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May 24, 2022

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street – Filing Room (2 North)
Harrisburg, PA 17120

Re: Courtney Matkovich v. Verizon North LLC;
Docket No. C-2020-3022369

Dear Secretary Chiavetta:

Enclosed please find the Exceptions of Verizon North LLC in connection with the above-referenced case, which were electronically filed today.

If you have any questions with regard to this filing, please direct them to me. Thank you for your attention to this matter.

Very truly yours,

Suzan D. Paiva
Counsel for Verizon North LLC

SDP/sau
Enclosures

Via Email & US First Class Mail

cc: Honorable Katrina Dunderdale (kdunderdal@pa.gov)
Courtney Matkovich (courtneyyokom@hotmail.com)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Courtney Matkovich,	:	
Complainant	:	
	:	
v.	:	Docket No. C-2020-3022369
	:	
Verizon North LLC	:	
Respondent	:	

EXCEPTIONS OF VERIZON NORTH LLC

Pursuant to 52 Pa. Code § 5.533, Verizon North LLC (“Verizon”) excepts to the May 5, 2022, Initial Decision (“ID”) of Administrative Law Judge Katrina L. Dunderdale.

BACKGROUND

On October 13, 2020, Courtney Matkovitch filed a formal complaint against Verizon alleging that her “high speed internet is unreliable.” Ms. Matkovitch subscribes to Digital Subscriber Line (DSL) service, an internet access service that is provided over telephone lines.¹ She also subscribes to a landline from Verizon, but it is not the subject of her complaint. The ID concluded that Verizon “failed to provide reasonable and adequate customer service when it did not provide her with at least 1.5 megabits per second download speed” and should pay a civil penalty of \$1,000.

While normally Verizon would not except to a \$1,000 civil penalty, it is necessary to do so in this case because of the significant legal and factual errors in this ID. First, the ID exceeds this Commission’s jurisdiction by treating retail internet service as a public utility service subject to Section 1501 and other provisions of the Public Utility Code, rather than confining its legal review to the narrow authority that exists under Chapter 30 of the Code. Second, the ID’s factual

¹ Transcript of December 14, 2021 Hearing (“Tr.”) at 58.

conclusion that Verizon failed to provide a service with 1.5 Mbps of bandwidth is directly contrary to the evidence and is based on logically fallacious reasoning. The Commission should review the record fairly, apply the correct legal standard, reject the ID, and dismiss the complaint.

EXCEPTIONS

Verizon Exception 1: The ID Exceeded This Commission’s Jurisdiction by Treating Retail Internet Service as a Regulated Public Utility Service.

The ID treats retail internet service as a public utility service subject to the broad service standards of Section 1501 of the Public Utility Code. This is clear legal error because it is well-established that the Commission lacks jurisdiction over service and pricing of retail internet service, including DSL, which is an interstate service under the purview of the Federal Communications Commission (“FCC”). While this Commission may have limited authority to review a company’s compliance with the network modernization plan requirements of Chapter 30 of the Public Utility Code – and Verizon clearly established its compliance as discussed in the second exception – the ID erred by using Chapter 30 as an excuse to create a giant loophole that treats internet as a Commission-regulated public utility service.

The ID’s conclusion that “Verizon North LLC failed to provide reasonable and adequate customer service” (ID, Ordering ¶ 1) is based on an erroneous view of the extent of the Commission’s authority over internet service. The ID’s error is clear when it states that “Ms. Matkovich alleged reliability, safety or quality problems with her *utility service.*” (ID at 1) (emphasis added). DSL is not a “utility service.” The ID erroneously finds that the DSL service provided to Ms. Matkovich is a public utility service under 66 Pa. C.S.A. §§ 102 and 1501. (ID at 9). It then concludes that “Respondent’s failure to provide reliable and adequate internet service violates Section 1501 of the Public Utility Code. 66 Pa.C.S.A. § 1501.” (ID at 19).

The Commission must act within, and cannot exceed its jurisdiction.² Jurisdiction cannot be conferred by the parties where none exists.³ As a “creature of statute,” this Commission has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication.”⁴

It is well-settled that retail internet service is not a “public utility service” subject to this Commission’s jurisdiction to broadly regulate under Section 1501 of the Public Utility Code. The Commission itself has made this clear, holding that “retail broadband access services to the Internet are generally under the regulatory purview of the FCC” and outside the jurisdiction of this Commission.⁵ Therefore, the Commission has held that “allegations regarding . . . [a] service outage of . . . retail Internet service should be dismissed for lack of subject matter jurisdiction. In general, this Commission does not have jurisdiction over the provision of retail Internet services.”⁶ The Commission has upheld the dismissal of claims relating to faulty DSL service, holding that “[w]e agree that the allegations regarding Internet connection and service

² *Loma, Inc. v. Pennsylvania Public Utility Commission*, 682 A.2d 424 (Pa. Cmwlth. 1996).

³ *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

⁴ *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 8, 383 A.2d 791, 794 (Pa. 1977). *See also Allegheny County Port Authority v. PA P.U.C.*, 427 Pa. 562, 237 A.2d 602 (Pa. 1967).

⁵ *Daskalakis v. Verizon Pennsylvania, Inc.*, No. C-2010-2172222, 2011 Pa. PUC LEXIS 2042 (Opinion and Order entered April 4, 2011). *See also MilleniaNet Corporation v. Verizon Pennsylvania Inc.*, Docket No. C-20055173 (Opinion and Order entered May 2, 2008), *affirmed*, *MilleniaNet Corporation v. Pennsylvania Public Utility Commission*, Docket No. 990 CD 2008 (Commonwealth Court, Memorandum Opinion by Judge Butler filed April 30, 2009) (this Commission “has no jurisdiction” over the disputes at issue because “both the Pennsylvania General Assembly and Congress have indicated that the [Commission’s] authority does not . . . extend to internet services.”)

⁶ *A. Moses, Inc. v. Verizon Pennsylvania Inc.*, Docket No. C-2010-2205259, 2011 Pa. PUC LEXIS 310 (Opinion and Order entered November 4, 2011).

should be dismissed for lack of subject matter jurisdiction. In general, this Commission does not have jurisdiction over the provision of retail Internet services.”⁷

The Legislature has also made clear that this Commission does not regulate “IP-enabled” service, which is any “service, capability, functionality or application provided using Internet protocol or any successor protocol that enables an end user to send or receive a communication in Internet protocol format or any successor format, regardless of whether the communication is voice, data or video.”⁸ DSL internet access service clearly fits that definition. Under the Voice Over Internet Protocol Freedom Act “...no department, agency, commission or political subdivision of the Commonwealth may enact or enforce, either directly or indirectly, any law, rule, regulation, standard, order or other provision having the force or effect of law that regulates, or has the effect of regulating, the rates, terms and conditions of . . . IP-enabled service.”⁹

The Commission has recognized that it has authority under Chapter 30 of the Public Utility Code, 66 Pa. C.S. §3014(b), to review whether a local exchange telecommunications company has met the terms of its network modernization plan. But this limited ability to review whether a company is able “to provide broadband availability to 100% of its total retail access lines at the Chapter 30 minimum standard of 1.544 Mbps downstream and 0.128 Mbps upstream” utilizing any technology, and “to make broadband access available to a consumer

⁷ *Ebersole-Brown v. The United Telephone Company of Pennsylvania LLC, d/b/a CenturyLink*, Docket No. F-2012-2310988 (Opinion and Order entered February 28, 2013) (dismissing claims relating to faulty DSL service but reversing dismissal of any claims relating to the telephone service only).

⁸ 73 P.S. § 2251.3.

