

333 OAK LANE
BLOOMSBURG, PA 17815
SCOTT.J.RUBIN@GMAIL.COM

SCOTT J. RUBIN
ATTORNEY • CONSULTANT

TEL: (570) 387-1893
FAX: (570) 387-1894
CELL: (570) 850-9317

March 8, 2012

Rosemary Chiavetta, Secretary
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg PA 17105-3265

Re: Utility Workers Union of America System Local
537 v. Pennsylvania-American Water Company
Docket No. C-2012-2287204

Dear Secretary Chiavetta:

Enclosed for filing please find the Answer of Utility Workers Union of America System Local 537 to Motion to Dismiss in the above-referenced proceeding.

The document was filed electronically with the Commission on this date.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott J. Rubin". The signature is written in a cursive, flowing style.

Enclosure

cc: Susan Simms Marsh and Seth A. Mendelsohn
Ember Jandebour, Administrative Law Judge

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Utility Workers Union of America	:	
System Local 537	:	
	:	
v.	:	Docket No. C-2012-2287204
	:	
Pennsylvania-American Water Company	:	

ANSWER OF
UTILITY WORKERS UNION OF AMERICA
SYSTEM LOCAL 537
TO MOTION TO DISMISS

Pursuant to 52 Pa. Code § 5.103, Utility Workers Union of America System Local 537 (“UWUA”) hereby files this Answer to the Motion to Dismiss filed on February 28, 2012, by Pennsylvania-American Water Company (“PAWC” or “Company”). In support of this Answer, UWUA states as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted in part and denied in part. It is admitted that UWUA is not a residential customer of PAWC. It is denied that this fact means that UWUA has “no aggrieved rights.” As UWUA averred in its Formal Complaint, UWUA members are being forced to engage in conduct, and otherwise render service to the public, that is in violation of the Commission’s regulations. Such conduct not only exposes UWUA

members to potential legal liability, but also may jeopardize their livelihood and physical well-being. Indeed, PAWC's own Answer to UWUA's Formal Complaint raises the specter of such liability, when it avers: "If any failure may have occurred with the posting of the three-day notices, it may involve UWUA members failing to actually post said notices." Answer of PAWC, dated February 28, 2012, ¶ 10.

6. Admitted in part and denied in part. It is admitted that UWUA members are continuing to work under the terms of the contract that has a stated termination date of November 17, 2009. It is denied that the parties' inability to agree on the terms of a new contract has any relevance to this proceeding.

7. Denied. It is denied that UWUA's complaint constitutes only a "report to the Commission." Rather, UWUA's complaint falls within the ambit of the subject matter of complaints that is expressly recognized in the Public Utility Code. Specifically, Section 701 of the Code states, in relevant part:

The commission, or any person, corporation, or municipal corporation having an interest in the subject matter ... may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.

66 Pa. C.S. § 701 (emphasis added).

8. Denied. UWUA and its members have a direct interest in the issues raised in this proceeding.

9. Admitted in part and denied in part. It is admitted that PAWC has correctly stated the general law of standing. It is denied that PAWC has cited all relevant cases, particularly as it relates to the standing of utility employees and the authorized legal representatives of those employees. More than 50 years ago, the Commission and our

courts addressed this issue. In *Reading Co. v. Pa. PUC*, 188 Pa. Super. 146, 146 A.2d 746 (1958), the Superior Court rejected a public utility’s challenge to the standing of its employees (and their representatives) to file a complaint with the Commission concerning unsafe conditions and other alleged violations of Commission regulations. The court summarized the utility’s contention, and the court’s holding, as follows:

The main burden of Reading Company’s argument, here, is that the Pennsylvania Public Utility Commission does not have jurisdiction to grant relief to employees of a public utility whose personal safety is jeopardized by the conditions under which they work. With this contention we are unable to agree.

Id., 188 Pa. Super. At 149, 146 A.2d at 748 (emphasis added).¹ The court then continued to explain that Section 401 of the Public Utility Law, which is now Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501, specifically protects the “accommodation, convenience, and safety” of utility employees. *Id.*

Section 1501 of the Code reads, in relevant part, as follows:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements to service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. ... Such service and facilities shall be in conformity with the regulations and orders of the commission.

66 Pa. C.S. § 1501 (emphasis added).

It should be recalled that the definition of “service” in the Public Utility Code is quite broad. Section 102 of the Code defines service as follows:

Used in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities ...

¹ The original case at the Commission, which the court affirmed, is reported as *Cooperative Legislative Committee, Railroad Brotherhoods in Pennsylvania v. Reading Co.*, 36 Pa. PUC 59 (1958).

in the performance of their duties under this part to their patrons, employees, other public utilities, and the public ...

