



Agenda Date: 8/19/15
Agenda Item: 7C

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CUSTOMER ASSISTANCE

EDISON-METUCHEN ORTHOPAEDIC GROUP,)	ORDER ADOPTING AMENDED
Petitioner,)	ORDER, ACCEPTING
)	WITHDRAWAL OF PETITION, AND
v.)	DISMISSING COUNTERCLAIM
)	
COOPERATIVE COMMUNICATIONS, INC.,)	BPU DOCKET NO. TC13100941U
Respondent)	OAL DOCKET NO. PUC 05818-14

Parties of Record:

Daniel M. Stanzione, Esq., Law Offices of Lombardi and Lombardi, on behalf of Edison-Metuchen Orthopaedic Group
Dennis C. Linken, Esq., Scarinci & Hollenbeck, LLC, on behalf of Cooperative Communications, Inc.

BACKGROUND

On October 4, 2013, Edison-Metuchen Orthopaedic Group (“Petitioner” or “EMOG”) filed a petition with the Board of Public Utilities (“Board”) requesting a formal hearing related to a billing dispute with Cooperative Communications, Inc. (“Respondent” or “Cooperative”) for communication services rendered by Respondent. In sum, the dispute between Petitioner and Respondent arose from an April 8, 2013 contract for telecommunications services as set forth in a document entitled “Cooperative Communications, Inc. Service Agreement Terms and Conditions,” which was not subject to any review by the Board.

According to Petitioner, Cooperative was served with its complaint to the Federal Communications Commission (“FCC”) on September 11, 2013 for refusing to release customer service record (“CSR”) so that EMOG could switch back to its previous communication vendor, Paetec/Windstream. Petition at 1. Also, Cooperative failed to follow its own policy of resolving a disputed amount before formally addressing billing questions and gave verbal notice to disconnect service in less than four business days; if Cooperative had released CSR in compliance with FCC regulations, the disputed amounts would have stopped in August and, therefore, EMOG requested Cooperative to release EMOG of its financial obligations, if any, after August 6, 2013, ten days after Cooperative had acknowledged receipt of CSR. Id. at 1-2.

According to EMOG, it had requested to port back to Paetec due to poor quality of phone and fax services delivered by Cooperative. EMOG claimed financial damages and lost productivity, requested that the Board (i) order Cooperative to keep EMOG's phone and fax services running until Windstream had successfully ported the service; (ii) relieve EMOG from early termination fees; and (iii) impose penalties and punitive damages upon Cooperative. Id. at 2-3.

On or about December 3, 2013, Cooperative filed an Answer, denying each of EMOG's claims. (Answer at 1-3.) As part of its affirmative defenses, Cooperative asserted that it and EMOG had entered into a written agreement dated April 9, 2013, with respect to the provision of telecommunications services to EMOG, a copy of which was annexed to the Answer as Exhibit A, under which service was installed on May 9, 2013. (Answer at 3.) Also, it was not until June 19, 2013 that EMOG notified Cooperative of any problem whatsoever, and when it did, it advised of a problem with faxes. And, upon learning of the problem, Cooperative immediately attempted to resolve the issue, and was eventually successful in doing so at Cooperative's own cost. Notwithstanding the fact that the problem was not caused by Cooperative, Cooperative nevertheless extended credits as a courtesy to EMOG for the problem. Ibid.

Cooperative further asserted that under the Agreement, EMOG is liable for an early termination liability to Cooperative based upon EMOG's early and improper termination of the contract. Cooperative requested that the Board direct EMOG pay to Cooperative all unpaid amounts due and owing under the Agreement between the parties, inclusive of liability for services rendered from May 9, 2013 to October 23, 2013, as well as EMOG's early termination liability. Id. at 4.

On May 9, 2014, the Board transmitted this matter to the Office of Administrative Law ("OAL") for hearing and initial disposition as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. This matter was assigned to Administrative Law Judge ("ALJ") Kimberly A. Moss.

Respondent filed an Answer and Counterclaim with the Board on July 11, 2014, essentially repeating its assertions set forth in its December 3, 2013 Answer. (Answer and Counterclaim at 1-4.) Also, Cooperative asserted: "By reason of its early and improper termination of the Agreement, which constitutes a default under the Agreement, EMOG is also indebted to Cooperative in the amount of \$38,649.00." Id. at 5. Accordingly, Cooperative requested that the Board "issue an Order in this matter directing EMOG pay to Cooperative the total sum of \$42,835.43 as follows: (1) \$3,186.43, for the period of May 9, 2013 to October 23, 2013; and (2) \$39,649.00, as a result of EMOG's default under the Agreement." Ibid.

ALJ Moss conducted several conferences in this matter, and EMOG and Cooperative engaged in various discovery and procedural motions. On December 15, 2014, Respondent filed a motion for specific answers to discovery. Petitioner indicated that it wanted to withdraw its petition. Respondent stated that if the petition were to be withdrawn, it wanted to proceed on the counterclaim. ALJ Moss requested briefs on the issue of whether the OAL has jurisdiction to hear the counterclaim. Respondent filed its brief on February 10, 2015, and Petitioner filed its brief on February 17, 2015.

By an electronic mail to the OAL Clerk dated February 10, 2015, Board Staff transmitted Cooperative's Answer and Counterclaim for delivery to ALJ Moss. By Order dated February 24,

2015 ("Counterclaim Order")¹, ALJ Moss determined that the Board does not have jurisdiction over the subject matter of Cooperative's counterclaim or the counterclaim itself. Counterclaim Order at 4. ALJ Moss found undisputed the following: Cooperative in its counterclaim states that there was a written agreement between itself and EMOG with respect to Cooperative's providing telecommunication services; Cooperative alleges that EMOG's request that the service be disconnected violated the contract and that it is owed \$3,186.43 from EMOG for services rendered; because of the early termination, EMOG defaulted on the contract and owes Cooperative an additional \$38,649; and, EMOG wants to withdraw its petition, but not if Cooperative's counterclaim would proceed after EMOG's withdrawal. Id. at 2. The issue in this matter, according to ALJ Moss, is whether OAL has jurisdiction over the counterclaim. Ibid.

Relying on N.J.S.A. 48:2-13(a), Integrated Telephone Service v. Bell Atlantic-New Jersey, Inc., PUC 5737-97, Initial Decision, <http://lawlibrary.rutgers.edu/oal/search.html>, and Brooks v. Public Service Electric Company, 1 N.J.A.R. 243 (1981), ALJ Moss determined that "[t]he Board does not have jurisdiction to review contracts or award damages as a remedy for breach of contracts. (Counterclaim Order at 2.) ALJ Moss reasoned that Cooperative's counterclaim states that EMOG and Cooperative entered into a contract, the terms of which were violated by EMOG; that EMOG is indebted to Cooperative under the contract for services provided by Cooperative; and that the resolution of the counterclaim requires review of the terms of the contract to determine if the terms were violated. Id. at 3.

Also, ALJ Moss noted:

N.J.A.C. 14:1-4.1 provides:

(a) Pleadings before the Board shall be petitions, answers, and replies which, for purposes of these rules, are defined as follows:

1. "Petition" means the pleading filed to initiate a proceeding invoking the jurisdiction of the Board;

2. "Answer" means the pleading filed by a respondent or other party against whom a petition is directed or who is affected by the filing of a petition; and

3. "Reply" means the pleading filed by the petitioner or others in response to an answer.

The regulations do not provide for the filing of counterclaims in public utilities cases.

(Counterclaim Order at 3-4)

Accordingly, ALJ Moss noted that if EMOG withdrew its petition, then she would order that the matter be returned to the Board. Id. at 4.

¹ By a March 13, 2015 Memorandum to the parties, ALJ Moss transmitted an Amended Order to correct a typographical error on page one of the Counterclaim Order. By a July 22, 2015 Memorandum to the parties, ALJ Moss transmitted an Amended Order to reflect the correct agency docket number.

By letter to ALJ Moss dated February 27, 2015, Cooperative argued that its "Counterclaim should be permitted to proceed and its Motion to Compel Further Discovery Responses should be granted." Id. at 3. On or about March 10, 2015, Cooperative filed a letter with the Board as a request for interlocutory review of ALJ Moss's February 24, 2015 Order. Cooperative argued that the Counterclaim Order "effectively dispose[d] of this matter thereby making the issue ripe for review by the Board," because EMOG had advised of its intention to withdraw its Petition. Letter Motion at 1. Also, Cooperative claimed that "[d]isputes between a regulated utility and its customers are clearly cognizable before the Board," "the early termination charge assessed against EMOG is part and parcel of Cooperative's service practices," "[w]hile regulation over such specific charge is not expressly granted by the jurisdictional statute, the sweeping grant of power vested in the Board most certainly places it squarely under the Board's authority," and the Board has never stated that it has no jurisdiction to review contracts. Id. at 2-3. Lastly, Cooperative argued that "EMOG act[ed] with unclean hands and should be estopped from attempting to have Cooperative's Counterclaim not heard," "if EMOG were not to withdraw its Petition, the parties would be forced to litigate in two separate forums," and "EMOG waited too long to raise its jurisdictional contention." Id. at 4.

By letter filed with the Board on March 18, 2015, EMOG responded to Cooperative's motion for interlocutory review, arguing that ALJ Moss's decision "is sound and just and interlocutory review is not warranted." Id. at 2.

By letter dated July 9, 2015, EMOG advised ALJ Moss that it was withdrawing the petition "without prejudice due to jurisdictional issues." Id. On July 16, 2015, the OAL returned the case file to the Board.

DISCUSSION AND FINDINGS

The Board may review an order interlocutorily at the request of a party. N.J.A.C. 1:1-14.10(a). 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. Also, 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.

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 ALJ's ruling shall be considered conditionally affirmed. Additionally, N.J.A.C. 1:1-14.10(c) provides: "If the agency head does not so act within 10 days, the request for review shall be considered denied." 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, 97-98 (1982) (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."). The Board did not review ALJ Moss's Counterclaim Order interlocutorily.

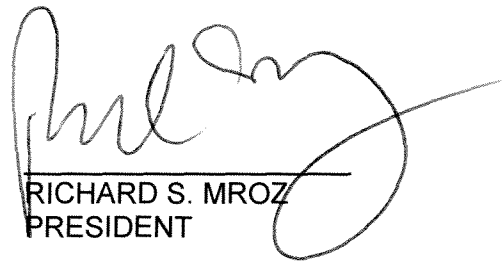
The Board agrees with ALJ Moss that this case is about a contract dispute. Cooperative by its Counterclaim specifically requested that the Board award it damages against Petitioner for breach of the Agreement. Accordingly, the Board would need to review the terms of the Agreement, which was never subject to its review, to determine if EMOG breached it. Such exercise is not within the Board's specialized expertise under N.J.S.A. 48:2-13 et seq.

The Board also has no jurisdiction to award damages to Cooperative or any party. See Muise v. GPU, Inc., 332 N.J. Super. 140, 163 (App. Div. 2000); Boldt v. Correspondence Management, Inc., 320 N.J. Super. 74, 87 (App. Div. 1999). Therefore, the Board is precluded from exercising jurisdiction over Cooperative's counterclaims seeking damages against Petitioner, as ALJ Moss explained. Accordingly, the Board **HEREBY ADOPTS** the Counterclaim Order and dismisses the Counterclaim of Respondent, accepts the withdrawal of the Petition, and concludes the within case docket.

The effective date of this Order shall be August 29, 2015.

DATED: 8/19/15

BOARD OF PUBLIC UTILITIES
BY:



RICHARD S. MROZ
PRESIDENT



JOSEPH L. FIORDALISO
COMMISSIONER



MARY-ANNA HOLDEN
COMMISSIONER

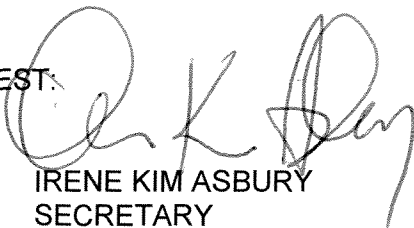


DIANNE SOLOMON
COMMISSIONER



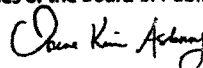
UPENDRA J. CHIVUKULA
COMMISSIONER

ATTEST:



IRENE KIM ASBURY
SECRETARY

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



EDISON-METUCHEN ORTHOPEDIC GROUP

V.

COOPERATIVE COMMUNICATIONS

BPU DOCKET NO. TC13100941U

OAL DOCKET NO. PUC05818-14

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