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November 15, 2010

Ms. Renee Jenkins
Docketing Division
Public Utilities Commission of Ohio
180 East Broad Street, 13th Floor
Columbus, OH 43215-3793

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PUCO

Re: *OHIOTELNET.COM, INC. v. Windstream Ohio, Inc.*
Case No. 09-515-TP-CSS

Dear Ms. Jenkins:

Enclosed are the original and eight (8) copies of *Windstream Ohio, Inc.'s Motion to Strike Testimony, Request for Expedited Ruling, and Public Offer of Settlement* for filing in the above-referenced matter. Please time stamp the extra copies and return them to our courier.

Thank you for your assistance.

Very truly yours,

BAILEY CAVALIERI LLC



William A. Adams

WAA:sg

Enclosure

cc(w/enclosure): Doug Jennings, Hearing Examiner
James R. Cooper, Esq.

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

OHIOTELNET.COM, INC.,

Complainant,

v.

WINDSTREAM OHIO, INC.,

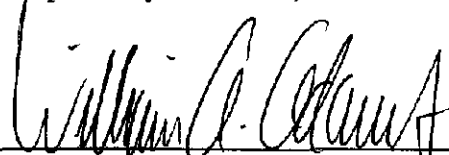
Respondent.

Case No. 09-515-TP-CSS

**WINDSTREAM OHIO, INC.'S MOTION TO STRIKE TESTIMONY, REQUEST
FOR EXPEDITED RULING, AND PUBLIC OFFER OF SETTLEMENT**

Pursuant to Rules 4901-1-12 and 4901-1-14, Ohio Administrative Code, Respondent Windstream Ohio, Inc. ("Windstream") hereby moves to strike testimony, requests an expedited ruling on the same, and makes a public offer of settlement as set forth in the attached Memorandum in Support.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

This complaint, which has now been pending before the Public Utilities Commission of Ohio ("Commission") for over seventeen months, concerns actions that Respondent Windstream Ohio, Inc. ("Windstream") may take concerning certain billing disputes, some of which concern unregulated services and some of which are more than eight years old. Specifically, the complaint filed by Ohiotelnet.com, Inc. ("Complainant") alleges that: (1) Windstream "claim[s] that Complainant owes them approximately \$88,000.00 in billings pursuant to various invoices . . . , " charges which Complainant disputes (Complaint at ¶ 6); (2) Windstream "placed an embargo on Complainant's account in Ohio for failure to make requested payments" (Complaint at ¶ 14); and (3) Windstream "unilaterally notified Complainant's customers that telephone service provided by Complainant will be disconnected on June 23, 2009" (Complaint at ¶ 15). The text of the complaint contains no further factual allegations against Windstream. Since the complaint was filed, the Attorney Examiner's Entry Orders have repeatedly and properly characterized this proceeding as pertaining to such billing disputes.

Now, on November 12, 2010, less than a month prior to hearing, Complainant is apparently seeking to turn this proceeding into an omnibus examination of the relationship between Windstream and Complainant. As described in greater detail below, Complainant is raising issues that were not remotely previously pled and, in some cases, far outside the jurisdiction of the Commission.

Rule 4901-9-01(B), Ohio Administrative Code, requires a complaint against a public utility such as Windstream to "clearly explain[] the facts which constitute the basis of the complaint" and include "a statement of the relief sought." Such provision also states that "[i]f discrimination is alleged, the facts that allegedly constitute discrimination must be stated with

particularity.” As discussed below, because Complainant did not raise in its complaint several of the claims raised in Complainant’s pre-filed testimony, such claims and testimony relating thereto should be struck pursuant to Ohio Adm. Code § 4901-9-01(B).

Setting aside legal procedural considerations which Windstream believes necessitate striking large portions of Complainant’s pre-filed testimony, permitting Complainant to move forward with its expanded set of inappropriate claims does not serve the public interest for a variety of reasons. The issues in this proceeding are already sufficiently complex – expanding areas of inquiry at hearing will serve to confuse the record and waste Commission resources. Further, neither the Hearing Examiner nor Commission staff should be expected to prepare to examine issues that a complainant did not see fit to raise in its initial complaint. Maintaining a precedent against complaints being merely “kick-off” exercises for overly-broad and poorly-defined explorations of intercarrier relationships serves to focus the Commission’s resources in future proceedings on well-pled detailed issues that can be intelligently considered over the course of the proceeding, rather than being raised at the last minute prior to hearing in severely belated testimony.

These considerations do not even take into account the procedural unfairness of requiring Windstream to defend itself against an ever-proliferating list of inchoate claims. Windstream has already been forced to expend substantial resources so that Complainant can be provided its “day in court.” Most significantly, Windstream’s witnesses, in-house counsel, and outside counsel had previously arranged their schedules so as to devote the time necessary to preparing pre-filed testimony and preparing for and attending a November 2, 2010 hearing. In addition, Windstream’s witnesses and in-house counsel made costly travel arrangements for attending the hearing on such date. As a result of Complainant’s unsuccessful attempt to avoid filing any

written testimony before hearing, the Hearing Examiner was forced to reschedule the hearing, which has disrupted the Commission's schedule, and has caused Windstream's witnesses, in-house counsel, and outside counsel to rearrange their schedules and reserve new large blocks of time to review Complainant's filings and prepare for a new hearing date, as well as to incur the cost of rebooking travel arrangements.

Prior to turning to the specific testimony that Windstream moves to strike, Windstream observes that by Complainant's own admission, the billing disputes pertain only to total service resale. *See, e.g.,* Ohiotelnets.com, Inc., Application for Rehearing (filed February 26, 2010) ("it is unreasonable to permit Respondents to terminate all services provided to Complainant when only Resale service under the Interconnection Agreement is in dispute," *id.* at 2). Therefore, no issues unrelated to total service resale have any bearing on the billing disputes.

MOTION TO STRIKE

Windstream seeks for the following testimony of Complainant to be struck and Complainant to be barred from discussing such matters at hearing, including live testimony and cross-examination of Windstream's witnesses.

a. Direct Testimony of Thomas Cotton ("Cotton Testimony") at p. 8, l. 8 through p. 9, l. 2 and any other testimony pertaining to discussions of the potential business relationship between Windstream's predecessor in interest and Complainant prior to the execution of the interconnection agreement between the parties (Complaint, Exhibit B) ("Interconnection Agreement"). Pursuant to Section 33 of the Interconnection Agreement, such claims are not probative for purposes of interpreting or enforcing the interconnection agreement, the stated basis for the complaint.

b. Cotton Testimony at p. 18, l. 7 through p. 20, l. 3; p. 37, l. 7 through p. 39, l. 17 and any other testimony pertaining to claims that Windstream's billings to Complainant have been excessively delayed to the extent that such claims either: (i) were not presented to Windstream as the basis for dispute at the time that the pertinent charge was disputed, as required by Section 9.1 of the Interconnection Agreement; or (ii) are not the bases of disputes included in the \$76,436 of allegedly unresolved billing disputes, as calculated by Complainant Witness Annette Duboe. (Direct Testimony of Annette Duboe ("Duboe Testimony" at 22). To the extent that either of these conditions exist, such claims do not appear anywhere on the face of the complaint and were not the stated grounds for relief sought by Complainant, as required by Ohio Adm. Code § 4901-9-01(B).

c. Cotton Testimony p. 20, l. 4 through 21, l. 8 and any other testimony pertaining to allegations that Windstream has degraded the quality of Complainant's service by supposedly intentionally providing inadequate capacity to Complainant. Again, nowhere on the face of its complaint does Complainant raise such issues nor did Complainant state the relief that it sought with regard to such nonexistent claim. Further, because the billing disputes only pertain to total service resale, no issues relating to intentionally providing inadequate capacity concern properly-raised issues in this proceeding. Therefore, the above-referenced testimony should be struck, as the underlying claim was not properly raised in the complaint, as required by Ohio Adm. Code § 4901-9-01(B).

d. Cotton Testimony at p. 20, l. 4 through p. 29, l. 14; p. 31, l. 16 through p. 35, l. 16 and any other testimony pertaining to claims that Windstream has discriminated against Complainant. Mr. Cotton's testimony is largely a melodramatic tale of what he appears to consider to be personal slights, some of which were supposedly imposed on another company

that he owns, Midwest Service Management, Inc. ("MSM"), which is neither a party to this proceeding nor has standing before the Commission to raise any of the claims that could possibly be fashioned out of the rambling allegations raised in Mr. Cotton's testimony. No claims of discrimination by Complainant (or, of course, MSM, even if it were a party to this proceeding) appear on the face of the complaint, as required by Ohio Adm. Code § 4901-9-01(B), nor did Complainant state the relief that it sought with regard to such nonexistent claim. In addition, as this claim does not appear on the face of the complaint, it, of course, was also not pled with the particularity required by such rule provision for claims of discrimination.

e. Cotton Testimony at p. 21, ll. 16-18; p. 29, l. 15 through p. 31, l. 15 and any other testimony pertaining to allegations that Windstream has failed to provide collocation or unbundled network elements pursuant to Sections 251 and 252 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § § 251, 252. Nowhere on the face of its complaint does Complainant raise issues pertaining to collocation or unbundled network elements nor did Complainant state the relief that it sought with regard to such nonexistent claim. Further, no billing disputes raised by Complainant concern collocation or unbundled network elements. Testimony four weeks prior to hearing is neither the time nor the place to raise such issues for the first time. Therefore, the above-referenced testimony should be struck as the underlying claim was not properly raised in the complaint, as required by Ohio Adm. Code § 4901-9-01(B).

f. Cotton Testimony at p. 31, l. 16 through p. 35, l. 12 and any other testimony pertaining to supposed installation of bridge coils on metallic circuits purchased by Complainant. Windstream finds itself at a loss to identify what, if any, relief Complainant seeks with regard to such allegations as MSM, the supposed victim of the alleged actions of Windstream, is not a party to this proceeding. Like much of Complainant's testimony, this issue is not raised

anywhere on the face of the complaint nor did Complainant state the relief that it sought with regard to such nonexistent claim, as required by Ohio Adm. Code § 4901-9-01(B). In addition, the Commission has already held that Windstream's predecessor in interest (and, thus, Windstream) may prohibit Complainant from using intrastate private line service, such as the service relating to Complainant's allegations regarding metallic circuits, for providing Internet access service and that such services are properly purchased from an interstate, rather than intrastate, tariff. *Ohiotelnet.com, Inc. v. ALLTEL Ohio, Inc.*, Case No. 01-1530-TP-CSS, "Opinion and Order" (Feb. 19, 2004), *reh'g denied*, Apr. 14, 2004. Thus, even if MSM were a party to this proceeding, which it is not, MSM would have no claim for harm because its attempted use of metallic circuits purchased from an intrastate tariff has been adjudicated as inappropriate. To the extent that MSM were ordering service out of the appropriate tariff, MSM would have to seek relief from the Federal Communications Commission, not the Commission as it pertains to interstate services purchased from an interstate tariff.

g. Cotton Testimony, p. 35, l. 17 through p. 37, l. 6 and any other testimony pertaining to claims that Windstream has allegedly failed to institute toll blocking per the supposed request of Complainant to the extent that such claims either: (i) were not presented to Windstream as the basis for dispute at the time that the pertinent charge was disputed, as required by Section 9.1 of the Interconnection Agreement; or (ii) are not the bases of disputes included in the \$76,436 of allegedly unresolved billing disputes, as calculated by Complainant Witness Duboe. (Duboe Testimony at 22). To the extent that either of these conditions exist, such claims do not appear anywhere on the face of the complaint and were not the stated grounds for relief sought by Complainant, as required by Ohio Adm. Code § 4901-9-01(B).

