DT 02-165

VERIZON NEW HAMPSHIRE

Investigation of Verizon New Hampshire's Treatment of Yellow Pages Revenues

Order on Motion for Rehearing and/or Reconsideration

O R D E R N O. 24,385

October 19, 2004

I. INTRODUCTION AND BACKGROUND

Verizon New Hampshire (VNH) seeks rehearing and/or reconsideration pursuant to RSA 541:3 of Order No. 24,345 (Order), entered by the New Hampshire Public Utilities Commission (Commission) on July 9, 2004 in connection with this proceeding. The issues in this case involved VNH's treatment of Yellow Pages revenues, including the proper regulatory treatment of the revenues realized as a result of the publishing of New Hampshire Yellow Pages directories, whether the accounting treatment of these revenues is in accord with such determination, and whether any harm has resulted or remedy is necessary.

The procedural history of this docket is set forth at length in Order No. 24,345, which is repeated here only in relevant part. In Order No. 24,345, following discovery, prefiled testimony, hearings and post hearing briefs, the Commission found that pursuant to RSA 366:5, the Directory Publishing Agreement entered into by New England Telephone & Telegraph Company (NET) and NET's directory publishing affiliate, Bell Atlantic Yellow Pages Company, dated as of January 1, 2000 (2000 DPA), to which VNH and its directory publishing affiliate, Verizon Yellow Pages Company (VYPC) have succeeded, is unjust and unreasonable as it pertains to VNH and its customers. The Commission ruled that to remedy the unjust and unreasonable effects of the 2000 DPA, it is appropriate to impute revenues to VNH. The

Commission specified that a second phase of this proceeding would be conducted to quantify, on a prospective basis, the level of imputation. Pending the conclusion of this second phase, the Commission ordered that $23.3 million in revenues be imputed annually to VNH for regulatory purposes. On August 6, 2004, VNH filed with the Commission a motion requesting rehearing and/or reconsideration of Order No. 24,345 (Rehearing Motion). No responses were filed.

II. SUMMARY OF THE REHEARING MOTION

VNH advances eleven arguments in support of its Rehearing Motion. VNH first argues that the Commission lacks the authority to impute the revenues of VYPC to VNH and, in seeking to do so, has exceeded the scope of the authority delegated to it by the Legislature. VNH's argument is based on the premise that transactions in which a utility provides something of value to a third party are already amply covered by other provisions in the Commission's enabling statutes. VNH contends the plain wording of RSA 366 provides no basis for the Commission's conclusion that the Legislature gave the Commission the authority to impute revenue from an unregulated business to its regulated affiliate. VNH further contends that the statutory framework governing the Commission's authority makes clear that the transfer of a utility asset on terms not approved by the Commission was intended to be addressed by RSA 374:30, while the provision of service on terms not approved by the Commission was intended to be addressed by RSA 374:2 and, in the case of free service, by RSA 378:14.

Second, VNH argues that the Commission erred as a matter of law in ruling that there is anything of value flowing from VNH to VYPC for which VNH is entitled to compensation. VNH maintains that beyond its subscriber listings, for which it is compensated, it has nothing of value that VYPC needs to conduct its directory publishing business and therefore

there is no legal basis for the Commission's determination that the payments under the 1991 Directory Licensing Agreement (1991 DLA) should have been continued after termination of that agreement by NYNEX Information Resources Company (NIRC). According to VNH, the 2000 DPA did not create any value for VYPC, nor could it. VNH alleges that, rather than pointing to an asset or right that VNH has made available to VYPC through their publishing arrangement, the Commission claims that the public's mere awareness that VNH and VYPC are owned by the same holding company creates an entitlement to the revenues of the unregulated company by customers of the regulated company.

VNH asserts that, aside from the separate issue of whether significant value is in fact flowing to the Yellow Pages business from its association with the regulated company, the Commission failed to explain how advertisers and those using the Yellow Pages would make the association, but for the common name of the two companies. VNH reasons there is no basis for the Commission's conclusion that the "association" that customers make when they see the Verizon name is solely with the regulated company and that the entire value of any association the public may make with the Verizon name belongs to the regulated company. VNH reiterates that customers of the regulated company have no right to any value derived from the name, and the Commission erred in determining otherwise.

