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May 23, 2011

Via Overnight Mail

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
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Harrisburg, PA 17105-3265

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MAY 28 2011

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

RE: Brian M. Rudnick v. Verizon Pennsylvania Inc.; Docket No. C-2011-2238995;
PRELIMINARY OBJECTIONS

Dear Ms. Chiavetta:

Enclosed, for filing with the Commission, are the original and three (3) copies of the Preliminary Objections of Verizon Pennsylvania Inc. in response to the above-captioned Formal Complaint. A copy of this document has been served in accordance with the attached Certificate of Service.

Thank you for your attention to this matter. If you have any questions concerning this filing, please feel free to contact me.

Very truly yours,

Janet L. Miller

Counsel for Verizon Pennsylvania Inc.

JLM/das
Enclosures

cc: Brian M. Rudnick

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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BRIAN M. RUDNICK,

Complainant

v.

VERIZON PENNSYLVANIA INC.,

Respondent

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Docket No. C-2011-2238995

**PRELIMINARY OBJECTIONS OF VERIZON PENNSYLVANIA INC.
TO THE FORMAL COMPLAINT FILED BY BRIAN M. RUDNICK**

Verizon Pennsylvania Inc. (Verizon PA or Company), by its attorneys in this matter, Hawke McKeon & Sniscak LLP, and pursuant to 52 Pa. Code § 5.101, hereby asserts the following Preliminary Objections in response to the Formal Complaint filed by Brian M. Rudnick (Complainant) in connection with the above-captioned proceeding. Specifically, Verizon PA requests that the Formal Complaint filed at Docket No. C-2011-2238995 (2011 Complaint) be dismissed preliminarily on the grounds that (a) the Pennsylvania Public Utility Commission (Commission) lacks subject matter jurisdiction over the claims set forth in the 2011 Complaint; (b) the dispute raised in the 2011 Complaint previously has been fully litigated and decided by the Commission and is therefore barred by the doctrine of *res judicata*, and/or (c) the 2011 Complaint is legally insufficient because it does not set forth a claim against Verizon PA for which the Commission can grant relief. In support of its Preliminary Objections, Verizon PA avers and represents as follows:

I. BACKGROUND

1. On November 16, 2009, Brian M. Rudnick filed a Formal Complaint with the Commission in which he disputed charges billed to his telephone account for 13 calls that were directly dialed from his home telephone number to telephone numbers that terminated in Ecuador. Complainant also asserted he had been given incorrect information, or he was unable to locate any information, regarding the per minute rate for calls placed from his residence. The Formal Complaint was assigned Docket No. C-2009-2142052 (2009 Complaint).

2. An evidentiary hearing was held in connection with the 2009 Complaint during which Complainant presented oral testimony and offered documentary exhibits. Administrative Law Judge Marlane R. Chestnut issued an Initial Decision dated March 22, 2010, recommending that the 2009 Complaint be dismissed. Complainant filed Exceptions to the Initial Decision and Verizon PA filed Replies to Exceptions. The Commission entered an Opinion and Order on August 3, 2010 (August 2010 Order) in which it denied Complainant's Exceptions and dismissed the 2009 Complaint.

3. On August 6, 2010,¹ only three (3) days after the Commission entered its August 2010 Order dismissing the 2009 Complaint, Complainant filed a Petition for Reconsideration (Reconsideration). By Opinion and Order entered on September 2, 2010 (September 2010 Order), the Commission granted the Reconsideration "pending further review of, and consideration on the merits."

¹ Complainant filed a revision to the August 6, 2010 Reconsideration on August 9, 2010 in which he corrected a reference to a video link he had identified in the August 6, 2010 filing. The link connects to a YouTube video that is the same as the video contained on the CD attached to the Formal Complaint at Docket No. C-2011-2238995.

4. On August 12, 2010, Complainant filed a “Petition for Extension of Time to Supplement Complainant’s Petition for Reconsideration” (Extension). Verizon PA filed a timely response to both the Reconsideration and the Extension.

5. On October 14, 2010, Complainant filed a “Petition for reconsideration: updated” (Updated Reconsideration).

6. The Commission denied Complainant’s Reconsideration, Extension and Updated Reconsideration in an Opinion and Order entered on April 1, 2011 (April 2011 Order).

