ORIGINAL

IN THE SUPREME COURT OF OHIO

12-0027

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| OHIOTELNET.COM, INC.<br><br>Appellant,<br><br>v.<br><br>The Public Utilities Commission of Ohio<br><br>and<br><br>Windstream Ohio, Inc.<br><br>Appellees. | : | Appeal from the Public Utilities Commission of Ohio<br><br>Public Utilities Commission of Ohio Case No. 09-515-TP-CSS |

# NOTICE OF APPEAL OF APPELLANT OHIOTELNET.COM, INC.


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ATTORNEY FOR APPELLEE
WINDSTREAM OHIO, INC.

Todd A. Snitchler, Chairman
The Public Utilities Commission of Ohio
180 E. Broad Street
Columbus, Ohio 43215

APPELLEE, THE PUBLIC UTILITIES
COMMISSION OF OHIO



FILED
JAN 06 2012
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellant OHIOTELNET.COM, INC.

Appellant OHIOTELNET.COM, INC., hereby gives notice of its appeal, pursuant to R.C. 4903.11 and 4903.13, to the Supreme Court of Ohio, from an Opinion and Order of The Public Utilities Commission of Ohio, entered September 20, 2011, and Entry on Rehearing, entered November 9, 2011, in PUCO Case No. 09-515-TP-CSS.

Appellant was and is a party of record in PUCO Case No. 09-515-TP-CSS, and timely filed its Application for Rehearing of the PUCO's September 20, 2011, Opinion and Order in accordance with R.C. 4903.10. Appellant's Application for Rehearing was denied with respect to the issues on appeal herein, by entry dated November 9, 2011.

The appellant complains and alleges that the PUCO's September 20, 2011, Opinion and Order and the PUCO's November 9, 2011, Entry on Rehearing in PUCO Case No. 09-515-TP-CSS are unlawful, unjust, and unreasonable in the following respects, as set forth in appellant's Application for Rehearing:

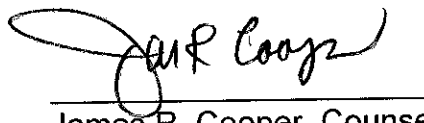
1. The denial of all billing credits sought by appellant was unlawful and unjust.
2. The PUCO did not perform a complete and thorough review of the evidence admitted into evidence by appellant.
3. The PUCO's September 20, 2011, Opinion and Order and the PUCO's November 9, 2011, Entry on Rehearing are against the manifest weight of the evidence.
4. The PUCO committed error in its finding that "(I)t would be not appropriate for the Commission to evaluate the validity of numerical data . . ." that was admitted into evidence. See Finding (6), Entry on

Rehearing filed November 9, 2011.

5. The PUCO committed error in its finding that appellant did not meet its burden of proof.

WHEREFORE, appellant respectfully submits that the PUCO's September 20, 2011, Opinion and Order and the PUCO's November 9, 2011, Entry on Rehearing in PUCO Case No. 09-515-TP-CSS are unlawful, unjust, and unreasonable, and should be reversed. The case should be remanded to the PUCO with instructions to correct the errors complained of herein.

Respectfully submitted,

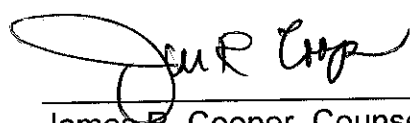


James R. Cooper, Counsel of Record

COUNSEL FOR APPELLANT,
OHIOTELNET.COM, INC.

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. Mail and by electronic mail transmission to all parties to the proceedings before the Public Utilities Commission and pursuant to Section 4303.13 of the Ohio Revised Code on January 6, 2012.



James R. Cooper, Counsel of Record

COUNSEL FOR APPELLANT,
OHIOTELNET.COM, INC.

## SERVICE LIST

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The Public Utilities Commission of Ohio
180 E. Broad Street
Columbus, Ohio 43215

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Bailey Cavalieri LLC
10 West Broad Street, Suite 2100
Columbus, Ohio 43215

## CERTIFICATE OF FILING

I certify that a Notice of Appeal has been filed with the docketing division of the Public Utilities Commission in accordance with Sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.

James R. Cooper, Counsel of Record

COUNSEL FOR APPELLANT,
OHIOTELNET.COM, INC.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

| | | |
|---|---|---|
| In the Matter of the Complaint of OHIOTELNET.COM, INC., | ) | |
| Complainant, | ) | |
| v. | ) | Case No. 09-515-TP-CSS |
| Windstream Ohio, Inc., | ) | |
| Respondent. | ) | |

ENTRY ON REHEARING

The Commission finds:

(1) On June 19, 2009, OHIOTELNET.COM, INC. (OHIOTELNET) filed a complaint against Windstream Ohio, Inc. (Windstream) in response to a payment demand from Windstream. In its complaint, OHIOTELNET alleged that Windstream overcharged for its services and submitted incorrect and inaccurate invoices.

(2) The Commission issued an opinion and order on September 20, 2011, in which it denied the complaint, concluding that OHIOTELNET failed to sustain its burden of proof.

(3) On October 20, 2011, OHIOTELNET filed an application for rehearing. OHIOTELNET asserts that the Commission erred by failing to conduct a complete and thorough review of the exhibits submitted by OHIOTELNET. OHIOTELNET points out that its witness provided testimony describing her method of accounting and the process of identifying credits due on a monthly basis. More specifically, OHIOTELNET states that its witness identified the credits due by examining each invoice and comparing the invoice with the customer's order.

OHIOTELNET acknowledges that the invoices were voluminous and were submitted to the Commission in their entirety in an electronic format. Pointing to language in the opinion and order, OHIOTELNET believes that the Commission did not conduct a thorough examination of its admittedly large volume of records.

(4) On October 28, 2011, Windstream filed a memorandum contra. Windstream argues that OHIOTELNET has presented no facts or arguments that the Commission has not already considered. Referring to OHIOTELNET's evidence consisting of 18,500 pages of exhibits covering 9,000 disputes, Windstream contends that the evidence, by itself, does not demonstrate the validity of any particular dispute. Instead, according to Windstream, the evidence merely shows the presence of a dispute and the possible appearance of uncredited disputed charges.

Beyond failing to prove anything, Windstream asserts other reasons why OHIOTELNET's billing disputes should be denied. Windstream points out that OHIOTELNET did not present evidence against Windstream's critiques. Specifically, Windstream highlights that OHIOTELNET did not present evidence that it has not been reimbursed for the tax portion of billing credits or that its disputes are not time-barred. In all, Windstream sees no basis for rehearing.

(5) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.

(6) The application for rehearing should be denied. OHIOTELNET has not raised any new facts or arguments that would give the Commission cause to alter the decision in this case. Moreover, OHIOTELNET has not shown through its application for rehearing that the Commission erred or that OHIOTELNET has carried its burden of proof. OHIOTELNET's witness testified that there are approximately 17,000 billing line items in dispute (Tr. 59). OHIOTELNET suggests that the Commission erred by failing to conduct a complete examination of each line item by employing the technique described by its witness. However, such an undertaking by the Commission would be tantamount to the Commission taking on the burden of proof that OHIOTELNET is obligated to carry. It would not be appropriate for the Commission to evaluate the validity of numerical data without the benefit of supporting arguments or cross-examination. OHIOTELNET cannot carry its burden of proof simply by presenting summary data with the expectation that the Commission would apply a suggested technique to verify the

validity of each line item. Moreover, as pointed out by Windstream and noted in the opinion and order, there are other bases for rejecting OHIOTELNET's claims. For example, OHIOTELNET did not refute Windstream's assertion that many of the disputes that OHIOTELNET raised were time barred. Finding no error in our decision, we conclude that OHIOTELNET failed to sustain its burden of proof and that the application for rehearing should be denied.

It is, therefore,

ORDERED, That OHIOTELNET's application for rehearing is denied in its entirety. It is, further,

ORDERED, That a copy of this entry on rehearing be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Paul A. Centolella

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

LDJ/vrm

Entered in the Journal
NOV 09 2011

Betty McCauley
Secretary

**Ohio Rules**

**RULES OF PRACTICE OF THE SUPREME COURT OF OHIO**

**§ 2. INSTITUTION OF APPEALS; NOTICE OF APPEAL.**

*As amended through April 1, 2011*

**Rule S.Ct. Prac. R. 2.3. Institution of Appeal from Administrative Agency**

**(A) Appeal from the Board of Tax Appeals**

(1) A notice of appeal from the Board of Tax Appeals shall be fled with the Supreme Court and the Board within thirty days from the date of the entry of the decision of the Board, include a copy of the decision being appealed, set forth the claimed errors, comply with the service requirements of S.Ct. Prac. R. 14.2(B)(2), and otherwise be in conformance with section 5717.04 of the Revised Code.

