



*The Commonwealth of Massachusetts*

*Department of Public Utilities*

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*100 Cambridge Street, Boston 02202*

*WC 10-101*

September 1, 1978

FILED/ACCEPTED

APR 26 2010

Federal Communications Commission  
1919 M Street, N.W.  
Washington, DC 20554

Federal Communications Commission  
Office of the Secretary

Attention: James M. Talens, General  
Attorney, Room 522

To the Commission:

The Massachusetts Department of Public Utilities hereby certifies to the Federal Communications Commission that this Department is authorized to regulate the rates, terms and conditions for cable television pole attachments, and that it is authorized to consider and will consider the interests of cable television services as well as the interests of consumers of utility services, as required by §224 of the Communications Act of 1978 and Massachusetts General Laws, c. 166, §25A.

Enclosed is a copy of the recent state legislation which confers authority to regulate CATV pole attachments on the Department of Public Utilities. The Department has not yet had the occasion to exercise jurisdiction under the new law, but intends to regulate in accordance with its provisions.

For the Department,

Paul F. Levy  
Chairman

PFL:sjf

Enclosure

## THE COMMONWEALTH OF MASSACHUSETTS

Advance Copy

1978

Acts and Resolves

PAUL GUZZI, Secretary of the Commonwealth

Chap. 292. AN ACT RELATIVE TO THE POWERS OF THE DEPARTMENT  
OF PUBLIC UTILITIES.

Be it enacted, etc., as follows:

SECTION 1. Chapter 166 of the General Laws is hereby amended by inserting after section 25 the following section:-

Section 25A. The following terms as used in this section shall have the following meanings:

"Utility", means any 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.

"Attachment", means any wire or cable for transmission of intelligence by telegraph, telephone or television, including cable television, or for the transmission of electricity for light, heat, or power and any related device, apparatus, appliance or equipment installed upon any pole or in any telegraph or telephone duct or conduit owned or controlled, in whole or in part, by one or more utilities.

"Licensee", means 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.

"Usable Space", means the total space which would be available for attachments, without regard to attachments previously made, (i) upon a pole above the lowest permissible point of attachment of a wire or cable upon such pole which will result in compliance with any applicable law, regulation or electrical safety code or (ii) within any telegraph or telephone duct or conduit.

The department of public utilities shall have 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 interest 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.

No attachments shall be made to the poles, towers, piers, abutments, conduits, manholes, and other fixtures necessary to sustain, protect, or operate the wires and cables of any lines used principally for the supplying of electricity in bulk.

SECTION 2. The department, pursuant to section twenty-five A of chapter one hundred and sixty-six of the General Laws, inserted by section one of this act, shall determine a just and reasonable rate for the use of poles and communication ducts and conduits of a utility for attachments of a licensee by assuring the utility recovery of 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. Such 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.

SECTION 3. Section two of this act shall become inoperative on January first, nineteen hundred and eighty-four.

Approved June 27, 1978

Before the  
Federal Communications Commission  
Washington, D.C. 20554

**PUBLIC NOTICE**

Released: February 21, 1992

**STATES THAT HAVE CERTIFIED THAT  
THEY REGULATE POLE ATTACHMENTS**

Pursuant to Section 1.1414(b) of the Commission's Rules on cable pole attachments, the following states\* have certified that they regulate rates, terms, and conditions for pole attachments, and, in so regulating, have the authority to consider and do consider the interests of subscribers of cable television services, as well as the interests of the consumers of the utility services. Moreover, these states have certified that they have issued and made effective rules and regulations implementing their regulatory authority over pole attachments, including a specific methodology for such regulation which has been made publicly available in the state.

Certification by a state preempts the FCC from accepting pole attachment complaints under Subpart J of Part 1 of the Rules.

- |                      |               |
|----------------------|---------------|
| Alaska               | Massachusetts |
| California           | Michigan      |
| Connecticut          | New Jersey    |
| Delaware             | New York      |
| District of Columbia | Ohio          |
| Idaho                | Oregon        |
| Illinois             | Utah          |
| Kentucky             | Vermont       |
| Louisiana            | Washington    |
| Maine                |               |

\* "state" by Section 1.1402(g) of the Rules, means any state, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

This Public Notice supersedes the Public Notice of December 30, 1987, DA No. 87-1862.

FEDERAL COMMUNICATIONS COMMISSION

# PUBLIC NOTICE

Federal Communications Commission - 1010 M Street, NW. - Washington, D.C. 20554



For recorded listing of releases and texts call 632-0002

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call 632-7260

7244

September 12, 1978 - CC

## POLE ATTACHMENTS

Pursuant to Section 1.1414(b) of the Commission's Rules on cable television pole attachments, the following States\* have certified that they regulate rates, terms, and conditions for pole attachments, and, in so regulating, have the authority to consider and do consider the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services.

(Certification by a State preempts the FCC from accepting pole attachment complaints under Subpart J of Part 1 of the Rules.)

