

D.T.E. 98-57

October 22, 1999

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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INTERLOCUTORY ORDER ON J. JOSEPH LYDON'S APPEAL

OF HEARING OFFICER RULING GRANTING

COVAD COMMUNICATIONS' MOTION PRO HAC VICE

## I. INTRODUCTION

This is an order addressing the Appeal filed by Mr. J. Joseph Lydon ("Mr. Lydon") of a portion of the Hearing Officer ruling issued in 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 September 27, 1999, by New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, D.T.E. 98-57 (June 28, 1999) ("Covad Ruling"), in which the Hearing Officer granted the Petition to Intervene, Petition to File a Late Petition, and Motion Pro Hac Vice (collectively, "Covad Motions") filed by Covad Communications Company ("Covad"). The Appeal refers solely to the granting of the Motion Pro Hac Vice ("Davis Motion") filed by Ms. Susan Jin Davis of Covad.

On January 4, 1999, Mr. Lydon filed a petition to intervene as a full intervenor on behalf of all shareholders of Bell Atlantic stock. On January 8, 1999, during the course of a procedural hearing, the Hearing Officer granted Mr. Lydon's petition to participate in this case only as a limited participant, not as a full intervenor, and limited his participation status to acting on his own behalf, not on behalf of Bell Atlantic shareholders (Tr. at 28-29). The Hearing Officer limited Mr. Lydon's participation rights to receiving documents filed by the Department and the parties and to participating in the public hearings (id.). Mr. Lydon did not appeal that Hearing Officer's ruling.

On April 15, 1999, the Department issued a notice of public hearing and procedural conference which set a May 10, 1999, deadline for the filing of petitions to intervene. On June 18, 1999, Covad filed the Davis Motion, which asserted that Covad's counsel, Ms. Susan Jin Davis, is a member in good standing of the Pennsylvania Bar and has represented Covad before other state regulatory agencies in Maryland, New Jersey, New York, Pennsylvania, and Virginia (Davis Motion at 1). The Department received no response to the Davis Motion. On June 28, 1999, the Hearing Officer issued the Covad Ruling in which the Hearing Officer granted Covad's Motions, allowed Covad to participate as a full intervenor in this docket, and granted Ms. Davis permission to appear before the Department (Covad Ruling at 6).

On July 1, 1999, Mr. Lydon, a limited participant, appealed the portion of the Covad Ruling that granted the Davis Motion on the grounds that: 1) the Covad Ruling does not reference the filing of a similar motion to practice before the Clerk for Suffolk County of the Supreme Judicial Court of Massachusetts; and 2) the Commonwealth of Virginia issued no Certificate of Good Standing to support the Davis Motion (Appeal at 1). Mr. Lydon requests that the Department issue an advisory opinion, as part of his Appeal, on the requirements for out-of-state counsel to appear before the Department (id. at 2). The Department received no responses to the Appeal.

## II. HEARING OFFICER RULING



In the Covad Ruling, the Hearing Officer found that "Attorney Davis has demonstrated sufficient qualifications to appear before this Department in this matter and has stated that she intends to comply with the existing schedule. Accordingly, the Hearing Officer grants the Motion for Leave to Appear Pro Hac Vice filed by Covad." Covad Ruling at 5.

### III. ANALYSIS AND FINDINGS

For the reasons discussed below, we uphold the Hearing Officer's Covad Ruling and deny the Appeal.

Before the Department can consider the substance of this Appeal, the Department must consider the procedural defect apparent in Mr. Lydon's Appeal: Mr. Lydon did not appeal the Hearing Officer's January 8, 1999 ruling which restricted his participation rights to receiving copies of documents and participating in the scheduling conferences and other public hearings. This ruling granted Mr. Lydon the status of a limited participant, not a party in interest, and, consequently, Mr. Lydon has no standing to appeal the Covad Ruling.

The Covad Ruling clearly states that "Under the provision of 220 C.M.R. § 1.06(6)(d)(3), any *aggrieved party* may appeal this Ruling to the Commission by filing a written appeal with supporting documentation by July 1, 1999, at 5:00 p.m. (emphasis added)." Covad Ruling at 6. Under G.L. c. 25, § 5 and G.L. c. 30A, § 10, only an aggrieved party in interest may appeal from a Departmental ruling or decision. Attorney General v. Department of Public Utilities, 390 Mass. 208, 216-217 (1983) ("Attorney General"). An aggrieved party in interest is: (1) an intervenor who holds full participation rights; (2) an entity who has the right to intervene as a matter of law (such as the Attorney General for the Commonwealth under G.L. c. 12, § 11E); or (3) an entity who has demonstrated damage peculiar to himself, is substantially and specifically affected by a proceeding, or has a constitutional or statutory right to participate fully in the proceedings. Attorney General, supra; Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 673 (1975); Robinson v. Department of Public Utilities ("Robinson II"), 416 Mass. 668, 671 fn. 3 (1993); NYNEX, D.P.U. 94-50 at 3 (July 22, 1994 Order). A limited participant does not qualify as a party in interest. Robinson II, supra. See also Boston Edison Co. v. D.P.U., 375 Mass. 1, 45 (1978), cert. denied, 439 U.S. 921 (1978); and Robinson v. Department of Public Utilities ("Robinson I"), 835 F.2d 19 (1<sup>st</sup> Cir. 1987).

Mr. Lydon is a limited participant, not a full intervenor, and consequently is not an aggrieved party in interest according to the above statutes and case law. Mr. Lydon's participation rights do not include the right to appeal Hearing Officer rulings on petitions to intervene because his rights are limited to: 1) receiving copies of documents, and 2) participating in public hearings. Consequently, Mr. Lydon has no standing to appeal the Covad Ruling. This is a fatal defect to Mr. Lydon's Appeal and, accordingly, we must deny the Appeal and support the Hearing Officer's Covad Ruling.

Because we deny the Appeal based on the standing issue, we need not address the remainder of Mr. Lydon's Appeal or request for advisory opinion.

#### IV. ORDER

After review and consideration, it is hereby

ORDERED: That the appeal of the Hearing Officer Ruling filed by limited participant J. Joseph Lydon is hereby DENIED.

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

