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May 9, 2012

VIA HAND DELIVERY

Rosemary Chiavetta, Secretary
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400 North Street – Filing Room
Harrisburg, PA 17120

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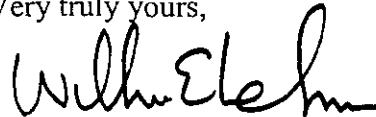
RE: Larry L. Wolfe v. Verizon North LLC; Docket No. C-2011-2266224
EXCEPTIONS TO INITIAL DECISION

Dear Secretary Chiavetta:

Enclosed for filing with the Commission are the original and nine (9) copies of the Exceptions of Verizon North LLC to the April 16, 2012 Initial Decision of Administrative Law Judge Joel H. Cheskis in the above-captioned proceeding. As indicated on the attached Certificate of Service, a copy of these Exceptions has been served on the Complainant.

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,



William E. Lehman
Counsel for Verizon North LLC

WEL/bes

Enclosures

cc: Honorable Joel H. Cheskis (via hand delivery)
Office of Special Assistants (via hand delivery)

MAILING ADDRESS: P.O. BOX 1778 HARRISBURG, PA 17105

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

LARRY L. WOLFE,

Complainant

v.

VERIZON NORTH LLC,

Respondent

Docket No. C-2011-2266224

**EXCEPTIONS OF
VERIZON NORTH LLC**

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Dated: May 9, 2012

INTRODUCTION

The Initial Decision (“I.D.”) imposes an excessive fine on Verizon North LLC (“Verizon North”) for which there is no justification under the facts or the law. The ALJ imposed duplicative fines adding up to \$3,000 for violations of multiple regulations and statutes for two limited service outages caused by events outside Verizon North’s control that Verizon North made significant efforts to correct.

By filing these Exceptions, Verizon North in no way wishes to diminish how seriously it has taken Complainant’s reports about service interruptions; however, the record shows that the interruptions complained of were caused by power surges or equipment failures outside Verizon North’s control, and Verizon North responded in a way that was reasonable under the circumstances which, for one outage, was impacted by Hurricane Lee. For the other outage, the ALJ concluded Verizon North was 1/2 hour late in responding, and in imposing a severe fine ignored the complex nature of the problem which took time to diagnose and address.

The record could not be clearer that Verizon North made significant and successful efforts to address these incidents. Given the totality of the circumstances described in its Exceptions, the ALJ’s imposition of cumulative fines, which amounts to the maximum fine of \$1,000 per day, per violation, is clearly excessive, is not supported by the facts or the law, and is not a reasonable exercise of discretion under the circumstances. The ALJ’s conclusion squarely conflicts with the rationale and reasoned policy underlying Verizon North’s tariff¹ and the Commission’s regulations² which recognize and provide for billing remedies for such outages. The ALJ’s conclusion also does not properly follow or apply reasonable discretion under the Commission’s guidelines for imposing penalties.

¹ Verizon North Tariff, Section 1, Sixth Revised Sheet 9.

² 52 Pa. Code §63.24.

As explained by Verizon North's witness, Ron Kielar, a network operations manager, the Complainant is served by fiber running from the central office to the Fruitland multiplexer ("MUX") where it is converted to analog and fed onto copper facilities to the customer. (Transcript ("Tr.") at 28). The Complainant in this case, Mr. Wolfe, experienced four telephone service outages, each of which resulted from unusual events causing outages with the equipment at that MUX. There was no problem with Verizon North's cable or facilities at his house.

Three of the outages were caused by power surges "back-feeding from the copper facilities into the Fruitland MUX" and getting into Verizon North's equipment and blowing out the light span cards. (Tr. at 32).³ Although the cards were replaced and service was restored immediately, it took longer to conduct tests and to diagnose the underlying cause and how to prevent it: "[S]ometimes it just takes time to figure out what's going on and come up with a resolution" (Tr. at 33). Verizon North did not just reflexively fix the blown out cards without thinking about the larger cause of the problem. Verizon North manager, Ron Kielar testified that the blown cards were an "unusual" type of problem" and that "it's just hard to nail down what is going on." (Tr. at 48). Knowing that it was a power issue, Mr. Kielar "had the cable department also go out and just look at all of the facilities from the remote MUX all the way to [Mr. Wolfe's] house, and look at them for any type of grounding or bonding issues." (Tr. at 49). He also "had the supervisor for construction get in touch with Met-Ed, which is the power company down in that area" to find out "why are we having all these power outages" in the area and "asked them to look into their facilities and see if they can find any issues with power grounding

