

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, SEPTEMBER 12, 2019

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PETITION OF

DECLARATION NETWORKS GROUP, INC.

CASE NO. PUR-2018-00200

Seeking State Corporation Commission
investigation of, and sanctions against, Eastern
Shore of Virginia Broadband Authority

FINAL ORDER

On December 17, 2018, Declaration Networks Group, Inc. ("Declaration"), filed a petition ("Petition") with the State Corporation Commission ("Commission") in which Declaration alleged that the Eastern Shore of Virginia Broadband Authority ("ESVBA") violated §§ 56-484.7:1 and 56-484.7:2 of Article 5.1 of the Code of Virginia ("Code")¹ by: (a) failing to petition the Commission for authority to provide qualifying communications services; (b) illegally providing qualifying communications services in areas that have three or more competitors providing functionally equivalent services; and (c) proposing to expand its unlawful qualifying communications services into additional geographic areas where three or more non-affiliated companies are providing functionally equivalent services.²

Declaration also asserted that ESVBA's actions violate its founding document in which it was created as a wireless broadband authority under Code § 15.2-5431.1 *et seq.* ("Wireless Service Authorities Act" or "Act"), by the counties of Northampton and Accomack, Virginia, to provide high speed data service and internet access service in underserved areas.³

¹ Code § 56-484.7:1 *et seq.* ("Article 5.1").

² Petition at 2.

³ *Id.* at 1-4.

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Declaration requested that the Commission investigate the matter and order ESVBA: (a) to cease providing any further qualifying communications services and expanding into additional areas unless and until the Commission issues proper authority; and (b) to stop providing qualifying communications services in all areas that are served by three or more competitors after a period of time sufficient to permit its existing customers to find an alternative service provider.⁴ Declaration also requested that the Commission levy any other sanctions on ESVBA, and order ESVBA to compensate Declaration for lost business, as permitted by law.⁵

On January 4, 2019, ESVBA filed a Response to Petition and Motion to Dismiss.

On January 8, 2019, the Commission entered an Order that docketed the matter and assigned it to a Hearing Examiner to establish a procedural schedule, to hold further proceedings as necessary, and to issue a report and recommendation to the Commission. The Order also directed the Staff of the Commission ("Staff") to participate in this case to the same extent as permitted by 5 VAC 5-20-80 D of the Commission's Rules of Practice and Procedure.⁶

On January 18, 2019, Declaration filed a Reply to Response to Petition and Motion to Dismiss. On February 5, 2019, ESVBA filed a Reply in Support of Motion to Dismiss. On February 5, 2019, Eastern Shore Communications, Inc. ("ESCI"), filed a Motion for Leave to File Amicus Brief together with its Amicus Brief Supporting the Petition.

On February 7, 2019, Senior Hearing Examiner A. Ann Berkebile heard oral argument presented by counsel for ESVBA, Declaration, and Staff.

⁴ *Id.* at 6.

⁵ *Id.*

⁶ 5 VAC 5-20-10 *et seq.*

On February 28, 2019, the Hearing Examiner issued her Report. The Hearing Examiner found that ESVBA is not bound by the approval requirements of Article 5.1 and that the Petition should be dismissed.⁷

On March 20, 2019, Declaration filed comments objecting to the Hearing Examiner's Report. Declaration's comments were accompanied by a Motion for Hearing, which requested additional oral argument before the full Commission. On March 21, 2019, ESVBA and Staff each filed comments supporting the Hearing Examiner's Report.

On April 2, 2019, ESVBA filed an Opposition to Motion for Hearing. On April 9, 2019, Staff filed a Response to Declaration's Motion for Hearing. On April 11, 2019, Declaration filed a Reply to the responses filed by ESVBA and Staff.

NOW THE COMMISSION, upon consideration of this matter, is of the opinion and finds as follows.

Petition

The Petition raises a question of statutory interpretation, which the Commission will address herein. As noted by the Hearing Examiner, ESVBA has withdrawn its prior assertion that the Commission lacks subject matter jurisdiction over the Petition.⁸

Next, the Commission summarily rejects Declaration's legally and factually unsupported assertion that Staff somehow had a "conflict of interest" attendant to the instant Petition because

⁷ Hearing Examiner's Report at 7. The Hearing Examiner also granted ESCI's Motion for Leave to File Amicus Brief, noting that no objection had been made thereto. *Id.* at 2 n.6.

⁸ *Id.* at 2 n.8; Tr. 72.

