BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

NEBRASKA TECHNOLOGY & TELECOMMUNICATIONS, INC.,	)	Application No. FC-1336
Complainant,	)	ORDER
v.	)	
WINDSTREAM NEBRASKA, INC.,	)	
Respondent.	)	ENTERED: October 14, 2009

APPEARANCES:

For NT&T:

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For Windstream:

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For the Commission:

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BY THE COMMISSION:

Procedural Background

On May 13, 2009, Nebraska Technology & Telecommunications, Inc. (NT&T) filed a formal complaint against Windstream Nebraska, Inc. (Windstream) alleging a violation of their interconnection agreement and anti-competitive behavior. The complaint identified four disputed issues as follows: (A) the Media Gateway collocation dispute; (B) the customer information dispute; (C) the hot cut conversion dispute; and (D)

the proration dispute. An answer and a motion to dismiss the proration dispute were timely filed on June 1, 2009.

Notice of the formal complaint appeared in the Daily Record, Omaha on May 18, 2009. A planning conference was held on June 26, 2009 in the Commission Niobrara Conference Room, Lincoln, Nebraska. Mark Fahleson and Troy Kirk appeared for the complainant. James Overcash appeared for the respondent. The Hearing Officer entered an Order on July 7, 2009, memorializing the procedural schedule consented to by counsel for the complainant and respondent.

In accordance with the procedural schedule, a response to Windstream's motion to dismiss was filed by NT&T and a reply to the response was then filed by Windstream. On July 23, 2009, the Hearing Officer denied the motion to dismiss.

A hearing on the complaint was held on September 10, 2009, in the Commission Hearing Room, in Lincoln, Nebraska. Appearances were entered as indicated above. Prior to the commencement of the hearing, the Commission was informed that parties reached a settlement on two of the four issues identified in the complaint, namely, (C) the hot cut conversion dispute; and (D) the proration dispute. The Commission was not presented with the details of the settlement reached on those two issues.

E V I D E N C E

NT&T called two witnesses in support of its complaint, Mr. Michael Orcutt and Mr. Steven Turner.

Mr. Orcutt is the Chief Executive Officer of NT&T. NT&T provides competitive local telecommunications services in a number of Nebraska exchanges served by Qwest, Windstream and Citizens. NT&T currently has approximately 18,235 access lines in Qwest's Nebraska exchanges. In the Windstream exchanges, NT&T provides service on a resale basis. NT&T currently has approximately 7,952 access lines in Windstream's Nebraska exchanges.

Mr. Orcutt testified that NT&T is planning a network deployment in the Windstream territory requiring investment by NT&T of approximately $2.6 million. The network deployment will enable NT&T to serve approximately 8,000 of its access lines in a facility-based manner. According to Mr. Orcutt, this will enable NT&T to offer a complete array of services with greater pricing flexibility. NT&T will also extend Digital Subscriber

Line services to over 20 communities in the Windstream territory.

Mr. Orcutt then summarized the two remaining disputed issues: (A) the “Media Gateway collocation dispute” and (B) the “customer information dispute”.

NT&T expressly sought a collocation agreement from Windstream in its negotiations of its interconnection agreement in 2007. Mr. Orcutt stated their agreement required Windstream to provide collocation of equipment that is “used and useful” for interconnection. Windstream denied NT&T’s request to collocate a Media Gateway device in Windstream’s central office.

Windstream’s carrier interface system requires NT&T to have the Windstream customer’s account number and pass code (a number assigned by Windstream on all customer accounts) in order to access customer information and to send a local service request. Mr. Orcutt testified that, based on his experience most subscribers did not know what their account number was and where to find it on the telephone bill. NT&T would then be required to have the customer call Windstream to obtain the customer account number and then call NT&T back. Mr. Orcutt believed the number of subscribers that did not know they have a pass code on their account would be greater since this number was assigned to customers via a bill message and does not appear routinely on the bill.

Mr. Turner is a Managing Director at FTI Consulting in Washington, D.C. Mr. Turner holds a degree in electrical engineering from Auburn University. He generally provides consulting services in the telecommunications industry and worked with NT&T on the negotiation of their interconnection agreement with Windstream and contributed significant portions of the provisions set forth in the interconnection agreement. Mr. Turner testified that the interconnection agreement requires Windstream to provide collocation of equipment that is “used and useful” for interconnection. NT&T filed an application for collocation with Windstream on December 4, 2008. NT&T requested collocation of a Media Gateway device. Windstream denied NT&T’s request.

