THE COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Order Instituting Rulemaking)

to Establish Complaint and Enforcement)

Procedures to Ensure Non-Discriminatory) DT.E. 98-36

Access for Telecommunication Carriers)

and Cable System Operators to Utility)

Poles, Ducts, Conduits, and Rights-of-Way)

COMMENTS OF MASSACHUSETTS ELECTRIC COMPANY,

NANTUCKET ELECTRIC COMPANY

AND NEES COMMUNICATIONS, INC.

Massachusetts Electric Company (Mass. Electric), Nantucket Electric Company (Nantucket) and NEES Communications, Inc. (NEESCom) (all together, the NEES companies), hereby express their support for the Department's initiative in instituting the captioned docket regarding non-discriminatory access to utility poles, ducts, conduits and rights-of-way.

The NEES companies have considerable general and joint interests in the outcome of this proceeding, as well as specific and differing interests due to the varying nature of their business enterprises. Mass. Electric is the state's largest provider of distribution services and has a sole or joint ownership interest in some 550,000 poles and is the sole owner of approximately 1400 miles of underground conduit. Mass. Electric has long provided open, non-discriminatory access to its distribution assets for cable system operators and, within recent years, has begun providing the same access to telecommunications service providers. Nantucket provides distribution service to the Island of Nantucket and is a party to several agreements of the type affected by this docket.[(1)] NEESCom is also an affiliate of the New England Electric System whose primary business is the provision of dark fiber and other telecommunications services to non-affiliates. NEESCom has

entered into agreements with numerous parties for attachment and telecommunications services purposes.

The NEES companies anticipate that the Department's initiative will help to minimize disputes over access to utility assets and will establish an appropriate adjudicatory framework for those that cannot be resolved at the local level. The NEES companies' comments are divided into two sections below, (I) Issues for Clarification and (II) Recommended Modifications to the Proposed Rules. Unless indicated that a specific question or recommendation is set forth by Mass. Electric/Nantucket or NEESCom, the following may be read as jointly sponsored by the three.

I. ISSUES FOR CLARIFICATION

A. The prefatory text to the proposed rules seems to indicate that the DTE intends to apply its proposal to all ducts and conduits owned by all types of jurisdictional utilities. If the terms "duct" and "conduit" are deemed fungible, this impression is supported by the Department's definition of "Attachment" in §45.02, which refers to "telegraph or telephone duct or conduit owned or controlled, in whole or in part, by one or more utilities". However, the Department's definition of "Usable Space" in the same section refers only to "telegraph or telephone duct or conduit". The NEES companies recommend that the Department clearly make the proposed rules applicable to duct or conduit owned by utilities other than telegraph or telephone companies. Such a modification would clarify the scope of the proposed rules.

B. While the concept of ownership of poles, ducts and rights-of-way is relatively clear, it is less certain what the Department may intend regarding a utility's "control" of such assets. For example, does the Department intend to apply its proposed rules to utilities that merely lease or license poles or conduits from another party? To what extent would a utility's "control" of a right-of-way affect its obligation to provide access to a third party? The Department's clarification of "control" will provide affected parties with a better understanding of the scope of the proposed rules and the rights and obligations of the parties subject to 220 C.M.R. §45.00.

As lessees, licensees or grantees under easements, utilities may not have the right to further subdivide their limited interests to accommodate access requests from telecommunications carriers or cable system operators. In instances where a utility's legal right to grant access to third-parties is not explicit, Mass. Electric and Nantucket suggest that such requests be directed to the owner of the asset or underlying property, not to the utility whose rights are restricted by deed, covenant or other legal means. The condemnation authority given to electric companies in G.L. 164 §72 is limited to siting electric transmission and distribution lines serving the public convenience and consistent with the public interest. Mass. Electric and Nantucket believe that this limitation severely

restricts a utility's legal right -- and obligation -- to provide property interests for third parties where the utility has none.

C. In §45.03(2), the Department specifies a 45-day period for utilities to grant or deny access to poles, ducts, conduits or rights-of-way. It is not clear to the NEES companies whether the Department conceives of the 45-day period as applying to negotiations of general terms and conditions of access (and rates applicable to attachments) or whether the Department intends to grant 45 days for the preliminary engineering and field work that must precede the grant of access to specific duct, conduit, poles or rights-of-way. Furthermore, does the Department intend for make-ready work such as pole modifications, pole replacements and equipment rearrangements by parties already attached to poles to be accomplished within the same 45-day period?

While Mass. Electric and Nantucket have established a form agreement for pole attachments to ensure non-discriminatory terms, conditions and rates for all attachers and to promote efficient use of staff time and resources, it is possible for the deliberations over these agreements to take more than 45 days. If the Department should intend that the 45-day period apply to negotiations over general terms, conditions and rates, then Mass. Electric and Nantucket respectfully request that the Department also impose a due diligence and good faith in negotiations obligation on the party requesting access. As now drafted, utilities bear the greater burden under §45.03(2) even though they do not unilaterally control the negotiations. For further discussion of §45.03(2), see II.A below.

D. The Department proposes the following addition to its rules and regulations found at §45.10:

A utility that engages in the provision of telecommunications services or cable services shall charge any affiliate, subsidiary, or associate company engaged in the provision of such services an amount *equal to* the pole attachment rate for which another such company would be liable under this section. (emphasis added)

The Department defines its pole attachment formula as a fully allocated cost. *Cablevision of Boston, Inc., et al.*, D.P.U./D.T.E. 97-82 at 18 (1998). Accordingly, one could conclude that the Department will require a utility to charge its affiliate the fully allocated cost of attachment or use. However, in 220 C.M.R. §12.04(1), the Department has imposed a differing requirement on distribution companies which permit their affiliates to attach to their poles and to use their ducts/conduits. The cited provision of the Department's rules for affiliate transactions obligates utilities to charge their affiliates "the higher of the net book value or market value of the asset".[(2)] The NEES companies propose that the Department create an exception to this rule by adding the following final sentence to 220 C.M.R. §12.04(1):

Notwithstanding the foregoing, a Distribution Company's rates for a Competitive Affiliate's pole attachments and conduit licenses shall be calculated in accordance with 220 C.M.R. §45.00.

II. RECOMMENDATIONS FOR MODIFICATION

A. Mass. Electric has recently experienced problems with attaching parties that have entered into pole attachment agreements with Mass. Electric and have obtained licenses for the use of specific poles, but have also attached their equipment to other Mass. Electric poles without requesting or obtaining licenses. These acts raise serious legal questions about breach of contract, trespass, safety, liability and prudent engineering practices. Furthermore, they deprive Mass. Electric of revenues for third party use of such unlicensed poles, since annual billings are based upon authorized licenses. Accordingly, Mass. Electric and Nantucket propose that §45.03(2) be expanded as follows:

(2) Requests for access to a utility's poles, ducts, conduits, or rights-of-way by a licensee must be in writing. No attachment shall be made to any utility pole, duct or conduit without prior written notice to the owner thereof...

The Department's inclusion of this language will underscore its interest in promoting non-discriminatory access *and* proper processing of and payments for such access.

B. As discussed earlier, in §45.03(2), the Department specifies a 45-day period for utilities to grant or deny access to poles, ducts, conduits or rights-of-way. However, the proposed rule places no limit whatsoever on the number of requests that may be tendered to the utility at one time. This is of particular importance because once Mass. Electric or Nantucket and an attaching party enter into a master agreement for access (as discussed in I.C. above, containing the general terms, conditions and rates pertaining to that customer's use of the utility's distribution assets), Mass. Electric or Nantucket issues licenses for access on a pole-specific basis and grants duct/conduit requests on a specific "route" basis. This approach permits the utility to analyze the characteristics of each duct, conduit or pole in which the attaching party is interested for safety, reliability, capacity and other engineering considerations. This careful analysis requires staff, time, planning and coordination which may not be completed in 45 days if the attaching party submits an otherwise unlimited request for licenses. In addition, it is not uncommon at all for more than one attaching party to have requests for access pending at one time. With these considerations in mind, Mass. Electric and Nantucket propose that the Department incorporate a limit on the number of specific licenses that an attaching party may submit and have pending at one time. The following language from the form agreement used by Mass. Electric and Nantucket for pole attachments has worked well for the utilities and their customers and may be useful to the Department in determining reasonable limits for both attaching parties (i.e., Licensee) and utilities (i.e., Licensor):

Licensee agrees to limit the filing of applications for pole attachment licenses and Overlash approvals to include not more than 200 poles on any one application and 2,000 poles on all applications which are pending approval by Licensor at any one time. Licensee further agrees to designate a desired priority of completion of the Field Survey and Make-Ready Work for each application relative to all other of its applications on file with Licensor at the same time. [(3)]

Mass. Electric's experience also shows that some middle ground between outright grants and outright denials may develop, particularly if the requesting party seeks access to rights-of-way not owned in fee by the utility. In this regard, Mass. Electric and Nantucket propose that §45.03(2) be expanded to include the following language:

(2) Requests for access to a utility's poles, ducts, conduits, or rights-of-way by a licensee must be in writing. If access is not granted in 45 days of the request for access, the utility must explain in writing the reason for delaying the grant or, in the case of a denial, the utility must confirm the denial in writing by the 45th day...

Mass. Electric and Nantucket ask that the Department consider together their comments in Section I and Section II on §45.03(2) and, at a minimum, set a 45-day period for negotiating the master agreement yielding general access and a second 45-day period for granting specific access and impose a due diligence and good faith negotiations obligation on all parties requesting access. An additional period may be required if extensive make-ready work is necessary to accommodate a Licensee's specific request. Given the numerous variables that may affect the timing of make-ready work, the NEES companies propose an obligation of reasonableness and due diligence upon all parties involved in make-ready work: the utility, the attaching party and pre-existing attaching parties that may be required to rearrange their equipment to accommodate the newcomer.

C. In §45.03(3)(c), the Department imposes an obligation on utilities to give their attaching licensees 60 days advance written notice of "any modification of facilities other than routine maintenance or modification in response to emergencies or to a request from a governmental authority *without giving such notice to a licensee"* (emphasis added). The NEES companies suggest that the italicized phrase should be deleted in order to accomplish the Department's apparent objective of carving out exceptions to the proposed rule.

D. The Department proposes to expand §45.04 to include complaints over access by adding (e) (1) through (5) to §45.04. Some complaints could conceivably cover both rates and access issues. To clarify further that complainants may pursue only *one* of these issues, the NEES companies recommend that the Department modify §45.04(2)(b) as follows:

(b) the specific attachment rate, term or condition which is claimed to be unjust or unreasonable in any case where a rate, term or condition is at issue;

This slight modification will clearly signal that parties who do not object to rates, terms or conditions but who raise questions over access need not attack rates, terms or conditions in their pleadings and may focus solely on access issues.

E. In §45.07, the Department lays out potential remedies for rate-related proceedings. Given the possibility that some complaint proceedings may be limited to access issues, NEESCom suggests that the Department expand §45.07 to include appropriate remedies such as (i) orders to provide access, (ii) orders to provide temporary access pending the final resolution of all issues, and (iii) orders to use due diligence in "make-ready" work. Delays in field work such as pole setting, engineering work and similar activities can occur well after licenses have been granted, yet they are not independently addressed in the Department's proposed rules. NEESCom suggests that, at a minimum, the Department require "due diligence" on the part of utilities in preparing for third-party attachments once access has been granted. The Legislature has given the Department the authority to granting such remedies in G.L. 166 c.25A, as amended by St. 1997, c. 164, §§ 265, 266. Articulation of potential remedies will assist Complainants in determining whether the Department is capable of providing relief under specified circumstances.

F. NEESCom acknowledges that the Department's authorizing statute, G.L. c.166, c.25A grants the Department 180 days to issue a final Order on complaints, as reflected in §45.08. This is an appropriate period of time for making determinations in cases that involve only rate issues. However, in cases involving allegations of discriminatory access, denials of or delays in access, NEESCom fears that the 180-day period is a considerable barrier to business; opportunities for telecommunications service providers and their customers may be lost if access remains denied or delayed for up to six (6) months. Accordingly, NEESCom respectfully suggests that the Department consider establishing a fast-track procedure for deciding access issues when Complainants can demonstrate that imminent harm will result from continued delays in or denials of access. In those Complaints involving both rates, terms, conditions and access, NEESCom proposes that the issues be bifurcated and the access issue(s) placed on a faster track to resolution than the standard 180 days.

III. CONCLUSION

The NEES companies applaud the Department's initiative as a good first step toward improving its rules and regulations to ensure nondiscriminatory access to utility ducts, conduits, poles and rights-of-way. From the differing perspectives of access provider (Mass. Electric and Nantucket) and access seeker (NEESCom), the NEES companies support the Department's effort in this regard and plan to participate in the hearing scheduled for January 29, 1999.

Respectfully submitted,

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1. Both Mass. Electric and Nantucket post their policies regarding fiber optic cable in the (1) supply area of distribution poles and (2) underground conduit on their Internet home pages. See www.nees.com/library/meco/index.htm and www.nees.com/library/naneco/index.htm.

2. "A Distribution Company may sell, lease, or otherwise transfer to an Affiliate, including a Competitive Affiliate, an asset, the cost of which has been reflected in the Distribution Company's rates for regulated service, provided that the price charged the

Affiliate is the higher of the net book value or market value of the asset. The Department shall determine the market value of any such asset sold, leased, or otherwise transferred, based on the highest price that the asset could have reasonably realized after an open and competitive sale." 220 C.M.R. §12.04(1) (1998).

3. Two hundred poles cover roughly 5 miles; 2000 poles are roughly the distance between Boston and Providence, Rhode Island.