

IN THE SUPREME COURT OF OHIO

OHIOTELNET.COM, Inc.)	Case No. 12-0027
)	
Appellants,)	Appeal from the Public Utilities
)	Commission of Ohio
v.)	
)	Public Utilities Commission of Ohio Case
The Public Utilities Commission of Ohio,)	NO. 09-515-TP-CSS
)	
Appellee.)	

MERIT BRIEF OF INTERVENING APPELLEE WINDSTREAM OHIO, INC.

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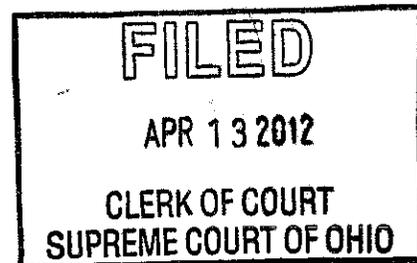


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I. INTRODUCTION

Appellant OHIOTELNET.COM, Inc. (“Ohiotelnet”) has appealed factual determinations made by the Public Utilities Commission of Ohio (“Commission”) in a proceeding that lasted more than two years, albeit presented by Ohiotelnet in the guise of a supposed question of law. The Commission properly found that Ohiotelnet had not met its burden of proof against Intervening Appellee Windstream Ohio, Inc. (“Windstream”) based on substantial and unrefuted categorical defenses by Windstream and Ohiotelnet’s lack of credibility and generally insufficient presentation of evidence. This Court’s precedent holds strongly in favor of refusing to substitute this Court’s own judgment for that of the Commission and, therefore, in favor of denying Ohiotelnet appeal.

II. STATEMENT OF FACTS AND CASE

Appellant Ohiotelnet’s Statement of Facts is deficient in three general respects. First, it fails to provide the quantity and age of disputes that Ohiotelnet sought to be resolved by the Commission. Second, it did not describe the general nature and purported purpose of the exhibits that Ohiotelnet seeks for this Court to require the Commission to review in fine detail. Third, Ohiotelnet’s Statement of Facts in no way describes the Commission’s rationale for holding in favor of Windstream.

As initial background not provided by Ohiotelnet, this case concerns telecommunications services purchased on a wholesale basis by Ohiotelnet from Windstream pursuant to a contract known as an “interconnection agreement” that Ohiotelnet, in turn, resells to its own retail customers. Over the years, Ohiotelnet disputed thousands of line items of Windstream invoices. Windstream acted in good faith to resolve the disputes. Appellant’s App. at 30. Ohiotelnet admitted that Windstream has granted tens of thousands of dollars of credits regarding such

disputes. Appellant's App. at 10. Nevertheless, this left, as far as Ohiotelnet was concerned, a substantial number of billing disputes. Appellant's App. at 7. On July 19, 2009, Ohiotelnet filed a complaint with the Commission alleging, in pertinent part with regard to this case, that Windstream was supposedly overcharging for its services and submitting incorrect and inaccurate invoices. Appellant's App. at 9.

On December 6, 2010, the day before the Commission hearing was to commence, Ohiotelnet filed approximately 18,500 pages of exhibits, designated as Exhibits 1-75. Hearing Transcript at 32-33. Exhibits 2-75 were simply every invoice issued by Windstream from April 2004 through June 2010. Appellant's App. at 27. Exhibit 1 was 287-page spreadsheet that reduced every dispute to a row and included the dispute number, the billing date, the end user telephone number, a service code (ASOC) code, and what Ohiotelnet considered to be the credit amount requested, the credit approved, whether credit was given for tax, the date closed, and the disputed amount. *Id.*

At hearing, Ohiotelnet essentially laid its 18,500 pages of exhibits on the lap of the Commission. Ohiotelnet admitted that the Commission would have to conduct a line-by-line assessment and comparison to the more than 18,000 pages contained in Exhibits 2-75 even to determine the basis for each of the more than 17,000 disputes dispute listed in Exhibit 1. Hearing Transcript at 75-76. As a suggested means of navigating the labyrinth of its exhibits, Ohiotelnet conducted what it describes as a "walk[-]through" of how it seems to believe that the Commission should have conducted its examination of the disputes in each of the more than 17,000 rows of the 287-page spreadsheet. Ohiotelnet Brief at 5. This walk-through consisted of presenting four examples of different types of billing disputes. And, even then, Ohiotelnet's limited examples had self-evident flaws. Appellant's App. at 28. As matters transpired, at least

one of Ohiotelnet's four examples was invalid on its face (claimed improper charge on a bill on which a reversing credit for such charge was issued). *Id.* In the two days that Windstream had between the filing of Ohiotelnet's exhibits and Windstream's testimony, Windstream discovered and presented at hearing numerous examples of its own of invalid disputes listed in Ohiotelnet's exhibits. Appellant's App. at 27-28.

The Commission issued an Opinion and Order denying Ohiotelnet's complaint on September 20, 2011. Appellant's App. at 9-32. Such order resolved a wide range of issues, finding, among other things that Windstream had negotiated in good faith with Ohiotelnet and that Ohiotelnet had failed to provide any response to numerous defenses by Windstream each of which was applicable to thousands of Ohiotelnet's disputes. Appellant's App. at 28-29. The Commission ultimately concluded that:

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

Appellant's App. at 31.

Ohiotelnet sought rehearing of the Commission's Opinion and Order solely on the ground that the Commission supposedly failed to conduct a complete and thorough review of Ohiotelnet's exhibits. The Commission concluded in its November 9, 2011 Entry on Rehearing that engaging in the level of examination sought by Ohiotelnet "would be tantamount to the Commission taking on the burden of proof that OHIOTELNET is obligated to carry." Appellant's App. at 8. Recognizing the procedural infirmities in such an approach, the Commission observed that "It would not be appropriate for the Commission to evaluate the

validity of numerical data without the benefit of supporting arguments or cross-examination.” *Id.* The Commission also noted the multiple reasons for denying Ohiotelnet’s claims without resorting to the examination requested sought by Ohiotelnet. *Id.*

III. STANDARD OF REVIEW

As this Court has observed: “A PUCO order will be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable. R.C. 4903.13.” *Elyria Foundry Co. v. Pub. Util. Comm'n*, 118 Ohio St.3d 269, 271, 2008-Ohio-2230, 271, 888 N.E.2d 1055, 1058, ¶ 12; R.C. § 4903.13. The level of deference the Court provides to the Commission depends on whether the appeal is an issue of law or fact. Contrary to Ohiotelnet’s assertion (Ohiotelnet Brief at 2), Ohiotelnet does not present this Court with a question of law, but one of fact. The matter before this Court is not, as Ohiotelnet puts it, whether the Commission willfully disregarded its duty, but rather whether factual determinations are supported by the evidence. There are no issues of law in this appeal.¹

This Court has “consistently refused to substitute its judgment for that of the commission on evidentiary matters.” *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 84, 2002-Ohio-1735, 765 N.E.2d 862, 866, *citing Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 86 Ohio St.3d 53, 711 N.E.2d 670 (1999); *Dayton Power & Light Co. v. Pub. Util. Comm.*, 4 Ohio St.3d 91, 447 N.E.2d 733 (1983); *Columbus v. Pub. Util. Comm.*, 170 Ohio St. 105, 163 N.E.2d 167 (1959). Absent a showing that the Commission’s decision is “manifestly against the weight of the evidence” and “so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty,” this Court will not reverse or modify a Commission decision. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 577-78,

¹ A conclusion that Ohiotelnet’s appeal is one of fact rather than law is supported by an examination of the “Argument” section of Ohiotelnet’s brief, which lacks a single citation to statute or legal precedent.

2004-Ohio-6896, 820 N.E.2d 921, 927, ¶ 29, quoting *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.*, 88 Ohio St.3d 549, 555, 728 N.E.2d 371 (2000) (citing *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 38 Ohio St.3d 266, 268, 527 N.E.2d 777 (1988)).

IV. ARGUMENT

Proposition of Law I:

The Public Utilities Commission of Ohio Did Not Have a Duty to Undertake Its Own Examination of More Than 17,000 Individual Billing Line Item Disputes When Presented Without Complete Analysis by the Complainant, and Particularly When Respondent Has Presented Persuasive Reasons Why Many Such Disputes Should be Denied on a Categorical Basis on Multiple Grounds.

The Commission conducted a sufficient examination of the exhibits presented by Ohiotelnet on which to base a denial of Ohiotelnet's complaint. Ohiotelnet bore the burden of proof regarding its complaint. *Grossman v. Pub. Util. Comm.*, 5 Ohio St. 2d 189, 214 N.E.2d 666 (1966). It was Ohiotelnet's duty to find a way to present its evidence in a manner that demonstrated the validity of its billing disputes. Ohiotelnet simply failed to do so.

In considering the general nature of Ohiotelnet's exhibits, it is important to note that the "evidence" at issue in this case consisted of a 287-page spreadsheet of billing disputes (its Exhibit 1) and more than 18,000 pages of billing invoices (its Exhibits 2-75). The billing invoices themselves, did not actually demonstrated the validity of a particular dispute -- instead, they merely indicated the presence of such dispute and the possible appearance of an uncredited disputed charge on the pertinent invoice(s). As the Commission correctly acknowledged, testimony would actually be required to determine the validity of each dispute. See Appellant's App. at 8.

Earlier this month, this Court held that the Commission acted reasonably in denying a request by Duke Energy Ohio, Inc. to recover certain expenses relating to hurricane wind

damage based on an insufficient evidentiary showing. *In re Application of Duke Energy Ohio, Inc.*, Slip Opinion No. 2012-Ohio-1509 (Apr. 5, 2012) (“*Duke Energy*”). In *Duke Energy*, the party with the burden of proof, Duke Energy, sought to justify \$371,196 in expenses based on a reference to a 51-page spreadsheet that required additional testimony. This Court properly concluded that it was reasonable for the Commission not to engage in its own analysis of individual portions of such spreadsheet not accompanied in particularity with sworn testimony. *Id.* at ¶ 18. The Commission made a similar reasonable decision in this case.

The Commission had strong grounds for choosing not to engage in a line-by-line analysis of Ohiotelnet’s billing dispute “evidence.” As discussed above, Ohiotelnet did not demonstrate that its chosen four billing dispute examples presented at hearing were valid, a failure that called into question the general credibility of Ohiotelnet’s entire set of exhibits. Further, Windstream successfully explained why whole swaths of billing disputes were invalid sometimes for multiple reasons – not merely that Ohiotelnet had failed to prove anything. The Commission explicitly accepted at least three of these arguments in the Order – lack of evidence that Ohiotelnet has not be reimbursed for the tax portion of billing credits, disputes being time-barred, and other Windstream critiques of Ohiotelnet’s disputes which the Commission correctly considered to be “unchallenged.” (Opinion and Order at 22; Appellant’s App. at 30.)

The actual validity of this extremely voluminous catalog of disputes rested entirely on unsupported statements made by Ohiotelnet’s witness that such disputes were valid. One such statement, made categorically about the entirety of Ohiotelnet’s exhibits, was made after the witness, herself, admitted to an error in one of the four examples that she presented at hearing. Hearing Transcript at 58.

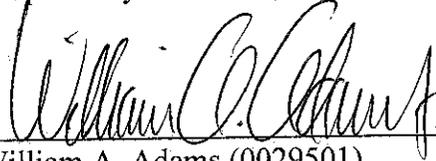
When the lack of proof contained in Ohiotelnet's exhibits, the demonstrated lack of credibility of Ohiotelnet's live testimony, and the Commission's findings regarding entire categories of disputes are considered, there was no reason for the Commission to analyze Ohiotelnet's roughly 18,500 pages of exhibits any further. No amount of examination of such exhibits could have led the Commission to conclude that Ohiotelnet carried its burden of proof, as such evaluation, as put by the Commission, would require it "to evaluate the validity of numerical data without the benefit of supporting arguments or cross-examination." Appellant's App. at 7.

To the extent that the Commission was required to review on its own the voluminous exhibits provided by Ohiotelnet, which it was not, the Commission made its own judgment regarding the totality of evidence presented by Ohiotelnet. Such judgment also entailed decisions regarding the degree to which weight could possibly be given to evidence in determining the extent to which such evidence should be examined. Such determinations constitute the type of judgment on evidentiary matters for which this Court does not substitute its own. *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 84, 2002-Ohio-1735, 765 N.E.2d 862, 866.

V. CONCLUSION

For the foregoing reasons, Ohiotelnet has presented no reason why the Commission was required to conduct a more thorough examination of the roughly 18,500 pages of Windstream bills and lists of Ohiotelnet disputes in deciding to deny Ohiotelnet's complaint and deny rehearing of such decision. Thus, particularly based on the Court's refusal to substitute its judgment for the Commission's on evidentiary matters, Windstream respectfully suggests that this Court affirm the Commission.

Respectfully submitted,



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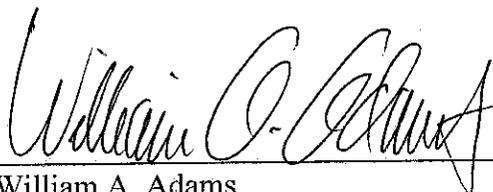
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief of Intervening Appellee, Windstream Ohio, Inc. was sent to the following via regular U.S. mail, postage prepaid, this 13th day of April, 2012, to:

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