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February 22, 2010

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VIA HAND DELIVERY

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street – Filing Room (2 North)
Harrisburg, PA 17120

RE: Richard Ryan v. Verizon Pennsylvania Inc.; Docket No. C-2009-2135745;
**MOTION OF VERIZON PENNSYLVANIA INC. TO VACATE THE
“ORDER ON RESPONDENT’S PRELIMINARY OBJECTIONS” ISSUED
BY THE CHIEF ADMINISTRATIVE LAW JUDGE ON JANUARY 28,
2010**

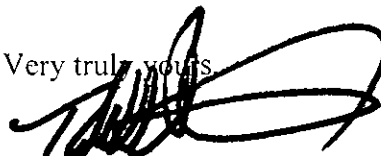
Dear Mr. McNulty:

Enclosed for filing with the Commission are the original and three (3) copies of Verizon Pennsylvania Inc.’s Motion filed in the above-captioned proceeding.

A copy of each of this document has been served upon the Complainant in accordance with the attached Certificate of Service.

If you have any questions with regard to this filing, please direct them to me. Thank you for your attention to this matter.

Very truly yours,



Todd S. Stewart
Counsel for Verizon Pennsylvania Inc.

TSS/bks

Enclosures

cc: The Honorable Cynthia Williams Fordham (Via Electronic & First Class Mail)
Richard Ryan

MAILING ADDRESS: P.O. BOX 1778 HARRISBURG, PA 17105

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RICHARD RYAN,

Complainant

v.

VERIZON PENNSYLVANIA INC.,

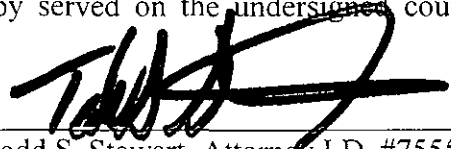
Respondent

Docket No. C-2009-2135745

NOTICE TO PLEAD

TO: Richard Ryan, Complainant

Pursuant to 52 Pa. Code §5.103, you are hereby notified that, if you do not file a written response denying or correcting the enclosed Motion of Verizon Pennsylvania Inc. to Vacate the "Order on Respondent Preliminary Objections" issued by the Chief Administrative Law Judge on January 28, 2010 within twenty (20) days from service of this notice, the facts set forth by Verizon Pennsylvania Inc. in the Motion may be deemed to be true, thereby requiring no other proof. All pleadings such as a Reply to the Motion must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served on the undersigned counsel for Verizon Pennsylvania Inc.



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Counsel for Verizon Pennsylvania Inc.

DATED: February 22, 2010

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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SECRETARY'S BUREAU

RICHARD RYAN,

Complainant

v.

VERIZON PENNSYLVANIA INC.,

Respondent

Docket No. C-2009-21357453

**MOTION OF VERIZON PENNSYLVANIA INC.
TO VACATE THE
“ORDER ON RESPONDENT’S PRELIMINARY OBJECTIONS”
ISSUED BY THE CHIEF ADMINISTRATIVE LAW JUDGE ON
JANUARY 28, 2010**

Verizon Pennsylvania Inc. (“Verizon PA”), by and through its counsel, Hawke McKeon & Sniscak LLP, hereby moves the Pennsylvania Public Utility Commission (“Commission”) and the Presiding Administrative Law Judge to vacate the Order on Respondent’s Preliminary Objections issued January 28, 2010 (“Order”), in the above-captioned matter. In support of its Motion, Verizon PA avers and argues as follows:

Summary

1. The Order erred as a matter of law for two compelling reasons. First, it erroneously accepted as fact and then relied upon, in reaching its conclusion, a speculative, non-factual mischaracterization or argument, which is not competent and which cannot be considered in evaluating a Preliminary Objection, as the Complainant’s contention was at best conjecture. Second, Verizon PA’s due process rights under the statute, the pertinent regulations, and under the state and federal constitutions were violated because the document in which the mischaracterization

was made was never served upon Verizon PA by the Complainant or Commission before the Order that relied upon it was issued.

2. Specifically, the Order states that “In particular, Complainant claims that Respondent has attempted to deceive and frighten Complainant and his wife ... Respondent does not address these claims in its Preliminary Objections.” (Order, p. 8). This finding is based upon two sentences that appeared in an apparent additional pleading that was filed by the Complainant (on or about November 9, 2009) *after* Verizon PA submitted its Preliminary Objections on November 4, 2009.