Mr. Turner testified that in the NT&T network configuration (an Internet Protocol-based network) a media gateway is a piece of equipment that is essential to convert Internet Protocol (IP) transmissions into Time Division Multiplexing (TDM) transmissions. Traditional telecommunications networks such as Windstream’s currently require that the interfaces occur on a

TDM basis. The Media Gateway allows for this conversion between the IP and TDM basis.

In rejecting the collocation request Windstream's representative wrote:

> Windstream has, and follows the policy to reject the installation in a collocation of a CLEC's core switch network equipment for access to UNEs and for interconnection purposes. Acceptable collocation equipment should only consist of equipment necessary to terminate the "unbundled elements." Placing core switching in the collocation area is not necessary to accommodate this operation.

NT&T then removed the CA9000 Call Server-the switch in NT&T's network from the collocation application according to Mr. Turner. Windstream then rejected the revised application stating that the Media Gateway was still "part of the core switching architecture (with the CA9000) that provides the ability to switch local traffic, extending beyond the mere ability to interconnect or accessing unbundled loops in the Windstream network."

Mr. Turner testified that despite the specific language in the interconnection agreement using the "used and useful" standard, Windstream's response has consistently been that the equipment be necessary for interconnection or access to unbundled elements. In addition, Mr. Turner stated, in his opinion, the Media Gateway equipment is "necessary" for interconnection to Windstream's network. Instead, he testified, Windstream wants NT&T to place this equipment in another location and purchase DS3 transport (most likely as Special Access circuits) from this off-premises site back to the collocation arrangement. According to Mr. Turner, by refusing to allow collocation under these terms, Windstream is attempting to increase the economic cost to NT&T for competing against Windstream. Windstream presently purchases MetaSwitch switches. Mr. Turner testified as a practical, economic and operational matter, the rejection of the Media Gateway equipment precludes NT&T from obtaining interconnection with Windstream at a level equal in quality to that which Windstream obtains within its own network or it provides to any affiliate, subsidiary, or other party.

Mr. Turner also testified about access to consumer information. Windstream requires NT&T to have a subscriber's account number and pass code in order to port a telephone number from Windstream to NT&T per the customer's request. Mr. Turner

testified that the interconnection agreement specifically requires Windstream to provide the account number when the customer has authorized NT&T to obtain that information. NT&T ceased marketing services in the Windstream territory due to the transition from a resale to a facilities-based platform. However, NT&T obtains a recorded individual Letter of Agency (LOA) from the customer. In the LOA, the customer authorizes Windstream to provide all customer proprietary network information (CPNI) including the account number. Mr. Turner testified that federal law requires Windstream to disclose CPNI upon the affirmative written request made by the customer to any person designated by that customer.

Windstream called two witnesses, Mr. Charles Morse and Mr. Steven Weeks.

Mr. Morse is the Staff Manager of Strategic Planning. Mr. Morse holds an engineering degree from the University of Arkansas. Mr. Morse testified the Media Gateway sought to be collocated is capable of performing various functions. It provides a protocol conversion between the PSTN and the voice over Internet Protocol equivalent called real time protocol (RTP) traffic. The Media Gateway device also provides the SS7 protocol conversion between the Message Transfer Part (MTP) based signaling traffic and the IP equivalent called SGTRAN. The gateway also provides switching functions between incoming and outgoing bearer (voice) traffic that does not leave the gateway. In addition, the gateway speaks other signaling formats, provides tones, announcements, and 3-way conferencing.

Mr. Morse testified that Windstream rejected NT&T's request to physically collocate its Media Gateway in Windstream's office because the equipment is not required by the FCC or otherwise to be located on Windstream's property. Mr. Morse testified that the equipment is not necessary in allowing NT&T to interconnect with Windstream and access UNEs. Mr. Morse testified that the Media Gateway is fundamentally part of the switching infrastructure and not the interconnection infrastructure.

