

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joseph McGuckin	:	
	:	
v.	:	C-2020-3022113
	:	
Talk America Services, LLC.	:	

INITIAL DECISION

Before
Christopher P. Pell
Deputy Chief Administrative Law Judge

INTRODUCTION

This Initial Decision grants Joseph McGuckin’s Complaint against Talk America Services, LLC upon finding that the Complainant successfully carried his burden of proving that the utility failed to provide him with adequate and reasonable service.

HISTORY OF THE PROCEEDING

On September 11, 2020, Joseph McGuckin (Complainant) filed a formal Complaint (Complaint) against Talk America Services, LLC (Talk America or Respondent) with the Pennsylvania Public Utility Commission (Commission). In the Complaint, the Complainant placed a checkmark in the box indicating “[t]he utility is threatening to shut off my service or has already shut off my service,” next to which he wrote in that the Respondent shut off his hardline telephone service in the middle of the National COVID-19 crisis. As relief, the Complainant requested that the Commission require the Respondent to reconnect his hardline telephone and DSL service, and that the Commission also sanction and fine the Respondent for violating written consent decrees and

memorandums of agreement by terminating his service in April 2020 during the COVID-19 pandemic.

On October 14, 2020, the Respondent filed an Answer denying that it disconnected the Complainant's service in early April 2020. The Respondent further answered that it disconnected the Complainant's telephone service on March 17, 2020, pursuant to a Commission order at Docket No. A-2019-3013838 authorizing Talk America Services' disconnection of service to Pennsylvania customers including the Complainant.

By Hearing Notice dated October 16, 2020, a hearing was scheduled for December 1, 2020 at 10:00 a.m., and the matter was assigned to me.

I issued a Prehearing Order on October 19, 2020. The Prehearing Order directed the parties to comply with various procedural requirements and explained that the complainant bears the burden of proof to establish that the respondent violated its tariff, the Public Utility Code, or a Commission Order or regulation, and that he is entitled to the relief requested in the Complaint.

The hearing convened as scheduled on December 1, 2020. The Complainant appeared *pro se* and testified. The Complainant offered five exhibits, all of which were admitted into the record by stipulation (Complainant Exhs. 1-5). The Respondent also appeared and was represented by Anthony C. Decusatis, Esq. The Respondent did not present any witness testimony. The Respondent offered four exhibits, all of which were admitted into the record by stipulation (Talk America Exhs. 1-4).

The record consists of a 60-page transcript and nine exhibits. The record closed on January 8, 2021 upon my receipt of the hearing transcript.

FINDINGS OF FACT

1. The Complainant in this case is Joseph McGuckin.

2. The Respondent in this case is Talk America Services, LLC.

3. The Complainant resides at 3331 Longshore Avenue, Philadelphia, PA 19149-2026 (service address). Tr. 15.

4. The Complainant was a customer of the Respondent. Tr. 15.

5. On October 28, 2019, the Respondent filed an Application with the Pennsylvania Public Utility Commission seeking a Certificate of Public Convenience pursuant to Section 1102(a)(2) of the Public Utility Code, 66 Pa. C.S. § 1102(a)(2), requesting Commission approval of the discontinuance and abandonment of its Interexchange Carrier Reseller and Competitive Local Exchange Carrier services to the public in the Commonwealth of Pennsylvania. Talk America Exh. 1.

6. By Commission Order at Docket No. A-2019-3013838,¹ the Commission approved the Respondent's Application. Talk America Exh. 1.

7. As part of the Commission Order, the Commission directed that the Respondent "shall continue to provide telecommunications service to its remaining customers until such time as those customers have obtained comparable service from a competing acquiring LSP or March 31, 2020, whichever is earlier." Talk America Exh. 1.

8. The Complainant is aware of the Commission Order granting the Respondent's Application to abandon service. Tr. 21.

9. In January and March of 2019, the Respondent sent the Complainant notices advising that it was no longer going to provide phone and internet service, and that he would have to find another provider to avoid disruption of service. Tr. 20.

¹ *Application of Talk America Services, LLC for Approval of the Discontinuance and Abandonment of its Interexchange Carrier Reseller and Competitive Local Exchange Carrier Services to the Public in the Commonwealth of Pennsylvania*, Docket No. A-2019-3013838 (Order entered March 12, 2020).

