

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT)
OF CHET SIMONS, DBA STARLINK)

Complainant)

-vs-

WESTERN RESERVE TELEPHONE CO.)

Respondent)

Case No. 96-1405-TP-CSS

COMPLAINANT'S REPLY TO RESPONDENT'S BRIEF FOR FINAL ARGUMENT

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STATEMENT OF THE CASE

This cause arises from the complaint of Chester Simons, dba Starlink against the Western Reserve Telephone Company for both the failure/refusal of Western Reserve Telephone Company to complete installation ordered by Complainant in November, 1996 for 5872 Main Street Peninsula, Ohio (See Complainant's Exhibits 8 and 12 as well as Complainant's Exhibits 15 through 23) and for a total termination of services to Complainant which took place December 27, 1996 (See Complainant's Exhibit 10). In its brief, Respondent does not challenge the facts as alleged by Complainant, but attempts to "justify" its actions by its claim that Complainant acts "illegally" as a "telephone company".

In addition to the issues and evidence presented to the Attorney-Examiner at the December 15, 1997 evidentiary hearing, the Attorney-Examiner requested that the parties answer the following questions in their briefs: 1) Does the PUCO decision in the case of In the Matter of the Complaint of Ohio Direct Communications v. Alltel, Ohio, Inc., et. al., Case No. 95-819-TP CSS (May 22, 1997) govern the issues presented in this case; 2) Is Starlink a "telephone company" as defined in R.C. 4905.03(A)(2). (Tr. P. 219, 220)

Chet Simons testified that Starlink began in June, 1996 as a membership club, similar to another of his businesses, Wayne County Connection. (Tr. P. 103) Wayne County Connection uses United Sprint without any problems in a manner the same as

Starlink uses Western Reserve Telephone Company in which Starlink pays for the lines that it and its members use. (Tr. P. 126)

It was Chet Simons' understanding and intent that Starlink operate under the Western Reserve Telephone company's tariffs (Tr. P. 122) as a membership club and that memberships were only available to those who could utilize the services being provided. (Tr. P. 118) Chet Simons' general manager, Tim Jordan noted that he turned down four to five persons per day who wanted to join the Starlink Membership Club, notwithstanding the telemarketing and other advertising that was going on to get new members (Tr. P. 45). Complainant's Exhibits 1 and 2 demonstrate the nature of the advertising of Complainant as a "membership club" something allowed under the Respondent's tariff and completely different from what Ohio Direct Communications was doing. (Tr. P. 105) In addition, Starlink was offering free membership and service to churches and schools so as to distinguish Starlink from Ohio Direct. (Tr. P. 104) Chet Simons testified that since Complainant's Exhibit 7, Western Reserve Telephone Company's tariff with the PUCO did not define "members of clubs" which was the exception to the requirement that the customer directly use the service which was being purchased from the company, he relied upon the dictionary definition of "clubs" contained in Complainant's Exhibit 24. Chet Simons also noted that Ohio Direct was using technology that Starlink did not use. (Tr. P. 126)

In its brief, Respondent attempts to challenge Complainant's claim to be a "membership club" by alleging that Complainant is

not allowed to operate "for profit" and that the members and not Complainant are allowed to own and operate the business. Examples of businesses legally operating as "clubs" are video stores such as Roadrunner Video, Video Tyme and Blockbuster Video and Walmart's "Sam's Club", a consumer goods store.

Dennis McGiles, Vice President of Operations for Respondent testified that even though all services for Starlink were ordered through "The Beeper Shop", another business owned by Chet Simons, he and Western Reserve Telephone Company connected the two entities for purposes of doing business with Starlink in mid-October, 1996. (Tr. P. 163) At the same time, Western Reserve Telephone Company prepared Complainant's Exhibit 14 to determine the nature of the business that was being conducted by Starlink. (Tr. P. 24). He acknowledged that Western Reserve Telephone Company received Complainant Exhibit 8, a service order for 5872 Main Street, Peninsula, Ohio, that the service order was processed and work orders issued as exemplified by Complainant Exhibit 12 (Tr. P. 25, 184) and that Western Reserve Telephone Company employees were dispatched to 5872 Main Street, Peninsula, Ohio, December 12, 1996 to install cable for service to be provided. However, he later decided to halt the installation to Peninsula and unssplice the cable that had been previously spliced. (Tr. P. 175-6). Tim Jordan noted that before Western Reserve Telephone Company had completely disconnected the planned service to Peninsula, Ohio, he was able to make both a regular call

