

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Joint Application of)	DOCKET UT-090842
)	
VERIZON COMMUNICATIONS INC.)	ORDER 05
AND FRONTIER COMMUNICATIONS)	
CORPORATION)	
)	ORDER GRANTING IBEW’S
For an Order Declining to Assert)	PETITION FOR INTERLOCUTORY
Jurisdiction Over, or, in the Alternative,)	REVIEW AND DENYING BCAW’S
Approving the Indirect Transfer of)	PETITION FOR INTERLOCUTORY
Control of Verizon Northwest Inc.)	REVIEW
)	
.....)	

1 **SYNOPSIS.** *The Commission determines that the International Brotherhood of Electrical Workers’, Local 89 (IBEW) petition for interlocutory review should be granted and the IBEW afforded limited intervention status. The Commission further determines that the Broadband Communications Association of Washington’s (BCAW) petition for interlocutory review should be denied*

2 **NATURE OF PROCEEDING.** On May 29, 2009, Verizon Communications Inc. (Verizon) and Frontier Communications Corporation (Frontier) filed a joint application with the Washington Utilities and Transportation Commission (Commission) for an order declining to assert jurisdiction over the indirect transfer of control of Verizon Northwest, Inc. (Verizon Northwest) from Verizon to Frontier or, in the alternative, approving the Application under the ‘Transfer of Property’ statute and rules set forth in RCW 80.12, WAC 480-143, and any other authority deemed necessary to effect the transaction.¹

3 By Order 02, Prehearing Conference Order, entered July 28, 2009, the Commission, acting through an administrative law judge, among other things, denied intervention to the International Brotherhood of Electrical Workers, Local 89 (IBEW) and limited

¹ Verizon and Frontier may be collectively referred to as the Joint Applicants or Applicants.

the intervention of the Broadband Communications Association of Washington (BCAW) to its interest as a wholesale customer of Verizon. On August 6, 2009, both IBEW and BCAW filed petitions for interlocutory review of Order 02 as it relates to the rulings on their participation in this proceeding. On August 17, 2009, Verizon/Frontier and the Commission's regulatory staff (Commission Staff or Staff)² filed answers to the petitions.

4 **STANDARD OF REVIEW.** WAC 480-07-430(3), allows a party to object to a prehearing conference order within 10 days of the date the order is served. The prehearing conference order will control the course of the proceeding unless modified by subsequent order or decision of the presiding officer.

5 According to WAC 480-07-810(2), interlocutory review is discretionary. The Commission may accept review if the Commission finds that:

- (1) the interlocutory ruling terminates a party's participation and the inability to participate could cause substantial and irreparable harm;
- (2) interlocutory review is necessary to prevent substantial prejudice that would not be remediable through post-hearing review; or
- (3) interlocutory review could save the Commission and parties substantial effort or expense.

6 According to the Administrative Procedures Act's provision regarding intervention, RCW 34.05.443(2), the Commission may impose conditions on an intervenor's participation including:

- (a) [L]imiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition; and

² In formal proceedings, such as this, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as other parties to the proceeding. There is an "*ex parte* wall" separating the Commissioners, the presiding Administrative Law Judge, and the Commissioners' policy and accounting advisors from all parties, including regulatory staff. *RCW 34.05.455*.

(b) [L]imiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

(c) [R]equiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

7 **IBEW PETITION FOR INTERLOCUTORY REVIEW.** In its petition, the IBEW stated that it represents approximately 1,300 Verizon employees in Washington. IBEW acknowledged that its interest is in protecting its members who are employees but disagreed that this interest is outside the scope of this proceeding. IBEW argued that the public interest includes the effect of the proposed transaction on the utility's employees who must work for the new employer, answer customers' telephone calls, install new service, respond to outages, maintain facilities, and do all that is required to provide customers with safe and reliable service in a cost-effective manner.

8 IBEW cited two cases from other jurisdictions in which state commissions permitted labor union intervention.³ In addition, IBEW cited two prior Commission cases in which labor unions were permitted intervention.⁴ The IBEW recognized that the

³ The Commission considered and rejected the decisions by other state commissions supporting intervention by labor unions. These decisions are neither germane nor persuasive.

