

STEVENS & LEE
LAWYERS & CONSULTANTS

17 North Second Street
16th Floor
Harrisburg, PA 17101
(717) 234-1090 Fax (717) 234-1099
www.stevenslee.com

Direct Dial: (717) 255-7365
Email: mag@stevenslee.com
Direct Fax: (610) 988-0852

August 26, 2011

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

**Re: Core Communications, Inc. v. Verizon of Pennsylvania, Inc. and Verizon
North, LLC
Docket Nos. C-2011-2253750 and C-2011-2253777**

Dear Secretary Chiavetta:

Enclosed for filing please find the original plus four copies of the Answer of Core Communications, Inc. to the Preliminary Objections filed by Verizon of Pennsylvania, Inc. and Verizon North, LLC. A copy of the Answer has been served upon the parties of record in accordance with the attached Certificate of Service. Upon filing, please return a time-stamped copy of the Answer to our courier.

If you have any questions, please feel free to contact me.

Sincerely,

STEVENS & LEE


Michael A. Grun

RECEIVED
2011 AUG 26 PM 3:22
PA PUC
SECRETARY'S BUREAU

Enclosures

cc: Certificate of Service
Honorable Susan Colwell, Administrative Law Judge

Philadelphia • Reading • Valley Forge • Lehigh Valley • Harrisburg • Lancaster • Scranton
Williamsport • Wilkes-Barre • Princeton • Cherry Hill • New York • Wilmington

A PROFESSIONAL CORPORATION

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

CORE COMMUNICATIONS, INC. :
Complainant :
v. :
VERIZON PENNSYLVANIA INC. :
and :
VERIZON NORTH, LLC :
Respondents :

Docket No. C-2011-2253750
Docket No. C-2011-2253787

RECEIVED

AUG 26 2011

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**CORE COMMUNICATIONS, INC.'S
ANSWER TO THE PRELIMINARY OBJECTIONS OF VERIZON PENNSYLVANIA, INC.
AND VERIZON NORTH, LLC**

Core Communications, Inc. ("Core"), pursuant to 52 Pa. Code §§5.101(f), hereby Answers the Preliminary Objections filed by Verizon Pennsylvania, Inc. and Verizon North, LLC. (collectively "Verizon").

While Verizon's Preliminary Objections rely in part on half-formed "ripeness" and "legal insufficiency" theories, the crux of Verizon's position is that Core cannot seek relief from the Commission because Core agreed to a binding alternative dispute process that prohibits Core from filing a Complaint in response to Verizon's non-payment. Verizon asserts that the dispute resolution process outlined in the Interconnection Agreements ("ICAs") constitutes an "agreement for alternative dispute resolution" that prohibits Core's Complaint from being considered by the Commission.

Verizon's Preliminary Objections are flawed for several reasons. *First*, Verizon's Preliminary Objections rely largely on documents and testimony that are beyond the four corners of

Core's Complaint, and it is well-settled that such material is not considered when ruling on a preliminary objection. A demurrer will not be sustained unless the face of the pleadings shows that the law will not permit recovery.¹ In resolving Verizon's preliminary objections, only the facts pled in Core's Complaint can be considered, and such facts must be accepted as true and viewed in the light most favorable to Core, along with any reasonable inferences from those facts. Facts averred by Verizon cannot be considered.² As a general rule, courts may **not** consider testimony or anything outside the pleadings when ruling upon a preliminary objection in the nature of a demurrer.³ Furthermore, a preliminary objection on the ground of legal insufficiency is the improper vehicle to raise affirmative defenses.⁴

Second, the dispute resolution process outlined in the ICAs is plainly not an "agreement for alternative dispute resolution" that would preclude a party from seeking Commission resolution of a dispute. The ICAs clearly do not include a mediation or arbitration clause, and clearly do not require the parties to mediate or arbitrate a dispute rather than litigate it. To the contrary, the ICAs explicitly state that the parties are permitted to seek Commission resolution of a dispute if the parties cannot resolve it themselves. The ICAs are the exact opposite of agreements for alternative dispute resolution – rather than binding the parties to arbitrate a dispute, they in fact explicitly

¹ *Giordano v. Ridge*, 737 A.2d 350 (Pa. Cmwlth. 1999), Order affirmed, 559 Pa. 283, 739 A.2d 1052 (1999).

² When ruling on a preliminary objection, the Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. *County of Allegheny v. Commonwealth of Pennsylvania*, 490 A. 2d 402 (Pa. 1985); *Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988) The Commission must view the complaints in this case in the light most favorable to Core and should dismiss the complaints only if it appears that Core would not be entitled to relief under any circumstances as a matter of law. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

³ *Bonanni v. Weston Hauling, Inc.*, 392 Pa. 248, 140 A.2d 591 (1958).

⁴ *Rose Tree Media School District v. Department of Public Instruction*, 431 Pa. 233, 244 A.2d 754 (1968).

permit the parties submit disputes to the Commission for resolution.

As set forth in Core's Complaint, Core requested that Verizon provide the factual and legal basis for Verizon's sudden cessation of payment. Verizon ignored those requests, and merely repeated conclusory, non-sensical, and self-serving grounds for its refusal to pay. In light of Verizon's clear message that it would not provide a specific basis for its non-payment, and considering the financial consequences of Verizon's non-payment, Core reasonably concluded that the parties could not resolve the dispute themselves, and justifiably sought relief from the Commission.

Core notes that this matter is in an unusual procedural posture, with an evidentiary hearing having been held before Preliminary Objections were filed. This unusual posture, however, does not allow for a deviation from the principles for resolving Preliminary Objections. That is, the focus of Preliminary Objections is on the Complaint, and whether the Complaint states a claim for which relief can be granted and whether the Complaint is barred due to a prior agreement for dispute resolution. In deciding preliminary objections, the Commission must determine whether, **based on well-pleaded factual averments of the complainant**, recovery or relief is possible. *Dep't of Auditor General, et al v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa.Cmwlt. 2003); *P.J.S. v. Pa. State Ethics Comm'n*, 669 A.2d 1105 (Pa.Cmwlt. 1996) (emphasis added). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward*, 802 A.2d 705 (Pa.Cmwlt. 2002). **All of the non-moving party's averments in the complaint must be viewed as true** for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees' Retirement Bd.*, 690 A.2d 1312 (Pa.Cmwlt. 1997) (emphasis added).

Verizon's Preliminary Objections seek to insert discussion of facts beyond those stated in Core's Complaint. In that respect, Verizon's Preliminary Objections are akin to a premature motion

for summary judgment. Such a motion is clearly improper when the pleadings in the case are not yet closed (Core's Answer to Verizon's New Matter is not due until September 6, 2011). To be clear, Core believes that the totality of the evidence in the case, once elicited, will clearly demonstrate that Core's Complaint should be sustained. Specifically, Core will demonstrate that the allegations set forth in paragraphs 113-15 of Verizon's August 16, 2011 Answer, New Matter and Counterclaims are completely untrue and have no plausible foundation in fact.⁵ However, at the Preliminary Objection stage of the proceeding, the focus is not on the totality of the evidence but rather on the four corners of the Complaint, and whether that Complaint can be dismissed for one of the permitted reasons set forth in the 52 Pa. Code 5.101. As set forth below, Verizon has clearly not met the necessary burden to prevail on its Preliminary Objections.

I. BACKGROUND

1. Core admits that the Commission served Verizon with Core's Complaint, and Core's Complaint speaks for itself. Core denies Verizon's characterization of Core's Complaint. Core denies that Verizon validly initiated disputes of Core's May 31, 2011 and June 30, 2011 invoices. To the contrary, Verizon unilaterally deemed 100% of the traffic that it sends to Core's network as "non-compensable" while making no reference whatsoever to the ICA or applicable law.
2. Core admits that Verizon filed an Answer, New Matter and Counterclaim for Affirmative relief, but denies all other averments in paragraph 2.
3. Admitted in part and denied in part. The ICAs in question also incorporate relevant statutory and case law that is not included in the four corners of the ICAs themselves. Core admits that the ICAs contain a dispute resolution process, but Core denies that such

⁵ Indeed, Core has already forwarded Verizon records that conclusively disprove Verizon's central allegation, in paragraph 115 of its filing, that "92 percent of all calls,,, were directed to less than ten numbers."

processes were validly invoked and deny that such processes preclude a party from submitting a Complaint to the Commission to allege that the other party breached the ICA.

4. Admitted in part and denied in part. Core admits that it transmitted invoices to Verizon for locally-dialed traffic originating from Verizon's network and terminating with Core for the period from May 1 –May 31, 2011, in accordance with the format that Core had utilized for the preceding six-plus years. Core admits that the invoices reflect the number of minutes terminated by Core. Core denies that the rate reflected on the invoices is inaccurate and contrary to the contracts and federal law. To the contrary, the rate reflected on the invoices is the TELRIC tandem reciprocal compensation rate contained in the ICAs. Core denies that the minutes reflected on the invoices are "unsubstantiated".
5. Core admits that Verizon and Core exchanged emails in which both parties sought records from each other related to the local traffic exchanged between the parties. The remainder of the averments in paragraph 5 are denied, and the contents of the email exchanges speak for themselves. Further answering, the email exchanges referenced by Verizon are not relevant for the consideration of preliminary objections. In resolving Verizon's preliminary objections, only the facts pled in Core's Complaint can be considered, and such facts must be accepted as true and viewed in the light most favorable to Core, along with any reasonable inferences from those facts. Facts averred by Verizon cannot be considered.⁶ As a general rule, courts may **not** consider testimony or anything outside the pleadings when ruling upon a preliminary objection in the nature of a demurrer.⁷ Furthermore, a preliminary

⁶ See *infra.*, discussion at footnote 2.