(2) If a party timely fles a notice of appeal in the Supreme Court, any other party may fle a notice of appeal pursuant to section 5717.04 of the Revised Code.

**(B) Appeal from the Public Utilities Commission**

(1) A notice of appeal from the Public Utilities Commission shall be fled with the Supreme Court and with the Commission within the time specifed in and in conformance with sections 4903.11 and 4903.13 of the Revised Code and sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.

(2) If a party fles a notice of appeal in the Supreme Court, any other party may fle a notice of cross- appeal pursuant to section 4903.13 of the Revised Code. The notice of cross-appeal shall be fled within the later of the time prescribed by section 4903.11 of the Revised Code or ten days after the frst notice of appeal was fled.

**(C) Appeal from the Power Siting Board**

A notice of appeal or cross-appeal from the Power Siting Board shall be fled with the Supreme Court and the Board in accordance with division (B) of this rule and pursuant to section 4906.12 of the Revised Code.

**History.** Effective Date: June 1, 1994

Amended Effective: April 1, 1996; April 1, 2000; June 1, 2000; July 1, 2004; August 1, 2004; January 1, 2008; January 1, 2010.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

| | | |
|---|---|---|
| In the Matter of the Complaint of OHIOTELNET.COM, INC., | ) | |
| Complainant, | ) | |
| v. | ) | Case No. 09-515-TP-CSS |
| Windstream Ohio, Inc., | ) | |
| Respondent. | ) | |

OPINION AND ORDER

The Commission, considering the complaint filed by OHIOTELNET.COM, Inc. and the evidence admitted at the hearing, hereby issues its Opinion and Order.

APPEARANCES:

Morrow, Gordon & Byrd, Ltd., by Mr. James R. Cooper and Mr. Matthew J. Kunsman, 33 West Main Street, P.O. Box 4190, Newark, Ohio 43058-4190, on behalf of OHIOTELNET.COM, Inc.

Bailey Cavalieri, LLC, by Mr. William A. Adams, 10 West Broad Street, Suite 2100, Columbus, Ohio 43215-3422, on behalf of Windstream Ohio, Inc.

OPINION:

I. HISTORY OF THE PROCEEDINGS

On June 19, 2009, OHIOTELNET.COM, INC. (OHIOTELNET) filed a complaint against Windstream Communications, Inc. (Windstream Communications) and Windstream Ohio, Inc. (Windstream) in response to a payment demand of $88,000.[1] In its complaint, OHIOTELNET claimed that Windstream overcharged for its services and submitted incorrect and inaccurate invoices. OHIOTELNET added that Windstream did not act in good faith in dealing with disputed items and that it did not provide timely billings. In addition to billing issues, OHIOTELNET asserted that Windstream did not

[1] On July 13, 2009, Windstream moved to dismiss Windstream Communications as a party, arguing that because it did not have an interconnection agreement with OHIOTELNET Windstream Communications did not have a real interest in this proceeding. By entry issued September 23, 2009, the Commission agreed and dismissed Windstream Communications as a party.

complete service and installation orders in a timely manner, thereby discriminating against OHIOTELNET in favor of its own customers. Faced with disconnection, OHIOTELNET filed concurrently with its complaint a motion for temporary restraining order. Windstream, in its July 13, 2009, memorandum contra, committed to maintaining OHIOTELNET's service during the pendency of the complaint. Windstream, however, urged the Commission to issue an order requiring OHIOTELNET to place disputed funds into an escrow account. Windstream requested an escrow amount of $70,666.84. To limit losses, and in an effort to secure payment of past due bills, Windstream placed an embargo on OHIOTELNET's account.

OHIOTELNET was incorporated in Ohio in 1999 and confines its services to the State of Ohio (OTN Ex. 76 at 6-7). OHIOTELNET describes itself as a competitive local exchange carrier (CLEC) and a reseller of multiple services, including unbundled network elements (UNEs), digital subscriber line (DSL) services, high speed Internet, and long distance telephone services to customers in Licking and surrounding counties in Ohio (OTN Ex. 76 at 7; Tr. 9). OHIOTELNET has a business relationship with Midwest Service Management, Inc., which provides all technical support for OHIOTELNET, including customer support, billing, troubleshooting, and installations (OTN Ex. 76 at 3). OHIOTELNET initiated service in June of 2002 (*Id.* at 8).

OHIOTELNET's relationship with Windstream began when OHIOTELNET entered into an interconnection agreement with Alltel Ohio, Inc. (Alltel). The Commission approved the interconnection agreement in Case No. 00-1601-TP-ARB. Alltel is now known as Windstream (Resp. Ex. 1 at 3). OHIOTELNET describes Windstream as an incumbent local exchange carrier (ILEC) from which it purchases UNEs and other resale services (OTN Ex. 76 at 10). Resale services include service installations, move orders, change orders, service suspensions, and service restorations (Tr. 11-12).

With its complaint, OHIOTELNET filed a motion for temporary restraining order seeking to prevent Windstream from terminating or interrupting OHIOTELNET's telecommunication services. In response to OHIOTELNET's motion for temporary restraining order, Windstream filed on July 8, 2009, a motion for additional time to respond with a request for expedited ruling. The attorney examiner granted Windstream's request for additional time by entry issued July 10, 2009. Windstream filed a memorandum contra OHIOTELNET's motion for temporary restraining order on July 13, 2009. Concurrently, Windstream filed an answer to the complaint and a motion to dismiss. In its motion to dismiss, Windstream requested that the Commission order OHIOTELNET to place $70,666.84 into an interest bearing escrow account.

Windstream pointed out in a letter filed September 9, 2009, that OHIOTELNET did not plead in opposition to the request for an escrow of funds. OHIOTELNET did not file a memorandum in opposition to Windstream's motion to dismiss until September 30, 2009.

Also on September 30, 2009, OHIOTELNET also included a reply in support of its motion for a temporary restraining order. In turn, on October 1, 2009, Windstream filed a reply in support of its motion to dismiss.

In a September 23, 2009, entry, the Commission ordered Windstream to maintain service to OHIOTELNET for the duration of the proceeding upon OHIOTELNET depositing funds into an escrow account. The Commission authorized Windstream to proceed with disconnection pursuant to Rule 4901:1-7-29, Ohio Administrative Code (O.A.C.), if OHIOTELNET failed to place $70,666.84 into an escrow account within 15 days.

In accordance with the Commission's September 23, 2009, entry and an attorney examiner entry issued October 6, 2009, the parties engaged in mediated discussions on October 15, 2009. On October 26, 2009, Windstream filed a letter in which it announced that the parties had reached an agreement to lift the embargo. In exchange for OHIOTELNET's payment of $8,393.14 and a deposit of equal amount, Windstream lifted its embargo (Resp. Ex. 2 at 14).

On October 2, 2009, OHIOTELNET filed a motion for partial relief from the Commission's September 23, 2009, entry. OHIOTELNET later supported its motion with an affidavit filed on October 9, 2009. OHIOTELNET argued that the escrow amount was too onerous and would lead to loss of business and eventually disconnection. In an October 19, 2009, memorandum contra, Windstream opposed OHIOTELNET's motion for partial relief. On October 20, 2009, OHIOTELNET filed a pleading in which it stated that its motion for partial relief may, if necessary, be considered as an application for rehearing. On October 28, 2009, the Commission issued an entry on rehearing. In its entry on rehearing, the Commission suspended the requirement that OHIOTELNET make an escrow deposit upon the condition that it negotiate in good faith with Windstream and comply with the terms referred to in Windstream's October 26, 2009, letter.

After a 30-day period of negotiation, Windstream filed a letter on November 20, 2009, notifying the Commission that the parties had reached an impasse. Windstream, therefore, requested that the Commission issue an order requiring OHIOTELNET to place funds into an escrow account. Windstream calculated a lower outstanding balance of $64,641.29. On December 4, 2009, OHIOTELNET responded with a letter requesting that the Commission uphold the temporary restraining order and relieve it of any obligation to place funds into escrow.

On January 27, 2010, the Commission issued an entry in which it ordered Windstream to maintain service to OHIOTELNET for the duration of the proceeding upon the condition that OHIOTELNET pay into an interest bearing escrow account the sum of $64,641.29 within 15 days. If OHIOTELNET failed to place funds into escrow, the

Commission authorized Windstream to initiate applicable notice and disconnection procedures.

