

Matter of Amerivest Partners LLC v Public Serv. Commn. of State of N.Y.
2013 NY Slip Op 30726(U)
April 11, 2013
Supreme Court, Albany County
Docket Number: 246-12
Judge: George B. Ceresia Jr
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
AMERIVEST PARTNERS LLC,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

Petitioner,

-against-

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK and VERIZON NEW
YORK, INC.,

Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJ1 # 01-12-ST3306 Index No. 246-12

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner is a member of the American Stock Exchange (hereinafter “AMEX”). On December 2, 2002 AMEX, on behalf of itself and its members, entered into a contract with defendant Verizon New York, Inc. (“Verizon”) whereby they would purchase communication service (voice and data transmission) from Verizon. By the terms of the contract, referred to as a “Limited Service Offering” (“LSO”)¹, Verizon was to provide private line service by means of what is referred to as a “SONET Ring”.² Two AMEX offices (one in Brooklyn, New York and one in Manhattan) were to be located on the SONET ring, which was routed through (and connected with) seven Verizon facilities. AMEX and its individual members (including the petitioner) were charged a discounted rate for use of the SONET: \$21.75 per month per DS0 circuit and \$150.68 per month per DS1 Circuit.³ While the two AMEX offices were to be located on the SONET ring, AMEX members (such as the petitioner) were not.

On November 5, 2007 the petitioner filed a complaint with the New York State

¹As described in the PSC Determination Dated April 23, 2012 (and discussed under the heading “Verizon’s Billings For Tail Currents”, infra) an LSO is used to provide special services to customers with particularized needs not otherwise addressed by the applicable tariff.

²“SONET (Synchronous Optical NETwork) is a ‘family of fiber optic transmission rates, from 51.84 million bits per second to 39.812 gigabits ...per second [or higher]. created to provide the flexibility needed to transport many digital signals with different capacities...’ The term SONET ring refers to the fact that ‘SONET transmission systems ideally are laid out in a physical ring for purposes of redundancy’ [.]” (PSC Determination dated September 19, 2011, p. 2, footnote 5, quoting Newton’s Telecom Dictionary [19th ed., 2003]).

³“DS0 (or DS-0) stands for Digital Signal, level zero; DS1 or (DS-1) stands for Digital Signal, Level one. A DS0 line (or circuit) is a voice-grade channel of 64,000 bits per second, which is ‘the worldwide standard of speed for digitizing one voice conversation using Pulse Code Modulation (PCM).’ DS1, or Digital Signal, level 1, supports 24 voice-grade conversations.” (PSC Determination dated September 19, 2011, p. 2, footnote 4, quoting Newton’s Telecom Dictionary [19th ed., 2003]).

Department of Public Service (“PSC” or “Commission”), Office of Consumer Services concerning Verizon’s billing practices. The issue there was whether the petitioner was entitled to a retroactive rate reduction (and refund) in accordance with the favorable LSO billing rate. Verizon, in that proceeding, maintained that the petitioner was not entitled to the LSO billing rate, because it had not submitted confirmation orders (as expressly directed in the LSO) to request that circuits be connected to the SONET ring. In an informal hearing decision dated March 25, 2009 the complaint was denied. The petitioner appealed the determination to the full Commission, and on February 16, 2010 the determination was reversed, and the complaint upheld. The Commission found that submission of a confirmation order had been waived by Verizon, and therefore was not required. Rather, when the petitioner was requesting service under the LSO, submission by the petitioner of a different document, referred to as a communication permit, was sufficient.⁴ The Commission directed Verizon to recalculate its charges and provide refunds, where applicable. By petition filed on March 18, 2010 Verizon sought a rehearing. The Commission, in a determination dated June 21, 2010, granted the rehearing only to the extent of clarifying the February 16, 2010 determination, which was otherwise confirmed.

By letter dated April 7, 2010 and subsequent letters⁵, the petitioner sought clarification

⁴Specifically, it found that the petitioner (together with other AMEX members) and Verizon had effectively modified the LSO by adopting a “standard procedure” whereby AMEX, on behalf of its members, could request service under the LSO through submission of a communication permit, rather than a confirmation order.

⁵See PSC Determination dated September 19, 2011, page 5, footnote 10.

of the February 16, 2010 determination. Several new issues were raised, which the PSC grouped into three broad classifications. The first related to the petitioner's assertion that LSO pricing should apply to what are referred to as tail circuits (circuits which are not on the SONET ring, which connect AMEX members to the SONET ring). The second related to petitioner's contention that circuits which pre-existed the date of the LSO should benefit from LSO pricing. The third related to the petitioner's contention that LSO pricing should apply to all circuits installed after the LSO went into effect. In a determination dated September 19, 2011 the PSC largely rejected the various arguments advanced by the petitioner.

On October 16, 2011 the petitioner submitted to the PSC a request for a rehearing. Thereafter, on January 12, 2012, the petitioner commenced the instant CPLR Article 78 proceeding. The PSC made a motion to dismiss the petition, in part, on grounds that the CPLR Article 78 petition was premature, since the PSC had not yet ruled on the October 16, 2011 petition for a rehearing. In the alternative, the respondents requested a stay of the proceeding until the PSC issued an administrative determination with regard to the rehearing. The Court, in a decision-order dated April 24, 2012 stayed the proceeding for thirty (30) days. Unbeknownst to the Court, the PSC had, on April 23, 2012, issued its decision denying a rehearing. Each of the respondents served answers to the petition in late May, 2012. Oral argument was held on July 9, 2012. During the appearance on July 9, 2012 the petitioner made an oral motion to amend the petition to include the April 23, 2012 PSC determination. Although initially opposing the amendment, the respondents ultimately gave their consent, with all parties stipulating that they were resting on the papers already submitted. The Court,

granted the motion as stipulated by the parties.

Notably, the Court's role in reviewing an administrative determination is not to substitute its judgment for that of the agency, but simply to ensure that it is not made in violation of lawful procedure or affected by an error of law, and was not arbitrary and capricious or an abuse of discretion (see CPLR 7803 [3]; Matter of Peckham v Calogero, 12 NY3d 424, 431 [2009]; In the Matter of Terrace Court, LLC v. New York State Division of Housing and Community Renewal, 18 NY3d 446, 454 [2012]; Matter of Warder v Board of Regents, 53 NY2d 186, 194; Matter of Flacke v Onondaga Landfill Sys., 69 NY2d 355, 363; Akpan v Koch, 75 NY2d 561, 570; Matter of Prestige Towing & Recovery, Inc. v State of New York, 74 AD3d 1606 [3rd Dept., 2010]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (Matter of Peckham v Calogero, *supra*), citing Matter of Pell v Board of Educ., 34 NY2d 222, 231 [1974]; Matter of Prestige Towing & Recovery, Inc. v State of New York, *supra*).

"It is [also] well settled that when an agency acts within its area of expertise in interpreting statutes it is responsible for administering, its construction of those statutes is to be upheld if its decision is not irrational or unreasonable" (In the Matter of Transitional Services of New York for Long Island, Inc. v NYS Office of Mental Health, 13 NY3d 801, 802 [2009], citing Matter of Brooklyn Assembly Halls of Jehovah's Witnesses, Inc. v Department of Env'tl. Protection of City of N.Y., 11 NY3d 327, 334 [2008]; see Matter of Aides At Home, Inc. v State of New York Workers' Compensation Board, 76 AD3d 727 [3rd Dept., August 5, 2010]).

The Court observes that the PSC determination dated April 23, 2012 did not address

all of the issues discussed in the September 19, 2011 determination, and/or give equal attention or weight to such issues (most likely by reason of how the issues were framed by the petitioner in its application for a rehearing). Where appropriate here, the Court has referenced portions of each determination in this decision.

Petitioner's Contention That The LSO Did Not Require The Petitioner To Be Connected To The SONET Ring

The petitioner advances the following arguments: “there is absolutely no condition that the [LSO] rate of \$21.75 is conditioned upon Amerivest making any connection to any Sonet.” (petition ¶18); “whatever has to be done in this connection must be done by Verizon” (petition ¶ 21); “[i]t is the contention of the petitioner that the contract itself [the LSO] can not impose any duty or obligation on Amerivest, a non-party to the contract to connect the circuit to the sonet ring” (petition ¶ 23); “the contention of Verizon that petitioner must connect the circuit to the sonet to qualify for the LSO rate is not supported by the contract or any other evidence before the Commission.”

As relevant here, the LSO includes the following language:

“Services. Customer, acting for it self and as agent for its member brokerage firms (‘Member’ or ‘Members’) hereby requests and agrees to purchase from the undersigned Verizon company (‘Verizon’) on behalf of its Members the services identified in Exhibit A to this Agreement and as further described in Verizon’s applicable tariffs (the ‘Services’) [].”

[]

Exhibit A

“1. Services and Quantity Commitments. Customer agrees to

purchase the following Services from Verizon New York ('Verizon') at the rates set forth below and in quantities set forth below. Such Services are provided under the authority of Verizon's P.S.C. No. 7 Tariff as a Limited Servicing Offering ('LSO'), as well as Verizon's P.S.C. No. 1 Tariff for Telephone Services. Any other work, services or facilities required will be provided subject to prevailing tariff rates and charges, or if no tariff is applicable, at Verizon's then-current retail rates.

"The Services shall consist of DS0 and DS1 circuits delivered over a diversely routed Sonet platform between Customer's two locations and the seven Verizon central office (CO) locations set forth below, and also indicated on the diagram on Exhibit C. Members will connect to the Service at the Verizon CO locations set forth below. Customer and members shall pay the applicable monthly charge set forth below for each DS0 and DS1 circuit. DS0 circuits will be aggregated and handed off at Customer's locations as DS1 circuits.

"Verizon will install and maintain the network facilities of Verizon used to provide the Services up to the demarcation point between Verizon's net work and Customer's premises equipment and facilities, in accordance with Verizon's applicable tariffs as shown on Exhibit C. Customer and Members shall provide at its cost, any conduit, pathways, and building entrance facilities that may be required on private property, and suitable and secure space, with suitable environmental conditions, power, and access at its premises for placement of any equipment or facilities to be used by Verizon to provide the Services.

"Verizon will assign appropriate personnel necessary to implement the Sonet platform. []

[]

"4. Charges. Customer and Members shall pay a monthly charge for each DS0 and DS1 circuit at the rates set forth below from date each circuit is activated. The monthly rate set forth below for a DS0 circuit includes DS0 to DS1 Central Office Muxing. Each circuit ordered after the initial order is placed will be subject to a \$56.00 service order charge.

Circuit	Monthly Recurring Charge Per Circuit
DS0	\$21.75
DS1	\$150.68"

In its September 19, 2011 determination the PSC found that the discounted billing rate under the LSO was applicable only to circuits, or portions of circuits using the SONET ring. Circuits (or portions) not using the SONET ring were not entitled to the LSO billing rate. This finding is well supported in Exhibit A of the LSO which recites “[t]he services shall consist of DS0 and DS1 circuits *delivered over a diversely routed Sonet platform* between Customer’s two locations and the seven Verizon central office (CO) locations [.]” (LSO, Exhibit A, paragraph 1, supra, emphasis supplied). The mechanism for implementing the foregoing (which, as noted above, was found by the PSC to have been modified by the parties) was for AMEX to submit a communication permit to Verizon requesting such service on behalf of its members pursuant to the LSO. As such, the Court determines that PSC’s finding dated September 19, 2011, that a circuit had to utilize the SONET ring in order to receive the discounted LSO rate, had a rational basis.⁶

Circuits Installed Prior To The Date Of The LSO

Some of the circuits at issue were in existence prior to the signing of the LSO. The petitioner contends that it is entitled to re-billing at the LSO rate for such circuits, from the

⁶Contrary to an argument advanced by the petitioner, the record discloses no suggestion that the petitioner was obligated or required to perform the physical work necessary to connect its circuits to the SONET. All that was required was that a communication permit containing such a request be submitted to Verizon by AMEX. It would then be Verizon’s responsibility to reconfigure the circuit to the SONET ring.

date the SONET ring became available. The PSC found in its determination dated September 19, 2011 that unless and until a pre-existing circuit was reconfigured to utilize the SONET, the circuit would properly continue be billed at the prior rate. Specifically, the determination recited, in part, as follows:

“The service provided by such previously existing circuits was not the service to which the LSO rate applied. There is no language in the LSO that states, or even intimates, that Verizon had any reason to reconfigure such circuits to utilize the SONET ring without a request from Amerivest or on Amerivest’s behalf.

“However, to the extent that, after the SONET ring became available, pre-existing circuits were subsequently reconfigured on the SONET ring, the appropriate pricing should apply from the date that occurred.” (PSC Determination dated September 19, 2011, at 24).

Thus PSC rejected petitioner’s assertion that such circuits automatically receive the discounted LSO rate from the date the SONET ring became available.

Much of the evidence before the PSC with respect to this issue took the form of spreadsheets submitted by both the petitioner and Verizon. The PSC found that petitioner’s spreadsheets failed to provide information with regard to when pre-existing circuits were reconfigured to connect to the SONET ring. The PSC concluded that petitioner’s spreadsheet provided “no useful information about when circuits were first configured on the SONET ring, or about which charges were for service over the SONET ring, and which were for tail circuits.” (PSC Determination dated September 19, 2011, at 27). A review of the spreadsheets submitted by both the petitioner and Verizon supports PSC’s findings. The Court finds that the PSC’s determination on this point had a rational basis.

Circuits Installed After The LSO Went Into Effect

The petitioner complains that a number of circuits installed after the date of the LSO did not receive the benefit of the lower LSO billing rate. The PSC determined that unless and until the new circuits were added to the SONET, they were not entitled to the benefit of the LSO billing rate; and that in order to be added to the SONET, the petitioner needed to make a request to Verizon that this be done (see PSC Determination dated September 19, 2011, 28-30). The PSC made reference to the following language found in the LSO: “Customer shall order Services on behalf of members who communicate to Customer their request to purchase Services from Verizon under the terms of this Agreement.” (LSO, Exhibit A, paragraph 8 [f]). The PSC found that this language “contradicts Amerivest’s claim that it was not permitted to request services pursuant to the LSO” (see PSC Determination dated September 19, 2011, 29). The Court finds that the PSC determination on this point has a rational basis in the record, since the petitioner had the ability to request service over the SONET, through AMEX.

Verizon’s Billings For Tail Currents

Both the September 19, 2011 PSC Determination and the April 23, 2012 PSC Determination discuss the issue of tail currents. A tail circuit is described by the PSC as a circuit used to connect a location off of the SONET ring to a location on the SONET ring⁷ (see PSC Determination Dated September 19, 2011, 21-22; PSC Determination dated April

⁷The example given in the PSC Determination Dated September 19, 2011, was a circuit which connected the petitioner, located on the SONET ring, with a client located off of the SONET ring (see PSC Determination dated September 19, 2011, 21).

23, 2012, 11). The PSC found that tail circuits are not included in the LSO, and therefore do not benefit from LSO billing rates.

By way of explanation, the PSC in the April 23, 2012 determination indicated that an LSO is not intended to provide for service regularly offered to and used by numerous customers, which are provided through the utility's regular tariff (see PSC Determination Dated April 23, 2012, 8). Rather, an LSO is designed to provide "services not available under the utilities regular tariff" (PSC Determination Dated April 23, 2012, 8), which the PSC found to be DS0 and DS1 circuits delivered over the SONET ring (id., quoting a portion of the LSO, Exhibit A, paragraph 1). As a part of the foregoing, the PSC pointed out "the special service provided by the LSO was the SONET Platform"; and that the LSO recited that "[m]embers [such as Amerivest] will connect to the Service at the Verizon CO locations set forth below [i.e., the central office locations on the SONET platform]." (see id., 8-9). The PSC also made reference to LSO Exhibit A, paragraph 8 (e) which recites:

"Tail Circuits - The tail circuits which are accessed from the Services above, including any usage therefore, are not included in the monthly recurring charges set forth above, and will be purchased by Customer and Members under other existing contracts or at tariffed rates, terms and conditions. Accordingly, if any such services are terminated, applicable termination charges as set forth in such contracts or tariffs shall apply".

The PSC concluded that only those circuits, or portions of circuits, which were on the SONET ring were entitled to LSO pricing; and that those circuits or portions of circuits that connected to an off-ring location must be billed in accordance with the applicable tariff.⁸

⁸See PSC Determination dated April 23, 2012, p. 9, footnote 13.

The Court finds that the determination has a rational basis in the record, by reason that the LSO clearly defined the term “services” as DS0 and DS1 circuits delivered over a diversely routed Sonet platform, while also indicating that tail circuits would be governed by the applicable tariff. The fact that a single circuit was comprised of two portions, one on the SONET (which received the LSO rate), and one which continued to a location off of the SONET (which did not receive the LSO rate), does not change the result.

In arguments which preceded issuance of the April 23, 2012 PSC determination, the petitioner maintained that the applicable tariff never mentions the term “tail circuit”. The PSC conceded that this was true, but indicated that

“the term ‘tail circuits’ is not used in the LSO to refer to specific circuits that can be found in the tariff under that name. Rather, the term is a colloquial reference to certain circuits for which the tariff provides separate and distinct charges.” (see PSC Determination dated April 23, 2012, at 10)

The Court finds the foregoing explanation satisfactory.

The Court further finds that there is no evidence in the record to substantiate petitioner’s claim that Verizon waived payment for tail circuits, either through refunds given to other customers (discussed below), or through Verizon’s preparation and delivery to Amerivest of a spreadsheet which eliminated the charge for tail circuit charges (which was never carried out, and which Verizon subsequently indicated was furnished in error).

In view of the foregoing, the Court finds that the determinations with respect to Verizon’s billing for tail circuits have a rational basis.

Discriminatory Refunds To Other Verizon Customers In Connection With Tail Circuits

The Petitioner indicates that Verizon provided refunds to some members of AMEX to eliminate charges for tail circuits in excess of the LSO billing rate, but did not do so for the petitioner. The petitioner maintains that this was discriminatory, and in violation of the provisions of Public Service Law §§ 91 and 92. The PSC disagreed, stating as follows:

“[T]he fact that Verizon may have rebilled, or provided refunds to, other AMEX member firms in a manner not in accord with the utility’s applicable tariff does not allow, much less require, Verizon to similarly rebill Amerivest at a rate not specified in Verizon’s tariff .

We cannot direct Verizon to rebill with respect to tail circuits in a manner that would be inconsistent with the terms of the LSO and Verizon’s filed tariffs, and the rebilling we have directed does not authorize discrimination in violation of the PSL. We are not able to require refunds where a utility has billed in accordance with its ‘filed rate’”.(see PSC Determination dated April 23, 2012, 13).

To be sure, Public Service Law 91 recites as follows:

1. Every telegraph corporation and every telephone corporation shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable. All charges made or demanded by any telegraph corporation or telephone corporation for any service rendered or to be rendered in connection therewith shall be just and reasonable and not more than allowed by law or by order of the commission. Every unjust or unreasonable charge made or demanded for any such service or in connection therewith or in excess of that allowed by law or by order of the commission is prohibited and declared to be unlawful.

2. (a) No telegraph corporation or telephone corporation shall directly or indirectly or by any special rate, rebate, drawback or other device or method charge, demand, collect or receive from any person or corporation a greater or less

compensation for any service rendered or to be rendered with respect to communication by telegraph or telephone or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect to communication by telegraph or telephone under the same or substantially the same circumstances and conditions. []

3. No telegraph corporation or telephone corporation shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (Public Service Law § 91)

In addition, Public Service Law 92 (2) (d) recites:

“No utility shall charge, demand, collect or receive a different compensation for any service rendered or to be rendered than the charge applicable as specified in its schedule on file and in effect. Nor shall any utility refund or remit directly or indirectly any portion of the rate or charge so specified, nor extend to any person any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are specified in its schedule filed and in effect and regularly and uniformly extended to all persons under like circumstances for the like or substantially similar service.” (Public Service Law § 92 [2] [d])

The PSC cites Public Service Law § 118 (3) which recites:

"Credit or refund of overpayments.

(a) The commission shall have the power to require a public utility company or municipality to provide a refund or credit to a customer when a payment has been made in excess of the correct charge for actual service rendered to the customer." (Public Service Law § 118 [3])

While clearly, the commission has the statutory authority to direct a utility company

to refund sums where a customer has paid an amount in excess of the correct charge, in this instance the petitioner has not shown that this is the case. To the contrary, the only claim here is that other AMEX members received a refund, but the petitioner did not. The Court observes that the sole mechanism in place to formally address discriminatory rates or billing practices is through PSL § 97, which authorizes the Commission, after a hearing, to issue an order establishing “which such rates, charges or rentals are thereafter to be observed []”, “upon such terms, conditions or safeguards as the Commission may prescribe”(see PSL § 97 [1]).

In the Court’s view, the Commission properly found that it could not direct Verizon to grant the petitioner a refund, where it was not shown that the rates paid by the petitioner violated either the LSO or the applicable tariff. The fact that other members of AMEX were apparently given refunds (even if by “mistake” as asserted by Verizon), does not mandate a different result, since the error was in the refund, not in the initially billing for tail circuits.

Nor does the Court discern that there was a need to appoint an administrative law judge. Under the rules of the Department of Public Service, “[i]f there is a factual or legal dispute, the commission may order a formal evidentiary hearing on the complaint or make such other decision as it deems appropriate.” (see 16 NYCRR 12.14 [b]). In the Court’s view, the petitioner failed to present sufficient evidentiary facts to demonstrate the need for a hearing. The denial of a hearing was not an abuse of discretion.

The Court has reviewed and considered remaining arguments and contentions and found them to be without merit.

The Court finds that the determination was not made in violation of lawful procedure,

is not affected by an error of law, and is not irrational, arbitrary and capricious, or constitute an abuse of discretion. The Court concludes that the petition must be dismissed.

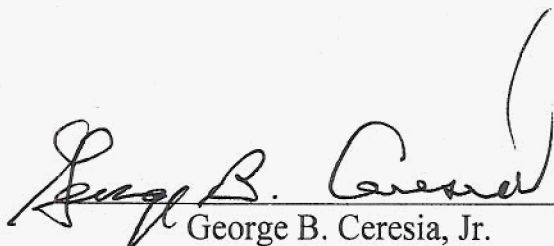
Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondent, Public Service Commission. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: January 8, 2013
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Petition dated January 9, 2012, Petition, Supporting Papers and Exhibits
2. Petitioner's Supplemental Affirmation dated February 8, 2012
3. Verified Answer of Public Service Commission dated May 23, 2012 With Record
4. Verified Answer of Verizon New York, Inc. Dated May 24, 2012
5. Petitioner's Additional Exhibits dated May 30, 2012
6. Reply Affidavit of Suzanne Fischer, sworn to May 31, 2012
7. Letter dated June 6, 2012 of Louis J. Castellano, Jr., Esq. with Exhibit