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March 06, 2019

Ms. Aida Camacho, Secretary
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor
Suite 314
P.O. Box 350
Trenton, NJ 08625-0350

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 et seq. and The New Jersey Administrative Code, N.J.A.C. 14:18-1.1 et seq.

BPU Docket No.: CS18121288

Dear Ms. Camacho:

On behalf of the New Jersey Division of Rate Counsel, enclosed please find the original and ten copies of the comments to Altice USA's answer to the Board's Order to Show Cause in the above captioned matter.

Sincerely,

Maria Novas-Ruiz, Esq.
NJ DIVISION OF RATE COUNSEL

Service List

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 TELEVISION ACT, NJSA 48:5A-1 ET SEQ., AND THE NEW JERSEY ADMINISTRATIVE CODE, NJAC 14:18-1.1 ET SEQ.	)	OFFICE OF CABLE TELEVISION AND TELECOMMUNICATIONS **ORDER TO SHOW CAUSE** **BPU DOCKET No.: CS18121288**

COMMENTS OF THE STATE OF NEW JERSEY, DIVISION OF RATE COUNSEL

The State of New Jersey Division of Rate Counsel ("Rate Counsel") as a duly authorized statutory party in all utility matters representing and protecting the public interest of ratepayers hereby respectfully provides its comments for the New Jersey Board of Public Utilities' ("Board") consideration herein.[1]

INTRODUCTION

The Order to Show Cause was initiated by the Board *sua sponte* pursuant to *N.J.S.A.* §48:5A-9 on December 18, 2018, in response to over 100 customer complaints received by the Board between 2016 and the present in connection with Altice USA, Inc.'s ("Altice" and or the "Company") alleged practice of no longer prorating customer bills upon termination of service as required pursuant to the Board's regulations. *N.J.A.C.* §14:18-3.8.[2] In its reply to the Board, Altice confirms that after providing notice to customers, Altice ceased the practice of prorating

[1] *N.J.S.A.* §52:27EE-48. Pub. L.2005, c.155, s.48; amended 2010, c.34, s.33; NJ Rev. Stat. §52:27EE-48 (2013).
[2] Order to Show Cause, at p. 1.

customer bills upon termination of service in October of 2016, but asserts it did so pursuant to a waiver of said regulation granted to the Company 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 was a party to the 2011 matter which resulted in the Board's Rule Relief Order which sits at the heart of the Board's Order to Show Cause herein. Although the Board granted the Company's waiver request, the waiver was based upon and limited by the sample bills provided by the Company along with its 2011 petition for relief. The sample bills provided by the Company at the time did not indicate any substantive changes to customer billing and confirmed the continued practice of prorating customer bills upon termination of service.[3] The Company's actions which began on or after October of 2016,[4] are therefore *ultra vires* and unauthorized in violation of the Board's regulations and Rule Relief Order.

For the reasons discussed in more detail further below, Rate Counsel respectfully recommends that the Board require Altice to 1) immediately cease and desist the non-proration of customer bills upon termination of service; 2) provide the Board and Rate Counsel with a plan detailing how customer refunds will be processed and issued; 3) provide proof of customer refunds to the Board and Rate Counsel; and 4) provide annual reports during a three year period demonstrating prorated customer accounts where service was discontinued. Rate Counsel also supports any other remedies, including penalties, that the Board may deem warranted and appropriate under the circumstances.[5]

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[3] Rule Relief Order, pp.6-7.
[4] Altice Reply to the Order to Show Cause, p. 5.
[5] The Board has the **Error! Main Document Only.**regulatory authority to provide credit/rebate refunds as may be warranted pursuant to *N.J.S.A.* §48:5A-11a and *N.J.A.C.* §14:18-3.5 and impose penalties pursuant to *N.J.S.A.* §48:5A-51.

ARGUMENT

I. The Rule Relief Order Did Not Waive the Regulatory Requirement to Prorate Customer Bills upon Initiation and Discontinuance of Service

The Board's Rule Relief Order did not remove the Company's continuing regulatory obligation under *N.J.A.C.* §14:18-3.8 to prorate bills upon initiation and discontinuance of a customer's service. In fulfilling its statutory mission, the Board strives to strike a balance between encouraging industry by providing, when appropriate, regulatory flexibility to facilitate innovation and ensuring that services remain adequate and safe without harming consumers or the public interest.[6] The Board's Rule Relief Order achieved this balance by limiting the waiver under *N.J.A.C.* §14:18-3.8, based on the sample bills filed by the Company in connection with its 2011 petition for relief. As stated by the Board in its Order to Show Cause and noted in the Rule Relief Order, the sample bills provided by the Company indicated the Company would continue to provide prorated billing.[7] Therefore, the relief granted under the Board's Rule Relief Order did not contemplate that the Company would discontinue prorating customer bills upon discontinuance of service.

Any other interpretation of the relief provided by the Board in its Rule Relief Order would be contrary to the Board's overarching responsibility to protect customers/ratepayers from policies and practices that run counter to the public interest. It is inherently unfair to allow a company not to prorate customer bills upon discontinuance of service, thereby charging customers for service not provided. The Board's intent to ensure that companies do not engage in this type of behavior is clear under *N.J.A.C.* §14:18-3.8(a), which specifically requires that companies prorate billing upon *both* initiation of service and discontinuance of service. The requirement to prorate billing is further expanded under *N.J.A.C.* §14:18-3.8 (c) and (d) of same.

[6] *N.J.S.A.* §48:2-21.16(a)(4) and *N.J.S.A.* §48:2-21.16(b)(1), (3).
[7] Order to Show Cause, at pp. 6-7 and Rule Relief Order at p. 6.

The Company argues that "if the section of the regulation requiring proration still applied, the flexibility the Board stated it intended to provide would be illusory."[8] *N.J.A.C.* §14:18-3.8(a) also covers various billing options, there is no reason to believe that a waiver relating to one requirement of the regulation would automatically apply to all subjects listed in the regulation. This is particularly true since the Rule Relief Order clearly states:

> "... its sample bill demonstrates that the company is billing in a proper manner and shows how Cablevision will prorate its bills pursuant to the requirements of this section."[9]

The Board's Rule Relief Order was based on the sample bills provided by the Company which did not indicate that the Company would cease to prorate billing upon discontinuance of service. Therefore, the Board did not intend to waive that requirement. The Company further argues that although the sample bills provided demonstrated the bill format that Cablevision intended to use if waiver was granted, it did not bar their right to modify billing procedures in the future under the waiver.[10] The Company's argument cannot be sustained. It is evident that the Board relied on the sample bills in deciding how much billing flexibility it would afford the Company. If the Company wanted additional flexibility it should have provided notice to the Board of its intent to change its billing process and provided a new sample bill for the Board's review and consideration. The Board's order notes that the Company did not raise any contemplated changes during the Board's review of the Company's merger matter which had concluded scarcely six months prior to the Company's change in billing process.

Rate Counsel stresses that the requirements under *N.J.A.C.* §14:18-3.8, particularly the requirement to prorate initial and final bills are meant to protect against abuse of captive departing customers. Customers end service subscribership for a multitude of reasons including

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[8] Altice Reply, p. 2.
[9] Rule Relief Order, p. 7.
[10] Altice Reply, p. 10.

change in geographic location, loss of dwellings post storms, economic challenges, as well as the exercise of consumer choice in light of market competition. It is inherently wrong and contrary to public policy to charge customers for service they have not and will never receive. The Company further argues that although the sample bills demonstrated the bill format that Cablevision intended to use if a waiver was granted, they did not bar their right to modify billing procedures in the future under the waiver.[11]

The Company's *ultra vires* practice is not only in violation of the Board's regulations and Rule Relief Order, it is also deceptive. It is akin to "negative option billing" practices prohibited under Section 623(f) of the *Communications Act of 1934* as amended, and contrary to Section 76.981(a) of the Federal Communications Commission's rules ("Rule") under *the Cable Television Consumer Protection and Competition Act of 1992.*[12] The Act and Rule ensure that customers would not have to pay for cable services that the customer did not request. It is even more offensive here where the service provider discontinues service at the customer's request but then continues to bill for services that will not be provided.

The Company's October 2016 change in billing policy is especially egregious since pre-2016 customers who discontinued service after October 2016 detrimentally relied on the terms of their original service contract with the Company, which provided that billing would be prorated upon initiation and discontinuation of services. The Company's continued unauthorized billing practice serves to penalize departing customers in violation of *N.J.A.C.* §14:18-3.8(a), (c) and

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[11] Altice Reply, p. 10.

[12] FCC Enforcement Bureau Order, paras. 3-4, *In the Matter of Comcast Corporation*, File No. EB-IHD-15-00018, Acct. No.: 201632080013; FRN: 0015401581; DA 16-1127, Order (October 11, 2016), citing at footnotes 5, 6, 7 and 8 to: 47 USC § 543 (f); *Petition for a Declaratory Ruling Regarding Negative Option Billing Restrictions of Section 623(f) of the Communications Act and the FCC's Rules and Policies*, Declaratory Ruling, 26 FCC Rcd. 2229, 2230, para. 4 (MB 2011); *See also* Third Order on Recons., 9 FCC Rcd at 4361-62, para. 128 & n. 83; 138 Cong. Rec. S14248 (daily ed. Sept. 21, 1992) (statement of Sen. Gorton); 138 Cong. Rec. S567-S568 (daily ed. Jan. 29, 1992)(statement of Sen. Gordon). *See also, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Sixth Order on Reconsideration, 10 FCC Rcd 1226, 1296, Appendix B, para. 4 (1994) (Sixth Order on Recons.). https://docs.fcc.gov/public/attachments/DA-16-1127A1.pdf

(d), and the federal *Cable Television Consumer Protection and Competition Act of 1992* and violates their reasonable expectations. Any other determination would be contrary to public policy and places the Board in the untenable position of breaching its overarching statutory obligation to ensure customers are not harmed in the process of receiving safe and adequate utility services.

II. The Company's Interpretation of the Board's Rule Relief Order is Patently Erroneous

The Company's interpretation of the Board's Rule Relief Order is erroneous in several respects. The Company initially states that the Rule Relief Order failed to use express conditional language limiting the waiver under *N.J.A.C.* §14:18-3.8, citing to the inclusion of limiting language to carve out exceptions to authorized waivers contained in certain prior Board Orders.[13] This argument is without merit. The Board's Rule Relief Order did not carve out a proration exception because the sample bills upon which the Board's order is based stated that the Company would continue to prorate customer billing upon termination of service. There was no need for the Board to insert any language or carve out an exception. Likewise, the Company's reliance on *State v. Badr*, 415 *N.J. Super*. 455, 466 (App. Div. 2010), is misplaced as the case concerns defining and interpreting the meaning of ambiguous regulatory language.[14] The wording and meaning found under *N.J.A.C* §14:18-3.8 is not ambiguous and the regulatory requirements contained thereunder are not in question here. The Rule Relief Order clearly states that the Board's decision was based on the sample bills provided as part of the Company's relief petition.[15] The sample bills did not contain any indication that customer bills would no longer be

[13] Altice Reply, p. 7.
[14] Id.
[15] Board's Order to Show Cause, paragraphs 8-9, p. 2, citing to Rule Relief Order, p. 6.

prorated upon discontinuance of service. To the contrary, specific language in the sample bills stated that customer bills would be prorated upon termination of service. There is no other reasonable inference that may be made from the Board's requirement that the Company submit a sample bill with a relief petition, other than to see what changes or modifications the Company seeks to make. Based on these facts, it is not reasonable for the Company to expect that the Rule Relief Order waived the requirement to continue to prorate customer bills upon discontinuance of service.[16]