OHIOTELNET filed an application for rehearing on February 26, 2010. In its application for rehearing, OHIOTELNET revealed that Windstream provided three distinct types of service to OHIOTELNET. OHIOTELNET asserted that the entry on rehearing was unreasonable and unlawful for failing to specify the type of service Windstream would be permitted to terminate if OHIOTELNET failed to place the requisite sum into escrow. OHIOTELNET further pointed out that the parties are only in dispute with respect to resale services. OHIOTELNET emphasized that billing for facilities-based collocation and DSL services were not in dispute. On March 5, 2010, Windstream filed a memorandum contra. Windstream agreed with OHIOTELNET that facilities-based collocation and DSL services should not be subject to disconnection. Windstream, however, warned that the termination of resale services may have an indirect impact upon some of OHIOTELNET's DSL customers. Windstream pointed out that OHIOTELNET's DSL customers who receive service over Windstream's resold lines would be disconnected. Though not allowed by the Commission's rules, OHIOTELNET filed a reply to Windstream's memorandum contra on March 17, 2010. OHIOTELNET agreed that the Commission's entry spoke only to the termination of resale services. Facilities-based collocation and digital subscriber lines should not be included. OHIOTELNET urged that those DSL customers served by resold Windstream lines should not be disconnected if they are current in their billings.

In a March 24, 2010, entry on rehearing, the Commission granted, in part, OHIOTELNET's application. The Commission clarified its entry. Noting that some DSL customers would be disconnected upon the termination of resale services, the Commission ordered OHIOTELNET to collaborate with the Commission's Staff to identify and provide reasonable notice to those customers. The Commission let stand Windstream's authority to disconnect services upon OHIOTELNET's failure to deposit $64,641.29 into an escrow account.

Because OHIOTELNET did not place funds into escrow, Windstream proceeded with disconnection by drafting a notice to OHIOTELNET's customers. After review and modification by Staff and OHIOTELNET, Windstream mailed the disconnection notice to OHIOTELNET's customers on April 8, 2010. The letter notified customers that their OHIOTELNET service would be disconnected on May 10, 2010, and that they would have to select another provider to avoid having their service interrupted. Windstream stated that it allowed the lines to stay in service until May 24, 2010, at the request of Staff to lessen the interruption of 911 service (Resp. Ex. 2 at 16-17; Resp. Br. 4-5).

To hear claims of overcharging, improper billing, and failure to act in good faith, the attorney examiner issued an entry on September 21, 2010, scheduling the complaint for a November 2, 2010, hearing.

On September 30, 2010, Windstream filed a pleading seeking an order from the Commission compelling OHIOTELNET to deposit $64,641.29 into escrow. The pleading also sought to have the complaint dismissed if OHIOTELNET failed to make the escrow deposit. Windstream requested an expedited ruling. OHIOTELNET filed a memorandum contra on October 12, 2010. OHIOTELNET revealed in its pleading that Windstream disconnected OHIOTELNET's resale services. OHIOTELNET opposed what it described as an attempt by Windstream to circumvent a hearing on the merits by seeking a summary dismissal. OHIOTELNET rejected the notion that an escrow deposit was a precondition for a hearing. To OHIOTELNET, the purpose of the escrow deposit was to secure continued service. The attorney examiner denied Windstream's motion by entry issued October 28, 2010.

For the hearing, Windstream filed testimony on October 21, 2010. OHIOTELNET did not file testimony. Subsequent to a prehearing conference, the attorney examiner canceled the hearing and issued an entry on November 3, 2010, directing OHIOTELNET to provide additional information and file testimony. To allow time to prepare and submit the information, the attorney examiner rescheduled the hearing to begin on December 7, 2010. In accordance with the November 3, 2010, entry, OHIOTELNET filed additional information on November 5, 2010, and prefiled its testimony on November 5 and 12, 2010.

On November 15, 2010, Windstream filed a pleading in which it requested an expedited ruling on its motion to strike portions of OHIOTELNET's prefiled testimony. Windstream included in its pleading a public offer of settlement. To end the proceeding, without any admission of fault, Windstream offered OHIOTELNET a bill credit of $76,840.28, representing the full amount of the last Windstream invoice issued to OHIOTELNET. Moreover, Windstream offered to lift the embargo on OHIOTELNET's orders. In exchange, Windstream requested that OHIOTELNET dismiss its complaint with prejudice. On November 24, 2010, OHIOTELNET filed a memorandum contra Windstream's motion to strike. OHIOTELNET did not respond to Windstream's settlement offer. On December 1, 2010, the attorney examiner issued a ruling granting and denying in part the motion to strike.

As rescheduled, the hearing took place on December 7 and 8, 2010. At the conclusion of the hearing, the attorney examiner issued a schedule for filing briefs. Pursuant to the schedule, OHIOTELNET filed a brief on January 21, 2011. Windstream filed a brief on February 22, 2011. OHIOTELNET filed a reply brief on March 7, 2011.

## II. APPLICABLE LAW

OHIOTELNET and Windstream are public utilities, as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of the Commission.

Section 4905.26, Revised Code, requires that the Commission set for hearing a complaint against a public utility whenever reasonable grounds appear that any rate charged or demanded is in any respect unjust, unreasonable, or in violation of law, or that any practice affecting or relating to any service furnished is unjust or unreasonable. The Commission also notes that the burden of proof in complaint proceedings is on the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St. 2d 189 (1996). Therefore, it is the responsibility of the complainant to present evidence in support of the allegations made in a complaint.

## III. SUMMARY OF THE TESTIMONY

### Mr. Thomas Cotton

Mr. Thomas Cotton appeared at the hearing and testified on behalf of OHIOTELNET. He is a 94 percent shareholder, president, and chief executive officer of OHIOTELNET. He sponsored OTN Ex. 76, which is his prefiled testimony, and Exhibits TC1 through TC5. In his testimony, he states that OHIOTELNET purchased services from Windstream totaling $1,556,931. Mr. Cotton stated that OHIOTELNET submitted billing disputes totaling $133,953. Of that amount, he testified that Windstream granted $57,691 in credits. The remaining $76,436.00 is in dispute (OTN Ex. 76 at 12). The disputes involve resale services and, in a few cases, UNEs (*Id.* at 13). Mr. Cotton described the disputes as involving improper charging, charging for services that did not exist, and delays in charging for periods of up to four months (Tr. 18). Mr. Cotton claimed that the delayed billings caused customers to switch to other providers, sometimes without paying the bill (OTN Ex. 76 at 13-14). Mr. Cotton cites one occasion where OHIOTELNET received four months of charges within three days (*Id.* at 38). OHIOTELNET also claimed that Windstream improperly billed for toll blocking and charges from third-party long distance carriers (Tr. 18-20). Feature services, such as Caller ID, were also the subject of disputes (Tr. 20). Starting from 2004, OHIOTELNET counted approximately 17,000 billing disputes requiring 2,726 hours of labor (OTN Ex. 76 at 14).

OHIOTELNET highlighted circumstances that led to or resulted from the billing disputes. One point of contention is OHIOTELNET's position that it should not have to pay tax on uncollectibles (OTN Ex. 76 at 41). In agreement with Windstream's witness, Mr. Cotton asserted that, since August 2008, OHIOTELNET has not paid an invoice in full. OHIOTELNET explains that every bill since August 2008 contained errors that required OHIOTELNET to lodge a dispute (*Id.* at 42). Although OHIOTELNET raised disputes

with each invoice, OHIOTELNET declares that it paid undisputed portions of the bill in full (*Id.* at 43). Nevertheless, OHIOTELNET states that Windstream placed embargoes on several occasions because of OHIOTELNET's failure to pay the entire bill (*Id.* at 43-44; Tr. 22, 23).

While under the embargoes, OHIOTELNET stated that Windstream did not perform the required duties under the interconnection agreement. According to OHIOTELNET, Windstream was obligated to do disconnections, restores, suspends, and change orders to remove features. OHIOTELNET pointed out that Windstream did not do restores and change orders. OHIOTELNET also submitted disputes for toll blocking that were requested but not provided (Tr. 18-19). Ultimately, OHIOTELNET claims that Windstream's failure to adhere to its obligations led to the loss of customers (OTN Ex. 76 at 45-46).

Mr. Cotton described the procedure for submitting credit requests to Windstream. He explained that if the time for correcting a service problem became extended, OHIOTELNET would request a billing credit (Tr. 11). If OHIOTELNET received a billing that it considered inaccurate, it would dispute the billing pursuant to the interconnection agreement (Tr. 13). Windstream would either accept or reject the dispute.

