UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CITYNET, LLC, on behalf of
the United States of America,

Plaintiff/Relator,

v.

Civil Action No. 2:14-cv-15947
(Honorable John T. Copenhaver, Jr.)

FRONTIER WEST VIRGINIA INC.,
a West Virginia corporation, **KENNETH ARNDT,** individually, **DANA WALDO,** individually, **MARK McKENZIE,** individually, **JIMMY GIANATO,** individually, and **GALE GIVEN,** individually,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

The State of West Virginia, by and through its Attorney General, Patrick Morrisey, respectfully submits this memorandum of law in support of its Motion to Intervene. Pursuant to Federal Rule of Civil Procedure 24, the State of West Virginia (the "State") has moved to be admitted as an intervening party for the reasons set forth in the memorandum. As explained herein, the State satisfies the requirements for intervention as of right, as well as permissive intervention. Consequently, the State's Motion should be granted such that the State's equitable claim may be considered by Court.

BACKGROUND

The State, through the Executive Office of the State of West Virginia, was the recipient of a grant identified as NTIA BTOP Award Number: NT10BIX5570031 (the "Grant"). Frontier West Virginia Inc. ("Frontier") was a subrecipient of the Grant involved in planning, design, and build-

out relative to the Grant's goals. Years after the closeout of the Grant in 2015, the National Oceanic and Atmospheric Administration's Acquisition and Grants Office (the "NOAA Grant Office") issued two (2) Investigation Resolution Determination Letters (each an "IRDL," collectively the "IRDLs"). These letters communicated determinations by NOAA and the National Telecommunications and Information Administration ("NTIA") disallowing previous reimbursements under the Grant. The IRDL dated August 21, 2016, determined that (i) Frontier's facility build-out (FBO) invoice processing fees were unallowable costs, disallowing $465,000 of previously-reimbursed expenses, and (ii) Frontier's "loadings" charges were unallowable costs, disallowing $4,240,000. *See* IRDL dated August 21, 2016 (attached hereto as Exhibit A). A second IRDL dated May 24, 2018, further determined that Frontier had deployed 37 miles of excess maintenance coils (of fiber optic cable) and calculated $244,200 in additional disallowed costs. *See* IRDL dated May 24, 2018 (attached hereto as Exhibit B). The State timely exercised its rights to appeal each of these IRDLs.

In April and May 2019, the NOAA Grant Office issued final decision letters on the State's appeals. *See* appeal resolution determination letters dated April 4, 2019, and May 20, 2019 (attached hereto as Exhibits C and D). These final decisions did not alter NOAA and NTIA's original determinations set forth in the IRDLs. Since the final decisions were issued, the State has made payments to NTIA in the amounts of $4,705,000 (relative to the first IRDL) and $244,200 (relative to the second IRDL).[1]

The State does not seek to intervene relative to the Plaintiff/Relator's claims under the False Claims Act. In fact, the State takes no position as to those claims. Rather, the nature of the

[1] The State has entered into an agreement for payment of additional amounts related to the IRDLs with the National Institute of Standards and Technology (NIST), a bureau of the Department of Commerce, which is the department housing NOAA.

State's interest is equitable and relates to the federal government. In the event that Plaintiff/Relator successfully proves that Frontier violated the False Claims Act, the statutory recovery to the Plaintiff/Relator and the federal government will derive from figures specified in the Amended Complaint [Docket No. 30]. The measures of damages therein include, among other things, the same amounts that were the subject of the IRDLs. *See, generally,* Amended Complaint [Docket No. 30].[2] As recovery of these sums could only result from a finding that Frontier's conduct in relation to the Grant was fraudulent, false, and/or conspiratorial—in short, highly culpable behavior—equity demands that any such recovery inuring to the benefit of the federal government should result in a return of those amounts already paid by the non-culpable State under the IRDLs. Thus, the State seeks to intervene simply to be in position to equitably recoup the amounts already paid to the federal government should the federal government stand to receive similar payment based on the same underlying costs.