Moreover, the Company argues that if the Board's Rule Relief Order requires the Company to continue proration it would render the Board's order incoherent, unreasonable and illusory, eviscerating whatever benefit billing flexibility provides.[17] Therefore, the Company argues, the Board's interpretation of its own Order is unreasonable and contrary to the regulation's plain meaning.[18] The case cited by the Company in support of this argument is inapposite to the facts herein. That case involved the court's reversal of an agency's denial of Medicaid benefits finding that the agency had failed to recognize that assets theoretically accessible to the plaintiff were in fact not accessible until a guardian's appointment. *I.L. v. Dep't of Human Servs.,* 389 *N.J. Super.*, 354, 365-366 (App. Div. 2006). Here, the Board has not misinterpreted or misapplied its regulation. The Board waived *N.J.A.C.* §14:18-3.8(a) partially, but not completely, based on the sample bills provided by the Company. The requirement to prorate billing under *N.J.A.C.* §14:18-3.8(a), is not linked to the various billing options mentioned in the regulation. Each requirement is independent and severable. It is well-settled that "deference to an agency decision is particularly appropriate where interpretation of the Agency's own regulation is in issue". *See H.K. v. Div. of Med. Assistance Health Servs., 379 NJ*

[16] Altice Reply, p. 11.
[17] Id., pp. 7-8.
[18] Id.

Super. 321, 327, 878 *A.2d* 16 (App. Div.) ("An agency's interpretation of its own regulation is entitled to substantial deference.") (quoting *DiMaria v. Bd. of Trustees of the Pub. Employees Ret. Sys.*, 225 *N.J. Super.* 341, 351, 542 *A.2d* 498 (App. Div.), *certif. denied, 113 N.J. 638, 552 A.2d 164* (1988)), *certif. denied, 185 N.J. 393, 886 A.2d 663* (2005)." *Dep't of Human Servs.*, 389 *N.J. Super.*, at 364-365. The Board's interpretation and application of the plain language of its own regulation as it applies to the Company in the Order is clearly reasonable and no further interpretative process is necessary. *State v. Badr*, 415 *N.J. Super.* 455, 466 (App. Div. 2010).

Additionally, the Company proposes that the prorated bill samples provided in response to Rate Counsel discovery in connection with its rule relief application were meant only as examples of the Company's "then" current bill format, stressing that they "represent[ed] the bill format that Cablevision *currently intends to use* . . . if waiver is granted."[19] This argument is simply an attempt at further deception. The Company cannot change its billing format unilaterally, any billing changes must first be provided for the Board's review and approval, and that review and approval is justifiably based on the Company's representations.

The Company argues that the Order's grant of flexibility in the future without also allowing the flexibility not to prorate would be an empty gesture. The Company is wrong. The Board's regulation is clear and unambiguous, the Board's order provided the Company with the flexibility to use various billing options, and the Company's sample bills confirmed the billing method that would be employed which included a representation that the Company would continue to prorate. There is no other reasonable interpretation in law or fact.

[19] Altice Reply, p. 10.

Moreover, the Company had the opportunity to ask to change the proration requirement but did not specifically do so during the review of the Company's merger petition.[20] The Board's Merger Order, confirms this fact and reaffirms the requirements under which the Company would continue to operate, including the requirements related to billing practices and termination of service.[21] The Company's reliance on *In re Eastwick College LPN-RN Bridge Program*, 225 *N.J.* 533, 542 (2016) is misplaced.[22] In *Eastwick*, the Nursing Board denied accreditation to a nursing program instituted by Eastwick College, by interpreting the term "graduating class" to include all program graduates who took the licensing examination during a given calendar year, regardless of the year a particular student graduated from the program. This interpretation skewed Eastwick's pass rate causing it to lose its accreditation. In remanding, the Court noted that the Nursing Board's interpretation of the regulation was incongruent with the plain wording of the statute and would undermine the statute's objective. *Id.* Here, the regulation is plain and unambiguous, and mandates that the company follow a billing method that prorates at initiation and termination of service. There is no misinterpretation by the Board under either the facts herein or the plain language of the regulation. In light of these facts, the Company's arguments are without basis in fact or law. The Company's actions are *ultra vires* and should not be allowed to continue.

[20] I/M/O the Verified Joint Petition of Altice, N.V. and Cablevision Systems Corporation and Cablevision Cable Entities for Approval to Transfer Control of Cablevision Cable Entities, Docket No. CM15111255 ("Merger Petition" and/or "Merger Order") dated May 25, 2016.
[21] Board's Order to Show Cause, at paragraphs 10-12, p. 3, citing to Merger Order, p. 11.
[22] Altice Reply, p. 12.

