

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
|---|---|--------------------------------|
| In the Matter of the Complaint of |) | |
| Southeast, Inc., |) | |
| |) | |
| Complainant |) | Case No. 16-2288-TP-CSS |
| |) | |
| v. |) | |
| |) | |
| Mitel Cloud Services, Inc., |) | |
| |) | |
| Respondent. |) | |
| |) | |
| Relative to Alleged Unreasonable and |) | |
| Unlawful Billing of Service. |) | |

RESPONSE TO COUNTERCLAIM

Pursuant to the Attorney Examiner’s April 25, 2017 Entry, Southeast, Inc. (“Southeast” or “the Complainant”) files this Response to the Mitel Cloud Services, Inc. (“Mitel” or “the Respondent”) Counterclaim against Southeast, Inc. found on pages 9-11 of the March 14, 2017 filing with the Public Utilities Commission of Ohio (“Commission”) alleging the following:

1. With respect to Paragraph 1 of the Counterclaim, Southeast admits that Mitel, or its predecessor, Mitel Net Solutions, Inc. (both local exchange carriers and telephone companies) and Southeast entered into a series of service agreements for telephone, dedicated data services, Primary Rate Interface (“PRI”) Service and switched long-distance telephone services, beginning in November 2008, each for an initial sixty (60) month term of service. However, none of these service agreements/contracts were ever filed with this Commission as required by Rule 4901:1-6-17 of the Ohio Administrative Code which was in effect at the time of execution. Had Mitel Cloud Services, Inc., or its predecessor, complied with this rule and filed the contracts and required affidavit with the Commission, the Commission Staff would have had the opportunity to review the contracts, identify and determine that the automatic five-year renewal term was unreasonable,

unlawful and contrary to the telecommunications policy of this state, and could have modified or suspended the contracts or deleted the automatic five-year renewal term. The Respondent's failure to obey this rule deprived the Commission and its Staff of that opportunity. See attached Rule 4901:1-6-17 of the Ohio Administrative Code. The Commission is requested to take administrative notice of the absence of any "TP-CTR" filing by Mitel or its predecessor in the Docketing Information System records.

2. With respect to the first sentence of Paragraph 2 of the Counterclaim, Southeast admits that such service agreements each contain auto-renewal provisions. However, none of these auto-renewal provisions were ever submitted to the Commission in a filing within fifteen days of execution as required by Rule 4901:1-6-17 of the OAC. Southeast admits the allegations contained in the second, third and fourth sentences of Paragraph 2 of the Counterclaim.

3. Southeast admits the allegations of Paragraph 3 of the Counterclaim.

4. With respect to Paragraph 4 of the Counterclaim, Southeast admits that the terms of the service agreements provided for automatic renewal at the same monthly recurring commitment level and term but denies that such a practice is just, reasonable or lawful; the contracts were never filed with the Commission at all, let alone within fifteen days of execution. An automatic five year renewal term in a service agreement/contract is inconsistent and contrary to the state telecommunications policy of promoting diversity and options in the supply of telecommunications services and equipment; recognizing the continuing emergence of a competitive telecommunications environment through flexible regulatory treatment of telecommunications services where appropriate; and not unduly favoring or giving an advantage to any provider and not unduly giving a disadvantage to any providers of competing and functionally equivalent services. See attached Section 4927.02(A)(6), (7), and (9), Revised Code.

5. Southeast admits the allegations contained in Paragraph 5 of the Counterclaim.

6. Southeast admits in Paragraph 6 of the Counterclaim that Mitel informed Southeast via a written letter on June 22, 2016 of certain alleged obligations but denies the obligation to pay \$587,906.30 in early termination charges is just, reasonable or lawful.

7. With respect to the allegations contained in Paragraph 7 of the Counterclaim, Southeast admits that to the extent Mitel had any alleged obligations under the service agreements since June 22, 2016, it performed them, but denies that Mitel is entitled to any further payment.

8. With respect to the allegations contained in Paragraph 8 of the Counterclaim, Southeast denies that it failed to provide any instructions to Mitel regarding auto-renewal or cancellation of the circuits identified in Counts V through VII before said circuits were auto-renewed. Southeast also denies that it has failed to pay for any continued service. Southeast also denies that any early termination fees associated with the accounts that were auto-renewed are just, reasonable and lawful.

