The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.P.U. 19-76-A
D.T.C. 19-4-A

December 7, 2021

Joint Investigation by the Department of Public Utilities and the Department of Telecommunications and Cable, on their own motions, instituting a rulemaking pursuant to Executive Order No. 562 to Reduce Unnecessary Regulatory Burden, G.L. c. 30A, § 2, 220 CMR 2.00, and 207 CMR 2.00, to amend 220 CMR 45.00.

ORDER ADOPTING FINAL REGULATION

TABLE OF CONTENTS

I. INTRODUCTION

On March 31, 2015, by Executive Order No. 562, the Governor's Office directed each Executive Agency, including the Department of Public Utilities ("DPU") and the Department of Telecommunications and Cable ("DTC") (jointly, the "Departments"), to undertake a review of its regulations.[1] The Governor's Office directed agencies to rescind, revise, or simplify their regulations in accordance with the requirements of Executive Order No. 562, and to retain or modify only those regulations that are mandated by law or essential to the health, safety, environment, or welfare of the Commonwealth's residents. Executive Order No. 562, §§ 2, 3.

The DPU and the DTC each conducted assessments of their respective regulations to determine whether action is required under the criteria of Executive Order No. 562. As part of this review, the DPU and the DTC identified 220 CMR 45.00: Pole Attachment, Duct, Conduit and Right-of-Way Complaint and Enforcement Procedures for amendment and revision. By virtue of their shared history and related statutory provisions, the Departments share jurisdiction over the administration and enforcement of 220 CMR 45.00.[2] The

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1 See Office of the Governor, Commonwealth of Massachusetts, Executive Order No. 562 (March 31, 2015).

2 Prior to 2007, the current DPU and the DTC were a single agency known as the Department of Telecommunications and Energy ("DTE") and, prior to 1997, was also known as the DPU. In 2007, the DTE was abolished and replaced by the current DPU and DTC. See St. 2007, c. 19 ("Act"). After the passage of the Act, the current DPU retained general supervision over gas, electric, and water companies, whereas the DTC retained general supervision over telecommunications and cable companies. Because the provisions of 220 CMR 45.00 involve electric,

agencies' predecessor last revised this regulation in 2000. Order Establishing Complaint and Enforcement Procedures to Ensure Telecommunications Carriers and Cable System Operators Have NonDiscriminatory Access to Utility Poles, Ducts, Conduits, and Rights of Way, D.T.E. 98-36-A (2000).

With this Order, the DPU and the DTC jointly issue final regulation 220 CMR 45.00: Pole Attachment, Duct, Conduit and Right-of-Way Complaint and Enforcement Procedures.[3]

II. PROCEDURAL BACKGROUND

On July 11, 2019, the Departments issued an order instituting a joint rulemaking ("Order Instituting Rulemaking") pursuant to G.L. c. 30A, § 2, 220 CMR 2.00, and 207 CMR 2.00, to rescind the regulatory clauses deemed invalid by the Supreme Judicial Court ("SJC"), to update applicable references, to correct spelling errors, as well as to consider other relevant corrections and changes to 220 CMR 45.00, as determined during the course of the proceeding. The DPU and the DTC issued a copy of the proposed Pole Attachment, Duct, Conduit and Right-of-Way Complaint and Enforcement regulation as Appendix A to D.P.U. 19-76 and D.T.C. 19-4. Pursuant to the requirements of G.L. c. 30A, § 2, notice of this rulemaking was published in The Boston Globe and The

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telecommunications, and cable services, the DPU and the DTC use a Memorandum of Agreement ("MOA") to clarify the roles of each agency under 220 CMR 45.00. The Departments first entered into the MOA on October 14, 2008. A seventh extension of this MOA remains in effect until its expiration on February 8, 2022.

[3] Attached hereto as Appendix A is a copy of the Final Regulation marked to show the changes made to the Proposed Regulation. Attached hereto as Appendix B is a clean copy of the Final Regulation.

Springfield Republican on July 26, 2019, and in the Massachusetts Register on July 26, 2019. On September 10, 2019, the DPU and the DTC jointly held a public hearing to receive comments. The Departments accepted initial written comments through August 20, 2019 and reply comments through September 24, 2019.

The DPU and the DTC received initial comments from Massachusetts Electric Company and Nantucket Electric Company, each d/b/a National Grid ("National Grid"); The New England Cable & Telecommunications Association, Inc. ("NECTA"), CenturyLink Communications, LLC, Broadwing Communications, LLC, CenturyLink Public Communications, Inc., Global Crossing Local Services, Inc., Global Crossing Telecommunications, Inc., Level 3 Communications, LLC, Level 3 Telecom Data Services, LLC, and WilTel Communications, LLC (jointly, "CenturyLink"); and ExteNet Systems, Inc. ("ExteNet").

Comments from the following were received at the public hearing: Pamela Hollick, associate general counsel with CenturyLink; James White, senior director of regulatory affairs of Comcast Cable Communications, LLC on behalf of NECTA; Alexander Moore of Verizon New England, Inc. ("Verizon"); and Haran Rashes, senior counsel for regulatory affairs of ExteNet. The DPU and the DTC also received written reply comments from the Office of the Attorney General of Massachusetts ("Attorney General"); CenturyLink; ExteNet; NSTAR Electric Company d/b/a Eversource Energy and National Grid (jointly, "electric distribution companies" or "EDCs"); CTIA-The Wireless Association ("CTIA"); the Municipal Electric Association of Massachusetts ("MEAM"); and Verizon.

III. FINAL POLE ATTACHMENT REGULATION

A. General Revisions

1. 207 CMR 1.00

a. Introduction

The pole attachment regulation previously referred to the DPU's procedural regulation, 220 CMR 1.00. The Departments proposed to amend the pole attachment regulation to incorporate the DTC's procedural regulation, 207 CMR 1.00. No commenters addressed this issue.

b. Analysis and Findings

In 2017, the DTC promulgated procedural regulation, 207 CMR 1.00, applicable to cable and telecommunications. Order Adopting Final Regulations, D.T.C. 16-2 (2017). Prior to 2017, due to the shared history of the two agencies, the DTC relied on the DPU's procedural regulation, 220 CMR 1.00, to fulfil its regulatory duties. Given the shared jurisdiction over 220 CMR 45.00, the Departments amend 220 CMR 45.00 to refer to the procedural regulations of both agencies.

2. Non-Substantive Revisions

a. Introduction

To ensure consistency within the regulation and conformity with requirements of the Secretary of the Commonwealth, the Departments proposed non-substantive revisions to the regulation.

b. Analysis and Findings

The Departments amend 220 CMR 45.00 to incorporate non-substantive revisions to the regulation, including formatting, renumbering, incorporating the effective date of the prior amendments in 2000, and identifying referenced subsections explicitly. These revisions are necessary to ensure consistency within the regulation due to other revisions adopted in this Order, and to comply with requirements of the Secretary of the Commonwealth.

B. 220 CMR 45.02: Definitions

1. "Department"

a. Introduction

The definition of "Department" at 220 CMR 45.02 previously referred to the Department of Telecommunications and Energy. The DPU and the DTC proposed to amend the definition to refer to both the DPU and the DTC. No commenters addressed this issue.

b. Analysis and Findings

To reflect the joint oversight and administration of 220 CMR 45.00, the DPU and the DTC amend the definition of "Department" at 220 CMR 45.02 to refer to both the DPU and the DTC.

2. "Commercial Building" and "Utility"

a. Introduction

The DPU and the DTC proposed to amend the definitions of "Commercial Building" and "Utility" contained at 220 CMR 45.02 by deleting the definition of "Commercial Building" in its entirety and deleting the second paragraph of the definition of "Utility" that

applies to commercial and multiple dwelling units. No comments were received on the proposed revisions to these definitions in 220 CMR 45.02.

b. Analysis and Findings

The DPU and the DTC delete the definition of "Commercial Building" in its entirety and delete the second paragraph of the definition of "Utility" that applies to commercial and multiple dwelling units. These deletions are consistent with the SJC's findings in Greater Boston Real Estate Board v. Department of Telecommunications and Energy, 438 Mass. 197 (2002) ("Greater Boston").[4]

3. "Licensee"

a. Introduction

ExteNet[5] urges the Departments to revise the definition of licensee in the pole attachment regulation to ensure that all intrastate telecommunications providers registered in the Commonwealth are treated as eligible licensees under the regulation even if they own utility poles in the Commonwealth.

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4 The SJC held that 220 CMR 45.00 was not properly applicable to passive recipients of utility services. Greater Boston, 438 Mass. at 203.

5 ExteNet is an intrastate telecommunications services provider registered to do business in the Commonwealth (ExteNet Comments at 5).

b. Comments

ExteNet asserts that ambiguity exists for ExteNet and certain utility pole owners under the definitions in the existing regulation for licensee[6] and utility.[7] Specifically, ExteNet maintains that it should be considered a licensee under the regulation but, as a utility pole owner in Massachusetts, may be considered a utility, and thus may leave ExteNet in "legal limbo" (ExteNet Comments at 6). ExteNet points to federal statutory pole attachment language in support of its proposal (ExteNet Comments at 5-6, citing 47 U.S.C. § 224(a)(1), (4) ("Section 224")). As a result, ExteNet urges the Departments to revise the definition of licensee in the regulation to state that the term licensee includes entities registered with the DTC to provide intrastate telecommunications services in Massachusetts regardless of whether the registered entity is otherwise deemed a utility under the regulation (ExteNet Comments at 5-7). Although ExteNet notes differences in the definitions for utility between the federal statute at Section 224 and the Massachusetts regulation at 220 CMR 45.02, it does not propose a revision to that definition. No other commenters addressed this issue.

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6 "Licensee" is defined, in relevant part, as any person, form or corporation other than a utility, which is authorized to construct lines or cables upon, along, under and across the public ways. 220 CMR 45.02.

7 "Utility" is defined as any person, firm, corporation or municipal light plant that owns or contracts or shares ownership or control of poles, ducts, conduits, or rights-of-way 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. 220 CMR 45.02.

c. Analysis and Findings

The Departments decline to revise the definition of licensee for the following reasons. The current definition of licensee in the pole attachment regulation, 220 CMR 45.02, aligns with the statutory definition in G.L. c. 166, § 25A, and, notwithstanding ExteNet's references to federal law, there is no dispute that state law applies to pole attachments in the Commonwealth or to 220 CMR 45.00.[8] Moreover, ExteNet raises a speculative interpretation of the existing definition for licensee, providing no factual support for its assertions, such as examples of complaints filed with the Departments or their predecessors for any denials of access based on an entity's ownership of utility poles. Should such a complaint be presented for our consideration, the DPU and/or the DTC, as appropriate,[9] would investigate and address the matter within the context of a contested case based on a thorough examination of the specific facts involved. Accordingly, we decline to revise the definition of licensee.

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8 Under 47 U.S.C. § 224(b) and (c), the rates, terms, and conditions for pole attachments are subject to regulation by the FCC, except where a state has certified to the FCC that the state regulates such rates, terms, and conditions. Massachusetts has certified to the FCC that it regulates pole attachments. See States That Have Certified That They Regulate Pole Attachments, 35 FCC Rcd. 2784 (March 19, 2020); Letter from Kajal Chattopadhyay, General Counsel, DTC, to Marlene Dortch, Secretary, FCC, WC Docket No. 10-101 (August 25, 2010).

9 Under the MOA, jurisdiction over a complaint, and the applicable procedural regulations, is determined on a case-by-case basis with the appropriate agency to adjudicate a pole attachment complaint determined by the primary purpose of the attachment at issue.

C. "Wireless Providers"

1. Introduction

Verizon urges the Departments to conform the pole attachment regulation with statutory amendments to G.L. c. 166, § 25A, the statute that authorizes the pole attachment regulation, that were adopted in 2006 (Verizon Reply at 4, citing St. 2006, c. 123, §§ 73 and 74; St. 2006, c. 143).

2. Comments

Verizon asks the Departments to amend 220 CMR 45.02 to add the statutory definition of "wireless provider" and to add a reference to "wireless communication" in the existing definition of "attachment" (Verizon Reply at 3). Further, Verizon requests that the Departments revise 220 CMR 45.03 to effectuate the attachment rights granted to wireless providers in the second paragraph of the statute (Verizon Reply at 4). No other commenter addressed this issue.

3. Analysis and Finding

In 2006, G.L. c. 166, § 25A was amended to afford wireless providers pole attachment rights. An Act Relative to Economic Investments in the Commonwealth to Promote Job Creation, Economic Stability, and Competitiveness in the Massachusetts Economy, St. 2006, c. 123, §§ 73 and 75; An Act Relative to Wireless Communication, St. 2006, c. 143. Accordingly, consistent with G.L. c. 166, § 25A, the Departments amend 220 CMR 45.02 to include the definition of "wireless provider" as "any person, firm, or corporation other than a utility, which provides telecommunications service." Additionally,

the Departments amend the regulation to reference "wireless communication" in the definition of "attachment." Finally, the Departments amend a utility's duty to provide access in 220 CMR 45.03(1) to reference wireless providers in accordance with G.L. c. 166, § 25A.

D. 220 CMR 45.04(2)(h): Complaints Involving Access to Commercial and Multiple Dwelling Unit Buildings

1. Introduction

The DPU and the DTC proposed to rescind 220 CMR 45.04(2)(h) concerning complaints received regarding access to commercial and multiple dwelling unit buildings. No comments were received on this matter.

2. Analysis and Findings

The DPU and the DTC rescind 220 CMR 45.04(2)(h) concerning complaints received regarding access to commercial and multiple dwelling unit buildings and revise the designation of the current 220 CMR 45.04(2)(i) due to the proposed rescission of 220 CMR 45.04(2)(h). This rescission is consistent with the SJC's findings in Greater Boston. 438 Mass. at 204.

E. 220 CMR 45.04(2)(d): Complaints Concerning an Unjust or Unreasonable Rate or a Term or Condition that Requires Review of an Associated Rate

1. Introduction

The Departments' regulation, 220 CMR 45.04(2), identifies the materials to be included in support of a complaint filed pursuant to 220 CMR 45.00. For complaints that involve a claim of an unjust or unreasonable rate or that a term or condition requires review

of an associated rate, 220 CMR 45.04(2)(d) identifies specific data and information to be included in the complaint, where applicable and available to the complainant.[10] This includes the requirement that the "[d]ata should be derived from Form M, FERC 1, or other reports filed with state or regulatory agencies." 220 CMR 45.04(2)(d).

In this proceeding, the Departments proposed to delete the reference to Form M, which no longer exists, and to include a reference to "publicly available reports" filed with the Federal Communications Commission ("FCC"), the DPU, the DTC, or the Federal Energy Regulatory Commission ("FERC"). Additionally, the Departments proposed to clarify the reference to "FERC 1" to indicate the "Federal Energy Regulatory Commission's Form No. 1." No comments were received regarding the clarification of FERC 1.

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[10] The regulation identifies the following data and information: (1) the utility's gross pole line investment; (2) utility investment in appurtenances not used by or useful to the licensee; (3) the depreciation expense for the gross pole line investment; (4) the total number of poles (a) owned and (b) controlled or used by the utility; (5) the total number of poles which are the subject of the complaint; (6) the annual carrying charges attributable to the cost of owning a pole, and the specific factors used in the determination of these charges; (7) the average amount of useable space per pole for those poles used for pole attachments; and (8) reimbursements received from the licensee for non-recurring costs. 220 CMR 45.04(2)(d).

2. Comments

a. NECTA

NECTA[11] expresses concern with the Departments' addition of the "publicly available reports" language without also replacing the Form M reference with the type of information that should be filed by telecommunications carriers that own poles (NECTA Comments at 2). NECTA maintains that, pending resolution of D.T.C. 18-3,[12] use of the term "publicly available reports" alone would be too vague and could result in insufficient information being provided by pole owners (NECTA Comments at 2, citing Investigation by the Dep't of Telecomms. & Cable on its own Motion into Accounting Practices & Recordkeeping of Telecomms. Carriers, D.T.C. 18-3, Order Opening Notice of Inquiry (June 25, 2018)). As a result, NECTA proposes that the regulation be amended to replace reference to the Form M with a specific reference to data historically provided by telecommunications carrier pole owners, tabulated pursuant to Part 32 of the Uniform System of Accounts ("USOA") (NECTA Comments at 2). Additionally, NECTA proposes that, if the DTC has not issued a

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11 NECTA is a nonprofit organization and trade association that represents the interests of most cable television and cable-based telecommunications providers in the New England region in legislative and regulatory proceedings.

12 In D.T.C. 18-3, the DTC sought comment on recent changes to the federally-required accounting practices of certain regulated telecommunications carriers, the FCC's abandonment of the Form M, and whether it should require telecommunications carriers to file at the state level all data necessary to calculate pole attachment rates in Massachusetts. See D.T.C. 18-3, Order Opening Notice of Inquiry (June 25, 2018); see also D.T.C. 18-3, Further Request for Comment (October 22, 2019). That docket remains pending.

decision in D.T.C. 18-3 ahead of a final order in the instant docket, then the Departments should replace the reference to Form M with specific reference to the FCC's replacement to the Form M, the Automated Reporting Management Information System ("ARMIS") Report 43-01, Table III, or its equivalent successor, utilizing USOA-based pole and conduit data (NECTA Comments at 2 n.4 & Att.).

b. Attorney General

The Attorney General agrees with NECTA that replacing Form M with "publicly available reports" is vague, because it will not ensure that traditional Part 32 USOA-based information will be publicly available due to the FCC's decision to no longer require that data be filed by regulated telecommunications carriers at the federal level for pole attachments (Attorney General Reply at 3). Moreover, according to the Attorney General, it is unclear whether companies subject to the DTC's jurisdiction are now required to provide Form M-equivalent information to the DTC (Attorney General Reply at 3). Therefore, she urges the Departments to determine whether the traditional USOA-based data is publicly available with the FCC or the DTC before including the "publicly available reports" language (Attorney General Reply at 3-4). To the extent that the Departments determine that Part 32 USOA-based information is not currently publicly filed with any regulatory agency, the Attorney General advises against adoption of the "publicly available reports" language and instead urges the Departments to adopt language that ensures the continued availability of Part 32 USOA data until the DTC resolves the issues raised in D.T.C. 18-3 (Attorney General Reply at 4).

c. Verizon

Verizon argues that the Departments' proposed revision does not address what information must be provided but rather from where that information comes (Verizon Reply at 3). Verizon states that the data that must be provided is specified in subparts 1 through 8 of 220 CMR 45.04(2)(d) and argues that the Departments' proposed revision tightens up the regulation by requiring the information in a complaint be derived from publicly available reports (Verizon Reply at 3). Further, Verizon dismisses as irrelevant NECTA's proposal to insert a reference to the FCC's former Part 32 USOA accounting requirement (Verizon Reply at 3). Verizon claims it demonstrated in D.T.C. 18-3 that the FCC's elimination of the Part 32 USOA-based accounting requirements does not affect the availability of pole cost data and that the DTC can address any such concerns by adopting targeted requirements similar to those adopted by the FCC (Verizon Reply at 3-4).

d. CenturyLink

CenturyLink[13] states that the Departments' proposed amendment improves the pole attachment rules and supports the proposed change insofar as the proposal clarifies the reliance on publicly available financial data for setting just and reasonable pole attachment rates (CenturyLink Comments at 1-2).

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[13] CenturyLink is a registered telecommunications provider in Massachusetts.

3. Analysis and Findings

When 220 CMR 45.00 was originally promulgated in 1984, the Departments' predecessor agency required that complaint data be derived from the FCC's Form M for large telephone companies, such as Verizon's predecessor, New England Telephone and Telegraph Company ("NET"), and the FERC Form 1 submitted by EDCs, "or other reports filed with state or regulatory agencies." See 220 CMR 45.04(2)(3); Cable Television Rulemaking, D.P.U. 930, at 4 (1984); A-R Cable Servs. et al. v. Mass. Elec. Co., D.T.E. 98-52, at 7 (1998) ("A-R Cable"); Greater Media et al. v. New England Telephone & Telegraph Co., D.P.U. 91-218, at 33-34 & n.11, n.22 (1992) ("Greater Media").[14] At the time, the reporting requirements in Massachusetts for municipal lighting plants ("MLPs"), EDCs, and telephone providers[15] like NET had long been USOA-based, consistent with financial reporting requirements at the federal level for the EDCs and NET.

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[14] Verizon remains subject to the pricing requirements for poles and conduits established in Greater Media pursuant to Verizon's approved Alternative Regulation Plan ("AltReg Plan") until otherwise ordered. Appropriate Regulatory Plan to Succeed Price Cap Regulation for Verizon New England, D.T.E. 01-31-Phase II, Verizon AltReg Plan at 3, ¶ M (approved June 6, 2003).

[15] Historically, similar to electric service provided by MLPs and EDCs, traditional telephone companies were the sole utility providers of landline telephone service in their service territories. These historic monopoly landline providers are a type of telecommunications carrier now known as incumbent local exchange carriers. Two types of incumbent local exchange carriers exist under federal law: price cap incumbent local exchange carriers like Verizon, and rural, rate-of-return incumbent local exchange carriers. In Massachusetts, Verizon is the incumbent local exchange carrier in all but a handful of towns. See DTC FY2019 Annual Report at 5 (November 2019).

See, e.g., G.L. c. 159, §§ 31, 32; G.L. c. 164, §§ 61, 81, 83; 220 CMR 79.00; 220 CMR 51.01(1); Harbor Elec. Energy Co., D.P.U. 17-136, at 54 (2018) (discussing historic accounting requirements for EDCs); Municipal Light Dep't Reporting Requirements, D.T.E./D.P.U. 06-29, Advisory Opinion at 4, 16-18 (2007) (discussing historic accounting and annual return reporting requirements for MLPs); Accounting Requirements & Annual Returns, D.P.U. 4940, Order (April 24, 1947) (discussing NET and other telephone companies' accounting and annual returns reporting requirements). Moreover, the Departments' predecessor declined to include a specific rate formula within the regulation, determining that multiple methods of determining the "proportional capital and operating expenses of the utility" under G.L. c. 166, § 25A may be possible. D.P.U. 930, at 14. In 1993, the FCC discontinued use of the Form M, and replaced it with ARMIS-based USOA reporting. See In re Revision of ARMIS USOA Report (FCC Report 43-02) for Tier 1 Telephone Companies and Annual Report Form M, 8 FCC Rcd. 2535 (1993); In re Implementation of the Telecommunications Act of 1996: Reform of Filing Requirements and Carrier Classifications, 12 FCC Rcd. 8071, 8075 (1997).

In 1998, to ensure consistency with the earlier decision in Greater Media involving NET's conduit rates, the DTE established the current Massachusetts Formula, which attachers and pole- and conduit-owners continue to rely upon in calculating pole attachment and conduit rates in the Commonwealth. A-R Cable at 7-8; Cablevision of Boston Co. et al. v. Boston Edison Co., D.P.U./D.T.E. 97-82 (1998) at 15-19 ("Cablevision"). In adopting the Massachusetts Formula, the agency's goal was to simplify pole attachment rates as much

as possible by adopting standards that relied upon publicly available data, namely, FERC 1 submitted by EDCs, Form M submitted by NET, and annual returns filed with the DPU by other utilities, thus limiting the need for agency intervention. A-R Cable at 7; Cablevision at 19; Greater Media at 13, 33-34, 40-41. At the time, these submissions continued to rely on USOA-based data.

Since that time, the data used to calculate rates under the Massachusetts Formula has been publicly available through annual returns submitted by MLPs and EDCs to the DPU, and by incumbent local exchange carriers ("ILECs"), like Verizon,[16] through ARMIS filings in place of the Form M to the FCC. See, e.g., Accounting Practices and Recordkeeping of Telecommunications Carriers, D.T.C. 18-3, Further Request for Comment at 1-2 (October 22, 2019); Comcast v. Peabody Municipal Light Plant, D.T.C. 14-2, Phase I Order at 10-13 (2014). To date, MLPs and EDCs remain subject to USOA-based annual return reporting requirements with the DPU. See supra at 15-16. However, in 2008, the FCC eliminated the requirement for certain price cap ILECs, like Verizon, to report pole attachment and conduit data with the FCC for those states that asserted jurisdiction over pole and conduit regulation; and in 2017, the FCC eliminated mandatory USOA-based accounting for purposes of calculating pole attachment rates for all price cap ILECs. In re Comprehensive Review of the Part 32 Unif. Sys. of Accounts,

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16 Prior to the Accounting Order, ILECs were the telecommunications carriers historically subject to Part 32 USOA accounting and reporting requirements. See Accounting Order at 1738-1740 (citations omitted).

32 FCC Rcd. 1735, 1745-1747 (2017) ("Accounting Order"); Qwest ARMIS Forbearance Order, 23 FCC Rcd. 18,483, 18,490-18,491 (2008) ("Qwest Forbearance"). Verizon has voluntarily continued to file its Massachusetts data with the FCC since that time. See Accounting Practices and Recordkeeping of Telecommunications Carriers, D.T.C. 18-3, Further Request for Comment at 1-2 (October 22, 2019). With this historic framework in mind, we now turn to our findings involving revisions to 220 CMR 45.04.

Verizon supports the Departments' proposal to include "publicly available reports" in 220 CMR 45.04(2)(d), but other commenters oppose this language given the DTC's open inquiry in D.T.C. 18-3. These commenters instead seek language that will ensure, at least until the DTC's resolution of D.T.C. 18-3, continued access to the Part 32 USOA-based data previously available in Form M and, subsequently, the ARMIS reports filed with the FCC. After review and consideration, the DPU and the DTC delete the reference to Form M in 220 CMR 45.04(2)(d) because that form no longer exists. Moreover, we amend the regulation to refer to publicly available reports filed with the FCC, FERC, the DTC, or the DPU, clarifying that this requirement already exists under the Massachusetts Formula. A-R Cable at 7; Cablevision at 19; Greater Media at 13, 33-34, 40-41. Further, we decline to replace the reference to Form M with the ARMIS Report 43-01, Table III, as Verizon is no longer required to submit Massachusetts-specific pole and conduit data with the FCC. Qwest Forbearance, 23 FCC Rcd. at 18490-18491.

We are not persuaded that there is a need to specify the accounting method for pole data in the regulation in order to enforce the Massachusetts pole attachment rules. Similar to

our decision in D.P.U. 930 to exclude a specific formula in the regulation, we decline to identify a specific accounting method in the regulation as multiple source inputs may be possible for calculating just and reasonable pole and conduit rates in the Commonwealth. Accordingly, we determine that adoption of the reference to publicly available reports is consistent with the longstanding case precedent in Massachusetts and the Departments' oversight responsibilities over the terms, conditions, and rates for pole, duct, and conduit attachments.

Although the former regulation specifically identified Form M along with "other reports filed with state or federal agencies," the regulation contemplates that necessary data may not be accessible by a complainant by the inclusion of the phrase "if applicable and available to the complainant." 220 CMR 45.04(2)(d). Complainants, however, must be provided upon request with the calculations used to generate the data. 220 CMR 45.04(2)(d). Therefore, the absence in the regulation of an explicit reference to specific data does not preclude access to that data if needed to resolve a complaint filed pursuant to 220 CMR 45.04(2)(d).

Further, the last sentence of 220 CMR 45.04(2)(d) states that "[c]alculations made in connection with these figures should be provided to the complainant upon request, as should the computation of any rate determined by using the formula specified above." However, the regulation does not include a formula to calculate rates, as noted above. Therefore, the Departments amend the language to state "[c]alculations made in connection with these figures should be provided to the complainant upon request, as should the computation of any

rate determined by using the formula adopted for calculating reasonable attachments rates in Massachusetts." We determine that this revision encapsulates the current Massachusetts Formula, as well as any revisions to the requirements under that formula that the Departments may implement in the future.

Finally, the Departments amend the reference to "FERC 1" to indicate "Federal Energy Regulatory Commission's Form No. 1." This amendment more clearly identifies the specific document referenced and filed by EDCs with their annual returns to the DPU. As noted above, no commenters addressed this matter.

In sum, we conclude that a specific reference to particular accounting methods in the regulation is unnecessary, eliminate reference to the outdated Form M, update the FERC 1 reference, and adopt in the final regulation a requirement that data must be derived from publicly available reports filed with the FCC, the FERC, the DTC, or the DPU.

F. Additional Proposed Amendments to 220 CMR 45.00

1. Introduction

Some commenters urge the Departments to consider three additional amendments to the attachment complaint and enforcement regulation. First, ExteNet and CenturyLink urge adoption of the FCC's one touch make-ready[17] requirements for pole attachments governed

[17] "Make-ready" generally refers to the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the pole. Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, 33 FCC Rcd. 7705, 7706 (2018). Under the FCC's one touch make-ready rules, a new attacher may opt to perform all work to prepare a pole for new wireline attachments in the communications space on a pole, rather than wait for existing attachers to perform the work. Accelerating Wireline Broadband

by federal law. See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, 33 FCC Rcd. 7705 (2018) ("Accelerating Wireline Broadband Deployment") (subsequent history omitted). Second, ExteNet and CenturyLink ask the Departments to adopt the FCC's formula for calculating pole attachment rates. Finally, CenturyLink asks the Departments to consider incorporating the recommendations of the Broadband Deployment Advisory Committee ("BDAC").

Several commenters objected to the additional proposals on both substantive and procedural grounds. Below, we clarify the scope of this proceeding and address the proposed amendments.

2. Comments

a. ExteNet

ExteNet notes that the Departments' Order Instituting Rulemaking specifically indicates that the DPU and the DTC would consider other relevant corrections and changes to 220 CMR 45.00 as determined during these proceedings (ExteNet Reply at 2). ExteNet states that it emphasized issues that it believes are clearly identified needs for governmental intervention that are best addressed by the Departments in 220 CMR 45.00, including adoption of the FCC's one touch make-ready rules and the FCC's rate formula for pole

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Deployment by Removing Barriers to Infrastructure Investment, 33 FCC Rcd. 7705, 7706 (2018). In states where the FCC regulates pole attachments, the FCC's make-ready rules went into effect on May 20, 2019. Wireline Competition Bureau Announces Effective Date of Order Instituting "One-Touch-Make-Ready" Regime for Pole Attachments, 34 FCC Rcd. 3657 (2019).

attachments (ExteNet Reply at 2). ExteNet argues that while Massachusetts's pole attachment regulation provides for complaint and enforcement procedures, it does not establish any rates, terms, or conditions (ExteNet Reply at 2-4). ExteNet maintains that the FCC's rules were adopted based on a deliberative process and argues that there is no reason to reinvent the rules, regulations, and formulas developed on a national basis (ExteNet Reply at 4-5).

Turning to make-ready work, ExteNet notes that each Massachusetts utility company has its own procedures, rules, conditions, and timelines (ExteNet Comments at 9). ExteNet argues that because there is nothing in the Massachusetts regulations to standardize the make-ready work process for attachment of new facilities to utility poles, the burden in a complaint is on the licensee to prove why any delay or requirement is unreasonable (ExteNet Comments at 9). ExteNet maintains that a predictable and uniform timeline and procedures will assist telecommunications providers to plan and budget for expansion of wireless and broadband offerings throughout the Commonwealth (ExteNet Reply at 5). To help standardize the attachment of new facilities to utility poles and ensure that the attachment is done in an efficient and orderly manner, ExteNet urges the Departments to incorporate by reference the FCC's one touch make-ready rules established in 47 CFR 1.1411, 47 CFR 1.1412, and 47 CFR 1.1415, inclusive of future amendments, that govern timelines for processing applications, conducting surveys, completing make-ready work, and conducting inspections (ExteNet Comments at 9-10; ExteNet Reply at 5-6).

Additionally, ExteNet maintains that 220 CMR 45.00 places the burden on licensees complaining of unjust and unreasonable rates and, given the absence of a specific pole attachment rate formula in 220 CMR 45.00, questions whether Massachusetts has effective rules and regulations to implement the Commonwealth's regulatory authority over pole attachments (ExteNet Comments at 7-8, citing 220 CMR 45.07 and 45.10; ExteNet Reply at 3-4). ExteNet therefore recommends that the Departments ensure just and reasonable pole attachment rates and nondiscriminatory access by adopting the FCC's pole attachment rate formulas and conditions. Specifically, ExteNet proposes language that states rates for attachments to poles shall be considered prima facie just and reasonable if they comply with the formulas and conditions set forth by the FCC in 47 CFR 1.1406, inclusive of future amendments to these federal regulations (ExteNet Comments at 8; ExteNet Reply at 5).

b. CenturyLink

CenturyLink maintains that the pole attachment regulation lacks standards, specific rate methodology, and terms and conditions governing the attachment process (CenturyLink Reply at 2). CenturyLink therefore urges the Departments to codify processes, timelines, and procedures designed to accelerate broadband deployment and reduce delays in network construction (CenturyLink Comments at 2; CenturyLink Reply at 5). CenturyLink maintains that the FCC's rules include additional tools and processes for pole owners and attachers to streamline the attachment process that would relieve pole owners from some burdens associated with the process (CenturyLink Comments at 2). CenturyLink therefore urges adoption of the FCC's one touch make-ready process adopted in the Accelerating Wireline

Broadband Deployment, including the FCC's timelines for access to utility poles in 47 CFR 1.1411, the FCC's use of contractors for survey and make-ready work in 47 CFR 1.1412, and the FCC's overlashing definition[18] and process in 47 CFR 1.1415 (CenturyLink Comments at 3-4). CenturyLink also urges the Departments to incorporate the FCC's rate formula set forth in 47 CFR 1.1406 by defining "formula" in 220 CMR 45.04(2)(d) as the FCC rate formula (CenturyLink Comments at 4; CenturyLink Reply at 5). Last, CenturyLink states that the BDAC's Competitive Access to Broadband Infrastructure Working Group's proposals warrant review and inclusion in 220 CMR 45.00, including proposals by the BDAC's Competitive Access to Broadband Infrastructure Working Group to establish a shot clock to resolve pole attachment complaints, streamline make-ready workflow and contractor management, define complete attachment applications, establish joint field surveys, improve self-help remedies for requesting attachers, and ensure disclosure of electric cooperative pole attachment rates (CenturyLink Comments at 4). According to CenturyLink, the present proceeding is an ideal opportunity to align the Massachusetts pole

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[18] The FCC has defined "overlashing" as the practice whereby an attacher physically ties additional wiring to other wiring already attached to the pole. In re Amendment of Commission's Rules and Policies Governing Pole Attachments et al., 16 FCC Rcd. 12,103, 12,129 n.178 (2001); In re Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments, 13 FCC Rcd. 6777, ¶ 59 (1998), aff'd sub nom National Cable & Telecommunications Assn., Inc. v. Gulf Power Co., 534 U.S. 327 (2002).

attachment rules with those of the FCC and to incorporate the BDAC working group's recommendations (CenturyLink Comments at 3; CenturyLink Reply at 4).

CenturyLink argues that incorporation of the FCC's rules is within the scope of the present proceeding and consistent with the Commonwealth's legal obligations as a reverse preemption state (CenturyLink Comments at 2; CenturyLink Reply at 2). CenturyLink points to other reverse preemption states, including New Hampshire, Maine, Connecticut, Vermont, and New York, that have undertaken efforts to update their rules and have incorporated make-ready timelines, explicit rate formulas, and additional self-help remedies that refer to, mirror, or incorporate the FCC's rules (CenturyLink Reply at 3-4).

c. Verizon

Verizon agrees with ExteNet and CenturyLink that the Departments should adopt in Massachusetts the FCC's one touch make-ready rules, including rules governing the timeline for access to utility poles, use of contractors, and overlashing set forth in 47 CFR 1.1411, 1.1412, and 1.1415, and does not object to adoption of the FCC's pole attachment rate formula (Verizon Reply at 1-2). Verizon notes that the Massachusetts rate formula is found in case law (Verizon Reply at 2, citing Cablevision and A-R Cable). Verizon states that the Massachusetts Formula is very similar to the FCC's formula such that adoption of the FCC formula will not cause an appreciable change in practice or rates (Verizon Reply at 2, citing Cablevision at 18). Further, Verizon argues that adoption of the FCC formula will promote uniformity and ease of use consistent with the Departments' predecessor's intent "to have a simple, predictable, and expeditious procedure that will allow parties to calculate pole

attachment rates without the need for Department intervention" (Verizon Reply at 2, citing A-R Cable at 7).

Turning to CenturyLink's request regarding the BDAC working group's proposals, Verizon maintains that CenturyLink fails to specify which BDAC proposals it is referencing, and states that the FCC adopted most of the BDAC's proposals in the categories CenturyLink identified (Verizon Reply at 2-3). Verizon therefore urges the Departments to decline CenturyLink's request (Verizon Reply at 3).

d. Attorney General

The Attorney General argues that ExteNet's and CenturyLink's requested changes seek to overhaul the scheme of pole attachment rate calculation and dispute resolution currently in effect in Massachusetts and lie outside the scope of the proceeding as described in the Order Instituting Rulemaking (Attorney General Reply at 1). The Attorney General maintains that the Order Instituting Rulemaking does not provide sufficient notice to stakeholders that the Departments may consider changes to the dispute resolution procedures or rate formula (Attorney General Reply at 2). To the extent that the Departments find CenturyLink's and ExteNet's proposals worthy of consideration, the Attorney General recommends opening a separate docket and providing clear notice that implementation of the FCC's one touch make-ready rules and the FCC's rate formula are being considered, or at a minimum, that this proceeding be re-noticed with additional opportunity for comment and a new public hearing (Attorney General Reply Comments at 2).

e. MEAM

MEAM[19] argues that the scope of the Departments' proposed amendments to 220 CMR 45.00 was narrowly limited to "rescind regulations deemed invalid by the Supreme Judicial Court ("SJC"), to update applicable references, and to correct spelling errors" (MEAM Reply at 1). MEAM contends that ExteNet's and CenturyLink's proposals seek to expand the scope of the present proceeding to include, among other things, adopting pole attachment rates and terms aligned with FCC regulations and the FCC's one touch make-ready rules (MEAM Reply at 1). MEAM maintains that consideration of the proposals ExteNet and CenturyLink raised would require a separate rulemaking with a separate public notice of proposed amendments, or a notice of inquiry to gather information before issuing any proposed substantive amendments (MEAM Reply at 1). MEAM therefore urges the Departments to limit the scope of this rulemaking to the technical amendments that the Departments proposed (MEAM Reply at 1).

f. CTIA

CTIA[20] supports adoption of a uniform national regulatory framework governing rates, terms, and conditions for wireless pole attachments to help facilitate deployment of advanced wireless technology and to ensure deployment decisions are not driven by "artificial regulatory constructs" (CTIA Reply at 1-2). CTIA urges the Departments to amend their

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19 MEAM is a statewide association formed in 1953 and includes all 40 municipally-owned electric utilities in the Commonwealth.

20 CTIA is a trade association that represents the U.S. wireless communications industry.

rules to mirror, or match as closely as practicable, the FCC's attachment rules (CTIA Reply at 1).

g. EDCs

First, the EDCs assert that the proposals to incorporate the FCC's regulations or the BDAC's recommendations are beyond the intended scope of this proceeding (EDC Reply at 3-4). The EDCs argue that the Departments issued this rulemaking in response to Executive Order No. 562, which is intended to reduce unnecessary regulatory burdens (EDC Reply at 3). According to the EDCs, CenturyLink's and ExteNet's proposals do not assist the Departments in streamlining the regulation (EDC Reply at 4). Rather, the EDCs state, CenturyLink and ExteNet are attempting to expand the scope of this rulemaking into one in which significant policy changes will be made based on limited information (EDC Reply at 4). The EDCs urge against making policy changes affecting pole attachments in a proceeding that was designed for a limited purpose (EDC Reply at 4).

Additionally, the EDCs assert that ExteNet's and CenturyLink's recommendations undermine the Departments' regulatory autonomy, contravene the reverse preemption provisions of the federal Pole Attachment Act, 47 U.S.C. § 224(c), and would reverse the policy adopted in 1978 by the Massachusetts Legislature to regulate pole attachments in the Commonwealth (EDC Reply at 4-6). The EDCs note that the federal Pole Attachment Act was not intended to preempt state regulation and that Massachusetts has explicitly opted out of FCC regulation for pole attachments (EDC Reply at 5).

Specifically, the EDCs state that the Legislature in 1978 authorized the Departments' predecessor to regulate pole attachments and that the Departments' predecessor subsequently promulgated in 220 CMR 45.00 the rules for rates, terms, and conditions for pole attachments (EDC Reply at 5, citing G.L. c. 166, § 25A). The EDCs maintain that by opting out, Massachusetts policymakers decided that state regulators, rather than federal regulators, were in the best position to decide what pole attachment regulations should apply in the Commonwealth (EDC Reply at 5). The EDCs contend that although the Departments have acknowledged it may be helpful to consider how the FCC addresses issues raised, the Departments have determined they are not bound by the FCC's interpretations and are free to depart from federal approaches when justified on state policy grounds (EDC Reply at 5-6, citing A-R Cable at 8; Cablevision at 18).

In this proceeding, the EDCs argue that ExteNet and CenturyLink seek to implicitly reverse the decision made by the Massachusetts Legislature and the Departments to opt out of FCC regulation and to subject the DPU and DTC to current and future federal changes that contradict Massachusetts precedent (EDC Reply at 6, citing Cablevision at 18). Further, if the DPU or DTC disagreed with a future FCC revision to the pole attachment regulations, the EDCs observe that the Departments' recourse would be to institute a rulemaking to change its regulation (EDC Reply at 6). Because incorporating or adopting the FCC's regulations in 220 CMR 45.00 would reduce the Departments' autonomy, the EDCs urge the Departments to reject ExteNet's and CenturyLink's recommendations (EDC Reply at 6, 8).

The EDCs question the suitability in Massachusetts of the FCC's pole attachment regulations and the BDAC's recommendations; and they raise public safety concerns with incorporation of these regulations or recommendations into 220 CMR 45.00 (EDC Reply at 6-8). The EDCs state that the FCC's pole attachment regulations and the BDAC's recommendations seek to accelerate broadband deployment (EDC Reply at 6). But, the EDCs argue, broadband technologies are widely available in Massachusetts, and thus, incorporation of the FCC's pole attachment regulations and the BDAC's recommendations into 220 CMR 45.00 is not best suited to Massachusetts conditions (EDCs Reply at 6-7).

Finally, the EDCs state that the FCC pole attachment regulations impose fixed schedules on pole owners and allow companies seeking new pole attachments to engage in self-help, with the BDAC's recommendations in some cases going further than the FCC regarding the types of self-help by attachers that would be permitted (EDC Reply at 7). However, the EDCs contend that the FCC regulations and the BDAC's recommendations do not require workers performing pole attachment work to have the same level of expertise as electric utility employees and, thus, the EDCs claim that allowing attachers to engage in self-help increases the risk to public safety and electric reliability (EDC Reply at 7). Further, the EDCs argue that imposing strict deadlines on electric utility pole owners could negatively affect public safety and electric reliability (EDC Reply at 7). For example, the EDCs maintain that during outage events, public safety and service restoration is paramount and inflexible pole attachment deadlines would be contrary to safety and restoration priorities (EDC Reply at 7).

In sum, the EDCs maintain that adoption or incorporation of the FCC's regulations on pole attachments or the BDAC's recommendations are beyond the scope of this proceeding; will reduce the Departments' regulatory autonomy; and will negatively impact public safety and reliability of electric service. The EDCs therefore oppose CenturyLink's and ExteNet's proposals to incorporate various provisions of the FCC's regulations on pole attachments or of the BDAC's recommendations (EDC Reply at 1, 8-9).

3. Analysis and Findings

We first address the argument that commenters' proposals for incorporation into 220 CMR 45.00 of the FCC's make-ready rules, the FCC's pole attachment rate formula, and the BDAC's recommendations are beyond the scope of this proceeding. Although the impetus for instituting this rulemaking was Executive Order No. 562, our Order Instituting Rulemaking did allow for other relevant changes to be considered in this proceeding. But, after review and consideration, we decline to adopt or incorporate the federal pole attachment rules, federal pole attachment rate formula, or the BDAC's recommendations for the following reasons.

The Departments have certified to the FCC that we regulate pole attachments in Massachusetts and, as such, there is no need to align the state pole attachment requirements with federal rules. At this time, the Departments do not agree that there is a need to abandon Massachusetts' autonomy to regulate pole attachments, and therefore, the

Departments will not adopt CenturyLink's and ExteNet's proposal to adopt the federal pole attachment rules.[21]

Turning to the proposals for adoption of the FCC's attachment rate formula, as noted above, the formula to calculate attachment rates in Massachusetts was established in Cablevision, A-R Cable, and Greater Media. Although the Massachusetts Formula is substantially similar to the federal rate formula, we will not obstruct our ability to depart from the federal formula when state grounds require us to do so. Moreover, the agency specifically declined to codify a rate formula when it enacted the regulation. D.P.U. 930, at 15. Further, we agree with the EDCs that incorporation of the federal rate formula would relinquish certain regulatory autonomy the Massachusetts Legislature has specifically provided the Departments. See G.L. c. 166, § 25A. It would be inappropriate to allow potential future changes made by the FCC to dictate and modify the rules in Massachusetts. Cablevision at 18 (finding that proposed or future changes to the federal formula are neither

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[21] The Departments note that although the FCC's new pole attachment access rules, including the one touch make-ready requirements, went into effect on May 20, 2019, there are a number of outstanding requests for clarification and further findings by the FCC. See, e.g., In re Accelerating Wireline Broadband Deployment by Removing Barrier to Infrastructure Investment, WC Docket 17-84, 2020 WL 4428179 (F.C.C.), n. 13 (July 29, 2020); Wireline Competition Bureau Seeks Comment on a Petition for Decl. Ruling Filed by NCTA – The Internet & Television Ass'n, WC Docket 17-84, 2020 WL 4196757 (F.C.C.) (July 20, 2020); In re Accelerating Wireline Broadband Deployment by Removing Barrier to Infrastructure Investment, WC Docket 17-84, 2021 WL 228019 (F.C.C.), ¶¶ 2, 9 (January 19, 2021).

controlling nor persuasive for purposes of setting pole attachment rates). Accordingly, consistent with our findings above, we decline to adopt the FCC's rate formula.

Last, CenturyLink generally identifies six BDAC working group recommendations and asks the Departments to consider adoption of these recommendations into the Massachusetts pole attachment regulation. We decline to do so. The suitability of adoption of any one of the recommendations in Massachusetts has not been determined and we would need to thoroughly investigate the potential impacts that any of these recommendations could have on public safety and electric reliability in Massachusetts prior to considering adoption of any of the recommendations.

IV. ADOPTION OF FINAL REGULATION

For the reasons stated above, the Departments, by this Order, adopt the attached Final Regulation 220 CMR 45.00, Pole Attachment, Duct, Conduit and Right-of-Way Complaint and Enforcement Procedures.

The Departments will submit a standard Regulation Filing Form and the regulation, 220 CMR 45.00, to the Office of the Secretary of the Commonwealth, State Publications and Regulations Division. This regulation is effective upon publication in the Massachusetts Register.

By Order of the Department of Telecommunications and Cable,

Karen Charles Peterson, Commissioner

By Order of the Department of Public Utilities,

Matthew H. Nelson, Chair

Robert E. Hayden, Commissioner

Cecile M. Fraser, Commissioner

220 CMR: DEPARTMENT OF PUBLIC UTILITIES

220 CMR 45.00: POLE ATTACHMENT, DUCT, CONDUIT AND RIGHT-OF-WAY COMPLAINT AND ENFORCEMENT PROCEDURES

Section

45.01: Purpose and Applicability

220 CMR 45.00 effects legislative policy in favor of competition and consumer choice in telecommunications by providing for complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to poles, ducts, conduits, and rights-of-ways owned or controlled, in whole or in part, by one or more utilities with rates, terms and conditions that are just and reasonable. The general procedural rules set forth at 207 CMR 1.00: *Procedural Rules* and 220 CMR 1.00: *Procedural Rules* are also applicable except to the extent that they are inconsistent with 220 CMR 45.00.

45.02: Definitions

As used in 220 CMR 45.00, except as otherwise required by the context

Attachment. Any wire or cable for transmission of intelligence by telegraph, wireless communication, telephone or television, including cable television, or for the transmission of electricity for light, heat, or power and any related device, apparatus, appliance or equipment installed upon any pole or in any telegraph or telephone duct or conduit owned or controlled, in whole or in part, by one or more utilities. "Duct" and "conduit" is not limited to "telegraph" or "telephone" ducts and conduits.

~~"Duct" and "conduit" is not limited to "telegraph" or "telephone" ducts and conduits.~~

Complainant. A licensee or a utility who files a complaint.

220 CMR: DEPARTMENT OF PUBLIC UTILITIES

Complaint. A filing by either a licensee or a utility alleging that it has been denied access to a pole, duct, conduit, or rights-of-way owned or controlled, in whole or in part, by one or more utilities in violation of 220 CMR 45.00, and/or alleging that a rate, term or condition for an attachment is not just and reasonable. A complaint shall constitute an initial pleading within the meaning of 207 CMR 1.04(1) and 220 CMR 1.04(1).

Department. The Department of Public Utilities and/or Department of Telecommunications and Cable.

Licensee. Any person, firm or corporation other than a utility, which is authorized to construct lines or cables upon, along, under and across the public ways. For the purposes of 220 CMR 45.02: Licensee, the term shall also include a municipal lighting plant or cooperative that operates a telecommunications system outside the limits of its service territory pursuant to M.G.L. c. 164, § 47E, but only for those attachments that are outside its service territory.

Respondent. A licensee or a utility against whom a complaint has been filed.

Usable Space. The total space which would be available for attachments, without regard to attachments previously made,

(a) 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

(b) within any telegraph or telephone duct or conduit.

Utility. Any person, firm, corporation or municipal lighting plant that owns or controls or shares ownership or control of poles, ducts, conduits or rights-of-way 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.

Wireless Provider. Any person, firm or corporation other than a utility, which provides telecommunications service.

45.03: Duty to Provide Access; Modifications; Notice of Removal, Increase or Modification; and Petition for Interim Relief

(1) In accordance with M.G.L. c. 166, § 25A, ~~A~~a utility shall provide a licensee and a wireless provider with nondiscriminatory access to any pole, duct, conduit, or right-of-way used or useful, in whole or in part, ~~for the purposes described in M.G.L. c. 166, § 25A,~~ owned or controlled by it. Notwithstanding this obligation, a utility may deny a licensee or a wireless provider access to its poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis for valid reasons of insufficient capacity, reasons of safety, reliability, generally applicable engineering standards, or for good cause shown. Any exclusive contract between a utility and

a licensee entered into or extended after ~~the Department's adoption of 220 CMR 45.00~~ August 18, 2000 concerning access to any pole, duct, conduit, or right-of-way, owned or controlled, in whole or in part, by such utility shall be presumptively invalid insofar as its exclusivity provisions are concerned, unless shown to be in the public interest.

(2) Requests for access to a utility's poles, ducts, conduits, rights-of-way owned or controlled, in whole or in part, by one or more utilities must be in an adequately descriptive writing directed to an appropriate named recipient designated by the utility. A utility is required to make such a designation. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant information supporting its denial, and shall explain how such information relates to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

(3) (a) A utility shall provide a licensee no less than 60 days' written notice prior to:
1. removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the licensee's attachment agreement;
2. any change in attachment rates, terms or conditions; or
3. any modification of facilities other than routine maintenance or modification in response to emergencies;

(b) any licensee that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or rights-of-way accessible;

(c) any licensee that obtains an attachment to a pole, duct, conduit, or right-of-way shall not be required later to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity, including the owner of such pole, duct, conduit, or rights-of-way;

(d) Exceptions: A utility may provide to a licensee less than 60 days' written notice of removal, change or modification if such removal, change or modification of facilities or telecommunications equipment is due to routine maintenance or an emergency.

(e) when a utility provides a licensee with less than 60 days' written notice pursuant to 220 CMR 45.03(3), such utility shall endeavor to provide its licensee with as much notice as is practicable in the particular circumstances.

(4) In conjunction with the complaint procedure outlined ~~herein~~in 220 CMR 45.04 – 45.09, a licensee may file with the Department a "Petition for Interim Relief" of the action proposed in a notice received pursuant to 220 CMR 45.03(3)(a) within 15 days of receipt of such notice. Such submission will not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of the licensee's service to its customers, a copy of the notice, and certification of service as required by 207 CMR 1.00: *Procedural Rules* and 220 CMR 1.00: *Procedural Rules*. The named respondent may file an answer within seven days of the date on which the Petition for Interim Relief was filed. No further filings with respect to this petition will be considered unless requested or authorized by the Department and no extensions of time will be granted with respect to this petition unless allowed pursuant to 207 CMR 1.02(5) and 220 CMR 1.02(5).

45.04: Complaint

(1) A complaint will commence a proceeding under 220 CMR 45.00. Complainants may join together to file a joint complaint.

(2) Every complaint shall conform to the requirements specified in 207 CMR 1.04(1)(b) and 220 CMR 1.04(1)(b) and shall be accompanied by certification of service on any utility, licensee, or party named as complainant or respondent. The complaint shall also contain the following:

(a) a copy of the attachment agreement, if any, between the licensee and the utility. If no attachment agreement exists, the petition shall contain:

1. a statement that the utility uses or controls, in whole or in part, those poles, ducts, conduits, or rights-of-way at issue which are used or designated for attachments;
2. a statement that the licensee currently has attachments on the utility's poles, ducts, conduits, or rights-of-way or has requested that attachments be placed on the utility's poles, ducts, conduits, or rights-of-way;

(b) the specific attachment rate, term or condition which is claimed to be unjust or unreasonable;

(c) in any case where it is claimed that a term or condition is unjust or unreasonable, the complaint shall specify all information and argument relied upon to justify said claim;

(d) in any case where it is claimed that a rate is unjust or unreasonable, or that a term or condition requires review of the associated rate, the data, information and argument in support of said claim shall include, but not be limited to, the following, where applicable and available to the complainant:

1. the gross investment by the utility for the pole lines;
2. the investment by the utility in appurtenances not used by or useful to the licensee. This may be expressed as a percentage of the gross pole investment, and shall include a list of specific appurtenances considered not used or useful;
3. the depreciation reserve for the gross pole line investment;
4. the total number of poles (A) owned; and (B) controlled or used by the utility;
5. the total number of poles which are the subject of the complaint;
6. the annual carrying charges attributable to the cost of owning a pole, and the specific factors used in the determination of these charges. Annual carrying charges may be expressed as a percentage of net pole investment;
7. the average amount of useable space per pole for those poles used for pole attachments; and
8. the reimbursements received from the licensee for non-recurring costs.

Data and information should be based on historical or original cost methodology, to the extent possible. Data should be derived from publicly available reports filed with the Department of Telecommunications and Cable, the Department of Public Utilities, the Federal Communications Commission, the Federal Energy Regulatory Commission, such as the Federal Energy Regulatory Commission's Form No. 1, or other reports filed with state or regulatory agencies. The source of any data shall be identified. Calculations made in connection with these figures should be provided to the complainant upon request, as should the computation of any rate determined by using the formula ~~specified above~~ adopted for calculating reasonable attachments rates in Massachusetts;

(e) In addition to meeting the other requirements of 220 CMR 45.04, in any case where it is claimed that a complainant has been improperly denied access to a pole, duct, conduit, right-of-way, owned or controlled, in whole or in part, by one or more utilities, the complaint shall include the data and information necessary to support the claim, including:

1. The reasons given for the denial of access to the poles, ducts, conduits, and rights-of-way, owned or controlled, in whole or in part, by one or more utilities;
2. The basis for the complainant's claim that the denial of access is improper;
3. The remedy sought by the complainant;
4. A copy of the written request to the utility for access to its poles, ducts, conduits or rights-of-way; and
5. A copy of the utility's response to the complainant's written

request, including all information given by the utility to support its denial of access. A complaint alleging improper denial of access will not be dismissed if the complainant is unable to obtain a utility's written response;

(f) a statement that the utility and licensee have been unable to agree and a brief summary, including dates, of all steps taken to resolve the problem prior to filing. If no such steps were taken, the complainant shall state the reason(s) why;

(g) any other information and arguments relied upon to attempt to establish that a rate, term or condition is not reasonable; and

(h) a statement that the complainant requests that a hearing be convened pursuant to 207 CMR 1.06: *Hearings* and 220 CMR 1.06: *Hearings* or that it waives its right to a formal hearing.

(3) Where the attachments involve ducts, conduits or rights-of-ways, appropriate data and information, equivalent to that required by 220 CMR 45.04(2), shall be filed.

(4) All factual allegations set forth in the complaint shall be supported by affidavit(s).

45.05: Response

(1) The response to a complaint under 220 CMR 45.00 shall be filed within 14 days after service of the document to which the response is directed.

(2) The response shall specifically address all contentions made by the complainant. All factual statements shall be supported by affidavit(s).

(3) The response shall include a statement either that the respondent requests that a hearing be convened pursuant to 207 CMR 1.06: *Hearings* and 220 CMR 1.06: *Hearings* or that it waives its right to a formal hearing.

45.06: Procedures Where Formal Hearing is Waived

(1) Applicability. The procedures set forth in 220 CMR 45.06 apply only if no party requests and is granted a hearing. If a full hearing is to be convened, the procedures contained in 207 CMR 1.06: *Hearings* and 220 CMR 1.06: *Hearings* shall apply.

(2) Notice. The Department shall give public notice by such means as it deems appropriate, consistent with due process, that a complaint has been filed and docketed. Such notice shall include a brief description of the complaint and shall set a time limit for filing of petitions to intervene. That time limit shall be no shorter than 14 days after such public notice.

(3) Intervention. The procedures outlined in 207 CMR 1.03: *Appearances; Intervention and Participation; Parties* and 220 CMR 1.03: *Appearances; Intervention and Participation; Parties* shall generally apply to petitions to intervene under 220 CMR 45.06. If a person is allowed by the Department to intervene, the ruling on intervention shall be in writing and shall inform the petitioner of its right to a hearing, its responsibility to request a hearing within seven days after service of the ruling, and of the consequence of failure to make such a request (namely, waiver of the right to a hearing on the ruling). If a hearing is requested and granted, the procedures set forth in 207 CMR 1.06: *Hearings* and 220 CMR 1.06: *Hearings* shall apply.

(4) Reply and Comments. The complainant shall have 20 days from the date the response is served to file a reply. Any person permitted to intervene as a party shall have the opportunity to file comments with the Department not later than 20 days after issuance of the Order permitting intervention. Any such comments shall be served on all parties and the parties may file a reply to the comments within 20 days after service. Unless authorized by the Department, no further filings shall be considered.

(5) Meetings and Evidentiary Proceedings. The Department may decide each complaint upon the filings and information before it, may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute, or may, in its discretion, order evidentiary proceedings upon any issues.

(6) Department Consideration of Complaint. In its consideration of the complaint, response, reply, and comments, the Department may take notice of any information contained in publicly available filings made by the parties and may accept, subject to rebuttal, studies that may have been conducted. The Department may also request that one or more of the parties make additional filings or provide additional information. Where one of the parties has failed to provide information required to be provided by 220 CMR 45.00 or requested by the Department, or where costs, values or amounts are disputed, the Department may estimate such costs, values or amounts it considers reasonable on the basis of available evidence of record, or may decide adversely to a party who has failed to supply requested information which is readily available to it, or both.

45.07: Remedies

If the Department determines that a denial for access is discriminatory or that the rate, term or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term or condition and may:

(1) terminate the unjust and unreasonable rate, term or condition; and

(2) substitute in the attachment agreement the reasonable rate, term or condition established by the Department; or

(3) order relief the Department finds appropriate under the circumstances.

45.08: Time Limit

The Department shall issue a final Order on the complaint filed in accordance with 220 CMR 45.00 within 180 days after the complaint is filed.

45.09: Appeal from Department Decisions

The Department shall notify all parties of their rights to appeal a final decision of the Department pursuant to M.G.L. c. 25, § 5, and of the time limits on their rights to appeal.

45.10: Rates Charged Any Affiliate, Subsidiary, or Associate Company

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which the utility would be liable under 220 CMR 45.10.

45.11: Severability

The provisions of 220 CMR 45.00 shall be deemed severable if any particular provision(s) is (are) rendered invalid by judicial determination or by statutory amendment.

REGULATORY AUTHORITY

220 CMR 45.00: 47 U.S.C. § 224; 47 C.F.R. § 1.1405; M.G.L. c. 159; and M.G.L. c. 166, § 25A~~;~~. ~~47 U.S.C. § 224; 47 C.F.R. § 1.1401 *et seq.*~~

220 CMR: DEPARTMENT OF PUBLIC UTILITIES

220 CMR 45.00: POLE ATTACHMENT, DUCT, CONDUIT AND RIGHT-OF-WAY COMPLAINT AND ENFORCEMENT PROCEDURES

Section

45.01: Purpose and Applicability

220 CMR 45.00 effects legislative policy in favor of competition and consumer choice in telecommunications by providing for complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to poles, ducts, conduits, and rights-of-ways owned or controlled, in whole or in part, by one or more utilities with rates, terms and conditions that are just and reasonable. The general procedural rules set forth at 207 CMR 1.00: *Procedural Rules* and 220 CMR 1.00: *Procedural Rules* are also applicable except to the extent that they are inconsistent with 220 CMR 45.00.

45.02: Definitions

As used in 220 CMR 45.00, except as otherwise required by the context

Attachment. Any wire or cable for transmission of intelligence by telegraph, wireless communication, telephone or television, including cable television, or for the transmission of electricity for light, heat, or power and any related device, apparatus, appliance or equipment installed upon any pole or in any telegraph or telephone duct or conduit owned or controlled, in whole or in part, by one or more utilities. "Duct" and "conduit" is not limited to "telegraph" or "telephone" ducts and conduits.

Complainant. A licensee or a utility who files a complaint.

Complaint. A filing by either a licensee or a utility alleging that it has been denied access to a pole, duct, conduit, or rights-of-way owned or controlled, in whole or in part, by one or more utilities in violation of 220 CMR 45.00, and/or alleging that a rate, term or condition for an

attachment is not just and reasonable. A complaint shall constitute an initial pleading within the meaning of 207 CMR 1.04(1) and 220 CMR 1.04(1).

Department. The Department of Public Utilities and/or Department of Telecommunications and Cable.

Licensee. Any person, firm or corporation other than a utility, which is authorized to construct lines or cables upon, along, under and across the public ways. For the purposes of 220 CMR 45.02: Licensee, the term shall also include a municipal lighting plant or cooperative that operates a telecommunications system outside the limits of its service territory pursuant to M.G.L. c. 164, § 47E, but only for those attachments that are outside its service territory.

Respondent. A licensee or a utility against whom a complaint has been filed.

Usable Space. The total space which would be available for attachments, without regard to attachments previously made,

(a) 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

(b) within any telegraph or telephone duct or conduit.

Utility. Any person, firm, corporation or municipal lighting plant that owns or controls or shares ownership or control of poles, ducts, conduits or rights-of-way 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.

Wireless Provider. Any person, firm or corporation other than a utility, which provides telecommunications service.

45.03: Duty to Provide Access; Modifications; Notice of Removal, Increase or Modification; and Petition for Interim Relief

(1) In accordance with M.G.L. c. 166, § 25A, a utility shall provide a licensee and a wireless provider with nondiscriminatory access to any pole, duct, conduit, or right-of-way used or useful, in whole or in part, owned or controlled by it. Notwithstanding this obligation, a utility may deny a licensee or a wireless provider access to its poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis for valid reasons of insufficient capacity, reasons of safety, reliability, generally applicable engineering standards, or for good cause shown. Any exclusive contract between a utility and a licensee entered into or extended after August 18, 2000 concerning access to any pole, duct, conduit, or right-of-way, owned or controlled, in whole or in part, by such utility shall be presumptively invalid insofar as its exclusivity provisions are concerned, unless shown to be in the public interest.

220 CMR: DEPARTMENT OF PUBLIC UTILITIES

(2) Requests for access to a utility's poles, ducts, conduits, rights-of-way owned or controlled, in whole or in part, by one or more utilities must be in an adequately descriptive writing directed to an appropriate named recipient designated by the utility. A utility is required to make such a designation. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant information supporting its denial, and shall explain how such information relates to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

(3) (a) A utility shall provide a licensee no less than 60 days' written notice prior to:
1. removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the licensee's attachment agreement;
2. any change in attachment rates, terms or conditions; or
3. any modification of facilities other than routine maintenance or modification in response to emergencies;

(b) any licensee that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or rights-of-way accessible;

(c) any licensee that obtains an attachment to a pole, duct, conduit, or right-of-way shall not be required later to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity, including the owner of such pole, duct, conduit, or rights-of-way;

(d) Exceptions: A utility may provide to a licensee less than 60 days' written notice of removal, change or modification if such removal, change or modification of facilities or telecommunications equipment is due to routine maintenance or an emergency.

(e) when a utility provides a licensee with less than 60 days' written notice pursuant to 220 CMR 45.03(3), such utility shall endeavor to provide its licensee with as much notice as is practicable in the particular circumstances.

(4) In conjunction with the complaint procedure outlined in 220 CMR 45.04 – 45.09, a licensee may file with the Department a "Petition for Interim Relief" of the action proposed in a notice received pursuant to 220 CMR 45.03(3)(a) within 15 days of receipt of such notice. Such submission will not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of the licensee's service to its customers,

a copy of the notice, and certification of service as required by 207 CMR 1.00: *Procedural Rules* and 220 CMR 1.00: *Procedural Rules*. The named respondent may file an answer within seven days of the date on which the Petition for Interim Relief was filed. No further filings with respect to this petition will be considered unless requested or authorized by the Department and no extensions of time will be granted with respect to this petition unless allowed pursuant to 207 CMR 1.02(5) and 220 CMR 1.02(5).

45.04: Complaint

(1) A complaint will commence a proceeding under 220 CMR 45.00. Complainants may join together to file a joint complaint.

(2) Every complaint shall conform to the requirements specified in 207 CMR 1.04(1)(b) and 220 CMR 1.04(1)(b) and shall be accompanied by certification of service on any utility, licensee, or party named as complainant or respondent. The complaint shall also contain the following:

(a) a copy of the attachment agreement, if any, between the licensee and the utility. If no attachment agreement exists, the petition shall contain:

1. a statement that the utility uses or controls, in whole or in part, those poles, ducts, conduits, or rights-of-way at issue which are used or designated for attachments;
2. a statement that the licensee currently has attachments on the utility's poles, ducts, conduits, or rights-of-way or has requested that attachments be placed on the utility's poles, ducts, conduits, or rights-of-way;

(b) the specific attachment rate, term or condition which is claimed to be unjust or unreasonable;

(c) in any case where it is claimed that a term or condition is unjust or unreasonable, the complaint shall specify all information and argument relied upon to justify said claim;

(d) in any case where it is claimed that a rate is unjust or unreasonable, or that a term or condition requires review of the associated rate, the data, information and argument in support of said claim shall include, but not be limited to, the following, where applicable and available to the complainant:

1. the gross investment by the utility for the pole lines;
2. the investment by the utility in appurtenances not used by or useful to the licensee. This may be expressed as a percentage of the gross pole investment, and shall include a list of specific appurtenances considered not used or useful;
3. the depreciation reserve for the gross pole line investment;
4. the total number of poles (A) owned; and (B) controlled or used by the utility;

5. the total number of poles which are the subject of the complaint;
6. the annual carrying charges attributable to the cost of owning a pole, and the specific factors used in the determination of these charges. Annual carrying charges may be expressed as a percentage of net pole investment;
7. the average amount of useable space per pole for those poles used for pole attachments; and
8. the reimbursements received from the licensee for non-recurring costs.

Data and information should be based on historical or original cost methodology, to the extent possible. Data should be derived from publicly available reports filed with the Department of Telecommunications and Cable, the Department of Public Utilities, the Federal Communications Commission, the Federal Energy Regulatory Commission, such as the Federal Energy Regulatory Commission's Form No. 1, or other reports filed with state or regulatory agencies. The source of any data shall be identified. Calculations made in connection with these figures should be provided to the complainant upon request, as should the computation of any rate determined by using the formula adopted for calculating reasonable attachments rates in Massachusetts;

(e) In addition to meeting the other requirements of 220 CMR 45.04, in any case where it is claimed that a complainant has been improperly denied access to a pole, duct, conduit, right-of-way, owned or controlled, in whole or in part, by one or more utilities, the complaint shall include the data and information necessary to support the claim, including:

1. The reasons given for the denial of access to the poles, ducts, conduits, and rights-of-way, owned or controlled, in whole or in part, by one or more utilities;
2. The basis for the complainant's claim that the denial of access is improper;
3. The remedy sought by the complainant;
4. A copy of the written request to the utility for access to its poles, ducts, conduits or rights-of-way; and
5. A copy of the utility's response to the complainant's written request, including all information given by the utility to support its denial of access. A complaint alleging improper denial of access will not be dismissed if the complainant is unable to obtain a utility's written response;

(f) a statement that the utility and licensee have been unable to agree and a brief summary, including dates, of all steps taken to resolve the problem prior to filing. If no such steps were taken, the complainant shall state the reason(s) why;

(g) any other information and arguments relied upon to attempt to establish that a rate, term or condition is not reasonable; and

(h) a statement that the complainant requests that a hearing be convened pursuant to 207 CMR 1.06: *Hearings* and 220 CMR 1.06: *Hearings* or that it waives its right to a formal hearing.

(3) Where the attachments involve ducts, conduits or rights-of-ways, appropriate data and information, equivalent to that required by 220 CMR 45.04(2), shall be filed.

(4) All factual allegations set forth in the complaint shall be supported by affidavit(s).

45.05: Response

(1) The response to a complaint under 220 CMR 45.00 shall be filed within 14 days after service of the document to which the response is directed.

(2) The response shall specifically address all contentions made by the complainant. All factual statements shall be supported by affidavit(s).

(3) The response shall include a statement either that the respondent requests that a hearing be convened pursuant to 207 CMR 1.06: *Hearings* and 220 CMR 1.06: *Hearings* or that it waives its right to a formal hearing.

45.06: Procedures Where Formal Hearing is Waived

(1) Applicability. The procedures set forth in 220 CMR 45.06 apply only if no party requests and is granted a hearing. If a full hearing is to be convened, the procedures contained in 207 CMR 1.06: *Hearings* and 220 CMR 1.06: *Hearings* shall apply.

(2) Notice. The Department shall give public notice by such means as it deems appropriate, consistent with due process, that a complaint has been filed and docketed. Such notice shall include a brief description of the complaint and shall set a time limit for filing of petitions to intervene. That time limit shall be no shorter than 14 days after such public notice.

(3) Intervention. The procedures outlined in 207 CMR 1.03: *Appearances; Intervention and Participation; Parties* and 220 CMR 1.03: *Appearances; Intervention and Participation; Parties* shall generally apply to petitions to intervene under 220 CMR 45.06. If a person is allowed by the Department to intervene, the ruling on intervention shall be in writing and shall inform the petitioner of its right to a hearing, its responsibility to request a hearing within seven days after service of the ruling, and of the consequence of failure to make such a request (namely, waiver of the right to a hearing on the ruling). If a

hearing is requested and granted, the procedures set forth in 207 CMR 1.06: *Hearings* and 220 CMR 1.06: *Hearings* shall apply.

(4) Reply and Comments. The complainant shall have 20 days from the date the response is served to file a reply. Any person permitted to intervene as a party shall have the opportunity to file comments with the Department not later than 20 days after issuance of the Order permitting intervention. Any such comments shall be served on all parties and the parties may file a reply to the comments within 20 days after service. Unless authorized by the Department, no further filings shall be considered.

(5) Meetings and Evidentiary Proceedings. The Department may decide each complaint upon the filings and information before it, may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute, or may, in its discretion, order evidentiary proceedings upon any issues.

(6) Department Consideration of Complaint. In its consideration of the complaint, response, reply, and comments, the Department may take notice of any information contained in publicly available filings made by the parties and may accept, subject to rebuttal, studies that may have been conducted. The Department may also request that one or more of the parties make additional filings or provide additional information. Where one of the parties has failed to provide information required to be provided by 220 CMR 45.00 or requested by the Department, or where costs, values or amounts are disputed, the Department may estimate such costs, values or amounts it considers reasonable on the basis of available evidence of record, or may decide adversely to a party who has failed to supply requested information which is readily available to it, or both.

45.07: Remedies

If the Department determines that a denial for access is discriminatory or that the rate, term or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term or condition and may:

(1) terminate the unjust and unreasonable rate, term or condition; and

(2) substitute in the attachment agreement the reasonable rate, term or condition established by the Department; or

(3) order relief the Department finds appropriate under the circumstances.

45.08: Time Limit

The Department shall issue a final Order on the complaint filed in accordance with 220 CMR 45.00 within 180 days after the complaint is filed.

220 CMR: DEPARTMENT OF PUBLIC UTILITIES

45.09: Appeal from Department Decisions

The Department shall notify all parties of their rights to appeal a final decision of the Department pursuant to M.G.L. c. 25, § 5, and of the time limits on their rights to appeal.

45.10: Rates Charged Any Affiliate, Subsidiary, or Associate Company

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which the utility would be liable under 220 CMR 45.10.

45.11: Severability

The provisions of 220 CMR 45.00 shall be deemed severable if any particular provision(s) is (are) rendered invalid by judicial determination or by statutory amendment.

REGULATORY AUTHORITY

220 CMR 45.00: 47 U.S.C. § 224; 47 C.F.R. § 1.1405; M.G.L. c. 159; and M.G.L. c. 166, § 25A.