



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

April 8, 2016

Via Electronic Filing

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

Re: Petition of Communications Workers of America for a Public, On-the-Record Commission Investigation of the Safety, Adequacy, and Reasonableness of Service Provided by Verizon Pennsylvania LLC
Docket No. P-2015-2509336

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Bureau of Investigation and Enforcement's Brief on the Petition for Interlocutory Review and Answer to Material Question of Verizon Pennsylvania LLC in the above-referenced matter.

Copies have been served on the parties of record in accordance with the attached Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Bradley R. Gorter", with a long, sweeping flourish extending to the right.

Bradley R. Gorter
Prosecutor
PA Attorney I.D. No. 312666

Enclosure

cc: Honorable Joel H. Cheskis
As per Certificate of Service

Petition of Communications Workers of :
America for a Public, On-the-Record :
Commission Investigation of the Safety, : Docket No. P-2015-2509336
Adequacy, and Reasonableness of Service :
Provided by Verizon Pennsylvania LLC :

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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Date: April 8, 2016

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Communications Workers of :
America for a Public, On-the-Record :
Commission Investigation of the Safety, : Docket No. P-2015-2509336
Adequacy, and Reasonableness of Service :
Provided by Verizon Pennsylvania LLC :

**BRIEF OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT ON
THE PETITION FOR INTERLOCUTORY REVIEW AND ANSWER TO
MATERIAL QUESTION OF VERIZON PENNSYLVANIA LLC**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

AND NOW COMES the Bureau of Investigation and Enforcement (“I&E”) of the Pennsylvania Public Utility Commission (“Commission”), by and through its prosecuting attorneys, pursuant to 52 Pa. Code § 5.302(b), and files this Brief on the Petition for Interlocutory Review and Answer to a Material Question (“Petition for Review”) filed on March 29, 2016, by Verizon Pennsylvania LLC (“Verizon”) in the above-captioned proceeding. With regard to Verizon’s Petition for Review, I&E argues as follows:

I. STATEMENT OF THE CASE

On October 21, 2015, the Communications Workers of America (“CWA”), through its attorney Scott J. Rubin, *Esquire*, filed its “Petition of Communications Workers of America for a Public, On-the-Record Commission Investigation of the Safety, Adequacy, and Reasonableness of Service Provided by Verizon Pennsylvania LLC” (“Petition for Investigation”), alleging multiple violations of Pennsylvania law and Commission regulations and orders with regard to maintenance of Verizon’s copper

facilities in Pennsylvania. CWA is the authorized bargaining unit for approximately 4,700 employees of Verizon who are responsible for the maintenance and operation of Verizon's facilities in Pennsylvania. Verizon is a telecommunications provider that is authorized by the Commission to operate as a local exchange carrier in Pennsylvania. In its Petition for Investigation, CWA alleges that Verizon has neglected, failed to maintain, and failed to repair its copper facilities and requests that the Commission conduct an in-depth examination and audit of Verizon's copper facilities in Pennsylvania. Upon conducting the investigation, CWA requests that the Commission order Verizon to take remedial actions and impose civil penalties on Verizon for its failure to comply with the Public Utility Code, the Commission's regulations, and standard industry practices.

On November 3, 2015, the Office of Consumer Advocate filed a Notice of Intervention and Public Statement. Verizon filed an Answer to the Petition for Investigation on November 10, 2015. Also on November 10, 2015, Full Service Network filed a separate Answer in support of CWA's Petition, and the Office of Small Business Advocate filed a Notice of Appearance, Notice of Intervention, and a Public Statement. I&E filed a Notice of Intervention on February 24, 2016.¹

An Initial Prehearing Conference was held on March 18, 2016. At the Prehearing Conference, the parties were unable to agree on the scope of the instant proceeding and Verizon indicated that it would seek interlocutory review from the Commission regarding the scope and procedure proposed by the presiding Administrative Law Judge ("ALJ").

¹ Additional filings in the form of letters supporting CWA's request to initiate an investigation have been submitted at this docket.

The proposed procedure is memorialized in the Scheduling Order dated March 22, 2016 and establishes evidentiary hearings involving consumer and expert witnesses. Should the record evidence demonstrate a violation of the Public Utility Code or Commission regulation or order, appropriate remedies would be imposed, including, but not limited to, the imposition of civil penalties.

In anticipation that the instant Petition for Review will be decided by the Commission prior to or at the Public Meeting scheduled for May 19, 2016, a further Prehearing Conference is scheduled for May 26, 2016, with associated Prehearing Memoranda to be filed by May 20, 2016.

On March 29, 2016, Verizon, through counsel, filed the instant Petition for Review pursuant to 52 Pa. Code §5.302. Pursuant to Section 5.302(b), I&E files this Brief regarding Verizon's the Petition for Review.

II. MATERIAL QUESTIONS AND COUNTER QUESTIONS

In its Petition for Review, Verizon purports to raise four (4) Material Questions for Interlocutory Review. These questions can be grouped into two separate categories: (1) factual argument; and (2) procedural issues. Verizon's third Material Question requests that the Commission review factual allegations ("Factual Question"). Verizon's first, second and fourth Material Questions ("Procedural Questions") raise procedural issues that all can be decided together. As such, I&E will consider the Material Questions that raise procedural issues concurrently.

1. WHETHER VERIZON HAS FAILED TO MEET THE STANDARDS FOR INTERLOCUTORY REVIEW BY ASKING THE COMMISSION TO DISMISS THE PETITION FOR INVESTIGATION ON AN IMPERMISSIBLE FACTUAL BASIS?

Suggested Answer: Yes.

2. WHETHER VERIZON'S MATERIAL QUESTIONS RELATED TO PROCEDURAL ISSUES SHOULD BE ANSWERED TO CLARIFY THE SCOPE OF THE INSTANT PROCEEDING?

Suggested Answer: Yes.

III. SUMMARY OF ARGUMENT

As noted above, Verizon's Material Questions can be designated as one Factual Question and three related Procedural Questions. For the reasons set forth below, the Commission should decline to answer Verizon's Material Question as it relates to the factual matter and the parties should be provided with the opportunity at hearing to present evidence regarding the material facts, which are in dispute. Conversely, the Commission should entertain the Procedural Questions raised by Verizon as they allege significant issues with the procedure set forth in the Scheduling Order dated March 22, 2016.

IV. ARGUMENT

- A. The Commission Should Decline To Answer Verizon's Factual Question Because It Fails To Meet The Interlocutory Review Standards And Requests Impermissible Relief Based On The Disputed Facts.

In its Petition for Review, Verizon states the following as its **Material Question #3**: "Whether the Commission should dismiss the petition because it has sufficient programs already in place to monitor Verizon's service and the data collected shows no

reason for concern?” (Pet. for Review, at 3). The Commission will only grant requests for interlocutory review upon a showing by the petitioner of extraordinary circumstances or compelling reasons. 52 Pa. Code § 5.302; see also Petition of West Penn Power Company, 2010 WL 4687833, *2-4 (Pa. PUC 2010) (citing Pa. PUC v. Wynnewood Sewer Corp., Docket No. R-00963708 (Order entered Dec. 6, 1996)). Further, the Commission will only grant interlocutory review where it is necessary to prevent substantial prejudice *and* that the prejudice flowing from the error cannot be satisfactorily cured during the normal Commission review process. See Saucon Creek Associates, Inc. v. Borough of Hellertown, 69 Pa.P.U.C. 467 (1989).

With regard to the Factual Question, Verizon has failed to demonstrate that Verizon will suffer any substantial prejudice or that the potential harm cannot be cured during the Commission’s regular review process. Instead, Verizon’s Factual Question asks that the Commission prematurely rule on the merits of the Petition for Investigation and grant relief more suited to a dispositive motion on the pleadings or for summary judgment. See generally 52 Pa. Code § 5.102. Further, Verizon’s Petition for Review assumes material facts that are disputed in the Petition for Investigation by stating that “the data collected shows no reason for concern.” (Pet. for Review at 3). Conversely, CWA directly disputes this allegation in its Petition for Investigation and provides evidence supporting its claims. (See generally Pet. for Investigation at 4-22). As the Commission found in Saucon Creek, a question that turns on disputed facts of a case should not be answered because the facts can only be ascertained through the discovery and hearing process. Saucon Creek, 69 Pa.P.U.C. at 467. Accordingly, the Commission

should decline to answer the Factual Question or determine that the petition was improper and the parties should be afforded the opportunity at hearing to present evidence regarding the material facts, which are disputed.

B. The Commission Should Answer The Procedural Questions Raised By Verizon To Clearly Define The Scope Of This Proceeding

In its Petition for Review, Verizon raises three Material Questions that all challenge the procedure and litigation schedule outlined by the ALJ in the Scheduling Order dated March 22, 2016. The three Material Questions are as follows:

Material Question #1: Whether the procedure outlined in the ALJ's March 22, 2016 order violates *Lyness v. State Board of Medicine*[?]