December 13, 1996 and a collect call from 5872 Main Street, Peninsula, Ohio to Starlink's office as proven by Complainant's Exhibit 6 (Tr. P. 54) and that the number was billed from one of the telephone numbers which had been assigned to Starlink by Western Reserve Telephone Company. (Tr. P. 79). In its brief, Respondent attempts to justify its failure to complete installation by claiming that Complainant operated "illegally".

Following the decision by Western Reserve Telephone Company's Dennis McGiles to disconnect the wires spliced for service to Peninsula, Ohio, Mr. McGiles turned his attention to Starlink's operations from Bainbridge, Ohio sending a letter dated December 18, 1996, Complainant's Exhibit 10 to Chet Simons. (Tr. P. 28). Thereafter, he received Complainant's Exhibit 11, a letter directed to him from Complainant's legal counsel requesting him to refrain from terminating service (Tr. P. 29) and a copy of Complainant's complaint to the PUCO (Tr. P. 30, 186) and notwithstanding those documents ordered the termination of service to Complainant's Bainbridge office December 27, 1996. (Tr. P. 187). The PUCO ordered service restored to Starlink December 31, 1996 (Tr. P. 79; See Order of Attorney-Examiner of December 31, 1996).

Complainant's position centers over its right to conduct its business under Section S2.2.1(A) the tariffs of Western Reserve Telephone Company which Complainant claim have the "force of law". 78 Ohio Jurisprudence 3d Public Utilities Sec. 143. Respondent claims that Complainant is a "clone" of Ohio Direct

Communications and is operating in violation of both Ohio law and Respondent's tariff. Complainant believes that the evidence presented December 15, 1997 before the Attorney-Examiner demonstrates conclusively that Starlink IS NOT Ohio Direct and that the termination of service at Peninsula, Ohio on December 13, 1996 to Starlink and the subsequent cancellation of all services to Starlink December 27, 1996 violated Western Reserve Telephone Company's tariffs and call for a decision by the PUCO in favor of Starlink which has proven its case by more than a greater weight of the evidence.

SUMMARY OF ARGUMENT

- ARGUMENT 1: SIGNIFICANT DIFFERENCES EXIST BETWEEN THE EVIDENCE PRESENTED IN THIS CASE VERSES THE EVIDENCE PRESENTED IN OHIO DIRECT v. ALLTEL CASE NO. 95-819-TP-CSS SUCH THAT THE PUCO CAN RULE IN FAVOR OF COMPLAINANT AND BE CONSISTENT WITH THE OHIO DIRECT DECISION.
- ARGUMENT 2: THE NATURE OF STARLINK'S BUSINESS FOLLOWS THE DISTINCTION MADE BY THE OHIO GENERAL ASSEMBLY AND RECOGNIZED BY THE OHIO SUPREME COURT BETWEEN THE "COMMUNICATIONS BUSINESS" AND "TELEPHONE BUSINESS" SUCH THAT STARLINK SHOULD NOT BE DEEMED TO BE A "TELEPHONE COMPANY".
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ARGUMENT 1: SIGNIFICANT DIFFERENCES EXIST BETWEEN THE EVIDENCE PRESENTED IN THIS CASE VERSES THE EVIDENCE PRESENTED IN OHIO DIRECT v. ALLTEL CASE NO. 95-819-TP-CSS SUCH THAT THE PUCO CAN RULE IN FAVOR OF COMPLAINANT AND BE CONSISTENT WITH THE OHIO DIRECT DECISION.

When the Attorney-Examiner and the PUCO compare the evidence which was presented in the case of In the Matter of the Complaint of Ohio Direct Communications v. Alltel, Ohio, Inc., et. al., Case No. 95-819-TP-CSS significant differences between the business of Ohio Direct and Starlink far outweigh the similarities such that each case is entitled to a separate decision by the PUCO and that the PUCO can be consistent in its position by adopting Complainant's position in this case as being separate and distinct from Ohio Direct.

In his "Corrected Testimony", Respondent's Vice President of Operations, Dennis McGiles admits that Starlink employs different EAS routes and has a different "call-forwarding scheme" from Ohio Direct. (See Corrected Testimony P. 2) At the same time, a comparison of the evidence presented in the Ohio Direct case to the evidence presented to the Attorney-Examiner December 15, 1997 will show substantial differences between the two cases which allow the PUCO to adopt the position advocated by Complaint and still be consistent with the Ohio Direct ruling.

For example, in Ohio Direct, Alltel made a traffic study of 27,660 calls generated by Ohio Direct customers over a ten day period in September and October, 1995 and found an average of 12.8 calls per line per hour resulting in customer reports of

"circuit busy". (See Ohio Direct Decision P. 9) This finding contrasts to the admission by Dennis McGiles during his testimony that Western Reserve Telephone Company never did a study to determine how much of its EAS network was being used by Starlink or its members (Tr. P. 197) and his admissions that no customer of Western Reserve Telephone Company was denied service because of the Starlink usage of its lines (Tr. P. 39) and that there has been no harm to its network from Starlink since June, 1996 (Tr. P. 191). Dennis McGiles testimony as to "potential harm" to the network as being the basis for termination of services to Starlink. Western Reserve Telephone Company has failed to substantiate its fears of damage to its facilities and/or its ability to provide service to its customers in contrast to Alltel's evidence in the Ohio Direct case. Respondent fails to address this issue in its brief and instead relies upon its mere "claim" that Complainant is operating "illegally" without any proof whatsoever to support such claim.

Another major deviation from the Ohio Direct Case, comparing it to this case, is the fact that Ohio Direct was asking the PUCO to ignore the tariffs that it was being accused of violating, something that the PUCO would not do. (See Ohio Direct decision P. 17, 24). Complainant is not asking the PUCO to ignore Western Reserve Telephone Company's tariffs, but to RECOGNIZE Section S2.2.1(A) which specifically provides that "members of clubs" are a specific exception to the requirement that use of Western

Reserve Telephone Company's lines are limited to the customer. In the Ohio Direct decision, the PUCO noted that it looks at "...the relationship that the involved entity has with its customers...(Ohio Direct decision P. 22) In this case, Complainant has established with Complainant's Exhibits 1 and 2 as well as the testimonies of Tim Jordan and Chet Simons that Starlink was operated as a membership club. Dennis McGiles admitted that Ohio Direct did not operate as a "membership club" (Tr. P. 181) and stated that anyone could interpret the tariffs of Western Reserve Telephone Company (Tr. P. 35) and that the word "club" is not defined by the Western Reserve Telephone Company tariffs. Dennis McGiles has maintained that Starlink is not a "club" (See Corrected Testimony of Dennis McGiles). In its brief, Respondent once again alleged that Complainant was not a "club" but did not respond to Complainant's analysis regarding its tariffs.

However, the meaning and effect of a provision of a tariff is to be ascertained from the language employed and any ambiguity is to be construed in favor of the customer and against the utility company. Respondent failed to address that point in its brief.

Complainant's Exhibit 24 establishes the dictionary definition which Starlink used in its business operations and Dennis McGiles also admits that Western Reserve Telephone company's tariffs had exceptions to the requirements that the services purchased by the customer from Western Reserve Telephone Company be used solely by the customer (Tr. P. 40) and that the

call-forwarding being used by Starlink was not a per se violation of the tariffs. (Tr. P. 41).

Another differentiation between Ohio Direct's dealings with Alltel and Starlink's dealings with Western Reserve Telephone comes with Alltel's claim that Ohio Direct's use of Centrex lines was not contemplated and that Alltel had proven and quantified Ohio Direct's impact upon its EAS network. In this case, Starlink's order for service to Peninsula, Complainant's Exhibit 8 was specific as opposed to "not contemplated". At the same time, Western Reserve Telephone Company at the time of the Peninsula Order, Complainant's Exhibit 14 clearly demonstrates that Western Reserve Telephone Company knew the exact nature of Starlink's business and that no study was made or ordered to determine whether Starlink's business had any impact upon Western Reserve Telephone Company's EAS network (Tr. P. 197).

