STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

CSC TKR, LLC, Petitioner, v. BOROUGH OF MADISON, Respondent	)	DOCKET NO. CC23030139

REPLY BRIEF OF CSC TKR, LLC, IN FURTHER SUPPORT OF MOTION FOR PARTIAL SUMMARY DISPOSITION

James H. Laskey, Esq.
Anthony D'Elia, Esq.
Vaughn Parchment, Esq.
Norris McLaughlin, PA
400 Crossing Blvd, 8th Floor
Bridgewater, New Jersey 08807

Sohrab Shahandeh, Esq.
Director, Government & Policy
Altice USA
One Court Square
Long Island City, NY 11101

May 30, 2023

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

STATE CASES

FEDERAL STATUTES

STATUTES

REGULATIONS

INTRODUCTION

This matter arises out of the Petition brought before the Honorable Board of Public Utilities (the "Board") by CSC TKR, LLC, a wholly owned subsidiary of Altice USA (hereinafter "Altice" or "Petitioner"), seeking an Order pursuant to N.J.S.A. 48:5A-9 ruling that the Borough of Madison (hereinafter "Madison", the "Borough", or "Respondent") must: (1) immediately cease its unlawful demand that Altice agree to pay additional compensation, over and above the cable service franchise fee, in consideration for receiving access to the "Highways" of the Borough (defined in N.J.S.A. 48:5A-3(h) to include every street, road, alley, thoroughfare, way or place of any kind used by the public or open to the use of the public); and (2) immediately grant Altice access to all Highways of the Borough so that Altice may: (a) commence long delayed deployment of its Fiber-to-the-Home ("FTTH") cable system by overlashing fiber-optic cable to its existing Hybrid Fiber-Coax ("HFC") cable system within the Borough; and (b) perform regular maintenance and servicing as needed to both its HFC and FTTH cable systems, as is Altice's right under its system-wide cable franchise and the State's cable laws (N.J.S.A 48:5-1 *et. seq.*).

The Opposition Brief filed by Respondent does not refute Petitioner's right to the relief requested in the instant motion in any way. First, Respondent's arguments as to subject matter jurisdiction are wholly incorrect and unsupported by the relevant case law on the subject of primary jurisdiction. Second, Respondent has intentionally ignored Petitioner's arguments regarding N.J.A.C. 14:18-2.3(a) and attempts to have the Board read N.J.A.C. 14:18-2.3(b) out of context in a manner which would unreasonably benefit Respondent. Third, Respondent has effectively conceded that the existing poles at issue here qualify as facilities for the purposes of N.J.A.C. 14:18-2.3 and that Altice has an existing right to access the Borough poles, as indicated by the language of the Joint Use agreement among Respondent, Petitioner and Verizon and the parties' course of conduct. Thus, there is no genuine issue of material fact with regard either to Petitioner's

need for continued access to those poles in order to carry out its duties under its February 22, 2017 System-Wide Cable Television Franchise Renewal or to Petitioner's right to access these poles at current rates under the Joint Use agreement, whose term extends through October 13, 2023.

At this time, it is clear that the Board can issue an Order in the form put forward by Altice, as the undisputed material facts indicate that, as a matter of law and contract, Altice is entitled to the relief it seeks in the instant motion.

LEGAL ARGUMENT

I. THE BOARD HAS JURISDICTION TO DECIDE THIS MOTION BASED ON THE DOCTRINE OF PRIMARY JURISDICTION.

Despite Madison's attempts to argue the contrary, the Board clearly has jurisdiction to decide the instant motion for partial summary decision based on the Doctrine of Primary Jurisdiction.

The Supreme Court of New Jersey has long determined that the BPU should have "the widest range of regulatory power over public utilities." Deptford v. Woodbury Terrace Sewerage Corp., 54 N.J. 418, 424 (1969); see also In re Centex Homes, LLC, 411 N.J. Super. 244, 254 (App. Div. 2009); Boss v. Rockland Elec. Co., 95 N.J. 33, 39-41 (1983); Atlantic Coast Elec. Ry. Co. v. Bd. of Pub. Util. Comm'rs, 92 N.J.L. 168, 173 (E. & A.1918), app. dismissed, 254 U.S. 660 (1920). In keeping with this longstanding judicial policy, New Jersey courts have adopted the Doctrine of Primary Jurisdiction, under which "a 'court declines original jurisdiction and refers to the appropriate body those issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.'" Curzi v. Raub, 415 N.J. Super. 1, 20 (App. Div. 2010) (quoting Borough of Haledon v. Borough of N. Haledon, 358 N.J. Super. 289, 301–02 (App. Div. 2003)); see also Muise v. GPU, Inc., 332 N.J. Super. 140, 158 (App. Div. 2000); Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 269 n. 1 (1978). Primary jurisdiction serves two crucial

purposes: "'to allow an agency to apply its expertise to questions which require interpretation of its regulations,'" and "'to preserve uniformity in the interpretation and application of an agency's regulations.'" Ibid. A "court should defer to an agency's primary jurisdiction only if 'to deny the agency's power to resolve the issues in question' would be inconsistent with the 'statutory scheme' which vested the agency 'with the authority to regulate [the] industry or activity' it oversees.'" Ibid.

The Appellate Division has set forth a four-part test to determine whether the Doctrine of Primary Jurisdiction should be applied to a given dispute:

> (1) Whether the matter at issue is within the conventional experience of judges;
>
> (2) Whether the matter is peculiarly within the agency's discretion, or requires agency expertise;
>
> (3) Whether inconsistent rulings might pose the danger of disrupting the expertise; and
>
> (4) Whether prior application has been made to the agency.

Curzi, 415 N.J. Super. at 20 (citing Haledon, 358 N.J. Super. at 301-02); see also Muise, 332 N.J. Super. at 160; Boldt v. Correspondence Mgmt., Inc., 320 N.J. Super. 74, 85, 726 A.2d 975 (App. Div. 1999). "Further, if 'a claim presents some issues that are within an agency's special expertise and others which are not, proper course is for the court to refer the former to the agency, and then to apply the agency's findings or conclusions to its determination of the remaining issues.'" Curzi, 415 N.J. Super. at 21 (quoting Haledon, 358 N.J. Super. at 303; see also Muise, 332 N.J. Super. at 161).

Here, Petitioner's Motion for Partial Summary Judgment seeks a decision from the Board regarding whether Petitioner is entitled to access to all Highways and facilities of the Borough so that Petitioner may: (a) commence long delayed deployment of its FTTH cable system by

overlashing fiber-optic cable to its existing HFC cable system within the Borough; and (b) perform regular maintenance and servicing as needed to both its HFC and FTTH cable systems, as is Petitioner's right under its system-wide cable franchise and the State's cable laws (N.J.S.A 48:5-1 *et. seq.*). This subject matter is clearly not within the "conventional expertise of judges", as it falls squarely within the Board's discretion, requiring the Board's expertise to reach a final determination that takes into consideration all the important policy questions at issue, including how Petitioner's customers living within the Borough of Madison will be affected by Respondent's unilateral decision to deny Petitioner access to their existing facilities, the poles currently being used by Petitioner in conjunction with Verizon. Further, inconsistent rulings would absolutely pose the danger of disrupting the Board's expertise and subject matter jurisdiction over regulation relating to public utilities. Finally, no prior application for this relief has been made to the Board before. There is therefore no genuine dispute of material fact that Petitioner meets the four-factor test as espoused in Curzi, Haledon, and Muise.

Respondent has not even attempted to argue that the Board does not possess Primary Jurisdiction over this dispute. Instead, Respondent has done nothing more than cite to N.J.S.A. 40:62-12 and N.J.S.A. 40:62-13, which simply state that municipalities may fix and collect rates and charges for supply of electricity within its own borders; Respondent admits that this is all these statutes actually say. See Opposition Brief, pages 4-5. The instant motion specifically has **nothing to do with** actually asking for a decision on what rates Respondent should charge in connection with access to its pre-existing facilities. It therefore cannot be disputed that the Board has subject matter jurisdiction over the question of whether Petitioner is entitled to access Respondent's existing facilities; the question of what rates should be charged is **not before the Board on the**

instant motion. The Board should therefore decline to accept Respondent's argument as to its lack of subject matter jurisdiction over the instant application.

Accordingly, because the Board has jurisdiction to decide the issue of whether Petitioner is entitled to access Respondent's existing facilities under the Doctrine of Primary Jurisdiction, the Board should decline to adopt Respondent's arguments regarding jurisdiction and issue an Order granting Petitioner's motion in its entirety.

II. THE BOARD SHOULD REAFFIRM THE PETITIONER'S CLEAR AUTHORIZATION TO CONTINUE TO ATTACH TO THE BOROUGH'S POLES AND RECOGNIZE THE PETITIONER'S EXISTING PRESENCE ON THE POLE IN CONJUNCTION WITH THE EXISTING JOINT USE AGREEMENT.

The record in this matter confirms that Petitioner is currently authorized to be on the Borough's poles under current rates under the Joint Use Agreement. See Cody Cert., Exhibit A. Similarly, Altice and its predecessor have made payments accepted by the Borough (through Verizon as the agreement's administrator) for a period dating back decades. Indeed, Madison's more recent conduct affirms this point; its October 13, 2022 resolution seeks to terminate the Joint Use Agreement as of October 13, **2023**,[1] and as the Borough's opposition concedes, its negotiations with Altice have focused on a payment structure in a revised or new agreement starting *after* that date.[2]

Thus, even if the Board were not inclined to invoke primary jurisdiction as urged in Section I, the Board can and should reach the narrow and noncontroversial conclusion that by virtue of Altice's systemwide cable franchise and the Joint Use Agreement, Altice has current authorization

[1] State and Federal cable law would flatly prohibit the Borough from seeking to use the expiration of the Joint Use Agreement from terminating or otherwise constraining Altice's right to provide cable service to Madison residents post October 13 2023. *See, e.g.,* Sections 253 & 626, 47 U.S.C §546 & N.J.S.A 48:5-1 *et. seq*. Altice specifically reserves all rights at law and equity to continue to install and maintain its cable system, including on municipal poles, after October 13, 2023.

[2] See Opposition at 4, citing Cody declaration. ("In addition, payments would not commence until after expiration of the Joint Use Agreement with Verizon. See Cody Cert. at ¶14."))

to access the public rights of way in Madison – including municipally owned poles pursuant to current rates that even Madison concedes govern the parties at least through October 13, 2023.

The Board granted approval of the conversion of a municipal consent franchise to a system-wide franchise on February 22, 2017, and the Petitioner has continued to operate with clear authorization as it had been for decades prior. As stated in the Petitioner's initial Motion for Partial Summary Judgment, it was not until on or about November 29, 2021, that the Borough's Police Department approached the Petitioner's service technicians claiming that the Petitioner did not have authorization and, in the Respondent's latest response, claiming the Petitioner never did – a nearly nonsensical claim obviously belied by the current systemwide franchise, the prior municipal consent franchise, the language of the Joint Use Agreement and the parties' course of conduct.

If the Board does not wish to exercise its primary jurisdiction, the Board should at a minimum, affirm Altice's current right to access municipally owned poles under the Joint Use Agreement. This narrow ruling at least would enable Altice to respond timely to customer trouble calls, install service to requesting households, and repair any damaged facilities – all of which are required by Board regulations – in addition to upgrading its cable system to enhance service to Madison customers.

III. RESPONDENT HAS FAILED TO ADEQUATELY RESPOND TO PETITIONER'S ARGUMENTS CONCERNING N.J.A.C. 14:18-2.3(a), AND THERE IS NO GENUINE DISPUTE REGARDING ANY MATERIAL FACTS.

Regarding the actual substance of Petitioner's Motion for Partial Summary Decision, Respondent has essentially chosen to ignore Petitioner's arguments entirely as they relate to N.J.A.C. 14:18-2.3(a), instead arguing that a genuine dispute of material fact exists arising out of N.J.A.C. 14:18-2.3(b), which it has chosen to read in complete isolation.

Respondent begins its argument by citing N.J.A.C. 14:18-14.10, which merely states that system-wide franchisees may negotiate rates for pole attachments. See Opposition Brief, page 5.

Respondent then goes on to cite the complete language of N.J.A.C. 14:18-2.3(a) & (b) before eventually reading N.J.A.C. 14:18-2.3(b) in complete isolation from N.J.A.C. 14:18-2.3(a). Respondent's argument, therefore, violates the longstanding principle that "[s]tatutory words must be read in context and in harmony with related provisions to give meaning to the legislation as a whole." State v. Moran, 202 N.J. 311, 323 (2010) (citing DiProspero v. Penn, 183 N.J. 477, 492, (2005)); see also Voss v. Tranquilino, 413 N.J. Super. 82, 93 (App. Div. 2010) (". . . even apparently plain words [in a statute] must be read in context.").

