



**STATE OF NEW JERSEY**  
**Board of Public Utilities**  
**Two Gateway Center**  
**Newark, NJ 07102**  
**[www.bpu.state.nj.us](http://www.bpu.state.nj.us)**

CABLE TELEVISION

IN THE MATTER OF THE PETITION OF )  
COMCAST CABLEVISION OF JERSEY CITY, LLC )  
FOR ACCESS TO CERTAIN PREMISES KNOWN AS )  
THE "ABRAHAM LINCOLN" LOCATED AT 204 10<sup>TH</sup> )  
STREET IN THE CITY OF JERSEY CITY, COUNTY )  
HUDSON, STATE OF NEW JERSEY )

ORDER ADOPTING IN PART,  
REJECTING IN PART AND  
MODIFYING IN PART INITIAL  
DECISION

BPU DOCKET NO. CE05040342  
OAL DOCKET NO. CTV9051-05

(SEE ATTACHED SERVICE LIST)

BY THE BOARD:

The New Jersey Board of Public Utilities (Board) and its Office of Cable Television (OCTV), pursuant to N.J.S.A. 48:5A-1 et seq., have been granted general supervision and regulation of and jurisdiction and control over all cable television systems which operate within the State of New Jersey, subject only to the limitations of federal law. This matter was opened to the Board upon the filing of a petition by Comcast Cablevision of New Jersey, LLC (Comcast) pursuant to N.J.S.A. 48:5A-49 and N.J.A.C. 14:18-4.5(b) for access to the property known as the "Abraham Lincoln" situated at 204 10<sup>th</sup> Street within what is known as the Newport Development complex in Jersey City, New Jersey and owned by H.P.Lincoln Urban Renewal Company (H.P. Lincoln). The Board must now take action on the Initial Decision (ID) rendered by Administrative Law Judge (ALJ) Barry N. Frank, filed with the Board on September 15, 2006.

This matter centers on the attempt by Comcast to gain access to the Abraham Lincoln residential property to provide cable television service to tenants who have requested such service. In 2001, Comcast sought and ultimately received access to the eight residential buildings that made up the Newport Complex at that time. In that matter, relied on by ALJ Frank in his Initial Decision in this matter, the Board granted Comcast access to provide cable television service to the Newport Complex, subject to conditions, including, among other things, compensation to the owner of the complex for any damage caused by the installation, operation and removal of the cable system, compensation to the owner and the operator of the established video system serving the complex for the cost of employees to monitor the construction of the Comcast facilities, and the purchase by Comcast of environmental hazard

liability insurance. I/M/O Petition of Comcast Cablevision of Jersey City, Inc. for Access to Certain Premises known as "Newport" in the City of Jersey City, New Jersey, BPU Dkt. No. CE01090585, OAL Dkt. No. CTV 9687-01 (Aug. 7, 2003) (Newport Order), appeal pending, App. Div. Docket No. 000562-03T5.

The instant matter was transmitted to the Office of Administrative Law on July 16, 2005 as a contested matter under N.J.S.A. 52:14B-2(b) and N.J.A.C. 14:17-9.1 et seq., and after motion practice, ALJ Frank conducted evidentiary hearings over the course of two days, June 8, 2006 and June 13, 2006.

At the beginning of the June 8, 2006 hearing, ALJ Frank orally ruled on a motion by Comcast for summary decision granting summary decision in part and limiting the scope of the hearings (Partial Summary Decision or PSD). The ALJ's decision, predicated on the Newport Order, barred certain testimony alleging projected lost income resulting from Comcast competing with the incumbent provider of multi-channel television services as a basis for just compensation, restricting testimony on that issue to a showing of a diminution in the value of the real property as a result of Comcast's proposed access. The PSD, which was later memorialized in an Order dated August 29, 2006, also included the following rulings:

1) the issue of the scope of services Comcast could provide following access is beyond the scope of the proceeding; 2) the duration of access shall be coterminous with the term of Comcast's franchise in Jersey City; 3) the disposition of Comcast's wiring and facilities shall be governed by the laws existing at the time of the termination of Comcast's service in the event Comcast's services were to terminate; 4) H.P. Lincoln's request that Comcast post a performance bond and/or parent guarantee, was rejected on the grounds that a cable franchise need only post a performance bond as demanded by the franchising municipality under N.J.S.A. 48:5A-28(1)(d); 5) the issue of a default of the parties' obligation with respect to access is a factual issue appropriate for trial; 6) H.P. Lincoln can make a proffer of proof on any of the claims rejected by the ALJ without Comcast having any obligation to rebut any such offer; and 7) the pre-filed testimony and exhibits, or portions thereof, of both H.P. Lincoln and Comcast relating to the issues that are subject to the partial granting of summary decision are precluded from admission in the evidentiary record.

After hearing testimony on the remaining issues and submission of briefs by the parties, ALJ Frank filed his Initial Decision with the Board on September 15, 2006, including the PSD as Exhibit A, to be considered by the Board in its final decision. Exceptions were filed by H.P. Lincoln and Comcast on October 5, 2006. Reply exceptions were due on October 10, 2006 but at the request of the attorney for Comcast and on consent of the attorney for H.P. Lincoln, an extension was provisionally granted by Board Staff until October 17, 2006 for the filing of those replies and that extension is HEREBY GRANTED, as within time, by the Board. The parties submitted their replies to exceptions on October 17, 2006, and H.P. Lincoln filed a response to Comcast's reply on October 24, 2006 objecting, among other things, to Comcast's manner of submission of "confidential information" within its reply to H.P. Lincoln's exceptions. None of the information H.P. Lincoln seeks to protect will be revealed in this Order, thereby allaying any possible harm to H.P. Lincoln. Additionally, Comcast is HEREBY ORDERED to conform its reply to exceptions to the Board's confidentiality regulations as contained in N.J.A.C. 14:1-12.1 et seq. and the terms of ALJ Frank's confidentiality order dated May 16, 2006, and submit a redacted public version along with the version previously filed which should be marked as confidential.

While Comcast has limited its exceptions to the ALJ's findings and conclusions with regard to the issue of default and termination, H.P. Lincoln has challenged almost all of the remaining findings and rulings of the ALJ, predicated on its position that the ALJ could not rely on the Newport Order because it is currently on appeal. The Board hereby rejects H.P. Lincoln's position and adopts the ALJ's reasoning that the Newport Order is a statement of the Board's policy on access petitions such as this one, and that it was incumbent on the ALJ to follow those policies. See, I/M/O William J. Kallen, 92 N.J. 14 (1983). The filing of an appeal in and of itself does not stay an order of this Board, and no application for a stay of the Newport Order was filed. We therefore find that the Partial Summary Decision was properly based on the Board's policies as expressed in the Newport Order.<sup>1</sup>

### Contested Issues

#### Tenants' Requests

N.J.S.A. 48:5A-49 governs the terms of access and the respective rights of landlords and tenants in situations where a tenant seeks to secure cable television service from a franchised cable television operator. ALJ Frank found that as a matter of statutory interpretation, a request by one tenant is all that is required to "trigger" operation of the statute for access to the entire property. Respondent H.P. Lincoln argues that Comcast has failed to meet its burden to submit a valid tenant request for cable television services, and questions the two requests submitted by Comcast in evidence, arguing that one is not from a current tenant and that the other, submitted by two roommates in a single apartment, was not specifically for cable television services (Respondent Reply Brief at 11-12). Comcast, on the other hand, maintains that it has shown multiple requests for service and notes that it forwarded 47 additional requests collected over the years to H.P. Lincoln, but only submitted two in evidence since, as it reads the law, only one request was necessary to trigger the statute ( Petitioner Reply Brief at 19 and 25). Comcast further maintains that H.P. Lincoln's argument is a "bad faith violation of its obligation as an owner under the access statute not to deny Comcast's service to those who desire it." (Id. at 25.)

ALJ Frank found that there was a clear and obvious request for Comcast's cable television services within the Abraham Lincoln. (ID at 5.) He further found that H.P. Lincoln was "clearly aware" of the requests for service, including those that were not admitted into evidence, and that Comcast had provided two requests that were admitted into evidence and were sufficient to "trigger the statute." To find otherwise he held, would lead to unnecessary expense and litigation on the part of both parties. (ID at 15.) On this basis, ALJ Frank ordered that Comcast is entitled to install cable television services at Respondent H.P. Lincoln's property known as the "Abraham Lincoln" and granted access for that purpose. (Ibid.)

H.P. Lincoln takes exception to the ALJ's findings concerning the sufficiency of the evidence of requests for cable television service, and states that the ALJ violated his own ruling by considering the additional requests produced on the eve of trial. However, the ALJ's finding of at least one request for cable television service valid at the time of the request for access is

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<sup>1</sup> In its exceptions, Comcast asserts that H.P. Lincoln is estopped from challenging the rulings of the Newport Order because the issues were litigated there by a party whose ownership is similar to H.P. Lincoln. The Board agrees with H.P. Lincoln that any estoppel arguments should have been raised before the ALJ and not for the first time in the exceptions, especially where the parties are not identical.

supported by evidence in the record, and one request is all that is needed. N.J.A.C. 14:18-4.12(a)(2) specifically bars a multiple dwelling unit owner or agent from denying “any tenant of a dwelling under its control access to the services of a cable television operator.” (Emphasis added.) See also, I/M/O the Petition of Comcast of Central New Jersey, LLC. For Access to Certain Premises known as “Regency at Monroe.” OAL Dkt. No. CTV 2991-05 (10/18/05). Based on the entirety of the record, including the tenant requests marked into evidence as P-7 and P-8, which the ALJ found to be business records, (Tr. 6/8/06 at 113:17-20; Tr. 6/13/06 at 28:19—31:25, 115:9—12), we find that there was a sufficient basis for the ALJ to conclude that Comcast has a right to access. Additionally, H.P. Lincoln’s own arguments concerning just compensation, calculating an access fee based on a percentage of the projected gross revenue to be derived by Comcast’s service once access is granted, manifests H.P. Lincoln’s own belief that there is an existing demand for Comcast’s services at the Abraham Lincoln. In accordance with N.J.A.C. 1:1-18.6(d), the Board does not find substantial evidence in the record that would support the rejection of the ALJ’s finding as requested by H.P. Lincoln.

Accordingly, the Board HEREBY ADOPTS the ALJ’s recommendation and HEREBY FINDS AND ORDERS that Comcast has a right to access the Abraham Lincoln, subject to the statutorily-required “reasonable conditions necessary to protect the safety, functioning, appearance and value of the premises and the convenience, safety and well-being of other tenants” addressed below. See N.J.S.A. 48:5A-49.

#### Compensation:

ALJ Frank determined that the proper compensation for the taking of property associated with the installation of cable wires and equipment was the \$1.00 offered by Comcast under N.J.A.C. 14:18-4.5(a). Citing to the analysis and rationale in the Newport Order, ALJ Frank evaluated the parties’ positions. H.P. Lincoln argued that it is entitled to compensation beyond that outlined in N.J.A.C. 14:18-4.5(a) and contended that it is either entitled to “just compensation” based on N.J.A.C. 14:18-4.5(d), or alternatively to compensation as a “reasonable condition” of access based on N.J.S.A. 48:5A-49(a) (H.P. Lincoln Brief at 1). Concerning its first argument, H.P. Lincoln contends that it is entitled to just compensation based on N.J.A.C. 14:18-4.5(d) which provides for such compensation where the owner can “clearly demonstrate” a diminution in value due to the installation (H.P. Lincoln Reply Brief at 6-7). To support its argument, H.P. Lincoln submitted a market study created by its witness that calculated a value to a cable company from the number of tenants that use cable lines, and assumed that a fee for access to a pool of potential cable subscribers could be assessed. ALJ Frank rejected these arguments based upon the Board’s findings in the Newport Order that a cost of service basis is an improper method for calculating just compensation for the grant of access as the information couched in terms of an access value was essentially the same as the rejected cost of service value. . Similarly, the ALJ rejected H.P. Lincoln’s second argument that compensation is a reasonable condition of access based upon a plain reading of the statute that prohibits owners from charging fees for access to cable television service beyond the nominal fee set, and the failure of H.P. Lincoln to demonstrate the diminution in the value of the property resulting from Comcast’s access required under N.J.A.C. 14:18-4.5(d).