Ms. Annette Duboe

Ms. Annette Duboe appeared on behalf of OHIOTELNET and testified concerning billing disputes. As a manager at OHIOTELNET, she sponsored OTN Ex. 77. Ms. Duboe outlined how OHIOTELNET processes the bills that it receives from Windstream. As part of her duties, she reviews bills for accuracy. She reviews both paper and electronic bills. If, for example, an installation was not completed in a timely manner, she would determine that the customer is entitled to a credit pursuant to the minimum telephone service standards. Or, if charges were to appear where a block to prevent usage sensitive charges were in place, she would dispute the bill (OTN Ex. 77 at 5-6). She testified that, on a monthly basis, she would total the bill amounts, subtract the disputed amounts, and remit the difference (*Id.* at 6).

By Ms. Duboe's calculations, Windstream incorrectly billed OHIOTELNET a total amount of $133,953. Of that amount, $76,436 remains in dispute (OTN Ex. 77 at 22-23). She estimated that this amount summarizes 17,000 line items and 80 ASOC codes (Tr. 59, 60-61).[2] At the hearing, Ms. Duboe explained the process she used to verify Windstream's billings (Tr. 40-47, 49-55, 61-70). While disputing billings, Ms. Duboe contends that OHIOTELNET has paid all undisputed portions of its bills (OTN Ex. 77 at 24).

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2 The ASOC code is a service feature code. There is a code for every feature of service that a customer could use or order with their telephone service (Tr. 36; OHIOTELNET Ex. 77 at 4).

Ms. Duboe testified that she reviewed the monthly bills item-by-item for discrepancies. She would begin by reviewing the paper bills at face value. Then she would compare the electronic invoice with the orders placed in Windstream Express. She described Windstream Express as a web accessible software package that OHIOTELNET uses to enter orders, trouble tickets, and billing disputes (OTN Ex. 77 at 6-7). In reviewing invoices, she ensured that orders placed by OHIOTELNET customers were accurately reflected in Windstream's bills (*Id.* at 3-4). For example, if a customer ordered blocking, she would dispute any charges for calls that should have been blocked (*Id.*). Ms. Duboe noted in her review of invoices that Windstream did not work orders in a timely manner, that it did not program lines correctly, and that it would charge for services that were not ordered (*Id.* at 27). In further verifying the accuracy of invoices, she detected what she believes is an inordinate number of trouble tickets, estimating between five and ten percent of installs (*Id.* at 28-29). Ms. Duboe stated that she spent, on average, 25 hours each month reviewing invoices. As the number of disputes grew, so did the time she spent reviewing invoices (OTN Ex. 77 at 7, 25).

Ms. Duboe states that she tracked disputes manually and maintained a record of disputes using an Excel spreadsheet. The spreadsheet contains the history of disputes starting from April 2004 (OTN Ex. 77 at 8). Asked whether there is a time line for resolving disputes, Ms. Duboe answered that there is. She added that Windstream typically failed to resolve disputes within the time line and that six months was the average time for resolving disputes (*Id.* at 8-9). Explaining the dispute process, she stated that Windstream would respond to a dispute with a rejection, acceptance, or close out. Windstream closes out cases that are too long in dispute without resolution. If OHIOTELNET disagreed with Windstream's decision, Ms. Duboe stated that OHIOTELNET would either resubmit the dispute or invoke the informal dispute resolution process provided by the interconnection agreement (*Id.* at 9-10, OTN Ex. 78).

To establish that Windstream denied valid disputes, Ms. Duboe referred to invoices, identified specific disputes, and described how Windstream failed to resolve the disputes correctly (OTN Ex. 77 at 11-17; Exs. AD1-3.). Ms. Duboe complained that Windstream's process for reviewing disputes was not timely and that the company appeared to reject disputes arbitrarily (OTN Ex. 77 at 19). To support her claim of arbitrary decisions, she noted that Windstream would deny credits where in similar or identical circumstances it had provided credits (*Id.*). For OHIOTELNET's part, Ms. Duboe assured that OHIOTELNET complied with the interconnection agreement's one-year time frame for submitting disputes (*Id.* at 24).

Ms. Duboe expressed concerns over the propriety of third-party billing. According to Ms. Duboe, third-party billing involves many different service types (Tr. 39-40). She stated that, initially, she did not dispute third-party billing. Third-party billing became an

issue when she attempted to set up third-party billing for one of OHIOTELNET's customers. It was then that Windstream informed her that OHIOTELNET was not allowed to accept third-party billing. Because third-party bills had appeared on past Windstream invoices, Ms. Duboe began to request credits for third-party billings (Tr. 38-39). At the hearing, she noted the presence of third-party billing on the July 2007 and August 2007 invoices (Tr. 40-47).

Ms. Tana Henson

Ms. Tana Henson appeared and testified on behalf of Windstream. She sponsored Respondent's Exhibit 1, which is her prefiled testimony, along with Attachments TH1 through TH7. Ms. Henson is a staff manager of Windstream's Service Center. In that capacity, she is responsible for the Local Service Provider Access Center (LSPAC). The LSPAC consists of 48 to 58 employees (Tr. 95, 126). She oversees the day-to-day operations of local service requests and escalations. For the hearing, she addressed billing and provisioning issues (Tr. 95; Resp. Ex. 1 at 3).

Ms. Henson described how resale service orders are processed through the LSPAC. She stated that, pursuant to the interconnection agreement, all resale service requests are processed by a team of representatives in the LSPAC on a first-in, first-out basis. To emphasize parity, she noted that service requests are scheduled on the same calendar that is used for Windstream's retail orders. Orders receive due dates in parity with Windstream's own customers. She explained that the parties used the local service request (LSR), which she declared to be the industry accepted practice for submitting requests for service. She further explained that Windstream responds to LSRs from many other providers in a nondiscriminatory manner within 24 to 48 hours (Resp. Ex. 1 at 2-4).

Discussing invoices, Ms. Henson stated that Windstream invoiced OHIOTELNET on a monthly basis. Windstream mailed paper invoices by the fifth of each month. Windstream also provided electronic reports on or before the tenth of the month with details of OHIOTELNET's account. Ms. Henson noted that the electronic reports were not required by the interconnection agreement. Windstream provided them free of charge as a courtesy. Even though Windstream provided electronic reports for verifying bills, Ms. Henson noted that the paper invoices were sufficient for verifying bills (Resp. Ex. 1 at 4-5).

In response to OHIOTELNET's claim that Windstream has overcharged for services, Windstream admits that billing errors do sometimes occur. Windstream explains that errors arise because OHIOTELNET is due a discount on some services but not others. Another source of errors comes from Windstream's manual processing of orders and billings. Windstream further admitted that OHIOTELNET may have been billed for services that it did not request. Windstream points out that when OHIOTELNET submits an LSR to the LSPAC a customer service representative manually reviews and validates

the LSR. The representative also manually keys the request into Windstream's ordering and provisioning system. Human error may result in the inadvertent addition or omission of a service. Nevertheless, upon being advised of the error, Ms. Henson states that Windstream corrects the error or issues a credit (Resp. Ex. 1 at 5-6).

Ms. Henson discussed the handling of billing disputes submitted by OHIOTELNET. She testified that CLECs submit billing disputes through Windstream Express. Windstream Express also allows CLECs to track the status of billing disputes (Tr. 96). Upon receipt of a disputed charge, the LSPAC researches the claim and provides a response. If the dispute is found to be valid, Windstream issues a credit and closes the matter. If the dispute is found to be invalid, Windstream notifies the CLEC that the dispute is denied and the matter is closed. The charges then become due and payable. The CLEC may pursue the matter pursuant to the dispute resolution terms of the interconnection agreement (Tr. 96-100; Resp. Ex. 1 at 7).

Ms. Henson emphasized that Windstream researched the disputes lodged by OHIOTELNET, and, after determining that the charges were valid, denied the disputes. Given the choice of either paying the charges or seeking dispute resolution, Ms. Henson asserted that OHIOTELNET did neither (Resp. Ex. 1 at 7). She rejects the accusation that Windstream did not respond to OHIOTELNET's disputes (*Id.* at 7-8). To the contrary, she recalls that the LSPAC sought to respond to disputes within 90 days as provided by the interconnection agreement (Tr. 101; *Id.* at 9). In a billing dispute report, Ms. Henson showed that for the period January 1, 2010, through November 19, 2010, Windstream resolved OHIOTELNET's disputes, on average, in 33 days (Tr. 102, 104; Ex. TH-1). Of a total of $114,779.95 in disputed amounts, she reports that Windstream has issued credits in the amount of $56,941.89 (Tr. 102, 130; Ex. TH-1). Moreover, she contends that there have been many good faith efforts to resolve the disputes, involving countless hours and combing through years of records. She claimed that efforts to resolve disputes have been made difficult because OHIOTELNET failed to dispute or verify its bills in a timely manner (Resp. Ex. 1 at 7-8). She also rejects the claim that Windstream billed for services that were not provided to OHIOTELNET. In her review of escalations she did not find any such occurrences (Resp. Ex. 1 at 9). The most common disputes involved incorrect discounts, service order charges that were not applicable because of missed dates, late payment charges, usage sensitive charges, directory assistance charges, and toll charges (*Id.* at 7-9).

