SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Stefanie A. Brand, Esq.
(NJ-Atty.ID No.032331986)
Maria T. Novas-Ruiz, Esq.
(NJ-Atty.ID No.003591991)
State of New Jersey
Division of Rate Counsel
Attorneys for Appellant,
New Jersey Division of Rate Counsel

IN THE MATTER OF THE BOARD'S INVESTIGATION REGARDING THE RECLASSIFICATION OF INCUMBENT LOCAL EXCHANGE SERVICES AS COMPETITIVE	)	APPELLATE DIVISION DOCKET NO.A-004769-14T2 CIVIL ACTION On Appeal from the May 19, 2015 Order of the New Jersey Board of Public Utilities in BPU Docket No. TX11090570

REPLY BRIEF OF APPELLANT THE STATE OF NEW JERSEY DIVISION OF RATE COUNSEL

STATE OF NEW JERSEY
DIVISION OF RATE COUNSEL
140 East Front Street, 4th Fl.
P.O. Box 003
Trenton, NJ 08625
T(609)984-1460 * F(609)292-2923

On the Brief:
Stefanie A. Brand, Director
New Jersey Division of Rate Counsel
Maria T. Novas-Ruiz,
Assistant Deputy Rate Counsel

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

PRELIMINARY STATEMENT

The issues in this case are straightforward:

- Is it arbitrary and capricious for the Board of Public Utilities ("Board" or "BPU") to use a four-year old record and undisclosed data to determine that competition exists for stand-alone residential and single-line business telephone service?

- Is the Board relieving Verizon from meeting its service quality standards after three or five years and, if so, is it consistent with Due Process for the Board to do so without a record or public notice that this issue would be decided in this case?

- Is it arbitrary and capricious for the Board to use evidence of competition for other services to find that competition exists for stand-alone residential and single-line business telephone service? and

- Is it arbitrary and capricious for the Board to approve rate increases up to 36% over the next three years without a record to support the reasonableness of those rates?

Verizon and the Board assert that there is no time limit at all between when a record is developed and when an Order may issue. (Vb22-27;Bb56-59).[1] Even with factual issues that are temporal in nature, they assert that an administrative agency is free to make findings based on facts adduced years earlier without raising due process concerns. They also maintain that the Board was free to rely not only on a record that is stale, but on unspecified "information of which it could take

[1] Reference herein throughout to Respondents Verizon and the Board of Public Utilities' briefs will be cited as ("Vb") and ("Bb") respectively.

administrative or judicial notice" regarding the presence of competition for stand-alone telephone service. (Bb50).

Where Verizon and the Board may not agree is whether the approved stipulation provides for continued BPU oversight over Verizon's service quality standards after three, or potentially five years. The Board maintains that the applicable service quality standards will continue until further order of the Board, while Verizon maintains, consistent with the language of the Stipulation that they expire in three years with a possible two year extension. Either way, jurisdiction over service quality was never an issue in this case and there was no notice to the public and no record to support any change in the Board's oversight.

The Board and Verizon spend many pages arguing that competition exists for stand-alone residential and single-line business telephone service utilizing evidence that does not relate to those two specific services. For example, their reliance on the presence of competitive local exchange carriers ("CLECs") and cable companies is of no moment, since those entities do not offer stand-alone residential and single-line telephone service. The services that are offered by those companies are already deregulated and the existence of competition for those services does not demonstrate the existence of competition for stand-alone telephone.

Finally, the Board does not even attempt to argue that the record supports a finding that the rate increases approved over the next three years are just and reasonable. Verizon's only justification is based on its belief that the Board could have deregulated its rates as of today, which would have left Verizon free to raise its rates at will. Thus, the Company reasons, the rate caps allowing for increases up to 36% over the next three years actually benefit ratepayers and thus need not be justified further. However, the Board has an overriding obligation to make sure rates are just and reasonable. N.J.S.A. 48:2-21; see also, Petition of Public Service Elec. and Gas Co., 304 N.J. Super. 247, 265 (App. Div. 1997). The fact that rates could have been worse if left to the non-competitive market for stand-alone telephone service, does not provide sufficient evidence that the rate increases included in the Stipulation are just and reasonable.

The fact remains that customers who seek only stand-alone telephone service do not have any choices. These customers may be few in number but they tend to be lower income, elderly consumers. They deserve the benefit of the law that requires a finding of competition for the actual service they are seeking. They also deserve the protection of the BPU to ensure reasonable rates and adequate service quality.

ARGUMENT

I. THE BOARD'S DECISION IS ARBITRARY AND CAPRICIOUS BECAUSE IT RELIES ON STALE AND UNDISCLOSED EVIDENCE.

It is not disputed that the public and evidentiary hearings were held in this matter in 2012, and that the record created in those hearings, upon which the Board has determined that competition exists for stand-alone telephone service, is primarily from 2011 and 2012. The Board argues that the lapse of time is "inconsequential," and that there is no time period after the hearings within which they must issue a decision.(Bb 57). Verizon argues that the statute "does not prescribe how long the Board has after notice and a hearing before it must determine whether or not the subject services should be reclassified." (Vb22)

Respondents' arguments are inconsistent with the overall structure of N.J.S.A. 48:2-21.19. The statute recognizes that the competitiveness of a particular service may change over time. Subsection b. allows the Board, upon the filing of a request by a telecommunications carrier, to deem a particular service to be "competitive." Subsection c. empowers the Board to require continued reporting by the carrier so that it may continue to monitor the competitiveness of a particular service. Subsection d. allows the Board "to reclassify any telecommunications service that it has previously found to be

competitive if, after notice and hearing, it determines that sufficient competition is no longer present…." N.J.S.A. 48:2-21.19(d). That same subsection also requires the Board to monitor the competitiveness of services it reclassifies in the event "the telecommunications service has again become sufficiently competitive" to be deregulated. Id.

Thus, the statute recognizes the temporal nature of the inquiry. It assumes that a service may be competitive at one point in time, but may subsequently become non-competitive, or vice-versa. If, as argued by Respondents, there is no time period after the creation of the record by which the Board must decide whether a service is competitive, then this aspect of the statute will be thwarted.

Admittedly, there is no time period specified in the statute for the Board to render its decision. However, a reasonable time period must be assumed in order for the statutory provisions cited above to have meaning. Rate Counsel submits that the Board's reliance on what is now approximately five year old data is not reasonable. In order for the Board to use the existing record to make a finding of competitiveness, it should have allowed the parties to refresh the record.

The cases cited by Respondents to support their argument are inapposite. For example, the Board cites McDonald Partners, Inc. v. NLRB, 331 F. 3d 1002 (D.C. Cir. 2003) for the

proposition that the Board in that case "never dismissed evidence as stale solely based on its age; it has required changed circumstances or new evidence calling the reliability of the old evidence into doubt." (Bb57). In McDonald, however, the Court remanded the matter specifically for the NLRB to review whether the evidence alleged to be stale should be considered, holding that "review of evidence should be a matter of logic and sound inference from all the circumstances…." Id. at 1007-1008. Equally misplaced is the Board's reliance on Powerhouse Arts Dist. Neighborhood Ass'n v. City Council of the City of Jersey City, 413 N.J. Super. 332, 336 (App. Div. 2010), in which the Court rejected a challenge to a 20 year old Legislative blight designation, not an administrative determination that must be based on "substantial evidence" in the record. In re Pub. Serv. Elec. & Gas Co., 35 N.J. 358, 376 (1961)(quoting In re Hackensack Water Co., 41 N.J. Super. 408, 418 (App. Div. 1956). (Bb57).[2]

Both Respondents rely on In the Matter of Pub. Serv. Elec. & Gas Co.'s Unbundling, Stranded Costs & Restructuring Filings, although the Board cites the Supreme Court decision at 167 N.J. 377 (2001) and Verizon relies upon the Appellate Division

[2] It is unclear why the Board cited Devins v. Borough of Bogota, 124 N.J. 570, 579 (1991) at all. That case abrogated the doctrine of *nullum tempus occurrit regi* ("time does not run against the King") for municipally owned property, thus subjecting the State to adverse possession claims.

decision at 330 N.J. Super. 65 (App. Div. 2000). (Bb58, Vb18,31). That reliance is also misplaced. In that case, the issue was whether the record supported the Board's valuation of PSE&G's "stranded costs" after the deregulation of generation facilities pursuant to the Electric Discount and Energy Competition Act ("EDECA"), N.J.S.A. 48:3-49 to 98. There was no allegation that the record relied upon was stale, only that it was insufficient. In addition, the unbundling of services contemplated in EDECA was not subject to the temporal changes anticipated in the statute at issue in this case. Once the generation facilities at issue in EDECA were sold or transferred to affiliate entities, EDECA did not provide a procedure by which they would be reregulated if circumstances changed.

While the Board certainly has some discretion to determine the appropriate process to fulfill its statutory duties, that discretion must be informed by the statute it is implementing. See, In re Public Service Elec. and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, 330 N.J. Super. 65, 103; In re Board Investigation & Review of Loc. Exch. Carrier Intrastate Exch., 2012 N.J. Super. Unpub. Lexis 1430, *48-*51, 2012 WL 2344585 (App. Div. 2012).(See Verizon Appendix Vol. 3, at p. 452a).

The statutes at issue here clearly contemplate a continuing and fluid review of the competitiveness of the

subject services. The interpretation argued by Respondents, that the Board may gather information on the state of competition for a service and then wait to rule on the issue for many years, is inconsistent with this aspect of the underlying statute.

Indeed, it appears that the Board itself recognized that refreshing the record was required as it cited updated information in its decision. As noted in Rate Counsel's initial brief, the Board's decision contained new and updated information regarding the:

- percentage of households in Verizon NJ's wireline area that subscribe to the services affected by the Stipulation; (Aa21).
- number of VoIP lines in the state; (Aa22).
- percentage of New Jersey households with a choice of two or more providers of wired broadband; Aa22.
- volume of DA calls between 2011 and 2014; (Aa22).
- amount of Verizon's alleged current line loss and the alleged cause of the line loss. (Aa22). and
- information that in 2015 the state of Pennsylvania Washington and Colorado reclassified residential and small-line business services as competitive. (Aa23).

Verizon concedes that this information was not included in the original record, arguing instead that because the information was included in the "comments" submitted by Verizon to support the Stipulation that had already been signed, the

Board was free to rely on this new "evidence." (Vb33-34). The Board makes a different argument, stating that its Order was based on the record created in 2012 and "information of which it could take administrative or judicial notice in approving the 2015 Stipulation…." (Bb50).[3] These arguments are meritless. First, the new information is not the type of information that is subject to judicial notice. Judicial Notice may be taken of facts that are "so universally known that they cannot reasonably be the subject of dispute," or are "capable of immediate determination by resort to sources whose accuracy cannot reasonably be questioned." N.J. Rule Evid. 201. While the Board could perhaps take notice of the fact that three other states reclassified certain services as competitive, the record on which those decisions were made are not known and cannot be immediately or easily determined. As for the other new evidence, not only are they not universally known facts, some of them have been designated as proprietary by the Company. (Aa491-2).

As for Verizon's argument that inserting this new evidence in its comments is sufficient, obviously Rate Counsel and other interested parties had no opportunity to test the Company's

[3] Later in its brief, the Board similarly refers to its determination as being based on the 2012 evidentiary record and "post-evidentiary hearing information of which the Board could take administrative notice…" (Bb59).

comments through cross-examination or the submission of competing evidence. Moreover, Verizon's argument that Rate Counsel and other interested parties did not proffer any evidence about changes in market conditions since the evidentiary record had closed is simply wrong. An entire volume of Appellant's Appendix contains comments offering information on the current state of competition for stand-alone "Plain Old Telephone Service" (POTS). For example, the League of Municipalities wrote that "[m]any New Jersey municipalities lack alternatives to Verizon's basic local exchange service and single line business service as demonstrated by the comments submitted by a number of our members." (Aa390). The Mayor of Upper Deerfield Township commented that while the Town itself was able to change telephone carriers to get better service, "residents and businesses in rural areas of the Township and surrounding communities do not have that luxury. These residents and businesses rely on Verizon's landlines." (Aa396). Hopewell Township in Cumberland County wrote of large areas in the town "where Hopewell residents have no other option for reliable telephone service." (Aa410). The County of Cumberland specifically asked that "approval of this stipulation be deferred until interested parties who will be affected by such a

stipulation have a thorough and comprehensive opportunity to weigh in on the impacts that are being proposed." (Aa407).[4]

While these pleas were ignored, it is incorrect to say that no information challenging the current state of competition for stand-alone telephone service was submitted. The Board simply chose to ignore that information and rely instead on information provided by the Company both in its comments and most likely during the negotiations of the Stipulation to which Rate Counsel and other interested parties were not invited. Central to procedural fairness is a chance to know the opposing evidence and to present evidence and argument in response. Tosco Corp. v. Dep't of Transp. and Marketfair, 337 N.J. Super. 199, 208 (App. Div. 2001)(holding that an administrative agency is not free to rely on undisclosed evidence that parties have not had an opportunity to rebut). Appellant and other stakeholders were denied the opportunity to review the new evidence submitted to the Board by Verizon on the current state of competition for these services or to test or challenge the information.

The Board had an obligation to refresh the record with new data before ending a century of consumer protection in this

[4] Indeed, the County of Cumberland and sixteen municipalities in the southern part of the state have already filed a petition with the Board seeking reclassification of stand-alone telephone services pursuant to N.J.S.A. 48:2-21.19(d) due to the lack of competition and poor service quality in their area. (Aa833-Supp.) That petition was filed on November 24, 2015, and has been opposed by Verizon. (Aa906Supp.). It remains pending.

area, and before abandoning residential and single-line business consumers who continue to rely on stand-alone plain old telephone service ("POTS") for which there is no competition. Because the Board's decision is based on stale and undisclosed evidence, this matter should be remanded for further proceedings.

II. THE STIPULATION ALTERS THE APPLICABILITY OF VERIZON'S SERVICE QUALITY STANDARDS, AN ISSUE THAT WAS NOT PROPERLY NOTICED AND FOR WHICH THERE IS NO RECORD TO SUPPORT ANY MODIFICATION.

Service quality issues were not part of the 2012 proceeding and thus the record lacks any evidence regarding the service quality standards or the reliability of Verizon's stand-alone telephone services. A review of respondents' briefs also reveals apparent disagreement between the Board and Verizon on the future applicability of those standards. The Stipulation in paragraph 20 states that the Board will only have authority over service quality standards for residential basic local exchange service and single-line business basic exchange service after a minimum of three years with an option to extend the period by an additional two years. (Aa41). The Board, however, insists in both its Order and its briefs that it retains authority over service quality unless and until it issues an Order relinquishing that authority. The difference is difficult to

reconcile and since the public proceedings in this matter gave no notice that service quality regulation would be impacted at all, resolution of this issue is of extreme importance and requires remand to allow for additional public process and notice.

The public hearing notice in 2012 mentioned that "[w]hen the Board determines retail services to be competitive, it no longer regulates, fixes or prescribes the rates of those services." (Aa106). It states further that "[s]hould the Board, at the close of the proceeding, determine that these are competitive services; the Board would no longer regulate the rates of these services." (Aa106). There was no mention whatsoever in the public notice of any change in the Board's oversight of service quality or in the service quality standards to be applied to Verizon. (Aa106-7)

When the Stipulation was released to the public, it contained paragraph 20, which states that the "Signatory Parties agree that the service quality standards set forth by prior decision of the Board" will continue to apply to stand-alone residential and single-line business services for three years. (Aa41). At the end of three years, "the Board will then determine whether these service quality standards should apply for the remaining two years." (Aa41). During the comment period, Rate Counsel and other parties raised concerns about what

appeared to be an agreement that the service quality standards applicable to Verizon would remain in effect for at most five years. Many commenters also raised specific concerns surrounding service quality, chronic deteriorated service, and the lack of choices for better service. (Aa388-392, Aa395-483).

The Board in its Order stated that service quality oversight for previously deregulated services (Aa849-52) would remain unchanged, citing Paragraphs 18, 19 and 22 of the Stipulation that provide that the terms of the Stipulation do not apply to obligations not specifically discussed in the Stipulation.(Aa27). The Board also states that "Verizon's service quality obligations remain unchanged and are in full effect until such time as the Board engages in a review of the standards." (Aa26). However the Board did not specifically address the terms of Paragraph 20 which states that after the review at year three, the Board can only extend the service quality standards for two more years. (Aa41).

In its Brief, the Board repeats this language, stating that Verizon's service quality obligations remain "in full effect until such time as the Board engages in a review of the standards," without acknowledging the five year limit. (Bb61). Verizon, in its brief, does acknowledge the five year limitation for service quality standards, in contrast to the Board. (Vb 30). However, it argues that Rate Counsel and the public should

have been aware that service quality could be impacted because the public notice referenced the possibility of total rate deregulation. (Vb29). This argument makes no sense, since previous orders reclassifying Verizon's rates for competitive services had specifically and clearly continued BPU oversight over service quality and the service quality standards established in PAR-2.[5] (Aa847-53, BPUa46). Thus, there was no reason for Rate Counsel or the public to assume that the public hearing statements were intended to mean anything other than what they said, i.e. that reclassification would only impact the Company's rates. Contrary to Verizon's assertions, this settlement did "introduce new concepts which had never been considered by the parties during the proceedings." (Vb31, citing In re Public Service Elec. and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings, 330 N.J. Super. 65, 111(App. Div. 2000).

While it is admittedly difficult to understand precisely what service quality oversight will apply to Verizon in the future, there can be no doubt that the Stipulation approved by the Board in this case contemplates an outer limit of five years of continued application of the service quality standards

[5] PAR-2 is Verizon's Plan for Alternative Regulation approved by the Board in 2002 which sets forth, in Attachment B (Aa849-853) the service quality standards that apply to both regulated and deregulated services offered by Verizon.

approved in prior Board Orders. (Aa41). This was an issue that was not addressed in the 2012 record and was not discussed in the public notice or public hearings in this case. The Board argues that despite the language in Paragraph 20, no changes have been made. Verizon argues that changes were made but the public should have contemplated that anything could be addressed in this case. These arguments demonstrate precisely why the Order in this case cannot withstand scrutiny and should be remanded for further proceedings consistent with due process.

III. THE BOARD'S DECISION IS ARBITRARY AND CAPRICIOUS BECAUSE IT USES EVIDENCE OF COMPETITION FOR OTHER SERVICES TO FIND THAT COMPETITION EXISTS FOR STAND-ALONE RESIDENTIAL AND SINGLE-LINE BUSINESS TELEPHONE SERVICE

Throughout their briefs, respondents blur the issue before the Board in order to buttress an inadequate record. They speak in terms of competition in the "telecommunications industry" (Vb 34, 36) and the existence of competitors who have petitioned the Board to provide "telecommunications service." (Vb38; Bb51-52). However, the issue here is not the competitiveness of the telecommunications industry generally. Verizon's other services were reclassified in 2002 and 2008. (Aa833-856; BPUa15-65). The issue here is whether competition exists for stand-alone Plain Old Telephone Service for residential and single-line business

customers and the non-recurring installation charges that accompany such services. The evidence relied on by the Board and Verizon to support the findings in the Stipulation and the Order that competition exists does not apply to those services and thus does not support the findings made. For this reason, the Board's Order is arbitrary and capricious and should be remanded for further proceedings.

The Board's decision ignores substantial evidence that competition does not exist for stand-alone telephone services for residential and single-line business customers and residential directory assistance services. The Board and Verizon submit that the mere presence and availability of cable telephony, wireless, and the existence of competitive local exchange carriers ("CLECs") proves ease of market entry, the presence of competitors and the availability of like or substitute services. (Bb14-16, Bb33; Vb8-10, Vb43-44). However, the record demonstrates that the CLECs that were present in 2011 provided services to medium and large enterprise business customers and that CLEC service for stand-alone residential and single-line business was mostly nonexistent throughout Respondent Verizon's service territory. (Aa265, 275-276; Confidential Aa623 and 634-635). This may be even more true today.

The Board counters by saying that it "is allowed to disagree with Rate Counsel that CLECs are not viable competitors in the telecommunications market." The Board states that "[T]he fact that CLECs negotiate with ILECs[6] for the use of their facilities to deliver services does not qualify as a barrier to entry. . ." and that ". . . the number of CLEC providers active today" prove that entrance has not been thwarted and service competitors exist. (Bb51) This simply ignores the evidence that is in the record regarding the relevant market served by the CLECS. As the majority of CLECs in New Jersey did not provide stand-alone telephone services for residential and single-line business customers throughout Verizon's service footprint, their presence was inconsequential as these CLECs are not true market competitors in the geographic market and do not provide a like or substitute service for the stand-alone telephone services sought by residential and single-line business customers in New Jersey. (Aa243-261; 291-292; 532-534; and Confidential Aa601-619; 649-650; and 711-713).

With respect to cable, the comments submitted opposing the Stipulation noted that some areas of the state, particularly rural areas, do not have access to cable. (Aa210-212; 278-296; 313-327 and 396; Confidential Aa636-654 and 670-685). The data

[6] "ILECs" refers to Incumbent Local Exchange Carrier like Verizon.

provided by Rate Counsel in 2011 also demonstrated that cable providers, even if present in the general geographic market, serve customers who seek bundled services linked to cable video programming and Internet broadband services. They do not offer stand-alone residential and single-line business telephone service. (Aa267-270 and 522; Confidential Aa625-628 and 701a). Moreover, the price of these bundled services makes cable untenable for the average residential and single-line business customer seeking stand-alone plain old telephone service. In terms of pricing, the evidence demonstrated that cable telephony service providers offer bundled services which are significantly higher priced than the cost for stand-alone plain old telephone service, and require customers to sign yearly service contracts which contain early termination penalty fees. (Aa213-215, 268-274, 300-305 and Confidential Aa622-628,658-663).In terms of actual service, it is common knowledge that cable telephony runs on an Internet service platform, hence its' name Voice-over-Internet Platform ("VoIP"). As such, VoIP is not a self-sustaining telephone system and its functionality is limited to the life duration of its battery back-up. For customers who value or require uninterrupted service functionality for medical reasons and/or medical devices, the requirement of a contract, the higher pricing for services they do not want nor need, coupled with the potential for loss of service during power

outages, the availability of cable telephony is not a viable substitute.

The Board simply rejected the importance of this distinction, stating that ". . . in a competitive environment, it makes no difference if the voice service is delivered as part of a bundle or stand-alone service. . ." (Bb53). This reasoning is circular and perplexing, since the precise issue is whether there is competition for stand-alone POTS service. If the service offered by cable companies is not stand-alone POTS service, it is not only relevant but dispositive as to whether cable is a competitor that offers like or substitute services.

Likewise, the fact that wireless providers exist in the New Jersey market does not mean that wireless is a viable competitor for customers who seek plain old telephone service. Appellants provided overwhelming data in 2011 which demonstrated that the majority of New Jersey residential and single-line business customers had in fact not cut the cord, and that wireless service is considered merely an additional service by certain demographic groups of customers but is not seen as a substitute service by these customers. (Aa271-276; Confidential Aa629-634). While more customers may have "cut the cord" since 2011, many customers, particularly the elderly, those who live in rural areas, or those who cannot afford the price of cable or wireless

still seek access to stand-alone POTS service. (Aa83-87, 213-214, 267-270 and 522; Confidential Aa629-634 and 701a).

Similar to cable, wireless telephone service is more expensive than stand-alone plain old telephone service and is also susceptible to unexpected service interruption due to lack of cell tower coverage, satellite failures, and power-outages which jeopardize and may limit equipment functionality that relies on battery back-up. In addition, certain medical devices do not operate on a satellite/wireless platform which makes the service susceptible to loss of E911 capability by compromising the service's ability to determine the location of the user by the call receiver. (RCib39-40, Aa309-311; Confidential Aa667-669). More importantly, the record demonstrates that the Federal Communications Commission ("FCC") has determined that at present mobile wireless service does not constrain the price of wireline service and studies do not show the extent to which consumers view wireless and wireline access services as close substitutes. (RCIB38-39; Aa213, 272-277; Confidential Aa630-635).[7] Thus, the Board's finding that wireless service is a viable substitute for

[7] / Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket 09-135 Qwest Phoenix 2010 Memorandum Opinion and Order, (Rel. June 22, 2010) at paragraph 58. http://www.netcompetition.org/wp-content/uploads/pdf/Qwest%20Phoenix%20Order%202010.pdf

stand-alone telephone service for residential and single-line business customers is not supported by the record.

An administrative agency's ruling can only be upheld if the court finds the agency decision to be reasonable, and "'[a]ny review of the facts must be confined to the question of whether they are supported by substantial evidence, i.e., such evidence as a reasonable mind might accept as adequate to support a conclusion.'" In re Pub. Serv. Elec. & Gas Co., 35 N.J. 358, 376 (1961)(quoting In re Hackensack Water Co., 41 N.J. Super. 408, 418 (App. Div. 1956). The record below is insufficient to demonstrate that competition for stand-alone plain old telephone service for residential and single-line business and the non-recurring installation charges that accompany such services exists in New Jersey. Customers who want and require stand-alone plain old telephone service do not have viable alternatives. Therefore, the Board's Order in light of the evidence submitted below was arbitrary, capricious and an abuse of discretion and requires that the matter be remanded for findings consistent with the record below.

IV. THE RECORD IS DEVOID OF ANY EVIDENCE TO SUPPORT THE APPROVED RATE INCREASES.

The 2012 record demonstrates that the cost of providing service and the reasonableness of any particular rate were not

part of the proceeding below. The rates imposed under the Board's 2015 Stipulation that result in a graduated 36% rate increase within a five year period, if they were supported at all, could only have been supported based on new evidence provided by Verizon. The APA clearly provides that the parties shall be afforded an opportunity "to respond, appear and present evidence and argument on all issues involved." N.J.S.A. 52:14B-9(c). The Board's determination that rate increases up to 36% are "just and reasonable" and its failure to afford Rate Counsel and other stakeholders the opportunity to verify the accuracy of the new evidence and challenge the findings renders the decision inconsistent with due process and requires a remand. In re Musick, 143 N.J. 206, 216-217 (1996); See also, In re Galloway Tp. & Bridgeton, 418 N.J. Super. 94, 103 (App. Div. 2011).

Respondents essentially argue that the approved rate increases are justified because they could have been worse. They reason that since rates could have been deregulated immediately and entirely based on the Board's findings, no challenge should be entertained regarding the lesser rate increases that were approved. While this may be true, as long as the Board is setting rates it must assure that they are just and reasonable based on the record before it. N.J.S.A. 48:2-21. Verizon's reliance on In re Adoption of N.J.A.C. 9a:10-7.8(b), 327 N.J. Super. 149, 155, (App. Div. 2000) for this proposition

is misplaced. (VB29,31). That decision supports a remand in this case. The court in In re Adoption, stated that "where, following the notice of a proposed rule, an agency determines to make changes in the proposed rule which are so substantial that the changes effectively destroy the value of the original notice, the agency shall give a new notice of the proposed rule and public opportunity to be heard." Id.

Likewise, Verizon's reliance on Union County Park Com. v. County of Union, 154 N.J. Super. 213 (App. Div. 1976) is inapposite. (VB31). That case involved a legislative enactment, not an administrative order that must be based on a record before the administrative agency. As the Court stated in Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988), cited by Verizon for the proposition that an Appellate Court's review is limited, (Vb36),

> The court must survey the record to determine whether there is sufficient credible competent evidence in the record to support the agency head's conclusions. Goodman v. London Metals Exch., Inc., 86 N.J. 19, 28 (1981); Close v. Kordulak Bros., 44 N.J. 589, 599 (1965). As we have stated, "this standard requires far more than a perfunctory review; it calls for careful and principled consideration of the agency record and findings * * *." Mayflower Sec. v. Bureau of Sec., 64 N.J. 85, 93 (1973).

Rate Counsel could find no case law to support the proposition that a rate set by the Board is *per se* just and reasonable simply because the Board could have set a higher rate. To the

contrary, while the Courts allow the Board great flexibility in setting rates and defer to its expert judgments, they also consistently require a record on which those expert judgments are based. See, New Jersey Bell Tel. Co., v. State, Dep't of Public Utilities, Board of Public Utility Comm'rs, 162 N.J. Super 60, 73-74 (App. Div. 1978). It is a long-standing legal principle that "a court cannot accept without question an agency's conclusory statements/findings, and an agency decision must set forth evidence to support their decision". In re Board Investigation & Review of Loc. Exch. Carrier Intrastate Exch., 2012 N.J. Super. Unpub. Lexis 1430, *48-*51, 2012 WL 2344585 (App. Div. June 21, 2012).(See Verizon Appendix Vol. 3, at p. 452a). Moreover, where the reasonableness of fixed rates is challenged and subject to judicial review, the reviewing court is required to consider the evidence and resolve for itself the issue of reasonableness. Central R. Co. v. Department of Public Utilities, 7 N.J. 247, 260-261 (1951). The case law on this subject is clear and consistent, and the Courts have remanded to the Board where evidence in the record did not support a rate increase. Petition of Public Service Coordinated Transport, 5 N.J. 196, 217-218(1950). In Public Service, the Court held that there must be proof in the record that the rate is "just and reasonable, and lacking such evidence any determination of rates must be considered arbitrary and unreasonable." Id. at 219.

Here, there is no record upon which this Court can review whether the rate increases of up to 36% allowed by the Stipulation are just and reasonable. Accordingly, this matter should be remanded for further proceedings and the development of a complete and updated record.

III. CONCLUSION

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

Respectfully submitted,

STATE OF NEW JERSEY
DIVISION OF RATE COUNSEL

Stefanie A. Brand,
Director
Maria T. Novas-Ruiz,
Assistant Deputy Rate Counsel
On Behalf of Appellant,
New Jersey Division of Rate Counsel

Dated: February 8, 2016.