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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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MAR 12 2010

PUBLIC SERVICE
COMMISSION

In the Matter of:

FORMAL COMPLAINT FOR EMERGENCY RELIEF)	
BY INSIGHT PHONE OF KENTUCKY, LLC TO)	
REQUIRE WINDSTREAM KENTUCKY EAST, LLC)	CASE NO.
AND WINDSTREAM KENTUCKY WEST, LLC)	2008-00335
TO PROVIDE ACCOUNT NUMBERS WHEN)	
AUTHORIZED BY CUSTOMERS IF IT REQUIRES)	
AN ACCOUNT NUMBER FOR PORTS)	

**INSIGHT'S RESPONSE TO WINDSTREAM'S BRIEF IN OPPOSITION TO
INSIGHT'S FORMAL COMPLAINT**

Insight Phone of Kentucky, LLC (hereinafter "Insight Phone"), by counsel, hereby files this response to the Brief filed in opposition to Insight Phone's petition ("Brief or Br.") to the Public Service Commission of the Commonwealth of Kentucky (hereinafter "Commission") by Windstream Kentucky East, LLC and Windstream Kentucky West, LLC (hereinafter, collectively "Windstream").

INTRODUCTION

Windstream has proffered no legal or policy justification to support its so-called customer protection policy of requiring pass codes and/or account numbers before permitting Insight Phone to access customer account information through its Windstream Express interface. Instead, Windstream's efforts to verify that Insight Phone has in fact obtained authorization to access customer information and port telephone numbers are flatly prohibited by the Federal Communications Commission ("FCC") rules. Windstream's purported justifications are built on blatant misapplication of the rules. In fact, Windstream has no right at all to deny Insight access to account numbers, pass codes or any other relevant information from a customer's account once Insight obtains

customer authorization because Windstream is bound by the parties' interconnection agreements ("ICAs") to provide that information to Insight. Even if the ICAs did not specifically require Windstream to make this information available to Insight, there is no basis in the law for Windstream to withhold it, and relevant precedent demonstrates this to be the case. This Commission must not allow Windstream's behavior to continue.

In attempting to justify its anti-competitive policies, Windstream relies almost exclusively on the FCC Simple Port Order. Br. at 9 (citing Telephone Requirements for IP-Enabled Services Providers, *Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking*, 22 FCC Rcd 19531 (2007) (the "Simple Port Order")). Windstream falsely asserts that this order authorizes account numbers and passcodes "on all port requests and requests to access customer CPNI." Br. at 10. This is just plain wrong. The Simple Port Order does not address in any way a carrier's access to customer records or CPNI. Access to a customer's service record is wholly distinct from the process of submitting a request to port a telephone number. The FCC rules with respect to CPNI access are clear, and all that is required is that the new carrier obtain the customer's authorization. Windstream cannot require more and it has proffered nothing to suggest that Insight Phone does not comply with this requirement.

The FCC Simple Port Order, which Windstream calls the "four fields" order, sought to ensure that consumers benefit from local number portability by addressing the maximum number of information fields that can be required when a carrier submits a request to port a telephone number, which is a separate step in the process of changing carriers. In this process, if a customer desires to port a telephone number from Windstream to Insight, Windstream as the executing carrier has only one legal obligation,

to process the port request as quickly and efficiently as possible. The FCC has determined that an executing carrier may request such information in the port request as is absolutely necessary, and no more, to ensure that the right customer account is being moved. This is called *validation*, which is what the Simple Port Order was about.

Windstream conflates port *validation*, a process designed to ensure that the correct customer information is being provided, with *verification*, a process designed to ensure that the carrier submitting a port request has received authorization from the customer. The FCC's rules could not be clearer -- Windstream has no business trying to verify that Insight Phone has obtained the customer's authorization to port his or her number. The entire premise of Windstream's argument, that pass codes and account numbers are required to "guard against unauthorized carrier changes" demonstrates that Windstream's actions are unlawful. Br. at 4, 14. The FCC has determined that whatever customer protection may be provided by the executing carrier's effort to re-verify authorization is far outweighed by the harm to competition caused by interfering with the porting process. In short, the FCC has already precluded the policy determination that Windstream seeks to assert for itself.

Windstream also misapplies applicable law by asserting that an attempt to access customer records without customer authorization constitutes slamming. Br. at 6 (incorrectly asserting that if a carrier seeks to access CINI or submits a change request without authorization, the customer has been slammed.). This is not slamming. Slamming is defined as the unauthorized *change* in a customer's carrier. See "When Your Authorized Telephone Company Is Switched Without Your Permission - 'Slamming,'" FCC Consumer Facts, at <http://www.fcc.gov/cgb/consumerfacts/>

slamming.html (describing slamming as “the illegal practice of *switching* a consumer’s traditional **wireline** telephone company for local, local toll, or long distance service without permission”) (emphasis in original).

Windstream admits in its Brief that it has no business purpose in requiring account numbers and pass codes except to create an impermissible “test” for Insight Phone. Additionally, Windstream’s basis for its impermissible actions violate the Interconnection Agreements (“ICAs”) in effect between the Parties, and approved by the Commission, by bypassing the dispute resolution procedures which require notice and informal proceedings prior to bringing any issue before this Commission. The ICAs and the law are clear that incumbent telephone providers such as Windstream must not take it upon themselves to police the porting process which is exactly what Windstream has admitted that it is doing in Kentucky with Insight Phone. This Commission must not allow it to continue.