⁴*In the Matter of the Proposal by PUGET SOUND POWER & LIGHT COMPANY to Transfer Revenues from PRAM Rates to General Rates*, Docket UE-951270 and *In the Matter of the Application of PUGET SOUND POWER & LIGHT COMPANY and WASHINGTON NATURAL GAS COMPANY for an Order Authorizing the Merger of WASHINGTON ENERGY COMPANY and WASHINGTON NATURAL GAS COMPANY with and into PUGET SOUND POWER & LIGHT COMPANY, and Authorizing the Issuance of Securities, Assumption of Obligations, Adoption of Tariffs, and Authorizations in Connection Therewith*, Docket UE-960195 (Consolidated), 14th Supplemental Order, entered February 5, 1997. *In the Matter of the Application of PACIFICORP AND SCOTTISH POWER PLC for and Order (1) Disclaiming Jurisdiction Or, in the Alternative, Authorizing the Acquisition of Control of PacifiCorp by Scottish Power and (2) Affirming with RCW 80.08.040 for PacifiCorp's Issuance of Stock in Connection with the Transaction*, Docket UE-981627, First Supplemental Order on Prehearing Conference, entered February 18, 1999.

Commission recently ruled that it should not have been permitted to intervene in CenturyTel/Embarq merger.⁵ IBEW argued that regardless of the facts in that case, and IBEW respectfully disagreed with the Commission's characterization of its conduct,⁶ that is not a valid reason for denying a utility's employees the right to participate in this case. IBEW contended that the ruling denying its petition to intervene should be reversed.

9 In their answer, the Applicants argued that IBEW failed to state a substantial interest in this proceeding related to its purpose as an organization and that the IBEW's recent conduct in the CenturyTel/Embarq merger gives the Commission no reason to believe that IBEW's participation would be in the public interest.⁷ The Applicants contended that the Commission's ruling on IBEW's intervention was correct and should not be disturbed.

10 Staff, in its answer, stated that the Commission has applied the "zone of interest" test in other proceedings to determine standing and has interpreted the "zone of interest" test to address whether the interest sought to be protected is within the "zone of interest" protected by statute. Staff argued that the Commission could either limit or deny the IBEW party status.

The Commission notes that these cases are 12 and 10 years old, respectively, and have been superseded by more recent precedent denying intervention to labor unions. (*See*, for example, n. 5.)

⁵ Order 05 entered May 28, 2009, in Docket UT-082119, *In the Matter of the Joint Application of Embarq Corporation and CenturyTel, Inc., For Approval of Transfer of Control of United Telephone Company of the Northwest d/b/a Embarq and Embarq Communications, Inc.*

⁶The Commission notes that IBEW did not file a petition for reconsideration of that decision in accordance with WAC 480-07-850 and the time for doing so has long since expired.

⁷ *See* n. 5.

11 **COMMISSION DISCUSSION AND DECISION.** IBEW requests that we overturn the presiding officer's decision denying the union intervenor status. We accept IBEW's request for interlocutory review and conclude that our review here could save the Commission and parties substantial effort and expense.⁸

12 There are three public policy and legal considerations at play in this circumstance. First, public policy favors the inclusion of individuals or organizations in administrative matters affecting their interests. For this reason, administrative hearings are open to the public and those interested parties or organizations are permitted to represent their interests before the tribunals. Second, the law and public policy dictate that administrative tribunals ensure effective due process for the parties involved, while preserving the tribunal's efficiency and economy. Finally, public policy favors candor to the presiding officer and to the decision-making tribunal, and our rules allow the imposition of sanctions in the event a party fails to act accordingly.

13 In order to grant the relief requested, we must find that the IBEW either has a substantial interest in the subject matter of the proceeding, or that its participation is in the public interest.⁹ We also must determine "that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings."¹⁰

14 For the purpose of analyzing whether a party has a substantial interest in the proceeding, we apply the zone of interest test which would require IBEW to demonstrate a nexus between the *purpose* of its organization and an *interest* protected by a Washington statute within the Commission's jurisdiction.¹¹ Applying the public

⁸ While WAC 480-07-430 provides that the presiding officer shall address petitions for interlocutory review of prehearing conference orders, we undertake this review. WAC 480-07-810(2)(c).

