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September 19, 2011

Via Overnight Delivery

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street – 2nd Floor North
Harrisburg, PA 17120

RECEIVED
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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

RE: Russell L. Bennett v. Verizon Pennsylvania Inc.; Docket No. C-2010-2190280;
EXCEPTIONS

Dear Ms. Chiavetta:

Enclosed, for filing with the Commission, are the original and nine (9) copies of the Exceptions of Verizon Pennsylvania Inc. to the Initial Decision of Administrative Law Judge Conrad A. Johnson issued in connection with this proceeding. A copy of this document has been served on Mr. Bennett as indicated on the attached Certificate of Service.

Ms. Cheryl Walker Davis, Director of the Office of Special Assistants, granted the parties an extension of time for the filing of Exceptions. This extension results in a due date of September 29, 2011 for the filing of Replies to Exceptions.

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: Honorable Conrad A. Johnson
Cheryl Walker Davis, Director
Russell L. Bennett

**EXCEPTION THE CIVIL PENALTY RECOMMENDED IN THE INITIAL
DECISION IS GROSSLY EXCESSIVE AND SHOULD NOT BE
ADOPTED BY THE COMMISSION.**

A. Introduction.

The Initial Decision recommends that Verizon be required to pay a civil penalty of \$6,000 on the basis that the Company failed to properly bill Complainant's account for telephone service provided as part of the Verizon Freedom Triple Bundle service package (Triple Bundle Plan) he subscribed to in March 2009. The record shows that Verizon provided the discounted rate for the Double Bundle Plan, rather than the discounted rate for the Triple Bundle Plan.

At the time of Complainant's subscription, the Triple Bundle Plan included unlimited local, regional toll and long distance toll calling (all encompassed in the charge for "telephone service"), high speed internet service up to 3.0M and DirecTV (DTV) satellite television service with free Showtime for 12 months and one free DTV receiver.² There was some dispute in the record as to whether Complainant had actually enrolled in the Triple Bundle Plan³ but, accepting the ALJ's conclusion that he had done so, the services described above were to be provided to Complainant at a discounted rate of \$124.99 for the first 12 months of his subscription, or from April 2009 through March 2010. Telephone service was to be billed at the discounted rate of \$36.01 per month, which was \$13.98 less than the non-bundled service rate of \$49.99 per month.⁴ In addition to the services already identified, Complainant subscribed to and received a nonpublished telephone number, used the three-way calling feature occasionally and made several directory assistance calls during the 12-month discount period. The charges billed for these additional telephone services and features, as well as for taxes and surcharges, were not

² ID at 3.

³ NT at 61, 64, 77.

⁴ ID at 3, 6.

included in the \$124.99 Triple Bundle Plan flat monthly fee.⁵ The \$124.99 Triple Bundle Plan rate also did not include optional internet and DTV services subscribed to and received by Complainant such as additional DTV receivers, internet and DTV protection and backup plans, Starz Play and Games on Demand for internet and pay-per-view movies. Complainant was billed for and was responsible to pay the charges associated with these extra services.⁶

As noted earlier, the ALJ concluded that Verizon erroneously billed Complainant the discounted rate for telephone service available to a customer subscribed to the Double Bundle Plan (\$42) when it should have billed him the discounted rate available to a customer subscribed to the Triple Bundle Plan (\$36.01). While Verizon does not necessarily agree, the Company is not excepting to this finding and will provide all appropriate credits to Complainant's account as directed by the Initial Decision. However, even accepting the conclusion that Complainant's account was overbilled for telephone service as determined by the ALJ, the \$6,000 penalty recommended in the Initial Decision is grossly excessive in that it is 100 times greater than the amount of the monthly overbilling (\$5.99) and 83 times greater than the total amount overbilled over the entire 12-month discount period (\$71.88). A penalty of such magnitude is not representative of the circumstances of this case, is not necessary to deter future overbillings of Complainant's telephone service and should not be adopted by the Commission.

