

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

IN THE MATTER OF:

JOINT ELECTRONIC APPLICATION OF RED FIBER PARENT)	
LLC, RF MERGER SUB, INC., CINCINNATI BELL INC., AND)	
CINCINNATI BELL TELEPHONE COMPANY LLC FOR (1) AN)	
APPROVAL OF THE PROPOSED INDIRECT TRANSFER OF)	
OF CONTROL OF CINCINNATI BELL TELEPHONE)	
COMPANY LLC TO RED FIBER PARENT LLC PURSUANT)	CASE NO.
TO KRS 278.020(6) AND KRS 278.020(7), OR ALTERNATIVELY,)	2020-00259
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)	

**MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE FILED BY TIME
WARNER CABLE INFORMATION SERVICES (KENTUCKY), LLC**

Red Fiber Parent LLC (“Red Fiber Parent”), RF Merger Sub, Inc. (“Merger Sub”), Cincinnati Bell Inc. (“Cincinnati Bell”) and Cincinnati Bell Telephone Company LLC (“CBT”) (collectively, the “Applicants”), by their undersigned representatives, respectfully submit this Memorandum in Opposition to the Motion to Intervene filed by Time Warner Cable Information Services (Kentucky), LLC (“Charter”). As set forth below, Applicants oppose Charter’s Motion to Intervene. This Memorandum is submitted pursuant to 807 KAR 5:001, Section 5(2).¹

I. INTRODUCTION

1. On August 10, 2020, Applicants filed a Joint Application (“Application”)²

¹ 807 KAR 5:001, Section 5(2) provides in pertinent part that “...a party to a case shall file a response to a motion no later than seven (7) days from the date of filing of a motion.”

² Capitalized terms used, but not otherwise defined herein shall have the same meanings ascribed to such terms in the subject Application filed in this docket.

requesting that the Kentucky Public Service Commission (“Commission”) approve the transfer of indirect control of CBT to Red Fiber Parent (the “Transaction”) pursuant to KRS 278.020(6) and 278.020(7), or alternatively, pursuant to KRS 278.020(6) with a declaration that approval under KRS 278.020(7) is not required in this proceeding; and granting such other relief as the Commission may deem applicable, required, just and/or reasonable under the circumstances and/or in order for the transactions described in the Application to be consummated.

2. The Application is for a holding company transaction between the Applicants. Only the corporate parent of CBT and the other entities that provide service in Kentucky are affected. As stated in the Application, the merger will be transparent to customers and will not have any cognizable effect on the consumers in the Commonwealth, either directly or indirectly when consumers receive service from providers that use wholesale inputs supplied by CBT. After closing the Transaction, CBT will continue to provide service in Kentucky just as it did before the transaction. There will be no transfers of assets because of the merger, no tariffs will need to be amended or adopted, and nothing will affect the Commission’s regulatory authority over CBT.

3. On August 28, 2020, Charter, CBT’s largest competitor in Kentucky, filed the Motion to Intervene, claiming the Transaction will have a “substantial effect” on “rates, terms, and conditions that apply to wholesale services and facilities provided by CBT” due to Charter’s reliance on “CBT, a Kentucky incumbent local exchange carrier (“ILEC”), to provide service to its customers within CBT’s service territory.”³ Charter states that these services include, but are not limited to, “interconnection, number porting, wholesale operational support systems, pole attachments, and other functionalities, which Charter obtains through interconnection agreements,

³ Motion to Intervene at ¶ 3.

CBT's tariffs, and/or pole attachment agreements."⁴ Charter asserts that "it has substantial and specific interests not adequately represented by other parties in this proceeding and which differ from those of the general public."⁵

4. As discussed in this opposition, Applicants respectfully submit that Charter's Motion to Intervene is an improper attempt by a competitor to: (1) delay or hinder the regulatory approval of the proposed transfer of indirect control; and (2) advance Charter's market position to the detriment of CBT and the public generally. Charter's alleged concerns regarding the impact of Transaction are baseless and at a minimum entirely speculative and will certainly broaden and unduly complicate the issues presented in the proceeding, contrary to 807 KAR 5:001, Section 4(11)(b).

5. Charter's alleged interest in this matter is to ensure that the proposed transfer of indirect control will not adversely affect CBT's provision of **regulated wholesale services**.⁶ Even assuming that Charter's alleged interest may be somewhat different from the general public's interests, such interest does not transform the central issues in this proceeding — whether Applicants are able to perform the services currently being offered including those wholesale services Cincinnati Bell supplies Charter, and whether the proposed transfer of control is reasonable and in the public interest, to one that justifies Charter's intervention in this proceeding.

