D.T.E. 00-39-A

Rulemaking by the Department of Telecommunications and Energy, pursuant to 220 C.M.R.

§§ 2.00 et seq., to promulgate regulations governing an expedited dispute resolution process for complaints involving competing telecommunications carriers as 220 C.M.R. §§ 15.00

et seq.

ORDER PROMULGATING FINAL REGULATIONS

I. INTRODUCTION

On June 5, 2000, the Department of Telecommunications and Energy ("Department") proposed regulations to create an accelerated docket for disputes involving competing telecommunications carriers. In its Order Instituting Rulemaking, D.T.E. 00-39, at 1 (2000), the Department noted that the formal complaint procedures in place at the Department are often too slow and cumbersome to address adequately many local competition disputes. The Department proposed several new regulations in the new section 220 C.M.R. §§ 15.00 et seq., which, once in effect, would provide for the option of quicker resolution of certain complaints brought to the Department. The Department's proposed regulations were modeled in large part after the Federal Communications

Commission's ("FCC's") Accelerated Docket Procedures as discussed in Amendment of the Rules Governing Procedures to be Followed when Formal Complaints are Filed Against Common Carriers, Second Report & Order, 13 FCC Rcd 17018 (1998) ("FCC's Accelerated Docket Order"). See 47 C.F.R. § 1.730.

In the Order opening this rulemaking, the Department solicited comments on the proposed regulations. The Department received an initial round of nine written comments.[(1)] After receipt of the initial comments, the Department conducted a public hearing on July 7, 2000. On July 21, 2000, the Department received five written reply comments.[(2)]

II. FINAL REGULATIONS

This Order adopts the final rules implementing expedited dispute resolution procedures for complaints involving competing telecommunications carriers. These rules, found in new section 220 C.M.R. §§ 15.00 et seq., are designed to facilitate increased competition for telecommunications services by offering an option for prompt resolution of disputes between carriers. Overall, the commenters were supportive of the Department's proposed rules. The commenters, however, objected to a number of provisions and offered suggestions for changes. The Department has modified several of its proposals in response to suggestions from commenters.

A. Participation in Accelerated Docket Proceedings

1. Comments

Several commenters strongly supported proposed 220 C.M.R. § 15.04(1), which proposed that participation in accelerated docket proceedings would not be conditioned on voluntary participation by both (or all) parties (Mpower Comments at 2; NECTA Reply Comments at 11; AT&T Reply Comments at 1-2; Rhythms Reply Comments at 4-5; Mpower Reply Comments at 2-3). However, Verizon disagreed, arguing that requiring a party to participate in accelerated docket proceedings without its consent would deprive that party of procedural rights and necessary preparatory time that it would have under normal complaint rules (Verizon Comments at 2-3; Verizon Reply Comments at 2). Other commenters suggested that the Department retain the authority to transfer an existing complaint onto the accelerated docket on its own motion, similar to the Department's authority under proposed 220 C.M.R. § 15.04(4) to transfer a matter off the accelerated docket on the Department's own motion (Mpower Comments at 4; Rhythms Reply Comments at 6). Commenters also raised the concern that the requirement in proposed 220 C.M.R. § 15.04(3) that the parties must show they participated in good faith negotiations for at least ten days prior to filing a request for inclusion on the accelerated docket would permit the party opposing the process to block the complainant's access to the accelerated docket by merely refusing to negotiate during this

time (Mr. Kanter Comments at 2; Mpower Comments at 2-3; AT&T Comments at 3; NECTA Reply Comments at 5-6; Mpower Reply Comments at 2-3). One commenter expressed concern as to when the "clock" would start to run on the required ten day pre-request negotiation period (AT&T Broadband Comments at 2); and other commenters disputed the need the for a pre-request negotiation period at all (Rhythms Comments at 3; NECTA Comments at 2; AT&T Comments at 3; NECTA Reply Comments at 5-6). One commenter expressed support for the pre-docketing negotiation period as proposed (AT&T Broadband Comments at 1-2).

2. Analysis and Findings

The Department affirms its proposal in 220 C.M.R. § 15.04(1) that it is only necessary for one party to elect to participate in accelerated docket proceedings. The Department concurs with the FCC's conclusion as stated in the FCC's Accelerated Docket Order at ¶ 32, "[r]equiring mutual agreement of the parties, as suggested by some commenters, would give either party veto power over the process and substantially reduce the docket's effectiveness at stimulating a competitive environment." A party opposing inclusion on the accelerated docket may respond to a request for inclusion on the accelerated docket and that response may be included in the Department's evaluation whether a matter is appropriate for the accelerated schedule. Further, the Department is offering the accelerated docket as an option for carriers if a particular dispute fits within the constraints of the accelerated schedule. Therefore, the Department will not require parties to an existing complaint to accelerate their complaint if no party wishes to do so; however, parties to an existing complaint may request transfer of their complaint to the expedited schedule pursuant to proposed 220 C.M.R. § 15.03(1). The Department believes that the pre-docketing thirty-day required negotiation period (ten day pre-request negotiation under proposed 220 C.M.R. § 15.04(3) plus the twenty day post-request Department-sponsored mediation under proposed 220 C.M.R. § 15.03(5)) is an essential part of the accelerated docket process. The Department expects that, with cooperation from the parties, a significant number of disputes will be resolved during the pre-docketing negotiation period. Therefore, the Department rejects commenters' suggestions to reduce or eliminate this period. The Department agrees that the proposed regulation requiring that parties show they have negotiated in good faith for ten days prior to petitioning the Department for expedited review does raise the possibility of one carrier avoiding negotiations entirely and thereby attempting to block access to the accelerated docket. Therefore, the Department accepts the suggestion to change proposed 220 C.M.R. § 15.04(3) to require only the complainant to certify that he has attempted in good faith to engage the opposing party in negotiations for a minimum period of ten days before petitioning the Department for inclusion on the accelerated docket.

B. Time Intervals on the Accelerated Docket

1. Comments

The Department's proposed regulations set out an accelerated docket schedule consisting of 87 days (97 including the mandatory ten-day minimum pre-request negotiation

period). Several commenters urged the Department to shorten this proposed schedule (Rhythms Comments at 2; AT&T Comments at 3-4; NECTA Reply Comments at 9-10). Rhythms suggested the accelerated docket be shortened to as little as 36 days (Rhythms Comments at 3); AT&T suggested a 62, or alternatively, a 75 day process (AT&T Comments at 3-4; AT&T Reply Comments at 2-3, Att.). Verizon suggested that in order to minimize confusion, the Department should extend the schedule proposed by the Department to mirror the schedule in the FCC Accelerated Docket Order (Verizon Comments at 5-6; Verizon Reply Comments at 3). Other commenters suggested overlapping certain steps in the proposed process, or scheduling them concurrently (AT&T Comments at 3-4). Several commenters questioned how the time intervals would be calculated, and requested that the Department clarify whether business or calendar days, or a combination of both, would be used in the accelerated schedule (Mr. Kanter Comments at 2; AT&T Comments at 2; RNK Comments

at 6, 8; NECTA Reply Comments at 10; Verizon Reply Comments at 4).

2. Analysis and Findings

As stated above, because of the importance the Department places on the pre-docketing negotiation period, the Department declines to accept commenters' suggestions that the pre-docketing negotiation period be reduced or eliminated. For the same reason, the Department declines to accept commenters' suggestions that the twenty-day Department-sponsored mediation period occur simultaneously with post-docketing steps. The Department likewise rejects commenters' recommendations that the entire proposed procedural schedule be further accelerated. The Department expects that the schedule proposed by the Department will provide carriers with significantly quicker resolution of certain complaints than the formal (non-accelerated) complaint process while still allowing parties adequate time to prepare their cases and the Department adequate time to evaluate the issues. For this reason, the Department does not see the need to reduce, expand, or mirror exactly the FCC's expedited procedures. Therefore, the accelerated docket procedural schedule will be adopted as proposed with one addition. The Department will add to the procedural schedule the option of allowing an opposing party to respond to an appeal to the Commission of a staff-recommended decision. According to proposed 220 C.M.R. § 15.09, an appeal of a staff-recommended decision is due within five days of the issuance of the staff-recommended decision or the Commission will concur with the staff recommended decision. Under the rules adopted today, a response by an opposing party to an appeal will be due within three days of receipt of the appeal. The order on appeal will be issued by the Commission within ten days of receipt of the response to an appeal.[(3)] Therefore, the final accelerated docket procedural schedule will be 90 days (100 including the mandatory ten-day minimum pre-request negotiation period). The Department accepts the commenters' suggestion to adopt the definition of "day" in 220 C.M.R. § 1.02(4), requiring that the term "day" refers to "calendar day" except when a prescribed interval is five days or less, in which case the term refers to "business day." The accelerated docket procedural schedule as adopted is as follows:

- •Days -10 to -1 Minimum required pre-request negotiation efforts
- •Day 1 Request for expedited review received by Department
- •Days 3 to 6 Department conference call with parties; document production; first Department meeting with parties
- •Days 7 to 20 Informal Department-sponsored mediation continues
- •Day 21 Complaint docketed on Accelerated Docket
- •Day 27 Answer filed
- •Day 34 Pre-status conference filing due
- •Day 36 Initial status conference
- •Day 48 Witness and exhibit lists exchanged
- •Day 49 Proposed findings of fact and conclusions of law due
- •Days 51 to 54 Expedited hearing held
- •Day 57 Revised findings of fact, conclusions of law and position statements due
- •Day 72 Staff decision issued
- •Day 77 Deadline for appeal to Commission or Commission Order issued
- •Day 80 Response to appeal due to Commission
- •Day 90 Commission order on appeal issued

C. Precedential Value of Accelerated Docket Decisions/Intervention

1. Comments

Commenters differ on the precedential value that should be accorded to Department accelerated docket decisions (Mpower Reply Comments at 4-5; NECTA Reply Comments at 7-8; Verizon Comments at 4). NECTA argues that accelerated docket decisions should have limited, if any, precedential effect (NECTA Reply Comments at 7). NECTA states that a contrary rule would require all potentially affected carriers to seek intervention in accelerated docket matters, with the likely result of slowing the process and the removal of the matter from the expedited schedule (id. at 7). Verizon argues that findings from accelerated docket cases should relate only to the dispute at

issue and should have no preclusive or precedential effect in other Department proceedings (Verizon Comments at 4). Verizon argues that parties should not be precluded from presenting a de novo factual case if the same issues are raised in a separate proceeding (id. at 5). Mpower argues that decisions resulting from expedited proceedings should be given the same precedential effect as decisions resulting from the formal (non-accelerated) complaint process (Mpower Reply Comments at 4-5). The Attorney General warns that the Department should be sensitive to the possibility of inconsistent resolutions among carriers due to lack of intervention (AG Comments at 1). Further, the Attorney General suggests that the proposed rules be modified to reflect the Attorney General's authority under G.L. c. 12, § 11E, to intervene in Department proceedings, including accelerated docket proceedings, on behalf of Massachusetts consumers, although the Attorney General anticipates that his involvement in accelerated docket matters will be limited to those cases which present matters of significant policy interests that he determines should be considered outside of the accelerated docket (id. at 2).

2. Analysis and Findings

As stated in the Department's order opening this rulemaking, the Department anticipates that primarily single-issue, two party disputes will constitute most, if not all, the cases on the accelerated docket. D.T.E. 00-39, at 2-3.[(4)] Further, proposed 220 C.M.R. § 15.04(c) makes clear that whether persons other than the complainant and respondent will be substantially and specifically affected by the proceeding is a consideration for determining whether a matter will be accepted onto the accelerated docket.[(5)] In addition, intervention by numerous parties in a proceeding accepted on the accelerated docket may burden and slow down the proceeding to the extent that it is no longer appropriate for expedited treatment and may be removed from the accelerated docket pursuant to proposed 220 C.M.R. § 15.04(4). The Department determines that the precedential value of accelerated docket cases will be limited to the parties and the issue(s) involved in the particular proceeding. The final decision in an accelerated docket matter will have no precedential impact on disputes between the original parties and a third party; but future disputes involving the same parties and set of facts would be informed by the prior decision. The Department is in no way inclined to curtail intervention by the Attorney General in matters on the accelerated docket and welcomes the Attorney General's participation in cases in which he feels his participation is warranted. Due to the limited scope of the cases that the Department expects will be accepted onto the accelerated docket, however, the Department expects that participation by the Attorney General on behalf of consumers in accelerated docket matters will be the exception rather than the rule.

D. Other Comments and Findings

Commenters suggested that the Department designate that accelerated docket procedures supplant the dispute resolution procedures contained within carriers' existing interconnection agreements (Mpower Reply Comments at 3-4; NECTA Reply Comments at 8; Rhythms Reply Comments at 5-6). Other commenters disagreed, and encouraged the

Department not to undermine the dispute resolution processes in existing agreements (Verizon Comments at 4; AT&T Comments at 1-2). The Department intends that accelerated docket procedures not interfere with carriers' expressed contractual intent regarding inter-carrier dispute resolution.[(6)] If a dispute concerns service provided under an interconnection agreement, the accelerated docket is an option a complainant may choose once it has exhausted the dispute resolution provisions, if any, required by the applicable interconnection agreement, but the accelerated docket will not supersede or supplant negotiated dispute resolution provisions within carriers' interconnection agreements.[(7)]

Further, one commenter suggested that when the Department is contemplating removing an accelerated docket matter from the expedited schedule pursuant to 220 C.M.R.

§ 15.04(4), due process requires that the Department offer the parties the opportunity to comment on the contemplated removal, and that Department issue a written statement of reasons for the removal (NECTA Comments at 2; NECTA Reply Comments at 8-9). The Department disagrees, and finds that no due process concerns are implicated in removing a matter that is no longer appropriate for accelerated treatment from the accelerated docket to the non-accelerated complaint docket.

Several commenters requested that, in addition to the option of an accelerated docket, the Department should provide carriers with the option of seeking preliminary injunctive-type relief from the Department on a showing of immediate and irreparable harm (NECTA Comments at 2; AT&T Broadband Comments at 2; AT&T Comments at 4; Rhythms Reply Comments at 3; NECTA Reply Comments at 6-7). Verizon disagreed, and questioned the Department's authority to grant such equitable relief (Verizon Reply Comments at 4-5). The Department finds that the accelerated docket procedures adopted today go far to address carriers' concerns for speedy resolution of inter-carrier disputes, and, therefore, the Department declines to rule on commenters' suggestions for additional expedited measures at this time.

Likewise, commenters suggested that the Department expand the scope of the proposed accelerated docket procedures to include complaints involving cable television operators and complaints involving pole attachment disputes (Mr. Kanter Comments at 1; Tr. at 23-28). The Department declines to expand the scope of this rulemaking to include these suggestions and finds that complaints involving cable television and/or pole attachment disputes can be adequately addressed within other Department dispute resolution mechanisms.[(8)]

In addition, commenters suggested that certain document production and required filings under the proposed accelerated docket regulations are redundant and unnecessary (Mr. Kanter Comments at 3; AT&T Broadband Comments at 2; RNK Comments at 9; NECTA Reply Comments at 10). Specifically, commenters suggest that the required filing of stipulations and discovery issues contemporaneously with the respondent's filing of an answer, under proposed 220 C.M.R. § 15.05(4), is premature and unnecessary given the similar requirement in the pre-initial status conference filings seven days later under

proposed 220 C.M.R. §§ 15.07(4), (5) (AT&T Broadband Comments at 2; RNK Comments at 2; NECTA Reply Comments at 10). The Department agrees that the pre-initial status conference filing of stipulations and disputed facts is sufficient; thus, the Department will not require a prior filing of stipulations and discovery issues at the time of filing of the respondent's answer.

Finally, the Department establishes an effective date of January 1, 2001, for the regulations adopted today.

V. ORDER

After considering comments received on the Proposed Regulations, the Department now issues final rules that balance the interests of telecommunications providers for prompt resolution of disputes while taking into account the time necessary for adequate case preparation by the parties and sufficient Department evaluation. Review of these regulations may be had by a petition for declaratory relief in accordance with G.L. c. 30A, § 7, and

c. 231A, § 2. Limitations on the scope of review are set forth in Thomas v. Commissioner of the Division of Medical Assistance, 425 Mass. 738, 746 (1997). See also, G.L. c. 231A, § 9, on construction of the review remedy. Accordingly, after notice, hearing and consideration, it is hereby

ORDERED: that the regulations designated as 220 C.M.R. §§ 15.00 et seq. and entitled "Accelerated Docket for Disputes Involving Competing Telecommunications Carriers" attached hereto are hereby ADOPTED; and it is

FURTHER ORDERED: that the Secretary to the Department shall cause the revised regulations, adopted today and attached hereto, to be transmitted to the Secretary of the Commonwealth for publication in the next number of the Massachusetts Register.

By Order of the Department,

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James Connelly, Chairman

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

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Deirdre K. Manning, Commissioner

1. The Department received written comments from the Massachusetts Attorney General ("Attorney General" or "AG"); Mr. David G. Kanter, as an individual member of the Town of Lexington Telecommunications Advisory Committee ("Mr. Kanter"); New England Cable Television Association ("NECTA"); MediaOne Telecommunications of Massachusetts, Inc., now AT&T Broadband ("AT&T Broadband"); AT&T Communications of New England, Inc. ("AT&T"); Bell Atlantic-Massachusetts, now Verizon Massachusetts ("Verizon"); RNK Inc. d/b/a RNK Telecom ("RNK"); joint comments from Rhythms Links, Inc. and Covad Communications Company (jointly, "Rhythms"); and joint comments from MGC Communications, Inc. d/b/a Mpower

Communications Corporation, RCN Telecom Services, Inc., and Vitts Networks (jointly, "Mpower").

2. The Department received written reply comments from NECTA; AT&T; Rhythms; Verizon; and Mpower.

3. If no appeal of the staff recommended decision is filed, the Commission will issue an order immediately following the appeal period.

4. Of course, this does not preclude the Department from using the accelerated docket to resolve multi-issue or multi-party disputes, if warranted.

5. The showing that a person will be substantially and specifically affected by a proceeding is the requirement for intervention in a Department proceeding under G.L. c. 30A, § 10; 220 C.M.R. § 1.03(b).

6. On July 7, 2000, Verizon filed with the Department a letter notifying the Department of the method by which Verizon proposes to comply with the alternative dispute resolution conditions required by the FCC for approval of the Bell Atlantic Corp./GTE Corp. merger. The ADR procedures proposed by Verizon in its July 7, 2000 letter will likewise not be supplanted by the accelerated docket procedures adopted today by the Department, and will provide an additional option for inter-carrier dispute resolution.

7. In Bell Atlantic Tariff No. 17, D.T.E. 98-57, at 161-162 (2000), the Department suggested that once accelerated docket procedures were adopted by the Department, those procedures could be available to resolve disputes under Tariff No. 17. Therefore, we direct Verizon to incorporate these rules, once effective, into its tariff.

8. See e.g., Order Establishing Complaint and Enforcement Procedures to Ensure that Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-of-Way and to Enhance Consumer Access to Telecommunications Services, D.T.E. 98-36-A (2000).