APPENDIX C

The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

April 17, 1992

D.P.U. 91-218

Investigation by the Department upon the complaint of Greater Media, Inc., Greater Media Cablevision, Inc., Greater Massachusetts Cablevision, Inc., Greater Worcester Cablevision, Inc., Greater Chicopee Cablevision, Inc., Greater Oxford Cablevision, Inc., and Greater Millbury Cablevision, Inc., pursuant to M.G.L. c. 166, § 25A, and 220 C.M.R., §§ 1.04(1) and 45.04, seeking relief from the imposition by New England Telephone & Telegraph Company of unlawful and unreasonable cable television conduit attachment rates.

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I. INTRODUCTION

A. History of the Proceedings

On October 21, 1991, Greater Media, Inc.; Greater Media Cablevision, Inc.; Greater Massachusetts Cablevision, Inc.; Greater Worcester Cablevision, Inc.; Greater Chicopee Cablevision, Inc.; Greater Oxford Cablevision, Inc.; and Greater Millbury Cablevision, Inc. (collectively, "Greater Media" or "Complainants") filed a Complaint and request for hearing with the Department of Public Utilities ("Department") pursuant to G.L. c. 166, § 25A and 220 C.M.R. §§ 1.04(1) and 45.04,[1] seeking relief from New England Telephone and Telegraph Company's ("NET" or "Company") cable television ("CATV") conduit attachment rates.[2] The Complainants, interrelated CATV companies[3] serving approximately 72,000 customers in central Massachusetts, enter into license agreements with NET for the occupancy of NET-owned conduit space through which CATV cables are installed (Complaint, p. 4, ¶ 4; Exh. GM-1, p. 2). NET presently charges $1.90 per

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1 220 C.M.R. 45.04(1) provides that complainants may file a joint Complaint with the Department.

2 On October 21, 1991, Greater Media also filed a Motion for Interim Relief. The Department addresses this Motion in section I.B., infra.

3 Greater Media, Inc. is the parent company of Greater Media Cablevision, Inc. Greater Media Cablevision, Inc. is, in turn, the parent company of Greater Worcester Cablevision, Inc., Greater Chicopee Cablevision, Inc., and Greater Massachusetts Cablevision, Inc. Greater Massachusetts Cablevision, Inc. is the parent company of Greater Oxford Cablevision, Inc. and Greater Millbury Cablevision, Inc. (Complaint, p. 2, ¶ 1).

foot per year for full duct[4] and $0.95 per foot per year for half-duct to all conduit attachers throughout Massachusetts. These rates have been in effect since 1981 (NET Motion for Entry of Order, p. 1).

There is a federal and state statutory and regulatory framework relating to CATV. More specifically, there are federal regulations that govern the rights of licensees, the determination of rates, and the issue of refunds. Pursuant to G.L. c. 166, § 25A, the Department has jurisdiction to determine rates for both pole and conduit attachments. In CATV Rulemaking, D.P.U. 930 (1984), the Department issued regulations outlining procedures governing complaints regarding rates for pole and conduit attachments (See 220 C.M.R. 45.00, et seq.). However, in D.P.U. 930, the Department declined to determine a specific method of calculation for either pole or conduit attachment rates, instead leaving the method(s) to be determined by adjudication. D.P.U. 930, pp. 14-15. Greater Media's request is the first such complaint received pursuant to those regulations and the first instance in which the Department has been asked to review NET's conduit rates.

Specifically, Greater Media requests that the Department: (1) order NET to provide attachment rate support data and information previously requested by the Complainants and required

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4 NET defines a duct as "a single enclosed pipe raceway for wire conductors or cables within a conduit system" (Exh. DPU-33).

