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APPELLATE DIVISION

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IN THE MATTER OF THE ALLEGED FAILURE OF ALTICE, USA INC., TO COMPLY WITH CERTAIN PROVISIONS OF THE NEW JERSEY CABLE TELEVISION ACT, N.J.S.A. 48:5A-1, ET SEQ., AND THE NEW JERSEY ADMINISTRATIVE CODE, N.J.A.C. 14:18-1, ET SEQ.

BOARD OF PUBLIC UTILITIES

OFFICE OF CABLE TELEVISION AND TELECOMMUNICATIONS

DOCKET NO.: CS18121288

APPELLATE DIVISION DOCKET NO.: A-001269-19

BRIEF AND APPENDIX (RCa1-RCa103)OF THE RESPONDENT NEW JERSEY DIVISION OF RATE COUNSEL

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PRELIMINARY STATEMENT

Respondent, the State of New Jersey Division of Rate Counsel ("Rate Counsel") is tasked by statute with representing and protecting the interest of ratepayers in utility matters. Rate Counsel provides this Brief in support of the November 13, 2019 Order of the New Jersey Board of Public Utilities ("Board") requiring Appellant Altice U.S.A., Inc., ("Altice")to (1) prorate customer bills as required under N.J.A.C. 14:18-3.8, (2) provide customer refunds and (3) comply with all other directives set forth in the November 13, 2019 Order ("Board Order").

New Jersey has a long history, beginning as early as the 1960s, of protecting its consumers against anticompetitive, deceptive and fraudulent business practices. One such consumer protection is N.J.A.C. 14:18-3.8, which addresses customer rights and methods of billing for cable service providers. The regulation requires that customer bills be prorated at inception and termination of service and has, up until now, been observed by all cable and video providers in New Jersey. The intent and purpose of the regulation is to ensure customers are only billed for service they receive.

In October 2016, Altice stopped prorating customer bills in violation of N.J.A.C. 14:18-3.8, charging customers who initiate

or cancel service in the middle of a billing cycle for a full month of service. As stated in the Board's Order, complaints filed with the Board confirm that Altice has charged customers for a full month of service even where a customer cancels service on the sixth day immediately after the service has begun. As a result of Altice's action, customers are forced to pay for cable services not provided in violation of N.J.A.C. 14:18-3.8.

Altice makes several arguments in support of its action. Altice argues it was awarded a waiver of the regulation under an Order issued by the Board in 2011 ("Relief Order"). However, that Order did not provide such relief and was never intended to abrogate the important consumer protection embodied in the Board's regulation. In the alternative, Altice argues that the regulation is rate regulation and federally preempted. These arguments are unsupported by the facts and are wrong on the law. As will be discussed below, N.J.A.C. 14:18-3.8is a consumer protection regulation enacted and enforced to protect customers against deceptive and fraudulent business practices. If Altice's position were to prevail, it would undermine the ability of State commissions to exercise the concurrent authority granted to them under the federal Cable Television Consumer Protection and Competition Act and will erode important consumer protections.

Altice's arguments in every respect fail to advance any legal or compelling reasons why the Board Order should be set aside. Just as cable service providers may seek payment for theft of service when a person illegally connects to a provider's cable network, it is equally important to ensure that customers are not charged for cable services they are not provided. New Jersey's regulation requiring proration has not been waived and is consistent with and not preempted by federal law. The Board Order should be sustained.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Appellant, Altice USA, Inc. ("Altice" or "the Company") is the parent of Cablevision Systems Corporation and Cablevision Cable Entities (formerly known as "Cablevision"), *see*, In The Matter of the Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Cable Entities for Approval to Transfer Control of Cablevision Cable Entities, Docket No. CM15111255,("Merger Order" dated May 25, 2016). Following the merger in October 2016, Altice stopped prorating customer bills upon termination of a customer's service and stopped issuing refunds. In March 2017, after receiving customer complaints the Board notified Altice that its actions were

[1] Because the Procedural History and Statement of Facts in this case are so intertwined, Rate Counsel has combined them in this brief for the purpose of clarity and for the convenience of the Court.

violating N.J.A.C. 14:18-3.8 and a September 21, 2011 Order of the Board that required proration and refunds. In the Matter of the Petition of Cablevision Systems Corporation for Relief Pursuant to N.J.A.C. 14:18-16.7, Order Docket No. CO11050279 ("Relief Order"). (RRCa50-53). In September 2017, Altice responded, arguing that the 2011 Order granted relief from the provisions of N.J.A.C. 14:18-3.8. (RRCa51)

The September 2011 Rule Relief Order arose out of a May 5 2011, petition filed by Cablevision seeking relief from several requirements of N.J.A.C. 14:18.[2] As part of its filing, Cablevision supplied a sample bill that it intended to use. On September 21 2011, the Board issued an Order affording Cablevision relief noting: ". . . its sample bill demonstrates . . . how Cablevision will prorate its bills pursuant to the requirement of [N.J.A.C. 14:18-3.8]". (RRCa6). Following the Board's Relief Order, from 2011 and up to October 2016, Cablevision continued to prorate customer bills as required under N.J.A.C. 14:18-3.8. On November 5, 2015, Altice filed a petition seeking approval to merge with Cablevision.[3] In

[2] The request mirrored relief that had been granted to Verizon. See, I/M/O Verizon New Jersey, Inc., for Relief of Compliance with Certain Provisions of N.J.A.C. 14:18 pursuant to N.J.A.C. 14: 18-16.7, Docket No. CO10040249 (issued March 11, 2011).

[3] In The Matter of the Verified Joint Petition of Altice, N.V. and Cablevision Systems Corporation and Cablevision Cable Entities for Approval to Transfer Control of Cablevision Cable

discussing the merger structure the Board noted that Petitioners assert there are no plans to change terms, service conditions or customer service. (RRCa17-18). The Merger Order also confirms Petitioners' continued obligation to meet the "customer service obligations under customer service standards, performance standards, and service metrics as delineated under N.J.A.C. Title 14, including but not limited to Chapters 3, 10 and 18, and N.J.S.A. 48:5A, including, but not limited to, requirements related to billing practices and termination." (RRCa25 and 29 at para. 17). After the Merger, Altice continued to prorate customer bills as required under N.J.A.C. 14:18-3.8 until stopping in October 2016.

In 2017, after receiving customer complaints, the Board contacted Altice seeking information regarding proration. (RRCa51). On December 18, 2018, in light of Altice's continued refusal to prorate customer bills and after receiving over 100 customer complaints regarding Altice's continuing violation of N.J.A.C. 14:18-3.8, the Board issued an Order to Show Cause ("OSC") seeking information as to why Altice should not be found in violation of the regulation and the Board's 2011 Relief Order. (RRCa51-52) Altice, in its Answer to the Board filed on January 31, 2019, confirmed that it had ceased the practice of

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Entities, BPU Docket No. CM15111255, Order Approving Stipulation of Settlement, (Issued: May 25, 2016).

prorating customer bills in October of 2016, asserting it did so pursuant to a waiver of said regulation granted to Cablevision by the Board in its Relief Order. (RRCa57). Rate Counsel was a party to both Cablevision's 2011 rule relief petition and the petitioner's 2015 merger application, and filed its Response to Altice's Answer to the Board's OSC on March 6, 2019. Rate Counsel's response requested that the Board order Altice to: 1) immediately resume the proration of customer bills upon termination of service; 2) provide the Board and Rate Counsel with a plan detailing how customer refunds would be processed and issued; 3) provide proof of customer refunds to the Board and Rate Counsel; 4) provide annual reports during a three-year period demonstrating prorated customer accounts where service was discontinued; and any other remedies, inclusive of penalties which the Board may deem were warranted and appropriate. On November 13, 2019, finding that the Company was in violation of N.J.A.C. 14:18-3.8, the Board issued a Cease and Desist Order against Altice ordering the Company resume prorated billing, issue refunds within 60 days from the effective date of the Order (November 23, 2019), and remit a one-time non-recoverable contribution totaling $10,000 towards the Altice Advantage Internet program to provide low-cost internet services to eligible New Jersey customers. In addition, the Company was ordered to conduct an audit of its customer billing records and

report to the Board within 30 days the names and account numbers of customers who were improperly billed due to the Company's failure to prorate. Within 30 days after Board review of the Company's audit report, Altice was ordered to refund the overage and provide proof to the Board of compliance. In addition, the Company was required to provide proof within 30 days that it had made the one-time non-recoverable contribution of $10,000 towards the Altice Advantage program. (RRCa60-61).

Altice moved before the Board for a Stay of the Board's Cease and Desist Order. Rate Counsel filed opposition to Altice's request on December 7, 2019. The Board denied Altice's Motion to Stay on December 20, 2019. In addition, on November 26, 2019, Altice appealed the Board's November 13, 2019 Order to the Superior Court, Appellate Division. (Docket Number A-001269-19). On December 13, 2019, Altice also filed a Complaint in the Federal District Court of New Jersey. (Docket Number 19-CV-21371). On December 23, 2019 the federal court dismissed the Altice Complaint for lack of subject matter jurisdiction. On January 3, 2020, Altice filed a Motion for Reconsideration and an Amended Complaint before the Federal District Court. On January 29, 2020 the Federal District Court entered an Order for a preliminary injunction as to the individually named Commissioners. The Board filed a Motion for Reconsideration with the Federal District Court which was denied on March 10, 2020.

The Board appealed the preliminary injunction to the Third Circuit Court of Appeals on April 9, 2020. On May 13, 2020, Altice filed for a stay of the New Jersey Superior Court, Appellate Division matter, which was denied May 13, 2020. Throughout all of these procedural maneuvers, from October 2016 to the present, Altice has continued charging customers for service it has not provided in continuous violation of the regulatory requirement to prorate initial and final customer bills under N.J.A.C. 14:18-3.8.

STANDARD OF REVIEW

Our Courts have held that "[i]n order to reverse an agency's judgment, an appellate court must find the agency's decision to be arbitrary, capricious, or unreasonable." In re Stallworth, 208 N.J. 182, 194 (2011). The "decision of an administrative agency carries with it a presumption of reasonableness." Atl. City Med. Ctr. v. Squarrell, 349 N.J. Super. 16, 23 (App. Div. 2002; see also Smith v. Ricci, 89 N.J. 514, 525 (1982). Such a presumption "is particularly [applicable] when the issue under review is directed to the agency's special 'expertise and superior knowledge of a particular field.'" In re Stallworth, supra, at 195, or where, as here, an agency is interpreting its own prior orders. MCI Worldcom Network Servs. v. FCC, 274 F.3d 542, 548 (D.C. Cir.

2001). A court is "bound to recognize and respect the Board's substantive expertise, especially on questions that are primarily of judgmental or predictive nature." In re N.J. Bell Tel. Co., 291 N.J. Super. 77, 89 (App. Div. 1996) (citing FCC v. Nat'l Citizens Cornm' n for Broad., 436 U.S. 775, 813 (1978)).

Although the question of preemption is a legal question to be reviewed *de novo*, the preemption inquiry begins with the assumption that Congress did not intend to supersede a state statute unless that was Congress' clear and manifest purpose. In re Reglan Litig., 226 N.J. 315, 328 (2016). As will be addressed below, there is no clear and manifest Congressional intent to usurp State consumer protection regulations such as N.J.A.C. 14:18-3.8. Absent federal intent to occupy the field of regulation, a state law may only be invalidated if it is found to be in conflict with federal law, that is, when it is impossible to comply with both federal and state law. In that instance, under the Supremacy Clause, federal law supersedes the contrary state law. Art. VI, C.2. The Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 543 et seq., ("Cable Act") affirms a state's concurrent authority to enact consumer protection laws that meet or exceed the federal standards. See, 47 U.S.C. §552(c)1 and §552(c)2. In short, there is no field preemption and no conflict preemption of state consumer protection regulation in the Cable Act that would

relieve Altice from the requirement to comply with N.J.A.C. 14:18-3.8.

ARGUMENT

I. THE BOARD'S DECISION IS CONSISTENT WITH STATE LAW (Ab11-13), (Ab17-18), (Ab22), (RRCa2), (RRCa3-4), (RRCa51-52), (RRCa55, fn2)

Both the facts and law support the Board Order in this case. The Board Order is not arbitrary, capricious, or unreasonable and does not violate state or federal law. The Board decision and Order should be sustained.

A. The Board's decision is consistent with the State regulation. (Ab12-13), (RRCa2), (RRCa55)

Contrary to Altice's argument, the Board's interpretation and enforcement of N.J.A.C. 14:18-3.8 is reasonable and appropriate under the facts herein. Altice contends that the Rule Relief Order makes no sense unless it exempted Cablevision from the requirement to prorate bills because the proration requirement is the only substantive requirement under N.J.A.C. 14:18-3.8, as the other requirements are merely permissive. (Ab12-13). However, this is not the case. The regulation appears under Subchapter 3, titled "Customer Rights," subsection 8 titled "Methods of Billing," and states under subsection (a):

> Bills for cable television service shall be rendered monthly, bi-monthly, quarterly, semi-annually or annually and shall be prorated upon establishment and termination of service. In unusual credit situations,

bills may be rendered at shorter intervals. N.J.A.C. 14:18-3.8.

Clearly, the use of the word "and" informs the reader that the two clauses are independent. Subsection (a) permits the service provider to determine which billing cycle it will employ (monthly, bi-monthly and so forth) ensuring customers have notice and understand the mode employed for the accrual of charges. Additionally, it separately requires that charges be prorated on initial and final bills to ensure customers are not billed for services that are not provided by the cable operator. It is a straightforward provision that the Board is applying correctly.

Similarly, subsection (c) allows advance billing subject to the billing cycle and the original terms noticed on the service provider's filed tariff. In addition, it reaffirms that despite the ability to charge prospectively, service providers are expected to continue to prorate initial and final customer bills ensuring that customers will not be harmed by a service provider changing the terms and conditions of service midway through a service term. Likewise, subsection (d) reaffirms the expectation that cable providers prorate upon disconnection of service, protecting customers from being billed for services they will never receive. That section states:

> If a cable television company electronically disconnects or otherwise curtails, interrupts or

> discontinues all or a portion of the customer's services for non-payment of a valid bill or for other reasons provided under N.J.A.C. 14:18-4.3, the cable television company shall prorate the charges for all affected services as of the date of the electronic service curtailment, interruption or disconnection. N.J.A.C. 14:18-3.8(d).

Thus, the requirement to prorate appears as an independent requirement in addition to the other separate requirements found under three of the four subsections of N.J.A.C. 14:18-3.8. The regulation's intent and language could not be clearer. The regulation was enacted and is enforced to protect customers against harms from deceptive and fraudulent business practices by a cable service provider. Customers should not be billed for services they do not receive. As there is no ambiguity in the language expressing the regulation's requirements, purpose and intent, the Board's enforcement action should be sustained. *See*, In re Election Law Enforcement Commission Advisory Opinion No 01-2008, 201 N.J. 254, 262-263 (2010) and Lawrence v. City of Philadelphia, 527 F. 3d 299, 316-317 (3d Cir. 2008).

Altice's reliance on I.L. v. N. J. Dep't of Hum. Servs., v. Div. of Med. Assistance & Health Servs., 389 N.J. Super. 354, 364-65 (App. Div. 2006) is misplaced. In I.L., the court reversed and remanded the matter finding that the agency's reasons for the denial of eligibility and Medicaid benefits in that case was clearly in conflict with and contrary to the legislative intent of the New Jersey Medical Assistance and

Health Services Act. Similarly, in Schulmann Realty Grp. v. Hazlet Twp. Rent Control Bd., 290 N.J. Super. 176, (App. Div. 1996), also cited by Altice, the court reversed a rent control board's ruling as inconsistent with an underlying ordinance Id., 184-185.

No such showing has been made here, where the language and intent of the regulation are consistent with the Board's actions. The intent and purpose of N.J.A.C. 14:18-3.8 is clearly consumer protection, ensuring that customers are not billed for services they do not receive. The regulation's directive to prorate is specifically noted in three of its four subsections, clearly demonstrating the expectation that initial and final customer bills will be prorated. No cable provider has ever been relieved of this regulatory requirement. The record herein demonstrates that the Board's interpretation of N.J.A.C. 14:18-3.8 is consistent with the regulatory language and that the Board has applied the regulation consistently to Altice's predecessor Cablevision and other cable/video service providers, such as Verizon.(RRCa2, RRCa55)

It is well-established that courts will ". . . defer to a state agency's interpretation of statutes and implementing regulations that fall within a legislative scheme the agency is charged with construing and enforcing." In re Election Law Enforcement Commission Advisory Opinion No 01-2008, 201 N.J.

254, 260, 262-263 (2010). Moreover, acceptance of Altice's interpretation of the regulation would eviscerate the intent and purpose of the regulation and would condone the continuation of a deceptive and fraudulent business practice. The record confirms that the Board's decision and Order is consistent with the intent and purpose of the regulation and should be sustained.

B. The Board's decision is consistent with the Relief Order (Ab11-13), (RRCa3-4), (RRCa55), (RRCa55, fn2)

Altice also argues that the Board's 2011 Relief Order exempted it from the proration requirement and that the Board's interpretation of its Relief Order is unreasonable and should be voided.(Ab11-13). The record below demonstrates that the Board's Relief Order never exempted Cablevision (now Altice) from the obligation to prorate. The Relief Order did grant Cablevision some regulatory relief, but it also noted: "the relief sought was not intended to be beyond the scope of that granted to Verizon."(RRCa55, RRCa3-4). As noted above, the Verizon Order did not end the proration requirement and Verizon continues to prorate bills consistent with the regulation.

The Rule Relief Petition solely addressed the need for flexibility in customer billing arrangements. The Board's Relief Order clearly states that Cablevision's Rule Relief Petition did

not discuss or specifically request relief from the requirement to prorate. (RRCa55).

Additionally, in addressing the Relief Order the Board noted:

> As part of the review process, and pursuant to N.J.A.C. 14:18-16.7(a)(1}, Staff of the Board of Public Utilities ("Board Staff" or "Staff") requested that Cablevision provide a sample bill for approval by the Office of Cable Television ("OCTV"). In response, Cablevision in fact submitted a sample bill which demonstrated proper billing practices and provided an example of how it would continue to prorate customer bills. Id., supra.

After reviewing the sample bill provided by Cablevision, the Board concluded in the Relief Order that "the sample bill [provided by Cablevision] demonstrates that the company is billing in a proper manner and shows how Cablevision will prorate its bills pursuant to the requirements of this section." (RRCa6). In the Order appealed here, the Board noted that this has consistently been its application of the regulation in other similar petitions filed before it; citing to the Verizon Order that contains language similar to the Relief Order. Specifically, the Board noted that the Verizon Order indicates that Verizon's "sample bill demonstrates how the company will prorate its bills pursuant to the requirements of [N.J.A.C. 14:18-3.8] ," (RRCa55, at fn2). The Verizon Order also states that "As of the date of this Cease and Desist Order, Verizon

continues to comply with the proration requirements of N.J.A.C. 14:18-3.8." (RRCa55, Id.).

Thus, there is substantial evidence in the record that the Board never exempted Cablevision (now Altice) from the obligation to prorate initial and final customer bills. This is supported by the fact that Cablevision upon procuring the Relief Order from the Board in 2011 never ceased to prorate in its billing method. In 2015, when the merger took place, that was still the case. This is the most compelling indication that Cablevision understood and accepted that the Relief Order did not waive the proration required by the regulation, contrary to the argument now raised by its successor Altice.

The Board's Merger Order clearly states that Altice is bound by the Board's prior Orders, including the 2011 Relief Order. Therefore, Altice clearly violated not only the Board's Relief Order but also the Merger Order once it ceased prorating monthly bills. The Merger Order did not change the terms of the Relief Order or impose additional obligations with regards to N.J.A.C. 14:18-3.8. Altice was still subject to monthly prorated billing under the Merger Order which Altice failed to abide by in breach of the Merger Order. (RRCa25). Thus, the Board's decision is consistent with the plain language, intent and purpose of and the Board's 2011 Relief Order and Merger Order and it should be sustained.

C. The Board provided appropriate process. (Ab17), (RRCa51-52)

Alternatively, Altice argues the Board's Cease and Desist Order modified the Board's Relief Order, making this a "contested matter" that required a hearing under N.J.A.C. 14:1-8.4(b) and N.J.S.A. 48:2-40(e). (Ab17) Altice cites to a number of cases that are fact sensitive and inapplicable to the facts herein. Moreover, the Board's Order to Show Cause provided the appropriate process: notice, opportunity to present evidence in defense of the charge against it and opportunity to reply to comments filed by interested parties. The Board did not deny Altice the right to provide evidence and argument in its defense. In fact, the Order to Show Cause provided Altice with notice, and invited Altice to comment and present evidence, which Altice fully availed itself of in this matter. Moreover, the salient fact underlying the Board's action – that Altice had ceased prorating bills – is not disputed. It is thus unclear what further process would be required. As our Supreme Court has stated, "While the manner of conducting a hearing may vary, as long as principles of basic fairness are observed and adequate procedural safeguards are afforded the requirements of administrative due process have been met." Kelly v. Sterr, 62 N.J. 105, 107 (1973). There is ample evidence in the record to support that the process provided by the Board to Altice was

fair and provided adequate due process. The Board Order did not modify the Relief Order or modify the requirements under N.J.A.C. 14:18-3.8. The Board's Relief Order did not relieve Cablevision from the requirement to prorate initial and final bills. Therefore, the Board Order was the result of an enforcement action pursuant to the Board's 2018 Order to Show Cause. (RRCa51-52). Courts have held that informal procedures may satisfy due process requirements as long as the parties had adequate notice, a chance to know opposing evidence, and to present evidence and argument in response. In Re Public Svc. Elec. and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, 330 N.J. Super. 65,120(App.Div.2000). The Board provided the appropriate due process in this case and its Order should be sustained.

D. The Board has the authority to impose penalties and order customer refunds.(Ab17-18), (Ab22), (RRCa51)

Pursuant to its remedial authority, the Board may impose penalties as permitted under N.J.S.A. 48:5A-51(b). Therefore, Altice's reliance on In Re Suspension Matter of Wolfe, 160 N.J. Super. 114, 119 (App. Div. 1978) is also misplaced. (Ab17-18). In Wolfe, the court found "the Board exceeded its authority because the statute did not include any broad inherent power to impose penalties. Likewise, in 225 Union St., v. Dep't of Cmty. Affairs, No. A-5488-04T1, 2007 N.J. Super. Unpub. LEXIS 2044,

*16-17 / 2007 WL 1542035 (App. Div., May 30, 2007) the court vacated and remanded the penalty order because the agency had not provided specific factual findings to determine if the evidence supported the penalty order. Here, Altice admitted that it stopped prorating customer bills since October 2016. Thus, no additional fact-finding was necessary. The Board Order should be sustained.

Likewise, Altice's contention that the Board failed to act with reasonable due diligence and exceeded the statutory timeframe for assessing penalties is equally misleading.(Ab18) The record shows that the Board timely advised Altice that it was in violation of N.J.A.C. 14:18-3.8 after receiving customer inquiries and complaints in 2017. Delays in the administrative process were in part due to Altice, which did not respond to the Board's April 2017 notice until six months later in September 2017. (RRCa51). Similarly, Altice's reliance on In re Island Bay, LLC, No. A-3163- 05T3, 2006 WL 1687222, (App. Div. June 21, 2006) is clearly misplaced. (Ab22). In Island Bay the delay between DEP's approval of the construction of sewer connection and its rescission more than two-and-a-half years later was found to be significant because the company had already made substantial expenditures and work in reliance of the project's approval and DEP's rescission two and a half years later was found to be arbitrary and capricious. Id., at *20. Such is not

the case here, as the Board immediately notified Altice after receiving customer complaints that it was in violation of N.J.A.C. 14:18-3.8. (RRCa51). New Jersey law authorizes the Board to impose penalties pursuant to N.J.S.A. 48:5A-51 for violations of its regulations, and N.J.A.C. 14:18-16.8(f), allows the Board to assess violations as far back as three years from the date of the Board's written notice. Therefore, the Board was timely in assessing penalties.

The Board's interpretation and application of the plain language of its own regulation as it applies to Altice in the Order is reasonable and no further interpretative process is required. State v. Badr, 415 N.J. Super. 455, 466 (App. Div. 2010). Therefore, the Board Order should be sustained.

II. THE BOARD'S ORDER IS NOT RATE REGULATION AND IS NOT PREEMPTED. (Ab26),(Ab28),(RRCa55-56), (RRCa98-99)

The Board Order enforces a consumer protection regulation, N.J.A.C. 14:18-3.8. It is not rate regulation. The record supports a finding that the Board has uniformly required all cable providers to adhere to the requirement to prorate initial and final bills to ensure customers only pay for services they actually receive. (RRCa55-56). As a result, the Order and the regulation are not preempted by federal law. Altice's claim to the contrary is not supported by the record or by case law. Its preemption argument should therefore be rejected.

A. The Board's Order is not rate regulation. (Ab26), (Ab28-29), (RRCa98-99)

Altice argues that N.J.A.C. 14:18-3.8 regulates rates because it forces Altice to sell its service by the day. (Ab26). Altice's interpretation and application of the regulation is incorrect in several respects. The regulation does not itself establish, set or control the tariff for Altice service. The rate is determined exclusively by Altice and N.J.A.C. 14:18-3.8 does not interfere or change the rate that Altice has determined is appropriate for its service. N.J.A.C. 14:18-3.8 does not set or adjust the amount, degree, or rate of the service. Because a requirement to prorate is not controlling the creation of or the components of the rate itself, it cannot be defined as rate regulation

The cases cited by Altice do not support Altice's claim in this regard. American Telephone and Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214, 223 (1998) addresses the filed-rate doctrine which bars claims against a utility that conflict with its tariffs or claims that would vary or enlarge a party's rights as defined by the tariff. Clearly, proration billing does not affect, modify or change Altice's tariff rates nor does it run counter to the filed-rate doctrine. Likewise, although the holding in Time Warner Entm't Co., L.P. v. F.C.C., 56 F.3d 151, 190 (D.C. Cir. 1995) confirms that cable companies

that are subject to effective competition may not be rate regulated; the D.C. Court noted that the Federal Communications Commission has interpreted the prohibition of "negative option billing," a practice whereby a cable service provider charges a customer for service, equipment or upgrades not requested, as a consumer protection provision rather than rate regulation. Id. at 194(citing to Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Third Order on Reconsideration, 9 F.C.C.R. 4316, 4360-4361 (1994)) The Court further noted that "because the prohibition against negative option billing is directed entirely at the terms of purchase and sale other than rates, the Commission's interpretation is reasonable," and "that Congress did not preempt state negative option billing laws either expressly or through occupation of the field." Id. It is against public policy to charge customers for service they will not receive. See also, 47 C.F.R. §76.309, requiring refunds and credits upon termination of service, which the Board has the authority to enforce under 47 C.F.R. § 76.309 (c)(3)(i) and (ii) . The legal rationale that defines regulations prohibiting negative option billing as consumer protection regulation and not rate regulation is equally applicable to the requirement to prorate initial and final bills under N.J.A.C. 14:18-3.8. In addition, N.J.A.C. 14:18-3.8 is found under a section titled

"Customer Rights" and is solely intended to protect customers against predatory and deceptive business practices.

Altice cites to the New Jersey federal district court decision in Altice's injunction application, Altice USA, Inc. v. N.J. Bd. of Pub. Util., Case No. 3:19-cv-21371, 2020 WL 359398, at *8, *10 (D.N.J. Jan. 22, 2020).(Ab28). However, this matter did not definitively decide the underlying preemption question and the temporary injunctive relief afforded to Altice therein is currently under review by the Third Circuit. (Ab28).

As discussed above, prorated billing is not rate regulation. Cello Partnership v. Hatch, 431 F.3d 1077, (8th Cir. 2005) cited by Altice in support of its argument, is inapposite. In Cello, the Eighth Circuit analyzed a Minnesota statute prohibiting wireless providers from making any changes in the terms and conditions of their contracts with subscribers "that could result in increased rates or an extended contract term, unless they first obtain affirmative written or oral consent from the subscriber." Id. at 1079. The Eighth Circuit concluded this statute constituted rate regulation and was therefore preempted by 47 United States Code section 332(c)(3)(A) because "the requirement ... that consumers consent to any substantive change prevents providers from raising rates for a period of time, and thus fixes the rates." Cello, supra, 431 F.3d at 1082-83. In this case, N.J.A.C. 14:18-3.8 affects the method of

billing only – ensuring that customers only get billed for actual services received and does not affect the actual rate set by Altice. The requirement to prorate does not affect the service rate set by Altice, Altice remains at liberty to modify the rate when it chooses to do so.

Lastly, Altice cites to the holding in Windstream Nebraska, Inc. v. Nebraska Public Service Comm'n, Case No. CI 10-2399, (June 9, 2011) involving a voice service provider. (Ab29) The court in Windstream found that a municipal ordinance requiring prorated billing violated a specific Nebraska statute. The Court ruled that the Nebraska Commission did not have authority under its statute or the Nebraska Constitution to enact consumer protection regulation and therefore the regulation constituted a form of rate regulation in violation of Nebraska's statutory scheme. Windstream, supra, at 9-10.(RRCa98-99). New Jersey has a different regulatory scheme. There is nothing in the record that suggests that the regulation here is an over-extension of the Board's statutory authority to protect customers from predatory and unfair billing practices.

There are several other reasons why Windstream is not dispositive of the issues here. Windstream involved regulations governing a voice service provider, regulations that are not applicable to cable service providers. As discussed above, the federal Cable Act specifically allows states to continue to

regulate consumer protection and customer service. On the question of unfair or deceptive business practices the Court in Windstream, noted:

> a customer who begins service with Windstream in the middle of a billing cycle is not charged for the service until the start of the next billing cycle, and Windstream essentially provides the beginning interim service at no charge to the customer. Windstream, supra, at 10. (RRCa99).

In contrast, Altice customers are charged for a full month of service even when starting service mid-month. As noted by the Board in the Order below,

> on July 23, 2017, a customer complained that while service was terminated and equipment returned to Cablevision on July 18, 2018, Cablevision refused to prorate the customer's bill because they failed to cancel service prior to the beginning of the billing cycle on July 14, 2018, and charged them for an entire month of service, although they only received service for four days. More recently, on September 18, 2019, a complaint was received from a customer who cancelled service on September 6, 2019 and when they inquired with the Company regarding their final bill, was informed that they would be charged for the entire month although they had only received service for six days. (RRCa56).

these legal and factual differences make the Windstream holding inapplicable to the facts herein, as here Altice customers are charged for services they will never receive.[4]

[4] Lastly, it should be underscored that the decision in Windstream is unpublished and was issued by a district court in Nebraska, which is a trial court of general jurisdiction. State of Nebraska Judicial Branch, supremecourt.nebraska.gov

The Board Order enforces a consumer protection measure N.J.A.C. 14:18-3.8 that protects customers against deceptive and predatory business practices by cable providers. As previously addressed, the Board has authority to protect customers against harm from practices that are against public policy under both federal and state regulations. The enforcement of such consumer protection regulations does not compromise or remove Altice's ability to set the rates for its services. Altice remains at liberty to charge its customers the rate it believes its service demands. The Board Order only ensures that Altice will not charge its customers for service that customers will never receive. Therefore, because Altice continues to have full control over the rates it will charge its customers, the Board Order is not rate regulation and should be sustained.

B. Billing practices under N.J.A.C. 14:18-3.8 are not preempted under the Federal Cable Act and are consistent with federal law.

The federal Cable Act ("Act") affirms a State's right to enact "any consumer protection law, to the extent not specifically preempted by this subchapter." 47 U.S.C. § 552(d)(1) (emphasis added). Thus, a State has authority under the Act to establish and enforce customer service requirements and performance requirements on cable companies. The Act specifically recognizes under subsection (d) that:

> nothing in this subchapter shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this subchapter" . . . or "to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission under subsection (b)" . . . or "prevent the establishment or enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section." 47 U.S.C. § 552(d)(1) and (2).

The manner and methods of billing prescribed under N.J.A.C. 14:18-3.8 are customer service standards and consumer protection requirements that are not specifically preempted under the Cable Act. They are customer service and consumer protection standards that a state commission is permitted to enforce under the Cable Act. . . 47 U.S.C. § 552(d)1 and (2).

The Supreme Court has cautioned, that "striking down state laws on preemption grounds is generally disfavored" . . . "Consideration of issues starts with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." Storer Cable Commc'ns v. City of Montgomery, 806 F. Supp. 1518, 1531-32(M.D. Ala. 1992) citing to Supreme Court decisions in Cipollone v. Liggett Group, 505 U.S. 504 at 516-517,(1992); 112 S. Ct. at 2617 (quoting Rice v. Santa

Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947)) (alterations in original). "Therefore, courts should proceed on "the conviction that the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted." Merrill Lynch, Pierce Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127, 94 S. Ct. 383, 389-90, 38 L. Ed. 2d 348 (1973)." Storer, 806 F. Supp. at 1532. The consumer protections delineated under the billing methods and requirements addressed under N.J.A.C. 14:18-3.8 are well within the customer service requirements contemplated by and permitted under the federal regulation. 47 U.S.C. § 552(d). There is no federal preemption of N.J.A.C. 14:18-3.8.

The cases cited by Altice are inapplicable to the facts here. For example, in Arizona v. United States, 567 U.S. 387 (2012), the Court held that three of four provisions in the state law conflicted with and were preempted by the federal alien registration requirements and federal enforcement provisions already in place. The provisions were found to interfere with the careful balance Congress struck with federal laws on the issues of unauthorized employment and usurped the federal government's authority to use discretion in the removal process, creating an obstacle to carrying out the purposes and objectives of federal immigration laws. Id., 413-16. The Cable

Act, however, does not manifest federal field exemption of the consumer protections afforded under N.J.A.C. 14:18-3.8. The Act contemplates continued State involvement in enforcing consumer protection and customer service requirements.

Likewise, reliance on Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936 (2016) is misplaced. (Ab23). There, the federal Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 et seq., preemption clause indicated clear Congressional intent to establish the regulation of employee retirement plans exclusively, finding that 50 different state plans would undermine the congressional goal. Id., at 944. These facts are distinguishable from the case herein. There is no federal intent to preempt the State's police powers in the field of consumer protection. Therefore, the Board may enforce the provisions under N.J.A.C. 14:18-3.8.

Similarly, the facts in City of New York v. FCC, 486 U.S. 57 (1988) are not applicable. In City of New York the Court found that the FCC had the statutory authority to enforce the Cable Communications Policy Act of 1984 §624(e), 47 U.S.C. § 544(e) which preempted state or local authority from imposing more stringent "technical" standards than those required under the Act. Id., at 63-64. The New Jersey regulation does not involve the setting of technical standards that are preempted by federal regulation. In the area of consumer protection the

federal Cable Act is clear and does not prohibit any State from enacting or enforcing any consumer protection law or customer service requirements that exceed the standards set by the Commission or that address matters not addressed by the standards set by the Commission. See, 47 U.S.C. § 552(d) The state regulation, N.J.A.C. 14:18-3.8 is consumer protection regulation, which is not preempted by or in conflict with federal regulations and is therefore enforceable.

Thus, the cases cited by Altice all involve enforcement of state action where there was clear Congressional intent to preempt state involvement. As discussed above, there is no such Congressional intent to preempt state regulation of consumer protection and customer service regulation in the Cable Act. To the contrary, the Act recognizes concurrent jurisdiction for the states to enact regulations that impose customer service requirements that exceed the standards set by the federal regulation or that addresses matters not addressed by the standards set under the federal Cable Act. See, 47 U.S.C. §552(c)1 §552(c)2, and §552(d)(1)and(d)2. The consumer protection and customer service regulation requiring that cable providers prorate initial and final customer bills under N.J.A.C. 14:18-3.8 is not preempted under federal law.

Nor is Board Order below preempted because it conflicts with Federal Law. Conflict preemption only occurs when a state

law conflicts with a valid federal law so that it is impossible to comply with both or where a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congressional intent. The facts herein negate the existence of any such conflict. As addressed above, the federal Cable Act specifically recognizes that States retain jurisdiction and concurrent authority on consumer protection regulation and customer service. In this area, N.J.A.C. 14:18-3.8 does not conflict with any federal regulation. Moreover, contrary to frustrating congressional intent, it furthers consumer protections envisioned by Congress. Likewise, the cases cited by Altice to infer there is a conflict with federal law are inapposite on the facts and the law. No such conflicts exist. The Board Order should be sustained.

CONCLUSION

For the foregoing reasons, the New Jersey Division of Rate Counsel respectfully requests that this Court affirm the New Jersey Board of Public Utilities Order in its entirety.

Respectfully submitted,

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Dated: October 22, 2020.

Agenda Date: 9/21/11
Agenda Item: 3A

STATE OF NEW JERSEY

Board of Public Utilities
44 South Clinton Avenue, 9th Floor
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Trenton, NJ 08625-0350
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CABLE TELEVISION

IN THE MATTER OF THE PETITION OF CABLEVISION SYSTEMS CORPORATION FOR RELIEF PURSUANT TO N.J.A.C. 14:18-16.7	)))	ORDER DOCKET NO. CO11050279

Parties of Record:

Sidney A. Sayovitz, Esq., Schenck, Price, Smith & King, for Cablevision Systems Corporation
Stephanie A. Brand, Director, New Jersey Division of Rate Counsel

BY THE BOARD:

On May 5, 2011, Cablevision Systems Corporation ("Cablevision") filed a petition with the Board of Public Utilities ("Board") requesting relief from certain rules as permitted by N.J.A.C. 14:18-16.7. N.J.A.C. 14:18-16.7 provides that, "[u]pon a finding by the Board that the Federal Communications Commission has decertified rate regulation for any cable television system, pursuant to 47 C.F.R. § 76.905, on a final finding of effective competition, after April 17, 2000," a cable television company may seek relief from nine separate provisions of N.J.A.C. 14:18, as discussed more fully below. 47 C.F.R. § 76.905 sets forth the criteria for determining whether a cable system is subject to effective competition.[1]

[1] 47 C.F.R. § 76.905(b) provides, in relevant part, that:

A cable system is subject to effective competition when any one of the following conditions is met:

(1) Fewer than 30 percent of the households in its franchise area subscribe to the cable service of a cable system.

(2) The franchise area is:

(i) Served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and

(ii) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area.

(3) A multichannel video programming distributor, operated by the franchising authority for that franchise area, offers video programming to at least 50 percent of the households in the franchise area.

(4) A local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

The Federal Communications Commission ("FCC") issued orders[2] finding that Cablevision is subject to effective competition in 162 community units, comprising 161 of its franchised municipalities.[3] A list of municipalities subject to effective competition is attached to this Order as Appendix "I." Cablevision provides cable television service to 177 municipalities either by way of municipal consent-based franchises or by one of seven converted system-wide franchises, pursuant to N.J.S.A. 48:5A-25.1.

In its petition, Cablevision requests the same relief, pursuant to N.J.A.C. 14:18-16.7, as that previously granted to Verizon New Jersey, Inc. ("Verizon").[4] Cablevision notes that, in addition to being granted effective competition in the listed municipalities, similar treatment should rightfully be accorded to the company as a direct competitor with Verizon in 87 percent of its service area. Granting the petition, Cablevision argues, levels the playing field between it and its largest, wireline cable television competitor. In addition, Cablevision notes, granting relief to Cablevision does not foreclose revisiting regulation if it becomes necessary in the future, and the Board can require Cablevision to provide information regarding any area where relief has been granted under N.J.A.C. 14:18-16.7(c).

On May 17, 2011, Board staff requested additional information from Cablevision regarding its petition. On June 20, 2011, Cablevision responded to Board staff. On May 31, 2011, the New Jersey Division of Rate Counsel ("Rate Counsel") sent discovery requests to Cablevision regarding its petition. On June 27, 2011, Cablevision responded to Rate Counsel's requests.

RATE COUNSEL'S COMMENTS

On June 3, 2011, Rate Counsel filed comments objecting to Cablevision's petition for relief of the foregoing rules. Most notably, Rate Counsel argues that since it has filed Applications for Review asking the FCC to set aside the Media Bureau's orders granting effective competition to Cablevision, a "final" finding of effective competition has not been issued by the FCC, and therefore, Cablevision's petition should be dismissed as premature. Rate Counsel contends that a Media Bureau decision is final only if no application for review is filed within 30 days.[5] Rate Counsel notes that in 2004, Rate Counsel and the Board filed a joint application for review. Rate Counsel Letter at 1-2.

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[2] Cablevision of Paterson d/b/a Cablevision of Allamuchy, Petition for Determination of Effective Competition in Allamuchy, 17 FCC Rcd 17239 (2002); Cablevision of Raritan Valley, Inc., Cablevision of New Jersey, Cablevision of Monmouth, Petitions for Determination of Effective Competition, 19 FCC Rcd 6966 (2004); Cablevision of Rockland/Ramapo, Inc. Montvale New Jersey, CSC TKR, LLC d/b/a Cablevision of Elizabeth, Elizabeth New Jersey and Cablevision of Warwick, LLC, West Milford New Jersey, Petitions for Determination of Effective Competition, 22 FCC Rcd 11487 (2007); Subsidiaries of Cablevision Systems Corporation, Petitions for Determination of Effective Competition in 103 Communities in New Jersey, 23 FCC Rcd 14141 (2008); Cablevision of Oakland, Inc. CSC TKR, Inc., Petitions for Determination of Effective Competition in Four Communities in New Jersey, 24 FCC Rcd 1801 (2009); and CSC TKR, Inc. Petition for Determination of Effective Competition in Highland Park Borough, New Jersey, 25 FCC Rcd 4948 (2010).

[3] Cablevision holds two municipal consent-based franchises for the Township of Montville: most of the municipality is served by Cablevision of Oakland, LLC; the remainder is served by CSC TKR, LLC d/b/a Cablevision of Morris.

[4] *Order*, I/M/O Verizon New Jersey, Inc. for Relief of Compliance with Certain Provisions of N.J.A.C. 14:18 Pursuant to N.J.A.C. 14:18-16.7, Docket No. CO10040249 (issued March 30, 2011).

[5] 47 C.F.R. § 1.115(k).

Rate Counsel further requests that, if the Board determines not to dismiss the petition as premature, the matter should be treated as a contested case, with appropriate hearings. A hearing is necessary, Rate Counsel contends, to determine whether the relief sought by Cablevision is in the public interest and whether Cablevision has shown "good cause" for the waivers sought. Rate Counsel notes two decisions, In Re Bell Atlantic New Jersey, Inc., 342 N.J. Super. 439 (App. Div. 2001) and Petition of MCI Telecommunications, 263 N.J. Super. 313 (App. Div. 1993), where the courts reversed the Board's decisions and directed hearings to be held. Rate Counsel Letter at 3.

On July 7, 2011, Cablevision responded to Rate Counsel's June 3, 2011 comments, noting that pursuant to both federal statutes and regulations, the FCC's Media Bureau findings of effective competition are final findings that are effective and binding. Cablevision Letter at 1. Cablevision stated in its petition with regard to the effective competition orders issued by the Media Bureau that, pursuant to 47 U.S.C. § 155(c)(3), any "order, decision, report, or action made or taken pursuant to any such delegation...shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission." Cablevision notes that "in the absence of Commission action to the contrary, the Media Bureau decisions have the force of law."[6] The FCC's rules, Cablevision notes, also make it clear that the Chief of the Media Bureau, when acting pursuant to its delegated authority, has "all the jurisdiction, powers, and authority conferred by law upon the Commission"; that actions of the Bureau, when taken pursuant to the delegated authority, "have the same force and effect... as actions of the Commission";[7] and that "[n]on-hearing actions taken pursuant to delegated authority, unless otherwise ordered...are effective upon release." Cablevision Letter at 1-2.

Further, Cablevision contends that Rate Counsel's Applications for Review do not abrogate the finality of the Media Bureau's effective competition orders. The FCC has made it clear, Cablevision argues, that whether or not a Bureau order is final for purposes of judicial appeal has no bearing on whether or not the order is final and effective for all other purposes.[8] Cablevision also notes that Rate Counsel's motion for a stay of an effective competition order was denied by the FCC, which found that Rate Counsel had "failed to establish that it is likely to prevail on the merits of its pending Application for Review of our decision" and further that the motion did not give the FCC a "reason to reconsider our earlier rulings or revisit them in detail here."[9] Cablevision Letter at 2-3.

In response to Rate Counsel's request for a hearing, Cablevision contends it has satisfied all of the Board's factual and pleading requirements with respect to its petition. Further, Cablevision argues that both cases referenced in Rate Counsel's argument as to why this matter should be considered a contested case addressed proper procedural mechanisms that the Board should follow in the absence of specific regulatory requirements. Cablevision contends that in the instant matter, the Board has an explicit standard and procedure for relief from certain regulatory requirements, the demonstration of a competitive market, and these cases are therefore inapposite. Cablevision Letter at 3.

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[6] *Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008).

[7] 47 C.F.R. § 0.203(a), 47 U.S.C. § 155(c)(3).

[8] *In Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications, Act, et al., Memorandum Opinion and Order*, 17 FCC Rcd 19654 (2002).

[9] *Subsidiaries of Cablevision Systems Corporation, Petitions for Determination of Effective Competition in 103 Communities in New Jersey*, Memorandum Opinion and Order, 23 FCC Rcd 17012 (2008).

On August 10, 2011, in response to notification from the Board's Office of Cable Television (OCTV) that this matter would be considered at the Board's August 18, 2011 agenda meeting, Rate Counsel filed a letter requesting that the Board defer its ruling on Cablevision's rule-relief request to its September 2011 agenda meeting so that it can "file comments on the merits on or before September 1, 2011." Rate Counsel claims that it has not filed comments on the merits of the petition "because [it has] not received responses to [its] discovery requests." Rate Counsel indicated that following its receipt of the Cablevision's responses on July 27, 2011, it requested additional information on July 1, 2011, which was received on August 5, 2011. In addition, Cablevision met with Rate Counsel on August 9, 2011 to confer on the discovery responses, and agreed to provide additional information in response to Rate Counsel's requests. Rate Counsel seeks to file comments on the merits of the petition following receipt of the additional information.

On August 12, 2011, Cablevision filed a response arguing that Rate Counsel's request for a deferral should be rejected. Cablevision states that it has provided all relevant information sought by Rate Counsel to date and no relevant discovery answers are pending. Cablevision argues that Rate Counsel should have filed a motion to compel if it believed that Cablevision had not adequately responded to discovery requests. Cablevision maintains that granting Rate Counsel's request at this late date "would prejudice Cablevision and unnecessarily and unreasonably delay the benefits of deregulation to consumers" and "would also be inconsistent with Governor Christie's deregulatory policies."

On August 15, 2011, Rate Counsel was informed via e-mail from the Attorney General's office, that it would be allowed an opportunity to file a reply to Cablevision's August 12, 2011 letter by close of business on August 16, 2011. Rate Counsel filed its response via email by letter dated August 15, 2011, reiterating its request for deferral of the matter until the Board's September agenda meeting, since Cablevision had not shown granting the deferral would be prejudicial to its interests or would have detrimental impact on its business.

Rate Counsel subsequently filed an additional letter dated August 15, 2011, indicating that since it had not been informed that its deferral request would be granted, it requested that the Board consider this letter addressing the merits of Cablevision's petition at its August 18, 2011 agenda meeting. In its letter, Rate Counsel requests that if the Board declines to dismiss the petition as requested in its June 3, 2011 letter, that it should deny the waiver requests because Cablevision has failed to sustain its burden of proof to show that the waivers are warranted, in the public interest, and will have no adverse effect on the provisions of safe, proper and adequate service. By letter dated August 17, 2011, Cablevision filed its response to Rate Counsel's August 15, 2011 supplemental comments, arguing that Rate Counsel had provided no compelling reasons for the Board to delay or deny Cablevision's petition for relief. Cablevision also noted that it "is seeking the same relief that the Board has granted to its largest competitor Verizon."

At its August 18, 2011 Agenda Meeting, the matter was deferred by the Board to be heard at its next scheduled Agenda Meeting on September 21, 2011.

DISCUSSION

For the following reasons, the Board believes that Cablevision's petition and responses to requests for information satisfy the requirements for granting of relief pursuant to N.J.A.C. 14:18-16.7, and Rate Counsel's various requests for dismissal and/or denial of the petition are without merit and should be denied.

Rate Counsel's objection to Cablevision's filing as "premature" based on pending Applications for Review is not supported by FCC precedent. As noted in Cablevision's comments, the FCC has consistently recognized the effectiveness of the Media Bureau's Orders granting effective competition, under its delegated authority; and the effectiveness of such orders has not been diminished by challenges through pending Applications for Review. Nor are the FCC rules stating the requirements for judicial review of a Bureau decision dispositive on what constitutes a "final" order for purposes of review of a petition filed pursuant to N.J.A.C. 14:18-16.7.

The Board notes that the earliest FCC Order granting effective competition to Cablevision was issued in 2002, and the FCC has not acted on Rate Counsel's Applications for Review in any of the above referenced effective competition deregulation orders. Furthermore, since the FCC decertified the Board's rate regulation authority for the municipalities listed in Appendix "I", Cablevision has not included these municipalities in any of its regulated rate filings; however, Rate Counsel has never challenged the finality of these Media Bureau Orders as it relates to Cablevision's relief from rate regulation. Additionally, the Board concurs with the FCC's finding that it is unlikely that any effective competition ruling would be reversed based on Rate Counsel's Applications for Review, especially in light of Verizon's competitive entry in New Jersey's cable television market.

Further, the Board agrees with Cablevision's contentions regarding the standard of review for the filing and the lack of a necessity for hearings. N.J.A.C. 14:18-16.7 is specific as to the standard of review for rule relief, which deals with competition, rather than inability to perform or undue hardship as required for a waiver. The cases referenced by Rate Counsel wherein hearings were required to be held upon reversal of decisions of the Board addressed statutory hearing requirements, and are distinguishable from the instant matter, where there is no statutory requirement for a hearing. As noted by Cablevision, the Board has identified specific provisions of its cable television rules under N.J.A.C. 14:18-16.7, for which a cable television company may seek relief, and has explicitly determined that upon a final finding of effective competition, the Board could relieve a cable television company of these provisions since such relief would not harm customers. In this instance, no statutory right or constitutional mandate exists under which Rate Counsel is required to be granted a hearing, and therefore, Rate Counsel's request to treat the matter as a contested case is DENIED.

Moreover, "[i]t is only when the proposed administrative action is based on disputed adjudicative facts that an evidentiary hearing is mandated." In re Solid Waste Util. Customer Lists, 106 N.J. 508, 517 (1987). See also State, Div. of Motor Vehicles v. Pepe, 379 N.J. Super. 411, 419 (App. Div. 2005) ("No disputed issue of material facts existed. Hence, no evidentiary hearing was required."). Since the Board has determined that the FCC has made a finding of effective competition regarding Cablevision and Rate Counsel is not entitled to a contested case "to determine whether the relief sought is in the public interest and whether Cablevision has shown 'good cause' for the waivers sought," the Board denies Rate Counsel's request for a contested-case hearing.

Therefore, because effective competition relief has been granted by the FCC, it is within the Board's discretion to grant the requested relief, if and when the Board is satisfied that consumers are adequately protected. The Board agrees that Cablevision is subject to effective competition in the 161 municipalities listed in Appendix "I". The remaining 16 municipalities will remain subject to regulation by the Board, and the relief discussed herein is not applicable for those municipalities at this time.[10]

RULE RELIEF DISCUSSION

N.J.A.C. 14:18-3.8 "Method of billing." This section allows cable television companies to bill for service in a number of options (monthly, quarterly, semi-annually or annually or shorter intervals in unusual credit situations) and allows for advanced billing. The rule also requires cable television companies to prorate service in the event of disconnection. Relief can be sought provided that the cable television company provides a sample bill to be utilized in lieu of compliance with this section for approval by the Office of Cable Television (OCTV).

Cablevision requests relief from this rule and submitted several sample bills for review by the OCTV. Cablevision asserts that competition will ensure that its billing is done in a customer-oriented method; that the rule limits Cablevision's flexibility to adapt its billing to meet its customers' needs; and that its sample bill demonstrates that the company is billing in a proper manner and shows how Cablevision will prorate its bills pursuant to the requirements of this section. Additionally, Cablevision notes, a customer will switch to another provider, such as Verizon, if Cablevision does not meet its customers' billing needs.

Rate Counsel contends that the waiver should be denied because Cablevision has provided no empirical evidence to support its claims as to why it should be granted relief. Rate Counsel argues Cablevision did not provide any evidence to support its claim that it would lose customers to another provider, absent the waiver. Rate Counsel also noted that Cablevision's discovery responses did not support its claim that the waiver is needed to construct tailored billing arrangements and payment plans. Rate Counsel recommends that if the waiver is granted, the Board should require Cablevision to include FCC contact information for consumer inquiries related to Internet and VoIP telephone service and complaints; and that relief under this rule does not relieve Cablevision from bill itemization required under N.J.A.C. 14:18-3.7. Cablevision responds that Rate Counsel's argument that Cablevision's waiver should be denied because Cablevision does not currently have plans to change its billing format misses the point; and that the purpose of the waiver is to provide flexibility should Cablevision wish to modify its billing procedures in the future. Since nothing in the Board's orders implementing N.J.A.C. 14:18-16.7 requires the operator seeking relief to demonstrate specific future changes, Cablevision argues that it has met the burden that the subject rule is not necessary in a competitive environment.

[10] The 16 municipalities in question are: Bedminster Township (The Hills); Berkeley Township; Bloomingdale Borough; Boonton Township; Butler Borough; Hopatcong Borough; Lincoln Park Borough; Metuchen Borough; Mount Arlington Borough; Netcong Borough; Pequannock Township; Pompton Lakes Borough; Ringwood Borough; Tenafly Borough; Toms River Township and Wanaque Borough. Cablevision's June 27, 2011 response to Rate Counsel also listed Picatinny Arsenal; however, this is federal property and not subject to Board regulation.

As noted previously, the standard for rule relief deals with competition, rather than inability to perform or undue hardship. Pursuant to the Board's rules, upon a final determination of effective competition by the FCC, the Board may relieve a cable television company of compliance with certain provisions, such as N.J.A.C. 14:18-3.8, where the Board is satisfied such relief would not harm consumers. In this instance, the Board has reviewed the sample bills submitted by Cablevision and is satisfied that Cablevision is billing its customers adequately and in a manner which provides its customers sufficient information. Rate Counsel's request that Cablevision should amend its bills to include FCC contact information for consumer inquiries related to Internet and VoIP telephone service and complaints goes beyond the scope of the petition seeking relief by placing new burdens on the provider which are unnecessary for customer protection. Moreover, the relief granted from this rule does not relieve Cablevision from providing bill itemization as required by N.J.A.C. 14:18-3.7.

Therefore, the Board **FINDS** that Cablevision has satisfied the requirements of this rule relief provision and is **HEREBY GRANTED** relief of N.J.A.C. 14:18-3.8.

N.J.A.C. 14:18-3.15 "Trial services" at subsection (b). This section requires a cable television company to keep records of any trial service for a period of three years and to provide the OCTV notice of the terms and conditions prior to offering a trial. Pursuant to N.J.A.C. 14:18-1.2, a "trial service" means the initial offering of a new capability or technology over a cable television system to some or all existing customers in the cable television company's service area for a limited, specified period of time, not to exceed six months, during which the cable television company assesses the performance or marketability of the new capability or technology, and after which the service is either introduced as a standard offering or discontinued.

Cablevision seeks relief from this provision as it is continually developing new trial products and service options for customers in order to effectively compete in the market. Requiring Cablevision to take the extra step to pre-notify the Board causes a delay in its ability to react to market changes and gives its competitors the advantage of knowing what new services Cablevision is marketing. This places Cablevision at an unusual disadvantage to its competitors, such as Verizon and direct broadcast satellite ("DBS") providers who are not subject to the rule. To comply with this rule, Cablevision maintains, which is burdensome and unnecessary, the company has spent substantial resources in notifying the Board of the scope and term of each offering and for maintaining records of such services. Cablevision, in response to Rate Counsel's request for information, noted that it had not introduced any trial services in 2010 or 2011.

Rate Counsel once again recommends that the Board reject the waiver request, arguing that Cablevision petition lacks empirical support of the reasons offered for the need for the waiver, based on Cablevision's lack of trial service offerings for 2010 and 2011. If the waiver is granted, Rate Counsel believes the Board should require Cablevision to provide notice of terms and conditions of any trial offering which is introduced as a standard or promotional offering; maintain records on promotional services for three years; and post trial services and promotions on its web site. In response, Cablevision notes once again that the fact that Cablevision has no trial or promotional offerings in New Jersey today does not preclude Cablevision from seeking relief from the rule which would provide flexibility to provide such offerings in the future as quickly as possible.

The Board has accepted Cablevision's assertions that providing notice and keeping detailed records of any offered trial service is burdensome. In addition, since trial services are for a limited time only (up to six months) and must thereafter either be introduced as a standard offering or discontinued, there is a limited time window for potential dispute. If introduced as a standard offering, Cablevision would be required to provide notice to the Board of the terms and conditions of that service. Because of the limited scope and nature of these trial services, the Board believes that customers are adequately protected. Therefore, the Board **HEREBY GRANTS** Cablevision the relief from compliance with N.J.A.C. 14:18-3.15(b) as requested in its petition.

N.J.A.C. 14:18-3.17 "Notice of alteration in channel allocation". This section requires 30 day notice of deletions and advanced notice of additions in a cable television company's channel line-up to be provided to the OCTV, consumers and municipalities. The rule also requires cable television companies to file a full revised channel allocation list, twice yearly.

Cablevision seeks relief under this section of Chapter 18 because cable television operators seeking to win and retain customers have every incentive to inform them directly about issues affecting their service and are in the best position to know how to do so, including on screen messages. Cablevision notes that in the Board order granting Verizon some relief of this provision, that relief wouldn't "have an adverse impact on customer notice protections, since channel allocation sheets are not how a customer would generally learn about channel changes."

Cablevision states that it has over 490 channels. In 2010, Cablevision filed 24,000 pages of paper with the Board, and over 52 rate and programming notices were filed in 2009, amounting to almost 28,000 pieces of paper; of which an estimated 91 percent were for the 161 municipalities where effective competition relief had been granted. The burden of providing these notices, Cablevision contends, far outweighs the benefit. When it was unable to provide timely notices, Cablevision notes, it was required to expend valuable resources filing waiver requests with the Board. Therefore, Cablevision requests the same relief as the Board granted to Verizon. Specifically, Cablevision has committed to continue to provide 30 days notice to the OCTV and to its customers of any channel deletion in a manner reasonably calculated to provide such information; to notify the OCTV and its customers no later than five days after the addition of a channel; and to file updated channel allocation sheets upon request of Board staff.

In its comments, Rate Counsel contends that limited relief should be granted, consistent with the relief granted to Verizon; but Cablevision should not be relieved from its obligations to provide channel line-up cards to its customers on a yearly basis, as required under N.J.A.C. 14:18-3.18.

The Board believes it is appropriate at this time to grant the relief sought by Cablevision under this rule based on the information provided. The relief sought is not expected to have an adverse impact on customer notice protections, since channel allocation sheets are not how a customer would generally learn about channel changes. Moreover, it is in the cable television company's best interest to provide notice to its customers of channel additions, so as to avoid calls to its customer service center(s) and potentially lose customers. Regarding Rate Counsel's recommendation, the Board notes that Cablevision is still required to provide channel line-up cards to their customers on a yearly basis, pursuant to N.J.A.C. 14:18-3.18. Therefore, the Board believes that granting the relief requested by Cablevision by allowing post-notification of channel additions within five days to its customers and the Board is reasonable. Furthermore, the Board believes it is appropriate to relieve Cablevision from filing channel

allocations sheets, except upon specific request of Board staff. Therefore, the Board **HEREBY GRANTS** Cablevision relief from the requested provisions of N.J.A.C. 14:18-3.17 under the following conditions: 1) Cablevision shall continue to provide 30 day notice to the OCTV and to its customers of any channel deletion in a manner reasonably calculated to provide such information; 2) Cablevision shall notify the OCTV and its customers no later than five days after the addition of a channel; and 3) Cablevision shall file updated channel allocation sheets upon request of Board staff.

N.J.A.C. 14:18-3.20 "Discounts for senior and/or disabled citizens" at paragraphs (a)2 and 3. These sections require a cable television company, prior to the effective date of any such discount, to provide notice to each customer and municipality served and to the OCTV along with revised schedule of prices, rates, terms and conditions showing any such changes.

Cablevision seeks relief from the provisions of paragraphs (a)2 and 3 because the expense in notifying each customer and municipality served prior to offering the discount may reduce the frequency of the discount offerings to seniors and disabled persons. Cablevision states it should be permitted the flexibility to offer such discounts without advanced notice.

Rate Counsel argues that Cablevision could not confirm that any notices were given in 2010 and 2011 related to the waiver. If the waiver is granted, Rate Counsel recommends that the Board require that Cablevision continue prior notice of alteration or discontinuance of discount programs to seniors, disabled customers, municipalities and the Board; continue providing notice to customers on a quarterly basis of the availability of senior and/or disabled discounts as required under N.J.A.C. 14:18-3.18, and post all discounts to seniors and disabled customers on its web site. Cablevision responds that it has met its burden of proof while Rate Counsel offers no justification upon which denial could be based.

The Board notes that there is no requirement that a cable television company offer a senior and/or disabled discount, although a cable television company may offer one on a voluntary basis. The Board believes that because the senior/disabled discounts are voluntary, it is in the best interest of the cable television company to notify its customers of the discount that is applicable to them. Otherwise, there would be no point to offering the discount. Requiring Cablevision to post all senior/disabled discounts on its website, as suggested by Rate Counsel, would impose additional burdens upon Cablevision which would be inconsistent with the relief sought. Additionally, sufficient customer protections remain in place, since Cablevision would still be required under N.J.A.C. 14:18-3.18 to provide notice to its customers on a quarterly basis of the availability of a senior and/or disabled discount, as well as provide prior notice of any alteration or discontinuance of the discounts. Therefore, the Board believes that customers are adequately protected and **HEREBY GRANTS** Cablevision relief from the provisions of N.J.A.C. 14:18-3.20(a)2 and 3.

N.J.A.C. 14:18-3.22 "Notice of planned interruptions". This section requires a cable television company to provide reasonable notice to all customers in advance of any planned interruption.

Cablevision seeks relief of this rule because in order to gain customers and prevent losing customers it must offer the highest quality services. Cablevision notes it is necessary to routinely upgrade and maintain their networks to do so. It is also necessary to minimize disruptions to customers, which is why Cablevision performs most of its system maintenance in the overnight hours. Notifying customers of planned interruptions where the customer might not even notice the disruption is burdensome and has no concomitant benefit to the customer.

Additionally, because Cablevision is in a competitive environment where its competitors do not have to comply with this rule, Cablevision notes, it should be granted the relief sought.

Rate Counsel argues that Cablevision did not provide any notices in 2010 and 2011 related to the rule, and that the waiver request should be denied because there is no public interest benefit. Rate Counsel recommends that the Board should require that all planned interruptions be posted on Cablevision's web site at least seven days prior to such planned interruptions. Cablevision responds that it has met its burden of proof while Rate Counsel offers no justification upon which denial could be based.

While the Board agrees that advanced notice of a planned outage or interruption to customers is good business practice, it is not convinced if a customer does not receive notice, that the customer is irreparably harmed. The Board believes that, in a competitive environment, the cable television company can decide how and when to notice its customers, and therefore, does not adopt Rate Counsel's recommendation for additional notice. Therefore, the Board **HEREBY GRANTS** Cablevision relief from the provisions of N.J.A.C. 14:18-3.22.

N.J.A.C. 14:18-7.4 "Notification of system rebuilds, upgrades, hub and headend relocations". This section requires a cable television company to provide at least 30 days' notice of a system rebuild, upgrade, hub or headend relocation or other significant change in the system as designed as well as providing information as to how the system will perform once the work has been performed.

Cablevision requested relief from this rule noting that it should not be held to the 30 days advanced notice of infrastructure changes to the OCTV. Cablevision notes that requiring a minimum notification period before any network improvements is inimical to today's video distribution market. Cablevision must upgrade and update their networks continually and consumers directly benefit from these changes. Cablevision seeks the same relief as granted to Verizon, and has committed to provide advanced notice to the OCTV of any major infrastructure changes on its Video Hub Office(s) (VHO) or Super Headend(s) (SHE) that would affect its New Jersey customers.

Rate Counsel argues that Cablevision should be denied relief because there is no public interest benefit and noted that they would still be required to provide notices for any hub or headend that serves a franchise area not subject to effective competition. Cablevision responds that it has met its burden of proof while Rate Counsel offers no justification upon which denial could be based. Rate Counsel recommends that the Board require that Cablevision confirm that it will notify OCTV prior to the start of any major infrastructure change on its Video Hub Office(s) (VHO) or Super Headend(s) (SHE) that could adversely affect cable television service.

The Board notes that Cablevision's cable television plant is designed differently than that of its competitor, Verizon. Cablevision does not have VHOs or SHEs. Therefore, to only require that Cablevision provide notice when upgrading a VHO or SHE would completely eliminate any notification to the OCTV or Board. The equivalent in Cablevision's infrastructure would be headends or hubs. Therefore, the Board **HEREBY GRANTS** Cablevision relief from the provisions of N.J.A.C. 14:18-7.4, under the following conditions: if Cablevision plans to perform major infrastructure changes on its headend(s) or hub(s) that would affect its New Jersey customers, it must notify the OCTV prior to the start of the project.

N.J.A.C. 14:18-7.6 "Telephone system information". This section requires a cable television operator to provide the OCTV with information concerning the operation of its telephone system.

Cablevision requested relief because it contends that the report is burdensome to compile and relief would not leave the Board unable to identify any potential inadequacy with its telephone system, since they would still be required to comply with N.J.A.C. 14:18-7.7 and 7.8, which address telephone performance.

Rate Counsel submits that the waiver should be denied, arguing that since Cablevision will still be required to report on its remaining regulated systems, the grant of this waiver will not change the status quo. Rate Counsel suggests that the Board should require that Cablevision comply with federal standards under 47 CFR § 76.309 and N.J.A.C. 14:18-7.8.

The Board believes in a competitive environment, it is necessary for a cable television company to have the equipment available to answer its telephones. In addition, N.J.A.C. 14:18-7.8 "Telephone Performance" will ensure that Cablevision is answering its telephones in accordance with the federal standard found at 47 C.F.R. § 76.309, regardless of how the company chooses to do so. Therefore, the Board **HEREBY GRANTS** Cablevision relief from the provisions of N.J.A.C. 14:18-7.6.

Having reviewed this matter the Board **HEREBY FINDS** for good cause shown, that the relief requested pursuant to N.J.A.C. 14:18-16.7 is appropriate in the 162 communities listed in Appendix "I". Therefore, the Board **HEREBY APPROVES** Cablevision's request for rule relief subject to the following conditions:

1. Cablevision shall continue to comply with the rules where relief has been granted herein in the 16 municipalities listed above where there has been no finding of effective competition relief from the FCC. If Cablevision is granted a finding of effective competition by the FCC in any of the 16 municipalities, then the relief granted herein shall apply to those municipalities as well, upon notice to the Board.

2. Cablevision shall continue to provide 30 day notice to the Board and to its customers of any channel deletion in a manner reasonably calculated to provide such information.

3. Cablevision shall notify the Board and its customers no later than five days after the addition of a channel.

4. Cablevision shall file updated channel allocation sheets upon request of Board staff.

5. If Cablevision plans to perform major infrastructure changes on its hub(s) or headend(s) that would affect its New Jersey customers, it must notify the OCTV prior to the start of the project.

6. Cablevision shall cooperate with any reasonable requests for information from the Board or Board staff regarding any matter for which relief has been granted.

7. Cablevision shall continue to comply with all other applicable State and federal laws, and the rules and regulations of the Board and the OCTV.

8. This Order shall become effective upon the service thereof, in accordance with N.J.S.A. 48:2-40.

DATED: 9/22/11

BOARD OF PUBLIC UTILITIES
BY:

LEE A. SOLOMON
PRESIDENT

JEANNE M. FOX
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

NICHOLAS ASSELTA
COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

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

Appendix "I"
Cablevision Municipalities Subject to Effective Competition per Finding by the FCC

Municipality	County
Aberdeen Township	Monmouth
Allamuchy Township	Warren
Allendale Borough	Bergen
Allentown Borough	Monmouth
Alpine Borough	Bergen
Asbury Park City	Monmouth
Avon by the Sea Borough	Monmouth
Bayonne City	Hudson
Belmar Borough	Monmouth
Bergenfield Borough	Bergen
Bernards Township	Somerset
Bogota Borough	Bergen
Boonton Town	Morris
Bound Brook Borough	Somerset
Bradley Beach Borough	Monmouth
Bridgewater Township	Somerset
Brielle Borough	Monmouth
Cedar Grove Township	Essex
Chatham Borough	Morris
Clifton City	Passaic
Closter Borough	Bergen
Colts Neck Township	Monmouth
Cresskill Borough	Bergen
Demarest Borough	Bergen
Denville Township	Morris
Dover Town	Morris
Dumont Borough	Bergen
Dunellen Borough	Middlesex
East Hanover Township	Morris
Edison Township	Middlesex
Elizabeth City	Union
Elmwood Park Borough	Bergen
Emerson Borough	Bergen
Englishtown Borough	Monmouth
Fair Lawn Borough	Bergen
Farmingdale Borough	Monmouth
Florham Park Borough	Morris
Franklin Lakes Borough	Bergen
Freehold Township	Monmouth
Garfield City	Bergen

Municipality	County
Glen Rock Borough	Bergen
Green Brook Township	Somerset
Hackensack City	Bergen
Haledon Borough	Passaic
Hamilton Township	Mercer
Hanover Township	Morris
Harrington Park Borough	Bergen
Hasbrouck Heights Borough	Bergen
Haworth Borough	Bergen
Hawthorne Borough	Passaic
Highland Park Borough	Middlesex
Hillsdale Borough	Bergen
Hoboken City	Hudson
Ho-Ho-Kus Borough	Bergen
Howell Township	Monmouth
Interlaken Borough	Monmouth
Jackson Township	Ocean
Jefferson Township	Morris
Keansburg Borough	Monmouth
Keyport Borough	Monmouth
Kinnelon Borough	Morris
Lake Como Borough	Monmouth
Lakewood Township	Ocean
Lavallette Borough	Ocean
Little Falls Township	Passaic
Lodi Borough	Bergen
Madison Borough	Morris
Mahwah Township	Bergen
Manalapan Township	Monmouth
Manasquan Borough	Monmouth
Manville Borough	Somerset
Marlboro Township	Monmouth
Matawan Borough	Monmouth
Maywood Borough	Bergen
Middlesex Borough	Middlesex
Midland Park Borough	Bergen
Millstone Township	Monmouth
Milltown Borough	Middlesex
Mine Hill Township	Morris
Montague Township	Sussex

Municipality	County
Montvale Borough	Bergen
Montville Township (Morris System)	Morris
Montville Township (Oakland System)	Morris
Morris Plains Borough	Morris
Morris Township	Morris
Morristown Town	Morris
Mount Olive Township	Morris
Mountain Lakes Borough	Morris
Neptune City Borough	Monmouth
Neptune Township	Monmouth
New Brunswick City	Middlesex
New Milford Borough	Bergen
Newark City	Essex
North Bergen Township	Hudson
North Brunswick Township	Middlesex
North Caldwell Borough	Essex
North Haledon Borough	Passaic
Northvale Borough	Bergen
Norwood Borough	Bergen
Nutley Township	Essex
Oakland Borough	Bergen
Ocean Township	Monmouth
Old Bridge Township	Middlesex
Old Tappan Borough	Bergen
Oradell Borough	Bergen
Paramus Borough	Bergen
Park Ridge Borough	Bergen
Parsippany-Troy Hills Township	Morris
Passaic City	Passaic
Paterson City	Passaic
Piscataway Township	Middlesex
Prospect Park Borough	Passaic
Ramsey Borough	Bergen
Randolph Township	Morris
Raritan Borough	Somerset
Ridgewood Village	Bergen
River Edge Borough	Bergen
River Vale Township	Bergen
Riverdale Borough	Morris
Robbinsville Township	Mercer
Rochelle Park Township	Bergen
Rockaway Borough	Morris

Municipality	County
Rockaway Township	Morris
Rockleigh Borough	Bergen
Roxbury Township	Morris
Saddle Brook Township	Bergen
Saddle River Borough	Bergen
Sandyston Borough	Sussex
Sayreville Borough	Middlesex
Sea Girt Borough	Monmouth
Seaside Heights Borough	Ocean
Seaside Park Borough	Ocean
Somerville Borough	Somerset
South Amboy City	Middlesex
South Bound Brook Borough	Somerset
South Hackensack Township	Bergen
South Orange Village Township	Essex
Spring Lake Borough	Monmouth
Spring Lake Heights Borough	Monmouth
Stanhope Borough	Sussex
Teaneck Township	Bergen
Totowa Borough	Passaic
Union Beach Borough	Monmouth
Union City	Hudson
Upper Freehold Township	Monmouth
Upper Saddle River Borough	Bergen
Victory Gardens Borough	Morris
Waldwick Borough	Bergen
Wall Township	Monmouth
Warren Township	Somerset
Washington Township	Bergen
Watchung Borough	Somerset
Wayne Township	Passaic
Weehawken Township	Hudson
West Milford Township	Passaic
West New York Town	Hudson
Westwood Borough	Bergen
Wharton Borough	Morris
Woodcliff Lake Borough	Bergen
Woodland Park Borough	Passaic
Wood-Ridge Borough	Bergen
Wyckoff Township	Bergen

Agenda Date: 5/25/16
Agenda Items: 3D

STATE OF NEW JERSEY

Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

OFFICE OF CABLE TELEVISION AND TELECOMMUNICATIONS

IN THE MATTER OF THE VERIFIED JOINT PETITION OF ALTICE N.V. AND CABLEVISION SYSTEMS CORPORATION AND CABLEVISION CABLE ENTITIES FOR APPROVAL TO TRANSFER CONTROL OF CABLEVISION CABLE ENTITIES	)	ORDER APPROVING STIPULATION OF SETTLEMENT
	)	DOCKET NO. CM15111255
IN THE MATTER OF THE VERIFIED JOINT PETITION OF ALTICE N.V. AND CABLEVISION SYSTEMS CORPORATION, CABLEVISION LIGHTPATH-NJ, LLC, AND 4CONNECTIONS LLC FOR APPROVAL TO TRANSFER CONTROL OF CABLEVISION LIGHTPATH-NJ, LLC AND 4CONNECTIONS LLC, AND FOR CERTAIN FINANCING ARRANGEMENTS	)	DOCKET NO. TM15111256

Parties of Record:

Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
Sidney A. Sayovitz, Esq., Schenck, Price, Smith & King LLP, for Petitioners

BY THE BOARD:

By a verified Petition filed on November 5, 2015, Altice N.V. ("Altice"), Cablevision Systems Corporation ("Cablevision"), and the Cablevision Cable Entities[1] ("CCE") ("Cable Petitioners"), initiated a proceeding before the Board of Public Utilities ("Board"), pursuant to N.J.S.A. 48:5A-38 and N.J.A.C. 14:17-6.18, seeking approval for Altice to acquire control of the CCE

[1] Cablevision of Hudson County, LLC, Cablevision of Monmouth, LLC, Cablevision of New Jersey, LLC, Cablevision of Newark, Cablevision of Oakland, LLC, Cablevision of Paterson, LLC, Cablevision of Rockland/Ramapo, LLC, Cablevision of Warwick, LLC, and CSC TKR, LLC.

(Docket No. CM15111255).[2] Altice, Cablevision, Cablevision Lightpath-NJ, LLC ("Lightpath"), and 4Connections, LLC ("4Connections") ("Telecom Petitioners") concurrently also filed a separate verified Petition, pursuant to N.J.S.A. 48:2-51.1 and N.J.A.C. 14:1-5.14 requesting approval of the proposed transfer of control to Altice of Lightpath and 4Connections, both indirect wholly-owned subsidiaries of Cablevision, and approval for Lightpath to participate in the financing related to the Telecom Petitioners' proposed transfer of control ("Transaction Financing"), pursuant to N.J.S.A. 48:3-9, and N.J.A.C. 14:1-5.9. (Docket No. TM15111256) ("Merger" or "Transaction").[3]

BACKGROUND

Altice is a publicly-traded holding company with limited liability (*naamloze vennootschap*)[4] incorporated under the laws of the Netherlands that is headquartered at Prins Bernhardplein 200, 1097 JB Amsterdam, the Netherlands. Altice is a multinational cable and telecommunications company operating in Western Europe (including France, Portugal, Benelux and Switzerland), the United States, Israel, the Dominican Republic and the French Overseas Territories, providing cable and fiber-based fixed services, including, but not limited to, pay TV; broadband internet access, fixed-line telephony, and mobile telephony services (other than in the United States) in all of the geographies in which it operates. Altice serves approximately 36 million subscribers worldwide. Altice does not have operations or customers in New Jersey.

Cablevision, a publicly traded Delaware corporation that is headquartered at 1111 Stewart Avenue, Bethpage, NY 11714, is a connectivity, telecommunications and media company offering digital television, high-speed Internet services, and VoIP service to approximately 3.12 million customers in New York, New Jersey, and Connecticut.

The CCE provide cable television service pursuant to cable television franchises to approximately 783,058 subscribers (*Form F99*) in one hundred and seventy-six (176) municipalities in twelve New Jersey counties.[5] ("CCE Systems"). The CCE are wholly owned indirect subsidiaries of Cablevision with states of incorporation or organization in Delaware and New York.

Lightpath is a Delaware limited liability company (LLC) that is a wholly owned subsidiary of Cablevision Lightpath, Inc., which in turn is a wholly-owned subsidiary of Cablevision. 4Connections is a New Jersey LLC and is a wholly-owned subsidiary of Lightpath. Their principal place of business is also 1111 Stewart Avenue, Bethpage, NY 11714. Both Lightpath and 4Connections are authorized in New Jersey to provide local and interexchange

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[2] Cable Petitioners also filed with the Board a FCC Form 394 – Application for Franchise Authority Consent to Assignment or Transfer of Control of Cable Television Franchise, setting forth pertinent information concerning the Transaction.

[3] Altice, Cablevision, CCE, Lightpath and 4Connections shall hereinafter be referred to jointly as "Petitioners".

[4] Naamloze vennootschap (often abbreviated N.V. or NV) is a public company, usually only used in the Netherlands, Belgium, Indonesia, and Suriname. The company is owned by shareholders, and the company's shares are not registered to certain owners, so that they may be traded on the public stock market.

[5] Bergen, Essex, Hudson, Mercer, Middlesex, Monmouth, Morris, Ocean, Passaic, Somerset, Union, and Warren.

telecommunications services pursuant to the Board's order in Docket No. TE02010035 issued March 26, 1998 and, in Docket No. TE04091033 issued January 28, 2009, respectively.

MERGER STRUCTURE

On September 16, 2015, Cablevision and Altice entered into an Agreement and Plan of Merger (the "Merger Agreement"), by and among Altice, Neptune Merger Sub Corp., a wholly-owned subsidiary of Altice ("Merger Sub"), and Cablevision. Pursuant to the Merger Agreement (*CSC 10K PG 1-2*) Altice, through newly formed, wholly owned Dutch intermediate subsidiaries (the "Altice Intermediate Subs"), wholly owns a newly formed Delaware corporation, Neptune Holding US Corp. ("Neptune Holding"). In turn, Neptune Holding wholly owns Neptune Merger Sub Corp. (also a Delaware corporation ("Merger Sub"). Upon consummation of the Transaction, Merger Sub will be merged with and into Cablevision, after which point Merger Sub will no longer exist as a separate corporate entity. Cablevision will be the surviving corporation. At the same time, according to the Petitioners, CPP Investment Board, a Canada-organized investment management organization that invests the assets of the Canada Pension Plan ("CPPIB") and a group of limited partnerships formed under the laws of Guernsey, U.K., and associated with BC Partners Holding Limited ("BC Partners") and together with CPPIB, the "Co-Investors") have exercised an option to purchase a combined total of 30% of Cablevision that will result in the Co-Investors receiving a total of 30 percent of the ownership interests in one of the Altice Intermediate Subs. Altice will acquire the remaining 70 percent, giving Altice a controlling interest in Cablevision. As a result, Cablevision will be 100 percent directly owned by Neptune Holding and 70 percent indirectly owned by Altice. Accordingly, as a result of the merger of their ultimate parent, the CCE, Lightpath and 4Connections also will be 70 percent indirectly owned by Altice.

In connection with the Merger, each outstanding share of the Cablevision NY Group Class A common stock, Cablevision NY Group Class B common stock, and various restricted shares, stock options and other outstanding equity-based compensation will be converted into the right to receive $34.90 in cash, without interest, less applicable tax withholdings.

In addition, in connection with the financing of the Transaction, Neptune Holding will form a separate wholly-owned subsidiary, Neptune FinCo Corp., a Delaware corporation ("Neptune Finco)". Upon consummation of the Transaction, Neptune Finco will be contributed by Neptune Holding to Merger Sub and merged with and into CSC Holding, LLC ("CSC Holdings"), an existing Cablevision subsidiary, with CSC Holding surviving the merger and Neptune Finco ceasing to exist as a separate corporate entity. CSC Holding will remain a direct wholly-owned subsidiary of Cablevision.

The CCE will remain the franchised cable television providers in New Jersey and will continue to operate and serve the CCE Systems. According to Altice, there are no plans to change the names of the CCE, the legal entities holding the franchises for the CCE Systems. Accordingly, Petitioners assert that Cablevision shall abide by all of its obligations under existing local franchise agreements throughout the term of such agreements as provided by applicable law. Petitioners also assert that there are currently no concrete plans to change rates, terms or service conditions or operations of the systems (FCC 394 Exhibit 2) which will develop in response to the market and regulatory developments, including changes with respect to finances, operations, accounting, rates, depreciation, operating schedule, maintenance and management, affecting the public interest. In addition, Petitioners assert that there are no concrete plans to change rate structures or programming tiers at this time, no specific plans in

place for changes in the customer service structure, and no specific programming changes are known or contemplated at this time.

TRANSACTION FINANCING

The Transaction will be financed with $8.6 billion of new debt to be assumed by CSC Holdings (as part of Neptune Finco's merger into CSC Holdings described above), cash on hand at Cablevision, and an equity contribution of $3.3 billion from Altice and the Co-Investors. The new debt to be assumed by CSC Holdings on completion of the Transaction is split as follows: $3.8 billion from a seven-year senior secured term loan; $1.0 billion in 10-year senior guaranteed notes; and $3.8 billion in seven-year and 10-year senior unsecured notes. The senior secured term loan and senior guaranteed notes will be guaranteed by certain of CSC Holdings' wholly-owned subsidiaries, including (subject to required approvals received herein) Lightpath. The senior secured term loan will be secured by the pledge of capital stock held by CSC Holding and subsidiaries that are guarantors in subsidiaries of CSC Holdings (subject to exclusion and limitations to be agreed). However, according to the Petitioners, CSC TKR, LLC and its subsidiaries (including the CCE that are party to the Cable Petition which own and operate the New Jersey cable television systems) will not be required to provide guarantees and/or first priority security interests in their stock or assets prior to or at the closing of the Transaction and therefore CSC TKR, LLC and its subsidiaries are excluded from the Financings that will be concluded at closing. Neptune Finco Corp. has agreed that it will use commercially reasonable efforts, within one year after closing of the Transaction, to obtain the required regulatory approvals to add CSC TKR, LLC and its subsidiaries as guarantors under the Financings. No such addition will take place until and unless all required regulatory approvals have been obtained. Petitioners will seek the Board's approval for CSC TKR, LLC and its subsidiaries to participate in the Financings by a separate petition to be filed with the Board after the closing of the Transaction. Accordingly, CSC TKR, LLC and its subsidiaries will not participate in the Financings until and unless all future required regulatory approvals have been obtained. Cablevision has also secured a five-year, $2 billion revolving facility, which, according to the Petitioners, will ensure ample resources to meet Cablevision's liquidity needs.

In addition, to finance a part of the equity portion of the consideration for the Transaction, on October 9, 2015, Altice raised $1.8 billion worth of new equity capital by issuing 69,997,600 Altice A shares and 24,825,602 Altice B shares. The total amount raised represents approximately 10 percent of the issued share capital of each class of stock.

TRANSACTION BENEFITS

Altice asserts in the Petitions and in responses to discovery that the proposed Transaction will serve the public interest by promoting New Jersey customers' access to innovative, high-quality services at just and reasonable rates. Altice further asserts this will be achieved by: (a) investing heavily in and improving CCE NJ's network by pushing fiber deeper into the network, thereby eliminating active components in order to achieve lower failure rates; (b) introducing newer, more reliable, and more consumer-friendly customer premises equipment; and (c) investing in IT infrastructure and replacing legacy IT systems with more robust, easier-to-manage platforms, which will reduce operational complexity and enable the company to better serve customers through improved service provisioning, billing, and incident management. Over time, as network reliability and IT infrastructure improves, Altice asserts it will be able to redeploy resources as needed to ensure that Cablevision continues to operate reliably and

efficiently. Altice further asserts that by providing Cablevision with access to Altice's larger scale, operational expertise, and capital resources, the Transaction will allow Cablevision to build on its position as an innovative and dynamic competitor in the broadband, video and telecommunications markets and provide New Jersey consumers in Cablevision's territory with a more robust competitive option for these services. Altice states it has approximately 36 million subscribers worldwide, including the approximately 1.5 million subscribers served by Suddenlink.[6] This "additional scale," Altice asserts, will place it in a better negotiating position with suppliers and also enable Altice to eliminate duplicative costs, and spread the fixed cost of developing additional innovative and competitive service offerings across a larger subscriber base that to date has not been available to Cablevision. In addition, Altice asserts the Transaction will enhance the ability of Cablevision and its subsidiaries to compete in the telecommunications marketplace in New Jersey through network investment, consumer-focused products and services, and innovative pricing and packaging, thus promoting competition and customer choice. Altice further intends to focus on providing world-class broadband Internet connectivity, video and voice service and accordingly is fully committed to investing in the Cablevision network and offering New Jersey consumers the best quality and value in broadband Internet connectivity and video programming choices. In addition, Altice asserts the Transaction will reduce vertical integration in distribution and programming while posing no horizontal harms, and will cause no competitive harms since no overlap will be created between competing cable providers. Finally, Altice asserts the Transaction will enable the combined company to continue and enhance Cablevision's efforts to increase broadband connectivity and Wi-Fi service deployment and over-the-top video services.

In a letter issued by the Committee on Foreign Investments in the United States (Committee) dated February 17, 2016, the Committee indicated that after careful and full review of the proposed transaction "there were no unresolved national security concerns".

On May 3, 2016, the Federal Communications Commission's ("FCC") Wireline Competition Bureau approved the Transaction,[7] finding that it will serve the public interest, convenience and necessity. The FCC found that the Transaction is unlikely to result in any significant public interest harms and that it is likely to result in some public interest benefits of increased broadband speeds and more affordable options for low income consumers in Cablevision's service territory. Accordingly, while the FCC concedes that the public interest benefits are limited, the "scales tilt in favor of granting the Applications because of the absence of harms."[8] The FCC also stated: "Our review of applications filed with the Commission does not affect the states' independent proceedings on the proposed transaction, nor do we intend any finding in this Memorandum Opinion and Order to pre-judge the states' independent consideration of matters before them under applicable state law or precedent, which may differ from our standard of review."[9]

In addressing the issue of significant debt load associated with the transaction, the FCC, in analyzing the record before it, held that there was no evidence "Altice is underfunded or an irresponsible buyer unqualified to undertake the transaction. Altice has demonstrated that it has

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[6] Altice completed the purchase of Suddenlink on December 21, 2015.

[7] In the Matter of Applications Filed by Altice N.V. and Cablevision Systems Corporation to Transfer Control of Authorizations from Cablevision Systems Corporation to Altice N.V., W.C. Docket No. 15-257, DA 16-485, Memorandum Opinion and Order, 31 FCC Rcd _____ , at ¶1 (May 3, 2016) (FCC Order).

[8] FCC Order at ¶50.

[9] FCC Order, at ¶2, n. 2.

the requisite financial qualifications...."[10] Further, the FCC stated that "Moody's predicts a cost savings of $450 million in two to three years post-transaction, adding to Cablevision's cash flow.[11]

On May 11, 2016, the New York City Franchise Concession Review Committee approved the transaction. A determination by the New York Department of Public Service is anticipated in June.

DISCUSSION

Following submission of the Petitions, discovery commenced and several rounds of discovery was exchanged in the within matters, propounded by Board Staff ("Staff") and the New Jersey Division of Rate Counsel ("Rate Counsel") . The Petitioners provided written responses to both routine and extended discovery requests dealing with the details of the transaction, its impact on New Jersey consumers, and the ability of the CCE, Lightpath and 4Connections to continue to provide safe, adequate and proper service subsequent to the transfer.

Rate Counsel submitted comments to the Board on March 17, 2016 regarding the Transaction, raising various concerns, including the substantial new debt and pressure to achieve the level of annual savings proposed by Altice without resulting in service quality deterioration, price hikes, and employee layoffs. Based on these concerns, Rate Counsel recommended that any approval of the Transaction should include conditions addressing the following areas: (a) Affordable broadband Internet access; (b) Affordable stand-alone voice service; (c) No data caps; (d) Commitment, without an expiration date, to not block or throttle Internet traffic and to abide by the FCC's net neutrality rules; (e) Commitment for broadband upgrade; (f) Unlimited flat rate broadband option; (g) Opt-out option for Wi-Fi hotspots; (h) Network reliability and public safety, including back-up batteries for Voice over Internet Protocol ("VoIP") customers and customer education (i) Service Quality metrics; (j) Billing and termination procedures, i.e., increase the billing payment period and reduce late payment charges; (k) Protection of PEG channels; and (l) Open customer premises equipment.

The Petitioners did not reply to Rate Counsel's comments as settlement negotiations ensued.

A. Analysis of Statutory Criteria

Various statutes and Board regulations apply to the Transaction and are addressed herein. Cable entities in New Jersey are generally governed under the Cable Television Act, N.J.S.A. 48:5A-1 et seq. N.J.S.A. 48:5A-38(a) in part provides that "no CATV company shall combine, merge, or consolidate with, or acquire control of, another organization without first obtaining the approval of the board, which shall be granted only after an investigation and finding that such proposed combination, merger, consolidation, or acquisition is in the public interest." Petitions for approval of a merger or consolidation must also conform with the filing requirements found in N.J.A.C. 14:17-6.18. Also, under N.J.S.A. 48:5A-38(b), certain mergers or consolidations involving an affiliate or a parent of a cable television company do not require Board approval, but that is not the case for the Transaction.

[10] FCC Order at ¶21.

[11] FCC Order, at ¶20.

Mergers or consolidations of telephone utilities are subject to N.J.S.A. 48:2-51.1, which in part provides that "no person shall acquire or seek to acquire control of a public utility directly or indirectly. . . without requesting and receiving the written approval of the Board of Public Utilities. Any agreement reached, or any other action taken, in violation of this act shall be void."

In considering a request for approval of an acquisition of control under N.J.S.A. 48:2-51.1., the Board shall evaluate the impact of such an acquisition on competition, on the rates of ratepayers affected by the acquisition of control, on the employees of the affected public utility or utilities, and on the provision of safe and adequate utility service at just and reasonable rates. In evaluating for approval a merger or consolidation of a New Jersey public utility, under N.J.A.C. 14:1-5.14(c), the Board must be "satisfied that positive benefits will flow to customers and the State of New Jersey and, at a minimum, there are no adverse impacts on any of the criteria delineated in N.J.S.A. 48:2-51.1." Also, pursuant to N.J.S.A. 48:3-7 and N.J.S.A. 48:3-10, the Board must determine whether the public utility or a wholly-owned subsidiary thereof may be unable to fulfill its pension obligations to any of its employees. Finally, pursuant to N.J.S.A. 48:3-9, the Board must approve the Transaction Financing if it is satisfied that the proposed issue is to be made in accordance with law and the purpose thereof is approved by the Board.

B. Comments

While the matter was pending, comments in support of the merger were received from the following entities: Morris County Chamber of Commerce; Norman Schmelz, Mayor-Borough of Bergenfield; Rotary Club of Newark; YMCA of Hamilton; Newark Pop Warner Football League; North Hudson Community Action Corporation; Boys and Girls Clubs of New Jersey; East Side High School (Newark); Boys and Girls Clubs of Newark; Breaking the Chain Through Education; Neptune High School; Metuchen High School; Saint Anne School (Fair Lawn); West New York Memorial High School; Puerto Rican Day Parade Inc.; and Commerce and Industry Association of New Jersey.

C. Settlement

After numerous meetings and extensive negotiations, a Stipulation of Settlement ("Stipulation") was entered into by the Petitioners, Rate Counsel and Staff (collectively, "the Parties"), which was filed with the Board on or about May 19, 2016, addressing issues including matters beyond the terms contained in the Petitions. Elements of the agreement are summarized below:[12]

1. Altice commits to the following:

    a. Network Upgrade/Expansion: The Company will upgrade its network such that it can provide Internet access service with speeds up to 300 Mbps, to be available on an equitable and nondiscriminatory basis to all existing customer locations passed no later than December 31, 2017. Within thirty (30) days following the closing of the Transaction (the "Closing"), the Company will submit a detailed description of the current network in New Jersey including system capacity, analog/digital RF

[12] Although described in the Order at some length, should there be any conflict between this summary and the Stipulation, the terms of the Stipulation control, subject to the findings and conclusions in this Order.

allocation, and maximum broadband speed offering (downstream and upstream). Within one-hundred twenty (120) days following the Closing, the Company will submit a descriptive deployment plan and timeline indicating phases of completion of work and likely dates for the release of the 300 Mbps service in each system and, for each calendar quarter following the Closing, shall provide an update on progress toward service availability in each system until it is launched. The updates shall include progress on the bandwidth reclamation plan; IP Network augmentation and upgrade; hardware installation, testing, and activation; and operation readiness training and tools, as appropriate.

b. Low-Income Broadband: Within six (6) months after the Closing, the Company shall launch pilot projects, training, and engagement of stakeholders with respect to low-income broadband service. Within fifteen (15) months after Closing, the Company will make available to New Jersey households statewide passed by the Company a low-income broadband service as follows:

i. Eligibility — The Company will offer its low-income broadband service to (A) households with children that have a student or students eligible for the National School Lunch Program, or (B) persons age 65 and older who are eligible for and receive benefits under the Supplemental Security Income ("SSI") program from the federal government. No credit check shall be required to enroll. It shall not be the responsibility of the Company to verify and confirm eligibility. Any current or former customers in arrears will not be eligible until those debts have been cleared. This policy will be applied to New Jersey customers in the manner applied to New York customers, in accordance with the Order of the New York Public Service Commission ("PSC") approving the Transaction, as that Order is applied by the PSC.

ii. Service Offering and Cost — The Company shall offer low-income broadband service with speeds up to 30 Mbps at a price not to exceed $14.99 per month. This low income broadband service shall not include a modem fee or charge for self-installation, and will be offered without a data cap.

c. Low-Cost Broadband Service: Within 120 days of Closing, the Company shall (A) increase speed on the existing 5/1 Mbps low-cost broadband service offering to 10/1 Mbps, (B) offer this service at a price not to exceed $24.95 per month, and (C) shall continue to offer such low-cost broadband service for a period of not less than two (2) years from the date of Closing. Customers previously enrolled for low-cost broadband service may maintain service for up to three (3) years following the Closing.

d. Network Resiliency/Recovery: In the event of the declaration of an active, qualifying state of emergency, pursuant to N.J.S.A. App. A:9-33 et seq., the Company shall provide the following:

i. Emergency Wi-Fi for Everyone — The Company shall provide wireless Internet access for customer and non-customers in the relevant geographic area subject to such qualifying state of emergency via the Company's Outdoor Emergency Optimum Wi-Fi network without a fee.

ii. Hyper Local News and Weather for All Residents — The Company shall provide customer and non-customer access to the News 12 website for access to storm and emergency information.

iii. Partner with Utilities to Speed Power Restoration — The Company shall provide access to outage data at no cost to partnering utilities during the term of the qualified state of emergency. The Company will generally make available on reasonable and non-discriminatory commercial terms real-time power outage data to partnering utilities to target and prioritize outages.

iv. Backup Customer Support — The Company shall provide backup customer support resources during an emergency, including rerouting customer service calls from affected areas to adequately staffed support centers and third-party support operations inside and outside the affected locales.

In support of emergency preparedness initiatives, the Company shall provide the following:

v. Enhanced Network Resiliency — The Company shall commit to maintain Ring within Ring topology to remote hub for redundancy.

vi. Backup Powering — The Company shall commit to maintain an adequate backup power generation capacity to support outside plant in the event of a prolonged regional power outage.

vii. Storm Readiness Communications Plan — The Company shall launch public service announcements and other information about storm preparedness, the availability of backup batteries for cable modem MTA (for voice use), and the availability of other information portals such as News 12 during storms.

Nothing in this section of the Stipulation shall be read to preclude the Board from adopting or enforcing subsequently any lawful rule, regulation, or order regarding the matters addressed in this section.

e. Most Favored Nation: Within sixty (60) days following the Closing, the Joint Petitioners will provide Board Staff and Rate Counsel with a copy of the final Orders and Settlement Stipulations from any State or other jurisdiction under which conditions are imposed on the Joint Petitioners, along with an analysis indicating and explaining the valuation of the customer benefits awarded in that jurisdiction as compared to the valuation of the customer benefits awarded in New Jersey, in each case,

calculated on a per customer basis. In recognition of the risks to New Jersey of approving the Transaction before other jurisdictions, the Signatory Parties agree that in the event that the Joint Petitioners agree to and accept orders under which another state or jurisdiction obtains materially greater benefits in the aggregate than New Jersey pursuant to this Stipulation and order of approval, including but not limited to faster broadband speeds, more advantageous low-income broadband, low-cost broadband, network resiliency and improvement, employment commitments, or other per subscriber benefits, then New Jersey shall be protected because the Joint Petitioners shall provide equivalent benefits to New Jersey. The Joint Petitioners and Board Staff agree that the "most favored nation" provision ensures that the synergy savings associated with the Transaction are shared with New Jersey customers in a manner equivalent to that of other States or jurisdictions on a per subscriber basis and on the same time schedule as agreed or required in the State of New York.

f. Employment Commitments: Cablevision will not cause a reduction in force in customer-facing jobs, including at the Newark Project Facility located at 494 Broad Street, for two years following the close of the transaction. For purposes of this Stipulation, "customer-facing" refers to direct, non-incidental interaction with customers, including but not limited to call center and other walk-in center jobs, and service technicians. On an annual basis, Cablevision shall provide the Board with the following information: Total number of NJ Employees; Total number of customer-facing jobs in NJ; Total number of Employees in the Newark Project Facility; and Total number of customer-facing jobs at the Newark Project Facility.

g. Data Caps: For three (3) years following the Closing, the Company will offer a broadband product without a data cap, as well as provide the Low-Income Broadband Program referenced in subsection b., infra, without a data cap.

h. Customer Service Offices: Cablevision presently maintains sixteen (16) local customer service offices in the State of New Jersey. Cablevision commits to maintain customer service offices in the State in accordance with its municipal franchise obligations, and applicable statutes and regulations, including but not limited to N.J.S.A. 48:5A.-26(d) and N.J.A.C. 14:18-5.1. In addition, for two (2) years following the Closing, the Company commits to maintain at least thirteen (13) of Cablevision's sixteen (16) existing local customer service offices, including offices in Paterson, Union City, Bayonne, Elizabeth and Newark. For a period of three (3) years from the issuance of an Order approving this Stipulation, in the event there is any net loss of customer-facing jobs in New Jersey greater than fifteen percent (15%), the Joint Petitioners shall notify the Board of such change and provide an appropriate explanation.

i. Customer Service: The Company commits throughout the term of the Stipulation to a repair and service metric in which it will: (a) provide the Board with the Repair & Service calls per customer for the calendar year

2015 (the "Service Quality Benchmark") within 30 days of the Closing; and (b) provide the Board with quarterly reports, within forty-five (45) days of the end of each calendar quarter, on the Repair & Service calls per customer for the prior quarter and for the prior twelve (12) months (the "Report"). Based on the Report for the prior twelve (12) months, if the Repair & Service calls per customer exceed the Service Quality Benchmark by ten percent (10%) or more, then the Company shall be required to invest up to $250,000 per quarter to improve customer service over the next twelve (12) months.

j. Notice of Credit Downgrade: If, within three (3) years of the Closing, one of the nationally-recognized statistical rating organizations such as Fitch, Standard and Poor's, or Moody's, issues a report indicating a downgrade in the Company's credit ratings below current level, the Company shall notify the Board within three (3) business days of the date of the issuance of such report and provide information on any proposed response to the downgrade within ten (10) business days of the issuance of such report.

k. Compliance: The Company will abide by applicable customer service standards, performance standards, and service metrics as delineated under N.J.A.C. Title 14, including but not limited to Chapters 3, 10 and 18, and N.J.S.A. 48:5A, including, but not limited to, requirements related to billing practices and termination.

l. Adverse Impact: If the Federal Communications Commission ("FCC") imposes conditions of the Joint Petitioners in an order by the FCC approving the Transaction and such conditions adversely impact those conditions contained in the Board Order approving the Transaction, the Company shall notify the Board of the impact that such conditions will have on its commitments to New Jersey and will work with the Board and Staff to ensure that New Jersey also obtains its commensurate benefit. Notwithstanding the foregoing, the conditions set out herein shall be provided in addition to any benefit that results from any federal action regarding the Transaction.

m. Accounting Standards: Financial reports and related submissions to the Board by the Company will be denominated in U.S. dollars and will conform to U.S. GAAP subject to the requirements of applicable United States and international law.

n. Pledge of Assets/Credit: Altice will not pledge the assets and/or credit of Cablevision's New Jersey operations to secure financing for any transaction unrelated to its New Jersey business or operations, except with prior approval of the Board as provided by applicable New Jersey law.

o. Local Franchise Commitments: The Company shall abide by all of its obligations under existing local franchise agreements throughout the term of such agreements as provided by applicable law.

p. Pending FCC Appeals: Altice expressly affirms that, subsequent to the Closing, Altice will cause the Cablevision operating entities to abide by and honor any final order with respect to any pending appeal or declaratory judgment, whether issued by the FCC or by a court of competent jurisdiction.

q. Timeframe: Unless otherwise specified, commitment term is three (3) years.

FINDINGS AND CONCLUSIONS

Based upon the Stipulation and the Board's independent review of the record in this matter, as well as consideration of the applicable statutes and regulations, cited above, the Board **HEREBY ACCEPTS** the Stipulation as filed with the Board.

Regarding the rate impact, based upon the Stipulation and the Board's independent review of the record in this matter, the Board concludes that there will be no negative impact on rates or service quality as a result of the Transaction.[13]

On the impact on service quality, the stipulated benefits include requiring that Cablevision maintain at least 13 of 16 local offices for a minimum of two (2) years, including offices in Paterson, Union City, Bayonne, Elizabeth and Newark, and commit to maintain customer service offices in the State in accordance with its municipal franchise obligations and applicable statutes and regulations, including but not limited to N.J.S.A. 48:5A-26(d) and N.J.A.C. 14:18-5.1. Further, Service Quality Benchmarks ("SQB") for Repair & Service ("R & S" Calls") per customer will be provided quarterly. If R & S Calls exceed the SQB by 10% or more, Altice shall be required to invest up to $250,000 per quarter to improve customer service over the next twelve (12) months.

On the impact on employees, Cablevision will not cause a reduction in force in customer-facing jobs, including at the Newark Project Facility located at 494 Broad Street, for two years following the close of the transaction. After the two year period, but before 3 years post approval, if there is any net loss of customer-facing jobs in New Jersey greater than 15%, the Joint Petitioners shall notify the Board of such change and provide an appropriate explanation.

On the impact on competition, the stipulated benefits include requiring Altice to continue to offer Cablevision's Low Cost Broadband service at the price of $24.95, increase its speed from 5 Mbps to 10 Mbps, and allow enrolled customers to retain that service for three (3) years; requiring Altice to offer one broadband product without data caps; and requiring Altice to establish a low income broadband program within 15 months offering 30 Mbps speeds service without data caps and a free modem, for households with National School Lunch Program eligible children, and SSI eligible participants. Altice has further agreed to pay the CCE's liability for potential refunds to customers with respect to any pending appeals with the Federal Communications Commission. By the stipulated terms, New Jersey consumers will benefit from the Transaction and are not harmed by the increasing market concentration/lack of competition. The Board is, therefore, satisfied that positive benefits will flow to customers and that the Transaction will strengthen the Petitioners' competitive posture in the telecommunications

[13] Rates for basic cable service in the Cablevision Systems are not regulated. Thus, the CCE Systems' rates for basic service, or potential changes thereto, were not considered in the Board's determination.

market due to their access to additional resources. The Stipulation, executed on May 18, 2016, resolves the issues raised.

Accordingly, the Board **HEREBY FINDS** the Transaction as asserted in the Stipulation is in accordance with law, is in the public interest, and has a likelihood of creating positive benefits. The Board **FURTHER FINDS** that Altice has demonstrated that it possesses the financial resources and technical qualifications which ensure the Board of Altice's ability to provide safe, adequate and proper service. After review, the Board **FURTHER FINDS** that the proposed Transaction Financing with respect to the Telecom Petitioners is consistent with the applicable law and is in the public interest.

Moreover, the Board has continuing authority to regulate the CCE's cable television franchises and customer service obligations. The Petitioners have asserted that, following the Transaction, the CCEs will continue to hold the required Certificates of Approval ("COAs") for the CCE System's 176 municipalities, thereby obviating the need to transfer the COAs. Therefore, based on the structure of the Transaction, the Board **FINDS** that no new COAs are required.

Therefore, the Board **ADOPTS** the Stipulation, attached hereto, including all attachments and schedules, in its entirety, incorporating by reference the terms and conditions of the Stipulation as if fully set forth herein. In view of the foregoing, the Board **HEREBY ORDERS** that Petitioners be and are **HEREBY AUTHORIZED** to transfer the equity interests of the CCE, Lightpath and 4Connections to Altice, engage in the Transaction Financing related only to the Telecom Petitioners and not any CCE, and to execute all documents related thereto.

This Order is subject to the following:

1) This Order shall not affect or in any way limit the exercise of the authority of the Board, the Office of Cable Television and Telecommunications or the State of New Jersey in any future petition or in any proceeding regarding franchises, service, financing, accounting, capitalization, depreciation or any other matters affecting the Petitioners.

2) Notwithstanding anything to the contrary in the documents executed pursuant to the financing transactions or other supporting documents, a default or assignment under such agreement does not constitute an automatic transfer of Petitioners' assets. Board approval must be sought pursuant to N.J.S.A. 48:1-1 et seq. where applicable.

3) This Order shall not be construed as directly or indirectly fixing, for any purpose whatsoever, any value of tangible or intangible assets now owned or hereinafter to be owned by Petitioners.

4) This Order shall not be construed as superseding pending rate proceedings involving Cablevision.

5) Petitioners shall notify the Board, within five business days, of any material changes in the proposed financing, and shall provide complete details of such transactions including any anticipated effects upon service in New Jersey.

6) Petitioners shall notify the Board of any material default on the terms of the notes within five business days of such occurrence.

7) The Petitioners shall notify the Board, in writing, within five (5) days of the date on which each of the Transactions is consummated.

8) Consummation of the above referenced transactions must take place no later than one-hundred-eighty (180) days from the date of this Order unless otherwise extended by the Board.

9) Petitioners shall file a Certification with the Board within thirty (30) days of the closing attesting to the lack of material deviation in the executed closing documents or final terms from those terms and conditions described herein and /or submitted to the Board with the petition. Any such material deviation in the executed closing documents shall render this Order voidable by the Board.

10) Petitioners shall file journal entries with the Board to record the transactions approved herein within forty-five (45) days of final closing, including but not limited to the consolidation entries of Cablevision under GAAP into Altice's IFRS.

11) Altice shall provide any outstanding certificates of incorporation or formation of any merger entities not previously provided, and any revisions to the corporate structure as provided in Exhibit B to the Petition, within forty-five (45) days of final closing.

12) Altice shall provide proof of compliance with rules, regulations and statutes requiring approval from other State and Federal regulatory agencies having jurisdiction in the matter, pursuant to N.J.A.C. 14:17-6.18(a) (13) within 10 days after all approvals have been received.

13) Altice shall file a final statement of the fees and expenses incurred in connection with the merger and the accounting disposition to be made thereof, on the books of the surviving corporation, within 30 days of such filing with the Securities and Exchange Commission, pursuant to N.J.A.C. 14:17-6.18(a) (14).