⁷ *Bonanni v. Weston Hauling, Inc.*, 392 Pa. 248, 140 A.2d 591 (1958).

objection on the ground of legal insufficiency is the improper vehicle to raise affirmative defenses.⁸

6. Core denies that Verizon is unable to substantiate Core's bills. Core's bills are based on traffic delivered from Verizon's network, therefore, Verizon has in its possession records to validate Core's invoices.⁹ Furthermore, if Verizon avers that it cannot substantiate Core's invoices, then Verizon cannot reasonably conclude that 100% of the traffic it sends to Core is non-compensable. By baldly asserting that 100% of its traffic is non-compensable, while simultaneously averring that it does not have the records needed to substantiate Core's invoices, Verizon is acting in bad faith and is breaching the ICAs. Core admits that the ICAs contain definitions of Reciprocal Compensation Traffic, Local Traffic, and Internet Traffic, but such definitions do not permit a party to deem traffic as "non-compensable" without providing any grounds for such a conclusion. Verizon concluded that the traffic it sends to Core is not "reciprocal compensation traffic", but provides no factual or legal basis for this conclusion. And, based on the nature of the traffic delivered--locally-dialed traffic sent over direct local trunks--it is simply impossible for 100% of the traffic to be non-compensable, as discussed in Core's Complaint.
7. Core denies that it admitted that its bills are overstated and inaccurate. Core denies that it has provided no evidence that the traffic it terminated for Verizon exists or is compensable. Core provided the Affidavit of Bret Mingo with its Complaint, along with copies of the invoices which reflect the exact number of minutes terminated for Verizon. Further answering, Verizon's references to the transcript of the evidentiary hearing on Core's Petition for Emergency Relief amount to New Matter which cannot be validly considered in

⁸ *Rose Tree Media School District v. Department of Public Instruction*, 431 Pa. 233, 244 A.2d 754 (1968).

⁹ Indeed, Verizon recently admitted to Core that it does have records relating to the traffic it sends Core.

ruling of preliminary objections. In resolving Verizon's preliminary objections, only the facts pled in Core's Complaint can be considered, and such facts must be accepted as true and viewed in the light most favorable to Core, along with any reasonable inferences from those facts. Facts averred by Verizon cannot be considered.¹⁰ As a general rule, courts may **not** consider testimony or anything outside the pleadings when ruling upon a preliminary objection in the nature of a demurrer.¹¹

8. Core admits that Verizon sent letters dated July 1, 2011. Those letters are attached to Core's Complaint as Exhibit 1, Tab B. Those letters speak for themselves, and Core denies Verizon's characterization of those letters.
9. Core admits that the ICAs contain the excerpts referenced in paragraph 9 and included in Core's Complaint. Core denies Verizon's characterizations of those excerpts from the ICAs. As set forth in Core's Complaint, at paragraph 12, the ICAs require Verizon to pay Core for locally dialed calls sent to Core's network for termination, at the rate set forth in the ICA. Core's averments must be accepted as true for purposes of resolving Verizon's Preliminary Objections.
10. Core admits that the ICAs contain "auditing provisions", but deny that Verizon validly invoked those provisions. Verizon's letters to Core which deem all of its traffic "non-compensable" never mention the word "audit", nor do they invoke any record inspection provisions of the ICA. Furthermore, Verizon's request for records was not reasonably tied to any articulated concern or need. Verizon's references to the audit provisions amount to New Matter, as they are not included in Core's Complaint or attachments thereto, and therefore the ICA provisions referenced by Verizon are outside the scope of materials to be

¹⁰ See *infra.*, discussion at footnote 2.

¹¹ *Bonanni v. Weston Hauling, Inc.*, 392 Pa. 248, 140 A.2d 591 (1958).

considered in ruling on preliminary objections. Core will respond to Verizon's characterizations of the ICA audit provisions in Core's Answer to Verizon's New Matter.

