COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts.	)	D.T.E. 01-20

February 28, 2003

HEARING OFFICER RULING ON RCN-BECOCOM, LLC'S LATE-FILED PETITION TO INTERVENE AS A LIMITED PARTICIPANT

I. INTRODUCTION

The Department of Telecommunications and Energy ("Department") opened the D.T.E. 01-20 docket on January 12, 2001 to establish new rates for unbundled network elements ("UNEs") and interconnection offered by Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") to competitive local exchange carriers ("CLECs").[1] On July 11, 2002, after a comprehensive 18-month investigation, the Department issued its order completing Part A[2] of D.T.E. 01-20 ("Order"). Verizon and several other parties filed motions for reconsideration and clarification of the Order on August 14, 2002. On January 14, 2003, the Department issued an order deciding those motions ("Reconsideration Order"). As directed in the Reconsideration Order, Verizon submitted its D.T.E. 01-20 Part A Compliance Filing on February 13, 2003, and the Department established a procedural schedule for the compliance phase of the proceeding, including technical sessions, comments, and reply

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[1] The investigation was opened pursuant to the five-year cycle established in Investigation of Resale Tariff of Bell Atlantic, D.T.E. 98-15-Phases II/III (March 19, 1999).

[2] Part B remains in abeyance. UNE Rates, D.T.E. 01-20, Interlocutory Order on Part B Motions (April 4, 2001).

comments, to be conducted in March 2003. On February 24, 2003, RCN-BecoCom, LLC ("RCN") filed a petition ("Petition") to intervene as a limited participant in the D.T.E. 01-20 proceeding.

II. LATE-FILED PETITION TO INTERVENE

A. Position of the Petitioner

RCN requests that it be permitted to intervene as a limited participant to "represent and protect its interests during the compliance phase of this proceeding" (Petition at ¶ 3). RCN states that if permitted limited participation it would participate in the technical sessions and written comments of the compliance phase (Letter from Philip J. Macres, Counsel for RCN, to Department , February 26, 2003 ("RCN Letter")). RCN states that, in Massachusetts, it provides telecommunications services in the metropolitan Boston area as a CLEC and interexchange carrier and also offers video programming and internet access services (Petition at ¶ 1). RCN asserts that, as a competitor and customer of Verizon, it is substantially and specifically affected by this proceeding, because any changes to UNE rates affect its ability to compete with Verizon, and because it relies on certain Verizon services to support its business plan and network (id. at ¶ 3, 5). Further, RCN states, its concerns cannot adequately be represented by any other party of record, because its business plan and network are unique and its concerns distinct from those of other parties (id. at ¶ 5).

RCN states that it has questions and concerns regarding Verizon's compliance tariff and the extent to which it complies with the Department decisions rendered in this proceeding, and that, until the current stage of the proceeding, it did not believe it was necessary to participate in the case to protect its interests (id. at ¶ 4, 7). RCN argues that it has good cause for its late-filed petition because: (1) when the Department initiated the proceeding, RCN did not have the resources to be an active participant in the case; (2) RCN seeks explanation of application of certain aspects of the proposed tariff, and because the proposed tariff and final rates were not available until recently, there was no opportunity to inquire about these issues earlier; and (3) the Department has just begun its review of the compliance filing (id. at ¶ 7-9).

RCN states that it does not seek to relitigate issues decided earlier in this case, but will "take the record as it stands" and address only the issue of whether Verizon's compliance tariff is consistent with the Department's decisions in this proceeding (id. at ¶ 6). RCN asserts that its intervention would not delay the proceeding or prejudice any party, but rather would help ensure that Verizon's compliance filing is consistent with the Department's directives (id. at ¶¶ 4, 7, 10).

No party filed an opposition to RCN's Petition. On February 26, 2003, RCN submitted a letter stating that parties Verizon,[3] AT&T Communications of New England, Inc., and WorldCom, Inc. had informed RCN that they did not object to RCN's Petition (RCN Letter at 1). The Attorney General subsequently informed the Department by telephone that he is also unopposed to RCN's participation.

B. Standard of Review

Regardless of whether a petition for intervention is filed timely or late, the Department's regulations require that a petition to intervene describe how the petitioner is substantially and specifically affected by a proceeding. 220 C.M.R. §1.03(1)(b); see also G.L. c. 30A, § 10. In interpreting this standard, the Department has broad discretion in determining whether to allow participation, and the extent of participation, in Department proceedings. Attorney General v. Department of Public Utilities, 390 Mass. 208, 216 (1983); Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, 45 (1978) (with regard to intervenors, the Department has broad but not unlimited discretion), cert. denied, 439 U.S. 921 (1978); see also Robinson v. Department of Public Utilities, 835 F. 2d 19 (1st Cir. 1987). The Department may allow persons not substantially and specifically affected to participate in proceedings for limited purposes. G.L. c. 30A, § 10; 220 C.M.R. § 1.03(1)(e); Boston Edison, 375 Mass. at 45. A petitioner must demonstrate a sufficient interest in a proceeding before the Department will exercise its discretion and grant limited participation. Boston Edison, 375 Mass. at 45. The Department is not required to allow all petitioners seeking intervenor status to participate in proceedings. Id.

Should the hearing officer agree that the petitioner meets the threshold mentioned above, then when ruling on late-filed petitions to intervene, the hearing officer must balance the extent of participation against the need to conduct a proceeding in a complete, efficient and orderly fashion. See Transition Costs, D.P.U. 94-104-B, at 5, Order on Hearing Officer Ruling Denying Late Petition to Intervene by MASSPOWER and Altresco Pittsfield, L.P. (January 18, 1995); see also New England Telephone and Telegraph Co., D.P.U. 94-50, at 3, Order on Appeal by Mark Brown of Hearing Officer Ruling Denying Late-Filed Petition to Intervene (July 22, 1994) ("NYNEX").

In ruling on late-filed petitions to intervene, or otherwise participate in its proceedings, the Department takes into account a number of requirements and factors in its analysis. First, the Department considers whether a petitioner has demonstrated good cause for late-filing. See 220 C.M.R. § 1.01(4). While "good cause" may not be readily susceptible of precise

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[3] Verizon commented in a letter to the Department that although it does not believe RCN had shown good cause for the late filing, it does not object to RCN's admission as a limited participant so that RCN can understand Verizon's compliance filing (Letter from Bruce P. Beausejour, Counsel for Verizon, to Department, February 26, 2003).

definition, the proponent of a waiver must make a convincing showing of good cause and may not reserve such a showing for a later appeal of the hearing officer's ruling. See Bay State Gas Company, D.P.U. 95-52, at 2, Interlocutory Order (July 21, 1995). Administrative efficiency requires that a proponent of a waiver state all available grounds at the time the ruling is requested. If the Department finds that there is good cause and that the petitioner is substantially and specifically affected, then the Department balances the extent of participation against the need to conduct a proceeding in a complete, efficient, and orderly fashion. When balancing, the Department has considered: (1) the extent of the delay; (2) the effect of the late participation on the ongoing proceeding; and (3) the explanation for the tardiness. Western Massachusetts Electric Company, D.P.U. 92-8C-A at 5 (1993); NYNEX, D.P.U. 94-50, at 3 (1994). The Department has denied petitions for late intervention solely on the issue of timeliness. See, e.g., D.P.U. 94-104-B, at 6; New England Power Company, D.P.U. 91-115 (1992).

C. Analysis and Findings

We find that RCN has demonstrated that, as a competitor and customer of Verizon in Massachusetts, it is substantially and specifically affected by this proceeding because changes to UNE rates and associated terms and conditions affect its business plan and network. However, a petitioner seeking intervention at this late stage of a proceeding faces a heavy burden of demonstrating "good cause" for the late filing. The Department granted the majority of petitions to intervene in this case at a February 8, 2001 procedural conference. We also granted three late-filed petitions to intervene, all filed the same month as the procedural conference, because those parties requested intervention as soon as they were on notice that their interests could be affected by this proceeding. See D.T.E. 01-20, Hearing Officer Ruling on Late-Filed Petitions to Intervene (March 15, 2001). No other parties have sought to intervene since February 2001.

RCN argues that it did not intervene earlier because it did not have the resources to participate, and it was not aware that it needed to protect its interests until Verizon's compliance filing was available. However, RCN, like the many intervenors to this proceeding, is a customer/competitor of Verizon, and hence should have known from the Department's Vote and Order instituting the UNE rates proceeding in January 2001 that was likely to be affected by the Department's investigation; yet RCN did not choose to participate. Hence, we find that RCN has not shown "good cause" for its extremely late filing.

Nevertheless, the Department has broad discretion in determining whether to allow participation, and the extent of participation, in Department proceedings. Notwithstanding the extent of RCN's tardiness in seeking to participate, in a complex and lengthy proceeding such as this the Department will benefit from RCN's participation, limited to seeking explanation of Verizon's compliance filing and examining whether it accords with the Department's

directives. All parties to the proceeding are barred from relitigating any issues, see D.T.E. 01-20, Hearing Officer Ruling on Scope of Compliance Phase at 2 (February 28, 2003); thus no party will prejudiced by our admitting RCN as a limited participant, and in fact no party objected to us doing so.

In addition, we do not find that allowing RCN's limited participation will cause delay or interfere with the Department's need to conduct a proceeding in a complete, efficient, and orderly fashion. RCN will be permitted only to clarify issues of Verizon's compliance and to seek understanding of the compliance filing – the purpose for which the informal, off-the-record technical sessions are intended. Accordingly, RCN's petition to intervene as a limited participant[4] for the purpose of taking part in the technical sessions and written comments of the compliance phase is granted.

III. RULINGS

Accordingly, after due consideration, the late-filed petition to intervene as a limited participant of RCN-BecoCom, LLC, is granted.

Under the provision of 220 C.M.R. § 1.06(6)(d)(3), any aggrieved party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation by Monday, March 3, 2003, at 5:00 p.m. A copy of this Ruling must accompany any appeal. Any response to any appeal must be filed by Wednesday, March 5, 2003, at 5:00 p.m.

Date: February 28, 2003

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Marcella Hickey, Hearing Officer

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[4] Limited participants, as distinct from intervenor parties, have no right to appeal as to matters of law from final Orders issued by the Department. See G.L. c. 25, § 5; G.L. c. 30A, § 1(3); 220 C.M.R. § 1.03.