D.P.U./D.T.E. 97-88/97-18 (Phase II-A)

Investigation by the Department of Telecommunications and Energy on its own motion regarding (1) implementation of Section 276 of the Telecommunications Act of 1996 relative to Public Interest Payphones, (2) Entry and Exit Barriers for the Payphone Marketplace, (3) New England Telephone and Telegraph Company d/b/a NYNEX's Public Access Smart-pay Line Service and (4) the rate policy for operator services providers.

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ORDER ON MOTION FOR RECONSIDERATION OF NEPCC,

MOTION FOR RECONSIDERATION OF AT&T, AND MOTIONS FOR RECONSIDERATION, CLARIFICATION, AND EXTENSION OF APPEAL PERIOD OF BELL ATLANTIC

I. INTRODUCTION

On April 17, 1998, the Department of Telecommunications and Energy ("Department") issued its decision in Entry and Exit Barriers and OSP Rate Cap, D.P.U./D.T.E. 97-88/97-18 (Phase II) ("Order"), ordering the removal of barriers to entry and exit of the payphone marketplace and modifying the existing operator service provider ("OSP") rate cap. In the Order, the Department (1) required registered payphone providers to disclose their rates for local coin calls, (2) classified OSPs as non-dominant carriers authorized to charge market-based rates, and (3) required OSPs to notify customers orally of the long distance rates those customers would be charged. Order at 11-12.

On May 6, 1998, New England Public Communications Counsel ("NEPCC") filed a Motion for Reconsideration ("NEPCC Motion") of the Department's Order. Specifically, NEPCC requests that the Department delay implementing the OSP rate cap as it applies to store-and-forward telephone equipment[(1)] until October 1, 1999, the deadline established by the Federal Communications Commission ("FCC")[(2)] for OSPs to comply with a similar directive. Similarly, on May 7, 1998, AT&T filed a Motion for Clarification ("AT&T Motion") requesting that the Department require OSPs to implement the oral rate disclosures on October 1, 1999, to conform with the FCC's compliance requirements (AT&T Motion at 2).

Also on May 7, 1998, New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic") filed a Motion for Reconsideration and Clarification of the Department's Order, and for Extension of the Judicial Appeal Period ("Bell Atlantic Motion"). Bell Atlantic seeks reconsideration and clarification of the Department's: (1) decision to prohibit charges for intrastate directory assistance calls from public payphones, (2) requirement that all OSPs orally notify callers of long distance rate information, and (3) determination to maintain its regulation of inmate calling services (Bell Atlantic Motion at 2, 7 and 9).

II. STANDARDS OF REVIEW

A. Reconsideration

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 have a significant impact upon the 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).

B. Clarification

Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is so ambiguous as to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

C. Extension of Judicial Appeal Period

G.L. c. 25, § 5, provides in pertinent part that a petition for appeal of a Department order must be filed with the Department 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 twenty days after the date of service of said decision, order or ruling." See also 220 C.M.R. § 1.11(11). The 20-day appeal period indicates a clear intention on the part of the legislature to ensure that the decision to appeal a final order of the Department be made expeditiously. Ruth C. Nunnally d/b/a L&R Enterprises, D.P.U. 92-34-A at 6 n.6 (1993); see also Silvia v. Laurie, 594 F. 2d 892, 893 (1st Cir. 1978). The Department's procedural rule, 220 C.M.R. § 1.11(11), states that reasonable extensions shall be granted upon a showing of good cause. The Department has stated that good cause is a relative term and depends on the circumstances of an individual case. Boston Edison Company,

D.P.U. 90-335-A at 4 (1992). Whether good cause has been shown "is determined in the context of any underlying statutory or regulatory requirement, and is based on a balancing of the public interest, the interest of the party seeking an exception, and the interests of any other party." Id. The filing of a motion for extension of the judicial appeal period automatically tolls the appeal period for the movant until the Department has ruled on the motion. Nandy v. Massachusetts Electric Company, D.P.U. 94-AD-4-A at 6 n.6 (1994); Nunnally, D.P.U. 92-34-A at 6 n.6.

III. MOTIONS

A. NEPCC Motion for Reconsideration and AT&T Motion for Clarification

NEPCC and AT&T request that the Department allow OSP providers that use store-and-forward technology until October 1, 1999, to comply with the oral rate disclosure requirements, in accordance with FCC rulings (NEPCC Motion at 2; AT&T Motion at 1). The Department's Order required OSPs to comply with oral rate disclosure requirements by July 1, 1998, regardless of their applied technology (id.). NEPCC, and AT&T contend that OSPs that use store-and-forward technology could not meet the

Department's deadline because updates to the equipment were necessary, and could not be completed in time (NEPCC Motion at 2-3; AT&T Motion at 1-2).

B. Bell Atlantic Motion for Clarification, Reconsideration, and Extension of Judicial Appeal Period

1. Introduction

Bell Atlantic has requested that the Department reconsider and clarify our decision concerning three issues: 1) prohibiting charges for directory assistance; 2) OSP oral rate disclosure requirements; and 3) inmate calling services (Bell Atlantic Motion at 2).

2. Directory Assistance

Bell Atlantic requests that the Department reconsider its determination to uphold the Massachusetts statutory prohibition on charging for intrastate directory assistance calls (Bell Atlantic Motion at 2). Bell Atlantic contends that the Department's finding that "the power to declare the statutes of the Commonwealth unconstitutional because they are preempted lies with the courts" is inaccurate (id., citing Order at 6). Bell Atlantic contends that the Department must adhere to the federal rules concerning fair compensation and preemption provisions of §§ 276(b)(1)(A) and 276(c) of the Telecommunications Act of 1996 ("Act") (id. at 2-3). Specifically, Bell Atlantic states that Congress delegated rulemaking authority to the FCC, and the FCC determined that payphone providers could assess charges for directory assistance calls from public payphones (id. at 3). Bell Atlantic argues that where conflicts arise between § 276 of the Act and G.L. c. 159, § 19A, which prohibits payphone providers in Massachusetts from charging for directory assistance, pursuant to the Supremacy Clause of the United States Constitution, states must comply with the federal law (id. at 4-5). Bell Atlantic argues that the Department has previously declared state law to be preempted by federal law (id. at 6, citing D.P.U. 94-73).

3. Oral disclosure rules

Bell Atlantic requests that the Department clarify whether the OSP rate disclosure requirements apply to Bell Atlantic (id. at 6-7). Bell Atlantic states that, in its Order, the Department noted that OSP rate disclosure requirements were similar to the rules adopted by the FCC for interstate OSP calls (id. at 7). However, Bell Atlantic contends that the Department's requirements are broader than those imposed by the FCC, and thus raise administrative, technical and cost considerations (id.). Specifically, Bell Atlantic contends that the FCC's rate disclosure requirements apply to interstate 0+ calls from aggregator locations (id. at 8). Bell Atlantic argues that since it does not operate interstate 0+ calls from aggregator locations, it need not comply with the

FCC's requirements (id.). However, Bell Atlantic notes that the Department's Order stresses that the requirements apply to all OSPs (id.).

4. Inmate rate cap

Bell Atlantic requests that the Department reconsider its decision to continue regulating inmate calling services (id. at 9-10). Bell Atlantic notes that with respect to the per call surcharge, the Department had previously approved the removal of that rate from Bell Atlantic's tariff (id.).

5. Extension of Judicial Appeal Period

At the conclusion of Bell Atlantic's Motion, the Company requests that the Department grant an extension of time within which a judicial appeal may be filed (id. at 10).

IV. ANALYSIS AND FINDINGS

- NEPCC Motion for Reconsideration and AT&T Motion for Clarification

The Department first considers NEPCC's Motion for Reconsideration and AT&T's Motion for Clarification. The inability of OSPs to use store-and-forward technology to comply with the Department's deadline for oral rate disclosures was not presented to the Department prior to issuing its Order. Consequently, the Department finds that this previously unknown or undisclosed fact merits reconsideration of the Department's Order on this issue. Therefore, NEPCC's Motion for Reconsideration is granted. Moreover, in light of the FCC's Second Report (in which the FCC allowed OSPs using store-and-forward technology until October 1, 1999 to comply with oral rate disclosure requirements), and the Department's stated intent to implement rate disclosure requirements similar to those adopted by the FCC, the Department finds that our Order was so ambiguous as to leave doubt to its meaning. Therefore, the Motion for Clarification filed by AT&T is granted.

In its Second Report, the FCC allowed OSPs using store-and-forward technology until October 1, 1999 to comply with oral rate disclosure requirements. In our Order, the Department adopted the FCC's rules concerning rate disclosure mandates for OSPs. Because of a technological impossibility, OSPs using store-and-forward technology could not comply with the July 1, 1998 implementation date for oral rate disclosure. Therefore, the Department finds that OSPs using store-and-forward technology shall have until

October 1, 1999, to comply with the directives contained in our Order. In addition, in a subsequent Order issued on June 30, 1998, the FCC granted other OSPs (not using store-and-forward technology) extensions until December 31, 1998, to allow additional time for them to implement the oral rate disclosure requirements for collect call operator services and inmate operator services. Billed Party Preference for InterLATA

0+ Calls, CC Docket No. 92-77, Order, DA 98-1285 at ¶¶ 28-36 (rel. June 30, 1998).[3] Thus, the Department requires OSPs to implement our oral rate disclosure requirements no later than the date for interstate implementation under FCC directives. For most carriers, compliance with our Order should have already occurred. Only those carriers using store-and-forward technology are allowed until October 1, 1999 to implement our oral rate disclosure requirements. For interstate intraLATA interexchange operator services calls, Massachusetts implementation is required within 60 days of the release of the FCC's order on reconsideration and clarification.

Finally, in our April 17, 1998 Order, the Department directed OSPs to file an affidavit confirming compliance with the new rate disclosure requirements by July 1, 1998. Although some carriers did comply with this directive, we recognize that others might have believed that the affidavit requirement was not in effect until the Department addressed the pending motions for reconsideration and clarification. We remind OSPs of their obligation to file an affidavit, regardless of pending motions, and will extend the deadline for such filings until October 1, 1999. B. Bell Atlantic Motion for Reconsideration, Clarification, and Extension of the Judicial Appeal Period

Next, the Department addresses Bell Atlantic's request that the Department reconsider its decision not to authorize changes from payphones for directory assistance. Bell Atlantic did not allege previously unknown or undisclosed facts in its motion. Although Bell Atlantic argues that the Department's decision was based on mistake or inadvertence, Bell Atlantic bases its contention on information that it presented in the main case (see Bell Atlantic Initial Comments at 2). The Department has consistently stated that it does not grant motions for reconsideration simply because a company reargues 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). Therefore, Bell Atlantic's Motion for Reconsideration concerning directory assistance is denied.

Regarding OSP oral rate disclosure requirements, we also find that Bell Atlantic has not met our standard of review for reconsideration, and therefore, deny Bell Atlantic's Motion. However, because our findings were meant to mirror FCC requirements and are somewhat ambiguous in comparison, we find that clarification is warranted.

First, the Department's Order is only meant to apply to intrastate, 0+ (i.e., customer dialed non-access code) interexchange calls originating from aggregator locations. It does not apply to access code, 0- (0 minus) calls or any other types of calls. This is consistent with the FCC's application of its rules. See Erratum Decision in CC Docket No. 92-77 (rel. Feb. 12, 1998); see also Billed Party Preference for InterLATA 0+ Calls, CC docket No. 92-77, at ¶ 17 n.55 ("The [new disclosure] requirement also is inapplicable to calls to local and long distance operators, i.e., 0- and 00 calls, where

callers who wish to make interstate calls already have the opportunity to obtain rate quotes.").

With respect to disclosure of aggregator surcharges, the Department clarifies that OSPs are only required to disclose the specific amount of aggregator surcharges to the extent such amounts are reflected in agreements OSPs have with aggregators. Otherwise, the disclosure obligation will be satisfied by a general message informing callers that, besides per minute rates, they may incur aggregator surcharges.

We also clarify the requirements concerning notification of how consumers may access the long distance carrier of choice. The Department requires that after notifying the caller of rate information orally, and before connecting and billing for the call, the OSP include a general message stating that callers have the right to access their preferred long distance carrier by dialing the access code or toll free telephone number. If an OSP has the technical capability to provide rate information orally prior to connecting the call, then this additional oral message should be provided. We do not require that OSPs "obtain and attest to the accuracy of the access codes or other numbers of all long distance carriers and operator service providers," as Bell Atlantic suggests (see Bell Atlantic Motion, Attach. at 2). We believe the slight increase in call duration because of these oral rate notification requirements is far outweighed by the benefits to the consumer of receiving this information. Moreover, since under our requirements OSPs may require callers to take affirmative action to receive this rate information (such as by pressing the # key, or by staying on the line), a caller not interested in waiting for information can simply bypass the message. Finally, the Department notes that the Order applies to Bell Atlantic, as well as all other intrastate OSPs.

Bell Atlantic next contends that the Department's directive regarding inmate rate caps was the result of mistake or inadvertence. Bell Atlantic suggests that OSP calls made from inmate pay telephones are outside the Department's regulatory authority because "inmate telephone service is included as a payphone service by definition in § 276(d) of the Act." The Department has again reviewed the FCC's Payphone Order and Payphone Order on Reconsideration as well as the FCC's Billed Party Preference for InterLATA 0+ Calls Order and have found no indications that state regulation of intrastate OSP rates for inmate calls are preempted by the Act or FCC rules. Unless a carrier can provide a more persuasive argument, we will continue to interpret the existing law as allowing the Department to regulate the intrastate OSP rates of inmate calling services providers. Nevertheless, Bell Atlantic is correct that the Department did allow Bell Atlantic to detariff its inmate calling services rates, when the Company deregulated its payphone operations in March 1997. D.T.E. 97-18, at 5 (1997). This was done inadvertently; Bell Atlantic's inmate calling services' OSP rates should not have been detariffed. Bell Atlantic's inmate calling services' OSP rates are subject to Department mandates, as are all other inmate calling services providers. In addition, the modified rate cap we approved in our Order also applies to Bell Atlantic's rates. Therefore, the Department orders Bell Atlantic to file tariffs for its inmate calling services' OSP rates (surcharge, and usage rate, if applicable) within fourteen days of

this Order. Accordingly, Bell Atlantic's motion for reconsideration on this point is denied.

Concerning Bell Atlantic's request for an extension of the judicial appeal period, the Department's procedural rules state that extensions of the judicial appeal period shall be granted upon a showing of good cause. See 220 C.M.R. § 1.11(11); see also Nunnally, D.P.U. 92-34-A. Bell Atlantic's Motion merely requested an extension of time for judicial appeal, but did not indicate that good cause existed for the Department to grant such a request. As Bell Atlantic's request was did not comply with the Department's precedent or our regulations, the Department denies Bell Atlantic's request for additional time within which to file a judicial appeal of our April 17, 1998 Order.

The Department notes, however, that we have well-established precedent that the filing of a motion for extension of the judicial appeal period automatically tolls the appeal period for the movant until the Department has ruled on the motion. Nandy, D.P.U. 94-AD-4-A at 6 n.6; Nunnally, D.P.U. 92-34-A at 6 n.6. Moreover, as a matter of practice, the Department normally allows parties a few days in which to prepare an appeal even when denying the extension request, when our ruling comes after the appeal period would otherwise have expired. Dispatch Communications of New England d/b/a Nextel Communications, Inc., D.P.U. 95-59-B/95-80/95-112/96-13, at 7-8, Interlocutory Order on Appeal of Hearing Officer's Ruling and Motions for Extension of Appeal Period (June 7, 1999). To do otherwise would effectively require parties to file both an appeal and an extension request simultaneously in order to preserve their appeal rights in the event that the Department did not issue a ruling prior to the expiration of the appeal period. Id.

Bell Atlantic filed its request for an extension of time twenty days after the Department issued its Order. Under normal circumstances, we would grant a party whose request for extension of time has been denied the amount of time remaining before the deadline in which to file an appeal. If that were the case, Bell Atlantic would be effectively prohibited from filing an appeal, since the request for an extension of time was made on the last day of the statutorily-imposed appeal period. See G.L. c. 25, § 5. However, prohibiting Bell Atlantic from filing an appeal seems unnecessarily strict in light of the extended history of this proceeding. Therefore, Bell Atlantic is allowed five days following issuance of this Order in which to file a petition for appeal with the Secretary of the Commission, should they so choose.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That the Motion for Reconsideration filed by NEPCC on the issue of oral rate disclosures is hereby granted; and it is

FURTHER ORDERED: That the Motion for Reconsideration filed by AT&T on the issue of oral rate disclosures is hereby granted; and it is

FURTHER ORDERED: That the Motion for Reconsideration filed by New England

Telephone & Telegraph Company d/b/a Bell Atlantic-Massachusetts regarding directory assistance and inmate rate regulation is hereby denied; and it is

FURTHER ORDERED: That the Motion for Clarification filed by New England Telephone & Telegraph Company d/b/a Bell Atlantic-Massachusetts regarding OSP oral rate disclosure is hereby granted; and it is

FURTHER ORDERED: That New England Telephone & Telegraph Company d/b/a Bell Atlantic-Massachusetts shall file tariffs for its inmate calling services OSP rates (including usage rates and surcharges) within fourteen days of this Order; and it is

FURTHER ORDERED: That New England Telephone & Telegraph Company d/b/a

Bell Atlantic-Massachusetts will have five days following the issuance of this Order in which to file a petition for appeal with the Secretary of the Commission; and it is

FURTHER ORDERED: That companies comply with all directives contained in this Order.

By Order of the Department,

_____

Janet Gail Besser, Chair

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James Connelly, Commissioner

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr., 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).

1. A store-and-forward payphone, or "smart" payphone, is essentially an automated operator system contained in the payphone itself. Billed Party Preference for InterLATA 0+ Calls, CC Docket No. 92-77, Order at n.7, DA 98-1285 (rel. June 30, 1998).

2. Billed Party Preference for InterLATA 0+ Calls, Second Report and Order Reconsideration, CC Docket No. 92-77 FCC 98-9.

3. In that Order, the FCC also stayed its oral disclosure rules as they applied to interstate intraLATA operator services until 60 days after the release of an FCC reconsideration order addressing petitions for reconsideration and clarification filed by Ameritech and U S WEST. Billed Party Preference for InterLATA 0+ Calls, CC Docket No. 92-77, Order, DA 98-1285 at ¶ 27 (rel. June 30, 1998). The FCC has not yet ruled on those petitions.