

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

MARC DAVID SWARTZ,	:	
Complainant,	:	Complaint Docket
	:	No: C-2015-2465416
v.	:	Electronically Filed
	:	
COMCAST PHONE OF PENNSYLVANIA LLC	:	
Respondent	:	

**COMCAST PHONE OF PENNSYLVANIA LLC’S
PRELIMINARY OBJECTIONS TO COMPLAINT**

Pursuant to 52 Pa. Code § 5.101, Comcast Phone of Pennsylvania, LLC (“Respondent”) submits these Preliminary Objections to the above-captioned complaint (“Complaint”) of Marc David Swartz (“Complainant”). As explained herein, since the services at issue in this Complaint are not regulated by the Pennsylvania Public Utility Commission (“Commission”), and since the entity named as Respondent has never provided any services to Complainant, and since the Comcast entities providing such services are not regulated public utilities, the Commission lacks jurisdiction to consider the Complaint or to grant any of the relief that has been requested. The Commission also lacks jurisdiction to award the damages demanded in the Complaint.

In specific support of its Preliminary Objections, Respondent states as follows:

Procedural History

1. On or around January 29, 2015, Complainant filed his Complaint, which alleges a dispute concerning alleged incorrect billing as well as problems with service. The Complaint also seeks monetary damages for alleged damage to Complainant’s carpets.

2. While Complainant checked a box on the Complaint for “telephone” service, the allegations of the Complaint relate to voice, internet and cable services. The voice service at issue here is solely Voice over Internet Protocol service (“VoIP service”).

**Preliminary Objection Based On Commission’s
Lack Of Jurisdiction Over Respondent**

3. As it received its charter through legislation, the Commission possesses only the authority the State Legislature has specifically granted to it in the Public Utility Code (the “Code”), 66 Pa. C.S. §§101, *et seq.* The Commission’s jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1977); *Allegheny County Port Authority v. Pa. P.U.C.*, 237 A.2d 602 (Pa. 1967); *Behrend v. Bell of Pa.*, 390 A.2d 233 (Pa. Super. 1978); *Harrisburg Taxicab & Baggage Co. v. Pa. P.U.C.*, 786 A.2d 288 (Pa. Cmwlt. 2001); and *City of Erie v. Pa. Electric Co.*, 383 A.2d 575 (Pa. Cmwlt. 1978). Parties to an action may not confer jurisdiction upon a tribunal where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). *See also Silvestri et al. v. Comcast Phone of Pennsylvania, LLC*, Docket Number C-2011-2241959, Initial Decision of Christopher P. Pell, Administrative Law Judge, Order entered August 26, 2011, attached hereto as Exhibit A.

4. Respondent provides wholesale local exchange telecommunications services to unregulated entities that in turn provide non-jurisdictional VoIP services to retail end users. *See Application of Comcast Phone of Pennsylvania, LLC for Approval of the partial Abandonment or Discontinuance of Residential Competitive Local Exchange Carrier Services and Residential Interexchange Toll Carrier Service to the Public in the Commonwealth of Pennsylvania*, Docket Numbers A-2008-2032577, R-2008-2033469,

R-2008-203347, Order entered May 27, 2008 (acknowledging the abandonment of traditional circuit-switched telephone service).

5. Complainant has never been a customer of Respondent.

6. At the time the Complaint was filed, Complainant was a customer of Respondent's affiliate, Comcast IP Phone, LLC, an entity that provides VoIP services (the "telephone" service described in the complaint), and Complainant was a customer of Respondent's affiliate, Comcast of Southeast Pennsylvania, LLC, an entity that provides cable television and internet services.

7. Even if this Complaint were brought against Comcast IP Phone, LLC, and/or Comcast of Southeast Pennsylvania, LLC, the Complaint would fail to properly state a cause of action over which the Commission has jurisdiction, and the Commission would not possess the authority to grant any of the relief requested by Complainant, as the services provided by these entities to Complainant are not regulated by the Commission.

