



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

MEMORANDUM

To: Attached Service List

From: Paul J. Hibbard, Chairman, Department of Public Utilities
Sharon E. Gillett, Commissioner, Department of Telecommunications
and Cable

Re: Memorandum of Agreement regarding jurisdiction over pole attachment and
double pole disputes

Date: October 15, 2008

I. INTRODUCTION

On July 18, 2008, the Department of Public Utilities ("DPU") and the Department of Telecommunications and Cable ("DTC") jointly requested comment from industry stakeholders on a proposed Memorandum of Agreement ("MOA") regarding the regulation of attachments to utility poles, ducts, and conduits pursuant to G.L. c. 166, § 25A and double poles pursuant to G.L. c. 164, § 34B. Comments on the proposed MOA were due August 1, 2008.

We received comments from the following entities: (1) collectively by Fitchburg Gas and Electric Light Company d/b/a Unitil; Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid; NSTAR Electric Company; and Western Massachusetts Electric Company (together, "electric distribution companies"); (2) Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon"); (3) the Attorney General of the Commonwealth of Massachusetts ("Attorney General"); (4) New England Cable and Telecommunications Association, Inc. ("NECTA"); (5) Five Colleges, Inc. ("Five Colleges"); and (6) The Distributed Antenna Systems ("DAS") Forum.¹

¹ The full text of the comments is available online on the DPU's website at www.state.ma.us/dpu (go to the "Electric Power Division" link in the upper left corner and then click on "Safety and Reliability") and on the DTC's website at

We appreciate the review and feedback from the above participants. We have evaluated the comments, and we conclude that the MOA should be modified in two respects: first, regarding the collaborative forum provision, and second, regarding intervention rights. This memorandum summarizes the modifications and addresses additional key concerns raised in the comments. The revised MOA, as executed, is attached to this memorandum.

II. MODIFICATIONS TO THE MOA

A. Delay of Collaborative Forum

The electric distribution companies, the Attorney General, and NECTA raise issues with the proposed collaborative forum. In general, the electric distribution companies and the Attorney General state that the scope of the collaborative forum should be established prior to scheduling the forum. NECTA objects to the purpose and timing of the forum, and suggests that a waiting period of at least one year after the MOA's implementation is necessary to determine whether any issues exist to make the forum necessary. Given these comments, the MOA has been revised to reflect agreement by the DPU and DTC that we will determine the appropriate scope and parameters prior to convening any such collaborative forum.

B. Clarification of Intervention Rights

Five Colleges and NECTA inquire as to the scope of "intervention" rights to be conferred upon the agency that does not have jurisdiction over a dispute. We have revised the MOA to clarify that an intervenor will have full party rights.

III. OTHER CONCERNS RAISED IN THE COMMENTS

A. Determining Jurisdiction - Primary Purpose of Attachment

Verizon, NECTA and DAS Forum address whether jurisdiction over pole attachment disputes should be determined based on the primary purpose of the attachment, as provided in paragraph five of the MOA. Verizon suggests that this approach may not be appropriate in some circumstances, as it may result in the DPU obtaining jurisdiction over cases that involve attachments in the communications space on poles.

Instead, Verizon recommends determining jurisdiction based on the identity of the parties to the dispute (e.g., a complaint against Verizon would be adjudicated by the DTC).

www.state.ma.us/dtc (scroll down to the "Competition Division" link, click on it and then click on to "Telecommunications Division", next scroll down to "Telecom Statutes, Rules, and Notices" click on it and then on "Comments filed with the Department regarding Pole Attachment Jurisdiction" located at the bottom of the page).

Where pole co-owners are parties to an action, the location or proposed location of the attachments on the poles would determine the agency to adjudicate the claim (e.g., the DPU would determine complaints concerning attachments in the power supply space or the neutral zone).

NECTA and DAS Forum support the primary purpose approach but both commenters suggest that the "exception" language in paragraph five would improperly result in assigning DPU exclusive jurisdiction over attachments that transmit electricity. They contend this would deprive the DTC of jurisdiction over disputes within its expertise and result in inefficient splits of jurisdiction between the two agencies. They recommend narrowing the language in this paragraph to disputes over the provision of electricity or electric safety issues.

DPU and DTC have concluded that it is unnecessary to modify paragraph five of the MOA, as we are persuaded that the primary purpose approach remains the best possible means of resolving jurisdiction over complaints. To the extent that issues arise related to jurisdiction, the agencies will resolve them during the 15-day consultation period. In addition, both agencies will be able to intervene in dispute proceedings, when necessary, to further address any issues that may arise.

B. Safety and Reliability

The Attorney General and the electric distribution companies raise issues related to safety and reliability. The Attorney General submits that whichever agency ultimately retains jurisdiction over the dispute must remain cognizant of applicable safety, reliability, and engineering standards, even if this means hiring outside experts or sharing personnel among the agencies.

The electric distribution companies suggest that in cases where the DTC has jurisdiction over a pole attachment complaint, but a question has been raised concerning the safety and reliability of the electric system, an opinion by the DPU that the attachment would not negatively impact the safety and reliability of the electric system should be a condition precedent to a decision by the DTC. They recommend revising the MOA to reflect this prerequisite.

We conclude that such modification is unnecessary. The commenters' concerns can be addressed through the agencies' mutual right of intervention. Specifically, the intervening agency will be able to address safety and reliability issues and provide necessary expert information to the agency retaining jurisdiction over the complaint. In addition, all interested parties, including the Attorney General and the electric distribution companies, can seek to intervene and provide expert testimony regarding safety and reliability.

C. Pole Attachment Rates

The electric distribution companies suggest that the MOA should be revised to clarify that the DPU, and not the DTC, will set rates for attachments on poles owned by electric companies. We decline to modify the MOA in this respect. The rate formula for pole attachments is governed by statute, case law, and regulations, all of which provide sufficient guidance regarding pole attachment rates. We conclude that any issues relating to rates can be addressed by either agency through its right of intervention under paragraph nine of the MOA.

D. Shared Jurisdiction of Double Poles

The electric distribution companies state that the MOA is silent as to the actual process of shared jurisdiction by the agencies as to double poles, and they recommend that the MOA be revised to address this issue. As stated in the MOA, the DPU and DTC agree to develop a process to share issues relative to double poles. The agencies also agree to address double poles issues, if necessary, in a future collaborative forum with interested stakeholders. As such, the DPU and DTC conclude that no further modification to the MOA is necessary at this time.

E. 15-day Consultation Period

The Attorney General raises a concern that procedural issues could arise during the 15-day consultation period between the DPU and DTC that require one agency to issue an immediate ruling, such as a claim for interim relief. The Attorney General suggests that the agency before which a claim for immediate relief is filed should review the merits in a timely manner. We believe that the agencies can reach agreement on interim procedural decisions during the 15-day consultation period, and the appropriate agency then will issue a ruling.

IV. CONCLUSION

We thank those who submitted comments and offered suggestions on the MOA. Prior to the expiration of the MOA in two years, the DPU and DTC will review our experience under the MOA and will have another opportunity to address any concerns raised by our stakeholders.

MEMORANDUM OF AGREEMENT
between
Department of Public Utilities
and
Department of Telecommunications and Cable
regarding the regulation of attachments to utility poles, ducts, and conduits pursuant to
G.L. c. 166, § 25A and double poles pursuant to
G.L. c. 164, § 34B

This Memorandum of Agreement (“MOA”) is entered into this October 14, 2008 between Department of Public Utilities (“DPU”) and Department of Telecommunications and Cable (“DTC”).

WHEREAS, on April 11, 2007, pursuant to Article 87 of the Amendments to the Massachusetts Constitution, Chapter 19 of the Acts of 2007 (“Act”) reorganized the Governor’s cabinet and certain agencies of the Executive Department, separating the functions of Department of Telecommunications and Energy (“DTE”) into two successor agencies;

WHEREAS, the Act created DPU within the Executive Office of Energy and Environmental Affairs (“EOEEA”), as the successor to the DTE, for purposes of regulation of gas, water, and electric utilities, pipelines, and transportation industries;

WHEREAS, the Act created DTC within the Executive Office of Housing and Economic Development (“EOHED”) as the successor to the DTE, for purposes of regulation of the telecommunications and cable television industries;

WHEREAS, notwithstanding the above changes, jurisdiction over the regulation of attachments to utility poles, ducts, and conduits (“pole attachments”) pursuant to G.L. c. 166, § 25A and over double poles pursuant to G.L. c. 164, § 34B remains with DTE;

WHEREAS, DPU and DTC have agreed on a process to share jurisdiction over issues relative to pole attachments pursuant to G.L. c. 166, § 25A;

WHEREAS, DPU and DTC jointly agree to develop a process to share jurisdiction over issues relative to double poles;

NOW THEREFORE, the parties to this MOA, intending to be legally bound hereby, agree as follows:

1. When any entity files or otherwise raises a complaint with DPU relative to pole attachments or double poles, DPU will send a copy of such complaint or notice of proceeding to DTC within three business days at the following address:

Department of Telecommunications and Cable
Two South Station - 4th Floor
Boston, Massachusetts 02110

