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 MOTION TO DISMISS OR TO REQUIRE ADDITIONAL FILINGS

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] On April 20, 1994, the Department suspended the Company's filing for investigation until November 14, 1994. The investigation was docketed as D.P.U. 94-50.

On April 28, 1994, the Attorney General of the Commonwealth ("Attorney General") filed a "Motion To Dismiss Petition Or To Require Additional Filings" ("Attorney General Motion"). On May 6, 1994, the Company filed an Objection to the Attorney General's Motion ("Company Response"). On May 11, 1994, the Attorney General filed a Reply to the Company's Response ("Attorney General Reply").

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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.

On May 4, 1994, the Department issued a notice allowing interested persons to submit comments on the Attorney General's Motion. Comments were received from the New England Cable Television Association, Inc. ("NECTA"), the Department of Defense And All Other Federal Executive Agencies ("DOD"), the Commonwealth of Massachusetts's Executive Office of Economic Affairs ("EOEA"), AT&T Communications of New England, Inc. ("AT&T"), and MCI Telecommunications Corporation ("MCI"), all intervenors in this proceeding. [2]

II. ATTORNEY GENERAL'S MOTION

A. Attorney General

In his Motion, the Attorney General stated that the Company's petition is "patently deficient and should be dismissed, or in the alternative, that the case should be divided into phases and the Company should be required to make additional filings to cure the deficiencies" (Attorney General Motion at 1). In support of the relief requested, the Attorney General argues that: (1) NYNEX is requesting a general rate increase without showing a need for additional revenue; (2) current rates have not been established to be the right starting point for alternative regulation; and (3) NYNEX's proposed Plan does not meet the Department's standard for a proper tariff filing (id.).

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[2] At the time the notice was issued, the Company and the Attorney General were the only parties to the case, as the Department had yet to rule on petitions to intervene.

With regard to the issue that the filing constitutes a general rate increase, the Attorney General contends that pursuant to G.L. c. 159, § 20, "when a telecommunications common carrier seeks changes 'which represent a general increase in rates' that carrier bears 'the burden of proof to show that such increase is necessary to obtain a reasonable compensation for the service rendered ...'" (id. at 2). According to the Attorney General, NYNEX's filing represents a general increase in rates, and the Company has not met its burden of proof in showing that the increase is necessary (id.).[3] Moreover, the Attorney General contends that the Company has provided insufficient information to meet its statutory burden of proof, under G.L. c. 159, § 20, that it has a need for additional revenue (id. at 4). The Attorney General maintains that instead of filing the required information on "cost of service," as dictated by Department precedent for telephone companies, the Company's "showing" for its need for additional revenue amounts to "nothing more than a summary of current return on book investment ..." (id. at 4).[4]

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[3] The Attorney General argues that the Company's current revenue requirement is not just and reasonable because it is based on outdated data from a 1985-1986 historical test year (Attorney General Motion at 2-3). The Attorney General notes that since then, the telecommunications industry has seen dramatic cost decreases, which would have significantly altered the Company's current revenue requirement (id. at 3).

[4] The Attorney General points out that public utility

(continued...)

The Attorney General claims that under Department precedent, dismissal is the proper action for a filing which is patently deficient or fails to meet Department standards (id. at 5, citation omitted).

With regard to the starting point for implementing price caps, the Attorney General argues that the Company has not shown that current rates for individual rate classes represent the right starting point, and, therefore, the filing should be dismissed (id. at 7). The Attorney General argues that if the Department were to allow NYNEX to implement its price cap at the wrong starting point, "any existing unfairness to ratepayers as a whole or to individual rate classes" could be "greatly magnif[ied]" (id.).

Concerning his position that the price cap filing is not a proper tariff filing, the Attorney General contends that the Company's proposed tariff filing, M.D.P.U. No. 10, is deficient because it does not comply with Department regulations and case law governing tariffs (id. at 8). The Attorney General argues that the filing does not contain sufficient detail to: (1) explain the basis for the rate to be charged for the offered services; (2) provide a sufficient demonstration of the

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[4](...continued)
commissions in many other states conducted reviews of current costs, full revenue requirement proceedings, and/or full rate cases before approving alternative regulation (Attorney General Motion at 3-4).

reasonableness of the rate; and (3) enable the public to apply the rate to reasonably obtain the price term (id., citing Boston Gas Company , D.P.U. 92-259, at 47 (1993) (quotation omitted)). The tariff, according to the Attorney General, also does not "show plainly all requisite detail fully to explain the basis of all changes to be made ..." as required by the Department's tariff regulations at 220 C.M.R. § 5.02(3) (id.). He contends that a ratepayer seeking to determine the "price term" under the proposed tariff could not do so (id.).