Alaska	New Jersey
California	New York
Connecticut	Ohio
Illinois	Pennsylvania
Indiana	Puerto Rico
Louisiana	Vermont
Massachusetts	Wisconsin

\*"State", by Section 1.1402(g) of the Rules, means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

- FCC -



# The Commonwealth of Massachusetts

## Secretary of State

### REGULATION FILING AND PUBLICATION

1. REGULATION CHAPTER NUMBER AND HEADING: 220 C.M.R. Section 45.00

2. NAME OF AGENCY: Department of Public Utilities

3. READABLE LANGUAGE SUMMARY: State the general purposes and requirements of this regulation as well as the persons, organizations and businesses affected.

Petition of New England Cable Television Association, Inc., requesting for adoption of regulations in order to provide CATV services, the CATV operators install wires, cables and other equipment upon poles, and in communications ducts and conduits owned or controlled by utilities.

4. AGENCY CONTACT FOR ADDITIONAL INFORMATION: Mary L. Cottrell, Secretary

Address: 100 Cambridge Street, Boston, Mass. Telephone 727-3500

5. STATUTORY AUTHORITY: M.G.L. Chapter 159A

*The Regulations Division will complete the following 6 and 7:*

6. PUBLICATION: Massachusetts Registrar Number 426 Date 7/26/84

Code of Massachusetts Regulation Volume 9 Page -

7. EFFECTIVE DATE: 7/26/84

FISCAL EFFECT STATEMENT FILED YES X NO    

A TRUE COPY ATTEST

*Michael Joseph Connolly*

MICHAEL JOSEPH CONNOLLY  
SECRETARY OF STATE

DATE 7/26/84 CLERK *[Signature]*

(4) "Department" means the Department of Public Utilities.

(5) "Licensee" means 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.

(6) "Respondent" means a licensee or a utility against whom a complaint has been filed.

(7) "Usable space" means the total space which would be available for attachments, without regard to attachments previously made, (i) upon a pole above the lowest permissible point of attachment of a wire or cable upon such pole which will result in compliance with any applicable law, regulation or electrical safety code or (ii) within any telegraph or telephone duct or conduit.

(8) "Utility" means any 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.

#### 45.03: Notice of Removal and Petition for Interim Relief

(1) A utility shall provide a licensee no less than sixty (60) days' written prior notice for (a) removal of facilities, such removal or termination arising out of an attachment agreement, or (b) any increase in attachment rates. Nothing contained herein, however, shall in any way limit the right of a utility to respond to an emergency or to a request from a governmental authority without giving such notice to a licensee.

(2) In conjunction with the complaint procedure outlined herein, a licensee 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, a copy of the notice, and certification of service as required by the Department's Procedural Rules. The named respondent may file an answer within seven (7) days of the date on which the Petition for Interim Relief was filed. No further filings with respect to this petition will be considered unless requested or authorized by the Department and no extensions of time will

(iii) the depreciation reserve for the gross pole line investment;

(iv) the total number of poles (A) owned; and (B) controlled or used by the utility;

(v) the total number of poles which are the subject of the complaint;

(vi) the annual carrying charges attributable to the cost of owning a pole, and the specific factors used in the determination of these charges. Annual carrying charges may be expressed as a percentage of net pole investment;

(vii) the average amount of usable space per pole for those poles used for pole attachments;

(viii) reimbursements received from the licensee for non-recurring costs.

Data and information should be based on historical or original cost methodology, to the extent possible. Data should be derived from Form M, PERC 1, or other reports filed with state or regulatory agencies (identify source). Calculations made in connection with these figures should be provided to the complainant upon request, as should the computation of any rate determined by using the formula specified above;

(e) a statement that the utility and licensee have been unable to agree and a brief summary, including dates, of all steps taken to resolve the problem prior to filing;

(f) any other information and arguments relied upon to attempt to establish that a rate, term or condition is not reasonable; and

(g) a statement that the complainant requests that a hearing be convened pursuant to 220 CMR § 1.06 or that it waives its right to a formal hearing.

(3) Where the attachments involve ducts or conduits, appropriate and equivalent data and information shall be filed.

(4) All factual allegations set forth in the complaint shall be supported by affidavit(s).

(5) Meetings and Evidentiary Proceedings. The Department may decide each complaint upon the filings and information before it, may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute, or may, in its discretion, order evidentiary proceedings upon any issues.

(6) Department Consideration of Complaint. In its consideration of the complaint, response, reply, and comments the Department may take notice of any information contained in publicly available filings made by the parties and may accept, subject to rebuttal, studies that may have been conducted. The Department may also request that one or more of the parties make additional filings or provide additional information. Where one of the parties has failed to provide information required to be provided by these rules or requested by the Department, or where costs, values or amounts are disputed, the Department may estimate such costs, values or amounts it considers reasonable, or may decide adversely to a party who has failed to supply requested information which is readily available to it, or both.

45.07: Remedies

If the Department determines that the rate, term or condition complained of is not reasonable, it may prescribe a reasonable rate, term or condition and may:

- (1) terminate the unreasonable rate, term or condition; and
- (2) substitute in the attachment agreement the reasonable rate, term or condition established by the Department.

45.08: Time Limit

The Department shall issue a final order on the complaint filed in accordance with this part within one hundred-eighty (180) days after the complaint is filed.

