

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Verizon Pennsylvania Inc. and	:	
Verizon North LLC,	:	
Petitioners	:	
	:	No. 1353 C.D. 2011
v.	:	
	:	Argued: March 12, 2012
Pennsylvania Public Utility	:	
Commission,	:	
Respondent	:	

BEFORE: HONORABLE ROBERT SIMPSON, Judge
 HONORABLE PATRICIA A. McCULLOUGH, Judge
 HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: August 8, 2012

Verizon Pennsylvania Inc. and Verizon North LLC (together, Verizon) petition for review of the June 24, 2011 order of the Pennsylvania Public Utility Commission (PUC) suspending for a period not to exceed six months the revisions filed by Verizon which would have resulted in the withdrawal of Verizon's informational tariffs for competitive services (identified as Tariff No. 500 for Verizon Pennsylvania Inc. and Tariff No. 11 for Verizon North LLC). This order further directed Verizon to restore its original informational tariffs, treated the proposed revisions as letter petitions seeking to modify Verizon's Chapter 30 amended

alternative regulation and network modernization plans (NMPs),¹ and provided for a comment period with respect to the proposed revisions. We affirm.

Pursuant to the Public Utility Code, 66 Pa. C.S. §§101-3316, the Commission is an independent administrative agency responsible for regulating jurisdictional public utilities, including telecommunications carriers, for the benefit of the public. The original Chapter 30 of the Code was enacted to, *inter alia*, “maintain universal telecommunications service at affordable rates while encouraging the accelerated deployment of a universally available, state-of-the-art, interactive, public-switched broadband telecommunications network in rural, suburban and urban areas” and to “[e]nsure that customers pay only reasonable charges for local exchange telecommunications services....” Section 3001(1), (2) of the Code, 66 Pa. C.S. §3001(1), (2).² Under this Chapter, the Commission was authorized to identify competitive services, maintain and ensure compliance with the tariffs or price lists filed by telecommunications companies, determine access charges, and review and approve requests by telecommunications companies for alternative regulation and network modernization implementation plans. Sections 3003-3005 of the Code, 66 Pa. C.S. §§3003-3005.

However, recognizing that consumers had a wide choice of unregulated and lightly-regulated providers to meet their communications needs, the General Assembly in 2004 repealed the existing provisions of Chapter 30 and replaced them

¹ Section 3012 of the Public Utility Code (Code) defines an NMP as a “plan for the deployment of broadband service by a local exchange telecommunications company under this chapter or any prior law of this Commonwealth.” 66 Pa. C.S. §3012.

² Sections 3001-3009 of the Code, 66 Pa. C.S. §§3001-3009, were repealed by the Act of November 30, 2004, P.L. 1398, and replaced with sections 3011-3019 of the Code, 66 Pa. C.S. §§3011-3019.

with sections 3011-3019 of the Code (Code), 66 Pa. C.S. §§3011-3019. In enacting these sections, the General Assembly specifically sought to reduce the regulatory obligations imposed on traditionally regulated companies to “levels more consistent with those imposed upon competing alternative service providers.” Section 3011(13) of the Code, 66 Pa. C.S. §3011(13).³ Under these new provisions, the PUC cannot

³ Section 3011 of the Code declared the following to be the new policy of the Commonwealth with respect to telecommunications services under the revised Chapter 30:

(1) Strike a balance between mandated deployment and market-driven deployment of broadband facilities and advanced services throughout this Commonwealth and to continue alternative regulation of local exchange telecommunications companies.

(2) Maintain universal telecommunications service at affordable rates while encouraging the accelerated provision of advanced services and deployment of a universally available, state-of-the-art, interactive broadband telecommunications network in rural, suburban and urban areas, including deployment of broadband facilities in or adjacent to public rights-of-way abutting public schools, including the administrative offices supporting public schools, industrial parks and health care facilities.

(3) Ensure that customers pay only reasonable charges for protected services which shall be available on a nondiscriminatory basis.

(4) Ensure that rates for protected services do not subsidize the competitive ventures of telecommunications carriers.

