COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

Comcast of Massachusetts III, Inc.	)	
Complainant,	)	
v.	)	D.T.C 14-2
Peabody Municipal Light Plant and Peabody Municipal Lighting Commission	)	
Respondents.	)	

PHASE I JOINT REPLY BRIEF OF ASHBURNHAM MUNICIPAL LIGHT PLANT, PEABODY MUNICIPAL LIGHT PLANT AND THE PEABODY MUNICIPAL LIGHTING COMMISSION

I. INTRODUCTION

A. Comcast and the Department of Public Utilities Position

The arguments advanced by Comcast of Massachusetts III, Inc. ("Comcast") and the Department of Public Utilities ("DPU") may be stated simply: (1) the Cablevision Formula[1] applies to all utilities; (2) Ashburnham Municipal Light Plant ("AMLP"), Peabody Municipal Light Plant and the Peabody Municipal Light Plant Commission (together "PMLP") are utilities; therefore (3) the Cablevision Formula applies to AMLP and PMLP. This proposition, Comcast and the DPU contend, is correct because: (1) an attachment to an investor owned utility ("IOU") pole is the same as an attachment to a pole of AMLP, PMLP or any other municipal light plant ("MLP"); (2) the Cablevision Formula applies to pole attachments; therefore (3) the Cablevision Formula yields just and reasonable rates for any pole attachment, including when applied to attachments on AMLP or PMLP's poles.

[1] Comcast and the DPU refer to this as the "Massachusetts Formula". AMLP and PMLP do not concede that the "Massachusetts Formula" is a Massachusetts-wide formula because its applicability to municipal light plants has not been determined.

Fundamentally, the Comcast and the DPU argument is premised on the assertion that the Cablevision Formula will yield just and reasonable rates when applied to MLPs in the same manner as it is applied to IOUs because IOUs and MLPs are identical.[2]

B. AMLP and PMLP's Position

AMLP and PMLP do not dispute that they are "utilities" as defined in to G.L. c. 166, § 25A. Nor do AMLP and PMLP dispute that the Cablevision Formula applies to pole attachments.

AMLP and PMLP do dispute that when applied to attachments on their poles, the Cablevision Formula will yield just and reasonable rates. All utilities subject to G.L. c 166, § 25A are not the same, even though physical attachments to poles may be the same.

The legal issue in Phase I is not whether an attachment is the same. The legal issue in Phase I is whether there are legal and structural differences between IOUs and MLPs that would make application of the Cablevision Formula to MLPs result in a rate that is not just and reasonable. The determination of a just and reasonable rate for an IOU is very different than the determination of a just and reasonable rate for a MLP.

As a matter of law, AMLP and PMLP would not be compensated fairly for their expenses and costs if the Cablevision Formula is applied to them and the Cablevision Formula does not properly balance the interests of AMLP and PMLP customers and Comcast's cable subscribers.

There are legal, fundamental, significant, and substantial differences between IOUs and MLPs, in legal rights, ownership, management, statutory authority and limitations, constitutional safeguards, regulation, ratemaking methodologies and accounting systems that undeniably show the application of the Cablevision Formula to AMLP and PMLP will not yield just and

[2] Comcast also advances a subsidiary argument that because the FCC formula is applied to both IOUs and MLPs in other states it is reasonable to apply the Cablevision Formula to MLPs in Massachusetts. However, Massachusetts has rejected a direct application of the FCC formula by virtue of its pre-emption of federal regulation of pole attachment rates. *Cablevision,* at 17. In addition, the DPU has explicitly recognized that facts and circumstances may warrant departure from the FCC method. *See Cablevision,* at 19.

reasonable rates. Moreover, several elements of the Cablevision Formula are simply inapplicable or not adaptable to MLPs.

Consequently, the Department of Telecommunications and Cable ("Department") should conclude in Phase I, that as a matter of law, the Cablevision Formula does not apply to PMLP and AMLP to determine whether their pole attachment rates are just and reasonable.

