

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
AT LOUISVILLE

CIVIL ACTION NO. 3:09-CV-440-H

DANA BOWERS, et al.  
PLAINTIFFS

V.

WINDSTREAM KENTUCKY EAST, LLC, et al.

DEFENDANTS

**MEMORANDUM OPINION AND ORDER**

Plaintiffs, Dana Bowers and Sunrise Children's Services, Inc., have moved for partial summary judgment as to Count III of the Complaint which alleges that Defendants violated state law by failing to amend their state tariffs to reflect the "Kentucky Gross Receipts Surcharge" before imposing that surcharge on customers.

Previously on April 29, 2010, this Court entered an order staying Count III of the Complaint pending a ruling by the Kentucky Public Service Commission ("PSC") on two specific issues. On May 4, 2012, the PSC filed an order addressing those two issues and it is on the basis of that order that Plaintiffs now request that the stay be lifted and that summary judgment be entered in their favor.

Essentially, the Court faces two issues: First, whether to lift the stay; and second, whether to grant Plaintiffs' motion for summary judgment. As to the first issue, the Court is now of the opinion that its stay should be lifted. The primary reason for doing so is that the Court's initial purpose, that is allowing the PSC to give its opinion on two specific state tariff issues, has been accomplished. Even though that ruling is now on appeal, the Court sees no reason to delay other potential meritorious progress in this litigation simply because of that appeal. Therefore, the

Court will lift the stay and proceed, where appropriate, with adjudication of the issues raised in Count III.

Plaintiffs base their motion for partial summary judgment on Count III primarily upon a recent PSC order. Having reviewed that order and Defendants' commentary on it, the Court concludes that there are sound reasons for denying Plaintiffs' motion for summary judgment at this time. First, Defendants have appealed the PSC rulings and it is quite possible that the Court may benefit from further rulings of Franklin Circuit Court or a Kentucky appellate court. In any event, the Court sees no benefit in ruling prematurely when subsequent reviews may be helpful to the Court. Moreover, Defendants have raised a number of issues which call into question whether Plaintiffs are entitled to summary judgment on their own claims. Defendants have certainly raised factual issues which may not be resolved at this time.

As part of their response, Defendants have also moved for their own summary judgment as to Count III. Some of the issues raised are also part of their current appeal of the PSC ruling. Because Defendants have not discussed these issues in great depth, the Court will deny their motion at this time.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the Court's stay as to further proceedings on Count III of the complaint is LIFTED.

IT IS FURTHER ORDERED that Plaintiffs' motion for partial summary judgment on Count III is DENIED.

IT IS FURTHER ORDERED that Defendants' motion for summary judgment on Count III is DENIED.

cc: Counsel of Record