



COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 06-61

February 27, 2012

Investigation by the Department of Telecommunications and Energy on its own motion as to the propriety of the rates and charges set forth in the following tariff: M.D.T.E. No. 14, filed with the Department on June 16, 2006, to become effective July 16, 2006, by Verizon New England, Inc. d/b/a Verizon Massachusetts.

**ORDER ON VERIZON'S MOTION FOR EXTENSION OF THE JUDICIAL
APPEAL PERIOD AND MOTION TO EXTEND COMPLIANCE PERIOD**

I. INTRODUCTION

In this Order, the Department of Telecommunications and Cable ("Department") allows the Motion For Extension Of The Appeal Period ("Appeal Motion") and the Motion To Extend Compliance Period ("Compliance Motion") of Verizon New England Inc., d/b/a Verizon Massachusetts ("Verizon"), which were filed on January 18, 2012.¹ Accordingly, the Department determines that: (1) Verizon's appeal period is tolled until up to seven (7) calendar days after the Department approves Verizon's compliance filing; and (2) Verizon will submit its calculation of the avoided costs discount rates and refunds in accordance with the Order (the "Compliance Filing") on or before July 24, 2012.

¹ In connection with the briefing on these two motions, Verizon filed on February 7, 2012 a Motion For Leave To Reply, which is granted. Verizon also filed on January 18, 2012 a Motion For Clarification and Partial Reconsideration. The Department will address that motion in a separate order.

II. BACKGROUND

On January 5, 2012, the Department issued its *Order on Reconsideration* (“Order”) in this proceeding. In the Order, the Department granted the CLEC Coalition’s² motion seeking reconsideration of an order issued by the Department’s predecessor, the Department of Telecommunications and Energy (“DTE”), on January 30, 2007. The Department found that the DTE’s January 30, 2007 order ignored record evidence of avoided indirect costs based upon a mistaken interpretation of the Eight Circuit Court of Appeals decision in *Iowa Utilities Bd. v. FCC*.³ Thus, the Department determined that Verizon failed to meet its burden to show that indirect costs are not avoided when determining the wholesale discount to be applied when Verizon sets its wholesale rate for resold services.⁴ The Department directed Verizon New England Inc. d/b/a Verizon Massachusetts (“Verizon”) to submit the Compliance Filing within 21 days.⁵

On January 18, 2012, Verizon filed the Appeal Motion and the Compliance Motion. On January 24, 2012, the Department issued a Procedural Order that set a schedule for briefing on Verizon’s motions and extended the time for Verizon to submit the filing at issue in the Compliance Motion for 30 days, until February 27, 2012, to permit the Department time to address the substance of Verizon’s motions.

The CLEC Coalition filed oppositions to the Appeal Motion and the Compliance Motion on January 27, 2012. Verizon filed replies to these oppositions, together with a motion for leave

² As was the case throughout this proceeding, the term “CLEC Coalition” refers collectively to Metropolitan Telecommunications of Massachusetts, Inc. d/b/a MetTel; One Communications; Broadview Networks, Inc.; DSCI Corp.; Eureka Telecom, Inc. d/b/a InfoHighway Communications; and New Horizon Communications.

³ 219 F.3d 744, 755-56 (8th Cir. 2000), *aff’d in part and rev’d in part on other grounds sub nom Verizon Commc’ns Inc. v. FCC*, 535 U.S. 467 (2002).

⁴ *See* Order, at 9-11.

⁵ *Id.* at 19.

to file the replies, on February 7, 2012. The Department now allows both the Appeal Motion and the Compliance Motion.

III. ANALYSIS

A. Appeal Motion

The Department allows Verizon's Appeal Motion, and it will toll the time period for filing any appeal of the Order until seven days after it approves the Compliance Filing. Usually, a party must file an appeal of a Department decision with the Secretary of the Department within 20 days of service of the order.⁶ The Department is permitted to set a different deadline for filing of such appeals "upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling." *Id.* Verizon's Appeal Motion was filed within the 20 day period as required by G. L. c. 25, § 5.⁷

The Department finds that granting the Appeal Motion is appropriate for several reasons. First, the Department agrees with Verizon that the calculations required to be performed pursuant to the Order are complex, and indeed the CLEC Coalition has agreed with Verizon's position that the Order does not adequately address the methodology needed to calculate two categories of avoided indirect costs.⁸ Second, factual and legal issues remain to be resolved in this docket, and requiring the parties to litigate some aspects of this proceeding before the Supreme Judicial

⁶ G. L. c. 25, § 5.

⁷ Verizon's filing of a timely motion tolled the time for Verizon to file an appeal from the date of Verizon's filing until the issuance of this order. *In re Complaint of Kalidas Nandy Relative to Electric Bills Caused by His Alleged Violations of the Sanitary Code, 105 C.M.R. § 410.254 & § 410.354*, D.P.U. 94-AD-4-A, at 6 n.6 (1994) ("The filing of the Motion to Extend the Appeal Period operated to toll the appeal period until the Department ruled on that motion"); *Application of Ruth C. Nunnally, d/b/a L R Enterprises, under the Provisions of Chapter 159 of the General Laws, as amended, for a Certificate of Public Convenience and Necessity to Provide Pay-Telephone Services within the Commonwealth of Massachusetts*, D.P.U. 92-34-A at 6 n.6 (1993) (same).

⁸ See CLEC Coalition's Response To Verizon MA's Motion For Clarification And Partial Reconsideration, at 2 (Feb. 10, 2012) ("The CLEC Coalition does not oppose the clarification Verizon MA's [sic] seeks associated with Accounts 612300 and 672300.").

Court while simultaneously litigating related aspects before the Department is contrary to the interest of administrative and judicial efficiency.⁹ Third, allowance of Verizon's motion is consistent with applicable precedent, the DTE allowed motions to extend the appeal period in at least one very similar circumstance in the past.¹⁰

In addition to these reasons, the Department is cognizant that resolution of the outstanding legal and factual concerns in this matter could create additional appellate issues. The Department therefore allows Verizon's Appeal Motion. As Verizon's Appeal Motion was filed on the 13th day of the original appeal period under G. L. c. 25, § 5, the Department grants Verizon up to seven days after approval of the Compliance Filing to file an appeal.

B. Compliance Motion

While it recognizes this proceeding has a long history and it is cognizant of the CLEC Coalition's desire for a resolution of this matter, the Department allows Verizon's request for an extension of time to make the Compliance Filing until July 24, 2012, to comply with the Order. In support of its motion, Verizon submits the sworn affidavit of Sean J. Sullivan, a Director of Product Management and Product Development at a Verizon affiliate, regarding a number of difficulties Verizon faces with respect to calculating retail discount rates and refunds due in accordance with the Order. Mr. Sullivan's affidavit identifies a number of reasons that these calculations will take considerably longer than anticipated by the Department when it issued its

⁹ *See Atkinson's, Inc. v. Alcoholic Beverages Control Comm'n*, 15 Mass. App. Ct. 325, 327 (1983) (noting Massachusetts appellate courts' "traditional abhorrence of piecemeal appellate review").

¹⁰ *See Investigation of the DTC 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 Resale Services in Massachusetts*, DTE 01-20, at 16 (Jul. 30, 2002) (allowing a motion to extend the appeal period during pendency of motions for reconsideration or clarification because "allowing this extension could prevent an appeal that may be avoided by further proceedings at the Department").

Order. At a minimum, Verizon has established with this affidavit that completion of the Compliance Filing will take longer than the 21 days contemplated by the Order.¹¹

In response, the CLEC Coalition argues only that Verizon should “devote[] more resources” to the project.¹² It does not, however, identify any specific ways in which Verizon could streamline its process, nor does it take issue with the tasks Mr. Sullivan identifies as necessary in order to complete the work Verizon claims is necessary. In response, Verizon has indicated its commitment to devoting adequate personnel to the project in its reply submission. Without any record evidence before it to determine that the extension of time is unreasonable, the Department accepts Verizon’s sworn statement as true and will allow Verizon’s motion.

The Department does not adopt the CLEC Coalition’s alternative proposal, under which Verizon would calculate discounts due to the CLEC Coalition members first, while using the remainder of the 180-day extension period sought by Verizon to calculate discounts due to other CLECs operating in the Commonwealth. Such a result is unfair, as it would grant special treatment to the CLEC Coalition over other CLECs who are equally entitled to a refund. Moreover, there are the threshold issues raised in Verizon’s other motion, concerning the methodology of the calculations underlying the Compliance Filing, which will have to be addressed before Verizon can complete that filing.¹³ The Department allows the Compliance Motion and directs Verizon to file the Compliance Filing on or before July 24, 2012.

¹¹ See Affidavit of Sean J. Sullivan, at ¶¶ 3-6.

¹² See CLEC Coalition’s Opposition To Verizon’s Motion To Extend

¹³ Verizon’s Motion To Extend Compliance Period, at 2 (Jan. 18, 2012) (“That [the issues in Verizon’s Motion For Clarification And Partial Reconsideration] remain open does not prevent Verizon MA from proceeding with the refund calculation project, but the amount of the revised discount rates is obviously necessary to complete the project”)

IV. CONCLUSION

The Department allows Verizon's Appeal Motion and Compliance Motion, and it is

ORDERED: The period for any party to file an appeal of the Order is tolled pending the Department's approval of Verizon's compliance filings submitted in accordance with the Order; and it is

FURTHER ORDERED: Verizon will submit the Compliance Filing required by the Order on or before July 24, 2012.

By Order of the Department:

/s/ Geoffrey G. Why
Geoffrey G. Why
Commissioner