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November 13, 2012

VIA HAND DELIVERY

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street – Filing Room
Harrisburg, PA 17120

RE: Ken Eernisse v. Verizon Pennsylvania LLC; Docket No. C-2012-2287023;
EXCEPTIONS TO INITIAL DECISION

Dear Secretary Chiavetta:

Enclosed for filing with the Commission are the Exceptions of Verizon Pennsylvania LLC to the October 2, 2012 Initial Decision of Administrative Law Judge Mary D. Long 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 Pennsylvania LLC

WEL/bes
Enclosures
cc: Honorable Mary D. Long
Office of Special Assistants (via hand delivery with CD Rom)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

KEN EERNISSE,	:	
	:	
Complainant	:	
	:	
v.	:	Docket No. C-2012-2287023
	:	
VERIZON PENNSYLVANIA LLC,	:	
	:	
Respondent	:	

EXCEPTIONS OF
VERIZON PENNSYLVANIA LLC

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Counsel for Verizon Pennsylvania LLC

Dated: November 13, 2012

INTRODUCTION

Pursuant to 52 Pa. Code § 5.533, Verizon Pennsylvania LLC, formerly known as Verizon Pennsylvania Inc. ("Verizon"), excepts to portions of the Initial Decision ("ID") of Administrative Law Judge Mary D. Long, issued on October 17, 2012.[1] In particular, Verizon asks the Pennsylvania Public Utility Commission ("Commission") to reduce the ID's recommended $23,400 civil penalty, which is excessive in light of the facts, is based on legal errors and factual misunderstandings, and is out of proportion with penalties imposed in similar cases.

By filing these exceptions, Verizon in no way wishes to diminish how seriously it has taken Complainant's reports about service issues. Verizon concedes that – although it repaired the equipment that caused this customer's June, 2011 service complaints and ultimately resolved the issue[2] - its handling of the situation could have been better. Had the ID simply recommended a reasonable penalty related to the June 2011 issues, Verizon would not have filed exceptions.

But rather than confining itself to the applicable regulations and the record facts, the ID piles on a series of duplicative and unsubstantiated additional fines to derive a huge penalty that requires the Commission's review to ensure a reasonable result in this case. For example, the ID substantially compounds and increases penalties based on its finding that there was a history of chronic trouble and unresponsiveness prior to the 2011 events. But under closer scrutiny the record fails to support this finding and its consideration of this alleged history in assessing penalties.

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[1] Exceptions were originally due on November 6, 2012, but for good cause shown and with the consent of the Complainant, a one-week extension of time was granted, making Exceptions due on November 13, 2012.

[2] The troubles the Complainant experienced in the summer of 2011 were associated with a mini DSLAM unit, which was replaced and no subsequent trouble reports associated with the DSLAM unit have been reported since. (Transcript ("Tr.") at 43, 48.)

Specifically, the ID's "history" discussion is based on four isolated pre-2011 service calls over a two-year period that the complainant himself did not even raise in his complaint. The ID essentially made the speculative leap that service calls equal inadequate or unreasonable service. That has never been the law. Indeed, the record shows that in each case Verizon responded the next day when no dial tone ("NDT") was reported and found no trouble with its facilities (aside from one instance of a tree fallen on the lines). This unsubstantiated preconception of a history of chronic troubles colors and legally taints the whole ID and requires a close reexamination of the ID's "successively more substantial civil penalties." (ID at 14)

The ID also misunderstands what actually happened in this case, attributing all service calls to its speculation that the issues were caused by the lines getting wet every time it rains, a lay conclusion that is not borne out by the service history or the technical expert evidence. Rather, the relevant service problem related to the failure of a specific piece of equipment that came to a head in the summer of 2011. Over an approximately one-month period in June of 2011, the complainant experienced service outages when a mini DSLAM unit went bad, causing lines to fall out of some of the ports and disrupt service. (Tr. at 43, 46-47) The mini-DSLAM is a piece of equipment used to support DSL service that is located out in the field rather than at the customer's residence. Verizon first repaired the issue by transferring the line to another port in the DSLAM unit on June 13 (Tr. at 46), and that fix held for 9 days. Another temporary repair restored service on June 30. In mid to late summer the DSLAM unit was replaced, which fixed the problem permanently. (Tr. at 43, 48) Unfortunately, during the attempts to repair the problem and replace this equipment, Verizon was not as responsive as it should have been and missed some commitments, including on one day when a medical issue was reported. For those failures Verizon accepts responsibility and does not contest a reasonable fine.

But the ID's legal errors and unsupported findings result in a fine recommendation that incorrectly concludes that service calls equal unreasonable service regardless of the cause of the call, is completely out of proportion to the facts of the case, and must be rejected. Verizon is willing to admit that its response was not perfect in this case and to accept a reasonable penalty, but that penalty should not exceed $1,900, based on a reasonable application of the law to the facts of this case, as discussed below.

