

Suzan DeBusk Paiva  
Assistant General Counsel



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

January 17, 2012

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

**RECEIVED**

JAN 17 2012

**PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU**

Re: Georgianna Abrashoff v. Verizon Pennsylvania Inc.;  
Docket No. C-2011-2247860; **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 black ink 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

RECEIVED

JAN 17 2012

Georgianna Abrashoff,

Complainant

v.

Verizon Pennsylvania Inc.,

Respondent

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Docket No. C-2011-2247860

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NOTICE TO PLEAD

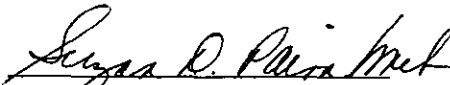
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TO: Georgianna Abrashoff  
15480 Groghan Pike  
Shirleysburg, PA 17066

James McClure, Esq.  
113 Fourth Street  
Huntingdon, PA 16652

You are hereby notified that Verizon Pennsylvania Inc. ("Verizon PA") has filed, pursuant to 52 Pa. Code §§5.101 *et seq.*, Preliminary Objections to the Formal Complaint in the above-captioned proceeding. You may submit a response to the Preliminary Objections within ten (10) days pursuant to 52 Pa. Code § 5.101(f). If no response is submitted, the presiding officer may rule on the Preliminary Objections without a response from you, thereby requiring no other proof. All Pleadings, such as a response to the Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on the undersigned counsel for Verizon PA.

Dated: January 17, 2012

  
Suzan DeBusk Paiva, I.D. No. 53853  
Verizon  
1717 Arch Street, 3<sup>rd</sup> Floor  
Philadelphia, PA 19103  
Phone: (215) 466-4755  
Fax: (215) 563-2658

*Counsel for Respondent  
Verizon Pennsylvania Inc.*

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RECEIVED

JAN 17 2012

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Georgianna Abrashoff,

Complainant

v.

Verizon Pennsylvania Inc.,

Respondent

Docket No. C-2011-2247860

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**PRELIMINARY OBJECTIONS OF  
VERIZON PENNSYLVANIA INC.**

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

**A. Background**

1. On or about June 27, 2011, the Complainant filed the above-captioned Formal Complaint against Verizon PA with the Pennsylvania Public Utility Commission ("Commission"). Upon information and belief, however, Complainant is a customer of Line Systems Inc., a competitive local exchange carrier ("CLEC"), not a customer of Verizon PA.

2. Verizon PA has filed an Answer and New Matter in this proceeding. The Answer and New Matter are incorporated herein by reference. Verizon PA is filing the instant Preliminary Objections in conjunction with its Answer and New Matter. The

Preliminary Objections are being raised on the ground that the Complainant lacks standing to bring a complaint against Verizon PA because she is not a Verizon PA customer.

**B. Preliminary Objections**

3. The Commission's regulations permit the filing of Preliminary Objections seeking dismissal of a complaint on the ground of the Complainant's lack of standing to bring this Complaint against Verizon PA. 52 Pa. Code §5.101(a)(1) and (5). For purposes of disposition of such a motion, all well-pleaded material facts of the non-moving party must be accepted as true. *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (Pa. 1977). The Motion will be granted only if the moving party prevails as a matter of law.

**Lack of Standing to File a Complaint**

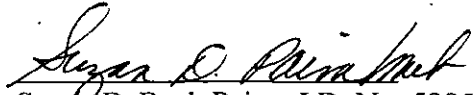
4. Complainant is a customer of Line Systems Inc. not Verizon PA and therefore Complainant has no standing to file a complaint against Verizon PA. The Commission has repeatedly held that a Complainant must be the Respondent's customer to have standing to file a complaint, *see Re: Pennsylvania American Water Company*, 85 Pa. P.U.C. 548 (1995); *Pa. P.U.C. et al v. Marietta Gravity Water Company*, 87 Pa. P.U.C. 864 (1997), and has previously dismissed complaints against Verizon PA brought by complainants who were customers of CLECs rather than customers of Verizon PA. *See Paul Rabinowitz Glass Co., Inc. v. Verizon Pennsylvania Inc.*, Final Order, Docket No. C-2009-2094531 (November 20, 2009) (adopting Initial Decision of CALJ Smith issued August 20, 2009). Further, in the recent Initial Decision of *In Home Oxygen and Medical Equipment v. Verizon Pennsylvania Inc.* Docket # C-2011-2267086, ALJ Melillo cites to *Wroblewski v. Pennsylvania Electric Company* Docket No. C-2008-2058385, Order entered May 15, 2009, confirming that lack of standing could be raised

in preliminary objections and support dismissal of a complaint. True and correct copies of ALJ Smith's Initial Decision and the Commission's November 20, 2009 Order, and ALJ Melillo's Initial Decision are attached hereto as Exhibits A, B and C, respectively. Accordingly, the Complaint should be dismissed because the Complainant has no standing to file a complaint against Verizon PA.

