Before the
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE
Commonwealth of Massachusetts

NEXTG NETWORKS O F 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

BRIEF IN SUPPORT OF
RCN'S RESPONSE TO
COMPLAINT FOR DENIAL OF ACCESS TO CONDUIT

Respondents RCN New York Communication, LLC; RCN Telecom Services of MA, Inc.; RCN Telecom Services, Inc.; and RCN Corporation (collectively "RCN"), by their attorneys Sullivan & Worcester LLP, in support of RCN's Response to the Complaint for Denial of Access to Conduit filed by NextG Networks of NY, Inc. ("NextG"), and in view of intervening developments in this matter, respectfully submit the following additional points and authorities, in accordance with the Procedural Schedule for this matter set on December 11, 2008.

BACKGROUND

NextG's Complaint was filed on September 8, 2008, and RCN timely filed its Response thereto on September 26, 2008. RCN asserted, among other defenses, that

1) the Complaint was premature;[1] 2) the statute and regulations cited by NextG do not require a competitive provider such as RCN to grant NextG access to RCN's conduit in the circumstances presented; and 3) if applied to a competitive provider in the circumstances presented, the Department of Telecommunications and Cable ("DTC") would need to provide guidance as to what constitutes just and reasonable terms and conditions of access.

NextG's Complaint demands access to 19 separate conduit segments, ranging in length from 119 to 1,605 feet, in three different Massachusetts municipalities, for a total of 9,669 linear feet of conduit.[2] In negotiations with RCN, NextG initially proposed to pay $0.49 per foot per year for conduit jointly occupied with RCN, which would have resulted in an annual rental payment to RCN for the 19 requested conduit segments of less than $5,000.

As discussed in RCN's Response to the Complaint, 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 know as "RCN-BecoCom, Inc."). Although the joint venture has since been

[1] The subsequent negotiations among the parties, discussed herein, have since afforded RCN the opportunity to respond to NextG's access request set forth in the Complaint, and have illuminated the areas of impasse between the parties.

[2] NextG in its response to the DTC's information requests, dated January 6, 2009, states "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." *See* NextG's Responses to Department of Telecommunications and Cable Requests, at 2. In negotiations with RCN, NextG requested access to RCN conduit in other states. The anti-competitive and anti-consumer impacts discussed herein arising from NextG's current demand for access would be magnified, if it were allowed to expand its demand for access to RCN conduit segments in additional jurisdictions.

dissolved (and RCN-BecoCom, Inc., is now wholly owned by RCN), much of the conduit used by RCN for its network continues to be owned by NStar Com. RCN's rights to use the conduit are subject to a complex indefeasible right of use ("IRU") agreement with NStar Com. Consequently, RCN has neither ownership nor unilateral control over much of the conduit in its network, and is not in a position to grant access to such conduit.

In the intervening period since the Complaint was filed in September, RCN has acted in good faith in an effort to respond constructively to this dispute. RCN reassigned legal, engineering, and operational personnel to this matter, who undertook to clarify, with NStar, RCN's authority to grant access to the 19 specific conduit segments requested by NextG. RCN also conducted a survey of each segment to determine capacity, and – despite RCN's view that it had no statutory or regulatory obligation to do so – initiated 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 were unsuccessful due to impasse on several key terms and conditions, and RCN formally denied NextG's access request by letter to the DTC dated December 15, 2008, based on RCN's position that it has no statutory or other duty to provide access on the terms asserted by NextG. Part I of this brief discusses RCN's contention that G.L. c. 166, § 25A and the implementing regulations at 220 CMR § 45 do not mandate access in the circumstances presented.

Although the parties' negotiations ultimately broke down, they nonetheless produced several exchanges of proposals and counterproposals on a draft form of agreement. The parties were able to reach agreement on a number of commercial terms. 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 constitutes just and reasonable commercial terms and conditions for conduit access. The questions set forth in the Joint Stipulated Statement of Facts at ¶¶ 20-21 reflect the primary areas of remaining disagreement between RCN and NextG regarding the rates, terms, and conditions for the use by NextG of RCN's ducts and conduits. Part II of this brief elaborates those issues, which – if the DTC rejects RCN's arguments in Part I and mandates access – RCN respectfully requests the DTC to decide.[3]

POINTS AND AUTHORITIES

I. Competitive Providers Should Not Be Made Subject to the Compulsory Access Provisions of the Massachusetts Pole Attachment Statute and Regulations

The threshold question that the DTC must resolve in this case is whether G.L. c. 166 § 25A compels a competitive provider, such as RCN, to provide access to its conduit when access potentially will harm RCN and its customers. RCN submits that the statute and associated regulations do not compel access in the circumstances presented. G.L. c. 166, § 25A, which directs the DTC to consider "the interest of subscribers of cable television services and wireless telecommunications services" in its regulation of attachment rates, terms, and conditions, inherently requires that the

[3] The DTC must, of course, decide as a threshold matter whether G.L. c. 166, § 25A requires RCN to afford NextG access to its conduit. Only if access is mandated must the DTC then proceed to resolve the points of impasse between the parties as to appropriate rates, terms and conditions of access. G.L. c. 166, § 25A provides that "upon its own motion or upon petition of any utility or licensee [the DTC] 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."

DTC consider all relevant facts and circumstances, including very significantly the competitive position of the pole or conduit owner.[4] The regulations recognize that it will sometimes be appropriate for a utility to deny access "for good cause shown," 220 CMR § 45.03(1). Here, given the disproportionate and unfair burden imposed on RCN and its customers if access is required, along with the detrimental impact this burden will have by chilling competitive investment in cable, broadband and telephony competition in Massachusetts, compulsory access pursuant to G.L. c. 166, § 25A must be denied.

As the Department of Telecommunications and Energy made clear in its 2000 Order implementing the current pole attachment regulations, the purpose of both the federal and the Massachusetts pole attachment laws was to obviate the ability of incumbent monopoly utilities to extract monopoly rates for access to so-called "bottleneck" facilities. *See, e.g.*, Order Establishing Complaint and Enforcement Procedures, D.T.E. 98-36-A, 2000 Mass. PUC LEXIS 21, rel. July 24, 2000, at 55 (purpose of the 1996 amendment to the Federal pole attachment Act, which Massachusetts generally follows, was "to allow telecommunications service providers to attach to utilities' 'bottleneck facilities' without having to pay monopoly rents."). The intent was not to allow new competitors in the marketplace to exploit the capital investment of other new competitors, but rather to ensure that incumbent, monopoly utilities not utilize their monopoly control over bottleneck facilities to exclude new

[4] This is consistent with federal law, which provides for reverse preemption of the federal pole attachment act by any state that certifies, as Massachusetts has, that it regulates pole attachments in accordance with the minimum conditions set forth in 47 U.S.C. § 224(c). These conditions include that: "in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of utility services." 47 U.S.C. § 224(c)(2)(B).

entrants: "For competitive carriers to have the fair opportunity to succeed in the market, they must have at least potential access to customers seeking their services." *Id.* at 33. Here, it cannot credibly be argued that, without access to RCN's conduit, NextG will be precluded from reaching its customers.

Because RCN obviously is not a monopolist, and does not control "bottleneck" conduit, G.L. c. 166, § 25A should not be applied. Unlike former monopoly utilities such as the incumbent phone and electric companies, which historically operated in a monopoly market and could recoup their infrastructure investment through government regulated rates, RCN deployed its conduit in a competitive, non-rate regulated environment. It bore the full cost of construction without any assurance of recoupment of its investment. Furthermore, unlike the incumbent utilities that had ubiquitous pole and conduit networks that could not be replicated by new market entrants, the very fact that RCN built the requested conduit demonstrates that NextG could do the same. Just as RCN, a competitive provider, obtained conduit rights and rights-of-way on a commercial basis from third parties and deployed conduit segments where needed at its own risk and expense, so too must other competitive providers, such as NextG. Indeed, to require a fellow competitor to open its conduit to NextG would, in effect, shift the capital cost and risk of NextG's network deployment to RCN, its shareholders, and its customers. Such a result would clearly contravene the DTC's paramount concern, in implementing the pole attachment law, with the interests of consumers, and would impair, rather than enhance, telecommunications competition in the Commonwealth.[5]

[5] "The Massachusetts Pole Attachment Statutes mandates that the Department 'shall consider...the interest of consumers' in exercising its statutory authority." Id. at 4, note 3. "The statute

