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April 23, 2019

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: North Buffalo Township v. Windstream Pennsylvania, LLC
Docket No. C-2017-2636341

Dear Secretary Chiavetta:

Enclosed for filing on behalf of Windstream Pennsylvania, LLC is its Motion to Dismiss in the above matter. Copies of the Motion are being served in accordance with the attached Certificate of Service.

Should you have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,

THOMAS, NIESEN & THOMAS, LLC

By

Charles E. Thomas, III

Enclosure

cc: Certificate of Service (w/encl.)
James Lloyd, Esq. (w/encl.) (via email)

Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

NORTH BUFFALO TOWNSHIP,	:	
Complainant	:	
	:	
v.	:	Docket No. C-2017-2636341
	:	
WINDSTREAM PENNSYLVANIA, LLC,	:	
Respondent	:	

MOTION TO DISMISS

AND NOW, comes Respondent Windstream Pennsylvania, LLC (“Windstream”), by and through its counsel, and, pursuant to 52 Pa. Code § 5.103, moves to dismiss, *with prejudice*, the Formal Complaint (“Complaint”) of North Buffalo Township (“Complainant”), as follows:

I. BACKGROUND

1. On or about November 29, 2017, Complainant filed a Complaint with the Pennsylvania Public Utility Commission (“Commission”) against Windstream, alleging issues with Complainant’s telephone and fax lines and internet service at a municipal building. The Commission served the Complaint on Windstream on December 4, 2017.

2. Windstream filed an Answer to the Complaint with New Matter on January 25, 2018, denying all material allegations. Windstream’s Answer and New Matter are incorporated herein by reference. Complainant did not deny or otherwise file a response to the averments made in Windstream’s New Matter.

3. By Interim Order Setting Resolution Conference issued January 26, 2018, the Commission directed the parties to attempt to resolve the case themselves.

4. On February 26, 2018, Windstream filed status report with Mediator Tiffany A.

Hunt (“Mediator”) advising on the status of the matter, including work performed by Windstream in mid-February 2018 relocate Complainant’s service lines from an underground conduit to an aerial cable. The parties also consented to holding the case with the Commission’s Mediation Unit while the parties sought a resolution.

5. Following reports from Complainant of additional intermittent telephone issues, Windstream dispatched technicians on April 5, 2018 and again on May 10, 2018 to investigate the purported issues. Each time, Windstream tested the inside and outside service lines and found no problem with the lines to the network interface device (NID) at Complainant’s building. In addition, at the May 10, 2018 inspection, Windstream advised Complainant that Complainant needed additional bandwidth for its operations, beyond its current 3 MB business internet service plan.

6. On June 1, 2019, Windstream provided an additional status report to the Mediator.

7. Complainant subsequently claimed it was still having problems. In response, the parties arranged for a meeting to allow Windstream to conduct further tests of the inside wiring at Complainant’s building. Testing revealed no issues with the wiring to the point of Complainant’s private bank exchange (PBX). Windstream again reminded Complainant of the capacity issues with the internet service plan.

8. On August 1, 2018, Complainant voluntarily disconnected all services (both voice and data) with Windstream and transferred those services to a new provider effective August 3, 2018. On August 6, 2019, Windstream advised the Mediator of this latest development.

9. Between August 2018 and January 2019, Windstream and the Mediator made numerous attempts to contact Charles A. Pascal, Jr., Esquire, Complainant’s attorney of record

for this proceeding,¹ at the email address and telephone numbers of record to discuss how Complainant intended to proceed in light of Windstream's repair work and the fact that Complainant was no longer a Windstream customer. Neither Complainant nor Attorney Pascal responded to any of these outreach efforts.

10. On January 11, 2019, the Mediator sent formal correspondence via email and first class mail to Attorney Pascal, with a copy to Complainant, requesting contact by January 28, 2019 to discuss the case and advising the case may be scheduled for hearing if contact was not made. Again, neither Complainant nor Attorney Pascal responded to the letter.

11. By Notice dated January 30, 2019, the Commission scheduled an Initial Call-In Telephonic Prehearing Conference for March 5, 2019 before Deputy Chief Administrative Law Judge Mark A. Hoyer. Judge Hoyer subsequently issued a Prehearing Conference Order on February 4, 2019, setting forth instructions and requirements for the prehearing conference.

12. Windstream made several additional attempts to contact Attorney Pascal without success in the weeks leading up to the prehearing conference.

13. The prehearing conference convened as scheduled by Judge Hoyer on March 5, 2019. The undersigned counsel and two company representatives appeared on behalf of Windstream. Neither Complainant nor Attorney Pascal appeared. At the conclusion of the prehearing conference, after providing an extensive summary of the history and facts of this case, Windstream moved to dismiss the case, which Judge Hoyer asked Windstream to reduce to writing and file with the Commission.

