**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Marc David Swartz :

:

v. : C-2015-2465416 :

Comcast Phone of Pennsylvania LLC :

**INITIAL DECISION SUSTAINING PRELIMINARY OBJECTIONS**

**AND DISMISSING COMPLAINT**

Before

David A. Salapa

Administrative Law Judge

INTRODUCTION

A customer filed this complaint regarding his telephone service alleging incorrect charges, reliability problems, and that the utility had threatened to terminate service. This decision dismisses the complaint because the Commission lacks jurisdiction over internet protocol-enabled services.

HISTORY OF THE PROCEEDING

On January 29, 2015, Marc David Swartz (Complainant) filed a complaint with the Pennsylvania Public Utility Commission (Commission) against Comcast. The complaint alleges the utility is threatening to shut off service, there are incorrect charges on the Complainant’s bill, and there is a reliability, safety, or quality problem with the utility service.

In his complaint, the Complainant asserts that he was told by a Comcast representative that his bill would be no more than $124.00 per month but that his bills have

consistently exceeded this figure. He further asserts his phone service has “ring back issues,” he has no caller identification, he cannot make international or out of state calls, and Comcast has, or is threatening, to terminate his service. As relief, he requests credits be applied to his account for over charges, missed appointments by Comcast personnel, and as compensation for his service malfunctioning. He further requests that he be reimbursed in the amount of $200 for carpet cleaning needed after a Comcast employee tracked mud onto his carpeting.

On February 24, 2010, Comcast Phone of Pennsylvania LLC (Respondent) filed an answer with new matter and preliminary objections. In its answer and new matter, the Respondent denies the allegations in the complaint and asserts that the entity named in the complaint does not provide any service to the Complainant. Rather, service is provided by an unregulated affiliate and the Commission lacks jurisdiction to consider the complaint and to grant any relief. In its new matter, the Respondent details its history with the Complainant since January 1999.

In its preliminary objections, the Respondent reiterates that a non-jurisdictional entity provides non-jurisdictional services to the Complainant and requests dismissal of the complaint for failure to state a claim upon which relief can be granted and lack of jurisdiction. The Respondent states that although the Complainant checked the box on the complaint form indicating that he was having a problem with his telephone service, the allegations in the complaint actually relate to voice over internet protocol (VOIP), internet, and cable services which are not regulated by the Commission. The Respondent further asserts that these services are provided to the Complainant by two affiliates, Comcast IP Phone, LLC and Comcast of Southeast Pennsylvania, LLC, and the Complainant has never been a customer of the Respondent.

By notice dated March 11, 2015, the Commission notified the parties that it had assigned the case to me as motion judge. As of the date of this decision, the Complainant has not filed an answer to the Respondent’s pleading. The preliminary objections are ready for decision. For the reasons set forth below, I will treat the preliminary objections as a motion for judgment on the pleadings and dismiss the complaint.

FINDINGS OF FACT

1. The Complainant in this case is Marc David Swartz.

2. The Respondent in this case is Comcast Phone of Pennsylvania LLC.

3. On January 29, 2015, the Complainant filed a complaint with the Commission against Comcast.

4. On February 24, 2015, the Respondent filed preliminary objections.

5. As of the date of this decision, the Complainant has not filed a reply to the Respondent’s preliminary objections.

6. The Complainant is not a customer of Comcast Phone of Pennsylvania, LLC.

7. The Complainant is a customer of Comcast IP Phone, LLC.

8. The Complainant receives VOIP services.

DISCUSSION

The Commission's Rules of Practice and Procedure permit parties to file preliminary objections for, *inter alia*, lack of Commission jurisdiction. 52 Pa.Code § 5.101(a). Commission preliminary objection practice is similar to Pennsylvania civil practice. Equitable Small Transportation Intervenors v. Equitable Gas Company*,* 1994 Pa. PUC LEXIS 69 (July 18, 1994). A complaint is properly dismissed when no relief or recovery is possible. P.J.S. v. Pa. State Ethics Commission, 669 A.2d 1105 (Pa. Cmwlth. 1996). When considering preliminary objections, the Commission may not rely upon the factual assertions of the moving party, but must accept as true, for purposes of disposing of the motion, all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. County of Allegheny v. Commonwealth of Pennsylvania, 490 A.2d 402 (Pa. 1985); Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa., 551 A.2d 602 (Pa. Cmwlth. 1988).

Here, the Complainant has alleged reliability and billing issues related to his phone service. In response, the Respondent has filed an answer and new matter stating that the Complainant’s phone service is an unregulated service provided by a non-jurisdictional affiliate. The Complainant has not filed a reply to the new matter denying the Respondent’s averments. Relevant facts stated in new matter may be deemed to be admitted when a timely reply to new matter is not filed. 52 Pa.Code § 5.63(b).

As the Respondent is seeking dismissal of the complaint based upon assertions in new matter, the appropriate filing is a motion for judgment on the pleadings rather than preliminary objections. The regulation at 52 Pa.Code § 1.2(a) provides that the presiding officer or Commission may disregard an error or defect of procedure which does not affect the substantive rights of the parties. Here, I may disregard the Respondent's error in procedure if it does not affect the Complainant's substantive rights.

I will consider the issue of jurisdiction in order to secure a just, speedy and inexpensive determination of this proceeding pursuant to 52 Pa.Code § 1.2(a). This will not adversely affect the Complainant's rights since he had notice of the issue and opportunity to respond. Since the Respondent timely raised the issue of jurisdiction as an affirmative defense in its new matter, I shall treat the Respondent's preliminary objections as a motion for judgment on the pleadings, filed pursuant to 52 Pa.Code § 5.102, and deem the averments made in the new matter as admitted.

The Commission’s Rules of Practice and Procedure at 52 Pa.Code § 5.102 govern motions for judgment on the pleadings. The Commission will grant a motion for judgment on the pleadings only if the pleadings show there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa.Code § 5.102(d)(1). Only in a case where the moving party’s right to prevail is so clear that a trial would be a fruitless exercise should judgment on the pleadings be granted. Williams v. Lewis, 466 A.2d 682 (Pa. Super. 1983); Service Employees International Union, Local 69, AFL-CIO v. The Peoples Natural Gas Company, d/b/a Dominion Peoples, Docket No. C-20028539 (Order entered December 19, 2003). In ruling on a motion for judgment on the pleadings, the tribunal must consider as true all well-pleaded averments of the party against whom the motion is directed and consider against him only those facts he specifically admits. Judgment on the pleadings should be entered only when the case is clear and free from doubt. Reuben v. O’Brien, 496 A.2d 913 (Pa. Super 1985).

In this case, the Complainant, in his complaint, has alleged that his “triple play” phone service is not working correctly in that it has a ring back issue, he does not have caller ID on his phones or television, and that he cannot make international or out of state calls. Additionally, he alleges that he has been over billed for this service. In response, the Respondent contends in its new matter that the Complainant has never been its customer, the Complainant is a customer of an unregulated affiliate, Comcast IP Phone, LLC, and the Complainant receives VOIP services, a service not regulated by the Commission. Accepting the facts alleged in the complaint as true for purposes of disposing of the motion for judgment on the pleadings as well as the facts alleged, and deemed admitted, in the Respondent’s new matter, the Respondent contends that the Commission does not regulate the service that is the subject of the complaint. I agree.

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. Tod and Lisa Shedlosky v. Pennsylvania Electric Co., Docket No. C-20066937 (Order entered May 28, 2008); Feingold v. Bell Tel. Co. of Pa., 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. City of Pittsburgh v. Pa. Pub. Util. Comm’n., 43 A.2d 348 (Pa Super. 1945). Jurisdiction may not be conferred by the parties where none exists. Roberts v. Martorano, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. Hughes v. Pennsylvania State Police, 619 A.2d 390 (Pa. Cmwlth. 1992) alloc. denied 637 A.2d 293 (Pa. 1993). Here the General Assembly has divested the Commission of jurisdiction over VOIP services.

The Voice Over Internet Protocol Freedom Act of 2008 at 73 P.S. § 2251.4 generally prohibits the Commission, as well as any department, agency, commission or political subdivision of the Commonwealth from regulating the rates, terms and conditions of internet protocol-enabled services. The statute at 73 P.S. § 2251.6 provides that the Commission, as well as any department, agency, commission or political subdivision of the Commonwealth retains the authority to regulate 1) the provision and administration of 911 service; 2) telecommunications relay service; 3) universal service fund fees; 4) switched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company and; 5) rates, terms or conditions of protected services provided under tariffs subject to approval by the Commission.

The facts alleged in the complaint do not bring this complaint within any of the exceptions set forth in 73 P.S. § 2251.6. The complaint alleges that Comcast provides “triple play” phone services to the Complainant. Neither Comcast IP Phone, LLC nor Comcast Phone of Pennsylvania, LLC are regulated local exchange carriers or regulated competitive local exchange carriers. Comcast IP Phone, LLC provides VOIP telephone service. Pursuant to the Voice Over Internet Protocol Freedom Act of 2008, the Commission has no jurisdiction over the subject matter of the Complainant’s complaint as it relates to VOIP. The Commission has previously addressed this issue.

In his initial decision in Brown v. Armstrong Digital Services, Inc. d/b/a Armstrong Telephone, Docket No. C-2008-2079810 (Initial decision issued May 21, 2009) (Brown), ALJ John H. Corbett, Jr. dismissed a complaint for lack of jurisdiction where the respondent raised the Voice Over Internet Protocol Freedom Act of 2008. In that case, the respondent was an entity the Commission did not regulate providing VOIP services. ALJ Corbett concluded that the Voice Over Internet Protocol Freedom Act of 2008 prohibited the Commission from exercising jurisdiction over the complaint. By Commission final order entered June 30, 2009, ALJ Corbett’s initial decision became final without further Commission action. The Commission has reiterated that it lacks jurisdiction to adjudicate disputes involving VOIP services. Robles v. Service Electric Telephone Company, LLC, Docket No. C-2010-2187832 (Order entered October 28, 2011); Silvestri v. Comcast Phone of Pennsylvania, LLC, Docket No C-2011-2241959 (Order entered October 7, 2011).

As set forth above, the Voice Over Internet Protocol Freedom Act of 2008 prohibits the Commission from regulating the service that is the subject of the complaint. Since the Commission’s jurisdiction does not extend to this service, I will sustain the preliminary objections and dismiss the complaint.

CONCLUSIONS OF LAW

1. The Commission has no jurisdiction to regulate the rates, terms and conditions of VOIP service or other internet protocol-enabled services. 73 P.S. §§ 2251.1-2251.6.

2. It is just, reasonable and in the public interest that the complaint filed at Docket No. C-2015-2465416 is dismissed with prejudice.

ORDER

THEREFORE,

IT IS ORDERED:

1. The motion for judgment on the pleadings filed by Comcast Phone of Pennsylvania, LLC at Docket No. C-2015-2465416 is sustained.
2. That the formal Complaint filed by Marc David Swartz against Comcast Phone of Pennsylvania LLC at Docket No. C-2015-2465416 is dismissed for lack of jurisdiction.
3. That the Secretary mark this docket closed.

Date: March 26, 2015 /s/

David A. Salapa

Administrative Law Judge