III. Requiring Altice to Prorate is Not a Form of Rate Regulation and Does Not Violate Federal or State Law

In the alternative, the Company argues that the Board is constrained by the Federal Communication Commission's ("FCC") *Effective Competition Preemption Order*, which prohibits a state or franchising authority from regulating the rates of a cable system if that system is subject to effective competition, and by 47 U.S.C. §543(a)(2) and *N.J.S.A.* §48:5A-11(f) which prohibit the Board from regulating rates of cable television operators in areas with effective competition.[23] In support, the Company cites to Nebraska case law on facts that are inapplicable, and based on the Nebraska Commission's regulatory authority under a Nebraska statute.[24] *Windstream Neb., Inc v. Neb. Pub. Serv. Comm'n,* Case No. CI 10-2399 (Neb. Dist. Ct. 2011) *("Windstream Neb.").* The Windstream decision did address proration, but was fact sensitive and based on different billing methods. The court noted that "...a customer who begins service with Windstream in the middle of the billing cycle is not charged for the service until the start of the next billing cycle and Windstream essentially provides the beginning interim service at no charge to the customer." *Windstream Neb.*, at p. 10. Here, the Company's billings practices are different, and under New Jersey law, the Board is not over-stepping its statutory authority to require the proration of bills upon termination of service. *N.J.A.C.* §14:18-3.8. Similarly, the Company's reliance on *Storer Cable Commc'ns v. City of Montgomery*, 806 F. Supp 1518, 1543 (M.D. Ala. 1992) ("*Storer*") is misplaced. In *Storer*, the City of Montgomery enacted an ordinance that although it contained no specific pricing schedule, prohibited the implementation of "anti-competitive rates" and the court held that part of the ordinance was in fact rate regulation and preempted under the federal Act, as the company was subject to effective

[23] Altice Reply, pp.13-14.
[24] Id., p.14.

competition. *Storer, supra* at 1543-48. The decision did not, however, rule on whether billing methods such as proration constitutes "rate regulation" that is preempted.

The existence of effective competition only prohibits the Board's authority to review and regulate the company's rates but does not remove the Board's authority to enforce regulations that protect the public interest and ensure that customers are not harmed by anticompetitive company practices or unfair and deceptive billing practices. Requiring service providers meet certain standards of conduct such as the regulatory requirements in *N.J.A.C.* §14:18-3.8 that initial and final customer bills be prorated, are not akin to rate regulation and are thus not contrary to the *Effective Competition Preemption Order*, or to 47 U.S.C. §543(a)(2) or *N.J.S.A.* §48:5A-11(f). The Board has consistently taken affirmative action in ensuring that the requirement to prorate billing continues to be strictly adhered to by companies that provide services in New Jersey.[25] In short, improper billing practices, not improper rates, is the real issue here.

IV. The Board May Extend, Modify or Reverse any Prior Determination and Order and Provide Adequate Remedies

Assuming *arguendo* that the Board's Rule Relief Order did in fact grant the Company's request to waive the requirement to prorate billing upon termination of service, (which it did not) this would not bar the Board from reviewing its prior determination and reversing course, particularly in light of the serious public policy implications and harm caused to customers. The Legislature has vested the Board with broad discretion in the exercise of its authority under Title

[25] *In the Matter of the Alleged Failure of Time Warner Cable Information Services (New Jersey), LLC to Comply with Certain Provision of a Board Order and the Alleged Failure of Time Warner Cable New York City, LLC to Comply with Certain Provisions of the New Jersey Cable Television Act, N.J.S.A.* 48:5a-1 *et seq., the New Jersey Administrative Code, N.J.A.C.* 14:17-1.1 *et seq. and N.J.A.C.* 14:18-1.1 *et seq., and Certain Provisions of Board Orders, Order Accepting Offer of Settlement*, Docket No. C0150911 02, (February 24, 2016).

48. *In Re Public Service Elec. and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings*, 167 *N.J.* 377, 384 (2001) cert. den., 534 *U.S.* 813, 122 *S. Ct.* 37, 151 *L. Ed.* 2d 11 (2001), citing to *Public Serv. Coordinated Transp.*, 5 *N.J.* 196, 214 (1950). Moreover, the Board has undeniable statutory authority to move on its own initiative to reopen or reconsider its orders. *N.J.S.A.* §48:2-40 states, "the Board at any time may order a rehearing and extend, revoke or modify an order made by it," particularly, as is the case here, in response to numerous complaints made by the public which the Board cannot ignore.

The Board's obligations encompass a "comprehensive legislative design" ... "one of continuous supervision, with a mandate to the Board to resolve initial investigations, expeditiously, and yet granting to it concomitant authority to institute corrective proceedings and especially where after experience furnishes evidence of failure of an earlier order to accomplish its intended purpose." *Central R. Co. v. Department of Public Utilities*, 7 N.J. 247, 254-255 (1951). While *N.J.S.A.* §48:2-40 would certainly not justify the Board reopening or reconsidering cases in a haphazard fashion, such is obviously not the case here. It is evident that the Board has carefully considered the issue and has taken appropriate and reasonable action based upon over 100 customer complaints filed with the Board since October 2016 to the present. It should not be forgotten that those complaints were made in connection with non-prorated customer billing of "charges incurred for services no longer rendered after termination,"[26] in violation of *N.J.A.C.* §14:18-3.8.

The arguments and case law cited by the Company attempt to strip the Board of its statutory authority to continue to ensure the safe and adequate provision of services to New Jersey customers. It is well-settled that New Jersey administrative agencies have the inherent authority to reassess or reconsider prior decisions and policies. This has been the holding even in

[26] Order to Show Cause, paragraphs 13 through 16, p. 3.

cases where the doctrine of res judicata has been raised, as aptly observed by our Appellate Division:

> The application of res judicata, collateral estoppel and kindred doctrines in the setting of an administrative agency is tempered by the recognition that a particular administrative agency may have continuing regulatory responsibilities over the areas within its jurisdiction. The exercise of some of its supervisory functions in a quasi-judicial manner, such as administrative hearings and adjudications, may be an incident to, rather than the essence of, its primary administrative authority. It is fitting, therefore, that subject to statutory restrictions, such an administrative agency, in appropriate circumstances, has the power to reassess or reconsider its actions in order to perform fully its responsibilities as a regulatory body. [Citation omitted.] In this sense, the power to reconsider, to rehear and to revise determinations may be regarded as inherent in administrative agencies. [Citation omitted.] This power to reappraise and modify prior determinations may be invoked by administrative agencies to protect the public interest and thereby to serve the ends of essential justice. (Emphasis added.)

Trap Rock Industries, Inc. v. Sagner, 133 N.J. Super. 99, 109 (App. Div. 1975), aff'd, 69 N.J. 599.

It is unquestionably in the public interest for the Board to find that ratepayers should not be charged for services they did not and will not receive, such as where service is discontinued any time prior to a service provider's full billing cycle. The Board in balancing the interests of both service providers and customers enacted *N.J.A.C.* §14:18-3.8, which requires that initial and final customer bills be prorated upon discontinuance of service. Enforcing that principle here is well within the Board's authority and obligation.

The Company should not be allowed to continue to violate the Board's Rule Relief Order and/or circumvent the Board's regulations in this manner. In light of the Company's continuing violation of a Board Order, the Board has the regulatory authority to provide refunds as may be warranted pursuant to *N.J.S.A.* §48:5A-11a and *N.J.A.C.* §14:18-3.5. In addition, 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.

V. The Board has the Authority to Require the Company to Issue Refunds and May Impose Penalties

The Company states that the Board has limited circumstances under which it has the authority to mandate customer refunds, such as in the event of service outage and may impose penalties as permitted under *N.J.S.A.* §48:5A-51(b), only if they find the Company to be in violation of the Rule Relief Order and cites to cases overturning cases where penalties assessed were beyond the agency's statutory authority.[27] The cases cited are inapplicable to the facts herein. In *Re Suspension Matter of Wolf*, 160 *N.J. Super.* 114, 119 (App. Div. 1978) the court found "the Board exceeded its authority because the statute did not include any broad inherent power to impose penalties based upon the theory of unjust enrichment." *Ibid.* 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 enable the court to determine if the evidence supported the penalty order. 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.

However, 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

[27] Altice Reply, pp. 14-15.

termination of service, which the Board has the authority to enforce.[28] Section 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. In fact, 47 *C.F.R.* §76.309 expressly permits the Board to establish and enforce customer service standards that exceed the minimum standards enumerated under the federal regulations, particularly if the additional obligations are for the protection of consumers.[29] The requirement under *N.J.A.C.* §14:18-3.8 that customer bills be prorated upon initiation and discontinuance of service, is consistent with similar important public policy interests and protective measures found under the federal *Cable Television Consumer Protection and Competition Act of 1992 ("Consumer Protection and Competition Act").* The *Consumer Protection and Competition Act* recognizes that the Commission as well as state and local governments have concurrent jurisdiction to protect customers/consumers against deceptive billing practices."[30]

In addition, the Company's decision not to prorate final bills is similar to "negative option billing" practices which are prohibited under Section 623(f) of the *Communications Act of 1934* as amended, and contrary to Section 76.981(a) of the Federal Communications Commission's rules ("Rule") under *the Cable Television Consumer Protection and Competition Act of 1992*,[31] as well as under 47 U.S.C. §543(f) which prohibits a cable operator from charging

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[28] 47 C.F.R. § 76.309 (c)(3)(i) and (ii).
[29] 47 *C.F.R.* § 76.309(b) (1-4).
[30] FCC Enforcement Bureau Order, para. 2, *In the Matter of Comcast Corporation*, File No. EB-IHD-15-00018, Acct. No.: 201632080013; FRN: 0015401581; DA 16-1127, Order (October 11, 2016) and at footnote 3.
[31] FCC Enforcement Bureau Order, paras. 3-4, *In the Matter of Comcast Corporation*, File No. EB-IHD-15-00018, Acct. No.: 201632080013; FRN: 0015401581; DA 16-1127, Order (October 11, 2016), citing at footnotes 5, 6, 7 and 8 to: 47 USC § 543 (f); *Petition for a Declaratory Ruling Regarding Negative Option Billing Restrictions of Section 623(f) of the Communications Act and the FCC's Rules and Policies*, Declaratory Ruling, 26 FCC Rcd. 2229, 2230, para. 4 (MB 2011); *See also* Third Order on Recons., 9 FCC Rcd at 4361-62, para. 128 & n. 83; 138 Cong. Rec. S14248 (daily ed. Sept. 21, 1992) (statement of Sen. Gorton); 138 Cong. Rec. S567-S568 (daily ed. Jan. 29, 1992)(statement of Sen. Gordon). *See also, Implementation of Sections of the Cable Television Consumer*

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. It is even more offensive here where the service provider discontinues service at the customer's request but then continues to bill for services that will not be provided.

For the foregoing reasons, the Board has clear regulatory authority to require the Company to prorate a customer's billing upon initiation and termination of service pursuant to *N.J.A.C.* §14:18-3.8, and order customer refunds on the overcharges levied on services that were not provided to customers. 47 *C.F.R.* §76.942, to *N.J.S.A.* §48:5A-11a; *N.J.A.C.* §14:18-3.5. The Board may also impose penalties for the Company's violation of the Board's orders and regulations as permitted under *N.J.S.A.* §48:5A-51(b).

VI. The Company's Due Process Argument is Contradictory and Unsupported

In the alternative, the Company argues that the Order to Show Cause is the Board's attempt to modify its order through an enforcement proceeding.[32] The Company further argues that modifying or rescinding the waiver affects the Company's property interests and requires he Board to fully and clearly articulate its basis and provide proper notice with an opportunity for all parties to test the order's basis and sufficiency.[33] In support, the Company's cites to *Frederick Gumm Chem. Co. v. Dep't of Envtl. Prot.,* No. A-1056-05T2, 2007 WL 1574304, at *5 (NJ Super. Ct. App. Div. June 1, 2007), where "a previously granted waiver was rescinded by DEP solely on the basis of a single section of a remedial action workplan, prepared as required by DEP, that "identified that areas other than the regulated underground storage tank were

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Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration, 10 FCC Rcd 1226, 1296, Appendix B, para. 4 (1994) (Sixth Order on Recons.). https://docs.fcc.gov/public/attachments/DA-16-1127A1.pdf

[32] Altice Reply, p. 11

[33] Altice Reply, p. 11.

contributing to the contamination detected at this site." *Id., supra.* The court in remanding the matter back to the Office of Administrative Law, as a contested matter held that "that an agency's power to rescind a prior permit or approval cannot validly be based upon a presumed fact where the person or entity affected disputes the existence of the fact or its sufficiency as a basis for the rescission action taken." *Id.* In the addition, the Company argues that the Board is precluded from modifying the Rule Relief Order because it failed to act with reasonable due diligence, relying on *Ruvoldt v. Nolan,* 63 *N.J.* 171, 183-84 (1973) is misplaced. The action in *Ruvoldt* concerned the reversal of a public employee's disability pension eight years after the grant. The court noted that if denial of the pension had occurred eight years prior the pensioner could have either provided additional evidence as to his disability or attempted to gain other public employment. Reversal eight years later is manifestly unfair to pensioner who relied to his detriment on the pension grant.

The facts of *Gumm* and *Ruvoldt* are dissimilar to the facts herein and the holdings in those cases are inapplicable. First, there was no detrimental reliance on the part of the Company because a waiver relieving the Company from its obligation to prorate was never granted by the Board. Likewise, the Board acted with reasonable diligence in contacting the Company within a few months after receiving customer complaints, advising the Company that it was in violation of the Board's order and regulations and affording the Company an opportunity to provide an explanation.[34] The Company provided its first response to the Board's inquiry *six* months later, on September 13, 2017.[35] Thus, any delay in the administrative process herein is solely attributable to the Company.

[34] Board's Order to Show Cause, p.3.
[35] Id.

The Company's argument that it was not afforded sufficient due process is also unsupported by the facts. The facts show that the Company was provided with two opportunities to explain its actions. The first opportunity came after the Board's March 2017 request. Six months later, on September 13, 2017, the Company's reiterated its position that the Rule Relief Order granted it the right not to prorate billing. The second opportunity was provided under the Order to Show Cause, issued on December 18, 2018, to which the Company filed its response on January 31, 2019.[36] The very fact that the Board is affording the Company an opportunity under the Order to Show Cause to explain its actions and rectify its behavior to comply with the Board's regulations provides the Company the due process protections it argues it has not received. Otherwise, the Board would have immediately issued a cease and desist order and imposed penalties.

It is unclear how much due process the Company seeks. The Company cites to *Gumm,* in which the court remanded the matter for a fact-finding hearing. However, here, the Company vehemently contends that no fact-finding hearing is needed.[37] The Company cannot have it both ways. Rate Counsel agrees that there is no need for fact finding since the Company does not deny its practice, only the legality of the Board's efforts to end it. Accordingly, the Company's due process argument lacks merit and should be rejected.

CONCLUSION

Based on the foregoing, Rate Counsel respectfully recommends that the Board require Altice to 1) immediately cease and desist the non-proration of customer bills upon termination of service; 2) provide the Board and Rate Counsel with a plan detailing how customer credit

[36] Altice Reply, p. 6.
[37] Altice Reply, pp. 15-16.

refunds will be processed and issued; 3) provide proof of customer credit refunds to the Board and Rate Counsel; 4) provide annual reports during a three-year period demonstrating prorated customer accounts were service was discontinued. Rate Counsel also supports any other remedies, inclusive of penalties which the Board may deem are warranted and appropriate under the circumstances.

Respectfully Submitted,

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March 5, 2019.

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I/M/O the alleged failure of Altice USA, Inc., to comply with certain provisions of the New Jersey cable television act, NJSA 48:5A-1 ET Seq., and the New Jersey administrative code, NJAC 14:18-1.1 Et Seq.

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