The Board finds the determination of the ALJ to be persuasive and appropriate. N.J.A.C. 14:18-4.5 provides that the owner of property being taken by a cable company so that cable service can be provided to tenants has the burden to prove any just compensation calculation that deviates from the default amount of \$1.00. H.P. Lincoln did not carry this burden. H.P. Lincoln’s own witness, citing to the testimony of its expert, a real estate appraiser, found that there would be no difference in the value of H.P. Lincoln’s real property caused by Comcast’s

taking. Specifically, he found that “[t]he land and building structures will remain essentially the same after the taking due to the cable access proposal (with the exception of the physical presence of wiring and equipment and any repairs and/or renovations required to accommodate Comcast’s wiring and equipment), as they were in the before condition.” (Sussman Testimony, Exhibit H-3, 3:22-28 – 4:1-5.) In addition, H.P. Lincoln’s assertions notwithstanding, there is no evidence in the record that establishes a compensable loss of property value as a result of Comcast’s installation. Mr. Garrigan’s testimony seeks to attribute a value to the right of access and set it according to a sliding scale based on H.P. Lincoln’s estimate of Comcast’s expected penetration. While such a calculation may serve to demonstrate a loss of income to H.P. Lincoln as a result of Comcast’s presence, it is no equivalent to a “before” and “after” examination of the value of the property as prescribed by N.J.A.C. 14:18-4.5.

The law clearly provides for access and sets the fee for such access at \$1.00 unless the property owner can establish that there is a clear diminution in the value of its property. The fact that the cable television company derives a benefit from the access in the form of fees for service, or that the property owner suffers a loss of income from an existing provider is in no way related to the value of the property as contemplated by the statute, nor can it serve as a surrogate for a showing of a clear diminution in the value of the property that is required by law. See, NYT Cable TV v. Homestead at Mansfield, 214 N.J. Super 148 (App. Div. 1986). Accordingly, the Board HEREBY ADOPTS the ALJ’s recommendation on the issue of compensation, and HEREBY FINDS AND ORDERS that Comcast must provide compensation in the amount of \$1.00 for the access required of H.P. Lincoln by this decision.

#### Conditions of Access:

##### Term

As part of the PSD, ALJ Frank followed the Newport Order and found that the term of access to the Abraham Lincoln would be equal to the remaining term of Comcast’s franchise in Jersey City, absent an agreement of the parties to an alternative arrangement. While Comcast supports this finding, H.P. Lincoln takes exception claiming that the grant is arbitrary and capricious and anti-competitive due to the possible length of the typical franchise grant which would “lock in” Comcast’s access. H.P. Lincoln requests that this Board order a 5 year term or remand to the ALJ for the taking of evidence on the reasonableness of such a term. (H.P. Lincoln Exceptions at 12--14.) The Board agrees with ALJ Frank’s determination, based on the Newport Order, that the term of access is equal to the remainder of the term of Comcast’s Jersey City franchise. The certificate of authority issued by this Board is based on the municipal consent granted by Jersey City and is the document that grants Comcast the right to operate within the franchise area. Therefore, there is a clear nexus between the right to operate in the franchise area and the right to provide service to tenants in the Abraham Lincoln located within that franchise area. Any argument that such a grant prevents competition is baseless as any access granted pursuant to the statute is nonexclusive. Once access is granted by Order rather than by mutual agreement, the parties are no longer in a position to negotiate terms. The Board HEREBY ADOPTS the ALJ’s recommendations, with modification rejecting the alternative of allowing the parties to negotiate an alternate agreement after the entry of this Order, and HEREBY FINDS AND ORDERS that Comcast’s term of access to the Abraham Lincoln shall be coterminous with the expiration of Comcast’s Jersey City franchise.

### Scope of Services

As part of the Partial Summary Decision, ALJ Frank followed the Newport Order and found that any restrictions on the services that Comcast could provide once its wires are installed was not a condition of access that is ripe for decision within this proceeding. H.P. Lincoln maintains that this finding must be reviewed due to “new dispositive legislation,” P.L. 2006 c. 83, that amended the definition of cable television service, effective after this petition was filed, narrowing that definition to mirror the definition contained in the Federal Cable Act at 47 USC sec. 522(6). (H.P. Lincoln Exceptions at 4—8.) Comcast filed the instant petition under N.J.S.A. 48:5A-49 for access to provide cable television service to tenants of the Abraham Lincoln, and that is what is granted by this Order. The Board will not speculate as to what Comcast may or may not seek to do at some future time as to do so does not constitute a reasonable condition of access. H.P. Lincoln mischaracterizes the testimony of Comcast witness, Fred Kopcecki stating that “Comcast should not be prevented from competing [for phone and internet service]”, Ex. P-6 at 5:15—23, as stating that Comcast will indeed offer such services. Therefore, the Board does not find that the passage of P.L. 2006 c. 83 mandates rejection of its holding under the Newport Order as adopted by ALJ Frank that any question as to the scope of services is outside the purview of this proceeding, or reconsideration of the conclusion of the Board that no basis exists for a provision in an access order that expressly prohibits certain services as a condition of access, especially as regards to telecommunications services. See, 47 U.S.C. § 541(b)(3)(B).

### Disposition of Wiring upon Termination

As part of the PSD, ALJ Frank followed the Newport Order and found that the disposition of Comcast’s wiring and facilities will be governed by the laws existing at the time of termination of Comcast’s services, thereby rejecting H.P. Lincoln’s position that a plan for such disposition is necessary as a condition of access. H.P. Lincoln takes exception to this finding still maintaining that setting conditions for removal upon some future termination is a reasonable condition of access necessary for its protection. (H.P. Lincoln Exceptions at 14—16.) The Board does not find H.P. Lincoln’s argument to be persuasive. Should Comcast discontinue service, it must seek Board approval under N.J.S.A. 48:5A-37, thereby giving H.P. Lincoln the opportunity to be heard on the matter of termination within a more appropriate context. As there is no contract between the parties, N.J.A.C. 14:18-4.12(e) does not dictate a different result.

### Expenses:

ALJ Frank, citing to the Newport Order, directed Comcast to compensate H.P. Lincoln for its additional security costs, but not for the review costs it claimed concerning the installation of Comcast’s equipment and wiring in the Abraham Lincoln. (ID at 5.) The ALJ’s decision was predicated upon H.P. Lincoln’s estimated extra security costs based upon the time estimated by Comcast to complete the project. Absent an analysis and contrary estimate by Comcast, the ALJ found H.P. Lincoln’s estimate reasonable. He found that since the security costs are calculable based on a set rate for a set period of time, they can be easily determined and should be considered an out-of-pocket cost, subject to true-up. (ID at 18—19.)

With regard to the plan review costs claimed by H.P. Lincoln, the ALJ found that the costs claimed by H.P. Lincoln are based on the value of the time attributable to work by someone already employed by H.P. Lincoln to handle the activities associated with cable installation.

Therefore, the ALJ found that the work is already covered by the Respondent and should not be recovered from Comcast as an “out-of-pocket” or “extraordinary” cost. (ID at 19.)

In its exceptions, H.P. Lincoln maintains that the supervisory costs would not be incurred if Comcast were not granted access, and that there are other costs such as notifications to tenants that Comcast should be required to cover. (H.P. Lincoln Exceptions at 18—19.) Comcast did not respond on this issue.

The Board agrees with the decision of ALJ Frank on expenses. Under N.J.A.C. 14:18-4.5(d)(4) and (5), H.P. Lincoln had the burden to show those out of pocket and extraordinary costs associated with the installation which it maintains Comcast should be required to bear. Based upon the evidence provided and the testimony taken before ALJ Frank, the only costs on which H.P. Lincoln satisfied its burden were the additional security costs. Accordingly, H.P. Lincoln will not recover the additional installation plan review and other incidental expenses it claims under N.J.A.C. 14:18-4.5(d) (4) and (5) which it failed to show were both extraordinary and out-of-pocket. Thus, the Board HEREBY ADOPTS the ALJ’s recommendation and HEREBY FINDS AND ORDERS that Comcast, under the provisions of N.J.S.A. 48:5A-49, must compensate H.P. Lincoln for its increased security costs, subject to final true-up, but not for the installation plan review costs or other incidental costs claimed regarding the installation of Comcast’s equipment and wiring in the Abraham Lincoln.

Conditions for Protection of the Premises:

With regard to the physical installation of cable facilities, the law is clear that the property owner has the right to require “reasonable conditions” for such installation in order to protect “the safety, functioning, appearance and value of the premises and the convenience, safety and well-being of other tenants.” N.J.S.A. 48:5A-49(a).

The record clearly shows that the parties agree that of the three options for entry into the building proposed by Comcast, the best option entails the use of H.P. Lincoln’s existing conduit to enter the building and bring the cabling to the individual units. However, absent an agreement on the terms for use of the existing conduit, ALJ Frank appropriately addressed the available alternatives outlined below. (ID at 19.)

Trench Plan/ Riser Plan:

Concerning a trenching plan to gain access to the property, H.P. Lincoln proposed a trench across Manila Avenue because it is the shortest distance for trenching (H.P. Lincoln Brief at 26-27). Comcast, argued that all things being equal it would prefer to trench over a shorter distance, but that the difficulties posed by an 8 foot retaining wall would not meet the reasonable requirements of the statute in light of the fact that the hole at the retaining wall would have to be dug at a depth of 11-12 feet and at a circumference of six feet by six feet (Comcast Brief at 34, P-5 at 2:1-16). Instead, Comcast proposed to trench across 10<sup>th</sup> Street or from Erie Street which has a four foot retaining wall (P-5 at 2:1-16). H.P. Lincoln objected to the 10<sup>th</sup> Street alternative due to the required length of excavation (320 feet around the building), including excavation across a highly visible area of front landscaping (H.P. Lincoln Brief at 26-27).

H.P. Lincoln further sought to have the entire street repaired after trenching. Comcast argued that such a condition is unreasonable and beyond what the City of Jersey City requires for street repair. (H.P. Lincoln Brief at 27; H.P. Lincoln Reply Brief at 34.)

Upon examination of the difficulties posed by each alternative, ALJ Frank determined that the both the Manila Avenue and Erie Street proposals posed an undue hardship and expense for Comcast, were beyond the bounds of “reasonable” and should be rejected. He further found that the 10<sup>th</sup> Street plan, while not ideal for the protection of appearance of the premises or convenience of the tenants, resulted in a shallower trench which is safer, and posed merely a temporary problem. Therefore ALJ Frank determined that the 10<sup>th</sup> Street plan meets conditions that are both reasonable and necessary for protection of the premises and the tenants. (ID at 21.)

With regard to the issue of street repair, the ALJ rejected H.P. Lincoln’s position that it is reasonable to require Comcast to repair the entire street and return it to its original condition, and determined that Comcast should only be required to follow Jersey City’s requirements for street repairs currently limited to the obligation to resurface a one foot patch beyond the affected area. The ALJ determined that requiring Comcast to repair the entire street was not a reasonable and necessary condition for access as required by N.J.S.A. 48:5A-49(a). A claim that patching is “unsightly” does not outweigh the additional expense to Comcast or the additional inconvenience to tenants that would result from resurfacing the entire street. (ID at 22.)

Thus, the Board HEREBY ADOPTS the ALJ’s recommendations, and HEREBY FINDS AND ORDERS that in the event no agreement to use the owner’s conduit for installation can be reached, the 10<sup>th</sup> Street trench plan and the riser plan agreed to by the parties and outlined elsewhere herein should be used to effect the installation. The Board HEREBY ADOPTS the recommendation of the ALJ on the issue of street repair, and FURTHER FINDS AND ORDERS that for street repairs that become necessary due to its installation activities, Comcast shall follow the requirements determined by the City of Jersey City for street repairs..

#### Hallways:

As noted in the Initial Decision and outlined more fully below, the parties have agreed to a plan for the installation of Comcast facilities and wiring in the hallways of the Abraham Lincoln, the installation of homerun cable and laying of other wiring. The sole remaining issue in dispute regarding hallway wiring, concerns H.P. Lincoln’s request for a 12-inch separation between Comcast’s and other parties’ wiring and equipment. Comcast objected to this condition as an unreasonable condition for access, and maintained that its promise not to lay wiring on existing equipment is sufficient to address H.P. Lincoln’s concerns. ALJ Frank agreed with Comcast. (ID at 22.) He indicated that neither party has provided evidence that a general separation between Comcast’s wiring and any other wiring and equipment versus a 12-inch separation as requested by H.P. Lincoln makes any difference in the property’s value. Therefore, the ALJ held that because the 12-inch separation fails to meet the statutory requirement to be both reasonable and necessary, it should be rejected.

In its exceptions, H.P. Lincoln seeks a “clarification” of the ALJ’s determination and seeks an explicit direction that Comcast cannot attach its wiring to existing wiring or relocate existing wiring or equipment. (H.P. Lincoln Exceptions at 26—27.) In reply, Comcast maintained that the requested clarification was unnecessary, and committed to installing its facilities in “a good and workmanlike manner,” with an “ultimate separation of equipment.” (Comcast Reply to H. P. Lincoln Exceptions at 22—23.)

The Board agrees with ALJ Frank and declines to “clarify” his finding that Comcast has already agreed not to lay wiring on any existing equipment. It is incumbent upon the property owner in an access situation to demonstrate the reasonableness and necessity of conditions it seeks to impose on the cable operator seeking access to its premises. H.P. Lincoln has not satisfied its burden here. Accordingly, the Board HEREBY ADOPTS the ALJ’s recommendations, and HEREBY FINDS AND ORDERS that the agreed upon hallway plan for installation should be used and a general separation between Comcast’s wiring, and any other wiring and equipment is appropriate.

On Site Supervisor / Signed Documents:

H.P. Lincoln requested that a Comcast supervisor be on-site throughout the installation and provide instruction for all its employees and contractors’ employees regarding access conditions as contained in ALJ and Board Orders, and that Comcast provide signed acknowledgements that it has provided such instruction (H.P. Lincoln Brief at 31-32). Comcast countered that these conditions are excessive (Comcast Reply Brief at 33-34). There is no dispute that Comcast will be using the services of various subcontractors in its installation, nor that damage has occurred as a result of prior installations at the Newport Complex, including activities performed by Comcast employees. In light of this history, the ALJ found that extra precautions may be necessary to protect the premises in this situation, and granted H.P. Lincoln’s request for an on-site supervisor, and that signed acknowledgements be required from Comcast employees and contractors regarding access conditions contained in ALJ and Board Orders in this case only. (ID at 23.) Comcast did not take exception to this finding.

The Board agrees with the ALJ that both Comcast and H.P. Lincoln have an interest in avoiding damage to H.P. Lincoln’s property in the first place, and in light of the history between these parties in prior installations, that an on-site supervisor and signed acknowledgements that proper instruction has been given is a reasonable condition of access in this case. Accordingly, the Board HEREBY ADOPTS the ALJ’s recommendation, and HEREBY FINDS AND ORDERS that Comcast provide an on-site supervisor and documents showing awareness by Comcast employees and contractors working at the site of the provisions of this Board Order pertaining to the installation of Comcast wiring and facilities at the Abraham Lincoln.

Default/Termination:

H.P. Lincoln sought to define default terms in this matter based upon an earlier agreement between Comcast and H.P. Lincoln’s affiliate NADC that governs Comcast’s use of conduit owned by NADC. NADC owns and controls most of the residential properties within the Newport Complex in Jersey City. H.P. Lincoln argued that the definition of default and the accompanying remedies should include the terms that Comcast agreed to in its conduit agreement with NADC, with language to fit it to the instant case. One of the requested remedies proposed by H.P. Lincoln is that in the event of a default on the part of Comcast, H.P. Lincoln would have “the right at its sole discretion, to terminate the other party’s rights.” In particular, H.P. Lincoln proposed that each of the following conditions would constitute an event of default:

- a) the failure of Comcast to timely make any payment to owner, when due and the continuation of such failure for five (5) business days after written notice to Comcast;
- b) the failure of Comcast to maintain in effect the insurance coverage required and/or the failure to deliver the certificates evidencing such insurance coverage;

- c) any other breach of the parties obligations under Orders or Agreements that constitutes a violation of legal requirements and its continuation for more than the lesser of ten (10) days after by the non-defaulting party to the defaulting party or, if a notice of violation (or similar notice) has been issued by such Governmental Authority, the period of time provided the applicable Governmental Authority for the cure of such violation without penalty, fine or enforcement action;
- d) any other breach of this Agreement and its continuation for more than ten (10) days after notice by the non-defaulting party to the defaulting party; and
- e) any termination, revocation, or reversal of any right granted by the Order.

In terms of a remedy in the event of a default, H.P. Lincoln proposed the following:

If an Event of Default occurs hereunder and remains uncured within the time permitted the non-defaulting party shall have the right, at its sole discretion, to terminate the other parties' rights under Orders or Agreements with ten (10) days prior written notice to the defaulting party. The non-defaulting party shall also have the right to institute suit, in law or in equity, against defaulting party for any default or breach, Orders or Agreements. The prevailing party in any such action shall be entitled to collect from the non-prevailing party, all costs of the action, including reasonable attorneys' fees. (H.P. Lincoln Brief at 34-35; and Exhibit H -12.)

Comcast argued that only the Board can end the company's franchise or right to access. (Comcast Reply Brief at 35-36)

Predicated upon the testimony given at trial, ALJ Frank determined that reserving the right to terminate access at will in the event of a default is not a reasonable condition of access. (ID at 25.) Such default must be determined at a later date, if and when it occurs with the appropriate penalties adjudicated in a court of law. Concerning the proposed conditions of default, the ALJ found that paragraphs b, c, d and e proposed by H.P. Lincoln were reasonable and necessary and should be ordered with appropriate penalties if not adhered to by the parties. ALJ Frank modified the default clause proposed by H.P. Lincoln to provide for remedies for either H.P. Lincoln or Comcast as a non-defaulting party in the event of a default or breach of orders or agreements. It reads as follows:

"If an event of default occurs hereunder and remains uncured within the time permitted, the non-defaulting party shall have the right to institute suit, in law or in equity, against defaulting party for any default or breach, orders or agreements. The prevailing party in any such action shall be entitled to collect from the non-prevailing party, all costs of the action, including reasonable attorneys' fees."

