

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

Comcast of Massachusetts III, Inc.

*Complainant,*

v.

Peabody Municipal Light Plant and Peabody  
Municipal Lighting Commission

*Respondents.*

D.T.C. 14-2

**BRIEF IN RESPONSE TO THE DEPARTMENT'S  
PROPOSED MODIFIED SCHEDULE PROPOSAL**

In accordance with 220 C.M.R. 1.06(6)(b)(2), Comcast of Massachusetts III, Inc. (“Comcast”) hereby submits its brief in response to the Hearing Officer’s Order dated May 15, 2014 (“May 15 Order”), in the captioned proceeding.

**I. INTRODUCTION**

**A. Background**

The May 15 Order directs the parties to brief a proposal by the Department of Telecommunications and Cable (“DTC” or “Department”) to conduct a two-phase inquiry into the pole attachment rates of Peabody Municipal Light Plant and the Peabody Municipal Light Commission (collectively “PMLP”) that have been challenged by Comcast in its Pole Attachment Complaint filed March 19, 2014. In Phase I, the Department would first consider whether the formula established in its prior decisions for setting maximum permitted pole attachment rates pursuant to G.L. c. 166, § 25A (the “Massachusetts Formula”) applies to municipal electric pole owners and then in Phase II, focus on discovery into the specific facts relevant to PMLP’s proposed rates.

In order for the Department to make a determination regarding its proposed two-phase inquiry, the May 15 Order directs the parties to brief three issues: (1) whether the two-phase format would cause undue prejudice or produce an inefficient or inequitable result; (2) whether the legal threshold of determining the applicability of the formula is accurate and susceptible to treatment apart from the specifics of the PMLP rate studies; and (3) to what extent Ashburnham Municipal Light Plant (“Ashburnham”) should participate in either phase. For the reasons set forth in detail below, Comcast urges the Department to adopt its two-phase approach and resolve the legal threshold issue first. Such an approach is consistent with Department and Department of Public Utilities (“DPU”) precedent, and would not prejudice the parties. A two-phase approach would also streamline the proceeding, and likely result in many of the factual issues being resolved or settled without litigation as intended by G.L. c. 166, § 25A and the Department’s pole attachment precedent.

#### **B. Department Precedent on Two-Phase Proceedings**

It is common for the Department to phase proceedings by resolving legal issues first and then addressing factual issues when disposition of one issue for review will substantially narrow, eliminate, or affect other issues. *See, e.g., Investigation into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England*, Interlocutory Order on Scope, D.T.E. 01-31 at 19, (2001) (bifurcating proceeding into phases to first determine threshold legal and factual question of sufficient competition before considering specific proposals). *See also Application of Massachusetts Electric Company and New England Power Company for Approval of a Memorandum of Understanding*, Notice of Inquiry and Order Seeking Preliminary Comments, D.P.U. 93-138 at 4 (1993) (initiating a two-phase review process, first determining the appropriateness of the applicant’s request for an exception to Integrated Resource

Management regulations and then later deciding what review procedures would be appropriate for the applicant's proposed Regional Integrated Resource Plan).

Bifurcating a proceeding is particularly useful where, as here, there is a question about the standard of review that the Department should apply.<sup>1</sup> As demonstrated below, the primary issue to be determined in Phase I is whether the Massachusetts Formula applies to municipal light plants like PMLP.<sup>2</sup> Resolving that issue first will greatly streamline the remainder of the proceedings and allow Phase II to focus on the inputs to that formula by way of discovery.

## II. RESPONSES TO SPECIFIC QUESTIONS

### A. **Question 1: Explain in detail whether a proposed two-phase format would unduly prejudice any party to this case or otherwise produce an inefficient or inequitable result.**

The Department's proposed two-phase approach will not unduly prejudice any party but instead will produce an efficient and equitable result. The basic legal dispute between Comcast and PMLP, whether the Massachusetts Formula applies to PMLP, must be resolved at the outset. In Phase I, parties can fully address whether the Massachusetts Formula applies. If the answer is the Massachusetts Formula applies, Phase II will be streamlined and likely many factual issues

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<sup>1</sup> See *Comcast of Massachusetts, III, Inc. v. Board of Selectmen of the Town of Framingham*, Interlocutory Order on Standard of Review, Administrative Notice, and Partial Summary Decision, C.T.V. 05-2 at 4 (2006) (determining standard of review of denial of a franchise renewal proposal upon request of the parties before investigating additional questions of law and fact); *Investigation on Petition of New England Energy Group*, Order Opening an Investigation, D.P.U. 85-178 at 1 (1985) (bifurcating proceedings to first determine appropriateness of requiring natural gas local distribution companies to file transportation rates, then conduct a case-by-case review of reasonableness of any rates filed). See also In *Joint Petition for Approval of Merger Between NSTAR and Northeast Utilities*, D.P.U. 10-170 (2010), the D.P.U. sought "to resolve the standard of review issue as early as possible" before determining whether the merger was "consistent with the public interest." Interlocutory Order on Standard of Review, D.P.U. 10-170 at 1 (2010).

<sup>2</sup> Comcast contends that the Massachusetts Formula should apply. Comcast Petition at 1-2 and ¶ 20. PMLP on the other hand contests the application of the Massachusetts Formula and proposes a formula that has not been adopted or considered by the DTC or its predecessor and that is inconsistent with Massachusetts law. PMLP Answer at ¶ 20.

can be negotiated and resolved (or even settled) thereby avoiding the needless expenditure of resources by the parties and the Department in analyzing and arguing over inputs to some other irrelevant formula. If the answer is the Massachusetts Formula does not apply, then in Phase II, PMLP would be able to offer expert testimony to support a different formula than the Massachusetts Formula and to support its rates.<sup>3</sup> Such factual evidence or testimony is irrelevant to the threshold issue in Phase I: whether the current Massachusetts Formula is controlling legal precedent for municipal utilities. No party is prejudiced by answering this pivotal question first. In contrast, if the issue is not resolved at the outset, the parties will not know whether the Massachusetts Formula applies and the proceeding could not be conducted efficiently to the detriment of the parties and the Department.

Indeed, a brief examination of the governing law and Department precedent demonstrates that a preliminary determination in Phase I could be made easily without any need for a hearing or discovery. G.L. c. 166, § 25A requires the Department to “determine a just and reasonable rate for the use of poles ... by assuring the utility recovery of not less than the additional costs of making provision for attachments nor more than the proportional capital and operating expenses of the utility attributable to that portion of the pole...” In *Cablevision of Boston Company, et al. v. Boston Edison Company*, 1998 WL 35235111 (April 15, 1998) (“*Cablevision*”) and *A-R Cable Services, Inc., et al. v. Massachusetts Electric Company*, D.T.E. 98-52 (Nov. 6, 1998) (“*A-R Cable*”), the Department did just that and “established a method to estimate the fully –allocated costs of pole attachments that is consistent with G.L. c. 166, § 25A” – the Massachusetts

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<sup>3</sup> As noted in footnote 1 of the DPU’s Letter in Lieu of Brief dated May 27, 2014, to the extent that changes are contemplated to the regulations, policies or procedures applicable to pole attachments, such changes are to be jointly developed and promulgated by the DPU and DTC pursuant to ¶ 6 of the Memorandum of Agreement (“MOA”) executed on March 10, 2014. To the extent that a new formula for determining maximum permitted pole attachment rates is to be used instead of the Massachusetts Formula, this formula will likely need to be developed by the DPU and the DTC.

Formula.<sup>4</sup> Contrary to PMLP's suggestion, no particular fact needs to be established through discovery in this proceeding in order to determine whether the Massachusetts Formula applies. Comcast's attachments to PMLP's poles are clearly subject to the requirements of G.L. c. 166, § 25A because PMLP is a "utility" whose poles are subject to regulation for third-party attachments.<sup>5</sup>

Moreover, the types of services offered by Comcast over its attachments are not relevant to the choice or application of the Massachusetts Formula, as suggested by PMLP at the procedural conference. The Massachusetts Formula applies to "attachments"<sup>6</sup> and is not dependent on the attaching companies remaining in the same form, remaining the same size, or providing certain or the same services. Neither *Cablevision* nor *A-R Cable* indicates that the application of the Massachusetts Formula is dependent on services in place in 1998 or stagnation of attaching entities. While the Massachusetts Formula was adopted for all utilities in 1998, and services provided by attachers may have evolved since that time, this does not change the fact

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<sup>4</sup> As the Hearing Examiner recognized in the May 15 Order, the Massachusetts Formula was developed in 1998 by the Department of Telecommunications and Energy ("DTE") – the predecessor agency of the DTC and the Department of Public Utilities ("DPU") – in these two seminal cases.

<sup>5</sup> "'Utility', means any person, firm, corporation or *municipal lighting plant* that owns or controls or shares ownership or control of poles ... used or useful, in whole or in part, for supporting or enclosing wires or cables for the transmission of intelligence by telegraph, telephone or television or for the transmission of electricity for light, heat or power." (emphasis added); *see also* 220 CMR 45.02 (defining "utility" in the same manner as G.L. c. 166, § 25A).

<sup>6</sup> G.L. c. 166, § 25A establishes regulated rates for "attachments", a term defined broadly under the statute, which "means any wire or cable for transmission of intelligence by telegraph, wireless communication, telephone or television, including cable television, or for the transmission of electricity for light, heat, or power and any related device, apparatus, appliance or equipment installed upon any pole or in any telegraph or telephone duct or conduit owned or controlled, in whole or in part, by one or more utilities." *See also* 220 CMR 45.02.

that the Massachusetts Formula is controlling legal precedent, complies with G.L. c. 166, § 25A and remains good policy.<sup>7</sup>

If the Department determines that the Massachusetts Formula does not apply to PMLP, then Phase II can go forward on that basis – and neither party will be prejudiced having considered the Phase I issue; indeed it will allow Phase II to be entirely devoted to determining the proper formula and rate. Any challenge to a specific element of the formula will be more efficiently addressed in Phase II when the parties know whether the Massachusetts Formula applies.

**B. Question 2: Explain in detail whether the legal threshold articulated above is accurate, and could it be addressed separately from the specifics of the PLMP/PLMC rate studies?**

As explained above, the threshold legal issue as articulated in the May 15 Order is accurate – namely does the Massachusetts Formula apply to municipal utilities like PMLP. This threshold legal issue can and should be addressed separately from the specifics of the PMLP rate studies and the setting of a specific pole rental rate because the validity of the rate studies should only be evaluated in the context of whether the Massachusetts Formula applies. Failure to establish whether the Massachusetts Formula applies at the outset, thereby requiring discovery and review of multiple formulas simultaneously with specific rates, will be far more complex and detailed than need be. Once there is a ruling whether the Massachusetts Formula applies, the factual issues will be streamlined significantly. Indeed, that was the whole idea behind the

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<sup>7</sup> PMLP's suggestion that the Massachusetts Formula is somehow "stale" or outdated is belied by the fact that the FCC's cable formula (upon which the Massachusetts Formula is based) has successfully governed pole attachment rates in 30 states for over three decades and is followed by the vast majority of other states that regulate pole attachments. Just two months ago, Missouri adopted legislation establishing the FCC cable formula as the maximum rate that can be charged by municipal pole owners. Mo. Rev. Stat. §67.5104(3).

Massachusetts Formula – it is time-tested and compliant with the precept under Massachusetts law to have an expeditious process for setting pole attachment rates:

The Department’s pole attachment formula reasonably balances the interests of subscribers of CATV services as well as the interests of consumers of utility services as required by G.L. c. 166, § 25A. The Department’s goal in adopting this pole attachment formula was to simplify the regulation of pole attachment rates as much as possible by adopting standards that rely upon publicly available data. The Department’s intent remains to have a simple, predictable, and expeditious procedure that will allow parties to calculate pole attachment rates without the need for Department intervention ...<sup>8</sup>

Bifurcation thus provides a great opportunity for expedition, consistent with Department practice, with no prejudice to either party. To the extent the Department reaffirms the Massachusetts Formula as controlling precedent, PMLP is still able to present its arguments that specific costs or other facts relevant to its operations should be considered. For example, as demonstrated in the *Cablevision* and *A-R Cable* cases, the Massachusetts Formula (like the FCC formula on which it is based) allows for the parties to rebut certain factual presumptions based on the utility’s specific facts, such as the average height of the poles to which the attacher is attached.<sup>9</sup>

**C. Question 3: Address the Town of Ashburnham’s Motion to Intervene as it would relate to participation in each phase of this investigation.**

As Comcast addressed in its Answer to Petition to Intervene of Ashburnham, which it incorporates by reference herein, Ashburnham’s participation should be limited to the legal issue

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<sup>8</sup> *A-R Cable Services* at 7 (citations omitted).

<sup>9</sup> The usable space “presumption may be rebutted if a company provides credible evidence, in the form of a statistical analysis or projections using actual pole surveys, that its average usable space is materially different from 13.5 feet.” *Cablevision of Boston* at 24. Similarly, PMLP’s contention that the Massachusetts Formula is not based on “fully allocated costs” and that the Massachusetts Formula subsidizes attachers by not allocating to them any of the costs of the “unusable” space on the pole are straightforward legal issues that can be handled in Phase I. Compare PMLP’s Answer at ¶ 20 and its attached affidavit at ¶ 7 with *Cablevision* at 9, quoting G.L. c. 166, § 25A.

to be addressed in Phase I. Ashburnham questions the applicability of the Massachusetts Formula to its pole rate calculation and this issue is squarely before the Department in the proposed Phase I. Accordingly, Comcast does not object to intervention by Ashburnham for the limited purpose of addressing this legal issue in Phase I. *See* 220 CMR 1.03(1)(e).

The Department should deny Ashburnham's full participation in this matter. Ashburnham's assertion that "[n]o party would be unduly prejudiced by AMLP's [full] intervention"<sup>10</sup> is incorrect. If granted full intervenor status, Ashburnham has indicated that it would submit "evidence, including but not limited to affidavits, expert testimony, briefs, and cross-examination."<sup>11</sup> Thus, it appears that Ashburnham intends to introduce an entirely new set of facts and possibly an entirely new rate calculation theory (separate and apart from PMLP's theory) as to why its pole attachment fees do not comply with the Massachusetts Formula, yet comport with Massachusetts law. As a result, full intervenor status for AMLP would require Comcast to respond to additional discovery demands (if such discovery is deemed necessary by the Department), rebut expert testimony potentially advocating an entirely different rate formula, and rebut issues arising from a materially different pole attachment agreement, which concerns a completely different set of poles and facts in a different community. Unquestionably, whether or not the Massachusetts Formula applies, Comcast would be prejudiced by a grant of full intervenor status to Ashburnham which essentially would require it to litigate on two fronts against both PMLP and Ashburnham on different facts, different contracts and potentially different formulas within the already tight statutory deadline for resolving the Complaint against PMLP.

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<sup>10</sup> Ashburnham Petition at ¶ 14.

<sup>11</sup> Ashburnham Petition at ¶ 15.

### III. CONCLUSION

Comcast respectfully agrees with the Department's proposed two-phase format for the inquiry into PMLP's pole attachment rates. Comcast also does not object to Ashburnham's participation in Phase I with respect to the threshold legal issue as identified by the Department, but the Department should deny Ashburnham's request for full party status and Ashburnham should not participate in Phase II.

Respectfully submitted,



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Dated: May 27, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that on May 27, 2014, I served the foregoing Brief in Response to the Department's Proposed Modified Schedule Proposal by first-class U.S. Mail to the attached Service List in accordance with the requirements of 220 CMR 1.05.

  
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Kevin Conroy