

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Sherry Kalasnik	:	
	:	
v.	:	C-2016-2532227
	:	
Verizon Pennsylvania LLC	:	

**INITIAL DECISION**

Before  
Joel H. Cheskis  
Administrative Law Judge

**INTRODUCTION**

This decision grants a preliminary objection filed by a local exchange carrier and dismisses a formal complaint filed by a consumer who complained about the speed of broadband service she receives from the company. The complaint will be dismissed with prejudice because it fails to raise an issue over which the Commission has jurisdiction to consider.

**HISTORY OF THE PROCEEDING**

On February 25, 2016, Sherry Kalasnik filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against Verizon Pennsylvania LLC (Verizon), Docket Number C-2016-2532227. In her complaint, Ms. Kalasnik averred that she is having a reliability, safety or quality problem with her utility service. Ms. Kalasnik provided a detailed explanation wherein she stated, among other things, that she believes that she is not getting the high speed internet service that she pays for. She averred that she needs one megabit per second (mbps) service upload speed in order to be able to work from home. Ms. Kalasnik stated that she was receiving upload speeds of 2.35 mbps when she first received the service

from Verizon in 2013 but that she no longer receives that speed service. Ms. Kalasnik added that she has now lost her job because she does not receive the necessary upload broadband service.

On March 28, 2016, Verizon filed an answer and new matter in response to Ms. Kalasnik's complaint. In its answer, Verizon admitted or denied the various averments Ms. Kalasnik made in her complaint. In particular, Verizon stated that the complaint does not pertain to telephone service but to retail internet service. Verizon added that the service to which Ms. Kalasnik subscribes does not support the higher tier service she needs. Verizon stated that Ms. Kalasnik receives the service speed at or above the speed provided for her in her plan. In its new matter, which was accompanied by a notice to plead, Verizon averred that Ms. Kalasnik's internet service is providing her higher than the 128 kilobits per second (kbps) upload service as defined as "broadband" in Chapter 30 of the Public Utility Code. Verizon added that the Commission lacks jurisdiction over issues related to Ms. Kalasnik's retail internet service or her request for 1 mbps upload speed.

Also on March 28, 2016, Verizon filed preliminary objections in response to Ms. Kalasnik's complaint. In its preliminary objections, which were also accompanied by a notice to plead, Verizon argued that the Commission does not have jurisdiction over the provision of internet service which is an information service that is categorized as jurisdictionally interstate. Verizon added that the Commission has determined that it lacks jurisdiction over disputes concerning billing and other services provided in connection with interstate services. Verizon argued that a party may file a preliminary objection to dismiss a pleading for legal insufficiency and that a complaint may be dismissed without a hearing if a hearing is not necessary in the public interest. Verizon concluded that, as the Commission lacks authority over Ms. Kalasnik's demand, a hearing would be a fruitless exercise and a waste of resources. Verizon, therefore, asked that the complaint be dismissed or denied in its entirety.

Ms. Kalasnik's answer to Verizon's preliminary objections was due no later than April 11, 2016. 52 Pa.Code §§ 5.101(f)(1), 1.12(a), 1.56(a)(1) and (b). Ms. Kalasnik's answer to Verizon's new matter was due no later than April 22, 2016. 52 Pa.Code §§ 5.63(a), 1.12(a),

1.56(a)(1) and (b). Ms. Kalasnik did not file an answer to either Verizon's preliminary objections or its new matter.

On May 16, 2016, the Commission issued a Motion Judge Assignment Notice indicating that I am responsible to resolve any issues which may arise during the preliminary phase of this proceeding. The record in this proceeding closed on May 16, 2016 when the Motion Judge Assignment Notice was issued.

Verizon's preliminary objections are now ready for disposition. For the reasons discussed below, Verizon's preliminary objections will be granted and Ms. Kalasnik's complaint will be dismissed.

#### FINDINGS OF FACT

1. The Complainant in this case is Sherry Kalasnik.
2. The Respondent in this case is Verizon Pennsylvania LLC.
3. The service address is 963 State Route 49 West, Ulysses, PA.
4. On February 25, 2016, Ms. Kalasnik filed a formal complaint against Verizon.
5. On March 28, 2016, Verizon filed an answer to Ms. Kalasnik's formal complaint.
6. On March 28, 2016, Verizon filed preliminary objections.
7. Ms. Kalasnik did not file an answer to Verizon's preliminary objections.

