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VIA HAND DELIVERY

July 28, 2000

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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

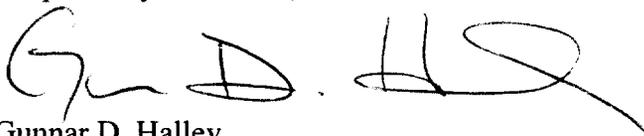
Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

Please find attached a letter with enclosure from the Smart Buildings Policy Project to Chairman Kennard, Commissioner Ness, Commissioner Furchtgott-Roth, Commissioner Powell, and Commissioner Tristani delivered Tuesday, July 26, 2000 that concerns the above-referenced proceedings. I apologize for the oversight in not providing copies to the Office of the Secretary simultaneous with the original delivery of the document.

In accordance with the Commission's rules, for each of the above-mentioned proceedings, I hereby submit to the Secretary of the Commission two copies of this notice of the Smart Buildings Policy Project's written ex parte presentation.

Respectfully submitted,



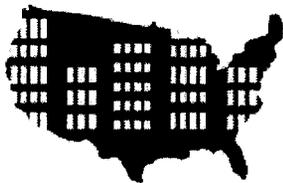
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Counsel for SMART BUILDINGS POLICY PROJECT

- | | | |
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| Eloise Gore (CSB) | Cheryl King (CSB) | Wilbert Nixon (WTB) |
| Christopher Wright (OGC) | David Horowitz (OGC) | Joel Kaufman (OGC) |
| Jonathan Nuechterlein (OGC) | | |

Enclosure

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VIA HAND DELIVERY
July 26, 2000

The Honorable William E. Kennard, Chairman
The Honorable Susan Ness, Commissioner
The Honorable Harold Furchtgott-Roth, Commissioner
The Honorable Michael Powell, Commissioner
The Honorable Gloria Tristani, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: WT Docket No. 99-217 and CC Docket No. 96-98

Dear Mr. Chairman and Commissioners:

On Monday, the Massachusetts Department of Telecommunications and Energy (“DTE”), acting on behalf of consumers, issued a critical ruling supporting the rights of consumers living or working in multi-tenant environments (“MTEs”) to access their telecommunications provider of choice. The decision properly observes that “[c]onsumer sovereignty is a principal goal of the Telecommunications Act of 1996” and that “sovereign choice by commercial and residential consumers can be realized only if consumers are accorded unfettered access to the contenders for their telecommunications business.”¹ The DTE recognizes that “[c]onsumer welfare and consumer choice are and ought to be the touchstone of economic regulatory policy. That choice is denied and that welfare impeded where a lessor can block or unreasonably restrict a business or residential consumer’s access to the telecommunications marketplace.”² In granting nondiscriminatory access, partly pursuant to Section 224 of the Communications Act of 1934, as amended, the DTE explains that

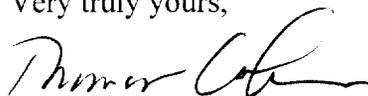
¹ Order Establishing Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-of-Way and to Enhance Consumer Access to Telecommunications Services, DTE 98-36-A, *Order Promulgating Final Regulations*, slip op. at 1 (Mass. DTE, rel. July 24, 2000).

² *Id.* at 11.

“[t]hrough competitive suppliers’ networks may serve a consumer’s street, the consumer derives no benefit from competition if his lessor arbitrarily stands between him and the telecommunications service the consumer might, if unfettered, choose.”³ The DTE adds that the legal status of the landlord does not encompass the role of exclusive broker for tenants in accessing telecommunications services.

In the past, the Commission has taken note of and adopted regulatory practices in the Commonwealth of Massachusetts.⁴ In the context of nondiscriminatory access to MTEs, the members of the SBPP encourage the Commission to promote the interests of consumers as diligently as the Massachusetts DTE has done in this Order by adopting nondiscriminatory access rules that will give all Americans the benefits of competition that Massachusetts tenants will now enjoy. In this regard, please find enclosed a copy of the DTE’s Order for your review.

Very truly yours,



Thomas Cohen

Enclosure

cc:	Kathryn Brown	Peter A. Tenhula	Clint Odom
	Brian Tramont	Adam Krinsky	Mark Schneider
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	Jonathan Nuechterlein (OGC)		

³ *Id.* at 22.

⁴ See, e.g., *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, *Report and Order*, 15 FCC Rcd 6453 at ¶ 93 (2000)(adopting Massachusetts Department of Public Utilities’ half-duct methodology for establishing conduit attachment rates).





The Commonwealth of Massachusetts
DEPARTMENT OF
TELECOMMUNICATIONS AND ENERGY

July 24, 2000

D.T.E. 98-36-A

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

ORDER PROMULGATING FINAL REGULATIONS



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I. INTRODUCTION

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

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

Sovereign choice by commercial and residential consumers can be realized only if consumers are accorded unfettered access to the contenders for their telecommunications business. An array of products and services is of little value to a consumer if providers cannot reach the consumer in his place of business or in his home. Innovative, efficient providers cannot reap the benefits of their foresight and efficiency without genuine access to the homes, offices, stores, and factories of their intended customers.

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

Only by ensuring nondiscriminatory access by telecommunications competitors to the poles, ducts, conduits and rights-of-way through which consumers receive telecommunications services can the benefits of the 1996 Telecommunications Act be realized.² The regulations adopted by this Order exercise the authority granted by the Federal Pole Attachment Act, 47 U.S.C. § 224, and by the Massachusetts Pole Attachment Statute, G.L. c. 166, § 25A, to accord competitive telecommunications providers' access to consumers³ - - and hence, consumers' access to would-be providers - - to the greatest extent practicable. Without opening the routes to end users, consumer sovereignty cannot be given effect; and this principal goal of the 1996 Telecommunications Act would remain unrealized. Legislative intent to benefit end-use consumers would be thwarted. The Department's job is to effect legislative intent. The rules adopted pursuant to statute today are the means to effect that purpose.

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

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

II. PROCEDURAL HISTORY

On December 9, 1998, the Department of Telecommunications and Energy (the "Department") opened a rulemaking⁴ in order to establish complaint and enforcement procedures to ensure that, in the interest of the consumers of their services, telecommunications carriers and cable system operators have nondiscriminatory access to poles, ducts, conduits and rights-of-way (collectively "pole attachments"). This rulemaking was docketed as D.T.E. 98-36. General Laws c. 166, § 25A (the "Massachusetts Pole Attachment Statute") regulates the "rates, terms and conditions of use of poles or of communication ducts or conduits of a utility for attachments of a licensee in any case in which the utility and licensee fail to agree."⁵ The statute *expressly directs* the Department to *consider the interests of consumers*. Although Federal law and regulations occupy this same field, there

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

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

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

Included with the Order in D.T.E. 98-36 opening this rulemaking proceeding was a set of proposed regulations designed to promote nondiscriminatory access by telecommunications carriers and cable system operators to utility poles, ducts, conduits, and rights-of-way. Order, Att. ("Proposed Regulations"). The Department's current regulations, adopted in 1984, are set forth at 220 C.M.R. §§ 45.00 et seq. ("Current Regulations") and address only rates, terms and conditions for cable television attachments. The Current Regulations fall well short of meeting consumers needs or of addressing market realities *post* the 1996 Telecommunications Act.

In 1978, Congress enacted Public Law 95-234, which directed the Federal Communications Commission ("FCC") to regulate the rates, terms and conditions of cable television system attachments to utility-owned poles, ducts, conduits, and rights-of-way. 47 U.S.C. § 224(b). Although this statute was not intended to preempt state regulation in this area, it still required the FCC to promulgate implementing regulations that would apply in the absence of effective state regulation. 47 U.S.C. § 224(c). Later in 1978, the Massachusetts General Court similarly authorized the Department (then the Department of Public Utilities) to

⁶ The Federal Pole Attachment Act states: "Nothing in this section shall be construed to apply to, or to give the [Federal Communications] Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of way for pole attachments in any case where such matters are regulated by a State." 47 U.S.C. § 224(c)(1).

regulate pole attachments. G.L. c. 166, § 25A, as amended by St.1997, c. 164, §§ 265, 266. The Department subsequently promulgated rules for rates, terms and conditions for pole attachments, codified at 220 C.M.R. §§ 45.00 et seq.⁷

In 1996 Congress sought to allow and enable competition in local telephone and cable television markets when it passed Pub. L. No. 104-104, 110 Stat. 56, amending the Telecommunications Act of 1934, now codified in 47 U.S.C. § 224: An Act to Promote Competition and Reduce Regulation in Order to Secure Lower Prices and Higher Quality Service for American Telecommunications Consumers and Encourage the Rapid Deployment of New Telecommunications Technologies ("Telecommunications Act of 1996"). Numerous provisions of the Telecommunications Act of 1996 are aimed at achieving these goals, including the expanded applicability of the Federal Pole Attachment Act to require utility companies, including local exchange carriers, to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it." Telecommunications Act of 1996 (amending 47 U.S.C. § 224(f)(1)).