under 220 C.M.R. 45.04(2)(d);[5] (2) order NET to refrain from acting or refusing to act in any way prejudicial to the Complainants' rights under existing license agreements; (3) order NET to refrain from retaliating against the Complainants as a result of their failure to pay a disputed March 1, 1991 invoice in the amount of $603,595.40;[6] (4) order NET to use its best efforts to process pending requests by the Complainants for conduit use; (5) order NET to refrain from taking any action to collect the disputed March 1, 1991 invoice, or alternatively, order that the amount be paid by the Complainants and held in escrow, or be paid by the Complainants subject to the possibility of refund; (6) find the present rates charged by NET for CATV conduit attachments to be unlawful and unreasonable; (7) terminate such unlawful and unreasonable rates; (8) substitute new rates into existing license agreements between the Complainants and NET; (9) determine that CATV conduit attachment rates from January 1, 1984 were unlawful and unreasonable; (10) order NET to refund amounts paid by the Complainants to NET from January 1, 1984 in excess of the maximum lawful rate; and (11) order other relief as appropriate.

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5 At the direction of the Hearing Officer, this information was provided by NET subsequent to the December 17, 1991 prehearing conference.

6 The disputed March 1, 1991 invoice was rendered to Greater Worcester Cablevision, Inc. for attachments in Worcester, Auburn, Leicester, and Spencer. This invoice covered the period from January 1, 1991, to December 31, 1991 (Complaint, p. 10, ¶ 16).

On November 4, 1991, NET filed an answer to the Complaint in which it: (1) denied that it had created delays in processing pending requests for conduit use; (2) denied that the present rates were unlawful and unreasonable; and (3) denied that it had willingly failed to provide cost data or to comply with Department rules. NET also set forth what it labelled as six "affirmative defenses" to the Complainants' allegations and moved that the Complaint be dismissed, arguing that: (1) the Complaint fails to state a cause of action upon which relief can be granted; (2) the rates in the existing contracts are valid, enforceable, and binding on the parties; (3) NET has not failed to negotiate agreements and is willing to negotiate rates for future application; (4) the rates should be tariffed rather than arrived at through individual license agreements; (5) the Complainants are estopped from protesting the rates since they are the result of valid contracts between the parties; and (6) the Department has no authority to grant the retroactive rate relief sought by the Complainants.

On December 16, 1991, NET filed a Motion for Entry of Order, requesting that the Department direct NET to file a tariff governing conduit as well as pole attachment rates, in which it noted that "a change in the Company's rates for conduit attachments may be warranted" (p. 2). The Motion was opposed by Greater Media, and on January 21, 1992, NET's Motion for Entry of Order was denied by the Department.

Three days of evidentiary hearings were held at the Department's offices on February 26, 27, and 28, 1992. In support of its Complaint, Greater Media presented the testimony of two witnesses: Edward A. Moller, vice president of CATV operations for Greater Media, Inc.; and Lee L. Selwyn, president of Economics and Technology, Inc. NET presented the testimony of Pamela Ford-Pierce, director of cost of service study for the Company. No petitions for leave to intervene were filed. NET entered seven exhibits into the record, Greater Media entered 28 exhibits into the record, and the Department entered 41 exhibits into the record. Both parties filed briefs and reply briefs.

B. Motion for Interim Relief

On October 21, 1991, Greater Media filed a Motion for Interim Relief, seeking protection from: (1) retaliatory actions or omissions by NET prejudicial to Greater Media's rights under existing license agreements; (2) retaliatory termination of license agreements; and (3) unconditional payment of the disputed March 1, 1991 bill. Greater Media argued that undue delays on the part of NET in processing requests for license agreements are "tantamount to a cessation of Complainants' service" (Motion for Interim Relief, p. 5). Greater Media also argued that absent the granting of interim relief, NET might attempt to terminate current license agreements with the Complainants (id., p. 5). Finally, Greater Media alleged that it would suffer irreparable harm if it were forced to pay the outstanding March 1991 bill (id., p. 4).

On October 28, 1991, NET filed an answer to Greater Media's Motion for Interim Relief in which the Company asserted that it would take no action to terminate the existing license agreements for failure to pay the March 1, 1991 bill, and requested that the Department order both parties to comply fully with the terms of the agreements, pending the issuance of a final Department Order (Answer of NET to Motion for Interim Relief, pp. 3, 5).