These sentences are:

On November 2, 2009, Todd Stewart from Hawke, McKeon, Sniscak called my wife Diane Burko to say that they were filing preliminary objections with the PUC declaring that this case should be moved to the Court of Common Pleas. What they are doing is trying to frighten my wife into thinking that we will have to hire a lawyer in order for justice to be served.

The Order then found that the second sentence in this quote from Complainant’s November 9, 2009 Amended Complaint, may constitute a violation of Section 1501 the Public Utility Code, 66 PA. C.S. § 1501. and thus gives rise to Commission jurisdiction.¹

3. Verizon PA never had an opportunity to respond to the November 9, 2009 document filed by the Complainant because he failed to serve Verizon PA, nor did the Commission due to an

¹ By suggesting that the Commission’s authority to regulate utility service under 66 Pa. C.S. § 1501 extends to the conduct of outside attorneys representing utilities in complaint proceedings, the Order commits clear error. While it may be true that the Commission’s regulations purport to provide the Commission with the authority to regulate the conduct of all person’s, including attorneys, who appear before the Commission, 52 Pa. Code § 1.27, those regulations require due process that is entirely distinct from any underlying proceeding in which alleged bad conduct occurs, and any remedy applies solely to the offending person, not the their client. Moreover, it is the Pennsylvania Supreme Court, not the Commission, that has exclusive authority to regulate the conduct of attorneys. *Wajert v. State Ethics Commission*, 420 A.2d 439, 442 (Pa. 1980), *Pennsylvania Public Utility Commission Bar Association v. Thornburgh*, 434 A.2d 1327, 1331 (Pa. Commw. 1981). In short, the law is absolutely clear that the negotiation or defense of positions, and advocacy in support thereof, cannot fall within the definition of public utility service, the Order’s contrary conclusion is reversible error. 66 Pa. C.S. § 102.

apparent breakdown in its process.² This Motion requests that the Order be vacated, and that Verizon PA be afforded its due process right to answer the pleading that contains the speculative mischaracterization of the communication between Verizon's counsel and the Complainant's wife, including the right to submit preliminary objections thereto. The precise procedural history and legal authority for vacating the Order are as follows.

4. On or about October 15, 2009, Verizon PA was served with a Complaint in the above-captioned matter. The Complaint alleged, among other things that, "Telephone wires owned by Verizon are attached to the entire length of the western façade of our home." The Complaint made additional spurious allegations that Verizon PA had lied to or tried to deceive the Complainant.

5. On November 4, 2009, Verizon PA submitted an Answer and New Matter and Preliminary Objections to the Complaint. Verizon PA denied the allegations in the Complaint.

6. At about the same time that it filed its Answer and New Matter and Preliminary Objections, the undersigned counsel for Verizon PA as a courtesy and to explore settlement (as is Verizon PA and the Commission's policy) attempted to contact the Complainant. Complainant was unavailable and Complainant's wife said she was able to speak to the matter. Counsel for Verizon PA then explained that Verizon PA would be filing an Answer and New Matter and Preliminary Objections and suggested that Verizon PA nonetheless was willing to discuss settlement. Specifically, Verizon PA's counsel explained, in response to a question by Complainant's wife as to what was the basis of Verizon PA's Preliminary Objections, that the objections claim that the Commission lacked jurisdiction to adjudicate the existence of an easement. Verizon PA's counsel

² Verizon PA is not suggesting the ALJ or office of OALJ caused such due process violation as the Judge and Office naturally would have assumed that service of the document had either occurred via the Complainant or the Secretary's office.

also represented that if the preliminary objection was granted it did not mean the dispute was over but that the forum for entertaining any action would be the Court of Common Pleas or civil court system. At no time, however, did Verizon PA's counsel threaten Complainant's wife or suggest that Complainant could not obtain "justice without an attorney." Indeed, the conversation was friendly and cordial, and settlement was discussed. Verizon PA ordinarily would not raise here such conversations regarding settlement but because the Complainant in his two different versions of his Answer to the Preliminary Objections and Answer has raised and made certain derogatory claims regarding Verizon PA settlement³ offers. He did the same in his unserved additional or amended Complaint. The breach of the settlement discussion confidentiality by the Complainant and his unfounded accusations about what settlement discussions mean or imply, require Verizon PA to defend itself against such derogatory claims, in order to ensure that what actually happened is clear and fairly stated.

