

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

2006 Annual Price Stability Index/ Service Price Index filing of Buffalo Valley Telephone Company	:	:	P-00981428F1000
2006 Annual Price Stability Index/ Service Price Index filing of Conestoga Telephone & Telegraph Company	:	:	P-00981429F1000
2006 Annual Price Stability Index/ Service Price Index filing of Denver & Ephrata Telephone & Telegraph Company	:	:	P-00981430F1000

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ORDER GRANTING PETITION TO INTERVENE OF THE VERIZON COMPANIES

On April 28, 2006, Denver & Ephrata Telephone & Telegraph Company, Conestoga Telephone & Telegraph Company, and Buffalo Valley Telephone Company (collectively "Companies") filed their annual PSI/SPI Chapter 30 filings which determine the allowable change in rates for noncompetitive services based upon the annual change in the Gross Domestic Product Price Index. The Commission issued orders which permitted each proposed rate change to become effective after adjustment of the PSI/SPI procedure using actual year-end revenues from 2005. The Companies sought reconsideration of the Commission's Order insofar as it directed the adjustment to the PSI/SPI procedure, requesting reconsideration of the change directed in the revenue entitlement formula and addressing the criticisms regarding increases in intrastate access charges.

The Commission adopted an order at the public meeting of November 9, 2006, entered November 15, 2006 which directed the Office of Administrative Law Judge to conduct expedited hearings reconsidering the Commission orders of June 23, 2006 which had allowed the three telephone companies to raise intrastate access charges. The order directed that a

recommended decision be issued on or before February 28, 2006, and a prehearing conference was scheduled and held on November 28, 2006.

The Order directs that the goal is to determine, “based on the record, whether any rescission or amendment would be warranted by the evidence, consistent with our access charge reform and universal service policies, and lawful under the Companies’ Chapter 30 plans.” Order adopted November 9, 2006, entered November 15, 2006, at p. 15.

At the prehearing conference, the Companies were represented by Michael L. Swindler, Esq., and Charles E. Thomas III, Esq.; the Office of Consumer Advocate (OCA) was represented by Joel Cheskis, Esq.; the Office of Small Business Advocate (OSBA) was represented by Steven C. Gray, Esq.; the Office of Trial Staff (OTS) was represented by Johnnie E. Simms, Esq.; and the Verizon companies (Verizon)¹ were represented by Suzan D. Paiva, Esq.

The Verizon Petition to Intervene was opposed by the Companies and argued at the prehearing conference by Verizon and the Companies. While the parties were informed that Verizon’s Petition to Intervene would be granted, it is granted in this separate Order to facilitate any interlocutory appeals without affecting the schedule set by the Scheduling Order.

The Companies’ Opposition to Verizon’s Intervention

The Companies protest that the Verizon Petition to Intervene is inappropriate at this time because the case is on reconsideration. The time to intervene was when the original filing was made. Verizon did not intervene at that time even though, as a D&E access customer, it was afforded notice of the Companies’ PSI filing. Tr. 8.

In addition, Verizon had an opportunity to intervene following issuance of the June 23, 2006 Orders and failed to do so. The June 23rd Orders were published in the

¹ A Petition to Intervene was filed on behalf of Verizon Pennsylvania Inc., Verizon North Inc., Verizon Select Services Inc., Bell Atlantic Communications, Inc. d/b/a/ Verizon Long Distance, Verizon Global Networks, Inc., MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services Inc. (collectively “Verizon”).

Pennsylvania Bulletin, which afforded constructive notice, and Verizon did not seek intervention at that time. Tr. 9.

The only step taken by Verizon was to file an amicus response to the Companies' petition for reconsideration, filed in July 2006.

The Companies believe that the present proceeding is not a new one in which petitions to intervene are expected. Rather, it is the Commission "affording due process to the parties by allowing "D&E to participate in an evidentiary hearing where D&E can present testimony to say to the Commission: here's why moving forward with an increase in the access charges is not precluded by our Chapter 30 plan; here's why it is okay to do that pursuant to the Global Order; here's why it is not prohibited under any USF order." Tr. pp. 9-10.

The Commission Order states, "Upon notice thereof is given to the other parties to the proceeding," and the Companies aver that the notice refers to the existing parties, not new parties. The Companies rely upon *Popowsky v. Pa. Publ. Util. Comm'n*, 805 A.2d 637 (Pa. Cmwlth. Ct. 2002) for an understanding of the 703(g) process.

The Companies point out that, especially in an expedited proceeding such as this one, it is important to stick to the issue, which is why they can move forward with the stated increase, not why Verizon thinks it is unfair. Since Verizon is a party to the USF case, it has a forum for raising generic arguments regarding those issues. In addition, Verizon is free to file an amicus brief in this matter as well.

The Companies claim that Verizon does not meet the Commission's standard for intervention in 52 Pa. Code § 5.72, which requires an interest to support intervention. The issue does not directly affect Verizon. Tr. 12. In response to Verizon's arguments, the Companies counter that Verizon's arguments are no different now than they would have been in April, when the PSI filings were submitted, or in May, when Verizon was notified as a customer. Tr. 17.

Verizon

In response, Verizon states that it does have an interest because it is an access customer of the three Companies and pays the very rates that are at issue in this proceeding. Further, it is the only customer seeking to participate, therefore providing a unique perspective otherwise not present in the case. Tr. 13.

Verizon buttresses its argument by pointing out the Verizon is the single largest contributor to the Universal Service Fund (USF), and the impact on the USF is at issue in this case. Tr. 13.

Verizon explained that it had not intervened when the Companies filed the PSI because the notices went to the office which pays the bills, not to the lawyers. The PSI proceedings are expedited, and by the time the notices reached the lawyers, the only viable option was to file the amicus brief. Verizon continues:

Then the Commission, in its three June 23 orders, basically said: we're going to let these rates go into effect, but we are still going to consider the substantive issues of whether access rates should be raised, whether these access rates, as raised, are just and reasonable, but what we're going to do is consider them in the I docket, the I-00040105, which is the rural carrier investigation. Verizon was already a party to that case, so for our purposes of having the right to address the merits of the issues that we were interested in, the Commission had put it into a case where we were a party, so there really was no need at that point for Verizon to go back and try to intervene in the P dockets, because the P dockets were essentially closed. And since the Commission had not foreclosed our opportunity to address the merits, our interests were protected as well. But then we get to the Commission's November 14 order. The Commission decides: well, we're going to change, procedurally, how we're doing this; we're going to send the merits of these issues back to the P dockets and we're going to stay the proceeding at the I docket. At that point being a party to the I docket is not going to allow us to participate in the merits of this anymore, because the Commission has sent it back to the P dockets, so at that point our intervention in the P dockets becomes necessary. Tr. 14-15.

Verizon states that the Commission's referral of the case to OALJ for development of a record and evidence is a sign that there should be discovery and testimony of other parties. Tr. 15. In addition, Verizon points out that the reason the Commission is sending these cases back for hearing is "because that should adequately address Verizon's concerns regarding the instant motion (to continue the stay in the I-docket)." It is unlikely that the Commission intended to address Verizon's concerns without Verizon's participation. Tr. 16. In fact, Verizon submits that, as a customer and as a contributor to the USF, its due process rights would be violated if it were not permitted to participate in this proceeding. Tr. 16.

Discussion

Allowance of intervention is a matter within the discretion of the Commission. *City of Pittsburgh v. Pa. Publ. Util. Comm'n*, 153 Pa. Super. 83, 33 A.2d 641 (1943), *NAACP, Inc. v. Pa. Publ. Util. Comm'n*, 290 A.2d 704 (Pa.Cmwlt. Ct. 1972). In determining whether to grant a late-filed petition for intervention, the two key factors are: (1) whether the entity has standing to intervene; and if so, (2) whether there is good cause shown for the late filing?

Intervention is governed by Commission regulations, 52 Pa. Code §§ 5.71 through 5.76:

§ 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.

* * *

In *Re Equitable Gas Company*, 76 Pa. P.U.C. 23 (1992), the Commission stated that “interest” as used in that section means a substantial, immediate and direct interest. Regarding matters before the Commission, the Commonwealth Court has defined these terms as follows:

A “substantial” interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens 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 statute or the constitutional guarantee in question. *George v. Pa. Publ. Util. Comm’n*, 735 A.2d 1282, 1286(Pa. Cmwlth. Ct. 1999) *appeal denied* 563 Pa. 650, 758 A.2d 1202(2000)(quoting *Ken R. ex rel. C.R. v. Arthur Z.*, 682 A.2d 1267, 1270 (Pa. 1996)).”

As both a customer of the Companies and a contributor to the USF, Verizon meets the criteria for intervention. The next issue is whether Verizon meets the criteria for late-filed intervention.

The time of the filing of a petition to intervene is governed by Commission regulations:

§5.74. Filing of petitions to intervene.

(a) Petitions to intervene and notice of intervention may be filed following the filing of an application, petition, complaint or other document seeking Commission action, but no later than the date fixed for the filing of petitions to intervene in an order or notice with respect to the proceeding or, except for good cause shown, the date fixed for filing protests as published

in the *Pennsylvania Bulletin*. Intervention will not be permitted once an evidentiary hearing has concluded absent extraordinary circumstances.

Thus, under the regulation, intervention may be granted, even if late-filed, for good cause shown. While this is a reconsideration proceeding, it may be viewed as a new one from the point of view of those entities who were party to the “I” docket which shared the caption with the three “P” dockets which survived the referral to OALJ. If a new proceeding, intervention is timely. If not, then the Commission’s treatment of late-filed interventions should apply.

In *Re Pennsylvania-American Water Company*, Docket No. A-212285F0096, A-230073F0004 (Order Entered May 9, 2002), the Commission denied the Commission on Economic Opportunity’s (“CEO”) late-filed Petition to Intervene because it did not meet the standards for good cause shown. The standards are:

1. Did the petitioner have a reasonable excuse for missing the protest due date?
2. Is the proceeding contested at the time of the filing of a petition for intervention?
3. Will a grant of intervention delay the orderly progress of the case; and
4. Will the grant of intervention broaden significantly the issues, or shift the burden of proof.

Id. At 6 (quoting *S.T.S. Motor Freight*, 54 Pa. P.U.C. 343 (1980)).

All four of the prongs must be met in order to permit late-filed intervention. *Re Milton Transportation, Inc.*, 56 Pa. PUC 623 (1982).

1. Did the petitioner have a reasonable excuse for missing the protest due date?

Here, Verizon explained that notice went to the billing office, not to the legal office, and the speed of the proceeding, not contemplated by the standard procedural rules,

precluded meaningful intervention until the amicus brief stage, which Verizon filed. This constitutes a reasonable excuse.

2. Is the proceeding contested at the time of the filing of a petition for intervention?

There is no doubt that the proceeding is contested. OCA, OSBA and OTS have entered appearances.

3. Will a grant of intervention delay the orderly progress of the case?

The addition of Verizon at this point, which is effectively the beginning of the litigation phase of the case, will not hamper the parties' ability to prepare their cases.

4. Will the grant of intervention broaden significantly the issues, or shift the burden of proof?

The addition of Verizon will make no difference to the issues, which were set by the Commission's order and remain the same regardless of the parties.

The Commission has been liberal in interpreting this 'good cause' requirement, particularly where the grant of intervention will not delay the orderly progress of the case, significantly broaden the issues or shift the burden of proof. See *Application of Penn Access Corporation*, 1992 Pa.P.U.C. LEXIS 56; *Re Milton Transportation, Inc.* 56 Pa.P.U.C. 623 (1982); *STS Motor Freight, Inc.* 54 Pa.P.U.C. 343 (1980). Here, the Commission specifically issued an order which included another docket, and Verizon is a party to the other docket. The Commission also included Verizon's concerns as one of the reasons for the referral to OALJ for an evidentiary proceeding. To bar Verizon's participation would be inconsistent with the Commission's Order.

Therefore, Verizon's Petition to Intervene shall be granted, as indicated to the parties at the prehearing conference.


THEREFORE,

IT IS ORDERED:

1. That the Petition to Intervene of Verizon Pennsylvania Inc., Verizon North Inc., Verizon Select Services Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, Verizon Global Networks, Inc., MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services Inc. d/b/a Verizon Business Services in the 2006 Annual Price Stability Index/Service Price Index filings of Buffalo Valley Telephone Company at P-00981428F1000, Conestoga Telephone & Telegraph Company at P-00981429F1000 and Denver & Ephrata Telephone & Telegraph Company at P-00981430F1000 is granted.

2. That the scope of the proceeding is unchanged by the intervention granted in Paragraph 1, above.

Dated: December 19, 2006


Susan D. Colwell
Administrative Law Judge

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