

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATION**

CRC Communications LLC, d/b/a OTELCO,

Complainant,

v.

Massachusetts Electric Company d/b/a National
Grid, and Verizon New England Inc.,

Respondents.

D.T.C. 22-4

**INITIAL BRIEF OF
CRC COMMUNICATIONS LLC, D/B/A OTELCO**

August 18, 2022

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The Department should find that the pole attachment policies and practices of Verizon New England Inc. (“Verizon”) and Massachusetts Electric Company d/b/a National Grid (“National Grid” and, collectively, the “Pole Owners”) pertaining to opposite side construction (also called “boxing”), attaching below Verizon, and charging OTELCO for make-ready work that benefits others, and National Grid’s refusal to provide sufficiently detailed make-ready cost estimates, are unreasonable and discriminatory practices in violation of M.G.L. 166 § 25A and the Department’s pole attachment regulations. Because of those policies and practices, the citizens of 17 Western Massachusetts municipalities are being deprived of the benefits of state-of-the-art broadband services that would contribute to the educational, social, economic, and medical well-being of the areas in which they would be deployed but for Verizon’s and National Grid’s actions.

D.T.C. 22-4

Initial Brief of CRC Communications LLC d/b/a OTELCO

I. INTRODUCTION AND SUMMARY

This proceeding presents to the Department an opportunity to dramatically improve access to broadband for the citizens of Massachusetts. By reducing unnecessary and improper costs and delays, this Department can significantly increase private broadband investment, as well as the impact of both private and public investment. The result, of course, will be more broadband, in more places, for better prices for citizens, businesses and institutions in the Commonwealth.

The importance of broadband cannot be overstated. Broadband is critical infrastructure for education, healthcare, commerce, entertainment, and employment. Indeed, broadband has been instrumental in mitigating the effects of a global pandemic. Unfortunately, the benefits of broadband have not been available to all, and many were faced with the dual challenges of a pandemic and pandemic mitigation efforts that disproportionately impacted the “disconnected.” For example, “[w]hen schools switched to distance learning in March 2020, around 15 million students [in the United States] found themselves without broadband internet, worsening a ‘homework gap’ between school age children with and without high-speed internet at home.”¹ Conversely, broadband access can “improve health and life outcomes, offering access to remote healthcare providers, online social networks, and educational opportunities.”²

In short, broadband access is a primary factor to ensure full participation in society and the economy. As the effects of the COVID-19 pandemic continue to reverberate, it is likely that certain societal adaptations, such as distance learning or telecommuting, will remain permanent fixtures going forward. To meet the increased demand for connectivity, particularly in residential

¹ Sophia Campbell, Jimena Ruiz Castro & David Wessel, *The Benefits and Costs of Broadband Expansion*, BROOKINGS (Aug. 18, 2021, updated Nov. 9, 2021), <https://www.brookings.edu/blog/up-front/2021/08/18/the-benefits-and-costs-of-broadband-expansion/>.

² *Id.*

areas where demand has not been met, it is imperative to create conditions to facilitate construction of broadband infrastructure.

O TELCO plans to deploy over 1,000 route-miles of fiber-to-the-premises (“FTTP”) network to 115,000 locations in 17 communities across the Western part of the Commonwealth. To do so, O TELCO requires access to poles owned by the Commonwealth’s electric utilities and incumbent local exchange carriers. In response to O TELCO’s attachment applications submitted in accordance with the pole attachment agreements, both National Grid and Verizon mandated extensive, time consuming and costly work, which they deemed billable to O TELCO as “make-ready work.” This extra work dramatically increases the costs of building the infrastructure critical to serving the broadband needs of the Commonwealth’s citizens. Some of the mandated work was targeted to correct code violations that exist already on the poles in question. Worse, as shown below, much of the mandated work is unnecessary if common alternative attachment techniques are used, and needlessly impairs and delays deployment of critical services.

In response to the shocking amount and cost of the mandated make-ready work, O TELCO proposed sensible, widely used, and safe alternative attachment methods, particularly “boxing” poles and attaching new facilities to the lowest point on the pole compliant with the National Electrical Safety Code (“NESC”). Just drive down the road in Sherborn, South Natick, Wellesley, and Newton, Massachusetts, for instance, and one will see numerous examples of boxed poles. Yet Verizon and National Grid unreasonably and unjustifiably have rejected these proposals. Neither pole owner has presented specific objections showing an unsafe or unreasonable result for a given pole. Rather, they have offered vague suppositions to support their unreasonable behavior, rather than facts.

The use of common alternative attachment techniques (consistent with the NESC) stretches investment dollars and shortens attachment timeframes, and will position Massachusetts to attract maximum investment and to help prevent that investment from leaving the Commonwealth.

In neighboring Connecticut, alternative attachment methods, particularly boxing, are used ubiquitously. As a result, make ready costs in Connecticut are a small fraction of those in the Verizon and National Grid controlled territory in Massachusetts. And, the time from pole application to serving customers in Connecticut is 90 days, substantially lower than the 10 years testified to by Verizon. Effectively, Connecticut has a competitive advantage in attracting broadband investment over Massachusetts. Similarly, Maine has adopted rules to promote the use of alternative attachment methods to reduce costs and eliminate needless make ready work.³ The Department should seize this opportunity to facilitate the expansion of broadband's benefits to the residents and businesses of Massachusetts, and to prevent needed broadband investment from leaving the state to be spent elsewhere.

OTELCO also requested to place its facilities below Verizon's on poles where there was NESC-compliant space. If a new attacher can simply attach in compliance with the NESC below the existing ILEC attachment, make ready charges often can be avoided. As was the case with boxing, OTELCO's inquiries regarding placement in the lowest pole position were summarily rebuffed. Neither Verizon nor National Grid offered any factual support showing that such an attachment created an unsafe or unreasonable result. Again, Maine has explicitly added this alternative technique to the pole attachment toolbox, declaring presumptively unreasonable "[a] prohibition against attachments below existing attachments, to the extent that space is not available

³ See 65-407 CMR Ch. 880.

above existing attachments along the proposed route (or most of the route) of the additional attachments.”⁴ Consequently, OTELCO’s make-ready costs in Maine are also substantially less than the estimated costs proposed by National Grid and Verizon in Massachusetts.

Unsatisfied with imposing costs for unnecessary make ready work, Verizon and National Grid have also attempted to impose on OTELCO the costs associated with correction of preexisting NESC noncompliance. This is self-evidently improper for at least two reasons; first, it is fundamentally unfair to pass the costs of an incumbent’s noncompliance on to an innocent party; and second, in many instances the new attachment may be made in compliance with the NESC, regardless of the preexisting noncompliance. As the FCC has made clear in its rules, a new attacher should not incur the cost of make ready work required to bring a pole into compliance with the NESC where the NESC noncompliance cannot have been caused by the new attacher.

Of course, this further demonstrates the need for detailed, pole by pole make-ready cost estimates, which National Grid refuses to provide.

OTELCO sought to show Verizon and National Grid that safe attachment alternatives could reduce the costs on all parties. They unreasonably and unjustifiably rejected those proposals. Verizon and National Grid have harmed the consumers, businesses, and institutions of the Commonwealth for too long. Their pole attachment regime increases costs on investment, decreases options for consumers while keeping prices artificially elevated, and leaves businesses without adequate communications options. The Department should embrace the opportunity to bring Massachusetts pole attachment practices into line with the nearby states competing for

⁴ 65-407 CMR Ch. 880, § 2(B)(3).

broadband investment. For the reasons set forth herein, OTELCO’s request for relief should be granted in its entirety.

II. BACKGROUND

A. Access to Poles Owned and Controlled by National Grid and Verizon Is Essential to Competitive Broadband Deployment in Massachusetts

Together, National Grid and Verizon own almost two million poles in Massachusetts. National Grid Panel at 14:3; Verizon’s Response to OTELCO-VZ 1-1. Without access to these poles, competitive cable and telecommunications broadband providers (hereafter “broadband providers”),⁵ such as OTELCO, would be unable to serve the state’s residents, businesses and institutions. *See* Compl. at 2; Exhibit DA-1. Indeed, as recognized by the Department of Telecommunications and Energy (“DTE”)⁶ over 20 years ago, “[o]nly by ensuring nondiscriminatory access by telecommunications competitors to the poles, ducts, conduits and rights-of-way through which consumers receive telecommunications services can the benefits of the 1996 Telecommunications Act be realized.”⁷ In connection with the rollout of the National

⁵ As recognized by the Department, broadband is “the pipeline by which telecommunications and cable services are being provided to Massachusetts consumers.” [MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE FISCAL YEAR 2019 ANNUAL REPORT NOVEMBER 2019](https://www.mass.gov/doc/dtc-fy-2019-annual-report/download), at 11, <https://www.mass.gov/doc/dtc-fy-2019-annual-report/download>.

⁶ The DTE is the predecessor agency of the Department and the DPU. Pursuant to Chapter 19 of the Acts of 2007, the DTE was dissolved, with jurisdiction over the chapter divided between the Department and the DPU over telecommunications and energy matters respectively. *See* St. 2007, c. 19. The Department considers all previous orders of the DTE and DPU to be precedential. *See Comcast of Mass. III, Inc. v. Peabody Municipal Light Plant & Peabody Municipal Lighting Commission*, D.T.C. 14-2, Hearing Officer Order on Hearing Procedure and Motion to Intervene, at 3 n.2 (June 23, 2014), <https://www.mass.gov/doc/dtc-14-2-hearing-officers-order-on-hearing-procedure-and-motion-to-intervene/download>.

⁷ *Order Establishing Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-Of-Way and to Enhance Consumer Access to Telecommunications Services*, D.T.E. 98-36-A, 2000 Mass. PUC LEXIS 21, at *3 (July 24, 2000) (hereinafter “*Complaint and Enforcement Procedures Order*”). *See also In Re Oxford Networks—Request for Commission Investigation into Verizon’s Practices and Acts Regarding Access to Utility Poles*, Dkt. No. 2005-486, 2006 WL 4091227, Order at 9 (Oct. 26, 2006)

Broadband Plan,⁸ then-FCC Chairman Julius Genachowski recognized that “[i]f every company that wanted to provide broadband service had to build its own separate set of poles to carry its equipment, we wouldn’t have much broadband in this country—it would simply be too expensive, and often impossible, to build an entirely new network of poles.”⁹ Indeed, it has long been widely recognized that access to existing utility poles is essential to the deployment of broadband networks.¹⁰ “As the communications industry evolves, accompanied by the increasing need for and deployment of broadband services, the ability to install the associated cables on existing infrastructure is becoming increasingly difficult” due to “insufficient space on the utility poles.” Slavin Direct 7:7-11.

B. Federal And State Regulation of Poles and Conduit Developed to Assure Competitive Access to These Essential Facilities

Federal law requires investor-owned utilities, such as National Grid, and local exchange carriers (“LECs”), such as Verizon, to provide any telecommunications carrier, including OTELCO, with non-discriminatory access to poles they own or control. 47 U.S.C. § 224(f). The Federal Communications Commission (“FCC”) is charged with regulating the rates, terms and conditions of pole access by telecommunications carriers, except where a state has certified to the

(“Utility poles are a scarce resource and represent bottleneck facilities for competitive telecommunications services.”) (hereinafter “*Oxford Pole Order*”).

⁸ See Federal Communications Commission, *Connecting America: The National Broadband Plan*, <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>.

⁹ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240, 5377-78, 2011 FCC LEXIS 1362, at *366 (FCC Apr. 7, 2011) (emphasis added) (hereinafter “*Implementation of Section 224 of the Act*”).

¹⁰ See *National Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327 (2002) (recognizing poles as essential to deployment of communications networks). H.R. Rep. No. 94-1630, at 5 (1976). See also H.R. Rep. No. 95-721, at 2 (1977) (“Use is made of existing poles rather than newly placed poles due to the reluctance of most communities, based on environmental considerations, to allow an additional, duplicate set of poles to be placed.”).

FCC that the state regulates such rates, terms and conditions. 47 U.S.C. § 224(b), (c). Massachusetts has certified that it regulates pole attachment rates, terms and conditions of pole attachments, and that in doing so, it considers the interests of the subscribers of the services offered via such attachments. 47 U.S.C. § 224(c)(2).¹¹

“The Department of Telecommunications and Energy shall have the authority to regulate the rates, terms and conditions applicable to attachments.” M.G.L. 166 § 25A. The DPU first established regulations and asserted its authority to govern rates terms, and conditions of attachments to utility poles and conduits in 1984.¹² In 2000, the DTE expanded its pole and conduit rules to adopt “procedures designed to ensure that access to poles, ducts, conduits and rights-of-way is provided on a nondiscriminatory basis, and ensure that rates, terms, and conditions are just and reasonable.”¹³ At that time, the DTE affirmed its “technologically neutral” approach to pole attachment regulation, determining that it would not distinguish between services using wireless and wireline technologies.¹⁴ Last year, the Department and the Department of Public Utilities jointly amended their rules to be consistent with 2006 amendments to M.G.L. 166 § 25A, which extended pole attachment rights to “wireless providers,” defined broadly and consistent with the Department’s technology neutral policy to include “any person, firm or corporation other than a

¹¹ *See also States that have Certified that they Regulate Pole Attachments*, 35 FCC Rcd. 2784 (2020).

¹² CATV Rulemaking Order, D.P.U. 930 (1984).