## DISCUSSION

Section 5.101 of the Commission's Rules of Administrative Practice and Procedure provides for the filing of preliminary objections. 52 Pa.Code § 5.101. Commission preliminary objection practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) (Equitable).

Section 5.101(a) provides:

- (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.
  - (7) Standing of a party to participate in a proceeding.

52 Pa.Code § 5.101(a)(1)-(7).

For purposes of disposing of preliminary objections, the Commission must accept as true all well pleaded, material facts of the nonmoving party, as well as every reasonable inference from those facts. County of Allegheny v. Commonwealth of Pennsylvania, 490 A.2d 402 (Pa. 1985); Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa., 551

A.2d 602 (Pa. Cmwlth. 1988). The Commission must view the complaint in this case in the light most favorable to Ms. Kalasnik and should dismiss the complaint only if it appears that Ms. Kalasnik would not be entitled to relief under any circumstances as a matter of law. Equitable, supra; see also, Interstate Traveler Services, Inc. v. Commonwealth, Department of Environmental Resources, 406 A.2d 1020 (Pa. 1979).

Furthermore, administrative agencies, like the Commission, are required to provide due process to the parties appearing before them. This requirement is satisfied when the parties are afforded notice and the opportunity to appear and be heard. Schneider v. Pa. Pub. Util. Comm'n., 479 A.2d 10 (1984). Where there are no disputed questions of fact and the issue to be decided is purely one of law or policy, a case may be disposed of without resort to an evidentiary hearing. Dee-Dee Cab, Inc. v. Pa. Pub. Util. Comm'n., 817 A.2d 593 (Pa. Cmwlth 2003). The Commission may dismiss a complaint without a hearing if a hearing is not necessary or in the public interest. 66 Pa.C.S. § 703(b); 52 Pa.Code § 5.21(d).

In this case, Verizon argued that Ms. Kalasnik's complaint should be dismissed because it is legally insufficient. A preliminary objection based on legal insufficiency is referred to as a demurrer. Preliminary objections in the form of a demurrer will be sustained only in cases which are free and clear of doubt and where dismissal is clearly warranted by the record. Community Life Support Systems, Inc., et al. v. Commonwealth of Pennsylvania, 689 A.2d 1014, 1017 (Pa. Cmwlth. 1997). Any doubt must be resolved in favor of overruling a demurrer. Id.; *see also*, Hoffman v. Misericordia Hospital of Philadelphia, 439 Pa. 501, 267 A.2d 867 (1970) ("the question presented by the demurrer is whether on the facts averred, the law states with certainty that no recovery is possible").

When accepting as true every well plead material fact averred by Ms. Kalasnik, as well as every reasonable inference from those facts, and viewing the complaint in the light most favorable to Ms. Kalasnik, it appears that Ms. Kalasnik is unable to receive broadband internet service from Verizon at upload speeds of 1 mbps or higher. Ms. Kalasnik was able to receive an upload speed of 2.35 mbps but is no longer able to receive that speed.

In support of its preliminary objection, Verizon notes that the Commission does not have jurisdiction over the provision of internet service, including DSL service. Verizon further noted that the Commission, therefore, lacks jurisdiction over Ms. Kalasnik's demand that the company provide her an internet service with at least 1 mbps upload speed.

The subject matter of this complaint is governed by Chapter 30 of the Public Utility Code. As a nonrural local exchange carrier, Verizon was required to provide broadband availability to 100% of its total retail access lines in its distribution network by December 31, 2015. 66 Pa.C.S. § 3014(b)(3)(ii)(A). Chapter 30 defines broadband as “a communication channel using any technology and having a bandwidth equal to or greater than 1.544 mbps in downstream direction and equal to or greater than 128 kbps in the upstream direction.” 66 Pa.C.S. § 3012. As a result, even when accepting as true Ms. Kalasnik's averment that Verizon is not providing her with 1 mbps upload service, as well as every reasonable inference from that averment, and viewing the complaint in the light most favorable to Ms. Kalasnik, it is clear and free from doubt that Ms. Kalasnik is not entitled to any relief under the circumstances because Chapter 30 only requires Verizon to provide her with 128 kbps upload service, not the 1 mpbs upload service she requests. Furthermore, as there is no disputed question of fact and the issue is one purely of law, a hearing is not necessary.

As such, even when accepting as true all well pleaded material facts averred by Ms. Kalasnik, as well as every reasonable inference from those facts, and viewing the complaint in the light most favorable to Ms. Kalasnik, it appears that Ms. Kalasnik would not be entitled to relief under any circumstances as a matter of law. Verizon's preliminary objections will be granted and Ms. Kalasnik's complaint will be dismissed.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. § 701.

2. Commission preliminary objection practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections. Equitable Small Transportation Intervenor v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

3. Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. 52 Pa.Code § 5.101(a)(1)-(7).

4. Preliminary objections must state specifically the legal and factual grounds relied upon and be limited to the following: (a) lack of Commission jurisdiction or improper service of the pleading initiating the proceeding; (b) failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter; (c) insufficient specificity of a pleading; (d) legal insufficiency of a pleading; (e) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action; (f) pendency of a prior proceeding or agreement for alternative dispute resolution; or (g) Standing of a party to participate in a proceeding. 52 Pa.Code § 5.101(a)(1)-(7).

5. For purposes of disposing of preliminary objections, the Commission must accept as true all well pleaded, material facts of the nonmoving party, as well as every reasonable inference from those facts. County of Allegheny v. Commonwealth of Pennsylvania, 490 A.2d 402 (Pa. 1985); Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa., 551 A.2d 602 (Pa. Cmwlth. 1988).

6. For purposes of disposing of preliminary objections, the Commission must view the complaint in this case in the light most favorable to the complainant and should dismiss the complaint only if it appears that the complainant would not be entitled to relief under any circumstances as a matter of law. Interstate Traveler Services, Inc. v. Commonwealth, Department of Environmental Resources, 406 A.2d 1020 (Pa. 1979).

7. A preliminary objection based on legal insufficiency is referred to as a demurrer and will be sustained only in cases which are free and clear of doubt and where dismissal is clearly warranted by the record. Community Life Support Systems, Inc., et al. v. Commonwealth of Pennsylvania, 689 A.2d 1014, 1017 (Pa. Cmwlth. 1997).

8. Any doubt when resolving a preliminary objection based on legal insufficiency must be resolved in favor of overruling a demurrer. Hoffman v. Misericordia Hospital of Philadelphia, 439 Pa. 501, 267 A.2d 867 (1970).

9. Due process is provided when the parties are afforded notice and the opportunity to appear and be heard. Schneider v. Pa. Pub. Util. Comm'n., 479 A.2d 10 (1984).

10. Where there are no disputed questions of fact and the issue to be decided is purely one of law or policy, a case may be disposed of without resort to an evidentiary hearing. Dee-Dee Cab, Inc. v. Pa. Pub. Util. Comm'n., 817 A.2d 593 (Pa. Cmwlth 2003).

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

12. Nonrural local exchange carriers are required to provide broadband availability to 100% of its total retail access lines in its distribution network by December 31, 2015. 66 Pa.C.S. § 3014(b)(3)(ii)(A).

13. Broadband is “a communication channel using any technology and having a bandwidth equal to or greater than 1.544 mbps in downstream direction and equal to or greater than 128 kbps in the upstream direction.” 66 Pa.C.S. § 3012.

14. Verizon’s preliminary objections should be granted because Ms. Kalasnik has failed to state a claim over which the Commission has jurisdiction.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections filed by Verizon Pennsylvania LLC March 28, 2016 at Docket Number C-2016-2532227 are hereby granted.
2. That the formal complaint filed by Sherry Kalasnik against Verizon Pennsylvania LLC at Docket Number C-2016-2532227 dated February 25, 2016 is hereby dismissed.
3. That this matter be marked closed.

Date: May 20, 2016

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/s/  
Joel H. Cheskis  
Administrative Law Judge