220 C.M.R. 45.03(2) sets forth the grounds for submitting a Petition for Interim Relief. Pursuant to 220 C.M.R. 45.03(2), a licensee:[7]

> may file with the Department a "Petition for Interim Relief" of the action proposed in a notice received pursuant to paragraph (1) of this section within fifteen (15) days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of the licensee's service....

220 C.M.R. 45.03(1) requires that a utility provide 60 days' notice to attachers prior to removal or termination of facilities, or any increase in attachment rates.

The present motion, filed in conjunction with Greater Media's Complaint, provides no evidence of notice from NET to the Complainants of either an increase in rates or a threat to discontinue service. NET's sole act appears to have been to notify the Complainants orally that Greater Worcester

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[7] Chapter 166, § 25A and 220 C.M.R. 45.02 define licensee as: "any person, firm or corporation other than a utility, which is authorized to construct lines or cables upon, along, under and across the public ways."

Cablevision, Inc. was in default of its licensing agreement for nonpayment (Motion for Interim Relief, p. 4). Section 45.03(2) specifically provides that the petition for interim relief include a showing of irreparable harm as well as likely cessation of service. In this instance, not only have the Complainants failed to show likely cessation of service, but NET has agreed that it would take no action to terminate Greater Worcester's licensing agreement, and has stated that, under the applicable regulations, it could not do so absent express Department approval (Answer of NET to Motion for Interim Relief, p. 3).

In D.P.U. 930, the Department noted that the underlying intent in creating a provision for interim relief was that such relief be invoked "only in the most compelling of circumstances." D.P.U. 930, p. 14. While the Complainants' argument that termination of licensing agreements would cause irreparable harm may be a reasonable one, we note that under § 45.03(1), NET would be required to provide 60 days' written notice prior to any required termination of an attacher's agreement and NET has provided no such notice to Greater Media. Nor do we agree with the Complainants' assertion in this case that alleged delays in executing license agreements for future occupancy constitute a showing of likely cessation of service as was intended under the regulations. Therefore, the requirements necessary to grant Greater Media's Motion for Interim Relief are absent and, with the issuance of this Order, said Motion is moot.

II. POSITIONS OF THE PARTIES

The parties addressed the following issues: (1) the remedies available to the Complainants and the Department's authority to grant such remedies; and (2) the appropriate calculation and application of the conduit attachment rate. The positions of the parties are set forth in the sections that follow.

A. Greater Media

Greater Media's position relies on two main arguments: (1) that the appropriate conduit rental rate is $0.15 per foot per year for half-duct; and (2) that the remedies requested in Greater Media's Complaint are within the Department's authority to grant (Greater Media Brief, pp. 99-104). As noted, the remedies sought by Greater Media are protection from retaliation and a refund of alleged overcharges.

1. Remedies

a. Retaliation

Greater Media asserts that protection from retaliation is necessary to prevent NET from abusing its position as the sole provider of CATV attachments (Exh. GM-3, citing Exh. GM-1). Greater Media also alleges that NET has caused unnecessary delays in processing license applications for new licensing agreements (Complaint, p. 14, ¶ 26). Specifically, Greater Media alleges that license applications for conduit attachments in Sturbridge, Oxford and Millbury have been delayed by NET as a result of the outstanding March 1991 invoice, and that further retaliation is

possible (id.). According to Greater Media, these delays prevent the timely rendering of service to potential CATV customers, and consequently damage the Complainants' business reputation and good will (Complaint, p. 3, ¶ 3). Finally, Greater Media asserts that NET's attempt to include pole attachment rates in the instant proceeding amounts to retaliation (Greater Media Brief, p. 30).

b. Refunds

Greater Media contends that the Department should grant refunds for alleged excessive charges for the years 1984 through 1990 (Greater Media Brief, p. 104). Greater Media further argues that awarding refunds would conform existing license agreements to statutory requirements, and would not nullify such contracts (Greater Media Reply Brief, p. 9). The Complainants state that, alternatively, if the Department determines that it cannot grant refunds, it should make findings that NET's attachment rates from 1984 to date exceeded the statutory maximum (id.; Greater Media Brief, p. 103). According to Greater Media, such findings might then be used as the basis of a civil suit between the parties (Exh. DPU-26).