66 Pa. C.S. § 102 (emphasis added). Thus, the safety and reasonableness of “service” in Section 1501 encompasses the safety and reasonableness of all actions taken by a utility in furtherance of its obligations under the Code to the public and its employees.

More recently, ALJ Susan Colwell addressed a similar standing challenge by a public utility (Commonwealth Telephone Co.) to its labor union (the Communications Workers of America, or CWA) that sought to address issues related to customer service and reliability, among others. In dismissing the utility’s preliminary objections to the union’s intervention on those issues, ALJ Colwell wrote:

It is clear that the union, representing a collective bargaining unit comprised of 22,500 members in Pennsylvania, including approximately 425 members employed by Commonwealth Telephone Company, has a substantial, direct and immediate interest in the outcome of this case. The very livelihood of the 425 members rests on the management decisions made by Commonwealth, and the myriad of decisions made by that management (relating to maintenance practices, operational procedures, call center staffing and location, etc.) are vital to the members. While, as Joint Applicants point out, CWA is not vested with the rights of the consumer advocate, the issues which are important to the OCA are the issues which are interrelated with the work and responsibilities of the CWA members. Customer service, safety and reliability, network deployment and the financial health of the two Joint Applicants affect not only the customers of the Joint Applicants but the employees who provide the services.

For the purposes of the filing of a protest and intervention, CWA has the necessary standing, and the Preliminary Objections of the Joint Applicants which seek to limit the participation of the CWA shall be denied.

Order Disposing of the Preliminary Objections of Commonwealth Telephone Company, CTSI, LLC and CTE Telecom, LLC d/b/a Commonwealth Long Distance Seeking to Limit the Participation of the Communications Workers of America, *Joint Application of*

Commonwealth Telephone Company, Docket No. A-310800F0010 (Dec. 14, 2006) (a copy of which is attached hereto as Appendix A), slip op. at 6-7.

10. Admitted in part and denied in part. It is admitted that the term “standing” is not defined in the Public Utility Code or the Commission’s regulations. It is admitted that the Commission may determine whether a party has standing. It is denied that the cases cited have any bearing on the standing of a public utility’s labor union to complain about a utility that is allegedly requiring members of the labor union to violate Commission regulations. In addition, the answer to paragraph 9, above, is incorporated herein by reference.

11. Denied. The answers to paragraphs 5 and 7-10 are incorporated herein by reference.

WHEREFORE, the Utility Workers Union of America System Local 537 respectfully requests the Commission to deny Pennsylvania-American Water Company’s Motion to Dismiss and allow this case to proceed to a hearing and decision on the merits.

Respectfully submitted,



Scott J. Rubin
333 Oak Lane
Bloomsburg, PA 17815-2036
Phone: (570) 387-1893
Fax: (570) 387-1894
e-mail: scott.j.rubin@gmail.com
(Pa. Supreme Court ID: 34536)

Counsel for:
Utility Workers Union of America System
Local 537, Complainant

Dated: March 8, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served this day a true copy of Answer of Utility Workers Union of America System Local 537 to Motion to Dismiss, upon the parties listed below by electronic mail and U.S. mail, first-class, postage prepaid, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Susan Simms Marsh, Corporate Counsel
Seth A. Mendelsohn, Corporate Counsel
Pennsylvania-American Water Company
800 Hershey Park Drive
Hershey, PA 17033
susan.marsh@amwater.com
seth.mendelsohn@amwater.com

Dated: March 8, 2012



Scott J. Rubin
*Counsel for Utility Workers Union of
America System Local 537*

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joint Application of Commonwealth	:	
Telephone Company, CTSI, LLC, and CTE	:	A-310800F0010
Telecom, LLC d/b/a Commonwealth Long	:	A-311095F0005
Distance Company for All Approvals	:	A-311225F0003
Under the Public Utility Code for the	:	
Acquisition By Citizens Communications	:	
Company of All of the Stock of the	:	
Joint Applicants' Corporate Parent,	:	
Commonwealth Telephone Enterprises, Inc.	:	

ORDER DISPOSING OF THE PRELIMINARY OBJECTIONS OF COMMONWEALTH TELEPHONE COMPANY, CTSI, LLC AND CTE TELECOM, LLC D/B/A COMMONWEALTH LONG DISTANCE SEEKING TO LIMIT THE PARTICIPATION OF THE COMMUNICATIONS WORKERS OF AMERICA

On September 29, 2006, Commonwealth Telephone Company, CTSI, LLC, and CTE Telecom, LLC d/b/a Commonwealth Long Distance (Commonwealth or Joint Applicants) filed an Application for approvals necessary under the Public Utility Code for the Joint Applicants' parent company, Commonwealth Telephone Enterprises, Inc., to be acquired by Citizens Communications Company (Application). The Application was published in the Pennsylvania Bulletin October 14, 2006, 36 Pa. B. 6355, with a protest due date of October 30, 2006.

