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THOMPSON
HINE & FLORY LLP

Attorneys at Law

(614) 469-3246 • Thomas E. Lodge • tlodge@thf.com

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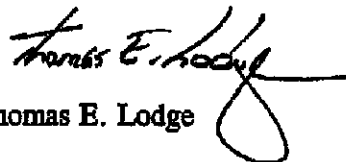
Re: In the Matter of the Complaint of Chet Simons, dba Starlink v. ALLTEL
Ohio, Inc. and The Western Reserve Telephone Company, Public Utilities
Commission of Ohio, Case No. 96-1405-TP-CSS

Dear Ms. Crockron:

Enclosed are an original and ten (10) copies of the Initial Post-Hearing Brief Of The
Western Reserve Telephone Company, to be filed in the above-referenced matter.

Thank you for your assistance. If you have any questions, please call.

Very truly yours,


Thomas E. Lodge

TEL/mjh

cc: Gretchen Petrucci, Attorney Examiner
Donald E. George, Esq.,
Stephen B. Rowell, Esq.

Enclosures

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint
of Chet Simons d/b/a Starlink

Complainant,

v.

ALLTEL Ohio, Inc.

and

The Western Reserve Telephone
Company,

Respondents.

Case No. 96-1405-TP-CSS

INITIAL POST-HEARING BRIEF
OF THE WESTERN RESERVE TELEPHONE COMPANY

THE WESTERN RESERVE TELEPHONE COMPANY, Respondent herein
("Western Reserve"), hereby submits its Initial Post-Hearing
Brief pursuant to the direction of the Attorney Examiner at the
hearing of this matter.

SUMMARY

1. This case presents a near carbon-copy of the facts determined in Ohio Direct Communications, Inc. v. ALLTEL Ohio, Inc. et al., Case No. 95-819-TP-CSS (the "Ohio Direct Case"). Like the Ohio Direct Case, this case was filed by an uncertificated common carrier that is operating in violation of Ohio law, in violation of this Commission's orders, and in violation of Western Reserve's tariffs. Each and every criterion identified by the Commission in the Ohio Direct Case to reach its result is present here. Accordingly, the Commission should authorize Western Reserve to terminate its service, or at least direct Starlink to obtain certification and order Starlink to pay compensation pursuant to Western Reserve's access tariffs.
2. The only distinction identified by Starlink to separate itself from the Ohio Direct Case is the allegation that Starlink operates as a "membership club", while Ohio

Direct does not. That distinction fails miserably. First, the Record shows that the only attribute of a "membership club" possessed by Starlink is the self-styled designation itself: Starlink calls itself a "membership club". Otherwise, Starlink operates just like any other common carrier, and its "members" are treated just like any other customers. Second, as Western Reserve has repeatedly asserted, whether or not Starlink is a "club" under Western Reserve's tariffs (which it is not), Starlink is a statutory "telephone company" and a statutory "public utility" that has not obtained the requisite authority from this Commission, and is therefore operating illegally. Its status as a "club" (or lack thereof) is utterly irrelevant to that result.

3. Likewise, Starlink failed to sustain its burden of proof with respect Starlink's service order for Peninsula. Western Reserve was not obligated to install that service, in fact no installation at that location was ever completed, and Starlink's use of Western Reserve's network at that location was unlawful. Thus, the fact that Starlink never received service at that location is neither unlawful nor unreasonable in any respect. Accordingly, that element of the complaint in this matter should be dismissed as well.
4. Finally, as respects the remaining allegations of the Complaint:
 - A. The notice provided to Starlink was well within the requirements of Western Reserve's tariff, which were approved in the Ohio Direct Case.
 - B. Starlink proved absolutely no discriminatory or anti-competitive conduct on the part of Western Reserve, either as respects providers identical to Starlink or any business remotely like it. To the contrary, the record shows that Western Reserve has done everything that could be expected (short of violating an order of this Commission) to treat all of its customers in a like manner.

STATEMENT OF FACTS

The Record of this case presents a clear picture of Starlink's operations and intentions, a clear picture of Western Reserve's response to them, and, indeed, a clear picture of

Starlink's misperceptions. For clarity, this Statement of Facts will first address the identity between Starlink's operations and the criteria established in the Ohio Direct Case, will then address Starlink's claims to be a "membership club", and will conclude by addressing the circumstances surrounding Starlink's service order for Peninsula.

Ohio Direct Criteria

Starlink is a business owned and operated by the Complainant in this case, Mr. Chat Simons. Tr. 102. Mr. Simons also operates a similar business in Wayne County (known as Wayne County Connection), in addition to his used-automobile and auto-parts businesses. Id. Mr. Simons' former wife is an employee of Ohio Direct, Tr. 103, and Mr. Simons met with Ohio Direct representatives before establishing Starlink. Id.

