D.P.U. 95-83

Investigation by the Department of Public Utilities on its own motion as to the propriety of the rates and charges set forth in tariff schedules D.P.U. Mass. Nos. 10 and 15, filed with the Department on July 3, 1995 to become effective September 15, 1995, by New England Telephone and Telegraph Company d/b/a NYNEX.

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I. INTRODUCTION On July 3, 1995, New England Telephone and Telegraph Company, d/b/a NYNEX ("NYNEX") filed revisions to its tariffs, M.D.P.U. Nos. 10 and 15 with the Department of Public Utilities ("Department") ("July 3rd Compliance Filing"), in compliance with the Department's Order in New England Telephone and Telegraph Company d/b/a NYNEX, D.P.U. 94-50 (1995) ("Price Cap Order"). The filing constitutes NYNEX's initial annual filing under the price cap form of regulation approved for NYNEX by the Department. The Department docketed its investigation into this matter as D.P.U. 95-83 but did not initially suspend the tariffs. The proposed tariff revisions will become effective on September 15, 1995, unless suspended or disallowed by the Department.

On June 9, 1995, NYNEX filed a motion with the Department requesting a six-month extension of the price floor filing requirement, which was to have been submitted with the initial compliance filing. On June 28, 1995, the Department denied NYNEX's motion for a six-month extension, instead allowing NYNEX until August 1, 1995 to submit the price floor data. See New England Telephone and Telegraph Company d/b/a NYNEX, D.P.U. 94-50-C (1995). On July 12, 1995, NYNEX filed a motion for reconsideration in which NYNEX asked the Department to allow it to submit by August 1, 1995 only those price floors related to the specific rate changes proposed in the July 3rd Compliance Filing and to file price floor data for all of its other services by September 15, 1995. The Department granted NYNEX's motion on July 21, 1995. On August 1, 1995, NYNEX filed with the Department the price floor data for the rate changes proposed to its Massachusetts tariffs M.D.P.U. Nos. 10 and 15.

The Department received timely filed petitions to intervene from AT&T Communications of New England, Inc. ("AT&T"), MCI Telecommunications Corporation ("MCI"), Frontier

Communications of New England, Inc. and Frontier Communications International, Inc. (collectively referred to as "Frontier"), and New England Cable Television Association ("NECTA"), all of which were granted. In addition, the Attorney General of the Commonwealth ("Attorney General") filed notice of intervention pursuant to G.L. c. 12, § 11E.

On August 16, 1995 and August 18, 1995, late-filed petitions to intervene were filed by the Department of Defense and all other Federal Executive Agencies ("DOD/FEA") and Teleport Communications Group Inc., on behalf of Teleport Communications-Boston ("TC-Boston"), respectively. On August 21, 1995 and August 29, 1995 the Hearing Officer allowed the late-filed petitions to intervene of DOD/FEA and TC-Boston, respectively.

On August 11, 1995, the Hearing Officer issued a "Notice of Request for Comments on Suspending the Effective Date of NYNEX's Proposed Tariff Schedules M.D.P.U. Nos. 10 and 15." The Request sought comments on (1) whether NYNEX's proposed tariff schedules comply with the pricing rules established in D.P.U. 94-50, and (2) whether NYNEX has correctly calculated the price floors for rates that it has proposed changing. In addition, the Hearing Officer asked the parties whether they planned to raise other issues in the course of the investigation. The Department received comments from the Attorney General, AT&T, MCI, and NECTA. On August 22, 1995 the Hearing Officer issued a notice allowing NYNEX to file a written reply to the intervenors' comments. NYNEX filed reply comments on August 28, 1995.

II. DESCRIPTION OF THE COMPLIANCE FILING

According to NYNEX, the July 3rd Compliance Filing revises M.D.P.U. Nos. 10 and 15 as follows:

- The business local message rate within the 617/508 LATA is reduced and restructured from $.03 per message for all exchanges to $.028 per message for Zone 1 exchanges and $.01 per message for Zone 2 exchanges.

- The local message rate for central offices where timing facilities were unavailable is deleted. Timing facilities are now available in all central offices in Massachusetts.

- The usage rate for Circle Calling, Suburban, Metropolitan Service, Bay State East Service, and Call Around 413 Plus Services are disaggregated into Residence One-party unlimited usage and premium usage components.

- The Bay State East service is changed by (1) eliminating the time period restriction, (2) disaggregating the usage rate into Residence One-party unlimited usage and premium usage components, and (3) reducing the usage rate by $1.00 for Metropolitan customers and $2.01 for non-Metropolitan customers.

- The Measured Circle Calling Service rate is reduced from $8.25 to $7.35.

- The Eastern LATA time of day structure for Switched Access Service is changed to Peak, Off-Peak to match the Western LATA. Simultaneously, the Originating Carrier Common Line rate is reduced to zero and the Common Line Usage Credit is eliminated.

- The Originating and Terminating Local Switching rates for 800 Switched Access Service are reduced.

- The 800 Originating and Terminating Local Transport Termination rates are reduced.

(July 3rd Compliance Filing Cover Letter, dated July 3, 1995)

NYNEX states that the estimated impact of the tariff revisions is an approximately $32.8 million decrease in its Massachusetts intrastate revenues (July 3rd Compliance Filing). NYNEX states that the revenue reduction is comprised of the following changes:

- a $7.54 million decrease in switched access revenue, resulting from decreases in various switched access rates that will bring these rates to or closer toward target levels approved in D.P.U. 93-125;

- a $19.67 million decrease in revenues from residence optional calling plans, resulting from reductions in rates for the Baystate East services (Metropolitan and Non-Metropolitan) and Measured Circle Calling Service; and

- a $5.73 million decrease in business local usage revenues, resulting from reductions to the Zone 1 and Zone 2 message rates.

(id.)

An additional $5.3 million revenue reduction is associated with an increase in the Lifeline credit, resulting from a $2.50 per month increase in the Lifeline discount for eligible subscribers, which took effect on June 11, 1995 as directed in the Price Cap Order (July 3rd Compliance Filing Cover Letter, dated July 3, 1995).

NYNEX states that the price floor data filed on August 1, 1995 relates solely to the rate changes proposed in tariffs M.D.P.U. Nos. 10 and 15 and that NYNEX provides adequate data to determine the reasonableness of its proposed rate reductions, filed for effect on September 15, 1995 (NYNEX Reply Comments at 2, 15).

III. COMPLIANCE WITH THE PRICING RULES AND CALCULATION OF PRICE FLOORS

A. Introduction

The July 3rd Compliance Filing raises two basic issues: (1) whether NYNEX's proposed tariff schedules comply with the pricing rules established in the Price Cap Order, and (2) whether

NYNEX has correctly calculated the price floors for the rates it has proposed changing.

B. Positions of the Parties

1. Attorney General

The Attorney General states that NYNEX's proposed tariff schedules do not comply with the pricing rules established in the Price Cap Order (Attorney General Comments at 1-3). The Attorney General argues that NYNEX's assertion, in its July 3rd Compliance Filing, that there is a one percent cap on the service quality penalty provision established in the Price Cap Order, is incorrect (id. at 2). The Attorney General submits that the Department did not prescribe any such cap in the service quality performance penalty provisions of its price cap plan and the July 3rd Compliance Filing is therefore deficient (id.). The Attorney General notes, however, that the operation of the cap included in the July 3rd Compliance Filing has no impact on the magnitude of the pricing changes proposed in tariffs M.D.P.U. Nos. 10 and 15 (id.)

The Attorney General argues that NYNEX is subject to a performance penalty if its overall performance relative to twelve individual performance measures is less than acceptable (i.e., a total performance score of less than 33) and is also subject to a performance penalty if its service relative to three or more of these twelve measures is less than acceptable (id. at 3). The Attorney General argues that the operation of the two components of the service quality adjustment mechanism is not mutually exclusive (id.). Therefore, the Attorney General asks the Department to issue an order making it clear that there is not a one percent cap on the penalty to be paid by NYNEX if its quality of service to its customers falls below acceptable levels (id.).

The Attorney General further states that NYNEX has incorrectly calculated the price floors which it has proposed changing (id. at 4). The Attorney General states that NYNEX has

not provided the price floors for the individual essential inputs or rate elements that it used to create the four categories of service included in its August 1, 1995 price floor filing: (1) Baystate Metropolitan; (2) Baystate Non-Metropolitan; (3) Measured Circle Calling Service; and (4) Business local usage (id.). Instead, the Attorney General states that NYNEX bundled a number of the essential inputs for a competitor's offerings into each of these four categories of services (id.). The Attorney General argues that this bundling of essential inputs has created the possibility of artificially low price floors for these services which could act to deter competitive entry (id.).

The Attorney General concludes that the Department should allow the proposed $38 million aggregate rate decrease to go into effect on September 15, 1995 (id. at 5). The Attorney General states that if an adjustment is necessary after investigation, the Department should prospectively adjust the tariffs (id.).

2. AT&T

AT&T addresses the issues of pricing rule compliance and the correct calculation of price floors by separately addressing each of the services which NYNEX is proposing to change in its July 3rd Compliance Filing (i.e., life-line credit, switched access rates, residence optional calling plan rates, and business local usage rates)

(AT&T Comments at 2-7).

As regards the life-line credit and switched access rates, AT&T states that NYNEX is in compliance with the Department's Price Cap Order (id. at 3-4). Further, AT&T recommends that NYNEX's proposed revisions to M.D.P.U. No. 15 (i.e., the switched access rate reductions) be allowed to go into effect on September 15, 1995 as proposed by NYNEX (id.).

As regards the residence optional calling plan rates, AT&T states that the proposed rate

reductions (1) fly directly in the face of the Price Cap Order, (2) will be clearly anticompetitive, and (3) should be suspended until the Department has conducted a full investigation (id. at 4). AT&T notes two problems with compliance with the pricing rules (id.). First, AT&T states that NYNEX has failed to comply with the Department's directive that it demonstrate that its current rates for such services are not already anticompetitively low (id.). Second, AT&T states that NYNEX has failed to provide price floors for those services which comply with the Department's directives (id. at 5).

AT&T notes four deficiencies with NYNEX's August 1, 1995 price floor filing (id. at 5-7). First, AT&T states that it is "virtually impossible" to follow NYNEX's calculation of its price floors because of the "paucity" of descriptive material submitted in the August 1, 1995 price floor filing (id. at 5). Second, AT&T states that NYNEX has failed to reflect in the price floor calculation any factor incorporating the price that its competitors will have to pay in order to provide service competing with the local exchange component of NYNEX's bundled service offerings (id. at 5-6). Third, AT&T states that NYNEX has failed to compare its price floor, as calculated, to rate elements or the overall service price (id. at 6). Fourth, AT&T states that NYNEX has not only calculated an average revenue figure for purposes of determining compliance with its flawed price floors, but it has failed to include in each of those revenue per minute calculations all of the components of its optional calling plan service offerings (id.).

As regards the business local usage rate, AT&T states that NYNEX failed to calculate an actual price floor in accordance with the Department's directives (id. at 7). AT&T states that there are two deficiencies to the price floor calculation (id.). First, NYNEX has failed to factor into the price floor the price that its competitors must pay to NYNEX for the essential input that

the competitors will need in order to compete for the business local usage services, namely NYNEX's proposed link (id.). Second, AT&T states that NYNEX's price floor calculation for its business local usage rates depends on average revenue per minute calculations (id.).

Finally, AT&T notes four additional issues regarding the proposed tariff changes (id.). First, AT&T states that NYNEX has only submitted a small piece of the total package of price floors and that it is not clear whether the methodology to be employed in its September 15th filing will be consistent with the methodology already submitted (id. at 8). Second, AT&T states that it is unclear what definitions of "service" and "rate element" NYNEX chooses to adopt in its price floor determinations (id.). Third, AT&T states that it is unclear whether, and if so how, NYNEX intends to comply with the Department's determination in the Price Cap Order that wholesale-retail relationships should not be based on averages (id.). Fourth, AT&T states that it is unable to determine the appropriateness of NYNEX's calculation of retail overhead costs as set forth in its August 1, 1995 price floor filing (id.). AT&T concludes that the Department should suspend and investigate the proposed revisions to M.D.P.U. No. 10. (id. at 9).

3. MCI

MCI urges the Department to suspend NYNEX's proposed revisions to M.D.P.U. No. 10 until NYNEX proposes proper service-specific price floors for those services (MCI Comments at 1). MCI states that the price floors that NYNEX has submitted to the Department for those services are deficient in that they incorrectly calculate the "non-access" costs associated with the retail services (id. at 2). Therefore, MCI states that NYNEX's proposed price floors do not accurately state the marginal cost of related overhead for each of its services (id. at 2)

MCI states that NYNEX's proposed price floor for switched access service, M.D.P.U. No 15, does comply with the Price Cap Order and, therefore, should be allowed to go into effect (id. at 2).

4. NECTA

NECTA makes five arguments for suspension of the NYNEX tariffs (NECTA comments at 2-4). First, NECTA states that non-tariffed conduit license fees are not rate elements for price cap purposes, since they are established pursuant to G.L. c. 166, § 25A and, therefore, NYNEX's characterization of conduit license fees as rate elements is inappropriate (id. at 2). Second, NECTA states that it is necessary to determine whether other offsets to tariffed revenues should be made to account for revenue increases in

non-tariffed miscellaneous revenues (id.). Third, NECTA states that NYNEX's compliance filing appears to be based on stale quantities of lines in service and minutes of use (id. at 3). Fourth, NECTA is concerned that pricing issues under investigation in D.P.U. 94-185 not be preempted by NYNEX's compliance filing (id.). Fifth, NECTA states that the July 3rd Compliance Filing does not contain complete price floor data and therefore cannot be fully examined (id. at 5).

NECTA concludes that the July 3rd Compliance Filing be suspended in its entirety (id.).

5. NYNEX

NYNEX responds to the comments of the intervenors by stating that there are two issues before the Department at this stage of the proceeding (NYNEX Reply Comments at 2). NYNEX states that the Department must determine (1) whether there is a need to conduct further investigation, and (2) if further investigation is warranted, whether to allow the proposed tariffs to go into effect pending investigation (id.). NYNEX states that the Department has the clear discretion under G.L. c. 159, §§ 19 and 20 to permit rates to go into effect, even though further investigation may be appropriate (id.).

NYNEX states that "the fact that the computation of price floors raises a number of issues on which there is potential for debate and that further proceedings will be required to resolve all of the issues is self-evident" (id.). NYNEX states that the Department discussed price floors only in broad terms and did not define, in detail, each of the specific inputs or every element that must go into determining price floors, nor did the Department define specific methodologies for calculating key price floor elements (id.). Nevertheless, NYNEX states that its August 1, 1995 price floor filing reasonably responds to the letter and spirit of the Department's Price Cap Order and that further investigation on the price floors does not mean that the initial set of price changes proposed in M.D.P.U. Nos. 10 and 15 should not go into effect (id. at 5).

NYNEX further states that price floors are the only subject that requires further investigation in this docket (id. at 6). NYNEX responds to each of the issues raised by the intervenors concerning other elements of NYNEX's filings: (1) the service quality adjustment to the productivity factor; (2) the classification of charges for attachments of NYNEX's poles and

conduit as "rate elements"; (3) offsets to tariffed revenues; and (4) the service quantity data used in determining revenue effects (id.). NYNEX states that the contentions on these issues either do not affect the computations of price indices made in the July 3rd Compliance Filing or are based on clearly erroneous interpretations of the Price Cap Order.

NYNEX states that all rate reductions should be permitted to go into effect immediately (id. at 14-15). NYNEX states that its customers should receive immediately the benefits of the rate reductions totalling approximately $38 million (id. at 15). NYNEX argues that its July 3rd Compliance Filing and the August 1, 1995 price floor filing established compliance with the pricing rules and presented a reasonable price floor analysis, warranting approval of all rate changes pending further investigation of the price floors (id.).

NYNEX responds to AT&T's contention that approval of the proposed retail rate reductions would be inappropriate because the rates may be anticompetitive, and AT&T's allegation that the record in the Price Cap Order established that the existing rates for residential optional toll calling plans already are below the average access charges that interexchange carriers would have to pay to NYNEX (id. at 16). First, NYNEX states that AT&T's argument ignores that switched access charges are reduced in the July 3rd Compliance Filing, and, therefore, the retail/wholesale relationships it presented in the Price Cap Order are not the relationships that will exist if all proposed rates are approved (id.). Second, NYNEX states that the residence optional calling plan rates that NYNEX proposes to reduce in the July 3rd Compliance Filing were not the subject of AT&T's analysis in the Price Cap Order (id.). Finally, NYNEX states that AT&T's argument that retail rate reductions should be withheld from NYNEX's customers because of its anticompetitive concerns is disingenuous in light of its position, echoed by MCI, that access rate

reductions should be made immediately (id. at 17). NYNEX states that changes in access charges will have no less of a competitive effect in the market than changes in NYNEX retail rates (id.). Therefore, NYNEX concludes that all proposed rate changes should be permitted to go into effect on September 15, 1995 (id. at 18).

IV. ANALYSIS AND FINDINGS

The issues before the Department for determination are (1) whether, based on the record before us, there is sufficient evidence to conclude that NYNEX has complied with the pricing rules and correctly calculated the price floors as directed in the Price Cap Order or whether there is a need to conduct further investigation, and (2) if further investigation is needed on one or both of the above two issues, whether the Department should suspend the rates or allow them to go into effect pending further investigation.

Regarding compliance with the pricing rules and calculation of the price floors, the Department finds that the intervenors have raised sufficient issues to warrant further investigation. The Department notes that NYNEX, itself, agrees that further investigation is warranted on the issue of calculation of the price floors. Accordingly, the Department will set a procedural schedule for the further investigation of both compliance with the pricing rules and calculation of the price floors as directed in the Price Cap Order.

Next, we address the issue of suspension. The Department has been granted broad ratemaking authority over common carriers, including telecommunications companies, pursuant to G.L. c. 159, §§ 19 and 20.[1] In addition, the courts have interpreted the statutory authority of the

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[1] G.L. c. 159, § 20 states in part:

(continued...)

Department under Chapter 159 as allowing the Department great latitude. In Donham v. Public Service Commission, 232 Mass. 309, 313 (1919), the Supreme Judicial Court ("Court") construed St. 1913, c. 784, § 21, the predecessor statute to G.L. c. 159 § 20, as granting the Public Service Commission considerable authority. The Court said that "the scope of the powers conferred by the statute upon the public service commissioners is far-reaching. Subject only to the limitations that the fares, rates and charges must `yield reasonable compensation for the service rendered' and must be `just and reasonable' having relation to `the service to be performed' and must not violate any provision of law, its powers are ample" Id., citing Arlington Board of

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[1](...continued)

> Whenever the department receives notice of any changes proposed to be made in any schedule filed under this chapter which represent a general increase in rates by a common carrier furnishing the service of transmission of intelligence by electricity, it shall notify the attorney general of the same forthwith, and shall thereafter hold a public hearing and make an investigation as to the propriety of such proposed changes after first causing notice of the time, place and the subject matter of such hearing to be published at lease twenty-one days before such hearing in such local newspapers as the department may select. Pending any such investigation and the decision thereon, the department may, by order served upon the common carrier affected, suspend, from time to time, the taking effect of such changes, but not for a longer period than ten months in the aggregate beyond the time when the same would otherwise take effect. After such hearing and investigation, the department may make, in reference to any new rate, joint rate, fare, telephone rental, toll, classification, charge, rule, regulation or form of contract or agreement proposed, such order as would be proper in a proceeding under section fourteen ... If at a hearing involving any proposed decrease in any rate, joint rate, fare, telephone rental, toll or charge demanded by any common carrier, it shall appear to the department that the said rate, joint rate, fare, telephone rental, toll or charge is insufficient to yield reasonable compensation for the service rendered, the department may determine what will be a just and reasonable minimum to be charged, and make an order that the common carrier shall not thereafter demand or collect less than the minimum so prescribed without first obtaining the consent of the department, after a public hearing.

Survey v. Bay State Street Railway,

224 Mass. 463, 469 (1916). Thus, the Department is accorded broad discretion in allowing, suspending and investigating proposed changes to tariffs. See also, AT&T Communications of New England, Inc., D.P.U. 90-24 (1990). In AT&T Communications of New England, Inc., the Department allowed AT&T to put into effect a revision to its tariff pending investigation.

Regarding whether the Department should suspend the tariffs pending investigation, or allow the rates to go into effect pending investigation, we find that, although there are sufficient issues to warrant further investigation, NYNEX has provided substantial evidence in its July 3rd Compliance Filing and the August 1, 1995 price floor filing to warrant allowing the rates to go into effect pending further investigation, to be adjusted prospectively if necessary. Accordingly, the Department will allow tariffs M.D.P.U. Nos. 10 and 15 to go into effect pending further investigation.

V. ORDER

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

ORDERED: That the Department will set a procedural schedule for the further investigation of the propriety of the tariffs M.D.P.U. Nos. 10 and 15, filed with the Department on July 3, 1995, to become effective September 15, 1995, by New England Telephone and Telegraph Company d/b/a NYNEX, and the propriety of the price floor data filed with the Department on August 1, 1995.

By Order of the Department,

_____
Kenneth Gordon, Chairman

_____
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).