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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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PA P.U.C.
SECRETARY'S BUREAU

David Smyk

v.

Verizon Pennsylvania, Inc.

C-20065797

ORDER GRANTING MOTION TO DISMISS, IN PART

DOCUMENT
FOLDER

Before
Veronica A. Smith
Chief Administrative Law Judge

DOCKETED
AUG 1 8 2006

On January 23, 2006, David Smyk (Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against Verizon Pennsylvania, Inc. (Respondent). Complainant challenges "one time charges" appearing on his bill after terminating his long distance and regional toll call services¹. Complainant states that he was not informed that he would be charged for terminating these services and requested, *inter alia*, a credit to his account in the amount of \$6.00.

On February 16, 2006², Respondent filed its Answer admitting and denying the various Complaint allegations. Respondent is advised that when including, with its Answer, any statement of material fact, which is not merely a denial of the averments of the complaint, it shall be pled under the heading of "New Matter." 52 Pa. Code §5.62(b).

Respondent filed a Motion to Dismiss, in Part (Motion), endorsed with a Notice to Plead, pursuant to 52 Pa. Code §5.101, contemporaneously with its Answer moving to dismiss that portion of the Complaint which disputes charges made pursuant to Respondent's federal

¹ These services were provided by AT&T.

² Respondent was served with a copy of the Complaint on January 24, 2006.

tariff on file with the Federal Communications Commission (FCC). According to Commission records, to date, no Answer to the Motion has been filed³.

The Motion was assigned to me by Motion Judge Assignment Notice dated February 23, 2006 and is procedurally ready for a ruling.

The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary motions, specifically a motion questioning the jurisdiction of the Commission. 52 Pa. Code §5.101(a)(1). When considering a motion to dismiss, the Commission must view the Complaint in a light most favorable to the Complainant, and the Complaint should be dismissed only when it appears that the Complainant would not be entitled to relief under any circumstances. Equitable Small Transportation Interveners, 1994 Pa. PUC LEXIS 69 (July 18, 1994); Interstate Traveller Services, Inc. v. Pa. Dept. of Environmental Resources, 406 A.2d 1020 (Pa. 1979). This is similar to Pennsylvania civil practice with respect to the filing of preliminary objections. Equitable Small Transportation Interveners, *supra*.

The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the motion, all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts. County of Allegheny v. Commw. of Pa., 490 A.2d 402 (Pa. 1985); Commw. of Pa. v. The Bell Telephone Co. of Pa., 551 A.2d 602 (Pa. Commw. 1988). The motion may be granted only if the moving party prevails as a matter of law. Roc v. Flaherty, 527 A.2d 211 (Pa. Commw. 1985). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. Dept. of Auditor General, et al. v. State Employees' Retirement System, et al., 836 A.2d 1053, 1064 (Pa. Commw. 2003) (citing, Boyd v. Ward, 802 A.2d 705 (Pa. Commw. 2002)).

The Complaint alleges that Respondent imposed "one time charges" totaling \$6 when he terminated his long distance and regional toll service.

³ Pursuant to 52 Pa. Code §5.101(d), a response to the Motion was due on or before February 26, 2006.

Complainant attached a copy of the bill reflecting these charges and they are broken down as follows:

Change of long distance company - \$1.00

Change of regional toll company - \$5.00

In its Preliminary Motion, Respondent moves to dismiss that portion of the Complaint challenging the imposition of a "change of long distance company" service charge. Respondent argues that the Commission lacks subject matter jurisdiction over that portion of the Complaint because the disputed charge was billed by Respondent pursuant to its Tariff, FCC No. 1, Original Page 4-40 and 4-43⁴. Respondent states that this Commission does not have subject matter jurisdiction over the collection of charges authorized by the FCC.

It is worthy of repeating that Respondent moves to dismiss only that portion of the Complaint challenging charges billed pursuant to FCC mandates and acknowledges that the remaining disputed charges were billed pursuant to its tariff on file with this Commission at Tariff Pa. PUC No. 302, 2nd Revised Sheet 120A and 6th Revised Sheet 120G. See Answer and Appendix B.

The Commission cannot exceed its jurisdiction and must act within it. City of Pittsburgh v. Pa. Public Utility Commission, 43 A.2d 348 (Pa. Super. Ct. 1945). Jurisdiction may not be conferred by the parties where none exists. Roberts v. Martorano, 427 Pa. 581, 235 A.2d 602. Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. Cf., Hughes v. PA State Police, 619 A.2d 390 (1992), *alloc. denied*, 637 A.2d 293 (1993). The mere fact that a party to an action qualifies as a regulated public utility does not confer subject matter jurisdiction on the Commission. See DeFrancesco v. Western Pennsylvania Water Co., 453 A.2d 595 (Pa. 1982).