WHEREFORE, for the reasons set forth above, Verizon PA respectfully requests that the Formal Complaint of Georgianna Abrashoff against Verizon PA be denied or dismissed in its entirety.

Dated: January 17, 2012

Respectfully submitted,



Suzan DeBusk Paiva, I.D. No. 53853

Verizon

1717 Arch Street, 3<sup>rd</sup> Floor

Philadelphia, PA 19103

Phone: (215) 466-4755

Fax: (215) 563-2658

*Counsel for Respondent*

*Verizon Pennsylvania Inc.*



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

Exhibit A

IN REPLY PLEASE  
REFER TO OUR FILE

ISSUED: August 31, 2009

C-2009-2094531

LEIGH A HYER ESQUIRE  
VERIZON PENNSYLVANIA INC  
1717 ARCH STREET  
17<sup>TH</sup> FLOOR  
PHILADELPHIA PA 19103

RECEIVED SEP - 2 2009

Paul Rabinowitz Glass Company, Inc.  
v.  
Verizon Pennsylvania Inc.

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Chief Administrative Law Judge Veronica A. Smith. This decision is being issued and mailed to all parties on the above specified date.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions MUST BE FILED WITH THE SECRETARY OF THE COMMISSION 2<sup>ND</sup> FLOOR, KEYSTONE BUILDING, 400 NORTH STREET, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265, within **twenty (20) days** of the issuance date of this letter. The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §1.11(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions. A certificate of service shall be attached to the filed exceptions.

If you receive exceptions from other parties, you may submit written replies to those exceptions in the manner described above within **ten (10) days** of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)".

If no exceptions are received within **twenty (20) days**, the decision of the Chief Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

Very truly yours,

James J. McNulty  
Secretary

RECEIVED

JAN 17 2012

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Encls.  
Certified Mail  
Receipt Requested

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Paul Rabinowitz Glass Company, Inc.

v.

Verizon Pennsylvania Inc.

:  
:  
:  
:  
:

C-2009-2094531

**INITIAL DECISION**

Before  
Veronica A. Smith  
Chief Administrative Law Judge

**HISTORY OF THE PROCEEDING**

On March 4, 2009, Paul Rabinowitz Glass Company, Inc. (Complainant) filed a Formal Complaint with the Pennsylvania Public Utility Commission (Commission) against Verizon Pennsylvania Inc. (Verizon PA, the Company or Respondent) alleging that on Monday, January 26, 2009, its telephone service had gone down and it took Verizon PA seven days to identify the problem and complete the repairs. As relief, Complainant requests that the Commission order Verizon PA to reimburse Complainant for its loss of business in the amount of \$15,000.

On April 1, 2009, Respondent filed an Answer and New Matter denying the material allegations of the Complaint. On the same day, Respondent filed Preliminary Objections seeking the dismissal of the Complaint because Complainant lacked standing to file a complaint against Verizon PA, and because the Commission lacked "authority or jurisdiction" to grant the relief sought by the Complainant. Preliminary Objections ¶ 5.

According to Commission records, as of August 19, 2009, Complainant did not file a response to the New Matter<sup>1</sup> portion of Respondent's Answer or its Preliminary Objections.<sup>2</sup>

The matter was assigned to me by Motion Judge Assignment Notice dated June 11, 2009. The Respondent's Preliminary Objections are ready for ruling.

#### FINDINGS OF FACT

1. Complainant is Paul Rabinowitz Glass Company, Inc., which mailing address is 1401 N. American Street, Philadelphia, PA 19122.
2. Respondent is Verizon Pennsylvania Inc.
3. Complainant is not a customer of Verizon PA, instead it receives internet, and local and long distance telephone services from XO Communications (XO). Complaint Attachment and New Matter ¶ 1.
4. On March 4, 2009, Complainant filed a Formal Complaint against Verizon PA alleging that on Monday, January 26, 2009, its telephone service had gone down, and that it took Verizon PA seven days to identify the problem and complete the repair of its facilities. Complaint Attachment.
5. As relief, Complainant requests that the Commission order Verizon PA to reimburse Complainant for its loss of time and business in the amount of \$15,000. Id.
6. On April 1, 2009, Respondent filed an Answer and New Matter denying the material allegations of the Complaint.

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<sup>1</sup> Pursuant to 52 Pa. Code § 5.63(a) Complainant's response to New Matter was due on or before April 21, 2009.