14) Altice and/or Cablevision and/or the CCE shall be liable for the State assessment, pursuant to N.J.S.A. 48:5A-32, and municipal franchise fees, pursuant to N.J.S.A. 48:5A-30, due and owing as of the statutory payment dates for the preceding calendar year relating to the CATV System being acquired pursuant to the Transaction approved herein.

15) Altice and/or Cablevision and/or Lightpath and 4Connections shall be liable for the State assessment, pursuant to N.J.S.A. 48:2-59, and any additional fees due and owing as of the statutory payment dates for the preceding calendar year relating to Lightpath and 4Connections being acquired pursuant to the Transaction approved herein.

16) Altice and/or Cablevision and/or the CCE shall be liable for any prior State Assessment and municipal franchise fee ("Fees") amounts becoming due and owing as a result of any Board or OCTV audit (Audit) or review performed on any CCE with respect to such Fees and shall be liable for any potential refunds to any CCE customers and municipalities arising out of such Audit.

17) All franchise obligations, commitments and agreements for the existing CCE Systems shall continue in force in all respects following the Transaction under Altice's ownership.

18) Altice shall file within 45 days of the closing of the Transaction a revised tariff for cable television service reflecting the new ownership and listing all charges as required by the Board, the Office of Cable Television and Telecommunications and/or the Federal Communications Commission.

19) The CCE shall provide, within 45 days of the date of closing, revised Office of Cable Television and Telecommunications Forms CATV-1 and CATV-2, which shall reflect gross revenue, as defined by the applicable statutes, for the periods January 1, 2015 through closing, for the CATV System transferred.

20) All of the obligations imposed upon the CCE under the Certificates of Approval issued by the Board for the municipalities served by the CCE or by any and all Offers of Settlement involving the CCE Systems, shall be assumed by Altice upon consummation of the Transaction.

21) All representations and Commitments made by the CCE to the municipalities serviced by the CATV System and the Board are fully enforceable as if set forth at length herein and shall also be assumed by Altice.

22) Approval of the transfer of the CATV System approved herein shall not constitute automatic approval of any business contract referenced in the Merger Agreement or supporting documents, if Board approval, pursuant to N.J.S.A. 48:5A-1 et seq. would otherwise be required.

23) Within ninety (90) days from the date of closing of the proposed Transaction, Petitioners shall certify, for each system under their control, as well as each system to be acquired as part of the Transaction the following items:

a) That all New Jersey cable television systems under their respective ownership and/or control, are in full compliance with Article 820 of the National Electrical Code as previously certified.
b) That all Board Ordered requirements or conditions arising out of any and all Offers of Settlement and Certificates of Approval have been or are being satisfied within the time frame set forth therein.
c) That sufficient funds will be available to fund all outstanding network extensions, rebuilds, upgrades, or other construction commitments arising from a system's primary Service Area (PSA), Certificate of Approval, Municipal Consent, Letters of Intent or other Orders or agreements, including but not limited to the Board Order in Docket No. CO16050416 and documentation provided subsequent thereto.
d) That billing records are available for all customers in New Jersey cable television systems under their respective ownership and/or control and to provide the Board and its OCTV with copies of such records for three (3) years in accordance with N.J.A.C. 14:18-3.7.
e) That within 90 days from the date of closing of the Transaction, Altice will provide certification that the CCEs are and will remain fully compliant with Emergency Alert System (EAS) obligations imposed by the FCC on digital

programming services, effective December 31, 2013, and will retain the current levels of EAS functionality as currently being provided under the State Operational Plan.

Should Petitioners be unable to complete their review of their respective systems within 90 days of closing, each petitioner shall file a certified report with the Staff prior to the expiration of the 90-day period setting forth its progress on the requirements set forth above in paragraphs a through d. Petitioners will at that time have the option of requesting an extension of time of up to 90 days to finalize the review of their systems and certify to same with regard to the provisions of paragraphs a through d set forth above.

The conditions set forth by Stipulation and in this Order are binding and enforceable by the Board and failure to comply will result in an enforcement action.

The effective date of this Order is May 27, 2016.

DATED: 5/26/16

BOARD OF PUBLIC UTILITIES
BY:

RICHARD S. MROZ
PRESIDENT

JOSEPH L. FIORDALISO
COMMISSIONER

MARY-ANNA HOLDEN
COMMISSIONER

DIANNE SOLOMON
COMMISSIONER

UPENDRA J. CHIVUKULA
COMMISSIONER

ATTEST:

IRENE KIM ASBURY
SECRETARY

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

* * *

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

IN THE MATTER OF THE VERIFIED PETITION OF ALTICE N.V. AND CABLEVISION SYSTEMS CORPORATION AND CABLEVISION CABLE ENTITLES FOR APPROVAL TO TRANSFER CONTROL OF CABLEVISION CABLE ENTITIES	BPU DOCKET NO. CM15111255
IN THE MATTER OF THE VERIFIED PETITION OF ALTICE N.V. AND CABLEVISION SYSTEMS CORPORATION, CABLEVISION LIGHTPATH-NJ, LLC AND 4CONNECTIONS LLC FOR APPROVAL TO TRANSFER CONTROL OF CABLEVISION LIGHTPATH-NJ, LLC AND 4CONNECTIONS LLC, AND FOR CERTAIN FINANCING ARRANGMENTS	BPU DOCKET NO. TM15111256

STIPULATION OF SETTLEMENT

APPEARANCES:

Sidney A. Sayovitz, Esq., Schenck Price Smith & King, LLP, on behalf of Altice, N.V., Cablevision Systems Corporation, Cablevision Lightpath-NJ, LLC and 4Connections, LLC (collectively, "Lightpath") and Cablevision of Hudson County, LLC, Cablevision of Monmouth County, LLC, Cablevision of New Jersey, LLC, Cablevision of Newark, Cablevision of Oakland, LLC, Cablevision of Paterson, LLC, Cablevision of Rockland/Ramapo, LLC, Cablevision of Warwick, LLC, and CSC TKR, LLC (collectively, the "Cablevision Cable Entitles"), Joint Petitioners

Christopher Psihoules, Deputy Attorney General (Robert Lougy, Acting Attorney General of New Jersey), on behalf of the Staff of the Board of Public Utilities

Stefanie Brand, Director, New Jersey Division of Rate Counsel, on behalf of the Division of Rate Counsel

TO THE HONORABLE BOARD OF PUBLIC UTILITIES:

The parties to this proceeding are Altice N.V. ("Altice"), Cablevision Systems Corporation, Lightpath and Cablevision Cable Entities (collectively "Cablevision", and collectively with Altice, "Joint Petitioners"); the Division of Rate Counsel ("Rate Counsel"); and

the Staff of the New Jersey Board of Public Utilities ("Board Staff" or "Staff"). The New Jersey Board of Public Utilities shall be referred to in this Stipulation of Settlement ("Stipulation") as the "Board" or "BPU".

PROCEDURAL HISTORY

On November 5, 2015, Joint Petitioners initiated this proceeding with the filing of a Verified Joint Petition, BPU Docket No. CM15111255, to obtain approval of the Board pursuant to N.J.S.A. 48:5A-38 and N.J.A.C. 14:17-6.18 for the transfer of control of the Cablevision Cable Entities to Altice (the "Transaction"), pursuant to which an Altice merger subsidiary (Neptune Merger Sub) will merge with and into Cablevision Systems Corporation, such that Cablevision will be the surviving corporation and become an indirect subsidiary of Altice and as more fully described in the Joint Petition and in the Merger Agreement dated September 16, 2015 (the "Merger Agreement").

On this same date, Joint Petitioners also filed a Verified Joint Petition (the "Joint Petition", and collectively with the Verified Joint Petition in BPU Docket No. CM 15111255, the "Joint Petitions"), BPU Docket No. TM15111256, pursuant to N.J.S.A. 48:2-51.1 and N.J.A.C. 14:1-5.14 for the transfer of control of Lightpath. Further, under the Joint Petition (Docket No. TM15111256), approval was sought pursuant to N.J.S.A. 48:3-9 and N.J.A.C. 14:1-5.9 for Lightpath to participate in the financing arrangements to be entered into in connection with the transfer of control.

Following the filing of the Joint Petitions and extensive discovery propounded by both Board Staff and Rate Counsel, the Joint Petitioners, Board Staff, and Rate Counsel engaged in settlement negotiations. Discussions were held with Board Staff and Rate Counsel regarding the benefits to be provided by the Joint Petitioners as a result of the proposed Transaction. In addition, Joint Petitioners provided discovery responses to Board Staff and Rate Counsel's inquiries. The Joint Petitioners, Rate Counsel, and Board Staff (collectively, the "Signatory Parties") have come to an agreement on all factual and legal issues arising in this matter.

AGREEMENT

THEREFORE, the Signatory Parties, intending to be bound, hereto agree and stipulate as follows:

1. The statutory criteria for approval of petitions involving acquisitions of control of a New Jersey cable television company, as set forth in N.J.S.A. 48:5A-38 and N.J.A.C. 14:17-6.18, governing Docket No. CM15111255, have been satisfied. More particularly, Joint Petitioners assert that the record in Docket No. CM15111255, coupled with the conditions set forth herein, supports findings and conclusions by the Board that the Transaction is in the public interest.

2. The statutory criteria for approval of petitions involving acquisitions of control of a New Jersey public utility, as set forth in N.J.S.A. 48:2-51.1, have been satisfied. More particularly Joint Petitioners assert that the record in Docket No. TM15111256, coupled with the conditions set forth herein, supports findings and conclusions by the Board that the Transaction will not have an adverse impact on competition, on the rates of affected ratepayers, on the

employees of Cablevision, or on the provision of safe and adequate service at just and reasonable rates. The Signatory Parties further agree that consummation of the Transaction is consistent with the conditions set forth in this Stipulation, is in the public interest, and will result in positive benefits to customers and the State of New Jersey.

3. The statutory criteria for approval of petitions involving financing transactions of a New Jersey public utility, as set forth in N.J.S.A. 48:3-9 have been satisfied. More particularly, Joint Petitioners assert that the record in Docket No. TM15111256, coupled with the conditions set forth herein, supports findings and conclusions by the Board that the financing with respect to Lightpath in connection with the Transaction is in the public interest.

4. The Joint Petitioners agreed to extend, through May 27, 2016, the 120-day period for which the Board has to grant a transfer of control request under 47 CFR 76.502(c).

5. Based upon the Joint Petitioners' agreement to comply with the conditions set forth below, Rate Counsel and Board Staff do not object to the Board making findings set forth in paragraphs 1-3 above, and authorizing Joint Petitioners to take all actions necessary in order for the Transaction to be lawfully consummated.

6. Once the Board makes the findings set forth in paragraphs 1-5 above, and following the closing of the Transaction, provided that the Joint Petitioners commit to the conditions and commitments set out below herein, the Signatory Parties agree that the Joint Petitioners shall be authorized to take all actions necessary in order for the Transaction to be lawfully consummated, such that Altice may acquire a controlling interest in Cablevision (the "Company"), as described in the Joint Petitions in Docket Nos. CM15111255 and TM15111256 as follows:

a. Neptune Merger Sub may merge with and into Cablevision by the filing of a Certificate of Merger with the Secretary of State of the State of Delaware, such that Cablevision may continue as the surviving corporation, as described in the Merger Agreement.

b. Shares of Cablevision NY Group Class A Common Stock, par value $0.01 per share and Cablevision NY Group Class B Common Stock, par value $0.01 per share, issued and outstanding immediately prior to the effective time of the Merger may be cancelled and converted automatically into the right to receive the consideration as described in the Merger Agreement.

c. Cablevision may become an indirect subsidiary of Altice as described in the Merger Agreement.

d. Lightpath may assume the financial obligations imposed upon it in connection with the Transaction, as described in the Joint Petitions and Merger Agreement.

7. **Network Upgrade/Expansion.** The Company will upgrade its network such that it can provide Internet access service with speeds up to 300 Mbps, to be available on an equitable and nondiscriminatory basis to all existing customer locations passed no later than December 31, 2017. Within thirty (30) days following the closing of the Transaction (the "Closing"), the Company will submit a detailed description of the current network in New Jersey including

system capacity, analog/digital RF allocation, and maximum broadband speed offering (downstream and upstream). Within one-hundred twenty (120) days following the Closing, the Company will submit a descriptive deployment plan and timeline indicating phases of completion of work and likely dates for the release of the 300 Mbps service in each system and, for each calendar quarter following the Closing, shall provide an update on progress toward service availability in each system until it is launched. The updates shall include progress on the bandwidth reclamation plan; IP Network augmentation and upgrade; hardware installation, testing, and activation; and operation readiness training and tools, as appropriate.

a. **Low-Income Broadband**. Within six (6) months after the Closing, the Company shall launch pilot projects, training, and engagement of stakeholders with respect to low-income broadband service. Within fifteen (15) months after Closing, the Company will make available to New Jersey households statewide passed by the Company a low-income broadband service as follows:

i. Eligibility — The Company will offer its low-income broadband service to (A) households with children that have a student or students eligible for the National School Lunch Program, or (B) persons age 65 and older who are eligible for and receive benefits under the Supplemental Security Income program from the federal government. No credit check shall be required to enroll. It shall not be the responsibility of the Company to verify and confirm eligibility. Any current or former customers in arrears will not be eligible until those debts have been cleared. This policy will be applied to New Jersey customers in the manner applied to New York customers, in accordance with the Order of the New York Public Service Commission ("PSC") approving the Transaction, as that Order is applied by the PSC.

ii. Service Offering and Cost — The Company shall offer low-income broadband service with speeds up to 30 Mbps at a price not to exceed $14.99 per month. This low income broadband service shall not include a modem fee or charge for self-installation, and will be offered without a data cap.

b. **Low-Cost Broadband Service.** Within 120 days of Closing, the company shall (A) increase speed on the existing 5/1 Mbps low-cost broadband service offering to 10/1 Mbps, (B) offer this service at a price not to exceed $24.95 per month, and (C) shall continue to offer such low-cost broadband service for a period of not less than two (2) years from the date of Closing. Customers previously enrolled for low-cost broadband service may maintain service for up to three (3) years following the Closing.

c. **Network Resiliency/Recovery.** In the event of the declaration of an active, qualifying state of emergency, pursuant to N.J.S.A. App. A:9-33 et seq., the Company shall provide the following:

i. Emergency Wifi for Everyone — The Company shall provide wireless Internet access for customer and non-customers in the relevant geographic area subject to such qualifying state of emergency via the Company's Outdoor Emergency Optimum WiFi network without a fee.

ii. Hyper Local News and Weather for All Residents — The Company shall provide customer and non-customer access to the News 12 website for access to storm and emergency information.

iii. Partner with Utilities to Speed Power Restoration — The Company shall provide access to outage data at no cost to partnering utilities during the term of the qualified state of emergency. The Company will generally make available on reasonable and non-discriminatory commercial terms real-time power outage data to partnering utilities to target and prioritize outages.

iv. Backup Customer Support — The Company shall provide backup customer support resources during an emergency, including rerouting customer service calls from affected areas to adequately staffed support centers and third-party support operations inside and outside the affected locales.

In support of emergency preparedness initiatives, the Company shall provide the following:

v. Enhanced Network Resiliency — The Company shall commit to maintain Ring within Ring topology to remote hub for redundancy.

vi. Backup Powering — The Company shall commit to maintain an adequate backup power generation capacity to support outside plant in the event of a prolonged regional power outage.

vii. Storm Readiness Communications Plan — The Company shall launch public service announcements and other information about storm preparedness, the availability of backup batteries for cable modem MTA (for voice use), and the availability of other information portals such as News 12 during storms.

Nothing in this section of the Stipulation shall be read to preclude the Board from adopting or enforcing subsequently any lawful rule, regulation, or order regarding the matters addressed in this section.

Most Favored Nation. Within sixty (60) days following the Closing, the Joint Petitioners will provide Board Staff and Rate Counsel with a copy of the final Orders and Settlement Stipulations from any State or other jurisdiction under which conditions are imposed on the Joint Petitioners, along with an analysis indicating and explaining the valuation of the customer benefits awarded in that jurisdiction as compared to the valuation of the customer benefits awarded in New Jersey, in each case, calculated on a per customer basis.

In recognition of the risks to New Jersey of approving the Transaction before other jurisdictions, the Signatory Parties agree that in the event that the Joint Petitioners agree to and accept orders under which another state or jurisdiction obtains materially greater benefits in the aggregate than New Jersey pursuant to this Stipulation and order of approval, including but not limited to faster broadband speeds, more advantageous low-income broadband, low-cost

broadband, network resiliency and improvement, employment commitments, or other per subscriber benefits, then New Jersey shall be protected because the Joint Petitioners shall provide equivalent benefits to New Jersey. The Joint Petitioners and Board Staff agree that the "most favored nation" provision ensures that the synergy savings associated with the Transaction are shared with New Jersey customers in a manner equivalent to that of other States or jurisdictions on a per subscriber basis, and on the same time schedule as agreed or required in the State of New York.

d. **Employment Commitments.** Cablevision will not cause a reduction in force in customer-facing jobs, including at the Newark Project Facility located at 494 Broad Street, for two years following the close of the transaction. For purposes of this Stipulation, "customer-facing" refers to direct, non-incidental interaction with customers, including but not limited to call center and other walk-in center jobs, and service technicians. On an annual basis, Cablevision shall provide the Board with the following information: Total number of NJ Employees; Total number of customer-facing jobs in NJ; Total number of Employees in the Newark Project Facility; and Total number of customer-facing jobs at the Newark Project Facility.

e. **Data Caps.** For three (3) years following the Closing, the Company will offer a broadband product without a data cap, as well as provide the Low-Income Broadband Program referenced in subsection a., infra, without a data cap.

f. **Customer Service Offices.** Cablevision presently maintains sixteen (16) local customer service offices in the State of New Jersey. Cablevision commits to maintain customer service offices in the State in accordance with its municipal franchise obligations, and applicable statutes and regulations, including but not limited to N.J.S.A. 48:5A.-26(d) and N.J.A.C. 14:18-5.1. In addition, for two (2) years following the Closing, the Company commits to maintain at least thirteen (13) of Cablevision's sixteen (16) existing local customer service offices, including offices in Paterson, Union City, Bayonne, Elizabeth and Newark. For a period of three (3) years from the issuance of an Order approving this Stipulation, in the event there is any net loss of customer-facing jobs in New Jersey greater than fifteen percent (15%), the Joint Petitioners shall notify the Board of such change and provide an appropriate explanation.

g. **Customer Service.** The Company commits throughout the term of the Stipulation to a repair and service metric in which it will: (a) provide the Board with the Repair & Service calls per customer for the calendar year 2015 (the "Service Quality Benchmark") within 30 days of the Closing; and (b) provide the Board with quarterly reports, within forty-five (45) days of the end of each calendar quarter, on the Repair & Service calls per customer for the prior quarter and for the prior twelve (12) months (the "Report"). Based on the Report for the prior twelve (12) months, if the Repair & Service calls per customer exceed the Service Quality Benchmark by ten percent (10%) or more, then the Company shall be required to invest up to $250,000 per quarter to improve customer service over the next twelve (12) months.

h. **Notice of Credit Downgrade.** If, within three (3) years of the Closing, one of the nationally-recognized statistical rating organizations such as Fitch, Standard and Poor's, or Moody's, issues a report indicating a downgrade in the Company's credit ratings below current level, the Company shall notify the Board within three (3) business days of the

date of the issuance of such report and provide information on any proposed response to the downgrade within ten (10) business days of the issuance of such report.

i. **Compliance.** The Company will abide by applicable customer service standards, performance standards, and service metrics as delineated under N.J.A.C. Title 14, including but not limited to Chapters 3, 10 and 18, and N.J.S.A. 48:5A, including, but not limited to, requirements related to billing practices and termination.

j. **Adverse Impact.** If the Federal Communications Commission ("FCC") imposes conditions of the Joint Petitioners in an order by the FCC approving the Transaction and such conditions adversely impact those conditions contained in the Board Order approving the Transaction, the Company shall notify the Board of the impact that such conditions will have on its commitments to New Jersey and will work with the Board and Staff to ensure that New Jersey also obtains its commensurate benefit. Notwithstanding the foregoing, the conditions set out herein shall be provided in addition to any benefit that results from any federal action regarding the Transaction.

k. **Accounting Standards.** Financial reports and related submissions to the Board by the Company will be denominated in U.S. dollars and will conform to U.S. GAAP subject to the requirements of applicable United States and international law.

l. **Pledge of Assets/Credit.** Altice will not pledge the assets and/or credit of Cablevision's New Jersey operations to secure financing for any transaction unrelated to its New Jersey business or operations, except with prior approval of the Board as provided by applicable New Jersey law.

m. **Local Franchise Commitments.** The Company shall abide by all of its obligations under existing local franchise agreements throughout the term of such agreements as provided by applicable law.

n. **Pending FCC Appeals.** Altice expressly affirms that, subsequent to the Closing, Altice will cause the Cablevision operating entities to abide by and honor any final order with respect to any pending appeal or declaratory judgment, whether issued by the FCC or by a court of competent jurisdiction.

o. **Timeframe.** Unless otherwise specified, commitment term is three (3) years.

8. Each Signatory Party agrees to use its best efforts to ensure that this Stipulation shall be submitted to the Board for approval as soon as possible.

9. The Signatory Parties agree that this Stipulation represents the entirety of the agreement between the Signatory Parties. This Stipulation includes proposals and conditions above and beyond the terms contained in the Petitions in Docket Nos. CM15111255 and TM15111256. Notwithstanding statements made in the Petitions, discovery, materials or any information provided by the Joint Petitioners, only those commitments stated in this Stipulation shall apply.

10. The Signatory Parties further agree to defend this Stipulation in the event of opposition to approval of the Transaction from non-signatory parties before the Board.

11. Notwithstanding anything to the contrary set forth herein, upon the occurrence of any of the following events this Stipulation shall terminate, and shall be deemed null and void and of no force or effect:

a. If by July 1, 2016, the Board fails to issue a final Order approving the Transaction and this Stipulation or issues a decision disapproving this Stipulation; or

b. If for any reason the Transaction is not consummated; or

c. If the Board issues a written order approving this Stipulation, subject to any condition or modification of the terms set forth herein that an adversely affected Signatory Party, in its discretion, finds unacceptable. Such Signatory Party shall serve notice of unacceptability on the other Parties within three (3) business days following receipt of such Board order. Absent such notification, the Signatory Parties shall be deemed to have waived their respective rights to object to the acceptability of such conditions or modifications contained in the Board Order, which shall thereupon become binding on all Signatory Parties.

12. This Stipulation shall be binding on the Signatory Parties upon approval by the Board, without any change of its terms, or in the event of change, upon acceptance of such change (whether affirmatively accepted or by the passage of time). This Stipulation contains terms and conditions above and beyond the terms contained in the Petitions, each of which is interdependent with the others and essential in its own right to the signing of this Stipulation. Each term is vital to the agreement as a whole, since the Signatory Parties expressly and jointly state that they would not have signed the Stipulation had any term been modified in any way. None of the Signatory Parties shall be prohibited from or prejudiced in arguing a different policy or position before the Board in any other proceeding, as this agreement pertains only to these matters and to no other matter.

13. This Stipulation represents the full scope of the agreement between the Signatory Parties. This Stipulation may only be modified by a further written agreement executed by all the Signatory Parties to this Stipulation.

14. This Stipulation is submitted to the Board for approval as a whole. If a Signatory Party is adversely affected by a modification or condition to the Stipulation and provides timely notice in accordance with Paragraph 11, then the Stipulation shall be ineffective and void.

15. This Stipulation may be executed in as many counterparts as there are Signatory Parties to this Stipulation, each of which counterparts shall be an original, but all of which together shall constitute one and the same instrument.

ALTICE, N.V.

May 16, 2016
Date

By: Sidney A. Sayovitz, Esq.

CABLEVISION SYSTEMS CORPORATION
CABLEVISION CABLE ENTITIES

May 16, 2016
Date

By: Sidney A. Sayovitz, Esq.

ROBERT LOUGY
ACTING ATTORNEY GENERAL OF NEW JERSEY

May 18, 2016
Date

Christopher Psihoules, Deputy Attorney General
Attorney for the Staff of the Board of Public Utilities

STEFANIE A. BRAND, DIRECTOR
NEW JERSEY DIVISION OF RATE COUNSEL

May 18, 2016
Date

Stefanie Brand, Director of the New Jersey Division of Rate Counsel

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

IN THE MATTER OF THE VERIFIED PETITION OF ALTICE N.V. AND CABLEVISION SYSTEMS CORPORATION AND CABLEVISION CABLE ENTITLES FOR APPROVAL TO TRANSFER CONTROL OF CABLEVISION CABLE ENTITIES	BPU DOCKET NO. CM15111255
IN THE MATTER OF THE VERIFIED PETITION OF ALTICE N.V. AND CABLEVISION SYSTEMS CORPORATION, CABLEVISION LIGHTPATH-NJ, LLC AND 4CONNECTIONS LLC FOR APPROVAL TO TRANSFER CONTROL OF CABLEVISION LIGHTPATH-NJ, LLC AND 4CONNECTIONS LLC, AND FOR CERTAIN FINANCING ARRANGMENTS	BPU DOCKET NO. TM15111256

STIPULATION OF SETTLEMENT

APPEARANCES:

Sidney A. Sayovitz, Esq., Schenck Price Smith & King, LLP, on behalf of Altice, N.V., Cablevision Systems Corporation, Cablevision Lightpath-NJ, LLC and 4Connections, LLC (collectively, "Lightpath") and Cablevision of Hudson County, LLC, Cablevision of Monmouth County, LLC, Cablevision of New Jersey, LLC, Cablevision of Newark, Cablevision of Oakland, LLC, Cablevision of Paterson, LLC, Cablevision of Rockland/Ramapo, LLC, Cablevision of Warwick, LLC, and CSC TKR, LLC (collectively, the "Cablevision Cable Entitles"), Joint Petitioners

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TO THE HONORABLE BOARD OF PUBLIC UTILITIES:

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Following the filing of the Joint Petitions and extensive discovery propounded by both Board Staff and Rate Counsel, the Joint Petitioners, Board Staff, and Rate Counsel engaged in settlement negotiations. Discussions were held with Board Staff and Rate Counsel regarding the benefits to be provided by the Joint Petitioners as a result of the proposed Transaction. In addition, Joint Petitioners provided discovery responses to Board Staff and Rate Counsel's inquiries. The Joint Petitioners, Rate Counsel, and Board Staff (collectively, the "Signatory Parties") have come to an agreement on all factual and legal issues arising in this matter.

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Most Favored Nation. Within sixty (60) days following the Closing, the Joint Petitioners will provide Board Staff and Rate Counsel with a copy of the final Orders and Settlement Stipulations from any State or other jurisdiction under which conditions are imposed on the Joint Petitioners, along with an analysis indicating and explaining the valuation of the customer benefits awarded in that jurisdiction as compared to the valuation of the customer benefits awarded in New Jersey, in each case, calculated on a per customer basis.

In recognition of the risks to New Jersey of approving the Transaction before other jurisdictions, the Signatory Parties agree that in the event that the Joint Petitioners agree to and accept orders under which another state or jurisdiction obtains materially greater benefits in the aggregate than New Jersey pursuant to this Stipulation and order of approval, including but not limited to faster broadband speeds, more advantageous low-income broadband, low-cost

broadband, network resiliency and improvement, employment commitments, or other per subscriber benefits, then New Jersey shall be protected because the Joint Petitioners shall provide equivalent benefits to New Jersey. The Joint Petitioners and Board Staff agree that the "most favored nation" provision ensures that the synergy savings associated with the Transaction are shared with New Jersey customers in a manner equivalent to that of other States or jurisdictions on a per subscriber basis, and on the same time schedule as agreed or required in the State of New York.

d. **Employment Commitments.** Cablevision will not cause a reduction in force in customer-facing jobs, including at the Newark Project Facility located at 494 Broad Street, for two years following the close of the transaction. For purposes of this Stipulation, "customer-facing" refers to direct, non-incidental interaction with customers, including but not limited to call center and other walk-in center jobs, and service technicians. On an annual basis, Cablevision shall provide the Board with the following information: Total number of NJ Employees; Total number of customer-facing jobs in NJ; Total number of Employees in the Newark Project Facility; and Total number of customer-facing jobs at the Newark Project Facility.

e. **Data Caps.** For three (3) years following the Closing, the Company will offer a broadband product without a data cap, as well as provide the Low-Income Broadband Program referenced in subsection a., infra, without a data cap.

f. **Customer Service Offices.** Cablevision presently maintains sixteen (16) local customer service offices in the State of New Jersey. Cablevision commits to maintain customer service offices in the State in accordance with its municipal franchise obligations, and applicable statutes and regulations, including but not limited to N.J.S.A. 48:5A.-26(d) and N.J.A.C. 14:18-5.1. In addition, for two (2) years following the Closing, the Company commits to maintain at least thirteen (13) of Cablevision's sixteen (16) existing local customer service offices, including offices in Paterson, Union City, Bayonne, Elizabeth and Newark. For a period of three (3) years from the issuance of an Order approving this Stipulation, in the event there is any net loss of customer-facing jobs in New Jersey greater than fifteen percent (15%), the Joint Petitioners shall notify the Board of such change and provide an appropriate explanation.

g. **Customer Service.** The Company commits throughout the term of the Stipulation to a repair and service metric in which it will: (a) provide the Board with the Repair & Service calls per customer for the calendar year 2015 (the "Service Quality Benchmark") within 30 days of the Closing; and (b) provide the Board with quarterly reports, within forty-five (45) days of the end of each calendar quarter, on the Repair & Service calls per customer for the prior quarter and for the prior twelve (12) months (the "Report"). Based on the Report for the prior twelve (12) months, if the Repair & Service calls per customer exceed the Service Quality Benchmark by ten percent (10%) or more, then the Company shall be required to invest up to $250,000 per quarter to improve customer service over the next twelve (12) months.

h. **Notice of Credit Downgrade.** If, within three (3) years of the Closing, one of the nationally-recognized statistical rating organizations such as Fitch, Standard and Poor's, or Moody's, issues a report indicating a downgrade in the Company's credit ratings below current level, the Company shall notify the Board within three (3) business days of the

date of the issuance of such report and provide information on any proposed response to the downgrade within ten (10) business days of the issuance of such report.

i. **Compliance**. The Company will abide by applicable customer service standards, performance standards, and service metrics as delineated under N.J.A.C. Title 14, including but not limited to Chapters 3, 10 and 18, and N.J.S.A. 48:5A, including, but not limited to, requirements related to billing practices and termination.

j. **Adverse Impact**. If the Federal Communications Commission ("FCC") imposes conditions of the Joint Petitioners in an order by the FCC approving the Transaction and such conditions adversely impact those conditions contained in the Board Order approving the Transaction, the Company shall notify the Board of the impact that such conditions will have on its commitments to New Jersey and will work with the Board and Staff to ensure that New Jersey also obtains its commensurate benefit. Notwithstanding the foregoing, the conditions set out herein shall be provided in addition to any benefit that results from any federal action regarding the Transaction.

k. **Accounting Standards.** Financial reports and related submissions to the Board by the Company will be denominated in U.S. dollars and will conform to U.S. GAAP subject to the requirements of applicable United States and international law.

l. **Pledge of Assets/Credit**. Altice will not pledge the assets and/or credit of Cablevision's New Jersey operations to secure financing for any transaction unrelated to its New Jersey business or operations, except with prior approval of the Board as provided by applicable New Jersey law.

m. **Local Franchise Commitments**. The Company shall abide by all of its obligations under existing local franchise agreements throughout the term of such agreements as provided by applicable law.

n. **Pending FCC Appeals**. Altice expressly affirms that, subsequent to the Closing, Altice will cause the Cablevision operating entities to abide by and honor any final order with respect to any pending appeal or declaratory judgment, whether issued by the FCC or by a court of competent jurisdiction.

o. **Timeframe**. Unless otherwise specified, commitment term is three (3) years.

8. Each Signatory Party agrees to use its best efforts to ensure that this Stipulation shall be submitted to the Board for approval as soon as possible.

9. The Signatory Parties agree that this Stipulation represents the entirety of the agreement between the Signatory Parties. This Stipulation includes proposals and conditions above and beyond the terms contained in the Petitions in Docket Nos. CM15111255 and TM15111256. Notwithstanding statements made in the Petitions, discovery, materials or any information provided by the Joint Petitioners, only those commitments stated in this Stipulation shall apply.

10. The Signatory Parties further agree to defend this Stipulation in the event of opposition to approval of the Transaction from non-signatory parties before the Board.

11. Notwithstanding anything to the contrary set forth herein, upon the occurrence of any of the following events this Stipulation shall terminate, and shall be deemed null and void and of no force or effect:

a. If by July 1, 2016, the Board fails to issue a final Order approving the Transaction and this Stipulation or issues a decision disapproving this Stipulation; or

b. If for any reason the Transaction is not consummated; or

c. If the Board issues a written order approving this Stipulation, subject to any condition or modification of the terms set forth herein that an adversely affected Signatory Party, in its discretion, finds unacceptable. Such Signatory Party shall serve notice of unacceptability on the other Parties within three (3) business days following receipt of such Board order. Absent such notification, the Signatory Parties shall be deemed to have waived their respective rights to object to the acceptability of such conditions or modifications contained in the Board Order, which shall thereupon become binding on all Signatory Parties.

12. This Stipulation shall be binding on the Signatory Parties upon approval by the Board, without any change of its terms, or in the event of change, upon acceptance of such change (whether affirmatively accepted or by the passage of time). This Stipulation contains terms and conditions above and beyond the terms contained in the Petitions, each of which is interdependent with the others and essential in its own right to the signing of this Stipulation. Each term is vital to the agreement as a whole, since the Signatory Parties expressly and jointly state that they would not have signed the Stipulation had any term been modified in any way. None of the Signatory Parties shall be prohibited from or prejudiced in arguing a different policy or position before the Board in any other proceeding, as this agreement pertains only to these matters and to no other matter.

13. This Stipulation represents the full scope of the agreement between the Signatory Parties. This Stipulation may only be modified by a further written agreement executed by all the Signatory Parties to this Stipulation.

14. This Stipulation is submitted to the Board for approval as a whole. If a Signatory Party is adversely affected by a modification or condition to the Stipulation and provides timely notice in accordance with Paragraph 11, then the Stipulation shall be ineffective and void.

15. This Stipulation may be executed in as many counterparts as there are Signatory Parties to this Stipulation, each of which counterparts shall be an original, but all of which together shall constitute one and the same instrument.

ALTICE, N.V.

May 16, 2016
Date

By: Sidney A. Sayovitz, Esq.

CABLEVISION SYSTEMS CORPORATION
CABLEVISION CABLE ENTITIES

May 16, 2016
Date

By: Sidney A. Sayovitz, Esq.

ROBERT LOUGY
ACTING ATTORNEY GENERAL OF NEW JERSEY

May 10, 2016
Date

Christopher Psihoules, Deputy Attorney General
Attorney for the Staff of the Board of Public Utilities

STEFANIE A. BRAND, DIRECTOR
NEW JERSEY DIVISION OF RATE COUNSEL

May 18, 2016
Date

Stefanie Brand, Director of the New Jersey Division of Rate Counsel

Agenda Date: 12/18/18
Agenda Item: 3A

STATE OF NEW JERSEY

Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

OFFICE OF CABLE TELEVISION
AND TELECOMMUNICATIONS

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

Party of Record:

Paul Jamieson, Esq., Vice President, Government Affairs and Policy, Altice USA, Inc.

BY THE BOARD:

The New Jersey Board of Public Utilities ("Board"), an agency within a department of the Executive Branch of State Government, with principal offices at 44 South Clinton Avenue, Trenton, New Jersey, by way of Order to Show Cause, alleges:

1) The Board pursuant to N.J.S.A. 48:5A-9 has been granted general power, authority and jurisdiction to receive or initiate complaints of the alleged violation of any provisions of P.L. 1972, c. 186 or of any of the rules and regulations made pursuant to P.L., c. 186 or the terms and conditions of any municipal consent or franchise granted pursuant thereto.

2) The Board, pursuant to N.J.S.A. 48:5A-9 is vested with the authority to supervise and regulate every CATV Company operating within this State and its property, property rights, equipment, facilities, contracts, certificates and franchises and to do all things necessary or convenient in the exercise of such power and authority.

3) Pursuant to N.J.S.A. 48:5A-10, the Director of the Office of Cable Television and Telecommunications ("OCTV&T"), with the approval of the Board, shall establish rules and regulations governing the provision of safe, adequate and proper cable television service, technical standards for performance, the prohibition and prevention of the imposition of any unjust or unreasonable, unjustly discriminatory or unduly preferential individual or joint rate, charge or schedule for any service supplied or imposition of any unjust or unreasonable classification.

4) Altice USA, Inc., ("Altice") formerly known as Cablevision Systems Corporation ("Cablevision"), owns and operates certain cable television systems as that term is defined in N.J.S.A. 48:5A-3(d), in the State of New Jersey, pursuant to applicable State and federal law, and such cable systems provide cable television services in the State of New Jersey.

5) Altice is subject to the jurisdiction of the Board and OCTV&T, within the Board, pursuant to the provisions of the New Jersey Cable Act, N.J.S.A. 48:5A-1 et seq., and the New Jersey Administrative Code, N.J.A.C. 14:17-1.1 et seq., and N.J.A.C. 14:18-1.1 et seq.;

6) In September 2011, the Board issued an Order regarding a Petition by Cablevision which sought relief from several provisions of the Board's rules, including N.J.A.C. 14:18-3.8. I/M/O the Petition of Cablevision Systems Corporation for Relief Pursuant to N.J.A.C. 14:18-16.7, docket number CO11050279 (September 21, 2011). ("Rule Relief Order")

7) N.J.A.C. 14:18-3.8, "Method of billing" for cable television companies, provides that:

> (a) Bills for cable television service shall be rendered monthly, bi-monthly, quarterly, semi-annually or annually and shall be prorated upon establishment and termination of service.
>
> [. . .]
>
> (c) A cable television company may, under uniform nondiscriminatory terms and conditions, require payment, in advance for a period not to exceed that for which bills are regularly rendered, as specified in its applicable filed schedule of prices, rates, terms and conditions. Any such advance payment for a greater period shall reflect appropriate discount for the additional period involved. Unless otherwise provided for in the applicable filed schedule of prices, rates, terms and conditions, initial and final bills shall be prorated as of the date of the initial establishment and final termination of service.

8) The Board's order granting in part the relief sought from compliance with N.J.A.C. 14:18-3.8, states that "Relief can be sought provided that the cable television company provides a sample bill to be utilized in lieu of compliance with this section for approval by the Office of Cable Television (OCTV)" and found that "the sample bill [provided by Cablevision] demonstrates that the company is billing in a proper manner and shows how Cablevision will prorate its bills pursuant to the requirements of this section." (Rule Relief Order at 6).

9) Based on the representations of the Company provided to the Board which indicated that Cablevision would continue to prorate its bills pursuant to the requirements of the rules and with reliance on that representation and the assurance that waiver of certain provisions of the rules "would not harm consumers" and that the Company would continue to prorate its bills, relief was granted in the Board's Order. (Rule Relief Order at 7).

10) By verified petition filed in November 2015, Altice N.V., Cablevision Systems Corporation and the Cablevision Entities initiated a proceeding before the Board seeking approval for Altice to acquire control of the Cablevision Cable Entities. (I/M/O the Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Cable Entities for Approval to Transfer Control of Cablevision Cable Entities, docket number CM15111255 ("Merger Petition").

11) In its filing, the Petitioner indicated that Altice shall abide by all of its obligations under existing local franchise agreements throughout the terms of such agreements, and averred that it intended to operate under existing rates, terms and service conditions. Further, the Petitioners indicated no specific plans were in place to change the customer service structure, or to undertake actions affecting the public interest. (Merger Petition at 8).

12) In the Board's May 2016 Order approving the Merger Petition, the Board adopted a Stipulation of Settlement wherein Altice agreed that it "will abide by applicable customer service standards, performance standards, and service metrics delineated under N.J.A.C. Title 14, including but not limited to Chapters 3, 10 and 18 and N.J.S.A. 48:5A, including but not limited to, requirements related to billing practices and termination." (Order Approving Stipulation of Settlement, I/M/O the Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Cable Entities for Approval to Transfer Control of Cablevision Cable Entities, docket number CM15111255, page 11 (May 25, 2016), ("Merger Order").

13) In October 2016, Altice issued a bill notice to customers indicating they would no longer prorate bills and provide partial credits or refunds to customers cancelling service prior to the end of the billing period.

14) On or about March 2017, Staff notified Altice that its actions were inconsistent with the rules and did not comport with the sample bill provided when Cablevision was granted relief from some of the provisions set forth in N.J.A.C. 14:18-3.8, in the Rule Relief Order.

15) On September 13, 2017, Altice responded to Staff's query regarding the prorating billing policy, indicating that based on their interpretation of the Board's Rule Relief Order, Altice is not subject to the provisions set forth in N.J.A.C. 14:18-3.8.

16) Since the change in policy, Board staff has received over 100 complaints from customers regarding charges incurred for services no longer rendered after termination.

The Board **HEREBY ORDERS**:

1) Altice to show cause before the Board why the Board should not Order that Altice cease and desist immediately its failure to properly prorate customer bills.

2) Altice to show cause before the Board why the Board should not find Altice's actions for failure to properly prorate customer bills from the period of October 2016 to the present constitute a violation of the Board's Rule Relief Order and the Merger Order.

3) Altice to show cause before the Board why the Board should not assess a monetary penalty for Altice's failure to comply with the Board's Rule Relief Order and Merger Order, from the period of October 16, 2016 to the date of this Board Order.

4) Altice to show cause before the Board why the Board should not order that Altice issue refunds to all customers that have suffered harm from Altice's failure to properly prorate customer bills.

5) Altice to file an Answer to this Order to Show Cause and provide any and all documents or other written evidence upon which it may rely in responding to the within Order to Show Cause by January 15, 2019.

6) If Altice fails to respond by the designated date of January 15, 2019, the Board may commence proceedings to revoke the franchise authority granted the Company.

The Board **HEREBY DIRECTS** that a certified copy of this Order be served upon Respondent pursuant to N.J.S.A. 48:2-40.

This Order shall be effective December 28, 2018.

DATED: 12/18/18

BOARD OF PUBLIC UTILITIES
BY:

JOSEPH L. FIORDALISO
PRESIDENT

MARY-ANNA HOLDEN
COMMISSIONER

DIANNE SOLOMON
COMMISSIONER

UPENDRA J. CHIVUKULA
COMMISSIONER

ROBERT M. GORDON
COMMISSIONER

ATTEST:

AIDA CAMACHO-WELCH
SECRETARY

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

Agenda Date: 11/13/19
Agenda Item: 3A

STATE OF NEW JERSEY

Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

OFFICE OF CABLE TELEVISION
AND TELECOMMUNICATIONS

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

Parties of Record:

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

BY THE BOARD:

The respondent, Altice USA, Inc. ("Altice" or "Company") was ordered to show cause on December 18, 2018, why its failure to prorate customer bills should not immediately be discontinued, and why the Board of Public Utilities ("Board") should not find Altice's actions for failure to properly prorate customer bills from the period of October 2016 to the present to constitute a violation of the Board's Rule Relief Order, I/M/O the Petition of Cablevision Systems Corporation for Relief Pursuant to N.J.A.C. 14:18-16.7, docket number CO11050279, (order dated September 22, 2011) ("Rule Relief Order"), and the Board's Merger Order, I/M/O the Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Cable Entities for Approval to Transfer Control of Cablevision Cable Entities, docket number CM15111255, (order dated May 25, 2016) ("Merger Order"), and, why the Board should not issue a penalty for Altice's failure to comply with the Rule Relief Order and the Merger Order and issue refunds to all customers that have suffered harm from Altice's failure to properly prorate customer bills. I/M/O the Alleged Failure of Altice USA, Inc. to Comply with Certain Provisions of the New Jersey Cable Television Act, N.J.S.A. 48:5A-1 et seq., and the New Jersey Administrative Code, N.J.A.C. 14:18-1.1 et seq., docket number CS18121288, (Order dated December 18, 2018) ("Order to Show Cause").

BACKGROUND AND PROCEDURAL HISTORY

Altice, formerly known as Cablevision Systems Corporation ("Cablevision"), owns and operates certain cable television systems in the State of New Jersey as that term is defined in N.J.S.A.

48:5A-3(d), pursuant to applicable State and federal law, and such cable systems provide cable television services in the State of New Jersey.

Altice is subject to the jurisdiction of the Board and the Office of Cable Television and Telecommunications ("OCTV&T") within the Board, pursuant to the provisions of the New Jersey Cable Television Act, N.J.S.A. 48:5A-1 to 64, and the New Jersey Administrative Code, N.J.A.C. 14:17-1.1 to 11.4, and N.J.A.C. 14:18-1.1 to 16.8.

On May 5, 2011, Cablevision filed a petition with the Board requesting relief in the form of waivers of certain rules set forth in N.J.A.C. 14:18-16.7 ("Rule Relief Petition"). N.J.A.C. 14:18-16.7 provides that, "[u]pon a finding by the Board that the Federal Communications Commission has decertified rate regulation for any cable television system, pursuant to 47 C.F.R. 76.905, on a final finding of effective competition . . ." a cable television company may seek relief from nine provisions in N.J.A.C. 14:18 specifically set forth in N.J.A.C. 14:18-16.7.

For purposes of this order, discussion of the waiver will be limited to the provisions related to the Order to Show Cause, specifically, N.J.A.C. 14:18-3.8, "Method of billing" for cable television companies, which provides that:

> (a) Bills for cable television service shall be rendered monthly, bi-monthly, quarterly, semi-annually or annually and shall be prorated upon establishment and termination of service. In unusual credit situations, bills may be rendered at shorter intervals.
>
> (b) Cable television seasonal service may be billed in accordance with reasonable terms and conditions of service set forth in the filed schedule of prices, rates, terms and conditions.
>
> (c) A cable television company may, under uniform nondiscriminatory terms and conditions, require payment, in advance, for a period not to exceed that for which bills are regularly rendered, as specified in its applicable filed schedule of prices, rates, terms and conditions. Any such advance payment for a greater period shall reflect appropriate discount for the additional period involved. Unless otherwise provided for in the applicable filed schedule of prices, rates, terms and conditions, initial and final bills shall be prorated as of the date of the initial establishment and final termination of service.
>
> (d) If a cable television company electronically disconnects or otherwise curtails, interrupts or discontinues all or a portion of the customer's services for non-payment of a valid bill or for other reasons provided under N.J.A.C. 14:18-4.3, the cable television company shall prorate the charges for all affected services as of the date of the electronic service curtailment, interruption or disconnection.

Cable companies are permitted to bill for service in a number of ways - monthly, quarterly, semi-annually or annually, or shorter intervals if necessary - and the Rule also allows for advanced billing. N.J.A.C. 14:18-3.8 also requires cable television companies to prorate service in the event of disconnection.

In the Rule Relief Petition, Cablevision based its request for relief on the relief previously granted to Verizon New Jersey, Inc. ("Verizon") earlier that same year. Rule Relief Petition at 3-4. See I/M/O Verizon New Jersey, Inc. for Relief of Compliance with Certain Provisions of N.J.A.C. 14:18 Pursuant to N.J.A.C. 14:18-6.7, docket number CO10040249 (Order dated March 30, 2011) ("Verizon Order"). In its filing, Cablevision noted that similar treatment should be afforded to Cablevision as a direct competitor of Verizon. Rule Relief Petition at 3-4. The Rule Relief Petition clearly stated that "[g]ranting Cablevision's petition is also necessary to ensure that there continues to be a level playing field between Cablevision and its largest, wireline cable television rival with regard to relief from the rules specified herein". Ibid. Thus, the relief sought was not intended to be beyond the scope of that granted to Verizon. Furthermore, in support of its request for relief from N.J.A.C. 14:18-3.8, Cablevision asserted that "[t]his rule [i]s not necessary in a competitive environment, and limits cable operators' flexibility to adapt billing procedures to meet customer needs" and "[f]orbearance from the rule would enable Cablevision to meet its customers' billing needs by allowing it to construct tailored billing arrangements and payment plans." Id. at 5. The Rule Relief Petition solely addressed the need for flexibility in customer billing arrangements. Nowhere in the Rule Relief Petition did Cablevision discuss and specifically request relief from the requirement to prorate.[1]

As part of the review process, and pursuant to N.J.A.C. 14:18-16.7(a)(1), Staff of the Board of Public Utilities ("Board Staff" or "Staff") requested that Cablevision provide a sample bill for approval by the Office of Cable Television ("OCTV").[2] In response, Cablevision in fact submitted a sample bill which demonstrated proper billing practices and provided an example of how it would continue to prorate customer bills.

In September 2011, after full consideration of the relief requested in the Rule Relief Petition and the potential consequences of granting any relief, the Board issued the Rule Relief Order. Based on the representations by Cablevision provided to the Board, which indicated that Cablevision would continue to prorate its bills pursuant to the requirements of the rules, and with reliance on that representation and the assurance that waiver of certain provisions of the rules "would not harm consumers", relief was granted in the Board's Order. Rule Relief Order at 7.

In the Rule Relief Order, the Board explicitly stated that the waiver was granted based on an understanding that consumers would not be harmed. Ibid. The Rule Relief Order provides, "Relief can be sought provided that the cable television company provides a sample bill to be utilized in lieu of compliance with this section for approval by the Office of Cable Television (OCTV)" and found that "the sample bill [provided by Cablevision] demonstrates that the company is billing in a proper manner and shows how Cablevision will prorate its bills pursuant to the requirements of this section." Id. at 6. Furthermore, the Rule Relief Order itself

[1] The Verizon Order contains language similar to the Rule Relief Order, specifically, it indicates that Verizon's "sample bill demonstrates how the company will prorate its bills pursuant to the requirements of [N.J.A.C. 14:18-3.8]." Verizon Order at 2. As of the date of this Cease and Desist Order, Verizon continues to comply with the proration requirements of N.J.A.C. 14:18-3.8.

[2] In September 2015, the Board's Division of Telecommunications was merged into OCTV, creating the current Office of Cable Television and Telecommunications ("OCTV&T").

discussed how the sample bill evidenced the intent to continue to prorate customer bills. Id. at 6.

By verified petition filed in November 2015, Altice N.V., Cablevision Systems Corporation and the Cablevision Entities initiated a proceeding before the Board seeking approval for Altice to acquire control of the Cablevision Cable Entities. I/M/O the Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Cable Entities for Approval to Transfer Control of Cablevision Cable Entities, docket number CM15111255 ("Merger Petition"). In their filing, the Petitioners indicated that Altice would abide by all of its obligations under existing local franchise agreements throughout the terms of such agreements, and averred that it intended to operate under existing rates, terms and service conditions. Further, the Petitioners indicated no specific plans were in place to change the customer service structure, or to undertake actions affecting the public interest. Merger Petition at 8.

Subsequently, in the Merger Order approving the Merger Petition, the Board adopted a Stipulation of Settlement wherein Altice agreed that it "will abide by applicable customer service standards, performance standards, and service metrics delineated under N.J.A.C. Title 14, including but not limited to Chapters 3, 10 and 18 and N.J.S.A. 48:5A, including but not limited to requirements related to billing practices and termination." Merger Order at 11.

In October 2016, Altice issued a bill notice to customers indicating they would no longer prorate bills and provide partial credits or refunds to customers cancelling service prior to the end of the billing period. Staff notified Altice that its actions were inconsistent with the rules and did not comport with the sample bill provided when Cablevision was granted relief from some of the provisions set forth in N.J.A.C. 14:18-3.8 in the Rule Relief Order.

On September 13, 2017, Altice responded to Staff's query regarding the prorating billing policy, indicating that based on their interpretation of the Board's Rule Relief Order, Altice is not subject to the provisions set forth in N.J.A.C. 14:18-3.8.

Following the change in Company policy in October 2016, and continuing to the present, Board Staff has received over 100 inquiries/complaints from customers regarding charges incurred for services no longer rendered after termination. For example, on July 23, 2017, a customer complained that while service was terminated and equipment returned to Cablevision on July 18, 2018, Cablevision refused to prorate the customer's bill because they failed to cancel service prior to the beginning of the billing cycle on July 14, 2018, and charged them for an entire month of service, although they only received service for four days. More recently, on September 18, 2019, a complaint was received from a customer who cancelled service on September 6, 2019 and when they inquired with the Company regarding their final bill, was informed that they would be charged for the entire month although they had only received service for six days.

After reviewing the complaints, in December 2018, the Board issued the Order to Show Cause. The Company was ordered to show cause before the Board why it should not be ordered to cease and desist immediately its failure to properly prorate customer bills; why the Board should not find Altice's actions for failure to properly prorate customer bills from the period of October 2016 to the present to constitute a violation of the Rule Relief Order and Merger Order; why a monetary penalty for failure to comply with the Rule Relief Order and Merger Order should not be assessed; and why the Board should not order Altice to issue refunds to all customers that have suffered harm from Altice's failure to properly prorate customer bills.

The Company was ordered to file an answer by January 15, 2019. It was properly served with the Order to Show Cause and filed a request for an extension of time by which to file its answer. The request for an extension of time to answer to January 31, 2019 was granted.

ALTICE'S ANSWER

On January 31, 2019, Altice submitted its Answer to the OSC ("Answer"). In its Answer, Altice outlines its understanding of the Rate Relief Order which, it explains, provided the Company with flexibility upon which to modify its billing procedures to respond to effective competition. Altice, in defense of its position, avers that the Board cannot require Altice to prorate because mandatory proration is a form of rate regulation preempted by the Federal Cable Act. Answer at 2. Altice indicates that it implemented monthly billing across its 21 state footprint as of October 10, 2016. Id. at 5. The Company explains that by this policy customers are billed for service monthly in advance. Ibid. In relying on the Rule Relief Order, Altice contends that the waiver is unconditional as the language in the order does not specify any restrictions to the waiver granted. Id. at 6.

In describing the relief requested, Altice asserts that N.J.A.C. 14:18-3.8 mandates essentially nothing besides the requirement to prorate. Id. at 8. It also claims that it never represented that it would continue to prorate indefinitely. Id. at 7. In addition, it claims that the sample bills presented included both prorated and non-prorated bills in response to Staff's requests. Id. at 9. Altice asserts that it told Staff, even after bills reflecting proration were submitted, that the waiver sought was for "future" flexibility and that the samples reflected the Company's existing billing practices to establish compliance at the time and were not intended to establish a continued practice of compliance. Id. at 10.

Regarding enforcement and the Board's ability to require that the Company refund customers for its failure to prorate, Altice contends the Board's authority is confined to the terms of N.J.S.A. 48:5A-51, which authorizes specific penalties, not customer refunds. Id. at 14. Customer refunds, Altice claims, are for limited instances and can be imposed only in the event of a service outage. Ibid.

Lastly, Altice asserts that this matter is not a contested case under New Jersey's Administrative Procedure Act because there are no material facts in issue that must be decided after a full hearing. Id. at 15. None of the material facts, according to Altice, are in dispute. Ibid. Instead, Altice asserts that this matter rests upon a question of law regarding the Board's legal interpretation of its order and the scope of its authority. Ibid.

RATE COUNSEL'S RESPONSE

On March 6, 2019, the New Jersey Division of Rate Counsel ("Rate Counsel") responded to Altice's Answer to the Board's Order to Show Cause ("Response"). Rate Counsel was a party to both proceedings that resulted in issuance of the Rule Relief Order and Merger Order. Rate Counsel asserts, in the Response, that the Rule Relief Order did not relieve the Company from its continuing regulatory obligation of prorating customer bills under N.J.A.C. 14:18-3.8. Response at 3. Throughout its Response, Rate Counsel stresses the Board's overarching responsibility to protect customers and ratepayers from policies and practices that run counter to the public interest, while highlighting the fact that the requirement to prorate initial and final bills is meant to protect against abuse of captive departing customers, and to ensure that customers do not pay for cable services that they are not requesting. Id. at 3, 4, 5. Rate Counsel recommends that Altice immediately cease and desist the non-proration of customer

bills upon termination of service; provide Board Staff and Rate Counsel with a plan for issuing customer refunds; provide proof of customer refunds; and provide annual reports during a three year period demonstrating prorated customer accounts where service was discontinued. Id. at 2.

Rate Counsel emphasizes that the Rule Relief Order did not alter the Company's continuing obligation to prorate bills upon initiation and discontinuance of a customer's cable service. Id. at 3. Rate Counsel asserts that the Rule Relief Order was based upon sample bills that indicated the Company would continue to prorate billing. Ibid. In addition, Rate Counsel points to the fact that the Company did not raise any interest in changing the billing process during the merger review period which had concluded six months prior to the Company's change in billing practices. Id. at 4. The Company's ultra vires practice, as per Rate Counsel, violates Board regulations and the Rule Relief Order. Id. at 5. According to Rate Counsel, this action by Altice is the equivalent of "negative option billing"[3] which is prohibited under federal law, specifically, Section 623(f) of the Communications Act of 1934, and is contrary to Section 76.981(a) of the Federal Communications Commission's rules under the Cable Television Consumer Protection and Competition Act of 1972. Ibid.

Rate Counsel further asserts that Altice's claim that the Rule Relief Order failed to express conditional language limiting the waiver is erroneous. Id. at 6. Rate Counsel explains that the Rule Relief Order did not contain a carve-out because the sample bills established that the Company would continue to prorate customer bills and therefore it was unwarranted. Ibid.

Rate Counsel refutes the cases cited by the Company and supports application of Section 76.942 of the Code of Federal Regulations which recognizes the Board's authority to order a cable operator to refund subscribers for overcharges, such as in this instance, where the Company has charged customers for service that was not received. Id. at 15. See 47 C.F.R. § 76.942(a).

ALTICE'S REPLY

Altice filed a reply on April 2, 2019 ("Reply"). In its Reply, the Company emphasizes that the plain language of the Rule Relief Order does not include any condition on the waiver of N.J.A.C. 14:18-3.8, and again asserts that, effectively, there is no other requirement within that Rule except proration. Reply at 1-2. The Company states that the sample bills provided by the Company during the pendency of the Rule Relief Petition should not have been relied upon by the Board or Rate Counsel as indicative of the Company's future billing practices. Id. at 3. Altice asserts that it was always Cablevision's intention to seek a waiver of the proration requirement found in N.J.A.C. 14:18-3.8. Ibid. The Company suggests that Rate Counsel and the Board should have asked Cablevision for a commitment to prorate customer bills if that was what Rate Counsel and the Board intended. Id. at 4-5. Altice reiterates that the Board lacks authority to order the Company to issue refunds and argues that if the Board were now to order the Company to prorate bills, it would be a modification or rescinding of the Rule Relief Order, which would be improper by way of order to show cause, the purpose of which is to enforce an existing order. Id. at 7, 9.

[3] Section 623(f) of the Communications Act of 1934, found at 47 U.S.C. § 543, provides, "A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name."

DISCUSSION

The Board has been granted general power, authority and jurisdiction to receive or initiate complaints of the alleged violation of any provisions of N.J.S.A. 48:5A-1 to 64 or of any of the rules and regulations made pursuant thereto or the terms and conditions of any municipal consent or franchise granted pursuant thereto. Additionally, the Board, pursuant to N.J.S.A. 48:5A-9, is vested with the authority to supervise and regulate every cable television company operating within this State and its property, property rights, equipment, facilities, contracts, certificates, and franchises and to do all things necessary or convenient in the exercise of such power and authority. The Board has reviewed the current practices of Altice with respect to prorating of monthly bills, and **HEREBY FINDS** the failure to prorate customer bills at commencement and termination of service to be in violation of the Rule Relief Order and the Merger Order.

The Rule Relief Order clearly indicates the reliance of the Board upon Altice continuing to prorate bills following the issuance of the Order. The Rule Relief Order stated, as set forth in N.J.A.C. 14:18-16.7(a)(1), that relief sought from the rule could only be provided subject to the provision of "a sample bill to be utilized in lieu of compliance with [NJAC 14:18-3.8] for approval by the Office [of Cable Television]." Rule Relief Order at 6. It then reads, "[Cablevision's] . . . sample bill demonstrates that the company is billing in a proper manner and shows how Cablevision will prorate its bills pursuant to the requirements of this section." Id. at 18. The purpose of the sample bill submission required by the rule is to show the Board how the Company will bill customers should a waiver be granted. This requirement would be meaningless if a cable television company could then, in practice, drastically deviate from its representation and alter the way it bills, especially to the detriment of customers, as Altice has done in this instance. Furthermore, the Order indicates that waivers requested are only granted "where the Board is satisfied such relief would not harm consumers." Id. at 7. Altice's failure to seek Board approval prior to changing its proration policy reflected in the sample bills presented to the Board in 2011, and the basis upon which relief of certain provisions of the rules was reliant upon, violated the terms of the grant of relief in this instance, and caused harm to consumers.

In support of its argument that the Board granted Cablevision permission to discontinue prorating customers' initial and final bills, Altice claims that Board Staff and Rate Counsel were, in fact, provided with some sample bills that did not show proration, and therefore it was unreasonable for Board Staff and Rate Counsel to rely only upon the prorated bills. Answer at 9-10. While it is true that some sample bills provided by Cablevision showed full months of charges, nowhere did Cablevision, in its submission of those bills, nor do the actual bills themselves, indicate that they were bills for partial billing cycles, when service had been initiated or terminated. The bills appear to be for full billing periods, where customers received and requested service the entire time. Conversely, the bills that were prorated clearly indicated a credit for partial months of service, indicating that service was not for a full billing period. Those sample bills were the only bills submitted that showed service for less than a full billing cycle. It was therefore entirely reasonable for the Board to accept those as examples of how Cablevision would continue to prorate the account for the date of the initial establishment and final termination of service.

In addition, Altice argues that the ordering paragraph of the Board's 2011 Order provides an absolute waiver of the provisions of N.J.A.C. 14:18-3.8 addressing bill proration. The Board's review is that the language in the 2011 Order is clear that Cablevision (now Altice) was

committing to continue prorating customer bills and that the Board granted the waiver on that basis.

In requesting relief, the burden was on Cablevision to be specific as to the relief it sought. As stated above, when requesting relief from N.J.A.C. 14:18-3.8, Cablevision asserted that the "rule [i]s not necessary in a competitive environment, and limits cable operators' flexibility to adapt billing procedures to meet customer needs" and "[f]orbearance from the rule would enable Cablevision to meet its customers' billing needs by allowing it to construct tailored billing arrangements and payment plans." Rule Relief Petition at 5. The Rule Relief Petition solely addressed the need for flexibility in customer billing arrangements, and nowhere in the Rule Relief Petition did Cablevision discuss and specifically request relief from the requirement to prorate. In fact, it asserted that a waiver would allow it to better serve customers, focusing on the ability to tailor billing arrangements to meet customer needs, as opposed to assigning each customer a billing option specifically set forth in the Rule. Cablevision neglected to represent that contrary to the sample bill provided, it planned to discontinue prorating customer bills, a practice that would actually harm customers by billing them for service that they did not request or receive.

The Company argues that the Board is unable to require proration by Altice as it is preempted by federal law, namely, the Effective Competition Preemption Order, which bars states or franchising authorities from regulating the rates of a cable system operator if that system is subject to effective competition, and by 47 U.S.C. Section 543(a)(2) and N.J.S.A. 48:5A-11(f), which serve to prohibit the Board from regulating rates in effective competition areas. As stated by Rate Counsel in its reply, requiring service providers to follow the rules and to enforce regulations that protect the public interest and ensure customers are not harmed by anticompetitive Company practices does not rise to the level of rate regulation under the law.

N.J.S.A. 48:5A-51(b) provides for monetary penalties for noncompliance with a Board Order. In such instances of noncompliance, penalties may be assessed of "not more than $1,000 for a first offense, not less than $2,000 nor more than $5,000 for a second offense, and not less than $5,000 no more than $10,000 for a third and every subsequent offense." The Board **FINDS** that, by its own admission, Altice has discontinued the proration of customer bills since October 2016, resulting in scores of customers who have been billed in full for months that they did not receive or request service.

Additionally, the Board is authorized to order Altice to refund subscribers for overcharges, such as here where the Company has charged customers for service they did not receive. See 47 C.F.R. § 76.942(a).

FINDINGS

After careful consideration of the record and an examination of the Answer and Reply filed by Altice and the response filed by Rate Counsel to the Order to Show Cause issued on December 18, 2018, the Board **HEREBY FINDS** that Altice, pursuant to N.J.A.C. 14:18-3.8, the Rule Relief Order, and the Merger Order, is required to prorate customer bills, and that its failure to do so violates the Rule, the Relief Order and the Merger Order.

As a result of these violations, the Board **HEREBY ORDERS** Altice to immediately Cease and Desist from its failure to comply with existing rules that require Altice to prorate monthly bills upon inception and termination of service. It is **FURTHER ORDERED** that within sixty (60) days from the date of this Order, Altice must issue refunds to each customer affected by the

Company's failure to prorate charges for partial billing cycles upon inception and/or termination of service from the time the Company discontinued prorated billing in 2016; and it is **FURTHER ORDERED** that Altice shall remit a one-time non-recoverable contribution totaling $10,000 toward the Altice Advantage Internet program to provide low cost internet service to New Jersey customers who are eligible for or participate in the National School Lunch Program (NSLP); or eligible for or receive Supplemental Security Income (SSI) and are 65 years of age or older; or a veteran and receives State or federal public assistance.

The Board **FURTHER ORDERS** Altice to conduct an audit of its customer billing records from the date the Company ceased proration of customer bills for initiation and termination of service, in October 2016, and to report to the Board the names and account numbers of all customers who were improperly billed and the amount each customer was improperly billed due to the Company's failure to prorate, within 30 days of the effective date of this order. The Board **ALSO ORDERS** Board Staff to then review the submission and inform the Company of any perceived errors. Within 30 days of the completion of Board Staff's review, the completion of which to be determined by Board Staff, the Company is **HEREBY ORDERED** to refund the overage amount to each customer and provide proof of such refunds to the Board and Rate Counsel, by way of certification attaching a sample bill showing either a credit toward a future bill, in the case of an existing customer, or a check to a former customer in the total amount of the appropriate refund. The Company is **ORDERED** to file a certification within 30 days of the effective date of this Order demonstrating the accounting of the $10,000 one-time non-recoverable contribution toward the Altice Advantage program.

This Order shall be effective on November 23, 2019.

DATED: 11/13/19

BOARD OF PUBLIC UTILITIES
BY:

JOSEPH L. FIORDALISO
PRESIDENT

MARY-ANNA HOLDEN
COMMISSIONER

DIANNE SOLOMON
COMMISSIONER

UPENDRA J. CHIVUKULA
COMMISSIONER

ROBERT M. GORDON
COMMISSIONER

ATTEST:

AIDA CAMACHO-WELCH
SECRETARY

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

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

STATE OF NEW JERSEY

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

OFFICE OF CABLE TELEVISION
AND TELECOMMUNICATIONS

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

Parties of Record:

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

BY THE BOARD:

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

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

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

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

(Cease and Desist Order at 8-9)

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

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

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

THE MOTION

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

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

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

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

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

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

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

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

RATE COUNSEL RESPONSE

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

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

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

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

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

ALTICE REPLY COMMENTS TO RATE COUNSEL

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

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

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

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

DISCUSSION AND FINDINGS

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

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

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

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

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

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

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

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

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

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

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

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

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

This Order shall be effective on December 20, 2019.

DATED: 12/20/19

BOARD OF PUBLIC UTILITIES
BY:

JOSEPH L. FIORDALISO
PRESIDENT

MARY-ANNA HOLDEN
COMMISSIONER

DIANNE SOLOMON
COMMISSIONER

UPENDRA J. CHIVUKULA
COMMISSIONER

ROBERT M. GORDON
COMMISSIONER

ATTEST:

AIDA CAMACHO-WELCH
SECRETARY

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

* * *

Erney v. Board of Trs. of the Police & Firemen's Ret. Sys.

Superior Court of New Jersey, Appellate Division

September 28, 2005, Argued; January 30, 2006, Decided

DOCKET NO. A-0094-04T1

Reporter
2006 N.J. Super. Unpub. LEXIS 587 *; 2005 WL 3710645

WILLIAM G. ERNEY, JR., Petitioner-Appellant, v. BOARD OF TRUSTEES OF THE POLICE AND FIREMEN'S RETIREMENT SYSTEM, Respondent-Respondent.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the final administrative decision of the Board of Trustees of the Police and Firemen's Retirement System, PFRS # 3-10-26763.

Core Terms

pension, retirement, Township, firefighting, enrollment, membership, eligible, extinguishment, Firemen's, suppression, reopening, refund, training, fight, Personnel, equitable, municipal, reexamination, diligence, payroll, grandfathered, ineligibility, appointment, full-time, permanent, civilian, notice

Counsel: Charles P. Allen, Jr. argued the cause for appellant.

David Dembe, Senior Deputy Attorney General, argued the cause for respondent (Peter C. Harvey, Attorney General, attorney; Patrick DeAlmeida, Assistant Attorney General, of counsel; Dawn M. Harris, Deputy Attorney General, on the brief).

Judges: Before Judges Fall, Grall and Levy.

Opinion

PER CURIAM

Petitioner William G. Erney, Jr. appeals from a final administrative decision issued by the Board of Trustees of the Police and Firemen's Retirement System (PFRS), finding that he was not eligible to collect a retirement pension under PFRS, and requiring him to reimburse the PFRS for all retirement monies he had been paid prior to cessation of his pension benefit. The following factual and procedural history is relevant to our consideration of the arguments advanced on appeal.

Effective January 27, 1986, petitioner was appointed provisionally as a full-time Combustibles Inspector in the Township of Lawrence. It is not disputed that this title was not an eligible title for enrollment in the PFRS. Effective April 2, 1986, **[*2]** petitioner's title was changed to Fire Prevention Specialist, as directed by the Civil Service Commission. On December 10, 1986, a payroll notice indicated that petitioner's title was changed to Fire Prevention Specialist/UFD; [1] that change was made in conjunction with a total reorganization of the Township's emergency operations. [2] At or about that time, petitioner sought enrollment in the

[1] "UFD" means "Uniform Fire District."

[2] At the hearing held in this matter in the Office of Administrative Law (OAL), both petitioner and William Guhl, Municipal Manager of Lawrence Township, testified that petitioner never held a "UFD" title with the Township. Additionally, although a "Request for Personnel Action" signed by petitioner on December 5, 1986, requested provisional appointment by the Civil Service Department as a "Fire Prevention Specialist/UFD," on December 26, 1986, an

PFRS, but was unable to do so because he was overage. *See N.J.S.A. 43:16A-3* (requiring that applicants for PFRS membership be under age 35 at the time of enrollment). [3]

On April 28, 1987, a payroll notice issued by the Township indicated that petitioner was serving in the position of Fire Prevention Specialist, presumptively as a result of the classification determination by the Civil Service Department on December 26, 1986.

By letter to the Division of Pensions and Benefits dated January 8, 1988, the Township's Personnel Officer stated, in pertinent part:

> The Township of Lawrence has two (2) Fire Prevention Specialists/UFD and I would like to bring their Police and Firemen's Retirement System (PFRS) applications to your attention.
> * * * *
> The other employee is William Erney, Jr. He is not in either the PERS or PFRS. He became a permanent employee on April 28, 1987. He has applied for PFRS inclusion, but in a memo from Delores J. Shwara dated June 15, 1987 she had stated that Mr. Erney was overage. I contend that . . . Mr. DeNicholas' [December 7, 1987] letter stated above will enable Mr. Erney to become a member of the PFRS. I have enclosed his pertinent data for your information as well.

By **[*4]** letter dated January 20, 1988, the Division responded, stating that

> the title of Fire Prevention Specialist/UFD is not covered by the PFRS. The only titles covered by PFRS in a municipality are uniformed policemen, firemen, detectives, linemen, fire alarm operators, or inspectors of combustibles of a police or fire department or township fire district. If these individuals are holding the titles of Fire Protection Specialist/UFD, they must participate in the Public Employees' Retirement System (PERS).
> * * * *
> With respect to Mr. Erney, a PERS enrollment application should be submitted so this office can enroll him without further delay.

A payroll notice issued by the Township dated October 21, 1988, indicated that petitioner was serving in the full-time position of Fire Marshal, followed by a letter to petitioner from the Township's Acting Municipal Manager dated October 24, 1988, informing him that he had been "chosen for the position of Fire Marshal for the Township[,]" effective October 31, 1988, at an annual salary of $ 32,878.

On October 31, 1988, petitioner completed an application for enrollment in PFRS under the title of Fire Marshal. The Township certified petitioner's application, **[*5]** stating that he was currently employed in the position of Fire Marshal as of October 21, 1988, and had been employed by the Township since January 27, 1986. That application was filed with the Division of Pensions on December 7, 1988.

By letter to the Township dated December 16, 1988, the Division of Pensions and Benefits stated that petitioner's application could not be processed because his position of Fire Marshal was not covered by the PFRS, and that petitioner must file a PERS enrollment application.

On January 30, 1989, petitioner completed yet another application for enrollment in PFRS. The certification on that PFRS enrollment application completed by the Township erroneously stated that petitioner's title since October 21, 1988, was "Fire Inspector." The application was filed with the Division on February 6, 1989. [4] The Division issued an "Enrollment Confirmation" dated February 22, 1989, enrolling petitioner in the PFRS. Based on that enrollment, petitioner and the Township made payroll contributions into the PFRS system. [5]

On May 2, 1989, petitioner was appointed by the Township as Fire Subcode Official. On June 20, 1989, petitioner submitted a "Duties Questionnaire" to the Department of Civil Service, stating that he held the titles of Fire Marshal, Fire Subcode Official and Deputy Director of Emergency Management with the Township. Those titles were not covered by the PFRS.

A payroll notice issued by the Township dated September 22, 2000, stated that effective July 1, 1992, petitioner took a leave of absence without pay from the position of Fire Marshal, from July 1, 1992 to July 1, 2001, to assume the position of Construction Official. The title of Construction Official is not eligible for PFRS enrollment. Petitioner remained in that

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authorized representative of the Department countersigned the Request for Personnel Action, and classified petitioner's duties as "Fire **[*3]** Prevention Specialist."

[3] That barrier to PFRS enrollment was overcome when petitioner's military service tenure was subtracted from his age at the time of employment.

[4] During the OAL hearing conducted in this matter, petitioner testified that he did not have the position of Fire Inspector when he made this application. **[*6]** However, he contended that one of his duties in the position of Fire Prevention Specialist was as a fire inspector.

[5] Ultimately, the Board determined that, as of November 1, 1988, petitioner had been properly enrolled in PFRS as a result of his permanent appointment as Fire Prevention Specialist, a title in which he worked from November 1, 1988 through May 1, 1989.

position until his effective date of retirement on July 1, 2001.

Ordinance Number 1316-92 was adopted by the **[*7]** Township on July 15, 1992. It, *inter alia*, amended Section 2-91(l) of the Township Code to state that the Division of Construction Code Enforcement shall "[r]espond to and conduct investigation of all fires."

Lawrence Township is serviced by three volunteer fire companies; petitioner was not a member of those companies. Petitioner was never a member of the local IAFF, the firefighter's collective bargaining unit; rather, he was a member of the local chapter of CWA, a civilian collective bargaining unit.

For reasons not relevant to this appeal, a payroll notice issued by the Township on November 2, 2000, stated that effective October 27, 2000, petitioner was suspended without pay from the position of Construction Official.

Beginning on November 9, 2000, petitioner submitted several "Applications To Purchase Service Credit" in the PFRS to the Division of Pensions. Eventually, after several modifications, that application was approved. Meanwhile, on May 29, 2001, petitioner completed an "Application for Retirement Allowance" from the PFRS, with a proposed retirement date of July 1, 2001. On June 26, 2001, petitioner paid $ 114,876.03 to the PFRS in payment for his purchase of thirteen years **[*8]** of service credits. In order to partly fund that purchase, petitioner and his wife borrowed the sum of $ 92,000 from Yardville National Bank over a term of seven years, with equal monthly payments of principal and interest at an initial annual interest rate of 9% for the first five years, to be adjusted thereafter.

On August 6, 2001, the PFRS issued petitioner a "Quotation of Retirement Benefits" stating he had 25 years of service credited with a monthly retirement benefit of $ 3,941.85. His application for retirement was approved by the Board of Trustees of the PFRS on August 20, 2001, and benefits were paid as of July 1, 2001.

However, by letter to petitioner dated October 18, 2001, the Division stated in pertinent part:

> This is to advise you that the Board of Trustees of the Police and Firemen's Retirement System will be reviewing your pension membership account at their November 19, 2001 meeting to determine if you are eligible to continue to receive a retirement benefit from the retirement system. Due to your retirement, an audit was performed on your account and it appears that you may have retired from a Civil Service position that is not covered by the PFRS.

In an internal memorandum **[*9]** to the PFRS Board dated October 30, 2001, the Board Secretary stated:

> On July 1, 2001, William Erney retired from PFRS. Shortly thereafter, it was brought to the attention of the Board Office that Mr. Erney might not have served in a position covered by the PRFS. For that reason, records were requested from his employer, Lawrence Township, and the Department of Personnel.
>
> From our review, it appears that Mr. Erney was originally hired in the position of *Fire Marshall*. The application for PFRS enrollment was submitted by the employer and rejected by the Division, as it was not a covered title. Shortly thereafter, another application was submitted for the position of *Fire Prevention Specialist* in 1986, which was a covered title and Mr. Erney was enrolled in PFRS. The record indicates that Mr. Erney was placed on a leave of absence from this position. Though documentation was provided to the Division of Personnel, the employer continued to remit contributions to PFRS. Earlier this year, Mr. Erney purchased 13 years of service credit and filed for a special retirement benefit effective July 1, 2001. Mr. Erney is currently receiving a monthly retirement allowance of $ 3,941.
>
> Please determine **[*10]** whether Mr. Erney is eligible for benefits under PFRS.

The Department of Community Affairs issued petitioner a letter dated November 8, 2001, stating in pertinent part:

> This is to inform you that according to our records, you held the position of Fire Official, Fire Marshal and Fire Sub-Code Official for the Township of Lawrence from November 1988 through October 2000.

Thereafter, the Board issued a letter to petitioner's attorney dated November 21, 2001, stating in relevant part:

> Following its review, it was the Board's determination that Mr. Erney was correctly enrolled in the Police and Firemen's Retirement System as a result of his appointment as a *Fire Prevention Specialist* on November 1, 1988; the date of his permanent appointment. However, a further review of his record shows that he received a regular appointment as a *Fire Protection Subcode Official* on May 2, 1989. This title is not covered by the PFRS. Furthermore, Department of Personnel records further indicate that Mr. Erney did not return to any title covered by the PFRS.
>
> Based on these facts, the Board of Trustees finds that Mr. Erney is not eligible for enrollment in PFRS and is not entitled to . . . retirement benefits. **[*11]** The Retirement Bureau will be notified to terminate Mr. Erney's retirement allowance, and he will be requested to

> reimburse the PFRS all retirement money received since July 1, 2001. As Mr. Erney was in a title covered by the Public Employees' Retirement System ("PERS"), his service credit erroneously accrued in PFRS will be moved to his current PERS account. The contribution rate difference between PFRS and PERS will be refunded to him or used to offset the overpayment of retirement benefits.
>
> The Board noted that Mr. Erney made a substantial purchase of service credit. If he chooses, he may elect to have the entire amount refunded to him or transfer[] the service to his current PERS account. If Mr. Erney chooses to transfer the purchase of credit to PERS, he is entitled to a refund in the purchase cost between PFRS and PERS. Please notify me within 30 days of this letter of his decision so the proper adjustment can [be] made to Mr. Erney's account.

Petitioner filed an appeal from the determination of the PFRS Board, and in January 2002, the matter was transmitted as a contested case to the OAL for a hearing before an Administrative Law Judge (ALJ).

While the matter was pending in the **[*12]** OAL, the ALJ originally assigned to hear the matter found that "newly discovered documents were considered significant enough to merit reconsideration by the [PFRS] Board." The OAL hearing was postponed and the matter remanded back to the PFRS Board of Trustees for reconsideration. In letter to counsel for petitioner dated December 17, 2002, the Board stated in pertinent part:

> Upon review of the additional documents, the Board voted to refer this matter to the Director of the Division of Pensions and Benefits in accordance with *N.J.S.A. 43:16A-1(2)* (also known as a Chapter 204 review). In this particular case, under the Chapter 204 review, the titles of Fire Protection Sub-code Official and Construction Official will be reviewed as to whether or not these positions are covered under the PFRS. It is anticipated that the Director will forward his recommendation to the Board for its next meeting on January 27, 2003.

In separate memoranda to the PFRS Board, the Director of the Division of Pensions and Benefits recommended that the positions of "Fire Protection Subcode Official" and "Construction Official" not be approved for PFRS participation on the basis that neither position reported to **[*13]** a firefighting unit, those positions had no fire suppression duties, and do not require any firefighting training.

By letter to petitioner's counsel dated January 28, 2003, the Secretary for the PFRS Board stated, in relevant part:

> In a separate action, the Board determined that the positions of Fire Protection Subcode Official and Construction Official are not eligible for participation in the PFRS. The Board determined these positions do not meet the definition of "firemen" as stipulated in *N.J.S.A. 43:16A-1(2)(b)*. The employees in these positions do not report to a firefighting unit, and have no requirement to participate in firefighting training and finally the primary duties do not include the control and extinguishment of fires. All of these requirements are necessary in order for positions to qualify for membership in the PFRS. The Board affirmed its original decision denying Mr. Erney's enrollment in the PFRS and the subsequent eligibility for PFRS retirement benefits.

The matter was then transferred back to the OAL, and a hearing was conducted before an ALJ on February 5, 2003 and October 1, 2003. On May 12, 2004, the ALJ issued an Initial Decision, recommending that PFRS reinstate **[*14]** petitioner "as a beneficiary of all rights and privileges of a retiree of the Police and Firemen's Retirement System." In so concluding, the ALJ stated in pertinent part:

> Petitioner was employed by Lawrence Township (Township) from 1986 until his retirement in June 2001. During that period he was given various job titles, some of which were recognized by the PFRS as valid for qualification in that pension system and some of which were not. In 1988 petitioner held the recognized job title of Fire Prevention Specialist and he was admitted into the PFRS system. . . . Until his retirement all necessary monetary contributions were made into that system. From at least 1988 on, regardless of his job title, petitioner had the obligation to report to every active fire in the Township and to take part in the extinguishment of that fire. In 1992 the Township gave Mr. Erney the job title of Construction Official, which had the effect of increasing his duties and altering the source of his salary. However, it did not decrease his firefighting duty. The Township has at least one paid fireman who works a normal nine-to-five, Monday through Friday workweek and he supplements the fire suppression obligation **[*15]** of the volunteer firemen who provide[] coverage on evenings and weekends. Mr. Erney, although he had other job duties as well, was also charged with the responsibility of responding to fire calls during his workday along with the paid fireman. He was qualified for this duty since he had experience as a firefighter from being a volunteer in other municipalities and had an associate's degree in Fire Science Technology. The Township also sent him to seminars and conventions to

increase his knowledge in fire suppression. To assist him in his fire suppression duties, he was supplied with a Township vehicle that was equipped with emergency lights, a siren and a communication radio so he could be located at any time for fire response. He was also supplied with custom turnout gear to wear on his fire calls. His obligation to fight fires while working was mandatory and if he chose not to respond to a fire alarm, he would have been subject to discipline by his employer. This obligation was formalized in Township Ordinance Article V, Section 2-91 . . . which required the petitioner as part of the Division of Code Enforcement to respond to all fires. The Township's manager confirmed this section **[*16]** of the ordinance to mean petitioner was obligated to report to and suppress all active fires. The petitioner also recognized this as one of his job responsibilities.

On or about November 2000, petitioner considered retirement and at various times thereafter spoke with employees at the Pension Board. He was advised of the process and amount needed to buy certain time needed for retirement eligibility. Petitioner was also informed as to the benefits he would receive if he elected to buy additional years of service. Based on that information, he mortgaged his property in the approximate amount of $ 92,000, took savings of approximately $ 23,000 and paid respondent $ 114,876 to purchase the necessary service credits needed for retirement. When his application for retirement was approved, he left his position in Lawrence Township. Petitioner started receiving monthly pension benefits. He then assumed another position in another municipality and was enrolled in the Public Employees' Retirement System. . . .

* * * *

Petitioner argues he is entitled to stay in the PFRS because he is a firefighter as defined in the statute; but even if he is not, he was rightfully in the system at one time and **[*17]** since his duty to fight fires continued throughout his employment, he is a grandfathered participant. He also argues the PFRS is equitably estopped from denying his benefits at this time.

* * * *

The term "fireman" is defined in *N.J.S.A. 43:16A-1(2)(b)*, as a permanent, full-time employee of a firefighting unit whose primary duties include the control and extinguishment of fires and who is subject to training and physical and mental requirements applicable to the job. It is undisputed that petitioner was a permanent and full-time employee of the Township of Lawrence. It is also undisputed that the Township required him to attend training sessions on fire suppression activities. The term "firefighting unit" is not defined. Respondent takes the position Lawrence Township is not a firefighting unit because the job titles it uses do not have a "UFD" suffix. This is not entirely true because documents have been presented which show petitioner held the title of Fire Prevention Specialist/UFD . . . in 1986. In his testimony, the Township Manager stated the municipal organization was more concerned with functionality in its daily activities than pro forma Department of Personnel titles. He also **[*18]** stated petitioner always held a position with firefighting responsibilities and although his job title changed from time-to-time and for various reasons, his duty to actively fight fires continued until his retirement. It is not disputed that Lawrence Township employs at least one paid fireman who works a normal forty-hour week. This is an indication the Township has elected to assume the responsibility of suppressing fires within its borders. Since the Township has assumed that responsibility for its citizens, I CONCLUDE Lawrence Township is a firefighting unit within the meaning of the aforesaid statute.

* * * *

Petitioner also makes the argument he is entitled to PFRS benefits under the "grandfather" provision of the Police and Firemen's Retirement statute. *N.J.S.A. 43:16A-1(2)(a)*. Petitioner cites the sentence which states "a member whose position was covered prior to the effective date [December 20, 1989] of this amendatory and supplementary act shall continue to be eligible for membership in the retirement system while in the same position." The Township Manager clearly testified petitioner's duties were increased over time, but he always retained the obligation to fight fires. Petitioner **[*19]** entered the PFRS as a Fire Prevention Specialist. . . . The Township Manager testified that position has fire suppression duties and petitioner maintained that position and assumed additional positions and job titles as time went by. There has been no indication petitioner ever lost the title of Fire Prevention Specialist, just that he assumed additional job titles with associated additional duties. Petitioner also argues that if one were to analyze his duties, they would understand that a more accurate job title would have been Fire Protection Subcode Official/UFD, as this title encompassed many of his duties and did not contain any duties which he did not have. He argues, but for the funding issue pertaining to his salary, he would have held that job title.

* * * *

For the reasons set forth herein, I CONCLUDE one of petitioner's primary duties was to fight fires during his

> employment by the Township of Lawrence. I further CONCLUDE the Township of Lawrence is a firefighting unit as set forth in N.J.S.A. 43:16A-1(2)(b). I further CONCLUDE petitioner maintained the position and duties of Fire Prevention Specialist until his retirement and is grandfathered into the PFRS.

Exceptions to the **[*20]** Initial Decision were filed with the PFRS Board by both parties.

In its final administrative decision dated August 9, 2004, the PFRS Board of Trustees rejected the recommended Initial Decision of the ALJ, finding petitioner ineligible for PFRS retirement benefits. In reaching that conclusion, the Board stated in pertinent part:

> N.J.S.A. 43:16A-3 sets forth the requirements for eligibility for enrollment in the Police and Firemen's Retirement System (PFRS). Only firemen, as that term is defined in N.J.S.A. 43:16A-1(2)(b) may be enrolled. The title of construction official, which Petitioner held at the time this matter was first addressed by the Board, does not meet the definition of a firefighter as set forth in N.J.S.A. 43:16A-1(2)(b). The fact that he may sometimes perform some of these duties is not enough to satisfy the statutory mandate, nor is the fact that some employees have been trained for some of these duties in other distinct positions. Thus, Mr. Erney is not eligible for continued enrollment in the system while continuing to be employed in this title.
>
> The law, on its face, requires that a determination be made as to the primary duties of a firefighter, and if these primary **[*21]** duties include the control and extinguishment of fires. In order to be eligible for PFRS membership, each of the criteria in N.J.S.A. 43:16A-1(2)(b) must be satisfied. Further, the Board does not have the jurisdiction to re-classify Mr. Erney's title or to create a new title for him. That is strictly within the purview of the Department of Personnel. If Mr. Erney believed he was working as a Firefighter then he should have appealed to the Department of Personnel for a title change.
> * * * *
> The testimony is clear that Mr. Erney's primary purpose for reporting to a scene of a fire was as an inspector and not as a firefighter . . .
> * * * *
>
> In essence, Mr. Erney is a first responder to a fire scene primarily in the capacity as an inspector, and only if there are not a sufficient number of people to fight the fire does he participate in fighting the fire. Thus, the duty to suppress and extinguish fires is not a primary job function to justify Mr. Erney's membership in the PFRS pursuant to N.J.S.A. 43:16A-1(2).
> * * * *
>
> In determining whether Lawrence [Township] qualified as a "firefighting unit" under the law, the evidence presented shows that Lawrence is not a "firefighting unit." In determining **[*22]** whether Mr. Erney's duties qualified him as a "firefighter," it is clear . . . that a "firefighter's" primary duties must be the control and extinguishment of fires. . . . [A] member's "occasional" involvement in extinguishing and controlling fires, especially small ones, is not sufficient for PFRS membership if the member's main area of responsibility and the great majority of his or her duties lie in the area of public safety. . . . Mr. Erney . . . , even initially as a Fire Prevention Specialist, did not have the primary duty of extinguishing fires. Rather, the primary duties associated with the Fire Prevention Specialist position are civilian: inspecting building premises to detect and eliminate fire hazards.
>
> Thus, the evidence presented clearly shows that Mr. Erney's primary job duties with Lawrence Township were to inspect fires and handle code matters--both civilian job duties. The evidence does not support the ALJ's finding that "Mr. Erney's obligation to fight fires was mandatory . . . and would have suffered consequences if he did not respond to the fire." . . . Furthermore, the evidence in the record is insufficient for Mr. Erney to prove that he continued to qualify as a **[*23]** "firefighter" pursuant to N.J.S.A. 43:16A-1(2), as he accepted more civilian job responsibilities during his employment with Lawrence Township. Lastly, from a policy standpoint, the decision to allow Mr. Erney to be reinstated in the PFRS flies in the face of the legislative intent of Chapter 204, P.L. 1989 [to restrict and reduce membership in PFRS]. For the foregoing reasons, the Initial Decision of the ALJ is rejected and Mr. Erney's pension membership should be properly transferred to the Public Employees' Retirement System.

The PFRS Board also ruled that the ALJ incorrectly determined that Mr. Erney had held a UFD title. The Board noted that the fact that petitioner never held a UFD job with the Township was confirmed by the testimony of the Township Manager, stating that "[t]he significance of UFD positions is that the job titles that are UFD specifically include a primary duty of extinguishing and suppressing fires[.]" The Board also found significant the fact that petitioner was not a member of any of the three volunteer fire companies within the Township, nor was he ever a member of the local IAFF,

the firemen's collective bargaining unit, noting that petitioner was a member **[*24]** of the local CWA chapter, a civilian collective bargaining unit.

On appeal, petitioner presents the following arguments for our consideration:

> *POINT I*
> THE BOARD IS IN ERROR ON THE LAW AND VIOLATED ITS OWN ADMINISTRATIVE RULES AND REGULATIONS AND SO IS NOT ENTITLED TO DEFERENCE BY THIS REVIEWING COURT AND IS PER SE ARBITRARY IN DENYING APPELLANT MEMBERSHIP BENEFITS.
>
> *POINT II*
> A. THE BOARD COMMITTED NUMEROUS ERRORS MANDATING REVERSAL. AT ALL TIMES, APPELLANT WAS PERFORMING THE SAME FIRE SUPPRESSION DUTIES AS THOSE WHICH ORIGINALLY QUALIFIED HIM FOR MEMBERSHIP AND WAS AT ALL TIMES A MEMBER OF PFRS IN FACT; AND, THE BOARD ERRED IN DETERMINING THAT LAWRENCE TOWNSHIP IS NOT A FIREFIGHTING DISTRICT; IN DETERMINING THAT APPELLANT'S MEMBERSHIP CEASED WHEN HE TOOK A NEW JOB TITLE; IN FAILING TO CONDUCT AN ANALYSIS AS REQUIRED BY P.L. 1989, c. 204; AND FURTHER, IN TERMINATING APPELLANT'S MEMBERSHIP.
> B. APPELLANT QUALIFIES FOR RETIREMENT BY VIRTUE OF THE "GRANDFATHER" CLAUSE OF THE STATUTE.
>
> *POINT III*
> EQUITABLE ESTOPPEL APPLIES AGAINST THE BOARD IN THIS MATTER.
>
> *POINT IV*
> THE DOCTRINE OF SUBSTANTIAL COMPLIANCE IS APPLICABLE AGAINST THE BOARD IN THIS MATTER.
>
> *POINT V*
>
> APPELLANT HAS MET HIS BURDEN OF PROOF AND COUNSEL **[*25]** FEES SHOULD BE ASSESSED AGAINST THE BOARD.

We first address the proper procedures applicable to an analysis of this pension dispute. Administrative agencies have the inherent authority to reopen and modify previous decisions. *In re Kallen, 92 N.J. 14, 24, 455 A.2d 460 (1983)*; *Skulski v. Nolan, 68 N.J. 179, 195, 343 A.2d 721 (1975)*; *Ruvoldt v. Nolan, 63 N.J. 171, 183, 305 A.2d 434 (1973)*; *In re D'Aconti, 316 N.J. Super. 1, 10-11, 719 A.2d 652 (App. Div. 1998)*. However, in the exercise of that authority, there must be reasonable diligence exerted by the agency. *Skulski, supra, 68 N.J. at 195-96*; *Handlon v. Belleville, 4 N.J. 99, 106-07, 71 A.2d 624 (1950)*; *D'Aconti, supra, 316 N.J. Super. at 11*.

What constitutes "reasonable diligence" depends on the interplay of the time element with a number of other factors, such as the reason for the administrative reexamination; the fraud or illegality that led to the original administrative action and any contribution by the pensioner to that fraud or illegality; and the extent of any reliance or justified change of position by the pensioner. *Skulski, supra, 68 N.J. at 196*; *Ruvoldt, supra, 63 N.J. at 183-84*.

In applying these principles in *Ruvoldt*, the Court found it would be unjust to reopen the pensioner's case eight **[*26]** years after the grant of his pension. *63 N.J. at 184-85*. Accordingly, there are indeed limits placed on the authority of an administrative agency to reconsider previously-granted pensions. *Skulski, supra, 68 N.J. at 197*.

In weighing the conflicting considerations of the general policy against dissipation of public funds through unauthorized pension grants, the reliance of the pensioner on the pension grant, and the issues of time and reasonable diligence, "[t]here is no easy formula to resolve issues of this kind. The ultimate objective is fairness to both the public and the individual [pensioner]." *Tremarco Corp. v. Garzio, 32 N.J. 448, 457, 161 A.2d 241 (1960)*; *accord Sautto v. Edenboro Apartments, Inc., 84 N.J. Super. 461, 470, 202 A.2d 466 (App. Div.), certif. denied, 43 N.J. 353, 204 A.2d 588 (1964)*; *Winn v. Margate, 204 N.J. Super. 114, 123, 497 A.2d 928 (Law Div. 1985)*. *See also Skulski, supra, 68 N.J. at 197* (applying this principle in *Tremarco* to the reopening of the grant of a pension).

Thus, "even with respect to public entities, equitable considerations are relevant in evaluating the propriety of conduct taken after substantial reliance by those whose interests are affected by subsequent actions." *Skulski, supra, 68 N.J. at 198*. **[*27]** *See also Summer Cottagers' Assn v. Cape May, 19 N.J. 493, 504, 117 A.2d 585 (1955)* (noting that the doing or forbearing to do an act induced by the conduct of another may work an estoppel to avoid wrong or injury ensuing from reasonable reliance upon such conduct).

In *Skulski, supra*, the Court adopted a two-step approach in applying these equitable considerations, stating in pertinent part:

> The first phase of the inquiry concerns the threshold question of the propriety of reexamining the merits of a prior pension grant. Except to the extent noted below, the merits of the arguments for or against entitlement itself are not pertinent to this phase of the proceedings. With respect to this aspect of the inquiry, the pensioner will have the burden of coming forward with evidence of such facts and circumstances as will justify the conclusion that the merits of his entitlement to pension benefits should not be reexamined. This determination will be based on proofs by pensioner which may include the following:
>
> (1) the applicant's subjective good faith belief that he was entitled to benefits;
>
> (2) the extent of the applicant's change of position in reliance on the initial pension grant; and
>
> (3) the extent to which **[*28]** the applicant's reliance has foreclosed alternate opportunities for pension benefits.
>
> * * * *
>
> With respect to the time period between the initial grant and the [agency's] reconsideration, the [agency] will have the burden of both coming forward and burden of proof (persuasion) that action was taken within a reasonable period and with due diligence. . . .
>
> * * * *
>
> If, but only if, the [agency] sustains [its] burden of proving that the pension award should be reconsidered, the second phase of the inquiry becomes material, that is, a determination as to whether the applicant was . . . entitled to a pension pursuant to the statute.
>
> At the said second phase, the original decision of the [agency] in awarding the pension is still entitled to a presumption of validity and, accordingly, the [agency] should bear the onus of proving that the applicant was not entitled to the pension at the time of the original grant. It may satisfy this burden by a preponderance of the evidence as to the invalidity of the original action. . . .
>
> [*68 N.J. at 199-201*.]

Thus, the threshold issue in cases of this nature is "whether the pension grant[] should be reopened at all and if so, whether the [agency] has sustained **[*29]** [its] burden of showing that the [pensioner was] not entitled to benefits measured against" these standards. *Skulski, supra, 68 N.J. at 201*. It is only after a determination has been made that it is appropriate for the agency to reopen its decision awarding a pension that the merit of the pensioner's entitlement to a PFRS pension is considered. Stated differently, the proper procedure is to first consider whether equitable principles would preclude the agency from reopening its previous grant of a PFRS pension.

Here, petitioner should have first been required to come forward with evidence to demonstrate that the merit of his entitlement to a PFRS pension should not be reexamined. That would include the pensioner demonstrating: (1) whether he had a subjective good faith belief that he was entitled to a PFRS retirement benefit; (2) whether he had changed his position in reliance on the pension grant; and (3) the extent to which that reliance had foreclosed alternate opportunities for pension benefits.

Here, however, both the ALJ and the PFRS Board initially addressed the merits of petitioner's pension entitlement, instead of first considering whether there were equitable considerations **[*30]** that precluded the reopening and modification of the pension grant by the Board. Notwithstanding this divergence from the Court's procedural dictates in *Skulski*, we cannot conclude that our review has been adversely affected since an adequate record was developed in the OAL proceedings and all arguments were considered. *See Stevens v. Board of Trustees of the Public Employees' Retirement System, 309 N.J. Super. 300, 305, 706 A.2d 1191 (App. Div. 1998)* (holding that improper allocation of burden of proof on employee to establish his entitlement to continued pension benefits did not affect the result where the Board of Trustees had fully and thoroughly analyzed all of the evidence).

It is, of course, unfortunate that the ineligibility determination was made after the pension grant. Seemingly, the intensity and length of this litigation could have been avoided had the issue of petitioner's "eligibility" requirements been reviewed or audited *prior* to embarking on the processing and approval of his requests to purchase PFRS service credits, and *prior* to the approval of his pension-benefit retirement application. *See Skulski, supra, 68 N.J. at 201* (noting that there should be prompt, diligent inquiry into **[*31]** the merits of each pension application). The Board's October 18, 2001 letter to petitioner states that an audit was performed on his account "[d]ue to [his] retirement," indicating it may be the procedure of the PFRS Board to only audit an account after it has already granted a retirement application. If so, we urge the Board to examine whether such a procedure should be modified to comport with the expectations expressed by the Court in *Skulski*, *ibid.*

Applying the criteria outlined in *Skulski, supra, 68 N.J. at 200*, the record discloses that petitioner certainly had a good faith belief that he was entitled to a PFRS pension benefit. The PFRS Board had enrolled him in the PFRS many years ago, accepted his PFRS pension contributions over the years,

issued his annual enrollment statements, and approved his application for service credits, accepting the sum of $ 114,876 from him in return for those credits. Thereafter, the PFRS Board approved his retirement application and paid him several months in benefits before reconsidering and terminating benefits.

With respect to petitioner's change of position in reliance on the initial pension grant, petitioner borrowed significant funds to purchase **[*32]** service credits, left his position with Lawrence Township in order to retire, took a position with Ewing Township, and enrolled in the PERS. However, petitioner's reliance has not foreclosed alternate opportunities for him to receive pension benefits because he can certainly eventually obtain a pension benefit through the PERS upon meeting the eligibility requirements of that pension system. Moreover, PFRS has offered to refund all of the monies petitioner paid to acquire service credits or, at petitioner's option, recalculate a purchase of PERS service credits and refund the difference to him. The Division of Pensions and Benefits also agreed to recalculate the appropriate amount of contributions under the PERS and refund the difference.

Balanced against these considerations are the reasons advanced by the PFRS for reexamination of the pension grant; whether there was any illegality in the action of the PFRS and, if so, whether petitioner bears some responsibility in that action; and the length of time between the reexamination and the action taken.

The PFRS Board of Trustees is the agency vested with the general responsibility for proper operation of the PFRS. *N.J.S.A. 43:16A-13(1)*. **[*33]** Public pension systems are bound up in the public interest, and provide employees significant rights which are deserving of conscientious protection. *See Zigmont v. Board of Trustees, Teachers' Pension and Annuity Fund, 91 N.J. 580, 583, 453 A.2d 1333 (1983)*; *Uricoli v. Police & Firemen's Retirement Sys., 91 N.J. 62, 449 A.2d 1267 (1982)*. Among those interests is the responsibility of the PFRS Board to guard against disruption of that pension system's funding mechanism and protection of the actuarial soundness of its pension system. *Fraternal Order of Police v. Board of Trustees, Police and Firemen's Retirement Sys., 340 N.J. Super. 473, 480, 774 A.2d 680 (App. Div. 2001)*; *Wilson v. Board of Trustees of the Police & Firemen's Retirement Sys., 322 N.J. Super. 477, 483, 731 A.2d 513 (App. Div. 1998)*; *Turbidy v. Consolidated Police & Firemen's Pension Fund Comm'n, 84 N.J. Super. 257, 263, 201 A.2d 736 (App. Div. 1964)*.

We also note that petitioner's enrollment in the PFRS, the consequential grant of his application to purchase PFRS service credits, and the approval of his PFRS retirement benefit application were based on his PFRS enrollment as a Fire Prevention Specialist. However, petitioner only held that title from November 1, 1988 to May 1, 1989. As of **[*34]** May 2, 1989, petitioner became the Township's Fire Subcode Official, an ineligible position for PFRS membership, and he never held thereafter a PFRS-eligible position. Moreover, the "grandfathered" provisions of *P.L.* 1989, *c.* 204, codified as *N.J.S.A. 43:16A-1.2*, became effective December 20, 1989. By that time, petitioner was no longer serving in a PFRS-eligible title; therefore, the protection accorded by that enactment was inapplicable.

The PFRS Board approved petitioner's retirement application at its August 20, 2001 meeting. Approximately two months later, by letter dated October 18, 2001, the PFRS Board informed petitioner it appeared he "may have retired from a Civil Service position that is not covered by the PFRS." Therefore, the reopening and change of decision occurred shortly after the grant of the application for retirement.

Our review of a final administrative decision "is quite circumscribed." *Fraternal Order of Police, supra, 340 N.J. Super. at 479* (citing *In re Taylor, 158 N.J. 644, 656, 731 A.2d 35 (1999)*). Essentially, our scope of review is limited to whether the agency's decision offends the State or Federal Constitution; whether it violates express or implied legislative policies; **[*35]** whether there is substantial evidence in the record to support the findings on which the agency decision was based; and whether, in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of relevant factors. *In re Taylor, supra, 158 N.J. at 656*; *Brady v. Board of Review, 152 N.J. 197, 210-11, 704 A.2d 547 (1997)*.

Weighing these factors in light of our standard of review, we conclude that the action of the PFRS Board in reviewing the grant of a PFRS pension to petitioner was a reasonable exercise of its authority to reopen and modify its previous determination, and was undertaken with due diligence and within a reasonable time.

We begin our analysis of the merits with a review of the relevant statutory language. *N.J.S.A. 43:16A-1(3)* defines a "Member" of PFRS to "mean any policeman or fireman included in the membership of the retirement system[.]" *N.J.S.A. 43:16A-1(2)(b)* defines the term "fireman" to

> mean a permanent, *full-time employee of a firefighting unit whose primary duties include the control and extinguishment of fires and who is subject to the training and physical and mental fitness requirements* ***[*36]*** *applicable to the position of municipal firefighter* established by an agency authorized to establish these

> requirements on a Statewide basis, or comparable training and physical and mental fitness requirements as determined by the board of trustees. The term shall also include an administrative or supervisory employee of a firefighting unit whose duties include general or direct supervision of employees engaged in fire control and extinguishment activities or training responsibility for these employees and a requirement for engagement in fire control and extinguishment activities if necessary. As used in this paragraph, "firefighting unit" shall mean a municipal fire department, a fire district, or an agency of a county or the State which is responsible for control and extinguishment of fires.
> [Emphasis added.]

All public employees actively employed in positions meeting the definition of "fireman" shall be members of PFRS. *N.J.A.C. 17:4-2.1(a)*. *N.J.S.A. 43:16A-1(2)(b)*

> was part of a series of amendatory laws intended to increase the retirement allowance of police officers and firefighters and *restrict and reduce membership in PFRS* . . .
>
> The articulated objective was to encourage police **[*37]** officers and firefighters to "retire[] at a younger age, in order to protect the public." *Hearing on S. 2602 Before The Assembly State Gov't Comm.*, 203rd Legis., 2d Sess., at 18 (Feb. 6, 1989) (Statement of Douglas Forrester, Director, Div. of Pensions). It was said in the legislative hearings that police officers and firefighters were to be given enhanced benefits "because the nature of [their] duties . . . requir[ed] a level of physical attributes [and energy] which [are] found, statistically speaking, among younger members." *Ibid.* The underlying idea was to "facilitate" early retirement and "turnover within the system" by "giv[ing] better benefits." *Ibid.* In signing the bill, the Governor also emphasized the objective of "*restrict[ing] eligibility for membership*" by allowing only "police and fire personnel" to participate in the system. *Governor's Press release for S. 2602*, at 2 (Dec. 19, 1989).
>
> [*In re Union County Prosecutors, 301 N.J. Super. 551, 559-60, 694 A.2d 289 (App. Div. 1997)* (Emphasis added).]

For these reasons, "[f]rom its inception, the PFRS . . . provided police and firefighters with a more generous pension than the State's other pension systems, such as the Pubic Employee's Retirement **[*38]** System (PERS). . . . Consequently, there was considerable impetus for employees to try to qualify for membership." *Kossup v. Board of Trustees, PFRS, 372 N.J. Super. 468, 473, 859 A.2d 721 (App. Div. 2004)*.

In light of the clear legislative intent to limit PFRS membership, the finding of the PFRS Board that petitioner's primary duties did not include the control and extinguishment of fires, a requirement for membership, is supported by the record on appeal. Irrespective of the titles petitioner held during his employment with Lawrence Township, it cannot be reasonably concluded that his "primary duties include[d] the control and extinguishment of fires[,] *N.J.S.A. 43:16A-1(2)(b)*, nor can it be reasonably found that petitioner was "an administrator or supervisory employee of a firefighting unit whose duties included general or direct supervision of employees engaged in fire control and extinguishment activities or training responsibility for these employees[,]" *ibid.* Therefore, petitioner cannot be considered a "fireman" eligible for PFRS membership pursuant to *N.J.S.A. 43:16A-3*.

Petitioner was at fire scenes for reasons other than the control and extinguishment of fires. Although he was issued firefighting **[*39]** gear, "firefighting" was not a primary duty. To the extent his various job titles included "fire," those positions had little to do with the work of actually fighting fires.

