COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 22-4 April 26, 2024

CRC Communications LLC d/b/a OTELCO v. Massachusetts Electric Company d/b/a National Grid and Verizon New England Inc.

DEPARTMENT ORDER ON APPEAL OF

HEARING OFFICER'S RULING

I. INTRODUCTION AND PROCEDURAL HISTORY

The appeal before the Department is the latest iteration in a long-running dispute between the parties. On April 14, 2022, CRC Communications LLC d/b/a OTELCO ("OTELCO") filed a pole attachment complaint ("Complaint") against Massachusetts Electric Company d/b/a National Grid ("National Grid") and Verizon New England Inc. ("Verizon") (collectively, "the pole owners"). On October 11, 2022, the Department issued its Final Order ("Order") granting in part and denying in part OTELCO's Complaint. On February 21, 2023, OTELCO filed with the Department a Motion for Enforcement of the Order. After the pole owners filed their responses, OTELCO filed a Motion for Leave to File a Reply ("Reply") and Supporting Evidentiary Material ("New Evidence") along with its Reply and New Evidence on April 18, 2023. The pole owners submitted sur-replies on May 10, 2023.

The Hearing Officer then issued a ruling on August 22, 2023, that is the subject of the present appeal ("Hearing Officer Ruling"). The ruling construed the Motion for Enforcement as a

motion for reconsideration and granted reconsideration of the Department's Order for the limited purpose of clarifying how the parties should implement the Department's Order. The Department also granted OTELCO's Motion for Leave to File a Reply and Supporting Evidentiary Material, as the Department reasoned that the proffered evidence would likely assist the Department in resolving one issue regarding the implementation of the Department's Order. On August 29, 2023, the pole owners appealed ("Appeal") the Hearing Officer Ruling, asserting that the Hearing Officer committed several errors of law. On August 31, 2023, OTELCO filed its response to the pole owners' appeal ("Response to Appeal").

Compliance with the pole attachment statute inherently requires some level of cooperation between pole owners and attachers. In the approximately 18 months since the Department's original Order was issued, the parties have been unable to agree on any compromise to implement the Order, even with the benefit of mediation facilitated by the Department's appointed Settlement Counsel. With the parties unable, or unwilling, to negotiate a practical implementation strategy, the Hearing Officer has sought to provide further guidance on the contested issues, by granting reconsideration and reopening the administrative record for new evidence on a limited basis.

For the following reasons, the Department finds that the Hearing Officer did not err in his ruling and therefore the Department DENIES the pole owner's appeal in its entirety.

II. STANDARD OF REVIEW

To prevail in an appeal before the Department, an appellant has the burden of proving that the Hearing Officer erred in his ruling or that he abused his discretion. *In re Pet. of Choice One Commc'ns of Mass. Inc., Conversent Commc'ns of Mass. Inc., CTC Commc'ns Corp. & Lightship Telecom LLC for Exemption from Price Cap on Intrastate Switched Access Rates as*

Established in D.T.C. 07-9., D.T.C. 10-2, Interlocutory Order on Appeal of Hearing Officer's Rulings Regarding Motions for Leave to Respond to Rebuttal Testimony at 4 (Mar. 21, 2011) (citing *In re Bay State Gas Co.,* D.T.E. 02-73, *Order* at 4 (Feb. 4, 2003)); see *also Pet. of W. Mass. Elec. Co. for approval of its Transition Charge Reconciliation filing for the periods Jan. 1, 2000 through Dec. 31, 2000 & Jan.1, 2001 through Dec. 31, 2001,* D.T.E. 01-36/02-20, Interlocutory Order on Appeal of Hearing Officer Ruling Denying Alternate Power Source Inc.'s Pet. to Intervene at 7 (Jan. 31, 2003).[1] If the appellant fails to establish error or abuse of discretion, the Department must affirm the Hearing Officer's ruling. *Petition of Recipients of Collect Calls from Prisoners at Correctional Institutions in Massachusetts Seeking Relief from the Unjust and Unreasonable Cost of such Calls*, 11-16, Order on Appeal of Hearing Officer's Ruling at 3-4 (Feb. 26, 2014). The Department grants its hearing officers substantial discretion and "will not readily overrule them in the sound exercise of their delegated discretion." *Investigation by the Dep't of Telecomms. & Energy on its own motion pursuant to § 271 of the Telecomms. Act of 1996 into the Compliance Filing of New England Tel. & Tel. d/b/a Bell Atlantic-Mass. as part of its application to the FCC for entry into the in-region interLATA (long distance) tel. market*, D.T.E. 99-271, Interlocutory Order on Joint Petitioners' Appeal of Hearing Officers' Decisions Dated Aug. 19, 1999, at 9-10 (Sept. 30, 1999).

III. POSITION OF THE PARTIES

Appellants do not allege that the Hearing Officer abused his discretion in his Ruling. Thus, the sole question before the Department is whether the Hearing Officer erred in granting reconsideration and reopening the administrative record.

[1] In 2007, the Department of Telecommunications and Energy ("DTE") was divided into the Department of Telecommunications and Cable ("DTC") and the Department of Public Utilities ("DPU"). When interpreting procedural rules, the Department may rely on the analyses of its predecessor agency.

National Grid and Verizon

The pole owners assert four primary reasons for why the Department's Hearing Officer erred in allowing reconsideration and reopening the administrative record. First, the pole owners argue that the Hearing Officer did not have good cause to consider a Motion for Reconsideration filed about three months after the 20-day deadline specified by the Department's regulations in 207 CMR 1.10 (10). Second, the pole owners assert that, even if the Department can consider a late-filed motion for reconsideration, no extraordinary circumstances exist to justify the reconsideration of the Department's Order here. Appeal at 4-5. Third, the pole owners assert that allowing reconsideration of the Order would weaken the finality of the Department's administrative decisions in the future. Appeal at 6-9. Fourth, the pole owners assert the Hearing Officer's ruling fails to comply with the G.L. c. 30A § 14 and violates the pole owners' due process rights as the ruling does not specify a time by which the pole owners may submit rebuttal evidence if other parties submit new evidence regarding the resurvey issue. Appeal at 9.

OTELCO

OTELCO asserts that the Hearing Officer's decision to grant reconsideration and reopen the record was correctly and properly decided for four reasons. First, OTELCO asserts that extraordinary circumstances exist which permit reconsideration of the Department's Order and the reopening of the administrative record. Response to Appeal at 5-7.[2] Second, OTELCO argues that good cause exists to reopen the record for the limited purpose of accepting new evidence on the resurvey issue. Response to Appeal 7-9. Third, OTELCO asserts the Hearing Officer Ruling strengthens compliance with future Department orders. Response to Appeal at 10-11. Fourth,

[2] Additionally, OTELCO argues that the Hearing Officer did not abuse his discretion in the appealed ruling. As the appellants do not allege that the Hearing Officer abused his discretion, the Department does not consider the merits of this argument.

OTELCO asserts that the pole owners due process claims are invalid because the Hearing Officer's ruling has given the pole owners an additional opportunity to submit evidence into the record. Response to Appeal at 10.

IV. ANALYSIS

a. The Hearing Officer has Good Cause to Reconsider the Order.

The Department must decide whether the Hearing Officer erred when he granted reconsideration on a motion that was filed three months after the 20-day deadline from the issuance of the Final Order. According to Department precedent, the party seeking late consideration must show good cause, which is "a relative term and it depends on the circumstances of an individual case. Good cause is determined in the context of any underlying statutory or regulatory requirement and is based on the balancing of public interest, the interest of the party seeking an exception, and the interests of any other affected party." *Global-Naps-Verizon*, D.T.E. 02-21-A at 6 (Feb. 12, 2003); *see also* Order on Mayflower Wind Energy LLC's Motion for Full Participant Status and to Extend the Judicial Appeal Period**,** D.P.U. 22-70-A, at 13 (Mar. 13, 2023).

Here, the pole owners informed OTELCO of the need for additional surveys on November 30, 2022. However, according to National Grid's own timeline of events provided in its response to the Motion for Enforcement, there was continuing communication between the parties after November 30, 2022. *See* National Grid Opposition to Motion for Enforcement at 4-6.

The pole owners assert that the Hearing Officer should not have granted reconsideration of the order because "the companies informed OTELCO of the need for additional surveys during their first discussion of OTELCO's request to box these poles, on November 30, 2022. OTELCO

has offered no basis, let alone good cause, why it delayed an additional three months before filing its motion." Appeal at 6.

The good cause standard makes clear that whether a party has good cause to file a motion for reconsideration after the 20-day deadline is a fact intensive inquiry in which the Department has substantial latitude to reconsider an order as the Department weighs multiple factors and consider how much weight to give each factor. *See Global-Naps-Verizon*, D.T.E. 02-21-A at 6. Here, the parties attempted to resolve their differences over the resurvey issue amicably but were unable to reach a resolution. At an impasse, when OTELCO believed negotiations had broken down and were no longer fruitful, OTELCO sought the intervention of the Department. Based on the Department's review of the record, the Hearing Officer's decision to allow the late-filed motion does not constitute an error. It would have been difficult, if not impossible, for OTELCO to know that the resurvey issue would lead to such disagreement that the Order could not be effectuated within 20 days of the Order's issuance. Therefore, the Department finds that good cause existed for the Hearing Officer to grant reconsideration because OTELCO's delay in filing the motion resulted from OTELCO's efforts to resolve the resurvey conflict directly with the pole owners. It would be unreasonable, and bad policy, to punish OTELCO for continuing to engage with the pole owners for an additional three months before filing its Motion for Enforcement to effectuate the Department's Order.

b. Effectuating an Order can Constitute Extraordinary Circumstances for Granting Reconsideration of an Order

The Department finds that the Hearing Officer did not err in granting reconsideration as effectuating an Order provides a sufficient basis for granting reconsideration. For the following reasons, the pole owners' reliance on several court precedents to assert that effectuating an order is not a ground for reconsideration is misplaced.

The Hearing Officer correctly cited to the *Cablevision* standard that the Department may grant reconsideration at any time where "extraordinary circumstances" dictate that the Department "take a fresh look" at a proceeding after issuing a final order. *Cablevision of Boston, Inc.,* D.T.E. 97-82 at 7 (March 5, 1998). The pole owners misinterpret *Stowe v. Bologna,* which holds that agencies have the right to reconsider their own decisions. 32 Mass. App. Ct. 612, 615, *aff'd* 415 Mass. 20 (1993) (holding that "in the absence of express or perceived statutory limitations, administrative agencies possess an inherent power to reconsider their decisions"). That decision mentions fraud as one of the most compelling situations in which agencies can reconsider their own decision, but fraud is hardly the only reason that agencies can reconsider their own decisions.

In addition, the fact that reconsideration was denied in the *Cablevision* case does not support the pole owners' contention that the Hearing Office erred because *Cablevision* is distinguishable from the present case. *Cablevision* involved an interlocutory order limiting the scope of the proceeding to whether attachment rates were reasonable as opposed to deciding the merits of a discriminatory access claim. *Cablevision* at 1-2. This situation is unrelated to the Hearing Officer's Ruling that addressed whether a Motion for Reconsideration should be granted to effectuate the Department's Order. *See generally,* Hearing Officer Ruling. Therefore, the Department is unpersuaded by the pole owners' reliance on *Cablevision*. Although perhaps not as egregious as a case of fraud, reconsideration for the purpose of effectuating an Order is within the discretion of the Hearing Officer. Therefore, the Hearing Officer did not err as a matter of law in granting reconsideration.

The same logical fallacy with the pole owners' argument applies to their narrow interpretation of *Doe v. Sex Offender Registry Bd.* 99 Mass.App.Ct. 533, 537-538 (2021)

(quoting *Stowe v. Bologna)* (holding that "In the absence of express or perceived statutory limitations, administrative agencies possess an inherent power to reconsider their decisions."). In *Doe,* the appellant alleged that a miscarriage of justice resulted from his lack of legal representation, and the court held that the appellant was not entitled to reconsideration as he did not allege how his lack of counsel had prejudiced him. *Doe* at 540. Miscarriage of justice is a broad concept and neither *Cablevision* nor *Doe* limit the application of that concept to the specific situations detailed in those cases as a valid basis for reconsideration.

Here, the Hearing Officer Ruling correctly noted that agencies have the inherent authority to reconsider a previously issued order. Hearing Officer Ruling at 5. The Department expended substantial resources for six months to adjudicate this proceeding including, but not limited to, the issuance of multiple rounds of information Requests, rulings on various motions and procedural conferences. If there is no resolution to this resurvey issue, the result would be a substantial waste of Department resources because the Order will have little practical effect if the disputes regarding implementation of the Order cannot be resolved. Additionally, it would be a tremendous waste of Department resources to require OTELCO to file a new pole attachment complaint over the resurvey issue, as the pole owners suggest. The Department would need to begin an entirely new proceeding over one implementation issue. For these reasons, the Hearing Officer did not err in holding that effectuating the Department's Order constituted a valid ground for reconsideration.

c. Reconsideration Will Not Adversely Affect the Finality of Department Orders

The Massachusetts Supreme Judicial Court ("SJC") has held that the "finality of administrative decisions is a significant concern – significant to the parties, the agency and to the public served by the agency." *Alliance to Protect Nantucket Sound Inc. v. Department of Pub.*

Utilis., 461 Mass 190, 195 (2011). The SJC clearly encourages finality in the administrative process to ensure that administrative proceedings are not endless, but the importance of finality is not the only factor an agency must consider. "While each agency's decision to reopen a proceeding must be considered in the specific context of the circumstances presented and statutory scheme involved, factors generally to be weighed by the agency include the advantages of preserving finality, the desire for stability, the degree of haste or care in making the first decision, timeliness, and the specific equities involved." *Doe v. Sex Offender Registry Bd.,* 478 Mass. 454, 458 (2017). Furthermore, the Massachusetts Appeals Court has made clear that agencies have inherent power to reopen their concluded proceedings in compelling situations as justice may require. *Covell v. Department of Social Services*, 42 Mass.App.Ct. 427, 433 (1997).

Here, the pole owners assert that reconsidering this Order will adversely affect the finality of future Department Orders. This argument lacks merit for the following reasons. First, contrary to the pole owners' assertion, the Department finds that not granting reconsideration would have more seriously undermined the finality of the Department's future orders. If an order cannot be effectuated, it would weaken the finality of Department orders as parties could disregard the provision of an order they do not like with no consequences. Furthermore, the Hearing Officer Ruling simply holds that, when a dispute arises that prevents an order from being effectuated, the Department has the right to reconsider its order.

Second, the pole owners' argument belies the reality of the Department's adjudicatory proceedings. The Department rarely addresses motions for reconsideration. Implementation of the Department's Order, and the pole attachment statute itself, relies on cooperation among parties as they enter into a rental relationship. This cooperation is a unique feature of pole complaints and is not necessary in the majority of the Departments docketed proceedings. Much

of the Department's current dockets involve regulatory approval of individual companies. In the Department's experience, post-order motions are uncommon.

Third, the Hearing Officer Ruling was narrowly tailored to provide further guidance on implementing the Order; it did not permit OTELCO to raise claims "which are not related to the implementation of the Department's October 11, 2022, Order." Order at FN1. The Hearing Officer's Ruling only relates to issues that are still actively disputed by the parties. There were numerous issues addressed in the Order that the Hearing Officer did not grant reconsideration of, for example, the lowest attachment policy of Verizon. This situation demonstrates that the Department has narrowly tailored its Hearing Officer Ruling to only those issues that merit reconsideration.

Finally, reconsideration was the appropriate procedural decision to promote administrative efficiency. As the dispute between the parties still relates to the same underlying set of pole applications, and the evidentiary record of this proceeding is relevant to the Department's examination of disputed issues, the Hearing Officer's Ruling promotes administrative efficiency.

Therefore, the Hearing Officer did not err when considering the issue of the finality of administrative orders.

d. The Hearing Officer Ruling did not Violate the Massachusetts Administrative Procedure Act ("APA") or the Pole Owners' Due Process Rights

The pole owners argue that the Hearing Officer's ruling does not specify when the pole owners may offer rebuttal evidence or argument if OTELCO or another party offers evidence in response to the Hearing Officer Ruling. Appeal at 9. The pole owners specifically cite M.G.L. c. 30A § 11(1) ("Reasonable notice of the hearing shall be accorded all parties and shall include statements of the time and place of the hearing. Parties shall have sufficient notice of the issues

involved to afford them reasonable opportunity to prepare and present evidence and argument.") and § 11(3) ("Every party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence.").

The Department holds that no APA violation has occurred. The Hearing Officer's ruling did not prohibit the pole owners from responding to any evidence that is presented by other parties in response to the Hearing Officer Ruling. The Hearing Officer acted reasonably in not scheduling later procedural steps in this proceeding, as no other parties besides the pole owners may choose to submit evidence. The pole owners' argument merely relates to potential future violations of the APA and is premature. For these reasons, no APA violation has occurred.

Finally, the pole owners briefly mention a due process concern which is premature and therefore without merit. The United States Supreme Court has made clear that due process "is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), citing *Morrissey v. Brewer*, 408 U.S. 471, 481, (1972). "The fundamental requirement of due process is notice and the opportunity to be heard 'at a meaningful time and in a meaningful manner,' ... although exactly what that entails 'varies with context.'" *Duarte v. Comm'r of Revenue*, 451 Mass. 399, 412 (2008) (internal citations omitted).

As explained above, the pole owners' arguments relate to future due process violations that might occur if the Hearing Officer does not take certain procedural steps. As the pole owners' due process arguments are based on mere speculation about a future procedural schedule, these arguments are premature and without merit. For these reasons, the Hearing Officer's ruling did not violate the pole owners' due process rights.

V. CONCLUSION

For the foregoing reasons, the Hearing Officer did not err in granting reconsideration or reopening the administrative record regarding the resurvey issue. The Department therefore DENIES the pole owners' appeal, in its entirety.

VI. ORDER

Accordingly, after due notice, opportunity to be heard, and consideration, the Department hereby:

1. DENIES the pole owners' appeal,
2. LIFTS the stay which was in effect during the pendency of this appeal, and
3. DIRECTS the Hearing Officer to prepare a new procedural schedule to resolve this matter expeditiously.

By Order of the Department,

Karen Charles
Commissioner

RIGHT OF APPEAL

Pursuant to G.L. c. 25, § 5, and G.L. c. 166A, § 2, an appeal as to matters of law from any final decision, order or ruling of the Department may be taken to the Supreme Judicial Court for the County of Suffolk by an aggrieved party in interest by the filing of a written petition asking that the Order of the Department be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Department within twenty (20) days after the date of service of the decision, order or ruling of the Department, or within such further time as the Department may allow upon request filed prior to the expiration of the twenty (20) days after the date of service of said decision, order or ruling. Within ten (10) days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court for the County of Suffolk by filing a copy thereof with the Clerk of said Court. Appeals of Department Orders on basic service tier cable rates, associated equipment, or whether a franchising authority has acted consistently with the federal Cable Act may also be brought pursuant to 47 C.F.R. § 76.944.