

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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**PUBLIC SERVICE
COMMISSION**

In the Matter of:

FORMAL COMPLAINT FOR EMERGENCY RELIEF)
BY INSIGHT PHONE OF KENTUCKY, LLC TO)
REQUIRE WINDSTREAM KENTUCKY EAST, LLC)
AND WINDSTREAM KENTUCKY WEST, LLC)
TO PROVIDE ACCOUNT NUMBERS WHEN)
AUTHORIZED BY CUSTOMERS IF IT REQUIRES)
AN ACCOUNT NUMBER FOR PORTS)

CASE NO.
2008-00335

INSIGHT’S OPPOSITION TO WINDSTREAM’S MOTION TO STRIKE

Insight Phone of Kentucky, LLC (hereinafter “Insight Phone”), by counsel, hereby files this response in opposition to the Motion to Strike filed by Windstream Kentucky East, LLC and Windstream Kentucky West, LLC (hereinafter, collectively “Windstream”).

INTRODUCTION

Insight Phone has called upon the Public Service Commission to determine the legality of Windstream’s requirement to provide passcodes and account numbers before accessing any customer information and/or when submitting an order to port a telephone number. Insight Phone also asked that the Commission determine whether Windstream must include customer account freeze information when Insight accesses Customer Proprietary Network Information (“CPNI.”). Windstream’s motion to strike bears no relevance to the resolution of those issues. Windstream’s motion, like much of its advocacy in this proceeding, seeks to distract the Commission with unsubstantiated claims regarding Insight Phone’s (or other unnamed companies’) alleged behavior.

Windstream hopes to convince the Commission that its requirement that Insight provide customer passcodes and account numbers before accessing customer information and/or requesting to port a customer telephone number is needed to protect its customers’ account

information and prevent the possibility of slamming. As was demonstrated in Insight Phone's reply brief, there is no legal basis to demand such information either before seeking customer information or as a way to verify authorization to port a telephone number. Unable to rebut Insight Phone's legal arguments, Windstream instead resorts to irrelevant pleadings, hoping to have the last word on factual allegations that are beside the point.

Apart from their irrelevancy to this proceeding, Windstream's claims that Insight Phone unfairly included "new" facts are spurious. Many of the claimed "new" facts are actually set forth in the Stipulated Facts and/or other documents submitted by the parties in this proceeding. In addition, many of the asserted "facts" -- such as Windstream's motives for imposing these requirements -- are not "facts" that Insight is trying to establish but are legal arguments. Moreover, certain information included in Insight Phone's reply, such as the NANC recommendations are in response to Windstream's having itself submitted information outside of the Stipulated Facts. If it is permissible for Windstream to incorporate unstipulated facts into its briefs Insight Phone must be permitted to counter Windstream's use of such facts and this Commission can certainly read all the briefs and decide for itself the legal issues before it.

Windstream is simply seeking a final word to the Commission when the briefing schedule does not allow it the final word. The duplicitous nature of Windstream's Motion to Strike is best seen by its insistence that it must be allowed to supplement Insight Phone's NANC Recommendation Exhibit with Windstream's own self-serving letter regarding those Recommendations, even though it had already included that letter as Exhibit 2 to its Initial Brief. Insight Phone's inclusion of the NANC Recommendation in its Reply Brief was in response to Windstream's Exhibit 2. Now the Commission has Windstream's self-serving letter as exhibits to two documents.

ARGUMENT

I. Windstream's Motion is Irrelevant to the Legal Issues At Hand.

Throughout this proceeding, Windstream has sought to distract this Commission with unsubstantiated allegations of Insight Phone's behavior. Windstream's allegations are irrelevant to the resolution of Insight Phone's complaint. The Commission must rule on whether Windstream's policies and practices violate the Interconnection Agreements ("ICAs") and/or the federal rules and policies. Windstream's allegations that its policies and practices are based on a desire to protect its customers from possible unauthorized access to information or what Windstream imagines is slamming by Insight Phone is irrelevant. The ICAs and federal rules and policies do not allow Windstream to adopt unlawful procedures to protect against potential slamming or guard against access to information. If Windstream has a good faith belief that slamming is occurring, the ICAs provide a remedy that must be followed.

Windstream, in its argument 1, complains that Insight Phone should not be allowed to discuss Windstream's use or nonuse of the ICAs' dispute resolution procedures. The ICAs are a matter of public record and are attached to the Stipulated Facts. Insight Phone relies on the language in the ICAs including the dispute resolution language.¹ The fact that Windstream has not invoked the dispute resolution procedure with regard to alleged concerns regarding Insight Phone is also a fact that cannot be disputed, but at any rate has no bearing on the legality of Windstream's requirement that Insight provide customer passcodes and account numbers before accessing customer information and/or requesting to port a customer telephone number.