In Ohio Direct, the PUCO concluded that Ohio Direct was receiving service from Alltel without paying appropriate compensation for use of Alltel's network. (Ohio Direct decision P. 27-8) In this case, Dennis McGiles admitted that Starlink was billed on a monthly basis for the services that it was receiving and that Starlink paid its bills (Tr. P. 24-5). At the same time, Starlink General Manager Tim Jordan testified that Starlink pays eight cents per call to Ameritech for use of Ameritech's lines in the call transfer process. (Tr. P. 95) Therefore Starlink pays for the services that it receives for its members.

The PUCO compared the business of a company called "Telwest" with that of Ohio Direct in making its finding that Ohio Direct was a "telephone company". (See Ohio Direct decision P. 20) While Telwest resold local telephone service, generated its own dial tone and intended to operate as a full range telephone company, there was no evidence in the December 15, 1997 hearing - that Starlink did any of these. Complainant's Exhibits 1 and 2 demonstrated that Starlink had a limited area of service. This evidence is contrary to Respondent's assertion that Starlink made its services available to everyone, an assertion contradicted by the testimony of Tim Jordan that Starlink turned down applicants on a daily basis. Respondent presented no evidence to contradict Mr. Jordan's testimony on that point. Starlink General Manager Tim Jordan testified that the expansion in Peninsula, Ohio came as a consequence of Starlink's being unable to give service to potential Cleveland Members. (Tr. P. 96)

Another important distinction between Ohio Direct and Starlink is the finding by the PUCO that Ohio Direct was for hire to the general public. Starlink has established in Complainant's Exhibit 1 that Starlink is looking to only a certain aspect of the public. Starlink General Manager testified that four to five persons per day were turned down for membership because Starlink could not help them. (Tr. P. 45). Chet Simons noted that Starlink's request for services in Peninsula, Ohio was to expand its services into the Northfield, Ohio area which was not being serviced with the Bainbridge operation. (Tr. P. 108).

Respondent's brief fails to address the evidence presented by Complainant on this issue.

The importance of the differentiations between Ohio Direct and Starlink come from a basic difference in the way the business of each is conducted. Ohio Direct took the position that the tariffs of Alltel were antiquated and should be ignored in accordance with the statement of policy contained in R.C. 4927.02. Starlink, on the other hand believes that Schumaker v. Ohio Bell Telephone Company, 66 Ohio Law Abs. 213 (Cuyahoga County, 1953) that tariffs filed with the PUCO have the force of law is still the law of the state of Ohio. The question in this case becomes one of interpreting the tariffs of the Western Reserve Telephone Company and in particular Section S2.2.1(A) which excludes "members of clubs" from the tariff requirements that the customer be the only party permitted to use the services which are being provided by Western Reserve Telephone Company. Western Reserve Telephone Company believes that it had the right to terminate service to Starlink claiming that Starlink's use of the services purchased from Western Reserve Telephone Company violated its tariffs. Building Industries Exhibit, Inc. v. PUCO, 150 Ohio St. 251 (1948). Starlink has demonstrated that its business was conducted within the tariff of Western Reserve Telephone Company so as to make the disconnection of service a violation of its tariffs by Respondent.

Finally, the PUCO ruled in Ohio Direct offered no proof of

services similar to that being provided by Ohio Direct which were not being regulated by the PUCO or how such services interconnected or operated. (See Ohio Direct decision P. 16). Starlink offered Complainant's Exhibit 13 to show how the Internet offered services similar to that being offered by Starlink so as to demonstrate that Starlink does not offer services which make it a "public utility" or a "telephone company" as is the case with Ohio Direct Communications, Inc. Respondent failed to address that issue in its brief.

The above illustrations of differences between Starlink and Ohio Direct individually and collectively show that the business conducted by Starlink and Ohio Direct while appearing similar, are NOT THE SAME either for purposes of determining the rights of Starlink verses the rights of Ohio Direct. The PUCO decision declaring Ohio Direct to be a telephone company SHOULD NOT BE PER SE BINDING ON STARLINK since Starlink's business operations do not fall into the same category of concern as do the business operations of Ohio Direct. Ohio Direct tried to conduct its business virtually ignoring the tariffs of Alltel while Starlink conducts its business IN ACCORDANCE WITH THE TARIFFS OF WESTERN RESERVE TELEPHONE COMPANY. Starlink has not made the mistakes made by Ohio Direct and should not be forced to pay the same price that Ohio Direct must pay. Respondent's brief fails to address the differences shown by Complainant between its business operations and the operations of Ohio Direct such that Respondent's position should be rejected and a ruling made in

favor of Complainant which can be consistent with the PUCO's ruling in Ohio Direct.

One last important differentiation between Ohio Direct and Starlink was that Ohio Direct was NOT operating under the tariffs of Alltel Ohio, Inc. or Western Reserve Telephone Company so that the PUCO made NO DETERMINATION as to whether a switching of calls done in accordance with an existing tariff would or would not be subject to further PUCO regulation. That issue in and of itself precludes the PUCO decision in Ohio Direct from being applied retroactively to Complainant. Once again, Respondent ignored that issue in its brief taking the "ostrich" approach to the many issues raised by Complainant since Respondent has no justifiable rebuttal to Complainant's analysis.

ARGUMENT 2: THE NATURE OF STARLINK'S BUSINESS FOLLOWS THE DISTINCTION MADE BY THE OHIO GENERAL ASSEMBLY AND RECOGNIZED BY THE OHIO SUPREME COURT BETWEEN THE "COMMUNICATIONS BUSINESS" AND "TELEPHONE BUSINESS" SUCH THAT STARLINK SHOULD NOT BE DEEMED TO BE A "TELEPHONE COMPANY".

In Radio Corp. v. PUCO, 45 Ohio St. 2d 121, 127 (1976) the Ohio Supreme Court ruled that in 1949, the 98th General Assembly of Ohio recognized a "communications business" and distinguished it from the telephone business (123 Ohio Laws 444). The Ohio Supreme Court used that distinction to overrule the PUCO which had declared a "paging signal" to be a "telephone company".

The question of Starlink being a "telephone company" was not addressed by the testimony per se and is therefore made the subject of an Affidavit of Chester Simons, owner of Starlink. The Affidavit establishes the following points:

1. That he is the owner and operator of the Starlink Membership Club;
2. That the Starlink Membership Club owns no telephone lines;
3. That Starlink Membership Club does not own any equipment for the connection of telephone lines to telephone poles;
4. That Starlink Membership Club does not connect telephone lines to telephone poles in order to initiate service to its members;
5. That Starlink Membership Club uses the telephone lines of telephone companies such as Western Reserve Telephone Company and Ameritech in order to provide Starlink's service to its members and uses call forwarding features of the service which it obtains from its carriers such as Western Reserve Telephone Company and Ameritech and Starlink's computers in order to provide the service which Starlink provides to its members;
6. That Starlink Membership Club does not initiate any dial tone;
7. That Starlink Membership Club makes no repairs to any of the telephone EAS lines that it uses, nor does Starlink Membership Club have the resources or the technological knowledge to make such repairs;

8. That Affiant is not taxed by the State of Ohio as a public utility;

9. That Affiant does not purchase services from Ameritech or Western Reserve Telephone Company at a discount such that Starlink Membership Club should not be construed as a "reseller" of services;

Respondent failed to acknowledge or address the facts contained in the Affidavit in its brief and simply "concluded" that Complainant was a telephone company because Respondent said so. Respondent failed to refute any point raised by Complainant as to why Complainant WAS NOT A TELEPHONE COMPANY. Accordingly the PUCO should rule as a matter of law that Complainant is not a telephone company.