Windstream admits that it is creating roadblocks to ports to “test” Insight and asks this Commission to allow it to keep the answers to the test secret. Such a test not only violates the ICAs and federal law, it is also completely unnecessary because Windstream is protected by the ICAs and their dispute resolution procedures if Windstream believes Insight Phone has violated its duties. Windstream has never invoked those dispute resolution proceedings and must not be allowed to violate the ICAs by bypassing them here.

In the ICAs Insight Phone represents and covenants that it will only use the Windstream Express interface for access to customer information and ordering customer ports, pursuant to the agreement. ICA 45.3. Attachment 12 to the ICA requires Insight

Phone to be responsible for the accuracy and quality of data submitted to Windstream. ICA attachment 12 at 2.1 discussing billing data specifically. If Windstream has a problem with Insight Phone's use of Windstream Express, it need not erect impermissible roadblocks, it need merely follow the procedures in Section 9 of the ICA.

Windstreams' argument that this Commission has no jurisdiction must be rejected. Windstream voluntarily consented to Commission jurisdiction under the ICAs on file with this Commission which contains a dispute resolution section that specifically allows submission to this Commission. *ICA §9.4*. Additionally, KRS 278.54611 gives the PSC jurisdiction over interconnection agreements and telecommunications carriers both of which are relevant to Insight Phones allegations in its Formal Complaint. KRS 278.535 sets forth Kentucky's requirements for switching telecommunications providers. (In Insight Phone's Formal Complaint, 530 was cited instead of 535.)

ARGUMENT

Windstream's actions are in direct violation of the terms of the parties' ICAs, which requires it provide Insight with access to all relevant customer data. Windstream relies on an erroneous reading of the FCC Simple Port order, an order that actually supports Insight Phone, in its attempt to justify erecting roadblocks to ports. Additionally, Windstream's efforts to suggest that Insight Phone is engaged in slamming should be ignored, as no evidence of slamming ever has been produced or been the subject of any dispute resolution procedure under the ICAs.

I. Windstream's Actions Violate the Terms of the Parties' ICAs.

Windstream's initial brief entirely ignores the terms of the parties' ICAs, but those terms are dispositive. Under the ICAs, Windstream is required to provide access to

customer CPNI upon Insight Phone's representation that it has obtained authorization from the customer, and has no right to limit that access or to demand any further documentation. Thus, requiring proof of customer authorization to obtain access to account number and pass code information is a plain violation of the ICAs.

Insight Phone has described the terms of the ICAs concerning access to CPNI in detail in previous briefs. The key language is as follows:

17.4 Subject to applicable rules, orders, and decisions, Windstream will provide Insight with access to Customer Proprietary Network Information (CPNI) for Windstream End Users upon Insight providing Windstream a signed blanket Letter of Agency (LOA) for Windstream's Customer of record, based on Insight's representation that subscriber has authorized Insight to obtain such CPNI.

Under this provision, Windstream has a duty to accept Insight Phone's representation that Insight has obtained authorization, so long as Insight Phone has provided Windstream with a signed blanket letter of agency. The parties agree that Insight Phone has provided the necessary letter. Consequently, Windstream is required to provide customers' CPNI upon request from Insight Phone.

If Windstream suspects that Insight Phone does not have customer authorization, the ICAs provide for specific remedies. They include requesting documentation of the customer authorization and dispute resolution under the terms of the ICAs.¹ Windstream has not invoked any of these remedies since the ICAs came into effect and never has complained to Insight Phone that a customer's authorization has not been obtained for access to CPNI. Moreover, the remedies do not include refusing to provide the

¹ See ICA, § § 17.4.2 (allowing a party to request a specific end user letter of agency in response to slamming complaints), 17.4.4 (subjecting disputes to dispute resolution process under section 9.0 of the agreement)

information, the form of self-help that Windstream has been engaged in since it adopted its requirement to provide account numbers and pass codes to accept a port request.

Although Windstream does not address the terms of the ICAs directly, it does make claims that could relate to the applicability of these provisions to requests for pass codes and account numbers. First, Windstream argues that they are not CPNI. Windstream Brief at 18. The fundamental problem with this argument is that the definition of CPNI includes “information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier.” 47 U.S.C. § 222(h)(1). Since Windstream places the account number and the pass code on customer bills, they plainly are CPNI.²

Second, Windstream argues that it is not required by the federal Communications Act to disclose CPNI in the absence of written customer authorization. Windstream Brief at 8-9. Windstream has, of course, waived any right it might have to demand written authorization by agreeing to the procedure in the ICAs. Moreover, the statute itself does not make written authorization the exclusive mechanism for release of CPNI; rather, it affirmatively requires the release of CPNI when written authorization is provided, without prohibiting release under other circumstances.³ Consequently, Windstream’s claim that it is not obligated to provide account numbers and pass codes to Insight Phone, despite the explicit terms of the ICAs, is insupportable.

² Of course, if they were not CPNI, then Windstream would not be able to claim that it would be unable to disclose them without customer permission.

³ 47 U.S.C. § 222(c)(2). It is clear from the FCC’s rules that there is no prohibition on granting access to CPNI based on oral consent. For instance, a carrier may obtain customer consent during an inbound or outbound telemarketing call for the purposes of that call. 47 C.F.R. § 64.2008(f).

II. Windstream's Reliance On The *Simple Port Order* to Justify Requiring Pass Codes and Account Numbers for Access to CPNI Is Misplaced.