B. Commission Standards for Applying a Civil Penalty.

In determining if a civil penalty should be assessed against a utility, and how much that penalty should be, the Commission must review and evaluate the standards set forth in the Commission's Opinion and Order entered in *Joseph A. Rosi v. Bell Atlantic-Pennsylvania Inc.*

⁵ ID at 7, NT at 6-7.

⁶ ID at 7, NT at 65-67.

*and Sprint Communications Company, L.P.*⁷ By their own language, these standards, which were memorialized in a Policy Statement that appears in the Commission's Regulations at 52 Pa. Code § 69.1201 (Policy Statement), are to be used to determine "if a fine for violating a Commission order, regulation or statute is appropriate...."⁸

Pursuant to *Rosi* and the Policy Statement, each of the following standards are to be considered when evaluating the appropriateness of imposing a civil penalty upon a public utility:⁹

- (1) Whether the conduct at issue was of a serious nature.
- (2) Whether the resulting consequences of the conduct at issue were of a serious nature.
- (3) Whether the conduct at issue was deemed intentional or negligent.
- (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future.
- (5) The number of customers affected and the duration of the violation.
- (6) The compliance history of the regulated entity which committed the violation.
- (7) Whether the regulated entity cooperated with the Commission's investigation.
- (8) The amount of the civil penalty or fine necessary to deter future violations.
- (9) Past Commission decisions in similar situations.
- (10) Other relevant factors.

⁷ Docket No. C-00992409, Initial Decision of Administrative Law Judge Michael Schnierle issued on October 19, 1999, Opinion and Order entered February 10, 2000. Mr. Rosi's complaint against Bell Atlantic-Pennsylvania, Inc. was dismissed. A civil penalty of \$16,000 was assessed against Sprint Communications Company, L.P. for an unauthorized toll carrier change (*i.e.*, slamming), which the Commission has determined qualifies as a serious violation of the Public Utility Code. *Harriet E. and Jeremy Gaige v. AT&T Communications of Pennsylvania, Inc.*, Docket No. C-00981211, Opinion and Order entered September 17, 1999.

⁸ 52 Pa. Code § 69.1201(a).

⁹ 52 Pa. Code § 69.1201(c). The explanatory text included in the Policy Statement is not repeated in the language set forth above.

C. The Facts of this Case Do Not Warrant the Imposition of a Civil Penalty, Let Alone a Penalty of \$6,000.

The Initial Decision sets forth the ALJ's analysis and application of the standards cited above to the facts of this case. As a result of that analysis, the ALJ concluded that Verizon's conduct in overbilling Complainant's telephone service was serious in nature, intentional and recurring; thereby warranting a civil penalty of \$6,000 to "deter future violations" by the Company.¹⁰ As discussed in further detail below, such a conclusion views only a small portion of the facts of this case and should not be supported by the Commission.

D. Application of the Policy Statement Standards to the Relevant Facts of This Case.

The civil penalty recommended by the ALJ is based on an analysis of only three of the ten standards cited above.¹¹ The ALJ determined that Verizon's conduct (and presumably the consequences of such conduct) was of a serious nature, for which a higher penalty should be imposed, because the Company failed to "bill Complainant at the telephone rate of \$36.01" for the first 12 months of his subscription to the Triple Bundle Plan and because Complainant requested "billing corrections [in] April, May, June and July" of 2009.¹² The ALJ determined Verizon's conduct was intentional based on Complainant's requests for billing corrections and on his testimony that, although he was given credits every time he called to complain about his

¹⁰ ID at 21-22, 52 Pa. Code §§ 69.1201(c)(1), (3) and (8).

¹¹ ID at 18-22, 52 Pa. Code §§ 69.1201(c)(1)-(3). The ALJ determined no testimony was given that was relevant to the standards at 52 Pa. Code §§ 69.1201(c)(4)-(7) and (10) (*Changes made to the Company's internal procedures to address the overbilling of Complainant's account or to prevent such an overbilling from occurring in the future; Number of customers other than Complainant who were similarly billed for the Triple Bundle Plan telephone service; or Verizon's compliance history or its level of cooperation with a Commission investigation in connection with Complainant's disputes*). For this reason, the ALJ determined that "a higher penalty would not be warranted" based on these standards.