11. Core denies Verizon's characterizations of the testimony of Bret Mingo. Further answering, Verizon's references to the hearing transcript amount to New Matter, as they are not included in Core's Complaint or the attachments thereto, and therefore the transcript passages referenced by Verizon are outside the scope of materials to be considered in ruling on preliminary objections. As a general rule, courts may **not** consider testimony or anything outside the pleadings when ruling upon a preliminary objection in the nature of a demurrer.¹² Core will respond to Verizon's characterizations of the hearing transcript in Core's Answer to Verizon's New Matter.
12. Core denies that the ICAs permit Verizon to withhold payment of Core's invoices. Verizon withheld payment of Core's invoices without invoking a bona fide dispute, in contravention of the ICAs. See paragraphs 25-33 of Core's Complaint.
13. Core admits that the ICAs contain the excerpts referenced in paragraph 13, and that such excerpts were included in Core's Complaint. Core denies Verizon's characterizations of those excerpts from the ICAs.
14. Core admits that Verizon sent letters dated July 1, 5, 12, and 18, 2011. Those letters are attached to Core's Complaint. Those letters speak for themselves, and Core denies Verizon's characterization of those letters. As stated in Core's Complaint, Core did not consider Verizon's letters to be valid dispute letters, as the letters provided no legal or factual support for the Verizon's conclusion that the traffic sent by Verizon was non-compensable. Verizon's letters are also internally contradictory. It is telling that the July 1

¹² *Bonanni v. Weston Hauling, Inc.*, 392 Pa. 248, 140 A.2d 591 (1958).

and 18 letters state that Verizon's "review of the facts" led it to conclude that its traffic is not compensable, and that Core's billings are "grossly overstated", yet Verizon has consistently averred that it does not have the records it needs to substantiate Core's billings. This begs the question: if Verizon does not have the records it needs to substantiate Core's billings, how could it possibly determine that the traffic referenced in Core's invoices is not compensable? If Verizon did not have the records to substantiate Core's billings, then Verizon's conclusion that 100% of the traffic is non-compensable has no foundation and is a bad faith breach of the ICA. Conversely, if it is true that Verizon has such records, then Verizon's averments to the contrary are simply untrue.

15. Core admits that the ICA contains the excerpts referenced in paragraph 15 and included in Core's Complaint. Core denies Verizon's characterizations of those excerpts from the ICAs. As set forth in paragraph 27 of Core's Complaint, the Core-Verizon ICA dispute resolution process explicitly states that disputes that the Parties cannot resolve themselves may be submitted to the Commission for resolution on an expedited basis.

16. Core admits that the ICA contains the excerpts referenced in paragraph 16 and included in Core's Complaint. Core denies Verizon's characterizations of those excerpts from the ICAs. The Core-Verizon North ICA clearly specifies that either party may initiate an appropriate action in any regulatory or judicial forum of competent jurisdiction if negotiations fail to resolve a dispute in a reasonable time. With Core facing imminent business disruption, and with Verizon providing no basis for its "non-compensability" conclusion despite multiple requests, Core's filing of its Petition and Complaint was reasonable and permitted under the ICA.

17. Core admits that it filed the Complaint on July 22, 2011. Core denies the remainder of Verizon's characterizations. Core was within its rights under the ICAs to seek a

Commission remedy for Verizon's non-payment. As set forth above in paragraphs 15 and 16, the ICAs do not constitute agreements for alternative dispute resolution, and expressly permit the parties to seek Commission relief for a billing dispute at any time. The parties are clearly not required to wait for the lengthy dispute resolution procedure to be exhausted before seeking such Commission relief. Under the circumstances, with Core facing imminent business disruption due to Verizon's non-payment, Core was well within its rights to immediately take its Complaint to the Commission to seek expedited relief.

II. ANSWER TO PRELIMINARY OBJECTIONS

18. Core admits that the Commission's regulations and the Public Utility Code contain the references identified in paragraph 18. Core denies Verizon's characterizations of those references.

19. Core admits that a preliminary objection for legal insufficiency under 52 Pa. Code 5.101(4) is comparable to a demurrer in a civil case. In deciding preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the complainant, recovery or relief is possible. *Dep't of Auditor General, et al v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa.Cmwth. 2003); *P.J.S. v. Pa. State Ethics Comm'n*, 669 A.2d 1105 (Pa.Cmwth. 1996). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward*, 802 A.2d 705 (Pa.Cmwth. 2002). All of the non-moving party's averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees' Retirement Bd.*, 690 A.2d 1312 (Pa.Cmwth. 1997). A demurrer will not be sustained unless the face of the complaint shows that the law will not permit recovery, and any

doubts should be resolved against sustaining the demurrer. *Giffin v. Chronister*, 151 Pa.Cmwlth. 286, 290, 616 A.2d 1070, 1072 (1992).