(ID at 10)

Both Comcast and H.P. Lincoln take exception to the default provisions adopted by ALJ Frank. Comcast argued that the provisions are unnecessary as in the absence of an agreement between the parties, this Board Order will control, and any violation of this order is subject to the jurisdiction of the Board. Comcast maintains that the ALJ erred in finding that default conditions were a factual issue, and in any event there is no evidence in the record to support the reasonableness of the default provision adopted by the Initial Decision. (Comcast Exceptions at 4—6.) Comcast, further, argued that there is "no basis for creating default provisions incident to an "agreement" which, in fact, does not exist and which the parties did not negotiate." (Comcast

Exceptions at 2.) H.P. Lincoln takes exception to the modifications of its proposed default provisions eliminating the failure to make payment as an event of default and the right of H.P. Lincoln to terminate as a remedy. (H.P. Lincoln Exceptions at 27—28.)

The parties in access cases are generally free to negotiate terms of access including those governing the rights of parties in the case of a default of their agreement. However, the parties have not reached an agreement on the appropriate terms of access requiring instead that the terms of access be determined by Board Order. Once access is granted by Board Order rather than through mutual agreement, the parties are no longer in a position to negotiate over terms or otherwise seek to control the terms of access. The ALJ in this matter sought to in essence create what he believed was an equitable agreement for the parties as to what actions could reasonably constitute events of default, what remedies should be available, and what cure periods should exist, finding such a default provision as reasonable and necessary under N.J.S.A. 48:5A-49(a). On this matter the Board agrees with Comcast that in the absence of a governing agreement, this Board Order governs the terms of access. Failure of either party to fulfill any of the obligations imposed by this order, including all of the terms enumerated as agreed upon matters, constitutes a violation of a Board Order. Therefore, the Board disagrees with the findings of ALJ Frank that as modified paragraphs c, d and e proposed by H.P. Lincoln are reasonable and necessary conditions of access in this proceeding. Because Comcast has agreed to obtain the necessary insurance and deliver proof of coverage to H.P. Lincoln, and failure to comply with that agreement would constitute violation of this Order, we find paragraph b to be unnecessary.

Thus, the Board HEREBY REJECTS the ALJ's recommendations, and HEREBY FINDS AND ORDERS that no specific default provision will be imposed as a condition of access to the premises.

Assignment of Rights or Lease of Facilities by Comcast:

H.P. Lincoln argues that it is within its rights to preclude Comcast from transferring its access rights or leasing its wiring to another entity to provide services, because Comcast will not commit to not leasing its wiring at the Abraham Lincoln to another party, and

[w]ithout such a condition Comcast may usurp the owner's right to control the access of other service providers to operate at the property. Here, Comcast seeks to force its way into the property by virtue of its special status as a franchised cable television company. But it has no right under N.J.S.A. 48:5A-49 to thereafter permit some other unknown company to access the property and provide service over the owner's objection. Given the upheaval and lightening pace of transactions in the communications industry (e.g., Comcast acquisition of AT&T Broadband's assets), H.P. Lincoln has a legitimate concern that such a transfer to a new provider may occur. This could leave the property owner stuck with that provider for years, even though it may not be a franchisee or have any rights under N.J.S.A. 48:5A-49.

( H.P. Lincoln Reply Brief at 35-37.)

Comcast argued that the issue is premature and beyond the scope for this access case. (Comcast Reply Brief at 36.)

ALJ Frank determined that H.P. Lincoln's proposed restriction on Comcast's future transfer of its access rights or wiring would be acceptable only if it was limited to a restriction on Comcast's transfer of its installation rights to a third party. (ID at 26.) The ALJ found that H.P. Lincoln only has the power to make reasonable and necessary conditions for access to the property under N.J.S.A. 48:5A-49(a) and therefore refused to adopt this provision.

H.P. Lincoln took exception to the ALJ's rejection of its proposed condition, and seeks either that the Board impose this condition or require that Comcast seek Board approval prior to any transfer by Comcast of its wiring or access rights (H.P. Lincoln Exceptions at 28.) Comcast replied that there should be no advance limits placed on future business decisions, and H.P. Lincoln could seek relief from the Board if it believed that assignment was improper in the event that Comcast did not first seek Board approval for the transfer. (Comcast Reply to H.P. Lincoln Exceptions at 24.)

The statute governing cable television access, N.J.S.A. 48:5A-49(a), grants rights to landlords in access cases to require that the installation of cable television facilities conforms to all reasonable conditions to protect the safety, functioning, appearance and value of the premises and the convenience, safety and well being of other tenants. The statute does not expand those rights to include any right within an access proceeding to control the use of those facilities by the landlord once access has been granted. The issue of Comcast's potential use of the facilities once access is granted falls outside of the scope of a petition for access under N.J.S.A. 48:5A-49 such that any arguments as to limiting Comcast's use of the facilities or expanding the petition to include the potential use of those facilities are irrelevant to this proceeding. The Board agrees with ALJ Frank to the extent that he finds that conditions beyond those governing installation of facilities and the rights to so install facilities are not reasonable and necessary conditions for access to the property under N.J.S.A. 48:5A-49(a). Additionally, should Comcast seek to sell, lease or dispose of its property, privileges or rights other than in the ordinary course of business, it must first seek Board approval. N.J.S.A. 48:5A-40.

Accordingly, the Board HEREBY ADOPTS the ALJ's recommendations, and rejects H.P. Lincoln's request to include a provision to preclude Comcast from transferring its rights or leasing its wiring to another entity as a condition of access to its premises.

#### Indemnification:

H.P. Lincoln argued that Comcast should be required to indemnify it for any damage caused by the installation, operation, or removal of cable facilities and for any liabilities related thereto. In setting forth its position on damages to be covered, H.P. Lincoln included a lengthy description of what it considers to be encompassed within the term "damages." (H.P. Lincoln Reply Brief at 38-39.)

H.P. Lincoln "clarifies" that the definitions of "owner" in N.J.S.A. 48:5A-49(a) should include "any ownership interests, mortgagees and respective affiliates and partners, directors, officers, shareholders, members, servants, representatives and agents." The term "any damages" should include any injuries or claims from third parties, including governments and legal authorities. (H.P. Lincoln Reply Brief at 38-39.)

Comcast argued that the indemnification language in the "agreement" H.P. Lincoln seeks to have the court adopt is superfluous as it confers no greater rights than the statute. (Comcast Reply Brief at 37.) Neither party filed exceptions on this issue.

ALJ Frank determined that the issue is whether the conditions proposed by H.P. Lincoln are reasonable and necessary to protect the safety, functioning, appearance and value of the property under N.J.S.A. 48:5A-49(a). (ID at 27.) Concerning the first “definition” which broadens the term “owner,” he held that since the value of the property will remain the same regardless of who is indemnified, and no safety or other physical alteration would occur based on this definition, it is not necessary.

Regarding the second part, in which H.P. Lincoln sought to broaden the meaning of the term “any damages” to include injuries to third parties, the ALJ held it is not a reasonable and necessary condition of access, and while it may give incentive on the part of Comcast to further protect its installation, operation and repair for safety, it is not necessary to protect safety. Therefore, he concluded that the indemnification sought should not be ordered and the provisions outlined in N.J.S.A. 48:5A-49(a) should be sufficient. (ID at 28, 29.)

Comcast’s obligation to indemnify H.P. Lincoln for damages caused by its installations is clear in the law. N.J.S.A. 48:5A-49(a) provides that a cable television company being granted access to provide service to a property “shall agree to indemnify the owner thereof for any damage caused by the installation, operation or removal of such facilities and for any liability which may arise out of such installation, operation or removal.” The record clearly shows that Comcast has agreed to indemnify H.P. Lincoln for any physical damage it causes during installation, operation and removal of its facilities. In addition as required by statute, Comcast is required to compensate H.P. Lincoln for any liability which might arise in the future out of the installation, operation or removal, subject to the proof requirements set forth in N.J.A.C. 14:18-4.5. Like the ALJ, the Board is not persuaded that the additional protections that H.P. Lincoln seeks here are appropriate to protect the safety, functioning, appearance and value of the property under N.J.S.A. 48:5A-49(a). Accordingly, the Board HEREBY ADOPTS the ALJ’s recommendations, and HEREBY FINDS AND ORDERS that the provisions of N.J.S.A. 48:5A-49(a) are sufficient to govern Comcast’s liability for any damages caused by its installation.

### Extent of Installation

In its exceptions, H.P. Lincoln states that the ALJ failed to make an express finding on the extent of the installation that Comcast should be permitted if access is granted. H.P. Lincoln maintains that Comcast should only be permitted to run its cables to the first floor telephone room and from there only to the apartments of tenants who have requested Comcast’s services. H.P. Lincoln maintains that allowing main cables into the building to be available when there are tenant requests is consistent with the requirements of N.J.S.A. 48: 5A - 49, and commits that it will not require any further litigated proceedings or complaint process on a subscriber-by-subscriber basis if installation is so limited. (H.P. Lincoln Exceptions at 29—32.)

In its reply to H.P. Lincoln’s exceptions, Comcast counters that requiring its crew to install on a unit by unit basis is inconsistent with the intent of N.J.S.A. 48:5A-49 to provide access to the “property,” would be expensive and much more time-consuming. Comcast maintains that H.P. Lincoln is simply seeking to further delay Comcast’s provision of cable television services within the Abraham Lincoln. (Comcast Reply to H.P. Lincoln Exceptions at 24—28.)

The Board is persuaded that installation should not be limited as requested by H.P. Lincoln as to do so would greatly increase the time and expense of installation, and would certainly not protect “the convenience, safety and well-being of other tenants” as required by the

statute. Therefore, the Board HEREBY FINDS and ORDERS that Comcast is hereby granted access to the entire premises to the extent necessary to install cable television services at the Abraham Lincoln in an efficient and cost effective manner.

#### Agreed Upon Matters

The parties to this proceeding H.P. Lincoln and Comcast voluntarily agreed, as evidenced by testimony in this proceeding and their respective briefs, to a series of terms surrounding Comcast's access to the Abraham Lincoln and its installation of facilities. The following terms are deemed to be non-contested and incorporated as conditions of Comcast's access.

#### A. Concerning the Appropriate Riser Plan:

- 1 Comcast will advise HP Lincoln of the exact location of the electrical closet where Comcast intends to bore a hole. Rooney Rebuttal Testimony (P-5) at 3:5-9.
2. Comcast will obtain HP Lincoln's approval prior to drilling provided that HP Lincoln's consent is not unreasonably withheld for reasons that do not relate to the existence of other equipment or other safety concerns. Id.
3. Comcast will work with HP Lincoln to ensure that the electrical closets are closed and locked once Comcast leaves them. Id. at 3:10-4.
4. Comcast will be careful that no damage is done to any existing equipment in the electrical closets. Id. at 3:11-12.
5. Comcast will cover and protect all existing equipment from water and other damage. Id. at 3:5-18, Transcript at 49:15-18.
6. Comcast will apply "fire stops" to seal the holes between floors following installation. Id.

#### B. Home Run Wiring:

- 1 The home run cable will be installed above the sheetrock ceilings by dropping down light fixture to access the space. Garrigan Testimony (H-1) at 10:10-13, Rooney Testimony (P-1) at 4:10-14, 5:15-18.
2. Comcast will repair any damage to ceilings caused by installation so they are returned to their original condition. Id.
3. Comcast will not lay wiring on the ceiling or any existing equipment. Petitioner's Brief at 32.
4. Comcast must use safety cones around the drop down lights so tenants are forced to walk around them and avoid injury. Garrigan Testimony (H-1) at 10:10-13; Rooney Testimony (P-1) at 4:10-14, 5:15-18.

C. Conditions for Apartment Access:

In installing its wiring in apartments, Comcast should run its wiring on top of baseboard molding (rather than using wire molding along the ceilings) and should use white wire to match the color of the baseboard molding.

D. Prior Approval of Design Plans, Construction Plans and Construction Schedules:

HP Lincoln may approve any design diagrams (and specific facilities' placement), construction plans, and schedules before they are implemented by Comcast, provided HP Lincoln's consent is not unreasonably withheld.

2. Comcast should provide as-built drawings showing the location of all facilities within owner's building to avoid problems with future installations.

E. Installations Costs:

1. Comcast will pay all costs and expenses associated with construction, installation, operation, repair, replacement, and removal of any system it installs.
2. Comcast agrees to pay for any physical damage resulting from such activities.

