

CE01090585, OAL Dkt. No. CTV 9687-01 (Aug. 7, 2003) (Newport Order), appeal pending, App. Div. Docket No. 000562-03T5.

By letter dated June 28, 2004, Comcast requested that NADC permit it to construct and install its cable television equipment and wiring in the Pacific, an additional building within the Newport Development Complex which was not covered by the Newport Order. In response, NADC sent a letter of its own dated July 27, 2004 refusing access. Comcast then filed the petition that brought this matter before the Board on or about November 4, 2005. After NADC filed its answers and defenses, the instant matter was transmitted to the Office of Administrative Law on February 22, 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. After motion practice, ALJ Frank conducted an evidentiary hearing on July 28, 2006.

At the beginning of the July 28, 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). 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 Partial Summary Decision, which was later memorialized in an Order dated August 4, 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) as a matter of stare decisis, 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) NADC's request that Comcast post a performance bond and/or parent guarantee, was rejected on the grounds of stare decisis and that a cable franchisee 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) Comcast is ordered to secure and provide proof of environmental hazard liability insurance naming NADC as an additional insured when and if installation work begins on the Pacific.

After hearing testimony on the remaining issues and the submission of briefs by the parties, ALJ Frank filed his Initial Decision with the Board on November 6, 2006, including the Partial Summary Decision as Exhibit A, to be considered by the Board in its final decision. Exceptions were filed by NADC and Comcast on November 22, 2006. Reply exceptions were due on November 27, 2006, but at the request of the attorney for Comcast and on consent of the attorney for NADC, an extension was provisionally granted by Board Staff until December 4, 2006 for the filing of those replies, and that extension is HEREBY GRANTED, as within time, by the Board. Replies to Exceptions were filed on November 27, 2006 by NADC, and on December 4, 2006 by Comcast. NADC filed a response to Comcast's reply on December 12, 2006, objecting, among other things, to Comcast's manner of submission of "confidential information" within its reply to NADC's exceptions. None of the information NADC seeks to protect will be revealed in this Order, thereby allaying any possible harm to NADC. 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. NADC's additional contention that Comcast violated the rules on exceptions by adding new issues in its reply is HEREBY REJECTED as without merit. N.J.A.C. 1:1-18.4(d) permits replies to include both cross-exceptions and submissions in support of the decision.

While Comcast's exceptions are limited to the ALJ's findings and conclusions with regard to the issue of default and termination, NADC 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 NADC'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.

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 NADC argues that Comcast has failed to meet its burden to submit a valid tenant request for cable television services, and questions the electronic business records submitted by Comcast in evidence (Exhibit P-1), arguing that they are hearsay and do not represent requests from current tenants. (NADC Reply Brief at 21-22.) Comcast, on the other hand, maintains that it has shown multiple requests for service and at the hearing provided a list of 16 telephone calls, a majority of which occurred in 2005, from residents of the Pacific requesting access to cable television service which it asserts were rightfully admitted into evidence over NADC's hearsay objections. (Comcast Reply Brief at 17; Tr. at 31:21-24; 65:17-18.) Comcast further maintains that NADC'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." (Comcast Reply Brief at 21.)

ALJ Frank found that there was ample documentation of tenant requests for Comcast's cable television services within the Pacific. (ID at 9.) He further found that NADC was "clearly aware" of the requests for service. (ID at 10.) To find otherwise he held, would lead to unnecessary expense and litigation on the part of both parties. (ID at 16.) On this basis, ALJ Frank ordered that Comcast is entitled to install cable television services at Respondent NADC's property known as the "Pacific" and granted access for that purpose. (Ibid.)

NADC takes exception to the ALJ's findings concerning the sufficiency of the evidence of requests for cable television service, and states that the only evidence originally provided by Comcast was a complaint from a person who is not currently a tenant, and the additional requests, evidenced by Comcast's computer service logs, were not produced until the eve of trial. (NADC Exceptions at 38-40.) NADC additionally maintains that the computer records are hearsay and do not qualify as business records because they are inherently unreliable as there are two versions, archived and non-archived, and the witness was not qualified to verify them as he had no personal knowledge of the individual requests for service. (Id. at 40-42.) Comcast replied that NADC failed to investigate any of the information previously provided to verify tenant requests, and that the requests provided were maintained in service logs that qualify as business records under New Jersey law. (Comcast Reply to Exceptions at 40-41.)

Having carefully reviewed the submissions of the parties and the record, the Board is persuaded that the ALJ's finding of at least one request for cable television service valid at the time of the request for access is supported by evidence in the record, and that 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 the "Regency at Monroe," BPU Dkt. No. CE05030273 (October 18, 2005). The ALJ's admission of the computer service logs kept by Comcast in the ordinary course of business as evidence of tenants' requests for service under an exception to the hearsay rule was proper under New Jersey law, even if the witness had no personal knowledge of the contents of the records. (Tr. 65:6-66:3.) See, N.J.R.E. 803(c)(6); Hahnemann University Hospital v. Dudnick, 292 N.J. Super. 11 (App. Div. 1996). NADC failed to provide any evidence to support its contention that the mere existence of archived and non-archived forms of the documents made them unreliable as any changes due to updating were clearly marked showing both date and time of any entry. (Tr. 53:8 –55:23.) Based on the entirety of the record, including the tenant requests marked into evidence as P-1, which the ALJ properly found to be business records, we find that there was a sufficient basis for the ALJ to conclude that Comcast has a right to access. We reject the contention that any qualifying requests must be current, as to do so rewards delaying tactics on the part of the property owner who seeks to deny access. This is a recurring issue which deserves review, even if a specific request is no longer viable because that tenant has moved in the interim. See, Green Party v. Hartz Mt. Industries, 164 N.J. 127 (2000). However, we do agree with NADC's request (NADC Exceptions at 47) that in any future access proceedings, Comcast must produce evidence of tenant requests either with its petition or in response to discovery, and not wait to produce necessary evidence until the eve of trial.

Additionally, NADC'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 NADC's own belief that there is an existing demand for Comcast's services at the Pacific. 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 NADC.

Accordingly, the Board HEREBY ADOPTS the ALJ's recommendation and HEREBY FINDS AND ORDERS that Comcast has a right to access the Pacific, 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 is 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. NADC 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 entitled to "just compensation" based on its witnesses' calculation of the value of the right of access. (NADC Brief at 10-12.) NADC argues that to be justly compensated, NADC must be given a percentage of Comcast's revenues with payments increasing as Comcast's penetration increases. (Id. at 14.) To support its argument, NADC submitted a market study created by its witness, Mr. Garrigan, that calculated a value to a cable television company from the number of tenants that use cable lines, and assumed that a

fee for access to a pool of potential 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 NADC'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 NADC 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). (ID at 17-18.)

NADC takes exception to the ALJ's findings on compensation, both as to the ALJ's barring evidence of the valuation of the income stream in reliance on the Newport Order, and as to the ALJ's finding that the potential impact on the income that an owner receives is not part of the value to be considered when determining just compensation for the taking. NADC contends that the footnote in NYT Cable TV v. Homestead at Mansfield, 214 N.J. Super. 148 (App. Div. 1986), that the Board relied on in the Newport Order, is "too insubstantial a basis" to prevent consideration of NADC's potential loss of income due to a forced grant of access to Comcast. (NADC Exceptions at 11-13.) The ALJ's reliance on the concept of a \$1.00 statutory fee for access has not been addressed by the New Jersey Supreme Court, and an approach that forecloses payment beyond that amount would be unconstitutional in NADC's view. (Id. at 26-29.)

Comcast responded that the Newport Order controls what evidence may be considered in this proceeding, and the analysis of NADC's witness, Mr. Sussman, of potential lost income was properly excluded. (Comcast Reply to Exceptions at 4-6.) Comcast argues that while the ALJ improperly allowed new testimony on compensation based on excluded testimony, he properly rejected that testimony as lacking in credibility, and as based on lost revenues due to competition and not on diminished value of the real estate as NDAC failed to provide any evidence of any diminution. The compensation sought is a business damage claim not contemplated by the regulation. (Id. at 22-32.)

