

**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

**NEXTG RESPONSES TO DEPARTMENT OF TELECOMMUNICATIONS
AND CABLE REQUESTS**

NextG Networks of NY, Inc. d/b/a NextG Networks East (“NextG”) respectfully submits these responses to the Information Requests (“Requests”) from the Department of Telecommunications and Cable (“DTC”).

These responses were prepared by undersigned counsel for NextG, in consultation with NextG’s in-house legal staff and personnel.

Request D.T.C. – NextG 1-1

Regarding the Joint Stipulated Statement of Facts at ¶ 19, please indicate the location of any other ducts, conduits, and rights-of-way owned or controlled by RCN to which NextG has sought access.

Response 1.

While NextG desires to use RCN conduits in other areas of Massachusetts, in particular, in Cambridge, it has not yet formally requested access to specific conduits in those other locations. The ability or inability to obtain information from RCN regarding the location of its conduits (an issue raised by the parties in the Joint Stipulated Facts) may impact NextG's ability to evaluate its need or desire to use RCN conduit in specific cases.

D.T.C. – NextG 1-2

Regarding the Joint Stipulated Statement of Facts at ¶¶ 20-21, please provide a full explanation, including the facts at issue, on the circumstances that would require the Department to provide guidance to the parties regarding each of the listed questions.

Response 2.

NextG believes the four questions specified at Paragraph 20 of the Joint Stipulated Statement of Facts (“Stipulated Facts”) are relevant to the question of whether RCN has denied conduit access to NextG in violation of G.L. c. 166, § 25A and 220 CMR § 45. As the parties have bona-fide disputes over each of these issues relevant to access, the circumstances are present that would require the DTC to provide guidance to the parties in the form of a ruling.

The first two questions posed by RCN and NextG at ¶ 20 of the Stipulated Facts are an extension of the fundamental, definitional question of whether RCN is a utility required to provide conduit access, and are therefore relevant to the instant dispute.

The first question concerns whether RCN can limit a conduit access agreement to “conduits” that it “wholly owns.” It is clear that under G.L. c. 166, § 25A and 220 CMR § 45, RCN cannot refuse to have a conduit access agreement include language explicitly copying the statute, recognizing that NextG may access conduits and ducts that RCN “owns or controls or shares ownership or control of.” Because RCN purports to be denying access unless NextG agrees to language limiting its conduit access to conduits “wholly owned” by RCN, the question is relevant and should be addressed by the Department.

The second question concerns whether RCN can limit a conduit access agreement to “ducts and conduits,” excluding “rights-of-way.” In this case, RCN has purported to deny

access, at least in part, on the ground that NextG will not accept RCN's demand that a conduit agreement exclude "rights-of-way." RCN's position is inconsistent with the plain language of G.L. c. 166, § 25A and 220 CMR § 45, which requires RCN to grant access not only to conduit but the underlying "rights-of-way." As RCN disputes that it is a utility required to grant right-of-way access, the question is relevant and should be addressed by the Department.

The third question posed by RCN and NextG at ¶ 20 of the Stipulated Facts concerns whether RCN can deny access to "redacted maps, records or additional information relating to the location, capacity, and utilization of the utility's conduit, ducts, and rights-of-way before a request is made for access to a specific conduit, duct, or right-of-way." RCN refuses to recognize in a conduit access agreement an obligation to provide NextG with such redacted maps, records, or additional information relating to the location, capacity, and utilization of the utility's conduit, ducts, and rights-of-way before NextG makes a specific request for access to conduit, ducts, or rights-of-way. This denial by RCN is unreasonable because without such information *in advance* NextG cannot accurately identify where RCN owns or controls ducts, conduits, or rights-of-way that NextG may seek to access. In addition, in this case, RCN contends that NextG's initial April 2008 application for access lacked sufficient technical detail concerning which RCN conduits NextG desired access to. RCN Response at p. 2. To the extent RCN believes it may withhold information about its conduit or deny access on the grounds that NextG's access request was made with insufficient information, the question is relevant and should be answered in this case.

The fourth question posed by RCN and NextG at ¶ 20 of the Stipulated Facts is relevant to the adjudication of the instant factual dispute. RCN insists that a conduit access agreement contain a clause allowing RCN to deny access to specific conduits based on its desire to maintain

available capacity for its own future use where RCN does not have immediate or definite plans for use of the conduit capacity. This position by RCN is unreasonable, potentially anticompetitive, and clearly inconsistent with FCC rules. Because RCN purports to be denying access unless NextG accedes to a provision allowing RCN such unlimited reservation ability, the question is relevant and should be addressed by the Department.

As stated in ¶ 21, NextG does not believe the three questions at ¶ 21 of the Stipulated Facts are relevant to the adjudication of the instant factual dispute. NextG believes that the questions posed by RCN are overly broad and seek speculative, advisory opinions from the DTC on issues so broad that they could only be addressed in a rulemaking or alternatively in response to a specific adjudication raising facts not at issue in this case. For example whether any particular IRU or lease constitutes ownership or control or shared ownership or control over conduit 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.

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. For example, whether a particular requirement by a utility for inspection or oversight is reasonable will depend on the language of the demand, and whether the attaching party must pay the cost of the oversight or inspection will depend on whether the utility has already recovering the cost of

such inspections or oversight in its annual rental rate charges. In addition to being abstract questions, these are not at issue in this case, as NextG understands that the parties 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. As discussed in response to Information Request 11, below, and as NextG will address in its briefs, 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. 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"), which would require a specific set of facts regarding RCN's costs. Likewise, whether a utility could *require* a term of multiple years may require a factual showing of its costs and recovery in the annual reate. Absent such facts, which are not present here, the question is purely hypothetical and would not even be appropriate for a generalized rulemaking.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Chris Fedeli, hereby certify that on January 6, 2008, I caused a copy of the foregoing to be served via e-mail and 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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