Decision **PROPOSED DECISION OF ALJ MASON** (Mailed 10/30/2012)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Cinderella Hair, Inc., Complainant, vs. MCI Communications Services, Inc., dba Verizon Business Services (U5378C), Defendant.	Case 12-05-025 (Filed May 25, 2012)

PROPOSED DECISION GRANTING MOTION TO DISMISS COMPLAINT

1. Summary

We grant MCI Communications Services, Inc. dba Verizon Business Services' Motion to Dismiss Cinderella Hair, Inc.'s complaint on the grounds that the Verizon Business Services Agreement contains a mandatory arbitration clause which requires the parties to submit their dispute to binding arbitration under the rules of the American Arbitration Association.

This proceeding is closed.

2. Background

2.1. The Complaint

On May 25, 2012, Cinderella Hair, Inc. (Cinderella Hair or complainant) filed a complaint against MCI Metro Access Transmission Services, dba Verizon Business Services (U5253C) (MCI Metro). As it happens, Cinderella Hair sued

the wrong party and on September 14, 2012, the assigned Administrative Law Judge (ALJ) granted MCI metro's unopposed Motion to Substitute out as Defendant and substitute in its place MCI Communications Services, Inc. dba Verizon Business Services (Verizon Business). The details of Cinderella Hair's complaint are contained in its letter dated August 22, 2011, and attached to its complaint. In essence, Cinderella Hair claims the T-1 system that was installed pursuant to the July 30, 2009 Verizon Business Services Agreement failed to work, causing complainant to lose an entire day of business estimated on average to be about $25,000.00. Complainant seeks reimbursement for its daily loss of business, a local point of contact, and replacement of the copper lines as backup at no charge due to the alleged unreliability of the T-1 system.

2.2. Verizon Business' Answer and Motion to Dismiss

On July 11, 2012, Verizon Business filed both an answer and a Motion to Dismiss Complaint (Motion) on the following grounds:

1) The Commission cannot order any of the requested relief since neither law nor the Business Services Agreement permit the recovery of damages, imposition of a local point of contact, or free copper-based service;
2) Essentially, the complaint is about dissatisfaction with Customer Premises Equipment, for which the Commission lacks jurisdiction; and
3) The Business Services Agreement contains a mandatory arbitration clause.

2.3. Complainant's Response

Although complainant's original response date to the Motion was July 26, 2012, complainant was given an extension of time until August 9, 2012 to both retain counsel and to file its response. Complainant failed to file any response by the deadline. The assigned ALJ gave complainant a final extension of time to

September 21, 2012 to file a response to the Motion and was further advised that there would not be an in-person hearing prior to the Commission's ruling on the Motion.

On September 18, 2012, Ron Weinberg, the General Manager for Cinderella Hair, e-mailed the assigned ALJ and asserted as follows:

> After completely reviewing the Motion to Dismiss, we feel that our company Cinderella Hair/Golden Supreme[1] was financially harmed by Verizon for reasons that we outlined in our letter to the Office of the Public Utilities Commission on August 22, 2011.
>
> We feel that Verizon was at fault for the length of time it took to evaluate the problem to point us to have the router, which they found to have malfunctioned, be re-programmed. It took them over a full business day before they had anyone evaluate the issue.
>
> If it is decided that Verizon will be allowed to dismiss this case, we would like to request that you order that this case be resolved by binding arbitration.

As Cinderella Hair has not filed any other response to the Motion, we will treat the September 18, 2012 e-mail as Cinderella Hair's response.

3. Standards for Ruling on a Motion to Dismiss

Over the years, the Commission has developed two similar standards for ruling on a motion to dismiss and we address and apply each standard in this decision.

[1] Although it is not clear from the record, it appears that Cinderella Hair and Golden Supreme are related companies for which Ron Weinberg serves as the General Manager.

3.1. The First Standard: Do the Undisputed Facts Require the Commission to Rule in the Moving Party's Favor as a Matter of Law?

In *Raw Bandwidth Communications, Inc. v. SBC California, Inc. and SBC Advanced Solutions, Inc.* (*Raw Bandwidth*), the Commission stated that a Motion to Dismiss "requires the Commission to determine whether the party bringing the motion prevails based solely on undisputed facts and matters of law. The Commission treats such motions as a court would treat motions for summary judgment in civil practice."[2] A motion for summary judgment is appropriate where the evidence presented indicates there are no triable issues as to any material fact and that, based on the undisputed facts, the moving party is entitled to judgment as a matter of law. (California Code of Civil Procedure, § 437(c) (Section 437(c)); Weil & Brown, Civil Procedure Before Trial, 10:26-27.) While there is no express Commission rule for summary judgment motions, the Commission looks to § 437(c) for the standards on which to decide a motion for summary judgment. (*Id.*)[3] Section 437(c) provides:

> The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers . . . and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on

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[2] Decision (D.) 03-05-023 (September 11, 2003) (Scoping memo and Ruling of Assigned Commissioner on Motion to Dismiss and Preliminary Matters at 3, citing to *Westcom Long Distance, Inc. v. Pacific Bell et al.*, D.94-04-082, 54 CPUC 2d 244, 249).

[3] *See Westcom*, *supra*, 54 CPUC 2d, 249-250.

> inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

A further beneficial purpose of such a motion is "that it promotes and protects the administration of justice and expedites litigation by the elimination of needless trials." (*Westcom Long Distance, supra,* 54 CPUC2d, 249.) As such, where appropriate, the Commission regularly grants motions for summary judgment or summary adjudication. (*See* D.07-07-040 [granting Chevron judgment against Equilon "as a matter of law"]; D.07-01-004 [granting Cox Telecom judgment against Global NAPs of California]; and D.02-04-051 [granting summary adjudication of a claim by County Sanitation District against Southern California Edison].)

3.2. The Second Standard: Is Defendant Entitled to Prevail Even if the Complaint's Well-Pleaded Allegations are Accepted as True?

In *Re Western Gas Resources-California, Inc.*, D.99-11-023 (November 4, 1999), we articulated another standard for dismissing complaints and applications that is slightly different than what was adopted in *Raw Bandwidth:*

> On a motion to dismiss a complaint, the legal standard against which the sufficiency of the complaint is measured is whether, taking the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law. (e.g., MCI Telecommunications Corp. v. Pacific Bell, D.95-05-020, 59 Cal. PUC 2d 665, 1995 Cal. PUC LEXIS 458, at *29-*30, citing Burke v. Yellow Cab Co. (1973) 76 Cal. PUC 166.) 3 CPUC 3d, 301.

This standard was employed more recently in *Everyday Energy Corporation v. San Diego Gas & Electric Company*, D.12-03-037 (March 29, 2012) wherein the Commission added: "By assuming that the facts as alleged in the complaint are true for the purpose of deciding whether to grant a motion to dismiss, we assume

that complainant will be able to prove everything alleged in its complaint." (Slip Op., 7.)

In determining if the complainant's allegations are "well pleaded," we are guided by the standards set forth in Pub. Util. Code § 1702, which provides that the complainant must allege that a regulated utility has engaged in an act or failed to perform an act in violation of any law or Commission order or rule:

> Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or anybody politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission.

As demonstrated by past precedent, the Commission will dismiss a complaint that fails to meet this two-pronged standard. (*See Monkarsh v. Southern California Gas Company*, D.09-11-017 at 3 (November 24, 2009); *Pacific Continental Textiles, Inc. vs. Southern California Edison Company*, D.06-06-011 at 4 (June 15, 2006); *Watkins v. MCI_Metro Access Transmission Services*, D.05-03-007 at 4 (March 17, 2005); *Rodriquez v. Pacific Gas and Electric Company*, D.04-03-010 at 3-4 (March 16, 2004); *AC Farms Sheerwood v. So. Cal Edison*, D.02-11-003 (November 7, 2002); and *Crain v. Southern California Gas Company*, D.00-07-045 (July 20, 2000).)

In addition to the requirements of Pub. Util. Code § 1702, Rule 4.2(a) of the Commission's Rules of Practice and Procedure requires that complaints be drafted with specificity so that the defendant and the Commission know precisely the nature of the wrong that defendant has allegedly committed, the injury, and the relief requested:

> The specific act complained of shall be set forth in ordinary and concise language. The complaint shall be so drawn as to completely advise the defendant and the Commission of the facts constituting the grounds of the complaint, the injury complained of, and the exact relief which is desired.

In sum, while the first and second standards for deciding a Motion to Dismiss differ slightly (one looks at the undisputed facts while the other assumes the well-pleaded facts to be true), both standards require the Commission to examine the factual allegations and to make a legal determination regarding whether judgment should be entered in the moving party's favor. In applying both standards to Cinderella Hair's complaint, we conclude that Verizon Business' Motion must be granted.

4. The Undisputed Facts Establish that Verizon Business is Entitled to Judgment as a Matter of Law

4.1. The Business Services Agreement Requires Cinderella Hair to Submit its Dispute to Binding Arbitration

California policy favors arbitrating disputes when there is a valid arbitration agreement. (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 163; *Nyulassy v. Lockheed Martin Corp*. (2004) 120 Cal.App.4th 1267, 1278; Office of the Attorney General of the State of California No. 80-811 1981 Cal. AG LEXIS 128; 64 Ops. Cal. Atty. Gen. 47, 51 (January 21, 1981).) That policy has been codified in Code of Civil Procedure § 1281: "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." This Commission has also enforced arbitration provisions as the

proper procedural vehicle to address disputes.[4]

Recently, in *Pinnacle Museum Tower Association v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223,[5] the California Supreme Court summarized the rules for construing and enforcing mandatory-arbitration provisions:

> In California, "[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate." (*Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 420 [100 Cal. Rptr. 2d 818]; see *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972–973 [64 Cal. Rptr. 2d 843, 938 P.2d 903].) Generally, an arbitration agreement must be memorialized in writing. (*Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1363 [95 Cal. Rptr. 3d 252].) A party's acceptance of an agreement to arbitrate **[**13]** may be express, as where a party signs the agreement. A signed agreement is not necessary, however, and a party's acceptance may be implied in fact (e.g., *Craig*, at p. 420 [employee's continued employment constitutes acceptance of an arbitration agreement proposed by the employer]) or be effectuated by delegated consent (e.g., *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 852–854 [114 Cal. Rptr. 3d 263, 237 P.3d 584] (*Ruiz*).) An arbitration clause within a contract may be binding on a party even if the party never actually read the clause. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1215 [78 Cal. Rptr. 2d 533].)

In addition, where a party seeks to compel the other contracting party to arbitration, the California Supreme Court explained the respective burdens of proof: "The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden

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[4] *Administrative Law Judge's Ruling Denying Motion for Dispute Resolution Pursuant to Decision 95-12-056* (December 1, 2005) Rulemaking 95-04-043/Investigation 95-04-044.

of proving any defense, such as unconscionability. (*Engalla v. Permanente Medical Group, Inc., supra*, 15 Cal.4th at 972)."

Verizon Business has met its burden of proof. It has established the existence of the arbitration clause in ¶ 15 of the Verizon Business Services Agreement that plaintiff executed on July 30, 2009.[6] It provides that:

> any claim or dispute ("Dispute") arising out of or relating to this Agreement (other than claims relating to indemnification and equitable relief) must be resolved by binding arbitration of a single arbitrator under the rules of the American Arbitration Association at a mutually agreed upon location…The parties agree that all Disputes must be pursued on an individual basis in accordance with the procedure noted above, and waive any rights to pursue an Dispute on a class basis, even if applicable law permits class actions or class arbitrations.

Verizon Business has also established that this claim or dispute arises out of the Verizon Business Services Agreement. Complainant's letter of August 22, 2011, which is attached to its complaint references the Verizon Business Service Agreement and discusses "Verizon when it comes to delivering promised services to our company." As Verizon Business points out in its Motion, "Complainant has received service from Verizon Business only because it entered into the BSA, and has had that service since July 2009."[7] We conclude that Verizon Business has met its burden of proof.

