

D.P.U. 94-35

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

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

Respondent

I. INTRODUCTION

A. Procedural History

On February 24, 1994, pursuant to G.L. c. 159 § 24, twenty-nine residents of Cuttyhunk Island ("Cuttyhunk Customers") filed a petition with the Department of Public Utilities ("Department") requesting an investigation into the rates charged to customers of New England Telephone and Telegraph Company d/b/a NYNEX ("Company" or "NYNEX"). On July 20, 1994, the Department conducted a hearing at Cuttyhunk Island ("Cuttyhunk" or "Island") where the Cuttyhunk Customers expressed their concerns. The evidentiary record consists of 18 exhibits, including the direct testimony of the Company witness, Philip J. Wood, staff director-regulatory issues management in the law and government affairs department of NYNEX ("Testimony").⁽¹⁾

B. Background

Until 1989, NYNEX provided telephone service to the Cuttyhunk Customers using seven public pay telephones connected to the New Bedford central office via a submarine cable placed by the government for coastal defense during the second world war (Exh. C-3, at 1; Testimony at 3). In late 1989, the cable was severed, which resulted in loss of public pay telephone service to the Island (Exh. C-3, at 1-3; Testimony at 3, 4). In order to restore the public pay telephone service, in early 1990, NYNEX made an initial investment of \$225,000 to replace the submarine cable with a new digital radio system to provide Basic Exchange Telecommunications Radio Service ("BETRS")⁽²⁾ (Exh. C-3, at 1-3). The Company treated this \$225,000 investment as a sunk or non-avoidable cost (id. at 3). To introduce residence and business exchange service on Cuttyhunk, NYNEX invested an additional \$20,000 into the BETRS system to provide additional radio

channels at the New Bedford antenna site (Exh. C-1 at 1). Further, before the Company could provide residential and business exchange service, each Cuttyhunk Customer was required to have an antenna with radio transmission equipment ("Subscriber Unit") (id.). The Company provided the Subscriber Units at a cost of \$2,750 each (id. at 3-4). The Company determined that the additional investment at the New Bedford antenna site as well as the cost of each Subscriber Unit were direct or avoidable costs and, therefore, the Company has been recovering both costs directly from the Cuttyhunk Customers (id.).⁽³⁾

The Company currently charges each Cuttyhunk Customer a total of \$35.55 per month, in addition to the basic residential and business exchange rates that the New Bedford customers pay ("supplemental charges") (Exh. C-3, at Attachment 4; IR-DPU 3-8; Testimony at 6). The supplemental charges consist of: (1) \$7.77 per month to pay for the base radio antenna in New Bedford ("Distribution Element"); and (2) \$27.78 for the Subscriber Units (IR-DPU 3-8; see also, Exh. C-3, at 4, Att. 4). As the number of customers increase, NYNEX expects the charges for the Distribution Element to decrease (Testimony at 6).⁽⁴⁾ Further, the Company stated that the charges for the Subscriber Unit will not be affected by such growth since these charges relate to equipment located at each Cuttyhunk Customer's premise, or at a cluster antenna on a per customer basis (id. at 6).

Since 1991, the number of residential and business subscribers has increased from 13 to 32 (Exh. C-1, at 1; Testimony at 3, 4). Also, at present there are five public pay telephones on Cuttyhunk: three telephones are at the airplane dock, one on Main Street, and one at the ferry dock (Testimony, Attachment A at 7).⁽⁵⁾

II. POSITIONS OF THE PARTIES

A. NYNEX Cuttyhunk Customers

The Cuttyhunk Customers filed a petition with the Department requesting an investigation into the "reason for the high telephone rates being charged on the island of Cuttyhunk" and telephone-related service problems. Specifically, the Cuttyhunk Customers indicated their concerns about: (1) access to affordable telephone service; (2) the number, inadequacy, and the general availability of public pay telephones on the Island; (3) difficulty in using answering machines, facsimiles and portable telephones; (4) unexpected cut offs of connections; and (5) a drop of commission income from the public pay telephones (Tr. at 13-27).

B. Company

The Company states that, when it installed the BETRS system, its intention was to restore the public telephone service to the Island (IR-DPU 3-5, at 2). According to NYNEX, after the BETRS system was installed and fully tested, the Company advised the Island's Board of Selectmen of the availability of 32 additional lines that could be used to provide residence and business exchange services (id.). The Company indicated that after the

Board of Selectmen expressed their interest in the availability of additional lines, the Company expanded telephone service to the Island accordingly (id.).

The Company states that basic residential and business exchange rates paid by Cuttyhunk Customers are the same as those paid by other customers served by NYNEX in the New Bedford exchange area (Testimony at 6, 7). According to the Company, the difference in the bills comes from the application of the special construction charges which are governed by tariff language approved by the Department (id.). The Company contends that the construction charges and special conditions tariff provisions are applicable in situations where facilities other than the normal aerial or underground plant are required to provide basic exchange, centrex or private line services or where service is desired at remote locations (Exh. C-3, Attachment 1, at 2). Moreover, according to the Company, the tariff provides that special conditions charges be based on the cost to recover the additional expense plus the normal service charges (id.).

According to the Company, NYNEX has applied construction charges for highway construction, private property construction, airport underground construction or special conditions as a one time charge or as a recurring charge with a minimum revenue guarantee and a maximum termination liability (id. at 5). The Company states that past cases where NYNEX has implemented a special conditions tariff involve service to a single or at most several customers using a fixed plant that can not readily be used elsewhere (id.). The Company also states that the Cuttyhunk situation is slightly different in that it potentially involves an entire municipality and uses a technology which theoretically has greater reuse potential (id.).⁽⁶⁾

The Company claims that it has investigated every trouble report regarding telephone services at Cuttyhunk (Testimony at 9). The Company indicates that the radio system, designed primarily to transmit voice signals, was modified in 1993 to accommodate facsimile and telephone answering machines (Testimony, Attachment A at 2). The Company states that it also provided residents with a list of equipment compatible with the modified radio system (id.). However, due to the nature of the technology, the Company indicates that the radio system is susceptible to interference due to weather, atmospheric conditions and other radio transmissions that are beyond the Company's control (id.). As for service at the public pay telephones, the Company notes that fewer than 20 incidents of trouble were reported during the past year and less than half of those reported required repair by a Company technician (id.). The remaining troubles, mostly due to coin jams, were found to be no longer a problem (id.; see also Testimony at 8, 9).

In response to the Cuttyhunk Customers' concern about the decrease in commission income from the public pay telephones, NYNEX notes that the drop in commission was due to an increase in Cuttyhunk Customers' use of private telephones on the Island, expanded use of cellular phones by boaters, and the removal of two public pay telephones from an inn which closed down in 1993 (id. at 1).

III. Standard of Review

The Department's standard to determine the propriety of the Company's application of the special conditions tariff to customers on Cuttyhunk Island is found in G.L. c. 159, § 16 which states:

If the [D]epartment is of opinion, after a hearing ... that the ... practices ... or service of any common carrier are unjust, unreasonable, unsafe, improper or inadequate, the [D]epartment shall determine the just, reasonable, safe, adequate and proper regulations and practices thereafter to be in force and to be observed ... and services thereafter to be used, and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby Before making such order, the [D]epartment shall consider the relative importance and necessity of the changes ... proposed to be included therein and of other changes which may be brought to its attention during the course of the hearing, 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.

In accordance with the statute, the Department, must first determine whether the Company's determination that the special conditions tariff applies to a residential community such as Cuttyhunk is unreasonable, unsafe, improper or inadequate. If the Department determines that such tariff is not applicable, then, the Department must determine the just, reasonable, safe, adequate and proper method for NYNEX to charge Cuttyhunk Customers and must consider the Company's ability to comply with the Department's order consistent with the Company's financial ability to provide services to the public.

IV. ANALYSIS AND FINDINGS

The construction charges and special conditions tariff provisions used by NYNEX as a basis for determining the charges for BETRS for Cuttyhunk Customers are found in NYNEX's tariff. The tariff language reads as follows:

The Telephone Company places either aerial or underground construction and determines in each case the normal type of construction to be used to furnish service. If another type of construction is required, such as submarine or radio (emphasis added), or if service is desired at remote locations, the provisions in this Section governing Special Conditions or the regulations in this Tariff pertaining to Hazardous or Inaccessible Locations apply.

If a special assembly or a special installation involving special construction is made on behalf of the customer, or if the cost involved is disproportionately large in comparison with the estimated revenue, charges based on cost apply, in addition to service charges specified in Section 3.

D.P.U. - Mass. - No. 10, Part A, §§ 2.1.1.B and 2.1.6.B.

As noted by the Company, past cases where NYNEX has implemented the special conditions tariff involve service to a single or at most several customers using a fixed plant that can not readily be used elsewhere. However, the Company acknowledges that the Cuttyhunk situation is slightly different in that it involves an entire municipality and uses a technology which has greater reuse potential. Moreover, while the tariff allows NYNEX to apply special conditions in cases where the construction involves submarine cable or radio system, the Company has already invested \$225,000 to restore the public pay telephone service and NYNEX treated that investment as a sunk or non-avoidable cost. Therefore, the issue here is not the recovery of the cost of construction of a radio system, as that has been taken care of by the Company, but it is for the additional investment of \$20,000 at the New Bedford antenna for additional radio channels to introduce residence and business exchange services plus the \$2,750 for the Subscriber Unit that each customer needs to complete a call. Since NYNEX has treated the construction of the radio system for public pay telephones as a sunk cost, we do not believe that NYNEX should treat the cost of the construction of additional channels for Cuttyhunk Customers as a special assembly or a special installation involving a special construction. As the Company indicated, the incremental radio channel investment and the Subscriber Unit are substitutes for the normal outside plant feeder and distribution facilities that provide the subscriber premises to central office connection. Although the tariff allows the Company to charge customers based on cost when the cost is disproportionately large in comparison with the estimated revenue from the service, there is nothing in the record to indicate that in the present case the Company cannot recover the cost without imposing the additional charge, given that the customer base on the Island has been steadily increasing and that NYNEX's business relationship with the Cuttyhunk customers is an on-going concern and not a one-time activity. Therefore, based on the above reasons, the Department finds that in this case it is unreasonable and unjust for NYNEX to assess special construction fees to the Cuttyhunk Customers. The Department notes that this finding is based upon the specific facts presented in this case.

NYNEX indicates that the overall revenue effect would be a decline of about \$924.00 per month (IR-DPU 5-1).⁽⁷⁾ The cost of this monthly decline, when spread among all residential ratepayers in the state, would be \$0.00036 per line, per month, which NYNEX indicates would have a de minimis revenue effect (id.). Therefore, we find that the revenue impact on the Company is de minimis and, pursuant to G.L. c. 159 § 16, would not "effect [the Company's] financial ability to make ... other changes ... of equal or greater importance or necessity ... to the public." Moreover, in NYNEX Alternative Regulatory Plan, D.P.U. 94-50 (1995) ("D.P.U. 94-50"), the Department found that any exogenous cost⁽⁸⁾

adjustment must affect the Company's revenues by at least \$3 million. In the present case, we consider the overall revenue decline to be an exogenous cost. However, this decline does not exceed the amount needed to make an adjustment as permitted in D.P.U. 94-50.

The Cuttyhunk Customers indicated their concerns about the number, inadequacy, and the general availability of public pay telephones on the Island and a drop of commission income from the public pay telephones. The removal of two public pay telephones from

an inn that has closed, and the stated increased use of private and cellular telephones which resulted in a drop in commission income to the Island, are conditions which are not under the control of the Company. Further, the Company has testified that it has adequately addressed service problems. Based on the Company's response to the concerns of Cuttyhunk Customers at the public hearing and the Company's responses to the Department's inquiries, the Department finds that the public pay telephone service on the Island is adequate and safe. Notwithstanding our finding, however, the Department notes that due to the remote location of Cuttyhunk, and the small number of public pay telephones, it is in the public interest and safety that all public pay telephones be in good working condition at all times. Accordingly, the Department encourages the Customers to notify both the Company and the Department's Consumer Division on a timely basis if service problems develop with public pay telephones on the Island. Further, the Department notes that if serious service problems do develop, the finding of adequacy and safety of the existing number of pay telephones will need to be reexamined.

With regard to the difficulty in using answering machines, facsimiles and portable telephones and unexpected cut-offs of connections, the record indicates that NYNEX modified the system to accommodate facsimile and telephone answering machines. However, due to the nature of the technology, the radio system is susceptible to inclement weather, atmospheric conditions, and radio transmissions originating from other sources. The Cuttyhunk Customers can alleviate some of these problems by selecting compatible fax and modem connections, but, other than installing a submarine cable, which is not appropriate at this time, some of these conditions are beyond the Company's control. Accordingly, the Department finds that the quality of service on Cuttyhunk is reasonable and adequate.

V. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That New England Telephone and Telegraph Company d/b/a NYNEX shall file within 60 days of this Order, new rates and charges for residence and business customers in Cuttyhunk Island consistent with the provision of this Order, and it is

FURTHER ORDERED: That New England Telephone and Telegraph Company d/b/a NYNEX shall comply with all other directives contained in this Order.

By Order of the Department,

Mary Clark Webster, Commissioner

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).

1. At the public hearing, on July 20, 1994, the Company moved into evidence its responses to three information requests from the Department; thereafter, the Company responded to additional information requests. The Department, on its own motion, hereby moves the responses to the additional information requests and the Testimony into evidence.

2. The BETRS system functions like a cellular telephone system whereby there is a central transmitter tower and associated radio transmission equipment located in New Bedford (Exh. C-1, at 1, 2). Cuttyhunk Customers obtain service in one of two ways: (1) a subscriber may be connected by wire to a "cluster" of antennas at the Island's antenna site, originally established to provide public pay telephone service; or (2) through individual antennas that directly communicate with the New Bedford central office (*id.*, at 1; Exh. C-2).

3. The Company stated that, in concept, the additional radio channel investment and the individual Subscriber Units are substitutes for the normal outside plant feeder and distribution facilities (the loop) that provide the subscriber premises to central office connection (Exh. C-1 at 2, Att. A).

4. For example, due to the increase in the number of Cuttyhunk Customers, the Company reduced this element of the supplemental charges to \$6.31 as of April, 1994 (Exh. C-1 at Attachment A).

5. Two public pay telephones were removed when an inn closed in the fall of 1993 (Testimony, Attachment A at 3).

6. Specifically, according to the Company, subscribers for whom NYNEX has performed work under the special conditions tariff range from colleges and universities in Metropolitan Boston to numerous cities, towns and state agencies, corporations, houses of worship and residential subscribers throughout the Commonwealth (IR-DPU 3-2).

7. The Company derived the \$924.00 amount by multiplying the number of subscribers (26 customers) by the monthly "special condition" or supplemental charges of \$35.55 (IR DPU 5-1).

8. Exogenous costs are defined as changes in tax laws, accounting, regulatory, judicial, or legislative changes uniquely affecting the telecommunications industry, and mandated jurisdictional separation changes.