

FILE

RECEIVED-DOCKETING DIV

PUBLIC UTILITIES COMMISSION OF OHIO **2013 JAN 30 PM 2: 22**

COVISTA COMMUNICATIONS, INC., Complainant

PUCO

VERSUS

VICTORY TELECOM, INC. AND XTENSION SERVICES, INC., Respondents

Case Number 12-2574-TP-CSS

MEMORANDUM IN OPPOSITION TO XTENSION SERVICES, INC.'S
MOTION TO DISMISS COMPLAINT

NOW COMES Covista Communications, Inc. ("Covista"), through undersigned counsel, which files this Opposition to the Motion to Dismiss brought by Xtension Services, Inc. ("Xtension"). Covista filed its Complaint with the Ohio Public Utilities Commission as this matter involves issues unique and important to the telecommunications industry. Specifically, Xtension is attempting to enforce a contract to which it was not a party. Secondly, Xtension is seeking to collect sums against Covista contrary to the rate deck provided to Covista by Victory Telecom, Inc., d/b/a Victory Communications ("Victory"). This Commission has jurisdiction over this matter as it involves disputes between two regulated telecommunications providers in the State of Ohio, as well as Victory, an un-certified telecommunications company doing business in Ohio contrary to law. Further, the amounts alleged to be owed by Covista are the result of an unfair and deceptive trade practice, insofar as Covista was provided a rate deck yet has been billed at higher rates. Finally, Xtension suggests that it, at all times, was the actual provider of services to Covista which, if true, constitutes a violation of the federal and state truth in billing statutes.

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business
Technician A. J. Date Processed 1/30/13

I. Factual Background

The underlying dispute in this matter is strictly between Victory and Covista. The relationship between the parties arises from a Master Service Agreement (“MSA”) between Victory and Covista dated March 3, 2008, attached hereto as Exhibit A. Xtension is attempting to convince this Commission, as it has attempted to convince the Court of Common Pleas, Franklin County, Ohio, that it is somehow a party to this MSA and entitled to bring claims against Covista for monies allegedly due pursuant to the MSA.

Xtension attempts to create this fiction by stating that “Victory Communications, in its capacity as agent for Xtension, caused Covista to execute a Master Service Agreement.” (See Xtension’s Memorandum in Support of Motion to Dismiss, p. 3). This Commission will see from a reading of the MSA, which is only three pages long, that Victory never identifies itself as an “agent for Xtension,” nor that telecommunication services would be “arranged by Xtension.” Xtension flatly misrepresents the language and meaning of the MSA to this Commission.

In support of its misrepresentation, Xtension points to a sentence in paragraph 1 of the MSA which states: “In addition to those terms and conditions, additional terms and conditions as detailed at www.xtensionservices.com may be associated with specific services.” No reasonable reading of this language can lead to the conclusion that Xtension was to be the provider of services and that Victory was operating only the capacity as an agent for Xtension. Further, the quoted language states that conditions found at the website “**may**” be associated with specific services. This permissive language does not incorporate any specific terms and conditions into the MSA, but merely provides that terms and conditions found at the website “**may** be associated with specific services.” Without further language identifying which services are being provided, and which terms and conditions from

the website would apply to those such services, the reference to the website adds no substantive meaning to the MSA.

The MSA is clear that Victory was to provide telecommunications services to its customer, Covista. Xtension should not be part of any dispute between the two arising from the MSA, as it was not a party to the MSA.

II. The Complaint States Reasonable Grounds

The Complaint, both the original Complaint and First Supplemental and Amending Complaint taken in their entirety, clearly sets forth the dispute between the companies, and the reasonable grounds therefor. As stated, Xtension is attempting to enforce a contract to which it was not a party. Xtension is seeking to collect sums against Covista contrary to the rate deck provided to Covista by Victory. Victory is operating as a telecommunications provider in Ohio without the requisite certification. Finally, as discussed more fully below, a clear claim has been articulated that Xtension is in violation of federal and state truth in billing requirements.

III. The Commission Enjoys Jurisdiction Over This Matter

Xtension suggests that the MSA is beyond the jurisdiction of the Commission because there was no duty to file the MSA with this Commission. This is a nonsensical argument. Ohio statutes specifically provide the jurisdiction of this Court to hear and act upon any disputes between telephone companies (*see* Ohio R.C. §4927.21), and specifically complaints that rates are unjust and unreasonable (*see* Ohio R.C. §4905.26). There is no limitation on the Commission's ability to entertain the complaint because of the fact that the contract from which the complaint arises is not filed with the Commission.

