COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATION AND ENERGY

_____

)

Verizon Massachusetts Tariff Filing of January 12, 2001)

_____)

OPPOSITION OF VERIZON MASSACHUSETTS

Verizon Massachusetts ("Verizon MA") files this opposition to the Motion of AT&T Communications of New England, Inc. ("AT&T") and Covad Communications Company ("Covad") (hereinafter collectively referred to as "Movants") for Reconsideration and for Extension of the Judicial Appeal Period filed with the Commission on March 7, 2001. Movants seek reconsideration of the Department's decision not to suspend revisions to D.T.E. Tariff 17 proposed by Verizon MA on January 12, 2001. As discussed below, the Department should deny the motion. Whether the Department chooses to suspend and investigate proposed tariff changes is within its discretion, and Movants have no grounds for reconsideration (or appeal) when the Department does not suspend a tariff. Movants have also failed to establish that good cause exists for an extension of the judicial appeal period. Accordingly, the request for such an extension should be denied.

I. PROCEDURAL BACKGROUND

On January 12, 2001, Verizon MA filed proposed revisions to D.T.E. Tariff 17 regarding the application of DC power rates, the rates for Meet Point A and Meet Point C interconnection arrangements, and the methodology used to calculate the Unbundled TC Reciprocal Compensation rate. With respect to DC power, Verizon MA proposed to change the manner in which it charges from a per fused amp basis, as required under the Department-approved D.T.E. Tariff 17 at that time, to a per load amp basis. Verizon MA also proposed language regarding random inspections to verify the actual power load drawn by physical collocation arrangements. See Verizon MA's January 12, 2001 Tariff Filing.

On January 24, 2001, the Department issued a Hearing Officer Memorandum requesting comments on the January 12 Tariff Filing, and an explanation from Verizon MA regarding its reasons for the proposed revisions. See Hearing Officer Memorandum dated January 12, 2001. As requested, Verizon MA filed a letter on February 1st explaining its reasons for filing the proposed revisions. Verizon MA pointed out that the DC power changes were "intended to address an issue that was raised in Verizon MA's initial 271 filing with the FCC regarding the application of power rates." See Letter from Bruce Beausejour to Mary L. Cottrell Re: Verizon Massachusetts Tariff Filing of January 12, 2001 dated February 1, 2001. Verizon MA also noted, as it had in its January 12th Tariff Filing, that the proposed changes

to the DC power provisions would result in significant cost savings to CLECs who collocate in Massachusetts.

Movants filed their comments on February 1st in which they stated their objections to Sections 2.6.3.C (relating to DC power charges) and 2.3.5.E. and 2.3.5.F (relating to inspections and audits) and requested inter alia that the Department suspend and investigate the proposed revisions. See Petition of AT&T Communications of New England, Inc. and Covad Communications Company to Investigate Certain Provisions of January 12, 2001 Tariff filing and Suspend and Investigate Certain Other Provisions, D.T.E. 98-57 (February 2001) ("Suspension Petition"). The Department determined not to suspend the effective date of the tariff changes and, on February 15, 2001, approved the proposed tariff revisions.(1)

On February 22, 2001, AT&T and Covad filed a complaint with the Department alleging that Verizon MA was charging for DC power in violation of D.T.E. Tariff 17. See Complaint of Covad Communications and AT&T Communications of New England, Inc. Regarding Collocation Power Charges Assessed By Verizon New England, Inc. Many of the allegations contained in Movants' Complaint were identical to those raised in their Suspension Petition. Movants followed-up their Complaint with this motion.

II. ARGUMENT

Movants make three arguments in support of their motion for reconsideration. They argue that: (1) the Department's approval of the tariff revisions was procedurally improper because it was made "without evidence"; (2) the Department's approval of Verizon MA's proposed inspection and penalty provisions was procedurally improper because the Department did not conduct a review and did not provide a statement of reasons, including a determination of each issue of fact or law necessary to make its decision; and (3) the Department provided inadequate notice and opportunity for parties to present evidence and argument before rendering final decision. Movants' claims are without merit and must be rejected.

A. The Decision Whether To Suspend a Tariff Is Within the Sole Discretion of the Department

The Movants provide pages of argument about the burden of proof, the need for the Department to act on a record, the need for a decision to be based on a statement of reasons, etc. (Movants' Motion at 4-11). The authorities cited by Movants are completely irrelevant to this matter. All of the decisions upon which the Movants rely involved adjudicatory proceedings in which the Department opened an investigation, thereby triggering the procedural requirements of G.L. c. 30A. The filing of a proposed tariff does not, however, require that the Department commence an adjudicatory proceeding, and the decision as to whether the Department will suspend proposed tariffs for investigation is within the Department's discretion, which it may exercise without instituting an adjudicatory proceeding.(2) Thus, the procedural requirements associated with adjudications, which the Movants' assert the Department was obligated to follow, were never triggered here.

Contrary to the Movants' claim, the mere fact that a commenter challenges a tariff change does not entitle it to a suspension or require that the Department open an adjudicatory proceeding. The Department has broad discretion in allowing, suspending and investigating proposed tariff changes. In New England Telephone and Telegraph Company, D.P.U. 97-18-A (1997), reconsideration was sought of a Department decision to permit a tariff change to go into effect.(3) The Department rejected the request for reconsideration, finding that decisions on suspension were discretionary in nature and that there was no standing to challenge such decisions:

…under G.L. c. 159, §§ 19 and 20, the Department has broad discretion to determine the structure of investigations of tariff filings by common carriers, including whether to suspend such filings or allow them to go into effect without suspension…. In this case, the Department vacated the suspensions without establishing an adjudication. Thus, [the movants for reconsideration] did not have "party" status and any associated procedural rights. Accordingly, we find that neither [of the movants] have legal standing to seek reconsideration.

Id. at 5. See also Boston Gas Co. v. Department of Public Utilities, 368 Mass. 51, 53-57 (1975).(4) In D.T.E. 97-18-A, the Department also addressed the issues of whether the Department was required to hold hearings, and the due-process and procedural rights of those seeking suspension and adjudication:

After reviewing comments filed by interested persons, the Department determined that it would not be prudent to conduct a resource-intensive adjudication…. Moreover, because this was…not a request for a general rate increase, the Department finds that it was not required to conduct evidentiary or public hearings. See G.L. c. 159, §§ 19 and 20.

****

Under certain circumstances, particularly with a request for a general increase in rates, the Department is required to investigate and hold hearings on such a tariff filing pursuant to §§ 19 and 20. However, it is the nature of the tariff filing (e.g., a general rate increase) or the Department's determination to conduct an adjudicatory proceeding, that confers certain procedural rights on parties to that proceeding, including (in most cases) the right to a hearing.

Id., at 5-6.

Thus, only if the Department exercises its discretion to suspend and investigate a proposed tariff do any procedural rights accrue to putative parties. In short, the Movants had no right under Massachusetts law to an adjudicatory proceeding and have no standing to seek reconsideration or appeal of the Department's decision to permit tariffs to go into effect without suspension. Therefore, Movants' motion for reconsideration of the Department's decision not to suspend Verizon MA's tariff is fatally flawed in that there is no proceeding from which reconsideration or appeal is permissible.

B. The Department's Decision Not to Suspend Verizon MA's

Proposed Tariff Revisions Was Consistent With Due Process

Movants' reliance on the Department's disposition of a motion for reconsideration in Petition of CTC Communications Corp., D.T.E. 98-18-A (July 24, 1998) ("CTC") to support its argument that the Department provided inadequate notice and opportunity for parties to present evidence and argument before rendering its final decision is misplaced. The facts of that case were completely different from those at issue here. In CTC, Verizon MA filed a motion for reconsideration on grounds that its due process rights were violated. The cause of this violation was not the fact that the Department failed to convene an evidentiary hearing, as Movants argue, but because the Hearing Officer at a procedural conference led Verizon MA to believe that the Department intended to act only with respect to the scope of the proceeding rather than act on the merits of the pending matter. As a result, Verizon MA filed comments that addressed only the scope of the proceeding rather than the underlying merits. It was the Department's failure to convene hearings in this factual circumstance and the resulting ambiguity which Verizon MA argued and the Department ultimately concluded was a violation of Verizon MA's due process rights. See id. at 9-10.

In sharp contrast to what transpired in CTC, nothing in the Department's January 24, 2001 Hearing Officer Memorandum suggested that the Department intended to hold further evidentiary proceedings with respect to the tariff changes proposed by

Verizon MA. The Movants have no constitutional or statutory right to a hearing or adjudicatory process regarding the suspension of proposed tariffs, and therefore, due process rights are not implicated in the Department's exercise of its discretionary decision on whether to suspend rates or conduct an investigation. In these circumstances, Movants have no claim that their due process rights were denied. Accordingly, Movants' motion for reconsideration should be denied.

C. Movants' Motion Mischaracterizes the Changes to

D.T.E. Tariff 17 Proposed by Verizon MA

In their effort to create the impression that Verizon MA's proposed tariff changes dramatically and negatively affect the level of DC power charges under D.T.E. Tariff 17, Movants have misconstrued the changes proposed by Verizon MA in its January 12, 2001 Tariff Filing and their effect on the application of the previously approved DC power charges. For example, Movants allege that Verizon MA proposed to modify the manner in which its DC power rates are applied "with the effect that Verizon may charge twice the amount (or more) permitted by the language of the previous tariff." See Motion at 6. This is not correct.

