THE COMMONWEALTH OF MASSACHUSETTS

# DEPARTMENT OF PUBLIC UTILITIES

# DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

## MEMORANDUM

To: Attached Service List

From: Paul J. Hibbard, Chairman, Department of Public Utilities
Sharon E. Gillett, Commissioner, Department of Telecommunications and Cable

Re: Memorandum of Agreement regarding jurisdiction over pole attachment and double pole disputes

Date: October 15, 2008

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## I. INTRODUCTION

On July 18, 2008, the Department of Public Utilities ("DPU") and the Department of Telecommunications and Cable ("DTC") jointly requested comment from industry stakeholders on a proposed Memorandum of Agreement ("MOA") regarding the regulation of attachments to utility poles, ducts, and conduits pursuant to G.L. c. 166, § 25A and double poles pursuant to G.L. c. 164, § 34B. Comments on the proposed MOA were due August 1, 2008.

We received comments from the following entities: (1) collectively by Fitchburg Gas and Electric Light Company d/b/a Unitil; Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid; NSTAR Electric Company; and Western Massachusetts Electric Company (together, "electric distribution companies"); (2) Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon"); (3) the Attorney General of the Commonwealth of Massachusetts ("Attorney General"); (4) New England Cable and Telecommunications Association, Inc. ("NECTA"); (5) Five Colleges, Inc. ("Five Colleges"); and (6) The Distributed Antenna Systems ("DAS") Forum.[1]

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[1] The full text of the comments is available online on the DPU's website at www.state.ma.us/dpu (go to the "Electric Power Division" link in the upper left corner and then click on "Safety and Reliability") and on the DTC's website at

We appreciate the review and feedback from the above participants. We have evaluated the comments, and we conclude that the MOA should be modified in two respects: first, regarding the collaborative forum provision, and second, regarding intervention rights. This memorandum summarizes the modifications and addresses additional key concerns raised in the comments. The revised MOA, as executed, is attached to this memorandum.

## II. MODIFICATIONS TO THE MOA

### A. Delay of Collaborative Forum

The electric distribution companies, the Attorney General, and NECTA raise issues with the proposed collaborative forum. In general, the electric distribution companies and the Attorney General state that the scope of the collaborative forum should be established prior to scheduling the forum. NECTA objects to the purpose and timing of the forum, and suggests that a waiting period of at least one year after the MOA's implementation is necessary to determine whether any issues exist to make the forum necessary. Given these comments, the MOA has been revised to reflect agreement by the DPU and DTC that we will determine the appropriate scope and parameters prior to convening any such collaborative forum.

### B. Clarification of Intervention Rights

Five Colleges and NECTA inquire as to the scope of "intervention" rights to be conferred upon the agency that does not have jurisdiction over a dispute. We have revised the MOA to clarify that an intervenor will have full party rights.

## III. OTHER CONCERNS RAISED IN THE COMMENTS

### A. Determining Jurisdiction - Primary Purpose of Attachment

Verizon, NECTA and DAS Forum address whether jurisdiction over pole attachment disputes should be determined based on the primary purpose of the attachment, as provided in paragraph five of the MOA. Verizon suggests that this approach may not be appropriate in some circumstances, as it may result in the DPU obtaining jurisdiction over cases that involve attachments in the communications space on poles.

Instead, Verizon recommends determining jurisdiction based on the identity of the parties to the dispute (e.g., a complaint against Verizon would be adjudicated by the DTC).

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www.state.ma.us/dtc (scroll down to the "Competition Division" link, click on it and then click on to "Telecommunications Division", next scroll down to "Telecom Statutes, Rules, and Notices" click on it and then on "Comments filed with the Department regarding Pole Attachment Jurisdiction" located at the bottom of the page).

Where pole co-owners are parties to an action, the location or proposed location of the attachments on the poles would determine the agency to adjudicate the claim (e.g., the DPU would determine complaints concerning attachments in the power supply space or the neutral zone).