7. Prior to the Order at issue, the documents by Complainant that were served on Verizon PA by Complainant (his Answer to New Matter and Preliminary Objections)⁴ or the Commission, contain no allegation as quoted and relied upon in the Order that Verizon PA's counsel threatened Complainant's wife with regard to the need to hire counsel or to obtain counsel if the matter were to proceed in Common Pleas Court.

8. On or about January 15, 2010, Verizon PA received a packet of documents from a Commission employee, Special Agent Eranda Vero, with a cover letter stating that it appeared that

³ On or about December 8, 2009, Verizon PA received a copy of a document which appeared to be Complainant's Answer to New Matter and Verizon PA's Preliminary Objections attached as Appendix 1 hereto. That document contains unfounded and hyperbolic accusations, that are intended to arouse prejudice against Verizon PA, but which are pure conjecture on the part of the Complainant. Moreover, the document recites the contents of settlement discussions with Verizon PA, which are not competent evidence. 52 Pa. Code §5.231(a). It is beyond the pale for Complainant to argue that Verizon PA's position is compromised simply because it made an offer of settlement. Such statements cannot form the basis of any determination.

⁴ The fact that Complainant served at least one version of his Answering documents on Verizon, but no others, indicates that the Complainant was apparently aware of his duty to served Verizon PA with such documents.

the Complainant had filed certain enclosed documents at the Commission and that those documents had not been provided to counsel for Verizon PA. Moreover, Complainant filed what appeared to be a different version of his Answer to Verizon PA's New Matter and Preliminary Objections, and he had not provided copies of the variations on Verizon PA. Yet, none of the documents provided by Special Agent Vero contained an allegation that Verizon PA's counsel ever threatened Complainant's wife, as was quoted and accepted as if true in the Order at issue. Apparently, there was yet another document Complainant had filed but not served upon Verizon PA, and the ALJ likely assumed that either the Complainant or the Secretary's office had served it upon Verizon PA, though its date postdated the date of Verizon PA's Preliminary Objections.⁵

9. On February 4, 2010, Verizon PA received a copy of the Chief Administrative Law Judge's Order in which the Chief Administrative Law Judge repeats three times Complainant's mischaracterization of the content of the conversation between Verizon PA's attorney and his wife, and erroneously accepted such mischaracterization or argument as if it were a fact that could be relied upon in the Order as a basis for denying the Preliminary Objections. Moreover, the error was compounded by a due process violation caused by Complainant's failure to serve Verizon PA at any time with a document that contains such an allegation as quoted by, and relied upon in Order.

10. On February 4, 2010, Verizon PA learned that the statement relied upon and appearing in the Order in question came from an apparent amended or additional Complaint that had been filed on or about November 9, 2009 ("November 9 Complaint") that was never served upon Verizon PA. Therefore, Verizon PA had no opportunity to respond. Verizon PA was subsequently provided with a scanned version of the November 9 Complaint on February 4, 2010.

⁵ Thus, the Order's statement that Verizon did not address that claim in its Preliminary Objections and the Order's inference or assumption that Verizon PA did not challenge the legality of such claim was error.

11. The unserved November 9 Complaint to which Verizon PA had no opportunity to respond, but which the Order in question relied upon, contains the following pertinent excerpt:

On November 2, 2009, Todd Stewart from Hawke, McKeon, Sniscak called my wife Diane Burko to say that they were filing preliminary objections with the PUC declaring that this case should be moved to the Court of Common Pleas. What they are doing is trying to frighten my wife into thinking that we will have to hire a lawyer in order for justice to be served.