Third, VNH argues the Commission erred as a matter of law in ruling that VNH and its customers are entitled to the value of tangible or intangible assets that are not on the books of the regulated company. VNH contends that, even assuming that the "association" the public makes between VNH and VYPC is something of value that belongs to VNH, the Commission nevertheless erred by requiring that the revenues derived by VYPC from that

association be imputed to VNH for regulatory purposes. VNH claims that just as customers are not charged for goodwill (i.e., the value of assets over and above their historic book value), shareholders are entitled to the value of those assets when removed from ratebase, to the extent they exceed the value at which they were on the books of the regulated entity. According to VNH, the reason for this allocation is clear—customers of a utility do not have an equity interest in the assets that serve them; for example, when a utility is sold, even in the typical circumstance when it is sold for more than its book value, shareholders reap all of the economic benefit and customers reap none of it.

VNH states that the Commission has historically followed the rule that customers' rates should only be based on the depreciated original cost of the utility assets and any amount paid for goodwill cannot be recovered from customers of the regulated company. VNH concludes that even assuming the Commission has any jurisdiction over the asset in question in this case, the Commission's ruling which allocates that value runs directly contrary to these principles. VNH cites two cases to support its contention, *Pennichuck Water Works v. State*, 103 N.H. 49 (1960) and *Appeal of the City of Nashua*, 121 N.H. 874 (1981), each of which refer to a previous case, *Chicopee Mfg. Co. v. Company***,** 98 N.H. 5, 13-14 (1953). In *Appeal of the City of Nashua*, the New Hampshire Supreme Court followed a rule set forth in the *Chicopee* case that "under the commission's accounting rules and as a 'matter of general equity,' the profits realized from the sale of [a capital asset] belong to the stockholders rather than the ratepayers because any loss realized from the sale of such assets could not be charged to future consumers." *Id*. at 877. VNH concludes that the Commission cannot properly allocate to customers the value of assets, such as goodwill, for which customers have not paid and the economic risk which they

have not borne, let alone the value of assets that are not owned by the utility at all.

Fourth, VNH argues that the Commission erred as a matter of law in (i) ruling that VNH could have granted special rights to VYPC or any other publisher of a telephone directory for which it would be due compensation and (ii) failing to rule that the enactment of section 222(e) of the Telecommunications Act of 1996 (TAct) made the change in terms of the publishing arrangement reasonable. Section 222(e) requires telecommunications carriers such as VNH and its predecessor, NET, to provide subscriber list information on non-discriminatory terms to directory publishers. VNH contends that with the passage of section 222(e), VNH was legally prohibited from granting special rights on an exclusive basis to VYPC or any other directory publisher. VNH further contends that because the grant of such special rights provided the primary basis for the compensation paid by VYPC to VNH, once such special rights were outlawed, no further basis for compensation existed. VNH concludes that the Commission erred in disregarding the effect of section 222(e) of the TAct.

Fifth, VNH argues that the Commission erred by basing its conclusions on eight critical findings that are unsupported or contradicted by the record. VNH challenges the following statements in the Order:

a. The Yellow Pages "were (and are) commonly viewed as integral to providing telecommunications services to ratepayers." *See* Order at 84. VNH claims that this is a finding

which is unsupported by any evidence and is directly contrary to a statement[1] cited with approval in *PK's Landscaping, Inc. v. New England Telephone and Telegraph Company*, 128 N.H. 753 (1986) that the Yellow Pages business was "outside the scope of [NET's] public service functions." VNH maintains that the Commission improperly relied on a 2000 Utah Supreme Court case[2] which, according to VNH, was based on an earlier 1979 Utah Supreme Court case[3] ruling that directory publishing operations were "utility operations." In addition, VNH urges that whether customers view Yellow Pages as being integral is irrelevant to the Commission's authority to impute revenues.

