

Note on Supreme Judicial Court Decision Affecting 220 CMR 45.00

*The Supreme Judicial Court (“SJC”), in its decision, Greater Boston Real Estate Board v. Department of Telecommunications and Energy, 438 Mass. 197 (2002), held that “the second paragraph of the definition of ‘[u]tility’ appearing in 220 Code Mass. Regs. § 45.02, as it applies to commercial and multiple dwelling unit buildings, is ultra vires of the [Department of Telecommunications and Energy’s] authority under G.L. c. 166, § 25A” and therefore invalid. 483 Mass. 197, 204, 205. The SJC also declared that 220 Code Mass. Regs. § 45.04(2)(h) is invalid. Id. The SJC noted that, “[b]ecause the regulations contain a severability provision, the remaining portions of 220 Code Mass. Regs. § 45.00” are not affected by its holding. 483 Mass. 197, 204 at n.14.

220 CMR 45.00: POLE ATTACHMENT, DUCT, CONDUIT AND RIGHT-OF-WAY COMPLAINT AND ENFORCEMENT PROCEDURES

Section

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45.01: Purpose and Applicability

220 CMR 45.00 effects legislative policy in favor of competition and consumer choice in telecommunications by providing for complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to poles, ducts, conduits, and rights-of-ways owned or controlled, in whole or in part, by one or more utilities with rates, terms and conditions that are just and reasonable. The general procedural rules set forth at 220 CMR 1.00 are also applicable to proceedings initiated under this part except to the extent that they are inconsistent with 220 CMR 45.00.

45.02: Definitions

As used in 220 CMR 45.00, except as otherwise required by the context,

Attachment means any wire or cable for transmission of intelligence by telegraph, 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.

“Duct” and “conduit” is not limited to “telegraph” or “telephone” ducts and conduits.

Commercial Building means structures that are leased in whole or part for nonresidential purposes and used for the conducting of one or more business enterprises.

Complainant means a licensee or a utility who files a complaint.

Complaint means a filing by either a licensee or a utility alleging that it has been denied access to a pole, duct, conduit, or rights-of-way owned or controlled, in whole or in part, by one or more utilities in violation of 220 CMR 45.00, and/or alleging that a rate, term or condition for an attachment is not just and reasonable. A complaint shall constitute an initial pleading within the meaning of 220 CMR 1.04(1).

Department means the Department of Telecommunications and Energy.

Licensee means any person, firm or corporation other than a utility, which is authorized to construct lines or cables upon, along, under and across the public ways. For the purposes of 220 CMR 45.02: Licensee, the term shall also include a municipal lighting plant or cooperative that operates a telecommunications system outside the limits of its service territory pursuant to M.G.L. c. 164, § 47E, but only for those attachments that are outside its service territory.

Respondent means a licensee or a utility against whom a complaint has been filed.

Usable Space means the total space which would be available for attachments, without regard to attachments previously made,

- (a) upon a pole above the lowest permissible point of attachment of a wire or cable upon such pole which will result in compliance with any applicable law, regulation or electrical safety code, or
- (b) within any telegraph or telephone duct or conduit.

Utility means any person, firm, corporation or municipal lighting plant that owns or controls or shares ownership or control of poles, ducts, conduits or rights-of-way 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.

[*See headnote.] Effective July 1, 2001, utility, for purposes of 220 CMR 45.00, shall include but not be limited to a building that is rented, leased, let or hired

out, for office or other commercial purposes and a multiple dwelling unit building that is rented, leased, let or hired out for office or other commercial purposes and a multiple dwelling unit building that is rented, leased, let or hired out for occupation as the residence of four or more residential tenants or lessees living independently of each other. This definition exempts buildings that house fewer than four families living independently of one another and exempts four-unit buildings where one of the four units is owner occupied. Condominiums, homeowners' associations, tenancies of less than 12 months in duration and transient facilities such as hotels, rooming houses, continuing care retirement communities, including assisted living apartments, and nursing homes shall also be exempted from 220 CMR 45.02: Utility.

45.03: Duty to Provide Access; Modifications; Notice of Removal, Increase or Modification; and Petition for Interim Relief

- (1) A utility shall provide a licensee with nondiscriminatory access to any pole, duct, conduit, or right-of-way used or useful, in whole or in part, for the purposes described in M.G.L. c. 166, § 25A, owned or controlled by it. Notwithstanding this obligation, a utility may deny a licensee access to its poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis for valid reasons of insufficient capacity, reasons of safety, reliability, generally applicable engineering standards, or for good cause shown. Any exclusive contract between a utility and a licensee entered into or extended after the Department's adoption of 220 CMR 45.00 concerning access to any pole, duct, conduit, or right-of-way, owned or controlled, in whole or in part, by such utility shall be presumptively invalid insofar as its exclusivity provisions are concerned, unless shown to be in the public interest.
- (2) Requests for access to a utility's poles, ducts, conduits, rights-of-way owned or controlled, in whole or in part, by one or more utilities must be in an adequately descriptive writing directed to an appropriate named recipient designated by the utility. A utility is required to make such a designation. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant information supporting its denial, and shall explain how such information relates to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.
- (3) (a) A utility shall provide a licensee no less than 60 days' written notice prior to:
 1. removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the licensee's attachment agreement;
 2. any change in attachment rates, terms or conditions; or
 3. any modification of facilities other than routine maintenance or modification in response to emergencies;

- (b) any licensee that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or rights-of-way accessible;
 - (c) any licensee that obtains an attachment to a pole, duct, conduit, or right-of-way shall not be required later to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity, including the owner of such pole, duct, conduit, or rights-of-way;
 - (d) Exceptions: A utility may provide to a licensee less than 60 days' written notice of removal, change or modification if such removal, change or modification of facilities or telecommunications equipment is due to routine maintenance or an emergency.
 - (e) when a utility provides a licensee with less than 60 days' written notice pursuant to 220 CMR 45.03(3), such utility shall endeavor to provide its licensee with as much notice as is practicable in the particular circumstances.
- (4) In conjunction with the complaint procedure outlined herein, a licensee may file with the Department a "Petition for Interim Relief" of the action proposed in a notice received pursuant to 220 CMR 45.03(3)(a) within 15 days of receipt of such notice. Such submission will not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of the licensee's service to its customers, a copy of the notice, and certification of service as required by the Department's Procedural Rules. The named respondent may file an answer within seven days of the date on which the Petition for Interim Relief was filed. No further filings with respect to this petition will be considered unless requested or authorized by the Department and no extensions of time will be granted with respect to this petition unless allowed pursuant to 220 CMR 1.02(5).

45.04: Complaint

- (1) A complaint will commence a proceeding under 220 CMR 45.00. Complainants may join together to file a joint complaint.
- (2) Every complaint shall conform to the requirements specified in 220 CMR 1.04(1)(b) and shall be accompanied by certification of service on any utility, licensee, or party named as complainant or respondent. The complaint shall also contain the following:
 - (a) a copy of the attachment agreement, if any, between the licensee and the utility. If no attachment agreement exists, the petition shall contain:
 - 1. a statement that the utility uses or controls, in whole or in part,

those poles, ducts, conduits, or rights-of-way at issue which are used or designated for attachments;

2. a statement that the licensee currently has attachments on the utility's poles, ducts, conduits, or rights-of-way or has requested that attachments be placed on the utility's poles, ducts, conduits, or rights-of-way;
- (b) the specific attachment rate, term or condition which is claimed to be unjust or unreasonable;
 - (c) in any case where it is claimed that a term or condition is unjust or unreasonable, the complaint shall specify all information and argument relied upon to justify said claim;
 - (d) in any case where it is claimed that a rate is unjust or unreasonable, or that a term or condition requires review of the associated rate, the data, information and argument in support of said claim shall include, but not be limited to, the following, where applicable and available to the complainant:
 1. the gross investment by the utility for the pole lines;
 2. the investment by the utility in appurtenances not used by or useful to the licensee. This may be expressed as a percentage of the gross pole investment, and shall include a list of specific appurtenances considered not used or useful;
 3. the depreciation reserve for the gross pole line investment;
 4. the total number of poles (A) owned; and (B) controlled or used by the utility;
 5. the total number of poles which are the subject of the complaint;
 6. the annual carrying charges attributable to the cost of owning a pole, and the specific factors used in the determination of these charges. Annual carrying charges may be expressed as a percentage of net pole investment;
 7. the average amount of useable space per pole for those poles used for pole attachments;
 8. reimbursements received from the licensee for non-recurring costs.

Data and information should be based on historical or original cost methodology, to the extent possible. Data should be derived from Form M, FERC 1, or other reports filed with state or regulatory agencies. The source of any data shall be identified. Calculations made in connection with these figures should be provided to the complainant upon request, as should the computation of any rate determined by using the formula specified above;

- (e) In addition to meeting the other requirements of 220 CMR 45.04, in any case where it is claimed that a complainant has been improperly denied access to a pole, duct, conduit, right-of-way, owned or controlled, in whole or in part, by one or more utilities, the complaint shall include the data and information necessary to support the claim, including:

1. The reasons given for the denial of access to the poles, ducts, conduits, and rights-of-way, owned or controlled, in whole or in part, by one or more utilities;
 2. The basis for the complainant's claim that the denial of access is improper;
 3. The remedy sought by the complainant;
 4. A copy of the written request to the utility for access to its poles, ducts, conduits or rights-of-way; and
 5. A copy of the utility's response to the complainant's written request, including all information given by the utility to support its denial of access. A complaint alleging improper denial of access will not be dismissed if the complainant is unable to obtain a utility's written response;
- (f) a statement that the utility and licensee have been unable to agree and a brief summary, including dates, of all steps taken to resolve the problem prior to filing. If no such steps were taken, the complainant shall state the reason(s) why;
 - (g) any other information and arguments relied upon to attempt to establish that a rate, term or condition is not reasonable;
 - (h) where a complaint concerns access to a commercial building or multiple dwelling unit building, a writing signed by a lessee or tenant clearly evidencing that said lessee or tenant has requested service by the complainant for the provisions of which service the denied attachment is necessary; and
 - (i) a statement that the complainant requests that a hearing be convened pursuant to 220 CMR 1.06 or that it waives its right to a formal hearing.
- (3) Where the attachments involve ducts, conduits or rights-of-ways, appropriate data and information, equivalent to that required by § 45.04(2), shall be filed.
 - (4) All factual allegations set forth in the complaint shall be supported by affidavit(s).

45.05: Response

- (1) The response to a complaint under 220 CMR 45.00 shall be filed within 14 days after service of the document to which the response is directed.
- (2) The response shall specifically address all contentions made by the complainant. All factual statements shall be supported by affidavit(s).
- (3) The response shall include a statement either that the respondent requests that a hearing be convened pursuant to 220 CMR 1.06 or that it waives its right to a formal hearing.

45.06: Procedures Where Formal Hearing is Waived

- (1) Applicability. The procedures set forth in 220 CMR 45.06 apply only if no party requests and is granted a hearing. If a full hearing is to be convened, the procedures contained in 220 CMR 1.06 *et seq.* shall apply.
- (2) Notice. The Department shall give public notice by such means as it deems appropriate, consistent with due process, that a complaint has been filed and docketed. Such notice shall include a brief description of the complaint and shall set a time limit for filing of petitions to intervene. That time limit shall be no shorter than 14 days after such public notice.
- (3) Intervention. The procedures outlined in 220 CMR 1.03 shall generally apply to petitions to intervene under this part. If a person is allowed by the Department to intervene, the ruling on intervention shall be in writing and shall inform the petitioner of its right to a hearing, its responsibility to request a hearing within seven days after service of the ruling, and of the consequence of failure to make such a request (namely, waiver of the right to a hearing on the ruling). If a hearing is requested and granted, the procedures set forth in 220 CMR 1.06 *et seq.* shall apply.
- (4) Reply and Comments. The complainant shall have 20 days from the date the response is served to file a reply. Any person permitted to intervene as a party shall have the opportunity to file comments with the Department not later than 20 days after issuance of the Order permitting intervention. Any such comments shall be served on all parties and the parties may file a reply to the comments within 20 days after service. Unless authorized by the Department, no further filings shall be considered.
- (5) Meetings and Evidentiary Proceedings. The Department may decide each complaint upon the filings and information before it, may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute, or may, in its discretion, order evidentiary proceedings upon any issues.
- (6) Department Consideration of Complaint. In its consideration of the complaint, response, reply, and comments, the Department may take notice of any information contained in publicly available filings made by the parties and may accept, subject to rebuttal, studies that may have been conducted. The Department may also request that one or more of the parties make additional filings or provide additional information. Where one of the parties has failed to provide information required to be provided by 220 CMR 45.00 or requested by the Department, or where costs, values or amounts are disputed, the Department may estimate such costs, values or amounts it considers reasonable on the basis of available evidence of record, or may decide adversely to a party who has

failed to supply requested information which is readily available to it, or both.

45.07: Remedies

If the Department determines that a denial for access is discriminatory or that the rate, term or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term or condition and may:

- (1) terminate the unjust and unreasonable rate, term or condition; and
- (2) substitute in the attachment agreement the reasonable rate, term or condition established by the Department; or
- (3) order relief the Department finds appropriate under the circumstances.

45.08: Time Limit

The Department shall issue a final Order on the complaint filed in accordance with 220 CMR 45.00 within 180 days after the complaint is filed.

45.09: Appeal from Department Decisions

The Department shall notify all parties of their rights to appeal a final decision of the Department pursuant to M.G.L. c. 25, § 5, and of the time limits on their rights to appeal.

45.10: Rates Charged Any Affiliate, Subsidiary, or Associate Company

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which the utility would be liable under 220 CMR 45.10.

45.11: Severability

The provisions of 220 CMR 45.00 shall be deemed severable if any particular provision(s) is (are) rendered invalid by judicial determination or by statutory amendment.

REGULATORY AUTHORITY

220 CMR 45.00: M.G.L. c. 159A; M.G.L. c. 166, § 25A; 47 U.S.C. 224; 47 CFR § 1.401 *et seq.*