Agenda Date: 7/13/22
Agenda Item: 4A

STATE OF NEW JERSEY
Board of Public Utilities
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OFFICE OF CABLE TELEVISION
AND TELECOMMUNICATIONS

IN THE MATTER OF THE BUSINESS AUTOMATION TECHNOLOGIES, INC. D/B/A/ DATA NETWORK SOLUTIONS V. VERIZON NEW JERSEY, INC.	))))	ORDER ADOPTING INITIAL DECISION BPU DOCKET NO. TC17091015 OAL DOCKET NO. PUC 01597-2018

Parties of Record:

Andrew M. Klein, Esq. for Petitioner, Business Automation Technologies, Inc., d/b/a Data Network Solutions
Eric D. Wong, **Esq. Greenberg Traurig LLP,** for Respondent, Verizon New Jersey, Inc.

BY THE BOARD:

PROCEDURAL HISTORY

On September 26, 2017, Business Automation Technologies d/b/a Data Network Solutions ("DNS" or "Petitioner") filed a petition with the New Jersey Board of Public Utilities ("Board") regarding disputed billings assessed by Verizon New Jersey, Inc. ("Verizon" or "Respondent") for access charges under a Board-approved Interconnection Agreement ("ICA").[1] DNS alleged that

[1] Pursuant to 47 U.S.C. §252(a)(1) of the Telecommunications Act of 1996 (the "Act"), an incumbent local exchange carrier may negotiate and enter into a binding ICA with a carrier requesting interconnection, service, or network elements without regard to the standards set forth in 47 U.S.C. §251 (b) and (c). The agreement shall be submitted to the State commission for approval or rejection on certain grounds pursuant to 47 U.S.C. § 252(e). Thus, ICAs require Board review for approval or rejection of the negotiated agreement.

Further, while the Act is silent on procedure for post-formation disputes, the Federal Communications Commission ("FCC") explained that interpretation and enforcement of post-formation interconnection agreement disputes are within the states' responsibility under § 252. Core Communs. Inc. v. Verizon Pa. Inc., 493 F.3d 333, 341 (3rd Cir., Jul. 18, 2007). State commissions interpret and enforce approved ICAs to ensure local competition is implemented fairly. Id. at 335. See also, Southwestern Bell Tel. Co. v. Brooks Fiber Communs. of Okla . Inc., 235 F.3d 493 (10th Cir., Dec. 13, 2000) (stating State commissions are authorized to interpret the terms of a previously approved interconnection agreement pursuant to § 252 authority). Thus, post-formation ICA disputes are reviewable by the Board in the first instance. The Board's jurisdiction pertains to issues related to the Board-approved ICA, the ICA terms of agreement, and the Board rules governing the intrastate provision of safe, adequate, and proper service to customers.

Verizon created false billing issues and disputes in an attempt to drive DNS out of the market. (Petitioner's Opening Statement at 2; Initial Decision at 9). DNS also alleged that the billing practices of Verizon amounted to bad faith in order to damage and remove DNS from the market. Id. The Respondent argued that DNS could not prevail on its breach of contract and bad faith claims as DNS itself failed to comply with its own contractual obligations under the ICA. (Respondent's Opening Statement at 3; Initial Decision at 9). The Petitioner also requested that the Board direct Verizon to lift a service hold preventing the Petitioner from processing new and existing service orders based on the disputed charges, hereinafter referred to as the 'embargo' by the parties; as well as direct Verizon to cease all collection activity pending the outcome of the present matter. The Board issued an Order on December 29, 2017, granting the Petitioner's request and ordering Verizon to lift the embargo and to continue providing service to DNS under the ICA until final resolution of the matter.[2] In addition, the Board ordered the transmission of the matter to the OAL for hearing as a contested case with respect to all issues in dispute related to the ICA.

Pursuant to the Board's Order, the matter was transmitted to the OAL on January 26, 2018 and assigned to Administrative Law Judge ("ALJ") Tricia M. Caliguire. During the pendency of the matter, on April 5, 2018, Petitioner filed a letter with the OAL alleging that Verizon had reinstituted the embargo in violation of the Board's December Order. DNS's letter was treated as a Motion for Enforcement of the Board's Order. Following briefing of the issue, on May 15, 2018, ALJ Caliguire rendered a decision in favor of Petitioner, granting the request that Verizon lift the embargo on all new service orders and ordering Verizon to discontinue the manual ordering process for DNS orders and resume the use of the Operations Support System established under the ICA. Verizon filed a Motion for Interlocutory Review of the ruling with the Board on May 18, 2018. The Board denied the motion in its Order issued on June 22, 2018.

After several settlement and status conferences with the OAL, the parties were unable to reach a resolution. On November 13, 2019, the Respondent filed a motion for summary decision arguing that there were no issues of material fact and that the law supported Verizon's position. The issue was fully briefed and on January 8, 2020, the ALJ issued an order denying the motion for summary decision and directing the parties to appear for hearings.

Hearings were held over 13 days in September and December of 2020. After the close of the hearings, but while the record at the OAL remained open, DNS filed a motion with the Board for interlocutory review of evidentiary rulings relating to Exhibits P-124 and P-125. By Order dated February 6, 2021, the Board denied, in part, Petitioner's request for review of the evidentiary rulings. The Board directed the Petitioner to inform the OAL of the accommodations required by Mr. Fajerman, the lead witness for the Petitioner, as a result of his visual impairment and directed the OAL to take testimony and permit cross-examination on the limited topics of Exhibits P-124 and P-125 by March 8, 2021.

Furthermore, under the ICA, Sections 14.1 to 14.3, 'Dispute Resolution', the Board is empowered to mediate ICA disputes and can retain the matter or may transmit the case to the Office of Administrative Law ("OAL").

[2] Order, In re the Petition of Business Automation Technologies d/b/a Data Network Solutions v. Verizon New Jersey, Inc., Docket No. TC17091015, Order dated December 19, 2017.

Candice Hendricks ("Hendricks"), OAL Assistant Director of Judicial Standards and Procedures and OAL ADA Compliance Officer, sent written notice to Petitioner of the manner by which Fajerman's disability could be accommodated. Further, Hendricks provided Petitioner with several potential dates for the completion of the hearing prior to the expiration of the Board's deadline.

On March 1, 2021, the Petitioner filed a request with the Board seeking a 30-day extension of the March 8, 2021 deadline explaining that Mr. Fajerman had undergone cataract surgery in February 2021 and would not be able to be fitted for eyeglasses until March 18, 2021. The Board issued an Order on March 3, 2021 approving Petitioner's request for a 30-day extension of the deadline for the completion of the hearing. The final hearing date was conducted by Zoom on April 8, 2021 per Board Order. Post hearing submissions were filed on August 3, 2021; September 21, 2021 and; October 14, 2021. Parties were asked to make supplemental filings dated December 1, 2021 and December 16, 2021 regarding whether specific credits given by Verizon affected the amounts allegedly in dispute as of the date of the Petition. The record closed in December 2021.

ALJ Caliguire filed an Initial Decision in this matter on January 28, 2022. By way of the February 23, 2022 Board Order, pursuant to New Jersey Statutes Annotated ("N.J.S.A.") 52:14B-10(c) and New Jersey Administrative Code ("N.J.A.C.") 1:1-18.8, an extension of time of 45 days for issuing a Final Decision in this matter and the request of the parties for an extension of the deadline to file exceptions and reply exceptions was granted. Exceptions were filed by both the Petitioner and Respondent. On March 21, 2022 the parties filed Reply Exceptions. On April 6, 2022, a second extension of time was entered by the Board extending the time to file a Final Decision until May 31, 2022. A third and final extension of time was entered by way of Board Order on May 18, 2022, with consent of the parties extending the time to file a Final Decision until July 15, 2022.

INITIAL DECISION

By way of background, DNS is a competitive local exchange carrier ("CLEC") based in New Jersey.[3] Verizon is an incumbent local exchange carrier ("ILEC") and, as such, is subject to regulation by the Board for certain services provided to New Jersey customers. Under separate orders, the Board approved the ICA[4], and a negotiated resale agreement between DNS and Verizon[5], by which DNS was authorized to provide basic local exchange services to customers in New Jersey using wholesale services purchased from Verizon. (Initial Decision at 7). The parties began their business relationship in 2003. By the summer of 2017 disputes over charges for services under the ICA and other non ICA contracts covering services in New Jersey and other states became contentious. Id.

[3] In re the Petition of Business Automation Technologies, Inc. d/b/a Data Network Solutions for Authority to Provide Telecommunications Services Throughout New Jersey, BPU Docket No. TE03020104, Order dated July 9, 2003.

[4] In re the Joint Application of Verizon New Jersey Inc. and Data Net Systems, LLC for Approval of an Interconnection Agreement Under Section 252 of the Telecommunications Act of 1996, BPU Docket No. TO03100837, Order dated February 11, 2004.

[5] In the Matter of Application of Verizon New Jersey, Inc. for Approval of a Resale Agreement with Business Automation Technologies d/b/a Data Network Solutions Under Section 252 of the Telecommunications Act of 1996, BPU Docket No. TM02070422 (April 24, 2003).

While consensus was not reached between the parties as to the disputed amount, the parties do agree that the amount claimed by Verizon as unpaid and disputed for ICA-related services was modest, especially when compared to the total that Verizon claimed to be unpaid by DNS across all its accounts. (See Initial Post-Hearing Brief of Petitioner (August 3, 2021) Br. of Petitioner at 2; Initial Decision at 7, 18). Evidence as to the amounts involved in non-ICA disputes was permitted only to the extent that those disputes (and the alleged failure to pay those charges) contributed to the decision of Verizon to impose the embargo, a decision claimed by DNS to be evidence of Verizon's bad faith. (See Petition, ¶ 10; see also, Letters to ALJ Caliguire from Philip R. Sellinger, Esq. (September 25, 2020), and from Daniel J. O'Hern, Esq. (September 28, 2020); Initial Decision at 7).

The following issues were the focus of the hearing, testimony and, documentary evidence:

1. Whether Verizon incorrectly claimed that as of August 24, 2017, DNS had a past-due balance for tariff and/or ICA-related charges, including for undisputed charges, of $32,991, and a past-due balance of $6,395, under the Wholesale Advantage contract. (Petition at ¶¶ 12-15). Petitioner was directed to present documentary evidence of the bills it challenges, the charges on those bills which it disputes and did not pay, and the amounts it did pay. (See Initial Decision at 8).

2. Whether Verizon failed to properly credit DNS for payments made for undisputed charges. (Petition at ¶¶ 17, 20, 26). Petitioner was directed that for each non-disputed charge as to which payment was made and improperly credited, to show the original bill, proof of payment, and the subsequent bills showing that the payment(s) was not credited. (See Initial Decision at 8).

3. Whether Verizon's imposition of late payment charges ("LPCs") has been done properly and consistent with the ICA. (Petition at ¶¶ 28-29, 40, 66-79; See also Initial Decision at 8).

4. Whether Verizon improperly billed DNS for federal and state taxes and regulatory surcharges; DNS claims that such billing was made although DNS provided all required tax exemption certificates to Verizon. (Petition at ¶¶ 27-29, 40; Initial Decision at 8).

5. Whether Verizon properly charged DNS for services related to Local Interconnection Service trunks and Tandem Transit trunks. (Petition at ¶¶ 19, 20, 23- 25, 32, 53-60; Initial Decision at 8).

6. Whether Verizon refused to honor reduced-priced offers and/or blocked orders made by DNS under the ICA at the prices listed in the ICA. (Petition at ¶ 12; Initial Decision at 9).

7. Whether Verizon properly followed the dispute resolution process in the ICA. (Petition at ¶¶ 35-40, 47; Initial Decision at 9).

8. Whether the embargo instituted by Verizon preventing orders by DNS under the ICA is a violation of Sections 14 and 18 of the ICA. (Petition at ¶¶ 41-42, 48, 49; Initial Decision at 9).

9. Whether the parties violated the good faith provisions of the ICA and the covenant of good faith and fair dealing imposed on parties to a contract under state and federal law. (Petition at ¶¶ 33, 43-44, 80-88; Initial decision at 9).

Witnesses on behalf of the Petitioner:

Isaac Fajerman ("Fajerman") is the president and owner of Petitioner DNS, a company he established in 1998. Fajerman designs telecommunications systems for commercial and public sector use.

Mary Lou Ellen Carey ("Carey") is a telecommunications consultant, who has worked in the industry since 1997, when she took a position with Pacific Bell. In 2003, she opened her own business, Backup Telecom Consulting, in Franklin, Tennessee. Since then, Carey has provided consulting and ordering services for CLECs, including DNS, such as setting up and managing networks; reviewing and/or auditing bills; writing access service requests ("ASRs"); and troubleshooting. Although Petitioner offered Carey as an expert on CLECs in three (3) categories and her expertise and experience was noted, Carey did not conduct an independent evaluation for Petitioner and did not provide Respondent with a report of her findings and conclusions (as was requested in discovery), and was therefore accepted only as a fact witness by ALJ Caliguire. (Initial Decision at 13).

Fred Goldstein ("Goldstein"), of Interstate Consulting Group worked in the telecommunications industry for many years and appeared as an expert witness before the Board as early as 1996. Goldstein began working with DNS in 2003-04.

Witnesses on behalf of Respondent:

Peter D'Amico ("D'Amico") testified for Respondent. He retired from Verizon in December 2018, after 35 years of service, the last twenty-five as product manager of voice services.[6] D'Amico handled all aspects of the product, from ordering and contracts, to forecasting and network architecture.

Brandon Chase Bartlett ("Bartlett"), Associate Director Private Sector Collections, worked at Verizon for 25 years, in his current title since 2017. Bartlett supervises a team of 120 persons who are responsible for collection of accounts receivable ("AR'") from 2,000 wholesale customers. Bartlett has no role in sales or product outreach. His group performs a post-billing function and does not decide what amounts are billed and/or the basis for billing.

A. **Process for Disputing Bills**

The Petitioner alleged that at the time of filing the Petition all charges due to Verizon had been paid under the ICA and that DNS was owed a credit of $1,775.00. DNS's request for relief included a final reconciliation of all accounts and a statement of the credit due or remaining amount due if any and a determination of the actual amount of later charges owed if any. (Petition at ¶¶ 94, 96; Initial Decision at 17). Furthermore, the Petitioner claimed it "paid all undisputed amounts, but withheld payments on disputed amounts as allowable under the ICA." Id.

[6] Voice services are those services, which connect to public switch telephone networks, such as CLEC, wireless interconnection, and voice over internet protocol.

Carey, Bartlett and, Fajerman testified that Verizon established an online dispute portal for customers to use to notify Verizon of potentially erroneous charges on Verizon-issued bills. As reflected in the record, a common practice between the parties was also for DNS to send an email to Bartlett's team regarding billing issues. Regardless of the format, Verizon requires specific information when filing a dispute.[7]

Bartlett testified that if a customer does not use the online form or submits an incomplete form, a notice is issued with an explanation of what is missing. When a claim is accepted as complete, a notice is sent with the tracking number. (See R-126).

In depth testimony was given by the witnesses regarding the manner in which DNS, and in particular, Fajerman, raised disputes as to allegedly erroneous charges on its bills. According to Bartlett, Fajerman said he did not like to use the portal because, if he did, DNS' disputes would go to the back of the line and he found it quicker to use email. Bartlett agreed that DNS provided sufficient information in some emails but more frequently, DNS sent emails with insufficient information to which Verizon responded with a request for more information. In such cases, Verizon contended DNS did not provide the additional information and withheld payment of the disputed amounts. Eventually, Fajerman complained to Bartlett that the dispute process was too complicated and confusing and asked to zero out the balance and start fresh. Bartlett identified a series of emails between Verizon staff and DNS to illustrate his claim that numerous disputes raised by DNS could have been resolved simply had DNS only provided sufficient information for Verizon to conduct its own investigation, but instead due to inexplicable delays, disputes lasted for years. (R-25; R-26).

Carey testified she submitted billing dispute claims via the Verizon portal, received receipts, and then created a running spreadsheet of what is billed; payments made; what is credited and disputed charges. [Tr. (September 11, 2020) (T-4), at 29-30, describing P128; Initial Decision at 19-20.] The ALJ determined that Carey, who was hired to monitor DNS' bills, kept a running summary of charges as described above in a spreadsheet. Carey described that she created the spreadsheet by looking at the bills, some of which allegedly contained errors. Notwithstanding, numbers on a spreadsheet must be backed up by the actual documents from which the numbers were taken, documents that Carey said she reviewed. DNS did not provide copies of the bills in question, Carey's submissions to the Verizon portal, or the receipts she received. (Initial Decision at 24).

In the opening statement of the Petitioner, the resolution process and good working relationship between DNS and Verizon up until 2015 was described. When handled by Melissa (Missy) Roper ("Roper") DNS claimed "if billing issues were not resolved at the initial stage then DNS would escalate to a Wholesale Financial Operations Manager and through cooperation and negotiation most of the billing disputes would be settled while usually late fees were waived and the monthly recurring rate or one time charges would be worked out provided it was within their authority. DNS did not have to invoke further contractual remedies – § 14 dispute resolution or file a Petition at the Board for assistance – during that period because the parties had a reasonably good

[7] The specific information required by Verizon to be provided includes: Circuit ID; Billing Account Number; Bill Date in Dispute; Claim Type; Claim Amount; Description of Claim; Customer Claim Number; Customer Audit Number; Adjustment Serial Number; Contract Number; PON/ASR/LSR; Verizon Service Order Number; Verizon Trouble Ticket Number; USOC/IOSC; Phrase Code; Factor Type; Amount Withheld.

working relationship. [Roper, the] Billing and Collection Manager, in particular, assigned to DNS would work in good faith with DNS and most issues were resolved informally." (Petitioner's Opening Statement, ¶ 10; Initial Decision at 21).

The representative handling DNS's account on behalf of Verizon changed in late 2015. Bartlett began handling the DNS account. Although Roper did not testify, testimony and documentary evidence confirm that prior to November 2015, DNS did not strictly comply with Verizon's Petition procedures and Roper did not require such compliance before essentially writing down (forgiving) certain disputed amounts. [T-1 at 94, 126-27; Tr. (December 9, 2020) (T-13), at 179; P-12; (Initial Decision at 21)]. There was no documentary evidence presented from either party as to the amounts involved, the frequency in which Roper took such action, or that Roper acted improperly. [See T-13 at 183.; Initial Decision at 21]. Bartlett testified that around 2015, Verizon determined that credits in the wholesale segment were being issued that may not have been due to billing errors; that Roper was issuing concession credits to DNS without following proper protocol. Although Bartlett, like Roper, had some discretion to issue credits, that authority capped at $100,000 in AR and when Bartlett took over the account, DNS owed $200,000, only half of which was disputed. (T-12 at 63). Fajerman specifically asked Bartlett to treat the account as Roper had, but Bartlett stated he had no such authority, as the AR balance was too high. Instead, Bartlett told Fajerman that he would review DNS's account in good faith and issue credits when due. (T-12 at 141, 143.; Initial Decision at 22).

Bartlett identified emails of November 2016, with Jo Hanna ("Hanna"), Verizon's sales representative who handled the DNS account, regarding concession credits for DNS. (R-27). Bartlett recommended that Fajerman speak with Hanna as Bartlett's team had no authority to give such credit and, typically, sales representatives pushed for concession credits for their customers. In her email to Bartlett, Hanna stated that concession credits were not an option in this particular case for DNS, and also stated that she preferred "to do business with [Fajerman] in writing because he can twist [her] words into things [she] never said." (Id.; See also Initial Decision at 22)..

Fajerman agreed that in an email exchange with Leyla Redmon ("Redmon"), Verizon Consultant, Wholesale Financial Operations, he asked for a "reset of accounts," which he described as an agreement as to what was owed and to clear things up. (R-25 at 1361; See also Initial Decision at 22). In November 2016, Fajerman asked Bartlett to "reset the billing errors to something we can agree on," (R-25 at 1360), and in January 2017, (on a recorded call) Fajerman offered Bartlett a settlement by which the parties would agree on $170,000 as past-due, "split the 170 in half, and then we adjust the accounts, and then we move forward," but Bartlett refused. [Tr. (September 10, 2020) (T-2), at 114-15.] Even so, Fajerman stated that by May 2017, DNS owed nothing to Verizon.

The dispute with DNS over unpaid charges, was referred by Bartlett to William Sayle Carnell ("Carnell"), Verizon Assistant General Counsel in June 2017, and Fajerman, in kind, referred the matter to DNS outside counsel, W. Scott McCullough ("McCullough"). (P-53). McCullough agreed to provide Carnell spreadsheets showing "the specific amounts in dispute and the detailed justification for non-payment of these amounts." Id. Carey prepared the summary of disputed charges at McCullough's request using the same type of spreadsheet that she created when auditing customers' accounts. (R41; P-128). Fajerman stated that Carnell rejected the DNS spreadsheet, a form of 'stonewalling.' Bartlett, however, stated that he and Redmon were tasked with reviewing the spreadsheets line-by-line to determine whether DNS's claims regarding all disputed charges had merit. Bartlett identified the results of this investigation as summarized in an email from Carnell to McCullough. (R-61). First, DNS did not dispute but had not paid $28,618

in charges. Second, DNS renewed a dispute over $145,126 in charges which Verizon had already denied. The claim was reviewed again and still found to be without merit. Third, DNS raised a dispute regarding $77,854, but failed to provide sufficient detail for Verizon to fully investigate. Verizon agreed that it had overcharged DNS $1,680, mostly in federal excise charges, and credited this amount to DNS. (R-61; R-63; *See* also Initial Decision at 23).

The ALJ held the Petitioner did not present adequate evidence of the bill challenges, the charges on those bills which it disputed and did not pay and the amounts paid. Billing error notices were not produced by DNS during the proceedings, and Carey was unable to explain why the spreadsheet produced included approximately $28,600 in unpaid, undisputed charges. (Initial Decision at 24). Additionally, the ALJ directed DNS, for each undisputed charge to provide proof of payment and what was improperly credited and to show the original bill, proof of payment and the subsequent bills showing payment was credited. The ALJ found no such evidence in the record. Id.

B. **Allegations of Breach of Contractual and Common Law Covenant of Good Faith and Fair Dealing**

Petitioner alleged that Verizon imposed LPCs on DNS in violation of the ICA in two respects. First, Verizon allegedly imposed LPCs on amounts that were not overdue. Fajerman testified that Verizon did not credit the DNS accounts for payments made in a timely manner, including checks sent by UPS or overnight delivery service, but would wait seven (7) days to post the payment and then assess a LPC on the next month's bill. (T-1 at 8; Initial Decision at 25). The ALJ directed DNS to provide documentary evidence of these claims but, no such evidence was produced. (Initial Decision at 25).

Secondly, DNS claimed that Verizon imposed inflated LPCs using "deceptive and disallowed practices." (Petition at ¶ 12). The ICA provides that Respondent cannot charge more than 1.5 percent interest per month on unpaid balances: "charges due to the billing Party that are not paid by the Due Date, shall be subject to a late payment charge. The late payment charge shall be in an amount specified by the billing Party which shall not exceed a rate of one-and-one-half percent (1.5%) of the overdue amount . . . per month". (ICA Section 9.4). Fajerman stated that Verizon always charges an interest rate higher than permitted under the ICA by charging a rate of .00059 percent, compounded daily and compounded monthly. (T-1 at 74-76). While the monthly rate varies depending on the number of days in each month, the result will always be a monthly rate above 1.5 percent, and as much as 1.84 percent. (Initial Decision at 26). In a July 2017 email, Fajerman stated that Verizon's minimum LPC of $5 had exceeded the rate of 1.5 percent and therefore, is also a violation of the ICA. (P-57).

During the Hearing, Bartlett testified that DNS had not previously raised this issue; DNS had never filed a claim regarding the imposition of an incorrect LPC rate. Based on Fajerman's testimony, Bartlett investigated and confirmed that DNS's ICA accounts had been overcharged for LPC. As of December 2020, Bartlett stated that Verizon's investigation was continuing, and the system would be corrected and that other customers are impacted. In the Respondent's brief, filed almost a year after Bartlett announced the investigation into this issue, Verizon states that the problem was fixed, and DNS was credited across all accounts. (Verizon Br. at 25, fn. 34).

The Initial Decision held that while the Petitioner did not make a specific Petition to Verizon with respect the LPCs; that DNS did, however, provide a written explanation of its argument with respect to this issue in the Petition, filed September 26, 2017. (See Petition at ¶¶ 74-79.; Initial Decision at 26). Therefore, Verizon had notice as of October 2017 of a potential system wide

error that could result in violations of the ICAs of more than one customer and Verizon waited three (3) years to investigate. (Initial Decision at 26). ALJ Caliguire also held that in October 2017, Verizon had notice of DNS' claim that its use of a minimum LPC would violate the ICA. Id.

C. **Allegations that Verizon improperly billed the Petitioner for state and federal taxes**

DNS established it is exempt from payment of state and federal taxes on certain accounts and claimed to have provided to Verizon all required certificates proving its exemption from payment of "state and federal sales/excise taxes and USF assessments" through 2020. (Petition at ¶¶ 27, 28). Notwithstanding, in October 2015, Verizon began charging DNS for New Jersey State taxes and federal excise taxes. (Petition at ¶ 29; Initial Decision at 27).

Fajerman testified that in November 2015, he first notified John Ross Davis ("Davis"), Consultant, WFO-Claims/Collections, that even though DNS had not been billed for taxes in the prior 15 years and the requisite proofs regarding exemption had been remitted, Verizon was billing DNS for the same. Davis responded the same day (with copies to a number of persons, including Bartlett) that he would "look at the taxes" and at another issue and would follow up later that day. (R-25 at 1368). On January 15, 2016, Davis stated in an email to Fajerman that two (2) tax claims (with claim numbers) were unresolved, several were resolved, and Redmon would be assisting with this issue. (P-16). Fajerman responded by email of January 16, 2016, describing a number of issues, some unrelated to taxes. Id.

Thereafter, Redmon emailed Fajerman and stated that Verizon was endeavoring to resolve the issue in a timely manner. Id. Redmon also stated that Davis would no longer be working on the DNS account. On or about April 15, 2016, Karlie Simpson ("Simpson") sent tax exemption forms to Fajerman, who stated that he returned them immediately and saw state tax charges stop, but federal tax charges continue. (R-26 at 1475).

A year later Fajerman, first notified Davis of the error when he emailed Redmon and asked again about the tax issue which had not yet been completely addressed. (R-26 at 1475; R-25 at 1368). Redmon responded with instructions for filing a claim through the portal, unless "this is an old dispute," in which case she asks for the Claim ID. (R-25 at 1366). Both Goldstein and Fajerman subsequently emailed Redmon to express their frustration as Davis accepted the dispute over taxes and stated that he would address it; Fajerman also included all affected account numbers in his response. (R-25 at 1362-65; P-24 at 1251).

Fajerman, by follow up email, advised Simpson on November 7, 2016, that certain accounts were still being charged taxes. (P-24 at 1250). Simpson responded that DNS must file claims; Fajerman explains to Simpson and Redmon that this dispute is over a year old, was accepted but not resolved by Davis, and three (3) of the nine (9) affected accounts have already been corrected. (Id. at 1249-50; R-26 at 1475). Both Carey and Goldstein described action they took on behalf of DNS to document and/or notify Verizon with respect to the improper charges for taxes. (Initial Decision at 28). Both confirmed that Verizon corrected this error in November 2016. Bartlett stated that he had no record of the dispute over improperly assessed taxes being filed in November 2015, and upon review of the same email chains described above, stated that Fajerman' s November 2015 emails to Davis were not sufficient notice of claims. (T12 at 122-25; Initial Decision at 28).

The Initial Decision held that while the incidents described by Petitioner and documented in the cited exhibits are evidence of mismanagement at the Verizon staff level, inconsistent communication with a customer, and inconsistent application of policy regarding the method of disputing charges was not evidence of malicious intent, and once the required certifications were resubmitted, Verizon credited all charges. (Initial Decision at 29).

D. **Failure to honor reduced-price offers and/or blocked orders made by DNS under the ICA**

Goldstein testified under forbearance contracts, CLECs could negotiate with the ILEC, Verizon, for rates instead of ordering elements at uniform tariff rates. (Initial Decision at 29). While not part of the existing agreement under consideration, the issue is addressed only to the extent it impacted the decision of the Respondent to impose the embargo. The ALJ found there was no evidence that failure to resolve this dispute was a factor in Verizon's imposition of an embargo or that refusal to offer the EVC discount, resulted in significant increased charges. Id. at 30.

E. **LIS Trunk Dispute**

The Hearing contained testimony regarding disputes over local interconnection service ("LIS") trunks ordered by DNS from Verizon. LIS trunks allow customers to make local calls and to receive in-bound calls. Testimonial and documentary evidence showed that there were several billing issues involving the LIS trunks from the time of installation. The first dispute was resolved in 2016; evidence was presented as to both to support DNS's claim that Verizon acted in bad faith, in violation of the ICA and of applicable law. (Initial Decision at 30).

Carey testified that typically, before placing the first order she would meet with Verizon's project team to discuss where the interconnection point was going to be and what the trunks would be used for as well as who the SF7 provider would be and other technical aspects. Carey testified that DNS would specifically state which type of trunks they intended to order and did so in 2014 placing the order for the first dispute. (Initial Decision at 30; T-4 at 13).

Respondent witness, D'Amico agreed the order was for tandem trunks in the 224 LATA, which is the Newark-area network served by Verizon. D'Amico identified a series of emails from March-April 2014 between himself, Carey, Kathryn Rubin ("Rubin") of Verizon, and Fajerman. (R-18). Carey attempted first to submit an ASR for the trunks using the "POVN inspect" code, but the order was rejected by Verizon because DNS did not have a POVN contract.[8] Carey identified the email of March 28, 2014, by which she explained to Rubin (with a copy to D'Amico) that the DNS order was complete but for the agreement on the POVN. (P-4). The DNS ICA is a "point of interconnection/interconnection point" (POI/IP) contract, which requires DNS as the originating party to be financially responsible for getting its local traffic to the Verizon IP. D'Amico identified the portion of the ICA which provides for DNS to have the POI/IP contract:

> 2.1.2 Each Party ("Originating Party"), at its own expense, shall provide for delivery to the relevant interconnection point (IP) of the other Party ("Receiving Party") Reciprocal Compensation Traffic and Measured Internet Traffic that the Originating Party wishes to deliver to the Receiving Party.

[8] "POVN" stands for "point of interconnection on the Verizon network".

Carey identified D'Amico's March 31, 2014, email in which he supported the decision that DNS was not eligible for POVN, point of interconnection on the Verizon network, by reference to the ICA. (R-18). Fajerman responded to D'Amico's email, stating that the parties were already meeting at the colocation (Newark) and on April 8, 2014, D'Amico sent an email agreeing that "we're meeting at the colocation." (T-4 at 16-17; Initial Decision at 32). D'Amico identified his email dated April 8, 2014, in which he proposed to move both parties' IP to the DNS colocation (Newark), for both parties to be responsible to get their traffic to the colocation, and for local traffic beyond that point to not be charged. (R-18). This was not a POVN contract but would permit DNS to "have a 'POVN-like arrangement' and populate the POVNAC[9] in the SPEC field of the ASR" to obtain POVN billing. (R-18). D'Amico stated that the agreement he made with DNS for a POVN-like arrangement was not a physical change in the network but a billing change.

D'Amico testified, Carey complained that the issue was causing "serious and unnecessary delays" in DNS' launch and D'Amico was worried about further delays, so instead of signing a new contract immediately, he decided to help DNS get the network operating and worry about the contracts later. D'Amico stated that in September 2014, he recommended that DNS amend their ICA to reflect POVN but by September 2016, DNS had not done so. (R-29). Further, to D'Amico's knowledge, DNS never signed a POVN contract (or amended the ICA to reflect the POVN deal), but Verizon always honored the arrangement. (T-10 at 122; Initial Decision at 32).

Carey testified that billing issues began in and around August 2014 and that she filed billing disputes using the Verizon online portal regarding the erroneous trunk port charges. (Initial Decision at 32). Under the POVN agreement with D'Amico, DNS should have only been charged for transport (by a third-party) up to and through Newark and for minutes of use from Newark on Verizon's network, but DNS was being charged fees for transport on the LIS trunks beyond the interconnection point.

Sharla J. Denton ("Denton"), a CPA and consultant in wholesale financial operations for Verizon, handled the investigation of this dispute. On November 21, 2014, Carey emailed additional information to Denton, stating "I've gone through the bills and noted the billings issues on each one. Attached is an updated file for the dispute through 10/25/14" (P-6). In an email dated January 28, 2015, D'Amico concurred that there should never have been a charge for trunk ports. (P-6). Denton concluded that DNS had been billed for the LIS trunks at the highest possible rate even though Verizon should not have billed DNS (at all) for these trunks. Verizon agreed to correct the error and credit DNS for past amounts billed. (P-7). In an April 3, 2015 email, Denton stated that the disputed charges would be removed, credits would be issued, and staff would make a manual correction to their billing system to prevent the error from recurring. (P-7; P-9). The total amount of the erroneous charge was $47,463.36, which was credited in June 2015.

Verizon did not fully address the billing problems related to the LIS trunks and by November 2015, DNS claimed to have been erroneously charged over $100,000 for these trunks. (P-12). On November 23, 2015, Fajerman emailed Roper to complain that the "credits and corrections" promised by Denton were never applied. (P-12 at 12-13). Roper notified DNS that she was reassigned, and Bartlett would be handling the DNS account. The parties met on September 1, 2016, to discuss numerous issues, including DNS eligibility for POVN billing. DNS requested monthly meetings to review ongoing billing errors, a request that Verizon denied. Bartlett (1) agreed that DNS should not be paying port charges on LIS trunks and would be credited; (2) POVN billing was not available to DNS; and (3) all other billing issues were resolved. (P-20).

[9] "POVNAC" stands for point of interconnection on the Verizon network access transport.

On September 26, 2016, D'Amico explained the 2014 deal he struck with DNS to Bartlett and his staff. D'Amico said that Bartlett had "actually read the contract correctly . . . except for the fact that I had cut this kind of side deal." (T-10 at 153). D'Amico explained his understanding that DNS was going to sign a POVN contract, but "that didn't happen and that's where the problems came from." (Id. at 158). To D'Amico's knowledge, the billing group honored the deal and credited DNS. Bartlett confirmed that he was involved in this billing dispute, but that as of September 1, 2016, he did not know about the POVN agreement made by D'Amico and no one from DNS told him about it. (R-29; P-20). Once Bartlett obtained the information Verizon reversed the charges and credited DNS for unpaid charges including LPCs.

D'Amico testified that he was surprised to learn in September 2016 that DNS had not yet amended their ICA to provide for the POVN arrangement. (T-10 at 159; Initial Decision at 34). Verizon cites D'Amico's testimony to support its statement that "Verizon sent [DNS] a POVN ICA to formalize the agreement, but [DNS] never executed it." (Verizon Br. at 17). D'Amico did not provide an email to DNS in which a new ICA or instructions for amending the existing ICA were attached. D'Amico identified the September 29, 2016, email from Redmon and stated that it was sent to Pete Eager ("Eager"), from the contract administration group. Eager, however, is not shown as copied on this email chain. (R-19). In this email, Redmon told Fajerman that D'Amico would reach out about the new ICA; D'Amico said he discussed the need to amend the ICA with Eager, not Fajerman. Neither party presented any other evidence regarding discussions to amend the ICA as recommended by D'Amico. At the hearing, D'Amico stated that he spoke again with Eager who said, "he did what he [Eager] needed to do," but that the amendment was never executed. (T-10 at 161, Initial Decision at 35).

ALJ Caliguire held that DNS reached an agreement with Verizon's representative, D'Amico, for POVN-type billing on LIS trunks and reasonably expected to obtain the benefits of that agreement and that Verizon did not correct billing errors within 45 days and some billing issues took years to resolve due to human or computer system errors at Verizon. (Initial Decision at 35-36).

F. **Erroneous Billing of Trunk Groups 102, 104, 114, and 115 as Access Toll Connecting Trunks**

The second trunk dispute involved the characterization and billing of trunk groups 102, 104, 114 and 115. In 2014, DNS began exercising its options under the ICA to use Verizon's local access trunks. On June 20, 2014, Carey submitted an ASR to Verizon for 48 trunks carrying traffic from Newark to West Orange on a network channel or code ("NC") identified as "SDUP." (P-106). Carey is shown as the customer contact on the ASR. (Initial Decision 36). Additional trunks were ordered by Carey in May 2015, again with the NC code SDUP. (R-120). Both parties agree that although these trunks were installed between late 2014 and 2016, they were only first billed for access mileage by Verizon in August 2017, well after service began.

On August 16, 2017, Redmon sent an email to Fajerman stating that Verizon conducted a review of the DNS account and found that four (4) access toll connecting ("ATC") trunk groups were billed incorrectly. (P-62; R-15). In an email response, Fajerman objected; Bartlett responded by email that DNS should file a formal Petition once the charges appeared on an invoice. Thereafter, DNS filed the Petition and included this change in billing among the issues for resolution. (Petition at ¶¶ 53-60). Verizon, before hearings commenced, unilaterally credited DNS for all past-due amounts and changed the billing to zero on these trunks going forward. Since these specific charges would not be included in the calculation of disputed charges, the issue remaining is whether Verizon's actions regarding said trunks disputes amount to bad faith.

At issue are (1) what type of trunks did DNS order; (2) what type of trunks did Verizon install and how did they operate; and (3) was this a mistake by either or both parties or, as DNS contends, an attempt by Verizon to retaliate against DNS. There is no dispute that Carey placed the orders; the dispute is whether she ordered CLEC transit trunks, as she claims, or ATC trunks, as Verizon claims.

Carey testified that she was familiar with Verizon's network architecture and had a copy of the ICA which defines ATC trunks, so she knows that she did not order ATC trunks. Goldstein knows Carey as an expert on ordering using an ASR, which is a "standard form designed by an industry trade group," of which Verizon is a member. (T-8 at 34). Goldstein identified the ASR submitted by DNS to Verizon on June 20, 2014. (P-106). He testified that it reflects the network architecture (or trunk circuit) he recommended DNS implement to move calls from non-Verizon carriers for intra-LATA traffic. Goldstein agreed that the NC SDUP is used by Carey; he said this means "trunk into an access tandem switch" but conceded that the code can be used for "different purposes, and that's part of the problem." (T-8 at 48). Further down on the ASR, traffic type is coded as "TS" which means transit. In the remarks section on page 2 of the ASR, the statement "install . . . from Newark to West Orange," which Goldstein said makes clear that this is tandem transit and CLEC transit trunks were ordered, not ATC trunks. (T-8 at 50).

D'Amico also identified the ASR which was filled out for DNS by Carey. (R-120). Like Goldstein, D'Amico described the ASR form as "an industry standard that is used to order access services." (T-11 at 63, December 2, 2020). As shown on the second page, Carey used the NC "SDUP" which D'Amico said is used for ATC trunks. D'Amico identified a January 28, 2015, email he sent to Gerald Langhorne of Verizon and Carey in which he explained (in very technical acronyms) that SDUP is for ATC trunks. (P-6). D'Amico had no recollection of Carey responding to this email. Consistent with the testimony of DNS' other witnesses, Goldstein stated that when the trunks were first installed, there was no charge, but later, Verizon conducted an audit and decided these were not intra-LATA transit trunks, but ATC trunks and therefore began charging for access mileage.

Fajerman indicated his experts advised that Verizon was re-characterizing the trunks, in violation of the ICA. When questioned why DNS did not simply ask Verizon to change the ATC trunks to transit trunks, Fajerman stated that the trunks had been properly ordered and installed and had operated for three (3) years as transit trunks; there was no need to change them.

Carey testified that she ordered tandem transit trunks (not ATC) to receive inbound calls from cell phones and non-Verizon local callers and to send out-bound 800- number calls. As D'Amico explained, ATC trunks are used to "allow a CLEC customer to either connect to an interexchange carrier through a Verizon access tandem or to receive traffic from an interexchange carrier." (T-10 at 133).

Notably though D'Amico said it was impractical, a CLEC does not have to use the ILEC for long-distance calls. (T-10 at 134-36). If DNS had meant to order a local trunk, its customers could have still gotten interexchange (IX) calls if they had an IX carrier ("IXC") to send the calls through, but they would only get calls from IXCs with whom they entered contracts. DNS customers could probably get most of the IX calls without ATC trunks if they had contracted with the five (5) largest IXCs, but problems would still come up.

D'Amico stated that in 2017, because he was the subject matter expert at Verizon regarding interconnection, he was asked to assist the Verizon collections group in determining whether

these trunks were ATC or transit trunks. He emailed the Verizon translation group, the technical support staff at Verizon with the most knowledge of ATC and local trunk programming. (R-35).

Georgi Jasper ("Jasper"), network translations group engineer, responded that the trunks were built as "CLEC IXC," which is the equivalent of an ATC trunk. (R-35 at 2833). In her email, Jasper appears willing to consider DNS's arguments but, according to D'Amico, the Verizon records that might have supported DNS did not exist because Verizon did not bill DNS for usage on ATC trunks. (See R-34 at 2826; Initial Decision at 39).

When trunk groups are initially set up, testing is typically conducted on both sides during the ordering and provisioning phase to ensure that the new equipment is working. (T-11 at 87). Carey agreed that when a trunk group is set up, both the customer and the vendor must agree to the same instructions. D'Amico does not know if test calls were conducted on these trunks or who would have such knowledge if such tests were conducted. (T-11 at 88).

While Carey could not dispute that email correspondence from Redmon and Verizon's translation department states that the disputed trunks were built as ATC trunks, (R-12; R-13; R-36), she was critical of Verizon for excluding DNS from any examination of "call detail records" and/or "test calls to see if an IXC call will actually connect or not." (T-5 at 73).

In 2020, Goldstein asked DNS technical staff to conduct test calls over the disputed trunks, theorizing that because toll traffic (long-distance calls) should not be possible over a non-toll (or local) trunk, a long-distance call attempted over one of the disputed trunks would fail. Goldstein identified the summary of two (2) test calls conducted by DNS staff at his direction and stated that the results demonstrated that toll calls on one of the trunks at issue were rejected at the Verizon end. (P-152; P-153).

Goldstein identified the extensive call detail records ("CDR") generated for each test call. (P-154). Goldstein stated, CDR can be generated on outgoing or incoming calls, are usually generated by the billing party, and are used when billing disputes arise. Goldstein asked DNS staff to provide CDR for the West Orange trunk group to see if the calls carried by the group are in-state or out-of-state calls. Goldstein admitted that the CDR may be missing specific information (such as the circuit ID) and though the results of the tests conducted by DNS show that long distance calls will not be routed over the disputed trunks, there are other reasons for a call to fail. (R-137). Goldstein conceded further that the test calls were made on October 6, 2020, not in 2017, when the dispute between the parties as to the nature of the trunks arose. (P-154). Overall, Goldstein could not answer questions about the software used to run the tests, verifications used, the identification of the circuit tested, or even the qualifications of the staff at DNS who conducted the test. Goldstein, the witness designated to testify as to the results of the test, did not observe nor participate in the testing.

D'Amico concluded that the disputed trunks are ATC trunks based on the confirmation from the Verizon translation group, the use by Carey of the NC code SDUP, the input from John Andrade ("Andrade"), a subject matter expert at Verizon consulted by D'Amico, and that DNS already has a local IXC group at the West Orange tandem and did not likely need another. Goldstein concluded his review of the trunk issue by stating that the trunks are not ATC trunks, cannot carry long-distance traffic, and should not have been billed as ATC because that is not how they were used by DNS. (R-12; R-15).

Bartlett acknowledged that in August 2017, the issue was determining the character of the four (4) trunk groups, local or ATC. He stated that both D'Amico and Andrade came to the same

conclusion, that the four disputed trunk groups were built as ATC trunks and therefore, the change in billing was proper. (R-34; R-36). Redmon also sent DNS the information from Andrade. (R-12). Bartlett has no recall of any DNS response after August 25, 2017, other than that DNS did not accept Andrade's explanation and gave no new information, and never paid the charges for these trunks.

The ALJ held that there was a mistake in the billing of the four (4) trunks in question, whether at the time of the installation as Verizon alleges, or in 2017 when the Verizon internal audit occurred, which led to the change of the billing, as DNS alleges. The proper classification of the trunks is not at issue, as the disputed charges have been reversed. The proper issue is whether Verizon acted in good faith when taking action to change billing on four (4) disputed trunk groups that resulted in the ATC billing dispute, which is addressed below.

G. **Verizon's Alleged Failure to Comply with the ICA Dispute Procedure**

DNS alleges that Verizon failed to comply with the dispute resolution process outlined in Sections 9 and 14 of the ICA. First, Petitioner contends that Respondent's procedure violates Section 9 of the ICA as customers, such as DNS, are required to resubmit the same challenge to a charge (or class of charges) each month until Respondent either accepts and credits, or denies, the claim. (Initial Decision at 43).

Such a requirement would explicitly violate Section 9.3 of the ICA, which provides:

> If any portion of an amount billed by a Party under this Agreement is subject to a good faith dispute between the Parties, the billed Party shall give notice to the billing Party of the amounts it disputes [and] include in such notice the specific details and reasons for disputing each item. A Party may also dispute prospectively with a single notice a class of charges it disputes.

The ALJ held that Verizon did not violate Section 9.3 of the ICA by requiring the customer to provide additional information if a claimant failed to adequately provide sufficient information. Additionally, if a claim was properly substantiated but then denied, an appeal of that denial would also require a new claim but that would not violate the ICA either.

Petitioner also alleged that Verizon violated the terms of Section 14 of the ICA which describes the dispute resolution process as:

> Except as otherwise provided in this Agreement, any dispute between the Parties regarding the interpretation or enforcement of this Agreement or any of its terms shall be addressed by good faith negotiation between the Parties. To initiate such negotiation, a Party must provide to the other Party written notice of the dispute that includes both a detailed description of the dispute or alleged nonperformance and the name of an individual who will serve as the initiating Party's representative in the negotiation. The other Party shall have ten (10) Business Days to designate its own representative in the negotiation. The Parties' representatives shall meet at least once within thirty (30) days after the date of the initiating Party's written notice in an attempt to reach a good faith resolution of the dispute. Upon agreement, the Parties' representatives may utilize other alternative dispute resolution procedures such as private mediation to assist in the negotiations.

On April 12, 2017, Verizon sent a letter to DNS stating DNS had a past due non-disputed balance of close to $300,000.00 across accounts in three (3) states and that non-payment could result in service disruptions or the refusal of Verizon to accept new orders. (Initial Decision at 46; R-49). The letter also included a spreadsheet with DNS accounts, the amounts past-due for each, the open disputed claims and the undisputed past-due amounts all per Verizon's records.

Fajerman sent a Notice of Dispute on May 8, 2017 to Respondent (via Bartlett) pursuant to Section 14 of the ICA. (P-49; R-42). Fajerman described the dispute, alleging that among other things, Verizon made repeated errors in the bills issued to DNS and "engaged in intimidation and harassment" and improperly retaliated against DNS for its attempts to resolve these billing disputes. According to Bartlett, this letter included a list of disputes, but not information sufficient to permit investigation by Verizon. Id. Fajerman contended numerous errors in the schedule of charges which accompanied Bartlett's April 12, 2017, delinquency notice, but does not delineate the specific errors. Fajerman also made 16 charges of action by Verizon in breach of the ICA and/or in bad faith without noting information such as the dates such action took place. (Id. at 2-3). Fajerman did not provide documentary support for any of the claims with the Notice of Dispute, saying he had done so previously. (T-2 at 50, 58). Further, Fajerman stated there were spreadsheets proving that Verizon had overcharged DNS but conceded that he never sent this information to Verizon as Verizon did not designate a negotiator; despite Fajerman identifying an email from Bartlett in May 10, 2017 which stated that Bartlett had been Verizon's representative in the dispute negotiations for over a year. (T-2 at 75-77). While continuing to assert Verizon did not designate a negotiator, Fajerman stated that although Verizon alleged past due balances of about $300,000.00, only about $25,000 of the total was due and disputed ICA-related charges. (Initial Decision at 47). Accordingly, Bartlett testified there was no expectation the embargo would be delayed. (Id. at 48).

Attempts by Verizon and DNS to negotiate and resolve the issues were unsuccessful. DNS failed to make any payments to Verizon even for amounts overdue but not in dispute. Verizon did agree that it overcharged DNS by $1,680.00 and credited the amount to DNS.

In July 2017, Verizon placed an embargo on new service orders from DNS. Bartlett stated that existing services continued and there was no impact on repair and maintenance. (R-59). The decision to impose the embargo was made by Verizon legal and regulatory staff and management with the recommendation of Bartlett's team. Bartlett stated that the purpose of the embargo was to protect Verizon and to prevent increased account balances. While Fajerman initially stated that the embargo was initiated by Verizon without notice, he later conceded that Bartlett had notified him in writing that service interruptions could result. What was not clear to Fajerman was that service under the ICA would be affected. Fajerman did not, however, ask to pay just the amount owed under the ICA to maintain service under the ICA, as he believed it was too difficult to work with Bartlett. The dispute over the embargo as discussed above culminated in an order on May 15, 2018 directing Verizon to discontinue all aspects of the embargo, which Verizon did per Bartlett's testimony. (Initial Decision at 50).

ALJ Caliguire held that Verizon did not violate Section 14 of the ICA's dispute resolution procedures, finding that although specific procedures were not adhered to, such failures were imparted upon both the Petitioner and the Respondent. DNS did not provide a detailed outline of the dispute; the ICA does not set forth the form within which designation of a negotiator should be, nor the qualifications thereof. The ALJ also found Verizon provided notice to DNS of the embargo. (Id. at 52).

H. **Alleged Admissions by Verizon**

In the post-hearing brief, DNS for the first time in these proceedings stated that in Verizon's answer to the Petition, Verizon did not deny all material allegations of the Petition and therefore, those allegations are deemed admitted, pursuant to New Jersey Court Rules[10] R. 4:5-3 and R. 4:5-5, and N.J.A.C. 14:1-6.1(b). (Initial Decision at 54).

In its answer to the Petition, filed October 31, 2017, Verizon responded to each of 92 numbered paragraphs in the Petition [the four (4) remaining numbered paragraphs are requests for relief]. Where Verizon did not specifically admit or deny Petitioner's allegations, Verizon explicitly stated: that it was without "knowledge or information sufficient to form a belief as to the allegations" in the respective paragraph(s); or that the cited document(s) speak for themselves; or made reference to earlier numbered responses; or that the specific "allegations are legal conclusions as to which no response is necessary." (See generally Respondent's Answer). It is the latter response which Petitioner now claims is tantamount to an admission of the respective allegations.

Pursuant to the Uniform Administrative Procedure Rules, applicable in administrative proceedings, "pleading requirements are governed by the agency with subject matter jurisdiction over the case." [N.J.A.C. 1:1- 6.1(a).] The regulations specific to BPU proceedings only provide that an answer must "apprise the parties and the Board fully and completely of the nature of the defense and shall admit or deny specifically and in detail all material allegations of the petition." [N.J.A.C. 14:1-6.1(b).]

In order to "achieve just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay" the Initial Decision deemed that Verizon's responses to paragraphs 12, 14, 48-52, 63, 71-73, 81-83 and 85 of the Petition shall not be deemed admissions of the allegations in those paragraphs, allegations which have been fully litigated. [N.J.A.C. 1:1- 1.3(a); N.J.A.C. 14:1-1.2(a).] The ALJ found that Verizon's Answer was sufficient and responses to paragraphs 12, 14, 48-52, 63, 71-73, 81-83 and 85 of the Petition were not deemed admitted.

FINDINGS OF THE INITIAL DECISION

ALJ Caliguire issued an Initial Decision and held the following:

Petitioner DNS failed to prove by a preponderance of credible evidence that:

(1) Verizon erroneously charged DNS $39,386 under the ICA and the Wholesale Advantage Contract;

(2) Verizon failed to properly credit DNS for payments made for undisputed charges; and

(3) Verizon assessed LPCs for amounts that were not overdue.

[10] Pursuant to Rule 4:1. Scope of Rules: "the rules in Part IV, insofar as applicable, govern the practice and procedure of civil actions in the Superior Court, Law and Chancery Divisions, the surrogate's courts and the Tax Court"

Petitioner DNS proved by a preponderance of credible evidence that Verizon breached the contractual obligations to perform its obligations under the ICA in good faith and breached the implied covenant of good faith and fair dealing by:

(i) its imposition of LPCs in violation of the terms of the ICA and its failure, once notified of the potential violation, to promptly investigate; and

(ii) its action in changing billing on four disputed trunk groups to that charged for ATC trunks without exercising due diligence to support such a change.

Petitioner failed to prove by a preponderance of credible evidence that Verizon acted in bad faith, in violation of the ICA and/or of applicable law with regard to:

(iii) improper billing of State and federal taxes;

(iv) refusal to honor reduced-priced offers or to block orders prior to the imposition of the embargo;

(v) the disputes over charges related to the LIS trunks, including POVN billing; and

(vi) the alleged violations of Section 9.3 of the ICA.

(Initial Decision at 64-65).

EXCEPTIONS OF PETITIONER TO INITIAL DECISION

On February 28, 2022, DNS filed exceptions to the Initial Decision. In sum, DNS disagreed with three (3)) main points of the Initial Decision: (1) Petitioner believes the Initial Decision's attempt to order damages is unlawful; (2) Verizon's Answer to the Petition admitted material allegations of the Petition as a matter of law (3) Verizon acted in bad faith in violation of the ICA.

Although the present matter arises out of a billing dispute, DNS argues that the OAL and by extension the Board "lacks authority to award damages" when the ALJ determined that DNS owed the disputed balance under the ICA. (DNS Exceptions at 2). DNS argues that "claims relat[ing] to an ICA- must be determined in court." Id. DNS further contended in the exceptions that "VZN never claims nor itemized any amount allegedly owed by DNS...such a claim was never put before the ALJ for consideration" (Id. at 10).

DNS argued that Verizon violated the ICA and acted in bad faith not only due to the billing errors contained in DNS's bills but, because "while there are scores of carriers that VZN claims owe VZN money, nearly all of whom have claimed balances greater than any amounts here, VZN's overly aggressive actions relative to DNS make it clear that VZN illegally targeted DNS." (Id. at 13). The Petitioner contended it did not receive what was anticipated under the ICA due to Verizon's actions and that their bill credits over the years establish gross misbilling. (Id. at 14). DNS reiterated in its exceptions that Verizon failed to hold good faith negotiations and designate a negotiator or meet to negotiate and embargoed DNS services absent written notice. (Id. at 15-17).

Additionally, DNS argued that Verizon acted in bad faith alleging it did not follow the dispute resolution procedures of the ICA sufficiently and placed a service embargo into effect on July 20, 2017. Petitioner also points to the LIS trunk billing dispute as further support its position that

Verizon violated the ICA and therefore acted in bad faith. (Id. at 24). Petitioner also argued that Verizon continues to bill DNS with "excessively high monthly rate charge of 1.84%" for late payment charges despite Verizon's representations to the contrary. (Id. at 32).

In the exceptions DNS argued Verizon, by way of answer, admitted to material allegations contained in paragraphs 12, 14, 48-52, 63, 71-73, 81-83 and 85 of the Petition by not specifically denying each count. (DNS Exceptions at 15).

Finally, DNS argued in its exceptions that the holdings in the Initial Decision which, DNS disagreed with, were a result of bias by ALJ Caliguire. DNS argued that witness Bartlett was able to testify on a wide range of topics, DNS on the other hand was prevented from questioning the witness to reveal "the truly minimal weight to which his testimony is entitled". (Id. at 29). DNS argued that Mr. Fajerman was subject to "abusive cross examination through the zoom- conducted hearings prior to current counsel's entry into the case. The ALJ certainly failed to ensure that the hearing was conducted fairly." (Id. at 24). Petitioner stated that "there are conclusions in the Initial Decision adverse to DNS that appear to result from this bias." (Id. at 30). Counsel for Petitioner believes that "at times VZN Counsel, Bartlett and the ALJ even laughed at Mr. Fajerman and mocked his vision impairment." (Id. at 25-26). Counsel does not cite to where in the record this belief stems from. Counsel recognizes that Mr. Fajerman was permitted to be recalled and questioned after receiving an accommodation for his visual impairment, but argues that ALJ Caliguire was still biased.

Petitioner also claimed that ALJ Caliguire "may have improperly based her decision on external influences… when the ALJ denied the motion of Petitioner's new counsel to reinstate stricken exhibits and testimony, the ALJ stated that "Mr. Fajerman has been involved in other proceedings at the Office of Administrative Law and no other ALJ has brought such impairment to my attention." Petitioner contended that the ALJ may have improperly based her decision on external influences, particularly from ALJ Gertsman – with whom ALJ Caliguire shares a Judicial Assistant – and against whom Mr. Fajerman filed an Ethics Complaint in 2019." (Id. at 27).

DNS further takes exception to the findings of the ALJ with respect to the admission of exhibit R-121 which it contended records the history of eight (8) years of billing errors including information regarding the resolution thereof. (Id. at 31). The Petitioner concluded its claims asserting Verizon continued to charge excessive late payment interest rates.

EXCEPTIONS OF RESPONDENT TO INITIAL DECISION

On February 28, 2022, Verizon filed exceptions to the Initial Decision. Verizon, in part, was in agreement with the findings of the Initial Decision and requested the Board affirm them. Verizon disagreed with the Initial Decision's holding that Verizon did not act in good faith. Additionally, Verizon also requested the Board vacate its' preliminary order prohibiting Verizon from imposing an embargo on new orders.[11]

Verizon argued that the Board should reject the finding that Verizon breached its obligations of

[11] Verizon requested an opportunity for oral argument before the Board regarding the exceptions before the Board issued its Final Decision. The Board does not hold oral argument before issuing final decisions, the parties are permitted to submit written exceptions if they take exception to any findings of fact, conclusion of law or dispositions as determined by the Initial Decision that they would like the Board to consider. N.J.A.C. 1:1-18.4.

good faith when investigating the LPC disputes as the ICA permits Verizon to assess LPC on past due amounts. "DNS asserted that Verizon assessed LPCs at rates higher than that allowed under the ICA, by charging 0.00059% per day instead of 1.5% per month on some accounts (the "LPC rate issue"), and by assessing a $5 minimum LPC where the 1.5% rate would result in lower charge on other accounts (the "minimum LPC issue"). During the hearing, Verizon acknowledged these issues and explained that they were caused by mistakes in Verizon's accounting systems." (Verizon Exceptions at 4). Verizon argued overcharging of the LPCs was not intentional nor were the overcharges alone a finding of bad faith. Accordingly, the ALJ's holding as to the LPCs should not be upheld. Additionally, Verizon emphasized that the LPCs were a result of a system wide error and that such an error cannot support a finding of bad faith especially in this instance where the Petitioner did not pay for the LPCs and continued to receive services without the payment. (Verizon Exceptions at 6).

Verizon also argued that the Board should reject the conclusion that Verizon breached its obligation of good faith when it charged the Petitioner for ATC trunks because there is no evidence that the decision to begin billing for the ATC trunks was motivated by malice. (Id. at 7). Verizon reiterated that the decision to begin billing for the trunks was initiated after an internal audit to confirm that customers were being billed correctly. (Id. at 8). Therefore, even if there was a mistake in billing of the ATC trunks, Verizon's 'honest mistake' does not constitute bad faith. Id.

Finally, Verizon requested the order preventing Verizon from establishing an embargo as to services to be provided to DNS be vacated. Verizon argues that as this matter is about to be resolved by final determination and is no longer pending, the order expressly requiring Verizon to continue providing services to DNS should be lifted. (Id. at 9). Verizon states "DNS has acted with impunity simply refusing to pay Verizon's charges while also not disputing them causing its undisputed past-due balance to skyrocket to more than $1.6 million as the time of the hearing." (Id. 9-10).

REPLY EXCEPTIONS OF PETITIONER TO INITIAL DECISION

On March 21, 2022, DNS filed reply exceptions to the Initial Decision. Petitioner argued that the Board should adopt and extend the conclusion of the Initial Decision that Verizon breached its duty of good faith and reject Verizon's exceptions to those findings.

Petitioner once again reiterated that it believes that the Board should affirm that Verizon breached the duty of good faith; that Verizon's response to the Petition was insufficient and therefore should be deemed admitted and the claims conceded; Verizon failed to follow the ICA dispute resolution procedures; and that the determination that DNS was responsible for its outstanding bills was incorrect. DNS also argued the Board should reject Verizon's exceptions. The Petitioner argued that the Board should extend the finding that Verizon breached its duty of good faith with respect to: (1) complying with Section 14 of ICA; (2) LIS trunk billing; (3) overall billing practices.

In the reply exceptions, Petitioner argued that the determinations not objected to in the Verizon exceptions should be accepted. (Reply at 1). DNS refuted the exceptions filed by Verizon as misdirected and despite the ALJ's findings in favor of DNS, Verizon continues to pursue an embargo. (Id. at 2). The Petitioner's reply exceptions stated that VZN's exceptions misstate the applicable legal standards regarding bad faith and misconstrues *Brunswick* by representing the decision requires direct evidence of bad intent. (Id. at 3-4). DNS emphasized its belief that Verizon acted in bad faith in violation of the ICA and the common law covenant of good faith. (Id. at 4; 9). Petitioner additionally argues that as "VZN violated the terms of the ICA and breached the duty of good faith owed to DNS in relation to the LPC and ATC issues. It is appropriate for

the Board to find VZN violated the same duty of good faith and fair dealing to DNS concerning VZN's analogous actions and violations." (Id. at 5). DNS asserted the finding of bad faith should be extended to Verizon's alleged failure to "hold good faith negotiations, designate a negotiator, or meet to negotiate the NJ ICA dispute." Id. Additionally, DNS argued the Respondent's billing errors relating to the LIS trunk dispute that resolved in 2016, were intentional and that a finding of bad faith should be determined by the Board. (Id. at 6). Petitioner also contended that the billing errors in general support a finding of bad faith. Id.

With respect to the issue of LPCs, Petitioner takes exception with Verizon's characterization that DNS did not suffer harm as a result of the LPC billing errors as DNS did not pay any of the charges. (Id. at 7). DNS argued it "has suffered tremendous harm due to Verizon's admitted incompetence, including years of administrative time, expense, and suffering through hundreds of billing claims and irreconcilable accounts, hundreds of hours of executive, employee, consultant and attorney time, and years of litigation imposing six-figure costs on DNS" Id. Further, DNS emphasized its position that Verizon has not corrected LPC overcharges. Id.

On the issue of ATC trunk billing, Petitioner claimed that Verizon acted in bad faith because "after VZN placed its unlawful embargo on DNS, prior to the reclassification, VZN did not verify, investigate, or even inquire as to why the trunks were not being billed as ATC. Instead, VZN arbitrarily changed the billing of the trunks from local to ATC based on a routine audit. VZN did ASR, or its own Customer Service Record ("CSR")." (Id. at 8).

DNS's reply exceptions restated claims of egregiously incorrect billing practices by Verizon established that "VZN evaded the spirit of the ICA, lacked diligence, willfully rendered imperfect performance, abused discretion, and interfered with DNS's performance under the ICA," and therefore the Board should conclude they acted in bad faith. (Id. at 13). Verizon, according to DNS, presented little to no support for its claims of non-payment. (Id. at 14). Petitioner also argued that the Board should find that the embargo instituted in 2017 by Verizon was a violation of the ICA and Board rules, was an effort to win back customers, and done in bad faith. (Id. at 14-15). Furthermore, the Petitioner excepted to the representation of Verizon that it owed a substantial amount of money in overdue balances. (Id. at 16). DNS countered Verizon's exceptions respecting the embargo claiming the lack of evidence on the part of Verizon as to amounts owed by DNS. (Id. at 18).

DNS reasserted in the reply, the embargo was in bad faith as exemplified by the emails exchanged by Verizon and it is obligated to admit or deny claims and failed to do so. and therefore seeks the Board accept the reply exceptions. (Id. at 20-21).

REPLY EXCEPTIONS OF RESPONDENT TO INITIAL DECISION

Verizon filed Reply Exceptions to the Initial Decision on March 21, 2022. Verizon requested that (1) the Board adopt the finding that DNS owes Verizon $39,386.00 for services rendered as of August 24, 2017; (2) the Board adopt the ruling that Verizon did not admit allegations in DNS's Petition; (3) the Board adopt the finding that Verizon did not breach its obligation of good faith in its dealings with DNS; and (4) the Board uphold ALJ Caliguire's creditability determinations.

Verizon reemphasized its position that DNS did not meet its burden of proof with respect to the outstanding billing issue. Verizon contended that DNS had ample opportunity to provide sufficient evidence to establish that DNS did not have any outstanding bills throughout the proceedings in the OAL and that the Board should adopt the finding of the Initial Decision in that regard. (Verizon Reply Exceptions at 2-3). Furthermore, Verizon indicated that it would be comfortable with the

Board adopting a change in the exceptions filed by DNS "Verizon would accept the Board adopting the Initial Decision's finding that the money is owed, without an express order that DNS pay it forthwith." (Id. at 4).

Additionally, Verizon objected Petitioner's argument that the allegations in the Petition should be deemed admitted by Verizon "because Verizon did not expressly deny certain paragraphs in its Answer to DNS's Petition" Id. Verizon references the New Jersey Court Rules as well as the Uniform Administrative Procedures Rules in support of its position. Verizon also argued that it would not be in the interest of justice to uphold DNS's position on this issue as DNS is estopped from making the argument at this stage of the proceedings. (Id. at 5).

Furthermore, Verizon requested that the Board adopt the conclusion that "subject to two limited instances that Verizon addressed in its initial exceptions, [the ALJ] held that Verizon's conduct did not breach its obligations of good faith rejecting nearly all of DNS's unsupported claims that Verizon acted in bad faith." (Id. at 6). Verizon argued that DNS failed to support its position pursuant to N.J.A.C. 1:1-18.4(b)(3) when it did not cite to established law or evidence of bad motivation or intent on the part of Verizon. Id.

Verizon contended that the Board should adopt the credibility determinations of ALJ Caliguire and reject what it characterizes as "meritless accusations" of bias by DNS. (Id. at 7). Verizon cites to N.J.A.C. 1:1-18.6(c); N.J.A.C. 1:1-15.1(a); N.J.A.C. 1:1-18.4(c) as well as several cases in support of its position. Finally, Verizon concluded its Reply Exceptions by requesting that the Board vacate the Order prohibiting Verizon from imposing an embargo.

FINDINGS AND CONCLUSIONS

The Board is authorized under federal law to adjudicate disputes involving the terms of the ICA pursuant to the Telecommunications Act of 1996, which was enacted "to promote competition and reduce regulation in order to secure lower prices and higher quality service for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Preamble, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the Act).

Under Section 251 of the Act, ILECs are required to interconnect their networks with the networks of competitors, CLECs, and in so doing, must provide interconnection:

> [T]hat is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection [and] on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the [ICA] and the requirements of this section and section 252 of this title. [47 U.S.C. § 251(c)(2).]

Interconnection agreements set forth the terms and conditions by which the ILECs fulfill their substantive duties under the Act, Id. § 252(c)(1), and must be submitted to the respective state commission for approval. (Id. § 252(e)(1)). The United States Court of Appeals for the Eighth Circuit confirmed that pursuant to Section 252 of the Act, state commissions, like the Board, "are vested with the power to enforce the terms of the agreements" they approve. Iowa Utils. Bd. v. F.C.C., 120 F. 3d 753, 804 (8th Cir. 1997), rev'd in part on other grounds sub nom., AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999). The Board also has jurisdiction in this matter under State law. (See N.J.S.A. 48:2-13, 2-16, 2-19(a), 3-2 and 3-4).

The ICA provides, in pertinent part:

2. Term and Termination

2.2 Either [party] may terminate this agreement . . . by providing written notice of termination at least ninety (90) days in advance of the date of termination.

6. Assurance of Payment

6.1 Upon request by Verizon, [DNS] shall provide to Verizon adequate assurance of payment of amounts due (or to become due) to Verizon hereunder.

6.2 Assurance of payment of charges may be requested by Verizon if [DNS] . . . fails to timely pay a bill rendered to [DNS] by Verizon as required by Section 9 of this Agreement, [or] admits its inability to pay its debts as such debts become due[.]

9. Billing and Payment; Disputed Amounts

9.1 Except as otherwise provided in this Agreement, each Party shall submit to the other Party on a monthly basis in an itemized form, statement(s) of charges incurred by the other Party under this Agreement.

9.2 Except as otherwise provided in this Agreement, payment of amounts billed for Services provided under this Agreement, . . . shall be due . . . on the due date specified on the billing Party's statement[.] Payments may be transmitted by electronic funds transfer.

9.3 If any portion of an amount billed by a Party under this Agreement is subject to a good faith dispute between the Parties, the billed Party shall give notice to the billing Party of the amounts it disputes ("Disputed Amounts") and include in such notice the specific details and reasons for disputing each item. A Party may also dispute prospectively with a single notice a class of charges that it disputes. Notice of a dispute may be given by a Party at any time, either before or after an amount is paid, and a Party's payment of an amount shall not constitute a waiver of such Party's right to subsequently dispute its obligation to pay such amount or to seek a refund of any amount paid. The billed Party shall pay by the Due Date all undisputed amounts. Billing disputes shall be subject to the terms of Section 14, Dispute Resolution.

9.4 Charges due to the billing Party that are not paid by the Due Date, shall be subject to a late payment charge. The late payment charge shall be in an amount specified by the billing Party which shall not exceed a rate of one-and-one half percent (1.5%) of the overdue amount (including any previously billed late payment charges) per month.

13.4 Nothing in this section shall limit Verizon's right to cancel or terminate this Agreement or suspend provision of Services under this Agreement.

14. Dispute Resolution

14.1 Except as otherwise provided in this Agreement, any dispute between the Parties regarding the interpretation or enforcement of this Agreement or its terms shall be addressed by good faith negotiation between the Parties. To initiate such negotiation, a Party must provide to the other Party written notice of the dispute that includes both a detailed description of the dispute or alleged nonperformance and the name of an individual who will serve as the initiating Party's representative in the negotiation. The other Party shall have ten (10) Business Days to designate its own representative in the negotiation. The Parties' representatives shall meet at least once within thirty (30) days after the date of the initiating Party's written notice in an attempt to reach a good faith resolution of the dispute. Upon agreement, the Parties' representatives may utilize other alternative dispute resolution procedures such as private mediation to assist in the negotiations.

14.2 If the Parties have been unable to resolve the dispute within thirty (30) days of the date of initiating Party's written notice, either Party may pursue any remedies available to it under this Agreement, at law, in equity, or otherwise, including, but not limited to, instituting an appropriate proceeding before the Commission, the FCC, or a court of competent jurisdiction.

18. Good Faith Performance

The Parties shall act in good faith in their performance of this Agreement.
The Interconnection Attachment to the ICA includes the following provisions:

2.1 Methods for Interconnection

2.1.2 Each Party ("Originating Party"), at its own expense, shall provide for delivery to the relevant Interconnection Point (IP) of the other Party ("Receiving Party") Reciprocal Compensation Traffic and Measured Internet Traffic that the Originating Party wishes to deliver to the Receiving Party.

2.1.3 [DNS] may use any of the following methods for interconnection with Verizon:

2.2 Trunk Types

2.2.1 In interconnecting their networks pursuant to this Attachment, the Parties will use as appropriate, the following separate and distinct trunk groups:

2.2.1.1 Interconnection Trunks for the transmission and routing of Reciprocal Compensation Traffic, translated LEC ItraLATA toll free service access code traffic, and IntraLATA Toll Traffic, . . . and Tandem Transit Traffic in accordance with Section 12 of this Attachment;

> 2.2.1.2 Access Toll Connecting Trunks for the transmission and routing of Exchange Access traffic, including translated InterLATA toll free service access code traffic, between [DNS] Telephone Exchange Service Customers and purchasers of Switched Exchange Access Service via a Verizon access Tandem, in accordance with Sections 9 through 11 of this Attachment[.]

Bill Dispute

In customer billing disputes before the Board the Petitioner bears the burden of proof by a preponderance of the competent credible evidence. See Atkinson v. Parsekian. 37 N.J. 143, 149 (1962). The burden of proof is met if the evidence establishes the reasonable probability of the facts alleged and generates reliable belief that the tended hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div)., certif. denied, 31 N.J. 75 (1959).

Petitioner, when disputing amounts charged by the Respondent is required to provide reliable evidence from which the billing disputes arose. During the course of this proceeding, to establish its claim, the Petitioner proffered spreadsheets created by Carey which were not supplemented with copies of the bills in question, submissions to the Verizon portal or receipts received from Verizon. (Initial Decision at 24). The Respondent also introduced a spreadsheet showing the history of disputes raised by DNS as of September 2020; shortly before the hearings began. (R-121). Furthermore, Verizon represented that its records reflect, all disputes raised as of that date had been reviewed and responded to. The spreadsheet also shows disputes that were escalated, or appealed, by DNS after receipt of the Verizon response. The ALJ upon review found this exhibit no more reliable than Carey's spreadsheet as it too is hearsay, not corroborated by the actual documents (or online submissions). The burden, however, set forth in case law, rests with the Petitioner of proving its allegations regarding erroneous charges. (Initial Decision at 24).

In the Initial Decision, the ALJ considered whether Verizon incorrectly claimed that DNS had a past due balance of $32,991 that she characterized as undisputed ICA charges and a past balance of $6,395 under a separate negotiated contact known as Wholesale Advantage contract.[12] Petitioner was directed to present documented evidence of bills it challenged, the charges on those bills, which it disputed and did not pay, and the amount it did pay.

In addition, DNS was directed to provide evidence for each non-disputed charge as to which payment was made and improperly credited to provide the original bill, proof of payment and the subsequent bills showing that payment(s) was not credited. (Initial Decision at 8).

In its defense, the Petitioner claimed that the Respondent created false billing issues and disputes in an attempt to drive the company out of the market and when the Respondent refused to negotiate a settlement of past due amounts that the Respondent failed to document and/or substantiate disputed amounts. (Initial Decision at 9).

[12] April 23, 2018 Brief in Reply to Verizon's Response to DNS's Motion for Enforcement of the Board's December 19, 2017 Order at p 23 and 24 DNS notes The Board does have jurisdiction over Verizon's delivery of intrastate services even those covered by the Wholesale Advantage as the activity is related to basic intrastate local service used by New Jersey consumers, businesses and governments. Verizon acknowledges in their March 21st response that the 39,000 is part ICA part Wholesale Advantage. (See also Petition at ¶¶ 9; 15).

The ALJ held the Petitioner failed to comply with the clear directive of the court to produce documented evidence to support its contention that Verizon was trying to collect on charges properly disputed. While the amount of the disputed charges was not agreed upon by the parties, the amount reflected in the Petition and later miscategorized by the Petitioner in its exceptions as damages, derive from the bills generated by the Respondent and disputed by the Petitioner. The Petition was initiated by DNS based upon monies sought by the Respondent and therefore the burden of proof regarding alleged errors in the amounts sought rests with the Petitioner.

Accordingly, based upon the record the ALJ determined the Petitioner did not satisfy its burden of proof by the preponderance of the evidence and did not present adequate documentary evidence of the bills it challenged, the charges on those bills, which it disputes; the amounts that remained unpaid and the amounts paid.

Covenant of Good Faith

The Initial Decision addressed multiple issues whether Verizon's actions amounted to a violation of the covenant of good faith. Namely regarding the billing of LPCs; billing of ATC trunks; the imposition of the embargo; the imposition of state and federal taxes; the charges related to LIS trunks including POVN billing and honoring reduced price offers; and finally, allegations of violations of Section 9.3 of the ICA. Pursuant to the Third Circuit case of Core Communications, Inc. v. Verizon Pennsylvania, Inc., 493 F.3d 333,344 (3d Cir. 2007) "interpretation and enforcement actions that arise after a state commission has approved an interconnection agreement must be litigated in the first instance before the relevant state commission. A party may then proceed to federal court to seek review of the commission's decision or move on to the appropriate trial court to seek damages for a breach, if the commission finds one. This case fits squarely within that rule because the Board approved the ICA, and this dispute involves an interpretation of the ICA, accordingly the allegations that Verizon breached the good faith requirements of the ICA are within the jurisdiction of the Board.[13] As noted in the Initial Decision, a covenant of good faith and fair dealing is implied in every contract in New Jersey, regardless of the type of contract at issue. See Wood v. New Jersey Mfrs. Ins. Co., 206 N.J. 562 (2011).

The covenant of good faith and fair dealing provides that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract [.]" Kalogeras v. 239 Broad Ave., L.L.C., 202 N.J. 349, 997 A.2d 943, 953 (2010) (citations and internal quotations omitted). A party breaches the implied covenant of good faith and fair dealing when it acts in bad faith or engages in some other form of inequitable conduct, even where there is no breach of the express terms of the contract. Avatar Business Connection, Inc. v. Uni–Marts, Inc., 2006 WL 1843136, at *7 (D.N.J. June 30, 2006); Kapossy v. McGraw–Hill, Inc., 921 F.Supp. 234, 248 (D.N.J.1996); see also McGarry v. Saint Anthony of Padua Roman Catholic Church, 307 N.J.Super. 525, (N.J.Super.Ct.App.Div.1998); Sarlo v. Wells Fargo Bank, N.A., 175 F. Supp. 3d 412, 424 (D.N.J. 2015).(Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001) ("a party's performance under a contract may breach that implied covenant even though that performance does not violate

[13] The present matter is distinguished from Edison-Metuchen Orthopedic Group v. Cooperative Communications, Inc., BPU Docket No. TC13100941U, OAL Docket No. PUC 05818-14 (N.J. B.P.U. Aug. 19, 2015), cited by the Petitioner as the Edison matter addressed a contract dispute that was not subject to any review of the Board and therefore the matter was dismissed. Presently, the ICA was approved by the Board and under the jurisdiction of the Board.

a pertinent express term.") Sons of Thunder Inc. V. Borden, Inc., 148 N.J. at 419, 420; see also Bak-A-Lum Corp. v. Alcoa Bldg. Prods., Inc., 69 N.J. 123, 129-30 (1976) (defendant's conduct in terminating contract constituted bad faith although it did not violate express terms of written agreement).

When considering the arguments of the parties regarding allegations of "bad faith" the standards set forth in case law govern. To show bad faith, "bad motive" by the defendant is essential, and "an allegation of bad faith or unfair dealings should not be permitted to be advanced in the abstract and absent improper motive." Wilson at 248; see also Donnelly v. Option One Mortg. Corp., 2014 WL 1266209, at *16 (D.N.J. Mar. 26, 2014). Exercises of discretion for "ordinary business purposes" do not constitute improper motive, and a plaintiff cannot satisfy the "improper motive" element by merely alleging that a defendant's discretionary decisions benefitted the defendant and disadvantaged the plaintiff. See Hassler v. Sovereign Bank, 644 F.Supp.2d 509, 518 (D.N.J.2009) [citing Elliott & Frantz, Inc. v. Ingersoll–Rand Co., 457 F.3d 312, 329 (3d Cir.2006)].

For DNS to prevail on its claim of bad faith, it must show bad intentions motivated Verizon's actions. Brunswick Hills Racquet Club, Inc. v. Rte. 18 Shopping Ctr. Assocs., 182 N.J. 210, 227, 229, 231 (2005) (notwithstanding the failure of plaintiff to exercise the strict terms of an option contract, court found that defendant breached the covenant of good faith and fair dealing by engaging "in a pattern of evasion, sidestepping every request by plaintiff to discuss the option and ignoring plaintiff's repeated written and verbal entreaties to move forward on closing"). A party who acts in good faith on an honest, but mistaken, belief that his or her actions are justified has not breached the covenant of good faith and fair dealing. But, generally, "[s]ubterfuges and evasions" in the performance of a contract violate the covenant of good faith and fair dealing "even though the actor believes his conduct to be justified." 182 N.J. at 225, 229.

With respect to the embargo, the Petitioner contended the action undertaken by Verizon violated specific provisions of the ICA. In reviewing the matter, the ALJ found the failure of the Respondent to comply with the Board's Order regarding the embargo was a mistake with respect to the BPU Order that did not rise to the level that would constitute bad faith. (Initial Decision at 63-64). The judge determined that Verizon misinterpreted the Board's May 15, 2018 Order and that this incorrect interpretation was not evidence of bad faith. Id.

The ALJ when considering the Petitioner's claims regarding LPCs and ATC trunks held DNS proved that Verizon breached the contractual obligations to perform its obligations under the ICA in good faith and breached the implied covenant of good faith and fair dealing by (1) its imposition of LPCs in violation of the terms of the ICA and its failure, once notified of the potential violation, to promptly investigate; and (2) its action in changing billing on four disputed trunk groups to that charged for ATC trunks without exercising due diligence to support such a change. (Initial Decision at 64).

Furthermore, the ALJ held, the Petitioner failed to prove by a preponderance of credible evidence that facts in this matter satisfy the standards for a finding Verizon acted in bad faith, in violation of the ICA and/or of applicable law with regard to (1) improper billing of State and federal taxes; (2) refusal to honor reduced-priced offers or to block orders prior to the imposition of the embargo; (3) the disputes over charges related to the LIS trunks, including POVN billing; and (4) the alleged violations of Section 9.3 of the ICA.

Exceptions and Reply Exceptions

The rules regarding exceptions set forth in N.J.A.C. 1:1-18.4 provide in relevant part:

(b) The exceptions shall:

1. Specify the findings of fact, conclusions of law or dispositions to which exception is taken;

2. Set out specific findings of fact, conclusions of law or dispositions proposed in lieu of or in addition to those reached by the judge;

3. Set forth supporting reasons. Exceptions to factual findings shall describe the witnesses' testimony or documentary or other evidence relied upon. Exceptions to conclusions of law shall set forth the authorities relied upon.

(c) Evidence not presented at the hearing shall not be submitted as part of an exception, nor shall it be incorporated or referred to within exceptions.

As summarized above, DNS alleges the balance due constitute damages over which the Board does not enjoy jurisdiction. The outstanding sum is characterized by DNS as damages in the exceptions filed which is inconsistent with the record. Throughout the proceeding the charges are described as amounts in dispute and the basis for the Petition. (DNS Petition at ¶¶ 5-6). Defining the outstanding charges as damages is not supported by the existing record or the exceptions. Accordingly, the exceptions with respect to damages constitute alternative findings of fact unsupported by evidence thereof and accordingly do not satisfy the requirements for acceptance.

In addition, the Petitioner exceptions claimed Verizon's answer to its Petition did not serve to deny the allegations therein. The N.J.A.C. is instructive in this regard and the parties must consult and comply with the requirements contained therein. An answer must fully and completely apprise the parties and the Board of the nature of the defense and shall admit or deny specifically and in detail all material allegations. See N.J.A.C. 14:1-6.1(b). The ALJ held the standard in the N.J.A.C. were satisfied and absent evidence to the contrary, we concur with the ALJ findings, that Verizon's responses to the Petition are not deemed admissions of the allegations.

The Petitioner also took exception with the determinations of the ALJ in the Initial Decision regarding the absence of bad faith. Petitioner's Reply Exceptions similarly take issue with the ALJ's determinations regarding bad faith and echo the previous filings of the Petitioner. However, DNS fails to fulfill the standards in N.J.A.C. 1:1-18.4(b) and therefore was not persuasive. Upon review, we **FIND** the errors in billing on the part of Verizon while replete in the record, do not establish ill motive which is a necessary element essential for a finding of bad faith.

As summarized above Verizon takes exception with the ALJ's findings it breached its obligations under the ICA dealing with the covenant of good faith as it pertains to the LPCs and the billing of certain trunks. In its Reply Exceptions, Verizon mainly supports the findings of the Initial Decision and takes exception with the absence of good faith determinations once again. The Board **CONCURS** with the ALJ's findings that Verizon's inactions and unnecessary delays in resolving these issues was a violation of the covenant of good faith.

The Board acknowledges receipt of the Exceptions and Reply Exception filed by the parties as well as the issues raised therein. Notwithstanding, the Board **DOES NOT FIND** the Exceptions or Reply Exceptions contain the requisite support to substantiate their claims and therefore the requested modifications to the Initial Decision will not be incorporated as part of the final decision.

Credibility Determinations

In this instance, both the Petitioner and the Respondent challenged the credibility of the witnesses. (Initial Decision at 16). Herein, the ALJ determined that witness Fajerman was not reliable and thus did not serve as a credible witness.[14] ALJ determined that the remaining witnesses were credible.

As the finder of fact, ALJ Caliguire is charged with determining the credibility of the witnesses who testify before the OAL. See, In Re Estate of Perrone, 5 N.J. 514, 522 (1950); See also, AT&T Communications of New Jersey, Inc., et al. v. Verizon New Jersey, Inc., OAL Docket No. 08336-01, Initial Decision, 2004 NJ AGEN LEXIS 764, *63 (July 2, 2004). In any matter before a judicial body, the trier of fact must assess the credibility of the witnesses and weigh the evidence presented. The judge must assess the credibility of the witnesses presented through an evaluation of the statements made and the documentary evidence submitted at trial. Pursuant to N.J.A.C. 1:1-18.6(c) "the agency head may not reject or modify any finding of fact as to issues of credibility of lay witnesses unless it first determines from a review of the record that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent and credible evidence in the record."

Based on the record and the controlling legal standards, the Board does not find any of the ALJ's determinations regarding credibility of the witnesses to be arbitrary, capricious or unreasonable. Accordingly, the Board is bound by these findings.

Allegation of Bias

Addressing the allegation of bias on the part of the ALJ, set forth in the Petitioner's exceptions to the Initial Decision. ALJs, as entrusted fact finders of contested cases, are tasked with weighing the evidence presented and making findings based upon the record presented. The Petitioner's allegations of bias on the part of Judge Caliguire derive from a claim the hearings were not conducted fairly, in part due to the fact the proceedings were held via ZOOM, and ultimately resulted in adverse conclusions in the Initial Decision and unfavorable rulings regarding the credibility of witnesses. (Petitioner Exceptions at 24-28). "It is well-established that adverse rulings—even if they are erroneous—are not in themselves proof of prejudice or bias." Drummond v. Robinson Twp., 9 F.4th 217, 234 (3d Cir. 2021); see also Liteky v. United States, 510 U.S. 540, 555 (1994) ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion" since they rarely "evidence the degree of favoritism or antagonism required ... when no extrajudicial source is involved"). There is no case law cited by the Petitioner nor any proof in the record to establish that ALJ Caliguire acted with bias or animus towards the Petitioner.

Pursuant to N.J.A.C. § 1:1-14.12 a party may file a motion to disqualify a judge "as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist." The Petitioner failed to take any such action.

The record reflects ALJ Caliguire undertook her responsibility as an impartial finder of fact

[14] ALJ Caliguire found that Mr. Fajerman "did not distinguish himself as a reliable and credible witness" primarily due to his behavior on the last day of the hearing and his explanations on the record about the subject of the conversation he was having with an unknown third party regarding the matter in dispute via telephone after being instructed that he was still under oath and directed not to talk to anyone including counsel during a break. See Initial Decision 16.

earnestly and seriously. The ALJ was charged with reviewing all the evidence before her and making determinations and findings based on the evidence before her. The record reflects that ALJ Caliguire fairly balanced the record evidence presented. Furthermore, there is no record of a motion being filed during the course of the proceeding seeking ALJ Caliguire's recusal.

Accordingly, we **HEREBY FIND** the Petitioner's allegations of bias on the part of Judge Caliguire are without merit.

Thus, after careful review and consideration of the entire record, the Board **HEREBY FINDS** the findings and conclusions of law of ALJ Caliguire to be reasonable and, accordingly, **HEREBY ACCEPTS** them. The Board **ACCEPTS** and adopts ALJ Caliguire's determinations on the credibility of the witnesses and evidence admitted into the record. Specifically, the Board **FINDS** that Petitioner failed to meet its burden of proof in part and the Petitioner met its burden of proof, in part. Accordingly, the Board **HEREBY ADOPTS** the Initial Decision in its entirety and **ORDERS** that that the Petition be **DISMISSED**. The Petitioner remains responsible for $39,386 in outstanding charges to be paid to the Respondent. The Petitioner's claim that the Respondent Verizon New Jersey, Inc. acted in violation of Sections 14 and 18 of the ICA and in breach of the implied covenant of good faith and fair dealing found in New Jersey common law is **HEREBY APPROVED** with respect to (1) Verizon's imposition of LPCs in violation of the terms of the ICA and its failure to promptly investigate the same; and (2) Verizon's action in changing billing on four disputed trunk groups described herein to that charged for ATC trunks without exercising due diligence to support such a change. Any action by the Petitioner for damages shall proceed in the appropriate forum.

As the decision herein determines the issues set forth in the Petition filed on September 20, 2017, and the dispute therein having been fully adjudicated, the Board's order of December 17, 2019[15] requiring Verizon to continue to provide service to DNS under the ICA is no longer in effect as the matter has been resolved by final determination.

[15] In re the Petition of Business Automation Technologies D/B/A Data Network Solutions v. Verizon New Jersey, Inc., BPU Docket No. TC17091015.

The Order shall become effective on July 14, 2022.

DATED: July 13, 2022

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:

CARMEN D. DIAZ
ACTING 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 BUSINESS AUTOMATION TECHNOLOGIES D/B/A DATA NETWORK SOLUTIONS VS. VERIZON NEW JERSEY, INC.

BPU DOCKET NO. TC17091015
OAL DKT. NO. PUC 0159-2018

SERVICE LIST

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. PUC 01597-18

AGENCY DKT. NO. TC17091015

BUSINESS AUTOMATION TECHNOLOGIES

d/b/a DATA NETWORK SOLUTIONS,

Petitioner,

v.

VERIZON NEW JERSEY, INC.,

Respondent.

Andrew M. Klein, Esq., for petitioner Business Automation Technologies d/b/a Data Network Solutions (Klein Law Group, PLLC, attorneys)[1]

Eric D. Wong, Esq., for respondent Verizon New Jersey, Inc. (Greenburg Traurig, LLP, attorneys)

Itko Malic, Deputy Attorney General, for Staff of the Board of Public Utilities (Andrew J. Bruck, Acting Attorney General of New Jersey, attorney)

Record Closed: December 16, 2021 Decided: January 28, 2022

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

[1] Through the fifth day of the hearing, petitioner was represented by Daniel O'Hern, Esq. of Byrnes, O'Hern & Heugle, LLC. Respondent was represented during early proceedings, including settlement discussions, by Verizon deputy general counsel Richard Fipphen. Prior to November 2021, Philip R. Sellinger, Esq., served as lead counsel for Verizon. Staff of the Board was previously represented by Veronica Beke and Timothy Oberleighton, Deputy Attorneys General.

STATEMENT OF THE CASE

On September 26, 2017, petitioner Business Automation Technologies d/b/a Data Network Solutions (DNS)[2] filed a petition with the Board of Public Utilities (Board, BPU) to contest billings assessed by respondent Verizon New Jersey, Inc. (Verizon) for access charges under a Board-approved interconnection agreement (ICA).

PROCEDURAL HISTORY

On September 26, 2017, DNS filed a petition with the Board to contest allegedly erroneous service charges which respondent Verizon was attempting to collect (Petition). Further, DNS requested an immediate order from the Board directing Verizon to lift a service hold preventing DNS from obtaining and processing new and existing service orders based on the disputed charges (the embargo), and to cease all collection activity pending the outcome of the contested case. By order dated December 29, 2017, the Board determined that the embargo was "a discontinuance of service [and ordered] Verizon to remove the embargo on the account." I/M/O The Petition Of Business Automation Technologies D/B/A Data Network Solutions v. Verizon New Jersey, Inc., Docket No. TC17091015, Order (December 19, 2017) (Order). The Board also directed the transmission to the Office of Administrative Law (OAL), for hearing as a contested case, all issues in dispute related to the ICA. Order at 4. The matter was transmitted to the OAL on January 26, 2018, where it was filed as a contested case on January 29, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

By letter dated April 5, 2018, petitioner claimed that despite an initial respite, Verizon allegedly reinstituted the embargo in violation of the Order. Petitioner's Motion for Enforcement of the Order (April 5, 2018). DNS asked that Verizon's alleged failure to comply with the Order be addressed and therefore, the DNS letter was treated as a motion to enforce the Order. On May 15, 2018, Verizon was directed to immediately lift

[2] In the Order transmitting this matter to the OAL, the Board refers to petitioner by the acronym "DNS." Although throughout the proceedings, including in documents filed by both parties and in testimony, the acronym "BAT" is used extensively, the petitioner shall be referred to here only as DNS.

the embargo on all service applications of DNS, to dispense with a newly-instituted manual ordering process, and to permit DNS to resume use of the Operations Support System access platforms established under the ICA.[3]

On February 26, 2019, DNS filed a Motion to Compel Discovery, by which it sought to compel Verizon to respond to interrogatories and a request for documents. Verizon filed its response to this motion on March 15, 2019; DNS filed a reply on March 21, 2019. On March 28, 2019, the parties appeared for a settlement conference, prior to which I read my ruling on the discovery dispute into the record with the stated intention of issuing a formal order on discovery to the parties following the conference. Prior to the conclusion of the settlement conference, Verizon made a new offer of settlement to DNS, which was transmitted in writing later that day. I approved the parties' joint request to defer the effective date of the order on discovery while they engaged in settlement discussions.

On April 25, May 31, July 11, and August 12, 2019, the parties participated in telephone status conferences and each time represented that settlement was close, pending agreement on minor issues. On November 13, 2019, Verizon notified me that all attempts to settle this matter had failed and therefore, Verizon filed a motion for summary decision in its favor on the grounds that there are no issues of material fact, and the law supports Verizon. Following filing of additional briefs, an order was issued on January 8, 2020, denying Verizon's motion and directing the parties to appear for hearing.

On May 12, 2020, a Stipulated Confidentiality Order was entered by which the parties agreed to the manner in which they would share and protect Confidential Information found in Discovery Material (with both terms defined in the order).[4]

[3] Verizon filed a motion for interlocutory review of this ruling on May 18, 2018; the Board denied the motion on July 2, 2018.

[4] On November 2, 2020, respondent requested an order directing petitioner to notify the Board that in an unrelated proceeding before the Board, petitioner had disclosed information it had obtained through discovery in this matter, such disclosure being a violation of the terms of the confidentiality order. Letter of Philip R. Sellinger, Esq. to ALJ Caliguire (November 2, 2020), at 2. Respondent was advised to raise this issue directly with the Board.

An initial prehearing order was issued on April 13, 2018. An amended prehearing order was issued on February 3, 2020, reflecting new deadlines for completion of discovery and hearing dates of September 9, 10, and 11, 2020. In March 2020, the Governor of the State of New Jersey declared a State of Emergency due to the COVID-19 public health crisis and mandated stay-at-home protocols for citizens and public employees. The OAL adopted the use of a remote video and audio platform [Zoom Video Communications, Inc. (Zoom)] to conduct hearings during the State of Emergency. On August 3, 2020, a second amended prehearing order was issued, incorporating the OAL Amended Omnibus COVID-19 Order for the Conduct of Remote Hearings, executed by the Honorable Ellen S. Bass, Acting Director and Chief ALJ. Under paragraph 4 of the second amended prehearing order, the parties were directed that should either "contend that the use of Zoom presents undue hardship, that party shall move to adjourn the hearings for good cause" no later than twenty days prior to the first hearing date. No such motions were received.

As counsel for petitioner rested his case, mid-way through the eighth day of the hearing, he stated that he had just emailed to the tribunal and opposing counsel reports from two doctors of Isaac Fajerman (Fajerman), president and owner of DNS, stating that Fajerman has a disability, specifically cataracts, which impairs his ability to fully participate in a Zoom hearing. Counsel claimed that my failure to accommodate Fajerman's disability is a violation of his rights under the Americans with Disabilities Act, 42 U.S.C. 12101, et seq. (ADA). Further, petitioner claimed that during cross-examination, counsel for respondent used the Zoom "share screen" feature to highlight specific portions of petitioner's exhibits P-124 and P-125, but Fajerman was unable to view such exhibits due to his disability and petitioner was therefore prejudiced by my decision to strike the exhibits and all testimony regarding those exhibits. See Tr. (December 1, 2020) (T-10), at 89-93.

The reports from Fajerman's doctors were dated November 30, 2020, thirty-nine days after he completed his testimony. As I stated on the record, from the date on which petitioner filed this matter before the Board through the eighth day of the hearing,

a period of close to three years, neither Fajerman nor counsel brought his disability and need for accommodation to my attention, or to that of the OAL and/or the Board. Both parties agreed to the use of Zoom; notwithstanding that agreement, the parties were advised in writing that should they object to the use of Zoom, they could raise such objections by motion for adjournment. See Second Amended Prehearing Order (August 3, 2020), ¶ 4. Petitioner did not exercise that option. Finally, the basis for sustaining respondent's objections to petitioner's exhibits P-124 and P-125 was that Fajerman could not or would not answer specific questions regarding the exhibits, claiming to have no knowledge to support a response even though he allegedly created the exhibits. Notwithstanding the foregoing, Fajerman was directed to submit his request for ADA accommodation as soon as possible.

On December 30, 2020, after the close of the hearing, but while the record remained open, petitioner filed a motion with the Board for interlocutory review of several evidentiary rulings, including the striking of testimony regarding, and exclusion of, exhibits P-124 and P-125. By order, effective February 6, 2021, the Board denied in part petitioner's request for review of evidentiary rulings, directed petitioner to inform the OAL of the accommodations Fajerman requires for his disability, and directed me to take testimony and permit cross-examination on the limited topic of exhibits P-124 and P-125, within thirty days (by March 8, 2021). Upon receipt and review of the Board's interlocutory order, petitioner's request for specific accommodations, and respondent's reply, Candice Hendricks (Hendricks), OAL Assistant Director of Judicial Standards and Procedures and OAL ADA Compliance Officer, sent written notice to petitioner of the manner by which Fajerman's disability would be accommodated. Hendricks noted that petitioner had requested limitations on the method and scope of cross-examination but that such were not a request for accommodation and were not granted. Further, Hendricks provided petitioner with several potential dates for the completion of the hearing prior to the expiration of the Board's deadline.

On March 1, 2021, by letter directly to the Board, petitioner requested a thirty-day extension of the deadline explaining that Fajerman had undergone cataract surgery

in February 2021 and would not be fitted for eyeglasses until March 18, 2021. Petitioner also requested clarification from the Board as to the scope of cross-examination that would be permitted by respondent when the hearing resumed. By order, effective March 8, 2021, the Board approved a thirty-day extension of the deadline for the completion of the hearing.[5]

Scheduling conflicts resulted in the final hearing being conducted by Zoom on April 8, 2021.[6] While Fajerman was under cross-examination, the parties took a short break, necessitated by technical difficulties being experienced by Fajerman. He and counsel were specifically advised that a "breakout room" would not be available to them until after Fajerman concluded his testimony as he would not be permitted to consult with counsel while on the [virtual] witness stand. Tr. (April 8, 2021) (T-15), at 132-33. When the proceedings resumed, respondent objected to Fajerman speaking on his cellphone to a third-party (without muting his line or turning off his video) during the break about the testimony he had just given, a portion of which conversation I also overheard. Fajerman stated that he "never spoke about any exhibits" while on his cellphone during the break, contrary to that which was heard. T-15 at 134.

Testimony concluded and the record remained open for the submission of post-hearing briefs. After extensions were granted, petitioner submitted a post-hearing brief on August 3, 2021, and respondent submitted a response brief on September 21, 2021. Petitioner submitted a reply brief on October 14, 2021. The parties were asked to make supplemental filings to clarify whether specific credits given by Verizon after the date of the Petition affected the amounts allegedly in dispute as of the date of the Petition;

[5] By letter dated March 29, 2021, petitioner charged me with "private communications" with Hendricks opposing petitioner's accommodations. This allegation was made as a result of a wide-ranging request to Hendricks under the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. (OPRA), for any OAL communications regarding petitioner and/or Fajerman. Given that Fajerman had previously been involved in matters handled by the OAL, Hendricks provided him with hundreds of documents, including an email from me intended to clarify that two exhibits, P-124 and P-125, had originally been the subject of dispute, but petitioner offered four exhibits for the final hearing, P-124A and B, and P-125A and B. On review, it was determined that petitioner had merely separated the original exhibits. See T-15 at 4, 5.

[6] Board staff did not object to this date and Hendricks approved my request to hold the hearing on April 8, 2021, without requiring petitioner to obtain a one-day extension from the Board.

these filings were made on December 1 and 16, 2021, and on December 16, 2021, the record closed.

BACKGROUND/ISSUES IN DISPUTE

By way of background, DNS is a competitive local exchange carrier (CLEC) based in New Jersey. Verizon is an incumbent local exchange carrier (ILEC) and, as such, is subject to regulation by the Board for certain services provided to New Jersey customers. Under two separate orders, the Board approved the ICA (J-1)[7], and a negotiated resale agreement between DNS and Verizon, by which DNS was authorized to provide basic local exchange services to customers in New Jersey using wholesale services purchased from Verizon. Order at 1-2.

The parties' business relationship began in 2003; by July 24, 2017, they had for some time been involved in a dispute over charges for services under the ICA and under other, non-ICA contracts covering services in New Jersey and in other states. In the Petition, DNS challenges bills, and/or charges on bills, of Verizon alleged to be erroneous but, as stated by the Board, the parties did not agree on the amount of disputed charges (or if there were any such charges) at the time the Petition was filed. See Order at 2. The parties do agree that the amount claimed by Verizon as unpaid and disputed for ICA-related services was modest, especially when compared to the total that Verizon claimed to be unpaid by DNS across all its accounts. Initial Post-Hearing Brief of Petitioner (August 3, 2021) (Br. of Petitioner), at 2. Evidence as to the amounts involved in non-ICA disputes was permitted only to the extent that those disputes (and the alleged failure to pay those charges) contributed to the decision of Verizon to impose the embargo, a decision claimed by DNS to be evidence of Verizon's bad faith. Petition, ¶ 10; see also, Letters to ALJ Caliguire from Philip R. Sellinger, Esq. (September 25, 2020), and from Daniel J. O'Hern, Esq. (September 28, 2020).

[7] Both parties marked the ICA as an exhibit. Rather than make references to both marked exhibits, the ICA will be referred to as J-1. The original ICA was entered on March 15, 2002, between SBC Telecom, Inc., and Verizon. (J-1.) On September 29, 2003, the parties here entered into a letter agreement by which DNS adopted the terms of the ICA. (R-2.)

At the hearing, testimony and documentary evidence were presented as to the following issues[8]:

1. Whether Verizon incorrectly claimed that as of August 24, 2017, DNS had a past-due balance for tariff and/or ICA-related charges, including for undisputed charges, of $32,991, and a past-due balance of $6,395, under the Wholesale Advantage contract. Petition, ¶¶ 12-15. Here, petitioner was directed to present documentary evidence of the bills it challenges, the charges on those bills which it disputes and did not pay, and the amounts it did pay.

2. Whether Verizon has failed to properly credit DNS for payments made for undisputed charges. Id., ¶¶ 17, 20, 26. Petitioner was directed that for each non-disputed charge as to which payment was made and improperly credited, to show the original bill, proof of payment, and the subsequent bills showing that the payment(s) was not credited.

3. Whether Verizon's imposition of late payment charges (LPC) has been done properly and consistent with the ICA. Id., ¶¶ 28-29, 40, 66-79.

4. Whether Verizon has improperly billed DNS for federal and state taxes and regulatory surcharges; DNS claims that such billing was made although DNS provided all required tax exemption certificates to Verizon. Id., ¶¶ 27-29, 40.

5. Whether Verizon properly charged DNS for services related to Local Interconnection Service trunks and Tandem Transit trunks. Id., ¶¶ 19, 20, 23-25, 32, 53-60.

[8] In the Petition, DNS claimed that Verizon improperly billed DNS for monthly and/or one-time service rates and demanded payment for uncollectible amounts older than twenty-four months. DNS presented no evidence to support these allegations at the hearing.

6. Whether Verizon has refused to honor reduced-priced offers and/or blocked orders made by DNS under the ICA at the prices listed in the ICA. Id., ¶ 12.

7. Whether Verizon properly followed the dispute resolution process in the ICA. Id., ¶¶ 35-40, 47.

8. Whether the embargo instituted by Verizon preventing orders by DNS under the ICA is a violation of Sections 14 and 18 of the ICA. Id., ¶¶ 41-42, 48, 49.