The first sentence of this excerpt from paragraph 4.B. of the November 9 Complaint is a factual allegation that speaks for itself and is roughly accurate although Attorney Stewart never used the word “declaring” but rather said “seeking.” The second sentence is the Complainant’s characterization (actually a mischaracterization) that amounts to no more than speculation or conjecture. As discussed below, it is blackletter law that characterizations or argument are not facts, and that they may not be accepted as true for purposes of evaluating sufficiency of a complaint—and the Order erred by doing so.⁶

12. The Order must be vacated for two key reasons. First, in reviewing a complaint for purposes of deciding a preliminary objection the finder of fact can accept only well-pleaded facts, not conclusions or argumentative characterizations.⁷ Elsewhere in his pleadings, Complainant has stated that in his view of the world, the Courts of Common Pleas do not or will not give him justice and it should have been apparent that this characterization is simply his own personal view of the Common Pleas Courts⁸ as opposed to what Verizon PA counsel actually said. Thus, the Order was plainly wrong to accept the second sentence⁹ as if it were a fact supporting a claim. Moreover, not

⁶ *County of Allegheny v. Commw. Of Pa.*, 490 A.2d 402 (Pa. 1985).

⁷ *Id.*

⁸ Complainant’s negative view of the court of common pleas is clear - “A common homeowner has no chance in Municipal or Common Pleas Court against Verizon.” (Complainant’s Answer to New Matter and Preliminary Objections ¶ J.).

⁹ The Order in question quotes this second sentence three times (Order at pp. 2, 5 and 8) and concludes that the Commission’s jurisdiction over this matter is founded, in part on this conjecture opinion. The Order concludes that the Commission has jurisdiction because this statement constitutes an allegation of unreasonable service under 66 Pa. C.S.

only does the second sentence fail to follow from the first, but it also implies that Verizon PA's counsel acted in an unprofessional manner—which plainly was not the case. The conversation was pleasant in tone and non-confrontational—it was neither threatening nor abusive in any respect. Moreover, the Complainant admits that the nature of the conversation upon which the conjecture is based was that of a settlement discussion, as made plain by the remainder of the November 9, 2009 document he filed. Accordingly, it should have been afforded the privilege that attaches to such discussions. 52 Pa. Code § 5.231(a). Thus, it was additional error for the Order to go into such claims as they were in the context of settlement discussions.

13. Second, the failure to serve Verizon PA with the November 9, 2009 Complaint and the subsequent reliance on the document involves multiple violations of the Public Utility Code, the Commission's regulations, and Verizon PA's fundamental constitutional rights.

14. The pleading was never provided to Verizon PA prior to the issuance of the Order. The Complainant's failure to serve Verizon PA with the pleading violates the Commission's regulations that require service of documents on all parties in ongoing litigation, 52 Pa. Code §§ 1.54(a) & 1.55, and the Commission's failure to otherwise serve what was appeared to be a new or amended Complaint upon Verizon PA violates the express requirements of the Public Utility Code. 66 Pa. C.S. § 702. Finally, the Order's reliance on a statement contained in a pleading that Verizon PA never saw, and to which it had no opportunity to respond, is an undeniable violation of the most fundamental due process rights.¹⁰ Had Verizon PA been provided with an opportunity to respond to the November 9 Complaint, it could have explained why it was not proper for the Commission to

§ 1501. (Order at p. 8). A statement made by counsel in the context of discussing the possibility of settlement does not fall under the definition of "service" for purposes of Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501.

rely on the speculative and unfounded allegation. No such opportunity was provided here. Accordingly, before any determination can be had on Verizon PA's preliminary objections, it must be afforded its due process rights to respond to Complainant's unserved November 9 Complaint, including the right to submit preliminary objections to the unserved pleading.

15. The Commission's regulations require litigants to serve copies of all pleadings upon opposing parties. 52 Pa. Code § 1.54(a). The rationale for this requirement is simple – opposing parties have rights to respond to pleadings, and require notice of the filing and service in order to protect their rights. Failure to serve documents, particularly an amended complaint, causes severe prejudice to the right of a respondent to answer. In this case, the fact that the Commission relied explicitly on statements made in a document that was not provided to Verizon PA, makes clear the prejudice and compounds it.¹¹

16. It is also a deprivation of Verizon PA's constitutional rights for the Presiding Administrative Law Judge to rely upon in any way an allegation to which Verizon PA has not been given an opportunity to respond.¹² The Commission's Rules of Practice and Procedure require a

¹⁰ *Pa. P.U.C. v. Gensimore Trucking, Inc.*, 49 Pa. P.U.C. 463, 464 (1975) (“[T]he complaint, upon which [the Commission’s] order . . . was based, was never served upon Respondent. In view of this . . . [the Commission’s order] clearly violates Respondent’s rights.”).