6. Further, Charter's allegation that it "lacks any other means to protect its interests" is incorrect. Despite Charter's assertion that its concerns are not "merely contractual," Charter's focus is on CBT's provision of wholesale services to Charter under its existing contracts.⁷ Under

⁴ *Id.*

⁵ *Id.*

⁶ Motion to Intervene at ¶¶ 4, 6-8.

⁷ *Id.* at ¶ 4.

these contracts, Charter already has sufficient remedies to protect its interests, particularly where such contracts are already subject to regulatory oversight. Such contractual matters may be subject to the Commission’s jurisdiction but they are also subject to federal laws and regulations such as Sections 251-252 of the Communications Act of 1934, as amended (“Communications Act”) governing interconnection agreements, and the Pole Attachment Act (47 U.S.C. § 224) which already provide Charter with robust means to protect its interests, contrary to Charter’s assertions.

7. As further discussed below, it is apparent that Charter’s allegations are not reasonably pertinent to and would unreasonably broaden the issues already presented in this proceeding, and would not assist the Commission in the determination of this proceeding as set forth in 807 KAR 5:001, Section 4(11)(b). Charter has failed to satisfy the standard for intervention under the Commission’s rules, and therefore, its motion should be denied.

II. STANDARD FOR INTERVENTION

8. KRS 278.310(2) requires the Commission to adopt rules and procedures governing investigations and hearings before it. The Commission has adopted specific administrative regulations governing all of its proceedings. Among these is 807 KAR 5:001, Section 4(11) which sets forth the requirements for intervention. It is important to recognize that the only person with a statutory right to intervene in a proceeding before the Commission is the Kentucky Attorney General.⁸ Intervention by all others is permissive and within the sole discretion of the Commission.⁹ 807 KAR 5:001, Section 4(11)(b) states that “[t]he commission shall grant a person leave to intervene if the commission finds . . . that he or she has a special interest in the

⁸ KRS 367.150(8)(b). The Kentucky Attorney General has not requested to intervene in this case.

⁹ *Inter-County Rural Electric Cooperative Corporation v. Public Service Commission of Kentucky*, 407 S.W.2d 127, 130 (Ky. 1996); PSC Case No. 2019-00176, *In the Matter of: Application of New Cingular Wireless PCS, LLC d/b/a AT&T Mobility for Issuance of a Certificate of Public Convenience and Necessity to Construct a Wireless Communications Facility in the Commonwealth of Kentucky in the County of Casey*.

case that is not otherwise adequately represented or that his or her intervention is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.”¹⁰

III. ARGUMENT

9. Charter has failed to demonstrate that it has a “special interest in the case that is not otherwise adequately represented,” nor is Charter likely to assist the Commission “without unduly complicating or disrupting the proceedings” under 807 KAR 5:001, § 4(11)(b).

A. The Nature and Extent of Charter’s Interest as a Wholesale Customer and Competitor

10. Charter’s ostensible concern that the change of control “could result in modification or impairment of CBT’s operational support systems, platforms and interfaces, and wholesale change management processes” is specious.¹¹ There is nothing in the Application to suggest that Applicants have such plans. Indeed, the Application, and the testimony of Mr. Moldan on behalf of Red Fiber Parent and Mr. Heckmann on behalf of CBT explicitly state that the Transaction “will have no adverse impact on customers and will not alter the manner of service delivery or billing.”¹² Charter attempts to manufacture concern by speculating about potential impacts to public safety because of Charter’s concerns over its reliance on “CBT’s facilities . . . to transport 911 emergency and public safety calls to the correct Public Safety Answering Points (PSAPs) within CBT’s

¹⁰ KRS 278.020(7) requires that a compressed case administration timeline apply to transfer of control cases such as this one. In its 8/20/20 Order the Commission recognized this and put in place a procedural schedule intended to provide a final order within the 120-day statutory deadline (or by 12/07/20). In such cases it is even more critical that putative intervenors lacking standing in the proceeding not be permitted to raise extraneous issues that complicate or disrupt the proceedings thereby misdirecting the Commission’s resources and statutory mandate to decide the case in 120 days.

¹¹ Motion to Intervene at ¶ 7.

¹² Application at ¶ 38

service area,”¹³ despite lacking grounds for this assertion. Such concerns are entirely speculative in nature at this time and not appropriate for the subject Application because no such changes in management of these wholesale services is being contemplated at this time or as a direct result of the Transaction. Again, Applicants have explained that the Transaction “will be transparent and seamless to consumers in the Commonwealth. In particular, after the merger the Licensees will continue to provide service in Kentucky just as they did before the transaction.”¹⁴ This includes all retail and wholesale services. Charter’s rank speculation appears to be manufactured simply to support a motion to intervene, has no basis in the Application, and demonstrates how Charter’s participation in this proceeding would unreasonably complicate and disrupt the proceeding.

11. Further, the limited slate of Charter’s interconnection agreements (“ICA”) with CBT undermines Charter’s argument that its services in the Commonwealth are so dependent on Cincinnati Bell’s wholesale services that an indirect, parent level transfer of control – that will be seamless to customers somehow warrants Charter’s intervention in this proceeding. Charter adopted an existing ICA in April, 2010 that took effect in July 2012. The underlying ICA, between CBT and Insight Phone of Kentucky, LLC took effect in late 2005. The ICA provides for a two-year initial term renewable annually unless terminated by either party. Since adoption, Charter has permitted the ICA – originally drafted fifteen years ago, to renew each year for a total of over eight years without a request to amend or negotiate.

12. In a recent case¹⁵ the Commission denied the permissive intervention request of

¹³ Motion to Intervene at ¶ 7

¹⁴ Application at ¶ 22.

¹⁵ *In the Matter of: 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*, Order, Case No. 2019-00271, (Ky. P.S.C. Oct. 14, 2019).

ChargePoint, Inc (“ChargePoint”) in Duke Energy Kentucky, Inc.’s (“Duke Kentucky”) rate case because it did not receive retail service from Duke Kentucky. In so finding, the Commission’s order of denial states: “The Commission’s jurisdiction is limited to regulating the rates charged, and the service provided, by Duke Kentucky to its retail customers. Here, ChargePoint has not established that it pays any retail rate to Duke Kentucky or that it receives any retail service from Duke Kentucky. Thus, ChargePoint has not established any direct interest in Duke Kentucky’s retail rates or service, much less one that is not otherwise adequately represented. Because only retail customers of Duke Kentucky have an interest in its rates or service ChargePoint failed to establish that it should be permitted to intervene based on a special interest that is not otherwise adequately represented.”¹⁶ Like ChargePoint’s relationship to Duke, Charter neither pays retail rates nor takes retail service from CBT. The Commission’s interpretation of its own regulations on the subject require that Charter’s intervention request be denied.

B. Charter’s Stated Interests are More than Adequately Protected by the Terms of the Applicable Agreements and Recourse to the Commission or the FCC

13. Charter’s alleged issues or concerns all relate to CBT’s continued fulfillment of its obligations under existing interconnection or other wholesale services agreements with Charter. The terms of those agreements will not be affected in any way by the proposed indirect parent-level transfer of control. The Application is explicit that “the merger will be transparent and seamless to consumers in the Commonwealth”¹⁷ and that “the Licensees will continue to provide service in Kentucky just as they did before the transaction.”¹⁸

14. Compliance with such agreements is contractual in nature and is not a regulatory

¹⁶ *Id.* at page 3.

¹⁷ Application at ¶ 22.

¹⁸ *Id.*

matter. For example, CBT's ICA with Charter includes certain standards that the parties to the agreement have pledged to follow. In addition, the agreement includes procedures that the parties must follow in the event one party alleges non-compliance by the other party. These procedures further include a dispute resolution mechanism that the parties are required to follow, which does not contemplate Commission intervention in a transfer of control proceeding. Charter fails to provide any discussion regarding the terms of its existing interconnection agreement or explain why, in the event a dispute arises under the ICA regarding CBT's performance, it could not seek relief pursuant to the ICA's terms. Charter's Motion to Intervene further fails to acknowledge that its stated interests in protecting its ability to interconnect with CBT are adequately addressed and protected by Sections 251 and 252 of the Communications Act.¹⁹ Based on the foregoing it is clear that Charter's contention that it "has no other means to protect its interests in Kentucky" is frivolous.

15. Charter also asserts a special need to protect its interests regarding access to CBT's poles because Charter "is attached to more than 13,000 CBT poles in Kentucky."²⁰ Charter, like every other cable provider or telecommunications carrier attaching to CBT's poles has non-discriminatory access to pole attachments through CBT's Tariff. The rates, terms and conditions in the tariff are subject to Commission review and oversight consistent with the Pole Attachment Act (47 U.S.C. Section 224). As the Application explains repeatedly, no modifications will be required to its Tariff as a result of the Transaction.²¹ Further, Charter has ample opportunity to raise pole attachment issues before the Commission, without bogging down this unrelated transfer

¹⁹ See 47 U.S.C. §§ 251- 252, and the FCC's rules implementing those sections of the Communications Act. See also 47 C.F.R. Part 51.

²⁰ Motion to Intervene at ¶ 8.

²¹ Application at ¶¶ 22, 38; FN 18.

of control proceeding, as the Commission is undertaking a regulatory review seeking comments specifically on matters such as pole attachments.²²

16. Applicants intend to honor CBT's wholesale obligations to ensure a seamless transition after the Commission approves the Transaction. In the unlikely event that issues arise from the Transaction that implicate CBT's fulfillment of its wholesale obligations, or, consistent with the dispute resolution procedures of the agreement, Charter may raise those issues in the appropriate forum, including before the Commission in a complaint. For Charter to suggest, at this juncture, that it has unidentified speculative grievances regarding wholesale services CBT provides Charter, especially when there are no managerial or operational changes required to implement the Transaction, would be highly premature, inappropriate and not pertinent to the issues the Commission will address in this proceeding.

C. Charter's Intervention Will Not Assist the Commission in Fully Considering the Matter

17. Charter's Motion to Intervene further fails to explain how its proposed intervention or participation will assist the Commission in this proceeding. In fact, Charter's Motion demonstrates that its participation in this proceeding would muddle the record with new issues that would unduly complicate or disrupt the proceedings in direct contravention of 807 KAR 5:001, § 4(11)(b).

18. Charter alleges that it "has substantial operating experience with CBT not only in Kentucky but also in the other states in which Cincinnati Bell operates," and general experience in telecommunications industry systems, processes, and procedures. However, it is unclear how a competitor's experience in unrelated markets is relevant to the issue of whether the proposed

²² See, Proposed Revisions to 807 KAR 5:0XX (available at [https://psc.ky.gov/agencies/psc/Proposed%20Amendments/022020/807%20KAR%2050XX%20Pole%20attachment%20regulation%20\(1\).pdf](https://psc.ky.gov/agencies/psc/Proposed%20Amendments/022020/807%20KAR%2050XX%20Pole%20attachment%20regulation%20(1).pdf))

transfer of indirect control under the circumstances of the subject Transaction satisfies the Commission's standard for approving the Application. Allowing Charter's intervention in this proceeding would only establish a precedent for opening the door to all competitors who wish to intervene in a transfer of control proceeding and to use that proceeding to attempt to raise or rehash issues and to attempt to obtain concessions from the ILEC regardless of the merits of the Transaction itself, which would undermine the purpose of 807 KAR 5:001, § 4(11)(b).

D. Charter has Other Means to Address its Concerns over the Transaction

19. As explained above, Charter is simply wrong that it has “no other means to protect its interests in Kentucky,” as Charter has ample ability to use the dispute provisions of its Agreements with Cincinnati Bell to protect itself in the unlikely event the Transaction impacts CBT's performance under those agreements. Further, Charter can review all documents filed in this case and monitor the proceedings via the Commission's website, and may file comments in this proceeding as frequently as it chooses, and those comments will be entered into the record of the case consistent with 807 KAR 5:001, Section 4(11). Finally, Charter may also attend and present real-time comments at the public hearing to be held at the Commission's offices. This process allows Charter to bring to the Commission's attention any legitimate concerns over the Transaction. The document monitoring and comment process is the more appropriate channel for Charter's participation given that the concerns it has alleged bear no relationship to the underlying facts of the transfer of control, but rather to contracts that provide Charter with adequate remedies.

