**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

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| Public Meeting held April 21, 2016Commissioners Present:Gladys M. Brown, Chairman, StatementAndrew G. Place, Vice Chairman, Joint Statement, dissenting Pamela A. Witmer, Joint Statement, dissenting John F. Coleman, Jr. Robert F. Powelson |
| 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 |  P-2015-2509336 |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is a Petition for Interlocutory Review and Answer to a Material Question (Petition) filed by Verizon Pennsylvania LLC (Verizon or Company) on March 29, 2016, in the above-captioned proceeding. On April 8, 2016, the Communications Workers of America (CWA), Verizon, the Office of Consumer Advocate (OCA), and the Bureau of Investigation and Enforcement (I&E) filed briefs in response to the Petition.

**I. Introduction**

On October 21, 2015, pursuant to Section 5.41 of the Commission’s Regulations, 52 Pa. Code § 5.41, CWA filed a petition captioned 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 (CWA Petition). On March 29, 2016, following the initial prehearing conference held in this proceeding at which presiding Administrative Law Judge (ALJ) Joel H. Cheskis established the framework for the conduct of the proceeding, Verizon filed the Petition before us seeking interlocutory review of four material questions. In its Petition, Verizon requests interlocutory Commission review and answer to the following material questions regarding the process and standards to be applied by the ALJ:

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?

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

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?

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?

Petition at 2-3. Verizon requests that the Commission answer each of the material questions in the affirmative.

For the reasons more fully discussed below, we grant interlocutory review, answer the material questions in the negative, and return this matter to the Office of Administrative Law Judge (OALJ) for such proceedings as may be necessary.

**II. History of the Proceeding**

In the CWA Petition filed on October 21, 2015, CWA averred that it was the authorized bargaining unit for approximately 4,700 Verizon employees, and it was also a customer of Verizon at two offices, in Philadelphia and Bridgeville, Pennsylvania. Included in its membership, asserted CWA, were employees directly responsible for the operation and maintenance of Verizon’s physical facilities, including poles, wires, cables, and conduits. CWA Petition at 1.

As part of its obligations to its members, CWA alleged that it conducted an investigation into its members’ working conditions in Verizon’s territory where Verizon has not deployed FiOS, the trademarked name of Verizon’s fiber-optic service deployed to the home,[[1]](#footnote-1) focusing on outside plant readily observable from public areas. CWA avers that while it expected to find deferred maintenance for non-FiOS plant, instead it found what it described as “numerous instances throughout the Commonwealth of physical plant in an appalling state of disrepair that pose a safety hazard to utility employees and the public.” *Id.* at 2.

Based upon its finding, CWA petitioned the Commission to conduct an in-depth examination and audit of Verizon’s records and physical plant, particularly in areas not served by FiOS. CWA averred that the Commission had authority to conduct such an investigation, as well as impose civil penalties, under Sections 1501, 331(a), 501, 506, 1505(a), and 3301 of the Public Utility Code (Code), 66 Pa. C.S. §§ 1501, 331(a), 501, 506, 1505(a), and 3301.[[2]](#footnote-2) *Id.* at 3-4.

CWA further alleged that Verizon had “intentionally failed to maintain its physical plant in non-FiOS areas” for many years, jeopardizing “the safety of [Verizon]’s employees and the public.” CWA Petition at 4. Safety is impaired, claimed CWA, by requiring employees to work around, and the public to be around, damaged, bent, broken, or displaced poles; sagging or damaged cables; damaged cross-connect boxes and remote terminals; failed vegetation maintenance; and infestations of animals and insects in facilities in disrepair. CWA supported its allegations with pictures of facilities in public places that CWA claimed showed examples of Verizon’s “gross neglect of its physical plant in non-FiOS areas” resulting from Verizon’s “policies and practices that systematically neglect copper facilities and customers on the copper networks.” *Id.* at 5, 6-18. CWA also alleged that Verizon’s maintenance of non-FiOS property violates several provisions of the National Electrical Safety Code (NESC), the safety standard with which Verizon is obliged to comply following the waiver of Section 63.23 of the Commission’s Regulations, 52 Pa. Code § 63.23, the Commission granted in the *Reclassification Order*. *Id.* at 18-19.

CWA alleged that as a result of Verizon’s maintenance practices and policies for non-FiOS facilities, millions of residential, business, and wholesale customers who rely on Verizon’s traditional copper network are not receiving safe, adequate, and reasonable service, as evidenced by service outages and deficiencies complained of in numerous informal and formal complaints filed by customers with the Commission. Further, stated CWA, the complaints themselves are understated because of Verizon’s “warm transfer” procedure that diverts complaints to Verizon before they reach the Commission. These service deficiencies, as alleged by CWA, include falling poles, sagging cables, hanging terminals and poles, and customers’ inability to connect with emergency 911 providers, medical service providers, and other important calls. *Id.* at 19-23.

CWA sought the institution of a Commission investigation, in which it requested as follows:

 that the Commission conduct a comprehensive, state-wide investigation into the adequacy, safety, efficiency, and reasonableness of [Verizon’s] service and facilities in the non-FiOS portions of Pennsylvania [in which Verizon] would bear the burden of proof pursuant to 66 Pa. C. S. §§ 315(b) and 315(c) [and to also include] (i) an in-depth in-person examination and audit of [Verizon’s] records and physical plant throughout [its] service area, with a particular emphasis on areas where [Verizon] has not deployed FiOS; (ii) the adoption of detailed findings of fact; (iii) an order that [Verizon] take specific, detailed remedial actions; and (iv) the imposition of substantial civil penalties on [Verizon] 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.* at 23. CWA also sought a thorough Commission evaluation of other issues related to Verizon’s copper network, including analyses of finances over the past ten years, staffing, and policies and procedures, but not such that would delay an immediate investigation and repair of the safety violations earlier averred.

 As also averred in the CWA Petition, its members are subject to a Verizon “Code of Conduct,” which CWA alleged could be read to impose restrictions on employees’ abilities to share this Verizon-specific information outside the Company and also render such employees subject to disciplinary action by Verizon if additional information beyond that publicly-available information averred by CWA were disclosed by an employee. For this reason, CWA averred that the information it could share with the Commission regarding Verizon’s neglect in its Petition was limited. *Id.* at 4-5.

Accordingly, CWA requested that “the Commission order initiating the investigation should include an injunction prohibiting [Verizon] from enforcing its ‘Code of Conduct’ or taking any employment action against any employee who provides evidence to the Commission as part of this investigation[.]” *Id.* at 24. Such employees, alleged CWA, would include technicians and customer service representatives who are positioned to observe first-hand Verizon’s practices towards its copper infrastructure and the resultant impact on customer service. Although these employees would “welcome the opportunity to participate fully in a Commission investigation[,]” CWA claimed, they “fear reprisal and retaliation by [Verizon] for their participation in providing information to the Commission.” *Id.* at 25. According to CWA, the Commission has authority to issue such an injunction under Sections 332(f), 3316, and 3019(i) of the Code, 66 Pa. C.S. §§ 332(f), 3316, and 3019(i).[[3]](#footnote-3)

On November 10, 2015, Verizon filed an Answer (Verizon Answer) to CWA’s Petition pursuant to Section 5.61(e) of the Commission’s Regulations, which provides for answers to complaints, petitions, motions, and preliminary objections. In its Answer, Verizon contested CWA’s claims and the need for an investigation, accusing CWA of filing the CWA Petition “to use the Commission to pursue its parochial interests in ongoing labor negotiation” and asserting that the request for an investigation “would be a wasteful fishing expedition in search of headlines and publicity to be exploited in labor contract discussions.” Verizon Answer at 1-2. The Commission, contended Verizon, is fully capable of monitoring Verizon’s service quality in several different ways, including review of annual network maintenance expenditures, trouble service reports, and two years of monitoring following the *Reclassification Order*. None of the data reported supports the need for the investigation CWA seeks, concluded Verizon. *Id.* at 2-4.

Regarding the pictures included in the CWA Petition, Verizon responded that they represented “a tiny fraction” of Verizon’s facilities that could not be used to draw any conclusions. *Id.* at 4. Characterizing the factual averments drawn from the “selective pictures” from “undisclosed locations” as intentionally misleading, Verizon responded generally to the categories of allegations presented by CWA and, where locational identification was discernible, to the specific examples of facilities depicted in the CWA Petition’s pictures. *Id.* at 4-5. For example, in general, Verizon contended that with respect to CWA’s allegations of “double poles,” instances of occasional double poles out of the over 1.5 million poles used by Verizon was neither surprising nor did it present a safety concern since double poles are a normal part of the process of replacing old poles to which other utility lines are attached and from which the telecommunications line is removed last. As support, Verizon averred that the double poles depicted on page 7 of the CWA Petition demonstrated that third-party facilities were still attached. *Id*. at 5-8. Verizon presented similar responses with respect to CWA’s allegations of unsafe cables (out of Verizon’s more than 50 million cable miles) and terminals (out of over 1.5 million terminals), claiming, for example, that the unused cable and terminal depicted on page 10 of the CWA Petition was inactive and should have been removed by the technician. *Id.* at 8-13.

With respect to CWA’s allegations regarding customer complaints, Verizon responded that CWA presented “anecdotal information” that contradicted Verizon’s own trends that showed both formal and informal complaints, as well as complaints tracked by the Bureau of Consumer Services (BCS) as “justified,” as declining and significantly lower even adjusted for line loss, with formal complaints being at an “all-time low.” *Id.* at 14. Verizon disputed CWA’s calculation of informal complaints and CWA’s assertion that the number was understated due to the warm transfer process, which transfers, Verizon contended, are included in BCS’ informal complaint count. *Id*. at 14-15.

In responding to CWA’s request for injunctions to protect employees from Verizon’s taking retaliatory action against employees, Verizon contended that CWA provided no evidence to show adverse action had been taken or threatened. Citing Section 3019 of the Code, Verizon responded that by failing to comply with that statutory directive, CWA has not demonstrated the need for an injunction. Verizon also specifically challenged CWA’s averments that Verizon employees had cause to feel threatened by bringing safety issues to the Company, contending that as front-line employees, technicians play a critical function in alerting the Company to potential hazards, and that they are specifically trained and encouraged to do so. As support, Verizon noted that days before the CWA Petition was filed, CWA’s Vice President sent a letter to the Company noting locations where CWA members had safety concerns, which Verizon investigated and acted upon. Excerpted in Verizon’s response was a letter, attached to the Answer as an exhibit, from Verizon’s Vice President of Field Operations in which the Company assured CWA that no employee should fear retaliation for reporting safety issues to Verizon management, as required in the Code of Conduct, or “to the Environmental Health and Safety organization or anonymously through the Verizon ethics hotline.” *Id.* at 17. Averring that certain of the conditions portrayed by CWA may be the result of CWA members employed by Verizon not performing their work properly, Verizon concluded that “[i]t is not this Commission’s job to step in and take in safety reports from CWA-represented employees and dole them out to Verizon PA for a response.” *Id.* Because the Commission is “not a super board of directors[,]” the Commission should decline to entertain reports of alleged unsafe conditions unless the CWA can demonstrate the conditions were properly reported to Verizon and that the Company had an opportunity to respond. *Id.*

Also on November 10, 2015, Full Service Network, LLP (FSN), filed an Answer (FSN Answer) to the CWA Petition. FSN is a wholesale customer of Verizon that resells Verizon products at retail, often to customers in Verizon’s territory where alternatives to Verizon’s copper network are unavailable. FSN supported the CWA Petition, claiming it was “one of those customers who is not receiving safe, adequate, and reasonable service from Verizon due to Verizon’s neglect of the copper infrastructure.” FSN Answer at 1. As support, FSN cited to its own experiences involving service from Verizon in which the copper network appeared to be ill-maintained or completely removed. For example, FSN alleged that its own technicians have reported an increasing number of Verizon facilities, including copper demarcation points, terminals, and cables, in a state of disrepair. FSN also cited an example of a Verizon employee appearing at a FSN business customer’s location, without notice, bearing the message “that the ‘copper to the building is being removed[,]’ [t]he implicit message to FSN’s customers” being that unless the customer switched to FiOS, it would lose all service. *Id.* at 5-6. FSN not only supported CWA’s request that the Commission conduct a comprehensive investigation but also recommended expanding the investigation to determine whether Verizon treats wholesale customers on a nondiscriminatory and reasonable basis, whether Verizon affords itself or affiliates advantages in facility repair and maintenance, and whether Verizon has undertaken a de facto effort to abandon its copper network. FSN asserted it was willing to participate in a Commission investigation in any useful manner. *Id.* at 1-2. As FSN stated, Verizon’s failure to maintain its copper network adversely affects FSN’s ability to service its own customers, and to the extent Verizon is insufficiently funding maintenance of its copper network in order to focus on FiOS or wireless networks, Verizon is giving a corporate affiliate a preference. *Id.* at 7.

