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February 26, 2015

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Re: Appeal In the Matter of Verizon New Jersey, Inc.'s Alleged Failure to Comply with Opportunity New Jersey Commitments; On Appeal from the April 29, 2014 Order of the New Jersey Board of Public Utilities in BPU Docket No.: TO12020155. **Appellate Division Docket No.: A-004352-13T3**

Dear Mr. Orlando:

Annexed for filing on behalf of the Appellant, the New Jersey Division of the Rate Counsel, please find an original and four copies of Appellant Rate Counsel's Reply Brief and Certification of Service. Kindly return one copy date stamped "filed" for our records.

Thank you for your attention to this matter.

Very truly yours,

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I/M/O Verizon NJ Inc.'s Alleged Failure to Comply with Opportunity New Jersey Commitments NJBPU Decision & Order; BPU Docket No.: TO12020155
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I/M/O Verizon New Jersey, Inc.'s Alleged Failure to Comply with Opportunity New Jersey Commitments	APPELLATE DIVISION **Docket No. A-004352-13T3** Civil Action On Appeal from the April 29, 2014 Order of the New Jersey Board of Public Utilities in BPU Docket No.: TO12020155

APPELLANT THE NEW JERSEY DIVISION OF RATE COUNSEL'S CERTIFICATION OF SERVICE

I hereby certify that on this 26th day of February 2015, I filed an original and four copies of Rate Counsel's Reply Brief with attachments with the Clerk of the Superior Court, Appellate Division, and served two copies each of the within referenced documents via regular mail and a courtesy electronic copy via email to the parties listed below in the above captioned matter.

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REPLY BRIEF OF APPELLANT NEW JERSEY DIVISION OF RATE COUNSEL

On The Brief:
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Dated: February 26, 2015

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STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Rate Counsel relies on its Statement of Facts and Procedural History as set forth in its Initial Brief. Rate Counsel seeks to highlight, however, the following facts in the record.

When BPU issued its Order to Show Cause on March 12, 2012, asking Verizon to show that it had met its ONJ commitment, it specifically listed Rate Counsel as a party to that proceeding. (Aa-46, 49)[2] In its April 12, 2012 answer to the Order to Show Cause, Verizon set forth its belief as to why it had met its obligations, and specifically asked that if the Board determined to go forward with this proceeding, that it do so utilizing full evidentiary proceedings. Verizon stated:

> Should the Board proceed with this docket, as a matter of law, Verizon must be afforded an opportunity to respond to the Board's allegation in the context of a full and complete evidentiary hearing….

---

[1] For the purpose of clarity and the convenience of the Court, Rate Counsel has combined the Procedural History and Facts in this brief.

[2]/ In this Reply Brief, the Board of Public Utilities' Reply Brief will be cited to as ("Bb"); and Verizon's Reply Brief will be cited as ("Vb"). The Board's Appendix will be cited as ("Ba") and Verizon's Appendix will be cited as ("Va"). The citation to Appellant Rate Counsel's Initial Brief will be ("Ab") and Appellant Rate Counsel's appendix will be cited as ("Aa").

> As part of that process, Verizon must be permitted the opportunity to take discovery, assert affirmative defenses, test the Board's arguments and evidence, and submit evidence of its own in a trial-type proceeding. Accordingly, should the Board move forward here despite the success of Opportunity New Jersey described above, the Board must set a pre-hearing conference date in order to set a schedule for discovery, pre-hearing motion practice and hearing dates. [Ra-39-40 (footnotes omitted)].

After that, as far as Rate Counsel was aware, *nothing happened*. The matter sat dormant until January 29, 2014, when Board Staff and Verizon released the Stipulation of Settlement seeking comments from the public. While the Board states in its brief that settlement discussions "thereafter ensued" between Staff and the Company, the process was not as passive as that description would imply. Clearly, at some point still unknown to Rate Counsel, either Verizon or Board Staff approached the other party to initiate settlement discussions. Those discussions continued until January 29, 2014 and at no time was Rate Counsel, a party to this proceeding and the statutory representative of the customers who would be impacted by these discussions, informed of these discussions or invited to participate.

Even after the Stipulation was released to the public, it was not clear that an opportunity for a hearing to resolve any factual issues would not be afforded. The January 29, 2014 Notice from the Board invites interested parties to comment and

states: "After reviewing comments, it will be determined whether to take additional action relating to this matter." (Aa714). As noted in Rate Counsel's Initial Brief, over 2700 comments were filed by members of the public, including Rate Counsel. Despite this, no additional action was taken by the Board except the issuance of a Final Order approving the settlement. (Aa1).

ARGUMENT

I. THE PROCESS UTILIZED BY THE BOARD IN THIS CASE DOES NOT MEET THE REQUIREMENTS OF ITS STATUTE, THE ADMINISTRATIVE PROCEDURE ACT ("APA") OR DUE PROCESS.

A. N.J.S.A. 48:2-21.18 requires a hearing when there is a material modification to a PAR.

As discussed by Rate Counsel throughout its initial brief, (RCIB 21-24) the enabling statute at issue in this case, N.J.S.A. 48:2-21.16, et.seq., grants the Board the authority to approve alternative forms of regulation in order to address changes in technology and the structure of the telecommunications industry; to modify the regulation of competitive services; and to promote economic development. However, it can only do so "after notice and hearing," and based on a finding that the plan meets eight enumerated standards. N.J.S.A. 48:2-21.18. The Board and Verizon argue, however, that the requirement of notice and hearing and consistency with the eight statutory criteria only applies to the initial approval of

a Plan for Alternative Regulation, not subsequent modifications to the PAR, no matter how material those modifications may be.

This argument must be rejected. Although an agency is entitled to significant deference in interpreting a statute it is charged with implementing, Matturi v. Bd. Of Trustees of Judicial Retirement System, 173 N.J. 368, 381 (2002), its freedom to interpret a statute is not unfettered. As the Supreme Court stated in Mazza v. Bd. of Trustees, 143 N.J. 22, 25 (1995) an agency's interpretation can be overturned when it:

> is clearly inconsistent with its statutory mission or with other State policy. Although sometimes phrased in terms of a search for arbitrary or unreasonable agency action, the judicial role is generally restricted to three inquiries: (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) 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 the relevant factors. (citations omitted).

An agency's interpretation is entitled to deference unless it is "plainly unreasonable." Merin v. Maglaki, 126 N.J. 430, 447 (N.J.). Consistency of interpretation is also a factor. See, Sherman v. Citibank (S.D.), N.A., 143 N.J. 35, 58 (1995) ("Far less than the usual amount of deference to an agency interpretation is appropriate when that agency has failed to adopt a consistent interpretation in administering the statute in question.") Indeed, the Supreme Court held in Sherman, that

"judicial deference to administrative rulings should be cast on a sliding scale whereby the usual respect for agency determination diminishes as apparent inconsistencies surmount." Id. at 59.

> Moreover, as this Court has stated, courts are also guided by well-established tenets of statutory construction. In this regard, "our goal is to discern and effectuate the Legislature's intent." Absent a clear definition included within the statute itself, our starting point in defining a statutory term is the plain language of the statute, giving the particular words used by the Legislature their generally accepted meaning, while striving to give effect to each word.

In re the August 16, 2007 Determination of the NJDEP, 414 N.J. Super. 592, 602 (App.Div. 2010)(citations omitted). Courts should "avoid a construction that renders a legislative enactment meaningless." Sherman, supra, at 64. In the end, "statutory construction is ultimately a judicial function." Id. at 38.

Here, the interpretation of the statute that the Board and Verizon are advancing would undermine the Legislative goals and render the statute meaningless. Among the purposes of the statute is to "[m]aintain universal telecommunications service at affordable rates;" and "[e]nsure that customers pay only reasonable charges for local exchange telecommunications services, which shall be available on a non-discriminatory basis." N.J.S.A. 48:2-21.16. To effectuate these goals the Legislature required the Board to adopt a PAR only after notice

and hearing and only if it made specific findings that the eight criteria set forth in N.J.S.A. 48:2-21.18 had been met. If the Board was then free to modify the PAR at will, it is not clear what purpose the review set forth in N.J.S.A. 48:2-21.18 would serve. Under the Board's reasoning, it could completely change the terms of the PAR without notice or a hearing and in a manner inconsistent with the eight statutory criteria as long as it did so through subsequent modifications. This is clearly contrary to the Legislature's intent in requiring a hearing and consistency with the eight criteria in the first instance.

Verizon attempts to argue that notice and hearing are not required because this is the settlement of an "investigatory proceeding."(Vb24) However it cites no authority for that proposition. Citing N.J.S.A. 48:2-32.7, it argues further that all the Board is required to do when interpreting its prior orders establishing an alternative regulation plan is "provide notice to the public and to memorialize its decision either at a public meeting or in a written document." (Vb25). That statute, however, does not on its face support the proposition advanced by Verizon. It simply sets forth the procedure for the issuance of final orders after the extensive public process required for electric and gas rate increase requests.

Moreover, contrary to the representations made by the Board and Verizon in their briefs, the procedure followed here is not

consistent with how the Board has applied this statute in the past.[3] In I/M/O The Board Investigation Regarding the Reclassification of Incumbent Local Exchange Carrier (ILEC) Services as Competitive, BPU Docket No. TX07110873 (July 14, 2008), cited by the Board and Verizon in their briefs in support of the process utilized here, (Bb25, 30. Vb26), a full evidentiary process was initiated to address the issues. The Board noted:

> In order to provide a full record and to allow for an inclusive and transparent process, the Board established a procedural schedule which provided for initial, reply and rebuttal testimony, public and evidentiary hearings and invited interested parties to petition the Board for intervention. (Ba76).

According to the Order in that case, initial, reply and rebuttal testimony was filed by the parties, three public hearings were held, and two days of evidentiary hearings were conducted. After that, settlement discussions among the parties were held. Three parties (Verizon, Board Staff and Rate Counsel) signed the Stipulation. Two parties (AT&T and Sprint) did not sign the Stipulation but did not oppose it. One party, Teletruth,

[3] The Board states in its brief that "[t]hrough its public hearing process, the Board provided appropriate due process, consistent with prior Board settlements." (Bb25) It should be noted that contrary to the Board's assertion (Bb1), there were no public hearings on the Stipulation and Settlement. There was only a 45-day comment period to submit written comments and thereafter approval of the Stipulation at a Public Agenda Meeting, which provides no forum for parties to speak, provide information or ask questions.

opposed the settlement. (Ba77). While the Board did note its authority to approve non-unanimous stipulations in that order (Ba81), it cannot be cited as supporting the process that was used in this case. To the contrary, it supports Rate Counsel's position that in matters involving the same statute as this case, the Board has previously recognized the need to provide evidentiary hearings on issues of fact.

The same is true of I/M/O The Board Investigation Regarding the Reclassification of Competitive Local Exchange Carrier (CLEC) Services as Competitive, BPU Docket No. TX06120841, (June 29, 2007), also cited in the Board's brief (Bb30). In that case, the Board "approved a procedural schedule setting forth the dates of submission of testimony, discovery, evidentiary hearings and the submission of briefs…" (Ba63) Discovery was exchanged and initial, reply and rebuttal testimony was filed. (Ba64). Evidentiary hearings were held and post-hearing briefs were submitted. (Ba65).

I/M/O Lifeline and Linkup Reform Docket No. TO12050367 (May 23, 2012) (Ba 206) and I/M/O Lifeline and Linkup Reform Docket No. TO12050367 (April 24, 2014) (Ba213) are also inapposite. Those cases involved the suspension of automatic enrollment of customers in Lifeline service based on a ruling by the Federal Communications Commission ("FCC"). That matter required quick action to ensure that vulnerable Lifeline customers continued to

be served in compliance with a change in federal law and the Board's ultimate solution resulted from a meeting to which all interested parties and commenters were invited. (Ba215).

Finally, the Board and Verizon's tortured reading of In re Bell Atlantic, 342 N.J. Super. 439 (App. Div 2001) must be rejected. They offer no explanation why the identical notice and hearing language in N.J.S.A. 48:2-21.18 and N.J.S.A. 48:2-21.19 would have different meanings. Simply declaring that the statute must only be followed upon the first review of the PAR does not demonstrate that such a reading is plainly dictated by the statutory language or is consistent with the intent of the statute.

These arguments are no more than *post hoc* rationalizations. The Board did not once cite N.J.S.A.48:2-21.18 in its order and only offers this interpretation to justify this omission after the fact. The briefs of Verizon and the Board are replete with factual and legal assertions that are not in the record - to the extent there is a record - and are not discussed in the Board's order. It is significant that the Board's "Counter Statement of the Case" runs longer than the Board's Decision and Order in this matter and includes citations to cases not relied on nor cited in its Order below. (Bb5 through 8, 10, and 11).

The U.S. Supreme Court in SEC v. Chenery Corp., 318 U.S. 80 (1943), held that discretionary administrative action will only

be upheld on grounds articulated by the agency in the record. The Chenery rule preserves in agencies the formal authority to exercise the discretion delegated by statute, preventing courts from substituting their own policy for that of the agency. At the same time, Chenery limits agency power to make policy outside of public scrutiny. The Court in Chenery held that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." Id., at 87.[4] Accordingly, a court must assess agency action based on the rationales forwarded by the agency itself at the time of its decision: "courts may not accept appellate counsel's post hoc rationalizations for agency action." Burlington Rock Lines v. United States, 371 U.S. 156, 168-69 (1962). The Chenery decision has been widely followed. See, e.g., Navas v. INS, 217 F.3d 646, 658, n.17 (9th Cir. 2000); Massachusetts v. Daley, 170 F.3d 23, 31 (1st Cir. 1999). Thus, this court should only allow the Board to defend its actions on the basis of the reasons it articulated prior to judicial review.

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[4] In reviewing the SEC's action after remand, the Court later explained that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." SEC v. Chenery Corp., 332 U.S. 194, 197 (1947).

In sum, the interpretation that the notice and hearing requirement and consistency with the eight statutory criteria is required only upon the first review of a PAR is a *post hoc* rationalization and is plainly unreasonable. This interpretation renders the initial review a sham, since it can be easily and arbitrarily undone by subsequent modifications. It is also inconsistent with how the Board has proceeded in the past, as the record actually demonstrates that in previous matters involving the implementation of N.J.S.A. 48:2-21.16 et seq. the Board has afforded full process where contested issues existed. For these reasons, the Board's argument that the statute does not require a hearing should be rejected.

B. The Administrative Procedure Act and Due Process Also Require That A Hearing be Afforded in this Case Not Only Because Of The Statutory Hearing Requirement But Also Because Material Issues Of Fact Exist Making this Matter a Contested Case.

Evidentiary hearings are also required in this case pursuant to the Administrative Procedure Act (APA) and as a matter of fundamental fairness. The APA requires that a matter be heard as a "contested case" where, as here, there is a statute that requires a hearing. N.J.S.A. 52:14B-2, and where there are contested issues of material fact. N.J.S.A 52:14B-9. High Horizons Dev. Co. v. Dept't. of Transp., 120 N.J. 40 49-50,

53 (1990); Gasior v. State, Dep't of Civil Service, State Awards Program, 154 N.J. Super. 568 (App.Div. 1977).

As set forth in Rate Counsel's Initial Brief (Ab24-27), the 2700 comments submitted in response to the Stipulation clearly raised issues of fact. Both Verizon and the Board dismiss those comments, based on their view that "the comments opposing the Settlement clearly reflected "confusion" regarding the scope of ONJ." (Aa13) According to Verizon, the Board was dealing only with issues of interpretation and policy over the scope of the ONJ requirements in 2014. Because the Board was interpreting its own order, Verizon argues that the Board correctly found that "no contested-case or evidentiary hearing is required here." (Vb12).

An examination of the briefs, much less the record, shows that there are clearly material issues of fact. These include whether the Settlement materially modifies the PAR. Verizon argues it does not. (Vb29). Rate Counsel obviously believes that it does. Another disputed factual issue is whether ONJ required fiber to the curb. The Board argues that it "has previously, and going forward continues to consider DSL acceptable to meet the ONJ broadband requirement." (Bb37)[5] Rate Counsel disagrees,

[5] The Board argues that Rate Counsel did not dispute that DSL was sufficient as "it uses DSL as the standard to measure the terms of the Stipulation against (Aa378)." (Bb 37) A review of the

citing numerous places in the PAR-1 Order where fiber-based broadband was contemplated and required. (Aa129-130, Aa132-137), (Ab7-10). In addition, Rate Counsel notes that the Board's approval of Verizon's PAR 2 included approval of Staff's recommendation "to monitor ONJ and require NJ Bell to commit to achieving the entire plan, including fiber to the curb, so the projected benefits become a reality." (Aa142). (Ab7-11).[6]

Another factual issue is whether 100% deployment was required. Verizon argues that ONJ was intended to utilize a "holistic standard" that allowed for less than 100% deployment. (Vb8-9). While Verizon argues that 100% deployment is "not practical, workable or realistic" (Vb9), there is nothing in the record to support that assertion and Rate Counsel was given no

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page cited shows that the comment referred to the much higher cost of wireless, not whether it was an equivalent service.

[6] Rate Counsel notes that the FCC has recently modified the definition of broadband to require download and upload speeds that would require fiber-optic broadband as such speeds cannot be obtained through DSL service. In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, GN Docket No. 14-126, FCC 15-10, (Rel. February 4, 2015). Access 117-page FCC Report at:

http://transition.fcc.gov/Daily Releases/Daily Business/2015/db0206/FCC-15-10A1.pdf

opportunity to test it or rebut it. Indeed, it appears that Board Staff believed, until reaching a settlement otherwise, that 100% deployment was required. The Order to Show Cause issued by the Board states that Verizon was "required to achieve ONJ in its entirety, including full broadband capability." Order at paragraph 7 (Aa47). At the Agenda meeting at which the Order to Show Cause was authorized, the Board President asked Staff whether the deployment requirement was truly 100%. (Aa52, T6-L13-15). The Board's Director of Telecommunications responded:

> That is my view. I was here when we negotiated that. Verizon accepted it. Verizon has on more than one occasion in every deployment report it indicated that their commitment is 100 percent. 99.4 is good, but 99.4 is not a hundred percent. And for those thirty or 40,000 consumers that don't have access to a wireline provider that means a lot. (Aa52, T6-L16-22).

Additional factual issues include whether wireless is an adequate equivalent service. (Bb37) The Board states: "With regards to concerns about 4G wireless, the Board noted that ONJ does not set forth a specific medium." (Bb15). However, as noted above, Rate Counsel maintains that ONJ did specify a medium, and there is nothing in the record to support the proposition that 4G wireless is equivalent to "full broadband capability." (Aa47). Rate Counsel and other commenters also raised the factual issue of whether the BFRR process will create a class of ratepayers without access to broadband. While Board Staff seems to think the issue is resolved by noting that the 35

customer threshold is "a minimum," (Bb38) the fact is that customers in those census tracts must garner 34 other customers in the same census tract willing to sign up for Verizon service and willing to provide a deposit before they are able to get the service that was promised to them under ONJ. It also places the burden on those customers to show they do not have access to cable or 4G wireless. The impact of these new requirements and whether they will result in some customers being denied access to broadband has not been explored and should be before the Settlement can be declared "reasonable." Finally, there is a factual issue as to whether the Settlement will adversely impact competition. The Board simply brushes past this question by noting that there was no competition prior to ONJ either. (Bb 38). In doing so, the Board completely ignores the Legislative findings that support the statute it is supposed to be implementing that speak of promoting "diversity in the supply of telecommunications services," and promoting "a wider selection of services at competitive market based prices." N.J.S.A.48:2-21.16.

Rate Counsel fully recognizes that Verizon does not agree with Rate Counsel's position on these issues. However, the Board is not free to simply resolve these issues by deciding which party they agree with. The mere proclamation that the Stipulation is reasonable does not render it so and a cursory

acknowledgement of comments received and recitation of the Board's authority and expertise absent clear evidentiary support for its findings is insufficient to support the Board's action here. The Board is required to allow the parties to create a record, provide evidence to support their positions and then base its decision on a review of that record.

Here, the Board failed to provide sufficient process to support its decision. Rate Counsel and the other parties were denied the opportunity to create a record or review, much less rebut, the information submitted by Verizon to the Board in settlement discussions. It is well settled that "...no court or administrative agency is so knowledgeable that they can make fair findings of fact without providing both sides an opportunity to be heard." Paco v. Am. Leather Co., 213 NJ Super. 90, 97(App. Div. 1986). (Ab27-31). It is also well established that "an agency is never free to act on undisclosed evidence that parties have had no opportunity to rebut." Tosco Corp. v. Dep't of Transp. and Marketfair, 337 N.J. Super. 199, 208 (App. Div. 2001). Therefore, pursuant to the Administrative Procedure Act ("APA"), N.J.S.A. 52:14B-9(c), and fundamental due process, the Board was required to provide Rate Counsel and the parties below the opportunity to test the evidence provided by Verizon herein and relied upon by the Board in reaching its decision and

provide opposing evidence for consideration. The Board's failure to do so is clear error.

II. RATE COUNSEL DID NOT WAIVE ITS RIGHT TO A HEARING.

In a Kafkaesque argument, Verizon and the Board argue that Rate Counsel waived its right to evidentiary hearings by not making a request for such process below. (Vb17, Bb32). They make this argument despite the fact that Verizon itself requested full evidentiary hearings in this matter, arguing "as a matter of law" that "the Board must follow certain procedural requirements and satisfy certain evidentiary burdens before taking any action considered adverse to Verizon." (Va39-40). They make this argument despite the fact that after requesting a hearing themselves, they engaged in undisclosed settlement discussions intentionally leaving out the party to the proceeding whose interests may have been adverse to theirs. They argue that Rate Counsel should have asserted the right to a hearing before there was any way to know it would be denied. They complete their argument by asserting that the Court should not consider Rate Counsel's plea for due process because the procedural issues raised by Rate Counsel "do not implicate the public interest." (Vb20). This argument represents the height of hubris and must be rejected.

The Board's argument in this regard is just as remarkable. While the Board does not go so far as to assert that the issues raised herein do not implicate the public interest, it states that "a review of Rate Counsel's brief makes clear that Appellant does not dispute that the Board conducted a hearing prior to issuing the appealed order," (Bb32) citing a page in Rate Counsel's brief describing the process that was utilized in IMO Bell Atlantic, supra, 342 N.J. 439, 448-449, not the process that was utilized here. The Board clearly knows that it did not conduct a hearing in this case and the fact that it is suggesting to this Court that it did, is startling. The Board then reiterates its argument that in prior cases affecting a PAR the Board provided "appropriate public hearing and due process" as was provided here, and that in those cases Rate Counsel did not "rais[e] the need for an evidentiary hearing." (Bb32). As noted above, in the previous cases affecting the PAR cited by the Board, evidentiary hearings were in fact held. Here, there was no public hearing; there were no evidentiary hearings, and the Board's arguments are simply nonsensical.

In reality, Verizon asked for evidentiary hearings in this case, a fact that was known to Rate Counsel. Verizon and Board Staff then entered into settlement discussions among themselves, a fact not known to Rate Counsel. Once they had reached agreement based on discussions and facts not shared with Rate

Counsel or any other party, the Board released the Stipulation to the public and invited written comments in writing. It gave no indication that this was the only process that would occur, stating instead that "[a]fter reviewing comments, it will be determined whether to take additional action relating to this matter." (Aa714) It is wholly inappropriate for Verizon and the Board to hide the ball in this manner and shift the burden of affording due process to the party that has been denied it. While Verizon recognizes that the Board must follow certain procedural requirements before taking action adverse to Verizon, (Va39-40) it apparently does not believe those requirements must be met when actions impacting the public are taken. Moreover, there can be no reasonable argument that this case does not implicate the public interest, particularly when over 2700 members of the public submitted comments and 63% of those commenters opposed the Stipulation. (Aa5). Unfortunately, it also raises issues that may arise in the future, as they have in the past. See, e.g. I/M/O the Provision of Basic Generation Service, 205 N.J. 339, 362 (2011) (in which the Supreme Court overturned the BPU's Order "insisting that the BPU turn square corners in its provision of adequate notice of its possible actions affecting ratepayers….") Rate Counsel's procedural arguments were not waived below as the Board's notice did not fairly indicate that after reviewing the comments it would

simply issue a final Decision and Order approving the Stipulation without further proceedings. The efforts of Verizon and the Board to shift the obligation to provide due process to the parties who have been denied such process should be rejected.

CONCLUSION

For the forgoing reasons, Rate Counsel respectfully requests that the Court vacate the Board Order and remand this matter.

Respectfully submitted,

NEW JERSEY DIVISION OF RATE COUNSEL

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Stefanie A Brand, Director
On Behalf of Appellant,
Division of Rate Counsel

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