F. Security/Physical Access Restrictions:

1. Comcast will coordinate access with the General Manager for the properties.
2. Access for the purpose of installation of facilities is limited to the hours of 9:00 a.m. to 5:00 p.m., Monday through Friday.
3. Access to telephone rooms, electrical rooms, pump room and riser closets is limited to approved personnel only and subject to sign in.
4. The ability of Comcast employees to enter the premises shall be subject to HP Lincoln's reasonable conditions and guidelines for worker access to the building, including regarding time of entry, scheduling of appointments and sign in requirements.
5. Comcast will be responsible for supervising the work of any company which does work on its behalf.

G. Appropriation of Wiring:

Comcast will not appropriate wiring installed and owned by others for its own use should a tenant switch from another provider to Comcast service.

H. Conditions for Subcontractors:

- 1 Prior to installation, Comcast will submit its contractors to HP Lincoln for pre-approval of qualifications, provided HP Lincoln's consent will not be unreasonably withheld.
2. Prior to installation, Comcast will prove that the contractors have obtained the necessary insurance.

Compliance with the Law:

- 1 Comcast will comply with its franchise requirements and all applicable federal, state and local requirements.
2. Comcast will comply with the New Jersey Cable Act and BPU regulations.

J. Non-interference with Existing Television and Utility Service:

- 1 Comcast will not interfere with existing wiring or facilities.
2. Comcast will not appropriate wiring that it does not own.

K. Condition for Non-Exclusivity:

Comcast is not entitled to be an exclusive provider for its services.

L. Conditions for Insurance:

- 1 Comcast will procure insurance coverage in the amounts of \$1.9 million per occurrence (General Liability); \$10 million (Automobile); \$5 million per occurrence (Excess Liability); and \$2 million per accident (Worker's Compensation).
2. Comcast will deliver to the owner proof of current policies in the above types and amounts naming the owner and its ownership interests as additional insureds.

ALJ Frank determined that the above terms, having been agreed upon during the course of testimony by both parties, should be adopted and were adopted by him as a partial stipulation of facts. The Board agrees with the decision of ALJ Frank, HEREBY ADOPTS the ALJ's recommendation, and HEREBY FINDS AND ORDERS that the above items having been agreed upon during the course of testimony by both parties should be adopted as reasonable conditions of access.

## Summary of Findings:

The following is a summary of the Board directives contained herein.

1. The Board ADOPTS the ALJ's recommendation and HEREBY ORDERS Comcast to access and provide cable television service to the Abraham Lincoln, subject to the reasonable conditions presented herein.
2. The Board ADOPTS the ALJ's recommendation and HEREBY ORDERS Comcast to provide compensation to H.P. Lincoln in the amount of \$1.00 for the takings imposed by this decision.
3. The Board ADOPTS the ALJ's recommendation, and HEREBY ORDERS Comcast to compensate H.P. Lincoln for its increased security costs, subject to final true-up, but not for the installation plan review costs claimed regarding the installation of Comcast's equipment and wiring in the Abraham Lincoln.
4. The Board ADOPTS the ALJ's recommendation, and HEREBY ORDERS that in the event the owner's conduit is not used for installation, or no agreement regarding its use can be reached, the 10<sup>th</sup> Street trench plan and the riser plan agreed to by the parties and outlined elsewhere herein should be used to effect the installation.
5. The Board ADOPTS the ALJ's recommendation, and HEREBY ORDERS that in terms of street repairs that become necessary due to its installation activities, Comcast should only be required to follow the requirements determined by the City of Jersey City for street repairs.
6. The Board ADOPTS the ALJ's recommendation, and HEREBY ORDERS that the agreed upon hallway plan for installation should be used and a general separation between Comcast's wiring, and any other wiring and equipment is appropriate.
7. The Board ADOPTS the ALJ's recommendation, and HEREBY ORDERS that Comcast provide an on-site supervisor and documents showing awareness by Comcast employee and contractors working at the site of the provisions of Board Orders pertaining to the installation of Comcast wiring and facilities at the Abraham Lincoln.
8. The Board REJECTS the ALJ's recommendation, and HEREBY ORDERS that paragraphs b, c, d and e proposed by H.P. Lincoln to define events of default as modified by the ALJ not be included as reasonable and necessary conditions of access.
9. The Board ADOPTS the ALJ's recommendation, and HEREBY FINDS AND ORDERS that H.P. Lincoln may not preclude Comcast from transferring its rights or leasing its wiring to another entity as a condition of access to its premises.
10. The Board ADOPTS the ALJ's recommendations, and ORDERS that the provisions of N.J.S.A. 48:5A-49(a) will govern Comcast's liability for damages caused by its installation.

11. The Board ADOPTS the ALJ's recommendation, and HEREBY ORDERS that the matters agreed to by both parties as set forth herein are in effect a stipulation of facts for both parties and should be implemented as agreed upon conditions of access.
12. The Board GRANTS, as within time, Comcast's request to extend the due date of the reply exceptions from October 10, 2006 to October 17, 2006.

Based upon the foregoing, the Board HEREBY ADOPTS IN PART, MODIFIES IN PART, AND REJECTS IN PART the ALJ's Initial Decision as set forth herein. The Board likewise HEREBY ORDERS that all parties shall provide ongoing documentation to the Board as each provision is satisfied.

DATED: **3/8/07**

BOARD OF PUBLIC UTILITIES  
BY:

  
JEANNE M. FOX  
PRESIDENT

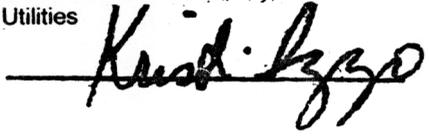
  
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COMMISSIONER

  
CHRISTINE V. BATOR  
COMMISSIONER

ATTEST:  
  
KRISTI IZZO  
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities  


**I/M/O THE PETITION OF COMCAST CABLEVISION OF JERSEY CITY, LLC. FOR ACCESS TO CERTAIN PREMISES KNOWN AS THE "ABRAHAM LINCOLN" LOCATED AT 204 10<sup>TH</sup> STREET IN THE CITY OF JERSEY CITY, COUNTY OF HUDSON, STATE OF NEW JERSEY**

**BPU Docket No. CE05040342  
OAL Docket No. CTV 9051-05**

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