

ORIGINAL

In The
Supreme Court of Ohio

OHIOTELNET.COM, INC.

Appellant,

v.

The Public Utilities Commission of
Ohio

Appellee.

:
:
: Case No. 12-0027
:
: Appeal from the Public Utilities
: Commission of Ohio, *In the Matter*
: *of the Complaint of*
: *OHIOTELNET.COM, Inc. v.*
: *Windstream Ohio, Inc.*, Case No.
: 09-515-TP-CSS,

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SUPREME COURT OF OHIO

MERIT BRIEF
SUBMITTED ON BEHALF OF THE
PUBLIC UTILITIES COMMISSION OF OHIO

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PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

OHIOTELNET.COM, Inc. (Appellant) is asking the Court to review and weigh over 18,000 pages of exhibits because it disagrees with the Public Utilities Commission of Ohio's (Commission) decision. This request should be denied. This Court has held on numerous occasions that it will not second-guess the Commission on factual determinations and reweigh evidence already considered by the Commission. *Consumers' Counsel v. Pub. Util. Comm'n*, 114 Ohio St. 3d 340, 347, 872 N.E.2d 269, 276-277 (2007). The Commission admitted Appellant's voluminous exhibits into the record and considered the exhibits in its decision. The Commission also considered evidence that undermined the reliability of Appellant's exhibits. Based upon all the evidence, the Commission deter-

mined that Appellant failed to meet its burden of proof. This factual determination is supported by the record, is reasonable, and should be affirmed.

STATEMENT OF FACTS

Appellant is a competitive local exchange carrier (CLEC) and a reseller of various telecommunication services to retail customers. *In the Matter of the Complaint of OHIOTELNET.COM, Inc. v. Windstream Ohio, Inc.*, Case No. 09-515-TP-CSS (Opinion and Order) (September 20, 2011) (hereinafter “Opinion and Order”), Appellant’s App. at 8-31.¹ Windstream Communications, Inc. (Windstream) is an incumbent local exchange carrier (ILEC) that sells Appellant unbundled network elements and other telecommunication services at wholesale prices. Appellant’s relationship with Windstream began when Appellant entered into an interconnection agreement with Alltel Ohio, Inc., which later became Windstream. *Id.*

On June 19, 2009, Appellant filed a complaint against Windstream with the Commission. In its complaint, Appellant alleged that Windstream overcharged for its services and submitted incorrect invoices to Appellant. *Id.* at 1, Appellant’s App. at 8. Appellant also claimed that it submitted over 17,000 disputes to Windstream regarding these services and related invoices. *Id.* at 7, Appellant’s App. at 14; Tr. 59, 60-61, Supp. at 77, 78-79. Appellant claimed that Windstream incorrectly denied its numerous

¹ References to appellant’s appendix are denoted “App. at ____.” (The pages of appellant’s appendix are not numbered; therefore the references made herein are to unnumbered pages.) References to appellee’s appendix attached hereto are denoted “App. at ____,” and references to its supplement are denoted “Supp. at ____.”

requests for credit and failed to adequately resolve these disputes. Ultimately, Appellant contended that Windstream owed it \$76,436.00 for overcharges and incorrect billing. Opinion and Order at 6; Appellant's App. at 13; Direct Testimony of Cotton at 12, Supp. at 66; Tr. 59, Supp. at 77.

As complainant in the case below, the Appellant had the burden of proof. Opinion and Order at 6, Appellant's App. at 13. To prove its case, Appellant relied heavily upon two sets of evidence: (1) a 287-page invoice summary that reduced each dispute to a line item ("invoice summary") and (2) the related invoices, which totaled over 18,000 pages.² These exhibits are the focus of this appeal. Appellant's Brief at 5-7.