¹¹ *Pa. P.U.C. v. Gensimore Trucking, Inc.*, 49 Pa. P.U.C. 463, 464 (1975).

¹² *Armour Transportation Co. v. Pa. P.U.C.*, 10 A.2d 86, 88 (Pa. Super. 1939) (“Armour Transportation”) (“[T]he failure to inform appellant of the nature of the violations charged, by the filing of a reasonably specific written complaint, constituted a denial of procedural due process in violation of state and federal constitutional provisions.”)

party to serve a copy of any pleading filed with the Commission on the opposing party.¹³ Moreover, the Commission's regulations require that upon the filing of an amended complaint, the Respondent has the right to plead over. 52 Pa. Code § 5.91. None of these rights were afforded to Verizon PA here.

17. The only appropriate remedy under the circumstances is to vacate the entire Order and provide Verizon PA with a meaningful opportunity to respond to the November 9 Complaint, including the right to file preliminary objections thereto, before any determination is made.

18. In addition, Complainant should be directed to serve counsel for Verizon PA, upon submission, with any document he files with the Commission or submits to an ALJ.

19. On February 8, 2010, Verizon PA was served with a notice assigning this matter to Presiding Administrative Law Judge Cynthia Williams Fordham and scheduling a hearing on March 8, 2010. In order to allow Verizon PA its due process right to answer the new pleadings, Verizon PA respectfully requests that said hearing be continued.

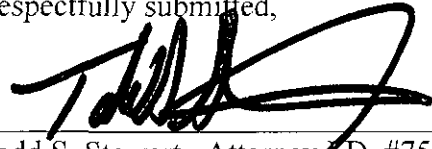
20. Finally, Verizon PA believes that this matter may still be susceptible to resolution through settlement with the assistance of the Commission's skilled mediation staff and therefore requests that this matter be referred to mediation before being scheduled for a hearing.

WHEREFORE, Verizon Pennsylvania Inc. respectfully requests that the Presiding Administrative Law Judge vacate the Order of January 28, 2010, in the above-captioned proceeding and afford Respondent the opportunity to respond to Complainant's November 9, 2009 Amended

¹² *Middleton v. UGI Utilities, Inc.*, 2005 WL 1651735 (2005) ("Without service, a complaint cannot be prosecuted and is properly dismissed without prejudice."); *Armour Transportation* at 89 ("The requirement of due process of law . . . applies to administrative as well as to judicial proceedings. This doctrine of notice and hearing becomes a more potent force in our land . . . [and] this essential requisite of due process cannot be dispensed with.")

Complaint, including the ability to file preliminary objections thereto, before any determination is reached on any preliminary objections, that the Presiding ALJ continue the hearing currently scheduled in this matter for March 8, 2010, and the this matter be referred to mediation.

Respectfully submitted,



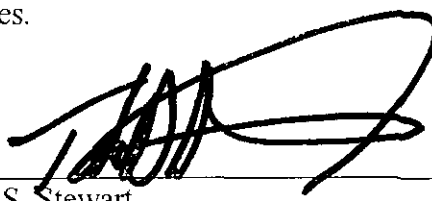
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Counsel for Verizon Pennsylvania Inc.

DATED: February 22, 2010

AFFIDAVIT

I, Todd S. Stewart, certify that I am counsel for Verizon Pennsylvania Inc. and that, in this capacity, I am authorized to and do make this Affidavit for them, that the facts set forth in the foregoing document are true and correct to the best of my knowledge, information and belief, and that I expect Verizon Pennsylvania Inc. to be able to prove the same at any hearing hereof. I understand that false statements made therein are made subject to the penalties of 18 Pa. C.S. §4904, relating to unsworn falsifications to authorities.



Todd S. Stewart

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of §1.54 (relating to service by a party).

SERVICE VIA FIRST CLASS MAIL:

Richard Ryan
310 South Juniper Street
Philadelphia, PA 19107



Todd S. Stewart
Counsel for Verizon Pennsylvania Inc.

Dated this 22nd day of February 2010

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