I. STATE IS ENTITLED TO INTERVENE TO ASSERT EQUITABLE CLAIM

A party is entitled to intervene as of right where (1) its motion is timely; (2) it claims an interest relating to the transaction that is the subject of the action; (3) is so situated that disposing of the action may, as a practical matter, impair or impede the movant's ability to protect its interest; and (4) no existing party to the action adequately represents that interest. Fed. R. Civ. P. 24(a). *See also, Scott v. Bond*, 734 F. App'x 188, 191 (4th Cir. 2018) ("[T]o intervene as a matter of right under Rule 24(a), a movant generally must satisfy four criteria: (1) timeliness, (2) an interest in

[2] E.g., ¶¶ 92 ("Frontier devised a plan to expend all of the $42,000,000 of the budgeted BTOP fund by: 1) charging for impermissible 'loadings' that were nothing more than prohibited indirect costs; 2) fabricating the amount of fiber built by utilizing maintenance coils; 3) fabricating the amount of fiber built after the length of maintenance coils had already been considered in the total; 4) […] and 5) billing for inappropriate 'invoicing fees' that were not allowed under the grant."); 104 ("Frontier submitted 365 separate invoices with loadings fees totaling $4,553,387.31."); 118 ("In all, Frontier submitted 327 invoices that contained FBO invoice processing fees in the amount of $593,888.20.").

the litigation, (3) a risk that the interest will be impaired absent intervention, and (4) inadequate representation of the interest by the existing parties."). The State meets these criteria.

A. The State's Motion is Timely

The timeliness of this motion is within the bounds of propriety given the reasons for filing presently. In evaluating timeliness of a motion to intervene as of right, courts consider the disposition of the underlying suit, the potential for prejudice that may accompany any delay resulting from intervention, and the reasons for late timing of such filing. *See Alt v. U.S. Envtl. Prot. Agency*, 758 F.3d 588, 591 (4th Cir. 2014).

The State's basis for seeking intervention in this matter arose very recently, and the State has not delayed its effort to intervene in this action. As the basis of the State's present interest came only as a consequence of payment of now-disallowed costs under the Grant, there was no basis for intervention during the continued pendency of the appeals of the IRDLs. Those appeals were resolved only within the last few months, and the State has been addressing the resultant payment issues with the federal government, such that this effort is now appropriate. Nor has time been of the essence, as this matter presently rests under an indefinite stay pending the outcome of the interlocutory appeal to the United States Court of Appeal for the Fourth Circuit and has been removed from the Court's active docket. *See* Order filed July 2, 2019 [Docket No. 176]. Similarly, intervention would not prejudice any of the parties. While the qui tam action is well along and on a trajectory for eventual trial, the State's interest is essentially legal and would not require additional discovery or negatively impact the continued conduct of the litigation. In light of this and without the need for additional discovery or briefing, granting this motion would not result in delay. Consequently, lack of notable delay (if any) practically negates the potential for prejudice to the existing parties. Under these circumstances, this motion is timely.

B. The State Has an Interest Relating to Transaction That Is the Subject of this Action

The State's equitable interest relative to the federal government is significant and relates to the transaction underlying the qui tam action. The State was the recipient of the Grant for which Frontier was the subrecipient. The federal government's administrative action, which resulted in the IRDLs and the receipt of funds from the State, relate back to that Grant. While the State does not question the statutory and regulatory bases underlying the IRDLs, the administrative actions were initiated later and have resolved more quickly than this qui tam action. Consequently, these administrative actions have effectively placed the State in the position of ensuring some recovery to the federal government vis-à-vis the Grant.

Should this Court determine that Frontier's conduct relating to the Grant was fraudulent and allow the federal government similar recovery here, the State should be equitably subrogated to such recovery up to the amount it has already paid to the federal government due to Frontier's conduct under the Grant. The West Virginia Supreme Court of Appeals has stated that, "[t]he right of subrogation depends upon the facts and circumstances of each particular case" and "[t]he purpose of subrogation is 'to compel the ultimate payment of a debt by one who, in justice, equity, and good conscience, should pay it." *Old Republic Ins. Co. v. O'Neal*, 237 W. Va. 512, 526, 788 S.E.2d 40, 54 (W.Va. 2016) (citing Syl. Pt. 3 *Bush v. Richardson*, 199 W.Va. 374, 484 S.E.2d 490 (W.Va. 1997); Syl. Pt. 3 *Ray v. Donohew*, 177 W.Va. 441, 352 S.E.2d 729 (W.Va. 1986) (citing Syl. Pt. 3 *Huggins v. Fitzpatrick*, 102 W.Va. 224, 135 S.E. 19 (W.Va. 1926)). Furthermore, "subrogation is an equitable right which arises out of the facts and which entitles the subrogee to collect that which he has advanced." *See Travelers Indem. Co. v. Rader*, 152 W.Va. 699, 703, 166 S.E.2d 157, 160 (W.Va. 1969).