Greater Media asserts that it waited until 1991 to file a complaint about rates that it has paid since 1984 because of its dependence on NET's facilities and NET's ability to slow down Greater Media's construction or cause Greater Media undue delays (Greater Media Brief, p. 28). Greater Media argues that these fears are justified by other attachers' experiences with other

utility companies and because "there is simply no forum which has proven itself able to relieve a cable operator faced with retaliatory delays" (id., p. 29).

Greater Media does not disagree with NET's position that the Department must have an express grant of authority to award reparations, but argues that chapter 166 is distinguishable from other statutes because it allows the Department to enforce the rates, terms or conditions it sets for conduit attachments (id., p. 100). Greater Media alleges that because the present conduit attachment rates have exceeded the statutory ceiling found in G.L. c. 166, § 25A(2) from 1984 to the present, the Department should find NET's rate to have been unreasonable during that time period (id., p. 99). Greater Media also argues that there is a rate ceiling in the statute that may be equated with a tariff provision under which NET's rate is "capped" and therefore, any charge above that cap should be found unreasonable (id., p. 100, n.58). According to Greater Media, the Department may enforce the allowable rate, whether the rate is treated as a tariff or a statutory maximum, over the terms of the contracts at issue, and in so doing, should direct NET to refund the overcharges (id., p. 100).

c. License Contracts

Regarding NET's license agreements, Greater Media states that because it has no practical alternative to using NET's conduit, it has been forced to enter into contracts which treat attachers as subordinate users (id., pp. 23-25). Greater Media

contends that it has not waived its right to relief from, or objection to the terms of, "unjust" attachment rates merely because it signed an adhesion contracts[8] (id., pp. 32-34).

Greater Media asserts that adoption of NET's position, that the signing of the license contracts represents a binding agreement between the parties, would leave no choice for attachers but to sign NET's standard contract and have no available remedy, or risk franchise renewal problems with municipalities (Greater Media Reply Brief, pp. 3-4). Greater Media alleges that because the contract used by NET is a contract of adhesion, assent to its terms should not bar recovery of illegal charges (id., p. 2). Greater Media also argues that 220 C.M.R. 45.00 et seq. assume that complaints may be based upon the existence of contracts. Consequently, Greater Media asserts that NET's position that the Department may not modify existing contracts would deprive the Department of its jurisdiction over such disputes (id., pp. 2-3).

In addition, Greater Media asserts that there is no constitutional protection afforded contracts when a state properly exercises its police powers, as when contracts are illegal or contrary to public policy (id., pp. 6-7). The Complainants also argue that NET did not enter the contracts in

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8 An adhesion contract is defined by Black's Law Dictionary as a "contract form offered to consumers of goods and services on [an] essentially 'take it or leave it' basis ... under such conditions that [the] consumer cannot obtain desired product or services except by acquiescing [to the standard terms]."

question in good faith because the Company knew, and has known for the past ten years, that the rates were well above the statutory maximum (id., p. 8).

Accordingly, Greater Media argues that NET's conscious disregard of the law requires full refunds as requested by the Complainants (id., p. 9; Greater Media Brief, pp. 102-104, citing City of Boston v. Edison Elec. Illuminating Co. of Boston, 242 Mass. 305, 136 N.E. 113 (1922); Lowell Gas Co. v. Attorney General, 377 Mass. 37, 385 N.E. 2d 240 (1979)).

2. Rates

Greater Media proposes a rental rate of $0.15 per year per foot of half-duct. First, Greater Media asserts that the federal and Massachusetts statutes regarding conduit and pole attachments establish a minimum rate at marginal cost and a maximum rate at the fully allocated cost (Greater Media Brief, p. 17).[9] The Complainants propose to use a fully allocated cost methodology. However, Greater Media argues that the Department should establish a conduit license rate at less than the statutory maximum provided in G.L. c. 166, § 25A(2), for several reasons: (1) to "preclude anti-competitive abuses;" (2) to account for

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9 St. 1978, c. 292, § 2, as amended by St. 1990, c. 393, although not codified, supplements § 25A(2) of c. 166, and is effective until December 31, 1992. G.L. c. 166, § 25A(2), provides that the utility recover "not less than the additional costs of making provision for attachments nor more than the proportional capital and operating expenses of the utility attributable to that portion of the pole, duct or conduit occupied by the attachment."

attachers' "subordinate rights;" and (3) to "sanction NET for misrepresentation and knowing misconduct" (id., p. 5).

Second, Greater Media asserts that the derivation of the fully allocated cost of a duct foot should follow the Federal Communications Commission's ("FCC") fully allocated cost formula,[10] which allocates conduit investment to total conduit capacity of record and uses publicly available Form M[11] data (id., pp. 3-4). Greater Media maintains that the Department's regulations for attachment complaints contemplated the availability of NET's Form M data as the basis for determining the fully allocated cost (id., pp. 18-20).

a. Conduit Carrying Cost

According to Greater Media, in order to determine the conduit carrying cost, conduit carrying charges should be calculated by adding together five categories identified by the FCC in its attachment formula: depreciation, rate of return, taxes, maintenance, and administration (id., pp. 40-41). Greater Media states that data for calculating four of these carrying

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10 The FCC formula referred to by Greater Media is specifically for pole attachments, but Greater Media asserts that the FCC has directed that a comparable method be applied to derive costs for the licensing of conduit, substituting appropriate information as necessary (Exh. GM-3, p. 25, Table 2).

11 Form M is a report which is required under Part 43 of the FCC's Rules and is filed on an annual basis by telephone companies operating telephone exchanges and having operating revenues in excess of $100 million. It is composed of 45 schedules which contain financial, corporate, and statistical data. Revision of ARMIS Report, CC Docket AAD 91-46, Order Inviting Comments, DA 91-1113, released September 4, 1991.

charge categories are available from NET's annual Form M, while rate of return can be found in the Department's orders (id.). Based on these factors, Greater Media calculates a carrying charge factor of 29.35 percent (id., p. 42). Multiplying the carrying charge factor by its calculation of net investment per conduit foot, Greater Media determines a fully allocated cost per full duct foot of $0.55 and a fully allocated cost per half-duct foot of $0.275 (id., pp. 42-43, citing Exh. GM-3).

The Complainants present several arguments supporting rejection of NET's carrying charge methodology. First, Greater Media argues that NET's carrying charge methodology requires the use of NET's cost of service study ("COSS"), which would make the Form M irrelevant, thereby eliminating any possibility of a less costly and less burdensome "paper proceeding"[12] for the resolution of an attachment complaint (id., pp. 54-55). According to Greater Media, the Department's regulations for attachment complaints contemplated the availability of NET's Form M data as the basis for determining the fully allocated cost (id., p. 18). Greater Media also argues that the Department contemplated the use of Form M data in order to facilitate paper proceedings that would obviate the need for hearings (id., p. 20).

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12 220 C.M.R. 45.06 sets forth procedures to be employed when a formal hearing is waived, i.e., a "paper proceeding."

Second, Greater Media indicates that, once NET completes its transition to cost-based rates,[13] there may be no COSS available for use in calculating carrying charges (id., p. 56).

Third, Greater Media asserts that NET's carrying charge estimates should be rejected because such charges were not calculated by NET in accordance with Department precedent, as outlined in D.P.U. 86-33-C (id., p. 58).

Finally, Greater Media contends that using the COSS to determine carrying charges is burdensome and expensive to both telephone ratepayers and CATV subscribers, and it may be subject to controversy if perceived to be flawed (id., pp. 55-57).

b. Usable Space

Greater Media contends that because of the mandatory nature of G.L. c. 166, § 25A(2), the Department is not free to modify the amount of total duct capacity. According to Greater Media, unlike the section of the statute which contains a limitation of usable space for pole attachments, the section of the statute concerning conduit contains no such qualifier (id., p. 39).[14] Also, Greater Media asserts that total duct feet is the only figure representing conduit capacity that is available from

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13 See NET, D.P.U. 89-300 (1990), in which the Department directed NET to move its rates toward costs through a series of transitional filings.