Even if the ICAs did not address the specific question of whether Windstream can withhold account numbers and pass codes, Windstream still would be unable to do so because it is using them unlawfully to verify the customer's decision to change carriers. Windstream repeatedly points to the FCC's *Simple Port Order*^{4/} as providing the "legal basis to conclude that Windstream may require account numbers and/or pass codes for access to CPNI" Br. at 8-10, 12. This is wrong. That order had nothing to do with accessing customer service records or protecting CPNI. The relevant provisions of that order addressed only one issue, the type of information that an executing carrier like Windstream may request from a carrier like Insight Phone when submitting a port request.^{5/}

The rules that actually do govern access to CPNI in the context of a carrier change wholly undermine Windstream's claims. Access to the customer information contained in the customer service record ("CSR") through Windstream Express is a precursor to submitting a port request. Carriers must have access to the CSR to ensure submission of an accurate -- that is valid -- port request. Carriers like Windstream have a duty under section 251(c) of the Act to provide non-discriminatory access to the customer service record to competing providers such as Insight Phone.^{6/} The rules regarding access to the CPNI contained in the customer service record by a competing provider seeking to win

^{4/} *In re Telephone Number Requirements for IP-Enabled Service Providers*, 22 FCC Rcd 19531, FCC 07-188, ¶2, (2007) ("Four Fields Order").

^{5/} *Four Fields Order*, 22 FCC Rcd at ¶¶ 42-49.

^{6/} See, e.g., *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information* 13 FCC Rcd 8061, 8126, n. 315 (1998) (citing *Local Competition Order*, 11 FCC Rcd at 15763-65).

the customer are wholly different than the rules that apply when a customer calls its own carrier for access to CPNI.

In the carrier change context, all that is required before Insight Phone or its properly designated agent, Accenture, may access the information in the customer service record is the customer's oral consent. It is for this reason that Windstream's citation to section 222(c)(2) to suggest that Insight Phone must obtain written authorization from the customer before accessing the CPNI in a customer's service record is misplaced. Br. 15, n. 6. Section 222(c)(2), which requires carriers to disclose CPNI upon its own customers' written authorization, is not applicable in the context of a competing carrier seeking access to a customer service record based on the customer's consent. As stated by the FCC:

We note, however, that section 222(c)(1) does not prohibit carriers from disclosing CPNI to competing carriers, for example, upon customer "approval." Accordingly, although an incumbent carrier is not required to disclose CPNI pursuant to section 222(d)(1) or section 222(c)(2) absent an affirmative written request, local exchange carriers may need to disclose a customer's service record *upon the oral* approval of the customer to a competing carrier prior to its commencement of service as part of the LEC's obligations under sections 251(c)(3) and (c)(4).

13 FCC Rcd at 8126. (emphasis added).

Once Insight or its agent obtains oral consent from a customer to access his or her CPNI, Windstream is required to provide access to that information, contained in the CSR, on a non-discriminatory basis. As the Commission has recognized, "a carrier's failure to disclose CPNI to a competing carrier that seeks to initiate service to that customer who wishes to subscribe to a competing carrier's service, may well constitute an unreasonable practice in violation of section 201(b), depending on the circumstances."

Id.

Moreover, as described above, the ICAs also require Windstream to provide Insight access to customer CPNI “based on Insight’s representation that subscriber has authorized Insight to obtain such CPNI.” ICA 17.4. The ICAs do not require or permit confirmation of Insight’s representation that it has authorization. Windstream has never made any complaint that Insight has viewed CPNI without customer authorization; and if Windstream believed that this has occurred, section 17.4.4 of the ICAs requires that Windstream follow the dispute resolution procedure set forth in the ICAs before raising any such complaint to this Commission.

Windstream has pointed to no authority whatsoever to support its imposition of pass codes and/or account codes, or to suggest the need for written authorization, before providing access to customer service records. Windstream, rather, admits throughout its Brief that it has no business purpose in requiring account numbers and pass codes before providing access to customer service records. Windstream asserts that it has adopted its porting procedures to “test” Insight Phone and states that it will not provide the “answers to the test” even when customers authorize Insight Phone to access their customer information. The fact is that Windstream is not authorized to “test” Insight Phone at all.

III. Windstream’s Efforts to Guard Against Unauthorized Access Ports by Requiring Pass Codes and Account Numbers is Unlawful in the Absence of Making that Information Available in the CSIR.

The submission of an order to port a customer’s number is separate from the question of accessing CPNI. Just as Windstream’s efforts to impose pass codes and/or accounts codes to access CPNI is unlawful, Windstream’s requirement to provide this information in the port request is unlawful.

Windstream consistently confuses validation of porting information with verification of authorization to request a port. This confusion is captured in statements such as the following: "Windstream's validation process is intended to prevent this type of customer confusion by ensuring that requesting carriers like Insight Phone are not submitting unauthorized orders to Windstream." Br. 15. This, however, is not validation. What Windstream wants to do is called re-verification. Validation is permitted; re-verification is not. The FCC rules clearly prohibit Windstream from seeking to ensure that Insight Phone has authorization from the customer before executing the port request.