9. Whether the parties violated the good faith provisions of the ICA and the covenant of good faith and fair dealing imposed on parties to a contract under state and federal law. Id., ¶¶ 33, 43-44, 80-88.

Petitioner contends that respondent created "false billing issues and disputes" in an attempt to "drive [DNS] out of the market[.]" Petitioner's Opening Statement (August 28, 2020), at 2. Petitioner contends that respondent's "billing practices are both grossly incompetent [and] intentional and done in bad faith to damage and remove [petitioner] from the market." Ibid. Further, Verizon's billing "imposes enormous burdens and costs on DNS" as Verizon "puts the burden on [its carrier customers] to identify, report, escalate, pursue and resolve" errors that Verizon makes in billing. Post-Hearing Reply Brief of Petitioner (August 14, 2021) (Reply Br. of Petitioner), at 2.

Respondent contends that petitioner cannot prevail on its breach of contract and bad faith claims because petitioner failed to comply with its own obligations under the ICA. Respondent's Opening Statement (September 8, 2020), at 3. When respondent refused to negotiate a settlement of past-due amounts, petitioner claimed respondent was trying to collect on charges that were all properly disputed but, significantly, failed to document and/or substantiate disputed amounts, and instead allowed its unpaid balance to increase across all its Verizon accounts. This continued even after Board staff advised petitioner to provide Verizon with a "specific detailed accounting of all disputed charges." Id. at 5. The only specific claims made by DNS—trunks billed

improperly, and taxes assessed improperly—were credited before the hearing began. Id. at 2.

FACTUAL DISCUSSION AND FINDINGS

The Relevant Agreements and Terms

DNS entered the ICA with Verizon in 2003. (J-1; R-2.) The ICA provides, in pertinent part:

> **2. Term and Termination**
>
> 2.2 Either [party] may terminate this agreement . . . by providing written notice of termination at least ninety (90) days in advance of the date of termination.
>
> **6. Assurance of Payment**
>
> 6.1 Upon request by Verizon, [DNS] shall provide to Verizon adequate assurance of payment of amounts due (or to become due) to Verizon hereunder.
>
> 6.2 Assurance of payment of charges may be requested by Verizon if [DNS] . . . fails to timely pay a bill rendered to [DNS] by Verizon as required by Section 9 of this Agreement, [or] admits its inability to pay its debts as such debts become due[.]
>
> **9. Billing and Payment; Disputed Amounts**
>
> 9.1 Except as otherwise provided in this Agreement, each Party shall submit to the other Party on a monthly basis in an itemized form, statement(s) of charges incurred by the other Party under this Agreement.
>
> 9.2 Except as otherwise provided in this Agreement, payment of amounts billed for Services provided under this Agreement, . . . shall be due . . . on the due date specified on the billing Party's statement[.] Payments may be transmitted by electronic funds transfer.

9.3 If any portion of an amount billed by a Party under this Agreement is subject to a good faith dispute between the Parties, the billed Party shall give notice to the billing Party of the amounts it disputes ("Disputed Amounts") and include in such notice the specific details and reasons for disputing each item. A Party may also dispute prospectively with a single notice a class of charges that it disputes.

Notice of a dispute may be given by a Party at any time, either before or after an amount is paid, and a Party's payment of an amount shall not constitute a waiver of such Party's right to subsequently dispute its obligation to pay such amount or to seek a refund of any amount paid. The billed Party shall pay by the Due Date all undisputed amounts. Billing disputes shall be subject to the terms of Section 14, Dispute Resolution.

9.4 Charges due to the billing Party that are not paid by the Due Date, shall be subject to a late payment charge. The late payment charge shall be in an amount specified by the billing Party which shall not exceed a rate of one-and-one-half percent (1.5%) of the overdue amount (including any previously billed late payment charges) per month.

14. Dispute Resolution

14.1 Except as otherwise provided in this Agreement, any dispute between the Parties regarding the interpretation or enforcement of this Agreement or its terms shall be addressed by good faith negotiation between the Parties. To initiate such negotiation, a Party must provide to the other Party written notice of the dispute that includes both a detailed description of the dispute or alleged nonperformance and the name of an individual who will serve as the initiating Party's representative in the negotiation. The other Party shall have ten (10) Business Days to designate its own representative in the negotiation. The Parties' representatives shall meet at least once within thirty (30) days after the date of the initiating Party's written notice in an attempt to reach a good faith resolution of the dispute. Upon agreement, the Parties' representatives may utilize other alternative dispute resolution procedures such as private mediation to assist in the negotiations.

18. Good Faith Performance

The Parties shall act in good faith in their performance of this Agreement.

The Interconnection Attachment to the ICA includes the following provisions:

2.1 Methods for Interconnection

2.1.2 Each Party ("Originating Party"), at its own expense, shall provide for delivery to the relevant Interconnection Point (IP) of the other Party ("Receiving Party") Reciprocal Compensation Traffic and Measured Internet Traffic that the Originating Party wishes to deliver to the Receiving Party.

2.1.3 [DNS] may use any of the following methods for interconnection with Verizon:

2.2 Trunk Types

2.2.1 In interconnecting their networks pursuant to this Attachment, the Parties will use as appropriate, the following separate and distinct trunk groups:

2.2.1.1 Interconnection Trunks for the transmission and routing of Reciprocal Compensation Traffic, translated LEC ItraLATA toll free service access code traffic, and IntraLATA Toll Traffic, . . . and Tandem Transit Traffic in accordance with Section 12 of this Attachment;

2.2.1.2 Access Toll Connecting Trunks for the transmission and routing of Exchange Access traffic, including translated InterLATA toll free service access code traffic, between [DNS] Telephone Exchange Service Customers and purchasers of Switched Exchange Access Service via a Verizon access Tandem, in accordance with Sections 9 through 11 of this Attachment[.]

Witnesses

The hearing took place over thirteen days; petitioner presented three witnesses and respondent presented two witnesses. For the sake of simplicity, the witnesses are listed first, by order of appearance, and the description of their testimony is incorporated into the discussions of each of petitioner's claims. These discussions are not meant to include a verbatim report of the testimony and evidence presented in this matter but are intended to summarize the portions of the testimony and evidence I found relevant to the above-listed issues.

Isaac Fajerman (Fajerman) is the president and owner of petitioner DNS, a company he established in 1998. He designs telecommunications systems for commercial and public sector use.

Mary Lou Ellen Carey (Carey) testified on behalf of petitioner. Carey is a telecommunications consultant; she has worked in the industry since 1997, when she took a position with Pacific Bell. In 2003, she opened her own business, Backup Telecom Consulting, Franklin, Tennessee. Since then, she has provided consulting and ordering services for CLECs, including DNS, such as setting up and managing networks; reviewing and/or auditing bills; writing access service requests (ASRs); and troubleshooting. Although petitioner offered Carey as an expert on CLECs in three categories and her expertise and experience was noted, she did not conduct an independent evaluation for petitioner and did not provide respondent with a report of her findings and conclusions (as was requested in discovery), and was therefore accepted only as a fact witness.

Fred Goldstein (Goldstein), of Interstate Consulting Group, testified on behalf of petitioner. He has worked in the telecommunications industry for many years and appeared as an expert witness before the Board as early as 1996. Goldstein began working with DNS in 2003-04.

Peter D'Amico (D'Amico) testified for respondent. In December 2018, he retired from Verizon after thirty-five years of service,[9] the last twenty-five as product manager of voice services. Voice services are those services which connect to public switch telephone networks, such as CLEC, wireless interconnection, and voice over internet protocol. D'Amico handled all aspects of the product, from ordering and contracts, to forecasting and network architecture.

Brandon Chase Bartlett (Bartlett), Associate Director Private Sector Collections, testified for respondent.[10] Bartlett has worked at Verizon for twenty-five years, in his current title since 2017. He supervises a team of 120 persons who are responsible for collection of accounts receivable (AR) from 2,000 wholesale customers. These Verizon customers spend from five thousand dollars/month to more than eighty million dollars/month. Bartlett's team is responsible for collection of approximately one billion dollars/month from all customers; he stated that their "goal" is to collect cash, reduce delinquent AR, and to minimize "churn" (when a customer leaves Verizon). Tr. (December 3, 2020) (T-12), at 61. Bartlett has no role in sales or product outreach. His group performs a post-billing function and does not decide what amounts are billed and/or the basis for billing.

Credibility Analysis

Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey described the analysis of credibility as follows:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.

[9] D'Amico was paid on an hourly rate by Verizon for his participation in this matter, including testimony, some preparation with Verizon counsel, and discussions with a Verizon representative regarding test calls conducted by DNS (described more fully below).

[10] As a representative of Verizon, Bartlett attended the entire hearing. On the eighth day of the hearing, petitioner objected to his presence and continued this objection each day until Bartlett took the stand.

[In Re Estate of Perrone, 5 N.J. 514, 522 (1950).]

See also, Spagnuolo v. Bonnet, 16 N.J. 546, (1954); State v. Taylor, 38 N.J. Super. 6 (App. Div. 1955).

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Perrone, 5 N.J. at 521-22; Congleton v. Pura- Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958) (trier-of-fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony).

Accordingly, assessing credibility does not mean determining who is telling the truth, but rather requires a determination of whose testimony is "worthy of belief" based upon numerous factors, including the witness' demeanor, his or her ability to recall specific details, and the consistency of testimony under direct and cross-examination, "the significance of any inconsistent statements or evidence, and otherwise gathering a sense of the witness's candor." AT&T Communications of New Jersey, Inc., et al. v. Verizon New Jersey, Inc., OAL Docket No. 08336-01, Initial Decision, 2004 NJ AGEN LEXIS 764, *63 (July 2, 2004).

The dispute here involves not just the ICA, but verbal agreements and orders for services under the ICA and other non-ICA contracts. The witnesses testified based on their recollections and by reference to exhibits. Generally, those witness statements corroborated by documents (primarily email communications) that were created contemporaneously were given greater weight, especially in light of the use by both parties of hearsay.[11]

[11] While hearsay evidence is admissible in administrative proceedings, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability

Both parties challenged the credibility of witnesses, particularly of Carey and Bartlett. Overall, Carey, Goldstein, D'Amico and Bartlett appeared reasonable, candid and credible. They all generally indicated when their recollection was not clear because of the elapsed time and often, to the extent possible, refreshed their recollection through contemporaneous documents. Both parties objected when witnesses attributed motive to a party; those statements were disregarded. All witnesses made some statements that I found questionable and drew some conclusions for which I found little or no support in the documentary record. To the extent possible, such limitations on their testimony are noted.

As is explained in greater detail below, much of the witness testimony is not disputed and the issues on which the witnesses differ most were resolved before the hearing began or are best resolved using documentary evidence. For that reason, determining the specific credibility of one witness over another was often unnecessary.

Notwithstanding the above, it is necessary to note that Fajerman did not distinguish himself as a reliable and credible witness. He gave confusing explanations or incomplete answers and frequently stated that he relied on others to explain or handle issues directly related to petitioner's claims. While Fajerman's last-minute appeal for ADA accommodations for a condition that he failed to disclose for close to two years was curious, such could be blamed on failings of his first two counsel. But his behavior on the last day of the hearing, and his on-the-record explanation about the subject of the conversation he was heard having with an unnamed third-party, calls his credibility into question.[12]

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and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b). Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony, when there is a residuum of legal and competent evidence in the record. Weston v. State, 60 N.J. 36, 51 (1971).

[12] Fajerman testified on five separate days; it is sufficient here to summarize only the portions of his testimony deemed reliable and, if applicable, to note statements unsupported or contradicted by the documentary record.

Petitioner's Claims

To begin, the parties' business relationship is complicated, covering multiple states and multiple contracts, only two of which are subject to the jurisdiction of the Board. As petitioner states, "Verizon has established 32 separate billing accounts for DNS" with "384 separate invoices each year." Br. of Petitioner, at 1. Through the course of these proceedings, however, it was apparent that the issues raised by petitioner and the allegations both parties make regarding their business relationship (including allegations regarding unpaid bills) are not unique to the Board-approved contracts and often involved both ICA-related and non-ICA-related services. In particular, Verizon argues that its decision to impose the embargo was influenced by the alleged failure of petitioner to pay for non-ICA-related services and DNS argues that Verizon's inappropriate billing and collection policies affected all its accounts. Therefore, testimony was permitted with regard to incidents and/or allegations that arose under non-ICA contracts solely for the purpose of determining whether Verizon had breached its contractual obligation to perform in good faith and/or the common-law covenant of good faith and fair dealing.

The Billing Dispute: Petitioner alleges that as of August 24, 2017, (1) Verizon incorrectly claimed that DNS had a past-due balance of $39,386 for Board-regulated services; (2) the only outstanding charges were those which were properly disputed; and (3) Verizon failed to properly credit DNS for payments made on undisputed charges.

In its request for relief, DNS asked for a "final reconciliation of all accounts and a statement of the credit due or remaining amount due" and a determination of the "actual amount of late charges," if any, owed. Petition, ¶¶ 94, 96. As of the date of the Petition, DNS claimed that it had paid all charges due to Verizon under the ICA and it was owed a credit of $1,775 on the account. Order at 2. Further, DNS claimed it "paid all undisputed amounts, but withheld payments on disputed amounts as allowable

under the ICA." Ibid. Therefore, DNS contends that as of August 24, 2017, it had no past-due balance.[13]

Section 9.3 of the ICA provides that a party challenging a bill must provide the billing party "the amounts it disputes [and] the specific details and reasons for disputing each item." While petitioner offered evidence to show that Verizon's billing practices are "notoriously incorrect," Petition at ¶ 17, with respect to the specific amount in dispute, petitioner's opening statement included the following:

> While it would be impossible to identify each and every billing error and action taken by Verizon in the context of this hearing, suffice it to say that the errors, mistakes and just general failure to timely address DNS concerns in this regard are myriad.
>
> [Petitioner's Opening Statement, ¶ 1.]

Notwithstanding that alert, at the hearing, petitioner was asked to present documentary evidence of the bills it challenges, the charges on those bills which it disputes and did not pay, and the amounts it did pay. See Tr. (September 9, 2020) (T-1), at 10-13.

Carey, Bartlett and Fajerman testified that Verizon established an online dispute portal and asks its customers to use this portal to notify Verizon of potentially erroneous charges on Verizon-issued bills. Whether a customer uses the dispute portal or sends an email to Bartlett's team,[14] Verizon asks for the following specific details about each disputed charge:

- Billing Account Number
- Circuit ID

[13] As stated above, the parties did not agree as to the amount allegedly owed by DNS to Verizon. DNS stated that the Verizon sought approximately $25,000. Petition, ¶ 13. Verizon responded that DNS had an outstanding balance for disputed ICA-related charges of $32,991, and "approximately $270,000 total past-due under non-ICA contracts." Order at 2.

[14] For example, Bartlett identified his email of February 23, 2017, in which he gave Fajerman the option of using the portal or a dedicated email address. (R-54.)

- Bill Date in Dispute
- Claim Type
- Claim Amount
- Description of Claim
- Customer Claim Number
- Customer Audit Number
- Adjustment Serial Number
- Contract Number
- PON/ASR/LSR
- Verizon Service Order Number
- Verizon Trouble Ticket Number
- USOC/IOSC
- Phrase Code
- Factor Type
- Amount Withheld

[R-109.]

Bartlett stated that if a customer does not use the on-line form or submits an incomplete form, a notice is issued with an explanation of what is missing. (See R-125 (claim closed due to missing information).) When a claim is accepted as complete, a notice is sent with the tracking number. (See R-126.) Bartlett identified an example of a spreadsheet completed for DNS by Verizon claims staff and then sent to Rita Lopez of DNS by email. (PX-134-I; PX-134-H1.)

Much testimony was given regarding the manner in which DNS, and in particular, Fajerman, raised disputes as to allegedly erroneous charges on its bills. According to Bartlett, Fajerman said he did not like to use the portal because, if he did, DNS' disputes would go to the back of the line and he found it quicker to use email.[15] Bartlett agreed that DNS did provide sufficient information in some emails but more frequently, DNS sent emails with insufficient information to which Verizon responded with a request for more information. In such cases, DNS did not then provide the additional information but still withheld payment of the disputed amounts. Eventually, Fajerman complained to Bartlett that the dispute process was too complicated and confusing and asked to zero out the balance and start fresh. Bartlett identified a series of emails

[15] Bartlett stated that email was also an appropriate method of raising disputes.

between Verizon staff and DNS to illustrate his claim that numerous disputes raised by DNS could have been resolved simply had DNS only provided sufficient information for Verizon to conduct its own investigation, but instead due to inexplicable delays, disputes lasted for years. (R-25; R-26.) "It's my experience that dealing with [DNS] when it came to disputes submitted outside [the online portal] process, that it was hard to be able to help, because often times they wouldn't provide the necessary detail." T-12, at 135.

At the same time, there is evidence that DNS, and Carey in particular, did submit claims using the Verizon online portal. Carey stated that she submitted billing disputes for DNS using the Verizon dispute portal, received receipts, and then created a running spreadsheet of disputed charges. She identified the spreadsheet on which she detailed this work for DNS:

> [On a spreadsheet, I document] all of Verizon charges every single month on the bill. So you can see month over month what's being billed. [For] each BAN and for each month I list every circuit that's billed. If they get credits, I list the credits. I list all the payments that [DNS] has made. And so there's a running balance according to what Verizon's bill is and then I also keep track of what the correct charge should be so we know how much to dispute.
>
> That's my process for any audit that I do, because you have to know what we're being billed for month over month and when you're doing auditing what you do is you look for variances . . . . [T]ypically, when a circuit goes in, it's that cost and unless there's a change made, it stays that cost . . . . [A] flate rate circuit should bill the same every month . . . . If you know that . . . it's being billed X amount and you know that's the correct amount, you don't have to touch that one again.
> [Tr. (September 11, 2020) (T-4), at 29-30, describing P-128.[16]]

[16] Though Carey stated that she started the document marked as P-128 in 2017, she could not verify information added after 2017, up through 2020. Tr. (October 21, 2020) (T-6), at 50.

In its opening statement, petitioner described the manner in which billing issues were resolved when Melissa (Missy) Roper (Roper) handled the account, prior to November 2015:

> For quite some time, however, if billing issues were not resolved at the initial stage then DNS would escalate to a Wholesale Financial Operations Manager and through cooperation and negotiation most of the billing disputes would be settled while usually late fees were waived and the monthly recurring rate or one time charges would be worked out provided it was within their authority. DNS did not have to invoke further contractual remedies – § 14 dispute resolution or file a complaint at the Board for assistance – during that period because the parties had a reasonably good working relationship. [Roper, the] Billing and Collection Manager, in particular, assigned to DNS would work in good faith with DNS and most issues were resolved informally.
>
> [Petitioner's Opening Statement, ¶ 10.]

By November 2015, Roper "moved on to another position" and Bartlett began handling the DNS account. (P-12.) Fajerman stated that he had been able to resolve disputes with Roper "within her authority; she was always attempting to settle and resolve things in a very fair manner." T-1 at 58. Although Roper did not testify, testimony and documentary evidence confirm that prior to November 2015, DNS did not strictly comply with Verizon's complaint procedures and Roper did not require such compliance before essentially writing down (forgiving) certain disputed amounts. (P-12; T-1 at 94, 126-27; Tr. (December 9, 2020) (T-13), at 179.) There was no documentary evidence presented from either party as to the amounts involved, the frequency in which Roper took such action, or that Roper acted improperly. See T-13 at 183.

With respect to the staffing change involving Roper, Bartlett stated that around 2015, Verizon determined that credits in the wholesale segment were being issued that may not have been due to billing errors; that Roper was issuing concession credits to DNS without following proper protocol. Although Bartlett, like Roper, had some discretion to issue credits, that authority capped at $100,000 in AR and when Bartlett

took over the account, DNS owed $200,000, only half of which was disputed. T-12 at 63. Fajerman specifically asked Bartlett to treat the account as Roper had, but Bartlett stated he had no such authority as the AR balance was too high. Instead, Bartlett told Fajerman that he would review DNS' account in good faith and issue credits when due. T-12 at 141, 143.

Bartlett identified emails of November 2016, with Jo Hanna (Hanna), the Verizon sales representative who handled the DNS account, regarding concession credit for DNS. (R-27.) Bartlett had recommended that Fajerman speak with Hanna as Bartlett's team had no authority to give such credit and, typically, sales representatives pushed for concessions credit for their customers. In her email to Bartlett, Hanna stated that concessions credit was not an option in this particular case for DNS, and also stated that she preferred "to do business with [Fajerman] in writing because he can twist [her] words into things [she] never said." Ibid.

Fajerman agreed that in an email exchange with Leyla Redmon (Redmon), Verizon Consultant, Wholesale Financial Operations, he asked for a "reset of accounts," which he described as an agreement as to what was owed and to clear things up. (R-25 at 1361.) In November 2016, Fajerman asked Bartlett to "reset the billing errors to something we can agree on," (R-25 at 1360), and in January 2017, (on a recorded call) Fajerman offered Bartlett a settlement by which the parties would agree on $170,000 as past-due, "split the 170 in half, and then we adjust the accounts, and then we move forward," but Bartlett refused. Tr. (September 10, 2020) (T-2), at 114-15. Even so, Fajerman stated that by May 2017, DNS owed nothing to Verizon.[17]

In June 2017, Bartlett referred the dispute with DNS over unpaid charges to William Sayle Carnell (Carnell), Verizon Assistant General Counsel,[18] and Fajerman referred the matter to DNS outside counsel, W. Scott McCullough (McCullough). (P-53.) McCullough agreed to provide Carnell spreadsheets showing "the specific

[17] Fajerman explained away his willingness to pay $85,000 when he owed nothing as that being typical in settlements. "I'm naturally going to take some losses." T-2 at 115.
[18] Petitioner refers to Carnell as "notorious" without explanation. Br. of Petitioner, at 15, 17; Reply Br. of Petitioner, at 17.

amounts in dispute and the detailed justification for non-payment of these amounts." (Ibid.) Carey prepared the summary of disputed charges at McCullough's request using the same type of spreadsheet that she created when auditing customers' accounts. (R-41; P-128.) This spreadsheet shows month-to-month billing for all circuits, disputed charges, and when credits were applied by Verizon for incorrect bills; McCullough sent this information to Carnell. (R-40; R-41.)

Fajerman stated that Carnell rejected the DNS spreadsheet, a form of "stonewalling." Bartlett, however, stated that he and Redmon were tasked with reviewing the spreadsheets line-by-line to determine whether DNS' claims regarding all disputed charges had merit. Bartlett identified the results of this investigation as summarized in an email from Carnell to McCullough. (R-61.) First, DNS did not dispute but had not paid $28,618 in charges. Second, DNS renewed a dispute over $145,126 in charges which Verizon had already denied. The claim was reviewed again and still found to be without merit. Third, DNS raised a dispute regarding $77,854, but failed to provide sufficient detail for Verizon to fully investigate. Finally, Verizon agreed that it had overcharged DNS $1,680, mostly in federal excise charges, and credited this amount to DNS. (R-61; R-63.)

Discussion

Given that each monthly Verizon bill includes hundreds of pages,[19] it is credible that Carey, who was hired to monitor DNS' bills, would keep a running summary of charges (disputed, paid, credited) in a spreadsheet. Carey said that she created the spreadsheet by looking at the bills, some of which allegedly contained errors. Without even addressing the issues respondent raised as to the accuracy of P-128,[20] suffice it to say that numbers on a spreadsheet must be backed up by the actual documents from which the numbers were taken, documents that Carey said she reviewed. DNS

[19] As respondent noted, Goldstein acknowledged that carrier-to-carrier bills are complex, and the bills from Verizon to DNS "are not the most complex . . . or the simplest." Verizon's Post-Hearing Brief (September 17, 2021) (Verizon Br.), at 26, fn. 35 citing Tr. (November 30, 2020) (T-8), at 119.
[20] See Verizon Br. at 10.

did not provide copies of the bills in question, Carey's submissions to the Verizon portal or the receipts she received.

For its part, respondent also introduced a spreadsheet showing the history of disputes raised by DNS as of September 2020 (shortly before the hearing began). (R-121.) According to Verizon's records, as of that date, all disputes raised had been reviewed and Verizon had provided DNS with a response; the spreadsheet also shows disputes that were escalated, or appealed, by DNS after receipt of the Verizon response. This exhibit is no more reliable than Carey's spreadsheet as it too is hearsay, not corroborated by the actual documents (or online submissions). Even so, as stated earlier, petitioner bears the burden of proving its allegations regarding erroneous charges.

I **FIND** that petitioner did not present adequate documentary evidence of the bills it challenges, the charges on those bills which it disputes and did not pay, and the amounts it did pay. Despite introducing many exhibits, the bills (or the "summary of charges" pages from those bills) showing the amounts Verizon allegedly overcharged or erroneously charged were not introduced. Petitioner argues that prior to April 2017, it provided Verizon "hundreds of billing error notices providing specific details and reasons for disputing each item" and that the spreadsheets submitted to Carnell in July 2017 were "supplemental to the dispute information previously provided." Br. of Petitioner, at 18. Even these billing error notices were not introduced at the hearing and Carey could not explain why the spreadsheet she developed for submission to Carnell included approximately $28,600 in unpaid, undisputed charges.

DNS also claims that Verizon failed to properly credit payments made for undisputed charges, leading to a large but erroneous unpaid balance as to which LPCs accrue. At the hearing, petitioner was directed that for each non-disputed charge as to which payment was made and improperly credited, to show the original bill, proof of payment and the subsequent bills showing that such payment or payments were not credited. I **FIND** that no such evidence was presented.

The Alleged Breach of the Contractual and Common Law Covenant of Good Faith and Fair Dealing

All remaining allegations in the Petition would, if proved, support petitioner's claim that Verizon acted in bad faith, in violation of the ICA and of applicable law.

Petitioner alleges that Verizon's imposition of LPCs was improper and in violation of the ICA

Petitioner alleged that Verizon imposed LPCs on DNS in violation of the ICA in two respects. First, Verizon allegedly imposed LPCs on amounts that were not overdue. Fajerman testified that Verizon did not credit the DNS accounts for payments made in a timely manner, including checks sent by UPS or overnight delivery service, but would wait seven days to post the payment and then assess a LPC on the next month's bill. T-1 at 85. Here, again, petitioner was directed to provide documentary evidence of these claims (such as the dated delivery receipts and subsequent bills). I **FIND** that no such evidence was produced.

Second, DNS claims that Verizon imposed inflated LPCs using "deceptive and disallowed practices." Petition, ¶ 12. The ICA provides that respondent cannot charge more than 1.5 percent interest per month on unpaid balances:

> Charges due to the billing Party that are not paid by the Due Date, shall be subject to a late payment charge. The late payment charge shall be in an amount specified by the billing Party which shall not exceed a rate of one-and-one-half percent (1.5%) of the overdue amount . . . per month.
>
> [J-1, Section 9.4, p. 6.]

Fajerman stated that Verizon always charges an interest rate higher than permitted under the ICA by charging a rate of .00059 percent, compounded daily and compounded monthly. T-1 at 74-76. While the monthly rate varies depending on the

number of days in each month, the result will always be a monthly rate above 1.5 percent, and as much as 1.84 percent. Further, in a July 2017 email, Fajerman stated that Verizon's minimum LPC of $5 had exceeded the rate of 1.5 percent and therefore, is also a violation of the ICA. (P-57.)

As he sat in on each day of the hearing, Bartlett heard Fajerman testify that the LPC rates charged by Verizon violated the ICA. Bartlett stated that DNS had not previously raised this issue; DNS had never filed a claim regarding the imposition of an incorrect LPC rate. Based on Fajerman's testimony, Bartlett investigated and confirmed that DNS' ICA accounts had been over-charged for LPC. As of December 2020, Bartlett stated that Verizon's investigation was continuing, and the system would be corrected (and that other customers are impacted).[21]

Discussion

Fajerman testified credibly that "the [Verizon] computer has programmed in it the long [sic] wrong rate." T-1 at 82. Based on Bartlett's testimony and more significantly, the absence of documentary evidence proving otherwise, I **FIND** that prior to filing the Petition, DNS made no specific complaint to Verizon regarding the violation of Section 9.4 of the ICA because of the rate of LPCs. T-13 at 170. DNS did, however, provide a written explanation of its argument with respect to this issue in the Petition, filed September 26, 2017, and transmitted to Verizon on October 4, 2017. See Petition, ¶¶ 74-79. I **FIND** that Verizon had notice in October 2017 of the potential system-wide error that could result in violation of the ICAs of more than just one customer and by the testimony of Bartlett, Verizon waited more than three years to investigate. I further **FIND** that in July 2017, Verizon had notice of DNS' claim that its use of a minimum LPC would violate the ICA.

[21] In its brief, filed almost a year after Bartlett announced the investigation into this issue, Verizon states that the problem was fixed, and DNS was credited across all accounts. Verizon Br. at 25, fn. 34. Petitioner, however, stated that the "erroneous interest rate" is still being billed and supplied the most recent Verizon bill as proof, but without providing sufficient information regarding the calculation of the compounded rate. Reply Br. of Petitioner, at 14 and Attachment B.

Verizon should not expect that its customers will monitor its ICA compliance. There is no way to determine if Verizon would or would not have addressed this issue prior to this proceeding had DNS filed a claim using the Verizon website. Further, Bartlett stated that he was not aware of the potential problem until the hearing, and there is no basis to conclude that the specific allegations in the Petition regarding LPCs were shared with him prior to September 2020. Someone at Verizon, however, was responsible for setting rates for LPCs in excess of that permitted under the ICA.[22] I **FIND** that the LPCs imposed by Verizon on DNS exceeded that permitted by the ICA.

Petitioner alleges that Verizon improperly billed DNS for state and federal taxes

As a vendor to governmental entities, DNS is exempt from payment of state and federal taxes on certain accounts. In the Petition, DNS claims to have provided to Verizon all required certificates proving its exemption from payment of "state and federal sales/excise taxes and USF assessments" through 2020. Petition, ¶¶ 27, 28. In October 2015, Verizon began charging DNS for New Jersey State taxes and federal excise taxes. Id. at ¶ 29.

Fajerman stated that in November 2015, he first notified John Ross Davis (Davis), Consultant, WFO-Claims/Collections, that respondent was billing DNS for state and federal taxes, even though DNS had not been billed for taxes in the prior fifteen years. Davis responded the same day (with copies to a number of persons, including Bartlett) that he would "look at the Taxes" and at another issue and would follow up later that day. (R-25 at 1368.)

On January 15, 2016, Davis stated in an email to Fajerman that two tax claims (with claim numbers) were unresolved, several were resolved, and Redmon would be assisting with this issue. (P-16.) Fajerman responded by email of January 16, 2016, describing a number of issues, some unrelated to taxes. Ibid. Three days later,

[22] Bartlett testified to the "routine audits" Verizon runs on customer accounts for the purpose of billing. See T-12 at 134; T-13 at 6, 103, 146-47; T-14 at 24-25, 69. There was no testimony regarding audits to ensure billing is consistent with contracts and/or applicable law. Cf., T-13 at 19.

Redmon emailed Fajerman and stated that Verizon was "working to get [the two unresolved tax issues] resolved in a timely manner." Ibid. Redmon also states that Davis would no longer be working on the DNS account. On or about April 15, 2016, Karlie Simpson (Simpson) sent tax exemption forms to Fajerman, who stated that he returned them immediately and saw state tax charges stop, but federal tax charges continue. (R-26 at 1475.)

On November 2 and 9, 2016, a year after Fajerman first notified Davis of the error, Fajerman emailed Redmon and asked again about the tax issue which had not yet been completely addressed. (R-26 at 1475; R-25 at 1368.) Redmon responded with instructions for filing a claim through the portal, unless "this is an old dispute," in which case she asks for the Claim ID. (R-25 at 1366.) Both Goldstein and Fajerman subsequently email Redmon to express their frustration as Davis accepted the dispute over taxes and stated that he would address it; Fajerman also included all affected account numbers in his response. (R-25 at 1362-65; P-24, at 1251.)

In a separate email chain, Fajerman wrote to Simpson on November 7, 2016, to tell her that certain accounts were still being charged taxes. (P-24 at 1250.) Simpson responds that DNS must file claims; Fajerman explains to Simpson and Redmon that this dispute is over a year old, was accepted but not resolved by Davis, and three of the nine affected accounts have already been corrected. Id. at 1249-50; R-26 at 1475.

Both Carey and Goldstein described action they took on behalf of DNS to document and/or notify Verizon with respect to the improper charges for taxes (though Carey stated that the improper charges began in September 2014, rather than 2015). Both confirmed that Verizon corrected this error in November 2016. Bartlett stated that he had no record of the dispute over improperly assessed taxes being filed in November 2015, and upon review of the same email chains described above, stated that Fajerman's November 2015 emails to Davis were not sufficient notice of claims. T-12 at 122-25.

Discussion

I **FIND** that the incidents described by petitioner and documented in the cited exhibits are evidence of mismanagement at the Verizon staff level, inconsistent communication with a customer, and inconsistent application of policy regarding the method of disputing charges. The tax issue was understandably frustrating for petitioner, but I **FIND** no evidence of malicious intent, and once the required certifications were resubmitted, Verizon credited all charges.

Petitioner alleges that Verizon refused to honor reduced-priced offers and/or blocked orders made by DNS under the ICA at prices listed in the ICA

By way of background, Goldstein explained that an ICA, such as that entered into by DNS and Verizon, describes connections within the local access transport area (LATA) at regulated rates (those permitted by the regulatory agency, in this case, the Board). Forbearance contracts covering certain interstate services are permitted by the Federal Communications Commission without the same regulatory oversight of an ICA and/or Board-approved tariff. Instead of ordering elements at uniform tariff rates, under a forbearance contract, each CLEC would negotiate with the ILEC (here, Verizon) for rates.

Even though matters arising under this contract would not be within the jurisdiction of the Board, evidence was permitted as to an offer for a discount on an ethernet virtual circuit (EVC) only to the extent that the dispute over this offer impacted Verizon's decision to impose the embargo. Events related to this dispute, described by Goldstein, date from 2011-2012.

It is not necessary to summarize Goldstein's extensive testimony on this issue as I **FIND** that there was no evidence that the failure of the parties to resolve this dispute contributed to Verizon's decision to impose the embargo or that as a result of Verizon's

refusal to implement the EVC discount, the amount of non-ICA-related disputed charges increased significantly.[23]

Further, I **FIND** that notwithstanding DNS' claim that after the embargo was imposed, Verizon blocked orders under the ICA, which is discussed below, there was no evidence that Verizon blocked orders under the ICA at lower prices prior to the imposition of the embargo.

LIS Trunk Disputes

The majority of the hearing was spent describing two disputes over trunks ordered by DNS from Verizon. The first dispute was resolved in 2016, the second during these proceedings but prior to the hearing; evidence was presented as to both to support DNS' claim that Verizon acted in bad faith, in violation of the ICA and of applicable law. Br. of Petitioner, at 9.

Fajerman, Carey and D'Amico all stated that in 2014, DNS ordered local interconnection service (LIS) trunks from Verizon to allow DNS customers to make local calls and to receive in-bound calls. Testimonial and documentary evidence showed that there were several billing issues involving the LIS trunks from the time of installation.

Carey stated that as was typical, before placing the first order, she first met with Verizon's project team to:

> [T]alk about where the interconnection point is going to be, what we're going to use [the trunks] for, who the SF7 provider is and all the different pieces that need to come together[.] And a forecast is issued and we specifically state these are the types of trunks that we're going to order[.]
>
> [T-4 at 13.]

[23] Petitioner introduced evidence that Verizon refused to honor the EVC discount due to an unpaid balance for forbearance services; as stated earlier, disputes regarding non-ICA contracts are not at issue in this matter.

D'Amico agreed that this order was for tandem trunks in the 224 LATA, which is the Newark-area network served by Verizon, the ILEC. D'Amico identified a series of emails from March-April 2014 between himself, Carey, Kathryn Rubin (Rubin) of Verizon, and Fajerman. (R-18.) Carey attempted first to submit an ASR for the trunks using the "POVN inspect" code, but the order was rejected by Verizon because DNS did not have a POVN contract.[24] Carey identified the email of March 28, 2014, by which she explained to Rubin (with a copy to D'Amico) that the DNS order was complete but for the agreement on the POVN. (P-4.)

The DNS ICA is a "point of interconnection/interconnection point" (POI/IP) contract, which requires DNS as the originating party to be financially responsible for getting its local traffic to the Verizon IP. D'Amico identified the portion of the ICA which provides for DNS to have the POI/IP contract:

> 2.1.2 Each Party ("Originating Party"), at its own expense, shall provide for delivery to the relevant interconnection point (IP) of the other Party ("Receiving Party") Reciprocal Compensation Traffic and Measured Internet Traffic that the Originating Party wishes to deliver to the Receiving Party.
>
> [J-1 at 53.]

Carey also identified D'Amico's March 31, 2014, email in which he supported the decision that DNS was not eligible for POVN by reference to the ICA. (R-18.) Fajerman responded to D'Amico's email, stating that the parties were already meeting at the colocation (Newark) and on April 8, 2014, D'Amico sent an email agreeing that "we're meeting at the colocation." T-4 at 16-17.

D'Amico identified his email dated April 8, 2014, in which he proposed to move both parties' IP to the DNS colocation (Newark), for both parties to be responsible to get their traffic to the colocation, and for local traffic beyond that point to not be charged.

[24] "POVN" stands for "point of interconnection on the Verizon network"; under a POVN arrangement, each party is financially responsible for local interconnection traffic on their side of the interconnection point (IP).

(R-18.) This was not a POVN contract but would permit DNS to "have a 'POVN-like arrangement' and populate the POVNAC in the SPEC field of the ASR" to obtain POVN billing. (R-18.) D'Amico stated that the agreement he made with DNS for a POVN-like arrangement was not a physical change in the network but a billing change.

According to D'Amico, Carey had complained that the issue was causing "serious and unnecessary delays" in DNS' launch and D'Amico was worried about further delays, so instead of signing a new contract immediately, he decided to help DNS get the network operating and worry about the contracts later. "My view, and actually my obligation as a product manager, was . . . to sell my product or to help my product, whether or not [my customers are] competing with some other leg of Verizon." T-10 at 120. D'Amico stated that in September 2014, he recommended that DNS amend their ICA to reflect POVN but by September 2016, DNS had not done so. (R-29.) Further, to D'Amico's knowledge, DNS never signed a POVN contract (or amended the ICA to reflect the POVN deal), but Verizon always honored the arrangement. T-10 at 122.

Carey stated that there were billing issues from the beginning (in and around August 2014). Carey filed billing disputes for DNS using the Verizon online portal regarding charges for taxes although DNS was tax-exempt and had provided documentary proof (as discussed above), and regarding erroneous trunk port charges. Further, under the POVN agreement with D'Amico, DNS should have only been charged for transport (by a third-party) up to and through Newark and for minutes of use from Newark on Verizon's network, but DNS was being charged fees for transport on the LIS trunks beyond the IP.

Sharla J. Denton (Denton), a CPA and consultant in wholesale financial operations for Verizon, handled the investigation of this dispute. On November 21, 2014, Carey emailed additional information to Denton, stating "I've gone through the bills and noted the billings issues on each one. Attached is an updated file for the

dispute through 10/25/14[.]" (P-6.) In an email dated January 28, 2015, D'Amico concurred that there should never have been a charge for trunk ports. (P-6.)

Denton concluded that DNS had been billed for the LIS trunks at the highest possible rate even though Verizon should not have billed DNS (at all) for these trunks. As a result of Denton's investigation, Verizon agreed to correct the error and credit DNS for past amounts billed. (P-7.) In an April 3, 2015 email, Denton stated that the disputed charges would be removed, credits would be issued, and staff would make a manual correction to their billing system to prevent the error from recurring. (P-7; P-9 (April bills still not corrected).) The total amount of the erroneous charge was $47,463.36, which was credited in June 2015.

Verizon failed, however, to fully address the billing problems related to the LIS trunks and by November 2015, DNS claimed to have been erroneously charged over $100,000 for these trunks. (P-12.) On November 23, 2015, Fajerman emailed Roper to complain that the "credits and corrections" promised by Denton were never applied. (P-12 at 12-13). The same day, November 23, 2015, Roper notified DNS that she was reassigned, and Bartlett would be handling the DNS account. But, Roper referred this issue to Davis, who asked for additional information and then acknowledged that Verizon had yet to correct erroneous billing for port charges and yet to resolve the tax issue. (P-12.)

The parties met on September 1, 2016, to discuss numerous issues, including DNS eligibility for POVN billing. At this meeting, DNS requested monthly meetings to review ongoing billing errors, a request that Verizon denied. Following the meeting, Bartlett (1) agreed that DNS should not be paying port charges on LIS trunks and would be credited; (2) POVN billing was not available to DNS; and (3) all other billing issues were resolved. (P-20.)

On September 20, 2016, Carey emailed D'Amico asking him to get involved in the billing dispute over the LIS trunks. T-4 at 52; R-29. D'Amico agreed to assist; he

identified the calendar invitation he sent to his colleagues at Verizon and the attachments sent with the invite. (R-28; R-29; R-30; R-31.) D'Amico was not asked to resolve the dispute; the Verizon billing group had questions about the application of the tariff and/or ICA to this dispute. During this internal call, which took place on September 26, 2016, D'Amico explained the 2014 deal he struck with DNS to Bartlett and his staff. D'Amico said that Bartlett had "actually read the contract correctly . . . except for the fact that I had cut this kind of side deal." T-10 at 153. D'Amico explained his understanding that DNS was going to sign a POVN contract, but "that didn't happen and that's where the problems came from." Id. at 158. To D'Amico's knowledge, the billing group honored the deal and credited DNS (though D'Amico conceded he has no first-hand knowledge).[25]

Bartlett confirmed that he was involved in this billing dispute, but that as of September 1, 2016, he did not know about the POVN agreement made by D'Amico and no one from DNS told him about it. (R-29; P-20.) On September 27, 2016, D'Amico forwarded to Bartlett his original email with DNS confirming the POVN agreement. (R-30.) Bartlett identified the following audio of a telephone conversation with Fajerman:

> Fajerman: Did you get the Pete D'Amico email?
>
> Bartlett: Yes, we got it. I wish you had sent that over in the beginning.
>
> [P-139, 1:50 – 3:10.]

Bartlett said DNS never explained why they did not tell him about the agreement with D'Amico sooner, but in any event, Verizon reversed the charges and credited DNS for the unpaid charges, including LPCs. (R-111; R-112-114.)

D'Amico stated that he was surprised to learn in September 2016 that DNS had not yet amended their ICA to provide for the POVN arrangement. T-10 at 159. Verizon

[25] Though Redmon spoke with Fajerman about amending the ICA to reflect the 2014 deal and D'Amico asked the Verizon contract administration group to send DNS a POVN contract, D'Amico had no further involvement. (R-19.)

cites D'Amico's testimony to support its statement that "Verizon sent [DNS] a POVN ICA to formalize the agreement, but [DNS] never executed it." Verizon Br., at 17. But D'Amico never identifies an email to DNS in which a new ICA or instructions for amending the existing ICA were attached. D'Amico identified the September 29, 2016, email from Redmon and stated that it was sent to Pete Eager (Eager), from the contract administration group. (Eager, however, is not shown as copied on this email chain.) (R-19.) In this email, Redmon told Fajerman that D'Amico would reach out about the new ICA; D'Amico said he discussed the need to amend the ICA with Eager, not Fajerman. Neither party presented any other evidence regarding discussions to amend the ICA as recommended by D'Amico. At the hearing, D'Amico stated that he spoke again with Eager who said, "he did what he [Eager] needed to do," but that the amendment was never executed. T-10 at 161.

Discussion

In sum, D'Amico, Carey and Bartlett were credible witnesses on the topic of the LIS trunks/"POVN" contract. While their recollections vary somewhat, they agree on the most important points: there were billing errors, first due to errors made by Verizon that were eventually corrected manually by persons responsible for the DNS account, and second, due to the side agreement D'Amico made with DNS that was inconsistent with the language of the ICA and for some inexplicable reason, was never shared with the persons at Verizon in charge of billing (or with the collections group).

There was no evidence that the DNS ICA was ever modified to reflect the agreement with D'Amico. No witness gave any reason why DNS would prefer not to amend the ICA and more important, no evidence was offered that DNS refused to sign such an amendment. In sum, I **FIND** that DNS reached an agreement with Verizon's representative, D'Amico, for POVN-type billing on LIS trunks and reasonably expected to obtain the benefits of that agreement.

While Verizon contends that once its collections group was provided sufficient evidence to support the finding of improper billing, Verizon credited DNS for disputed charges and any related LPCs, petitioner makes the stronger point that Verizon made mistakes that led to billing errors of almost $10,000/month and then took over a year to correct them. Br of Petitioner, at 9-13. Further, it was reasonable for DNS to expect that Verizon would maintain accurate records regarding the services and/or products purchased and for its bills to reflect agreements (whether verbal or written) regarding prices.

Bartlett stated that although Verizon's goal is to resolve billing disputes within forty-five days, some DNS issues took years to resolve because DNS delayed sending the necessary information for Verizon to investigate the dispute. T-12 at 111. Despite this stated goal, I **FIND** that the disputes raised by DNS over LIS trunks evidence that Verizon did not always correct billing errors within forty-five days even when DNS used the portal, and some billing issues took years to resolve because of human or computer (system) errors at Verizon.

Petitioner Claims Verizon Erroneously Billed Trunk Groups 102, 104, 114 and 115 as Access Toll Connecting Trunks

The more complex dispute involved the characterization and billing of trunk groups 102, 104, 114 and 115. As stated above, in 2014, DNS began exercising its options under the ICA to use respondent's local access trunks. On June 20, 2014, Carey submitted an ASR to Verizon for forty-eight trunks carrying traffic from Newark to West Orange on a network channel or code (NC) identified as "SDUP." (P-106.) Carey is shown as the customer contact on the ASR. Additional trunks were ordered by Carey in May 2015, again with the NC code SDUP. (R-120.)

Both parties agree that although these trunks were installed between late 2014 and 2016, they were only first billed for access mileage by Verizon in August 2017, well after service began. On August 16, 2017, Redmon sent an email to Fajerman stating

that Verizon conducted a review of the DNS account and found that four access toll connecting (ATC) trunk groups were billing incorrectly. (P-62; R-15.) In an email response, Fajerman objected; Bartlett responded by email that DNS should file a formal complaint once the charges appeared on an invoice. Shortly after that exchange, DNS filed the Petition and included this change in billing among the issues for resolution. Petition, ¶¶ 53-60.[26]

Prior to the hearing, Verizon unilaterally credited DNS for all past-due amounts and changed the billing to zero on these trunks going forward. Since these specific charges would not be included in the calculation of disputed charges, the issue remaining with respect to these trunks is whether Verizon's actions with respect to this dispute amount to bad faith. DNS claims:

> In mid-August [2017] Verizon advised DNS that it was going to further retaliate against DNS for its persistent efforts to secure proper billing on a historical and prospective basis by beginning to bill access for interconnection-related trunks used to handle local "transit" traffic from other CLECs and wireless carriers.
>
> The trunks in issue are not [ATC] trunks. They were ordered as Tandem Transit, they were provisioned as Tandem Transit and they handle only local (non-access, non-toll) transit traffic to and from other CLECs and CMRS providers.
>
> [Petition, ¶¶ 57, 61.]

Essentially, the questions here are (1) what type of trunks did DNS order; (2) what type of trunks did Verizon install and how did they operate; and (3) was this a mistake by either or both parties or, as DNS contends, an attempt by Verizon to retaliate against DNS.

There is no dispute that Carey placed the orders; the dispute is whether she ordered CLEC transit trunks, as she claims, or ATC trunks, as Verizon claims. Carey

[26] Note, however, charges for ATC trunks had not yet appeared on a Verizon bill by the time the Petition was filed and were not, therefore, included in the amount allegedly disputed and/or overdue.

stated that she was familiar with Verizon's network architecture and had a copy of the ICA which defines ATC trunks, so she knows that she did not order ATC trunks. Goldstein knows Carey as an expert on ordering using an ASR, which is a "standard form designed by an industry trade group," of which Verizon is a member. Tr. (November 30, 2020 (T-8), at 34. Goldstein identified the ASR submitted by DNS to Verizon on June 20, 2014. (P-106.) He stated that it reflects the network architecture (or trunk circuit) he recommended DNS implement to move calls from non-Verizon carriers for intra-LATA traffic.

Goldstein agreed that the NC SDUP is used by Carey; he said this means "trunk into an access tandem switch" but conceded that the code can be used for "different purposes, and that's part of the problem." T-8 at 48. Further down on the ASR, traffic type is coded as "TS," which means transit. In the remarks section on page 2 of the ASR, the statement "install . . . from Newark to West Orange," which Goldstein said makes clear that this is tandem transit and CLEC transit trunks were ordered, not ATC trunks. T-8 at 50.

D'Amico also identified the ASR which was filled out for DNS by Carey. (R-120.) Like Goldstein, D'Amico described the ASR form as "an industry standard that is used to order access services." Tr. (December 2, 2020) (T-11), at 63. As shown on the second page, Carey used the NC "SDUP" which D'Amico said is used for ATC trunks. D'Amico identified a January 28, 2015, email he sent to Gerald Langhorne of Verizon and Carey in which he explained (in very technical acronyms) that SDUP is for ATC trunks. (P-6.) D'Amico had no recollection of Carey responding to this email.

Consistent with the testimony of DNS' other witnesses, Goldstein stated that when the trunks were first installed, there was no charge, but later, Verizon conducted an audit and decided these were not intra-LATA transit trunks, but ATC trunks and therefore began charging for access mileage. Fajerman stated that his experts told him that Verizon was re-characterizing the trunks, in violation of the ICA. When asked why DNS did not simply ask Verizon to change the ATC trunks to transit trunks, Fajerman

stated that the trunks had been properly ordered and installed and had operated for three years as transit trunks; there was no need to change them.

Carey stated that she ordered tandem transit trunks (not ATC) to receive in-bound calls from cell phones and non-Verizon local callers and to send out-bound 800-number calls. As D'Amico explained, ATC trunks are used to "allow a CLEC customer to either connect to an interexchange carrier through a Verizon access tandem or to receive traffic from an interexchange carrier." T-10 at 133. Note here, though D'Amico said it was impractical, a CLEC does not have to use the ILEC for long-distance calls. T-10 at 134-36. If DNS had meant to order a local trunk, its customers could have still gotten interexchange (IX) calls if they had an IX carrier (IXC) to send the calls through, but they would only get calls from IXCs with whom they entered contracts. DNS customers could probably get most of the IX calls without ATC trunks if they had contracted with the five largest IXCs, but problems would still come up.

D'Amico stated that in 2017, because he was the subject matter expert at Verizon regarding interconnection, he was asked to assist the Verizon collections group in determining whether these trunks were ATC or transit trunks. He emailed the Verizon translation group, the technical support staff at Verizon with the most knowledge of ATC and local trunk programming. (R-35.) Georgi Jasper (Jasper), network translations group engineer, responded that the trunks were built as "CLEC IXC," which is the equivalent of an ATC trunk. (R-35 at 2833.) In her email, Jasper appears willing to consider DNS' arguments but, according to D'Amico, the Verizon records that might have supported DNS did not exist because Verizon did not bill DNS for usage on ATC trunks. See R-34 at 2826.

When trunk groups are initially set up, testing is typically conducted on both sides during the ordering and provisioning phase to ensure that the new equipment is working. T-11 at 87. Carey agreed that when a trunk group is set up, both the customer and the vendor must agree to the same instructions. D'Amico does not know if test calls were conducted on these trunks or who would have such knowledge if such

test were conducted. Id. at 88. While Carey could not dispute that email correspondence from Redmon and Verizon's translation department states that the disputed trunks were built as ATC trunks, (R-12; R-13; R-36), she was critical of Verizon for excluding DNS from any examination of "call detail records" and/or "test calls to see if an IXC call will actually connect or not." Tr. (October 19, 2020) (T-5), at 73.

In 2020, prior to the hearing, Goldstein asked DNS technical staff to conduct test calls over the disputed trunks, theorizing that because toll traffic (long-distance calls) should not be possible over a non-toll (or local) trunk, a long-distance call attempted over one of the disputed trunks would fail.[27] Goldstein identified the summary of two test calls conducted by DNS staff at his direction and stated that the results demonstrated that toll calls on one of the trunks at issue were rejected at the Verizon end. (P-152; P-153.) Specifically, Goldstein identified the extensive call detail records (CDR) generated for each test call. (P-154.) According to Goldstein, CDR can be generated on outgoing or incoming calls, are usually generated by the billing party, and are used when billing disputes arise. In this case, Goldstein asked DNS staff to provide CDR for the West Orange trunk group to see if the calls carried by the group are in-state or out-of-state calls.