Accordingly, we affirm the determination by the PFRS Board that petitioner was not entitled to a PFRS pension benefit, substantially for the reasons articulated by the Board in its written final administrative decision dated August 9, 2004. We also agree with the Board that because there were no material factual disputes, it was not required to accord deference to the findings and conclusions of the ALJ. The Board's interpretation and application of *N.J.S.A. 43:16A-1(2)(b)* comports with the clearly-expressed legislative purpose.

Although, in its August 9, 2004 decision the PFRS Board did not directly deal with the issue of the refund of the pension payments made to petitioner prior to the Board's determination of ineligibility after its reopening and reversal of its grant of the pension, it is evident from the Board's November 21, 2001 determination that petitioner "will be requested to reimburse the PFRS all retirement money received since July 1, 2001." In all likelihood, since there was no stay of the Board's **[*40]** November 21, 2001 initial determination, the Board may have already accomplished the "requested" reimbursement, perhaps offset by "[t]he contribution rate difference between PFRS and PERS" as suggested in the November 21, 2001 letter.

It is here that we part company with the PFRS Board. We conclude that the equitable considerations discussed above

weigh heavily in favor of petitioner when applied to the period between the effective date of the original pension grant--July 1, 2001--and the reversal of that determination on November 21, 2001. The failure of the PFRS Board to properly determine petitioner's eligibility for a pension *prior* to granting his pension application led to these circumstances. Therefore, it would be inequitable to permit the PFRS Board to recoup payments made prior to its re-determination on November 21, 2001. Therefore, to the extent the final administrative decision can be construed to require petitioner to repay those PFRS pension benefits he received subsequent to the grant of his pension benefit, and prior to that determination, it is reversed.

In summary, the final administrative determination of the PFRS Board is affirmed to the extent of petitioner's ineligibility **[*41]** for receipt of a PFRS pension as of the November 21, 2001 re-determination date, but is reversed to the extent it requires petitioner to repay pension benefits paid to him between July 1, 2001 and November 21, 2001. Petitioner shall inform the PFRS Board as to whether he desires a refund of the $ 114,876.03 paid by him for the purchase of thirteen years of service credits, or whether he desires the transfer of the purchased service credits to his PERS account, in which event the PFRS Board shall refund petitioner the difference between a PERS service-credit purchase, and the $ 114,876.03 cost for the PFRS service-credit purchase. As noted in the November 21, 2001 initial decision of the PFRS Board, "[t]he contribution rate difference between PFRS and PERS will be refunded to [petitioner]." The matter is remanded to the PFRS Board to effectuate the terms of this opinion.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

End of Document

In re Island Bay, LLC

Superior Court of New Jersey, Appellate Division

May 31, 2006, Argued; June 21, 2006, Decided

DOCKET NO. A-3163-05T33163-05T3

Reporter
2006 N.J. Super. Unpub. LEXIS 2453 *; 2006 WL 1687222

IN THE MATTER OF ISLAND BAY, LLC

Prior History: **[*1]** On appeal from New Jersey Department of Environmental Protection.

Core Terms

Island, sewer, wetlands, exempt, freshwater, buffer, foot, tie, Municipal, Coastal, map, site, confirm, rescission, adjacent, transition, depicts

Counsel: Richard M. Hluchan argued the cause for appellant Island Bay, LLC (Ballard Spahr Andrews & Ingersoll, attorneys; Mr. Hluchan, of counsel and on the brief; Robert S. Baranowski, Jr. and Emily Daher, on the brief).

Brian Weeks, Deputy Attorney General, argued the cause for respondent New Jersey Department of Environmental Protection (Zulima V. Farber, Attorney General, attorney; Patrick DeAlmeida, Assistant Attorney General, of counsel; Timothy Mulvaney, Deputy Attorney General, on the brief).

Judges: Before Judges Skillman, Axelrad and Sabatino.

Opinion

PER CURIAM

Appellant Island Bay owns eleven residential lots on Seabreeze Lane, which are located in the Avalon Manor section of Middle Township in Cape May County. These lots are the remaining undeveloped portion of a larger subdivision known as Sterback Harbor.

The DEP has been involved with the subdivision for the last three decades. In 1976, the DEP issued a letter acknowledging that the project "was in the state of 'on site construction including site preparation' on the effective date of the [Coastal Area Facility Review Act (CAFRA)]." Therefore, the DEP concluded that the project was **[*2]** "exempt from the provisions of the Act, and a CAFRA permit will not be required."

On October 22, 1981, the Middle Township Planning Board approved an updated preliminary plat of the Avalon Manor area, and on December 17, 1986, the Planning Board granted final major subdivision approval "for single family homes contingent upon public water and sewer being available." The Planning Board approved the final plat on February 25, 1988, and it was filed on March 14, 1988.

In early 1988, the Cape May County Municipal Utilities Authority (CMCMUA) notified the DEP that it planned to include the Avalon Manor subdivision in its sewer service area. On March 25, 1988, the DEP sent a letter which stated: "[P]lease be advised that the Division [of Coastal Resources] has no objection to the inclusion of the Avalon Manor parcel in the forthcoming Middle Township Sewerage District's CAFRA permit application."

On July 27, 1989, the DEP issued CAFRA permit 88-1016-5, which authorized construction of a sewer line at Avalon Manor, subject to certain conditions. Condition # 2 stated that

"[s]ewer line hook-ups shall be prohibited within the wetlands and the 50 feet inland wetlands buffer, designated as field **[*3]** delineated and N.J.D.E.P. approved on the Wetland Plottings map of the Middle Township Sewer District . . . prepared by Kona Thomas and Associates." The summary report that accompanied the CAFRA permit stated that "the proposed sewer line will also be within the center of an 'L' shaped undeveloped portion of Avalon Manor[,]" which is Seabreeze Lane. The sewer system was ultimately constructed, and all existing and subsequently constructed homes within Avalon Manor have been tied into the system.

On December 3, 1991, Island Bay purchased the remaining undeveloped lots in the subdivision, which are located on Seabreeze Lane.

In 1988 and again in 1993 and 1998, the DEP granted extensions of the CAFRA exemption for the subdivision that it had recognized in 1976. The letter granting the five-year extension in 1998 stated:

> Provided that the unfinished portion of the project is completed in compliance with the exempted plans and there is no lapse in construction for a cumulative period of one year or longer, CAFRA Exemption ER # 85 is extended for an additional five (5) year period.
>
> As you are aware, should any of the exempted or non-exempted areas as outlined in the Department's August 4, 1988 **[*4]** letter fall within the jurisdiction of the Wetlands Act, the Waterfront Development statute or the Freshwater Wetlands Protection Act, permits would need to be obtained prior to the start of construction.

The two prior extensions of the CAFRA exemption contained similar language.

The 1998 letter also made the extension contingent upon Island Bay granting the DEP's Land Use Regulation Program "a 10 foot wide perpendicular access way from Seabreeze Lane to Ingrams Thorofare." To satisfy this condition, an easement agreement between Island Bay and the DEP was executed on January 26, 1999 and filed on February 4, 1999.

Between 1998 and 2002, Island Bay constructed twenty-one homes in the subdivision, and as of 2002, it was in the process of constructing several other homes. However, there were eleven remaining lots on which there had been no construction because Middle Township questioned whether such construction would be exempt from CAFRA and whether the homes could be tied into the sewer system.

To resolve these questions, on June 18, 2002, Island Bay's representatives met with Kevin Broderick, the manager of the DEP Bureau of Coastal Regulation. On July 25, 2002, Island Bay's counsel sent **[*5]** a lengthy letter to Broderick which summarized the discussions at the meeting and set forth Island Bay's position that the CAFRA exemption was still valid as applied to the eleven lots and that Island Bay was entitled to connect the houses it planned to construct on the lots to the CMCMUA sewer system. Because this appeal revolves around Broderick's response to the July 25th letter, we consider it appropriate to quote the letter at length:

> As you know, this firm is counsel to Island Bay, LLC, the owner of the above-referenced lots in Avalon Manor, Middle Township. Rick Valente, Jordan B. DeFlora, Esq., and I met with you in Trenton on June 18, 2002 in order to review the status of these lots. Specifically, we discussed the continuing viability of the CAFRA exemption for these lots, as well as tying proposed homes on these lots into the existing sewer system. Following is our analysis, as well as the backup documentation you requested. For the reasons which follow, the lots continue to be exempt from CAFRA, and should be permitted to tie into the sewer system. We request your written confirmation in order to facilitate obtaining building permits from Middle Township.
>
> . . . .
>
> In sum, the **[*6]** CAFRA exemption continues to be valid for the Island Bay lots, pursuant to *N.J.A.C. 7:7-2.1(c)*. Site plan approval for this project was issued long before July 19, 1994 (as required by that regulation), construction commenced prior to July 19, 1997, and construction continues to completion without significant lapses.
>
> As such, we request that you confirm in writing that the CAFRA exemption remains valid so that we may pursue permits from Middle Township.

As previously noted, on July 27, 1989, DEP issued a CAFRA permit for the Avalon Manor Sewer Collection System (Exhibit E). It should be noted that the Dixon tract was intended to be served by the Avalon Manor Sewer Collection System. This was confirmed in a September 11, 1987 letter from the Cape May County Municipal Utilities Authority, "Re: Sewerability of Block 117.04, Lots 1.04-1.51, Avalon Manor, Middle Township," which letter confirmed that "the above-referenced area of Avalon Manor is included in the 201 facilities plan for the 7 mile beach/middle region as a sewerable area, as shown on the enclosed copy of the Avalon Manor portion of the 7 mile beach/middle region Appendix C Sewerability Map (June 1981)." (Exhibit J). As a result, **[*7]** "development on the upland portion of this subdivision could be connected to the regional wastewater treatment system . . . conditional upon written approval by the NJDEP Division of Water Resources Technical Services Section, and provided

there is available capacity at the treatment plant to service such development at the time of application for an NJDEP sewer extension permit." See Exhibit J. Moreover, on February 8, 1988, Charles Kona, P.E., engineer for the Township, indicated in a letter to NJDEP, Division of Coastal Resources that "the [Sewer] District has no objections to including the 'Dixon parcel' within its service area as long as your department has no objections." (Exhibit K). By letter of March 25, 1988 from Steven E. Epstein, NJDEP, Division of Coastal Resources, Mr. Epstein indicated that "please be advised that the Division has no objection to the inclusion of the Avalon Manor parcel in the forthcoming Middle Township Sewerage District's CAFRA permit application." (Exhibit L).

The Summary Report which is part of the CAFRA permit for the Avalon Manor Collection System (July 1989) (Exhibit E) confirms that the Dixon tract was to be provided with sewer service. At page **[*8]** 2, the Summary Report indicates that "in addition, the proposed sewer line will also be within the center of an 'L' shaped undeveloped portion of Avalon Manor which is southwest of Sterback Harbor." This street is Seabreeze Lane.

In order to avoid secondary impacts unacceptable to DEP, the CAFRA permit for the Avalon Manor Sewer Collection System was conditioned upon prohibiting sewer hookups within the following special areas:

> 1. The wetland designated as field delineated and NJDEP approved on the Wetlands Plottings map of Middle Township Sewer District No. 3, dated April 4, 1989 last revised November 25, 1985 and prepared by Kona Thomas & Associates;
> 2. A 50 foot buffer inland from the above-mapped wetlands;
> 3. Any new development that is an area that falls under island corridor policy and intends to tie into the sewer line but does not submit plans that are reviewed and approved by this Bureau. (Summary Report, Page 5.)

The Kona Wetlands Plottings map (copy enclosed for your information) depicts the NJDEP mapped coastal wetlands line taken from adopted coastal wetland maps. It also depicts the freshwater wetlands line (i.e. unmapped coastal wetlands and freshwater wetlands) and a 50 **[*9]** foot buffer therefrom. In the area of Seabreeze Lane, it appears that the freshwater wetlands line as well as the 50-foot buffer encompass significant areas of lots 1.05 through 1.27 where homes have been constructed over the past ten years. We searched in the Middle Township Sewer Department and Construction Office for copies of all permits issued in connection with the construction of those homes. . . . Although municipal sewer connection permits had been issued in all cases, there was no evidence that DEP had ever approved tie in of any of these homes to the sewer system. At our meeting on June 18th, we specifically requested that you search DEP's files, and provide us with copies of any DEP permits issued for sewer tie in of these homes. Since we have been provided with no permits from DEP, we assume that none were issued.

It seems apparent that DEP determined not to review the homes constructed on lots 1.04 through 1.27 because no such review was necessary. This is so for two reasons. First, since construction of these homes has consistently been deemed to be exempt from CAFRA, they must also reasonably be exempt from the CAFRA condition applied to the permit for the sewer collection **[*10]** system. Second, DEP is only authorized to regulate freshwater wetlands (including unmapped coastal wetlands, see *N.J.A.C. 7:7A-1.4*, definition of "freshwater wetlands") and their adjacent transition areas pursuant to the terms of the Freshwater Wetlands Protection Act. See *N.J.S.A. 13:9B-30*, which states that "It is the intent of the Legislature that the program established by this act for the regulation of freshwater wetlands constitutes the only program for this regulation in the State. . . .") In *NJ Chapter of NAIOP v. DEP, 241 N.J. Super. 145, 574 A.2d 514 (App. Div. 1990), certif. denied, 122 N.J. 374, 585 A.2d 379 (1991)*, the court made clear that the Freshwater Wetlands Protection Act is the exclusive means under which DEP may regulate freshwater wetlands and transition areas; thus, DEP has no independent authority under CAFRA to regulate such areas. See also *Matter of Waterfront Development Permit, 257 N.J. Super. 524, 608 A.2d 973 (App. Div. 1992)*. Under the Freshwater Wetlands Protection Act, because preliminary subdivision approval for the Dixon tract was granted pursuant to the Municipal Land Use law prior to July 1, 1989, those lots are *completely exempt* from transition area regulation. *N.J.S.A. 13:9B-4(d); Appeal* ***[*11]*** *of Adoption of N.J.A.C. 7:7A-1.4, 118 N.J. 552, 573 A.2d 143 (1990)*. Accordingly, the homes located in the area from lot 1.05 through 1.27 were properly constructed, even though they appear to be located within the 50 foot buffer as set forth on the Kona map.

Similarly, the Island Bay lots at issue here (lots 1.29 through 1.39) must also be allowed to tie into the sewer collection system. It appears that construction on some of these lots will not occur within the 50 foot buffer as depicted on the Kona plan. In any event, DEP's consistent practice has been to allow build out of this

> CAFRA exempt project, and to attempt at this late date to prohibit construction on the remaining Island Bay lots, where 22 plus homes have already been constructed over the past ten years, would plainly be unfair, inequitable, discriminatory and in violation of fundamental principles of fairness.
>
> Accordingly, we ask you to confirm that lots 1.29 through 1.39 should be permitted to tie into the sewer collection system.
>
> As pointed out above, Middle Township has already revoked two construction permits previously issued to Island Bay because the Township believed that issues existed as to the CAFRA exemption and sewer tie **[*12]** in. I trust that the above history indicates that no such issues remain. It is important to my client that we obtain expeditious written guidance from DEP to this effect, so that we may proceed to obtain local permits from Middle Township. We need DEP's cooperation in this regard in order to complete this project on a timely basis without substantial lapses.

Nearly a year after Island Bay sent this letter, Broderick sent a response, dated July 9, 2003, which stated that Island Bay's construction of single family houses in Avalon Manor continues to be exempt from CAFRA for an additional five years through December 28, 2008 and that houses could be connected to the sewer system. However, the DEP imposed two significant conditions upon its approval of Island Bay's application. First, it stated that Island Bay could construct no more than seven houses on the lots, rather than the eleven houses Island Bay had planned to construct. Second, it required Island Bay to execute a conservation easement in favor of the DEP for all wetlands on the lots.

Because of its central importance to this appeal, we quote the Broderick letter in full:

> On behalf of your client, Island Bay LLC, you applied for **[*13]** an extension of CAFRA Exemption ER # 85. In addition, you sought approval for sewer tie-ins for eleven (11) new single family homes which is required pursuant to condition 3 of the CAFRA permit issued to Middle Township Municipal Utilities Authority for the Avalon Manor sewer collection system (CAFRA permit No. 88-1016-5, issued July 27, 1989). Based upon our review of the information submitted, please be advised that we have determined both requests as follows:
>
> 1. The construction of single family homes on the land comprising Tax Block 117.04, lots 1.29 through 1.39 (the "Property") continues to be exempt from CAFRA. This exemption shall be valid for an additional period of five (5) years expiring on December 28, 2008.
>
> 2. No more than seven (7) single family homes may be constructed on Block 117.04, lots 1.29 through 1.39 and/or tied into the sewer system. Subject to the area to be protected by the conservation restriction, the homes may be located in the discretion of your client.
>
> 3. There shall be no construction, structures or improvements within the High Tide Line established by the US Army Corps of Engineers as verified by Stephen C. Martinelli, LS, LLC, as set forth on the plan **[*14]** entitled Jurisdictional Determination, dated October 25, 2000.
>
> 4. Prior to the start of any site disturbance, pre-construction earth movement or any construction of any of the seven dwellings through any portion of the Property, Island Bay LLC, its successors and/or assigns shall record a Conservation Restriction in favor of the Department for all of the wetlands throughout the Property in a form acceptable to the State. The Conservation Restriction shall include a Plan that depicts the protected area and a metes and bounds description.
>
> 5. No further approvals from NJDEP shall be necessary or required for said construction.

Island Bay agreed to the conditions set forth in Broderick's letter.

In November and December 2004, Island Bay obtained the required municipal approvals for construction of the seven houses authorized by Broderick's July 9, 2003 letter, and subsequently, it obtained construction permits for four of the seven houses.

On July 8, 2005, Island Bay submitted a copy of the proposed conservation easement for all wetlands on the eleven remaining lots, which was one of the conditions of DEP's approval of construction of seven houses on these lots, and on December 30, 2005, Island **[*15]** Bay recorded the document reflecting the easement.

On June 6, 2005, the owners of several of the existing houses in the Avalon Manor development brought an action in lieu of prerogative writs in the Law Division against Island Bay, the DEP and various land use agencies and officials of Middle Township, challenging the validity of both the DEP's and the municipality's approval of Island Bay's development project. The Law Division subsequently transferred the action to this court as an appeal from a final decision of a state administrative agency.

On February 21, 2006, we granted Island Bay's motion, in which the DEP joined, to dismiss the neighboring property owners' appeal on the ground that it constituted an untimely

appeal of the DEP's July 9, 2003 final decision approving Island Bay's development project. On March 27, 2006, we granted the plaintiff property owners' motion for reconsideration and transferred the part of the case challenging the municipal approvals given to Island Bay back to the Law Division. Our order also reaffirmed the dismissal of the challenge to the July 9, 2003 letter as untimely.

During the pendency of the action in lieu of prerogative writs, the plaintiff property **[*16]** owners submitted various factual materials and legal arguments to the DEP questioning the appropriateness of its July 9, 2003 decision approving the construction of seven houses on the remaining eleven lots. Around the same time, following this court's denial of plaintiffs' motion for an injunction prohibiting construction of the houses, Island Bay began site preparation work.

On February 2, 2006, Broderick sent Island Bay's counsel a letter summarily rescinding the DEP's prior approval of the sewer connections for the seven houses that Island Bay had been authorized to construct on the remaining eleven lots. The pertinent part of this letter stated:

> [T]he Department (DEP) is presently a party to litigation currently before the Appellate Division of Superior Court. One of the primary issues before the court is whether the DEP has authorized sewer connections from the existing sewer line in Sea Breeze Lane to structures that are located within 50 foot of the adjacent wetlands. The requirement for a 50 foot buffer was established by Condition # 2 of CAFRA Permit # 88-1016-5, originally issued by DEP on July 27, 1989. . . .
>
> . . . [T]he Land Use Regulation Program in evaluating the requirements **[*17]** of Condition # 2, finds that it erred in authorizing sewer connections to seven lots adjacent to Sea Breeze Lane and Ingrams Thorofare.
>
> Based on the above, any houses constructed on Sea Breeze Lane while they would continue to be exempt from CAFRA, would not be exempt from permit Condition # 2 of CAFRA permit # 88-1016-5, requiring a 50 foot wetlands buffer be incorporated for developments tying into the sewer line. Accordingly, while construction of the houses may proceed, construction may only occur if no tie ins to the sewer line are contemplated. Options available to handle site generated sewerage include composting toilets and holding tanks.
>
> Please note this letter is intended to supersede all letters previously issued by the Program concerning the availability of sewer tie ins for houses proposed on Sea Breeze Lane and adjacent to Ingrams Thorofare.

On February 6, 2006, Middle Township issued Stop Construction orders to Island Bay based on the DEP's rescission of the approval for the sewer connections.

On February 24, 2006, Island Bay filed a notice of appeal to this court from the DEP's rescission of its July 9, 2003 sewer connection approval, and a motion for acceleration of the **[*18]** appeal, which we granted.

The DEP filed a motion to dismiss Island Bay's appeal on the ground that the February 2, 2006 letter did not constitute final agency action. We reserved decision on this motion pending consideration of the merits of the appeal. We now deny the motion and reverse the DEP's February 2, 2006 decision rescinding its authorization to Island Bay to connect the seven houses Island Bay plans to construct in Avalon Manor to the existing CMCMUA sewer line.

I

Initially, we address the DEP's motion to dismiss the appeal on the ground that Broderick's February 2, 2006 letter was not a final agency action. First, we note that Broderick's July 9, 2003 letter was unquestionably a final agency decision. It extended the period of Island Bay's CAFRA exemption for five more years, and it authorized Island Bay to construct seven additional houses that could connect to the existing CMCMUA sewer lines. Furthermore, the letter ended by stating: "No further approvals from the NJDEP shall be necessary or required for said construction." Broderick's February 2, 2006 letter modified the July 9, 2003 approval by eliminating the authorization to connect the seven houses to the CMCMUA sewer **[*19]** system. Moreover, the letter states that it "supersede[s] all letters previously issued by the Program concerning the availability of sewer tie ins for houses proposed on Sea Breeze Lane and adjacent to Ingram's Thorofare." The letter does not suggest that Broderick's determination is subject to further review at a higher level within the DEP. Therefore, like an order modifying a final judgment in a civil action, Broderick's February 2, 2006, letter constituted a final agency decision modifying the July 9, 2003 final agency decision. Furthermore, even if we viewed the February 2, 2006 letter as interlocutory in nature, we would grant leave to appeal "in the interest of justice." *R. 2:2-4*.

II

Where a government agency issues a permit or other approval to a property owner to construct a building or other facility, and the property owner substantially relies upon the approval, the property owner may acquire vested rights that the agency may not take away. *See Tremarco Corp. v. Garzio, 32 N.J. 448, 456-57, 161 A.2d 241 (1960)*. The determination of whether an approval by a government agency may be reconsidered and rescinded depends on the circumstances of the particular case. *See Ruvoldt v. Nolan, 63 N.J. 171, 183-85,*

305 A.2d 434 (1973). **[*20]** Any reconsideration of such an approval must be undertaken "within a reasonable time[.]" *Id. at 183*. What a reasonable time is depends on "other attendant factors, such as the particular occasion for administrative reexamination of the matter, the fraud or illegality in the original action and any contribution thereto or participation therein by the beneficiary of the original action, as well as the extent of any reliance or justified change of position by the parties affected by the action." *Id. at 183-84*.

Judged by these criteria, the DEP's rescission of the approval it gave to Island Bay in 2003 to connect the last seven houses Island Bay proposed to build in the Avalon Manor subdivision to the CMCMUA sewer system was arbitrary and capricious. The delay between the DEP's approval of the sewer connection in July 2003 and its rescission more than two-and-a-half years later in February 2006 was significant. Moreover, Island Bay substantially relied upon that approval during the intervening period. Island Bay did not challenge the conditions that the DEP attached to the approval -- the reduction of the number of houses it could construct from eleven to seven and the required dedication **[*21]** of all wetlands to the DEP -- which undoubtedly reduced the potential profit from this development. Instead, Island Bay expended a substantial amount of money, which it estimated to total $ 320,000, to design the homes, obtain the municipal approvals needed to proceed with construction and undertake site preparation work.

The DEP does not allege that its 2003 approval of the sewer connections was based on any fraud, illegality or other impropriety on the part of Island Bay. To the contrary, the July 25, 2002 letter from Island Bay's counsel to the DEP made complete disclosure of all relevant facts, including in particular that a substantial number of houses previously constructed in the Avalon Manor development had been allowed to connect to the CMCMUA sewer system even though those connections violated the conditions contained in CAFRA permit 88-1016-5 and had not been approved by the DEP:

> In the area of Seabreeze Lane, it appears that the freshwater wetlands line as well as the 50-foot buffer encompass significant areas of lots 1.05 through 1.27 where homes have been constructed over the past ten years. . . . Although municipal sewer connection permits had been issued in all cases, **[*22]** there was no evidence that DEP had ever approved tie in of any of these homes to the sewer system. At our meeting on June 18th, we specifically requested that you search DEP's files, and provide us with copies of any DEP permits issued for sewer tie in of these homes. Since we have been provided with no permits from DEP, we assume that none were issued.

The July 25, 2002 letter hypothesized that the DEP's approval had not been required for the sewer connections to the houses previously constructed in Avalon Manor because such approval would have been beyond the DEP's statutory authority for two reasons:

> First, since construction of these homes has consistently been deemed to be exempt from CAFRA, they must also reasonably be exempt from the CAFRA condition applied to the permit for the sewer collection system. Second, DEP is only authorized to regulate freshwater wetlands (including unmapped coastal wetlands, see *N.J.A.C. 7:7A-1.4*, definition of "freshwater wetlands") and their adjacent transition areas pursuant to the terms of the Freshwater Wetlands Protection Act. . . . Under the Freshwater Wetlands Protection Act, because preliminary subdivision approval for the Dixon tract was granted **[*23]** pursuant to the Municipal Land Use Law prior to July 1, 1989, those lots are *completely exempt* from transition area regulation.

Based on these two statutory arguments, the letter concluded that the homes had been properly allowed to be constructed and connected to the CMCMUA sewer system even though they were "located within the 50 foot buffer as set forth in the [DEP approved wetlands map]."

In addition to Island Bay's statutory arguments, the July 25, 2002 letter also contended that because the DEP had allowed all the other houses constructed in the Avalon Manor subdivision to be connected to the CMCMUA sewer system, it would be unfair and inequitable to deny that same right to Island Bay with respect to the houses it planned to construct on the remaining eleven lots:

> DEP's consistent practice has been to allow build out of this CAFRA exempt project, and to attempt at this late date to prohibit construction on the remaining Island Bay lots, where 22 plus homes have already been constructed over the past ten years, would plainly be unfair, inequitable, discriminatory and in violation of fundamental principles of fairness.
>
> Accordingly, we ask you to confirm that lots 1.29 through 1.39 **[*24]** should be permitted to tie into the sewer collection system.

Broderick's July 9, 2003 letter does not indicate which, if any, of the three arguments set forth in Island Bay's July 25, 2002 letter was found sufficiently compelling to warrant approval of Island Bay's construction of seven additional homes on the remaining eleven lots and connection of those houses to the CMCMUA sewer system. Whatever Broderick's reasons may have been, however, he gave unequivocal approval for such

development.

We reject the DEP's argument that Broderick's statement that "[n]o more than seven (7) single family homes may be constructed on Block 117.04, lots 1.29 through 1.39 and/or tied into the sewer system" was ambiguous because of his use of the term "and/or." The houses obviously could not be tied into the sewer system without being constructed, and the July 25, 2002 letter from Island Bay to Broderick made it clear that the houses could not be constructed without being tied into the sewer system.

We also reject the DEP's argument that Island Bay's statement in the July 25, 2002 letter that "[i]t appears that construction on some of [the remaining eleven] lots [in the Avalon Manor subdivision] will not **[*25]** occur within the 50 foot buffer as depicted on the [wetlands map][,]" suggested that Island Bay could construct houses on all the remaining lots without any incursion into the 50 foot wetlands buffer zone, and therefore, Broderick's July 9, 2003 letter should not be read to approve sewer connections of houses constructed within that zone. The July 25, 2002 letter on behalf of Island Bay clearly indicated that significant areas within which houses had been constructed during the preceding ten years had been within wetlands or the 50 foot buffer zone and that this also would be true of some of the remaining houses Island Bay planned to construct. Indeed, if Island Bay did not plan to construct any houses within the 50 foot buffer zone, there would have been no need for the presentation of the three arguments set forth in the July 25, 2002 letter as to why the conditions contained in CAFRA permit 88-1016-5 could not or should not be applied to that construction. Moreover, Broderick's July 9, 2003 letter did not place any restriction on the location of the seven houses he authorized Island Bay to construct on the eleven remaining lots. To the contrary, the letter expressly stated: "Subject **[*26]** to the area to be protected by the conservation restriction, the homes may be located in the discretion of your client."

Therefore, we conclude that the part of Broderick's February 2, 2006 letter that rescinded the authorization that he gave to Island Bay in July 2003 to connect to the CMCMUA sewer system was arbitrary and capricious.

We have no need in deciding this appeal to consider the validity of the statutory arguments set forth in the July 25, 2002 letter. Suffice it to say that those arguments were not frivolous and that, upon receiving Broderick's July 9, 2003 letter, Island Bay could reasonably have concluded that the DEP had accepted those arguments or Island Bay's alternative equitable argument or had decided that the arguments were sufficiently meritorious to warrant administrative action approving Island Bay development plans, conditioned upon a reduction in the number of houses from eleven to seven, rather than litigating the issues that Island Bay's submission raised.

III

Because we conclude that the DEP's February 2, 2006 rescission of its July 9, 2003 final decision was arbitrary and capricious and must be reversed, we have no need to address Island Bay's alternative **[*27]** arguments that the February 2, 2006 letter constituted a revocation of a license within the intent of *N.J.S.A. 52:14B-11*, and consequently, Island Bay was entitled to a hearing before such action could be taken, and that the DEP lacked jurisdiction over the matter as of February 2, 2006 because of the pendency of the property owners' appeal from the DEP's July 9, 2003 approval of the sewer tie-in.

Accordingly, the February 2, 2006 decision, insofar as it relates to the approval of the sewer connections to the CMCMUA system, is reversed, and the July 9, 2003 approval of those connections is reinstated.

In 1993, the Legislature enacted amendments to CAFRA that repealed the exemption for projects commenced prior to the September 18, 1973 effective date of this legislation. *L.* 1993, *c.* 190, § 5. However, the Legislature provided an exemption for projects that received preliminary subdivision approval prior to the effective date of the CAFRA amendments, which was July 19, 1994. *N.J.S.A. 13:19-5.2(a)*; *N.J.A.C. 7:7-2.1(c)*. Because the Middle Township Planning Board granted preliminary subdivision approval for Avalon Manor in 1981, it remained exempt from CAFRA.

Island Bay has completed construction **[*28]** of six more homes since 2002, and two additional homes are presently being constructed by other property owners.

Dixon was Island Bay's predecessor in title.

The letter also concluded that a CAFRA permit would be required for a retaining wall that Island Bay proposed to construct on the site. Island Bay does not dispute this conclusion. Island Bay has not yet decided whether to include a retaining wall in the development project.

Island Bay also sent a letter to the Commissioner of the DEP asking her to reconsider Broderick's rescission of the approval of the sewer connections. Insofar as the record before us indicates, the Commissioner never responded to this letter.

June 21, 2006

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

WINDSTREAM NEBRASKA, INC. and WINDSTREAM OF THE MIDWEST, INC.,	)	Case No. CI 10-2399
Plaintiffs,	)	
vs.	)	
NEBRASKA PUBLIC SERVICE COMMISSION, COMMISSIONER FRANK E. LANDIS, JR., COMMISSIONER ANNE C. BOYLE, COMMISSIONER TIM SCHRAM, COMMISSIONER ROD JOHNSON, AND COMMISSIONER GERALD L. VAP (Commissioners are named in their official capacities as commissioners of the Nebraska Public Service Commission),	)	**ORDER**
Defendants.	)	

This matter came before the court on March 24, 2011, for hearing on the merits of the complaint filed by the plaintiffs, Windstream Nebraska, Inc. and Windstream of the Midwest, Inc. (collectively "Windstream" or "Windstream companies"). James A. Overcash appeared for Windstream. Assistant Attorney General L. Jay Bartel appeared on behalf of the defendants, the Nebraska Public Service Commission and Commissioners Frank E. Landis, Jr., Anne C. Boyle, Tim Schram, Rod Johnson, and Gerald L. Vap in their official capacities as commissioners of the Nebraska Public Service Commission. The court received exhibit 1, the parties' Stipulation of Facts and Evidence, as well as exhibits 2 through 12 and 15. The court also received Exhibits 13 and 14 subject to Windstream's relevancy objections, which the court now overrules and Exhibits 13 and 14 are received. Arguments were heard, and the matter was submitted on the parties' briefs. Being fully advised, the court finds and orders as follows:

Facts

Windstream Nebraska, Inc. is a Delaware corporation, and Windstream of the Midwest, Inc. is a Nebraska corporation. The Windstream companies are telecommunications common carriers as defined by NEB. REV. STAT. § 86-118 (Reissue 2008), and telecommunications companies as defined by NEB. REV. STAT. § 86-119. Windstream provides telecommunications services to customers in Nebraska. As part of these services, Windstream provides wireline telecommunications services to residential and business customers. Companies affiliated with Windstream provide similar services in multiple states.

The Nebraska Public Service Commission ("Commission") is an agency of the State of Nebraska and pursuant to NEB. REV. STAT. § 75-110 (Reissue 2009) is responsible for the adoption and promulgation of rules and regulations which the Commission deems necessary to regulate persons within the Commission's jurisdiction. Frank E. Landis, Jr., Anne C. Boyle, Tim Schram, Rod Johnson, and Gerald L. Vap are duly elected and qualified commissioners of the Commission.

On November 24, 2009, the Commission adopted an amendment of Nebraska Administrative Code, Title 291, Chapter 5, Telecommunications Rules and Regulations, Section 002.17, entitled "Customer Billing." This regulation was approved by the Governor and filed with the Secretary of State on June 7, 2010. The regulation became effective on June 12, 2010. As part of the amendment to Section 002.17, the Commission adopted Section 002.17C which provides:

> Upon termination of service, either customer or carrier initiated, the carrier shall cease charging the customer for services and equipment as of the date of termination and shall refund the pro rata portion of the month's charges for the period of days remaining in the billing period after termination of service to the customer. This section shall not apply to a minimum initial service period not to exceed one month.

291 N.A.C. § 5.002.17C.

Windstream is engaged in the provision of intrastate wireline telecommunications services. Windstream prices its retail telecommunications services to customers on a monthly basis. Windstream bills for its services one month in advance, and Windstream does not prorate

charges or provide credit for any partial periods when a customer initiates services, or if a customer changes, adds, or terminates their service on a date prior to the last day of the billing cycle.

Windstream instituted this action on June 10, 2010, seeking a declaration pursuant to NEB. REV. STAT. § 84-911 that Section 002.17C exceeds the Commission's authority and is invalid.[1] The Commission answered on July 16, 2010, denying the invalidity of Section 002.17C. A hearing on the merits was held on March 24, 2010.

Standard of Review

"Basic civil jurisprudence indicates that the burden of proof in declaratory judgment actions is a preponderance of the evidence and the burden is to be borne by the plaintiff." *Tipp-It v. Conboy*, 257 Neb. 219, 224, 596 N.W.2d 304, 309 (1999).

Section 84-911 provides that upon a challenge to a rule or regulation adopted by an administrative agency, the issue is whether the rule or regulation "violates constitutional provisions, exceeds statutory authority of the agency, or was adopted without compliance with the statutory procedures." NEB. REV. STAT. § 84-911 (Reissue 2008). The Supreme Court has held that NEB. REV. STAT. § 84-911 is "a limited statutory waiver of sovereign immunity and confers subject matter jurisdiction for a declaratory judgment concerning the validity of a state agency's rule or regulation." *Riley v. State*, 244 Neb. 250, 258, 506 N.W.2d 45, 50 (1993).

Analysis

The sole issue raised by Windstream is whether Section 002.17C exceeds the Commission's statutory authority. Windstream contends that Section 002.17C interferes with, impairs, or threatens to interfere with or impair the Windstream companies' ability to bill for their telecommunications services on a monthly basis. Windstream further argues that adoption of Section 002.17C would, as a practical matter, require the Windstream companies to terminate their current practice of billing and collecting for their telecommunications services in this State on a monthly basis.

The Commission defends its rule as within its constitutional and statutory authority. The

[1] In its complaint, Windstream also included a claim that amended Section 002.17 was adopted without compliance with the required statutory procedures. The parties have agreed to dismissal of that claim.

Commission contends that Windstream may continue to bill and collect for its intrastate wireline telecommunications services in the State of Nebraska on a monthly basis, but, under Section 002.17C, upon termination of service by either the customer or Windstream, Windstream will be required to cease charging the customer for services and equipment as of the date of termination and to refund the pro rata portion of the month's charges for the period of days remaining in the billing period after termination of service to the customer, with the exception of a minimum initial service period not to exceed one month.

The Commission's telecommunications rules and regulations are promulgated pursuant to authority delegated to it under NEB. REV. STAT. § 75-110 (Reissue 2009) and the Nebraska Telecommunications Regulation Act, NEB. REV. STAT. §§ 86-101 to 86-163 (Reissue 2008) (hereinafter "the Act"). *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm'n*, 273 Neb. 133, 139, 728 N.W.2d 560, 567 (2007). Generally, a legislative enactment may properly confer general powers upon an administrative agency and delegate to the agency the power to make rules and regulations concerning the details of the legislative purpose. *City of Omaha v. Kum & Go, LLC*, 263 Neb. 724, 730–31, 642 N.W.2d 154, 160 (2002). An administrative agency may not enact regulations that modify, alter, or enlarge provisions of a statute which it is charged with administering. In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated. *Id.* at 731, 642 N.W.2d at 160. The power to regulate must be exercised in conformity with all the provisions of the act in question and in harmony with its spirit and expressed legislative intent. *Id.* at 730, 642 N.W.2d at 160.

The Commission's regulatory jurisdiction is derived from Article IV, Section 20 of the Nebraska Constitution, which provides, in relevant part that "[t]he powers and duties of [the Commission] shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." NEB. CONST. art. IV, § 20. This constitutional provision grants the Commission inherent authority to regulate common carriers. *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 275, 445 N.W.2d 284, 293 (1989). In the absence of specific legislation, the powers of the Commission to regulate common carriers are absolute and unqualified. *Myers v. Blair Tel. Co.*,

194 Neb. 55, 59, 230 N.W.2d 190, 194 (1975). Therefore, the Commission has the power to regulate certain rates of common carriers, including telecommunications providers, but this authority may be limited by the Legislature.

Section 002.17C was adopted by the Commission in Rule and Regulation No. 172 by order entered on November 24, 2009 ("Rule Adoption Order"). The Rule Adoption Order provided that "[o]n May 19, 2009, the Nebraska Public Service Commission (Commission), on its own motion, opened the above-captioned proceeding to amend Title 291, Chapter 5, Telecommunications Rules and Regulations, to add rules regarding customer billing practices pursuant to the Nebraska Telecommunications Regulation Act, *Neb. Rev. Stat.* §§ 86-101 et seq." (Ex. 11 at 34). The Rule Adoption Order clearly states that the Commission was adopting the rules pursuant to its statutory authority, subject to the limitations on that authority, as provided by the Legislature and contained in the Act.

Windstream asserts that there are only two possible statutory bases that could potentially provide authority for the Commission to adopt Section 002.17C under the Act: (a) quality of service regulation or (b) rate regulation. Under the Act, the Commission's jurisdiction extends to quality of service matters, and to a narrow aspect of rate regulation. As provided in NEB. REV. STAT. § 86-123,

> 1) The commission shall regulate the quality of telecommunications service provided by telecommunications companies and shall investigate and resolve subscriber complaints concerning quality of telecommunications service, subscriber deposits, and disconnection of telecommunications service. . . .
>
> (2) The commission may regulate telecommunications company rates pursuant to sections 86-139 to 86-157.

Windstream argues that Section 002.17C clearly does not constitute quality of service regulation, nor does Section 002.17C fall within the Commission's narrow authority regarding rate regulation provided by the Legislature.

A. Section 002.17C Exceeds the Commission's Authority to Regulate Quality of Service

The authority for the Commission to regulate the quality of service provided by telecommunication companies is set forth in NEB. REV. STAT. § 86-123(1). This statutory section provides that "[t]he commission shall regulate the quality of telecommunications service

provided by telecommunications companies and shall investigate and resolve subscriber complaints concerning quality of telecommunications service, subscriber deposits, and disconnection of telecommunications service." NEB. REV. STAT. § 86-123(1).

Windstream contends that "quality of service" has been regarded as synonymous with "adequacy of service" as addressed in 291 N.A.C. § 5.002.02 and in the service standards addressed in 291 N.A.C. §§ 5.002.03 through 5.002.12, as opposed to customer billing which is addressed in amended Section 002.17. Windstream argues that Section 002.17C imposes a requirement affecting a filed tariff and the billing relationship between the carrier and its customer and goes well beyond issues of service quality or adequacy, subscriber deposits, and the disconnection of service. Therefore, Section 002.17C exceeds the Commission's authority to regulate the quality of telecommunications service.

The Commission maintains that the "adequacy of service" rules are only a subset of the Commission's rules pertaining to "quality of service." According to the Commission, "adequacy of service" generally relates to the physical components of providing access line service, including plant and equipment adequacy, service interruptions, trouble reports, the nature of access line service provided, emergency operation and power, public telephone service, maintenance programs for plant and equipment including periodic testing, inspections, and preventative measure, operator rules, and testing of metering and recording equipment. *See* 291 N.A.C. §§ 5.002.02 to 5.002.14. The Commission points out that its rules pertaining to billing, including Section 002.17C, fall under the Commission's other "quality of service" regulations, which include applications for service, refusal of service and disconnection of service, customer billing, information and directory assistance, establishment of credit and customer deposits, complaint handling procedures, tariff filing provisions, compiling and publishing directories, record maintenance, and accounting principles. *See* 291 N.A.C. §§ 5.002.15 to 5.002.24. The Commission argues that its quality of service rules contain many provisions which establish or impact the collection and remittance of fees and charges from customers by telecommunications carriers, and the maintenance of customer accounts. Such rules do not involve any "rate regulation," according to the Commission, but are rate neutral, as they function in the same manner regardless of the rates charged by any carrier.

The court disagrees with the Commission's characterization of Section 002.17C as a "rate neutral" quality of service regulation. Section 002.17C, unlike any other rule cited by the Commission, impacts the rate charged by the carrier as opposed to the quality of service that the customer is receiving. No other rule requires the carrier to cease charging or to limit a rate. The only rule that comes close to limiting a carrier's charges is 291 N.A.C. § 5.002.19, which places limits on the amount of customer deposits. The Commission, however, is given specific authority to regulate customer deposits in NEB. REV. STAT. § 86-123(1).

"Quality of service" as used in the field of telecommunications generally refers to the methods and systems for providing services in communications networks. *See Verizon Servs. Corp. v. Cox Fibernet Va., Inc.*, 602 F.3d 1325, 1330 (Cir. 2010) (describing a "Quality of Service Patent" which covers a method for providing services using an enhanced routing technique that can quickly respond to changes in network configuration and traffic). Quality of service issues are distinct from issues of the cost charged for the service, as quality of service relates to a customer's ability to access and use the carrier's telephone network and not the customer's satisfaction or lack thereof with the carrier's charges for that service. *See Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035 (9th Cir. 2010) (treating consumer complaints regarding rates and quality of service as two separate issues). The court finds that Section 002.17C is a rule affecting the amount of the rate charged for a carrier's service and, thus, falls outside the Commission's authority to regulate a carrier's "quality of service."

B. Section 002.17C Exceeds the Commission's Authority to Regulate Rates

Under Article IV, Section 20 of the Nebraska Constitution, the Commission has authority to regulate the rates of telecommunications carriers, but this authority may be limited by the Legislature. In the absence of specific legislation, the powers of the Commission to regulate common carriers are absolute and unqualified. *Myers v. Blair Tel. Co.*, 194 Neb. 55, 59, 230 N.W.2d 190, 194 (1975). The Commission argues that Section 002.17C falls within the Commission's power under NEB. CONST. art. IV, § 20 to exercise general control and regulate the service of common carriers and is not prohibited by the specific rate regulation provisions of the Act.

With respect to rate regulation, the Act provides that "[t]he commission may regulate

telecommunications company rates pursuant to sections 86-139 to 86-157." NEB. REV. STAT. § 86-123(2). Section 86-139, however, states that "[e]xcept as provided in the Nebraska Telecommunications Regulation Act, telecommunications companies shall not be subject to rate regulation by the commission and shall not be subject to provisions as to rates and charges prescribed in sections 75-101 to 75-158." NEB. REV. STAT. § 86-139.

The Commission's argument that Section 002.17C is not prohibited "rate regulation" is based on its reading of *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989) ["*Spire*"], which was a constitutional challenge to L.B. 835, the Act now codified at NEB. REV. STAT. §§ 86-101 to 86-163. In *Spire*, the Nebraska Supreme Court held that

> The provisions in L.B. 835 concerning *rate review* in the various telecommunications markets are specific legislation rather than general. We therefore hold that L.B. 835 constitutionally divests the PSC of *rate review jurisdiction* over intraLATA interexchange and interLATA intrastate telephone service, and constitutionally limits PSC *rate review jurisdiction* over local exchange service rates.

Spire, 233 Neb. at 279, 445 N.W.2d at 295 (emphasis added).

According to the Commission, the Court's decision in *Spire* establishes that telecommunications companies are not subject to "rate regulation" by the Commission except as provided in the Act. *See* NEB. REV. STAT. § 86-139. Based on *Spire*, the term "rate regulation" pertains to the Commission's exercise of jurisdiction to review and approve the rates charged by telecommunications companies, which is limited to review of basic local exchange rates and which may be undertaken only under certain specified circumstances. *See* NEB. REV. STAT. § 86-141 and §§ 86-144 to 86-148. The Commission points to L.B. 835's legislative history in support of its interpretation of *Spire* that prohibition of Commission rate regulation was directed to restricting Commission review and approval of telecommunications company rates. (Ex. 13 at 36; Ex. 14 at 16, 22). The Commission argues that Section 002.17C does not constitute an attempt by the Commission to review, approve, or alter Windstream's basic local exchange service rate and, thus, is not "rate regulation" prohibited by the Act.

As recognized in *Spire* and as provided in the Act, the Commission may regulate in three

areas: quality of service, rate regulation as provided in the Act, and entry into and exit from the marketplace. *Spire*, 233 Neb. at 279, 445 N.W.2d at 295. Contrary to the Commission's argument, the *Spire* decision did not appear to provide that the Commission still would possess some unspecific fourth area of "general jurisdiction." In *Spire*, the Supreme Court clearly set forth the Commission's remaining areas of regulation:

> L.B. 835 restricts the situations and manner in which the PSC may exercise its regulatory power over rates of telecommunications companies. Regarding basic local exchange service, *L.B. 835 expressly and precisely delineates the situations and manner in which the PSC may exercise its power in relation to its duties.* Concerning intrastate toll calls, however, L.B. 835 completely divests the PSC of its regulatory control over rates. The constitutionality of these restrictions on the PSC's regulatory power depends on the characterization of the statute as either specific legislation or general legislation.
>
> *Although L.B. 835 restricts the PSC's authority over the rates set by telecommunications companies, the act leaves intact PSC control over the quality of service provided by telecommunications suppliers, and retains the PSC's power to allow entry into and exit from the marketplace. . . . .*
>
> The Legislature has not abandoned or abolished all PSC regulation of telecommunications companies. Rather, through L.B. 835, the Legislature has restricted or limited the regulatory power of the PSC concerning rates and has provided a means by which the system of limited rate regulation may be evaluated by the Legislature. *The act preserves the PSC's regulatory jurisdiction regarding quality of service and entry into the telecommunications market* and, therefore, does not divest the PSC of its regulatory power over telephone companies.

Id. at 278–79, 445 N.W.2d at 294–95 (citations omitted) (emphasis added). The *Spire* decision appears to clearly hold that L.B. 835 is specific legislation restricting the Commission's regulatory power over telecommunications carriers.

Even if the court assumes that the Commission retains "general jurisdiction" over telecommunications carriers outside of the Act, the Commission's argument ignores the fact that Section 002.17C was adopted pursuant to the Act as provided in the Rule Adoption Order. (Ex. 11 at 34). Furthermore, such "general jurisdiction," if it exists, cannot be used in the area of rate regulation as rate regulation is explicitly addressed in the Act. *See* NEB. REV. STAT. §§ 86-123(2) and 86-139 to 86-157. The court specifically finds that Section 002.17C is "rate regulation" as addressed in the Act. Contrary to the Commission's position, Section 002.17C is an attempt by the Commission to review, approve, or alter Windstream's basic local exchange

service rate. Section 002.17C essentially states that during the last month of a customer's service, Windstream must change its rate from a monthly fixed rate to a daily rate so that the rate can be prorated. Section 002.17C attempts to modify the amount of time that is covered by the amount of dollars charged by a carrier. The court agrees with Windstream that the scope of regulatory jurisdiction delegated to the Commission by the Legislature does not provide the Commission with the authority to mandate that the rate period for service be less than one month.

While not necessary to the determination of this case, the court considers the Commission's remarks regarding the policy decision behind adoption of Section 002.17C. The Commission states that adoption of the proration policy in Section 002.17C "protects consumers from being forced to pay for services not rendered." (Defendants' Brief at 23). The Commission's remarks imply that Windstream's nonproration policy is unfair to consumers. The court, however, does not view Windstream's policy as unfair or in any way deceptive. Windstream's policy of not prorating charges applies to both termination and initiation of service. Thus, for example, a customer who begins service with Windstream in the middle of a billing cycle is not charged for the service until the start of the next billing cycle, and Windstream essentially provides the beginning interim service at no charge to the customer. Thereafter, the customer is charged for a month of service in full at the beginning of each monthly billing cycle, which the customer is informed of through Windstream's billing statements and tariff. (Ex. 2). Such a billing practice hardly seems unfair considering that the customers are clearly made aware of it and can, presumably, utilize the service until the end of the month before terminating if they so choose.

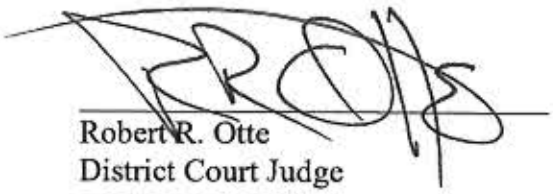
Windstream's practice of not prorating customers' charges upon initiation or termination of service conforms with its filed tariff which provides for billing on a monthly basis. (Ex. 2). While the Commission may not approve of this practice, the court finds that the Commission lacks the authority to prohibit Windstream from structuring its service rates as a fixed monthly fee.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Nebraska Public Service Commission's regulation, 291 N.A.C. § 5.002.17C, is declared illegal and invalid. Judgment is hereby entered in favor of the plaintiffs and against the defendants. Costs are taxed

to the defendants.

DATED this 9th day of June, 2011.

BY THE COURT:



Robert R. Otte
District Court Judge

cc: James A. Overcash, Attorney for Plaintiffs
L. Jay Bartel, Attorney for Defendants

225 Union St. v. Dep't of Cmty. Affairs

Superior Court of New Jersey, Appellate Division

January 23, 2007, Argued; May 30, 2007, Decided

DOCKET NO. A-5488-04T1

Reporter
2007 N.J. Super. Unpub. LEXIS 2044 *; 2007 WL 1542035

225 UNION STREET, JERSEY CITY, FRANK J. NOSTRAME, Appellant, v. DEPARTMENT OF COMMUNITY AFFAIRS, BUREAU OF HOUSING INSPECTION, Respondent.

Prior History: **[*1]** On appeal from the New Jersey Department of Community Affairs.

Core Terms

inspection, abate, re-inspection, notice, Exterior, boiler, detectors, enclosure, caulking, monoxide, carbon, locks, smoke

Counsel: Frank J. Nostrame, appellant, argued the cause pro se (Bogart, Keane, Ryan & Hamill, attorneys; James F. Ryan, on the brief).

Julie Cavanagh, Deputy Attorney General, argued the cause for respondent (Stuart Rabner, Attorney General, attorney; Michael J. Haas, Assistant Attorney General, of counsel; Ms. Cavanagh, on the brief).

Judges: Before Judges Lisa, Holston, Jr. and Grall.

Opinion

PER CURIAM

Petitioner Frank J. Nostrame appeals from a final decision of the Commissioner of the Department of Community Affairs (Department). The Commissioner determined that Nostrame "failed to abate various continuous violations" of the Hotel and Multiple Dwelling Law (the Act), *N.J.S.A. 55:13A-1 to -28*, and the regulations promulgated pursuant to that Act, *N.J.A.C. 5:10-1.1 to -28.1*. The Commissioner assessed penalties for these violations in the amount of $ 31,125 and inspection fees in the amount of $ 1196. Because the Commissioner erred in allocating the burden of proof, assessed penalties not authorized by law and failed to provide sufficiently specific factual findings to enable the court to determine if the evidence supports the order, we vacate the **[*2]** final order and remand.

Nostrame owns a nineteen-unit apartment building in Jersey City. On March 9, 2001, pursuant to *N.J.S.A. 55:13A-13*, an inspector employed by the Department inspected Nostrame's building. More than three months later, on June 28, 2001, the Commissioner issued a report citing 173 violations of the regulations and directing Nostrame to correct the deficiencies by August 27, 2001. The twelve-page inspection report and order identifies each of the 173 violations by location - exterior areas, common areas (basement, vestibule, stairways) or individual apartment - and citation to the regulation violated.

Nostrame requested additional time to comply with the order and was given an extension until November 9, 2001. The Commissioner's inspection report and order invites such requests for extensions and advises that an extension request is the equivalent of a concession of liability for the violations and a waiver of the right to a hearing.

The inspector returned to re-inspect Nostrame's property on January 2, 2002. According to the re-inspection report, fifty-nine of the violations had been abated and thirty-nine remained open. Because the inspector could not gain access **[*3]** to all areas of the building, he did not report on the status of the remaining seventy-five violations.

On April 3, 2002, the Commissioner issued a notice of violation and order to pay a penalty. The notice charged Nostrame with a violation of *N.J.S.A. 55:13A-19(a)(4)* "FOR [HIS] FAILURE TO COMPLY WITH PREVIOUS ORDER DATED 06/28/2001." The total penalty assessed was $ 2125. The notice explained that *N.J.S.A. 55:13A-19(b)* authorizes a penalty of "not less than $ 50.00 nor more than $ 500.00 [for each failure to comply], and a penalty of not less than $ 500.00 nor more than $ 5,000.00 for each continuing violation." *N.J.S.A. 55:13A-19(b)*.

A penalty assessment form that provides additional but limited information about the violations upon which the penalty was based also was completed. [1] The penalty assessment form includes blank lines in which the number of violations and penalty amount can be handwritten. The form is divided into three sections based on the site of the violation - "Exterior," "Common Areas" and "Units." Printed on the form are standard penalty amounts, per violation, in each of the three sites. The amount of the penalty varies depending on whether the violation implicates **[*4]** life or safety, "L/S," or does not, "N/L/S." The penalties for "L/S" violations are higher than those for "N/L/S" violations. [2]

The penalty assessment form does not identify the specific violations listed in the June 28, 2001 "Inspection Report and Orders of the Commissioner" that led the Commissioner to assess penalties. Nostrame was assessed penalties as follows. One "N/L/S" penalty in the amount of $ 125 related to an unspecified violation in the "Exterior" area. (The inspection report for January 2002 on which the penalty is based reflects six open violations related to the exterior.) He was assessed one "L/S" penalty related to "Common Areas" in the amount of $ 500. (There were five open violations for "Common Areas" reflected on the January 2002 inspection report.) He was assessed eight penalties related to unidentified "Units," **[*5]** four of which were for "L/S" violations in the amount of $ 250 each and four of which were for "N/L/S" violations in the amount of $ 125 each. (The January 2002 inspection report reflects twenty-eight open violations in seven different "Units.")

Upon receipt of the order imposing penalty, Nostrame filed timely objections. On July 10, 2002, the Commissioner transferred the contested case to the Office of Administrative Law. *See N.J.S.A. 52:14B-1 to -15*.

On November 7, 2002, Nostrame's property was re-inspected. The inspector gained access to areas not available to him in January 2002. Of the initial 173 violations, this report indicated that forty-five remained open and ninety-two had been abated. Because the inspector was not given access to all apartments, the report reflected no change in the status of the remaining thirty-six violations.

Based on the November 2002 inspection, on January 2, 2003, the Commissioner issued a "notice of continuing unabated violations and orders to abate violations and to pay penalty." The Commissioner alleged a "continuing violation" by failure to abate. *N.J.S.A. 55:13A-19(a)(4),(b)*. As recited in that notice and order, *N.J.S.A. 55:13A-19(b)* provides for **[*6]** increased penalties of not less than $ 500 nor more than $ 5000.

The total penalty assessed after the November 2002 re-inspection was $ 14,500. With respect to the "Exterior" area, where the Commissioner previously charged Nostrame with one "N/L/S" penalty, Nostrame was charged with one "continuing" "L/S" penalty in the amount of $ 1500. For "Common Areas," Nostrame was charged, as before, with one "L/S" penalty. With respect to "Units," where the Commissioner previously charged Nostrame with four "L/S" and four "N/L/S" penalties, he was now charged with five "L/S" penalties in the amount of $ 1500 each, for a total of $ 7500, and four "N/L/S" penalties in the amount of $ 1000 each, for a total of $ 4000. Nostrame did not request a hearing on that assessment.

On April 24, 2003, the Administrative Law Judge (ALJ) assigned to adjudicate the contested case conducted a prehearing conference at which she determined that Nostrame bore the burden of persuasion and directed the Department to re-inspect Nostrame's property. [3] The hearing commenced, and the ALJ heard testimony from Nostrame, Linda Rogers, who is the superintendent of Nostrame's apartment building,

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[1] It is not clear on this record whether that undated penalty assessment form was given to Nostrame with the notice of violation and order of penalty or provided after Nostrame requested a hearing on the penalty.

[2] For example, a blank penalty assessment form provides:

EXTERIOR

__ L/S AREA(S) @ $ 500.00 per area $ __

__ N/L/S AREA(S) @ $ 125.00 per area $ __

[3] An order memorializing these rulings was entered on April 25, 2003.

and inspectors employed by the **[*7]** Department. The hearing was adjourned and continued, apparently to permit the re-inspection that the ALJ had ordered.

The re-inspection of Nostrame's property was done on April 25, 2003. The inspector gained access to areas not previously available. Of the initial 173 violations, the inspector's report indicates that thirty-five remained open and 122 had been abated. The report reflected no change in the status of the remaining sixteen violations because the inspector was not given access to the units.

Based on the April 25, 2003 inspection, the Commissioner again assessed penalties for continuing violations in the total amount of $ 14,500. With respect to the "Exterior" area, Nostrame was charged with a second penalty for a "continuing" "L/S" violation in the amount of $ 2500. For "Common Areas," Nostrame was charged with a second penalty for a continuing "L/S" violation in the amount of $ 2500. With respect to "Units," where the Commissioner last charged Nostrame with five continuing "L/S" and four "N/L/S" penalties, he was now charged for three "L/S" penalties in the amount of $ 2500 each, for a total of $ 7500, and **[*8]** two "N/L/S" penalties in the amount of $ 1000 each, for a total of $ 2000. Nostrame did not challenge that order.

A fourth re-inspection was done on September 10, 2003, again at the direction of the ALJ. The inspector again gained access to areas not previously available. Of the initial 173 violations, this report confirmed nine unabated violations.

Based on the September 10, 2003 inspection, the Commissioner assessed penalties for continuing violations in the total amount of $ 45,000. With respect to the "Exterior" area, Nostrame was charged with a third penalty for a "continuing" "L/S" violation in the amount of $ 15,000. For "Common Areas," Nostrame was charged with a third penalty for one continuing "L/S" violation in the amount of $ 5000. With respect to "Units," where the Commissioner last charged three "L/S" penalties and two "N/L/S" penalties, the Commissioner now assessed two "L/S" penalties in the amount of $ 5000 and two "N/L/S" penalties in the amount of $ 5000 each, for a total of $ 25,000. Nostrame filed a timely request for a hearing on that assessment.

By order dated May 12, 2004, the ALJ granted the Department's application to consolidate the contested cases. The hearing **[*9]** was completed on September 4, 2004.

The ALJ concluded that Nostrame "failed to abate various continuing violations and is liable for a $ 32,321.00 in penalties [sic] and inspection costs." The ALJ's decision addresses seven continuing violations. We discuss the evidence and the ALJ's findings with respect to each of those seven violations separately.

The ALJ concluded that Nostrame failed to abate a continuing violation of *N.J.A.C. 5:10-6.4(a)*, which requires the exterior of the premises to be "kept free of all nuisances, insanitary [sic] conditions, and any hazards to the safety or health of occupants, pedestrians and other persons utilizing the premises." That determination was supported by the following finding: "unauthorized objects on the fire escape, which would interfere with emergency exiting from the building existed on the dates and times indicated on the inspection reports." The ALJ did not point to specific evidence that supported that finding.

Nostrame was also cited for a violation that required him to scrape and paint all the fire escapes. He testified that the painting and scraping was done after he received the Commissioner's June 28, 2001 notice and order. The inspector's **[*10]** report for the re-inspection completed in January 2002 confirms that the fire escapes had been scraped and painted. Rogers also testified that the fire escapes had been cleared but acknowledged that she had seen a garbage bag on a fire escape and directed the tenant to remove it. According to the inspector, during his initial inspection he saw plants, bags and garbage on the fire escapes. On the second inspection he saw rubbish. He could not recall what he saw on the fire escapes on other occasions.

The ALJ concluded that Nostrame did not abate a violation of *N.J.A.C. 5:70-4.18* concerning a boiler enclosure. The inspector testified that he concluded that the violation was abated because there was a sprinkler above the boiler that obviated the need for an enclosure, which he had not noticed on prior inspections. The ALJ did not address that testimony. [4]

The ALJ also concluded that Nostrame failed to abate a violation of *N.J.A.C. 5:10-21.1(a)*, which requires a bathtub or shower that must be "maintained in good operating condition" and "drain into a sanitary sewer or other approved sanitary disposal system." *N.J.A.C. 5:10-21.1(e)*. The Commissioner's inspection report and orders referenced violations based on inadequate caulking and grout. The inspector did not know whether the bath tubs leaked. The ALJ found that some bathrooms had tubs that were not properly caulked or grouted and concluded that this amounted to a

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[4] The ALJ's decision includes numerous factual errors including errors related to the number of abated and open violations. She provides no explanation for the penalty imposed. Moreover, it is not at all apparent that the ALJ considered the need to determine whether Nostrame's failure to abate the violations she found continued to the **[*11]** relevant dates.

failure to maintain them "in good operating condition."

The ALJ concluded that Nostrame did not abate violations for failure to install smoke detectors, N.J.A.C. 5:10-1.6, and carbon monoxide alarms, N.J.A.C. 5:10-28.1(a). According to Nostrame and Rogers, tenants removed or disabled smoke detectors. After receiving the June 28, 2001 inspection report and order, Nostrame purchased simple plug-in carbon monoxide detectors for each apartment and Rogers distributed them to the tenants, who signed for them. According to the inspector, he saw disabled smoke detectors and uninstalled carbon monoxide alarms in several **[*12]** apartments on re-inspection.

The ALJ concluded that Nostrame did not abate a violation of N.J.A.C. 5:10-20.1, which requires a connection for gas stoves "by permanent fixtures and tubing to avoid leakage of gas." The inspector testified that a stove burner in one apartment did not light, apparently because it was clogged with grease. When the gas supply to that burner was open, the gas leaked. That condition had not been rectified when he re-inspected the stove.

The ALJ concluded that Nostrame failed to correct violations based on double-keyed locks that several tenants had installed in their apartments, which she found violated N.J.A.C. 5:10-5.3. Nostrame did not dispute that tenants had installed such locks, but contended that he was not responsible. [5]

On May 5, 2005, the Commissioner issued the following one sentence decision: "Having reviewed the Initial Decision of the [ALJ] in this matter, together with any exceptions **[*13]** or replies submitted, I hereby adopt the Initial Decision as the Commissioner's Final Decision." Because the Commissioner adopted the ALJ's decision without comment, we refer to the decision rendered by the ALJ and adopted by the Commissioner as the Commissioner's decision.

This court defers to an agency's decision unless it is arbitrary, capricious or unreasonable or not supported by substantial credible evidence in the record. Bailey v. Bd. of Review, 339 N.J. Super. 29, 33, 770 A.2d 1216 (App. Div. 2001). We cannot afford that deference, however, unless we have "confidence that there has been a careful consideration of the facts in issue and appropriate findings addressing the critical issues in dispute." *Ibid.* "The requirement of findings is far from a technicality and is a matter of substance. It . . . is a fundamental of fair play that an administrative judgment express a reasoned conclusion. A conclusion requires evidence to support it and findings of appropriate definiteness to express it." New Jersey Bell Tel. Co. v. Communications Workers of Am., 5 N.J. 354, 375, 75 A.2d 721 (1950) (citation omitted). "Findings must be free from ambiguity which raises a doubt as to whether the administrative authority **[*14]** proceeded upon a correct legal theory. . . . [F]indings of fact [must] be sufficiently specific under the circumstances of the particular case to enable the reviewing court to intelligently review an administrative decision and ascertain if the facts upon which the order is based afford a reasonable basis for such order." Id. at 376-77. "When an agency's decision is not accompanied by the necessary findings of fact, the usual remedy is to remand the matter to the agency to correct the deficiency." In re Issuance of a Permit by Dep't of Envtl. Prot. to Ciba-Geigy Corp., 120 N.J. 164, 173, 576 A.2d 784 (1990).

The Commissioner's decision is so inadequate as to require remand under the foregoing standards. The question in this case was whether Nostrame failed to comply with the Commissioner's order to correct specific violations listed in the first inspection report and order to abate. *See* N.J.S.A. 55:13A-19(a)(4). Because Nostrame did not challenge the Commissioner's initial report of inspection and orders, he effectively conceded the initial violations. The penalties the Commissioner assessed, however, were based on Nostrame's failure to obey the order to correct the initial violations. Nostrame challenged **[*15]** that determination. Thus, the Commissioner was required to state factual findings supporting her conclusion that Nostrame failed to correct specific violations listed in the initial notice that warranted the penalties assessed. If the Commissioner undertook that necessary analysis, it is not reflected in the Commissioner's decision.

By way of illustration and explanation, we point to several deficiencies in the factual findings supporting the conclusions. The Commissioner's decision discusses seven violations that Nostrame failed to abate - fire escape debris, boiler enclosure, door locks, smoke detectors, carbon monoxide alarms, cooking stove and bathtub caulking. The first penalty assessment form notes penalties in the aggregate amount of $ 2125 for ten separate violations - eight within units, one for the exterior of the building (presumably the fire escapes) and one for the common area (presumably the boiler). The apparent inconsistency between the decision and the penalty assessment form is arguably explainable on the ground that there was more than one apartment in which Nostrame failed to correct a smoke detector, carbon monoxide alarm, door lock or caulking violation. The difficulty **[*16]** is that the decision is so inadequate that we are left to speculate if that is what the Commissioner found. It is simply not clear whether

[5] With respect to the locks, Nostrame was charged with a violation of N.J.A.C. 5:10-19.2(a), not a violation of N.J.A.C. 5:10-5.3. The ALJ did not discuss the discrepancy. We note that there is not a single reference to N.J.A.C. 5:10-5.3 in the inspection report and order.

the decision is arbitrary or supported by factual findings that are not expressed.

The factual findings that support a determination that Nostrame failed to correct violations related to caulking, fire escapes and the boiler are also inadequate. As noted above, the findings must be sufficiently clear to allow this court to determine if the evidence provides a basis for the decision. *New Jersey Bell Tel. Co., supra, 5 N.J. at 376-77*. This requires a discussion of conflicting evidence and a discussion of how the Commissioner has concluded that the facts establish a violation of the regulation at issue.

There was conflicting evidence about a "continuing" failure to clear the fire escape of debris. The inspector determined that Nostrame had abated a violation requiring scraping and painting of the fire escapes. Presumably, that task required removal of all items from the surface of the structures. According to Nostrame and Rogers, they saw the fire escapes clear. According to the inspector, he saw different objects on the fire escapes at different times. **[*17]** It is unclear whether the Commissioner found additional violations involving different debris or a continuing failure to clear debris. The decision leaves us to speculate.

There was also conflicting evidence about a violation involving the boiler. The inspector testified that he marked the boiler enclosure violation abated because he had not noticed sprinklers installed above the boiler that obviated the need for an enclosure. The Commissioner's decision does not address this testimony.

The Commissioner's decision also fails to relate factual findings to the regulatory violations at issue. For example, the decision is unclear as to how the Commissioner determined that Nostrame's failure to re-caulk or re-grout bathtubs violated a regulation addressing "operating condition" and drainage of bathing facilities. With respect to the door locks, the Commissioner found a violation of a regulation different than the regulation violation Nostrame was ordered to abate.

Because these deficiencies in the Commissioner's decision preclude meaningful review, we vacate the order and remand.

Nostrame raises an additional issue relevant to the penalty that also requires remand. Specifically, he contends **[*18]** that the penalties imposed for continuing violations after he appealed are illegal. The Commissioner argues that we should not consider this issue because it was not raised below. This legal issue, however, was squarely presented in a motion to dismiss that was submitted to the ALJ prior to her final decision.

N.J.S.A. 55:13A-19(b) provides enhanced penalties "of not less than $ 500.00 nor more that $ 5,000.00 for each continuing violation." It further provides:

> Where any violation of *subsection (a) of [N.J.S.A. 55:13A-19]* is of a continuing nature, each day during which such continuing violation remains unabated after the date fixed by the commissioner in any order or notice for the correction or termination of such continuing violation, shall constitute an additional, separate and distinct violation, *except during the time on [sic] appeal from said order may be taken or is pending*.
>
> [*N.J.S.A. 55:13A-19(b)*.]

Under the plain and unambiguous terms of this provision, once Nostrame challenged the penalties for failure to abate he was not subject to additional penalties for a continuing violation while that claim was pending before the Commissioner. Recognizing that *N.J.S.A. 55:13A-2* requires **[*19]** a liberal construction of the Act and arguing on the basis of public policy, the Commissioner contends that we should construe *N.J.S.A. 55:13A-19(b)* to permit assessment of additional penalties for failure to abate unless the landlord has moved for a stay pursuant to *N.J.S.A. 55:13A-18*. Where the terms of a statute are clear, however, there is no need for judicial construction, and our courts apply the statute as written. *See MCG Assocs. v. Dep't of Envtl. Prot., 278 N.J. Super. 108, 119-20, 650 A.2d 797 (App. Div. 1994)* (and cases cited therein). The imposition of additional penalties for continuing violations imposed after Nostrame challenged the assessments was unauthorized and contrary to *N.J.S.A. 55:13A-19(b)*. Accordingly, we direct the Commissioner to vacate any penalties based on assessments imposed for continuing violations after Nostrame's challenge was filed.

Nostrame also contends that the determination may be flawed because he was erroneously required to carry the burden of persuasion. We agree. Generally, an agency that seeks to impose a penalty or sanction must establish the basis for the action by a preponderance of the evidence. *See In re Polk License Revocation, 90 N.J. 550, 560-61, 449 A.2d 7 (1982)*; **[*20]** *New Jersey Dep't of Envtl. Prot. v. Louis Pinto & Son, Inc., 311 N.J. Super. 552, 556, 710 A.2d 1015 (App. Div. 1998)*. We see no reason for deviating from the general rule in this case. Acknowledging that the Department ordinarily has the burden of establishing violations that warrant a penalty, the Commissioner contends that the burden shifts to Nostrame because he did not challenge the initial inspection report. While Nostrame may be deemed to have conceded the initial violations due to his request for an extension rather than a hearing, he did not waive his right to have the agency establish a subsequent violation of *N.J.S.A. 55:13A-19(a)(4)* based on his failure to correct those violations.

We decline to consider Nostrame's objection to the assessment of penalties based on the conduct of his tenants. As we understand the charges and the Commissioner's decision, the penalties are based on Nostrame's failure to take actions adequate to abate the violations. The Commissioner should articulate factual findings and a conclusion relevant to this issue on remand.

For all of the foregoing reasons, we reverse and remand for reconsideration in light of this decision. We leave it to the discretion of the Commissioner **[*21]** to determine whether to refer the matter to the OAL for a new hearing or reconsider her decision and the penalty assessed, in light of this decision, based on the record developed during the first hearing. We do not retain jurisdiction.

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