8. With regard to VoIP services, such services are not provided by Respondent and are not regulated by the Commission, pursuant to the Voice-Over-Internet Protocol Freedom Act. *See* 73 P.S. § 2251.4; *see also* Exhibit A, *Silvestri et al. v. Comcast Phone of Pennsylvania, LLC*, Docket Number C-2011-2241959, Initial Decision of Christopher P. Pell, Administrative Law Judge, Order entered August 26, 2011.

9. Moreover, none of the five statutorily prescribed areas of regulation under the Voice-Over-Internet Protocol Freedom Act apply to this Complaint. *See* 73 P.S. §2251.6 (providing that the Commission, as well as any department, agency, commission or political subdivision of the Commonwealth retains the authority to regulate (1) the provision and administration of 911 service; (2) telecommunications relay service; (3) universal service fund

fees; (4) switched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company and; (5) rates, terms or conditions of protected services provided under tariffs subject to approval by the Commission); *see also* Exhibit A, *Silvestri et al. v. Comcast Phone of Pennsylvania, LLC*, Docket Number C-2011-2241959, Initial Decision of Christopher P. Pell, Administrative Law Judge, Order entered August 26, 2011.

10. The Telecommunications Act of 1996 generally prohibits the Commission from regulating the rates, services, facilities and equipment of cable television services. *See* 47 U.S.C. §§ 543 and 544. Section 543(a)(1) provides in pertinent part that “[i]n general . . . [n]o Federal agency or State may regulate the rates for the provision of cable service.” Additionally, regarding the regulation of services, facilities, and equipment, 47 U.S.C. § 544(f)(1) provides in general that “[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services.” 47 U.S.C. § 543(a)(1); *see also* Exhibit A, *Silvestri et al. v. Comcast Phone of Pennsylvania, LLC*, Docket Number C-2011-2241959, Initial Decision of Christopher P. Pell, Administrative Law Judge, Order entered August 26, 2011.

11. Under the Voice-Over-Internet Protocol Freedom Act, internet-protocol services are not regulated by the Commission. *See* 73 P.S. § 2251.4. Rather, such services fall under the jurisdiction of the Federal Communications Commission (FCC). *See MilleniaNet Corporation v. PUC*, No. 990 C.D. 2008, 2009 Pa. Commw. Unpub. LEXIS 786, at *5-6 (Pa. Commw. Apr. 30, 2009); *see also* Exhibit A, *Silvestri et al. v. Comcast Phone of Pennsylvania, LLC*, Docket Number C-2011-2241959, Initial Decision of Christopher P. Pell, Administrative Law Judge, Order entered August 26, 2011.

12. None of these services are provided by Respondent to Complainant.

13. None of the services provided by Comcast IP Phone, LLC, or by Comcast of Southeast Pennsylvania, LLC, to Complainant is regulated by the Commission.

WHEREFORE, Respondent requests that the Commission dismiss the instant Complaint for failure to state a claim upon which relief can be granted due to the lack of jurisdiction of the Commission.

**Preliminary Objection Based On Commission's
Lack Of Authority To Award Damages**

14. The Complaint seeks compensation for damages allegedly caused to Complainant's carpets, which is relief that the Commission lacks the authority to grant.

15. It is well-settled that the remedial and enforcement powers granted to the Commission by statute do not include the power to award damages to a private litigant. *See Feingold*, 383 A.2d at 794 (“the statutory array of PUC remedial and enforcement powers does not include the power to award damages to a private litigant for breach of contract by a public utility. Nor can we find an express grant of power from which the power to award such damages can be fairly implied”); *Elkin v. Bell Telephone Co.*, 420 A.2d 371, 375 (Pa. 1980) (explaining that the legislature has withheld from the Commission the power to award damages); *DeFrancesco v. Western Pennsylvania Water Co.*, 453 A.2d 595, 596 (Pa. 1982).¹

16. Moreover, the Commission does not have jurisdiction over private contractual disputes between citizens and utilities. *Pizoli v. Duquesne Light Company*, Docket No. C-2011-2231202, 2011 Pa. PUC Lexis 1441.