⁹ 73 P.S. § 2251.4. None of the limited exceptions set forth in 73 P.S. § 2251.6 apply here. *See also Brown v. Armstrong Digital Services*, Docket No. C-2008-2079810 (Final Order entered May 12, 2009); *Wildman v. Verizon Pennsylvania LLC*, Docket No. C-2013- 2342700 (Recommended Decision of ALJ Barnes dated February 25, 2013; Final Order entered April 9, 2013); *Silvestri v. Comcast Phone of Pennsylvania, LLC*, Docket No C-2011-2241959 (Order entered October 7, 2011).

within ten business days of request,”¹⁰ does not create a loophole that allows the Commission to engage in service quality or rate regulation of an interstate service. Chapter 30 does not empower adjudication of traditional quality of service issues or allow for civil penalties for occasional internet service outages, which is why the Commission routinely dismisses claims relating to internet service outages.¹¹ Chapter 30 simply reviews whether the company has the network facilities to provision an internet access service using any technology that provides at least 1.544 Mbps downstream and 128 Kbps upstream – compliance that Verizon clearly established in this case.

The ID improperly conflates and confuses the limited Chapter 30 authority with the Commission’s broad regulatory oversight of jurisdictional telephone service. The Commission should reject the ID to the extent it assumes that the Commission can treat DSL internet access service as a “utility service” and impose penalties for inadequate or unreasonable service based on allegations of occasional service outages under Sections 1501 and 3301 of the Public Utility Code.

Verizon Exception 2: The ID’s Factual Conclusion That Verizon Did Not Provide a Service of at Least 1.5 Mbps is Not Supported by Substantial Evidence.

The evidence of record establishes that Verizon offers a “broadband” service at this location that substantially exceeds Chapter 30’s definition of “having a bandwidth equal to or greater than 1.544 megabits per second (mbps) in the downstream direction and equal to or

¹⁰ *White v. Verizon North LLC*, Docket No. C-2016-2532236 (Opinion and Order entered November 2, 2016); *Roberts v. The United Telephone Company of Pennsylvania LLC d/b/a CenturyLink*, Docket No. C-2017-2632824 (Opinion and Order entered June 28, 2018).

¹¹ *See, e.g., A. Moses, Inc. v. Verizon Pennsylvania Inc.*, Docket No. C-2010-2205259, 2011 Pa. PUC LEXIS 310 (Opinion and Order entered November 4, 2011).

greater than 128 kilobits per second (kbps) in the upstream direction.”¹² To the extent the ID concludes otherwise, it is plainly in error.

A. The Evidence

The Complainant’s evidence consisted of her own testimony stating that she did not encounter any issues with her DSL service until the pandemic started in approximately April of 2020. At that time, as a nurse practitioner, Complainant was required to conduct more telemedicine appointments over her laptop from home. Due to legal privacy restrictions she had to use her employer’s secure applications to communicate over the internet and could not speak to the patients over her landline.¹³ She stated that at times she was not able to access the healthcare applications on her laptop and the green light on the Verizon modem that supplies her DSL service would be flickering.¹⁴ She concluded that Verizon was not providing sufficient internet bandwidth because she stated that she has done speed tests from her laptop and cell phone that show less than 1.5 Mbps or no connection.¹⁵ She admitted that the 3 Mbps DSL service was used for more than just her work laptop, and at various times it has been used to do school work, to watch Netflix, to connect a Firestick for television watching, to operate a Playstation, and to connect a cellphone over Wi-Fi.¹⁶ She states Verizon has come out several times, replaced modem, checked the line, checked the speed, did different troubleshooting but she is not satisfied.¹⁷ She also testified that she has a T-Mobile wireless hotspot that can provide

¹² 66 Pa. C.S. § 3012.

¹³ Tr. at 24-29.

¹⁴ Tr. at 38.

¹⁵ Tr. at 17, 44.

¹⁶ Tr. at 39-44.

¹⁷ Tr. at 27.

up to 25 Mbps of bandwidth but she has not set it up as secure to use it for patient calls for work.¹⁸

Verizon presented the testimony of Todd Brannen, a senior engineer primarily responsible for equipment placement and installations who serves as Verizon's single point of contact for any Chapter 30 and DSL congestion issues and deployment in Pennsylvania and Delaware, and is therefore well qualified to provide an analysis of the Complainant's DSL service.¹⁹ Mr. Brannen testified that the Complainant's DSL service is provisioned to deliver 3.36 Mbps downstream and 768 Kbps upstream and that he would not expect it to go higher than the speed it is provisioned for.²⁰ He testified that she has the most modern configuration for DSL, with service that is on fiber all the way to the remote terminal and is on copper only for the 11,000 feet from the remote terminal to the home.²¹ The copper was examined and there is nothing to indicate that there are any problems with the copper lines or the outside network in general.²²

To investigate the issues reported in the complaint, he and the Verizon team performed an end-to-end analysis of the Complainant's DSL service. They looked at the network, did remote testing and had a technician perform testing on site while Mr. Brannen was on the phone with the technician. Based on this investigation, the witness concluded that the DSL service is consistently providing the provisioned 3 Mbps bandwidth, that "every time we've looked at it it's

¹⁸ Tr. at 42.