14 In determining the proportional share of the pole or conduit occupied by attachers, G.L. c. 166, § 25A, provides that "[s]uch portion shall be computed by determining the percentage of the total usable space on a pole or the total capacity of the duct or conduit that is occupied by the attachment."

Form M (id., p. 40). Greater Media maintains that NET's use of sheath feet[15] to represent available duct is legally and factually unsupportable (id., p. 44).

Greater Media states that NET should not be allowed to deem broken duct, duct reserved for municipal use, and duct reserved for emergency purposes as unusable, because each of these three classes of duct is both usable and used by NET (id., p. 46). Greater Media asserts that broken duct should be considered usable because both NET and the attachers repair broken duct to make it usable (id., p. 48). Greater Media indicated that some municipalities do not use the reserved duct and that NET uses duct reserved for the municipality in Worcester and possibly in other communities (RR-DPU-11, Greater Media's response). Greater Media also argues that duct reserved for emergency purposes should not be considered unusable because, if NET uses it for emergency maintenance, it is usable by definition (Greater Media Brief, p. 49).

c. Full Duct vs. Half-duct

Greater Media asserts that NET currently charges for a foot of full duct if the licensee's cable is attached to a previously vacant duct, regardless of whether that attachment precludes use of the rest of the duct, and alleges that this method of billing attachers for full duct versus half-duct feet is inappropriate.

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15 NET defines sheath feet as "[t]he measure in feet of the length of cable carrying a number of wire conductors for the transmission of voice or data communication" (Exh. DPU-33).

Because duct that is solely occupied by attachers remains available for subsequent use by NET or other attachers, Greater Media argues that all of its conduit attachments should be charged at a half-duct rate (id., p. 14).

d. Interests of CATV and NET Subscribers

Greater Media argues that its recommended rate would "not unduly impact, and may not impact at all, telephone ratepayers" because it would have such a minor impact upon NET's total revenues that there would be no adverse impact upon NET's customer classes (id., pp. 91, 95-96). Greater Media also asserts that its recommended rate would benefit CATV customers because it could result in potential savings to those customers and would serve to decrease "pressure" to raise CATV rates (id., pp. 96-97).

B. NET

There are three major arguments set forth by the Company. NET argues that the licensing agreements at issue are valid and enforceable contracts that should be honored by the Department (NET Brief, pp. 14-16). In addition, the Company argues that, based on the fully allocated cost methodology employed by NET, the charges stated in such contracts are just and reasonable (id., p. 29). Finally, the Company contends that the relief requested by Greater Media exceeds the authority of the Department (id., pp. 21-27).

1. Remedies

a. Retaliation

NET denies the Complainants' allegations that it has engaged in retaliatory activity and notes that even though Greater Media is in default of the March 1991 invoice, it has neither taken nor threatened to take any action to terminate the Complainants' licensing agreements (Answer to Complaint, p. 9; Mackey Affidavit, p. 4; Answer to Motion for Interim Relief, p. 3). NET argues that it has never failed to renew an agreement, never required a licensee to vacate conduit, and charges the same rates to all licensees (NET Brief, pp. 5-6, citing Exh. NET-1, p. 2). NET also denies that it has caused unnecessary delays in processing the Complainants' licensing applications (Answer to Complaint, p. 2, ¶ 4).

In support of its position, NET submitted an affidavit from Albert E. Mackey, staff director of engineering and provisioning. Mr. Mackey detailed NET's standard procedures for processing licensing applications and provided examples of applications from the Complainants which had been processed quickly (Mackey Affidavit, pp. 3-4). Mr. Mackey stated that applications received from the Complainants are treated in the same manner as those received from other conduit attachers (id., p. 4). NET also stated that it will continue to process the Complainants' license applications in accordance with its standard procedures (Answer to Motion for Interim Relief, p. 4).