Xtension then makes the interesting statement that this dispute “involves only a trace of incidental Ohio intrastate interexchange traffic and therefore the MSA is simply too remote from any material issues over which this Commission has jurisdiction to warrant the Commission’s time and attention.” (Xtension’s Memorandum in Support of Motion to Dismiss, p. 5). This assertion is interesting because of the fact that Xtension chose to sue Covista, for claims arising out of the very same MSA, in the Court of Common Pleas, Franklin County, Ohio. Xtension suggests to this Commission that the matter is so far removed from the State of Ohio to constitute a waste of this Commission’s time and attention, while at the same time grants itself license to waste the time and attention of the Court of Common Pleas, Franklin County, Ohio. Xtension simply cannot argue both sides of the same issue – i.e., the material connection of this dispute to the State of Ohio – based upon its strategic preference. By virtue of the fact, alone, that Xtension saw fit to sue Covista in the State of Ohio, this Commission should exercise its authority in this dispute, involving two certified Ohio carriers, and Victory, operating in the state without certificate or registration as required by Ohio R.C. §4927.05.

IV. Truth In Billing Requirement

Xtension finally argues that there is no Complaint stated under the federal truth in billing requirements, never once mentioning O. A. C. 4901(1-6-17), containing Ohio’s version of the same statute. As clearly set forth in the original Complaint, it is Covista’s contention that the federal and state truth in billing requirements have not been met. The original MSA identifies Victory as the company which will provide international, domestic interstate and intrastate telecommunication services to Covista. Every bill came with the large emblem identifying Victory Communications, below which, in small print, it states “network provided by Xtension Services, Inc.” It is respectfully

submitted that language stating “network provided by” does not meet the truth in billing requirements by identifying the provider of services. It certainly is well known in the telecommunications industry that most local and long distance providers are reselling services purchased from a larger company. That the calls may be completed through the network, equipment or infrastructure of a larger company does not mean, legally, that the company on whose network the calls are routed is the company providing services to its customer. In this case, the MSA identifies Victory as the provider of services, and the bills indicate that they are coming from Victory. The entirety of the dispute in this matter is the result of the principal of Victory providing a rate deck sheet, which resulted in a number of calls by Covista customers being routed to Victory’s network via the least cost routing system. After the calls were completed, Covista was initially billed, and paid its bills, at the rates identified on the rate deck. Victory subsequently re-rated the same traffic, and sent a supplemental bill to Covista.

There is no logical reason why Covista would conclude that Xtension was its telecommunication service provider, when it at all times dealt with Victory, executed a contract with Victory, and received bills from Victory. The fact that the payment was to be directed to Xtension is of no consequence. It is standard practice in the industry that telecommunication services may be outsourced for billing purposes or may be billed by a local exchange provider. Identifying Xtension as the company to whom payment is directed in no way identifies to the customer that Xtension was actually the provider of telecommunication services.

V. Conclusion

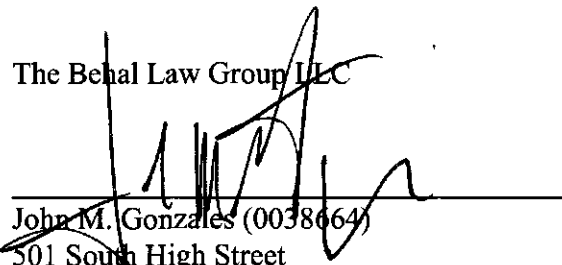
Obviously this case involves unique telecommunications issues, including the significance of rate decks provided by telecommunications providers, the operation of the least cost routing

system, the prevalence of resellers in both local and long distance markets, the sometimes convoluted relationships between various companies, etc. Xtension claims that this case is so remotely connected to Ohio as to not warrant this Commission's time and attention rings hollow in light of the fact that Xtension brought this same dispute to the state courts of Ohio. Finally, Victory was identified as the provider of services in the MSA, and some services were indeed provided in the State of Ohio, in violation of the requirement that Victory be certified to provide services in this state.

For all these reasons, the Motion to Dismiss must be denied.

Respectfully submitted,

The Behal Law Group LLC



John M. Gonzales (0038664)
501 South High Street
Columbus, Ohio 43215
T: (614) 643-5050
F: (614) 224-8708
Email: jgonzales@behallaw.com

Edward P. Gothard, Bar No.: 16775
NOWALSKY, BRONSTON & GOTHARD
A Professional Limited Liability Company
1420 Veterans Memorial Boulevard
Metairie, Louisiana 70005
Telephone: (504) 832-1984
Facsimile: (504) 831-0892
Email: egothard@nbglaw.com

Attorneys for Petitioner, Covista Communications,
Inc.