¹³ *Complaint and Enforcement Procedures Order*, D.T.E. 98-36-A, 2000 Mass. PUC LEXIS 21, at *14.

¹⁴ *Id.* at *53, *57 (recognizing that “telecommunications services use a combination of wires, cables, spectrum, digital pulses of electricity and other related devices” and declining to distinguish between wireless and wireline services eligible for pole attachment protection because it could not “base a distinction ... on whether the device contains a wire or cable alone as many of today’s services use a combination of wireless and wireline technologies”).

utility, which provides telecommunications service” without reference to wireline or wireless technology.¹⁵

The Department rules, set forth in 220 CMR 45.01 *et seq.*, seek to “ensure that telecommunications carriers and cable system operators have nondiscriminatory access to poles, ducts, conduits and rights-of-way owned or controlled, in whole or in part, by one or more utilities.” *Id.* at 45.01. To this end, Section 45.03 directs utilities to provide “licensees” and “wireless providers” with non-discriminatory access to poles they own or control on terms and conditions that are just and reasonable. Several decisions supplement the Department pole attachment rules.¹⁶

C. Verizon And National Grid’s Make-Ready Practices Are Preventing OTELCO From Building Its Competitive Broadband Network

1. OTELCO’s Massachusetts network deployment plans.

OTELCO plans to deploy over 1,000 route-miles of fiber-to-the-premises (“FTTP”) network to 115,000 locations in 17 communities across the Western part of Massachusetts. Allen Direct at 3:4-6. Based on OTELCO’s experience deploying communications networks on existing utility poles in other states, including Maine, as well as good-faith assumptions concerning make-ready, construction costs, and application costs, OTELCO reasonably budgeted **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL INFORMATION]** [REDACTED] **[END HIGHLY**

¹⁵ See 220 CMR 45.02; see also *Joint Investigation by the Department of Public Utilities and the Department of Telecommunications and Cable, on their own motions, instituting a rulemaking pursuant to Executive Order No. 562 to Reduce Unnecessary Regulatory Burden, G.L. c. 30A, § 2, 220 CMR 2.00, and 207 CMR 2.00, to amend 220 CMR 45.00*, D.P.U. 19-76-A; D.T.C. 19-4-A, Decisions, 2021 Mass. PUC LEXIS 400, at *7 (2021).

¹⁶ *Comcast of Mass. III, Inc. v. Peabody Municipal Light Plant*, D.T.C. 14-2, [Phase I Order](#) (Sept. 3, 2014) (holding that FCC Cable Formula also applies to municipally owned utilities); *A Complaint and Request for Hearing of Cablevision of Boston Co.*, [Order](#), D.P.U./D.T.E. 97-82 (Apr. 15, 1998) (adopting FCC cable formula with minor variations)

SENSITIVE CONFIDENTIAL INFORMATION] per mile in make-ready¹⁷ costs to deploy its network in Massachusetts. Allen Direct at 10:10-15. Notably, OTELCO’s budgeted amount was more than twice the per mile expense it has experienced in neighboring Maine, where OTELCO’s make-ready costs are under **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL INFORMATION]** [REDACTED] **[END HIGHLY SENSITIVE CONFIDENTIAL INFORMATION]** per mile, and in Connecticut, where OTELCO-affiliate NetSpeed LLC’s make-ready costs are under **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL INFORMATION]** [REDACTED] **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL INFORMATION]** per mile. Allen Direct at 10:8-10.

OTELCO’s budget for its Massachusetts deployment included reasonable presumptions concerning the number of poles that it would need to pay to replace. Specifically, OTELCO presumed it would have to pay to replace 2.3 poles per mile (approximately 6 percent of the total poles to which it sought to attach) at an average cost of \$7,500 per replacement. OTELCO’s Response to VZ-O 2-3; *see also* Allen Direct at 17:10-11; Exhibit DA-7. OTELCO’s estimated number of pole replacements did not factor in the ability to box poles or attach OTELCO’s facilities below Verizon. Response to VZ-O 2-3; Allen Direct at 15:1-22. OTELCO’s presumption of 2.3 pole replacements per mile was more than reasonable and is confirmed and amplified by numerous utilities in their testimony to the FCC in an ongoing rulemaking concerning

¹⁷ “Make-ready” refers to the modification or replacement of a utility pole, or the lines or equipment on the utility pole, necessary solely to accommodate additional facilities on the utility pole. *See* 47 C.F.R. § 1.1402(o); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling, 36 FCC Rcd. 776, 779 ¶ 6 (2021) (“utilities may not require requesting attachers to pay the entire cost of pole replacements that are not necessitated solely by the new attacher”). The National Grid Attachment Agreement defines “Make-Ready Work” as limited to “the work required to accommodate Licensee’s Attachment(s) on Pole(s)[.]” National Grid Attachment Agreement, § 1.16. Likewise, the Verizon PAA defines “Make-ready Work” as “work ... required to accommodate the attachment of licensee’s facilities to a pole or anchor.” Verizon PAA at Art. I, § 1.10.

pole replacement costs. For example, in that proceeding, a coalition of six major investor owned utilities stated that “record evidence [in that proceeding] indicates that less than **1.78%** of poles within attachment applications require a pole replacement.”¹⁸ Another utility, reported a similar percentage of poles replaced per applied for poles (**1.8%**), while another reported having to replace only **0.3%** of poles on applications involving over 33,000 attachments.¹⁹

2. The Pole Owners’ unreasonable make-ready estimates.

Verizon and National Grid’s combined make-ready cost estimates are nearly triple what OTELCO reasonably budgeted. Compl. ¶ 25; Allen Direct at 10:5-8. As of the date of the Complaint, there were a total of 18 applications where OTELCO had received make-ready invoices from both National Grid and Verizon.²⁰ The total make-ready costs for those applications totaled \$3,175,590 covering 45.57 route miles, which represents an average of approximately \$69,686 per mile. This price tag is prohibitively costly. If the Department does not require National Grid and Verizon to permit deployment at much lower costs, the Pole Owner’s policies will force OTELCO to cancel its project and consider investing in opportunities elsewhere. See Perrone Direct at 5:21-6:2. By maintaining their prohibitive practices, National Grid and

¹⁸ See Comments of Southern Company, Oncor Electric Delivery Company LLC, Entergy Corporation, Duke Energy Corporation, American Electric Power Service Corporation, and Ameren Services Company, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Second Further Notice of Proposed Rulemaking, at 8 (filed June 27, 2022) (hereinafter “Electric Utilities Comments”).

¹⁹ See Comments of Virginia Electric and Power Company d/b/a Dominion Energy Virginia and d/b/a Dominion Energy North Carolina, Dominion Energy South Carolina, Inc., and Xcel Energy Services, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Second Further Notice of Proposed Rulemaking, at 10-11 (filed June 27, 2022) (Dominion Energy Virginia reporting 0.3% and Excel Energy reporting 1.8%) (emphasis added).

²⁰ Both the Verizon and National Grid pole attachment agreements require OTELCO to pay the pole owner estimated make-ready costs in advance. Verizon PAA, ¶ 3.3.2; National Grid Agreement, ¶ 3.8.

Verizon will deprive Western Massachusetts citizens, businesses and institutions of the benefits of the broadband network OTELCO would have built.

As alleged in the Complaint, and borne out by the evidence in this case, the Pole Owners' high-cost estimates are driven largely by their determinations that make-ready, including pole replacements, is necessary due to a lack of vertical pole space available to accommodate OTELCO's attachment. Allen Direct at 13:5-8. Pole replacement costs—which Verizon and National Grid estimate at *\$4,142 to \$17,540 per pole*²¹—are primarily responsible for these exceedingly high estimates. Even less complex work, such as rearrangements, however, add up when the costs are multiplied by the thousands of poles required to deploy networks.²² Moreover, these make-ready estimates are in addition to the more than \$441,000 in application fees and survey/design fee charges that OTELCO already has paid National Grid and Verizon as of June 30, 2022 for 101 applications covering 6,783 poles on applications in Belchertown, Northampton, and Palmer. Allen Direct at 4:7-14.²³

3. The Pole Owners' improper attribution of remediation of pre-existing pole conditions to OTELCO under the guise of "make-ready" costs.

²¹ Estimates for which detail has been provided by both National Grid and Verizon give make-ready estimates for pole replacements ranging from \$4,142 to \$17,540. Allen Direct at 17:14-17. National Grid estimates that, as of April 26, 2022, out of 7,969 poles implicated by OTELCO's applications in Belchertown, Granby, Northampton, Palmer, and Wilbraham, 648 poles would need to be replaced, requiring 27,899.27 labor hours alone. Allen Direct at 16:20-21; Exhibit NG-2.

²² "For example, Verizon charges \$1,450 to remove the old pole, transfer their cable, and cover site protection during the work (in addition to amounts charged by National Grid to set the new pole and transfer its facilities). Even relatively simple make-ready work such as raising or lowering a cable on a pole costs as much as \$242.70 (plus \$210.00 for flagging and police protection) according to Verizon's Form 3. That is not an insignificant amount, particularly when multiplied across thousands of poles." Allen Direct at 17:17-18:2.

²³ Osmose has not yet completed engineering work in Northampton or Palmer. *Id.*

Based in part upon these unreasonably high estimates and on OTELCO's due diligence in reviewing the estimates for which sufficient information was provided, it is clear that National Grid and Verizon are allocating costs to OTELCO that include correction of pre-existing conditions that should be borne by the Pole Owners, such as to address an already weak or leaning pole, or to correct existing non-compliance with governing separation or clearance requirements. For instance, OTELCO identified numerous instances where OTELCO was being charged to rearrange existing facilities that did not meet the NESC required separation of communications lines from energized power facilities, including for pole replacements. Exhibit DA-1, ¶ 11, Ex. C. In one such example, this resulted in OTELCO being billed \$8,082.46 in make-ready by Verizon and National Grid on just one pole. *Id.* at Ex. C.

4. Verizon and National Grid's unreasonably slow pole access process.

Competitive, privately-funded broadband networks, like those OTELCO is attempting to deploy, will not be built in Massachusetts under Verizon's and National Grid's pole access timelines. Where make-ready is necessary, it is taking the Pole Owners around nine months from the time an application is filed just to provide a make-ready estimate. Specifically, for applications where National Grid has provided a make-ready invoice, the process has taken on average 241 days from the time OTELCO initiated work with Osmose to the time National Grid has provided the make-ready estimate invoice. For the 67 applications for which National Grid has not yet sent invoices, the elapsed time is 279 days on average, and counting. For applications where Verizon has provided a make-ready invoice, the process has taken on average about 179 days from the time OTELCO submits its application in the Verizon portal to the time Verizon provided the invoice. Allen Direct at 6:10-16.

By comparison, under the FCC rules, complete applications for *larger* orders (up to 3,000 poles) must be processed (through the estimate stage) in no more than three months. *See* 47 C.F.R. § 1.1411(c)-(d). Applications for up to 300 poles must be processed in less time. *Id.* And where only simple make-ready work is required (such as raising or lowering a communications line), under one-touch make-ready (“OTMR”) rules, the entire attachment approval process takes approximately 45 days. *See* 47 C.F.R. § 1.1411(j). In Maine, which has its own OTMR process, OTELCO submits its own make-ready engineering results to pole owners, which then take 45 days to review,²⁴ after which make-ready construction can begin. Allen Direct at 6:18-20. In Connecticut, OTELCO’s affiliate is actually able to serve customers within three months of applying for poles. Perrone Direct at 4:8-14; 65-407 CMR Ch. 880, § 2(A)(13)(a)(iii)-(vi).

To make matters worse, the Pole Owners’ lengthy application processing timelines do not even account for their performance of actual make-ready work. For work identified as necessary by National Grid only for poles on OTELCO’s applications that it had processed as of the date of its testimony, National Grid estimates the make-ready work will take *at least three years* to complete. National Grid Panel at 17:4-13. This is consistent with the recent experience reported by the Massachusetts Broadband Institute, which led to the formation of the Massachusetts Make Ready Working Group, created to address “the activities required to make space on utility poles in advance of the construction of broadband networks”—characterized as “the largest obstacle to extending broadband access across 53 ‘Last Mile’ communities in Western and Central Massachusetts.”²⁵ Verizon reports that its work for MBI took nearly 10 years to finish, suggesting

²⁴ *See* 65-407 CMR Ch. 880, § 2(A)(13)(a)(iii)-(vi).

²⁵ *Press Release*, EXECUTIVE OFFICE OF HOUSING AND ECONOMIC DEVELOPMENT, *Baker-Polito Administration Celebrates Completion of Make Ready Work, Critical to Extending Broadband to “Last Mile” Towns* (Mar. 24, 2022), <https://www.mass.gov/news/baker-polito-administration-celebrates->

that somehow that is acceptable. Verizon Panel at 26:13-16. In the meantime, Massachusetts residents, businesses and institutions were deprived of broadband services.

5. National Grid’s failure to provide sufficiently detailed make-ready cost estimates and charges to correct pre-existing pole conditions.

Part of the delay experienced by OTELCO is attributable to National Grid’s refusal to provide sufficient pole-by-pole cost detail with their make-ready estimates. OTELCO already receives this type of detailed itemization of such costs from Verizon, but National Grid has thus far refused to provide comparable pole-by-pole unit costs as its regular practice. Compl. ¶ 72; Allen Direct at 9:3-19.²⁶ Currently, National Grid’s cost estimate is for the entire application; it does not use task codes or provide its cost estimate on a pole-by-pole basis. *See, e.g.*, Exhibit DA-4. Because of the lack of cost detail, OTELCO cannot tell whether it is being charged only for the work necessitated by its proposed attachment or is also being charged to correct a pre-existing condition on the pole. Allen Direct at 6:3-8. OTELCO needs the underlying cost data to verify the accuracy of charges and determine whether some costs to correct pre-existing pole conditions are being improperly classified as make-ready. The information also is necessary to assess whether alternative construction options or alternate build routes would reduce costs. Allen Direct at 9:3-19; 9:20-10:5. Where OTELCO has been able to obtain such information, it was successfully able, after just one challenge, to get National Grid to “reclassify[]” certain conditions initially marked as make-ready to non-billable. If OTELCO did not complete this internal review process, non-

[completion-of-make-ready-work-critical-to-extending-broadband-to-last-mile-towns](#) (hereinafter “*Make Ready Work Press Release*”).

²⁶ This is despite the fact that Osmose, working on behalf of National Grid in New York, already provides this type of cost detail to OTELCO in that state. Instead, National Grid has unreasonably refused to replicate this level of cost detail in Massachusetts, even if paid an hourly fee. Allen Direct at 7:19-8:2.

billable work would inaccurately be billed as make-ready.” Allen Direct at 10:20-12:9; Exhibit DA-1 and Ex. C; National Grid Panel at 28:13-29:4.²⁷

6. The Pole Owners’ refusal to allow time and cost saving construction alternatives, including boxing and attaching below Verizon.

Faced with unreasonably high and misallocated make-ready charges and the intolerable attendant delay, including the time required for numerous pole replacements alleged to be necessary to accommodate OTELCO’s attachments, OTELCO requested permission from National Grid and Verizon to use time and cost saving construction alternatives, including boxing²⁸ and/or attaching below Verizon where sufficient space was not available to attach above Verizon (without make-ready) but was available below Verizon. Exhibit DA-1, ¶ 5. In either case, the majority of time-consuming, costly make-ready work would have been unnecessary. To be clear, OTELCO only sought these solutions where its facilities could be installed and maintained in accordance with the requirements and specifications of the NESC²⁹ and *Blue Book*.³⁰ The Pole Owners have flat-out rejected these sensible, efficient solutions in common use in nearby states.

a. Boxing

²⁷ This further highlights the margin of error and why alternative construction that reduces or eliminates make-ready is best. National Grid says the “possibility ... is low,” but it clearly exists. National Grid Panel at 27:21-28:2.

²⁸ The practice of pole boxing (a/k/a opposite side construction) refers to the installation of cables or wires running in the longitudinal direction, along the line, on opposite sides of the pole, as illustrated in Figure 1 of Dr. Slavin’s testimony, which is a reproduction of the boxing example set forth in the Telcordia *Blue Book – Manual of Construction Procedures* (“*Blue Book*”). Slavin Direct at 6:15-7:1.

²⁹ The NESC is the authoritative source for electrical engineering safety practices and is widely recognized as a “basic” safety code. Although the NESC is not formally adopted in every state, it is generally recognized or reflected in the industry practices throughout most of the country, including territories. Slavin Direct at 4:1-9; 9:10-12.

³⁰ This is consistent with both the Verizon PAA and the National Grid Attachment Agreement, which establish the standards by which attachment compliance shall be measured. *See* Verizon PAA at Art. VI, § 6.1; National Grid Attachment Agreement §§ 1.11, 5.1.

Boxing is an efficient, cost-effective means of adding communications cables to existing poles, as it dramatically reduces or eliminates the amount of work required to make space for new attachments. In addition to effectively doubling the useable communications space on a given pole, it also may be used to avoid costly, time-consuming make-ready, including the immediate need for an expensive pole replacement operation. Slavin Direct at 5:1-6:1; Perrone Direct at 3:8-4:2. Boxing is also consistent with the safety rules of the NESC and may be used where space is not available to meet governing separation requirements, but the pole has sufficient remaining strength. *See, e.g.*, Slavin Direct at 6:15-7:4, 10:20-11:12.

While a utility may decide to exceed the rules of the NESC in order to create an even “safer” environment, it is also recognized that it is necessary to balance various issues when attempting to provide essential (lifeline) services to the public. Slavin Direct at 4:4-16; 9:10-12. Indeed, NESC rules are globally recognized and intended to provide a *practical* standard of safe practices that can be adopted by public utilities, private utilities, state or local utility commissions or public service commissions, or other boards or bodies having control over safe practices employed in the design, installation, operation, and maintenance of electric supply, communication, street and area lighting, signal, or railroad utility facilities. As a practical standard, this means that it is necessary to balance various issues, such as in joint-use construction or boxing. OTELCO’s Response to DTC-OTEL 2-6. Accordingly, the use of joint-use construction is, and always has been, a balance between the need to provide as safe a working environment as possible and the ability to practically deliver critical electric supply and communications services. Slavin Direct at 4:4-16; 9:10-12.

Boxing is also consistent with the industry practices provided in the *Blue Book*. In the *Oxford Pole Order*, the Maine PUC stated sixteen years ago:

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Neither the NESC nor the Blue Book prohibit or restrict boxing. On the contrary, the Blue Book contains information illustrating how to properly box a pole. Moreover, the Blue Book (section 3.2) specifies that the 12-inch separation requirement between cables at the pole may be measured diagonally when the cables are on the opposite sides of the poles as long as the minimum 4 inch separation between bolts is maintained.³¹

Boxing is thus an accepted practice and entirely appropriate when it facilitates delivery of advanced communication services, without which the provision of such services may not be feasible. *See* Slavin Direct at 6:15-7:4; 10:7-11:18. In fact, evidence in the record demonstrates that boxing is currently in use on National Grid and Verizon poles in Massachusetts (Exhibit DA-1, ¶ 14 and Ex. F), and Verizon is currently boxing poles as a third-party attacher in Connecticut. Perrone Responsive at 6:7-14 and Exhibit TP-1.

b. Attaching below Verizon

Attachment below Verizon presents another cost-effective construction alternative that may be used to avoid extensive make-ready work. The lowest communications attachment on a pole is required to maintain sufficient clearance from the relevant surface below the pole (i.e., roads, farmland, water). Minimum surface clearance requirements are indicated by the NESC and typically department of transportation regulations. Allen Direct at 13:17-18; 18:3-14. While Verizon's facilities typically occupy the lowest position on the pole, often its facilities are attached above the minimum height on the pole that may be used for a communications attachment. There are currently examples of where Verizon is attached above the required ground clearance on poles in Belchertown, Massachusetts. Allen Responsive at 5:14-18 and Exhibit DA-8. When that is true, attachment below Verizon can be done immediately and without the need for time consuming, costly make-ready work to lower Verizon's facilities. Allen Direct at 18:7-13.

³¹ *Oxford Pole Order* at 15.

c. The Pole Owners’ blanket refusal to allow boxing or attachment below Verizon

Each of these solutions proposed—i.e., boxing and attaching below Verizon—take into account that unlike Verizon, which is already attached to the poles, OTELCO cannot simply employ the overlashing method to deploy its FTTP network.³² These time and cost saving solutions are also consistent with OTELCO’s commitment to build and deploy its network safely and in compliance with non-discriminatory standards contained in the Verizon PAA and National Grid Attachment Agreement, the NESC, and the *Blue Book* in order to bring additional competitive broadband services to Massachusetts residents.

Thus, OTELCO identified NESC-compliant instances where boxing would provide a safe alternative and would result in significant cost savings—not only for OTELCO, but also for Verizon and/or National Grid where they had agreed to assume some of the pole replacement costs. Exhibit DA-1, ¶ 13, Ex. E. But when OTELCO initially proposed using boxing to Verizon and National Grid, both unreasonably refused to even consider this option, instead flatly rejecting it outright in favor of more onerous and expensive make-ready solutions. In February 2022, Verizon told OTELCO that its policy was that it does not ever allow boxing on its poles; never boxes poles itself; and any instances of boxing found in the field is immediately addressed. Verizon also indicated that it would not authorize attachments below their own. Exhibit DA-1, ¶¶ 6-8 and Ex. A; Allen Direct at 15:3-7. Yet despite these representations near the beginning of the year, on May 5, 2022—*after* OTELCO filed its Complaint in this case—Verizon for the first time stated that it does indeed allow boxing on some occasions and provided OTELCO with a link to its “Guidelines on Boxing and Extension Arms Version 1.1 JS Revised 5-22-2019.” Allen Direct at

³² The anticompetitive advantages of Verizon’s overlashing ability are discussed in Section III(C).

15:7-22; Exhibits DA-1 and DA-6. Notably, however, Verizon continues to maintain that, while it does allow boxing on occasion (but is unable to point to an example), and while it engages in the practice itself (but it has no records showing how often or where), it will not be allowing boxing on any of the poles for which OTELCO has applied. It is clear that Verizon’s purported “guidelines” are disregarded by the company and its representatives in favor of a blanket prohibition on boxing by third-party attachers. Indeed, Verizon has identified no instances where it has ever allowed a third party (as opposed to Verizon itself) to box a pole in Massachusetts.³³

III. DISCUSSION

A. The Department Has Broad Discretion To Order Verizon And National Grid To Modify Their Unreasonable And Discriminatory Pole Attachment Practices

1. OTELCO is entitled to the protections of the Massachusetts Pole attachment law and regulation.

M.G.L. 166 § 25A charges the Department with determining and enforcing reasonable rates, terms and conditions for the use of poles for attachments by “licensees” and “wireless providers.” OTELCO is both a licensee and a wireless provider as those terms are defined by M.G.L. 166 § 25A and the Department’s implementing regulations. OTELCO is authorized to, and does, provide telecommunications services in Massachusetts. *See* Exhibit DA-2 (CRC Communications LLC’s Intrastate Telecommunications Tariff D.T.C. No. 1 filed with the DTC January 23, 2012); *see also* OTELCO Response to DPU-OT 1-1 (listing communities where OTELCO provides telecommunications services). OTELCO does not own poles and therefore is not a “utility.”³⁴ As such, OTELCO meets the definition of a “wireless provider” under the

³³ *See infra* Section III(B)(1)(a) and III(B)(3).

³⁴ As set forth in M.G.L. 166 § 25A:

statute³⁵ and as that term is used in the Massachusetts pole attachment regulations.³⁶ OTELCO also satisfies the federal definition of a telecommunications service provider protected by Section 224.³⁷ In addition, OTELCO has authority to construct its facilities in communities that do not require formal permitting and is in the process of applying for permission in other communities that require formal permission. Allen Rebuttal 2:8-15. OTELCO thus also satisfies the definition of a “licensee.”³⁸ As a wireless provider and a licensee OTELCO is entitled to the protections of Massachusetts pole attachment law and regulations.

2. The Department has the authority to order National Grid to allow the attachment practices OTELCO advocates in this case.

“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.

See 220 CMR 45.02. Only OTELCO’s affiliate, Granby Telephone Company (“Granby Telco”), owns poles in Massachusetts. Those poles are exclusively within the service territory of Granby Telephone Company and are not at issue in this case. *See* OTELCO’s Response to DTC-OTEL 1-21 and NG-OTELCO 2-7.

³⁵ M.G.L. 166 § 25A provides in part:

The following terms as used in this section shall have the following meanings: ... “Wireless provider,” any person, firm or corporation other than a utility, which provides telecommunications service.

³⁶ 220 CMR 45.02. The DTE has long maintained that its pole attachment rules would “be neutral as to the technology used to provide services.” *Complaint and Enforcement Procedures Order*, D.T.E. 98-36-A, 2000 Mass. PUC LEXIS 21, at *57 (declining to distinguish between wireless and wireline services eligible for pole attachment protection because it could not “base a distinction ... on whether the device contains a wire or cable alone as many of today’s services use a combination of wireless and wireline technologies”).

³⁷ *See* 47 U.S.C. § 224(5) (defining pole attachment to include “any attachment by a provider of telecommunications service”); 47 U.S.C. § 153(53) (defining telecommunications service as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”). *See also Fiber Technologies Networks, L.L.C. v. North Pittsburgh Telephone Co.*, 22 FCC Rcd. 3392, 3395 (2007) (finding Fibertech to be a telecommunications carrier protected by Section 224 because it possessed valid state authorizations to provide telecommunications service, and had filed state tariffs offering such services to the public).

³⁸ *See* 220 CMR 45.02.

Based on a National Grid response to an information request from the DPU, OTELCO expects National Grid to argue that the Department should defer to the discretion of National Grid’s management and not interfere in company operational matters. *See* National Grid’s Response to DPU-NG-1-5. Like many of its other contentions, however, digging even slightly below the surface shows that this argument has no foundation.

While it is true that the Department will defer in some operational and business matters to a utility’s management discretion, it is not a case of “anything goes;” rather, that discretion is bounded by law and policy. In addition, the utility has the burden of clearly and reasonably justifying its exercise of that discretion – another thing National Grid fails to mention. In making its arguments, National Grid has provided the Department with only partial, out-of-context citations. In particular, it left off a key part of the Supreme Judicial Court’s statement in *Fitchburg Gas and Electric Light Co. v. Department of Public Utilities*, 375 Mass. 571 (1978). The Court’s complete statement in that case was as follows:

Within a substantial range, business decisions are matters for the Company’s determination. Even in such matters, however, the Company when challenged must come forward with evidence to explain its decisions and show that they are not inconsistent with valid policies enforced by the Department.