The requisite interest for intervention of right exists if the movant faces a potential injury sufficient to establish Article III standing. *See Crossroads Grassroots Policy Strategies v. Fed. Elections Comm'n*, 788 F.3d 312, 320 (D.C. Cir. 2015). If the State is unable to intervene and pursue recovery of the subrogated amount, then the federal government could enjoy double recovery – a disfavored outcome in any matter. *See Equal Emp't Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002) ("[I]t goes without saying that the courts can and should preclude double recovery by an individual" (quotation omitted)). This result would unnecessarily and inequitably deprive the State of funds that would equally have been recovered by the federal government from Frontier.

The State has both a legally protectable interest in the outcome of this matter and Article III standing to Intervene. *See Crossroads Grassroots*, 788 F.3d at 320 (equating standing and legally protected interest). This conclusion has particular force in light of the "special solicitude" to which states are entitled "for the purposes of invoking federal jurisdiction." *See Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 518, 520 (2007).

C. Disposing of This Action May Practically Impair or Impede the State's Ability to Protect Its Interest

The State's ability to protect its interest would be impaired if not permitted to intervene. Regarding recovery to the federal government here based on the same costs underlying State's payments to date, the State would have no option but to initiate a subsequent matter to pursue its equitable claim. This would, at the very least, delay significantly the time frame for any recoupment for the State. More critically, to pursue the State's equitable claim through a separate subsequent action – rather than seeing the State's interest resolved as part of this action – would give rise to a likelihood for mistake or error not present in this Court. Any later stand-alone action by the State would begin at "square one" vis-à-vis another court's understanding of the relevant

factual circumstances. Given the intricate factual scenario here, particularly preceding the recent creation of the State's interest and the wider background that relates to the myriad claims throughout this matter, there is notable potential for a future court to confuse or misconstrue the nature of the State's interest as indistinct from Plaintiff/Relator's claims. This is not a criticism; it is a simple acknowledgement of the highly unusual circumstances in this matter. The only certain way to avoid this potentiality is to have the State's interests considered by this Court.

D. The State's Interest is Not Adequately Represented by Any Present Party

For the purposes of Rule 24(a), a movant's "need not show that the representation [of its interest] by existing parties will *definitely* be inadequate." *See JLS, Inc. v. Pub. Serv. Comm'n of W. Va.*, 321 F. App'x 286, 289 (4th Cir. 2009) (quoting *Trbovich v. UMWA*, 404 U.S. 528, 538 n. 10 (1972)) (emphasis added). The requisite demonstration of inadequate representation is sufficient when such "representation of his interest 'may be' inadequate." *Id.* The Plaintiff/Relator's concern, as per the claims pled, is proving up violations of the False Claims Act to secure recovery to itself and the federal government. In proving False Claims Act violations, Plaintiff/Relator has no reason or opportunity to defend the State's equitable interest against double recovery by the federal government. Similarly, Frontier's defense against the Plaintiff/Relator's claims runs counter to any recovery, let alone the State's interest relative to the federal government. There is no reasonable expectation that the State's interest will receive due consideration without the opportunity to intervene.

II. PERMISSIVE INTERVENTION

For the same reasons, the State satisfies the criteria for permissive intervention. The previously-articulated claim "shares with the main action a common issue of law or fact," Fed. R. Civ. P. 24(b)(1)(B). The amounts disallowed via the IRDLs – and paid by the State – relate to the

same grant as the underlying qui tam action. The IRDL amounts are largely similar to amounts stated in the Amended Complaint.[3] Denying the State the opportunity to intervene could result in the federal government experiencing double recovery – a disfavored outcome in any matter – on the measure of these amounts. Recovering funds for the federal government from a fraudulent actor is an appropriate result for any False Claims Act case, but, in the event of such recovery here, it would only be proper that the State be permitted to pursue its equitable interest to recover the amounts it has already paid to the federal government. Furthermore, given the present disposition and circumstances here, intervention would not "unduly delay or prejudice the adjudication of the original parties' rights" in this matter. Fed. R. Civ. P. 24(b)(3).

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[3] Regarding invoice processing fees, the IRDL specifies $465,000 while the Amended Complaint lists $593,888.20. Regarding "loadings" charges, the IRDL specifies $4,240,000 while the Amended Complaint lists $4,553,387.31.

Respectfully submitted,

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DATE: November 8, 2019

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Defendants.

CERTIFICATE OF SERVICE

I, Curtis R. A. Capehart, hereby certify that on this 8th day of November, 2019, I filed the foregoing "***Memorandum in Support of Motion to Intervene***" using the Court's CM/ECF system and/or United States Postal Service to be served upon the following:

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