9. With respect to the allegation contained in Paragraph 9 of the Counterclaim, Southeast incorporates and restates the allegations in Paragraphs 1-8 of its Response to the Counterclaim.

10. Southeast denies the allegations contained in Paragraph 10 of the Counterclaim.

11. With respect to Paragraph 11 of the Counterclaim, Southeast admits that Mitel has submitted three invoices and that Southeast has not paid any of the three invoices. Southeast further denies that it owes Mitel any amounts invoiced in August, October and November, 2016 and denies failing to instruct Mitel to replace or cancel its existing 3 MBPS circuit.

12. Southeast denies the allegations contained in Paragraph 12 of the Counterclaim.

DEFENSE TO COUNTERCLAIM

13. Southeast is neither a public utility, railroad, telephone company, commercial mobile radio service provider, competitive retail electric service provider or a competitive retail natural gas

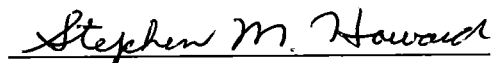
service provider; nor has Mitel alleged the same. This Commission is a creature of statute. It has statutory authority to regulate certain entities known as public utilities, railroads, telephone companies, commercial mobile radio service providers, competitive retail electric service providers or competitive retail natural gas service providers. It has no jurisdiction to entertain claims against entities such as Southeast which are not public utilities, railroads, telephone companies, commercial mobile radio service providers, competitive retail electric service providers, or competitive retail natural gas service provider.

14. Mitel Cloud Services, Inc., or its predecessor, unreasonably and unlawfully failed to comply with Rule 4901:1-6-17 of the Ohio Administrative Code which was in effect at the time the contracts were executed. Neither the Respondent nor its predecessor filed the service agreements/contracts or the required affidavits with the Commission, thereby depriving the Commission and its Staff of the opportunity to review and modify or suspend the contracts or to delete the automatic five-year renewal term provision.

PRAYER FOR RELIEF WITH RESPECT TO THE COUNTERCLAIM

WHEREFORE, the Commission should find that it has no jurisdiction over claims against Southeast, Inc. The Counterclaim should be dismissed in its entirety.

Respectfully submitted,

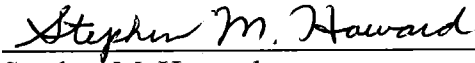


Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, OH 43215
614-464-5401
smhoward@vorys.com

Attorney for Southeast, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via overnight courier upon the following person this 9th day of May, 2017.


Stephen M. Howard

Barbara Bison Jacobson
The Bison Jacobson Firm, LLC
2199 Victory Parkway
Cincinnati, OH 45206

Baldwin's

OHIO MONTHLY RECORD

Rules filed for the
month are printed
in numerical order.
Rules are published
exactly as filed.

Emergency rules are
printed with a
note before the text
of the rule and are
effective for 90 days.

Pamphlet No. 3

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SEPTEMBER 2007

The commission may take whatever actions it deems appropriate with respect to CMRS providers as it relates to 9-1-1 and universal service funding, consistent with state and federal law and the Telecommunications Act of 1996.

HISTORY: 2007-08 OMR pam. #3 (R-E), eff. 9-18-07; 2002-03 OMR 2071 (E), eff. 4-8-03

RC 119.032 rule review date(s): 5-31-12; 5-31-07

Historical and Statutory Notes

Ed. Note: Effective 9-18-07, 4901:1-6-15 contains provisions of former 4901:1-6-16.

Cross References

RC 4901.13, Publication of rules governing proceedings

RC 4927.03, Exemptions or alternative regulatory requirements for competitive telephone companies

4901:1-6-16 Customer notice

(A) Customer notice is required for the following circumstances:

- (1) Change in a carrier's name.
- (2) Changes in terms and conditions of an existing service.
- (3) Increase in rate(s).
- (4) Expansion of local calling area.

(B) Notice shall be provided to affected end users either by bill insert, bill message, direct mail, or, if the customer consents, by electronic mail, or as otherwise agreed to within a LEC's contract with a nonresidential customer. Agreement by the customer to electronic billing satisfies customer consent requirements with respect to customer notice that would otherwise be provided as part of the customers' regular billing. Notice shall be provided to the chief of telecommunications of the utilities department and the chief of the reliability and service analysis division of the service monitoring and enforcement department no later than the date it is provided to customers. All notices sent to end user customers must include:

- (1) For customer inquiries, company's customer service toll-free telephone number and web site (if web site exists).
- (2) Name of service offering being changed.
- (3) Effective date of change.
- (C) Notices for rate or service changes, where applicable, must contain in addition to paragraph (B) above:
 - (1) Current rate.
 - (2) New rate.
 - (3) Distinction of rate increase between residential and nonresidential customers (if the rate change is different for the two classes).
 - (4) Description of service terms if they change.
 - (5) For self-complaint (SLF) applications, a competitive local exchange carrier (CLEC) shall also

include language stating that the increase is pending commission approval and that affected customers have a right to file an objection with the commission within fifteen days of the filing of the SLF application.

(6) For change in operation applications filed pursuant to rule 4901:1-6-14 of the Administrative Code, the customer notice must explain how the customer will be directly impacted by the application and what customer action, if any, is necessary as a result of such application.

(D) All customer notices must be sent to affected customers at least fifteen days prior to filing the application or a zero-day notice with the commission. Applicants must include with the application or notice, at the time of filing, the actual customer notice and a notarized affidavit verifying that this customer notice has been provided to affected customers. The time frames provided pursuant to this paragraph apply to all customer notices unless specific rules provide otherwise.

(E) In the event that the commission staff determines that a notice provided to customers is not consistent with commission rules, the commission staff may require the company to re-notice customers.

HISTORY: 2007-08 OMR pam. #3 (R-E), eff. 9-18-07; 2002-03 OMR 2071 (E), eff. 4-8-03

RC 119.032 rule review date(s): 5-31-12; 5-31-07

Historical and Statutory Notes

Ed. Note: Effective 9-18-07, 4901:1-6-16 contains provisions of former 4901:1-6-17; see 4901:1-6-15 for provisions of former 4901:1-6-16.

Cross References

RC 4901.13, Publication of rules governing proceedings

RC 4927.03, Exemptions or alternative regulatory requirements for competitive telephone companies

4901:1-6-17 Customer contracts

(A) A local exchange carrier may not enter into customer contracts for residential tier 1 services. All telephone companies are required to file nonresidential tier 1 and, with the exception of toll services, residential tier 2 customer contracts with the commission pursuant to division (E) of section 4905.31 of the Revised Code, and the terms of the contract shall be made available to all similarly situated customers on a nondiscriminatory basis:

(B) Each telephone company filing contracts will be assigned, upon filing the first contract on a yearly basis, a contract filing (CTR) docket number that will remain open and represent the exclusive repository for customer contract filings for that company for that year. A new CTR docket will be opened each year utilizing the same case number except for the year denoted. Each telephone company subject to this provision is required to file all customer contracts involving regulated services in their respective CTR docket no later than fifteen days after execution.

Adopted September 2007

(C) Customer contracts are effective upon execution and are subject to a zero-day filing in the company's CTR docket. Pursuant to rule 4901:1-6-07 of the Administrative Code, customer contracts are subject to suspension in the event that the commission determines that the contract may not be in the public interest or is in violation of commission rules or regulations.

(D) All docketed customer contracts must clearly identify the service or services to be provided by the contract and must disclose all terms and conditions of the service offering. Customer contracts must not reference some agreement or attachment which is not a part of the contract. Further, the case caption must clearly identify the service or services to be provided by the contract. Prior to docketing a copy of the executed customer contract, the telephone company may redact any customer identifying information such as the customer's name, the names of any employees of the customer, and the customer's business address, service location and telephone number pursuant to the provisions of case number 96-389-TP-AEC et. al. A telephone company must make a copy of the executed unredacted contract available to commission staff upon request.

(E) All contracts that do not follow tariff provisions in their entirety must disclose all terms and conditions of service and must be inclusive (for example, if the tariff does not contain termination liability, but the contract does, then the contract must be filed). Contracts that do follow tariff provisions in their entirety do not require separate contract filings.

(F) For companies that enter into multiple contracts of similar offerings to similarly situated customers, companies may employ an alternate method to meet the filing requirements set forth in paragraph (C) of this rule by filing a summary matrix of its contracts on a zero-day notice in its CTR docket. The summary matrix will contain the following information: the contract identification number; type of service; length of contract in months; and tariff reference, if applicable. Customer identifying information may be redacted from the summary matrix consistent with paragraph (D) of this rule. An unredacted version of the summary matrix shall be provided to the chief of the telecommunications division, utilities department.

