D.P.U. 94-50

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.

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INTERLOCUTORY ORDER ON ATTORNEY GENERAL'S APPEAL OF HEARING OFFICER'S RULING DENYING HIS RECORD REQUEST NO. 63

I. INTRODUCTION

On April 14, 1994, New England Telephone and Telegraph Company d/b/a NYNEX ("NYNEX" or "Company") filed with the Department of Public Utilities ("Department") documents described as revisions to its tariff, M.D.P.U. Mass. No. 10, for effect May 14, 1994, as part of an Alternative Regulatory Plan ("Plan") for NYNEX's Massachusetts intrastate operations. [1] The matter was docketed as D.P.U. 94-50.

The instant interlocutory Order relates to an appeal, filed on August 23, 1994, by the Attorney General of the Commonwealth ("Attorney General") of a Hearing Officer ruling, which sustained objections by NYNEX to the Attorney General's Record Request No. 63. [2, 3]

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[1] The Plan proposes a new form of regulation for NYNEX to replace the Department's existing rate-of-return regulation. Instead of continuing to regulate the Company's expenses, revenues, and earnings, the Department would only regulate the Company's prices, under a "price cap" form of alternative regulation. The "price cap" mechanism would allow the Company to change prices each year based on increases in inflation, less a pre-determined productivity factor, adjusted for exogenous cost changes.

[2] In this case, record requests are a method by which the Department allows a witness to respond to cross-examination in writing, where fault of memory or complexity of subject matter so requires. See Ground Rule No. 3.

[3] Attorney General Record Request No. 63 asked the Company to (continued...)

On August 26, 1994, the New England Cable Television Association ("NECTA") filed Comments in opposition to the Appeal. On August 31, 1994, NYNEX filed a Response in opposition to the Appeal. No other parties commented.

II. HEARING OFFICER RULING

The Hearing Officer's ruling was made during an evidentiary hearing on August 16, 1994. Prior to the ruling, the Hearing Officer allowed parties substantial opportunity to argue for allowance of the Attorney General's Record Request No. 63. See Tr. 13, at 64-69. In sustaining the Company's objection to the contested record request, the Hearing Officer stated:

> The issue is beyond the scope of the proceeding as defined by the Department and confirmed in its July 14th Order on page 7. Specifically, the Department confirmed its previous determination that cost allocation and rate structure issues are beyond the scope of the present proceeding. Further, even if cost-allocation and rate-structure issues were included in the current proceeding, attachment rates are governed by a separate statute, Chapter 166, Section 25A, and subject to specific regulations and procedures to change rates, and therefore would be beyond the scope of a traditional rate case, which would encompass cost-allocation and rate-structure issues.

Tr. 13, at 69-70.

III. POSITIONS OF THE PARTIES

A. Attorney General

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[3](...continued)
"provide a pro-forma cost of service per pole for pole attachments and ... all workpapers, calculations, formulas, and other supporting documentation to support the cost of that service" (Tr. 13, at 64).

The Attorney General argues that the record request for a pro-forma cost of service per pole for pole attachments seeks information that is clearly relevant to the reasonableness of NYNEX's revenue requirement and how the pole attachment rates affect the Company's starting rates for the Plan (Attorney General Appeal at 1). The Attorney General also argues that the apparent cross-subsidization by captive customers of other service providers is also relevant (id.). Accordingly, the Attorney General requests that the Department reverse the Hearing Officer's ruling sustaining NYNEX's objection to his record request and order NYNEX to provide the information requested (id.).

The Attorney General maintains that the Hearing Officer's ruling has excluded a revenue requirement issue from the proceeding, and that this ruling is contrary to the Department's intent that this proceeding address revenue requirement issues (id. at 2). The Attorney General states that he is not questioning the rates charged for pole attachments; rather, he is seeking to determine the proper assignment of pole attachment service costs so that certain pole attachment costs are not included in NYNEX's cost of service for telephone service (id.).

The Attorney General argues that the assignment of costs to the "pole attachment business" is a revenue requirement issue rather than a cost-allocation issue (id. at 2-3). As a

consequence, the Attorney General argues that the common costs of NYNEX's pole attachment services and telephone services "must be divided/separated before determining the cost of service for telephone service" (id.). In support of this contention, the Attorney General argues that the Department "regularly makes this type of assignment to businesses that are not part of the revenue requirement in the cost of service segments of base rate case proceedings" (id. at 3, citing Berkshire Gas Company , D.P.U. 92-210, at 4-18 (1993) (additional citations omitted).

The Attorney General states that the record is "very clear" that the costs associated with pole attachments have increased significantly since 1970 (id., citing Tr. 13, at 58-64). Because the Company currently charges the same pole attachment rates that it used in 1970, he argues that entities that attach wires and other materials to NYNEX poles are being undercharged, and, therefore, NYNEX's ratepayers are subsidizing these entities (id. at 3-4). The Attorney General maintains that these subsidies have an effect on NYNEX's revenue requirement, and, accordingly, that the pro-forma cost of service for pole attachments and supporting workpapers are relevant to determine NYNEX's proper revenue requirement (id. at 4).

B. NECTA

NECTA submits that the Attorney General's appeal should be denied for the reasons stated by NYNEX counsel during the hearing

(NECTA Comments at 1). In addition, NECTA argues that the "comprehensive scheme established by the Legislature, the Department, and Congress for the regulation of pole attachment rates does not allow room for this issue to be raised in the context of this investigation (id. at 2).[4, 5]

NECTA argues that the methods for instituting a Department investigation of pole attachment charges are limited by G.L. c. 166, § 25A to (1) the Department's own motion, or (2) a petition of any utility or licensee (id.). In addition, NECTA argues that allowing the pole attachment costs and rates to be considered in telephone and electric utility rate cases would (1) result in two separate cases being included in one six-month investigation, (2) unreasonably tax the Department's limited resources, and (3) require cable operators to incur the expense of "protective interventions" in utility rate proceedings (id.

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[4] NECTA notes that pole attachment license agreement charges are not tariffed and are determined exclusively under G.L. c. 166, § 25A (NECTA Comments at 1, citing Greater Media, D.P.U. 91-218 (1992) (" Greater Media"); Greater Media, Inc. v. Department of Public Utilities, 415 Mass. 409 (1993)). NECTA further notes that the Department's regulations require that NYNEX provide at least sixty days prior written notice of any proposed increase in pole attachment charges (id., citing 220 C.M.R. 45.03(1)).

[5] NECTA states that it does not dispute the right of the Attorney General to request the Department to open an investigation under G.L. c. 166, § 25A, or the authority of the Department to investigate and determine reasonable pole attachment rate levels, but that the statutory scheme regarding pole attachment rates provides the "sole vehicle" for examination of those issues (NECTA Comments at 4-5).

at 2-3). NECTA asserts that this approach would "squarely violate the statutory and due process rights of cable operators under G.L. c. 166, § 25A by creating an end run around the Massachusetts Pole Attachment Statute" (id. at 3).

NECTA argues that although the Attorney General contends that he is not questioning the rates charged for pole attachments, he is doing precisely that (id.). Therefore, NECTA asserts that "the Department should not allow form to be elevated over substance" (id.). Because pole attachment revenues are included in miscellaneous revenues and are credited to cost of service, NECTA asserts that the sole purpose of the Attorney General's record request is to enable him to propose an imputed increase in NYNEX's revenues based upon a pro-forma cost of service per pole for pole attachments (id. at 3-4). [6]

NECTA states that the Department has followed the revenue credit approach with regard to attachments, and, therefore, the Attorney General's argument that pole attachment related costs should be removed from NYNEX's telephone cost of service is incorrect (id. at 4).

C. NYNEX

NYNEX asserts that the Department should deny the Attorney

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[6] In addition, NECTA argues that the Department has elected to base attachment rates on fully allocated cost, so the Attorney General is seeking in this case to change pole attachment charges outside of G.L. c. 166, § 25A (NECTA Comments at 4, citing Greater Media).

General's appeal and affirm the ruling of the Hearing Officer (NYNEX Response at 1). According to NYNEX, the Attorney General's arguments -- that determining the costs of pole attachments is necessary to insure that such costs are not included in NYNEX's cost of service for telephone service, and that an exclusion of these costs from NYNEX's study period results is consistent with Department precedent and is required to guarantee that telephone ratepayers are not subsidizing firms that place attachments on the Company's poles -- are without merit (id. at 2).

The Company maintains that the Attorney General in his appeal "completely ignores" applicable Department precedent regarding attachments and instead cites to "clearly distinguishable" ratemaking policies (id. at 3). NYNEX argues that Department precedent does not support the exclusion of attachment costs from the study period results because attachment revenues and costs have historically been included in the Company's cost of service in rate case proceedings (id. at 2-3, citing New England Telephone , D.P.U. 411, at 21 (1981); New England Telephone , D.P.U. 86-33-G, at 321-322 (1989)). [7, 8] NYNEX

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[7] The Company states that while this case is not a revenue requirement proceeding, "there is no reason to consider attachments in a different manner for the purpose of assessing the reasonableness of Company earnings" (id. at 3, n.1).

(continued...)

also asserts that in cases involving electric companies, the Department consistently considers attachment revenues and costs as part of the overall cost of service (id. at 3, citing Cambridge Electric Company , D.P.U. 89-114/90-331/91-80, at 142-143 (1991)).

NYNEX agrees with NECTA that attachment fees are reported by the Company as miscellaneous revenues and are applied as credits to customer classes in Cost of Service Studies ("COSS") filed by the Company, and that the COSS methodology approved by the Department does not require that revenues and costs associated with miscellaneous services be separately identified and reported (id. at 4, citing New England Telephone , D.P.U. 86-33-C at 31 (1987)). NYNEX argues that the subject record request seeks data that can only be used to support a different manner for assigning the attachment revenues and costs, and, according to NYNEX, such an inquiry raises a cost allocation issue beyond the scope of the proceeding (id.).

NYNEX also contends that the Attorney General's argument ignores the fact that the licensing of space by a utility on NYNEX's poles and the rates charged by NYNEX for these

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[8](...continued)
[8] NYNEX further notes that the Attorney General in those cases treated attachments as part of the Company's revenue requirement and had proposed revenue adjustments to reflect known and measurable post-test-year changes in the number of attachments (id. at 3).

attachments are governed by a specific statute and by specific Department regulations (id., citing G.L. c. 166, § 25A, and 220 C.M.R. 45.00). As a result, NYNEX argues that if the Attorney General is permitted to adjudicate attachment costs in this proceeding, the framework for addressing attachment issues set forth in the statute and the regulations would be circumvented and the rights of NYNEX and licensees created under these provisions would be "substantially impaired" (id. at 5). NYNEX argues that any determination by the Department in this case concerning attachment costs would necessarily have a bearing on the rates the Company charges for attachments (id. at 5).[9]

IV. STANDARD OF REVIEW

The Department's Procedural Rules state that the hearing officer "shall make all decisions regarding the admission or exclusion of evidence ... in the course of the hearing." 220 C.M.R. § 1.06(6)(a).

The State Administrative Procedure Act provides that "[e]vidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are

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[9] NYNEX claims that pursuant to the Department's ruling in Greater Media , the Company is entitled to set its attachment rates to recover the costs as determined by the Department, and, therefore, the Department cannot make findings regarding the costs of attachments in this case without also establishing the costs the Company must be permitted to recover from parties attaching to the Company's poles (id. at 5-6).

accustomed to rely in the conduct of serious affairs." G.L. c. 30A, § 11(2); see also Town of Framingham v. Department of Public Utilities, 355 Mass. 138, 144 (1969). Except in matters of privilege, however, administrative agencies "need not observe the rules of evidence observed by courts." G.L. c. 30A, § 11(2); Boston Gas Company, D.P.U. 88-67 (Phase I), at 15 et seq. (1988).

With regard to the legal standard for relevance, the Supreme Judicial Court has stated:

> As a general rule the parties to an action have a right to show all material facts .... In determining whether evidence offered serves any valid purpose we apply the rule that it must merely render the desired inference more probable than it would be without the evidence .... We are influenced by the general view that relevant evidence should be admitted unless there is a quite satisfactory reason for excluding it ....

Green v. Richmond, 369 Mass. 47, 59 (1975) (citations omitted). [10]

V. ANALYSIS AND FINDINGS

The issue before us is whether the Hearing Officer's ruling sustaining objection to the contested record request and, thereby, excluding responsive information from the evidentiary record in this proceeding, was correct. [11] Pursuant to the above standard of review, we must determine whether the information sought by the record request is relevant to a material issue in

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[10] Although the Department is not bound by judicial rules of evidence, we find this standard instructive.

[11] In this case, the Ground Rules state that responses to record request are a part of the evidentiary record. See Ground Rule No. 3.

this proceeding. For the reasons cited below, we find that the information is not relevant for it would not tend to prove facts of consequence to issues material to the investigation.

The contested record request relates specifically to the costs of pole attachments. The Attorney General requests that the Company provide a "pro-forma cost of service per pole for pole attachments." As noted, the Company objects to the record request on the grounds that it is not relevant to any issue in the proceeding and that the subject of attachment fees is governed by G.L. c. 166, § 25A. The Hearing Officer sustained the Company's objection for two reasons: (1) the issue is beyond the scope of the proceeding, as set forth in the Department's June 14 and July 14, 1994 Interlocutory Orders; and (2) attachment rates are governed by a separate statute, G.L. c. 166, § 25A, and are subject to specific regulations and procedures governing rate changes.

At the outset, it is necessary to determine the nature of the Attorney General's arguments. We note that the Attorney General claims that he is not questioning the rates charged for pole attachments. Yet, in his appeal, he maintains that attachment licensees are being undercharged for the service. [12]

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[12] Similarly, during hearings, the Attorney General clearly questioned the rates charged for pole attachments. For example, immediately prior to making his record request No. 63, the Attorney General asked the Company's witness, "Given

(continued...)

The Attorney General appears to be questioning substantively the rates charged for pole attachments, [13] but we will address his stated argument (i.e. , the proper assignment of costs) on its merit.

The Attorney General's stated argument in support of his appeal is that the contested record request is necessary to "divide" the common costs of NYNEX's pole attachment services and telephone services in order to determine the cost of service for telephone service. He argues, therefore, that the assignment of costs to the "pole attachment business" is a revenue requirement

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[12](...continued)
the list of costs that we've just discussed with regard to pole attachments, if the Department wanted to determine a pole attachment rate, would it take a great deal of effort for the Company to provide those component costs of the poles to determine that rate?" (Tr. 13, at 63). In addition, in responding to the Company's objection to his record request, the Attorney General stated "...if there is a cross-subsidization going on because these rates are too low, then that particular issue the Attorney General believes is an issue that is ripe in this proceeding and should be addressed in this proceeding" (Tr. 13, at 68).

[13] An investigation of pole attachment rates is beyond the scope of this proceeding since this matter is governed by statute and regulations separate from the statutory scheme pursuant to which this proceeding is being conducted. See G.L. c. 166, § 25A and 220 C.M.R. 45.00 et seq.; compare G.L. c. 159, § 20. Chapter 166, § 25A limits the methods for instituting a Department investigation of specific pole attachment charges to the Department's own motion, or a petition of any utility or licensee. Thus, while the Attorney General has the right to petition the Department to open an investigation under Section 25A in a separate docket, we are without authority to determine and enforce new attachment rates in this proceeding.

issue rather than a cost-allocation issue. We disagree with the characterization of attachments as a non-utility "business." In prior cases, the Department has not considered attachments to be a separate, non-utility line of business for utility companies, and has consistently used a revenue credit approach to include attachment costs and revenues in a utility's overall cost of service (see New England Telephone , D.P.U. 411, at 21 (1981); New England Telephone , D.P.U. 86-33-G at 321-322 (1989)). The Attorney General is arguing that attachments in this proceeding should be treated as a non-utility line of business. In raising this argument, the Attorney General is advocating a change in the Department's established method of allocating costs, and, as the Hearing Officer correctly noted, cost allocation is beyond the scope of this proceeding. [14] See July 14, 1994, Interlocutory Order , D.P.U. 94-50, at 7.

Accordingly, for the above reasons, we find that the Attorney General's Record Request No. 63 is not relevant to an issue in this proceeding. Therefore, we affirm the Hearing Officer's ruling excluding this record request, and deny the Appeal of the Attorney General.

VI. ORDER

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[14] As noted above, we also believe that the Attorney General is questioning the reasonableness of the rate for pole attachments, which is a rate structure issue beyond the scope of the proceeding.

Accordingly, after due consideration, it is

ORDERED: That the Appeal of the Attorney General, filed with the Department on August 23, 1994, be and hereby is DENIED.

By Order of the Department,

Kenneth Gordon
Chairman

Barbara Kates-Garnick
Commissioner

Mary Clark Webster
Commissioner