CSC TKR, LLC, Petitioner, v. BOROUGH OF MADISON, Respondent.	STATE OF NEW JERSEY BOARD OF PUBLIC UTILITIES DOCKET NO.: CC23030139

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION FOR RECONSIDERATION AND A STAY OF THE BOARD'S ORDER DATED JUNE 29, 2023

CLEARY GIACOBBE ALFIERI JACOBS LLC
Ronald F. Kavanagh, Esq.
Attorney ID No.: 025012008
169 Ramapo Valley Road
Upper Level 105
Oakland, NJ 07436
(973) 845-6700
Attorneys for Respondent, Borough of Madison

Of Counsel and on the Brief:
Ronald F. Kavanagh, Esq.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Administrative Decisions

PRELIMINARY STATEMENT

In the instant matter, it is respectfully submitted that the Board of Public Utilities ("Board") failed to consider the significance of several critical facts in its June 29, 2023 Order. Specifically, the Board concluded that it has subject matter jurisdiction over this dispute. Notwithstanding, as will be discussed below, the Board failed to consider that the Borough of Madison ("Borough" or "Respondent") is not a "public utility" under New Jersey law. Accordingly, the Board does not have the jurisdiction to adjudicate the pole attachment dispute at issue between the parties.

Further, the Board found that Petitioner CSC TKR, LLC ("Altice" or "Petitioner") is legally entitled to maintain its equipment in the Borough pursuant to the Borough's Joint Use Agreement with Verizon. The Board opined that the Borough gave the necessary consent based upon the language of the Borough's municipal consent ordinances and the parties' course of conduct. This finding ignores the fact that the municipal consent ordinances are no longer valid, as the municipal consent based franchise has been converted to a system-wide franchise. Moreover, the municipal consent ordinances only give Petitioner the right to access the right-of-way. They do not allow Petitioner to access the Borough's utility poles. That is the sole purpose of the Joint Use Agreement. Petitioner has failed to provide any evidence that the Borough gave its consent for Petitioner to place its equipment on the Borough's utility poles pursuant to the Joint Use Agreement.

For these reasons, the Board's order granting partial summary decision must be reconsidered and Altice's petition must be dismissed. Finally, the Borough requests a stay of the Board's order while the instant motion is being considered.

STANDARD OF REVIEW

N.J.A.C. 14:17-9.6 provides that a motion for rehearing, reargument or reconsideration may be filed by any party within 15 days after the issuance of any final decision or order by the Board. Such motion shall state the alleged errors of law or fact relied upon.

Board precedent for evaluating motions for reconsideration holds that generally, a party should not seek reconsideration merely based upon dissatisfaction with a decision. Rather, reconsideration is reserved for those cases where (1) the decision is based upon a palpably incorrect or irrational basis or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. The moving party must show that the action was arbitrary, capricious, or unreasonable. The Board will not modify an order in the absence of a showing that the Board's action constituted an injustice or that the Board failed to take notice of a significant element of fact or law. See New Jersey Board of Public Utilities Docket No. EO18101115, Order on Motion for Reconsideration, (June 5, 2020) citing D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div.1990); Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996).

LEGAL ARGUMENT

POINT I

THE BOARD ERRED IN FINDING THAT IT HAS JURISDICTION OVER THIS MATTER

A. The Borough is not a public utility under New Jersey Law

In granting Petitioner's Motion for Partial Summary Decision, the Board erroneously concluded that it has jurisdiction over this matter. Specifically, the Board disregarded the controlling statutes, regulations and relevant case law which clearly provide that the Borough of Madison Electric Utility is not subject to the regulation or jurisdiction of the Board. New Jersey law provides that the Board of Public Utilities shall have "general supervision and regulation of and jurisdiction and control over all public utilities." N.J.S.A. 48:2-13. A "public utility" is defined as:

> every individual, copartnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, their successors, heirs or assigns, that now or hereafter may own, operate, manage or control within this State any railroad, street railway, traction railway, autobus, charter bus operation, special bus operation, canal, express, subway, pipeline, gas, electricity distribution, water, oil, sewer, solid waste collection, solid waste disposal, telephone or telegraph system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof

Id. This statute has been held to vest jurisdiction of the Board over private corporations only and not over municipal corporations. Jersey City Incinerator Auth. v. Dep't of Pub. Utilities of N.J., 146 N.J. Super. 243, 251 (App. Div. 1976). The determination that municipal corporations are not

included within the general grant of jurisdiction to the Board of Public Utilities has been extant since 1935 and has not provoked the enactment of any legislation indicating a contrary intent. Id. at 252-53. See also Ridgewood v. Hopper, 13 N.J. Misc. 775, (Sup.Ct.1935); In re Glen Rock, 25 N.J. 241 (1957).

In fact, the Board has recognized the need for specific statutory inclusion of municipal corporations by its own regulations, which define 'public utility' as having the same meaning as defined in N.J.S.A. 48:2-13 and including utilities as defined in N.J.S.A. 48:10-3 and municipally-operated utilities, **insofar as the Board's jurisdiction is extended to them under the appropriate statutes.** See Jersey City, supra at 253 (emphasis added). When in the past the Legislature has intended to give the Board jurisdiction over a municipal function, it has indicated that intent by the enactment of a specific statute.[1] Id. If it were the intent of the Legislature that a municipality furnishing utility services should be subject to the general jurisdiction of the Board, additional statutory enactments would be unnecessary. Id. at 254. As such, general jurisdiction over municipal corporations cannot be inferred under N.J.S.A. 48:2-13. Id.

The Legislature has only given the Board statutory authority over municipalities serving others. Indeed, the law expressly provides, "Every

[1] See N.J.S.A. 40:14B-20(6), where the Board of Public Utilities is given authority to approve a request by a municipality to purchase water at retail from a municipal water authority created pursuant to N.J.S.A. 40:14B-1 et seq.; N.J.S.A. 40:62-1, requiring every municipality operating any form of public utility service to keep records and accounts in a manner directed by the Board. (*quoting* Jersey City, supra at 253).

municipality in supplying electricity, gas, steam or other product **beyond its corporate limits** is hereby declared to be a public utility. N.J.S.A. 40:62-24. See also New Jersey Power & Light Co. v. Borough of Butler, 4 N.J. Super. 270 (App. Div. 1949) (holding that Borough of Butler became a "public utility" when it entered Borough of Kinnelon for the purpose of distributing electric power therein). If the Legislature had intended for the Board's power to include municipalities that operate solely within their corporate limits, it would have provided for same.

In the instant matter, it is undisputed that the Borough owns and operates an electric utility wholly within its borders. Accordingly, it is not a public utility under the law.

B. The Board does not have subject matter jurisdiction over this dispute

Further, the Board erroneously found that it has subject matter jurisdiction over this matter as the State's cable franchising authority. The Board opined that it is statutorily empowered to adjudicate pole attachment disputes. A plain reading of the statutes and regulations cited by the Board illustrate that they are inapplicable to the instant matter. Specifically, N.J.S.A. 48:5A-20 provides, in pertinent part:

> Whenever the board shall find that public convenience and necessity require the use by a CATV company or a public utility of the wires, cables, conduits, poles or other equipment, or any part thereof, on, over or under any highway or any right-of-way and **belonging to another CATV company or public utility**...**and that such CATV companies or public utilities** have failed to agree upon such use or the terms and conditions or compensation for the same, the board may order that such use be permitted

> and prescribe a reasonable compensation and reasonable terms and conditions for the joint use.

(Emphasis added). Pursuant to the express language of the statute, the Board only has the authority to adjudicate a dispute between a CATV Company and a public utility. As discussed above, the Borough is not a public utility under the law. Thus, the Board's statutory authority under N.J.S.A. 48:5A-20 does not extend to Madison.

Similarly, N.J.S.A. 48:5A-21 provides that:

> The terms and conditions, including rates and charges to the CATV company, imposed **by any public utility** under any such lease, rental or other method of making available such facilities or rights-of-way, including pole space, to a CATV company **shall be subject to the jurisdiction of the board in the same manner and to the same extent that rates and charges of public utilities generally are subject to the board's jurisdiction** by virtue of the appropriate provisions

Accordingly, the statute provides that charges for pole space imposed by a public utility shall be subject to the jurisdiction of the Board in the same manner and to the same extent that the rates and charges of public utilities generally are subject to the Board's jurisdiction.

It is undisputed that the Borough is authorized to fix and collect rates for the supply of electricity and that those rates are not subject to Board regulation. See N.J.S.A. 40:62–12; N.J.S.A. 40:62–13; H.P. Higgs Co. v. Borough of Madison, 188 N.J. Super. 212, 222 (App. Div. 1983). By the very terms of the statute, the Board's authority to adjudicate pole attachment disputes is limited to the extent that rates are subject to the Board's jurisdiction. Here, the Board has no jurisdiction over the rates set by the

Borough. Accordingly, the Board does not have the statutory authority to adjudicate the pole attachment dispute at issue here.

POINT II

NEITHER THE SYSTEM-WIDE FRANCHISE NOR THE PRIOR CONSENT ORDINANCES GIVE ALTICE THE RIGHT TO ATTACH ITS EQUIPMENT TO THE BOROUGH'S UTILITY POLES

Even assuming arguendo that the Board has jurisdiction over this matter, the Board erred in finding that the prior municipal consent ordinances and the system-wide franchise give Altice the Authority to utilize the Borough's utility poles. The issue of pole attachment is governed solely by the Pole Attachment Agreement between the Borough and Verizon, not by any prior municipal consent ordinances, the most recent of which went into effect almost sixteen (16) years ago and has long since expired.

