Agenda Date: 6/18/12
Agenda Item: 4A-1

STATE OF NEW JERSEY

Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, NJ 08625-0350
www.nj.gov/bpu/

TELECOMMUNICATIONS

IN THE MATTER OF THE PETITION OF FIBER TECHNOLOGIES NETWORKS, LLC, FOR AN ORDER FINDING UNREASONABLE THE MAKE-READY COSTS IMPOSED BY VERIZON NEW JERSEY INC. ON FIBER TECHNOLOGIES, LLC, REQUIRING REFUNDS, AND ESTABLISHING REASONABLE MAKE-READY RATES, TERMS, AND CONDITIONS	)	ORDER GRANTING VERIZON NEW JERSEY INC.'S MOTION FOR INTERLOCUTORY REVIEW BPU DOCKET NO.TO09121004 OAL DOCKET NO. PUC 00784-2012

Parties of Record:

Dennis C. Liken, Esq., for Petitioner
William J. Balcerski, Esq., for Verizon of New Jersey Inc.
Stefanie A. Brand, Esq., Director, for Division of Rate Counsel

BY THE BOARD:

This matter is before the New Jersey Board of Public Utilities ("Board") on the June 5, 2012 motion of respondent Verizon New Jersey Inc. ("Verizon"), pursuant to N.J.A.C. 1:1-14.10, for interlocutory review of the May 23, 2012 Order of the Honorable Leland S. McGee, Administrative Law Judge ("ALJ McGee" or "Judge McGee"), denying Verizon's motion to dismiss for lack of subject-matter jurisdiction.

BACKGROUND

On December 17, 2009, Petitioner Fiber Technologies Networks, LLC ("Fibertech"), a subsidiary of Fibertech Networks, LLC, filed a Verified Petition ("Petition") with the New Jersey Board of Public Utilities ("Board") requesting that the Board issue an Order finding the make-ready costs imposed by Verizon on Fibertech unreasonable, finding the appropriate levels of refunds, ordering such refunds, and establishing reasonable rates, terms, and conditions related to make-ready costs. Petition at 1 and 16. Fibertech states that its business address is 300 Meridian Centre, Rochester, New York and that it received its authorization from the Board on September 14, 2005 in Docket No. TE05080683 to provide telecommunications services in New Jersey. Id. at 2. Fibertech avers that in order to deploy its competitive fiber-optic broadband networks in New Jersey, it is required to enter into Verizon's standard form pole

attachment agreement, i.e., Joint Use License Agreement, governing the rates, terms, and conditions of attachment. Id. at 6. A review of the Joint Use License Agreement, which is attached to the Petition as Exhibit 1, indicates that it was executed by Fibertech and Verizon on August 30, 2007 in the State of New York.[1] According to Fibertech, the Board has jurisdiction over this matter pursuant to 47 U.S.C. § 224, N.J.S.A. 48:2-1 et seq., and N.J.A.C. 14:3-2.3 et seq. Petition at 2-3.

Verizon filed a Response to Verified Petition on January 29, 2010, asserting, among other things, that its make-ready costs are fair and reasonable; denying that Petitioner is entitled to any of the relief requested; and, asking that the Petition be dismissed for various legal and factual reasons. Id. Because Fibertech and Verizon failed to reach any settlement agreement, the Board on January 12, 2012 transmitted the matter as contested case to the Office of Administrative Law ("OAL"), where it was assigned to ALJ McGee, who conducted a telephone pre-hearing conference on February 23, 2012 and subsequently issued a Prehear ng Order on March 12, 2012. ALJ McGee set forth the issues to be resolved as follows: "Whether petitioner can establish that the make-ready costs imposed by Verizon are not just and reasonable and warrants a finding of a refund, and the establishment of reasonable rates, terms, and conditions related to the make-ready costs." Id. at 2. Judge McGee also scheduled the case for evidentiary hearings on July 24, 25, and 26, 2012. Id. at 3.

On April 9, 2012, however, Verizon submitted letters both to the Board and the OAL, asserting that the Board's jurisdiction had reverted by operation of law to the Federal Communications Commission ("FCC"), pursuant to 47 U.S.C. § 224, because more than 180 days had lapsed since Fibertech first filed its petition with the Board. Verizon on April 25, 2012 filed a formal motion to dismiss for lack of subject-matter jurisdiction, and on April 27, 2012, Fibertech filed a brief in opposition of Verizon's motion. Both parties filed additional papers in support of their position, and neither the Division of Rate Counsel nor Board Staff filed any papers regarding Verizon's motion.

On May 23, 2012, Judge McGee agreed with Fibertech's position and denied Verizon's motion and directed the parties to participate in a telephone conference for the express purpose of establishing a new procedural schedule. See ALJ McGee's May 23, 2012 Order at 3 and 14. Judge McGee reasoned that since the dispute between Fibertech and Verizon was not originally filed with the FCC, jurisdiction cannot be reverted to the FCC. Moreover, only Fibertech would be aggrieved by the Board's failure to act within the 180-day or 360-day period and thus would have the right to invoke the FCC's jurisdiction. Id. at 9-10.

