

CLEARY | GIACOBBE | ALFIERI | JACOBS LLC

RONALD F. KAVANAGH, Partner

rkavanagh@cgajlaw.com

Reply to: Oakland Office

April 3, 2023

Via Email

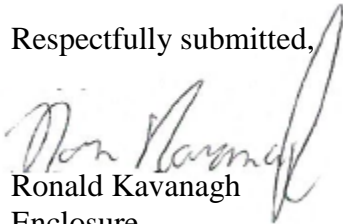
Carmen Diaz, Acting Board Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 1st Floor
P.O. Box 350
Trenton, NJ 08625-0350

**Re: I/M/O Verified Petition of CSC TKR, LLC v. Borough of Madison
Docket No. CC23030139**

Dear Ms. Diaz:

This firm serves as counsel to the Borough of Madison (“Borough”). Enclosed please find the Borough’s Answer to the verified petition in this matter.

Respectfully submitted,



Ronald Kavanagh
Enclosure

cc: Lawanda Gilbert, Director
Raymond M. Codey, Borough Administrator
Vaughn Parchment, Esq.
Matthew J. Giacobbe, Esq.

Oakland Office: 169 Ramapo Valley Road, UL 105, Oakland, NJ 07436 Tel 973 845-6700 Fax 201 644-7601

Somerville Office: 50 Division Street, Suite 501, Somerville, NJ 08876 Tel 732 583-7474 Fax 908 524-0096

Haddonfield Office: 255 Kings Highway East, Haddonfield, NJ 08033 Tel 732 583-7474 Fax 732 290-0753

Matawan Office: 955 State Route 34, Suite 200, Matawan, NJ 07747 Tel 732 583-7474 Fax 732 290-0753

CLEARY GIACOBBE ALFIERI JACOBS LLC

Ronald F. Kavanagh, Esq.
169 Ramapo Valley Road
Upper Level 105
Oakland, NJ 07436
(973) 845-6700
Attorneys for Respondent, Borough of Madison

CSC TKR, LLC,

Petitioner,

v.

BOROUGH OF MADISON,

Respondent.

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

DOCKET NO.: CC23030139

**ANSWER TO VERIFIED
PETITION**

Respondent, the Borough of Madison (hereinafter the “Borough” or “Respondent”), having administrative offices at 50 Kings Road, Madison, NJ 07940, submits this answer to the Verified Petition filed by CSC TKR, LLC, a wholly owned subsidiary of Altice USA (hereinafter “Altice” or “Petitioner”) as follows:

1. Respondent denies that it has unlawfully demanded that Petitioner pay additional compensation, over and above the cable service franchise fee, in consideration for receiving access to the Highways of the Borough, as defined by N.J.S.A. 48:58-3.
2. Respondent denies that it has restricted Petitioner’s access to the Highways of the Borough.

COUNTERSTATEMENT OF FACTS

3. Unlike most other municipalities in New Jersey, the Borough operates its own municipal electrical utility. As such, the Borough absorbs all costs related to installing, replacing, maintaining, and insuring the 2650 poles that make up its utility infrastructure.
4. Altice is the holder of a system-wide cable franchise issued by the New Jersey Board of Public Utilities pursuant to N.J.S.A. 48:5A-1 et seq. Altice admits that under both state and federal law, the holder of a system-wide franchise may access to the right-of-way to “construct” a cable system. As such, the system-wide franchise only grants Altice access to the right-of-way. It does not give Altice the right to use Borough-owned utility poles.
5. Contrary to Altice’s assertions, the Borough has not denied Altice access to the right-of-way. Pursuant to its rights under the law, Altice is free to access the right-of-way to construct its own infrastructure in that space. If Altice seeks to utilize the Borough’s poles, however, an attachment fee is warranted.
6. Altice argues that it currently pays attachment fees for the use of the Borough’s utility poles to Verizon pursuant to a Joint Use Agreement dated October 9, 1950 between the Borough and New Jersey Bell Telephone Company. Altice cites Article 7(c) of the Joint Use Agreement, which states that “Any arrangement for payment of rental or other compensation for pole space involving another party...shall be by agreement between the Telephone Company and the other party.” However, Altice fails to cite the controlling language in Article 7(b), which states that “[s]ubsequent to the execution of this Agreement, attachments of another party shall be made only with the approval of both parties to this Agreement.” The Borough has never given Altice or any other third party approval to attach equipment to its utility poles.

7. Altice contends that the Borough previously granted such permission through prior municipal consent ordinances. This argument is meritless. First, those ordinances do not provide for the use of the Borough's utility poles. In addition, the ordinances have since expired and Altice now operates in the Borough solely under its system-wide cable franchise.
8. Further, Altice has failed to meet its statutory obligations pursuant to its system-wide franchise. Specifically, Altice has not provided courtesy installations to the Hartley Dodge Memorial Building, the Museum of Early Trades & Crafts or the John Avenue, Loveland Street and Madison Plaza pump and lift stations.
9. On October 13, 2022, the Borough adopted a resolution terminating the Joint Use Agreement effective October 13, 2023 to allow the correct entities to be reflected in a subsequent agreement and to update the fee schedule which has been in effect for seventy-three (73) years.
10. The Borough has continued to negotiate in good faith with Altice. On February 28, 2023, after two mediation sessions with Lawanda Gilbert, Director of the Office of Cable Television and Telecommunications, the Borough presented a proposal for a ten-year agreement. The agreement would require an annual attachment fee of \$30.00 per pole for the 2,245 poles that Altice seeks to utilize, plus a 2% annual escalator. In addition, payments would not commence until after expiration of the Joint Use Agreement with Verizon. The Borough believes that this proposal is fair and represents only a fraction of the expense the Borough incurs to operate and maintain its utility infrastructure. Further,

the attachment fee presented to Altice is in no way discriminatory, as a similar proposal will be presented to Verizon for consideration.

11. Although Altice and its predecessor companies have paid a pole attachment fee for the last seventy-three (73) years, Altice now maintains that the Borough's request for a pole attachment fee violates the 3.5% franchise fee cap under N.J.S.A. 48:5A-30(d)(1). This argument is self-serving and specious, as it belies Altice's own actions and those of its predecessor companies for the last (7) decades. Moreover, it fails to take into account that the Borough is one of only ten (10) municipalities in New Jersey that owns and operates a municipal electric utility. Unlike the other 554 municipalities in the State that also benefit from the 3.5% franchise fee, the Borough must absorb the cost of installing, replacing, maintaining, and insuring its utility pole infrastructure.
12. Simply put, Altice has no right under either its system-wide franchise agreement, state law, federal law, or the Joint Use Agreement to utilize the Borough's utility poles. The pole attachment fee proposed by the Borough is reasonable and permissible under state and federal law.
13. The Borough respectfully requests that this matter be referred to the Office of Administrative Law as the Madison Electrical Utility is not under the jurisdiction of the New Jersey Board of Public Utilities.

AFFIRMATIVE DEFENSES

1. The Petitioner fails to state a claim upon which relief may be granted.
2. At all times relevant to this matter, the Borough, its agents, employees, officers, staff and designee(s) complied with all requirements of state law, federal law, and all corresponding regulations.

3. The New Jersey Board of Public Utilities lacks the requisite jurisdiction to adjudicate this matter.
4. Respondent reserves the right to assert such other affirmative defenses as continuing investigation and discovery may indicate.

WHEREFORE, Respondent demands (1) that the Verified Petition be dismissed with prejudice and an Order be entered in favor of the Borough of Madison or (2) Alternatively, that this matter be referred to the Office of Administrative Law.

CLEARY GIACOBBE ALFIERI JACOBS LLC
Attorneys for Respondent

By: *s/ Ronald F. Kavanagh*
Ronald F. Kavanagh, Esq.

Dated: April 3, 2023