Exception No. 1: Verizon excepts to the ID's erroneous finding that there was a history of chronic trouble based on 4 service calls in 2009/2010, upon which the ID relied to escalate and compound penalties unreasonably for later incidents, and also excepts to the $650 in penalties for these pre-2011 calls that the complainant himself did not even raise in his complaint. (ID at 14-15)

The ID goes to great lengths to create a pre-2011 "history" of chronic troubles that is not supported by the record and from which it attempts to justify an unreasonable escalation and compounding of penalties for later incidents on the theory that Verizon made no "effort to improve the reliability of Complainant's telephone service," (ID at 14) that Verizon should have known from these earlier service calls that there was a chronic problem, and that a normal response to a service call was not sufficient for this customer. (ID at 15) This is plain error.

This "history" is based on 4 service calls over a 2 year period in 2009/2010 that the ID concedes the complainant "did not specifically mention" at the hearing or in the Complaint (ID at 13), but which the ID culled from Verizon's service records. The bedrock of the ID's huge penalty recommendation is an escalation of later penalties based on its conclusion from these 4 service calls that there was chronic trouble with this line and a pattern of slow response by Verizon. (Tr. at 18)

An examination of the facts of the 2009 and 2010 service calls below, however, shows that the ID's conclusion of chronic troubles and slow response by Verizon is not supported by

the evidence. And the penalties the ID levies for the 2009 incidents – which the complainant did not even raise in his case – are based on errors of law and unsupportable.

A. 2009 Service Calls.

The only evidence of what happened in 2009 is Verizon's records because the complainant did not raise issues as to 2009.

(1) **October 10, 2009 service call** – Verizon's records show the complainant called on Friday, 10/9 at 6:37 am reporting no dial tone. A commitment of 10/13 was given to the customer. There is no evidence that the customer did not accept this commitment. A Verizon technician found no problems and working service on 10/10 (the next day, a Saturday) at 3:00. (ID at 3; Tr. at 21, 22, 43; Verizon Ex. 1 at Tab A) Therefore, Verizon met its commitment to the Complainant.

The ALJ abused her discretion by imposing a $50 fine for this trouble report for violating 52 Pa. Code § 63.57(b) (failing to take substantial action within 24 hours) because the technician reported working service at 3:00 on 10/10. But there is no evidence the Complainant did not accept the 10/13 commitment time frame and Verizon met (in fact, exceeded) its commitment by responding the next day (a Saturday) and finding that the service was working properly. Furthermore the ALJ erroneously relies on the Complainant's lay statement that his service goes out every time the lines are wet. (ID at 12) It is the Complainant's burden to prove that any alleged service trouble is caused by Verizon's facilities. This simplified and exaggerated statement (the Complainant's facilities are obviously not affected every time it rains given the few cable associated trouble reports the Complainant filed compared to the number of times it must have rained) does not support a finding that the alleged outage was caused by trouble associated with Verizon's facilities. The $50 fine for this trouble report is an abuse of discretion and should be eliminated.

(2) **October 15, 2009 service call** – Verizon's records show that on Thursday, 10/15/09 at 3:58 the customer reported "humming and static" (not lack of dial tone). A commitment was made for Monday, 10/19/09. There is no record evidence that the customer did not agree with this commitment date. Verizon met its commitment and the technician found no problems and working service on 10/19 at 12:30 pm. (ID at 3; Tr. at 24-25, 44, Verizon Ex. 1 at Tab B)

The ID fines Verizon $300 for violating 63.57(b) (failing to take substantial action within 24 hours) (ID at 13, 21) but that regulation does not even apply to this service call because the customer did not report "out-of-service," as required by 63.57(b), but simply reported an alleged static problem. Any fine for violating 63.57(b) for this service call is an error of law and should be eliminated.

The ID also fines Verizon $300 for violating 63.24 (ID at 13, 21) for failure to maintain its system to provide reasonably continuous service. But the only record evidence shows that service was working (albeit with alleged static) (Tr. at 44; Verizon Ex. 1 at Tab B), so Verizon could not have failed to provide reasonably continuous service. This is the first in a series of improper attempts by the ID to use 63.24 to "double" penalties for violating other rules, an error of law that is addressed in Exceptions 2 and 3. A $300 fine for violating 63.24 is an error of law and should be eliminated.

Furthermore, it is completely unjustified for the ALJ to conclude that "[a] higher daily penalty is appropriate for the October 15 outage since it occurred so soon after the October 9 outage" (ID at 13), implying that Verizon should have made some sort of repair on October 10 to prevent the next service call. Service was found good and working on October 10 and the record reveals no reason that Verizon should have thought to do more than it did on October10. There were no other service calls in 2009 and the next one was over a year later, which undercuts the

ID's assumption of some sort of chronic, repetitive outages. In fact, there is no evidence that there was an "outage" on October 9, 2009 since complainant did not raise this incident and Verizon's objective evidence showed working service. This is the first of many unfair and unsupported conclusions by the ID from which it believed "successively more substantial civil penalties" were warranted. (ID at 14)

B. 2010 Service Calls.

The ID again culls from Verizon's service records two (2) more service calls, from 2010, that were not raised by the complainant. Even though these reports occurred over a year subsequent to the last report from 2009 and Verizon found no trouble with Verizon's facilities on the one report and the other was caused by a tree falling on the line (which Verizon promptly restored to service), the ID unfairly characterizes these instances as a recurring problem that became worse by the end of 2010. (ID at 3, Finding of Fact ("FOF") 10) This finding again exemplifies the ID's unfair and biased attempt to create a history of chronic trouble to justify its "successively more substantial civil penalties." (ID at 14)

(1) <u>October 28, 2010 service call</u> – Verizon's records show that on Thursday, Oct. 28 at 1:36 pm the complainant reported no dial tone. A commitment for the next day was given and met by Verizon when the technician found no trouble and working service at 1:00. (ID at 4, FOF 11; Tr. 25, 44; Verizon Ex. 1 at Tab C) The complainant provided no evidence that anything was wrong with Verizon's facilities in this instance. Even the ALJ concluded that Verizon did not violate any Commission regulations. (ID at 14) Therefore it is an error of law and abuse of discretion for the ALJ to use this trouble report later to attempt to create a history of chronic trouble to justify its "successively more substantial civil penalties." (ID at 14)

(2) **November 16, 2010 service call** – Verizon's records show that on 11/16 at 6:19 the complainant reported no dial tone and a loud hum on the line. A commitment was given for 11/18. The next day the technician reported that there was a tree on the line, and restored service immediately with a temporary bypass because the tree needed to be removed before a permanent fix was possible. (ID at 4, FOF 12; Tr. at 25, 44-45; Verizon Ex. 1 at Tab D) Service was moved back to the permanent cable a few weeks later, once the trees had been removed.[3] (Tr. at 45) While not identifying any violation of a Commission regulation in this case, where Verizon responded within 24 hours and immediately restored service that was interrupted by an act of nature, the ID betrays its bias by stating that "these circumstances do not amount to a *sufficient violation* of the Commission's regulations to merit a civil penalty." (emphasis added) (ID at 14) There was no violation to determine the sufficiency of!

Compounding future penalties based on these incidents is not only unsupported by the record but also 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.[4].

Based solely on the facts relating to the above four (4) service calls over a two-year period, the ID concludes that there is a history of chronic trouble at this location, exemplified by FOF 6 stating that "[t]ypically, whenever it rains, Complainant loses his dial tone for a day or two because the lines are wet" and "it takes Verizon between three and five days for a technician to come and fix the problem." (FOF 6) This is the heart of the ID's history of chronic problems finding, which it uses to escalate and compound penalties for later incidents.

[3] Verizon testified that bypass is standard procedure to restore service while a longer repair such as tree removal is needed. The bypass cable is the same and as good as regular copper line and service is not affected by the temporary lines hanging low or being on the ground. (Tr. at 52)

[4] *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).

But FOF 6 is unreasonable and contrary to the facts. In only 3 of the 4 cases did the complainant report NDT (the other was only static). In each of the 3 NDT cases a Verizon technician was out the next day (not 3-5 days out). In 2 of the 3 cases Verizon found working service and no outage; and in the 3rd the outage was caused by an act of nature (fallen tree) and was restored immediately.

It is unreasonable to conclude that there was a problem caused by the facilities getting wet when it rained – and even more unreasonable to conclude that Verizon must have known, based on these facts, that this was the case. It must have rained many more than 3 times in this whole 2-year period so the small number of service calls undercuts the ID's law assumption. And the extended outage in 2011 (discussed in more detail below) turned out not to be caused by the lines getting wet but with a problem with the lines falling out of the DSLAM equipment (which Verizon replaced and fixed the problem), so even in hindsight there is no basis to conclude that there was a chronic problem of outages when the lines got wet.

This conclusion was apparently based only on the complainant's hearsay testimony that "Verizon technicians … have told me numerous times that the phone lines along Route 52 which goes up to my house … are in such bad shape that there is really not much they can do, they have trees landing on them, they have been stretched, they have been pulled, they cannot really seal the connections up watertight anymore." (ID at 6; FOF 22; Tr. at 11) It is not reasonable to credit his lay opinion as the only evidence for a highly technical conclusion that is not supported by the objective facts.

The Commission should grant this exception, reject the $650 penalties for the 2009/2010 service calls and reject any inference that there was some sort of history of chronic problems when the lines got wet and slow response by Verizon that "merit[ed] successively more substantial civil penalties" for the events that occurred in 2011.

Exception No. 2: While Verizon does not oppose the imposition of any penalty for the service events of June, 2011 relating to the DSLAM equipment affecting this customer, Verizon excepts to the ID's recommendation of an excessive and unjustified $19,850 penalty, which is based on errors of law and a failure to understand the facts. (ID at15-19)

The evidence of record shows that over an approximately one-month period in June of 2011 the complainant experienced several service outages. The first occurred on June 6 when the Complainant reported no dial tone. This report was closed when Verizon's scrubber tested the line and found service to be working properly. (Tr. 26, 45; Verizon Ex. 1 at Tab F) At this point, Verizon's procedure was to contact the customer through an automated system and explain that the service had tested as working correctly and given them the option of contacting Verizon if they were still having a problem. There is no evidence that this was not done by Verizon. (Tr. at 34, 45; Verizon Ex. 1 at Tab F) The next few reports involved service outages when a "mini DSLAM" unit went bad, causing lines to fall out of some of the ports and disrupt service. (Tr. at 47; Verizon Ex. 1 at Tabs G, H) The mini-DSLAM is a piece of equipment used to support DSL service that is located out in the field rather than at the customer's residence. With the first outage, Verizon repaired the issue by transferring the line to another port in the DSLAM unit on June 13 (Tr. at 50), and that fix held for 9 days. Another temporary repair restored service on June 30. In mid to late summer the DSLAM unit was replaced, which fixed the problem permanently. (Tr. at 43, 48)

The ID imposed a total of $19,850 in penalties for the incidents over this period, broken down as follows: $1,000 for violations of 52 Pa. Code § 63.57(a), $5,100 for violations of 52 Pa. Code § 63.57(b), $1,500 for violations of 63.57(c), and $12,250 for violations of 63.24. (ID at 21)

The ALJ abused her discretion in imposing these excessive penalties colored by improper assumptions as to the history of trouble. As discussed in Exception 1, an assumption that there was a "history" of trouble is unfounded, and there is no basis to escalate the penalties.

The ALJ decided that a substantial civil penalty is appropriate for these June violations based on the erroneous conclusion that "Verizon knew or should have known that the condition of the lines that served the Complainant's residence required more substantial attention given the number of trouble reports in 2009, 2010 and 2011." (ID at 18) As explained in Exception No. 1 above, the evidence shows that there was a "history" of only four service calls over a two-year period. In only three of the cases did the complainant report no dial tone. In each of the three cases a Verizon technician was out the next day and in two of those cases Verizon found no trouble with its facilities. The third outage was caused by an act of nature (fallen tree) and was restored immediately. There was no "condition of its lines" that Verizon should have been aware that would have alerted Verizon to act in a way other than it did.

Not only is the conclusion about history of chronic trouble unsupported as discussed above, but also the record shows the June 2011 trouble was caused by a unique equipment failure, the DSLAM going bad, not the "condition of the lines." The DSLAM was replaced and the issue was resolved. (Tr. at 43, 48)

Regarding the missed appointments, Verizon is not going to contest the recommended penalty of $500 for 3 missed appointments on 6/6, 6/24 and 6/27 and a penalty for being 4 hours late on 6/29. Verizon takes its commitments seriously, as evidenced by the fact that Verizon met all other commitments in this case. Section 63.57(c) allows Verizon to change a commitment if "timely notice of unavoidable changes is given to the customer or applicant or a reasonable attempt is made to convey the notice." Although the record shows that Verizon would have contacted him on June 6th after the report was closed, the ALJ found that there was no evidence that Verizon actually did that. In hindsight, with regard to the other appointments, Verizon could have called him on his cell phone or showed up at his house, even if it was to tell him Verizon

was still working on replacing the DSLAM – the record does not show Verizon did that and Verizon apologizes.

Likewise, Verizon will not contest a penalty for being no more than 4 hours late on 6/29 (although the evidence shows that the commitment was 11:59 and the technician made repairs at 4:00 – which means that Verizon might have arrived earlier but there is no evidence to support this). However, $1,000 is excessive since Verizon is already being penalized for the emergency nature of the call under 63.57(b). (See also Exception 4, below)

A. Fines for Violations of 63.57(b).

The ALJ fines Verizon $5,100 for violations of 63.57(b), requiring a public utility to take "substantial action" within 24 hours of a reported out-of-service trouble. (ID at 21) These fines are based on an error of law and an abuse of discretion by the ALJ. Given the totality of the circumstances, Verizon will not oppose some penalty for failing to take substantial action during the series of events from June 6 through June 30; however, $5,100 is excessive and should be reduced for the following reasons:

Penalty calculation is internally inconsistent. On page 17 of the ID, the ALJ finds that Verizon violated 63.57(b) by failing to take substantial action within 24 hours on June 6, June 8, and June 22nd. However, on page 19, she determines that a penalty is warranted in the amount of $500 for each day of violation of 63.57(b) from June 22 through June 28, but finally, in her fines table on page 21, she calculates fines for violations of 63.57(b) as follows: $300 for each of seven (7) days from June 6 through June 13 for a total of $2,100, and $500 for each of six (6) days from June 22 through June 28 for a total of $3,000. These fines are inconsistent with her finding that Verizon only violated 63.57(b) on 3 occasions, June 6, June 8, and June 22, (ID at 17) and should be reduced accordingly.

ID erroneously assumes dispatch is always required. The ID's conclusion that 63.57(b) always requires a "dispatch" within 24 hours is an error of law that must be corrected by the Commission. The ALJ's statement and reliance on one Commission case and one pending ID for this conclusion is in error. On page 9 of the ID, the ALJ relies on the *Miller* and *Wolfe* cases for the proposition that "the Commission has held in decisions, that although the regulation does not require the utility to have telephone service repairs completed within 3 hours of an emergency report or 24 hours of a non-emergency outage report, the utility is required to at least dispatch a technician and begin to make repairs within that period of time." (ID at 9) This is clear error. At no place in the *Miller* final order does the Commission come to that conclusion and a final order has not even been issued yet in the *Wolfe* case.

"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.[5] 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.[6] Here, there are mitigating factors that need to be considered in an analysis of the totality of the circumstances.

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[5] *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).

[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 (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.").

Furthermore, changing "substantial action" to mean "dispatch" is a fundamental substantive change to the regulation. This change would affect every telephone company in the state without due process. Any such change to the regulation would be in essence promulgating by ALJ decision a new regulation outside of the rulemaking process and that is clearly prohibited.[7]

The totality of the facts showed Verizon was taking action to address the problem that did not require a dispatch to the customer's house. The problem was a faulty DSLAM. That equipment is not at the customer's house but in the field, but it caused his problems during this time. Verizon ultimately ordered a new DSLAM during this period and replaced it. It is undisputed that this equipment replacement did solve his problem. (Tr. at 43, 48) Under these facts the Commission should make clear that lack of a technician dispatch is not per se a violation of the substantial action rule. If the record showed that Verizon was diligently ordering and replacing the DSLAM during the repair period that would be substantial action.

Likewise, Verizon did a scrubber test on June 6, which showed that the complainant's facilities were working properly. This activity certainly qualifies as substantial action and Verizon should not be required to dispatch a technician when its lines are testing OK. Not dispatching a technician when its lines are working properly creates more efficiency in Verizon's field maintenance process and should not be discouraged.

Verizon does not contest a reasonable penalty under 63.57(b). Although Verizon believes that the ALJ's calculation of penalties is inconsistent, and that her conclusion that "substantial action" always requires a dispatch is error and not consistent with Commission decisions, Verizon is not going to contest some penalty for failing to take substantial action

[7] See, e.g. *Bell Atlantic-Pennsylvania v. Public Utility Commission*, 763 A.2d 440, 468 (Pa. Cmwlth. Ct. 2000), vacated on other grounds 844 A.2d 1239 (Pa. Supreme Ct. 2004).

within 24 hours from 6/8 to 6/13 and 6/22 to 6/28 under the totality of the circumstances presented by the record here. But the ID's per-day penalty amounts of $300 per day and then $500 per day are excessive in light of the evidence that Verizon was working to replace the DSLAM and the fact that the excessive penalty amounts were colored by the improper finding of chronic outage history. A reasonable penalty would be no more than $50 per day. Plus the ALJ improperly penalizes Verizon for the first 24 hours, adding an extra day to each period. Finally, the calculation for the initial June 6 report should begin on June 9, as the line test determined on June 6 that there was no trouble with his facilities. A reasonable fine would be $250 ($50 per day for 5 days 6/9, 10, 11, 12 and 13) and $250 ($50 for 5 days 6/24, 25, 26, 27, 28).

B. Fines for the June 29 Service Call

The ALJ fines Verizon a total of $3,000 based on the fact that the customer called on 6/29/11 at 5:57 pm reporting no dial tone and a medical emergency. (ID at 21) Verizon gave the customer a commitment of 11:59 on 6/30 but the record shows the technician fixed the problem at 4:00 on 6/30. (ID at 19)

Verizon will not contest a $500 (See Exception 4, below) penalty for failing to take substantial action in 3 hours. But to the extent the ID assumes that it is an automatic violation if the technician does not show up in 3 hours - that is not supported by the law or the facts. Section 63.57(a) says 3 hours "consistent with the needs of customers" and it is typical for customers to agree to a commitment the next morning rather than expecting someone to show up for a repair call late at night. Here the record suggests the complainant agreed to the commitment.[8] Moreover, substantial action might not require a dispatch and it is based on the totality of the evidence (see discussion above).

