

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of
OHIOTELNET.COM, INC.

V. Complainant,

Case No. 09-515-TP-CSS

Windstream Communications, Inc., et al.

Respondents.

**OHIOTELNET.COM, INC.'S MEMORANDA CONTRA TO WINDSTREAM OHIO, INC.'S
MOTION TO STRIKE TESTIMONY**

Now comes Complainant, OHIOTELNET.COM, Inc. ("OTN") and submits its Memorandum Contra to Respondent, WINDSTREAM OHIO, Inc.'s ("Windstream") Motion to Strike Testimony. OTN submits to the Public Utilities Commission of Ohio ("Commission") that Windstream's Motion to Strike Testimony is without merit and should be denied. A memorandum is attached.

Respectfully submitted,

/s/ James R. Cooper
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MEMORANDUM IN SUPPORT

Windstream submits in its Motion to Strike that OTN is seeking to turn the hearing scheduled in this matter for December 7-8, 2010, into "an omnibus examination of the relationship" between Windstream and OTN. In support of this proposition Windstream indicates that OTN includes claims outside of those alleged in its Complaint and Windstream has been without notice of several of the issues related to billing disputes identified by OTN in its prefiled testimony. Windstream states that these claims will confuse the record, waste Commission resources and pose an unfair hardship on Windstream to make travel arraignments and defend against OTN's claims in this matter. Windstream has claimed that OTN's "belated testimony" has exacerbated these hardships. Despite Windstream's characterization to the contrary, OTN's prefiled testimony was submitted timely pursuant to the November 3, 2010, Entry which ordered the filing of OTN's testimony on or before November 12, 2010.

The facts contained in OTN's prefiled testimony support the allegations in the Complaint. Windstream has had notice of these allegations since June 19, 2009, when OTN's Complaint was filed and more than adequate time to prepare its defense. In support of this, OTN addresses below each of the specific requests by Windstream to strike testimony or documents from the record below.

1. Direct Testimony of Thomas Cotton at p.8, l.8 through p.9, l.2.

Windstream submits that testimony provided by Thomas Cotton concerning the steps leading to the Interconnection Agreement with its successor in interest should be stricken from the record as "not probative" to interpreting or enforcing the Interconnection Agreement. In doing so Windstream references Section 33 of the Interconnection Agreement which recites that the agreement sets forth the entire understanding between its parties¹. OTN submits that the testimony Windstream seeks to strike provides context to the business relationship and billing disputes between Windstream and OTN and is not an attempt to introduce parole evidence or

¹ See Interconnection Agreement between Alltel, Ohio, Inc. & OHIO TELNET.COM, INC., Section 33, previously filed in this matter.

modify the Interconnection Agreement. Curiously, pages 6-8 of Mr. Cotton's prefiled testimony contain similar business history between the parties which Windstream has not requested be stricken on the basis of probative value. The testimony should be considered with all of the other evidence in the case. Therefore, Windstream's motion to strike this testimony should be denied.

2. Direct Testimony of Thomas Cotton at p.18, I.7 through p.20, I.3; p.37, I.7 through p.39, I.17, and any other testimony pertaining to claims that Windstream's billings to Complainant have been excessively delayed.

Windstream submits that testimony provided by Mr. Cotton which claims that Windstream delayed submitting bills to OTN and that this delay caused disputed charges should be stricken from OTN's pretrial testimony. In support, Windstream states that such claims were either not presented to Windstream as a basis for dispute at the time the dispute was made or are not included in the disputed amount of \$76,436.00 as calculated by Witness Annette Duboe. OTN disagrees with Windstream's position. Untimely billing was a specific cause of billing disputes and claimed by OTN in its Complaint.

OTN specifically claims that Windstream violated the terms of the Interconnection Agreement by its failure to provide timely billings and that untimely billings were a type of dispute which should result in credits to OTN.² Also, as evidenced by its prefiled testimony, OTN claims that the delay by Windstream was a source of billing disputes and a claim for proper credit by OTN was made.³ Rather than strike this testimony from the record, the Commission should hear evidence from both Windstream and OTN concerning the basis for the dispute and the denial of proper credit to OTN. Windstream's motion to strike this testimony should be denied.

3. Direct Testimony of Thomas Cotton at p.20, I.4 through p.21, I.8, and any other testimony pertaining to allegations that Windstream has degraded the quality of Complainants service.

² "Complainant alleges that Respondents...have not provided timely billings." Complaint at ¶7. "Paragraph 9.1.1 of the [Interconnection Agreement] provides a procedure to resolve billings disputes...including, among other things, untimely billing." Complaint at ¶10.

³ Direct Testimony of Thomas Cotton, p.39, II.7-8.

Windstream claims that OTN's pretrial testimony concerning Windstream's alleged provision of intentionally inadequate capacity to OTN does not appear on the face of the Complaint. Several claims in the Complaint concern billing credits requested by OTN and denied by Windstream. Due to the inadequate capacity provided by Windstream and delays in order processing, service issues and "trouble tickets" were generated in an excessive amount. These increased the billing disputes with Windstream due to credit which should have been received for a delay or service issue.⁴ Also, Windstream's lack of adequate capacity to OTN's customers and failure to timely process orders constitute failure by Windstream to act in good faith as alleged in Paragraph 7 of the Complaint. Therefore, Windstream's motion to strike this testimony should be denied.

4. Direct Testimony of Thomas Cotton 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 discriminated against Complainant.

Windstream characterizes Mr. Cotton's testimony as "largely a melodramatic tale" of personal discrimination and these "rambling allegations" should be stricken due to the failure of OTN to allege, with specificity, discrimination in its Complaint as required by Ohio Administrative Code § 4901-9-01(B).

A closer examination reveals that, although he chooses to use the word "discrimination," Mr. Cotton actually describes a pattern of behavior by Windstream which constitutes breach of the Interconnection Agreement. Mr. Cotton is committed to and passionate about his business and his testimony reflects his frustration with the pattern of Windstream's behavior. The tone of Windstream's contentions is indicative of the barriers and lack of good faith in dealing with billing disputes Mr. Cotton experienced.

In his testimony, Mr. Cotton alleges Windstream failed to perform services timely, permitted customers to use pay-per-use services which were blocked and charged OTN for

⁴ Direct Testimony of Thomas Cotton, p.21, ll.11-18.

services customers did not receive. Each of these actions resulted in a charge OTN rightfully disputed and requested a credit. When attempting to resolve these disputes, Mr. Cotton describes a series of barriers and a lack of good faith encountered by OTN and as alleged in the Complaint. Therefore, Windstream's request to strike this testimony should be denied.

5. Direct Testimony of Thomas Cotton at p.21, ll.16-18; p.29, l.15 through p.31, l.15, and any other testimony pertaining allegations that Windstream failed to provide collocation of unbundled network elements.

Windstream submits that OTN failed to include a specific claim pertaining to collocation of unbundled network elements on the face of its Complaint. The Complaint does not contain a specific allegation concerning unbundled network elements. Again, a close examination of the prefiled testimony reveals that Mr. Cotton is not claiming that OTN violated the Interconnection Agreement by failing to unbundle network elements. As indicated in Mr. Cotton's prefiled testimony, the amount billed for network elements is the source of the dispute. Although the question to Mr. Cotton references a failure to unbundle network elements, Mr. Cotton describes a pure billing dispute concerning these elements.⁵

Mr. Cotton indicated that Windstream sold "unbundled" elements under the Interconnection Agreement to OTN in compliance with the Telecommunications Act. However, Windstream circumvented the purpose of providing unbundled elements (i.e. a lower price) with the creation of a discretionary tariff and incrementally raised its price of the unbundled element purchased by OTN to equal that of the bundled element. OTN submitted this practice as a billing dispute under the Interconnection Agreement.⁶ Therefore, Windstream's motion to strike this testimony should be denied.

6. Direct Testimony of Thomas Cotton at p.31, l.16 through p.35, l.12, and any other testimony pertaining to the installation of bridge coils.

Midwest Service Management, Inc. ("MSM") is not a party to this proceeding. As indicated in Mr. Cotton's prefiled testimony, he is the majority shareholder for both OTN and

⁵ Direct Testimony of Thomas Cotton, p.30, ll.17-20.

⁶ Direct Testimony of Thomas Cotton, p.31, ll.4-15.

MSM.⁷ MSM provides technical support for OTN including customer support, billing and troubleshooting installations.⁸ Concerning any harm suffered by MSM, both Windstream and its predecessor in interest considered MSM and OTN the same entity for the purposes of billing for services and are estopped from denying the same. Attached, to rebut Windstream's claim, and marked as Exhibits A and B, respectively, are an invoice and notice sent to "MSM/OHIOTELNET". Exhibit B, sent by Windstream, makes reference to a disputed billing amount for services provided and gives notice of an embargo and disconnection. OTN submits that this evidence indicates Windstream considered MSM and OTN the same entity for its purposes under the Interconnection Agreement and, therefore, Windstream's motion to strike this testimony should be denied.

7. Direct Testimony of Thomas Cotton at p.35, l.17 through p.37, l.6 and any other testimony pertaining to claims that Windstream allegedly failed to institute toll blocking.