Here, as outlined in Petitioner's moving brief, on February 22, 2017, the Board granted Petitioner a System-Wide Cable Television Franchise Renewal (the "Franchise"). See Hoch Cert., Exhibit A. According to the Franchise, the Petitioner was granted the following rights thereunder:

> 3. In Bound Brook Borough **and Madison Borough**, [Petitioner] **shall provide service** to any resident in the municipality at no cost beyond the installation rates contained in its schedule of prices, rates, terms and conditions filed with the Board.
>
> . . .
>
> 7. [Petitioner] shall pay a franchise fee to each municipality served in the amount of 3.5% of its gross revenues, as defined by N.J.S.A. 48:5A-3(x) and -30(d), paid by subscribers in the municipality.
>
> . . .
>
> This Renewal System-wide Cable Television Franchise **is subject to all applicable State and federal laws**, the rules and regulations of the Office of Cable Television, and any such lawful terms, conditions and limitations as currently exist or may hereafter be attached to the exercise of the privileges granted herein.

Id. (emphasis added).

In accordance with Petitioner's franchise, Petitioner is therefore empowered to provide cable television service to Madison in accordance with all applicable State laws, including N.J.A.C. 14:18-2.3. Respondent is now taking the absurd position that Petitioner has never had

the Borough's permission to use the poles currently maintained by Verizon and that, if Petitioner does not comply with Madison's conditions for continued use of those poles, then Petitioner's only alternative is essentially to construct its own separate poles in the same public use areas. If Madison's extralegal position had legitimacy, Petitioner could be unable to maintain its current facilities and services as they exist today, let alone work to improve same.

As Petitioner argued in its moving brief, access to Highways and other public use areas under New Jersey statutory authority (specifically, N.J.S.A. 48:5A-20) implies access to the infrastructure that already exists there. Indeed, N.J.A.C. 14:18-2.3 itself specifically states that cable television providers should utilize already-existing rights-of-way **and facilities** wherever possible to provide service to their customers. The poles currently maintained by Verizon unquestionably qualify as facilities for the purposes of this section of the Administrative Code, as do the roads they sit on qualify as already-existing rights-of-way. Crucially, **Respondent at no point disputes that the existing poles qualify as facilities under N.J.A.C. 14:18-2.3 nor that the current Joint Use Agreement is in effect at least through October 13, 2023**. There is therefore **no genuine dispute of material fact** as to this question, which means that there cannot possibly be It therefore cannot be disputed that, in order for Petitioner to fully comply with its obligations under the Franchise, and to exercise its rights granted under the Franchise, Petitioner must be afforded the ability to continue using the poles currently maintained by Verizon and which are the subject of this dispute. Should Petitioner lose access to these poles, Petitioner's customers in Madison will suffer an immediate and dramatic disruption of service which Petitioner will be entirely unable to remedy.

Accordingly, because no genuine dispute of material fact exists with regard to Petitioner's right to use Respondent's existing facilities, the Board should issue an Order either: (a) granting

Petitioner's motion in its entirety; or, in the alternative, (b) affirming Altice's current right to access the public rights of way including municipally owned poles.

WHEREFORE, Petitioner seeks entry of an Order granting it partial summary decision confirming that Petitioner is entitled to access to all Highways and facilities of the Borough so that Petitioner may: (a) commence long delayed deployment of its FTTH cable system by overlashing fiber-optic cable to its existing HFC cable system within the Borough; and (b) perform regular maintenance and servicing as needed to both its HFC and FTTH cable systems, as is Petitioner's right under its system-wide cable franchise and the State's cable laws (N.J.S.A 48:5-1 *et. seq.*).

Respectfully submitted,

James H. Laskey, Esq.
NORRIS McLAUGHLIN, PA
Attorneys for Petitioner

/s/ James H. Laskey
400 Crossing Blvd, 8th Floor
Bridgewater, NJ 08807
(908) 722-0700

Dated: May 30, 2023