D.T.E. 98-36-A

Order Establishing Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-Of-Way and to Enhance Consumer Access to Telecommunications Services.

ORDER PROMULGATING FINAL REGULATIONS

I. INTRODUCTION

Consumer sovereignty is a principal goal of the Telecommunications Act of

1996 ("Act").[(1)] It is also the goal of the rules adopted here today. The Act's purposes were to increase the variety of innovative telecommunications goods and services and to make them available to commercial and residential consumers at increasingly efficient prices. Consumers will benefit from an ever widening array of affordable products; and efficient and innovative telecommunications providers would be rewarded by access to an ever widening market. Both consumer and provider will profit from the opening of markets and expanded choice envisioned by the Act.

Moreover, telecommunications is an important part of the Massachusetts economy, both as jobs-producing industry and as economic infrastructure; and its growth must be not hampered by artificial barriers. Enhancing productivity and workplace flexibility - - important features of the "work-at-home revolution"- - also depend on pervasive provider access to consumers.

Sovereign choice by commercial and residential consumers can be realized only if consumers are accorded unfettered access to the contenders for their telecommunications business. An array of products and services is of little value to a consumer if providers

cannot reach the consumer in his place of business or in his home. Innovative, efficient providers cannot reap the benefits of their foresight and efficiency without genuine access to the homes, offices, stores, and factories of their intended customers.

Only by ensuring nondiscriminatory access by telecommunications competitors to the poles, ducts, conduits and rights-of-way through which consumers receive telecommunications services can the benefits of the 1996 Telecommunications Act be realized.[(2)] The regulations adopted by this Order exercise the authority granted by the Federal Pole Attachment Act,

47 U.S.C. § 224, and by the Massachusetts Pole Attachment Statute, G.L. c. 166, § 25A, to accord competitive telecommunications providers' access to consumers[(3)] - - and hence, consumers' access to would-be providers - - to the greatest extent practicable. Without opening the routes to end users, consumer sovereignty cannot be given effect; and this principal goal of the 1996 Telecommunications Act would remain unrealized. Legislative intent to benefit end-use consumers would be thwarted. The Department's job is to effect legislative intent. The rules adopted pursuant to statute today are the means to effect that purpose.

II. PROCEDURAL HISTORY

On December 9, 1998, the Department of Telecommunications and Energy

(the "Department") opened a rulemaking[(4)] in order to establish complaint and enforcement procedures to ensure that, in the interest of the consumers of their services, telecommunications carriers and cable system operators have nondiscriminatory access to poles, ducts, conduits and rights-of-way (collectively "pole attachments"). This rulemaking was docketed as D.T.E. 98-36. General Laws c. 166, § 25A (the "Massachusetts Pole Attachment Statute") regulates the "rates, terms and conditions of use of poles or of communication ducts or conduits of a utility for attachments of a licensee in any case in which the utility and licensee fail to agree."[(5)] The statute *expressly directs* the Department to *consider the interests of consumers*. Although Federal law and regulations occupy this same field, there

is no preemption; and the authority of the Department, pursuant to state statute, interstitially to regulate access to poles, ducts, conduits and rights-of-way is preserved by 47 U.S.C. § 224 (the "Federal Pole Attachment Act").[(6)]

Included with the Order in D.T.E. 98-36 opening this rulemaking proceeding was a set of proposed regulations designed to promote nondiscriminatory access by telecommunications carriers and cable system operators to utility poles, ducts, conduits, and rights-of-way. Order, Att. ("Proposed Regulations"). The Department's current regulations, adopted in 1984, are set forth at 220 C.M.R. §§ 45.00 et seq. ("Current

Regulations") and address only rates, terms and conditions for cable television attachments. The Current Regulations fall well short of meeting consumers needs or of addressing market realities *post* the 1996 Telecommunications Act.

In 1978, Congress enacted Public Law 95-234, which directed the Federal Communications Commission ("FCC") to regulate the rates, terms and conditions of cable television system attachments to utility-owned poles, ducts, conduits, and rights-of-way. 47 U.S.C. § 224(b). Although this statute was not intended to preempt state regulation in this area, it still required the FCC to promulgate implementing regulations that would apply in the absence of effective state regulation. 47 U.S.C. § 224(c). Later in 1978, the Massachusetts General Court similarly authorized the Department (then the Department of Public Utilities) to regulate pole attachments. G.L. c. 166, § 25A, as amended by St.1997, c. 164, §§ 265, 266. The Department subsequently promulgated rules for rates, terms and conditions for pole attachments, codified at 220 C.M.R. §§ 45.00 et seq.[(7)]

In 1996 Congress sought to allow and enable competition in local telephone and cable

television markets when it passed Pub. L. No. 104-104, 110 Stat. 56, amending the

Telecommunications Act of 1934, now codified in 47 U.S.C. § 224: An Act to Promote Competition and Reduce Regulation in Order to Secure Lower Prices and Higher Quality Service for American Telecommunications Consumers and Encourage the Rapid Deployment of New Telecommunications Technologies ("Telecommunications Act of 1996"). Numerous provisions of the Telecommunications Act of 1996 are aimed at achieving these goals, including the expanded applicability of the Federal Pole Attachment Act to require utility companies, including local exchange carriers, to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit or

right-of-way owned or controlled by it." Telecommunications Act of 1996 (amending

47 U.S.C. § 224(f)(1)).

As a result of the passage of the Telecommunications Act of 1996, the FCC amended its pole attachment regulations to provide "complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable." 47 C.F.R. § 1.1401. These regulations grant jurisdiction to the FCC unless a state has certified that it has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments. 47 C.F.R. § 1.1414. As states may regulate rates, terms and conditions, so too may states regulate matters of discriminatory access compatibly with 47 C.F.R. § 1.414. To do so, a state needs only effective statutes, rules, or regulations in this specific area. Id. Massachusetts has such a statute, G.L. c. 166,

§ 25A, and, with the adoption of the proposed rules as modified pursuant to notice and hearing, will have the requisite, implementing regulations.

Before the completion of this rulemaking, Massachusetts had not yet taken the requisite

steps to exercise jurisdiction over discriminatory access claims, although the Department has for some time regulated rates, terms and conditions for pole attachments, ducts, conduits and rights-of-way.[(8)] Accordingly, the Department opened this rulemaking to benefit consumers:

(1) by requiring persons subject to § 25A to provide nondiscriminatory access to any pole, duct, conduit, or right-of-way under their ownership or control, and (2) by establishing regulations for discriminatory access complaints. Order at 2-3.

In the Order opening this proposed rulemaking, the Department solicited comments on

the proposed revisions to the Current Regulations. The Department received an initial round of 17 written comments.[(9)] The Department conducted a public hearing on January 29, 1999. On August 27, 1999, the Department sought supplemental comment on the issue of whether the regulations should provide competitive telecommunications and cable companies with nondiscriminatory access to poles, ducts, conduits and rights-of-way inside and on commercial buildings ("CB") and multiple-residential buildings referred to as a multiple dwelling unit ("MDU").[(10)] The Department received eight supplemental written comments.[(11)]

Although the Department opened this proceeding to perfect the jurisdiction necessary to address nondiscriminatory access claims, the initial comments to this rulemaking sought the Department's consideration of related matters within the general scope of its December 9, 1998 Notice (see note 4 supra). Upon review, a substantial number of these matters necessitate a level of specificity that is better suited to case-by-case adjudication rather than consideration in this generalized rulemaking. No rule can expressly address or provide for the specifics of any and all future fact-patterns; and any rule that attempts to do so runs the risk of being so particular as unwittingly to exclude cases intended to be covered. Rules of general application allow considered development of a body of Department precedent. In addition, many of the comments seeking the Department's review have been previously addressed in other dockets[(12)] or are beyond the scope of this rulemaking.