¹² ID at 18-22.

bill, no one at Verizon could answer his billing questions.¹³ The limited nature of these facts and conclusions, however, presents an incomplete view of this case.

The ALJ's analysis with regard to the nature and scope of Verizon's billing of Complainant's telephone service for the 12 months between April 2009 and March 2010 looked at the length of time over which the billing took place. However, the actual error he concluded that Verizon made was designating Complainant's service package as a Double Bundle Plan rather than a Triple Bundle Plan. If this mistake is determined to be a violation of the Public Utility Code, it is only a single violation and it resulted in only minimally higher monthly charges on Complainant's ensuing bills, not a series of 12 repeated and recurring violations as determined by the ALJ. Further, the ALJ failed to consider the fact that the scope of the overbilling was small. Under the Triple Bundle Plan, Complainant was to be billed \$36.01 per month for telephone service, resulting in total charges of \$432.12 ($\36.01×12). Instead, Complainant was billed \$42 per month for telephone service, resulting in a 12-month billing of \$504 ($\42×12). This is a **total** difference of \$71.88.

Other record facts also negate the conclusion that the overbilling of Complainant's telephone service represented serious misconduct by the Company. Specifically, as shown on Verizon Exhibit No. 2-R, the total amount owed by Complainant for telephone, internet and DTV services as of his March 7, 2010 bill was \$451.27 ($\250.23 past due and $\$201.04$ current). These amounts included all charges billed through the end of the March 2010 service period.¹⁴ The \$71.88 overbilling represents only about 13% of this amount and the ALJ should have considered this information during his evaluation of the nature of the Company's conduct in this case.

¹³ ID at 4-5, 8, 16, 21.

¹⁴ As noted by the ALJ, the total outstanding balance due as of the April 20, 2011 hearing was \$1,917.67. ID at 8. The \$71.88 total overbilling is less than 4% of this balance.

The ALJ also misconstrues Complainant's testimony that he "repeatedly" requested correction of Verizon's billing of his account during the period from April 2009 through March 2010 and that "no one could give him an answer" when he called to question his bills.¹⁵ This testimony does not support the conclusion reached by the ALJ because it completely ignores the basic fact that underlies Complainant's billing dispute. That is, Complainant mistakenly believed that the monthly bills issued for his account between April 2009 and March 2010, when he was entitled to certain discounts under the bundled service plan, should only have shown a total due of \$125. In a sense, the ALJ's imposition of a penalty punishes Verizon for Complainant's erroneous belief that the monthly amount he was to be billed was lower than it actually was or that the \$125 amount included all the services and features he received. Complainant's mistake cannot be used as the basis upon which to impose a penalty upon Verizon.

Indeed, Complainant testified about this issue over and over again during the April 20, 2011 hearing. Specifically, he testified as follows:¹⁶

[Verizon] called and made an offer to me to get a bundle package which included the Internet and direct T.V. And I was supposed to be paying ... \$125 a month.

The very next month I get my next bill [dated May 7, 2009], and it was for \$234.79, I called Verizon and I asked them why is my bill so high.

My very next month I received another bill [dated June 7, 2009] for two hundred dollars. I called back to Verizon and I said to them, I hadn't received a bill yet for \$125. How come this is my third bill and it still wasn't no \$125.

Not one time have I seen a bill for [\$]125.

¹⁵ ID at 21-22.

¹⁶ NT at 17-19, 31, 35, 41.

I never received a \$125 bill. And to this day I still haven't received a bill that says [\$]125 on it, which was part of my bundle agreement.

For the first year, I never received a bill for the [\$]125.

After I received all of [the discounts] ... It would have come out to \$124.99 which is [\$]125 plus the taxes.

It came out to be more than [\$]125 ... After receiving my two discounts from Verizon, my bill would have ended up being [\$]125 Once they took them off my bill, my bill would have been [\$]125.

As seen in the testimony cited above, Complainant's contacts with Verizon about the billing of his telephone account were based on his mistaken belief that each bill issued during the 12-months he was to receive the Triple Bundle Plan discounts would total \$125. This was not true.¹⁷

Even if Complainant had received the Triple Bundle Plan discount for telephone service instead of the Double Bundle Plan discount between April 2009 and March 2010, his monthly bills still would not have totaled only \$125. Taxes and surcharges plus the valid charges billed for the additional services and features provided outside the bundled service package, which Complainant continued to use, were the primary reason Complainant's monthly bills were higher than he expected. Verizon's representatives attempted to explain this to Complainant. For example, Complainant testified he contacted Verizon after receiving his May 7, 2009 bill¹⁸ and questioned why his bill was so high (current charges totaling \$234.79).¹⁹ When he received his June 7, 2009 bill, which showed total current charges of \$212.35, Complainant again contacted Verizon and asked why he "hadn't received a bill ... for \$125 ... [and] how come [his] bill ...

¹⁷ This testimony also contradicts other testimony given by Complainant that he knew certain services and features that he subscribed to and was receiving were not included in the \$124.99 Triple Bundle Plan charge. NT 41, 55-57.

¹⁸ ID at 21, NT at 17-20.

¹⁹ NT at 17-18, Verizon Exhibit Nos. 1 and 2-R. As a result of this conversation, local service and Triple Bundle Plan credits were issued to Complainant's account.

still wasn't no \$125."²⁰ After receiving his August 7, 2009 bill, Complainant contacted Verizon and asked "why my bill is never what it was supposed to be," *i.e.*, \$125 per month.²¹ Finally, Complainant contacted Verizon after receiving his March 7, 2010 bill and questioned why "[n]ot one time have I seen a bill for 125."²² Complainant's erroneous expectation that his bills would total \$125 after he received the discounts offered by the Triple Bundle Plan explains Complainant's assertion that no one at Verizon could give him an answer when he called to discuss his bills. Complainant was asking for something that did not exist and could not be provided; *i.e.*, a monthly bill that totaled only \$125, when, in fact, his understanding of the services and rates of the bundled service package was not correct and he subscribed to multiple services not included in the bundled package fee.

E. Imposition of a Penalty is Not Warranted in this Proceeding.

Verizon submits that imposition of a civil penalty based on the facts of this case and the analysis set forth above is not appropriate. Furthermore, imposition of a penalty in the magnitude of that recommended in the Initial Decision – *i.e.*, \$6,000 – is even less appropriate. When all factors are considered, the overbilling of Complainant's telephone service in the total amount of \$71.88 does not rise to the level of conduct of a serious nature for which a penalty is warranted. Complainant's "repeated requests for billing corrections" were based, at least in large part, on his mistaken belief regarding the services and charges that were and were not included in the Triple Bundle Plan. In addition, Complainant did and continues to subscribe to services and features not included in the bundled package fee and for which he is and should be held accountable.

²⁰ NT at 18, Verizon Exhibit Nos. 1 and 2-R. Complainant was issued additional credits as a result of this conversation.

²¹ NT at 18.

²² NT at 19.

F. The Cases Cited in the Initial Decision Do Not Support Imposition of a Penalty in this Proceeding.

As precedent for the civil penalty recommended in the Initial Decision, and to satisfy the ninth standard set forth in the Policy Statement,²³ the ALJ cites four prior cases decided by the Commission over the last six years in which Verizon was required to pay a civil penalty for some action taken on a customer's account. The Initial Decision, however, fails to put these cases in perspective. A review of the Commission's on-line docketing system reveals that, over the same six-year time period, from 2005 to the present, Verizon has been served with nearly 1,500 formal complaints, the vast majority of which have either been resolved amicably with the customer or litigated without resulting in a penalty. The four cases cited by the ALJ represent about one-quarter of one percent of Verizon's total complaint case load during the six-year period. Further, both the 1,500 complaints received and the four incidents cited by the ALJ where fines were imposed represent an infinitesimal percentage of the total number of customers that Verizon serves in Pennsylvania. There is absolutely no basis for the Initial Decision to infer from the four cited cases that Verizon is a bad actor deserving of a "higher penalty" for "recurring violation[s]."²⁴