Goldstein admitted that the CDR may be missing specific information (such as the circuit ID) and though the results of the tests conducted by DNS show that long-distance calls will not be routed over the disputed trunks, there are other reasons for a call to fail. (R-137.) Goldstein conceded further that the test calls were made on October 6, 2020, not in 2017, when the dispute between the parties as to the nature of the trunks arose. (P-154.) Overall, Goldstein could not answer questions about the software used to run the tests, verifications used, the identification of the circuit tested, or even the qualifications of the staff at DNS who conducted the test. Typically, in a billing dispute, Board staff conducts the test of the equipment or at least supervises the

[27] Counsel for Board staff was asked to provide the input, if any, of his client on this limited issue given that as a general rule, tests of equipment involved in billing disputes are conducted by the utility with the participation and/or supervision of Board staff and there is no record here that respondent or Board staff was notified, much less present, for these tests. Staff of the Board did not respond to this request.

testing.[28] In this instance, Board staff was not even notified of the testing and Goldstein, the witness testifying as to the results of the test, did not observe or participate in the actual test.

D'Amico concluded that the disputed trunks are ATC trunks based on the confirmation from the Verizon translation group, the use by Carey of the NC code SDUP, the input from John Andrade (Andrade), a subject matter expert at Verizon consulted by D'Amico, and that DNS already has a local IXC group at the West Orange tandem and did not likely need another. He sees no room here for reasonable disagreement. Goldstein concluded his review of the trunk issue by stating that the trunks are not ATC trunks, cannot carry long-distance traffic, and should not have been billed as ATC because that is not how they were used by DNS. (R-12; R-15.)

Bartlett acknowledged that in August 2017, the issue was determining the character of the four trunk groups, local or ATC. He stated that both D'Amico and Andrade came to the same conclusion, that the four disputed trunk groups were built as ATC trunks and therefore, the change in billing was proper. (R-34; R-36.) Redmon also sent DNS the information from Andrade. (R-12.) Bartlett has no recall of any DNS response after August 25, 2017, other than that DNS did not accept Andrade's explanation and gave no new information, and never paid the charges for these trunks.

Discussion

No matter whether there was a mistake in the order placed by DNS, I **FIND** that there was a mistake in the billing of the four trunk groups, either immediately after the trunks were installed, as Verizon claims, or in August 2017, as DNS claims. Though the timing of the Verizon "internal audit" which led to the change in billing of the alleged ATC trunks was curious, no evidence of any Verizon employee specifically threatening retaliation or threatening action that could be construed as retaliation was introduced.

[28] See N.J.A.C. 14:3-4.4, -4.5 (regulations on testing of utility meters).

In an email to Redmon dated August 17, 2017, it is Goldstein who said that the decision to change the billing "smacks of retaliation and bad faith." (P-63.)

For the reasons described above, I **FIND** that the results of tests Goldstein requested be run in 2020 are of no use to prove DNS' position in a dispute which began in 2017, and will not be considered here. However, Goldstein's testimony raises the issue of why, if such a test was so simple to conduct and the results of such tests properly supervised would be dispositive, Verizon did not conduct one and DNS did not request one at the time Verizon claimed to discover the mistake in billing. See Reply Br. of Petitioner at 10.

Verizon argues that "when [DNS] disputed these charges in August 2017, Verizon investigated that dispute in good faith and confirmed that the trunks were ATC trunks." Verizon Br. at 22. This argument, however, ignores that DNS only disputed the charges because Verizon changed the billing. Yes, Verizon conducted what D'Amico described as "a comprehensive investigation" of a mistake in classification and installation made several years earlier. But I **FIND** that Verizon's comprehensive investigation did not precede the change in billing. As stated by Verizon, "given the technical nature of this dispute, Bartlett and his group enlisted the assistance of Verizon's [subject matter expert] in this area, D'Amico." Ibid. The documentary evidence confirms that this internal consultation between D'Amico, Jasper and Andrade began two days after Redmon notified DNS of the reclassification. As petitioner notes:

> [P]rior to unilaterally reclassifying the transit trunks, Verizon did no verification. Verizon did not check with the interconnection team who did the network planning. Verizon did not analyze the traffic on the trunks to determine if the traffic was local or long distance/toll. Verizon did not communicate with DNS concerning the type and usage of the trunks. Verizon did not even check the ASR, or its own CSR. Verizon simply charged a much higher rate.
>
> [Br. of Petitioner, at 9, citing T-14 at 85-87.]

As Verizon notes, the proper classification of the trunks is not at issue here as the disputed charges have been reversed. "Rather, [the tribunal] need only decide whether Verizon resolved the dispute in good faith." Verizon Br. at 24. I disagree and **FIND** that the proper issue here is whether Verizon acted in good faith in taking the action that resulted in the dispute.

Verizon's Alleged Failure to Comply with the ICA Dispute Procedure

Petitioner claims that Verizon failed to comply with the dispute resolution process outlined in Sections 9 and 14 of the ICA. First, petitioner contends that respondent's claims procedure violates Section 9 of the ICA as customers, such as DNS, are required to resubmit the same challenge to a charge (or class of charges) each month until respondent either accepts and credits, or denies, the claim. Such a requirement would explicitly violate Section 9.3 of the ICA, which provides:

> If any portion of an amount billed by a Party under this Agreement is subject to a good faith dispute between the Parties, the billed Party shall give notice to the billing Party of the amounts it disputes [and] include in such notice the specific details and reasons for disputing each item. A Party may also dispute prospectively with a single notice a class of charges it disputes.
>
> [J-1, at 5 (emphasis added).]

Discussion

The documentary and testimonial evidence shows Verizon taking different action in different circumstances with respect to these allegations. As Carey conceded with respect to the tax issue discussed earlier, Verizon permitted DNS to file once to challenge billing for tax exempt charges. (R-26 at 1475.) This is consistent with her testimony that Verizon permitted DNS to file a single claim for a disputed charge when Verizon agreed with DNS' position, but if Verizon did not agree, DNS would have to re-file a claim each month that the disputed charge(s) appeared on the bills.

I **FIND** that Verizon required multiple claims for a single charge or class of charges in two circumstances, neither of which specifically violates Section 9.3 of the ICA. First, if Verizon rejected a claim because the claimant failed to adequately support it (e.g., provided insufficient information), a new claim would be required if the customer continued to dispute the charge. Second, if a claim was properly substantiated, but Verizon denied the claim, an appeal of that denial would require a new claim.

Overall, I **FIND** that DNS failed to provide documents showing that Verizon violated Section 9.3 of the ICA. Notwithstanding this finding, there was documentary evidence and testimony that Verizon employees routinely failed to follow Verizon policies regarding substantiation of claims, and this resulted in what could be objectively described as a frustrating experience for the customer, particularly when these policies appeared to change without explanation. I **FIND** that Verizon permits (or permitted) employees to exercise some discretion with regard to deviations from standard policies.

Second, DNS claims that Verizon violated the terms of Section 14 of the ICA, which describes the dispute resolution process as follows:

> Except as otherwise provided in this Agreement, any dispute between the Parties regarding the interpretation or enforcement of this Agreement or any of its terms shall be addressed by good faith negotiation between the Parties. To initiate such negotiation, a Party must provide to the other Party written notice of the dispute that includes both a detailed description of the dispute or alleged nonperformance and the name of an individual who will

> serve as the initiating Party's representative in the negotiation. The other Party shall have ten (10) Business Days to designate its own representative in the negotiation. The Parties' representatives shall meet at least once within thirty (30) days after the date of the initiating Party's written notice in an attempt to reach a good faith resolution of the dispute. Upon agreement, the Parties' representatives may utilize other alternative dispute resolution procedures such as private mediation to assist in the negotiations.
>
> [P-1, at 9.]

Petitioner alleges that on or about January 2017, Bartlett and his team "announced [they] would no longer work with DNS under the §9 process." Petitioner's Opening Statement, ¶ 42.[29] As discussed above, as late as January 2017, there were still uncorrected errors in the Verizon billing system and, at the same time, disputed claims across many of DNS' accounts (most of which did not involve the New Jersey ICA). See Id., ¶¶ 44, 46, 48.

By letter dated February 16, 2017, Fajerman complained to then-Board President Richard Mroz regarding Verizon's use of disputed balances "to deny [DNS] additional services and lower prices than they routinely extend to other, like customers." (P-43.) Lawanda Gilbert, Director of the BPU Division of Telecommunications (Director Gilbert), responded to this letter and recommended that DNS "provide Verizon with a specific detailed accounting of any and all disputed charges, including dates, charges and a description of the facilities in question." (R-56.) Alternately, Director Gilbert suggested that DNS initiate the dispute resolution process found in ICA or file a petition with the Board. (Ibid.)

On April 12, 2017, Bartlett sent a letter to Fajerman stating that DNS had a past-due non-disputed balance of close to $300,000 (across accounts in three states) and that non-payment could result in service disruptions or the refusal by Verizon to accept new orders. (R-49.) With this letter, Bartlett included a spreadsheet showing DNS accounts, the amounts past-due for each, the open (disputed) claims, and the

[29] No evidence of this announcement was presented.

undisputed past-due amount, all pursuant to Verizon records.[30] Ibid. Bartlett stated that he could have sent a similar letter in January 2016, when the undisputed balance was just $100,000, or in November 2016, when the undisputed balance was $200,000. He waited to attempt to work with DNS but by April 2017, Verizon had to take action and an embargo on new service orders is permitted under the ICA, Section 12, and the BPU Tariff, Section 2.1.8. (J-1; R-6.) At no time following receipt of the April 12, 2017 letter did DNS make any payments on the alleged undisputed balance.

On May 8, 2017, Fajerman sent a Notice of Dispute to respondent (via Bartlett) pursuant to Section 14 of the ICA. (P-49; R-42.) In this letter, Fajerman gave a general description of the dispute, alleging that among other things, Verizon made repeated errors in the bills issued to DNS and "engaged in intimidation and harassment" and improperly retaliated against DNS for its attempts to resolve these billing disputes. According to Bartlett, this letter included a list of disputes, but not information sufficient to permit investigation by Verizon. Ibid. Specifically, Fajerman writes that there are numerous errors in the schedule of charges which accompanied Bartlett's April 12, 2017, delinquency notice, but does not delineate the specific errors. Fajerman also made sixteen charges of action by Verizon in breach of the ICA and/or in bad faith without noting so much as the dates such action took place. (Id. at 2-3.) Fajerman did not provide documentary support for any of these charges with the Notice of Dispute, saying he had done so previously. T-2 at 50, 58. Further, Fajerman stated that he had spreadsheets proving that Verizon had overcharged DNS but conceded that he never sent this information to Verizon as Verizon did not designate a negotiator. T-2 at 75-77.

Fajerman stated that the ICA required respondent to designate a negotiator within thirty days of the Notice of Dispute and Verizon did not do so, yet he identified Bartlett's email of May 10, 2017, in which Bartlett stated that he had "been Verizon's representative in dispute negotiations," and had been negotiating with Fajerman for "at least a year." (P-50; R-23.) Further, Bartlett noted that he was happy to discuss the open, unresolved disputes of just $4,725 in charges, but that the remaining past-due

[30] Verizon states that DNS could have paid the balance for ICA-related services but did not. Verizon Br., at 5, fn. 3.

balance of $295,379 "needs to be paid immediately." Ibid. Fajerman characterized this email as insufficient to satisfy the ICA, stating that Bartlett had "already made up his mind" and respondent "did not follow the rules." T-1 at 140, 141. Fajerman identified his letter of May 30, 2017, in which he stated that "Verizon failed to comply with the obligation to respond [to the Notice of Dispute] and name a representative [for negotiations]." (P-51.) This letter continued:

> Verizon has also not indicated any desire to contest DNS' claims or take up DNS' offer to consider proof Verizon may have that any amounts are in fact due. We therefore conclude and assert that Verizon's failure to respond or engage necessarily means that Verizon has decided that DNS is correct in its contentions, and has waived any right to assert its former position that DNS owes Verizon the amounts previously claimed to be due, or any amount.
>
> [Ibid.]

Bartlett also identified the May 30, 2017 letter from Fajerman to Verizon, noting there is no reference to Bartlett's May 10, 2017 email. Bartlett responded to the May 30, 2017, letter the day he received it, repeating the gist of his earlier email. (P-52; R-57.) Fajerman continued to stand by his position that respondent did not assign a negotiator as required by the ICA, despite Bartlett's emails stating that he had already responded to the Notice of Dispute. (P-52.) At this point, Fajerman stated that although Verizon claimed that DNS had an unpaid balance of almost $300,000, only about $25,000 of that total was due and disputed ICA-related charges. T-1 at 149.

On May 31, 2017, Fajerman sent Bartlett a lengthy email detailing the basis for his conclusion that Verizon failed to comply with the dispute resolution procedure found in the ICA and demanded a meeting in New Jersey on or before June 8, 2017. (R-59.) Since Fajerman stated that he would bring counsel to this meeting, Bartlett forwarded the matter to Carnell, who sent an email to Fajerman on June 16, 2017, stating that Verizon followed the ICA dispute resolution process each time DNS disputed a bill, that the ICA required Fajerman to provide detailed descriptions of any dispute, such claims

had been analyzed by Bartlett and Redmon, who also served as Verizon's negotiators during telephone meetings with DNS. (P-53.)

Fajerman sent Carnell's email to DNS outside counsel, W. Scott McCullough (McCullough). (Ibid.) McCullough agreed to provide Carnell spreadsheets showing "the specific amounts in dispute and the detailed justification for non-payment of these amounts" on or before June 30 and July 17, 2017. (Ibid.) There was some delay in this transmission; Fajerman identified the email from McCullough explaining that "the person building the spreadsheets was detained." (P-53; R-60.) Carey prepared the summary of disputed charges at McCullough's request using the same type of spreadsheet that she created when auditing customers' accounts. (R-41; P-128.) This spreadsheet shows month-to-month billing for all circuits and when credits were applied by Verizon for incorrect bills; McCullough sent this information to Carnell. (R-40; R-41.) At the hearing, Fajerman stated that he would have brought this same information to any mediation, had respondent properly designated a mediator.

Meanwhile, Verizon continued its plans to institute an embargo on new service orders from DNS. Bartlett stated that there was no agreement or expectation by either party that the embargo would be delayed pending the results of discussions between Carnell and McCullough.

Bartlett identified the spreadsheets sent by McCullough to Carnell on July 3, 2017, stating that he first requested this information from Fajerman one year earlier. (R-40; R-41.) Bartlett and Redmon reviewed the spreadsheets line-by-line to determine whether DNS' claims regarding all disputed charges had merit. Bartlett identified the results of this investigation as summarized in an email from Carnell to McCullough. (R-61.) First, DNS did not dispute but had not paid $28,618 in charges.[31] Second, DNS renewed a dispute over $145,126 in charges which Verizon had already denied; the claim was reviewed again and still found to be without merit. Third, DNS raised a

[31] Even if no other data from any document is considered, at the very least, this spreadsheet – developed by Carey and sent to Verizon by McCullough – confirms that DNS owed Verizon $28,618 as of July 2017. Carey stated that she was never asked to comment on this statement in Carnell's response letter. T-6 at 65.

dispute regarding $77,854, but failed to provide sufficient detail for Verizon to fully investigate.[32] Finally, Verizon agreed that it had overcharged DNS $1,680, mostly in federal excise charges, and credited this amount to DNS. (R-61; R-63.)

In July 2017, Verizon placed an embargo on new service orders from DNS. Bartlett stated that existing services continued and there was no impact on repair and maintenance. (R-59.) The decision to impose the embargo was made by Verizon legal and regulatory staff and management with the recommendation of Bartlett's team. Bartlett stated that the purpose of the embargo was to protect Verizon and to prevent AR from growing. While Fajerman first stated that the embargo was initiated by Verizon without notice, he later conceded that Bartlett had notified him in writing that service interruptions could result. What was not clear to Fajerman was that service under the ICA would be affected. Fajerman did not, however, ask to pay just the amount owed under the ICA to maintain service under the ICA, as he believed it was too difficult to work with Bartlett.

Bartlett denied that Verizon generally or he specifically tried to put DNS out of business or imposed the embargo as a form of retaliation. Bartlett had an incentive to keep DNS in business as his performance is rated on his success in collecting AR. Bartlett agreed that DNS was a difficult customer and that Verizon considered simply disconnecting DNS but did not do so as some end users of DNS' services were governmental entities. Verizon could have chosen more severe options than an embargo; Verizon could have terminated service, asked for an assurance of payment or an escrow account for past-due amounts. According to Bartlett, Fajerman had refused to provide an assurance of payment or an escrow as he claimed such measures would put the company into bankruptcy.

Fajerman identified an internal Verizon email exchange in which Verizon employees considered how best to "minimize downside" risks to DNS's government

[32] The amounts given by Carnell of new disputed charges ($77,854) and previously reviewed but rejected disputed charges ($145,126), to the extent those charges were due under Board-approved contracts, would in a typical billing dispute form the basis of the issues to be resolved by the Board. The distinction between ICA-related and other charges found in the McCullough spreadsheet was not made at hearing.

customers when the embargo was instituted. (P-75.) As a result of the embargo, Fajerman filed the Petition and as described above, the Board directed Verizon to lift the embargo pending resolution of the underlying dispute.

Bartlett is aware that Verizon was instructed by the Board to lift the embargo imposed on DNS by December 29, 2017, and to set up a process for DNS to submit new orders. He understood this to mean only ICA-related services must continue and that an embargo on other services was permitted. (See P-77.) He stated that Verizon had no intention to violate the Board order. (P-115 (letter from Verizon to Board describing compliance efforts).) The new ordering process created by Verizon for DNS was an attempt to override the standard system rejection that normally happens when a client is under an embargo. (P-77.) Even so, Fajerman stated that the process Verizon created was unworkable, his account was assigned to staff who did not understand his business, (P-78), and he was still unable to obtain services for his clients.

After the May 15, 2018 OAL Order directing Verizon to discontinue all aspects of the embargo, Bartlett stated that Verizon complied and has continued to comply since then. The Board previously determined that the embargo was "a discontinuance of service . . . inconsistent with the Board rules at N.J.A.C. 14:3-7.6 et seq., [and ordered] Verizon to remove the embargo on the account." Order at 1. The Board will not award damages (discussed below); it is therefore not necessary to summarize the competing testimony regarding the impact of the embargo.[33]

Discussion

To show that Verizon acted toward DNS in a discriminatory and unfair manner by denying favorable contract terms to DNS due to erroneous claims of unpaid balances, at the least, DNS would have had to provide the same evidence requested with respect to the billing dispute. I **FIND** that specific, detailed evidence that Verizon imposed

[33] Fajerman testified regarding three instances in which DNS orders were rejected. (See P-88; P-89; P-90; P-96; P-100.) Bartlett stated that since the embargo was first imposed, in 2018, DNS has successfully placed more than 200 orders.

charges in error was not provided. Further, as was explained throughout these proceedings, the Board will not decide the accuracy of the charges DNS claims Verizon imposed in error across other, non-regulated accounts. As was made clear through the testimony of both parties' witnesses, by September 2017, there were outstanding charges for services across all DNS accounts that were not in dispute. The fact of unpaid balances supports the decisions of Verizon to take punitive action, including an embargo on future services, and mitigates a finding of bad faith.

It is not lost here that DNS used the ICA Section 14 dispute procedure to challenge charges that arose under other contracts. Both parties agree that the ICA-related charges in dispute were a relatively small portion of the approximately $250,000 in unpaid charges described by McCullough. None of the other contracts were introduced (and only those approved by the Board would have been considered here), so it is unknown whether those contracts also included dispute resolution provisions.

Looking at the terms of Section 14, the most explicit directions go to the content of the Notice of Dispute, requiring a "detailed description of the dispute." While the Notice of Dispute does explicitly designate Fajerman as the designated representative for DNS, I **FIND** it does not provide a detailed description of the dispute.[34] With respect to the alleged failings of Verizon's response, the ICA does not specify the qualifications of the designated representative for negotiations, nor does it mandate the form in which such a designation must take. While DNS is critical of Bartlett's qualifications to serve as a negotiator, it provides no basis in statute, regulation or caselaw to conclude that the Board would find Bartlett an inappropriate choice. Fajerman stated that Bartlett was an inappropriate choice as a negotiator as he had already made up his mind, not because he lacked technical expertise. Verizon could have made similar criticisms of Fajerman as the negotiator for DNS. Further, as late as August 8, 2017, Fajerman attempted to use the Section 14 dispute resolution process to negotiate past-due amounts with Bartlett. See R-63.

[34] For example, Fajerman wrote that Verizon "repeatedly made written offers upon which DNS relied to place orders and then refused to honor those written offers." (P-49 at 2.) Presumably, Fajerman was referring to the two offers made under the forbearance contract, testified to here by Goldstein, but not described in any detail in the Notice.

Bartlett (and Carnell) stated that Verizon had been involved in a bona fide dispute resolution process long before Fajerman's Notice of Dispute. Even if based on Director Gilbert's letter, petitioner had reason to believe that the parties had not been engaged in dispute resolution, and so expected a more formal response from Verizon, Fajerman was not credible – in his correspondence with Verizon and in his testimony – concluding that Verizon demonstrated an intention to ignore the Section 14 Notice and simply permit an allegedly large balance go unpaid. Further, I **FIND** that in the Section 14 Notice, Fajerman did not provide details regarding the disputed charges consistent with the ICA requirements, or with Director Gilbert's directions. Both parties did, eventually, assign counsel to handle the Section 14 negotiations and DNS did then provide Verizon with the information specified in the ICA as necessary for meaningful negotiations.[35] Although the specific Section 14 procedures were not followed (e.g., meeting of negotiating teams within thirty days of initial notice), I **FIND** that such failure was due as much to the delay occasioned by DNS in providing the "detailed written notice of the dispute" as to any action or inaction by Verizon. The email from McCullough stating that DNS was working on this information in June 2017 contradicts Fajerman's statements that this information was already collected and ready to go when he sent the Section 14 notice in early May.

I **FIND** that Verizon gave advance notice of the embargo to DNS. I **FIND** that after the Board directed Verizon to lift the embargo, Verizon mistakenly presumed the Order applied only to ICA-related services. Bartlett was credible in his explanation of why Verizon developed a new ordering procedure, and that Verizon did not intend to violate the Order. This testimony was supported by the procedural history of this matter, in particular Verizon's interlocutory appeal of the OAL order and its compliance with that order in the interim.

[35] To be clear, the spreadsheets the parties reviewed in July 2017 did not satisfy my requests for documentary evidence of the bills challenged, the charges on the bills disputed and not paid, and the amounts paid.

LEGAL ANALYSIS AND CONCLUSIONS

Jurisdiction

The OAL has jurisdiction over contested cases that are transmitted by "the State agency with appropriate subject matter jurisdiction." N.J.A.C. 1:1-3.1. The Board is authorized under federal law to adjudicate disputes involving the terms of the ICA pursuant to the Telecommunications Act of 1996, which was enacted "to promote competition and reduce regulation in order to secure lower prices and higher quality service for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Preamble, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the Act). Under Section 251 of the Act, ILECs are required to interconnect their networks with the networks of competitors, CLECs, and in so doing, must provide interconnection:

> [T]hat is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection [and] on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the [ICA] and the requirements of this section and section 252 of this title.
>
> [47 U.S.C. § 251(c)(2).]

Interconnection agreements set forth the terms and conditions by which the ILECs fulfill their substantive duties under the Act, Id. § 252(c)(1), and must be submitted to the respective state commission for approval. Id. § 252(e)(1). The United States Court of Appeals for the Eighth Circuit confirmed that pursuant to Section 252 of the Act, state commissions, like the Board, "are vested with the power to enforce the terms of the agreements" they approve. Iowa Utils. Bd. v. F.C.C., 120 F. 3d 753, 804 (8th Cir. 1997), rev'd in part on other grounds sub nom., AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999).

The Board also has jurisdiction in this matter under State law. See N.J.S.A. 48:2-13, 2-16, 2-19(a), 3-2 and 3-4. Finally, the ICA provides that it shall be governed and construed in accordance with the laws of the United States and the State of New Jersey. (J-1, Section 4.1.) I **CONCLUDE** that the OAL has proper jurisdiction here as it is within the Board's jurisdiction to resolve disputes between the parties involving the ICA.

Burden of Proof

Petitioner cites an order of the Federal Communication Commission requiring ILECs to provide their CLEC customers with "complete, accurate and timely wholesale bills" to support its argument that "Verizon bears the burden of proof in disputes where it seeks to collect payment under its wholesale bills." Br. of Petitioner, at 3 (citations omitted). Verizon, however, did not bring this action to collect overdue charges. DNS is the petitioner and, as stated in the prehearing orders issued in this matter, I **CONCLUDE** that DNS bears the burden of proving the allegations in its petition by a preponderance of the competent, credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the facts alleged and generates reliable belief that the tendered hypothesis, in all likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div.), certif. denied. 31 N.J. 75 (1959); see also Mueller v. Suez Water New Jersey, OAL Docket No. PUC 11917-18, Final Decision (May 28, 2019).

Alleged Admissions by Verizon

In its post-hearing brief, DNS claims for the first time in these proceedings that in Verizon's answer to the Petition, Verizon did not deny all material allegations of the Petition and therefore, those allegations are deemed admitted, pursuant to R. 4:5-3 and R. 4:5-5, and N.J.A.C. 14:1-6.1(b). Br. of Petitioner, at 5. Specifically, DNS claims Verizon, by its answer, admitted the allegations in paragraphs 12, 14, 48-52, 63, 71-73, 81-83 and 85 of the Petition. Id. at 6.

