Agenda Date: 6/22/18
Agenda Item: 4A

STATE OF NEW JERSEY

Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CABLE TELEVISION AND TELECOMMUNICATIONS

IN THE MATTER OF THE PETITION OF BUSINESS AUTOMATION TECHNOLOGIES D/B/A DATA NETWORK SOLUTIONS VS. VERIZON NEW JERSEY, INC.	)))))	ORDER DOCKET NO. TC17091015 OAL DKT. NO. PUC 0159-2018

Parties of Record:

Daniel J. O'Hern, Jr., Byrnes, O'Hern & Heugle, LLC, on behalf of Business Automation Technologies
Richard C. Fipphen Esq., for Verizon New Jersey, Inc.

BY THE BOARD:

This matter is before the New Jersey Board of Public Utilities ("Board") by way of motion dated May 21, 2018 by Respondent Verizon New Jersey, Inc. ("Verizon") seeking interlocutory review of the May 15, 2018 Order ("May 15 Order") of Administrative Law Judge Tricia M. Caliguire ("ALJ Caliguire") pursuant to N.J.A.C. 1:1-14.10 and 1:14-14.4. The May 15 Order directed Verizon to lift an embargo that it had instituted on all service applications of Petitioner, Business Automation Technologies d/b/a Data Network Solutions ("DNS" or "Petitioner") and ordered Verizon to do away with the manual ordering process it had instituted for DNS, to permit DNS to resume use of the Operations Support System ("OSS") access platform it had used previously.

BACKGROUND

On September 26, 2017, DNS filed a petition with the Board disputing bills rendered by Verizon for charges incurred pursuant to multiple billing disputes arising out of several agreements between the parties.[1] Through the filing, DNS sought an immediate order requiring Verizon to lift a service hold, or embargo, that prevented DNS from placing and modifying new and existing

[1] The parties' Interconnection Agreement was approved by the Board on February 11, 2004. I/M/O the Joint Application of Verizon New Jersey, Inc. and Data Net Systems, LLC for Approval of an Interconnection Agreement Under Section 252 of the Telecommunications Act of 1996, BPU Docket No. TO03100837 (February 11, 2004).

service orders and to cease all collection activity pending the outcome of the proceeding.[2] The Board issued an Order dated December 19, 2017 directing Verizon to lift the embargo that was imposed upon DNS, as it constituted a discontinuance of service during an ongoing bill dispute. The Board also ordered the transmittal of the matter to the Office of Administrative Law ("OAL") for hearing and initial disposition as a contested case. The matter was transmitted to OAL on January 26, 2018.

During the pendency of the matter at the OAL, on April 5, 2018, Petitioner sent a letter to the OAL indicating that Verizon had reinstituted the embargo in violation of the Board's December Order. DNS's letter was treated as a Motion for Enforcement of the Board's Order. ALJ Caliguire established a briefing schedule, and on April 16, 2018, Verizon opposed the motion by letter brief, and DNS submitted a reply brief on April 24, 2018. On May 15, 2018, ALJ Caliguire rendered a decision in favor of Petitioner, granting the request that Verizon lift the embargo on all new service orders and ordering Verizon to discontinue the manual ordering process for DNS orders and resume the use of the Operations Support System established under the parties' Interconnected Agreement.

MOTION FOR INTERLOCUTORY REVIEW

On May 21, 2018, Verizon filed a motion for interlocutory review of the May 15 Order pursuant to N.J.A.C. 1:1-14.10 and 1:14-14.4. In its motion, Verizon argued that the OAL Order: (i) erroneously interprets and applies the Board's December 19, 2017 Order relating to Verizon's embargo on new service orders placed by Petitioner under its several wholesale contracts with Verizon; (ii) exceeds the scope of the Board's transmittal of this case to the OAL, which, it claims, covers only disputes related to the ICA; (iii) unlawfully exceeds the Board's jurisdiction by asserting authority over services that are not regulated by the Board, including deregulated interstate services; and (iv) erroneously interprets the parties' ICA with respect to the methods available to order services under the ICA. Verizon contends that the May 15 Order unlawfully expands the Board's authority by requiring action by Verizon to lift an embargo on unregulated services in direct conflict with its rights under federal law and therefore must be set aside by the Board.

In sum, Verizon disputes the ALJ's reading of the ICA regarding the use of the electronic ordering system, claiming that the terms of the agreement do not support a finding that the OSS platform is an absolute right of DNS under the agreement. Further, Verizon argues the ALJ's Order unlawfully asserts jurisdiction over services not regulated by the Board.

On May 25, 2018, the Board received DNS's opposition to Verizon's Motion for Interlocutory Review. In its opposition, DNS discussed the legal standard for interlocutory review and asserted that Verizon failed to satisfy that standard. DNS also expressed its belief that the Order issued by ALJ Caliguire was specific in its purpose in that two issues were addressed: the manual processing of orders, newly implemented by Verizon following the filing of this dispute; and the processing of new orders under non-ICA related contracts. DNS claimed that the imposition of the embargo by Verizon has far-reaching effects on its ability to serve customers going forward and has little impact on the billing dispute. DNS also argued that the Board's Order was designed to ensure undisrupted service and to prevent retaliatory conduct by

[2] For a detailed procedural history of events that occurred in this matter prior to December 19, 2017, see the Board's Order of that date. I/M/O the Petition of Business Automation Technologies D/B/A Data Network Solutions vs Verizon New Jersey, Inc., BPU Docket No. TC17091015 (December 19, 2017).

Verizon. Moreover, DNS argued that Verizon has not established that irreparable harm results from the lifting of the embargo. DNS stated that the Board's supervisory and regulatory role set forth in N.J.S.A. 48:2-13 and 48:2-23 expressly grants the authority and jurisdiction over the current dispute in that the impact on the provisioning of safe, adequate, and proper service is at issue as a result of Verizon's unlawful curtailment of service to its customer, DNS. For all these reasons, DNS asserted that interlocutory review should be denied and that ALJ Caliguire's Order should stand.

DISCUSSION AND FINDINGS

An order or ruling of an ALJ may be reviewed on an interlocutory basis by an agency head at the request of a party. N.J.A.C. 1:1-14.10(a). Also, any request for interlocutory review shall be made to the agency head no later than five working days from the receipt of the order. N.J.A.C. 1:1-14.10(b). Pursuant to N.J.A.C. 1:14-14.4(a), a rule of special applicability that supplements N.J.A.C. 1:1-14.10, the Board shall determine whether to accept the request and conduct an interlocutory review by the later of (i) ten days after receiving the request for interlocutory review or (ii) the Board's next regularly scheduled open meeting after expiration of the 10-day period from receipt of the request for interlocutory review.

In addition, under N.J.A.C. 1:14-14.4(b), if the Board determines to conduct an interlocutory review, it shall issue a decision, order, or other disposition of the review within twenty (20) days of that determination. And, under N.J.A.C. 1:14-14.4(c), if the Board does not issue an order within the timeframe set out in N.J.A.C. 1:14-14.4(b), the judge's ruling shall be considered conditionally affirmed. However, the time period for disposition may be extended for good cause for an additional twenty (20) days if both the Board and the OAL Director concur. Finally, it should be noted that N.J.A.C. 1:1-14.10(i) in relevant part provides that:

> any order or ruling reviewable interlocutorily is subject to review by the agency head after the judge renders the initial decision in the contested case, even if an application for interlocutory review:
>
> 1. Was not made;
>
> 2. Was made but the agency head declined to review the order or ruling; or
>
> 3. Was made and not considered by the agency head within the established time frame.

The legal standard for accepting a matter for interlocutory review is stated in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982). In that case, the New Jersey Supreme Court concluded that an agency has the right to review ALJ orders on an interlocutory basis "to determine whether they are reasonably likely to interfere with the decisional process or have a substantial effect upon the ultimate outcome of the proceeding." Id. at 97-98. The Court held that the agency head has broad discretion to determine which ALJ orders are subject to review on an interlocutory basis. However, it noted that the power of the agency head to review ALJ orders on an interlocutory basis is not itself totally unlimited, and that interlocutory review of ALJ orders should be exercised sparingly. Id. at 100. In this regard, the Court noted:

> In general, interlocutory review by courts is rarely granted because of the strong policy against piecemeal adjudications. See Hudson v. Hudson, 36 N.J. 549 (1962); Pennsylvania Railroad, 20 N.J. 398. Considerations of efficiency and economy also have pertinency in the field of administrative law. See Hackensack v. Winner, 82 N.J. at 31-33; Hinfey v. Matawan Reg. Bd. of Ed., 77 N.J. 514 (1978). See infra at 102, n.6. Our State has long favored uninterrupted proceedings at the trial level, with a single and complete review, so as to avoid the possible inconvenience, expense and delay of a fragmented adjudication. Thus, "leave is granted only in the exceptional case where, on a balance of interests, justice suggests the need for review of the interlocutory order in advance of final judgment." Sullivan, "Interlocutory Appeals," 92 N.J.L.J. 162 (1969). These same principles should apply to an administrative tribunal.
>
> [90 N.J. at 100].

The Court held that interlocutory review may be granted "only in the interest of justice or for good cause shown." Id. Also, the Court stated:

> In the administrative arena, good cause will exist whenever, in the sound discretion of the agency head, there is a likelihood that such an interlocutory order will have an impact upon the status of the parties, the number and nature of claims or defenses, the identity and scope of issues, the presentation of evidence, the decisional process, or the outcome of the case.
>
> [Ibid.].

As set forth above, the decision to grant interlocutory review is committed to the sound discretion of the Board, and is to be exercised sparingly to avoid piecemeal adjudication. Having reviewed Verizon's application and DNS's opposition, the Board is not persuaded that it is appropriate to grant interlocutory review. The Board deems it unnecessary to review the merits of the matter at this stage, and instead will review the proceeding in its entirety, following the filing of briefs, the issuance of ALJ Caliguire's initial decision, and any exceptions filed thereto. The Board believes that the decision made by ALJ Caliguire who, consistent with N.J.A.C. 1:1-14.6, has the power to develop the record and render an initial decision dispositive of the issues before the OAL, should remain undisturbed at this juncture. The parties will be afforded the opportunity to address the issue prior to the Board's issuance of a final decision. Likewise, the Board is free to revisit this matter, and, if necessary, require the parties to further brief the issues and "reject or modify conclusions of law, interpretations of agency policy, or findings of fact" in ALJ Caliguire's initial decision, pursuant to N.J.A.C. 1:1-18.6.

There is no dispute over the fact that the billing by Verizon involves the ICA, Wholesale Assurance agreement and forbearance services contracts between the parties. As ALJ Caliguire correctly stated in the Order, the basic facts of this matter are not in dispute. The mixture of billing disputes and services have yet to be appropriately factually sorted and resolved. The alleged inaccurate and potential resultant cross over billing issues raised by Petitioner are the basis of the currently pending matter before ALJ Caliguire. During the ongoing dispute, an embargo was placed by Verizon on all new orders. Until such time as the

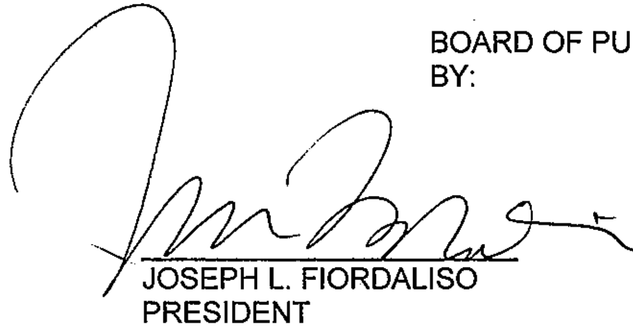
billing issues have concluded, and the matter fully vetted, the Board declines to render a determination regarding the embargo.

Accordingly, the Board **HEREBY DENIES** Verizon's motion for interlocutory review of ALJ Caliguire's May 15 Order.

This Order shall become effective on July 2, 2018.

DATED: 6\22\18

BOARD OF PUBLIC UTILITIES
BY:



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PRESIDENT

MARY-ANNA HOLDEN
COMMISSIONER

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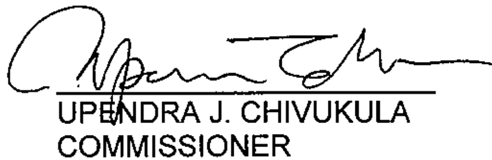
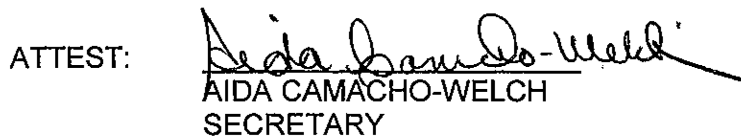


UPENDRA J. CHIVUKULA
COMMISSIONER

ROBERT M. GORDON
COMMISSIONER

ATTEST:



AIDA CAMACHO-WELCH
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities.

