

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

COUNTY OF BUTLER,

Plaintiff,

v.

CENTURYLINK COMMUNICATIONS, LLC, THE UNITED TELEPHONE COMPANY OF PENNSYLVANIA LLC, CONSOLIDATED COMMUNICATIONS ENTERPRISE SERVICES, INC., CORE COMMUNICATIONS, INC., INTERMEDIA COMMUNICATIONS OF FLORIDA, INC., VERIZON PENNSYLVANIA, INC., LEVEL 3 COMMUNICATIONS, LLC, TELCOVE OF EASTERN PENNSYLVANIA, AT&T CORP., TELEPORT COMMUNICATIONS AMERICA, LLC, US LEC OF PENNSYLVANIA, INC., BANDWITH.COM CLEC, LLC, COMCAST PHONE OF PENNSYLVANIA, PEERLESS NETWORK OF PENNSYLVANIA, LLC, AND ABC COMPANIES 1 THROUGH 20

Defendants.

AD No. 15-11007

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HORAN, J.

DATE: August 11, 2016

## MEMORANDUM OPINION

Before this Court for disposition are Defendants' Joint Preliminary Objections. Also before this Court is Moving Defendants' Preliminary Objection Requesting Transfer of Plaintiff's Complaint to the Pennsylvania Utility Commission. Upon consideration of all relevant motions and briefings, the pleadings, arguments of counsel, and for the following reasons, Defendants' First Joint Preliminary Objection, requesting dismissal of all counts due to legal insufficiency, pursuant to Pa.R.C.P 1028(a)(4), is sustained. As such, Defendants' remaining Joint Preliminary Objections, as well as Moving Defendants' Preliminary Objection Requesting Transfer of Plaintiff's Complaint to the Pennsylvania Utility Commission, are moot.

### Background

Plaintiff's Complaint alleges that Defendants have violated Pennsylvania's legal regime, governing 911 services (the "911 Act"). *See* 35 Pa.C.S.A. § 5301 *et seq.* Plaintiff, County of Butler ("the County"), asserts that the 911 Act requires telecommunications providers to collect a monthly 911 fee from their subscribers and to forward that fee to the County. The County alleges that Defendants are telecommunications services providers (traditional wireline and/or VoIP<sup>1</sup>) and/or exchange companies within Butler County. The County further alleges that Defendants have failed to charge, collect, remit and report 911 fees as required by the 911 Act. The County alleges three categories of misconduct: 1) failure to charge or remit 911 fees at all; 2) incorrect classification of service; and 3) undercharging for service, and therefore under-collecting and under-remitting of 911 fees.

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<sup>1</sup> "Voice over Internet Protocol." 35 Pa.C.S.A. § 5302.

On February 11, 2016, the County commenced the present action by filing a Complaint in Civil Action against the Defendants, asserting claims of Breach of Fiduciary Duty, Fraud, Negligent Misrepresentation, and Accounting. Each of the County's claims is premised upon Defendants' alleged failure to charge, report, collect, and remit 911 fees to the County in accordance with the 911 Act.

On April 8, 2016, Defendants filed Joint Preliminary Objections to the County's Complaint, demurring first on the grounds that all of the County's claims are barred by Section 1504 of Pennsylvania's Statutory Construction Act. All Defendants, with the exception of ABC Companies 1-20, who have yet to file an appearance, have either filed or joined in Defendants' Joint Preliminary Objections. Said Defendants also argue in their Joint Preliminary Objections that each of the County's claims fails for independent reasons, and that each should be dismissed for those reasons as well. In addition, on April 11, 2016, Defendants, Bandwith.com CLEC, LLC, Consolidated Communications Enterprises Services, Inc., Consolidated Communications of Pennsylvania Company, LLC, Core Communications, Inc., Level 3 Communications, LLC, Peerless Network of Pennsylvania, LLC, and TelCove of Eastern Pennsylvania ("Moving Defendants"), filed a Preliminary Objection Requesting Transfer of Plaintiff's Complaint to the Pennsylvania Utility Commission. Moving Defendants request that, should the Court not sustain the Joint Preliminary Objections, this Court transfer this action to the Pennsylvania Utility Commission ("PUC"), pursuant to Pa.R.C.P 1028, Pa.R.C.P 5103(a), and Pennsylvania's doctrine of primary jurisdiction.

