

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held August 25, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman, Statement, Concurring in part, Dissenting in part
John F. Coleman, Jr., Vice Chairman
Ralph V. Yanora

Courtney Matkovich

C-2020-3022369

v.

Verizon North LLC

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Verizon North LLC (Verizon or Company) filed on May 24, 2022, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Katrina L. Dunderdale, issued on May 5, 2022, in the above-captioned proceeding. The Initial Decision sustained the Formal Complaint (Complaint) of Courtney Matkovich (Ms. Matkovich or Complainant) (collectively with Verizon, Parties) against Verizon for failing to provide available and reliable broadband internet and telephone service. No Replies to Exceptions were filed. For the reasons stated

below, we grant Verizon’s Exceptions, reverse the ALJ’s Initial Decision, and dismiss the Complaint, consistent with this Opinion and Order.

I. History of the Proceeding

On October 13, 2020, Ms. Matkovich filed a Complaint with the Commission against Verizon. Using the Commission’s standard formal complaint form,¹ Ms. Matkovich checked the box indicating that the “type of utility service that [was] the subject of [her] complaint” was “TELEPHONE/TELECOMMUNICATIONS (local, long distance).” Complaint at ¶ 3. As the reason for her Complaint, the Complainant checked the box that is introduced with the language “I am having a reliability, safety or quality problem with my utility service.” Complaint at ¶ 4.

In explaining the problem as requested on the form, Ms. Matkovich stated that her highspeed internet was unreliable in that it is out several times a day, it was out for the entire week of September 21, 2020, and it did not meet minimum requirements, leaving her with “between 0.12 and 0.4 MBPS” at most times. Complaint at ¶ 4. She averred she could not complete her work from home, and her children could not complete their class work. Describing her Verizon service as “a nightmare since the day” she started, the Complainant averred she spent “countless hours” on the phone with Verizon technical, support, and supervisory personnel and had technicians visit her home. All responded that there was nothing more the Company could do and that they

¹ The Commission Formal Complaint form used by Ms. Matkovich is dated May 2020 in the lower left corner. The current Formal Complaint form available on the Commission’s website at www.puc.pa.gov/complaints/formal-complaints is dated March 2022. Upon review, except for the addition of “Storm Water” as a utility category in paragraph 3, and slight language modifications addressing domestic violence orders in paragraph 6, legal representation in paragraph 8, and information about filing the complaint in paragraph 10, the currently available form is similar in all other respects to that used by Ms. Matkovich.

saw no issues on the line that would cause it to be slow or non-existent. Ms. Matkovich claimed she should have the service she pays for. *Id.*

For relief, Ms. Matkovich requested “high speed internet” in her area “that at least meets the minimal qualifications of the chapter 30 requirements. I pay for 15 MPS and only receive 0.4 or less.”² Complaint at ¶ 5.

On November 2, 2020, Verizon timely filed an Answer (Answer) to the Complaint.³ Verizon stated that it provides telephone service to Ms. Matkovich but that her Complaint relates to her retail internet service. Verizon denied Ms. Matkovich’s averments in her Complaint about her internet service. Verizon stated that Company records did not corroborate the Complainant’s allegations that her service is out many times throughout the day and was out for the entire week of September 21, 2020. Verizon further averred that Ms. Matkovich is a Digital Subscriber Line (DSL) customer who subscribes to a plan providing up to 1.1 Mbps download speed and that pursuant to Company tests of her line, Ms. Matkovich is receiving the speed provided in her plan. Answer at 1.

Verizon further averred that on October 30, 2020, a Company representative spoke with Ms. Matkovich to discuss her Complaint. The Company stated that it desired to continue to work with the Complainant to resolve outstanding issues with her service. On that basis, Verizon requested that the matter be placed into

² The Commission’s formal complaint form advises that “the PUC generally does not handle complaints about cell phone or internet service, but may be able to resolve a dispute regarding voice communications over the internet (including the inability to make voice 911/E911 emergency calls) or concerns about high-speed access to Internet service.” Complaint at ¶ 4.

³ In its Answer, Verizon noted that the Complaint was docketed to and served on Verizon Pennsylvania LLC, but that service was provided by Verizon North LLC. The Company requested that the caption be amended, which it was.

mediation so that the Company could monitor the Complainant's service and provide an update in one month. Answer at 2.

On November 9, 2020, the Commission issued an order of the Chief Administrative Law Judge directing the Parties to attempt to resolve the issue themselves. The case was directed to mediation and required that a short report be filed with the Commission's Mediator Cynthia Lehman by December 9, 2020.

Review of documents included in the Commission's case records indicates that the next action was the issuance of a Call-In Telephonic Notice (Hearing Notice) to the Parties by the Office of Administrative Law Judge (OALJ) on October 28, 2021, advising of a call-in telephonic hearing to be held on December 14, 2021. The Hearing Notice also provided contact information for the ALJ, a toll-free call-in number for the hearing, and instructions on how to participate in the hearing, including information on how to request a continuance and the consequences of failing to appear.

On November 1, 2021, the Commission issued the ALJ's Prehearing Order for Telephone Hearing (Prehearing Order). The Prehearing Order affirmed the December 14, 2021 hearing date and again provided hearing instructions. In addition, in the Prehearing Order, the ALJ explained that the burden of proof was on the Complainant to present evidence sufficient to demonstrate that the utility has violated the Public Utility Code (Code) or a regulation or order of the Commission.

On December 14, 2022, a telephonic hearing convened as scheduled. Ms. Matkovich appeared *pro se* and presented for the evidentiary record both her own testimony as well as that of a witness. Verizon was represented by counsel and presented one witness who testified and also sponsored two exhibits that were entered into the

record. The hearing generated a transcript comprising 141 pages. Neither party filed briefs. By ALJ Interim Order issued February 2, 2022, the record was closed.

The Commission served the ALJ's Initial Decision on the Parties on May 5, 2022. In her Initial Decision, the ALJ made fifty-one Findings of Fact (FOF) and reached seven Conclusions of Law (COL). I.D. at 3-8; 22-23. The ALJ granted the Complaint, finding that Verizon failed to provide reasonable service and failed to provide the download speed required under Chapter 30. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

Verizon filed Exceptions (Exc.) on May 24, 2022. No Replies to Exceptions were filed.

II. Discussion

A. Legal Standards

1. The Burden of Proof

As a matter of law, to establish a legally sufficient claim, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). The offense must be a violation of the Code, a Commission Regulation or order, or a Commission-approved tariff. 66 Pa. C.S. § 701.

As the party seeking affirmative relief from the Commission, Section 332(a) of the Code provides that a complainant has the burden of proof. 66 Pa. C.S. § 332(a). Before the Commission, the standard by which the burden of proof is satisfied is measured by the “preponderance of the evidence.” *Suber v. Pennsylvania Com’n on Crime and Delinquency*, 885 A.2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992) (*Lansberry*). To establish a fact or claim by a preponderance of the evidence means to offer the greater weight of the evidence, or stated differently, to provide evidence that outweighs, or is more convincing than, by even the smallest amount, the probative value of the evidence presented by the other party. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

The burden of proof comprises two distinct burdens: the burden of production and the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 2000). The burden of production, also called the burden of going forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. *Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Final Order entered August 25, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party’s claim or affirmative defense. *Id.* It may shift between the parties during a hearing. If a complainant introduces sufficient evidence to establish the legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant’s evidence. *Id.* If the utility introduces evidence sufficient to balance the evidence introduced by the complainant, that is, evidence of co-equal value or weight, the complainant’s burden of proof has not been satisfied and the burden of going forward with the evidence shifts back to the complainant. The complainant then must provide some additional evidence favorable to the complainant’s claim. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001) (*Milkie*); *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff’d*, 501 Pa. 433, 461 A.2d 1234 (1983) (*Burleson*).