45.09: Appeal from Department Decisions

The Department shall notify all parties of their rights to appeal a final decision of the Department pursuant to G.L. c. 25, § 5, and of the time limits on their rights to appeal.

REGULATORY AUTHORITY:

220 CMR 45.00: M.G.L. c. 159A



# The Commonwealth of Massachusetts

## DEPARTMENT OF PUBLIC UTILITIES

RECEIVED

July 18, 1984

JUN 4 1985

ENFORCEMENT DIVISION

D.P.U. 930

Petition of New England Cable Television Association, Inc. requesting for adoption of regulations in order to provide CATV services, the CATV operators install wires, cables and other equipment upon poles, and in communications ducts and conduits owned or controlled by utilities.

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### I. INTRODUCTION

On October 22, 1981, the Department of Public Utilities ("Department") received a petition from the New England Cable Television Association, Inc. ("NECTA"), an incorporated association of community antenna television systems operators, requesting that the Department adopt rules and regulations governing the rates, terms and conditions for attachments to utility poles and conduits pursuant to G.L. c. 166, § 25A. The petition included a set of regulations proposed for adoption by NECTA.

On April 27, 1982, the Department conducted the first public hearing in this matter. Subsequent hearings were held on August 20, 1982, and October 6, 1982. Proposed regulations were issued by the Department on May 11, 1983, and a final public hearing was held on June 13, 1983.

In addition to NECTA, the following companies or associations submitted comments or otherwise participated in the proceeding: Cambridge Electric Light Company, Eastern Edison Company, Western Massachusetts Electric Company, Commonwealth Electric Company, Massachusetts Electric Company, Boston Edison Company, New England Telephone and Telegraph Company, Fitchburg Gas and Electric Light Company, and the Municipal Electric Association of Massachusetts ("Association") (hereinafter collectively referred to as the "utilities"). The utilities own or control, in whole or in part, utility poles or conduits in Massachusetts.

## II. BACKGROUND

Cable television ("CATV") is a system for distributing electronic information by means of electrical cables and related equipment. Most of the CATV cables now in place in Massachusetts are attached to existing poles or placed in underground conduits owned by telephone or electric utilities. The CATV companies have generally entered into attachment agreements with the utilities through which they received a license to use space on the utility poles or conduits for a rental fee. Until 1978, the rates, terms and conditions of these attachment agreements were not regulated by either Federal or State law.

In 1978 the U.S. Congress enacted Public Law 95-234, which directed the Federal Communications Commission ("FCC") to regulate the rates, terms and conditions of pole attachments. 47 U.S.C. § 224. The statute further provided that this legislation

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was not intended to preempt state regulation in this area. States are permitted to regulate CATV attachments as long as each State certifies to the FCC that its regulations take into account the interests of CATV subscribers as well as the interests of utility customers. 47 U.S.C. § 224(c)(1) and (2). The FCC adopted its own procedural regulations that would apply absent State regulation. 47 C.F.R. Part 1, Subpart J.

In 1978 the Massachusetts General Court authorized the Department to regulate CATV pole attachments. G.L. c. 166, § 25A, parallels the Federal statute and provides, in pertinent part:

The department of public utilities shall have authority to regulate the rates, terms and conditions applicable to attachments...and shall consider the interest of subscribers of cable television services as well as the interest of consumers of utility services...

The present rulemaking procedure was initiated by NECTA's petition to the Department to promulgate regulations implementing the statute.

### III. SUMMARY OF PROPOSED REGULATIONS

The regulations proposed by the Department on May 11, 1983, provided procedures for CATV operators and utilities to file complaints with the Department alleging that a rate, term or condition for CATV attachments to poles or in conduits is unreasonable. Those regulations contemplated that the filing of a complaint would initiate a full adjudicatory proceeding pursuant to 220 C.M.R. §§ 1.06 et seq.

A complaint filed under the proposed regulations would be

in the form outlined in the Department's general procedural regulations (see 220 C.M.R. § 1.04(1)(b)) but would contain additional information relevant to the proceedings. Section 1.5(2) of the proposed regulations. The attachment agreement, if any, would be included as well as a description of the rate or term that is claimed to be unreasonable. If the reasonableness of a rate is at issue, the complaint would include specific data that would permit a calculation of the average proportional capital and operating expenses of the utility attributable to CATV attachments in accordance with a formula that expresses the annual rental fee as a percentage of net pole investment. Section 1.4 of the proposed regulations. That formula was developed in proceedings before the FCC under the similar Federal statute. See, e.g., In the Matter of Fairmount, Inc., 79 FCC 2d 232 (1980). The proposed regulations anticipated that the information necessary to perform the computations would generally be available from Form M, FERC 1 and/or other documents filed by the utilities with state or federal agencies.

The proposed regulations would permit the Department to impose a reasonable rate, term or condition if it were determined that the contested rate, term or condition was unreasonable.

Section 1.8 of the proposed regulations. The regulations would also require utilities to provide at least 60 days' written notice before termination of service or increase of a rate.

Section 1.3(1) of the proposed regulations. CATV operators would also be permitted to request a temporary stay of a rate increase

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or termination upon a showing of irreparable harm and likely cessation of service. Section 1.3(2) of the proposed regulations.

#### IV. COMMENTS

##### A. Calculation of Rates

Many of the comments received addressed the calculation of a "reasonable" rental fee. Section 2 of St. 1978, c. 292, provides that the utility recover

[no] 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. Such 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.

Under this standard, the maximum rate has two general components: (1) the capital and operating expenses (or the so-called "carrying charges") and (2) the proportional share of the pole or conduit occupied by the CATV operator (or the space occupied by the CATV divided by the total usable space).

It has been the accepted practice before the FCC and State regulatory agencies that the carrying charges be expressed as a percentage of net pole investment and not directly as dollar amounts. Most of the comments received in this rulemaking proceeding were based on this method. Only Boston Edison substantially deviated from this approach by arguing that reasonable rates should be based on the current or replacement costs of the poles or conduits and not on historical investment costs. The generally-accepted formula was included as Section 1.4 of the proposed regulations. Although there was considerable

agreement that the formula should be applied in calculating reasonable rental rates, there was substantial disagreement as to the method of computing the elements of the formula.

1. Gross Pole Investment/Net Pole Investment

Comments submitted to the Department from NECTA and the utilities regarding the calculation of the pole investment generally presume that the information reported by the utility on Form M (for telephone utilities) and FERC 1 (for electric utilities) will serve as the starting point for the calculation of the pole investment. The comments submitted by the Municipal Electric Association of Massachusetts ("Association") indicated that its membership is not required to complete the FERC reports and suggested that calculations for municipal electric utilities would have to recognize the differing accounting and legal requirements for these entities.

NECTA argued that, to determine the proper net pole investment for use in the formula, the gross pole investment taken from Account 241 of Form M or Account 364 of FERC 1 must be reduced by two factors: (1) that portion of the gross pole investment not useful to the CATV attachment (cross-arms and other hardware) and (2) deferred income taxes. One NECTA witness estimated that 20 to 25 percent of the gross pole line investment of a telephone company pole and 25 to 30 percent of the gross pole line investment of an electric utility pole is not used for CATV attachments. Another NECTA witness urged the Department to adopt the rebuttable presumption used by the FCC that 15 percent

of the gross pole line investment is not useful to CATV.

In response, New England Telephone and Telegraph Company ("NET") stated that most of the investment items that were eliminated by NECTA were essential to brace and support poles and were, therefore, useful to CATV attachments. NET contended that the gross pole investment should be reduced only by the amounts attributable to cross-arms, pole brackets and cable extension arms and that these non-CATV items would reduce the gross investment figures by less than 1 percent. NET also argued that a reduction for deferred income taxes would be inappropriate since the utilities and the Department have generally treated deferred income taxes as part of the rate of return rather than as a rate base deduction.   /

## 2. Usable Space

The comments on calculating the percentage of a pole occupied by CATV generally agreed that the space occupied by a CATV attachment should be considered to be one foot. There was wide disagreement as to the average amount of total usable space on poles. The term "usable space" is specifically defined in G.L. c. 166, § 25A, as:

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  / We note that for utilities other than NET the Department has traditionally treated deferred income taxes as a deduction from rate base.

the total space which would be available for attachments, without regard to attachments previously made, (i) upon a pole above the lowest permissible point of attachment of a wire or cable upon such pole which will result in compliance with any applicable law, regulation or electrical safety code or (ii) within any telegraph or telephone duct or conduit.

The proposed regulations incorporated a rebuttable presumption that the usable space is 9.02 feet per pole. Both the utilities and NECTA disagreed with that presumption, and conflicting evidence was submitted on this issue.

NECTA argued that a more reasonable presumption would be that the average amount of usable space is 13.5 feet per utility pole. NECTA contended that the FCC has adopted the 13.5 feet presumption, and cited a study conducted by the New York Telephone Company and six electric utilities which showed an average of 13.67 feet between the lowest measured attachment level and the top of the pole. This figure was based, in part, on the presumption that the average lowest attachment height is 18.45 feet. NECTA stated that the Department's presumption of 9.02 feet of usable space implies an average pole size of 33.02 feet which, it contended, is not representative of the average pole height in Massachusetts. NECTA has indicated that it is performing a survey to determine the average amount of usable space on Massachusetts utility poles. The results of the survey were not submitted before the issuance of this Order, and therefore are not part of the record for this rulemaking proceeding.

The utilities attacked NECTA's assumptions and

conclusions regarding the issue of usable space. In its detailed comments, NET stated that the average low attachment height is actually 20 feet and that space reserved for municipal purposes (12 inches), neutral or safety space for electrical clearance (40 inches) and the top five inches of the pole should be excluded from usable space. NET calculated the average amount of usable space to be 5.5 feet per pole.

### 3. Annual Carrying Charge Factor

NECTA submitted a calculation format for determining the annual carrying charge factor. According to NECTA's witness, the cost elements included in that method are the same as those that have been adopted by the FCC. NECTA stated that the carrying charge should include components for administration, maintenance, depreciation, taxes and return on investment, but that costs that are not directly related to CATV should be omitted.

NET argued that, consistent with the Massachusetts Cost Development Form ("CDF") guidelines, allocation of a reasonable share of the total administration costs of the utility should be included in the annual carrying charges. This method would differ from the calculation advocated by NECTA since it would use statutory rather than effective income tax rates, include certain wage-related maintenance expenses such as Social Security, relief and pensions; apply the "Fully Assigned Administration Factor" of the CDF rather than limiting administration expenses to those directly related to CATV; and include costs associated with license expenses. In addition, NET would add a so-called

"trending factor" that would increase expenses to adjust for the effects of inflation in operating expenses.

B. Simplified Complaint Procedures

The comments submitted by the utilities suggested that complaints be resolved through what has been termed a "paper" proceeding. They argued that a full evidentiary hearing process for each case would be costly and burdensome to the parties and the Department. The utilities contended that the objectives of G.L. c. 166, § 25A, could be achieved by a written exchange of pleadings, documents and exhibits and that such a system has been successfully used by the FCC in processing similar complaints.

NECTA generally supported the concept of the simplified procedure proposed by the utilities as long as an expanded proceeding would be available where required.

C. Temporary Stays

The utilities strongly objected to the temporary stay procedures included in the proposed regulations, based on their contention that the Department lacks statutory authority to stay rate increases. NET stated that the stay of a rate increase is the equivalent of asserting suspension authority and that such power can be granted only by specific statutory authorization.

D. Information Requirements

Section 1.5(d) of the proposed regulations listed ten categories of information that are to be included in a complaint where the reasonableness of a rate is at issue. Although it was contemplated that most of the information would be available from

reports prepared and filed by the utilities, NET, among other utilities, claimed that some of the information is unnecessary in computing reasonable rates and is not readily available. Specifically, NET stated that the data listed in Sections 1.5(d)(iv)(2), (v), (vi), (vii) and (x) would not be required to compute rates pursuant to the proposed formula and that compiling such information would require new recordkeeping and accounting procedures. NET further contended that such information has been demanded in proceedings before the FCC, but has never been used in calculating rates.

NECTA generally disagreed that such information was unnecessary and stated that the data was readily ascertainable and might be relevant to the proceedings.

#### E. Time Limits for Responses

The Association objected to the 14-day period for utilities to respond to a complaint. Section 1.6(1) of the proposed regulations. The Association argued that its membership is made up of relatively small electric light departments and that it would be difficult for such organizations to prepare a response in such a short time frame. The Association proposed a 30-day time limit for filing responses by municipal light departments.

#### F. Right of Access

The joint comments filed by the utilities alleged that portions of the proposed regulations imply that CATV operators have a right to use utility poles and conduits even if there is

no attachment agreement between the utility and the CATV operator. They argued that the enabling statute, G.L. c. 166, § 25A, does not authorize the Department to mandate such attachments where there is no agreement by the parties. NECTA replied that the proposed rule does not imply a right of access.

#### V. REGULATIONS ADOPTED

In promulgating these regulations, the Department has considered all comments submitted during the rulemaking including those summarized above and others that are not specifically discussed in this Order. A section-by-section analysis of the final regulations follows. It should be noted that these regulations have deleted the phrase "just and reasonable rates" wherever it appeared in the proposed regulations and replaced it with "reasonable rates". This does not substantively alter the standard for review, but merely incorporates, verbatim, the standard established by G.L. c. 166, § 25A.

##### 45.01: Purpose and Applicability

Section 45.01 states that the purpose of the regulations is to establish complaint procedures to ensure reasonable rates, terms and conditions for CATV pole attachments and provides that these procedures supersede the Department's general procedural regulations to the extent that those rules are inconsistent.

##### 45.02: Definitions

The definitions included in the final regulations are the same as those contained in Section 1.1 of the proposed regulations and incorporate the definitions set forth in G.L. c.

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166, § 25A.

45.03: Notice of Removal and Petition for Interim Relief

This section adopts Section 1.3 of the proposed regulations without substantive change. The term "temporary stay" is replaced by "interim relief" consistent with the terminology used by the Department in other similar circumstances as discussed below.

The objections submitted by the utilities regarding the Department's authority to grant such relief must be rejected. The argument was based almost exclusively on the contention that the Department lacked statutory authority to promulgate such regulations. The grant of authority to regulate and enforce reasonable rates, terms and conditions set forth in G.L. c. 166, § 25A, is general in nature and, therefore, permits the Department to promulgate regulations reasonably designed to further the purposes of the legislation. The Department was recognized the need to consider granting interim relief where a party contends that irreparable harm would result absent such action. See, e.g., New England Telephone and Telegraph Company, D.P.U. 1661 (1983) and Western Massachusetts Electric Company, D.P.U. 1300 (1983).

The Department has determined that where a utility is about to take an action that would result in "irreparable harm and likely cessation of the licensee's services", it would be appropriate for the Department to consider granting interim

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relief to protect "...the interest of subscribers of cable television services..." as mandated by the enabling statute. The Department intends to invoke this authority in only the most compelling of circumstances but finds that the procedure is authorized by statute and should be available under the proper conditions.

45.04: Complaint

The final regulations prescribing the content of complaints reflect what the Department anticipates will be the scope of review. Although the final regulations do not specifically include the formula for calculating reasonable rates, this should not be interpreted as a rejection of the formula. Rather, it is an indication that this method of computing rates is not specifically required by the statute and that other methods of determining the "proportional capital and operating expenses of the utility" may be possible. However, the information that should be included in the complaint where the reasonableness of a rate is in question (§ 45.04(2)(d)) recognizes the likelihood that the formula will be used and requires the submission of data necessary to make that calculation. In this regard, the information listed in Sections 1.5(d)(vi) and (vii) of the proposed regulations has been eliminated from the final rule since it is not apparent that this data will be needed for the computation. The Department retains wide authority to request additional information, and if it is determined that this or any other information would be helpful in

the context of a particular case, the Department will not hesitate to require the production of such data.

The Department has determined not to include any presumptions or otherwise make any substantive findings regarding the calculation of net pole investment, usable space and the annual carrying charge factor. As summarized above, there has been considerable disagreement on these issues and NECTA is still conducting a survey on the usable space issue. It is obvious that any rebuttable presumptions or tentative decisions regarding these issues would be vigorously challenged (possibly by both sides) when a complaint is filed with the Department. Consequently, it would be more appropriate for the Department to consider these issue in full within the context of a contested case rather than as part of this procedural rulemaking proceeding.

Similarly, it would be premature for the Department to use the promulgation of these procedural regulations to delimit explicitly the extent of its jurisdiction. The Department recognizes that the utilities object to any implication that the statute or regulations grant a right of access to CATV operators. Nonetheless, it is not difficult to anticipate fact situations where a CATV operator claims that a rate, term or condition is unreasonable and a utility responds that the CATV operator is attempting to use the complaint procedure as a means of asserting a right of access. In any event, a decision on the limits of the Department's jurisdiction and authority should be made if and

when the issue is directly raised in a contested matter. The procedural regulations promulgated by this Order should not be read as the Department's interpretation of the jurisdiction issue.

The final regulations have added the requirement that the complaint include a statement either requesting or waiving a formal hearing. Section 45.04(2)(g). This has been included as part of the implementation of a simplified "paper" proceeding as described in more detail under Section 45.06, below.

#### 45.05: Response

The filing requirements for a response are basically unchanged from those included in the proposed regulations. The Department has retained the 14-day time limit notwithstanding the objection of the Association. The Department believes that, since the filing of a complaint will likely be made only after direct negotiations between the parties fail, the action should come as no surprise to the respondent. Thus, fourteen days should normally be a sufficient response time. However, nothing in this section would preclude a respondent from filing a motion for an extension of time pursuant to the provisions of 220 C.M.R. § 1.02(5) of the Department's general procedural regulations.

The added requirement that the response contain a request for or waiver of a formal hearing is required to implement the "paper" proceedings as outlined under Section 45.06, below.

#### 45.06: Procedures Where Formal Hearing is Waived

The Department has adopted the suggestion that procedures

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be established to permit a "paper" proceeding. The Administrative Procedure Act requires that all parties to an adjudicatory proceeding be given the "opportunity for full and fair hearing." G.L. c. 30A, § 8. The regulations implementing the "paper" proceeding for consideration of complaints are designed to ensure that no party's right to a full and fair hearing is abridged.

(1) Applicability

The informal procedures apply only where the parties have waived their right to a formal hearing. If any party requests a full hearing, the procedures set forth at 220 C.M.R. §§ 1.06 et seq. shall apply.

(2) Notice

In order to ensure that all interested persons are given an opportunity to participate in the proceeding, public notice of a complaint shall be given by the Department, and a 14-day time limit is established for filing of petitions to intervene.

(3) Intervention

This section provides that if a person is permitted to intervene with full rights as a party, the intervenor must be notified in writing of its right to a hearing. If a hearing is requested and granted, the "paper" proceeding must be terminated and the formal hearing procedures implemented.

(4) Reply and Comment

Assuming that no party requests a formal hearing, the complainant shall be given the opportunity to reply to the

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response and intervenors shall be entitled to file comments. Replies to the response and comments will generally close the record for the proceeding.

(5) Meetings and Evidentiary Proceedings

This paragraph specifically permits the Department to require informal meetings or evidentiary proceedings even under this "paper" proceeding if the Department deems it necessary to clarify issues or settle disputes.

(6) Department Consideration of Complaint

In considering a complaint under these procedures, the Department will retain broad latitude in requesting additional information, taking notice of other publicly available information and studies, and making reasonable estimates and/or adverse inferences where a party has unreasonably failed to provide requested information.

45.07: Remedies

There is no substantive change in the remedy section contained in the proposed regulations. The Department has the option of terminating an unreasonable rate, term or condition and substituting what it determines to be a reasonable rate, term or condition.

45.08: Time Limit

The Department has imposed a 180-day time limit for issuance of a final Order. This represents a maximum limitation consistent with the requirements of Section 4 of H.R. 4130, currently pending before the U.S. Congress.

45.09: Appeal from Department Decisions

This is unchanged from the proposed regulations and merely requires the Department to notify all parties of their right to appeal a final decision of the Department.

VI. FISCAL EFFECT

The regulations promulgated herein are procedural in nature and implement a statutory requirement. Consequently, the regulations will have no fiscal effect within the meaning of G.L. 30A, § 5.

VII. ORDER

Based upon the above considerations, it is hereby

ORDERED: Pursuant to the authority contained in G.L. c. 166, § 25A, that the rules and regulations of the Department of Public Utilities at 220 Code of Massachusetts Regulations are amended by the adoption of a new Part 45, as set forth below, effective upon publication in the Massachusetts Register.

By Order of the Department,

/s/ ROBERT J. KEEGAN

Robert J. Keegan, Commissioner

A true copy  
Attest;

Mary L. Cottrell  
Secretary

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the clerk of said court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

220 CMR 45.00: REGULATIONS GOVERNING THE RATES, TERMS AND  
CONDITIONS FOR CABLE TELEVISION ATTACHMENTS

Section

- 45.01 Purpose and Applicability
- 45.02 Definitions
- 45.03 Notice of Removal and Petition for Interim Relief
- 45.04 Complaint
- 45.05 Response
- 45.06 Procedure Where Formal Hearing is Waived
- 45.07 Remedies
- 45.08 Time Limit
- 45.09 Appeal from Department Decisions

45.01: Purpose and Applicability

The rules and regulations contained in this part provide for complaint and enforcement procedures to ensure that rates, terms and conditions for cable television attachments are reasonable. The general procedural rules set forth at 220 CMR, Part 1 are also applicable to proceedings initiated under this part except to the extent that they are inconsistent with these rules.

45.02: Definitions

As used in 220 CMR 45.00, except as otherwise required by the context,

(1) "Attachment" means any wire or cable for transmission of intelligence by telegraph, telephone or television, including cable television, or for the transmission of electricity for light, heat, or power and any related device, apparatus, appliance or equipment installed upon any pole or in any telegraph or telephone duct or conduit owned or controlled, in whole or in part, by one or more utilities.

(2) "Complaint" means a filing by either a licensee or a utility alleging that a rate, term or condition for an attachment is not reasonable. A complaint shall constitute an initial pleading within the meaning of 220 CMR § 1.04(1).

(3) "Complainant" means a licensee or a utility who files a complaint.

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(4) "Department" means the Department of Public Utilities.

(5) "Licensee" means 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.

(6) "Respondent" means a licensee or a utility against whom a complaint has been filed.

(7) "Usable space" means the total space which would be available for attachments, without regard to attachments previously made, (i) upon a pole above the lowest permissible point of attachment of a wire or cable upon such pole which will result in compliance with any applicable law, regulation or electrical safety code or (ii) within any telegraph or telephone duct or conduit.

(8) "Utility" means any 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.

#### 45.03: Notice of Removal and Petition for Interim Relief

(1) A utility shall provide a licensee no less than sixty (60) days' written prior notice for (a) removal of facilities, such removal or termination arising out of an attachment agreement, or (b) any increase in attachment rates. Nothing contained herein, however, shall in any way limit the right of a utility to respond to an emergency or to a request from a governmental authority without giving such notice to a licensee.

(2) In conjunction with the complaint procedure outlined herein, a licensee 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, a copy of the notice, and certification of service as required by the Department's Procedural Rules. The named respondent may file an answer within seven (7) days of the date on which the Petition for Interim Relief was filed. No further filings with respect to this petition will be considered unless requested or authorized by the Department and no extensions of time will

be granted with respect to this petition unless allowed pursuant to 220 CMR § 1.02(5).

45.04: Complaint

(1) A complaint will commence a proceeding under this part. Complainants may join together to file a joint complaint.

(2) Every complaint shall conform to the requirements specified in 220 CMR § 1.4(1)(b) and shall be accompanied by certification of service on any utility, licensee, or party named as complainant or respondent. The complaint shall also contain the following:

(a) a copy of the attachment agreement between the licensee and the utility. If no attachment agreement exists, the petition shall contain:

(i) a statement that the utility uses or controls, in whole or in part, those poles, ducts or conduits at issue which are used or designated for attachments;

(ii) a statement that the licensee currently has attachments on such poles, ducts or conduits or has requested from the utility that such attachments be placed;

(b) the specific attachment rate, term or condition which is claimed to be unreasonable;

(c) in any case where it is claimed that a term or condition is unreasonable, the complaint shall specify all information and argument relied upon to justify said claim;

(d) in any case where it is claimed that a rate is unreasonable, or that a term or condition requires review of the associated rate, the data, information and argument in support of said claim shall include, but not be limited to, the following, where applicable:

(i) the gross investment by the utility for the pole lines;

(ii) the investment by the utility in appurtenances not used by or useful to the licensee. This may be expressed as a percentage of the gross pole investment, and shall include a list of specific appurtenances considered not used or useful;

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(iii) the depreciation reserve for the gross pole line investment;

(iv) the total number of poles (A) owned; and (B) controlled or used by the utility;

(v) the total number of poles which are the subject of the complaint;

(vi) the annual carrying charges attributable to the cost of owning a pole, and the specific factors used in the determination of these charges. Annual carrying charges may be expressed as a percentage of net pole investment;

(vii) the average amount of usable space per pole for those poles used for pole attachments;

(viii) reimbursements received from the licensee for non-recurring costs.

Data and information should be based on historical or original cost methodology, to the extent possible. Data should be derived from Form M, FERC 1, or other reports filed with state or regulatory agencies (identify source). Calculations made in connection with these figures should be provided to the complainant upon request, as should the computation of any rate determined by using the formula specified above;

(e) a statement that the utility and licensee have been unable to agree and a brief summary, including dates, of all steps taken to resolve the problem prior to filing;

(f) any other information and arguments relied upon to attempt to establish that a rate, term or condition is not reasonable; and

(g) a statement that the complainant requests that a hearing be convened pursuant to 220 CMR § 1.06 or that it waives its right to a formal hearing.

(3) Where the attachments involve ducts or conduits, appropriate and equivalent data and information shall be filed.

(4) All factual allegations set forth in the complaint shall be supported by affidavit(s).

45.05: Response

- (1) The response to a complaint under this part shall be filed within fourteen (14) days after service of the document to which the response is directed.
- (2) The response shall specifically address all contentions made by the complainant. All factual statements shall be supported by affidavit(s).
- (3) The response shall include a statement that the respondent requests that a hearing be convened pursuant to 220 CMR § 1.06 or that it waives its right to a formal hearing.

45.06: Procedures Where Formal Hearing is Waived

- (1) Applicability. The procedures set forth in this Section 45.06 apply only if no party requests and is granted a hearing. If a full hearing is to be convened, the procedures contained in 220 CMR §§ 1.06 et seq. shall apply.
- (2) Notice. The Department shall give public notice by newspaper publication or by such other means as it deems advisable that a complaint has been filed and docketed. Such notice shall include a brief description of the complaint and shall set a time limit for filing of petitions to intervene. That time limit shall be no shorter than fourteen (14) days after such public notice.
- (3) Intervention. The procedures outlined in 220 CMR § 1.03 shall generally apply to petitions to intervene under this part. If a person is allowed by the Department to intervene, the Order shall be in writing and shall inform the intervenor of its right to a hearing, its responsibility to request a hearing within seven (7) days after service of the Order, and that failure to make such a request will constitute a waiver of that right. If a hearing is requested and granted, the procedures set forth in 220 CMR §§ 1.06 et seq. shall apply.
- (4) Reply and Comments. The complainant shall have twenty (20) days from the date the response is served to file a reply. Any person permitted to intervene as a party shall have the opportunity to file comments with the Department not later than twenty (20) days after issuance of the Order permitting intervention. Any such comments shall be served on all parties and the parties may file a reply to the comments within twenty (20) days after service. Unless authorized by the Department, no further filings shall be considered.

(5) Meetings and Evidentiary Proceedings. The Department may decide each complaint upon the filings and information before it, may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute, or may, in its discretion, order evidentiary proceedings upon any issues.

(6) Department Consideration of Complaint. In its consideration of the complaint, response, reply, and comments the Department may take notice of any information contained in publicly available filings made by the parties and may accept, subject to rebuttal, studies that may have been conducted. The Department may also request that one or more of the parties make additional filings or provide additional information. Where one of the parties has failed to provide information required to be provided by these rules or requested by the Department, or where costs, values or amounts are disputed, the Department may estimate such costs, values or amounts it considers reasonable, or may decide adversely to a party who has failed to supply requested information which is readily available to it, or both.

#### 45.07: Remedies

If the Department determines that the rate, term or condition complained of is not reasonable, it may prescribe a reasonable rate, term or condition and may:

- (1) terminate the unreasonable rate, term or condition; and
- (2) substitute in the attachment agreement the reasonable rate, term or condition established by the Department.

#### 45.08: Time Limit

The Department shall issue a final order on the complaint filed in accordance with this part within one hundred-eighty (180) days after the complaint is filed.

#### 45.09: Appeal from Department Decisions

The Department shall notify all parties of their rights to appeal a final decision of the Department pursuant to G.L. c. 25, § 5, and of the time limits on their rights to appeal.



*The Commonwealth of Massachusetts*  
*Department of Public Utilities*  
*Leverett Saltonstall Building, Government Center*  
*100 Cambridge Street, Boston 02202*

MARY L. COTTRELL  
 SECRETARY

727-3500

RECEIVED

May 21, 1985

JUN 4 1985

ENFORCEMENT DIVISION

To Whom It May Concern:

I, Mary L. Cottrell, Secretary of the Department of Public Utilities and Keeper of the Records, hereby certify that the annexed is a true copy of the Decision in D.P.U. 930: "Petition of New England Cable Television Association, Inc. requesting for adoption of regulations in order to provide CATV services, the CATV operators install wire, cables and other equipment upon poles, and in communications ducts and conduits owned or controlled by utilities." dated July 18, 1984.

Very truly yours,

*Mary L. Cottrell*  
 Mary L. Cottrell,  
 Secretary

MLC  
 Attachments

