

**COMMONWEALTH OF MASSACHUSETTS**  
**DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

---

)

Rulemaking by the Department of Telecommunications )

and Energy, pursuant to G.L.c. 166, §25A, and )

220 C.M.R. §§ 2.00 et seq., to amend the )

regulations at 220 C.M.R. §§ 45.00 et seq. )

to Establish Complaint and Enforcement ) D.T.E. 98-36

Procedures to Ensure that Telecommunications )

Carriers and Cable System Operators have )

Non-Discriminatory Access to Utility Poles, )

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

---

)

**COMMENTS OF RCN-BECOCOM, LLC**

**January 21, 1999**

## **I. INTRODUCTION**

### **A. General**

RCN-BECOCom, LLC ("RCN") commends the Department for instituting this rulemaking to establish complaint and enforcement procedures regarding access to utility poles, ducts, conduits and rights-of-way ("Transmission Facilities") and to allow such access on a fair and expeditious basis. In order to achieve the goal of open, competitive markets that provide to consumers both (i) increased choice of services and providers and (ii) lower prices, it is widely acknowledged that facilities-based competition must be encouraged and fostered. One of the several approaches to facilities-based service is the construction of one's own fiber-based network. This is the approach RCN has taken with respect to significant portions of its network. In part, RCN has contracted with parties for access to their Transmission Facilities on a system basis. In part, RCN must seek the rights to attach to utility Transmission Facilities, on virtually a pole to pole basis. In the course of its network construction, RCN has encountered several unreasonable barriers to access.

The Telecommunications Act of 1996 (the "Telecom Act") recognized that new entrants like RCN that were trying to build their own network would need to have access to Transmission Facilities of entities with whom they would be competing. Therefore, the Telecom Act included section 703, which amended the Pole Attachment Act (section 224) to require non-discriminatory access. The FCC adopted rules to allow enforcement of this statutory change. The Department's rules reasonably use the FCC regulations as a basis for the Proposed Rules.

These comments first discuss the problems that the new entrants have faced in constructing a new network, then generally discuss potential solutions. The third section discusses each of RCN's proposed changes. Attachment A is a summary of the current process Licensees must satisfy before attaching their lines to Bell Atlantic Massachusetts ("Bell Atlantic" or "BA") poles. In Attachment B, RCN sets forth the Department's proposed regulations marked to show the changes suggested by RCN. A number of RCN's proposed changes are based upon regulations recently adopted by the California Public Utilities Commission (CPUC). The CPUC regulations are attached hereto as Attachment C.

## **B. Problems To Be Resolved**

The primary problems that RCN seeks to have addressed by the regulations are as follows:

- (1) The time expended from any initial request for access to commencement of construction is so open-ended and lengthy that new entrants have serious difficulty in planning their network deployment, and constructing their networks in a time frame consistent with contractual arrangements and sales commitments.
- (2) ILEC charges for access (*i.e.* application fees, surveys and make ready work) exceed the ILEC's costs and any reasonable mark-up significantly. Such charges are separate and distinct from pole-attachment rates that the Department has recently addressed.
- (3) Serious questions of fairness have arisen in the extent of make ready work that the utilities' surveyors have required to be done and paid for by the new entrant before the utilities allow access to add the new entrant's lines. For example, the survey process may determine that poles to which a Licensee proposes to attach have pre-existing violations, *e.g.*, in many cases the most recent communications (cable television) attachment lacked the requisite clearances. Often the Licensee must bear the entire cost and delay of fixing such violations, even when the make ready work either was caused by, or benefits other parties. In this context, a Licensee's ability to challenge charges imposed upon it is significant.
- (4) The ILEC often unduly restricts the number of poles for which it processes access requests at any given time. This has the effect of delaying and lengthening the entire access process, for no apparent reason.
- (5) The standards and processes employed by the ILEC in processing access requests vary from town to town. Such variations hurt new entrants' planning and construction efforts.

## **C. Solutions to the Problems**

RCN has encountered instances where the incumbent utility has acted in such an unreasonable fashion that the complaint process, as established by the FCC or as proposed by the Department would be useful to assist CLECs seeking to construct a network. Therefore, RCN supports the Department's proposed Rules, and agrees they form a good foundation to effect the policy of expeditious and fair access. Requiring the utility to allow access or to provide good reasons for denial, all within 45 days is appropriate.

It is also necessary and proper for the Department's proposed regulations to allow licensees to initiate the complaint procedures to seek redress for unreasonable terms and

conditions of access, beyond denial. Also, RCN believes that it is necessary to refine the proposed regulations, to address in greater detail the necessary steps in establishing, engineering and implementing access. To help ensure that the Department's goal of expeditious access can be achieved, RCN proposes establishment of reasonable time parameters for all the component steps of gaining access, *e.g.* determination of space availability, make ready efforts and commencement of construction. Thus, if a utility delays in any particular step (which almost certainly would cause a delay in ultimate access) the licensee could file a complaint without having to wait the additional time period for the entire access process to expire. RCN also urges a much more simple process whereby Licensees could undertake all the survey and make ready efforts and costs. Utilities would be allowed short time frames (consistent with the fact that all necessary work is already done by qualified contractors) to sign off on such work.

The Department should also establish the standard by which reasonableness of the utility's behavior can be judged so as to minimize delay and the need for expenditure of resources by parties or the Department. Not only would such approach provide some degree of certainty for new entrants' planning and construction activities, but it would also provide both new entrants and incumbent utilities with realistic expectations of the likely resolution of a given dispute regarding access requests. In turn, establishment of a standard and realistic expectations (at least where combined with some of RCN's other suggestions) would reduce litigation before the Department. Other proposals that RCN makes to address the problems noted above include the following: specification of a quarterly limit of 15,000 poles per district (as currently configured) for which access requests can be made in one calendar quarter; reasonable time frames for each step of the access process are specified; and statutory obligations not to disclose or misuse proprietary information disclosed as part of the access process. Also, RCN strongly urges specific allowance of reasonable, alternative construction practices in order to provide additional space for attachments, which in turn reduces the time and cost burdens of unnecessary make ready work.

RCN believes the Department should adopt other changes to the Proposed Regulations that would help ensure that expeditious access is available and that utilities cannot use the litigation process inappropriately to avoid or delay a new entrant's network deployment. Specifically, RCN urges adoption of the "English Rule" on litigation costs, allowance of temporary attachments under certain circumstances during the pending of a complaint, and an automatic allowance of access after six months like the expiration of a utility rate suspension period. RCN also suggests a number of other changes to the proposed regulations to avoid anti-competitive activity by the utility and to address some more technical and drafting concerns.

In summary, the solutions that RCN suggests for the problems noted above include the following.

(1) Strengthening the rules in terms of minimizing the time required for a licensee to gain access for its network construction, by specifying that a Licensee can use approved third party contractors both for the usual survey and make ready work.

(2) Where it is not feasible for the Licensee to have the survey and/or make ready work performed by third party contractors due to safety or reliability reasons, specific deadlines for the utilities' performance of such work are established.

(3) Where a utility unreasonably delays a Licensee's access beyond established reasonable times and without good cause, allow temporary attachments during the pendency of the complaint proceeding.

(4) Standards are established to assist determination of discriminatory treatment regarding access, specifically describing in what circumstances the utility may reserve space or capacity, that "first come, first served" is a valid approach and that non-discrimination does not mean identical treatment, especially where circumstances attending different requests may differ.

(5) Certain practiced engineering techniques such as "boxing" and "back bolting" and extension arms and brackets no longer involve any safety issues because work on pole attachments is now routinely done by workers in bucket trucks, rather than by men climbing poles. Therefore, RCN urges that the regulations specifically designate such techniques as allowable, in order to provide more attachment options and reduce access time and make ready costs.

#### **D. Proper Scope of this Proceeding**

RCN is mindful of the Department's desire to keep this proceeding narrowly focused to the end of clarifying the Department's jurisdiction over the terms and conditions of access. As set forth above, RCN certainly supports that effort and the goal of effecting such clarification expeditiously. RCN, however, strongly urges the Department to address significant other issues at the earliest possible date. In the event that the Department finds the issues RCN raises are beyond the scope of the proceeding, RCN urgently suggests that the Department establish a separate phase in this docket to allow RCN's issues to be addressed expeditiously.

### **II. Specific Problems To Be Addressed: Rampant Delay in Access and Establishment of Unreasonable Burdens on New Entrants.**

RCN has primarily encountered two generic types of problems in seeking access to Transmission Facilities: (1) unnecessary delay on the part of the utility and its contractors, and (2) unreasonable burdens, both in terms of cost and time involved with make ready requirements. Unfortunately, it is clear that neither of these issues is sufficiently addressed (at least specifically) by the Department's proposed regulations,

which are directed largely at a "denial" of access. The problems in the field are more subtle from the legal perspective. Rarely does the utility simply deny access.

Usually, the utility has several levels of review of a given access request and each step can take 30 or more days. Typically, nothing the new entrant can do will expedite the process.

With such excessive time frames, the process for even a small section of right-of-way could take between nine and twelve months. In areas where the new entrant has no network and must build out an entire community, often in a specified time frame, the utility's anachronistic and unduly time-consuming processes, even without denials, can make network construction, market entry and compliance with franchise agreements impossible. Also, Bell Atlantic will process requests for only 2000 poles at a time, in any one district. Where the average district has around 15,000 poles and the access process cycle often can be a year, it is clear that BA's artificial limit severely extends the time for all customers in a given district to have access to the benefits of competition. For example, based upon usual time frames experienced with Bell Atlantic, it would take RCN up to six years to build out Quincy (which has about 11,000 poles) where it recently obtained a franchise to provide video service. In contrast, the negotiated franchise agreement requires that RCN complete construction of the network within two years. Without such restrictions RCN could build out a town like Quincy in one year.

It is obvious that the development of facilities-based competition cannot succeed with such unnecessary impediments in place. In the absence of a national mandate for telecommunications competition, BA's limit on processing access requests perhaps did not matter. Now, after the enactment of the Telecom Act and the extensive deployment of capital by many new competitors, BA's limits are a real problem. Those limits can serve not only to delay competition, but to foreclose it altogether. As it stands, the current access process gives the incumbent monopoly telephone and cable television companies a further, unfair advantage - the ability to reach customers with upgraded networks and thereby provide the services that customers want; services which RCN could deliver if it were not handcuffed by the current process. Also, it is not unreasonable to require an increase in the number of pole attachment requests BA will process because much of the survey and make ready work is done by outside contractors who can easily be imported from districts where less construction is occurring.

The other significant problem that RCN has encountered is the imposition of unreasonable make ready efforts. To the extent that a given pole or other facility is inadequate to accommodate the new entrant's proposed line, make ready work would entail replacement of the entire pole, etc. RCN certainly does not contest the need for make ready work, but it has a significant problem with the not uncommon abuses of the make ready process that occur. For example, many existing cable television attachments lack the requisite clearances even before considering addition of a new line,

but RCN has been forced to bear the entire burden of making right the prior violation by a competitor. Sometimes poles already need replacement, but the Licensee must bear the entire cost despite the benefit to the utility. In other cases, the utility has required RCN to perform work that is unnecessary in the context of an added line. In these ways costs of upgrading the utility's infrastructure are being improperly imposed on new entrants and the new competitive market.

### **III. RCN'S SUGGESTED REVISIONS TO THE DEPARTMENT'S PROPOSED REGULATIONS**

Changes should be made to the proposed regulations as shown on Attachment B, for the reasons set forth below. All suggested additions and deletions from the Department's proposed regulations are marked.

**45.01** Given the technical distinction between generic cable television system operators and Open Video System (OVS) operators, this provision should be changed to clarify that the complaint and enforcement provisions are available to OVS operators.

**45.02** We have suggested some minor changes to the current definitions based on grammar and syntax and to further clarify their meaning. We have also included some additional defined terms that we believe are necessary to prevent ambiguity and to make the "access" process and the action of the participants in such process more predictable and established.

More specifically, however, the definition of "attachment" and "usable space" should be modified to make clear that any type of duct, conduit or right-of-way owned or controlled by a utility is subject to a request for access. This is consistent with federal law and the Department's desire to align itself more closely therewith.

Definitions of "back-bolting", "boxing" and "extension bracket" should be included. These terms define common practices and techniques to attach new cable and wire, which the Department should sanction.

"Denial of access" should be included as a defined term because, as discussed above, a utility can effectively deny access through a variety of means without formally issuing a written denial to the licensee. A cable or wire network, like the proverbial chain, is only as strong as its weakest link. Any delays, interference or inaction by the utility, anywhere along the proposed network or at any point along the chain of procedure from the request for information, to surveys and make ready, to installation and maintenance, can be as effective a denial of access as any written denial issued by the utility; but with one major difference. Under the present regulations, a utility could ostensibly grant access to a licensee and then, through bureaucratic review, delay, interference and inaction, effectively deny access, with no apparent redress available to the licensee. As incumbent providers often have unduly lengthy review procedures, infrastructure in need of repair or updating, and little incentive to support competition, the opportunity is

ripe for a utility's effective denial through delay, interference, abuse of make ready estimates and requirements, whether it be intentional or merely the by-product of a non-competitive system of granting access in need of reform.

A definition of an "incumbent local exchange carrier" (ILEC) should be added. We have included the federal definition of ILEC.

The definition of "licensee" should be expanded to include business entities other than firms and corporations. In addition, the definition should be amended so that utilities, in general, are not excluded from the pool of potential licensees. The mere fact that a telecommunications provider may technically be deemed to "control" or "share control" of poles, ducts, conduits or rights-of-way used or useful for wire communications (and thus qualify as a "utility" under the proposed rules), should not serve as a basis to deny such companies the critical protections of the proposed rules. On the other hand, it is the ILECs that already monopolize most of the necessary Transmission Facilities who rightfully should be precluded from the definition of licensee. ILECs do not need the protection of the proposed rules and could use such rules to further delay and interfere with rising competition. Accordingly, we suggest the substitution of the defined term "ILEC" for "utility" in the definition of licensee. This is consistent with the treatment of ILECs under the Telecom Act.

A definition of "make ready" should be included as a defined term. As detailed above, an integral part of the access process is the estimation and completion of the make ready work necessary to modify or install Transmission Facilities to accommodate new wire or cable. The definition should make clear that make ready does not include those repairs, modifications and replacements to a utility's Transmission Facilities that the utility should have performed itself prior to any access request. This is important as utilities often attempt to update or repair facilities, or bring them into compliance with applicable law, under the guise that such work is necessary to accommodate a request for access. The Department should also recognize that back-bolting, boxing, and the use of extension brackets, are commonly practiced in the industry and it should provide that such practices and techniques are presumed reasonable, safe and reliable means of attaching wire and cable to Transmission Facilities. These techniques greatly streamline the access process and reduce the amount of necessary make ready. By establishing a presumption in favor of the use of these practices and techniques, the Department will likely reduce litigation over acceptable attachment practices and further promote competition by foreclosing another possible means for a utility to delay access and competition.

A technical change to the definition of "utility" should be made to expand the meaning of that term to include other types of corporate entities.

**45.03(1)** As we have indicated above, there are several critical steps that must be completed in a timely manner in order for a licensee to construct wire and cable facilities to meet market demand and satisfy contractual obligations. One such critical



step is obtaining information concerning the available capacity of a utility's Transmission Facilities and an assessment of any necessary make ready work to accommodate the licensee's access request. Ideally, the licensee should be able to choose whether to have a utility or a qualified, pre-certified, independent third party contractor obtain such information and conduct necessary surveys of the utility's Transmission Facilities. In the event a licensee opts to have the utility provide the requested information, it should be able to respond to requests involving 1000 or fewer poles (10 miles or less of conduit or rights-of-way) within 10 business days, if no survey is required, and 20 business days if one is required. The utility should be able to recover its actual cost of providing such information and to request a reasonable up front payment of the estimate of such cost, to be adjusted upon completion. We have included further language to make absolutely clear that a licensee has a choice of using either the utility or, as detailed below, a third party contractor, to obtain necessary information about a utility's Transmission Facilities.

**45.03(2)** As it presently stands, a request for information concerning capacity and make ready often requires a licensee to suffer chronic bureaucratic delays, endure limitless procedural "hoops," and pay exorbitant fees, all at the hands of utilities that exert anti-competitive control over every step of the access process. If local competition is ever to rise to the level where the public will benefit, licensees must be able to streamline the information gathering process and avoid unnecessary costs and expenses. One way to achieve this is to allow licensees to use qualified, pre-certified, independent third party contractors to respond to information requests by licensees. There is no reason why a licensee should not be able to directly engage the same contractors currently used by the utilities themselves to respond to information requests. This would allow the licensee to bypass the utility's bureaucracy and avoid excessive costs and delay. Moreover, it would relieve the utility of the burden of administering such requests. It is important to note, however, that no benefit will be realized if utilities are permitted to prevent or interfere with the ability of such contractors to timely obtain such information and perform such surveys.

**45.04(1)** Because "nondiscriminatory access" is a somewhat amorphous term, we recommend including a provision to place that phrase in context to reduce ambiguity and possible litigation over its scope and meaning. Nondiscriminatory access is more readily defined by what it is not than what it is. It does not represent the notion that all licensees must be treated identically; nor does it mean that each licensee must have the same access that a utility or another provider may have with respect to such utility's Transmission Facilities. Rather, nondiscriminatory access should take into account the practical reality of "first come, first served" and should recognize that what is mandated is merely that similarly situated parties should have similar opportunities for access at similar rates, terms and conditions. In order to achieve regulation through market-based competition, however, it is necessary to allow the market to come to bear through negotiated access agreements. These agreements should be able to set competitive prices against the price ceiling on attachment rates established by the Department's regulations.

**45.04(2)** Under the proposed rules, a utility must respond to a request for access within 45 days of such request. Presumably, this is to allow the utility the time to conduct an internal assessment of available capacity, necessary make ready work, and potential safety and reliability concerns. We believe this time frame is appropriate, however, if the utility does not respond in a timely manner, then it should be deemed to have granted the access request. Moreover, if the licensee has used a third party contractor to survey the utility's capacity and make ready requirements, the licensee should produce this information to the utility at the time it makes its access request. Because the utility would then have most, if not all, of the information it needed to accept or deny access, it should be able to respond to the licensee's request in a more timely manner. In that regard, we propose that the utility be given a response time equal to 5 days per 1000 poles (10 miles of conduit or right-of-way) included in the access request, up to the current maximum of 45 days. We believe this time frame is fair and reasonable, particularly in light of our proposal to allow a licensee to request access to up to a maximum of 15,000 poles and 150 miles of conduit or right of way per calendar quarter. Alternatively, if the licensee requests the utility to survey the subject Transmission Facilities as part of its response, then the utility shall have the 45 day period the Department has suggested in which to obtain such information and respond. The utility should have the ability to recover the actual costs of responding to the request and should be able to request an estimate of such cost be paid up-front, with the amount of the payment to be adjusted upon completion and delivery of the utility's response. We agree that any denial of access by the utility should include a detailed response setting forth evidence that relates to and supports a denial based upon legitimate capacity, safety, reliability or engineering standards.

**45.04(3).** For the same reasons that third party contractors are necessary to perform surveys and respond to information requests, such contractors are also necessary in the context of performing make ready work for, and construction and maintenance of, cable and wire facilities.

**45.04(4)** In addition to the use of third party contractors, licensees also should be able to use their own trained and qualified personnel to perform make ready work for, and construction and maintenance of, cable and wire facilities in, on, across or under a utility's poles, ducts, conduits and rights-of-way. This will further promote competition by allowing licensees to construct wire and cable facilities with increased efficiency which, in turn, will save money and decrease the burden upon utilities to perform such work themselves.

**45.04(5)** To ensure licensees and contractors are duly qualified, ILECs should seek industry input and adopt written guidelines, consistent with the goals of these provisions. Such guidelines should apply equally to licensee, utility and third party contractors and personnel.

**45.04(6)** In the event a licensee opts to have the utility perform necessary make ready pursuant to an access request, the utility should be required to perform such work as

soon as possible, consistent with applicable legal, safety and reliability requirements. However, with respect to ILECs, it is absolutely necessary to prescribe time limits for ILECs to complete such work in order to avoid the problems that plague the current access and make ready process, i.e., months of bureaucratic delay, excessive paper work and procedures, and rampant make ready abuses and overcharging. In that case, the Department should mandate that an ILEC perform make ready requests for 500 or fewer poles (5 miles or less of conduit or right-of-way) within 30 business days of receipt of payment of a reasonable estimate of the actual cost of such work. Upon completion of the work, the payment owed to the utility should be adjusted to reflect the actual cost of performing such work. For requests involving more poles or more miles of duct or conduit, the parties should be able to work out a mutually agreeable schedule, in accordance with the spirit and purpose of these regulations.

**45.04(7)** Suggested language has been added to subsection (c) of this provision to require the utility to provide timely notice to the licensee in cases of either emergency or government requested maintenance or modifications.

**45.04(8)** We suggest some changes to reflect that a denial of access can occur in forms other than by written notice and may occur after a notice granting access has been issued. In addition, the standard for interim relief should be expanded to recognize that a licensee's service may not have yet begun and therefore "prevention" rather than "cessation" should be the applicable standard in that case.

**45.05(1) and (2)** We propose language to address the issue of reservation of capacity and, in doing so, attempt to balance the need of electric utilities to reserve capacity for core utility customers against the need to protect licensees from having to spend precious time and effort expanding facilities or building new facilities when capacity is already available. Of course, in order to prevent the "shield" of reservation from being used as an anti-competitive "sword", we strongly suggest limiting such reservation to electric utilities that meet our suggested requirements and prohibiting all other utilities from otherwise using this tactic to deny access.

**45.06(1), (2), (3)** Given the forced coupling of two competitive entities that would otherwise not likely interact, if the free exchange of relevant and necessary information is to occur on a timely and even-handed basis, it is necessary to provide some regulatory framework from which the parties can take comfort that such information will not be unnecessarily disseminated and used against them. Accordingly, we suggest that the parties be able to enter into mutual nonuse/nondisclosure agreements. In addition, we suggest statutory nonuse/nondisclosure requirements which provide that any information obtained pursuant to an information request and designated by the providing party as proprietary may be disclosed and used only by those persons who "need to know" such information in order to fulfill information requests. Although far from bulletproof, mutual agreements together with statutory mandates backed by the power to sanction and make findings of fact to support further claims of an aggrieved

party, should go a long way towards assuaging any fear over the possible misuse of such exchanged information.

**45.07(2)(a)(1)** We suggest a technical change to this provision to reflect that, in light of the fact that all Transmission Facilities of a utility are subject to requests for access, it would be improper to possibly limit claims by this provision, indirectly, to only those relating to facilities actually "used" or controlled by a utility. In keeping with the standard articulated under the Telecom Act, the standard should be "owned or controlled."

**45.07(2)(f)** It is absolutely essential to licensees that they be able to construct cable and wire networks on a timely basis. Any delay in construction, for whatever reason, seriously undermine a licensee's ability to meet contractual obligations and market demand, thereby threatening the licensee's economic stability and, by extension, the stability of market-based competition. Accordingly, we propose that, during the period an access complaint is pending, a licensee should be allowed to construct and use temporary attachments on, in, across or under the poles, ducts, conduits and rights-of-way at issue. This will allow the licensee to continue to build, remain on schedule and meet the market, while the merits of the complaint are decided. There is little or no burden placed upon the utility from such attachments, as the licensee or its contractors would perform all of the necessary installation and later modifications. A utility should be able to deny access during the complaint procedure only if it is able to show either irreparable harm and likely cessation of service, or imminent risk of serious bodily harm as a result of the proposed temporary attachments. To allow otherwise, would permit an anti-competitive utility from challenging every request for access and thereby crippling its competitors through delays that could last up to 180 days.

**45.07(2)(g)** In order to prevent disputes over the length of time parties must try and resolve a dispute prior to bringing a claim, to remove another possible vehicle of delay, and to promote parties expectations with respect to the dispute process, we suggest that a potential complainant need not try and resolve a dispute over access for more than seven business days prior to bringing a claim with the Department.

**45.07(3)** We recommend a technical change to this provision to recognize that the proper scope should include "rights-of-way" in addition to ducts and conduits.

**45.07(5)** We recommend specific procedures be included to address circumstances where a utility and licensee have a dispute concerning the fee to be paid for the utility to obtain information and/or perform surveys or make ready, at the request of the licensee.

**45.10(4)** Recognizing the economic reality that many incumbents have vastly greater resources than do potential licensees, it is not unfair to state that, for a utility bent on anti-competitive practices, each dollar spent in litigation translates into a significant diversion of a licensee's limited time and resources. In order to provide sufficient

disincentive for utilities and licensees to raise specious or other arguments not founded in good faith, we suggest a provision by which the Department can award the prevailing party its costs and expenses of litigation should the Department find the losing party's arguments so lacking a good faith foundation.

**45.11** We have suggested some language to further clarify that if, for any reason, the Department is unable to issue a final Order within 180 days after a complaint has been filed with respect to a denial of access, then the licensee shall have the right to commence or complete the construction that was the subject of such complaint. In addition, the licensee shall be able to immediately construct permanent attachments to all poles, ducts, conduits and rights-of-way on, in, across or under which the licensee placed temporary attachments pending determination of its complaint.

**45.13** We recommend language to clarify that the focus should be on those Transmission Facilities that a utility owns or controls, rather than those facilities it uses to provide telecommunications services. Similarly, only affiliates, subsidiaries and associates that are actually using the utility's Transmission Facilities should be required to pay attachment fees.

#### **IV. CONCLUSION**

For all the reasons set forth above, RCN respectfully urges the Department to consider the suggested changes to the Proposed Regulations, as attached hereto. The problems described in these Comments are very real and will have a very real impact on the ability of RCN and other new competitors to construct a network in a time frame that will ensure the vibrant competition necessary to meet the goals of market-based regulation.

Respectfully Submitted,

**RCN-BECOCOM, LLC**

By Its Counsel

---

**Rich, May, Bilodeau & Flaherty, P.C.**

Eric J. Krathwohl, Esq.

Thomas H. Bilodeau, Esq.

294 Washington Street

Boston, MA 02108

(617) 482-1360

Dated: January 21, 1999

## **ATTACHMENT A**

### **SUMMARY OF BELL ATLANTIC POLE ATTACHMENT PROCEDURES**

Bell Atlantic's pole attachment process is unnecessarily lengthy and expensive. First, a licensee must obtain a Master Aerial License Agreement. This form itself is unreasonable in several regards. With this Agreement in place, the licensee can seek specific pole attachments once it provides (i) an insurance certificate showing licensee's property damage liability coverage of \$1,000,000.00, and bodily injury of \$3,000,000.00, (ii) a Performance Bond with financial security between \$1,000.00 and \$25,000.00 depending on the amount of poles on the application, (iii) a copy of the Municipal or private authorization to place aerial facilities and (iv) an application fee and several other Bell Atlantic Forms. Note that Bell Atlantic only allows a single application to cover a maximum of 200 poles. This process begins with Bell Atlantic's central Reimbursable Construction Administration ("RCA"). Further, Bell Atlantic will only process up to 2,000 poles in any district at one time. This results in (i) greater application fees; and (ii) much slower processing.

Bell Atlantic normally takes 2-4 weeks to determine a charge for the survey work, which the licensee must pay before the process continues. Upon receipt of licensee's payment, RCA refers this matter to BA's local district office which, in turn, schedules the field survey to determine the necessary conditions for pole attachment. It normally can take 3-6 weeks before the scheduling is arranged and performed. After the survey is made, it normally takes BA several weeks to advise the licensee of the make ready work required and the charges thereof. Not infrequently that time period can stretch over *2-3 months*.

Again, at this point, continuation of the process depends upon the licensee's payment of the amount specified. Upon receipt of the make ready work payment, RCA contacts the district where the work is needed, and schedules the start of the make ready work. The district assigns an engineer to the project who then becomes responsible for the completion of the work. In RCN's previous experience, the make ready work appears to be Bell Atlantic's last priority, and the licensee must repeatedly call both RCA and the district engineer to expedite construction. In fact, the Master Aerial License Agreement essentially enshrines the low priority given make ready work.

Upon completion of the make ready work by the district, RCA is notified and they, in turn, complete the Master Aerial License Agreement and forward it to the licensee. The licensee is then permitted to attach strand and cable to the poles.

K:\utl\oth\98-36com2.rcn