The testimony establishes the following additional points which must be taken into consideration in making a determination as to whether Starlink should or should not be declared to be a "telephone company" within the definition of R.C. 4905.03(A)(2):

1. Western Reserve Telephone company assigns phone numbers for its services; Starlink does not and cannot assign its own phone numbers (Tr. P. 79 - Testimony of Tim Jordan);

2. Starlink does not appeal to an "indefinite public" which would have a legal right to demand and receive services so as to make it a public utility 78 Ohio Jurisprudence 3d Public Utilities Sec. 3 as is noted by the chart in Complainant Exhibit #1 which indicates the exchanges which could benefit from

Starlink's services;

3. Starlink IS NOT involved in the splicing of cable to connect or disconnect telephone service; (See testimony of John Grissom)

4. Starlink employs different EAS routes and a different call forwarding scheme from Ohio Direct (See Corrected Testimony of Dennis McGiles P. 2)

5. Ohio Direct employs use of "hook-flashes" to accomplish the switching of calls (See Ohio Direct decision P.5) and there is no mention of the term "hook-flash" in the evidence presented to the Attorney-Examiner December 15, 1997;

6. Starlink is employing technology similar to that used on the Internet (Tr. P. 56 and Complainant's Exhibit 13);

In light of the above illustrations, Starlink has proven itself to be in the "communications business" and NOT the "telephone business" for purposes of R.C. 4905.03(A)(2). Respondent fails to address these issues and accordingly Complainant has proven its position and is entitled to a ruling in its favor by the Attorney-Examiner and the PUCO.

While Starlink may use some telephone technology, it has no telephone equipment of its own, nor does it control the use of the telephone equipment of its members, nor does it set up the wires needed in order to establish telephone communication for its members. A telephone company is basically defined by the business operations of Western Reserve Telephone Company. Such is the definition of "telephone company" which should be employed in this

case. A comparison between the business of Western Reserve Telephone Company and Starlink will establish that Starlink is literally nothing in the telephone business compared to the services offered by Western Reserve Telephone Company.

ARGUMENT 3: COMPLAINANT EXHIBITS 8 AND 12 CLEARLY ESTABLISH THAT COMPLAINANT HAD ORDERED SERVICE FROM RESPONDENT FOR PENINSULA, OHIO AND THAT RESPONDENT FAILED TO COMPLETE THE SERVICE ORDER AND TERMINATED THE SMALL PORTION OF THE SERVICE ORDER WHICH HAD BEEN COMPLETED SO AS TO VIOLATE RESPONDENT'S OWN TARIFFS.

In Case No. 97-629-TP-CSS, In the Matter of the Complaint of Chester Simons, dba Starlink v. Communications Buying Group, the PUCO ruled that a public utility/telephone company has an obligation to honor requests for service made to it. In this case, Complainant Exhibit 8 clearly shows that Starlink ordered telephone service to be installed at 5872 Main Street, Peninsula, Ohio. Complainant's Exhibit 12 demonstrates that Western Reserve Telephone Company processed the order illustrated by Complainant Exhibit #8. In its brief, Respondent attempts to "justify" its actions by claiming that Complainant's business is "illegal". There has been no ruling or determination that Complainant is operating its business in violation of any law or regulation. Complainant has proven that it has been operating its business within the tariff of Respondent.

The Testimony of Joyce Kuzior (Tr. 12-18) together with the photographs comprising Complainant Exhibits 15 through 23 show

that Western Reserve Telephone Company did SOME work to splice cable so as to provide the service requested by Starlink. While the parties may disagree as to the degree of completion of the service, apparently there was enough service installed so that Tim Jorday could make a collect call as evidenced by Complainant's Exhibit 6. John Grissom of Western Reserve Telephone Company testified that he received a work order to splice cable into Western Reserve Telephone Company's main cable on Main Street in Peninsula, Ohio (Tr. P. 136) and testified that the wires pictured in Complainant Exhibits 15, 16, 17, 18, 19 and 20 were placed by Western Reserve Telephone Company employees to establish additional telephone service for 5872 Main Street, Peninsula, Ohio.

Western Reserve Telephone Company Vice President of Operations, Dennis McGiles admitted that he ordered the installation of service to 5872 Main Street, Peninsula, Ohio stopped December 12, 1996 (Tr. P. 175) and that he sent John Grissom back out December 13, 1996 to the Western Reserve Telephone Company Main Cable on Main Street, Peninsula, Ohio to - unsplice what he had previously spliced (Tr. 176). Since Western Reserve Telephone Company has been unable to demonstrate that it had the right to deny telephone service to Starlink under its tariffs, Western Reserve Telephone Company's refusal to COMPLETE the installation of service ordered in Complainant's Exhibit 8 constitutes a violation of its own tariffs to provide

service to its customers. Respondent had an obligation to provide the installation ordered by Complainant for Peninsula, Ohio. Respondent recognized that obligation by doing everything but completing the installation. However, it is said that "close" only counts in horseshoes and hand grenades and the failure by Respondent to complete the installation at Peninsula, Ohio requires a ruling in favor of Complainant by the Attorney-Examiner and the PUCO.