The party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling. *Moore*. While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the party seeking affirmative relief from the Commission. *Milkie; Burleson*. It is entirely possible for a party to carry the burden of production but not be entitled to a favorable ruling because the party did not carry the burden of persuasion. *Moore*. In determining whether a complainant has met the burden of persuasion, the ultimate factfinder may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. *See Moore*, citing *Suber*.

Finally, adjudications by the Commission must be supported by substantial evidence in the record. 2 Pa. C.S. § 704. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Company of New York v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1983). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961); *Murphy v. Comm. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

2. Broadband Under Chapter 30

Chapter 30 of the Code, 66 Pa. C.S. §§ 3011-3019, imposes broadband deployment obligations on incumbent local exchange telecommunications companies, commonly known as Incumbent Local Exchange Carriers or companies (ILECs). 66 Pa. C.S. § 3012. Under Chapter 30, broadband is defined as “[a] communication channel using any technology and having a bandwidth equal to or greater than 1.544 megabits per second (Mbps) in the downstream direction and equal to or greater than 128

kilobits per second (Kbps) in the upstream direction.” 66 Pa. C.S. § 3012. Service at a lesser speed is identified in the statute as “advanced service,” and is defined as “[a] retail telecommunications service that, regardless of transmission medium or technology, is capable of supporting a minimum speed of 200 kilobits per second (Kbps) in at least one direction at the network demarcation point of the customer's premises.” *Id.*

Broadband deployment obligations of nonrural ILECs are set forth in Section 3014(b) of Chapter 30 and required those companies to provide broadband availability to 100% of their total retail access lines no later than December 31, 2015, and to make it available to an individual customer within ten business days of that customer’s request for broadband service. 66 Pa. C.S. §§ 3014(b)(3)(ii)(A) and 3014(b)(5).

B. The ALJ’s Initial Decision

In her Initial Decision, the ALJ sustained Ms. Matkovich’s Complaint that Verizon “failed to provide reasonable and adequate customer service” by failing “to provide Complainant with available and reliable broadband internet and telephone service as required by Chapter 30.” I.D. at 1.

The ALJ commenced her decision with a summary of Ms. Matkovich’s underlying allegations. Referring to Ms. Matkovich’s Complaint, the ALJ recited the Complainant’s allegation of “reliability, safety or quality problems with her utility service[.]” I.D. at 1. The ALJ continued that Ms. Matkovich alleged that her internet service goes out multiple times a day, has been a consistent problem since April 2020, and provides service at only 0.12 to 0.4 Mbps download speed, which is insufficient for her work responsibilities. The ALJ noted Ms. Matkovich’s request for a Commission order “directing Verizon to provide the high speed internet she pays for or provide at least the 1.5 mbps of download speed Verizon is required to provide her.” I.D. at 2.

Turning to Verizon's Answer, the ALJ stated that Verizon generally denied Ms. Matkovich's allegations and averred that the Complaint raised internet, not telephone service. The ALJ further stated that the Company's records did not corroborate the Complainant's allegations of the number and extent of outages and that Ms. Matkovich subscribed to Verizon's DSL service on a plan that provides up to 1.1 Mbps download speed, which Verizon confirmed the Complainant receives. I.D. at 2.

As to Ms. Matkovich's service complaints, the ALJ found pertinent to her decision that starting April 2020, the Complainant began experiencing unavailable or unreliable internet "and/or" landline telephone service that affected her work and her children's ability to do schoolwork during the pandemic. FOF Nos. 7, 31. The ALJ found that the Complainant's employment as a nurse practitioner requires her to use a secure messaging application for patient confidentiality, as well as two other applications, all of which require a telephone landline connection. FOF Nos. 9-12. The ALJ also found that the Complainant conducted speed tests on her internet service on her desktop, her laptop, and her cell phone using Verizon's speed test available online, and at various times it showed less than 1.5 Mbps internet service available, which impeded her ability to work. FOF Nos. 16-22, 26. I.D. at 3-6.

As to Verizon's service, the ALJ found that Verizon visited the service address, checked the line, checked the speed, trouble-shot the problem, conducted an end-to-end analysis of the DSL service, checked the DSL network, conducted remote and onsite testing, tested the modem from inside the residence and replaced the modem, and tested the Network Interface Device (NID) from outside the address. FOF Nos. 30, 32, 33. The ALJ also found that the equipment at the Complainant's service address is configured to provide 3.36 Mbps downstream and 768 Kbps upstream speeds, and that on December 3, 2021, Verizon conducted a FAST.com speed test that indicated that 3.08

Mbps of data were sent from Verizon's local office to the service address and 3.09 Mbps were received at the service address.⁴ FOF Nos. 34, 36-37.

The ALJ further found that on December 6, 2021, the Complainant reported that her DSL had not worked on December 5th, and that on December 6th, Verizon tested the DSL by connecting to the DSL line outside the residence, connecting and downloading a video, and determining that the DSL line was providing 2.8 Mbps download speed, close to the 3.3 Mbps download speed the Complainant paid for, using 100% of the available 3.36 Mbps, and was functioning appropriately. FOF Nos. 38-41, 47. With respect to additional testing on December 8, 2021, that ALJ concluded that Verizon found no congestion or problems on the circuit serving the Complainant. FOF No. 42. In general, the ALJ found that in December 2021, Verizon's service line was capable of transmitting and receiving service at 3.0 Mbps/64 Kbps downstream/upstream, but that if the Complainant and her household attempted to use more than 3 Mbps, her service would buffer or fail to connect. FOF Nos. 43, 44. The ALJ also found that DSL availability at the service address could be adversely affected by DSL usage in the same network by a neighbor, but it is designed not to become unavailable due to simultaneous congestion on the same network (FOF No. 48); the closest fiber to the service address is 11,000 feet away, the central office is not equipped to run fiber to the home; and DSL service would improve if the network were all fiber. FOF Nos. 50-51. The ALJ concluded that Verizon could not explain the Complainant's problems or recommend a solution. FOF No. 49. I.D. at 6-8.

Commencing her analysis, the ALJ repeated the nature of Ms. Matkovich's Complaint as challenging the "reasonableness and adequacy" of her Verizon service and

⁴ FAST.COM is an industry-accepted speed test that is performed, *inter alia*, by sending and comparing how much data is sent versus how much is received, based on test algorithms and network conditions. While different tests may yield slightly different results, the differences in numbers should not be huge. Tr. at 80-84.

requesting that Verizon provide her “the minimum Chapter 30 requirements of 1.5 mbps for reliable and available broadband and telephone services.” I.D. at 8-9 (footnote citation to Chapter 30 omitted).

The ALJ cited Section 701 of the Code, 66 Pa. C.S. § 701, for the premise that a complaint may lie against a public utility in violation of a law the Commission has jurisdiction to administer. The ALJ applied the jurisdiction the Commission has to administer to require the provision by a utility of adequate, efficient and reasonable facilities and service, using the term service in its broadest sense, in reliance on Sections 1501, 1505, and 102 of the Code, 66 Pa. C.S. §§ 1501, 1505, 102. I.D. at 9-10.

The ALJ assigned the burden of proving a violation of a law the Commission has jurisdiction to administer to Ms. Matkovich under Section 332 of the Code, 66 Pa. C.S. § 332, and long-standing case law. I.D. at 10-11. Again restating Ms. Matkovich’s Complaint, the ALJ described that the Complainant asserted that “Verizon’s customer service – in failing to provide her with available and reliable internet service – is unreasonable and inadequate to meet her needs and fails to comply with Chapter 30 requirements.” I.D. at 11. The ALJ stated that “[b]y asserting Verizon failed to provide her with reliable residential telephone service that is free of the problems she describes, Ms. Matkovich alleges Verizon provides inadequate or unreasonable service” in violation of Sections 1501 and Chapter 30 of the Code, and that Verizon should be compelled to repair or replace her service so that she may receive reliable service. *Id.*

Further describing that Ms. Matkovich’s Complaint and Verizon’s Answer involved internet access, the ALJ turned from addressing utility service generally to a discussion captioned “Responsibility of Public Utilities Offering Internet Service,” where she then quoted extensively the network modernization plan obligations of rural and nonrural local exchange telecommunications companies under Section 3014(b) of the

Code, 66 Pa. C.S. § 3014(b). I.D. at 11-14. As the ALJ stated, “Verizon did not contest whether Complainant experienced problems with accessing her internet services[.]” I.D. at 11. The ALJ summarized that Verizon’s “records and testing could neither confirm nor deny problems occurred, starting in April 2020.” *Id.* Further, the ALJ described the problems as occurring variously during the day and night and intermittently and concluded that the Complainant “typically contacted Verizon when she recognized a problem with the service[.]” and her contacts with Verizon “are well documented.” *Id.*

After explaining the applicable legal standards, the ALJ again summarized the Complainant’s position, now focusing exclusively on broadband internet access. The ALJ repeated Ms. Matkovich’s allegation that Verizon failed to provide her reliable broadband access services, citing the entirety of Chapter 30 generally, Section 3014(c)(2)(i) specifically,⁵ and the Commission’s Order in *White v. Verizon North LLC*, Docket No. C-2016-2532236 (Order entered November 2, 2016) (*White*). I.D. at 14. The ALJ also asserted that Ms. Matkovich contended that she subscribed to Verizon’s DSL with a download speed of 3.3 Mbps, and that Verizon must provide her at least the minimum Chapter 30 download speed of 1.54 Mbps, which the Complainant averred Verizon failed to do on numerous occasions. *Id.* According to the ALJ, Ms. Matkovich argued that her internet service had not been reliable since April 2020, and Verizon’s testing in December 2021 was not reflective of the service she regularly received. The ALJ stated that Ms. Matkovich used text messaging applications only, which did not contain video or pictures, and therefore Verizon’s explanations that she is using too much bandwidth were wrong. The ALJ noted the Complainant’s argument that at times one user cannot stream video without buffering, or send a text, or pull up a webpage. I.D. at 15.

⁵ Section 3014(c)(2)(i) of Chapter 30 addresses the criteria of the bona fide retail request program, which is not relevant to Verizon’s broadband obligation under this Complaint. While broadband deployment is addressed in Section 3014(b), replicated in the Initial Decision, Section 3014(b)(2)(i) applies to rural ILECs, not Verizon.

The ALJ next summarized Verizon's position. The ALJ characterized Verizon's response as not disputing Ms. Matkovich's testimony that at times her internet service was unreliable or unavailable but rather it was a matter of Verizon's being unable to replicate or confirm a problem. The ALJ further stated that because Verizon could not find a problem, it could not suggest remedies. I.D. at 15. According to the ALJ, the only action Verizon could take, if so ordered by the Commission, would be to perform more diagnostics, troubleshooting, reinspections, and replacement of inside wiring. *Id.* at 15-16, citing Tr. at 113-16. The ALJ did note, however, Verizon's recommendation that when the internet was required for the Complainant's work purposes, she should power off all other devices programmed to connect automatically. *Id.* at 15.

The ALJ repeated Verizon's argument that the Commission did not have jurisdiction over the internet, rather, the Commission only had jurisdiction to review Verizon's compliance with Chapter 30, namely whether the Company provided "at least 1.5 mbps of broadband or DSL service." I.D. at 16. Based on the Company's testing of the service going into the service address and within the service address, and its findings of service speeds with the 3.3 Mbps service Ms. Matkovich subscribes to and no congestion on the line, the ALJ acknowledged that Verizon contended it did all it could but could not verify the Complainant's issues existed. *Id.*

In her analysis, the ALJ relied on the most recent Commission cases addressing broadband obligations under Chapter 30, *White*, previously cited, and *Roberts v. The United Telephone Co. of Pennsylvania LLC, d/b/a CenturyLink*, Docket No. C-2017-2632824 (Order entered June 28, 2018) (*Roberts*). As the ALJ noted, the Commission has jurisdiction to inquire into matters involving the availability and provisioning of retail broadband access services by ILECs, which includes Verizon. I.D. at 16. Accordingly, the ALJ determined that the Commission has jurisdiction to determine whether Verizon provided retail broadband access service to Ms. Matkovich consistent with applicable Chapter 30 standards, which includes the provisioning of

broadband at a minimum standard of 1.544/0.128 Mbps downstream/upstream speeds. *Id.* at 17.

According to the ALJ, Ms. Matkovich testified credibly about her difficulty connecting and remaining connected to the internet at the Chapter 30 speeds, a matter that caused her hardship in her employment. The ALJ further determined that while Verizon did everything it could, it could neither replicate the problem nor find any flaw in its services or facilities. Because Verizon did not contend that Ms. Matkovich was lying, the ALJ concluded that the Company had not sufficiently rebutted Ms. Matkovich's testimony. *I.D.* at 17-18.

The ALJ determined that although both Parties acted responsibly, Verizon has a statutory obligation "to provide a minimum of 1.5 mbps of download speed. Complainant proved Verizon did not provide that on various occasions starting in April of 2020." *Id.* at 18. For those reasons, the ALJ granted Ms. Matkovich's Complaint. The ALJ also concluded that Verizon "offered no solutions, no suggested solutions or even recommendations of actions" Ms. Matkovich could take to improve her access to reliable internet service, and on that basis recommended the Commission's order be provided to its Bureau of Technical Utility Services to provide Verizon insight and guidance to improve reliability on its network. *Id.* at 18-19, 24.

Based on her conclusion that Verizon failed to provide "reliable and adequate internet service [in violation of] Section 1501 of the [Code,]" the ALJ next undertook an analysis of the severity of the violation in accordance with our decision in *Rosi v. Bell Atlantic-Pa, Inc. and Sprint Communications Co.*, Docket No. C-0092409 (Final Order entered February 10, 2000) and our policy statement at 52 Pa. Code § 69.1201(c) and imposed a fine under Section 3301 of the Code of \$1,000. *I.D.* at 19-23. Of the two Parties, the ALJ concluded that Verizon was the one "best situated to find the cause of the problem." *Id.* at 21.

In line with the analysis, the ALJ concluded that Verizon failed “to provide the download speed required under Chapter 30, to locate the sources of the problem and to ascertain the steps Complainant must take to improve the conditions[,]” a serious violation warranting a penalty. In accord with her analysis and findings, the ALJ concluded as a matter of law that Verizon “must provide and maintain adequate, efficient, safe, and reasonable service and facilities, making all such repairs, changes, alterations, as needed or proper for the accommodation, convenience, and safety of its patrons[,]” citing Section 1501 of the Code. I.D. at 22, COL No. 2. The ALJ also found that by presenting evidence that makes the existence of a fact more likely than its nonexistence, the Complainant met her burden of proof that Verizon failed to provide the download speed required by Chapter 30. I.D. at 22-23, COL Nos. 4 and 5. Finally, the ALJ determined that her findings of violations of Section 1501 and Chapter 30 of the Code warranted the imposition of a fine of \$1,000. I.D. at 23, COL Nos. 6 and 7.

C. Verizon’s Exceptions

Verizon filed two Exceptions. In its first Exception, Verizon challenges the breadth of the jurisdiction the Initial Decision asserts over Ms. Matkovich’s internet service.

Verizon contends that by holding its provision of internet service to the service quality standards established under Section 1501 of the Code, the ALJ has created “a giant loophole that treats internet as a Commission-regulated public utility service.” Verizon Exc. at 2. This is wrong, Verizon contends, because the Commission lacks jurisdiction over the service and pricing of retail internet service, which is an interstate service subject to the regulatory authority of the Federal Communications Commission (FCC). Verizon argues that the Commission has previously been clear that retail broadband internet access service is generally outside the Commission’s authority. Verizon Exc. at 3, citing *Daskalakis v. Verizon Pennsylvania Inc.*, Docket No.

