COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

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

PHASE I INITIAL BRIEF OF THE DEPARTMENT OF PUBLIC UTILITIES AND OPPOSITION TO MOTION FOR RECONSIDERATION

I. INTRODUCTION

On March 19, 2014, pursuant to G.L. c. 166, § 25A and 220 C.M.R. § 45.04, Comcast of Massachusetts III, Inc. ("Comcast") filed with the Department of Telecommunications and Cable ("DTC") a pole attachment rate complaint against the Peabody Municipal Light Plant and the Peabody Municipal Lighting Commission (together, "PMLP"). Consistent with the Hearing Officer Order on Hearing Procedure and Motion to Intervene ("Hearing Officer Order"), issued June 23, 2014, the Department of Public Utilities ("DPU") submits its initial brief in Phase I of the above-captioned matter. Additionally, DPU submits its opposition to the Motion for Reconsideration of a Portion of the Hearing Officer's Order on Hearing Procedure and Motion to Intervene ("Motion for Reconsideration") filed by PMLP and Ashburnham Municipal Light Plan ("AMLP").

II. BRIEF STATEMENT OF FACTS AND PROCEDURAL HISTORY

In its complaint, Comcast requests that DTC direct PMLP to charge a pole attachment fee that does not exceed the maximum lawful rate (Complaint at 3). Comcast claims that beginning in the second quarter of 2011, in abrogation of its pole attachment agreement with Comcast, PMLP increased its pole attachment fees (Complaint at 2). Comcast contends that these increased fees are unjust, unreasonable, and unlawful under Massachusetts' statutes, regulations, and governing case law (Complaint at 2). Comcast seeks to have DTC apply the formula for pole attachment rates set forth in 220 C.M.R. § 45.04, Cablevision of Boston Co. et al. v. Boston Edison Co., D.P.U./D.T.E. 97-82 (1998) ("Cablevision"), and A-R Cable Servs. Inc., et al. v. Mass. Elec. Co., D.T.E. 98-52 (1998) ("A-R Cable") ("Massachusetts Formula").

On April 7, 2014, DPU intervened in this matter.[1] On June 23, 2014, after review of the parties' briefs on the procedural schedule, DTC established a two-phase procedural process.[2] Phase I of this proceeding is limited to the legal issue of whether the formula set forth in Cablevision and A-R Cable, for establishing the maximum permitted pole attachment rates of utility companies, applies to municipal light plants and municipal lighting commissions established pursuant to G.L. c. 164. Hearing Officer Order at 6. Phase II of this proceeding

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1 DPU is a full-party intervenor in this matter pursuant to ¶ 9 of the Memorandum of Agreement ("MOA") executed on March 10, 2014, between DPU and DTC.

2 On June 23, 2014, DTC granted Ashburnham Municipal Light Plant limited participant status for Phase I of this proceeding. Hearing Officer Order at 7-10.

will include discovery and evidentiary hearings regarding the specific facts relevant to PMLP's rates (Hearing Officer Order at 9).

On June 27, 2014, PMLP and AMLP jointly filed the Motion for Reconsideration and a Motion to Stay Enforcement of Hearing Officer's Order on Hearing Procedure and Motion to Intervene and to Toll the Period for Filing An Appeal.[3] Specifically, PMLP and AMLP assert that excluding factual evidence from Phase I is an error, and that whether the Massachusetts Formula applies to municipal light plants is not a pure question of law capable of being decided on brief (Motion for Reconsideration at 3-4). On July 1, 2014, the Hearing Officer set a deadline for parties to respond to the Motion for Reconsideration, concurrent with the deadline for initial briefs.

III. ARGUMENT ON INITIAL BRIEF

A. Introduction

The issue in Phase I of this proceeding is whether the Massachusetts Formula set forth in Cablevision and A-R Cable, for establishing the maximum permitted pole attachment rates of utility companies, applies to municipal light plants and municipal lighting commissions established pursuant to G.L. c. 164. Hearing Officer Order at 6. As discussed below, municipal light plants and municipal lighting commissions are utilities as defined within the Massachusetts pole attachment statute and regulations, G.L. c. 166, § 25A and 220 C.M.R.

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[3] The Hearing Officer stated that he would not delay the already established procedural deadlines, but tolled the period for filing an appeal of the Hearing Officer Order until five business days after the Department rules on the Motion for Reconsideration. Email from Lindsay DeRoche, Hearing Officer, DTC, to D.T.C. 14-2 Service List (July 1, 2014).

§ 45.02. Thus, the Massachusetts Formula for pole attachment rates, established pursuant to G.L. c. 166, § 25A, is applicable to municipal light plants and municipal lighting commissions in Massachusetts.

B. The Massachusetts Formula Applies in Pole Attachment Complaints in Massachusetts

Under 47 U.S.C. § 244, the rates, terms, and conditions for pole attachments are subject to regulation by the Federal Communications Commission ("FCC"), except where a state has certified to the FCC that the state regulates such rates, terms, and conditions. 47 U.S.C. § 244(b), (c). Massachusetts has certified to the FCC that it regulates pole attachments. See States That Have Certified That They Regulate Pole Attachments, WC Docket No. 10-101, Public Notice (FCC May 19, 2010).

General Laws c. 166, § 25A authorizes DTC and DPU[4] to regulate the rates, terms, and conditions applicable to attachments, including determining a just and reasonable rate for attachments of a licensee, and sets forth the procedures regarding the regulation of the rates, terms, and conditions applicable to attachments in Massachusetts. Specifically, the statute provides that in determining a just and reasonable rate, the utility must be assured of recovery of "not less than the additional costs of making provision for attachments nor more than the proportional capital and operating expenses of the utility attributable to that portion of the pole,

[4] General Laws. c. 166, § 25A references the Department of Telecommunications and Energy ("DTE"), the predecessor agency of DTC and DPU. Prior to April 11, 2007, regulatory jurisdiction over pole and conduit access and rate disputes resided solely with DTE. Pursuant to Chapter 19 of the Acts of 2007, the DTE was dissolved, and DTC and DPU were created as separate agencies with jurisdiction, respectively, over telecommunications and energy companies. See St. 2007, c. 19 (April 11, 2007).

duct, or conduit occupied by the attachment." G.L. c. 166, § 25A. The statute further provides that "[s]uch portion shall be computed by determining the percentage of the total usable space[5] on a pole or the total capacity of the duct or conduit that is occupied by the attachment." G.L. c. 166, § 25A.

Pursuant to G.L. c. 166, § 25A, the pole attachment regulations, 220 C.M.R. § 45.00 et seq., provide for a complaint proceeding to determine the maximum attachment rate through the use of data inputs from annual reports filed by the utilities. See 220 C.M.R. § 45.04(2)(d)(8); A-R Cable at 7. Specifically, the regulations provide that data should be derived from Form M (telecommunications), FERC 1 (electric) or other reports filed with state or regulatory agencies.[6] See 220 C.M.R. § 45.04(2)(d)(8); A-R Cable at 7. The pole attachment regulations, however, do not establish a specific method of calculation for pole attachment rates. 220 C.M.R. § 45 et seq. Rather, the method of calculation was established in Cablevision, and further clarified in A-R Cable. These Orders "established a method to estimate the fully-allocated costs of pole attachments that is consistent with G.L. c. 166, § 25A

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5 G.L. c. 166, § 25A and 220 C.M.R. § 45.02 define usable space as:

> the total space which would be available for attachments, without regard to attachments previously made, (i) upon a pole above the lowest permissible point of attachment of a wire or cable upon such pole which will result in compliance with any applicable law, regulation or electrical safety code or (ii) within any telegraph or telephone duct or conduit.

6 The annual returns filed with DPU by municipal lighting plants pursuant to G.L. c. 164, § 63 and 220 C.M.R. § 79.00 et seq. contain data required by 220 C.M.R. § 45.04, such as total gross investment in pole plant and total plant in service.

and the related pole attachment regulations." A-R Cable at 7. The stated goal in creating a single formula was to simplify the regulation of pole attachment rates as much as possible by adopting standards that rely upon publicly available data. A-R Cable at 7, citing Cablevision at 19. The purpose of the Massachusetts Formula was to "have a simple, predictable, and expeditious procedure that will allow parties to calculate pole attachment rates" without the need for agency intervention. A-R Cable at 7. Accordingly, the Massachusetts Formula, as set forth in 220 C.M.R. § 45.00 et seq., and the Orders in Cablevision and A-R Cable, is the relevant standard that governs the calculation of just and reasonable pole attachment rates in Massachusetts.

C. Municipal Lighting Plants are Defined as Utilities under Massachusetts Pole Attachment Law

As noted above, G.L. c. 166, § 25A and the regulations regarding pole attachments, 220 C.M.R. § 45.00 et seq., set forth the authority and procedures regarding the regulation of the rates, terms, and conditions applicable to attachments in Massachusetts. Both G.L. c. 166, § 25A and the regulations regarding pole attachments, 220 C.M.R. § 45.00 et seq., define "utility" as

> any person, firm, corporation, or municipal lighting plant that owns or controls or shares ownership or control of poles . . . 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 or for the transmission of electricity for light, heat or power.

G.L. c. 166, § 25A; 220 C.M.R. § 45.02 (emphasis added).

Under the plain language of the statute, a municipal lighting plant is a utility for purposes of G.L. c. 166, § 25A and 220 C.M.R. § 45.00 et seq. There is no question that the

Legislature intended to include municipal lighting plants within the definition of utility. Therefore, as a municipal lighting plant, PMLP is a utility for the purposes of G.L. c. 166, § 25A and 220 C.M.R. § 45.02. Any attachments to PMLP's poles, as defined under those provisions, are thus subject to the provisions of G.L. c. 166, § 25A and 220 C.M.R. § 45.00 et seq., as well as the precedent established in the Cablevision and A-R Cable Orders interpreting and applying those provisions.

D. Conclusion

The provisions of G.L. c. 166, § 25A and 220 C.M.R. § 45.02, and in Orders in Cablevision and A-R Cable set forth the formula and method of calculation for the maximum just and reasonable pole attachment rate applicable in Massachusetts. Because municipal lighting plants are included in the statutory definition of "utility," DPU urges DTC to find that the Massachusetts Formula applies to PMLP in determining whether its pole attachment rates are just and reasonable.

IV. RESPONSE TO MOTION FOR RECONSIDERATION

A. Introduction

In the Motion for Reconsideration, PMLP and AMLP assert that excluding factual evidence from Phase I is an error and that whether the Massachusetts Formula applies to municipal light plants is not a pure question of law capable of being decided on brief (Motion for Reconsideration at 3-4). As discussed below, the Motion for Reconsideration is procedurally invalid under the regulations governing this proceeding and, even if addressed substantively, fails to satisfy the standard for reconsideration.

B. A Party May Not Move for Reconsideration of a Hearing Officer Order

Under 220 C.M.R. § 1.11(10),[7] a party[8] may file a motion for reconsideration within 20 days after service of a final Order. The regulations do not authorize the filing of a motion for reconsideration in response to either an Interlocutory Order by the Commission or a Hearing Officer decision. UNE Rates Investigation, D.T.E. 01-20, Interlocutory Order at 3 (October 8, 2001); Verizon Alternative Regulation, D.T.E. 01-31-Phase I, Hearing Officer Ruling at 3-4 (August 20, 2001); Price Cap Plan, D.T.E. 94-50, Interlocutory Order at 3 n.3 (July 14, 1994). In this case, the Motion for Reconsideration seeks reconsideration of a Hearing Officer ruling and there is no basis in the procedural rules for this motion. The procedural rules are based on the principle of administrative efficiency. DTC's ability to make final determinations on issues and carry out its regulatory duties would be seriously hampered if it were required to reconsider every preliminary, procedural, and interlocutory decision. This principle is also recognized in G.L. c. 30A. Under G.L. c. 30A, administrative agency

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[7] In its Motion to Stay, PMLP cites to sections of 801 C.M.R. § 1.00 et seq. as well as the provisions of 220 C.M.R. § 1.00 et seq. Pursuant to 220 C.M.R. § 45.01, the general procedural rules at 220 C.M.R. § 1.00, apply to proceedings initiated under the regulations governing pole attachment complaints. Accordingly, the procedural regulations at 220 C.M.R. § 1.00 et seq. govern this proceeding. The provisions of 801 C.M.R. § 1.00 et seq. are inapplicable.

[8] The Motion for Reconsideration and Motion to Stay were jointly filed by PMLP and AMLP. On June 23, 2014, the Hearing Officer granted AMLP limited participant status for Phase I of this proceeding and specified that, as a limited participant, AMLP shall receive copies of all documents submitted, and shall be permitted to submit briefs in Phase I. Hearing Officer Order at 9. AMLP did not appeal that ruling to the Commission. AMLP is not a full party to this proceeding and, therefore, its role is limited to filing briefs in Phase I. It is beyond the scope of AMLP's status as a limited participant to file the instant motions.

actions and rulings that are procedural or interlocutory in nature are not immediately reviewable under G.L. c. 30A, § 14. Thus, DTC should deny the Motion for Reconsideration on the basis that it is procedurally invalid.

C. PMLP Fails to Satisfy the Standard for Reconsideration

Even if DTC were to substantively consider the request for reconsideration, PMLP fails to satisfy DTC's standard for reconsideration. DTC reconsiders Orders filed pursuant to 220 C.M.R. § 1.11(10), and DTC's standard for reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that DTC take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. Western Massachusetts Electric Company, D.T.E. 00-110-C at 9 (2001); Fitchburg Gas and Electric Light Company, D.T.E. 98-51-A at 5-6 (1999); North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991). Extraordinary circumstances warranting reconsideration include "previously unknown or undisclosed facts that would have significant impact upon the decision already rendered" newly brought to light, or whether an issue was wrongly decided due to mistake or inadvertence. D.P.U. 90-270-A at 2-3; Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991). A motion for reconsideration should not attempt to reargue issues considered and decided in the main case. See, e.g., Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); D.P.U. 90-270-A at 2-3, 7-9; Boston Edison Company, D.P.U. 1350-A at 4-5 (1983).

Here, PMLP asserts that excluding factual evidence from Phase I is an error, constituting an extraordinary circumstance warranting reconsideration (Motion for

Reconsideration at 3-4). Specifically, PMLP contends that whether the Massachusetts Formula applies to municipal light plants is not a pure question of law capable of being decided on brief. Rather, PMLP argues that evidence is required to evaluate the effect of certain similarities or differences between municipal lighting plants and investor owned utilities in determining whether departure from the Massachusetts Formula is justified (Motion for Reconsideration at 3).

PMLP's position is without merit. PMLP does not meet the standard of review for reconsideration because it cannot show that DTC wrongly decided an issue due to mistake or inadvertence or that there are extraordinary circumstances as required. Instead, PMLP simply disagrees with the ultimate decision. Accordingly, PMLPs fail to demonstrate that reconsideration is appropriate. Additionally, as discussed further below, even if DTC were to reconsider its decision, it is clear that the Hearing Officer properly established a two-phase schedule for this proceeding, and appropriately limited the first phase to the relevant legal standard.

D. The Proper Remedy Was to File an Appeal of the Hearing Officer Order to the Commission

The procedural regulations permit parties to appeal a ruling or decision of the presiding officer to the Commission. 220 C.M.R. §1.06(d)(3). The regulations do not, however, contemplate a request for the Hearing Officer to reconsider his own Order. Here, the only proper avenue for PMLP to seek relief from an adverse ruling was via an appeal of the Hearing Officer Order to the Commission under 220 C.M.R. §1.06(d)(3). PMLP did not avail

itself of this option.[9] Even so, DPU briefly addresses the substantive issues raised in PMLP's filing below and asserts that the Hearing Officer properly established a two-phase schedule for this proceeding, and appropriately limited the first phase to determining the relevant legal standard.

Finally, in the event that PMLP does raise these issues in a subsequent appeal to the Commission, DPU notes that DTC's consideration of any such appeal need not delay the proceeding. The procedural regulations provide that any Hearing Officer ruling or decision remains in full force and effect unless and until set aside or modified by the Commission. 220 C.M.R. §1.06(d)(2).[10]

E. DTC Properly Established a Two-Phase Proceeding

The Hearing Officer appropriately exercised his discretion pursuant to 220 C.M.R. § 1.04(6)(b)(1) in adopting a two-phase procedural schedule to efficiently address the issues in this proceeding. DTC must determine whether PMLP's pole attachment rates are just and

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[9] DTC has tolled the period for PMLP filing an appeal of the Hearing Officer Order until five business days after DTC rules on its Motion for Reconsideration. To the extent that any party addresses the substance of the issues raised in the Motion for Reconsideration as if they had been properly raised in an appeal, PMLP will now have the opportunity to preview those arguments, prior to filing its appeal to the Commission. Such duplicative filings are both administratively inefficient and prejudicial to the responding parties.

[10] For example, any such appeal may be addressed in the final Order. See 220 C.M.R. §1.06(d)(2); Bay State Gas Company, D.P.U. 13-158, at 26-29 (2014) (denying an appeal of a Hearing Officer ruling regarding the procedural schedule in final Order); Fitchburg Gas and Electric Light Company, D.T.E. 02-24/25, at 13-15 (2002) (denying an appeal of the procedural schedule established by the Hearing Officer in final Order); Braintree Electric Light Department, D.P.U. 90-263, at 7-8 (1991) (deciding a motion for summary judgment in final Order).

reasonable. G.L. c. 166, § 25A; 220 C.M.R. § 45.00 et seq. As discussed herein, application of the Massachusetts Formula is the appropriate standard for determining whether pole attachment rates are just and reasonable. A-R Cable at 7. PMLP argues, however, that the Massachusetts Formula should not apply to municipal light plants because a municipal light plant is fundamentally different than an investor-owned utility. Therefore, the appropriate threshold issue in this proceeding is what standard should apply to determine a municipal light plant's pole attachment rates. See Hearing Officer Order at 3-5.

Conducting a full factual investigation of PMLP's costs and rates, without first determining whether the Massachusetts Formula applies to municipal lighting plants, will likely result in unnecessary and costly discovery and could delay the proceeding. As such, the Hearing Officer appropriately adopted a procedural schedule to efficiently resolve the threshold issue of whether the Massachusetts Formula applies to municipal light plants in Phase I of the proceeding while preserving the rights of PMLP to present evidence concerning whether the resulting pole attachment rates are just and reasonable in Phase II of the proceeding. See Hearing Officer Order at 4-6.

F. DTC Properly Limited Phase I to a Determination of the Relevant Legal Standard

DTC appropriately limited the first Phase of this proceeding to a determination of whether the Massachusetts Formula applies to municipal light plants. As discussed in Section III.B., above, 220 C.M.R. § 45.00 et seq. contemplates broad application of the method underlying the Massachusetts Formula to establish fully allocated pole attachment rates based on publicly available data. A-R Cable at 7; Cablevision at 19. The Massachusetts

Formula incorporates numerous policy determinations in its method of calculation, each consistent with G.L. c. 166, § 25A. A-R Cable at 7. This proceeding is a pole attachment rate dispute between PMLP and one attacher; it is not the appropriate venue to revisit any of the well-considered policy decisions underlying the Massachusetts Formula.[11]

Nonetheless, PMLP argues that certain differences exist between municipal lighting plants and investor-owned utilities, and that these factual differences or similarities must be addressed in determining whether, as a matter of law, the Massachusetts Formula applies to municipal lighting plants. PMLP is incorrect. As discussed above, pursuant to the plain terms of G.L. c. 166, § 25A and 220 C.M.R. § 45.00 et seq., the Massachusetts Formula applies to municipal lighting plants as a matter of law. Any relevant differences between municipal lighting plants and investor-owned utilities may be appropriately considered in Phase II of the proceeding, in looking at the facts specific to PMLP and applying the Massachusetts Formula. This is because such differences may be accounted for within the established formula and do not require the creation of an entirely new regulatory scheme, as PMLP seeks to do.[12] For example, any differences in the accounting methods of municipal lighting plants and

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[11] As noted by DPU in its May 27, 2014 letter regarding the proposed procedural schedule, pursuant to ¶ 6 of the MOA, to the extent that any changes are contemplated to the regulations, polices, or procedures applicable to pole attachments, such changes are to be jointly developed by DPU and DTC.

[12] A review of PMLP's proposed pole attachment rate formula reveals that PMLP seeks to revisit what constitutes the fully-allocated costs of pole attachments. For example, the formula proposed by PMLP is based on the entire pole (including support space), rather than the usable space as defined by G.L. c. 166, § 25A and 220 C.M.R. § 45.00 et seq., and incorporated in the Massachusetts Formula.

investor-owned utilities may be properly addressed in a factual determination of the appropriate inputs under the Massachusetts Formula.

G. Conclusion

For the reasons discussed above, DPU respectfully urges DTC to deny the Motion for Reconsideration and reaffirm the briefing schedule established for Phase I of this proceeding in the Hearing Officer Order.

Respectfully Submitted,

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Alison Lackey, Esq.
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Enc.
cc: Service List, D.T.C. 14-2