

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Robert Adams	:	
	:	
v.	:	C-2022-3032837
	:	
Zito Media Voice, LLC	:	

INITIAL DECISION

Before
Dennis J. Buckley
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the Formal Complaint filed at Docket No. C-2022-3032837 by Robert Adams against Zito Media, LLC, as the Commission is without authority to adjudicate the Complaint.

HISTORY OF THE PROCEEDING

On May 20, 2022, Robert Adams (Complainant) filed a Formal Complaint (Complaint) against Zito Media Voice, LLC (Zito or Respondent), alleging inadequate telephone and internet service and requesting a refund from Zito for services not received.

On July 14, 2022, a hearing Notice was issued setting a telephonic hearing for September 1, 2022.

On July 15, 2022, a standard form prehearing Order was issued.

On July 19, 2022, Maria T. Browne, Esquire, filed a Notice of Appearance seeking to enter her appearance on behalf of Zito Media in this matter. Attorney Browne holds a license to practice law from the District of Columbia, but not from Pennsylvania.

On July 21, 2022, Zito Media filed Preliminary Objections with the Secretary of the Commission. The Preliminary Objections were properly endorsed with a Notice to Plead. In its Preliminary Objections, Zito contended that it did not provide telephone service to Complainant. Rather, Zito argued that telephone service was being provided by Zito Central PA, LLC, a cable television company over which the Commission has no jurisdiction. This clarification notwithstanding, Zito went on in its Preliminary Objections stating, “Zito will work with Mr. Adams to resolve the issues in his formal Complaint.” Preliminary Objections at ¶ 10. Zito asked that the Complaint be dismissed.

On August 26, 2022, an Order was issued cancelling the hearing set for September 1, 2022, and directing that Zito comply with 52 Pa. Code §§ 1.21, 1.22 which requires that a corporation be represented by an attorney licensed to practice in the Commonwealth of Pennsylvania or admitted *pro hac vice*.

On August 29, 2022, Nellie Dunderdale, Esquire, an attorney licensed to practice in Pennsylvania, entered her appearance and filed a Motion for the admission of Attorney Browne *pro hac vice*. Attorney Dunderdale also refiled Zito’s Preliminary Objections, again properly endorsed with a Notice to Plead.

On September 2, 2022, Complainant filed an Answer to Zito’s Preliminary Objections. Complainant asserted that Zito Media Voice, LLC, does provide him with telephone service and provided additional details with respect to his quality of service complaint.

On September 27, 2022, an Order was issued granting the Motion for Admission of Attorney Browne *pro hac vice*.

On December 21, 2022, a hearing Notice was issued setting a hearing in this case for February 14, 2023.

On January 12, 2023, the Commission issued an Opinion and Order granting the Application of Zito Media Voice, LLC, for the Discontinuance and Abandonment of Competitive Local Exchange Carrier and Competitive Access Provider services by Zito Media Voice, LLC, to the public within the Commonwealth of Pennsylvania. *See Application of Zito Media Voice, LLC for Approval of the Discontinuance and Abandonment of Competitive Local Exchange Carrier and Competitive Access Provider Services to the Public in the Commonwealth of Pennsylvania*, Docket No. A-2022-3036219 (Order entered Jan. 12, 2023).

On January 27, 2023, Zito filed a Notice of Change of Regulatory Status in this proceeding, attaching a copy of the Commission's January 12, 2023, Opinion and Order.

On February 14, 2023, a telephonic hearing convened pursuant to Notice. Complainant was present and represented himself. Maria T. Browne, Esquire, appeared on behalf of Respondent. No exhibits were offered by either party.

On March 14, 2023, an 18-page transcript was filed by the court reporting service. The record closed on that day.

The matter is ready for resolution. For the reasons set forth, below, the Complaint of Robert Adams at Docket No. C-2022-3032837 is dismissed.

FINIDNGS OF FACT

1. Robert Adams is the Complainant in this matter.
2. Zito Media Voice, LLC, at the time of the filling of the Complaint, was a Competitive Local Exchange Carrier (CLEC) and is the Respondent in this matter.

3. Zito Media provides high-speed internet service and digital cable television to more than 100 communities around the United States.

4. On May 20, 2022, Complainant filed a Formal Complaint against Zito alleging inadequate telephone and internet service and requesting a refund from Zito for allegedly inadequate services and for services not received.