³ On Tuesday June 1, 2010 Mr. Wolfe's telephone service was disrupted by a power surge blowing out a light span card at the MUX; the card was replaced and service restored on June 2. On Saturday, June 19, 2010 another power surge blew out the light span card at the MUX; a technician was dispatched Sunday morning June 20 and service restored Monday morning June 21. On Sunday, October 24, 2010 another power surge blew out an entire bank of light span cards at the MUX; a technician was dispatched first thing Monday morning October 25 and service was restored October 26. (ID at 7-9).

that might be back-feeding their power onto our cable facilities and back into that MUX.” (Tr. at 49). After the third surge it seemed that only a few lines in the area were being affected, including Mr. Wolfe’s, suggesting that the source of the surges was something coming back over one of the customer lines. (Tr. at 40). Ron Kielar proactively had the technicians isolate Mr. Wolfe’s line and the others and “put extra power surge protection” on those lines just a couple of days later. (Tr. at 40). There were no more power surge outages after that time. (Tr. at 41). They also went out to speak with Mr. Wolfe and gave him a personal explanation of what had happened. (Tr. at 41).

The fourth outage occurred nearly a year later and was unrelated to the power surge issue, which had been fixed. (Tr. at 32; 44). On this occasion, the ring generator on the MUX went bad. (Tr. at 45). Customers could make calls but couldn’t receive them because the phone would not ring. (Tr. at 32-33). Ron Kielar testified that this outage occurred soon after Hurricane Lee, when there was still a backlog of outages. (Tr. at 43, 45). In fact, the Federal Emergency Management Agency declared York County to be a disaster area from September 3 to October 15, 2011.⁴ Although the record shows that Verizon North is sufficiently staffed in this area to meet normal workload, (I.D. at 21; Tr. at 48), this catastrophic event was not a normal situation. Also, it was not an easy problem to fix: Ron Kielar testified that it was not a simple diagnosis trying to “isolate the ringing trouble” and that the techs worked on it “basically all day and into part of the night.” (Tr. at 45). Also, the Complainant was not completely out of service because he could make calls out; he just couldn’t receive calls because the phone would not ring. (Tr. at 32-33).

⁴ <http://www.fema.gov/news/eventcounties.fema?id=15712>

Although the ALJ found that Verizon North did not respond in a timely fashion to the Complainant's first and fourth outages, he concluded that Verizon's response to the second and third outages was timely. On the second outage (June 19), the Complainant called at 6:32 pm. on a Saturday night and Verizon North dispatched a technician first thing Sunday morning and fixed it on a Sunday. (I.D. at 4; Verizon Exhibit No. 1; Tr. at 37-38). The third outage (October 24) was reported on a Sunday at 11:19 and dispatched at 9:25 on Monday morning. (I.D. at 5; Verizon Exhibit No. 1; Tr. at 38-40). The ALJ found that Verizon North missed its dispatch time by only a few minutes on the first outage. (I.D. at 17). With the fourth outage the customer reported the trouble on September 22, 2011 and Verizon dispatched a technician on September 25, 2011, but the ALJ found that Verizon North's response to the fourth outage was seriously affected by forces beyond its control, namely, Hurricane Lee. (I.D. at 18-19). In light of those facts, a \$3,000 fine is excessive and is not justified by the record or the law.

Exception No. 1: A \$1,000 fine for "repetitive outages" is not supported by the record or the regulations and is unreasonable under the circumstances. (I.D. at 19; Ordering Paragraph No. 3)

1. The ALJ found that "the fact that Mr. Wolfe has experienced four outages in less than eighteen (18) months" is per se "unreasonable service" and fines Verizon North \$1,000 for "repetitive" outages, on top of the individual fines for the actual incidents at issue. In this manner the ALJ effectively fines Verizon North for the second and third outages – despite the fact that he found that Verizon North responded appropriately in those two instances, did not violate the statute, and had complied with the regulations. (I.D. at 19). Imposing a separate fine for "repetitive outages" based in part on these two outages violates law stating that the Commission may not impose fines or remedies for incidents when no violation of the statute or

regulation may be found.⁵ While Verizon North strives for perfect service, this Commission has long recognized that things happen that may cause service not to be continuous and that if a utility responds *reasonably under the circumstances* no violation of 66 Pa. C.S. §1501 occurs.⁶ Indeed, Section 1501 does not mandate perfect and continuous service but rather states that service should be “reasonably continuous and without unreasonable interruptions or delay.” The Commission thus must exercise its discretion in reviewing the particular circumstances surrounding a service outage. Here the ALJ erred in failing to consider the circumstances and actions taken and thus abused discretion in imposing and compounding fines.

