UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1773

ALTICE USA, INC.

Plaintiff- Respondent,

v.

NEW JERSEY BOARD OF PUBLIC UTILITIES, et al.

Defendants- Petitioners.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 19-CV-21371

BRIEF OF DEFENDANTS-PETITIONERS NEW JERSEY BOARD OF PUBLIC UTILITIES, JOSEPH L. FIORDALISO, MARY-ANNA HOLDEN, DIANNE SOLOMON, UPENDRA CHIVUKULA, BOB GORDON

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INTRODUCTION

Because New Jersey law requires that bills for cable television services are to be rendered monthly (or in longer intervals), a problem arises whenever a consumer cancels after the commencement of a billing cycle: she may still be required to pay for television services that she does not want to receive. In a rational effort to protect consumers from this unconscionable commercial practice, the New Jersey Board of Public Utilities ("BPU"), like a number of State legislatures and/or State agencies elsewhere in the country, adopted a simple solution—it required operators to refund the remaining portions of that subscriber's bills for that billing period at the time of cancellation. *See* N.J. Admin. Code. § 14:18-3.8 (establishing that "[b]ills for cable television service shall be rendered monthly, bi-monthly, quarterly, semi-annually or annually," and that such bills "shall be prorated upon establishment and termination of service"). This approach to protect consumers from the overreaching of cable television service companies ensures that every party receives precisely what it deserves: the cable operator gets paid for all the time that the consumer was a subscriber, at whatever rate the cable operator has set for its services, while the consumer does not have to pay for services she necessarily did not want after she provided her notice of termination.

The only question this case presents is whether federal law allows New Jersey to take this action to protect its consumers, or whether it must stand idly by anytime

a cable operator decides to bilk customers for services they terminated and do not want to receive—whether for days, for weeks, for months, or even for the better part of a year depending on the billing cycle. Altice believes that New Jersey is powerless to protect consumers, and so it ignored New Jersey's rules by adopting a subscription cancellation policy that required consumers to pay a pre-paid monthly fee and did not provide any refund for the remaining days of service in the event of a mid-month cancellation. Altice is wrong as a matter of law.

After learning of Altice's behavior in contravention of New Jersey regulations, BPU ordered Altice to comply with New Jersey's law. Altice refused and instead chose to rush to federal court, urging the district court to find that New Jersey's hands were tied by the Federal Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-573 ("Cable Act"). Unfortunately, the District Court did not provide any opportunity for the parties to fully brief the merits and also *sua sponte* issued a preliminary injunction in favor of Altice, reasoning that the Cable Act bars States from adopting consumer protection laws such as this one.

The District Court made two fundamental errors in reaching its conclusion, which both separately and together require this Court to reverse the holding that the Cable Act preempts State consumer protection efforts like this one. First, the plain language of the Cable Act stops States from regulating "the rates for the provision of cable service." The BPU's regulation has nothing to do with the rates of service

provided for several reasons. As a threshold matter, the BPU's regulation in no way affects the "rates" that Altice charges, which otherwise would be preempted under the Cable Act. As dictionary definitions confirm, a "rate" charged is the ratio of costs to a unit of service. By allowing Altice to charge individuals whatever rate it wishes *for the entire period during which someone has service*, the BPU has left Altice in full control over the ratio it sets, as allowed by the Cable Act. And even more to the point, even if a court were to conclude that the regulation affects "rates," the impact is not on actual rates "for the provision of cable service"—after all, the very point of New Jersey's rule is that Altice can charge whatever it wishes for the cable services a consumer wishes to receive, but a provider like Alice cannot charge after the service has been canceled. The BPU's regulation is thus fully consonant with the plain text of the Cable Act and is not preempted.

Second, even were the question a close one, the Cable Act contains an explicit provision allowing States to adopt consumer protection laws in order to protect their residents from these sorts of unconscionable commercial practices. *See* 47 U.S.C. §552 (d)(1) ("Nothing in this subchapter shall be construed to prohibit any State . . . from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this subchapter."). That exception, too, justifies the action New Jersey has taken. After all, under Altice's reading, an individual who is charged for service annually, and who cancels their services on January 5, must be required

to continuing paying for those canceled services for 360 days, until the end of that billing period. The state regulations adopted to keep this from happening are a "customer service requirement," designed with consumers in mind, to ensure that customers get what they pay for and only pay for the services they get.

The District Court misunderstood these central aspects of the Cable Act. As a result, this Court should reverse, and confirm as a matter of law New Jersey's clear authority under the Cable Act to protect consumers from Altice's unfair practice of requiring payments for services neither desired nor, in some cases, ever received.

JURISDICTIONAL STATEMENT

On January 22, 2020, the District Court of New Jersey (Martinotti, J.) entered an Order granting a preliminary injunction to Altice to stay the enforcement of a November 13, 2019 Cease and Desist Order of the BPU. This Court has jurisdiction to review that Order under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

Whether a consumer protection law requiring cable providers to refund any remaining portions of a subscriber's monthly, quarterly, or annual cable bills at the time of cancellation constitutes "ratemaking" preempted under the Cable Act.

STATEMENT OF THE CASE

This matter concerns the District Court's issuance of a preliminary injunction, finding that a regulation requiring proration of customer bills upon cable television service cancellation is preempted as "ratemaking" under the Cable Act.

a. The Cable Act.

To resolve the "fluid and ever-changing balance between state and federal authority over cable television," Congress passed the Cable Act, with the goal to "provide and delineate within Federal legislation the authority of Federal, state and local governments to regulate cable systems." *Cable Television Ass'n of New York, Inc. v. Finneran*, 954 F.2d 91, 97 (2d Cir. 1992) (quoting H. Rep. No. 98-934, at 22 (1984)). With this purpose in mind, the Cable Act sets forth a comprehensive regulatory regime, allocating the powers of states and localities on the one hand, and the FCC on the other.

The Cable Act specifies when the FCC and the States can, and cannot, regulate rates for the provision of cable services. Under the statute, whenever "the [Federal Communications] Commission finds that a cable system is subject to effective competition,[1] the rates for the provision of cable service by such system shall not be

[1] The BPU and Altice accept there is effective competition in New Jersey. In a series of orders, the FCC determined that Cablevision, the predecessor in interest to Altice, is subject to effective competition in 162 community units in New Jersey, comprising 161 of its franchised municipalities. *See* Cablevision of Paterson d/b/a Cablevision of Allamuchy, 17 FCC Rcd 17239 (2002).

subject to regulation by the Commission or by a State or franchising authority under this section." 47 U.S.C. § 543(2).

That said, the Cable Act makes clear that both States and localities retain their traditional authority to adopt consumer protection rules. *See* 47 U.S.C. § 552(d)(1) ("Nothing in this subchapter shall be construed to prohibit any State . . . from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this subchapter."). That includes any requirements related to customer service. *See id.* § 552(d)(2) ("Nothing in this subchapter shall be construed to prevent the establishment or enforcement of . . . any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section."). In other words, except where *specifically* preempted, Congress allowed States to exercise regulatory control over the manner in which services are provided.

b. The BPU's Regulation and Enforcement Action.

The BPU has adopted a number of consumer protection requirements for cable television companies providing services to consumers in New Jersey. Among other provisions, N.J. Admin. Code § 14:18-3.8(a) establishes that "[b]ills for cable television service shall be rendered monthly, bi-monthly, quarterly, semi-annually or annually and shall be prorated upon establishment and termination of service."

The point of the regulation is clear: New Jersey's consumers cannot be charged for services they have cancelled and do not wish to receive.

Altice, as the successor to Cablevision, provides cable television subscription services to customers in New Jersey. After the May 25, 2016, merger between Altice and Cablevision, Altice customers complained to the BPU that Altice had modified Cablevision's subscription cancellation policy from a proration basis to a pre-paid monthly fee, with no proration in the event of a mid-cycle cancellation. *See* Pa 91-100.[2] Altice changed the cancellation policy without the required notice to, and approval of, the BPU. N.J. Admin. Code §14:18-16.7(a)(1); *see also* Pa41-55.

On December 18, 2018, BPU ordered Altice to show cause why its failure to prorate customer bills should not immediately be discontinued and why the BPU should not find Altice's actions in violation of the BPU's rules, previous Orders, and conditions imposed on the merger. Pa56-90.

[2] Pursuant to the May 25, 2016 Merger Order, Altice agreed to abide by applicable customer service requirements under "N.J.A.C. Title 14, including but not limited to Chapters 3, 10 and 18, and N.J.S.A. 48:5A, including, but not limited to, requirements related to billing practices and termination." *See* Pa66; Order Approving the Stipulation of Settlement, In the Matter of the Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Cable Entities, Docket No. CM15111255, and In the Matter of the Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation, Cablevision Lightpath-NJ, LLC and 4Connections LLC, Docket No. TM15111256, N.J. Bd. Pub. Utils., May 25, 2016 . Altice's actions violate this Order, which Altice agreed to abide by but has not.

On November 13, 2019, BPU issued a Cease and Desist Order declaring that Altice was required to refund customer bills for the remaining period of any billing cycle after the consumer canceled the service, and that its failure to do so violated the BPU's rules, prior Orders, and merger conditions. Pa 56-90. On November 26, 2019, Altice appealed the Cease and Desist Order to the Superior Court of New Jersey, Appellate Division. The appeal is pending and a briefing schedule has been set.

c. Altice's Litigation in the Federal Court.

On December 13, 2019, Altice filed a Complaint against the BPU and BPU President Joseph L. Fiordaliso in the United States District Court for the District of New Jersey seeking injunctive relief staying the enforcement of the BPU's Cease and Desist Order. Altice requested a declaration that the regulation is preempted as "ratemaking" under the Cable Act and FCC regulations.

Because Altice had sued the BPU itself, as a corporate body, and its President, but had not sued the other individual members of the BPU, on December 23, 2019, Judge Martinotti dismissed the case for lack of subject matter jurisdiction. *See* Order denying Temporary Restraining Order and Preliminary Injunction, ECF No. 14 (Dec. 23, 2019). The Court explained that any suits against the BPU itself violated principles of sovereign immunity and that only suing the BPU President was insufficient to obtain relief, because an injunction against President Fiordaliso would

only bind him and thus would be ineffective with respect to a multi-member board. *See* Memorandum of Opinion, ECF No. 13 (Dec. 23, 2019).

On December 27, 2019, Altice filed a motion for reconsideration and requested permission to file an Amended Complaint naming the four other BPU Commissioners as defendants in their official capacities. *See* Plaintiff's Motion for Reconsideration, ECF No. 18 (Jan. 3, 2020); Letter from Jeffry T. LaRosa, ECF No. 15 (Dec. 27, 2019). On December 30, 2019, the Court granted Altice permission to file the Amended Complaint. *See* Text Order, ECF No. 16 (Dec. 30, 2019).

Then, on January 10, 2020, the court heard oral argument on Altice's motion for reconsideration and, *sua sponte* over Defendants' objections, treated the motion for reconsideration as a motion seeking a preliminary injunction, reversed its finding of lack of subject matter jurisdiction, and granted the preliminary injunction, subject to Altice's posting a $2.11 million bond. *See* Memorandum of Opinion, ECF No. 25 (Jan. 22, 2020); Order, ECF No. 26 (Jan. 22, 2020); *See* Letter Order, ECF No. 31 (Jan. 29, 2020). No testimony or other evidence was presented by any party as to the appropriateness of the bond amount.

Defendants' then moved for reconsideration of the Order issuing the preliminary injunction, which was denied on March 10, 2020. *See* Defendants' Motion for Reconsideration, ECF No. 33 (Feb. 12, 2020);

This appeal followed.

RELATED CASES AND PROCEEDINGS

On November 26, 2019, Altice appealed the BPU's November 13, 2019, Cease and Desist Order to the Superior Court of New Jersey, Appellate Division. (Docket Number A-001269-19). The appeal is currently pending.

SUMMARY OF ARGUMENT

As a threshold matter, the Supreme Court has long recognized a presumption against federal preemption of state law, consistent with well-established federalist principles. Because N.J. Admin. Code § 14:18-3.8 is a consumer protection requirement, and because consumer protection functions are one of the States' longstanding and well-established roles, this New Jersey regulation is entitled to the strongest presumption against preemption. As a result, this Court may only conclude that this regulation is invalid if there is "clear and manifest" evidence that this is what Congress intended in passing the Cable Act. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992).

There is no clear and manifest evidence of preemption here, because the Cable Act's express preemption provision does not speak to laws and regulations like this one. Under the plain terms of the Cable Act, in certain markets like this one, states may not regulate "rates for the provision of cable service." The State's regulation, which requires bills to reflect the actual period of service desired by the customer, is not ratemaking because the regulation does not dictate the amount of money a cable

service provider can charge for the provision of cable service. Rather, the regulation *only* prohibits the cable service provider from charging for services the customer does not want or did not receive. Upon any fair reading of the BPU's regulation, it is clear that the regulation does not require Altice bill its customers in any specific increment of time or at a specific rate. Rather, it establishes that Altice can only charge its customers for the services they actually receive or request, no more and no less. The regulation's purpose and effect is to act as a consumer protection measure, not to regulate "the rates for the provision of cable service."

Finally, the Cable Act expressly reserves certain regulatory functions to the States, including to pass consumer protection measures. *See* 47 U.S.C. § 552 (d)(1). ("Nothing in this subchapter shall be construed to prohibit any State . . . from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this subchapter."). Congress further categorized "disconnection; rebates and credits to consumers" as consumer protection categories authorized to the States. H. Rep. 98-934 at 79. Congress clearly intended to permit states to enact precisely the very type of regulation exemplified by N.J. Admin. Code § 14:18-3.8.

For these reasons, the proration requirement is not ratemaking, but rather is a consumer protection method adopted by a state within its authority under state law. New Jersey's law is designed to prevent the unscrupulous business practice of charging a consumer for services she necessarily did not want after she provided her

notice of termination, including for the better part of a year for a cable company that renders bills on an annual cycle. This provision is consistent with, and thus is not preempted by, the provision of the Cable Act that limits state regulation of the rates for the provision of cable services.

ARGUMENT

I. New Jersey Law Is Permissible Under The Cable Act Because It Does Not Regulate "Rates For The Provision Of Cable Service."

Standard of Review: When considering a decision regarding a request for a preliminary injunction, this Court reviews legal conclusions de novo. *See Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116, 133-34 (3d Cir. 2020). This standard of review applies to all arguments below.

As a threshold matter, and consistent with bedrock federalist principles, this Court must begin with the presumption against federal preemption of state law. *See N.Y.S. Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) (Supreme Court recognizing the importance and pedigree of presumption against preemption); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (same). Said another way, the "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone*, 505 U.S. at 516 (quoting *Rice*, 331 U.S.

at 230); *see also In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d 71, 84 (3d Cir. 2017); *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 687 (3d Cir. 2016).

Whatever the precise theory of federal preemption, "[i]n areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" *Travelers Ins.*, 514 U.S. at 655. This presumption holds true no matter whether the Court is assessing a claim of express preemption, conflict preemption, or any other form of the analysis. *See In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 291 (3d Cir. 2016) (holding that it "is relevant even when there is an express pre-emption clause ... because when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that *disfavors* pre-emption") (emphasis added).

Consumer protection laws are a perfect example. As the Supreme Court has long recognized, "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Medtronic v. Lohr*, 518 U.S. 470, 475 (1996). Accordingly, N.J. Admin. Code § 14:18-3.8 is entitled to the strongest presumption against preemption, which can only be overcome by a "clear and manifest" preemptive purpose. *Rice*, 331 U.S. at 230; *see Medtronic, Inc.*, 518 U.S. at 485. *See also* 47 U.S.C. § 556(a) ("Nothing in this subchapter shall be construed to affect any authority of any State… regarding matters of public health, safety, and welfare, to

the extent consistent with the express provisions of this subchapter."). In other words, the presumption against preemption, including express preemption, is especially strong here, where the state has relied on one of its most venerable and established authorities.

Especially in light of that high bar, Altice cannot meet its burden of showing that the Cable Act preempts this state regulation. There is no dispute regarding the relevant preemption provision: under the Cable Act, states may not regulate "rates for the provision of cable service." There are two reasons why that provision does not apply, however: (1) New Jersey law does not regulate rates, and (2) New Jersey law does not regulate rates for the provision of cable service.

A. New Jersey Is Not Regulating "Rates."

The threshold question for this Court to resolve is whether a requirement that a company provide a refund for the period of time after which an individual cancels their service sets a "rate" for Altice's services. It does not.

Although the Cable Act itself does not define rates, dictionary definitions all show that a "rate" requires the ratio between price and the unit of service remain the same, *not* that the price be set at whatever time period a company chooses. *See, e.g.*, RATE, Black's Law Dictionary (11th ed. 2019) ("Proportional or relative value; the proportion by which quantity or value is adjusted. <rate of inflation>."). An everyday example helps to prove why. If a grocery store advertises $4 for two boxes

of Oreo cookies, the customer may well choose to buy two boxes of Oreo cookies at that price. But he may also decide to buy one box for $2, or three boxes for $6, and everyone would easily accept that the "rate" of payment is the same in every example because the ratio of cookies to cost is the same. And if a state law orders the grocery store to refund a customer who seeks to return one of those boxes of Oreo cookies, that in no way changes the rate charged for all of the Oreo cookies that the customer ultimately purchased and consumed.

The analysis does not change just because this case turns on cable television service rather than cookies. All that New Jersey has required is for cable companies like Altice to maintain the same ratio of price to units sold (*i.e.*, service accepted) in the final billing cycle, whether the cycle is monthly or annual. In other words, if the cable subscriber cancels at the midpoint of that billing cycle, then she still has to pay the same rate for the entire period of the service she accepted. If the customer buys two boxes of cookies, she can be charged accordingly, even though all agree that Nabisco is still setting the price; similarly, if the customer cancels after two weeks, she can be charged accordingly, and Altice is still setting the price.

Altice's primary counterargument is that even if it is still allowed to set the ratio of price to service received, it is being required to adopt a particular *structure* for its rates. *See* Plaintiff's Amended Complaint, ECF No. 17, ("Altice charges its consumers by the *month*; the BPU seeks to compel Altice to charge its customers by

the *day* by mandating a credit for each day of the month the customer does not wish to pay for service."). As a threshold matter, Section 543(a)(2) of the Cable Act prohibits states only from regulating "rates for the provision of cable service"; the law makes no reference to "rate structures." Moreover, the BPU's regulation does not require that Altice bill its customers in any specific increment of time, only that the customers of Altice only pay for the services they actually receive or request.

And most importantly, the math itself disproves Altice's claim. To see why, imagine a hypothetical customer who purchases cable services at $100 per month and whose monthly service begins on the first of each month. If that customer were to cancel service on September 15, 2020, New Jersey law would require the cable provider to prorate the final month of service by 50%— because September has thirty days—and the customer would receive a $50 pro rata credit. But if a different customer canceled service on February 15, 2021, that customer would only be entitled to a refund of 46.43%—because February 2021 has twenty-eight days—and the customer would receive a $46.43 credit. (In order to receive a 50% credit, the second customer would have had to cancel after fourteen days of service in February. This example clearly demonstrates that customers are being charged by the month and that Altice's claim that service is being charged by the day is incorrect. It certainly does not allow, as Altice appears to imply, customers to opt-in to cable service one day, and then opt-out the next, which is what true daily billing would

permit. Moreover, the customers in these two hypothetical scenarios are not receiving the same pro rata refund based on a daily rate. Because September 2020 has two more days than February 2021, the first customer is charged $3.33 per day in September, while the second customer pays $3.57 per day in February. But because both customers pay $100 per month, their monthly rates are the same.

None of the case law on which Altice and the district court have relied are to the contrary. The primary case on which they rely to support the argument that requiring proration is ratemaking under the Cable Act is *Windstream Neb. Inc. v. Neb. Pub. Serv. Comm'n*, 2011 WL 13359491 (D. Neb 2011). They misunderstand that decision, which is neither controlling nor persuasive. In *Windstream*, the Nebraska Public Service Commission enacted a law requiring telecommunication carriers to "cease charging the customer for services and equipment as of the date of termination [of service] and [to] refund the pro rata portion of the month's charges for the period of days remaining in the billing period after termination of service to the customer." *Id.* at *1. The plaintiff, a telecommunications company that provided wireline telecommunication services (i.e., services connected via old-fashioned telephone wires) to residential and business customers, challenged the provision on the sole basis that it allegedly exceeded the Nebraska Public Service Commission's authority under the Nebraska State Constitution. *Id.* at * 2.

In the unpublished decision, the state district court found that the Nebraska Public Service Commission had exceeded its authority *under state law* and struck down the amended provision. *Id.* at * 4. The decision in *Windstream* focuses solely on the language of Nebraska Constitution and state law concerning the power of the Public Service Commission to regulate telecommunications. The decision does not even mention the Cable Act, or any federal law for that matter. Therefore, any reliance on *Windstream* for interpretation of the Cable Act or what constitutes "rate regulation" is misplaced.

Before the District Court, Altice also relied on *Storer Cable Commc 'ns v. City of Montgomery*, 806 F. Supp. 1518 (M.D. Ala. 1992), but that reliance is similarly misplaced. In *Storer*, the City of Montgomery enacted an ordinance that prohibited the implementation of "anti-competitive rates." 806 F. Supp. at 1543-48. Although the ordinance contained no specific pricing schedule, the court logically and quite unsurprisingly held that the ordinance was rate regulation and preempted under the Cable Act. *Id.* In other words, that case stands for the proposition that a local law actually setting rates (or placing limits on rates) triggers a preemption provision that bars state and local governments from doing so. It says nothing about the State's arguments that refunds during the final billing cycle have nothing to do with the rates Altice charges. *Storer* is thus not relevant to the legal question at hand.

Under the BPU's regulation, Altice can set whatever price it wants for its service. Altice can also choose to bill on a monthly basis. But what Altice cannot do under New Jersey's consumer protection laws is bar the consumer from selecting an end date for service. Simply put, what Altice wants is the right to force customers to continue to purchase services they seek to disconnect and hold them captive. This approach to billing is not rate based, but rather is a company policy inconsistent with the basic tenets of consumer protection and fairness. The Cable Act does not bar states from addressing this.

B. New Jersey Is Not Regulating "For The Provision Of Cable Service."

Notwithstanding that New Jersey is not in fact regulating "rates" at all, there is an even easier way to resolve this case: to simply hold that New Jersey's rules are certainly not regulating rates *for the provision of cable service*. Because New Jersey is only regulating the cost *for service that has been canceled*, it is in no way running afoul of that basic provision.

The text of the statute makes the importance of this distinction plain. Notably, the Cable Act does not simply prevent states from regulating rates. Instead, it prevents states only from regulating rates "for the provision of cable service." 47 U.S.C. § 543 (a)(1), (2). That phrase appears in both provisions of the statute that speak to what states may, and may not, regulate. And this Court is not free to overlook the importance of that provision: it is a fundamental rule that statutes are

read as a whole, and that each word in the statute must be given effect. *See, e.g.*, *Paek v. Attorney General*, 793 F.3d 330, 337 (3d Cir. 2015) ("The canon against surplusage counsels us to 'give[] effect to every word' of a statute and to avoid rendering a statute 'superfluous,' whether in whole or in part." (quoting *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013)). In other words, any interpretation of the preemption provision must address plainly how what New Jersey has done impacts the ratio of prices Altice charges for the provision of cable service, or else this Court would essentially be reading that phrase out of the statute.

The Second Circuit's decision in *Cable Television Ass'n of New York, Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1992), demonstrates the meaning and importance of this provision, and provides significant support to New Jersey. In *Finneran*, the cable companies regularly offered special deals to entice customers to purchase "top tier" bundles of channels. 954 F.2d at 93. In order to deter customers from moving to a lower, cheaper tier of cable service, cable companies routinely charged customers "downgrade fees." *Id*. Pursuant to its police powers to protect consumer welfare, New York issued a regulation banning cable companies from charging downgrade fees in excess of the cost of completing a customer downgrade. *Id.* The cable association challenged the state's authority to regulate rates charged by companies to customers who wished to downgrade to a less expensive level of cable service. The cable association sought injunctive and declaratory relief. It argued that the

federal government preempted the authority to regulate downgrade charges in the Cable Act. *Id.* at 98-99.

In its analysis of the Cable Act, the Second Circuit noted that "cable services" is not merely limited to "cable programming." *Id.* at 99. But the Court further held that it is crucial to read the entirety of the provision at issue, not just select terms in isolation.

> It is axiomatic that in interpreting a statute the court must "give effect, if possible, to every clause and word of [the] statute." Section 543(a) pre-empts all "rates for the provision of cable services," not "all rates for cable services." Thus, [plaintiff cable companies] must still establish the linguistically unlikely proposition that the customer is "provided" with cable service *when services* (defined as both facilities and programming) *are removed*.

Id. (emphasis added) (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)). In an attempt to overcome its "linguistically unlikely proposition," the New York cable companies vaguely gestured to the Cable Act's deregulatory purpose. *Id.* at 100. But as the Second Circuit pointed out, "Congress' purpose in section 543 was not to curtail regulation in the abstract but rather to do so in order to allow market forces to control the rates charged by cable companies ... downgrade charges, however, insulate cable companies from market forces." *Id.* at 100.

The Court held that as "there can be no doubt that the central purpose of the state regulation is to protect consumers, not to indirectly regulate rates," the Cable Act did not preempt the state's regulation of downgrade charges. *Id.* at 36. A critical

aspect of the Court's reasoning was the fact that Congress left regulation of complete disconnections to the states which indicated that downgrades, which are in essence partial disconnections, are also within the state's regulatory province. All of that analysis applies with equal force to this case, where the central purpose of the law is once again to protect consumers, and where the State is once again taking action that in no way trammels on rates charged for the actual provision of service.