C-2010-2172222 (Order entered April 4, 2011); *MilleniaNet Corp. v. Verizon Pennsylvania Inc.*, Docket No. C-20055173 (Order entered May 2, 2008), *aff'd* *MilleniaNet Corp. v. Pa. PUC*, 2009 WL 9105922 (Pa. Cmwlth. 2009) (unreported memorandum opinion); *A. Moses, Inc. v. Verizon Pennsylvania Inc.*, Docket No. C-2010-2205259 (Order entered November 4, 2011); *Ebersole-Brown v. The United Telephone Company of Pennsylvania, LLC, d/b/a CenturyLink*, Docket No. F-2012-2310998 (Order entered February 28, 2013). Verizon also cites to the Voice-Over-Internet Protocol Freedom Act, 73 P.S. §§ 2251.1-2251.6, for the premise that the Commission lacks jurisdiction to regulate the rates, terms, and conditions of IP-enabled service, which it contends includes its DSL service. Verizon Exc. at 4.

Verizon contends that the Commission's jurisdiction is limited to that provided under Chapter 30 of the Code, specifically Section 3014(b), to review an ILEC's compliance with its network modernization plan. In turn, this, Verizon states, is limited to whether the ILEC is able to provide broadband availability to 100% of its total retail access lines at the minimum Chapter 30 speeds of 1.544/0.128 Mbps using any technology, with broadband access availability due to an individual customer within ten business days of a request. Verizon Exc. at 4-5. Verizon contends this does not "empower [Commission] adjudication of traditional quality of service issues or allow for civil penalties for occasional internet service outages[.]" *Id.* at 5.

Verizon concludes its first Exception by arguing that in invoking Sections 1501 and 3301 of the Code to find a service violation and impose a civil penalty with respect to its provision of retail internet service to Ms. Matkovich, the ALJ's Initial Decision improperly conflates and confuses the limited Chapter 30 authority with traditional regulatory oversight of telephone service, and this should be rejected. Verizon Exc. at 5.

In its second Exception, Verizon takes issue with the ALJ's determination that substantial evidence supported the conclusion that the Company did not provide internet service at the Chapter 30 speeds. Verizon reviews the evidence in the proceeding, commencing with Ms. Matkovich's testimony that she had no issues with her DSL until the onset of the Covid-19 pandemic in April 2020. According to Verizon, at that time, the Complainant, a nurse practitioner, began conducting more telemedicine appointments that required her use of specific secure internet-based healthcare applications to ensure patient confidentiality. Verizon points to Ms. Matkovich's testimony that at times she could not access the internet on her laptop, and the greenlight on her Verizon-supplied modem was flickering. According to Verizon, the Complainant also testified that the 3 Mbps DSL service she subscribes to was used for more than her work laptop, and included usage for schoolwork, a Firestick connection to her television to watch Netflix, use of a Playstation, and usage for cell phone connections over Wi-Fi. Verizon Exc. at 6, citing Tr. at 17, 24-29, and 38-44.

Verizon refers to Ms. Matkovich's testimony that the Company made several site visits, replaced her modem, checked her line, checked her speed, and conducted troubleshooting, but that the Complainant remains dissatisfied. Verizon also notes Ms. Matkovich's access to a Wi-Fi hotspot from T-Mobile that can provide up to 25 Mbps bandwidth but which Ms. Matkovich has not set up for her secure work concerns. Verizon Exc. at 6-7, citing Tr. at 27, 42.

Verizon next summarizes the testimony of its witness, Todd Brannen, an engineer whose primary responsibility is equipment placement and installations and who is Verizon's single point of contact for any Chapter 30 or DSL deployment and congestion issues in Pennsylvania and Delaware. According to Verizon, Mr. Brannen testified that the Complainant subscribes to DSL service designed to deliver speeds of 3.36/0.768 Mbps but no higher and that she has the most modern DSL configuration with fiber to the remote terminal and service on copper only for the last 11,000 feet from the

remote to the home. According to Verizon, Mr. Brannen and staff from Verizon performed “an end-to-end” analysis of Ms. Matkovich’s DSL service, testing the network both remotely and on site. Testing of the copper lines and outside network revealed no problems on the lines, and the DSL consistently provided 3 Mbps bandwidth. Verizon Exc. at 7, citing Tr. at 42, 57, 66-69, 118, and 131. Verizon quotes Mr. Brannen’s conclusion that the DSL service consistently provisioned 3 Mbps bandwidth and that “every time we’ve looked at it it’s been in service and . . . we’ve seen traffic going across it” and, thus, it met the Chapter 30 standards. *Id.* at 7-8, citing Tr. at 95-96.

Verizon also summarizes Mr. Brannen’s exhibits, which comprise the results of remote testing for congestion and capacity. According to Mr. Brannen, the remote tests indicated that there was no congestion and there was “plenty of capacity” on the network to accommodate the service requirement of 3 Mbps even if neighbors were on the line at the same time. Verizon Exc. at 8, citing Tr. at 71-72.

Verizon next addresses Mr. Brannen’s testimony regarding on site speed and quality testing Verizon conducted on December 3, 2021. This comprised a Verizon technician’s plugging Ms. Matkovich’s own modem into the NID to isolate interference from other devices within the house, then plugging a cell phone directly into the modem in the NID and running a YouTube video expected to use approximately 3 Mbps. This test demonstrated that 2.8 Mbps was sent and received and that the video ran smoothly and without buffering. According to Mr. Brannen, this verified the line’s bandwidth capability of 3 Mbps and that the modem was good, but also that running a single YouTube video could consume almost the entire 3 Mbps bandwidth. Verizon Exc. at 8-9, citing Tr. at 59-60, 75-76, 79, and 81-82. When the technician ran the same video capacity and speed testing from within Ms. Matkovich’s house and through her laptop, however, buffering occurred, indicating either an issue with the Complainant’s laptop itself or other devices in the house trying to share the same bandwidth. *Id.*

Verizon describes that after the December 3rd test, the Company received a call from Ms. Matkovich stating that on December 5, 2021, she experienced internet connectivity problems. In response, Verizon conducted additional remote testing at 3:55 a.m. Central Standard Time on December 6, 2021.⁶ This testing demonstrated that the full 3 Mbps to Ms. Matkovich's premises was in use at that time, indicating to Verizon that a device in the home was using full service at that time. Testing of the network at the same time showed ample network capacity with no congestion. Continued testing on December 8, 2021, at several different times throughout the day revealed similar results, with service at no time going below 1.5 Mbps. Verizon Exc. at 9, citing Tr. at 85-89.

Verizon contends that its witness, 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." Verizon Exc. at 9. As examples, Mr. Brannen identified one person watching a video while another tried to access the internet would share the bandwidth or a cell phone configured to connect to Wi-Fi over the DSL automatically, which could cause unknown passive use simply by the phone's receiving updates. Mr. Brannen also testified that during the pandemic, additional use of healthcare applications could cause problems with the applications' servers themselves being able to meet demand, a capacity issue outside Verizon's network. As Mr. Brannen explained, this would not indicate that the DSL was unable to receive 3.3 Mbps, just that it was stretched beyond that, causing a failure to connect. *Id.* at 9-10, citing Tr. at 90-93, 105-06.

⁶ Verizon uses a testing diagnostic system called NavisCore, which uses Central Standard Time in its date stamps. Verizon's testing of Ms. Matkovich's service actually occurred at 4:55 a.m. local time. Tr. at 71.

Verizon asserts that Ms. Matkovich's testimony about the modem's flashing green light also indicates overuse of the DSL as a possibility, because if the DSL were out, the light would be yellow. Asking too much of the DSL could "knock the modem out of sync." Verizon Exc. at 10, citing Tr. at 110. Verizon also refers to Mr. Brannen's testimony and his exhibit addressing typical bandwidth required for various internet usages. Verizon argues that "even one very high bandwidth application (such as a laptop with high security firewall applications) might exceed the bandwidth." *Id.*, citing Verizon Exh. 2. Verizon points to Mr. Brannen's conclusion, however, that the DSL it provisions Ms. Matkovich is "more than capable of meeting the Chapter 30 standards of 1.5 Mbps down and 128 Kbps up." *Id.*, citing Tr. at 95-96.

Based on this review of the evidence, Verizon contends that the ALJ's finding that Verizon failed to meet those statutory standards is based on "faulty logic and unsupportable conclusions." Verizon Exc. at 10. Verizon argues that the primary basis for the ALJ's finding against the Company was her posture that because Verizon did not contest Mr. Matkovich's assertion that she experienced difficulties with her internet service, and because the Company did not assert the Complainant was lying, the Company admitted that the DSL was not providing 1.5 Mbps service and "Complainant's uncontroverted testimony about the existence of service issues was not sufficiently rebutted by Verizon." Verizon Exc. at 11, citing the I.D. at 11, 17.

Verizon refutes this, contesting the notion that failing to call a complainant a liar is tantamount to a concession or admission, "effectively or by implication," that its DSL service failed to meet the Chapter 30 requirement. *Id.* Verizon contends that its evidence proved that the Company is provisioning the 3 Mbps service subscribed to and that the more likely fact pattern, based on that evidence, is that the problem is caused by trying to use too much bandwidth on a 3 Mbps service. *Id.*

Verizon also challenges the ALJ's conclusion that there was a problem with Verizon's service because Verizon "could not prove the existence or non-existence of the problems" that Ms. Matkovich alleged occurred when Verizon was not testing. *Id.*, citing I.D. at 17. Verizon argues that in her Initial Decision, the ALJ concluded that because Verizon did not accuse Ms. Matkovich of lying, her testimony was accepted as credible evidence that "proved [the] intermittent interruptions occurred." Verizon Exc. at 11-12, citing I.D. at 18. Verizon argues that such reasoning is the "classic logical fallacy of *argumentum ad ignorantiam*, a faulty conclusion that because something has not been proved false, it is therefore [sic] must be true." Verizon Exc. at 12. Verizon cites, among other cases, *Dilenno v. Libbey Glass Div., Owens-Illinois, Inc.*, 668 F. Supp. 373, 378 (D. Del. 1987) (*Dilenno*) for the proposition that it is not incumbent on a defendant to prove lack of a defect but rather on the plaintiff to bear the burden of producing evidence of a defect. As Verizon continues, an "argument from ignorance" that a proposition is true simply because it has not been proved false is a mistake. Verizon Exc. at 12.

Verizon also contends that the ALJ's finding fault with Verizon for not knowing how to fix the problem if ordered to do so, and for offering no solutions, suggested solutions, or recommendations Ms. Matkovich could take to improve her service, is neither a fair nor accurate description of the evidence. Verizon Exc. at 12-13. As to faulting Verizon for not knowing how to fix the problem, Verizon quotes its witness' testimony that it is difficult to find a solution to a problem that the Company cannot see. As Mr. Brannen further testified, "I do not see what we would do at the 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." Verizon Exc. at 13, citing Tr. at 114, 127.

In response to the ALJ's finding that the Company failed to offer solutions or recommendations, Verizon refers to its evidence addressing overuse of the 3.3 Mbps

DSL bandwidth and suggestions of ways to remediate it. This included limiting the number of devices competing for use of the DSL, seeking information on the minimum bandwidth needs of the Complainant's work-related healthcare applications, and investigating use of the 25 Mbps T-Mobile hotspot. Verizon Exc. at 13, citing Tr. at 38, 109-10.

Finally, Verizon refers to the testimony provided by Ms. Matkovich's witness, her neighbor Janelle Thies-Green. Verizon contends that Ms. Thies-Green not only conceded that her own DSL speed met the Chapter 30 1.5 Mbps speed requirement but also testified that the "real issue" was that "DSL itself 'is not necessarily able to power the modern world.'" Verizon Exc. at 13, citing Tr. at 52-53. Verizon concludes that the 3 Mbps DSL service it provides Ms. Matkovich is "appropriate for customers with medium level bandwidth needs." However, as the Complainant's own witness testified, modern demands for broadband are changing. While the federal and state governments are acting to address broadband needs, the recommendation in the Initial Decision to impose a civil penalty on Verizon "for failing to deliver Chapter 30 internet speeds in this case is unsubstantiated and should be reversed." Verizon Exc. at 14.

D. Disposition

Any issue or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. It is well settled that the Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

This case ultimately turns on whether Ms. Matkovich satisfied her burden of proving that there was a problem in her internet access speed and availability, and the problem was caused by Verizon.⁷

As explained above, the burden of proof comprises two distinct burdens: the burden of production and the burden of persuasion. As the Complainant, Ms. Matkovich had the burden of going forward with evidence to support her claim. Once Ms. Matkovich introduced sufficient evidence to establish the legal sufficiency of her claim, also called a *prima facie* case, the burden of production shifted to Verizon to rebut her evidence. If Verizon introduced evidence sufficient to balance the evidence introduced by Ms. Matkovich, that is evidence of co-equal value or weight, her burden of proof as the Complainant was not satisfied, and the burden of going forward with the evidence shifted back to her as the Complainant. Ms. Matkovich was then required to provide additional evidence favorable to her claim.

As the Complainant, Ms. Matkovich must also carry the burden of persuasion to be entitled to a favorable ruling. Ms. Matkovich may carry the burden of production but not be entitled to a favorable ruling because she did not carry the burden of persuasion, a burden that always remains on a complainant. In determining whether a complainant has met the burden of persuasion, the ultimate factfinder⁸ may engage in

⁷ While the ALJ references Verizon's unreliable telephone service, she ultimately provided no specific or independent analysis of that service. Further, on review, at most the Complainant's testimony about the landline service was that problems were sporadic and "random." Tr. at 28-29. This case focused specifically on internet accessibility and speed, which is what we address herein.

⁸ In formal complaint proceedings, the Commission, not the ALJ, is the ultimate factfinder; it weighs the evidence and resolves conflicts in testimony. When reviewing the initial decision of an ALJ, the Commission has all the powers that it would have had in making the initial decision except as to any limits that it may impose by notice or by rule. *Milkie*, 768 A.2d at 1220, n.7, citing, *inter alia*, 66 Pa. C.S. § 335(a).

determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence.

On review of the evidentiary record, we cannot conclude that Ms. Matkovich has carried her burden of proving that Verizon is responsible for a problem under a statute we have jurisdiction to administer.

Through her testimony, Ms. Matkovich established a *prima facie* case that she experienced issues with her internet service. The burden of going forward with evidence sufficient to at least balance, or to outweigh, the Complainant's evidence then shifted to Verizon. Verizon presented testimony from its witness that explained the service it provides, the network over which it provides that service, and the results of multiple tests it conducted of that service and related facilities. Based on that evidence, Verizon sufficiently proved that it was providing service that satisfied its obligations under Chapter 30 of the Code and under the terms of the DSL service to which Ms. Matkovich subscribes. Further, contrary to the ALJ's conclusion that Verizon offered no solutions or recommendations, Verizon also offered explanations and suggestions on conditions outside the Company's control that could be affecting the service the Complainant receives, conditions for which Ms. Matkovich had no response. On this record, we cannot conclude that Ms. Matkovich satisfied her burden of proof.

Finally, we agree with Verizon that clarification of our jurisdiction over retail internet access service is warranted. On these bases, as discussed in more detail below, we reverse the Initial Decision and dismiss the Complaint.

We first address Verizon's Exception to the ALJ's application of our jurisdiction over retail internet broadband access service. Chapter 30 contains the alternative regulation of "local exchange telecommunications companies," including broadband deployment obligations under network modernization plans, that originated in

1993 in Pennsylvania under the original Chapter 30, Act 67 of 1993 at 66 Pa. C.S. §§ 3001-3009. Act 67 was subject to sunset and was ultimately repealed and replaced with Act 183 of 2004 at 66 Pa. C.S. §§ 3011-3019. Under the current provisions of Chapter 30, a local exchange telecommunications company is defined as an “incumbent” rural and nonrural carrier authorized by the Commission to provide local exchange service. 66 Pa. C.S. § 3012 (Definitions). In other words, the broadband obligations imposed under Chapter 30 attach to Commission-certificated ILECs.⁹ Thus, Verizon is correct that our jurisdiction over the internet derives from Chapter 30 of the Code.

While internet service is generally subject to federal review of interstate tariffs under the purview of the FCC, in Chapter 30 the General Assembly has invested the Commission with jurisdiction over regulated ILECs to assure broadband is deployed to 100% of their retail customers by December 31, 2015, at speeds no less than 1.544/0.128 Mbps, upon ten business days of their customer’s requests.

We most recently addressed our jurisdiction over broadband internet access service in two cases cited by both the ALJ and Verizon, *White* and *Roberts*. In *White*, we vacated an Initial Decision granting preliminary objections raising lack of subject matter jurisdiction and dismissing a complaint challenging the availability from Verizon North of its DSL internet service. In remanding the case for further proceedings, we found that the ALJ’s dismissal based on lack of jurisdiction was not consistent with the statutory directives of Chapter 30. As we stated there:

The Commission has appropriate statutory jurisdiction to properly inquire into matters involving the availability and provisioning of retail broadband access services by incumbent local exchange carrier (ILEC) telephone companies with Chapter 30 broadband deployment commitments and

⁹ We take administrative notice of the fact that Verizon is a nonrural ILEC that elected to provide broadband availability to 100% of its total retail access lines by December 31, 2015.

obligations. Verizon North is such an ILEC that has completed its Chapter 30 broadband deployment as of December 31, 2015, and is required to supply retail broadband access services “using any technology” at the Chapter 30 minimum standard of 1.544 Mbps download and 0.128 Mbps upload speeds. Furthermore, Verizon North is required to supply such services to a customer within ten business days of the customer’s request. 66 Pa. C.S. §§ 3012, 3014(b)(3)(ii)(A), and 3014(b)(5). Thus, the Commission has the necessary jurisdiction to determine whether Verizon North is providing retail broadband access service to the Complainant consistent with the applicable Chapter 30 statutory standards.

White, slip opinion at 6-7.

We reaffirmed our assertion of jurisdiction over broadband internet access services in *Roberts*, a case in which the complainant raised intermittent internet service. In *Roberts*, we again reversed an Initial Decision that had preliminarily dismissed the complaint on grounds of lack of subject matter jurisdiction. Affirming the ILEC’s Chapter 30 obligations, we stated the following:

Although the Commission as part of an individual case adjudication has yet to further define what constitutes “availability” under Chapter 30, the Initial Decision also overlooks Commission precedent recognizing that the availability of broadband access service provided by carriers’ subject to, and defined by, Chapter 30, remains within the Commission’s jurisdiction. In White, we confirmed that the Commission has appropriate statutory jurisdiction to inquire into matters involving the availability and provisioning of retail broadband access services by ILECs with Chapter 30 broadband deployment commitments and obligations. . . . [C]onsistent with our holding in White, the Commission has the necessary jurisdiction to determine whether CenturyLink is providing retail broadband access service to the

Complainant consistent with the applicable Chapter 30 statutory standards.

Roberts, slip opinion at 8-9 (citations omitted) (emphasis added).

On these bases, we grant Verizon’s first Exception challenging the ALJ’s application of the Section 1501 quality of service standard over broadband internet access service. As our precedent provides, we derive our jurisdiction under Chapter 30 of the Code, which explicitly provides jurisdiction over speed and availability.¹⁰ Pricing and service quality standards, however, are generally left to jurisdiction of the FCC. Our disposition of this first Exception, coupled with our resolution of Verizon’s evidentiary challenges in its second Exception, renders moot Verizon’s challenge to the ALJ’s application of Section 3301 of the Code to its broadband service.¹¹

¹⁰ As to what constitutes “available” under Chapter 30, as distinguished from “reliable” under Section 1501, we recognize that the formal complaint form used by the Complainant largely employs our traditional jurisdictional language. For example, as previously noted, the formal complaint form at paragraph 4 is introduced with the language “I am having a reliability, safety or quality problem with my utility service.” *See, supra*, at 2. With respect to broadband, our focus is on availability even if the complaint form uses the word reliability. To this point, insufficient evidence exists to allow us to conclude either that it was Verizon’s provision of service that was the cause of intermittent service or that the service was so intermittent as to potentially be considered unavailable.

¹¹ Section 3301 of the Code applies to public utilities. 66 Pa. C.S. § 3301(a). Verizon is a certificated ILEC, *i.e.*, public utility, alternatively regulated under Chapter 30. It is by virtue of that certificated status that it is subject to our broadband jurisdiction under Chapter 30. Chapter 30 expressly supersedes all provisions of Chapter 13, primarily relating to ratemaking, except for those expressly preserved under specifically enumerated exceptions. In its stead, Chapter 30 provides that the terms of the ILECs’ alternative regulation and network modernization plans enacted under that Chapter shall govern their regulation. Except for Chapter 13, however, Chapter 30 and the regulatory plans approved thereunder otherwise only supersede “any conflicting provisions of this title or other laws of this Commonwealth[.]” *See* 66 Pa. C.S. § 3019(h). Application of a civil penalty under Section 3301 remains an open question if a violation is found under our Chapter 30 jurisdiction. Because we do not find a violation under Chapter 30, that question is no longer an issue before us and will not be decided here.

In response to Verizon's second Exception, we conclude that Verizon's representation of the evidence provided in this proceeding is thorough, fair, and persuasive and was unrefuted with additional favorable evidence from the Complainant. This compels our conclusion that Ms. Matkovich failed to sustain her burden of proof. While testifying to her internet experiences, she failed to carry her burden of proving that Verizon is responsible for the problems she experienced in light of Verizon's evidence demonstrating the performance of its service and facilities. The ALJ's conclusion that Verizon is best situated to find the problem with Ms. Matkovich's internet service is not without limit under the law, and her conclusion that the Company failed to offer any suggestions or recommendations to Ms. Matkovich on how to improve her service misstates the record.

We agree that Verizon is best situated to diagnose and fix a problem; however, such is the case as to facilities and services *within its control*. This it did, providing sufficient evidence to cast doubt on an integral part of Ms. Matkovich's burden in this case, that being that Verizon is responsible for the problem. After multiple tests failed to show a problem with Verizon's service or facilities, Verizon identified multiple devices, applications, and other services and servers that are outside its control that could affect the Complainant's internet service. Verizon also offered several recommendations how Ms. Matkovich might test and address those matters. For these reasons, we cannot adopt the Initial Decision. Because our disposition hinges on factual determinations from the evidence of record, we provide a detailed review of that evidence in this Opinion.

The Complainant's evidence consisted of her own testimony as to her personal experiences. Her direct and cross-examination testimony addressed her household usage that included her work usage, her description of the problems, and the timing of those problems.

Ms. Matkovich described her internet accessibility problems as commencing shortly after the pandemic hit. This was a time when her and her family's usage increased due to her introduction of telemedicine working from home that, *inter alia*, requires the use of three specific secure healthcare applications, her children's remote learning, and other personal uses. Tr. at 15, 23. She affirmed that prior to April 2020, she did not encounter many issues. Tr. at 24.