On May 20, 2016, the County filed a Brief in Opposition to Defendants' Joint Preliminary Objections, as well as a Memorandum of Law in Opposition to Moving Defendants' Preliminary Objection. On June 6, 2016, Defendants filed a Reply Brief in Further Support of their Joint Preliminary Objections. On July 18, 2016, the County supplemented their Brief in Opposition to Defendants' Joint Preliminary Objections and their Memorandum of Law in Opposition to Moving Defendants' Preliminary Objection. Oral arguments were held on July 25, 2016.

### Discussion

When considering Preliminary Objections, the Court must accept all material facts set forth in the complaint, as well as all inferences reasonably deducible therefrom, as admitted and true, and decide whether, based upon the facts averred, recovery is impossible as a matter of law. *Wiernik v. PHH U.S. Mortg. Corp.*, 736 A.2d 616 (Pa. Super. 1999). Preliminary objections should only be sustained in cases that are clear and free from doubt. *Pennsylvania AFL-CIO ex. Rel. George v. Com.*, 757 A.2d 917 (Pa. 2000); *Butler v. Illes*, 747 A.2d 943 (Pa. Super. 2000); *Martinez v. Baxter*, 725 A.2d 775 (Pa. Super. 1999). It should be clear from all of the pleaded facts that the pleader will be unable to prove facts sufficient to legally establish a right to relief. *Id.* Any doubt should be resolved by refusing to sustain the objections. *Ellenbogen v. PNC Bank, N.A.*, 731 A.2d 175 (Pa. Super. 1999).

Defendants first jointly demur to all four counts of the County's Complaint, arguing that the County's claims are barred by Section 1504 of Pennsylvania's Statutory Construction Act. Defendants request that the County's Complaint be dismissed in its entirety. Defendants assert,

and the County concedes, that the County's claims arise out of Defendants' alleged failure to charge, report, collect, and remit 911 fees in accordance with the 911 Act. Defendants assert that the 911 Act grants the Pennsylvania Emergency Management Agency ("PEMA") an express and exclusive enforcement remedy against service providers who violate their duties under the 911 Act. Defendants argue that Sections 5303(a)(12) and 5311.13 of the 911 Act provide the exclusive statutory remedy, i.e. an enforcement action by PEMA, for the alleged violations in this case. Defendants further argue that the statutory exclusion rule, 1 Pa.C.S.A. § 1504, therefore precludes, as a matter of law, the County's common law claims, which are based upon service provider Defendants' alleged violations of the 911 Act. The County argues that the 911 Act gives counties and PEMA concurrent jurisdiction for issues relating to the collection of 911 fees. The County further argues that Section 5307 of the 911 Act expressly empowers the County to bring an action to enforce the collection of 911 fees. The County also argues that the 911 Act creates a right to pursue a legal action, but that it does not provide a specific mechanism to redress violations or specify the process to remedy said violation. Thus, the County argues that the 911 Act does not create an exclusive remedy, nor does it enjoin a duty, such that Section 1504 does not apply in the present case. The County asserts that its claims against the Defendants, for their alleged failure to charge, report, collect, and remit 911 fees to the County, are not barred by Section 1504 of Pennsylvania's Statutory Construction Act.

In the present case, Section 5303(a) outlines the "powers and duties" of the agency, PEMA, under the 911 Act. The 911 Act creates mechanisms for fee determination, and grants PEMA the power and duty to approve or disapprove the fee proposed in a county's plans. *See* 35

Pa.C.S.A. § 5304(a); 35 Pa.C.S.A. § 5303(a)(3); 35 Pa.C.S.A. § 5305(c). The 911 Act expressly grants PEMA the power “[t]o take the actions necessary to implement, administer *and enforce* the provisions of this chapter.” 35 Pa.C.S.A. § 5303(a)(12) (emphasis added). Section 5304, which provides the “powers and duties” of counties under the 911 Act, does not expressly grant any enforcement power to counties. *See* 35 Pa.C.S.A. § 5304. Further, the “Enforcement” section of the 911 Act provides:

In addition to any powers expressly enumerated in this chapter, the agency has the power and duty *to enforce* and execute, by its regulations or otherwise, this chapter. *The agency may institute injunction, mandamus, or other appropriate legal proceedings to enforce* this chapter and regulations promulgated under this chapter.

35 Pa.C.S.A. § 5311.13 (emphasis added).

As regards the County’s argument, that the 911 Act expressly empowers the County to bring an action to enforce the collection of 911 fees against service providers, Section 5307(e)(1) of the 911 Act provides that a “local exchange telephone company shall not be required to take any legal action to enforce the collection of any charge imposed under this chapter. Action may be brought by or on behalf of the public agency imposing the charge.” 35 Pa.C.S.A. § 5307(e)(1). The charge imposed by the 911 Act is the “contribution rate,” which the Act defines as “[a] fee assessed against a telephone subscriber for the nonrecurring costs, maintenance and operating costs of a 911 system.” 35 Pa.C.S.A. § 5302. Section 5307(a) of the 911 Act imposes a duty upon service providers, which provide local exchange telephone service within a county, to collect the contribution rate from each subscriber and to remit that fee to the county. This duty is not a fee or a charge upon the service provider. Section 5311.14 governs collection and

disbursement of VoIP fees, which are also at issue in the present case. Section 5311.14 also requires service providers to collect a fee from their customers and to remit those fees to either the county or the Commonwealth. 35 Pa.C.S.A. § 5311.14(a)(1)(ii). This duty does not impose a fee or a charge upon the service provider. Further, Section 5311.14, unlike Section 5307(e)(1), does not expressly confer any authority upon the counties to bring an “action” to enforce collection of VoIP fees. *See* 35 Pa.C.S.A. § 5311.14(c) (“[a] VoIP provider has no obligation to take legal action to enforce the collection of a fee imposed under this section.”). There is no section of the 911 Act that imposes a charge or fee upon service providers. Thus, Section 5307(e) provides no authority for counties to pursue any action under the statute to collect any charge from service providers. Therefore, there is no authority, under Section 5307(e), or under any other provision of the 911 Act, whereby the County may pursue an action to enforce collection against service providers such as Defendants.

The Legislative Budget and Finance Committee (“LBFC”) Report, attached to both of the Parties’ briefings, speaks to the complexity of telecommunication management in relation to telephone subscribers and the contribution rate charge. Counsel for the County noted, during argument, that the section of the report titled, “Efforts to Determine Comprehensive Lists of Providers”<sup>2</sup>, outlines the difficulty of identification of providers and service lines/subscribers subject to contribution rate assessments. These difficulties are not unique to any specific county; they apply across the entire state and involve all providers servicing subscribers in the state. Consistency and predictability in regulation and in communications is essential for all service

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<sup>2</sup> *See* Plaintiff’s Ex. C to Brief in Opposition to Defendants’ Join Preliminary Objections at 15.

providers, subscribers, and counties within the state to have charges uniformly assessed, billed, collected, and remitted. It is also essential that the 911 Act and regulations be consistently applied in the Public Utility Commission's, the Pennsylvania Emergency Management Council's, and PEMA's reviews, pursuant to Sections 5305(c)-(e) of the 911 Act, of contribution rate requests within county plans, and in PEMA's decisions to approve or reject said contribution rates and plans. As such, a single source for guidance is appropriate.

