

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.

POST-HEARING BRIEF OF COMPLAINANT OHIOTELNET.COM, INC.

At the hearing held December 7 and 8, 2010, Complainant OHIOTELNET.COM, Inc. (“OTN”) provided evidence that Windstream Ohio, Inc., (“Windstream”) breached the terms of the Interconnection Agreement (“ICA”) between the parties by improperly placing an embargo on OTN orders and failing to provide billing credits to which OTN was entitled. Therefore, OTN is entitled to entry of an opinion and order in its favor which concludes that Windstream violated the terms of the ICA and that OTN is entitled to judgment in its favor.

A. PROCEDURAL HISTORY

On June 19, 2009, OTN filed a complaint against Windstream concerning a billing dispute. OTN, in addition to other relief, sought an order restraining Windstream from disconnecting services to OTN. The Public Utilities Commission of Ohio (“Commission”) issued an entry on September 23, 2009, granting the restraining order on the condition that OTN deposit into an escrow account the sum of \$70,666.84. In an entry on rehearing issued October 28, 2009, the Commission recognized the parties’ continued negotiations and Windstream’s agreement to postpone OTN’s escrow deposit pending further negotiations. When the Commission was notified the negotiations reached an impasse, Windstream filed a letter on November 20, 2009, requesting the Commission order OTN to deposit a lower sum of \$64,641.29 into an escrow account within fifteen (15) days. Otherwise, Windstream would be

allowed to proceed with disconnection. OTN sought rehearing by application filed February 26, 2010, which the Commission denied in part on March 24, 2010. The Commission affirmed its order that OTN deposit \$64,641.29 into an escrow account to avoid disconnection. OTN did not make the escrow deposit and Windstream disconnected services. On September 20, 2010, Windstream filed a motion for escrow with a request for an expedited ruling. Windstream cited its concerns that it may not receive payment from OTN upon a favorable ruling and requested the Commission dismiss OTN's complaint if the requested escrow deposit of \$64,641.29 was not made within seven (7) days of a Commission order. OTN filed a memorandum contra on October 12, 2010 arguing the escrow deposit, consistent with the Commission's prior entries, was for the purpose of preventing disconnection of resale services while the complaint was pending. Windstream's motion for escrow was denied by the Commission's entry of October 28, 2010. On November 3, 2010, the attorney examiner entered an order scheduling the complaint to be heard on December 7, 2010.

B. LAW AND ARGUMENT

The transactions between the parties are governed by the ICA between Windstream, as successor to Alltel Ohio, Inc., and OTN.¹ Windstream failed to provide credits due OTN which were properly disputed by OTN through Windstream's designated dispute process.² Windstream continued to include the amounts which were not properly credited to OTN on its invoices, adding them to OTN's past due balance resulting in incorrect and inaccurate invoices forwarded to OTN.³ In addition, Windstream failed to timely bill for services.⁴ Windstream also failed to deal with and negotiate the disputed items in good faith.

Paragraph 9.1.2 of the ICA⁵ provides:

¹ See Complainant's Ex. 78.

² Complainant's Ex. 76, p.11, l.21-24; p.12, l.1-10.

³ *Id.*

⁴ Complainant's Ex. 76, p.37, l.7-24; p.38, l.1-23.

⁵ See Complainant's Ex. 78 Interconnection Agreement between Alltel Ohio, Inc. and Ohiotelnet.com, Inc.

The parties agree that those portions of bills that are not disputed shall be paid when due...and that no other late payment fee or charge applies to overdue notices.

Paragraph 9.1.1 of the ICA describes the types of disputes contemplated by this section:

Examples of reasonable and valid billing disputes (“Billing Dispute”) include, but are not limited to:

9.1.1.1 incorrect rate applied;

* * *

9.1.1.3 service did/did not exist;

9.1.1.4 invalid factors;

9.1.1.5 incorrect customer being billed;

* * *

9.1.1.7 untimely billing.

OTN consistently used the dispute resolution process Windstream put in place. OTN has tracked items where OTN requested billing credit since April of 2004.⁶

OTN's record of these disputes and their submission is contained in a business record spreadsheet maintained by OTN.⁷ Each of the entries on this spreadsheet contain a Windstream dispute number and were, therefore, disputed through Windstream's designated process by OTN.⁸ Windstream claims that some of the disputes were not made within twelve (12) months and it is not obligated to consider them under the ICA. To support this claim, it cites an email from Annette Duboe dated April 8, 2009 which summarizes the disputes to that date.⁹ However, each dispute listed on Respondent's Exhibit 1 was submitted within the twelve (12) month timeframe of the ICA and has a designated Windstream dispute number received when it was submitted.¹⁰ Therefore, OTN's disputes are timely under the terms of the ICA.

⁶ Complainant's Ex.76, p.14, l.18 - p.16, l.12.

⁷ See Complainant's Ex. 1 Billing Dispute Spreadsheet on disc.

⁸ Tr. p. 68, l.14 - p.69, l.21.

⁹ Tr. p.109, l.1 - p.110, l.22.

¹⁰ Tr. p.137, l.1 - p.238, l.13.

