

**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-\_\_\_\_\_

**COMPLAINT FOR DENIAL OF ACCESS TO CONDUIT  
AND REQUEST FOR EXPEDITED TREATMENT**

Pursuant to Massachusetts General Laws Chapter 166, Section 25A, G.L. c. 166, § 25A, and Code of Massachusetts Regulations Title 220, Section 45.04, 220 CMR § 45.04, NextG Networks of NY, Inc. d/b/a NextG Networks East (“NextG”) brings this Complaint against RCN New York Communication, LLC, RCN Telecom Services of MA, Inc., RCN Telecom Services, Inc., and RCN Corporation (jointly “RCN”). NextG brings this Complaint in response to RCN’s denial of access to its underground conduits for the purpose of placing lawful telecommunications lines.

Given NextG’s time-sensitive need to receive lawful access to RCN’s conduit in order to complete NextG’s Boston area network buildout, NextG hereby waives its rights to a hearing pursuant to 220 CMR § 1.06. NextG respectfully requests prompt resolution of this complaint by the Department of Telecommunications and Cable (“DTC”) pursuant to the streamlined

complaint procedures specified at 220 CMR § 45.06. In support of this Complaint, the following is respectfully shown:

### **Introduction and Summary**

NextG must bring this Complaint now because, nearly four months after NextG first applied to RCN for access to RCN-owned underground conduit, RCN continues to respond with flat refusals to allow access. NextG first requested access to conduit owned or controlled by RCN in April, 2008. In the succeeding four months, RCN has refused to allow NextG to make such attachments under any terms or conditions. RCN's stated basis for denial of access is not based on any safety or capacity ground but rather on RCN's insistence that, despite owning conduit used for providing telecommunications services, it is not required by G.L. c. 166, § 25A to grant access to such conduits. NextG has reason to believe, as stated by RCN itself, that RCN's real reason for denial is that RCN has granted or is planning to grant exclusive access to its conduit to a carrier other than NextG. Alternatively, RCN has responded to NextG's requests for access to conduit by seeking to sell NextG one of RCN's active telecommunications services instead. Any and all of RCN's bases for denial are discriminatory and unreasonable and violate G.L. c. 166, § 25A and 220 CMR §§ 45.00 *et seq.*

RCN's actions threaten NextG with irreparable harm if they are not immediately remedied. NextG is currently under a contractual commitment to construct its telecommunications network and provide its telecommunications service in Massachusetts for a customer that is a federally-licensed wireless communications provider. Build-out and deployment of this network will bring additional competitive wireless telephone and broadband services to Massachusetts residents. RCN's unlawful denial of conduit access is preventing NextG's ability to ensure this project is completed. Thus, RCN's unlawful actions, if not

promptly remedied, will prevent NextG from meeting its obligations, causing NextG irreparable harm to its goodwill and reputation and threatening NextG's relationship with its customer and other potential customers, which extends far beyond RCN's Massachusetts territory.

### **Parties and Jurisdiction**

1. Complainant NextG is also a licensed telecommunications operator<sup>1</sup> authorized to construct lines across public rights of way in Massachusetts pursuant to 22 CMR § 45.02. NextG's address is 2216 O'Toole Avenue, San José, CA 95131. For purposes of G.L. c. 166, § 25A, NextG is a "wireless provider" in the Commonwealth of Massachusetts. *See* G.L. c. 166, § 25A.

2. Respondent RCN owns or controls conduit 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 the Commonwealth of Massachusetts and is therefore a "utility" for purposes of G.L. c. 166, § 25A. *See* G.L. c. 166, §§ 22A(f), 25A; 22 CMR § 45.02.

3. Massachusetts General Laws Chapter 166, Section 25A, requires RCN, as a utility, to provide "wireless providers" nondiscriminatory access to its conduits, ducts, and rights of way. G.L. c. 166, § 25A. Under 22 CMR § 45.03(1), utilities are required to provide nondiscriminatory access to conduit they own or control.

4. The DTC has jurisdiction over all aspects of this Complaint under G.L. c. 166, § 25A and 22 CMR § 45.04(e). In addition, the DTC has jurisdiction over this Complaint pursuant to the draft Memorandum of Agreement ("MOA") between the DTC and the Department of Public Utilities ("DPU"), attached hereto as Exhibit A. The MOA addresses

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<sup>1</sup> *See* Massachusetts Licensed Telecommunications Operators at <http://db.state.ma.us/dpu/qorders/frmTelecomList.asp> (last visited August 27, 2008).

jurisdiction for the regulation of attachments to utility poles, ducts, and conduits, as necessitated by the April 11, 2007 separation of the previous functions of the Department of Telecommunications and Energy into the DTC and DPU. Although the MOA is not final, it is the sole existing guidance on the current question of DTC and DPU jurisdiction over various pole and conduit access complaints.

5. NextG desires to attach and deploy its own wires used for the transmission of intelligence in and through the conduits owned or controlled by RCN. On information and belief, RCN's owned or controlled conduit is not used to transmit electricity. The instant Complaint therefore falls under the DTC's jurisdiction pursuant to the draft MOA. *See* MOA at pp. 2-3, §§ 4, 5 (Exhibit A).

### **Factual Background**

6. On April 4, 2008, NextG submitted an application to RCN for permission to deploy wire facilities in specific conduits controlled by RCN in the cities of Brookline, Brighton, and Somerville, Massachusetts. A copy of this application ("NextG Application") is attached as Exhibit 1 to the affidavit of Robert L. Delsman.

7. On April 17, 2008, RCN replied that it would not grant NextG access to its conduit, citing "conflicting interests" within RCN (attached as Exhibit 2 to Delsman Aff.). NextG has reason to believe that this "conflicting interest" consisted of RCN's desire to enter into a potentially lucrative business partnership with another communications provider for exclusive access to all of RCN's conduit space.<sup>2</sup>

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<sup>2</sup> *See* Affidavit of Robert Delsman at ¶ 4 ("Delsman Aff."), attached hereto as Exhibit B. *See* also Email from Robert Delsman to Rick Swiderski, July 18, 2008, attached as Exhibit 3 to Delsman Aff.

8. Upon learning of RCN's reason for denying access to its conduit, NextG wrote to RCN to explain RCN's obligations to provide non-discriminatory access to conduit under the laws of Massachusetts.<sup>3</sup> In that correspondence, NextG explained that RCN's desire for a business deal to provide exclusive conduit access to one party does not excuse RCN from complying with 220 CMR § 45.03.<sup>4</sup> RCN replied to inform NextG that it did not "read the regulations to sweep as broadly" as NextG.<sup>5</sup> RCN went on to suggest that NextG consider purchasing data transmission services from RCN at competitive rates instead of seeking to enforce its rights to non-discriminatory access to conduit to deploy NextG's own facilities.<sup>6</sup>

9. On August 6, 2008, Robert Delsman, NextG's Vice President of Regulatory Affairs and Government Relations, and NextG's outside Counsel, Scott Thompson of Davis Wright Tremaine, participated in a conference call with RCN's Vice President and General Counsel, Mr. Paul Eskildsen, and RCN's counsel, Tom Steele. (Delsman Aff. at ¶ 6). During that conference call, Mr. Eskildsen and Mr. Steele asserted that RCN was not subject to the conduit access requirements of G.L. c. 166, § 25A and 220 CMR § 45.03 because RCN is not an incumbent local exchange carrier. (*Id.*) Nonetheless, RCN agreed to re-evaluate the specific request made by NextG. (*Id.*)

10. Following up on the August 6, 2008 phone conference, in an e-mail on August 13, 2008, Mr. Delsman explained again that NextG wished to deploy facilities in RCN's conduit and asked RCN to act on the pending application for conduit access NextG submitted on April 17,

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<sup>3</sup> Email from Robert Delsman to Rick Swiderski, July 18, 2008, Exhibit 3 to Delsman Aff.

<sup>4</sup> *Id.*

<sup>5</sup> Email from Paul Eskildsen to Robert Delsman, July 30, 2008, Exhibit 4 to Delsman Aff.

<sup>6</sup> *Id.*

2008.<sup>7</sup> Mr. Delsman also informed RCN that if no acceptable agreement for NextG's access to RCN's conduit was reached by August 22, 2008, NextG would initiate this proceeding before the DTC. To date, NextG has received no response to this follow-up request.

11. RCN's refusal to grant conduit access is thwarting NextG's ability to meet its contractual obligations to its wireless carrier customer. This in turn will cause substantial and irreparable harm to NextG's goodwill and reputation as well as to its future business prospects. NextG is a recent entrant into the telecommunications industry and is in the process of establishing its reputation with customers and potential customers in a highly competitive niche area.<sup>8</sup>

12. The wireless telecommunications industry – from which NextG seeks to draw most of its customers – consists of a small number of major players. NextG's successful performance of its contract would enhance NextG's reputation within this industry and demonstrate to potential customers that NextG's services are reliable. Conversely, NextG's unsuccessful performance of the contract would have a significant negative effect on its ability to obtain future business. Even if NextG ultimately could recover monetary damages from RCN at some time in the future, the potential of restitution far in the future is simply not compensatory or the same as avoiding injury at the outset, and could not make NextG whole.<sup>9</sup>

13. In order for NextG to be able to provide its service to its customer and in turn for its customer to provide its service to the residents of Boston and surrounding areas in a timely manner and without further delay, it is necessary for this pole attachment dispute to be resolved as quickly as possible.

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<sup>7</sup> Email from Robert Delsman to Rick Swiderski, August 13, 2008, Exhibit 5 to Delsman Aff.

<sup>8</sup> Affidavit of Lawrence R. Doherty at ¶¶ 3-6, attached hereto as Exhibit C ("Doherty Aff").

<sup>9</sup> See Doherty Aff. at ¶¶ 4-9.

## Discussion

14. 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>10</sup> In 2000, the DTE expanded its pole and conduit rules to adopt regulations governing not only rates and terms but also guaranteeing nondiscriminatory access to poles, ducts, conduits, and rights of way.<sup>11</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>12</sup>

15. In the first conduit rate proceeding before it, the Massachusetts DTE lowered the conduit rates of New England Telephone to cost-based levels and set the rates by a formula which analogized conduit occupancy to pole occupancy under the FCC’s pole attachment formula.<sup>13</sup> That case served as the model upon which the FCC adopted its conduit rental

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<sup>10</sup> *CATV Rulemaking Order*, D.P.U. 930 (1984).

<sup>11</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>12</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>13</sup> *Greater Media, Inc.*, Mass. D.P.U. Util. 91-218, 40 (April 17, 1992); *Greater Media, Inc. v. Dep’t Pub. Util.*, 614 N.E.2d 632 (Mass. 1993).

formula, first in a contested case brought by a cable operator against Southwestern Bell in Wichita, Kansas in 1996,<sup>14</sup> and again in an FCC rulemaking adopted in April 2000.<sup>15</sup>

16. 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. 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 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>16</sup>

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<sup>14</sup> *Multimedia Cablevision, Inc. v. Southwestern Bell Telephone Company*, Memorandum Opinion & HDO, 11 FCC Rcd 11202, ¶¶ 21-22 (rel. September 3, 1996).

<sup>15</sup> *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, Report & Order, 15 FCC Rcd 6453, ¶¶ 80, 93 (rel. April 3, 2000).

<sup>16</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); *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.

17. Because it has been authorized to and has actually installed conduits, RCN has an affirmative obligation under Massachusetts law to provide NextG with non-discriminatory access to RCN's owned or controlled conduit pursuant to 220 CMR § 45.03(1). NextG provides telecommunications services and for purposes of G.L. c. 166, § 25A is a "wireless provider" under Massachusetts law.<sup>17</sup> NextG desires to make attachments of wires to RCN owned or controlled conduit to transport wireless communications traffic.<sup>18</sup> NextG is therefore entitled to access conduits owned or controlled by utilities.<sup>19</sup>

18. RCN is a "utility" under the relevant definitions in Massachusetts law, because RCN is a firm that "owns or controls or shares ownership or control" of conduits used for wire transmissions. G.L. ch. 166 § 25A; *see also* 22 CMR § 45.02. As the Supreme Judicial Court has held, under Massachusetts law a utility is any entity, public or private, that has been "granted authority to construct or maintain poles or associated wires in public ways for the purpose of

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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.").

<sup>17</sup> G.L. c. 166 §, 25A (a "Wireless provider" is defined as "any person, firm or corporation other than a utility, which provides telecommunications service.").

<sup>18</sup> G.L. c. 166 §, 25A ("Attachment", means any wire or cable for transmission of intelligence by telegraph, wireless communication, telephone or television.... 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.").

<sup>19</sup> G.L. c. 166, § 25A ("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. Notwithstanding this obligation, 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;").

transmitting electricity or telecommunications signals.”<sup>20</sup> RCN has been granted such authority by the DTE.<sup>21</sup>

19. RCN is authorized to provide telecommunications service in the state of Massachusetts.<sup>22</sup> RCN owns and controls 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. RCN is therefore a “utility” under the definition provided at G.L. c. 166, § 25A. RCN is also a “utility” under G.L. c. 166, § 22A(f) because it has been granted licenses in the cities of Brookline, Brighton, and Somerville, among others, to construct and maintain wires over and under the public rights of way.

20. On information and belief, RCN’s franchise agreements with the cities of Brookline, Brighton, and Somerville, Massachusetts require RCN to maintain surplus conduit capacity for future use. The purpose of this surplus capacity, precisely so that future telecommunications providers, such as NextG, would be able to access such conduit space rather than having to excavate city streets to install additional conduit. On information and belief, RCN has such surplus capacity available in its owned and controlled conduit.<sup>23</sup>

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<sup>20</sup> See *Greater Boston Real Estate Board v. Department of Telecommunications and Energy*, Docket No. SJC-08761, 779 N.E.2d 127, 202 (SJC Mass. 2002).

<sup>21</sup> See *Bell Atlantic Mobile Corporation, Ltd. d/b/a Verizon Wireless v. Commissioner of Review and Boards of Assessors of 220 Cities and Towns*, Docket Nos. C267959 through C268176, C269027 and C269028 (February 27, 2007) (“Another reason that RCN was found to be “undeniably engaged” in providing telephone service was that RCN was regulated as a telephone company. “From a regulatory standpoint, [RCN] submitted filings and was granted rights as a telephone company. For example, [RCN] filed an operating Tariff with DTE.””) (internal citations omitted), available at <http://www.mass.gov/atb/2007/07p121.doc> (last visited August 27, 2008).

<sup>22</sup> See Massachusetts Licensed Telecommunications Operators at <http://db.state.ma.us/dpu/qorders/frmTelecomList.asp> (last visited August 27, 2008).

<sup>23</sup> See *e.g.*, Delsman Aff. at ¶ 4 (RCN claims a planned exclusive agreement, not lack of conduit capacity when it denies NextG’s request).

21. In light of this, RCN's refusal to allow access to conduit coupled with its "offer" that NextG instead purchase RCN's fiber transmission services harks back to similar, take-it-or-leave-it "offers" made by AT&T to independent communications providers before the modern advent of distribution facility access laws.<sup>24</sup> General Law c. 166, § 25A and the Commission's regulations were adopted to prohibit precisely such behavior. The fact that RCN is not a remnant of the Bell System is not an element under the statute or the Commission's regulations, and is irrelevant.

### **Count I – Unlawful Denial of Access to Conduit**

22. NextG incorporates by reference as if fully set forth herein paragraphs 1 through 21 of this Complaint.

23. RCN has denied NextG access to its owned or controlled conduit in contravention of G.L. c. 166, § 25A and 220 CMR § 45.03(1). On information and belief, RCN has denied NextG access based on RCN's desire to provide exclusive access to only one party.<sup>25</sup>

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<sup>24</sup> AT&T notoriously attempted to force the migration of cable operators onto cables owned by AT&T, delaying pole attachment requests of independent communications providers who sought to deploy their own facilities until a more compliant "lease-back" provider could be installed in the service area. *See Better T.V. Inc. of Dutchess County v. New York Telephone Co.*, 31 FCC 2d 939, 967 (rel. October 7, 1971) (The independent cable operator "quickly took the hint about the lack of manpower to perform make-ready work and accepted channel service [e.g. lease of transmission from phone company] rather than run the risk of having the competing channel service customer get such a head start as to make a grant of its request for a pole attachment agreement an empty and worthless gesture."); General Telephone and United telecommunications also refused attachments for independent cable operators and, not being bound by the 1956 Bell consent decree, created cable television subsidiaries, which thereafter enjoyed great success in obtaining franchises where General and United operated telephone companies. *United States v. Western Elec. Co.*, 1956 Trade Cas. (CCH) & 68,246 (D.N.J. 1956); *See also* S. Rep. No. 580, 95th Congress, 1st Session 13 (1977).

<sup>25</sup> Email from Robert Delsman to Rick Swiderski, July 18, 2008, Exhibit 3 to Delsman Aff.

24. Neither of RCN's two written denials of access nor any of its oral communications claim that the denial is based on any lack of capacity in its controlled conduit, or on any safety, reliability or engineering reason.

25. Under 220 CMR § 45.03, capacity, safety, reliability or engineering justifications are the only reasons that access to conduit may be specifically denied.<sup>26</sup> In addition, the lawful reason chosen for denial must be provided at the time access is denied in writing.<sup>27</sup> Accordingly, RCN has failed to provide a justification for its denial of access sufficient to satisfy the standards of G.L. c. 166, § 25A and the DTC's Rules.

26. As a result of RCN's denial of access, NextG is suffering irreparable harm and will continue to suffer harm to its business.<sup>28</sup>

### **Count II – Unlawful Discriminatory Denial of Access to Conduit**

27. NextG incorporates by reference as if fully set forth herein paragraphs 1 through 26 of this Complaint.

28. Even if RCN's denial of access were based on a justification of capacity, safety, reliability, or engineering, the denial would still be discriminatory and therefore prohibited under G.L. c. 166, § 25.A. RCN has informed NextG that it is denying access based on its interest in entering an exclusive conduit access agreement with an unnamed third party.<sup>29</sup> RCN's statement that it will grant access to one party but not to another is the *sine qua non* of discriminatory access under Massachusetts pole and conduit access statute.

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<sup>26</sup> 220 CMR § 45.03(1).

<sup>27</sup> 220 CMR § 45.03(2).

<sup>28</sup> See Doherty Aff. at ¶¶ 4-9.

<sup>29</sup> Delsman Aff. at ¶ 4. See Email from Robert Delsman to Rick Swiderski, July 18, 2008, Exhibit 3 to Delsman Aff.

29. As a result of RCN's discriminatory denial of access, NextG is suffering harm and will continue to suffer harm.<sup>30</sup>

30. In addition to being an insufficient justification to deny access, RCN's alleged exclusive conduit access arrangement itself is likely *per se* illegal under Massachusetts regulations. 220 CMR § 45.03(1) states:

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.<sup>31</sup>

31. Indeed, RCN has already had its attempts to engage in exclusive access agreements for essential distribution corridors held unlawful. In 2001, the DTE found that agreements between Boston Edison Company and RCN granting RCN exclusive access to rights of way controlled by Boston Edison were null and void. The DTE stated:

Because the provisions in question are subject to applicable law and regulatory authority, and such law renders the provisions unenforceable, they are nugatory and thus need not be stricken from the agreements. In the event of an actual denial of access by BECo or BecoCom, the cable Intervenor may bring a claim pursuant to G.L. c. 166, § 25A and 220 C.M.R. § 45.00, the pole attachment statute and regulations.<sup>32</sup>

32. To the extent that RCN has purported to or is planning to grant exclusive access to its conduits to a single provider, RCN is in violation of 220 CMR § 45.03(1) and the agreement is null and void.

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<sup>30</sup> See Doherty Aff. at ¶¶ 4-9.

<sup>31</sup> 220 CMR § 45.03(1) (emphasis added).

<sup>32</sup> *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*, Massachusetts Department of Telecommunications and Energy, D.P.U./D.T.E. 97-95, 2001 Mass. PUC LEXIS 69, 153 (December 28, 2001).

## **Relief Requested**

For the foregoing reasons, NextG respectfully requests the DTC:

1. Assert its jurisdiction over all matters raised in this conduit access complaint;
2. Grant expedited treatment in this case providing for prompt resolution;
3. Find that RCN has unlawfully denied access to NextG for placement of wire facilities in RCN owned or controlled conduit;
4. Find that RCN has discriminated against NextG in denying access to RCN's conduits;
5. Affirm that RCN may not enter into an exclusive conduit access agreement with another communications provider;
6. Order RCN to grant access to NextG for the placement of its network facilities in RCN conduit at just and reasonable rates within 15 days of any DTC Order;
7. Order RCN to cease and desist its unlawful, unjust and unreasonable denial of access practices in a manner consistent with this Complaint;
8. Order RCN to cease and desist from engaging in unreasonable access denial practices in the future; and
9. Award NextG's attorneys' fees and costs associated with bringing the instant action; and
10. Award such other relief as the DTC deems just, reasonable and proper.

Respectfully submitted,

**NEXTG NETWORKS OF NY, INC.**

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September 8, 2008

### **CERTIFICATE OF SERVICE**

I, Dennis A. Murphy, hereby certify that on September 8, 2008, I caused a copy of the foregoing Complaint 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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Mary L. Cottrell, Secretary  
Department of Public Utilities  
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