

**Before the  
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE  
Commonwealth of Massachusetts**

NEXTG NETWORKS OF NY, INC.

*Complainant,*

v.

RCN NEW YORK COMMUNICATION,  
LLC; RCN TELECOM SERVICES OF MA,  
INC.; RCN TELECOM SERVICES, INC.;  
AND RCN CORPORATION,

*Respondents.*

File No. DTC 08-5

**INITIAL BRIEF OF NEXTG NETWORKS OF NY, INC.**

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NextG Networks of NY, Inc. d/b/a NextG Networks East (“NextG”) files this Initial Brief in the above-captioned case before the Department of Telecommunications and Cable (“DTC” or “Commission”<sup>1</sup>) pursuant to the DTC’s procedural schedule and 220 CMR §§ 1.02 and 1.11.

**I. SUMMARY OF FACTS AND BACKGROUND**

Massachusetts law states that all utilities must grant communications providers access to conduit, ducts, and rights-of-way and may only deny such access based on reasons of capacity, safety, reliability, generally accepted engineering practices, or good cause shown. *See* G.L. c. 166, § 25A; 220 CMR § 45.03(1). As the undisputed, stipulated facts demonstrate, RCN is a “utility” for purposes of G.L. c. 166, § 25A, and NextG is a telecommunications provider to whom RCN must give access to conduits, ducts, and rights-of-way that RCN owns or controls or over which it shares ownership or control.

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<sup>1</sup> As used herein the term *DTC* shall also mean its predecessor agency DTE where the context indicates a time period prior to the formation of the current agency.

NextG has filed a tariff with the DTC and is authorized to provide telecommunications services in Massachusetts, and NextG provides telecommunications service in Massachusetts. (Joint Statement of Stipulated Facts (hereafter “Stip. Facts”) ¶ 3). RCN has filed a tariff with the DTC and is authorized to and does provide telecommunications services in Massachusetts. (Stip. Facts ¶ 4).

RCN been granted franchise licenses in the Massachusetts cities of Brookline, Brighton, and Somerville, among others, to provide cable television services, and is authorized pursuant to those franchise licenses to construct and maintain wires over and under the public rights of way in Brookline, Brighton, and Somerville. In addition, RCN has been granted necessary grants of location or other licenses and authority to construct and maintain wires over and under the public rights of way in Brookline, Brighton, and Somerville for the purpose of providing telecommunications services. (Stip. Facts ¶ 5).

RCN owns or controls underground ducts and conduits 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 in Massachusetts. (Stip. Facts ¶ 6).

On April 4, 2008, Ralph Canina of NextG sent a letter with attachments to Margot Jones of RCN identifying 9,669 linear feet of conduit in a number of specific segments that NextG indicated it would like to rent from RCN in the cities of Brookville, Brighton, and Somerville, Massachusetts (the specific conduit segments requested are hereinafter referred to as “The Requested Conduit”). (Stip. Facts ¶ 7) (A true and correct copy of this correspondence is attached hereto as Exhibit 1). RCN owns The Requested Conduit. (RCN Response To Complaint (hereafter “RCN Response”) at p. 2).

On April 17, 2008, Peter Jablonsky of RCN sent an email to Ralph Canina of NextG, copying David Taber of RCN. (Stip. Facts ¶ 8) In the April 17, 2008, email, Mr. Jablonsky informed NextG that RCN would not grant NextG access to its conduit due to what he identified as conflicting interests within RCN. (Stip. Facts ¶ 8; A true and correct copy of this correspondence is attached as Exhibit 2).

On July 16, 2008 Robert Delsman of NextG sent a responding email to Rick Swiderski of RCN. (Stip. Facts ¶ 9; A true and correct copy of this correspondence is attached as Exhibit 3). On July 30, 2008, Paul Eskildsen of RCN sent a responding email to Robert Delsman of NextG, copying Tom Steel, Rick Swiderski, and Peter Jablonsky of RCN, in which Mr. Eskildsen communicated RCN's position that it is not subject to the Massachusetts laws and regulations requiring conduit owners to provide access to their conduit. (Stip. Facts ¶ 10; A true and correct copy of this correspondence is attached as Exhibit 4).

On August 6, 2008, Robert Delsman of NextG and Scott Thompson of Davis Wright Tremaine participated in a conference call with RCN's Paul Eskildsen and Tom Steel to further discuss NextG's request for access to RCN's owned or controlled conduit. (Stip. Facts ¶ 11). Following up on the August 6, 2008 discussion, on August 13, 2008, Mr. Delsman sent an email to Mr. Eskildsen, copying Mr. Steel, Mr. Swiderski, and Mr. Jablonsky of RCN, and Mr. Thompson, counsel to NextG. In his email, Mr. Delsman re-iterated NextG's desire to access RCN conduit and provided Mr. Eskildsen with copies of the original requests from April 2008. (Stip. Facts 12; A true and correct copy of this correspondence is attached as Exhibit 5).

Faced with no resolution of its requests for access, on September 8, 2008, NextG filed a conduit access complaint with the DTC against RCN, initiating this proceeding.

At no time has RCN asserted that there is any safety, engineering, or capacity issues preventing it from granting access to NextG. Indeed, it is a stipulated fact that there is sufficient capacity available to accommodate NextG’s proposed installation of fiber in the specifically requested segments of The Requested Conduit, and that there is no known safety, reliability or generally applicable engineering standards impediment to NextG’s use of The Requested Conduit. (Stip. Facts ¶¶ 17-18; *see also* RCN Responses to DPU Requests at p. 13).

The undisputed facts demonstrate that RCN is a utility under G.L. c. 166 § 25A and that it must, therefore, provide NextG access to the conduits, ducts, and rights-of-way owned or controlled, in whole or in part, by RCN. RCN has not identified any legitimate basis for denying NextG access.

Rather, RCN has repeatedly asserted that, although it admits that it is a “utility” under G.L. c. 166, § 25A, the statute “should” not apply to it. (RCN Response at pp. 3, 7; *see also* RCN Responses to DPU Requests at p. 14). In addition, after NextG and RCN attempted to negotiate a conduit access agreement in settlement of this dispute, RCN also asserted that it is denying access because NextG would not enter what RCN considered to be a “commercially reasonable” agreement. (Stip. Facts ¶ 16 (citing Letter from Elise Dieterich to Department of Telecommunications and Cable, File No. DTC 08-5, p. 2 (December 15, 2008)). In the Joint Stipulated Statement of Facts, RCN then attempted to broaden the dispute to encompass the issues RCN believes constitute either reasonable or “commercially reasonable” terms and conditions of conduit access. There is no merit to RCN’s defenses to NextG’s claim for access, and the DTC should reject RCN’s attempts to artificially inject issues that are not before this Commission or appropriate for resolution in this case.

## II. ARGUMENT

There are five legal questions presented to the DTC for determination in this case, several of which are interrelated. The primary, threshold issue is whether RCN is a “utility” as defined by G.L. c. 166, § 25A, and as a result whether it has wrongfully denied NextG access to conduits owned by RCN. The Stipulated Facts demonstrate that this threshold issue must be answered in the affirmative and in NextG’s favor. Next are two closely related questions. The first concerns whether RCN can limit access only to conduits that it “wholly owns,” as opposed to including language in a conduit access agreement that mirrors the statute, providing for access to conduit that RCN “owns or controls, or shares ownership or control of.” (Stip. Facts ¶ 20). The second concerns whether RCN can refuse to include in a conduit access agreement access to “rights-of-way,” as set forth in the statute. (Stip. Facts ¶ 20). Again, the plain language of G.L. c. 166, § 25A dictates that both of these questions be answered in NextG’s favor. The fourth question is whether and to what extent, under G.L. c. 166, § 25A and 220 CMR § 45, RCN is required to provide access to and copies of redacted maps, records or additional information relating to the location, capacity, and utilization of its conduit, ducts, and rights-of-way before a request is made for access to a specific conduit, duct, or right-of-way. The final question concerns whether RCN may deny access to a specific conduit, duct, or right-of-way based on its desire to maintain available capacity for its own future use where it does not have immediate or definite plans for use of the conduit capacity. Again, the answer to the fourth and fifth questions must be resolved in NextG’s favor, as RCN’s position is inconsistent with the intent of the access statute and on-point decisions by the FCC.

**A. RCN Is A Utility And Is Required To Provide Access To Its Conduits To NextG**

Under the plain language of G.L. c. 166, § 25A, RCN is a “utility” that must provide NextG access to ducts and conduits that RCN owns or controls. G.L. c. 166 § 25A states that “A utility shall provide a wireless provider with nondiscriminatory access to any pole or right-of-way used or useful, in whole or in part, owned or controlled by it for the purpose of installing a wireless attachment.” G.L. ch. 166 § 25A; *see also* 220 CMR § 45.03(1). In turn, the statute defines a “utility” as:

*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.*

G.L. ch. 166 § 25A (emphasis added); *see also* 220 CMR § 45.02 (same definition).

RCN has stipulated that it owns conduits used or useful, in whole or in part, for supporting or enclosing wires or cables for the transmission of intelligence by telephone. (Stip. Facts ¶ 6). RCN has also acknowledged that it has ownership or control over the specific conduit segments initially requested by NextG in April 2008. (RCN Response at 2; *see also* RCN Responses to DPU Requests at p. 3). Under the plain language of the statute and the stipulated facts, as a matter of law, RCN is a “utility” for purposes of G.L. c. 166, § 25A and 220 CMR § 45.02.

In turn, RCN must provide NextG with access to its ducts, conduits, and rights of way pursuant to G.L. c. 166 § 25A and 220 CMR § 45.03(1). The statute requires that “[a] utility shall provide a wireless provider with nondiscriminatory access to any pole or right-of-way used or useful, in whole or in part, owned or controlled by it for the purpose of installing a wireless attachment.” G.L. c. 166 § 25A; *see also* 220 CMR § 45.03(1). Under the statute, “a utility may

deny a wireless provider access to its poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis only for reasons of inadequate capacity, safety, reliability and generally applicable engineering standards.” *Id.*

A “wireless provider” is defined by G.L. c. 166 § 25A broadly to include “any person, firm or corporation other than a utility, which provides telecommunications service.” G.L. c. 166 § 25A. Because NextG provides telecommunications service (Stip. Facts ¶ 3), it is a “wireless provider” for purposes of G.L. c. 166 § 25A, and therefore, RCN must provide NextG with access to any conduit, unless there is a *bona fide* reason of inadequate capacity, safety, reliability and generally applicable engineering standards. In this case, RCN admits that there is no capacity, safety, reliability, or generally applicable engineering standard basis for denying NextG access to RCN’s conduit. (Stip. Fact ¶ 18).

Accordingly, RCN’s denial of access is contrary to law.

**1. RCN’s Status As A Competitive Provider Does Not Change Its Obligation To Provide Access**

Despite clearly falling within the definition of a “utility” under the statute and regulations, RCN has argued that the DTC should create an exemption from the statute because RCN is a competitive provider rather than an incumbent local exchange carrier or electric company. (*See* RCN Response at p. 7). RCN’s argument is inconsistent with the plain, broad scope of the statutory language. The DTC does not have authority to create an exemption to the statute as RCN requests, and ultimately RCN’s competitive status is irrelevant to the purpose of the pole and conduit access laws. As noted above, the statute broadly defines a “utility” to include “any” company that owns or controls conduit, or even shares ownership or control over conduit. G.L. c. 166, § 25A. If the legislature had intended to limit the scope of the requirement to incumbents only, it could have easily done so, but it did not. Rather, the legislature adopted a

broad requirement that would prevent discriminatory or anti-competitive practices by any entity that had been allowed to install or control bottleneck infrastructure, such as poles and conduits, in the public rights-of-way.

RCN has also suggested that the cost to its subscribers supports no, or different, access obligations. (*See RCN Response at p. 7*). However, there are no facts on the record regarding the costs to RCN's subscribers or the burden on RCN generally of providing access, so the Commission has no basis for decision. Moreover, even if RCN had presented evidence of costs to its subscribers from granting access to conduit, the statute permits the DTC to consider such evidence only when setting the rates, terms, and conditions of attachments, not whether access itself must be granted in the first place:

The department of telecommunications and energy shall have authority to regulate the rates, terms and conditions applicable to attachments, and in so doing shall be authorized to consider and shall consider the interest of subscribers of cable television services and wireless telecommunications services as well as the interest of consumers of utility services.

G.L. ch. 166 § 25A. Accordingly, the "cost to subscribers" issue would be relevant only *after* the question of whether RCN is required to grant access is resolved. Even then, the DTC would also be required to consider the impact on NextG's customers and the costs to wireless service subscribers in Boston as well.

Even if conduit access regulation did impose some hypothetical burden on RCN, it does not outweigh the overwhelming public interest in allowing *all* competitive communications providers to have access to essential facilities at reasonable rates, no matter who controls them. NextG is a competitive, non-incumbent communications provider, as is RCN. RCN's suggested policy would afford a preference to competitive providers who have entered into agreements with incumbent electric utilities (like NSTAR) to the exclusion of all others. As NextG pointed

out in its Complaint, the DTC has already ruled in an analogous context that private agreements between Boston Edison and RCN do not excuse compliance with the conduit access laws.<sup>2</sup>

The key question is not whether RCN is an incumbent operator or a competitive provider, but rather whether RCN owns or controls poles or conduits regardless of the means used. In this case, RCN admits that obtained its current control of conduit by entering a commercial agreement with the incumbent electric utility, the Boston Edison Company, now known as NSTAR Electric. (*See* RCN Response at p. 2; RCN Responses to DPU Requests at p. 3). Indeed, if the Department were to accept RCN’s argument, it effectively would create a gaping loophole that would allow all utilities to escape pole and conduit regulation by creating a “separate,” “competitive” telecommunications company and assigning control of poles and conduits to that “competitive” entity.

RCN nevertheless argues that the DTC must consider the competitive position of a conduit owner in evaluating applicability of the rules because ILECs and electric companies have ubiquitous access to customers and RCN does not. (RCN Response at 7). However RCN’s competitive position bears no relationship to the purpose of the pole and conduit access laws. The purpose of these laws is to allow competition in communications markets by preventing discriminatory or anti-competitive practices by *any entity* that owns or controls essential bottleneck communications facilities.

The federal Communications Act provides guidance here as well. Under Section 224, pole and conduit access obligations are extended to all electric and telephone utilities that “own or control” facilities, just as in the Massachusetts statute. 47 U.S.C. §§ 224(a)(1), 224(f)(1). But

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<sup>2</sup> *See Investigation by the Department of Telecommunications and Energy, on its own motion, into Boston Edison Company's compliance with the Department's Order in D.P.U. 93-37,*

the federal law also goes one step further to clarify that these access obligations apply not just to incumbent Local Exchange Carriers (“LECs”), but to competitive LECs (“CLEC”) as well.

Section 251(b)(4) of the federal Act demonstrates that the mere fact that CLECs have different structures than ILECs does not excuse them from access obligation. Section 251(b)(4) of the federal Act imposes conduit access obligations on all LECs, which clearly includes CLECs since the statute spells out additional responsibilities applicable solely to ILECs at Section 251(c). *See* 47 U.S.C. §§ 251(b)(4), 251(c). The relevant applicable requirement for *all* Local Exchange Carriers is:

Access to Rights-of-Way. – The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

47 U.S.C. § 251(b)(4). Accordingly, RCN’s argument that it “just cannot be” that CLECs would be required to give access in the same way as ILECs is meritless as a matter of law and policy.

The purpose of the pole and conduit access laws is to facilitate competition in communications markets and efficient use of limited resources by preventing discriminatory or anti-competitive practices by *any entity* that owns or controls essential bottleneck communications facilities. The Commonwealth of Massachusetts has been a leader in recognizing the importance of both nondiscriminatory access to distribution facilities generally and access to conduit in particular. The DTE first established regulations and asserted its authority to govern rates terms, and conditions of attachments to utility poles and conduits in 1984.<sup>3</sup> In 2000, the DTE expanded its pole and conduit rules to adopt regulations governing not

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Massachusetts Department of Telecommunications and Energy, D.P.U./D.T.E. 97-95, 2001 Mass. PUC LEXIS 69, 153 (December 28, 2001).

<sup>3</sup> *CATV Rulemaking Order*, D.P.U. 930 (1984).

only rates and terms but also guaranteeing nondiscriminatory access to poles, ducts, conduits, and rights of way.<sup>4</sup> The purpose of the revised regulations was to add sufficient regulatory safeguards and DTE procedures “designed to ensure that access to poles, ducts, conduits and rights-of-way is provided on a nondiscriminatory basis.”<sup>5</sup>

The purpose of pole and conduit access laws is to allow competition in communications markets and prevent anti-competitive practices, such as exclusive access deals, which artificially restrict competition.<sup>6</sup> As the DTE observed when it enacted conduit access regulations:

Only by ensuring nondiscriminatory access by telecommunications competitors to the poles, ducts, conduits and rights-of-way through which consumers receive telecommunications services can the benefits of the 1996 Telecommunications Act be realized. The regulations adopted by this Order exercise the authority granted by the Federal Pole Attachment Act, 47 U.S.C. 224, and by the Massachusetts Pole Attachment Statute, G.L. c. 166, 25A, to accord competitive telecommunications providers’ access to consumers -- and hence, consumers’ access to would-be providers -- to the greatest extent practicable. Without opening the routes to end users, consumer sovereignty cannot be given effect; and

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<sup>4</sup> *Order Establishing Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-Of-Way and to Enhance Consumer Access to Telecommunications Services*, Massachusetts Department of Telecommunications and Energy, 2000 Mass. PUC LEXIS 21, D.T.E. 98-36-A (July 24, 2000).

<sup>5</sup> Evaluation of the Massachusetts Department of Telecommunications and Energy, *In re Application of Verizon New England*, CC Docket No. 00-176, pp. 224-225 (filed with FCC on October 16, 2000).

<sup>6</sup> *See also FCC v. Florida Power Corp.*, 480 US 245, 247 (1987) (finding that Congress enacted the Pole Attachment Act “as a solution to a perceived danger of anticompetitive practices by utilities”); *Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission’s Rules Governing Pole Attachments*, 13 FCC Rcd 6777, 6780, ¶ 2 (1998) (FCC observes that the purpose of the Pole Attachment Act is to “ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers”), *aff’d*, *Southern Co. Services v. FCC*, 313 F.3d 574 (DC Cir. 2002); *FCC Common Carrier Bureau Cautions Owners of Utility Poles*, 1995 FCC Lexis 193, at 1 (rel. January 11, 1995) (“Utility poles, ducts and conduits are regarded as essential facilities, access to which is vital for promoting the deployment of cable television systems”).

this principal goal of the 1996 Telecommunications Act would remain unrealized. Legislative intent to benefit end-use consumers would be thwarted. The Department's job is to effect legislative intent. The rules adopted pursuant to statute today are the means to effect that purpose.<sup>7</sup>

In this case, RCN has been granted the right to construct and/or maintain conduits in the public rights-of-way. Municipalities have a substantial interest in other providers, such as NextG, using such existing infrastructure rather than excavating streets and deploying duplicative conduit within the finite space of the public rights-of-way. Accordingly, requiring even competitive companies such as RCN who own or control conduit to provide access to other providers, rather than making new entrants excavate and install yet more conduits, makes perfect sense from a policy and market entry perspective.

**B. RCN Must Provide Access To Conduits That It Owns Or Controls Or Over Which It Shares Ownership Or Control; It Cannot Limit Access To “Wholly-Owned” Conduits**

After having established that RCN is a utility that must give NextG access to its conduits, a subsidiary question is raised. During negotiations of a possible conduit access agreement, RCN took the position that it only had to agree to provide access to conduits that it “wholly-owned.” NextG, on the other hand, took the position that under the plain language of G.L. c. 166 § 25A, RCN may not limit access in that way, but rather, the agreement should govern access to conduits, ducts, and rights-of-way that RCN “owns or controls or shares ownership or control of.” (Stip. Facts ¶ 20).

The answer to the question of whether a utility must provide access only if it “wholly owns” conduit is answered by the plain text of 220 CMR § 45. There is no basis in the text of

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<sup>7</sup> *Order Establishing Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-Of-Way and to Enhance Consumer Access to*

the statute to limit access to “wholly-owned” conduits, ducts, or rights-of-way. Rather, the contrary is plain from the statute, which explicitly references conduits owned or controlled and conduits over which ownership or control is shared.

Moreover, although the DTC and its predecessor have never addressed this question of partial ownership, guidance may be taken from the rulings of the Federal Communications Commission. The FCC has held that an attachers’ arrangement with either one of two partial owners of poles is sufficient to establish legal rights and obligations under the pole and conduit attachment laws, and that attachers are not required to deal with both utilities. *Cable Telecomms. Ass’n of Maryland, Delaware and District of Columbia, v. Baltimore Gas & Elec. Co.*, 16 FCC Rcd. 5447, ¶ 7 (2001) (“It is unreasonable to expect attachers to separately negotiate agreements with more than one pole owner for attachment to a single pole that is jointly owned... It is unreasonable to expect Complainant to mediate between the utilities as to the amount each is due”). This reflects the FCC’s understanding that a utility must provide access even if it shares ownership or control.

Moreover, policy and rationale are against RCN’s interpretation. If by arranging their affairs so that they only “partially” own or control ducts, poles, and rights-of-way utilities could avoid the requirements of G.L. c. 166, § 25A and 220 CMR § 45, then any utilities that shared distribution facilities by arrangement could claim exemption from the access rules and exclude communications providers from their facilities. This is clearly not a tenable outcome, and it is precisely why the legislature included the specific language “or shares ownership or control.”

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*Telecommunications Services*, Massachusetts Department of Telecommunications and Energy, 2000 Mass. PUC LEXIS 21, D.T.E. 98-36-A (July 24, 2000).

**C. RCN Must Provide Access To Rights-Of-Way**

As reflected in the Parties' Stipulated Facts, an issue has also arisen where RCN refused to include in a conduit access agreement language reflecting the fact that it must also provide access to "rights-of-way" – not just conduits. (Stip. Facts ¶ 20). RCN's position is directly contrary to the plain language of G.L. c. 166, § 25A, and must be rejected.

G.L. c 166 § 25A provides that a utility must provide access not only to poles and conduits, but rights-of-way they own or control. G.L. c. 166 § 25A ("A utility shall provide a wireless provider with nondiscriminatory access to any pole or right-of-way. . . ."). There is simply no basis for refusing to include "rights-of-way" in describing the scope of matters covered by a conduit access agreement.

**D. RCN Must Make Access Possible By Providing Copies Of Maps Before NextG Makes A Request For Specific Segments**

During the course of negotiations between NextG and RCN regarding the terms of a conduit access agreement, RCN refused to include a provision that would obligate RCN to provide access to and copies of maps and records regarding the location of RCN's conduit prior to a request for a specific segment of conduit. (Stip. Facts at ¶ 20). RCN's refusal to give access to such maps and information, even subject to a confidentiality agreement, prior to a specific request is unreasonable. By refusing to provide access to maps and records necessary for NextG to identify the location of RCN conduit that it may wish to or have need to access, RCN would effectively prevent NextG from any further use of RCN's conduits. If NextG is unable to determine where RCN's facilities are located, it cannot make a specific request for access.

In its response to the DPU's and DTC's information requests, RCN states it is willing to provide maps only if NextG requests them for a given area. (RCN Response to DPU Request at 15-16; *see also* RCN Response to DTC Request at 5-6). This response is contrary to the position

that RCN took during negotiations and is also vague and unhelpful because RCN does not specify how small an area NextG must specify to receive the maps. While NextG is willing to request maps of RCN conduit by city or town, or perhaps even at a neighborhood level, depending on its deployment plans, the geographic scope of the request should not be relevant. For example, if an attaching party is planning a network for an entire city, it needs to know where existing conduit is located (whether owned by RCN or any other utility).

This issue arose because NextG proposed the following language, providing for RCN to give copies of or access to maps and information:

**RCN** will, upon request and at the expense of the Attaching Party, provide Attaching Party access to and copies of redacted maps, records and additional information relating to the location, capacity and utilization of **RCN**'s Structure. Upon request, **RCN** will meet with the Attaching Party to clarify matters relating to maps, records or additional information. **RCN** does not warrant the accuracy or completeness of information on any maps or records.

Maps, records or information are and remain the proprietary property of **RCN**, are provided to the Attaching Party solely for the pursue of enabling the Attaching Party to obtain access to **RCN**'s Structure, and may not be resold, reproduced or disseminated by the Attaching Party.

**RCN** will provide information currently available on the **RCN**'s maps and/or records regarding:

- the location of Structure and street addresses for manholes as shown on **RCN**'s maps;
- the footage between manholes or lateral ducts lengths, as shown on **RCN**'s maps;
- the total capacity of the Structure
- the existing utilization of the Structure.

**RCN** will not acquire additional information or provide information in formats other than that in which it currently exists and is maintained by **RCN**.

**RCN** will expunge any confidential or proprietary information from its maps and records prior to providing access to the same to the Attaching Party.

RCN's response was to demand that access be provided only *after* NextG had applied and RCN had issued an Occupancy Permit for access to specific conduit. In other words, RCN would only

provide maps and information after NextG had applied for access to specific conduit segments and RCN had actually granted an Occupancy Permit for that conduit segment.

In connection with, and upon the issuance by RCN of an Occupancy Permit for access by NextG to specific Conduit segments, RCN will provide NextG with appropriate and relevant information to permit the parties to effectively plan installation of NextG's facilities under this Agreement. RCN shall have no obligation to provide NextG with broad categories of information prior to the issuance of an Occupancy Permit for a specific Conduit segment, and shall have no obligation to provide maps, records or additional information relating to the location, capacity and utilization of **RCN's** Structure. Maps, records or information are and remain the proprietary property of **RCN**, are provided to NextG solely for the pursue of enabling the parties to implement agreed-upon access to specified segments of **RCN's** Conduit, and may not be resold, reproduced, disseminated or used by NextG for purposes other than as specifically set forth in this Agreement.

RCN's position would prevent NextG from ever knowing where RCN has conduit in order to formulate its request and would thus effectively prohibit NextG from ever again requesting access to RCN's conduit.

While Massachusetts has never addressed whether and to what extent it is reasonable for RCN to withhold maps from parties requesting access, the FCC has held that all utilities are required to provide such maps upon request by an attaching party seeking access to poles and conduits. In the *Local Competition Order*, the FCC stated:

“[W]e expect a utility that receives a legitimate inquiry regarding access to its facilities or property to make its maps, plats, and other relevant data available for inspection and copying by the requesting party, subject to reasonable conditions to protect proprietary information. This provision eliminates the need for costly discovery in pursuing a claim of improper denial of access, allowing attaching parties, including small entities with limited resources, to seek redress of such denials.”

*Local Competition Order* at ¶ 1223. The DTC should likewise clarify that RCN may not avoid providing information that is essential to attachers wishing to access conduit, particularly where NextG has agreed to treat the information as confidential.

**E. RCN Cannot Deny Access for the Purpose of Reserving Space for Its Own Communications Services**

Finally, RCN has attempted to deny NextG access to its conduits on the grounds that RCN desires to maintain available capacity for its own future use, even though RCN has not articulated an immediate or definite plan for use of the excess conduit capacity. (Stip. Facts at ¶ 20). RCN’s denial on such grounds is unlawful.

The FCC has specifically rejected the “reservation” of capacity that RCN seeks. The FCC has established that electric utilities may reserve space in conduit only pursuant to a “*bona fide* development plan” that projects specific needs for expanded services, and not just a vague assertion of future needs. *Local Competition Order* at ¶ 1169.<sup>8</sup> In addition, the FCC has held such reservation of space is permitted only for future uses involving core electrical utility functions and not for future planned communications service offerings. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, 14 FCC Rcd 18049, ¶¶ 72 (1999) (“We caution that, as with all reservations of space for a

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<sup>8</sup> See also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, 14 FCC Rcd 18049, ¶ 70 (1999) (“Consistent with the foregoing, a utility may reserve space if such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility, as opposed to telecommunications or video, service. We clarify that if a need arose for a utility to retrieve reserve capacity in order to provide its core utility services, but the exact circumstance was not laid out in the utility’s bona fide development plan, such recapture of reserve space is permitted so long as it is consistent with the company’s reasonable projections for growth as reported in the utility’s bona fide development plan. The purpose of these safeguards is to ensure that utilities are not permitted to recapture space for their own provision of competitive telecommunications and video programming distribution purposes under the guise that such recapture is for the utility’s ‘core’ business”).

utility's core functions, denials of access may not be made to accommodate a utility's provision of competitive telecommunications or video programming distribution services"). The FCC reasoned that a communications service provider that owns or controls conduit or poles may not reserve space for communications service because this service directly competes with other attaching parties offering communications service, and to allow such reservation would encourage anticompetitive conduct. *Local Competition Order* at ¶ 1170 ("Permitting an incumbent LEC, for example, to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC"). Indeed, the FCC has ruled that electric utilities must allow attaching parties to access space even when the utility has reserved pursuant to a qualifying *bona fide* development plan.<sup>9</sup>

For all the same reasons that drove the FCC's decisions, the DTC should hold that RCN may deny access to conduit based on its own desire to reserve capacity for its own potential future use.

RCN has articulated no credible policy reason for allowing RCN to reserve capacity in conduit at the expense of competitors like NextG. In its response to the DPU's and DTC's information requests, RCN argues that incumbents do not need to reserve capacity because their networks are already built, but a competitive provider like RCN should be allowed to reserve capacity space in conduit because it may wish to deploy additional fiber optic cables in the future. (See RCN Responses to DPU Request at 16, RCN Responses to DTC Request at 6).

These arguments do not bear scrutiny. First, many incumbent utilities *are* still building out their

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<sup>9</sup> *Local Competition Order* at ¶ 1169 ("The electric utility must permit use of its reserved space by cable operators and telecommunication carriers until such time as the utility has an actual need for that space").

networks. For example, Verizon just completed a \$600 million fiber optic expansion project in Massachusetts in support of its FiOS TV service. *See* January 6, 2009 Verizon press release, available at <http://newscenter.verizon.com/press-releases/verizon/2009/verizon-completes-600.html>. As discussed above, the FCC has held that incumbent phone companies like Verizon must share access to conduits regardless of future build out plans. RCN’s expansion plans (if any; its position here is that it should be allowed to deny access even where RCN has no specific or *bona fide* plan for its future use) therefore do not distinguish it from incumbent utilities in this regard or militate in favor of special treatment. RCN’s claims that it will lose the incentive to deploy additional conduit if it must share existing conduit also fails. Communications policy surrounding utility poles and conduit does not take into consideration incentives to create competing networks of distribution facilities for the reason that construction of competing sets of poles or conduit is both inefficient and frequently prohibited by cities because it is simply not practical to do so.<sup>10</sup> Having two sets of poles along side walks, or digging sidewalks up twice, is an unnecessary inconvenience most cities will not countenance. Even if it were reasonable to expect RCN – or any utility – to dig up streets in order to deploy additional and new conduit, an exemption from the access requirement will hardly create an incentive for RCN to engage in additional construction. If RCN is not using its existing conduit to deploy facilities now, letting the conduit lie fallow until a time of RCN’s choosing will not create an incentive for them to do so.

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<sup>10</sup> *See United States v. AT&T*, No. 74-1698, Plaintiffs’ First Statement of Contentions and Proof (D.D.C., filed Nov. 1, 1978) (Justice Department’s cataloging of utility pole-owner monopolies observes that “[t]he cost of building a separate pole system was prohibitive, and many municipalities simply forbade this alternative”); *General Tel. Co. of Southwest v. United States*, 449 F.2d 846, 851 (5th Cir. 1971) (“construction of systems outside of utility poles and ducts is generally unfeasible”).

**F. The DTC Cannot And Should Not Address RCN's Overbroad, Speculative, And Unripe "Questions"**

The proceeding before the DTC is one concerning the question of whether RCN may deny NextG access to conduit. That was the subject of NextG's properly filed complaint, which has now been designated for resolution. RCN has nevertheless attempted to expand this proceeding to address not only the question of access but also certain speculative, hypothetical questions of terms and conditions of access.

RCN did not raise any term or access issues in its Response to NextG's Complaint, but rather attempted to raise issues of conduit terms and conditions long after NextG filed its complaint. The first indication that RCN would attempt to broaden this proceeding came in its December 15, 2008 formal letter denying access filed in this proceeding. In the letter, RCN states that it was unable to grant NextG access to its conduit as it was unable to come to "commercially reasonable terms and conditions" under which NextG could do so. (Stip. Facts ¶ 16 (identifying Letter from Elise Dieterich to Department of Telecommunications and Cable, File No. DTC 08-5, p. 2 (December 15, 2008)). In the December 19, 2008 Joint Stipulated Statement of Facts in this proceeding, RCN insisted on informing the DTC that it believed the proceeding cannot be resolved without resolution of three issues (NextG did not agree with RCN's statement). (Stip. Facts ¶ 21).

The three questions at ¶ 21 of the Stipulated Facts are not relevant to the adjudication of the instant factual dispute. The questions posed by RCN are speculative in nature and assume facts neither in evidence nor in existence. RCN is requesting advisory opinions from the DTC on issues so broad that they could only be addressed in a rulemaking or in response to a specific adjudication raising facts not at issue in this case. Accordingly, the DTC should not address the three issues raised by RCN.

RCN's first question regarding the scope of control of conduit sufficient to trigger the statute (in particular whether an IRU constitutes ownership or control subject to G.L. ch. 166 § 25A) is a question so broad that it defies answer in the absence of specific facts. Whether a particular IRU or lease will constitute ownership or control or shared ownership or control will depend on the specific language of the IRU or lease. It would be impossible for the DTC to speculate about every possible IRU combination in the abstract. Moreover, in the current case, there is no specific IRU or lease presented.<sup>11</sup> NextG does not ask the DTC in this proceeding to order RCN to grant to NextG rights that RCN does not have. The DTC can reasonably address RCN's question in this regard with a broad affirmation of NextG's right of access to whatever level of ownership or control RCN enjoys in particular poles, conduits, or rights-of-way without the need for speculation on all conceivable permutations of ownership and control interests.

RCN takes a second attempt at this argument in its recent response to the DPU's information requests. RCN asserts its belief that the statutory language requiring utilities to grant access to poles and conduits in which they "share control" was meant to apply to situations where incumbent utilities lease facilities to subsidiaries. (*See* RCN Responses to DPU at 14, RCN Responses to DTC at 4-5). However, RCN can cite to no support for this position.

To the extent the DTC elects to rule on these issues, it should find that G.L. c. 166, § 25A and 220 CMR § 45.01 require RCN to grant access to all conduit, ducts, and rights-of-way that it owns or controls or over which it shares ownership or control, as required by the plain language

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<sup>11</sup> RCN has already acknowledged that it either owns or controls the *very conduit in question in this dispute*, and that it has the sole authority to grant or deny access to NextG. *See* RCN Response at p. 2; RCN Responses to DPU Requests at p. 3. Accordingly, as RCN's legal control over the conduit is a stipulated fact, no question is before the DTC on this issue and its queries are irrelevant

of the statute. Whether any particular situation – be it a lease an IRU or otherwise – constitutes legal ownership or control can only be resolved in that specific case.

Similarly, the question of “Whether and to what extent, under G.L. c. 166, § 25A and 220 CMR § 45, a utility has the right to oversee and inspect, at the leasing party’s cost, the use of its conduit by the party leasing the conduit” is vastly overbroad and not at issue in this case. (Stip. Facts ¶ 21). Whether a particular requirement by a utility for inspection or oversight is reasonable will depend on the language used in the access agreement and will depend on issues such as frequency of the inspections and their purpose. Moreover, whether the attaching party must pay the cost of the inspection will depend on whether the utility is already recovering the cost of such inspections or oversight in its annual rental rate charges. Many actions that may fall within the ambit of “oversee” are fully recovered through the utility’s annual rental. There are no facts that would allow the DTC to address the broad, generalized question posed by RCN.

In addition to being abstract questions, these are not at issue in this case. NextG understood that the parties had resolved negotiations regarding RCN’s requested frequency of inspection and the payment of costs.

RCN’s third question is likewise speculative and overbroad. RCN seeks to condition access to conduits, ducts, or rights-of-way on a commitment to lease access for a specific term length greater than one year and to require NextG to continue paying annual rent (as a “remedy”) in the event NextG terminates the attachment agreement and removes its facilities from the conduit prior to the term of years. Essentially, RCN seeks to require guaranteed rental payments under a contract “damages” clause, even if NextG were to withdraw its fiber from RCN’s conduit. RCN’s position is untenable.

This question requires a detailed set of facts that are not presented here. The statute and general state and federal rental regulations typically require a utility to recover its maximum lawfully permitted costs through its annual rental rates. *See* G.L. c. 166, § 25A; 220 CMR § 45. In such a case, there would be no “damages” to remedy in the event an attaching party withdrew its facilities. The only possible theory would be if RCN could prove that it had not recovered even the statutory minimum set forth in G.L. c. 166 § 25A (“additional costs of making provision for attachments”). However, to evaluate such a claim would require a specific set of facts regarding RCN’s costs that are not present in this case.<sup>12</sup> Likewise, whether a utility could *require* a term of multiple years may require a factual showing of its costs and recovery in the annual rate. Absent such facts, which are not present here, the question is purely hypothetical and would not even be appropriate for a generalized rulemaking.

**G. Even if the Issues Were Ripe Or Appropriate For This Case, RCN’s Proposed Terms and Conditions for Conduit Rental Are Unjust and Unreasonable**

As explained above, NextG believes the questions concerning terms and conditions of conduit rental presented by RCN in paragraph 21 of the Stipulated Facts are neither ripe for resolution nor proper for this dispute. NextG believes the DTC should avoid rendering advisory opinions on these issues and instead address RCN’s unlawful denial of access only. However, to the extent the DTC does address the questions RCN has raised, the DTC should find that RCN’s proposed terms and conditions for conduit access are unjust and unreasonable under G.L. c. 166, § 25A and 220 CMR § 45.01.

RCN asks the DTC whether and to what extent a utility has the right to oversee and inspect, at the leasing party’s cost, the use of its conduit by the party leasing the conduit. (Stip.

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<sup>12</sup> The parties did not stipulate to any facts regarding RCN’s costs, and NextG would object to

Facts ¶ 21). This question should be resolved in NextG’s favor. NextG does not dispute that conduit owners have some level of authority to oversee the use of their conduit. However, conduit owners do not have *carte blanche* to charge fees or undertake unnecessarily frequent inspections. Specifically, G.L. c. 166, § 25A’s and 220 CMR § 45.01’s requirement of attachments on reasonable terms and conditions dictates that utilities have a right to charge attachers only for reasonable inspection costs made necessary by the presence of the attachments.

The FCC’s past rulings provide persuasive guidance on this issue. The FCC has found that inspections paid for by the attaching party should not be reimbursed if the costs are already recovered in the rental rate,<sup>13</sup> that inspection practices and charges must be reasonable,<sup>14</sup> and that the attaching party is not responsible for inspections that are conducted for the benefit of the facility owner or are unrelated to the presence of its attachments.<sup>15</sup> To the extent the DTC believes this question must be addressed, it should adopt the same conclusions as the FCC

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any attempt by RCN to introduce facts outside the Joint Stipulation.

<sup>13</sup> *Mile Hi Cable Partners v. Public Service Co. of Colorado*, 15 FCC Rcd 11450, ¶ 8 (2000) (“Also, a separate charge or fee for periodic inspections of the pole plant, including a pole count survey, is not justified if the costs associated with the inspection are already included in the rate, based on fully allocated costs, which the utility charges the cable company”).

<sup>14</sup> *Newport News Cablevision Ltd. v. Virginia Power*, 7 FCC Rcd 2610, ¶ 8 (1992) (“[W]e find that the reasonableness of the cost of the inspection is tied to the reasonableness of the inspection practices. Any costs of an inspection designed only to inspect cable attachments should be borne by the cable company. However, an inspection designed to yield information about more than cable attachments and thus to benefit other pole users should not be paid for solely by the cable company. Conversely, inspection practices that would be reasonable if the costs of the inspection were shared may be unreasonable if cable pays the entire cost of the inspection”).

<sup>15</sup> *Cable Texas, Inc. v. Entergy Services, Inc.*, Order, 14 FCC Rcd 6647, ¶ 13 (1999) (“The cost of an inspection of pole attachments should be borne solely by the cable company, if and only if, cable attachments are the sole ones inspected and there is nothing in the inspection to benefit the utility or other attachers to the pole”).

regarding the reasonability of facility inspection charges pursuant to G.L. c. 166, § 25A and 220 CMR § 45.01.

RCN also asks whether a utility is permitted to condition access to conduits, ducts, or rights-of-way on a commitment to lease access for a specific term length greater than one year, and if so, whether such utility may require the attaching party to continue paying annual rent (as a “remedy”) in the event the attaching party terminates the attachment agreement and removes its facilities from the conduit. *See* Stipulated Statement at ¶ 21. There is no support for RCN’s position on this matter, and RCN’s policy arguments in favor of an early termination penalty completely distort pole and conduit rate and term policy. (*See* RCN Responses to DPU Requests at 18, RCN Responses to DTC Requests at 8). First, the administrative costs of processing third party attachers are deemed already recovered in the annual license fee for pole or conduit rental.<sup>16</sup> Attempts to assess additional administrative fees already accounted for in the annual pole attachment rent leads to “double billing” and is an unreasonable condition of attachment.<sup>17</sup> Accordingly, RCN’s conduit rental rate should already account for any costs incurred in conduit administration, and RCN need not recover such costs with an early termination penalty.

In addition, RCN states that it needs an early termination penalty to cover costs it would incur as a result of NextG terminating the agreement. (*See* RCN Responses to DPU Requests at 18, RCN Responses to DTC Requests at 8). However, RCN does not elaborate on what exactly those costs are and how they would not already be covered under existing conduit access laws.

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<sup>16</sup> *See Texas Cable & Telecomms. Ass’n v. Entergy Services, Inc.*, 14 FCC Rcd 9138, ¶17 (June 9, 1999) (“The application fees proposed by Entergy in its new agreement would require direct payment to Entergy for costs already recovered by Entergy in the annual fee”).

<sup>17</sup> *See Texas Cable & Telecomms. Ass’n v. GTE Southwest, Inc.*, 14 FCC Rcd 2975, ¶ 32 (February 18, 1999) (“A separate fee for recurring costs such as applications processing or periodic inspections is not justified, if the costs are included in a rate based upon fully allocated costs”), *aff’d sub nom*, 17 FCC Rcd 6261 (March 28, 2002).

Indeed, there are no facts on the record regarding this issue. Under G.L. c. 166, § 25A and 220 CMR § 45, NextG must pay RCN both a reasonable rate for conduit that covers the actual historical costs to RCN, *and* NextG must pay for the make-ready or construction costs that are made necessary by the deployment of NextG’s facilities. Utilities are only entitled to the incremental costs associated with third party pole attachments, which are minimal in most cases. The 11<sup>th</sup> Circuit Court of Appeals famously observed that “any implementation of the [FCC cable rate] (which provides for much more than marginal cost) necessarily provides just compensation.”<sup>18</sup> Utilities that receive the lawful rental rate for poles or conduit are therefore fully compensated as both communications policy and the U.S. Constitution allow. Accordingly, the amounts that NextG is required to pay under G.L. c. 166, § 25A (which follows the federal statute) already give RCN “much more” than its marginal costs of the conduit, and should be deemed sufficient. However, NextG emphasizes that there are no facts on the record in this proceeding that would allow the Commission to evaluate any of RCN’s allegations regarding its need to recover cost or damages it might incur in the event of an “early” termination.

Existing pole and conduit policy supports NextG’s position and would disallow RCN to impose an early termination fee as a condition of access. The FCC and the courts have held that utilities are entitled to recover only marginal costs of their conduit and poles absent a specific showing that poles are at full capacity or another buyer or higher valued use is present.<sup>19</sup> The

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<sup>18</sup> *Alabama Power Co. v. FCC*, 311 F. 3d. 1357 at 1370-1371 (11<sup>th</sup> Cir. 2002) *cert. denied*, 540 U.S. 937 (2003) (“*Alabama Power*”).

<sup>19</sup> *Florida Cable Telecomms. Ass’n, Inc. v. Gulf Power Co.*, 22 FCC Rcd 1997, ¶ 3 (2007) (“The Bureau determined that the Cable Formula provided just compensation, relying on Commission holdings that Cable Formula rent plus payment of make-ready expenses exceed just compensation. The Gulf Power Order also relied on the case of *Alabama Power Co. v. FCC*, 311 F3d 1357 (11th Cir 2002), *cert. denied*, 540 US 937 (2003) (“*Alabama Power*”). *Alabama Power* holds that a utility pole owner is constitutionally entitled only to marginal costs under the Cable Formula, unless it is shown by a preponderance of the evidence for each pole that: (1) the

FCC cited this same precedent when it protected RCN from the excessively high pole attachment rates that PECO Energy Company was trying to impose on RCN in Philadelphia six years ago.<sup>20</sup> Similarly, the FCC has held that penalty fees for safety violations may be imposed as a term and condition of attachment, but those fees must be reasonable.<sup>21</sup> While the FCC has never directly addressed a situation where the conduit owner demands that the attaching party continue paying annual rental after the attaching party terminates the agreement and withdraws its facilities, the FCC has held that penalty payments for safety violations must compensate the pole owner only for actual losses.<sup>22</sup> The FCC has also held that utility demands for protection from loss can be

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pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations”) (internal citations omitted).

<sup>20</sup> See *RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Co. and Exelon Infrastructure Services, Inc.*, Phase I Order, 17 FCC Rcd 25238, ¶ 6 (rel. December 18, 2002) (“As a final threshold issue, we reject PECO’s argument that it is entitled to charge a market rate for its attachments because our existing formula does not provide just compensation. In *Alabama Cable v. Alabama Power* the Commission concluded that the Commission’s pole attachment formulas, together with the payment of make-ready expenses, provide compensation that exceeds just compensation. In affirming this decision, the Eleventh Circuit Court of Appeals concluded that absent proof that each pole is at full capacity and evidence of either another available buyer waiting to use the space or the power company’s ability to put the space to a higher-valued use with its own operations (evidence lacking here), the Commission’s formula ‘(which provides for much more than marginal cost) necessarily provides just compensation’”).

<sup>21</sup> *Williamsburg Cablevision v. Carolina Power & Light*, 52 RR 2d 1697, ¶ 21 (1983) (“Since CP&L owns or controls the poles at issue, it has not only a right to compensation for attachments made to those poles but also a legitimate interest in ensuring all attachments are made in accordance with the contract and that pole conditions are safe and in compliance with NESC and construction specifications”).

<sup>22</sup> *Mile Hi Cable Partners v. Public Service Co. of Colorado*, 17 FCC Rcd 6268, ¶ 10 (2002) (“In the instant case, there is no basis in the record to support a conclusion that Respondent is entitled to exemplary or punitive damages beyond compensatory damages, and indeed, Respondent has attempted to justify its fee in terms of its actual losses. Respondent was unable to support its claim for the present value of fourteen years of annual fees plus some speculative amount related to alleged increased safety risks and administrative costs. Just and reasonable administrative costs associated with a pole attachment survey are fully recoverable in addition to any unauthorized attachment fee and therefore may not be included in the unauthorized

either reasonable or excessive, and the burden is on the utility to show why the protection is required and why a less severe form of protection (such as insurance) is insufficient.<sup>23</sup> There are no such facts in this case.

Because this case does not present a scenario under which NextG would be asking RCN to undertake construction of new facilities or improvements to existing facilities that would require amortization at a specific rate for a fixed term, there is no justification for RCN's insistence upon a lengthy term without a right of termination. A lawful rental rate will fully compensate RCN for NextG's use during the period of that use, be it one year or twenty. NextG has already agreed to pay all of RCN's legitimate makeready and other costs associated with NextG's request for access, and thus there is no economic justification for insisting upon a specified guaranteed rental stream. If NextG were to terminate in year three, the subject infrastructure would presumably again be available for use by RCN or another utility, and RCN would not thereby lose any element of return on its investment that it calculated it would receive when it undertook construction of the subject infrastructure unrelated to NextG's subsequent request for access. In this sense *any* income received from NextG for use of RCN's facilities would be pure profit to RCN. NextG would not be causing any incremental cost basis to occur that RCN would need to amortize in its rental structure over a substantial term of years.

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attachment fee. Complainant must also pay all just and reasonable costs associated with safety compliance issues in addition to any unauthorized attachment fee. Respondent was unable to provide support for actual losses in excess of the unauthorized attachment fee approved by the Bureau"), *aff'd Pub. Serv. Co. of Colo. v. FCC*, 328 F.3d 675, 679-80 (2003).

<sup>23</sup> *Cable Television Ass'n of Georgia, et al. v. Georgia Power Co.*, 18 FCC Rcd 16333, ¶ 29 (2003) ("Georgia Power fails to explain why provisions of the parties' prior pole attachment agreements (e.g., requiring the Cable Operators to provide evidence of insurance coverage or to post a bond in a definite amount) afforded the utility insufficient protection").

A utility should not be permitted to require the attaching party to agree to pay an “early termination penalty” in any form, much less as continued annual rentals, if the attaching party terminates an attachment agreement and removes its facilities because the utility recovers its costs through the annual maximum rental rate set by law. In the event of an “early” termination by the attaching party, the utility would have already been fully compensated and there would be no “damages” that the utility would be entitled to recover in the form of ongoing rent. Accordingly, NextG request that the DTC find RCN’s proposed early termination condition to be unjust and unreasonable under G.L. c. 166, § 25A and 220 CMR § 45.01.

### **III. CONCLUSION**

As demonstrated herein, the stipulated facts applied to the unambiguous, plain language of G.L. c. 166, § 25A require a finding that RCN is a utility, and that it has unlawfully refused to provide NextG access to its conduits, ducts, and rights-of-way. Accordingly, the DTC should grant NextG the relief requested in its Complaint and order RCN to provide NextG with access to conduits, ducts, and rights-of-way that RCN owns or controls or of which it shares ownership or control on just and reasonable rates, terms, and conditions. In addition, the DTC should clarify that RCN must provide NextG with access to maps and other such information regarding the location and capacity of RCN’s conduit prior to any specific request to occupy particular conduit, and clarify that RCN may not deny access to conduit based on its desire to reserve capacity for its own use. The DTC should reject RCN’s request to rule in an advisory capacity on the three unripe, speculative, and irrelevant issues unilaterally identified by RCN in paragraph 21 of the Stipulated Facts.

Respectfully submitted,

**NEXTG NETWORKS OF NY, INC.**

By its Attorneys:

*s/ Scott Thompson*

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January 16, 2009

**CERTIFICATE OF SERVICE**

I, Christopher A. Fedeli, hereby certify that on January 16, 2009, I caused a copy of the foregoing to be served via U.S. mail, first-class postage prepaid, in accordance with the requirements of 220 CMR § 1.05(1) on the following:

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