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

I. INTRODUCTION

On June 23, 2014, the Hearing Officer assigned to this matter by the Department of Telecommunications and Cable ("Department") determined that this docket would proceed in two phases.[1] Phase I is limited to the issue of whether, as a matter of law, the formula set forth in *Cablevision of Boston Co. et al. v. Boston Edison Co.*, D.P.U./D.T.E. 97-82, 1998 WL 35235111 (Apr. 15, 1998) ("*Cablevision*"), and *A-R Cable Servs. Inc., et al. v. Mass. Elec. Co.*, D.T.E. 98-52 (Nov. 6, 1998) ("*A-R Cable Servs*"), for establishing pole attachment rates of utility companies applies to municipal light plants and municipal lighting commissions established pursuant to G. L. c. 164.

[1] On June 27, 2014 AMLP and PMLP/PMLC filed a Joint Motion for Reconsideration, which is presently under advisement with the Department. Parties are to respond to the Motion for Reconsideration on July 8, 2014. Based on the determination by the Hearing Officer, AMLP and PMLP/PMLC are submitting this Phase I Joint Brief asserting arguments based upon the applicable statutes, regulations and caselaw and without the factual predicate the AMLP and PMLP/PMLC believe is necessary for a proper determination of a just and reasonable pole attachment rate. AMLP and PMLP/PMLC hereby preserve and do not waive their arguments presented in the Joint Motion for Reconsideration.

Phase II will be an evidentiary hearing on the pole attachment rates of the Peabody Municipal Light Plant ("PMLP"). Phase II will include discovery into the specific facts regarding the PMLP and the Peabody Municipal Light Plant Commission ("PMLC").

The Hearing Officer granted the Ashburnham Municipal Light Plant ("AMLP") limited participant status for Phase I.

AMLP and PMLP/PMLC hereby submit their Phase I Joint Brief addressing the issue of whether the formula set forth in *Cablevision* and *A-R Cable Servs* (the "Cablevision Formula") applies to municipal light plants and municipal lighting commissions as a matter of law.

II. ARGUMENT

A. Due to the Fundamental Differences Between Municipal Light Plants and Investor Owned Utilities, Applying the Cablevision Formula to Municipal Light Plants is not the Correct Legal Standard for Reviewing Municipal Light Plant Pole Attachment Rates

Numerous, significant and fundamental differences between investor owned utilities ("IOUs") and municipal light plants ("MLPs"), render the Cablevision Formula inapplicable to MLPs. Consequently, applying the Cablevision Formula to the relevant costs incurred by MLPs will not accomplish the statutory purpose of yielding a just and reasonable rate for pole attachments on MLP poles.

The Massachusetts pole attachment statute requires the Department to determine a just and reasonable rate, which recovers "the additional costs of making provisions for the attachments" without exceeding "the proportional capital and operating expenses of the utility attributable to that portion of the pole ... occupied by the attachment." G.L. c. 166, §25A. The purpose of the Cablevision Formula, adopted in 1998, was to establish "a method designed to capture the fully-allocated costs of aerial pole attachments." *Cablevision*, p. 11. As shown below, the Cablevision Formula, when applied to MLPs, cannot "capture the fully-allocated costs of aerial pole attachments" for MLPs.

1. IOUs and MLPs are fundamentally and significantly different in their ownership, management, regulation and method of ratemaking.

a. Separate statutory schemes. IOUs and MLPs are governed by completely separate and different statutory schemes. G.L. c. 164, § 2. IOUs are governed by G.L. c. 164, §§ 1-1H, 3-33A, 76-102C. MLPs are governed by G.L. c. 164, §§ 34-69A. A reading of these relevant statutes shows the fundamental differences between IOUs and MLPs established by the Massachusetts Legislature. These differences were clearly determined by the Department of Public Utilities ("DPU"). *Investigation by the Department of Public Utilities upon its own motion commencing a Notice of Inquiry/Rulemaking, pursuant to 220 C.M.R. 2.00 et seq., establishing the procedures to be followed in electric industry restructuring by electric companies subject to G.L.c. 164,* D.P.U. 96-100, at 32 (May 1, 1996) ("The general statutory scheme of G.L. c. 164 which governs the Department's authority over IOUs and municipal light plants **distinguishes between the two**.") (**emphasis added**).

The Legislature established very different regulatory, governance, operational and legal requirements for IOUs and MLPs. If the Legislature desired the same such structures and requirements for IOUs and MLPs, it would have done so. It did not. Rather, the Legislature, recognizing the fundamental differences between the IOUs and MLPs, created very different statutory requirements.

The Cablevision Formula does not allow for these fundamental differences. Hence, applying the Cablevision Formula to MLPs would be unlawful and not the correct legal standard. This legislative intent (together with the factual predicates) should be the overarching guide for the Department's deliberations in Phase I and its consideration as to whether the Cablevision Formula applies to MLPs in determining just and reasonable rates pursuant to G.L. c 166, §25A.

b. Private v. public ownership. IOUs are organized as profit making domestic corporations, owned by shareholders, publicly held holding companies or business trusts. G.L.c. 164, §§ 3-8D, 23-24, 33. MLPs are non-profit departments of Massachusetts cities and towns. As such, MLPs do not have a separate corporate identity apart from the town or city. *Municipal Light Commission of Taunton v. State Emp. Group Ins. Commission,* 344 Mass. 533 (1962).

Cities and towns own the land, structures and equipment ("plant") used by MLPs to supply and distribute electricity to their inhabitants. G.L. c. 164, §34. Cities and towns may not acquire or enlarge their MLPs' plant without the approval of the voters of the city or town. G.L. c. 164, §§ 35-39, 41. The voters within a city or town may vote, pursuant to G.L. c. 164, §68 to sell the MLP. None of these legal requirements are imposed on IOUs. On the other hand, IOUs own the property they use and may acquire or divest such property by their own corporate action. G.L. c. 164, §13.

c. Scope of activities. IOUs, simply by vote of their governing Board of Directors and/or stockholders, may engage in any business, operation or activity, including through partially or wholly owned subsidiaries. G.L. c. 164, §6; *see e.g,.* Restated Articles of Organization of Boston Edison Company. MLPs are completely limited by statute with respect to the business activities in which they may engage. MLPs may engage only in those activities conferred or necessarily implied by statute. *MacRae v. Selectmen of Town of Concord*, 296 Mass. 394 (1937). Consequently, the Legislature limited the scope of MLP activities to the governing statutes.

d. Sale and merger. IOUs may not transfer their franchises, lease their works or contract with anyone to carry on their works without the authority of the Massachusetts Legislature. G.L. c. 164, § 21. IOUs may merge or consolidate with, or sell their properties to, one another, provided that the transaction is approved by a two-thirds vote of their shareholders, and the DPU determines that it is in the public interest. G.L. c. 164, §§96-102B.

Cities and towns may sell their MLPs only upon authorization by their voters, provided the DPU determines that facilities for providing electricity in the municipality are not diminished and the sale is consistent with the public interest. G.L. c. 164, §68.

e. Service territory. IOUs have extensive services territories covering many cities and towns. *See* G.L. c. 164, § 1C. The DPU may authorize IOUs to conduct business in any town in the Commonwealth, and IOUs may purchase and hold real and personal property in such town for carrying on its business. G.L. c. 164, § 30. MLPs usually serve a single city or town, although some also provide service in an adjoining town. AMLP serves only the Town of Ashburnham. PMLP serves the entirety of the City of Peabody and portion of the Town of Lynnfield. The DPU may authorize cities and towns with MLPs to extend their lines into an adjoining city or town, but only if an IOU is not supplying electricity there. G.L. c. 164, §47.

f. Capitalization. IOUs may raise capital by issuing stock, bonds, debentures, notes and other evidences of indebtedness, subject to DPU approval. G.L. c. 164, §§ 9-12A, 14-19. IOUs may also mortgage their property. G.L. c. 164, § 13. MLPs are not permitted to issue stock or incur debt. Cities and towns having MLPs may incur debt for purposes of purchasing or replacing the plant upon a two-thirds vote of the voters, but debt may not be incurred to pay for the annual expenses of operating or maintaining the plant. G.L. c. 164, §§ 40, 57.

g. Retail choice. IOUs are required to accommodate choice of electricity suppliers by retail customers. IOUs divested all or most of their generating facilities and power supply contracts years ago, but continue to recover from ratepayers the above market or "stranded" cost associated with those facilities and contracts. G.L. c. 164, §§ 1A, 1F. As "wires only" distribution companies, IOUs distribute electricity to their retail customers, but provide default electricity supply only to those retail customers who have not chosen a competitive supplier. G.L. c. 164, § 1B. IOUs do not have the obligation to serve their customers since IOUs are not obligated to generate electricity for their customers. IOUs only have the obligation to deliver electricity purchased for or by their customers. The MLPs are exempt from the requirements to

allow competitive choice of electricity supply. G.L. c. 164, §47A. MLPs have the obligation to serve all inhabitants of the cities and towns in which they operate with both the supply of electricity and distribution of that electricity.

