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Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

JUL 09 2003

Ernie Wheeland,

Complainant

OFFICE OF SPECIAL ASSISTANTS

v.

Docket No. C-20015807

ALLTEL Pennsylvania, Inc. and
Verizon North Inc.,

Respondents

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S OFFICE

EXCEPTIONS
OF
ALLTEL PENNSYLVANIA, INC.

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
A. Reversal of the Initial Decision is Warranted	1
B. Background of the Case	3
II. EXCEPTIONS	5
A. ALJ Lovenwirth Erred in His Recitation of the History of the Proceedings	5
B. ALJ Lovenwirth Erred in His Recitation of the Findings of Fact	8
C. ALJ Lovenwirth Committed an Error of Law by Relying on the Cited FCC Regulations and <u>Jordan</u> Decision to Sustain Mr. Wheeland's Complaint ..	11
1. The Cited Federal Regulations at 47 C.F.R. Sections 68.3 and 68.105 Support the Reversal of ALJ Lovenwirth's Initial Decision	12
2. This Commission's <u>Jordan</u> Decision Supports the Reversal of ALJ Lovenwirth's Initial Decision ..	14
D. ALJ Lovenwirth Committed an Error of Law by Relying on 66 Pa. C.S.A. Section 1502 to Sustain Mr. Wheeland's Complaint	17
III. CONCLUSION	21

I. INTRODUCTION

A. Reversal of the Initial Decision is Warranted

Should the Initial Decision of Administrative Law Judge Richard M. Lovenwirth ("ALJ Lovenwirth") be permitted to stand in this proceeding, his legacy will be to have, in one of his final decisions,¹ turned one of the most common and accepted practices of the telephone industry and other utility groups completely on its head.

The assessment of Mr. Wheeland's claim, as stated in the Reply Brief ("R.B.") of ALLTEL Pennsylvania, Inc. ("ALLTEL"), is worth repeating:

A. Complainant's Argument Simply Defies Logic

Complainant contends that "there is no basis either in the Public Utility Code, this Commission's regulation, this Commission's decisions or ALLTEL's tariff which would preclude ALLTEL from providing service to a point selected by Mr. Wheeland." Complainant's Main Brief at 33.

Beyond the copious examples already provided by ALLTEL to contradict Complainant's claim, such a contention flies in the face of logic. ALLTEL shudders to think of the chaos that would ensue within the industry and throughout the Commonwealth if Complainant, and every applicant for telephone service, were permitted to arbitrarily select any spot as the point of demarcation. Were Bill Gates or Michael Jordan or Complainant's counsel to purchase, for example, a 2,000 acre parcel near the convergence of Lycoming, Union, Centre and Clinton counties, said landowner might find himself with property canvassing the service territories of five different local telephone companies.² Pursuant to Complainant's contention, the eccentric

¹The Initial Decision of ALJ Lovenwirth in this matter was issued on June 6, 2003. ALJ Lovenwirth retired from the Pennsylvania Public Utility Commission on June 27, 2003.

²ALLTEL Pennsylvania, Inc, service territory described at Tariff-Telephone PA P.U.C. No. 1; Buffalo Valley Telephone Company, service territory described at Local Exchange Tariff PA P.U.C. No. 7; Pennsylvania Telephone Company service territory described at Tariff Telephone PA P.U.C. No. 2; TDS, Telecom, Sugar Valley Telephone Company, service territory described at Tariff Telephone PA P.U.C. No. 3, and Verizon Pennsylvania Inc., service territory described at Tariffs PA P.U.C. Nos. 1 and 180A.

(continued...)

landowner would have the right to run cable to a pole in Company A's territory and demand telephone service for three months, then erect a pole on his property within Company B's territory and demand telephone service for three months, then erect a pole on his property within Company C's territory and demand telephone service for three months, then erect a pole on his property within Company D's territory and demand telephone service for three months, then erect a pole on his property within Company E's territory and demand telephone service, then go back to Company A, etc. Or, ALLTEL submits, would it instead be more practical and reasonable to follow an established standard industry practice whereby the point of demarcation establishing the identity of the serving telephone company will be determined by the location of the physical residence or business to which telephone service is ultimately to be provided? Pursuant to Section 1501 of the Public Utility Code, ALLTEL, as a certificated public utility, is charged with providing not only safe and reasonable service, but efficient service as well. 66 Pa. C.S. § 1501. Indeed, if Complainant were to select the point of demarcation for service to his residence, would Complainant thereby escape the grasp of this Commission's Chapter 64 regulations? If Complainant were correct, the Company would have no grounds to suspend Complainant's service for nonpayment, where Section 64.61 outlining the authorized suspension of service begins, "Telephone service to a dwelling may be suspended. . ." 52 Pa. Code §64.61(emphasis added). Complainant's belief that ALLTEL is obligated to serve him to any arbitrary point on his property is misguided and selfish, contrary to the Commission's regulations, the public interest as well as the interests of ALLTEL and its existing ratepayers and must be rejected (footnote omitted).

ALLTEL R.B. at 37-39.

Incredibly, ALJ Lovenwirth's Initial Decision has brought this incomprehensible scenario one step closer to reality. Despite ALLTEL's standard procedure for designating the Network Interface Device ("NID") on a residential customer's dwelling as the "point of demarcation" (the location where the telephone company's facilities meet those of the customer), the Initial Decision of ALJ Lovenwirth proclaims that ALLTEL's standard procedure may be ignored and that

²(...continued)

All such tariffs being duly on file with this Commission and to which the presiding officer and Commission may take official notice.

Mr. Wheeland may unilaterally select any object at any point on his property to be designated as the point of demarcation. The record evidences that the intention of Mr. Wheeland is to then connect his own service line from his selected point of demarcation to his home where the telephone equipment will be located and service will be used. The ultimate result is that ALLTEL's service would be provided to Mr. Wheeland's home even though Mr. Wheeland's home is located in the service territory of Verizon North Inc. ("Verizon-N").

The Initial Decision is fraught with error and must be reversed. Its "History of the Proceeding" is skewed, its "Findings of Fact" are, in part, inaccurate and the legal reasoning in the "Discussion" is misplaced. ALJ Lovenwirth's Initial Decision is not supported by the evidence of record presented in this proceeding, the Commission's case law or by the very Federal Communications Commission ("FCC") regulations that the Initial Decision portends to rely. Accordingly, the Initial Decision of ALJ Lovenwirth in this proceeding must be reversed.

B. Background of the Case

In this case, the Complainant, Ernie Wheeland ("Mr. Wheeland"), owns a parcel of property that spans the certificated service territories of both ALLTEL and Verizon-N. In April 2000, Mr. Wheeland started construction of a home on his property. This home was built on that portion of his property that is located within Verizon-N's certificated service territory. The record reflects that prior to selecting the building site for his home, Mr. Wheeland made no effort to determine what telephone company was certificated to provide service to his home. In fact, Mr. Wheeland first inquired about telephone service to his home in October 2000, six months after construction had begun. T.54; ALLTEL M.B. at 7. Only then did Mr.

Wheeland learn that his home was not located within ALLTEL's certificated service territory.

Mr. Wheeland persisted with his request that ALLTEL provide the service to his home due to his belief that ALLTEL's service would be more reliable and his understanding that he would not be required to bear as much of the installation cost for ALLTEL's service in comparison to if service were provided by Verizon-N. Mr. Wheeland was advised by ALLTEL that it could not provide service to his home because he had constructed his home within Verizon-N's service territory. Since it is ALLTEL's standard practice to designate the location of the NID on the side of the home as the demarcation point, he concocted the scheme to request that ALLTEL provide service to a shed or an electric utility pole located on his property, but within ALLTEL's service territory, designating that instead as the demarcation point.

Mr. Wheeland further stated that he would undertake the placement and responsibility of the service line from his selected demarcation point to his home. In fact, Verizon-N had already placed cable from the electric pole to Mr. Wheeland's home at no charge to Mr. Wheeland. Again, the ultimate result would be that ALLTEL's telephone service would be provided to Mr. Wheeland's home located within Verizon-N's certificated service territory. Such service would be provided without regard to ALLTEL's standard practice, without agreement from ALLTEL to deviate from its standard practice and without regard for the excessive cost that would be incurred by ALLTEL to provide service to this one individual.

II. EXCEPTIONS

A. ALJ Lovenwirth Erred in His Recitation of the History of the Proceedings

ALLTEL excepts, in part, to the "History of the Proceedings" portion of ALJ Lovenwirth's Initial Decision. The Initial Decision portrays Complainant's requested relief and Complainant's cost for ALLTEL service in such a way as to minimize the absurdity of ALJ Lovenwirth's ultimate disposition.