<sup>2</sup> Pursuant to 52 Pa. Code § 5.101(f) a reply to Preliminary Objections was due on or before April 13, 2009.

7. On April 1, 2009, Respondent filed Preliminary Objections seeking the dismissal of the Complaint because Complainant lacked standing to file a complaint against Verizon PA, and because the Commission lacked “authority or jurisdiction” to grant the relief sought by the Complainant. Preliminary Objections ¶ 5.

8. Complainant did not file a response to the New Matter portion of Respondent’s Answer or its Preliminary Objections.

### DISCUSSION

The Commission’s Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code § 5.101. See Equitable Small Transportation Interveners v. Equitable Gas Company, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994). Commission procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. Equitable Small Transportation Interveners v. Equitable Gas Company, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. 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). The Commission has adopted this standard. Montague v. Philadelphia Electric Company, 66 Pa. PUC 24 (1988).

The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection, all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts. County of Allegheny v. Commw. of Pa., 490 A.2d 402 (Pa. 1985). Therefore, in ruling on a preliminary objection, the Commission must assume, for decisional purposes only, that the factual allegations of the Complaint are true. Id. The preliminary objection may be granted only if the moving party prevails as a matter of law. Roc v. Flaherty, 527 A.2d 211 (Pa.Cmwlth. 1985). Any doubt must

be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. Dept. of Auditor General, et al. v. State Employees' Retirement System, et al., 836 A.2d 1053, 1064 (Pa.Cmwlth. 2003) citing, Boyd v. Ward, 802 A.2d 705 (Pa.Cmwlth. 2002).

Complainant avers, and Respondent admits, that Complainant is not a customer of Verizon PA, but that it receives telephone service from XO Communications, a competitive local exchange carrier that uses Respondent's lines to provide service to its customers. Complaint Attachment and New Matter ¶ 1. Complainant alleges that, when its telephone service went down on Monday, January 26, 2009, it immediately informed XO Communications of the problem. Complaint Attachment. XO created a service ticket for the incident and shortly thereafter Complainant was informed that Verizon PA had created a service ticket as well. Id. Complainant alleges that it took Verizon PA seven days to identify the problem and complete the repair of its facilities. Id. As relief, Complainant requests that the Commission order Verizon PA to reimburse Complainant for its loss of time and business in the amount of \$15,000. Id.

In its Preliminary Objections, Verizon PA seeks to dismiss the Complaint because Complainant is not a customer of Respondent and, therefore, lacks standing to file a complaint against it. Respondent argues that the Commission has previously dismissed a complaint by this same Complainant, Paul Rabinowitz Glass Company, Inc., against Verizon PA on the same ground in Paul Rabinowitz Glass Company, Inc. v. Verizon Pennsylvania Inc., Docket No. C-20043541, (Final Order entered December 29, 2004). The Commission adopted the Initial Decision of Administrative Law Judge (ALJ) Herbert Smolen, who ruled that "Inasmuch as Complainant is not a customer of Verizon, Complainant does not have standing to file a Complaint against Verizon for service problems when it receives telephone service from another company." Answer Exhibit A.

I agree with ALJ Smolen and Respondent's argument. There is no doubt that Complainant is not a customer of Verizon PA, and the Commission has repeatedly held that a complainant must be the respondent's customer to have standing to file a complaint. See Re: Pennsylvania American Water Company, 85 Pa. P.U.C. 548 (1995); Pa. P.U.C. et al v. Marietta

Gravity Water Company, 87 Pa. P.U.C. 864 (1997). Accordingly the Preliminary Objections will be granted and the Complaint will be dismissed without a hearing.

Respondent also seeks to dismiss the Complaint because the Commission lacks the authority to grant the relief that the Complaint is requesting in its Complaint, i.e. that the Commission order Verizon PA to reimburse Complainant for its loss of time and business in the amount of \$15,000. While this ground for dismissal should have been appropriately raised in a Motion for Judgment on the Pleadings, I agree with Respondent that Commission lacks the authority to order utilities to pay monetary damages.<sup>3</sup> See, DeFrancesco v. Western Pennsylvania Water Company, 453 A.2d 595 (Pa. 1982); Elkin v. Bell of Pa., 420 A.2d 371 (Pa. 1980); Feingold v. Bell of Pa., 383 A.2d 791 (Pa. 1977); Poorbaugh v. Pa. PUC, 666 A.2d 744 (Pa. Cmwlth. 1995).

For the reasons stated above, Respondent's Preliminary Objections will be granted and the Complaint will be dismissed without a hearing.

