

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 11, 2008

IN RE:)	
)	DOCKET NO.
PETITION OF WINDSTREAM)	06-00185
COMMUNICATIONS, INC F/K/A)	
ALLTEL HOLDING CORPORATION)	
SERVICES, INC. FOR EXPEDITED)	
APPROVAL OF TRANSFER OF)	
CUSTOMER BASE)	

DISSENTING OPINION OF DIRECTOR RON JONES

The above-styled docket came before a panel of the Tennessee Regulatory Authority (“Authority”) during an Authority Conference on March 12, 2007. At that conference, a majority of the panel declined to address a request to waive the application of Authority Rule 1220-4-2-.56(2)(d)4. presumably as a result of a determination that the requirement contained in the rule is moot.¹ Because it is my opinion that the failure to comply with the Authority’s rules should not be overlooked, I write separately to express my opinions on this issue.²

I. RELEVANT PROCEDURAL HISTORY

On July 14, 2006, Windstream Communications, Inc. f/k/a Alltel Holding Corporate Services, Inc. (“Windstream”) filed a petition with the Authority requesting approval of the transfer of 1,000 Alltel Communications, Inc. (“ACI”) customers to Windstream. According to the petition, ACI customers began to receive service from Windstream on July 17, 2007. Attached to the petition was a copy of a notice sent to customers notifying them that their service

¹ *Order Approving Transfer of Assets*, 5 (Jun. 11, 2008).

² Although I did not sign the *Order Approving Transfer of Assets*, I concur with the determinations reflected in the order to approve the transfer of customer base and the transfer of authority and to waive Authority Rule 1220-4-2-.56(2)(d)2.

would be transferred from ACI to Windstream. The attachment to the petition reveals that the customer notification letter had been provided to the Federal Communications Commission along with a cover letter explaining that the notices were sent to affected customers at least thirty (30) days prior to the transfer date.

On August 9, 2006, the Authority issued data requests to Windstream. Specifically, the Authority requested that Windstream re-file a customer notification letter with the Authority that complies with Rule 1220-4-2-.56(2)(d). Windstream filed responses to the data requests and a petition for waiver on August 18, 2006. In its data request responses, Windstream comments that it has complied with the spirit of all applicable rules.³ As to the waiver petition, Windstream requests pursuant to 1220-1-1-.05 waiver of the provisions of 1220-4-2-.56(2)(d) requiring the re-filing of a customer notification letter that is compliant with the Authority's rules. Windstream contends that good cause is present, that it provided ample notice within the requisite time period, and that further notice would create customer confusion.⁴

II. FINDINGS AND CONCLUSION

I find that the customer notification letter sent to customers in connection with the ACI-Windstream customer transfer fails to comply with the Authority's rules in the following respects:

- 1) The notification letter was not pre-approved by the Authority as is required by Authority Rule 1220-4-2-.56(2)(d)2.
- 2) The customer notification letter was not mailed by the current provider of telecommunications services as is required by Authority Rule 1220-4-2-.56(2)(d)2.

³ Responses to Data Request No. 2, p. 2, #3 (Aug. 18, 2006).

⁴ *Petition for Waiver of Windstream Communications, Inc. f/k/a Alltel Holding Corporate Services, Inc.*, 1-2 (Aug. 18, 2006).

- 3) There is no statement in the notification letter that customers will receive notice thirty (30) days in advance of any rate increase that may occur within ninety (90) days following the date of the transfer as is required by 1220-4-2-.56(2)(d)4.

Based on this finding, I read the petition for waiver, which addressed Rule 1220-4-2-.56(2)(d) generally, to include a request for waiver of all three of the rule deficiencies listed above. These rule deficiencies involve provisions of 1220-4-2-.56(2)(d)2. and 1220-4-2-.56(2)(d)4.

During the deliberations on March 12, 2007, the panel voted to waive the requirements of 1220-4-2-.56(2)(d)2. (items 1 and 2 above). I agreed with that vote and am of the opinion that the vote is properly reflected in the *Order Approving Transfer of Assets* entered in this docket on June 11, 2008. Therefore, I offer nothing further with regard to the lack of compliance with Authority Rule 1220-4-2-.56(2)(d)2.

Item 3 listed above relates to a requirement contained in 1220-4-2-.56(2)(d)4. The panel did not address the request to waive 1220-4-2-.56(2)(d)4. during the deliberations. However, in the *Order Approving Transfer of Assets*, it appears that a majority of the panel determined that the requirement contained in Rule 1220-4-2-.56(2)(d)4. was moot.⁵ Thus, it appears from my reading of the deliberations and the order that because the majority determined that the requirement of the rule was moot, there was no reason to specifically address the waiver request. I cannot agree with this analysis. Moreover, as expressed in my deliberations, it is my opinion that the Authority cannot waive the requirement contained in Rule 1220-4-2-.56(2)(d)4.

A. THE REQUIREMENT CONTAINED IN AUTHORITY RULE 1220-4-2-.56(2)(d)4. IS NOT MOOT.

In the *Order Approving Transfer of Assets*, the majority noted:

The Company's compliance deficiencies include failure to seek pre-approval from the Authority, the fact that the customer notification letter was sent

⁵ *Order Approving Transfer of Assets*, 5 (Jun. 11, 2008).

by the acquiring provider instead of the current provider, and failure to include language fulfilling the TRA Rule 1220-4-2-.56(2)(d)(4) requirement that customers will receive thirty days written notice of rate increases for up to ninety days from the date of the transfer. However, ninety days have elapsed since the transfer of customers to Windstream, which essentially renders the requirement in TRA Rule 1220-4-2-.56(d)(4) moot.⁶

I cannot agree with the final sentence of the above paragraph. As an initial point I do not fully understand the contention that the requirement of the rule is essentially rendered moot.⁷ Certainly, it would be ineffective, even absurd, to require Windstream to send a notification to customers regarding a ninety day period that has already expired. Perhaps this is what the majority intended by its use of the terms “essentially” and “moot.” Nonetheless, recognizing this ineffectiveness does not fully dispose of the issue because there remains the failure of Windstream to comply with the rule. Explained differently, the fact that requiring compliance with the rule would serve no purpose should not render Windstream’s failure to comply with the rule inconsequential.

In my opinion, this agency as part of its regulatory function has an obligation to recognize when carriers fail to comply with our rules and to take action with regard to such failures.⁸ The fact that the rule was violated must be recognized and the appropriate consequences determined. The Authority has many options available to it when addressing rule

⁶ *Order Approving Transfer of Assets*, 5 (Jun. 11, 2008) (emphasis supplied).

⁷ “A moot case is one that has lost its justiciability because it no longer involves a present, ongoing controversy. *McCanless v. Klein*, 182 Tenn. 631, 637, 188 S.W.2d 745, 747 (Tenn. 1945); *County of Shelby v. McWhorter*, 936 S.W.2d 923, 931 (Tenn.Ct.App. 1996). A case will be considered moot if it no longer serves as a means to provide some sort of judicial relief to the prevailing party.” *Shealy v. Policy Studies, Inc.*, 2006 WL 2482984 *6 (Tenn. Ct. App. August 29, 2006).

⁸ Our enabling legislation provides:

It is the duty of the Tennessee regulatory authority to ensure that the provisions of the Acts of 1995, ch. 305 and all laws of this state over which they have jurisdiction are enforced and obeyed, that violations thereof are promptly prosecuted, and all penalties due the state are collected.

Tenn. Code Ann. § 65-4-113 (2004 Repl.)

violations, including the imposition of monetary sanctions.⁹ In this case and as I explain later in this opinion, the appropriate consequence is for Windstream to be reminded of the requirements of Authority Rule 1220-4-2-.56(2)(d)4. and its on-going obligation to comply with all Authority rules in the future. The Authority should not overlook a rule violation simply because one of the possible consequences of the violation, forced compliance with the rule, results in an absurd outcome. There are multiple alternatives.

B. THE AUTHORITY CANNOT WAIVE AUTHORITY RULE 1220-4-2-.56(2)(d)4.

During the deliberations, I noted my opinion that the Authority is unable to waive the requirements 1220-4-2-.56(2)(d)4. and that Windstream should be reminded of the Authority's rule and the need to comply with all Authority rules in the future. Because these comments did not result in further deliberations on the requested waiver of 1220-4-2-.56(2)(d)4., I am compelled to offer my opinion on the request for waiver in this separate opinion.

Windstream cites Authority Rule 1220-1-1-.05 as the basis for its request to waive Authority Rule 1220-4-2-.56(2)(d)4. This rule provides:

For good cause, including expediting the disposition of any matter, the Authority may waive the requirements or provision of any of these rules in a particular proceeding, on motion of a party or on its own motion, except when a rule embodies a statutory requirement. The Authority shall state the basis of any such waiver and may impose conditions or limitations consistent with the basis for the construction of these rules.¹⁰

⁹ In addition to other statutory provisions related to the ability of the Authority to impose penalties, section 65-4-120 provides:

Any public utility which violates or fails to comply with any lawful order, judgment, finding, rule, or requirement of the authority, shall in the discretion of the authority be subject to a penalty of fifty dollars (\$50.00) for each day of any such violation or failure, which may be declared due and payable by the authority, upon complaint, and after hearing, and when paid, either voluntarily, or after suit, which may be brought by the authority, shall be placed to the credit of the public utility account.

Tenn. Code Ann. § 65-4-120 (2004 Repl.)

¹⁰ Tenn. Comp. R. & Regs. 1220-1-1-.05 (July 2006 Revised) (emphasis supplied).

The phrase “these rules,” highlighted above is defined in Rule Chapter 1220-1-1-.03(3)(h) as follows: ““These rules’ means Chapters 1 through 4 of Rule 1220-1, including any subsequent amendments thereto.”¹¹ Reading rules Rule 1220-1-1-.05 and .03(3)(h) together results in the single conclusion that the ability of the Authority to waive a rule pursuant to Rule 1220-1-1-.05 applies only to rules contained within Rule Chapters 1220-1-1, 1220-1-2, 1220-1-3 and 1220-1-4. Because Windstream is requesting waiver of Rule 1220-4-2-.56(2)(d)4. pursuant to Rule 1220-1-1-.05 and because Rule 1220-4-2-.56(2)(d)4. is not included within the list of rules that can be waived pursuant to Rule Chapters 1220-1-1-.05, the request as supported in the petition must be denied.

Having determined that the waiver as requested by Windstream must be denied, I looked elsewhere in the Authority’s rules to determine whether sufficient authority existed to grant a waiver of the requirement contained in Authority Rule 1220-4-2-.56(2)(d)4. The most obvious alternative provision is that contained in Authority Rule 1220-4-2-.56(2)(d)2. However, this provision is explicitly limited to part 2, and cannot be extended, in my opinion, to part 4, the part in question here. I have been unable to locate any other rule or even a statute that permits the Authority to waive Authority Rule 1220-4-2-.56(2)(d)4. Therefore, it is my conclusion that there is no grounds permitting the Authority to waive Authority Rule 1220-4-2-.56(2)(d)4. and any such waiver is contrary to law.

C. THE RESULT OF THE FAILURE TO COMPLY WITH AUTHORITY RULE 1220-4-2-.56(2)(d)4.

Having determined that the failure to comply with the rule is not moot and that the rule cannot be waived, I next considered how the failure to comply with the rule should be addressed. I am unaware of any other rule violations committed by Windstream. Additionally, I recognize

¹¹ *Id.* at 1220-1-1-.01(3)(h).

that companies face a difficult task when attempting to comply with the regulatory requirements of multiple states and the Federal Communications Commission. Based on such, it is my opinion that Windstream's failure to comply should not be overlooked and that Windstream should be reminded of the application of Authority Rule 1220-4-2-.56(2)(d)4. and its on-going obligation to comply with all Authority rules in the future.

III. CONCLUSIONS SUMMARY

Based on the foregoing, I have concluded that the requirement of Authority Rule 1220-4-2-.56(2)(d)4. is not moot and that the Authority cannot waive the requirement of Authority Rule 1220-4-2-.56(2)(d)4. I have further concluded that the request for waiver of Authority Rule 1220-4-2-.56(2)(d)4. included in the *Petition for Waiver of Windstream Communications, Inc. f/k/a Alltel Holding Corporate Services, Inc.* should be denied. As a result of the failure of Windstream to comply with Authority Rule 1220-4-2-.56(2)(d)4., Windstream should be reminded of the application of Authority Rule 1220-4-2-.56(2)(d)4. and its on-going obligation to comply with all Authority rules in the future.



Ron Jones, Director