First, ALJ Lovenwirth erroneously labels Mr. Wheeland's request for telephone service as a "request for telephone service at his property." I.D. at 1. ALJ Lovenwirth then misstates the amendment to Mr. Wheeland's complaint as simply a request "for an Order directing ALLTEL to provide service." *Id.* There exists a critical distinction between couching Mr. Wheeland's complaint as simply a "request for service", as is done in the Initial Decision, or recognizing the true request for ALLTEL to provide telephone service "to Complainant's new home." Attachment A to Complainant's formal complaint; ALLTEL M.B. at 1. This issue was thoroughly briefed by ALLTEL. ALLTEL M.B. at 16-20; ALLTEL R.B. at 10-11. Mr. Wheeland's stated request for relief was for the Commission to "order ALLTEL to alter their service territory slightly to accommodate my request for services at my new home." Attachment B to Complainant's formal complaint (emphasis added). When Complainant's formal complaint was orally amended at the prehearing conference of December 11, 2001, Complainant's request for relief was changed only to reflect that Complainant desired ALLTEL's service to his home whether or not the exchange boundary was ultimately modified. See, ALLTEL M.B. at 4. Moreover, the record reflects that from whatever point ALLTEL were to end its

facilities, Mr. Wheeland intended to continue with his own service line to his home wherein telephone service would be provided. In other words, Mr. Wheeland's request for ALLTEL to run telephone facilities to a shed, or a pole was not so that Mr. Wheeland could use a telephone in his shed or at the pole, but rather to allow Mr. Wheeland to circumvent ALLTEL's inability to service his home in Verizon -N's service territory. Mr. Wheeland never disputed that his ultimate goal was to secure telephone service to his home. To erroneously suggest that Mr. Wheeland simply sought telephone service to his property and that his shed would suffice as the point for service, paints a picture that makes ALJ Lovenwirth's ultimate decision to force ALLTEL to provide service to a demarcation point of Mr. Wheeland's choosing deceptively palatable.

Second, ALJ Lovenwirth's statement that ALLTEL's representative advised Complainant that if ALLTEL provided service to Complainant, the "cost to Complainant [sic] for service would be about \$490.00" is misleading. I.D. at 1. As ALLTEL explained throughout this proceeding, the validity of that estimate was dependent upon the location of Complainant's residence ultimately being within ALLTEL's certificated service territory which, due to the location and relative remoteness of the Complainant's property, was not evident at first glance. It was subsequently determined by ALLTEL that Complainant's home was not located within ALLTEL's service territory and that the \$490.00 estimate was no longer valid. In his Initial Decision, ALJ Lovenwirth nevertheless erroneously relies on this two-year-old estimate of the cost to Complainant for ALLTEL to provide telephone service to Complainant's home to direct in his Initial Decision that ALLTEL, "upon payment of the sum of \$490.00 by Complainant, furnish telecommunications service to

Complainant at any point in its service territory to any building or legal unit of real property." I.D. at 12.

Beyond ALJ Lovenwirth's error directing ALLTEL to provide telephone service at all, his directive that ALLTEL accept the original errant estimate of \$490.00 as payment to provide telephone service to Complainant anywhere on his 95-acre parcel of property within ALLTEL's service territory is an error of law that in and of itself requires reversal of this Initial Decision. The Initial Decision fails to consider that the original cost estimate was based on the specific distance measurement from ALLTEL's existing facilities to Complainant's home. For ALLTEL to be directed to accept the same payment for service to be initiated even to a point on Complainant's property that has not been identified and is potentially far removed from the location of Complainant's home to which the original estimate applied is error. There is simply no relation between the \$490.00 directed by ALJ Lovenwirth to be accepted by ALLTEL from Mr. Wheeland and the open-ended, yet-to-be-determined demarcation point. Moreover, as further error, the premature quote of \$490.00 relied upon by ALJ Lovenwirth was specifically quoted for the provision of residential service. Clearly, the provision of telephone service "at any point" goes beyond the provision of residential service. Indeed, as ALLTEL witness Mr. Stackhouse testified, it is not at all certain - and Mr. Wheeland presented no evidence to suggest - that the \$490.00 amount would apply "were the service classified as business service. T. 111." ALLTEL M.B. at 20. The crux of Mr. Wheeland's complaint was the provision of residential service to his home, and there is no evidence of record to reflect the cost to ALLTEL or to Complainant for the installation of service to any other point.