The Commission admitted the invoice summary exhibit and the underlying invoices into the record. Opinion and Order at 19-20, Appellant's App. at 26-27. The Commission considered this evidence in its decision. *Id.* at 11-12, 19-20, 21-22, Appellant's App. at 18-19, 26-27, 28-29. The Commission also considered evidence presented by Windstream that undermined the overall reliability of the invoice summary exhibit. *Id.* After considering all the evidence, the Commission concluded that Appellant failed to sustain its burden of proof and prove its case. *Id.* at 23-24, Appellant's App. at 30-31; *In the Matter of the Complaint of OHIO TELNET.COM, Inc.*, Case No. 09-515-TP-CSS (Entry on Rehearing) (November 9, 2011) (hereinafter "Entry on Rehearing"), Appellant's App. at 5-7. Appellant now appeals the Commission's decision, claiming that the

² Appellant refers to this invoice summary as "Exhibit 1" and refers the set of invoices as "Exhibit 2-75" in its Merit Brief. These exhibits are voluminous in nature and Appellant has not filed a supplement specifying the most pertinent portions of these exhibits. However, Appellant's Exhibits 1-75, in their entirety, were filed with the Court on February 6, 2012 as part of the Commission's record of the proceeding below.

Commission did not perform a “complete and thorough review” of the invoice summary exhibit and the underlying invoices. Appellant’s Brief at 5.

ARGUMENT

Standard of Review

This case deals *solely* with a question of fact. Ohio Revised Code Section 4903.13 provides that a Commission order shall be reversed, vacated, or modified by the Court only when, upon consideration of the record, the Court finds the order to be unlawful or unreasonable. *Constellation NewEnergy, Inc. v. Pub. Util. Comm’n*, 104 Ohio St. 3d 530, 540-541, 820 N.E.2d 885, 894 (2004). The Court “will not reverse or modify a PUCO decision as to questions of fact if the record contains sufficient probative evidence to show that the commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.” *Monongahela Power Co. v. Pub. Util. Comm’n*, 104 Ohio St. 3d 571, 578, 820 N.E.2d 921, 927 (2004) (citations removed).

Here, Appellant has the burden of demonstrating that the Commission’s decision is against the manifest weight of the evidence or is clearly unsupported by the record. *Id.* In addition, the Court has consistently refused to substitute its judgment for that of the Commission on evidentiary matters. *AK Steel Corp. v. Pub. Util. Comm’n*, 95 Ohio St. 3d 81, 84, 765 N.E.2d 862, 866 (2002).

Proposition of Law No. I:

The Court will not second-guess the Commission on questions of fact absent a showing that the Commission's findings are manifestly against the weight of evidence. *Consumers' Counsel v. Pub. Util. Comm'n*, 114 Ohio St. 3d 340, 347, 872 N.E.2d 269, 276-277 (2007).

Appellant asks this Court to second-guess the Commission's decision regarding the weight of the evidence and sit as the trier of fact. The Court should deny Appellant's request. The Commission weighed and considered the evidence presented by Appellant and fully explained its decision. Opinion and Order at 11-12, 19-20, 21-22, Appellant's App. at 18-19, 26-27, 28-29. Appellant, however, questions whether the Commission's review of the evidence was "complete and thorough." Appellant's Brief at 5.

This Court has stated on numerous occasions that it "will not second-guess the Commission on questions of fact absent" a showing that "the Commission's findings...are manifestly against the weight of evidence." *Consumers' Counsel v. Pub. Util. Comm'n*, 114 Ohio St. 3d 340, 347, 872 N.E.2d 269, 276-277 (2007). The Court previously refused to "review and weigh evidence anew" where an appellant asked the Court to "examine and weigh the evidence contained in a record of over 1,100 pages of testimony and thousands of pages of exhibits." *New Par v. Pub. Util. Comm'n*, 98 Ohio St. 3d 277, 281, 781 N.E.2d 1008, 1012 (2002); See also *Stephens v. Pub. Util. Comm'n*, 102 Ohio St. 3d 44, 48, 806 N.E.2d 527, 532 (2004) ("It is apparent from [appellant's] arguments that he is asking this court to examine in minute detail the record below and to weigh the evidence. We decline to do so.").