Verizon responds that it deemed certain statements in the above-numbered paragraphs of the Petition to be legal conclusions as to which no response was required and that further, "there is no serious question that Verizon has disputed and denied all of the material allegations that [DNS] has asserted in this proceeding." Verizon Br. at 27. Finally, Verizon notes that DNS is raising this issue after the hearing, where all the allegedly "admitted" allegations were litigated by both parties.[36]

DNS argues that the New Jersey Rules of Court support the conclusion that Verizon effectively conceded the claims in question. The rules provide, in pertinent part:

> An answer shall state in short and plain terms the pleader's defenses to each claim asserted and shall admit or deny the allegations upon which the adversary relies.
>
> A pleader who is without knowledge or information sufficient to form a belief as to the truth of an allegation shall so state and . . . this shall have the effect of a denial.
>
> Denials shall fairly meet the substance of the allegations denied. A pleader who intends in good faith to deny only a part or a qualification of an allegation shall specify so much of it as is true and material and deny only the remainder.
>
> The pleader may not generally deny all the allegations but shall make the denials as specific denials of designated allegations or paragraphs.
>
> [R. 4:5-3.]

Addressing the effects of a party's failure to deny allegations, the rule provides that:

[36] By letter dated August 28, 2020, then-counsel for petitioner stated that in response to my directions, "the parties have made efforts to agree upon a form of Stipulation of Disputed Issues" and on a joint stipulation of facts but had been unable to reach agreement on either. Ltr. of Daniel J. O'Hern, Esq., to ALJ Caliguire (August 28, 2021), at 1. Neither in this letter nor at any time prior to or during the hearing did petitioner contend that certain material allegations in the Petition were not in dispute.

> Allegations in a pleading which set forth a claim for relief, other than those as to the amount of damages, are admitted if not denied in the answer thereto . . .. Allegations in any answer setting forth an affirmative defense shall be taken as denied if not avoided in a reply; issue shall be deemed to have been joined upon allegations in an answer setting forth other matters. Allegations in a reply shall be taken as denied or avoided, and any defense thereto in law or fact may be asserted at trial.
>
> [R. 4:5-5 (emphasis added).]

As a threshold matter, the New Jersey Rules of Court do not apply to the proceedings of administrative agencies, but expressly apply only "to the Supreme Court, the Superior Court, the Tax Court, the surrogate's courts and the municipal courts." N.J. Court Rules, R. 1:1-1; see also, e.g., Shannon v. Acad. Lines, Inc., 346 N.J. Super. 191, 196 (App. Div. 2001). The Uniform Administrative Procedure Rules, applicable in administrative proceedings, state that "pleading requirements are governed by the agency with subject matter jurisdiction over the case." N.J.A.C. 1:1-6.1(a). The regulations specific to BPU proceedings only provide that an answer must "apprise the parties and the Board fully and completely of the nature of the defense and shall admit or deny specifically and in detail all material allegations of the petition." N.J.A.C. 14:1-6.1(b).

In its answer to the Petition, filed October 31, 2017, Verizon responded to each of ninety-two numbered paragraphs in the Petition (the four remaining numbered paragraphs are requests for relief). Where Verizon did not specifically admit or deny petitioner's allegations, Verizon explicitly stated: that it was without "knowledge or information sufficient to form a belief as to the allegations" in the respective paragraph(s); or that the cited document(s) speak for themselves; or made reference to earlier numbered responses; or that the specific "allegations are legal conclusions as to which no response is necessary." It is the latter response which petitioner now claims is tantamount to an admission of the respective allegations. I disagree and **CONCLUDE** that Verizon's responses to paragraphs 12, 14, 48-52, 63, 71-73, 81-83 and 85 of the Petition shall not be deemed admissions of the allegations in those paragraphs.

Should the Board find that the above-cited rules do not support this conclusion, I note that both the Uniform Administrative Procedure Rules and the Board's rules allow the judge discretion to "achieve just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." N.J.A.C. 1:1-1.3(a); N.J.A.C. 14:1-1.2(a) ("In special cases and for good cause shown, the Board may, unless otherwise specifically stated, relax or permit deviations from these rules."). Further, '[i]n the absence of a rule, a judge may proceed in accordance with the New Jersey Court Rules," N.J.A.C. 1:1-1.3(a), which provide that "[a]ll pleadings shall be liberally construed in the interest of justice." R. 4:5-7.

Even allowing that petitioner may not have had an opportunity prior to November 2020 to raise this argument, as DNS had not retained present counsel before then, a ruling in petitioner's favor would result in prejudice to Verizon and in a tremendous waste of government resources. Petitioner did not raise this argument in November 2020, but in August 2021. Between those dates, petitioner concluded its examination of its own witnesses, participated in the examination of Verizon's witnesses, and brought an interlocutory appeal to the Board on a different issue, after which petitioner recalled its first witness. In the interest of justice, I **CONCLUDE** that Verizon's responses to paragraphs 12, 14, 48-52, 63, 71-73, 81-83 and 85 of the Petition shall not be deemed admissions of the allegations in those paragraphs, allegations which have been fully litigated.

The Billing Dispute

A utility customer of record, such as petitioner, is responsible for payment of all utility service provided. N.J.A.C. 14:3-7.1 (a). The regulations further provide, however, that a customer may dispute a utility charge by notifying the utility; the customer must continue to pay all undisputed charges. N.J.A.C. 14:3-7.6 (a).

While the regulations and ICA do not, as petitioner notes, require the use by a utility customer of a designated web portal to dispute a bill (or a charge on a bill), the ICA does require the customer to provide Verizon with specific information regarding each item disputed. (J-1, Section 9.3.) Even when Verizon receives adequate information to fully investigate a dispute, the ICA anticipates that the party challenging the bill may not be satisfied, and so provides for dispute resolution. (J-1, Section 14.) As stated by Director Gilbert, a final option for a party challenging a bill is a petition to the Board. Considering the information provided to Verizon by McCullough, up to $222,980 in allegedly erroneous charges were identified by DNS and denied by Verizon (some of which were for ICA-related services). Verizon's denial did not end the inquiry as DNS petitioned the Board for review. But the Board will be no more able to determine the merit of DNS' position than can the OAL without the specific details that were repeatedly requested of DNS by Verizon, by Director Gilbert, and by me. See T-12 at 204-05, 212; R-56; T-1 at 10-13.[37]

In the Petition, DNS alleged that Verizon was claiming a past-due amount of $32,991 for ICA-related services and a past-due amount of $6,395 under the Wholesale Advantage contract. Petitioner alleged that it had no past-due balance, that all payments on all accounts had been made but for amounts properly in dispute. As discussed above, petitioner did not establish that as of the date of the Petition, Verizon was erroneously pursuing payment for specific charges (other than LPCs and for ATC trunks, which had not yet been assessed); DNS did not clarify the exact amount of erroneous charges, not to mention why these specific charges were in error (again, other than LPCs).[38]

[37] As stated by respondent, but for LPCs, the only overcharges as to which DNS provided specific evidence were either resolved prior to the date of the Petition or did not appear on DNS bills prior to the date of the Petition. As stated above, testimony on both of those categories of alleged overcharges was permitted as potential evidence of bad faith by Verizon.

[38] The chart in petitioner's brief details significant billing errors made by Verizon between July 2014 and January 2017. Br. of Petitioner, at 10 (chart includes October 2019 decision of Verizon to reverse billing on ATC trunks without admitting errors). The chart helped make the valid point that Verizon's billing system is rife with errors, but it includes only errors that had been corrected. It did not assist in a determination of whether the charges not paid and/or disputed as of August 2017 were erroneous.

I **CONCLUDE** that DNS did not carry the burden of proving that the only charges outstanding as of September 2017, were those which were under dispute, and did not carry the burden of proving that Verizon failed to properly credit DNS for payments made on undisputed charges and, therefore, I further **CONCLUDE** that DNS did not prove as erroneous $39,386 in charges past-due as of September 2017, and owed to Verizon for services under the ICA and the Wholesale Advantage Contract (notwithstanding the recent credit of LPCs).[39]

I **CONCLUDE** that petitioner failed to prove by a preponderance of credible evidence that Verizon failed to credit DNS for payments made for undisputed charges. At the same time and as discussed further below, I **CONCLUDE** that DNS did prove that with respect to certain charges, Verizon did attempt to collect charges improperly, changed billing without notice and refused to honor prior agreements, whether as to billing, contract type or services.

Imposition of LPCs in Violation of the ICA

For the reasons discussed above, I **CONCLUDE** that petitioner has proved by a preponderance of credible evidence that Verizon imposed LPCs improperly and in violation of the ICA. DNS did not, however, provide information to Verizon sufficient to permit an investigation of this claim prior to July 2017 (as to minimum LPCs) and October 2017 (as to the rate of LPCs).

Verizon's Alleged Breach of the Covenant of Good Faith and Fair Dealing

In its 2020 motion for summary decision, described above, respondent argued that petitioner's claim of bad faith on the part of Verizon is not an issue for the Board and therefore, is outside the jurisdiction of this forum. The Board does not have

[39] As discussed above, during these proceedings, Verizon determined that as DNS had alleged, LPCs on accounts involving ICA-related services were imposed improperly. Accordingly, Verizon issued a credit to DNS of $2,056.18 for LPCs charged prior to September 28, 2017. Ltr. to ALJ Caliguire from Eric Wong, Esq. (December 1, 2021), at 1. Those charges would otherwise have been deducted from the amount due to Verizon.

jurisdiction to award damages but is authorized to consider whether Verizon violated the terms of the ICA, including the duty to perform in good faith.[40] The Third Circuit case of Core Communications, Inc. v. Verizon Pennsylvania, Inc., 493 F.3d 333 (3d Cir. 2007) is directly on point (and was cited by the Board in the Order). The Third Circuit found that:

> [I]nterpretation and enforcement actions that arise after a state commission has approved an interconnection agreement must be litigated in the first instance before the relevant state commission. A party may then proceed to federal court to seek review of the commission's decision or move on to the appropriate trial court to seek damages for a breach, if the commission finds one.
>
> [Id. at 344].

This case fits squarely within that rule because the Board approved the ICA, and this dispute involves an interpretation of the ICA. I **CONCLUDE** that the allegations of petitioner that Verizon breached the good faith requirements of the ICA are within the jurisdiction of the Board, and of the OAL.

A covenant of good faith and fair dealing is implied in every contract in New Jersey; "a party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent express term." Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001), citing Sons of Thunder, 148 N.J. at 419, 420; see also Bak-A-Lum Corp. v. Alcoa Bldg. Prods., Inc., 69 N.J. 123, 129-30 (1976) (defendant's conduct in terminating contract constituted bad faith although it did not violate express terms of written agreement).

As petitioner notes, the ICA also "expressly imposes on Verizon a duty of good faith" in performance of the ICA and requires both parties to engage in "good faith negotiations" over any disputes. Br. of Petitioner at 4, citing J-1, §§ 18, 14.1. The

[40] To obtain damages, DNS would have to specifically show that Verizon's conduct prevented DNS from "receiving the fruits of the contract" and the economic harm that resulted. Sons of Thunder v. Borden, Inc., 148 N.J. 396, 425 (1997).

question then is whether Verizon acted with bad faith to interfere with DNS' right to receive the benefits of the ICA. It is not enough to prove that Verizon's motive(s) did not consider the best interests of DNS as the "law does not require parties to behave thoughtfully, charitably or unselfishly toward each other." Brunswick Hills Racquet Club, Inc. v. Rte. 18 Shopping Ctr. Assocs., 182 N.J. 210, 227, 229 (2005). For DNS to prevail on it claim of bad faith, it must show bad intentions motivated Verizon's actions. 182 N.J. at 229, 231 (notwithstanding the failure of plaintiff to exercise the strict terms of an option contract, court found that defendant breached the covenant of good faith and fair dealing by engaging "in a pattern of evasion, sidestepping every request by plaintiff to discuss the option and ignoring plaintiff's repeated written and verbal entreaties to move forward on closing").

A party who acts in good faith on an honest, but mistaken, belief that his or her actions are justified has not breached the covenant of good faith and fair dealing. But, generally, "[s]ubterfuges and evasions" in the performance of a contract violate the covenant of good faith and fair dealing "even though the actor believes his conduct to be justified." 182 N.J. at 225, 229 (defendant admitted that the option was not in its economic interest and therefore, it stayed silent on the requirements of the option until it was too late for plaintiff to exercise it) (citations omitted).

Both parties used evidence of email communications to support their claims that the other acted in an unprofessional and/or deliberatively malicious manner. I **FIND** no ill intent or motive beyond that occasioned by understandable frustrations of doing business with a difficult customer. Fajerman was a difficult customer, and it appears from internal Verizon emails that Carey was an aggressive advocate for her customer. At the same time, Verizon employees were less than charitable regarding DNS in their written communications and, in Fajerman's defense, the ongoing internal system errors involving thousands of dollars could cause even the most even-keeled to express annoyance in very strong terms.

While Verizon's goal of resolving disputes within forty-five days is laudable, the evidence shows that due to human and system errors, miscommunication and mismanagement, Verizon took several years to correct billing errors on certain DNS accounts. Further, the dispute over the tax exemption certification forms exemplifies mismanagement by Verizon staff. As summarized above, petitioner has shown that on or about October 2015, Verizon improperly assessed taxes on up to nine separate DNS accounts for which DNS had provided certification of tax exemption. When notified of the error, Davis did not ask (in writing) for additional information or require submission through the online portal. His email response led Fajerman to reasonably anticipate that the error would be addressed. The documentary record reflects that five months after Davis stated that he would address the issue, Simpson requested new exemption forms. Fajerman promptly complied with this request, and Verizon no longer charged DNS for sales tax (and credited for erroneous charges). But Verizon continued to charge DNS for federal taxes.

The series of emails between DNS and Verizon in November 2016 evidence failure by DNS to strictly comply with the protocols designed by Verizon to identify, track and resolve billing disputes, which may have contributed to the year-long delay in resolving this issue. At the same time, there is no proof that Davis even asked for such compliance, and it took Verizon five months to determine that it did not have the exemption certificates for customer accounts on which it had not previously charged state and federal taxes (for a number of years), and then Verizon took another seven months to correct the billing. The November 2016 emails also evidence failure of Verizon to respond to this customer with a consistent message; Simpson and Redmon essentially contradict Davis with no explanation to the customer.

In the end, Verizon corrected the mistake flagged by DNS and credited DNS for improper tax charges. The failure of Verizon staff to maintain a consistent position with respect to "strict policy" makes for lousy customer service but is not in and of itself evidence of bad faith. Bartlett was credible in his explanation that the reassignment of Roper was an attempt to prevent such deviations from policy. The failure of

communication between various Verizon departments (as was seen with the POVN dispute) and even the failure by Verizon to respond in a timely fashion was not, however, proof of motive to impose economic harm on DNS.

Moreover, personal animus alone is not evidence of bad faith; despite documentary proof of such, there is also evidence that Verizon staff continued to work on behalf of the customer and even correct internal mistakes to DNS' credit, seemingly making light of their displeasure in having to do so despite such ill feelings.

While N.J.A.C. 14:3-3A.1 provides that the Verizon "shall have the right to suspend or curtail or discontinue service" for certain reasons, including "nonpayment of a valid bill due for service," the regulations further provide that "[o]nce a formal or informal dispute is before the Board, all collections activity on the charge in dispute shall cease until Board staff notifies the utility and the customer that the dispute has been resolved." N.J.A.C. 14:3-7.6(a), (c).[41]

Verizon imposed the embargo after DNS instituted the Section 14 dispute resolution process, but before the Petition was filed. Although the regulations do not define "formal or informal dispute," the Board clearly deemed Fajerman's request for Board assistance as putting a dispute "before the Board," as the Board then determined that the action by Verizon in instituting the embargo was a violation of the ICA and Board rules. See Order at 4.

As described above, Verizon's initial attempt at compliance with the Order was insufficient in two respects. First, Verizon incorrectly assumed that the Board was permitting the embargo with respect to non-ICA-related services. Second, in order to prevent ICA-related orders from being rejected by the automated system, Verizon set up an ordering process that did not specifically comply with the Board's order to "provide [DNS] service consistent with the terms of the ICA." By order dated May 15, 2018, Verizon was directed to lift the embargo for all services and to dispense with the manual ordering process. As a result of Verizon's mistake with respect to the scope of the BPU

[41] The customer is obligated, however, to continue to pay current charges during the course of a billing dispute.

Order, Verizon designed an ordering process that was unnecessary and problematic. As set forth above, action taken on the mistaken assumption that it is justified is not evidence of bad faith; I **CONCLUDE** that Verizon's incorrect interpretation of the Order is not evidence of bad faith. See Brunswick Hills, 182 N.J. at 225.

On the record before me and by the standards set by the Supreme Court of New Jersey, I **CONCLUDE** that Verizon acted in violation of its contractual and common law duty to perform in good faith in two instances. First, Verizon's imposition of LPCs literally violated the express terms of the ICA and Verizon failed to promptly investigate when provided sufficient notice.[42] Second, while there may be adequate grounds for Verizon's decision to change billing of local trunks from tandem to ATC, all evidence shows that Verizon neglected to conduct the inquiry necessary to support such action prior to changing the billing. I **CONCLUDE** that Verizon's failure to exercise the same diligence prior to changing the billing that it exercised after the customer complained, particularly given the ongoing disputes with this customer, showed an absence of good faith.

In summary, I **CONCLUDE** that petitioner DNS failed to prove by a preponderance of credible evidence that (1) Verizon erroneously charged DNS $39,386 under the ICA and the Wholesale Advantage Contract; (2) Verizon failed to properly credit DNS for payments made for undisputed charges; and (3) Verizon assessed LPCs for amounts that were not overdue.

I **CONCLUDE** that petitioner failed to prove by a preponderance of credible evidence that Verizon acted in bad faith, in violation of the ICA and/or of applicable law with regard to (1) improper billing of State and federal taxes; (2) refusal to honor reduced-priced offers or to block orders prior to the imposition of the embargo; (3) the disputes over charges related to the LIS trunks, including POVN billing; and (4) the alleged violations of Section 9.3 of the ICA.

[42] This is not evidence that Verizon treated DNS differently than other customers; Bartlett admitted that Verizon was over-charging other customers in the same way they over-charged DNS.

I **CONCLUDE** that petitioner DNS proved by a preponderance of credible evidence that Verizon breached the contractual obligations to perform its obligations under the ICA in good faith and breached the implied covenant of good faith and fair dealing by (1) its imposition of LPCs in violation of the terms of the ICA and its failure, once notified of the potential violation, to promptly investigate; and (2) its action in changing billing on four disputed trunk groups to that charged for ATC trunks without exercising due diligence to support such a change.

ORDER

For the reasons set forth above, I **ORDER** that the appeal of **petitioner Business Automation Technologies doing business as Data Network Solutions** of charges for utility service issued by **respondent Verizon New Jersey, Inc.** is **DISMISSED**. I further **ORDER** that petitioner remains responsible for $39,386 in charges which shall be paid to respondent forthwith.

I **ORDER** that the claim of **petitioner Business Automation Technologies doing business as Data Network Solutions** for a determination that **respondent Verizon New Jersey, Inc.** acted in violation of Sections 14 and 18 of the ICA and in breach of the implied covenant of good faith and fair dealing found in New Jersey common law is **APPROVED** with respect to (1) Verizon's imposition of LPCs in violation of the terms of the ICA and its failure to promptly investigate the same; and (2) Verizon's action in changing billing on four disputed trunk groups described herein to that charged for ATC trunks without exercising due diligence to support such a change. Any action by petitioner for damages shall proceed in the appropriate forum.

Finally, I **ORDER** that all other claims of petitioner are **DENIED** and its appeal with respect to those claims is **DISMISSED**.

I hereby **FILE** my initial decision with the **BOARD OF PUBLIC UTILITIES** for consideration.

This recommended decision may be adopted, modified or rejected by the **BOARD OF PUBLIC UTILITIES,** which by law is authorized to make a final decision in this matter. If the Board of Public Utilities does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SECRETARY OF THE BOARD OF PUBLIC UTILITIES, 44 South Clinton Avenue, P.O. Box 350, Trenton, NJ 08625-0350,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 28, 2022
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nmn

APPENDIX

WITNESSES

For Petitioner:

Isaac Fajerman

Mary Lou Carey

Fred Goldstein

For Respondent:

Peter D'Amico

Chase Bartlett

EXHIBITS

Joint:

J-1 Interconnection Agreement

For Petitioner:

P-2 Letter Agreement (unsigned), dated September 29, 2003

P-3 Email dated January 24, 2012

P-4 Email dated March 31, 2014

P-5 Not introduced

P-6 Email dated January 28, 2015

P-7 Emails dated April 3, 2015

P-8 Not introduced

P-9 Emails dated May 1, 2015

P-10, 11 Not introduced

P-12 Emails dated November 22, 2015

P-13 – 15 Not introduced

P-16 Emails dated December 18, 2015

P-17 Email dated February 2, 2016

P-18 – 19 Not introduced

P-20 Emails dated September 15, 2016

P-21 – 23 Not introduced

P-24 Email dated November 7, 2016

P-25 Email dated November 8, 2016

P-26 Emails dated December 27, 2016

P-27 – 30 Not introduced

P-31 Email dated January 5, 2017

P-32 – 37 Not introduced

P-38 Email January 12, 2017

P-39 – 42 Not introduced

P-43 Letter dated February 16, 2017

P-44 – 48 Not introduced

P-49 Letter dated May 8, 2017

P-50 Email dated May 10, 2017

P-51 Letter dated May 30, 2017

P-52 Email dated May 30, 2017

P-53 Emails dated May 31, 2017

P-54 – 57 Not introduced

P-58 Email dated July 24, 2017

P-59 Not introduced

P-60 Emails dated August 2, 2017

P-61 Not introduced

P-62/R-15 Emails dated August 16, 2017

P-63 Email dated August 17, 2017

P-64 – 74 Not introduced

P-75 Emails dated November 27, 2017

P-76 Not introduced

P-77 Email dated December 21, 2017

P-78 Email dated December 28, 2017

P-79 – 86 Not introduced

P-87 Email dated March 12, 2018

P-88 Embargo Notice dated March 13, 2018

P-89 Email dated March 15, 2018

P-90 Email dated April 3, 2018

P-91 Email dated April 26, 2018

P-92 – 95 Not introduced

P-96 Embargo Notice dated July 13, 2018

P-97 Email dated July 19, 2018

P-98 Email dated October 31, 2018

P-99 Not introduced

P-100 Email dated March 14, 2018

P-101 – 105 Not introduced

P-106 ASR Order

P-107 – 114 Not introduced

P-115 Letter dated December 29, 2017

P-116 – P-123 Not introduced

P-124a, b Spreadsheets

P-125a, b Spreadsheets

P-126 Spreadsheets

P-127 Spreadsheet

P-128 Spreadsheet

P-129 – 133 Not introduced

P-134 Spreadsheets

P-135 Not introduced

P-136 Audio recording dated September 1, 2016

P-137 – 144 Not introduced

P-145 Audio recording

P-146 Not introduced

P-147 CSR dated August 2014

P-148 Not introduced

P-149 CSR dated August 2017

P-150 – 151 Not introduced

P-152 VZ_224_Out_LDFailure 1

P-153 VZ_224_Out_LDFailure 2

P-154 VZ224_Out_2020

P-155 – 157 Not introduced

P-158 Amendment and Email exchange

P-159

P-160

P-161

P-162

P-163 Not introduced

P-164 Trunking Form

For Respondent:

R-2 Letter agreement (signed) dated September 29, 2003

R-3 – 5 Not introduced

R-6 BPU Tariff No. 6, Sec. 2

R-7 FCC No 1, Sec. 6

R-8 BPU Tariff No. 6, Sec. 4

R-9 Not introduced

R-10 Emails dated August 29, 2017

R-11 Not introduced

R-12 Email dated August 25, 2017

R-13 CABS_TSC_RAMP_DATA Spreadsheet

R-14 Emails dated August 25, 2017

R-15 Duplicate of P-62

R-16 Emails dated August 24, 2017

R-17 CABS_TSC_RAMP_DATA Spreadsheet

R-18 Emails dated March 12 – April 8, 2014

R-19 Emails dated September 29, 2016

R-20 Emails dated August 16, 2017

R-21 Not introduced

R-22 Not introduced

R-23 Duplicate of P-50

R-24 Emails dated January 14, 2017

R-25 Emails dated November 21, 2016

R-26 Emails dated November 3, 2016

R-27 Emails dated November 1, 2016

R-28 Emails dated September 23, 2016

R-29 Emails dated September 20, 2016

R-30 Duplicate of R-18

R-31 Spreadsheet

R-32 – 33 Not introduced

R-34 Emails dated August 24, 2017

R-35 Emails dated August 21, 2017

R-36 Emails dated August 23, 2017

R-37 Spreadsheet

R-38 Emails dated August 15, 2017

R-39 Not introduced

R-40 Emails dated July 5, 2017

R-41 Spreadsheets

R-42 Notice of Dispute dated May 8, 2017

R-43 – 45 Not introduced

R-46 Billing Adjustment Request dated January 4, 2017

R-47 – 48 Not introduced

R-49 Letter dated April 12, 2017

R-50 – 52 Not introduced

R-53 Emails dated December 18, 2015

R-54 Email dated February 23, 2017

R-55 Emails dated March 3, 2017 (redacted portions)

R-56 Letter from Director Gilbert dated March 20, 2017

R-57 Email dated May 30, 2017

R-58 Duplicate of P-51

R-59 Emails dated June 23, 2017

R-60 Emails dated June 30, 2017

R-61 Emails dated August 4, 2017

R-62 Spreadsheet

R-63 Emails dated August 7, 2017

R-64 Spreadsheet of Credits

R-65 Email dated April 29, 2016

R-66 Federal Excise Tax Exemption Certificate

R-67 Not introduced

R-68 Not introduced

R-69 Email dated December 28, 2017

R-70 – 71 Not introduced

R-72 – 75 August 2020 Invoices for separate accounts

R-76 – 82 Not introduced

R-83 – 84 July 2020 Invoices for separate accounts

R-85 – 86 Not introduced

R-87 – 88 July 2020 Invoices for separate accounts

R-89 - 94 Not introduced

R-95 – 99 July 2020 Invoices for separate accounts

R-100 – 102 Not introduced

R-103 – 105 July 2020 Invoices for separate accounts

R-106 Not introduced

R-106a

R-107 Aging Report

R-108 CLEC Demonstrative

R-109 Customer Financial Services Claims Spreadsheet

R-110 Wholesale Financial Operations Claims Spreadsheet

R-111 Emails dated October 6, 2016

R-112 Billing Adjustment Request dated October 6, 2016

R-113 Adjustment Spreadsheet