Mr. Weeks is Director of Wholesale Services. Mr. Weeks testified that the customer's account number and pass code are not customer proprietary network information. Mr. Weeks testified that the account number is a numeric identifier used by Windstream's various systems. The account number, according to Mr. Weeks has no relationship to the telecommunications services used by the customer. Similarly, the password provides a measure of security to Windstream customers and has no relationship to the types or amount of telecommunications services used by the customer. Mr. Weeks further testified that

account numbers and pass codes are account information as defined in 47 C.F.R. § 64.2003(a). He concluded that although not CPNI, this information is related to CPNI because it is used as security protection for access to a customer's CPNI. Accordingly, Windstream protects this information from general public disclosure.

On the issue of porting telephone numbers, Mr. Weeks testified that account number and pass code information was included in the FCC's list of four fields which can be used by carriers to validate the correct customer has been identified in the local porting process. Accordingly, Windstream requires competitive carriers to populate the four fields, which includes both the customer account number and pass code prior to obtaining customer information and submitting local service orders. Windstream states the competing carrier must obtain this information from the customer.

O P I N I O N A N D F I N D I N G S

Based on the testimony and evidence in the record, and the post-hearing briefs filed by the parties, the Commission is of the opinion and finds the complaint filed by NT&T should be sustained on (A) the media gateway collocation dispute, and (B) the customer information dispute. The Commission finds Windstream must allow NT&T to collocate the Media Gateway equipment in one or more Windstream offices; and Windstream must release the pass code and account information to NT&T when a customer has provided a letter of agency (LOA) to NT&T for the purpose of switching service.

Collocation Dispute

NT&T and Windstream provided conflicting testimony on the standard to be used for collocation. NT&T argues that the standard agreed to by both parties is the "used and useful" standard which appears in Attachment 7, Section 9.0 of the agreement and reads as follows:

9.0 Use of Dedicated Space

9.1 Nature of Use
NT&T may locate all equipment used and useful for interconnection to Windstream under 47 U.S.C. § 251(C)(2) and accessing Windstream's unbundled network elements under 47 U.S.C. § 251 (C)(3) of the FTA 96, regardless of whether such equipment includes a switching functionality, provides enhanced services capabilities, or offers other

> functionalities. Windstream will permit the collocation of equipment such as DSLAMs, routers, ATM multiplexers, and remote switching modules in Windstream Eligible Structures. Windstream may not place any limitations on the ability of NT&T to use all the features, functions, and capabilities of collocated equipment including but not limited to, switching and routing features and functions.

Windstream, on the other hand, argues the standard for collocation is the "necessary" standard. Windstream bases this argument on Attachment 7, section 1.2 which provides,

> 1.2 Physical collocation provides actual space (hereinafter referred to as Dedicated Space) within a Windstream Eligible Structure as defined in Paragraph 2.0 Definitions, following. NT&T will lease the Dedicated Space from Windstream and install certain of its own telecommunications equipment within the Dedicated Space that is necessary for the purposes set forth in Paragraph 1.3, following. Windstream will provide caged, shared caged, cageless, and other physical collocation arrangements within its Eligible Structures. When space is Legitimately Exhausted inside an Eligible Structure, Windstream will permit collocation in Adjacent Structures in accordance with this Agreement so that collocators will have a variety of collocation options from which to choose.
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> 1.3 NT&T shall not occupy or use the Collocation Space, or permit the Collocation space to be occupied or used, for any purpose, act or thing, whether or not otherwise permitted by the Agreement, if such purpose, act or thing (i) is in violation of any public law, ordinance, or governmental regulation; (ii) may be dangerous to person or property; [or] (iii) violates the terms of this Agreement. Physical collocation is available for the purposes of (i) transmitting and routing telephone exchange service or exchange access pursuant to 47 U.S.C. 251(c)(2) of FTA96, or (ii) obtaining access to Windstream's unbundled network elements pursuant to 47 U.S.C. 251(c)(3) of FTA 96....

Upon review of the agreement, in particular Attachment 7 as a whole, we agree with NT&T that the more specific language requiring collocation of equipment that is "used and useful" for interconnection should control. This section of the agreement specifically references the Telecommunications Act's obligations of telecommunications carriers to provide interconnection, and further, provides specific examples of equipment which can be

collocated in Windstream's offices. The fact that the list does not include the specific "Media Gateway" device is not limiting. The list merely provides examples of equipment which may be collocated. The specific language also provides that NT&T may locate equipment in Windstream's Dedicated Space *even though the equipment includes a switching functionality, provides enhanced services capabilities, or offers other functionalities*. (Emphasis added). We agree with NT&T that the language in section 9.0 specifically addresses what type of equipment may be collocated in Windstream's offices and sections 1.2 and 1.3 are more general terms. The Commission is unpersuaded by Windstream's argument that section 9.0 was intended merely to allow the collocation of multifunctional equipment. It does not appear from the plain language in that section that it applies only to multifunctional equipment. Accordingly, we find the controlling standard for collocation between Windstream and NT&T is the "used and useful" standard in section 9.0.

It was undisputed that an incumbent carrier has a duty to permit a competitive carrier to collocate equipment and that the FCC has defined this duty using the "necessary" standard. However, NT&T is correct that the parties can mutually agree to a more lenient collocation standard such as the "used and useful" standard. We find that the parties did just that. We further conclude, based on the testimony in the record, the Media Gateway device is "used and useful" for interconnection to Windstream under 47 U.S.C. 251(C)(2) and accessing Windstream's unbundled network elements under 47 U.S.C. § 251(C)(3) of the Telecommunications Act.

Although we do not need to reach the issue here, it is quite likely that the Media Gateway device NT&T desires to collocate in Windstream's office would meet the FCC's "necessary" criteria.

In a 2001 Order, the FCC defined that standard as follows:

> We now conclude that equipment is ***necessary*** for interconnection or access to unbundled network elements within the meaning of section 251(c)(6) if an inability to deploy that equipment would, ***as a practical, economic, or operational matter, preclude the requesting carrier from obtaining interconnection or access to unbundled network elements***.[1] (Emphasis Added).

[1] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Fourth Report and Order 16 FCC Rcd 15,435, 15,447 (August 8, 2001)("Fourth Report and Order").

Specifically, as it relates to collocating equipment such as switching equipment, the FCC stated,

> ***We conclude that switching and routing equipment typically meets our equipment standard because an inability to deploy that equipment would, as a practical, economic, or operational matter, preclude a requesting carrier from obtaining nondiscriminatory access to an unbundled network element, the local loop.*** As a general matter, the incumbent LEC therefore must allow requesting carriers to collocate switching and routing equipment.[2]

NT&T's testimony demonstrated rejection of this equipment would increase NT&T's costs and, as a practical matter, it would make NT&T's network be less reliable if it were required to locate its equipment at an alternative location. NT&T has made a showing that rejection of its collocation has as a practical, economic or operational matter, precluded it from obtaining interconnection or access to unbundled network elements.[3]

Customer Information Dispute

NT&T also alleged Windstream was in violation of its interconnection agreement by not providing customer proprietary network information (CPNI) to NT&T upon a showing that the customer requested NT&T's service. NT&T alleges that Windstream's use of the customer's account number and pass code, in practice, is anti-competitive. The interconnection agreement provides in pertinent part,

> 17.4 Subject to applicable rules, orders, and decisions, Windstream will provide NT&T with access to

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[2] *Id*. at 15,442.

[3] In addition, as it pertains to multifunctional equipment, the FCC's Fourth Report and Order frames the issue as whether the primary purpose and function of the multifunctional equipment are to provide the requesting carrier with "equal in quality" interconnection or nondiscriminatory access to one or more unbundled network elements. *See* Fourth Report and Order, 36 FCC Rcd at 15454. NT&T demonstrated that the purpose and function of the equipment are to provide "equal in quality" interconnection and access to one or more unbundled network elements. Accordingly, we believe the FCC's test for multifunctional equipment would be satisfied by NT&T's demonstration. *See id*.; *see also* 47 C.F.R. § 51.323(c)(incumbent carriers may not place any limitations on the ability of competitive carriers to use all the features, functions, and capability of collocated equipment, including switching and routing features).

> Customer Proprietary Network Information (CPNI) for Windstream End Users upon NT&T providing Windstream a signed Letter of Agency (LOA) for Windstream's Customer of record, based on NT&T's representation that subscriber has authorized NT&T to obtain such CPNI.

Windstream counters that the account number and pass code are not CPNI. Windstream states that this information is a security measure for each subscriber to get access to a subscriber's CPNI. Windstream further argued it has an obligation to protect the privacy interests of its subscribers and therefore requires NT&T to obtain this information directly from the subscriber prior to accessing the Windstream Express system.

