

D.T.E. 98-18-A

Petition of CTC Communications Corp. for Emergency Relief with Respect to the Alleged
Actions and Omissions of New England Telephone and Telegraph Company d/b/a Bell Atlantic -
Massachusetts

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INTERLOCUTORY ORDER ON BELL ATLANTIC MOTION FOR RECONSIDERATION
OR, IN THE ALTERNATIVE, CLARIFICATION, AND MOTION FOR STAY OF ORDER

I. INTRODUCTION

On February 5, 1998, CTC Communications Corp. ("CTC") filed with the Department of Telecommunications and Energy ("Department") a complaint against Bell Atlantic - Massachusetts ("Bell Atlantic" or "the Company") claiming that Bell Atlantic has been wrongfully refusing to process resale orders submitted by CTC for the assignment of accounts of existing Bell Atlantic customers, unless the customer pays a termination fee to Bell Atlantic. CTC claims that Bell Atlantic's refusal to process the orders violates the Telecommunications Act of 1996 and applicable state law, and is a breach of the resale agreement between CTC and Bell Atlantic. CTC seeks interim injunctive relief and various forms of permanent relief, including an order directing Bell Atlantic to process CTC orders without charging a termination fee. The complaint was docketed as D.T.E. 98-18.¹

The case was duly noticed. Twelve parties moved to intervene. On March 26, the Department conducted a public hearing and a procedural conference. At the procedural conference, the Department sought a statement of stipulated facts from CTC and Bell Atlantic, and sought answers to briefing questions from CTC, Bell Atlantic, and the Attorney General, who was allowed to intervene as a matter of right. Ruling on the other petitions to intervene was deferred pending the resolution of issues unique to the dispute between CTC and Bell Atlantic. CTC and Bell Atlantic provided a stipulation of facts on April 15, 1998. CTC and Bell Atlantic

¹ CTC reiterated its request for relief in a Motion for Specific and Expeditious Emergency Relief filed on March 2, 1998.

provided responses to the briefing questions on April 17, 1998. CTC, Bell Atlantic, and the Attorney General filed replies to the initial responses on April 23, 1998.

On July 2, 1998, the Department issued an Order granting in part CTC's motion for expeditious relief and directing Bell Atlantic "to process orders from CTC that give effect to a valid assignment of contractual rights from a Bell Atlantic end user to CTC in which the essential terms of the original Bell Atlantic contract, including the price for and duration of the service, remain intact . . ." Complaint of CTC Communications Corp., D.T.E. 98-18 (July 2, 1998) ("the July 2 Order"), at 11. On July 9, 1998, Bell Atlantic filed a Motion for Reconsideration and Clarification of the July 2 Order, and a Motion for Stay of the July 2 Order pending the Department's decision on the Motion for Reconsideration and Clarification. On July 14, CTC and the Attorney General filed responses to Bell Atlantic's Motion for Stay. On Monday, July 20, CTC filed a response to Bell Atlantic's Motion for Reconsideration and Clarification.²

In this Order, the Department grants Bell Atlantic's motion for reconsideration on the grounds that the Department gave to Bell Atlantic inadequate notice and opportunity to present evidence and argument before issuing a final order in the case. The Department will, therefore, conduct further proceedings as provided in the body of the Order. During the pendency of the further proceedings, the effect of the Department's July 2 Order will be suspended.

² The Department refers the reader to the July 2 Order for further procedural background and relevant facts.

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 twenty 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).

The Department grants clarification of orders "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 sufficiently ambiguous so as to leave doubt as to its meaning." Boston Gas Company, D.P.U. 93-60-D at 1 (1994); Boston Edison Company, 90-270-A at 3-4 (1992).

Neither the enabling statutes nor the Department's procedural rules provide explicitly for a stay pending reconsideration of a Department order. The Department may grant a stay pending judicial appeal of a Department order in two circumstances. In the first circumstance, the Department takes the following factors into account: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be harmed irreparably absent a stay; (3) the prospect that others will be harmed if the Department grants the stay; and (4) the public interest in granting the stay. Boston Edison Company, D.P.U. 92-130-A at 7, n.7 (1993); Appeal of Robert K.M. Lynch, D.P.U. 88-203-A at 5 (1990). The second circumstance occurs when: (1) the consequences of adjudicatory decisions are far-reaching; (2) the immediate impact upon the parties in a novel and complex case is substantial; or (3) significant legal issues are involved. Stow Municipal Electric Department, D.P.U. 94-176-A at 2 (1996).

III. POSITIONS OF THE PARTIES

A. Bell Atlantic

In its Motion for Reconsideration and Clarification, Bell Atlantic argues that its due process rights were violated because the Department did not conduct an evidentiary hearing (Motion for Reconsideration at 3-5). Bell Atlantic maintains that statements made by the Hearing

Officer at the March 26 procedural conference led it to believe that the Department would act only with respect to the scope of the proceeding, rather than reach a decision on the merits of any of CTC's claims (id.). Bell Atlantic argues that, in reliance on the Hearing Officer's statements, it "addressed its limited comments to the briefing questions with a view toward the objective that the Department had identified -- what would be the scope of the case as it proceed[ed] to an adjudication" (id. at 4). The Department's failure to conduct an evidentiary hearing in the face of such ambiguity in the scope of the proceeding, Bell Atlantic argues, was a violation of G.L. c. 30A, §§ 11(1) and (3), and 220 C.M.R. §§ 1.06(5) and (6) (id.).

Bell Atlantic argues further for reconsideration on the grounds that the Department inadvertently or mistakenly made factual findings that are in conflict with evidence in the record and such further evidence it would have adduced had the opportunity been accorded to it to do so. Specifically, Bell Atlantic claims that provisions of certain tariffs under which end users take service do, in fact, prevent the assignment of end user contracts that the July 2 Order compels Bell Atlantic to allow (id. at 6). Bell Atlantic maintains that the existence of such tariff provisions shows that the Department's finding that "no provision of the Bell Atlantic contracts or the tariffs incorporated therein by reference forbids assignment of the contracts" was a factual error that should be corrected on reconsideration (id.).

Bell Atlantic argues for clarification on the grounds that the July 2 Order is ambiguous with respect to whether CTC may assign contracts that incorporate tariff provisions Bell Atlantic believes prohibit such assignment (id. at 7). Bell Atlantic seeks clarification that it may, in fact, enforce such tariff provisions (id.).

Bell Atlantic also argues that the July 2 Order should be stayed pending reconsideration or clarification. It claims that the factors set forth in Boston Edison Company, supra, are present in this case to a degree sufficient to warrant stay of the July 2 Order (Motion for Stay at 2-5). Bell Atlantic argues that a stay is justified independent of the Boston Edison Company factors on the grounds that this case raises the type of novel, complex, and significant legal issues that were present in the Stow case, such that a stay should be entered pending final resolution of those issues (id.).

B. CTC Communications Corp.

CTC argues that Bell Atlantic's motion for reconsideration should be denied. It argues that there were no procedural errors that violated Bell Atlantic's due process rights because the Department is not required to hold a full trial type hearing as a matter of course and has made several decisions without such hearings, exercising its discretion on a case-by-case basis (CTC Response to Motion for Reconsideration at 4). CTC argues that the parties were put on notice at the March 26 procedural conference that the complaint could be resolved on the basis of briefs submitted, that Bell Atlantic never asked that an evidentiary hearing be held, and that Bell Atlantic cannot make such request for the first time on motion for reconsideration (id. at 5).

CTC also argues that there were no factual errors in the July 2 Order that would justify reconsideration. It argues that the tariff provisions regarding transfer of service, cited by Bell Atlantic in the Motion for Reconsideration, were the fully discussed in briefs to the Department and are inapplicable to the case at hand (id. at 6). CTC argues that it, the Attorney General, and Bell Atlantic itself argued in briefs that tariff provisions dealing with "transfer of service" refer to

a change in the end user of telecommunications services, not to the assignment of rights contemplated in CTC's arrangements with resale customers (id. at 7-8). CTC argues that Bell Atlantic's Motion for Clarification should be denied on the same grounds, that there is no ambiguity in the July 2 Order with respect to the tariff provisions Bell Atlantic now cites (id. at 9).

CTC argues that the Motion for Stay should be denied because the current circumstances do not meet the requirements for a stay set forth in Boston Edison Company (CTC Response to Motion for Stay at 5-8). CTC argues that the harm to it and competitors like it if the stay is granted would be far greater than the harm to Bell Atlantic that might result should the motion for stay be denied (id. at 6-7). CTC also argues that the Stow case is factually distinguishable in that the stay in that case was necessary to protect customers of the party seeking the stay whereas, in this case, a stay would frustrate the wishes of Bell Atlantic customers who would like to assign their customers to CTC (id. at 9).

CTC also argues that the Motion for Stay should be denied because Bell Atlantic has continued its refusal to process orders submitted by CTC and others that take the form of the assignments of rights approved by the July 2 Order (id. at 2, n.1, and Affidavit of Michael Donnellan). CTC argues that Bell Atlantic refusal since July 2 to process orders is in direct contravention of the Department's order and should be subject to serious sanction (id. at 2).

C. The Attorney General

The Attorney General argues that Bell Atlantic's Motion for Stay should be denied because Bell Atlantic has failed to meet its burden on each element of the Boston Edison Company standard for the granting of a stay (Attorney General Response at 1-3). The Attorney General argues that Bell Atlantic cannot show that it would be harmed by the operation of the July 2 Order because it will continue to receive the full retail rate even as it avoids retail costs associated with customers who have assigned to CTC the obligation to pay Bell Atlantic (id. at 2). The Attorney General argues further that the entry of a stay would harm Massachusetts customers by denying them access to the benefits of competition (id.).

IV. ANALYSIS AND FINDINGS

A. Motion for Reconsideration

Bell Atlantic states two grounds for reconsideration. The first is that the Department's conduct of the proceeding deprived Bell Atlantic of the procedural due process rights that are granted by G.L. c. § 30A(11) and 220 C.M.R. § 1.06. Specifically, Bell Atlantic claims that it relied on statements made by the Hearing Officer at the March 26, 1998 procedural conference that led it to believe that the Department would issue a scoping order before it reached the merits of any of CTC's claims. Bell Atlantic argues that it was thereby "denied the right to present evidence (other than the stipulated, undisputed facts) or other arguments that would be germane to the final disposition of the case" (Bell Atlantic Motion for Reconsideration at 4).

The provisions of G.L. c. 30A, §§ 10 and 11 apply to adjudicatory proceedings before state agencies. An "adjudicatory proceeding" is defined in G.L. c. 30A, § 1 as "a proceeding

before an agency in which the rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after an opportunity for an agency hearing." The Department is an "agency" as that term is used in G.L. c. 30A, § 1(2). The legal rights at issue here rise to the level of rights deserving of constitutional protection, which leads to the conclusion that the Department's procedures in this case must comply fully with the requirements of G.L. c. 30A, §§ 10 and 11. General Chemical Corp. v. Department of Environmental Quality Engineering, 19 Mass. App. Ct. 287, 290-292 (Mass. App. 1985). While compliance with those statutory provisions does not always dictate that the Department conduct a full evidentiary hearing, the requirement that parties be given notice of the issues involved and accorded a reasonable opportunity to prepare and present evidence and argument must be scrupulously respected. See, e.g., Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 783-786 (Mass. App. 1980).

In this case, we find that a fair reading of the transcript of the March 26 procedural conference indicates that Bell Atlantic and its counsel could reasonably have believed that the Department would issue an order on the scope of the proceeding before reaching the merits of CTC's claims. See, e.g., Tr. at 59, 66, 70, 77. Further, Bell Atlantic could have reasonably relied on this belief in limiting the depth or breadth of its responses to the Department's briefing questions, or in foregoing the opportunity to request that the Department conduct an evidentiary hearing before rendering a final order in the matter. Inadequacy of notice regarding the issues involved denied Bell Atlantic the reasonable opportunity to prepare and present evidence and argument. Whether arising from oversight or from misunderstanding of the record, the

Department's failure to adequately signal the parties that it would render a final decision without further proceedings did not comport with the requirements of due process. These grounds are sufficient to grant Bell Atlantic's Motion for Reconsideration. Accordingly, we need not reach the merits of the Bell Atlantic Motion for Clarification.

The Department directs the Hearing Officer to schedule and hold a procedural conference on Friday, July 31, 1998, at 10:00 a.m. or as soon thereafter as is practicable to discuss with the parties the nature and scope of the further proceedings to be conducted in this case. All parties and those who have already filed petitions to intervene should attend.

B. Motion for Stay

Bell Atlantic has moved for a stay of the July 2 Order, pending reconsideration. Typically, the granting of reconsideration does not require the Department to stay its order. Customarily, ordering further proceedings is consistent with continued operation of the order (Cambridge Electric Light Company and Commonwealth Electric Company, D.P.U. 86-2D-2/86-3C-2 (1986)), or the relief granted may modify the existing order without the need for further proceedings (Western Massachusetts Electric Company, D.P.U. 87-260-A (1988)). In this case, however, the Department grants reconsideration for the specific purpose of correcting due process defects. Refusing to stay an order that rests upon an infirm procedural foundation would render that right to due process a nullity. The Department finds, therefore, that the circumstances of this case meet all of the requirements for a stay set forth in the Stow case, supra. The consequences of the decision in this adjudicatory proceeding are far-reaching; this is a novel and complex case that will have an substantial and immediate impact upon the parties. Significant

legal issues are involved. Stow Municipal Electric Department, D.P.U. 94-176-A at 2 (1996).

The effect of the July 2 Order will be stayed pending further proceedings before the Department.

The Department recognizes the importance of this case to the parties, however, and will complete its further proceedings with appropriate dispatch.

V. ORDER

Based on the foregoing, it is hereby

ORDERED: That Bell Atlantic's Motion for Reconsideration is hereby GRANTED; and it is

FURTHER ORDERED: That Bell Atlantic's Motion for Clarification is overtaken by events and thereby rendered moot; and it is

FURTHER ORDERED: That Bell Atlantic's Motion for Stay Pending Reconsideration is hereby GRANTED; and it is

FURTHER ORDERED: That a further procedural conference shall be held in this matter on Friday, July 31, 1998, at 10:00 a.m. or as soon thereafter as is practicable at the Department's offices at 100 Cambridge Street, Boston, Massachusetts.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner