

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

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

MOTION FOR PARTIAL SUMMARY DECISION

The Petitioner, CSC TKR, LLC, a wholly owned subsidiary of Altice USA (hereinafter “Altice” or “Petitioner”), hereby moves for partial summary disposition pursuant to the provisions of N.J.A.C. 1:1-12.5, applicable to this proceeding pursuant to N.J.A.C. 14:1-8.1. Specifically, Altice moves for an order by the Board of Public Utilities (the “Board”) confirming that Altice has the right under its existing cable television franchise to receive access to all Highways of the Borough (as defined in N.J.S.A. 48:5A-3(h)), and that such right enables Altice to 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 to perform regular maintenance and servicing as needed to both its HFC and FTTH cable systems.

In this Motion, Altice asks the Board for a narrow and expedited ruling, whose grant does not depend on any disputed facts or undercut the Borough’s position that it is entitled to negotiate for pole attachment fees at its preferred rate, when (as the Borough concedes) the Joint Use Agreement between the Borough and Verizon expires in October of this year. Rather, the Board need only confirm an unremarkable and well-established point of law -- that Altice’s systemwide

franchise grants it the ability to access the Highways of the Borough in order to maintain and install its cable system, with compensation limited to the cable franchise fee. Regrettably, the Borough's recalcitrance has served to bar Altice technicians from any work in the public right of way, whether to: (a) repair an outage for an Optimum NJ HFC customer or conduct preventive maintenance to avoid potential service interruption;¹ or (b) overlash fiberoptic cables to deploy its FTTH cable system, which offers symmetrical broadband speeds up to 5 Mbps, increased resiliency and decreased energy consumption that residents of more than 120 other New Jersey municipalities are already enjoying. Grant of this motion would impose no incremental burden on the Highways of the Borough, would not reach any pole attachment contractual or equitable issues, and does not turn on any facts in dispute. Rather, with a focus on service to Optimum customers in the Borough, this motion simply asks the Board to affirm points of law it has articulated many times before.

In support of this Motion, Altice relies on the brief and Certification with exhibits of Robert Hoch, Esq. dated April 24, 2023 ("Hoch Cert."), filed herewith.

¹ We note that Madison's "stop work" order could result in Altice's inability to comply with the Board's service quality rules for cable operators, such as timely installations and/or repairs.

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CSC TKR, LLC,)
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 Petitioner,)
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)
 Respondent)

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

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April 27, 2023

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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 (as defined in N.J.S.A. 48:5A-3(h)); 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.*). 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, Altice is entitled to the relief it seeks in the instant motion.

STATEMENT OF FACTS

Altice is the holder of a state issued system-wide cable franchise that authorizes Altice under state and federal law to construct a cable system within the Highways of all the communities in its franchise area (including the Borough), and through utility easements (the “Franchise”) See Certification of Robert Hoch, Esq. (“Hoch Cert.”) at ¶ 2 & Exhibit A. Pursuant to this authorization, Altice provides both cable and non-cable services over its system. See Hoch Cert. at ¶ 3.

4. The Borough is fully aware that Altice and its predecessors’ cable systems have been and continue to be attached to the Borough’s utility poles, and has given its permission to

such arrangement, as evidenced by a municipal consent franchise and three subsequent renewal authorizations adopted and approved by the Borough since 1975, which were in effect prior to Altice converting its authorization, by operation of law, to the current Franchise. See N.J.S.A. 48:5A-25.1; N.J.A.C. 14:18-14.13; and Hoch Cert. at ¶ 4 & Exhibit B. As an example, the Borough’s 1988 municipal consent ordinance states, “The Borough hereby grants to the Company its non-exclusive consent to place in, upon, along, across, above, over and under the highways, streets, alleys, sidewalks, public ways, and public places in the Borough poles, wires, cables, underground conduits, manholes, and other television conductors and fixtures necessary for the maintenance and operation in the Borough of a cable television system and cable communications system. Construction pursuant to said consent is conditioned upon prior approval of the Board of Public Utilities.” See Hoch Cert. at ¶ 5 & Exhibit B. The Borough’s 1995 and 2007 municipal consent renewal ordinances contain substantively the same provision. See Hoch Cert. at ¶ 5 & Exhibit B.