Before a carrier may submit a carrier change request, it must have obtained authorization from its customers and had that authorization verified in one of several ways identified in the FCC rules. These rules, found at 47 CFR 64.1120-30, are summarized in Windstream's Brief. Br. 12-13. Such authorization/verification may take the form of a writing, such as a letter of agency, an electronic authorization, or verbal and recorded authorization verified by a third party. Insight Phone fully complies with all such applicable rules. As stated before, Insight Phone obtains customer authorization of every port and then verifies that authorization using one of the required methods of verification, typically either verification in writing or third-party verification. The ICA states: "Subject to applicable rules, orders, and decisions, Windstream will provide Insight Phone with access to Customer Proprietary Network Information (CPNI) for Windstream End Users upon Insight Phone providing Windstream a signed **blanket Letter of Agency (LOA)** for Windstream's Customer of record." (Emphasis added.) Windstream has absolutely no role to play in this verification process and it cannot take

any steps to re-verify that Insight Phone has in fact obtained consent. To the contrary, as Insight Phone has pointed out continually in this proceeding: “[a]n executing carrier (Windstream) shall not verify the submission of a change in a subscriber’s selection of a provider of telecommunications service received from a submitting carrier.” 47 C.F.R. § 64.1120(a)(2).

There is a long history of attempts by incumbents to convince the FCC and other regulators that they should be allowed to “protect” their customers through verification of customer orders and other mechanisms that delay or deny carrier changes. The FCC consistently has rejected these efforts, and has adopted specific rules prohibiting these activities. The most notable of these prohibitions is Section 64.1120(a)(2) of the FCC’s rules, described above. The FCC adopted this rule because of concerns that executing carriers could use verification to impede competition, and despite claims that permitting executing carriers to require re-verification of service orders would reduce slamming. *See Implementation of the Subscriber Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers’ Long Distance Carriers, Second Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 1508, 1564-65 (1998). In 2008, the FCC spelled out the basis for the rule as follows:

The Commission expressed concern that that executing carriers [such as Windstream] could use the verification process as a means to delay or deny carrier change requests in order to benefit themselves or their affiliates. While the Commission agreed that allowing executing carriers to re-verify carrier change requests could, under certain circumstances, help deter slamming, it ultimately concluded that the anti-competitive effects of re-verification outweighed the potential benefits.”⁷¹

⁷¹ *Implementation of Subscriber Carrier Selection Change Provisions of the Telecommunications Act of 1996*, Order, 23 FCC Rcd 486, ¶ 6.(2008).

In that case, the Commission precluded local carriers from rejecting port requests on the ground that the information contained in the request conflicted with information in the customer's records held by the local carrier.^{8/} The Commission reaffirmed the clearly defined roles of the submitting carrier, like Insight Phone, and the executing carrier, like Windstream. The submitting carrier, through its independent third party verifier, is required to elicit consent, and the executing carrier's sole responsibility is "prompt execution of a change verified by a submitting carrier."^{9/} The Commission found that the local carriers' rejection of port requests that contained information that conflicted with their own records constituted an unfair effort to "block a transaction that has already occurred between a customer and another carrier."^{10/}

This analysis is consistent with a variety of other FCC decisions, including the decision adopting the carrier freeze rules, which prohibited carriers from imposing blanket freezes and required them to put freezes in place only at specific customer request. See 47 C.F.R. 64.1190(b)(2) (prohibiting freezes except in response to customer requests that meet specified requirements). Similarly, when the FCC adopted its CPNI rules following the 1996 Act, it concluded that incumbent carriers would not be permitted to use the information they obtained from carrier change requests to contact customers prior to the time of the carrier change because of the risk of anti-competitive behavior, even though there might be possible benefits to verification. Implementation of the Subscriber Change Selection Changes Provision of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, *Second Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC

^{8/} *Id.* ¶ 8.

^{9/} *Id.*

^{10/} *Id.*

Rcd 1508, 1568 (1998) (“Therefore, pursuant to Section 222(b), the executing carrier may only use such information to provide service to the submitting carrier, *i.e.*, changing the subscriber’s carrier, and may not attempt to verify that subscriber’s decision to change carriers.”).

Windstream’s self-admitted efforts to ensure that Insight Phone’s request to port a number was truly authorized by insisting on a pass code or account number is equally unavailing. The rules simply do not allow Windstream to undertake such an effort, under any guise.

IV. Pass Codes and Account Numbers Are Not Required to Validate a Port

Pass codes and account numbers are not required by the FCC’s rules, even for validation purposes. As noted, an executing carrier is permitted to seek information necessary to validate the port, that is, to determine that the correct customer account is being moved.

Windstream claims that the FCC’s *Simple Port Order* justifies its requirement that Insight Phone provide a pass code and account number to port a customer’s phone number, even without making the pass code and account number available in the customer service record. That Order, however, does exactly the opposite of what Windstream states: the FCC ruling requires providers to stop erecting roadblocks to porting by requiring more information than the minimum needed to identify a customer. The FCC was responding to concerns from competing providers that ILECs were requiring far more information -- in the form of validation fields -- than was needed. The result of some carriers requiring excessive validation information was to impermissibly burden requesting carriers, like Insight Phone, with gathering unnecessary information.

Indeed, in Paragraph 2 of the order, the FCC explains that a carrier may not require fields that have no business purpose:

Specifically, we clarify that no entities obligated to provide Local Number Portability may obstruct or delay the porting process by demanding from the porting-in entity information in excess of the minimum information needed to validate the customer's request. Simple Port Order at ¶2.

The FCC order identified a maximum of four fields that may be necessary to validate a port, but it in no way required all four fields. Windstream's erroneous interpretation is that it may use all four fields, but Windstream ignores the sentence before that which limits it to "the minimum information needed to validate the customer's request." *Id.* Windstream must, of course, have enough information to validate the customer's identification, but its past practice of porting without account numbers and pass codes illustrate that it does not need those fields to validate a customer.

Moreover, while identifying these fields, the FCC directed the North American Numbering Council (NANC) to develop industry guidelines implementing the order. The NANC recently proposed its recommendations. In two significant respects, the NANC recommendation, reflecting an industry consensus, rejected the arguments that Windstream makes here. First, the NANC recommendation would preclude carriers from requiring carrier-assigned pass codes such as those that Windstream uses in Kentucky. The recommendations emphatically state that pass codes such as Windstream's that are assigned by it without a request from a customer cannot be used as a validation field to obtain information or conduct ports: "Any Service Provider assigned password/PIN may not be utilized as a requirement in order to obtain a CSR." *Recommended Plan for*

Implementation of FCC Order 09-41, attached as Exhibit A. ("*NANC Recommendation*").¹¹

Second, the NANC recommendation would require that Windstream make available to Insight Phone all information that it uses for validation: "Any of the End User validation fields required by the Old Service Provider on an incoming LSR must be available on the CSR, excluding End User requested and assigned password/PIN." *NANC Recommendation*, at 3.2 (page 18) and 3.5.2 (page 25), attached as Exhibit A. In other words, if Windstream is going to require account numbers and pass codes, it must make that information available to Insight Phone as part of the customer service records available through Windstream Express when Insight Phone represents that it has customer authorization to view customer information.¹² This is consistent with the requirements under the ICAs and the current FCC rules as well. It is also consistent with current industry guidelines established by NANC and the Ordering and Billing Forum ("OBF"), which provides that a (new) provider may access another (old) provider's CSR, by indicating to the old provider that has oral authorization given by the end user proving consent to review their account. See ATIS/OBF Local Service Migration Guidelines, ATIS-0405300-0003 (2007) at 8-1 to 8-3. These policies are followed by almost all carriers in the industry, including Insight Phone.

The NANC recommendations also clarify that communication between old and new service providers must not delay the validation or processing of the port request.

¹¹ Windstream suggests that the Commission should wait until the FCC addresses the NANC recommendation before deciding Insight Phone's complaint. There is no reason to wait. Windstream's actions are impermissible today and they are impermissible under the NANC Recommendation. Whether and when the FCC may modify those recommendations in a manner more to Windstream's liking is speculative and provides no basis for the Commission to delay deciding Insight Phone's complaint.

¹² Even if the NANC recommendation is not adopted, however, Insight Phone still would be entitled to obtain access to this information under the ICAs.

NANC Recommendation at 3.2 (page 18). Windstream's practice of withholding account freeze information does just that. Windstream does not make available any freeze information as part of the customer information available through Windstream Express. Insight Phone's experience is that the vast majority of Windstream customers are not aware that a freeze has been placed on their account. Thus, Insight is unable to determine if a freeze has been placed on a customer's account even though the customer has authorized Insight to view their account information. Instead, to determine if an account has a freeze applied, Insight Phone must actually submit a port request and wait 24 hours to see if the port request is denied because of the account freeze. At that point, Insight Phone must then contact the customer to try to set up a three-way call with Windstream to lift the freeze and then start over. This means that this customer port takes twice as long as anyone else's.

Windstream's own customer terms and conditions show that Windstream is not motivated by any desire to protect customers. As contained on Windstream's website as of March 2, 2010, Windstream tells its customers in its Terms and Conditions that all personal identifiers, such as its pass codes, belong to Windstream, "Unless we provide you advance notice, you have no proprietary right to any such identifiers." See Windstream Terms and Conditions, attached as Exhibit E.

Windstream has stated that it uses the pass codes in its billing system, but it tells its customers in the Terms and Conditions that they should have no expectation of privacy regarding such information, "Information in our billing and customer care systems concerning your account and your use of Services belongs to us, and you have no expectation of privacy with respect to such information." Windstream then tells this

Commission that it must protect that information from Insight Phone even though a customer may have authorized Insight to receive that information. Clearly, the roadblocks are for Windstream's anticompetitive interests not for the customers' interests.

V. Windstream must comply with the terms and conditions of the ICAs

Section 17.4 of the ICAs specifically state that "Subject to applicable rules, orders, and decisions, Windstream will provide Insight with access to Customer Proprietary Network Information (CPNI) for Windstream End Users upon Insight providing Windstream a signed blanket Letter of Agency (LOA) for Windstream's Customer of record, based on Insight's representation that subscriber has authorized Insight to obtain such CPNI." In this context Insight is Windstream's customer of record. Insight Phone provided Windstream a signed blanket Letter of Agency (LOA), dated January 2, 2008, pursuant to sections 17.4 and 17.5 of the ICAs. This blanket LOA is consistent with the blanket LOA Insight Phone provides all other carriers and Windstream has never indicated that the blanket LOA provided is inadequate in any way. Neither the ICAs nor the FCC rules require that Insight obtain a customer letter of agency prior to accessing customer account information through Windstream Express. Rather, consistent with section 17.4.2 of the ICA, applicable FCC rules, and industry standards, Insight is permitted to and does obtain a customer's oral authorization to access customer CPNI with Windstream. This customer authorization is completely unrelated to a customer's authorization to port.

Indeed, it is apparent from the Windstream Brief that Windstream confuses (intentionally or not) the "signed blanket Letter of Agency (LOA)" described in ICA section 17.4 with the customer Letter of Authorization obtained to verify ports. The two

are not the same. The FCC's rules, as well as Section 2.12(c)(2) of the Communications Act state that a carrier shall disclose customer proprietary network information to any person designated by the customer. Thus, once Insight has obtained the customer's authorization to access the customer's CPNI, Windstream is required to provide that information to Insight. Neither the FCC rules nor the Communications Act require that Insight obtain a customer letter of authorization prior to accessing customer account information through Windstream's interface. Windstream attempts to justify erecting roadblocks by alleging that it is protecting its customers. Windstream suggests that providing access to pass codes or account codes is outside the scope of the ICA because that information does not qualify as CPNI. Rather, according to Windstream pass codes are "personally identifiable information," which should be protected more than CPNI. The authority cited for this proposition, Br. at 18, n. 9, says nothing of the sort.^{13/} It does not even discuss PII.^{14/} CPNI is the customer information afforded the most protection under the Telecommunications Act. 47 U.S.C. §222 and, in any event, because the account number and the pass code are listed on customer bills, they fall within the definition of CPNI. 47 U.S.C. § Section 222(h)(1) (defining CPNI to include "information contained in the bills pertaining to telephone exchange service"); 47 C.F.R.

^{13/} Windstream cites *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, 22, FCC Rcd 6927 ¶ 30 & n. 99. (2007). That paragraph discusses the need for carriers to disclose unauthorized access via pretexting to CPNI. That order does, however, appear to under mine the notion that personally identifiable information is not CPNI. *See id.* at n. 2 ("CPNI includes personally identifiable information derived from a customer's relationship with a provider of communications services.")

^{14/} Windstream cites *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, 22, FCC Rcd 6927 ¶ 30 & n. 99. (2007). That paragraph discusses the need for carriers to disclose authorized access via pretexting to CPNI. That order does, however, appear to under mine the notion that personally identifiable information is not CPNI. *See id.* at n. 2 ("CPNI includes personally identifiable information derived from a customer's relationship with a provider of communications services.")

§ 64.2003(a) (defining “account information, a type of CPNI, as “information that is specifically connected to the customer’s service relationship with the carrier, including such things as an account number or any component thereof”). If Insight Phone receives customer authorization to view customer information, Windstream has no right to withhold some of that information. Windstream’s motives in withholding the customer information have nothing to do with customer protection; Windstream merely is seeking to be anti competitive in contravention of the ICAs and federal rules and regulations. This is evident when Windstream argues that customers should call Windstream to find out their pass code. This argument demonstrates that pass codes have nothing to do with security, and everything to do with maximizing Windstream’s ability to retain its current customers. This is further evident since the pass code seems to be only required to accomplish porting. Windstream readily provides customers their pass code if they call in, which would alert Windstream that the customer is planning to change carriers, since there is no other reason for the customer to request the pass code. This allows Windstream to immediately target such customers with retention efforts.

VI. Windstream’s References To Alleged Slamming And Insight’s Authorization Practices Must Be Stricken From This Record And Cannot Justify Windstream’s Efforts To Police Ports.

Windstream fills its Brief with unproven and unsubstantiated allegations not properly before this Commission. It creates a definition of slamming that is unsupportable, ignores the ICA dispute resolution procedure, and uses an example of a customer switching services and changing account names to allege systemic problems that are nowhere in the record.

a. **Windstream's Definition Of Slamming Ignores Industry Standards.**

In several places in its Brief, Windstream redefines "slamming" as requesting customer information without customer authorization. This definition is completely contrary to industry usage. Windstream uses their erroneous definition in order to allege that Insight Phone *may* be slamming. First, Windstream has never identified a slamming complaint or made a specific slamming allegation, other than the 2 customers that are discussed below. It merely insinuates that it *could* happen. Second, slamming has an industry accepted definition; and Insight simply is incapable of slamming under that definition.

The FCC has defined slamming as "the illegal practice of *switching* a consumer's traditional wireline telephone company for local, local toll, or long distance service without permission." See FCC website at: www.fcc.gov/slamming. The FCC also has stated that "Slamming occurs when a company changes a subscriber's carrier selection without that subscriber's knowledge or explicit authorization. Implementation of Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, *Second Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 1508, 1509(1998). The emphasis on "switching" is in the original FCC definition. The FCC uses this definition in many documents, such as the attached FCC Consumer Facts document titled "When Your Authorized Telephone Company is Switched Without Your Permission - 'Slamming'". Slamming is not looking up information, it is "switching" a customer. As Insight Phone has repeatedly stated, Insight Phone is incapable of slamming because its service requires someone to

physically go to a customer's house, knock on the door, explain that the customer is switching carriers, and ask permission to do so.

Not only does Windstream have no evidence that Insight Phone has ever slammed a customer using the industry standard definition of slamming, it has absolutely no evidence that Insight Phone has ever "slammed" using Windstream's erroneous definition of slamming or in any other way. In fact, Windstream has no valid basis for making any such accusations. Insight Phone fully complies with all applicable FCC rules and does not slam customers in any way. Windstream states that because it cannot verify that two customers have authorized Insight Phone to view customer data, verification that is forbidden by the FCC's rules, then Insight Phone must have done so. This farfetched argument must be rejected. Other than these two customers, Windstream has never made any formal complaint of slamming using any definition of slamming to Insight Phone, and the facts show these customers were not slammed.¹⁵ Insight Phone is not required to defend itself against insinuations; any legitimate dispute raised by Windstream must first be addressed between the Parties pursuant to the ICAs before it is aired before this Commission by filing a separate complaint against Insight Phone.

b. The ICA Dispute Resolution Procedure Requires Notice, Documentation, Description And A Chance for Informal then Formal Resolution Before this Commission Is Involved.

Windstream devotes much of its brief to claims that simply are not properly before this Commission at this time. These claims are subject to specific dispute resolution procedures under the ICAs that Windstream has not satisfied and, in any event, are entirely unsupported.

¹⁵ The specifics of the two cases are discussed in more detail below.

Insight Phone has lodged its Formal Complaint under Section 17 of the ICAs. This section specifically requires Windstream to use the extensive dispute resolution procedures set out in Section 9 if it does not agree that Insight properly requested CPNI for a specific End User. (ICA 17.4.4). Windstream has not notified Insight Phone of any alleged wrongdoing by Insight Phone and has not filed a complaint with this Commission against Insight Phone; thus, Insight Phone's actions are not at issue here. This Commission must concentrate its examination on the actions of Windstream.

Nevertheless, Windstream devotes a substantial portion of its brief to claims that are subject to the ICA dispute resolution process. As an example, on page 2 of its Brief, Windstream alleges that Insight Phone "may not" be obtaining verified customer authorizations before submitting port requests. As explained above, Windstream has confused what is necessary to view CPNI with what is necessary to port and Insight is obtaining everything necessary to do both; more important, Windstream never has made such a claim to Insight Phone under the terms of the ICAs. If Windstream can provide written notice, documentation and a description of wrongdoing, then it may begin the dispute resolution procedure. It may not skip that procedure and bring vague allegations to this Commission to justify its own wrong actions. Moreover, a vague allegation that Insight Phone "may not" be doing something cannot form the basis for any Commission action. Quite simply, Windstream has absolutely no proof that Insight Phone has ever looked at customer information without customer authorization or ever ported a customer without authorization and verification.

On page 4 of its Brief Windstream makes several unfounded allegations against Insight's agent, Accenture, stating that its roadblocks to ports are necessary because

Insight Phone uses Accenture as an ordering agent and Windstream has no interconnection agreement with Accenture. Accenture has been Insight Phone's ordering agent since 1996 and has been disclosed as such to Windstream and to all other carriers with which Insight interconnects. Again, under the ICAs, if Windstream has a concern with any issue related to the ICA, including an issue with Insight Phone's ordering agent, Accenture, it must first notify Insight Phone in writing, document its problems, describe them and give Insight Phone a chance to resolve the issue informally. Indeed, it is clear from the ICAs that Windstream has no basis for any complaint because section 17 of the ICAs specifically allows the use of agents and set outs a procedure wherein Insight Phone must provide a blanket Letter of Agency for that agent. Insight Phone has provided Windstream the requisite blanket LOA, which was also included as an attachment to both the Formal Complaint and the Stipulated Facts filed with this Commission. The blanket LOA makes it clear that Insight Phone's ordering vendor, Accenture, acts on Insight Phone's behalf and Insight Phone remains subject to all privacy and CPNI laws and regulations. Moreover, Accenture is a well known ordering agent in the industry and engages with similar transactions with most carriers in the industry. Windstream's alleged concerns with Accenture are fabricated, because if it actually had concerns it would have brought them up before now.

Windstream also alleges that the customer letter of agency used by Insight Phone does not comply with federal regulations and thus violates section 17 of the ICA. Again, if Windstream so believes, it must notify Insight in the manner set forth in the ICAs prior to raising it before this Commission. The form in question, exhibit 4 to the Stipulated Facts, however, does comport with FCC regulations. Windstream's accusation is based

on text which informs customers that their decision to switch service providers may subject them to fees. This language actually is required by the FCC's rules. It informs customers not that Insight Phone may charge them a fee to switch, as Windstream suggests, but that Windstream may charge them a fee to switch. *See* 47 CFR 64.1130(e)(5) (requiring letters of agency to contain "clear and unambiguous language that confirms . . . [t]hat the subscriber may consult with the carrier as to whether a fee will apply to the change in the subscriber's preferred carrier"). In fact, this disclosure is particularly important when Windstream customers are switching to Insight Phone because Windstream does not prorate customer fees. If a customer switches phone service on any other day except the last day of a monthly billing cycle, Windstream will charge them a fee for switching services. Finally, of course, this particular claim has absolutely nothing to do with the question of whether Windstream must provide access to customer information; it is intended entirely as a distraction from Windstream's own violations of the ICAs and the FCC's rules.

c. The ICAs Provide Procedures For Dealing With Customer Changes and/or Customer Complaints Which Windstream Ignores.

Windstream has never made any formal complaint to Insight Phone regarding a customer port or alleged slamming incident except for the two incidents described in the letters attached to the Stipulated Facts as Exhibits 5 and 6. Insight Phone explained to Windstream in Exhibit 6 that the two customers were not slammed and have been adequately served.

One customer originally placed an order to port from Windstream to Insight Phone but canceled that order before the port occurred. Exhibit 6 to the Stipulated Facts. This is an action that is common enough that is contemplated in the ICAs. Section 17.3

states that when an End User changes or withdraws authorization, each Party must act in accordance with the customer's direction. Furthermore, attachment 14 to the ICAs sets forth a procedure for Insight Phone to notify Windstream in the case of a canceled port so as to minimize any service disruption. ICA, attachment 14 at 2.8. Windstream represents that the canceled order must be because the customer was confused by Insight Phone. It also could mean that the customer simply changed his or her mind. In any event, a single cancellation is no evidence of slamming.

The other customer ported from Windstream to Insight Phone in June of 2008. Exhibit 6 to the Stipulated Facts. Insight Phone provided service for two months when the customer decided to port back to Windstream on July 31, 2008. *Id.* When Insight Phone received the port request in July, it was in the name of someone else in the household, not in the name of the Insight Phone customer. *Id.* The two different names resulted in Insight Phone initially rejected the port. *Id.* Windstream must have consulted with the customer because it resubmitted the port request in the name of the customer on the Insight Phone account. The port went through once the names matched. *Id.*

As Insight Phone has stated several times, neither of these two incidents illustrate systemic problems. These are the only two incidents that Windstream has alleged; thousands of ports have gone through without any alleged customer confusion. Furthermore, neither show slamming. One customer never switched carriers. The other customer ported to Insight Phone, stayed there a while and ported back, without ever stating that she did not intend the first port. Instead of blaming Insight Phone of slamming, Windstream should think that maybe the customer simply liked Windstream's service better than Insight Phone. Obviously, this is atypical behavior.

VII Windstream's Reliance On Statistics Is Misplaced Even One Improperly Rejected Port Violates The ICA, Federal Law And Customer Rights.

Windstream attempts to minimize its violations of the ICAs and the FCC's rules by claiming that only a small proportion of port requests are rejected because Insight Phone does not provide account numbers or passcodes. Windstream's statistics are not verified and are entirely immaterial to the relief requested by Insight Phone. The ICAs and the FCC, through its orders and regulations, require Windstream to execute ports for each customer that requests them. Both the ICAs and the FCC require Windstream to provide information to Insight Phone when so authorized by a customer, including all information required for a port. Moreover, Section 64.1120(a)(2) of the FCC's rules prohibits Windstream from taking any action to verify whether a submitting customer has obtained authorization for a carrier change, even for one customer.

Windstream's attempts to belittle the impact of its prohibited policies also overlook, given Windstream's actions in unilaterally imposing such illegal roadblocks, Insight has had no other choice but to set up separate procedures to work around Windstream's requirements. Windstream also does not consider the unjustified additional work Insight must do to prevent a port order from being rejected due to Windstream's unwarranted policies or the additional delays caused in scheduling a customer port. Because of Windstream's policies Insight must schedule multiple customer callbacks, often requiring five or six attempts, and mail post cards to schedule a 3-way call with the customer to call Windstream to get the pass code Windstream unilaterally assigned to the customer's account. Insight also has had to schedule multiple follow-up calls with customers and Windstream to remove freezes placed on customer accounts (often without customer authorization). These obstacles have required Insight

Phone to schedule all ports from Windstream fourteen (14) days after the customer's request to change carriers, which is far longer than the port window Insight Phone experiences with all other carriers in the industry, and Insight Phone still often has to reschedule such ports. The patient cooperation of thousands of customers in working through Windstream's unjustified additional barriers to competition reflects more on the desire of such customers to switch service to Insight Phone than on the burden imposed by Windstream. Further, it does not reflect the substantial number of customers who have thrown their hands up in light of the difficulties in changing from Windstream to Insight Phone and were denied the opportunity to take advantage of the benefits of local telephone competition.¹⁶

Moreover, in attempting to minimize its violations, Windstream uses inaccurate and misinterpreted statistics, many of which are contrary to Insight Phone's records. Windstream asserts that between May and August 28, 2008, approximately 24% of Insight Phone's port orders were rejected. This period, of course, includes times both before and after Windstream began insisting on account numbers and pass codes, and, in fact, the vast majority of the rejections occurred during August, after Windstream began requiring account numbers on all ports. Insight Phone's records show that thereafter Insight Phone implemented policies to try to acquire this information before submitting the port request to Windstream. These policies enabled Insight Phone to lower the percentage of port orders rejected by Windstream to approximately 5% between October and December 2008. Again, to avoid having its port requests rejected due to Windstream's illegal policies, Insight Phone has been forced to set up separate

¹⁶ Of course, most of these customers never reach the point in the process where their port requests would be rejected, so they are not reflected in Windstream's statistics.

procedures to work with customers to meet Windstream's requirements. Insight Phone has documented many occasions when a customer interested in switching to Insight has become frustrated and stated he or she will have to call back when told to call Windstream for a pass code. Unfortunately, many of these prospective customers do not call back. Insight Phone's records show that even today approximately 5% of prospective customers are lost each month because of Windstream's policies regarding the pass code, the account number or an account freeze.

CONCLUSION

Insight Phone has asked this Commission to rule on three issues that require it to examine the action of Windstream when Insight Phone either views customer information or enters a port. Windstream has admitted that, although it has no specific evidence of wrongdoing and it has no right to verify customer authorization, it has erected roadblocks to "test" Insight Phone. Based on Windstream's admission, this Commission should order Windstream to either stop requiring account numbers and pass codes for ports or, if it requires account numbers and pass codes, to provide them to Insight Phone on its Windstream Express interface when Insight Phone has customer authorization to view customer information. Even without a port order, Windstream must provide Insight Phone with customer account numbers and/or pass codes when Insight Phone represents that the customer has authorized Insight Phone to access his or her information. Finally, Windstream must provide Insight Phone with customer freeze information when Insight Phone represents that the customer has authorized Insight Phone to view customer information.

Respectfully Submitted,




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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via U.S. Mail and email on this the 12th day of March 2010 upon:

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