based upon a review of the information submitted, and having received no opposition challenging Windstream's compliance with the pricing flexibility triggers, we conclude that Windstream has satisfied its burden of demonstrating that it has met the applicable requirements for each of the various services in the MSAs for which it requests relief.

## IV. ORDERING CLAUSE

17. Accordingly, IT IS ORDERED that, pursuant to section 1.774 of the Commission's rules, 47 C.F.R. § 1.774, the *Pricing Flexibility Order,* and the authority delegated by sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, the Petition filed by Windstream Kentucky East, LLC IS GRANTED to the extent detailed herein.

FEDERAL COMMUNICATIONS COMMISSION

Dana R. Shaffer
Chief, Wireline Competition Bureau

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[49] *Id.* at 3.

[50] *Id.*

[51] *Id*. at 3-4.

[52] *Id*.

[53] 47 C.F.R. §§ 1.774 and 69.701 *et seq*.

# APPENDIX

## Services Qualifying For Pricing Flexibility

**Trunking Services Basket***

Voice Grade
DS1
DS3
Synchronous Optical Channel Service

*Includes dedicated transport services (entrance facilities, direct trunked transport, flat-rated portion of tandem switched transport) and channel terminations between the service wire center (end office) and the end user's premises. Also includes the optional features and functions associated with these services.

**Special Access Basket****

Voice Grade
Digital Data (DDS)
Program Audio
Video
DS1
DS3
Digital FT1
Synchronous Optical Service (OCN) 3,12

** Includes channel terminations between the interexchange carrier point of presence and the end office, channel terminations between the end office and the end user's premises, and channel mileage. Also includes the optional features and functions associated with these services.