Windstream submits that testimony concerning its failure to institute toll blocking resulting in charges to OTN were either not presented as a basis of dispute or are not a basis of dispute included in the \$76,436.00 amount referenced by Witness Annette Duboe. Again, Windstream asks the Commission to strike testimony from the record on its assertion with no supporting evidence rather than permit the Commission to hear evidence from both Windstream and OTN concerning the basis for the dispute and the denial of proper credit to OTN. The prefiled testimony of both Mr. Cotton and Ms. Duboe clearly contradict Windstream's assertion and both use this as an example of the basis for a disputed charge.⁹

In addition, the prehearing statement of OTN filed in this matter on November 5, 2010, lists the ASOC codes for this type of billing dispute and indicates twenty (20) disputes of this

⁷ Direct Testimony of Thomas Cotton, p.2, ll.8-11 and ll.21-23.

⁸ Direct Testimony of Thomas Cotton, p.4, ll.3-8.

⁹ Direct Testimony of Thomas Cotton, p.36, ll.16-23; Direct Testimony of Annette Duboe, p.17, ll.10-24, p.18, ll.1-5.

type were filed with Windstream.¹⁰ Therefore, Windstream's motion to strike this testimony should be denied.

8. Direct Testimony of Thomas Cotton at p.23, l.8 through p.24, l.18 and any other testimony relating to the provision of digital subscriber line or any other broadband service.

Windstream claims that Mr. Cotton's pretrial testimony concerning Digital Subscriber Line service or DSL and the resulting billing disputes from the provision of such service is outside the Commission's jurisdiction and should be stricken. As a separate basis to strike this testimony, Windstream claims that OTN did not raise such claims in its Complaint. The provision of DSL services is a service contracted for between OTN and Windstream, has resulted in credits requested by OTN and billing disputes have arisen concerning these services between Windstream and OTN as alleged in the Complaint.

Windstream has agreed to and participated in this matter before the Commission on billing disputes due to Windstream's providing services to OTN. Therefore, Windstream has waived this jurisdictional issue by proceeding in this action and cannot now raise such a jurisdictional issue in a limited manner to strike specific testimony. Therefore, Windstream's motion to strike this testimony should be denied.

9. Exhibits TC-two, TC-3, TC-4 and TC-5.

Windstream states that Exhibits TC-2, TC-3, TC-4 and TC-5 were not sufficiently described on the Summary of Documentary Evidence ordered by the November 3, 2010, Entry. OTN considers these Exhibits as correspondence between OTN and its customers identified under item Five (5) of the Summary of Documents in its Prehearing Statement. OTN acknowledges that an affidavit or customer statement may not be a type of correspondence anticipated by Windstream. Therefore, OTN is willing to revise its Prehearing Statement, if necessary, to identify these specific pieces of correspondence.

¹⁰ Memorandum and Pre-Hearing Statement of Complainant, OHIOTELNET.COM, Inc. at p.17, ASOC Code Ref. #51.

OTN acknowledges that the underlying purpose of identifying documents is to allow the other party to properly prepare for the presentation of such documentary evidence. Part of this preparation is adequate notice of documents. OTN provided the Prehearing Statement on November 5, 2010 and submitted prefiled testimony containing the above exhibits on November 12, 2010. If OTN had identified these exhibits, as Windstream suggests, Windstream would only have had an additional seven (7) days notice of this evidence. Windstream has suffered no unfair prejudice from this delay. OTN specifically alleged improper contact of OTN's customers by Windstream's representatives as a source of harm to OTN in Paragraph 15 of its Complaint. Windstream anticipated statements from such customers well in advance of the hearing in this matter.

In addition, Windstream has had notice of the existence of these exhibits as they were attached to OTN's Complaint in the Licking County Common Pleas Court which was filed and served on counsel for Windstream on February 10, 2010.¹¹ Any claim by Windstream of unfair prejudice due to a lack of notice is without merit. Therefore, Windstream's motion to strike these exhibits should be denied.

Windstream's Motion to Strike the testimony and exhibits identified above should be denied by the Commission. The testimony Windstream requests be stricken is grounded in the claims made in the Complaint. The testimony and the exhibits were in Windstream's contemplation throughout this matter as arbitration, negotiation, and communication between the parties have occurred frequently in an attempt to resolve these issues. All of the pretrial testimony and exhibits presented by OTN directly relate to its claim of improper billing, denial of credits, and Windstream's breach of the Interconnection Agreement. Therefore, OTN respectfully request the Commission deny Windstream's Motion to Strike.

¹¹ Licking County Common Pleas Court, Case No. 10 CV 0225, filed February 10, 2010.

Respectfully submitted,

/s/ James R. Cooper
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Fax: (740) 349-9816
Attorney for Complainant

CERTIFICATE OF SERVICE

A copy of the foregoing was served on William A. Adams, BAILEY CAVALIERI LLC, 10 West Broad Street, Suite 2100, Columbus, Ohio 43215-3422, Attorney for Windstream Windstream Communications, and Windstream Ohio, Inc., by electronic mail and by ordinary U.S. Mail, postage prepaid, this 24 day of November, 2010.