20. Charter has already unsuccessfully attempted to intervene in other State regulatory proceedings related to the underlying Transaction. On June 19, 2020, Charter filed an eerily similar Motion to Intervene (“Hawaii Motion”) in a proceeding at the Hawaii Public Utilities Commission (“Hawaii PUC”) for approval of the transfer of indirect control of Cincinnati Bell subsidiaries, Hawaiian Telecom Inc., Hawaiian Telcom Services Company Inc., and Wavecom Solutions

Corporation to Red Fiber Parent (“Hawaii Application”).²³ As it argues in its pending Motion, Charter argued to the Hawaii PUC that intervention was necessary to ensure that the transfer of indirect control would not adversely affect its existing wholesale agreements related to interconnection and pole attachments.²⁴ Recognizing that Charter failed to provide evidence that it “can assist the [Hawaii PUC] with the review of Cincinnati Bell’s proposed owners/managers of Red Fiber,” much like it has failed to do in the instant case, the Hawaii PUC denied Charter’s Motion to Intervene.²⁵

21. The Hawaii PUC instead granted Charter’s Motion to Participate.²⁶ Similar to its ability to file comments in the instant proceeding, the Hawaii Commission’s participant status provides Charter with a limited involvement in the proceedings to voice its concerns over the tangential issues of the wholesale service agreements. The Hawaii PUC specifically limited Charter from “any attempt to broaden the issues or to unduly delay the proceeding,” and noted that it would “reconsider any Participants’ inclusion in this docket if, at any time during the course of this proceeding, the Commission determines that a Participant is attempting to unreasonably broaden the pertinent issues.”²⁷

22. Applicants assert that this level of participation is more akin to the ability to

²³ In The Matter of the Application of, Red Fiber Parent LLC, Cincinnati Bell Inc., Hawaiian Telcom Inc., Hawaiian Telcom Services Company Inc., Wavecom Solutions Corporation, For Approval to Transfer Indirect Control of Hawaiian Telcom, Inc., Hawaiian Telcom Services Company, Inc. and Wavecom Solutions Corporation to Red Fiber Parent LLC, Docket No. 2020-0080, Order No. 37238 (Haw. P.U.C. July 29, 2020). <https://dms.puc.hawaii.gov/dms/DocumentViewer?pid=A1001001A20G29B43909G00239>

²⁴ Charter’s Hawaii Motion at ¶ 6-7, 11 and 14.

²⁵ Hawaii Order at 26, 30.

²⁶ Hawaii Order at 27, 30. Charter filed a Motion to Intervene or in the Alternative to Participate before the Hawaii PUC in the Hawaii Transaction proceedings. When granted the ability to participate in a proceeding before the Hawaii PUC, a participant may present direct and rebuttal testimony, exhibits, briefs and may issue Information Requests to Applicants, limited to the specific issues set by the PUC.

²⁷ Hawaii Order at 30.

comment detailed in 807 KAR 5:001, § 4(11)(e). If denied intervener status, Charter will be able to raise any current or future concerns during the pendency of the instant proceeding to the attention of the Commission through the filing of comments. In conjunction with the contractual and statutory protections noted above in Section III.B., *supra*, participation through commenting provides Charter with many opportunities “to protect its interests in Kentucky.” Applicants respectfully submit that the Commission should follow the example set by the Hawaii PUC in preventing Charter from unduly disrupting the proceedings before it.

IV. CONCLUSION

23. By filing its Motion to Intervene Charter assumes the burden to establish that it meets the requirements set forth in 807 KAR 5:001, Section 4(11)(b), which provides that “[t]he commission shall grant a person leave to intervene if the commission finds . . . that his or her intervention is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings” (emphasis added). Charter’s unsupported allegations fail to show that it will assist the Commission to develop facts in this docket, or that it will not unduly disrupt the issues already presented in it. Charter has not met its burden to demonstrate entitlement to intervention in this case.

24. Charter’s Motion to Intervene is Charter’s apparent attempt to muddle the record of the Commission’s review of the instant transaction with extraneous matters, as it has done in proceedings before other state commissions. The purpose of this proceeding is to conduct regulatory review of the proposed indirect change of control, and this proceeding should not be used by competitors as a forum to attempt to advance or leverage their respective market positions. Charter’s intervention in this proceeding would result in a variety of business competition matters being raised that are far beyond the scope of Commission’s regulatory review, which would in turn (1) divert valuable time, attention and resources away from the regulatory review process to

evaluate the proposed transfer of indirect control, and (2) unnecessarily disrupt consideration and decision of the pertinent issues presented in this change of control proceeding.

25. Based on the foregoing reasons and the authorities cited above, Applicants respectfully request that the Commission issue an order fully denying Charter's Motion to Intervene as required under 807 KAR 5:001, Section 4(11)(b).

Respectfully submitted,



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