Explaining a typical dispute arising from a service charge, Ms. Henson gave, as an example, a situation where service was not provisioned within the prescribed time frame. In that case, OHIOTELNET would be entitled to a credit. Whether a credit is due is determined by a report that identifies customers with missed installation dates. LSPAC representatives would complete the necessary steps in Windstream's system to issue a service order charge credit to OHIOTELNET (Resp. Ex. 1 at 11).

On the issue of billing delays, Ms. Henson testified that Windstream typically bills a call on the next invoice following Windstream's receipt of the billable record. A delay may occur if the long distance carrier delays the transmittal of the toll record to Windstream, causing a consequential delay in Windstream billing OHIOTELNET for the call. She noted that Windstream encounters the same problem with its own customers (Resp. Ex. 1 at 11-12).

To substantiate her claim that Windstream acted in good faith to resolve disputes, Ms. Henson points out that Windstream often gave OHIOTELNET the benefit of the doubt when it was not able to determine quickly and easily whether credits had been applied. She contends that Windstream, in many instances, may have issued double credits in a show of good faith. In other instances, she states that Windstream offered credits against what it knew to be invalid claims solely to end disputes. Ms. Henson revealed that Windstream, as a further show of good faith, considered disputes older than 12 months. Under the interconnection agreement, Windstream is not obligated to accept disputes older than 12 months (Resp. Ex. 1 at 8).

Ms. Henson concluded that most of OHIOTELNET's disputes were not timely raised. For support, she points to Exhibit TH-3. Exhibit TH-3 is a spreadsheet of itemized disputes e-mailed to her from Ms. Duboe on April 8, 2009. Based on her review, Ms. Henson testified that in this 40-page document only two and a half pages contain disputes that fall within the 12-month time limitation (Tr. 110; Ex. TH-3).

As did Ms. Duboe, Ms. Henson also discussed third-party charges. She acknowledged that Windstream billed third-party charges. She explained that third-party charges sometimes include toll charges. The charges arise because Windstream has billing and collection agreements with certain carriers. When a charge appears, Windstream passes it to the customer or to the reseller. Ms. Henson does not recall that OHIOTELNET escalated third-party charges. She explained that billing delays arise because of late invoicing from the third-party carrier. Windstream, for its part, she stated, invoiced the third-party charge on the next available invoice. She noted that late third-party billing does not violate the interconnection agreement because the agreement allows billing back for a period of up to one year (Tr. 110-113, 134). On cross examination, Ms. Henson revealed that Windstream had granted disputes lodged by OHIOTELNET for third-party billing (Tr. 148-149). She explained that the dispute may have arisen because Windstream failed to provide a toll restrictor (Tr. 149).

In response to OHIOTELNET's Exhibit 1, Ms. Henson produced Exhibits TH-4 through TH-7 to challenge the accuracy of OHIOTELNET's records. In Exhibit TH-4, she offers proof that OHIOTELNET's claim for a $2 credit is invalid. Upon review of the dispute she determined that OHIOTELNET's Lifeline customer was not charged and,

therefore, no credit was due (Tr. 119-120). In Exhibit TH-5, she offers another example of an invalid claim asserted by OHIOTELNET. OHIOTELNET claimed that its customer was incorrectly charged for a call while subscribed to billed number screening service. Ms. Henson ultimately revealed that the customer was not charged for the call, and, therefore, OHIOTELNET was not entitled to the requested $2 credit (Tr. 121). She offered Exhibit TH-6 as another example where OHIOTELNET requested credits of 21 cents and 63 cents. Windstream denied the credits because they had already been disputed and granted (Tr. 122-124). Equally in Exhibit TH-7, Ms. Henson claimed that it shows where OHIOTELNET requested a credit after Windstream had granted a credit (Tr. 124-126). Ms. Henson believes that there are other instances where OHIOTELNET has sought duplicate credits (Tr. 125-126).

Upon denying a dispute, Ms. Henson stated that the LSPAC would notify OHIOTELNET by either e-mail or Windstream Express. She noted that OHIOTELNET did not consistently escalate disputes. In her description of the escalation process, Ms. Henson stated that CLECs can escalate to a team within the LSPAC. If the CLEC is not satisfied with the decision, the CLEC may escalate to a supervisor and finally to Ms. Henson (Tr. 105-106, 107, 108). Moreover, she noted that, generally, OHIOTELNET did not re-file, seek informal resolution, or take steps toward formal resolution. She added that OHIOTELNET generally escalated only after Windstream pursued remedies for past due amounts (Resp. Ex. 1 at 10). In sum, Ms. Henson calculates that OHIOTELNET owes Windstream at least $64,641.29 (*Id.* at 12).

Mr. Scott Terry

Mr. Scott Terry appeared at the hearing and sponsored Respondent's Exhibit 2, which is his prefiled testimony. With his testimony, he attached Exhibits ST1 through ST7. Mr. Terry is employed as a staff manager of interconnection services for Windstream Communications. At the outset, he explained the relationship between Windstream and OHIOTELNET. He noted that, with resale, there are two distinct relationships. One involves a wholesale service and billing arrangement between Windstream and OHIOTELNET. OHIOTELNET orders services from Windstream and is billed by Windstream. The other involves a retail service and billing arrangement between OHIOTELNET and its end user. OHIOTELNET takes orders from its customers, bills its customers, and gets paid by its customers (Resp. Ex. 2 at 3-4). In his explanation of the relationship between Windstream and OHIOTELNET, he emphasizes, contrary to assertions by OHIOTELNET, that OHIOTELNET is not an agent, partner, or affiliate of Windstream. Nor does Windstream have a relationship with OHIOTELNET's customers (*Id.* at 5).

At the hearing, Mr. Terry responded to OHIOTELNET's claim that OHIOTELNET should not have to pay taxes on uncollectible items. Windstream disagrees. Mr. Terry

voiced Windstream's position that it should not share in OHIOTELNET's losses because there is no agency relationship between the companies. Windstream is responsible for billing and collecting taxes from its customer, which, in this case, is OHIOTELNET. OHIOTELNET, in turn, is responsible for billing and collecting taxes from its end users (Tr. 155-156). Mr. Terry also explained how late payments and interest were calculated for disputed and undisputed amounts and how credits would affect interest (Tr. 158-159, 193-195).

Mr. Terry remarks in his testimony that OHIOTELNET's invoice payments have been inconsistent. Only partial payments have been made for each invoice at issue. For the period June 2002 through November 2007, OHIOTELNET made at least partial payments each month within 90 days of the invoice. Over time, payments extended to 170 days. Eventually, payment periods lengthened to the point where OHIOTELNET made only four payments toward the August 2008 to December 2009 invoices, finally reaching the point where OHIOTELNET stopped making payments altogether (Tr. 159; Resp. Ex. 2 at 6). The interconnection agreement initially provided that invoices be paid within 50 days. By later agreement, the period was extended to 80 days (Tr. 157; Resp. Ex. 2 at 6-7).

In his testimony, Mr. Terry gave an account of the events leading up to the filing of the complaint (Resp. Ex. 2 at 8). After negotiations, he states that Windstream ultimately wrote off undisputed and unpaid charges. Pursuant to an agreement reached during a November 12, 2009, conference call, Mr. Terry relates that the parties agreed on an outstanding balance of $64,641.29 (*Id.* at 15). When OHIOTELNET failed to place that amount in escrow pursuant to the Commission's January 27, 2010, entry, Windstream disconnected OHIOTELNET's resale services (*Id.* at 15-16). Mr. Terry notes that Windstream provided service to OHIOTELNET each month during the period November 2009 through May 2010. OHIOTELNET made no payments during this period. As compensation, Windstream applied OHIOTELNET's October 2009 security deposit to the outstanding balance. To avoid an increased contested balance, Mr. Terry points out that Windstream is not seeking to collect the balance due for this period. Windstream seeks to collect from OHIOTELNET the sum of $64,641.29 (*Id.* at 18-19).

