D.P.U. 94-50-B

Petition of New England Telephone and Telegraph Company d/b/a NYNEX for an Alternative Regulatory Plan for the Company's Massachusetts intrastate telecommunications services.

APPEARANCES: A. Eric Rosen, Esq.
Bruce P. Beausejour, Esq.
Barbara Anne Sousa, Esq.
185 Franklin Street, Room 1403
Boston, Massachusetts 02107-1585

-and-

Robert J. Keegan, Esq.
Robert N. Werlin, Esq.
Ellen W. Schmidt, Esq.
Keohane & Keegan
21 Custom House Street
Boston, Massachusetts 02110

-and-

James K. Brown, Esq.
Richard W. Benka, Esq.
Michael I. Joachim, Esq.
Foley, Hoag and Eliot
One Post Office Square
Boston, Massachusetts 02109

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

L. Scott Harshbarger, Attorney General
By: George B. Dean
Edward G. Bohlen
Daniel Mitchell
Viveca Tung Kwan
William McAvoy
Joseph W. Rogers
Kevin McNeely
James Stetson
Assistant Attorneys General
200 Portland Street
Boston, Massachusetts 02114
Intervenor

Jeffrey F. Jones, Esq.
Jay E. Gruber, Esq.
Palmer & Dodge
One Beacon Street
Boston, Massachusetts 02108

-and-

George Finkelstein, Esq.
Eleanor Olarsch, Esq.
32 Avenue of the Americas, Room 2700
New York, New York 10013
FOR: AT&T COMMUNICATIONS OF NEW ENGLAND, INC.
Intervenor

Robert Glass, Esq.
Glass, Seigle & Liston
75 Federal Street
Boston, Massachusetts 02110

-and-

Richard C. Fipphen, Esq.

Hope Barbalescu, Esq.
One International Drive
Rye Brook, New York 10573
FOR: MCI TELECOMMUNICATIONS CORPORATION
Intervenor

Alan D. Mandl, Esq.
Rubin and Rudman
50 Rowes Wharf
Boston, Massachusetts 02110

-and-

Paul Cianelli, Esq.
Thomas Steel, Esq.
100 Grandview Road, Suite 201
Braintree, Massachusetts 02184
FOR: NEW ENGLAND CABLE TELEVISION ASSOCIATION, INC.
Intervenor

Andrew D. Lipman, Esq.
Russell M. Blau, Esq.
Dana Frix, Esq.
Swidler & Berlin, Chartered
3000 K Street, N.W.
Washington, D.C. 20007
FOR: MFS COMMUNICATIONS COMPANY, INC.
Intervenor

Teresa Marrero, Esq.
Teleport Communications Group, Inc.
Regulatory Affairs
One Teleport Drive
Staten Island, New York 10311
FOR: TELEPORT COMMUNICATIONS - BOSTON
Intervenor

Cathy Thurston, Esq.
1850 M Street, N.W.
11th Floor
Washington, D.C. 20036
FOR: SPRINT COMMUNICATIONS COMPANY, L.P.
Intervenor

Richard J. Quist, Jr.
Southwestern Bell Mobile Systems, Inc. d/b/a Cellular One
Westwood Executive Center
100 Lowder Brook Drive
Westwood, Massachusetts 02090

- and -

Robert L. Dewees, Jr., Esq.
Peabody & Brown
101 Federal Street
Boston, Massachusetts 02110
FOR: SOUTHWESTERN BELL MOBILE SYSTEMS, INC. D/B/A CELLULAR ONE
Intervenor

Mark R. Perkell
General Counsel
29 Church Street
P.O. Box 967
Burlington, Vermont 05402
FOR: RCI LONG DISTANCE NEW ENGLAND, INC. D/B/A LONG DISTANCE NORTH
Intervenor

Andrew D. Lipman, Esq.
Dana Frix, Esq.
Swidler & Berlin, Chartered
3000 K Street, N.W.
Washington, D.C. 20007

-and-

Francis D.R. Coleman
Corporate Counsel
39 State Street
Rochester, New York 14614
FOR: ACC CORPORATION
Intervenor

Paul C. Besozzi, Esq.
Besozzi, Gavin & Craven
1901 L Street, N.W.
Suite 200
Washington, D.C. 20036
FOR: THE NEW ENGLAND PUBLIC COMMUNICATIONS COUNCIL, INC.
Intervenor

Cecil O. Simpson, Jr., Esq.
Office of the Judge Advocate General
Department of the Army
Litigation Center
901 North Stuart Street, Room 400
Arlington, Virginia 22203-1837
FOR: DEPARTMENT OF DEFENSE AND ALL OTHER FEDERAL EXECUTIVE AGENCIES
Intervenor

Frank Burns
Director of Voice Communications
Commonwealth of Massachusetts
Office of Management Information Systems
Bureau of Communications Technology
One Ashburton Place, Room 811
Boston, Massachusetts 02108-1518
Intervenor

David A. Tibbetts
General Counsel
One Ashburton Place, Room 2101
Boston, Massachusetts 02108
FOR: COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ECONOMIC AFFAIRS
Intervenor

Honorable Daniel E. Bosley
Representative
Commonwealth of Massachusetts
House of Representatives
State House, Room 43
Boston, Massachusetts 02133
Intervenor

Honorable Christopher J. Hodgkins
Representative
Commonwealth of Massachusetts
House of Representatives
State House, Room 34
Boston, Massachusetts 02133
Intervenor

Thomas P. O'Neill, Esq.
One Beacon Street
Boston, Massachusetts 02108
FOR: BOSTON GAS COMPANY
Limited Participant

John Cope-Flanagan, Esq.
COM/Energy Services Company
One Main Street
P.O. Box 9150
Cambridge, Massachusetts 02142-9150
FOR: CAMBRIDGE ELECTRIC LIGHT COMPANY,
COMMONWEALTH ELECTRIC COMPANY, AND
COMMONWEALTH GAS COMPANY
Limited Participants

Stephen Ostrach, Esq.
150 Lincoln Street
Boston, Massachusetts 02111
FOR: NEW ENGLAND LEGAL FOUNDATION
Limited Participant

Raymond W. LaBarge
Chairman
Board of Hampshire County Commissioners
County Commissioners' Office
Hampshire County Court House
99 Main Street, Room 232
Northampton, Massachusetts 01060
Limited Participant

George C. Jordan, III
The Gate House at Ventfort Hall
Lenox, Massachusetts 01240-2709
Limited Participant

Mitchell Ziegler
5 Daniel Court
Hyde Park, Massachusetts 02136
Limited Participant

Mark Brown
22 Haverhill Street
Andover, Massachusetts 01810
Limited Participant

ORDER ON ATTORNEY GENERAL'S MOTION FOR CLARIFICATION AND MOTION TO EXTEND THE JUDICIAL APPEAL PERIOD

I. INTRODUCTION

On May 12, 1995, the Department of Public Utilities ("Department") issued its final Order in this case, approving price cap regulation for New England Telephone and Telegraph Company d/b/a NYNEX ("NYNEX" or "Company"). NYNEX, D.P.U. 94-50 (1995).

On June 2, 1995, the Attorney General of the Commonwealth ("Attorney General") filed with the Department a Motion for Clarification of the Department's final Order and a Motion for Extension of the Judicial Appeal Period ("Attorney General Motion").[1] Also on that date, the Department stayed the running of the 20-day judicial appeal period (which was to expire on June 5, 1995)[2] "until such time as the Department rules on the Attorney General's motions." June 2, 1995 Hearing Officer Notice. The Department stated that "[u]pon the Department's issuance of an order on the Attorney General's motions, the ... appeal period will begin to run again ... [and] there will be

---

[1] On June 2, 1995, the Department denied a joint motion of AT&T Communications of New England, Inc. ("AT&T") and MCI Telecommunications Corporation ("MCI") to extend the judicial appeal period, and a motion of the New England Cable Television Association, Inc. ("NECTA") to extend or stay the judicial appeal period. See NYNEX, D.P.U. 94-50-A (1995).

[2] Service of the Order was completed on May 15, 1995. See D.P.U. 94-50-A at 1.

three days left in the appeal period, unless extended by action on the Attorney General's Motion to Extend the Judicial Appeal Period." Id. For purposes of filing post-order motions, however, the deadline for such motions expired on June 5, 1995. See May 22, 1995 Hearing Officer Notice .

Answers to the Attorney General's Motions were filed by NYNEX, AT&T, [3] and NECTA. [4]

II. POSITIONS OF THE PARTIES

A. Attorney General

The Attorney General requests that the Department make clear (1) the effect that the Department's final Order has on the complaint rights under G.L. c. 159, § 14, [5] and (2) the type of

---

[3] AT&T's answer is unresponsive to the Attorney General's Motion. However, we will address herein the issues raised by AT&T. On June 6, 1995, AT&T refiled its Answer as a Motion for Clarification and also filed a Motion to Extend the Period for Filing Motions for Clarification. Because we address the issues raised by AT&T in its Answer, it is not necessary for us to rule on both of its motions.

[4] NECTA reargues an issue that was extensively briefed and decided in the case -- the Department's statutory authority to approve price cap regulation that does not provide for company-specific review of costs and earnings (NECTA Answer at 2-4). See D.P.U. 94-50, at 173-199. The Department will not consider NECTA's Answer because it is unresponsive, except to note that NECTA supports the Attorney General's motion (NECTA Answer at 1).

[5] Section 14 states inter alia:

> Whenever the [D]epartment shall be of opinion, after a hearing had upon its own motion or upon complaint, that any of the rates, fares or charges of any common

(continued...)

evidence the Department will allow parties to present during the Company's annual filing (Attorney General Motion at 1-5).

The Attorney General, in pointing to language in the Order, argues that the Department appears to limit the rights of parties under Section 14 to challenging whether "NYNEX's prices are in compliance with [the price cap plan's] pricing rules" (id. at 2-3). Therefore, the Attorney General requests that the Department affirmatively state that the Department "will receive and consider evidence to support a Section 14 complaint, irrespective of whether the rates, that are the subject of the complaint, are in compliance with the pricing rules" (id. at 4).

The Attorney General also maintains that language in the Order dealing with the Company's annual filings was "unclear" as to the type of evidence the Department would allow parties to present (id. at 3). Specifically, the Attorney General requests that the Department affirmatively state that it will allow parties to present evidence of more than just the Company's compliance or non-compliance with pricing rules, and will allow

---

[5](...continued)

> carrier for any services to be performed within the commonwealth, or the regulations or practices of such common carrier affecting such rates, are unjust, unreasonable, unjustly discriminatory, unduly preferential, in any wise in violation of any provision of law, or insufficient to yield reasonable compensation for the service rendered, the [D]epartment shall determine the just and reasonable rates, fares and charges to be charged for the service to be performed, and shall fix the same by order ....

for a "full adjudicatory hearing," when determining whether the Company's proposed rates are just and reasonable as a general increase in rates pursuant to G.L. c. 159, § 20 (id. at 5).

In regard to his Motion for Extension, the Attorney General requests that the judicial appeal period be extended until 20 days after the Department issues a decision on the instant motion (id. at 1). If the Department were to grant the previously filed AT&T/MCI Motion to Extend and such an extension was longer than the extension requested by the Attorney General, the Attorney General states that his extension should expire on the same date as the extension granted for AT&T/MCI (id. n.1).[6]

B. NYNEX

NYNEX argues that the Attorney General's motions should be denied (NYNEX Answer at 1). With regard to the Motion for Extension, the Company contends that the Attorney General has failed to state any justification for the extension, and therefore that request also should be denied and the stay on the running of the appeal period lifted (id.). As concerns the Motion for Clarification, NYNEX asserts that the Attorney General "attempts to create ambiguity ... where none exists" (id. at 3). According to the Company, the Department's final Order does not affect the rights of complainants under G.L. c. 159, § 14 or

---

[6] The AT&T/MCI Motion was denied on June 2, 1995. See, supra, note 1.

parties to a G.L. c. 159, § 20 proceeding (id.). NYNEX also claims that the Order does not prevent parties from presenting evidence, beyond evidence of the compliance or non-compliance with pricing rules, during annual filing proceedings (id.). The Company asserts that the Attorney General is asking the Department to determine in advance the type of evidence that would be relevant in those proceedings, and that it would be unwarranted to engage in such "speculation" at this point (id. at 3-4). Finally, regarding the issue of a "full adjudicatory hearing" in the annual filing proceedings conducted pursuant to G.L. c. 159, § 20, the Company contends that the Department was clear that it would respect the rights of all parties, including the statutorily-prescribed right to a hearing (id. at 4).

C. AT&T

AT&T supports the Attorney General's Motion for Clarification (AT&T Answer at 1). AT&T also argues that there is a need for clarification on three points in the Order. AT&T states that: (1) for purposes of computing the proper price floors, it is not clear whether marginal costs are to be calculated in accordance with the ("marginal cost study") MCS VI, or by a method to be determined when the Company files its computation of the price floor; (2) for purposes of determining whether a proposed rate is anticompetitive, it is unclear whether the Department will consider evidence that a proposed rate is

anticompetitive notwithstanding the fact that the proposed rate exceeds the relevant price floor; and (3) it is not clear whether it is open to intervenors in NYNEX's compliance filing to argue that the marginal cost method for determining price floors should be based on long-term marginal costs that would include the costs that are fixed in the short term (id. at 2-4).

III. STANDARD OF REVIEW

A. 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 genuine rather than rarefied 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. 19296/19297, at 2 (1976).

B. Extension of Judicial Appeal Period

G.L. c. 25, § 5, provides in pertinent part that a petition for appeal of a Department final order must be filed with the Department no later than 20 days after service of the order "or within such further time as the [C]ommission may allow upon

request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling." See also 220 C.M.R. § 1.11(11). Granting such requests lies within the sound exercise of discretion vested by the statute in the Department.

The deadlines established by statute and implemented by Department rule indicate a clear intention to ensure that an aggrieved party expeditiously makes a determination to appeal a final order of the Department, embody the appeal in a petition to the Department within twenty days, and enter that appeal with the Court ten days later. The statute has as its purpose that there be timely finality to Department proceedings. Nunnally d/b/a L&R Enterprises, D.P.U. 92-34-A at 4 (1993). Swift judicial review benefits both the appealing party and other parties and serves the public interest by promoting the finality of Department orders. Id. at 4-5. The Court has carefully protected from encroachment the procedural demands of G.L. c. 25, § 5, as an expression of Legislative will. See, e.g., Attorney General v. Department of Pub. Utils., 390 Mass. 208, 212-213 (1983).

In order to effect what the Legislature has mandated, the Department has required a genuine and substantive showing of good cause as a predicate to the exercise of its discretion under G.L. c. 25, § 5, to extend the statutory appeal period. To this end, the Department's procedural rule states that "reasonable

extensions shall be granted upon a showing of good cause." 220 C.M.R. § 1.11(11). With respect to determining what constitutes good cause, the Department has stated:

> 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.

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

IV. ANALYSIS AND FINDINGS

A. Motion for Clarification

For the reasons stated below, we find that clarification is not warranted on the issues identified in the Attorney General's Motion. First, nothing in the Department's final Order, including the language at issue in Sections V.A.2.b.iii and VI.C.2.b., diminishes the rights of parties to petition for an investigation of NYNEX's rates, pursuant to G.L. c. 159, § 14. Under G.L. c. 159, § 14, parties have a statutory right to file at any time a complaint with the Department regarding the rates charged by NYNEX and/or the regulations or practices affecting those rates. What the Legislature has ordained, only the Legislature may alter or abrogate. In addition, the Department's Order did not indicate that the Department would limit the type of evidence that could be presented in a proceeding conducted pursuant to Section 14. We stated only that compliance with the

price cap pricing rules would be evidence of the reasonableness of rates. See D.P.U. 94-50, at n.130. The Department will address the specific type of relevant evidence that parties may present in such cases at the appropriate time, i.e., during a Section 14 proceeding. It would be premature for the Department to speculate on evidentiary matters in advance of such a filing. There is no present basis to do so.

Contrary to the Attorney General's assertions, the Order did not limit the rights of parties during proceedings on the annual filings to present evidence only on NYNEX's compliance or noncompliance with the price cap's pricing rules. Nor did the Department indicate that it would preclude parties from presenting other types of relevant evidence during those proceedings. See D.P.U. 94-50, at n.130. It was clear that the Department would adhere fully to the statutory requirements of Section 20, including notice to the Attorney General, notice to the public, and a hearing. See D.P.U. 94-50, at 219 (1995). Because we find that the Department's final Order is not silent as to the disposition of the specific issues identified in the Attorney General's Motion for Clarification and does not contain language that is so ambiguous so as to leave doubt as to its meaning, we deny the Attorney General's Motion for Clarification. See, supra, D.P.U. 92-1A-B at 4; D.P.U. 89-67-A at 1-2.

For the reasons stated below, we find that clarification is

not warranted on the issues identified by AT&T. There appears to be no difference between the first and third issues raised in AT&T's Answer; therefore, we will address only issues one and two.

On the first point, the Department stated in the Order that:

> For those services where NYNEX controls an essential input for a competitor's offering of a competing service, in order to prevent anti-competitive pricing, the proper price floor for NYNEX's own rate element shall consist of the relevant wholesale rate that at least one competitor pays to NYNEX in order to offer the service, and NYNEX's marginal cost of related overhead. For all other services, in order to prevent cross-subsidization, the proper price floor shall be the marginal cost, as reported in the Company's most recent marginal cost study ("MCS"), MCS VI. This two-part price floor will prevent cross-subsidization and anticompetitive pricing. We direct the Company to include in its initial price cap filing a listing and calculation of the relevant price floor for each service, i.e., NYNEX's marginal cost, or the relevant wholesale rate plus NYNEX's marginal cost of related overhead. Other parties will then have the opportunity to comment on whether NYNEX has proposed the proper price floor for each service.

D.P.U. 94-50, at 205-206 (footnote omitted). Clearly, the Department intends for NYNEX to use the MCS VI in its initial price cap filing in order to propose price floors. However, if parties believe that this will not represent a proper price floor, they are free to argue that there should be an alternative calculation of marginal costs, including a calculation of long-run incremental costs. If, on the basis of such arguments, the Department determines that such a calculation is necessary in order to determine the proper price floor, it will direct the

Company to perform such a calculation.

On the second point, the Department stated that a showing by NYNEX that a proposed rate exceeds the Department-approved price floor would be prima facie evidence that the rate is not anticompetitive. As long as the proposed rate exceeds the relevant price floor, the rate will be presumed not to be anticompetitive unless refuted. The Department will consider evidence to refute such a presumption, notwithstanding the fact that the proposed rate exceeds the relevant price floor. Were someone to challenge a NYNEX tariff filing and were the Department to suspend that tariff, the Department would consider competent evidence on any material issue. The passage from the Order at page 258, cited by AT&T, requires no clarification.

Because we find that the Department's final Order is not silent as to the disposition of the specific issues identified in AT&T's Answer and does not contain language that is so ambiguous so as to leave doubt as to its meaning, we further find that clarification on the issues raised by AT&T is not necessary.

B. Motion for Extension

In regard to the Attorney General's Motion for Extension, the Attorney General requests, at a minimum, a 20-day extension of the judicial appeal period beginning at the issuance of the Department's decision on his Motion for Clarification. In effect, the Attorney General seeks a new appeal period but fails

to provide any reasons for such an extension.

As we noted in our decision on the AT&T/MCI and NECTA motions to extend the judicial appeal period, there are important public interests to consider when evaluating any request to extend an appeal period. See D.P.U. 94-50-A at 6-7. In this case, we have already found that the broad public interest in promoting finality of Department decisions and the specific public interest in not delaying unnecessarily the implementation of NYNEX's price cap plan clearly outweighed the interests of AT&T/MCI and NECTA in extending the appeal period. Id. In making that determination, we considered the specific reasons offered by the parties in support of their requests. The Attorney General, however, offers no support for his requested extension and has not met his burden under the Department's "good cause" standard. Therefore, we find that the Attorney General has not demonstrated good cause for granting his motion to extend the judicial appeal period. [7]

Pursuant to the June 2, 1995 Hearing Officer Notice, the appeal period was tolled until after the issuance of this Order. On June 2, 1995, there were three days remaining in the 20-day appeal period, therefore, the 20-day appeal period will now

---

[7] By staying the procedural schedule to rule on the Attorney General's motions, the Department effectively has given a five-day extension of the period in which to file a petition for appeal.

expire at close of business on June 12, 1995.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That the Motion for Clarification of the Attorney General of the Commonwealth is DENIED; and it is

FURTHER ORDERED: That the Motion of the Attorney General of the Commonwealth for Extension of the Judicial Appeal Period is DENIED.

By Order of the Department

Kenneth Gordon, Chairman

Mary Clark Webster, 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).