Also, Judge McGee found that any "rates" charged pursuant to a pole-attachment agreement cannot be established retroactively, "[a]lthough retroactive ratemaking is permissible if specific statutory authorization exists, [but in this case], no such authorization exists." Id. at 13. Thus, under N.J.S.A. 48:2-21, "the BPU can only fix rates under a pole-attachment agreement prospectively." Id. at 13-14. However, Judge McGee found that the Board "maintains greater flexibility" as to surcharges and therefore the Board "can require a utility to repay any excess surcharge collected," and that "the scope of N.J.A.C. 14:18-2.9 suggests that the present

[1] According to Section 1.11 of the Joint Use License Agreement, "make-ready or make-ready work" is defined as follows: "All work, including but not limited to rearrangement and/or transfer of existing facilities, replacement of a Pole, and other changes, required to accommodate Licensee's Facilities on a Pole, or in a Conduit or Right of Way."

dispute involving make-ready fees does not encompass pole-attachment rental rates because such rental rates are an ongoing payment." Id. at 14.

Accordingly, Judge McGee concluded that this matter should be decided in two stages: the first stage is to establish prospective rates for make-ready fees, and the second stage is to determine the reasonableness of the prior make-ready fees and fixing a remedy if warranted. Id. at 14. On June 5, 2012, Fibertech filed a motion for reconsideration and clarification of Judge McGee's Order, arguing that the relief sought in Fibertech's Petition does not constitute retroactive ratemaking and that the proceeding need not be bifurcated.

MOTION FOR INTERLOCUTORY REVIEW

On June 5, 2012, pursuant to N.J.A.C. 1:1-14.10, Verizon filed a motion for interlocutory review of the denial of its motion to dismiss for lack of subject-matter jurisdiction, arguing that (i) the federal authority divesting state jurisdiction is unambiguous and dispositive; (ii) Judge McGee's Order fails to identify a valid basis for continued Board jurisdiction; and (iii) dismissal of Fibertech's Petition will not implicate any policy or fairness concerns. Attached as Exhibit B to Verizon's motion is a January 21, 1985 letter from Bernard R. Morris, Director, Office of Cable Television, to Margaret Wood, Esq., FCC, wherein Mr. Morris certifies, pursuant to 47 U.S.C. § 224, that the Board regulates cable television pole attachment rates, terms, and conditions. Mr. Morris also indicates that petitions concerning pole, trench, or conduit rates will be decided within 180 days of filing. On June 7, 2012, Fibertech filed a letter with the Board arguing that it does not believe that interlocutory review is warranted, but, if the Board grants Verizon's motion, it will be prepared to submit comprehensive arguments with additional comments to support Judge McGee's decision.

DISCUSSION AND FINDINGS

An order or ruling of an ALJ may be reviewed interlocutorily 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 the 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 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 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: [i] was not made; [ii] was made but the agency head declined to review the order or ruling; or [iii] 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 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.].

In addition, the New Jersey Supreme Court has declared that "[a]dministrative agency power derives solely from a grant of authority by the Legislature." See, e.g., General Assembly of New Jersey v. Byrne, 90 N.J. 376, 393 (1982). Thus, an administrative agency, such as the Board, possesses only "the powers expressly granted which in turn are attended by those incidental powers which are reasonably necessary or appropriate to effectuate the specific delegation." New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978) (citations omitted). Moreover, "[w]here there exists reasonable doubt as to whether such power is vested in the administrative body, the power is denied." In re Closing of Jamesburg High School, 83 N.J. 540, 549 (1980).

As stated 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. Given the significance of the issue of subject-matter jurisdiction, this case should not be continued in this forum if indeed the Board no longer has jurisdiction. Indeed, it would be contrary to the interest and administration of justice, as well as illogical and administratively uneconomic, to conduct a contested-case hearing if jurisdiction of Fibertech's Petition has reverted to the FCC. On the

other hand, if the Board still retains jurisdiction to adjudicate Fibertech's claims, then the OAL proceeding should be continued, as directed by Judge McGee. Thus, interlocutory review is warranted here.

Accordingly, the Board **HEREBY GRANTS** Verizon's motion for interlocutory review of ALJ McGee's May 23, 2012 Order.

DATED: 6/18/12

BOARD OF PUBLIC UTILITIES
BY:

ROBERT M. HANNA
PRESIDENT

JEANNE M. FOX
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

NICHOLAS ASSELTA
COMMISSIONER

MARY-ANNA HOLDEN
COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

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

I/M/O the Petition of Fiber Technologies Networks, LLC for the An Order Finding Unreasonable the Make-Ready Costs Imposed by Verizon New Jersey Inc. On Fiber Technologies, LLC. Requiring Refunds, and Establishing Reasonable Make-Ready Rates, Terms and Conditions
OAL Docket No. PUC 00784-2012N
BPU Docket No. TO09121004

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