h. Taxation. As private, profit making enterprises, IOUs pay both income and property taxes. Allowances for these taxes are specifically included in IOU rates. *See e.g. Boston Edison Company v. Department of Public Utilities*, 375 Mass. 1 (1978). As departments of their respective cities or towns, MLPs pay neither income nor property taxes. Hence, no such charges are in MLP rates.

i. Private v. public management. IOUs are controlled by boards of directors elected by their shareholders. The boards of directors appoint corporate officers to manage and operate the IOU. MLPs are operated and managed by a single manager. The manager is a public official appointed by the mayor in cities, the selectmen in towns, or the municipal light board in those cities and towns that elect a municipal lighting board. G.L. c. 164, §55, 56.

j. State regulation of IOUs As private enterprises, IOUs' prime obligation is to make profits and pay dividends to shareholders. To balance this private directive, the Legislature gave the DPU general supervisory authority over all IOUs. G.L. c. 164, §76. The overriding consideration in the DPU's regulatory and ratemaking scheme for IOUs is the public interest. *Attorney General v. Department of Telecommunications and Energy,* 438 Mass. 256 (2002). The DPU may order an IOU to reduce or change its prices or improve the quality of its service. G.L. c. 164, §93.

Whenever an IOU seeks a change in rates, it must first file the proposed rates with the DPU for approval. The DPU notifies the Attorney General, conducts a public hearing and investigates the propriety of the proposed rates. The DPU may suspend the effective date of the proposed rates for up to ten months while it conducts its investigation.

IOUs must also file all contracts for the sale of electricity with the DPU, which may investigate the propriety of such contracts, and make orders relative to their rates and terms.

G.L. c. 164, §94. The burden is on the IOU to show that its proposed rates are proper. *Metropolitan District Commission v. Department of Public Utilities*, 352 Mass. 18 (1967). In determining the propriety of rates, the DPU must find that they are just and reasonable. *Bay State Gas Company v. Department of Public Utilities*, 459 Mass. 807 (2011).

k. Local control and regulation of MLPs. As non-profit municipal departments, the MLPs' prime directive is to provide reliable, low cost electricity to the cities and towns' residents and businesses. MLPs are regulated at the local level. The mayor, selectmen or municipal light board and the manager of the MLP fix the electricity prices charged by the MLP in accordance with a statutory formula. G.L. C. 164, § 58. As public officers, they are entitled to deference in fixing prices. *Board of Gas and Elec. Com'rs of Middleborough v. Department of Public Utilities*, 363 Mass. 433 (1973). No DPU approval is required for an MLP to change prices (unless it intends to deviate from the statutory formula). G.L. c. 164, §58. The DPU does not have authority to suspend the prices fixed by a municipal light board pending investigation, *Board of Gas and Elec. Com'rs of Middleborough v. Department of Public Utilities*, 363 Mass. 433 (1973), but it may investigate allegations of discriminatory practices. *Holyoke Water Power Co. v. City of Holyoke*, 349 Mass. 442 (1965).

l. MLPs are subject to requirements inapplicable to IOUs. Each fiscal year, the manager furnishes to the mayor, selectmen or municipal light board an estimate of the income from sales of electricity during the ensuing fiscal year, and the expenses of operating and maintaining the plant, interest and principal on any bonds issued to pay for the plant, and an amount for depreciation. G.L. c. 164, §57. All moneys received by MLPs are paid to the city or town treasurer. G.L. c. 164, §56. If charges for electricity are not paid MLPs when due, they become a lien on the owner's real estate, and may be added to the owner's real estate taxes. G.L. c. 164, §§58B-58D.

All accounts of the MLP are subject to inspection by the city auditor or selectmen. All bills are paid through a warrant process. The city auditor or the selectmen approve all bills

before they are paid by the city or town treasurer. The auditor may disallow and refuse payment of any bill as fraudulent, unlawful or excessive. G.L. c. 164, §56.

All contracts of MLPs involving $5,000 or more (not just contracts for the purchase of electricity) are required to be filed with the city or town auditor and are open for public inspection. G.L. c. 164, §56C. Contracts for the purchase of equipment costing $25,000 or more cannot be awarded unless requests for proposals have been published in the city or town newspaper and opened in public. G.L. c. 164, §56D. None of these legal requirements or restrictions is imposed on IOUs.

m. Ratemaking. The DPU has jurisdiction over the entire rate structure of an IOU. The DPU is free to select or reject a particular method of IOU ratemaking as long as the choice is not confiscatory or illegal. *American Hoechest Corp. v. Department of Public Utilities*, 379 Mass. 408 (1980); *Massachusetts Electric Company v. Department of Public Utilities*, 376 Mass. 294 (1978); *Boston Edison Company v. Department of Public Utilities*, 375 Mass. 1 (1978). 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. *Boston Gas Company v. Department of Public Utilities*, 367 Mass. 92 (1975). IOU ratemaking uses a test-year model under which the DPU examines a test period on the theory that the revenue, expense and rate base during that period accurately reflects the IOUs' present financial situation and fairly predicts its future performance. *Bay State Gas Company v. Department of Public Utilities*, 459 Mass. 807 (2011). The DPU designs base rates using a cost allocation method that is based on equalized rates of return for each customer class, but if the method impacts any customer class by more than 10%, the DPU may phase in the elimination of any cross subsidies between rate classes over a reasonable period. G.L. c. 164, §94I.

n. MLPs fix rates in accordance with a statutory formula. The statutory formula defines the minimum price in any rate schedule and the maximum price for all rate schedules that may be charged by MLPs. No price may be set at less than production cost. All schedules

of prices may not yield more than 8% on the cost of plant, after payment of all operating expenses, interest on the outstanding debt, the requirements of any fund established to pay the debt, and an amount for depreciation equal to 3% of the cost of plant, or such smaller or larger amount as the DPU may approve. G.L. c. 164, §58. All income for each fiscal year must be used to pay for the annual expense of the MLP for that fiscal year. Any surplus of the annual allowance for depreciation not used for replacing plant is held in a depreciation fund by the town treasurer for replacing plant in succeeding years, or for paying nuclear decommissioning costs, stranded costs or, upon DPU approval, any indebtedness issued to pay for plant replacements. G.L. c. 164, §57. None of this structure applies to an IOU.

o. Charitable contributions. IOUs may include reasonable charitable contributions in calculating revenue requirements for their rates. *American Hoechest Corp.*, 379 Mass. at 413. MLPs may not make charitable contributions or pay gratuities. Massachusetts Department of Revenue, Division of Local Services ("DLS"), File No. 2002-68 (February 22, 2002) (MLP may not donate to town library construction); DLS File No. 99-305, June 23, 1999 (MLP may not pay for tickets for retirees or customers to attend centennial ball. *See e.g. Quinlan v. Cambridge,* 320 Mass. 124, 127 (1946) (public funds may be used only for public purpose.).

p. Accounting. IOUs must keep their books and accounts in a form prescribed by the DPU and close their books annually. G.L. c. 164, §81. They must also file an annual return with the DPU of the amount of their authorized capital, indebtedness and financial condition, their income and expenses during the preceding year, and a balance sheet of their accounts. G.L. c. 164, §83. IOUs use the Uniform System of Accounts promulgated by the Federal Energy Regulatory Commission, ("FERC"). IOUs annually file their FERC Form 1 with the DPU. MLPs keep their books, records and accounts in a form prescribed by the DPU, and also file an annual return with the DPU stating their income and expenses. G.L. c. 164, §63. MLPs use a

system of accounts prescribed by the DPU which reflects the important differences between MLPs and IOUs. MLPs also file a return with the DPU prescribed specifically for MLPs.

The fundamental legal differences between IOUs and MLPs in the purpose, ownership, management, operation, accounting requirements, legal requirements, and method of rate making demonstrate that MLPs and IOUs are entirely different types of entities. The statutory and regulatory differences – which have been established by the Massachusetts Legislature and recognized by the DPU – dictate that MLPs and IOUs cannot be treated identically.

Consequently, the same formula to determine a just and reasonable pole attachment rate cannot apply to both MLPs and IOUs. This is shown by the decision in *Cablevision* where the Department addressed the impact of its determination of a pole attachment rate has on electric ratepayers and CATV subscribers. *Cablevision,* p. 23. For an IOU, the DPU is authorized to regulate the rates of IOUs. *See §1(j),(m) supra.* The DPU does not have the same authority over MLPs. *See §1(k),(n) supra.* Because of the fundamental differences between IOU's and MLPs, applying the Cablevision Formula to MLPs will result in impacts on the MLP electric ratepayers premised on an unlawful approach. The result will not yield just and reasonable rates for either the electric ratepayers of an MLP or for the CATV subscribers. This result would violate G.L. c. 166 Sec. 25A.

2. The Cablevision Formula includes numerous elements inapplicable to MLPs.

The Cablevision Formula involves three general steps. *Cablevision,* p. 11. First, an average value is placed on a utility's investment in poles. *Id.* Second, an annual carrying charge is developed to recover the ongoing cost of poles. *Id.* Third, the costs are allocated among the utility and others using the poles to attach lines and facilities. *Id.* None of these steps can be applied to MLPs pursuant to the Cablevision Formula in the same manner as they have been applied to IOUs in order to reach a just and reasonable rate because the information that goes into the calculation for each step differs between MLPs and IOUs.

a. FERC Form 1. The basic source document for the Cablevision Formula is the FERC Form 1. MLPs do not prepare and file a FERC Form 1 because they are not regulated by FERC. The return an MLP files with the DPU does not include the same accounting which is part of the Cablevision Formula. *Uniform System of Accounts for Gas and Electric Companies and Municipal Lighting Plants,* D.P.U. 4240-A (September 7, 1960). For example, depreciation expense is not tied to asset life, but an amount equal to 3% of the cost of plant, or such smaller or larger amount as the DPU may approve. *Id.* at p. 172.

b. Annual Carrying Charge. The annual carrying charge used in the Cablevision Formula is the sum of an administrative carrying charge rate, a depreciation carrying charge rate, a maintenance carrying charge, a tax carrying charge rate, and a rate of return. *Cablevision,* p. 18. The administrative carrying charge for an IOU is calculated by dividing the administrative expense (stated on FERC Form 1, Accounts 920-931) by the net plant in service. *Id.* The depreciation carrying charge for an IOU is the product of the ratio of gross investment in poles to the net investment in poles and the annual depreciation rate for poles. *Id.* at 20. An IOU's maintenance carrying charge is determined by dividing maintenance expense (found on FERC Form 1, Account 593) by net investment in poles. *Id.* at 19. The tax carrying charge for an IOU is determined by dividing the normalized tax expense (found on FERC Form 1, Account 408-411) by the net plant in service. *Id.* at 18. None of these calculations will accurately capture the annual carrying charge for MLPs because MLPs do not file FERC 1 or submit the same accounting information on their returns to the DPU.

c. Depreciation. The Cablevision Formula uses annual depreciation, accumulated depreciation, depreciation reserve and depreciation carrying charge. For IOU's rate making the depreciation rate is tied to the useful life of assets. Some assets may have a useful life of 30 years while others may have useful life of five or any other number of years. Depreciation has an entirely different definition and purpose for MLPs. For MLPs, the depreciation rate is not tied to asset life. MLPs use the depreciation rate as a mechanism for internal cash generation to be

used as capital. *Reading Municipal Light Department*, D.P.U. 85-121/85-138/86-28-F, pp. 10-13 (October 21, 1987). The depreciation rate of MLPs is fixed by statute at 3% of the cost of plant, but MLPs may petition the DPU for lower or greater rate, depending on their need for additional capital. G.L. c. 164, §57. Thus, depreciation for MLPs has no relationship to diminution of asset values. The depreciation rate for MLPs may be 0% or up to 5% on the original cost of the MLP's assets, not reduced by accumulated depreciation. For IOUs, one year depreciation expense is added to the total of depreciation accumulated throughout the useful life of an asset and that accumulated depreciation is deducted from the original cost of an asset in setting an IOU's rates. Under the Cablevision Formula, the net investment in bare poles is determined by reducing the gross pole investment by the amounts for accumulated depreciation and accumulated deferred taxes. *Cablevision,* pp. 12 – 17. This is completely inapplicable to MLPs.

d. Taxes. The Cablevision Formula uses federal and state tax-based elements, including accumulated deferred taxes, normalized tax expense and tax carrying charge. None of these elements are applicable to MLPs because MLPs do not pay income taxes. However, some MLPs make voluntarily payments in lieu of taxes ("PILOT") to the cities and towns in which they operate. In contrast to property tax payments made by IOUs, which are treated as above the line expenses, PILOTs made by MLPs are treated as below the line payments from the MLPs' unappropriated earned surplus account. Above the line means the item is included for purposes of determining total allowed revenue. Below the line means the item is deducted after all expenses and return are calculated. *Reading Municipal Light Department*, D.P.U. 85-121/85-138/86-28-F, pp. 15-16 (October 21, 1987). In determining the total accumulated deferred taxes for an IOU, the Department has included both FERC accounts 281 and 282. *Cablevision,* p. 16. These FERC accounts are inapplicable to MLPs.

e. Interest. The Cablevision Formula makes no provision for interest expense because, for IOUs, interest expense is a below the line item. MLPs are entitled to treat interest expense as a direct (above the line) expense chargeable to ratepayers. G.L. c. 164, §58.

f. Rate of Return. The Cablevision Formula uses rate of return to calculate pole attachment rates. Rate of return reflects IOUs' debt/equity ratio and includes both a cost of equity associated with the IOUs' stock (both preferred and common) and retained earnings as well as the interest rate on all debt outstanding. For IOUs, return on equity should be commensurate with returns on investments in other enterprises having corresponding risks and should assure such confidence in the IOU's financial integrity so as to maintain its credit and attract capital. *Massachusetts Electric Company v. Department of Public Utilities*, 376 Mass. 294 (1978).

Rate of return has absolutely no application to MLPs. MLPs do not issue capital stock and, for MLPs, interest on debt is a direct expense chargeable to ratepayers, not a below the line item. MLPs are entitled to fix prices to yield up to 8% on the original cost of their plants, but like depreciation, the amount of this yield is tied to the MLPs' need for cash. Moreover, any such return is not mandatory. It is discretional with the MLP as whether to have a return or not. Whereas for IOUs a rate of return is mandated by law. *Boston Gas Co. v. Dep't of Pub. Utilities*, 387 Mass. 531, 539(1982) (Investor-owned utilities are permitted "to charge rates which are compensatory of the full cost incurred by efficient management, provided that there is no recovery for costs which are excessive, unwarranted, or incurred in bad faith.")

3. The Cablevision Formula would result in prohibited cross-subsidies

a. Support Space. The Cablevision Formula is based on the usable space on the pole, *i.e.*, the top of the pole where attachments are affixed. The Cablevision Formula does not provide for the bottom of the pole, or the support space without which the usable space would not exist. Under the Cablevision Formula, the costs associated with the support space are subsidized or borne by IOUs' electric ratepayers or the IOUs' stockholders. But MLPs cannot subsidize the cost of the support space used by cable subscribers. By statute, all MLP revenue must be used to pay the annual cost and expenses of plant in that year. G.L. c. 164, § 57.

MLPs cannot use revenues collected through rates to subsidize or donate to the support costs of cable subscribers.

b. Cost Allocation. The Cablevision Formula purportedly requires the calculation of a "fully allocated rate" utilizing an "allocation factor" or "usage factor" to allocate the costs among the utility and others attaching lines to the pole. *Cablevision,* p. 21. The calculation is based on only the "assumed attachment space" and the "usable space" on a pole. *Id.*

The calculation mandated by the Cablevision Formula does not acknowledge that the interests of MLP ratepayers should be weighed by the Department in determining the just and reasonable pole attachment rate. However, the Massachusetts pole attachment statute directs the Department to consider the "interest of subscribers of cable television and wireless communications services as well as the interest of consumers of utility services. G.L. c. 166, §25A; *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.").

This balancing test must be guided by the principles used in ratemaking. *Attorney Gen. v. Dep't of Telecomm. & Energy*, 438 Mass. 256, 262, 268, 273 (2002) ("The "public interest" standard constitutes an overriding consideration in the department's regulatory and ratemaking scheme."); *Massachusetts Inst. of Tech. v. Dep't of Pub. Utils.*, 425 Mass. 856, 868 (1997); *see Wolf v. Dep't of Pub. Utils.*, 407 Mass. 363, 369 (1990); *Boston Real Estate Bd. v. Dep't of Pub. Utils.*, 334 Mass. 477, 495 (1956) ("The controlling consideration of the public interest in the exercise of the department's statutory regulating power is implicit throughout the statute. It is the

standard which supports the grant of power over rates and regulations in general, and it is not necessary to specify further").

MLPs, such as PMLP and AMLP, employ a fully allocated cost-of-service methodology taking into account cost causation and allocate costs to the customers or customer classes responsible for those costs. This approach is consistent with well-established ratemaking principles. *Boston Edison Co., Cambridge Elec. Light Co., Commonwealth Elec. Co.*, D.T.E. 03-121, at 46-47 (July 23, 2004); *see Boston Gas Co.*, D.P.U. 96-50 (Phase I) at 133-134 (Nov. 29, 1996); *Boston Gas Co.*, D.P.U. 93-60, at 331-337, 410, 423 (Oct. 29,1993); *Bay State Gas Co.*, D.P.U. 92-111, at 54, 283-284, 311-312 (Oct. 30, 1992). MLPs must recover all of their costs-to-serve each year since they are not-for-profit entities without shareholders. G.L. c. 164, §§ 57, 58.

A fundamental principle underlying the cost-of-service approach is the avoidance cross-subsidies. *Stowe Mun. Elec. Dep't v. Dep't of Pub. Utils.*, 426 Mass. 341, 349 (1997) ("To the extent that, one way or another, utilities pass their fixed costs on to ratepayers, the public interest requires that no group of customers bear an unfair share of these costs."). "[C]ross-subsidization is of critical concern in the ratemaking process." *Investigation by the Department of Telecomm. and Energy upon its own motion commencing a rulemaking pursuant to 220 C.M.R. §§ 2.00 et seq., establishing standards of conduct governing the relationship between electric distribution companies and their affiliates and between natural gas local distribution companies and their affiliates*, D.P.U. 97-96, at 4 (May 29, 1998). A fully allocated cost-of-service approach ensures that costs incurred by one group of customers are not subsidized by another group of customers.

The cost of providing "usable space" for pole attachments necessarily includes the cost of the underlying support space. The Cablevision Formula does not include support space and is therefore not based on fully-allocated costs. The Cablevision Formula would require the electric consumers of not-for-profit citizen-owned MLPs to subsidize the pole attachments of a

global for-profit media and communications corporation. *Contra Lowell Gas Light Co. v. Dep't of Pub. Utils.*, 319 Mass. 46, 52 (1946) ("[T]he function of the department is the protection of public interests and not the promotion of private interests.").

B. The Department should depart from the Cablevision Formula for MLPs

1. MLPs' circumstances warrant departure from the Cablevision Formula

The Department has "extensive freedom" to determine pole attachment rates, provided that the mechanism adopted is within the confines of G.L. c. 166, §25A and 220 C.M.R. 45.00, *et seq.* Accordingly, in *Cablevision*, the Department stated that it could "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,* p. 12.

MLPs present a set of circumstances different from IOUs. Such circumstances warrant protection of the public interest and an adjudication of just and reasonable rates. As a matter of legal structure and operation, MLPs, like AMLP and PMLP, embody the "public interest".

MLPs are owned by the municipalities in which they operate. G.L. c. 164, §§ 34-69A. The operations of an MLP are overseen by a publicly elected board of light commissioners. G.L. c. 164, §§ 55-56A. MLPs sell electricity to the citizens of and the businesses in their respective municipalities. By law, the pricing of the electricity sold by MLPs is at cost. G.L. c. 164, § 58.

The Supreme Judicial Court has found that Massachusetts MLPs are imbued with the public interest. *See Bd. of Gas & Elec. Comm'rs of Middleborough v. Dep't of Pub. Utils.*, 363 Mass. 433, 438 (1973) ("The special provisions applicable to municipal light boards (see G. L. c. 164, Sections 55-56A) indicate a legislative deference to the fact that their rate schedules are fixed by 'public officers acting under legislative mandate' (*Adie v. Mayor of Holyoke*, 303 Mass. 295, 300), and that therefore they do not require the close scrutiny and measure of supervision by the Department which is authorized or required as to nonmunicipal electric companies under Section 94.").

MLPs are fundamentally different than the IOUs in *Cablevision* (Boston Edison) and *A-R Cable Servs* (Massachusetts Electric). Thus, the Cablevision Formula, which was applied with respect to the IOUs in those cases, cannot be applied to MLPs with the expectation that it will result in a just and reasonable rate. In fact, the differences between MLPs and IOUs clearly indicate the opposite is true.

2. CATV operators' circumstances warrant departure from the Cablevision Formula

Nearly sixteen (16) years have passed since the decisions in *Cablevision* and *A-R Cable Servs* were rendered. In that time period, cable television ("CATV") providers have changed considerably. During the last 16 years, Comcast has changed through consolidation, technological improvements, and the expansion of service offerings. Comcast is no longer just a CATV provider. Today, Comcast is a global Fortune 50 company and has expanded into the areas of business and home high-speed internet service, digital phone service, and home security. None of these services were as prevalent—if even in existence—16 years ago.

Consequently, the "certain benefit" enjoyed by CATV operators from their ability to attach to poles in 1998 has been amplified greatly. *See Cablevision,* p. 10 ("CATV operators enjoy a certain benefit from their ability to attach to poles and, therefore, under current ratemaking standards it is appropriate for them to pay a share of the costs incurred in erecting and maintaining these poles."). To adhere to the Cablevision Formula in these circumstances would violate the statutory and regulatory requirements that the Department determine that the MLPs' pole attachment rates are *just and reasonable* and as a consequence whether Comcast has *nondiscriminatory access* to the MLP poles.

C. Application of the Cablevision Formula to MLPs would violate G.L. c. 164

MLPs have been granted exclusivity in setting their rates for gas and electricity. G. L. c. 164, §§ 56 and 58; *see Shea v. Boston Edison Co.,* 431 Mass. 251, 254 (2000); *Bd. of Gas & Elec. Comm'rs of Middleborough v. Dep't of Pub. Utils.*, 363 Mass. 433, 438 (1973). The rates of

MLPs are only subject to revision by the DPU if they are found to be discriminatory. *See Holyoke Water Power Co. v. City of Holyoke*, 349 Mass. 442, 446-447 (1965).

The AMLP's and PMLP's publicly elected commissions have determined the allocation between the electric ratepayers and the cable ratepayers based on fully allocated cost-of-service studies. If the application of the Cablevision Formula by the Department in this case—without cost allocation evidence—results in shifting costs to electric ratepayers, then the Department would have substituted its judgment for the judgment of the publicly elected light commissioners of AMLP and PMLP who have exclusive legal jurisdiction to set rates in their communities.

This cost-shifting was recognized by the Department in *Cablevision*, where the Department, quite correctly, balanced the interests of the IOU ratepayers against those of the CATV subscribers. *Cablevision,* p. 23. The Department clearly acknowledged that a change in the pole attachment rate would impact other rates. *Id.* In *Cablevision*, the Department made a determination as to whether the pole attachment rate would impose a "financial disruption" on the IOU ratepayers and CATV subscribers. *Id.* For MLPs, such a determination results in the Department setting rates for the MLP ratepayers in violation of G.L. c. 164, §§ 56 and 58.[2]

In addition, because 100% of MLP revenues must cover 100% of their costs in a year, a change in a pole attachment rate which results in an allocation change disrupting an MLP's ability to cover all of its costs.

[2] The Department has expressed its unwillingness to intrude upon commercial pole attachment agreements, entered into after the *Cablevision* Order, absent a compelling reason. *A-R Cable Servs, at* 5-6 n.7. AMLP and Comcast are parties to a Pole Attachment Agreement dated 2003. Until recently, Comcast paid all charges calculated by AMLP under the Pole Attachment Agreement, none of which were calculated pursuant to the Cablevision Formula. By applying the Cablevision Formula under these circumstances, the Department would be reforming the Pole Attachment Agreement.

III. CONCLUSION

The Cablevision Formula should not apply to MLPs and municipal lighting commissions as a matter of law. MLPs present fundamental legal differences from IOUs, for which the Cablevision Formula was developed. Application of the Cablevision Formula to MLPs would not yield an accurate determination of the fully-allocated costs of aerial pole attachments. Instead, its application would disregard the interests of the MLP ratepayers and result in impermissible cross-subsidies.

Thus, with regard to MLPs, the Cablevision Formula is not a mechanism for determining pole attachment rates that falls within the confines of the Department's regulations (220 C.M.R. § 45.00) and the Massachusetts pole attachment statute (G.L. c. 166, § 25A).

For all these reasons, in addition to those set forth in this brief, the Department should not apply the Cablevision Formula in this proceeding.

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COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2014, I served the foregoing Joint Phase I 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.

Matthew C. Campbell

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