
CSC TKR, LLC,

Petitioner,

v.

BOROUGH OF MADISON,

Respondent.

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

DOCKET NO.: CC23030139

**RESPONDENT'S REPLY BRIEF IN FURTHER SUPPORT OF RESPONDENT'S
MOTION FOR RECONSIDERATION AND A STAY OF THE BOARD'S ORDER
DATED JUNE 29, 2023**

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PRELIMINARY STATEMENT

The Board of Public Utilities (“Board”) must reconsider and vacate its June 29, 2023 Order since it failed to appreciate that it does not have subject matter jurisdiction over this dispute. Specifically, the Board exceeded its authority since the Borough of Madison (“Borough” or “Respondent”) is not a “public utility” under New Jersey law.

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. However, the Board failed to acknowledge that Altice never had permission pursuant to the Joint Use Agreement to access the Borough’s utility poles. Further, the previous consent ordinances only gave Petitioner the right to access the Borough’s right-of-way. They do not allow Petitioner to access the Borough’s utility poles. As such, the Board’s June 29, 2023 Order requiring that the Borough allow Altice to use its utility infrastructure amounts to the imposition of a term or condition on the Borough by the Board related to a pole attachment agreement. Under the statutory authority granted to the Board, the Board may only make such an imposition in situations involving a public utility.

For these reasons, the Board’s order granting partial summary decision must be reconsidered and Altice’s petition must be dismissed.

LEGAL ARGUMENT

POINT I

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

Altice does not dispute that the Borough owns and operates the Madison Electric Utility that provides electricity exclusively to the residents of the Borough of Madison. Further, it is undisputed that, as a municipally-owned utility, the Borough is responsible for all costs related to installing, replacing, maintaining and insuring its 2,680 utility poles. While the Borough does not dispute that Altice holds a system-wide franchise which permits Altice to access the Borough's rights-of-way, that franchise does not, and cannot, grant Altice access to the Borough's utility poles. Under N.J.A.C 14:18-14.10, the parties are authorized to negotiate for a pole attachment agreement but there is no mandate that the Borough give Altice access to its utility infrastructure.

Altice's opposition to the Borough's Motion for Reconsideration does not dispute that statutes, regulations and relevant case law 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. 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 Legislature has only given the Board statutory authority over municipalities serving others. 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). It is undisputed that the Legislature has not extended the Board's power to include municipalities that operate solely within their corporate limits. As such, it is clear that the Board does not have the power to regulate the operations of the Madison Electric Utility.

The Board, in its decision granting partial summary decision in favor of Altice, stated that it had jurisdiction over this matter based upon N.J.S.A. 48:5A-20, N.J.S.A. 48:5A-21, and N.J.A.C. 14:18-2.9. While this authority grants the Board approval power with regard to the construction and maintenance of wires, cables and conduits by a CATV company and the lease of facilities and rights-of-way to a CATV company for such purposes, the authority of the Board to adjudicate issues related to the terms and conditions of such arrangements is specifically limited to situations where a public utility is involved.

With regard to N.J.S.A. 48:5A-20, Altice points to subsection (a) of this statute to support its position that the Board has jurisdiction over the Borough in this matter. Specifically, Altice argues that "N.J.S.A. 48:5A-20(a) confers upon the Board the power to grant prior approval for construction and maintenance of CATV systems in New Jersey." Notwithstanding, this statute does not give the Board authority to grant Altice access to the Borough's private utility poles or to adjudicate a pole attachment dispute between Altice and the Borough.

N.J.S.A. 48:5A-20(b) provides for an extension of the Board’s authority beyond the approval power stated in subsection (a). Specifically, under subsection (b), when the Board has provided the approval under subsection (a), and the requesting CATV company cannot agree with “another CATV company or public utility” regarding the terms and conditions of the use approved under subsection (a), the Board has authority to step in and order the use and set the terms and conditions of such use. The reference to “another CATV company or public utility” is notable as these are entities over which the Board has been granted statutory authority to regulate. There would be no need for such limitation in the language if the Board was afforded jurisdiction over all uses by a CATV company over and under any highway or right-of-way, such as those involving the Madison Electric Utility which clearly does not qualify as a “public utility.” This is consistent with the court’s reading of the statute in Princeton Cablevision, Inc. v. Union Valley Corp. where the court stated that:

in cases arising under *N.J.S.A. 48:5A-20*... the BPU has the authority to order joint use of poles, lines or other equipment by a franchised cable company **and another public utility**, to set terms and conditions and to fix reasonable compensation to be paid to the party whose property is ordered to be shared.