IN THE MATTER OF THE BUSINESS AUTOMATION TECHNOLOGIES D/B/A DATA NETWORK SOLUTIONS VS. VERIZON NEW JERSEY, INC.

BPU DOCKET NO. TC17091015
OAL DKT. NO. PUC 0159-2018

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ORDER ON MOTION

TO ENFORCE BOARD ORDER

OAL DKT. NO. PUC 01597-18

AGENCY DKT. NO. TC17091015

BUSINESS AUTOMATION TECHNOLOGIES
d/b/a DATA NETWORK SOLUTIONS,

Petitioner,

v.

VERIZON NEW JERSEY, INC.,

Respondent.

Daniel J. O'Hern, Jr., Esq., for petitioner (Byrnes, O'Hern & Heugle, attorneys)

Richard C. Fipphen, Assistant General Counsel, for respondent (Craig Silliman, Executive Vice-President-Public Policy and General Counsel)

Veronica Beke, Deputy Attorney General, for Staff of the Board of Public Utilities (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF CASE AND PROCEDURAL HISTORY

On September 26, 2017, petitioner Business Automation Technologies d/b/a Data Network Solutions (DNS) filed a petition with the Board of Public Utilities (the Board) to contest billings assessed by respondent Verizon New Jersey, Inc. (Verizon) for access

charges under a Board-approved interconnection agreement (ICA). In its petition, DNS requested an immediate order from the Board directing Verizon to lift the service hold preventing DNS from obtaining and processing new and existing service orders based on the disputed charges (the embargo), and to cease all collection activity pending the outcome of the contested case. By order dated December 29, 2017, the Board determined that the embargo was "a discontinuance of service [and ordered] Verizon to remove the embargo on the account." I/M/O/ The Petition Of Business Automation Technologies D/B/A/ Data Network Solutions VS Verizon New Jersey, Docket No. TC17091015, Order (December 19, 2017) (the Order). The Board also directed the transmission to the Office of Administrative Law (OAL), for hearing as a contested case, all issues in dispute related to the ICA. Order at 4. The matter was transmitted to the OAL on January 26, 2018, where it was filed as a contested case on January 29, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On April 5, 2018, petitioner sent a letter to the undersigned stating that despite an initial respite, Verizon has allegedly reinstituted the embargo in violation of the Order. Pet'r.'s Motion for Enforcement of the Order (April 5, 2018). DNS asked the undersigned to address Verizon's alleged failure to comply with the Order during the telephone prehearing conference scheduled for April 9, 2018. During that conference, I notified the parties that I would treat DNS's letter of April 5, 2018, as a motion to enforce the Order, and provided a schedule for the submission of briefs. Verizon submitted a response by letter brief on April 16, 2018, DNS submitted a reply brief on April 24, 2018, and the motion is now ripe for determination.

FACTUAL DISCUSSION AND FINDINGS

The basic facts of this matter are not in dispute. Accordingly, I **FIND** the following as **FACTS:**

DNS is a competitive local exchange carrier based in New Jersey. Under two separate orders, the Board approved the ICA and a negotiated resale agreement between DNS and Verizon, by which DNS was authorized to provide basic local exchange services to customers in New Jersey using wholesale services purchased from Verizon. Order at 1-2.

By July 24, 2017, the parties had for some time been involved in a disagreement over billing charges and service under the ICA and under other, non-ICA contracts.[1] On July 24, 2017, Verizon instituted the embargo by which DNS was prevented from submitting orders to add, move or change services under the ICA and under other, non-ICA contracts. The Board determined that this action by Verizon was a discontinuance of service because of nonpayment of disputed charges and, therefore, was in violation of Board rules. In the Order, the Board directed Verizon to "lift the service hold embargo on [DNS's] account and provide service consistent with the terms of the ICA." Order at 4.

In response to the Order, Verizon created a new process for DNS to use when placing orders for service under the ICA. Verizon notified DNS of this new, manual, process by email of December 28, 2017, from Trey Hoffpauir to Isaac Fajerman. Letter Br. of Resp't. in Response to Motion for Enforcement of the Order (April 16, 2018), Ex. 1. On December 29, 2017, Verizon sent a letter to the Board confirming its compliance with the Order and stating that it had "lifted its embargo of new service orders for services provided under the [DNS-Verizon ICA]." Pet'r.'s Motion, Ex. B. In this short letter, Verizon did not state that it had instituted a new method for DNS to place orders, that it had delegated processing of DNS orders to two staff, both of whom are based in Verizon's Tulsa, Oklahoma office and had not worked previously with DNS, and/or that DNS would no longer be able to use the ordering system established under the ICA.