As a result of the passage of the Telecommunications Act of 1996, the FCC amended its pole attachment regulations to provide "complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable." 47 C.F.R. § 1.1401. These regulations grant jurisdiction to the FCC unless

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

a state has certified that it has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments. 47 C.F.R. § 1.1414. As states may regulate rates, terms and conditions, so too may states regulate matters of discriminatory access compatibly with 47 C.F.R. § 1.414. To do so, a state needs only effective statutes, rules, or regulations in this specific area. Id. Massachusetts has such a statute, G.L. c. 166, § 25A, and, with the adoption of the proposed rules as modified pursuant to notice and hearing, will have the requisite, implementing regulations.

Before the completion of this rulemaking, Massachusetts had not yet taken the requisite steps to exercise jurisdiction over discriminatory access claims, although the Department has for some time regulated rates, terms and conditions for pole attachments, ducts, conduits and rights-of-way.⁸ Accordingly, the Department opened this rulemaking to benefit consumers: (1) by requiring persons subject to § 25A to provide nondiscriminatory access to any pole, duct, conduit, or right-of-way under their ownership or control, and (2) by establishing regulations for discriminatory access complaints. Order at 2-3.

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

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

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

¹⁰ Notice of Request for Further Written Comments on Proposed Amendments to 220 C.M.R. §§ 45.00 et seq. (August 20, 1999).

¹¹ The Department received supplemental written comments from AT&T; Bell Atlantic; Competitive Telecommunications Association ("CompTel"); BECo and Com/Electric, (jointly "NSTAR"); RCN; Teligent; the Towns (supplemented by Bedford); and ServiSense. Although it solicited comments directly from commercial real estate interests and realty trade organizations, the Department received none from those interest groups. In addition to the general notice soliciting supplemental comments, the
(continued...)

Although the Department opened this proceeding to perfect the jurisdiction necessary to address nondiscriminatory access claims, the initial comments to this rulemaking sought the Department's consideration of related matters within the general scope of its December 9, 1998 Notice (see note 4 supra). Upon review, a substantial number of these matters necessitate a level of specificity that is better suited to case-by-case adjudication rather than consideration in this generalized rulemaking. No rule can expressly address or provide for the specifics of any and all future fact-patterns; and any rule that attempts to do so runs the risk of being so particular as unwittingly to exclude cases intended to be covered. Rules of general application allow considered development of a body of Department precedent. In addition, many of the comments seeking the Department's review have been previously addressed in other dockets¹² or are beyond the scope of this rulemaking.

¹¹(...continued)

Department sent targeted notice to real estate organizations seeking their views. Specifically, notice was sent to the Massachusetts Landlords Association, Building Owners and Managers Association, Massachusetts Association of Realtors, Greater Boston Real Estate Board, Massachusetts Real Estate Investors Association, The Metro South Property Owners Association, Massachusetts Rental Housing Association, Inc., Small Property Owners Association of Cambridge, Cape Cod Property Owners & Managers Association, Greater Lowell Landlord's Association, Property Owners Cooperative, South Shore Rental Association, Worcester Property Owners Association, Inc., The Greater Marlboro Property Owners Association, Greater New Bedford Landlord Association, Landlords' Business Association of Franklin County, Somerville Homeowners Association, Southern Worcester County Landlord Association, and The Beacon Hill Institute for Public Policy Research.

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

The Current Regulations address only the rates, terms and conditions for pole attachments. The Department's Final Regulations include procedures designed to ensure that access to poles, ducts, conduits and rights-of-way is provided on a nondiscriminatory basis, and to ensure that rates, terms, and conditions are just and reasonable. In addition, the Final Regulations incorporate the following notable amendments to the Current Regulations based, in part, on information provided by commenters: (1) the Final Regulations require an owner/controller of any pole, duct, conduit, or right-of-way to provide nondiscriminatory access to it; (2) the Final Regulations codify the Department's interpretation of the term "utility" (i.e., the owner/controller of poles, ducts, etc.) in G.L. c. 166, § 25A to include owners of CBs and MDUs for the purposes of this section and a carrier or other utility to whom such CB or MDU owner has ceded control of facilities; (3) the Final Regulations prescribe access into CBs and MDUs through a requirement that they open their public and private right-of-way to competing carriers, from whose services consumers might otherwise be barred; (4) the Final Regulations establish a rebuttable presumption that the exclusivity provision of a contract between a service provider and a CB or MDU owner contravenes both Federal and state pole attachment statutes; (5) the Final Regulations amend the title of 220 C.M.R. §§ 45.00 et seq., from "Rates, Terms and Conditions for Cable Television Attachments" to "Pole Attachment Complaint and Enforcement Procedures;" (6) the Final Regulations revise the complaint procedures to address claims of nondiscriminatory access; (7) the Final Regulations require a timely response from owners/controllers to requests for access to pole attachments, ducts, conduits and rights-of-way; and (8) the Final Regulations

require that an owner/controller charge for access to poles, ducts, conduits and rights-of-way an amount equal to what it charges itself, or to an affiliate, subsidiary or associated company, or to another entity allowed to use these facilities.

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

III. ACCESS TO MULTIPLE DWELLING UNITS

The Department opened this proceeding to put into effect Federal and state legislative policy: that is, (1) to ensure consumers the broadest access to the burgeoning array of telecommunications services; and (2) to secure for providers of telecommunications and cable services nondiscriminatory access to the poles, ducts, conduits and rights-of-way, so that they may offer their services to consumers in a truly competitive marketplace. The Department has long promoted competition in all communications markets. See e.g., Local Competition, D.P.U. 94-185, Order Opening Investigation (January 6, 1995).

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

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

¹³ See Linda Sandler, *Landlords Use Real-Estate Proceeds for Technology Plays*, Wall Street Journal, April 26, 2000; Scott Thurm and Barbara Martinez, *Big Landlords Are Joining Telecom Fray*, Wall Street Journal, October 5, 1999; and Lawrence R. Freedman and Richard L. Davis, *New Entrants Seek Access to Multiple Dwelling Units*, Legal Times, May 3, 1999. See also, comments, generally, in this proceeding.

¹⁴ The FCC is presently considering access to MDUs in FCC Docket 96-98, Notice of Proposed Rulemaking and Notice of Inquiry (July 7, 1999) ("FCC Rulemaking"). Additionally, several states (*i.e.*, Connecticut, Nebraska, Texas and Ohio) already have enacted legislation or regulations to prohibit owners of MDUs from discriminating and/or demanding unreasonable compensation for access to MDUs. Finally, the National Association of Regulatory Utility Commissioners ("NARUC") supports
(continued...)

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

The authority of the Department to regulate nondiscriminatory access into CBs and MDUs is provided in the Massachusetts Pole Attachment Statute. Until now, the state of the telecommunications market has not made it necessary for the Department to exercise the full measure of authority granted to it.¹⁵ We do so now to ensure that consumers benefit from a

¹⁴(...continued)

“legislative and regulatory policies that allow customers to have a choice of access to properly certified telecommunications providers in multi-tenant buildings,” and also “supports legislative and regulatory policies that will allow all telecommunications service providers to access, at fair, nondiscriminatory and reasonable terms and conditions, public and private property in order to serve a customer that has requested service of the provider.” NARUC Resolution Regarding Nondiscriminatory Access To Buildings For Telecommunications Carriers (July 29, 1998).

¹⁵ The issue is, however, not strictly one of first impression at the Department. It arose some fifteen years ago, even during the heyday of monopoly telephony. See New England Telephone and Telegraph Company, D.P.U. 86-124-D, at 11-16 (1986) (concluding that a shared tenant services provider, including a property owner, could be deemed to be furnishing or rendering telecommunications services for public use and could, therefore, be subject to Department regulation pursuant to G. L. c. 159, § 12); Massachusetts Institute of Technology, D.P.U. 86-13, at 15-16 (1988) (MIT’s provision of local exchange service to dormitory residents would not be subject (continued...))

truly competitive marketplace. To do this, the Final Regulations rely on § 25A's broad definition of the term "utility" to include poles, ducts, conduits, and rights-of-way appurtenant to a CB or MDU. Additionally, the Department relies on the breadth of the term "right-of-way" so that competing providers may obtain access to the distribution poles, ducts, conduits, and other support structures located inside and on commercial and residential buildings and "used or useful, in whole or in part," for telecommunications. G.L. c. 166, § 25A. The Department also adopts a rebuttable presumption that an exclusivity provision of a contract between a service provider and a CB or MDU owner is, more likely than not, anti-competitive because exclusive contracts interfere with the rights of tenants to freely choose between the many available competitive telecommunication services. Therefore, exclusive contracts contravene legislative policy as expressed in both state and Federal pole attachment statutes.

A. Utilities

1. Comments

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

¹⁵(...continued)

to regulatory oversight, but ruling was "contingent upon MIT's explicitly indicating that it will continue to allow its dormitory residents the option to contract directly with NET and competing carriers for local exchange service"); Intra-LATA Competition, D.P.U. 1731, at 85-97 (October 18, 1985) (criteria for whether telecommunications network was offered for public use).

landowner, exercising significant control over rights-of-way by reserving power over the operation of facilities and having the authority to revoke a license and force abandonment of service, itself constituted a "utility" under G.L. c. 166, § 25A (RCN Supplemental Comments at 5). For this reason, RCN comments that, to the extent a person owns or controls pole attachments for supporting or enclosing wires for telecommunications or for transmission of electricity in a building, that person comes squarely within § 25A's purview and should provide reasonable access to those facilities (RCN Supplemental Comments at 4).

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

2. Analysis and Findings

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

[A]ny person, firm, corporation or municipal lighting plant that owns or controls or shares ownership or control of poles, ducts, conduits or rights of way used or useful, in whole or in part, for supporting or enclosing wires or cables for the transmission of intelligence by telegraph, telephone or television or for the transmission of electricity for light, heat or power.

G.L. c. 166, § 25A (emphasis added).

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

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

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

The evident intent was to make the Massachusetts Pole Attachment Statute's scope comprehensive. An owner of a CB or MDU that owns or controls poles, ducts, conduits or rights-of-way as described in § 25A is clearly a "utility" under this definition. See Shamban v. Masidlover, 429 Mass. 50 (1999) (rules of statutory interpretation hold that a court is bound to follow statutory language where it is plain and unambiguous). By contradistinction, where the legislature has sought to exclude "landlord" from the definition of an entity subject to Department regulation, it has done so unmistakably. See G.L. c. 165, § 1, definition of companies subject to water rate regulation. The Supreme Judicial Court previously reviewed the Department's statutory interpretation of G.L. c. 166, § 25A in Greater Media, Inc. v. Department of Public Utilities, 415 Mass. 409 (1993). The Court concluded that the Department's interpretation of particular terms in G. L. c. 166, § 25A was within the Department's authority and explained, "ordinary precepts of statutory construction instruct us to accord deference to an administrative interpretation of a statute" (id. at 4, citing Massachusetts Organization of State Engineers & Scientists v. Labor Relations Commission,

389 Mass. 920, 924 (1983)). Of particular note to the matter at hand, the Court observed that "[t]his is particularly so 'where, as here [i.e., interpreting G.L. c. 166, § 25A], an agency must interpret a legislative policy which is only broadly set out in the governing statute.'" Id.

The broad definition of "utility" in the Massachusetts Pole Attachment Statute means that entities other than traditional regulated electric and telephone companies, including CBs and MDUs, are also subject to the terms of § 25A. Our definitions of CB and MDU should be of sufficient breadth to effect the statutory purpose to accord consumers the opportunity to benefit from competition. However, when defining a CB or MDU, we must also balance the need to avoid overly taxing landlords or burdening the regulatory process.

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

In order to avoid imposing unreasonable regulatory burdens on the owners of smaller MDUs, the Final Regulations exempt buildings that house fewer than four families living independently of one another and exempt 4-unit buildings where one of the four units is owner-occupied (§ 45.02). Additionally, the Final Regulations exempt condominiums, as

defined in G.L. c. 183A, and homeowners' associations, because these organizations are operated through a decision-making process whereby each owner has a vote in business dealings (id.). Finally, all tenancies of 12 months or less in duration and transient facilities, such as hotels, rooming houses, nursing homes and serviced by payphones are exempted from the regulations because the potential for changes in tenancies of such short duration may disturb other tenants and cause unnecessary expense to property owners (id.). As noted earlier, these restrictions on the regulations' definition are also driven by pragmatic concern for the limits of the Department's adjudication and enforcement resources. A day may come, as the telecommunications market develops, when regulation may profit from a less restrictive definition of CB and MDU. The statute's breadth admits of such future change.

B. Right-of-way

1. Comments

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

¹⁷ Notice of Request for Further Written Comments on Proposed Amendments to 220 C.M.R. §§ 45.00 et seq. (August 20, 1999).

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

Bell Atlantic comments that the Proposed Regulations already apply to utility-owned facilities no matter where located and, thus, specific reference to interior facilities is unnecessary (Bell Atlantic Supplemental Comments at 3). Citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432-38 (1982), Bell Atlantic warns that any effort by the Department to construct a right of physical access by competitive providers seeking to install its own equipment on private property would cause a significant and possibly insurmountable constitutional "taking" problem (Bell Atlantic Supplemental Comments at 3). Bell Atlantic notes that the FCC has commenced a rulemaking on this issue and urges the