Additionally, none of the complaints cited in the Initial Decision supports the imposition of a fine as high as \$6,000 in this case. In *Babatunde Olubanjo v. Verizon Pennsylvania Inc.*,²⁵ the Commission imposed a \$250 penalty against the Company because of its failure to terminate the customer's service in a timely manner. The length of time that elapsed between Mr. Olubanjo's request for service termination and the time when the termination was completed is similar to the 12 months involved here -- the request was made on September 9, 2008 and the

²³ 52 Pa. Code § 69.1201(c)(9).

²⁴ ID at 22.

²⁵ Docket No. C-2009-2123326, Opinion and Order entered March 18, 2011 (*Olubanjo*).

service was terminated almost ten months later on June 26, 2009.²⁶ In its Order, the Commission adopted the reasoning set forth by the ALJ in the Initial Decision stating:

[A]lthough the violation here was certainly annoying to Complainant, ***it was not serious and did not result in any serious consequences for him.*** As such, we conclude that it was of a negligent nature. In light of the fact that Verizon PA remedied the situation and applied proper credits to Complainant's account, we agree that the ALJ's assessment of a \$250.00 penalty is appropriate in this case.²⁷

A similar analysis applies to this proceeding. Here, while his "need" to contact Verizon to discuss his account may have inconvenienced Complainant, had he correctly understood the services and charges applicable to the Triple Bundle Plan, the contacts he made with Verizon may not have been necessary. Furthermore, the Company's actions in billing his telephone service did not "result in any serious consequences." Complainant's telephone service was not threatened with suspension or termination as a result of these charges, even though Complainant carried a past due balance that ranged between \$50 and \$350 during nine of the 12 months in which the overbilling identified by the ALJ occurred, and even though Complainant was not and is not paying the undisputed charges billed to his account for the additional services he receives.²⁸ Complainant also received a number of local service credits totaling approximately \$100 during the 12-month discount period.²⁹ Based on the similarities that exist between the *Olubanjo* case and this proceeding, the Commission should modify the ALJ's recommendation and, if any penalty is warranted (which Verizon submits it is not), should impose a penalty similar to that imposed in *Olubanjo* – *i.e.*, \$250.

²⁶ *Olubanjo*, Slip Opinion at 5, 23.

²⁷ *Olubanjo*, Slip Opinion at 23 (emphasis added). It is notable that neither the ALJ nor the Commission found it necessary to impose a \$250 fine for each month the customer's account was billed after it should have been disconnected.

²⁸ Verizon Exhibit Nos. 1 and 2-R.

²⁹ Verizon Exhibit Nos. 1 and 2-R.

In *Dezort v. Verizon Pennsylvania Inc.*,³⁰ the ALJ recommended that Verizon pay a penalty of \$4,500 because (i) the premise visit needed to repair the customer's reported problem of static on his line was not scheduled until five days after the report was made; (ii) Verizon's service technician did not arrive for the scheduled visit; and (iii) Verizon failed to correct the static problem even though the customer contacted the Company three times on two successive days.³¹ The Commission disagreed with the ALJ's analysis and the recommended penalty, finding that the only misconduct of a serious nature committed by Verizon was the technician's failure to appear for the scheduled premise visit. For these reasons, the Commission reduced the penalty from \$4,500 to \$500.³² The facts of the current case, however, are distinguishable from those that existed in the *Dezort* case and that case cannot be used as precedent to impose the \$6,000 penalty recommended in the Initial Decision. Here, Complainant had no problem with his telephone service. In fact, he was and is receiving not only service for voice use, but also internet and television services. Also, the issue of a missed service commitment does not exist in this case. Based on these facts, the *Dezort* case does not support a finding that Verizon's actions in billing Complainant for telephone service at an incorrect amount were such that imposition of a penalty of any amount is warranted. Should the Commission determine a penalty is appropriate, the amount of that penalty should be reduced in the same manner it was reduced by the Commission in *Dezort* – to a minimal amount.

Moreover, the large civil penalty of \$6,000 recommended in the Initial Decision is completely out of proportion to the facts of this case and to the Commission's handling of other cases. Here, the ALJ concluded that Verizon erroneously provided the Complainant with the

³⁰ Docket No. C-2009-2099508, Opinion and Order entered May 7, 2010 (*Dezort*)

³¹ *Dezort*, Slip Opinion at 5-6. The two days were those just before the date on which the customer's service problems were corrected.

³² *Dezort*, Slip Opinion at 8.

telephone service discount applicable to the Double Bundle Plan rather than the discount applicable to the Triple Bundle Plan, resulting in an overbilling that totaled \$71.88. By contrast, in a previous case involving electric service, *Emerald Art Glass v. Duquesne Light Company*,³³ the Commission imposed a fine of only \$1,000 despite a finding that Duquesne Light Company provided unreasonable service in violation of 66 Pa.C.S. § 1501 because, over a period of four years, the customer had suffered over 20 power outages to the detriment of its business operations and because the utility failed to explain the cause of these outages or to take any specific investigative or remedial actions in response to the customer's repeated reports. The fine imposed in the *Emerald* case was one-sixth of the civil penalty recommended here, even though the conduct of the utility in that case (the customer's actual loss of utility service) was of a much more serious nature than the billing error that occurred in this proceeding.

Finally, the Commission recently found that a civil penalty of \$10 per day was appropriate in a case where a customer had experienced noise and static on his telephone line for several years despite numerous unsuccessful repair attempts.³⁴ In contrast, the ALJ in the present case has recommended a penalty of \$500 per-month, for a total penalty of \$6,000, for a billing error that only involved \$71.88. Such a penalty is totally unreasonable and should not be supported by the Commission.

³³ Docket No. C-00015494, Opinion and Order entered June 14, 2002 (*Emerald*).

³⁴ *Richard Kaufman v. Verizon Pennsylvania Inc.*, Docket No. C-20055680, 2008 Pa. PUC LEXIS 53 (PUC 2008).

CONCLUSION

WHEREFORE, for the reasons set forth above, Verizon Pennsylvania Inc. respectfully requests that the Initial Decision of Administrative Law Judge Conrad A. Johnson dated July 28, 2011 and issued on August 25, 2011 be modified consistent with these Exceptions and that no civil penalty be imposed as a result of this proceeding.

Respectfully submitted,



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DATED: September 19, 2011

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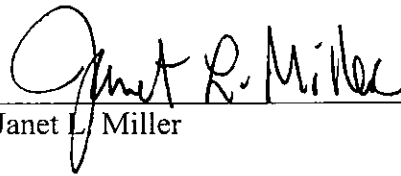
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing

Exceptions upon the Complainant via *Overnight Mail* addressed as follows:

Russell L. Bennett
114 Wallis Street
Farrell, PA 16121-2128



Janet L. Miller

Counsel for Verizon Pennsylvania Inc.

Dated this 19th day of September, 2011.

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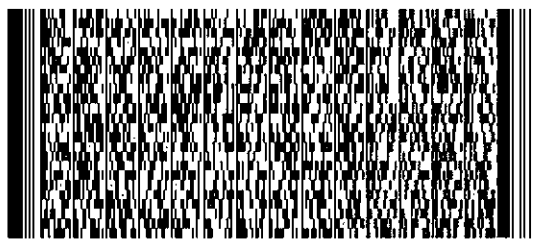
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