By the admission of its own witnesses, and setting aside its pointless characterization as a "membership club", Starlink operates just like Ohio Direct. The record could not be clearer:

- Starlink operates on a for-profit basis, Tr. 117;
- Starlink operates as a common carrier, in that it offers its services indiscriminately to the public at large, Tr. 44-45, 47, 62, 118-119;
- Starlink advertises its services in broadly-disseminated media, including radio, television, print, and telemarketing, Tr. 46, 63, 107;
- That advertising includes a telephone number to call for information and service activation, Tr. 64, 86;
- That advertising and responses to customers discloses the rates charged for the service, which are per-call charges in various packages, Tr. 64, 120-121;
- Technically, the service involves transmitting telephonic

messages, Tr. 127. This is accomplished by way of a personal computer acting as a switch to process calls, Tr. 60-61, 94, for the purpose of transferring calls from one exchange to another end destination that is not within the local calling area of the originating exchange, Tr. 93. From the standpoint of the calling customer, the process for dialing and completing calls is identical to that described in the Ohio Direct Case, Tr. 60.

"Membership Club"

Starlink describes itself publically as a "membership club", and includes that phrase in most of its promotional literature. However, Starlink evidences no other attributes of a "club" of any sort:

- Starlink has no meetings, Tr. 127.
- Starlink is owned by Mr. Simons, not by its "members", Tr. 115-116.
- Starlink is far from exclusive. Indeed, its services would be available to the entire populations of Cleveland and Akron were they interested. Tr. 118-119.
- Membership is not limited by age, gender, educational affiliation, or military service. Id.
- Members make no capital contribution to Starlink, beyond a "membership fee" that is often waived, Tr. 120.

In short, Starlink serves no purpose other than to provide telephone service to customers in exchange for money; it is a "membership club" in name only. It is indistinguishable from Ohio Direct, and this case is indistinguishable from the Ohio Direct Case.

The Peninsula Service Order

The only remaining evidence in this case relates to the service order placed by Mr. Jordan for service at 5872 Main Street, Peninsula, Ohio (hereinafter, "Peninsula"). Starlink has alleged in its complaint that service to Peninsula was wrongfully terminated by Western Reserve on December 12 or December 13, 1996. At hearing, Starlink attempted to demonstrate as much. Starlink failed.

The facts surrounding the Peninsula service order are largely undisputed:

- Mr. Jordan, using the name of another of Mr. Simons' businesses, "The Beeper Shop," placed an order for service at Peninsula in mid-November. Complainant Exhibit 8.
- On December 12, 1996, a line crew and a cable splicer (Mr. Grissom) began installation of ten (10) centrex lines at Peninsula. Tr. 136-136.
- In the basement at Peninsula, Mr. Grissom attached a terminal to a plywood backboard supplied by Mr. Jordan, and attached wires to that terminal that had been run from the street and into the basement. Tr. 136. Mr. Grissom also spliced the wires at the street that same day.
- Also on December 12, Mr. McGiles confirmed that Western Reserve was not obligated to complete the installation at Peninsula, and that Western Reserve in fact did not desire to do so. Accordingly, Mr. McGiles issued an order on that day to terminate the service order. Tr. 175.
- The next day, December 13, Western Reserve "unspliced" the wires at the street that had been spliced the day before. Tr. 176.
- No installation at Peninsula was ever completed, in part because Western Reserve never installed a Network Interface Device, or NID. Tr. 174. Such a device is a necessary element of any installation, as demonstrated by the NIDs installed at Starlink's Bainbridge, *id.* and Perry locations. Tr. 218.

The remaining evidence relating to Peninsula is of little help.

For example, Mr. Jordan and Ms. Kuzior claim that Mr. Grissom provided on instruction on use of a "311" code to identify line numbers, Tr. 15, 54, but Mr. Grissom denies this. Tr. 140. Mr. Jordan was able, through the use of alligator clips connected to the terminal, to identify active telephone lines and to place telephone calls for a brief while on December 13, Tr. 68-69; Mr. McGiles explained, however, how such a connection could be physically possible even though installation was incomplete. Respondent Exhibit B at 10-11.

Finally, the evidence demonstrates that Western Reserve, unlike Starlink, stayed above board as the Peninsula service order was processed. Western Reserve continuously advised Mr. Jordan of installation dates as they were rescheduled, and advised the Starlink business office when the service order was terminated on December 13; as Mr. Jordan testified, personnel at his office "got a call" on the morning of December 13, were told Western Reserve would be "turning those [lines] off", and were told that Western Reserve has "been trying to get a hold of" Mr. Jordan. Tr. 69.

In short, the Record shows that Western Reserve never installed service at Peninsula, never terminated service at Peninsula, and necessarily never wrongfully terminated service at Peninsula.

ARGUMENT

Summary — The evidence demonstrates that Starlink's operations are identical to Ohio Direct's in all material ways. Consequently, as it did in the Ohio Direct Case, the Commission should find that Starlink is violating Western Reserve's tariffs. The Commission should also authorize Western Reserve to terminate Starlink's service in accordance with those tariffs. If the Commission is unwilling to direct such a termination, the Commission should at least order Starlink, as it ordered Ohio Direct, to obtain certification as a common carrier and to pay Western Reserve appropriate compensation, as determined by its access tariff.

The Commission should also find that Starlink is in no sense a "membership club", and that, in any event, if Starlink were a "membership club" its operations (a) would still violate Western Reserve's tariffs, (b) would still merit disconnection pursuant to those tariffs, and (c) consistent with the Ohio Direct Case, would still qualify Starlink as a "telephone company" for which certification is required.

Finally, the Commission should find that the remaining allegations of the Complaint are without merit and should be dismissed. The Commission should find that Starlink has failed to prove any unlawful or unreasonable conduct on Western Reserve's part in connection with the service order for Peninsula, that Starlink has failed to prove any unreasonable discrimination on Western Reserve's part, and (as it has in the

past) that the notice of disconnection supplied to Starlink was sufficient and lawful under Ohio law.

These items will be addressed in turn.

1. Starlink's Operations Are Identical to Ohio Direct's In All Material Respects.

In the Ohio Direct Case, the Commission stated as follows:

ODC clearly holds itself out to its customers as providing a service, it advertises that service, it provides a telephone number for persons to call to obtain the service, it addresses the complaints and concerns of its customers, and it charges a fee and collects payment for the service it renders. . . The Commission concludes that ODC is clearly engaged in the business of transmitting telephonic messages.

The calls at issue in this case cannot be completed as local calls without the use of ODC's computer, which functions as a switching mechanism. . . ODC is clearly involved in the switching and transmission of calls in the state of Ohio.

Based on the evidence presented, the Commission concludes that ODC is a telephone company as defined by Section 4905.03 (A) (2).

Ohio Direct Case, Opinion and Order of May 22, 1997 at 22-23.

The evidence in this case parallels the foregoing findings precisely. Specifically:

<u>Ohio Direct Case</u>	<u>Starlink</u>
"ODC clearly holds itself out to its customers as providing a service".	Starlink's advertising, for print, broadcast and telemarketing, unquestionably meets this criterion. See Complainant Exhibits 1-4.
"[I]t advertises that service".	Starlink described its advertising in the Record at the earliest opportunity. Tr. 44. See Complainant Exhibits 1-4.

"[I]t provides a telephone number for persons to call to obtain the service".	Customers contact Starlink at a telephone number it advertises. <u>See</u> Complainant Exhibit 1: "TO JOIN STARLINK ALL YOU HAVE TO DO IS CALL THE MEMBER SERVICE OFFICE." <u>See also</u> Complainant Exhibit 2.
"[I]t addresses the complaints and concerns of its customers".	Starlink provides specific customer service numbers and instructions. <u>See</u> Complainant Exhibit 1: "CALL CUSTOMER SERVICE AT AKRON LOCAL NUMBER 330-773-8010 OR OUT OF THE AKRON LOCAL AREA CALL 1-800-652-5355. SUNDAYS OR NIGHTS CALL 330-250-0327 (PAGER)." <u>See</u> Complainant Exhibit 2: "CUSTOMER SERVICE #773-8010/773-8020".
"[I]t charges a fee and collects payment for the service it renders".	Starlink charges fees in packages. <u>See</u> Complainant Exhibit 1-4; Tr. 64, 120-121.
"ODC is clearly engaged in the business of transmitting telephonic messages."	In response to the question, "[Starlink's] in the business of transmitting telephonic messages"?, Mr. Simons, Starlink's owner, responded repetitively: "That is correct. That is correct". Tr. 127.
"The calls at issue in this case cannot be completed as local calls without the use of ODC's computer, which functions as a switching mechanism".	In response to the question, "And those calls cannot be completed as local calls without Starlink's equipment"?, Mr. Jordan, Starlink's chief technical employee, responded: "Without the computer, no, they couldn't be". Tr. 94.
"ODC is clearly involved in the switching and transmission of calls in the state of Ohio".	In response to the follow-up "And, therefore, the computer is involved in the transmission of calls from two points within the State of Ohio that are not within the local calling area of one another"?, Mr. Jordan replied, "Right". Tr. 95.