⁹ See WAC 480-07-355(3)

¹⁰ RCW 34.05.443(1).

¹¹ See Order Granting in Part Motion to Strike Protest of Inlandboatmen's Union of the Pacific; Limiting Protest of Inlandboatmen's Union of the Pacific, *In re Application of Aqua Express, LLC*, 2004 WL 3421993, page 5 (2004).

interest test, we have more latitude to grant intervention when such action would enhance our understanding and analysis of the matter at hand. We apply both tests below.

- 15 IBEW readily acknowledges that its purpose is to protect its 1,300 members who are employees of Verizon in matters pertaining to labor relations generally, including the enforcement of its collective bargaining agreement with Verizon. Such labor relations matters clearly fall outside the scope of our jurisdiction.¹² Thus, the interest IBEW expressly protects is one we cannot consider when deciding the outcome of this case. If we were to decide this issue based on this test alone, we would deny IBEW intervenor status. Therefore, we turn to the application of the public interest test as a basis for granting intervention.
- 16 IBEW argues that the Application raises issues related to the safety and reliability of service to the consumer. It further argues that the union could provide a unique perspective on such issues – a perspective not held by other parties. It points out that the observations of its members as to their work ‘in the field’ pertains directly to safety and reliability issues within the purview of the Commission.¹³
- 17 We agree, in this case, that the union could bring a different and perhaps unique perspective on these matters, and, subject to the conditions expressed below, we grant the IBEW’s petition to intervene, finding that its proffered evidence bears a sufficient nexus to the public interest. Accordingly, we will limit the IBEW’s participation to those matters specifically addressing safety and reliability of service to the Applicants’ customers and where the union is actually involved with the provision of such service. The IBEW shall not raise, nor shall we consider, “labor relations” matters, which we define as those subjects of bargaining covered by the union’s collective bargaining agreement, including but not limited to the terms, tenure, wages, hours, benefits, and conditions of employment.¹⁴ Finally, in order to ensure that

¹² RCW Title 49, Labor Regulations.

¹³ IBEW Petition for Interlocutory Review, p. 3, ¶ 8.

¹⁴ See e.g., *Application of Puget Sound Power and Light Company with Washington Natural Gas Company*, Docket Nos. UE-951270 and UE-960195.

intervention will “not impair the orderly and prompt conduct of the proceedings,”¹⁵ we require the IBEW to coordinate any discovery, cross-examination or presentation of evidence with the Commission Staff and Public Counsel Section of the Office of the Attorney General (Public Counsel) as both parties are charged with protecting the interests of consumers as they pertain to matters of safety and reliability. In this way, we can ensure that the evidence presented or cross-examination offered by the IBEW shall not be duplicative of that presented or offered by the parties charged by statute to protect the same interests expressed by the union.

18 As the Applicants note in their answer, the Commission’s recent experience with allowing intervention to the IBEW was unfavorable. In the CenturyTel/Embarq proceeding, we initially granted IBEW intervention. However, we subsequently denied IBEW’s motion to withdraw and, on our own motion, dismissed IBEW as a party finding that “it misrepresented its interest in this proceeding in its petition to intervene, that it in fact had no substantial interest in this proceeding, and that its participation is not in the public interest.”¹⁶ We sharply criticized IBEW and its counsel for the actions taken in that case finding that:

Despite IBEW’s representations at prehearing that it would keep labor relations out of this case, and its unreasoned argument later that it did so, the language of the side-agreement and IBEW’s own arguments show beyond peradventure that the union used its status as a party in this proceeding principally, if not exclusively, to extract labor concessions from the Applicants. While union-management negotiations are important, and we would not want to interfere with them in any way, their insertion in the regulatory process can undermine the integrity of our processes. . . . It also undermines the credibility of counsel who made representations to the tribunal that were disingenuous at best.¹⁷

¹⁵ RCW 34.05.443(1).

