

The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

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September 10, 1996

CAMBRIDGE MA.

D.P.U. 95-59-B/95-80/95-110/95-112/96-13

Consolidated proceeding reopening the record in Dispatch Communications of New England d/b/a Nextel Communications, Inc., D.P.U. 95-59 (1996) in order to investigate whether providers of Commercial Mobile Radio Services are public service corporations within the meaning of G.L. c. 40A, § 3.

In Dispatch Communications of New England d/b/a Nextel Communications, D.P.U. 95-59 (1995), the Department issued an Order denying Nextel's Petition for an exemption from the town of Sterling's zoning bylaws on the ground that Nextel, a provider of Commercial Mobile Radio Services ("CMRS"), was not a public service corporation ("PSC") within the meaning of G.L. c. 40A, § 3. Based on its finding that providers of CMRS did not qualify as PSCs under G.L. c. 40, § 3, the Department dismissed similar Petitions pending in Dispatch Communications of New England d/b/a Nextel Communications, Inc., D.P.U. 95-80 (Marlborough); Dispatch Communications of New England d/b/a Nextel Communications, Inc., D.P.U. 95-112 (Manchester-by-the-Sea); Cellco Partnership d/b/a Bell Atlantic Nynex Mobile, D.P.U. 95-110 (Holliston); and Cellco Partnership d/b/a Bell Atlantic Nynex Mobile, D.P.U. 96-13 (Hanover). Nextel filed a Motion for Reconsideration and several other motions were filed by other parties and petitioners as well.

On July 19, 1996, the Department issued D.P.U. 95-59-A, in which we ordered, inter alia, that (1) the Orders of Dismissal in D.P.U. 95-80, D.P.U. 95-110, D.P.U. 95-112 and D.P.U. 96-13 be vacated; (2) those proceedings be consolidated with D.P.U. 95-59 for the purpose of investigating and ruling on whether CMRS providers are PSCs within the meaning of G.L. c. 40A, § 3; and (3) the record in D.P.U. 95-59 be reopened in order to determine if there is previously unknown or undisclosed information regarding a material issue that would be likely to have a significant impact on the decision already rendered.

The deadline for intervention in the consolidated proceeding shall be **Thursday, October 10, 1996**. The Department will rule on all motions for intervention and then establish a schedule for the filing of other motions.

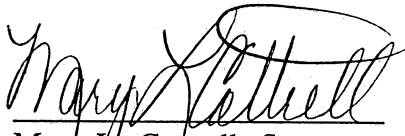
The Petitioners in the consolidated proceeding, Dispatch Communications of New England d/b/a Nextel Communications and Cellco Partnership d/b/a Bell Atlantic Nynex Mobile, are ordered to serve a copy of this notice by certified mail no later than **Thursday, September 26, 1996** to: the Board of Selectmen, the Planning Board, the Members of the Zoning Board of Appeals, the Town Clerk and the Town Counsel for the municipality from which an exemption is sought, and all persons or entities, governmental or private, owning

real estate abutting the parcel on which the proposed site in dispute is located and abutters to the abutters within 300 feet of the property line in the parcel as they appear on the most recent applicable tax list.

The Petitioners shall make return of service, including a list of those individuals and entities to whom notice was sent by the deadline of the date for intervention.

Pursuant to 220 C.M.R. § 1.03(1), any person who desires to participate in the consolidated proceeding shall file a written petition for leave to intervene or to participate in the proceeding with Mary L. Cottrell, Secretary, Department of Public Utilities, 100 Cambridge Street - 12th Floor, Boston, Massachusetts 02202, not later than 5:00 p.m. on **Thursday, October 10, 1996**. A petition to intervene must satisfy the timing and substantive requirements of 220 C.M.R. § 1.03, including setting forth the manner in which the petitioner is substantially and specifically affected by the proceeding. Receipt by the Department--not mailing--constitutes filing and determines whether a petition has been timely filed. A late-filed petition may be disallowed as untimely, unless good cause is shown for waiver of the seven-day rule under 220 C.M.R. § 1.01(4). To be allowed, a petition under 220 C.M.R. § 1.03.(1) must satisfy the standing requirements of G.L. c. 30A, § 10.

By Order of the Department,


Mary L. Cottrell, Secretary



The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

July 19, 1996

D.P.U. 95-59-A

Petition of Dispatch Communications of New England, Inc. d/b/a Nextel Communications, Inc. for exemption from the zoning by-laws of the Town of Sterling for the purpose of constructing and operating communications facilities.

APPEARANCES: Robert D. Shapiro, Esq.
Kenneth Ira Spigle, Esq.
Rubin and Rudman
50 Rowes Wharf

Boston, Massachusetts 02111

FOR: DISPATCH COMMUNICATIONS OF NEW
ENGLAND, INC. d/b/a NEXTEL
COMMUNICATIONS, INC.

Petitioner

PROCEDURAL ORDER VACATING THE DISMISSALS IN D.P.U. 95-80,
D.P.U. 95-110, D.P.U. 95-112, AND D.P.U. 96-13, REOPENING THE RECORD IN
D.P.U. 95-59, CONSOLIDATING D.P.U. 95-59, D.P.U. 95-80, D.P.U. 95-112,
D.P.U. 95-110, AND D.P.U. 96-13, AND ADDRESSING OUTSTANDING MOTIONS
FILED IN THE UNCONSOLIDATED CASES

I. INTRODUCTION

The Department of Public Utilities ("Department") issues this Procedural Order to address the several motions, identified below, filed by several companies relating to the Order in Nextel Communications, Inc., D.P.U. 95-59 (1996), in which the Department ruled that providers of Commercial Mobile Radio Services ("CMRS") do not qualify as public service corporations ("PSCs") under G.L. c. 40A, § 3. To resolve these interrelated motions efficiently and fairly, the Department issues this Procedural Order and serves it on all parties and non-party movants in each of the enumerated cases so that the Department may conduct further inquiry into the common question of whether CMRS providers in Massachusetts are public service corporations within the meaning of G.L. c. 40A, § 3.¹

II. PROCEDURAL BACKGROUND

On February 9, 1996, the Department issued its Order in Nextel Communications.

¹ This statute provides, in pertinent part, that:

Lands or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if, upon petition of the corporation, the [D]epartment of [P]ublic [U]tilities shall, after notice given pursuant to section eleven and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public....

Inc., D.P.U. 95-59, in which it concluded that Dispatch Communications of New England, Inc. d/b/a Nextel Communications, Inc. ("Nextel") did not qualify as a public service corporation within the meaning of G.L. c. 40A, § 3 and therefore was not eligible to petition the Department for an exemption from local zoning bylaws under this statute. The Department reached this conclusion following a detailed analysis of whether Nextel met the test for PSC status set forth in Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667 (1975) ("Save the Bay"), which provides that:

... among the pertinent considerations are, [1] whether the corporation is organized pursuant to an appropriate franchise from the State to provide for a necessity or convenience to the general public which could not be furnished through the ordinary channels of private business; [2] whether the corporation is subject to the requisite degree of governmental control and regulation; and [3] the nature of the public benefit to be derived from the service provided.

Save the Bay, 366 Mass. at 680-681 (numbering added).

The Department's Order in D.P.U. 95-59 addressed the three specific prongs above, as well as two other pertinent considerations. We raised questions as to whether Nextel met the first prong of the test. D.P.U. 95-59, at 14. With regard to the second prong, we concluded that "the current governmental regulation of Nextel and other CMRS providers does not meet the level of requisite governmental control and regulation contemplated in Save the Bay." Id. at 18. Respecting the third prong, we reexamined the basis of earlier findings of public need for, and benefits from, CMRS providers such as Nextel, and concluded that because CMRS services are now broadly available, and the CMRS market is increasingly

competitive, the original "immediate need" for mobile radio services had been met.² We determined that the benefit provided by further extension of CMRS would therefore be an incremental increase in the number of competitors. Id. at 20-21. In addition, we indicated our concerns about the proliferation of proposals to construct CMRS towers within the Commonwealth, and our belief that routine intrusion into the affairs of local government could be justified only by extremely significant public benefits. Id. at 21-22. Finally, we indicated that we were not convinced that competition in the CMRS market necessarily depended on extending PSC status to CMRS providers, and noted that the Telecommunications Act of 1996 offered a mechanism to address siting concerns. Id. at 22. The Department concluded that "[a]fter reviewing the purpose of G.L. c. 40A, § 3, and the legal standards and policy implications pertinent to its analysis, the Department finds that, on balance, Nextel and other CMRS providers do not meet the standard set forth in Save the Bay, and consequently do not qualify as public service corporations." Id. at 23.

The Department noted in its Order that its findings applied to all CMRS providers in Massachusetts. Therefore, the Department also issued orders dismissing four other pending

² In prior cases, the Department's analysis of the need for and benefits of mobile radio was based in part on a 1981 finding by the Federal Communications Commission ("FCC") regarding the immediate public need for cellular radio. D.P.U. 95-59, at 20 (citations omitted). The Order in D.P.U. 95-59 stated that the nature of the public benefits offered by CMRS providers needed to be reassessed in light of changes in the CMRS industry over the past decade, including the current broad availability of cellular service, and recent findings by the FCC and the Department that the industry had become more competitive. Id. at 20-21 (citations omitted). On the basis of this analysis, the Department determined that the original "immediate need" for mobile radio services had been met, and that this change needed to be factored into an assessment of whether Nextel and other CMRS providers meet the Save the Bay test. Id. at 21.

zoning exemption petitions by CMRSs: two filed by Nextel (D.P.U. 95-80 and D.P.U. 95-112), and two filed by Bell Atlantic NYNEX Mobile ("Bell Atlantic") (D.P.U. 95-110 and 96-13).

On February 28, 1996, Nextel filed Motions for Reconsideration in all three Nextel cases, asserting errors of law and fact in the Department's analysis of the PSC issue. On February 29, 1996, Bell Atlantic filed Motions for Reconsideration and to Reopen the Record in D.P.U. 95-110 and D.P.U. 96-13. Motions for Extension of the Judicial Appeal Period were filed by Nextel in each of its three cases on February 22, 1996, and by Bell Atlantic on February 29, 1996, in its two cases; the Department granted Nextel's and Bell Atlantic's Motions on February 29, 1996, and extended the appeal period for Nextel and Bell Atlantic until ten days after the Department ruled on the Motions for Reconsideration. On February 28, 1996, AT&T Wireless Services, Inc. ("AT&T")³ filed an Assented to Petition to Intervene Late in D.P.U. 95-59, and on February 29, 1996, filed a Motion to Extend the Period for Moving for Reconsideration and to Extend the Appeal Period in D.P.U. 95-59. On March 14, 1996, the City of Marlborough filed an Opposition to Nextel's Motion in D.P.U. 95-80. On March 15, 1996, AT&T filed Petitions to Intervene in D.P.U. 95-110 and D.P.U. 96-13 as well as Motions to Extend the Period for Moving for Reconsideration and to Extend the Appeal Period in D.P.U. 95-110 and D.P.U. 96-13. Additionally, on March 15, 1996, Sprint Spectrum L.P. ("Sprint") filed an Assented To Petition for

³ AT&T indicates that some of its pleadings are filed by AT&T Wireless Services, Inc. and others are filed by its subsidiary, Wireless PCS, Inc. For purposes of this Order we refer to these entities as "AT&T".

Permission to Intervene Late in D.P.U. 95-59.

III. ANALYSIS

The various motions for late intervention, reconsideration, and reopening of the records in these cases all urge the Department to reconsider its decision in D.P.U. 95-59 and to allow further evidence and argument on whether CMRSs meet the standard for PSC status under G.L. c. 40A, § 3. As a preliminary matter, we note a procedural defect in our dismissals of the petitions in D.P.U. 95-80, D.P.U. 95-110, D.P.U. 95-112, and D.P.U. 96-13. Although there is no question that the Department may establish policy through adjudication, and that a general finding on an issue is precedent on that issue for all other companies, see Wolf v. Dept. of Public Utilities, 407 Mass. 363, 370 (1990); Massachusetts Electric Company v. Dept. of Public Utilities, 383 Mass. 675, 678-679 (1981), entities that are not parties to the underlying adjudication must be given the opportunity to be heard on whether the precedent is correct or whether it should be applied to them, see Massachusetts Electric Company v. Dept. of Public Utilities, 383 Mass. at 680-681. This procedure was not followed in the dismissals noted above. We therefore vacate the dismissals in D.P.U. 95-80, D.P.U. 95-110, D.P.U. 95-112, and D.P.U. 96-13; this action reopens the dockets in those cases.

The primary issue in each of the five cases is the same: our analysis of PSC status for CMRSs in the context of G.L. c. 40A, § 3. Given the unusual circumstances in these cases, i.e., the procedural defect outlined above, and the need to address a common issue of law and fact, and based on the procedural arguments presented in the various motions, the Department finds that there is good cause to reopen the record in D.P.U. 95-59 in order to

determine if there is previously unknown or undisclosed information regarding a material issue that would be likely to have a significant impact on the decision already rendered. See 220 C.M.R. § 1.11(8); 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).

In order to allow affected entities the opportunity to address the Department's analysis of the PSC issue in D.P.U. 95-59 and to ensure a complete record on this issue, and given the common questions of law and fact in these cases, the Department on its own motion hereby consolidates the cases into a single docket, D.P.U. 95-59-B/95-80/95-110/95-112/96-13, for the purpose of investigating and ruling on the issue of PSC status for CMRSs in a manner which will apply to all entities in the consolidated cases and which will serve as precedent for all CMRSs. See 220 C.M.R. §§ 1.09, 1.11 (8). The consolidated docket will be renoticed and deadlines will be set for motions to intervene and for any additional motions.

Given the opportunities to intervene and to file motions in the consolidated docket, we deny the pending motions to intervene late, to file additional motions if intervention is granted and to extend judicial appeal periods in the unconsolidated cases; movants will be able to file or refile the appropriate motions in accordance with the notice in the consolidated docket.^{4,5} Any motions filed by the parties to the five cases that are not disposed of by this

⁴ For example, in its Motions to Extend the Period for Moving for Reconsideration and to Extend the Appeal Period, AT&T indicated that it "expects that it will ask the Department to reconsider its decision and to reopen the hearing...." Because AT&T will receive full opportunity to participate in the consolidated docket, AT&T's

Order, i.e., Nextel's Motions for Reconsideration in D.P.U. 95-59, D.P.U. 95-80, and D.P.U. 95-112, Bell Atlantic's Motions for Reconsideration in D.P.U. 95-110 and D.P.U. 96-13, and the City of Marlborough's Opposition to Nextel's Motion in D.P.U. 95-80, will be incorporated into the consolidated docket. After any additional motions have been filed in the consolidated docket, the Department will issue an order on the motions and take whatever further action is necessary.

IV. ORDER

Accordingly, after due consideration, it is hereby

ORDERED: That the Department's Orders of dismissal in D.P.U. 95-80, D.P.U. 95-110, D.P.U. 95-112, and D.P.U. 96-13, based on the holding in D.P.U. 95-59, are hereby vacated; and it is

FURTHER ORDERED: That the record in D.P.U. 95-59 shall be reopened and the dockets in D.P.U. 95-59-B, D.P.U. 95-80, D.P.U. 95-110, D.P.U. 95-112, and D.P.U. 96-13 shall be consolidated into a single docket for the purpose of determining if there is previously unknown or undisclosed information regarding a material issue that would be likely to have a significant impact on the decision rendered in D.P.U. 95-59; and it is

Motions to Extend the Period for Moving for Reconsideration are denied.

⁵ As indicated above, Nextel's and Bell Atlantic's Motions for Extension of the Judicial Appeal Period were granted on February 29, 1996, and the appeal periods for both parties were extended until ten days after the Department ruled on their Motions for Reconsideration. The Department hereby modifies those grants to allow the appeal period to run until 20 days after the Department's final Order in the consolidated case. All other motions to extend appeal periods are denied, since the procedure in the consolidated docket will allow any party with appeal rights to seek further judicial relief following issuance of the final Order in the consolidated case.

FURTHER ORDERED: That Bell Atlantic NYNEX Mobile's Motions to Reopen the Records in D.P.U. 95-110 and 96-13 are DENIED; and it is

FURTHER ORDERED: That AT&T Wireless Services, Inc.'s Assented To Petition to Intervene Late in D.P.U. 95-59 and its Motion to Extend the Period for Moving for Reconsideration and to Extend the Appeal Period in D.P.U. 95-59 are DENIED; and it is

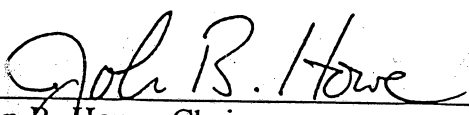
FURTHER ORDERED: That the Assented To Petition of Sprint Spectrum L.P. for Permission to Intervene Late in D.P.U. 95-59 is DENIED; and it is

FURTHER ORDERED: That AT&T Wireless Services, Inc.'s Petitions to Intervene in D.P.U. 95-110 and D.P.U. 96-13 and its Motions to Extend the Period for Moving for Reconsideration and to Extend the Appeal Period in D.P.U. 95-110 and D.P.U. 96-13 are hereby DENIED; and it is

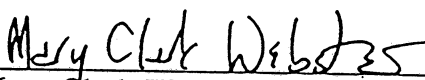
FURTHER ORDERED: That the outstanding motions filed by the parties in D.P.U. 95-59, D.P.U. 95-80, D.P.U. 95-110, D.P.U. 95-112 and D.P.U. 96-13, i.e., Nextel's Motions for Reconsideration in D.P.U. 95-59, D.P.U. 95-80, and D.P.U. 95-112, Bell Atlantic's Motions for Reconsideration in D.P.U. 95-110 and D.P.U. 96-13, and the City of Marlborough's Opposition to Nextel's Motion in D.P.U. 95-80, are hereby incorporated in the consolidated case; and it is

FURTHER ORDERED: That petitioners may file further petitions and motions consistent with the procedure to be set in consolidated docket D.P.U. 95-59-B/95-80/95-110/95-112/96-13.

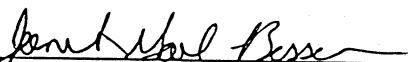
By Order of the Department,



John B. Howe, Chairman



Mary Clark Webster, Commissioner



Janet Gail Besser, Commissioner

A true copy
Attest:

MARY L. COTTRELL
Secretary

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 further 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).

Consent Communication #1

S-479

Communication was received from Department
of Public Utilities transmitting notice
of consolidated proceeding.

In City Council September 30, 1996

Referred to the City Manager