

Agenda Date: 12/19/17
Agenda Item: 4A

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

CABLE TELEVISION AND
TELECOMMUNICATIONS

IN THE MATTER OF THE PETITION OF BUSINESS)	ORDER
AUTOMATION TECHNOLOGIES D/B/A DATA)	
NETWORK SOLUTIONS VS VERZION NEW JERSEY,)	
INC.)	DOCKET NO. TC17091015

Parties of Record:

Daniel J. O'Hern, Jr., Esq., Byrnes, O'Hern & Heugle, LLC for Business Automation Technologies
Richard C. Fiphen, for Verizon New Jersey

BY THE BOARD:¹

On September 26, 2017, Business Automation Technologies d/b/a Data Network Solutions ("DNS") filed a formal petition for hearing with the Board of Public Utilities ("Board") disputing billing charges and service with Verizon New Jersey, Inc. ("Verizon") under an interconnection agreement. By the filing, DNS requests an immediate order requiring Verizon to lift the service hold preventing DNS from obtaining and processing new and existing service orders based on disputed charges and to cease all collection activity pending the outcome of this proceeding. By this order, the Board determines the embargo is a discontinuance of service, orders Verizon to remove the embargo on the account, and orders all interconnection agreement-related issues in dispute be transmitted to the Office of Administrative Law for hearing and initial disposition as a contested case.

BACKGROUND

DNS is a New Jersey Corporation with its principal place of business located in Little Silver, New Jersey and a competitive local exchange carrier ("CLEC") authorized by the Board to provide local exchange services in New Jersey. See In the Matter of the Petition of Business Automation Technologies, Inc. d/b/a Data Network Solutions for Authority to Provide Telecommunications Services Throughout New Jersey, BPU Docket No. TE03020104 (July 9,

¹ Commissioner Upendra J. Chivukula did not participate.

2003). DNS entered into a negotiated interconnection agreement (“ICA”) with Verizon approved by the Board on February 11, 2004. See In the Matter of the Joint Application of Verizon New Jersey Inc. and Data Net Systems, LLC for Approval of an Interconnection Agreement Under Section 252 of the Telecommunications Act of 1996, BPU Docket No. TO03100837 (February 11, 2004). DNS also entered into a negotiated resale agreement with Verizon approved by the Board on April 24, 2003. See In the Matter of Application of Verizon New Jersey, Inc. for Approval of a Resale Agreement with Business Automation Technologies d/b/a Data Network Solutions Under Section 252 of the Telecommunications Act of 1996, BPU Docket No. TM02070422 (April 24, 2003). The terms and conditions of the ICA and resale arrangements allow DNS to offer basic local exchange services to New Jersey customers.

DNS contends there are several billing issues associated with non-ICA contracts and, by letter dated September 26, 2017, DNS filed a formal petition for hearing with the Board disputing billing charges and service with Verizon. With respect to the ICA, DNS claims no outstanding balance exists for ICA-related charges and DNS is owed a net credit of \$1,775 on the account. DNS states it consistently paid all undisputed amounts, but withheld payments on disputed amounts as allowable under the ICA. DNS further claims that Verizon placed an embargo on the account for all amounts Verizon claimed due and owing under the ICA to coerce DNS to pay disputed amounts in an effort to shut down DNS operations. DNS specifically requests an order requiring Verizon to lift the embargo placed upon DNS on July 24, 2017 pending final resolution.

On October 18, 2017, Verizon filed a letter with the Board requesting a 2-week extension of time to submit its answer by November 9, 2017. On October 23, 2017, DNS objected to the extension request and asserted that Verizon must lift the embargo as a matter of law consistent with N.J.A.C. 14:3-3A.2(e)(5), N.J.A.C. 14:3-3A.9, and N.J.A.C. 14:3-7.6 upon the filing of a formal petition.

On October 31, 2017, Verizon filed its answer with the Board. Verizon countered that DNS has an outstanding balance of \$32,991 as of August 25, 2017 in New Jersey for ICA-related access charges. Verizon claimed the ICA-related dispute involves a relatively small sum of \$32,991 as compared to approximately \$270,000 total past due under non-ICA contracts. Verizon requested dismissal of the complaint for failure to state a claim on which relief could be granted and lack of subject matter jurisdiction.

On November 1, 2017, DNS filed a letter with the Board arguing that Verizon’s response was filed out of time and that Verizon failed to lift the embargo. DNS again requested that Verizon be directed to lift the embargo due to substantial and continuing harms inflicted upon DNS and its customers.

On November 3, 2017, Verizon responded to the November 1, 2017 letter filed by DNS. Verizon claimed the embargo should not be lifted upon DNS’ incorrect reliance upon the Board rules, including the discontinuance of service for nonpayment of disputed charges rule at N.J.A.C. 14:3-3A.2(e)(5), the restoration of service rule at N.J.A.C. 14:3-3A.9, and the dispute resolution rule at N.J.A.C. 14:3-7.6. Verizon argued it need not accept new service order applications from a customer with substantial unpaid but disputed invoices on existing services. Verizon contends the vast majority of disputed charges involve interstate or forbearance services outside of the Board’s jurisdiction, therefore Verizon sought dismissal of the matter for lack of subject matter jurisdiction.

On November 9, 2017, DNS responded to the November 3, 2017 letter filed by Verizon. DNS stated the ICA embargo was instituted in large part due to its withholding of disputed charges under a separate unregulated contract and the termination of ICA service order access was to coerce DNS to pay disputed amounts under other contracts to shut down DNS operations. DNS acknowledged the other contract disputes fall outside of Board jurisdiction, but argued that the Board is the appropriate forum for resolution of the ICA-related disputes, including the continuing discontinuance of service provision. DNS argued that the embargo constitutes a discontinuance, presents a significant public safety threat, and must end immediately pending a final determination on the merits.

DISCUSSION

Pursuant to 47 U.S.C. §252(a)(1) of the Telecommunications Act of 1996 (the “Act”), an incumbent local exchange carrier may negotiate and enter into a binding interconnection agreement with a carrier requesting interconnection, service, or network elements without regard to the standards set forth in 47 U.S.C. §251(b) and (c). The agreement shall be submitted to the State commission for approval or rejection on certain grounds pursuant to 47 U.S.C. § 252(e). Thus, interconnection agreements require Board review for approval or rejection of the negotiated agreement. Further, while the Act is silent on procedure for post-formation disputes, the FCC explained that interpretation and enforcement of post-formation interconnection agreement disputes are within the states’ responsibility under § 252. Core Communs., Inc. v. Verizon Pa., Inc., 493 F.3d 333, 341 (3rd Cir., Jul. 18, 2007). State commissions interpret and enforce approved interconnection agreements to ensure local competition is implemented fairly. Ibid. at 335. See Southwestern Bell Tel. Co. v. Brooks Fiber Communs. of Okla., Inc., 235 F.3d 493 (10th Cir., Dec. 13, 2000)(stating State commissions are authorized to interpret the terms of a previously approved interconnection agreement pursuant to § 252 authority). Thus, post-formation ICA disputes are reviewable by the Board in the first instance. The Board’s jurisdiction pertains to issues related to the Board-approved ICA, the ICA terms of agreement, and the Board rules governing the intrastate provision of safe, adequate, and proper service to customers.

The ICA was approved by the Board on February 11, 2004 in BPU Docket No. TO03100827. Under the ICA, Sections 14.1 to 14.3, Dispute Resolution, the Board is empowered to mediate ICA disputes and can retain the matter or may transmit the case to the Office of Administrative Law.

The Board has reviewed the submissions of the parties. The ICA-related post-formation disputes involve challenges to both billing charges and the provision of service.

By its petition, DNS argues that Verizon unilaterally, and without notice, engaged in unlawful self-help by imposing an embargo on the account for all service orders beginning July 24, 2017 when the ICA obligates good faith negotiations. DNS further states that the embargo imposed covers all contracts between the parties, including contracts outside of the ICA. As a result of the embargo, DNS cannot submit any new orders or secure the provisioning of existing orders under the ICA. DNS argues this embargo presents a public safety risk and could disrupt normal governmental operations as new and existing service orders cannot be fulfilled as a result of the

embargo. DNS references the ICA, Section 18, requiring good faith performance, stating neither party can unreasonably withhold any action that is required under the agreement.

By its answer, Verizon argues DNS erroneously relies upon N.J.A.C. 14:3-3A.2(e)(5), 14:3-3A.9 and 14:3-7.6 to remove the embargo. Verizon refutes the claim that it has acted in violation of the ICA and the rules, contending that the regulations do not support the argument that a regulated company must accept new service orders from a customer with substantial unpaid but disputed invoices on existing service orders. Verizon argues it is not discontinuing existing service, therefore it cannot be in violation of Board rules.

The Board has previously determined post-formation disputes derived from an approved ICA. See In the Matter of the Petition of CAT Communications International, Inc. Requesting that Sprint Communications Co., L.P. be Required to Allow Dial-Around Calling and Alternatively for Relief From the Payment of Verizon's Tariff for Blocking Dial-Around Calls, BPU Docket No. TC01080526 (May 15, 2002)(granting emergent relief and determining that a utility may not disconnect service to its customers when a billing dispute has been formally or informally brought before the Board provided that non-disputed charges have been paid).

However, these filings reflect disagreement on the disputed amounts for services and the undisputed amounts for services covered under the ICA. The Board is cognizant that Verizon, aware that the disputed charges were not finalized, nonetheless initiated the embargo preventing DNS from provisioning any service orders under the ICA, resulting in DNS claims of harms to customers, thwarting local competition, and violating Board rules. N.J.A.C. 14:3-3A.2(e)(5) provides a utility shall not discontinue service because of nonpayment in cases where a charge is in dispute, provided the undisputed charges are paid and the customer has requested that the Board investigate the disputed charge, in accordance with N.J.A.C. 14:3-7.6(b). The Board views Verizon's argument, that its policy relates to a denial of new service applications and is not a discontinuance of existing service, as flawed. That distinction is misplaced as Verizon's customer, DNS, has not changed. Further, the Verizon refusal to accept new service applications from its existing customer, DNS, is effectively a denial of service to that customer, not the end user, and a discontinuance of service in violation of N.J.A.C. 14:3-3A.2(e)(5).

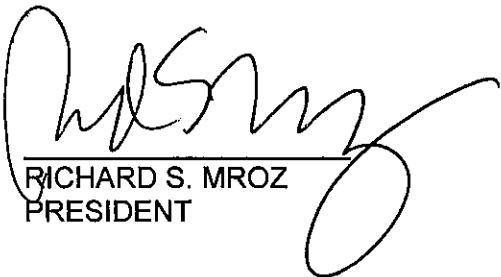
The Board recognizes the detrimental effect of the embargo on DNS's ability to serve customers. In the course of negotiations during an ongoing billing dispute, Verizon unilaterally placed an embargo on DNS accounts on July 24, 2017 without prior notification to the Board. The embargo resulted in the disconnection of service to the customer, DNS, which is inconsistent with Board rules. Accordingly, Verizon must lift the service hold embargo on the account and provide service consistent with the terms of the ICA. Therefore, based on the circumstances presented to the Board, the Board **FINDS** that the embargo is a discontinuance of service executed in a manner inconsistent with the Board rules at N.J.A.C. 14:3-7.6 *et seq.* Accordingly, the Board **HEREBY GRANTS** the request by DNS to lift the embargo placed upon it by Verizon and **ORDERS** Verizon to continue to provide service to DNS under the ICA until the matter is resolved by final determination.

The Board **FURTHER ORDERS** the transmittal of all ICA-related issues in dispute to the Office of Administrative Law for hearing and initial disposition as a contested case pursuant to N.J.S.A. 52:14B-1 *et seq.* and N.J.S.A. 52:14F-1 *et seq.*

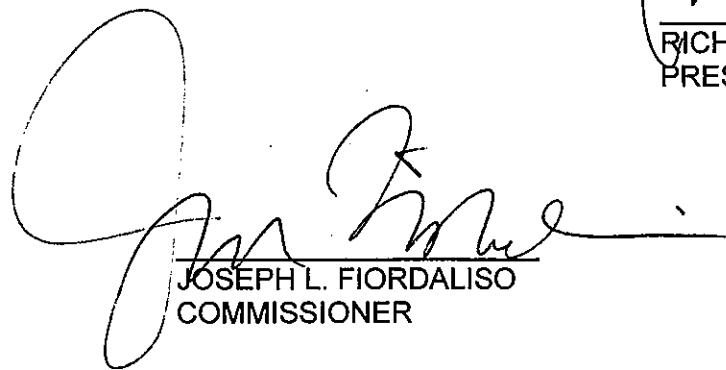
The effective date of this Order is December 29, 2017.

DATED: 12/19/17

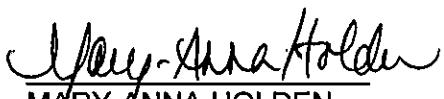
BOARD OF PUBLIC UTILITIES
BY:



RICHARD S. MROZ
PRESIDENT



JOSEPH L. FIORDALISO
COMMISSIONER

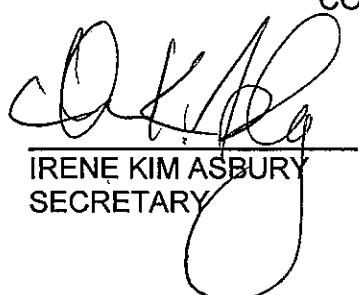


MARY-ANNA HOLDEN
COMMISSIONER



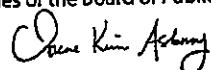
DIANNE SOLOMON
COMMISSIONER

ATTEST:



IRENE KIM ASBURY
SECRETARY

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



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

DOCKET NO. TC17091015

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