A. The Case is Clearly Ripe for Adjudication

20. Core denies that its Complaint is legally insufficient. Verizon's "ripeness" argument is both factually and legally flawed. In resolving a preliminary objection for legal insufficiency, the adjudicator must determine if relief or recovery is possible. The Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. *County of Allegheny v. Commonwealth of Pennsylvania*, 490 A. 2d 402 (Pa. 1985); *Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988.) The Commission must view the complaint in this case in the light most favorable to Core and should dismiss the complaints only if it appears that Core would not be entitled to relief under any circumstances as a matter of law. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994). With its ripeness argument, Verizon is raising a flimsy affirmative defense which it has the burden of proving, and such an affirmative defense is not relevant for purposes of a preliminary objection. A preliminary objection on the ground of legal insufficiency is not the improper vehicle to raise affirmative defenses.¹³ Core has alleged that 1) the ICAs between the parties require Verizon to compensate Core for all local traffic that is sent to Core's network, 2) Verizon has delivered significant traffic to Core's network, 3) Verizon has refused to compensate Core for such traffic, 4) Verizon has provided no legal or factual

¹³ *Rose Tree Media School District v. Department of Public Instruction*, 431 Pa. 233, 244 A.2d 754 (1968).

basis for its non-payment, and 5) Core has been damaged by Verizon's non-payment. In resolving Verizon's preliminary objections, only the facts pled in Core's Complaint can be considered, and such facts must be accepted as true and viewed in the light most favorable to Core, along with any reasonable inferences from those facts. Facts averred by Verizon cannot be considered.¹⁴ If Core's allegations are accepted as true, it is clear that relief is possible under Core's claim. Furthermore, as set forth above, Verizon's contention that the ICAs preclude the filing of a Complaint is simply wrong. The ICA's expressly permit the parties to seek Commission resolution of a dispute at any time.

21. Core denies that the "ripeness doctrine" has any relevance to Verizon's Preliminary Objections. It is clear that an actual controversy exists between Core and Verizon, as outlined at length in Core's Complaint, and that the issues are adequately developed for judicial review. This is not a case where Core is alleging a hypothetical harm or possible future harm. Core has averred an actual breach of the ICAs by Verizon, actual non-payment, and actual infliction of damages. The ICAs between the parties expressly permit the parties to seek Commission review of such controversies. The case cited by Verizon for support of its ripeness argument (*Norbeck v. PECO*, Docket No. C-2008-2051267, October 28, 2008 Initial Decision) involved a complaint against a utility company which indicated that it may, at some point in the future, cease service to some customers. The Commission correctly determined in that case that a hypothetical event, which may or may not happen at some point in the future, is not ripe for a Complaint. That is clearly not the situation in the present case between Verizon and Core.

¹⁴ See *infra.*, discussion at footnote 2.

22. Core denies that the dispute with Verizon is a “potential future dispute”. The dispute is current and ongoing. Verizon has ceased paying any intercarrier compensation to Core in clear violation of the ICAs. Verizon has provided no factual basis for its cessation of payment, and has only reiterated its self-serving, and factually impossible legal conclusion that all of the millions of minutes of traffic that it sends to Core are suddenly “non-compensable”. The ICAs are clear on their face that it is not necessary for the lengthy dispute resolution process to run its course before a party can seek Commission relief. The dispute resolution process outlined in the ICAs is clearly voluntary, not mandatory, if a party believes that the dispute cannot be resolved. The issues are certainly adequately developed for Commission review. The issue is whether Verizon’s non-payment violated the terms of the ICA and applicable law. The dispute resolution process is not necessary to develop the issues in the case. Further, Verizon’s reference to a “potential future dispute” is telling in that it exposes Verizon’s real position regarding the billing dispute and dispute resolution processes. In Verizon’s view, these processes enable it to stop payment on all invoices **and then** engage in a lengthy fishing expedition in search of grounds for a “potential future dispute.”

23. Core denies that the ICAs preclude the parties from seeking Commission relief prior to the exhaustion of the dispute resolution procedures. As set forth in paragraph 27 of Core’s Complaint, the Core – Verizon ICA dispute resolution process explicitly states that disputes that the Parties cannot resolve themselves may be submitted to the Commission for resolution on an expedited basis. The Core-Verizon North ICA clearly specifies that either party may initiate an appropriate action in any regulatory or judicial forum of competent jurisdiction if negotiations fail to resolve a dispute in a reasonable time. Core further denies that Verizon is entitled to withhold payment during the pendency of the Commission

proceeding. The Core-Verizon ICA states that “During the Commission proceeding, each Party shall continue to perform its obligations under the Agreement”. See Paragraph 27 of Core’s Complaint. Furthermore, to the extent there is any doubt as to the requirement to exhaust the dispute resolution process before initiating a complaint, under well settled law regarding disposition of preliminary objections, such doubt must be resolved in Core’s favor. Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward*, 802 A.2d 705 (Pa.Cmwlth. 2002). All of the non-moving party’s averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees’ Retirement Bd.*, 690 A.2d 1312 (Pa.Cmwlth. 1997). A demurrer will not be sustained unless **the face of the complaint** shows that the law will not permit recovery, and any doubts should be resolved against sustaining the demurrer. *Giffin v. Chronister*, 151 Pa.Cmwlth. 286, 290, 616 A.2d 1070, 1072 (1992).

24. Core admits that the ICAs contain lengthy dispute resolution procedures, including various escalation steps and a process that could last as long as 120 days. However, as set forth above and in Core’s Complaint, the ICAs explicitly state that any dispute that the parties cannot resolve in a reasonable time can be submitted to the Commission for expedited review. Verizon’s interpretation of the ICAs would lead to an absurd result. Under Verizon’s interpretation, if a party chooses to dispute 100% of bill for no valid reason (as Verizon has done here), and ignores the other party’s request for a factual reason for non-payment, the billing party would be forced to endure 120 days of non-payment while the dispute process runs out before it is capable of filing a Complaint with the Commission.

Under Verizon's view, this period must be exhausted even if it is clear from Day 1 that the billed party will not provide a basis for its non-payment and will not release payment. Such an interpretation is directly contrary to the express terms of the ICAs which permit the parties to take disputes to the Commission. Furthermore, such an interpretation would essentially enable the billed party to starve the billing party for up to four months before a complaint could be filed.

25. Core denies that it has not complied with the dispute resolution provisions of the ICAs. The fact is that Verizon never raised a valid, bona fide dispute before informing Core that Verizon was deeming 100% of its traffic non-compensable. See Core's July 8, 2011 letter to Verizon, attached to Core's Complaint as Exhibit 1, Tab C. Verizon did not reference the ICA's dispute provisions. Verizon did not identify any factual basis for its dispute. As set forth in Core's Complaint, Verizon waited until the due date of Core's June 1, 2011 invoice to declare that 100% of its traffic was non-compensable. Verizon did not specify why its traffic had suddenly become non-compensable. Verizon did not identify any specific grounds for its complete withholding of payment. Verizon did not invoke any audit provisions of the ICA. When Core requested Verizon's factual basis for non-payment, Verizon refused to provide any factual basis. In short, Verizon's actions amounted to an outright breach of the ICAs, not an invocation of the dispute resolution processes. Core's Complaint and attachments thereto set forth in detail the reasons why Verizon did not raise a bona fide dispute.¹⁵ For the purposes of resolving a demurrer, the allegations contained in

¹⁵ Indeed, Verizon did not provide any basis whatsoever for its "dispute" until it filed its Answer, New Matter and Counterclaims on August 16. See, Verizon Answer, New Matter and Counterclaims, at ¶¶ 113-15. Core has already provided Verizon with records demonstrating the basis Verizon asserted therein is completely untrue and without foundation.

Core's complaint must be accepted as true, and it is clear that if Core's allegations are accepted as true, Core has demonstrated a right to relief.

26. Denied. As set forth above, the dispute resolution process outlined in the ICAs explicitly allow the parties to seek Commission relief for a dispute that cannot be resolved between the parties.

27. Core denies that Verizon transmitted a bona fide dispute notice. Verizon's July 1 letters reference certain "facts" available to Verizon that indicate that the traffic is non-compensable, but curiously do not reveal those "facts". Core was left to guess at which "facts" Verizon relied upon for its conclusion that the traffic had suddenly become non-compensable. Verizon's failure to specify the factual grounds for its dispute was not a valid invocation of the ICA dispute resolution procedures. To the contrary, Verizon's actions amounts to an outright abuse of the process. If Verizon truly wanted to raise a dispute and invoke the collaborative dispute resolution process, Verizon would have explained to Core how and why 100% of Verizon's traffic had suddenly become non-compensable. Instead of being forthright, Verizon has chosen to play games with the dispute process and hide being self-serving legal conclusions that have no meaning without a factual underpinning.

28. Core admits that Verizon's July 1, 2011 letters provide no explanation for the conclusion that 100% of Verizon's traffic had suddenly become non-compensable. Verizon did not provide 3 separate grounds for a dispute, as it alleges in its Preliminary Objections. To the contrary, Verizon's July 1 dispute letters take the position that all of its traffic is non-compensable. Verizon's other justifications for non-payment – overstatement of minutes and incorrect rate, were provided in the alternative to the primary conclusion of non-compensability and would only justify partial withholding of payment, if the justifications were even valid in the first place. Verizon's letters stated that the traffic it sent Core had

become “non-compensable as reciprocal compensation traffic”. This is a legal conclusion that has no meaning unless a factual underpinning is provided. This conclusion did not allow Core to understand why Verizon was claiming the traffic was not “reciprocal compensation traffic”. Core was left guessing as to the basis for the conclusion – was the traffic interexchange access traffic? was it not telecommunications traffic? If Verizon had a factual basis for its conclusion that the traffic was not “reciprocal compensation traffic”, and truly wanted to raise a dispute, it could have stated such a basis in its letter.

29. As set forth in the Complaint, Cores attempted to ascertain Verizon’s factual basis for suddenly ceasing payment, but Verizon refused to provide any grounds. Within days of receiving Verizon’s non-payment notices, Core indicated that Verizon had not provided sufficient information to allow Core to understand the basis for Verizon’s non-payment. Core also explained that Verizon’s actions threatened Core’s business operations in Pennsylvania. In response to Core’s letter, Verizon refused to provide any elaboration of its “non-compensability” conclusion, and simply reiterated its vague and non-sensical statements. Verizon breached the ICAs by informing Core that that all of Verizon’s traffic had become non-compensable, and exacerbated the breach by refusing to communicate in good faith with Core. Verizon’s claim that none of its traffic is reciprocal compensation traffic is simply ludicrous, and factually impossible, as discussed in Core’s Complaint.

30. Any doubts as to the interpretation of the ICA dispute resolution clauses must be resolved in favor of Core.¹⁶ Verizon’s sole ground for its preliminary objection is that the dispute resolution process precludes Core from filing a complaint until the process is exhausted. Core disputes that the dispute resolution process in the ICAs precludes the filing of a formal

¹⁶ *Boyd v. Ward*, 802 A.2d 705 (Pa.Cmwth. 2002).

complaint. Core reasonably interpreted Verizon's actions as being a material breach of the ICA that does not trigger the dispute resolution processes. Furthermore, even if the dispute resolution processes were invoked, the ICAs plainly state that the parties can seek Commission relief to resolve disputes that they cannot resolve themselves. The ICAs clearly do **not** say that the entire dispute resolution and escalation process must be exhausted before such Commission relief can be sought. To the extent there is a doubt on this point, such doubt must be resolved in Core's favor and Verizon's preliminary objections must fail.

31. It is far from clear that Verizon's interpretation of the ICAs is correct. Verizon chooses to ignore the ICAs' express language which allows the parties to take a dispute to the Commission if they cannot resolve it themselves. Instead, Verizon reads an "exhaustion of remedies" clause into the ICAs that simply does not exist. Verizon has a very high burden to prevail on its preliminary objections, yet its sole argument in support of its objection requires an interpretation of the ICAs that is not supported by the plain language in the documents. Under the well-settled principles for resolving preliminary objections in general and demurrers in particulate, Verizon's objections simply cannot be upheld.

32. Core disputes Verizon's conclusion that its cessation of payments was authorized by the ICA. Verizon did not validly dispute Core's invoices, for the reasons set forth in Core's complaint. In its preliminary objections, Verizon again makes its self-serving conclusory statement that its traffic was not reciprocal compensation traffic, but provides no factual underpinning for this conclusion. Merely stating that traffic is not reciprocal compensation traffic does not make it so.

33. It is laughable for Verizon suggest that the current dispute between the parties is hypothetical. The controversy between the parties is fully formed, active, and ongoing. Verizon has baldly asserted that none of the traffic it sends to Cores is compensable.

Verizon has ceased paying Core's intercarrier compensation invoices; and has indicated no willingness to resume payment despite multiple requests, and receipt of Core's records.

Verizon's claim of non-compensability is completely meritless and impossible as a matter of fact and law. As set forth in Core's Complaint, there is simply no legal basis to support Verizon's contention that millions of minutes of locally dialed traffic that Verizon sends to Core over direct local interconnection trunks can be non-compensable. Core has demonstrated that Verizon's actions are gravely damaging to Core. There is nothing hypothetical about Verizon's actions, their legal significance, or their impact on Core.

34. There are ample grounds for the Commission to entertain Core's Complaint. For one, the ICAs approved by the Commission explicitly authorize the Commission to adjudicate disputes between the parties. Secondly, Core's Complaint raises significant concerns about the anti-competitive behavior of the largest ILEC in Pennsylvania. Contrary to Verizon's contention, the Commission would be setting a dangerous precedent if it tolerated Verizon's actions. If Verizon could cease paying intercarrier compensation to competitive carriers without providing a factual basis for its non-payment, and then misuse the dispute resolution process to continue its non-payment for months, competitive carriers would face considerable uncertainty and be put at a severe disadvantage to Verizon. The Commission has already stated that it will not look kindly on the type of self-help that Verizon has wielded here, and Commission precedent clearly permits the Commission to sanction Verizon for its actions.

35. Verizon's demurrer should be rejected. The ICAs clearly do not require the parties to exhaust the lengthy dispute resolution process before seeking Commission relief, when it is clear that the dispute will not be resolved by that process. In addition, nothing in the ICA prohibits the parties from pursuing a formal complaint at the Commission at the same time

as they pursue dispute resolution. When considering only Core's well-pled facts and resolving any doubts in favor of Core, it is painfully clear that Core has stated a claim for which relief can be granted.

B. No Prior Agreement For Alternative Dispute Resolution Exists Which Would Preclude the Filing of Core's Complaint

36. Verizon's preliminary objection on the grounds of "prior agreement for alternative dispute resolution" must also be dismissed. As set forth above, the dispute resolution processes outlined in the ICAs are plainly not "agreements for alternative dispute resolution" that would preclude a party from seeking Commission resolution of a dispute. The ICAs clearly do **not** include a mediation or arbitration clause, and clearly do **not** require the parties to mediate or arbitrate a dispute rather than litigate it. To the contrary, the ICAs explicitly state that the parties are permitted to seek Commission resolution of a dispute if the parties cannot resolve it themselves. The ICAs are the exact opposite of agreements for alternative dispute resolution – rather than binding the parties to arbitrate a dispute, they in fact explicitly permit the parties to submit disputes to the Commission for resolution. Verizon's interpretation of the ICAs is simply incorrect. Verizon chooses to ignore the ICAs' express language which allows the parties to take a dispute to the Commission if they cannot resolve it themselves. Instead, Verizon reads an "exhaustion of remedies" clause into the ICAs that simply does not exist.

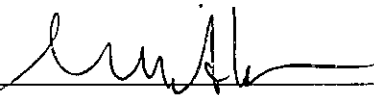
37. Verizon cannot point to a single case wherein a Commission or court has held that an ICA under the Telecommunications Act of 1996 constitutes an agreement for alternative dispute resolution that would preclude a Commission or court from resolving a claim for breach of the ICA. This is because no such case exists. Verizon's raising of this preliminary objections stretches the bounds of credibility, and by raising this frivolous argument,

Verizon is the party wasting the limited time and resources of the Commission. Verizon would have served the Commission better by using the time spent drafting its preliminary objections to finally articulate the factual grounds for its unprecedented conclusion that 100% of its traffic had suddenly become non-compensable overnight.

38. Core's claim is clearly ripe, and in no way prohibited by the terms of the ICASs. All of Verizon's objections to the Complaint are questionable, at best, and rely in large part on averments that are beyond the scope of consideration for a preliminary objection. As such, Verizon's preliminary objections should be dismissed.

WHEREFORE, for the foregoing reasons, Core respectfully requests that the Commission dismiss Verizon's Preliminary Objections.

Respectfully submitted,



Michael A. Gruin, Esq.
ID No. 78625
Stevens & Lee
17 N. 2nd St.
16th Floor
Harrisburg, PA 17101
717-255-7365
mag@stevenslee.com

*Counsel for Complainant Core
Communications, Inc.*

August 26, 2011

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

CORE COMMUNICATIONS, INC.
Complainant

v.

VERIZON PENNSYLVANIA INC.
and

VERIZON NORTH, INC.
Respondents

Docket No. C-2011-2253750
Docket No. C-2011-2253787

CERTIFICATION OF SERVICE

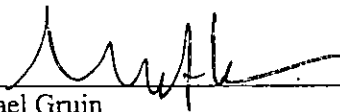
I hereby certify that I have this day served by First Class U.S. Mail and Electronic Mail a true and correct copy of the foregoing Answer to Preliminary Objections upon the parties listed below, in accordance with the requirements of § 1.54 (relating to service by a party)

VIA ELECTRONIC MAIL AND FIRST CLASS US MAIL

Todd Stewart, Esq.
William Lehman, Esq.
Hawke McKeon & Sniscak
100 North 10th Street
Harrisburg, PA 17101

Joseph M. Ruggiero
Assistant General Counsel
Verizon
1515 N. Courthouse Road, Ste. 500
Arlington, VA 22201

August 26, 2011



Michael Gruin