On October 30, 2006, a Protest and Petition to Intervene was filed by each of the following: RCN Corporation and RCN Telecom Services, Inc. (RCN); Sprint Communications Company L.P. (Sprint); Blue Ridge Digital Phone Company (Blue Ridge); and, Broadband Cable Association of Pennsylvania (BCAP). A Protest and Preliminary Objections were filed by the Communications Workers of America (CWA), but the Preliminary Objections were withdrawn by letter dated November 13, 2006. A Protest and Public Statement was filed by both the Office of Small Business Advocate (OSBA) and the Office of Consumer Advocate (OCA), and a Notice of Appearance was filed on behalf of the Office of Trial Staff (OTS). Citizens Communications Company (Citizens) filed a Petition to Intervene.

On November 9, 2006, Joint Applicants filed an Answer to the Preliminary Objections of CWA.

On November 8, 2006, a Notice of Prehearing Conference was issued which set the prehearing conference for November 29, 2006 in Harrisburg.

On November 10, 2006, Joint Applicants filed Preliminary Objections to Dismiss Portions of the Protest and to Limit Participation of the CWA, and separate Preliminary Objections with Citizens which sought to dismiss the Protests and Petitions to Intervene of Blue Ridge, Sprint, BCAP and RCN.

On November 13, 2006, I issued a prehearing order which set forth some of the procedural requirements of a hearing before the Commission and required the parties to submit a prehearing memoranda in accordance with the regulations.

On November 20, 2006, CWA, OCA, Blue Ridge, Sprint, BCAP and RCN filed Answers to the Joint Applicants' Preliminary Objections.

On November 20, 2006, the Joint Applicants filed letters indicating that they did not oppose the participation of the OCA, OSBA and OTS.

All parties of record filed Prehearing Memos and the following were represented at the prehearing conference: for Joint Applicants, Norman J. Kennard, Esq.; for OSBA, Steven Gray, Esq., and Lauren Lepkoski, Esq.; for OCA, Shaun Sparks, Esq. and Joel Cheskis, Esq.; for OTS, Robert V. Eckenrod, Esq.; for Citizens, Lillian S. Harris, Esq.; for BCAP and Blue Ridge, Pamela Polacek, Esq.; for CWA, Scott J. Rubin, Esq.; for Sprint, Jennifer Duane, Esq., and for RCN, John F. Povilaitis, Esq., and Matthew A. Totino, Esq.

A separate Order has been issued which sets a litigation schedule for the parties to follow, and disposes of uncontested motions. Another Order disposes of the Preliminary

Objections Blue Ridge Digital Phone Company, Sprint Communications Company LP, and RCN Telecom Services, Inc. An Initial Decision disposes of the Preliminary Objections of the Joint Applicants and Citizens to Dismiss Protests and Petitions to Intervene of the Broadband Cable Association of Pennsylvania and RCN Corporation. This Order denies the Preliminary Objections of Joint Applicants to Limit the Participation of the CWA.

DISCUSSION

Joint Applicants filed Preliminary Objections seeking to limit the participation of the CWA to issues that the CWA has standing to raise, stating that the appropriate issues are limited to those which concern the CWA member employees. CWA's Protest also raises a number of issues which Joint Applicants claim are beyond the CWA ability to raise, such as benefits to consumers by increasing investment in the network, accelerated deployment of advanced services, quality of service, whether financial information submitted is sufficient to evaluate the transaction, and post-merger plans. CWA Protest.

Commission regulations provide:

§ 5.101. Preliminary objections.

(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.

52 Pa. Code § 5.101(a).

In deciding the preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the Petitioners, recovery or relief is possible. *Dept. of Auditor General, et al v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003), 2003 Pa. Commw. LEXIS 849; *P.J.S. v. Pa. State Ethics Comm'n*, 669 A.2d 1105 (Pa. Cmwlth. 1996) 1996 Pa. Commw. LEXIS 11. Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002) 2002 Pa. Commw. LEXIS 580. All of the non-moving party's averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees' Retirement Board*, 690 A.2d 1312 (Pa. Cmwlth. 1997) 1997 Pa. Commw. LEXIS 148.

Joint Applicants do not claim that CWA has no standing to participate in the proceeding. Rather, Joint Applicants claim that the CWA has only *limited* standing, and that its participation should be limited to those topics for which it has standing. Joint Applicants do not seek to dismiss those portions of the CWA Protest which raise issues relating to employment levels or the continuation of the current union contract. The Preliminary Objections point out that the CWA is not vested with the rights of a consumer advocate and has no standing to raise issues before the Commission related to advanced services deployment, adequacy of service or financial fitness of the parties. POs, ¶ 10-11.