The Court should decline Appellant's invitation to examine and weigh the evidence in the record below. The Commission's factual determinations are not against the manifest weight of the evidence because those findings were based on various portions of the record. Opinion and Order at 6-13, 19-23, Appellant's App. at 13-20, 26-30. Appellant disagrees with the Commission's decision but the Commission's decision is lawful and reasonable. Therefore, the Commission's decision should be affirmed.

Proposition of Law No. II:

A Commission Order denying a complaint will be affirmed where the complainant fails to meet its burden of proof and fails to produce enough evidence to establish its claim. *Grossman v. Public Utilities Commission*, 5 Ohio St.2d 189, 190, 214 N.E.2d 666, 667 (1966)

Appellant failed to meet its burden of proof in the hearing below. It relied primarily upon an invoice summary exhibit to prove its case. This 287-page spreadsheet exhibit purportedly reduced 17,000 disputes to line items. Each line item contained only the most basic information, such as the billing date, the end user telephone number, a service code, Appellant's requested credit amount, whether the credit was approved, and whether there was still a disputed amount. The only way to determine the validity of Appellant's claims was to conduct "a line-by-line assessment" of all the disputes listed in the invoice summary and then compare these line items to the corresponding invoices, which totaled over 18,000 pages. Tr. 75-76, Supp. at 80-81. The Commission determined, after weighing all the evidence, including the invoice summary exhibit, that Appellant was not entitled to recovery. The evidence supports the Commission's decision.

A. The reliability of the invoice summary exhibit, Appellant's primary exhibit, was undermined during the hearing.

Ms. Annette Duboe, a manager for the Appellant, testified regarding the billing disputes between the parties. Opinion and Order at 7, Appellant's App. at 14. Ms. Duboe discussed how Appellant processed the invoices it received from Windstream and how she reviewed these invoices for accuracy. *Id.* She was responsible for creating the invoice summary exhibit and testified that she personally reviewed every invoice listed in the summary. Tr. 28, 31, 37, 57-58, Supp. at 68, 69, 70, 75-76.

Relying primarily upon her invoice summary, Ms. Duboe presented a few examples of billing disputes at the hearing. Appellant's Brief at 5. She admitted, however, that some of the information contained in her invoice summary was inaccurate and that one of her billing dispute examples was invalid. Tr. 57, Supp. at 75. Initially, Ms. Duboe testified that Windstream refused to pay Appellant \$2.00 for incorrect billing. Tr. 53-55, Supp. at 71-73. However, upon cross-examination, Ms. Duboe admitted that Windstream had already paid Appellant the \$2.00 credit and, thus, the invoice summary exhibit inaccurately indicated that there was still an outstanding dispute. Opinion and Order, at 19, Appellant's App. at 26; Tr. 56-57, Supp. at 74-75. This inaccuracy decreased the reliability of the invoice summary overall.

The problems with the invoice summary exhibit did not end there. Windstream discredited Appellant's invoice summary in a number of other ways. Ms. Tana Henson, staff manager for Windstream Service Center, testified that various disputes listed in Appellant's invoice summary exhibit were either already resolved or inaccurate because

Appellant was not entitled to a credit.³ For example, Appellant relied upon its invoice summary to show that it was entitled to a credit for various incorrect customer charges. Appellant claimed that one particular customer was subscribed to billed number screening and, therefore, should not have been billed for collect or third-party calls.⁴ Opinion and Order at 12, Appellant's App. at 19. However, in her review of the invoice summary, Ms. Henson discovered that the Appellant was not entitled to a credit because the customer was never actually charged for the disputed call. *Id.* at 20, Appellant's App. at 27; Tr. 115-121, Supp. at 86-92; TH-Ex. 4 (Henson Billing Example), Supp. at 45-46; TH-Ex. 5 (Henson Billing Example), Supp. at 47-50. Appellant's invoice summary also listed a number of usage charge disputes that Appellant had already received credit for but Appellant was mistakenly still disputing. Opinion and Order at 20, Appellant's App. at 27, Tr. 121-123, Supp. at 92-94, TH-Ex. 6 (Henson Billing Example), Supp. at 51-56. The invoice summary also indicated that some local number portability surcharge disputes were still outstanding when, in actuality, Appellant had already been credited for these disputes.⁵ Opinion and Order at 12, Appellant's App. at 19; Tr. 124-126, Supp. 95-

³ Windstream Service Center processes service requests and billing disputes submitted by CLECs regarding issues with telecommunication services. As the sales manager for Windstream Service Center, Ms. Henson was familiar with the processing of invoice disputes submitted by Appellant. Opinion and Order at 9, Appellant's App. at 16; Direct Testimony of Henson at 3-4, Supp. at 2-3; Tr. 95, 100, Supp. at 82, 83.