7. The 2011 Complaint was dated April 14, 2011 (13 days after entry of the April 2011 Order) and was filed with the Commission on April 18, 2011. The substance of the 2011 Complaint is Complainant’s displeasure with and his alleged inability to locate information on the www.verizon.com website regarding the per minute rate for calls placed to Ecuador. This is the same issue as was raised and decided in the 2009 Complaint.

8. Concurrently with these Preliminary Objections, Verizon PA has filed an Answer and New Matter in response to the 2011 Complaint, which Answer and New Matter is incorporated herein by reference.

II. PRELIMINARY OBJECTIONS

9. The Pennsylvania Public Utility Code² provides that a written complaint may be filed by any person concerning “any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the Commission has jurisdiction to administer, or of any regulation or order of the commission.”³

² 66 Pa.C.S. §§ 101, *et seq.* (Code).

³ 66 Pa.C.S. § 701. *See also*, 52 Pa. Code § 5.21.

10. The Commission's Rules of Administrative Practice and Procedure permit the filing of Preliminary Objections under certain circumstances, including lack of Commission jurisdiction and legal insufficiency of a pleading.⁴ In addition, Section 703 of the Code allows the Commission to dismiss a complaint without a hearing, if the Commission determines such a hearing "is not necessary in the public interest."⁵

11. Preliminary Objections allowed by 52 Pa. Code § 5.101 are comparable to a demurrer in a civil case, which is authorized by Rule 107(b) of the Pennsylvania Rules of Civil Procedure.⁶ The Commission has adopted this standard.⁷

12. In filing a Preliminary Objection, the moving party may not rely on its own factual assertions but must accept, for purposes of disposition of the objection, all well-pleaded material facts of the other party, as well as every inference reasonably deductible from those facts. The objection is granted only if the moving party prevails as a matter of law. Thus, in order to be successful, the moving party must show that, even if every factual allegation raised in the complaint were considered to be true, it still would not state a cause of action that is cognizable before the Commission. The purpose of such a demurrer is to save the Commission and the parties the time and expense of preparing for and holding a hearing, when no hearing is required to dismiss the complaint.

⁴ 52 Pa. Code § 5.101(a)(1) and § 5.101(a)(4).

⁵ 66 Pa.C.S. § 703(b).

⁶ A *demurrer* is an assertion that the complaint does not set forth a cause of action upon which relief can be granted, and it admits, for purposes of testing the sufficiency of the complaint, all properly pleaded facts, but not conclusions of law. *Estate of Cletus J. Hollywood v. First National Bank of Palmerton*, 859 A.2d 472 (Pa. Super. 2004), *reargument denied*, 876 A.2d 396 (Pa. 2005); *Walter Balsbaugh v. James H. Rowland*, 290 A.2d 85 (Pa. 1972); *Milton Engle v. Friend's Hospital, et al.*, 266 A.2d 685 (Pa. 1970).

⁷ *Application of Main Line Transit Service, Inc.*, Docket No. A-00116172, Initial Decision issued January 4, 2000, Final Order entered October 3, 2002.

A. The 2011 Complaint Should Be Dismissed Preliminarily Because The Commission Lacks Subject Matter Jurisdiction To Hear And Decide The Issues Raised.

13. The Commission's Regulation at 52 Pa. Code § 5.101(a)(1) permits a party to file a Preliminary Objection to dismiss a pleading for "lack of Commission jurisdiction[.]"

14. In order to decide a controversy, the Commission must have subject matter jurisdiction to decide the matter at issue.⁸ In addition, the Commission must act within and cannot exceed its statutory authority.⁹ Jurisdiction cannot be conferred by the parties where it would otherwise not exist, nor can it be obtained by waiver or estoppel.¹⁰

15. The Commission's authority to regulate the rates and terms of competitive services is controlled by Chapter 30 of the Code.¹¹ Relevant to this proceeding, Section 3012 of the Code provides the following definitions (Section 3012 Definitions):

"Competitive service." A service or business activity determined to be competitive by the commission on or prior to December 31, 2003, and a service or business activity determined or declared to be competitive pursuant to section 3016 (relating to competitive services).

"Noncompetitive service." A regulated telecommunications service or business activity that has not been determined or declared to be competitive.

"Nonprotected service." Any telecommunications service provided by a local exchange telecommunications company that is not a protected service.

⁸ *Colton L. Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa.Cmwlt. 1992), *Alloc. Den.*, 637 A.2d 293 (Pa. 1993).