Mr. Terry noted that the sum of $64,641.29 represents billings for services rendered prior to January 2009. He clarified that Windstream is not seeking payment for the period January 2009 to the termination of resale service in 2010. Even though Windstream believes that OHIOTELNET owes for services rendered during this period, Windstream does not expect to be paid. Mr. Terry estimates that billings for the period November 2009 to May 2010 total approximately $20,000 (Tr. 178-179, 211). For the period January through October 2009, Mr. Terry testified that Windstream accepted OHIOTELNET's payment of $8,393.14 as satisfaction, writing off remaining unpaid amounts (Tr. 212; Resp. Ex. 2 at 14).

IV. BRIEFS

OHIOTELNET's post-hearing brief

In its brief, OHIOTELNET states that it has provided evidence that Windstream breached the terms of the interconnection agreement by placing an improper embargo on OHIOTELNET's orders, failing to provide billing credits, issuing untimely billings, and failing to negotiate disputed billings in good faith. OHIOTELNET points out that its record of the disputes is contained in a business record spreadsheet identified as Complainant's Exhibit 1.

OHIOTELNET takes issue with Windstream's characterization that OHIOTELNET agreed that it owes or had agreed to pay $64,641.29. As a correction, OHIOTELNET states that during a February 5, 2009, conference call, the parties agreed that $64,641.29 was the disputed amount (Comp. Br. 4).

OHIOTELNET states in its brief that it submitted each billing dispute and that it would submit the dispute again to Windstream's dispute process if a credit were not recognized on a subsequent invoice. OHIOTELNET would also resubmit a dispute if there were a delayed response from Windstream (Comp. Br. 4). Moreover, where Windstream determined that a credit was due, OHIOTELNET complains that it was economically harmed because Windstream did not reimburse the tax that accompanied the charge (Comp. Br. 4).

In its brief, OHIOTELNET takes issue with an embargo placed on its account by Windstream in April 2009 and a disconnection notice issued by Windstream to OHIOTELNET's customers in June 2009. OHIOTELNET contends that Windstream's actions were inappropriate because all undisputed charges had been paid. Also troubling to OHIOTELNET was that Windstream's representatives informed OHIOTELNET's customers that OHIOTELNET was "going out of business" (Comp. Br. 5).

In further criticizing the actions of Windstream, OHIOTELNET points to evidence that, in November 2009, Windstream refused to review requests for credit. To OHIOTELNET, this was a violation of the parties' interconnection agreement and showed a lack of good faith in resolving disputes (Comp. Br. 5). OHIOTELNET concludes by stating that it has put forth evidence showing that Windstream breached the interconnection agreement, placed an improper embargo on its account, and failed to provide billing credits. As a result, OHIOTELNET has calculated that it is owed $76,436.00 in billing credits from Windstream (OTN Ex. 77 at 22; Comp. Br. 6).

Windstream's post-hearing brief

In its brief, Windstream phrases the issue as whether Windstream properly handled billing disputes and whether Windstream's actions concerning the disputes were lawful. Describing its dispute review process, Windstream points out that it submits monthly invoices to OHIOTELNET. Payment is to be received within 50 days, which Windstream states that it voluntarily lengthened to 80 days (Resp. Br. 1). Windstream states that billing disputes with OHIOTELNET have spanned several years. In processing the disputes, Windstream has at times granted them on the merits, denied them on the merits, or has granted them as a matter of good will (Resp. Br. 1). Windstream has calculated that, over the years, there have been approximately 1,398 billing disputes involving 15,484 detail items totalling $114,779.95 (*Id.*). According to Windstream's evidence, it granted credits totaling $56,941.89. Windstream notes that it granted credits beyond this amount as part of a previous settlement. To rebuff claims that Windstream has not acted in good faith, Windstream points out that it has attempted to use OHIOTELNET's figures wherever possible, has written off charges as gestures of good faith, has ceased charging late fees, and has often reduced its demands to merely undisputed amounts (Resp. Br. 1-2).

Windstream points to evidence showing that OHIOTELNET's untimely payments led to Windstream enforcing its rights under the interconnection agreement. Windstream states that until its November 2007 invoice, OHIOTELNET routinely made at least partial payments within 90 days. Payment intervals lengthened beginning with the December 2007 invoice. From August 2008 to December 2009, Windstream received four invoice payments (Resp. Br. 2). On January 6, 2009, Windstream took action by notifying OHIOTELNET that it would place an embargo if payment were not received by January 22, 2009. OHIOTELNET did not make a payment. Windstream responded by placing an embargo on OHIOTELNET's account. The parties conducted a conference call on February 5, 2009, to discuss settlement (Tr. 168-170). According to Windstream, to lift the embargo, OHIOTELNET agreed and paid $13,402.25 in undisputed amounts and a security deposit of $17,778.80 (Resp. Ex. 2 at 9; Resp. Br. 2-3). As agreed, Windstream lifted the embargo (Resp. Br. 2-3).

According to Windstream, OHIOTELNET's payment deficiencies continued after Windstream lifted the embargo. In response, Windstream notified OHIOTELNET by letter on April 3, 2009, that it would place an embargo on its account for failure to pay its January 2009 invoice. Upon receiving a check for the invoice, Windstream delayed the embargo pending verification of the check (Resp. Br. 3). Upon discovering that the check was dishonored for insufficient funds, Windstream implemented an embargo on April 29, 2009 (Resp. Ex. 2 at 10-11; Resp. Br. 3). Because OHIOTELNET did not pay its February 2009 invoice, Windstream placed a second embargo on OHIOTELNET's account on May 8, 2009 (Resp. Ex. 2 at 11; Resp. Br. 3). On May 15, 2009, OHIOTELNET wired funds to pay

the January 2009 invoice. Nevertheless, because the February invoice remained unpaid, Windstream maintained the May 8, 2009, embargo (Resp. Ex. 2 at 11; Resp. Br. 3).

Because the February 2009 invoice remained unpaid, Windstream, as its next step, notified OHIOTELNET on May 11, 2009, that if the outstanding balance remained unpaid after June 12, 2009, Windstream would initiate the disconnection of OHIOTELNET's wholesale services (Resp. Ex. 2 at 11; Resp. Br. 3). According to Windstream, OHIOTELNET did not make a payment. Windstream, therefore, drafted a disconnection notice for delivery to OHIOTELNET's customers. Upon sharing a draft of the notice with OHIOTELNET, OHIOTELNET, without objecting to the notice, responded on June 9, 2009, with a request to delay issuance of the notice for one week (Resp. Ex. 2 at 11-12; Resp. Br. 3). When OHIOTELNET filed a complaint at the Commission on June 19, 2009, Windstream halted its disconnection efforts (Resp. Ex. 2 at 12; Resp. Br. 3-4).

For its argument, Windstream claims that OHIOTELNET has failed to meet its burden of proof that its billing disputes are meritorious. In addition, Windstream contends that OHIOTELNET has failed to show that Windstream's embargoes and disconnections were unjustified and unlawful. Windstream argues that, even if OHIOTELNET had valid disputes concerning the individual billing line items, OHIOTELNET's failures to pay undisputed amounts justified Windstream's embargoes, disconnection notices, and the ultimate disconnection of service. To justify its embargo, Windstream refers to the parties' interconnection agreement. Under the express terms of the interconnection agreement, Windstream concludes that it had authority to impose the embargoes for OHIOTELNET's failure to pay the January 2009 and February 2009 invoices (Resp. Br. 6). Similarly, Windstream contends that its July 2009 letter to OHIOTELNET's customers was authorized by the interconnection agreement (Resp. Br. 6-7). Finally, Windstream believes there can be no question concerning the validity of the disconnection. The disconnection was sanctioned by the Commission, and OHIOTELNET approved the customer notification letter (Resp. Br. 7).

Windstream disputes OHIOTELNET's claim that it always paid undisputed amounts. Countering this assertion, Windstream points out that OHIOTELNET did not provide convincing evidence that it paid undisputed bills. To the contrary, Windstream points to evidence that OHIOTELNET did not pay undisputed bills. Windstream argues that OHIOTELNET would not have faced embargoes or disconnections if it had paid undisputed amounts. Furthermore, OHIOTELNET's attempt to pay by check from an account with insufficient funds and the subsequent wire transfer reveal efforts to pay undisputed amounts. Otherwise, the payments would have been in the ordinary course of business and would not have been the subject of this proceeding (Resp. Br. 7).

Windstream proclaims that OHIOTELNET has not proven the validity of its billing disputes. By Windstream's count, OHIOTELNET filed approximately 18,500 pages of

exhibits the day before the hearing. Notwithstanding the exhibits, Windstream contends that OHIOTELNET presented no evidence concerning services subscribed by or provided to its customers. Without this information, Windstream concludes that OHIOTELNET cannot carry its burden of proof. Windstream also concludes that OHIOTELNET's position on a large number of disputes is invalid or highly suspect because of OHIOTELNET's testimony (Resp. Br. 8).