Section 703 of the Public Utility Code, 66 Pa. C.S. § 703(b), provides that the Commission may dismiss any complaint *without a hearing if, in its opinion, a hearing, is not necessary or in the public interest*. See also 52 Pa. Code § 5.21(d). The public interest does not require a hearing in this case. A hearing in this case would be a fruitless exercise and therefore is not necessary or in the public interest.

#### CONCLUSIONS OF LAW

1. Commission regulations provide for the filing of preliminary objections.  
52 Pa. Code § 5.101.

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<sup>3</sup> Respondent is confusing authority with jurisdiction. While the Commission has jurisdiction to adjudicate claims of unsafe or inadequate service, it lacks authority to award monetary damages. Furthermore, while lack of jurisdiction is one of the six grounds for preliminary objections, lack of authority is not. See 52 Pa. Code § 5.101(a). The lack of Commission authority to award monetary damages should have been appropriately raised as ground for dismissal in a Motion for Judgment on the Pleadings, pursuant to 52 Pa. Code § 5.102.

2. A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. Interstate Traveler Services, Inc. v. Pa. Dept. of Environmental Resources, 406 A.2d 1020 (Pa. 1979).

3. The preliminary objection may be granted only if the moving party prevails as a matter of law. Roc v. Flaherty, 527 A.2d 211 (Pa.Cmwlth. 1985).

4. Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. Dept. of Auditor General, et al. v. State Employees' Retirement System, et al., 836 A.2d 1053, 1064 (Pa.Cmwlth. 2003) citing, Boyd v. Ward, 802 A.2d 705 (Pa.Cmwlth. 2002).

5. Nothing in the Code confers jurisdiction upon the Commission to award monetary damages. See, DeFrancesco v. Western Pennsylvania Water Company, 453 A.2d 595 (Pa. 1982).

6. Section 703 of the Public Utility Code, 66 Pa. C.S. § 703(b), provides that the Commission may dismiss any complaint without a hearing if, in its opinion, a hearing, is not necessary in the public interest.

#### ORDER

THEREFORE,

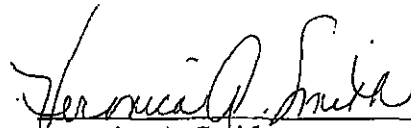
IT IS ORDERED:

1. That the Preliminary Objections, filed by Verizon Pennsylvania Inc. seeking dismissal of Complaint filed by Paul Rabinowitz Glass Company, Inc., Docket No. C-2009-2094531, is granted.

2. That the Complaint filed by Paul Rabinowitz Glass Company, Inc. Glass Company, Inc. against Verizon Pennsylvania Inc. at Docket C-2009-2064531 is hereby dismissed.

3. That this matter be marked closed.

Dated: August 20, 2009

  
\_\_\_\_\_  
Veronica A. Smith  
Chief Administrative Law Judge

PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265

Public Meeting held November 19, 2009

Commissioners Present:

James H. Cawley, Chairman  
Tyrone J. Christy, Vice Chairman  
Kim Pizzingrilli  
Wayne E. Gardner  
Robert F. Powelson

RECEIVED  
JAN 17 2012  
PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Paul Rabinowitz Glass Company, Inc. :

v. :

Verizon Pennsylvania Inc. :

C-2009-2094531

ORDER

BY THE COMMISSION:

We adopt as our action the Initial Decision of Chief Administrative Law Judge  
Veronica A. Smith dated August 20, 2009;

THEREFORE,

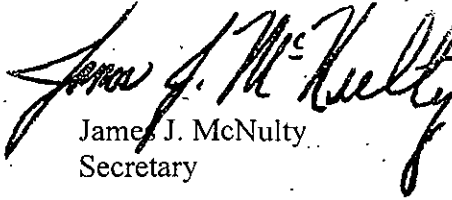
IT IS ORDERED:

1. That the Preliminary Objections, filed by Verizon Pennsylvania Inc.  
seeking dismissal of Complaint filed by Paul Rabinowitz Glass Company, Inc., Docket No.,  
C-2009-2094531 is granted.

2. That the Complaint filed by Paul Rabinowitz Glass Company, Inc. Glass  
Company, Inc. against Verizon Pennsylvania Inc. at Docket C-2009-2064531 is hereby  
dismissed.

3. That this matter be marked closed.

BY THE COMMISSION,



James J. McNulty  
Secretary

(SEAL)

ORDER ADOPTED: November 19, 2009

ORDER ENTERED: November 20, 2009

Exhibit C



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE  
REFER TO OUR FILE

December 22, 2011

C-2011-2267086

**TO ALL PARTIES:**

In Home Oxygen and Medical Equipment  
v.  
Verizon Pennsylvania, Inc.