b. "The fact that, for a period of time before the 1991 DLA took effect, the covers of the directories announced to the world that they were 'The Official Directory of New England Telephone' is inconsistent with a sale or other permanent disposition of the Yellow Pages directory advertising operations." Order at 93. VNH asserts that although NIRC may have been free to publish its own telephone directory at the time, it gained additional value by being able to proclaim its directory as the "Official Directory" of NET and that this additional value provided the basis for NET to obtain compensation from NIRC under the first two directory publishing agreements. VNH claims that the Commission is attempting to rewrite

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[1] The complete statement, from *McTighe v. New England Telephone and Telegraph Co.*, 216 F.2d 26 (2d Cir. 1954), reads as follows: "In entering into the [Yellow Pages] advertising contract, the telephone company in its private capacity contracted as to matters outside the scope of its public service functions, and was free to include in the contract a limitation of liability, as this would not operate to defeat its public purpose." *Id*. at 30.

[2] The case referred to is *US West Communications, Inc. v. Public Service Commission of Utah*, 998 P.2d 247 (Utah 2000).

[3] The 1979 case apparently referred to is *Committee of Consumer Services v. Public Service Commission*, 595 P.2d 871 (Utah 1979), referred to in the *US West Communications, Inc.*, *supra*, decision as *Wexpro I*. *Wexpro I* involved a natural gas company which proposed a transfer of certain oil-producing properties to its non-regulated and wholly owned subsidiary; providing natural gas was a regulated utility service while producing oil was not. As further described in the Order at 123-126, the 2000 *US West Communications, Inc.*, *supra*, decision applied the criteria set forth in *Wexpro I* to directory publishing and held that the publishing affiliate's directory operations are utility assets subject to the Utah Public Service Commission's authority.

history and reverse its first two Yellow Pages orders, *New England Telephone and Telegraph Company*, Docket No. DE 84-12, 70 NH PUC 630 (1985) and *New England Telephone Company*, Docket No. DE 90-200, 76 NH PUC 130 (1991).

c. "It is true the record in DE 84-12 contains a few scattered references to a corporate restructuring occurring behind the scenes to accommodate implementation of the 1984 DPA. . . ." Order at 93. VNH contends that this statement is plainly wrong, given the record in this docket and in DE 84-12.

d. "NET did not present any details, such as accounting documentation, consistent with a sale or other permanent disposition and VNH has not done so in this docket." Order at 94. VNH contends that this statement is plainly wrong, given the record in this docket and in DE 84-12.

e. "For practical purposes, the directory publishing and advertising arrangement between [VNH and VYPC] is an exclusive one." Order at 114. VNH urges that this statement is wrong if the Commission intended to rule that VYPC obtained any exclusive rights from VNH.

f. "The financial result for ratepayers under the 2000 DPA is inconsistent with the result of an arm's length transaction. . . ." Order at 115. With respect to this statement, VNH maintains that there is no Commission finding as to what an arm's length transaction would have yielded and therefore it is speculative. In addition, VNH maintains that the Commission appears to have assumed, incorrectly, that the regulated company and its customers were entitled to compensation for that value regardless of the source of the value and therefore an arm's length transaction would have included such a payment.

g. The "association" that the Commission claims the public makes between VYPC and VNH has a positive value, and the value of that association is equal to the net revenues from its New Hampshire Yellow Pages operations. For this statement, VNH refers to the Order at 107-108, 111-112 and 114. According to VNH, the Commission assumed without foundation that the value was positive and that it was equal to the net revenues of VYPC's New Hampshire Yellow Pages operations despite a lack of quantification of that value in the record. VNH further maintains that such a conclusion is contrary to the evidence showing that VYPC spends substantial effort to rebut competitors' claims that the association has disadvantages.

h. The advertising market in which VYPC operates does not represent "economically significant competition" or is even "competitive." Order at 135-136. VNH charges that the Commission's statements about competition are unsupported and are contrary to the evidence in the record regarding the "substantial competitive pressures" that VYPC faces in retaining its share of the market as well as the number of competitors and alternative yellow pages telephone directories in the New Hampshire market.

