D.P.U./D.T.E. 97-18-A

Investigation by the Department of Telecommunications & Energy on its own motion as to the propriety of the rates and charges set forth in the following tariffs: M.D.P.U. Nos. 10 and 15, filed with the Department on December 31, 1996, to become effective January 30, 1997 [Public Access Smartline Service], and M.D.P.U. No. 10 filed January 24, 1997, to become effective February 23, 1997 [elimination of coin rate for local calls] by New England Telephone & Telegraph Company d/b/a/ NYNEX.

ORDER ON MOTIONS FOR RECONSIDERATION
OF ACTION, INC./MASSPIRG AND MCI

I. INTRODUCTION

On March 31, 1997, the Department of Telecommunications & Energy ("Department") issued an Order permitting New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic" or "Company") to remove their tariffs concerning Bell Atlantic's payphones in accordance with § 276 of the Telecommunications Act of 1996 ("Act"). NYNEX Payphone Coin Rate, D.P.U. 97-18.[1] On April 14, 1997, the Department issued a companion Order ("April 14 Order") stating its reasons for allowing Bell Atlantic to detariff its local coin rate.

On April 30, 1997, Action, Inc. and the Massachusetts Public Interest Research Group ("Action, Inc./MASSPIRG") filed a joint petition for reconsideration. On May 6, 1997, MCI Telecommunications Corporation ("MCI") also filed a petition for reconsideration.[2]

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[1] In that Order, the Department vacated a January 29, 1997 Order of Suspension, thereby allowing revisions to Bell Atlantic tariffs, M.D.P.U. Nos. 10 and 15, to take effect on April 1, 1997. The tariff revisions, filed respectively on December 31, 1996 and January 24, 1997, eliminated Bell Atlantic's payphone local coin rate, thereby allowing Bell Atlantic to implement a $.25 rate and implemented Public Access Smartline Service ("PASL").

[2] Without addressing whether Action, Inc./MASSPIRG and MCI have standing to appeal, the Department nonetheless grants Action, Inc./MASSPIRG and MCI's motions to extend the appeal period until 20 days from the date of this Order.

II. STANDARD OF REVIEW

The Department's Procedural Rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within 20 days of service of a final Department Order. The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence.

Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

III. POSITIONS OF THE COMMENTERS

A. Action, Inc./MASSPIRG

Action, Inc./MASSPIRG seeks reconsideration and contends that the Department exceeded its authority by allowing a rate increase without a hearing and without cost allocation evidence. Specifically, Action, Inc./MASSPIRG claims that the Department acted arbitrarily by failing to protect consumers from excessive rates and failing to abide by law and hold public hearings once it suspended the tariff (Motion at 4-5). Moreover, Action, Inc./MASSPIRG states that contrary to the Department's finding, it would take less than six months to investigate Bell Atlantic's cost analysis and Bell Atlantic should be required to file same (id. at 5-6).

Finally, Action, Inc./MASSPIRG argues that since Bell Atlantic asserted a cost of 16.7 cents per local payphone call, there was no justification for the Department to allow a rate of 25 cents per telephone call. Also, Action, Inc./MASSPIRG states that since there is no record evidence on which the Department can reliably determine the cost of a local payphone call, there is no way for the Department to determine whether pay phone rates are subsidized (id. at 7-8).

B. MCI

MCI requests that the Department commence an investigation to determine the appropriate level of subsidies to be reduced from Bell Atlantic's intrastate access rates. MCI

states that the Department violated the requirement of the Act and the Federal Communications Commission's ("FCC") Payphone Orders by not requiring the removal of any subsidies from intrastate switched access rates by April 15, 1997 (Motion at 4-6). MCI also contends that the Department incorrectly found that allowing Bell Atlantic to implement its increase in the coin rate decreased the subsidy that ratepayers were providing for coin services (id. at 7).

Further, MCI argues that the Department's April 14 Order contradicts previous findings that Bell Atlantic may propose an increase in its public and semi-public initial coin rate only at the time of an annual price cap compliance filing (id. at 7-8 citing NYNEX, D.P.U. 94-50 at 219 (1995)). Finally, MCI states that the Department violated due process by (1) suspending Bell Atlantic's tariffs and then failing to allow for intervention and hearings, (2) referring to information in its Order that was not provided to commenters, and (3) relying on Bell Atlantic's reply comments submitted the same day that the Department vacated its suspension of Bell Atlantic's tariffs (id. at 8-9).

IV. ANALYSIS AND FINDINGS

First, the Department will address whether the petitioners have standing to seek reconsideration. The right to file for reconsideration only applies to Department adjudications and then only to "parties" to that adjudication. See G.L. c. 30A, § 1(1) and (3); 220 C.M.R. §§ 1.03(2) and 1.11(10). Contrary to Petitioners' arguments, the Department did not conduct a Chapter 30A adjudication in this proceeding. Although the Department docketed and suspended Bell Atlantic's December 31, 1996 and January 24, 1997 petitions, those actions did not establish this proceeding as an adjudication. The docketing function is merely a filing,

numbering, and tracking system. Specifically, under G.L. c. 159, §§ 19 and 20, the Department has broad discretion to determine the structure of investigations of tariff filings by common carriers, including whether to suspend such filings or allow them to go into effect without suspension. See Boston Gas Co. v. Dept. of Pub. Utils., 368 Mass. 51, 53-57 (1975) (Department suspension orders are not final, appealable decisions, requiring hearing, findings of fact and statement of reasons); see also Donham v. Pub. Serv. Comm., 232 Mass. 309 (1919). The Department also has interpreted its authority to suspend tariffs to include authority to vacate suspensions. NYNEX, D.P.U. 94-50 (May 24, 1994 Interlocutory Order at 14 n.12, 16). In this case, the Department vacated the suspensions without establishing an adjudication. Thus, Action, Inc./MASSPIRG and MCI did not have "party" status and any associated procedural rights. Accordingly, we find that neither Action, Inc./MASSPIRG nor MCI have legal standing to seek reconsideration. Notwithstanding this finding, we will address their arguments.

Both Petitioners contend that before allowing Bell Atlantic to detariff its coin rate, the Department was required to hold hearings, develop a factual record, and allow participation from interested parties, and that failure to do so constituted a violation of due process. Contrary to the Petitioners' claims, the only question that the Department addressed in its April 14 Order was whether to vacate the suspension (and allow the tariffs to take effect) or to continue the suspension and conduct an adjudication. D.P.U. 97-18, at 10-11. After reviewing comments filed by interested persons, the Department determined that it would not be prudent to conduct a resource-intensive adjudication of the coin rate increase and subsidy issues. Id.

Moreover, because this was a request to detariff Bell Atlantic's coin rate only and not a request for a general rate increase, the Department finds that it was not required to conduct evidentiary or public hearings. See G.L. c. 159 §§ 19 and 20.

The Petitioners also contend that once the Department suspended Bell Atlantic's tariffs, it was required to investigate and hold hearings, pursuant to §§ 19 and 20. We disagree. Under certain circumstances, particularly with a request for a general increase in rates, the Department is required to investigate and hold a hearing on such a tariff filing, pursuant to §§ 19 and 20. However, it is the nature of the tariff filing (e.g., a general rate increase) or the Department's determination to conduct an adjudicatory proceeding, that confers certain procedural rights on parties to that proceeding, including (in most cases) the right to a hearing. The mere act of suspending a tariff does not automatically confer on any person the right to participate in an investigation or to obtain a hearing. Furthermore, the Petitioners ignore the fact that the suspension Order, which they contend gave them certain due process rights, was vacated by the Department.

Finally, the Petitioners argue that it was inappropriate for the Department to base its decision on responses to information requests issued to Bell Atlantic by the Department that were not made available to others, and on unsolicited reply comments by Bell Atlantic. Generally, when the Department conducts an adjudication, it is required to provided all parties "an opportunity for a full and fair hearing." See G.L. c. 30A, § 11(4). This includes the right of parties to review and rebut evidence in the possession of the Department or other parties. Id. However, since the Department did not open an adjudication and there were not parties

participating in this matter, the Department was not required to share the responses to information requests with the Petitioners, apart from the requirements of G.L. c. 66 (Massachusetts Public Records Law). See 220 C.M.R. §§ 1.00 et seq.

Also, Petitioners' arguments that the Department should not have relied on Bell Atlantic's reply comments simply because they were filed the day the Order was issued is without merit. The Department finds that in determining whether to open an adjudication, it may consider any timely filed, relevant information it receives regardless of whether the information is filed the same day that an Order is issued.

We next address the Petitioners' arguments that the Department's decision violated substantive state and federal law. MCI argues that the Department violated the Act and the FCC's Payphone Rules by not identifying and removing subsidies from Bell Atlantic's payphone operations, and returning those subsidies to exchange access and switched access customers by April 15, 1997. Contrary to MCI's argument, the Department finds that by allowing Bell Atlantic's tariff revisions to go into effect on April 1, 1997, thus eliminating subsidies as of that date, and by requiring the Company to return those subsidies to customers at the time of the Company's next annual compliance filing, the Department complied with § 276 of the Act and the FCC's regulations implementing that section. See CC Docket Nos. 96-128 and 91-35, Report and Order, FCC 96-388, released September 20, 1996 and FCC 96-439, released November 8, 1996 (collectively, "Payphone Order").[3] The deferral of the return

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[3] As noted in the Department's August 14, 1997 Interlocutory Order in D.P.U. 97-67, (continued…)

of the subsidies from April 15, 1997 until August 15, 1997 in no way harmed Bell Atlantic's ratepayers, since Bell Atlantic was required to give ratepayers a one-time refund of $12 million to reflect this timing difference. See NYNEX, D.P.U. 97-67 (August 14, 1997 Interlocutory Order at 15-20); D.P.U. 97-18, at 11. As stated in the April 14th Order, Bell Atlantic's price cap plan only allows for changes in revenue to be reflected in rates at the time of the annual filings. To have returned subsidies to customers by April 15th would have required the Department to conduct an inefficient, resource-intensive, single-issue rate case.

In addition, MCI argues that by allowing Bell Atlantic to increase its local coin rate prior to the Company's third annual compliance filing, the Department gave Bell Atlantic a "$62 million windfall" and violated Bell Atlantic's price cap plan, which only allows increases in rates at the time of annual filings. These arguments were previously made by MCI in its original comments and addressed by the Department in the April 14th Order. Therefore, the Department finds that this is an attempt by MCI to reargue previously-determined issues. See D.P.U. 97-18, at 10-11.

Finally, Action, Inc./MASSPIRG argues that the Department must continue to investigate Bell Atlantic's increase of its local coin rate, notwithstanding the FCC's then-anticipated deregulation of local coin rates and should open a "market failure investigation,"

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[3](…continued)

MCI and other intervenors have been allowed to challenge whether Bell Atlantic has complied with the FCC's requirements for removing and returning to ratepayers payphone subsidies. NYNEX, D.P.U. 97-67 (August 14, 1997 Interlocutory Order at 15-19).

including an investigation of Bell Atlantic's payphone costs and payphone competition in low-income and rural neighborhoods. Effective October 7, 1997, the FCC deregulated local coin rates, thus allowing payphone providers to charge market-based rates for coin calls. Even if there were credible reasons for investigating Bell Atlantic's coin rates at this time, the Department no longer has the authority to do so. However, we note that the FCC does allow states to petition to re-regulate coin rates, if a state determines that market failures are preventing effective competition. See FCC Payphone Order at ¶¶60-61. The Department finds that should credible evidence come to light which shows the existence of market failures, then the Department will consider conducting such an investigation. But nothing presented here warrants that investigation.

Accordingly, for the above reasons, we find that the Petitioners' arguments do not bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered, nor have the Petitioners shown that the Department's treatment of an issue was the result of mistake or inadvertence. Therefore, we deny the Motions for Reconsideration of MCI and Action, Inc./MASSPIRG.

V. ORDER

Accordingly, after due consideration, it is hereby

ORDERED: That the Motions for Reconsideration filed with the Department on April 30 and May 6, 1997, respectively, by Action, Inc./MASSPIRG and MCI Telecommunications Corporation, be and hereby are denied.

By Order of the Department,

Janet Gail Besser, Acting Chair

John D. Patrone, Commissioner

James Connelly, Commissioner