Movants' assertion is based on their unsupported and erroneous view that, prior to the proposed changes, D.T.E. Tariff 17 did not authorize Verizon MA charge CLECs for DC power on a per fused amp, per feed basis. Movants make similarly flawed allegations in their Complaint. As discussed in Verizon MA's Answer to that Complaint, Verizon MA charged CLECs for DC power on a fused amp, per feed basis in accordance with the express terms of D.T.E. Tariff 17. Movants' arguments to the contrary are completely without merit. A copy of Verizon MA's Answer is attached as Exhibit 1 and the substance of Verizon MA's arguments are incorporated as if fully set forth herein.

The "changes" proposed by Verizon MA were clearly explained in the materials accompanying the January 12, 2001 Tariff Filing and in the February 1, 2001 letter filed by Verizon MA at the Department's request. Specifically, the changes provided that DC power charges apply only to the number of load amps requested by the CLEC, rather than the number of fused amps made available to the CLEC's collocation arrangement. Since D.T.E. Tariff 17 clearly provided that DC power charges would be assessed to CLECs on a per fused amp, per feed basis, based on the total amount of power provisioned by Verizon MA to the CLEC, Verizon MA's proposed change from a "fused amp" to a "load amp" basis substantially decreases in the DC power charges assessed to CLECs under D.T.E. Tariff 17. See Letter from Bruce Beausejour to Mary L. Cottrell Re: Verizon Massachusetts Tariff Filing of January 12, 2001 dated February 1, 2001.

D. Movants Have Failed to Demonstrate "Good

Cause" Exists to Stay the Judicial Appeal Period

G.L. c. 25, § 5 provides in pertinent part, that an aggrieved party in interest may file an appeal of a Department final order no later than 20 days after service of the order or within such further time as the Commission may allow upon request filed prior to the expiration of the 20 days after the date of service of said decision or ruling. G.L. c. 25, § 5. The Movants' request for an extension of the appeal period must be denied for two reasons. First, as described above, the Department did not institute a proceeding to investigate the proposed tariff changes, and therefore, there were no "parties" to an adjudication of the tariff changes. Movants simply have no standing to file an appeal under G.L. c. 25, § 5.

Second, the 20 day appeal deadline indicates a clear intention on the part of the Legislature and the Department to ensure that the decision of an aggrieved party to

appeal a final order of the Department must be made expeditiously. Id. Swift judicial review benefits both the appealing party and other parties, and serves the public interest by promoting the finality of Department orders. Ruth C. Nunnally d/b/a L&R Enterprise, D.P.U. 92-34-A, at 4 (1993). The Department's procedural rules provide that extensions to the judicial appeal period may be granted upon a showing of good cause. 220 C.M.R. § 1.11(11). Although Movants have no right to an appeal, even if they did, their arguments are devoid of merit and fail to establish "good cause" that would merit an extension of the judicial appeal period. Accordingly, Movants Department should deny Movants' request.

IV. CONCLUSION

For all of the foregoing reasons, Movants' Motion should be denied.

Respectfully submitted,

Verizon New England Inc.,

d/b/a Verizon Massachusetts

By its attorneys,

_____

Bruce P. Beausejour

Keefe B. Clemons

185 Franklin Street, Room 1403

Boston, MA 02110-1585

(617) 743-2445

Dated: March 15, 2001

1.

1 As a technical matter, the Department was not required to take this step because by operation of law the tariff revisions took effect on February 11, 2001 - 30 days after the filing date. See G.L. c. 159, § 19 (proposed tariffs become effective by law unless suspended within the 30-day period).

2.

2 Department decisions on whether to suspend a tariff filing is always discretionary. A hearing is required only if a tariff filing "represent[s] a general increase in rates…". G.L. c. 159, § 20. Therefore, in this case, which is not a "general increase in rates," there is no statutory requirement for either suspension or investigation.

3.

3 In fact, the Department had initially suspended the tariff filing, but subsequently vacated the suspension order. Id. at 1.

4.

4 In Boston Gas, the Supreme Judicial Court reviewed the similar suspension powers of the Department for regulated gas and electric companies set forth in G.L. c. 164, § 94. In that decision, the Court reviewed an appeal from a company whose interim tariffs were suspended by the Department without hearing or a statement of reasons. The Court ruled that: "No hearing is required before the entry of any suspension order. The [D]epartment is not obliged to make any findings of fact or to issue any statement of its reasons for suspending rates…. The Legislature has thus granted the [D]epartment discretion to suspend rates without imposing any obligation on the [D]epartment to create a record which could serve as a basis for judicial review. We conclude that the Legislature did not intend that this court have statutory jurisdiction to review the [D]epartment's discretionary decision to suspend filed rates." Id. at 54.