¹⁶ See n. 5.

¹⁷ *Id.* at 24.

- 19 We are concerned that similar behavior on the part of the IBEW's counsel could be an issue here. However, we are willing to give the union a second opportunity to participate as a party. If, at any time, we have reason to believe that the IBEW is again engaging in impermissible behavior and using its participation in this proceeding to gain leverage in labor negotiations, we shall reconsider our decision in this order¹⁸ and take whatever actions necessary to rectify the situation.
- 20 IBEW's petition for interlocutory review is granted and the IBEW is granted intervention specifically limited to those issues addressed in paragraph 17 of this Order. We further require IBEW to coordinate its presentation of evidence and argument, discovery, and other participation with Public Counsel and Commission Staff. If, for some reason, this coordinative role of Public Counsel and Commission Staff becomes unwieldy, their counsel should contact the presiding administrative law judge.
- 21 **BCAW PETITION FOR INTERLOCUTORY REVIEW.** In its petition, BCAW argued that its participation was not limited during the prehearing conference; it was later limited by the Prehearing Conference Order. BCAW further argued that the joint applicants did not serve BCAW with their prefiled direct testimony until the day after the prehearing conference and the applicant's testimony demonstrates the gross inconsistency with the applicants' objection to intervention and a primary basis for approval of their application. Specifically, the joint applicants discuss the alleged public interest benefits of the proposed transaction on unregulated services including broadband and television services.
- 22 The Joint Applicants argued that BCAW's participation was appropriately limited to its members' interest as wholesale customers. The Joint Applicants contended that any impact on unregulated competitors is outside the scope of this proceeding.

¹⁸ RCW 34.05.443(3).

23 Staff contended that the Prehearing Conference Order properly limits the scope of
BCAW's intervention to interconnection issues. Staff argued that BCAW's interest
as competitors in the broadband services market, which is unregulated by the
Commission, is not a basis for intervention.

24 **COMMISSION DISCUSSION AND DECISION.** We accept review of BCAW's
petition because its participation in this proceeding is limited and such limitation may
result in substantial or irreparable harm or substantial prejudice that cannot be
protected by post-hearing review.¹⁹

25 We conclude that BCAW's argument that there is inconsistency between the oral
ruling and the Prehearing Conference Order is without merit.²⁰ We next consider
BCAW's argument that it should be permitted to address the broadband service issues
raised by the Applicants. BCAW's members are cable companies that compete with
Verizon in the provision of broadband services. We agree with Commission Staff
that the Federal Communications Commission has exclusive regulatory jurisdiction
over services defined as "information services."²¹ Moreover, we have no authority,
save specific statutory authority to the contrary, to consider the effect of a regulated
utility on an unregulated business.²² Therefore, we conclude that BCAW's
participation is appropriately limited to their interests as wholesale customers; an
interest within our jurisdiction.

¹⁹ WAC 480-07-810(2)(a) and (b).

²⁰ In fact, the clarity of that ruling is demonstrated by Verizon's request that Comcast's
intervention be *similarly* limited to that of BCAW's. TR 13 at lines 20 -23.

²¹ 200 FCC Rcd 14853, 14899, ¶ 86 (2005). We have, however, previously considered company
commitments with regard to the expansion of broadband services as a benefit that may offset
harms to competition or other reasons. See, e.g. *In the Matter of the Petition of Qwest
Corporation to be Regulated Under an Alternative Form of Regulation Pursuant to RCW
80.36.135*, Docket UT-061625.

²² *Cole v. Washington Utilities & Transportation Commission*, 79 Wn.2d 302, 3026 (1971)

IT IS HEREBY ORDERED That:

- 26 (1) The petition for interlocutory review filed by the IBEW is granted, the IBEW is granted limited intervention, and IBEW must coordinate its participation in this proceeding with Public Counsel and Commission Staff as set forth in the body of this Order.
- 27 (2) The petition for interlocutory review filed by the BCAW is denied.

Dated at Olympia, Washington, and effective September 10, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner