The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

ISSUED December 15, 2004

D.T.E. 03-59-B

Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops.

ORDER DENYING MOTION OF VERIZON MASSACHUSETTS FOR PARTIAL RECONSIDERATION

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ORDER DENYING MOTION OF VERIZON MASSACHUSETTS
FOR PARTIAL RECONSIDERATION

I. INTRODUCTION

On January 23, 2004, the Department of Telecommunications and Energy ("Department") denied the motion of DSCI Corporation and InfoHighway Communications Corporation ("DSCI/InfoHighway") for partial reconsideration of the Department's November 25, 2003 order[1] closing the investigation in this docket. D.T.E. 03-59-A, Order Denying Motion of DSCI Corporation and InfoHighway Communications Corporation for Partial Clarification and Reconsideration of Order Closing Investigation (Jan. 23, 2004) ("Reconsideration Order"). In the Reconsideration Order and in the Order Closing Investigation, the Department observed that because the Federal Communications Commission ("FCC") found that competitive local exchange carriers ("CLECs") are not "impaired" under 47 U.S.C. § 251 without unbundled access to local switching at TELRIC[2] rates to serve

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[1] Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops, D.T.E. 03-59, Order Closing Investigation (Nov. 25, 2003) ("Order Closing Investigation").

[2] The FCC adopted Total Element Long Run Incremental Cost ("TELRIC") as a "just and reasonable" pricing standard for unbundled network elements ("UNEs") required to be unbundled under 47 U.S.C. §§ 251, 252. See 47 C.F.R. § 51.505(b).

enterprise customers,[3] any obligation that Verizon Massachusetts ("Verizon") may have to offer local circuit switching for high capacity loops arises only under 47 U.S.C. § 271. Reconsideration Order at 7-8; see also Triennial Review Order at ¶ 451 (finding no impairment for enterprise switching). The Department held that the arbitration provisions of 47 U.S.C. § 252 alone do not subject enterprise switching to compulsory arbitration, because enterprise switching is not required to be unbundled under Section 251, and because nothing in Section 252 gives the Department authority to arbitrate or enforce Verizon's Section 271 obligations unless the parties agree to subject the terms to arbitration. Reconsideration Order at 8. In footnote 9 of the Reconsideration Order, we noted that we "expect Verizon to file the new rates, terms, and conditions for approval in a wholesale tariff, because [enterprise switching] services are jurisdictionally intrastate common carriage subject to Department approval." Id. at 8 n.9. We also noted that "[w]hether those market-based rates continue to meet Verizon's Section 271 obligations, however, is for the FCC to determine." Id.

On February 12, 2004, Verizon moved for partial reconsideration, requesting that the Department strike footnote 9 of the Reconsideration Order (Motion of Verizon Massachusetts for Partial Reconsideration of Order Denying Motion for Reconsideration of Order Closing

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[3] The FCC defines enterprise markets as medium and large business customers that can be served with a DS-1 capacity or above loop. Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; and Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, at ¶ 209 (rel. Aug. 21, 2003) ("Triennial Review Order"). A DS-1 loop is a digital loop providing a transmission speed of 1.544 megabits per second. Id. at ¶ 202 n.634.

Investigation ("Motion")). On March 4, 2004, DSCI/InfoHighway filed an opposition (Opposition of DSCI and InfoHighway to Verizon Motion for Partial Reconsideration ("Opposition")).

II. STANDARD OF REVIEW

The Department's procedural rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within twenty days of service of a final Department order. The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would warrant a material change to a decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based

on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

III. POSITIONS OF THE PARTIES

A. Verizon

Verizon argues that the "dictum" in footnote 9 was not necessary to the Department's determination of DSCI/InfoHighway's motion, and that the footnote is inconsistent with the Department's finding that Verizon's obligation to provide enterprise market switching arises solely from Section 271 of the Telecommunications Act[4] (Motion at 1-2). Verizon argues that Section 271(d)(6) gives the FCC "sole and exclusive authority to enforce compliance with Section 271 obligations following approval of an application to provide interLATA service" (id. at 2). Verizon agrees with our holding that the Department "does not have jurisdiction to enforce Verizon's unbundling obligations pursuant to Section 271," because Section 271(d)(6) grants to the FCC exclusive enforcement authority to ensure that a Bell operating company that has received authority to provide interLATA service continues to comply with the market opening requirements of Section 271 (id.).

Verizon argues that "[i]t would be wholly anomalous for [Verizon] to file a tariff with the Department for services [Verizon] is obligated to provide solely due to federal law and

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[4] Communications Act of 1934, 47 U.S.C. §§ 151 et seq., amended by Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 86 (1996) (collectively, the "Act").

which the Department does not have jurisdiction to approve and enforce" (id. at 3 (emphasis in original)). Verizon argues that despite the Department's observation that enterprise switching is an intrastate service, the Department does not have jurisdiction to enforce Verizon's Section 271 obligations, because "not only pricing but all terms and conditions of such services are beyond the Department's authority," but rather, the authority rests exclusively with the FCC (id.). Verizon analogizes the situation to the wholesale generation of electricity, which may be provided wholly within a state, but for which the Department does not require services to be tariffed, because sole jurisdiction over wholesale generation resides with the Federal Energy Regulatory Commission (id.). Finally, Verizon cautions that the Department's imposition of a tariff filing requirement would "potentially" conflict with the FCC, which determines the scope of Verizon's obligations regarding enterprise switching (id. at 3-4).

B. DSCI/InfoHighway

DSCI/InfoHighway argue that Verizon has not met the Department's well settled reconsideration standards, because the Motion is not based on the Department's inadvertence or other circumstances that warrant modification of the Department's decision (Opposition at 2). DSCI/InfoHighway argue that Verizon should have raised the issue of the Department's jurisdiction over Section 271 elements earlier in this proceeding, not for the first time on reconsideration (id. at 3).

DSCI/InfoHighway argue that it would not be "anomalous" to require Verizon to file tariffs for enterprise switching, notwithstanding our holding that Verizon's obligation to offer enterprise switching arises only under Section 271 (id.). First, DSCI/InfoHighway argue that

the Department cannot ignore the statutory requirements that common carriers must file tariffs and are subject to investigation (id., citing G.L. c. 159, §§ 12-14, 19). Second, DSCI/InfoHighway note that the tariff filing obligation plays an "informational" role for the Department, CLECs, the Attorney General, and the public, as they give such parties notice of proposed changes and opportunity to present concerns about those changes (id. at 4). Third, DSCI/InfoHighway argue that Verizon is subject to the obligation to avoid "unjust, unreasonable, unjustly discriminatory, unduly preferential" or otherwise unlawful rates (id., citing G.L. c. 159, § 14). Finally, DSCI/InfoHighway note that Verizon continues to be subject to quality of service requirements and compliance with its performance assurance plan (id.). DSCI/InfoHighway urge the Department not to risk impliedly voiding such obligations without investigation or full consideration (id.).

IV. ANALYSIS & FINDINGS

For the reasons stated below, we deny Verizon's motion for reconsideration. Verizon begins its motion for reconsideration with an acknowledgment that the language that it requests be stricken is "dictum" (Motion at 1). Verizon's request does not meet our well established standard of review of motions for reconsideration, because by objecting to dictum, Verizon is not requesting a material change to the Reconsideration Order.[5] Moreover, in the Order Closing Investigation, we commented on the application of state law to pricing for tariffed services in light of the FCC's finding of no impairment for enterprise switching and of

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[5] A motion for reconsideration should bring to light previously unknown or undisclosed facts that would warrant a material change to a decision already rendered. See D.P.U. 92-3C-1A at 3-6.

Verizon's continuing obligation under federal law to offer the service on just and reasonable terms under Section 271. Order Closing Investigation at 18-20. Verizon did not object to the Department's finding in the Order Closing Investigation within twenty days of the issuance of that order. 220 C.M.R. § 1.11(10). Footnote 9 of the Reconsideration Order merely restates our previous findings on pricing for enterprise switching.

It is important to reiterate that the Department continues to have jurisdiction over enterprise switching, if it is offered as common carriage. Far from being anomalous, requiring Verizon to file a wholesale tariff for enterprise switching merely recognizes that Verizon is to be treated just as any other carrier offering wholesale services as common carriage. See, e.g., Clarification of Wholesale Tariffing Requirements, Memorandum to Massachusetts Telecommunications Carriers and Interested Persons (Telecommunications Division, Aug. 12, 2003) (noting that all carriers that are offering services as "common carriage" are required to file tariffs).

Section 271 and the FCC's implementing rules do not preempt the Department's jurisdiction over local switching when it is offered as common carriage.[6] The FCC's authority under Section 271 to enforce unbundled access to enterprise switching is to determine the conditions for Bell operating companies to be permitted to enter, and to continue to serve, the

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[6] We note that the FCC has requested comments on whether it should clarify the independent Section 271 unbundling obligations and whether the FCC should preempt the states from asserting jurisdiction over enforcement of those obligations. In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179, at ¶ 11 n. 38 (rel. Aug. 20, 2004).

interLATA market. The Department has general regulatory authority over intrastate common carrier services to enforce the obligation of every common carrier to file tariffs under state law.[7] G.L. c. 159, §§ 12, 19. The FCC's jurisdiction to determine the reasonableness of rates for Section 271 elements and the Department's jurisdiction to enforce the filing of tariffs for common carrier services are not mutually exclusive. Whether the Department's exercise of jurisdiction would "potentially" conflict with the FCC's determination of just and reasonable rates for Section 271 elements, under Sections 201 and 202 of the Telecommunications Act, is merely speculative. Moreover, where the FCC finds rates for Section 271 elements to be just and reasonable, the Department intends to defer to the FCC's findings in considering whether those rates are just and reasonable under state law.

Where Verizon offers enterprise switching on generally available terms pursuant to Section 271 and the FCC's rules, it offers the service as common carriage and therefore must file a tariff for the service with the Department. G.L. c. 159, §§ 12, 19. This filing obligation is the same obligation as that of any common carrier. Chapter 159 does many things; and so by interpreting one feature, our discussion does not delimit the Chapter as a whole. Section 17 of Chapter 159 expressly governs relations between common carriers every bit as much as between a common carrier and another person not a common carrier. Moreover, the notice provisions of terms for common carriage within the Commonwealth require that terms be stated and universally applied. There is no necessary or even evident conflict between this

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[7] Verizon's analogy to wholesale electricity generation is inapposite, because state law explicitly excludes wholesale generation from tariff regulation. G.L. c. 164, § 94.

notice requirement and the FCC's exercise of jurisdiction over rates. Cf. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143-46 (1963). Where the service is offered through individually negotiated contracts, and no uniform common carriage rate is made generally available, then no obligation to file a uniform tariff may arise. Therefore, Verizon's motion for partial reconsideration must be denied.[8]

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[8] See Verizon New England, Inc., D.T.E. 03-60/04-73, Consolidated Order Dismissing Triennial Review Order Investigation and Vacating Suspension of Tariff M.D.T.E. No. 17, at 71-72 (2004).

V. ORDER

After due notice and consideration, it is

ORDERED that the motion of Verizon Massachusetts for partial reconsideration of the Department's Order Denying Motion for Reconsideration of Order Closing Investigation is DENIED.

By Order of the Department

/s/
Paul G. Afonso, Chairman

/s/
James Connelly, Commissioner

/s/
W. Robert Keating, Commissioner

/s/
Eugene J. Sullivan, Jr., Commissioner

/s/
Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order, or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order, or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order, or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5 Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).