

D.P.U. 93-125-A

Investigation by the Department of Public Utilities on its own motion as to the propriety of the rates and charges set forth in tariff schedules D.P.U. Mass. Nos. 10 and 15, filed with the Department on June 14, 1993, to become effective July 14, 1993, by New England Telephone and Telegraph Company.

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ORDER ON MASSACHUSETTS PAYPHONE ASSOCIATION, INC.'S  
MOTION FOR RECONSIDERATION AND  
EXTENSION OF JUDICIAL APPEAL PERIOD

I. INTRODUCTION

On February 2, 1994, pursuant to 220 C.M.R. §§ 1.11(10) and (11), the Massachusetts Payphone Association, Inc. ("MPA") filed with the Department of Public Utilities ("Department") a motion for (1) reconsideration of that part of the Department's Order in New England Telephone Company, D.P.U. 93-125 ("Order"), issued on January 13, 1994, relating to Directory Assistance ("DA") charges imposed on pay-telephone service providers by New England Telephone and Telegraph Company ("NET" or "Company"); and (2) an extension of the judicial appeal period ("Motion"). On February 9, 1994, NET filed a Response in opposition to MPA's Motion. On February 18, 1994, MPA filed a motion to supplement its Motion for Reconsideration, and its Supplement. On February 22, 1994, NET filed a Letter in Opposition to MPA's motion to supplement. Notwithstanding NET's opposition, on February 25, 1994, the Hearing Officer granted MPA's motion to supplement and gave NET an opportunity to submit a reply to MPA's Supplement. NET chose not to submit a further reply, instead allowing its February 22, 1994 Letter in Opposition to serve as its reply.

In its Order, the Department rejected MPA's request to

eliminate NET's DA charges to pay-telephone service providers,<sup>1</sup> because "MPA ha[d] not presented any new evidence sufficient to cause the Department to reverse its well-established policy." Order at 51. The Department noted that "the issue of charging for DA and recovery of DA charges from pay-telephones by companies other than NET ..." had been consistently raised by pay-telephone service providers in Department proceedings since 1989, and in each case the Department has declined to change its previous determinations. Id. Notwithstanding its decision to maintain its policy requiring that pay-telephone service providers pay for the cost of DA from their PALs, the Department approved NET's proposal to institute a flat monthly rate of \$5.07 per PAL for DA to protect PAL subscribers from "unnecessary DA charges that result from the inappropriate use of free DA service from pay-telephone service providers." Id. at 51-52.<sup>2</sup>

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<sup>1</sup> Pay-telephone service providers obtain access to NET's network by subscribing to NET's public access line ("PAL") service. Currently, NET charges pay-telephone service providers a tariffed rate of \$0.34 per DA call made from a PAL, excluding a statutory 10-call allowance.

<sup>2</sup> The Company derived the flat rate of \$5.07 per PAL per month by taking the average number of billable DA calls per PAL per month in excess of the ten-call statutory allowance (i.e., 14.9 calls) and multiplying that number by the tariffed rate of \$0.34 per direct-dialed DA call (NET Reply Brief at n.29). In addition, the Department ordered NET to include in its compliance tariff language indicating that the flat monthly DA charge will be reviewed and updated each year in January to reflect actual DA use

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II. POSITIONS OF THE PARTIESA. MPA

MPA maintains that the record in this proceeding contains more than adequate evidence for the Department to conclude that its current policy of requiring NET to charge pay-telephone service providers for DA is "unfairly discriminatory and anticompetitive" (Motion at 2). MPA points to certain evidence in the record as well as arguments contained in its initial and reply briefs, and its Motion ( id. at 3). For example, MPA claims that the Company's costs of providing DA to its payphone customers are subsidized by more than \$3.6 million per year, and PAL subscribers are bearing a portion of that subsidy ( id. at 2-3). Moreover, MPA contends that contrary to the Department's "assertion" in the Order that NET's monthly volume credit offsets the potential anticompetitive effects associated with the wholesale/retail relationship between NET and pay-telephone service providers, <sup>3</sup> the volume credit does not

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from PAL locations. Order at 52.

<sup>3</sup> Because pay-telephone service providers are competitors of NET in providing pay-telephone service and in recognition of the disparity that exists between the rates that pay-telephone service providers must pay to NET and the rates NET charges itself for pay-telephone service, the Department found in D.P.U. 89-300 that an adequate level of commission payments to pay-telephone service providers was

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"'solve[]' the DA charge burden" ( id. at 3). Finally, MPA describes the Department's analysis on the DA charging issue as "conclusory," and argues that in its Order the Department failed to address the evidence and arguments presented by MPA (Motion at 2).<sup>4</sup>

If the Department declines to eliminate DA charges for pay-telephone service providers, MPA asserts that the Department should nevertheless revise its methodology for determining the new flat monthly rate ( id. at 4). MPA claims that the Department's "analogy" to the methodology used in setting residential premium rates "is inappropriate here, where there are clear competitive implications" ( id.). MPA states that because of such competitive implications and consistent with "the goals of the Department's orders approving competition and governing the transitional rate process," the Department should require NET to use the marginal cost of DA calls, rather than the tariff rate

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needed to offset the potential anticompetitive effects of the wholesale/retail rate relationship. NET, D.P.U. 89-300, at 271 (1990). Therefore, the Department ordered NET to provide all Department-certified pay-telephone service providers a credit of 20 percent off the total monthly billed amount for each pay telephone that generates monthly revenue for NET of \$100.00 or more. Id. at 273-274. Because of the reductions to business use rates, the Department in D.P.U. 92-100 reduced to \$75.00 the monthly revenue threshold. NET, D.P.U. 92-100, at 54 (1992).

<sup>4</sup> Thus, MPA seems to argue that the Department's DA decision was unsupported ( see Motion at 2.).

of \$0.34 per call, to calculate the flat monthly rate ( id. at 6). MPA maintains that the marginal cost of a direct-dialed DA call (\$.1634) multiplied by 11.2 calls ( i.e., the monthly average number of billable DA calls on PALs) produces a monthly flat rate of \$1.83 per month per PAL ( id., citing Exhs. MPA-10, 13).

With regard to its Motion for extending the judicial appeal period, MPA argues that there is good cause for an extension of twenty days after the Department rules on MPA's Motion ( id. at 7). MPA contends that it should not have to sacrifice its right to appeal the Department's Order for having first sought to "exhaust[] its prescribed administrative remedies" ( id.).

B. NET

NET contends that MPA has failed to satisfy the Department's standard for reconsideration because it has (1) presented no new evidence which would warrant reconsideration; and (2) not shown how the Department failed to consider existing evidence through either mistake or inadvertence (NET Response at 2-3). NET also claims that the Department's decision with regard to DA charges for pay-telephone service providers is "reasonable and fully supported by the record evidence" ( id. at 1).

The Company notes that MPA in its Motion has reargued the same issues raised by MPA in the instant proceeding and prior transitional filings -- that is, that pay-telephone service providers should not have to pay the cost of DA calls placed from

their coin operated pay telephones ( id. at 3). NET states that the Department has consistently rejected this argument in prior transitional filings, and, according to NET, since no "new or compelling" evidence was presented in this case or in MPA's motion, the Department "acted with reasoned consistency" in again rejecting MPA's request ( id.). The Company also asserts that the fact that the Department did not restate in detail the basis for sustaining its DA policy in its Order would not deem the Department's decision unsupported ( id. at 4). Furthermore, NET contends that the Department did make adequate findings to support its DA decision, as well as relying on prior decisions, such as D.P.U. 91-30 and D.P.U. 92-100, that have addressed the same issue ( id., citing Massachusetts Electric Company v. Department of Public Utilities , 381 N.E. 2d 325, 330 (1978)).

With regard to MPA's claim of subsidization by PAL subscribers, NET contends that its DA charges to pay-telephone service providers "appropriately charge[] the cost-causers for their use of DA" ( id. at 5). The Company argues that the \$3.6 million figure reported by MPA is the result of the Department's effort to balance its regulatory goals of economic efficiency, fairness, and rate continuity -- thus, coin-rates are not yet at the target level ( id.).

NET maintains that MPA's arguments regarding the Company's flat monthly DA charge are "erroneous" ( id. at 6). NET states

that the Department's requirement that NET update annually the average DA usage characteristics from PAL's is reasonable and appropriate, and is consistent with the Department's treatment of Residence Premium Services ( id. at 6-7). The Company also contends that, contrary to MPA's assertion, the Company used the correct average number of calls for purposes of calculating the monthly DA charge for PALs -- a figure that appropriately took into consideration the average DA call allowance from PALs ( id. at 7). Finally, NET states that MPA's claim that the Company should use the marginal cost of DA calls, rather than the \$0.34 tariffed rate, is "unfounded and ... a relitigation of issues" (id. at 8). NET asserts that the Department has repeatedly rejected arguments by pay-telephone service providers that their charges should be based on marginal costs ( id. at 9, citing NET, D.P.U. 89-300, at 271-272). According to NET, the Department has recognized that these rates must be set above marginal cost to recover overall embedded costs, and, therefore, such rates are just and reasonable ( id. at 9).

NET did not address MPA's request for an extension of the judicial appeal period.

### III. STANDARD 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 after review and deliberation. Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Essex County Gas Company, D.P.U. 87-59-A at 2 (1988); Western Massachusetts Electric Company, D.P.U. 85-270-C at 12-13 (1987); Hutchinson Water Company, D.P.U. 85-194-B at 1 (1986).

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. Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Western Massachusetts Electric Company, D.P.U. 84-25-A at 6-7 (1984); Boston Edison Company, D.P.U. 1720-B at 12 (1984); Hingham Water Company, D.P.U. 1590-A at 5-6 (1984); Boston Edison Company, D.P.U. 1350-A at 4 (1983); Trailways of New England, Inc., D.P.U. 20017, at 2 (1979); Cape Cod Gas Company, D.P.U. 19665-A at 3 (1979).<sup>5</sup> 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

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<sup>5</sup> 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. See generally Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987).

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), citing Western Union Telegraph Company , D.P.U. 84-119-B (1985).

B. Extension of Judicial Appeal Period

G.L. c. 25, § 5 provides that an appeal of a Department final order must be filed with the Department no later than twenty days after the party has been served a copy 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 ... order." Nunnally d/b/a L & R Enterprises , D.P.U. 92-34-A at 2 (1993). The Department's Procedural Rules state that "reasonable extensions shall be granted upon a showing of good cause." 220 C.M.R. § 1.11(11). Good cause is a general standard for granting equitable relief that appears throughout the Department's Procedural Rules. Id., citing 220 C.M.R. §§ 1.00 et seq. (footnote omitted). In Nunnally , supra , the Department reiterated that:

Good cause is a relative term and it depends on the circumstances of an individual case. Good cause 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 affected party.

Id. at 3, citing Boston Edison Company , D.P.U. 90-335-A at 4 (1992).

In the context of a request to extend the appeal period filed contemporaneously with a motion for reconsideration, the mere filing of such a motion for reconsideration does not constitute good cause for an extension of the appeal period, "notwithstanding the common practice of the Department to grant such motions when accompanied by a motion to reconsider ...." Fall River Gas Company, D.P.U. 89-199-A at 7 (1989) (citation omitted).

#### IV. ANALYSIS AND FINDINGS

##### A. Motion for Reconsideration

We find that MPA's Motion has not met the Department's standard for reconsideration.

With regard to the Department's first ground for reconsideration, MPA's Motion does not present previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. <sup>6</sup> First, we note that in reaching

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<sup>6</sup> MPA also seems to argue that the Department's decision on DA charging was unsupported ( see Motion at 2). This contention is unfounded. It was not necessary to address MPA's evidence and arguments point-by-point because we found that MPA had not presented any new evidence than proffered in previous cases sufficient to justify a change in the Department's well-established policy. Therefore, that finding, when taken together with the Department's citations

our decision not to eliminate DA charging for pay-telephone service providers, we fully considered the evidence and arguments made by MPA and other parties. MPA primarily presented evidence to support its contention that DA charging is unfairly discriminatory and anticompetitive. However, as in prior cases where this issue was raised, we found in this proceeding that MPA had not presented sufficient evidence to warrant a change in the Department's DA policy. Order at 51; see D.P.U. 91-30, at 85; D.P.U. 92-100, at 55.

Second, as concerns our decision approving NET's methodology for calculating the flat monthly DA rate, we note that we fully considered the record evidence and arguments of the parties, including MPA, and found that NET's proposal was reasonable and consistent with the methodology approved by the Department for developing target rates for residence premium exchange services. Order at 51. Such a finding is an implicit recognition that the evidence and arguments in support of MPA's position were less persuasive.

With regard to the Department's other ground for reconsideration, MPA does not contend that the Department's decision to maintain DA charging and to approve NET's methodology

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of the analysis and findings in D.P.U. 91-30 and D.P.U. 92-100 on the same issue, provides more than adequate support for our decision.

for calculating the flat monthly DA rate resulted from mistake or inadvertence, as those terms have been defined in Department case law. See Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); NET, D.P.U. 86-33-J at 2 (1989). Moreover, such an assertion would be incorrect. It was not by mistake or inadvertence that we reached these decisions. Rather, the record evidence supported a determination to continue the Department's policy of requiring NET to charge pay-telephone providers for the cost of DA, and supported a finding that NET's methodology for calculating the flat monthly DA rate was reasonable.

In summary, simply claiming that the Department made an incorrect decision without explicit reference to the Department's standard of review is inadequate ground for reconsideration. The Department has consistently held that it will not entertain reargument on issues already considered and determined in a proceeding. Accordingly, we hereby deny MPA's Motion for Reconsideration.

B. Motion for Extension of Judicial Appeal Period

MPA filed its request for a twenty-day extension of the judicial appeal period on the last day of the appeal period. No parties to the case, including NET, filed responses to the motion.

The filing of a motion for extension of the judicial appeal period serves to toll the appeal period until the Department

rules on the motion. Nunnally, supra at n.6 (citations omitted). However, it does not automatically ensure that the Department will "reset the clock" by granting an extension. For an extension to be granted, the Department must find that there is good cause. As we held in Fall River Gas Company, supra, the filing of a contemporaneous motion for reconsideration does not, by itself, constitute good cause for an extension of the appeal period. MPA's arguments in support of its motion for an extension suffer from the same deficiency that we noted in the Fall River Gas case. However, in applying the balancing test set forth in Boston Edison Company, D.P.U. 90-335-A, supra, we find that since no party objected to MPA's request for an extension, and consistent with the public interest in timely judicial review and finality of Department decisions, we will grant MPA a seven-day extension. See Nunnally, supra.

V. ORDER

Accordingly, after due consideration, it is hereby

ORDERED: That the Motion for Reconsideration of the Massachusetts Payphone Association, Inc., filed with the Department on February 2, 1994, is denied; and it is

FURTHER ORDERED : That the Motion of the Massachusetts Payphone Association, Inc. filed with the Department on February 2, 1994, to extend the judicial appeal period pertaining to the

Department's January 13, 1994 Order, be and hereby is denied in part and granted in part; and it is

FURTHER ORDERED : That, pursuant to G.L. c. 25, § 5, the time within which the Massachusetts Payphone Association, Inc. may appeal the Order in this case dated January 13, 1994, is extended until seven days from the date of this Order.

By Order of the Department,