Id. at 578-79 (citations omitted); *see Monsanto Co. v. Dep’t of Pub. Utils.*, 379 Mass. 317, 319 (1979) (substantially identical language). In addition, “the Company was required to prove its case before the Department by a clear and reasonable analysis.” *Id.* at 582. Finding that the utility’s analysis purporting to justify its decision was “misleading” and “widely erroneous,” the Court found, “the Company has not sustained this burden here.” *Id.* at 579, 582.

Neither has National Grid sustained its burden in this case. First, National Grid’s blanket prohibition on boxing is inconsistent with the Department’s policy to expand broadband

deployment in the Commonwealth.³⁹ Indeed, the Department has long sought to promote competitive telecommunications service, recognizing this as “an important part of the Massachusetts economy, both as jobs-producing industry and as economic infrastructure; and its growth must be not hampered by artificial barriers.”⁴⁰ Second, as discussed herein, National Grid fails to justify its purported safety concerns, and fails to show how it justifies impeding broadband deployment. Without a “clear and reasonable analysis,” National Grid’s position should not prevail.

In this regard, National Grid’s reliance on *Bay State Gas Co.*, D.T.E. 05-27 (Nov. 30, 2005), is misplaced. In *Bay State Gas*, there was no dispute regarding the need for replacement of the unprotected steel infrastructure. The question was how to prioritize the company’s remediation efforts and associated allocation of resources as between two suggested approaches. *Id.* at 37. The D.T.E. noted that it “cannot discern, based on its review of the record in this case, any substantive difference between these two approaches.” *Id.* at 38. Given that either method would accomplish the Department’s policies regarding safety and reliability equally well, the Department stated:

³⁹ For reasons stated herein, the blanket prohibition (not applied to Verizon) also violates black letter law forbidding discriminatory and anticompetitive standards.

⁴⁰ *Complaint and Enforcement Procedures Order*, D.T.E. 98-36-A, 2000 Mass. PUC LEXIS 21, at *2. See also MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE FISCAL YEAR 2019 ANNUAL REPORT NOVEMBER 2019, available at <https://archives.lib.state.ma.us/bitstream/handle/2452/808751/ocn905970460-2019.pdf?sequence=1&isAllowed=y> (last visited Aug. 13, 2022) (“Competition Division staff also monitor broadband-related activities, since it is increasingly becoming the pipeline by which telecommunications and cable services are being provided to Massachusetts consumers and is a major focus of many FCC reform proceedings.”); *id.* (stating the Department “[p]rovided continued support to the development of the Commonwealth’s Broadband Expansion Initiative to unserved areas ... the Department Commissioner sits on the MBI’s Board of Directors”); COMMONWEALTH OF MASSACHUSETTS, *Subsidized Telephone and Internet Connectivity*, available at <https://www.mass.gov/doc/subsidized-telephone-and-internet-connectivity-information/download> (last visited Aug. 13, 2022) (discussing importance of internet during COVID-19 pandemic); MASSACHUSETTS HEALTHY AGING COLLABORATIVE, *Emergency Broadband Benefit Program Available to Older Adults*, available at <https://mahealthyagingcollaborative.org/emergency-broadband-benefit-program-available-to-older-adults/> (last visited Aug. 13, 2022) (discussing Department’s list of educational materials on broadband).

Endorsing a specific method of replacing a utility’s unprotected steel infrastructure would not only limit the utility management’s operational flexibility, but also could encumber the Department’s future prudence reviews. Accordingly, the Department will not direct a specific approach and will defer to the Company’s management judgement to choose the appropriate approach for the replacement of its unprotected steel infrastructure, taking into account the paramountcy of public safety and the goals of efficiency and reasonable cost.

Id. at 39.

That is a very different situation than the one in this case. Here, the Department is not considering two technical alternatives with equal policy outcomes. National Grid’s no-boxing rule will actually and substantially impede achievement of important broadband deployment policies. That is where management discretion ends. The Department can and should limit such discretion and direct National Grid to permit the pole attachment practices OTELCO advocates in this case.

3. The pole attachment agreements are contracts of adhesion.

Pole Owners, including Verizon and National Grid, have historically sought to leverage their monopoly control over poles to extract unreasonable terms and conditions from attachers in the form of pole attachment agreements. To address this type of unfair bargaining, the FCC, charged with regulating pole attachments in more than half the states, adopted a “sign and sue” rule, pursuant to which “an attacher may execute a pole attachment agreement with a utility, and then later file a complaint challenging the lawfulness of a provision of that agreement.”⁴¹

Here, Mr. Allen explained that OTELCO was forced to sign National Grid’s pole attachment agreement without obtaining any of its requested changes. Exhibit DA-1, ¶ 3. It did so, however, “reserving all rights, in the interest of commencing its deployment project as soon as

⁴¹ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd. 11864, 11905 ¶ 99 (2010) (the “sign and sue” rule “allows an attacher to seek relief where it claims that a utility has coerced it to accept unreasonable or discriminatory contract terms to gain access to utility poles”).

possible,” while noting that “[t]he agreement does not reflect the current state of the law and regulation at the national level and in many other states throughout the country.” National Grid Attachment Agreement at 1; Exhibit DA-1, ¶ 3. Given National Grid’s control of the utility poles, which are essential to the deployment of broadband in Massachusetts, the National Grid Attachment Agreement is a “take-it-or-leave-it” adhesion contract,⁴² and therefore its terms should be viewed through this lens.

B. Verizon And National Grid’s Refusal To Allow OTELCO To Use Opposite Side Construction Is Unreasonable And Discriminatory In Violation Of Massachusetts Pole Attachment Law And Regulations

The record in this proceeding clearly demonstrates that boxing facilitates competitive broadband deployment and extends the life of poles by avoiding premature pole replacement, and is therefore in the public interest. The record also shows that boxing may be done consistent with applicable codes and does not present undue safety concerns. Indeed, there are *zero examples in the record* of boxing resulting in injuries, property damage or significant increased operational costs.⁴³ National Grid’s and Verizon’s base speculation that boxing will significantly increase pole replacement and other operational costs are overstated, unsupported by any factual underpinnings, and outweighed by the advancement of competitive broadband in the state and the avoidance of otherwise unnecessary, premature pole replacements. Pole owner prohibitions on the use of boxing are resulting in unnecessary delay and excessive make-ready costs, and are therefore unreasonable. In short, there is no “clear and reasonable analysis” justifying the Pole Owners’ stance. In addition, given Verizon’s use of the boxing construction methodology for its own needs in Massachusetts and elsewhere, the Pole Owners’ prohibition is also discriminatory.

⁴² See *CONTRACT*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁴³ See *infra* Sections III(B)(3)-(4).

1. **Allowing poles to be boxed is in the public interest.**
 - a. **Boxing will facilitate more timely, cost effective broadband deployment in Massachusetts.**

It is undisputed that boxing saves time and money for new attachers and therefore facilitates competitive broadband deployment. “Boxing dramatically reduces or eliminates the amount of work required to make space for new attachments (“make-ready work),” including pole replacements. Perrone Direct 3:17-19; 3:8-4:2. NESC expert Dr. Slavin testifies that boxing can be “the most practical, efficient, and cost-effective means” of attaching communications facilities, because it may be used to avoid considerably more difficult, time consuming, and costly make-ready work. Slavin Direct 5:1-6:1, 8:2-14. As explained by the New York Public Service Commission (“NY PSC”) when it directed pole owners to allow boxing over 18 years ago, boxing is “employed in order to save space in attaching facilities to utility poles,” and its advantages include “the avoidance of high make-ready cost, pole replacements, and/or saving time and expediting construction.”⁴⁴ In the *Oxford Pole Order*, the Maine PUC found that boxing “can be used to add space for attachments,” and that “Verizon’s policy of prohibiting third-party attachers from boxing poles except in the precise circumstances in which it boxes poles is an unreasonable act and practice and discriminatory.”⁴⁵

That boxing facilitates cost-effective network deployment is borne out by an OTELCO affiliate’s experience in Connecticut, where it is attached to 110,000 poles, nearly all using boxing. There, OTELCO’s average make-ready cost is **[BEGIN HIGHLY SENSITIVE**

⁴⁴ New York Public Service Commission, Case 03-M-0432, Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues, *Order Adopting Policy Statement on Pole Attachments*, Appendix A at 6 (issued and effective Aug. 6, 2004), https://phillipslytle.com/wp-content/uploads/2019/03/Telecom-2004_Policy_Statement.pdf.

⁴⁵ *Oxford Pole Order* at 14-15.

CONFIDENTIAL INFORMATION] [REDACTED] [END HIGHLY SENSITIVE

CONFIDENTIAL INFORMATION] per mile as compared to the nearly \$70,000 per mile being charged by Verizon and National Grid. Perrone Direct at 5:21-6:2. The Pole Owners’ steep per mile cost is being driven largely by unnecessary, premature pole replacements. By way of example, Verizon and National Grid’s make-ready estimates, for which detail has been provided by both National Grid and Verizon, propose pole replacements ranging in costs from \$4,142 to \$17,540. Allen Direct at 17:11-12. Together, Verizon and National Grid have identified over 650 poles which they assert must be replaced to accommodate OTELCO’s fiber attachment. *See* Exhibit NG-2; *see generally* Complaint. National Grid testified that on average it replaces up to 15 percent of applied-for poles. National Grid Panel at 14:8-10. This is a startling number, and significantly above the percentage that OTELCO has experienced in other states, which is closer to six percent. *See, e.g.*, OTELCO’s Response to VZ-O 2-3; Allen Direct at 17:10-11; Exhibit DA-7. It is also well above what pole owners have reported to the FCC in the pole replacement docket, which is in the range of 1.8%. Verizon agrees that “boxing would make make-ready cheaper for third party attachers.” Verizon Panel at 5:1-2.

By eliminating unnecessary make-ready work, boxing also will overcome Pole Owners’ unreasonably long attachment processes and bring the benefits of broadband to Massachusetts citizens that much sooner. National Grid estimates that, as of April 26, 2022, out of 7,969 poles implicated by OTELCO’s applications in Belchertown, Granby, Northampton, Palmer, and Wilbraham, 648 poles would need to be replaced. Allen Direct at 16:20-21; Exhibit NG-2. Allen testified that based on his more than 25 years of experience, an individual pole replacement takes a minimum of six months and, in many cases, years to be completed. Exhibit DA-1, ¶ 16. Indeed, National Grid projects that for just the pole replacement work it has identified on those of

O TELCO’s applications it has reviewed, the “level of construction work translates to ... almost three years of work, assuming each project is completed sequentially, with no interruptions for storm response or other emergency work.” National Grid Panel at 17:8-13; NG-12 (estimating 648 pole replacements to require 27,899.27 labor hours). In contrast, in Connecticut, O TELCO’s affiliate is able to serve customers within 3 months of submitting a pole attachment application. Perrone Direct 4:10-11.

The Pole Owners cast blame on O TELCO for the attachment process delays, citing OTECLO’s decision to challenge their unreasonable make-ready estimates (National Grid Panel at 18:12-22) and the volume of poles covered by O TELCO’s applications. National Grid Panel at 17:8-13. Tellingly, however, the Pole Owners fail to cite a single instance of O TELCO actually dragging its heels because it has not. Moreover, as evidenced by MBI’s recent broadband build-out, which impacted approximately 40,000 utility poles, broadband expansion requires access to thousands of poles.⁴⁶ To facilitate these broadband deployments, pole owners must adopt (or be required to adopt) practices that can handle this volume.

In addition, boxing is especially important to timely deployment since under the terms of the parties’ pole agreements – which, as discussed above, are classic contracts of adhesion – the pole owners purport to disclaim enforceable make-ready time frames. Indeed, National Grid’s “take-it-or-leave-it” contract, by its terms, “extend[s] Make-Ready Work timeframes in [National Grid’s] sole discretion.” National Grid Panel at 18:7-8. Delays are common. According to National Grid, it takes on average over six months to accommodate a new attachment where no or only simple make-ready is required, and nine months for a pole replacement. National Grid Panel

⁴⁶ See *Make Ready Work Press Release*, *supra* note 25.

at 20:11-14. But poles requiring replacement can occur anywhere in a run, meaning that a network build cannot be finished until all pole replacements are completed. *See also* Verizon Panel at 26:9-10 (stating “Verizon MA has finite and limited resources”); *id.* at 26:13-16 (ten years to complete MBI’s project). National Grid’s applicant directed design model does not alleviate these delays, and can instead contribute to them. Allen Direct at 6:21-8:6.

National Grid argues that its refusal to permit OTELCO to box has not negatively impacted broadband deployment to date. National Grid Panel at 15:2-4. But poles are increasingly more crowded, and the Pole Owners’ refusals to allow boxing increasingly has a significant impact on a company’s ability to invest. *See* Perrone Direct at 4:19-5:3 (“Improper prohibitions on Boxing thereby create a double hazard: increased cost and delayed return on investment. As the costs to provide broadband services increase, inversely, a provider’s level of investment in the state may decrease if it finds other more attractive, cost-effective environments in which to offer services.”). Unreasonably high make-ready costs will also undermine government funding and limit OTELCO’s ability to offer competitive pricing and promotions. Perrone Direct at 5:6-18.

Verizon clearly recognizes the benefits of boxing, as evidenced by the fact that Verizon uses boxing in the Commonwealth when it suits Verizon. Allen Direct at 14:10-13 (citing Exhibit DA-1 and Ex. F); Exhibit DA-5 (showing precise location of boxed poles). The Verizon boxing examples in the record only represent those that OTELCO happened to find in the course of applying to just a fraction of the 1.3 million poles owned by Verizon across the state. Verizon did not dispute these examples or that more Verizon boxed poles exist in Massachusetts. *See* DTC-Verizon 1-22 (explaining when it allows boxing in Mass—basically to avoid going underground). Instead, it claims not to have any records of poles that it has boxed. *See* Verizon’s Responses to DTC-Verizon 1-21 (“Verizon MA does not keep records of which poles have been boxed”); DTC-

Verizon 1-22 (“Verizon MA does not keep record of which poles it has boxed”); Verizon’s Responses to OTELCO-VZ 2-2, 2-4, 2-10, 2-15, 2-18 (claiming to have no records pertaining to boxing). Verizon also uses boxing in Connecticut. Perrone Responsive at 6:7-14; Exhibit TP-1 (showing numerous poles where Verizon has boxed poles in Connecticut). And, Verizon used boxing in Maine before it sold its network to FairPoint Communications, now Consolidated Communications.⁴⁷

b. Boxing helps to avoid unnecessary premature pole replacement.

By using available space on a pole with sufficient remaining strength to accommodate an attachment, boxing avoids premature pole replacements. Slavin Direct at 5:9-6:1; Perrone Responsive at 5:21-6:2. In recent comments submitted to the FCC in its ongoing Pole Replacement Docket, other utilities submitted a study quantifying what they consider to be a “net loss” associated with prematurely replacing poles.⁴⁸ They assert that “the opportunity costs incurred by the Electric Utilities prematurely replacing a pole greatly exceed the speculative benefit” of replacing the pole solely to create additional space when the pole has remaining strength.⁴⁹

Verizon concedes that some boxed poles “may not be replaced for many years.” Verizon Panel at 7:11-12. Verizon also states it “would prefer that third party attachers not cause [it] or its joint owners to replace poles early.” Verizon’s Response to OTELCO-VZ 2-15. This extended

⁴⁷ See *Oxford Pole Order* at 16 (“[T]he record indicates that Verizon boxes poles for essentially the same reasons that Oxford desires to box poles—to save time and reduce costs”). Here, the record is devoid of any evidence that Verizon has since restricted the circumstances in which it employs boxing for its own benefit. To the contrary, the record shows that Verizon continues to box in Massachusetts, and through its competitive affiliate in Connecticut.

⁴⁸ Electric Utilities Comments, at 48 and Appendix 1 (Table 3), *supra* note 18.

⁴⁹ *Id.* at 47-48.

life generally outweighs increased replacement costs, which cost can be allocated when, and if, it occurs. Slavin Direct at 13:4-10 (explaining that facilities may be moved underground).⁵⁰ A secondary benefit of avoiding a pole replacement is that it reduces the number of “double pole” complaints, a problem that has attracted the specific attention of the Massachusetts Legislature.⁵¹ Perrone Direct at 6:9-19.⁵² Boxing may also be used to address existing non-compliance in a more cost effective manner thereby saving time and money for the pole owner money and possibly existing attachers (i.e., not just for entities making new attachments). Perrone Direct at 7:2-7.

2. Boxing is consistent with applicable codes.

As set forth above and explained by Dr. Slavin, boxing is consistent with the safety rules of the NESC, as well as the industry practices provided in the *Blue Book*. Slavin Direct at 6:15-17. The *Blue Book* specifically contemplates its use and includes recommended spacings and clearances. Slavin Direct at 6:17-7:4. *See also* Perrone Direct at 3:7-13. In the *Oxford Pole Order*—a case requiring Verizon to allow boxing—the Maine PUC agreed, finding “[n]either the

⁵⁰ Verizon acknowledges that some poles may never be replaced due to undergrounding, but claims fewer communities today are going in that direction. Verizon Panel at 11 n.1. Pole owners in the FCC pole replacement docket offer a contrary view. *See, e.g.*, Comments of the Edison Electric Institute, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, at 31-32 (filed June 27, 2022) (“For example, many electric companies are retiring poles in favor of undergrounding their facilities for reasons of resiliency.... Electric companies have pointed out that early retirement, premature replacement or accelerated replacement of poles is economically inefficient and a detriment to the electric company pole owner and its customers, unless the associated costs are fully covered by the party that will reap the direct benefit of the new pole.”).

⁵¹ As described by the Communications Workers of America, double poles occur when “Verizon has failed to move its equipment from an old pole that was replaced with a new one by another utility (e.g., the electric company).” “In many cases, these are dangerous conditions—poles are falling, leaning, rotting, partially cut off, etc.” *See* Jon Brodtkin, *Verizon is forced to fix 5,000 “double poles” and other network problems*, ARS TECHNICA (June 6, 2017), <https://arstechnica.com/information-technology/2017/06/verizon-grudgingly-agrees-to-fix-thousands-of-copper-network-problems/>. M.G.L. 164 § 34(B) establishes timeframes for replacement of existing poles in Massachusetts.

⁵² This particular benefit is not “speculative,” as National Grid suggests. National Grid Panel at 12:19-13:2. By reducing the number of pole replacements, the opportunity for double poles would therefore be reduced. *See* Perrone Direct at 6:3-21.

NESC nor the Blue Book prohibit or restrict boxing. On the contrary, the Blue Book contains information illustrating how to properly box a pole.”⁵³

National Grid’s assertion that boxing is never compliant with the NESC because it interferes with a pole’s climb-ability (*see* National Grid Panel at 9:11-19), lacks credibility. As Dr. Slavin explains, boxing is consistent with the NESC, which allows for climbing around longitudinal lines. Slavin Direct at 9:9-10:6. Dr. Slavin also explains that “the possible obstruction of the climbing space on the otherwise unoccupied side of the pole is irrelevant in most cases due to the wide-spread usage of aerial lifts or bucket trucks, or the use of ladders in rare cases when poles are not as accessible.” Slavin Direct at 8:22-9:3. These same standards recognize the necessity of relying upon bucket trucks for other types of non-standard attachments,⁵⁴ but nowhere mention the need to deploy a second bucket truck in such circumstances, as National Grid claims would be necessary (without any citation to any standard or operating procedure). National Grid Panel 10:5-6.

National Grid’s position also does not comport with its own practices. National Grid allows boxing in “extremely limited circumstances that are reviewed on case-by-case basis.” National Grid Panel at 7:6-7; *id.* at 13:6-9 (“[i]n both New York and Rhode Island, National Grid only permits (or permitted) boxing under limited circumstances”); National Grid’s Response to

⁵³ *Oxford Pole Order* at 15.

⁵⁴ *See, e.g.*, OTELCO-NG-1-6-A: Overhead Construction Standards § 9.1 (while generally not preferred, “Underbuild of subtransmission can be used if the subtransmission is accessible by bucket truck for normal maintenance and can be taken out of service if required”); § 15.4.20 (“Where practical, aluminum platform installations should be oriented with dial indicators and disconnect switches on the road side. Where this is not practical, the dial indicators and disconnect switches should be readily accessible by bucket truck. In this case, consideration to the terrain, slope and accessibility of the area behind the regulator installation.”); § 17.6.30 (poles used for antenna installations “accessible by bucket truck throughout the year.”).

DTC-NG-1-2 (stating boxing is permissible “on a case-by-case basis if it is the only viable alternative.”). National Grid’s Panel Testimony is also contradicted by its own Operating Procedures, which provide that boxing may be allowed in certain circumstances (*see* National Grid’s Response to DTC-NG-1-32 and Attachment), as well National Grid’s inclusion of the *Blue Book*, which instructs entities how to properly box a pole, in the required specifications listed in its License Agreement with Granby Telco, (OTELCO’s Supplemental Response to DTC-OTELCO 1-21, Ex. A), and its IOP 14 allowing for boxing in its Joint Ownership Agreement with Verizon upon agreement of the parties. Verizon’s Response to DTC-Verizon 1-2. In effect, National Grid’s panel has testified that National Grid’s own practices and standards violate the NESC, an audacious argument. National Grid Panel at 7:6-7, 9:11-19, 13:6-9. This nonsensical claim is made all the more alarming by National Grid’s assertion that this Department must accede to National Grid’s unfettered discretion in operational matters.⁵⁵

National Grid’s baseless assertion that boxing per se violates the NESC is belied by decisions of certified state Commissions explicitly endorsing the practice. For example, Maine’s pole attachment rules, which explicitly deem a prohibition on boxing to be an unreasonable practice, presume that boxing should be allowed where poles are accessible by bucket trucks, lifts or ladders, and are consistent with the position that boxing is safe and consistent with the NESC.⁵⁶ Indeed, the Maine PUC has held that “Verizon’s policy of prohibiting third-party attachers from boxing poles except in the precise circumstances in which it boxes poles is an unreasonable act

⁵⁵ *See supra* Section III(A)(2).

⁵⁶ 65-407 CMR Ch. 880, § 2(B); *see generally Oxford Pole Order*.

and practice and discriminatory.”⁵⁷ Finally, the FCC, state regulators, and utilities across the country allow poles to be boxed and would not do so if National Grid’s position had any merit.⁵⁸

Moreover, neither Verizon nor National Grid is aware of any municipalities that prohibit or limit boxing. *See* Verizon’s Response to DPU-Verizon 1-1; National Grid’s Response to DPU-NG 1-1. Verizon’s collective bargaining agreements do not prohibit the use of boxing. Verizon’s Response to DPU-Verizon 1-4. And, OTELCO’s affiliate, Granby Telco, allows other parties to use boxing on its poles. OTELCO’s Response to DTC-OTEL 1-4; OTELCO’s Supplemental Response to DTC-OTEL 1-21.

3. Boxing in and of itself does not create safety issues.

As Dr. Slavin testified, communications facilities may be attached to both sides of the pole (i.e., may be boxed) without compromising worker safety (Slavin Direct at 8:22-9:3), increasing loading problems (Slavin Responsive at 1:25-2:8), or otherwise increasing the likelihood of pole failure. Slavin Direct at 12:14-15 (rejecting premise that bolt holes in the communications space closer than 12” apart would cause a pole to break).⁵⁹ Indeed according to Dr. Slavin, boxing could actually decrease the load on a pole. Slavin Responsive at 1:25-26; 2:7-8 (“The bottom line is that the load effects of boxing will be essentially the same as if the additional attachment was on the same side of the pole.”).

⁵⁷ *Oxford Pole Order* at 15.

⁵⁸ *See infra* Section III(B)(4)(d).

⁵⁹ Further, National Grid’s claim that the additional hole required by boxing “create[es] a weak spot in the pole,” is supported only by its testimony that the pole “*could* become impaired by the presence of too many holes” and therefore “*could* [] lead to poles being prematurely retired.” National Grid Panel at 14:11-15 (emphasis added).

Dr. Slavin’s testimony is borne out in the record of this proceeding, which includes *zero instances of boxed poles leading to worker injuries or pole failures*. As testified by Tom Perrone, who has overseen NetSpeed’s use of boxing of over 100,000 poles in Connecticut (in addition to his 25 years of experience working for competitive providers in the Northeast, Mid-Atlantic, and Midwest), the company “never had an incident involving its facilities in CT attributable to Boxing” and he was “unaware of any such incident involving another provider in Connecticut.” Perrone Direct 4:4-7.

When asked for examples to back up their allegations that boxing is unsafe, neither Verizon nor National Grid could cite to any, instead pointing only to their lack of records of boxed poles. *See* Verizon’s Responses to DTC-Verizon 1-21 (“Verizon MA does not keep records of which poles have been boxed”); DTC-Verizon 1-22 (“Verizon MA does not keep record of which poles it has boxed”); DTC-Verizon 2-13 (regarding poles it has boxed, stating it is “not aware of whether any issues have arisen with respect to these poles’ safety or upkeep”). Verizon simply claims to have no records pertaining to boxing. *See* Verizon’s Responses to OTELCO-VZ 2-2, 2-4, 2-10, 2-15, 2-18. And despite National Grid’s own experience boxing poles in “extremely limited circumstances” (*see* National Grid Panel at 7:6-7), it could provide no examples of any accidents involving boxing. *See* National Grid’s Response to OTELCO-NG-2-6. Eschewing an opportunity to present facts showing that boxing is problematic, the pole owners instead propound speculation and “folk wisdom,” unsupported by empirical proof.

Faced with a similar record devoid of actual examples of problems created by boxing, the Maine PUC concluded that “[t]he wide acceptance of boxing as an acceptable alternative under

certain circumstances, and its actual use in Maine, reveals that the practice does not create undue safety concerns.”⁶⁰

4. Verizon and National Grid’s claims about increased operational costs are entirely speculative and contrary to OTELCO’s actual experience.

Neither National Grid nor Verizon has produced any actual evidence that boxing will lead to increased operational costs. Instead their claims are purely speculative, as evidenced by their testimony and responses to Information Requests. *See, e.g.*, Verizon Panel at 7:13-14 (stating “some of the costs imposed by boxing are difficult if not impossible to quantify”); *id.* at 12:7-9 (stating “added costs ... *could be* significant”) (emphasis added); Verizon’s Response to DTC-Verizon 1-4 (stating “boxing *may* interfere with the technician’s ability to maneuver”) (emphasis added); National Grid Panel at 11:11-12 (providing no evidence to support claim that boxing “will *likely* make future pole replacements more difficult and expensive”) (emphasis added). In contrast, based on OTELCO-affiliate NetSpeed’s extensive experience using boxing in Connecticut and elsewhere, boxing imposes no greater impact on the pole owner and other attachers than any other facilities attached to the pole.

a. The record does not demonstrate that boxing will unnecessarily complicate the pole replacement or transfer process.

It is acknowledged that boxing may add to the time and cost of replacing boxed poles. However, there is no evidence in the record that these costs or delays would be significant, or that they could not be allocated to the boxed entity. As explained by Mr. Perrone, based on his experience boxing more than 100,000 poles in Connecticut (approximately 10% of the poles in the state), and his experience participating in replacing boxed poles, “pole owners are not only capable

⁶⁰ *Oxford Pole Order* at 16.

of replacing boxed poles, but also any incremental increase in pole replacement difficulties and/or costs is offset by the substantial decrease in the number of poles requiring early replacement due to the use of boxing.” Perrone Responsive at 5:19-6:2.

In fact, as Verizon admits, any number of things can make a pole replacement more time consuming and costly: “[T]he more attachments on a pole, including transformers, junction boxes and other equipment in addition to cables, the more time it will take to relocate them to the new pole.” Verizon Panel at 6:4-6. Unlike National Grid, which refused to respond to OTELCO’s request that it quantify the additional pole replacement costs occasioned by boxing (*see* OTELCO-NG-3-4), Verizon estimates that boxing may increase the labor costs to replace a pole by “\$180 to \$281 per pole.” Verizon’s Response to DTC-Verizon 1-3. Notably, this is an *extremely small* fraction of the pole replacements costs estimated by National Grid and Verizon, which have averaged \$7,500 per pole (Allen Direct at 17:5-6 and Exhibit DA-7), and been as high as \$17,540 for a single pole. Allen Direct at 17:11-12. It is also significantly smaller than the net loss to the utility (and its customers) occasioned by an early pole replacement.⁶¹

Moreover, there is no credible evidence in the record that currently employed electronic notification systems, such as the National Joint Use Notification System (“NJUNS”), which employ a top-down approach for notifying entities when to transfer, would be incapable of accommodating a boxed pole. National Grid’s unsupported assertions to this effect do not ring true. *See* National Grid’s Response to DPU-NG-1-3. As Mr. Perrone explains, in Connecticut, where poles are ubiquitously boxed, the Alden One notification system accommodates boxing without apparent difficulty. Perrone Responsive at 2:10-3:9. Instead, “the most common

⁶¹ *See supra* note 49 citing Electric Utilities Comments at 47-48 and Appendix 1, Table 3.

challenge in completing a pole transfer [under such process] is the failure of any given party to perform work within its allotted time-sequence.” Perrone Responsive at 2:18-3:1. This is true in Connecticut, where boxing is “ubiquitous” and the where the ILEC, Frontier, commonly fails to perform transfers in a timely fashion. Perrone Responsive at 3:5-9. In response to the DPU’s information request concerning NJUNS, Verizon claimed not to know anything, further suggesting that this is not a problem. Verizon’s Response to DPU-Verizon 1-3. Indeed, boxing would significantly reduce the number of poles that need to be replaced, thereby requiring substantially fewer transfers and reducing the number of double poles. Perrone Direct at 6:9-18. Even if there were any merit to National Grid’s assertion that NJUNS would have to be updated, such updates would be warranted give the public interest in allowing boxing and facilitating efficient transfers. Put differently, the software must accommodate the policy, not vice versa.

While acknowledging that boxing may lead to certain complications if and when a pole is replaced, Dr. Slavin concludes, “[o]n balance, [boxing] would represent a much more reasonable and equitable alternative than imposing the major delay and cost of replacing an existing, otherwise healthy pole.” Slavin Direct at 13:10-12. And, as Dr. Slavin points out, Verizon’s own use of boxing further discredit its concerns regarding pole replacement complications. Slavin Direct at 11:19-12:3.

b. The record does not demonstrate that boxing will increase the likelihood of facilities contacting each other, or damage attached facilities over time.

Both National Grid and Verizon, who claim to use boxing only in the rarest of occasions, nevertheless assert with conviction that boxing will damage communications lines. In fact, as Dr. Slavin explains, “such contact is actually much less likely if the new attachment is placed on the opposite side of the pole, using boxing.” Slavin Responsive at 2:13-20. Again, Mr. Perrone

explains that he is not aware of boxing leading to facilities damage in Connecticut. Perrone Responsive at 4:19-20. Notwithstanding Verizon’s glib misrepresentation of Mr. Perrone’s experience in the region, Verizon’s claim that five years is not enough to discern damage lacks credibility, particularly given their lack of contrary evidence. Verizon Panel at 9:12-13. Indeed, boxing has been in use by Verizon in Massachusetts, apparently for many years, as well as in Maine for much longer than five years, including by Verizon when it operated there over fifteen years ago. Yet, Verizon offers no example of damaged lines where it uses boxing.

National Grid’s claims that boxing will affect vegetation management, or prolong the cycle time of licensing for new attachers (*see* National Grid’s Response to DPU-NG-1-2), also defies logic, and is not borne out by NetSpeed’s experience in Connecticut. *See* Perrone Responsive at 4:6-15. First, it is unclear how adding a line only inches away from an existing line would increase the amount of required tree trimming. Second, boxing will help to reduce, not prolong, the licensing time for new attachments. It reduces the time for the party that uses boxing “because the amount of actual make-ready work required to be completed is dramatically reduced or eliminated.” Perrone Responsive at 3:13-15. Second, even if a boxed pole must be replaced, boxing need not be restored, as National Grid suggests. As Mr. Perrone explained, “when a new, taller pole is set, sufficient space on the new pole exists to accommodate all attachments on the same side of the pole” Perrone Responsive at 3:19-4:2. Further, “any incremental time required to address boxing during the pole *removal* process would not extend the licensing process for attaching to the new pole, which would be set prior to the removal of the old pole.” Perrone Responsive at 4:3-5.

Nor is there any evidence in the record of boxing leading to storm related outages. According to Mr. Perrone, based on NetSpeed’s “experience in Connecticut, where there have

been many strong storms since NetSpeed started attaching to poles, boxing does not contribute to storm outages.” Perrone Responsive at 5:1-3. Nor has National Grid or Verizon provided any persuasive argument that boxing will increase storm restoration times any more than other facilities that may be attached to a pole.⁶² Again, Mr. Perrone’s testimony is that boxed poles do not increase storm restoration. Perrone Responsive at 5:1-3. The evidence in this case does show, however, that any number of facts can increase or decrease the costs associated with replacing a particular pole or addressing storm related damage. For example, a pole with a transformer, with multiple lines, may be more challenging to address in a storm than one without these characteristics, but the decision has been made that the benefit of attaching those facilities in that manner outweighs the cost.⁶³ As Dr. Slavin explains:

[T]he use of joint-use construction is, and always has been, a balance between the need to provide as safe a working environment as possible and the ability to practically deliver critical electric supply and communications services. Indeed, it would be considerably “safer” to utilize separate structures for delivering these two types of services, rather than combine them on the same structure. However, in most cases having two separate structures for electric and communications facilities is not a viable solution, as evidenced by the extensive joint-use of poles throughout the country.

Slavin Direct at 4:13-20.

c. Any actual costs the Pole Owners incur to adapt their policies to accommodate boxing are outweighed by its benefits.

National Grid and Verizon talk at length about how much effort it would take to change its operations standards, pole attachment agreements and practices to accommodate boxing. *See, e.g.,*

⁶² Nor is there any evidence in the record that OTELCO plans to weave back and forth from the field side to the street side, as National Grid speculates. National Grid Panel at 12:7-14. Indeed, its request is to allow boxing on all poles that are accessible by a bucket truck or ladder.

⁶³ Indeed, the record shows that an *un-boxed* pole replacement may be as little as \$4,124 and as much as \$17,540, depending largely on what is attached. Allen Direct at 17:16-17.

National Grid’s Response to DPU-NG-1-5; Verizon’s Response to DPU-Verizon 1-5. But the reality is that boxing already exists in the field, at least where Verizon perceives a benefit to itself to do so. Moreover, as Mr. Allen testified, when Maine changed its rules in 2018 to expressly require all pole owners to allow boxing,⁶⁴ and again in 2021 to establish one-touch make-ready rules, pole owners did not amend or otherwise change their existing pole attachment agreements with OTELCO or make obvious changes to their practices or electronic notification systems. Allen Responsive at 4:10-18. Instead, the “regulations simply govern in place of pole attachment agreement terms and conditions on those issues.” *Id.* Moreover, where regulatory changes necessitate updates; that is the cost of being a regulated utility with the right to earn a return on investment. Indeed, the Pole Owners can and do recover these and similar pole related costs through the annual rental charges paid by attachers.

d. Rules promoting the use of boxing in other states underscore that the Pole Owners’ prohibition on its use in Massachusetts is unreasonable.

Boxing is used throughout Connecticut and is permitted by several other nearby states and the FCC. For instance in Maine, “[a] prohibition on boxing poles (i.e., placing cables on both the road side and the field side of a pole) which can be safely accessed by emergency equipment and bucket trucks or ladders provided that such technique complies with the requirements of applicable codes” is *presumptively unreasonable*.⁶⁵ In a proceeding before the Maine PUC in 2006, that Commission recognized that “the boxing of poles is ... not an infrequent practice in the State, that it is an accepted industry practice, and that it can be used to add space for attachments,” and

⁶⁴ While the Maine PUC first ordered Verizon to allow boxing in 2006 in the *Oxford Pole Order*, it did not officially extend the requirement to electric utilities until 2018.

⁶⁵ 65-407 CMR Ch. 880, § 2(B).

concluded that “Verizon’s policy of prohibiting third-party attachers from boxing poles except in the precise circumstances in which it boxes poles is an unreasonable act and practice and discriminatory.”⁶⁶

In a 1991 decision, the New Jersey Board of Public Utilities commended New Jersey Bell for its “willingness to try other non-standard methods of cable attachment, including allowing [S]hore Cable to use *both sides* of the poles,” stating “[t]hese measures should reduce the number of required pole replacements, which is the single most costly element of make-ready in most cases, and should reduce substantially the rearrangement work by all parties.”⁶⁷ The FCC, to which the DTC looks for guidance on pole attachment matters,⁶⁸ has stated that “a utility may not simply prohibit an attacher from using boxing, bracketing, or any other attachment technique on a going forward basis where the utility, at the time of an attacher’s request, employs such techniques

⁶⁶ *Oxford Pole Order* at 15.

⁶⁷ *Report on the Status of Construction by Shore Cable Company of New Jersey, Inc. of a New Cable Television System in the Communities of Ventnor, Longport and Margate*, 1991 N.J. AGEN LEXIS 2517, at *17-18, 92 N.J.A.R.2d(BRC) 37 (Oct. 4, 1991) (emphasis added).

⁶⁸ See, e.g., DTC’s Comments to FCC’s *Order and Further Notice of Proposed Rulemaking, Implementation of Section 224 of the Act*, WC Docket No. 07-245, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, at *2-3 (Aug. 16, 2010) (stating that, while DTC has certified that it regulates pole attachments, “the adoption of new federal pole attachment rules will provide guidance to states in developing or amending their own regulations and will benefit all states to the extent that national providers integrate these rules into their pole attachment process on a nationwide basis”).

itself.”⁶⁹ And in its 2004 policy statement on a variety of pole attachment issues, the New York Public Service Commission noted that boxing is common around the state.⁷⁰

Opposite side construction is also regularly used—including by OTELCO-affiliate NetSpeed and Verizon—throughout the state of Connecticut. In fact, nearly all of the 110,000 poles to which NetSpeed is attached in Connecticut are boxed, and NetSpeed is attached to more than 10 percent of the approximately 900,000 poles in the state. Perrone Responsive at 4:11-12; 5:3-6. Significantly, NetSpeed has never had a safety incident involving its facilities in Connecticut attributable to boxing and is unaware of any such incident involving another provider in Connecticut. Perrone Direct at 4:4-5. Nor is it aware of any outage, delayed restoration of service in emergency or storm events, or increased operational costs caused by facilities being boxed in Connecticut. Perrone Direct at 4:6-7; Perrone Responsive at 4:9-5:3.

In sum, OTELCO requests that the Department order National Grid and Verizon to allow boxing on poles accessible by bucket truck, lift or ladder similar to Maine.

⁶⁹ *Implementation of Section 224 of the Act*, 26 FCC Rcd. at 5340 ¶ 227. In 2011, the FCC, the federal agency charged with regulating pole attachments in 27 states that have not certified to regulate pole attachments themselves, “revise[d] [their] pole attachment rules to improve the efficiency and reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks, in order to accelerate broadband buildout.” *Id.* at 5241 ¶ 1. They did so in order to “promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation.” *Id.*

⁷⁰ New York Public Service Commission, Case 03-M-0432, Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues, *Order Adopting Policy Statement on Pole Attachments*, Appendix A at 6 (issued and effective Aug. 6, 2004), https://phillipslytle.com/wp-content/uploads/2019/03/Telecom-2004_Policy_Statement.pdf.

C. Verizon and National Grid’s Refusal to Allow OTELCO to Attach Facilities Below Verizon is Unreasonable and Discriminatory in Violation of Massachusetts Pole Attachment Law

The Pole Owners’ refusal to allow OTELCO to attach below Verizon’s facilities is resulting in unnecessary cost and delay to OTELCO, and as such, is unreasonable and discriminatory. Where there is insufficient space to attach above the lowest attachment and sufficient space below, attaching in the lowest point avoids time consuming and costly make-ready work. Allen Direct at 18:5-19:13. In Maine, OTELCO routinely attaches facilities below the lowest existing attacher. Allen Direct 18:11-16. (“OTELCO is currently constructed in the bottom attachment position on 16,785 poles in 16 towns in Maine” and “currently has under construction attachments in the bottom attachment position on 16,063 poles in another 20 towns in Maine”). There, OTELCO’s average cost per mile is less than [BEGIN HIGHLY SENSITIVE CONFIDENTIAL INFORMATION] [REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL INFORMATION] per mile, as compared to nearly \$70,000 per mile estimated by Verizon and Grid in in connection with OTELCO’s Massachusetts pole attachment applications. Allen Direct at 19:3-8. Verizon and National Grid’s claims that allowing OTELCO to attach below Verizon will not “significantly address OTELCO’s issues regarding make-ready work” (*see, e.g.*, National Grid Panel at 30:19-31:4) do not comport with OTELCO’s analysis. If attaching below Verizon saves OTELCO from incurring any make-ready costs, this is valuable. Allen Direct at 18:3-7. Indeed, Verizon claims that saving between \$180 to \$281 on a pole replacement is valuable. Verizon’s Response to DTC-Verizon 1-3. Yet, the highest in this range is still less than the cost-savings to OTELCO that would result from Verizon lowering lines, for which Verizon charges “as much as \$242.70 (plus \$210.00 for flagging and police protection) according to Verizon’s Form 3.” Allen Direct at 17:21-18:1.

Sufficient space exists for OTELCO to attach below Verizon on numerous poles throughout the state. Allen Direct at 20:9-11; Exhibit DA-8. The fact that the lowest position is not available on every pole and therefore the cost-savings may not be available on every pole is not enough to prohibit this attachment location as an additional option.

Verizon’s primary justification for prohibiting any attachments below its facilities is that “sagging in” lighter fiber cables below Verizon’s heavier copper facilities may not work to keep the facilities from coming in contact. Verizon Panel at 15:11-15; Wolanin Aff. Ex. B, Sec. 31. Yet Verizon offers no evidence of actual problems resulting from the placement of light cables below heavier cable. *See, e.g.*, Verizon’s Responses to OTELCO-VZ 2-1; DTC-Verizon 2-7. Indeed, Verizon’s Panel testimony is entirely speculative; it relies on “general experience” working in Massachusetts and its belief that “the copper cable *is likely* to sag more than the fiber cable due to weather.” Verizon Panel at 18:17 (emphasis added). Verizon relies heavily on the *Blue Book*’s “recommended” hierarchy,⁷¹ but the *Blue Book* recognizes that exceptions can and will be made and that separation from power is the most important part of the hierarchy. Verizon Panel 19:1-17.

Meanwhile, Dr. Slavin, who represents the national telephone industry via the Alliance for Telecommunications Industry Solutions on the NESC Committee (*see* Slavin Direct at 2:1-3), opines that attachers can safely attach below an ILEC consistent with governing standards. Slavin Direct at 15:20-16:17 (“A company attaching a lighter weight cable below can add sufficient sag in its line to account for that of the heavier line above.”). Mr. Allen, who has numerous years of experience overseeing the construction of facilities in Maine, confirms that it is possible to, and

⁷¹ This is the same *Blue Book* that instructs parties how to effectively use the boxing construction methodology, which Verizon claims to be unsafe.

O TELCO does, sag in fiber lines below heavier copper facilities. Allen Direct at 18:19-21. Even Verizon admits that lighter cables can “sag in” below heavier copper lines. Verizon Panel at 17:1-7 (“a party should be able to sag in a lighter line below a heavier one”); Verizon’s Response to O TELCO-VZ 2-1 (agreeing sagging in is possible). Moreover, Verizon also concedes the common practice of sagging in to avoid contact between lines in the context of overlashing existing lines (likely because this is the primary means by which Verizon has chosen to upgrade its own network). *See* Verizon’s Responses to DTC-Verizon 1-19 and DTC-Verizon 1-20 (entities seeking to overlash—the method Verizon uses for deploying fiber—may “‘sag in’ (i.e., adjust the tension on) the combined facilities in an effort to ensure proper clearances over the span.”).

While Verizon notes that weather fluctuations may cause the amount of sag to decrease and increase the potential for lines to come into contact, Dr. Slavin counters Verizon’s weather concerns explaining that due to the actual impact of weather on the two types of facilities “the mid-span clearances may actually increase under severe weather conditions, making ‘crossover’ less, not more, likely to occur.” Slavin Direct at 16:1-17. Moreover, O TELCO’s experience in Maine, where O TELCO is attached in the lowest position on 16,785 poles and the weather and topography are similar to Massachusetts, Mr. Allen states that O TELCO has not experienced any problems resulting from attaching below the ILEC’s heavier copper facilities. Allen Direct at 19:4-6.

The Maine PUC agrees that entities placing lighter facilities below heavy copper lines can avoid contact by sagging in. It previously dismissed similar arguments made by Verizon, finding “Verizon has provided no evidence of industry concerns or literature regarding actual or potential problems resulting from the placement of lighter cables below heavier cable” and “cable movement at mid-span caused by wind is unlikely to significantly affect linemen working on

facilities that are on the poles and that telecommunications cable are difficult to damage.”⁷² Maine expressly deems a prohibition against attaching in the lowest position “presumptively unreasonable. 65-407 CMR Ch. 880, § 2(B)(3).

National Grid’s proffered concerns about allowing attachments below Verizon appear limited to its joint pole ownership agreement with Verizon, and the fact that Verizon is responsible for removing the pole once the last attachment is removed. National Grid Panel at 30:9-18. Verizon also raises this as an issue. Verizon Panel at 14:14-18 (asserting that allowing OTELCO to attach below it “would require two trips – one to transfer Verizon MA’s facilities and another to remove the old pole after third party has transferred its own facility”). However, there is no evidence in the record that Verizon currently regularly makes only one trip to the pole. Mr. Wolanin’s affidavit does not make this assertion; instead he only cites the company’s Networks Operations & Engineering Flash policy in support of this argument. Wolanin Aff. ¶ 15 (“Verizon *may* need an additional visit at an extra cost”). Verizon’s Panel says only that “when a pole is replaced, a Verizon MA crew *will normally* transfer the company’s facility to the new pole and also remove the old pole in a single trip” but offers no explanation of what constitutes “normal,” or how often the “normal” process is followed. Verizon Panel at 14:2-21 (emphasis add). Yet, Verizon does not appear to track any information concerning its pole removal practices, aside from the number it removes annually. Verizon’s Response to OTELCO-VZ 2-12.

Verizon also rebuffed the very reasonable solution proposed by OTELCO whereby Verizon could transfer OTELCO’s lines to avoid a return trip. Allen Direct at 18:1-10. As Mr. Allen explains, transfer agreements are a common industry practice that promotes efficiency in the

⁷² *Oxford Pole Order* at 14 (finding Verizon’s prohibition against third-party attachers placing their cable below Verizon’s to be an unreasonable act and practice).

pole replacement process. *Id.* Even Verizon concedes that it “will move the facilities of other attachers” (Verizon Panel at 21:11-12), including where the attacher “has failed to move or transfer its facilities on time and that failure is causing delay in other Verizon MA work.” Verizon’s Response to OTELCO-VZ 2-5. Indeed, Verizon already has a unit price for transfers that it could easily use for this service. *See, e.g.*, Exhibit DA-3 (listing unit price for “transfer/move/raise/lower wire—all types—including Licensee CA. ATT”). In fact, National Grid and Verizon conducted a single stream pole attachment transfer pilot program, which appears to have demonstrated the effectiveness of such a solution. *See* Verizon’s Response to DTC-Verizon 2-12. Tellingly, the Maine PUC, based on a similar record to that in this proceeding, ordered Verizon to either allow others to attach below them or absorb the cost of relocating to the lowest position.⁷³

Verizon also tries to cast doubt on the extensive analysis conducted by OTELCO’s contractor, CHR, which concluded that numerous poles lacking sufficient space above Verizon had sufficient space below to accommodate OTELCO, stating “it appears that CHR may have” applied an incorrect ground clearance measurement. Verizon Panel at 19:29-20:2. Verizon says it has chosen to exceed the NESC 15.5’ road clearance standard by 2.5 feet to account for New England weather. Verizon Panel at 20:3-18. However, the evidence in the record shows that this requirement is purely self-serving and unnecessary; Verizon itself admits that it “commonly” makes exception to this requirement for its *own* needs. Verizon Panel at 20:6-8 (“Verizon MA will commonly reduce its requirement to 16’ for a residential driveway not used by trucks or commercial equipment”). Moreover, Mr. Allen explained that in Maine, which has similar topography and weather to Massachusetts, the parties were able to reach a solution whereby

⁷³ *Oxford Pole Order* at 13 (citing “conflicting evidence as to whether Verizon actually transfers its cable and removes the old pole at the same time”).

OTELCO's facilities are attached to provide ground clearance of 6' above the NESC minimum. OTELCO's Response to DTC-OTEL 2-5. There the ILEC, Consolidated Communications, accepted that as the common practice that other providers have used in Maine for years. This is the supposition that CHR reasonably used in its analysis of potential cost savings in Massachusetts. *Id.* Moreover, even applying Verizon's unnecessarily large additional space requirement, several of the examples proffered by OTELCO in testimony would still allow room for OTECLO to attach below Verizon. *Id.*

The Pole Owners' other concerns are likewise unsupported. For example, Verizon's claim that allowing a third-party attacher to occupy the lowest position will make "make-ready surveys significantly more complicated" and "substantially delay completion of the surveys" lacks any evidentiary support and is illogical on its face. Verizon Panel at 15:17-16:5. National Grid's assertion that OTELCO's alternative attachment proposals will disrupt the NJUNS pole attachment transfer process is likewise unsupported based on Mr. Allen's experience with electronic notification systems in other states, including the Joint Use Management System ("JUMS") in Maine where OTELCO is attached in the lowest position on over 19,013 poles. According to Mr. Allen, electronic notification systems such JUMS and NJUNS are used to notify the next in line of the need to transfer attached facilities from the old to-be-removed pole to the new pole. If OTELCO is lowest, it will simply be the last to be notified of the need to transfer, and the last to transfer. If the ILEC is lowest, it will be the last to be notified and the last to transfer. Allen Responsive at 3:3-12.

Moreover, Verizon's claim that it will complicate raising or lowering lacks merit. If OTELCO attaches below Verizon because there is no room above, chances are neither party will have to move for the next entity as boxing or a pole replacement would likely be the only remaining

options. Verizon also claims that allowing a third party to attach below will delay service restoration because municipal officials may call Verizon and not the lowest attacher. Verizon Panel at 16:11-14. First, this is why companies place identification tags on their lines. *See* Verizon’s Response to OTECLO-VZ 2-9 (“Verizon does affix identifying tags to its facilities”). Second, in the extremely unlikely event that this were ever to occur, the attacher, and not Verizon, would be the one facing delayed restoration. This is a risk OTELCO is willing to assume.

D. Charging OTELCO for Work that Benefits Others, Including the Pole Owners, is Unreasonable and Discriminatory

OTELCO has presented evidence of representative poles where it is improperly being charged make-ready for work that was needed in order to correct pre-existing NESC violations, or to facilitate National Grid’s upgrade of its electrical facilities. Exhibit DA-1, ¶¶ 10-11 and Ex. C. Under widely accepted cost-causation principles applicable to pole attachments, attachers should pay only for costs caused solely by their attachments, and not for benefits incurred by the pole owner or another attacher, since holding a new attacher liable for preexisting violations would “unfairly penalize[] the new attacher for problems it did not cause.”⁷⁴ Congress recognized this when it passed the federal Pole Attachment Act,⁷⁵ and in its subsequent amendment.⁷⁶ The FCC

⁷⁴ *See, e.g., Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd. 24615 (2003); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd. 7705, 7766-67 ¶¶ 121-22 (Aug. 3, 2018) (hereinafter “*August 2018 Third Report and Order*”), *aff’d* by *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020)), *cert. denied*, *City of Portland v. FCC*, 141 S. Ct. 2855 (2021).

⁷⁵ *See, e.g.,* S. Rep. No. 95-580 at 19 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 127 (“In a few limited instances it may be necessary for the utility to replace an existing pole with a larger facility in order to accommodate the CATV user. In those cases it would be appropriate to charge the CATV user **a certain percentage** of these pole ‘change-out’ replacements costs, sometimes referred to as the ‘non-betterment costs.’”) (emphasis added).

⁷⁶ *See* 47 U.S.C. § 224(h) (only an “entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible”), and § 224(i) (“An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its

recognizes this concept in its rules, which prohibit pole owners from charging attachers to correct pre-existing conditions, 47 C.F.R. § 1.1411(d)(4) (“A utility may not charge a new attacher to bring poles, attachments, or third-party equipment into compliance with current published safety, reliability, and pole owner construction standards guidelines if such poles, attachments, or third-party equipment were out of compliance because of work performed by a party other than the new attacher prior to the new attachment.”), which allocate costs to the party that benefits from a modification, 47 C.F.R. § 1.1408(b), and which prohibit pole owners from charging a new attacher to replace a pole already identified as in need of replacement.⁷⁷ The FCC has further recognized that whenever attachers pay the full cost of a pole replacement, the pole owner stands to gain a windfall.⁷⁸ The issue of whether and to what extent pole owners should contribute to the costs of poles that must be replaced because they lack space for a new attachment is currently pending before the FCC.⁷⁹ Economic studies produced by commenters in those proceedings support allocating costs to attachers and pole owners based on the remaining life of pole.⁸⁰

attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way”).

⁷⁷ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling, 36 FCC Rcd. 776, 777 ¶ 3 (WCB 2021).

⁷⁸ *See Alabama Cable Telecomms. Ass’n v. Alabama Power Co.*, 16 FCC Rcd. 12209, 12234 ¶ 58 (“In instances where attachers pay the costs of a replacement pole, the attacher actually increases the utility’s asset value and defers some of the costs of the physical plant the utility would otherwise be required to construct as part of its core service.”).

⁷⁹ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Further Notice of Proposed Rulemaking, FCC 22-20, 2022 FCC LEXIS 946 (rel. Mar. 18, 2022).

⁸⁰ *See, e.g.*, P. Kravtin and E. Lopez, An Economic Study of the Barriers Erected by Current Utility Pole Replacement Practices and of Policy Prescriptions to Better Align Incentives and Promote Broadband Expansion, submitted in *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, prepared for Charter Communications, Inc., FCC WC Docket No. 17-84 (June 27, 2022), file:///C:/Users/shapm/Downloads/Kravtin%20Lopez%20White%20Paper%20-

While the FCC’s rules are not binding on the Department, Massachusetts historically has looked to the FCC for guidance in how to approach pole attachment regulation, particularly as it relates to pole attachment charges.⁸¹ Attachers compensate pole owners in two primary ways: through the payment of non-recurring charges for things like surveys, engineering and make-ready, and through recurring annual rent. Under Massachusetts law, pole owners may not charge more rent than is calculated using a formula that is essentially the same as the FCC formula applicable to cable system attachments.⁸² Both the Massachusetts and FCC formulas allow the pole owner to recover, in annual rent, all of the costs attributable to the entire pole allocated to each attachment based on the amount of space occupied by the attachment. And a key element of both formulas is the goal of ensuring that the pole owner does not “double recover” costs through annual rates that are also recovered through non-recurring charges.⁸³

%20WC%20Docket%20No.%2017-84%20(Resubmitted%20Version).pdf; Comments of Crown Castle Fiber, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment* Brattle, WC Docket No. 17-84 (June 27, 2022) at Exhibit A (Brattle Group, The Economics of Pole Replacement and Efficient Cost Allocation (June 27, 2022)).

⁸¹ See, e.g., *Comcast of Mass. III, Inc. v. Peabody Municipal Light Plant*, D.T.C. 14-2, Phase I Order (Sept. 3, 2014) (holding that FCC Cable Formula also applies to municipally owned utilities); *A Complaint and Request for Hearing of Cablevision of Boston Co.*, Order, D.P.U./D.T.E. 97-82 (Apr. 15, 1998) (adopting FCC cable formula with minor variations).

⁸² See 220 CMR 45.01 *et seq.*; *Cablevision of Boston Co.*, D.P.U./D.T.E. 97-82, 1998 WL 35235111, Order at Table 1 (Apr. 15, 1998); *A-R Cable Servs., Inc. v. Mass. Elec. Co.*, D.T.E. 98-52, Order at 7 (Nov. 6, 1998).

⁸³ See *Amendment of Commission Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Recon., 16 FCC Rcd. 12103, 12119 ¶ 24 & n.120 (2001) (hereinafter “*2001 Pole Recon. Order*”) (“If there is not adequate space on an existing pole for an attacher, the attacher is usually required to pay up front to replace the pole with a larger pole.... Alternatively, a utility could include an allocated portion of these costs in its annual rental rate, but most utilities prefer to recover up front, the full amount of make-ready or pole change out costs. Such costs are required to be excluded from the annual rate calculation to avoid a double recovery by the utility.”).

Numerous other states have similarly ruled that new attachers should not be responsible for the cost of correcting pre-existing non-compliance. For example, the Maine rules provide: “A requesting party is not required to bear the costs of modifying attachments that are on the pole at the time of the requesting party’s application but that were not in compliance with applicable safety, engineering, and construction codes and standards at the time of the attachments’ construction or installation.”⁸⁴ Connecticut has ruled that costs arising during the make-ready process “should be borne by the cost causers,”⁸⁵ and corrected “by the responsible party” within 14 days of notification or by the pole owner, “at the expense of the responsible party.”⁸⁶ Vermont law similarly provides, “[T]he new Attaching Entity shall not be responsible for any portion of the Make-Ready expense that is attributable to the correction of pre-existing violations, unless the new Attaching Entity has caused a portion of the violation.”⁸⁷ New Jersey, Kentucky and Texas similarly direct that a pole owner may not charge a new attacher to correct pre-existing non-compliance as make-ready.⁸⁸

⁸⁴ 65-407 CMR Ch. 880, § 2(A)(11).

⁸⁵ Docket No. 11-03-07, *DPUC Investigation into the Appointment of a Third Party Statewide Utility Pole Administrator for the State of Connecticut*, Decision at 15 (Oct. 8, 2014).

⁸⁶ Docket No. 07-02-13, *DPUC Review of the State’s Public Service Company Utility Pole Make-Ready Procedures – Phase I*, Decision at 15 (Apr. 30, 2008).

⁸⁷ 18-1 Vt. Code 8:3.708(I)(1).

⁸⁸ 807 Ky. Admin. Regs. 5:015, § 4(6)(b)(1) (“A utility shall not charge a new attacher, as part of any invoice for make-ready, to bring poles, attachments, or third-party or utility equipment into compliance with current published safety, reliability, and pole owner construction standards if the poles, attachments, or third-party or utility equipment were out of compliance because of work performed by a party other than the new attacher prior to the new attachment.”); *Report on the Status of Construction by Shore Cable Company of New Jersey, Inc. of a New Cable Television System in the Communities of Ventnor, Longport and Margate*, 1991 N.J. AGEN LEXIS 2517, at *19, 92 N.J.A.R. 2d (BRC) 37 (Oct. 4, 1991) (directing new attacher to pay “for all make-ready work . . . except for NESC violations which are to be corrected at the expense of the responsible party”); Tex. Util. Code § 253.0103(e) (“An electric cooperative is responsible for the costs of removing and replacing . . . a pole with recorded conditions or defects that would reasonably be expected to endanger human life or property and which should be promptly corrected;

1. The Department should clarify that under Massachusetts law, Verizon and National Grid may not charge attachers to correct pre-existing pole conditions, including poles already in need of replacement.

As OTELCO explained in its response to DTC-OTELCO 2-3, a pole replacement that eliminates the need to correct an existing pole condition also benefits the pole owner. This includes where the remaining groundline strength of the pole has deteriorated below the level required by the NESC. In fact, whenever an older, shorter pole is replaced with a new, often taller pole (at least five feet since poles come in five-foot increments), the pole owner benefits by avoiding the eventual need to replace the pole, reducing its maintenance costs, and, in the case of a taller pole, adding capacity for its own needs and for additional third-party rentals.

Verizon and National Grid agree that they have responsibility to pay for pole replacements that are necessary in the ordinary course. Verizon’s Response to OTELCO-VZ 2-11 (“if a pole is rotten or overloaded but also would require replacement to accommodate a new attachment for spacing reasons, then Verizon MA would bear the cost of replacing that pole”); National Grid’s Response to OTELCO-NG-1-22 (stating “[t]he Company replaces thousands of poles annually in the course of ordinary business” and “receives reimbursement from a third party attacher only when there is insufficient space to accommodate the request ...”); National Grid Panel at 24:7-9 (“National Grid (and its customers) are responsible for the cost of replacing a pole where the pole is beyond its useful life.”). They claim, however, that they have no responsibility to pay for any of the costs of pole replacements if they are precipitated by a lack of space for the new attachments, even when the replacement resolves a pre-existing violation (unless that violation would have

or that must be replaced for safety or reliability as a result of normal wear and tear or other natural causes and not on account of a pole attachment or the action of a broadband provider or third party.”).

required a pole replacement). National Grid Panel at 24:8-12.⁸⁹ However, neither pole owner has provided any evidence that it considered whether any of the poles including in OTELCO's applications required replacement due to diminished strength. *See* National Grid's Response to OTELCO-NG-3-3. Indeed, based on Verizon's response to OTECLO's Information Requests, it appears only to have evaluated loading after the fact to answer the question. (*See* Verizon's Response to OTELCO-VZ 2-11 (stating only that it "has reviewed a significant number of the make-ready surveys it has conducted for OTECLO and none fall into this category").)

Verizon does not even appear to know which of its poles require replacement due to rot or loading. It does not perform regular or periodic inspections of its pole plant unrelated to third party attachers or specific work on poles. Verizon's Response to OTELCO-VZ 2-13. And, it does not appear to have considered the condition of its poles contemporaneous with its review of OTELCO's attachments. *See* Verizon's Response to OTELCO-VZ 2-11(c) (stating only that it has reviewed some number of the surveys it conducted and determined none of the poles on that undisclosed number "fall into this category").

2. The Department should order National Grid to provide its make-ready cost estimates on a per pole basis.

National Grid's lack of detailed billing prevents OTELCO from being able to determine whether it is being properly charged for work or if some work is properly chargeable to another

⁸⁹ Specifically, National Grid argues that even if a pole has to be replaced due to diminished strength, OTELCO still must pay the incremental height difference even though National Grid benefits from an extra four feet of space (communications attachments occupy only one foot and poles come in five foot increments leaving at least four additional feet if the next height pole is deployed), which four feet National Grid can then use for its own needs or to lease to the next attacher.

entity and is therefore unreasonable.⁹⁰ Exhibit DA-1, ¶ 9 and Ex. B; Allen Direct at 6:3-8; 9:3-19; 9:20-10:5. However, National Grid provides little support for its refusal to provide OTELCO with more detailed billing for make-ready charges, choosing instead to rely on the status quo. (*See* National Grid Panel at 24:16 (stating National Grid already provides “a great level of detail”); 25:7-11 (stating the level of detail provided is “consistent with the Company’s standard practice” and “adequate for nearly all other attachers”).) It even suggests that the limited number of sample applications for which it has provided a more detailed breakdown should be sufficient “for comparative purposes” for all other poles across OTELCO’s pending applications (National Grid Panel at 25:16-18), even though each pole’s situation is different and requires a different solution. In sum, National Grid *could* provide OTELCO with a detailed breakdown of make-ready costs, it just chooses not to. The Department should order it to do so.

IV. CONCLUSION

In sum, boxing and attachment below Verizon where sufficient clearance exists are recognized as safe, cost-effective construction techniques and are essential to OTELCO’s efforts to deploy competitive broadband in Western Massachusetts. Therefore, OTELCO respectfully requests that the Department compel Verizon and National Grid to modify their unreasonable and discriminatory pole attachment practices to permit OTELCO to attach where there is open space on the pole when it can do so consistent with governing safety specifications. Specifically, OTELCO asks the Department to:

⁹⁰ FCC rules require that “[w]here a new attacher’s request for access is not denied, a utility shall present to a new attacher a detailed, itemized estimate, on a pole-by-pole basis where requested, of charges to perform all necessary make-ready” 47 C.F.R. § 1.1411(d).

- Order National Grid and Verizon to allow boxing on poles accessible by bucket truck, lift or ladder, similar to Maine;
- Order National Grid and Verizon to allow OTELCO to occupy the lowest position on the pole where it can do so in compliance with the NESC, including surface clearance and separation requirements;
- Order National Grid and Verizon to allow OTELCO to attach to their poles even if there is pre-existing non-compliance on the poles, so long as OTELCO can safely do so in compliance with the NESC and without worsening any pre-existing non-compliance;
- Order National Grid and Verizon to refrain from charging costs associated with correction of pre-existing noncompliance to OTELCO; and
- Order National Grid to provide invoices to OTELCO breaking down costs on a pole-by-pole basis.

Verizon and National Grid’s resistance to the reasonable, non-discriminatory attachment practices advocated by OTELCO undermine broadband investment in the state, which ultimately harms consumers and business who are left with higher costs and fewer communications options. In contrast, by granting the relief requested by OTELCO, the Department will not only alleviate the delays and exorbitant costs that have plagued OTELCO’s own deployment efforts in Massachusetts, but will also serve the following, universal policy objectives:

- It will facilitate efforts to expand access to competitive broadband to citizens of the Commonwealth;
- It will ensure that Massachusetts pole attachment practices are consistent with neighboring states and the FCC;
- It will protect against monopoly abuse; and

- It will reduce unnecessary administrative burdens and regulatory uncertainty.

As such, OTELCO respectfully requests that its request for relief be granted in its entirety.

Respectfully submitted,

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By its Attorneys:

/s/

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