

**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. D.T.C. 08-5

**RESPONSES OF RCN TO
FIRST SET OF INFORMATION REQUESTS FROM
THE DEPARTMENT OF PUBLIC UTILITIES**

Respondents, RCN New York Communication, LLC; RCN Telecom Services of MA, Inc.; RCN Telecom Services, Inc.; and RCN Corporation (collectively "RCN"), through their attorneys Sullivan & Worcester LLP, respectfully provide the following responses to the First Set of Information Requests from the Department of Public Utilities ("DPU") to RCN, dated December 24, 2008.

As requested, each numbered request of the DPU is set out in italics, followed by RCN's response thereto. Peter Jablonsky of RCN was responsible for those questions requesting technical and engineering information regarding the RCN conduit to which NextG has requested access. Paul Eskildsen of RCN was responsible for answering those questions pertaining to ownership and control of conduit utilized for the RCN network.

1. *Please refer to NextG's Complaint for Denial of Access to Conduit and Request for Expedited Treatment, at Exhibit 4, page 1. Identify in full and complete detail the utilities that own the conduit, as referenced in that document, and the arrangement between RCN and the conduit owners that governs RCN's use of the conduit. Provide complete and detailed documentation supporting your response.*

As set forth in RCN's Response to the Complaint for Denial of Access to Conduit on file herein, RCN's network in Massachusetts was largely constructed pursuant to a joint venture relationship with Boston Energy Technology Group, Inc., and its subsidiaries BecoCom, Inc. (now known as "NStar Com") and Boston Edison Company (now known as "NStar Electric"). The joint venture established an entity known as RCN-BecoCom, LLC (now known as "RCN-BecoCom, Inc."). Although the joint venture has since been dissolved (and RCN-BecoCom, Inc., is now wholly owned by RCN), much of the conduit in RCN's network continues to be held pursuant to an indefeasible right of use ("IRU") agreement with NStar Com. Consequently, RCN has neither sole ownership nor unilateral control over much of the conduit in its network, and is not in a position to grant access to such conduit. The complexities in the IRU agreement are the subject of ongoing dialogue between NStar Com and RCN, which have not always agreed upon the ownership of specific network segments.

In response to NextG's access request, RCN sought in good faith to clarify ownership and control of the conduit segments in question. NextG identified nineteen (19) conduit segments in three municipalities, totaling 9,669 linear feet, that it sought to rent. See Exhibit 1 to NextG's Complaint (Letter dated April 4, 2008, from Ralph Canina, Market Director for NextG, to Margot Jones, Engineering Manager for RCN, and table

attached thereto). Based upon information received from NStar, it was determined that – as to the 19 specific conduit segments in Brookline, Brighton, and Somerville to which NextG has requested access – RCN does, in fact, have control over the applicable conduit and authority to consider NextG's access request without NStar's involvement. *See* Affidavit of Paul Eskildsen dated September 26, 2008 ("Eskildsen Aff."), submitted with RCN's Response to Complaint for Denial of Access to Conduit and Request for Expedited Treatment, filed on September 26, 2008, at ¶ 8. RCN has not conclusively determined the ownership status of any other conduit segments, beyond those to which NextG has specifically requested access.

2. *Please state whether RCN owns any of the conduit to which NextG seeks access. If no, please identify in full and complete detail the owner(s), if not otherwise identified in the preceding information request, and the arrangement between RCN and the owner(s) that governs RCN's use of the conduit. Provide complete and detailed documentation supporting your response.*

Please see response to 1, above. The nineteen (19) specific conduit segments in Brookline, Brighton, and Somerville to which NextG has requested access contain only RCN's communications-related facilities, and are not used by NStar. Accordingly, NStar has not asserted dominion over these discrete pieces of conduit, and RCN has control and authority to process NextG's request for access to these 19 locations.

3. *Please refer to Response to Complaint for Denial of Access to Conduit and Request for Expedited Treatment filed by RCN, at page 2. For any of the conduit not owned by RCN, please describe in full and complete detail the scope of control RCN exercises over the conduit and the authority under which RCN may grant access to third parties for use of the conduit. Provide complete and detailed documentation supporting your response.*

Please see responses to 1 and 2, above. RCN has access to the vast majority of the conduit it uses pursuant to a lease or an IRU agreement with NStar or another incumbent utility, and RCN utilizes the conduit on a shared-use basis with the utility owner. RCN does not believe that these lease and/or IRU agreements permit RCN to resell or sub-lease the conduit that RCN occupies.

The nineteen (19) segments to which NextG has requested access are unique, in that use of those segments is not shared with NStar or another utility. RCN does not know how NextG selected the segments to which it requested access, but notes that the request was initially submitted to RCN by Ralph J. Canina, Jr., of NextG, who previously served as RCN's Director of Construction and later Senior Director of Network Construction, and therefore is intimately familiar with the configuration of RCN's network. See Exhibit 1 to NextG's Complaint (Letter dated April 4, 2008, from Ralph Canina, Market Director for NextG, to Margot Jones, Engineering Manager for RCN).

4. *Please refer to Response to Complaint for Denial of Access to Conduit and Request for Expedited Treatment filed by RCN, at page 2. State whether NSTAR Com and/or NSTAR Electric use the subject conduit for any reason and, if so, describe in full and complete detail the nature of the use.*

Neither NStar Com nor NStar Electric use the nineteen (19) specific conduit segments in Brookline, Brighton, and Somerville to which NextG has requested access.

5. *Please state whether RCN's owned or controlled conduit, to which NextG seeks access, transmits electricity for light, heat, or power. State in full and complete detail all of the facts supporting your response, and provide complete and detailed documentation supporting your response.*

The nineteen (19) specific conduit segments in Brookline, Brighton, and Somerville to which NextG has requested access do not transmit electricity for light, heat, or power.

6. *Please state whether NextG's installation of facilities in RCN's owned or controlled conduit would affect or could affect the measurement, reading, tracking, or recording of (a) any customer's electric or natural gas usage, and (b) electric or natural gas demand consumption at any level of aggregation. State in full and complete detail all of the facts supporting your response, and provide complete and detailed documentation supporting your response.*

To the best of RCN's knowledge, NextG's installation of facilities in the nineteen (19) specific conduit segments in Brookline, Brighton, and Somerville to which NextG has requested access conduit would not affect and could not affect the measurement, reading, tracking, or recording of (a) any customer's electric or natural gas usage, and (b) electric or natural gas demand consumption at any level of aggregation, because the subject conduit segments are not used for those purposes.

7. *Please state whether NextG's installation of facilities in RCN's owned or controlled conduit would affect or could affect the remote reading of customer electric or natural gas meters, or the connection, disconnection, or alteration of electric or gas service to a customer or groups of customers. State in full and complete detail all of the facts supporting your response, and provide complete and detailed documentation supporting your response.*

To the best of RCN's knowledge, NextG's installation of facilities in the nineteen (19) specific conduit segments in Brookline, Brighton, and Somerville to which NextG has requested access conduit would not affect and could not affect the remote reading of customer electric or natural gas meters, or the connection, disconnection, or alteration of electric or gas service to a customer or groups of customers, because the subject conduit segments are not used for those purposes.

8. *Please state whether NextG's installation of facilities in RCN's owned or controlled conduit would affect or could affect the remote alteration of the electric or gas consumption of any end-user's residence or place of business. State in full and complete detail all of the facts supporting your response, and provide complete and detailed documentation supporting your response.*

To the best of RCN's knowledge, NextG's installation of facilities in the nineteen (19) specific conduit segments in Brookline, Brighton, and Somerville to which NextG has requested access conduit would not affect and could not affect the remote alteration of the electric or gas consumption of any end-user's residence or place of business, because the subject conduit segments are not used for those purposes.

9. *Please state whether NextG's installation of facilities in RCN's owned or controlled conduit would affect or could affect any application related to electric smart grid or advance metering. State in full and complete detail all of the facts supporting your response, and provide complete and detailed documentation supporting your response.*

To the best of RCN's knowledge, NextG's installation of facilities in the nineteen (19) specific conduit segments in Brookline, Brighton, and Somerville to which NextG has requested access would not affect and could not affect any application related to electric smart grid or advance metering, because the subject conduit segments are not used for those purposes.

10. *Please refer to the Joint Stipulated Statement of Facts at ¶ 18. State in full and complete detail all of the facts supporting this statement, and provide complete and detailed documentation supporting your response.*

RCN has surveyed the nineteen (19) specific conduit segments in Brookline, Brighton, and Somerville to which NextG has requested access and determined that additional communications cable could be installed in those conduits – assuming adherence to accepted industry construction and maintenance standards – without posing concerns regarding safety, reliability, or generally applicable engineering standards. These conduit segments currently contain only communications facilities; therefore, safety, reliability, and generally applicable engineering standards pertaining to electrical or natural gas facilities do not apply. Please see response to 3, above.

11. *Please refer to the Joint Stipulated Statement of Facts at ¶ 20. Explain in full and complete detail why it is relevant to the adjudication of the factual setting in this instant case for D.T.C. to provide guidance on each of the four questions stated therein.*

The questions set forth in the Joint Stipulated Statement of Facts at ¶¶ 20-21 reflect the areas of disagreement between RCN and NextG as to what constitute reasonable rates, terms, and conditions for the use by NextG of RCN's ducts and conduits, illuminated by the parties' efforts to negotiate a mutually acceptable conduit access agreement. Since the Complaint in this matter was filed in September 2008, RCN has acted in good faith in an effort to respond constructively to this dispute. RCN clarified the ownership status of the conduit requested by NextG in its Complaint, surveyed the conduit to determine capacity, and -- despite its view that it had no statutory or regulatory obligation to do so -- initiated good faith negotiations with NextG in an effort to arrive at commercially reasonable terms and conditions under which NextG could utilize the requested RCN conduit segments. These negotiations produced several exchanges of proposals and counterproposals on a draft form of agreement, many provisions of which were agreeable to both parties. However, the negotiations also revealed stark disagreements between the parties over both the applicability and scope of the access statute and regulations, as well as what constitute just and reasonable terms and conditions for conduit access.

G.L. c. 166, § 25A provides, *inter alia*, that:

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; and upon its own motion or upon petition of any utility or licensee said department shall determine and enforce reasonable rates, terms and conditions of use of poles

or of communication ducts or conduits of a utility for attachments of a licensee in any case in which the utility and licensee fail to agree.

Pursuant to the foregoing, should the DTC determine that G.L. c. 166, § 25A requires RCN to provide NextG access to its conduits, RCN respectfully requests the DTC's guidance on the areas of impasse enumerated in ¶¶ 20 and 21 of the parties' Joint Stipulated Statement of Facts, to enable the parties to finalize a conduit access agreement.

The circumstances that require the DTC to provide guidance to the parties on the questions listed in paragraph 20 of the Joint Stipulated Statement of Facts are as follows:

With regard to the question whether a utility has an obligation to provide access to conduit and ducts over which it shares ownership or control, and to rights-of-way, RCN submits that the parties need guidance as to what G.L. c. 166, § 25A and 220 CMR § 45 require where the request for conduit access is made not to an incumbent utility but to a competitive provider that has, itself, obtained access to the conduit pursuant to a lease or IRU agreement. RCN owns very little of the conduit and rights-of-way that it occupies. Rather, the majority of the conduit and rights-of-way occupied by RCN are utilized pursuant to IRU or lease arrangements with third parties. While RCN is prepared to try to accommodate NextG's desire to rent conduit wholly owned by RCN, RCN does not believe it can provide access to conduit or rights-of-way owned by third parties, and should not be required to facilitate access to third-party conduit or rights-of-way that NextG could negotiate itself. Moreover, RCN believes that the language in G.L. c. 166, § 25A referencing ducts, conduits or rights-of-way as to which a utility "shares ownership or control" was intended to apply to incumbent utilities that may have assigned infrastructure to a subsidiary, and not competitive providers that have themselves had to lease or IRU

such facilities from an underlying, independent third party utility. Accordingly, it is RCN's contention that G.L. c. 166, § 25A, which directs the DTC to consider "the interest of subscribers of cable television services and wireless telecommunications services as well as the interest of consumers of utility services" in regulating the rates, terms and conditions applicable to attachments, does not categorically require that a conduit access agreement cover shared ducts, conduits, and rights-of-way, or those not wholly owned by the provider. NextG, however, insists that any agreement for access to RCN's conduit should recite the statutory "owned or controlled" language verbatim, and RCN is concerned that an unacceptably expansive interpretation of this "owned or controlled" language would impose untenable and unintended burdens on users of leased or IRU'ed conduit. The parties seek the DTC's guidance on these points.

With regard to the scope of a provider's obligation to provide a competitor that seeks access to its conduit copies of its proprietary, confidential, and competitively sensitive network maps, the parties also are in disagreement. NextG sought language in the conduit access agreement that would have required RCN to provide copies of its proprietary maps of the entire RCN network in advance of any request for access to specific conduit segments, *i.e.*, NextG would have RCN provide a menu of all potentially available conduit from which NextG could then order at will. RCN believes that any requirement that it provide complete network maps to a competitor would be anti-competitive and would raise significant concerns regarding network security. RCN submits that a more appropriate procedure to meet any obligation it may have to provide a competitor, such as NextG, access to its conduit (should the DTC determine that such an obligation exists) would be for the requesting party to first identify the geographic location

in which access is sought, and the capacity requested. RCN would then determine whether it could meet the request, and provide maps of the conduit available capacity at that time. The parties seek the DTC's guidance as to what constitute reasonable terms and conditions on this point.

The parties also jointly seek the DTC's guidance on the question whether access to conduit may be denied based on the desire of a competitive provider, such as RCN, to reserve capacity for its own anticipated network expansion. Whereas incumbent utilities had, for the most part, fully built out their ubiquitous networks prior to the advent of competitors' pole attachment rights, RCN is still actively expanding its network as market conditions and availability of capital allow. As such, it is essential to RCN's viability as a competitor that it be allowed to reserve conduit capacity for anticipated future network expansion, so that it may continue to add customers and meet service demands. In its negotiations with NextG, however, NextG refused the inclusion of terms allowing RCN to reserve a reasonable amount of expansion and growth capacity in its own conduit. Limiting RCN's right to reserve capacity would result in RCN raising the capital to invest in the construction, deployment and maintenance of facilities, being forced to allow others to use them, and then not be able to use them for itself. This would have a crippling impact on RCN's ability to engage in long term plans to reach new customers, and would chill RCN's interest in building out additional facilities, to the detriment of both competition in the marketplace and consumers. If access in this context is required, the parties providing access must be permitted to carve out a reasonable amount of capacity for future use that goes beyond immediate needs.

12. *Please refer to the Joint Stipulated Statement of Facts at ¶ 20. State whether the Federal Communications Commission has provided any guidance on any of the questions stated therein. If so, provide applicable cites.*

Pursuant to the Procedural Schedule for this matter set on December 11, 2008, the parties' initial briefs are due on January 16, 2009. RCN will discuss in its brief, and append thereto copies of, any applicable guidance from the Federal Communications Commission on the questions stated in the Joint Stipulation of Facts at ¶ 20.

13. *Please refer to Response to Complaint for Denial of Access to Conduit and Request for Expedited Treatment filed by RCN, at page 2. Given that RCN admits that it has control over the subject conduit, explain in full and complete detail why it is relevant to the adjudication of the factual setting in this instant case for D.T.C. to provide guidance on each of the four questions stated in the Joint Stipulated Statement of Facts at ¶ 20.*

Please see response to 11, above.

14. *Please refer to the Joint Stipulated Statement of Facts at ¶ 21. Explain in full and complete detail why it is relevant to the adjudication of the factual setting in this instant case for D.T.C. to provide guidance on each of the four questions stated therein.*

Please see response to 11, above. The questions set forth in the Joint Stipulated Statement of Facts at ¶¶ 20-21 reflect the areas of disagreement between RCN and NextG as to what constitute reasonable rates, terms, and conditions for the use by NextG of RCN's ducts and conduits, illuminated by the parties' efforts to negotiate a mutually acceptable conduit access agreement. Should the DTC determine that G.L. c. 166, § 25A requires RCN to provide NextG access to its conduits, the parties will require the DTC's guidance on the areas of impasse enumerated in ¶¶ 20 and 21 of the parties' Joint Stipulated Statement of Facts, in order to finalize a conduit access agreement.

The circumstances that RCN contends (but NextG does not agree) require the Department to provide guidance to the parties on the questions listed in paragraph 21 of the Joint Stipulated Statement of Facts are as follows:

As set forth in the response to 11 above, NextG and RCN differ on the question whether a competitive provider, such as RCN, is required by G.L. c. 166, § 25A to attempt to afford another competitive provider, such as NextG, access to ducts, conduits, or rights-of-way that RCN utilizes pursuant to a lease or IRU agreement with an independent third party. Insofar as this question hinges on the meaning of the term "control" in the statute, should the DTC determine that G.L. c. 166, § 25A requires RCN to provide NextG access to its conduits, RCN seeks the DTC's guidance on the proper interpretation of the term "control" as applied in this context. RCN's agreements with NStar and other utility providers do not contemplate RCN's ability to resell or sub-lease conduit access. NextG

should be required to request and obtain access to third party conduit through its own direct discussions with those entities.

RCN and NextG also reached impasse in their negotiations as to the extent to which RCN could require oversight and inspection, at NextG's expense, of NextG's access to and use of RCN's conduit. Insofar as RCN believes the question of oversight and inspection raises substantial issues of safety, reliability, and cost, RCN requests the DTC's guidance as to what constitute reasonable terms and conditions on this point.

Lastly, RCN and NextG in their negotiations were in sharp disagreement as to whether it was reasonable, in a conduit access agreement that was to cover nineteen (19) small, disparate conduit segments, as to which the total annual rental payment could have been less than \$15,000,¹ to require a length of rental term sufficient for the conduit provider to recoup its administrative costs in processing the access request and/or to require payment of early termination fees sufficient to recoup its costs, if the conduit occupancy were to be terminated early. RCN seeks the DTC's guidance as to what is reasonable, given the statutory mandate that a utility required to provide access to its conduit be assured "recovery of not less than the additional costs of making provision for the attachments..." G.L. c. 166, § 25A.

¹ NextG initially proposed to pay \$0.49 per foot of conduit occupied when one half of the total number of ducts in a conduit were occupied, or \$0.98 per foot of conduit when all ducts in a conduit were occupied. This would potentially have yielded a total annual payment for all 19 conduit segments of less than \$5,000. RCN counterproposed an initial rate of \$1.38 per linear foot of innerduct per year (assuming a long-term agreement and agreement on all other terms of RCN's offer), which would have yielded a total annual payment for all 19 conduit segments of \$13,343.22.

15. *Please refer to the Joint Stipulated Statement of Facts at ¶ 21. State whether the Federal Communications Commission has provided any guidance on any of the questions stated therein. If so, provide applicable cites.*

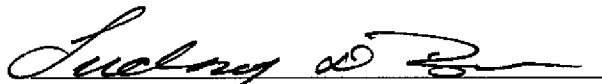
Pursuant to the Procedural Schedule for this matter set on December 11, 2008, the parties' initial briefs are due on January 16, 2009. RCN will discuss in its brief, and append thereto copies of, any applicable guidance from the Federal Communications Commission on the questions stated in the Joint Stipulation of Facts at ¶ 21.

Respectfully submitted,

RCN NEW YORK COMMUNICATION,
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By their attorneys,

January 6, 2009



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CERTIFICATE OF SERVICE

I, Lindsay D. Barna, hereby certify that on January 6, 2009, I caused a copy of the foregoing RESPONSES OF RCN TO FIRST SET OF INFORMATION REQUESTS FROM THE DEPARTMENT OF PUBLIC UTILITIES to be served via e-mail, with hard copies sent via U.S. mail, first-class postage prepaid, on the following:

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