

D.P.U. 93-98

Investigation by the Department of Public Utilities on its own motion into the regulatory treatment of telecommunications common carriers within the Commonwealth of Massachusetts.

I. INTRODUCTION

On June 18, 1993, pursuant to G.L. c. 159, § 12(d), the Department of Public Utilities ("Department") voted to open an investigation into the regulatory treatment of telecommunications common carriers within the Commonwealth of Massachusetts ("Order"). In the Order, the Department noted that "the telecommunications marketplace has changed dramatically since 1983, when the Department first made a policy decision to regulate entry into the telecommunications marketplace." Order at 3. The Department determined that it is appropriate to investigate whether the Department should continue to require telecommunications common carriers within the Commonwealth to obtain (1) a certificate of public convenience and necessity ("certificate") from the Department before offering intrastate services in Massachusetts; and (2) Department approval of the transfer of control or ownership of a certificate. The investigation was docketed as D.P.U. 93-98.

Pursuant to the Department's request for comments, the Attorney General of the Commonwealth ("Attorney General"), New England Telephone and Telegraph Company ("NET"), MFS-McCourt ("MFS"), Cablevision Lightpath, Inc. ("CLI"), New England Cable Television Association, Inc. ("NECTA"), Teleport Communications Group, Inc. ("Teleport"), NSI Communication Services, Inc. ("NSI"), New England Public Communications Council ("NEPCC"),

Communications Gateway Network, Inc. ("Gateway") and Clifford Wilson, a pay-telephone service provider, filed written comments with the Department.

II. PROPOSED CHANGES

In its Order opening the investigation, the Department articulated its proposed alternative to the current regulatory practices:

1. Carriers would not be required to apply for certification before offering telecommunications services within Massachusetts;
2. Pursuant to G.L. c. 159, § 19 and 220 C.M.R. § 5.00, carriers would continue to be required to have an approved tariff on file with the Department before offering services in Massachusetts. The Department may suspend any proposed tariff, or proposed modification to a tariff, for investigation;
3. Carriers would be required to have on file with the Department a "Statement of Business Operations," listing the carrier's address, telephone number, customer service telephone number, and regulatory contact person. Carriers also would have to sign a tax attestation form. The Department would rely on the "Statement of Business Operations" to maintain an accurate list of carriers operating in Massachusetts, in order to monitor the industry and to facilitate resolution of consumer complaints;
4. Carriers still would be required to comply with other regulatory requirements, such as the Department's alternative operator service ("AOS") rate and consumer notice policies (see International Telecharge, Inc., D.P.U. 87-72/88-72 (1988) (" ITI')) and the Department's pay-telephone requirements (see M.G. Communications, Inc., D.P.U. 90-143 (1991) (" M.G."));
5. Before offering service, pay-telephone service providers would be required to sign an affidavit stating that the provider understands and agrees to comply with the Department's pay-telephone regulations

and statutory requirements, with the understanding that the Department may order disconnection of the provider's public access lines for noncompliance. See M.G.;

6. Carriers still would be required to file an annual return with the Department, pursuant to G.L. c. 159, § 32;
7. Carriers would not be required to seek Department approval for a transfer of ownership or control of an existing certificate; however, carriers would be required to notify the Department when such a transfer takes place; and
8. The Department's consumer dispute resolution procedures for intrastate services would remain unchanged under this proposal. The Department's Consumer Division would continue to handle consumer complaints concerning the intrastate services provided by any carrier under the Department's jurisdiction.

The Department sought written comments regarding the proposed changes to the present regulatory framework as it relates to, among other things, consumer protection, administrative efficiency, and economic conditions in the telecommunications marketplace within Massachusetts.