b. Refunds

In regard to refunds, NET makes several assertions: (1) the Department may only set rates prospectively; (2) there is no express grant of authority for the Department to award reparations; and (3) Greater Media is entitled only to the remedies specified in § 45.07, which are "entirely prospective" in nature (NET Brief, pp. 24-28). NET also argues that calculation of past rates based upon a method established in the current proceeding would be "grossly unfair and unwarranted and ... without basis" under the applicable law or regulations (id., p. 28). In support of its position, NET notes that the initial CATV regulations proposed by the New England Cable Television Association ("NECTA") in D.P.U. 930 contained a provision allowing for the refund of amounts previously paid under an unreasonable rate, plus interest (See In Re Petition of NECTA, Proposed Regulations, § 1.8(c)). NET asserts that because as adopted by the Department, the regulations excluded the provision, refunds are not an available remedy under 220 C.M.R. 45.00 et seq. (NET Brief, pp. 26-27).

NET also argues that the Complainants should be estopped from asserting the claim for relief from 1984 to 1990 because the Complainants entered valid contracts during that period and, therefore, waived their rights to contest the charges in question (id., pp. 16, 20). According to NET, parties should be required to pursue their rights in a timely manner (id., p. 24, n.4).

c. License Contracts

NET also raised issues with regard to the validity of existing contracts. NET asserts that because the parties have entered into agreements governing their rights, the Complainants should be estopped from denying their obligations pursuant to those contracts (id., p. 16). NET asserts that in order to invoke the Department's jurisdiction, there must exist a failure to agree, but that in the majority of contracts at issue here, there was agreement between the parties as evidenced by signed contracts which did not contain protest clauses (id., pp. 15-17). NET also argues that the Department should only modify contract terms in contracts containing protest clauses (id., pp. 23-24).

Regarding the validity of the Company's contracts, NET contends that there is no evidence in this case to suggest that any of the terms and conditions of NET's standard license agreements are unreasonable. In NET's view, the sole challenge by Greater Media in this case concerns the rates charged to licensees (id., p. 8).

NET argues that Greater Media has no legal basis for seeking adjustments for each of the license agreements, primarily because the Department cannot invalidate contracts (id., p. 9). NET addresses each of the five license agreements which are the

subject of Greater Media's Complaint.[16] NET argues that the original Westborough agreement dated February 24, 1987, and the Worcester Agreement dated June 30, 1988, "were executed by [NET and Greater Media] without any claim by Greater Media that it was not willing to enter into those contracts under the terms proposed" (id., p. 17).

NET states that when the original license agreement for Worcester was signed in 1983, NET and Greater Media executed a second agreement in which Greater Media expressed its objection to NET's licensing fees (id., p. 18, citing Exh. GM-1, exh. A). Among other things, the second 1983 agreement provided that if the Department determined the rates to be excessive (through an Order issued in the then-pending docket D.P.U. 930), NET would provide a refund to Greater Media. NET notes that in D.P.U. 930, issued on July 18, 1984, the Department did not establish attachment rates or a methodology for computing attachment rates (id., p. 19). In addition, NET points out that following the issuance of that Order, Greater Media did not file a complaint with the Department concerning the Worcester agreement. NET further indicates that in 1988, the Worcester agreement was

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16 NET currently has five conduit licensing agreements with the Complainants for the following communities in Massachusetts: (1) Worcester, Auburn, Leicester, and Spencer, dated June 30, 1988 -- amended on August 23, 1991 to include Sturbridge; (2) Westborough, dated June 26, 1991; (3) Chicopee, dated June 26, 1991; (4) Oxford, dated July 1, 1991; and (5) Millbury, dated August 23, 1991.

renewed without objection from Greater Media regarding the rates (id., pp. 19-20).

NET argues that the 1987 and 1988 license agreements are valid, and that the Department has no authority under G.L. c. 166, § 25A to modify the terms of NET's contractual arrangements with a licensee. NET claims that § 25A gives the Department authority to regulate attachment rates, terms, and conditions "in any case in which the licensee and the utility fail to agree" (id., p. 21). NET argues that this provision would "be rendered a nullity if either party to a licensing contract could seek from the Department modifications well into its term and in the face of clear evidence of an agreement" (id.). NET contends that Greater Media has presented no compelling reason which could cause the Department to invalidate the parties' 1987 and 1988 contracts. NET contends, therefore, that no modifications should be made to the Westborough and Worcester agreements (id., pp. 21-22).

