

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of Covista)	
Communications, Inc.)	
)	
Complainant,)	
)	
v.)	Case No. 12-2574-TP-CSS
)	
Victory Telecom, Inc. and Xtension Services,)	
Inc.)	
)	
Respondent.)	

**JOINT MOTION OF VICTORY TELECOM, INC. AND XTENSION SERVICES, INC.
TO DISMISS
COVISTA COMMUNICATIONS, INC.'S FIRST SUPPLEMENTAL AND AMENDED
COMPLAINT**

Pursuant to Ohio Administrative Code ("O.A.C.") Rule 4901-9-01, Xtension Services, Inc. ("Xtension") respectfully moves the Public Utilities Commission of Ohio (the "Commission") to dismiss Covista Communications, Inc. ("Covista") First Supplemental and Amended Complaint. The grounds for this motion are set forth in the memorandum in support.

Respectfully submitted on behalf of,
VICTORY TELECOM, INC.

Handwritten signature of Erik J. Cecil, Esq.

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Respectfully submitted on behalf of,
XTENSION SERVICES, INC.

Handwritten signature of Thomas J. O'Brien.

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MEMORANDUM IN SUPPORT

I. Introduction

On January 30, 2103, Covista filed its First Supplemental and Amended Complaint (“Amended Complaint”). By this Motion to Dismiss, Xtension incorporates its Motion to Dismiss filed November 9, 2012 respectively.

II. The Amended Complaint Should be Dismissed for Failure to Comply with Civil Rule 15 of the Ohio Rules of Civil Procedure

Civ. R. 15(A) provides, in relevant part:

[A] party may amend his pleading only by leave of Court or by written consent of the adverse party. Leave of Court shall be given freely when justice so requires.

In the course of regular practice before this Commission, such leave is obtained through a motion for leave to file such amended complaints. Here, Covista has sought no such approval. The Amended Complaint should be stricken for this reason alone.

III. The Amended Complaint Should Be Dismissed for Failure to State Reasonable Grounds

Beyond the procedural infirmity of the Amended Complaint, the Commission should dismiss this additional burden on both the Commission and the Respondents because this attempt by Covista to “clarify the nature of the dispute” does nothing beyond raising further extraneous matters that relate only to the contract dispute between the parties properly brought in the Franklin County Court of Common Pleas, a dispute that is unquestionably beyond the authority of this Commission. The extra-jurisdictional nature of the contract dispute between the parties was thoroughly addressed in Xtension Services’ Motion to Dismiss, filed November 9, 2012. Xtension Services hereby incorporates by reference its prior Motion to Dismiss.

Nevertheless, Covista attempts to weave the contract dispute into this case by requesting that the Commission rule “[t]hat no amounts are owed by Covista to Victory, Extension, or any other company as all alleged charges exceed the rate deck provided by Victory to Covista and are therefore unfair and deceptive pursuant to Ohio Revised Code 4927.06” (Amended Complaint, paragraph 18c) thus cloaking the contract dispute in the guise of a claim of an “unfair or deceptive” practice on the part of Xtension Services. Similar to Covista’s attempt to cloak the contract dispute in the guise of a truth-in-billing claim, this latest ploy also fails to state reasonable grounds, as required by Ohio Revised Code (“R.C.”) 4927.21(B).

R.C. 4927.06 provides in relevant part:

(A) No telephone company shall commit any unfair or deceptive act or practice in connection with the offering or provision of any telecommunications service in this state. A failure to comply with any of the following requirements shall constitute an unfair or deceptive act or practice by a telephone company: (1) Any communication by the company, including, but not limited to, a solicitation, offer, or contract term or condition, shall be truthful, clear, conspicuous, and accurate in disclosing any material terms and conditions of service and any material exclusions or

limitations. The public utilities commission may prescribe, by rule, a commission review process to determine when disclosing such information is not practicable, and therefore nondisclosure does not result in an unfair or deceptive act or practice. (2) Any written service solicitation, marketing material, offer, contract, or agreement, as well as any written response from the company to a service-related inquiry or complaint that the company receives from a customer or others, shall disclose the company's name and contact information. The commission may prescribe, by rule, a commission review process to determine when disclosing such information is not practicable, and therefore nondisclosure does not result in an unfair or deceptive act or practice. ...

In its Amended Complaint, Covista again attempts to paint the agency relationship between Xtension Services and Victory Telecom as somehow nefarious, rather than a normal, common practice in the telecom industry. In fact, there is nothing at all deceptive about this practice and the agreement between the parties makes this abundantly clear. That the terms and conditions of the services involved were found through a clearly designated internet link cannot be said to constitute an unfair or deceptive practice.¹ As the Commission well knows, it is the normal practice for most *retail* telecommunications services provided in Ohio to inform consumers of the terms and conditions of services through web-based documents. The Commission also knows that it is an even more common practice for wholesale agreements to be structured in this fashion. Covista does not even attempt to explain how the web-based link that was plainly included in the agreement runs afoul of R.C. 4927.06, or the Commission rules implementing that provision of the Revised Code. It is, in fact, the normal practice in the industry.

Beyond this, the fact that Covista disagrees with the rates that were charged pursuant to this agreement, or whether any agreement even existed between Covista and Extension Services,

¹ The agreement between Covista, Victory and Xtension Services is referenced in the initial Complaint and is attached to the November 9, 2012 Motion to Dismiss filed by Extension Services and incorporated by reference herein.

are all matters pertaining to the commercial agreement involved in this dispute and are properly pending in the Franklin County Court of Common Pleas. The Commercial terms of that agreement are not properly before this Commission, as explained more fully in Xtension Services Motion to Dismiss of November 9, 2012.

IV. CONCLUSION

WHEREFORE, Covista's Amended Complaint must be denied because the Commission lacks jurisdiction, and even if the Commission asserts jurisdiction the Complaint must be denied because Covista failed to set forth reasonable grounds in its Complaint.

Respectfully submitted on behalf of,
VICTORY TELECOM, INC.

Handwritten signature of Erik J. Cecil in black ink, with the words "per author" written in smaller script at the end.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the forgoing Motion to Dismiss has been served upon the following parties listed below by electronic mail and/or regular U.S. mail, postage prepaid, this 8th day of February, 2013.



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Commission of Ohio Docketing Information System on

2/8/2013 4:23:32 PM

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Case No(s). 12-2574-TP-CSS

Summary: Motion Joint Motion of Victory Telecom, Inc. and Extension Services, Inc. to Dismiss Covista Communications, Inc.'s Amended Complaint electronically filed by Mr. Thomas J O'Brien on behalf of Xtension Services, Inc.