¹⁹ Tr. at 57.

²⁰ Tr. at 67-69.

²¹ Tr. at 66, 118.

²² Tr. at 131.

been in service and ... we've seen traffic going across it," and that it is more than capable of meeting the Chapter 30 standards of at least 1.5 Mbps down and 128 Kbps up.²³

To substantiate these conclusions, Mr. Brannen explained and provided documents showing the results of the remote testing demonstrating that there was no congestion on the lines or ports connecting the customer to the internet and that there was plenty of capacity on the network.²⁴ This means that the Complainant's service would not be degraded even if her neighbors were using their DSL at the same time, because everyone's access is limited to 3 Mbps and there is plenty of capacity to accommodate them. He testified about the on-site testing that was conducted on December 3, 2021. A technician tested the speed and quality of the DSL service by plugging the customer's own modem in at the Network Interface Device (NID) to isolate any interference from other devices within the house.²⁵ The technician plugged a cellphone directly into the modem at the NID and ran a You Tube video that was expected to utilize about 3 Mbps and found that the video ran smoothly with no buffering.²⁶ Simultaneous remote testing showed 2.8 Mbps being sent and received, showing that there was no problem getting that bandwidth to play the video.²⁷ Mr. Brannen explained that this showed, first, that there is no question that the line is providing 3 Mbps of bandwidth and the modem is good, and, second, that just running one You Tube video with nothing else used almost all of the 3 Mbps of capacity. While connected at the NID the technician also ran a speed test and Verizon monitored the results remotely, showing 3 Mbps of data being transmitted from the central office and being

²³ Tr. at 95-96.

²⁴ Tr. at 71-72.

²⁵ Tr. at 59-60, 75.

²⁶ Tr. at 75-76.

²⁷ Tr. at 79 (this test does not mean 2.8 Mbps was the maximum it could carry, but just that it was able to carry at least 2.8 Mbps with no problem.)

received by the customer.²⁸ However, when the technician went inside the house and tried to run the same video from the customer's laptop there was buffering, possibly indicating an issue with the laptop itself or other devices within the house trying to share the same 3 Mbps bandwidth.

After this technician visited on December 3, 2021, Ms. Matkovitch contacted Verizon and stated that she was having problems connecting to the internet on December 5.²⁹ Verizon tested remotely in the early morning hours of December 6, 2021 and saw the full 3 Mbps being used at 3:55 am Central Standard Time, indicating that some device in the home was using the whole capacity of the DSL service at that time.³⁰ Testing at the same time showed no congestion on the network and plenty of capacity in the network itself. Verizon continued to do random testing in the evening hours on December 8 to try to replicate the time period that the customer stated she had issues, but in every instance it found the service providing around 3 Mbps and never below 1.5, with no problems found through the testing done at various times of the day.³¹

Mr. Brannen explained that, given that there were no problems or defects found in the Verizon network facilities and no congestion, the issues the Complainant reports could be caused by one device or multiple devices trying to use more than the 3 Mbps of bandwidth at the same time. For example if one person was watching a video and someone else tried to access the internet with another device through the DSL, they would be sharing the bandwidth. As another example, if a cell phone is set up to automatically connect to Wi-Fi over the DSL service it might be using up bandwidth without the customer realizing it, especially if it tries to do an update.³²

²⁸ Tr. at 81-82.

²⁹ Tr. at 85-86.

³⁰ Tr. at 87-88.

³¹ Tr. at 88-89.

³² Tr. at 90-91.

“[Y]ou could stretch the three meg 3 enough that it would not, you know, you wouldn’t be able to connect to the internet,” but “[t]hat doesn’t mean that the line is not able to give you 3.3 MB, but just that you’re trying to use more than 3.3” and this could cause failures trying to connect.³³ With extra use from the pandemic there could also be problems with the healthcare application servers themselves (not part of Verizon’s network) meeting the capacity.³⁴ Mr. Brannen explained that the customer’s testimony that she saw a flashing green light on modem indicated overuse of bandwidth as a possibility because typically if the DSL service is out the light would be yellow. A flashing green light indicates reconnecting, which could very well be caused by exceeding the bandwidth and knocking the modem out of sync “if you’re . . . asking too much of the DSL”³⁵ Mr. Brannen provided an exhibit showing the typical bandwidth needed by a number of modern video streaming, gaming and teleconferencing applications, showing that a 3 Mbps DSL service would not be able to handle multiple of these uses if they were running at the same time and even one very high bandwidth application (such as a laptop with high security firewall applications) might exceed the bandwidth.³⁶ However, the DSL service itself is more than capable of meeting the Chapter 30 standards of at least 1.5 Mbps down and 128 Kbps up.³⁷

B. The ID’s Faulty Factual Conclusions

The ID’s finding that Verizon failed to provide a 1.5 Mbps broadband service is based on faulty logic and unsupportable conclusions. The overwhelming evidence shows that this DSL service is delivering 3 Mbps to the home, based on remote testing and testing on-site showing

³³ Tr. at 92-93.

³⁴ Tr. at 105-106.

³⁵ Tr. at 110.

³⁶ Verizon Exhibit 2 (showing, for example, that Netflix needs approximately 3 Mbps for standard definition streaming, a gaming console requires approximately 3 Mbps, a Zoom or Skype call requires approximately 1.5 Mbps, etc.)

³⁷ Tr. at 95-96.

that there is no congestion in the equipment or the network, plenty of capacity, no fault in the physical lines, and that the service is measured as consistently delivering the provisioned speed when tested remotely and at the NID.

The primary basis for the ID's finding against Verizon is its reasoning that "Verizon did not contest whether Complainant experienced problems with accessing her internet services, as described in the foregoing section of this decision." (ID at 11) According to the ID, since Verizon "did not contend Complainant was lying" it therefore admitted that the DSL service was not providing 1.5 Mbps and "Complainant's uncontroverted testimony about the existence of service issues was not sufficiently rebutted by Verizon." (ID at 17). But just because Verizon did not call the Complainant a liar does not mean it conceded that its DSL service was faulty. Verizon proved that its DSL service is providing the 3 Mbps that is provisioned to offer. The more likely fact pattern, as Mr. Brannen explained, is that the customer may well have experienced issues accessing certain applications or devices, but since the Verizon service has been proven to be good through examination and testing any such problems were likely caused by trying to use too much bandwidth on a 3Mbps DSL service. By failing to call the complainant a liar, Verizon did not admit, effectively or by implication, that its DSL service was not delivering a bandwidth above 1.5 Mbps to this residence.

The ID also concluded that there was a problem with Verizon's DSL service because Verizon "could not prove the existence or non-existence of the problems" that were alleged to have occurred at moments when Verizon was not actively engaged in remote testing. (ID at 17). According to the ID, "Verizon has been unable to verify that the interruptions occurred, but it has been unable to prove the interruptions did not occur" and therefore since Verizon "has indicated it is not accusing Complainant of lying" then "Complainant's testimony was accepted as credible

and proved these intermittent interruptions occurred.” (ID at 18). This is the classic logical fallacy of *argumentum ad ignorantiam*, a faulty conclusion that because something has not been proved false, it is therefore must be true. Courts have routinely rejected this faulty reasoning and the Commission should reject it as well. As the United States District Court for the Eastern District of Pennsylvania observed, it is the logical fallacy *argumentum ad ignorantiam* to rely on an absence of evidence of defect as support for the proposition that a defect exists.³⁸ “An argument from ignorance is ‘the mistake that is committed whenever it is argued that a proposition is true simply on the basis that it has not been proved false, or that it is false because it has not been proved true.’”³⁹ The Complainant had the burden of proving her claims.⁴⁰ She cannot meet that burden by arguing that Verizon failed to prove that the problems she asserts did not occur.⁴¹

The ID also found fault with Verizon because “Verizon acknowledged that it would not know how to fix the problems experienced at the service address, if the Commission ordered it to do so.” (ID at 15). “Unfortunately, Verizon offered no solutions, no suggested solutions or even recommendations of actions Complainant can take that would improve her access to reliable internet service.” (ID at 18). The ID concluded that Verizon’s failure “to locate the source of the problem and to ascertain the steps Complainant must take to improve the conditions at the service address – were serious and warrant a penalty.” (ID at 22). This is not a fair or accurate

³⁸ *Guinan v. A.I. Dupont Hosp. for Children*, 597 F. Supp. 2d 485, 511-512 (E.D. Pa. 2009), *reversed in part on other grounds*, *M.G. v. A. I. Dupont Hosp. for Children*, 2010 U.S. App. LEXIS 17711 (3d Cir., Aug. 24, 2010).

³⁹ *Ala. Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1257 (11th Cir. 2007) (*citing* Irving M. Copi & Carl Cohen, *Introduction to Logic* 93 (8th ed. 1990)).

⁴⁰ 66 Pa.C.S. §332(a).

⁴¹ *See DiIenno v. Libbey Glass Div., Owens-Illinois, Inc.*, 668 F. Supp. 373, 378 (D. Del. 1987) (“[I]t is not incumbent upon the defendants to prove the lack of a manufacturing defect. [The plaintiff] bears the burden of producing some evidence that the jar had a manufacturing defect at the time of sale.”)

description of the evidence. When the presiding officer demanded that Verizon’s witness say how he would “fix” a problem that he just testified did not exist, he answered “today we can’t see a problem, so it’s very difficult to find a solution.”⁴² When asked again, he said “I do not see what we would do at this moment to fix this, if it was decided there was something for us to fix. I do not believe there’s something for us to fix. I believe it is operating as it’s supposed to be.”⁴³ Penalizing Verizon for failing to say how to fix something that does not need to be fixed is more appropriate to *Alice’s Adventures in Wonderland* than a decision of this Commission.

It is also not correct to conclude that Verizon offered no solutions. Mr. Brannen offered suggestions about how to address the problem identified – overuse of the DSL bandwidth – by reducing the number of devices competing for the same bandwidth, particularly at times when it is needed for work.⁴⁴ The Complainant might also consider finding out if there is a minimum amount of bandwidth required for the work-related healthcare applications to work over her laptop.⁴⁵ The 25 Mbps T-Mobile hotspot seems cable of offering more bandwidth and could possibly be a better option for any bandwidth intensive healthcare applications.

The Complainant brought a neighbor to testify in support of her case. Janelle Thies-Green conceded that her own DSL service is providing a speed over 1.5 Mbps as required by Chapter 30, but stated that the real issue is that DSL itself “is not necessarily able to power the modern world.”⁴⁶ DSL service provides a 3 Mbps connection that is appropriate for customers with medium level bandwidth needs. But as Ms. Thies-Green pointed out, the demands of the

⁴² Tr. at 114.

⁴³ Tr. at 127.

⁴⁴ Tr. at 109-110.

⁴⁵ Tr. at 38 (Complainant states that her job has not indicated the minimum amount of bandwidth needed).

⁴⁶ Tr. at 52-53.

modern world are changing. The General Assembly is taking steps to bring higher speed broadband service to underserved and unserved locations. It is hoped that the recently enacted Act 96 of 2021, creating the Pennsylvania Broadband Authority to disburse federal funds for broadband deployment, will soon provide more higher bandwidth options for Ms. Matkovitch and her neighbors. However, the ID recommending a civil penalty on Verizon for failing to deliver Chapter 30 internet speeds in this case is unsubstantiated and should be reversed.

CONCLUSION

For the foregoing reasons the Commission should reject the ID and dismiss the complaint.

Respectfully submitted,

A handwritten signature in blue ink that reads "Suzan D. Paiva".

Date: May 24, 2022

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