

D.P.U. 94-185-A

Investigation by the Department on its own motion into IntraLATA and Local Exchange Competition in Massachusetts.

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ORDER ON MOTIONS FOR RECONSIDERATION AND  
CLARIFICATION OF AT&T AND MCI

I. INTRODUCTION

On August 29, 1996, the Department of Public Utilities ("Department") issued a final Order in its investigation of local exchange competition issues. Local Competition, D.P.U. 94-185 (1996). On September 17 and 18, 1996, respectively, MCI Telecommunications Corporation ("MCI") and AT&T Communications of New England, Inc. ("AT&T") filed with the Department separate motions for reconsideration and clarification of the Department's Order, pursuant to 220 C.M.R. § 1.11(10).

In Local Competition, the Department found, inter alia, that total service long-run incremental cost ("TSLRIC") is appropriate as a basis for determining the prices of New England Telephone and Telegraph Company d/b/a NYNEX's ("NYNEX") monopoly/essential services, for computing price floors for monopoly services, and for measuring subsidies. Local Competition at 15. The Department also found that it is appropriate to use long-run incremental cost ("LRIC") as a basis for determining the prices and price floors for NYNEX's competitive services. Id. Moreover, the Department also found that NYNEX's marginal cost study VI ("MCS VI") is a LRIC study and "can serve as an appropriate basis for determining the prices and price floors for NYNEX's competitive services." Id. at 16.

Both AT&T and MCI seek reconsideration of the Department's finding that NYNEX should use LRIC as the basis for determining price floors. AT&T also seeks reconsideration of the Department's finding that NYNEX's MCS VI is a LRIC study. AT&T and MCI also seek clarification of whether NYNEX is required to perform a TSLRIC study for competitive services.

On October 15, 1996, NYNEX filed a response ("NYNEX Response") in opposition to the motions. No other parties commented on the motions.

## II. POSITIONS OF THE PARTIES

### A. AT&T

AT&T argues that, given the ubiquitous nature of NYNEX's network, LRIC based price floors for competitive services would allow NYNEX to recover its service-specific fixed costs from its monopoly customers (AT&T Motion at 1-2). According to AT&T, prices based on LRIC may be appropriate in a fully developed market because competitors will have a broad customer base and the flexibility to recover their service-specific costs where the market permits (id. at 2). AT&T claims that at this stage of competition, while AT&T and other NYNEX competitors have to recover their variable and service-specific fixed costs from their customers, LRIC pricing of competitive services would allow NYNEX to recover only its variable costs, thus forcing it to recover its service-specific costs disproportionately from its low-volume customers (id.).

According to AT&T, because a LRIC-based price floor of NYNEX's competitive services is anti-competitive and contrary to the Department's policies against disproportionate allocation of common costs to low-volume users, AT&T requests that the Department require NYNEX to use TSLRIC rather than LRIC as a basis for calculating the price floors for its competitive services (id. at 3).

Moreover, AT&T requests that the Department withdraw its endorsement of MCS VI because in a recent hearing before the New York Public Service Commission, a New York

Telephone Company ("New York Telephone")<sup>1</sup> witness characterized the Massachusetts MCS VI study as a marginal cost study, not a LRIC study (id. at 3-4). According to AT&T, the New York Telephone witness indicated that the Massachusetts cost study was not a LRIC study, and further that it was based on stale data collected in 1983, thus making it unreliable for current pricing purposes (id. at 4). AT&T stated that this evidence criticizing Massachusetts' MCS VI constitutes previously unknown or undisclosed facts (id.).

Furthermore, AT&T requests clarification on whether the Order requires NYNEX to prepare TSLRIC studies for its competitive services in order to determine if such services are being subsidized (id. at 5). AT&T argues that if NYNEX is not required to perform TSLRIC studies for its competitive services, there would be no basis for determining whether those competitive services were being cross-subsidized (id.). AT&T contends that it is especially important that TSLRIC studies be performed for competitive services if NYNEX is permitted to price them at LRIC (id. at 5).

B. MCI

MCI raises arguments similar to those raised by AT&T. MCI claims that because TSLRIC is the appropriate methodology to determine the existence of a subsidy, it is also the appropriate methodology to use to establish price floors, regardless of whether a service is competitive or monopoly (MCI Motion at 2). MCI claims that if a service is priced at LRIC, then the service is being subsidized (id.). Thus, according to MCI, as long as there is any possibility

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<sup>1</sup> New York Telephone, a subsidiary of NYNEX Corporation and an affiliate of New England Telephone and Telegraph Company, is the incumbent local exchange company in New York.

that NYNEX can subsidize a competitive service from its non-competitive services, all of its services should be priced at TSLRIC (id.).

Moreover, MCI, like AT&T, requests that the Department clarify whether it is requiring NYNEX to conduct TSLRIC studies of both its competitive and non-competitive services (id. at 2).

### C. NYNEX

NYNEX argues that AT&T's and MCI's motions for reconsideration do not meet the Department's standard and, therefore, should be rejected (NYNEX Response at 1-4). NYNEX claims that the motions simply reargue the same issues that were argued and decided during the proceeding (id. at 4).

NYNEX contends that AT&T and others parties raised the issue of "stale" data during the proceeding, and it was rejected by the Department (id.). NYNEX also argues that the testimony of the New York Telephone witness cited by AT&T is not relevant to the Department's decision in this case (id. at 5). NYNEX contends that the testimony also does not constitute an extraordinary circumstance that would justify reconsideration of the decision, since the witness indicated that the two studies were performed in order to answer different questions (id.). NYNEX argues that while the witness indicated that it was not appropriate to rely on 1983 data in 1996, he was not asked about the new and updated marginal cost studies that NYNEX prepared for its transitional filings in Massachusetts (id.).

Furthermore, NYNEX contends that AT&T and MCI have failed to meet the Department's standard for clarification (id.). NYNEX claims that there is no ambiguity in the

Department's language since that language explicitly excluded competitive services from the scope of the TSLRIC study (id. at 6-7). According to NYNEX, the Department should reject the motions because the requests for clarification are nothing less than a request for reversal of the Department's decision on this issue (id. at 7).

### III. STANDARD OF REVIEW

#### A. Reconsideration

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 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).

IV. Analysis and Findings

A. Reconsideration

For the reasons set forth below, we find that the parties, in seeking reconsideration of our finding that NYNEX should use LRIC as the basis for determining price floors for competitive services, have not met the Department's standard for reconsideration. In Local Competition, at 16, we found that it is appropriate to use LRIC as a basis for determining the prices and price floors for NYNEX's competitive services, because in competitive markets, "companies have the ability to recover service-specific costs disproportionately from customers based on their usage

level" and "LRIC allows flexibility in recovering service-specific costs." The parties' motions do not raise previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. Nor do the motions show that the Department's decision was the result of mistake or inadvertence. Rather, we find that the motions are an attempt to reargue issues considered and decided in the main case. Accordingly, we deny the motions for reconsideration as they relate to our findings regarding the use of LRIC to determine the price floors for competitive services.

AT&T also requests that the Department reconsider its findings that MCS VI is a LRIC study. AT&T cites to testimony from a New York Telephone witness during a hearing in New York, which, AT&T claims, proves that the Massachusetts MCS VI is not a LRIC study. Since that testimony was presented after the record had closed in the instant case<sup>2</sup> and, according to AT&T, would have a significant impact upon the Department's decision, AT&T contends that it meets the Department's "extraordinary circumstances" standard for reconsideration.

The testimony of the New York Telephone witness appears to constitute the type of evidence that would qualify as "previously unknown or undisclosed facts," since it was not available until after the close of the record in the instant case. See U.S. Express, D.P.U. 90-156-A at 2, 9-12 (1991). Accordingly, the Department must determine, assuming the testimony is true, whether the testimony provides a basis for reconsidering the Department's findings regarding

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<sup>2</sup> The Department concluded hearings in this case on December 22, 1995. Although it is not clear from AT&T's motion when the New York Telephone witness submitted his prefiled rebuttal testimony in the New York proceeding, the motion does indicate that the transcript excerpt was from a July 24, 1996, hearing, well after the record had closed in D.P.U. 94-185.

MCS VI. Id. at 9. For the reasons cited below, we do not find that it does.

First, as NYNEX indicates, the New York Telephone witness stated that the MCS VI study was performed to answer different questions than the study to which it was being compared in the New York proceeding. In addition, a careful review of the witness' testimony reveals that in describing MCS VI, he notes the primary attribute of a LRIC study (i.e., identifying the cost of the next unit), while in describing the New York study, he notes the primary attribute of a TSLRIC study (i.e., identifying the average incremental cost of the entire service). This is consistent with what the Department stated in Local Competition: "LRIC represents the volume-sensitive costs that a firm incurs in producing an additional increment of output ... [and] does not include forward-looking ... costs" whereas TSLRIC "is determined by taking the long-run incremental cost of an entire service and dividing it by the expected output" ... and "includes all forward-looking costs." Local Competition at 14. Finally, the point that MCS VI contains "stale" data was made during the case by AT&T and other parties and was rejected by the Department in reaching its findings. Local Competition 16-17. In the Order, we stated that "for each transitional filing, NYNEX was required to conduct and submit new marginal cost studies, which, although not approved by the Department in those proceedings, were utilized by the Department in making its decisions in the transitional rate filing cases." Id., citing NYNEX, D.P.U. 94-50, at 501 (1995). The Department, therefore, finds that AT&T's motion does not raise facts that would have a significant impact upon our decision, and, as a result, AT&T has failed to show extraordinary circumstances that would justify reconsideration. Accordingly, AT&T's motion for reconsideration of our findings with respect to NYNEX's MCS VI study is denied.

B. Clarification

In Local Competition, we found that TSLRIC was the appropriate methodology to use to determine prices for NYNEX's monopoly/essential services, for computing price floors for monopoly services, and for measuring subsidies, and that LRIC was the appropriate methodology to use to determine prices and price floors for non-essential services. Local Competition at 15-16.<sup>3</sup> Thus, the Department was not ambiguous in finding that LRIC is the appropriate basis for determining price floors for NYNEX's non-essential services. Accordingly, we deny the parties' motions for clarification.

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<sup>3</sup> The Department directed NYNEX to develop and file a comprehensive description of the method it proposes to use to complete its TSLRIC cost study within 60 days of the date of the Order, and within 60 days of the approval by the Department of that method, to submit a geographic-based TSLRIC study for monopoly and essential network elements, in accordance with the approved TSLRIC methodology. Pursuant to a Department-approved extension of the filing deadline, on December 20, 1996, NYNEX filed its description of the method it will use to develop its TSLRIC cost study. On March 6, 1997, the Department sought comments on that filing, as well as on NYNEX's December 3, 1996 filing that lists the services for which NYNEX will develop price floors.

V. ORDER

Accordingly, after due consideration, it is hereby

ORDERED: That the Motion for Reconsideration and Clarification filed with the Department on September 17, 1996, by MCI Telecommunications Corporation, be and hereby is

DENIED; and it is

FURTHER ORDERED: That the Motion for Reconsideration and Clarification filed with the Department on September 18, 1996, by AT&T Communications of New England, Inc., be and hereby is DENIED.

By Order of the Department,

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John B. Howe, Chairman

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Janet Gail Besser, 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).