

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120**

**Joint Petition of Verizon Pennsylvania LLC
and Verizon North LLC for Competitive
Classification of All Retail Services In
Certain Geographic Areas and For A Waiver
of Regulations For Competitive Services**

**Public Meeting held February 26, 2015
2446303-OSA**

**Docket Nos. P-2014-2446303
P-2014-2446304**

STATEMENT OF COMMISSIONER GLADYS M. BROWN

Summary

On October 6, 2014, Verizon Communications (Verizon or Petitioner) petitioned the Commission under Section 3016 of the Public Utility Code, 66 Pa. C.S. § 3016, for two things.¹ First, Verizon asks the Commission to reclassify three of five protected services from protected service to competitive service in 194 of the 504 wire centers where Verizon provides telecommunications to residential and business customers in the Commonwealth of Pennsylvania. The 194 wire centers are located in Philadelphia, Erie, Scranton/Wilkes-Barre, Harrisburg, Pittsburgh, Allentown and York.

There are five protected services in Pennsylvania. These are (1) service provided to residential and business customers so they can make a local call; (2) touch-tone service; (3) switched access service; (4) special access service; and (5) ordering, installation, restoration, and disconnection of these services. If any of these protected services are declared competitive, the Commission no longer has authority to set the rate.

Verizon asks the Commission to reclassify basic dial tone service; touch-tone service; and, ordering, installation, restoration, and disconnection of these services. These three are the principal parts of basic stand-alone retail voice service (basic service) at rates set by the Commission for residential and business customers. Basic service allows a consumer to make local calls and to place 911 calls in an emergency.²

The Petition also seeks an eleven-year waiver of all Chapter 64 and parts of Chapter 63 of the Commission's regulations in Title 52 of the Pennsylvania Code, 52 Pa. Code §§ 63.01 and 64.01 *Et seq.*, pursuant to Section 3011(3), 66 Pa.C.S. § 3011(3), of the Public Utility Code. Chapter 64 contains the Commission's regulations which assure consumers that Verizon's basic

¹ Section 3016 of the Code allows the Commission to reclassify basic service from a protected service to a competitive service only if all the relevant information constitutes evidence that the petitioner has made out a *prima facie* case and has met the burden of proof for relief. A petitioner must present substantial evidence of the facts supporting the requested relief. A Commission decision is subject to appeal if the decision constitutes an error of law or lacks substantial evidence to sustain the Commission's decision. The Commission must decide a Section 3016 petition within 150 days of filing, in this case October 6, 2014, or the entire petition is deemed granted.

² Verizon is not asking the Commission to declare wholesale switched access or special access as competitive although those wholesale services are also protected service.

service is safe, adequate, reliable, and private under the Public Utility Code. Chapter 63 contains more general Commission regulations governing Quality of Service, Accounting, Payphone Service, and Extended Area Service. This request is intertwined with Verizon's Section 3016 Petition. Unlike the Section 3016 Petition, this request does not have to be decided within 150 days of filing.

Verizon's Petition should be rejected in its entirety for five reasons explained in more detail below.

1. Legal Error

Verizon's Petition and any decision other than outright dismissal violate the Statutory Construction Act, 1 Pa.C.S. § 1921 *Et seq.* (SCA). The words of Section 3016 are clear on the scope of a petition and clearly limit the Commission's determination on the scope of a petition. Section 3016 is limited to a service territory or a particular geographic area, exchange or group of exchanges or density cells within its service territory. When words of a statute are clear and free from ambiguity, courts (let alone the Commission) cannot engraft additional verbiage upon it to pursue its spirit. *In re: Incorporation of Borough of Bear Creek Village*, 616 A.2d 111 (Pa. Cmwlth. 1992); *Borough of Glendon v. Department of Environmental Resources*, 603 A.2d 226 (Pa. Cmwlth. 1992), appeal denied 608 A.2d 32. An agency subject to judicial review is equally precluded from grafting verbiage onto a statute because that agency is subject to judicial review.