The Board ignored the fact that the Joint Use Agreement expressly requires that attachments of another party shall be made only with the approval of both parties to the Agreement. The Borough has never given Altice or any other third party approval to attach equipment to its utility poles. By ignoring the express language of the Pole Attachment Agreement and relying instead on expired ordinances, the Board is allowing Altice to access the Borough's poles unjustly and without fair compensation. The Board ruling fails to take into account that unlike the vast majority of municipalities in New Jersey, the Borough must absorb significant costs to operate, maintain and insure its utility pole infrastructure.

Pursuant to its rights under the system-wide franchise, Altice is free to access the right-of-way to construct its own infrastructure in that space. That is the only right that the system-wide franchise grants Altice. It does not give Altice access to the Borough's utility poles.

At bottom, this matter is simply a dispute regarding Altice's right to use the Borough's utility poles. As discussed above, the Board does not have the jurisdiction to adjudicate pole attachment disputes between the parties. Therefore, by allowing Altice to utilize the Borough's poles, the Board is exceeding its authority. For these reasons, the Borough's motion for reconsideration must be granted and the matter dismissed.

POINT III

THE BOARD SHOULD GRANT A STAY OF THE BOARD'S ORDER UNTIL A RULING HAS BEEN MADE ON THE BOROUGH'S MOTION FOR RECONSIDERATION

It is respectfully requested that the Board stay its June 29, 2023 order until a ruling has been made on the instant motion. The Board's regulations provide that a stay will be granted for good cause shown. N.J.A.C. 14:17-9.7. The Borough submits that there is good cause for a stay and that a stay is warranted under the factors for injunctive relief set forth by the Supreme Court in Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Under Crowe, a party seeking a stay must demonstrate 1) the presence of irreparable harm; 2) the legal right to relief settled; 3) the probability of success on the merits; and 4)

the relative hardship between the parties. Id. With those principles in mind, the Borough submits that a stay of the order should be granted.

First, the Borough will suffer irreparable harm if a stay is not granted. The basis of the Borough's motion for reconsideration is that the Board does not have the legal authority to permit Altice access the Borough's utility poles. Allowing Altice to access the poles prior to the motion for reconsideration being decided would render the issue moot and would deprive the Borough of its right to have the matter reconsidered pursuant to N.J.A.C. 14:17-9.6. Further, without a stay Altice will be permitted to utilize the Borough's poles without the Borough's consent and in clear violation of the Pole Attachment Agreement.

Next, the Borough certainly has the legal right to the relief (a stay of the order) as requested as well as a strong probability of success on the merits. As discussed in the instant motion, the relevant statutes, regulations and case law are clear. The Borough is not a public utility under the law. As such, the Board lacks the jurisdiction to adjudicate the pole attachment dispute between the parties. Accordingly, the order must be rescinded as the Board has exceeded its authority.

Finally, a balancing of the equites favors the Borough. Staying the Board's order until this motion for reconsideration is considered would delay enforcement of the Board's order by no more than a few weeks. Conversely, great harm would befall the Borough if this matter is not stayed. The Board's order allows Altice to access the Borough's poles in contravention of the

express language of the pole attachment agreement and without fair compensation. Further, the Board's order fails to take into account the significant additional expenses that the Borough incurs to maintain its utility pole infrastructure. Here, a stay will preserve the status quo and will not negatively impact Altice as much as the Borough will be negatively impacted if the requested injunctive relief is not granted.

An injunction may be issued on a less than exacting showing if necessary to prevent the subject matter of the litigation from being destroyed or substantially impaired. Waste Mgmt. of New Jersey, Inc. v. Union County Utilities Authority, 399 N.J. Super. 508, 520 (App. Div. 2008) (*quoting* General Electric Co., v. Gem Vacuum Stores, Inc., 36 N.J. Super. 234, 237 (App. Div. 1955)).

Thus, if the Board does not find all Crowe factors to be present, the Borough requests that the Board grant a stay to preserve the status quo. A stay would not have a negative impact on Altice. However, denying the Borough's request would substantially impair the Borough's rights, as failure to grant a stay would render the Borough's motion for reconsideration moot. For these reasons, it is respectfully requested that the Board's order be stayed until the Board has ruled on the instant motion for reconsideration.

CONCLUSION

Based upon the foregoing, Respondent respectfully requests that Respondent's motion for reconsideration be granted and the matter dismissed.

CLEARY GIACOBBE ALFIERI JACOBS LLC
Attorneys for Respondent, Borough of Madison

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

Dated: July 5, 2023