DEC 23 2011

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of the Office of Administrative Law Judge.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. An original and nine (9) copies of your signed Exceptions to the decision, if any, **MUST BE FILED WITHIN TWENTY (20) DAYS OF THE ISSUANCE DATE OF THIS LETTER**, WITH THE SECRETARY OF THE COMMISSION, 2<sup>ND</sup> FLOOR, KEYSTONE BUILDING, 400 NORTH STREET, HARRISBURG, PA; OR, MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265; OR DOCUMENTS MAY BE E-FILED ACCORDING TO THE E- FILING PROCEDURES.

**IN ADDITION, BY THE SAME DATE AND TIME INDICATED ABOVE, A COPY OF EXCEPTIONS MUST BE IN THE HANDS OF THE OFFICE OF SPECIAL ASSISTANTS, 3<sup>RD</sup> FLOOR, KEYSTONE BUILDING, 400 NORTH STREET, HARRISBURG, PA; AND, A COPY IN THE HANDS OF EACH PARTY OF RECORD. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of Exceptions or Replies to Exceptions.**

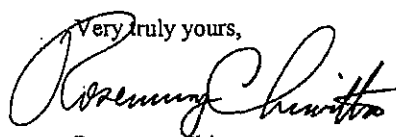
Parties are also requested to provide the Commission's Office of Special Assistants with a copy of the Exceptions or Replies to Exceptions on CD-ROM or DVD, in Microsoft Word 2007 format. If Word 2007 is not available, any Microsoft Office compatible format is acceptable including PDF.

Replies to Exceptions, if any, must be served on the Secretary of the Commission, Office of Special Assistants, and each party of record, in the manner described above, **WITHIN TEN (10) DAYS OF THE DATE THAT THE EXCEPTIONS ARE DUE.**

It is your responsibility to serve all the parties with your Exceptions and Replies to Exceptions. Failure to do so may render your filing unacceptable. A certificate of service shall be attached to the filed Exceptions or Replies to Exceptions.

Exceptions and Replies to Exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for Exceptions and the 25-page limit for Replies to Exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)". Any reference to specific sections of the Administrative Law Judge's Initial Decision shall include the page number(s) of the cited section of the decision.

If no Exceptions are received, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

Very truly yours,  
  
Rosemary Chiavetta  
Secretary

Encls.  
Certified Mail  
Receipt Requested

**RECEIVED**  
JAN 17 2012  
PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In Home Oxygen and Medical Equipment

v.

Verizon Pennsylvania, Inc.

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C-2011-2267086

**INITIAL DECISION**

Before  
Kandace F. Melillo  
Administrative Law Judge

**HISTORY OF THE PROCEEDINGS**

On September 29, 2011, In Home Oxygen and Medical Equipment (In Home or Complainant) filed a Formal Complaint with the Pennsylvania Public Utility Commission (Commission) at Docket No. C-2011-2267086 against Verizon Pennsylvania, Inc. (Verizon or Respondent). In its Complaint, In Home alleged that it was receiving inadequate service from CTSI, LLC d/b/a Frontier Communications (Frontier) using Verizon's equipment. The identical Complaint was also filed against Frontier at a separate docket number (Docket No. C-2011-2266439). As relief, Complainant requested that its service problems be permanently corrected.

On November 2, 2011, Verizon filed an Answer and New Matter, with a twenty (20) day Notice to Plead, denying that it was providing inadequate service to the Complainant and contending, in New Matter, that Complainant was not a telephone customer of Verizon. Verizon further asserted that, as Complainant was not a customer, the Complaint should be dismissed for lack of standing.

Also on November 2, 2011, Verizon filed Preliminary Objections, with a ten (10) day Notice to Plead, seeking dismissal of the Complaint apparently based upon lack of capacity to sue and lack of Commission jurisdiction. 52 Pa. Code §§5.101(a)(1) and (a)(5). However, Verizon did not specifically state how its dismissal request was related to these grounds and instead based its dismissal request on Complainant's lack of standing. Specifically, Verizon contended that Complainant was a customer of Frontier and not Verizon and therefore, Complainant had no standing to file a complaint against Verizon.

On November 14, 2011, In Home's general manager Marsha Noecker filed a timely letter response to New Matter.<sup>1</sup> In its response, In Home did not deny that it was a telephone customer of Frontier rather than Verizon. Instead, In Home requested that Verizon remain a party as Frontier apparently used Verizon's facilities in the provision of service and had blamed Verizon's facilities for the service issues.

To the best of my knowledge, In Home did not file an answer to Verizon's Preliminary Objections, and any timely response would have been due no later than November 17, 2011, based upon service of the Preliminary Objections by first class mail. 52 Pa. Code §§1.56(b) and 5.101(f)(1).

Verizon's Preliminary Objections were assigned to me by Motion Judge Assignment Notice dated November 18, 2011, and are now ready for a ruling. Since I am dismissing the Complaint due to Complainant's concession that it is not a Verizon customer, this ruling will be in the form of an Initial Decision, subject to exceptions. 52 Pa. Code §5.102(d)(3).

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<sup>1</sup> It is unclear whether Complainant is a business corporation. If so, Complainant must be represented by counsel to file a reply to New Matter on November 14, 2011, as this proceeding became adversarial on November 2, 2011 upon the filing of an answer by Verizon contesting the Complaint. 52 Pa. Code §§1.8, 1.21(b) and 1.22; Cars R Us c/o Holman Copeland v. Philadelphia Gas Works, Docket No. C-2008-2033437, Order entered February 4, 2010.

## FINDINGS OF FACT

1. Complainant, In Home Oxygen and Medical Equipment, 103 Lancaster Avenue, Reading, PA, 19611, is a telephone customer of CTSI, LLC d/b/a Frontier Communications and not Verizon. New Matter, ¶¶1, 2.

2. On September 29, 2011, Complainant filed a Formal Complaint at Docket No. C-2011-2267086 with the Commission against Verizon, alleging it was receiving inadequate service from Frontier. Complaint, ¶4. B.

3. On September 29, 2011, Complainant also filed an identical Formal Complaint against Frontier at Docket No. C-2011-2266439, alleging inadequate telephone service. Complaint, ¶4. B.

## DISCUSSION

The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code § 5.101. Commission procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. Equitable Small Transportation Interveners v. Equitable Gas Company, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

A preliminary objection seeking dismissal of a complaint, in whole or in part, will be granted only where relief is clearly warranted and free from doubt. Interstate Traveller Services, Inc. v. Pa. Dept. of Environmental Resources, 486 Pa. 536, 406 A.2d 1020 (1979). The moving party may not rely on its own factual assertions, but must accept for the purpose of disposition of the motion, all well-pleaded material facts of the other party, as well as every inference fairly deducible from those facts. County of Allegheny v. Commonwealth of Pa., 507 Pa. 360, 490 A.2d 402 (1985). Therefore, in ruling on a preliminary objection, the Commission must assume, for decisional purposes only, that the factual allegations of the

Complaint are true. Id. The motion will be granted only if the moving party prevails as a matter of law. Rok v. Flaherty, 106 Pa. Commw. 570, 527 A.2d 211 (1987). Any doubt must be resolved in favor of the non-moving party. Dept. of Auditor General, et al. v. State Employees' Retirement System, et al., 836 A.2d 1053 (Pa. Cmwlth. 2003).

The grounds for preliminary objections, which are set forth in 52 Pa. Code §5.101(a), are as follows:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.

Verizon claimed in its Preliminary Objections that its grounds for seeking preliminary dismissal were lack of jurisdiction and lack of capacity to sue. However, Verizon failed to support these claims and instead focused upon lack of standing as the basis for dismissal. It cited to Re: Pennsylvania American Water Company, 85 Pa. P.U.C. 548 (1995); and Pa. P.U.C. v. Marietta Gravity Water Company, 87 Pa. P.U.C. 864 (1997), in support of its contention that Complainant must be a customer to have standing to file a complaint against Verizon. In addition, Verizon asserted that the Commission has previously dismissed complaints against it which were brought by customers of CLECs, such as is the case herein. See, e.g., Paul Rabinowitz Glass Co., Inc. v. Verizon Pennsylvania Inc. (Rabinowitz), Docket No. C-2009-2094531, Final Order adopting Initial Decision of CALJ Smith entered November 20, 2009. Accordingly, Verizon requested that the Complaint of In Home against Verizon be denied or dismissed in its entirety for lack of standing.

In Wroblewski v. Pennsylvania Electric Company (Wroblewski), Docket No. C-2008-2058385, Order entered May 15, 2009, a case that was decided a few months prior to Rabinowitz, supra, the Commission specifically addressed whether lack of standing, which is not one of the grounds for preliminary objections, could nonetheless be appropriately raised in preliminary objections and support dismissal of a complaint. Therein, the Commission agreed with CALJ Smith's Initial Decision, which had concluded that lack of standing, an affirmative defense, was appropriately raised in a motion for judgment on the pleadings rather than preliminary objections, if standing had been raised in New Matter.

In accordance with Wroblewski, I will treat Verizon's preliminary objection on the basis of lack of standing as a motion for judgment on the pleadings. I note that Verizon appropriately included in New Matter certain factual assertions that Complainant was not a customer of Verizon and was a customer of Frontier. Complainant failed to deny these assertions in its reply to New Matter and therefore, in accordance with 52 Pa. Code §5.63(b), these relevant facts may be deemed to be admitted.

The standard for granting a motion for judgment on the pleadings is set forth in 52 Pa. Code §5.102(d)(1). As stated therein, judgment sought will be rendered if the applicable pleadings show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.

In order to bring a complaint before a tribunal, a complainant must first demonstrate that he has standing to maintain the action. Nye v. Erie Insurance Exchange, 470 A.2d 98, 100 (Pa. 1983) (citations omitted). Standing requires that a party have an interest in the matter that is substantial, direct and immediate. William Penn Parking Garage, Inc. et al. v. City of Pittsburgh, 346 A.2d 269 (Pa. 1975). These criteria are defined as follows:

A 'substantial' interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. A 'direct' interest requires a showing that the matter complained of caused harm to the party's interest. An

'immediate' interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or the constitutional guarantee in question.

George v. Pennsylvania PUC, 735 A.2d 1282, 1286 (Pa. Cmwith. 1999). See also, South Whitehall Township Police Service v. South Whitehall Township, 555 A.2d 793, 795 (Pa. 1989) (citations omitted); Bergdoll, et al. v. Kane, et al., 731 A.2d 1261, 1268 (Pa. 1999). The standard set by William Penn Parking Garage is applicable to the Commission cases. See, Courier Express, Inc. v. F.L. Shaffer Company, Inc., Order entered August 30, 1990 at Docket No. C-892462, petition for reconsideration denied December 3, 1990.

In the instant case, there is no genuine issue as to a material fact that Complainant is not a customer of Verizon. The Commission has repeatedly held that a complainant must be respondent's customer to have standing to file a complaint about its utility service. See, Re: Pennsylvania American Water Company; Pa. P.U.C. v. Marietta Gravity Water Company; and Paul Rabinowitz Glass Co., Inc. v. Verizon Pennsylvania Inc., *supra*. In other words, a complainant which is not a customer of a utility does not have the requisite substantial, direct, and immediate interest necessary to confer standing to bring the complaint about the service of that utility. Accordingly, Verizon's Preliminary Objection on the basis of lack of standing, which is being treated as a motion for judgment on the pleadings, will be granted and the Complaint will be dismissed.

The Commission has generally expressed a preference that administrative law judges refrain from dismissing complaints against unrepresented complainants without first giving them the opportunity to be heard orally and develop a sufficient record. See, Richard Carlock v. The United Telephone Company of Pa. (Carlock), Docket No. F-00163617, Order entered July 14, 1993. However, as noted by the Commission in Wroblewski, supra, Carlock did not absolutely preclude a disposition on the pleadings. Also, the instant case is distinguishable from Carlock as Complainant herein has filed an identical complaint against Frontier at Docket No. C-2011-2266439 and therefore, Complainant will have an opportunity to be heard and

develop a record in that docket against the utility which is actually providing its telephone service.

As stated previously, Verizon also mentioned lack of capacity to sue and lack of jurisdiction as grounds for its Preliminary Objections, although it failed to support these assertions. Verizon may be implying that lack of standing is synonymous with lack of capacity to sue and lack of jurisdiction. However, this is incorrect.

The preliminary objection "lack of capacity to sue" does not mean a lack of standing; instead, it refers to some personal disability of a party to bring an action. Commonwealth ex rel. Sheppard v. Central Penn National Bank, 375 A.2d 874 (Pa. Cmwlth. 1977). Examples of lack of capacity to sue include being an unemancipated minor, an adjudicated incompetent, and those subject to a statutory bar. Because there is no indication that Complainant falls under any of these categories, and Verizon has not provided any support for its claim that Complainant lacks capacity to sue, I will deny this portion of the Preliminary Objections.

The claim of lack of jurisdiction is equally invalid. The Commission clearly has jurisdiction over the reasonableness, adequacy and sufficiency of a public utility's service and facilities and has jurisdiction over service provided to Complainant by Frontier, a CLEC. 66 Pa. C.S. §3019(b)(2); Elkin v. Bell of PA, 420 A.2d 371 (Pa. 1980). Accordingly, I will also deny this portion of the Preliminary Objections.

Where there are no disputed questions of fact and the issue to be decided is purely one of law or policy, a case may be disposed of without resort to an evidentiary hearing. Dee-Dee Cab, Inc. v. Pa. P.U.C., 817 A.2d 593 (Pa. Cmwlth. 2003); Diamond Energy, Inc. v. Pa. P.U.C., 653 A.2d 1360 (Pa. Cmwlth. 1995); Lehigh Valley Power Committee v. Pa. P.U.C., 128 Pa. Commw. 276, 563 A.2d 557 (1989). Also, Section 703(b) of the Public Utility Code, 66 Pa. C.S. §703(b), provides that the Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. See also, 52 Pa. Code §5.21(d). A hearing in this case would be a fruitless exercise and therefore is not necessary in the public

interest.

### CONCLUSIONS OF LAW

1. Commission regulations provide for the filing of preliminary objections based upon lack of jurisdiction and lack of capacity to sue, but not lack of standing. 52 Pa. Code § 5.101(a); Wroblewski v. Pennsylvania Electric Company, Docket No. C-2008-2058385, Order entered May 15, 2009.

2. A preliminary objection on the grounds of lack of standing is appropriately treated as a motion for judgment on the pleadings, if the issue of lack of standing has been raised in New Matter. Wroblewski v. Pennsylvania Electric Company, Docket No. C-2008-2058385, Order entered May 15, 2009.

3. Judgment on the pleadings will be rendered if the applicable pleadings show that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa. Code §5.102(d)(1).

4. In order to bring a complaint before a tribunal, a complainant must first demonstrate that he has standing to maintain the action. Nye v. Erie Insurance Exchange, 470 A.2d 98, 100 (Pa. 1983) (citations omitted). Standing requires that a party have an interest in the matter that is substantial, direct and immediate. William Penn Parking Garage, Inc. et al. v. City of Pittsburgh, 346 A.2d 269 (Pa. 1975).

5. A complainant must be a customer in order to have standing to file a complaint about a utility's service. Re: Pennsylvania American Water Company, 85 Pa. P.U.C. 548 (1995); Pa. P.U.C. v. Marietta Gravity Water Company, 87 Pa. P.U.C. 864 (1997); Paul Rabinowitz Glass Co., Inc. v. Verizon Pennsylvania Inc., Docket No. C-2009-2094531, Final Order adopting Initial Decision of CALJ Smith entered November 20, 2009.

6. Complainant failed to deny assertions in New Matter that it was not a customer of Verizon and was a customer of Frontier; therefore, these relevant facts may be deemed to be admitted. 52 Pa. Code §5.63(b).

7. There is no genuine issue as to a material fact that Complainant is not a customer of Verizon, and Verizon is entitled to judgment as a matter of law. 52 Pa. Code §5.102(d)(1).

8. The instant case is distinguishable from Carlock v. The United Telephone Company of Pa., Docket No. F-00163617, Order entered July 14, 1993, in that Complainant will have an opportunity to be heard and develop a record at another docket against the utility (Frontier) that is actually providing the service.

9. A "lack of capacity to sue" does not mean a lack of standing; instead, it refers to some personal disability of a party to bring an action. Commonwealth ex rel: Sheppard v. Central Penn National Bank, 375 A.2d 874 (Pa. Cmwlth. 1977).

10. Verizon has not provided any support for its claim that Complainant lacks capacity to sue.

11. The Commission has jurisdiction over the parties and subject matter of this proceeding. 66 Pa. C.S. §3019(b)(2); Elkin v. Bell of PA, 420 A.2d 371 (Pa. 1980).

12. The Commission may dismiss a complaint without a hearing if a hearing is not necessary or in the public interest. 66 Pa. C.S. § 703(b); 52 Pa. Code § 5.21(d).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections of Verizon Pennsylvania, Inc., seeking to dismiss the Formal Complaint filed by In Home Oxygen and Medical Equipment at Docket No. C-2011-2267086 on the grounds of lack of capacity to sue and lack of jurisdiction, are denied.

2. That the Preliminary Objection of Verizon Pennsylvania, Inc., seeking to dismiss the Formal Complaint filed by In Home Oxygen and Medical Equipment at Docket No. C-2011-2267086 on the grounds of lack of standing, appropriately treated as a Motion for Judgment on the Pleadings, is granted.

3. That the Formal Complaint filed by In Home Oxygen and Medical Equipment against Verizon Pennsylvania, Inc. at Docket No. C-2011-2267086, is dismissed for lack of standing.

4. That the record at Docket No. C-2011-2267086 is marked closed.

Dated: December 15, 2011

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Kandace F. Melillo  
Administrative Law 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 17<sup>th</sup> day of January, 2012.

**VIA USPS FIRST CLASS MAIL**

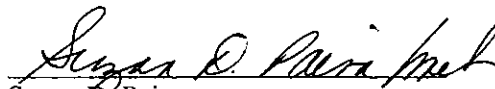
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**RECEIVED**

JAN 17 2012

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU



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