10. Through contacts with Talk America, the Complainant learned that Talk America personnel would be laid off by March 31, 2020. Tr. 24.
11. On March 18, 2020, the Respondent terminated the Complainant's service. Tr. 16, 23.
12. The Complainant received several notices from the Respondent prior to his termination. Tr. 19.
13. At the time of termination, the Complainant was current on his bills. Tr. 16.
14. The Complainant has not obtained services through another provider. Tr. 21.
15. On May 5, 2020, the Complainant received correspondence from Talk America indicating that his service had been disconnected per his request, and that a final bill was mailed to him and was now past due. Tr. 26; Comp. Exh. 2.
16. On May 26, 2020, the Complainant received a second letter from Talk America indicating that his service had been disconnected per his request, and that his unpaid bill was scheduled to be placed with a collection agency. Tr. 26; Comp. Exh. 2.

DISCUSSION

The Public Utility Code, 66 Pa.C.S. § 332(a), places the burden of proof upon the proponent of a rule or order. As the proponent of a rule or order, the Complainant has the burden of proof in this matter pursuant to 66 Pa.C.S. § 332(a).

To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the respondent public utility is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. P.U.C. 196 (1990), *Feinstein v. Phila. Suburban Water Co.*, 50 Pa. P.U.C. 300 (1976). Such a showing must be by a preponderance of the

evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa.Cmwlth. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa.Cmwlth. 1982); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa.Cmwlth. 1993); 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & W. Ry. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 194 Pa.Super. 278, 166 A.2d 96 (1960); *Murphy v. Pa. Dep't of Pub. Welfare, White Haven Cntr.*, 480 A.2d 382 (Pa.Cmwlth. 1984).

Upon the presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the Complainant shifts to the Respondent. If the evidence presented by the Respondent is of co-equal weight, the Complainant has not satisfied his burden of proof. The Complainant would be required to provide additional evidence to rebut the evidence of the Respondent. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa.Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

In the present case, the Complainant alleged that the Respondent inappropriately shut off his telephone service. As relief, the Complainant requested, in part, that the Commission require the Respondent to reconnect his telephone service. However, since the Commission granted Talk America's Application to abandon service effective March 31, 2020, the Commission cannot order the Complainant's requested relief.

Although the Commission granted Talk America's Application to abandon service effective March 31, 2020, Talk America was still required by law to provide the Complainant with adequate and reasonable service until that date. Section 1501 of the Public Utility Code, 66 Pa.C.S. § 1501, provides, in relevant part:

§ 1501. Character of service and facilities

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission.

66 Pa.C.S. § 1501.

Interpreting this provision in *W. Penn Power Co. v. Pa. Pub. Util. Comm'n*, 478 A.2d 947 (Pa. Cmwlth. 1984), the Commonwealth Court stated:

We hold that in order for the PUC to sustain a complaint brought under this section, the utility must be in violation of its duty under this section. Without such a violation by the utility, the PUC does not have the authority, when acting on a customer's complaint, to require any action by the utility.

Id. at 949 (footnote omitted).

The statutory definition of "service" is to be broadly construed.² *Country Place Waste Treatment Co., Inc. v. Pa. Pub. Util. Comm'n*, 654 A.2d 72 (Pa. Cmwlth. 1995). In applying the facts to the law, the issue becomes whether Talk America's actions as described in the Complaint rise to the level of inadequate service that constitutes a violation of the Public Utility Code.

² "Service." Used in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities, or contract carriers by motor vehicle, in the performance of their duties under this part to their patrons, employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them. 66 Pa. C.S.A. § 102.

The Commission Order at Docket No. A-2019-3013838 specifically directed that the Respondent “shall continue to provide telecommunications service to its remaining customers until such time as those customers have obtained comparable service from a competing acquiring LSP or March 31, 2020, whichever is earlier.”³ Talk America terminated the Complainant’s service on March 18, 2020, nearly two weeks early. The Complainant provided credible testimony that he was current on his bills at the time of termination, and that he did not request termination of service contrary to notices he received from the Respondent.⁴ The Respondent did not provide any witness testimony to rebut the Complainant’s testimony.

Prior to his termination, the Complainant had not sought comparable service from a competing acquiring LSP. Since the Complainant had not sought comparable service from a competing acquiring LSP, pursuant to the Commission’s Order at Docket No. A-2019-3013838, the Respondent was not permitted to stop providing service to him before March 31, 2020. Since the Respondent discontinued the Complainant’s service thirteen days before it had Commission approval to do so, and did not have other grounds for termination, the Respondent provided the Complainant with inadequate service in violation of the Commission’s Order as well as 66 Pa.C.S. § 1501.

Under Public Utility Code Sections 3301(a) and (b), "the Commission may levy a fine of up to \$1,000 per day for continuing violations of the Public Utility Code." 66 Pa.C.S. § 3301. The Commission has set forth, in a statement of policy, the factors and standards for evaluating proceedings involving violations of the Public Utility Code for purposes of determining appropriate civil penalty amounts. *See*, 52 Pa. Code § 69.1201(c). These factors and standards are as follows:

- (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty.

³ *Application of Talk America Services, LLC for Approval of the Discontinuance and Abandonment of its Interexchange Carrier Reseller and Competitive Local Exchange Carrier Services to the Public in the Commonwealth of Pennsylvania*, Docket No. A-2019-3013838 at 4. (Order entered March 12, 2020).

⁴ *See* Complainant’s Exh. 2.

When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

(2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

(3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

(4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

52 Pa. Code § 69.1201(c). These factors, relative to this proceeding, are examined below.

First, the evidentiary record collected in this matter does not contain sufficient evidence to conclude that Talk America's early discontinuance of the Complainant's service was willfully fraudulent or a misrepresentation. Second, Talk America's early discontinuance of the Complainant's service left him without a working phone, including access to emergency services, but did not result in property damage or personal injury. Third, the record in this case supports a finding that the violation of the Commission's Order, as well as Section 1501 of the Public Utility Code, 66 Pa.C.S. § 1501, resulted from the Respondent's unexplained negligence in discontinuing the Complainant's service early. Fourth, the Respondent did not offer any evidence of remedial measures taken to prevent similar conduct in the future.

Fifth, the record demonstrates that the only party affected by Talk America's early discontinuance was the Complainant. Sixth, the record does not include a history of Talk America's past offenses. Seventh, the Commission did not conduct an investigation in this proceeding. The eighth, ninth and tenth factors listed in 52 Pa. Code § 69.1201(c) are inter-related in this case and they are, respectively: the amount of a civil penalty required to deter future violations; prior Commission decisions in similar cases; and the catch-all "other relevant factors."

After reviewing the evidence collected in this matter, I conclude that a civil penalty in the amount of \$1,300 (\$100 for each day of the early discontinuance) is appropriate in this proceeding. This amount is clearly warranted based upon the Respondent's violation of the Commission's Order, and for the Respondent's failure to provide the Complainant with adequate and reasonable service.

Within thirty (30) days of the Commission's Final Order in this case, Talk America shall pay a civil penalty in the amount of \$1,300.00 by sending a certified check or money order payable to the Commonwealth of Pennsylvania. In addition, Talk America shall cease and desist from further violations of the Public Utility Code, 66 Pa.C.S. § 101 *et seq.*, and the regulations of the Pennsylvania Public Utility Commission, 52 Pa.Code § 1.1 *et seq.*

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties to and subject matter of this proceeding. 66 Pa.C.S. § 701.

2. Pursuant to 66 Pa.C.S. § 332(a), the burden of proof in this proceeding is upon the Complainant. 66 Pa.C.S. § 332(a).

3. Any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa.Cmwlth. 1982); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa.Cmwlth. 1993); 2 Pa.C.S. § 704.

4. It is every public utility's duty to "furnish and maintain adequate, efficient, safe, and reasonable service and facilities," and to "make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. 66 Pa C.S. § 1501.

5. Under Public Utility Code Sections 3301(a) and (b), the Commission may levy a fine of up to \$1,000 per day for continuing violations of the Public Utility Code. 66 Pa.C.S. § 3301.

6. The Complainant met his burden of proving that the Respondent failed to provide him with adequate and reasonable service.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaint of Joseph McGuckin against Talk America Services, LLC at Docket No. C-2020-3022113 is granted.

2. That Talk America Services, LLC shall pay a civil penalty in the amount of One Thousand and Three Hundred Dollars (\$1,300.00) by sending a certified check or money order payable to the Commonwealth of Pennsylvania, within thirty (30) days from the entry of the Final Commission Oder to:

Secretary
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

3. That Talk America Services, LLC shall cease and desist from further violations of the Public Utility Code, 66 Pa.C.S. § 101 *et seq.*, and the regulations of the Pennsylvania Public Utility Commission, 52 Pa.Code § 1.1 *et seq.*

4. That the record at C-2020-3022113 be marked closed.

Date: April 28, 2021

/s/
Christopher P. Pell
Deputy Chief Administrative Law Judge