POSITIONS OF THE PARTIES

DNS claims that for a brief period after Verizon set up the manual ordering process, DNS was able to submit orders but that Verizon has since reinstituted the embargo. DNS provided four specific examples of orders it attempted to place—for services, customer information and repairs—all of which were rejected under the embargo. DNS claims that this action by Verizon is in violation of the Order, is harming DNS's ability to serve its customers, and is a threat to public safety.

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[1] The parties do not agree over the amount of disputed charges; DNS claims there are no unpaid charges on the ICA account. Order at 2.

In response, Verizon explained that the new manual process was only intended for DNS to use to place orders for services under the ICA, and stated that it will not take orders for other services under other, non-ICA, contracts. Verizon contends that most of the services it sells DNS are outside the Board's jurisdiction and, therefore, those transactions are not affected by the Order. Verizon claims it is not obligated to lift the embargo for services which are beyond the scope of the Board's authority. To date, Verizon states that DNS has not submitted orders for new services under the ICA but the few orders which DNS submitted for modifications to existing ICA-related services were processed and filled.

With respect to the examples of denied service requests cited by DNS, Verizon stated that one was for a non-ICA service, the second was mischaracterized and unnecessary, the third was rejected because DNS "may not have been authorized by" the customer to obtain the requested information, and the last was actually filled. If DNS follows the new procedure mandated by Verizon, requests for service under the ICA will be honored.

In its reply, DNS objected to Verizon's attempt to re-litigate the issue of the Board's jurisdiction, noting that the Board found it has jurisdiction over ICA-related issues and the enforcement of Board rules ensuring provision by utilities of safe, adequate and proper service to customers. DNS described the problems it has had using the new ordering process mandated by Verizon and claimed that by requiring its use, Verizon has violated both the Order and federal rules requiring incumbent carriers to provide their customers nondiscriminatory access to operations support systems access platforms. DNS concluded with a request for sanctions against Verizon for the alleged violation of the Order, with an award of costs and reasonable expenses, including attorneys' fees, pursuant to N.J.A.C. 1:1-14(a)(4).

LEGAL ANALYSIS

DNS brings this motion for enforcement of the Order under N.J.A.C. 1:1-14.6(h), which provides that the ALJ "may render any ruling or order necessary to decide any matter presented to [her] which is within the jurisdiction of the transmitting agency[.]" Enforcement of an order issued by the Board is certainly within the jurisdiction of the Board. With respect to this specific matter, Verizon unsuccessfully moved for dismissal of DNS's initial petition to

the Board for lack of subject matter jurisdiction on the grounds that the "vast majority of disputed charges involve interstate or forbearance services outside the Board's jurisdiction." Order at 2. The Board stated that it has jurisdiction over "issues related to the Board-approved ICA, the ICA terms of agreement, and the Board rules governing the intrastate provision of safe, adequate and proper service to customers." Order at 3.

The issue for resolution here is whether Verizon has violated the Order by refusing to do business with DNS, its existing customer, on the terms that had characterized their relationship prior to July 2017, when Verizon first instituted the embargo.[2] It will not be necessary to address the specific applications of the embargo described by DNS and defended by Verizon; the ruling on DNS's motion requires the answer to two questions: was the implementation by Verizon of a new manual process for DNS to use in placing orders of all types a violation of the Order, and is the ongoing refusal of Verizon to sell DNS new services under the non-ICA related contracts a violation of the Order?

The first question is relatively simple to answer. Section 30 of the ICA provides:

> [DNS] shall use Verizon's electronic Operations Support System access platforms to submit Orders and requests for maintenance and repair of Services, and to engage in other pre-ordering, ordering, provisioning, maintenance and repair transactions. If Verizon has not yet deployed an electronic capability for [DNS] to perform a pre-ordering, ordering, provisioning, maintenance and repair transaction offered by Verizon, [DNS] shall use such other processes as Verizon has made available for performing such transaction (including but not limited to submission of Orders by telephonic facsimile transmission and placing trouble reports by voice telephone transmission).
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> [Letter Reply Br. of Pet'r. (April 24, 2018), Ex. A.][3]

[2] Verizon continues to argue for a limited view of the Board's jurisdiction, stating that "it is under no obligation to lift the embargo for services beyond the scope of the Board's authority, which the Board's Order recognizes." (Br. of Resp't. at 3.)

