

Suzan DeBusk Paiva
Assistant General Counsel



Verizon Pennsylvania Inc.
1717 Arch Street, Floor 3 SE
Philadelphia, PA 19103

January 17, 2012

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street – Filing Room (2 North)
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Curt Eckroth v. Verizon Pennsylvania Inc.;
Docket No. C-2011-2279168; **PRELIMINARY OBJECTIONS OF VERIZON
PENNSYLVANIA INC.**

Dear Secretary McNulty:

Enclosed for filing with the Commission are the original and three (3) copies of Verizon Pennsylvania Inc.'s Preliminary Objections in connection with the above-referenced case.

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

Very truly yours,

A handwritten signature in cursive script that reads "Suzan D. Paiva".

Suzan D. Paiva
Counsel for Verizon Pennsylvania Inc.

SDP/meb
Enclosures

Via U.S First Class Mail
cc: Office of Administrative Law Judge
Kimberly Hafner
Herbert Nurick, Mediator
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

CURT ECKROTH,

Complainant

v.

VERIZON PENNSYLVANIA INC.

Respondent

Docket No. C-2011-2279168

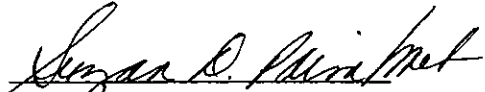
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NOTICE TO PLEAD

TO: Curt Eckroth
3081 W. Beersville Road
Bath, PA 18014

You are hereby notified that Verizon Pennsylvania Inc. ("Verizon PA") has filed pursuant to 52 Pa. Code §5.62(b), a New Matter to the Formal Complaint in the above-captioned proceeding. You may submit a response to the New Matter within twenty (20) days pursuant to 52 Pa. Code § 5.63. If no response is submitted, the presiding officer may rule on the New Matter without a response from you, thereby requiring no other proof. All Pleadings, such as a response to the New Matter, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on the undersigned counsel for Verizon PA.

Date: January 17, 2012


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*Counsel for Respondent
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BEFORE THE
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CURT ECKROTH,

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v.

VERIZON PENNSYLVANIA INC.

Respondent

Docket No. C-2011-2279168

PRELIMINARY OBJECTIONS TO THE
COMPLAINT OF CURT ECKROTH

Verizon Pennsylvania Inc. ("Verizon PA") hereby submits the following Preliminary Objections and Motion to Strike pursuant to 52 Pa. Code § 5.101(a)(2), to the Complaint filed by Curt Eckroth ("Complainant"). In support thereof, Verizon PA avers and represents as follows:

BACKGROUND

1. Mr. Eckroth filed the instant Formal Complaint regarding service issues with his phone and internet connection (DSL line) on or about December 5, 2011. The Commission served the Complaint on Verizon PA on December 21, 2011.¹

¹ Although the Respondent in this matter is Verizon PA, DSL service is provided by its affiliate Verizon On-Line. Therefore, the Complaint should also be dismissed because the company that provides the service complained of is not a certificated, regulated public utility company and does not provide public utility service as defined by the Code. 66 Pa. C.S. § 102.

PRELIMINARY OBJECTIONS

2. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections and a motion to strike. 52 Pa. Code §5.101(a)(2). Commission procedure regarding the disposition of preliminary objections and a motion to strike is similar to that utilized in Pennsylvania civil practice.²

3. A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt.³ The Commission has adopted this standard.⁴

4. A motion to strike "impertinent matter" is the appropriate means to challenge an erroneous prayer for damages.⁵

5. The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the motion, all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts.⁶ The motion may be granted only if the moving party prevails as a matter of law.⁷ Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections.⁸

² See *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

³ *Interstate Traveller Services, Inc. v. Pa. Dept. of Environmental Resources*, 406 A.2d 1020 (Pa. 1979); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa. Super. 1991).

⁴ *Montague v. Philadelphia Electric Company*, 66 Pa. PUC 24 (1988).

⁵ See *Leiby's Mobile Home Community LLC v. Verizon Pennsylvania*, Docket #C-2011-2225151, Order Denying Preliminary Objections, March 28, 2011, by Elizabeth Barnes, ALJ.

⁶ *County of Allegheny v. Commw. of Pa.*, 490 A.2d 402 (1985); *Commw. of Pa. v. The Bell Telephone Co. of Pa.*, 551 A.2d 602 (Pa. Commw. 1988).

⁷ *Roc v. Flaherty*, 527 A.2d 211 (Pa. Commw. 1985).

⁸ *Dept. of Auditor General, et al. v. State Employees' Retirement System, et al.*, 836 A.2d 1053, 1064 (Pa. Commw. 2003) (citing, *Boyd v. Ward*, 802 A.2d 705 (Pa. Commw. 2002)).

6. A preliminary objection that challenges the sufficiency of the complaint is in the nature of a demurrer.⁹ For testing the legal sufficiency of the challenged pleading, a preliminary objection in the nature of a demurrer admits as true all well-pleaded, material, relevant facts, and every inference deducible from those facts. The pleader's conclusions or averments of law are not considered to be admitted as true by a demurrer.¹⁰

7. The Commission must act within, and cannot exceed its jurisdiction.¹¹

8. The Commission does not have jurisdiction over the provision of Internet services, including DSL service, which is an information service that is categorized as jurisdictionally interstate.¹² This service is has been declared by the FCC to be an “interstate service that is properly tariffed at the federal level.”¹³ This Commission confirmed in *MilleniaNet Corporation v. Verizon Pennsylvania Inc.*, Docket No. C-20055173 (Opinion and Order entered May 2, 2008) that this Commission lacks “jurisdiction over disputes concerning billing and other services provided in connection with” interstate services. (*Id.* at 9). The Commonwealth Court affirmed that holding in *MilleniaNet Corporation v. Pennsylvania Public Utility Commission*, Docket No. 990 CD

⁹ *Jamieson v. Pa. Bd. of Probation and Parole*, 83 Pa. Commonwealth Ct. 546, 547, 478 A.2d, 152 (1984).

¹⁰ *County of Allegheny v. Commonwealth of Pennsylvania*, 507 Pa. 360, 372, 490 A.2d 402 (1985).

¹¹ *Feingold v. Bell of Pennsylvania*, 383 A.2d 791 (Pa. 1977); *Loma, Inc. v. Pennsylvania Public Utility Commission*, 682 A.2d 424 (Pa. Cmwlth. 1996).

¹² *Declaratory Order re: LEC Billing of Pay-Per-Call and Similar Information Services*, Docket No. M-00940569 (Order entered July 1, 1994); *Collins v. The United Telephone Company of Pennsylvania d/b/a Sprint*, Docket Nos. C-00970272 and C-00970273 (Order entered July 21, 1997); *Landis v. Denver & Ephrata Telephone and Telegraph Company d/b/a D&E Telephone*, Docket No. C-20039741 (Initial Decision dated July 15, 2003; Final Order entered September 15, 2003); *Benchmark Color Lab. Inc. v. Verizon Pennsylvania Inc.*, Docket No. C-20042694 (Initial Decision dated June 2, 2004; Final Order entered August 2, 2004).

¹³ *GTE Tel. Operating Cos; GTOC Tariff No. 1 GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC RCD 22466 (1998).

2008, (Memorandum Opinion by Judge Butler filed April 30, 2009)(**Exhibit A**), finding that this Commission “has no jurisdiction over disputes concerning billing and adequacy of interstate services provided by Verizon PA to MilleniaNet, since they were provided pursuant to the FCC-approved tariff” and “both the Pennsylvania General Assembly and Congress have indicated that the [Commission’s] authority does not . . . extend to internet services.” *See also A. Moses, Inc. v. Verizon Pennsylvania Inc.*, Docket No. C-2010-2205259 (Opinion and Order entered November 4, 2011) (“We also agree that the allegations regarding the extended service outage of the Complainant's retail Internet service should be dismissed for lack of subject matter jurisdiction. In general, this Commission does not have jurisdiction over the provision of retail Internet services.”)

9. In addition, the Commission does not have the authority or jurisdiction to order utilities to pay monetary damages. *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (Pa. 1977); *Suburban East Tires, Inc. v. Pa. PUC*, 582 A.2d 727 (Pa. Cmwlth. 1990). *See also, DeFrancesco v. Western Pennsylvania Water Company*, 453 A.2d 595 (Pa. 1982) and *Elkin v. Bell of Pa.*, 420 A.2d 371 (Pa. 1980).

10. In *Feingold*, the Pennsylvania Supreme Court explained:

. . . the statutory array of PUC remedial and enforcement powers does not include the power to award damages to a private litigant for breach of contract by a public utility. Nor can we find an express grant of power from which the power to award such damages can be fairly implied. Thus, it can be concluded that the Legislature did not intend for the PUC to have such a power.

Feingold, 383 A.2d at 794.

11. The Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest.¹⁴ As the Commission lacks

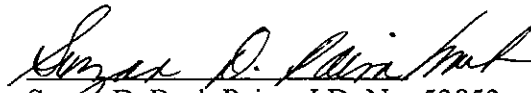
¹⁴ 66 Pa. C.S. § 703(b)

subject matter jurisdiction over both of these matters, and therefore has no authority to require any action to be taken by Verizon PA, holding a hearing on these issues would be a fruitless exercise and a waste of resources.

12. Accordingly, because the instant complaint partially involves a dispute over DSL services and a demand for monetary compensation, the Commission should dismiss those portions of the Complaint as it has no subject matter jurisdiction over these issues.

WHEREFORE, for the reasons set forth above, and in accordance with the Public Utility Code and the Commission's regulations, Verizon PA respectfully requests that the DSL claim and demand for monetary compensation in Formal Complaint Docket No. C-2010-2172222 be dismissed or denied in their entirety.

Date: January 17, 2012



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Counsel for Respondent

Verizon Pennsylvania Inc.

MilleniaNet's customers. Verizon PA provided the internet services to MilleniaNet pursuant to their PUC-approved June 18, 2002 resale agreement (Agreement) and Verizon PA's FCC-approved Tariff No. 20 (tariff). MilleniaNet is a competitive local exchange carrier (CLEC) i.e., a local phone company certified by the PUC to resell Verizon PA's telecommunications services within Pennsylvania at a discount, and Verizon PA is an incumbent local exchange carrier (ILEC).

In 2005, MilleniaNet filed a complaint with the PUC against Verizon PA, alleging that Verizon PA failed to provide adequate service, engaged in unreasonable billing practices, and issued excessive and unjustified bills. Verizon PA admitted that it failed to bill MilleniaNet for certain services for approximately 12 months, but otherwise denied MilleniaNet's allegations, and argued that the complaint should be dismissed because the issues related to services and facilities covered by its FCC tariff are not subject to the PUC's jurisdiction.

A hearing was held on May 31, 2006 before an Administrative Law Judge (ALJ). On May 21, 2007, the ALJ issued an initial decision sustaining allegations in MilleniaNet's complaint related to whether Verizon PA's services were adequate. The ALJ's initial decision denied certain other allegations of MilleniaNet, and imposed penalties upon Verizon PA. Verizon PA filed exceptions. By an opinion and order entered May 2, 2008, the PUC granted some of Verizon PA's exceptions, and modified the ALJ's initial decision, stating in pertinent part, that the PUC has no jurisdiction over disputes concerning billing and adequacy of interstate services provided by Verizon PA to MilleniaNet, since they were provided pursuant to the FCC-approved tariff. MilleniaNet appealed the PUC's order to this Court.¹

¹ This Court's review of a PUC order is limited to determining whether constitutional rights have been violated, factual findings are supported by substantial evidence, or an error of law has been committed. *Lloyd v. Pennsylvania Pub. Util. Comm'n*, 904 A.2d 1010 (Pa. Cmwlth. 2006).

MilleniaNet argues that Verizon PA's relations with local CLEC internet service providers like MilleniaNet, are subject to regulation and enforcement by the PUC, regardless of whether the amounts charged for those services are regulated by the FCC. Thus, the PUC erred by concluding that it did not have jurisdiction to resolve issues related to the quality of services purchased from an FCC-governed tariff. We disagree.

Specifically, MilleniaNet argues that the subject tariff controls only rates, not services. We note that Section 102 of the Public Utility Code (Code), 66 Pa.C.S. § 102, defines "tariff" as "[a]ll schedules of rates, all rules, regulations, practices, or contracts involving any rate or rates, including contracts for interchange of service" Pursuant to Section 203(a) of the Telecommunications Act of 1996 (Act), Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. § 203(a), connecting carriers for interstate and foreign wire or radio communication must file their tariffs with the FCC. "Public utility tariffs have the force and effect of law. . . ." *PECO Energy Co. v. Twp. of Upper Dublin*, 922 A.2d 996, 1004 (Pa. Cmwlth. 2007). Verizon PA's FCC-approved Tariff No. 20 was not part of the record produced on appeal, so we are unable to determine whether it addresses anything more than rates.

MilleniaNet also argues that the PUC has the authority and responsibility to regulate internet services between two Pennsylvania-based service companies providing services to Pennsylvania residents, and that such authority was not in this instance expressly preempted by Congress.

It is clear that the PUC has the authority and responsibility to regulate utility services under its jurisdiction within the Commonwealth of Pennsylvania. Section 1501 of the Code, 66 Pa.C.S. § 1501, requires that "[e]very public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities. . . ." This Court has stated that the Code is the supreme law of the

Commonwealth for the regulation and supervision of public utilities, and that the PUC is fully authorized to enforce its provisions. *PECO Energy Co. v. Twp. of Upper Dublin*, 922 A.2d 996 (Pa. Cmwlth. 2007). The PUC, therefore, has “exclusive jurisdiction over the reasonableness, adequacy and sufficiency of public utility services.” *Bell Tel. Co. of Pennsylvania v. Uni Lite, Inc.*, 439 A.2d 763, 765 (Pa. Super. 1982). Moreover, the PUC is authorized to regulate local exchange telecommunications services. See Chap. 30 of the Code, 66 Pa.C.S. §§ 3011-3019.

Both the Pennsylvania General Assembly and Congress have indicated that the PUC’s authority does not, however, extend to internet services. Specifically, the Pennsylvania General Assembly set forth in Section 104 of the Code, 66 Pa.C.S. § 104, that the Code’s provisions “shall not apply, or be construed to apply, to commerce . . . among the several states, except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress.” Further, Congress set forth in Section 151 of the Act, 47 U.S.C. § 151, that the FCC was created “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio. . . .” Although Section 152(b) of the Act, 47 U.S.C. § 152(b), specifically excludes from the FCC’s jurisdiction issues related to intrastate communication service by wire or radio; the FCC treats ISP calls as interstate for its jurisdictional purposes. *In the matter of Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, November 5, 2008 Order on Remand and Report and Order and Further Notice of Proposed Rulemaking at 11 n.69.² It is clear, therefore, that the PUC does not have jurisdiction over interstate telecommunications services.

Neither the ALJ nor MilleniaNet cite specific authority in support of their conclusion that the PUC still has jurisdiction over the adequacy or

² Public document published on the FCC’s website.

reasonableness of Verizon PA services and billing practices, despite the fact that the interstate services were provided under an FCC-approved tariff. The Act appears to intend otherwise.

Section 201 of the Act, 47 U.S.C. § 201, provides that

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, . . . to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, **practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable**, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful

(Emphasis added). Section 251(b) of the Act, 47 U.S.C. § 251(b), further provides that local exchange carriers have a duty “not to prohibit, and **not to impose unreasonable or discriminatory conditions or limitations** on, the resale of its telecommunications services.” (Emphasis added).

The June 18, 2002 Agreement between the parties specifically states that the parties are legally bound pursuant to Section 252 of the Act (relating to negotiation and approval of interconnection and service agreements). Reproduced Record (R.R.) at 284a. Paragraph 31.1 of the Agreement specifically requires that Verizon “shall provide Services under this Agreement in accordance with the performance standards required by Applicable Law, including, but not limited to, Section 251(c) of the Act.” R.R. at 300a. Section 251(c) of the Act, 47 U.S.C. § 251(c), states that ILECs have the duty to negotiate agreements in good faith, and

to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . that is **at least equal in quality** to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; **and . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory**

(Emphasis added). Moreover, “[a]n administrative agency’s interpretation of a statute for which it has enforcement responsibility is entitled to great deference and will not be reversed unless clearly erroneous. Judicial deference is even more necessary when the statutory scheme is complex.” *Armstrong Commc’ns, Inc. v. Pennsylvania Pub. Util. Comm’n*, 768 A.2d 1230, 1233 (Pa. Cmwlth. 2001) (citation omitted).

Since the PUC’s opinion is entitled to great deference, and the FCC has jurisdiction over not only the rates, but the quality and reasonableness of the services and billing supplied to MilleniaNet by Verizon PA due to Verizon PA’s FCC-approved tariff, the PUC correctly determined that the PUC does not have jurisdiction to resolve this matter. The PUC’s May 2, 2008 order as it relates to this issue is, therefore, affirmed.

JOHNNY J. BUTLER, Judge

CERTIFICATE OF SERVICE

I, Suzan D. Paiva, hereby certify that I have this day served a copy of the Preliminary Objections of Verizon Pennsylvania Inc., upon the participants listed below.

Dated at Philadelphia, Pennsylvania, this 17th day of January, 2012.

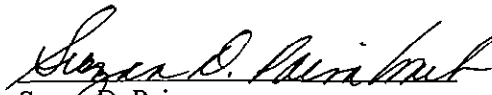
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