NECTA and DAS Forum support the primary purpose approach but both commenters suggest that the "exception" language in paragraph five would improperly result in assigning DPU exclusive jurisdiction over attachments that transmit electricity. They contend this would deprive the DTC of jurisdiction over disputes within its expertise and result in inefficient splits of jurisdiction between the two agencies. They recommend narrowing the language in this paragraph to disputes over the provision of electricity or electric safety issues.

DPU and DTC have concluded that it is unnecessary to modify paragraph five of the MOA, as we are persuaded that the primary purpose approach remains the best possible means of resolving jurisdiction over complaints. To the extent that issues arise related to jurisdiction, the agencies will resolve them during the 15-day consultation period. In addition, both agencies will be able to intervene in dispute proceedings, when necessary, to further address any issues that may arise.

B. Safety and Reliability

The Attorney General and the electric distribution companies raise issues related to safety and reliability. The Attorney General submits that whichever agency ultimately retains jurisdiction over the dispute must remain cognizant of applicable safety, reliability, and engineering standards, even if this means hiring outside experts or sharing personnel among the agencies.

The electric distribution companies suggest that in cases where the DTC has jurisdiction over a pole attachment complaint, but a question has been raised concerning the safety and reliability of the electric system, an opinion by the DPU that the attachment would not negatively impact the safety and reliability of the electric system should be a condition precedent to a decision by the DTC. They recommend revising the MOA to reflect this prerequisite.

We conclude that such modification is unnecessary. The commenters' concerns can be addressed through the agencies' mutual right of intervention. Specifically, the intervening agency will be able to address safety and reliability issues and provide necessary expert information to the agency retaining jurisdiction over the complaint. In addition, all interested parties, including the Attorney General and the electric distribution companies, can seek to intervene and provide expert testimony regarding safety and reliability.

C. Pole Attachment Rates

The electric distribution companies suggest that the MOA should be revised to clarify that the DPU, and not the DTC, will set rates for attachments on poles owned by electric companies. We decline to modify the MOA in this respect. The rate formula for pole attachments is governed by statute, case law, and regulations, all of which provide sufficient guidance regarding pole attachment rates. We conclude that any issues relating to rates can be addressed by either agency through its right of intervention under paragraph nine of the MOA.

D. Shared Jurisdiction of Double Poles

The electric distribution companies state that the MOA is silent as to the actual process of shared jurisdiction by the agencies as to double poles, and they recommend that the MOA be revised to address this issue. As stated in the MOA, the DPU and DTC agree to develop a process to share issues relative to double poles. The agencies also agree to address double poles issues, if necessary, in a future collaborative forum with interested stakeholders. As such, the DPU and DTC conclude that no further modification to the MOA is necessary at this time.

E. 15-day Consultation Period

The Attorney General raises a concern that procedural issues could arise during the 15-day consultation period between the DPU and DTC that require one agency to issue an immediate ruling, such as a claim for interim relief. The Attorney General suggests that the agency before which a claim for immediate relief is filed should review the merits in a timely manner. We believe that the agencies can reach agreement on interim procedural decisions during the 15-day consultation period, and the appropriate agency then will issue a ruling.

## IV. CONCLUSION

We thank those who submitted comments and offered suggestions on the MOA. Prior to the expiration of the MOA in two years, the DPU and DTC will review our experience under the MOA and will have another opportunity to address any concerns raised by our stakeholders.

**MEMORANDUM OF AGREEMENT**
**between**
**Department of Public Utilities**
**and**
**Department of Telecommunications and Cable**
**regarding the regulation of attachments to utility poles, ducts, and conduits pursuant to G.L c. 166, § 25A and double poles pursuant to G.L. c. 164, § 34B**

This Memorandum of Agreement ("MOA") is entered into this October 14, 2008 between Department of Public Utilities ("DPU") and Department of Telecommunications and Cable ("DTC").

WHEREAS, on April 11, 2007, pursuant to Article 87 of the Amendments to the Massachusetts Constitution, Chapter 19 of the Acts of 2007 ("Act") reorganized the Governor's cabinet and certain agencies of the Executive Department, separating the functions of Department of Telecommunications and Energy ("DTE") into two successor agencies;

WHEREAS, the Act created DPU within the Executive Office of Energy and Environmental Affairs ("EOEEA"), as the successor to the DTE, for purposes of regulation of gas, water, and electric utilities, pipelines, and transportation industries;

WHEREAS, the Act created DTC within the Executive Office of Housing and Economic Development ("EOHED") as the successor to the DTE, for purposes of regulation of the telecommunications and cable television industries;

WHEREAS, notwithstanding the above changes, jurisdiction over the regulation of attachments to utility poles, ducts, and conduits ("pole attachments") pursuant to G.L. c. 166, § 25A and over double poles pursuant to G.L. c. 164, § 34B remains with DTE;

WHEREAS, DPU and DTC have agreed on a process to share jurisdiction over issues relative to pole attachments pursuant to G.L. c. 166, § 25A;

WHEREAS, DPU and DTC jointly agree to develop a process to share jurisdiction over issues relative to double poles;

NOW THEREFORE, the parties to this MOA, intending to be legally bound hereby, agree as follows:

1. When any entity files or otherwise raises a complaint with DPU relative to pole attachments or double poles, DPU will send a copy of such complaint or notice of proceeding to DTC within three business days at the following address:

Department of Telecommunications and Cable
Two South Station – 4th Floor
Boston, Massachusetts 02110

2. When any entity files or otherwise raises a complaint with DTC relative to pole attachments or double poles, DTC will send a copy of such complaint or notice of proceeding to DPU within three business days at the following address:

   Department of Public Utilities
   One South Station - 2nd Floor
   Boston, Massachusetts 02110

3. As the utility poles, ducts, and conduits often are jointly owned by an electric distribution company and Verizon New England, Inc. and as the attachments at issue are used for various purposes, DTC and DPU will share jurisdiction over issues related to pole attachments pursuant to G.L. c. 166, § 25A and over double poles pursuant to G.L. c. 164, § 34B. As more fully described in paragraphs 4 and 5 below, the appropriate agency to adjudicate a pole attachment complaint will be determined by the primary purpose of the attachment at issue. As more fully discussed below in paragraph 11, DTC and DPU agree to establish a collaborative forum with interested stakeholders to identify and resolve issues related to pole attachments and double poles.

4. DTC JURISDICTION OVER POLE ATTACHMENTS: Except as provided below in paragraph 5, DTC shall be the appropriate agency to adjudicate a pole attachment complaint where the primary purpose of the attachment at issue is:

   for the transmission of intelligence by

   telegraph;

   wireless communications;

   telephone;

   television, including cable television;

   and any other communications service.

5. DPU JURISDICTION OVER POLE ATTACHMENTS: DPU shall be the appropriate agency to adjudicate a pole attachment complaint where the primary purpose of the attachment at issue is:

   for the transmission of electricity for light, heat, or power;

for the measurement, reading, tracking, or recording of any customer's electric or natural gas usage, or electric or natural gas demand or consumption at any level of aggregation;

for remote reading of customer electric or natural gas meters, or the connection, disconnection, or alteration of electric or gas service to a customer or groups of customers;

for the remote alteration of the electric or gas consumption of any end-use consuming appliance or mechanism within an end-user's residence or place of business; or

for any application related to electric smart grid or advanced metering.

Notwithstanding an attachment's primary purpose, any attachment which involves or requires attaching to, using, or drawing from any wire or device that transmits electricity, including any attachment for the purpose of transmission of intelligence over electric power lines, or any attachment that affects or could affect the provision of electric smart grid or advanced metering, whether on poles, underground, at substations, or between the poles and the customer's electrical meter, shall be under the jurisdiction of DPU.

6. DPU and DTC agree that 220 C.M.R. § 45.00 et seq. are the applicable regulations with respect to pole attachments. In the event that either agency seeks changes to these regulations, or to other policies or procedures applicable to pole attachments, DPU and DTC agree to jointly develop and promulgate such regulations, policies or procedures consistent with G.L. c. 166, § 25A and consistent with any directives resulting from the collaborative forum, discussed in paragraph 11.

7. CONSULTATION PLAN FOR POLE ATTACHMENT DISPUTES: The agencies anticipate that, in most circumstances, the appropriate agency to adjudicate a pole attachment complaint will be resolved by paragraphs 4 and 5, above. However, exceptional cases may arise in which the appropriate agency to adjudicate a complaint is not clear. Therefore, the DTC and the DPU agree, through this MOA, to consult to reach agreement regarding the appropriate agency to adjudicate a pole attachment complaint ("Consultation Plan").

8. In order to enable the agency with jurisdiction to meet the 180 day deadline to issue a final order as required in 220 C.M.R. 45.08, DTC and the DPU agree that they shall endeavor to complete all tasks in the Consultation Plan within 30 calendar days of receipt of filing by both agencies (see paragraphs 1 and 2 above, and subparagraph a, below).

a. When a pole attachment complaint is filed at either agency, the agency receiving the complaint will follow the procedure set forth in paragraphs 1 and 2, above.

b. Representatives from the DTC and the DPU will consult regarding the appropriate agency to adjudicate the pole attachment complaint within fifteen (15) business days of receipt of the filing by the other agency of the complaint ("15 Day Consultation Period"). The DTC and the DPU contemplate that, in most circumstances, this initial consultation will be sufficient to ensure that the complaint has been filed at the appropriate agency. In the event that either agency determines that it does not have sufficient information to determine the primary purpose of the attachment at issue as contemplated by paragraphs 4 and 5, above, it may request further information from the complainant and/or respondent. Either agency also may review the response to the complaint filed pursuant to 220 C.M.R. § 45.05. The 15 Day Consultation Period shall be suspended pending the receipt of such additional information or response to the complaint.

c. If the initial consultation results in agreement between DTC and DPU that the complaint is filed with the wrong agency, the agency that received the complaint shall dismiss that complaint, and the complaining party shall be directed to re-file the complaint with the appropriate agency.

d. If the initial consultation results in agreement by both DTC and DPU that neither agency has jurisdiction to resolve the complaint, then the agency that received the petition shall dismiss the petition on the basis of lack of jurisdiction.

e. If DTC and the DPU are unable to reach agreement regarding which agency is appropriate to adjudicate the complaint after the 15 Day Consultation Period, they shall submit the issue to the General Counsel of EOHED and the General Counsel of EOEEA for resolution.

9. The agency without jurisdiction shall have the right to intervene as a full party to any proceeding conducted pursuant to paragraphs 4 and 5 above.

10. DPU and DTC agree to cooperate in the implementation of this MOA, including responding to requests for information and meetings, upon request by either party, to discuss information or issues related to the MOA.

11. DPU and DTC agree to meet within twelve months of execution of this MOA to evaluate and discuss its implementation. After such discussions, DTC and DPU may agree that it is necessary to establish a collaborative forum to address specific issues with the implementation of the MOA or with the regulation of double poles. If DTC and DPU agree that a collaborative forum is necessary, we will decide on the scope of such a forum at that time.

12. Absent any intervening and pertinent statutory amendments to G.L. c. 166, § 25A or G.L. c. 164, § 34B, this MOA shall expire two (2) years from the date of execution.

13. This MOA may be renewed or modified by written agreement of DPU and DTC.

IN WITNESS WHEREOF, DPU and DTC hereby execute this Memorandum of Agreement, in duplicate, on the 14th day of October, 2008.

COMMONWEALTH OF MASSACHUSETTS

By and through:

DEPARTMENT OF PUBLIC UTILITIES

By: _____
Paul J. Hibbard, Chairman

DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

By: _____
Sharon E. Gillett, Commissioner

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**Department of Public Utilities**
**and**
**Department of Telecommunications and Cable**
**regarding the regulation of attachments to utility poles, ducts, and conduits pursuant to G.L c. 166, § 25A and double poles pursuant to G.L. c. 164, § 34B**

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