Sixth, VNH argues the Commission erred as a matter of law in ruling that VNH did not obtain any necessary approval regarding the transfer of directory publishing assets. VNH claims that the Commission ignored the fact that, according to VNH, all parties in this docket agreed that the Yellow Pages operations were transferred to VYPC in 1984. In addition, VNH reiterates that VNH owns no assets today that are needed by VYPC to conduct its business. VNH maintains that, in spite of the undisputed evidence of the transfer of the directory publishing assets in 1984, the Commission ruled that it could ignore the existence of the transfer for regulatory purposes. VNH asserts that such a ruling is inconsistent with the fact that, at the

time the transfer occurred and was disclosed to the Commission, the Commission conducted a thorough review of the 1984 DPA. VNH declares that there is no basis for the Commission to assert that the transfer that occurred in 1984 is invalid, in that its Order in DE 84-12 did not specifically refer to RSA 374:30.

In addition, VNH argues that the Commission improperly assumed that Commission approval of the 1984 asset transfer was required in the first place. VNH asserts that because the assets being transferred were not used to provide any utility service, separate approval of the transfer under RSA 374:30 was not required. VNH concludes that the Commission erred as a matter of law in determining that, for regulatory purposes, the transfer did not occur in 1984 and that the transfer of those assets can now be ignored.

Seventh, VNH argues that the Commission erred as a matter of law by collaterally attacking its own orders in DE 84-12 and DE 90-200. VNH asserts that the Order attempts to invalidate the transfer of directory publishing assets in 1984 despite the fact that the Commission reviewed the entire restructuring of NET in 1984, including the transfer of the Yellow Pages assets and the establishment of a directory publishing arrangement with NIRC, and subsequently approved the successor contract, the 1991 DLA. VNH remarks that, as the Commission itself noted, other state public service commissions presented with the same arrangement in 1984 as the Commission chose to disapprove the contracts presented. VNH claims the Commission seeks to rule that the 1984 DPA and the 1991 DLA were unreasonable because they were terminable after a prescribed period of time without payment of additional consideration.

Eighth, VNH argues the Commission is estopped from ruling that the assets of VNH's predecessor used in publishing telephone directories were not properly transferred to

VYPC. VNH avers that Commission Staff and the Office of Consumer Advocate agreed in this docket that an asset transfer in fact occurred in 1984 and states that the only disagreement relates to the significance of that transfer. VNH asserts that despite the Commission's ruling to the contrary, the Commission is estopped from asserting twenty years after the fact that for regulatory purposes it can now act as if the 1984 transfer did not occur. VNH contends that the Commission's decision first to allow the 1984 DPA to go into effect and subsequently to approve the 1991 DLA that replaced it are inconsistent with the position that it was either unaware that the asset transfer occurred or did not give the necessary approval for such a transfer. VNH avers that the problems posed by the Commission's "current effort to rewrite the events and decisions of 20 years ago" is amply illustrated by its statement in the Order that VNH's citations to the record in DE 84-12 did not provide sufficient evidence that the Commission was aware of the transfer of the directory publishing assets.

VNH further asserts that the Commission's revisiting of this issue puts VNH in the impossible situation of having to prove what the Commission did or did not understand twenty years ago based on the information provided to it at the time. VNH concludes that this creates a classic situation of laches, which further supports the basis to estop the Commission from determining either that the directory publishing assets were not transferred or that some additional approval for the transfer was required.

Ninth, VNH argues that the Commission's ruling that the 2000 DPA was unreasonable and that the revenues of VYPC associated with publishing its New Hampshire telephone directories should be imputed was arbitrary and capricious and exceeds the authority that the Legislature delegated, or properly could have delegated, to the Commission. VNH

asserts the Commission had no proper legal basis for imputation and the Commission did not articulate a sufficient and legally supportable standard for when imputation can occur. From this, VNH contends that the Commission's ruling is arbitrary and capricious and its finding that the 2000 DPA is unreasonable is erroneous as a matter of law. According to VNH, the policy of imputation announced by the Commission leaves utilities no reasonable basis by which to know when or if imputation is appropriate. VNH claims that if the "association" the public may draw between the names of two companies, one of which is regulated, is the touchstone for revenue imputation, then the Commission would arguably be free to impute any Verizon affiliates' revenues to VNH as well. VNH maintains that the Order provides no legally supportable distinction between its treatment of VYPC and any other Verizon entity, and none exists.