The Complainant's work requires that she use three different HIPAA-compliant secure applications: miSecureMessaging, Epic, and Quantum Elab.¹² She acknowledged on cross examination that she was unaware whether her use of those apps required a minimum internet speed. She testified that when those are not functioning, she cannot receive or send messages to a call service and has to change her location, sometimes moving from one place inside her home to another, sometimes moving from inside her home to outside. Tr. at 19, 30-31, 37-38. In addition to using secure encryption, one of the applications also provides additional functions such as tracking and storage of activities, which is information she is responsible for texting to all her co-workers. Tr. at 21.

As a nurse practitioner, Ms. Matkovich works with nine different nursing homes, each of which serves anywhere from 30 to 100 patients, and she takes calls from all nine homes. Tr. at 22-23. With the onset of the pandemic, the nursing homes closed, and employees were asked to do as much telemedicine as they safely could. She picked up telemedicine visits of four to eight-hour shifts maybe once or twice a month, which were in addition to nine mandatory 24-hour shifts per month that she engaged in prior to the pandemic. Tr. at 17-18, 23.

¹² HIPAA is the acronym for the Health Insurance Portability and Accountability Act of 1996.

Ms. Matkovich uses her Verizon service through her laptop as well as her cell phone through Wi-Fi, and apparently at one time through a desktop as well; her son has a PlayStation, though she stated that the majority of the time it would not work through the internet; the family uses a FireStick that uses the DSL to stream Netflix; and there are two other cell phone users in the house, which also have their own service. Occasionally others may use the DSL during the overnight hours of Ms. Matkovich's 24-hour shifts. Ms. Matkovich acknowledged the existence of the T-Mobile Wi-Fi higher speed service within her house but stated that she could not hook up more than two devices to that. Tr. at 39-44. We find that Ms. Matkovich's description of her household uses is evidence of opportunities for that usage to stretch the capabilities of the 3.3 Mbps service Verizon provides. We also find this to be corroborated by Verizon's test results and the flickering green light on her modem.

Ms. Matkovich testified that she "often" performed speed tests at home where her service did not show 1.5 Mbps service and she "often" has no service at all. Tr. at 17. She testified that Verizon technicians came out to her house "once a month or once every three months." Tr. at 32. She testified to problems with her overnight internet service on December 3 and 7, 2021 (Tr. at 20) and Verizon testified to the complaint about her service on December 5, 2021. Ms. Matkovich otherwise provided no other evidence, such as simultaneous notes of specific times, dates, outages, or other ongoing or not ongoing uses, to substantiate her Complaint, particularly in light of Verizon's response.

Ms. Matkovich also presented as a witness her neighbor, who testified to her personal experience. Ms. Theis-Green, who lives about a mile away from Ms. Matkovich, testified that she receives speeds in the range of 1.5 to 3 Mbps, "not necessarily able to power the modern world[,]" but she does not get reliable service. Ms. Theis-Green also provided no further specifics or details. Tr. at 52-53. *See* Verizon Exc. at 6.

Following Ms. Matkovich's presentation of her case, Verizon presented its evidence through the testimony of, and exhibits sponsored by, its witness Mr. Brannen. Mr. Brannen is a senior engineer at Verizon who is responsible for equipment placement and installations. He is also Verizon's single point of contact for Chapter 30 and DSL issues and deployment in Pennsylvania as well as Delaware. Mr. Brannen personally conducted, or was in consult with other technicians from both Verizon and Fortress, a support contractor that tests network architecture and performance, who conducted, several tests, both remotely and in person, of Ms. Matkovich's DSL infrastructure and service.¹³ This testing was conducted both inside and outside the Complainant's premises using both her devices and Company devices. Testing included an end-to-end analysis of the DSL service from Verizon's central office via fiber to the remote terminal that serves Ms. Matkovich, and ultimately of the copper that gets the DSL to her house, and included replacement of her modem. Tr. at 57-117; Verizon Exh. 1. At each point of Verizon's troubleshooting, the equipment and service were both performing as designed.¹⁴ Tr. at 95-96, 100.

Upon questioning by the ALJ, Mr. Brannen confirmed that during its testing of the on-site service and facilities, the Company was able to stream a video through a technician's cell phone, but that same video would not stream through Ms. Matkovich's own laptop. Tr. at 100-01, 133. To Mr. Brannen, this indicated that the problem could lie with Ms. Matkovich's own equipment. As he testified, the problem "could potentially be with the laptop. You know, I don't know what could be running on the laptop[,] but we couldn't get through, you know, to do it through the laptop, but we could through [the technician's] phone via the same modem and the same network." Tr. at 101. Mr. Brannen also responded to the ALJ that while he could not confirm what was occurring with Ms. Matkovich's own equipment during the overnight hours,

¹³ Fortress conducts diagnostic tests using NavisCore. Tr. at 111-12.

¹⁴ The network is provisioned to supply service at 3.3/0.768 Mbps, the service Ms. Matkovich subscribes to. Tr. at 67.

difficulty with accessibility in that time period could be explained by others using the service, citing his own experience having kids play Xbox usage “until the wee hours” or automatic updates or similar activity occurring during that time. Tr. at 104.

Mr. Brannen further explained upon questioning from the ALJ that with usage ramping up “exponentially” in the same time frame Ms. Matkovich testified her problems started, April 2020, there could have been an uptick in usage of the secure healthcare applications that could have impacted the servers of the medical facilities using the apps, over which Verizon would have no control. Tr. at 105-06. We know from Ms. Matkovich’s own testimony that she picked up telemedicine assignments from nine nursing homes at the onset of the pandemic, which is when her troubles began. Affirming the ALJ’s question that “there may be a drain going on from the Complainant’s end but [] Verizon is not causing this problem[,]” Mr. Brannen stated, “Yeah, that’s – that’s pretty much what I’m saying.” Tr. at 106. “The problem looks like it’s somewhere outside of the pipe. The pipe is delivering what it should. ... [W]e can only control what we can control.” *Id.*

As for recommendations, Mr. Brannen affirmed that he could not offer a solution to a problem he could not find on his system. However, he could recommend that Ms. Matkovich “maintain the integrity of what’s on [her] network.” Tr. at 109. By this, he meant that of all the devices accessing the network, each should be checked to ensure they were not set to do anything in the background such as receive automatic updates, limit what is done with Wi-Fi when the DSL service is needed the most, and carefully manage the 3.3 Mbps bandwidth that is available, which is the fastest Verizon offers in that area. Tr. at 108-11. If Verizon were ordered to fix a problem it could not find, it would have to do more diagnostics to attempt to discover what is drawing on the DSL. But doing this would be “hit or miss,” disconnecting this and that and seeing what happens, “the same thing a customer would have to do.” Tr. at 114-16. Upon cross examination by Ms. Matkovich, Mr. Brannen remained certain, that he “[did] not believe

there was something for [Verizon] to fix. I believe it is operating as it's supposed to be.” Tr. at 127.

Verizon provided evidence of general bandwidth needs for modern uses or applications. The lowest identified included standard personal video calling requiring speeds of at least 1 Mbps, DIRECTTV NOW at 2.5 Mbps, and standard definition streaming at 3-4 Mbps. Verizon Exh. 2. A Verizon on site test streaming of one YouTube video at Ms. Matkovich's premises transmitted 2.8 megabits of data with additional capacity remaining. Tr. at 74-79; Verizon Exh. 1, page 4. A simultaneous speed test confirmed speed above 1.544 Mbps and at or around the subscribed to speed. Tr. at 80-82; Verizon Exh. 1, page 5. These tests, conducted by Verizon on December 3, 2021, “proved that the line is capable of both transmitting and receiving the 3.0 meg and the [8]64k upstream.” Tr. at 83, 84.

