



Agenda Date: 1/27/21
Agenda Item: 4A

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

OFFICE OF CABLE TELEVISION
AND TELECOMMUNICATIONS

IN THE MATTER OF THE BUSINESS)
AUTOMATION TECHNOLOGIES, INC. D/B/A DATA)
NETWORK SOLUTIONS V. VERIZON NEW)
JERSEY, INC.)
)
) DOCKET NO. TC17091015
) OAL DOCKET NO. PUC 01597-2018

Parties of Record:

Andrew M. Klein, Esq. on behalf of Business Automation Technologies, Inc, d/b/a Data Network Solutions
Richard C. Fipphen, for Verizon New Jersey

BY THE BOARD:

This matter is before the New Jersey Board of Public Utilities ("Board") by way of motion dated December 30, 2020, filed by Petitioner, Business Automation Technologies Inc. d/b/a Data Network Solutions ("DNS") seeking interlocutory review of Administrative Law Judge Tricia M. Caliguire's ("ALJ Caliguire") ruling on December 22, 2020. For the reasons noted herein, the Board denies interlocutory review in part.

BACKGROUND AND PROCEDURAL HISTORY

On September 26, 2017, DNS filed a petition with the Board disputing bills rendered by Verizon for charges incurred pursuant to multiple billing disputes arising out of several agreements between the parties.¹ This matter was transmitted to the Office of Administrative Law for adjudication on January 29, 2018. Thereafter the case was assigned to ALJ Caliguire and set for hearing on December 22, 2020.

¹ The parties' Interconnection Agreement was approved by the Board on February 11, 2004. I/M/O 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).

MOTION FOR INTERLOCUTORY REVIEW

On December 30, 2020, DNS filed a Motion for Interlocutory review of various rulings made by ALJ Caliguire during the course of the proceedings held in this matter on December 22, 2020. The Petitioner contends that ALJ Caliguire erred in denying admission of testimony and evidentiary material, striking material and limiting cross examination. The Petitioner argues the ALJ did not provide for cross of VNJ's witness regarding various topics relevant to the case, including but not limited to customer disputes and did not allow the admission of emails the Petitioner argues are germane to the case.

In its motion, DNS claims ALJ Caliguire improperly excluded Exhibits, namely but not limited to, Exhibits P-124 and 125 proffered by the Petitioner. The DNS witness in this matter is visually impaired and the Zoom platform, Petitioner contends inhibited his ability to view documents. Documents were struck during the course of the proceedings, and various testimony excluded which Petitioner opposed. Further, the Petitioner contends he was denied the ability to question VNJ's witness regarding specific subject areas. Counsel for DNS did not notify ALJ Caliguire nor the OAL of the need of an accommodation for the DNS witness due to a disability until December 1, 2020 after the witness had already completed his testimony.

VNJ has not filed an objection nor a response to the Petitioner's motion.

DISCUSSION AND FINDINGS

An order or ruling of an ALJ may be reviewed on an interlocutory basis by an agency head at the request of a party. N.J.A.C. 1:1-14.10(a). Any request for interlocutory review shall be made to the agency head no later than five working days from the receipt of the order. N.J.A.C. 1:1-14.10(b). Pursuant to N.J.A.C. 1:14-14.4(a), a rule of special applicability that supplements N.J.A.C. 1:1-14.10, the Board shall determine whether to accept the request and conduct an interlocutory review by the later of (i) ten days after receiving the request for interlocutory review or (ii) the Board's next regularly scheduled open meeting after expiration of the 10-day period from receipt of the request for interlocutory review.

In addition, under N.J.A.C. 1:14-14.4(b), if the Board determines to conduct an interlocutory review, it shall issue a decision, order, or other disposition of the review within twenty (20) days of that determination. And, under N.J.A.C. 1:14-14.4(c), if the Board does not issue an order within the timeframe set out in N.J.A.C. 1:14-14.4(b), the judge's ruling shall be considered conditionally affirmed. However, the time period for disposition may be extended for good cause for an additional twenty (20) days if both the Board and the OAL Director concur. Finally, it should be noted that N.J.A.C. 1:1-14.10(i) in relevant part provides that:

any order or ruling reviewable interlocutorily is subject to review by the agency head after the judge renders the initial decision in the contested case, even if an application for interlocutory review:

1. Was not made;
2. Was made but the agency head declined to review the order or ruling; or

3. Was made and not considered by the agency head within the established time frame.

The legal standard for accepting a matter for interlocutory review is stated in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982). In that case, the New Jersey Supreme Court concluded that an agency has the right to review ALJ orders on an interlocutory basis "to determine whether they are reasonably likely to interfere with the decisional process or have a substantial effect upon the ultimate outcome of the proceeding. Id. at 97-98. The Court held that the agency head has broad discretion to determine which ALJ orders are subject to review on an interlocutory basis. However, it noted that the power of the agency head to review ALJ orders on an interlocutory basis is not itself totally unlimited, and that interlocutory review of ALJ orders should be exercised sparingly. Id. at 100. In this regard, the Court noted.

In general, interlocutory review by courts is rarely granted because of the strong policy against piecemeal adjudications. See Hudson v. Hudson, 36 N.J. 549 (1962); Pennsylvania Railroad, 20 N.J. 398. Considerations of efficiency and economy also have pertinency in the field of administrative law. See Hackensack v. Winner, 82 N.J. at 31-33; Hinfey v. Matawan Reg. Bd. of Ed., 77 N.J. 514 (1978). See infra at 102, n.6. Our State has long favored uninterrupted proceedings at the trial level, with a single and complete review, so as to avoid the possible inconvenience, expense and delay of a fragmented adjudication. Thus, "leave is granted only in the exceptional case where, on a balance of interests, justice suggests the need for review of the interlocutory order in advance of final judgment." Sullivan, "Interlocutory Appeals," 92 N.J.L.J. 162 (1969). These same principles should apply to an administrative tribunal.

[90 N.J. at 100].

The Court held that interlocutory review may be granted "only in the interest of justice or for good cause shown." Id. Also, the Court stated:

In the administrative arena, good cause will exist whenever, in the sound discretion of the agency head, there is a likelihood that such an interlocutory order will have an impact upon the status of the parties, the number and nature of claims or defenses, the identity and scope of issues, the presentation of evidence, the decisional process, or the outcome of the case.

Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The term "public entity" is defined as "any State or local government" and includes "any department, agency, special purpose district, or other instrumentality of a State . . . or local government." 42 U.S.C. § 12131(1)(A)-(B). The United States Supreme Court has found that Title II of the ADA abrogates state sovereign immunity. United States v. Georgia et al., 546 U.S. 151, 159 (2006); Tenn. v. Lane, 541 U.S. 509, 531 (2004). "A State must afford to all individuals a meaningful opportunity to be heard in its courts." Tenn. v. Lane, 541 U.S. 509, 532 (2004). Ali v. City of Newark, Civil Action No. 15-8374 (JLL), 11 (D.N.J. May. 11, 2018). The Office of Administrative Law and the Board of Public Utilities are public entities as defined by the ADA. Furthermore, pursuant to N.J.A.C. 13:13-4.11 individuals with disabilities are entitled to reasonable accommodations in places of public accommodation.

As set forth above, the decision to grant interlocutory review is committed to the sound discretion of the Board, and may be granted in the interest of justice. Having reviewed DNS's motion, the Board finds good cause at this time to grant the motion in part and modify the relief requested. With respect to the contention that Exhibits 124 and 125 were improperly excluded and testimony was improperly struck as a result of the witness for DNS needing an accommodation due to a visual impairment:

1. The Petitioner is hereby ordered to inform the OAL what accommodation the DNS witness needs for his visual impairment with respect to reviewing Exhibits 124 and 125 within ten (10) days of the date effective of this Order;
2. DNS will be permitted to recall the Witness to testify on the limited topic of Exhibits 124 and 125 with reasonable accommodation, VNJ will be permitted to cross-examine the DNS Witness.
3. The limited scope of testimony will take place within thirty (30) days of the effective date of this Order.

With respect to the remainder of the Motion for Interlocutory Relief the Board is not persuaded that it is appropriate to grant interlocutory review. The Board deems it unnecessary to review the merits of the ALJ's rulings at this stage, and instead will review the proceeding in its entirety, following the filing of briefs, the issuance of ALJ Caliguire's initial decision, and any exceptions filed thereto. The Board believes that the rulings made during the conduct of the proceeding by ALJ Caliguire who, consistent with N.J.A.C. 1:1-14.6, has the power to develop the record and render an initial decision dispositive of the issues before the OAL, should remain undisturbed at this juncture. The parties will be afforded the opportunity to address the issue prior to the Board's issuance of a final decision. Likewise, the Board is free to revisit this matter, and, if necessary, require the parties to further brief the issues and "reject or modify conclusions of law, interpretations of agency policy, or findings of fact" in ALJ Caliguire's initial decision, pursuant to N.J.A.C. 1:1-18.6.

Upon careful consideration of the Motion for Interlocutory review, the Board **HEREBY FINDS** the request is **DENIED IN PART**.

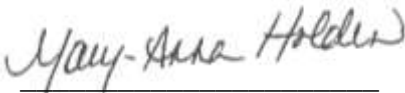
The Order shall become effective on February 6, 2021.

DATED: January 27, 2021

BOARD OF PUBLIC UTILITIES
BY:



JOSEPH L. FIORDALISO
PRESIDENT



MARY-ANNA HOLDEN
COMMISSIONER



DIANNE SOLOMON
COMMISSIONER



UPENDRA J. CHIVUKULA
COMMISSIONER



ROBERT M. GORDON
COMMISSIONER

ATTEST:



AIDA CAMACHO-WELCH
SECRETARY

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

**BPU DOCKET NO. TC17091015
OAL DOCKET NO. PUC 0159-2018**

SERVICE LIST

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