In accordance with 47 U.S.C. § 222(h)(1), CPNI is defined as

> (A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and
> (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier.

NT&T argued that the account number and pass code are information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of Windstream. Accordingly, Windstream is obligated to provide to NT&T the customer's Windstream assigned account number and pass code upon the presentation of a valid LOA. Windstream does not deny that the account number and pass code are contained in the billing statement. However, Windstream argues that the account number is a numeric identifier used by Windstream's various systems and the pass code is used for security and has no relationship to the types or amount of telecommunication services used by the customer.

Upon review of the interconnection agreement and considering the testimony and arguments of the parties, the Commission finds NT&T has the correct interpretation of the obligations of the parties under its agreement. The

interconnection agreement obligates Windstream to provide NT&T with the customer's information when NT&T has presented an LOA from the customer. We find this obligates Windstream to share the specific customer identification information such as the account number and pass code. We further agree that as NT&T states, the account number and pass code are contained in the billing statements and they pertain to telephone exchange service or telephone toll service received by a customer of a carrier consistent with the definition of CPNI in 47 USC § 222(h)(1). Windstream's requirement that NT&T obtain the account number and pass code from the customer as a condition precedent has the practical effect of stifling competition.

The FCC recognized the duty of incumbent carriers to share CPNI with competitive carriers upon a valid customer request. 47 USC § 222(c)(2) provides "a telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer." The FCC found it must carefully balance both privacy and competitive concerns when interpreting § 222.[4] Section 222(c)(2) imposes a disclosure requirement on carriers so that unaffiliated third party competitors can obtain access to individually identifiable CPNI.[5]

In response to Windstream's argument that its practices protect the security interest of the customer, we find that Windstream has failed to reach the appropriate balance between consumer privacy interests and competitive goals of the 1996 Act Congress intended. We are unpersuaded by Windstream's argument that federal requirements would require its security protocols to be met by NT&T to access Windstream Express.[6] Windstream has chosen, but is not required, to have an on-line interface such as Windstream Express for competitors to access customer information and make port requests. Additionally, the provisions relied on by Windstream related to on-line security measures were designed to keep CNPI from general public disclosure. These rules were designed to eliminate the practice of "pretexting" and scrupulous marketing practices, not to act as a barrier to competition.

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[4] *See In the Matter of the Implementation of the Telecommunications Act of 1996; Telecommunications Carrier's Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket 96-115, Notice of Proposed Rulemaking, 11 FCC Rcd 12513, 12521 (May 17, 1996) ("CPNI NPRM").

[5] *See id*. at 12528.

[6] Windstream based its argument on an FCC rule, 47 CFR § 64.2010, stating it is required to take reasonable measures to discover and protect against attempts to gain unauthorized access to CPNI.

We are further unpersuaded by Windstream's reliance on the FCC's Number Portability Order as a basis for requiring NT&T to provide a customer's pass code. That order is inapplicable to NT&T's right to access to customer account information. The FCC's Number Portability Order simply permitted carriers to require those fields be completed when processing a request to port a local number.

Windstream's policy which requires its competitors to complete the Windstream-issued customer pass code and account information has the practical effect of stifling competition, and is therefore anti-competitive. NT&T's access is virtually denied or at the very least delayed by extra steps NT&T must take to win a customer. More importantly, consumers' wishes to have telephone service from their carrier of choice are made more difficult.

We find, consistent with the terms of the interconnection agreement, Windstream must share the account number and pass code information at the point where NT&T presents a validly executed LOA. Windstream cannot require NT&T to first obtain account number and pass code information from its customer prior to effectuating a change in telecommunications service at the customer's request when NT&T presents Windstream with a validly executed LOA.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Complaint be and it is hereby sustained as it relates to the collocation and CPNI dispute.

IT IS FURTHER ORDERED that Windstream be and it is hereby required to permit NT&T to physically collocate its Media Gateway equipment in Windstream offices.

IT IS FURTHER ORDERED that Windstream be and it is hereby required to release a customer's Windstream account number and pass code upon NT&T's presentation of a validly executed Letter of Agency for that customer.

MADE AND ENTERED at Lincoln, Nebraska, this 14th day of October, 2009.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST

Executive Director

MADE AND ENTERED at Lincoln, Nebraska, this 14th day of October, 2009.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST

Executive Director

//s// Frank E. Landis