Staff previously adopted a position on the legal question raised herein.⁹ This accusation reflects, at best, a fundamental misunderstanding of the Staff's statutory and regulatory functions.¹⁰

The Commission also denies Declaration's Motion for Hearing. Declaration claims that an additional hearing is required in order "to resolve outstanding legal issues remaining from the [Hearing Examiner's] Report *before the full Commission*."¹¹ When the Commission assigns a matter to a Hearing Examiner, such matter is ultimately decided by the full Commission based on the entirety of the record.¹² Thus, Declaration's Motion for Hearing likewise appears to reflect a fundamental misunderstanding of the Hearing Examiner's statutory and regulatory functions.¹³

Statutory Construction

This case of statutory interpretation centers on two separate statutes from two separate Titles of the Code: (1) the Wireless Service Authorities Act, originally enacted in 2003 and located in Title 15.2 (Counties, Cities and Towns);¹⁴ and (2) Article 5.1 (Provision of Certain Communications Services), originally enacted in 1999 and located in Title 56 (Public Service

⁹ See, e.g., Declaration's March 20, 2019 Comments at 5, 10, 15-16.

¹⁰ See, e.g., Staff's April 9, 2019 Response at 7-10. See also ESVBA's April 2, 2019 Opposition at 6-8.

¹¹ Declaration's April 11, 2019 Reply at 2 (emphasis added).

¹² See, e.g., 5 VAC 5-20-120(C). See also *Board of Supervisors of Loudoun County v. State Corp. Comm'n*, 292 Va. 444, 454 n.10 (2016) ("We note that even in the absence of this representation by the Commission, pursuant to our governing standard of review, the Commission's decision comes to us with a presumption that it considered all of the evidence of record.") (citation omitted).

¹³ See also Code § 12.1-31; 5 VAC 5-20-120.

¹⁴ 2003 Acts ch. 643.

Companies).¹⁵ In short, the Commission is being asked to determine if a wireless service authority created under Title 15.2 is subject to the Commission's jurisdiction under Title 56.

In this regard, the Wireless Service Authorities Act in Title 15.2 states the following: "The purposes for which the [wireless service] authority is being created ... shall be to provide qualifying communications services as authorized by Article 5.1 (§ 56-484.7:1 *et seq.*) of Chapter 15 of Title 56."¹⁶ The Act repeats that a "[p]roject" for a wireless service authority "means any system of facilities for provision of qualifying communications services as authorized by Article 5.1 (§ 56-484.7:1 *et seq.*) of Chapter 15 of Title 56."¹⁷

Next, Article 5.1 of Title 56:

- (1) provides that a "qualifying communications service" is "a communications service, which shall include but is not limited to, high-speed data service and Internet access service, of general application, but excluding any cable television or other multi-channel video programming services";¹⁸
- (2) requires a "county, city, town, electric commission or board, industrial development authority, or economic development authority" (a) to petition the Commission for approval to offer qualifying communications services, and (b) to establish that such services are *not* "readily and generally in the specified geographic area available from each of three or more nonaffiliated companies";¹⁹ and
- (3) permits the Commission subsequently to revoke any such approval upon making certain findings.²⁰

¹⁵ 1999 Acts ch. 916.

¹⁶ Code § 15.2-5431.4.

¹⁷ Code § 15.2-5431.2.

¹⁸ Code § 56-484.7:1(A).

¹⁹ Code §§ 56-484.7:1(A) and 56-484.7:2.

²⁰ Code § 56-484.7:4.

In interpreting these provisions, the Commission follows instructions provided by the Supreme Court of Virginia ("Court"), to wit, "[w]hen construing a statute, our primary objective is to ascertain and give effect to the legislative intent, which is initially found in the words of the statute itself."²¹ As further directed by the Court, the Commission has also considered the Act and Article 5.1 *in pari materia*: "[W]e also generally consider as *in pari materia*, statutes related to the same subject matter, to make the body of the laws harmonious and just in their operation."²² In addition, because the question herein (i) does not require the Commission's technical expertise, and (ii) addresses the primacy between a locality's Title 15.2 powers and the Commission's Title 56 jurisdiction, the Commission's inquiry is straightforward: Whether the statutory plain language "reflect[s] a *manifest intent* on the part of the General Assembly" to subordinate powers given to localities under Title 15.2 to the Commission's jurisdiction under Title 56.²³

In considering the Act and Article 5.1 under such auspices, the Commission finds that the plain language thereof does not reflect a manifest intent on the part of the General Assembly to subject a "wireless service authority" created in Title 15.2 to the Commission's approval

²¹ *Chaffins v. Atlantic Coast Pipeline, LLC*, 293 Va. 564, 568 (2017) (internal quotation marks and citation omitted).

²² *Board of Supervisors of Fairfax County v. Cohn*, 296 Va. 465, 473 (2018) (internal quotation marks and citation omitted).

²³ *BASF Corp. v. State Corp. Comm'n*, 289 Va. 375, 402-403, 405 (2015) ("[I]n determining whether certain structures or uses are exempt from local zoning ordinances [and are subject to the Commission's jurisdiction], there must be a *manifest intention* on the part of the legislature to do so. ... [T]he intention to exempt switching stations from local zoning ordinances [in Title 15.2] is not *manifest* within Code § 56-46.1 [in Title 56]. ... Here, the plain language [giving the Commission jurisdiction under Title 56] does not reflect a *manifest intent* on the part of the General Assembly to exempt switching stations from [a locality's power under Title 15.2].") (emphases added) (internal quotation marks and citations omitted). Unlike the Commission's statutory analysis that was reversed in relevant part in *BASF Corp., supra*, we do not herein find that the statutory language requires the Commission's technical expertise to interpret an undefined electric utility term from an engineering standpoint. *BASF Corp.*, 289 Va. at 403-404 (the statutory construction "does not require analysis '[f]rom an engineering standpoint' as the Commission argues").

jurisdiction in Title 56. Indeed, this lack of clear subordination of a wireless service authority to the Commission's jurisdiction stands in stark contrast to the unquestionable intent as it relates to other governmental entities in this regard. That is, as quoted above, Article 5.1 in Title 56 *expressly* lists the localities and authorities that are subject to the Commission's jurisdiction thereunder and requires them to "petition the Commission" for approval prior to providing qualifying communications services.²⁴ Wireless service authorities are not included in that list.

Moreover, the Act's cross-reference to Article 5.1 (*i.e.*, a wireless service authority shall provide "qualifying communications services as authorized by Article 5.1")²⁵ does not serve as a replacement for such manifest intent. While this cross-reference clearly identifies the communications services that can be provided by a wireless service authority, nowhere does it state – as it does in Article 5.1 – that a wireless service authority must first "petition the Commission," and that the Commission must then "approve or disapprove" such petition upon making certain findings.²⁶ Simply put, read *in pari materia*, the lack of "a manifest intent on the part of the General Assembly"²⁷ to make a wireless service authority's Title 15.2 powers subservient to the Commission's Title 56 jurisdiction is even more glaring in light of the express, unmistakable intent therefor that exists for a "county, city, town, electric commission or board, industrial development authority, or economic development authority."²⁸

²⁴ Code § 56-484.7:1(A).

²⁵ Code § 15.2-5431.4.

²⁶ *See, e.g.*, Code § 56-484.7:1(A).

²⁷ *BASF Corp.*, 289 Va. at 405.

²⁸ Code § 56-484.7:1(A).

The Commission further notes the ease with which the General Assembly could have made such intent manifest as to wireless service authorities. The General Assembly could have expressly stated in the Act that a wireless service authority is required to "petition the Commission" for approval as it did in Article 5.1; but it did not. The General Assembly also could have expressly included "wireless service authority" in the list of localities and authorities that are subject to the Commission's jurisdiction in Code § 56-484.7:1(A) of Article 5.1; but it did not. Indeed, to paraphrase the Court when undertaking a similar analysis: "[W]e also note the ease with which the General Assembly could have included [wireless service authorities] in [Code § 56-484.7:1(A)] ... had that been its intent."²⁹

In addition, the Commission observes that this same statutory analysis is used in determining when the Commission has jurisdiction over localities in other contexts. For example, when a locality provides utility services such as electricity, natural gas, or water and sewer, the Commission only has jurisdiction thereover if the specific governmental entity is *expressly listed* in the relevant section of Title 56:

[I]n those specific and limited cases where the General Assembly intends to subject a governmental entity to the Commission's jurisdiction, it does so expressly and for limited purposes. ... Thus, if the General Assembly intended to include a municipality within the Commission's jurisdiction in § 56-570 of the Code, it had an explicitly defined term in which it could have done so, but did not.³⁰

²⁹ *BASF Corp.*, 289 Va. at 405 ("We also note the ease with which the General Assembly could have included substations in Code § 56-46.1(F) ... had that been its intent.").

³⁰ *Petition of Elizabeth River Crossings OpCo, LLC v. City of Portsmouth*, Case No. PUE-2013-00071, 2013 S.C.C. Ann. Rpt. 425, 427, Order Dismissing Petition (2013) (concluding that the General Assembly did not intend to give the Commission jurisdiction over a locality's provision of water and sewer service).

Next, neither ESVBA nor Declaration assert that the statutes are ambiguous as to the legal question herein.³¹ If the statutory language, however, is deemed of "uncertain nature, of doubtful purport, open to various interpretations, or wanting clearness of definiteness," the legislative history as argued by the parties does not alter the Commission's conclusion.³² The Commission does not find the legislative history dispositive such that it would necessitate a different result. Moreover, legislative history shows that the General Assembly – if it wanted to – knew exactly how to subordinate wireless service authorities to the Commission's jurisdiction. Specifically, legislation was introduced in 2005 that would have expressly inserted "wireless service authority" into the list of localities and authorities subject to the Commission's jurisdiction in Code § 56-484.7:1(A) of Article 5.1; the bill did not become law.³³

Furthermore, since the Act's passage in 2003,³⁴ there have been 30 wireless service authorities that have incorporated thereunder with the Commission.³⁵ The first was incorporated in 2004, and the most recent in 2018.³⁶ Staff has consistently held the legal position that wireless service authorities are not subject to the Commission's jurisdiction under Article 5.1. As a result,

³¹ See, e.g., ESVBA's February 5, 2019 Reply at 2-6; Declaration's March 20, 2019 Comments at 10.

³² *Shepherd v. Conde*, 293 Va. 274, 284 (2017) ("[A] statute is ambiguous when its language is capable of more senses than one, difficult to comprehend or distinguish, of doubtful import, of doubtful or uncertain nature, of doubtful purport, open to various interpretations, or wanting clearness of definiteness, particularly where its words have either no definite sense or else a double one.") (quoting *Newberry Station Homeowners Ass'n v. Board of Supervisors*, 285 Va. 604, 614 (2013) (internal quotation marks and citation omitted)). Thus, "[a]ssuming for the sake of argument that [the statute] is ambiguous ..., we may resolve such ambiguity by consulting legislative history." *Id.* (citing *JSR Mech., Inc. v. Aireco Supply, Inc.*, 291 Va. 377, 385 (2016)).

³³ Tr. 67. See House Bill 2395 (Amendment in the Nature of a Substitute), 2005 Session (<https://lis.virginia.gov/cgi-bin/legp604.exe?051+ful+HB2395H1>).

³⁴ 2003 Acts ch. 643.

³⁵ See, e.g., Staff's April 9, 2019 Response at Attachment A; Tr. 63-64.

³⁶ See, e.g., Staff's April 9, 2019 Response at Attachment A.

those 30 wireless service authorities have not petitioned the Commission for approval thereunder.³⁷ Thus, the Commission further observes that, even with this substantial number of wireless service authorities existing outside the parameters of Article 5.1, the General Assembly has never amended the Code to manifest a different intention.

Finally, the Commission rejects Declaration's argument that the outcome herein represents an "absurd result." Specifically, Declaration claims that the Commission's interpretation is legally "absurd" due to Declaration's belief that it represents "absurd" policy for the Commonwealth.³⁸ Such an argument, however, is directly contrary to Virginia law: "In this context, the anti-absurdity limitation has a legal, not colloquial, meaning. Our fidelity to the statutory text does not permit us to weigh policy arguments for and against legislation, holding out the possibility that we would fashion an interpretation based upon avoiding policies that a litigant thinks to be absurd."³⁹ Rather, the result herein is not legally "absurd" because it does not "force[] the statutory text into an internally inconsistent conflict or render[] the statute otherwise incapable of operation."⁴⁰

Accordingly, IT IS SO ORDERED, and this case is dismissed.

³⁷ See, e.g., Tr. 63-64. Moreover, ESVBA notes that it and Staff have "met informally over the years" on this specific question. Tr. 18.

³⁸ See, e.g., Declaration's March 20, 2019 Comments at 5-6.

³⁹ *Tvardek v. Powhatan Vill. Homeowners Ass'n*, 291 Va. 269, 279 (2016).

⁴⁰ *Id.* at 280 (internal quotation marks and citation omitted). Indeed, the result herein actually *avoids* potential conflicts or internal inconsistencies. Specifically, both the Act and Article 5.1 contain provisions regarding the rates that may be charged for qualifying communications services. Those rate provisions, however, are *not* the same and embody different rate requirements. See, e.g., Code §§ 15.2-5431.11(9), 15.2-5431.25, and 56-484.7:1(C). See also ESVBA's March 21, 2019 Comments at 10; ESVBA's February 5, 2019 Reply at 7; Staff's April 9, 2019 Response at 7 n.20.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to:

Jacqueline R. Neff, Esquire, Jonathan S. Marashlian, Esquire, and Ronald E. Quirk, Jr., Esquire, Marashlian & Donahue, PLLC, The CommLaw Group, 1420 Spring Hill Road, Suite 401, Tysons, Virginia 22102; L. Lee Byrd, Esquire, Stephen V. Durbin, Esquire, and Christopher M. Mackenzie, Esquire, Sands Anderson, PC, 1111 East Main Street, Suite 2400, Richmond, Virginia 23218-1998; and C. Meade Browder, Jr., Senior Assistant Attorney General, Division of Consumer Counsel, Office of the Attorney General, 202 N. 9th Street, 8th Floor, Richmond, Virginia 23219-3424. A copy also shall be delivered to the Commission's Office of General Counsel and Divisions of Utility Accounting and Finance and Public Utility Regulation.