¹ Windstream correctly asserts that the parties did engage in settlement discussions in August 2008 but those discussions were regarding Windstream's policies at issue in this proceeding, not whether Insight has ever viewed CPNI without customer authorization.

In its argument 2, Windstream seeks to strike statements that it has produced no evidence of slamming, apart from two notifications placed in the record regarding *possible* slamming.² In fact, the stipulated facts cover this exact point. The statements that Windstream objects to are each supported by items 28, 29 and 30 of the Stipulated Facts. Stipulated Fact no. 28 specifically states that Windstream sent a letter regarding two customer ports and “has not formally notified Insight of any slamming issues except as set out in this letter.” Moreover, Windstream seeks to strike Insight Phone’s statements regarding Windstream’s erroneous definition of what constitutes slamming, which is a legal issue. Windstream attempts in its Initial Brief to divert the Commission’s attention from its own behavior by alleging possible slamming, based on its characterization that seeking customer information without customer authorization is slamming. Insight Phone countered these statements by pointing out that the FCC has a standard definition of slamming used throughout the industry. Nevertheless, the Commission need not resolve the extent to which Windstream may or may not have raised slamming concerns in order to find that its efforts to protect against alleged slamming cannot justify the type of verification procedures Windstream seeks to employ.

In its argument 3, Windstream complains about statements that access to the CSR precede the submission of an order to port telephone numbers. Such statements are supported by Stipulated Fact no. 5 which states that one purpose of Windstream Express is to allow requesting carriers “to access some CPNI needed to complete those service provider change requests.” Windstream again argues in its Motion that some carriers may not use CSRs to fill out LSRs.³ As recognized by the NANC in its recommendations, however, carriers choosing not to access

² Windstream’s statement that Insight Phone suggested including in the stipulated facts broad-sweeping claims regarding slamming is perplexing and simply not true.

³ Windstream here is itself attempting to assert in its Motion new facts, which are not included in the stipulated facts.

the CSR face “a heightened risk that their [number porting request] may not be complete and accurate.”⁴ The primary point of Insight’s statements were to highlight the distinction between a request for information in the CSR and the submission of an order to port a telephone number. Windstream’s brief had thoroughly confused and conflated these two distinct actions. These separate activities are also subject to distinct legal obligations. Insight Phone’s reply emphasized the importance of understanding the different roles that these functions play and the applicable legal obligations that apply to each. Whether some carriers access CSRs without then submitting a LSR could be due to a variety of reasons and it is at any rate irrelevant to the determination of whether Windstream’s policies and practices violate the ICAs and/or the federal rules and policies.

II. Insight Phone’s “Factual” Assertions Simply Rebut Windstream’s Assertions.

Many of the claimed factual statements that Windstream objects to are actually legal arguments. Furthermore, Windstream’s allegation that Insight Phone has included impermissible facts in its briefs ignores the fact that Windstream made similar statements in its Initial Brief and Insight Phone’s Response is properly a response to those statements. In such cases, Insight Phone made its arguments in the Response Brief not to prove any particular fact but to rebut Windstream’s assertions. For example, Windstream argued in its Initial Brief that its actions are justified because it believes Insight Phone may have slammed customers, based on Windstream’s definition of slamming. Insight countered these statements by discussing the FCC definition of slamming and the CSR procedures, and by also pointing out that Windstream has provided no proof that Insight Phone has ever accessed customer information or ported a customer phone

⁴ NANC Recommendation 3.2 at page 7.

number without customer authorization.⁵ Insight Phone made its arguments to clarify the record in light of Windstream's factual assertions, many of which are not included in the stipulated facts. Nonetheless, the issues before this Commission are legal issues that can be determined without reliance on any such allegedly disputed facts.

In argument 4, Windstream complains that Insight Phone's statement that Windstream has previously accepted orders without requiring passcodes, indicating that such information is unnecessary, is a new fact. Besides the fact that this is a legal not factual argument, Insight Phone's statement is supported by Stipulated Fact no. 23, which states that prior to Windstream's policy change implemented on August 1, 2008, carriers were able to submit port orders through Windstream Express by providing a telephone number and checking a box verifying that they had previously obtained a valid customer authorization. Windstream validated and processed such orders without passcodes for years. Thus, it is entirely reasonable to draw the inference that passcodes are not necessary to validate orders, and there is nothing that bars Insight or the Commission from drawing such an inference. In fact, Insight Phone first made this argument in its Formal Complaint. Moreover, Insight Phone made this point again in its Response Brief to counter Windstream's argument, in its Initial Brief, that its passcodes are required for validations.⁶ Clearly, they are not. And clearly, Insight Phone should be able to argue so.

In argument 5, Windstream argues against Insight Phone's statements that Windstream does not make available any freeze information as part of the CSR available through Windstream

⁵ In addition, Windstream argues that this statement should be excluded because Windstream would have objected to including it in the stipulated facts. This is incorrect. It is a conclusion that can be drawn from the stipulated facts, which do not include any such allegations, let alone proof of such allegations. Windstream's reference to what it might have found in discovery is, like most of the motion, a red herring.

⁶ Of course, to the extent that Insight's argument concerning the need of passcodes for validation depends on facts not in evidence, so does Windstream's. This analysis applies to much of Windstream's motion; indeed, the general pattern of the motion is to seek to exclude Insight responses to Windstream assertions that, if anything, have less support in the stipulated facts than Insight's responses.

Express until a port request is submitted and then rejected the next day. Insight Phone's statements are supported by Stipulated Fact no. 6 which states that a "carrier cannot determine through Windstream Express at the time the carrier submits a port request if a customer has a carrier freeze on his/her account; instead, after placing the port request, a carrier is subsequently notified through Windstream Express if the carrier's port request is rejected for the reason that the customer has a carrier freeze on his/her account." Further, Insight Phone included these statements to counter Windstream's claims, in its Initial Brief, that Insight Phone's statements regarding customer freeze information being unavailable are wrong.⁷ It is in fact the case that the freeze information is not made available until after a request to port a number has been submitted. The problem with that approach is that it further delays the customer's request to port their number and Insight Phone essentially wastes time and resources submitting a port request on an account subject to a freeze on switching providers. Had Insight Phone been made aware of the freeze when it accessed the CSR, it would have taken the necessary steps to have the freeze lifted before submitting the port request.

In argument 6, Windstream alleges that Insight Phone should not make reference to Windstream's own Customer Terms and Conditions. First, Windstream did not deny that the document is as alleged, Terms and Conditions from Windstream's website. Second, the terms and conditions are a matter of public record, and therefore do not need to be included within the stipulated facts. Third, Windstream is, in effect, condemning its own actions, since Windstream first added documents outside the Stipulated Facts in Windstream's Initial Brief when it added the self-serving NANC Recommendation letter without adding the NANC Recommendations themselves. Fourth, Windstream stated in its Initial Brief that it regarded certain information

⁷ Although Windstream did agree to the statements in no. 6 of the Stipulated Facts, Windstream states that they would not have done so without discovery. These statements, however, are regarding Windstream's own policies.

such as passcodes to be personal information of the customer, a claim that also falls outside the stipulated facts. Insight Phone merely countered Windstream's statements in its Initial Brief by pointing out that in Windstream's Terms and Conditions, it tells each customer that the information is proprietary to Windstream and that Windstream controls that information.

Windstream's argument 8 is that Insight Phone should not be allowed to use statistics of customers who could not port due to Windstream's roadblocks. Insight Phone, however, raised its phone records to rebut Windstream's use of its unsubstantiated statistics in its Initial Brief to argue that only a small percentage of Insight Phone port requests are rejected because of Windstream's policies at issue. Insight Phone made these arguments, however, not to establish or prove any particular fact or statistic but to clarify the record in light of Windstream's assertions of fact that were outside the Stipulated Facts. For example, in the Stipulated Facts Windstream makes certain statements about its records, although Insight Phone did not agree to the truthfulness or accuracy of any such statements. In its Initial Brief, however, Windstream relies on its assertions about its records to make and support arguments which are not in the Stipulated Facts. As a result, Insight was forced to point out that we do not agree with Windstream's records and their arguments based on such records and, in fact, our records contradict Windstream's statements about its records.

Insight Phone raises these points about its records and its statements about what the records show not as issues of fact to be determined by the Commission, but simply to rebut Windstream's assertions. Whether 5% or 2.4% of Insight Phone's port requests are rejected each month because of Windstream's policies is not relevant and not essential to the determination of whether Windstream's policies violate the ICAs and the Federal rules and policies. As Insight Phone has noted many times, even one port request denied because of Windstream's roadblocks

is wrong. The veracity of the statistics for either party need not be proven for this Commission to decide the legal issues.

