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 REPLY BRIEF OF THE DEPARTMENT OF PUBLIC UTILITIES

I. INTRODUCTION

Pursuant to the procedural schedule established by the Department of Telecommunications and Cable ("DTC"), the Department of Public Utilities ("DPU") submits its reply brief in Phase I of the above-captioned matter. DPU incorporates its positions set forth in its initial brief as if fully stated herein and files this reply brief to respond to certain arguments raised by Peabody Municipal Light Plant and the Peabody Municipal Lighting Commission (together, "PMLP") and Ashburnham Municipal Light Plant ("AMLP") in their joint initial brief.

II. ARGUMENT ON REPLY BRIEF

A. Introduction

The issue in Phase I of this proceeding is whether the formula set forth in 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") for

establishing the maximum permitted pole attachment rates of utility companies ("Massachusetts Formula") applies to municipal light plants and municipal lighting commissions (together, "MLPs") established pursuant to G.L. c. 164. Hearing Officer Order at 6. The arguments set forth by PMLP and AMLP do not provide any legal support for the contention that the differences between investor owned utilities ("IOUs") and MLPs warrant the creation or application of a formula other than the well-established Massachusetts Formula. While PMLP and AMLP go to great lengths to point out the differences between the ownership, management, regulation, and method of ratemaking for IOUs and MLPs,[1] PMLP and AMLP fail to provide any legal precedent or support for their argument that these differences exempt MLPs from the pole attachment regulatory scheme set forth in the Massachusetts statute, regulations, and precedent. As explained in DPU's initial brief and reiterated below, because the Legislature explicitly included MLPs within the definition of utility in G.L. c. 166, § 25A, the Massachusetts Formula clearly applies to all pole attachments in Massachusetts, including those on poles owned by MLPs, and provides a fully allocated rate for such attachments.

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[1] In support of this position, PMLP and AMLP provide a number of examples of the statutory differences between IOUs and MLPs: (1) public versus private ownership; (2) scope of activities; (3) sale and merger; (4) service territory; (5) capitalization; (6) retail choice; (7) taxation; (8) private versus public management; (9) state regulation of IOUs versus local control and regulation of MLPs; (10) requirements only applicable to MLPs; (11) rate setting; (12) charitable contributions; and (13) accounting (Joint Brief at 4-10). Because the Legislature explicitly included MLPs within the definition of utility in G.L. c. 166, § 25A, this laundry list of statutory differences is wholly irrelevant to the question of whether the Massachusetts Formula applies to MLPs.

B. G.L. c. 166, § 25A Explicitly Applies to Municipal Lighting Plants

PMLP and AMLP contend that the Legislature established separate statutory schemes for MLPs and IOUs, setting forth different regulatory, operational, and legal requirements for each type of entity (Joint Brief at 3, citing G.L. c. 164, §§ 1-1H, 2, 3-33A, 34-69A; 76-102C). They assert that if the Legislature had intended the same structures and requirements to apply to MLPs and IOUs, it would not have created different regulatory, operational, and legal requirements. Therefore, they argue, applying the Massachusetts Formula to MLPs would be contrary to the intent of the Massachusetts Legislature (Joint Brief at 3). Within the statute governing pole attachments, however, the Legislature, specifically defined "utility" to include MLPs. Specifically, G.L. c. 166, § 25A defines "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 (emphasis added).

According to the rules of statutory interpretation, "[w]here the language of a statute is clear and unambiguous, it is conclusive as to legislative intent." Massachusetts Electric Company and Nantucket Electric Company, each d/b/a National Grid, D.P.U. 10-54, at 41 (2010) (citing Pyle c. Sch. Comm. of Hadley, 423 Mass. 283, 285-286 (1996)). While the Legislature created separate statutory frameworks for MLPs and IOUs elsewhere in the law, it explicitly included both MLPs and IOUs within the definition of utility for the purposes of establishing regulations regarding pole attachment rates. Compare G.L. c. 166, § 25A with G.L. c. 164, §§ 1-1H, 2, 3-33A, 34-69A; 76-102C. By including MLPs in the statutory

definition of utility G.L. c. 166, § 25A, it is clear that the Legislature intended that MLPs be regulated in the same manner as all other utilities when it comes to pole attachments in Massachusetts.

In a related argument, PMLP and AMLP contend that MLPs have been granted exclusivity in setting their gas and electric rates under G.L. c. 164, §§ 56 and 58. Thus, they conclude that unless application of the Massachusetts Formula results in rates based on fully allocated costs, such application would violate the exclusive legal jurisdiction of MLPs to set rates in their communities (Joint Brief at 17-18). This argument is wrong for two reasons. First, as discussed above, PMLP's and AMLP's argument ignores the plain statutory language of G.L. c. 166, which specifically addresses jurisdiction over pole attachment rates. While Sections 56 and 58 of Chapter 164 address the right of MLPs to set prices for gas and electricity within their municipal districts, these sections are silent regarding jurisdiction to set pole attachment rates. The plain language of G.L. c. 166, § 25A, however, conclusively gives jurisdiction over the pole attachment rates of both IOUs and MLPs to DTC and DPU.[2] Second, as discussed below, despite PMLP and AMLP's assertions to the contrary, the Massachusetts Formula results in a fully allocated pole attachment rate, consistent with G.L. c. 166, § 25A. Cablevision at 16; A-R Cable at 8.

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[2] 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).

C. The Massachusetts Formula Provides a Fully Allocated Pole Attachment Rate and Does Not Result in Cross-Subsidies

PMLP and AMLP contend that the Massachusetts Formula does not account for the costs of the underlying support space in setting pole attachment rates and, therefore, does not result in a fully allocated pole attachment rate (Joint Brief at 2, 13-15). For this reason, PMLP and AMLP assert that the Massachusetts Formula cannot be applied to MLPs as it would result in the unlawful cross-subsidization of the costs of the support space by MLP customers to the benefit of attachers' customers (Joint Brief at 13-16).[3]

This argument is incorrect and based on a fundamental misunderstanding of the operation of the Massachusetts Formula. When determining the costs to be allocated, the Massachusetts Formula accounts for the total costs of the poles, including costs associated with the underlying support space. A-R Cable at 8 (explaining the Department's method for calculating a "fully allocated pole attachment rate," which includes support-space costs such as net investment in bare poles and maintenance expenses). By contrast, the allocator, which is used to apportion those total pole costs between the utility and attachers, is based on the usable space on the pole. Cablevision at 11, 16; A-R Cable at 8.

The pole attachment 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, duct, or conduit occupied by the attachment."

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[3] If this argument were correct, it would apply equally to IOUs as well as MLPs. For the reasons discussed below, however, this argument is not correct as it is based on a fundamental misunderstanding of the Massachusetts Formula by PMLP and AMLP.

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[4] on a pole . . . that is occupied by the attachment." G.L. c. 166, § 25A.

The method for calculating a pole attachment rate using the Massachusetts Formula is fully consistent with the requirements of G.L. c. 166, § 25A. This method involves three steps: (1) placing an average value on a utility's net investment in poles (which includes the costs of bare poles and the costs to install the poles); (2) developing an annual carrying charge to recover the ongoing costs of poles (including costs such as maintenance expenses); and (3) allocating the costs among the utility and others using the pole to attach their lines and equipment (based on the percentage of usable space on the pole occupied by the attachment). Cablevision at 16; A-R Cable at 8.

The calculation of the net investment in poles includes both the cost of bare poles and the cost of pole installation, each of which take into account the entire pole cost and not just the costs associated with the usable space. Cablevision at 16; A-R Cable at 8. The carrying charge that covers the ongoing costs of the poles, such as pole maintenance, similarly takes into account the entire pole and not just the ongoing cost of the usable space on the pole. Cablevision at 16; A-R Cable at 8. It is only the final step in the calculation that distinguishes

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4 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.

between the usable space on the pole, as required by G.L. c. 166, § 25A ("[s]uch portion shall be computed by determining the percentage of the total usable space on a pole. . . that is occupied by the attachment"), and the underlying support space that is deemed unusable for attachments. Cablevision at 16; A-R Cable at 8.

To argue that the Massachusetts Formula only takes into account the usable space on a pole clearly demonstrates a misunderstanding of the operation of formula. The Massachusetts Formula represents a fully allocated pole attachment rate. It does not, as PMLP and AMLP argue, place an unfair share of the costs of pole attachments on MLPs (or IOUs for that matter). Accordingly, no cross-subsidies result. See Cablevision at 16; A-R Cable at 8.

D. Other Arguments

1. Introduction

As established above, the Massachusetts Formula clearly applies to all pole attachments in Massachusetts, including those on poles owned by MLPs. Distinguished from the arguments above that address whether the Massachusetts Formula applies to MLPs (it does), PMLP and AMLP make several arguments that, in essence, address how the Massachusetts Formula should be applied to MLPs.[5] Elements of these arguments are appropriate for consideration in Phase II of this proceeding.

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[5] PMLP and AMLP also assert that AMLP and Comcast are parties to a pole attachment agreement under which the rates were negotiated and, therefore, not based on a strict application of the Massachusetts Formula. Thus, they contend, that to now apply the Massachusetts Formula to AMLP's rates would reform that agreement in contravention of the intent expressed in the Cablevision to not intrude upon negotiated pole attachment agreements (Joint Brief at 18 n.2, citing A-R Cable at 5-6, n.7). The specific details of any agreement between AMLP and Comcast are outside of the scope of this proceeding (i.e., a complaint by Comcast regarding the pole attachment rates of

2. Annual Returns Filed by MLPs Contain Information Needed to Apply the Massachusetts Formula

PMLP and AMLP contend that differences in accounting systems between MLPs and IOUs dictate that these entities cannot be treated identically for the purpose of establishing pole attachment rates (Joint Brief at 9-10). PMLP and AMLP argue that the FERC Form 1 filed by IOUs is based on the Uniform System of Accounts prescribed by the Federal Energy Regulatory Commission ("FERC") ("FERC USOA") whereas the MLPs use a system of accounts prescribed by DPU in filing their annual returns (Joint Brief at 11-12). Thus, PMLP and AMLP assert that the annual return filed by MLPs does not include the same accounts that are part of the Massachusetts Formula (Joint Brief at 11). For the reasons discussed below, this argument is without merit.

The pole attachment regulations provide that data included with a pole attachment complaint "should be derived from Form M, FERC 1 or other reports filed with state or regulatory agencies." 220 C.M.R. § 45.04(2)(d) (emphasis added). The annual returns filed with DPU by MLPs are an example of just such an "other report." A comparison of the

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PMLP). Further, this argument ignores the language of G.L. c. 166, § 25A which provides:

> upon its own motion or upon petition of any utility or licensee said [D]epartment shall determine and enforce reasonable rates, terms and conditions of use of poles . . . of a utility for attachments of a licensee in any case in which the utility and licensee fail to agree.

It is clear that the statute specifically contemplates agency intervention in the instance that parties cannot arrive at a negotiated pole attachment rate. Simply because parties were previously able to agree on a rate through a negotiated agreement does not mean that they are barred from seeking relief under the statute when the negotiation of future pole attachment rates fail.

FERC Form 1 to PMLP's annual returns reveals that the same information is available in each report,[6] with corresponding accounts easily identifiable, thus enabling an application of the Massachusetts Formula. For example, the net investment per bare pole calculation contained in the Massachusetts Formula uses values from FERC Accounts 364 (Poles, Towers, and Fixtures), 365 (Overhead Conductors and Devices), and 369 (Services). Similarly, PMLP's 2012 Annual Report[7] at page 8B contains entries labeled "364 Poles, Towers, and Fixtures," "365 Overhead Conductors and Devices," and "369 Services."

While PMLP and AMLP similarly assert that the elements of the carrying charge component of the Massachusetts Formula cannot capture an accurate carrying charge for MLPs because MLPs do not file FERC Form 1 or submit the same accounting information as IOUs, a comparison of FERC Form 1 and PMLP's 2012 Annual Report demonstrates otherwise. In particular, the administrative component of the carrying charge for the Massachusetts Formula relies on FERC Accounts 920 through 931. FERC Account 920 is for "Administrative and General Salaries" while PMLP's 2012 Annual Report at page 41, line 43 contains an entry labeled "920 Administrative and General Salaries." FERC Account 921 is for "Office Supplies and Expenses," while PMLP's 2012 Annual Report at page 41, line 44 contains an entry labeled "Office Supplies and Expenses." In fact, for FERC Accounts 922 through 931,

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6 The accounting systems used by MLPs and IOUs are substantially similar because of their shared origins in FERC's USOA. See 220 C.M.R. § 51.00 et seq.; Uniform System of Accounts for Gas and Electric Companies and Municipal Lighting Plants, D.P.U. 4240-A at iii (September 7, 1960).

7 For the purposes of this discussion, we refer to PMLP's 2012 Annual Report as it was the most recent annual report on file with DPU during the briefing period. PMLP filed its 2013 Annual Report on July 18, 2014.

each category is found on page 41 of PMLP's 2012 Annual Report with the same account names as used in the FERC Form 1. Finally, PMLP and AMLP claim that the maintenance portion of the carrying charge for the Massachusetts Formula (based on FERC Account 593, "Maintenance of Overhead Lines") does not apply to MLPs. PMLP's 2012 Annual Report at page 41, however, includes an entry labeled "593 Maintenance of Overhead Lines."

In sum, contrary to PMLP and AMLP's assertions, a comparison of PMLP's annual reports and FERC Form 1 demonstrates that, for purposes of the Massachusetts Formula, MLPs provide accounting information that is virtually identical to what IOUs provide in the FERC Form 1. This publicly available information can be readily used in applying the Massachusetts Formula, as contemplated in the Cablevision and A-R Cable Orders. Cablevision at 19; A-R Cable at 7 (explaining that a purpose in adopting the Massachusetts Formula was to simplify the regulation of pole attachment rates by adopting standards that rely upon publicly available data).

3. The Massachusetts Formula Can Account for any Differences Between Municipal Lighting Plants and Investor Owned Utilities

PMLP and AMLP argue that differences between MLPs and IOUs regarding elements such as depreciation, taxes, and rate of return render the Massachusetts Formula inapplicable to MLPs (Joint Brief at 11-13). DPU recognizes that certain differences do exist between MLPs and IOUs regarding depreciation, taxes, and rate of return. Any such differences, however, can be accounted for within the context of the established Massachusetts Formula and should be addressed in Phase II of this proceeding.

PMLP and AMLP argue that the Massachusetts Formula cannot be applied to MLPs because it includes inputs (i.e., depreciation, taxes, and rate of return) that are inapplicable to MLPs. This argument must fail because PMLP, itself, includes each of these elements in the proposed pole attachment rate formula it seeks to apply in this proceeding. For example, PMLP claims that depreciation is inapplicable to MLPs while, at the same time, it proposes to apply 2.82 percent[8] as the appropriate input for depreciation in its formula (Joint Brief at 11-12; PMLP Response at App. B, Exh. 2). Similarly, PMLP and AMLP assert that rate of return has "absolutely no application to MLPs" but PMLP proposes a cost of capital carrying charge of 8.0 percent in its formula (Joint Brief at 13; PMLP Response at App. B, Exh. 2). Further, for taxes, PMLP proposes a rate of 1.33 percent in its formula, based on its payments in lieu of taxes ("PILOT") (Joint Brief at 12; App. B, Exh. 2).

For each of these elements (e.g., depreciation, rate of return, taxes), Phase II of the proceeding is the appropriate place to determine the correct values to apply for PMLP in the Massachusetts Formula. Accordingly, DPU takes no position on the values or methods proposed by PMLP for each of these elements in its response. However, none of the arguments raised by PMLP and AMLP about purported differences between MLPs and IOUs with respect to elements such as depreciation, taxes, and rate of return, warrants a departure from the statutorily mandated application of the Massachusetts Formula to MLPs.

The fact that PMLP was able to provide proposed values for depreciation, rate of return, and taxes confirms that it is possible to determine such values for MLPs to be applied

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[8] The depreciation rate proposed by PMLP appears to be calculated based on figures from its 2012 Annual Report.

within the context of the Massachusetts Formula. PMLP's arguments that such inputs cannot be applied to MLPs using the Massachusetts Formula but can readily be used within its own proposed formula defies logic. PMLP cannot have it both ways.

4. The Nature of Comcast's Services Does Not Warrant a Departure from the Massachusetts Formula for PMLP

Finally, PMLP and AMLP assert that because cable television ("CATV") providers now offer multiple services, including internet, phone and home security services, the Massachusetts Formula should no longer be used to determine whether pole attachment rates are just and reasonable (Joint Brief at 17). Specifically, PMLP and AMLP assert that because CATV providers now offer more services, they receive greater benefits from pole attachments (Joint Brief at 17). The nature of the service provided by an attacher is not relevant to a determination of the fully allocated costs of pole attachments pursuant to G.L. c. 166, § 25A. Similarly, any benefit received by attachers is not relevant in this determination.

Under, G.L. c. 166, § 25A, the determination of whether a rate is just and reasonable is based on "assuring the utility 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, duct, or conduit occupied by the attachment." As discussed above, the Massachusetts Formula is designed to capture the fully allocated costs of pole attachments.[9] Cablevision at 18. The pole attachment statute does not distinguish the

[9] In establishing the Massachusetts Formula, DTE declined to adopt an incremental cost-based rate for pole attachments, which would have recognized differences between types of attachers. Cablevision at 15. Instead, DTE found that CATV operators enjoy a benefit from their ability to attach to poles and, therefore, CATV operators should

nature of the service provided by the attacher in setting the pole attachment rate. Instead, it considers the amount of space required by the attachment regardless of the purpose of the attachment.

The amount of space required for an attachment is addressed within the Massachusetts Formula, with a rebuttable presumption of the space needed for an attachment, i.e., one foot per attachment for CATV attachment space. Cablevision at 43-44. If Comcast's current attachments require more space than the one foot per attachment presumption (whether due to a change in its business model or otherwise), PMLP may present evidence to rebut this presumption in Phase II of the proceeding. However, the mere fact that Comcast now offers services other than CATV through its attachment does not render the Massachusetts Formula inapplicable to PMLP.

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pay a share of the costs incurred in erecting and maintaining the poles. Cablevision at 15.

III. CONCLUSION

For the reasons set forth above, and those set forth in DPU's initial brief, DPU urges DTC to find that the Massachusetts Formula applies to MLPs as a matter of law in determining whether their pole attachment rates are just and reasonable. All issues concerning the appropriate application of the Massachusetts Formula to PMLP should be addressed in Phase II of this proceeding.

Respectfully Submitted,

/s/

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