

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

Public Meeting held August 3, 2023

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
Stephen M. DeFrank, Vice Chairman
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

Kathleen C. Babyak

C-2021-3024569

v.

Full Service Network, L.P.

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Jeffrey A. Watson, issued on May 15, 2023, in the above-captioned proceeding. Exceptions were not filed in this matter. However, the Commission has exercised its right to review the Initial Decision pursuant to Section 332(h) of the Public Utility Code (Code). 66 Pa. C.S. § 332(h). For the reasons stated below, we shall remand the matter to the Office of Administrative Law Judge for such further proceedings, as may be deemed necessary, consistent with this Opinion and Order.

I. History of Proceeding

On February 3, 2021, Kathleen C. Babyak (Complainant or Ms. Babyak) filed a Formal Complaint (Complaint) against Full Service Network, LP (FSN, Full Service or Respondent) with the Commission. The Complainant made various factual allegations and raised concerns with multiple instances of service interruptions and reliability. She also questioned FSN's customer service adequacy, including FSN's issuance of a service suspension notice to the Complainant for a single nonpayment which, in fact, was caused by FSN removing Auto-Pay from the Complainant's account. The Complainant also alleged numerous other customer service violations by FSN, including that: (1) FSN failed to investigate the Auto-Pay removal; (2) the unsatisfactory manner in which FSN's supervisor communicated with the Complainant about that conduct; (3) FSN's provision of inaccurate and erroneous information to the Complainant; (4) FSN's failure to explain or confirm information upon the Complainant's request; (5) FSN's failure to return numerous phone calls from the Complainant; and (6) its failure to record the Complainant's requests. Complaint at ¶ 4. As relief, the Complainant requested cooperation between the incumbent local exchange carrier (ILEC), Verizon, and competitive local exchange carrier (CLEC), FSN, to resolve reliability concerns, improved customer service, and retention of her previous tariffed National Plan. *Id.* at ¶ 5.

On March 30, 2021, Respondent, through counsel, requested a thirty-day extension to file a responsive pleading to the Complaint. The following day, on March 31, 2021, a Secretarial Letter was issued extending the deadline to file a responsive pleading to the Complaint until May 1, 2021.

On May 3, 2021, Respondent filed an Answer with New Matter (Answer) and Preliminary Objections. In its Answer, Full Service admitted and denied various factual allegations in the Complaint, specifically denying it provided the Complainant

poor customer service or made any unauthorized changes to her calling plan. Answer at 5. By way of a New Matter, Full Service argues the Complaint fails to state a claim upon which relief can be granted and is insufficient factually and legally. *Id.* at 6. The Preliminary Objections expand upon the allegations of the Answer, arguing insufficiency of the pleading or legal insufficiency as to the factual allegations in the Complaint. Preliminary Objections at 4-8. The Preliminary Objections request dismissal of the Complaint. *Id.* at 8.

A Motion Judge Assignment Notice was issued on June 7, 2021, assigning ALJ Watson as presiding officer. On June 11, 2021, an Interim Order was entered denying Respondent's Preliminary Objections.

On August 25, 2021, a Hearing Notice was issued scheduling a telephonic hearing for October 5, 2021. On September 30, 2021, the presiding officer received a request from Respondent, via email, to continue the hearing. *I.D.* at 2. Respondent stated that the Complainant did not oppose the continuance request. *Id.* On October 1, 2021, an Interim Order was entered continuing the hearing scheduled for October 5, 2021. *Id.*

On December 8, 2021, a Hearing Notice was issued scheduling a telephonic hearing for January 11, 2022. *Id.*

On December 10, 2021, counsel for Respondent filed a Motion for Continuance of the January 11, 2022 hearing. A copy of the Motion was served on the Complainant and no objection to the Motion for Continuance was received from the Complainant. On December 21, 2021, an Interim Order was entered continuing the hearing scheduled for January 11, 2022. *Id.*

By hearing notice dated August 11, 2022, the telephonic hearing was rescheduled for September 29, 2022. *Id.*

On September 15, 2022, Full Service filed a Motion for Continuance, for the hearing on September 29, 2022. No objection to the Motion for Continuance was received from the Complainant. On September 21, 2022, an interim order was entered granting the motion for a continuance filed by Full Service. I.D. at 2-3.