195 N.J. Super. 257, 270–71 (Ch. Div. 1983) (emphasis added). Clearly, this section of the statute is meant only to confer jurisdiction on the Board in matters involving a CATV company and another public utility.

The analysis under N.J.S.A. 48:5A-21 is essentially the same. The first sentence of this section, which is relied upon by Altice, grants the Board approval powers when any party agrees to “lease or rent or otherwise make

available facilities or rights-of-way, including pole space, to a CATV company...”. The second sentence then provides an extension of the Board’s authority related to the terms and conditions of such arrangements when there is a public utility involved, stating:

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

Once again, if the Board’s authority under this section was meant to extend to any person who entered into a lease or rental or other arrangement with a CATV company, there would be no need for the inclusion of the phrase “imposed by any public utility” and the phrase “any person” would have been used to remain consistent with the first sentence of the section.

With regard to N.J.A.C. 14:18-2.9, this code section does not confer any authority or jurisdiction to the Board with regard to pole attachment disputes. Instead, it only provides a method of calculation of the appropriate rental rate in such situations. Since, as described above, the Board only has jurisdiction to adjudicate disputes involving public utilities, this section must necessarily be interpreted to apply only to attachments on utility poles owned by public utilities.

In light of the foregoing, it is clear that the Board exceeded its authority by imposing a mandate on the Borough to give Altice access to its utility

infrastructure. Since the system-wide franchise held by Altice only permits Altice to access the Borough's rights-of-way, the Board's Order allowing Altice to use Borough utility structures constitutes the imposition of a term or condition of a pole use arrangement. As detailed above, the Board's authority to take such action under N.J.S.A. 48:5A-20 and N.J.S.A. 48:5A-21 is specifically limited to disputes involving public utilities, which the Madison Electric Utility clearly is not. The Board's action in this regard essentially amounts to an exercise of authority over a private entity utilizing private property. In addition, the Board's overextension will cause the Borough and the Borough's electric customers to absorb additional costs beyond the significant costs to operate, maintain and insure its own utility pole infrastructure. As a result, the Board has essentially taken steps to regulate a local utility over which it has no authority.

POINT II

THE BOARD ERRED IN FINDING THAT ALTICE POSSESSES A RIGHT TO ATTACH ITS EQUIPMENT TO THE BOROUGH'S UTILITY POLES

Altice contends that the Borough has completely ignored the fact that Altice has attached its equipment to the Borough's poles pursuant to the Joint Use Agreement with Verizon. Altice erroneously states that the Borough has never argued that the Joint Use Agreement does not permit Verizon to enter into a pole attachment agreement with Altice. Clearly, the Joint Use Agreement allows for pole attachments by third parties. However, the Borough has

repeatedly stated that it has never given Altice approval to attach equipment to its utility poles. The Board chose to ignore Article 7(b) of the Joint Use Agreement 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.” It is undisputed that Altice has failed to provide any evidence that the Borough consented to Altice’s use of the Borough’s poles pursuant to the Joint Use Agreement.

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. Moreover, a court may take a less rigid view with regard to an interlocutory injunction than it would after a final hearing when the injunction is merely designed to preserve the status quo. General Elec. Co. v. Gem Vacuum Stores, Inc., 36 N.J. Super. 234, 236–37 (App.Div.1955). In some cases, such as when the public interest is greatly affected, a court may withhold relief despite a substantial showing of irreparable injury to the applicant. Waste Mgmt. of New Jersey, Inc. v. Union Cnty. Utilities Auth., 399 N.J. Super. 508, 520 (App. Div. 2008) *citing* Yakus v. United States, 321 U.S. 414, 440 (1944).

In this instance, the Borough seeks only to preserve the status quo pending the resolution of the motion for reconsideration. Specifically, Altice should not be permitted to place its equipment on the Borough's utility infrastructure. The Borough would be irreparably harmed were a stay to be denied, as in that event Altice could proceed with placing its equipment on the Borough's poles while this motion was pending. Such action would render the Borough's motion and any further challenge the Borough may bring entirely moot. If a stay is entered, Altice's only harm is the requirement to wait to commence work until the motion is decided and this matter is entirely disposed. In addition, this matter impacts the public interest, including a potential added burden being placed on the Madison Electric Utility and its customers as a result of Altice placing equipment on its infrastructure while adjudication of the issue remains pending and uncertain.

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.

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Dated: July 24, 2023