D.P.U. 94-35-A

Petition of over twenty customers of New England Telephone and Telegraph Company d/b/a NYNEX, pursuant to G.L. c. 159, § 24, regarding telephone rates on Cuttyhunk Island.

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FOR: NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY D/B/A NYNEX
Respondent

ORDER ON MOTION FOR RECONSIDERATION

I. INTRODUCTION

On October 20, 1995, the Department of Public Utilities ("Department") issued its decision concerning an investigation into the rates charged to customers of New England Telephone and Telegraph Company d/b/a NYNEX ("Company" or "NYNEX") for a Fixed Rural Radio Telephone System ("FRRS")[1] on Cuttyhunk Island ("Cuttyhunk" or "Island"). NYNEX-Cuttyhunk Island, D.P.U. 94-35 (1995) ("Order"). In the Order, the Department found that it was unreasonable and unjust for NYNEX to assess special construction fees to the Cuttyhunk Customers based upon the specific facts presented in the case. Order at 8.

On November 8, 1995, NYNEX filed a Motion for Reconsideration of the Department's Order ("Motion").[2] NYNEX seeks reconsideration arguing that: (1) the Department failed to follow customary procedures regarding evidentiary hearings and briefing of the issues; (2) the Department's Order is based on a misinterpretation of NYNEX's special conditions tariff and its application; (3) NYNEX's treatment of its investment relating to the restoration of the public pay telephone system on the Island does not affect the issue of whether the special conditions tariff should be used to provide basic exchange service; and (4) the Department's decision to relieve the

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[1] The Company indicated that various types of FRRS have been used by other telephone utilities to provide Basic Exchange Telephone Radio Service ("BETRS") (Motion at 3). The Company added that the Department inaccurately identified FRRS as "BETRS" in the Order (id.). However, the Department notes that the use of the term BETRS does not affect the Department's analysis or findings in this case.

[2] Also on November 8, 1995, the Department allowed NYNEX's Motion for Stay of the Appeal Period and Compliance until ten days after the Department acts on the Company's Motion for Reconsideration.

customers on the Island from bearing the applicable special construction costs may have the inadvertent and unintended effect of limiting the Company's ability to utilize its special conditions tariff in future cases (Motion at 2, 6-16).

On November 30, 1995, the Cuttyhunk Customers filed a joint response ("Response") to the Motion requesting that the Department not change its decision. The Response stated that the telephones on the Island are a lifeline, but the charges are a burden to many of the customers who have fixed incomes and to businesses that have to bear additional costs (Response at 1).[3]

II. STANDARD OF REVIEW

The Department's policy on reconsideration[4] 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. 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

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[3] On December 1, 1995, Representative Eric T. Turkington (Barnstable, Dukes & Nantucket Districts) also filed a response in opposition to the Motion. The Representative stated that NYNEX has been given an opportunity to present all relevant facts in this case and NYNEX gives no good reason for the Department to change its decision.

[4] Within twenty days of service of a final Department Order, a party may file a motion for reconsideration. Parties to the proceeding shall be afforded a reasonable opportunity to respond to a motion for reconsideration. 220 C.M.R. § 1.11.

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

III. THE COMPANY'S MOTION

A. Department Procedures

1. Background

On July 20, 1994, the Department conducted a hearing on Cuttyhunk where eleven Cuttyhunk Customers presented sworn testimony and the Company moved into evidence its responses to three Department information requests (Exhs. C-1, C-2, C-3; Tr. at 6, 8-37). Following the hearing, the Department directed NYNEX to "file testimony responding to each of the concerns discussed" at the public hearing (Department Letter dated August 1, 1994). In response, NYNEX submitted the direct testimony of its staff director of

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[5] 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).

regulatory/issues management in the Company's law and government affairs department ("NYNEX Testimony"). Thereafter, NYNEX responded to twelve Department information requests which were issued pursuant to the NYNEX Testimony (IR-DPU-3-1 through 3-8; 4-1 through 4-3; 5-1).[6]

2. Position of the Company

Specifically, the Company argues that the Department: (1) conducted no evidentiary hearings in this proceeding; (2) did not provide NYNEX with an opportunity to move exhibits into evidence or file a brief; and (3) did not inform NYNEX about the close of the record in this case (Motion at 7). Further, NYNEX asserts that this is a departure from the process envisioned for adjudicatory proceedings under the State Administrative Procedure Act, G.L. c. 30A ("APA"), and the Department's own procedural rules and regulations (id.).

3. Analysis and Findings

The pertinent statutory provision under which this proceeding was initiated requires that, "[u]pon written complaint, relative to the service or charges for service [of telephone companies] ... by twenty customers ... the [D]epartment shall grant a public hearing ...." G.L. c. 159, § 24 (emphasis added). The statute governing this case does not explicitly state that evidentiary hearings be held.[7] In this case, the Department conducted a public hearing as required by statute.

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[6] The Department, on its own motion, moved the NYNEX Testimony and NYNEX responses to the information requests into evidence. Order at 1, n.1.

[7] The Department also notes that the APA does not require "evidentiary" hearings per se, but rather states that when the legal rights, duties or privileges of a person are involved, there must be an opportunity for an agency hearing. See G.L. c. 30A, § 1(1).

With respect to the Company's assertion that failure to hold an evidentiary hearing violates the Department's own precedent and regulations, the Company's position is not supported. The Department's regulations do not distinguish between a public hearing and an evidentiary hearing. Rather, the regulations require that a "[p]ublic hearing will be granted whenever required by statute, and otherwise as the Department may determine in specific cases." 220 C.M.R. § 1.06(1). In making a decision, the Department may consider sworn statements made at a public hearing. See 220 C.M.R. § 1.10(1). The Department may also offer into evidence "[a]ny matter contained in any records, investigations, reports and documents ... of which ... the Department desires to avail itself as evidence in making a decision ...." 220 C.M.R. § 1.10(3).

In this case, a public hearing was held at which evidence was taken. Further hearings were not deemed necessary since the Company filed direct testimony, had an opportunity to further explain its position by responding to Department issued information requests, and had an opportunity to respond to the concerns raised by the Cuttyhunk Customers. All of this information was admitted into evidence in this case. The Department notes that this was not a departure from the way the Department has conducted other proceedings. See NYNEX-Great Barrington, D.P.U. 94-163 (1995); NET-Northern Berkshire County, D.P.U. 90-308 (1992).

The Department did not establish a formal briefing schedule[8] in this case but during the proceeding NYNEX was given the opportunity to address all issues. Further, during the course of this proceeding NYNEX was under the continuing obligation to amend any of its responses if

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[8] The Department notes that 220 C.M.R. § 1.11(3) allows for the filing of briefs but does not require such.

they were incomplete or no longer accurate. 220 C.M.R. § 1.06(6)(c)5. While NYNEX was not formally notified of the close of the record in this case, there was adequate time for NYNEX to exercise its duty to amend any of its responses.[9] In addition, all substantive documentation submitted by NYNEX in this case was admitted into evidence. Therefore, we find that the procedures followed by the Department did not prohibit, or otherwise impede NYNEX from presenting the information necessary for the Company to make its case.

Based on the above, the Department fulfilled the requirements under the statute, the APA, and Department regulations by (1) holding the requisite statutory public hearing, and (2) making a decision based upon a record consisting of: (a) sworn testimony from the Cuttyhunk Customers; (b) testimony from NYNEX; (c) exhibits submitted by the Company at the public hearing; and (d) responses to Department information requests that the Department subsequently admitted into the record. Accordingly, the Department finds that the procedures used in this case allowed for a record to be made consisting of substantial evidence that "a reasonable mind might accept as adequate to support a conclusion."
G.L. c. 30A, § 1(6); See also, Bosley v. Department of Public Utilities, 417 Mass 510, 514 (1994). Accordingly, the Department finds that the Company does not meet the standard for reconsideration.

B. Interpretation of the NYNEX Tariff

1. Background

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[9] NYNEX had time to amend any of its responses as necessary because the Order was not issued until nearly twelve weeks after the Company submitted its response to the Department's final information request.

The Department found that the Company's assessment of special construction fees for the provision of basic exchange telephone services was "unreasonable and unjust." Order at 8. The Department stated that, unlike other cases where NYNEX implemented the special conditions tariff, Cuttyhunk is the only entire municipality for which NYNEX has implemented the special conditions tariff and uses a technology which has a greater reuse potential. Id. at 7. Moreover, the Department explained that since NYNEX has an ongoing relationship with the Cuttyhunk Customers and that the customer base has been steadily increasing, there was nothing in the record to indicate that the Company would not be able to recover its costs without imposing an additional charge. Id. at 8; (See also, Tr. at 14, 21, 23, 27, 41). The Department also determined that the revenue impact of this decision on NYNEX was de minimis. Order at 9; (See also, IR-DPU-5-1).

2. Position of the Company

The Company argues that the situation on the Island presents a "clear example" of the special conditions that warrant application of the special conditions tariff because Cuttyhunk's remote location requires a customized radio-telephone system and individual equipment (Motion at 2, 9, 10). The Company asserts that the intent of its special conditions tariff is to ensure that the general body of ratepayers is not required to pay additional costs to provide basic exchange service to customers who choose to locate in areas that require extensive special construction of facilities beyond normal aerial or underground facilities

(id. at 9).

The Company argues that the Department's statement that the Cuttyhunk situation is different because it involves an entire community and uses a technology with a greater reuse potential is misleading (id. at 11). The Company argues that nothing in the special conditions tariff precludes NYNEX from applying it to a municipality (id.). Further, NYNEX states that the reuse potential of the technology on the Island is limited due to the radio frequencies used by the FRRS and the few locations where the use of such technology is appropriate and feasible (id.). NYNEX asserts that the customer base on Cuttyhunk will not increase and the special conditions tariff "does not require any showing that costs cannot be recovered elsewhere as a basis for applying special construction charges" (id. at 13).

3. Analysis and Findings

The Department agrees with the Company that the intent of the special conditions tariff is to ensure that the general body of ratepayers is not required to pay additional costs to provide basic exchange service to customers who choose to locate in areas that require extensive special construction of facilities beyond normal aerial or underground facilities. This is a case of first impression in that the special conditions tariff is being applied to an entire municipality. Even though the special conditions tariff may not expressly distinguish between municipalities and individual customers or groups of customers within a municipality, it is the Department's responsibility to examine the specific facts of each case to determine whether the special conditions tariff should apply.

In this case, the record indicates that Cuttyhunk is the only entire municipality NYNEX serves under the special conditions tariff. Further, although NYNEX claims in its Motion that the

technology on Cuttyhunk has a limited reuse potential, the Company admits that the technology used on Cuttyhunk theoretically has greater reuse potential than that used in other service areas where it has implemented the special conditions tariff (Exh. C-3, att. 1, at 5).

NYNEX's assertion that the special conditions tariff does not require any showing that costs cannot be recovered elsewhere as a basis for applying special construction charges may be true in reading the tariff in isolation of the Department's statutory mandate. Specifically, pursuant to G.L. c. 159, § 16, the financial ability of the Company to comply with the Order is a factor the Department shall take into consideration in determining whether the special conditions tariff has been applied properly.[10] Further, NYNEX contends that the customer base on Cuttyhunk will not increase in the future. However, the record indicates that due to the increase in subscribers on Cuttyhunk, the Company has made a downward adjustment in the monthly charges in February 1994 and indicated that it expected to make further reduction in the monthly charge due to projected increase in demand (Exh. C-1).

In conclusion, the Department finds that the Company's arguments on these points are an attempt to reargue issues that were considered and decided in the main case. The Department also finds that the Company presented no new facts that would have an impact on the decision

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[10] Among other things, the statute requires the Department to consider:

> the financial ability of the carrier to comply with the requirements of the order, and the effect of the carrier's compliance therewith, upon its financial ability to make such other changes, if any, as may be deemed by the [D]epartment of equal or greater importance and necessity in the performance of the service which the carrier has professed to render to the public. G.L. c. 159, § 16.

already rendered or indicate that the Department's treatment of these issues was a result of mistake or inadvertence. Therefore, reconsideration on this issue is not warranted.

C. NYNEX's Treatment of its Investment to Restore Public Pay Telephones and its Special Conditions Tariff

1. Background

The Department stated that one reason NYNEX should not treat the cost of construction of additional channels as a special installation is because NYNEX invested $225,000 to restore the public pay telephone service and NYNEX treated that investment as a sunk or non-avoidable cost. Order at 8. Accordingly, the Department found that it is unreasonable and unjust for NYNEX to assess special construction fees to the Cuttyhunk Customers. Id.

2. Position of the Company

NYNEX asserts that its replacement of the public pay telephone system satisfied its obligation to restore existing telephone services to the Island (Motion at 14). NYNEX stated that it treated this as a sunk cost and did not attempt to recover this investment pursuant to the special conditions tariff (id. at 15). NYNEX argues that the Department was "clearly wrong" to consider the Company's treatment of its radio system investment to provide public pay telephone service as the basis for disallowing the Company's assessment of special construction charges to provide residential and business service to Cuttyhunk (id. at 16). NYNEX further argues that the Department ignored the fact that NYNEX's incremental investment for the radio system serves as a substitute for the normal outside plant feeder and distribution facilities (the "loop") and that NYNEX has credited Cuttyhunk Customers for this loop adjustment (id. at 15).

3. Analysis and Findings

Pursuant to G.L. c. 159, § 16, the Department must consider the Company's financial ability to comply with a Department order. See also, Order at 6, 7. The Department considered NYNEX's treatment of its investment to provide public pay telephone service to the Island as only one factor in assessing the financial impact of this Order on the Company. As noted, the Department also determined that: (1) the revenue impact of the order was de minimis; (2) the Company provided no evidence that it could not recover its costs without imposing an additional charge; (3) NYNEX had an ongoing relationship with the Cuttyhunk Customers and the customer base has expansion potential; and (4) the FRRS had a greater reuse potential on the Island when compared with other service areas where NYNEX implemented the special conditions tariff. Id. at 7-10.

The Company's argument that treatment of its investment relating to the restoration of the public pay telephone system does not affect its treatment of the special construction required to provide basic exchange service is an attempt by the Company to reargue an issue that was considered and decided in the Order. The Department finds that the Company did not bring to light any previously unknown or undisclosed facts on this issue that would have a significant impact on the decision already rendered. Therefore, the Company has failed to meet the standard for reconsideration regarding this issue.

D. NYNEX's Ability to Utilize the Special Conditions Tariff in Future Cases 1. Position of the Company

The Company argues that the Department's decision to relieve the customers on the Island from bearing the applicable special construction costs may have the inadvertent and unintended effect of limiting the Company's ability to utilize the special conditions tariff in future cases to recover special construction costs from customers when the extraordinary incremental costs are caused by and directly attributable to serving those subscribers (Motion at 2). Accordingly, the Company requests that the Department review its Order and consider the facts and evidence in this context (id.).

2. Analysis and Findings

The Department's finding that it is unreasonable and unjust for NYNEX to assess special construction fees to the Cuttyhunk Customers is specifically limited to the facts presented in this case. Order at 8. Cuttyhunk is not a new development. Rather, it is a remotely situated, small municipality which was previously serviced by a public pay telephone system for a number of years before the FRRS was introduced. The record indicates that there are a number of year-round residents on Cuttyhunk that need safe, reliable, and adequate telephone service (See Tr. at 14, 18, 20, 23, 27, 28).[11] NYNEX did not provide in its Motion or on the record, any facts indicating it utilized the special conditions tariff in Massachusetts service territories similar to that of the Island. The Department's decision to prohibit NYNEX's application of the special conditions tariff on Cuttyhunk is not intended to limit NYNEX in implementing the special conditions tariff to appropriate service areas.[12] Accordingly, the Department finds that its decision on this issue was not the result of mistake or inadvertence and the Company has not brought to light any previously unknown or undisclosed facts that would have a significant impact on the decision already made by the Department. Therefore, reconsideration of this issue is not warranted.

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[11] We note in this regard that the Company has been designated as an intraLATA carrier of last resort in Massachusetts. IntraLATA Competition, D.P.U. 1731, at 76 (1985).

[12] It may be useful to note that the Department's promotion of competition and an economically-efficient rate structure may necessitate geographic rate-deaveraging at some point. However, it is inappropriate for such deaveraging to occur on an exchange-by-exchange or municipality-by-municipality basis.

IV. ORDER

Accordingly, after due consideration it is

ORDERED: That the Motion for reconsideration of New England Telephone and Telegraph Company d/b/a NYNEX is hereby denied.

By Order of the Department,

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John B. Howe, Chairman

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Mary Clark Webster, Commissioner

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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).