The Current Regulations address only the rates, terms and conditions for pole

attachments. The Department's Final Regulations include procedures designed to ensure that access to poles, ducts, conduits and rights-of-way is provided on a nondiscriminatory basis, and to ensure that rates, terms, and conditions are just and reasonable. In addition, the Final Regulations incorporate the following notable amendments to the Current Regulations based, in part, on information provided by commenters: (1) the Final Regulations require an owner/controller of any pole, duct, conduit, or right-of-way to provide nondiscriminatory access to it; (2) the Final Regulations codify the Department's interpretation of the term "utility" (i.e., the owner/controller of poles, ducts, etc.) in G.L. c. 166, § 25A to include owners of CBs and MDUs for the purposes of this section and a carrier or other utility to whom such CB or MDU owner has ceded control of facilities; (3) the Final Regulations prescribe access into CBs and MDUs through a requirement that they open their public and private right-of-way to competing carriers, from whose services consumers might otherwise be barred; (4) the Final Regulations establish a rebuttable presumption that the exclusivity provision of a contract between a service provider and a CB or MDU owner contravenes both Federal and state pole attachment statutes; (5) the Final Regulations amend the title of

220 C.M.R. §§ 45.00 et seq., from "Rates, Terms and Conditions for Cable Television Attachments" to "Pole Attachment Complaint and Enforcement Procedures;" (6) the Final Regulations revise the complaint procedures to address claims of nondiscriminatory access;

(7) the Final Regulations require a timely response from owners/controllers to requests for access to pole attachments, ducts, conduits and rights-of-way; and (8) the Final Regulations require that an owner/controller charge for access to poles, ducts, conduits and rights-of-way an amount equal to what it charges itself, or to an affiliate, subsidiary or associated company, or to another entity allowed to use these facilities.

Other sections of the Current Regulations have been revised, as needed, to track changes in statutory language. See e.g., § 45.02 (insertion of amended definition of "licensee" pursuant to St. 2000, c. 12, § 8B); see also § 45.07 (insertion of "just and" before "reasonable" pursuant to statutory changes resulting from St. 1997, c. 164, §§ 265, 266). In this Order, the Department analyzes suggested amendments from commenters. We conclude by adopting Final Regulations, which will take effect upon publication in the Massachusetts Register, subject to certain effective-date-postponement terms expressed in the instant order.

III. ACCESS TO MULTIPLE DWELLING UNITS

The Department opened this proceeding to put into effect Federal and state legislative

policy: that is, (1) to ensure consumers the broadest access to the burgeoning array of telecommunications services; and (2) to secure for providers of telecommunications and cable services nondiscriminatory access to the poles, ducts, conduits and rights-of-way,

so that they may offer their services to consumers in a truly competitive marketplace. The Department has long promoted competition in all communications markets. See e.g., Local Competition, D.P.U. 94-185, Order Opening Investigation (January 6, 1995).

As is demonstrated by the comments and by recent media reports,[(13)] owners of CBs and MDUs sometimes demand large payments from carriers for access into CBs and MDUs, or they may outright refuse entry into their premises. The consequence is that a substantial number of consumers have been missing out on the price savings and technological advancements competitive carriers can offer - - merely because these carriers are unable to access MDUs and CBs that house customers' dwellings and businesses. This situation thwarts the purposes of state and Federal law.

Consumer welfare and consumer choice are and ought to be the touchstone of economic regulatory policy. That choice is denied and that welfare impaired where a lessor can block or unreasonably restrict a business or residential consumer's access to the telecommunications marketplace. Fortunately, Congress and the General Court have provided the Department the ability to correct this situation by authorizing it to adopt regulations which, among other things, can correct situations where lessors of CB or MDU space discriminate against cable operators and telecommunications carriers seeking access to consumer/tenant premises.[(14)]

In order to bring the benefits of competition to both business and residential consumers, regardless of whether they rent or own real property, an individual or company that owns or controls or that shares ownership or control of poles, ducts, conduits or rights-of-way must open these facilities to competitors where feasible. The Department seeks to eliminate barriers to the development of competitive networks and the Final Regulations prevent all utilities, including owners of CBs and MDUs, from discriminating in granting access to, or from requiring unreasonable (and, therefore, exclusionary) compensation for access to, poles, ducts, conduits or rights-of-way.

The authority of the Department to regulate nondiscriminatory access into CBs and MDUs is provided in the Massachusetts Pole Attachment Statute. Until now, the state of the telecommunications market has not made it necessary for the Department to exercise the full measure of authority granted to it.[(15)] We do so now to ensure that consumers benefit from a truly competitive marketplace. To do this, the Final Regulations rely on § 25A's broad definition of the term "utility" to include poles, ducts, conduits, and rights-of-way appurtenant to a CB or MDU. Additionally, the Department relies on the breadth of the term "right-of-way" so that competing providers may obtain access to the distribution poles, ducts, conduits, and other support structures located inside and on commercial and residential buildings and "used or useful, in whole or in part," for telecommunications. G.L. c. 166, § 25A. The Department also adopts a rebuttable presumption that an exclusivity provision of a contract between a service provider and a CB or MDU owner is, more likely than not, anti-competitive because exclusive contracts interfere with the rights of tenants to freely choose between the many available competitive telecommunication services. Therefore, exclusive contracts contravene legislative policy as expressed in both state and Federal pole attachment statutes.

A. Utilities

1. Comments

Although commenters supported the imposition of rules to ensure that telecommunications carriers and cable providers have access to CBs and MDUs, only one commenter specifically addressed the statutory interpretation question of CB's or MDU's constituting a § 25A "utility" for purposes of the regulations. RCN comments that a

landowner, exercising significant control over rights-of-way by reserving power over the operation of facilities and having the authority to revoke a license and force abandonment of service, itself constituted a "utility" under G.L. c. 166, § 25A (RCN Supplemental Comments at 5). For this reason, RCN comments that, to the extent a person owns or controls pole

attachments for supporting or enclosing wires for telecommunications or for transmission of electricity in a building, that person comes squarely within § 25A's purview and should provide reasonable access to those facilities (RCN Supplemental Comments at 4).

NSTAR contends that there is a historical bias in the Department's present regulatory scheme for pole attachment matters, specifically the dual notion that (a) traditional Chapter

164 electric companies and Chapter 159 telephone companies are the only entities that own or control facilities to which access should be mandated by regulation, and (b) cable system operators are the principal or only "licensees" whose access to "utility" facilities must be safeguarded (NSTAR Initial Comments at 3). NSTAR concludes that the regulations should explicitly recognize that the principle of nondiscriminatory access to essential infrastructure is equally applicable to existing infrastructure facilities owned or controlled by anyone who falls within § 25A's scope (i.e., not limited to just traditional Chapter 164 electric or Chapter

159 telephone companies) (id.).

2. Analysis and Findings

The Massachusetts Pole Attachment Statute was enacted shortly after the Federal Pole Attachment Act and uses a definition of "utility" significantly broader than even the Federal definition.[(16)] This purposeful legislative departure from and expansion of past state and Federal practice has substantial significance. For purposes of the Massachusetts Pole Attachment Statute, the General Court defined the term "utility" to mean:

[A]ny 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.

G.L. c. 166, § 25A (emphasis added).

The Massachusetts definition clearly goes well beyond the common acceptation of the term "utility" as a traditional electric, natural gas, or telephone/telegraph company. The cataloguing of these legal entities that come within the definition's scope is similar to the definition of "person" in the Massachusetts Antitrust Act, G.L. c. 93, § 2, which Act also seeks generally to remedy "restraint of trade or commerce in the commonwealth." G.L. c.

93 § 4. The term "person"encompasses all and more than is comprehended by G.L. c. 4, § 7, and its evident comprehensiveness is intensified by the accompanying words "firm, corporation, or municipal lighting plant." The reference to "municipal lighting plant" can be construed only as a deliberate intent to limit application to municipalities and their agencies, by implicating the rule in Hansen v. Commonwealth, 344 Mass. 214, 219 (1962). Ordinarily, "person" does not encompass state or municipalities but is here defined to include only the subclass of "municipal lighting plants."

The evident intent was to make the Massachusetts Pole Attachment Statute's scope comprehensive. An owner of a CB or MDU that owns or controls poles, ducts, conduits or rights-of-way as described in § 25A is clearly a "utility" under this definition. See Shamban v. Masidlover, 429 Mass. 50 (1999) (rules of statutory interpretation hold that a court is bound to follow statutory language where it is plain and unambiguous). By contradistinction, where the legislature has sought to exclude "landlord" from the definition of an entity subject to Department regulation, it has done so unmistakenly. See G.L. c. 165, § 1, definition of companies subject to water rate regulation. The Supreme Judicial Court previously reviewed the Department's statutory interpretation of G.L. c. 166, § 25A in Greater Media, Inc. v. Department of Public Utilities, 415 Mass. 409 (1993). The Court concluded that the Department's interpretation of particular terms in G.