2. The ALJ found that having “repetitive outages” by definition violates Section 63.57 and 63.24 and fined Verizon North \$500 for each “repetitive outage.” (I.D. at 19). This *compounding or double counting by the ALJ essentially resulted in his imposing additional fines for the same incidents for which he had already fined Verizon North.*

3. The ALJ’s “repetitive outage” automatic fine is not supported by the regulations, the record, the law, and is an abuse of discretion. Importantly, applying the Commission’s regulations is not a mathematical exercise of counting outages without considering the underlying facts, which the ALJ failed to do here. It is clear from the Commission’s penalty guidelines, which permit, if not require the circumstances to be considered, that the ALJ’s objective imposition and calculation lacks necessary subjective judgment to ensure fairness. The Commission has discretion to apply its own judgment to the facts of the case and should do so here to reject the ALJ’s \$1,000 fine for “repetitive outages.”

⁵ *West Penn Power Co. v. Pa. Pub. Util. Comm’n*, 478 A.2d 947 (Pa. Cmwlth. 1989) (the Commission cannot order a company to take remedial steps absent a finding of liability).

⁶ *Trautman v. Verizon Pennsylvania Inc.*, Docket No. C-20065809 (Initial Decision dated April 21, 2006; adopted as Commission Final Decision by Order entered June 2, 2006).

4. First, Section 62.57 does not say anything about repetition – it only addresses the time to take substantial action in an individual incident. It should be addressed only with regard to the individual incidents and does not support an additional fine of \$500 for a violation of 63.57 for “repetitive outages.”

5. Second, Section 63.24 does not support the ALJ’s unexamined counting of outages and finding a per se violation of 63.24 based only on the number of outages. The regulation requires the PUC to look at what was “reasonable” under the circumstances and to evaluate how the company has “endeavor[ed] to maintain its . . . system.”

6. Here the undisputed record shows that Verizon North acted very reasonably in addressing the power surge issue, which was not caused by a problem with Verizon North’s equipment but rather was caused by something sending power surges into its system and back over the copper line and blowing out the cards at the MUX. (Tr. at 28; 32). Verizon North’s employees not only replaced the cards quickly to restore service but they also were proactive in trying to isolate, diagnose and address the underlying cause of this “unusual” type of problem” that was “hard to nail down.” (Tr. at 48). Knowing that it was a power issue, they inspected all the facilities from the MUX to Mr. Wolfe’s house looking for “grounding or bonding issues” that could be related to power problems. (Tr. at 49). They also contacted the local power company asking them to check their facilities and see if they were sending power back into the MUX. (Tr. at 49). When it became evident after the third surge that only a few lines in the area were being affected, including Mr. Wolfe’s, suggesting that the source of the surges was something coming back over one of their lines, Verizon North’s employees proactively isolated Mr. Wolfe’s line and the others and “put extra power surge protection” to try to stop the power from coming back into the MUX. (Tr. at 40). These efforts worked and there were no more card blow outs due to

power surges after that time. (Tr. at 41). These efforts were “reasonable” under the circumstances and showed that Verizon North has “endeavor[ed] to maintain its . . . system in such condition as to make it possible to furnish continuous service” and took “reasonable measures” to prevent future “interruptions of service.”⁷ Thus, Verizon North should not be fined for violations of Sections 63.57 or 63.24.

7. The September 22, 2011 outage (the fourth outage) for which Verizon North is fined by the ALJ was not caused by a power surge as were the first three. (Tr. at 44-45). This outage was caused by a ring generator going bad. (Tr. at 44-45). Therefore, the undisputed evidence shows this was not related to the power surge problem in the first three trouble reports, and, therefore, not part of a “repetitive” problem. It was fixed the first time and has not reoccurred. (Tr. at 41). Thus, the ALJ erred on both factual and legal bases in finding there was a repetitive problem and in concluding to levy additional fines on that basis when indeed outage four was different from the other three outages and not repetitive.

Exception No. 2: The ALJ’s presumption that any violation of Section 63.57 was automatically also a violation of Section 63.24 is unreasonable. (I.D. at 14)

8. The ALJ’s fine of \$1,500 for supposed violations of Section 63.24 is nothing more than a doubling of the fines for alleged violations of 63.57. Even if one assumes *arguendo* that Verizon North had three separate violations of 63.57 (which Verizon North disputes below), it was an error to automatically double the fine by tacking on a violation of 63.24.

9. The Commission has found it is unreasonable to find that a violation of 63.57 is per se a violation of 63.24.⁸ Yet, the ALJ here, in seeking to raise the total fine, stated

⁷ 52 Pa. Code. §63.23(a).

⁸ This cumulative approach to violations of the Commission’s regulations was rejected by ALJ Weismandel and the Commission in *Russel Lerch v. Verizon Pennsylvania Inc.*, Docket No. C-20077297 (ALJ Weismandel’s Initial Decision at p. 12, adopted by Commission Final Order entered September 11, 2008).

“[b]ecause Verizon violated Section 63.57 on two separate occasions, I find that the Company also violated Section 63.24.” (I.D. at 14). This just doubles the fine without a requisite finding that Section 63.24 was violated based on the record or without notice or due process that such regulation was at issue. This is legal error.

10. Moreover, these are different regulations with different purposes. Section 63.24 says “(a) *System maintenance*. Each public utility shall endeavor to maintain its entire system in such condition as to make it possible to furnish continuous service, and shall take reasonable measures to prevent interruptions of service and to restore service with a minimum delay if interruptions occur.” This has to do with failure to maintain facilities or to take reasonable preventative measures. For the reasons discussed above, the record shows no underlying problem with Verizon North’s facilities, shows that its staffing was adequate, shows that it acted reasonably to prevent future occurrences, that the source of the problem for the first outage for which Verizon North was fined was diagnosed after substantial investigation and effort to be a third party imparting current into Verizon North’s equipment, and that the other outage (the fourth) for which Verizon North was fined was caused by a ring generator that became defective and was addressed reasonably during the Hurricane Lee aftermath.

Exception # 3: It is unreasonable to fine Verizon North \$500 for the June 1, 2010 outage. (I.D. at 19)

11. Section 63.57 requires that “[a] public utility shall respond to and take substantial action to clear other out-of-service trouble, not requiring unusual repair, within 24 hours of the report, except for isolated weekend outages affecting fewer than 15 customers in an exchange or where the customer agrees to another arrangement.”

12. “Substantial action” is not defined, and can mean different things based on the circumstances. Here the ALJ finds that “substantial action” means “dispatching a service

technician” within 24 hours, which historically has been a position advocated by the Office of Consumer Advocate and rejected by the Commission.⁹ (I.D. at 13). The regulation does not say “dispatch” and the better reading is that the Commission has the discretion to look at what was done under the circumstances as a whole and use common sense in determining what is or is not “substantial action” under the circumstances. For example, some troubles can be fixed remotely by computer without a dispatch.¹⁰

13. But even if one accepts that under the particular facts of this case a dispatch within 24 hours was required for substantial action, the record shows that the customer called in to report that he had no dial tone at the NID at 5:15 pm on June 1, 2010¹¹ and that a technician from the cable group was dispatched at 5:36 on June 2. That technician determined that the trouble was at the MUX and called the group who works on that piece of equipment and found “they were already out there working on it” and they closed the ticket at 7:13 pm on June 2 “when the actual line cards were changed out and restored service.” (Tr. at 37).

14. Thus, even if a dispatch was required, the 24 hour window was missed by only 21 minutes. The ALJ recommends a \$500 fine for the June 1, 2010 outage even though the I.D. concedes that even under his own reading of the timeline “[a] technician was dispatched only a few minutes after the twenty-four (24) hour period ended for the first outage.” (I.D. at 14). Again, this fine lacks discretion under the circumstances.

⁹ *Lerch*, supra.

¹⁰ *Trautman*, infra; Initial Decision of ALJ Salapa at p. 9 (“The Public Utility Code and Commission regulations do not require a telephone utility to dispatch a technician every time it receives a customer complaint.”).

¹¹ The record shows the customer first called at 4:54 and was instructed to first check his NID. It was completely reasonable for Verizon North to first ask him to test the NID. As Ron Kielar explained, it is particularly likely that this would find the problem in cases like this where a power outage was involved because “a lot of people have cordless phones” which would be affected by power issues. (Tr. at 34). This clock should not start until a customer calls back and says he checked the NID and found no dialtone (or was unable to do so for physical or access reasons). The ALJ is wrong in concluding that “merely instructing the customer to check his NID” is not substantial action “if those actions don’t resolve the problem.” Verizon North agrees that if the NID check shows trouble on its network it then has to take additional “substantial action,” but the clock starts from when the customer informs Verizon North that he has checked the NID (or could not do so).

15. It is unreasonable to find that Verizon North violated Section 63.57 under these facts, but even if there was a technical violation it was so slight that a \$500 fine for that incident is unreasonable and the amount should be reduced. Furthermore, this outage is counted against Verizon North as part of the “repetitive” outages for which the ALJ goes on to fine Verizon North another \$1,000. This fine is unreasonable and an abuse of discretion that should be eliminated or reduced significantly by the Commission.

Exception # 4: It was unreasonable to fine Verizon North \$1,500 for the fourth outage in light of extenuating circumstances of Hurricane Lee. (I.D. at 19)

16. Mr. Wolfe’s initial call for the fourth outage came in at 9:40 am on September 22. Verizon North began evaluating the report and an automatic line test was conducted at 3:17 p.m. on September 22. After the results of that test were evaluated, Verizon North dispatched a service technician at 9:41 am on September 25. (Verizon Exhibit No. 1; Tr. at 43-45). This delay was reasonable in light of the devastating affects Hurricane Lee had on the midstate and the backlog of trouble reports Verizon North was dealing with at the time. “Hurricane Lee had a lot flooding damage in our area. I had a couple of offices that had two, three inches of water in them.” “[T]he outside forces themselves, they had pages and pages of trouble reports to get through. We were working overtime on a regular basis.” (Tr. at 45-46; Verizon Exhibit No. 2.)

17. In any event, in applying Section 69.1201 of the regulations, the extenuating circumstances of Hurricane Lee should have been considered and mitigate against the fine imposed by the ALJ for the September 2011 outage. The Commission has the power to waive its regulations or to apply them with discretion where, as here, an act of nature has impacted the response ability of virtually every fixed utility in Pennsylvania. The ALJ failed to exercise such discretion. The Commission should do so here, and reduce or eliminate the fine in light of the circumstances.

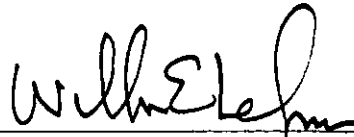
18. The ALJ basically conducts only a mathematical exercise calculating if the dispatch was more than 24 hours after the initial call, and not applying any judgment to the facts of the case to determine what was reasonable under the circumstances. Thus, even though he agrees that Verizon “was still experiencing a backlog of service outages up to the time of Mr. Wolfe’s outage” and “[t]here is no question that the effects of Tropical Storm Lee were significant for Verizon as well as other utilities in Pennsylvania,” he would not consider those factors at all because “Verizon is still obligated to comply with the Commission’s regulations.” (I.D. at 18). The ALJ applied the wrong legal standard. The Commission has discretion to determine what was reasonable under the circumstances and/or to provide a “temporary exemption” based on the facts, and is not bound to an unthinking counting exercise that ignores the facts of record.

CONCLUSION

For the reasons explained in detail above, the civil penalty imposed by the ALJ is highly excessive and inappropriate based on the record in this proceeding, which does not justify the fine imposed. Verizon North LLC respectfully requests that the Commission eliminate or reduce the fines imposed by the ALJ.

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Respectfully submitted,



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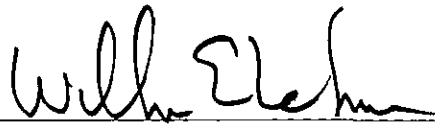
Dated: May 9, 2012

CERTIFICATE OF SERVICE

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

Service Via First Class Mail:

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William E. Lehman
Counsel for Verizon North LLC

Dated this 9th day of May 2012.

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