Agenda Date: 12/20/19
Agenda Item: 3A

# STATE OF NEW JERSEY

**Board of Public Utilities**
**44 South Clinton Avenue, 9th Floor**
**Trenton, New Jersey 08625-0350**
**www.nj.gov/bpu/**

OFFICE OF CABLE TELEVISION
AND TELECOMMUNICATIONS

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| IN THE MATTER OF THE ALLEGED FAILURE OF ALTICE USA, INC. TO COMPLY WITH CERTAIN PROVISIONS OF THE NEW JERSEY CABLE TELEVISION ACT, N.J.S.A. 48:5A-1 ET SEQ. AND THE NEW JERSEY ADMINISTRATIVE CODE, N.J.A.C. 14:18-1.1 ET SEQ. | ) | ORDER ON MOTION<br><br>DOCKET NO. CS18121288 |

**Parties of Record:**

**Sidney A. Sayovitz, Esq.,** Schenck Price Smith & King, LLP, on behalf of Altice USA, Inc.
**Stefanie A. Brand, Esq., Director**, New Jersey Division of Rate Counsel

BY THE BOARD:

Altice USA, Inc. ("Altice" or "Company" or "Movant") is the parent of Cablevision Systems Corporation and Cablevision Entities, see In the Matter of the Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Entities for Approval to Transfer Control of Cablevision Cable Entities, Docket No. CM15111255, ("Merger Order" dated May 25, 2016). Post-merger, upon receipt of several complaints from Altice customers regarding their prorating policy, the Company was ordered to show cause on December 18, 2018[1] why its failure to prorate customer bills should not immediately be discontinued, and why the Board of Public Utilities ("Board") should not find Altice's actions for failure to properly prorate customer bills from the period of October 2016 to the present constitute a violation of the Board's Rule Relief Order,[2] and the Board's Merger Order. And, why the Board should not issue a penalty for Altice's failure to comply with the Rule Relief Order and the Merger Order and issue refunds to all customers that have suffered harm from Altice's failure to properly prorate customer bills.

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[1] I/M/O the Alleged Failure of Altice USA, Inc. to Comply with Certain Provisions of the New Jersey Cable Television Act, N.J.S.A. 48:5A-1 et seq., and the New Jersey Administrative Code, N.J.A.C. 14:18-1.1 et seq. Docket Number CS18121288, (Order dated December 18, 2018) ("Order to Show Cause").
[2] I/M/O the Petition of Cablevision Systems Corporation for Relief Pursuant to N.J.A.C. 14:18-16.7, Docket Number CO11050279, (Order dated September 22, 2011) ("Rule Relief Order").

Thereafter, on November 13, 2019 the Board issued a Cease and Desist order[3] affirming that the Company pursuant to N.J.A.C. 14:18-3.8, the Rule Relief Order and the Merger Order is required to prorate customer bills and that its failure to do so violates the Rule, the Relief Order and the Merger Order. The Order instructed Altice to:

1) Cease and Desist from its practice of failing to comply with the Board's prorating rules,
2) Issue refunds to each customer affected within 60 days from the date of the Order,
3) Remit a contribution of $10,000 to the Altice Advantage Internet program for New Jersey residents who qualify for low cost internet, and
4) Conduct an audit of its customer billing records from the date the Company ceased to prorate and to report its findings to the Board within 30 days of the effective date of the order.

(Cease and Desist Order at 8-9)

The Cease and Desist Order tasked Board Staff with the review of the information submitted by the Company upon conclusion of the audit. Thereafter the Company must refund the overage to customers and provide a certification that the requirements set forth by Board Order have been complied with. (Id.)

On November 26, 2019, Altice filed a Notice of Appeal in Superior Court Appellate Division, to the Board's November 13, 2019 Cease and Desist Order. In its Case Information Statement the Company maintains Cablevision received relief from the Board's prorating requirements in 2011 via the Board's Rule Relief order because of effective competition in its franchise areas. In addition, Altice claims the Board's did not condition the waiver and thereby granted a complete release from the rules outlined in N.J.A.C. 14:18-16.7. In 2016, shortly following Board approval of the merger of Cablevision and Altice the Company commenced whole-month billing across its footprint which does not provide prorated billing.

On December 13, 2019, Altice filed a Verified Complaint for Permanent Injunctive Relief and Declaratory Relief in the U.S. District Court of New Jersey seeking relief from the Board's November 13, 2019 Cease and Desist Order.

**THE MOTION**

In addition to filing a Notice of Appeal, Altice moved for a Stay of the Board's Cease and Desist Order. Altice, in its brief in support of the motion, contends its petition meets all of the factors for a grant of relief set forth in Crowe v. DeGioia 90 N.J. 126, 132-34 (1982). Altice claims it will suffer irreparable harm if the Board does not stay the order; its position is reasonable and likely to succeed on the merits; the hardship associated with the order favors granting the motion; public interest favors a stay; and seeks the supersedeas bond requirement be waived. (Altice Brief in Support of Motion at 1-2) The Company relies on its claims that the Cease and Desist Order requires a special carve out of its standard policy specifically for New Jersey whereby its billing system would need to be modified; separate quality controls implemented; contracted and in-house customer service representatives retrained; terms of services modified; and notice provided to customers, all of which require an expense. Further, Altice contends it has no way of locating and refunding former customers subject to the policy, the majority of whom Altice claims

[3] I/M/O the Alleged Failure of Altice USA, Inc. to Comply with Certain Provisions of the New Jersey Cable Television Act, N.J.S.A. 48:5A-1 et seq., and the New Jersey Administrative Code, N.J.A.C. 14:18-1.1 et seq. Docket Number CS18121288 (Order dated November 13, 2019) ("Cease and Desist Order").

have moved. These costs Altice argues are not recoverable upon a favorable determination by the court. Estimates yield nearly 60 percent of New Jersey customers affected were due to customers relocating. (Id. at 6-8) In total the losses outlined constitute irreparable harm per Altice.

The Movant in its papers is unyielding in its proposition that it received a blanket waiver of N.J.A.C. 14:18-3.8 in 2011. The Rule Relief Order, Altice argues "makes no sense unless it exempted Cablevision (now Altice) from the proration requirement." (Id. at 9) The remainder of the provisions in the rule are based upon permissive language or are so broad that they do not limit cable operator's actions.

Boundaries exist limiting the occasion where the Board may require providers credit customers. Id. at 10, citing N.J.A.C. 14:18-3.5(a); *see also*, In re Suspension & Revocation of License of Wolfe, 160 N.J. Super. 114, 119 (App. Div. 1978) (finding that the Board of Medical Examiners exceeded its authority by imposing penalties not authorized by statute); 225 Union St. v. Dep't of Cmty. Affairs, No. A5488-04T1, 2007 WL 1542035, at 7 (App. Div. May 30, 2007) (vacating agency penalties that were contrary to the "plain and unambiguous terms" of the statute). Furthermore, the Movant referencing the Cease and Desist Order, says the Federal Communications Commission's rule upon which the Board relied governs overcharges deriving from rate regulated service and does not apply. The Board, according to Altice, is bound by the provisions of N.J.S.A. 48:5A-51(b) when considering penalties. (Id.)

Altice refutes all claims that their whole month billing rises to the level of "negative option billing" as there is no doubt that the cable customer selected the service that was provided throughout the billing period. Citing the premise that N.J.A.C. 14:18-3.8 constitutes rate regulation prohibited under federal law where effective competition exists, Altice states the actions of the Board amount to "quintessential rate regulation". *See* 47 U.S.C. Section 543.(a)(2). (Id. at 11) The Company asserts that previous courts, in addressing prorating, recognized this form of rate regulation in Windstream Neb., Inc. v. Neb. Pub. Serv. Comm'n, No. CI-102399 (Neb. Dist. Ct. June 9, 2011) The Movant, asserts that the court in reviewing a wireless case, describes "specifying the rate *type* at which a service must be sold e.g. wholesale or retail or here, monthly or daily rate is a species of rate regulation". *See* e.g. Digital Commc'ns Network, Inc. v. AT &T Wireless Servs., 63 F. Supp 2d 1194, 1195 (C.D. Cal. 199). (Id. at 12)

For the reasons claimed herein Altice seeks relief from posting a supersedeas bond pursuant to New Jersey Rules of Court 2:9-6(a)(2) as there is no dispute the Company has the resources to remit the refunds ordered by the Board if affirmed by the court.

