STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

IN THE MATTER OF THE ALLEGED FAILURE OF ALTICE, USA INC., TO COMPLY WITH CERTAIN PROVISIONS OF THE NEW JERSEY CABLE ACT, N.J.S.A. 48:5A-1, ET SEQ., AND THE NEW JERSEY ADMINISTRATIVE CODE, N.J.A.C. 14:18-1, ET SEQ.	BOARD OF PUBLIC UTILITIES OFFICE OF CABLE TELEVISION AND TELECOMMUNICATIONS Docket No.: CS18121288

RATE COUNSEL'S BRIEF IN OPPOSITION TO ALTICE'S MOTION FOR STAY OF THE BOARD'S NOVEMBER 13, 2019 CEASE AND DESIST ORDER

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PRELIMINARY STATEMENT

In October 2016, Altice U.S.A., Inc., ("Altice" and or the "Company")[1] stopped the proration of customer bills. Customers initiating or terminating service with Altice after this time were charged for a full month of service even when the monthly service to the customer had started after the beginning of the billing cycle or had stopped prior to the end of the billing cycle. After receiving numerous complaints from Altice customers regarding the Company's billing practice the New Jersey Board of Public Utilities (" Board") issued an Order To Show Cause ("OSC") against Altice seeking an answer as to why the Board should not find that Altice violated *N.J.A.C.* §14:18-3.8, (which requires proration of bills). Altice provided various arguments in support of its right to use a flat rate monthly billing method, including but not limited to a 2011 Board order that it alleges granted Cablevision a waiver of *N.J.A.C.* §14:18-3.8 and in the alternative Altice alleged that the regulation was preempted by federal law. Rate Counsel provided a reply to Altice's response to the Board's OSC on behalf of ratepayer customers in support of a finding that Altice's flat rate monthly billing practice was in violation the Board's regulation, that a waiver of the regulation had not been granted to Cablevision in the Board's 2011 order, that the regulation was not preempted under federal law and supporting Board action to issue all appropriate remedies available including customer refunds and penalties. On November 13, 2019, the Board issued a Cease and Desist Order against Altice determining that Altice was in violation of *N.J.A.C.* 14:18-8.1 *et. seq.* and ordered customer refunds, penalties and other administrative directives to be completed by Altice within 60 days

[1] Altice USA, Inc. ("Altice") is the parent of Cablevision Systems Corporation and Cablevision Entities (formerly known as "Cablevision"), see *In The Matter of the Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Entities for Approval to Transfer Control of Cablevision Cable Entities*, Docket No.:CM15111255, ("Merger Order" dated May 25, 2016).

from the effective date of the Board's Order. Thereafter, Altice filed with the Board a request for a stay pending an appeal simultaneously filed before the New Jersey Superior Court, Appellate Division, on November 26, 2019 on this matter.

Altice's request for a stay of the Board's November Order pending appeal is unsupported and fails to meet the criteria necessary for granting such extraordinary relief. In order to prevail on an application for a stay or injunction a party must show that (1) the legal right underlying the claim is well-settled law and there is a reasonable likelihood of ultimately prevailing on the merits: (2) there is a likelihood that immediate and irreparable injury will occur if relief is not granted; and (3) on balance, that the benefits of the relief granted would outweigh any harm such relief will cause other interested parties. *Crowe v. DeGioia*, 90 N.J. 126, 132-134 (1982). Altice has failed to meet the prerequisites to support granting a stay of the Board's November Order. Additionally, courts have highly disfavored allowing preliminary injunctions that alter the status quo, such as the stay requested herein by Altice. *Schrier v. Univ. of Colo.*, 427 F.3d at 1258 [*15] (quoting *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 977 (10th Cir. 2004)(en banc), aff'd on other grounds, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006))(internal quotation marks omitted).