Having received a complaint from Ms. Matkovich about her service on December 5, 2021, Verizon introduced test results from 3:55 a.m. (4:55 local time) on December 6, 2021, which showed that usage on Ms. Matkovich's line was at maximum capacity. While usage was at 100% capacity, the test also demonstrated that there were no call errors and no congestion on Verizon's network at that time. Tr. at 85-88; Verizon Exh. 1, page 3. Random testing two days later also demonstrated attempted use of maximum capacity at Ms. Matkovich's premises while the network continued to show no congestion. Mr. Brannen explained that just one user streaming one video could render the DSL capacity insufficient for another user to run another application, not that the line could not receive 3.3 Mbps, but that a user or users are trying to use more. Tr. at 88-92. This is consistent with Verizon's explanation how Ms. Matkovich could experience problems with internet service on her end even when Verizon's service and facilities are performing as designed.

Ms. Matkovich also acknowledged that she had no information about the bandwidth required for her to conduct business remotely, including use of three secure healthcare applications used by the nine nursing homes with which she conducts business. Tr. at 38. As Verizon contends, all these facts combined with Verizon's confirmation of the functionality of the infrastructure and services that are under its control, leave us to conclude that Ms. Matkovich failed to carry her burden of proving that the problems she is experiencing lies within Verizon's control rather than with her own devices and uses. Issues such as the bandwidth demands of the three secure healthcare applications¹⁵ that the Complainant uses while interfacing with nine nursing homes, all of which are outside of Verizon's control, could affect Ms. Matkovich's internet accessibility, one point among others that Verizon's witness noted could negatively affect her service. Verizon Exc. at 7-11.

Ms. Matkovich also corroborated Verizon's evidence that different technicians visited her premises several times, checked the speed, conducted troubleshooting and replaced her modem, and none diagnosed a problem with Verizon's service or facilities. Tr. at 27. As Ms. Matkovich's neighbor observed, the DSL service to which Ms. Matkovich subscribes, which is the best Verizon offers in her area, is not necessarily designed to satisfy modern needs.

We find Verizon's evidence disputing that the problem lies within its control to be of at least co-equal weight to the Complainant's testimony that she experiences problems. Verizon has proved its service has been available every time when tested, and that it is available as tested on the Company's equipment when inside Ms. Matkovich's premises even when it is not available on her devices. We find that more persuasive than Ms. Matkovich's recollected testimony, uncorroborated by any

¹⁵ One application, miSecureMessages, describes its encryption as "military grade." [Simple, Streamlined, Secure. | miSecureMessages](#), accessed July 11, 2022.

other evidence, describing her experience. Perhaps more importantly, the Complainant failed to refute with evidence other than her own inferences that no other household devices, programs, or users were not simultaneously using bandwidth, actively or passively, at the times she encountered problems. *See, e.g.*, Tr. at 44. The Complainant provided no evidence that she tested her own household devices to determine what programs, if any, were also running or what users, if any, were also using bandwidth, and if so, how much. In short, the Complainant provided no evidence to rebut Verizon’s evidence explaining how matters *outside* the Company’s control could cause issues since the Company’s testing found no problems within its control. Her initial case was sufficient for her to shift the burden of production to Verizon. Having provided evidence of at least co-equal value, which Verizon did, the burden returned to the Complainant to provide further evidence favorable to her case. This she did not do, and for that reason we cannot sustain her Complaint on the evidence provided.

To this point, although we agree with the ALJ that “[b]oth parties acted in a responsible manner to resolve the problem,” (I.D. at 18), we find no support for the ALJ’s statement that Ms. Matkovich’s evidence of service issues was “well documented.” I.D. at 11. As stated, Ms. Matkovich’s evidence consisted almost exclusively of her own testimony. Testimony alone is competent evidence that does not necessarily require corroboration to carry a party’s burden.¹⁶ However, Ms. Matkovich called her own recall into question by her statement that a Verizon technician visited her premises “once a month or once every three months.” Tr. at 32. And, other than for specific testimony describing specific problems in December 2021, her testimony was more general, for example frequently describing her problems as “often.” Tr. at 17. Imprecision can call refuted facts into question, diminishing the persuasive weight necessary for the Complainant to carry her burden of proof. Further, as stated,

¹⁶ *See Darlington v. Blue Pilot Energy, LLC*, Docket No. F-2015-2500535 (Order entered June 30, 2016) at 19 (“Oral testimony is not *per se* insufficient because it lacks written corroboration.”).

Ms. Matkovich offered no rebuttal to rule out Verizon's testimony that interference from devices and programs within her own control could account for her problem.

We also find persuasive Verizon's argument that the ALJ erred in her conclusion that because Verizon did not prove the interruptions did not occur, the evidence supports findings that they did occur. As Verizon argued, it is insufficient to base a finding that the interruptions occurred on the fact that Verizon did not prove the interruptions did not occur. This is even more tenuous in that there must be not only a finding that the interruptions occurred but also that *Verizon is responsible for the interruptions*. As Verizon correctly argues, the Complainant has the burden of proving her claims, and she cannot satisfy that burden by arguing Verizon failed to prove they did not occur. Verizon cites to *Dilenno* for this premise. In another case, in which a plaintiff argued that the defendants introduced no evidence showing that there was no gun at a brawl, the Court responded as follows: "While *argumentum ad ignorantiam* is the source of some consternation in philosophical circles, the law deals with the fallacy by placing the burden of proof on the plaintiff and (usually) leaving it there, requiring [plaintiff] to prove the existence of critical facts at the peril of losing his case." *Emery v. Talladega College*, 169 F.Supp. 3d 1271, 1283 n.12 (N.D. Alabama, Eastern Division 2016), citing *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 (11th Cir. 1993).

In this case, Ms. Matkovich, the plaintiff-equivalent, carries the burden of proof, which includes the burden of persuasion. Verizon's inability to prove the absence of an internet problem when it is not testing Ms. Matkovich's service cannot be used to support a finding to satisfy Ms. Matkovich's burden of proving a violation by Verizon. This is particularly the case given the Company's substantial, unrefuted evidence following multiple tests at various places and varying times, including the early morning hours Ms. Matkovich testified she works on call, that showed no problem with the services, facilities, and applications under the Company's control. On the other hand, while Verizon testified to various scenarios under which its service to Ms. Matkovich

may be stretched beyond its capability due to reasons outside the Company's control, Ms. Matkovich provided no evidence that she actually verified there was no other usage during those times.

We appreciate the gravity of Ms. Matkovich's predicament. As the testimony of Ms. Matkovich's neighbor Ms. Theis-Green affirmed, however, the statutory obligation placed on Verizon under Chapter 30 is insufficient to satisfy today's modern broadband needs. Unfortunately, so long as Verizon has proved it is abiding by Chapter 30's obligations with regard to broadband speed and availability, which on this record we find it has, that issue is beyond the Commission's jurisdiction.

Accordingly, for these reasons, we reverse the ALJ's Initial Decision and dismiss Ms. Matkovich's Complaint for failure to satisfy her burden of proving that Verizon has violated a Commission statute, order, or regulation the Commission has jurisdiction to administer and that Verizon is responsible or accountable for the problem described in the Complaint.

III. Conclusion

Based upon our review of the record and the applicable law, we grant the Exceptions of Verizon, reverse the Initial Decision of ALJ Katrina L. Dunderdale, and dismiss the Complaint of Ms. Courtney Matkovich, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

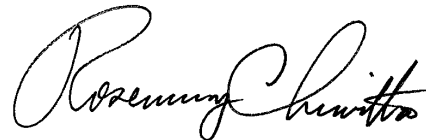
1. The Exceptions filed by Verizon North LLC on May 24, 2022, are granted, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Katrina L. Dunderdale issued on May 5, 2022, is reversed, consistent with this Opinion and Order.

3. That the Formal Complaint filed by Courtney Matkovich at Docket No. C-2020-3022369 is dismissed.

4. That this case be marked closed.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: August 25, 2022

ORDER ENTERED: August 25, 2022