

PLEASE DOCKET

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Carriers Coalition

v.

Verizon Pennsylvania Inc.

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C-20065798

ORDER DENYING
MOTION TO DISMISS

DOCUMENT
FOLDER

Before
Marlane R. Chestnut
Administrative Law Judge

DOCKETED
OCT 19 2006

HISTORY OF THE PROCEEDING

On January 19, 2006, Pennsylvania Carriers Coalition¹ (complainant or PCC) filed a formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against Verizon Pennsylvania Inc. (respondent or Verizon). In this Complaint, complainant PCC challenged Verizon's application of its Access to Operations Support Systems (Access to OSS) and Daily Usage File (DUF) charges to resold lines. As explained in the Complaint, in April 2005, Verizon began charging these rates on resold lines retroactive to October 1, 2004. PCC's position is that as these charges are contained in Verizon's Tariff 216 (Services for Other Telephone Companies (UNE)) rather than Tariff 1 (Local General Tariff), they are untariffed and therefore improper and unlawful. PCC also asserted that Verizon's cost recovery for Access to OSS is already incorporated into its resale rates through the wholesale discount and that Verizon improperly is charging the Access to OSS charge on a per telephone number basis, rather than per loop basis. As relief, PCC requested that the Commission (1) direct Verizon to credit the PCC

¹ The PCC members are Full Service Computing Corporation *vs* the Full Service Network (FSN), ATX Licensing, Inc. (ATX) and Line Systems, Inc. (LSI).

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members for all Access to OSS and DUF charges paid in relation to their resale lines and service; (2) impose the maximum civil penalty on Verizon pursuant to 66 Pa.C.S.A. §3301(a) for each PCC resale line on which Verizon imposed its “untariffed” OSS charge and each resale call on which Verizon imposed its “untariffed DUF charges;” and (3) declare that Verizon is precluded from filing a tariff supplement “designed to implement the Access to OSS and DUF charges in relation to CLEC Resale lines and service.”

On February 13, 2006, Verizon filed an Answer which denied the material averments of the Complaint. Verizon explained that the Access to OSS and DUF rates were established by the Commission in *Generic Investigation re: Verizon Pennsylvania Inc.'s Unbundled Network Element Rates*, Docket No. R-00016683, Commission Tentative Order entered November 4, 2002, Commission Final Order entered December 11, 2002 (*Generic UNE* proceeding), and it was clear that the costs were calculated on the basis of and intended to be charged to resold lines, as well as UNE lines (i.e., UNE loops and UNE platforms) and that two of the PCC members (FSN and ATX) had been parties to that proceeding while the third, LSI, had been denied intervention by the Commission. It also noted that DUF is an optional service which must be affirmatively ordered, and that there is language in Tariff 1 that other provisions may apply to resale lines. As New Matter, Verizon asserted the affirmative defenses of *res judicata*, collateral estoppel, waiver and 66 Pa.C.S.A. §316.²

On that same date, Verizon filed a separate Motion to Dismiss (Motion), in which it asserted that the Complaint should be dismissed because the Commission already decided in the *Generic UNE* proceeding that these rates apply to resold lines, that the PCC members had an opportunity to make their arguments in that case, that the rates are properly tariffed and that the Commission has already approved the compliance tariff containing the rates.

On February 23, 2006, complainant PCC filed an Answer to the Motion to Dismiss (Answer) in which it asserted that, accepting all well-pleaded allegations of fact in the Complaint as

² Access to OSS was a new rate intended to compensate Verizon for the past and on-going costs of making its OSS available to CLECs. *Generic UNE* Tentative Order at 169. DUF rates replaced an existing rate for a service through which CLECs purchase the intraLATA local and toll call usage records details of their end users. *Generic UNE* Tentative Order at 172.

true, the Motion must be denied because Verizon is alleged to have been charging untariffed rates in violation of 66 Pa.C.S.A. §§1302, 1303 and 1501 of the Public Utility Code. It also noted that the Motion failed to address the allegation in ¶¶24-27 of the Complaint that Verizon was misapplying the OSS charge and asserted that Verizon has "overstated" the Commission's *Generic UNE* decisions, which only affected Verizon's UNE rates. Finally, PCC stated that neither *res judicata* nor collateral estoppel can apply to bar the instant Complaint because there is not the required identity of issues and parties.

As discussed in more detail below, the Motion should be denied. Dismissal of the Complaint at this stage of the proceeding is neither clearly warranted nor free from doubt.

DISCUSSION

The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary motions. 52 Pa. Code §§5.101-5.103. Commission preliminary motion practice is similar to Pennsylvania civil practice regarding the filing of preliminary objections. *Equitable Small Transportation Interveners v. Equitable Gas Company*, Docket No. C-00935435, 1994 Pa. PUC LEXIS 69.

A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Dept. of Environmental Resources*, 406 A.2d 1020 (Pa. 1979); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa. Super. 1991). The Commission has adopted this standard. *Montague v. Philadelphia Electric Company*, 66 Pa. PUC 24 (1988).

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 (1985); *Commw. of Pa. v. The Bell Telephone Co. of Pa.*, 551 A.2d 602 (Pa. Commw. 1988). However, unjustified inferences and conclusions of law may not be drawn from

the face of the complaint. *Remas v. Duquesne Light Company*, 371 Pa. Super. 183, 185, 1988 Pa. Super. LEXIS 655 (Pa. Super. Ct. 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)).

Applying these standards, the Motion should be denied. It should be noted that Verizon is correct that in the *Generic UNE* proceeding, the Access to OSS and DUF charges clearly were calculated on the basis of and intended to be charged to resold lines, as well as UNE lines (i.e., UNE loops and UNE platforms). This is clear from the testimony and Tentative Order cited in Verizon's Answer and Motion. These charges were accepted by the Commission and included in Verizon's tariff. The fact that they are contained in Tariff 216, rather than Tariff 1, is irrelevant, in light of the language contained in Tariff 1, that "[t]o the extent that services are available for resale subject to terms and conditions set out in other subject to terms and conditions set out in other provisions of this Tariff or other Telephone Company Tariffs, those terms and conditions remain applicable except to the extent they conflict with the language of this Section." Tariff 1, Section 8.1(A)(1), First Revised Sheet 4A. There is additional language that, "[t]he regulations contained in this Section are intended to supplement the regulations contained in other sections of this or other Telephone Company tariffs to the extent such other regulations do not conflict with the regulations contained herein." *Id.* at (A)(2). Further, there is no language in tariff 216 stating that it applies only to UNE purchasers, not to resellers. In fact, it states that "[t]his tariff applies to services provided by [Verizon PA] to Other Telephone Companies that have been authorized by the Pennsylvania Public Utility Commission to provide local exchange service in Pennsylvania," which, as pointed out by Verizon, can include resellers as well as CLECs that lease UNEs. Tariff 216, Sec. 1(A), Third Revised Sheet 1.

Despite this, however, dismissal of the Complaint at this stage of the proceeding is not appropriate for several reasons. First, as pointed out by PCC in its Answer to the Motion to Dismiss, there is some question as to whether *res judicata* or collateral estoppel can be applied in this case. Both parties agree that FSN and ATX were parties of record in the *Generic UNE*

proceeding, while LSI was denied permission to intervene. On the other hand, according to the Commission's records, PCC was also a party of record there, as it is in this case. This may or may not constitute the identity of parties required to apply either doctrine.

In addition, there also may not be the required identity of issues, as the Commission in the *Generic UNE* proceeding addressed the justness and reasonableness of the proposed rates, including the charges for Access to OSS and DUF. Here, it seems that complainant PCC is not challenging the Commission's adoption of those rates or their inclusion in Verizon's compliance tariff, but rather is raising a billing question concerning the application of those charges to resale service. Thus, there is some question as to whether *res judicata* and/or collateral estoppel should be applied, as well as whether the Complaint can be dismissed through application of either waiver or 66 Pa C.S.A. §316.

The other reason why the Motion should be denied is that it fails to address the second issue raised by the Complaint, that Verizon is applying the Access to OSS charge on a per telephone line basis, rather than on a per loop basis as alleged in ¶¶24-27 of the Complaint.

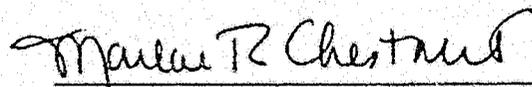
Finally, it is necessary to address the statement contained in PCC's Answer to the Motion, "Even assuming *arguendo* that Verizon's claims about the scope and impact of the Commission's decision in the *Generic UNE* proceeding were correct (which they are not), the facts, as pleaded by the PCC, establish that Verizon has never tariffed the contested Operation Support Systems (OSS) and Daily Usage File (DUF) charges. This statement of fact must be accepted, and none of the legal claims raised by Verizon mitigates its violations of Sections 1302, 1303 and 1501 of the Public Utility Code resulting from the imposition of the untariffed charges on the PCC." The statement that Verizon has not tariffed these charges is manifestly incorrect, as the Complaint itself recognizes that they are contained in Tariff 216. The allegation that the PCC members are being charged untariffed rates is a conclusion of law that may not be drawn from the face of the Complaint.

THEREFORE,

IT IS ORDERED,

1. That the Motion to Dismiss filed by respondent Verizon Pennsylvania Inc. is denied; and
2. That a prehearing conference be scheduled as soon as reasonably possible.

Date: April 5, 2006



Marlane R. Chestnut
Administrative Law Judge

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COMMONWEALTH OF PENNSYLVANIA
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P.O. BOX 3265, HARRISBURG, PA 17105-3265
April 10, 2006

IN REPLY PLEASE
REFER TO OUR FILE

In Re: C-20065798

(See attached list)

**DOCUMENT
FOLDER**

Pennsylvania Carriers' Coalition v. Verizon Pennsylvania, Inc.
Billing dispute.

NOTICE

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

Type: Initial pre-hearing conference

Date: Thursday, May 18, 2006

Time: 10:00 a.m.

Location: In an available hearing room
Philadelphia State Office Building
Broad and Spring Garden Streets
Philadelphia, PA 19130

Presiding: Administrative Law Judge Marlane R. Chestnut
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 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 Chestnut
Susan Licon
Beth Plantz
Docket Section
Calendar File