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*ALSO ADMITTED IN NEW JERSEY
*+MANAGING SHAREHOLDER-NEW JERSEY

June 6, 2012

Via Overnight Delivery

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

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JUN 06 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: Swenson v. ATC, Docket No. C-2012- 2305083

Dear Ms. Chiavetta:

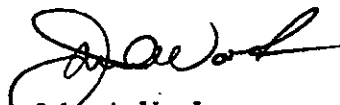
Enclosed for filing in the above-captioned dockets please find an original and three (3) copies of the "Preliminary Objections" filed by Janet Swenson in the above-captioned matter on behalf of ATC Outdoor DAS, LLC.

Kindly date-stamp as received the additional copy included herewith and return it in the postage prepaid envelope.

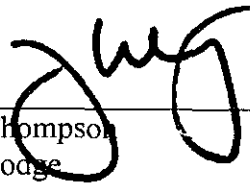
Copies have been served in accordance with the attached Certificate of Service.

Do not hesitate to contact the undersigned with any questions regarding this matter.

Very truly yours,


John A. VanLuvanee

JAV/eah
Enclosures



T. Scott Thompson

John C. Dodge

DAVIS, WRIGHT TREMAINE, LLC

1919 Pennsylvania Avenue NW

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[johndodge@dwt.com](mailto: johndodge@dwt.com)

- a. The Complainant lacks standing,
- b. The Complaint is legally insufficient.
- c. The Complaint fails to allege a violation of a statute which the Commission has jurisdiction to administer, or regulation or order of the Commission.
- d. The Complaint fails to state a claim upon which relief can be granted.
- e. The Complaint is subject to *res judicata*.
- f. The Complaint is collaterally estopped.

6. In order to bring a complaint before a tribunal, a complainant must first demonstrate that she has standing to maintain the action. *Nye v. Erie Insurance Exchange*, 470 A.2d 98,100 (Pa. 1983).

7. A complainant must be a customer of a public utility in order to have standing to file a complaint about the utility's service before this Commission. *See, e.g., In Home Oxygen and Medical Equipment v. Verizon Pennsylvania, Inc.*, 2011 Pa. PUC LEXIS 576, *14 (2011).

8. Section 102 of the Pennsylvania Code, 66 Pa.C.S. § 102, defines the word "service" as: "Used in its broadest and most inclusive sense, includes any and all acts done, rendered or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities . . . in the performance of their duties under [the Code]."

9. Complainant is not a customer of ATC.

10. Since Complainant is not a customer of ATC she does not have standing to file a complaint about ATC's service (including the facilities used to furnish that service) before this Commission.

11. In order to be a legally sufficient formal complaint, the pleading submitted must set forth an "act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission." 52 Pa.Code § 5.22(a)(4). *See also* 66 Pa.C.S. § 701.

12. Complainant has not set forth an act or thing done or omitted to be done by ATC in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission.

13. The Complaint is thus legally insufficient.

14. The Complaint requests that the Commission rescind ATC's "Certificate of Approval" alleging that ATC is a real estate trust representing a cell phone company, T-Mobile. Complaint at Paragraph 6.

15. ATC is not a real estate trust and ATC does not represent T-Mobile. ATC is a limited liability company providing RF Transport Services to T-Mobile pursuant to ATC's Pennsylvania P.U.C. Tariff No. 1 and using Distributed Antenna System ("DAS") infrastructure.

16. The Complaint thus fails to state a claim upon which relief can be granted.

17. The Complaint alleges that ATC is not a public utility. Complaint at Paragraph 6.

18. ATC is a public utility in Pennsylvania pursuant to a Certificate of Public Convenience granted by the Commission in Docket No. A-2008-2072972 (order entered Dec. 22, 2008).

19. The Complaint thus fails to state a claim upon which relief can be granted.

20. The Complaint requests that the Commission proscribe installation of ATC facilities in Northampton Township and direct the removal of existing ATC facilities in Northampton Township. Complaint at Paragraph 6.

21. The doctrine of *res judicata* reflects the refusal of the law to tolerate the re-litigation of a matter decided by a court of competent jurisdiction. A final valid judgment on the merits by a court of competent jurisdiction bars any future suit between the same parties on the same cause of action. See, e.g., *Dale Sattar v. Aqua Pennsylvania, Inc.*, 2012 Pa. PUC LEXIS 165, *6 (2012).

22. By order dated January 5, 2012 the Court of Common Pleas of Bucks County decreed that Northampton Township was “to permit ATC to enter upon and use the public rights of way to install DAS Infrastructure.” *ATC Outdoor DAS, LLC v. Board of Supervisors of Northampton Township and Michael T. Solomon*, No. 2011-09455. (Exhibit A.)

23. The Complaint is thus subject to *res judicata*.

24. The Complaint alleges that ATC defers to the Township and the Township defers to ATC. Complaint at Paragraph 6.

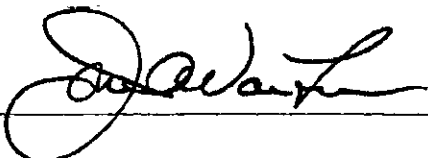
25. On January 30, 2012 an authorized representative of Northampton Township accepted a settlement agreement with ATC that, *inter alia*, allowed ATC to apply for permits to install its DAS facilities in the community. (Exhibit B.)

26. Complainant is a resident of Northampton Township and is bound by the settlement agreement executed by Northampton Township.

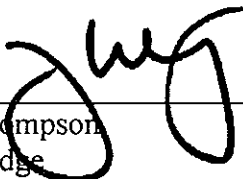
27. The Complaint is thus subject to collateral estoppel.

WHEREFORE, for the foregoing reasons, Respondent ATC respectfully requests that the Commission enter an order sustaining ATC's Preliminary Objections and dismissing the Complaint with prejudice.

Respectfully submitted,

By: 

John A. VanLuvanee (Bar No. 15974)
Kellie McGowan (Bar No. 93460)
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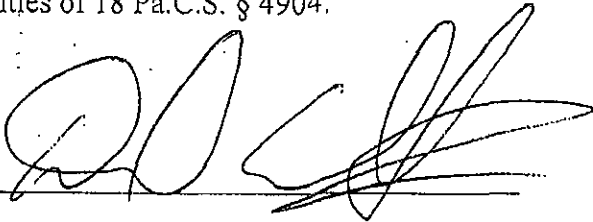
June 6, 2012

VERIFICATION

David Callender

I, _____, hereby state that I am the [title] of ATC Outdoor DAS, LLC and that the facts set forth above are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904.

Dated: June 6, 2012



[Name]

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JUN 06 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Janet Swenson
Complainant**

v.

**ATC Outdoor DAS LLC
Respondent**

C-2012-2305083

CERTIFICATE OF SERVICE

I hereby certify that I have, this 6th day of June 2012, served a true copy of the foregoing filing upon the person below, via U.S Mail, in accordance with the requirements of 52 Pa. Code Sec. 1.54:

Janet H. Swenson
139 Woodland Drive
Churchville, PA 18966

RECEIVED

JUN 06 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Eastburn and Gray, P.C.

By: 

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Attorneys for Respondent
Attorney I.D. #15794
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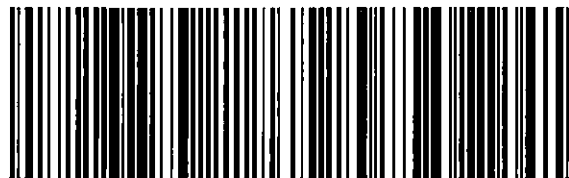
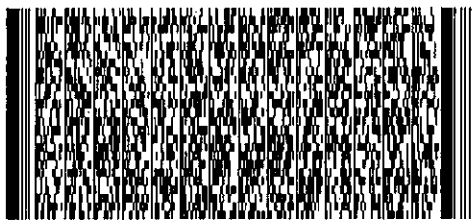
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