III. The Commission Has The Expertise And The Skill To Read The Briefs And Decide The Legal Issues Without Any Stricken Statements.

Windstream's Motion To Strike is simply a ploy by which Windstream would like to make further arguments and add more facts to the legal briefs before this Commission. The Commission has the expertise and skill to read the legal briefs and decide the issues without striking any statement. This is not a case where a lay jury must have each statement scrutinized for admissibility. It is an expert panel that will read these briefs.

For example, in Windstream's argument 7 it claims that Insight Phone cannot allege that Windstream's actions are motivated by its desire to retain customers. Once again, Windstream elides its own actions in this proceeding. Insight's statements about Windstream's motives for its policies were not made as an attempt to prove Windstream's motives as fact. Rather, Insight Phone raised more realistic motives for Windstream's policies to counter Windstream's argument in its Initial Brief that its actions are motivated and justified because it believes Insight Phone might allow unscrupulous agents or overzealous salesmen to access information without authorization. See, e.g, Initial Brief at 9. This claim, like many others in Windstream's Initial Brief is not only outside the scope of the Stipulated Facts, but entirely speculative and, at least in part, contradicted by the Stipulated Facts. Indeed, Windstream's Initial Brief is filled with statements in which Windstream alleged, with absolutely no factual basis or justification based on the stipulated facts, that it must protect its customers from Insight Phone because Insight Phone might possibly access information without authorization or slam customers. If Windstream can make such arguments outside the scope of the Stipulated Facts,

certainly Insight Phone may say that perhaps Windstream's motives for such policies are to retain customers.

Finally, Windstream's argument 9 is that Insight Phone should not be allowed to reference the NANC Recommendations, which conclude that passcodes and account numbers should not be required for ports and, if they are required, they must be provided as part of the CSR, without also attaching Windstream's self-serving letter regarding the NANC recommendations. The Commission can see this for what it is as well.

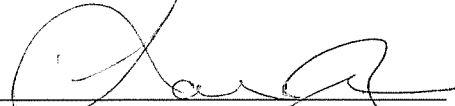
The Commission has the expertise and skill to read the legal briefs and decide the issues without striking any statement. However, should the Commission determine to grant Windstream's Motion by striking any of Insight Phone's statements in its Reply Brief the Commission must likewise also strike each of Windstream's assertions of fact that are outside the scope of the stipulated facts. To the extent that the Commission believes there is any validity to Windstream's motion, many of Windstream's arguments are inappropriate and should be disregarded as well. If the Commission took such action, it would have beneficial effect of stripping out many of the irrelevant claims that Windstream has made throughout the briefing process and permitting a more direct focus on the basic issues, notably how Windstream's actions violate the ICAs and other legal requirements. However, Insight believes that the best course is for the Commission to deny the Motion To Strike and to act based on the pleadings it has before, rather than allowing Windstream to distract the Commission from the very real impact of Windstream's unlawful actions on competition in Kentucky.

CONCLUSION

Windstream's Motion to Strike, like much of its advocacy in this proceeding, is a sideshow designed to distract the Commission from the infirmity of Windstream's legal position.

Windstream's Motion is an effort to prohibit Insight Phone from making any defense to Windstream's arguments. The Commission can readily decide the legal questions in this case based on the stipulated facts. While Insight Phone stands behind the veracity of each of its statements in its reply, the various allegations regarding each parties' conduct need not be resolved to conclude that Windstream is acting unlawfully by demanding carrier assigned passcodes and account numbers in order to access customer information and/or as a way to validate or verify a request to port the customer's telephone number. The Motion to Strike has no bearing on the resolution of the merits of this case and Insight Phone respectfully requests that the Commission deny Windstream's motion and issue its ruling on Insight Phone's Formal Complaint as expeditiously as possible.

Respectfully Submitted,



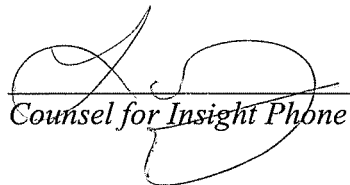
Laurence J. Zielke
Janice M. Theriot
Zielke Law Firm, PLLC
Meidinger Tower, Suite 1250
462 South 4th Street, Suite 1250
Louisville, KY 40202

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via U.S. Mail on this the 8th day of April 2010 upon:

Douglas F. Brent
Stoll, Keenon & Ogden PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202
douglas.brent@skofirm.com

Mark R. Overstreet
Stites & Harbison PLLC
421 West Main Street
P.O. Box 634
Frankfort, KY 40602-0634
moverstreet@stites.com



Counsel for Insight Phone