Section 3016(a)(1) and Section 3016(a)(3) limit the scope of a petition for reclassification to a service territory or a particular geographic area, exchange or group of exchanges or density cells within its service territory. Verizon's Petition and evidence continually relies on wire centers and rate centers. Since the General Assembly clearly and unambiguously defined the scope of a Section 3016(a) petition, Verizon commits legal error by using terms beyond those specified in the statute.³

Precedent also holds that it is absurd and unreasonable to conclude that the legislature intended the exact same phrase to have two distinctive meanings in the same section of a statute. *Unemployment Compensation Board v. Tickle*, 339 A.2d 864, (Pa. Cmwlth. 1975). Verizon's reliance on terms not in the statute in two parts of the same section proposes a distinctive meaning that is absurd and unreasonable. A Commission decision sharing that premise shares in the error.

Verizon's reliance on FCC Reports and decisions about cable voice and wireless voice is legal error because Verizon considers them evidence for the proposition that those voice services are a like or substitute for basic service. That is contradicted by the reports. The FCC Local Competition Reports of June 2014 and October 2014 expressly state the FCC rules require a broadband connection (internet service) for interconnected VoIP,⁴ an additional service which makes VoIP different from and more expensive than basic service.⁵ The FCC also states that the wireless subscriber counts that Verizon cites repeatedly from those reports do not constitute or

³ Compare Verizon Petition at para. 7 and Exhibit A with 66 Pa.C.S. §§ 3016(a)(1) and (3).

⁴ Compare Vasington Direct at 4-5, 10-11, 15-16 and Vasington Surrebutal at 15-16 and 19 with *FCC Local Competition Report* (June 2014) and *FCC Local Competition Report* (October 2014) at nn. 2 and 3.

⁵ Baldwin Direct at 4; Loube Direct at 4 and 47-48.

imply the extent to which wireline and wireless telephone services are demand substitutes.⁶ Verizon attempts to dismiss the FCC's ruling in the *Qwest Forbearance Order* that wireless is no substitute for wireline by claiming that the decision addressed wholesale competition not retail basic service⁷ competition -- as if basic service retail competition is not inextricably intertwined with wholesale competition.

2. No Prima Facie Case

Verizon failed to establish a *prima facie* case. A party fails to establish a *prima facie* case if it has not introduced sufficient evidence to establish the elements necessary to maintain an action. *Morena v. South Hills Health System*, 501 Pa. 634, 639, 462 A.2d 680, 682 (1983). Sufficient evidence is evidence that precludes the opposing party from a compulsory nonsuit, a directed verdict, or a judgment notwithstanding the verdict. *Huiping Xu v. Peoples Natural Gas*, Docket No. F-2009-2109569 (June 8, 2010), 2010 Pa. Lexis 936.

Since Verizon failed to introduce evidence sufficient to make out a *prima facie* case, a compulsory nonsuit to dismiss the Petition is required. That is done by dismissing the petition in its entirety.

Verizon's *prima facie* case rests on multiple services other than basic service. This includes bundled cable service (where voice is not a stand-alone service but is provided along with internet access or TV service or both),⁸ wireless services (which is not a stand-alone voice because it typically includes features like internet access and picture-taking),⁹ loss of access lines (due to bundles or declining service quality or consumers choosing services other than basic service for the additional features they provide),¹⁰ number porting (where consumers keep their number but the impact of returned numbers back to Verizon was not examined),¹¹ and texting, email, Skype, Vonage, MagicJack, and Over-the-Top (OTT) Voice over Internet Protocol (VoIP).¹²

None of these services are a like or substitute for basic service. They are less reliable and more costly because they generally require a consumer to pay more for the additional service, primarily broadband, that they need to use them. The additional services and costs precludes them from being a like or substitute for basic service. For example:

Cable Bundles. Verizon's claims about cable service bundle which deliver interconnected Voice Over Internet Protocol (VoIP) is not evidence. This interconnected VoIP requires broadband service (internet) under FCC rules.¹³ Bundles of voice and internet are not a like or substitute service for basic service. They cost more, they are not 100% available in every wire center,¹⁴ and they lack

⁶ *FCC Local Competition Report* (June 2014) and *FCC Local Competition Report* (October 2014) at nn. 2 and 3.

⁷ Compare Baldwin Direct at 28-31 with Vz. Vasington Surrebuttal at 6-7.

⁸ Baldwin Direct at 47.

⁹ Loube Direct at 10.

¹⁰ Baldwin Direct at 50-53.