The evidentiary hearing was rescheduled for January 3, 2023, and convened as scheduled. The record was closed on February 21, 2023. I.D. at 3.

On May 15, 2023, the Commission issued the Initial Decision of ALJ Watson, in which he sustained, in part,¹ and denied, in part, the Complaint and imposed a civil penalty on Full Service for failing to provide adequate and reasonable service regarding Auto-Pay, suspension notices, and customer service issues raised by the Complainant. I.D. at 1, 39-40.

II. Discussion

A. Legal Standards

We advise the Parties that, as a preliminary matter, any issue that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. We are not required to consider expressly or at length each contention

¹ The ALJ sustained the Complaint insofar as it sought a finding of unreasonable or inadequate service through its customer service representatives and/or managers by failing to process the autopay feature and failing to properly, adequately, timely and professionally communicate with the Complainant despite repeated requests by the Complainant regarding an investigation, under the circumstances, related to the autopay suspension notice and customer service issues.

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).

In determining whether a party is an indispensable party to a matter, the Supreme Court of Pennsylvania has held “an indispensable party is one whose rights are so directly connected with and affected by litigation that he must be a party of record to protect such rights, and his absence renders any order or decree of court null and void for want of jurisdiction.” *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 464 Pa. 377, 379 (Pa. 1975) (*Diamond Fuel*). Failure to join an indispensable party impacts jurisdiction and, therefore, may be raised at any time by the parties and, if not raised by the parties, should be raised *sua sponte*. *Posel v. Redevelopment Authority of Philadelphia*, 72 Pa. Commw. 115, 121 (Pa. Cmwlth. 1983) (*Posel*).

The Pennsylvania Supreme Court has established a four-part test to determine indispensability, which includes, “at least” the following considerations:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the issue?
4. Can justice be afforded without violating the due process rights of absent parties?

Mechanicsburg Area School Dist. v. Kline, 494 Pa. 476, 481 (Pa. 1981) (*Mechanicsburg*).

In utilizing this test, the Court has established “the basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of a third party.” *CRY, Inc. v. Mill Service, Inc.*, 536 Pa. 462, 469 (Pa. 1994)

(*CRY*). In *CRY*, the Court went on to clarify that any analysis of indispensability must refer to the nature of the claim and the relief sought. *Id.*

The Commission has strict procedures for the imposition of civil penalties for violations of the Code and the Commission's Regulations. The general rule states:

If any public utility, or any other person or corporation subject to this part, shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse to perform any duty enjoined upon it by this part; or shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the commission ... such public utility, person or corporation for such violation, omission, failure, neglect, or refusal, shall forfeit and pay to the Commonwealth a sum not exceeding \$1,000.

66 Pa. C.S. § 3301(a).

Under Section 3301(b) of the Code, 66 Pa. C.S. § 3301(b), the Commission may levy a civil penalty for each day of such violation.

The Commission's Policy Statement regarding *Factors and Standards for Evaluating Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations* sets forth ten (10) factors that the Commission may consider in evaluating whether a civil penalty for violating a Commission order, regulation, or statute is appropriate:

(1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

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

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

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

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

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

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

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

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

52 Pa. Code § 69.1201. *See also, Joseph A. Rosi v. Bell-Atlantic-Pennsylvania, Inc.*, Docket No. C-00992409 (Order entered March 16, 2000) (*Rosi*).

B. ALJ's Initial Decision

ALJ Watson made fifty-two (52) Findings of Fact and reached fourteen (14) Conclusions of Law. I.D. at 3-9, 36-38. We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law, except as reversed or modified by this Opinion and Order, either expressly or by necessary implication.

ALJ Watson's Initial Decision addressed each portion of the Complaint in the order listed. The Initial Decision imposed a total civil penalty of \$4,500 for the failures of FSN to provide adequate and reasonable service to the Complainant as it related to processing her Auto-Pay, the December 2020 suspension notice, and the customer service provided. I.D. at 25-36.

Regarding service outages, the Initial Decision held that the Complainant failed to prove FSN failed to provide adequate or reasonable service. As reason therefore, the ALJ noted FSN reported the alleged outages to Verizon and there was no evidence supporting the proposition that FSN was responsible for investigating or correcting the cause of outages reported to Verizon. I.D. at 13.

The Initial Decision also found the Complainant failed to establish a failure by FSN to provide adequate or reasonable service related to the change in cost for the Nationwide Calling Plan. Notably, the Complainant stated she was not challenging the

plan under the circumstances and the ALJ noted the change was appropriately reflected in FSN's tariff. I.D. at 14.

The ALJ found the Complainant did establish by a preponderance of evidence that FSN provided inadequate or unreasonable service by failing to process her auto-pay payment in November 2020, resulting in a December 2020 suspension notice for non-payment. I.D. at 18. The contrasting messages relayed to the Complainant, failure to process the payment, and further failure to investigate the issue were all bases for the ALJ imposing a civil penalty of \$2,000. *Id.* at 18, 30.

Regarding the suspension notice sent by FSN in December 2020, , the Initial Decision held the issuance of a suspension notice after a failure of FSN to process the auto-pay was inadequate or unreasonable service. I.D. at 19. Noting the failure of FSN to provide notice, additional time, or clarification regarding the suspension notice, the Initial Decision imposed a civil penalty of \$500 for this violation. *Id.* at 30-31, 33.

Finally, the Initial Decision imposed a civil penalty of \$2,000 for the customer service provided to the Complainant by FSN. I.D. at 36. This penalty was based on the Complainant showing by a preponderance of the evidence that FSN failed to return calls, to provide accurate information regarding questions posed by the Complainant, and to communicate with the Complainant, therefore, failing to provide adequate or reasonable service. *Id.* at 24, 34.

C. Disposition

Based on our review of the record in this case and the applicable law, we shall remand the matter to the Office of Administrative Law Judge so that Verizon can be joined as an indispensable party given that FSN provided service to the Complainant

using Verizon's leased network and the Complainant's averments regarding service outages can be properly addressed.

We note in particular, that in her Complaint, Ms. Babyak stated in the section regarding relief that she wants "Full Service to work with Verizon to solve my service outage problems." Ms. Babyak also referenced Verizon multiple times in her detailed explanation of her Complaint in an attachment. FSN also mentioned Verizon multiple times in its Answer and New Matter filed in response to Ms. Babyak's Complaint. Finally, Verizon was referenced multiple times during the hearing. Tr. 13, 16, 23, 25 30, 36-42, 49, 56. In particular, FSN submitted a screen shot of the Verizon portal as an exhibit. FSN Exh. No. 5.

Verizon should be interpleaded as an indispensable party to this proceeding in order to address the service outages, particularly because multiple service interruptions occurred as discrete events from summer to December of 2020. Therefore, this matter will be remanded so that Verizon can be joined as an indispensable party with regard to the averments pertaining to service outages.

A remand of this matter will also allow for a further explanation regarding any civil penalties imposed for violations not related to service outages. As part of the remand, the ALJ should provide a detailed explanation regarding how any civil penalties ultimately levied are consistent with Section 3301 of the Code and our Policy Statement at 52 Pa. Code § 69.1201.²

² Section 3301(a) provides, in pertinent part, that "if any public utility ... shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited ... such public utility, person or corporation for such violation, omission, failure, neglect or refusal, shall forfeit and pay to the Commonwealth a sum not exceeding \$1,000." *See*, 66 Pa. C.S. § 3301(a). When assessing an appropriate civil penalty, the Commission applies a ten-factor test set forth in our Policy Statement at 52 Pa. Code § 69.1201 and drawn from a prior Commission Order in *Rosi*.

III. Conclusion

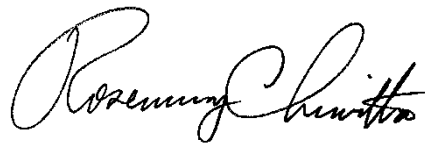
Upon review of the record, we shall remand this matter to the Office of Administrative Law Judge, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. This matter is remanded to the Office of Administrative Law Judge for the conduct of further proceedings as necessary to interplead Verizon Pennsylvania, Inc. and Verizon North, Inc. (Verizon) as indispensable parties; and

2. In the Initial Decision on Remand, the Office of Administrative Law Judge shall provide further explanation regarding how any civil penalties ultimately levied are consistent with Section 3301 of the Public Utility Code and our Policy Statement at 52 Pa. Code § 69.1201.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: August 3, 2023

ORDER ENTERED: September 14, 2023