¹ The Formal Complaint form provided by the Commission also specifically states that: “Under state law, the PUC cannot decide whether a utility or company should pay customers for loss or damages. Damage Claims may be sought in an appropriate civil court.” (emphasis in original).

17. The Courts of Common Pleas, not the Commission, have original jurisdiction to hear suits against public utilities for damages arising from failure to provide adequate service. *DeFrancesco*, 453 A.2d at 596 (citing *Feingold*, 383 A.2d at 795).

18. Original jurisdiction is only vested in the Commission “where it is a complex matter requiring special confidence, with which the judge or jury would or could not be familiar, and where there is a ‘need for uniformity and consistency in agency policy and a legislative intent,’” *Elkin*, 420 A.2d at 377, or where “the general reasonableness, adequacy or sufficiency of a public utility’s service is drawn into question.” *DeFrancesco*, 453 A.2d at 597.

19. The Commission does not have jurisdiction to consider negligence claims. *See DeFrancesco*, 453 A.2d at 597 (explaining that whether a utility negligently provided service is a question for the Courts, not the Commission, and holding that the Commission lacked the authority to decide whether a water company was responsible for fire damage caused to a customer’s residence); *see also Poorbaugh v. Pennsylvania PUC*, 666 A.2d 744, 751 (Pa. Commw. Ct. 1995) (holding that jurisdiction to decide whether utility was responsible for destruction of customer’s barn by fire is vested in the Courts of Common Pleas and not the Commission); *Pizoli*, Docket No. C-2011-2231202, 2011 Pa. PUC Lexis 1441 (“the Commission possesses no jurisdiction to consider complainant’s request for reimbursement of property damage”).

WHEREFORE, Respondent requests that the Commission dismiss the instant Complaint for failure to state a claim upon which relief can be granted due to the lack of jurisdiction of the Commission.

Respectfully submitted,

/s/ Tucker R. Hull

Michelle Skjoldal (PA 202084)

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Dated: February 24, 2015

Attorneys for Respondent

Comcast Phone of Pennsylvania LLC

VERIFICATION

I, Elizabeth Murray, hereby state that I am authorized to make this verification on behalf of Respondent Comcast Phone of Pennsylvania 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 (relating to unsworn falsification to authorities).

Date: February 24, 2015

A handwritten signature in black ink, appearing to read "Elizabeth Murray", written over a horizontal line.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing Preliminary Objections and Notice to Plead upon the persons listed below via first class mail in accordance with the requirements of Section 1.54 of the Commission's rules, 52 Pa. Code § 1.54:

Marc David Swartz
19 Long Meadow Road
Royersford, PA 19486

Date: February 24, 2015

/s/ Tucker R. Hull
Tucker R. Hull (PA 306426)

EXHIBIT

“A”

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Kimberly & Michael Silvestri	:	
	:	
v.	:	C-2011-2241959
	:	
Comcast Phone of Pennsylvania, LLC	:	

INITIAL DECISION

Before
Christopher P. Pell
Administrative Law Judge

HISTORY OF THE PROCEEDING

On May 4, 2011, Kimberly and Michael Silvestri (complainants) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against a company they identified as “Comcast Cable Company” (Comcast or respondent) in the Complaint.¹ In the Complaint, complainants checked off the boxes indicating “[t]here are incorrect charges on my bill,” and “[t]here is a reliability, safety or quality problem with my utility service.” Under the “State the facts of your complaint” section of the Complaint, the complainants provided the following explanation:

Made aware victims of severe/massive identity theft by Computer in March 2010. Comcast was internet, cable, and for very short time, phone. Believe the cable has been stolen, and for a very long time now. Purchased new TV in May 2009 – The television’s ports have been destroyed. A lock placed on new TV, as well as cable box, we cannot get the locks off and when you turn on downstairs TV the television clearly states no signal and the cable runs off the no signal. Phone service for one month, no voice mail connected by us, yet

¹ At footnote 1 of Respondent’s Preliminary Objections, Respondent identifies its name as Comcast Phone of Pennsylvania, LLC.

upstairs TV states that Caller ID is on. I shut it off, next hour back on. Reminder notices state our phone will be shut off and have no phone with Comcast. Manager came out and clearly saw all of these problems, couldn't explain, given no explanation, saw the TV was witness to everything.