III. POSITIONS OF THE PARTIES

A. The Attorney General

The Attorney General asserts that the current certification requirement should remain in effect in order to protect the public interest (Attorney General Comments at 2). The Attorney General contends that although there is no statutory requirement that common carriers must obtain certificates before offering telecommunications services, the Department has in previous cases

stated that managerial, technical and financial ability to offer telecommunications services, and a demonstration of public need are "relevant to the determination of the public interest" (id. at 3). The Attorney General states that the Department, in AT&T Communications of New England, D.P.U. 1641 (1983) (" AT&T"), found that certification not only is consistent with its general supervisory authority but necessary to protect the public interest (id. at 3-4). The Attorney General argues that the certification requirement has ensured that Massachusetts consumers "had less exposure to 'fly-by-night'" companies (id. at 6).

Moreover, the Attorney General contends that, as cable companies and interexchange companies are poised to enter the local market, more guidance from the government, not less, would be necessary to promote the public interest (id. at 7-8). The Attorney General argues that elimination of the certification requirement at this moment "would be an abandonment by the Department of its obligation to protect the public interest" (id. at 8).

Furthermore, the Attorney General contends that, in the case of pay-telephone and AOS, competition could not be relied upon for consumer protection because of the unique characteristics and environment in which these services are offered (id. at 4-5). The Attorney General maintains that the present system of

regulating pay-telephone service and AOS has proven effective and has provided consumers with greater choices (id. at 9).

Therefore, according to the Attorney General, abandoning the present system would "create greater administrative demands and little, if any, protection of the public interest" (id.).

Similarly, regarding the transfer of ownership of certificates, the Attorney General argues that the Department should not discontinue the present requirements because this would (1) eliminate the Department's ability to ensure that the new owner is qualified to provide telecommunications services and (2) potentially allow a local telephone monopoly to "spin-off" certain segments of its market, resulting in higher rates to captive customers (id. at 10-12).

B. NET

NET indicates its support of the Department's proposal to streamline the certification process but proposes its own procedures (NET Comments at 1). NET states that because there are several interexchange carriers and pay-telephone service providers operating in the state, "there is less of a need for the Department to adjudicate every application for a certificate so as to determine the public need for the proposed services and the technical, financial, and managerial competency of each potential interexchange carrier" (id. at 2). Similarly, because of the existence of multiple alternative providers, NET argues

that there is less need to adjudicate every transfer application (id.).

However, while supporting the streamlining effort, NET argues that the certification or transfer requirements should not be completely abandoned (id.). According to NET, "[C]ertification requirements are practices that serve to provide notice to the Department and parties of ongoing developments and emerging issues and are vehicles by which matters can be brought before the Department for a timely resolution, if necessary" (id.). Accordingly, NET proposes the following procedures:

1. Any person or entity wishing to receive notice of applications for certification, amendments to certificates, or transfers would request inclusion on a service list maintained by the Department;
2. A party seeking certification, either initially or to amend an existing certificate, or approval for a transfer would file a streamlined application with the Department and contemporaneously serve all parties on the service list;
3. If no objection to the proposed certification or transfer is filed within 45 days of submission to the Department, the filing would be deemed approved, unless the Department chooses to open an investigation on its own motion;
4. If an objection is received, the Department may open an investigation, approve the filing, despite the objection, or take whatever other action it deems appropriate;
5. The level of detail required for certification and transfer applications can be reduced to basic information. The applicant should provide a Statement of Business Operations as discussed by the Department in the Order. In addition, a clear and concise statement of the specific authority requested should be

provided, including the specific services which are the subject of the certificate or the transactions associated with the transfer of ownership or control; and

6. In the case of certification application, the carrier may include a copy of its initial or revised tariff to be effective at the end of the 45-day notice period.

(id. at 3).

C. MFS

MFS indicates its support of the Department's effort to streamline the certification process (MFS Comments at 1). MFS contends that streamlining of the certification process would be "a significant step toward removing regulatory burdens that inhibit competition in the telecommunications marketplace" (id.). MFS indicates that the Department, in granting MFS its certificate, recognized the benefits that would accrue to Massachusetts customers from the introduction of competition into the telecommunications marketplace (id. at 2).

Moreover, MFS argues that certification is not a statutory requirement and the Department's proposal to streamline the process would not "pose a threat" to the Department's ability to protect the public interest (id. at 3). MFS notes that the proposal is consistent with the Department's statutory obligations because carriers would have to file a "Statement of Business Operations," allowing the Department to supervise the industry and resolve consumer complaints (id.).

Furthermore, MFS requests that the Department expand the

scope of the investigation to include streamlining current tariff requirements (id. at 5). While it does not propose the complete elimination of tariff requirements, MFS requests that the Department consider a tariff review process similar to the one adopted by the Federal Communications Commission ("FCC") (id.). Specifically, MFS requests that the Department (1) reduce the tariff notice period for nondominant carriers from 30 days to one day and (2) permit nondominant carriers to file tariffs that include either fixed rates or a "reasonable range of rates" (id. at 7). According to MFS, the streamlining of tariff requirements would reduce the direct and indirect costs of filing a tariff, and would increase carriers' incentives to lower rates (id.).

D. CLI

Similarly, CLI supports the Department's initiative to streamline the certification process (CLI Comments at 2-4). CLI contends that the Department's review of applications for certification has become "pro forma," rarely requiring a hearing on an application (id. at 3). According to CLI, the Department's proposal would reduce "the regulatory burdens for both carriers and the Department ... in preparing, reviewing, and keeping certificates for what is ceasing to be a meaningful review..." (id. at 3-4).

CLI also requests that the Department extend its investigation to include streamlining tariff regulations (id.

at 4). CLI contends that the requirements of tariff regulation are an unnecessary burden to carriers (id. at 5). CLI argues that, based on G.L. c. 159, §20, the Department has authority to reduce the time in which tariffs become effective for good cause shown (id. at 6). CLI indicates that the Department, using its authority, has already changed its review of specialized services and Facility-Based Payment Option ("FPO") Centrex services¹ by relying more on competitive forces rather than its own tariff review to "insure just and reasonable pricing of competitive services" (id. at 7). Accordingly, CLI requests that the Department allow (1) nondominant carriers to file tariffs with 24 hours notice and (2) to file streamlined tariff revisions allowing for a range of rates and a letter of transmittal but with no letter of explanation (id. at 9-10). Alternatively, CLI requests that the Department clarify 220 C.M.R. § 5.02 to allow carriers to file tariffs with the Department in the same form adopted by the FCC (id. at 10). Accordingly, CLI requests that the Department begin a rulemaking to consider its proposed changes to the review of tariffs (id. at 11).

¹ FPO rates are individually developed rates and are based on the customer's system-specific configuration and quantity of facilities for each premises location. In NET-Centrex, D.P.U. 85-275/276/277 (1985), the Department allowed NET to price its FPO Centrex services based on market conditions, and the FPO Centrex rates are filed with the Department pursuant to G.L. c. 159, § 19.

E. NECTA, Teleport and NSI

NECTA, Teleport and NSI also indicate their support for the Department's proposed changes (NECTA Comments at 1; Teleport Comments at 1; NSI Comments). Also, Teleport requests that the Department's investigation include streamlining tariff filing regulations (Teleport Comments at 2).

F. NEPCC, Gateway and Clifford Wilson

Gateway indicates its opposition to the Department's proposed streamlining of the certification requirements, while NEPCC and Clifford Wilson indicate their opposition to the extent that the proposed changes affect the provision of pay-telephone service (Gateway Comments at 1; NEPCC Comments at 1; Clifford Wilson Comments). Regarding pay-telephone service requirements, NEPCC contends that the present process has "served a purpose by screening potential providers and allowing only those the Department believed could provide services within the regulatory framework to commence operation" (NEPCC Comments at 1). Similarly, Gateway argues that the proposal would expose consumers to fraudulent billing practices and deception by unscrupulous carriers (Gateway Comments at 1-2). Clifford Wilson contends that the proposal would further damage the credibility of pay-telephone service providers (Clifford Wilson Comments).

III. ANALYSIS AND FINDINGS

A. Introduction

The Department has endorsed competitive telecommunications markets as the best method for promoting its policy goals for the industry in Massachusetts. IntraLATA Competition, D.P.U. 1731, at 25 (1985). In D.P.U. 1731, the Department stated that "there are benefits inherent in a competitive marketplace that encourage greater levels of economic efficiency and fairness than does a regulated monopoly environment. These benefits have the clear potential of encouraging the development of a more efficient and modern telecommunications network in Massachusetts." Id. at 26. Moreover, the Department recognized the importance of changing the regulatory framework as competition penetrates into specific markets. Id. at 45. The Department stated that "as competitive forces begin to take hold in a market, the Department should begin to reduce the degree of regulation in the market, so that the benefits of competition may be enjoyed by the public. Such a reduction of regulation is consistent with our goal of economic efficiency, since we have found ... that competitive markets provide economic incentives without traditional regulatory review." Id. at 55.

B. Certification

In 1983, the Department found that "the regulation of entry into a specific field by a carrier is an integral part of safeguarding [the interests of the public]." AT&T, D.P.U. 1641, at 9. The Department has regulated market entry by requiring

that common carriers who wish to provide intrastate service in Massachusetts obtain a certificate from the Department. The Department has determined that an applicant must possess the managerial, technical, and financial ability to provide the proposed service, and that there is a public need for the proposed service. See MCI, D.P.U. 1655 (1984); GTE Sprint, D.P.U. 84-12 (1984); First Phone, Inc., D.P.U. 1581 (1984); ITI, supra; IMR Telecom, D.P.U. 89-212 (1990); and M.G., supra.

The above stated requirements have been the standard of review for certificate applications, but tariff review and other consumer protection requirements have been the Department's primary tools in ensuring that the provision of interexchange, competitive access,² and AOS services are in the public interest.

Although the Department is committed to promoting competition in telecommunications, we are not abandoning the concept of consumer protection nor are we abandoning our responsibility to follow the statutory requirement to ensure just and reasonable rates. Rather, we find in this case that current market forces, statutory requirements, and the Department's tariff regulations, notice requirements, and consumer complaint resolution process, are sufficient to ensure not only that rates are just and reasonable but that there is adequate consumer

² Competitive access service is provided by firms that offer private line and switched access services in competition with the local exchange carrier.

protection for interexchange, competitive access, and AOS services, absent the regulation of entry into these markets.³ Therefore, it is no longer necessary for the providers of these services to obtain a certificate before offering service.

The elimination of entry regulation does not constitute general deregulation of these markets, and it should not be construed as a reduction in the Department's commitment to insuring the protection of the public interest in telecommunications. Any common carrier that has an approved tariff on file with the Department, and that has submitted a Statement of Business Operations, will be considered a "registered" common carrier in the Department's new framework. Registered common carriers will be subject to the Department's general supervisory authority, including specific requirements in G.L. c. 159, and the Department's regulatory policies as articulated in Department Orders.

We anticipate that elimination of entry regulation will promote additional competition in Massachusetts and thus provide benefits to consumers, but should we later determine otherwise, we maintain the authority to reconsider the issue of certification as a condition of providing telecommunications

³ Consumer protections established by the Department include, among other things, residential customer billing and collection regulations (see NET, D.P.U. 18448 (1977)), operator service notice requirements (see ITI), and pay-telephone service requirements (see M.G.).

services within Massachusetts.

Because NET deems the process of certification useful for monitoring industry developments, NET recommended streamlining, but not eliminating, entry regulation. However, NET's proposed modifications to the Department's proposal are substantially the same as the current process. The Department has regulated entry ostensibly to protect the public interest, not to provide a mechanism for carriers to monitor industry developments. Because we find that entry regulation is no longer necessary to protect the public interest, continuing the current process for other reasons would be an inefficient use of regulatory authority.

The Attorney General's concern regarding the Department's proposal to eliminate the requirement for approval of a transfer can be addressed within the proposed regulatory framework, since carriers would be required to notify the Department when such transfers take place. Under this framework, the Department retains the authority to investigate any issue, including transfers of control of carriers or the transfer of certain segments of a carrier's market.

We note that the Department currently has before it a number of certificate and transfer applications for consideration. Because the decision to eliminate entry regulation will become effective as of the date of this Order, the Department will not continue to process those applications that are pending as of the

date of this Order under the current regulatory scheme. Therefore, those entities, other than applicants for authority to offer pay-telephone service, will be notified that they will only be required to submit a tariff and a Statement of Business Operations. If their respective tariff filings are approved by the Department, the entities would then be considered registered common carriers in Massachusetts and will be allowed to offer intrastate services, as of the effective date of the approved tariffs.

C. Pay-Telephone Service

The Department has previously found that "pay-telephone service, if not properly operated and maintained, and if not in compliance with statutory and regulatory requirements, could result not only in worse quality of service, but also could pose a threat to public safety." M.G., supra, at 22-23. Therefore, the Department required all pay-telephone service providers to obtain a certificate from the Department before providing services and to comply with certain additional minimum conditions of service. Id. at 24-39. As the Attorney General noted, the Department has denied certificates to several pay-telephone applicants that did not meet the Department's pay-telephone certification requirements.

Based on the comments filed by the Attorney General, the NEPCC, and others, and a review of the Department's pay-telephone

regulation, including the number of complaints about pay-telephone service received by the Department, we find that the Department's certification requirements for pay-telephone service providers should continue. Accordingly, pay-telephone service providers must obtain a certificate and comply with all other pay-telephone service requirements before providing service.

D. Tariff Regulation

Several parties requested that the Department expand this investigation to include streamlining the Department's tariff regulation. Specifically, the parties requested that the Department shorten the tariff review period from 30 days to 24 hours and that the Department permit nondominant carriers to file tariffs containing a range of rates. Consideration of such proposals is beyond the scope of this investigation. Moreover, such changes would call for legislative action because the review period is a statutory requirement. G.L. c. 159, § 19, requires that "... no change shall be made in any rate, except after thirty days from the date of filing"

With regard to the proposal to allow tariffs to include a range of rates instead of a specific rate for a service, the Department has previously disallowed such tariffs. See GTE Sprint Communications Corporation, D.P.U. 84-13 (1984); RCI Long Distance, Inc., D.P.U. 86-252 (1987); G.L. c. 159, §§ 14, 19.

IV. ORDER

Accordingly, after due notice and consideration, it is ORDERED: That telecommunications common carriers, other than pay-telephone service providers, shall no longer be required to obtain a certificate before offering intrastate telecommunications services in Massachusetts; and it is

FURTHER ORDERED: That, pursuant to G.L. c. 159, § 19 and 220 C.M.R. § 5.00, all telecommunications common carriers shall continue to submit tariffs for review by the Department and that such tariffs shall be approved by the Department before a carrier may offer intrastate telecommunications services in Massachusetts; and it is

FURTHER ORDERED: That telecommunications common carriers, other than pay-telephone service providers, shall file with the Department a "Statement of Business Operations," listing the carrier's address, telephone number, a brief description of the type of services to be offered, an "800" number or other number for customer service, a regulatory contact person, and sign a tax attestation form, and such other information and in a form determined by the Department; and it is

FURTHER ORDERED: That, pursuant to G.L. c. 159, § 32, telecommunications common carriers shall continue to file annual returns with the Department; and it is

FURTHER ORDERED: That telecommunications common carriers,

other than pay-telephone service providers, shall no longer be required to seek approval of a transfer of a certificate, but carriers shall continue to notify the Department within 30 days of such a transfer; and it is

FURTHER ORDERED : That all telecommunications common carriers shall comply with all other directives contained in this Order; and it is

FURTHER ORDERED : That this Order shall become effective upon issuance.

By Order of the Department,

Kenneth Gordon, Chairman

Barbara Kates-Garnick, Commissioner

Mary Clark Webster, Commissioner