NET states that determining whether the parties agreed to the rates for the Chicopee, Millbury, and Oxford cable systems "is a closer question" (id., p. 23). NET recognizes that licensees may not be able to delay the placement of their facilities until the resolution of a Complaint proceeding by the Department (id.). NET also acknowledges that in cases where a licensee signs an agreement under protest in order to gain access, and then files a Complaint with the Department in a timely manner, there is a basis for finding that the parties

failed to agree (id., pp. 23-24). NET states that it believes the Chicopee, Millbury and Oxford 1991 agreements fall into this category (id.).

2. Rates

In regard to the rate issues, NET argues that its present rates recover the fully allocated costs assigned to conduit licensees, and that a change in the rate structure is not warranted (id., p. 49). NET addresses three cost issues in regard to its calculation of the appropriate rental rate: (1) the appropriate conduit carrying charges; (2) the proportion of plant attributed to conduit licensees; and (3) the use of full duct versus half-duct. According to NET, the proportion of plant that should be used has the single greatest impact on the calculation of costs (id., p. 10). NET asserts that although no change is warranted, if the Department orders such a change, the impact on other licensees and the possible revenue effects should be examined (id., p. 50). NET also indicates that it would examine the possibility of increasing its rates for pole attachments if the Department orders a reduction in the rates for conduit attachments (id., p. 50).

a. Conduit Carrying Cost

In support of its proposal to use fully allocated costs to calculate conduit rates, NET argues that it has used a "conservative estimate of conduit investment and calculated carrying charges using the Department's [c]ost of [s]ervice [s]tudy ('COSS') framework" (id., p. 10). NET asserts that, in

contrast, Greater Media has used aggregate information which does not capture the account-specific detail of the COSS (id.). NET further asserts that while application of the COSS methodology may not be as simple as using Form M data, the COSS methodology provides greater detail and a more accurate identification of costs (NET Reply Brief, p. 7).

b. Usable Space

NET states that it used sheath feet as the basis of assigning costs because this measure "produces a reasonable approximation for the amount of usable conduit space available for attachments by NET and licensees" (id., pp. 10-11, citing Exh. DPU-41). NET argues that Greater Media's use of total installed duct feet for cost assignment is incorrect because a certain amount of conduit is either broken and therefore unusable, or set aside for municipal or emergency use (id., p. 11). NET asserts that it is not aware of a decision issued by any regulatory body that specifically addresses how this factor should be calculated (id., p. 41).

c. Full Duct vs. Half-duct

NET asserts that the current rates recover the fully allocated costs properly assigned to conduit licensees under the existing full duct and half-duct rate structure, and therefore no change in the rate structure is warranted (id., p. 49).

d. Interests of NET and CATV Subscribers

NET argues that the rate recommended by Greater Media does not fairly balance the interests of utility customers and CATV subscribers (id., p. 47). With regard to Greater Media's allegations regarding competition between the parties, NET states that there is nothing on this record that might cause the Department to be concerned about the potential impact of this case on competition between NET and CATV operators (id., p. 35). NET argues that the Department could address any issues of competition if and when it becomes appropriate (id.).

III. ANALYSIS AND FINDINGS

A. Remedies

Although the parties do not dispute the jurisdiction of the Department over the subject matter of the Complaint, they disagree as to what relief the Department may grant. As previously discussed, the Complainants have made several specific requests for relief. Section 25A of chapter 166 provides that the Department:

> shall have authority to regulate the rates, terms and conditions applicable to attachments ... said [D]epartment shall determine and enforce reasonable rates, terms and conditions of use of poles or communication ducts or conduits of a utility for attachments of a licensee in any case in which the utility and licensee fail to agree.

Pursuant to section 25A, the Department enacted 220 C.M.R. 45.00, et seq., relating to rates, terms and conditions for CATV attachments, and set out specific remedies. The relevant section, 45.07, provides: