

COMMONWEALTH OF PENNSYLVANIA



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April 8, 2016

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17101

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 is the Office of Consumer Advocate's Brief in Response to the Petition for Interlocutory Review and Answer to Material Question of Verizon Pennsylvania, LLC, in the above-referenced proceeding.

Copies have been served on the parties as indicated on the enclosed Certificate of Service.

Respectfully Submitted,

/s/ Lauren M. Burge
Lauren M. Burge
Assistant Consumer Advocate
PA Attorney I.D. 311570

Enclosure

cc: Honorable Joel H. Cheskis, ALJ
Certificate of Service
*219351

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**OFFICE OF CONSUMER ADVOCATE’S BRIEF
IN RESPONSE TO THE PETITION FOR
INTERLOCUTORY REVIEW AND
ANSWER TO MATERIAL QUESTION
OF VERIZON PENNSYLVANIA, LLC**

Pursuant to 52 Pa. Code Section 5.302, the Office of Consumer Advocate (OCA) submits this brief in response to Verizon Pennsylvania, LLC’s Petition for Interlocutory Commission Review and Answer to Material Question, and submits the following:

I. INTRODUCTION

On October 21, 2015, the Communications Workers of America (CWA) petitioned the Pennsylvania Public Utility Commission (Commission) to open a formal investigation into the state of Verizon Pennsylvania, LLC’s (Verizon) physical plant.¹ CWA avers that Verizon has allowed its physical plant to fall into a state of disrepair such that it poses a safety hazard to employees and the public, and fails to provide “adequate, efficient, safe, and reasonable service and facilities” as required by Section 1501 of the Public Utility Code. 66 Pa. C.S. § 1501. CWA alleges that these conditions exist in areas where Verizon has not deployed its fiber-to-the-home facilities, and that the poor condition of Verizon’s plant affects the quality of landline service

¹ As stated in CWA’s Petition, the “physical plant” includes “poles, wires, cables, and conduits” (Petition at 1) that are part of Verizon’s “traditional copper network for telephone and Internet access service.” Petition at 19. This includes areas where Verizon “has not deployed its fiber-to-the-home facilities knows as FiOS.” Petition at 2.

provided to customers and places utility workers in danger. CWA's petition requests that the Commission inspect both the physical plant as well as Verizon's records, and that the Commission take action to correct the deficiencies in Verizon's plant.

The OCA filed a Notice of Intervention and Public Statement in this proceeding on November 3, 2015. On November 10, 2015, the Office of Small Business Advocate (OSBA) filed a Notice of Appearance, Notice of Intervention and Public Statement. Also on November 10, 2015, Verizon and Full Service Network (FSN) filed Answers to CWA's Petition. Verizon subsequently filed a Reply to New Matter in response to FSN's Answer. On February 24, 2016, the Bureau of Investigation and Enforcement (I&E) filed a Notice of Intervention.

A Prehearing Conference was held on March 18, 2016, at which time Administrative Law Judge Joel H. Cheskis outlined the procedure that would be followed in this case. Verizon indicated that it would file a Petition for Interlocutory Review regarding the scope and procedure that ALJ Cheskis proposed. ALJ Cheskis issued a Scheduling Order on March 22, 2016 memorializing the discussions held at the Prehearing Conference, and Verizon filed its Motion for Interlocutory Review on March 29, 2016. A Further Prehearing Conference has been scheduled for May 26, 2016.

II. LEGAL STANDARD

Pursuant to Commission regulations, a party may timely petition the Commission for interlocutory review and answer to a material question, providing "the question to be answered and the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding." 52 Pa. Code § 5.302(a). The regulations also permit other parties, within 10 days of service of the petition, to submit briefs to the Commission in

support of, or opposing, the petition. 52 Pa. Code § 5.302(b). Within 30 days of receiving the petition, the Commission will take one of four actions:

- (1) Continue, revoke or grant a stay of proceedings if necessary to protect the substantial rights of the parties.
- (2) Determine that the petition was improper and return the matter to the presiding officer.
- (3) Decline to answer the question.
- (4) Answer the question.