[8] The record shows that the customer disagreed with the first commitment given, but when he did, Verizon complied with his request and provided the commitment of June 30 at 11:59. Verizon's records do not indicate that he disagreed with this commitment time. (Tr. at 27-30)

WhileVerizon is not contesting a penalty under 63.57(a), the duplicative additional $1,000 penalty under 63.24 for this incident is improper. This rule should not be used just as an automatic doubling of the Commission's penalty authority as the ALJ did here, and to do so is a plain error of law, as discussed in more detail below. And as discussed above, Verizon is also accepting a penalty for the missed commitment on 6/29, but it should be no more than the penalties for the other missed commitments, because the technician did respond that day if slightly later than promised.

C. Fines for Violations of 63.24

The most egregious penalty is $12,250 for violating 63.24 at $750 per day for 15 days and $1,000 for one day.[9] (ID at 21) This is nothing but an attempt to double the fines for each violation of the other rules. There should be no additional fine under this rule.

This rule requires that "[e]ach 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." 52 Pa. Code § 63.24.

This rule is intended to address "endeavoring" to maintain equipment. But the facts show that Verizon tried to fix the DSLAM and when Verizon could not fix this equipment satisfactorily, it was replaced. (Tr. 43-48) This clearly shows that Verizon was endeavoring to keep the network in working order. Network repair is not an exact science – first Verizon has to find the bad equipment; then it might be possible to fix the existing equipment, but if not, Verizon has to order and install a replacement – which it did. It is unreasonable for the ID to expect all that to be done instantaneously. Section 63.24 does not impose a standard of

[9] Verizon also addresses the appropriate amounts of these fines in Exception 4.

perfection. But by simply fining Verizon for violations of 63.24 for every day the complainant was allegedly out of service the ID is essentially doing that – requiring Verizon to provide perfect service. This is not the intention of the regulation and must be rejected by the Commission.

Furthermore, by fining Verizon for violations of 63.24 for every day out of service, the ALJ is simply using this section to double fines for violations of other regulations – Section 63.57 in this instance. This compounding or double counting by the ALJ essentially resulted in imposing additional fines for the same incidents for which the ALJ had already fined Verizon.

The Commission should grant this Exception, reduce the fines for violations of 52 Pa. Code § 63.57(b) and eliminate the fines for violations of 63.24, as discussed herein.

Exception 3: Verizon excepts to the ID's recommendation of $2,900 in penalties for 2 service calls in January and November of 2011, which are based on errors of law and unsupported factual assumptions. (ID at 15, 20, 21)

Although the bulk of the penalty is for the June 2011 incidents, the ID also imposes substantial penalties for 2 other service calls in 2011 that appear to be unrelated to the DSLAM issue and, when viewed fairly on the merits, do not warrant a fine.

(1) **January 2, 2011 service call** – Verizon's records indicate that the customer reported NDT on Sunday, 1/2/11 at 12:42. Verizon gave a commitment of 1/5/11 and met that commitment, repairing an aerial cable and restoring service that day. (Tr. at 25, 45; Verizon Exhibit 1 at Tab E)

The ID found that "a higher civil penalty is in order" (ID at 15) for this service call and therefore recommended $400 a day for 3 days for a total of $1,200, (ID at 21) based on its unfounded and unfair conclusions drawn from the 2009/2010 service calls, discussed in Exception 1 above, including the following:

- "Given the history of outages, Verizon should have known that the telephone lines which serve the Complainant's residence required more proactive attention and simply responding to outage reports was not sufficient." (ID at 15) Given that the previous trouble report was caused by a tree falling on the line, this is nothing but the same history of chronic trouble assumption that is unfounded for the reasons discussed in Exception 1.
- Based on the 2009/10 service calls "[t]here is no evidence that Verizon did anything during that period of time to either improve response time to service outages or performed any facility improvements to help prevent future outages." (ID at 15) However, as discussed above, there was no problem with Verizon's response time in 2009/10 and there was nothing wrong with the facilities other than a tree falling. This conclusion and reliance on the same by the ALJ in accessing fines is in error and an abuse of discretion.
- "There is no evidence that Verizon undertook any investigation to determine the Complainant's outages were caused by anything other than Verizon's equipment" (ID at 15) However, Verizon did not find any outages in 2009/10 except for the tree falling, which was an act of nature and promptly repaired. This conclusion and reliance by the ALJ on the same is in error and an abuse of discretion.

Even if any penalty is warranted here (which it is not as discussed below) there is no basis to enhance the penalty beyond an ordinary case because all of the above assumptions are unfounded. As discussed in Exception 1, there is no factual basis for any of the above findings and therefore the increase in penalties based on history is invalid.

The $600 penalty for violating 63.57(b) (ID at 21) is wrong for several reasons. Section 63.57(b) requires substantial action within 24 hours or "where the customer agrees to another arrangement." There is no evidence in the record that the customer did not agree to the commitment date and Verizon met its commitment. Therefore, Verizon did not violate 63.57(b) because another arrangement was made and Verizon met that commitment.

Also the events from 2009/10 showed Verizon dispatching the next day in all prior cases of no dial tone for this customer so the ALJ's bumping up the per day penalty in this instance on the assumption that Verizon was chronically slow in responding is not supported by the record. But even if the Commission determines Verizon did not do enough within 24 hours in this instance, a reasonable penalty for 3 days should be no more than $50 per day, or $150.

The duplicative additional $600 penalty for violating 63.24 (ID at 21) is wrong for several reasons. By fining Verizon for violations of 63.24 for every day out of service, the ALJ is simply using this section to double fines for violations of other regulations – Section 63.57 in this instance. This compounding or double counting by the ALJ essentially resulted in imposing additional fines for the same incidents for which the ALJ had already fined Verizon, which is invalid for the reasons discussed in Exception 2, above.

Furthermore, to the extent the ID is presuming aerial cable was not kept in condition to provide "reasonably continuous service" because of the history based on the 2009/2010 incidents, that is unfounded as discussed in Exception 1. The prior outage had been due to an act of nature (tree falling) and there was no evidence of any relation between the repair for the fallen tree and the fix that was required in January 2011. The ALJ's quote that this service call happened "[a] scant three months after" the tree fell on the line, (Tr. at 14) suggesting that some deficiency in the October 2010 service call caused this later problem is clear error and shows an obvious bias on the ALJ's part based on incidents that happened earlier to which Verizon responded properly.

As discussed in Exception 2, the ID is replete with an improper use of this rule to double penalties for 63.57(b), and this is just another example. There should be no additional penalties based on a violation of 63.24.

(2) **November 29, 2011 service call** – Verizon's records show the customer reported no dial tone on 11/29/11 at 11:07 am. A commitment was given for December 8th. Verizon exceeded that commitment and the technician found no trouble and working service on 12/3/11. (ID at 6; Tr. at 47, 48; Verizon Ex. No. 1 at Tab J)

The ID recommended enhanced penalties of $1,700 (ID at 15, 21) based on the following unsupported conclusions which make no sense in light of the fact that service was found working, there was no record of subsequent service calls disputing that service was indeed working, and the prior outage had been caused by the DSLAM issue, not lines getting wet.

- "no investigation of Complainant's equipment or facilities" and this incident was caused by lines getting wet. (ID at 15)
- "replacement of the DSLAM was insufficient to render telephone service to the Complainant reasonably continuous." (ID at 15) This is unsubstantiated since there was no trouble found on this service call and there has not been another service call since. (Tr. at 48)
- Verizon responded the same way it had responded in the past by undertaking just "a cursory investigation of the reliability of its facilities." (ID at 15) There is no evidence that Verizon's response was "cursory." Verizon dispatched a technician who found that there was no trouble with Verizon's facilities, and the customer did not call back to report trouble after this service call. (Tr. at 47-48; Verizon Exhibit 1 at Tab J)

It is unreasonable to conclude based on one isolated call 5 months later, where working service was found, that the DSLAM repair did not work.

The $700 penalty for violating 63.57(b) is wrong for similar reasons as discussed above. Verizon met its commitment and there is no evidence the customer disagreed with the commitment. Substantial action requires consideration of totality of circumstances and does not always mean dispatch. But even if the Commission determines Verizon did not do enough within 24 hours in this instance, a reasonable penalty for 3 days should be $50 per day or $150.

The duplicative piling on of a $1,000 penalty for violating 63.24(d) is wrong for all the reasons detailed above. How could Verizon have failed to "endeavor to maintain its entire system in such condition as to make it possible to furnish continuous service" when service was working, as borne out by the fact that there were no other service calls after this? In addition, Verizon performed a 100% line inspection a few months later verifying everything was in good working order. (Tr. at 49)

The excessive $1,000 penalty assumes the history of repetitive service outages from wet lines but that is not supported by the facts. The June 2011 incidents were caused by the DSLAM, which was fixed. If service were really going out every time it rains there would have been much more than this one isolated call.

The Commission should grant this Exception and eliminate or reduce the fines accordingly.

Exception 4: Verizon excepts to the ID's recommendation of individual fines of greater than $500 per violation when the ALJ held that there is no evidence that Verizon intentionally violated the regulations. (ID at 19)

The ALJ fines Verizon $1000 per day for individual violations of 63.57(a), 63.57(b) and 63.57(c) for the June 29, 2011 outage; $750 per day for individual violations of 63.24 for the June 6 through June 13 and June 22 through June 30, 2011 outage (excluding June 29, 2011) and

$700 and $1,000 respectively for one day of violations of 63.57(b) and 63.24 for the November 29, 2011 outage. (ID at 21) These fines are in violation of the Commission's standards that must be applied when imposing a civil penalty for violations of Commission regulations set forth in 52 Pa. Code § 69.1201.

When evaluating Verizon's violations as set forth in the ID, the ALJ concluded that "[a]lthough there is no evidence that Verizon *intentionally* chose not to inspect and repair its facilities in order to enhance the reliability of the Complainant's telephone service, its conduct is at least *negligent*... ." (ID at 19) (emphasis added). Nowhere in the ID did the ALJ find that Verizon intentionally violated any statute, regulation or Order of the Commission. Despite this conclusion, the ALJ fined Verizon more than $500 per day, per violation, on numerous occasions. This is contrary to the standards set forth in Section 69.1201.

The Commission's guidelines for determining fines for violations of the Public Utility Code and Commission's regulations, 52 Pa. Code § 69.1201 were implemented on November 30, 2007 in *Final Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations*, Docket No. M-000051875. ("*Final Policy Statement*"). This policy statement was based on the standards set forth in a litigated case before the Commission, *Rosi v. Bell Atlantic-Pennsylvania, Inc. and Sprint Communications Company, L.P.*, Docket No. C-00992409 (Order entered March 16, 2000). In *Rosi*, Commissioner Terrance Fitzpatrick's Motion set forth the factors to be considered in determining a fine. Specifically he stated the first factor thus:

> Whether the violation was intentional or negligent. If the violation is intentional, the Commission should start with the presumption that the penalty will be in the range of five hundred dollars to one thousand dollars per day. If the violation is negligent, the penalty should start with the presumption that the penalty will be in the range of zero dollars to five hundred dollars per day. ...

Motion at 2.

In its Order adopting the policy statement, the Commission specifically retained the considerations from *Rosi* regarding intentional or negligent conduct for a litigated case. *Final Policy Statement* at 10. They emphasized that in a litigated case, parties typically have an opportunity to develop an evidentiary record regarding the conduct at issue that can be evaluated by the presiding ALJ to determine culpability and an appropriate remedy. *Id.*

Therefore, because the ALJ found Verizon's conduct to be at worst negligent, and not intentional, the appropriate penalty per violation should be in the range of $0-$500 with consideration of the other factors before determining a final penalty in **that range**. To determine a penalty above a maximum of $500 for a negligent act would make this factor meaningless. By imposing fines in excess of $500 per violation, the ALJ committed an error of law and abused her discretion in violation of the *Final Policy Statement* and *Rosi*.[10]

As stated above in its Exceptions, Verizon in no way is attempting to diminish the seriousness in which it views its commitments to its customers, and Verizon has accepted the consequences and fines to the degree set forth in its Exceptions. However, should the Commission reject all of the arguments set forth in its Exceptions 1, 2 and 3 above, Verizon requests that the fines imposed be in conformance with the Commission's standards for negligent behavior as set forth in the *Final Policy Statement* and *Rosi*.

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 Pennsylvania LLC respectfully requests that the Commission eliminate and/or reduce the fines imposed by the ALJ. At page 21 of the ID the ALJ provides a chart

[10] And in some cases the ID exceeds even the maximum $1,000 per-day fine by imposing an improper duplicative fine under 63.24 to arrive at as much as a $2,000 per-day fine.

detailing her calculation of the grossly excessive $23,400 penalty recommendation in this case. Verizon reprints the chart below corrected to reflect a reasonable penalty as detailed in these Exceptions and eliminating the legally flawed and factually unsupported penalty calculations.

Date	Violation		Penalty amount	Number of days	Total
1/2/2011-1/5/2011	63.57(b)	failure to take substantial action in 24 hours	50	3	150
6/6/2011	63.57(c)	failure to meet commitment	100	1	100
6/8/2011-6/13/2011	63.57(b)	failure to take substantial action in 24 hours	50	5	250
6/22/2011-6/28/2011	63.57(b)	failure to take substantial action in 24 hours	50	5	250
6/24/2011; 6/27/2011	63.57(c)	failure to meet commitment	200	2	400
6/29/2011	63.57(a)	failure to take substantial action in 3 hours in medical emergency	500	1	500
	63.57(c)	failure to meet commitment	200	1	200
11/29/2011	63.57(b)	failure to take substantial action in 24 hours	50	3	150
				TOTAL	**$2,000**

Respectfully submitted,

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Counsel for Verizon Pennsylvania LLC

Dated: November 13, 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 52 Pa. Code § 1.54 (relating to service by a party).

Service Via First Class Mail:

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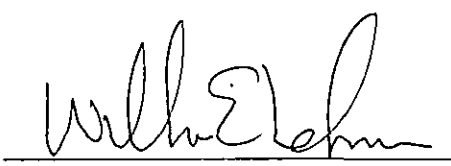

William E. Lehman
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Dated this 13th day of November, 2012.