As legal authority for the investigation, FSN cited to Section 1501 under the Code as well as various sections of federal law, further addressed in Commission Regulations, which, as FSN contended, task the Commission with “the duty of ensuring that Verizon is offering its retail services for resale on nondiscriminatory and reasonable terms” that provide “‘adequate’ access to its services and facilities.” *Id.* at 3-4 (footnotes omitted) (emphasis in original). FSN also asserted that under the *Reclassification Order*, Verizon is required to comply with Chapter 11 of the Code prior to abandoning its copper network in Pennsylvania.

On December 1, 2015, pursuant to Section 5.63 of the Commission’s Regulations, 52 Pa. Code § 5.63, Verizon filed a Reply (Verizon Reply) to the FSN Answer, characterized by Verizon as new matter.[[4]](#footnote-4) Verizon accused FSN of “[t]aking a page from the CWA playbook” by attempting to use the Commission in order to “put its own regulatory pressure on Verizon PA.” Verizon Reply at 1. According to Verizon, by coming directly to the Commission rather than seeking good faith negotiation and coming to Verizon first, FSN violated its interconnection agreement with Verizon. Verizon also pointed to the Commission’s alternative dispute resolution process as another option for FSN rather than “demanding a full scale investigation of Verizon PA’s entire network.” *Id.* at 3. While responding that FSN misstated facts or presented facts too vague to answer, Verizon refuted the example cited by FSN involving Verizon’s removal of copper by explaining that it involved property being renovated for which the owner requested fiber and to which both fiber and copper are now available. *Id.* at 4. For reasons similar to those stated in its Answer to the CWA Petition, Verizon contended that the Commission should not entertain FSN’s attempt to use the Commission to exert regulatory pressure on Verizon and should dismiss the CWA Petition.

Notices of intervention were filed by I&E, the OCA, and the Office of Small Business Advocate (OSBA). The Commission also received a number of other communications in response to the CWA Petition. The following substantially similar letters in support of the CWA Petition were filed: (1) on October 23, 2015, on behalf of the AARP Pennsylvania; (2) on November 5, 2015, on behalf of the Boilermakers Local 13 in Philadelphia; and (3) on November 18, 2015, on behalf of Put People First! PA. On November 17, 2015, the director of Pennsylvania Working Families filed a letter in support of the CWA Petition to which was attached a multiple-paged spreadsheet identifying consumers who alleged service issues. Also on January 11, 2016, a letter from members of the House of Representatives was filed in support of the CWA Petition. Finally, a letter dated February 24, 2016, from Nicholas Fuller to a Commissioner was forwarded to the Secretary’s Bureau for filing.

By notice dated February 17, 2016, from the OALJ, an initial prehearing conference was scheduled for, and held on, March 18, 2016. In attendance were CWA, Verizon, the OCA, the OSBA, I&E, and FSN. Following the prehearing conference, the ALJ issued a March 22, 2016 Scheduling Order (Scheduling Order), in which the ALJ memorialized the on-the-record prehearing conference discussions regarding the procedures to be following in the proceeding and established a further prehearing conference for May 26, 2016. In the Scheduling Orderthe ALJ stated as follows:

During the Initial Prehearing Conference, various procedural matters were discussed. Most notably, extensive discussion was held regarding a procedural schedule for this case. After the parties stated their position regarding scheduling matters and the scope of the proceeding, 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. This could be done by either 1) holding public input hearings throughout Verizon’s service territory, 2) accepting pre-served written consumer testimony that is subject to discovery and timely motions and that would be admitted into the record with consumers testifying in person or telephonically and being subject to cross-examination, and/or 3) accepting pre-served expert testimony. 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.

In response to this discussion, Verizon indicated that it would file a Petition for Interlocutory Review regarding the scope and procedure proposed for this proceeding. As a result, this Scheduling Order is being issued to memorialize the discussion and determinations made during the Initial Prehearing Conference in anticipation of the Petition for Interlocutory Review to be filed by Verizon.

Scheduling Order at 3.

On March 29, 2016, Verizon filed this Petition. Briefs responsive to the Petition were filed on April 8, 2016, by Verizon, CWA, I&E, and the OCA.

**III. Discussion**

**A. Legal Standard**

As a preliminary matter, we note that any issue we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. [*Consolidated Rail Corp. v. Pa. PUC,* 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also see, generally,* [*University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

 Verizon filed its Petition pursuant to Section 5.302 of the Commission’s Regulations, 52 Pa. Code § 5.302. During the course of a proceeding and pursuant to the provisions of that section, a party may seek interlocutory review and answer to a material question that has arisen or is likely to arise. Pursuant to 52 Pa. Code § 5.303, upon the filing of a petition for interlocutory review and answer to a material question, the Commission has the authority to (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; or (4) answer the question.

The standards for interlocutory review are well-established. Section 5.302 requires that the petitioning party “state . . . the com­pelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.” The pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice – that is, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process. *Joint Application of Bell Atlantic Corp. and GTE Corp.,* Docket No. A-310200F0002 (Order entered June 10, 1999); *Pa. PUC v. Frontier Communications of Pa. Inc.,* Docket No. R-00984411 (Order entered February 11, 1999); *In* *re: Knights Limousine Service, Inc*., 59 Pa. P.U.C. 538 (1985).