ARGUMENT 4: COMPLAINANT OPERATED ITS BUSINESS IN A MANNER CONSISTENT WITH RESPONDENT'S TARIFFS SUCH THAT RESPONDENT'S TERMINATION OF SERVICE TO COMPLAINANT DECEMBER 27, 1996 CONSTITUTED A VIOLATION OF RESPONDENT'S TARIFFS.

It is ironic that the position of Western Reserve Telephone Company in this case should shift 180 degrees from its position in Ohio Direct while attempting to persuade the PUCO to make the ruling in Ohio Direct applicable to Starlink. In the Ohio Direct case, Western Reserve Telephone Company and Alltel urged the PUCO to honor and not ignore their tariff provisions notwithstanding the complaints that Ohio Direct had regarding those tariff provisions. (Ohio Direct decision P. 17) The PUCO ruled that it would NOT OVERRIDE lawful tariffs of an LEC (Ohio Direct decision P. 24). In this case, Western Reserve Telephone Company's tariff provision at S2.2.1(A) allows "members of clubs" to be excepted from other tariff provisions which require that the customer directly use the service purchased from the company. That provision flies in the face of and contradicts the company's

position that Starlink is operating illegally and in violation of Western Reserve Telephone Company's tariff. In its brief, Respondent reasserts its position that Complainant is not a club ignoring both the testimony and the documentary proof submitted by Complainant. Respondent believes that its edicts outweigh evidence.

In his "Corrected Testimony", Dennis McGiles re-asserts Respondent position that Starlink is NOT a "club" for purposes of the tariff (See Corrected Testimony of Dennis D. McGiles P.6) and that the service from Western Reserve Telephone Company is intended only for the communications in which the customer has a direct interest and shall not be used for any purpose for which a payment shall be received from any other person. (Id at P. 5). In effect, Western Reserve Telephone Company is directing the PUCO to ignore Section S2.2.1(A) of its own tariffs because that section allows Starlink to operate its business as a membership club. Dennis McGiles acknowledged that the tariffs contain no definition of the term "...members of clubs..." (Tr. P. 31, 88) Nonetheless, it is his opinion that Starlink is not a membership club (Tr. P. 190) even though he acknowledges that anyone can interpret Western Reserve Telephone Company's tariff. (Tr. P. 35) Starlink meets the definition of "club" contained in Complainant Exhibit 24 which Complainant believes is the definition which should be adopted by the PUCO in examining and interpreting Section S2.2.1(A) of Western Reserve Telephone Company's tariffs

with the PUCO. Complainant contends that the tariffs should be interpreted from the language employed in the tariffs and that any ambiguity should be construed in favor of Starlink and against Western Reserve Telephone Company. 78 Ohio Jurisprudence 3d Public Utilities, Sec. 149. Complainant contends that the language in Section S2.2.1(A) of the Western Reserve Telephone Company tariffs is clear that "...members of clubs..." are excluded from the restriction that Western Reserve Telephone Company seeks to impose upon Starlink when it contends that Starlink is operating illegally, when, in fact, Starlink is operating within the provisions of Western Reserve Telephone Company's tariffs. Western Reserve Telephone Company successfully imposed the provisions of those tariffs against Ohio Direct and Western Reserve Telephone Company should likewise be bound by those tariffs in its dealings with Starlink.

At the same time, Western Reserve Telephone Company has always had the right to petition the PUCO if it wanted to "clarify" the rights of its customers or limit the application of certain language contained in its Tariffs. In Case No. 97-594-TP-ATA, the PUCO authorized Alltel, Inc., the parent company of Western Reserve Telephone Company, to revise its General Exchange Tariff by clarifying "...its termination liability language and the rates and conditions with its distance extension charge..." Western Reserve Telephone Company was authorized to do the same thing in Case No. 97-593-TP-ATA.