⁴ Billed number screening (BNS) is a service that allows end-users to restrict collect and/or third party calls.

⁵ Local number portability (LNP) is a service that provides customers with the ability to retain, their existing local telephone numbers when switching from one local telephone service provider to another.

97; TH-Ex. 7 (Henson Billing Example), Supp. at 57-61. Ms. Henson also testified that there were other inaccuracies contained in the invoice summary. Tr. 125-126, Supp. at 96-97. Furthermore, although it had ample opportunity to do so, Appellant failed to rebut Ms. Henson's testimony regarding these various inaccuracies. Opinion and Order at 20, Appellant's App. at 27.

Another problem with the invoice summary exhibit was that, based on the exhibit itself, many of Appellant's alleged disputes appeared to be time-barred under the interconnection agreement. The interconnection agreement required Appellant to submit all invoice disputes to Windstream within 12 months from the due date on the invoices. *Id.* at 21, Appellant's App. at 28; Section 9.1.1, Interconnection Agreement, Supp. at 99. Payment was typically due within eighty days of the invoice "billing date." Direct Test. of Scott Terry, at 6-7, Supp. at 63-64. The "billing dates" on the invoice summary exhibit range from May 2003 to May 2010. Opinion and Order at 21, Appellant's App. at 28; Entry on Rehearing at 3, Appellant's App. at 7. Ms. Henson testified that Appellant did not submit the majority of these billing disputes to Windstream until April 8, 2009. Tr. 109-110, Supp. at 84-85; TH-3 (Spreadsheet of itemized disputes), Supp. at 4-44. This means that invoice disputes with "billing dates" from 2003 to approximately late 2007 were submitted beyond the 12-month dispute period. Potentially thousands of the disputes listed on the invoice summary fell into this 2003 to late 2007 category. Therefore, Ms. Henson concluded that the vast majority of Appellant's disputes were time-barred under the terms of the interconnection agreement. Tr. 109-110, Supp. at 84-85. Appellant failed to rebut this claim. Opinion and Order at 21, Appellant's App. at

28. Further, without an explanation to the contrary from Appellant, the Commission concluded that the majority of Appellant's billing disputes were potentially time-barred. *Id.*; Entry on Rehearing at 3, Appellant's App. at 7.

Based upon this evidence, the Commission concluded that Appellant failed to explain uncontroverted inaccuracies in the invoice summary and, thus, the exhibit's reliability was questionable. Furthermore, the exhibit hurt Appellant's case because it indicated that many of Appellant's disputes were probably time-barred. Therefore, the Commission correctly concluded that Appellant failed to meet its burden of proof.

B. Although Appellant documented billing disputes in the invoice summary exhibit, it failed prove the validity of its disputes and failed to explain how the invoice summary exhibit proved that it was entitled to recovery.

Inaccuracies were not the only problem with the invoice summary exhibit. Even if the billing disputes were accurately reflected in the exhibit, it did not prove that Appellant was entitled to recovery under the interconnection agreement. The invoice summary showed that billing disputes existed between Windstream and Appellant. But neither party was disputing this issue. The true issue was whether Appellant was entitled to recover for these disputes. Appellant failed to prove the *validity* of its invoice disputes. Instead, Appellant submitted a 287-page spreadsheet that listed of over 17,000 disputes and provided a handful of examples of how the invoice summary was created. During the hearing, Appellant admitted that the only way to determine the validity of its claims was to conduct "a line-by-line assessment" of all the disputes listed in the invoice sum-

mary and then compare these line items to the corresponding invoices. Tr. 75-76, Supp. at 80-81. The Commission, however, was under no obligation to independently verify the validity of these thousand of line items. It was Appellant's duty to clearly and convincingly prove its case. It failed to do so.