[3] Neither party provided the complete ICA, and DNS provided only the portions which support its position. However, both parties know that the Order was premised on the complete ICA, which the Board initially approved and has had many opportunities to revisit. Further, Verizon had the chance to similarly highlight any provisions of the ICA which it believes support its position.

In the Order, the Board directed Verizon to "lift the service hold embargo on [DNS's] account and provide service consistent with the terms of the ICA," and to "provide service to DNS under the ICA." Order at 4. The Board did not add the limitation "but only for services covered by the ICA."[4]

The new (albeit, "special") system developed by Verizon to comply with the Order is a direct violation of the Board's specific direction to "provide service consistent with the terms of the ICA." It is telling that in the letter to the Board of December 29, 2017, Verizon provided no details to the Board on the manner in which it complied with the Order and gave the Board no explanation as to why it was necessary to go outside the processes established under the ICA. In its response here, Verizon admits that the new process is only for ICA-related orders and that it will not take non-ICA contract orders, which undercuts its argument that the new process was needed. I **CONCLUDE** that the manual ordering process established by Verizon for all communications with DNS regarding service is in direct violation of the Order.

With respect to the second question, whether the Board intended for Verizon to lift the embargo on all orders that DNS may submit or merely on those orders covered by the ICA, the Order supports the former conclusion. The Board stated that Verizon's "refusal to accept new service applications from its existing customer, DNS, is effectively a denial of service to that existing customer . . . and a denial of service in violation of N.J.A.C. 14:3-3A.2(e)(5)."[5] Order at 4. Later, the Board states that the embargo is a "disconnection [and] discontinuance of service" to a customer and inconsistent with the Board rules found at N.J.A.C. 14:3-7.6 et seq.[6] Id.

The Board recognized that the embargo covered both ICA-related and non-ICA related orders: "[T]he embargo imposed covers all contracts between the parties, including

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[4] Verizon characterizes this same page of the Order as containing an "explicit statement that [the Order] is limited to ICA services." Br. of Resp't. at 3.

[5] N.J.A.C. 14:3-3A.2(e)(5) provides that "[a] utility shall not discontinue a customer's service for non-payment in cases where a charge is in dispute, provided the undisputed charges are paid and the customer has requested that the Board investigate the disputed charge[.]"

[6] This section of the regulations covers billing disputes; a utility cannot stop serving a customer as a result of a billing dispute as long as non-disputed charges are paid, as they have been here.

contracts outside of the ICA." Order at 3. Further, the Board noted that due to the embargo, DNS was "unable to submit any new orders or secure the provisioning of existing orders under the ICA." Id. But, what the Board did not state was that the embargo would be lifted only as to ICA-related services.

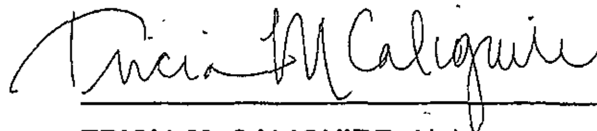
In the Order, the Board distinguishes between ICA-related issues and non-ICA related issues at least eight times, including in the transmission of the billing dispute to OAL. If the Board meant for Verizon to lift the embargo with respect to only those services covered by the ICA, it would have made that clear.[7] I **CONCLUDE** that the ongoing embargo by Verizon on all service orders placed by DNS is in direct violation of the Order.

ORDER

Based on the foregoing, the motion of petitioner DNS to enforce the December 29, 2017 Order of the Board of Public Utilities is **GRANTED.** Verizon is directed to immediately lift the embargo on all service applications of DNS, to dispense with the manual ordering process, and to permit DNS to resume use of the Operations Support System access platforms established under the ICA.

With respect to DNS's request for sanctions, I will reserve judgment until the end of the contested case, given that DNS made this request after Verizon had filed its response to the motion, and Verizon has not yet been heard on the issue.

This order may be reviewed by the **BOARD OF PUBLIC UTILITIES**, either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.



May 15, 2018
DATE
TMC/nd

TRICIA M. CALIGUIRE, ALJ

[7] Note the Board uses the term "service hold embargo." Order at 4.