Altice is confident there is a reasonable probability of success in its challenge stating the Board in its Rule Relief Order exempted them from proration requirements and that proration constitutes rate regulation preempted by federal law. Moreover, Altice contends that public interest supports the relief requested as the remedy is only postponed and thus no additional harm results. (Id. at 12-14)

**RATE COUNSEL RESPONSE**

On December 9, 2019 Rate Counsel ("RC") filed a brief in opposition to Altice's motion for a stay. (RC Brief) Therein, RC states that Altice failed to meet the criteria necessary for granting "such extraordinary relief." A mere recitation of the underlying theories, RC argues, is insufficient to meet the burden of proof for injunctive relief, citing Zanin v. Iacono, 198 N.J. Super, 490, 498. (RC Brief at 2) Moreover, the law prescribes "money, time and energy expended absent a stay are insufficient to establish irreparable harm" quoting Zoning Bd. Of Adjustment of Sparta Twp. v.

Service Elec. Cable Television Co. of N.J., Inc. 198 N.J. Super, 370, 381-82 (App. Div. 1985). (Id. at 7) Reliance on monetary losses to support a stay, RC asserts, is contrary to law, citing to Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp 1212, 1219 (D.N.J. 1976). (Id. at 8)

RC refutes Altice's claim that prorating will engender ill will from its customers. To the contrary, RC states Altice's reinstatement of bill prorating as required by Board regulations will promote increased customer satisfaction and resolve the many complaints received when the company discontinued this practice. Because Altice is not rate regulated, RC posits it can recover operating costs through various means, such as product and service pricing. (Id. at 9) RC claims "former and future customers continue to suffer financial loss through Altice's continued use of negative option billing in violation of C.F.R Section 76.981(a)[4] and non-compliance with N.J.A.C. 14:18-3.8[5]", an action barred by federal law. (Id. at 9)

The alleged financial harm described in Altice's motion, RC refutes as being self-inflicted. The facts and the applicable law do not support the relief requested and continued non-compliance is not in the public interest. (Id. at 11) Addressing Altice's claim the Board lacks authority to impose customer refunds, RC cites both federal and state law set forth in 47 C.F.R Sections 76.309 and 76.942 and N.J.S.A. 48:5A-51 provide ample authority upon which the Board may impose refunds and penalties for deviations. (Id. at 12) Engaging in these billing practices RC contends constitutes "deceptive business practices and at worst' negative option billing' in violation of 47 C.F.R. Section 76.981 and 47 U.S.C. Section 543(f) which prohibits a cable operator from charging a subscriber for any service or equipment that the subscriber has not affirmatively requested." (Id. at 13) Also, RC differs from the Movant in interpretation of effective competition in claiming that it does not serve to "eviscerate or relieve" cable providers from consumer protections that preserve the public interest. (Id.) In addition, RC notes the Company's request concerning a supersedeas bond are not obviated by its financial capabilities.

In sum, RC asserts that Altice knowingly violated Board regulations and should not benefit from its wrongful actions. Altice, RC contends, has not successfully met the elements to show irreparable harm required in Crowe and thus the application for a stay should be denied.

**ALTICE REPLY COMMENTS TO RATE COUNSEL**

On December 16, 2019 Altice responded to Rate Counsel's opposition to the motion for a stay. ("Altice Reply") Therein Altice restates its claim of irreparable harm due to the operating costs associated with the implementation of the Cease and Desist Order and its inability to locate, refund and recover funds from former customers should they prevail on the merits. (Altice Reply at 2) Altice refutes Rate Counsel's suggested remedy for recovery of costs through rate adjustments. (Id. at 3) Further, Altice stated that its irreparable harm claim is supported by the good will lost from consumer confusion that will result from credits that may be rescinded. (Id. at

[4] Rate Counsel filed comments (Comments) I/M/O the Alleged Failure of Altice USA, Inc. to Comply with Certain Provisions of the New Jersey Cable Television Act, N.J.S.A. 48:5A-1, et. seq., and the New Jersey Administrative Code, N.J.A.C. 14:18-1.1 et seq., Docket No. CS18121288, (dated March 6, 2019) wherein they cite that the billing prescribed by Altice is "akin to 'negative option billing' practices prohibited under Section 623(f) of the Communication's Act of 1934 as amended, and contrary to Sections 76.981(a) of the Federal Communications Commission rules under the cable Television Consumer Protection and Competition Act of 1992") (RC Comments p5).