The evidence presented to the Attorney-Examiner on

December 15, 1997 proves conclusively that Western Reserve Telephone Company violated its own tariffs first by failing/refusing to complete the installation of service ordered for 5872 Main Street, Peninsula, Ohio as evidenced by Complainant Exhibits 8 and 12 and subsequently by terminating all service to Starlink in accordance with its letter to the owner of Starlink dated December 18, 1996 which is Complainant Exhibit 10. Such actions by Western Reserve Telephone Company constitute a violation of their tariffs and a ruling by the PUCO should come out in favor of Complainant whose complaints have been proven by the evidence. An examination of Respondent's brief shows that Respondent has failed to refute any of the points made by Complainant such that Complainant is entitled to a decision in its favor.

C O N C L U S I O N

Complainant both by the testimony presented at the December 15, 1997 hearing before the Attorney-Examiner as well as Complainant's Exhibits one through twenty-four has demonstrated significant differences between his business operations with Starlink and Ohio Direct such that a decision in favor of Complainant can be made consistent with the PUCO's decision in the Ohio Direct case. At the same time, Complainant has demonstrated that he is in the "communications business" as differentiated by the Ohio General Assembly in 1949 from the "telephone business" and that Complainant is NOT a telephone company and that

Complainant is already complying with the tariffs of Respondent such that Complainant need not be regulated further by the PUCO. Respondent's brief fails to refute the points which Complainant made differentiating Complainant from Ohio Direct and demonstrating that Complainant IS NOT a telephone company. Respondent believes that its edicts calling Complainant a telephone company and claiming that Complainant must file a certificate of need in order to continue its business are sufficient. Complainant has proven that it has operated within the tariff of Respondent and the Ohio Direct case did not address the issue of a call forwarding company operating within existing tariffs and its right to continue to do so.

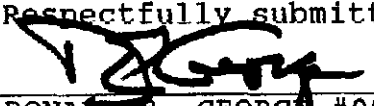
Complainant has proven through Complainant Exhibits 8 and 12 that Western Reserve Telephone Company agreed to provide service to Starlink at 5872 Main Street, Peninsula, Ohio, but failed to complete the installation such that Complainant could only make two completed calls before the installation was disassembled so as to violate Western Reserve Telephone Company tariffs. Respondent claims that because Complainant is operating "illegally" that is has no obligation to comply with its own contracts. The "illegality" of Complainant's business is in the imagination of Respondent as there has never been any determination by any governmental agency that Complainant has been operating his business in violation of any laws. Testimony from Respondent's own Dennis McGiles reveals that call forwarding is NOT PER SE in violation of its tariffs and that the term "...members of

clubs..." is not defined or limited by the tariff. Accordingly, Complainant has the right to conduct its business and Respondent is obligated to supply services.

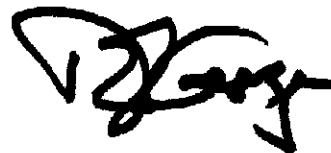
At the same time, Western Reserve Telephone Company violated its own tariffs with the discontinuance of service to Starlink which took place December 27, 1996 and continued until an order to reconnect service was obtained December 31, 1996. Complainant has met his burden of proof as to his complaints and seeks a ruling from the PUCO in his favor declaring Western Reserve Telephone Company to be in violation of its tariffs. Respondent's brief contends that it was within its right to terminate service, but the justification for its action comes only in the form of unwarranted allegations that Complainant is acting illegally without any foundation or proof to support such allegation.

In this case, there is no "middle ground". Either the PUCO must enforce the existing tariffs which Western Telephone Company has including Section S2.2.1(A) which Western Reserve Telephone Company seeks to ignor, or it must ignor the rights which Section S2.2.1(A) confers on Starlink allowing it to operate lawfully and within the tariffs of Western Reserve Telephone Company if it is to justify the termination of service to Starlink.

Respectfully submitted,


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PROOF OF SERVICE: I certify that a copy of the foregoing was sent to Thomas E. Lodge, Thompson Hine & Flory, counsel for Respondents, 10 West Broad Street #700, Columbus, OH 43215 by regular U. S. Mail this 30th day of January, 1998.

A handwritten signature in black ink, appearing to read "V. J. Gary", is written over the text.