In addition, during a conference call on February 5, 2009, Windstream agreed to “look back” and examine unresolved disputes from day one.¹¹ During a subsequent conference call and settlement conference on November 12, 2009, the parties agreed as to the disputed amount of \$64,641.29¹². However, OTN never agreed they owed this amount despite Windstream’s characterization as such during the testimony of Scott Terry.¹³ Also, no agreement to pay is reflected in the summary e-mail sent by Mr. Terry to OTN.¹⁴

OTN submitted each billing dispute when discovered on its monthly invoices received by Windstream.¹⁵ However, OTN would submit a second dispute through Windstream’s dispute process if credit due was not received on a subsequent invoice or delayed in processing by Windstream.¹⁶ During the testimony at the hearing, Windstream claimed its dispute process determines whether a credit is due or a charge is disputed under the ICA.¹⁷ Ms. Henson describes a “tier” system where disputes are elevated depending on Windstream’s internal criteria.¹⁸ Ms. Henson admitted, unlike Ms. Duboe, she has not reviewed every dispute submitted by OTN.¹⁹ Windstream’s “tier” system and dispute process are not contained in the terms of the ICA. OTN had no other choice but to utilize this process in order to receive credits due.²⁰

OTN was required to pay taxes on each invoice including disputed items. However, even if Windstream determined a credit was due and applied it to OTN’s account, OTN was not automatically reimbursed by Windstream for the taxes paid resulting in additional financial harm to OTN as a result of the billing disputes.²¹

¹¹ Respondent’s Motion to Dismiss, p.3-4, filed July 13, 2009.

¹² See Complainant’s Ex. 80 November 2009 E-mail Chain.

¹³ Tr. p.175, l.8 - p.176, l.12; p.188, l.17-23; p.197, l.20 - p.198, l.4.

¹⁴ *Id.*

¹⁵ Complainant’s Ex. 77, p.6, l.18 - p.7, l.7.

¹⁶ Complainant’s Ex. 77, p.9, l.19-23.

¹⁷ Tr. p.143, l.14 - p.144, l.4.

¹⁸ Tr. p.130, l.22 - p.132, l.12.

¹⁹ Tr. p.131, l.10-13.

²⁰ Complainant’s Ex. 77, p.7, l.15 - p.8, l.3.

²¹ Tr. p.194, l.2 - p.195, l.7.

Windstream admits it placed an embargo on OTN order in April of 2009 and in June of 2009 notified OTN customers they would be disconnected, offering Windstream's services as a replacement.²² Windstream claims that OTN's past due balance justified this action under the terms of the ICA.²³ OTN has paid in full all undisputed invoiced charges to Windstream.²⁴ Windstream took this action despite the numerous outstanding billing disputes and requests for credit previously submitted by OTN. In addition, when OTN's customers phoned the number Windstream included on the disconnection notice, Windstream's representatives informed these customers OTN was "going out of business".²⁵

Windstream's representative, Scott Terry, testified Windstream would rather not have to deal with competitive local exchange carriers like OTN and would prefer OTN's customers be direct customers of Windstream.²⁶ Despite OTN's continued attempts to resolve its valid requests for billing credits, Windstream has continued to condition payment of disputed amounts before removing its embargo. Moreover, Windstream continued to invoice OTN for services through May of 2010 but in November of 2009, Windstream informed OTN it would no longer review requests for credit submitted by OTN stating it was not going to waste any more time on billing disputes.²⁷ Therefore, despite OTN submitting billing disputes within the categories contained in paragraph 9.1.1 of the ICA, Windstream breached its duties under the ICA and lacked good faith by failing to review the disputes while continuing to invoice OTN for its services.

OTN has met its burden proving the allegations set forth in its complaint. OTN provided evidence during the hearing in this case that Windstream Ohio, Inc., ("Windstream") breached the terms of the Interconnection Agreement ("ICA") between the parties by improperly placing an embargo on OTN orders and failing to provide billing credits to which OTN was entitled. As a

²² Respondent's Ex. 2, p.10, l.23 - p.12, l.20.

²³ *Id* at p.8, l.17-22; p.12, l.6-13.

²⁴ Complainant's Ex. 76, p.42, l.10 - p.43, l.6.

²⁵ Complainant's Ex. 76, attached exhibits TC-2 to TC-5.

²⁶ Tr. p.191, l.16 - p.192, l.23.

²⁷ Tr. p.178, l.21 - p.179, l.16; p.150, l.12-21.

result of this breach, OTN has suffered financial harm and lost customers. Ms. Duboe testified OTN is owed \$76,436.00 in billing credits from Windstream.²⁸ Therefore, OTN is entitled to entry of an opinion and order in its favor concluding Windstream violated the terms of the ICA and finding that OTN is entitled to judgment in its favor.

Respectfully submitted,

/s/ James R. Cooper

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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 Communications, and Windstream Ohio, Inc., by electronic mail and by ordinary U.S. Mail, postage prepaid, this 21st day of January, 2011.

Respectfully submitted,

/s/ James R. Cooper

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Attorney for Complainant

²⁸ Tr. p.69, l.22 - p.70, l.7.

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Summary: Brief of Complainant, OHIOTELNET.COM, Inc. electronically filed by Mr. James R Cooper on behalf of OHIOTELNET.COM, INC.