B. ALJ Lovenwirth Erred in His Recitation of the Findings of Fact

ALLTEL excepts, in part, to the "Findings of Fact" portion of ALJ Lovenwirth's Initial Decision. The majority³ of these "Findings of Fact" were taken verbatim from the Main Brief of Verizon-N, without any regard to ALLTEL's Counter Proposed Findings of Fact set forth in its own Reply Brief which exposed the errors of many of the Verizon-N proposals now adopted by ALJ Lovenwirth. ALLTEL presented its Counter Proposed Findings of Fact in response to those of Verizon-N in its Reply Brief in part, as follows:

4. Currently, Mr. Wheeland does not have phone service to his residence. NT. 52.

RESPONSE: This finding applies specifically to wireline phone service. Mr. Wheeland testified that he currently does have wireless service at his residence.

17. Mr. Stackhouse is responsible for the layout and design of all new telephone plants and the rebuilding or relocation of existing facilities. Mr. Stackhouse also reviews all new service requests that may require construction. ALLTEL St. 1 at 1.

RESPONSE: Mr. Stackhouse's responsibilities are within ALLTEL's Muncy service area.

26. Mr. Stackhouse estimated the cost of providing service to a location near the PPL electric pole at approximately \$490.00. NT 92.

RESPONSE: This finding states the cost to applicant pursuant to ALLTEL's tariff provisions and not the estimated cost of providing service.

29. The cost to ALLTEL to provide service would be the same if it were to provide service to the buildings located within

³Findings of Fact 1 through 47 in the Initial Decision at pp. 2-8 were taken verbatim from the Main Brief of Verizon-N at Appendix B, but for ALJ Lovenwirth's deletion of Proposed Finding of Fact 37 which stated, "The company is not under an obligation to provide service to a pole if the NID is on that pole."

ALLTEL's service territory or to the PPL pole located in ALLTEL's service territory. N.T.101.

RESPONSE: The cited testimony references service to a pole, rather than service to buildings.

32. Though it may be possible for ALLTEL to provide service to the PPL pole, ALLTEL is not obligated to do so. ALLTEL St. 1 at 9-10.

RESPONSE: The testimony set forth that it was technically possible to provide such service.

33. Paul Bowers is employed by ALLTEL as an Area Manger of Operations. Mr. Bowers manages the operations portion of the area including installation and repair, cable, network, and buildings and grounds. ALLTEL St. 2 at 1.

RESPONSE: Mr. Bowers' responsibility is the Muncy and Kittanning service areas.

36. ALLTEL is obligated to provide service to a customer when the point of service is located within ALLTEL's service territory. NT 115.

RESPONSE: This finding of fact should be stricken based on redirect examination of the witness at T.123.

40. A group of customers located along the boundary of ALLTEL's Muncy exchange and Verizon North's Loyalsock-Mail exchange (High View Terrace) are being provided service by ALLTEL under a grandfather provision, with the understanding that if any of the existing customers change, the incoming customers will be provided service by Verizon North. ALLTEL St. 2 at 3-4.

RESPONSE: The reference to High View Terrace is incorrect.

See ALLTEL R.B. at 3-4.

Additionally, ALLTEL further excepts, as follows:

Finding of Fact No. 7 should note that Jerry VanBuskirk is referenced in his capacity as an employee of Verizon-N.

Finding of Fact No. 12 should reflect that the reference to "cost" more specifically refers to the cost that would be incurred by Mr. Wheeland, not the cost that would be incurred by the Company.

Finding of Fact No. 14 should note that the reference to Mr. Wheeland's willingness to assume cost and responsibility refers to those additional facilities that would, under the stated hypothetical, run from the pole to the home and be deemed "customer-owned" facilities.

Finding of Fact No. 15 is irrelevant and should be stricken.

Finding of Fact No. 19 is incorrect as stated. The evidence of record indicates that the facilities in question were in part supplied by Verizon-N in this instance.

Finding of Fact No. 37 unnecessarily repeats Finding of Fact 31 and should be stricken.

ALJ Lovenwirth's failure to incorporate ALLTEL's responses to Verizon-N's proposed Findings of Fact exemplifies ALJ Lovenwirth's lack of review and consideration of the positions presented by ALLTEL in this case. For example, despite much evidence and discussion presented on the record and in its Briefs regarding ALLTEL's provision of telephone service to the High View Terrace subdivision, ALJ Lovenwirth did little more than copy Finding of Fact No. 40 of Verizon-N, which incorrectly referred to such service as "grandfathered." See ALLTEL MB at 33. ALLTEL concedes that ALJ Lovenwirth correctly recognized ALLTEL's standard procedure in his Findings of Fact 18 and 20 wherein he stated that "[a] demarcation point is the point at which the customer's wiring meets that of the telephone company's. NT 69"; and "[t]he network interface device ("NID") is a

piece of equipment, a box, which houses the demarcation point, usually located on the house. NT 80.”