As Relief, the complainants requested the following:

Please refer to all paperwork sent to FCC. So many abnormalities and when supervisor came out he witnessed everything and still did nothing. Television completely ruined – useless and we are hardly downstairs to watch it.

To Solve: want Comcast out with manager. A complete new hookup from beginning – new lines, complete new account number. Have pics of neighbors lines going into our lines and clearly visible. Complete investigation of all wires. \$2300.00 to replace television - \$50.00 per month since May 2009 for cable returned to us for a perd [sic] locking our TV and channels. No full cable service for God knows how long - \$50.00 off is \$1200.00 to date and \$25,000.00 pain and suffering of letting us live with some one taking our cable. The manager clearly seeing the problem Comcast being notified over 200 times and doing nothing but letting consumers television be damaged, and stolen, and doing nothing.

On June 8, 2011, Comcast filed an Answer and New Matter denying the material averments of the Complaint. Respondent explained that it “is a Delaware limited liability company certificated to provide telecommunications services as an IXC reseller, CLEC, Competitive Access Provider (CAP) and a Facilities-Based IXC, within the Commonwealth of Pennsylvania.” Respondent maintained that it provides wholesale local exchange telecommunications services to unregulated entities that provide non-jurisdictional Voice-Over-Internet Protocol (VOIP) to retail end users; that it does not provide any retail telecommunications service to end-user consumers; that it does not provide any telecommunications services to complainants; that the complainants are current customers of its affiliate, Comcast of Philadelphia II, LLC, an entity that provides cable television service; and that it denies that complainants currently obtain internet service from any Comcast entity.

As New Matter, respondent maintained that the Commission is not empowered to award monetary damages as requested by the complainants; that it does not provide the cable television service which forms the basis of the complaint; that Voice-Over-Internet Protocol service provided generally by respondent's affiliate, Comcast IP Phone, LLC, is not regulated by the Commission; that the complainants are not customers of respondent or its affiliate, Comcast IP Phone, LLC; that to the extent that the Complaint is directed at the entity which currently provides cable television service to the complainants – Comcast of Philadelphia II, LLC – such service is not regulated by the Commission; that while the complainants make no allegations concerning internet service, respondent does not provide internet service and complainants are not currently purchasing internet service from respondent's affiliate, Comcast of Philadelphia II, LLC; that to the extent that this complaint is addressed to the entity which previously provided internet service to the complainants – Comcast of Philadelphia II, LLC – such service is not regulated by the Commission; and that the Commission lacks jurisdiction to consider the allegations of the Complaint or to grant any relief to the complainants, as the Commission does not regulate or have any authority over any of the services identified in the complaint. Respondent's New Matter was endorsed with a Notice to Plead, advising the complainants that they had 20 days to file a written response to respondent's New Matter, and that failure to file a timely reply to New Matter may be deemed in default, and relevant facts stated in the new matter may be deemed to be admitted.

Also on June 8, 2011, respondent filed Preliminary Objections seeking dismissal of the Complaint on the ground that the Commission does not have jurisdiction over any aspect of the Complaint. In the Preliminary Objections, respondent indicated that it does not provide any retail telecommunications service; that it does not provide any telecommunications services to complainants; that other than alleging that they received "phone service for one month," complainants make no allegations concerning telephone service; that complainants' allegations relate solely to cable television service; that even if any of complainants' allegations could be construed to concern voice-over-internet-protocol services, such services are not provided by respondent and are not regulated by the Commission pursuant to the Voice-Over-Internet-Protocol Freedom Act, 73 P.S. § 2251.4; that the complainants are customers of respondent's affiliate, Comcast of Philadelphia II, LLC, a Comcast entity that provides cable television service to the Philadelphia area; that complainants' allegations focus solely or primarily on the delivery and

alleged diversion of their cable television service; that the Telecommunications Act of 1996 generally prohibits the Commission from regulating the rates, services, facilities and equipment of cable television services; that the complainants make no allegations concerning internet services, nor have complainants purchased or obtained internet services from any Comcast entity since March 18, 2010; and that even if they had purchased or were now purchasing these services, Internet-Protocol services are not regulated by the Commission, pursuant to the Voice-Over-Internet Protocol Freedom Act. Consequently, respondent requested that the Complaint be dismissed for failure to state a claim upon which relief can be granted due to the lack of jurisdiction of the Commission. Respondent's Preliminary Objections were endorsed with a Notice to Plead, advising the complainants that they had 10 days to file a written answer to the objection or a judgment may be entered against them.

The complainants did not file a responsive pleading to either the New Matter or Preliminary Objections.

By Motion Judge Assignment Notice dated June 22, 2011, respondent's Preliminary Objections were assigned to Administrative Law Judge (ALJ) Conrad Johnson.

By Hearing Notice dated August 3, 2011, a hearing was scheduled for September 27, 2011, at 1:00 p.m. and the parties were notified that the ALJ in this case was changed from ALJ Johnson to me. The respondent's Preliminary Objections are ready for ruling.

As explained in more detail below, the Complaint will be dismissed.

DISCUSSION

The filing of Preliminary Objections is permitted under Commission regulations. 52 Pa. Code §§ 5.101(a)(1)-(6). Preliminary Objection practice before the Commission is similar to Pennsylvania civil practice respecting Preliminary Objections. *Equitable Small Transp. Intervenors v. Equitable Gas Co.*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

Commission regulations provide:

§ 5.101. Preliminary objections.

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

- (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.

52 Pa. Code § 5.101(a).

In deciding the Preliminary Objections, the Commission must determine whether, based on well-pleaded factual averments of the petitioners, recovery or relief is possible. *Dept. of Auditor General v. SERS*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003); *P.J.S. v. Pa. State Ethics Comm'n*, 669 A.2d 1105 (Pa. Cmwlth. 1996). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the Preliminary Objections. *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002). All of the non-moving party's averments in the complaint must be viewed as true for purposes of deciding the Preliminary Objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees' Retirement Board*, 690 A.2d 1312 (Pa. Cmwlth. 1997).

Therefore, the Preliminary Objections can be granted only if recovery or relief is not possible after all of the complainants' averments in the complaint are viewed as true for purposes of deciding the Preliminary Objections, using only those facts specifically admitted.

Respondent contends that the Complaint is legally insufficient because it fails to state a claim upon which the Commission may grant relief. Consequently, respondent raises Preliminary Objections to the Complaint pursuant to 52 Pa. Code § 5.101(a)(1) on the grounds that the Commission lacks subject matter jurisdiction and requests dismissal of the Complaint.

As in every case coming before this forum, the Commission must decide initially whether it has jurisdiction over the parties and the subject matter of this dispute. As a creature of legislation, the Commission possesses only the authority the state legislature has specifically granted to it in the Public Utility Code, 66 Pa. C.S. § 101, *et seq.* Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1977).

The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. PA Public Utility Comm'n*, 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). Neither silence nor agreement of the parties will confer jurisdiction where it otherwise would not exist, *Commonwealth v. VanBuskirk*, 449 A.2d 621 (Pa. Super. 1982), nor can jurisdiction be obtained by waiver or estoppel, *In Re Borough Of Valley-Hi*, 420 A.2d 15 (Pa. Commw. 1980).

Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. Cf., *Hughes v. PA State Police*, 152 Pa. Commw. 409, 619 A.2d 390 (1992), *alloc. den.*, 637 A.2d 293 (1993).

In their Complaint, the complainants stated that they want, in part, the following relief:

\$2300.00 to replace television - \$50.00 per month since May 2009
for cable returned to us for a perd [sic] locking our TV and channels.
No full cable service for God knows how long - \$50.00 off is
\$1200.00 to date and \$25,000.00 pain and suffering of letting us live
with some one taking our cable.

The requested relief constitutes a request for damages. The law in Pennsylvania is quite clear that the Commission does not have the jurisdiction to order a public utility to pay monetary damages. See, *DeFrancesco v. Western Pennsylvania Water Company*, 499 Pa. 374, 453 A.2d 595 (1982); *Elkin v. Bell of Pa.*, 491 Pa. 123, 420 A.2d 371 (1980); *Feingold v. Bell of Pa.*, 477 Pa. 1, 383 A.2d 791 (1977). As such, the Commission does not have the authority to order Comcast to make any monetary payments to the complainants.

Respondent contends that the complainants' allegations focus solely or primarily on the delivery and alleged diversion of their cable television service, and that the Telecommunications Act of 1996 generally prohibits the Commission from regulating the rates, services, facilities and equipment of cable television services. I agree. 47 U.S.C. § 543(a)(1) provides in pertinent part that "[i]n general . . . [n]o Federal agency or State may regulate the rates for the provision of cable service." Additionally, regarding the regulation of services, facilities, and equipment, 47 U.S.C. § 544(f)(1) provides in general that "[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services." Consequently, the complainants' Complaint against their cable TV provider is outside of the jurisdiction of this Commission.

Respondent further contends that the Commission does not have jurisdiction to regulate internet services. I agree. Internet services fall under the jurisdiction of the Federal Communications Commission (FCC):

Both the Pennsylvania General Assembly and Congress have indicated that the PUC's authority does not, however, extend to internet services. Specifically, the Pennsylvania General Assembly set forth in *Section 104* of the Code, *66 Pa. C.S. § 104*, that the Code's provisions "shall not apply, or be construed to apply, to commerce . . . among the several states, except insofar as the same may be permitted under the provision of the Constitution of the United States and the acts of Congress."

Further, Congress set forth in Section 151 of the Act,² 47 U.S.C. § 151 (b), that the FCC was created “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio. . . .” Although Section 152(b) of the Act, 47 U.S.C. § 152(b), specifically excludes from the FCC’s jurisdiction issues related to intrastate communication service by wire or radio; the FCC treats ISP calls as interstate for its jurisdictional purposes.”

MilleniaNet Corporation v. PUC, 2009 Pa. Commw. Unpub. LEXIS 786. Consequently, since the Commission’s jurisdiction does not extend to internet services, any complaint raised by complainants regarding internet services must be dismissed for lack of jurisdiction.

Regarding the complainants’ reference to telephone service in their Complaint, respondent explained in its Answer and New Matter that it provides wholesale local exchange telecommunications services to unregulated entities that provide non-jurisdictional Voice-Over-Internet Protocol to retail end users, that it does not provide any retail telecommunications service to end-user consumers and that it does not provide any telecommunications services to complainants. Respondent maintained that the Voice-Over-Internet Protocol service provided generally by its affiliate, Comcast IP Phone, LLC, of which it indicated that complainants are not customers, is not regulated by the Commission. I agree.

The Voice-Over-Internet Protocol Freedom Act of 2008 at 73 P.S. §2251.4 generally prohibits the Commission, as well as any department, agency, commission or political subdivision of the Commonwealth, from regulating the rates, terms and conditions of VOIP service or other internet protocol-enabled services. The statute at 73 P.S. §2251.6 provides that the Commission, as well as any department, agency, commission or political subdivision of the Commonwealth retains the authority to regulate 1) the provision and administration of 911 service; 2) telecommunications relay service; 3) universal service fund fees; 4) switched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company and; 5) rates, terms or conditions of protected services provided under tariffs subject to approval by the Commission.

² Telecommunications Act of 1996, Pub. L. No. 104-104, § 1(a), 110 Stat. 56 (February 8, 1996), which substantively amended the Communication Act of 1934, 47 U.S.C. § 151, *et seq.*

The complainants made only the following reference to telephone service in their complaint:

Phone service for one month, no voice mail connected by us, yet upstairs TV states that Caller ID is on. I shut it off, next hour back on. Reminder notices state our phone will be shut off and have no phone with Comcast.

Clearly, the complainants did not allege any facts in their Complaint that would bring this matter within any of the exceptions set forth in 73 P.S. § 2251.6. Consequently, even if the complainants were customers of Comcast's affiliate, Comcast IP Phone, LLC, and were seeking any relief related to telephone service provided by the affiliate, the Commission does not have jurisdiction over Voice-Over-Internet Protocol service.³

Section 703 of the Public Utility Code, 66 Pa. C.S.A. § 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). The public interest does not require a hearing in this case. The Commission does not have jurisdiction over cable television services, internet services, Voice-Over-Internet Protocol or the jurisdiction to award damages. Clearly, a hearing in this case would be a fruitless exercise and therefore is not necessary or in the public interest.

CONCLUSIONS OF LAW

1. The filing of a Preliminary Objection is permitted under Commission regulations. 52 Pa. Code § 5.101(a)(1)-(6).
2. Preliminary objection practice before the Commission is similar to Pennsylvania civil practice respecting Preliminary Objections. *Equitable Small Transportation*

³ I would note that the complainants currently have an outstanding Complaint against Verizon regarding telephone service at Docket No. C-2010-2174497.

Intervenors v. Equitable Gas Company, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

3. In deciding the Preliminary Objections, the Commission must determine whether, based on well-pleaded factual averments of the Petitioners, recovery or relief is possible. *Dept. of Auditor General, et al v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003); *P.J.S. v. Pa. State Ethics Comm'n*, 669 A.2d 1105 (Pa. Cmwlth. 1996). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the Preliminary Objections. *Boyd v. Ward*, 802 A.2d 705 (Pa.Cmwlth. 2002). All of the non-moving party's averments in the complaint must be viewed as true for purposes of deciding the Preliminary Objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees' Retirement Board*, 690 A.2d 1312 (Pa. Cmwlth. 1997).

4. The Commission does not have the jurisdiction to pay monetary damages to a litigant. *DeFrancesco v. Western Pennsylvania Water Company*, 499 Pa. 374, 453 A.2d 595 (1982); *Elkin v. Bell of Pa.*, 491 Pa. 123, 420 A.2d 371 (1980); *Feingold v. Bell of Pa.*, 477 Pa. 1, 383 A.2d 791 (1977).

5. The Commission has no jurisdiction over the rates, services, facilities or equipment of cable television services. 47 U.S.C. § 543(a)(1); 47 U.S.C. § 544(f)(1).

6. The Commission has no jurisdiction over internet services. *MilleniaNet Corporation v. PUC*, 2009 Pa. Commw. Unpub. LEXIS 786.

7. The Commission has no jurisdiction to regulate the rates, terms and conditions of Voice-Over-Internet Protocol service or other internet protocol-enabled services. 73 P.S. §§2251.1-2251.6.

8. The Commission may dismiss a complaint without a hearing if a hearing is not necessary in the public interest. 66 Pa.C.S.A. § 703(b).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the caption in this Complaint is amended to reflect Comcast Phone of Pennsylvania, LLC as the respondent.
2. That the Preliminary Objections filed by Comcast Phone of Pennsylvania, LLC in the case captioned Kimberly & Michael Silvestri v. Comcast Phone of Pennsylvania, LLC at Docket No. C-2011-2241959 is granted;
3. That the Complaint filed by Kimberly & Michael Silvestri against Comcast Phone of Pennsylvania, LLC at Docket No. C-2011-2241959 is dismissed for lack of jurisdiction;
4. That the hearing in this matter, scheduled to be held on Tuesday, September 27, 2011, is cancelled; and
5. That the record at Docket No. C-2011-2241959 be marked closed.

Date: August 26, 2011

Christopher P. Pell
Administrative Law Judge