In addition, VNH asserts that the Commission's ruling would give it unfettered discretion to create any remedy it sees fit when it wishes to reach out and claim the value of an affiliated business and transfer that business to the regulated company. VNH contends that by interpreting the statute in this way, the Commission claims authority it has not been granted by the Legislature, citing *In Re Jack O'Lantern*, 118 N.H. 445, 448 (1978). Alternatively, if an unbridled grant of authority were intended, VNH contends that it would violate the constitutional restrictions on the Legislature's own ability to delegate authority to administrative agencies, citing *Smith Ins. v. Grievance Comm.*, 120 N.H. 856, 861 (1980) and *Papachristou v. City of Jacksonville*, 405 U.S. 156, 31 L.Ed.2d 110, 115 (1971).

VNH contends that the Order is an attempt by the Commission to extend its authority to include the power to impute revenues from a company that is otherwise beyond its jurisdiction and this constitutes an unlawful arbitrary and uncontrolled extension of the

Commission's authority, citing *Ferretti v. Jackson*, 88 N.H. 296 (1936). VNH claims that such a broad grant of authority cannot properly be found in RSA 366 or any other statute under which the Commission operates and if it did exist it would not pass muster under applicable standards of constitutional due process.

Tenth, VNH argues the Commission's ruling that the 2000 DPA was unreasonable and that the revenues of VYPC associated with publishing its New Hampshire telephone directories should be imputed was confiscatory in that (i) it has the effect of taking the property of VYPC, which is not subject to Commission jurisdiction, without just compensation and without sufficient legislative or administrative authority and (ii) by increasing the purported revenues of VNH for regulatory purposes, it increases VNH's annual Commission assessment and reduces its revenue requirement. With regard to the claimed confiscation of VYPC's property, VNH asserts that VYPC is not subject to the Commission's jurisdiction and that the Commission lacks the authority to regulate VYPC's rate of return. VNH contends that this is what the Commission seeks to do when, according to VNH, the Commission treats VYPC's assets as though they were still owned by VNH and imputes VYPC's revenues to VNH over and above an approved level of earnings. VNH maintains that this amounts to a confiscation of VYPC's property.

VNH asserts that the imputation of revenues from an unregulated affiliate without a contractual or other proper basis would lead to an exceptional and wholly unauthorized expansion of the Commission's jurisdiction. VNH refers to certain testimony of John Antonuk, an expert witness testifying on behalf of Staff, as demonstrating the consequences of the Commission's asserting such authority which, according to VNH, include the existence of

Commission jurisdiction over whether VYPC maximized revenues, whether it prudently managed its business and what a reasonable rate of return would be for its Yellow Pages operations. VNH contends that the Order fails to establish any legislative intent that an unregulated business should be subject to such governmental control and oversight. VNH maintains that the power to impute revenues as though the assets of the unregulated company were in fact owned by the regulated company would constitute the nearly unlimited power to regulate a business that, as VNH avers, the parties and the Commission have acknowledged is not subject to Commission jurisdiction. VNH further contends that the Commission has not given the Commission such authority, and it cannot be fairly implied under the existing statutes governing the Commission. Based on this reasoning, VNH concludes that the Order confiscates VYPC's property by applying VYPC's revenues for the benefit of its regulated affiliate. Finally, VNH contends that increases to VNH's annual assessments or reductions to revenue requirements that would otherwise apply constitute a confiscation of VNH's property. VNH cites *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 251 U.S. 396, 40 S.Ct. 183, 64 L.Ed. 323 (1920) in support of its confiscation argument.

Finally, VNH argues that the Commission erred in assessing a penalty against VNH for failing to file the 1999 amendment (1999 Amendment) to the 1991 DLA because, according to VNH, the uncontroverted evidence demonstrates that the failure to file was inadvertent and had no material effect, and VNH's financial filings with the Commission fully and repeatedly informed the Commission of the change in the revenue sharing arrangement between VNH and VYPC. VNH contends that the Commission's determination to assess a penalty against it, even a small one, is not supported by the record and should be reconsidered.

In support of its position, VNH points to testimony that: the failure to file was unintentional and resulted from personnel changes and processes for which VNH has taken corrective action; numerous financial reports of VNH, reflecting a change in revenues from directory publishing in 1999 and afterward, were filed with the Commission and reviewed by Commission Staff; the Staff was aware from information filed by VNH that directory publishing revenue sharing had ended;[4] and the Commission had conducted a separate review of the filing status of all utility-affiliate agreements in the fall of 2000 without taking enforcement action against any utility that had failed to file an affiliate agreement in a timely manner. Based on this last-mentioned testimony, VNH maintains that singling out VNH would be unfair and constitute selective, discriminatory enforcement by the Commission.

III. COMMISSION ANALYSIS

For the Commission to grant a motion for rehearing, the movant must demonstrate good reason why the relevant order is unlawful or unreasonable. RSA 541:3 and 541:4. Good reason may be shown by new evidence that was unavailable at the original hearing, or by identifying specific matters that were either "overlooked or mistakenly conceived". *Dumais v. State,* 118 N.H. 309, 386 A.2d 1269 (1978). This must be more than merely reasserting prior arguments and requesting a different outcome. *See Connecticut Valley Electric Company/Public Service of New Hampshire,* DE 03-330*,* Order No. 24,189 at p. 3 (July 3, 2003).

The arguments raised by VNH in its Rehearing Motion either have been previously raised and addressed in Order No. 24,345, or are mere recastings of previous arguments. We address certain of VNH's arguments only as they are pertinent to demonstrate

[4] VNH contends that Staff was aware of this "not long after" the date of the 1999 Amendment, citing a Staff memorandum dated August 21, 2000 which indicated that Commission Audit Staff had reviewed the 2000 DPA and understood it did not provide for compensation by VYPC to VNH.

that matters were not mistakenly conceived in Order No. 23,345 and that the Order is not unlawful.

VNH's third argument, that VNH and its customers are not entitled to the value of tangible or intangible assets which are not on the books of the regulated company, is not a new argument, but VNH for the first time cites two New Hampshire Supreme Court cases in support of its position, *Pennichuck Water Works v. State*, *supra*, and *Appeal of the City of Nashua*, *supra*, each of which rely on *Chicopee Mfg. Co. v. Company*, *supra*. These cases stand for the proposition that "under the commission's accounting rules and as a 'matter of general equity,' the profits realized from the sale of [a capital asset] belong to the stockholders rather than the ratepayers because any loss realized from the sale of such assets could not be charged to future consumers." *Appeal of the City of Nashua*, *supra*, at 877.

These cases involved the issue of the removal of an item from rate base and whether the item should be valued at historical cost or fair market value, in the context of the sale[5] of a capital asset to an independent third party. VNH's objections to the Order, however, relate to a different issue, in a different context, namely, whether rates charged to customers may properly reflect the value of Yellow Pages revenues, under a directory publishing agreement between affiliated entities. We do not find the cited cases to be applicable to the very different circumstances of the present docket which involves the propriety of VNH's agreement to take no publishing compensation, pursuant to an affiliate contract.

In its fifth argument, VNH challenges the validity and support for certain factual findings and statements made in the Order, including the statement that "[t]he Yellow Pages

[5] *Chicopee* involved the deduction of the reserve for accumulated depreciation related to a floating power plant seized by the United States government during World War II while the other two cases involved the sale of land owned by the utility.

"were (and are) commonly viewed as integral to providing telecommunications services to ratepayers." Order at 84. Our statement was an observation, supported by the decisions of many public service commissions and courts in other states of the commonly-held regulatory rationale underlying the regulatory treatment of Yellow Pages operations in the past, particularly the long-standing practice of including directory assets in rate base and costs and revenues from Yellow Pages as "above the line" items reflected in the regulated telephone company's revenue requirement, despite the fact that Yellow Pages advertising activities were not regulated telecommunications services as such and were at least nominally open to competition. VNH did not challenge the propriety of this long-standing practice or produce any evidence in this docket showing that the experience in New Hampshire was different from that of other states.

In any event, we note that there was testimony that "[i]t is a long established principle that revenues from operations integrally related to and deriving substantial support from utility operations and assets may be considered as offsets to utility costs of service"[6] and "[l]ike directory revenues, [pole] attachment revenues arise from operations deemed to be integrally related to the provision of local service and they rely upon assets and operations that are integrally related. Specifically, the connection is the use of the same directory through which the telephone company publishes (or causes a contracted party to publish) white page listings."[7] Staff witness Mason testified that in Staff's view, "the profitable yellow pages business is an integral part of providing telephone service; and brings value of telephone service to VNH's customers."[8] VNH itself admitted that "[t]elephone directories are a very useful and beneficial

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[6] *See* prefiled Reply Testimony of John Antonuk, Exhibit 52 at 11.
[7] *See* prefiled Reply Testimony of John Antonuk, Exhibit 52 at 9-10.
[8] Day 2 Transcript (Tr.) at 18.

component in providing basic telephone service to the public"[9] and "[w]hen businesses purchase Yellow Pages advertising, they're paying for the delivery of their name, phone number, and advertisement to all telephone customers."[10]

VNH challenges the statement in the Order that "[t]he fact that, for a period of time before the 1991 DLA took effect, the covers of the directories announced to the world that they were 'The Official Directory of New England Telephone' is inconsistent with a sale or other permanent disposition of the Yellow Pages directory advertising operations." Order at 93. We read VNH's statement that the directories were 'The Official Directory of New England Telephone' impliedly if not expressly represented to the public that the directories, including both the White Pages and Yellow Pages portions, were owned or otherwise belonged to NET. Such a representation would not have been accurate had a true sale or other final, permanent and complete disposition of the Yellow Pages directory advertising operations occurred in 1984 and, as between NET and NIRC, such a representation was not expressly authorized by agreement of the parties until January 1, 1991, when the 1991 DLA became effective.

VNH challenges two statements in the Order regarding the paucity of specific information in the record of DE 84-12 and in this docket about the 1984 corporate restructuring and the accounting details of the transaction. The record does, of course, speak for itself on this point. In addition, we observe here that the primary focus of the hearing in DE 84-12 was on the operation of the complex publishing payment formula in Appendix A to the 1984 DPA. VNH did produce from its own records a letter to the Commission dated May 3, 1984,[11] upon which it relies for a basis that the Commission knew of the transfer of assets in 1984. The letter was sent

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[9] *See* testimony of John F. Nestor, III, Day 2 Tr. at 40-41.
[10] *See* testimony of Donna M. Loftus, Day 2 Tr. at 42.
[11] Exhibit 45.

several weeks after the hearing and responded to Record Request No. 1. This record request was for certain information regarding the publishing payment formula, namely, the workpapers entitled "Base Year Calculations" referenced on page 1, Appendix A of the 1984 DPA. By carefully comparing the information on Page 1D, NET's Yellow Pages investments as of 1983, with the information on Attachment 1, NET's remaining Yellow Pages investments as of 1984,[12] an analyst may have been able to deduce from the record request response that a building in Lynn, Massachusetts with a net value of $6,314,000 and "other investment" valued at $900,000 was removed from NET's rate base in 1984. However, that information and the other limited information in the record about the status of accounts receivable and prepaid expenses fall far short of revealing the terms of a sale or other permanent disposition of the Yellow Pages business in 1984 and do not support VNH's claim of knowledge on the part of the Commission.

VNH also challenges a statement in the Order that the financial result for ratepayers under the 2000 DPA is inconsistent with the result of an arm's length transaction and a statement regarding the value of the "association" between VNH and VYPC. We disagree that these statements are not supported by the record. *See* Order at 107-111. In addition, we note that VNH has focused its efforts to date on contesting the Commission's authority and justification for ordering imputation at all. VNH did not introduce evidence regarding what the result of an arm's length transaction would have been or what a reasonable amount to impute would be, nor has VNH advanced any persuasive reasons why imputing $23.3 million[13] in this stage of the proceeding is unreasonable. We have provided for a second phase of this docket in order to quantify, on a prospective basis, what the level of imputation should be.

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[12] *Id*.
[13] See Order at 127-129.