The 911 Act expressly provides for such single source for guidance within Section 5303(a). In particular, Section 5303(a)(12) provides, PEMA has the power and duty "[t]o take the actions necessary to implement, administer *and enforce* the provisions of this chapter." 35 Pa.C.S.A. § 5303(a)(12) (emphasis added). PEMA's enforcement power under the 911 Act is further clarified in Section 5311.13: "[i]n addition to any powers expressly enumerated in this chapter, [PEMA] has the power and duty *to enforce* and execute, by its regulations or otherwise, this chapter. [PEMA] may institute injunction, mandamus, or other appropriate legal proceedings *to enforce* this chapter and regulations promulgated under this chapter." 35 Pa.C.S.A. § 5311.13 (emphasis added). Therefore, the legislature has conferred standing and exclusive authority upon PEMA to enforce the provisions of the 911 Act, in relation to service providers. There is no other provision within the 911 Act that concerns the enforcement of said 911 Act duties. Conversely, the only defined county enforcement authorization is at Section 5307(e)(1), which empowers counties to pursue legal action to enforce collection of any charges imposed under the chapter. 35 Pa.C.S.A. § 5307(e)(1). Again, no charges are assessed against service providers under the 911 Act, only against subscribers.



As regards Defendants' argument, that the County's common law claims are barred, Section 1504 of Pennsylvania's Statutory Construction Act provides:

In all cases where a remedy is provided or a duty is enjoined or anything is directed to be done by any statute, the directions of the statute shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the common law, in such cases, further than shall be necessary for carrying such statute into effect.

1 Pa.C.S.A. § 1504. Under Section 1504 of Pennsylvania's Statutory Construction Act, “[w]here a statutory remedy is provided, the procedure prescribed therein must be strictly pursued to the exclusion of other methods of redress;’ but, where the legislature explicitly reveals in a statute that it does not intend for such exclusivity, a statutory procedure for dispute resolution does not preempt common law claims.” *White v. Conestoga Title Ins. Co.*, 53 A.3d 720, 733 (Pa. 2012) (quoting *Jackson v. Centennial Sch. Dist.*, 509 Pa. 101, 105, 501 A.2d 218, 220 (1985); *Deluca v. Buckeye Coal Co.*, 463 Pa. 513, 519, 345 A.2d 637, 640 (1975)). The Supreme Court of Pennsylvania has held that a statute provides no remedy and enjoins no duty where it does not “evidence any legislative intent to limit Appellee's common law rights or preempt common law causes of action.” In determining that Section 1504 did not preclude the claims in *Liss*, the Supreme Court of Pennsylvania also considered the fact that “[i]n addition, the legislature did not provide any mechanism or procedure for the resolution of disputes in circumstances where the [the statute] is violated by [individuals such as appellants].” 983 A.2d at 660. “The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give

effect to all its provisions.” 1 Pa.C.S.A. § 1921. “A statute's plain language generally provides the best indication of legislative intent.” *Bd. of Revision of Taxes, City of Philadelphia v. City of Philadelphia*, 4 A.3d 610, 622 (Pa. 2010).

The duty at issue in the present case is service providers’ duty to bill and collect 911 fees from subscribers and to remit said fees to the County, which duty and fees are exclusively created by the 911 Act. 35 Pa.C.S.A. § 5307(a). The 911 Act creates mechanisms for fee determination, and grants PEMA the power and duty to approve or disapprove the fee proposed in a county’s plans. *See* 35 Pa.C.S.A. § 5304(a); 35 Pa.C.S.A. § 5303(a)(3); 35 Pa.C.S.A. § 5305(c). As regards enforcement of the 911 Act, the legislative intent regarding enforcement is evidenced by the express provisions of the Act. The legislature provides that PEMA has the power “[t]o take the actions necessary to implement, administer *and enforce* the provisions of this chapter.” 35 Pa.C.S.A. § 5303(a)(12) (emphasis added). The power and duty to enforce the provisions of the 911 Act are clearly defined, and those responsibilities lie with PEMA. This express grant of enforcement power, exclusively to PEMA, evidences legislative intent to preempt common law causes of action brought by parties other than PEMA. Further, the remedy for violations of collection duties, imposed upon service providers under the 911 Act, is provided for under Section 5311.13: “[PEMA] may institute injunction, mandamus, or other appropriate legal proceedings to enforce this chapter and regulations promulgated under this chapter.” 35 Pa.C.S.A. § 5311.13. Thus, PEMA has the exclusive statutory power and duty to regulate and enforce the 911 Act against service providers. Therefore, an enforcement action by PEMA is the exclusive statutory remedy for the 911 Act violations and claims alleged by the County. “Where

a statutory remedy is provided, the procedure prescribed therein must be strictly pursued to the exclusion of other methods of redress . . . .” *White v. Conestoga Title Ins. Co.*, 53 A.3d 720, 733 (Pa. 2012) (quoting *Jackson v. Centennial Sch. Dist.*, 509 Pa. 101, 105, 501 A.2d 218, 220 (1985); *Deluca v. Buckeye Coal Co.*, 463 Pa. 513, 519, 345 A.2d 637, 640 (1975)). As such, the County’s common law claims for Breach of Fiduciary Duty, Fraud, Negligent Misrepresentation, and Accounting are precluded by Section 1504 of Pennsylvania’s Statutory Construction Act.

The present Complaint is an attempt by the County to enforce the provisions of the 911 Act against Defendants, who are service providers. However, the County has no standing under the Act to bring such suit against service providers. Such standing lies exclusively with PEMA. Thus, PEMA has exclusive enforcement authority and exclusive statutory remedy to pursue service providers for the matters asserted in the Complaint. As such, Section 1504 of Pennsylvania’s Statutory Construction Act precludes the County’s common law claims of Breach of Fiduciary Duty, Fraud, Negligent Misrepresentation, and Accounting. Accordingly, Defendants’ First Joint Preliminary Objection is sustained. The County’s Complaint is dismissed.

In light of the above, Defendants’ remaining Joint Preliminary Objections are moot. Further, Moving Defendants’ Preliminary Objection Requesting Transfer of Plaintiff’s Complaint to the Pennsylvania Utility Commission is likewise moot, as the underlying Complaint is dismissed.

In light of the above, this Court enters the following Order:

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

COUNTY OF BUTLER,

Plaintiff,

v.

CENTURYLINK COMMUNICATIONS,  
LLC, THE UNITED TELEPHONE  
COMPANY OF PENNSYLVANIA LLC,  
CONSOLIDATED COMMUNICATIONS  
ENTERPRISE SERVICES, INC., CORE  
COMMUNICATIONS, INC.,  
INTERMEDIA COMMUNICATIONS OF  
FLORIDA, INC., VERIZON  
PENNSYLVANIA, INC., LEVEL 3  
COMMUNICATIONS, LLC, TELCOVE  
OF EASTERN PENNSYLVANIA, AT&T  
CORP., TELEPORT COMMUNICATIONS  
AMERICA, LLC, US LEC OF  
PENNSYLVANIA, INC.,  
BANDWITH.COM CLEC, LLC,  
COMCAST PHONE OF  
PENNSYLVANIA, PEERLESS  
NETWORK OF PENNSYLVANIA, LLC,  
AND ABC COMPANIES 1 THROUGH 20

Defendants.

AD No. 15-11007

HORAN, J.

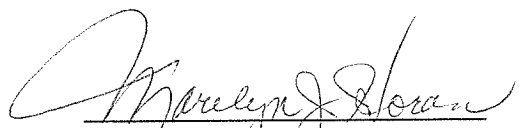
DATE: August 11, 2016

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**ORDER OF COURT**

AND NOW, this 11<sup>th</sup> day of August, 2016, upon consideration of all relevant motions and briefings, the relevant pleadings, the arguments of counsel, and for the foregoing reasons, Defendants' First Joint Preliminary Objection, requesting dismissal of all counts due to legal insufficiency, pursuant to Pa.R.C.P 1028(a)(4), is sustained. The County's Complaint is dismissed.

**BY THE COURT,**

  
**MARILYN J. HORAN, JUDGE**

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