Therefore, Joint Applicants claim that CWA must set forth facts establishing its standing to protest on any issues other than employment levels and continuation of the current union contract.

CWA responds by pointing out that lack of standing on one or more issues, when there is standing on other issues, is not a one of the grounds for a preliminary objection under the

applicable regulation, 52 Pa. Code § 5.101(a). Limitation of the scope of participation is not properly addressed through preliminary objections.

In addition, CWA states that the issues to which the Joint Applicants object to CWA's participation, customer service, safety and reliability, network deployment and the financial circumstances of the two Joint Applicants, are all legitimate concerns of the CWA. The CWA Answer states, in part:

CWA has a direct interest in the impact of a proposed transaction on the financial health of its employer, so that the employer can continue to operate, maintain, repair and upgrade facilities in a safe and responsible manner; and continue to employ enough personnel to reliably and safely serve the public.

CWA has a direct interest in determining if a proposed transaction will affect the safety and quality of service provided by the utility. CWA's members must operate, maintain, and repair the utility's facilities, as well as staff customer service centers. If the transaction will lead to changes in maintenance practices, operational procedures, call center staffing and location, such changes could have a direct impact on CWA and its members.

CWA has a direct interest in determining if a proposed transaction will encourage or discourage the deployment of advanced network services. CWA's members are responsible for implementing many of a utility's policies on network deployment.

CWA Answer, pp. 5-6.

Finally, CWA points out that if CWA's testimony strays into areas which are outside the scope of this proceeding or outside a witness' expertise, Joint Applicants are free to file appropriate motions to limit the scope or to strike the testimony. CWA Answer, p.6.

As Joint Applicants point out, in order to have standing, a party must have an interest which is substantial, direct, and immediate:

A "substantial" interest is an interest in the outcome of the litigation which surpasses the common interest in procuring obedience to the law. A "direct" interest requires a showing that the matter complained of caused harm to the party's interest. An "immediate interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it and is shown where the interest the party seeks to protect is within the zone of interest sought to be protected by the

statutes or the constitutional guarantee in question. *George v. Pa. Publ. Util. Comm'n*, 735 A.2d 1282, 1286 (Pa. Cmwlth. Ct. 1999).

OCA's Answer to the Preliminary Objections of Joint Applicants to Dismiss Portions of Protest and Limit Participation of CWA points out that the OCA participation in the proceeding does not serve as a bar to the participation of other interested parties nor as a substitute for the participation of others. In addition, OCA points out that its interests are not identical to CWA's, and as such, should not be used to bar CWA's participation. OCA Answer, p. 4. OCA states that many of the public interest and consumer issues that CWA raises in its Protest are important to both consumers and CWA for varying reasons.

Commission regulations provide:

§ 5.72. Eligibility to intervene.

(a) *Persons.* A petition to intervene may be filed by a person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought. The right or interest may be one of the following:

(1) A right conferred by statute of the United States or of the Commonwealth.

(2) An interest which may be directly affected and which is not adequately represented by existing participants, and as to which the petitioner may be bound by the action of the Commission in the proceeding.

(3) Another interest of such nature that participation of the petitioner may be in the public interest.

* * *

It is clear that the union, representing a collective bargaining unit comprised of 22,500 members in Pennsylvania, including approximately 425 members employed by Commonwealth Telephone Company, has a substantial, direct and immediate interest in the outcome of this case. The very livelihood of the 425 members rests on the management decisions made by Commonwealth, and the myriad of decisions made by that management (relating to maintenance practices operational procedures, call center staffing and location, etc.) are vital to the members. While, as Joint Applicants point out, CWA is not vested with the rights of the consumer advocate, the issues which are important to the OCA are the issues which are

interrelated with the work and responsibilities of the CWA members. Customer service, safety and reliability, network deployment and the financial health of the two Joint Applicants affect not only the customers of the Joint Applicants but the employees who provide the services.

For the purposes of the filing of a protest and intervention, CWA has the necessary standing, and the Preliminary Objections¹ of the Joint Applicants which seek to limit the participation of the CWA shall be denied.

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections of Commonwealth Telephone Company, CTSI, LLC, and CTE Telecom, LLC d/b/a Commonwealth Long Distance Company and Citizens Communications Company seeking to limit the participation of the Communications Workers of America are denied.

Dated: December 14, 2006

Susan D. Colwell
Administrative Law Judge

¹ A party may seek to limit the participation of another in the Answer to the Petition to Intervene. 52 Pa. Code § 5.75(c). Even without the specific limitation, Joint Applicants may challenge specific discovery requests or testimony.