52 Pa. Code § 5.303(a). The Commission has stated that, with respect to such petitions, its “principal concern is whether interlocutory review is necessary in order to prevent substantial prejudice. In this vein, we must consider whether the alleged error, and any prejudice flowing from that issue, could not be satisfactorily cured during the normal Commission review process.” *Petition of Energy Cooperative Association of Pa. to Enforce Settlement Order*, 2003 Pa. PUC LEXIS 43 at *4 (Pa. PUC 2003).

III. ARGUMENT

Material Question #1: Whether the procedure outlined in the ALJ’s March 22, 2016 Order violates *Lyness v. State Board of Medicine*, 529 Pa. 535, 605 A.2d 1204 (1992) and 66 Pa. C.S. § 308.2?

Suggested Answer: No.

In *Lyness v. State Board of Medicine*, the Pennsylvania Supreme Court held that “commingling prosecutorial and adjudicatory functions” within an agency violates due process when it creates “a mere possibility of bias.” 529 Pa. 535, 542, 544 (1992). However, the Court noted that:

it would be both unrealistic and counterproductive to insist that administrative agencies be forbidden from handling both prosecutorial and adjudicatory functions, where such roles are parceled out and divided among distinct departments or boards . . . if more than one function is reposed in a single administrative entity, walls of division must be constructed which eliminate the threat or appearance of bias.

Lyness at 546.

The procedure proposed by ALJ Cheskis in the March 22, 2016 Order does not violate *Lyness*. The proposed procedure provides all parties with the opportunity to present evidence on the issues raised in CWA's Petition through public input hearings, pre-served written consumer testimony, and/or pre-served expert testimony, followed by rebuttal, surrebuttal, evidentiary hearings, and briefs. March 22, 2016 Order at 3. The ALJ would then issue an Initial Decision, which would include, if necessary, "the appropriate remedy. . . consistent with the authority of the Office of Administrative Law Judge, including, but not limited to, the imposition of civil penalties." *Id.* The Initial Decision would be subject to Exceptions and Commission disposition. *Id.* I&E or the Commission would have the option to take any further action deemed appropriate based on the record developed in this proceeding.² This procedure adequately separates agency functions because the ALJ acts as the finder of fact, while the ultimate adjudicatory authority rests with the Commission, which can independently accept, deny, or modify the ALJ's Initial Decision. As such, adequate "walls of division" exist which remove any appearance of bias.

Similarly, the proposed procedure does not violate 66 Pa. C.S. Section 308.2(b). Section 308.2(b) states 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." Again, the proposed procedure requires the ALJ to act as a finder of fact, not a prosecutor, and the Commission has the ultimate adjudicatory authority. There is no commingling of functions in the proposed procedure, and as such there is no violation of 66 Pa. C.S. § 308.2(b).

² The OCA supports the general procedures set out by the ALJ as to how this proceeding will move forward, with the current understanding that such a process will result in a final order being issued by the Commission as to the merits of CWA's allegations. To the extent that the March 22, 2016 Order provides that either the Commission or I&E may decide to take "further action" as to this matter, providing that such "further action" is taken as a separate and distinct proceeding from the current docket, the OCA has no objection to that part of the ALJ's Order.

Further, in response to the *Lyness* decision, the Commission issued an Order modifying its own Practice Manual to comply with the requirements as set out by the Supreme Court. *Delegation of Prosecutory Authority to Bureaus with Enforcement Responsibilities, Order*, Docket No. M-00940593, 1994 Pa. PUC LEXIS 148 (Sept. 2, 1994). Importantly, in that Order the Commission provided that such modifications, and indeed the *Lyness* decision itself, only applies in matters *initiated* by the Commission. In relevant part, the Order provides:

It should be noted that the above procedures apply only to *agency-initiated proceedings*. For public utility-initiated tariff filings, rate filings, and other types of petitions and applications for Commission approval, our existing procedures will remain the same.

Id. (emphasis added).³ As this matter was initiated by the filing of a Petition by CWA, and not initiated by the Commission, *Lyness* does not preclude nor even have applicability to this proceeding or to the procedures outlined by the ALJ. Accordingly, Verizon’s arguments as to the applicability of *Lyness* to the matter at hand are misplaced and must be disregarded.

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

Suggested Answer: No. The Commission has broad authority to initiate investigations, particularly when public safety is at issue.

Verizon argues that Section 331(a) only allows the Commission to open an investigation “on its own motion,” and does not allow parties such as CWA to “act as a private prosecutor.”
Petition for Interlocutory Review at 2.

First, as discussed above and based on the relief sought in its Petition, CWA is not seeking to “act as a private prosecutor” in this case. Through the CWA Petition, Verizon employees have brought to the Commission’s attention Verizon’s potential violation of Section

³ See also *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Final Procedural Order, Docket No. M-2008-2071852 (Aug. 11, 2011). This Final Procedural Order modifies the *Delegation of Prosecutory Authority Order* to the extent that I&E replaced the Office of Trial Staff (OTS), but does not address *Lyness* issues.

1501, Commission regulations governing quality of service, and related Commission orders including but not limited to the Commission’s conditional waiver of certain regulations in certain portions of Verizon’s service territory.⁴

Section 331(a) does not limit the Commission to opening an investigation “on its own motion” as Verizon argues. Section 331(a) states that “the commission may, on its own motion *and whenever it may be necessary in the performance of its duties*, investigate and examine the condition and management of any public utility. . .” 66 Pa. C.S. § 331(a) (emphasis added). This provision, as well as Section 501 (66 Pa. C.S. § 501), give the Commission broad authority to open an investigation whenever necessary to carry out its duty to enforce the Public Utility Code.

Additionally, there is no limitation on how an issue may be brought to the Commission’s attention; in particular, the allegations in this case include serious public safety concerns that, if proven, must be addressed. Verizon is attempting to elevate form over substance by arguing that this proceeding should have been initiated by CWA filing a complaint, or by I&E conducting an informal investigation. These suggested requirements are overly formalistic and do not have a basis in law. Section 331(a) and Section 501 give the Commission authority regardless of how the allegations came to the Commission’s attention. For these reasons, the OCA submits that there is not a violation of 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?

Suggested Answer: No.

⁴ See *Joint Petition of Verizon Pennsylvania LLC and Verizon North LLC for Competitive Classification of All Retail Services in Certain Geographic Areas and for a Waiver of Regulations for Competitive Services*, Final Implementation Opinion and Order, Docket No. P-2014-2446303, -2446304 (Aug. 20, 2015).

CWA's Petition has alleged potentially serious concerns regarding public safety and the safety of working conditions for utility workers, as well as quality of service issues. Verizon has attempted to rebut these concerns in its Answer and Prehearing Memorandum. If Verizon believed that there was insufficient evidence to support CWA's Petition, it could have filed an appropriate pleading seeking dismissal of the Petition. Verizon has not filed any such pleading despite the fact that its Answer was filed in November, nearly five months ago. It is not appropriate for Verizon to now request that the CWA Petition be dismissed through its Petition for Interlocutory Review, rather than filing the appropriate pleadings at the appropriate time to be decided by the ALJ.

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?

Suggested Answer: No.

The Commission should not dismiss the Petition at this time. As explained previously, this proceeding has been sent to the ALJ for a recommendation. The CWA Petition alleges that the public safety and continuity of communications is at risk due to Verizon's network maintenance. Verizon's proposal to interpose an informal investigation by I&E and/or a formal complaint by CWA is neither necessary as a matter of due process, nor in the public interest. Additionally, if Verizon wished to have the Petition dismissed, it should have filed the appropriate pleadings as discussed above related to Material Question #3.

IV. CONCLUSION

WHEREFORE, the OCA respectfully requests that the Commission answer the material questions in the negative.

Respectfully Submitted,

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Dated: April 8, 2016
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CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Brief in Response to the Petition for Interlocutory Review and Answer to Material Question of Verizon Pennsylvania, LLC, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 8th day of April 2016.

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