[5] Rate Counsel in their December 7, 2019 filing transposed the number 8 and number 3 when citing to N.J.A.C. 14:18-3.8 which for purposes of accuracy has been revised herein.

4) Maintaining the status quo of whole month billing is the appropriate resolution at this point in the case since proration, according to Altice, is a form of rate regulation prohibited under federal law. (Id. at 5) "[T]he FCC and the courts have found that regulating the increment of time for which a company can bill for service e.g. by the minute by the day by the month, is rate regulation". (Id. at 6, citing Altice's Memorandum of Law at 12; see also In re Southwestern Bell Mobile Sys., Inc. Memorandum Opinion and Order, 14 FCC Rcd 19898, 19908 Para 20 (1999); accord Am. Tel. & Tel. Co. v Cent. Office Tel., Inc., 524 U.S. 214, 223 (1998)). Altice reasserts that federal rules do not require proration of bills. According to Altice, there are limited circumstances under which the Board may order refunds and because there was no service outage and the company did not fail to itemize its bill, the Board is not authorized to order refunds. (Id. at 7) In addition, Rate Counsel's opposition to waiving the posting of a supersedeas bond in light of the fact Altice is capable of fulfilling its monetary obligations should they be unsuccessful in their challenge, is without merit. (Id. at 8)

**DISCUSSION AND FINDINGS**

In reviewing the relief sought by the Movant, the Board is guided by the legal precept that a stay is a remedy "granted only for good cause shown." N.J.A.C. 14:1-8.7(d). The Board must follow prevailing law governing such relief. In seeking injunctive relief by way of a stay motion the movant bears the burden of establishing each of the factors described below:

1) The movant will suffer immediate and irreparable harm if the emergency relief is not granted:
2) The legal right underlying the movant's claim is well-settled;
3) There is reasonable probability that the moving party will succeed on the merits; and
4) The balance of the equities in granting or denying relief weighs in the movant's favor.

*See*, Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982); McKenzie v. Corzine, 396 N.J. Super. 404, 413 (App. Div. 2007). The factors cited above must be clearly and convincingly demonstrated. Waste Mgmt. of N.J. v Union County Util. Auth., 399 N.J. Super, 508, 520 (App. Div. 2008); *See also*, Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012). Because a stay is the exception rather than the rule, GTE Corp. v. Williams, 731 F. 2d 676, 678 (10th Cir. 1984), the party seeking such relief must clearly carry the burden of persuasion as to all of the prerequisites. U.S. v. Lambert, 695 F. 2d 536, 539 (11th Cir. 1983). Moreover, mere monetary loss alone does not constitute irreparable harm. Morton v. Beyers, 822 F. 2d. 364, 372 (3d Cir. 1987).

A stay is not a matter of right, even if irreparable harm may otherwise result. Yakus v. U.S., 321 U.S. 414, 440, 64 S.Ct. 660,675,88 L.Ed. 834, 857 (1944); Virginian Ry. V. US., 272 U.S. 658, 672, 47 S. Ct. 222, 228, 71 L.Ed. 463, 471 (1926). It requires an exercise of sound judicial discretion; the propriety of its issue is dependent upon the entire circumstances of a particular case, and "consideration of justice, equity and morality" Virginian Ry. Co., 272 U.S. at 672-73; Coskey's Television & Radio Sales and Serv. Inc. v. Foti, 253 N.J. Super. 626, 639 (App. Div. 1992) quoting Zoning Bd. Of Adjustment of Sparta Tp. v. Service Elec. Cable Television of N.J., Inc., 198 N.J. Super. 370, 379 (App. Div. 1985).

The arguments relied upon herein focus on concerns over the substantial cost and other burdens, namely an increase in operating costs Altice professes it would bear resulting from the estimated $5 million refund to customers. Altice also contends it does not have a specific billing process for New Jersey as it operates a single process across its twenty-one state footprint. While this may be the case, it does not relieve Altice of its obligations under New Jersey rules and regulations. The Company unilaterally opted to change its billing system to conform with its practices in other

states. Altice implemented this shift in billing practice absent Board approval. Prior to 2016, the Movant prorated bills consistent with New Jersey law and thereby established the ability to do so. The change in billing by the Company was independently undertaken without notice or approval of the Board.

Additionally, Altice expressed fear of reputational loss and customer goodwill if it modified its whole month billing and subsequently prevailed on appeal and had to switch back. Customer confusion and a concern regarding the inability to contact former customers and the fact Altice has no way of recovering monies refunded to customers no longer receiving service from them was also an issue raised. Such perceived hardships are unpersuasive. Of paramount concern is that customers who were wrongfully billed are made whole through the means outlined in the Board's Cease and Desist Order.

The Movant argues the Board's actions are untimely and therefore bars the Board from imposing retroactive penalties prior to the Cease and Desist Order. (Id. at 10) The time spent toward efforts to facilitate settlement is not representative of the Board being dilatory in the discharge of its duties as a regulator. To the contrary, the exhaustive efforts undertaken by staff establish the significant import given the issue and the measures exercised to fulfill the obligations of a governing body.

The Company's arguments that the Board's actions are inapposite of state and federal law and constitute a form of rate regulation are meritless. The Movant does not establish a credible nexus between traditional rate regulation and prorating a customer's cable bill. Likening its cable service to wireless service Altice contends there is a reasonable basis upon which to believe they will prevail on appeal. The consumer protections provided for in the rules governing cable operators specifically, N.J.A.C. 14:18-3.8 do not constitute rate regulation. The Movant's challenge of rules that maintain and preserve clear and consistent billing practices, under the guise of rate regulation, is unavailing.

Continued enforcement of the proration requirement, Altice alleges, would put them at a marketplace disadvantage. This contention is disingenuous as Altice, unlike its competitor Verizon, stands alone in its failure to prorate customers in New Jersey. Permitting the company to continue this practice would place them at a competitive advantage over other providers within the state.

Further, Altice believes the waiver issued by the Board in 2011 could only have served to relieve them from prorating. Altice rests on the theory N.J.A.C. 14:18-3.8 is a single issue rule. We disagree. N.J.A.C. 14:18-3.8 contains several provisions to which a provider must comply and is not limited to prorating. Notwithstanding, the sample bills submitted by Altice during the Board's review of the waiver petition reflected continued proration, a representation upon which the Board relied.

The Board, after reviewing the record and carefully considering the positions set forth by the parties, for the foregoing reasons, **HEREBY FINDS** that Altice has not met their burden of proving that injunctive relief is necessary to prevent irreparable harm. In sum, Altice has failed to show the likelihood of success on the merits. Therefore, the Board **HEREBY DENIES** the Movant's Motion for Stay.

The Board **FINDS** the Movant is of sufficient financial means to sustain an unfavorable outcome on appeal, and therefore the plea for relief from the filing of a supersedeas bond for good cause shown is **HEREBY GRANTED**.

This Order shall be effective on December 20, 2019.

DATED: 12/20/19

BOARD OF PUBLIC UTILITIES
BY:

JOSEPH L. FIORDALISO
PRESIDENT

MARY-ANNA HOLDEN
COMMISSIONER

DIANNE SOLOMON
COMMISSIONER

UPENDRA J. CHIVUKULA
COMMISSIONER

ROBERT M. GORDON
COMMISSIONER

ATTEST:

AIDA CAMACHO-WELCH
SECRETARY

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

IN THE MATTER OF THE ALLEGED FAILURE OF ALTICE USA, INC. TO COMPLY WITH CERTAIN PROVISIONS OF THE NEW JERSEY CABLE TELEVISION ACT, N.J.S.A. 48:5A-1 ET SEQ. AND THE NEW JERSEY ADMINISTRATIVE CODE, N.J.A.C. 14:18-1.1 ET SEQ.
DOCKET NO.CS18121288

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