Material Question #2: Whether the procedure outlined in the ALJ's March 22, 2016 order violates 66 Pa. C.S. § 331(a)?

[. . .]

Material Question #4: Whether the Commission should dismiss the petition without prejudice to BIE carrying out its normal investigatory function and/or CWA filing a formal complaint within its standing?

(Pet. for Review, at 2-3).

Each of these Procedural Questions challenges the Scheduling Order on similar procedural bases. Accordingly, I&E will address them concurrently.

The Public Utility Code and Commission regulations do not expressly allow for a situation, such as the instant matter, where a private party formally petitions the Commission to institute an investigation that is prosecutory in nature. In Lyness v. State Board of Medicine, 605 A.2d 1204 (Pa. 1992), the Pennsylvania Supreme Court ruled

that it is a violation of due process for an agency decision-maker to initiate a prosecution and subsequently decide the merits of a case. A Commission ruling that grants CWA's Petition for Investigation, followed by a subsequent Commission order that rules on the merits of the investigation and imposes relief in the form of civil penalties, may impermissibly commingle advisory and prosecutorial functions. The "mere possibility of bias under Pennsylvania law is sufficient to raise the red flag of protection offered by the procedural guaranty of due process." Lyness, 605 A.2d at 1208.

The current procedural schedule set forth in this matter anticipates a standard litigation schedule, including the potential for the scheduling of public input hearings, pre-served written consumer and expert testimony, rebuttal testimony, surrebuttal testimony, hearings and briefs. See Scheduling Order, March 22, 2016, at 3. Further, the presiding ALJ indicated that "to the extent that there was substantial record evidence demonstrating a violation of the Public Utility Code or a Commission regulation or Order, the appropriate remedy would be imposed consistent with the authority of the Office of Administrative Law Judge, including, but not limited to, the imposition of civil penalties" *Id.* It appears that the ALJ, in establishing a litigation schedule in this matter, is treating CWA's Petition for Investigation as if CWA has filed a formal complaint. This treatment of the Petition for Investigation as a complaint, however, was not memorialized in any order clearly delineating whether the Petition for Investigation proceedings would continue as if the matter were a formal investigation or as a formal complaint.

The Commission should answer Verizon's Procedural Questions by clarifying the scope of the proceeding now. Such clarification would prevent any procedural defect affecting Verizon's due process rights.

I&E respectfully submits that CWA's Petition for Investigation is best suited to be a complaint proceeding to protect the Commission by avoiding any potential commingling of prosecutorial and advisory duties pursuant to Lyness v. State Board of Medicine. This may be achieved using one of the following two avenues:

The Commission may treat the Petition for Investigation as a complaint proceeding and allow the current litigation to proceed as would a formal complaint. Pursuant to the Commission's regulations, the Commission or presiding officer may liberally construe pleadings "to secure the just speedy and inexpensive determination of every action or proceeding" and may "disregard an error or defect of procedure which does not affect the substantive rights of the parties." 52 Pa. Code § 1.2(a). By issuing an order declaring that the Petition for Investigation shall be treated as a formal complaint, the Commission will avoid any additional costs, delay and Lyness concerns while providing significant clarity as to Verizon's Procedural Questions.

Alternatively, the Commission may dismiss the Petition for Investigation without prejudice and with leave to CWA to file the matter as a formal complaint. Pursuant to the Commission's regulations, any intervenors who choose to do so could join CWA's complaint in order to properly litigate this matter and protect their substantial interests. 52 Pa. Code § 5.23.

A third but perhaps less desirable alternative would be for the Commission to assign this matter to I&E for I&E to conduct its own investigation and proceed as I&E sees fit. However, I&E's investigation would be between I&E and Verizon and any investigative materials would not be disclosed to the public.² Given the strong interests of CWA and the various intervenors, and their apparent desire to bring public awareness to the issues addressed in CWA's Petition for Investigation, assigning this matter to I&E would not serve the interests of all parties and, therefore, is not recommended.

² See 65 P.S. § 67.708(b)(17) (The Right To Know Law exempts from disclosure records of an agency relating to a noncriminal investigation including complaints submitted to an agency, investigative materials, notes, correspondence and reports, a record that includes the identity of a confidential source, a record that includes information made confidential by law, and a record that would reveal the institution, progress or result of an agency investigation).

V. **CONCLUSION**

For all of the above listed reasons, the Bureau of Investigation and Enforcement respectfully requests that the Commission decline to answer Verizon's Factual Question and answer the Procedural Questions to clarify that the scope of the instant proceeding pertains to a formal complaint.

Respectfully submitted,



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Date: April 8, 2016