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April 8, 2016

Rosemary Chiavetta, Secretary
Pa. 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 filing please find the Brief of Communications Workers of America in Opposition to Petition for Interlocutory Review in the above-referenced proceeding. The document was served on all parties as shown on the attached Certificate of Service.

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

Sincerely,


Enclosure

cc: ALJ Joel Cheskis
Per certificate of service

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
COMMUNICATIONS WORKERS OF AMERICA
IN OPPOSITION TO PETITION FOR INTERLOCUTORY REVIEW

In accordance with 52 Pa. Code § 5.302(b), the Communications Workers of America ("CWA") hereby files this Brief in opposition to the Petition for Interlocutory Review and Answer to a Material Question filed by Verizon Pennsylvania LLC ("Verizon" or "VZPA") on March 29, 2016 (cited herein as "Verizon Petition"). As explained below, the Administrative Law Judge's proposed procedure for conducting this proceeding is proper and fully consistent with the law. Verizon's various requests for Commission action, therefore, should be denied.

1. Background and Procedural History

On October 21, 2015, CWA filed a Petition asking the Commission to open a formal, on-the-record investigation "into the safety, adequacy, and reasonableness of the facilities and service of Verizon." CWA Petition, p. 1. CWA provided numerous examples, documented by photographs, of Verizon's neglect of facilities in portions of its network not served by fiber-to-the-premises ("FTTP"); that is, customers still receiving service over copper lines. CWA's Petition avers that Verizon is failing to adequately and

safely maintain its facilities in non-FTTP areas, resulting in broken poles, cables sagging below minimum clearances required by the National Electrical Safety Code, ungrounded cables, facilities that are not properly attached to poles, and other conditions that jeopardize the safety of Verizon's employees and the general public. CWA Petition ¶¶ 15-18.

CWA, therefore, asked the Commission to "conduct a comprehensive, state-wide investigation into the adequacy, safety, efficiency, and reasonableness of VZPA's service and facilities in the non-[FTTP] portions of Pennsylvania." CWA Petition ¶ 24. CWA suggested that the investigation include "(i) an in-depth in-person examination and audit of VZPA records and physical plant throughout VZPA's [non-FTTP] service area ...; (ii) the adoption of detailed findings of fact; (iii) an order that VZPA take specific, detailed remedial actions; and (iv) the imposition of substantial civil penalties on VZPA for its repeated and purposeful failure to comply with the Public Utility Code, Commission regulations, and standard industry practices for protecting the safety of the public and utility employees." Id.

The Office of Consumer Advocate, Office of Small Business Advocate, and Bureau of Investigation and Enforcement ("BIE") intervened in this proceeding, as of right, on November 3, 2015, November 11, 2015, and February 25, 2016, respectively.

Verizon filed its Answer to CWA's Petition on November 10, 2015. In its answer, Verizon did not dispute the accuracy of the photographs in the CWA Petition, but Verizon did question whether those photographs were representative of the overall condition of Verizon's non-FTTP network.

On November 10, 2015, Full Service Network, LP, filed an Answer in Support of CWA's Petition, alleging additional failures by Verizon to provide safe and adequate service. Verizon responded to Full Service Network's Answer on December 1, 2015.

According to the Commission's docket entries, on February 11, 2016, this matter was reassigned from the Law Bureau to the Office of Administrative Law Judge ("OALJ") "for hearing." No order or secretarial letter was issued to indicate the nature or subject matter of the hearings to be held.

A prehearing conference in this matter was held on March 18, 2016, before Administrative Law Judge Joel Cheskis. During the prehearing conference, and subsequently in a Scheduling Order served on March 23, 2016, ALJ Cheskis outlined his understanding of the process that would be followed to conduct hearings in this matter, as well as the subject matter of those hearings, as follows:

I determined that CWA and intervenors in support of CWA would first be given the opportunity to present evidence regarding all relevant issues raised in CWA's Petition. ... Subsequently, Verizon and intervenors in support of Verizon would have the opportunity to file rebuttal testimony in response to the evidence presented, which would be followed by the standard surrebuttal, hearing and briefing process.

I further explained 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 consistent with the Commission's Statement of Policy regarding civil penalties. 52 Pa. Code § 69.1201. An Initial Decision would be issued that would be subject to Exceptions and Commission disposition. To the extent that the Commission, or I&E, determined that there was any need for further action based on the record of this proceeding, or any other reason, such a determination would be made independently and consistent with appropriate authority and jurisdiction as set forth in Commission precedent as is the case for all proceedings before the Commission.

Scheduling Order p. 3.

On March 29, 2016, Verizon filed a Petition for Interlocutory Review and Answer to a Material Question. In its petition, Verizon argues that the procedure discussed in the Scheduling Order violates the procedures required by *Lyness v. State Board of Medicine*, 529 Pa. 535, 605 A.2d, 1204 (1992) ("*Lyness*"); 66 Pa. C.S. § 308.2; and 66 Pa. C.S. § 331(a). Verizon also asserts that the Commission should immediately dismiss CWA's Petition.

2. Requirements for a Commission Investigation

The Public Utility Code gives the Commission broad authority to conduct investigations, monitor the safety and adequacy of utility service and facilities, and order corrective action. Specifically, Section 331(a) of the Code authorizes the Commission to "investigate and examine the condition and management of any public utility." 66 Pa. C.S. § 331(a). That provision also requires the Commission to hold hearings before any order is issued.

Section 1505 of the Code, 66 Pa. C.S. § 1505, gives the Commission authority, "after reasonable notice and hearing," to order a utility to make any "repairs, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accommodation, and convenience of the public." The Code also authorizes the Commission to impose civil penalties. 66 Pa. C.S. § 3301.

Finally, Section 308.2 of the Code requires a separation of functions within the Commission. Specifically, the law requires that a Commission employee "engaged in a prosecutory function may not, in that matter or a factually related matter, provide advice or assistance to a Commission employee performing an advisory function as to that matter." 66 Pa. C.S. § 308.2(b).

As Verizon notes, the Pennsylvania Supreme Court's decision in *Lyness* constrains certain actions of regulatory agencies, including the Commission. Importantly, though, *Lyness* does not prevent regulatory agencies from doing their job. Rather, the Court recognized that some practical precautions could allow agencies to perform their statutory responsibilities while providing due process to the parties regulated by the agencies.

Specifically, the Court held as follows:

What our Constitution requires, however, is that if more than one function is reposed in a single administrative entity, walls of division be constructed which eliminate the threat or appearance of bias. As then-Justice Nix stated so percipiently in concurrence in *American Bankers*, a "mere tangential involvement" of an adjudicator in the decision to initiate [a] proceeding is not enough to raise the red flag of procedural due process. ... Our constitutional notion of due process does not require a *tabula rasa*. ... However, where the very entity or individuals involved in the decision to prosecute are "significantly involved" in the adjudicatory phase of the proceedings, a violation of due process occurs.

529 Pa. at 546-47, 605 A.2d at 1209-10 (emphasis added; citations omitted).

The Commission is well aware of the *Lyness* requirements and governs itself accordingly. Indeed, it appears that Section 308.2 of the Code (cited above) was enacted in 2008 precisely to address the potential commingling of prosecutory and adjudicatory functions prohibited by *Lyness*.

Lyness, however, did not eliminate the Commission's authority to conduct formal investigations. Rather, the protection of parties' due process rights only requires that the Commissioners not make initial findings of fact (similar to a finding of probable cause in the criminal context) or otherwise prejudge the matter prior to instituting an on-the-record proceeding in which parties' due process rights are protected.

For example, several times a year the Commission initiates formal, on-the-record investigations relating to railroad safety matters. In such proceedings, the Commission tends to rely on requests filed by local government officials, the Pennsylvania Department of Transportation, or other concerned members of the public. Relying on that type of inquiry, and perhaps an informal meeting or site visit by a Commission employee, the Commission will initiate a formal investigation to collect evidence and make formal findings and orders of remedial action. See, e.g., *Investigation upon the Commission's own motion to determine the condition, disposition and responsibility for maintenance of the existing railroad bridge structure*, Docket No. I-2014-2405193 (Mar. 6, 2014) ("By electronic mail received May 29, 2012, Pennsylvania Department of Transportation notified the Commission of a safety concern ..."); *Investigation upon the Commission's own motion to evaluate the safety of the traveling public*, Docket No. I-2015-2499361 (Sept. 17, 2015) ("The Commission has recently had inquiries concerning the safety of this crossing for several modes of transportation."); *Investigation upon the Commission's own motion to determine the condition and disposition of the existing structure*, Docket No. I-2011-2242471 (June 10, 2011) ("By letter dated January 24, 2011 ..., Marion Township requested that a meeting be held to discuss the current condition and disposition of the bridge ...").

In each of these types of cases, the Commission takes action to initiate a formal, on-the-record investigation that affects the property rights of entities it regulates. Yet none of those cases runs afoul of *Lyness*. Indeed, the Court in *Lyness* specifically recognized that a regulatory agency must continue to regulate, especially when it involves public safety concerns. As quoted above, the Court came to the common-sense

conclusion that a "mere tangential involvement" of an agency "in the decision to initiate [a] proceeding is not enough to raise the red flag of procedural due process. ... Our constitutional notion of due process does not require a *tabula rasa*." 529 Pa. at 546, 605 A.2d at 1209.

3. Applying *Lyness* to this case

As CWA described above, it is lawful, and perfectly reasonable, for the Commission to rely on reports of serious safety concerns and conclude that the matter should be investigated through a formal, on-the-record proceeding. This does not require the Commission to make any findings, initial conclusions, or other pre-determinations about the merits of the allegation (because such findings or conclusions might run afoul of the due process protections set forth in *Lyness*). Rather, these are exactly the types of determinations that a regulatory agency must make every day: someone says there is a problem; let's investigate and find out all the facts. The Commission must be able to respond to reports of potential safety concerns by saying that more information should be collected through a formal proceeding in which the rights of all those concerned are protected through due process of law.

That is exactly what CWA has requested in this case. CWA has made a report to the Commission (through its petition) showing serious safety concerns in the way Verizon maintains its non-FTTP facilities. Verizon has acknowledged that the photographs in CWA's petition are accurate, but argues that they are not representative of the condition of Verizon's non-FTTP network statewide. That should be more than enough information for the Commission to launch an investigation to determine the extent of these problems, the reasons they occur, and whether any corrective action or

penalties should be ordered. This is no different than what the Commission does routinely in railroad safety matters (among others) where a third party reports a credible safety concern and the Commission initiates an appropriate investigation.¹

Importantly, and contrary to Verizon's assertion on page 2 of its Petition, ALJ Cheskis did not "initiate[] a prosecutorial investigation." Rather, this matter was assigned to the OALJ "for hearings." The only logical conclusion is that the hearings are to be the Commission's investigation into the serious safety allegations contained in CWA's Petition. The ALJ did not initiate the investigation. That occurred when the matter was assigned to the OALJ.

As a result, the Commission should deny Verizon's Petition. The ALJ's Scheduling Order sets out an appropriate scope and procedure for this proceeding. That order is fully compliant with the law and it is consistent with standard Commission practice. There is no reason for the Commission to review the Scheduling Order or to change any aspect of it.

4. Answers to Verizon's Material Questions

In the interests of completeness, CWA provides the following specific responses to the four "material questions" posed by Verizon.

¹ The New York Public Service Commission recently instituted a similar investigation of the reliability of the non-FITP network of Verizon's sister company in that state. *Proceeding on Motion of the Commission to Consider the Adequacy of Verizon New York Inc.'s Retail Service Quality Processes and Programs*, Case 16-C-0122, Order Initiating Proceeding to Review Verizon New York Inc.'s Service Quality (Mar. 21, 2016), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={1A79C04D-3D4D-4EFE-89CC-06DDF732680A}> .

Material Question #1: Whether the procedure outlined in the ALJ's March 22, 2016, order violates *Lyness*.

CWA's Suggested Answer: No. As CWA explained above, the procedure outlined by ALJ Cheskis does not violate *Lyness* and does not impinge in any way on Verizon's due process rights. Neither the ALJ nor the Commission has made any type of "probable cause" finding or other pre-determination about the merits of CWA's Petition.

There is nothing in the process described by the ALJ that affects Verizon's right to a fair hearing by an impartial tribunal. As described in the Scheduling Order, the ALJ will preside over the hearings, oversee the development of the evidentiary record, and prepare an initial decision. If any party takes exception to any aspect of the initial decision, then the Commission will be the ultimate decision-maker in this matter. Throughout the process, CWA has no doubt that the Commission staff (including BIE and any other staff who may be assigned to assist in the prosecution of this matter) will comply with the bifurcation requirements of 66 Pa. C.S. § 308.2(b), as is the Commission's standard practice.

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

CWA's Suggested Answer: No. Section 331(a) of the Code, 66 Pa. C.S. § 331(a), authorizes the Commission to conduct investigations either with or without hearings (that is, either formal or informal investigations). If the investigation will result in an order (directing a utility to take correction action, for example), then the Commission must give affected parties the right to a hearing.

The Scheduling Order fully complies with Section 331(a). The procedure described by the ALJ includes evidentiary hearings, as well as the possibility of public

input hearings, during which the due process rights of Verizon and all other parties will be protected. There is absolutely nothing in the suggested procedure that violates Section 331(a).

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.

CWA's Suggested Answer: No. Verizon's request to dismiss CWA's Petition is improperly presented through a petition for interlocutory review. The ALJ has not been asked to rule on a request to dismiss the petition (and, obviously, the ALJ has not ruled on any such request). Verizon has not presented grounds for dismissing the case and has not followed the appropriate procedure for doing so.² Consequently, Verizon's request to dismiss CWA's Petition is improper and should not be considered by the Commission.

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

CWA's Suggested Answer: No. Similar to Material Question #3, Verizon's request to dismiss CWA's Petition without prejudice also is improperly presented through a petition for interlocutory review. Verizon has not filed an appropriate and timely motion seeking such a dismissal, and the ALJ has not ruled on such a request (because none was made). The Commission, therefore, cannot consider this request through a petition for interlocutory review.

² The Commission's regulations provide two separate procedures for dismissing a petition. A party may file preliminary objections, limited to certain grounds, that seek the dismissal of the case. 52 Pa. Code § 5.101. A party also may request judgment on the pleadings under 52 Pa. Code § 5.102. Verizon did not file preliminary objections (and the time for doing so under 52 Pa. Code § 5.101(d) has long-since passed). Verizon also has not filed a motion for judgment on the pleadings, even though Verizon filed its Answer to CWA's petition almost five months ago.

5. Conclusion

For the reasons set forth above, CWA respectfully requests the Commission to deny Verizon's Petition and refuse to answer the so-called "material questions" contained therein. The ALJ's Scheduling Order fully complies with the law and would not affect Verizon's due process rights in any manner. Verizon's first two "material questions," therefore, should be answered in the negative. Verizon's remaining two "material questions" are not material questions at all and are not properly before the Commission. The Commission, therefore, should deny Verizon's Petition and refuse to grant interlocutory review. In the alternative, the Commission can simply allow the 30-day review period to expire with no action which has the effect of deeming the petition to be denied. 52 Pa. Code § 5.303(b).³

Respectfully submitted,



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Dated: April 8, 2016

³ Verizon's Petition was filed on March 29, 2016. If the Commission does not rule by April 28, 2016, therefore, the Petition will be deemed to be denied.

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served this day a true copy of the foregoing document 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).

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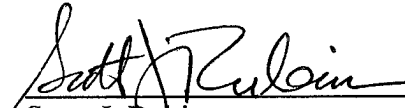
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