

**Before the
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE
Commonwealth of Massachusetts**

NEXTG NETWORKS OF NY, INC.

Complainant,

v.

RCN NEW YORK COMMUNICATION,
LLC; RCN TELECOM SERVICES OF MA,
INC.; RCN TELECOM SERVICES, INC.;
AND RCN CORPORATION,

Respondents.

File No. D.T.C. 08-5

**REPLY BRIEF
OF RESPONDENT RCN**

Respondents RCN New York Communication, LLC; RCN Telecom Services of MA, Inc.; RCN Telecom Services, Inc.; and RCN Corporation (collectively “RCN”), by their attorneys Sullivan & Worcester LLP, submit this reply to the briefs of NextG Networks of NY, Inc. (“NextG”) and the Department of Public Utilities (“DPU”), filed January 16, 2009, in accordance with the Procedural Schedule for this matter set on December 11, 2008.

**NextG’s Arguments Fail to Address the Merits of this Dispute,
and Should be Rejected**

NextG concedes on the first page of its Brief that Massachusetts law allows a utility to deny access to conduit based on “good cause shown.”¹ Notwithstanding this acknowledgement, NextG then proceeds to insist that if RCN meets the definition of a “utility,” the analysis ends, and RCN must provide access to its conduit, irrespective

¹ Initial Brief of NextG Networks of NY, Inc., dated January 16, 2009 (“NextG Brief”), at 1.

of the circumstances, and irrespective of whether the Department of Telecommunications and Cable (“DTC”) determines that consumers would be harmed as a result. Such an outcome would, of course, render the discretionary language contained in G.L. c. 166, § 25A and the implementing regulations a nullity. In support of its untenable position, NextG relies on inapposite (and non-binding) federal precedents addressed to incumbent, former monopoly utilities with ubiquitous networks, failing utterly to acknowledge the unique burdens imposed by its demand on RCN, and without ever establishing the merits of its request. NextG’s argument, in a nutshell, is: “we want it; we get it,” and never mind the cost to RCN and its customers.

NextG then argues that, despite having adopted a similarly inflexible posture in its commercial negotiations with RCN, the DTC should nonetheless impose on RCN the terms and conditions of access demanded by NextG, yet should disregard RCN’s request for guidance on the areas of impasse that NextG finds it inconvenient to discuss.

RCN submits that it has amply established “good cause shown”² to deny NextG’s conduit access request, that the DTC must find that NextG’s request is not in “the interest of subscribers of cable television services and wireless telecommunications services,”³ and that the DTC therefore must deny NextG’s Complaint. However, if the DTC grants NextG’s Complaint, in whole or in part, RCN respectfully submits that the interests of adjudicatory economy and fairness to the parties requires the DTC to provide guidance regarding the known areas of impasse,

² See 220 CMR § 45.03(1).

³ See G.L. c. 166, § 25A.

so as to obviate the need for a separate, subsequent proceeding to resolve issues that already have been joined.

I. RCN's Status as a Competitive Provider Differentiates This Case From the Precedents Cited by NextG, and Must Be Considered by the DTC.

NextG argues throughout its Brief that RCN should be treated like an ILEC or incumbent electric utility for purposes of G.L. c. 166, § 25A, to further the legislature's intent to "prevent discriminatory or anti-competitive practices by any entity that had been allowed to install or control bottleneck infrastructure...."⁴

However, nothing in the record in this case suggests that the 19 short conduit segments NextG seeks from RCN constitute "bottleneck" facilities, or that competition would be harmed if NextG were denied access. To the contrary, NextG has presented no reason that it cannot do precisely as RCN did, and obtain or construct its own facilities in the selected locations.⁵

The illogic of NextG's attempt to have the DTC impose on RCN precedents established in the context of incumbent utility facilities is highlighted by its insistence that the DTC deny RCN the right to reserve capacity for its own future expansion. NextG cites in support of its position provisions of the FCC's Local Competition Order⁶ that on their face have no applicability to a competitive telecommunications company, asserting: "the FCC has held such reservation of space is permitted only for

⁴ NextG Brief, at 7-8.

⁵ NextG's assertion that declining to require RCN to grant access to the 19 separate conduit segments, totaling 9,669 linear feet of conduit, that are at issue in this case "would afford a preference to competitive providers who have entered into agreements with incumbent electric utilities (like NStar) to the exclusion of all others," is nonsensical. As the record makes clear, the conduit segments requested by NextG are not subject to RCN's agreements with NStar.

⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, 14 FCC Rcd 18049 (1999) ("Local Competition Order").

future uses involving core electrical utility functions and not for future planned communications service offerings.”⁷ Clearly, the FCC did not intend that a limitation on an incumbent electric utility’s right to reserve capacity for communications services it might offer in the future be applied to prevent a CLEC from growing its business.

NextG’s glib dismissal of the “hypothetical” burden imposed on RCN and its customers⁸ in no way diminishes the DTC’s statutory obligation to take that burden into account in determining whether to apply G.L. c. 166, § 25A in this context. RCN does not dispute that if RCN were identically situated with an incumbent LEC or electric utility, G.L. c. 166, § 25A would (and should) be applied. But NextG cannot credibly argue that RCN is the same as an ILEC, or that NextG’s demand for conduit access places no more burden on RCN and its customers than a request to an ILEC would. It is readily apparent that RCN is distinguishable from the utilities in the cases cited by NextG in every important way: RCN does not control bottleneck facilities, lacks the personnel and business infrastructure to cost-efficiently respond to NextG’s demands, and cannot amortize the cost of providing access over a ubiquitous system. NextG does not contest that the 9,669 feet of conduit to which it requests access would generate less than \$15,000 in annual revenue to RCN at the rates proposed – yet NextG cavalierly asserts that “RCN’s conduit rental rate should already account for any costs incurred in conduit administration, and RCN need not recover such costs with an early termination penalty”⁹ and “the amounts that NextG is required to pay

⁷ NextG Brief, at 17, citing Local Competition Order.

⁸ *Id.*, at 8.

⁹ *Id.*, at 25.

under G.L. c. 166, § 25A (which follows the federal statute) already give RCN ‘much more’ than its marginal costs of the conduit, and should be deemed sufficient,”¹⁰ and that “*any* income received from NextG for use of RCN’s facilities would be pure profit to RCN.”¹¹ For the reasons fully elaborated in RCN’s opening Brief, NextG’s position with regard to the costs imposed by its demand, and RCN’s ability to recover those costs, is simply ludicrous.¹² RCN is a rational economic actor; if it could profit from renting conduit to NextG, it certainly would not be engaged in this expensive and protracted litigation to resist NextG’s request.¹³

Moreover, NextG’s purported willingness to reimburse RCN for its ‘legitimate makeready and other costs associated with NextG’s request for access’ so that “NextG would not be causing any incremental cost basis to occur that RCN would need to amortize...”¹⁴ is belied by its position that “[t]he parties did not stipulate to any facts regarding RCN’s costs, and NextG would object to any attempt by RCN to introduce

¹⁰ *Id.*, at 26.

¹¹ *Id.*, at 28.

¹² To add insult to injury, NextG ignores altogether the additional costs RCN would necessarily incur – on top of the costs of processing NextG’s access request and administering its use of the conduit – in order to be able to calculate the full amount chargeable to NextG pursuant to the FCC’s rate formula. As the DTC undoubtedly is aware, the FCC formula relies on detailed accounting information found in incumbent utilities’ FERC Form 1 or ARMIS reports, which separately capture the overhead and administrative costs associated with administering the incumbents’ large pole and conduit systems. RCN is not required to, and does not, keep its books in ARMIS form. Accordingly, to separately account for the personnel and overhead costs associated with the forced rental of 9,669 feet of conduit to NextG so that RCN could recoup those costs would, in itself, cause RCN to incur significant additional and unnecessary expense.

¹³ Indeed, RCN fears that if NextG were to prevail on the pending Complaint, NextG likely would pepper RCN with continued demands for more small, geographically dispersed conduit segments, forcing RCN to incur still greater administrative costs. See NextG Responses to DTC Requests, at 2 (“While NextG desires to use RCN conduits in other areas of Massachusetts, in particular, in Cambridge, it has not yet formally requested access to specific conduits in those other locations.”)

¹⁴ NextG Brief, at 28.

facts outside the Joint Stipulation.”¹⁵ RCN submits, however, that it is unnecessary to establish the precise cost that NextG’s conduit access demand is imposing, since it is obvious that even an extraordinarily high rental rate would be insufficient to recoup the personnel and administrative costs associated with determining the legal status of, and surveying, 19 conduit segments in three jurisdictions; negotiating the conduit access agreement; overseeing NextG’s access to, and maintenance and use of, the conduit; and invoicing and collecting the annual rental fees (not to mention recouping RCN’s original investment in the conduit), when only 9,669 feet of conduit are at issue.

II. If Access is Ordered, the DTC Should Fully Resolve the Parties’ Dispute, to Obviate the Need for Further Proceedings.

As set forth below, NextG’s self-serving arguments that the DTC should decide the terms and conditions of interest to NextG, as set forth in paragraph 20 of the Joint Stipulation, but not those of concern to RCN, as set forth in paragraph 21 of the Joint Stipulation, should be rejected. Conservation of the resources of both the DTC and the parties requires that the parties’ present dispute be fully resolved in the current proceeding.

The DPU Lacks Standing to Limit the Scope of This Proceeding

The DPU in its Brief takes no position on NextG’s request for access to RCN’s conduit, although it indicates it would oppose the request if “the installation of NextG’s facilities in RCN’s conduit could adversely affect the safe and reliable provision of electric or gas service, or any application of electric smart grid or

¹⁵ *Id.*, at 23-24, footnote 12.

advanced metering”.¹⁶ Presumably, it is these safety and reliability interests that the DPU intervened in this proceeding to protect.

Nonetheless, the DPU proceeds in its Brief to take a position opposing the parties’ joint request that, if the DTC grants NextG access to RCN’s conduit, the DTC also resolve the areas of impasse between the parties regarding the terms and conditions of such access. It is unclear to RCN how resolution of the disputed terms and conditions in this proceeding, rather than a subsequent proceeding, would be detrimental to any legitimate interest of the DPU. The parties have stipulated that the conduit segments to which NextG has requested access in its Complaint do not, to the parties’ knowledge, implicate the safety or reliability of the electric or gas systems.¹⁷ In any event, G.L. c. 166, § 25A provides that “upon its own motion or upon petition of any utility or licensee [the DTC] 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.” (Emphasis added.) Each of the statutory pre-requisites has been met: the utility and licensee have petitioned the DTC to decide terms and conditions of use, and this is a case in which the utility and licensee fail to agree.¹⁸ Accordingly, the areas of impasse between the parties are ripe for resolution.

In the event that the DTC (1) grants NextG’s Complaint, and (2) concludes that a formal petition and notice and comment period are required before the disputed

¹⁶ Initial Brief of the Department of Public Utilities, dated January 16, 2009, at 3.

¹⁷ See Joint Statement of Stipulated Facts (“Joint Stipulation”), at ¶18; NextG Responses to Information Requests of the DPU, at 3-8; and RCN Response to Information Requests of the DPU, at 6-12.

¹⁸ Joint Stipulation, at ¶ 20.

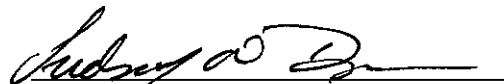
terms and conditions may be decided, RCN respectfully requests that the parties be given the opportunity to file a formal petition or petitions within the current docket, and that the DTC set a notice and comment schedule that will ensure prompt consideration of the terms and conditions in dispute, rather than requiring the parties to incur the cost and time involved in initiating a wholly new proceeding. RCN fears it may suffer "death by a thousand cuts," if each aspect of NextG's access demands (and every subsequent request for additional conduit segments) must be separately litigated. RCN submits, further, that no additional factual development is required for the DTC to answer the questions posed in paragraphs 20 and 21 of the Joint Stipulation; rather, the relevant facts have been adequately developed in the current case.¹⁹

Respectfully submitted,

RCN NEW YORK COMMUNICATION,
LLC; RCN TELECOM SERVICES OF MA,
INC.; RCN TELECOM SERVICES, INC.;
AND RCN CORPORATION,

By their attorneys,

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Lindsay D. Barna (BBO #664415)
L. Elise Dieterich
SULLIVAN & WORCESTER LLP
1666 K Street, NW
Washington, DC 20006
Tel: 202-775-1200; Fax: 202-293-2275

One Post Office Square
Boston, MA 02109
Tel: 617-338-2800; Fax: 617-338-2880

¹⁹ See Joint Stipulation; NextG Responses to Information Requests of the DPU and DTC; and RCN Responses to Information Requests of the DPU and DTC.

CERTIFICATE OF SERVICE

I, Lindsay D. Barna, hereby certify that on January 23, 2009, I caused a copy of the foregoing Reply Brief of Respondent RCN to be served via electronic mail and U.S. mail, first-class postage prepaid, on the following:

Geoffrey Why, General Counsel
Department of Telecommunications and
Cable
Two South Station – 4th Floor
Boston, MA 02110
via email: Geoffrey.G.Why@state.ma.us

Michael Isenberg, Director
Competition Division
Department of Telecommunications and
Cable
Two South Station, 4th Floor
Boston, MA 02110
via email: mike.isenberg@state.ma.us

T. Scott Thompson
Davis Wright Tremaine, LLP
1919 Pennsylvania Avenue, NW, Suite 200
Washington, DC 20006
via email: scottthompson@dwt.com

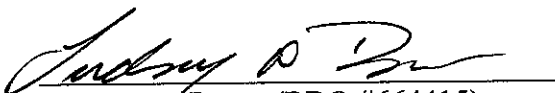
Marc J. Tassone, Counsel
Department of Public Utilities
One South Station
Boston, MA 02110
via email: marc.tassone@state.ma.us

Darleen Cantelo, Hearing Officer
Department of Telecommunications and
Cable
Two South Station, 4th Floor
Boston, MA 02110
via email: Darleen.cantelo@state.ma.us

Catrice C. Williams, Secretary
Department of Telecommunications and
Cable
Two South Station – 4th Floor
Boston, MA 02110
via email: catrice.williams@state.ma.us
DTC.Efiling@MassMail.State.MA.US

Dennis A. Murphy
Nixon Peabody LLP
100 Summer Street
Boston, MA 02110
via email: dmurphy@nixonpeabody.com

Paul G. Afonso
Kevin P. Joyce
Brown Rudnick
One Financial Center
Boston, MA 02111
via email: pafonso@brownrudnick.com
via email: kjoyce@brownrudnick.com


Lindsay D. Barna (BBO #664415)