As noted, the Attorney General asks that the Department dismiss NYNEX's tariff filing or, in the alternative, that the Department (1) find that the Company's filing is not properly a tariff investigation subject to the statutory six-month suspension period, (2) conduct the proceeding as a two-phased investigation, whereby the Department first reviews the Company's current rates as part of a full rate case [5] to determine the proper "cost-based starting point," and then review its proposal for alternative regulation, and (3) order NYNEX to make additional filings (id. at 8-10). [6]

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[5] As part of a rate case, the Attorney General states that NYNEX would be required to make all standard rate case filings, including a full Cost of Service Study ("COSS") and Marginal Cost Study ("MCS") (Attorney General Motion at 8).

[6] The Attorney General suggests the following schedule: (1) in the first phase, NYNEX would file tariffs by July 15, 1994,

(continued...)

B. NYNEX

In its Response, NYNEX asserts that there is no basis for dismissal of the filing (Company Response at 3). It contends that the filing "contains substantial evidence establishing a prima facie case" for NYNEX's alternative regulatory plan (id.). In addition, NYNEX contends that the Attorney General's alternative request for bifurcated review of a rate case and the alternative regulatory plan is unwarranted (id. at 4).

First, the Company contends that it is not requesting a general rate increase and its filing does not violate any Department filing requirements established for the consideration of an alternative regulatory plan (id. at 10, 11-14). NYNEX contends that the Department has plenary power to determine the form of regulation it exercises over carriers and has wide discretion in choosing its approach to rate regulation (id. at 5, citing New England Telephone and Telegraph Company v. Department of Public Utilities , 371 Mass. 76, 354 N.E. 2d 860 (1976); New England Telephone and Telegraph Company v. Department of Public Utilities , 360 Mass. 443, 275 N.E. 2d 493 (1971). According to NYNEX, the issue of whether the Department can examine a change

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[6](...continued)
for a full rate case review, for suspension until February 15, 1995 while the Department conducts its investigation; in the second phase, NYNEX would file a petition for alternative regulation in December 1994, and the Department would complete that investigation by May 15, 1995 (Attorney General Motion at 9, 11).

in regulatory policy, such as NYNEX's alternative regulatory plan filing, is subject to the Department's discretion (id. at 7). The Company contends that the Attorney General's position that filing requirements for traditional rate-of-return regulation should apply to NYNEX's proposal "unduly restricts" the Department from examining changes in regulatory policy (id.). Moreover, NYNEX maintains that the Attorney General does not point to any Department filing requirements for a proceeding examining a change in regulatory policy (id. at 6-7). According to NYNEX, there is "clear and unambiguous" precedent for the Department's ability to address changes in regulatory policy based upon the type of information included in its filing (id. at 8, citing AT&T Communications of New England, Inc. , D.P.U. 91-79 (1992).[7] [8]

Second, NYNEX contends that its filing contains sufficient evidence to establish that current revenues are a reasonable

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[7] NYNEX contends that in D.P.U. 91-79 the Department deferred AT&T's filing of rate case documentation, which had been expressly ordered in a previous case, in order to consider fully the alternative regulation proposal presented by AT&T (Company Response at 9, citing D.P.U. 91-79, at 1-2).

[8] In challenging the case law cited by the Attorney General in support of his contention that NYNEX failed to meet certain filing requirements, NYNEX claims that the cases cited are "inapposite" because: (1) none of the cases involved the issue of a fundamental change in the form of regulation, and (2) "virtually all" of the cases dealt with the issue of a company's disregard of an explicit Department directive (Company Response at 7-8). Both of these issues, asserts NYNEX, are not raised by the Company's filing (id.).

starting point for the Company's alternative regulatory plan, and that it is "simply unnecessary for the Company to submit additional materials or for the Department to undertake the significant burden of a separate [full revenue requirement] proceeding" (id. at 10, 14). The Company asserts that the Attorney General is "plainly incorrect" in contending that the Company's filing is deficient because it does not contemplate a full revenue requirement investigation, and that the Attorney General "ignores that the Department has broad discretion to fashion alternative regulatory approaches" (id. at 10, 12). [9] NYNEX contends that the Attorney General is incorrectly viewing the plan under Department standards that apply to traditional rate-of-return regulation, not to examinations of changes to regulatory policy (id. at 11). In addition, NYNEX maintains that the plan does not envision any "change in revenues or rate independent of the pricing rules set forth in the Plan" (id. at 11). Moreover, the Company claims that it has no burden to make an affirmative showing of a revenue requirement in its filing (id. at 12-13, citing G.L. c. 159, § 17). Lastly, NYNEX contends that it was not required to produce the "substantial financial information" that was included in the filing, though it

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[9] The Company asserts that because public utility commissions in other states conducted full revenue requirement investigations at the beginning of their alternative regulation case reviews "is clearly not determinative" in Massachusetts (Company Response at 12).

did so voluntarily (id. at 13-14).

Third, the Company maintains that the Attorney General's call for a new investigation into individual rate levels is "unwarranted" and that the Department can rely on current rates as the appropriate starting point for the Company's Plan, without the need for additional information and filings (id. at 15). NYNEX asserts that the Department in D.P.U. 89-300 and subsequent transitional rate proceedings has established reasonable rates, based on extensive cost data, which can be relied upon as the appropriate starting point for individual rates under the Plan (id. at 15-16). For the Attorney General to argue otherwise, according to NYNEX, amounts to another attempt at relitigating issues of cost allocation and rate design (id. at 16). Moreover, NYNEX argues that since existing rates have been determined to be reasonable by the Department, and since Massachusetts law provides the Department with substantial discretion in determining rates, existing rates may serve as an appropriate starting point (id. at 17, citing American Hoechest Corporation v. Department of Public Utilities , 399 N.E. 2d 1, 4 (1980)).

Fourth, the Company claims that the proposed tariff is "unquestionably acceptable" under Department standards, in part because: (1) it contains detailed terms setting forth the basis for future rate changes; (2) it includes extensive provisions relating to an annual tariff filing process in which specific

rates will be proposed in accordance with the Plan's pricing rules; and (3) it explains the methods and data sources to be used in applying the pricing rules (id. at 18).[10] NYNEX also contends that when the Company proposes rate changes in its annual tariff filing, the new rates will be clearly set out for ratepayers (id.). The Company also claims that the pricing mechanism in the proposed tariff is similar to other "standard formulas" in use by electric and gas utilities to calculate rate adjustments, such as purchased power clauses, cost of gas adjustment provision, and conservation charges (id. at 19, citing Consumer Organization for Fair Energy Equality, Inc. v. Department of Public Utilities , 335 N.E. 2d 341 (1975); 220 C.M.R. § 6.00; Boston Edison Company, Tariff M.D.P.U. No. 744; Boston Gas Company, Tariff M.D.P.U. No. 905; Commonwealth Electric Company, Tariff M.D.P.U. No. 274). NYNEX argues that its filing includes detailed terms setting forth the basis for future rate changes (id. at 18).

C. Attorney General Reply

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[10] NYNEX argues that the Department's decision in Boston Gas Company , D.P.U. 92-259, cited by the Attorney General in support of his argument, can be distinguished for several reasons: (1) that case dealt with the issue of whether Boston Gas Company could negotiate rates in certain instances; (2) Boston Gas Company did not propose to tariff negotiated rates; (3) the Department rejected the tariff because the pricing terms were not stated; and (4) the Department concluded that the Company could more appropriately negotiate rates under the contracting process (NYNEX Response at 19-20).

In his Reply, the Attorney General contends that the Department may dismiss as patently deficient a filing which proposes a new form of regulation but fails to satisfy Department standards under the existing regulatory scheme (Attorney General Reply at 1, citing Massachusetts Electric Company v. Department of Public Utilities, 383 Mass. 675 (1981)). In addition, the Attorney General contends that NYNEX's reliance on AT&T Communications of New England, Inc., D.P.U. 91-79, supra, is misplaced because of important distinctions between that case and the Company's filing (id. at 2).

D. Comments from Other Parties

NECTA supports the Attorney General's Motion, and argues that NYNEX's Plan constitutes a general rate increase under G.L. c. 159, § 20, and that the Company's filing is patently deficient (NECTA Comments at 10). NECTA asserts that the Company's Plan does not relieve NYNEX or the Department from compliance with the legal requirements of G.L. c. 159, § 20, governing a general increase in rates (id. at 11).

NECTA argues that an indexed rate change is subject to the statutory constraint that an increase or decrease in rates must be proven necessary to provide the Company with "reasonable compensation," which NECTA contends is a cost-based concept (id. at 11). NECTA maintains that the use of indexing for rate changes is by statute subject to a cost-based ceiling, and that

NYNEX has not made the requisite presentation of its revenue requirement under Department standards (id.).

The DOD supports the Attorney General's Motion because NYNEX's filing would halt the transitional rate restructuring process (DOD Comments at 1).

The EOEA opposes the Attorney General's Motion and urges the Department not to delay its examination of the Company's filing by dismissing the case or initiating a multi-phase proceeding (EOEA Comments at 2). The EOEA argues that the reasonableness of existing rates is a legitimate concern, but that it is inextricably linked to the Company's proposal and should be examined as part of the proposal, not as one phase of a proceeding (id.).

MCI argues that the Department should grant the Attorney General's Motion to dismiss the filing, or should adopt the Attorney General's proposed schedule for this proceeding (MCI Comments at 2). MCI agrees with the reasons stated by the Attorney General in his Motion (id. at 1). MCI also supports the Attorney General's proposed procedural schedule because it should permit the Department and the parties sufficient opportunity to conduct an appropriate "going-in" rate review, prior to addressing NYNEX's Plan (id. at 2).

AT&T opposes the Attorney General's Motion because, according to AT&T, NYNEX's filing is sufficient for the

Department to address the question of whether modification of the current regulatory regime is appropriate (AT&T Comments at 2-3).

III. ANALYSIS AND FINDINGS

The Attorney General has raised three issues for the Department's consideration in his Motion: (1) whether the Company's filing is properly a tariff filing, pursuant to the Department's standard for tariff filings; (2) whether the Company's filing is patently deficient, under G.L. c. 159, § 20, as a request for a general increase in rates, because the Company has not shown that it needs additional revenue; and (3) whether the Company has failed to establish in its filing that its current rates for individual rate classes are the appropriate starting point for implementation of its proposed Alternative Regulatory Plan.

In judging whether the filing at issue is a proper tariff filing, the Department is guided by statutory requirements in G.L. c. 159, the Department's tariff rules contained in 220 C.M.R. § 5.00, and previous Department decisions.

G.L. c. 159, § 19 provides that "[e]very common carrier shall file with the Department and shall plainly print and keep open to public inspection schedules showing all rates, joint rates, fares, telephone rentals, tolls, classifications and charges for any service ... and all conditions and limitations, rules and regulations and forms of contracts or agreements in any

manner affecting the same." In addition, 220 C.M.R § 5.02(3)(b), provides that "[t]ariffs and schedules shall show plainly all requisite detail fully to explain the basis of all charges to be made and all rules and regulations governing the same."

In Boston Gas , D.P.U. 92-259, at 40-41 (1993), the Department stated that "generally, a tariff is a public document setting forth a description of the utility's services being offered, the availability of the services offered, rates and charges with respect to the services, and governing rules, regulations, and practices relating to those services." Id., citing International Tel. & Tel. Co. v. United Tel. Co. of Florida , 453 F. Supp. 352, 357 n.4 (D.C. Fla. 1975).

After consideration of the Attorney General's Motion and the Company's filing of April 14, 1994, we conclude that the "tariff revisions" filed by NYNEX are better described as a form of regulation that NYNEX proposes the Department adopt. NYNEX's proposal does not set forth any proposed changes in rates for individual services that would take effect if the Department were to approve the Company's filing. Under the Company's proposal, the Company would have to file revisions to its current tariffs each year to implement rate changes allowed under a price cap formula, and, these subsequent filings would state the specific

rates charged for services. [11] For these reasons, the Department finds that the Company's April 14, 1994 filing is not a tariff filing.

The filing may, however, be considered a petition and is sufficient to serve as a basis for investigating the Company's proposed alternative form of regulation. The filing seeks to establish new standards for determining whether unstated rates to be filed in the future are just and reasonable. Accordingly, we will treat the Company's filing as a petition for the implementation of its Plan, and will investigate the Plan in this docket. [12] Although the Department's finding no longer subjects this proceeding to a maximum six-month investigation period, we acknowledge the concern of EOEA regarding any unnecessary delay in reviewing the Company's Plan and will, therefore, proceed with the conduct of this case in as expeditious a manner as possible, consistent with our regulatory responsibilities.

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[11] The Company argued that its pricing mechanism in the proposed tariff is similar to other "standard formulas" included in tariffs of certain electric and gas utilities to calculate rate adjustments, such as purchased power clauses, cost of gas adjustment provision, and conservation charges. However, those formulas are found in tariffs because the resulting rates are not otherwise listed in the electric and gas tariffs. Whereas, under NYNEX's proposal, a tariffed description of the formula is unnecessary because any tariff would include the rates that result from the application of the price cap formula.

[12] Because the April 14, 1994 filing is not a tariff filing, it is necessary to vacate the Department's Order of Suspension dated April 20, 1994.

Because we have found that the Company's filing is not a tariff filing, and the Department will consider the matter as a petition for alternative regulation, the Company's filing cannot constitute a general increase in rates under G.L. c. 159, § 20, as the Attorney General argues. Moreover, it is clear that a decision on the filing would not directly result in any change in the Company's rates. Rates may change in subsequent annual filings if a price cap formula is adopted. Whether or not such annual filings would amount to a request by NYNEX for a general rate increase is an issue that we need not address in this Order. The question of whether there are statutory impediments to the implementation of the proposed Plan, including any resulting changes in rates as a result of subsequent annual filings, and the question of whether statutory changes are needed to accommodate the annual filings, are questions that will be addressed during the course of this proceeding. For the above reasons, we deny the Attorney General's Motion to Dismiss based on his arguments that the filing constitutes a general rate increase. In addition, we deny the Attorney General's requests for a two-phase proceeding and for NYNEX to make additional filings.

Finally, the question raised by the Attorney General of whether the Company's existing rates may be appropriate as a "starting point" for any alternative regulatory plan that the

Department may approve is the subject of other pending motions on the scope of this proceeding. These motions will be dealt with promptly. As the Department has deemed NYNEX's filing not to be a request for a general increase in rates under G.L. c. 159, § 20, the Attorney General's objection to the use of existing rates as a starting point for the Department's investigation of the Plan is not a basis for dismissal.

IV. ORDER

Accordingly, after due consideration, it is

ORDERED: That the Motion to Dismiss of the Attorney General of the Commonwealth, filed with the Department on April 28, 1994, be and hereby is DENIED; and it is

FURTHER ORDERED: That the Motion for Alternative Relief of the Attorney General of the Commonwealth, filed with the Department on April 28, 1994, requesting that the Department find the April 14, 1994 filing of New England Telephone and Telegraph Company d/b/a NYNEX is not properly a tariff filing, be and hereby is GRANTED; and to establish a two-phase schedule in this proceeding, and to order NYNEX to make additional filings, be and hereby is DENIED; and it is

FURTHER ORDERED: That the Department's Order of April 20, 1994, suspending the operation of amendments to Tariff M.D.P.U. No. 10 of New England Telephone and Telegraph Company d/b/a NYNEX, until November 14, 1994, be and hereby is vacated; and it

is

FURTHER ORDERED: That the Department shall consider the April 14, 1994 filing of New England Telephone and Telegraph Company d/b/a NYNEX as a petition for an Alternative Regulatory Plan, and the Department shall investigate the petition within this docket.

By Order of the Department,

Kenneth Gordon
Chairman

Barbara Kates-Garnick
Commissioner

Mary Clark Webster
Commissioner