(5) Provide diversity in the supply of existing and future telecommunications services and products in telecommunications markets throughout this Commonwealth by ensuring that rates, terms and conditions for protected services are reasonable and do not impede the development of competition.

(6) Ensure the efficient delivery of technological advances and new services throughout this Commonwealth in order to improve the quality of life for all Commonwealth residents.

(Footnote continued on next page...)

require tariffs for competitive services and it does not fix or prescribe rates or otherwise regulate competitive services. Sections 3016(d)(2) and 3019(g) of the

(continued...)

(7) Encourage the provision of telecommunications products and services that enhance the quality of life of people with disabilities.

(8) Promote and encourage the provision of competitive services by a variety of service providers on equal terms throughout all geographic areas of this Commonwealth without jeopardizing the provision of universal telecommunications service at affordable rates.

(9) Encourage the competitive supply of any service in any region where there is market demand.

(10) Encourage joint ventures between local exchange telecommunications companies and other entities where such joint ventures accelerate, improve or otherwise assist a local exchange telecommunications company in implementing its network modernization plan.

(11) Establish a bona fide retail request program to aggregate and make advanced services available in areas where sufficient market demand exists and to supplement existing network modernization plans.

(12) Promote and encourage the provision of advanced services and broadband deployment in the service territories of local exchange telecommunications companies without jeopardizing the provision of universal service.

(13) Recognize that the regulatory obligations imposed upon the incumbent local exchange telecommunications companies should be reduced to levels more consistent with those imposed upon competing alternative service providers.

66 Pa. C.S. §3011.

Code, 66 Pa. C.S. §§3016(d)(2), 3019(g).⁴ Nevertheless, a local exchange telecommunications company may, at its option, still tariff its rates. Section 3016(d)(3) of the Code, 66 Pa. C.S. §3016(d)(3).⁵

Verizon initially opted to file informational tariffs for competitive services as permitted by section 3016(d)(3). However, by letters dated May 31, 2011, Verizon notified the PUC of its intent, effective June 1, 2011, to withdraw its informational tariffs and instead make all rates, terms, and conditions associated with its competitive products and services available in a “Price List and Product Guide” maintained on its website.⁶ By order dated June 24, 2011, the PUC deemed Verizon’s revisions to be “in potential violation of its amended Chapter 30 alternative regulation and network modernization plan” and directed that the revisions “be suspended for a period not to exceed six (6) months.” (PUC Order at 8.)

This order further directed Verizon to restore its original informational tariffs, treated the proposed revisions as letter petitions seeking to modify Verizon’s Chapter 30 NMPs, and provided for a comment period with respect to the proposed revisions. In issuing this order, the PUC noted that Verizon’s Chapter 30 NMPs

⁴ Section 3016(d)(2) of the Code states that “[t]he Commission may not require tariffs for competitive service offerings to be filed with the Commission.” Section 3019(g) provides that “[t]he Commission may not fix or prescribe the rates, tolls, charges, rate structures, rate base, rate of return or earnings of competitive services or otherwise regulate competitive services except as set forth in this chapter.”

⁵ Section 3016(d)(3) of the Code states that “[a] local exchange telecommunications company at its option may tariff its rates subject to rules and regulations applicable to the provision of competitive services.”

⁶ Section 3016(d)(4) of the Code provides that “[p]rice changes that are filed in a company’s tariff for competitive services will go into effect on a one-day notice.” 66 Pa. C.S. §3016(d)(4). PUC regulations also state that informational tariffs and price lists “become effective on 1-day’s notice.” 52 Pa. Code §53.58(d).

incorporated the maintenance of informational tariffs for competitive services and that section 3019(h) of the Code provides that the “terms of a local exchange telecommunications company’s alternate form of regulation and [NMPs] shall govern the regulation of the local exchange telecommunications company and, consistent with the provisions of this chapter, shall supersede any conflicting provisions of this title....” 66 Pa. C.S. §3019(h).

In other words, the PUC indicated that Verizon, through its Chapter 30 NMPs, had committed to maintaining its informational tariffs and that the purported revisions may not have been the proper vehicle for total elimination of these tariffs. The PUC suggested that, since the elimination of the tariffs and replacement with the “Price List and Product Guide” constituted a material change to the NMPs, Verizon should have submitted a petition seeking a modification of the NMPs. Nevertheless, the PUC concluded that further review of these issues was necessary before reaching a final determination. The PUC thereafter established a comment schedule, but only Verizon, the Office of Consumer Advocate (OCA), and Full Service Network (FSN), a small reseller of Verizon services, provided comments.

On July 22, 2011, Verizon filed the instant petition for review challenging the PUC’s order. OCA and FSN subsequently filed notices of intervention with this Court. On August 5, 2011, the PUC filed a motion to quash Verizon’s petition for review, alleging that its June 24, 2011 order was not a final order. This Court denied the PUC’s motion, concluding that the PUC’s order was a collateral order from which an appeal may be taken as of right pursuant to Pa. R.A.P. 313. By order dated November 14, 2011, the PUC granted Verizon’s requests to

withdraw its informational tariffs and directed Verizon to maintain price lists with the PUC for its competitive services.⁷

On appeal,⁸ Verizon argues that the PUC exceeded its statutory authority in suspending and directing further investigation of a tariff filing affecting an informational tariff for competitive services that had already taken effect. Verizon also argues that the PUC violated its right to due process by failing to provide notice and an opportunity to be heard and by failing to develop an adequate factual record prior to issuing its suspension order.

PUC's Motion to Quash

Before we reach the merits, we must address the PUC's contention that this Court erred in denying its motion to quash Verizon's petition for review. The PUC reiterates its allegation that the PUC's June 24, 2011, order was not a final order subject to appellate review and that Verizon's petition for review should be dismissed.

⁷ Section 3016(d)(4) of the Code, 66 Pa. C.S. §3016(d)(4), permits the PUC to require a local exchange telecommunications company to maintain price lists applicable to its competitive services.

⁸ Our scope of review of a PUC order is limited to determining whether a constitutional violation or an error of law has occurred and whether the necessary findings of fact are supported by substantial evidence. Chester Water Authority v. Pennsylvania Public Utility Commission, 581 Pa. 640, 868 A.2d 384 (2005). A reviewing court should neither substitute its judgment for that of the PUC when substantial evidence supports the PUC's decision on a matter within its expertise, nor should it indulge in the process of weighing evidence and resolving conflicting testimony. Energy Conservation Council of Pennsylvania v. Public Utility Commission, 25 A.3d 440 (Pa. Cmwlth. 2011). Moreover, in matters of statutory interpretation, courts should defer to the PUC's interpretations of the Code and its own regulations unless the PUC's interpretations are clearly erroneous. Lloyd v. Pennsylvania Public Utility Commission, 17 A.3d 425 (Pa. Cmwlth. 2011).

Pa. R.A.P. 313(a) states that “[a]n appeal may be taken as of right from a collateral order of an administrative agency or lower court.” An order is defined as a “collateral order” if all three of the following requirements are met:

(1) the order is separable from, and collateral to, the main cause of action;

(2) the right involved is too important to be denied review; and

(3) the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

Pa. R.A.P. 313(b); Adams v. Department of Health, 967 A.2d 1082 (Pa. Cmwlth. 2009).⁹

In reviewing these prongs, we have held that an order is separable if it does not affect the merits of the main cause of action. Pittsburgh Water and Sewer Authority v. Gladstone, 999 A.2d 1248 (Pa. Cmwlth. 2010). Additionally, our Supreme Court has held that it is not sufficient that the issue be important to the particular parties; rather, the issue must involve rights that are “deeply rooted in public policy going beyond the particular litigation at hand.” Geniviva v. Frisk, 555 Pa. 589, 598, 725 A.2d 1209, 1214 (1999). Finally, if a claim has the potential to be rendered moot as the result of a final judgment, we have held that review under Pa. R.A.P. 313 is appropriate. Pittsburgh Water and Sewer Authority.

The PUC relies heavily on our recent decision in Sentinel Ridge Development, LLC v. Department of Environmental Protection, 2 A.3d 1263 (Pa.

⁹ We have previously indicated that these requirements are stringent and must be narrowly construed. Adams; Commonwealth v. Rohrbaugh, 909 A.2d 12 (Pa. Cmwlth. 2006), appeal denied, 591 Pa. 737, 921 A.2d 498 (2007).

Cmwlth. 2010), for support. However, such reliance is misplaced as Sentinel Ridge did not address Pa. R.A.P. 313. In Sentinel Ridge, the Department of Environmental Protection (DEP) issued a storm water permit to the predecessors of Sentinel Ridge Development, LLC (Sentinel Ridge) and a local community organization appealed the issuance of the permit to the Environmental Hearing Board (EHB). Following hearings, the EHB issued an order suspending the permit and remanding the matter to DEP for further factual inquiry. Sentinel Ridge appealed the EHB's order to this Court and DEP filed a motion to quash alleging that the EHB's order was not a final order. This Court agreed with DEP and we issued an opinion and order quashing Sentinel Ridge's appeal. In our opinion, we concluded that the EHB's order was not a final order because it neither disposed of all claims nor intended to allow for interlocutory review. Nor was this Court persuaded by an argument from Sentinel Ridge that the appeal should be allowed to proceed under Pa. R.A.P. 311(f) because the issues presented in that case would evade appellate review. Rather, we noted that after further review, DEP would either restore the permit or revoke it and any aggrieved party could then appeal.

In the present case, the PUC's June 24, 2011 order deemed Verizon's proposed revisions to be in potential violation of its NMPs and directed that the revisions be suspended for a period not to exceed six months. Verizon challenged the PUC's order on the basis that the PUC lacked the authority to suspend the revisions, citing its right to revise these tariffs on one-day's notice. This issue was separable from the main issue of the propriety of the proposed revisions in light of Verizon's NMPs and involved an important right which could have significantly impacted not only Verizon, but the competitive market as a whole. Hence, the first two prongs of Pa. R.A.P. 313(b) were satisfied. Moreover, the PUC itself demonstrates that the

third prong was satisfied by arguing in its brief that its ultimate decision to permit the tariff withdrawals moots any complaints about procedural abuses and requires dismissal of the appeal. Because Verizon satisfied all three prongs of Pa. R.A.P. 313(b), this Court did not err in denying the PUC's motion to quash.

PUC's Statutory Authority to Suspend and Investigate Tariffs

Regarding the merits, Verizon argues that Chapter 30 of the Code superseded Chapter 13 and effectively removed the PUC's statutory authority to suspend and investigate tariff revisions for competitively classified services. Hence, Verizon contends that the PUC's reliance on section 1308(b) of the Code, 66 Pa. C.S. §1308(b), which permitted the PUC to suspend a tariff stating a new rate pending investigation and a subsequent hearing and decision, is misplaced. Verizon further argues that the PUC violated its right to due process by failing to provide notice and an opportunity to be heard and by failing to develop an adequate factual record prior to issuing its suspension order.

Contrary to Verizon's assertions, the PUC did not rely on section 1308(b) in suspending Verizon's tariff revisions, nor did the PUC violate Verizon's right to due process in issuing the suspension order. Instead, the PUC relied on its broad, general authority under section 501 of the Code, 66 Pa. C.S. §501.¹⁰ Verizon's

¹⁰ Section 501 provides as follows:

(a) *Enforcement of provisions of part.* --In addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof; and shall have the power to rescind or modify any such regulations or orders. The express enumeration of the powers of the commission in this part

(Footnote continued on next page...)

own NMPs, and section 3019(h) of the Code in suspending the tariff revisions. Verizon has incorporated the maintenance of informational tariffs for competitive services in its respective NMPs since the inception of the NMPs in the mid-1990s, agreeing to file such tariffs now and in the future, a contractual commitment the PUC accepted when it approved the NMPs.¹¹ Section 3013(a) of the Code provides that

(continued...)

shall not exclude any power which the commission would otherwise have under any of the provisions of this part.

(b) *Administrative authority and regulations.* --The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The commission may make such regulations, not inconsistent with law, as may be necessary or proper in the exercise of its powers or for the performance of its duties.

(c) *Compliance.* --Every public utility, its officers, agents, and employees, and every other person or corporation subject to the provisions of this part, affected by or subject to any regulations or orders of the commission or of any court, made, issued, or entered under the provisions of this part, shall observe, obey, and comply with such regulations or orders, and the terms and conditions thereof.

¹¹ See Bell Atlantic-Pennsylvania, Inc.'s Alternative Regulation Plan (modified in compliance with the Commission's Opinion and Order entered June 28, 1994), Docket No. P-00930715, dated July 27, 1994, Part 2, at 15 (Bell Atlantic was the predecessor to Verizon); Verizon Pennsylvania Inc.'s Alternative Regulation Plan (modified in compliance with the Commission's Opinion and Order entered June 28, 1994, and in compliance with the Commission's Order entered May 20, 2005), Docket Nos. P-00930715 and P-00930715F1000, dated June 20, 2005, Part 2, at 15; Verizon North Inc.'s Final Alternative Regulation Plan (modified in compliance with the Commission's Orders entered July 26, 2001 and April 11, 2002), Docket No. P-00001854F1000, dated October 10, 2002, Part 2, at 7; Alternative Regulation Plan of Verizon Pennsylvania Inc. as of August 2008 (modified in compliance with the Commission's Opinion and Order entered June 28, 1994 and in compliance with the Commission's Orders entered March 22, 2007, April 25, 2007, and May 27, 2008), Docket Nos. P-00930715, P-00930715F0001, R-00051228, dated August 20, 2008, Part 2, at 14-16.

any NMP approved by the PUC as of December 31, 2003, “shall remain valid and effective except as may be amended at the election of the local exchange telecommunications company as authorized by this chapter.” 66 Pa. C.S. §3013(a). Section 3013(b), 66 Pa. C.S. §3013(b), states that no change may be made to an NMP without the express agreement of both the PUC and the telecommunications company.

Section 3014(b)(6) of the Code similarly indicates that a telecommunications company operating under an amended NMP may petition the PUC for approval of further modifications, which the PUC “may grant upon good cause shown.” 66 Pa. C.S. §3014(b)(6). Additionally, as intervenor OCA notes, section 3014(e) of the Code further requires a telecommunications company seeking a modification of its NMP to serve OCA and the Office of Small Business Advocate with written notice of its election to amend its NMP and of the amended plan. 66 Pa. C.S. §3014(e). Thus, the Code sets forth an extensive process that must be followed before a telecommunications company may amend an NMP.

Moreover, we disagree with Verizon’s argument that its tariff revisions had already taken effect as of June 1, 2011, and that the PUC’s June 24, 2011 order violated its right to due process. As the PUC observes, the suspensions in this case were necessitated by Verizon’s proposed changes to its NMPs and had nothing to do with the fact that tariffs were involved. While Verizon is correct that price changes in a telecommunication company’s informational tariff are generally effective on one-day’s notice (section 3016(d)(4) of the Code), this section does not permit or otherwise address the complete withdrawal of an informational tariff. As intervenor FSN points out, the changes traditionally permitted under this section relate to product offerings and rates of service and nothing in Chapter 30 or elsewhere in the

Code permits the complete withdrawal of a tariff on a single day's notice. The PUC's June 24, 2011 order in no way prohibited Verizon from implementing a change in such offerings or rates of service. Instead, this order suspending Verizon's proposed revisions, which effectively amended its NMPs, was necessary to ensure compliance with the NMP amendment process, including the requirement that all interested parties be provided with notice and an opportunity to be heard. Thus, the PUC did not err or violate Verizon's right to due process in directing the suspension of Verizon's proposed tariff revisions.

Accordingly, the order of the PUC is affirmed.

PATRICIA A. McCULLOUGH, Judge

Judge Cohn Jubelirer did not participate in this decision.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Verizon Pennsylvania Inc. and	:	
Verizon North LLC,	:	
Petitioners	:	
	:	No. 1353 C.D. 2011
v.	:	
	:	
Pennsylvania Public Utility	:	
Commission,	:	
Respondent	:	

ORDER

AND NOW, this 8th day of August, 2012, the order of the Pennsylvania Public Utility Commission, dated June 24, 2011, is hereby affirmed.

PATRICIA A. McCULLOUGH, Judge