

**PENNSYLVANIA PUBLIC UTILITY COMMISSION  
HARRISBURG, PENNSYLVANIA 17105-3265**

**Michael Steven Sherman, P.C.**

v.

**Verizon Pennsylvania LLC**

**Public Meeting held January 17, 2019**

**3004072-ALJ**

**Docket No. C-2018-3004072**

**MOTION OF CHAIRMAN GLADYS M. BROWN**

On July 26, 2018, Michael Steven Sherman, P.C. filed a Formal Complaint against Verizon Pennsylvania LLC (Verizon) raising concerns with billing for services and the reliability, safety, and quality of the voice service and equipment provided to Complainant by Verizon. Specifically, the Complainant alleged that as part of its November 2017 three-year contract for service with Verizon, the business purchased four telephones that did not function properly because it was difficult to hear most callers and there were delays in connecting. The Complainant also alleged that Verizon overbilled in the beginning months. The Complainant concluded that Verizon failed to provide reliable, working telephone service or equipment and, as relief, requested new equipment at no additional cost and a bill adjustment for the overpayment alleged for the first several months of service.

On September 20, 2018, Verizon filed an Answer and New Matter and Preliminary Objections. In the Answer and New Matter, Verizon admitted that it provided voice service to the Complainant, but alleged that the voice service is Business Digital Voice, which Verizon claimed is a Voice-Over-Internet Protocol (VoIP) calling service outside this Commission's jurisdiction "[a]s detailed in its Preliminary Objections."<sup>1</sup> Verizon also alleged that although telephone equipment is also outside this Commission's jurisdiction, it had already provided new equipment to the Complainant. The matter of incorrect billing remains outstanding.

In its Preliminary Objections, Verizon argued that "[t]his Commission lacks jurisdiction to address any disputes relating to Complainant's service based on the Voice Over Internet Protocol Freedom Act"<sup>2</sup> and that "the Commission does not have jurisdiction over the provision of VoIP services pursuant to" Section 2251.4 of the VoIP Freedom Act.<sup>3</sup>

The Complainant filed no response to either Verizon pleading. The ALJ construed the Preliminary Objections as a Motion for Judgment on the Pleadings and dismissed the case with no hearing, considering the facts alleged in the moving party's pleadings sufficient to dispose of this proceeding.

I disagree with the ALJ's preliminary dismissal of this complaint in reliance on facts alleged by Verizon and the ALJ's stated rationale for dismissal. While the ALJ may properly rely on unanswered facts averred in Verizon's New Matter, deeming the Preliminary Objections

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<sup>1</sup> New Matter at 2, ¶ 3.

<sup>2</sup> Preliminary Objections at 2, ¶ 7.

<sup>3</sup> Preliminary Objections at 3, ¶ 8.

to be a Motion for Summary Judgment in order to rely on the facts in that pleading is not well-founded in this instance.

Unlike Verizon, the ALJ recognizes the circumstances under which this Commission retains jurisdiction over VoIP service.<sup>4</sup> Like Verizon, however, despite deeming Verizon's Preliminary Objections, which rely on a jurisdictional basis for summary relief, to be a Motion for Judgment on the Pleadings, which relies on facts to support summary relief, the ALJ concludes on the jurisdictional basis more appropriate for Preliminary Objections, and without facts from Verizon sufficient to support judgment on the pleadings, that "the General Assembly has divested the Commission of jurisdiction over VOIP services."<sup>5</sup>

Verizon filed Preliminary Objections because it alleged the Commission lacked jurisdiction over VoIP service conclusively as a matter of law. However, neither its Answer and New Matter nor its Preliminary Objections allege facts sufficient to conclude that the service affected is non-jurisdictional as a matter of law under the VoIP Freedom Act.

To the contrary, Verizon's position and the ALJ's dismissal are based primarily on Verizon's legal argument presented in the Preliminary Objections that the Commission lacks jurisdiction over VoIP services.<sup>6</sup> Moreover, the facts alleged in Verizon's pleadings do not sustain a decision that the exceptions in the VoIP Freedom Bill which retain Commission jurisdiction do not apply.

The only facts we have before us are that Verizon provides Business Digital Voice to the Complainant pursuant to a contract (which may or may not be tariff-based). These facts, however, are greatly overshadowed by Verizon's legal argument, and clear basis for seeking relief, that the Complainant's service is a VoIP service as defined in 73 P.S. § 2251.3 and is not subject to Commission jurisdiction as a matter of law. And this jurisdictional argument is presented without facts necessary to support a finding for summary dismissal that the service does not fall under any of the statutory provisions retaining Commission jurisdiction.

Because Verizon's pleading practice continues to be based on Preliminary Objections, which rely solely on Verizon's claim that the Commission lacks jurisdiction over VoIP generally, rather than a Motion for Judgment on the pleadings with facts sufficient to support a decision, we reject the ALJ's conversion of the jurisdictionally-based Preliminary Objections to a factual-based Motion for Judgment on the Pleadings and the decision resulting from that interpretation.

We believe that a remand for mediation is a more effective way to resolve this matter. In the event mediation does not succeed and a certificate of satisfaction is not filed, the matter is referred to the Office of Administrative Law Judge for subsequent disposition.

Based on the pleadings of record, genuine issues of law and fact remain outstanding. These include the nature of the consumer's service, what rate center is providing service, the regulatory classification of that rate center, and whether 911 service is involved. These are

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<sup>4</sup> Initial Decision at 6.

<sup>5</sup> Initial Decision at 5.

<sup>6</sup> See, e.g., Initial Decision at 2.

important factual determinations with legal significance that may be important if mediation proves unsuccessful.

Section 2251.4 of the VoIP Freedom Act, relied on by Verizon, provides that the Commission may not regulate the rates, terms and conditions of VoIP or IP-enabled service. However, Section 2251.6 of the VoIP Freedom Act, not addressed by Verizon, retains Commission jurisdiction in specific enunciated instances. Specifically, Section 2251.6(v) authorizes the Commission to enforce federal or state law or regulations relating to “rates, terms or conditions of protected services provided under tariffs which are subject to approval” by the Commission. Relying solely on a jurisdictional argument on the basis of Section 2251.4, Verizon failed to aver sufficient facts to allow us to conclude summarily clear and free from doubt that this or any other provision does not apply.

If the rate center involved is not competitive, Section 2251.6(5) could be important. Also, even if the service is reclassified as competitive, the Commission has Section 1501 jurisdiction to address the billing claims because they do not go to rates or terms or conditions of service governed by the VoIP Freedom Act. The limitations in the VoIP Freedom Act restrict Commission jurisdiction over the service provided, not necessarily the facilities or equipment used by a certificated provider that is otherwise subject to the Section 1501 statutory requirements.

Further, Section 2251.6(1) of the VoIP Freedom Act retains Commission jurisdiction over VoIP service in any rate center where 911 service is impacted regardless of its regulatory classification. The record is unclear on what reliability concerns were raised here and whether 911 service was or could have been adversely impacted by the voice quality of service matters raised here.

Under the VoIP Freedom Act, the Commission has jurisdiction over VoIP services, not traditional broad regulatory powers<sup>7</sup> but those specifically enumerated. A grant of judgment on the pleadings is inappropriate absent facts necessary to find that the complaint does not come within the Commission’s enumerated jurisdiction under the VoIP Freedom Act.<sup>8</sup>

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<sup>7</sup> See Section 2251.2 (describing legislative intent to minimize inhibitions to new VoIP technological developments arising from the “imposition of traditional State entry and rate regulation on voice-over-Internet-protocol and Internet protocol-enabled services”).


<sup>8</sup> The prior cited ALJ Initial Decisions concerning the Commission’s jurisdiction under the Public Utility Code and the VoIP Freedom Act are not dispositive. Those decisions became final by operation of law without further Commission action. Even if they are final, those decisions involved the certificated wholesale entity affiliated with a provider. They did not interplead the unregulated entity as an indispensable party as permitted by Pennsylvania law or issuance of a subpoena under Section 5.421(a) or (b)(5) of our rules to ensure their presence. Importantly, the decisions addressed substantive issues like cable service, internet service, content services like HBO, and unpaid bills. They proceedings did not involve protected services provided under tariff or 911 service, matters over which the Commission retains jurisdiction under the VoIP Freedom Act. In this case, the complaint raises matters about the voice service of a regulated entity provided using VoIP technology, but not pleaded without ambiguity not to involve a protected service. In *Brown v. Armstrong Digital Services, Inc.*, Docket No. C-2008-20079810 (May 12, 2009), the ALJ recognized that under *Comcast Business Communications LLC*, Docket No. A-2008-202089, the Commission retained jurisdiction over protected services provided by tariff but went on to note that the provider was not a regulated provider. In *Robles v. Service Electric Telephone Company*, Docket No. C-2010-2187832 (October 15, 2010), the respondent was the wholesale certificated telecommunications provider not the unregulated affiliate,

I believe that further action on this matter is appropriate. In order to resolve this in the most efficient manner, I vacate the Initial Decision, remand the proceeding and refer the matter to the Mediation Unit of our Office of the Administrative Law Judge for resolution,<sup>9</sup> while maintaining the availability of amended pleadings or an evidentiary hearing as a contingency if mediation fails.

**THEREFORE, I MOVE THAT:**

1. The ALJ's Initial Decision be vacated consistent with this Motion;
2. The matter is referred for mediation to the Mediation Unit of the Office of the Administrative Law Judge and the parties are directed to actively participate in good faith;
3. If the mediation and the resolution of this matter is successful appropriate and timely notice will be filed with the Commission;
4. If the mediation does not succeed this matter will be referred for an appropriate evidentiary hearing before the Office of Administrative Law Judge; and
5. The Office of Special Assistants draft an Opinion and Order consistent with this Motion.

January 17, 2019  
Date

  
Gladys M. Brown, Chairman

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Service Cable, and the incoming call problem was resolved whereas here the provider is a certificated local exchange carrier and it is unclear if 911 service was adversely impacted by the alleged voice quality problems. In *Silvestri v. Comcast IP Phone*, Docket No. C-2011-2241959 (August 26, 2011), the complainant raised issues of identity theft related to cable television service, issues not normally within the Commission's jurisdiction, in a complaint made over a year after the complainant was not a customer of the respondent. In this case, the issue is voice service provided by the certificated carrier. In *Gray v. Comcast IP Phone*, Docket No. C-2012-2292826 (August 15, 2012), the respondent was a regulated wholesale provider, not the unregulated affiliate about whom the complainant was complaining, and the issues disposed of consistent with *Silvestri* were cable television and internet services, matters over which the Commission does not have jurisdiction except for Chapter 30. The decision in *Wildman v. Verizon Pennsylvania, LLC*, Docket No. C-2013-2342700 (February 25, 2013) involved nonpayment of \$775.76 for an unregulated package including FiOS, DVR equipment, HBO content, and internet speeds. While citing older cases, Verizon fails to acknowledge *Fielder v. Verizon Pennsylvania, LLC*, Docket No. C-2016-2553231 (Order entered February 3, 2017), in which the Commission clarified an ALJ's ruling on the extent of our jurisdiction over VoIP-related services. And while the ALJ has acknowledged *Fielder*, he failed to account for the distinction as to jurisdiction presented in it. This case does not involve unpaid bills for cable or content services like HBO but voice and billing for voice service through a rate center whose classification is unclear and whether 911 service was adversely affected by the voice service quality issues.

<sup>9</sup> Verizon requested any portion of the matter not dismissed be referred to mediation. Verizon Answer at 3. If the