SUPREME COURT OF NEW HAMPSHIRE

Appeal of Verizon New England, Inc.

153 N.H. 50 (2005) · Decided December 28, 2005

SUMMARY

The New Hampshire Supreme Court reviewed the New Hampshire Public Utilities Commission's order requiring Verizon New England to impute at least $23.3 million in Yellow Pages revenues for ratemaking purposes. The court held that the directory publishing agreement was unjust and unreasonable because it failed to compensate the regulated telephone company and its ratepayers for associative value derived from the company's reputation and relationship with the directory affiliate. The court affirmed the revenue-imputation remedy and upheld a $1,000 penalty for failing to file an amendment to an affiliate agreement.

CASE DETAILS

COURT	Supreme Court of New Hampshire
WRITING FOR THE COURT	Dalianis, J.; Broderick, C.J.; Duggan, J.; Galway, J.; Nadeau, J.
JURISDICTION	New Hampshire
DECIDED	December 28, 2005
DISPOSITION	affirmed
PROCEDURAL POSTURE	Verizon New England appealed a New Hampshire Public Utilities Commission order that found its directory publishing agreement with an unregulated affiliate unjust and unreasonable, imputed at least $23.3 million in affiliate revenues to the regulated utility for ratemaking purposes, and imposed a $1,000 civil penalty for failure to file a contract amendment.
STANDARD OF REVIEW	A party challenging a PUC order must demonstrate that it is contrary to law or, by a clear preponderance of the evidence, unjust or unreasonable. PUC factual findings are presumed prima facie lawful and reasonable, and the court gives considerable deference to the PUC's policy choices when it balances competing economic interests.
PRECEDENTIAL VALUE	Published New Hampshire Supreme Court opinion; precedential.
PARTIES	Verizon New England, Inc. d/b/a Verizon New Hampshire v. New Hampshire Public Utilities Commission

TOPICS

judicial review of agency action · administrative law · agency adjudication · contracts · remedies

PRACTICE AREAS

administrative law · public utilities · telecommunications regulation · contracts · remedies

QUESTIONS PRESENTED

1. Whether the PUC properly found the 2000 directory publishing agreement unjust and unreasonable because it failed to reserve compensation for Verizon and its ratepayers for the associative value provided to the affiliate.
2. Whether the PUC had statutory authority under RSA 366:5 to impute revenues earned by an unregulated affiliate to the regulated telephone company as a remedy.
3. Whether 47 U.S.C. § 222(e) precluded Verizon from receiving compensation or sharing revenues with its directory publishing affiliate.
4. Whether the 1984 directory publishing agreement effected a permanent sale or transfer of Verizon's directory publishing assets requiring separate PUC approval.
5. Whether the PUC reasonably imposed a $1,000 civil penalty for Verizon's failure to file the 1999 amendment.

HOLDINGS

1. Because the 1999 amendment was not filed as required by RSA 366:3, it was unenforceable under RSA 366:4 and could not modify the 1991 agreement. The 1991 agreement therefore remained in effect until it was superseded by the 2000 agreements, making the 1999 termination of revenue-sharing payments improper.
2. The PUC was not collaterally estopped from determining that the 2000 directory publishing agreement was unjust and unreasonable merely because it had approved the 1991 agreement and its termination provisions.
3. The PUC reasonably found that the 2000 directory publishing agreement was unjust and unreasonable because the agreement failed to provide adequate compensation to Verizon and its ratepayers for the continuing associative value supplied to the affiliate.
4. Section 222(e) of the Telecommunications Act of 1996 does not prohibit a telecommunications provider from transferring the value of its reputation or association to an affiliate directory publisher in exchange for remuneration, including revenue sharing.
5. The 1984 directory publishing agreement was neither in form nor in effect a sale or permanent disposition of the directory publishing business.
6. RSA 366:5 grants the PUC broad remedial authority to order revenue imputation when an affiliate agreement is unjust or unreasonable, even though the statute specifically mentions disallowing payments.

7. The PUC properly imposed a $1,000 civil penalty for Verizon's failure to file the 1999 amendment.

KEY QUOTATIONS

> *"Nothing in the plain language of RSA 366:5 suggests that the legislature intended to so limit the remedial authority of the PUC."* (64)

> *"We, therefore, disagree with the Telephone Company's contention that the PUC is limited to the disallowance of payments as a remedy under RSA 366:5."* (65)

> *"Thus, we find nothing in the plain language of § 222(e) that would preclude revenue sharing between the Telephone Company and the Directory Company as part of a publishing arrangement such as the 2000 DPA."* (61)

FACTUAL BACKGROUND

After the 1984 AT&T divestiture, Verizon transferred its directory publishing assets and operations to an unregulated affiliate, Verizon Yellow Pages Company, while continuing to provide subscriber listings and directory-related services as a regulated telephone company. The parties' 2000 directory publishing agreement allowed the affiliate to sell advertising in the directories but provided no fees or revenue sharing to Verizon, even though the affiliate continued to benefit from its association with Verizon's name, reputation, subscriber base, and historical directory operations. The PUC found the arrangement inadequate to compensate Verizon and its ratepayers, imputed at least $23.3 million in affiliate revenues to Verizon, and imposed a $1,000 penalty because Verizon failed to file a 1999 amendment as required by statute.

PROCEDURAL HISTORY

The PUC investigated the regulatory treatment of Yellow Pages revenues after an audit concluded that revenues had been removed from the regulated utility and that the existing agreement did not adequately compensate the utility or its ratepayers. On July 9, 2004, the PUC ordered revenue imputation and imposed a civil penalty. Verizon appealed to the Supreme Court of New Hampshire, which affirmed.

DISPOSITION

affirmed

CASES CITED

- United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 193 (D.C. 1982), aff'd, 460 U.S. 1001 (1983)
- Appeal of Pinetree Power, 152 N.H. 92, 95 (2005)
- Appeal of Campaign for Ratepayers Rights, 145 N.H. 671, 675 (2001)
- State v. Hofland, 151 N.H. 322, 324 (2004)
- Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989)
- New Hampshire Hemp Council, Inc. v. Marshall, 203 F.3d 1, 6 (1st Cir. 2000)
- Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)

- State of R.I. v. Narragansett Indian Tribe, 19 F.3d 685, 698 (1st Cir. 1994)
- Appeal of Public Serv. Co. of N.H., 124 N.H. 479, 483 (1984)
- Appeal of Legislative Utility Consumers' Council, 120 N.H. 173, 174 (1980)
- U.S. West v. Public Service Commission of Utah, 998 P.2d 247 (Utah 2000)
- DeLucca v. DeLucca, 152 N.H. 100, 103 (2005)
- Appeal of Public Serv. Co. of N.H., 141 N.H. 13, 22 (1996)
- Appeal of Easton, 125 N.H. 205, 210 (1984)
- Appeal of Granite State Elec. Co., 120 N.H. 536, 539 (1980)
- U.S. West Communications, Inc. v. Utilities & Transportation Commission, 949 P.2d 1337, 1351-52 (Wash. 1997)
- Matter of Minn. Public Utilities Commission, 417 N.W.2d 274, 285-86 (Minn. Ct. App. 1987)
- Matter of Rates and Charges of U.S. West, 909 P.2d 716, 721-22 (N.M. 1995)
- Rochester Tel. Corp. v. Public Serv. Comm'n, 660 N.E.2d 1112, 1117 (N.Y. 1995)
- State v. Fernandez, 152 N.H. 233, 239 (2005)
- State v. Chick, 141 N.H. 503, 504 (1996)