2. When any entity files or otherwise raises a complaint with DTC relative to pole attachments or double poles, DTC will send a copy of such complaint or notice of proceeding to DPU within three business days at the following address:

Department of Public Utilities
One South Station - 2nd Floor
Boston, Massachusetts 02110

3. As the utility poles, ducts, and conduits often are jointly owned by an electric distribution company and Verizon New England, Inc. and as the attachments at issue are used for various purposes, DTC and DPU will share jurisdiction over issues related to pole attachments pursuant to G.L. c. 166, § 25A and over double poles pursuant to G.L. c. 164, § 34B. As more fully described in paragraphs 4 and 5 below, the appropriate agency to adjudicate a pole attachment complaint will be determined by the primary purpose of the attachment at issue. As more fully discussed below in paragraph 11, DTC and DPU agree to establish a collaborative forum with interested stakeholders to identify and resolve issues related to pole attachments and double poles.
4. **DTC JURISDICTION OVER POLE ATTACHMENTS:** Except as provided below in paragraph 5, DTC shall be the appropriate agency to adjudicate a pole attachment complaint where the primary purpose of the attachment at issue is:
for the transmission of intelligence by
telegraph;
wireless communications;
telephone;
television, including cable television;
and any other communications service.
5. **DPU JURISDICTION OVER POLE ATTACHMENTS:** DPU shall be the appropriate agency to adjudicate a pole attachment complaint where the primary purpose of the attachment at issue is:
for the transmission of electricity for light, heat, or power;

for the measurement, reading, tracking, or recording of any customer's electric or natural gas usage, or electric or natural gas demand or consumption at any level of aggregation;

for remote reading of customer electric or natural gas meters, or the connection, disconnection, or alteration of electric or gas service to a customer or groups of customers;

for the remote alteration of the electric or gas consumption of any end-use consuming appliance or mechanism within an end-user's residence or place of business; or

for any application related to electric smart grid or advanced metering.

Notwithstanding an attachment's primary purpose, any attachment which involves or requires attaching to, using, or drawing from any wire or device that transmits electricity, including any attachment for the purpose of transmission of intelligence over electric power lines, or any attachment that affects or could affect the provision of electric smart grid or advanced metering, whether on poles, underground, at substations, or between the poles and the customer's electrical meter, shall be under the jurisdiction of DPU.

6. DPU and DTC agree that 220 C.M.R. § 45.00 et seq. are the applicable regulations with respect to pole attachments. In the event that either agency seeks changes to these regulations, or to other policies or procedures applicable to pole attachments, DPU and DTC agree to jointly develop and promulgate such regulations, policies or procedures consistent with G.L. c. 166, § 25A and consistent with any directives resulting from the collaborative forum, discussed in paragraph 11.
7. **CONSULTATION PLAN FOR POLE ATTACHMENT DISPUTES:** The agencies anticipate that, in most circumstances, the appropriate agency to adjudicate a pole attachment complaint will be resolved by paragraphs 4 and 5, above. However, exceptional cases may arise in which the appropriate agency to adjudicate a complaint is not clear. Therefore, the DTC and the DPU agree, through this MOA, to consult to reach agreement regarding the appropriate agency to adjudicate a pole attachment complaint ("Consultation Plan").
8. In order to enable the agency with jurisdiction to meet the 180 day deadline to issue a final order as required in 220 C.M.R. 45.08, DTC and the DPU agree that they shall endeavor to complete all tasks in the Consultation Plan within 30 calendar days of receipt of filing by both agencies (see paragraphs 1 and 2 above, and subparagraph a, below).

- a. When a pole attachment complaint is filed at either agency, the agency receiving the complaint will follow the procedure set forth in paragraphs 1 and 2, above.
 - b. Representatives from the DTC and the DPU will consult regarding the appropriate agency to adjudicate the pole attachment complaint within fifteen (15) business days of receipt of the filing by the other agency of the complaint ("15 Day Consultation Period"). The DTC and the DPU contemplate that, in most circumstances, this initial consultation will be sufficient to ensure that the complaint has been filed at the appropriate agency. In the event that either agency determines that it does not have sufficient information to determine the primary purpose of the attachment at issue as contemplated by paragraphs 4 and 5, above, it may request further information from the complainant and/or respondent. Either agency also may review the response to the complaint filed pursuant to 220 C.M.R. § 45.05. The 15 Day Consultation Period shall be suspended pending the receipt of such additional information or response to the complaint.
 - c. If the initial consultation results in agreement between DTC and DPU that the complaint is filed with the wrong agency, the agency that received the complaint shall dismiss that complaint, and the complaining party shall be directed to re-file the complaint with the appropriate agency.
 - d. If the initial consultation results in agreement by both DTC and DPU that neither agency has jurisdiction to resolve the complaint, then the agency that received the petition shall dismiss the petition on the basis of lack of jurisdiction.
 - e. If DTC and the DPU are unable to reach agreement regarding which agency is appropriate to adjudicate the complaint after the 15 Day Consultation Period, they shall submit the issue to the General Counsel of EOHED and the General Counsel of EOEEA for resolution.
9. The agency without jurisdiction shall have the right to intervene as a full party to any proceeding conducted pursuant to paragraphs 4 and 5 above.
 10. DPU and DTC agree to cooperate in the implementation of this MOA, including responding to requests for information and meetings, upon request by either party, to discuss information or issues related to the MOA.

11. DPU and DTC agree to meet within twelve months of execution of this MOA to evaluate and discuss its implementation. After such discussions, DTC and DPU may agree that it is necessary to establish a collaborative forum to address specific issues with the implementation of the MOA or with the regulation of double poles. If DTC and DPU agree that a collaborative forum is necessary, we will decide on the scope of such a forum at that time.
12. Absent any intervening and pertinent statutory amendments to G.L. c. 166, § 25A or G.L. c. 164, § 34B, this MOA shall expire two (2) years from the date of execution.
13. This MOA may be renewed or modified by written agreement of DPU and DTC.

IN WITNESS WHEREOF, DPU and DTC hereby execute this Memorandum of Agreement, in duplicate, on the 14th day of October, 2008.

COMMONWEALTH OF MASSACHUSETTS

By and through:

DEPARTMENT OF PUBLIC UTILITIES

By: 
Paul J. Hibbard, Chairman

DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

By: 
Sharon E. Gillett, Commissioner

MEMORANDUM OF AGREEMENT
between
Department of Public Utilities
and
Department of Telecommunications and Cable
regarding the regulation of attachments to utility poles, ducts, and conduits pursuant to
G.L. c. 166, § 25A and double poles pursuant to
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Electronic Service List

A. Pappas	apappas@groveline.com
Abraham Leiber	Abe@Connect-tel.com
Adam Goodman, CTO	adam@wispring.com
Adam Lewis, VP, Finance	adam.lewis@eurekanetworks.net
Alan D. Mandl	amandl@smithduggan.com
Alex Valencia, Esq. - Regulatory Counsel	alex.valencia@phonesforall.com
Alexander Cochis, Office of the Attorney General	alexander.cochis@state.ma.us
Alexander Moore, Esq, Verizon	alexander.w.moore@verizon.com
Alicia C. Matthews, Esq., Comcast	Alicia_Matthews@cable.comcast.com
Amy G. Rabinowitz, Esq., National Grid	amy.rabinowitz@us.ngrid.com
Amy Horan, Government Relations Manager	amy.horan@cox.com
Andoni Economou	aeconomou@mettel.net
Andre O. Isar, President	aisar@millerisar.com
Andre Temnorod, Chief Executive Officer	aem@broadvox.net
Andrew Nicholl	andrewnicholl@comcast.net
Ann Marie Cullen	acullen@hamiltonma.gov
Ann Winkelman, Manager, Network Engineering	ann.b.winkelman@verizon.com
Anthony Hansel, Senior Counsel	thansel@covad.com
April Coffman, Project Manager	April@AmericanCLEC.com
Archie Typadis, Linear A Communications Corp.	atypadis@rcn.com
Aric Nunes, Account Executive	anunes@onecommunications.com
Art Magee, Comptroller	amagee@budgetphone.com
Awilda Santiago, Regulatory Affairs Supervisor	asantiago@cleartel.com
Barbara Dunn, Regulatory	bdunn@mcgrawcom.net
Barnstable Public Schools	orr_bethann@barnstable.k12.ma.us
Becky Gibson, Sr. Director-Regulatory Affairs	becky.gipson@excel.com
Becky Sommi,	rsommi@broadviewnet.com
Ben Aylesworth	ben@closecall.com
Beth Choroser	beth_choroser@comcast.com
Bettye Gadison, Regulatory Compliance Assistant	bgadison@commpartners.us

Bill Hunt, Vice President, Public Policy	bill.hunt@level3.com
Bob Zakarian, CEO & Co-Founder	rzakarian@communitywisp.com
Brian C. Beauregard	bbeauregard@hged.com
Broadband Associates	Jeffrey_Elletson@yahoo.com
Bryan Hopkins, President	bhopkins@comm-tract.com
Bryan Sullins, Regulatory Manager	bsullins@z-tel.com
Cameron F. Kerry, Esq.	cfkerry@mintz.com
Carl Wolf Billek, Regulatory	carl.billek@corp.idt.net
Carole Hamon, Regulatory Affairs	chamon@connect.com
Carrie L. Cox, VP & Senior Counsel	Carrie.Cox@chartercom.com
Casey Clark	cclark@ctcnet.us
Catherine Starks, Vice President	cstarks@rnetworx.com
Charles Harak, Esq.	charak@nclc.org
Charles Hunter	chunter@bridgecom.com
Charles L. Schneider, Jr., Director-Bus Develop	scshneider@bullseyetelecom.com
Charles P. Gamer	e.gamer@comcast.net
Charles Stockdale, Esq.	cstockdale@fibertech.com
Chris Van Deverg	chris@coretel.net
Chris Watson, VP-Operations	cwatson@teleconex.net
Chris Zack, Sales Engineer	Chris.Zack@us.ngridwireless.com
Christa Proper, Vice President	cproper@rnetworx.com
Christopher Marshall	cjmarshall@mmgholdings.net
Cinda Jones, President	cjones@cowls.com
Comcast	Mary_OKeeffe@cable.comcast.com
Comm-Tract Corp.	bhopkins@comm-tract.com
Crispen Tresp, Founder/CEO	crispin@wispring.com
Curtis Fox	cfox@fibertech.com
Cynthia Firstman	cat@airespring.com
D. Allen, Regulatory/Legal Affairs	dallen@equalaccessinc.com
D. Hanson, Assistant Supervisor	dhanson@norwoodlight.net
Dan Clifton	dclifton@fibertech.com
Dan Himes, Director, Business Development	dhimes@adestagroup.com
Dan Pak	dan.pak@hellodepot.com
Daniel E. Suda, Senior Director, Operations	Dan.Suda@pinetreenetworks.com
Daniel Golubek	dgolubek@wgeld.org
Daniel Meldazis	dan.medazis@broadwing.com
David Berndt, Assistant General Counsel	dberndt@lightship.net
David Flaxman, VP Business Development	dflaxman@utility.net
David LaFrance	david.lafrance@nextlink.com

David R. Conn, National Director,	dave.conn@t-mobile.com
Debra Chase, VP-Administration	dchase@iccinternet.com
Denise M. Jones-Williams	Denise.Jones-Williams@chartercom.com
Dexter Miller, President	masslocal@aol.com
Diane Cole, Legal	dcole@pngmail.com
Dolly Wrona, Telecom Engineer	wronadc@nu.com
Donald Bishop, Northeast Utilities Service Co.	bishodm@nu.com
Donald Walsh, C.O.O	dwalsh@cornerstonetelephone.com
Donna Baron	dlbaron@fivecolleges.edu
Donna Cupelo, Region President	donna.c.cupelo@verizon.com
Donna Nolan	dnolan@necta.info
Doreen Flash, Manager Compliance	doreen.flash@ATX.com
Doug Denny-Brown, Esq.	Dougdb@rcn.com
Douglas J. Minster, VP & General Counsel	dminster@atni.com
Douglas R. Norton, President	dnorton@accesspluscom.com
Ed Goldstein, AP Government	edward.goldstein@chartercom.com
Ed Tisdale, Vice President & CFO	Ed.Tisdale@pinetreenetworks.com
Ed Zyszkowski, CEO	edz@scnets.com
Ellen Kitchell	ekitchell@jhl.com
Ellen M. Cummings	ellen.m.cummings@verizon.com
Erin Humlicek, Marketing Specialist	ehumlicek@adestagroup.com
Eugene B. Johnson, Chairman and CEO	gjohnson@fairpoint.com
G. Cohen, General Manager	gcohen@beld.com
Garnet Goins	garnet.goins@sprint.com
Gary Epler, Esq., Unitil Service Corporation	epler@unitil.com
Geoff Cookman, Directory Regulatory Compliance	gcookman@yahoo.com
Glen Nelson, VP - Marketing/Business Dev.	info@nhcgrp.com
Greg Rogers, Director	Greg.Rogers@level3.com
Gregory M. Kennan, Esq.	gkennan@onecommunications.com
Gregory Rogers	greg.rogers@level3.com
Harriet Bruncker, Tax Manager	hbruncker@covista.com
Heather Douglas, Account Manager	heather.douglas@americantower.com
Hoyle Dana, Mgr. of Regulatory Affairs	dhoyle@matrixbt.com
J.T. Ambrosi, Vice President	jt.ambrosi@paetec.com
Jack L. Conroy, VP - Regulatory MA	John.L.Conroy@verizon.com
Jacquelyn M. Boyden	ervingboa@comcast.net
James G. White, Comcast	jamesg_white@cable.comcast.com
James J. Marzilli	james.marzilli@state.ma.us
James M. Avery, Esq.	javery@brownrudnick.com

James Mertz, Director, Government Affairs	James.Mertz@hypercube-llc.com
James R.J. Scheltema, Dir., Regulatory Affairs	jscheltema@gnaps.com
Jay E. Gruber, Esq.	jegruber@lga.att.com
Jed Nosal, Office of the Attorney General	jed.nosal@state.ma.us
Jeff Wirtzfeld, Regional Director - Public Policy	Jeff.Wirtzfeld@Qwest.com
Jeffery Elletson,	Jeffrey_Elletson@yahoo.com
Jeffrey C. Parnell, Associate General Counsel	jparnell@choiceone.com
Jenna Brown	jbrown@vcomsolutions.com
Jennifer E. Sikes, Regulatory Manager	jennifer.sikes@reconex.com
Jennifer Hassen	jennifer@bayring.com
Jennifer McMann, Manager	jennifer.mcmann@level3.com
Jerry Herring	dpikoff@dpiteleconnect.com
Jesse Reyes, Office of the Attorney General	jesse.reyes@state.ma.us
Jessica Renneker, Director-Regulatory Affairs	jrenneker@nos.com
Jill Papenhausen, Director	jpapenhausen@zonecms.net
Jim Lescault, Executive Director	director@actvamherst.com
Jim Prenetta, Exec. VP and General Counsel	jprenetta@onecommunications.com
Jody Stiefel, Esq.	jody.stiefel@sug.com
Joe Zukowski, Vice President	joseph.h.zukowski@verizon.com
Joel Mulder, Director, Business Development	jmulder@ADESTAGROUP.COM
John Chuang	chuang@cinergycom.com
John DeStefano, Director, Fiber Sales	John.DeStefano@us.ngridwireless.com
John Dullaghan, Vice President	jdullaghan@rnetworx.com
John Fogarty, VP & Assistant Chief Counsel	john.fogarty@twcable.com
John Johnson, Regulatory	jjohnson@nedd.com
John La Penta	jlapenta@fairpoint.com
John Mucha, Director, Government Relations	john.mucha@twcable.com
John Rickman	jrickman@contbb.com
John Sutich, Director of State Gov. Relations	John_Sutich@cable.comcast.com
John Sutphen, Director, Rates/Tariffs	jsutphen@fairpoint.com
Jonathan Fitch, General Manager	jfitch@pml.com
Jonathan S. Marshlian, Regulatory Counsel	jsm@commlawgroup.com
Joseph Isaacs, Consultant	isaacs@isg-telecom.com
Joseph Kahl, Sr. Director	joe.kahl@rcn.net
Joseph Rogers, Office of the Attorney General	joseph.rogers@state.ma.us
Judith Brownell	judy@bayring.com
Julie P. Laine, VP Chief Counsel of Telephony	julie.laine@twcable.com
Julie S. Adams, Director - Regulatory Affairs	Jadams@Fibertch.com
Justin Leland, President	jleland@trmcom.com

Karen M. Potkul, Esq.	karen.potkul@xo.com
Karen McDine, VP	kmcdine@bellatlantic.net
Karen Sistrunk	karen.r.sistrunk@mail.sprint.com
Karl Allen, Vice President, Energy Applications	kallen@utility.net
Kathleen Kerr Lawrence, Ass'tt General Counsel	klawrence@primustel.com
Keith Applewhite	lsteinhart@telecomcounsel.com
Keith J. Thibault, Director of Television Services	kthibaul@bristol.mass.edu
Kelly Faul, Regulatory Affairs Director	kelly.faul@xo.com
Ken Barber, Director, State Government	ken.barber@level3.com
Ken Duarte, Director	kduarte@volocommunications.com
Ken Hill, VP-Technical Operations	ken.hill@expedient.com
Kenneth M. Barna, Esq.	kbarna@rubinrudman.com
Kerry Britland, Nstar Electric & Gas Company	kerry.britland@nstar.com
Kevin Bulman, Light Board Commissioner	kjbulman@comcast.net
Kevin F. Penders, Esq.	kpenders@keeganwerlin.com
Kevin Glynn, Business Development	kglynn@adestagroup.com
Kim Bradley, Sr. Director, Regulatory Affairs	kbradley@GVCWinstar.net
Kim Partridge, Secretary	kimm@ucn.net
Lance Allen, Enterprise Account manager	lallen@fibertech.com
Lance J.M. Steinhart, Esq.	lsteinhart@telecomcounsel.com
Laura Brubaker, Senior Mgr of PR	Laura_Brubaker@cable.comcast.com
Lauri Vertrees	lvertrees@newroctel.com
Lewis Sckolnick, president	info@coyotedata.com
Linda Cicco, Regulatory Compliance Manager	Linda.cicco@bt.com
Linda Hunt, Manager	lindah@lightyearcom.com
Linda Joseph	linda.k.joseph@embarq.com
Lisa Lezotte, Legal Assistant	llezotte@acninc.com
Lisa Pache, Regulatory	lpache@bbcominc.com
Lynne Martinez	lmartin@pacwest.com
M. Quitada, General Manager	mquitada@ci.shrewsbury.ma.us
Malcolm N. McDonald	nld19@idt.com
Maria A. Abbagnaro, General Counsel	mabbagnaro@cordiacorp.com
Mark Carron,	carron.mark@gmail.com
Mark Montgomery, Vice President	mark.montgomery@induscom.com
Mark Reed	mark.reed@nstar.com
Mark Reilly	mark_reilly@cable.comcast.com
Mark Smith,	Mark.A.Smith1@chartercom.com
Mark Sorgman	mark.sorgman@us.ngrid.com
Mark Vaughan,	mvaughan@i-o-n.com

Mary Cegelski, Manager	mcegelski@firstcomm.com
Mary Farley	mfarley@scnets.com
Mary O'Keefe, Senior Manager	Mary_OKeefe@cable.comcast.com
Matthew Brady, Director of Sales	mbrady@federalsignal.com
Matthew Crocker, President	matthew@crocker.com
Matthew G. Feher	mather_feher@mma.org
Matthew Roth, Sr. Director	mroth@ccginc.com
Maureen Connolly, Development Director	Maureen@edcnv.org
Michael Bathrick, President	prez@berkshire.net
Michael Carbonneau, Director of Operations	mcarbonneau@usacsp.com
Michael Geoffroy, Corporate Counsel	michael.geoffroy@telrite.com
Michael McAlister, General Counsel	mike@navtel.com
Michael P. Donahue, Esq.	Michael.Donahue@Level3.com
Michael Quitadamo	mquitado@ci.shrewsbury.ma.us
'Michael Tarkus" Murphy, New Business Dev.	tarkus@ripco.com
Michelle Consalvo, VP External Affairs	mconsalvo@att.com
Mike Kirchner, President	mkirchner@rnetworx.com
Mike Lynch, Director	mike.lynch@ci.boston.ma.us
Mike Romano	mromano@globalinternetworking.com
Mike Tyler, Director of Operations	miket@itltd.net
Monique Byrnes, Consultant	mbyrnes@tminc.com
Nancy Jacobson	njacobson@onecommunications.com
Nancy Karm, Government Relations	nancy.karm@twcable.com
NE Investments Holding Corp.	ewbneinvestment@surfglobal.net
Nicole Browne, Regulatory Analyst	nbrowne@cypresscom.net
Optasite	info@optasite.com
Pamela L. Hintz, V.P., Regulatory Compliance	Phintz@onecommunications.com
Paola Lewis, Director - Regulatory Affairs	Pbulloch@infohighway.com
Pat A. Cerundolo, Esq.	pcerundolo@foleyhoag.com
Pat Mazzacone, Specialist, OSP License Admin.	patricia.r.mazzacone@verizon.com
Patricia J. Crowe, Esq.	patricia.crowe@us.ngrid.com
Patrick Coughlin, Neon Communications	pcoughlin@neoninc.com
Patrick D. Crocker, Esq.	pcrocker@earlylennon.com
Paul Anundson, Telecom Attachment Group	paul.anundson@us.ngrid.com
Paul Cianelli, NECTA	pcianelli@necta.info
Paul D. Keefe, Vice President/General Manager	pdkeefe@xo.com
Paul G. Afonso, Esq.	pafonso@brown_rudnick.com
Paul Joncas, President	paul@megaclec.com
Paul Masters, President p	masters@ernestgroup.com

Paul McIntire, Account Executive	pmcintir@nortel.com
Paula Foley, Esq.	pfoley@onecommunications.com
Peter Bowman, VP External Affairs	peter.t.bowman@verizon.com
Peter H. Feinberg, Associate General Counsel	Peter_Feinberg@comcast.com
Peter Mones, Regional Construction Manager	pete_mones@cable.comcast.com
Peter Sozek, Enterprise Account Manager	psozek@fibertech.com
Peter Taubkin, VP, Public Affairs	peter.taubkin@twcable.com
Rafael Ortiz, Manager	rortiz@adventllc.com
Ray Sullivan, Senior Partner	sullir@mohawkcom.com
Regulatory Affairs	esunday@stis.com
Regulatory Affairs	ftosi@elec-comp.com
Regulatory Affairs	markj@AccessOneInc.com
Rob Heath, Regulatory	rob.heath@afnltd.com
Robert Cellupica	rcellupica@ci.shrewsbury.ma.us
Robert D. Shapiro, Esq.	rshapiro@rubinrudman.com
Robert Gaboury, Director of Telecom	bgaboury@hged.com
Robert J. Munnely, Jr., Esq.	rmunnely@murthalaw.com
Robert L. Dewees, Jr., Esq.	rdewees@nixonpeabody.com
Robert Souza, President	Rob.Souza@pinetreenetworks.com
Rowena Hardin	rhardin@nos.com
Ruth Ann Brazill, AT&T Regulatory Manager	rbrazill@att.com
Safety Net Access	sgorman@safetynetaccess.com
Sam Vogel	svogel@mettel.net
Samuel Kline,	skline@granitenet.com
Sandy Bendremer, Vice President	sandy@gis.net
Sarah Trosch	sarah.trosch@verizonwireless.com
Schula Hobbs	shobbs@dsl.net
Scott Mailman, Project Manager	smailman@adestagroup.com
Sean Dandley, CEO/Pres.	sdandley@dscicorp.com
Sean Hopkins,	sean.hopkins@ayacht.com
Sean T. Gorman	sgorman@safetynetaccess.com
Senator Kennedy office	Rick_Ally@kennedy.senate.gov
Sharon Thomas, Consultant	sthomas@tminc.com
Shirley Ordenana, Regulatory Manager	SOrdenana@broadviewnet.com
Stacey Klinzman	staceyk@vcicompany.com
Stacey L. Parker, Sr. Dir., Regulatory Affairs	stacey_parker@cable.comcast.com
Stan Doe, Manager, System Planning	doesa@nu.com
Stanley H. Golove, Vice President-Regulatory	sgolove@mcctelco.com
Stella Gnepp, Regulatory Affairs Specialist	sgnepp@tncii.com

Stephen Fitzgibbons, Mgr. Govt Affairs	stephen_fitzgibbons@cable.comcast.com
Stephen M. Cross, Director of Operations	smc@wca.com
Stephen Wilson	stephen.wilson@spectrotrel.com
Steve Bogdan	sbogdan@broadviewnet.com
Steven J. Horvitz, Esq.	stevehorvitz@dwt.com
Susan B. Maxwell, General Manager	smaxwell@russellma.net
Susannah Pugh	spugh@keeganwerlin.com
Teresa S. Reff, Sr. Financial Analyst-Regulatory	teresa.reff@globalcrossing.com
Thomas G. Tumilty, Esq.	ttumilty@nixonpeabody.com
Thomas Margavio, Associate Manager	thomas.margavio@bellsouth.com
Thomas R. Josie	tjosie@ci.shrewsbury.ma.us
Thomas Steel, VP Regulatory Counsel	tom.steel@rcn.net
Tim Beckel, Regional Sales Manager	tbeckel@federalsignal.com
Tim Fedish, NE Representative	tim@dishelectronics.net
Tim Haas, Sr Network Engineer	thaas@hged.com
Todd Lesser, President	Todd@nccom.com
Todd Shobert	todd@safetynetaccess.com
Tom Cohan, Government Relations Manager	tom.cohan@chartercom.com
Tom Moylan, President and CEO	tmoylan@steeplecom.com
Tom Woods, Operations	twoods@communitywisp.com
Trudy Longnecker	trudy.longnecker@rcn.net
Utility Division, Attorney General	AGO@state.ma.us
Vanessa Leon, Regulatory Manager	vanessa.leon@spectrotel.com
William (Bill) Moriarty , Account Executive	william.moriarty@twcable.com
William A. Haas	whaas@mcleodusa.com
William August, Esq.	billaugustUSA@aol.com
William H. Weber, VP & General Counsel	william.weber@cbeyond.net
William J. Rooney, Jr., General Counsel	wrooney@gnaps.com
William N. Bancroft, Clerk	wmb@jmfc.com
William P. Leahy, Vice President	wleahy@att.com
William T. McCarthy, Esq., COO	wmccarthy@thelocalphonecompany.net
William Weber	william.weber@cbeyond.net
Zakee Rashid, Area VP, SE MA East	zakee_rashid@cable.comcast.com