5. On July 21, 2022, Zito Media filed Preliminary Objections contending that it did not provide telephone service to Complainant, and that service is being provided by Zito Central PA, LLC, a cable television company over which the Commission has no jurisdiction.

6. On September 2, 2022, Complainant filed an Answer to Zito's Preliminary Objections asserting that Zito Media Voice, LLC, does provide him with telephone service and provided additional details with respect to his quality of service complaint.

7. On January 12, 2023, the Commission issued an Opinion and Order granting the Application of Zito Media Voice, LLC, for the Discontinuance and Abandonment of Competitive Local Exchange Carrier and Competitive Access Provider services by Zito Media Voice, LLC, to the public within the Commonwealth of Pennsylvania. *See Application of Zito Media Voice, LLC for Approval of the Discontinuance and Abandonment of Competitive Local Exchange Carrier and Competitive Access Provider Services to the Public in the Commonwealth of Pennsylvania*, Docket No. A-2022-3036219 (Order entered Jan. 12, 2023).

8. On January 27, 2023, Zito filed a Notice of Change of Regulatory Status in this proceeding, attaching a copy of the Commission's January 12, 2023, Opinion and Order.

DISCUSSION

This case had its origin in a Formal Complaint filed against Zito alleging inadequate service. The statute at 66 Pa.C.S. § 1501 governs any allegations of unreasonable or inadequate service.

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

66 Pa.C.S. § 1501

Pursuant to 66 Pa.C.S. § 1501, the Commission has original jurisdiction over the reasonableness and adequacy of public utility service. *Elkin v. Bell Tel. Co.*, 372 A.2d 1203 (Pa. Super. 1977) *aff'd* 420 A.2d 371 (Pa. 1977); *Behrend v. Bell Tel. Co.*, 243 A.2d 346 (Pa. 1968). As a general proposition, neither the Public Utility Code nor the Commission's regulations require public utilities to provide constantly flawless service. The Public Utility Code at 66 Pa.C.S. § 1501 does not require perfect service or the best possible service but does require public utilities to provide reasonable and adequate service. *Analytical Lab'y Servs., Inc. v. Metro. Edison Co.*, Docket No. C-20066608 (Opinion and Order entered Dec. 21, 2007); *Emerald Art Glass v. Duquesne Light Co.*, Docket No. C-00015494 (Opinion and Order entered June 14, 2002); *Re: Metro. Edison Co.*, 80 Pa.P.U.C. 662 (1993).

However, from the outset there has been an issue with respect to the authority of the Commission to hear this case. In his Complaint, Mr. Adams refers to, "internet, telephone and television constantly dropping." This would indicate a bundled service though it is unclear just what the nature of Complainant's telephone service is.

In its Preliminary Objections, Zito contended that it did not provide telephone service to Complainant, that service being provided by Zito Central PA, LLC, a cable television company over which the Commission has no jurisdiction.

In his Answer to Zito's Preliminary Objections, Complainant refers to a bundled bill stating, "I am billed from Zito Media Voice and pay for the following services, Telephone,

Television and Internet.” He goes on to state that although the Commission has no jurisdiction over wireless and internet service, there are exceptions to the rule. Mr. Adams, however, does not state what the rule (or rules) are nor how his service falls under any exception.

The Commission’s Rules of Administrative Practice and Procedure permit the filing of preliminary objections. The Commission’s rules at 52 Pa.Code § 5.101(a) provide, in relevant part:

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in a proceeding.

52 Pa. Code § 5.101(a).

Commission procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. *Equitable Small Transp. Interveners v. Equitable Gas Co.*, Docket No. C-00935435 (Opinion and Order entered July 18, 1994) (*Equitable*).

A preliminary objection seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveller Servs., Inc. v. Pa. Dept. of Env't Res.*, 406 A.2d 1020 (Pa. 1979) (*Interstate*). The moving party may not rely on its own factual assertions but must accept for the purposes of disposition of the motion, all well-pleaded material facts of the other party, as well as every inference fairly deducible from those facts. *Cnty. of Allegheny v. Commonwealth*, A.2d 402 (Pa. 1985). The Commission must view the Complaint in this case in the light most favorable to Complainant and should dismiss the Complaint only if it appears that Complainant would not be entitled to relief under any circumstances as a matter of law. *Equitable*; *see also, Interstate*.

At this point, a hearing to ascertain the factual status of telephone service to Complainant is moot, because, as stated above, on January 12, 2023, the Commission issued an Opinion and Order granting the Application of Zito Media Voice, LLC, for the Discontinuance and Abandonment of Competitive Local Exchange Carrier and Competitive Access Provider services by Zito Media Voice, LLC, to the public within the Commonwealth of Pennsylvania. On January 27, 2023, Zito filed a Notice of Change of Regulatory Status in this proceeding, attaching a copy of the Commission's January 12, 2023, Opinion and Order.¹ The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly as contained in the Public Utility Code. Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992). The issue of subject matter jurisdiction may not be waived, and it may be raised at any stage of a proceeding by a party, or *sua sponte* by the court or agency in

¹ Based on Complainant's comments and descriptions in his pre-hearing filings, Zito Media did not provide land-line telecommunications service to Complainant as what Complainant is describing is internet based service over which the Commission has no jurisdiction as is contended by Zito Media in its Preliminary Objections. Zito contends that it operates a voice network that uses Internet protocol (IP) to provide cable telephony services and may operate using the newer transmission protocol that the industry has labeled "Voice over Internet Protocol" (VOIP). VoIP is an internet application that uses packet switching to transmit a voice communication over a broadband internet connection data network. VoIP is significantly different from the traditional circuit switched Public Switched Telephone Network (PSTN). VoIP communications use digital packets carrying the voice communication interspersed with data packets to complete the communication over a possible multiplicity of circuits. The traditional circuit switched PSTN uses analog signals over an electrical circuit that must be kept clear of other signals for the entire time the telephonic communication is occurring. VoIP is a more cost effective method of communication than the PSTN. *Mn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007). A portion of each call relies upon Internet protocol or "IP" rather than more traditional, "circuit switched" protocols. Zito states that it is a competitive local exchange carrier that acts as an intermediary for its cable affiliate, Zito Central PA, LLC. Preliminary Objections at ¶¶ 6-8.

which the case exists. *Scott v. Bristol Twp. Police Dep't.*, 669 A.2d 457 (Pa. Cmwlt. 1995). The Commission does not have the jurisdiction to hear Complaints about internet-based service, nor does the Commission have jurisdiction to hear a case involving an entity which no longer holds operating authority from the Commission. *In the Matter of Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd. 3307 (2004). Given that Zito Media no longer holds authority from the Commission as a CLEC, the Commission does not have the jurisdiction to adjudicate the Complaint filed by Mr. Adams.

For the foregoing reasons, the Complaint filed by Robert Adams at Docket No. C-2022-3032837 against Zito Media Voice, LLC, must be dismissed

CONCLUSIONS OF LAW

1. The Commission has the authority under the Public Utility Code to receive and resolve Complaints though this case raises a question of subject matter jurisdiction. 66 Pa.C.S. § 701.
2. The Commission is a creature of the legislative body which created it. As such, it has only the powers, duties, responsibilities and jurisdiction given to it by the Legislature. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlt. 1992).
3. The Commission must act within, and cannot exceed, its jurisdiction. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlt. 1992).
4. Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlt. 1992).
5. The issue of subject matter jurisdiction may not be waived, and it may be raised at any stage of a proceeding by a party, or *sua sponte* by the court or agency in which the case exists. *Scott v. Bristol Twp. Police Dep't.*, 669 A.2d 457 (Pa. Cmwlt. 1995)

6. The Commission issued an Opinion and Order granting the Application of Zito Media Voice, LLC, for the Discontinuance and Abandonment of Competitive Local Exchange Carrier and Competitive Access Provider services by Zito Media Voice, LLC, to the public within the Commonwealth of Pennsylvania. *Application of Zito Media Voice, LLC for Approval of the Discontinuance and Abandonment of Competitive Local Exchange Carrier and Competitive Access Provider Services to the Public in the Commonwealth of Pennsylvania*, Docket No. A-2022-3036219 (Order entered Jan. 12, 2023).

7. The Commission does not have the jurisdiction to hear Complaints about internet-based service, nor does the Commission have jurisdiction to hear a case involving an entity which no longer holds operating authority from the Commission. *In the Matter of Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd. 3307 (2004).

ORDER

THEREFORE.

IT IS ORDERED:

1. That the Complaint filed by Robert Adams in Robert Adams v. Zito Media Voice, LLC at Docket No. C-2022-3032837, is dismissed for lack of Commission jurisdiction.
2. That the Secretary of the Commission mark this matter closed.

Date: July 17, 2023

/s/
Dennis J. Buckley
Administrative Law Judge