

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

Public Meeting held November 9, 2023

Commissioners Present:

Stephen M. DeFrank, Chairman
Kimberly Barrow, Vice Chair
Ralph V. Yanora
Kathryn L. Zerfuss, Concurring in Result Only
John F. Coleman, Jr.

Robert Adams

C-2022-3032837

v.

Zito Media Voice, LLC

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Initial Decision (Initial Decision or I.D.) of Administrative Law Judge (ALJ) Dennis J. Buckley, issued on July 17, 2023, in the above-captioned proceeding. No Exceptions have been filed. However, we have exercised our 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 reverse the Initial Decision and remand the matter to the Office of Administrative Law Judge (OALJ), consistent with this Opinion and Order.

History of the Proceeding

On May 20, 2022, Robert Adams (Complainant) filed a Formal Complaint (Complaint) against Zito Media Voice, LLC (Zito Media or Respondent), alleging inadequate telephone and internet service. Complaint at 2-2A. As relief, the Complainant requested a refund from Zito Media for the services he did not receive.

On July 14, 2022, the Office of Administrative Law Judge (OALJ) issued a Hearing Notice scheduling a telephonic hearing for September 1, 2022.

On July 15, 2022, the OALJ issued Prehearing Order was set forth, *inter alia*, various procedural aspects including the representation by an attorney for a corporation regarding the proceeding.

On July 19, 2022, Maria T. Browne, Esquire, filed a Notice of Appearance seeking to enter her appearance on behalf of Zito Media. However, Attorney Browne is not licensed to practice in Pennsylvania.

On July 21, 2022, Zito Media filed Preliminary Objections in which it contended that it did not provide telephone service to the Complainant but that his telephone service was being provided by Zito Central PA, LLC., which is a cable television company over which the Commission has no jurisdiction and thus the Commission lacks jurisdiction to hear the complaint. Even though that is the case, Zito Media stated that it would work with the Complainant to resolve the issues in the Complaint. For relief, Zito Media argued that the Complaint should be dismissed.

On August 26, 2022, an Order was issued cancelling the September 1, 2022 hearing and directing that Zito Media 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 Media's Preliminary Objections.

On September 2, 2022, the Complainant filed an Answer to Zito Media's Preliminary Objections in support of his Complaint. In his Answer, Mr. Adams averred the following regarding the identity of his service provider; "[i]n addition to providing television services, Zito Media also provides telephone service to my residence." Answer at ¶ 1.

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

On December 21, 2022, a second Hearing Notice was issued scheduling a hearing 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 (Opinion and Order entered January 12, 2023) (*January 2023 Order*).

On January 27, 2023, Zito Media filed a Notice of Change of Regulatory Status in this proceeding per the *January 2023 Order*.

On February 14, 2023, the ALJ held a telephonic prehearing conference as scheduled. The Complainant was present and represented himself. Maria T. Browne, Esquire, appeared on behalf of Respondent. No exhibits were offered by either party. At the prehearing conference, an argument was held regarding the jurisdictional issues raised in the preliminary objections and it was noted that Zito Media was no longer certificated to operate in Pennsylvania.

On March 14, 2023, the record was closed.

On July 17, 2023, the Commission issued the Initial Decision of the ALJ in which he dismissed the Complaint on the grounds that the Commission does not have jurisdiction over the matter.

Discussion

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

Mr. Adams' complaint was dismissed on the basis of a preliminary objection. 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 the Complainant and should dismiss the Complaint only if it appears that the Complainant would not be entitled to relief under any circumstances as a matter of law. *Equitable; see also, Interstate*.

ALJ's Initial Decision

ALJ Buckley made eight (8) Findings of Fact and reached seven (7) Conclusions of Law. I.D. at 3-4, 8-9. 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.

Following the prehearing conference noted *supra*, the ALJ issued an Initial Decision dismissing the Complaint without a hearing. In his Initial Decision, the ALJ determined that "the Commission does not have jurisdiction to hear complaints about internet-based service, nor does the Commission have the jurisdiction to hear a case involving an entity which no longer holds operating authority from the Commission." I.D. at 8. Furthermore, the ALJ noted in the Initial Decision that "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." I.D. at 7, FN 1.

Disposition

Upon review of the pleadings and applicable law, the Initial Decision in this proceeding shall be reversed, and this matter shall be remanded to the Office of

Administrative Law Judge (OALJ) for further proceedings, as deemed necessary, consistent with this Opinion and Order.

According to the Initial Decision, a hearing to ascertain the factual status of telephone service to Complainant is moot because Zito Media is no longer a Commission-jurisdictional public utility in Pennsylvania. The Commission disagrees. The fact that Zito Media no longer is certificated to operate in Pennsylvania may not preclude Mr. Adams from having his complaint heard. Whereas the Commission approved Zito Media's abandonment of service in Pennsylvania via order effective January 12, 2023,¹ this approval was granted after Mr. Adams filed his complaint on May 20, 2022. Consequently, the allegations giving rise to the Complaint occurred while Zito Media was still a certificated public utility in Pennsylvania.

Moreover, for purposes of the preliminary objections, Zito Media must accept as true the facts plead by Mr. Adams. This includes the facts plead by Mr. Adams in his complaint that Zito Media is his provider of telephone service. For these reasons, it is not clear and free from doubt that the Commission is precluded from hearing the

¹ 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). We note that Zito Media in its abandonment filings did not disclose the existence of the above-captioned complaint. Ideally, the application for abandonment should have disclosed the above-captioned complaint so it could have been considered to determine if abandonment was yet proper.

Complaint as a matter of law, and it is also not clear that the Complainant is not entitled to relief under any circumstances.²

For the reasons above, we shall reverse the Initial Decision of the ALJ and remand the matter to the OALJ for such further proceedings, as deemed necessary, consistent with this Opinion and Order.

Conclusion

Based on the foregoing, we shall reverse the Initial Decision of ALJ Buckley and remand the matter to the OALJ for such further proceedings, as deemed necessary, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Initial Decision of Administrative Law Judge Dennis J. Buckley, issued on July 17, 2023, is reversed, consistent with this Opinion and Order.

² In addition, the Initial Decision fails to consider the potential application of the VOIP Freedom Act in this case. The Act generally prohibits the Commission from regulating the rates, terms, and conditions of VOIP service. 73 P.S. §§ 2251.1, *et seq.* However, the Act also preserves the Commission's authority over, *inter alia*, enhanced 911 service provided using VOIP. 73 P.S. § 2251.6(1)(i); *Eileen Floyd v. Verizon Pennsylvania, LLC*, Docket No. C- 2012-2333157 (Opinion and Order entered April 30, 2013). Thus, despite the provision of telephone service to Mr. Adams using VOIP, the Commission appears to have authority to adjudicate any claims involving emergency services raised in the complaint.

2. That the proceeding shall be remanded to the Office of Administrative Law Judge for further proceedings, as warranted, consistent with this Opinion and Order.

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: November 9, 2023

ORDER ENTERED: December 14, 2023