Respondent is correct in its assertion that the Commission lacks subject matter jurisdiction over charges approved by the FCC. McIntyre v. Bell Atlantic-Pennsylvania, Inc., Order entered October 7, 1999 at Docket No. C-00992560; Engle v. AT & T Communications of

⁴ Copies of the relevant pages of Respondent's FCC Tariff were included with the Motion as "Attachment A"

Pennsylvania, Inc., Order entered September 15, 1999 at Docket No. C-0092426; Zimmerman v. Bell Atlantic-Pennsylvania, Inc., Order entered August 19, 1999 at Docket No. C-00992492.

One of the charges disputed by Complainant is the "change of long distance company" charge. This charge has been approved by the FCC and is contained in Respondent's tariff on file with that agency. Accordingly, Respondent's Motion to Dismiss that portion of the Complaint disputing the imposition an FCC approved charge must be granted. The remaining allegations raised in the Complaint remain outstanding and a hearing will be scheduled for disposition of those issues.

The Commission may "dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest." 66 Pa. C.S. § 703(b), 52 Pa. Code § 5.21(d). Dismissing a complaint without a hearing is appropriate and in the public interest when there are no genuine questions of material fact and the Respondent is entitled to judgment as a matter of law. Lehigh Valley Power Comm. V. Pa. Public Utility Comm'n, 563 A.2d 548 (Pa. Commw. Ct. 1989); Edan Transportation Corp. V. Pa. Public Utility Comm'n, 623 A.2d 6 (Pa. Commw. Ct. 1993). Here, a hearing is not necessary in the public interest on the Complaint as it relates to disputed charges approved by the FCC. However, a hearing is necessary on the remaining complaint allegations and will be scheduled accordingly.

Respondent's Motion to Dismiss, in part is granted.

THEREFORE,

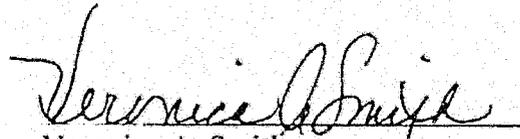
IT IS ORDERED:

1. That the Motion to Dismiss filed by Verizon Pennsylvania, Inc. to dismiss the Complaint filed by David Smyk at Docket No. C-20065797 is granted.

2. That that portion of the Complaint filed by David Smyk at Docket No. C-20065797 challenging the imposition of charges approved by the Federal Communications Commission is hereby dismissed.

3. That this case be set for hearing on the remaining allegations raised in the Complaint.

DATED: March 22, 2006


Veronica A. Smith
Chief Administrative Law Judge



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
Office of Administrative Law Judge
P.O. BOX 3265, HARRISBURG, PA 17105-3265
March 29, 2006

IN REPLY PLEASE
REFER TO OUR FILE

In Re: C-20065797

(SEE ATTACHED LIST)

David Smyk v. Verizon Pennsylvania Inc.

Billing Dispute

Telephone Hearing Notice

This is to inform you that a hearing by telephone on the above-captioned case will be held as follows:

Type: Initial Telephonic Hearing

Date: Wednesday, April 26, 2006

Time: 1:00 p.m.

Presiding: Administrative Law Judge Herbert Smolen
1302 Philadelphia State Office Building
1400 West Spring Garden Street
Philadelphia, PA 19130
Telephone: 215.560.2105
Fax: 215.560.3133

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If you have not provided a current telephone number where you can be reached for participation in the hearing OR YOUR AREA CODE HAS CHANGED, then you must contact the presiding officer at least 7 days before the actual hearing and provide the necessary information.

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MAR 30 2006
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At the above date and time, the Presiding Officer will contact the parties as follows:

David Smyk	610.692.0562
Rikardo J. Hull, Esquire	717.236.1300

If you have any hearing exhibits to which you will refer during the hearing, 3 copies must be sent to the Administrative Law Judge and 1 copy each must be sent to every other party. All copies must be received at least 5 days before the hearing.

Attention: You may lose the case if you do not take part in this hearing and present facts on the issues raised.

Except for those individuals representing themselves, the Commission's rules require that all parties have an attorney; therefore, you should have an attorney of your choice file an entry of appearance before the scheduled hearing.

If you are a person with a disability, and you wish to attend the hearing, we may be able to make arrangements for your special needs. Please call the scheduling office at the Public Utility Commission at least (2) two business days prior to your hearing:

- Scheduling Office: 717.787.1399
- AT&T Relay Service number for persons who are deaf or hearing-impaired: 1.800.654.5988

pc: Judge Smolen
Linda Salome
Beth Plantz
Docket Section
Calendar File