The DTC also must consider the impact of forcing RCN into an unwanted line of business. RCN was quite willing to offer to sell NextG its publicly available suite of telecommunications services. However, RCN does not "sell" conduit access and had no framework to respond to NextG's demand for access to disparate segments of conduit that RCN had built to complete its own network. RCN does not have the systems or personnel in place to economically administer conduit rentals. Not only would granting NextG's Complaint permit a competitor to have access to facilities without the costs and risks of investment, it would require RCN to establish and maintain costly personnel and procedures that do not currently exist, in order to administer conduit access by competing providers. It would require RCN to deploy additional network engineering and operational personnel to determine capacity and oversee the added activity in its facilities. It would require additional finance, accounting, and billing support. It would result in additional legal costs in connection with processing access requests and negotiating conduit access agreements. Given the limited scope of RCN's owned conduit and the absence of the economies of scale enjoyed by the incumbent utilities, it is highly unlikely that RCN could fully recoup through annual rental fees the full amount of the administrative costs associated with compulsory rental of its conduit, even if it were to charge very high per foot rate. NextG's initially proposed rate of $0.49 per foot per year is manifestly inadequate to reimburse RCN's costs, and even the parties' subsequent discussions of rates three times that amount would not come close to reimbursing RCN's costs. These unreimbursed costs would therefore be a burden on RCN's customers and

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expressly directs the Department to *consider the interests of consumers*." Id. at 5 (emphasis in original).

shareholders, and would harm RCN's ability to be an effective competitor in the Massachusetts marketplace.

Nothing in the decisional law implementing G.L. c. 166, § 25A or its federal analog, 47 U.S.C. § 224, suggests that compulsory access to a competitive provider's conduit should be mandated, where compelling reasons to deny access are presented.[6] RCN is not aware of any Massachusetts or Federal Communications Commission ("FCC") cases or orders requiring access in this context. The cases and orders cited by NextG in its January 6, 2009, responses to the Department of Public Utilities' ("DPU's") information requests address the obligations of incumbent, former monopoly utilities with ubiquitous networks and, as such, are inapposite to the questions presented in this case. To the contrary, the authorities cited by NextG generally serve to illustrate RCN's contention that the obligations NextG would have the DTC impose on RCN were developed to respond to abuses by monopoly, incumbent utilities that control bottleneck facilities, not the circumstances presented here.[7]

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[6] RCN notes that the DTC is not bound by 47 U.S.C. § 224 or the Federal Communications Commission's implementing regulations. Section 224 specifically grants deference to state laws, where a state has certified that it regulates pole attachments. The state law need not replicate the federal law; rather, it is enough that the state has elected independently to regulate the subject matter, and meets the minimum conditions set forth in 47. U.S.C. § 224(c). Where those prerequisites have been met, as they have in Massachusetts, "Nothing in [Section 224] shall be construed to apply to, or give the [Federal Communications] Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section [pertaining to non-discriminatory access], for pole attachments in any case where such matters are regulated by a State." Accordingly, the only binding precedent in this matter is Massachusetts precedent. As the DTC is aware, the question presented in this case – whether G.L. c. 166 § 25A compels a competitive provider such as RCN to provide access to its conduit when it will potentially harm RCN's customers to do so – is a matter of first impression before the DTC.

[7] For example, the case cited by NextG in support of its contention that RCN should be required to include non-wholly owned facilities within the scope of any conduit access agreement with NextG involved poles jointly owned by Baltimore Gas & Electric Company and Bell Atlantic-Maryland – two major incumbent utilities. *See Cable Telecommunications Assoc. of Maryland, Delaware, and District of Columbia, et al. v. Baltimore Gas & Electric Company and Bell Atlantic-Maryland,* 16 FCC

II. If Competitive Providers Are Compelled to Provide Access Pursuant to the Massachusetts Pole Attachment Statute and Regulations, the Terms and Conditions of Access Must Be Proscribed Consistent with Fair Competition

RCN's good faith negotiations toward an appropriate commercial agreement for use by NextG of the requested RCN conduit segments revealed key disagreements between the parties as to the scope, terms, and conditions of access contemplated by G.L. c. 166, § 25A. In the event the DTC were to determine that G.L. c. 166, § 25A requires compulsory access to RCN's conduit, it will be imperative that the DTC provide the parties guidance on these points. Specifically, the parties have set forth in their Joint Stipulated Statement of Facts at ¶ 20 four questions as to which they agree the DTC must provide guidance. The Joint Stipulated Statement of Facts at ¶ 21 sets forth three additional questions as to which RCN requests the DTC's guidance, to facilitate the implementation of an acceptable conduit access agreement, if required, without further intervention by the DTC.