In sum, the Cable Act only prohibits the regulation of a company's rates for the provision of services, not how the company handles issues like downgrading and the termination of service. New Jersey remains free to tackle the very sort of anti-consumer practices Altice is adopting.

II. N.J.A.C. 14:18-3.8 Is A Customer Service Protection Regulation Specifically Permitted By The Cable Act.

Standard of Review: When considering a decision regarding a request for a preliminary injunction, this Court reviews legal conclusions de novo. *See Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116, 133-34 (3d Cir. 2020).

Requiring service providers to meet certain standards of conduct such as the regulatory requirements in N.J. Admin. Code § 14:18-3.8 that initial and final customer bills be prorated, is not akin to rate regulation and thus is not contrary to 47 U.S.C. 543(a)(2) or N.J. Stat. Ann. § 48:5A-11(f). In fact, the Cable Act's explicit protection of consumer protection laws such as the requirements in N.J. Admin.

Code § 14:18-3.8 is codified in 47 U.S.C. § 552(d) which permits the State to impose "customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section." (47 U.S.C. §552(d)(2)). This should end the analysis.

But if it does not, the FCC has adjudicated comparable – although not identical – disputes in the past. The FCC's own deference to state regulatory consumer protection is highly instructive on how this Court should approach this matter. For example, Altice's refusal to prorate customer bills should be looked at just as the Commission viewed a series of cases involving 'negative option billing' in the mid-2000s. *See* 47 C.F.R. § 76.981(a). In I/M/O Omnicom Cablevision of Illinois d/b/a Post-Newsweek Cable, FCC 03-212 (September 17, 2003), the FCC described negative option billing as "a practice in which customers are charged for new service without their explicit consent." *Id.* In I/M/O the Implementation of Cable Television Consumer Protection and Competition Act of 1992, FCC 94-40 (March 30, 1994), the FCC discussed the categorization of the negative option billing as a consumer protection measure and *not* rate regulation in a way in which highlights the considerations that are taken into account "while the negative option billing provision is codified in Section 3 [of the 1992 Cable Act] governing rate regulation, it falls within the nature of a consumer protection measure rather than a rate

regulation provision per se. In this regard, the negative option billing provision governs the circumstances under which a cable operator may bill a subscriber for a particular service, rather than the reasonableness of the actual rate charged a subscriber for that service." *Id.* at *4361. So while one act involves billing for particular services or equipment and the other involves the service in its entirety a parallel can be drawn to the egregiousness of charging customers for services they did not request.

Based on this FCC precedent, the proration requirement is not ratemaking but rather is a billing method adopted by the BPU within its authority under state law, consistent with other consumer protections, which is not preempted state activity. 47 U.S.C. § 552.

Finally, although the Cable Act does not define the "consumer protection" or "customer service requirement" provisions that it reserves to the purview of States and localities, the available legislative history indicates what Congress had in mind when it passed the provisions. Section 632 of the Report issued by the House Committee on Energy and Commerce is entitled "Consumer Protection." There, the Committee stated:

> In general, customer service means the direct business relation between a cable operator and a subscriber. Customer service requirements include requirements related to interruption of service; *disconnection; rebates and credits to consumers;* deadlines to respond to consumer requests or complaints; the location of the cable

> operator's consumer service offices; and the provision to customers (or potential customers) of information on billing or services.

H. Rep. 98-934 at 79 (emphasis added).

By including both "requirements" "related to disconnection" and "requirements" "related to rebates and credits to consumers," Congress clearly intended to permit states to enact precisely the type of legislation exemplified by N.J. Admin. Code § 14:18-3.8. The Act also *authorizes states to regulate the direct business relationship between cable operators and subscribers*. *See* 47 U.S.C. § 552; H.Rep. at 79, reprinted in 1984 U.S.C.C.A.N. at 4716. The Committee additionally wanted to make "clear that nothing in this Title is intended to interfere with the authority of a state or local governmental body to enact and enforce consumer protection laws, to the extent that the exercise of such authority is not specifically preempted by this Title." H. Rep. 105-106.

Indeed, the Second Circuit agrees: "Similarly, as [the cable company plaintiffs] conceded at oral argument, the states may regulate charges associated with complete disconnections of service." *Finneran*, 954 F.2d at 101. Not only do the text and legislative history of the Cable Act permit the BPU's proration requirement, they encourage it.

Therefore, Court should find that the proration requirement is a consumer protection provision and not ratemaking under the Cable Act as the requirement ensures that customers get what they pay for and only pay for services requested.

CONCLUSION

For all of these reasons, this Court should reverse the decision below and find that Altice cannot prevail as a matter of law.

Respectfully submitted,

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Date: July 21, 2020

CERTIFICATION OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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Dated: July 21, 2020

Certification of Compliance

Pursuant to Fed. R. App. P. 32(a)(7)(C)(i) and L.A.R. 31.1(c), I certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because the brief contains 7,119 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and thus does not exceed the 14,000-word limit.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using the Microsoft Word word-processing system in Times New Roman that is at least 14 points.

3. The text of the brief filed with the Court by electronic filing is identical, except for signatures, to the text of the paper copies.

4. This brief complies with L.A.R. 31.1(c) in that prior to being electronically mailed to the Court today, it was scanned by the following virus detection software and found to be free from computer viruses:

> Company: McAfee, Inc.
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Certification of Service

I hereby certify that on July 21, 2020, I caused the Brief for Defendants to be filed with the Clerk of the United States Court of Appeals for the Third Circuit via electronic filing. Counsel of record will receive service via the Court's electronic filing system.

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Dated: July 21, 2020

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1773

ALTICE USA, INC.

Plaintiff- Respondent,

v.

NEW JERSEY BOARD OF PUBLIC UTILITIES, et al.

Defendants- Petitioners.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 19-CV-21371

APPENDIX OF DEFENDANTS-PETITIONERS NEW JERSEY BOARD OF PUBLIC UTILITIES, JOSEPH L. FIORDALISO, MARY-ANNA HOLDEN, DIANNE SOLOMON, UPENDRA CHIVUKULA, BOB GORDON

VOLUMN I (PA01-PA40)

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
VICINAGE OF NEWARK

Altice USA, Inc. Plaintiff v. New Jersey Board of Public Utilities et al. Defendants		CIVIL ACTION NO. 19-CV-21371 **NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that Defendants New Jersey Board of Public Utilities, Joseph L. Fiordaliso, Mary-Anna Holden, Dianne Solomon, Upendra Chivukula, Bob Gordon, hereby appeal to the United States Court of Appeals for the Third Circuit from the March 10, 2020 Opinion and Order (ECF No. 37 & 38).

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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ALTICE USA, INC. Plaintiff, v. NEW JERSEY BOARD OF PUBLIC UTILITIES, *et al.*, Defendants.	Case No. 3:19-cv-21371-BRM-ZNQ **OPINION**

MARTINOTTI, DISTRICT JUDGE

Before this Court is Plaintiff Altice USA, Inc.'s ("Altice") Motion for Reconsideration (ECF No. 18)[1] of this Court's December 23, 2019 Order (ECF No. 14) dismissing this case for lack of subject matter jurisdiction. Defendants New Jersey Board of Public Utilities ("BPU"), its president Joseph L. Fiordaliso ("President Fiordaliso"), and its four commissioners Mara-Anna Holden, Dianne Soloman, Upendra J. Chivukula, and Bob M. Gordon (all individual Defendants collectively, "Board Members") (Board Members and BPU collectively, "Defendants") oppose the motion. (ECF No. 19.) Having reviewed the parties' submissions filed in connection with the motion (ECF Nos. 1-10, 8, 11, 18-1, 19, & 22) and having heard oral argument pursuant to Federal Rule of Civil Procedure 78(a) on January 10, 2020, for the reasons set forth below and for good cause having been shown, the Court treats Altice's Motion for Reconsideration as a Motion for Preliminary Injunction,[2] and Courts will **GRANT** Altice's motion as to the Board

1 Altice filed its motion for reconsideration pursuant to the Court's order of December 30, 2019. (ECF No. 16.)

2 Defendants argue that Altice's motion for a preliminary injunction is not properly before the Court.

Members (subject to Altice posting a $2.11 million bond) and **DENY** the motion as to BPU.

I. FACTUAL AND PROCEDURAL BACKGROUND

BPU is a New Jersey state agency composed of five full-time board members (collectively "Board Members"), one of whom serves as president. N.J. Stat. Ann. §§ 48:2-1, -1.1. New Jersey's Cable Television Act vests BPU with the authority to regulate cable television companies. *See id.* § 48:5A-9(b). One of BPU's rules requires that "initial and final bills [for cable television services] shall be prorated as of the date of the initial establishment and final termination of service." N.J. Admin. Code § 14:18-3.8(c) (the "Prorated Bill Rule").

"Altice provides cable television, Internet, and telephone services to millions of customers in twenty-one states, including New Jersey." (ECF No. 17 ¶ 1.) Altice is the successor-in-interest to Cablevision, another provider of cable television services in New Jersey. (ECF No. 17-2, at 13.) In 2011, BPU waived Cablevision's obligation to comply with the requirements of the Prorated Bill Rule, subject to certain conditions. (ECF No. 17-1, at 6-7.) In October 2016, Altice—apparently relying on the 2011 waiver BPU granted to Cablevision—"implemented a policy of not providing prorated refunds to customers who contact Altice and request to cancel their cable services." (ECF No. 17-3 ¶ 2.)

After providing Altice notice of its impending action and an opportunity to comment, BPU found that Altice's policy violated both (1) BPU's 2011 order waiving Cablevision's obligation to comply with the Prorated Bill Rule and (2) BPU's 2016 order approving Altice's takeover of Cablevision. (ECF No. 17-7, at 7-9.) On November 23, 2019, BPU ordered Altice to begin prorating its cable customers bills when customers initiated or terminated service in the middle of a billing cycle, to provide refunds of non-prorated bills to affected customers, to make a one-time $10,000 charitable contribution, and to conduct an audit of its customers' bills since

October 2016 to determine which customers are entitled to partial refunds. (ECF No. 17-7, at 9.)

Altice filed a Complaint in this Court against BPU and its President Fiordaliso, asking for this Court to enjoin enforcement BPU's order of November 23, 2019 on the grounds that (1) the order was pre-empted by the federal Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* ("Cable Act"), and (2) the order violated various provisions of state law. (ECF No. 1, at 30-31.) This Court dismissed the complaint, holding that (1) sovereign immunity barred the action against BPU, and (2) Altice's claimed exception to sovereign immunity—the exception for actions against state officials seeking prospective injunctive relief to end an ongoing or continuing violation of federal law—did not apply because any injunction would bind only President Fiordaliso, not the remaining Board Members, and therefore could not provide effective relief. *Altice, Inc. v. N.J. Bd. of Pub. Utils.*, Civ. No. 19-21371, 2019 WL 7047207, at *1-3 (D.N.J. Dec. 23, 2019).

Altice requested (ECF No. 15), and this Court permitted (ECF No. 16), Altice to file an amended complaint naming all Board Members. After filing its amended complaint (ECF No. 17), Altice subsequently moved the Court to reconsider its earlier decision. (ECF No. 18.) Altice's amended complaint brings four claims. First, Altice brings what it styles as an "Action in Equity for Declaratory and Injunctive Relief to Enjoin Unlawful State Action in Violation of the Federal Cable Act."[3] (ECF No. 17, at 24.) Second, Altice brings an action pursuant to the

3 The Court is not clear on the exact cause of action Altice attempts to state in its first count. The claim mentions (1) the Cable Act, (2) the Supremacy Clause of the Constitution, and (3) the Declaratory Judgment Act. (ECF No. 17 ¶¶ 68, 69, 74.) It is not clear that the Cable Act provides an implied private right of action for cable providers. *Cf. Mallenbaum v. Adelphia Commcn's Corp.*, 74 F.3d 465, 469-70 (3d Cir. 1996) (holding that the Cable Act does not create an implied private right of action for cable subscribers). As the Court previously noted, the Supremacy Clause of the Constitution does not provide a private right of action. *See Altice*, 2019 WL 7047207, at *1 n.2 (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325 (2015)). Finally, the Declaratory Judgment Act does not create an independent cause of action. *See In re AZEK Bldg. Prods., Inc., Mkt'g & Sales Pracs. Litig.*, 82 F. Supp. 3d 608, 624-25 (D.N.J. 2015). At this time, the Court expresses no opinion concerning

Civil Rights Act of 1866, 42 U.S.C. § 1983. (ECF No. 17 ¶ 80.) Third, Altice brings an action to enforce an order of the Federal Communications Commission ("FCC") pursuant to 47 U.S.C. § 401(b).[4] (ECF No. 17 ¶ 87.) Fourth, Altice brings an action under New Jersey state law.[5] (ECF No. 17 ¶ 95.)

II. LEGAL STANDARD

"Preliminary injunctive relief is an 'extraordinary remedy, which should be granted only in limited circumstances.'" *Ferring Pharms., Inc. v. Watson Pharms., Inc.*, 765 F.3d 205, 210 (3d Cir. 2014) (quoting *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 586 (3d Cir. 2002)). The primary purpose of preliminary injunctive relief is "maintenance of the status quo until a decision on the merits of a case is rendered." *Acierno v. New Castle Cty.*, 40 F.3d 645, 647 (3d Cir. 1994).

In order to obtain a temporary restraining order or preliminary injunction, the moving party must show:

> (1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured . . . if relief is not granted. . . . [In addition,] the district court, in considering whether to grant

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whether Altice's first count constitutes a valid cause of action because its claim under 42 U.S.C. § 1983 provides a valid basis for the issuance of the injunction.

4 At oral argument, Altice identified the FCC's "orders" that Altice sought to enforce as the series of orders between 2002 and 2010 in which the FCC found that Cablevision was subject to effective competition. (ECF No. 17-1, at 2 n.2.). Under § 401(b), this Court may enforce an FCC "order," but not a rule or regulation. *See Mallenbaum*, 74 F.3d at 468-69. At this time, the Court expresses no opinion concerning whether the Commission's findings constitute enforceable "orders" or unenforceable rules or regulations because 42 U.S.C. § 1983 provides a valid basis for the issuance of the injunction.

5 Federal courts may not grant injunctive relief against state officials for violations of state law. *See, e.g.*, *N.J. Primary Care Ass'n v. N.J. Dep't of Human Servs.* ("*NJPCA*"), 722 F.3d 527, 536 (3d Cir. 2013) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984)). At this time, the Court need not determine whether this principle impacts Altice's fourth claim because of the valid federal basis for the preliminary injunction.

> a preliminary injunction, should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.

Reilly v. City of Harrisburg, 858 F.3d 173, 176 (3d Cir. 2017) (quoting *Del. River Port Auth. v. Transamerican Trailer Transp., Inc.*, 501 F.2d 917, 919–20 (3d Cir. 1974)).

The movant bears the burden of establishing "the threshold for the first two 'most critical' factors . . . . If these gateway factors are met, a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." *Id.* at 179.

III. DECISION

A. Jurisdiction

Defendants argue that this Court lacks subject matter jurisdiction over this action. The Court disagrees.

A district court has general federal question jurisdiction under 28 U.S.C. § 1331 as well as specific civil rights jurisdiction under 28 U.S.C. § 1343 over claims made under 42 U.S.C. § 1983. *See, e.g.*, *Houser v. Folino*, 927 F.3d 693, 697 (3d Cir. 2019). Additionally, district courts have jurisdiction over claims under § 401(b) of the Communications Act of 1934, because that provision provides its own grant of jurisdiction. *See* 47 U.S.C. § 401(b). When a district court has original jurisdiction over any claim, the court also has "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a).

This Court has jurisdiction over Altice's claims under all these provisions. Altice brings a claim under 42 U.S.C. § 1983, giving this Court general federal question jurisdiction as well as

specific civil rights jurisdiction over the § 1983 claim. Additionally, Altice makes a claim under § 401(b) of the Communications Act, which provision gives the Court jurisdiction over that claim. The Court has supplemental jurisdiction over the remaining claims.

B. Sovereign Immunity

Defendants argue that they are entitled to sovereign immunity. The Court agrees that BPU is immune from suit in light of its status as a state agency but finds that the Board Members lack sovereign immunity because Altice seeks prospective relief against them to end an ongoing violation of federal law.

1. Bureau of Public Utilities

The Supreme "Court's cases have recognized that the immunity of States from suit 'is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.'" *N. Ins. Co. of N.Y. v. Chatham Cty., Ga.*, 547 U.S. 189, 193 (2006) (quoting *Alden v. Maine*, 527 U.S. 706, 713 (1999)). Sovereign immunity "immunizes from suit in federal court both non-consenting states and those entities that are so intertwined with them as to render them 'arms of the state.'" *Karns v. Shanahan*, 879 F.3d 504, 513 (3d Cir. 2018) (quoting *Bowers v. NCAA*, 475 F.3d 524, 545 (3d Cir. 2007)).

While courts can "apply an 'oft-reiterated' three-part test to determine 'whether an entity is an alter ego or arm of a state for purposes of [sovereign] immunity,'" courts should dispense with the three-part test and summarily determine that an entity qualifies for sovereign immunity when state law establishes the entity "as an administrative agency without existence apart from the" state. *Betts v. New Castle Youth Dev. Ctr.*, 621 F.3d 249, 255 (3d Cir. 2010) (quoting *Christy*

v. Pa. Tpk. Comm'n, 54 F.3d 1140, 1144 (3d Cir. 1995)); *see also Wattie-Bey v. Att'y Gen.'s Office*, 424 F. App'x 95, 98 n.2 (3d Cir. 2011).

New Jersey's statutory law creates BPU as a state agency. *See* N.J. Stat. Ann. § 48:2-1. Accordingly, BPU is considered an arm of the state for purposes of sovereign immunity. *See Pa. Fed. of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 323 (3d Cir. 2002) (holding that sovereign immunity "renders states—and, by extension, *state agencies and departments* and officials when the state is the real party in interest—generally immune from suit by private parties in federal court" (quoting *Alden*, 527 U.S. at 751) (emphasis added)).

Altice argues that the nature of its suit permits it to evade BPU's sovereign immunity. The Court disagrees. There are three exceptions to sovereign immunity: (1) congressional abrogation of sovereign immunity, (2) consent to waive sovereign immunity, or (3) action for prospective injunctive relief against state officials. *See M.A. ex rel. E.S. v. State-Operated Sch. Dist. of City of Newark*, 344 F.3d 335, 345 (3d Cir. 2003). None of the three exceptions applies to BPU.

i. Congressional Abrogation of State Sovereign Immunity

First, Altice has not identified the law underlying any of its four claims as effecting a valid congressional abrogation of state sovereign immunity. Altice brings its first claim pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. (ECF No. 17 ¶ 74.) The Declaratory Judgment Act does not abrogate sovereign immunity. *See Dempsey v. United States*, Civ. No. 15-2847, 2015 WL 6561217, at *2 (D.N.J. Oct. 29, 2015).

Altice brings its second claim under 42 U.S.C. § 1983. (ECF No. 17 ¶ 80.) Altice fares no better under this venerable civil rights statute, because the provision limits its scope to suits

against "person[s]," and state agencies are not "persons" within the meaning of § 1983. *See, e.g.*, *Estate of Lagano v. Bergen Cty. Prosecutor's Office*, 769 F.3d 850, 854 (3d Cir. 2014).

Altice's third claim comes under Federal Communications Act § 401(b), 47 U.S.C. § 401(b). (ECF No. 17 ¶ 87.) Enacted pursuant to Congress' power under the Commerce Clause, the Federal Communications Act cannot abrogate BPU's sovereign immunity because "the power 'to regulate Commerce' conferred by Article I of the Constitution gives Congress no authority to abrogate state sovereign immunity." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672 (1999).

Altice cites a myriad of decisions in which courts have decided actions between private parties and state utility agencies. (ECF No. 18-1, at 8-9 n.5.) None of these decisions wrestles with the Supreme Court's more recent caselaw concerning the Commerce Clause and congressional abrogation of sovereign immunity. *See Coll. Sav. Bank*, 527 U.S. at 672. Accordingly, none of these decisions alters this Court's analysis.

Altice's fourth claim alleges violations of state statutory and state constitutional law. (ECF No. 17 ¶ 95.) State law in whatever form—whether state statutes, state constitutional provisions, or state court procedural rules—cannot effect a congressional abrogation of sovereign immunity. In order to validly abrogate state sovereign immunity, Congress must make its intention clear in the statute. *See, e.g., Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 35 (2012). Congress does not enact state statutes, state court procedural rules, or state constitutional provisions, and so these provisions of state law cannot be expressions of congressional intent. While Congress has enacted a supplemental jurisdiction statute allowing for state law claims to be heard in federal court, *see* 28 U.S.C. § 1367, this federal statute does not abrogate state

sovereign immunity from state law claims. *See Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 541-42 (2002).

None of the law underlying Altice's four claims effects a valid abrogation of state sovereign immunity. Accordingly, Altice cannot avoid BPU's sovereign immunity on the basis of congressional abrogation.

ii. State Waiver of Sovereign Immunity

Second, Altice does not argue that New Jersey has consented to federal suits by private parties against BPU. This Court has not located any independent basis to believe that New Jersey has waived BPU's right to sovereign immunity.

iii. Prospective Injunctive Relief Against State Officials

Finally, Altice argues that sovereign immunity does not bar this action against BPU because Altice seeks prospective, not retrospective relief. The Court disagrees. The "exception [to sovereign immunity for suits seeking prospective relief] is narrow: It . . . has no application in suits against the States and their agencies, which are barred *regardless of the relief sought*." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (emphasis added); *see also Rhett v. Evans*, 576 F. App'x 85, 88 (3d Cir. 2014) (holding that sovereign immunity "protects a state or state agency from a suit brought in federal court regardless of the relief sought"). BPU is therefore still immune from Altice's suit, notwithstanding that Altice seeks prospective, not retrospective relief.

2. Board Members

While sovereign immunity bars this action against state agencies like BPU, the same is not true of the individual commissioners[6]: sovereign immunity does not bar "[s]uits against *state*

6 Defendants argue that the Court should not permit Altice to amend its complaint to join all Board Members to this lawsuit, because Altice had an earlier opportunity to do so and failed. The Court disagrees. A party is entitled to amend its Complaint within 21 days after service.

officials that seek prospective injunctive relief to end a violation of federal law." *Hammonds v. Dir., Pa. Bureau of Driver Licensing*, 618 F. App'x 740, 742 (3d Cir. 2015) (emphasis added).

To determine whether this exception to sovereign immunity applies, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997)). "The label given to the requested relief is 'of no importance'—[courts] must 'look to the substance rather than the form of the relief requested' to determine if" the relief sought is prospective or retrospective. *Christ the King Manor, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 730 F.3d 291, 318 (3d Cir. 2013) (quoting *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 698 (3d Cir. 1996)).

Prospective relief, like an injunction, contrasts with retrospective relief, like damages (or a damages-like remedy). For instance, "injunctive relief requiring [state Medicaid officials] to reevaluate [plaintiff's] Medicaid application and find her eligible for benefits without a transfer penalty" constitutes retrospective damages-type relief because such an injunction would "award[] [plaintiff] Medicaid benefits that were withheld as a result of the imposition of transfer penalties, and those benefits would be paid out of State funds." *Williams ex rel. Bookbinder v. Connolly*, 734 F. App'x 813, 816 (3d Cir. 2018).

The relief Altice seeks is prospective, not retrospective. Altice seeks an injunction against the Board Members to require them to comply with federal law, going forward. The injunction would not entitle Altice to any money from the New Jersey state treasury, nor would an injunction retrospectively compensate Altice for any prior harm BPU has caused Altice.

Fed. R. Civ. P. 15(a)(1)(A). Altice met this deadline. Additionally, the Court explicitly granted leave for Altice to amend its Complaint. *See* Fed. R. Civ. P. 15(a)(2). Accordingly, Altice is entitled to amend its complaint to join all Board Members to this action.

Because Altice seeks prospective relief against state officials, sovereign immunity does not bar this action against the Board Members.

B. Abstention

Defendants argue that this Court should abstain from exercising jurisdiction over this action. *See Younger v. Harris*, 401 U.S. 37, 44-45 (1971). The Court disagrees because the BPU's order regulating Altice's billing practices—the order with which this action might interfere—does not constitute a quasi-criminal proceeding.

The *Younger* abstention doctrine provides that federal courts should generally abstain from exercising jurisdiction over cases that seek to interfere with certain types of pending state litigation, when "the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987). One qualifying type of state litigation is "civil enforcement proceedings." *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans* ("*NOPSI*"), 491 U.S. 350, 368 (1989).

A qualifying "civil enforcement proceeding" has certain characteristics. Traditionally, courts looked to three so-called *Middlesex* factors: (1) whether there was an ongoing state proceeding that was judicial in nature, (2) whether the state proceeding implicated important state interests, and (3) whether the state proceeding offered an adequate opportunity for the federal plaintiff to litigate federal constitutional challenges. *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). However, recent decisions caution that "these three factors [are not] the alpha and omega of the abstention inquiry" and "were never intended to be independently dispositive."[7] *Gonzalez v. Waterfront Comm'n of N.Y. Harbor*, 755

7 Defendants also argue that *Younger* imposes a requirement on federal plaintiffs that they exhaust their state remedies before initiating a federal action. This is not universally true. *Compare Huffman v. Pursue, Ltd.*, 420 U.S. 592, 1210-12 (1975) (requiring exhaustion when

F.3d 176, 182 (3d Cir. 2014); *see also Hamilton v. Bromley*, 862 F.3d 329, 337 (3d Cir. 2017). Before analyzing the *Middlesex* factors, courts must first determine whether the state proceedings possess a quasi-criminal character.[8] *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 81 (2013).

"[Q]uasi-criminal proceedings of this ilk share several distinguishing features." *Gonzalez*, 755 F.3d at 181. For instance, the proceeding will "characteristically [be] initiated to sanction the federal plaintiff, *i.e.*, the party challenging the state action, for some wrongful act." *Sprint Commc'ns*, 571 U.S. at 79. This is more than simply "negative consequences." *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 140 (3d Cir. 2014). "Sanctions are retributive in nature and are typically imposed to punish the sanctioned party 'for some wrongful act.'" *Id.* (quoting *Sprint Commc'ns*, 571 U.S. at 79). Sanctions must be more than the mere "cost of doing business, with the choice of whether to make such payment resting entirely with Plaintiffs." *Id.*

Additionally, "a state actor [will] routinely [be] a party to the state proceeding and often initiates the action." *Sprint Commc'ns*, 571 U.S. at 79. "To be sure, the Supreme Court has not directly held that *Younger* applies only when a state actor files a complaint or formal charges." *ACRA Turf Club*, 748 F.3d at 140. However, "the state's 'initiation' procedure must proceed with

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the relief sought is to enjoin the enforcement of a state judgment) *with Wooley v. Maynard*, 430 U.S. 705, 710-11 (1977) (holding that exhaustion was not required when the relief sought would not invalidate any existing state judgment). Even when *Younger* incorporates an exhaustion requirement, the underlying proceeding must still "be the sort of proceeding entitled to *Younger* treatment." *NOPSI*, 491 U.S. at 369. As discussed below, BPU's order is not the type of state proceeding to which *Younger* applies.

8 While quasi-criminal state proceedings are the most common category of cases involving *Younger*, the doctrine also applies to "ongoing state criminal prosecutions" and "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Commc'ns*, 571 U.S. at 78. Neither party argues that BPU's order concerning Altice's billing practices falls into either category.

greater formality than merely sending a targeted advisory notice to a class of people that may be affected by new legislation." *Id.*

Often, "the proceeding [will be] both in aid of and closely related to criminal statutes." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975). A proceeding is more likely to be quasi-criminal if "the State could have alternatively sought to enforce a parallel criminal statute" that "vindicates similar interests." *ACRA Turf Club*, 748 F.3d at 138; *see also Trainor v. Hernandez*, 431 U.S. 434, 444 (1977); *Gonzalez*, 755 F.3d at 182. For that reason, "[i]nvestigations are commonly involved, often culminating in the filing of a formal complaint or charges." *Sprint Commc'ns*, 571 U.S. at 79-80; *see also Gonzalez*, 755 F.3d at 182.

While quasi-criminal proceedings may share many attributes with actual criminal prosecutions, they will differ in one key respect: unlike a criminal prosecution, a quasi-criminal proceeding need not occur before the state's judiciary. To the contrary, abstention will apply "to state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim." *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 627 (1986); *see also Gonzalez*, 755 F.3d at 182 (describing a state administrative proceeding as "a textbook example of a quasi-criminal action").

Younger abstention is inappropriate here because the state proceedings below lack a quasi-criminal character. BPU's order regulating Altice's billing practices is not designed to sanction Altice for any wrongful act. BPU's regulatory order did not follow any investigation nor does it constitute a formal complaint or criminal charge. Finally, Defendants have not identified any criminal statutes aided by or related to BPU's order regulating Altice's billing

practices. Accordingly, BPU's regulatory order does not constitute a quasi-criminal proceeding, and the Court may not abstain under *Younger*.

C. Preliminary Injunction

Altice seeks a preliminary injunction. The Court will grant the issuance of a preliminary injunction because (1) Altice has a reasonable probability of eventual success in the litigation, (2) Altice will suffer irreparable injury in the absence of a preliminary injunction, (3) the possibility of harm to Defendants and to New Jersey cable subscribers by granting the injunction is minimal, and (4) the public interest is served in upholding the supremacy of federal law.

1. Reasonable Probability of Eventual Success in the Litigation

Altice has a reasonable probability of success in the eventual litigation because BPU's order violates Cable Act. The Cable Act prohibits states from "regulat[ing] the services, facilities, and equipment provided by a cable operator except to the extent consistent with" the Cable Act. 47 U.S.C. § 544(a). The Cable Act expressly preempts any state regulation of cable operators that is inconsistent with the Cable Act. *Id.* § 556(c). Among other things, the Cable Act prohibits states from regulating "the rates for the provision of cable service" if the FCC finds that "the cable system is subject to effective competition." *Id.* § 543(a)(2). A requirement that service providers prorate bills is a type of rate regulation. *Cf. Windstream Neb., Inc. v. Neb. Pub. Serv. Comm'n*, No. CI 10-2399, 2011 WL 13359491, at *6 (D. Neb. June 9, 2011) (holding that, in the context of a Nebraska state law challenge by an intrastate wireline telecommunications provider, a state agency rule requiring prorated billing constitutes rate regulation); *In re Sw. Bell Mobile Sys., Inc.*, 14 FCC Rcd. 19898, 19908 (Nov. 24, 1999) (holding that 47 U.S.C. § 332(c)(3) bars states from "prohibit[ing] [commercial mobile radio service] providers from charging for

incoming calls or charging in whole minute increments" because such a charging scheme would constitute prohibited rate regulation).

BPU's order violates the Cable Act. In a series of orders between 2002 and 2010, the FCC found that Cablevision was subject to effective competition. (ECF No. 17-1, at 2 n.2.) In 2015, the FCC "adopt[ed] a rebuttable presumption that [all] cable operators are subject to Competing Provider Effective Competition." In re Amendment to Commission's Rules Concerning Effective Competition, 30 FCC Rcd. 6574, 6577 (June 3, 2015). Because Cablevision was subject to effective competition, BPU may not regulate the rates of Cablevision's successor Altice. 47 U.S.C. § 543(a)(2). BPU's order requiring Altice to prorate customer bills based on the exact dates of service constitutes rate regulation. *Cf. Windstream*, 2011 WL 13359491, at *6; *Sw. Bell Mobile Sys.*, 14 FCC Rcd. at 19908. Accordingly, the Cable Act preempts BPU's order[9] and Altice possesses a reasonable probability of success in the eventual litigation.

2. Irreparable Injury

Altice will also suffer irreparable injury if this Court does not grant a preliminary injunction. In order to implement its whole-month billing policy, Altice expended significant resources in both monetary terms and in terms of the time of its billing personnel. (ECF No. 17-3 ¶ 4.) Requiring Altice to switch back to prorated billing "would be exceptionally difficult and would require substantial investments in time, effort, and money that Altice could not recoup." (ECF No. 17-3 ¶ 6.) This is in part because compliance with BPU's order would require Altice

9 For the first time at oral argument, Defendants raised the issue of whether the Cable Act's explicit protection for state "consumer protection law[s]," 47 U.S.C. § 552(d)(1), saves the Prorated Bill Rule from the reach of the Cable Act's prohibition on state rate regulation of cable systems subject to effective competition. The Court "do[es] not consider this contention, as it was raised for the first time at oral argument and thus is waived." *Estate of Roman v. City of Newark*, 914 F.3d 789, 803 n.9 (3d Cir. 2019).

to maintain a New Jersey-specific billing system to operate alongside its nationwide billing system, and building such a system would take over a year, cost approximately $5 million, and interfere with Altice's plans to upgrade its existing billing systems. (ECF No. 17-3 ¶ 8.) Additionally, Altice would have to create a New Jersey-specific billing quality control system for its billing processes to operate alongside its nationwide quality control system, a task that would require Altice to hire two full-time equivalent employees to run the system and cost approximately $200,000 per year. (ECF No. 17-3 ¶ 9.) Altice would incur other costs: retraining its entire nationwide corps of 3,500 customer service agents on the unique rules for Altice's New Jersey customers, which would cost Altice approximately $200,000. (ECF No. 17-3 ¶ 10.) Altice would incur other, unenumerated costs, such as the loss of customer goodwill and the cost of locating its former customers in order to issue refunds. (ECF No. 17-3 ¶¶ 11-12.)

These monetary costs will irreparably harm Altice.[10] While monetary consequences are usually insufficient to constitute irreparable harm (because they can be reimbursed), the same is not true of "unredressable financial consequences." *Pa. v. Pres. of the United States*, 930 F.3d 543, 574 (3d Cir. 2019). "[F]inancial consequences" are "unredressable" when the law prohibits the party seeking the injunction from recouping the value of those financial consequences via damages from its opponents in the litigation. *See id.*

This is precisely the situation in which Altice finds itself. If Altice incurs these compliance expenditures, it will be unable to recover damages from BPU (a state agency) or the Board Members (state officials in their official capacity), because sovereign immunity would bar

10 At oral argument, counsel for Defendants suggested that Altice will not suffer irreparable harm as a result of modifying its billing systems because it has previously, successfully modified its billing systems from prorated billing to whole-month billing. Whatever the merits of this argument, Defendants do not put forward any record evidence concerning the cost Altice will bear if forced to transition back to a prorated billing system, and the statements at oral argument of Defendants' counsel are not evidence. *See, e.g.*, *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1372 (3d Cir. 1996).

recovery. *See Williams v. Sec'y, Pa. Dep't of Corr.*, 848 F.3d 549, 572 n.151 (3d Cir. 2017) (state officials); *MCI Telecommc'ns Corp. v. Bell Atl. Pa.*, 271 F.3d 491, 503 (3d Cir. 2001) (state agencies). Because the law prohibits Altice from recouping its compliance expenses from BPU or the Board Members, Altice's financial consequences are unredressable, and the harm Altice faces is irreparable.

3. Harm to Defendants and New Jersey Cable Subscribers

The potential harm from the issuance of the injunction is minimal. This is true of both Defendants and non-parties.

The set of non-parties impacted by a preliminary injunction is limited to Altice's former cable subscribers in New Jersey who did not receive a prorated bill[11]—not all New Jersey citizens or even all New Jersey cable subscribers. Their harm is limited to a prorated refund of the amount of their final Altice cable bill, which presumably they would receive if the Court allowed BPU's order to remain in effect. This harm may only be temporary: if the Court declines to issue a permanent injunction at the conclusion of this litigation, or if an appellate court overturns this Court's preliminary injunction, Altice's former customers can still receive compensation for their financial injury.

Defendants do not argue that either BPU or the Board Members will suffer any financial or logistical consequences. The Defendants will suffer a less concrete harm: the issuance of the preliminary injunction intrudes into the sovereignty of the State of New Jersey. But the Court's

11 Counsel for Defendants represents that BPU received over 100 customer complaints concerning Altice's switch from prorated billing to whole-month billing. (ECF No. 8, at 13.) The Court cannot consider this fact because statements appearing in legal briefs are not evidence. *See, e.g.*, *Liszewski v. Moyer Packing Co.*, 252 F. App'x 449, 451 (3d Cir. 2007) (citing *Jersey Cent. Power & Light Co. v. Lacey Twp.*, 772 F.2d 1103, 1109-10 (3d Cir. 1985)).

order does nothing more than enforce federal law, so the intrusion into New Jersey's sovereignty is no greater than the intrusion from Congress' enactment of the Cable Act.

Because of the minimal harm to New Jersey's sovereignty that the preliminary injunction will impose on Defendants, the small class of non-parties who will suffer harm as a result of this preliminary injunction, as well as the temporary nature and *de minimis* degree of the harm to the non-parties, this factor weighs in favor of granting the preliminary injunction.

4. Public Interest

The public interest favors granting the preliminary injunction because doing so will minimize the potential for consumer confusion. Preventing confusion is in the public interest. *Cf. Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *Constr. Ass'n of W. Pa. v. Kreps*, 573 F.3d 811, 820 (3d Cir. 1978). If this Court declines to grant a preliminary injunction, BPU will enforce its order requiring Altice to prorate its customers' bills. However, if the Third Circuit later reverses this Court's denial of the preliminary injunction or this Court issues a permanent injunction at the conclusion of the litigation, BPU will be unable to enforce the Prorated Bill Rule, and Altice will likely cease prorating its customers' bills. This legal back and forth will create confusion among Altice's customers. (ECF No. 17-3 ¶ 11.) Avoiding that confusion by granting the preliminary injunction weighs in the public interest.

5. Review of All Factors

Having found that all four factors weigh in favor of granting the preliminary injunction, the Court necessarily must find that "the four factors, taken together, balance in favor of granting the requested preliminary relief." *Reilly*, 858 F.3d at 179.

D. Security for Potentially Wrongful Injunction

Defendants' counsel suggested in passing at oral argument that the Court, should it grant

the preliminary injunction, must also require Altice to post a bond.[12] The Court agrees, and will require Altice to post a $2.11 million bond.

"The court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). This Court must "interpret this requirement strictly." *Globus Med., Inc. v. Vortex Spine*, LLC, 605 F. App'x 126, 129 (3d Cir. 2015). "[W]hile there are exceptions, the instances in which a bond may not be required are so rare that the requirement is almost mandatory." *Scanvec Amiable Ltd. v. Chang*, 80 F. App'x 171, 175 (3d Cir. 2003) (quoting *Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 110 (3d Cir. 1988)). The "'extremely narrow exception' allowing for waiver of the bond requirement" exists "only 'when complying with the preliminary injunction raises no risk of monetary loss to the defendant,' and the District Court 'make[s] specific findings' in support of that conclusion." *Tilden Rec. Vehs., Inc. v. Belair*, 786 F. App'x 335, 343 (3d Cir. 2019). If the Court finds that the movant must post a bond, "the amount of the bond is left to the discretion of the court." *Frank's GMC Truck Ctr.*, 847 F.2d at 103.

A $2.11 million bond is appropriate in this case. If the Court wrongfully enjoins the Board Members, Defendants will incur substantial increased litigation costs, their constituent cable subscribers will be denied prorated refunds of their last months' Altice cable bills, and Defendants will have suffered a significant, needless intrusion into New Jersey's state sovereignty.[13] Given the scope of the issues in this case, including the expenditures at stake for

12 "I would suggest that were the Court to grant injunctive relief over the state of New Jersey's objection, that perhaps there would be necessarily some type of financial ramification to that that should be considered by the Court." Unofficial Tr. of Oral Arg. (Jan. 10, 2020).

13 The Court noted earlier that the issuance of the preliminary injunction would intrude only minimally into New Jersey's state sovereignty, because the preliminary injunction's intrusion is no greater than the imposition on state sovereignty already imposed by the Cable Act. *See*

Altice, for Altice's customers, and the sovereignty harms at issue for Defendants, $2.11 million is the most appropriate bond amount. Accordingly, the Court will require Altice to post a $2.11 million bond as a condition of issuing the preliminary injunction.

E. Duration of Preliminary Injunction

Having decided to issue a preliminary injunction, the Court must decide for how long the preliminary injunction will remain in force. No party addresses this topic. The Court finds that the preliminary injunction should last until the earlier of the conclusion of this litigation or until circumstances render the injunction unnecessary.

An injunction should last no longer than necessary to achieve the injunction's goals. *See Par Pharm., Inc. v. QuVa Pharma, Inc.*, 764 F. App'x 273, 281 (3d Cir. 2019); *SI Handling Sys., Inc. v. Heisley*, 753 F.3d 1244, 1266 (3d Cir. 1985). This Court must tailor the injunction's duration to take account of potential changes in circumstances that would impact the continued necessity of the injunction. *See Par Pharm.*, 764 F. App'x at 281; *SI Handling Sys.*, 753 F.3d at 1266. The factors that support the issuance of an injunction "do[] not necessarily support an indefinite injunction." *Par Pharm.*, 764 F. App'x at 281.

The unique circumstances of this case require that the Court place limits on the duration of the injunction. First, the injunction will last only so long as Altice is subject to effective competition. If Altice ceases to be subject to effective competition, the injunction will no longer be necessary because the Cable Act will no longer preempt state cable rate regulation. 47 U.S.C. § 543(a)(2). Likewise, if Congress repeals or a court invalidates any of the relevant provisions of the Cable Act, the injunction will no longer be necessary because there will be no relevant provision of the Cable Act to enforce.

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part III.C.3, *supra*. This analysis changes if an appellate court were to find that this Court *wrongfully* enjoined the Board Members, because an unlawful injunction intrudes more significantly into state sovereignty than a lawful injunction.

Although certain changes in circumstances would render the injunction unnecessary, a strict time limit on the injunction would not be appropriate. BPU's order has no end date. (ECF No. 17-7, at 9.) BPU's order enforces a provision of the New Jersey Administrative Code which has no expiration or sunset date. *See* N.J. Admin. Code § 14:18-3.8(c). Accordingly, absent the circumstances listed above, this preliminary injunction should remain in place through the conclusion of this litigation.

IV. CONCLUSION

For the reasons set forth above, the Court treats Altice's Motion for Reconsideration as a Motion for Preliminary Injunction, will **DENY** the motion as to BPU, and will **GRANT** the motion as to the Board Members (subject to Altice posting a $2.11 million bond). The Court will issue the preliminary injunction after reviewing Altice's proposed form of order.

/s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

Dated: January 22, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ALTICE USA, INC. Plaintiff, v. NEW JERSEY BOARD OF PUBLIC UTILITIES, *et al.*, Defendants.	Case No. 3:19-cv-21371-BRM-ZNQ **ORDER**

THIS MATTER is before this Court on Plaintiff Altice USA, Inc.'s ("Altice") Motion for Reconsideration. (ECF No. 18.) Defendants New Jersey Board of Public Utilities ("BPU"), its president Joseph L. Fiordaliso ("President Fiordaliso"), and its four commissioners Mara-Anna Holden, Dianne Soloman, Upendra J. Chivukula, and Bob M. Gordon (all individual Defendants collectively, "Board Members") oppose the motion. (ECF No. 19.) Having reviewed the parties' submissions filed in connection with the motion (ECF Nos. 1-10, 8, 11, 18-1, 19, & 22) and having heard oral argument pursuant to Federal Rule of Civil Procedure 78(a) on January 10, 2020, for the reasons set forth in the accompanying opinion and for good cause having been shown,

IT IS on this 22nd day of January 2020,

ORDERED that this case will be marked **OPEN**; and it is further

ORDERED that on or before 10:00 a.m. on Friday, January 25, 2020, Altice shall provide the Court with a proposed form of order consistent with the accompanying Opinion and Federal Rule of Civil Procedure 65.

/s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ALTICE USA, INC., Plaintiff, v. NEW JERSEY BOARD OF PUBLIC UTILIES, *et al.* Defendants.	Case No.: 3:19-cv-21371-BRM-ZNQ **OPINION**

Before this Court is Defendants' motion for reconsideration (ECF No. 33) of this Court's order (ECF No. 31). Plaintiff Altice USA, Inc. ("Altice") opposes the motion. (ECF No. 35.) Having reviewed the parties' submissions filed in connection with the motion and having declined to hear oral argument pursuant to Federal Rule of Procedure 78(b), for the reasons set forth below and for good cause having been shown, Defendants' motion for reconsideration is **DENIED**.

I. FACTUAL BACKGROUND

On December 13, 2019, Altice filed for preliminary and permanent injunctive relief against the New Jersey Board of Public Utilities ("BPU") and its president, Joseph Fiordaliso ("President Fiordaliso"). (ECF No. 1.) Both Altice (ECF No. 11, at 4-7) and Defendants (ECF No. 8, at 10-14) briefed whether a preliminary injunction was appropriate. A week later, the Court set a show cause hearing for December 23, 2019, and ordered President Fiordaliso to be present. (ECF No. 10.) The day before the hearing, the Court cancelled the hearing, with notice via e-mail to all parties. (ECF No. 12.) The next day—the day on which the hearing was originally scheduled—the Court dismissed the case without ruling on the appropriateness of a preliminary injunction,

holding that sovereign immunity barred the lawsuit and that the exception to sovereign immunity for actions seeking prospective injunctive relief to end an ongoing or continuing violation of federal law (the "*Young* Exception") did not apply because an injunction against only President Fiordaliso, but not any of the other BPU board members, would not suffice to provide the relief Altice sought. *See Altice USA, Inc. v. N.J. Bd. of Pub. Utils.*, Civ. No. 19-21371, 2019 WL 7047207, at *2-3 (D.N.J. Dec. 23, 2019) (citing *Ex parte Young*, 209 U.S. 123 (1908)).

Following the dismissal, Altice sought permission to file an amended complaint to remedy the original complaint's deficiency. (ECF No. 15.) This Court granted Altice's request, and ordered Altice to file "a formal motion for reconsideration." (ECF No. 16.) Altice subsequently filed an amended complaint, naming all the BPU board members in order to fit the case within the *Young* Exception. (ECF No. 17.) Altice also filed a motion—which, pursuant to this Court's order, Altice styled as a "Motion for Reconsideration"—requesting this Court grant preliminary injunctive relief. (ECF No. 18-1, at 11-12.) On January 10, 2020, the Court held oral argument on Altice's motion, at which counsel for Defendants both spoke at length about whether a preliminary injunction was appropriate and spoke briefly about whether Altice should have to post a bond if the Court agreed to grant a preliminary injunction. (ECF No. 23.) This Court (1) treated Altice's filing as a motion for a preliminary injunction, (2) found that the amended complaint naming all BPU's board members qualified the case for the *Young* Exception, and (3) announced its intent to grant a preliminary injunction subject to Altice posting a $2.11 million bond. *See Altice USA, Inc. v. N.J. Bd. of Pub. Utils.*, Civ. No. 19-21371, 2020 WL 359398, at *3-10 (D.N.J. Jan. 22, 2020). The Court later issued the preliminary injunction after requesting briefing on the injunction's exact language. (ECF No. 31.)

Defendants moved for reconsideration of the Court's order granting the preliminary

injunction. (ECF No. 33.)

II. LEGAL STANDARD

Motions for reconsideration are proper pursuant to this District's Local Civil Rule 7.1(i) if there are "matters or controlling decisions which counsel believes the Judge . . . has overlooked." L.Civ.R. 7.1(i); *Dunn v. Reed Grp.*, Civ. No. 08-1632, 2010 WL 174861, at *1 (D.N.J. Jan 13, 2010). The comments to that Rule make clear, however, that "reconsideration is an extraordinary remedy that is granted 'very sparingly.'" L.Civ.R. 7.1(i) cmt. 6(d) (quoting *Brackett v. Ashcroft*, Civ. No. 03-3988, 2003 WL 22303078, *2 (D.N.J. Oct. 7, 2003)). The Third Circuit has held the scope of a motion for reconsideration is "extremely limited." *Blystone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011).

"Such motions are not to be used as an opportunity to relitigate the case; rather, they may be used only to correct manifest errors of law or fact or to present newly discovered evidence." *Id.* A court commits clear error of law "only if the record cannot support the findings that led to the ruling." *ABS Brokerage Servs. v. Penson Fin. Servs., Inc.*, Civ. No. 09-4590, 2010 WL 3257992, at *6 (D.N.J. Aug. 16, 2010) (citing *United States v. Grape*, 549 F. 3d 591, 603-04 (3d Cir. 2008)). "Thus, a party must . . . demonstrate that (1) the holdings on which it bases its request were without support in the record, or (2) would result in 'manifest injustice' if not addressed." *Id.* In short, "[m]ere 'disagreement with the Court's decision' does not suffice." *ABS Brokerage Servs.*, 2010 WL 3257992, at *6 (quoting *P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp.*, 161 F. Supp. 2d 349, 353 (D.N.J. 2001)); *see also United States v. Compaction Sys. Corp.*, 88 F. Supp. 2d 339, 345 (D.N.J. 1999) ("Mere disagreement with a court's decision normally should be raised through the appellate process and is inappropriate on a motion for [reconsideration]."); *Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.*, 680 F. Supp. 159, 163 (D.N.J. 1988); *Schiano v. MBNA*

Corp., No. 05-1771, 2006 WL 3831225, at *2 (D.N.J. Dec. 28, 2006) ("Mere disagreement with the Court will not suffice to show that the Court overlooked relevant facts or controlling law, . . . and should be dealt with through the normal appellate process . . . .") (citations omitted).

III. ANALYSIS

Defendants argue that this Court should reconsider its order granting a preliminary injunction. This Court disagrees.

A. Motion for Reconsideration vs. Motion for a Preliminary Injunction

First, Defendants argue that this Court should not have treated the motion for reconsideration as a motion for a preliminary injunction. This Court disagrees. This Court looks to a motion's substance, not its form, to determine whether to treat a filing as a motion for reconsideration or a motion for a preliminary injunction. *See Ortho Pharm. Corp. v. Amgen, Inc.*, 887 F.2d 460, 463 (3d Cir. 1989); *see also* Fed. R. Civ. P. 1 ("These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."). Altice's motion for reconsideration was, in substance, a motion for a preliminary injunction: the motion expressly contemplates that the Court grant a preliminary injunction if the Court finds that sovereign immunity does not bar the action. (ECF No. 18-1, at 11-12.) Because Altice's motion requested preliminary injunctive relief, this Court rejects Defendants' argument that the Court should not have treated the motion for reconsideration as a motion for a preliminary injunction.

Defendants also argue that they were not given an opportunity to brief the preliminary injunction issue. The Court disagrees. First, Defendants briefed the appropriateness of a preliminary injunction when they initially responded to Altice's original complaint. (ECF No. 8, at 10-14.) Second, the Court explicitly granted Defendants an opportunity to make arguments in

writing after Altice filed its motion for reconsideration. (ECF No. 16.) Defendants did not make any new written arguments concerning the issuance of a preliminary injunction, but did incorporate arguments from their prior filing ("Defendants otherwise rely on the original opposition [(ECF No. 8)] to the Motion for Injunctive Relief . . . .") which did argue that the Court should not grant a preliminary injunction. (ECF No. 19.) Finally, Defendants spoke at length during oral argument concerning why this Court should not grant Altice's request for a preliminary injunction. (ECF No. 23.) The Court considered all of Defendants' arguments—both their written briefs and their presentation at oral argument—before deciding to issue a preliminary injunction. Given the multiple opportunities[1] the Court provided Defendants to brief the Court concerning the issuance of a preliminary injunction, this Court cannot agree that Defendants were denied an opportunity to be heard on the issue.

B. Amended Complaint vs. Original Complaint

Defendants also argue that the Court should not have considered the amended complaint when it decided the Altice's motion for reconsideration, because the Court's order—from which Altice moved for reconsideration—concerned only the original complaint, not the amended complaint. This fact does not entitle Defendants to relief. Altice's request (ECF No. 15) to file an amended complaint, combined with this Court's order (ECF No. 16) permitting Altice to do so and directing Altice to move for reconsideration, clearly contemplate that the amended complaint would serve as a cure for the *Young* Exception deficiency this Court identified in its first opinion.

Defendants also argue that this Court could not have considered the amended complaint

[1] The Court notes that Defendants spent considerable time arguing that President Fiordaliso's appearance was inappropriate. (ECF No. 20.) The Court ultimately excused President Fiordaliso from attending proceedings in his capacity as an "individual[] with settlement/decision making authority." (ECF No. 21.) However, President Fiordaliso is still a named party.

until it was properly served. This argument is waived because Defendants failed to timely challenge service of process, despite litigating the issue of the preliminary injunction against unserved defendants. *See* Fed. R. Civ. P. 12(h)(1); *cf. In re Asbestos Prods. Litig. Liab. Litig. (No. VI)*, 921 F.3d 98, 106 (3d Cir. 2019) (holding, with regard to a different defense which is also waivable under Rule 12(h)(1), that "Behavior that is consistent with waiver, and which indicates an intent to litigate the case on the merits, is sufficient to constitute waiver, regardless of whether the parties also express an intent to preserve the defense."); *In re Tx. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1236 (3d Cir. 1994) (holding that a party waives a personal jurisdiction defense—which, like improper service of process, is also waivable under Rule 12(h)(1)—by "actually litigat[ing] the underlying merits").

Even if not waived, Altice's compliance with Rule 5's procedures for service of process on BPU and President Fiordaliso, combined with the close relationship between the properly served defendants and the un-served new defendants, creates a poor case for vacating the preliminary injunction for improper service of process on the un-served new defendants. "[A] pleading filed after the original complaint" has less strict rules for service than the original complaint. Fed. R. Civ. P. 5(a)(1)(B). Service of an amended complaint may be made by "sending it to a registered user by filing it with the court's electronic-filing system." Fed. R. Civ. P. 5(b)(2)(E). "[S]ervice is complete upon filing or sending . . . ." *Id.*; *see also La. Counseling & Family Servs., Inc. v. Mt. Fuji Japanese Restaurant*, Civ. No. 08-6143, 2012 WL 4049937, at *6 (D.N.J. Aug. 9, 2012) ("Plaintiff's electronic filing of the Amended Complaint was sufficient to effectuate service."). Electronic service of the complaint is therefore appropriate as to BPU and President Fiordaliso. Rule 5 service does not apply to the other board members, who were not previously served with a summons. *See Linwood Trading Ltd. v. E.S. Recycling Express Corp.*,

Civ. No. 14-6332, 2017 WL 1882490, at *4 (D.N.J. May 9, 2017). However, given that the new defendants have the same counsel as the existing defendants BPU and President Fiordaliso, are all board members of the agency (BPU) that did receive proper service, and are joined as defendants merely as a formality to satisfy the strictures of the *Young* Exception, improper service of process does not require this Court to vacate its preliminary injunction.

C. Opportunity to Present Evidence Concerning Security for Potentially Wrongful Injunction

Defendants also contend that they were not given an opportunity to present evidence on the amount of any monetary bond or the need for other non-monetary conditions to be imposed on Altice following the grant of a preliminary injunction. The Court rejects this argument. As discussed above, Defendants both had notice and were actually aware that Altice was seeking a preliminary injunction. *See* part III.A., *supra*. Any order granting a preliminary injunction necessarily carries with it the attendant requirement that the movant provide security against a potentially wrongful injunction. *See* Fed. R. Civ. P. 56(c); *Tilden Rec. Vehs., Inc. v. Belair*, 786 F. App'x 335, 343 (3d Cir. 2019). In fact, Defendants brought up security at oral argument. *See Altice USA*, 2020 WL 359398, at *10 n.12. Had Defendants wanted to present evidence concerning the amount of any bond or request that the Court impose non-monetary conditions on Altice before granting the preliminary injunction, Defendants could have requested to do so either in their written briefing or at oral argument when counsel stated "that perhaps there would be necessarily some type of financial ramification to that that should be considered by the Court." (ECF No. 34, at 23:25-24:1.) Defendants' failure to do so is not a ground for vacating the preliminary injunction.

D. Reargument of Other Matters

Finally, Defendants ask the Court to vacate its preliminary injunction because the Court's

decision erred on the merits. (ECF No. 33, at 11-23). Defendants either could have made, or actually made, each of these arguments before the Court issued the preliminary injunction. None of these arguments constitute valid grounds for reconsideration. *See Compaction Sys.*, 88 F. Supp. 2d at 345; *Florham Park Chevron*, 680 F. Supp. at 163 (D.N.J. 1988); *Schiano*, 2006 WL 3831225, at *2.

IV. CONCLUSION

For the reasons set forth above, Defendants' motion for reconsideration is **DENIED**. An appropriate order accompanies this Opinion.

Dated: March 10, 2020

/s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ALTICE USA, INC., Plaintiff, v. NEW JERSEY BOARD OF PUBLIC UTILITIES, *et al.*, Defendants.	Case No.: 3:19-cv-21371-BRM-ZNQ **ORDER**

THIS MATTER is before this Court on Defendants' motion for reconsideration (ECF No. 33) of this Court's order granting a preliminary injunction (ECF No. 31). Plaintiff Altice USA, Inc. opposes the motion. (ECF No. 35.) Having reviewed the parties' submissions filed in connection with the motion and having declined to hear oral argument pursuant to Federal Rule of Procedure 78(b), for the reasons set forth in the accompanying Opinion and for good cause appearing,

IT IS on this 10th day of March 2020,

ORDERED that Defendants' motion (ECF No. 33) is **DENIED.**

/s/Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

APPEAL

U.S. District Court
District of New Jersey [LIVE] (Trenton)
CIVIL DOCKET FOR CASE #: 3:19-cv-21371-BRM-ZNQ

ALTICE USA, INC. v. NEW JERSEY BOARD OF PUBLIC UTILITIES et al
Assigned to: Judge Brian R. Martinotti
Referred to: Magistrate Judge Zahid N. Quraishi
Cause: 42:1983 Civil Rights Act

Date Filed: 12/13/2019
Jury Demand: None
Nature of Suit: 950 Constitutional - State Statute
Jurisdiction: Federal Question

Plaintiff

ALTICE USA, INC.

represented by **JEFFREY T. LAROSA**
SCHENCK, PRICE, SMITH & KING, LLP
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PO BOX 991
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ATTORNEY TO BE NOTICED

THOMAS N. GAMARELLO
SCHENCK, PRICE, SMITH & KING LLP
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ATTORNEY TO BE NOTICED

V.

Defendant

NEW JERSEY BOARD OF PUBLIC UTILITIES

represented by **MELIHA ARNAUTOVIC**
OFFICE OF THE ATTORNEY GENERAL OF NJ
25 MARKET ST, 7TH FL, WEST WING
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(609) 376-3370
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

JOSEPH FIORDALISO
in his official capacity as President of the New Jersey Board of Public Utilities

represented by **MELIHA ARNAUTOVIC**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

COMMISIONER MARY-ANNA HOLDEN represented by **MELIHA ARNAUTOVIC**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

DIANE SOLOMON represented by **MELIHA ARNAUTOVIC**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

UPENDRA J. CHIVUKULA represented by **MELIHA ARNAUTOVIC**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

BOB M. GORDON represented by **MELIHA ARNAUTOVIC**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
12/13/2019	1	COMPLAINT against All Defendants (Filing and Admin fee $ 400 receipt number 0312-10179863), filed by ALTICE USA, INC.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Text of Proposed Order Order to Show Cause with Temporary Restraints, # 10 Brief, # 11 Certificate of Service)(LAROSA, JEFFREY) (Entered: 12/13/2019)
12/13/2019	2	Corporate Disclosure Statement by ALTICE USA, INC. identifying None as Corporate Parent.. (LAROSA, JEFFREY) (Entered: 12/13/2019)
12/13/2019		CLERK'S QUALITY CONTROL MESSAGE - The case you electronically filed has been processed, however, the following deficiencies were found: In the future when choosing parties please choose each party individually. Do **NOT** select the **ALL PLAINTIFFS** or **ALL DEFENDANTS** button. The Clerk's Office has made the appropriate changes. Please refer to the Attorney Case Opening Guide for processing electronically filed cases. (jjc,) (Entered: 12/13/2019)
12/16/2019		Judge Brian R. Martinotti and Magistrate Judge Zahid N. Quraishi added. (abr) (Entered: 12/16/2019)
12/16/2019	3	SUMMONS ISSUED as to JOSEPH FIORDALISO, NEW JERSEY BOARD OF PUBLIC UTILITIES. Attached is the official court Summons, please fill out Defendant and Plaintiffs attorney information and serve. (abr) (Entered: 12/16/2019)
12/16/2019	4	TEXT ORDER: The Court will have an In-Person Conference on Plaintiff's Application for an Order to Show Cause [Doc. #1] set for 12/17/2019 at 9:30 a.m. in NEWARK - Courtroom #1, U.S. Post Office Building, 2 Federal Plaza, Newark, NJ. Further directed Plaintiff to notify the Attorney General. So Ordered by Judge Brian R. Martinotti on 12/16/2019. (DS) (Entered: 12/16/2019)

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12/16/2019	5	MOTION for Leave to Appear Pro Hac Vice by ALTICE USA, INC.. (Attachments: # 1 Text of Proposed Order, # 2 Certification of Jeffrey T. LaRosa, # 3 Certification of Howard Symons, # 4 Certification of Matthew Hellman, # 5 Certification of Devi Rao, # 6 Certification of Samuel Birnbaum, # 7 Certificate of Service)(LAROSA, JEFFREY) (Entered: 12/16/2019)
12/17/2019		Set Deadlines as to 5 MOTION for Leave to Appear Pro Hac Vice . Motion set for 1/21/2020 before Magistrate Judge Zahid N. Quraishi. Unless otherwise directed by the Court, this motion will be decided on the papers and no appearances are required. Note that this is an automatically generated message from the Clerk`s Office and does not supersede any previous or subsequent orders from the Court. (jdb) (Entered: 12/17/2019)
12/17/2019	6	Minute Entry for proceedings held before Judge Brian R. Martinotti: Status Conference held on 12/17/2019. (Court Reporter/Recorder Megan McKay Soule.) (lr,) (Entered: 12/17/2019)
12/17/2019		Set/Reset Hearings: Show Cause Hearing set for 12/20/2019 10:00 AM in Newark - Courtroom 1 before Judge Brian R. Martinotti. (lr,) (Entered: 12/17/2019)
12/18/2019	7	NOTICE of Appearance by MELIHA ARNAUTOVIC on behalf of JOSEPH FIORDALISO, NEW JERSEY BOARD OF PUBLIC UTILITIES (ARNAUTOVIC, MELIHA) (Entered: 12/18/2019)
12/19/2019	8	Letter from Meliha Arnautovic in reply to ECF 1. (Attachments: # 1 Exhibit Cert of Lawanda Gilbert, # 2 Exhibit 2011petition)(ARNAUTOVIC, MELIHA) (Entered: 12/19/2019)
12/19/2019	9	ORDER granting 5 Motion for Leave to Appear Pro Hac Vice as to Howard J. Symons, Esq., Matthew S. Hellman, Esq., Devi M. Rao, Esq., and Samuel C. Birnbaum, Esq. Signed by Magistrate Judge Zahid N. Quraishi on 12/19/2019. (jdb) (Entered: 12/19/2019)
12/20/2019	10	Minute Entry for proceedings held before Judge Brian R. Martinotti: Status Conference held on 12/20/2019. (Court Reporter/Recorder Megan McKay Soule.) (lr,) (Entered: 12/20/2019)
12/20/2019		Set/Reset Hearings: Show Cause Hearing set for 12/23/2019 09:30 AM in Newark - Courtroom 1 before Judge Brian R. Martinotti. (lr,) (Entered: 12/20/2019)
12/21/2019	11	BRIEF *(reply) in support of OSC* (LAROSA, JEFFREY) (Entered: 12/21/2019)
12/21/2019		CLERK'S QUALITY CONTROL MESSAGE - The Brief 11 submitted by Jeffrey Larosa on 12/21/2019 contains an improper signature. Only the filing user is permitted to sign electronically filed documents with an s/. PLEASE RESUBMIT THE DOCUMENT WITH A PROPER ELECTRONIC SIGNATURE. This submission will remain on the docket unless otherwise ordered by the court. (jdb) (Entered: 12/23/2019)
12/22/2019	12	TEXT ORDER: The Show Cause Hearing scheduled for 12/23/19 is CANCELLED. Plaintiff's application for a preliminary injunction and temporary restraints is DENIED. The case is DISMISSED for lack of jurisdiction. Formal order/opinion to be posted tomorrow. Counsel of record shall be responsible for advising each other of this order. So Ordered by Judge Brian R. Martinotti on 12/22/19. (Fiore, J) (Entered: 12/22/2019)
12/23/2019	13	MEMORANDUM OPINION filed. Signed by Judge Brian R. Martinotti on 12/23/2019. (jdb) Modified on 1/10/2020 (eaj,). (Entered: 12/23/2019)
12/23/2019	14	ORDER denying Temporary Restraining Order and Preliminary Injunction (ECF No. 1) This matter is DISMISSED for lack of subject jurisdiction. Signed by Judge Brian R. Martinotti on 12/23/2019. (jdb) (Entered: 12/23/2019)

12/27/2019	15	Letter from Jeffrey T. LaRosa, Esq.. (LAROSA, JEFFREY) (Entered: 12/27/2019)
12/27/2019		Pro Hac Vice fee received as to Howard J. Symons, Matthew S. Hellman, Devi M. Rao, and Samuel C. Birnbaum: $ 600, receipt number TRE108463 (jmh) (Entered: 12/27/2019)
12/30/2019	16	TEXT ORDER re 15 Letter request. It is ordered that the Plaintiff may file an amended complaint and formal motion to reconsider by 12:00 p.m. on January 3, 2020; the defendant shall respond by 5:00 p.m. on January 7, 2020; the Plaintiff may reply by 5:00 p.m. on January 8, 2020; the Court will hear arguments on January 10, 2020 @10:30 a.m. in Courtroom #1, U.S. Post Office Building, Newark, NJ; all parties and individuals with settlement/decision making authority shall appear. So Ordered by Judge Brian R. Martinotti on 12/30/2019. (DS) (Entered: 12/30/2019)
01/03/2020	17	AMENDED COMPLAINT against JOSEPH FIORDALISO, NEW JERSEY BOARD OF PUBLIC UTILITIES, MARY-ANNA HOLDEN, DIANE SOLOMON, UPENDRA J. CHIVUKULA, Bob M Gordon, filed by ALTICE USA, INC.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I)(GAMARELLO, THOMAS) (Entered: 01/03/2020)
01/03/2020	18	MOTION for Reconsideration by ALTICE USA, INC.. (Attachments: # 1 Brief, # 2 Certification, # 3 Certificate of Service, # 4 Text of Proposed Order)(GAMARELLO, THOMAS) (Entered: 01/03/2020)
01/03/2020		Set Deadlines as to 18 MOTION for Reconsideration . Motion set for 2/3/2020 before Judge Brian R. Martinotti. Unless otherwise directed by the Court, this motion will be decided on the papers and no appearances are required. Note that this is an automatically generated message from the Clerk`s Office and does not supersede any previous or subsequent orders from the Court. (abr) (Entered: 01/03/2020)
01/06/2020		Notice of Hearing: Oral argument re 18 MOTION for Reconsideration set for 1/10/2020 @10:30 AM in NEWARK - Courtroom 1 before Judge Brian R. Martinotti. Parties confirmed. (DS) (Entered: 01/06/2020)
01/07/2020	19	BRIEF in Opposition filed by All Defendants re 18 MOTION for Reconsideration (ARNAUTOVIC, MELIHA) (Entered: 01/07/2020)
01/07/2020	20	Letter from Meliha Arnautovic. (ARNAUTOVIC, MELIHA) (Entered: 01/07/2020)
01/08/2020	21	TEXT ORDER re Letter request [doc. 20]. It is ordered that portion of the courts prior order [doc. 16] requiring individuals with settlement/decision making authority to appear is Rescinded. Please be guided accordingly. So Ordered by Judge Brian R. Martinotti on 1/8/2020. (DS) (Entered: 01/08/2020)
01/08/2020	22	REPLY BRIEF to Opposition to Motion filed by ALTICE USA, INC. re 18 MOTION for Reconsideration (GAMARELLO, THOMAS) (Entered: 01/08/2020)
01/10/2020	23	Minute Entry for proceedings held before Judge Brian R. Martinotti: Motion Hearing held on 1/10/2020 re 18 MOTION for Reconsideration filed by ALTICE USA, INC.. Court RESERVED decision. (Court Reporter/Recorder Megan McKay Soule.) (lr,) (Entered: 01/10/2020)
01/17/2020	24	Notice of Request by Pro Hac Vice to receive Notices of Electronic Filings. (GAMARELLO, THOMAS) (Entered: 01/17/2020)
01/17/2020		Pro Hac Vice counsel, Howard J. Symons, Devi M. Rao, Samuel C. Birnbaum and Matthew S. Hellman, has been added to receive Notices of Electronic Filing. Pursuant to L.Civ.R. 101.1, only local counsel are entitled to sign and file papers, enter appearances and receive payments on judgments, decrees or orders. (jdb) (Entered: 01/19/2020)

01/22/2020	25	OPINION filed. Signed by Judge Brian R. Martinotti on 01/22/2020. (jdb) (Entered: 01/22/2020)
01/22/2020	26	ORDER denying 18 Motion for Reconsideration the motion as to BPU, and will GRANT the motion as to the Board Members (subject to Altice posting a $2.11 million bond); the Clerk is directed to reopen the case; and that on or before 10:00 a.m. on Friday, January 25, 2020, Altice shall provide the Court with a proposed form of order consistent with the accompanying Opinion and Federal Rule of Civil Procedure 65. Signed by Judge Brian R. Martinotti on 01/22/2020. (jdb) (Entered: 01/22/2020)
01/24/2020	27	Letter from Altice USA, Inc.. (Attachments: # 1 Text of Proposed Order)(GAMARELLO, THOMAS) (Entered: 01/24/2020)
01/24/2020	28	TEXT ORDER: On or before 10:00 a.m. on Tuesday, January 28, 2020, any party may file a brief of five or fewer pages concerning whether Plaintiff's proposed order (ECF No. 27-1) accurately reflects the ruling in the Court's opinion (ECF No. 25). In light of the exigencies of this case, the timetable provided in L.Civ.R. 7.1(e) will not apply. So Ordered by Judge Brian R. Martinotti on 1/24/2020. (DS) (Entered: 01/24/2020)
01/24/2020		CLERK'S QUALITY CONTROL MESSAGE - The 27 letter submitted by Thomas Gamarello on 01/24/2020 contains an improper signature. Only the filing user is permitted to sign electronically filed documents with an s/. PLEASE RESUBMIT THE DOCUMENT WITH A PROPER ELECTRONIC SIGNATURE. This submission will remain on the docket unless otherwise ordered by the court. (jdb) (Entered: 01/27/2020)
01/27/2020	29	Letter from Jeffrey T. LaRosa, Esq.. (Attachments: # 1 Text of Proposed Order)(LAROSA, JEFFREY) (Entered: 01/27/2020)
01/28/2020	30	Letter from Jeffrey T. LaRosa, Esq.. (LAROSA, JEFFREY) (Entered: 01/28/2020)
01/29/2020	31	LETTER ORDER that the application for a Motion for a TRO is denied with respect to the NEW JERSEY BOARD OF PUBLIC UTILITIES and is granted with respect to the COMMISIONER MARY-ANNA HOLDEN, JOSEPH FIORDALISO, DIANE SOLOMON, UPENDRA J. CHIVUKULA, and BOB M GORDON. This Preliminary Injunction is contingent upon the $2.11 million bond Altice posted on January 28, 2019 (ECF No. 30). Signed by Judge Brian R. Martinotti on 01/29/2020. (jdb) (Entered: 01/29/2020)
01/30/2020	32	BRIEF *with proper electronic signature 11* (LAROSA, JEFFREY) (Entered: 01/30/2020)
02/12/2020	33	MOTION for Reconsideration *of Order Entered January 29, 2020* by All Defendants. (ARNAUTOVIC, MELIHA) (Entered: 02/12/2020)
02/13/2020		Set Deadlines as to 33 MOTION for Reconsideration *of Order Entered January 29, 2020*. Motion set for 3/16/2020 before Judge Brian R. Martinotti. Unless otherwise directed by the Court, this motion will be decided on the papers and no appearances are required. Note that this is an automatically generated message from the Clerk`s Office and does not supersede any previous or subsequent orders from the Court. (jdb) (Entered: 02/13/2020)
02/19/2020	34	Transcript of MOTION HEARING held on 1/10/2020, before Judge Brian R. Martinotti. Court Reporter Megan McKay-Soule (215-779-6437). **NOTICE REGARDING (1) REDACTION OF PERSONAL IDENTIFIERS IN TRANSCRIPTS AND (2) MOTION TO REDACT AND SEAL:** The parties have seven (7) calendar days to file with the Court a Notice of Intent to Request Redaction of this Transcript to comply with Fed.R.Civ.P.5.2(a) (personal identifiers). Parties seeking to redact and seal this Transcript, or portions thereof, pursuant to L.Civ.R. 5.3(g) must e-file a Motion to Redact and Seal utilizing the event `Redact and Seal Transcript/Digital Recording`. Redaction Request to

		Court Reporter due, but not filed, by 3/11/2020. Redacted Transcript Deadline set for 3/23/2020. Release of Transcript Restriction set for 5/19/2020. (km) (Entered: 02/19/2020)
03/02/2020	35	RESPONSE in Opposition filed by ALTICE USA, INC. re 33 MOTION for Reconsideration *of Order Entered January 29, 2020* (LAROSA, JEFFREY) (Entered: 03/02/2020)
03/10/2020	36	OPINION filed. Signed by Judge Brian R. Martinotti on 03/10/2020. (jdb) (Entered: 03/10/2020)
03/10/2020	37	ORDER denying 33 MOTION for Reconsideration of Order Entered January 29, 2020. Signed by Judge Brian R. Martinotti on 03/10/2020. (jdb) (Entered: 03/10/2020)
04/09/2020	38	NOTICE OF APPEAL as to 37 Order on Motion for Reconsideration by UPENDRA J. CHIVUKULA, JOSEPH FIORDALISO, BOB M. GORDON, MARY-ANNA HOLDEN, NEW JERSEY BOARD OF PUBLIC UTILITIES, DIANE SOLOMON. Filing fee $ 505, receipt number ANJDC-10663926. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. (ARNAUTOVIC, MELIHA) (Entered: 04/09/2020)
05/18/2020	39	WAIVER OF SERVICE Returned Executed by ALTICE USA, INC.. UPENDRA J. CHIVUKULA waiver sent on 1/28/2020, answer due 3/30/2020; JOSEPH FIORDALISO waiver sent on 1/28/2020, answer due 3/30/2020; BOB M. GORDON waiver sent on 1/28/2020, answer due 3/30/2020; MARY-ANNA HOLDEN waiver sent on 1/28/2020, answer due 3/30/2020; DIANE SOLOMON waiver sent on 1/28/2020, answer due 3/30/2020. (LAROSA, JEFFREY) (Entered: 05/18/2020)
06/03/2020	40	ANSWER to Amended Complaint by All Defendants. (Attachments: # 1 Stipulation to Extend Time to File a Responsive Pleading)(ARNAUTOVIC, MELIHA) (Entered: 06/03/2020)
07/08/2020	41	Letter from Jeffrey T. LaRosa, Esq.. (LAROSA, JEFFREY) (Entered: 07/08/2020)
07/09/2020	42	ORDER SCHEDULING INITIAL CONFERENCE: Scheduling Conference set for 7/22/2020 02:30 PM in Trenton - Courtroom 7W before Magistrate Judge Zahid N. Quraishi. Signed by Magistrate Judge Zahid N. Quraishi on 07/09/2020. (jdb) (Entered: 07/09/2020)
07/14/2020	43	TEXT ORDER: The rule 16 conference scheduled for 7/22/2020 at 2:30 will be conducted via telephone. Counsel for the plaintiff shall initiate the call. So Ordered by Magistrate Judge Zahid N. Quraishi on 7/14/2020. (kas) (Entered: 07/14/2020)
07/15/2020	44	Joint Discovery Plan by ALTICE USA, INC.. (Attachments: # 1 Exhibit Proposed Discovery Schedule)(LAROSA, JEFFREY) (Entered: 07/15/2020)
07/15/2020	45	Joint Discovery Plan by All Defendants.(ARNAUTOVIC, MELIHA) (Entered: 07/15/2020)

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