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 television company so that cable television service can be provided to tenants has the burden to prove any just compensation calculation that deviates from the default amount of \$1.00. NADC did not carry this burden. NADC's own witness agreed under cross examination that there would be no diminution in the value of the real estate caused by Comcast's taking. (Tr. at 124:6-17.) In addition, NADC'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 NADC's estimate of Comcast's expected penetration. While such a calculation may serve to demonstrate a loss of income to NADC as a result of Comcast's presence, it is not the equivalent of a "before" and "after" examination of the value of the property as prescribed by N.J.A.C. 14:18-4.5.

The law plainly 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. N.J.A.C. 14:18-4.5. The law does not bar compensation beyond the default amount, but places the burden on the property owner to establish that it is entitled to more due to the diminished 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, *supra*. 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 NADC by this decision.

Conditions of Access:

Term

As part of the Partial Summary Decision, ALJ Frank followed the Newport Order and found that the term of access to the Pacific 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, NADC 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. NADC requests that the Board order a 5 year term or remand to the ALJ for the taking of evidence on the reasonableness of such a term as Comcast failed to provide an "economic justification" to support the current grant. (NADC Exceptions at 14-17.) Comcast responded that the ALJ properly followed the Newport Order, and there is no basis in the record for the Board to adopt the 5 year term requested by NADC. (Comcast Reply to Exceptions at 19.)

The certificate of authority issued by the 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 Pacific 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, a matter that is uncontested. Therefore, the Board HEREBY ADOPTS the ALJ's recommendations, and HEREBY FINDS AND ORDERS that Comcast's term of access to the Pacific 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. NADC maintains that this finding must be reviewed due to "new dispositive legislation," 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 U.S.C. § 522(6). (NADC Exceptions at 4-9.) Comcast filed the instant petition under N.J.S.A. 48:5A-49 for access to provide cable television service to tenants of the Pacific, 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. Therefore, the Board does not find that the passage of 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 with regard to telecommunications services. See, 47 U.S.C. § 541(b)(3)(B). Accordingly, the Board HEREBY ADOPTS the ALJ's recommendation, and

HEREBY REJECTS NADC's request to condition the grant of access for the provision of cable television service.

Disposition of Wiring upon Termination

As part of the Partial Summary Decision, 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 NADC's position that a plan for such disposition is necessary as a condition of access. NADC takes exception to this finding, maintaining that setting conditions for removal upon some future termination is a reasonable condition of access necessary for its protection, and that N.J.A.C. 14:18-4.12(e), adopted after the decision in Newport, requires such a term in an access agreement. (NADC Exceptions at 18-19.) The Board does not find NADC's argument to be persuasive. Should Comcast discontinue service, it must seek Board approval under N.J.S.A. 48:5A-37, thereby giving NADC 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 require a different result. The Board HEREBY ADOPTS the ALJ's recommendation, and HEREBY FINDS AND ORDERS that Comcast and NADC shall be bound by the regulations applying to the disposition of home run wiring at the time of termination.

Expenses:

ALJ Frank, citing to the Newport Order, directed Comcast to compensate NADC for its additional security costs, but not for the review costs it claimed concerning the installation of Comcast's equipment and wiring in the Pacific. (ID at 10-11.) The ALJ's decision, as to security costs, was predicated upon NADC'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 NADC'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 \$7,000.00 installation plan review costs claimed by NADC, the ALJ found that the costs claimed by NADC are based on the value of the time attributable to work by someone already employed by NADC 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 20.)

In its exceptions, NADC 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. (NADC Exceptions at 29-31.) Comcast responded that NADC was seeking to have Comcast pay NADC's own estimate of its own internal costs and in essence would be the equivalent of "writing a blank check to Pacific." (Comcast Reply Exceptions at 33-34.)

The Board agrees with the decision of ALJ Frank on expenses. Under N.J.A.C. 14:18-4.5(d)(4) and (5), NADC 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 NADC satisfied its burden were the additional security costs and power supply operation costs. Comcast agreed to pay the cost to operate its power supply. (ID at 20.) Accordingly, NADC should 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 NADC for its increased security costs, subject to final true-up, and pay power supply costs of \$25 per month, also subject to final true-up, but not pay for the installation plan review costs or other incidental costs claimed regarding the installation of Comcast's equipment and wiring in the Pacific.

Conditions for Protection of the Premises:

With regard to the physical installation of cable television 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 options for entry into the building proposed by Comcast, the best option entails the use of NADC'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 20-21.)

Trench Plan/ Riser Plan

Concerning a trenching plan to gain access to the property, only Comcast proposed a plan to gain access to the Pacific should it be unable to use NADC's conduit. (Exhibit P-4). NADC did not propose an alternative plan. The ALJ concluded that, in the absence of any alternative suggestions or an agreement, Comcast's proposal should be followed. (ID at 21.)

With regard to the issue of street repair, NADC sought to have the entire street repaired and the driveway repaved to its original condition after any trenching. Comcast argued that such a condition is unreasonable and beyond what the City of Jersey City requires for street repair. (NADC Reply Brief at 21-22.) The ALJ rejected NADC'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 21.) Neither party filed exceptions on this issue.

Thus, finding the reasoning of the ALJ to be persuasive, 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 trench plan and the riser plan proposed by Comcast 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 Pacific, the installation of homerun cable and laying of other wiring. The sole remaining issue in dispute regarding hallway wiring concerns NADC's request for a 12-inch separation between Comcast's wiring and other 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 NADC'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 NADC 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, NADC 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. (NADC Exceptions at 32.) 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 Exceptions at 35; Exhibit P-2, 4:19-5:2.)

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. NADC 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:

NADC 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 other ALJ and Board Orders, and that Comcast provide signed acknowledgements from employees and contractors that it has provided such instruction. (NADC Brief at 48-50). Comcast countered that these conditions are excessive. (Comcast Reply Brief at 25). 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 those 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 NADC'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.) Neither party filed exceptions to this finding.

The Board agrees with the ALJ that both Comcast and NADC have an interest in avoiding damage to NADC'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 are reasonable conditions 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 evidencing both receipt and review by Comcast employees and contractors working at the site of the provisions regarding the access conditions of this Board Order pertaining to the installation of Comcast wiring and facilities at the Pacific.

Default/Termination:

NADC sought to define default terms in this matter based upon an earlier agreement between Comcast and NADC that governs Comcast's use of conduit owned by NADC. (Exhibit NADC-9.) NADC owns and controls most of the residential properties within the Newport Complex in Jersey City. NADC argued that the definition of default and the accompanying remedies should include the terms that Comcast agreed to in its earlier conduit agreement with NADC, with language to fit it to the instant case. The requested remedy proposed by NADC provides that in the event of a default on the part of Comcast, NADC would have "the right at its sole discretion, to terminate the other party's rights." In particular, NADC 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.

(NADC Brief at 52-53.)

In terms of a remedy in the event of a default, NADC 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.

(NADC Brief at 52; Exhibit NADC-9.)

Comcast argued that only the Board can end the company's franchise or right to access, and that it did not agree to the proposed terms. (Comcast Reply Brief at 27-28.)

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 24-25.) He ruled that such default must be determined at a later date, if and when it occurs, with the appropriate penalties adjudicated and instituted in a court of law. Concerning the proposed conditions of default, the ALJ found that paragraphs b, c, d and e proposed by NADC are 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 NADC to provide for remedies for either NADC or Comcast as a non-defaulting party in the event of a default or breach of orders or agreements. With the ALJ's modifications, the clause would read 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 14.)

Both Comcast and NADC 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 are a factual issue, and in any event there is no evidence in the record to support the reasonableness of the default provisions adopted by the Initial Decision. (Comcast Exceptions at 5-7.) 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." (*Id.* at 2.) NADC 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 NADC to terminate as a remedy. (NADC Exceptions at 33-34.)

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 ALJ's findings that as modified paragraphs c, d and e proposed by NADC are reasonable and necessary conditions of access. Because Comcast has agreed to obtain the necessary insurance and deliver proof of coverage to NADC (ID at 9), 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 that portion of the ID recommending default provisions, and HEREBY FINDS AND ORDERS that no default provisions will be imposed as a condition of access to the premises.

Assignment of Rights or Lease of Facilities by Comcast:

NADC argued 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 Pacific 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), NADC 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.

(NADC Brief at 53-54.)

Comcast argued that the issue is premature and beyond the scope for this access case. (Comcast Reply Brief at 28.)

ALJ Frank determined that NADC's proposed restriction on Comcast's future transfer of its access rights or wiring would be acceptable only if it were limited to a restriction on Comcast's transfer of its installation rights to a third party. (ID at 25.) The ALJ found that NADC 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.

NADC 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. (NADC Exceptions at 34.) Comcast replied that there should be no advance limits placed on future business decisions, and NADC could seek relief from the Board if it believed that an assignment was improper in the event that Comcast did not first seek Board approval for the transfer. (Comcast Reply to NADC Exceptions at 36.)

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 under the access statute 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's finding 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 recommendation on this issue, and rejects NADC'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:

NADC argued that Comcast should be required to indemnify it for any damage caused by the installation, operation, or removal of cable television facilities and for any liabilities related thereto. In setting forth its position on damages to be covered, NADC included a lengthy description of what it considers to be encompassed within the term "damages." (NADC Brief at 55-57).

NADC maintains that the definition 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." NADC also seeks to clarify that the term "any damages" should include any injuries or claims from third parties, including governments and legal authorities. (NADC Brief at 55-57).

Comcast argued that the indemnification language in the "agreement" NADC seeks to have adopted is superfluous as it confers no greater rights than the statute. (Comcast Reply Brief at 37).

ALJ Frank determined that the issue is whether the conditions proposed by NADC 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 NADC 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 25-27.)

Neither party filed exceptions on this issue.

Comcast's obligation to indemnify NADC 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 NADC for any physical damage it causes during installation, operation and removal of its facilities (ID at 26). In addition as required by statute, Comcast is required to compensate NADC 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 NADC seeks here are reasonable and necessary 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 on this issue, to govern Comcast's liability for any damages caused by its installation.

Extent of Installation

In its exceptions, NADC 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. NADC 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. NADC 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. (NADC Exceptions at 35-38.)

In its reply to NADC'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 NADC is simply seeking to further delay Comcast's provision of cable television services within the Pacific, and requiring an actual tenant request before installation to any unit would create a logistical nightmare. (Comcast Reply to NADC Exceptions at 36-38.)

The Board is persuaded that installation should not be limited as requested by NADC 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 N.J.S.A. 48:5A-49. 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 Pacific in an efficient and cost effective manner.

Agreed Upon Matters

The parties to this proceeding, NADC 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 Pacific and its installation of facilities. The ALJ determined that these 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. (ID at 4-9.) No party took exception to this aspect of the ID.

Therefore, the following terms are deemed to be non-contested and incorporated as conditions of Comcast's access.

A. Trench Plan

- 1 Both parties agree that the best option for access to the building is to use NADC's internal access points (conduit) to avoid excavation of landscaping and hole boring to enter the building and bring cable up to the individual units.
- 2 In the event NADC's conduit cannot be used due to a failure of the parties to reach an agreement on the terms for its use, the trenching plan proposed by Comcast shall be used.

B. Conditions for the Riser Plan:

Comcast will advise NADC of the exact location of the electrical closet where Comcast intends to bore a hole.

- 2 Comcast will obtain NADC's approval prior to drilling provided that NADC's consent is not unreasonably withheld for reasons that do not relate to the existence of other equipment or other safety concerns.
- 3 Comcast will work with NADC to ensure that the electrical closets are closed and locked once Comcast leaves them. Comcast will be careful that no damage is done to any existing equipment in the electrical closets.
- 4 Comcast will obtain NADC's advance approval of any plan to cut the access panels in the first floor ceiling in order to pull its main cable up to the second floor electrical room and then up to every higher floor. NADC shall not unreasonably withhold its consent.

C. Conditions for the Hallways:

1. After installation, Comcast will reinstall dropped down light fixtures. Comcast will repair any damage to the ceilings caused by installation, and, if necessary, will paint the area damaged.
- 2 Comcast will take appropriate safety precautions to avoid danger to passersby, including the placement of safety cones around the installation area.

D. Conditions for Apartment Access:

In installing its wiring in apartments, Comcast shall run its wiring on top of baseboard molding, and shall use white wire to match the color of the baseboard molding.

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

1. NADC shall approve any design diagrams (and specific facilities' placement), construction plans, and schedules before they are implemented by Comcast, provided that NADC's consent is not unreasonably withheld.
2. Comcast shall provide as-built drawings showing the location of all facilities within owner's building to avoid problems with future installations.

F. Installation 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.
3. Comcast will pay the costs to operate its power supply.

G. 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 NADC'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.

H. Appropriation of Wiring:

1. Comcast will not interfere with other wiring, facilities and utility services in the building. Absent an agreement, Comcast will not appropriate wiring it does not own.

2. 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 NADC for pre-approval of qualifications, provided NADC's consent will not be unreasonably withheld.
2. Prior to installation, Comcast will prove that the contractors have obtained the necessary insurance.
3. Comcast will supervise the work of any company that works on its behalf.

Compliance with the Law:

1. Comcast will comply with its franchise requirements and all applicable federal, state and local requirements.
2. Comcast will install its facilities and provide cable television service in compliance 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.

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:

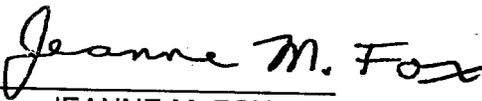
1. The Board ADOPTS the ALJ's recommendation and HEREBY ORDERS Comcast to access and provide cable television service to the Pacific, subject to the reasonable conditions presented herein.
2. The Board ADOPTS the ALJ's recommendation and HEREBY ORDERS Comcast to provide compensation to NADC in the amount of \$1.00 for the takings imposed by this decision.
3. The Board ADOPTS the ALJ's recommendation, and HEREBY ORDERS Comcast to compensate NADC for its increased security costs and power supply 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 Pacific.
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, Comcast's 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 Pacific.
8. The Board REJECTS the ALJ's recommendation, and HEREBY ORDERS that paragraphs b, c, d and e proposed by NADC 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 NADC may not preclude Comcast from transferring its rights or leasing its wiring to another entity at some future time 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.

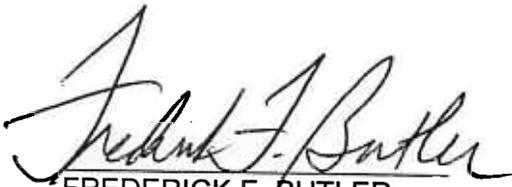
11. The Board ADOPTS the ALJ's recommendation, and HEREBY ORDERS that the matters agreed to by both parties as set forth herein are in effect a stipulation of facts for both parties and should be implemented as agreed upon conditions of access.
12. The Board GRANTS, as within time, Comcast's request to extend the due date of the reply exceptions from November 27, 2006 to December 4, 2006, and HEREBY ORDERS Comcast to conform its reply exceptions to the Board's confidentiality regulations and submit a redacted public version of that filing.

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 HEREBY ORDERS that all parties shall provide ongoing documentation to the Board as each provision is satisfied.

DATED: 3/22/07

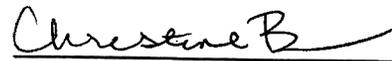
BOARD OF PUBLIC UTILITIES
BY:


JEANNE M. FOX
PRESIDENT

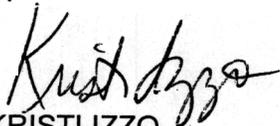

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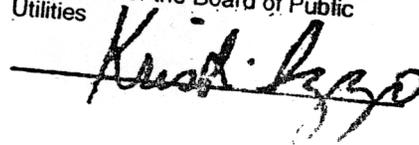

JOSEPH L. FIORDALISO
COMMISSIONER


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 "PACIFIC" LOCATED AT 25 RIVER DRIVE
SOUTH IN THE CITY OF JERSEY CITY, COUNTY OF HUDSON, STATE OF NEW JERSEY**

**BPU Docket No. CE04111418
OAL Docket No. CTV 9051-05**

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