

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of Windstream Missouri,)
Inc.'s Tariffs Filed to Adjust Rates and)
Rebalance Local Basic Rates and Switched)
Access Rates Under Section 392.245,)
RSMo, as amended by H.B. 1779.)

Case No. TT-2009-0134

Tariff No. JI-2009-0198

WINDSTREAM MISSOURI, INC.'S RESPONSE IN OPPOSITION
TO OFFICE OF THE PUBLIC COUNSEL'S
OBJECTION TO LOCAL BASIC RATE INCREASE UNDER
REBALANCING STATUTE

COMES NOW Windstream Missouri, Inc. ("Windstream" or "Company"), pursuant to Missouri Public Service Commission ("Commission") Rule 4 CSR 240-2.080 and the Commission's *Order Directing Filing* issued in this matter on October 17, 2008, and for its Response in Opposition to the Office of the Public Counsel's Objection to Local Rate Increase Under Rebalancing Statute ("OPC's Objection") respectfully states as follows:

1. OPC's Objection filed in this matter on October 15, 2008, thirty (30) days after Windstream filed its above-referenced Tariff No. JI-2009-0198¹, "gives notice to Windstream Missouri, Inc., its customers, to the public and to the Missouri Public Service Commission that it objects to Windstream's proposed rebalancing tariff filed under Section 392.245, RSMO 2000 as amended by HB 1779."² Windstream does not question OPC's right to express its philosophical opposition to the rate rebalancing

¹ As the Rate Rebalancing tariff sheets were filed in conjunction with Windstream's annual price cap filing, those sheets also reflect a 45-day effective date.

² OPC Objection, page 1.

statute, and to the recent statutory amendments embodied in House Bill 1779, in particular.³

2. However, as OPC explicitly acknowledges:

Public Counsel recognizes that HB 1779 has changed the statutory price cap rebalancing process. HB 1779 removed the cost/price analysis justification for the rebalancing. Section 392.245.8, RSMo as amended by HB 1779, seems to give Windstream unbridled discretion to rebalance with or without any justification. Under the new statute, PSC approval is not required.⁴

3. The language of Sections 392.245.8 and 392.245.9, RSMo 2000 (as amended by HB 1779) is clear and unambiguous, to-wit:

8. An incumbent local exchange telecommunications company regulated under this section may reduce intrastate access rates, including carrier common line charges, subject to the provisions of subsection 9 of this section, to a level not to exceed one hundred fifty percent of the company's interstate rates for similar access services in effect as of December thirty-first of the year preceding the year in which the company first exercises its option to rebalance rates under this subsection. Nothing in this subsection shall preclude an incumbent local exchange telecommunications company from establishing its intrastate access rates at a level lower than one hundred fifty percent of the company's interstate rates for similar access services in effect as of December thirty-first of the year preceding the year in which the company first exercises its option to rebalance rates under this subsection.

9. Other provisions of this section to the contrary notwithstanding, **the commission shall allow an incumbent local exchange telecommunications company regulated under this section which reduces its intrastate access service rates pursuant to subsection 8 of this section to offset the annual revenue loss resulting from its access service rate reduction by increasing each year its monthly maximum allowable prices applicable to basic local exchange telecommunications services by an amount not to exceed one dollar fifty cents.** A large incumbent local exchange telecommunications company shall not increase its monthly rates applicable to basic local telecommunications service under this subsection unless it also reduces its rates for intraLATA interexchange telecommunications services by at least ten percent in the year it first exercises its option to rebalance rates under

³ Windstream notes, however, that its failure to address an issue or allegation contained in OPC's pleading does not signify acquiescence in that argument.

⁴ OPC Objection, pages 4-5.

subsection 8 of this section. The total annual revenue increase due to the increase to the monthly maximum allowable prices for basic local telecommunications service shall not exceed the total annual revenue loss resulting from the reduction to intrastate access service rates. (emphasis added).

4. Despite this clear and unambiguous language, OPC appears to ask this Commission to invoke public interest considerations and graft language in the statutory section that simply is not there. However, where the language of the statutory provision is clear and unambiguous, the rules of statutory construction do not apply.⁵ In *Dueker v. Missouri Div. of Family Services*, 841 S.W.2d 772, 775 (Mo. App. E.D. 1992), the court held that “the legislature is presumed to have intended what a statute says directly.” The legislature expressed its intent in the plain language of the statute, and there is no need to seek any other meaning through statutory construction. “The plain and unambiguous language of a statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is different from that expressed in a statute’s clear and unambiguous language.” *State ex rel. Doe Run v. Brown*, 918 S.W.2d 303, 306 (Mo. App. 1996). Windstream would note that the Commission, in construing another subsection of 392.245 in a separate case, recently observed that it “no longer has authority to review whether the grant of competitive classification in the current application would be in the public interest,” as H.B. 1779, effective August 28, 2008, removed that part of Section 392.245.5(6) that allowed the Commission to deny competitive classification in a 60-day application if the Commission found “that such

⁵ *Brownstein v. Rhomberg-Haglin and Associates, Inc.*, 824 S.W.2d 13, 15 (Mo. banc 1992).

classification is contrary to the public interest.”⁶ Such “public interest” language was never in the subject statutory sections, Section 392.245.8 and 392.245.9, and it clearly is not there today.

5. Nowhere in its pleading does the OPC suggest that Windstream’s tariff filing does not meet the statutory requirements set forth above. Indeed, Windstream is a small incumbent local exchange telecommunications company regulated under the price cap statute, that has filed rate rebalancing tariff sheets in conformance with the applicable provisions of Section 392.245.

6. While OPC also expresses concerns with the provisions of Section 392.245.10, RSMo 2000, which requires “[a]ny telecommunications company whose intrastate access costs are reduced pursuant to subsections 8 and 9 of this section shall decrease its rates for intrastate toll telecommunications service to flow through such reduced costs to its customers,” the fact that a company can request a deferral of such flow through cannot impact Windstream’s lawful exercise of its option to initiate the rebalancing process – OPC’s request for an “investigation” to determine if the IXC’s carry out their obligations notwithstanding.

7. Windstream respectfully submits that there is absolutely no lawful basis for the suspension of its tariffs filed herein. While OPC erroneously and unlawfully suggests that “a brief 30 day suspension of the effective date *may* be in order,” it also observes that “[a]t the minimum the record should include the staff recommendation and the company’s response in light of Public Counsel’s objection.”⁷ Given the

⁶ Order Granting Competitive Classification and Approving Tariff Sheets, Case No. TO-2009-0061, In the Matter of Embarras Missouri, Inc.’s Application for Competitive Classification Under Section 392.245.5, RSMo 2008, page 8, footnote 19.

⁷ OPC Objection, page 6, emphasis added.

Commission's *Order Directing Filing* and the responses of the Commission Staff and Windstream filed in conformance therewith, OPC's record threshold should be satisfied.

WHEREFORE, Windstream Missouri, Inc. respectfully submits its response in opposition to OPC's Objection, and requests that the subject tariff sheets constituting Tariff No. JI-2009-0198 be allowed to go into effect on November 1, 2009, as filed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of October, 2008, a copy of the above and foregoing document was served via electronic mail, facsimile or U.S. Mail, postage prepaid to each of the following:

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