

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Michael Steven Sherman, P.C.	:	
	:	
v.	:	C-2018-3004072
	:	
Verizon Pennsylvania LLC	:	

**INITIAL DECISION SUSTAINING PRELIMINARY OBJECTIONS
AND DISMISSING COMPLAINT**

Before
David A. Salapa
Administrative Law Judge

INTRODUCTION

A customer filed this complaint regarding his telephone service alleging reliability, safety or quality problems. This decision dismisses the complaint because the Pennsylvania Public Utility Commission (Commission) lacks jurisdiction over internet protocol-enabled services.

HISTORY OF THE PROCEEDING

On July 26, 2018, Michael Steven Sherman, P.C. (Complainant) filed a complaint with the Commission against Verizon Pennsylvania LLC (Respondent). The complaint alleges there is a reliability, safety, or quality problem with the Complainant's telephone service and that there are incorrect charges on the Complainant's bill.

The complaint alleges that the telephone equipment the Respondent furnished to the Complainant is not functioning properly. According to the complaint, the Complainant

contacted the Respondent concerning the equipment but that the Respondent has failed to respond to the Complainant's concerns.

In addition, the complaint asserts that the Respondent overbilled the Complainant in the beginning months of his contract without providing an explanation for the charges. The complaint requests that the Commission order the Respondent to correct the problems with his telephone service, provide a credit for the telephone equipment and adjust his bills.

On September 20, 2018, the Respondent filed an answer with new matter and preliminary objections. In its answer, the Respondent denies the allegations in the complaint but admits that it provides service to the Complainant. However, the answer alleges that the Respondent provides the Complainant with Voice Over Internet Protocol (VOIP) telephone service. The answer contends that the Commission lacks jurisdiction over VOIP services.

The new matter states that the Respondent provides Business Digital Voice, a VOIP service to the Complainant. The new matter reiterates that the Commission lacks jurisdiction over VOIP services. The answer with new matter requests that the Commission dismiss or deny the Complainant's complaint.

In its preliminary objections, the Respondent reiterates that the Commission lacks jurisdiction over VOIP services. The preliminary objections request that the Commission dismiss and deny the Complainant's complaint.

By notice dated October 26, 2018, the Commission notified the parties that it had assigned the case to me as motion judge. As of the date of this decision, the Complainant has not filed an answer to the Respondent's pleading. The preliminary objections are ready for decision. For the reasons set forth below, I will treat the preliminary objections as a motion for judgment on the pleadings and dismiss the complaint.

FINDINGS OF FACT

1. The Complainant in this case is Michael Steven Sherman, P.C.
2. The Respondent in this case is Verizon Pennsylvania LLC.
3. On July 26, 2018, the Complainant filed a complaint with the Commission against Respondent.
4. On September 20, 2018, the Respondent filed an answer with new matter.
5. On September 20, 2018, the Respondent filed preliminary objections.
6. As of the date of this decision, the Complainant has not filed a reply to either the Respondent's preliminary objections or its new matter.
7. The Complainant receives VOIP services.

DISCUSSION

The Commission's Rules of Practice and Procedure permit parties to file preliminary objections for, *inter alia*, lack of Commission jurisdiction. 52 Pa.Code § 5.101(a)(1). Commission preliminary objection practice is similar to Pennsylvania civil practice. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa. PUC LEXIS 69 (July 18, 1994). A complaint is properly dismissed when no relief or recovery is possible. P.J.S. v. Pa. State Ethics Commission, 669 A.2d 1105 (Pa. Cmwlth. 1996). When considering preliminary objections, the Commission may not rely upon the factual assertions of the moving party, but must accept as true, for purposes of disposing of the motion, all well pleaded, material facts of the nonmoving party, as well as every 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).

Here, the Complainant has alleged reliability and billing issues related to his telephone service. In response, the Respondent has filed an answer and new matter stating that the Complainant's phone service is an unregulated service. The Complainant has not filed a reply to the new matter denying the Respondent's averments. Relevant facts stated in new matter may be deemed to be admitted when a timely reply to new matter is not filed. 52 Pa.Code § 5.63(b).

Since the Respondent is seeking dismissal of the complaint based upon assertions in new matter, the appropriate filing is a motion for judgment on the pleadings rather than preliminary objections. The regulation at 52 Pa.Code § 1.2(a) provides that the presiding officer or Commission may disregard an error or defect of procedure which does not affect the substantive rights of the parties. Here, I may disregard the Respondent's error in procedure if it does not affect the Complainant's substantive rights.

I will consider the issue of the Commission's jurisdiction in this matter in order to secure a just, speedy and inexpensive determination of this proceeding, pursuant to 52 Pa.Code § 1.2(a). This will not adversely affect the Complainant's rights since he had notice of the issue and opportunity to respond. Since the Respondent timely raised the issue of jurisdiction as an affirmative defense in its new matter, I shall treat the Respondent's preliminary objections as a motion for judgment on the pleadings, filed pursuant to 52 Pa.Code § 5.102, and deem the averments made in the new matter as admitted. The Commission has previously used this procedure when addressing Commission jurisdiction over VOIP services. Swartz v. Comcast Phone of Pennsylvania LLC, Docket No. C-2015-2465416 (Final Order entered May 20, 2015); Toth v. Verizon Pennsylvania LLC, Docket No. C-2017-2589150 (Final Order entered June 19, 2017).

The Commission's Rules of Practice and Procedure at 52 Pa.Code § 5.102 govern motions for judgment on the pleadings. The Commission will grant a motion for judgment on

the pleadings only if the pleadings show there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa.Code § 5.102(d)(1). Only in a case where the moving party's right to prevail is so clear that a trial would be a fruitless exercise should judgment on the pleadings be granted. Williams v. Lewis, 466 A.2d 682 (Pa. Super. 1983); Service Employees International Union, Local 69, AFL-CIO v. Peoples Natural Gas Company, Docket No. C-20028539 (Order entered December 19, 2003). In ruling on a motion for judgment on the pleadings, the tribunal must consider as true all well-pleaded averments of the party against whom the motion is directed and consider against him only those facts he specifically admits. Judgment on the pleadings should be entered only when the case is clear and free from doubt. Reuben v. O'Brien, 496 A.2d 913 (Pa. Super. 1985).

In this case, the Complainant, in his complaint, has alleged that there is a reliability, safety, or quality problem with the Complainant's telephone service and that there are incorrect charges on the Complainant's bill. In response, the Respondent contends in its new matter that the Complainant receives VOIP services, a service not regulated by the Commission. Accepting the facts alleged in the complaint as true for purposes of disposing of the motion for judgment on the pleadings as well as the facts alleged, and deemed admitted, in the Respondent's new matter, the Respondent contends that the Commission does not regulate the service that is the subject of the complaint. I agree.

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. Tod and Lisa Shedlosky v. Pennsylvania Electric Co., Docket No. C-20066937 (Opinion and Order entered May 28, 2008); Feingold v. Bell Tel. Co. of Pa., 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. City of Pittsburgh v. Pa. Pub. Util. 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). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. Hughes v. Pennsylvania State Police, 619 A.2d 390 (Pa. Cmwlth. 1992), alloc. denied, 637 A.2d 293 (Pa. 1993). Here the General Assembly has divested the Commission of jurisdiction over VOIP services.

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 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.

The facts alleged in the complaint do not bring this complaint within any of the exceptions set forth in 73 P.S. § 2251.6. Pursuant to the Voice Over Internet Protocol Freedom Act of 2008, the Commission has no jurisdiction over the subject matter of the Complainant's complaint as it relates to VOIP. The Commission has previously addressed this issue.

In his initial decision in Brown v. Armstrong Digital Services, Inc., Docket No. C-2008-2079810 (Initial decision issued May 21, 2009) (Brown), Administrative Law Judge (ALJ) John H. Corbett, Jr. dismissed a complaint for lack of jurisdiction where the respondent raised the Voice Over Internet Protocol Freedom Act of 2008. In that case, the respondent was an entity the Commission did not regulate providing VOIP services. ALJ Corbett concluded that the Voice Over Internet Protocol Freedom Act of 2008 prohibited the Commission from exercising jurisdiction over the complaint. By Commission final order entered June 30, 2009, ALJ Corbett's initial decision became final without further Commission action. The Commission has reiterated that it lacks jurisdiction to adjudicate disputes involving VOIP services. Robles v. Service Electric Telephone Company, LLC, Docket No. C-2010-2187832 (Order entered October 28, 2011); Silvestri v. Comcast Phone of Pennsylvania, LLC, Docket No. C-2011-2241959 (Order entered October 7, 2011); Swartz v. Comcast Phone of Pennsylvania LLC, Docket No. C-2015-2465416 (Final Order entered May 20, 2015); Fielder v Verizon Pennsylvania LLC, Docket No. C-2016-2553231 (Opinion and Order entered February 3, 2017);

Toth v. Verizon Pennsylvania LLC, Docket No. C-2017-2589150 (Final Order entered June 19, 2017).

As set forth above, the Voice Over Internet Protocol Freedom Act of 2008 prohibits the Commission from regulating the service that is the subject of the complaint. Since the Commission's jurisdiction does not extend to this service, I will sustain the preliminary objections and dismiss the complaint.

CONCLUSIONS OF LAW

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

2. It is just, reasonable and in the public interest that the complaint filed at Docket No. C-2018-3004072 is dismissed with prejudice.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections filed by Verizon Pennsylvania LLC at Docket No. C-2018-3004072 are sustained.

2. That the formal Complaint filed by Michael Steven Sherman, P.C. against Verizon Pennsylvania LLC at Docket No. C-2018-3004072 is dismissed with prejudice for lack of jurisdiction.

3. That the Secretary mark this docket closed.

Date: October 29, 2018

/s/
David A. Salapa
Administrative Law Judge