

**Matter of Verizon N.Y., Inc. v Environmental
Control Bd. of City of N.Y.**

2008 NY Slip Op 32384(U)

August 22, 2008

Supreme Court, New York County

Docket Number: 0117078/2007

Judge: Lewis Bart Stone

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. LEWIS BART STONE

PART 505

Index Number : 117078/2007
VERIZON NEW YORK INC
VS.
ENVIRONMENTAL CONTROL BOARD
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is granted in accordance with the annexed Decision and Order.*

FILED

AUG 28 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 22 Aug 08

Lewis Bart Stone
HON. LEWIS BART STONE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Telecommunications ("DOITT"), and to reimburse Verizon \$224,000 for fines paid by Verizon with respect to the NOV's, claiming that ECB's actions were in error of law, arbitrary and capricious and constituted abuses of discretion.

At issue here is the construction of certain provisions of the Administrative Code, ("Code") of the City of New York (the "City") and regulations of DOITT issued thereunder (the "Regulations") as they relate to the maintenance by Verizon of 911 access on Verizon's pay telephones located on City streets ("Street Phones").

Unfortunately, Street Phones are the regular target of vandals, and about 40% of Verizon's Street Phones are vandalized into inoperability at least once a year. It is likely that other Verizon Street Phones From time to time will become inoperative for other reasons. As Verizon is a "for profit" entity whose investment in Street Phones produces no return while it is inoperable, Verizon uses both electronic and human monitoring to detect when a Street Phone becomes inoperative and maintains systems for their prompt repair.

In addition to Verizon's economic interest in maintaining the operability of its Street Phones, Code §23-408(b), enacted as part of City Local Law No. 68 of 1995, requires Verizon as an operator of Street Phones to maintain certain service levels for such Phones, and sets forth penalties for the failure to do so. Such section provides:

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City and County
of New York
Department of
Environmental
Control
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“An owner who repeatedly fails to provide phone services from a public pay telephone for any sustained period of time or who fails to provide coinless twenty-four hour 911 service from such public pay telephone shall be in violation of this chapter and shall be liable for a civil penalty of not more than two thousand five hundred dollars for each violation which may be recovered in a civil action or in a proceeding before the environmental control board. In the case of a continuing violation, each day’s continuance shall be a separate and distinct offense.”

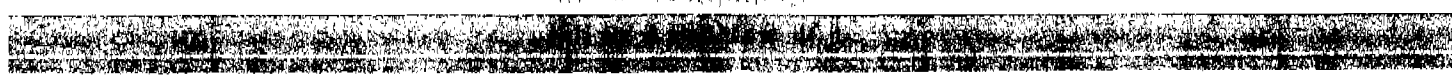
Verizon does not challenge this Local Law provision.

Code §23-403(b) authorizes DOITT to promulgate rules in order to implement this provision, and on December 17, 1996 DOITT issued regulations, (67 RCNY §6-05 (the “Regulations”)) which purported to do so. During the time relevant to this proceeding,¹ the relevant provisions of such Regulations read as follows:

§6-05 Maintenance of Public Pay Telephones. (a) Coinless 911 service. A public pay telephone shall provide twenty-four hour access to 911 service without use of a coin or other payment device. For purposes of this subdivision a violation of this requirement may be found where a public pay telephone lacks a dial tone, a clear and audible transmission and reception, a keyboard and handset in working order, or any other feature necessary to access to 911 service.

¹ The Regulations were amended effective March 18, 2006. As the NOV’s which are the subject of this proceeding predated the effective date of the amendment, the amendments are irrelevant to the issues presented and have not been considered by this Court in this Decision and Order.

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[a] notice of violation may be issued for a violation of a provision of subdivision (a) of this section when inspections on two occasions within a period of no shorter than twenty-four hours have disclosed a violation of such provision.

(b) Notwithstanding any other provision of this section:

(1) an owner who fails on two occasions within any three month period to provide phone service from a public pay telephone for any period of time exceeding twenty-four continuous hours or who fails to provide coinless twenty-four hour 911 service from such public pay telephone in compliance with the provisions of subdivision (a) or subdivision (b) of §6-05 of this chapter, as the case may be, shall be in violation of such subdivision(s) and shall be liable for a civil penalty of not more than two thousand five hundred dollars (\$2,500) for each violation [emphasis added] which may be recovered in a civil action or in a proceeding before the Environmental Control Board.

An owner of a public pay telephone shall not be considered to have failed to provide the service required in this subdivision where such owner has posted and maintained a written notification on the public pay telephone within seventy-two hours of the occurrence and provided written notification to the Department, within twenty-four hours of the occurrence of an event or a condition beyond his or her control, such as a power failure or an inability of the telephone company to provide access to the switched telephone network, that has rendered such telephone unable to provide such service.

Verizon challenges the Regulations to the extent they constitute legal authority for the Decisions.

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W. J. ...

Each NOV charges Verizon with failing to maintain 911 service with respect to a specific Street Phone. Each citation related to a Street Phone which had been found to be inoperative for slightly more than twenty-four hours.

Fifteen of these NOV's were referred to Administrative Law Judge ("ALJ") Bernard R. Twomey ("Twomey") for adjudication. Twomey dismissed three for inadequacy. Verizon asserted that with respect to the remaining twelve, the Regulations provision cited as the authority for the NOV's was not authorized by the Code. Twomey ruled that he had no authority to consider such issue and found that DOITT had established that Verizon violated the Regulations. Verizon paid the fines and appealed Twomey's ruling of November 12, 2004 to ECB which confirmed such ruling.

Eighty one of these NOV's were referred to ALJ Katherine Lesser ("Lesser") for adjudication. Lesser dismissed two for inadequacy. Verizon raised the same issues it had raised before Twomey with respect to the remaining seventy-nine NOV's. Unlike Twomey, Lesser considered Verizon's argument that the Regulations cited as authority for the NOV's was unauthorized and exceeded DOITT's authority under the Code, but ruled against Verizon. In considering such argument, Lesser also rejected the applicability of New York Tel. Co. v. ECB, Sup. Ct. Queens Co., No. 13863/98 (Feb. 8, 1999), which Verizon asserted was controlling precedent. Verizon also paid

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slightly more than 5

Verizon asserted

by the ALJ



the fines and appealed Lesser's ruling of August 2, 2007 to the ECB, which confirmed such ruling.

The third traunch² of twenty NOV's were referred to a third ALJ, Helaine Balsam ("Balsam"), for adjudication. Balsam, in her determination upholding the NOV's, like Lesser, both considered and rejected Verizon's arguments of the Code's authority for the Regulations which were cited to support the NOV's and also rejected New York Tel. Co. V. ECB, supra as controlling precedent. Verizon also paid the fines on these NOV's and appealed Balsam's ruling of December 28, 2005 to ECB which confirmed such ruling.

All three Decisions were issued on September 27, 2007 and each contained the following statement:

"The Board declines to rule on whether the service requirements of 67 RCNY §6-05(a) conflict with or expand those imposed by Section 23-408(b) of the Administrative Code of the City of New York, finding this issue to be outside the purview of the Board's authority."

The impact of the Decisions is that ECB has ruled that Verizon may be fined for an inoperable Street Phone if such Street Phone has either been inoperable for a

² Verizon's petition also alleged that DOITT continues to enforce the Regulations and that additional NOV's are in the administrative process. As no final ECB decision had been reached on these NOV's, they may not be considered in this CPLR Article 78 proceeding. Although such NOV's are not before the Court, further proceedings on them to the extent they involve the same issues considered in this proceeding, should, however, be effectively governed by this Decision and Order.

sustained period of time or does not provide 911 service twice within a period of at least 24 hours.

Verizon challenges the Decisions as violative of law, claiming the Regulations which constituted the basis for Verizon's liability were not authorized by the Code. Although Verizon also challenges the Decisions as being arbitrary and capricious and an abuse of discretion, as ECB correctly notes, Verizon's petition is devoid of support for any challenge to the NOV's on these grounds. Further, as ECB also correctly notes, the petition alleges no facts as to why the amounts of the fines set constitute an abuse of discretion. Accordingly, such grounds cannot constitute any basis for relief.

CPLR §7803(3) authorizes review of the Decision to ascertain whether they were affected by an "error of law." Verizon may therefore properly challenge the validity of the Regulations which were said to be the basis for NOV's here. As Verizon has reiterated such position at all stages of the controversy, it has preserved such claim for review by this Court.

ECB interposes two affirmative defenses. The first is that the Regulations were fully authorized by the Code or in the alternative that, to the extent the Code is unclear, DOITT's interpretation of the Code as set forth in the Regulations is reasonable and rational. As a second affirmative defense, the City, after

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TO: DOITT, p. 7, 8, 11
FROM: VERIZON, p. 10
LONG ISLAND CITY, NY



acknowledging that ECB in each of its Decisions “decline[d] to rule on Verizon’s challenge to the authority for the [Regulations]” asserts that such determination was a rational and reasonable response because under other City charter provisions, such a determination had instead, to be made by a court of general jurisdiction, such as this Court.³

ECB’s second affirmative defense correctly acknowledges that it did not rule on the authority of DOITT to issue the Regulation. Accordingly, even in the absence of the decision in New York Tel. Co. v. ECB, *supra*, such acknowledgment effectively removes the principle and traditional defense to a challenge to an administrative decision upholding the authority of the Regulations to support the NOV’s in a CPLR Article 78 proceeding, viz, that the agency’s determination as to the meaning and scope of the statute it administers is to be given substantial deference by the Court. Had ECB duly considered such issue, ruled upon it, and upheld the authority, this Court would have been required to apply such rule of deference. As ECB expressly declined to address such issue, this Court has the authority and power as well as the obligation to make such determination on its own.

³ The City asserts that the City Charter precludes ECB from considering a challenge to the validity of the statutory authority for the Regulations. This Decision and Order does not address whether such position is correct or was rational or reasonable but only the consequences of the non-determination of such issue in the proceeding before ECB.

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response hereby § 87(2)(b)

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Accordingly, ECB's "Affirmative Defenses" amount to no more than a denial of the validity of Verizon's claims.

THE MERITS

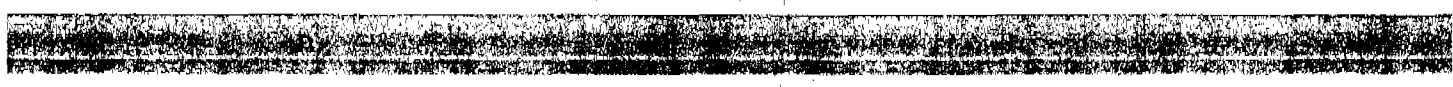
The Court's review of a determination of a decision of an administrative agency such as ECB may inquire into whether it was made in accordance with law. Law in this context includes whether the Regulations could support the NOV's within the statutory authority for such Regulations. As noted above, in reaching such determination, a court, conducting such inquiry, must consider any agency ruling on the issue. Here, as there was an express determination by ECB that the issue was not considered in the Decisions, the Court must therefore turn instead to the usual sources of the law to guide it in construing the statutory enactment, viz, precedent, legislative history and textual analysis of the statutory provision itself, applying generally applicable rules of statutory construction. As set forth below, each of these sources of guidance independently leads this Court to the same conclusion, that to the extent the Regulations purport to authorize the NOV's here, they are unauthorized by the Code and accordingly, the NOV's must be set aside.

A. Precedent

Verizon asserts that New York Tel. Co. v. ECB, supra, which construed the relevant Code provision and which ECB did not appeal, constitutes binding precedent

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THE MERITS



here. ECB has cited no other case construing the relevant provisions of the Code.

New York Tel Co. involved a challenge by New York Telephone Company ("NYT"), a company of which Verizon is the successor by merger, of an ECB decision upholding eleven NOV's asserted against NYT on September 26, 1996, based on NYT's failure to provide twenty-four hour 911 access from certain Street Phones in the City. At such time the Code was in force, but the Regulations, which went into effect on December 17, 1996, several months after the issuance of the NOV's, were not. DOITT based the challenged NOV's on a "policy" set forth in a letter of DOITT, which took the same position as the Regulations viz, that the requirement to provide 911 access is independent of the prohibition of a repeated failure to provide service. In New York Tel, the NOV's related to Street Phones totally out of service for four days which as a result, did not provide 911 access during such periods.

In New York Tel, NYT asserted the Code did not apply to it, that the Code section did not authorize the policy, that the ECB decision was in violation of law and proper procedure and that the magnitude of the penalty for each violation was arbitrary and capricious and an abuse of discretion. The Court, after reviewing the Legislative history of the relevant Code provision, found the Code did apply to NYT, but found ECB's decision of ECB "contrary to law, and lacked a rational basis, so as to be arbitrary and capricious." The Court, construed the Code as requiring that a

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NYT v. DOITT, 10/1/96

DOITT v. NYT, 10/1/96

NYT v. DOITT, 10/1/96



failure to provide 911 access be punishable only if the Street Phone was otherwise operable.

While the decision of Supreme Court, Queens County, being one of a court of equal jurisdiction to this Court, does not constitute binding precedent, it is precedent nonetheless, especially in the absence of any other court decision on the issue. In making its decision, this Court may consider whether such precedent is persuasive or helpful. "A decision of a court of equal or inferior jurisdiction is...entitled to respectful consideration." McKinney's NY Statutes §72. In so respectfully considering New York Tel., this Court finds such decision persuasive and worthy of following on its reasoning and analysis, and would have reached the same conclusion as did Justice Giola on the case before him.

This proceeding and Verizon's challenge here, however, differs somewhat from NYT's challenge in New York Tel. In New York Tel., ECB asserted that the authority for the NOV's resided in a policy letter issued by DOITT. Here, ECB asserts that the authority for the NOV's resided in the Regulations. In New York Tel., the court expressly noted that the Regulations came into force subsequent to the policy letter and that it was only ruling on the authority for the policy letter as the basis for the NOV's in question.

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The Court in New York Tel. found that the Code did not authorize DOITT's position in the policy letter. To the extent the policy letter was not authorized, Regulations to the same effect should be equally unauthorized. While a difference exists and the Court in New York Tel. expressly declined to address the Regulations, it borders on frivolous to assert that there should be a material difference in result. Under the usual rules of construing a precedent and extending precedent to materially identical situations, this Court would, based on precedent, find the Regulations not to be authorized by the Code so as to support the NOV's against Verizon.

B. Legislative History

A second method to construe a statute is to look to the legislative history of its enactment. Such history puts into context what the legislative body (the City Council here) was intending to accomplish to enable the court to determine the meaning of the enactment.

Verizon and its predecessor in interest were traditional telephone companies and the principle providers of Street Phones in the City. As a result of Federal and State deregulation of Telecommunications in the 1980s, competitors other than the traditional telephone companies began to provide Street Phone service in the City. Some of these providers, known as Customer Owned Currency Operated Telephones or "COCOT," as a method of maximizing revenues, blocked coinless 911 access



which was then being provided by the traditional telephone companies. To address these new telecommunication providers and to "level the playing field" the State Legislature, by Laws 1990, c. 697, added Public Service Law ("PSL") §92-c(7) which, *inter alia* provided:

"No alternate operator provider or COCOT service provider shall restrict access...to any emergency telephone number, including where available, 911 or E 911"

The City followed such enactment with Local Law 68 of 1995 which, *inter alia*, enacted the Code, to require all telephone providers to enter into a permit system to regulate Street Phones, and the language in the Code relating to 911 access was included at this time to enforce PSL §92-c(7) through the City permitting system.

Thus, as the purpose of the Code provision relating to 911 service was to prevent providers from blocking coinless 911 calls, the provisions relating to 911 must be construed to relate to such issue. As providers accomplish blocking by affirmative programming, of their systems, proscribing such activity without any grace period or need to show a continuous failure, is a construction of the Code consistent with its legislative purpose, the legislative history of the Code and the technology of blocking.

As Verizon's assertion in its petition that Street Phones "are, and at all relevant times have, been centrally programmed to provide coinless access to 911 service" has



not been challenged by ECB, such construction of the Code does not authorize the imposition of penalties on Verizon on the basis asserted in the NOV's.

Accordingly, using legislative history to construe the Code, this Court must set aside the NOV's as the Regulations to the extent they authorize the NOV's to go beyond the statutory authority for such Regulations in the Code.

While the City Council might have enacted Local Law provisions to impose immediate sanctions for any inoperability of Street Phones, they did not. Such a mandate, would, if imposed, however, not be without consequences, as the costs of complying⁴ and the payment of fines for failure to do so would raise the cost of providing Street Phones for all market participants and result in a higher equilibrium competitive price for Street Phone service to the public as well as result in the removal of Street Phones from locations where the level of vandalism could raise the cost of maintaining such Street Phone above its economic return.⁵ The trade-off between mandating "perfect" service against the benefits of having more available

⁴ A provider could, for example, station a guard at every Street Phone to check operability every few hours and call for the immediate replacement of a faulty Street Phone to a stand-by army of repairers who could fix the inoperable Street Phone before a DOITT inspector could arrive and cite the provider for a violation. Such a program would of course impose additional costs on providers of Street Phones.

⁵ With the advent of the Cel Phones, Street Phone usage has fallen and the number of Street Phones has also been falling rapidly. See Price v. New York City Board of Educ., Misc.3 543, 559 (Sup. Ct. NY Co. 2007). A factor in the decision as to which Street Phones are to be removed is undoubtedly the profitability of such Street Phone, taking into account usage, projected repair costs and possible fines and penalties.



virtually any outage of Street Phone would preclude 911 access from such Street Phone during such outage. While a literal reading of the Code, such reading makes little sense. However, the "Courts may in a proper case indulge in a departure from literal construction and will sustain the legislative intention although...it is contrary to the literal letter of the statute...the intent of the Legislature indeed is the primary object sought in the interpretation of statutes." McKinney's Statutes §111. Further, reading the Code in this literal manner would result in the Modifiers being meaningless, as such reading would make a violation of the coinless 911 service requirement immediate for any inoperative Street Phone. Such interpretation violates yet another canon of statutory interpretation which requires all words in a statute to be given a meaning if possible. McKinney's Statutes §98.

As the Council's use of the Modifiers may not be ignored, the proper construction of the Code is one which can integrate such Modifiers.

There are two possible constructions which would enable the Modifiers to be given a meaning. One is to adopt the approach of Justice Golia in New York Tel., to read in the concept of "if operable" into the proscription of the failure of a Street Phone to provide twenty-four hour 911 access. The other is to apply the Modifiers to the failure to provide coinless 911 access, requiring a showing of both "repeated failure" and "for any sustained period of time," before a penalty for the failure to

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provide twenty-four hour 911 access could be imposed. Under either construction, the NOV's at question here must be vacated as unauthorized.

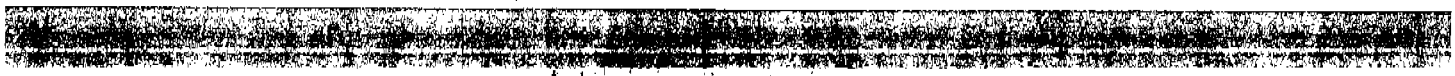
While the canon of construction which requires all words to be given meaning, if possible, does not indicate which of these two construction is correct, both legislative history and precedent, however, lead to the same choice. Justice Golia in New York Tel., and the legislative history, supports the construction that as the purpose of adding the language relating to 911 calls was to prohibit blockage by a provider of access to coinless 911 service for any amount of time, however brief. The Code is to be so construed, either adding the implicit "if operable" language, as did Justice Golia or construing the words "provide coinless twenty-four hour 911 service" as proscribing blocking such access. As both are functionally equivalent, this Court concludes that the Regulations provisions challenged go beyond the authorization in the Code. As they are unauthorized, the NOV's which rely on the Regulations must be set aside.

Remissions of Fines

Because this Court has found, for all the reasons set forth above, that the NOV's may not be sustained, it must set them aside. Accordingly, the NOV's are hereby vacated and this matter returned to ECB. Because this Court has found that the NOV's are unsustainable as a matter of law, Verizon's request for remission of the

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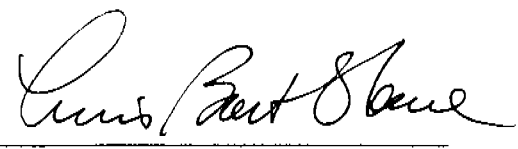


finest must be granted. As there is no basis to sustain the NOV's, the fines paid on them must be returned. ECB is hereby ordered to return Verizon such fines within sixty days of the service of notice of entry of this Decision and Order.

This is the Decision and Order of the Court.

DATED: AUGUST 22, 2008
NEW YORK, NEW YORK

ENTER:



Hon. Lewis Bart Stone
Justice of the Supreme Court

FILED
AUG 28 2008
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NEW YORK