VNH also challenges certain of our comments about competition in the Yellow Pages business. VNH and Staff presented conflicting testimony about the level of competition. We concluded that no persuasive evidence had been presented that the market for Yellow Pages is competitive. *See* Order at 136. We also noted that during the second phase of this proceeding, VNH and the other parties may introduce evidence of the level of competition insofar as such evidence bears on the issue of the amount to be imputed. We have made no determination regarding the significance of any competition in this context.

In its sixth argument, VNH complains that we asserted in our Order that the transfer of assets in 1984 was invalid. In addition, VNH further contends our conclusion on this point is based on an assumption that Commission approval for the transfer was required at all. VNH maintains that our analysis ignores the fact that the assets transferred in 1984 were not used to "provide any utility service" and therefore separate approval of the transfer under RSA 374:30 was not required.

VNH has not identified where in the Order we asserted that the transfer of assets in 1984 was invalid. In connection with characterizing the 1984 DPA and the Commission proceedings and analyzing their implications for our decision in this docket, we noted that NET did not request approval of the 1984 DPA as a transfer of the Yellow Pages business pursuant to RSA 374:30 and we remarked that the Commission did not make the statutory, "public good" finding or approve the transaction pursuant to RSA 374:30.[14] Our Order did not rest, however, on a determination of the exact scope of RSA 374:30 and we are not persuaded that such a determination is necessary or appropriate now. Nonetheless, we do not agree with VNH that the

[14] *See* Order at 94.

applicability of RSA 374:30 hinges on a narrow consideration of whether the asset being transferred was used to "provide [a] utility service." RSA 374:30 speaks more broadly in terms of the franchise, works or system, or portions thereof, of a regulated utility. Assets that have been included in rate base and paid for by regulated customers are fairly considered part of the franchise, works or system of the utility.

In its tenth argument, VNH complains about the untoward consequences of the Commission's alleged expansion of its jurisdiction by imputing revenues from an unregulated affiliate without a proper basis. According to VNH, such consequences include the existence of Commission jurisdiction over whether the non-regulated entity VYPC maximized revenues, whether VYPC prudently managed its business and what a reasonable rate of return would be for VYPC's Yellow Pages operations. VNH refers to certain testimony of John Antonuk, a witness on behalf of Staff, as support for its position.[15] It is clear from the transcript cited by VNH, however, that the testimony of Mr. Antonuk relates to the *regulated* telephone company's duty to manage contribution prudently and not to any duties of VYPC or its predecessors. *See also* prefiled Reply Testimony of John Antonuk, Exhibit 52 at 13. Thus we conclude that Mr. Antonuk's testimony provides no support for VNH's argument.

VNH also cites the *Brooks-Scanlon* case, *supra*. That case involved a company operating a narrow gauge railroad for its unregulated logging and lumber interests, but also as a regulated common carrier. The company depended on transportation for its logging and lumber business to make it a profitable rather than a losing concern. The issue before the United States Supreme Court was whether the company could be compelled by the Railroad Commission of

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[15] *See* Day 4 Tr. at 27-28.

Louisiana to operate its railroad as a common carrier. The Court held that "[a] carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage." *Id*. at 399. The Court recognized the special rule that "if a railroad continues to exercise the power conferred upon it by a charter from a State, the State may require it to fulfill an obligation imposed by the charter even though fulfillment in that particular may cause a loss," but said that it did not throw any doubt upon the general rule. *Id*. Our Order does not compel VNH or its affiliates to carry on any business. We conclude that the *Brooks-Scanlon* case, *supra,* does not provide any basis for granting rehearing.

Substantial revenue sharing payments were provided under the 1984 DPA and the 1991 LLA pursuant to agreements entered into by NET and NIRC. VNH has presented no sound basis for the stoppage of such payments as provided in the 2000 DPA. The Commission found as a consequence that the 2000 DPA was unjust and unreasonable. VNH has made no showing, pursuant to RSA 541:3, that Order No. 24,345 is unlawful or unreasonable or otherwise merits rehearing. Accordingly, and for the other reasons set forth in the Order, we will deny the Motion for Rehearing.

Based upon the foregoing, it is hereby

ORDERED, that the Rehearing Motion filed by Verizon New Hampshire be, and it hereby is, DENIED.

By order of the Public Utilities Commission of New Hampshire this nineteenth day of October, 2004.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary