D.T.E. 98-57

Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in the following tariffs: M.D.T.E. Nos. 14 and 17, filed with the Department on August 27, 1999, to become effective on September 27, 1999, by New England Telephone Telegraph Company d/b/a Bell Atlantic-Massachusetts.

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ORDER GRANTING BELL ATLANTIC'S MOTION FOR EXTENSION; GRANTING, IN PART, AND DENYING, IN PART, BELL ATLANTIC'S REQUEST TO DEFER DATE OF COMPLIANCE AND EXTENSION OF JUDICIAL APPEAL PERIOD; AND DENYING BELL ATLANTIC'S MOTION TO REOPEN

I. INTRODUCTION

On March 24, 2000, the Department of Telecommunications and Energy ("Department") issued its decision in the above-referenced docket ("Order"). In that Order, the Department rejected proposed Tariff No. 17 and directed New England Telephone and Telegraph d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic") to file, within four weeks, a Compliance Filing consistent with the findings contained in our Order. On April 13, 2000, Bell Atlantic filed the following motions: Request to Defer the Date for Compliance and Extension of the Judicial Appeal Period ("Request"); a Motion for Extension of Time ("Motion for Extension"); a Motion to Reopen; and a Motion for Reconsideration and Clarification ("Motion for Reconsideration") (collectively, "Motions"). On April 21, 2000, Bell Atlantic filed a Compliance Filing. However, the filing was not complete. Bell Atlantic indicated that cost studies were omitted since additional time was needed to complete them, and that changes to certain tariff provisions that were directed by the Order were not made pending the Department's review of those matters raised in its Motions.

On April 25, 2000, Rhythms Links, Inc. ("Rhythms") and Covad Communications Company ("Covad"), jointly, and MCI WorldCom, Inc. ("MCIW"), individually, filed

comments in opposition to the Request and Motion for Extension (respectively, "Rhythms/Covad's April 25 Opposition" and "MCIW's April 25 Opposition"). On May 1, 2000, RCN-BecoCom, LLC ("RCN") and AT&T Communications of New England, Inc. (AT&T) filed comments in opposition to the Motion for Reconsideration, whereas Rhythms and Covad, jointly, and MCIW, individually, filed their opposition to the Motion for Reconsideration and Motion to Reopen ("Rhythms/Covad's May 1 Opposition" and "MCIW's May 1 Opposition").

On May 17, 2000, Bell Atlantic filed compliance tariff provisions for collocation at remote terminals ("May 17 Compliance Filing"). On May 19, 2000, Bell Atlantic submitted compliance tariff provisions, including cost studies, that were associated with its Motion for Extension ("May 19 Compliance Filing"). The Department suspended, for further investigation, the April 21 and May 17 filings until July 17, 2000. In this order, we address Bell Atlantic's Motion for Extension, Request and Motion to Reopen.

II. DISCUSSION

A. Motion for Extension of Time

1. Positions of the Parties

a. Bell Atlantic

Bell Atlantic seeks a four-week extension beyond the compliance date set forth in the Department's Order to complete the cost studies and to develop certain provisioning intervals that were required by the Order. Specifically, Bell Atlantic states that additional time is needed to: (a) revise existing collocation cost studies and develop new costs for microwave and adjacent collocation; (b) develop tariff provisions and accompanying costs for collocation at remote terminals; (c) develop transaction-based non-recurring charges for Extended Enhanced Link ("EEL") testing; (d) revise the Site Survey/Report cost study; (e) develop costs supporting Bell Atlantic's proposed retention rate for information calls placed by competitive local exchange carrier ("CLEC") customers; (f) develop tariff language and accompanying costs for the services identified in RR-DTE-23; and (g) develop intervals for OC-3 and OC-12 facilities for quantities that Bell Atlantic is currently able to provision (Motion for Extension at 2).

Bell Atlantic argues that good cause exists for an extension since it will need to convene a diverse group of personnel, develop service and/or technical descriptions, and prepare cost information (id.). Bell Atlantic indicates that the additional time will assure that the responsible personnel can perform the required work completely and accurately (id.).

b. CLECs

The CLECs oppose Bell Atlantic's Motion for Extension of Time to file portions of its Compliance Filing dealing with EEL and/or collocation (MCIW's April 25 Opposition at 2-3; Rhythms/Covad's April 25 Opposition at 3). The CLECs state that Bell Atlantic has

provided no reason why it should be permitted to withhold from its competitors collocation servicing arrangements that have been ordered by the Department (MCIW's April 25 Opposition at 3; Rhythms/Covad's April 25 Opposition at 3). The CLECs note that Bell Atlantic had three weeks prior to the filing of the present motion to prepare its compliance filing and has been on notice for months that it would be required to provision, tariff and cost-out additional collocation serving arrangements in connection with the Advanced Services Order[(1)] issued by the Federal Communications Commission ("FCC") (MCIW's April 25 Opposition at 3; Rhythms/Covad's April 25 Opposition at 3). The CLECs argue that nowhere in its Motion for Extension does Bell Atlantic explain why an additional four weeks is needed for any single or combination of the seven items listed in its request for extension (MCIW's April 25 Opposition at 3; Rhythms/Covad's April 25 Opposition at 3). The CLECs assert that Bell Atlantic, in effect, is holding local competition hostage to its own schedule for compliance with the Department's Order and that once Bell Atlantic files its cost materials, more delay will ensue to review that material (Rhythms/Covad's April 25 Opposition at 3-4).

If the Department finds that Bell Atlantic should be afforded additional time to submit cost information, MCIW contends that this should not delay the submission of compliance tariffs or the availability of new services to CLECs (MCIW's April 25 Opposition at 3-4). MCIW insists that CLECs should be permitted to obtain new services such as EEL and collocation without further delay, subject to true-up, if necessary (id. at 4).

2. Standard of Review

For good cause shown, the Department has the discretion to extend time limits prescribed or allowed by its Procedural Rules. See 220 C.M.R. 1.02(5). The Department's "good cause" standard provides that:

Good cause 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 a balancing of the public interest, the interest of the party seeking an exception, and the interests of any other affected party.

Nunnally d/b/a L & R Enterprises, D.P.U. 92-34-A at 3 (1993), citing Boston Edison Company, D.P.U. 90-335-A at 4 (1992).

3. Analysis and Findings

In effect, due to the passage of time since the Motion for Extension was filed, the additional time sought has already been allowed. In fact, Bell Atlantic filed tariff pages for collocation at remote terminals on May 17, 2000, and, on May 19, 2000, Bell Atlantic submitted what appears to be the remaining compliance tariff pages for which it sought an extension. Moreover, the Hearing Officer has set a schedule for comments and reply comments on the April 21, May 17 and May 19 Compliance Filings. Thus, we need not

take formal action on the Motion for Extension since all tariff pages have been submitted and are in the process of being reviewed. The Motion for Extension is moot.

B. Deferral of Date for Compliance and Extension of the Judicial Appeal Period

1. Positions of the Parties

a. Bell Atlantic

Bell Atlantic requests that the Department defer the requirement that Bell Atlantic file compliance tariffs on tariff provisions relating to its Motion for Reconsideration pending the decision by the Department on the Motion for Reconsideration (Request at 1). Bell Atlantic states that the deferral would allow it to make changes to those portions of the tariff that would be affected by a Department ruling on the Motion for Reconsideration (id.). Specifically, Bell Atlantic seeks reconsideration on a number of collocation issues including commingling of equipment, security measures, off-site adjacent arrangement, virtual to cageless conversion, and cable racking and cross-connections (id.). Bell Atlantic's Motion for Reconsideration also addresses the following: (1) application of one unbundled local switching charge for an intra-office call; (2) use of Individual Cost Basis charges for microwave collocation; (3) rearrangement of facilities; (4) establishment of interoffice construction intervals; (5) commingling of Special Access and EEL services; (6) single service order invoice provisioning; (7) application of collocation requirements on EEL arrangements; and (8) incorporation of the Department's MediaOne and Greater Media arbitration decision into Tariff No. 17 (id. at 1-2).

Bell Atlantic argues that, to minimize confusion and unnecessary disruption, it should not be required to file compliance tariff provisions associated with these issues until the Department rules on the Motion for Reconsideration (Request at 2). Bell Atlantic states that deferring the compliance filing avoids later changes arising from a subsequent Department decision, and is a more efficient and reasonable manner for the Department to proceed (id.).

Last, to preserve its appeal rights if the Department does not grant the relief requested, Bell Atlantic also requests that the Department extend the judicial appeal period pending a ruling on its Motion for Reconsideration (Request at 2).

b. CLECs

The CLECs oppose Bell Atlantic's request to defer filing compliance tariff provisions on those issues raised in Bell Atlantic's Motion for Reconsideration until the Department rules on that motion (MCIW's April 25 Opposition at 4; Rhythms/Covad's April 25 Opposition at 4). The CLECs maintain that the request is anti-competitive since Bell Atlantic, in effect, is attempting to withhold collocation offerings requested by competitors for an indeterminate amount of time (id.). The CLECS insist that Bell Atlantic should not be allowed to circumvent the fact that a filing for reconsideration does not stay its obligations to comply with the Department's Order (id.).

The CLECs also argue that, in light of the lack of merit in the Motion for Reconsideration, Bell Atlantic's deferral request is unwarranted (MCIW's April 25 Opposition at 5; Rhythms/Covad's April 25 Opposition at 5). The CLECs assert that: 1) Bell Atlantic has misread and misapplied the FCC's GTE Decision[(2)]; 2) Bell Atlantic's reasoning was rejected in MCI v. US West, 2000 WL 232273 at 5, 6; and 3) Bell Atlantic has overlooked the Department's independent state authority to regulate the terms and conditions of collocation offerings (MCIW's April 25 Opposition at 5; Rhythms/Covad's April 25 Opposition at 5).

The CLECs contend that if Bell Atlantic is permitted to defer filing compliance tariff provisions on those issues for which it seeks reconsideration, Bell Atlantic will have the incentive to file for reconsideration of Department orders on as many issues as possible to delay the time it must comply with an order (MCIW's April 25 Opposition at 8; Rhythms/Covad's April 25 Opposition at 7). Rather, the CLECs urge the Department to deny Bell Atlantic's request with respect to tariff language for EEL and collocation services and to order that these services be made available subject to true-up and revision after the Department's review of the cost study compliance filings (id.).

The CLECs did not oppose Bell Atlantic's request to extend the judicial appeal pending the Department's ruling on the Motion for Reconsideration provided that the Department provides an equal extension to other parties to this proceeding (Rhythms/Covad's April 25 Opposition at n.4; MCIW's April 25 Opposition at n.4). The CLECs recommend that the Department extend the appeal deadline by ten days following the issuance of its decisions on Bell Atlantic's Motion for Reconsideration and AT&T's Motion for Clarification (id.).

2. Standard of Review

a. Request to Defer Date of Compliance

Department regulations define three types of motions that may be filed by the parties after a final Order of the Department: recalculation; reconsideration; and extension of the judicial appeal period. See 220 C.M.R. § 1.11. A final Department Order remains in effect even when a party files one of these three motions. Therefore, a party must request and be granted a stay of a Department Order if the Department's Order is not to become effective while a post-Order motion is addressed by the Department.

Neither the enabling statutes nor the Department's procedural rules provide explicitly for a stay pending reconsideration of a Department Order. See CTC Communications Corp., D.T.E. 98-18-A at 4 (1998) (stay granted pending motion for reconsideration due to procedural defects). The Department may grant a stay pending a 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 a stay. Boston Edison

Company, D.P.U. 92-130-A at 7 (1993). 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 (1998).

b. Extension of Judicial Appeal Period

General Law c. 25, § 5 provides, in pertinent part, that a petition for appeal of a Department order must be filed with the Department no later than 20 days after service of the order "or within such further time as the commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling." See also 220 C.M.R. § 1.11(11). The 20-day appeal period indicates a clear intention on the part of the legislature to ensure that the decision to appeal a final order of the Department be made expeditiously. Nunnally, D.P.U. 92-34-A (1993); see also Silvia v. Laurie, 594 F. 2d 892, 893 (1st Cir. 1978).

The Department's procedural rules state that reasonable extensions shall be granted upon a showing of good cause. 220 C.M.R. § 1.11(11). The Department has stated that good cause is a relative term and depends on the circumstances of an individual case. Boston Edison Company, D.P.U. 90-335-A at 4 (1992). Whether good cause has been shown "is determined in the context of any underlying statutory or regulatory requirement, and is based on a balancing of the public interest, the interest of the party seeking an exception, and the interests of any other party." Id. The filing of a motion for extension of the judicial appeal period automatically tolls the appeal period for the movant until the Department has ruled on the motion. Nandy, D.P.U. 94-AD-4-A at 6 n.6 (1994); Nunnally, D.P.U. 92-34-A at 6 n.6 (1993).

3. Analysis and Findings

a. Request to Defer Compliance

When we issued our Order, the Department was aware that the FCC's GTE Decision had the potential to impact our findings; however, time constraints prevented us from evaluating the full impact of the GTE Decision prior to issuance of the Order. Currently, the Department is reviewing the GTE Decision in conjunction with Bell Atlantic's Motion for Reconsideration. The merits of Bell Atlantic's Motion for Reconsideration have yet to be determined. At this time, the Department cannot preclude the possibility of revisions to the Order since the Order may have included determinations based upon FCC rules that the Court of Appeals vacated and remanded to the FCC for further consideration. With this in mind, we turn to Bell Atlantic's request to defer filing compliance tariff provisions on those issues raised in its Motion for Reconsideration.

The Department finds that Bell Atlantic's deferral request constitutes a motion to stay portions of our March 24th Order pending resolution of Bell Atlantic's Motion for Reconsideration and, thus, review the Request accordingly. First, in its Request, Bell Atlantic has not argued, nor do we find, that procedural defects exist which would warrant a stay of our Order. Second, although we find the reasons provided by Bell Atlantic in its Request insufficient on their own, we must agree that requiring the filing of compliance tariff provisions associated with the issues raised in Bell Atlantic's Motion for Reconsideration prior to a ruling on that motion could result in significant administrative inefficiencies to the Department as well as to Bell Atlantic and CLECs; and, thus, granting the stay is consistent with the public interest. In addition to administrative confusion absent a stay, we find that this case presents complex legal issues, including the interplay between state and Federal authority, which warrant granting a stay.

Thus, the Department concludes that deferral of the filing of compliance tariff provisions for issues raised in the Motion for Reconsideration is appropriate. Moreover, should the Department decide to revise conclusions in our Order after review of the Motion for Reconsideration, the Department concludes that the CLECs' proposal to require Bell Atlantic to make the EEL and collocation services available, subject to true-up and revision, is not practical. The Department determines that only a single item for which reconsideration is being sought -- the application of one unbundled local switching charge for an intra-office call -- could be made available, subject to true-up, without creating unnecessary confusion. Accordingly, the Department grants Bell Atlantic's Motion to Defer Compliance until the Department renders a decision on the Motion for Reconsideration, subject to the exception of the application of one unbundled local switching charge for an intra-office call. The Department directs Bell Atlantic to file compliance tariff provisions for the application of one unbundled local switching charge for an intra-office call within seven days of this ruling.

The Department emphasizes that our decision to allow a deferral to the compliance filing should not be regarded as routine. In the event the Department revises its Order, logistical problems would arise if we had not deferred the compliance filing. Thus, the unique circumstances surrounding this case calls for the action we take here. We do not intend to grant deferrals as a matter of course when a motion for reconsideration of an order is filed.

b. Extension of Judicial Appeal Period

The Department finds that a 20-day extension of the judicial appeal period will not unreasonably delay the finality of this proceeding nor prejudice any parties. Accordingly, we grant Bell Atlantic's motion for extension of the judicial appeal period. An appeal of the Department's decision on Bell Atlantic's Motion for Reconsideration must be filed within 20-days of the issuance of that decision.

We note that the CLECs' urged the Department to grant a similar extension to other parties, namely AT&T which filed a Motion for Clarification. However, because AT&T

did not file a request for extension of the judicial appeal period, we do not approve the CLECs' suggestion. See Eastern Energy Corporation v. Energy Facilities Siting Board et. al., 419 Mass. 151, 643 N.E.2d 428 (1994) (The Supreme Judicial Court affirmed the dismissal, as untimely, of an appeal filed by a party who neither requested nor received an extension of the appeal period. The Court held that granting an extension of the appeal period to certain parties did not extend the appeal period for all parties).

C. Motion to Reopen

1. Positions of the Parties

a. Bell Atlantic

Bell Atlantic contends that there were two issues decided by the Department on which the record was not fully developed (Motion to Reopen at 1). First, Bell Atlantic claims that no party introduced evidence regarding the square footage necessary to accommodate a twelve-inch deep or smaller equipment bay and, thus, argues that the record lacks sufficient evidentiary support for a seven square foot minimum space allocation for cageless collocation bays (id. at 2). Bell Atlantic states that if its Motion to Reopen is granted, it will introduce evidence explaining the reasons that a cageless collocation arrangement housing CLEC equipment that is twelve-inches deep or smaller would require at least eleven square feet of floor space per equipment bay (id.).[(3)]

Second, Bell Atlantic requests that the Department reopen the record on the issue of the changes to the ordering process that would allow CLECs to order all elements of an EEL arrangement in a single service order (Motion to Reopen at 2). Bell Atlantic states that it did not introduce evidence regarding the operation of its ordering systems for EEL arrangements and that this was in part due to the fact that the single service and sequential provisioning issues were raised for the first time in testimony submitted in response to Bell Atlantic's EEL Tariff filing (id.). Therefore, Bell Atlantic claims that there is no evidence in the record to explain the substantial technical constraints that drive Bell Atlantic's decision to require that a single service be ordered on each service order and that would hamper Bell Atlantic's ability to comply with the Department's Order (id.). Should its Motion to Reopen be granted, Bell Atlantic states that it would submit evidence explaining that the existing ordering systems use guidelines that are the product of industry consensus and that Bell Atlantic cannot unilaterally change these systems through its standard control processes (id. at 3).

Bell Atlantic maintains that admission of the additional information into the record will allow the Department to reconsider its earlier decision on these two issues with the benefit of a complete record (id.). Furthermore, Bell Atlantic states that this information would benefit the public interest, as well as all the parties, in assuring that Department decisions are based on record evidence (id.).

b. CLECs

The CLECs insist that parties do not have the right to reopen the record after a decision has been rendered (MCIW's May 1 Opposition at 18; Rhythms/Covad's May 1 Opposition at 19). In support of their claim, the CLECs point to the limitations on the Department's ability to reopen a hearing to those situations where a decision has not yet been rendered (id.).

2. Standard of Review

The Department's procedural rule on reopening hearings states, in pertinent part, that "[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause." 220 C.M.R. § 1.11(8). Good cause for purposes of reopening has been defined as a showing that the proponent has previously unknown or undisclosed information regarding a material issue that would be likely to have a significant impact on the decision. Machise v. New England Telephone and Telegraph Company, D.P.U. 87-AD-12-B at 4-7 (1990); Boston Gas Company, D.P.U. 88-67 (Phase II) at 7 (1989); Tennessee Gas Pipeline Company, D.P.U. 85-207-A at 11-12 (1986).

3. Analysis and Findings

If parties are allowed to reopen the hearing record after a final Department decision has been rendered, parties could undermine the administrative process by withholding pertinent evidence with the intent to seek reopening of the record for submission of such evidence only if an adverse decision is rendered. Consequently, parties could not rely upon the record with confidence because of the possibility that additional evidence would later be allowed into the record. A procedure that would allow such manipulation of the process is inconsistent with the Department's interest in conducting a proceeding in a orderly and efficient manner and thwarts the incentive to fully develop the record prior to a decision being rendered. Hence, the Department concludes that a party may not, absent extraordinary circumstances and a showing of good cause, reopen the hearing record after a decision has been rendered.[(4)]

Without addressing whether extraordinary circumstances exist to reopen the record in the present case, the Department dismisses Bell Atlantic's Motion to Reopen for failure to demonstrate good cause. Bell Atlantic was on notice of the two issues raised in its Motion to Reopen and was accorded a reasonable opportunity to prepare and present evidence and argument on those issues. For instance, the record shows that CLECs challenged Bell Atlantic's proposed fifteen square feet allocation of floor space for cageless arrangements and urged the Department to reduce this figure to seven square feet in pre-filed testimony filed on November 5, 1999, during the evidentiary hearings held on December 15 and December 17, 1999, and on briefs filed on February 10, 2000 (Exh. MCIW-2, at 3-4; Tr. 3, at 484, 531; Tr. 5, at 978; MCIW Brief at 53; Rhythms/Covad Brief at 9). Despite ample notice and opportunity to do so, Bell Atlantic did not present evidence that the reduction to seven square feet was not possible. Rather, Bell Atlantic argued that the

fifteen square feet floor space allocation was needed to accommodate equipment larger than twelve inches in depth or to allow CLECs to enclose their equipment in a locked cabinet (Exh. BA-MA-6, at 10; Tr. 3, at 480-481; Bell Atlantic Reply Brief at 35-36). The Department finds it unreasonable and unnecessary to allow Bell Atlantic to present additional evidence on an issue that was fully litigated.

Likewise, the record is also clear that at least one CLEC in pre-filed testimony opposed the inability to order an entire EEL arrangement in a single service order (Exh. MCIW-32, at 13; MCIW Brief at 31-32). In addition, the Department directly questioned Bell Atlantic's witness during the hearings on the service order requirements for EEL arrangements and on the submission of separate service orders for each element (Tr. 6, at 1156-1157). In its Reply Brief, Bell Atlantic responded to MCIW's arguments for a single service order for EEL arrangements and raised concerns about additional costs that would be incurred if it were to adopt a single service order EEL policy (Bell Atlantic Reply at 13-14). At no time did Bell Atlantic raise any industry restrictions on a single service order policy. The Department finds it inappropriate for Bell Atlantic to make such an argument now.

IV. ORDER

Accordingly, after review and consideration, it is

ORDERED: That Bell Atlantic's Motion for Extension of Time is hereby GRANTED; and it is

FURTHER ORDERED: That Bell Atlantic's Motion to Defer the Date of Compliance and to Extend the Judicial Appeal Period, is GRANTED in part and DENIED in part; and it is

FURTHER ORDERED: That Bell Atlantic's Motion to Reopen is DENIED; and it is

FURTHER ORDERED: That Bell Atlantic comply with all other directives stated herein.

By Order of the Department,

James Connelly, Chairman

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, 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 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).

1. - - " "

2. - - " "

3.

4. We note that in Machise v. New England Telephone and Telegraph Company, D.P.U. 87-AD-12-B (1990), New England Telephone and Telegraph Company opposed the Motion to Reopen filed by Mr. Machise, arguing that 220 C.M.R. § 1.11(8) implies that a motion to reopen is appropriate only to provide an opportunity to reopen hearings before a decision is rendered by the Department. Mr. Machise's Motion was denied by the Department.