¹¹ Baldwin Direct at 53-58.

¹² Vz. Vasington Direct at 8-10.

¹³ Vz. Vasington Direct at 4, 8-9; *FCC Local Competition Reports* (June 2014) and (October 2014), nn. 2.

¹⁴ Loube Direct at 47-48.

independent power to send 911 calls during an emergency when commercial power is gone.¹⁵ Even if there was a stand-alone interconnected VoIP, it is not as reliable as basic service for the same reasons.¹⁶

Wireless Service. Verizon's claim about wireless voice is not evidence that it is a like or substitute for basic service. Wireless is, at best, a supplement to, not a like or substitute for, basic service.¹⁷ It costs more because it is bundled with features like internet service or picture-taking which is not basic service.¹⁸ Customers who abandon basic service for wireless do so for the additional features such as internet access and picture taking. It cannot be a like or substitute service because wireless service is spotty, it is hard to get (if at all) in many wire centers and mountainous areas, it has no independent power source to provide service when commercial power goes out, and the cell towers are often overloaded during an emergency.¹⁹ It cannot even tell an emergency service provider a caller's physical location if they dial 911 in any emergency.²⁰

Texting, E-Mail, Instant Messaging. Verizon's claim that these non-voice services constitute basic service is not evidence. These non-voice communications reflect the dramatic expansion in the total universe of communications methodologies and there is no one-to-one correction between decrease in the use of basic service wireline connections and these new communication mediums.²¹ These technologies have increased the number and frequency of communications in any given day.²² This has little to do with competition and whether bundles are a like or substitute for basic service. This is particularly important for small businesses. They may buy internet service, create webpages, use Facebook and Twitter, or emails and instant messages to respond to an expansion in the number of contacts from potential customers but they do not abandon basic service. Such a customer will maintain this preferred means of reliable service and pays for it independent of whether it is heavily or lightly used.²³ Any Verizon claim to the contrary is mere speculation on the existence of a fact because Verizon never submitted any evidence or studies on the elasticity of demand for basic service compared to these expanded communications.²⁴

Line Loss and Number Porting. Verizon also relies on access-line loss and number porting. Line-loss occurs arises when consumers abandon basic service because they want to buy voice along with other features like internet

¹⁵ Loube Direct at 12; Baldwin at 31-36.

¹⁶ Baldwin at 31-36.

¹⁷ Baldwin Direct at 17-18 and 22-23.

¹⁸ Loube Direct at 10.

¹⁹ Baldwin Direct at 22-31.

²⁰ Baldwin at 30-31.

²¹ Baldwin Direct at 24-25.

²² Baldwin Direct at 25.

²³ Baldwin Direct at 25.

²⁴ Baldwin Direct at 26.

service or TV or both.²⁵ Those who abandon basic service for wireless seek additional features like internet and data.²⁶ Basic service cannot provide those features at any price.²⁷ Number porting is unconvincing because Verizon fails to distinguish customer migration from Verizon's basic service back to Verizon,²⁸ to another CLEC,²⁹ or to another Verizon service like FiOS or wireless (which is not a loss due to competition)³⁰ or to cable bundles or wireless service (which is not a like or substitute for basic service).³¹ These services also cost a lot more³² and do not provide nearly the level of reliability, safety, and 911 access as basic service.³³

3. Burden of Proof

Verizon failed to meet its burden of proof under the Code. As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Code, 66 Pa. C.S. § 332(a). A petitioner before this Commission must rebut the evidence of the opposing party by a preponderance of the evidence. *Patterson v. Bell Telephone Co. of Pennsylvania*, 72 Pa. PUC 196 (1990). Preponderance of the evidence means that the party with the burden of proof has presented evidence that is more convincing than that presented by the other party. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990) *alloc. den.*, 529 Pa. 654, 602 A.2d 863 (1992). Verizon did not present more convincing evidence and failed to rebut the facts and evidence presented by the opposing Parties.

4. No Substantial Evidence

Even if Verizon's claims were at least persuasive enough to rebut the opposing party's evidence (which it most certainly is not), the Commission still has to weigh the evidence of both parties to find facts and issue a decision. Commission decisions must be supported by substantial evidence. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. A mere "trace of evidence or a suspicion of the existence of a fact" is insufficient. *Norfolk and Western Railway Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (Pa. 1980). Verizon's evidentiary sources are not public and often contradict their own claim. With regard to claims that competitive Cable or Wireless service exists in the targeted wire centers, Verizon's evidence consists mostly of mere traces of evidence and suspicions of the existence of facts. For example:

Cable. Verizon relies on a private paid-for-subscription service to list where Verizon claims there is cable overlay in its wire centers. The accuracy of that service was not vetted on this record. Verizon never refuted the opposing Party's showing that only 13 of Verizon's 191 wire centers had uniform cable overlay and availability. Verizon cites the FCC's June 2013 Report as support for cable availability yet that Report specifically defines the interconnected VoIP

²⁵ OCA St. 1 at 10.

²⁶ OCA St. 1 at 10.

²⁷ Loube Direct at 15-16 and Verizon at Response of Verizon to Set I, Interrogatory No. 6.

²⁸ Baldwin Direct at 50-53.

²⁹ Baldwin Direct at 50-53.

³⁰ Baldwin Direct at 53 and Loube at 42-46, Miller at 10-12,

³¹ Baldwin Direct at 47 and 50-53.

³² Baldwin Direct at 49, Miller Direct at 10-12, and Pinsker Direct at 6-8.

³³ Miller Direct at 10-12, Baldwin Direct at 31-32, Loube Direct at 11-12 and 42-45,

product sold by cable companies as requiring additional, and expensive, broadband (internet) service.³⁴ Verizon equates the presence of cable or wireless as tantamount to availability throughout a wire center although 181 out of 194 wire centers do not have uniform availability.³⁵

Wireless. Verizon failed to produce the evidence requested from the Parties about Verizon's wireless service availability in its wire centers. Verizon cites the FCC's June 2013 Local Competition Report and the 16th Wireless Competition Report, to show the proliferation of wireless service compared to basic service. The FCC's June 2013 Report specifically states that its information on wireless service does not constitute a finding that wireless is a substitute for basic service. The FCC's own *Quest Forbearance Order* in the record expressly notes that wireless is not a substitute for wireline basic service. The FCC's Wireless Competition Report Verizon relies on states it is derived from Mosaik information which the FCC says probably overstates wireless service.³⁶ And, even if it did not, wireless is not as reliable because it cannot tell where a consumer making a 911 call is located and is prone to overloaded towers in natural disasters.³⁷

5. Other Approaches

The Petition raises substantial concerns about how to reconcile competition, when it does emerge, with Verizon's universal service obligation to provide telecommunications service at affordable rates to all consumers as required by their Carrier-of-Last-Resort (COLR) obligation and Eligible Telecommunications Carrier (ETC) designation, and money, under federal law to do that.

Verizon is understandably motivated by the regulatory disparity between carriers like Verizon who have COLR and universal service mandates that their competitors lack. This disparity has its roots in the fact that Verizon's cable and wireless competitors are not Title II common carrier telecommunications providers under state and federal law.

Verizon's competitors can deny service with impunity, refuse to deploy facilities without accountability, impose selective and discriminatory rate and service preferences, ignore COLR or universal service, and never worry if that service is safe, adequate, reliable, and private. Verizon does not have that luxury. The Commission must address this regulatory and market disparity but not based on a Petition that fails to make a prima facie case and that is not supported by an evidentiary record. Today's decision does not challenge competitors' to meet the standard under which Verizon provides stand-alone voice service. Instead, this decision lowers the standard, thereby allowing Verizon to ignore the public interest like its unregulated competitors.

³⁴ See *supra*.

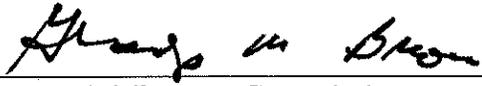
³⁵ Loube Direct at 13-45 and Miller Direct at 10-12 and Loube at 8-9 and 1-13.

³⁶ Loube Direct at 47-48.

³⁷ See *supra*.

I would have preferred a more measured and deliberate approach perhaps utilizing pilot programs to assess the impact that action under Section 3106 would have on the over 60% Verizon's customers that will be affected. This did not occur and for these reasons I dissent from today's decision.

February 26, 2015
Date



Gladys M. Brown, Commissioner