Respectfully submitted,

/s/ James R. Cooper
James R. Cooper (0023161)
Attorney for Complainant



ALLTEL OHIO INC.
STATE: OH
158 018 18
ICSC
ACNA MSM

ACCOUNT NO 158SPMSM MSM
INVOICE NO 04231-27012
PROCESS DATE AUG 21, 2004
BILL DATE AUG 18, 2004
PAGE 1

MSM/OHIO TELNET
25 WEST MAIN STREET
ACCOUNTS PAYABLE
NEWARK
43055

OH

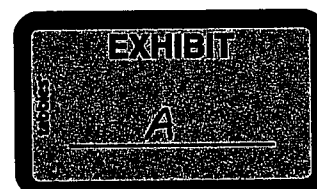
BILLING INQ. CALL CABS
AT (800) 351-4241

ICO CODE: 0665

FACILITY ACCESS SERVICE

* * * BALANCE DUE INFORMATION * * *

TOTAL AMOUNT LAST BILL	1,960.28	
PAYMENTS APPLIED - SEE DETAIL	316.95CR	
BALANCE PAST DUE - SEE DETAIL		1,643.33
* * * DETAIL OF CURRENT CHARGES * * *		
TOTAL - OHIO		
LATE PAYMENT CHARGES	12.77	
MONTHLY ACCESS CHARGES - INTERSTATE	418.06	
FROM AUG 19, 2004 - INTRASTATE	.00	
THRU SEP 18, 2004 - LOCAL	.00	
TOTAL CURRENT CHARGES		430.83
TOTAL BALANCE * DUE BY SEP 20 *		2,074.16



WINDSTREAM COMMUNICATIONS
Sales Billing (1170 B3F03-36B)
North Rodney Parham Rd.
Deer Creek, AR 72212-2442

VIA CERTIFIED MAIL



July 20, 2007

MSM/OHIO TELNET
25 WEST MAIN STREET
ACCOUNTS PAYABLE
NEWARK, OH 43055
Account Number: 2114

REMITTANCE ADDRESS

Send Check to:

Windstream Communications
c/o Bank of America, N.A.
P. O. Box 60549
St. Louis, MO 63160-0549

ACH Payments:

RTN #: 111 000 012
Acct #: 375 093 6049
email payment detail to:
WCI.CABS@windstream.com
SUBJ: Remit Detail

FINAL NOTICE OF SERVICE
EMBARGO / PIC BLOCK / DISCONNECTION

IN ACCORDANCE WITH THE APPLICABLE TARIFF OR CONTRACT, WINDSTREAM IS HEREBY PROVIDING YOU 30-DAY NOTIFICATION THAT SERVICE EMBARGO (including PIC block) AND/OR DISCONNECTION PROCEDURES HAVE BEEN INITIATED ON YOUR DELINQUENT ACCOUNTS. IN THE EVENT THAT PIC BLOCK OR DISCONNECT OCCURS, IT MAY TAKE UP TO ONE WEEK TO REMOVE SAID BLOCK OR RESTORE SERVICE.

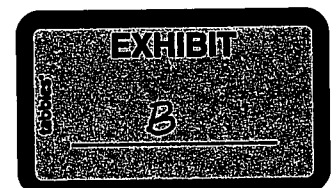
In accordance with the applicable tariff or contract, you must immediately pay the total amount due listed below to avoid embargo, PIC block and/or disconnection. An additional fee or deposit will be required to continue or reinstate service.

We do not want to lose your business, therefore please contact Brian T. Graggs immediately at 1-501-748-6633 to make appropriate arrangements to avoid embargo, PIC block and/or disconnection.

<u>BILLING ACCOUNT</u> <u>NUMBER (BAN):</u>	<u>INVOICE NUMBER</u>	<u>INVOICE DATE</u>	<u>INVOICE DUE</u> <u>DATE</u>	<u>AMOUNT DUE*</u>
158SPOON	0713879585	5/18/2007	6/17/2007	\$338.66
	<u>Total Due for this BAN:</u>			<u>\$338.66</u>
	<u>TOTAL AMOUNT DUE</u>			<u>\$338.66</u>

7-30-07

Called 11-06-07 L&H MCG



* Late payment charges will be applied per invoice not paid in full by the next cycle due date.

LET1234567-G

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Case No(s). 09-0515-TP-CSS

Summary: Memorandum Contra of Complainant, OHIOTELNET.COM, Inc. to Respondent, Windstream Ohio, Inc.'s Motion to Strike Testimony electronically filed by Mr. James R Cooper on behalf of OHIOTELNET.COM, INC.