(G) The contract must not foreclose the customer from disclosing the terms and conditions of the contract.

(H) All contract filings must contain a notarized affidavit attesting that the total price of the contract (including all contracted services whether regulated or unregulated) exceeds the total incremental cost of all regulated contracted services.

(I) Telephone companies are required to submit long run incremental service cost (LRSIC) studies to staff for any specific customer contract upon demand.

(J) The customer contract associated with a submitted LRSIC study is subject to suspension, after the fact, should the commission find the company is providing service below the total incremental cost of all regulated services in the contract.

(K) Commission authorization of contracts pursuant to the zero-day notice procedure does not constitute a determination of reasonableness. The filing of customer contracts is not intended to indicate that the commission has approved or sanctioned any terms or provisions contained therein. Signatories to such contracts shall be free to pursue whatever legal remedies they may have should a dispute arise.

HISTORY: 2007-08 OMR pam. #3 (R-E), eff. 9-18-07; 2002-03 OMR 2071 (E), eff. 4-8-03

RC 119.032 rule review date(s): 5-31-12; 5-31-07

Historical and Statutory Notes

Ed. Note: Effective 9-18-07, 4901:1-6-17 contains provisions of former 4901:1-6-19; see 4901:1-6-16 for provisions of former 4901:1-6-17.

Cross References

RC 4901.13, Publication of rules governing proceedings

RC 4927.03, Exemptions or alternative regulatory requirements for competitive telephone companies

4901:1-6-18 Alternative operator services including secured inmate facility services

(A) This rule applies to all telephone companies, including all incumbent local exchange carriers (ILEC) whether an ILEC is subject to a qualifying alternative regulation plan or not.

(B) Alternative operator service (AOS) and inmate operator service (IOS) are subject to the rate restrictions set forth in this rule, but otherwise shall be subject to the same regulatory treatment as applies to tier two services for purposes of this chapter.

(C) AOS parameters

(1) Except as exempted by paragraph (C)(2) of this rule, all AOS services shall be provided under the following parameters:

(a) The maximum amount of any operator assistance charge or call set up fee that may be applied by an AOS provider to any intrastate AOS call shall not exceed two dollars and seventy-five cents per call. The maximum rate of any usage sensitive charge that may be applied by an AOS provider to any intrastate AOS call shall not exceed forty-five cents per minute of use.

(b) Notice of any change in AOS rates, whether upward or downward, must be filed by the AOS provider with the commission in the form of a new pricing list, in accordance with commission-established tariff filing rules for tier two services.

(c) Upon request of the end user or billed party, and at no additional charge, the AOS provider must quote the actual intrastate price list rates for all

4927.02 State policy.

(A) It is the policy of this state to:

- (1) Ensure the availability of adequate basic local exchange service or voice service to citizens throughout the state;
- (2) Provide incentives for competing providers of telecommunications service to provide advanced, high-quality telecommunications service to citizens throughout the state;
- (3) Rely primarily on market forces, where they exist, to maintain reasonable service levels for telecommunications services at reasonable rates;
- (4) Encourage innovation in the telecommunications industry and the deployment of advanced telecommunications services;
- (5) Create a regulatory climate that provides incentives to create and maintain high technology jobs for Ohioans;
- (6) Promote diversity and options in the supply of telecommunications services and equipment throughout the state;
- (7) Recognize the continuing emergence of a competitive telecommunications environment through flexible regulatory treatment of telecommunications services where appropriate;
- (8) Consider the regulatory treatment of competing and functionally equivalent services and, to the extent practicable, provide for equivalent regulation of all telephone companies and services;
- (9) Not unduly favor or advantage any provider and not unduly disadvantage providers of competing and functionally equivalent services; and
- (10) Protect the affordability of telephone service for low-income subscribers through the continuation of federal lifeline assistance programs.

(B) The public utilities commission shall consider the policy set forth in this section in carrying out this chapter.

Amended by 131st General Assembly File No. TBD, HB 64, §101.01, eff. 9/29/2015.

Amended by 128th General Assembly File No. 43, SB 162, §1, eff. 9/13/2010.

Effective Date: 03-17-1989; 11-04-2005

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

5/9/2017 3:49:25 PM

in

Case No(s). 16-2288-TP-CSS

Summary: Response Response to Counterclaim electronically filed by Mr. Stephen M Howard on behalf of Southeast, Inc.