Even if the Commission did painstakingly scrutinize these thousands of line items, it still would not have been able to independently determine the validity of each alleged dispute. Appellant's invoice summary merely documented that, at some point since 2003, billing disputes existed between Appellant and Windstream. It did not, however, adequately explain the basis for Appellant's claims, and it did not explain why Appellant was entitled to recovery for each dispute under the terms of the interconnection agreement. In essence, Appellant expected the Commission to "take on the burden of proof" by independently verifying the validity of each of its disputes. Entry on Rehearing at 2, Appellant's App. at 5-7. This expectation was unreasonable.

As this Court recently concluded, the Commission is not obligated to perform an independent analysis of a party's voluminous spreadsheet exhibit when that exhibit lacks accompanying explanation. *In re Application of Duke Energy Ohio, Inc.*, Slip Opinion No. 2012 Ohio 1509 (Apr. 5, 2012) ("*Duke Energy Ohio*"). Furthermore, any independent analysis of the invoice summary by the Commission would have been unfruitful and unfair without cross-examination from Windstream. As the Commission noted, "[i]t would not be appropriate for the Commission to evaluate the validity of numerical data without the benefit of supporting arguments or cross-examination." Entry on Rehearing at 2, Appellant's App. at 6. Windstream had the right to examine and challenge the

validity of the invoice summary. Furthermore, only through cross-examination of Ms. Dubue and the testimony of Windstream's witness were the various flaws in the invoice summary brought to light.

Appellant asks this Court to reverse the Order of the Commission because the Commission did not perform a line-by-line examination of the invoice summary exhibit. However, Appellant failed to cite any specific portion of the invoice summary or the underlying invoices in its merit brief. Just as it did below, Appellant is asks this Court to carry Appellant's burden of proof and scour the record to find evidence in support of its appeal. The Court has previously denied such requests and should do so here. In *Duke Energy Ohio*, this Court concluded that an appellant's general citation to a 142-page spreadsheet, which was filled with thousands of rows of numbers, did not support the appellant's case. *In re Application of Duke Energy Ohio, Inc.*, Slip Opinion No. 2012-Ohio-1509. The Court stated that "[a]ppellate attorneys should not expect the court 'to peruse the record without the help of pinpoint citations' to the record.'" *In re Application of Duke Energy Ohio, Inc.*, Slip Opinion No. 2012-Ohio-1509, quoting *State ex rel. Physicians Comm. for Responsible Medicine v. Ohio State Univ. Bd.*, 108 Ohio St. 3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 13 (2006), quoting *Day v. N. Indiana Pub. Serv. Corp.*, 164 F.3d 382, 384 (7th Cir.1999). Much like the appellant in *Duke Energy Ohio*, Appellant has not met its burden because it failed to pinpoint specific portions of the record that support its appeal. Therefore, the Commission's decision should be affirmed.

CONCLUSION

In the hearing below, the Commission determined that Appellant failed to adequately demonstrate why it was entitled to recovery for its alleged invoice disputes. Appellant now has the obligation to explain to this Court why the Commission's decision was unlawful or unreasonable. It failed to do so. Rather, Appellant generally points this Court to voluminous exhibits and claims that the Commission did not properly weigh this evidence. The Commission, however, considered Appellant's exhibits, along with all the other evidence, and determined that Appellant did not prove its case. This factual determination is fully supported by the record evidence. Therefore, the Commission's decision is lawful, reasonable and should be affirmed.

Respectfully submitted,

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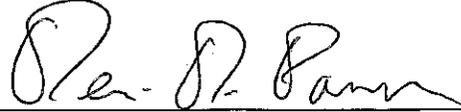
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PROOF OF SERVICE

I certify that a copy of the foregoing **Merit Brief** submitted by the Public Utilities of Ohio was sent by electronic mail and by U.S. postage paid mail to the parties listed on April 13, 2012.



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