14. As of the date of this Motion, Windstream has not received any communication or other contact from Complainant or Attorney Pascal regarding matters related to this Complaint,

¹ See Complaint at ¶ 8 (Legal Representation).

nor has the Commission. In fact, the last contact from Complainant occurred via an email sent by Attorney Pascal to Windstream at the beginning of July 2018.

15. The Commission's regulations at 52 Pa. Code § 5.103 allow for the filing of motions by parties to request relief during formal proceedings.

16. Accordingly, Windstream files the instant Motion to dismiss the Complaint (1) for Complainant's failure to prosecute, and (2) because there is no longer any continuing controversy or genuine issue still in dispute since Complainant is no longer a Windstream customer and thus lacks standing.

II. MOTION TO DISMISS

A. Failure to Prosecute

17. The Complaint should be dismissed for Complainant's failure to prosecute, despite being accorded ample due process safeguards and opportunities to be heard.

18. As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. *Schneider v. Pa. P.U.C.*, 479 A.2d 10 (Pa. Cmlwth. 1984). Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Id.* Here, Complainant's due process rights were fully protected, and Complainant was afforded sufficient notice and opportunity to be heard.

19. *First*, the Notice of the prehearing conference and the Prehearing Conference Order, as their respective service certificates indicate, were mailed to Complainant's counsel of record, Attorney Pascal, at the address identified in the Complaint. There is no indication that either the Notice or the Prehearing Conference Order was returned to the Commission by the postal service as being undeliverable. As such, it must be presumed that these documents, sent

in the ordinary course of business, were received by Attorney Pascal² and that Complainant had sufficient notice of the day, date, and time of the prehearing conference and how to participate.

20. *Second*, the Notice scheduling the Call-In Telephone Prehearing Conference expressly stated: “**At the above date and time, you must call into the hearing. If you fail to do so, your case will be dismissed. You will not be called by the Administrative Law Judge.**”³ The Prehearing Conference Order likewise advised the parties: “**You must call into the prehearing conference on the scheduled day and time. You will not be called by the Administrative Law Judge.**”⁴ Complainant, therefore, had sufficient notice that the case would be dismissed for failure to appear.

21. *Third*, no one appeared on behalf of Complainant at the date and time set for the prehearing conference in this case despite notice of the conference. Once the Commission provides notice of a hearing and the opportunity to be heard, it is the responsibility of the parties to appear and participate in the hearing. *Mumma v. PPL Electric Utilities Corporation*, Docket No. C-00014869 (Order entered Jan. 24, 2002); *Sentner v. Bell Telephone Co. of Pa.*, Docket No. F-00161106 (Order entered Oct. 25, 1993). Where a party fails to appear, Section 5.245 of the Commission’s regulations provides, in pertinent part, that:

(a) After being notified, a party who fails to be represented at a scheduled conference or hearing in a proceeding will:

(1) Be deemed to have waived the opportunity to participate in the conference or hearing.

(2) Not be permitted thereafter to reopen the disposition of a matter accomplished at the conference or hearing.

² *Berkowitz v. Mayflower Securities, Inc.*, 371 A.2d 584 (Pa. 1974); *Meierdierck v. Miller*, 147 A.2d 406 (Pa. 1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa. Super. 1997); *Judge v. Celina Mutual Insurance Co.*, 444 A.2d 658 (1982)).

³ Call-In Telephone Pre-Hearing Conference Notice (dated Jan. 30, 2019) (emphasis in original).

⁴ Prehearing Conference Order (dated Feb. 4, 2019) (emphasis in original).

* * *

(c) If the Commission or the presiding officer finds, after notice and opportunity for hearing, that the actions of a party, including an intervenor, in a proceeding obstruct the orderly conduct of the proceeding and are inimical to the public interest, the Commission or the presiding officer may take appropriate action, **including dismissal of the complaint**, application, or petition, **if the action is that of complainant**, applicant, or petitioner.

52 Pa. Code § 5.245 (emphasis added). Moreover, neither Complainant nor Attorney Pascal requested a postponement or continuance of the prehearing conference or provided any explanation for the failure to appear. Accordingly, Complainant's failure to appear cannot be considered "unavoidable."⁵

22. *Fourth*, Complainant's actions (or lack thereof) show no desire to move forward with its Complaint. As explained in Section I above, the last communication of any sort that either Windstream or the Commission received from Complainant was in early July 2018. Complainant subsequently disconnected all services with Windstream and ported services to another provider, effective August 3, 2018, and did so freely and of its own volition. Despite numerous efforts to contact Attorney Pascal since that time, Windstream has not heard from Complainant or its attorney of record regarding this matter. Moreover, the Commission's own efforts to contact Complainant, including the January 11, 2019 letter sent by the Mediator to both Complainant and its counsel, yielded no response. Complainant's silence speaks volume, and it is only fair that this Complaint be dismissed immediately to save Windstream and the Commission from having to expend additional time, cost, and resources trying to adjudicate the matter.⁶

⁵ See 52 Pa. Code § 5.245(b).

⁶ See *Eric Hudson v. PECO Energy Company*, Docket No. C-2016-2555083 (Order entered June 21, 2018) (recognizing that where a Complainant's failure to appear was not unavoidable, any further procedural activity would prejudice the public interest due to the wasteful use of the Commission's and respondent's time and resources).

23. In sum, Complainant's due process rights were fully protected. *Sentner, supra*; *see also* 52 Pa. Code § 5.245. Complainant had notice and full and fair opportunity to be heard, but chose not to appear at the prehearing conference or comply with the Commission's directives. It likewise has failed to communicate in any fashion with Windstream or the Commission or shown any willingness to proceed with this matter. For these reasons, it is wholly appropriate to dismiss, *with prejudice*, the Complaint for failure to prosecute.

B. The Complaint Is Moot since Complainant Is No Longer a Windstream Customer

24. Notwithstanding Complainant's lack of prosecution, the Complaint should also be dismissed because Complainant is no longer a customer of Windstream, having terminated all services effective August 3, 2018. Consequently, there is no longer any continuing controversy or genuine issue still in dispute, and the alleged reasons for the complaint are now moot.

25. The relief being sought by Complainant has also been rendered moot. Indeed, the Commission can no longer order the relief requested in its Complaint (*i.e.*, "install new lines for phone and internet"), as Complainant is no longer a customer of Windstream and is no longer receiving service at the account for which the purported issues in dispute arose. Even if it were to be granted, the relief would be meaningless, serving no purpose or benefit whatsoever.

26. Since it no longer receives service from Windstream, Complainant lacks standing to continue pursuit of the Complaint because it no longer has a "direct interest" in the issues raised. As the Commission has held, "[i]n order to have standing to pursue a formal complaint before the Commission under Section 701 [of the Public Utility Code], the complainant must have a direct, immediate, and substantial interest in the subject matter of the controversy." *David Hatchigian v. PECO Energy Company*, Docket Nos. C-2015-2477331, and C-2015-2487879

in addressing the complaint) (citing *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Order entered Dec. 26, 1995)).

(Order entered July 21, 2016) (citing *Municipal Authority of Borough of West View v. Pa. P.U.C.*, 41 A.3d 929 (Pa. Cmwlth. 2012)). For an interest to be direct, “the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains.” *Id.* (citing *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282)).

27. An evidentiary hearing, therefore, would be a useless exercise and a waste of administrative time and resources.⁷ The Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary or in the public interest. 66 Pa.C.S. § 703(b); 52 Pa. Code § 5.21(d). A hearing is necessary only to resolve disputed material questions of fact, and when the question presented is one of law, the Commission need not hold a hearing. *Lehigh Valley Power Comm’n v. Pa. P.U.C.*, 563 A.2d 548 (Pa. Cmwlth. 1989); *Edan Transportation Corp. v. Pa. P.U.C.*, 623 A.2d 6 (Pa. Cmwlth. 1993). That is no longer the case with this proceeding.

⁷ The Commission, moreover, would not be able to adjudicate any claims raised in the Complaint regarding internet service speeds because it lacks subject matter jurisdiction over the provision of Internet and broadband services. *Brown v. The United Telephone Company of Pennsylvania LLC, d/b/a CenturyLink*, Docket No. F-2012-2310988 (Order entered Feb. 28, 2013). The Commission must act within and cannot exceed its jurisdiction. *Feingold v. Bell of Pennsylvania*, 383 A.2d 791 (Pa. 1977); *Loma, Inc v. Pa. P.U.C.*, 682 A.2d 424 (Pa. Cmwlth. 1996).

III. CONCLUSION

WHEREFORE, for the reasons set forth above, Windstream Pennsylvania, LLC respectfully requests that the Pennsylvania Public Utility Commission grant this Motion and dismiss, *with prejudice*, the Formal Complaint of North Buffalo Township at Docket No. C-2017-2636341.

Respectfully submitted,



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*Attorney for Respondent
Windstream Pennsylvania, LLC*

DATED: April 22, 2019

VERIFICATION

I, James Lloyd, Counsel for Windstream Services, LLC, hereby state that the facts set forth in the foregoing document are true and correct to the best of my knowledge, information, and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Dated: April 22, 2019


James Lloyd

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of April, 2019, served a true and correct copy of the foregoing document upon the persons listed below in accordance with the requirements of 52 Pa. Code § 1.54:

Via Email and First Class Mail

Honorable Mark A. Hoyer
Deputy Chief Administrative Law Judge
Pennsylvania Public Utility Commission
Piatt Place, Suite 220
301 Fifth Avenue
Pittsburgh, PA 15222
mhoyer@pa.gov

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