Since 2017, pursuant to its franchises, Altice has been in the process of deploying throughout its service footprint an advanced FTTH cable system, which can provide multi-Gig capable Internet and cable service to residents and small-to-medium businesses in New Jersey. See Hoch Cert. at ¶ 6. Altice multi-Gig offerings are consistent with State and Federal goals to support infrastructure investments by cable operators to offer advanced communications services. See Hoch Cert. at ¶ 6. To date, Altice has worked with more than 120 New Jersey municipalities in the *Optimum* brand service area to successfully deploy FTTH (primarily by overlashing its existing aerial cable plant), consistent with both local right-of-way management rules and Altice’s franchise authorizations. See Hoch Cert. at ¶ 7. As a result, as of EOY 2022, the FTTH network

passed more than 2.2 million households, and the Company continues to make steady progress on deployment and service activation. See Hoch Cert. at ¶ 7.

On or about November 29, 2021, soon after Altice commenced aerial cabling of FTTH in the Borough pursuant to the Franchise, the Borough's police department communicated to Altice's service technicians that they were no longer permitted to conduct any activity within the Highways of the Borough. See Hoch Cert. at ¶ 8 & Exhibit C. Upon contacting the Borough Administrator, Altice was informed that the Borough would not permit Altice to proceed with aerial cabling until it: (1) completed an access agreement to traverse a Borough-owned parking lot within the business district ("Access Agreement"); and (2) negotiated the terms of a pole attachment agreement for the use of the utility poles owned by the Borough ("Attachment Agreement"). See Hoch Cert. at ¶ 9. Altice quickly negotiated the terms of the parking lot Access Agreement, including the commitment to a \$10,000 payment at the Borough's request. See Hoch Cert. at ¶ 10. Nevertheless, the Borough refused to permit Altice to resume cabling for FTTH until the Attachment Agreement was negotiated with the Borough, despite: (1) Altice's existing attachment agreement with Verizon; and (2) that fact that no new attachments are required for the overlash of FTTH to Altice's existing plant. See Hoch Cert. at ¶ 10.

Six weeks later, on January 10, 2022, the Borough submitted an attachment proposal requiring that Altice pay the Borough a \$250,000 annual fee for use of the poles already subject to the existing attachment agreement with Verizon. See Hoch Cert. at ¶ 11 & Exhibit D at page 20 ("Exhibit B"). Further, the Borough would not agree to make the obligation conditional upon Altice's release from its obligation to Verizon, effectively subjecting Altice to an even higher combined annual financial obligation by double-charging Altice for the same poles. See Hoch Cert. at ¶ 12. On January 18, 2022, Altice viewed the Borough's fee proposal as unreasonably

high and discriminatory, as well as being prohibited by the Joint Use Agreement designating Verizon as the sole collector of attachment fees in the Borough. See Hoch Cert. at ¶ 12.

On February 10, 2022, after several weeks of further negotiation, the Borough ultimately rejected a counteroffer from Altice to pay for attachment rights at a rate comparable to those paid by Altice to other municipalities in the State. See Hoch Cert. at ¶ 13 & Exhibit E. Since the Borough's rejection continued to effectively bar Altice from accessing the Highways, Altice once again approached the Borough in late February seeking a reasonable resolution. See Hoch Cert. at ¶ 14. The Borough thereafter did not respond until May 25, 2022 (three months since Altice's last inquiry and over seven months from the Borough initially stopping Altice's cabling without cause). See Hoch Cert. at ¶ 14. At that time, because of the resulting delays in deployment, Altice again offered to settle the outstanding attachment dispute as well as additional items raised by the Borough in its May 25 letter. See Hoch Cert. at ¶ 14. Altice was responsive to all of the Borough's existing and additional requests, agreeing to the terms of the Borough's attachment agreement within a more reasonable fee structure, completing the \$10,000 payment for the parking lot Access Agreement, addressing free service requests, and agreeing to provide additional community support as consideration -- all of which the Borough led Altice to believe would result in a timely resolution of the matter. See Hoch Cert. at ¶ 15. The Borough indicated that the offer would be considered at three different Council meetings, but it was not so considered at any of the meetings. See Hoch Cert. at ¶ 16. Then on October 5, 2022, the Borough finally responded to Altice with a counter-offer for Altice to pay the Borough a flat \$95,000 per year for the use of all Borough poles (whether actually used or not) with a 2% annual escalator. See Hoch Cert. at ¶ 16 & Exhibit F at page 20 ("Exhibit B"). The Borough provided Altice no justification for this amount, which is

almost 7 times the amount of Altice's current pole fee obligation to Verizon and was an increase over the Borough's previous proposal from February 2022. See Hoch Cert. at ¶ 17.

Having made no further progress with the Borough, Altice filed a letter on October 11, 2022 with Lawanda Gilbert, Director of the Office of Cable Television and Telecommunications (the "Office") seeking the Office's intervention in assisting Altice to gain access to the Highways of the Borough pursuant to its rights under the Franchise and applicable law. See Hoch Cert. at ¶ 18. Director Gilbert held mediation sessions for the parties on January 10 and February 23, 2023, but despite Petitioner's engagement in good faith negotiations, the Borough still refused to permit Altice access to its Highways to deploy FTTH. See Hoch Cert. at ¶ 18.

Immediately after Altice filed its letter with Director Gilbert seeking assistance with the Borough, the Borough adopted a resolution on October 13, 2022 authorizing the termination of the Joint Use Agreement, which will end Verizon's exclusive authority to receive compensation for attachments to the Borough's poles one year from providing notice to Verizon, on October 13, 2023. See Hoch Cert. at ¶ 19 & Exhibit G. The Borough took this action 11 months after initially denying Altice the right to deploy FTTH in the Borough unless Altice agreed to pay the Borough pole attachment fees. See Hoch Cert. at ¶ 20. Altice, however, maintains that, at all times relevant hereto, it continues to have the right to deploy FTTH without additional fees pursuant to its rights under the Franchise, its attachment agreement with Verizon, and Verizon's exclusive authority to manage and receive compensation for the Borough's poles under the Joint Use Agreement through October 13, 2023. See Hoch Cert. at ¶ 20.

Altice maintains that a demand for a separate pole attachment agreement, in addition to the one still in effect with Verizon, is not a sufficient justification for barring Altice from access to the Highways of the Borough – particularly, when such position is to the detriment of Borough resident

access to advanced services, and to whom such services would otherwise be available but for the unlawful acts of the Borough. See Hoch Cert. at ¶ 21.

Petitioner wishes to commence cabling for FTTH in the Borough as soon as possible. Consistent with that goal, Petitioner respectfully instituted this action before the Board. While the dispute over the amount Petitioner should be required to pay the Borough for pole attachments after the Joint Use Agreement expires is not ripe for summary disposition at this time, the Board can nevertheless grant a motion for partial summary decision finding that there is no genuine dispute over the existence of Petitioner's franchise and the rights that franchise affords and has afforded to Petitioner and its predecessors to access and operate within the Highways of the Borough continuously for almost 50 years.

LEGAL ARGUMENT

I. LEGAL STANDARD FOR SUMMARY DECISION.

N.J.A.C. § 1:1-12.5 provides as follows:

The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

The Supreme Court of New Jersey, in In re Uniform Admin Procedure Rules, has held that the summary decision rule, N.J.A.C. 1:1-12.5, is "indeed essential to the proper conduct of administrative hearings in contested cases."² The New Jersey Appellate Division, in IMO Robros

² 90 N.J. 85, 106 (1982).

Recycling Corp., held that “[a] contested matter can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts, as developed on motion or otherwise, indicate that a particular decision is required as a matter of law.” 226 N.J. Super. 343, 350 (App. Div. 1988).

Here, as discussed more fully below, the undisputed material facts indicate that, as a matter of law, this Board should issue an Order finding that the only genuine dispute in this matter concerns the amount to be paid by Altice for pole attachments.

II. THERE IS NO DISPUTE OVER THE EXISTENCE OF ALTICE’S FRANCHISE AND THE RIGHTS THAT FRANCHISE AFFORDS, MEANING THE ONLY DISPUTE HERE CONCERNS THE FEE AMOUNT TO BE PAID FOR POLE ATTACHMENTS.

While the parties have yet to agree upon a reasonable pole attachment fee once the Joint Use Agreement expires, there can be no dispute, based on the facts presented, that Altice possesses a valid franchise which permits it access to the Highways of the Borough to commence long delayed deployment of its FTTH cable system by overlashing fiber-optic cable to its existing HFC cable system, and to perform regular maintenance and servicing as needed to both its HFC and FTTH cable systems within the Borough.

The Board has the authority to grant franchises or privileges to any public utility; a franchise is,

a privilege of a public nature conferred by government on an individual or corporation to do that “which does not belong to the citizens of the country generally by common right.” In the case of public utilities, it means permission to operate a business, peculiarly of a public nature and generally monopolistic.

Delmarva Power & Light Co. v. Director, Div. of Taxation, 23 N.J. Tax 188, 200-01 (N.J. Tax Court 2006) (quoting In re Petition of South Lakewood Water Co., 61 N.J. 230, 238 (1972)). In overseeing the franchises it chooses to grant, the Board is guided in large part by the principle that

consumers must be “provided with safe and adequate services at reasonable rates.” Delmarva, 23 N.J. Tax at 201. Under state law, the issuance of a certificate of approval for a system-wide cable franchise by the Commission to a CATV company like Altice is deemed to confer a franchise upon the CATV company (see N.J.S.A. 48:5A-15). Further, the Federal Communications Act states that any cable franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system See 47 U.S.C. Sec. 541 (a)(2).

According to N.J.A.C. 14:18-2.3,

(a) Where practicable, every cable television company **shall use existing** electric and/or telephone utility rights-of-way **and facilities**.

(b) In areas which **are presently being provided with overhead utility service** . . . each cable television company wishing to serve therein may **make arrangements with the utility or utilities owning the existing poles or structures for the joint use of these facilities**.

(emphasis added). Under N.J.S.A. 48:5A-3(h), “highway” is defined as “every street, road, alley, thoroughfare, way or place of any kind used by the public or open to the use of the public.”

Here, 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, which is valid through 2024 (See Hoch Cert., Exhibit A), 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. Pursuant to that right, Petitioner maintains an attachment agreement with Verizon which permits Petitioner to utilize the existing poles, presently maintained by Verizon, which have been erected on existing public rights-of-way. See Hoch Cert., ¶ 10-11. Through the Joint Use Agreement, Verizon has maintained exclusive authority to charge for pole attachments to Borough-owned poles for over 70 years and the Borough, by its filing, concedes that the Joint Use Agreement is in effect until October 13, 2023 (one year after the Borough recently gave notice to Verizon that it is terminating the agreement). See Hoch Cert., ¶ 19. As detailed above, Madison 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. This has thrown Petitioner's ability to comply with its obligations under the Franchise into jeopardy, as without access to the already-existing poles, Petitioner will be entirely unable to maintain its current facilities and services as they exist today, let alone work to improve same.

Access to the Highway and other public use areas under New Jersey statutory authority 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. 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.

WHEREFORE, Petitioner moves for partial summary decision to confirm that Petitioner is entitled to access to all Highways 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,

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