h. Cotton Testimony, p. 23, l. 8 through p. 24, l. 18 and any other testimony relating to the provision of Digital Subscriber Line ("DSL") or other broadband service in a manner unspecified by Complainant. Mr. Cotton's testimony contains references to Complainant's provision of DSL service apparently using Windstream's facilities. The extent to which intercarrier disputes relating to such matters is within the Commission's jurisdiction is highly questionable, at best – to the extent that Complainant relies on purchase of service through an interstate tariff, such matters are without doubt beyond the Commission's jurisdiction. This, of course, is in addition to the fact that Complainant did not plead such claims in its complaint, as required by Ohio Adm. Code § 4901-9-01(B).

i. Exhibits TC-2, TC-3, TC-4, and TC-5. The November 3, 2010 Entry Order explicitly required Complainant to provide a summary of the documentary evidence that it will present at hearing. Nov. 3, 2010 Entry Order at 1. Exhibits TC-2, TC-3, TC-4, and TC-5 were not on such list.

REQUEST FOR EXPEDITED RULING

Pursuant to Ohio Adm. Code § 4901-1-12(C), Windstream requests an expedited ruling preferably no later than November 24, 2010. Such an expedited ruling is necessary to minimize the need for Windstream to devote resources to preparing to defend itself at hearing against improperly raised claims, many of which are not actionable. Complainant has not consented to this request and may file a memo contra within seven days, or November 22, 2010, since this pleading is being served by electronic mail.

PUBLIC OFFER OF SETTLEMENT

Virtually every single claim made by Complainant in its pre-filed testimony not relating to the validity of the billing disputes, themselves, is either improperly and untimely raised or is a

distracting sideshow of questionable legal consequence, particularly given the highly speculative nature of any relief that Complainant might seek and the level of proof that Complainant has so far offered. Windstream has already devoted substantial resources to this proceeding and anticipates devoting significantly more resources preparing for and attending the hearing, as well as developing its post-hearing brief.

At this point, Windstream seeks to put an amicable end to this proceeding by offering, solely for administrative convenience and without any admission of fault, to provide Complainant with a bill credit of \$76,840,28, the full amount of the last Windstream invoice issued to Complainant (May 2010),¹ and to lift its embargo of Complainant's orders. This offer is contingent on a dismissal of the complaint with prejudice, an agreement by Complainant not to relitigate either before a regulatory agency or court any of the allegations raised in its pre-filed testimony, withdrawal of each of Complainant's billing disputes with Windstream and an agreement not to file any other disputes regarding Windstream invoices through May 2010, and an understanding that Windstream may, pursuant to Section 3.9 of Attachment 2 to the Interconnection Agreement, seek a security deposit before processing future orders from Complainant.

Windstream believes that this offer is more than fair to Complainant given the extreme unlikelihood that Complainant's position on the merits of each and every dispute is correct (a matter that Windstream intends to vigorously dispute at hearing and on brief), that Windstream has already granted multiple disputes that it believes were spurious, and that Windstream has already written off all of its billings to Complainant since October 2009.

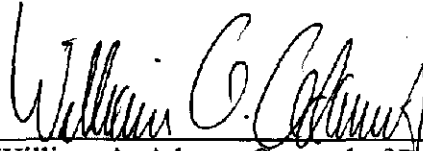
¹ This amount is greater than supposed amount of outstanding billing disputes as stated by Ms. Duboe – \$76,436. Duboe Testimony at p. 22.

CONCLUSION

WHEREFORE, Windstream respectfully requests the following:

1. That the Commission strike the pre-filed testimony of Complainant on the topics described above and bar Complainant at hearing from discussing such matters, including live testimony and cross-examination of Windstream's witnesses;
2. That the Commission expedite its ruling on this Motion; and
3. That the Commission take official notice of Complainant's public offer of settlement.

Respectfully submitted,




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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon Ohiotelnet.com, Inc. by electronic mail this 15th day of November, 2010, to:

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