II. ARGUMENT

A. A just and reasonable pole attachment rate for a MLP is different than a just and reasonable pole attachment rate for an IOU

The legal rights of the respective stakeholders in setting rates for an IOU, as compared to setting rates for PMLP and AMLP (and MLPs), give fully allocated costs a different meaning and affect what constitutes a just and reasonable rate.

In an IOU determination of a just and reasonable rate for pole attachments, both IOU shareholders and Comcast have a right to appeal on the basis of confiscation. In the determination of a just and reasonable rate for a MLP, only Comcast has such a right of appeal. If the Cablevision Formula is applied to MLPs and the rate fails to recoup all of the MLP's costs, then the city or town (as the owners of the assets) has no recourse to bring an appeal on the basis of confiscation. Therefore, contrary to Comcast's arguments, while both MLPs and IOUs are utilities, the application of the Cablevision Formula to MLPs will not yield just and reasonable rates if the application of the Cablevision Formula is too low for the MLP and thereby is confiscatory.

1. IOU ratemaking recognizes the legal rights of the owners of the utility

When the Department determines a just and reasonable pole attachment rate for an IOU it must take into account the rights and interests of three stakeholders: (1) IOU shareholders; (2) IOU ratepayers; and (3) Comcast.

The IOU shareholders are owners of the corporation. In any ratemaking decision, shareholders are allowed to earn a fair and reasonable return on their investment. *Fitchburg Gas & Electric Co. v. Dep't of Pub. Utils.*, 467 Mass. 768, 772 (2014) ("It is . . . within the department's purview to determine an appropriate rate of return, which covers operating expenses and adequately compensates investors based on the risk of investment."); *Fitchburg Gas & Elec. Light Co. v. Dep't of Pub. Utils.*, 371 Mass. 881, 884 (1977) ("A return is fair and reasonable if it covers utility operating expenses, debt service, and dividends, if it compensates investors for the risks of investment, and if it is sufficient to attract capital and assure confidence in the enterprise's financial integrity."); *Boston Gas Co. v. Department of Pub. Utils.*, 368 Mass. 780, 789-790 (1975); Sidak & Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851, 958 (1996) ("utility investors must be compensated in one way or another for prudently incurred sunk costs.").

With respect to IOU ratepayers, G.L. c. 166, § 25A requires that the Department consider their interests, as well as the interests of subscribers of cable television services. G.L. c. 166, § 25A.

If the pole attachment rate set by the Department is set too low for an IOU, and the IOU shareholders are not properly compensated for the use of their property, that gives rise to a right to appeal to the Supreme Judicial Court ("SJC") on the basis of confiscation. *See Fitchburg Gas & Electric Co. v. Dep't of Pub. Utils.*, 467 Mass. 768, 777 (2014) ("A confiscatory rate can result from the improper exclusion of a cost or item from the rate base, or from a rate of return that is too low to produce a reasonable return that would maintain investor confidence."); *American Hoechest Corp. v. Dep't of Pub. Utils.*, 379 Mass. 408, 413 (1980); *Massachusetts Electric Company v. Dep't of Pub. Utils.*, 376 Mass. 294, 299-302 (1978); *Boston Edison Co. v. Dep't of Pub. Utils.*, 375 Mass. 1, 9-17 (1978); *Fitchburg Gas & Elec. Light Co. v. Dep't of Pub. Utils.*, 371 Mass. 881, 884 (1977) ("The Department's power to regulate public utility rates is limited by a utility's constitutional right to a fair and reasonable return on investment.").

Likewise, if the pole attachment rate is set too high, then Comcast may appeal to the SJC on the basis of confiscation.

2. MLP ratemaking does not allow cities and towns the legal right of the owners of the MLPs to appeal on the basis of confiscation

The calculus of a just and reasonable rate for an MLP would be very different. The determination of a just and reasonable pole attachment rate through the Cablevision Formula would take into account the rights and interests of two stakeholders: (1) MLP customers; and (2) Comcast. *See* G.L. c. 166, § 25A. This is legally meaningful and significant. Unlike rate setting for IOUs there is no recognition of "shareholders," because MLPs are not-for-profit entities without shareholders. G.L. c. 164, §§ 57, 58. The owner of the MLP assets is the city or town which the MLP services. G.L. c. 164, §34.

If pole attachment rates are set too low for the MLP and cities and towns are not justly compensated for the use of their property, there is no constitutional right of appeal based on confiscation. *Trustees of Worcester State Hosp. v. The Governor*, 395 Mass. 377, 380 (1985) (holding that Governmental entities may not challenge the constitutionality of the acts of another of the State's agencies); *Spence v. Boston Edison Co.*, 390 Mass. 604, 610 (1983), (recognizing "the long-standing and far-reaching prohibition on constitutional challenges by governmental entities to acts of their creator State."); *Coleman v. Miller*, 307 U.S. 433, 441 (1939)("Being but creatures of the State, municipal corporations have no standing to invoke . . . the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator."); *City of Newark v. New Jersey*, 262 U.S. 192, 196 (1923)("The city cannot invoke the protection of the Fourteenth Amendment against the state.").

If pole attachment rates are set too high for a MLP, Comcast has a right of appeal to the SJC for confiscation.

In light of the differences in the respective legal rights of the relevant stakeholders, fully-allocated costs take on a different meaning when applied to MLPs as compared to IOUs. In the

MLP context, the interest of the MLP in a fully allocated pole attachment rate is of paramount importance because if the allocated costs to not compensate the cities and town for their investment, the cities and towns do not have the same constitutional safeguards as owners of the IOUs. Consequently, application of the Cablevision Formula to MLPs, if legally incorrect, cannot yield just and reasonable rates for a MLP as it would for an IOU.

B. There are numerous elements of the Cablevision Formula that cannot be applied to MLPs

Comcast asserts that the Cablevision Formula can accommodate any differences between MLPs and IOUs because the MLP's inputs are closely analogous to the IOU inputs. Comcast over-simplifies, downplays, and in some cases mischaracterizes these differences. Yet, it also summarily asserts that the "particulars of applying [the Cablevision Formula] to PMLP will be addressed in Phase II of the proceeding." Comcast Initial Phase I Brief, at 12. These "particulars" warrant a finding in Phase I that the Cablevision Formula should not apply to MLPs as a matter of law.

AMLP and PMLP draw the Department's attention to a few examples that highlight blindly trying to force square pegs into the round holes of the Cablevision Formula. *See* AMLP and PMLP's Phase I Joint Brief at 1-13; *see also Proceeding on Motion of Commission to Determine Pole Attachment Rates for Municipal-Owned Utilities*, N.Y.P.S.C., Case 06-E-1427, Order on Municipal Pole Attachment Rates, at 4 (May 9, 2007) ("[M]unicipal electric utilities do not use the detailed accounting necessary for direct application of the FCC formula.").

1. Depreciation

Comcast argues that an MLP's net investment in poles can be used as an input for accumulated depreciation in the Cablevision Formula.

In the IOU context, the depreciation rate is tied to the useful life of assets. 18 C.F.R., § 101, General Instructions, No. 22. ("Utilities must use a method of depreciation that allocates in a systematic and rational manner the service value of depreciable property over the service life

of the property."); 220 C.M.R. § 51.01(1) (adopting the Federal Energy Regulatory Commission's ("FERC") Uniform System of Accounts).

For MLPs, the depreciation rate is not tied to asset life. *Reading Municipal Light Department*, D.P.U. 85-121/85-138/86-28-F, at 10-13 (Oct. 21, 1987); 220 C.M.R. § 51.02(3) ("The Massachusetts system requires all Massachusetts electric utilities, *with the exception of municipal lighting plants*, to adopt [the FERC uniform] system of accounts.")(emphasis added).

