

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC JOINT APPLICATION OF RED)
FIBER PARENT LLC, RF MERGER SUB, INC.,)
CINCINNATI BELL, INC., AND CINCINNATI)
BELL TELEPHONE COMPANY LLC FOR (1))
APPROVAL OF THE PROPOSED INDIRECT)
TRANSFER OF CONTROL OF CINCINNATI)
BELL TELEPHONE COMPANY LLC TO RED)
FIBER PARENT LLC PURSUANT TO KRS)
278.020(6) AND KRS 278.020(7), OR)
ALTERNATIVELY, PURSUANT TO KRS)
278.020(6) AND A DECLARATION THAT)
APPROVAL UNDER KRS 278.020(7) IS NOT)
REQUIRED; (2) NOTICE OF THE PROPOSED)
INDIRECT TRANSFER OF CONTROL OF)
CINCINNATI BELL EXTENDED TERRITORIES)
LLC AND CBTS TECHNOLOGY SERVICES,)
LLC TO RED FIBER PARENT LLC; AND, (3))
ALL OTHER REQUIRED APPROVALS AND)
RELIEF)

CASE NO.
2020-00259

ORDER

This matter arises upon the motion of Time Warner Cable Information Services (Kentucky), LLC, a Delaware limited liability company (Charter), filed on August 28, 2020, for full intervention. Charter is a reseller and facilities based provider which provides local and interexchange service in the state. Charter specifically provides service to approximately 33,000 customers in the Cincinnati Bell Telephone Company LLC (CBT) service area in Kentucky.¹ Charter is requesting intervention arguing that the proposed change of control may have an effect on the rates, terms, and conditions that apply to

¹ Motion to Intervene at 1–2.

wholesale services and facilities provided by CBT to competitive carriers.² As grounds for its motion, Charter asserts that it has substantial interests that are not adequately represented by other parties, and that these interests differ from those of the general public. Charter is specifically concerned with the impact the proposed merger will have on competition in Kentucky.³ Charter asserts that its intervention will allow it to assist the Commission in developing the record because Charter will be allowed to draw on its experience in telecommunications.⁴ Charter states that CBT, as an incumbent local exchange carrier, has an obligation to provide Charter nondiscriminatory access to its facilities.⁵ Charter argues that because its interests are dependent upon CBT's facilities and performance under interconnection and wholesale agreements, Charter's ability to compete is also dependent upon CBT fulfilling these obligations. Charter states that it is concerned it may have to devote "considerable" resources to implement possible changes arising from the transfer.⁶

Red Fiber Parent LLC (Red Fiber), RF Merger Sub, Inc. (RF Merger), Cincinnati Bell, Inc. (Cincinnati Bell), and Cincinnati Bell Telephone Company LLC (CBT), (collectively, Joint Applicants), filed a response opposing the motion on September 4, 2020. Joint Applicants assert that Charter has failed to assert that it has a special interest

² *Id.* at 2.

³ *Id.* at 2–3.

⁴ *Id.* at 3.

⁵ *Id.*

⁶ *Id.* at 4.

not otherwise represented.⁷ The Joint Applicants argue that the proposed transaction is a holding company transaction between the joint applicants and will not have an effect on customers, or consumers that use wholesale services provided by CBT.⁸

The Joint Applicants argue that Charter's dearth of interconnection agreements with CBT undermine Charter's argument about its concerns regarding Charter's reliance on CBT's facilities for the provision of service. CBT notes that Charter, in 2010, adopted an existing interconnection agreement, which had been in existence since 2005, and that Charter has not attempted to amend or modify the agreement at any time.⁹

The Joint Applicants attempt to liken Charter's request for intervention to the motion to intervene that the Commission denied in another proceeding.¹⁰ In that proceeding, the Commission denied the motion to intervene of ChargePoint, Inc., finding that because ChargePoint, Inc. was not a retail customer of Duke Energy Kentucky, Inc., ChargePoint Inc. did not have an interest subject to the Commission's jurisdiction to justify granting intervention. The Joint Applicants argue that Charter is similarly situated to ChargePoint, Inc. in that Charter does not pay retail rates to CBT nor take retail service.¹¹

The Joint Applicants assert that Charter's interests are adequately protected by the terms of its interconnection agreement, which provide for avenues for relief from the

⁷ Memorandum In Opposition to Motion to Intervene Filed by Time Warner Cable Information Services (Kentucky) LLC (Memorandum in Opposition) at 5.

⁸ *Id.*

⁹ *Id.*

¹⁰ Case No. 2019-00271, *Electronic Application of Duke Energy Kentucky, Inc. for 1) an Adjustment of the Electric Rates; 2) Approval of New Tariffs; 3) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; and 4) All Other Required Approvals and Relief* (Ky. PSC Oct. 14, 2019).

¹¹ Memorandum in Opposition at 7.

Commission and the Federal Communications Commission should a dispute arise.¹² The Joint Applicants also note that any concerns regarding pole attachment are governed by both the Commission and Federal law.¹³

The Joint Applicants also argue that Charter will not help the Commission in considering the proposed transaction because, among other things, Charter does not state how its experience in other markets with CBT will allow it to assist the Commission with analyzing the proposed transfer.¹⁴ The Joint Applicants assert that granting Charter's motion would open the door for competitors to intervene in other transfers or incumbent local exchange carriers regardless of the merit of the transfer.¹⁵

On September 11, 2020, Charter filed its reply to the Joint Applicants' Memorandum in Opposition.¹⁶ In its response, Charter asserts that it does have an interest in CBT's rates and services because Charter relies upon CBT to provide wholesale network interconnection, number porting, pole attachments etc. at reasonable and nondiscriminatory rates. Charter asserts that to the extent the transaction affects these services, it could impede Charter's and other carriers' ability to compete with CBT.¹⁷ Charter also asserts that its concerns over pole attachments are well founded, because,

¹² *Id.* at 7.

¹³ *Id.* at 8.

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 10.

¹⁶ Time Warner Cable Information Services (Kentucky), LLC's Reply to Applicants' Memorandum in Opposition to Time Warner Cable Information Services (Kentucky), LLC's Motion to Intervene (Reply to Applicants' Memorandum in Opposition) (filed Sept. 11, 2020).

¹⁷ *Id.* at 4.

even though the Joint Applicants state no changes to pole attachment agreements, or tariffs will be as a result of the transaction, changes could be made in the future.¹⁸

Charter also disputes the Joint Applicants' argument that Charter has no interest in the proceeding because Charter is not a retail customer of CBT. Charter notes that, unlike the case of ChargePoint, Inc., Charter is a customer of CBT and pays CBT for wholesale service and relies upon CBT's network for interconnection, number porting etc.

Finally, Charter responds that it has interests that cannot be protected by its existing agreement with CBT. Charter argues that its existing interconnection agreement does not address possibility that the proposed change in control will may have the unintended consequences of degrading CBT's performance, particularly regarding the services and facilities upon which Charter relies to provide service.¹⁹ Charter asserts that its unique position as a competitor provides it valuable insight that will assist the Commission develop the record in this matter.²⁰

The Joint Applicants filed a motion to strike on September 13, 2020. The Joint applicants argue that Charter's response filed on September 11, 2020 was seven days after the Joint Applicants response and according to the Commission's regulations at 807 KAR 5:001 Section 5(3) the reply must be filed no later than five days of its response. Therefore the reply was untimely and must be stricken.

Charter filed its response to the motion to strike on September 17, 2020. Charter argues that KRS 446.030(1)(a) applies and when a prescribed time is less than seven

¹⁸ Reply to Applicants' Memorandum in Opposition at 4–5.

¹⁹ *Id.* at 7–8.

²⁰ *Id.* at 10.

days intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation of days. Charter argues that its reply was timely when the intervening Saturday, Sunday, and Labor Day holiday are excluded from the calculation of days.

The Joint Applicants filed its reply to the motion to strike on September 21, 2020. The Joint applicants argue that Charter's reliance on KRS 446.030(1)(a) does not apply and the Commission's rules are the only regulations that should apply.

DISCUSSION

The only person that has a statutory right to intervene is the Attorney General, pursuant to KRS 367.150(8)(b). Intervention by all others is permissive and is within the sound discretion of the Commission. In the unreported case of *EnviroPower, LLC v. Public Service Commission of Kentucky*, No. 2005-CA-001792-MR, 2007 WL 289328 (Ky. App. Feb. 2, 2007), the Court of Appeals ruled that the Commission retains power in its discretion to grant or deny a motion for intervention but that discretion is not unlimited. The Court then enumerated the statutory and regulatory limits on the Commission's discretion in ruling on motions for intervention. The statutory limitation, KRS 278.040(2), requires that the person seeking intervention have an interest in the rates or service of a utility as those are the only two subjects under the jurisdiction of the Commission. The regulatory limitation of 807 KAR 5:001, Section 4(11), requires that a person demonstrate a special interest in the proceeding which is not otherwise adequately represented or that intervention is likely to present issues or develop facts that assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. Applying those standards to the request for intervention, the Commission finds that

Charter has failed to establish that it has an interest that is not otherwise adequately represented.

Charter is a wholesale customer of CBT, and as such, does have an interest in the wholesale rates that CBT charges. Likewise, Charter relies upon CBT's facilities, in part, to provide service. However, neither of these concerns arises to a "special interest" to warrant intervention under 807 KAR 5:001, Section 4(11)(b).

In this proceeding, the Commission is reviewing whether the Joint Applicants have, "the financial, technical, and managerial abilities to provide reasonable service"²¹ and whether the proposed transfer "is to be made in accordance with law, for a proper purpose and is consistent with the public interest."²² Charter has an interest in the rates that CBT charges, as any customer does, but that does not necessarily arise to a "special interest." The Joint Applicants are not proposing to increase rates or changes conditions of service in this transaction. As such, because a change in rates is not proposed in this proceeding,²³ Charter does not have a "special interest" in a rate that is currently before the Commission to warrant granting intervention.

Likewise, while Charter does have an interest in the CBT's quality of service, particularly with regard to the facilities upon which Charter relies to provide service to its customers, Charter does not claim any immediate issues with service it purchases from CBT or CBT's current performance under their interconnection agreement or other obligations. This is particularly true because, as the Joint Applicants assert, the

²¹ KRS 278.020(6).

²² KRS 278.020(7).

²³ Commission records indicate that CBT has not changed its wholesale tariffed rates or access rates for over 15 years.

transaction will not lead to changes in existing tariffs or interconnection agreements. The interests that Charter claims are inadequately represented are hypothetical problems, and because the concerns are remote, they do not present “special interests,” pursuant to 807 KAR 5:001, Section 4(11)(b), that warrant being granted intervention in this matter in which CBT will remain intact with existing tariffs and assets even if the transfer is approved. Charter’s “special interests” may be protected through Charter’s interconnection agreement with CBT, or brought to the Commission on a case by case basis if CBT’s performance under the interconnection agreement or other legal obligations falters.²⁴

With regard to Charter’s assertion that it will assist the Commission in developing the record, the Commission finds that Charter has not presented sufficient evidence that it will assist the Commission in developing the record without unduly complicating the proceeding. Accordingly, we find that Charter’s motion should be denied.

The Commission takes issue, however, with some of the Joint Applicants’ arguments, particularly with regard to the argument that Charter did not have standing to intervene in this proceeding because it was not a retail customer of CBT. The Commission has jurisdiction over wholesale services offered by a telecommunications provider,²⁵ and the Commission allows, and has allowed, wholesale purchasers of services to intervene in proceedings involving their wholesale providers. For example, in

²⁴ Although the Commission’s jurisdiction with regard to the provision of retail telecommunications has been eroded over the last two decades, its jurisdiction over interconnection and wholesale issues has remained unaffected. Charter, or any competitor, may either negotiate a new interconnection agreement with CBT, or, may bring a complaint against CBT, which the Commission must resolve within 180 days of the complaint being filed. KRS 278.5435(5)(a) and (b).

²⁵ See generally KRS 278.542(1), KRS 278.5435, and 47 USC § 251-271.

Case No. 2019-00444,²⁶ the Commission allowed two wholesale purchasers of water to intervene in a proposed rate increase of their wholesale water provider. Although we deny Charter's motion on other grounds, its status as a wholesale customer of CBT is not one of those reasons for doing so.

The Commission also takes issue with Joint Applicants' motion to strike. Although the motion to strike is moot because the Commission is denying the motion to intervene, the Joint Applicants' motion served no purpose than to cause delay in this proceeding. Furthermore, we agree with Charter that its reply to applicants' memorandum in opposition was timely filed.

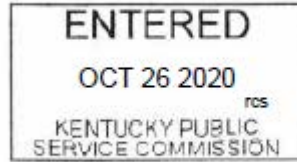
Charter will have ample opportunity to participate in this even though it is not granted intervenor status. Charter can review all public documents filed in this case and monitor the proceedings via the Commission's website. In addition, Charter may file comments as frequently as it chooses, and those comments will be entered into the record of this case.

IT IS THEREFORE ORDERED that:

1. Charter's motion for intervention is denied; and
2. Joint Applicants' motion to strike is denied.

²⁶ See Case No. 2019-00444, *Electronic Proposed Adjustment of the Wholesale Water Service Rates of Princeton Water and Wastewater* (Ky. PSC June 15, 2020).

By the Commission



ATTEST:



Deputy Executive Director

Case No 2020-00259

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