L. c. 166, § 25A was within the Department's authority and explained, "ordinary precepts of statutory construction instruct us

to accord deference to an administrative interpretation of a statute" (id. at 4, citing Massachusetts Organization of State Engineers & Scientists v. Labor Relations Commission, 389 Mass. 920, 924 (1983)). Of particular note to the matter at hand, the Court observed that "[t]his is particularly so 'where, as here [i.e., interpreting G.L. c. 166, § 25A], an agency must interpret a legislative policy which is only broadly set out in the governing statute.'" Id. The broad definition of "utility" in the Massachusetts Pole Attachment Statute means that entities other than traditional regulated electric and telephone companies, including CBs and MDUs, are also subject to the terms of § 25A. Our definitions of CB and MDU

should be of sufficient breadth to effect the statutory purpose to accord consumers the opportunity to benefit from competition. However, when defining a CB or MDU, we must also balance the need to avoid overly taxing landlords or burdening the regulatory process.

In other contexts, the General Court has defined an MDU as a building that is rented or leased for residential purposes by three or more families living independently of each other and not owner occupied. See G.L. c. 151B, § 1 (unlawful discrimination statute defining multiple dwelling); see also, 105 C.M.R. § 460.020 (lead poisoning statute defining multiple dwelling unit); and 521 C.M.R. § 9.00 (Architectural Access Board statute defining multiple dwelling unit). Guided by these legislative expressions, we adopt a somewhat different but still compatible definition for our regulations. In part, we are also guided by enforcement practicability.

In order to avoid imposing unreasonable regulatory burdens on the owners of smaller MDUs, the Final Regulations exempt buildings that house fewer than four families living independently of one another and exempt 4-unit buildings where one of the four units is owner-occupied (§ 45.02). Additionally, the Final Regulations exempt condominiums, as defined in G.L. c. 183A, and homeowners' associations, because these organizations are operated through a decision-making process whereby each owner has a vote in business dealings (id.). Finally, all tenancies of 12 months or less in duration and transient facilities, such as hotels, rooming houses, nursing homes and serviced by payphones are exempted from the regulations because the potential for changes in tenancies of such short duration may disturb other tenants and cause unnecessary expense to property owners (id.). As noted earlier, these restrictions on the regulations' definition are also driven by pragmatic concern for the limits of the Department's adjudication and enforcement resources. A day may come, as the telecommunications market develops, when regulation may profit from a less restrictive definition of CB and MDU. The statute's breadth admits of such future change.

2. Right-of-way

1. Comments

The Department sought comments on whether nondiscriminatory access should be applicable to all utilities' rights-of-way, including those rights-of-way located in MDUs. The Department was specifically interested in the issue of whether the regulations should provide competitive telecommunications and cable companies with nondiscriminatory access to poles, ducts, conduits and rights-of-way inside and on commercial and residential buildings.[(17)]

Many commenters support a requirement that utilities provide access to all rights-of-way, including those found within CBs and MDUs (Allegiance Initial Comments at 1; ALTS/Winstar Initial Comments at 1-2; AT&T Supplemental Comments at 1-2; CompTel Supplemental Comments at 2-3; RCN Supplemental Comments at 2; ServiSense Supplemental Comments at 2; Teligent Supplemental Comments at 3-4). CompTel supports nondiscriminatory access to rights-of-way within CBs and MDUs, alleging a variety of restrictions that competitive local exchange carriers ("CLECs") face in gaining access, including: (1) CB and MDU owners' insistence upon receiving a portion of the CLEC's gross revenues in exchange for CB or MDU access; (2) CB and MDU owners' insistence that the CLEC pay a fixed monthly rent in lieu of or in addition to a percentage of revenues; (3) CB and MDU owners' requirement that the CLEC pay a substantial one-time non-refundable fee for access; and (4) CB and MDU owners' refusal to grant any CLEC access to a CB or MDU on any terms (CompTel Supplemental Comments, Att. at 4).

Bell Atlantic comments that the Proposed Regulations already apply to utility-owned facilities no matter where located and, thus, specific reference to interior facilities is unnecessary (Bell Atlantic Supplemental Comments at 3). Citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432-38 (1982), Bell Atlantic warns that any effort by the Department to construct a right of physical access by competitive providers seeking to install its own equipment on private property would cause a significant and possibly insurmountable constitutional "taking" problem (Bell Atlantic Supplemental Comments at 3). Bell Atlantic notes that the FCC has commenced a rulemaking on this issue and urges the Department to await the completion of that rulemaking prior to taking any action (Bell Atlantic Supplemental Comments at 3-4). NSTAR agrees that access to a utility's poles, ducts, conduits and rights-of-way is necessary to further competition (NSTAR Supplemental Comments at 4). NSTAR comments that mandatory access to all utility property should not be permitted where access to such property (i.e. service centers and substations) is

unnecessary to advance competition (id.). NSTAR states that public utilities should have no greater obligations in providing non-discriminatory access than those properties privately owned (id.).

ALTS/WinStar seeks Department clarification to ensure that access to right-of-way is not simply to right-of-way outside private buildings but extends to right-of-way within privately owned buildings (ALTS/Winstar Initial Comments at 1-2). ALTS/Winstar further urges the Department to establish rules encompassing: 1) the placement of antennae on CB or MDU rooftops, 2) access from the roof to the riser conduits and other pathways linking the antenna on the roof to the "common block" where outside telecommunications facilities are

cross-connected to the interior wiring, and 3) direct access to the end user, where good engineering practices so dictate (ALTS/Winstar Initial Comments at 10-11). Teligent asserts that disputes over rights-of-way within CBs and MDUs will adversely affect Massachusetts consumers' ability to choose among competing telecommunication carriers (Teligent Supplemental Comments at 3). To prevent such disputes, Teligent suggests that the

Department interpret the term right-of-way to permit competitive telecommunications carriers nondiscriminatory access to right-of-way over private property (Teligent Supplemental Comments at 5).

0.2 Analysis and Findings

In order to serve consumers in CBs and MDUs, carriers logically require a route into CBs and MDUs and into their telephone closets and rooftops. Carriers are often restricted in developing their own rights-of-way either because the CB and MDU owners prohibit these carriers access or charge prohibitive fees for such access. Historically, a traditional electric, gas, and telephone company obtained rights-of-way through private property either by negotiation with the landowner or by governmental authority. Rights-of-way have always been a critical factor in conferring important services or consumers and remain today a critical factor in providing competitive services to the public. There must be a way for an intelligible telecommunications signal to travel from a sender and arrive at its intended receiver. Much of

modern life would be impossible - - or, at least, gravely impeded - - if consumers in their homes and businesses were blocked from enjoying telecommunications services. The poles, ducts, conduits and rights-of-way are the infrastructure supporting the networks over and across which such communication may occur. Without such support, the entire system would be impossible. It matters little to the consumer whether that infrastructure lies in public ways or in the building which he leases - - so long as he has access to telecommunications providers of his choice through that infrastructure. Section 25A's breadth supports this view.

In order to compete effectively, telecommunications carriers and cable system operators

must have the opportunity through nondiscriminatory access to provide service to consumers, including those in CBs or MDUs. Carriers' and operators' inability to offer services within CBs or MDUs denies tenants the right to choose, and thereby denies those consumers the benefits of the very competition that the 1996 Telecommunications Act sought to bestow on them. For competitive carriers to have the fair opportunity to succeed in the market, they must have at least potential access to customers seeking their services. Though competitive suppliers' networks may serve a consumer's street, the consumer derives no benefit from competition if his lessor arbitrarily stands between him and the telecommunications service the consumer might, if unfettered, choose. The legal status of landlord does not compass the role of exclusive broker of a tenant's telecommunications custom.

Black's Law Dictionary defines "right-of-way" as "a right belonging to a party to pass over the land of another." Black's Law Dictionary 921 (6th ed. 1991). The term

"right-of-way" is not defined in the Massachusetts Pole Attachment Statute or in the Current Regulations. In judging the statute as a whole, general rules of statutory construction permit the Department to apply the term "right-of-way" broadly to encompass a utility's means "for supporting or enclosing wires or cables" for telecommunications, located inside and on commercial and residential buildings, as well as outside. This construction of the term

"right-of-way" is consistent with its ordinary meaning and effectuates the intent of Legislature in promoting consumer sovereignty in his choice of telecommunications provider. Our broad application of the term is necessary in order to prevent incumbent electric and telecommunications companies from claiming that their existing private right-of-way does not

permit sharing access with competing telecommunications carriers and cable system operators. Consistent with the policy expressed by the General Court and Congress, the Final Regulations

make clear that utilities who own or control the necessary infrastructure[(18)] may not unjustifiably discriminate between and among competing providers of telecommunications and cable services on rates, terms and conditions associated with access to this infrastructure.

