D.T.E. 03-24-A July 28, 2003

Rulemaking by the Department of Telecommunications and Energy, pursuant to 220 C.M.R. §§ 2.00 et seq., to promulgate regulations to establish a funding mechanism for wireline Enhanced 911 services, relay services for TDD/TTY users, communications equipment distribution for people with disabilities, and amplified handsets at pay telephones, as 220 C.M.R. §§ 16.00 et seq..

ORDER ADOPTING FINAL REGULATIONS

ORDER ADOPTING FINAL RULES

I. INTRODUCTION

On March 13, 2003, the Department of Telecommunications and Energy ("Department") proposed regulations implementing Chapter 239 of the Acts of 2002 ("Act"), which requires the Department to establish a new funding mechanism for certain telecommunications programs within the Commonwealth: enhanced 911 service ("E911"), relay services for TDD/TTY users[1] ("DPRS" or "TRS"), a communications equipment distribution program for people with certain disabilities ("adaptive equipment"), and amplified handsets at Massachusetts pay telephones (collectively, "E911/disabilities access").[2] These services historically have been funded by directory assistance revenues. The Act requires the Department to promulgate regulations implementing a wireline surcharge on each voice grade residential and business line for the recovery of expenses that have been incurred, are being incurred, or will be incurred in providing E911/disabilities access through December 31, 2007.[3]

A public hearing on the proposed regulations was held at the Department's offices in Boston on April 30, 2003. The Department received initial comments on the proposed rules

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[1] TDD/TTY equipment are telecommunication devices for the deaf consisting of terminals that permit two-way, typed telephone conversations with or between deaf people.

[2] For additional information on E911/disabilities access funding and the legislation establishing the new funding mechanism, refer to the Department's Order Instituting Rulemaking, D.T.E. 03-24 (March 13, 2003).

[3] Acts of 2002, c. 239, § 1.

from the following: the Attorney General of the Commonwealth ("Attorney General"); AT&T Communications of New England, Inc. ("AT&T"); the City of Cambridge Emergency Communications Department ("City of Cambridge"); the Massachusetts Communications Supervisors Association ("MCSA"); the Statewide Emergency Telecommunications Board ("SETB"); and Verizon New England Inc. d/b/a Verizon Massachusetts ("Verizon"). Reply comments were received from the Attorney General, AT&T, the City of Cambridge, Verizon, and the Massachusetts Municipal Association.

II. PROCEDURAL MATTERS

On May 20, 2003, the Attorney General filed a Motion for Leave to File Supplemental Comments ("Motion"). Attached to his Motion, the Attorney General included Supplemental Reply Comments. AT&T filed a letter in lieu of comments, supporting the Attorney General's motion ("AT&T Letter"). Verizon filed an Opposition to the Motion ("Opposition").

According to the Attorney General, the E911 audit is relevant to the E911 rulemaking (id. at 2). The Attorney General contends that good cause exists to grant his request because: (1) Verizon relies heavily on the existence of the 1999 audit; (2) Verizon did not mention the existence of the audit until its reply comments, affording parties no opportunity to comment on the audit; (3) the 1999 audit covers only three years of E911 deficit data; and (4) the Department never approved the 1999 audit (id.). The Attorney General argues that granting the motion will not prejudice the rights of interested parties in this rulemaking proceeding because they may be afforded an opportunity to respond to the Motion (id. at 3). AT&T agrees that the E911 fund deficit determination is an essential element of the rulemaking, and

that parties should be afforded the opportunity to comment on the nature and sufficiency of the Verizon 1999 audit (AT&T Letter at 1-2).

Verizon opposes the Attorney General's Motion, stating that the Motion misrepresents the facts, and is an attempt to transform the Department rulemaking into an investigation of issues beyond the scope of this proceeding (Verizon Opposition at 1). According to Verizon, this rulemaking is not an investigation of Verizon's pre-existing deficit for providing E911, or the 1999 audit of the revenues and costs to provide that service (id. at 2). Verizon further argues that it was not obligated to disclose the existence of the audit because the audit was not at issue in this rulemaking (id.). Finally, Verizon contends that the Attorney General had full knowledge of the 1999 audit and its results, as Verizon has been providing annual tracking reports to the Attorney General since 1991 (id. at 3).

While the Department shares the Attorney General's goal that only proper deficit costs are passed onto ratepayers, this rulemaking is not the forum for such a determination. The Department has already opened a separate investigation into the appropriate level of the surcharge, and will explore the deficit in that investigation. See D.T.E. 03-63, Notice of Investigation, Public Hearing and Intervention; Request for Data and Surcharge Proposals; and Request for Comments by the Department of Telecommunications and Energy (May 29, 2003).[4] The amount of the deficit is not relevant in a rulemaking that states that "[t]he

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[4] The Attorney General also argues that the Department should set the surcharge amount based on the results of a full adjudication (Attorney General Comments at 3). Because the Department has opened a separate investigation into the appropriate level of the surcharge, the Attorney General's argument is properly the subject of the surcharge

(continued…)

surcharge may also recover a portion of the deficit," but does not specify the amount of the deficit to be so recovered. Accordingly, the Attorney General's Motion is hereby denied.

III. FINAL REGULATIONS

This Order adopts the final rules implementing the wireline E911/disabilities access surcharge. These rules, found in 220 C.M.R. §§ 16.00 et seq., are designed to enhance public safety and full participation in the telecommunications network by ensuring an adequate funding source for the E911/disabilities access programs. Overall, the commenters were supportive of the Department's proposed rules. Commenters objected to a number of specific provisions, and offered suggestions concerning, inter alia, the deficit incurred by the E911/disabilities access program under the previous funding mechanism, the wording of the surcharge on customers' bills, and the inclusion of specific categories of expenses in the definition of "prudently incurred costs." The commenters proposed many changes that are either beyond the scope of this rulemaking or outside the Department's jurisdiction. The Department modified one of its proposed rules in response to recommendations from the commenters.[5]

A. Definitions

The MCSA requested that the Department consider whether the rules' definitions of "telecommunications company" and "voice grade telephone exchange service" are sufficiently

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[4](…continued)
investigation, D.T.E. 03-63.

[5] The Department also incorporates several stylistic changes not discussed here.

inclusive of all telephone companies providing retail service in Massachusetts (MCSA Comments at 3-4). The MCSA did not suggest that any changes are necessary, but recommended that the Department review the definitions carefully to ensure that they are all-encompassing (id.). The rules apply to all local exchange carriers in Massachusetts. 220 C.M.R. § 16.02. The Department has reviewed the definitions in response to the MCSA's suggestion, and finds that no changes to the rules are necessary.

Some commenters urged the Department to amend the rules to define what constitutes a "prudently incurred cost." AT&T contends that while carriers are required pursuant to G.L. c. 166 § 15E(b) to provide TDD and adaptive equipment services, it is unclear from the proposed rules whether the surcharge will be used to reimburse carriers for all of their costs incurred in providing TRS and adaptive equipment, and suggests that the Department clarify the rules to indicate whether the reimbursement of "prudently incurred costs" would include the reimbursement of all costs (AT&T Comments at 3-4).[6] Verizon objects to AT&T's proposed change, arguing that nothing in the Act gives the Department the authority to alter the existing standard of "prudently incurred" (Verizon Reply Comments at 9-10). The MCSA argues that a "prudently incurred cost" must be defined as including specific E911-related expenses such as public education, equipment and materials, pre-service and in-service training for E911 operators, and out-of-pocket travel expenses for E911 operators attending training

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[6] See 220 C.M.R. § 16.04(3).

(MCSA Comments at 2-7).[7] The City of Cambridge supports the comments made by the MCSA, and argues that the rules must include explicit support for E911 call processing equipment and pre-service and in-service E911 operator training (City of Cambridge Comments at 2-4). The Attorney General argues that the Department should not adopt a blanket categorical definition of what constitutes a prudently incurred cost, but should require the SETB to establish that each expenditure was prudent and in the public interest (Attorney General Reply Comments at 2-3).

The Department declines to modify its rules to declare which specific programs qualify as prudently incurred costs, because the Department decides the prudence of costs only after fact-specific review. With regard to the MCSA's and the City of Cambridge's arguments concerning E911-related training programs, although the Act gives the Department the authority to implement a surcharge in order to recover the expenses of wireline E911, there is nothing in the Act that diminishes the SETB's sole statutory authority to determine the types of equipment, training, and support for which expenditures are necessary. Pursuant to G.L. c. 6A, §§ 18B-18D, the SETB has been charged with administering E911 in Massachusetts, and the Department does not have the authority to supplant the SETB's expertise when it comes to determining necessary training programs and equipment purchases. Furthermore, although the SETB may decide that a specific category of expense is necessary, all expenses made in that

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[7] See 220 C.M.R. §§ 16.03(1), 16.03(4)(a).

category must still be prudently incurred.[8] The Department declines to adopt AT&T's proposed change because amending § 16.04(3) to provide for the reimbursement of all costs would be contrary to the Act, which specifies that the Department's rules shall provide for the recovery of prudently incurred expenses.[9]

On a related matter, the MCSA and the SETB argue that the Department should amend § 16.03(5), which identifies the data upon which the interim surcharge will be based, inserting the word "necessary" so that the interim surcharge will be based on "estimated reasonable, customary, or necessary program costs, and estimated line count data" (SETB Comments at 1; MCSA Comments at 5). The SETB contends that this modification will provide the SETB with the flexibility necessary to fund new education and training initiatives which are consistent with the SETB's mandate but which have been under-funded due to inadequate resources (SETB Comments at 1). Similarly, the MCSA argues that this modification would ensure that the E911 program would not be limited to funding only those program costs funded as line-items in the previous year's budget (MCSA Comments at 5). The Attorney General objects to this proposed modification, arguing that while a given category of expense might, under the appropriate circumstances, qualify as prudent and in the public interest, that might not always be the case (Attorney General Reply Comments at 3). Verizon objects to the

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8 The Department has, in prior cases, undertaken an investigation into the prudence of the SETB's expenditures. See Petition of the Statewide Emergency Telecommunications Board, D.T.E. 00-58 (2000); Petition of the Statewide Emergency Telecommunications Board, D.T.E. 98-103 (1999); Petition of the Statewide Emergency Telecommunications Board, D.T.E. 97-87 (1998).

9 Acts of 2002, c. 239, § 1.

proposed change on the grounds that it will have no effect on the statutory standard for cost recovery, which is based on whether or not a cost is prudently incurred (Verizon Reply Comments at 9).

The Department amends § 16.03(5) to reflect the change proposed by the MCSA and the SETB. As discussed supra, the Department is not in a position to supplant the SETB's authority to determine what categories of expense are necessary for the administration of E911/disabilities access, and the Department would be remiss to leave unchanged a rule which conflicts with the SETB's statutory decision-making authority. Although the Department has the authority to review whether or not a particular expense is prudently incurred when setting the surcharge and in response to a § 18(D)(c)(4) petition, only the SETB has the authority to determine whether a category of expense is necessary, and our rules will be amended to reflect this wherever the phrase "reasonable and customary" appears.

B. The Deficit

The MCSA suggests that the Department add a new section to the proposed rules, requiring that the application of surcharge revenue for deficit reduction not adversely affect the financial operations of the E911 program (MCSA Comments at 5). AT&T argues that the Proposed Rules should make verification of the deficit a precondition to the disbursement of any funds to Verizon to pay down the deficit (AT&T Comments at 2). AT&T also contends that an audit is the only way to ensure that the deficit is an actual and prudent cost (id.). The Attorney General agrees that the Department should investigate the nature, extent, and effect of the deficit, and that interested parties must be allowed the opportunity to question Verizon and

the SETB about the past management of E911 funds and revenues, to whom the deficit is owed, the effect of the deficit to date, and how soon the deficit will be eliminated (Attorney General Comments at 3). Verizon objects, arguing that the Department has already verified the directory assistance accounting process in a 1999 audit performed by Deloitte and Touche (Verizon Reply Comments at 5). Verizon argues that the auditors found Verizon to be in full compliance with applicable accounting requirements, and that further examination would unreasonably require Verizon to incur additional costs (id.)

The Department declines to modify its rules to incorporate these proposed changes. With regard to MCSA's proposal, the Department is charged with the responsibility of ensuring one funding stream for E911/disabilities access as well as for a portion of the deficit, and the proper response to a funding shortfall would be for the Department to increase the surcharge, not to cannibalize one part of the program to fund another. Concerning the Attorney General's and AT&T's proposals, concerns over the documentation of the deficit will be fully explored in a separate surcharge proceeding, D.T.E. 03-63, Phase II.[10]

Verizon argues that the provision requiring that carriers provide annual reports to the Department on the status of the pre-existing deficit should be modified to state that "[t]he first

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[10] Investigation by the Department of Telecommunications and Energy to establish a surcharge to recover prudently incurred costs associated with the provision of wireline Enhanced 911 services, relay services for TDD/TTY users, communications equipment distribution for people with disabilities, and amplified handsets at pay telephones, D.T.E. 03-63.

report on August 1, 2003 will cover the period ending December 31, 2002." [11] Verizon argues that this modification is compliant with the Acts of 2002, c. 239, which requires that the Department determine the amount of the deficit as of the end of 2002 (Verizon Comments at 1). The Department rejects Verizon's proposed change. Although Verizon is correct that the Department is required to determine the extent of the deficit as of the end of prior statutory funding mechanism, the Department does not agree that its first report on the deficit should consist of data that are seven months old. Therefore, although Verizon is required to report on the status of deficit that existed at the end of the prior funding mechanism on December 31, 2002, the Department requires that Verizon shall include in its report additional information concerning any revenues that have been used to offset the deficit, as well as any increase to the deficit due to interest charges through June 30, 2003. The proposed rule stands, and by August 1, 2003, Verizon shall report to the Department on the status of the pre-existing deficit as of June 30, 2003.

The Attorney General argues that the rules should be amended to require carriers to continue to apply their directory assistance revenues to offset the deficit (Attorney General Reply Comments at 3). The Attorney General contends that, in the alternative, the Department should investigate whether excess directory assistance revenues require an exogenous adjustment and a concomitant reduction in retail dial tone rates (id. at 4). The Attorney General also argues that carriers should be required to reduce their directory assistance tariff charges after the deficit has been fully recovered, because the surcharge replaces those charges

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[11] See 220 C.M.R. § 16.05(3).

(Attorney General Comments at 4) The Attorney General's suggestion concerning the application of directory assistance revenues to offset the deficit is valid, but because the relation of directory assistance revenues to the deficit will be fully addressed in D.T.E. 03-63, Phase II, it is neither necessary nor appropriate to include such a provision in these rules.

C. Wording of Surcharge on Subscriber Bills

AT&T avers that the descriptive wording of the line item surcharge on subscriber bills will cause customer confusion, as it might appear that the surcharge reflects an amount to be retained by the telecommunications carrier instead of an amount paid to a state agency for the purpose of administering a social good.[12] In order to minimize the possibility of customer confusion, AT&T argues carriers should be required to list the surcharge as "MA 911/Disability Access Fee" (AT&T Comments at 3). In contrast, the Attorney General argues that in order to minimize customer confusion all carriers should be required to list the surcharge as "E911/Disabilities Access Fee" (Attorney General Comments at 4).

Verizon argues that the Attorney General's proposed alteration will not increase consumer understanding of the charge, and could result in mis-dialed emergency calls because the prefix "E" is not used when dialing enhanced 911 service (Verizon Reply Comments at 6-7). Similarly, Verizon argues that customers are unlikely to confuse the surcharge with a fee to be retained by the telecommunications carrier, thus a change in the wording is unnecessary (id. at 10). The Department declines to modify its wording of the line-item surcharge. The language in the proposed rule is sufficiently descriptive, and the alterations

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[12] See 220 C.M.R. § 16.03(2).

proposed by AT&T and the Attorney General are so minor that they are unlikely to result in an increase in consumer understanding.

IV. ORDER

Accordingly, after due notice, hearing, and consideration, it is hereby

ORDERED: That proposed 220 C.M.R. §§ 16.00 et seq. be amended to incorporate the change contained in this Order, and it is

FURTHER ORDERED: That the regulations designated as 220 C.M.R. §§ 16.00 et seq., attached hereto, are hereby ADOPTED, and that such regulations, as revised, be effective upon publication in the Massachusetts Register.

By Order of the Department,

_____/s/_____
Paul B. Vasington, Chairman

_____/s/_____
James Connelly, Commissioner

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Eugene J. Sullivan, Jr., Commissioner

_____/s/_____
Deirdre K. Manning, Commissioner