Moreover, Altice has failed to demonstrate a reasonable likelihood of success on the merits. Altice provides the same legal theories and arguments submitted in the matter below. However, contrary to their position, it is settled law that "a mere recitation of the underlying theories is insufficient to meet the required burden" to warrant injunctive relief. *Zanin v. Iacono*, 198 N.J. Super. 490, 498. Likewise, Altice has failed to show irreparable harm. Altice states that complying with the Board's November Order may potentially cost approximately $5 million dollars or more which costs it may not be able to recover should it prevail on appeal. However, it

is black-letter law that a claim for money damages is simply not an appropriate basis upon which to grant the extraordinary remedies of equity, especially the granting of a preliminary injunction. *Judice's Sunshine Pontiac, Inc. v. General Motors Corp.*, 418 F. Supp. 1212, 1219 (D.N.J. 1976). Altice also argues that requiring them to comply with the Board's regulation may potentially negatively impact the Company's goodwill and thus public interest supports a stay. This conclusory statement is completely unsupported by any evidence. Moreover, contrary to Altice's position, public interest weighs strongly against granting the relief requested in this matter. Altice has knowingly violated Board regulations since 2016, and now seeks extraordinary relief to allow it to continue to do so. Altice should not benefit from its continued wrongful actions at the expense of its New Jersey customers.

For these reasons as further discussed below, the Board should deny Altice's application for a stay pending resolution of this matter on appeal.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Rate Counsel adopts and includes by inference herein the background and procedural history as provided by the New Jersey Board of Public Utilities ("Board") *In The Matter of the Alleged Failure of Altice USA, Inc. to Comply with Certain Provisions of the New Jersey Cable Television Act, N.J.S.A. 48:5A-1, et seq., and the New Jersey Administrative Code, N.J.A.C. 14:18-1.1 et seq.*, Docket No.: CS18121288, ("Cease and Desist Order" dated November 13, 2019), ("Altice" and or "Company").

Altice USA, Inc. ("Altice") is the parent of Cablevision Systems Corporation and Cablevision Entities (formerly known as "Cablevision"), see *In The Matter of the Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Entities for Approval to Transfer Control of Cablevision Cable Entities*, Docket No.:CM15111255, ("Merger Order" dated May 25, 2016). On December 18, 2018, in response to numerous customer complaints received by the Board, the Board issued an Order to Show Cause ("OSC") seeking information from Altice USA, Inc. ("Altice" and or the "Company") concerning the allegations that the company had stopped prorating customer bills as required under *N.J.A.C.* § 14:18-8.3. Altice, in its' Answer to the Board filed on January 31, 2019, confirmed that it had ceased the practice of prorating customer bills in October of 2016, asserting it did so pursuant to a waiver of said regulation granted to Cablevision by the Board *In the Matter of the Petition of Cablevision Systems Corporation for Relief Pursuant to N.J.A.C.* §14:18-16.7, Docket No. CO11050279, Order dated September 21, 2011 ("Rule Relief Order"). Rate Counsel who had been a party in both matters below (the 2011rule relief petition and the 2016 merger application) filed with the Board on March 6, 2019, its Response to Altice's Answer to the Board's OSC requesting relief on behalf of New Jersey ratepayers.

On November 13, 2019, finding that the Company was in violation of *N.J.A.C.* 14:18-3.8, the Board issued a Cease and Desist Order against Altice ordering the Company resume prorated billing, issues refunds within 60 days from the effective date of the Order ("November 23, 2019"), remit a one-time non-recoverable contribution totaling $10,000 towards the Altice Advantage Internet program to provide low-cost internet services to New Jersey customers eligible for or who participate in the National School Lunch Program (NSLP); or eligible for or receive Supplemental Security Income (SSI) and are 65 years of age or older; or a veteran and receives State or federal public assistance. In addition, the Company was to conduct an audit from of its customer billing records and report to the Board the customer names and account numbers of customers improperly billed due to the Company's failure to prorate within 30 days from the date of the Board's order and within 30 days after Board review of the Company's audit report, refund the overage and provide proof to the Board of compliance. In addition, the Company was required to certify and provide proof within 30 days from the effective date of the Order the one-time non-recoverable contribution of $10,000 towards the Altice Advantage program.

On November 26, 2019, Altice filed a Notice of Appeal with the New Jersey Superior Court, Appellate Division appealing the Board's Cease and Desist Order dated November 13, 2019, and filed a Notice of Motion with the Board seeking a stay pending resolution of its appeal.

ARGUMENT

The Board should not stay its November Order pending appeal of this matter. The grant of a stay is discretionary absent an abuse of discretion, which is clearly not the case herein. Discretion is abused only when "injustice would be perpetrated on the one seeking the stay, and no hardship, prejudice, or inconvenience would result to the one against whom it is sought." *Avila v. Retailers & Mfrs. Distribution*, 355 N.J. Super. 350, 354 (App. Div. 2002) (affirming the denial of the application for stay pending appeal below). In this instance a grant of the application would be against the public interest as it would permit Altice to continue evading the Board's lawful regulation and permit Altice to continue harming its customers, which lay at the heart of this matter.

In addition, Altice has failed to meet the criteria necessary to warrant injunctive relief in this matter. The standard governing motions for stays pending appeal is the same as the standard governing injunctive relief. *Garden State v. Dow,* 216 N.J. 314, 320 (2013). A stay of the Board's November Order is not warranted because Altice has failed to demonstrate 1) that absent a preliminary injunction, it will suffer irreparable harm; 2) that the claim is based upon a settled legal right, and that it has a reasonable probability of success on the merits; 3) that the material facts are not disputed; and 4) that it will suffer the greater hardship if injunctive relief is denied, thus equity would favor injunction. *Crowe supra*, 132-135 and 139. Altice has the burden to prove each of the *Crowe* factors by clear and convincing evidence. *Garden, supra.* 320. As discussed below Altice has failed to meet the requisite prongs under *Crowe* and thus the Board should deny its application for injunctive relief pending the outcome of its appeal.

A. Altice Has Not Established Irreparable Harm

The law is clear that injuries, however substantial, in terms of money, time and energy expended absent a stay are insufficient to establish irreparable harm. *Zoning Bd. of Adjustment of Sparta Twp. v. Service Elec. Cable Television Co. of N.J., Inc.* 198 N.J. Super. 370, 381-82 (App. Div. 1985). Injunctive relief should be entered only when the threatened harm is "substantial, immediate, and irreparable." *Subcarrier Communications v. Day*, 299 *N.J. Super.* 634, 638 (App. Div. 1997) (irreparable harm critical element of injunctive relief). In particular, courts have disfavored allowing preliminary injunctions that 1) alter the status quo; 2) are mandatory preliminary injunctions and 3) afford the movant all the relief that it could recover at the conclusion of a full trial. *Schrier supra, at* 1258. As a result, Altice's claims of irreparable harm herein do not meet the requirements under *Crowe*.

Altice asserts that requiring it to resume prorated billing as required under *N.J.A.C.* §14:18-8.3 would impose substantial costs totaling approximately $5 million inclusive of administrative costs which it would not be able to recoup if it were to prevail in its challenge to the Board's Order. *Altice Brief, pp. 5-6.* Altice discusses a litany of itemized cost, such as modifying the coding of its billing system; revising customer-facing scripts; retraining over 3500 in-house and contract customer service representatives on New Jersey billing; and re-noticing New Jersey customers of the billing change. Altice also argues that it would not be able to recover refunded payments made to customers terminating service pending a determination on their appeal. *Altice Brief, p. 8.* Similarly, Altice argues that it would incur additional costs should it prevail on appeal to change back to the previous monthly flat rate method of billing. *Altice Brief, pp. 5-6.* The overwhelming argument made by Altice in support of a stay and injunction of the Board's November Order is monetary damages claimed to be unrecoverable relying on the

holding in *Chamber of Commerce of the U.S. v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) (noting that irreparable injury occurs when a party incurs "monetary damages that cannot later be recovered"); *Meza v. Bd. Of Educ. Of the Portales Mun. Sch.*, No. CIV 10-0963 JB/WPL, 2011 WL 1128876, at *18 (D.N.M. Feb. 25, 2011) (party faced irreparable harm because it "would likely be unable to recoup costs associated with implementing the Order if it prevails in this case'). Reliance on these cases is misplaced. In *Chamber* the court found that the state legislation "Section 7(B)" mandated a particular employment verification method that Congress expressly left voluntary. *Chambers, supra* at 770. Similarly, in *Meza* the court in reviewing the requested stay of educational services offered to a disabled student under a State program found strong "public interest considerations" weighed in favor of an injunction pending appeal. The facts and public interest concerns in these cases upon which temporary injunctions were granted are not applicable to the facts herein which merely concern administrative inconvenience and the potential for money damages Altice stands to incur. It is well established that a claim for money damages is simply not an appropriate basis to ask a court to employ the extraordinary remedies of equity, especially a preliminary injunction. *Judice's Sunshine Pontiac, Inc. v. General Motors Corp.*, 418 F. Supp. 1212, 1219 (D.N.J. 1976).

Additionally, Altice argues that it could suffer reputational loss and lose customer goodwill if it were forced to suspend its whole-month billing policy and make corresponding changes to its terms of service, only to change the policy back several months later if it prevails on appeal, citing to *ADP, LLC v. Rafferty*, 923 *F.3d* 113, 123 (3d Cir. 2019) and *U.S. Foodservice, Inc. v. Raad,* No. BER-C-82-06, 2006 WL 1029653, at *7 (*N.J. Super. Ct. Ch. Div.* Apr. 12, 2006). Altice Brief, p. 7. However, these cases are inapplicable herein. In *ADP,* a case which involved restrictive covenants, the court remanded the matter for further fact-finding

holding that the "district court's denial of a preliminary injunction could not stand because it was based on "an erroneous view of the applicable law," *Id.,* 120, citing *Am. Tel. & Tel. Co.*, 42 *F.3d* at 1427 (citation omitted). Such is not the case here. As discussed by Rate Counsel below, 47 *C.F.R.* §76.309 permits customer service standards that meet or exceed the federal regulations particularly if the additional obligations are for the protection of consumers. *Rate Counsel Comments pp. 10-11.* Likewise, reliance on *Foodservice* is overstated, as there in balancing the equities, the Court noted that an injunction should not issue when the benefit to the complainant is slight compared to the harm to the defendant.

Rate Counsel does not dispute that courts recognize business goodwill as legitimate and worthy of protection. However, it is highly improbable that Altice's goodwill will be detrimentally affected by complying with the Board's regulation and return to its prior practice of prorating customer billing in New Jersey. To the contrary, the return to proration billing will not only make it compliant with the Board's regulations but may engender increased customer satisfaction and customer loyalty, as it was the receipt of numerous angry customer complaints about Altice's failure to prorate that alerted the Board that Altice was no longer complying with *N.J.A.C.* §14:18-8.3. Additionally, in balancing the equities, Altice arguably will suffer less harm than its former and prospective customers by compliance with *N.J.A.C.* §14:18-8.3. Altice, is not rate regulated and operates in a competitive market, as such it may recoup operating costs through product and service pricing. It is former and future customers who continue to suffer financial loss through Altice's continued use of "*negative option billing*" in violation of *C.F.R* §76.981(a) and non-compliance with *N.J.A.C.* §14:18-8.3. *Rate Counsel Comments, p.5, In The Matter of the Alleged Failure of Altice USA, Inc. to Comply with Certain Provisions of the New Jersey Cable Television Act, N.J.S.A. 48:5A-1, et seq., and the New Jersey Administrative Code, N.J.A.C. 14:18-1.1 et seq.*, Docket No.: CS18121288, (dated March 6, 2019).

Altice also argues that "if Altice were to begin prorating under the Board's order, but eventually a court determined that Altice can have a whole month billing policy then Altice would be left with no way to recoup the prorated refunds" relying on *Transcon. Gas Pipe Line Co., LLC v. Permanent Easement for 2.59 Acres*, 709 F. App'x 109, 113 (3d Cir. 2017) (noting that "a financial loss may be irreparable if the expenditures cannot be recouped"); *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Twp.*, 768 F.3d *300,* 315 (3d Cir. 2014) (concluding that business faced irreparable harm because it faced loss of "the right to seek reimbursement from its customers"). *Altice Brief, p. 8.* However, the findings in *Transcon* and *Columbia* are likewise not applicable to the facts herein. For example, although noting financial consequences could arguably ensue, the courts in both *Transcon* and *Columbia* upheld preliminary injunctions in eminent domain matters predominantly based on the "public need" to have access to the natural gas carried by the pipeline sooner rather than later. *Transcon, supra* 113. In *Columbia* the court approved the injunction to replace a severely crumbling pipeline that risked "public safety" finding that "public interest" weighed more heavily in favor of the stay. *Columbia* at 315-316. Likewise, the facts of *Sherfel v. Gassman*, 899 F. Supp. 2d 676, 710 (S.D. Ohio 2012), aff'd, 768 F.3d 561 (6th Cir. 2014), are inapposite and inapplicable herein. *Sherfel*, involved the passing of a Wisconsin law that dictated distributions under employee benefits plans that directly conflicted with federal ERISA plan distribution directives the court (recognizing that pre-emption is required where compliance with both federal and state regulations is a physical impossibility) held that "the public interest would best be served by granting the injunction" ... because "the public does have an interest in furthering the purposes of ERISA, which include providing a uniform regulatory regime over employee benefit plans." *Id.* at 710-711. Here, Altice has willfully failed to comply with a state regulation since 2016,

which remains valid unless determined otherwise. Altice created the alleged financial harm they find themselves in, if any (as they can recoup these costs through product and service fee rates and tax opportunities) by their wrongful actions and should not be permitted to keep evading compliance with the Board's regulation or continue defying a Board order requiring refunds to injured customers. The "public interest" and "public good" herein rest with Altice customers, they are the party that need to be made whole and protected.

In sum, Altice bears the burden of showing irreparable harm. Based on the facts and the relevant applicable law, Altice's request for an injunction based on the alleged possible loss of goodwill is insufficient to support a stay of the Board's November Order. Likewise, monetary damages claimed by Altice herein, have also been held to be an insufficient basis to warrant injunctive relief. *Sparta Twp., supra,* 381- 382. Moreover, approval of a stay would permit Altice to benefit from its continued defiance of lawful New Jersey regulations at the expense of its customers. Clearly continued noncompliance by Altice is against the public interest. Altice has failed to show irreparable harm as required under the *Crowe* factors and for that reason its' application for a stay should not be granted.

B. Altice Has Not Established A Likelihood of Success on the Merits

Altice has failed to demonstrate that its claim is based upon a settled legal right, and that it has a reasonable likelihood of success on the merits. Altice restates the positions and caselaw previously asserted in the matter below. Altice continues to dispute the facts and reargues that 1) the Board's 2011 Order had granted Altice a waiver *N.J.A.C.* §14:18-8.3; 2) that the Board can only impose customer refunds under limited circumstances not applicable herein; 3) that the Board cannot impose the penalties assessed; 4) that Altice had not engaged in negative option billing; and 5) that customer service protections afforded under *N.J.A.C.* §14:18-8.3 are a

form of rate regulation preempted by federal law. *Altice Brief*, pp.8-12. Rate Counsel addressed these same arguments in the matter below and incorporates its arguments by reference herein, which were attached to Altice's Certification of Devi M. Rao, as *Exhibit 5.* Contrary to Altice's arguments the Board's 2011 Order was based on the sample bill attached to the company's request for relaxation of certain billing methods, which sample bill confirmed the company would continue its long history and practice of prorating customer bills consistent with *N.J.A.C.* §14:18-8.3. *Rate Counsel Comments,* pp. 6-7, 9-11. Likewise, the Board has the regulatory authority to mandate customer refunds pursuant to 47 *C.F.R.* §§76.309 and 76.942 and such regulation has not been preempted by federal law; *Rate Counsel Comments*, pp. 14-15. Moreover, the Board has the authority to impose penalties pursuant to *N.J.S.A.* §48:5A-51 and the decision to impose the maximum penalty is permissible based on the repeat offenses which began in 2016.

Altice's reliance on *In Re Suspension Matter of Wolfe*, 160 N.J. Super. 114, 119 (App. Div. 1978) is misplaced. *In Re Wolfe* the court found "the Board exceeded its authority because the statute did not include any broad inherent power to impose penalties. Likewise, in *225 Union St., v. Dep't of Cmty. Affairs,* No. A-5488-04T1, 2007 WL 1542035, at *7 (N.J. Super. Ct. App. Div. May 30, 2007) the court vacated and remanded the penalty order because the agency had not provided specific factual findings to determine if the evidence supported the penalty order. Here, it is clear that the Board may impose penalties as permitted under *N.J.S.A.* §48:5A-51(b) and that "service outage" as defined under *N.J.A.C.* § 14:18-3.5(a) is one of various triggering events where the Board may order customer refunds. Additionally, federal regulations also recognize other customer service obligations such as 47 C.F.R. §76.1619, requiring itemization of billing and other obligations enumerated under 47 *C.F.R.* §76.309, which include mandated

standards requiring refunds and credits upon termination of service, which the Board has the authority to enforce.[2] 47 *C.F.R.* 76.942 specifically recognizes the Board's authority to order a cable operator to refund subscribers for overcharges, such as here where the Company has charged customers for a service they did not receive. Furthermore, the Board may impose penalties pursuant to *N.J.S.A.* §48:5A-51, and *N.J.A.C.* §14:18-16.8(f), allowing the Board to assess violations as far back as three years from the date of the Board's written notice. *Rate Counsel Comments*, pp. 13-16. By charging customers for service they will never receive Altice is engaging at best in deceptive business practices and at worst in "*negative option billing*" in violation of 47 *C.F.R.* §76.981 and 47 U.S.C. §543(f) which prohibits a cable operator from charging a subscriber for any service or equipment that the subscriber has not affirmatively requested. The Act and Rules ensure that customers will not have to pay for cable services that the customer did not request. *Rate Counsel Comments*, pp. 5, 15-16. Additionally, the federal presumption of effective competition did not eviscerate or relieve service providers from long standing consumer protections afforded under both federal and state laws. Providers must still comply with customer service rules under 47 C.F.R. 76.309 and the requirements under *N.J.A.C.* §14:18-8.3 fit squarely within and under that paradigm. *Rate Counsel Comments*, pp. 10-11.

It is well settled law that "a mere recitation of the underlying theories is insufficient to meet the required burden" to warrant injunctive relief. *Zanin, supra,* 498, The court in *Zanin* found plaintiffs' recitation of the underlying theories for success on the merits challenging the validity of a municipal zoning ordinance, previously recited in the matter below "insufficient to meet the required burden." *Id.* Likewise, Altice's reliance on *Windstream Neb., Inc. v. Neb. Public Serv. Comm'n*, Case No. CI 10-2399 (Neb. Dist. Ct. 2011) in support of the likelihood of

[2] 47 C.F.R. § 76.309 (c)(3)(i) and (ii).

success on the merits is misplaced. While the *Windstream* court found that the Nebraska Commission's newly passed ordinance requiring proration of billing would violate a specific Nebraska statute, also found that *Windstream* had a long-standing practice of not prorating customer bills using a flat monthly fee rate and found no harm to the public as Windstream provided interim service for new customers subscribing for service mid-month at no charge until the start of the next monthly billing cycle. *Windstream supra*, at p. 10. These differences make *Windstream* inapplicable to the facts herein. Here, prior to 2016, Altice had for several decades prorated customer billing consistent with the regulations. Moreover, the billing practices of Altice are not the same as in *Windstream* as Altice charges customers a full-monthly rate regardless of when service is initiated or terminated. *Rate Counsel comments, pp. 10-11.* Moreover, the existence of effective competition only limits the Board's authority to review rates. Federal and state law recognizes the Board's legitimate interest and authority over service quality and customer service issues. *N.J.A.C.* §14:18-8.3 is not akin to rate regulation and thus not preempted under 47 *U.S.C.* §543(a)(2) or *N.J.S.A.* §48:5A-11(f). *Rate Counsel Comments, Id.*

Likewise, Altice's reliance in *Storer Cable Communications v. City of Montgomery,* 806 F. Supp. 1518, as a basis for preemption of *N.J.A.C.* §14:18-8.3 is misplaced. As noted by the court in *Storer,*

> There are three circumstances under which a state law will be regarded as having been preempted by federal law. The first is when Congress itself has spoken by providing express preemption language. Second, when a statute contains no express preemptive language but the relevant scheme of federal regulation is so comprehensive as to make reasonable the inference that Congress left no room for the states to supplement it, the court should deem that Congress intended to preempt the whole field of state law by implication. Third and finally, conflict preemption occurs when either compliance with both a federal and state regulation is impossible or the state law in question stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. In such circumstances, the supremacy clause demands that it is the state law which must give way. *Id.*, at 1531-1532.

The facts herein do not support preemption on any of the above three circumstances discussed in *Storer*. Additionally, the court in *Storer* further noted "The Supreme Court has cautioned, that striking down state laws on preemption grounds is generally disfavored" ... "Consideration of issues starts 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." *Storer, supra* at 1531. Therefore, courts should proceed on "the conviction that the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted." *Storer, id.*

The purpose of *N.J.A.C.* §14:18-8.3 is the protection of customers, as it ensures service quality and provides customers with service protections, both the intent and language are clear and unambiguous, thus the text should be applied as written. *See In re Election Law Enforcement Commission Advisory Opinion* No 01-2008, 201 N.J. 254, 262-263 (2010) and *Lawrence v. City of Philadelphia,* 527 F. 3d 299, 316-317 (3d Cir. 2008). The ambiguity claimed by Altice to exist in the language of *N.J.A.C.* § 14:18-8.3 is not there, therefore the regulation can only be preempted by federal law under a clear and unambiguous demonstration of Congressional intent. *Storer, supra,* at 1531-32. Altice also argues that the Board's interpretation of *N.J.A.C.* §14:18-8.3 grants nothing, rendering the regulation meaningless and therefore such interpretation should be avoided. *Altice Brief*, pp. 9-10. However, the rule is clear that it requires proration of bills, but gives Altice the choice to bill monthly, bi-monthly, quarterly, semi-annually or annually and interpreted the sample bill provided in the 2011 waiver application which noted continued monthly billing but failed to indicate the company would stop proration billing. The fault lies within the company's initial 2011 filing not in the Board's interpretation of the regulation. For the reasons set forth above, Altice has failed to demonstrate a

reasonable likelihood of success on the merits as required under the second prong of *Crowe* in support of its application for a stay of the Board's November Order.

C. Balancing the Harms and the Public Interest Favors a Denial of a Stay

Contrary to Altice's position, the public interest weighs strongly against granting the relief requested in this matter. A balancing of the equities demonstrates that public interests will be best served by denying the stay and requiring that Altice comply with the Board's November Order.

Altice argues that the regulation is preempted by federal law and therefore the equities align with approval of a stay because the "enforcement of an unconstitutional law is always contrary to the public interest." *Poffv. Caro*, 228 N.J. Super. 370, 375 (Law Div. 1987). However, the Court also found that "mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo." *Poffy Caro,* 374-375. Altice has merely raised an allegation and has not presented sufficient evidence to show that *N.J.A.C.* §14:18-8.3 conflicts with or has been preempted by federal law.

More importantly, as stated by the court in *Poffy Caro*, "a court must also weigh the relative hardship to the parties resulting from the grant or denial of preliminary injunctive relief." *Poffy Caro, Id.*, 374-375. In the within matter, such hardship would surely continue to fall on Altice customers initiating or terminating service who will be charged for services they will not receive. For customers initiating service the grant of a stay will prolong receipt of a refund. However, for customers terminating service, these customers may lose the ability to ever receive their refund. Public interest, principles of equity, and fairness support a denial of a stay in this matter. Altice itself acknowledges in its motion papers that it is a Fortune 500 company with

more than enough cash on hand to pay the refunds. Altice USA's Quarterly Report, (Form 10-Q) (Sept. 30, 2019), http://d18m0p25nwréd.cloudfront.net/CIK-0001702780/3a6afd30-84c3-4cada783-0d519a761£35.pdf; (listing approximately $175 million in cash and cash equivalents). *Altice Brief*, pp. 14-15.

In addition, as previously stated Altice will always have the opportunity to recoup any expenses they incur through adjustments in product and service rates, as well as through tax adjustments regardless of whether Altice is or is not successful on appeal. Clearly, Altice is in a better position than its customers to absorb any alleged financial impact. Based on these facts, Altice has failed to meet this prong of the *Crowe* prerequisites in support of a stay. For these reasons, based on the principles of equity and fairness, public interest warrants the denial of Altice's request for a stay.

D. The Supersedeas Bond Requirement

While New Jersey Rule of Court 2:9-6(a)(2), requires the filing of a supersedeas bond in certain such instances, Rate Counsel acknowledges that given the facts herein, and although corporations are susceptible to the suffer the same quagmires as individuals, (including the filing of bankruptcy and other legal actions), there is no doubt that Altice has the financial capability to meet the monetary obligations under the Board's Order should it not prevail on appeal. However, it remains a fact that Altice has brazenly disregarded *N.J.A.C.* §14:18-8.3 since 2016. The rights and interest of Altice customers is what must remain at the core of the Board's considerations herein. Therefore, any Board action herein should be taken first and foremost to protect the public and with Altice customers in mind.

CONCLUSION

It has been observed that "facts are stubborn things; and whatever may be our wishes, our inclinations or the dictates of our passions they cannot alter the state of facts and evidence." John Adams.[3] Such are the facts and evidence in the case herein. Altice has failed to meet the prerequisite showing under *Crowe* upon which a stay may be granted. For the reasons heretofore addressed in this filing by Rate Counsel, the Board should deny Altice's request for a stay pending resolution of its appeal in this matter and should order immediate compliance with the Board's November Order. Public interest and trust require nothing less.

Respectfully Submitted,

STATE OF NEW JERSEY
DIVISION OF RATE COUNSEL

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[3] The Boston Massacre Historical Society, Speech for the Defense, John Adams defense of British Soldiers in the Boston Massacre trial at: http://www.bostonmassacre.net/trial/acct-adams3.htm; *See also* the U.S. Library of Congress, The Trial of the British Soldiers of the 29th Regiment of Foot (1807).