In contrast, complainant has failed to establish why this Commission should not enforce the mandatory-arbitration provision. Complainant does not

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[5] 2012 Cal. LEXIS 7665 (2012).

[6] Greiner Decl., ¶ 3, Exhibit A, ¶ 15 (Dispute Resolution).

[7] Motion at 6.

claim and prove that the provision is void, unconscionable, or otherwise unenforceable. To the contrary, complainant wants to be ordered to arbitration if the Commission dismisses its complaint. Based on the record before us, we see no reason why the mandatory-arbitration should not be applied. Accordingly, the Motion should be granted and complainant must pursue its relief under the jurisdiction of the American Arbitration Association. As we are dismissing this complaint in light of the arbitration provision, we need not address Verizon's remaining grounds for dismissal.

5. Assuming Cinderella Hair's Factual Allegations are True, the Motion to Dismiss Must be Granted as the Complaint Must be Submitted to Arbitration

Cinderella Hair's complaint is that it entered into a business service agreement with Verizon Business, and that the installed T-1 line did not work as promised, causing Cinderella Hair to lose approximately a day and a half of lost business due to service interruption problems. Cinderella Hair further alleges that Verizon Business delayed in contacting AdTrans, the manufacturer of the router responsible for routing voice and data traffic, which hindered the prompt resolution of the service problem. Cinderella Hair has demanded that the T-1 lines be removed and that the copper lines be put back into the building.

Accepting these allegations as true, the complaint must still be submitted to binding arbitration under the terms of the Verizon Business Services Agreement. (*See* discussion, supra, at section 4.1.)

6. Categorization and Need for Hearings

The Instruction to Answer filed on June 11, 2012, categorized this complaint as adjudicatory as defined in Rule 1.3(a) and anticipated that this proceeding would require evidentiary hearings. But because of the reasoning set forth in this Proposed Decision, this complaint must be dismissed, and the

evidentiary hearings determination is changed to state that no evidentiary hearings are necessary.

7. Comments of Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311 of the Public Utilities Code and comments were allowed under Commission Rules of Practice and Procedure Rule 14.3. No comments were filed.

8. Assignment of Proceeding

Catherine J.K. Sandoval is the assigned Commissioner and Robert M. Mason III is the assigned ALJ in this proceeding.

Findings of Fact

1. On July 30, 2009 Verizon Business Network Services, Inc., on behalf of Verizon Business Services entered into a Business Service Agreement with Cinderella Hair.

2. The Business Service Agreement contains ¶ 15 entitled "Dispute Resolution" which provides that any claim or dispute arising out of or relating to the Business Service Agreement must be resolved by binding arbitration.

3. On August 15, 2011, Cinderella Hair called Verizon Business to report a problem with voice service.

4. On August 22, 2011, Cinderella Hair wrote to the California Public Utilities Commission and complained about the interruption of its telephone service due to the alleged unreliability of the T-1 system.

5. On May 25, 2012, Cinderella Hair filed a complaint against MCI Metro Access Transmission Services, dba Verizon Business Services (U5253C) due to the alleged unreliability of the T-1 system.

6. The May 25, 2012 Cinderella Hair complaint sought damages for one day of lost business, a local point of business, and replacement of the copper lines.

7. On September 14, 2012, the assigned ALJ granted the Motion to Substitute Defendant, which substituted in MCI Communications Services, Inc. dba Verizon Business Services.

Conclusions of Law

1. Pursuant to ¶ 15 of the Business Service Agreement, the instant dispute must be submitted to and resolved by binding arbitration.

2. The complaint should be dismissed for failure to state a cause of action for which relief may be granted.

3. No hearings are necessary.

O R D E R

IT IS ORDERED that:

1. The Cinderella Hair, Inc. complaint against MCI Communications Services, Inc., dba Verizon Business Services is dismissed.

2. If Cinderella Hair, Inc. wishes to pursue its claims against MCI Communications Services, Inc. dba Verizon Business Services, they must be resolved by binding arbitration under the rules of the American Arbitration Association.

3. The hearing determination is changed to no hearings necessary.

4. Case 12-05-025 is closed.

This order is effective today.

Dated _____, at San Francisco, California.