⁹ *City of Philadelphia v. Philadelphia Electric Company*, 473 A.2d 997 (Pa. 1984); *Loma, Inc. v. Pennsylvania Public Utility Commission*, 682 A.2d 424 (Pa.Cmwlt. 1996); *City of Pittsburgh v. Pennsylvania Public Utility Commission*, 43 A.2d 348 (Pa. Super. 1945).

¹⁰ *James Roberts v. Louis Martorano*, 235 A.2d 602 (Pa. 1967); *Commonwealth of Pennsylvania v. William VanBuskirk*, 449 A.2d 621 (Pa. Super. 1982).

¹¹ 66 Pa.C.S. §§ 3010-3019.

“Protected service.” The following telecommunications services provided by a local exchange telecommunications company unless the commission has determined the service to be competitive:

- (1) Service provided to residential consumers or business consumers that is necessary to complete a local exchange call.
- (2) Touch-tone service.
- (3) Switched access service.
- (4) Special access service.
- (5) Ordering, installation, restoration and disconnection of these services.

“Telecommunications service.” The offering of the transmission of messages or communications for a fee to the public.

16. Based on the Section 3012 Definitions set forth above, Complainant’s disputes involve a “nonprotected” and “competitive” service, which the Commission has no authority or power to decide.¹² The information sought by Complainant, and the method through which he seeks that information, are not necessary for the completion of a “local exchange call” from his telephone number. Nor is this information necessary to provide Complainant with touch-tone, switched access or special access service provided by Verizon PA. Complainant does not need to know the per minute rate for calls placed to Ecuador or to access this information on the www.Verizon.com website so he can order, install, restore or disconnect any service provided to his telephone account. In fact, Complainant’s dispute does not involve telecommunications service at all, as that term is defined in Section 3012 of the Code.¹³ For all of these reasons, Section 3018 of the Code prevents the Commission from hearing and deciding the issues raised in the 2011 Complaint.

¹² 66 Pa.C.S. § 3018(b)(1).

¹³ 66 Pa.C.S. § 3012.

17. Complainant makes no claims in the 2011 Complaint regarding the services provided or charges billed to his account by Verizon PA. His only dispute is that the www.Verizon.com website does not contain, or Complainant cannot find, information with regard to the per minute rate for calls placed from his residence to telephone numbers in Ecuador.

18. The calls for which Complainant seeks rate information are international calls that would be transmitted and billed by Verizon Long Distance or another interexchange communications provider, not by Verizon PA. The rates charged for these calls are deemed to be a competitive “interexchange service” that the Commission cannot regulate.¹⁴ Therefore, the Commission lacks subject matter jurisdiction over the issues raised in the 2011 Complaint and holding a hearing to decide these issues is unnecessary and would waste the limited resources of the ALJ, the Commission and the parties involved.

19. For the reasons discussed above, the Formal Complaint filed at Docket No. C-2011-2238995 should be dismissed preliminarily due to the Commission’s lack of subject matter jurisdiction, which precludes it from hearing and deciding the issues raised in the 2011 Complaint.

B. The 2011 Complaint Should Be Dismissed Preliminarily Because The Issues Already Have Been Decided And Relitigation Of The Same Claims Between The Same Parties Is Barred By The Doctrine Of *Res Judicata*.

20. The 2011 Complaint also must be dismissed preliminarily because Complainant already fully litigated these issues before the Commission and Complainant is barred by the doctrine of *res judicata* from raising these same issues in another proceeding. Application of this doctrine helps to prevent vexatious litigation, to conserve the parties’ and the tribunal’s resources

¹⁴ 66 Pa.C.S. § 3018(a) and § 3018(b)(1).

by eliminating redundant lawsuits and to establish certainty by bringing finality to the resolution of a controversy.¹⁵ Granting these Preliminary Objections is appropriate for these very reasons. The 2011 Complaint was filed just thirteen (13) days after the Commission entered a final Opinion and Order dismissing the 2009 Complaint. The subject matter of the 2009 and 2011 Complaints is the same – *i.e.*, the per minute rate of calls placed to Ecuador. Complainant already knows that information as he has made these calls in the past – most recently on November 13, 2010, at which time the calls were billed at 40¢ per minute. In addition, Complainant testified at the hearing held in connection with the 2009 Complaint that he uses a third-party pre-paid calling card to make calls to Ecuador because the per minute rate is less than that charged by Verizon Long Distance (his chosen interexchange telecommunications provider). It is clear from these facts that the 2011 Complaint was filed by Complainant for the sole purpose of being vexatious and that continuing through the litigation process in connection with that Complaint would not likely result in an outcome different from that rendered in connection with the 2009 Complaint. Instead, undertaking such activities would merely waste the time and resources of the ALJ, the Commission and Verizon PA. The Commission should not allow such waste to occur.

¹⁵ *McArdle v. Tronetti*, 627 A.2d 1219 (Pa. Super. 1993), *appeal denied*, 641 A.2d 587 (Pa. 1004); *Pa. Pub. Util. Comm'n. v. Katrina V. Waddington t/d/b/a Waddington Tours*, PUC Docket No. A-00108279 (Initial Decision dated February 1, 2002, 2002 Pa. PUC LEXIS 20; Order adopting Initial Decision entered May 20, 2002, 2002 Pa. PUC LEXIS 19).

21. *Res judicata* provides that matters that were litigated in a prior action, as well as those matters or issues that should or could have been litigated in that prior action, will not be relitigated in a subsequent action. When a final decision has been rendered in a proceeding, it is binding on any case brought subsequent to that time that involves the same parties and the same issues as previously raised.¹⁶

22. The requirements for application of *res judicata* are as follows:

(1) the issue decided in the prior case is identical to the one presented in the later case; (2) there is a final judgment on the merits in the prior case; (3) the party against whom the plea is asserted was a party, or in privity with a party, in the prior case; (4) the party or person in privity to a party had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment.¹⁷

23. All of the factors necessary for application of *res judicata* are present in this case. The allegations raised by Complainant in his 2009 and 2011 Complaints (C-2009-2142052 and C-2011-2238995) are identical: He cannot locate or was not provided with “accurate” information about the per minute rates billed for calls placed to Ecuador. The requested relief also is the same: Require Verizon PA to comply with its statutory duty under Section 1501 of the Code.¹⁸

24. There was a final judgment issued in the 2009 Complaint proceeding in which the Commission determined that “sufficient avenues [were] available for callers to determine the per-minute rates of international calls before they are dialed.” The Commission also concluded

¹⁶ *Anthony Cannon v. Verizon Pennsylvania Inc.*; Docket No. C-20043729 (Initial Decision of ALJ Susan D. Colwell dated December 14, 2004, Opinion and Order entered June 29, 2005).

¹⁷ *Lehigh Valley Power Committee v. Pa. Pub. Util. Comm’n.*, 563 A.2d 548 (Pa.Cmwlt. 1989); *Suprick, et al. v. Commonwealth Telephone Co.*, PUC Docket Nos. C-00903161, C-00903197; 1995 Pa. PUC LEXIS 15 (January 24, 2005), quoting *Davis v. O’Brien*, 326 A.2d 511 (Pa. Super. 1974).

¹⁸ 66 Pa.C.S. § 1501.

there was nothing in the Code or Regulations that required Verizon PA to provide notice about international toll rates, either before or after a direct-dialed call is made.¹⁹ Finally, the Commission indicated it had no jurisdiction to dictate the methods used by an interexchange service provider to disclose international rates to its customers. On these bases, the Commission held that Verizon PA did not provide unreasonable or inadequate service as is required by Section 1501 of the Code and dismissed the 2009 Complaint.

25. Application of *res judicata* also requires that the parties to the two proceedings must be the same. In this case they are: Brian M. Rudnick was and is the Complainant and Verizon PA was and is the Respondent in both the 2009 and 2011 Complaints.

26. The last two requirements that must be met for *res judicata* to apply are that both parties must have been afforded a full and fair opportunity to litigate the issues in the previous proceeding and that the determination made in that proceeding was essential to the judgment. Complainant not only was given a full and fair opportunity to litigate his 2009 Complaint, he took full advantage of that opportunity. Complainant's testimony covers 50 pages of the hearing transcript. During the course of the 2009 Complaint proceeding, Complainant filed Exceptions, a Petition for Reconsideration, a "Petition for Extension of Time to Supplement Complainant's Petition for Reconsideration" and a "Petition for reconsideration: updated." The Commission's August 2010 and April 2011 Orders dismissed the 2009 Complaint based on its finding that Complainant did not produce sufficient evidence to prove Verizon PA violated its duties under Section 1501 of the Code.

¹⁹ August 2010 Order at page 14.

27. Accordingly, all of the factors necessary for application of *res judicata* are present and have been satisfied in this case and the 2011 Complaint should be barred and dismissed on that basis.

C. The 2011 Complaint Should Be Dismissed Preliminarily Because It Is Not A Legally Sufficient Pleading.

28. The Commission's Regulation at 52 Pa. Code § 5.101(a)(4) permits a party to file a Preliminary Objection to dismiss a pleading that is legally insufficient – *i.e.*, when, based on the facts averred by the non-moving party, no recovery is possible.²⁰

29. The sole issue raised in the 2011 Complaint is that the www.verizon.com website does not provide, or Complainant is unable to locate on that website, information that states the per minute rate billed for calls placed to Ecuador. The sole relief requested is that the Commission require Verizon PA to comply with its obligations under Section 1501 of the Code. As noted above, the Commission already addressed these matters and issued a final determination in its August 2010 and April 2011 Orders.

30. Complainant makes no claims in his 2011 Complaint regarding the services provided or charges billed to his account by Verizon PA – the only issue raised is the per minute rate billed for international calls. Thus, Complainant has alleged no grounds upon which the Commission can find that Verizon PA violated “any law which the Commission has jurisdiction to administer, or of any regulation or order of the commission.”²¹

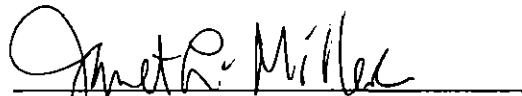
²⁰ *Limbach Company, LLC v. City of Philadelphia*, 2006 Pa. Cmwlth. LEXIS 399 (Pa.Cmwlth. 2006) (stating grounds for granting a demurrer).

²¹ 66 Pa.C.S. § 701.

31. Even assuming that all the facts set forth by Complainant are true, there is no claim against Verizon PA in the 2011 Complaint for which the Commission can grant Complainant's requested relief. Therefore, no hearing is necessary and the 2011 Complaint should be dismissed preliminary so as not to waste the limited time and resources of the ALJ, the Commission and Verizon PA.

WHEREFORE, for all the reasons set forth above, Verizon Pennsylvania Inc. respectfully requests that the Formal Complaint filed at Docket No. C-2011-2238995 be dismissed preliminary on the grounds that (a) the Commission is without subject matter jurisdiction to hear and decide Complainant's claims; (b) the Formal Complaint is barred by the doctrine of *res judicata*; and (c) the Formal Complaint is legally insufficient as it does not raise any claims against Verizon PA for which the Commission can direct relief.

Respectfully submitted,



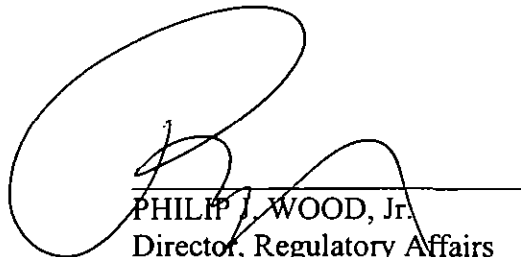
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DATED: May 23, 2011

Counsel for Verizon Pennsylvania Inc.

AFFIDAVIT

I, **PHILIP J. WOOD, Jr.**, Director, Regulatory Affairs of Verizon Pennsylvania Inc., am authorized to make this affidavit on its behalf, and I verify that the information provided in the foregoing document(s) is true and correct to the best of my knowledge, information and belief. I understand that false statements therein are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsifications to authorities.



PHILIP J. WOOD, Jr.
Director, Regulatory Affairs
Verizon Pennsylvania Inc.

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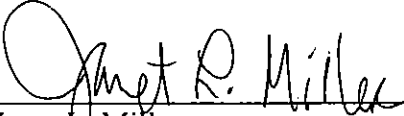
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I hereby certify that I have this day served a true copy of the foregoing document upon the party listed below, in accordance with the requirements of §1.54 (relating to service by a party).

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Brian M. Rudnick
230 East Highland Avenue
Philadelphia, PA 19118

Dated this 23rd day of May, 2011.



Janet L. Miller
Counsel for Verizon Pennsylvania Inc.

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SECRETARY'S BUREAU**

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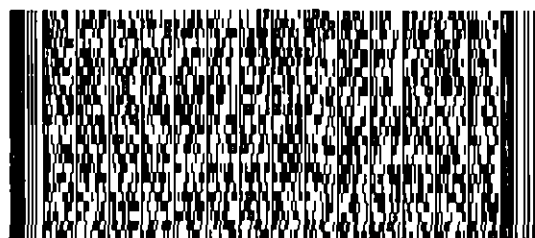
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