Bell Atlantic requests that the Department consider Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The Loretto case involved the issue of whether the placement of cable on an apartment building's rooftop or within its walls constituted a taking. The Loretto Court held that when the government causes a permanent physical

occupation of property, a taking results. The Loretto Court stated that, “The power to exclude has traditionally been considered one of the most treasured strands in an Owner’s bundle of property rights” id. at 435; and so the taking of property always requires compensation. Id. at 441.[(19)] Much has happened in telecommunications since 1982; and one may agree with the Loretto dissenters that the majority analysis “represents an archaic judicial response to a modern social problem.” Id. at 452, Blackmun, J., dissenting. Whether Loretto would be decided the same way today may be doubted, but it evidently remains the law.

More recently, the Court in Gulf Power Co. v. United States, 998 F.Supp. 1386, 1390 (N.D. Fla. 1998) decided that while mandated access to electric utility poles and conduits imposed a taking under Loretto, it was not an unconstitutional taking because just compensation was provided. The Court held that “[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking.” Id. at 1390, citing Williamson County Regional Planning Commission v. Hamilton Bank,

473 U.S. 172, 194, 105 S. Ct. 3108, 3120, 3121 (1985).

While in certain circumstances, access to a particular CB or MDU could possibly constitute a taking, most access into a CB or MDU may not itself be a taking, because it will involve mere access to and sharing of the same right-of-way already dedicated for public use. In this instance, there would likely be no taking because the property owner has previously given up his or her right to exclusive use of that part of the property for the purpose of

providing his lessees with access to electric or telecommunications service. Therefore, the property owner cannot legitimately complain that access by additional carriers creates a taking where access by the first service provider did not.

To the extent that additional carriers need to occupy space not already occupied for public use, some reasonable compensation by users of poles, ducts, conduits or rights-of-way may be required to satisfy Constitutional concerns. It is not the Department’s intent (and certainly not the Legislature’s) to deny compensation for the use of a utility’s right-of-way or a landowner’s property. The Massachusetts Pole Attachment Statute provides a “utility,” as there defined, an adequate process for obtaining just compensation:

Said department, pursuant to the provisions of this section, shall determine a just and reasonable rate for the use of poles and communication ducts and conduits of a utility for attachments of a licensee by assuring the utility recovery of not less than the additional costs of making provision for attachments nor more than the proportional capital and operating expenses of the utility attributable to that portion of the pole, duct, or conduit occupied by the attachment.

G.L. c. 166, § 25A. The compensation process mandated by the statute and implemented by the rules adopted here satisfies Gulf Power and hence Loretto.

The Department will ensure that the just and reasonable rates required by G.L. c. 166,

§ 25A also satisfy the Constitutional "just compensation" mandate. The entire cost of wiring and the installation of any other equipment necessary to provide telecommunications services will be assumed by the attaching telecommunications provider or cable system operator, and the attaching telecommunications provider must indemnify and hold harmless the property owner for any damages caused by the installation. The telecommunications provider must also offer a bond or otherwise reasonably compensate the property owner for any use of his property associated with the installation of wiring and other means for the provision of telecommunications service. Obviously, there will be cases where space availability, technical or structural limitations, or other considerations, make installation of competitive facilities quite infeasible. The Department encourages property owners and telecommunications providers and cable system operators to negotiate terms for the actual amount of compensation. In instances where the parties fail to agree, a party may, pursuant to these rules, petition the Department to determine a just and reasonable rate.[(20)]

Although the pending FCC Rulemaking will address, in part, nondiscriminatory access into CBs and MDUs, there is no requirement that the Department await the FCC's order in this matter. The Department is authorized to promulgate rules that provide for nondiscriminatory access so long as the rules comport with statute. A consumer's ability to choose among competitive carriers offers substantial benefit to both the public and industry. The Final Regulations promote that benefit.

C. Exclusive Contracts and Marketing Agreements

1. Comments

Several commenters request that the Department address the issue of exclusive contracts between carriers and MDUs, arguing that these types of agreements unfairly limit necessary access into CBs and MDUs. Allegiance requests that the Department prohibit exclusionary contracts because when access to MDUs is denied, tenants are deprived of benefits derived from competition and choice (Allegiance Initial Comments at 2).

ALTS/Winstar maintains that exclusive contracts should be prohibited because these arrangements are discriminatory and prevent subscribers from receiving the most advantageous pricing, technology and service available (ALTS/Winstar Initial Comments at 11). AT&T urges the Department to ban

exclusionary agreements because CB and MDU owners often either demand unreasonable payments for access to carriers or refuse entry into their buildings (AT&T Supplemental Comments at 7).

CompTel recommends that the Department disallow the use of exclusive contracts, arguing they are an unnecessary barrier in providing services to customers within CBs and MDUs (CompTel Supplemental Comments, Att. at 18). RCN maintains that exclusive arrangements violate G.L. c. 166A, § 22 ("the Massachusetts Cable Act")[(21)] and are contrary to the intentions of Congress as expressed in the Telecommunications Act of 1996 (RCN Supplemental Comments at 7). ServiSense asserts that all exclusive contacts should be prohibited since these contracts impede competition, reduce consumer choices, and favor incumbent providers (ServiSense Supplemental Comments at 7). Bell Atlantic suggests the Department adopt a rebuttable presumption that exclusive contracts with owners of MDUs are anticompetitive and thus null and void. Under Bell Atlantic's proposal, a telecommunications provider with an exclusive contract could rebut the presumption by: (1) establishing that

failure to maintain an exclusive contract for a period of time would deprive tenants of needed telecommunications services; or (2) demonstrating that certain terms were conditions imposed on the company by the CB or MDU owner. In such instance, Bell Atlantic recommends that the Department restrict the duration of such required exclusivity to a reasonable period of time (Bell Atlantic Supplemental Comments at 4).

0.1 Analysis and Findings

0.2

An exclusive contract is an agreement between a CB or MDU owner and a service provider in which the service provider is given exclusive right to the telecommunications custom of the tenants of the CB or MDU. Exclusive contracts prevent service providers from competing to serve CB or MDU tenants for the period the contract is in effect. Many commenters to this rulemaking describe these exclusive contracts as barriers to entry that have a discriminatory effect; and, therefore, the commenters encourage the Department to prohibit them as against telecommunications public policy as embodied in state and Federal law. We note that the Massachusetts Cable Act prohibits exclusive contracts because these types of arrangements "diminish and interfere with the rights of tenants." G.L. c. 166A, § 22. Similarly, exclusive contracts within the context of the Massachusetts Pole Attachment Statute interfere with the rights of tenants to freely choose between the many available competitive telecommunication services. The choice already has been made for them by the landlord.

Upon initial consideration, it is difficult to reconcile the existence of exclusive contracts with the nondiscriminatory requirements of this statute. Exclusive contracts clearly have the potential to interfere with the rights of CB or MDU tenants to use the services of any provider they choose. In addition, carriers with exclusive contracts have little motivation to provide competitive services because existing tenants of CBs and MDUs lack any real bargaining power. In fact, other states, such as Nebraska and Connecticut, have prohibited exclusive contracts between telecommunications companies and lessors/owners as inherently

anti-competitive.[(22)] Similarly, the FCC requires that customers of telephone services at aggregator locations (e.g., payphones, hospitals, hotels) have free access to the carrier of their choice, rather than be restricted to use only the presubscribed carrier that the location owner has chosen. 47 U.S.C. § 226 (c)(1)(B), (C); see also 47 C.F.R. §§ 64.703(b).

However, if our ultimate goal is to promote the consumer benefits of a competitive telecommunications market, there may be circumstances where exclusive contracts might be appropriate. For example, the FCC recognizes arguments that new entrants may require exclusive contracts for a limited period of time in order to recover their investment; and the FCC further acknowledges that if such contracts are not permitted, incumbents may face no competition at all. FCC Rulemaking at ¶ 61, citing May 13, 1999, House Telecommunications Subcommittee Hearing, Testimony of Jodi Case, Manager of Ancillary Services, AvalonBay Communities, Inc. at 5. In addition, there may be circumstances where CB or MDU tenants at

the time of contracting might benefit from and agree to the property owner's ability to enter into an exclusive contract of reasonable and limited duration by negotiating a discount with the carrier or realizing other efficiency-related benefits of exclusive dealing.

In an effort to ensure that the nondiscriminatory objectives of this rulemaking are also pro-competitive, the Department adopts a rebuttable presumption that an exclusive contract between a service provider and a CB or MDU owner is more likely than not anti-competitive and, therefore, not conformable to statute. The presumption applies to contracts entered into, or extended, as of the date the Final Rules are published in the Massachusetts Register and does not affect valid, extant contracts. A service provider or a CB or MDU owner can rebut this presumption by demonstrating that an exclusive contract benefits tenants and is, therefore, in the public interest.[(23)] In determining whether an exclusive contract is in the public interest, the Department will consider, among other factors, the duration of the contract, the contracting providers' status as a new entrant to the market, the effect of the exclusive contract on the development of competition and new technology, and efficiency benefits. Accordingly, the Department will add the following language to § 45.03(1): "Any exclusive contract between a utility and a licencee entered into or extended after the effective date of these regulations

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."

A marketing agreement is a contract by which the owner of a CB or MDU receives compensation from a service provider for allowing it to market its services to tenants or receives compensation for each new tenant that becomes a customer of the service provider. Although probably not as offensive to competition as exclusive contracts, marketing agreements also have the potential to encourage discriminatory behavior, because CB or MDU owners have a financial interest in influencing which service provider their tenants choose. While we do not find marketing agreements presumptively invalid, CB or MDU owners and the telecommunications providers who are partners to such agreements must disclose to tenants/customers the existence and terms of such marketing agreements.

IV. ADDITIONAL COMMENTS ON PROPOSED REGULATIONS

A. 220 C.M.R. § 45.00: Title of Regulations

1. Comments

The Department proposed to amend the title of 220 C.M.R. §§ 45.00 et seq. and to change it from "Rates, Terms and Conditions for Cable Television Attachments" to "Pole Attachment Complaint and Enforcement Procedures." Order, Att. Certain commenters suggest different wording to portray the scope of the revised regulations more accurately (AT&T Initial Comments, Exh. A, BECo Initial Comments at 8, NECTA, Att. A at 1). Combining these suggestions, commenters recommend a title change from "Rates, Terms and Conditions for Cable Television Attachments" to "Pole Attachment, Duct, Conduit and

Right-of-way Complaint and Enforcement Procedures." No commenters oppose an amendment in title.

2. Analysis and Findings

While the existing regulations encompass "Rates, Terms and Conditions for Cable Television Attachments," the Final Regulations address the additional issue of nondiscriminatory access. The current title of the regulations does not describe sufficiently the scope of the Final Regulations. It is, therefore, appropriate to amend the title of the Final Regulations. Accordingly, the title of the regulations will be changed from "Rates, Terms and Conditions for Cable Television Attachments" to the more accurately descriptive "Pole Attachment, Duct, Conduit and Right-of-way Complaint and Enforcement Procedures."

B. 220 C.M.R. § 45:01: Purpose and Applicability

1. Comments

The Department proposed to add language clarifying the purpose and applicability of 220 C.M.R. §§ 45.00 et seq. to ensure "telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-ways on rates, terms and conditions that are just and reasonable." Order, Att. Although no commenters oppose this proposed language, some commenters suggest alternative language.

For example, AT&T requests that § 45.01 be modified to clarify its application to "existing attachments and license agreements between utilities and licensees as well as to any future attachments and license agreements" (AT&T Initial Comments, Exh. A).

2. Analysis and Findings

The existing regulations at 220 C.M.R. § 45.01 are limited to rates, terms and conditions for cable television attachments. The Department proposed to amend 220 C.M.R.

§ 45.01 in order to acknowledge the expansion of the regulations to encompass additional issues of nondiscriminatory access. For this reason, the Department will modify 220 C.M.R. § 45:01 to read: "220 C.M.R. 45.00 provides 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." This section of the Final Regulations will apply to existing and future attachments and existing and future license agreements, because the opportunity for nondiscriminatory access is a prerequisite to the development of competition in the telecommunications industry. Where utility poles, ducts, conduits and rights-of-way are owned jointly by one or more utilities, each utility shall be severally responsible for ensuring non-discriminatory access.

C. 220 C.M.R. § 45.02: Attachment

1. Comments

Although the proposed regulations do not modify the definition of "attachment" at

220 C.M.R. § 45.02, several commenters suggest additional language to clarify the definition. EECo comments that the current definition of “attachment” does not embrace all available telecommunications technologies. EECo suggests broadening the definition from “transmission of intelligence by telegraph, telephone or television, including cable television” to “transmission of intelligence, including by telegraph, telephone, television and cable television” (EECo Initial Comments at 1). BECo recommends that the definition be amended to include fiber optic cable as well as telecommunications duct or conduit (BECo Initial Comments at 9). National Grid USA recommends that the definition be amended to clarify that “attachment” applies to all utility ducts and conduits and not just ducts and conduits owned by telephone or telegraph companies (National Grid USA Initial Comments at 3).

AT&T requests that the Department clarify whether wireless telecommunications carriers are entitled to nondiscriminatory access under the final regulations (AT&T Initial Comments at 2). AT&T recommends that the definitions of “attachment” and “licensee” be amended to include antennas and wireless telephone (AT&T Initial Comments at 4-5). AT&T notes that because wireless providers are telecommunications carriers within the definition of the Federal Pole Attachment Act and since wireless attachments are not materially distinct from wireline devices, the Department should interpret the Massachusetts Pole Attachment Statute to include wireless carriers (id. at 5).

Winstar comments that fixed wireless carriers require access into and throughout CBs and MDUs in order to provide service to individual tenants (Winstar Initial Comments at 3). Winstar urges the Department to adopt regulations that will ensure consumer choice and promote the advancing telecommunications market to all consumers (id. at 5). Teligent notes that many traditional wireline carriers presently maintain antennas and other wireless type devices on buildings' rooftops (Teligent Comments at 7). Therefore, Teligent requests that the Department offer guidance on the scope of access into CBs and MDUs by wireless carriers seeking to service its tenants (id.). Metricom asks that the Department interpret the Massachusetts Pole Attachment Statute broadly to include wireless carriers.[(24)] Metricom states that while the definitions of “attachment” and “licensee” in the Massachusetts Pole Attachment Statute do not refer expressly to providers of wireless services, the Department has the latitude to determine that the final regulations equally apply to wireless carriers and their attachments (Metricom Initial Comments at 8).

2. Analysis and Findings

In the past, pole attachments[(25)] consisted of conventional wireline equipment, such as wires and cables that fastened to poles and were pulled through ducts and conduits. Today’s telecommunications services use a combination of wires, cables, spectrum, digital pulses of electricity, and other related devices (such as those used to translate broadcast microwave signals into electrical pulses for television or computer CRTs). Who can say what additional, now unforeseen services lie over the horizon?

AT&T, BECo, EECo, Metricom, Teligent and Winstar request that the Final Regulations be modified to address new technological advances since the state and Federal pole attachment statutes were enacted. In today's market, cable and telecommunications companies

often apply a number of wireless technological components to their services, such as satellite links and microwave relays. Similarly, some wireless providers employ networks comprised of wires and cables and require wireline facilities.

The FCC's authority to regulate wireless attachments was recently reviewed by a three judge panel of the 11th Circuit Court of Appeals in Gulf Power Company, et al. v. FCC, 208 F.3d 1263 (11th Cir., 2000).(26) The Court concluded that the Federal Pole Attachment Act did not give the FCC the authority to include wireless communications equipment or attachments within the pole attachments regulatory scheme because the Federal statutory definitions of "attachment" and "utility" read, in combination, only give the FCC authority to regulate attachments to poles used, at least in part, for wire communications, and not wireless communications.(27)

Id. at 1273-1274. In addition, the Court reviewed the legislative history of the Federal Pole Attachment Act and found that the 1996 amendment to the Act was made to allow telecommunications service providers to attach to utilities' "bottleneck facilities" without having to pay monopoly rents. Id. at 1275. The Court stated that poles are not bottleneck facilities for *wireless* carriers because most *wireless* equipment can be placed on any tall building or other structure. Id. The Court noted that wireless systems operate in a completely different manner than do wireline systems: wireline networks transmit through linear networks of cables strung between poles, while wireless networks transmit through a series of concentric circle emissions that allow the network to continue working if one antenna malfunctions. Due to these differences, the Court questioned whether there are any bottleneck facilities for wireless systems and found that there is no need to protect wireless operators from any threat of monopoly pricing. Id.

As with the Federal Pole Attachment Act, the Massachusetts Pole Attachment Statute does not explicitly authorize the Department to regulate purely wireless attachments:

Attachment means any *wire or cable* for transmission of intelligence by telegraph, 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.

G.L. c. 166, § 25A (emphasis added). The Massachusetts Pole Attachment Statute's use of the terms "wire or cable" in its definition of attachment, therefore precludes purely "wireless" carriers from the category of companies able to take advantage of non-discriminatory access to utility's rights-of-way. The question then is who are the precluded "wireless" carriers? We cannot base a distinction here on whether the device contains a wire or cable alone as many of today's services use a *combination* of wireless and wireline technologies. For example, there are some companies categorized as commercial mobile radio service ("CMRS") providers, which are not subject to Department regulation as G.L. c. 159 common carriers. See Investigation by the Department of Public Utilities upon its own motion on Regulation of Commercial Mobile Radio Services, D.P.U. 94-73, at 14 (1994). There are also carriers who provide local exchange and other telecommunications services using a *combination* of wires, antennas, and radio signal, but who are not categorized as CMRS. These latter carriers are regulated by the Department as G.L. c. 159 common carriers.

The fixed facilities used by CMRS providers to render service do not have to be at the location of the end user. For example, cell sites can be located on a tower to serve mobile customers within a certain radius of that cell site. Utility poles, ducts, conduits and rights-of-way are not bottleneck facilities for these carriers because they do not require such access to reach their end customers. Contrast that to a situation where a carrier uses an antenna or satellite dish on a particular building to serve customers in that building. In this case, the carrier, practically speaking, requires access to utility rights-of-way to reach the end user. Otherwise, the consumer is denied access to a burgeoning array of modern telecommunications services.

Therefore, in circumstances where a "wireless" device located within or on a CB or MDU is necessary to receive and convey telecommunications signals for the benefit of a particular, requesting consumer located within the CB or MDU on which the wireless device is located, our new regulations would apply. Without the wireless attachment on his CB or MDU, a lessee/consumer would not be able to receive that particular service. The consumer's free choice of telecommunications provider would be constrained - - and unreasonably so.

A compensatory rate for such an attachment would, of course, be in order. However, if the "wireless" technology is designed merely to relay or rebroadcast signals and is not necessary to serve a particular, requesting consumer in that CB or MDU, these regulations would not apply. Access to facilities to enable a lessee/consumer to receive a signal is distinct from access merely for broadcasting. These transmitting technologies are able through location agreements to attach to countless facilities (e.g., buildings, towers, billboards) and do not require access into CBS or MDUs to serve consumers

within those CBS or MDUs.[(28)] But the consumer who wants to take advantage of wireless reception of telecommunications services should be able to enter an agreement with a provider in order to receive those services; and the provider chosen by the consumer should be able to use internal ducts, conduits, risers, etc. within the tenant/consumer's building and make incidental, unobtrusive attachments in order to make the tenant/consumer's choice a reality.[(29)]

Finally, because the services provided by, and regulatory treatment of, "wireless" carriers furnishing local exchange and other telecommunications services using a combination of wires, antennas, and radio signal are identical to services and regulation of other common carriers, our rules will be neutral as to the technology used to provide services.

Accordingly, we interpret and apply the term "attachment," where appropriate, in order to include a range of both existing and new technologies -- consistent with the goals for meaningful competition and to ensure technologically neutral access. The statute should be construed to effect its intent to benefit the public at large. Because the rapid growth and deployment of the various communications technologies likely would quickly render outdated any highly specific interpretation of "attachment," we will endeavor to eschew constraining specificity. Instead, when necessary to determine what is an "attachment," we will determine whether the technology at issue falls within this statutory definition. When making such a determination, the Department will look to the language of the statute as well as the purpose which the statute seeks to accomplish -- namely the promotion of consumer sovereignty.

D. 220 C.M.R. § 45.02: Complaint

1. Comments

The Department proposed to expand the definition of "complaint" at 220 C.M.R.

§ 45.02 to include a filing that alleges a denial of access to a pole, duct, conduit, or right-of-way owned or controlled, in whole or in part, by one or more utilities. Order, Att. NECTA and MMA support the proposed amendment (NECTA Initial Comments, Att. A at 2; MMA Initial Comments at 2). No commenters oppose the amendment.

2. Analysis and Findings

The complaint procedures contained in the Current Regulations address only filings containing allegations that a rate, term, or condition for an attachment is not reasonable. The Department's proposed revision to the definition of "complaint" is necessary to

effectuate a procedure for addressing allegations of nondiscriminatory access by telecommunications carriers and cable system operators to utility poles, ducts, conduits, and rights-of-way. Therefore, the Department will adopt the proposed revisions to provide an appropriate complaint procedure for allegations of discriminatory access.

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

1. Comments

The Department proposed the adoption of complaint procedures similar to the Federal pole attachment complaint procedures found at 47 C.F.R. § 1.1401. et seq. Order at 2. Many commenters support the adoption of these procedures (AT&T Initial Comments, Exh. A;

BECo Initial Comments at 9; MCI WorldCom Initial Comments at 3-4; NECTA Initial Comments, Att. A at 2-4; National Grid USA Initial Comments at 3-4, 6-8; RCN Initial Comments at 14-17).

Bell Atlantic requests clarification of a potential ambiguity in the proposed procedures concerning a utility's requirement to respond to requests for access to poles, ducts, conduits and rights-of-way within 45 days (Bell Atlantic Initial Comments at 2). Bell Atlantic requests

that the Department clarify that utilities are required to provide written responses to access

requests, but are not required to provide actual physical access, within the 45 day period

(Bell Atlantic Initial Comments at 3).

MMA suggests that the 60 day minimum notice requirements contained in proposed

220 C.M.R. § 45.03(3) be amended to provide for emergency notification to licensees of removal or modification requested by a municipality where public safety is threatened

(MMA Initial Comments at 2). Similarly, Bell Atlantic maintains that unanticipated problems can surface, which may not be properly characterized as an emergency, but which require a

utility to undertake a modification in a time-sensitive manner that does not permit 60 days notice (Bell Atlantic Initial Comments at 4). Bell Atlantic suggests that notice be provided as early as practicable (Bell Atlantic Initial Comments at 4).

MCI requests the addition of language similar to that contained in 47 U.S.C. § 224(h), to ensure that attaching parties have a reasonable opportunity to add to or modify their

existing attachments when notified that other modifications or alterations to poles, ducts, conduits or rights-of-way are to be made (MCI Initial Comments at 4-5). MCI also requests additional language, similar to that contained in 47 U.S.C. § 224(i), to guarantee that costs incurred to rearrange or replace an attachment as a result of new attachments or modifications to existing

attachments be paid by the party requesting the new or modified attachment and are not imposed on any entity that has previously obtained an attachment (MCI Initial Comments at 5). 2. Analysis and Findings

The Department seeks to adopt regulations that will ensure timely and nondiscriminatory access to poles, ducts, conduits, and rights-of-way. Requests for access are time-sensitive because of the competitive pressure on carriers to provide services to customers as quickly as possible. However, the Department recognizes that significant coordination among various parties is necessary to provide physical access to poles, ducts, conduits and rights-of-way. The Department must balance the need to ensure a timely response to access requests, with the need to adopt regulations that reflect, to the extent practicable, existing just and reasonable practices between utilities and licensees. Accordingly, we adopt this section of the rules. Pursuant to the Final Regulations, while physical access need not occur within

45 days, utilities must respond to all requests for access within 45 days. Physical access also should be accommodated within 45 days whenever reasonably practicable.

A utility must provide at least 60 days notice to a licensee if that utility's action may affect the licensee's attachments. However, 60 days written notice is not necessary for routine maintenance, or if an emergency situation renders such notification highly impracticable. In the event of an emergency, a utility must endeavor to provide as much notice as is practicable, given the particular circumstances. The term "emergency" will be broadly construed to include bona fide problems that merit exception to the 60 day notice requirement.

As provided in the Final Regulations, carriers should also be given the option to modify their attachments at their own expense in cases in which the owner of a pole, duct, conduit, or right-of-way chooses to alter the existing structures. In addition, should a new attachment require a rearrangement or replacement of existing attachments, the entity seeking to add the new attachment is responsible for the costs associated with the rearrangement or replacement of the attachment.

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

1. Comments

The Department proposed an addition to 220 C.M.R. §§ 45.00 to ensure that utilities charge any affiliate, subsidiary, or associate company engaged in the provision of telecommunications or cable services an amount equal to the pole attachment rate for

which another unaffiliated company would be liable. Order, Att. National Grid USA suggests the Department substitute the term “equal” for “equivalent” in referring to the rate to be charged to clarify that affiliates, subsidiaries and associate companies be treated in the same manner (National Grid USA Initial Comments at 4). BECo requests that the proposed language be modified to ensure that equal treatment of affiliates extends to all competitive providers of telecommunications services, and not just traditional utilities, arguing that any entity owning or controlling a significant network of conduits or other infrastructure can also achieve a discriminatory effect by not charging or imputing costs to an affiliate engaged in providing a new service in a competitive market (BECo Initial Comments at 4).

2. Analysis and Findings

The Department affirms the need for its Final Regulations to ensure that a utility

imposes upon its own or affiliated telecommunications and cable services the same rates it imposes on competitors. A utility that itself competes in the markets for telecommunications and cable services, either directly or through an affiliate or associate company, must not use its ownership and control of pole attachments, ducts, conduits and rights-of-way to favor itself or its affiliates. Preferential treatment discriminates against unaffiliated competitors and prevents the development of the competitive market.

Under the Final Regulations, entities will not be able to achieve a discriminatory effect by failing to charge or impute costs to an affiliate engaged in providing a new service in a competitive market. Utilities may charge themselves, their affiliates, subsidiaries or associate companies no less than they charge other unrelated entities for access to poles, ducts, conduits and rights-of-way. Accordingly, the Department adopts § 45.10 to address rate issues related to affiliates, subsidiaries or associate companies. In order to avoid potential confusion, the Department will adopt the term “equal” rather than “equivalent” when describing the rates for pole attachments, ducts, conduits and rights-of-way.

G. Appellate Remedy

Requiring nondiscriminatory access to in-building conduits serving commercial and residential tenants/customers in CBs and MDUs will effectuate legislative intent.

Nondiscriminatory access is consistent with the broad scope and wording of § 25A and with the overarching purposes of telecommunications legislation. However, subject to Department review and adjustment as circumstances may, after issuance of this Order, warrant enforcement of the regulations as they relate *particularly* to CB and MDU owners will be stayed until July 1, 2001.[(30)] This date allows a twelve-month period to enable market participants to analyze and absorb the changes to 220 C.M.R. and to seek such judicial review or legislative amendment as may be thought appropriate. All other provisions are effective (without stay) upon publication in the Massachusetts Register.

G.L. c. 30A, § 7, provides, by specific reference to G.L. c. 231A, that these regulations are subject to review upon filing of a petition for declaratory relief. Caselaw has elaborated a standing requirement as a predicate to Chapter 231A jurisdiction. While Chapter 231A jurisdiction lies with several departments of the judiciary, the Court most familiar with utility law and practice is, of course, the one vested with appellate jurisdiction over the Department under G.L. c. 25, § 5: The Supreme Judicial Court.[(31)]

Although we believe the regulations adopted here realize legislative intent to maximize consumers' access to telecommunications services and providers' access to potential customers, persons disputing our reading of § 25A can seek amendment of the statute itself. The Department operates under statutory delegation and must, as a creature of statute, enforce any statutory change that might be made.

V. ORDER

After considering comments received on the Proposed Regulations, the Department now issues final rules that promote meaningful competition, and take into consideration the interest of subscribers of cable television and other telecommunication services and consumers of utility services. G.L. c. 166, § 25A. Review of these regulations may be had by a petition for declaratory relief in accordance with G.L. c. 30A, § 7, and c. 231A, § 2. Limitations on

the scope of that review are set forth in Thomas v. Commissioner of the Division of Medical Assistance, 425 Mass. 738, 746 (1997). See also, G.L. c. 231A, § 9, on construction of the review remedy. Accordingly, after notice, hearing and consideration, it is hereby

DETERMINED: that the revised regulations attached hereto, and designated as

220 C.M.R. §§ 45.00 et seq. are reasonably necessary for the administration of Chapter

166, § 25A of the General Laws; and it is

ORDERED: that the regulations designated as 220 C.M.R. §§ 45.00 et seq. and entitled "Pole Attachment, Duct, Conduit and Right-of-way Complaint and Enforcement Procedures" attached hereto are hereby ADOPTED; and it is

FURTHER ORDERED: that the Secretary to the Department shall cause the revised regulations, adopted today and attached hereto, to be transmitted to the Secretary of State of the Commonwealth for publication in the next number of the Massachusetts Register; and it is

FURTHER ORDERED: that these regulations as they relate to CB and MDU owners shall take effect on July 1, 2001 and all other provisions shall take effect upon publication in the Massachusetts Register.

By Order of the Department,

_____

James Connelly, Chairman

_____

W. Robert Keating, Commissioner

_____

Paul B. Vasington, Commissioner

_____

Eugene J. Sullivan, Jr. Commissioner

Deirdre K. Manning, Commissioner

1. [1] Pub. L. No. 104-104, 110 Stat. 56, amending the Telecommunications Act of 1934, now codified as 47 U.S.C. § 224.

2. [2] Telecommunications access is today intimately connected with the free exchange of information, opinion, and ideas, a foundation principle of the Republic. Massachusetts' electric restructuring statute would not countenance obstructing a consumer's choice of competitive electric supplier, St. 1997, c. 164, §§ 1A, 1G, 76, 94, and 94A. Tolerating artificial barriers to consumer access to the telecommunications marketplace of information and ideas touches something even more fundamental.

3. [3] The Massachusetts Pole Attachment Statute mandates that the Department "shall consider . . . the interest of consumers" in exercising its statutory authority. This order and the rules adopted today carry out the legislative mandate that consumer interest be the touchstone for enforcement of § 25A. The Department's new rules intend to "ensure tenants access to [one of the] services the legislature deems important, such as water, electricity, natural light, telephones, inter-communications systems, and mail service." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 452 (1982), Blackman, J., dissenting.

4. [4] Order Instituting Rulemaking to Establish Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-of-Way, D.T.E. 98-36 (1998) ("Order").

5. [5] The Massachusetts Pole Attachment Statute states, in pertinent part: "The department of telecommunications and energy shall have the authority to regulate the rates, terms and conditions applicable to attachments, and in so doing shall be authorized to consider and shall consider the interest of subscribers of cable television services as well as the interests of consumers of utility services; and upon its own motion or upon petition of any utility or licensee said department shall determine and enforce reasonable rates, terms and conditions of use of poles or of communication ducts or conduits of a utility for attachments of a licensee in any case in which the utility and licensee fail to agree." G.L. c. 166, § 25A.

6. [6] The Federal Pole Attachment Act states: “Nothing in this section shall be construed to apply to, or to give the [Federal Communications] Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of way for pole attachments in any case where such matters are regulated by a State.”

47 U.S.C. § 224(c)(1).

7. [7] CATV Rulemaking Order, D.P.U. 930 (1984).

8. [8] In an early 1998 decision, the Department first addressed the issue of jurisdiction. It did so in ruling on whether claims, of discriminatory access-terms, first raised in 1997, lay within the scope of an investigation. Specifically, the Department limited that investigation to whether the pole attachment rates, terms and conditions available to the complainants were just and reasonable. The Department determined that it had not yet taken the prerequisite steps to invoke jurisdiction over the complainants' claims of discriminatory access. Cablevision of Boston Company, D.P.U./D.T.E. 97-82, at 7, Order on Scope of the Proceeding (February 11, 1998).

9. [9] The Department received initial written comments from Allegiance Telecom of Massachusetts, Inc. (“Allegiance”); the Association for Local Telecommunications Services, and Winstar Communications Inc. (jointly “ALTS/Winstar”); AT&T Communications of New England, Inc. (“AT&T”); Selectmen of the Town of Bedford (“Bedford”); New England Telephone and Telegraph Company d/b/a Bell Atlantic Massachusetts (“Bell Atlantic”); Boston Edison Company (“BECo”); Breakthrough Massachusetts; Cambridge Electric Light Company and Commonwealth Electric Company (jointly “COM/Electric”); CSC Holdings, Inc. (“CSC”); Eastern Edison Company (“EECo”); the Massachusetts Municipal Association (“MMA”); MCI WorldCom, Inc. (“MCI WorldCom”); the New England Cable Television Association, Inc. (“NECTA”); Massachusetts Electric Company, Nantucket Electric Company, and NEES Communications, Inc. (jointly “NEES” now “National Grid USA”);

RCN-BECoCom, LLC. (“RCN”); the Southeastern Regional Services Group (“SRSG”); and the Towns of Acton, Falmouth, Lexington and Yarmouth (jointly “Towns”).

10. [10] Notice of Request for Further Written Comments on Proposed Amendments to

220 C.M.R. §§ 45.00 et seq. (August 20, 1999).

11. [11] The Department received supplemental written comments from AT&T; Bell Atlantic; Competitive Telecommunications Association (“CompTel”); BECo and Com/Electric, (jointly “NSTAR”); RCN; Teligent; the Towns (supplemented by Bedford); and ServiSense. Although it solicited comments directly from commercial real estate interests and realty trade organizations, the Department received none from those interest groups. In addition to the general notice soliciting supplemental comments, the Department sent targeted notice to real estate organizations seeking their views. Specifically, notice was sent to the Massachusetts Landlords Association, Building

Owners and Managers Association, Massachusetts Association of Realtors, Greater Boston Real Estate Board, Massachusetts Real Estate Investors Association, The Metro South Property Owners Association, Massachusetts Rental Housing Association, Inc.,Small Property Owners Association of Cambridge, Cape Cod Property Owners

& Managers Association, Greater Lowell Landlord's Association, Property Owners

Cooperative, South Shore Rental Association, Worcester Property Owners Association, Inc., The Greater Marlboro Property Owners Association, Greater New Bedford Landlord Association, Landlords' Business Association of Franklin County, Somerville Homeowners Association, Southern Worcester County Landlord Association, and The Beacon Hill Institute for Public Policy Research.

12. [12] E.g., street lighting issues have been previously addressed in Boston Edison Company, D.T.E. 98-108 (1999), and Massachusetts Electric Company, D.T.E. 98-69 (1999).

13. [13] See Linda Sandler, *Landlords Use Real-Estate Proceeds for Technology Plays,*

Wall Street Journal, April 26, 2000; Scott Thurm and Barbara Martinez, *Big Landlords Are Joining Telecom Fray*, Wall Street Journal, October 5, 1999; and Lawrence R. Freedman and Richard L. Davis, *New Entrants Seek Access to Multiple Dwelling Units*, Legal Times, May 3, 1999. See also, comments, generally, in this proceeding.

14. [14] The FCC is presently considering access to MDUs in FCC Docket 96-98, Notice of Proposed Rulemaking and Notice of Inquiry (July 7, 1999) ("FCC Rulemaking"). Additionally, several states (i.e., Connecticut, Nebraska, Texas and Ohio) already have enacted legislation or regulations to prohibit owners of MDUs from discriminating and/or demanding unreasonable compensation for access to MDUs. Finally, the National Association of Regulatory Utility Commissioners ("NARUC") supports "legislative and regulatory policies that allow customers to have a choice of access to properly certified telecommunications providers in multi-tenant buildings," and also "supports legislative and regulatory policies that will allow all telecommunications service providers to access, at fair, nondiscriminatory and reasonable terms and conditions, public and private property in order to serve a customer that has requested service of the provider." NARUC Resolution Regarding Nondiscriminatory Access To Buildings For Telecommunications Carriers (July 29, 1998).

15. [15] The issue is, however, not strictly one of first impression at the Department. It arose some fifteen years ago, even during the heyday of monopoly telephony. See

New England Telephone and Telegraph Company, D.P.U. 86-124-D, at 11-16 (1986) (concluding that a shared tenant services provider, including a property

owner, could be deemed to be furnishing or rendering telecommunications services for public use and could, therefore, be subject to Department regulation pursuant to G. L. c.

159, § 12); Massachusetts Institute of Technology, D.P.U. 86-13, at 15-16 (1988) (MIT's provision of local exchange service to dormitory residents would not be subject to regulatory oversight, but ruling was "contingent upon MIT's explicitly indicating that it will continue to allow its dormitory residents the option to contract directly with NET and competing carriers for local exchange service"); Intra-LATA Competition, D.P.U. 1731, at 85-97 (October 18, 1985) (criteria for whether telecommunications network was offered for public use).

16. [16] The Federal statute reads: "The term 'utility' means *any person who is a* local exchange carrier or an electric, gas, water, steam, or other *public utility, and who owns or controls* poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State." 47 U.S.C. § 224(a)(1) (emphasis added). The relative clause modifying "any person" in this Federal definition uses the conjunction "and" to signify that *two* conditions must be met to fall within the defined term. G.L. c. 166, § 25A, embraces a much broader class. Where the Federal statute adopts the word "used," Massachusetts' statute employs the much broader phrase "used or useful," the latter term of the phrase suggesting a much wider coverage.

17. [17] Notice of Request for Further Written Comments on Proposed Amendments to

220 C.M.R. §§ 45.00 et seq. (August 20, 1999).

18. [18] The Department's use of the term "infrastructure" is broad in order to promote maximum access to and by the end-user. Thus, in an appropriate case, we may interpret the terms poles, ducts, conduits and rights-of-way to include piers, abutments, manholes, rooftops (for example, the case of microwave or other wireless communications) where local zoning permits telecommunications closets, risers, and other necessary infrastructure.

19. [19] The underlying principle in Loretto was recognized from the start by the Supreme Judicial Court in perhaps our earliest public utility dispute to leave an appellate record:

It may be observed that the sacred rights of private property are never

to be invaded but for obvious and important purposes of public utility.

Such are all things necessary to the upholding of mills. Hence the legislature

have authorized mill-owners to invade the property of their neighbors, even real

property, which by our laws seems to be regarded as the most inviolable, so as to render it wholly useless, by overflowing it with water, whenever the same

shall be *necessary* to the beneficial occupation of the mills. This invasion of

private property is authorized only by statute, and in no case but from *necessity* for the attainment of the objects intended.

Spring v. Lowell, 1 Mass. 423, 430 (1805) (emphasis in original), Sedgwick, J., concurring (dispute over damages from sawmill dam flowage on the Saco River in 1794).

20. [20] This analysis assumes that a tenant in a CB or MDU has formally requested service from a complaining telecommunications provider, who barred from achieving

on-premises access to the requesting tenant. The provider must be able to document a tenant's binding request as a predicate to invoking 220 C.M.R. 45.00 et seq.

21. [21] G.L. c. 166A, § 22 states, in pertinent part, "No operator shall enter into any agreement with persons owning, leasing, controlling or managing buildings served by a CATV system, or perform any act, that would directly or indirectly diminish or interfere with existing rights of any tenant or other occupant of such a building to the use of master or individual antenna equipment."

22. [22] See Nebraska Public Service Commission Order Establishing Statewide Policy for MDU Access at 6, Application No. C-1878/PI-23 (March 2, 1999); Conn.Gen.Stat.

§ 16-2471 (1997).

23. [23] Three years ago, the State of Ohio adopted a similar rebuttable presumption finding that "any arrangements whereby telecommunications carriers are provided the use of private building riser space, conduit, and/or closet space [are] anti-competitive and unlawful." The Public Commission of Ohio, In the Matter of the Commission Establishment of Local Exchange Competition and Other Competitive Issues, Case No. 95-845-TP-COI, Local Service Guidelines, Appendix A at 71-72 (February 20, 1997).

24. [24] On March 28, 2000, Metricom filed a Motion for Leave To File Comments After Expiration of Comment Period along with Metricom's Comments. On April 5, 2000, Metricom served both the Motion and Comments to all commenters in this proceeding. No commenters objected to Metricom's Motion. The Department hereby grants Metricom's Motion and will consider its filed Comments.

25. [25] As broadly used here. See p. 2, above.

26. [26] The Court consolidated several petitions seeking review of In re Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 F.C.C.R. 66777 (1998)

(codified at 47 C.F.R. §§ 1.1401-1.1418 (1999)) ("Report and Order") implementing the Federal Pole Attachment Act. On May 26, 2000, the FCC appealed the panel's decision to the full Court sitting *en banc*.

27. [27] Pursuant to the Federal definition, the term "pole attachment" means: "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).

The term "utility" means: "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any state." 47 U.S.C. § 224(a)(1).

28. [28] We note and emphasize that, subject to determinations that might be made under G.L. c. 40A, § 3, nothing in these regulations per se may be construed as authorizing any practice or attachment not in conformance with local zoning codes.

29. [29] Wireless telecommunications is one of the fastest growing and most promising technology. The ability to distribute wireless intelligence within a CB or MDU through ducts and conduits is essential to realizing its potential for consumers. Regulation that discriminates against wireless technology in favor of traditional landline technology to some extent turns its back on the future. Pure wireless telecommunications providers evidently do not come within the ambit of the Federal Pole Attachment Act. Gulf Power Co. v. Federal Communications Commission, 208 F.3d 1263 (11th Cir., 2000). The Massachusetts Pole Attachment Statute differs from its Federal counterpart and is broad enough to compass hybrid or mixed wireless-and-wire systems.

30. [30] Although enforcement is stayed until that date, the exclusivity presumption in

220 C.M.R. 45.03(1) will, once enforcement begins in July 2001, attach to contracts made or extended as of the date of this Order.

31. [31] From time to time, the Court has granted applications for direct appellate review of questions of utility law raised in lower courts. See, Boston Gas Company v. City of Newton, 425 Mass. 697, 698 (1997); Boston Gas Company v. City of Somerville,

420 Mass. 702, 703 (1995).