The depreciation rate of MLPs is initially set by statute at 3% of the cost of plant, but MLPs may petition the DPU for a lower or higher rate, depending on their capital needs. G.L. c. 164, § 57. Thus, depreciation for MLPs has no relationship to diminution of asset values.

For IOUs, on the other hand, depreciation expense is related to the diminution of value of an asset over the useful life of an asset. Accumulated depreciation is deducted from the original cost of an asset in setting an IOU's rates. *Reading Municipal Light Department*, D.P.U. 85-121/85-138/86-28-F, at 8 (Oct. 21, 1987) (explaining that "[i]t is accepted regulatory accounting practice for IOUs to use net plant in the calculation of rate of return and "an IOU's investment in plant is placed in rate base and depreciated."). That may work theoretically for an IOU to approximate the diminution in value of an asset over time. However, for a MLP, depreciation expense has nothing to do with the value of the asset. Yet, Comcast would have the Department use this approach to determine just and reasonable pole attachment rates for MLPs.

2. Rate of Return

With respect to the rate of return component in the carrying charge, Comcast suggests that "an appropriate level of return for PMLP can be determined in Phase II [of this proceeding]." Comcast Initial Phase I Brief, at 10. Unlike the IOU context, rate of return has absolutely no application in the MLP context.

MLPs are entitled to fix prices to yield up to 8% on the total cost of plant. G.L. c. 164, § 58. For an IOU the rate of return is on the net cost of assets. *See Boston Edison Co. v. Dep't of*

Pub. Utilities, 375 Mass. 1, 18 (1978) ("A public utility's rate base is its total investment (less depreciation) in property that is used and useful to the public in providing utility service during the test year.) Setting rates with a return of investment is mandatory for IOUs. See *Boston Gas Company v. Department of Public Utilities*, 367 Mass. 92 (1975) (holding that IOUs are entitled to charge rates which afford them an opportunity to meet their cost of service, including a fair and reasonable return on prudently invested capital). It is at the discretion of the MLP as whether to charge its ratepayers for a return or not. A return is not mandatory. Thus, applying the Comcast Formula and its rate of return component to MLPs is plainly not a viable approach.

3. Normalized Tax Expense and ADT

Comcast contends that even though MLPs do not pay income taxes, the contributions in lieu of taxes that some MLPs make can be used as a proxy for normalized tax expense in the Cablevision Formula. Comcast Initial Phase I Brief, at 9. The payments in lieu of taxes ("PILOTS") are made voluntarily by tax-exempt MLPs to contribute toward property taxes in a city or town. PILOTs have nothing to do with income taxes. Moreover, by law, PILOT payments are below the line expenses of an MLP. A below the line expense item is deducted after all expense and return are calculated. *Reading Municipal Light Department*, D.P.U. 85-121/85-138/86-28-F, at 15-16 (Oct. 21, 1987).

C. There are fundamental, significant, and substantial differences between IOUs and MLPs that must be considered in the determination of whether the Cablevision Formula applies to MLPs

The fundamental, significant, and substantial differences between IOUs and MLPs are discussed at length in AMLP and PMLP's Phase I Joint Brief at 3-10. Blindly grafting a one-size-fits-all formula—nearly sixteen years[3] after it was developed for IOUs—onto fundamentally

[3] In its Brief, Comcast states that "[f]or the past 15 years, utilities and third-party attachers throughout the Commonwealth have successfully negotiated pole attachment rates using the Massachusetts Formula as the reference point of reasonableness..." Comcast Initial Phase I Brief, at 7. Comcast adds, "This stable and efficient process ended abruptly when PMLP and AMLP unilaterally and inexplicably concluded that they were free to ignore Massachusetts law, free to ignore binding Department precedent, and thus free to devise their own pole attachment rate formula..." *Id.* These statements are pure nonsense. AMLP and

different utilities without taking into account MLPs and their differences violates G.L. c. 166, § 25A. G.L. c. 166, § 25A (requiring that the Department "consider the interest of subscribers of cable television and wireless communications services as well as the interest of consumers of utility services."); *see* 47 U.S.C. § 224(c)(2)(B) (providing that states preempting federal regulation must certify to the FCC that "the State . . . 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.")(emphasis added); *Louisiana Cablevision v. Louisiana Pub. Serv. Comm.*, 493 So.2d 555, 559 (1986) ("Fulfilling [the] mandate [to assure that the charges for pole attachments are just and reasonable] necessarily entails balancing the interests of cable television subscribers with the other interests at stake."); *Cablevision of Boston Co. et al. v. Boston Edison Co.*, D.P.U./D.T.E. 97-82, at 45 (Apr. 15, 1998) ("*Cablevision*") ("In resolving complaints from attachers, the Department is required to balance both the interests of utility ratepayers and CATV subscribers."). The interests of MLP customers are not the same as IOU customers.

An IOU owns the property it uses and may acquire or divest such property by its own corporate action. G.L. c. 164, § 13. In the MLP context, it is the cities and towns that own the land, structures, poles and equipment. G.L. c. 164, § 34. As a consequence, the Department is not presented with a monopoly corporation charging for access to privately-owned poles but instead with municipally owned poles that are utilized to provide a wide array of products and services (e.g., phone, electricity, internet, cable) to a local community.[4] MLP revenues must cover 100% of their costs in a year. G.L. c. 164, §§ 57, 58. Therefore, in the MLP context, the

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Comcast are parties to a Pole Attachment Agreement dated 2003. Comcast has paid all charges calculated by AMLP under the Pole Attachment Agreement for several years, none of which were calculated pursuant to the Cablevision Formula. PMLP has been calculating its pole attachment rates using the American Public Power Association ("APPA") formula for several years.

[4] The town Ashburnham and the city of Peabody make determinations at the local level regarding the granting of non-exclusive cable licenses. *See* G.L. c. 166A, § 3. The applications reviewed by Ashburnham and Peabody must contain information regarding "subscription fees." G.L. c. 166A, § 4. In Ashburnham and Peabody, Comcast is a non-exclusive license holder and not a "franchised cable operator" holder as Comcast suggests in its brief. Comcast Initial Phase I Brief, at 3.

interest of the city or town is in fully allocating the total costs of the pole among all the attaching entities providing products and services of equal value to the city or town.

The Cablevision Formula does not include support space. Therefore the Cablevision Formula is not based on fully-allocated costs. Application of the Cablevision Formula to MLPs would impose a "financial disruption" on MLP customers by preventing full recovery of costs. Its application would impose a formula that does not take into account properly the interests of MLP customers.

D. Massachusetts has preempted federal regulation of pole attachments and is free to depart from the FCC formula

Comcast argues that "the [Cablevision] Formula is appropriate for [MLPs] because the FCC Formula – upon which the [Cablevision] Formula is based – is successfully applied to IOUs and municipally-owned utilities in a number of other states." Comcast Initial Phase I Brief, at 12. However, several of the states to which Comcast cites in support of this proposition have not preempted federal regulation of pole attachments (e.g., North Carolina, Colorado and Missouri).[5] The IOUs in these states are automatically subject to the FCC formula. MLPs are generally exempt from federal pole attachment regulation but some states have nevertheless decided to enact legislation making the FCC rate applicable to MLPs. *See e.g.*, TEX. UT. CODE ANN. § 54.204(c) (capping MLP pole attachment fees at the FCC rate).

States like Massachusetts, on the other hand, that have elected to preempt federal regulation of pole attachment rates, are free to adopt some, all, or none of the FCC formula as the conditions and circumstances in the local State environment dictate.[6] *See Cablevision*, at

[5] Section 224(c) of the federal Pole Attachment Act authorizes states to preempt federal regulation and certify that the state regulates pole attachments. 47 U.S.C. § 224(c). The following states have certified that they regulate pole attachment rates: AK, AR, CA, CT, DE, D.C., ID, IL, KY, LA, ME, MA, MI, NH, NJ, NY, OH, OR, UT, VT, WA. *States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, 25 FCC Rcd 5541 (2010).

[6] Notably, the "clear congressional intent of [47 U.S.C. § 224] was that the states, not the federal government should have the main responsibility for regulation of pole attachments." *Louisiana Cablevision v. Louisiana Pub. Serv. Comm.*, 493 So.2d 555, 557 (1986). "The[Senate] Committee considers the matter of CATV pole attachments to be **essentially local in nature**, and that the various

17. If Massachusetts wanted a direct and uniform application of the FCC formula, it simply could have accepted federal regulation in this area. In *Cablevision* the DPU unambiguously expressed that it is free "depart from the FCC method when additional costs or adjustments to the federal method are justified on state policy grounds [and] . . . the Department . . . is free to depart from the federal approach in the future should circumstances warrant to protect the public interest." *Cablevision*, at 19; *see also A-R Cable Servs. Inc., et al. v. Mass. Elec. Co.*, D.T.E. 98-52, at 8 (Nov. 6, 1998) ("*A-R Cable Servs*"). As a policy matter, the legal, fundamental, significant, and substantial differences between MLPs and IOUs justify just such a departure from the Cablevision Formula. The protection of the public interest embodied by MLPs further supports this departure. *See* G.L. c. 164, §§ 34-69A (assets of the MLPs are owned by the municipalities in which they operate); G.L. c. 164, §§ 55-56A (the operations of an MLP are overseen by a publicly elected board of light commissioners); G.L. c. 164, § 58 (the pricing of the electricity sold by MLPs is at cost).

III. CONCLUSION

There is nothing in *Cablevision* or *A-R Cable Servs* stating that the DPU intended the Cablevision Formula to be dispositive for deciding all future pole attachment rate disputes. The DPU did not state that the Cablevision Formula was meant for general application in all future pole attachment rate disputes.

AMLP and PMLP agree that MLPs are included in the definition of "utility" under G.L. c. 166, § 25A. But that definition, by itself, does not settle the question of whether application of the Cablevision Formula to AMLP and PMLP would result in a just and reasonable rate in the MLP context. The argument that an "attachment" is an "attachment," regardless of whether it is on an MLP or an IOU pole is not dispositive of the legal issues in Phase I. Moreover, none of

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State and local regulatory bodies which regulate other practices of telephone and electric utilities are better equipped to regulate pole attachments. Regulation should be vested with those persons or agencies **most familiar with the local environment** within which utilities and cable television systems operate." S.Rep. No. 580, 95th Cong., 2d Sess. 16 *reprinted in* 1978 U.S. Code & Ad.News 109, 124 (emphasis added).

the Comcast or DPU arguments provide any insight into balancing the interests of AMLP and PMLP's customers and Comcast's cable subscribers as required by G.L. c. 166, § 25A. Any discussion regarding the balancing of interests is conspicuously absent from the briefs of Comcast and the DPU.

IOUs are distinguishable from MLPs contrary to what Comcast and the DPU suggest. The legal, fundamental, significant, and substantial differences in legal rights, ownership, management, statutory authority and limitations, constitutional safeguards, regulation, ratemaking methodologies and accounting systems make plain that the application of the Cablevision Formula to AMLP and PMLP will not yield just and reasonable rates.

The clearest distinction between IOUs and MLP are the constitutional safeguards held by each entity. IOU shareholders have the right to appeal to the SJC if the Department's determination of a just and reasonable rate for pole attachments does not adequately compensate them for the use of their property. Cities and towns do not have that same confiscation appeal right.

For all of the above reasons, AMLP and PMLP respectfully request that the Department should rule that the Cablevision Formula does not apply to PMLP and AMLP, as a matter of law.

Respectfully submitted,

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On behalf of the Ashburnham Municipal Lighting Plant

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2014, I served the foregoing Joint Phase I Reply Brief by electronic delivery, hand-delivery and first-class mail to the attached Service List in accordance with the requirements of 220 CMR § 1.05.

Nicholas J. Scobbo, Jr.

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