The first two questions presented are whether a conduit access agreement between two competitive providers, if mandated pursuant to G.L. c. 166, § 25A, necessarily must incorporate verbatim the statutory language encompassing conduit and ducts under shared ownership or control, as well as rights-of-way. G.L. c. 166, § 25A directs covered utilities to provide access to poles and rights-of-way "owned or

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Rcd 5477 (2001). Such a case has no bearing on whether a competitive provider such as RCN should be required to facilitate another competitor's access to conduit obtained from a third party. The Williamsburg Cablevision v. Carolina Power & Light case, cited by NextG for the proposition that providers may impose a reasonable fee for safety violations as a term or condition of attachment, serves to illustrate the extremely complex rate calculations required under the FCC's formulas, which rely upon detailed accounting information set forth in an electric utility's FERC Form 1 or an incumbent LEC's ARMIS report. This is data that competitive providers such as RCN are not required to compile. Thus, the Williamsburg Cablevision case reinforces the point that the compulsory access regimes under 47 U.S.C. 224 and G.L. c. 166, § 25A are ill-suited for application to competitive providers. *See The Williamsburg Cablevision v. Carolina Power & Light*, 52 RR 2d 1697 (1983).

controlled by it...." RCN wholly owns very little of the conduit and rights-of-way that it occupies. Rather, the vast majority of the conduit and rights-of-way occupied by RCN is utilized pursuant to indefeasible right of use ("IRU") or lease arrangements with third parties. RCN's agreements with NStar and other utility providers do not contemplate RCN's ability to resell or sub-lease conduit access. 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. RCN resisted inclusion of references to "...or controlled" because of a concern that NextG intended to assert that RCN "controlled" conduit that it leased from third parties. Stated plainly, it did not want to obligate itself to provide NextG with access to conduit RCN leases from NStar and other third parties, and wanted to avoid the need for subsequent litigation to determine the meaning of the word "controlled." RCN sought to avoid that conclusion in a commercial context by adopting clear language that avoided any ambiguity over the implications of conduit that is "controlled." RCN does not believe that the statute contemplates that conduit leased from third parties is thereafter "controlled" by the lessee.

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. 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.[8]

Requiring RCN to facilitate access for its competitors to third-party conduit, as NextG demands, might be impossible, and in any event would unquestionably increase still further the administrative demands and associated costs imposed on RCN, as discussed in Part I, above. Such a shifting of costs from NextG to RCN and it customers clearly would be both anti-competitive and unfair. Why should RCN be obligated to negotiate with underlying utilities over the terms of conduit access that will benefit NextG? RCN asserts that any such access must be obtained directly from the owner of the conduit. Competitors should not be coerced into being an unwilling advocate for another competitor's desire to take advantage of lease arrangements with incumbent utilities. For the reasons set forth in Part I of this brief, 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, affords the DTC ample discretion to conclude that a conduit access agreement between two competitive providers may be limited to ducts, conduits, and rights-of-way wholly owned by the provider.

The next question posed by the parties addresses a provider's obligation to provide complete copies of its proprietary, confidential, and competitively sensitive network maps to competitors seeking access to its conduit. In its negotiations with

[8] As set forth in the parties' Joint Stipulated Statement of Facts at § 21, NextG does not join RCN in seeking guidance on the meaning of the term "control."

RCN, 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. In effect, 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 specific 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 in which there was available capacity at that time.

The fourth question as to which the parties jointly seek the DTC's guidance is 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 growing service demands. This reservation of reasonable future capacity cannot be bounded by time limits or be conditioned on specific immediate build plans. Again, the interests of subscribers, which the DTC is required to consider, would be harmed if RCN's ability to grow at its own pace is curtailed. In negotiations, 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 1) raising capital to invest in construction; 2) deploying and maintaining costly facilities; 3) being forced to allow others to use them; and then 4) 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 consumers and competition. If compulsory access in this context is required, RCN must be permitted to carve out a reasonable amount of capacity for future use that goes beyond its immediate needs.

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. RCN believes that the cost imposed on RCN and, ultimately, its customers, to oversee NextG's requested access to and use of nineteen (19) disparate, small conduit segments in three jurisdictions squarely invokes the DTC's obligation under the statute 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 compulsory conduit access agreements. *See* G.L. c. 166, § 25A. 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 constitutes reasonable terms and conditions on this point.[9]

RCN submits that, if competitors are granted access to RCN's conduit and associated manholes and handholes, it is necessary and appropriate that RCN exercise oversight of that use. RCN should not be required to shoulder the burden of the cost of that reasonable oversight. RCN has obligations pursuant to its agreements with utilities and other underlying rights-of-way holders to ensure that construction and maintenance activity in the conduit and rights-of-way is carried out in a safe manner and disruption to traffic and adjacent property is minimized. In fact, in many cases RCN is not permitted to have access itself, and must pay the utility to construct, maintain and repair facilities. RCN faces potential liability if unsafe conditions are created by a competitor working in RCN's conduit, or service to RCN's customers is disrupted as a result of damage to RCN's facilities. Accordingly, if the DTC were to grant NextG's Complaint, RCN submits that it must be allowed to include, as a condition of conduit access, provisions for reasonable oversight and inspection of work conducted in its manholes, handholes, and conduit system, at the expense of any competitor requesting access, including inspection of the conduit at least annually.

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 and would result in a total annual rental

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[9] NextG does not join RCN in this request. *See* Joint Stipulated Statement of Facts, at ¶ 21. However, RCN seeks to obviate the need for a subsequent petition to the DTC for guidance, in the event NextG's access request is granted. Of course, should the DTC deny NextG's Complaint, RCN's questions in ¶ 21 of the Joint Stipulated Statement of Facts are rendered moot.

payment of less than $15,000,[10] – 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. NextG in negotiations with RCN demanded a long-term contract and rights to a long term lease from RCN, while reserving the right itself to terminate without further obligation upon short notice. RCN was willing to provide a long term lease, but demanded commercially reasonable early termination provisions, that would have permitted RCN to recoup at least some of the costs of supporting NextG's unwanted demand for conduit access. 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. RCN seeks clarification from the DTC that if access is required, any party seeking access must agree to reciprocal term commitments, of reasonable duration to allow the competitive provider furnishing the conduit to recoup its costs of providing access, and accept commercially traditional early termination fees in the event of premature early termination. This is the only rational approach to ensure that, if competitive providers are to be unwillingly forced to host fellow competitors in their facilities,

[10] 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. This would potentially have yielded a total annual payment for all 19 conduit segments of less than $5,000. In an effort to compromise and avoid protracted and costly negotiations, 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 less than $15,000.. Even at this higher rate proposed by RCN in an effort to resolve this matter, RCN did not expect to come close to recouping its investment in the conduit and its administrative costs associated with processing NextG's conduit access request.

they can offset the overhead associated with being compelled to enter this unwanted line of business.

CONCLUSION

In sum, in the circumstances presented, it would neither serve the purposes of G.L. c. 166, § 25A, nor comport with "the interest of subscribers of cable television services and wireless telecommunications services" to require RCN to provide NextG access to its conduit. RCN has established good cause for its denial of NextG's conduit access request, in accordance with 220 CMR § 45.03(1). Accordingly, NextG's Complaint should be denied.

In the event, however, that the DTC determines G.L. c. 166, § 25A mandates access and grants NextG's Complaint, the DTC should direct that (1) RCN need only afford access to RCN's wholly owned conduit, and not to any conduit leased from third parties; (2) RCN need not provide NextG a complete copy of RCN's network maps, and instead be required only to provide limited information necessary to facilitate access to specific conduit segments requested by NextG in which capacity is determined to exist; (3) RCN may reserve such conduit capacity as it may need for its own future network expansion, and may reserve conduit capacity without any obligation to have an immediate or short term build plan for that reserved conduit; (4) RCN may exercise, and NextG shall reimburse the cost of, such supervision of NextG's access to and use of RCN's manholes, handholes, rights-of-way, ducts, and conduit as RCN in its reasonable discretion deems necessary to protect the safety and integrity of its facilities; and (5) NextG, as a condition of conduit access under the statute must pay a rate that will fully reimburse and compensate RCN for a reasonable portion of the costs of constructing the conduit in question, and must fully reimburse RCN for the additional costs incurred by RCN in making provision for NextG's attachments, along with a commercially reasonable return on its investment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lindsay D. Barna, hereby certify that on January 16, 2009, I caused a copy of the foregoing Brief in Support of RCN's Response to Complaint for Denial of Access to Conduit to be served via electronic mail and U.S. mail, first-class postage prepaid, on the following:

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