The correctness of a presiding officer’s ruling is not determinative. *See* *Saucon Creek Assoc., Inc. v. Borough of Hellertown,* 69 Pa. P.U.C. 467 (1989) (*Saucon Creek*); *Berkery v. PECO Energy, LLC*, Docket No. C-2010-20170223 (Order entered January 14, 2011).[[5]](#footnote-5) Moreover, as a general rule, petitions for interlocutory review are not favored. The preferred approach is to permit proceedings to move forward in the normal course in order to provide all parties, the presiding officer, and the Commission, a full opportunity to develop the record, brief issues, and present arguments at each stage. *See* *In re: Application of Lyft, Inc.*, Docket No. P-2014-2433420 (Order entered August 8, 2014); *Pa. PUC Bureau of Investigation and Enforcement v. Snyder Bros., Inc.*, Docket No. C-2014-2402746 (Order entered July 24, 2014); *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Order entered October 23, 2009).

A showing that may support interlocutory Commission review can be accomplished by a petitioner’s proving that absent interlocutory review, some harm would result that would not be reparable through normal avenues, that the relief sought should be granted now rather than later, and that granting interlocutory review would prevent substantial prejudice or expedite the proceeding. *Pa. PUC v. Philadelphia Gas Works*, Docket Nos. P-2009-2097639 and R-2009-2139884 (Order entered April 15, 2010).

**B. The Parties’ Positions**

 **1. Verizon**

In its brief in support of its Petition, Verizon asserts that without Commission intervention, the ALJ “plans a full-blown investigation that improperly commingles prosecutorial and advisory functions and delegates prosecutorial authority to a private party” in violation of Verizon’s due process rights in administrative agency proceedings as clarified by the Supreme Court in *Lyness v. State Board of Medicine*, 529 Pa. 535, 605 A.2d 1204 (1992) (*Lyness*) and as set forth in Section 308.2 of the Code, 66 Pa. C.S. § 308.2.[[6]](#footnote-6) Verizon Brief at 1. Referring to the procedural discussions during the prehearing conference, the ALJ’s establishing “what he described as the ‘standard’ hearing and briefing process,” and the ALJ’s refusal “to rule out that the case would proceed as an investigation[,]” Verizon contends that the ALJ “proceeded as if he could both open and adjudicate a prosecutorial investigation and impose civil penalties.” *Id.* at 3. CWA’s initiating the proceeding through the filing of a petition is, as Verizon describes, tantamount to “appoint[ing] the CWA as a private prosecutor[.]” *Id.*

To support its contention that the ALJ impermissibly opened a prosecutorial investigation, Verizon argues that the ALJ’s reference to sanctions, fines, or other penalties as a possible result from this proceeding renders the matter prosecutorial. *Id.* at 5, citing *Delegation of Prosecutory Authority to Bureaus with Enforcement Responsibilities,* Docket No. M-00940593 (Order entered September 2, 1994), 1994 Pa. PUC LEXIS 148 (*Delegation Order*). In contrast, argues Verizon, the Commission is careful in non-prosecutorialinvestigations it opens to specify that while remedial action may be ordered, the case will not result in any type of fine, penalty, or sanction. *Id.* at 5‑6, citing *Gas Beyond the Mains Investigation*, Docket No. M-2008-2072850 (Order entered January 8, 2009) (*Gas Beyond the Mains*); *In re: Non-Prosecutory Investigation into Clarendon Water Company’s System*, Docket No. M-2008-2065551 (Order entered September 30, 2008), 2008 Pa. PUC LEXIS 586; *Investigation upon the Commission’s Own Motion to Determine the Condition and Disposition of the Existing Structure Carrying West Road (T-649) above the Grade of the Track of CSX Transportation, Inc., Operated thereon by Buffalo & Pittsburgh Railroad, Inc. in Marion Township, Beaver County*, Docket No. I-2011-2242471 (Order entered June 10, 2011).

The nature of prosecutorial investigations before the Commission was further addressed by the Commission, contends Verizon, in *Implementation of Act 129 of 2008, Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Final Procedural Order entered August 11, 2011) (*Reorganization Order*), following a revision to the Code that afforded the Commission greater organizational flexibility in carrying out its obligations. Verizon states that in that Order, the Commission delegated all prosecutorial functions to I&E. Quoting *Lyness*, Verizon argues that the structure proposed by the ALJ, including the plan “to take evidence on all of CWA’s assertions, to investigate and seek out customer complaints, to make a decision [on violations of the law], and then potentially to impose civil penalties, commingles prosecutorial and adjudicatory functions.” Verizon Brief at 7. The ALJ’s involvement is limited, contends Verizon. “The ALJ cannot make a recommendation to open a prosecutorial investigation because that authority has been delegated solely to I&E.” *Id.* at 8.

Now that the matter is before the Commission, however, Verizon argues that it should be disposed of without referral to the ALJ “in a way that would not run afoul of the restrictions in *Lyness*.” *Id.* at 9. This includes dismissing the CWA Petition without prejudice to I&E’s initiation of an investigation as addressed in Commission Regulations or determining that CWA’s allegations do not warrant an investigation because the Commission is adequately monitoring Verizon’s conduct pursuant to the *Reclassification Order.* The latter would not deny any party due process because the Commission may conclude that “the pleadings show no reasonable basis for concern” over Verizon’s service quality. Further, the Commission’s current monitoring of Verizon reports, both financial and service quality, is sufficient and shows no need for an investigation. *Id.* at 9-10. Alternatively, states Verizon, any party with standing may file a complaint. While suggesting that the Commission should find that CWA lacks standing were it to file a complaint, Verizon nonetheless defers this issue “unless and until CWA attempts to file a formal complaint.” *Id.* at 12.

If the Commission is unable to act on its Petition by May 26, 2016, Verizon contends that it should stay the proceedings to protect parties’ substantial rights. As Verizon concludes, there is the “prospect of a tremendous waste of resources as well as unjustified reputational damage to Verizon just by virtue of conducting an unsanctioned investigation.” *Id.*

 **2. CWA**

CWA acknowledges the constraints described in *Lyness* and codified in the Code at Section 308.2 but argues in response that *Lyness* recognized that “‘mere tangential involvement’ of an adjudicator in the decision to initiate [a] proceeding” does not implicate procedural due process concerns. CWA Brief at 5, quoting *Lyness*, 529 Pa. at 546, 605 A.2d at 1209 (emphasis added by CWA). According to CWA, the Commission may and does routinely institute investigations, such as investigations into railroad crossing safety triggered by requests from local governments, the Pennsylvania Department of Transportation, or other concerned members of the public, so long as it follows “practical precautions” such as not making initial findings of fact or otherwise prejudging the matter. *Id.*, citing, *e.g., Investigation upon the Commission’s Own Motion to Determine the Condition, Disposition, and Responsibility for Maintenance of the Existing Railroad Bridge Structure at the Public Grade-Separated Crossing (DOT 148 962 B) where SR 4035 (Yellow Dog Road) Crosses below Grade, the Abandoned Rail Line of the Buffalo and Pittsburgh Railroad, Inc. in West Franklin Township, Armstrong County*, Docket No. I-2014-2405193 (Order entered March 6, 2014).

CWA contends that the CWA Petition does not require the Commission to make any preliminary findings, conclusions, or other predeterminations on the merits more than any other report of potential safety issues that may be brought to the Commission’s attention. The inclusion of pictures in the CWA Petition, which CWA contends Verizon acknowledged as accurate but suggested are not representative of its system, is sufficient for the Commission to launch an investigation, argues CWA. To this end, CWA notes that the New York Public Service Commission recently launched an investigation into the current service quality of Verizon’s New York affiliate. *See id.* at 8 n.1, citing *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 (March 21, 2016). CWA also challenges Verizon’s characterization of the ALJ’s actions, arguing that “[t]he ALJ did not initiate the investigation. That occurred when the matter was assigned to the OALJ.” *Id.* at 8. These hearings, however, responds CWA, logically must be the Commission’s investigation into CWA’s safety allegations.

CWA does not challenge the order for presentation of evidence set out in ALJ’s Scheduling Order*,* in which CWA and parties in support are to present evidence first, followed by Verizon and intervenors in support filing rebuttal. According to CWA, the ALJ’s Order “sets out an appropriate scope and procedure” and “[t]here is no reason for the Commission to review the Scheduling Order or to change any aspect of it.” *Id.* Consequently, CWA proposes that the Commission answer each of Verizon’s four material questions in the negative.

As to the first two material questions, whether the procedure set forth by the ALJ in the Scheduling Order violates Verizon’s due process rights under *Lyness* and conflicts with Section 331(a) of the Code, CWA contends that the Commission has made no prejudgment on the merits of the CWA Petition and nothing in the ALJ’s proposed process affects Verizon’s right to an impartial proceeding in compliance with *Lyness* and Section 331(a). CWA Brief at 9. With respect to Verizon’s third and fourth material questions, whether the CWA Petition should be dismissed, CWA contends that Verizon’s Petition is improperly presented procedurally by presenting a request for a dismissal via interlocutory review. Verizon has presented no grounds supporting dismissal, contends CWA, and challenges seeking dismissal should have been presented through timely preliminary objections or a request for summary judgment on the pleadings in accordance with Chapter 5 of the Commission’s Regulations, both of which Verizon failed to do notwithstanding the filing of its Answer to the CWA Petition five months ago. *Id.* at 10.

**3. The OCA**

Like CWA, the OCA also contends that each material question raised by Verizon should be answered in the negative. The OCA argues that the procedure established by the ALJ for this proceeding does not violate *Lyness* because the ALJ is a fact finder, not a prosecutor, and the ultimate adjudicatory authority rests with the Commission. Relying on specific language in *Delegation Order*, the OCA contends that *Lyness* is applicable only to “matters ***initiated*** by the Commission. . . . 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.” OCA Brief at 5 (emphasis in original).

It is on this basis that the OCA also disputes Verizon’s claim raised in its second material question that the CWA is acting as a private investigator in this proceeding in violation of Section 331(a) of the Code. Through the CWA Petition, contends the OCA, CWA has brought the issue of Verizon’s potential service violations of Section 1501 of the Code to the Commission’s attention. In this respect, argues the OCA, there is no limitation on how issues are brought to the Commission’s attention. The serious public safety concerns raised in the CWA Petition must be proven, and if proven, addressed. The OCA argues Sections 331(a) and 501 of the Code provide the Commission authority to investigate a public utility by its own motion *and* whenever necessary to perform its duties. *Id*. at 5-6.

With respect to Verizon’s contentions in its third and fourth material questions that the CWA Petition should be dismissed, the OCA responds that CWA has raised serious concerns regarding the safety of the public and its utility workers that are now before an ALJ for a hearing and recommendation. If Verizon sought to challenge to the sufficiency of CWA’s allegations, the remedy was to file an appropriate pleading seeking its dismissal, not seek dismissal through interlocutory review. The OCA continues that Verizon’s arguments that the CWA Petition should be dismissed and replaced with a complaint or an I&E investigation elevate form over substance not required as a matter of due process or the public interest. *Id.* at 6-7.

**4. I&E**

In its response I&E restructures Verizon’s four material questions into two, one that it characterizes as a factual argument and three that it groups as a procedural question. I&E contends that Verizon’s third material question, whether the Commission should dismiss the CWA Petition because it has sufficient monitoring in place and the data shows no safety concerns, presents a factual issue that both fails to meet the standard for interlocutory review and requests impermissible relief upon the existence of disputed material facts. According to I&E, Verizon’s Petition raises no extraordinary circumstances or compelling reasons justifying interlocutory review; nor is interlocutory review necessary to prevent substantial prejudice that cannot be satisfactorily cured in the Commission’s normal process. I&E Brief at 5, citing *Petition of West Penn Power Company*, 2010 WL 4687833 (Pa.P.U.C.); *Saucon Creek*. Moreover, contends I&E, in this material question Verizon “asks that the Commission prematurely rule on the merits of the Petition for Investigation and grant relief more suited to a dispository [sic] motion on the pleadings or for summary judgment.” *Id.*, citing 52 Pa. Code § 5.102. According to I&E, allegations in the CWA Petition of alleged safety and service violations, contrasted with Verizon’s response in its Petition that current reports show no reason for concern, place in dispute material facts that are not properly disposed of on interlocutory review but rather require a hearing. As I&E argues, a material 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.” *Id.*, citing *Saucon Creek*, 69 Pa. P.U.C. at 467.

In response to the category of questions that I&E characterized as procedural, I&E contends that the Commission should clearly define the scope of the proceeding. I&E argues that the Commission’s Regulations do not expressly allow a private party to petition the Commission to institute a prosecutorial investigation. Under *Lyness*, a Commission order that grants the CWA Petition by initiating an investigation that the Commission would ultimately adjudicate and possibly impose penalties under “may impermissibly commingle advisory and prosecutorial functions” by raising “‘the mere possibility of bias[.]’” *Id.* at 7, quoting *Lyness*, 605 A.2d at 1208. Reviewing the ALJ’s procedural schedule, I&E concludes that the ALJ treated the CWA Petition as a complaint but without clearly delineating whether it would proceed as a complaint or an investigation. Thus, the Commission has the options to clarify that the proceeding should be deemed a complaint and proceed accordingly, dismiss the petition without prejudice to CWA’s filing a complaint, or assign the matter to I&E to conduct its own investigation and proceed as is it sees fit. Because of the confidentiality of I&E’s informal investigations, I&E does not recommend the last option. *Id.* at 8-9.

 **C. Disposition**

It is Verizon’s characterizations of the ALJ’s procedural discussion of this proceeding that give rise to its due process claims, claims that if not resolved at the beginning of this matter may unduly raise substantial issues, even if unfounded, at the end. This is exemplified more so in the on-the-record discussions as they flowed during the prehearing conference than in the ALJ’s memorialization in the Scheduling Order of the conclusions he reached from those discussions*.* Most notably, in response to Verizon’s question whether the proceeding was being treated “more like a complaint, or is it an investigation, as far as the procedure and the standards[,]” the ALJ responded that “[i]t’s neither and it’s both. This is a petition –it’s a pleading that’s not entirely clear.” Tr. at 18. Primarily arising from this lack of clarity, Verizon argues the matter may not proceed as presently constituted. We disagree.

We find Verizon’s characterizations of the ALJ’s prehearing conference comments and the resultant constitutional inference the Company presents in its *Lyness* arguments to be overstated when compared to the conclusions memorialized in the Scheduling Order. For example, based upon our review of the prehearing conference transcript and the SchedulingOrder, we find no support for Verizon’s conclusions that the ALJ “plans a full-blown investigation that improperly commingles prosecutorial and advisory functions and delegates prosecutorial authority to a private party” or that the ALJ “proceeded as if he could both open and adjudicate a prosecutorial investigation and impose civil penalties.” Verizon Brief at 1, 3. Moreover, notwithstanding the ALJ’s frank on-the-record discussions, we do not conclude that the procedure he prescribed charted this proceeding on an impermissible course of commingling with an unduly appointed private prosecutor. Despite Verizon’s characterization to the contrary, we also do not agree that the ALJ has made “a recommendation to open a prosecutorial investigation” improperly usurping authority that under *Delegation Order* and *Reorganization Order* is delegated solely to I&E. *Id.* at 8. Finally, for this and other reasons, we also disagree with Verizon that the CWA Petition should be dismissed at this stage.

Nonetheless, we perceive not only from the ALJ’s discussion but also from the parties’ briefs a potential lack of clarity as to the nature of the proceeding, and that answering the material questions will clarify and confirm the nature of the proceeding before the ALJ. Thus we find compelling reasons to grant interlocutory review*.* *See Re Year 2000 Compliance by Public Utilities*, 92 Pa. P.U.C. 194 (1999), 1999 WL 632762 (Pa.P.U.C.) (material question answered to provide guidance in the proceeding).

**1. The Procedure Outlined in the ALJ’s Scheduling OrderDoes Not Violate *Lyness* or Section 331(a) of the Code**

In its first and second material questions, Verizon argues that the procedural process described in the Scheduling Order violates both *Lyness* and Section 331(a) of the Code. Because we find that this is not a Commission-instituted investigation, we answer Verizon’s questions in the negative.

CWA filed its Petition pursuant to Section 5.41 of our Regulations, which allows a party to seek relief under the Code and requires, *inter alia*, a clear and concise statement of the petitioner’s interest. In this instance, CWA’s stated interest was, clearly and concisely, the safety of its members, who are employees of Verizon, as well as the safety of the public in general. This CWA accomplished through the averment of specific safety concerns, coupled with examples of alleged safety deficiencies it depicted in pictures of Verizon’s copper network. As relief CWA sought, *inter alia*, an investigation before the Commission, phrased alternately as a request for the Commission “to initiate a public, on-the-record investigation into the safety, adequacy, and reasonableness” of Verizon’s service and for the Commission to “conduct a comprehensive, state-wide investigation . . . in which [Verizon] would bear the burden of proof pursuant to 66 Pa. C.S. §§ 315(b) and (c)[.]” CWA Petition at 1, 24.

Following CWA’s filing of its Petition, multiple entities, including retail and wholesale customers, groups representing specific customers, and legislators, filed substantive responses. Verizon and FSN also filed Answers to the CWA Petition. Except for Verizon’s Answer, which, as CWA contends, affirmed the accuracy of some depictions but otherwise denied CWA’s safety allegations, all responsive filings echoed CWA’s safety and service allegations and concerns and supported the CWA Petition. The pleadings closed, and for five months thereafter until Verizon filed this Petition seeking interlocutory review, pending before the Commission were adversarial pleadings disputing material facts regarding, *inter alia*, potential safety and service violations under Section 1501 of the Code. As noted by CWA, the OCA, and I&E, however, absent in response to the CWA Petition were timely preliminary objections, which, for example, allow for challenges to standing or legal sufficiency, or motions seeking summary disposition such as a motion for summary judgment or judgment on the pleadings.

The contested pleadings were eventually referred to the OALJ for hearing and disposition. It was not until after the ALJ’s outline of a procedural schedule that Verizon objected to the CWA Petition on the basis of its alleged due process violations. As the OCA and CWA note, however, this is not a Commission-instituted investigation. Rather, CWA initiated this proceeding by filing its Petition. Thus *Lyness* is not implicated. *See Delegation Order* at \*7 (“[T]he 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[.]” *See also Barran v. State Board of Medicine*, 670 A.2d 765, 771 (Pa. Cmwlth. 1996) (medical board’s provisional denial of a medical license followed by board’s subsequent adjudication denying the application did not violate *Lyness* because impermissible commingling is not established merely because an agency performs more than one function or role in a particular process); *Stone and Edwards Insurance Agency, Inc. v. Commw., Dept. of Insurance*, 538 Pa. 276, 281-82, 648 A.2d 304, 307 (1994) (“[T]he form of impermissible ‘appearance’ of bias and partiality proscribed in *Lyness* must clearly be one that arises from an *actual* environment of commingled functions.” (Emphasis in original.)).

Parallel processes seeking a Commission-instituted investigation under Sections 331 and/or 501 of the Code have been employed in other matters brought before the Commission by either petition or complaint and have not been disallowed as procedurally improper. While not frequent, neither are they unprecedented. *See, e.g., Petition of the Office of Small Business Advocate Requesting the Pennsylvania Public Utility Commission to Conduct a Formal Investigation of Pennsylvania-American Water Company’s Interruption of Service in Western Pennsylvania*, 2007 WL 517086 (Pa.P.U.C.) (*OSBA 2007 Petition for Section 331 Investigation*); *Petition of the Office of Small Business Advocate (OSBA) Seeking Intervention by the Pennsylvania Public Utility Commission in Proceedings before the Federal Energy Regulatory Commission Regarding the Proposed Merger of Exelon Corporation and Constellation Energy Group; (II) Complaint of the OSBA Seeking an Investigation by the Commission into the Proposed Merger; and (III) Petition of OSBA for a Declaratory Order (A) Confirming Exelon Corporation Must Seek Prior Commission Approval of the Transfer of its Electric and Natural Gas Generation Supplier Licenses or Assignment of Customer Contracts and (B) Directing Constellation Energy Group to Notify the Commission of the Proposed Merger and File Amended License Applications*, 2011 WL 5034649 (Pa.P.U.C.) (*OSBA 2011 Complaint Seeking Section 331 Investigation*); *In the Matter of Petition to Open an Investigation into the Wire Centers That Verizon Pennsylvania Inc. and Verizon North Inc. Assert Are Non-Impaired Under the FCC’s Triennial Review Remand Order of ATX Licensing Inc. et al.*, Docket No. P-00062210 (Order entered December 12, 2006) (*CLEC Petition to Open Investigation into Verizon Wire Centers*) (petition filed by competitive local exchange carriers seeking Commission investigation into Verizon companies’ identification of wire centers declared non-impaired dismissed as unnecessary; pleadings could be informally discussed in non-adversarial fashion).

While CWA requested the Commission to institute an investigation pursuant to Section 331(a) of the Code, the Commission did not do so. Absent a Commission motion, order, or some other act instituting an investigation, there is no basis for the ALJ or any party to conclude that this is a Commission-instituted investigation. Informative to our conclusion is *OSBA 2007 Petition for Section 331 Investigation*, in which the OSBA petitioned the Commission to institute an investigation under Section 331 into a water utility’s interruption of service, which petition supported a letter from a state senator requesting the Commission institute an investigation on its own motion. In that case, the Commission adopted a motion of then-Chairman Wendell Holland to initiate an investigation under Sections 331, 501, and 1501 of the Code independent of the OSBA petition. The Commission also dismissed OSBA’s petition as moot because the remedy the OSBA sought was accomplished, although the Commission noted that the OSBA was not precluded from filing a complaint after the investigation or from participating directly in the investigation, in which the OSBA had already intervened. As the Commission has not instituted an investigation, *Lyness* is inapplicable and the contested pleadings were properly assigned to the OALJ for hearing.

Further, while in *OSBA 2007 Petition for Section 331 Investigation* the Commission assigned staff to direct the non-prosecutorial investigation, in the underlying CWA proceeding the Commission has not assigned any party, particularly not the petitioning party CWA or I&E as the Commission’s prosecutorial arm, to prosecute the case. Rather, I&E intervened of its own volition, as it is entitled to do, and is not tasked with any role or assignment other than that of its own choosing.

We are persuaded that the proceeding is properly postured before the ALJ because of the process outlined by the ALJ in the Scheduling Order, which does not comport with the process deployed in a “Commission-instituted investigation” in which the burden of proof would be on the public utility. *Delegation Order* at \*\* 8-9. According to the procedural process the ALJ prescribed, CWA and similarly-aligned parties will present evidence first, followed by the presentation of rebuttal by Verizon and similarly-aligned parties, an indirect assignment of the burden of proof to CWA to which CWA apparently does not disagree. This assignment comports with Section 332(a) of the Code and our Regulations, which assign the burden of proof in a proceeding on the party seeking affirmative relief. *See* 66 Pa. C.S. § 332(a) (burden of proof is on proponent of the rule or order); 52 Pa. Code § 5.242(a) (party with the burden of proof shall open and close unless otherwise directed.)

Finally, we disagree with Verizon’s contention that the ALJ’s reservation of all relief available under the Code, including the imposition of fines or penalties in addition to remedial orders, improperly converts this proceeding into a prohibited Commission prosecutorial investigation. Verizon cites to *Delegation Order* and *Gas Beyond the Mains* among others for the premise that the ALJ’s reference to sanctions, fines, or other penalties rendered this matter prosecutorial. While clearly invoked as a possible resolution in formal prosecutorial investigations, civil penalties have been imposed in proceedings initiated by private parties where the evidence so warrants without those proceedings having been deemed in fact or law to be Commission investigations. *See, e.g., Rosi v. Bell Atlantic-Pennsylvania, Inc.,* 94 Pa. P.U.C. 103 (2000), 2000 WL 1407936 (Pa.P.U.C.).

**2. The Petition Should Not Be Dismissed Because Verizon Has Monitoring Programs in Place, or for I&E to Carry Out Its Prosecutorial Function, or to Require CWA to File a Complaint**

As a purely mathematical expression, more Commission investigations have been instituted under Sections 331(a) or 501 of the Code following investigations by our prosecutorial divisions, I&E under our *Reorganization Order* and the Law Bureau Prosecutorial Staff before that, than have been triggered by the filing of a complaint or petition by a non-Commission party. However, CWA’s filing of a petition rather than a complaint does not require dismissal of the petition for the case to proceed. As described above, petitions and complaints seeking investigations have been filed by private parties, competitive local exchange carriers at odds with Verizon in *CLEC Petition to Open Investigation into Verizon Wire Centers*, and the OSBA in *OSBA 2007 Petition for Commission Investigation* and *OSBA 2011 Complaint Seeking Commission Investigation*.

Having found no support for Verizon’s contention that the proceeding as circumscribed by the ALJ is an impermissibly initiated Commission investigation that violates Verizon’s due process rights, we similarly find no compelling reason supporting Verizon’s proposed affirmative answers to its third and fourth material questions to dismiss the CWA Petition. Accordingly, we answer both of those questions in the negative.

As both the OCA and I&E maintain and the ALJ recognized, the Commission may consider the pending matter a hearing upon complaint, which is, as a result of the ALJ’s process description, for all intents and purposes how the matter was queued by the ALJ notwithstanding his statement that the proceeding is neither and both an investigation and a complaint. Having established the order of the proceeding, we find no reason to compel all parties to revisit their respective pleadings with the sole purpose of requiring CWA to recast its allegations under the caption of a complaint. Verizon points to no substantive or procedural right or process that was or will be denied based upon CWA’s having filed a petition rather than a complaint. Further, Verizon’s deferral of a challenge to CWA’s standing to “unless and until CWA attempts to file a formal complaint,” Verizon Brief at 12, was unnecessary. Verizon had the ability to challenge CWA’s standing in response to the CWA Petition by filing preliminary objections.[[7]](#footnote-7) As it currently stands, however, following the close of pleadings, the CWA Petition became an adversarial proceeding appearing to involve contested material facts. As such it was referred to the OALJ for hearing.

Given the procedural posture of this proceeding, we agree with CWA, the OCA, and I&E that Verizon’s effort to remove a disputed factual matter pending before the Commission through interlocutory review is misplaced. As the ALJ stated on the record:

I agree that I think it’s beyond the scope of my authority to open an investigation, a formal investigation that’s commonly under the jurisdiction of the Bureau of Investigation and Enforcement. What I would do in that decision is to apply the record evidence that’s been developed to the Commission’s regulations, determine if there’s been any violations of the Commission’s regulations, and if there have been and it’s appropriate, impose civil penalties as necessary, or any other remedy that may be appropriate that I do have authority to impose.

\* \* \*

If you want to call it an investigation or you want to call it a complaint, that’s beyond my control, but this is how I’ve decided we’re going to proceed in this case.

Tr. at 18-19. Having found that the pending matter is not a Commission-instituted investigation, we agree with I&E that a material 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.” I&E Brief at 5, citing *Saucon Creek*, 69 Pa. P.U.C. at 467. As I&E also argued, “[b]y 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 [p]rocedural [q]uestions.” I&E Brief at 8, citing 52 Pa. Code § 1.2(a) (to secure a speedy and inexpensive disposition the Commission may disregard an error or defect of procedure that does not affect substantive rights). The OCA similarly contended that Verizon’s request that the CWA Petition be dismissed only to have the CWA have to refile a complaint elevates substance over form. We agree and, pursuant to 52 Pa. Code § 1.2, deem the CWA Petition a complaint to be returned to the OALJ for further process.

**IV. Conclusion**

For the reasons set forth above, we answer the material questions presented by Verizon in the negative and return this matter to the Office of Administrative Law Judge, consistent with the discussion in this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Petition for Interlocutory Review and Answer to Material Questions, filed by Verizon Pennsylvania, Inc. on March 29, 2016, is granted.

2. That the following questions are answered in the negative:

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?

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

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?

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?

3. That this matter is returned to the Office of Administrative Law Judge.

**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: April 21, 2016

ORDER ENTERED: April 21, 2016

1. *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*, Docket Nos. P-2014-2446303, P-2014-2446304 (Order entered March 4, 2015) (*Reclassification Order*) at 18 n.20. [↑](#footnote-ref-1)
2. Section 1501 requires Verizon to provide adequate, efficient, safe, and reasonable service and facilities; Section 331(a) authorizes the Commission to investigate and examine any public utility; Section 501 affords the Commission full authority to enforce the Code; Section 506 authorizes the Commission to enter any property and inspect all plant and pertinent records of a public utility and hold hearings as necessary; Section 1505(a) allows the Commission to prescribe, after notice and hearing, service or facilities necessary for the safety and accommodation of the public; and Section 3301 authorizes the Commission to impose civil penalties. [↑](#footnote-ref-2)
3. Section 332(f) provides that a party who fails to be represented at a scheduled hearing, after notice, shall not be permitted to reopen any disposition unless the absence was unavoidable and other interests are not prejudiced. It also allows the Commission to reject any rule or order proposed by the offending party and bar counsel from further appearing if, after notice and opportunity to be heard, the Commission finds the action to be obstructive to the proceeding and inimical to the public interest. Section 3316 prohibits public utilities from threatening or retaliating against employees who make a good faith report to the Commission or public advocates of wrongdoing or waste, or who is requested by those parties to participate in an investigation regarding a public utility’s actions. A person alleging a violation of Section 3316 “may bring a civil action in a court of competent jurisdiction for appropriate injunctive relief” subject to time limitations and evidentiary standards. Enforcement is through “[a] court, in rendering a judgment in an action brought under” that section. Section 3019(i) similarly, prohibits a telecommunications carrier from threatening or retaliating against employees who make such good faith reports of violations and provides that an employee alleging a violation of this section “must bring a civil action in a court of competent jurisdiction for appropriate injunctive relief or damages” subject to a time limitation and instructions regarding evidentiary burdens. [↑](#footnote-ref-3)
4. Section 5.63 of our Regulations allows replies to answers seeking affirmative relief or to new matter. [↑](#footnote-ref-4)
5. Although our Regulations governing interlocutory review were amended in 2006, our past holdings regarding the requisite criteria for interlocutory review remain valid. *Saucon Creek*, 69 Pa. P.U.C. at 468-69. [↑](#footnote-ref-5)
6. Section 308.2 provides that an 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). [↑](#footnote-ref-6)
7. Under Section 5.101(a)(7) of our Regulations, preliminary objections are specifically available to challenge a party’s standing to participate in a proceeding. 52 Pa. Code § 5.101(a)(7). [↑](#footnote-ref-7)