C. ALJ Lovenwirth Committed an Error of Law by Relying on the Cited FCC Regulations and *Jordan* Decision to Sustain Mr. Wheeland's Complaint

Contrary to law and the evidence of record, ALJ Lovenwirth ruled that ALLTEL must ignore its own standard practice in order to satisfy the whim of a single customer. As legal support for his erroneous conclusion that ALLTEL should provide service to Mr. Wheeland at any point on his property of his choosing within ALLTEL's service territory, ALJ Lovenwirth supports his legal conclusion by adopting an excerpt taken from the position of Verizon-N, an additional Respondent in this matter. There, Verizon-N cited to FCC regulatory authority and a prior Commission decision to conclude that "...for the reasons cited by the Commission in the *Jordan* case, Verizon North submits that Mr. Wheeland has a choice of where his demarcation point is to be located, and, as such, can choose to receive telephone service from either company..." Initial Decision at 11. Additionally, ALJ Lovenwirth holds that ALLTEL's provision of telephone service to its Amish customers required the company to "do the same for Complainant." *Id.* Both points relied upon by ALJ Lovenwirth to sustain Complainant's complaint herein are fatally flawed. Consequently, the entirety of ALJ Lovenwirth's Discussion is a gross error of law, a misreading of the cited federal statutory authority, a misinterpretation of cited Commission precedent and a violation of ALLTEL's constitutional right to due process. As such, ALJ Lovenwirth's Initial Decision must be reversed.

1. **The Cited Federal Regulations at 47 C.F.R. Sections 68.3 and 68.105 Support the Reversal of ALJ Lovenwirth's Initial Decision**

ALJ Lovenwirth committed an error of law by relying on the FCC regulations cited in his Initial Decision to support his holding that Mr. Wheeland is free to unilaterally choose any location within his property as the demarcation point between the telephone company's facilities and the prospective customer's facilities. In his Initial Decision, ALJ Lovenwirth concludes that a review of 47 C.F.R. Section 68.105 (b) and (c), which discuss minimum point of entry and demarcation points for single unit installations, respectively, in concert with a review of Section 68.3, which defines "premises," supports Mr. Wheeland's right to unilaterally select the location of the demarcation point and, as a result, the telephone company from which Mr. Wheeland will receive service to his home. In fact, the FCC regulations relied upon by ALJ Lovenwirth indicate the exact opposite.

ALLTEL excepts herein to ALJ Lovenwirth's incomplete and, therefore, inaccurate interpretation of the cited FCC regulations. Specifically, ALJ Lovenwirth failed to grasp that, while the location of the demarcation point or minimum point of entry may vary from a point based on the telephone provider's standard practice to some deviation therefrom, it is the provider of the wireline telecommunications services (i.e. the telephone company) and not the customer or perspective customer, that decides the location of the demarcation point.

47 C.F.R. Section 68.105(b) reads:

- (b) Minimum point of entry. The "minimum point of entry" (MPOE) as used herein shall be either the closest practicable point to where wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings. **The reasonable and nondiscriminatory standard operating practices of the provider of wireline**

telecommunications services shall determine which shall apply. The provider of wireline telecommunications services is not precluded from establishing reasonable classifications of multiunit premises for purposes of determining which shall apply. Multiunit premises include, but are not limited to, residential, commercial, shopping center and campus situations.

I.D. at 9 (emphasis added).

Moreover, ALJ Lovenwirth cites 47 C.F.R. Section 68.3 as follows:

For purposes of Part 47 of the C.F.R., premises is defined as "generally a dwelling unit, other building or a legal unit of real property..." 47 C.F.R. Section 68.3 (2001)(emphasis added).

Id.

ALJ Lovenwirth's reliance on an incomplete quote causes him to reach an inaccurate and inappropriate conclusion. The unabridged definition of "premises" as set forth at 47 C.F.R. Section 68.3 is as follows:

Premises. As used herein, generally a dwelling unit, other building or a legal unit of real property such as a lot on which a dwelling unit is located, **as determined by the provider of telecommunications services reasonable and nondiscriminatory standard operating practices.**"

47 C.F.R. Section 68.3 (emphasis added).

ALJ Lovenwirth committed a clear error of law when he concluded, based on a misreading of the cited FCC Regulations, that the location of the demarcation point could be determined by Mr. Wheeland, when a more thorough reading of the relevant sections of the cited FCC Regulations expressly provide that such determination is left solely to the discretion of the telephone company. As such, based on this error of law, ALJ Lovenwirth's Initial Decision must be reversed.

2. This Commission's Jordan Decision Supports the Reversal of ALJ Lovenwirth's Initial Decision

ALJ Lovenwirth committed further error of law by relying on this Commission's decision in Jordan v. The United Telephone Company of Pennsylvania, Docket No. C-00946430, 1995 Pa. PUC LEXIS 158, for the proposition that Mr. Wheeland was free to unilaterally choose any location within his property as the demarcation point between the telephone company facilities and the customer's facilities. ALLTEL is baffled by ALJ Lovenwirth's reliance upon this Commission's decision in Jordan to support his finding in favor of Mr. Wheeland when, consistent with the discussion of the FCC Regulations above, the Jordan case expressly provides that the location of the demarcation point will be determined by the standard operating practice of the telephone company and not by the whim of the customer.

According to ALJ Lovenwirth, "for the reasons cited in the Jordan case ... Mr. Wheeland has a choice of where his demarcation point is to be located and, as such, can choose to receive telephone service from either company, as part of his property lies within both service territories." As ALLTEL stated in its Reply Brief:

Interestingly, in this case cited by Complainant, the Complainant's formal complaint alleging discrimination against the utility for its determination of the placement of the Network Interface Device or NID was denied. In Jordan, the Commission relied on the telephone companies' standard operating practices to justify the utility's NID placement. Complainant's reliance on Jordan for the proposition that the NID was placed other than on a house is misguided. This was a mobile home park and was entirely within the service territory of a single incumbent local exchange carrier. The case is factually quite dissimilar. However, the salient point in Jordan is the Commission's reliance on the Federal Communication Commission's Inside Wire Order and its reference to the FCC's regulations. The Commission in Jordan held, in part:

Assuring that a local exchange company negates in only reasonable nondiscriminatory standard operating practices comports with the FCC's regulations implementing the Inside Wire Order.

47 C.F.R. § 68.3 defines the "demarcation point" for the network communications services a local exchange carrier provides as follows:

Demarcation point: The point of demarcation and/or interconnection between [*18] telephone company communications facilities and terminal equipment, protective apparatus or wiring at a subscribers' premises. Carrier-installed facilities at, or constituting, the demarcation point, shall consist of wire or a jack conforming to subpart F of part 68 of the Commission's rules. "Premises" as used herein generally means a dwelling unit, other building or a legal unit of real property such as a lot on which a dwelling unit is located, **as determined by the telephone company's reasonable and nondiscriminatory standard operating practices.** The "minimum point of entry" as used herein shall be either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings. **The telephone company's reasonable and nondiscriminatory standard operating practices shall determined which shall apply.** The telephone company is not precluded from establishing reasonable classifications of multiunit premises for purposes of determining which shall apply. Multiunit premises include, but are not limited to, residential, commercial, shopping center and campus situations....

* * * *

(b) [*19] Multiunit installations. (1) In Multiunit premises existing as of August

13, 1990, the demarcation point shall be determined in accordance with the local carrier's reasonable and nondiscriminatory standard operating practices. Provided, however, that where there are multiple demarcation points within the multiunit premises, a demarcation point for a customer shall not be further inside a customer's premises than a point twelve inches from where the wiring enters the customer's premises.

Thus, the reasonable and nondiscriminatory standard operating practices of the local exchange carrier determine the limits of the customer's premises, where the demarcation point shall be located on multi-unit premises existing as of August 13, 1990 n4 and where the minimum point of entry shall be located for entry upon a multi-unit premises.

Jordan at ____ (Lexis)(Emphasis added).

It is quite evident that the FCC's regulations and the Commission's ruling in Jordan support ALLTEL's position that it is ALLTEL and not Complainant that has the right to determine where the NID will be located.

ALLTEL R.B. at 20-21.

ALJ Lovenwirth's reliance on the Jordan case is misplaced. As further stated in Jordan:

A long standing principal of public utility regulation holds that management of the utility retains the prerogative of determining the nature, size or extent of its facilities as will provide adequate and reasonable service in the most efficient and economical manner. Re Philadelphia Suburban Water Company [*34], 41 Pa. PUC 174 (1963). Accordingly, it is not within the province of the Commission to interfere with the management of a utility, unless an abuse of discretion or arbitrary action on behalf of the utility has been shown, Metropolitan Edison Company v. Pa. PUC, 62 Pa. Commonwealth Ct.460, 437 A.2d 76 (1981).

Jordan at ____ (LEXIS).

The evidence of record in this case clearly substantiated ALLTEL's standard practice for the placement of its demarcation point when went unchallenged by Mr. Wheeland:

Q. Mr. Stackhouse, with regard to your direct testimony on page 3, wherein, you stated that a network interface device or NID is normally located on the house, did your qualification of the word normally refer to the exception that you are familiar with that the Amish do not have service to the house?

A. Yes, it did.

Q. Are you aware of circumstances where the company does, in fact – other than those referenced by Mr. Stack house with regard to the Amish, are you aware of any other circumstances where ALLTEL places the demarcation at a location other than the customer's house?

A. No.

Q. For Clarification, I wanted to ask, is it ALLTEL's position that ALLTEL has an obligation to provide service to a pole in ALLTEL's service territory if the NID is on that pole even where the residence being served is located outside of ALLTEL's service territory?

A. It is not. We would not do that.

As in Jordan, the telephone company's standard practice must prevail. The Initial Decision of ALJ Lovenwirth has misinterpreted the Jordan case and must be reversed.

D. ALJ Lovenwirth Committed an Error of Law by Relying on 66 Pa.C.S.A. Section 1502 to Sustain Mr. Wheeland's Complaint

ALJ Lovenwirth committed an error of law by holding that, given the provision of service to its Amish customers, it would be discriminatory for and in violation of 66 Pa. C.S.A. Section 1502 for ALLTEL not to "do the same for Complainant."

Section 1502 of the Public Utility Code reads as follows:

No public utility shall, as to service, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public shall establish or maintain any unreasonable difference as to service, either as between localities or as between classes of service, but this section does not prohibit the establishment of reasonable classifications of service.

Given that the circumstances are distinguishable, no unreasonable prejudice or disadvantage could be proven to exist. In fact, Mr. Wheeland presented no such evidence. Moreover, ALJ Lovenwirth erred when he held that ALLTEL's failure to provide the requested service would be "discriminatory." The true test, under 66 Pa.C.S.A. §1502 is whether an action is "unreasonably discriminatory" (emphasis added).

As set forth in ALLTEL's Reply Brief:

Complainant contends that because ALLTEL has provided service to its Amish customers at a point of demarcation other than the Amish customer's home, that the failure to similarly provide for Complainant is tantamount to unreasonable discrimination. Complainant's M.B. at 31-33. Again, this contention must be summarily rejected.

At the outset, ALLTEL vehemently objects to Complainant's contention that ALLTEL's provision of service to its Amish customers has violated Section 1502 of the Public Utility Code or any statute which the Commission has jurisdiction to administer or of a regulation or order of the Commission. Such a claim was not presented either in Complainant's original formal complaint or in his complaint as subsequently orally amended. Consequently, the claim is beyond the scope of Complainant's complaint and need not be addressed here. To the extent that the issue is deemed relevant to Complainant's complaint, it is easily distinguishable from Complainant's request for service such that any claim that a comparison of the two reveal a pattern of discrimination on the part of ALLTEL must be rejected. In that instance, Complainant's discrimination claim is moot. Beyond that, the evidence of record presented by Complainant to satisfy his burden of proving such discrimination is primarily non-existent and woefully inadequate at best. For example, the record does not even reflect whether ALLTEL's Amish customers have service to poles or

sheds, does not identify the specific circumstances of actual customers, does not indicate whether the service provided is classified as residential or business, does not reflect whether all such customers receive service in a similar fashion or whether ALLTEL serves its customers any differently from other local exchange carriers.

Complainant has erroneously painted a picture of ALLTEL willing to bend its NID placement policy to serve its Amish customers while maintaining its unwillingness to exude the same flexibility with regard to service to Complainant. Complainant's argument is totally flawed due to his omission of one important factor that the record does reflect: Complainant's home is not in ALLTEL's service territory. There is no discriminatory parallel here. In explaining its service to its Amish customers, ALLTEL's witness, Mr. Stackhouse, made the following point on redirect examination:

Q. And in the case of the Amish, service to a pole would be a customer-owned pole and not a PPL pole; is that correct

A. Yes.

Q. And in those instances that you are familiar with, the house and the pole are all located within ALLTEL's service territory; is that right?

A. Yes, they are. T. 108.

As Complainant noted, the ALLTEL witness testified that, in fact, it is a building and not a pole to which such service is usually provided. T.81; Complainant's Main Brief at 31. Consequently, to the extent that the issue need be addressed in this proceeding at all, Complainant's claim that his circumstances are similar to those of ALLTEL's Amish customers is not supported by record evidence and must be rejected.

ALLTEL R.B. at 35-37.

In Honey Brook Water Company v. PA P.U.C., 647 A.2d 653 (Pa. Cmwlth. 1994), the Commonwealth Court noted that "due process in matters before the PUC required that a party be afforded a reasonable opportunity to know the nature of its opponents' responsive answer. (citations omitted)." Id. at 657. As ALLTEL averred

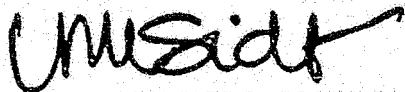
in its Main Brief and Reply Brief, ALLTEL was not afforded an opportunity to prepare an appropriate defense given that the issue was not raised by Mr. Wheeland until cross examination of ALLTEL witnesses. Moreover, even with its lack of notice and ability to adequately respond to the claim, ALLTEL's witnesses ably distinguished Mr. Wheeland's situation from that of ALLTEL's Amish customers. Specifically, ALLTEL explained that its Amish customers actually terminate service at their demarcation point. By comparison, Mr. Wheeland demands to select a demarcation point away from his home, but to continue his own service line such that telephone service access is provided to his home. Indeed, the Glossary of Terms at the Pennsylvania Utility Choice website defines "Access line" as "A telephone line connecting a caller to a telephone company's central office. This line runs from the central office to the caller's building. After that point, the wire is considered inside wiring." "Connecting the caller" is connecting the telephone company's facilities to the location of the caller's telephone. For the Amish, the telephone is located in the Shed. For Mr. Wheeland, the telephone is to be located in his home. Consequently, that point of connection is where the NID is located and where, as a standard practice, the demarcation point recognized. ALJ Lovenwirth's reference to presumed discriminatory actions by ALLTEL is inappropriate and should be reversed.

III. CONCLUSION

ALJ Lovenwirth's Initial Decision, if adopted by this Commission, would have perilous repercussions on the provision of telecommunications service throughout the Commonwealth. Throwing the standard operating procedures of telecommunications providers to the wind, competition among carriers would be thwarted as competing carriers would be left to determine the location of the demarcation point on a customer by customer basis in order to access the customer's NID; telephone companies could be required to allocate already scarce monetary and personnel resources in order to place facilities at the whim of the customer and at locations that could, for purposes of maintenance and repair, lack easy access by Company personnel; inside wire maintenance plans would be placed in jeopardy as "inside wire" would no longer define customer-owned facilities for those customers with demarcation points at locations away from the dwelling and so forth. ALLTEL implores this Commission to carefully review the evidence presented in this proceeding and ALLTEL's positions as set forth in its Main Brief and Reply Brief. In so doing, ALLTEL confidently avers that this Commission will find the Initial Decision of ALJ Lovenwirth contrary to controlling FCC regulations and contrary to this Commission's holdings in other related matters. Most importantly, the Commission should find that ALJ Lovenwirth's Initial Decision fails to recognize the standard operating procedure followed by ALLTEL in designating a demarcation point and ALLTEL's controlling right to follow that procedure. This case is neither about whether ALLTEL can, technically, provide telephone service to Mr. Wheeland nor whether the demarcation point can be located at a point other than the side of Mr. Wheeland's house. This case is about whether Mr. Wheeland

has the unilateral right to select any point on his property as a demarcation point for the telephone Company's facilities to terminate, so that Mr. Wheeland can force ALLTEL, irrespective of its standard operating procedure, to provide its service to Mr. Wheeland's dwelling located in Verison-N service territory. Contrary to the holding of ALJ Lovenwirth in his Initial Decision, Mr. Wheeland does not maintain a unilateral right to select a demarcation point and the Initial Decision should be reversed.

Respectfully submitted,

By 
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Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Ernie Wheeland,
Complainant

v.

ALLTEL Pennsylvania, Inc. and
Verizon North Inc.,
Respondents

Docket No. C-20015807

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OFFICE OF SPECIAL ASSISTANTS
CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of July, 2003 served true and correct copies of the foregoing document of ALLTEL Pennsylvania, Inc. in the above-docketed proceeding upon the persons and in the manner set forth:

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