Windstream believes that the core of the dispute with OHIOTELNET is whether Windstream's wholesale billing practices and methods of handling disputes are reasonable. Windstream contends that it presented evidence to show that its practices are reasonable. Windstream believes that it has supported its claim that it treated OHIOTELNET no differently than any other wholesale customer. As an example, Windstream states that it processed OHIOTELNET's billing disputes, on average, in 33 days (Resp. Br. 8). Windstream believes that it is important to note that it provided credits for more than half of OHIOTELNET's original disputes (Resp. Br. 8).

It is Windstream's position that OHIOTELNET failed in its method of proof in this proceeding. To substantiate its point, Windstream highlights the testimony of OHIOTELNET's witness Annette Duboe. She is the employee responsible for reviewing Windstream's invoices and for filing billing disputes. At the hearing, OHIOTELNET presented four examples of billing disputes. According to Windstream, credit for toll blocking charges for Lifeline customers is a type of dispute that represents 5,000 lines of OHIOTELNET's unresolved billing disputes. Calling into question OHIOTELNET's dispute of charges, Windstream highlighted a portion of Ms. Duboe's testimony to show the invalidity of one of the four example disputes. To make its point, Windstream points to a particular charge that OHIOTELNET admitted that it incorrectly disputed (Resp. Br. 9-10). From this example, Windstream concludes that OHIOTELNET is not infallible and that OHIOTELNET's evidence calls into question the validity of OHIOTELNET's more than 9,000 billing disputes (Resp. Br. 11).

Countering OHIOTELNET's evidence, Windstream emphasizes that it provided examples of OHIOTELNET seeking Lifeline toll blocking credits even though credits had already been granted (Resp. Br. 11). Moreover, Windstream points to evidence that OHIOTELNET filed duplicate disputes and where OHIOTELNET continued to seek credit for disputes that had already been granted (*Id.*). Windstream raises the point that OHIOTELNET has yet to remit payment for any disputed charge that Windstream has denied. It appears to Windstream that OHIOTELNET regards any charge that it disputes as valid (Resp. Br. 10).

In its brief, Windstream responds to OHIOTELNET's allegation that third-party billing is discriminatory. Windstream points out that third-party billing is permissible under the interconnection agreement. Because third-party billing appears on the bills of

its own customers, Windstream rejects the notion that it can be discriminatory. To avoid third-party charges, Windstream advised OHIOTELNET that it must request blockage of third-party services. Blockage is permitted under the interconnection agreement (Resp. Br. 11).

Windstream notes that OHIOTELNET, in its prefiled testimony, claims that Windstream attempted to collect taxes on OHIOTELNET's uncollectible billings. This makes no sense to Windstream because it is Windstream's understanding that OHIOTELNET has the burden of obtaining payment and taxes from its end users (Resp. Br. 11-12).

Windstream argues that most of OHIOTELNET's disputes are either time barred or settled. Windstream points out that it has an escalation process, of which OHIOTELNET is aware and has used, for denied disputes (Resp. Br. 12). According to Windstream, the escalation process is described in its wholesale customer system (*Id.*). Windstream states that OHIOTELNET chose instead to file new disputes every month without escalating denied disputes (*Id.*).

The interconnection agreement, Windstream points out, states that billing disputes must be filed within 12 months of the invoice due date. Windstream states that OHIOTELNET allowed most of its denied claims to lie dormant for years. Windstream regards the claims as stale. It was not until an April 2009 e-mail that Windstream became aware that OHIOTELNET wished to pursue thousands of claims that Windstream had denied. Windstream estimates that only two to two and a half pages of a 40-page spreadsheet contain disputes within the 12-month time frame. Without the 12-month limitation, Windstream argues, OHIOTELNET would be able to resurrect a denied dispute regardless of how old it is. Windstream highlights that its decision to review voluntarily claims beyond the 12-month deadline for settlement purposes does not waive its right to enforce the 12-month limit (Resp. Br. 12-13).

Windstream declares that disputes asserted by OHIOTELNET for the January 2009 through October 2009 time period have been settled and resolved (Resp. Br. 13). Windstream argues that OHIOTELNET should not be allowed to recover again for these disputes (*Id.*).

<u>OHIOTELNET's reply brief</u>

On March 7, 2011, OHIOTELNET filed a reply brief. In its reply brief, OHIOTELNET alleges that Windstream breached the interconnection agreement by placing an embargo on OHIOTELNET's orders and by failing to provide billing credits.

OHIOTELNET does not dispute that the interconnection agreement contains provisions for embargo and notice to customers of an impending disconnection. Instead, OHIOTELNET rejects Windstream's claim that OHIOTELNET failed to pay undisputed amounts. To the contrary, OHIOTELNET claims that Windstream improperly based its pursuit of remedies on disputed claims (Comp. Rep. Br. 2).

Although OHIOTELNET concedes that it presented one invalid example at the hearing, OHIOTELNET argues that it presented several other examples of valid requests for credit that were denied or rejected by Windstream (Comp. Rep. Br. 3). OHIOTELNET, in turn, questions the impact of Windstream's witness because she did not have first-hand knowledge of the invoices. In support of this position, OHIOTELNET points to testimony where Windstream's witness relies upon a team of 48 to 58 employees who review invoices (Comp. Rep. Br. 3).

OHIOTELNET rejects the notion that its claims are time barred or previously settled. Opposing Windstream's position that OHIOTELNET did not escalate its claims within the 12-month period, OHIOTELNET contends that the interconnection agreement has no provision or procedures for escalation (Comp. Rep. Br. 4). Taking into account all billing disputes, OHIOTELNET claims that it is owed $76,436.00 in billing credits (Comp. Rep. Br. 5).

## V. DISCUSSION AND CONCLUSIONS

As part of its evidence, OHIOTELNET submitted two discs containing 75 exhibits. Exhibits 2-75 are invoices issued by Windstream dating from April 2004 to June 2010 (Tr. 58). The invoices purportedly contain an itemization of all charges. By way of example, the August 2007 invoice contains 220 pages of billings for specific telephone numbers (Comp. Ex. 41). Following a steady decline in customers, the June 2010 invoice contains 20 pages (Comp. Ex. 75). Exhibit 1 is a spreadsheet that reduces each dispute to a line item. The 287-page spreadsheet references bills dating from May 23, 2003, to May 10, 2010. Each line of the spreadsheet contains the dispute number, the billing date, the end user telephone number, the ASOC code, the credit amount requested, the credit approved, whether credit was given for tax, the date closed, and the disputed amount (Tr. 35-37).

At the hearing, OHIOTELNET presented OTN Exhibits 1-75 to show where Windstream had denied valid disputes. It should be noted, however, that, under cross examination, Ms. Duboe admitted that OHIOTELNET inadvertently requested a credit of two dollars for a billed number screening charge, for which Windstream had already issued a credit (Tr. 56-57).

Ms. Henson provided testimony and exhibits to undermine the credibility of OHIOTELNET's account of disputes. To challenge OHIOTELNET's assertions, Ms.

Henson presented Exhibits TH-4 through TH-7, which are computer screen shots from Windstream Express. In Exhibit TH-4, Ms. Henson researched and confirmed Ms. Duboe's admission that OHIOTELNET requested credit for a charge that was not billed (Tr. 115-120; Exhibit TH-4). As another example, Ms. Henson discovered an instance where OHIOTELNET requested credit for a billed number screening charge of two dollars. Ms. Henson researched the bill and determined that Windstream had not billed for the charge. She concluded that Windstream rightfully denied the dispute (Tr. 120-121; Resp. Ex. TH-5). In Exhibit TH-6, Ms. Henson contested OHIOTELNET's requests for credit related to usage charges. Ms. Henson noted that the particular dispute involved two telephone numbers with charges of 21 cents and 63 cents. Her research disclosed that Windstream issued credits of 21 cents and 63 cents when OHIOTELNET disputed the charge. When OHIOTELNET resubmitted the dispute for the same amounts, Windstream denied the claim. She concluded that OHIOTELNET mistakenly sought duplicate credits (Tr. 121-122; Exhibit TH-6). In Exhibit TH-7, Ms. Henson shows that Windstream denied a credit for a local number portability surcharge because it had already granted a credit. Ms. Henson asserted that there are other instances where OHIOTELNET requested the same credit twice (Tr. 125-126).

To show valid disputes, OHIOTELNET presented Exhibits 1 through 75, consisting of thousands of line item billing charges. However, to undermine the accuracy of OHIOTELNET's accounts, Windstream presented examples of inaccuracies in OHIOTELNET's documentation. Taking into account an acknowledged error in OHIOTELNET's evidence juxtaposed with Windstream's unchallenged criticism, we are compelled to conclude that OHIOTELNET has failed to sustain the burden of proving that Windstream improperly denied disputes. More broadly, we cannot extrapolate from these limited examples that OHIOTELNET is entitled to $76,436.00 in billing credits from Windstream. Nor has OHIOTELNET presented sufficient evidence that it is entitled to some lesser amount.

OHIOTELNET contends that Windstream acted improperly by placing embargoes on its account. Windstream, on the other hand, claims that it placed embargoes on OHIOTELNET's account pursuant to the terms of the parties' interconnection agreement. Attachment 2 of the interconnection agreement is entitled "Resale." Section 5.2 contains the disconnection procedures. Specifically, Section 5.2.1 allows Windstream to suspend or terminate service for nonpayment. Furthermore, Section 5.2.3 provides that for delayed payment Windstream may refuse additional applications for service and refuse to complete pending orders (OTN Ex. 78).

Windstream points to two embargoes where it imposed an embargo for nonpayment. The first went into effect on April 29, 2009, for failure to pay the January 2009 invoice. The second went into effect on May 8, 2009, for failure to pay the February 2009 invoice. OHIOTELNET, on the other hand, revealed that Windstream imposed

multiple embargoes (OTN Ex. 76 at 43-44). The basis for each embargo was for "short pay," which OHIOTELNET's witness defined as payment of only the undisputed portion of a bill (*Id.* at 44). In disagreement with Windstream's witness, OHIOTELNET's witness claimed that OHIOTELNET always paid the undisputed portion of its bill. Nevertheless, she added that Windstream chose to place an embargo (OTN Ex. 77 at 24).

OHIOTELNET's witnesses merely offered conclusory statements to contend that Windstream placed embargoes after OHIOTELNET had paid all undisputed charges. OHIOTELNET, however, does not contest Windstream's statements supporting the April 29, 2009, and May 8, 2009, embargoes. Nor did OHIOTELNET dispute that it agreed and paid $13,402.25 in undisputed amounts and a security deposit of $17,778.80 to lift an embargo. Also uncontested is Windstream's claim that OHIOTELNET's check in April 2009 was dishonored for insufficient funds. This resulted in the nonpayment of undisputed charges. In response, Windstream imposed an embargo for nonpayment (Resp. Ex. 2 at 9-11). Most telling is OHIOTELNET failing to respond or provide evidence to counter Windstream's assertion that OHIOTELNET made only one payment toward 2009 invoices (Resp. Ex. 2 at 10). Given the evidence in this case, we cannot find that all of Windstream's invoices through 11 months of 2009 could be justifiably disputed. From the unchallenged evidence, we must conclude that OHIOTELNET has failed to demonstrate the impropriety of Windstream's embargoes.

OHIOTELNET rejects the notion that its disputes are time-barred (Comp. Br. 3). According to OHIOTELNET, each dispute listed in OTN Exhibit 1 was submitted within the 12-month period set forth in the interconnection agreement. Windstream disagrees. Windstream contends that OHIOTELNET allowed most of its denied claims to lie dormant for years. Windstream realized in April 2009 that OHIOTELNET wished to pursue thousands of claims that Windstream had denied.

Section 9.1.1 of the interconnection agreement is entitled "Billing Disputes." It provides that "[a] party must submit reasonable and valid billing disputes to the other Party within twelve (12) months from the due date...." OTN Exhibit 1 is a spreadsheet summary of billing disputes compiled by OHIOTELNET. Among other items of information, the spreadsheet provides the "billing date" and "date closed" for each dispute. Billing dates range from May 2003 to May 2010. Date closed ranges from August 2004 to March 2010. Similarly, Exhibit TH-3 lists disputes that show billing dates that range from November 2003 to January 2009. OHIOTELNET notified Windstream concerning these disputes by e-mail on April 8, 2009. From these date ranges, it appears, lacking any explanation, that many disputes are time barred pursuant to the agreement. In any event, OHIOTELNET has not explained why a significant number of billings would not be time barred pursuant to the interconnection agreement.

OHIOTELNET argues that it is entitled to the return of tax on credited charges. OHIOTELNET claims additional financial harm from Windstream because it failed to reimburse OHIOTELNET the tax portion of its payment (Comp. Br. 4). Windstream agreed that if OHIOTELNET is granted a credit, OHIOTELNET would be entitled to a refund of the tax. OHIOTELNET did not produce evidence, such as invoices, that substantiate its claim that Windstream did not return the tax portion of billing credits. Although it is true that OHIOTELNET did record in Exhibit 1 whether credit was given for tax, OHIOTELNET did not correlate this information with other substantiating evidence, such as invoices showing a credit without the corresponding tax reimbursement. Thus, we conclude that OHIOTELNET has not met its burden on this issue.

OHIOTELNET accused Windstream of failing to negotiate in good faith concerning disputed billings. In part, OHIOTELNET contends that Windstream refused to review requests for credit and has, otherwise, breached the interconnection agreement.

Windstream rebuffs all accusations that it did not act in good faith. Windstream's witness pointed to several good faith efforts to resolve the disputes. Ms. Henson noted that Windstream, as a show of good faith, may have issued double credits. Moreover, Ms. Henson testified that Windstream offered credits against what it knew to be invalid claims solely to end disputes. As a further showing of good faith, Ms. Henson pointed out that Windstream considered disputes older than 12 months.

Contrary to OHIOTELNET's assertions, we find evidence that Windstream has acted in good faith in negotiating disputes with OHIOTELNET. The evidence shows that Windstream spent a great deal of time and effort attempting to resolve the disputes raised by OHIOTELNET. During this proceeding, the parties made several attempts to resolve billing issues and entered into agreements. As an ultimate gesture of good faith, Windstream made a settlement offer to waive all amounts that it has claimed to be due, leaving OHIOTELNET free of all billing obligations. Taking these facts into consideration, we find no support for OHIOTELNET's claim that Windstream has not exercised good faith in its dealings with OHIOTELNET.

At the hearing, OHIOTELNET, through Mr. Cotton, complained that Windstream delayed billing. He noted that some billings were delayed for as long as four months. He added that the delay motivated some customers to switch providers.

Windstream explained that it attempts to bill a call on the next invoice following the receipt of the billable record. Windstream's witness, Ms. Henson, explained that a billing delay would occur if a long distance carrier delayed the transmittal of its toll record or if third-party carriers delayed their invoicing. Ms. Henson noted that Windstream encounters the same problem with its own customers. OHIOTELNET did not provide evidence to overcome Windstream's explanations for delayed billing. Consequently, we

cannot find that OHIOTELNET has shown that Windstream acted unreasonably or unlawfully because of delayed billing.

Overall, lacking evidence demonstrating that Windstream has violated any rule, regulation, law, or acted unjustly or unreasonably, the Commission finds that OHIOTELNET has failed to sustain its burden of proof. Accordingly, the complaint should be denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) On June 19, 2009, OHIOTELNET filed a complaint against Windstream alleging that Windstream had overcharged for telecommunication services, refused to issue proper credits for billing errors, and wrongfully imposed an embargo.

(2) With its complaint, OHIOTELNET filed a motion for temporary restraining order to prevent Windstream from disconnecting service.

(3) On July 13, 2009, Windstream filed an answer, a motion to dismiss, and a memorandum contra in response to OHIOTELNET's complaint and motion for temporary restraining order.

(4) A hearing in this matter was held on December 7 and 8, 2010. In accordance with the schedule established at the conclusion of the hearing, OHIOTELNET filed a post-hearing brief on January 21, 2011. Windstream filed a post-hearing brief on February 22, 2011. OHIOTELNET filed a reply brief on March 7, 2011.

(5) OHIOTELNET and Windstream are public utilities, as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of the Commission.

(6) In a complaint case, the burden of proof is on the complainant. *Grossman v. Public Utilities Commission*, 5 Ohio St. 2d 189 (1966).

(7) There is insufficient evidence to support a finding that Windstream's actions violated any tariff or state law, or that it acted unjustly or unreasonably or in violation of any rule, regulation, or law, or that any practice affecting or relating to any service furnished was unjust or unreasonable.

(8) Based on the record in this proceeding, OHIOTELNET has failed to sustain its burden of proof and the complaint should be denied.

ORDER:

It is, therefore,

ORDERED, That, based upon the findings and conclusions stated in this opinion and order, the complaint is denied. It is, further,

ORDERED, That a copy of this opinion and order be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Paul A. Centolella

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

LDJ/vrm

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Betty McCauley
Secretary