Unquestionably, then, Starlink's operations equate to those of Ohio Direct. This Commission, therefore, must reach the same conclusion reached in the Ohio Direct Case — that Starlink violates Western Reserve's tariffs, see Ohio Direct Case, Opinion

and Order of May 22, 1997 at 24. Indeed, given Mr. Jordan's creative deployment of alligator clips to attach to Western Reserve's network, Tr. 69, this case presents additional tariff violations that were not present in the Ohio Direct Case: that attachment not only violated §14.2.1 of Western Reserve's tariffs, but also arguably violated Revised Code §4931.28, which prohibits unauthorized wiretaps. In light of these tariff and statutory violations, Western Reserve should be authorized to terminate Starlink's service. See Tariffs attached to Respondent Exhibit B.

If the Commission is unwilling to authorize termination of Starlink's service, the Commission should nonetheless order, as it did in the Ohio Direct Case (1) that Starlink must obtain a certificate of public convenience and necessity, see Ohio Direct Case, Opinion and Order of May 22, 1997 at 28; and (2) that if Starlink seeks such a certificate, it must compensate Western Reserve in an appropriate manner, see id. at 24. Appropriate compensation, as Mr. McGiles testified, is established in and governed by Western Reserve's access tariff. Respondent Exhibit B at 6-7.

2. Starlink Is Not A "Membership Club". And If It Were The Results Would Be No Different.

Starlink's contends that it is a "membership club", and that such a status would somehow make a difference to this case. Yet, despite a years' worth of pleadings and argument in this case, Starlink has yet to establish either (a) that it is a "membership club" in anything other than name; or (b) that the issue is

meaningful in any respect. Starlink has proven nothing further at hearing.

As demonstrated above, the evidence shows that while Starlink calls itself a "membership club", admittedly on a consistent basis, saying it doesn't make it so. In fact, Starlink exhibits no other attributes of a "membership club" whatsoever. Its operations are those of any other business: it sells services to customers. Consequently, Starlink is not a "membership club."

Yet, even if Starlink were a club of some sort, that status would make no difference to the results here. In Ohio, any "telephone company" — whether operated on a for-profit basis or as a cooperative — is subject to Commission jurisdiction and is required to obtain a certificate of public convenience and necessity. Revised Code §§4905.02, 4905.03, 4905.24. Starlink is unquestionably a "telephone company" as established above. Consequently, Starlink's status as a "membership club" is immaterial to its regulatory obligations.

Starlink's status as a "membership club" is also immaterial to its tariff obligations. At hearing, Starlink attempted ad nauseam to establish that it was a "club" within the meaning of §2.2.1 of Western Reserve's tariff. Of course, it isn't the type of "club" described in that tariff — as Mr. McGiles established, that tariff has been applied consistently by Western Reserve only to permit incidental use of a telephone at a traditional "club's" location by its members, Respondent Exhibit B at 5-6. Yet,

again, whether or not Starlink is a "club" as the term is used in §2.2.1, Starlink nonetheless violates Western Reserve's tariffs through its improper use of the network and through its failure to pay appropriate compensation. See Respondent Exhibit B at 6-7. See also Ohio Direct Case, Opinion and Order of May 22, 1997 at 24: "ODC is violating the LECs general exchange tariffs by receiving service without paying appropriate compensation for use of the network". Thus, again, the result is the same whether or not Starlink is a "club": it is violating Western Reserve's tariffs, and Western Reserve is entitled to terminate service.

3. Starlink Failed To Prove That Western Reserve's Treatment of The Peninsula Service Order Was Unlawful Or Unreasonable.

With respect to Peninsula, the Record discloses (1) that Starlink ordered service in Peninsula under a false name, (2) that Western Reserve began installation of that service while it determined its regulatory obligations toward that service, (3) that Western Reserve concluded, correctly, that it was not required to supply the service as ordered, and (4) that Western Reserve terminated the installation before it was completed. Starlink proved no more at hearing; without more, Starlink has failed to make a case.

Western Reserve correctly concluded that it could not and would not install service for Starlink in Peninsula as ordered. As demonstrated above, Starlink is a common carrier and should obtain service through Western Reserve's access tariff, not the ALLTEL Digital Centrex tariff. Further, because Western Reserve

had consistently refused to install such service for other so-called "call-transfer" companies, it could not lawfully install it for Starlink without providing an unlawful preference. Consequently, it would have been unlawful and unreasonable for Western Reserve to complete the installation at Peninsula 1/.

In fact, however, Western Reserve did not complete the installation at Peninsula, as both Mr. McGiles and Mr. Grissom established. It is true that Mr Jordan, through the use of alligator clips and unlawful attachment to Western Reserve's network, was able to make calls from Peninsula for a short while. Nonetheless, the evidence plainly shows that the Peninsula installation lacked a NID and was incomplete; for that reason, the Peninsula installation was obviously different than the other Starlink installations in Bainbridge and Perry, and Mr. Jordan should have known as much if he didn't. See Tr. 174, 218. Consequently, because Western Reserve never installed service in Peninsula, Western Reserve never terminated service in Peninsula, and Starlink's complaint concerning Peninsula is without merit.

4. The Remainder of Starlink's Complaint is Without Merit.

The remaining allegations of Starlink's Complaint are makeweights derived from the complaint filed by Ohio Direct in 1995. They were not proven at hearing and should be dismissed.

Count II of Starlink's Complaint contends that the 5-day

1/ Western Reserve commenced the installation because operations personnel had not yet received final instructions, and wanted to preserve efficient options had they received instructions to go forward, Tr. 175.

termination notice provided by Western Reserve in December, 1996 was insufficient as a matter of law. The only evidence at hearing demonstrated that the notice was delivered December 18, 1996 and identified a termination date of December 27, 1997 (nine days, not five days, later). Tr. 168. The evidence also showed that Starlink received the notice with sufficient opportunity to do something about it: in fact, Messrs. Simons and McGiles discussed it on December 23, and the Complaint in this matter was filed in December 24. Regardless, in the Ohio Direct Case, this Commission concluded that Western Reserve's 5-day notice is adequate as a matter of law. Ohio Direct Case, Opinion and Order of May 22, 1997 at 22. The Commission must reinforce that conclusion and dismiss this Count of the Complaint.

Finally, Count Three of Starlink's Complaint alleges an unlawful preference by Western Reserve. No evidence of any such preference was presented at hearing^{2/}. To the contrary, Mr. McGiles testified, without rebuttal, that Western Reserve has treated all so-called "call-transfer" companies in the same way, terminating their service unless otherwise ordered by the Commission. Respondent Exhibit B at 4. This Count likewise must be dismissed.

^{2/} Mr. Jordan attempted to establish that Internet telephony is similar to Starlink's service. However, he also admitted that no such service was available within Western Reserve's service area or sanctioned by Western Reserve. Tr. 215. Necessarily, then, no discrimination was demonstrated.

CONCLUSION

For the foregoing reasons, the Commission should issue an order in this matter as follows:

1. Finding that Starlink is a telephone company and a public utility, subject to the jurisdiction of this Commission;
2. Finding that Starlink has violated and is violating Western Reserve's tariffs;
3. Authorizing Western Reserve to terminate all service to Starlink, and dissolving the Commission's Order of December 29, 1996;
4. Directing that if Starlink wishes to provide service in the State of Ohio, it must first seek and obtain a certificate of public convenience and necessity from this Commission;
5. Directing that if Starlink seeks and obtains such certification, the services and facilities provided by Western Reserve to call transfer companies (and in this instance specifically to Starlink), and the compensation to be paid to Western Reserve for such services and facilities, shall be determined by and shall be subject to Western Reserve's access tariff, in particular those services and facilities described as "Feature Group A" (but including all terms and conditions of such tariff), and further directing that any other services or facilities requested by Starlink from either Western Reserve for purposes of Starlink's services to its customers shall likewise be ordered, priced and provisioned pursuant to and in accordance with such access tariff; and

6. Finding that Starlink has failed to meet its burden of proof in this matter, and that its Complaint should therefore be dismissed.

Respectfully submitted,

THE WESTERN RESERVE TELEPHONE
COMPANY

By:


Thomas E. Lodge

THOMPSON HINE & FLORY LLP
One Columbus
10 West Broad Street, Suite 700
Columbus, Ohio 43215-3435
(614) 469-3200

Their Attorneys

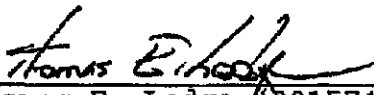
Of Counsel:

Stephen B. Rowell, Esq.
ALLTEL CORPORATION
One Allied Drive
Little Rock, Arkansas 72202
(501) 905-8000

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing, has been served upon the following parties listed below, by regular U.S. mail, postage prepaid, this 18th day of January, 1998.

Donald E. George, Esq.
503 Portage Lake Drive #8
Akron, Ohio 44319
Attorney for Complainant



Thomas E. Lodge (0015741)