Before the
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE
Commonwealth of Massachusetts

CRC COMMUNICATIONS LLC, D/B/A OTELCO, *Complainant*, v. MASSACHUSETTS ELECTRIC COMPANY D/B/A NATIONAL GRID, AND VERIZON NEW ENGLAND INC. *Respondents*.	File No. DTC-_____

POLE ATTACHMENT COMPLAINT
AND REQUEST FOR EXPEDITED TREATMENT

Pursuant to Massachusetts General Laws Chapter 166, Section 25A, G.L. c. 166, § 25A, and Code of Massachusetts Regulations Title 220, Section 45.04, 220 CMR § 45.04, CRC Communications LLC d/b/a OTELCO ("OTELCO") brings this Pole Attachment Complaint ("Complaint") against Massachusetts Electric Company d/b/a National Grid ("National Grid") and Verizon New England, Inc. ("Verizon") (jointly "Owners"). OTELCO brings this Complaint in response to National Grid and Verizon's imposition of discriminatory, unjust and unreasonable terms and conditions governing the construction specifications and related make-ready work for attaching to National Grid's and Verizon's utility poles.

Given OTELCO's time-sensitive need to receive lawful access to the Owners' utility poles in order to facilitate the deployment of competitive, top-quality, high-speed broadband internet access to Western Massachusetts, OTELCO hereby waives its rights to a hearing pursuant to 220 CMR § 1.06. OTELCO respectfully requests prompt

resolution of this complaint by the Department of Telecommunications and Cable ("DTC") pursuant to the streamlined complaint procedures specified at 220 CMR § 45.06. In support of this Complaint, the following is respectfully shown:

Introduction

OTELCO seeks to bring the fastest possible and most reliable broadband internet access to residents, businesses, and institutions throughout Massachusetts. Specifically, 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 the state. To do so, however, OTELCO requires access to poles owned by the state's electric utilities and incumbent local exchange carriers.[1] As observed by former Federal Communications Commission ("FCC") Chairman Julius Genachowski, "Utility poles are ***essential*** to providing broadband service, wired and wireless, because that's where communications companies string cables and, increasingly, place wireless antennas. If 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."[2]

Therefore, in 2021, OTELCO entered into pole attachment agreements with National Grid and Verizon in order to attach its fiber to National Grid or Verizon owned or controlled poles. Under Massachusetts law, National Grid and Verizon must provide

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[1] *See National Cable & Telecommunications Assn. v. Gulf Power Co.*, 534 U.S. 327 (2002) (recognizing poles as essential to deployment of communications network deployment).

[2] *In re Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, 5377-78, 2011 FCC LEXIS 1362, *366, 52 Comm. Reg. (P & F) 1027 (F. C.C. April 7, 2011) (emphasis added) ("*In re Implementation of Section 224 of the Act*").

non-discriminatory access to those poles on terms and conditions that are just and reasonable. *See* 220 CMR § 45.03.

However, in response to OTELCO's attachment applications submitted in accordance with the Owner's pole attachment agreements, both National Grid and Verizon identified extensive, time consuming and costly work, which they deemed necessary to accommodate OTELCO's attachments and thus billable to OTELCO as "make-ready work." National Grid's approved engineering contractor, Osmose, also improperly attributed remediation of pre-existing pole conditions and plant upgrades to OTELCO under the guise of "make-ready" costs.

Faced with unreasonably high and misallocated make-ready charges, OTELCO sought alternative attachment solutions to eliminate unnecessary delays in the attachment process and to lower construction costs without compromising safety. Specifically, to gain required separation from other communications lines but minimize its consumption of scarce vertical pole space, OTELCO proposed attaching its facilities on the opposite side of the pole from existing facilities, a construction method commonly referred to as "boxing" and/or "opposite side construction."[3] In most cases, opposite side construction would eliminate the need to replace a pole, facilitating immediate attachment at significant cost savings. OTELCO proposed the opposite side construction solution only

[3] The National Electrical Safety Code ("NESC") generally requires one foot of space between communications lines on the poles, though this can be lessened to 4 inches by agreement of the parties. *See* NESC Rule 235H ("The spacing between messengers supporting communication cables should be not less than 300 mm (12 in) except by agreement between the parties involved including the pole owner(s)."). One way to ensure that this 12 inches of separation is maintained is to attach on the side of the pole opposite other communications attachers because the width of the pole provides some of the required clearance. For instance, for a typical 45-foot long, Class 3 pole, with a communications attachment height at 20 feet, the diameter of the pole is 9.8 inches. Accordingly, less vertical space is required to achieve 12 inch separation.

where doing so would comply with all applicable safety requirements, including the National Electrical Safety Code ("NESC") and the Bellcore Blue Book Manual of Construction Procedures ("Blue Book"). As detailed herein, the Federal Communications Commission ("FCC"), as well as nearby states that, like Massachusetts, have certified to regulate pole attachments pursuant to 47 U.S.C. § 224(c) ("certified states"), have long recognized the benefits of opposite side construction. OTELCO also proposed that in certain instances, it should be permitted to attach below Verizon, thereby also avoiding the need for rearranging existing facilities, and facilitating prompt attachment.

OTELCO's proposals, which would have eliminated the need for time-consuming and costly make-ready, were unequivocally and unreasonably rebuffed. National Grid also unreasonably refused OTELCO's request that it provide OTELCO with a detailed breakdown of the costs attributable to specific make-ready charges on each pole so that it could determine whether some costs to correct pre-existing non-compliance had been improperly classified as make-ready, as OTELCO suspects they were.

Rather than work with OTELCO to reduce the costs and delays occasioned by its proposed make-ready work, National Grid is now threatening to cancel OTELCO's applications unless it pays the unreasonably demanded make-ready charges. At a minimum, this would cause OTELCO to lose $51,053.32 in application fees and survey/design fee charges already paid on four applications identified as having make-ready issues in 2021, covering 385 poles, which National Grid has indicated they intend to cancel as of April 15, 2022. Further, if National Grid proceeds with this course of conduct, and the endemic issues between the parties are not resolved, OTELCO is poised

to lose an additional $173,593.02 in application fees and survey/design fee charges on 15 other applications where they have received make-ready invoices, and an additional $44,161.32 in application fees and survey/design fee charges on eight other applications where make-ready invoices have not yet been received. OTELCO also has an additional 89 applications in the pipeline that have not yet been billed for application, survey, or design fees.[4] Thus, Verizon and National Grid's refusal to even negotiate or consider less costly attachment alternatives would sound the death knell for OTELCO's competitive broadband deployment in Massachusetts.

OTELCO is committed to building-out and deploying its network safely and in compliance with the NESC in order to bring additional competitive broadband services to Massachusetts residents. But National Grid and Verizon's imposition of unjust and unreasonable terms and conditions of attachment to their poles is making it untenable for OTELCO to complete this project in a timely and cost-effective manner. Thus, National Grid and Verizon's unlawful actions, if not promptly remedied, threaten OTELCO with irreparable harm.

Parties and Jurisdiction

1. Complainant OTELCO is a licensed telecommunications operator[5] authorized to construct lines or cables upon, along, under, and across public rights of way in Massachusetts pursuant to 22 CMR § 45.02. OTELCO is a corporation organized and existing under the laws of the State of Delaware, having its principal office at 56 Campus

[4] Declaration of David Allen ("D. Allen Decl."), ¶ 15.

[5] *See* Massachusetts Licensed Telecommunications Operators at https://services.oca.state.ma.us/dtc/frmTelecomList.aspx (last visited February 15, 2022).

Drive, New Gloucester, ME 04260. For purposes of G.L. c. 166, § 25A, OTELCO is a "licensee" in the Commonwealth of Massachusetts. *See* G.L. c. 166, § 25A.

2. Respondent National Grid is a Massachusetts corporation that owns or controls poles used or useful, in whole or in part, for supporting wires or cables for the transmission of intelligence by telegraph, telephone or television in the Commonwealth of Massachusetts and is therefore a "utility" for purposes of G.L. c. 166, § 25A. *See* G.L. c. 166, §§ 22.A(f), 25A; 220 CMR § 45.02. National Grid's principal office is located at 40 Sylvan Road, Waltham, Massachusetts 02451.

3. Respondent Verizon is a licensed telecommunications operator[6] authorized to construct lines or cables upon, along, under, and across public rights of way in Massachusetts pursuant to 22 CMR § 45.02. Verizon is organized and existing under the laws of the State of New York, having its principal office at 125 High Street, Boston, MA 02110.

4. The Massachusetts rules governing pole attachment complaints and enforcement "effects legislative policy in favor of competition and consumer choice in telecommunications by providing for complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to poles … owned or controlled, in whole or in part, by one or more utilities with rates, terms and conditions that are just and reasonable." *See* 220 CMR § 45.03.

5. OTELCO desires to install, own, and operate wired aerial fiber attachments, for the transmission and/or receiving of telecommunication signals to such attachments, on poles owned or controlled by National Grid or Verizon. OTELCO

[6] *See id*.

currently has applications pending within Belchertown, Northampton, and Palmer, Massachusetts. Therefore, the DTC has jurisdiction over all aspects of this Complaint under G.L. c. 166, § 25A and 220 CMR § 45.04(2)(c). The DTC also has jurisdiction over this Complaint pursuant to the Memorandum of Agreement ("MOA") between the DTC and the Department of Public Utilities ("DPU") dated October 14, 2008, attached hereto as Exhibit 1. The MOA addresses jurisdiction over pole attachment disputes, as necessitated by the April 11, 2007 separation of the previous functions of the Department of Telecommunications and Energy into the DTC and DPU.[7]

Factual Background

I. The Pole Attachment Agreements

6. There are two pole attachment agreements involved in this dispute.

7. On March 9, 2021, OTELCO and Verizon entered into a Pole Attachment Agreement (the "Verizon PAA") pursuant to which Verizon agreed to issue OTELCO non-exclusive licenses authorizing the attachment of OTELCO's facilities to Verizon's poles.[8]

8. Following a pre-construction survey, the Verizon PAA provides that if Verizon determines that a pole or anchor to which OTELCO seeks to make attachments requires make-ready work, that make-ready work will be performed following receipt of advance payment by OTELCO. Upon receipt of advance payment, Verizon shall provide OTELCO with the estimated start and estimated construction completion date of the make-ready work.[9]

[7] *See* Exhibit 1 at pp. 2-3, §§ 4, 5.

[8] Verizon PAA, Art. II, § 2.1, attached hereto as Exhibit 2.

[9] *Id*. at Art. V, § 5.3(2).

9. The Verizon PAA defines "Make-ready Work" as "[a]ll work … required to accommodate the attachment of licensee's facilities to a pole or anchor."[10]

10. The Verizon PAA also establishes the standards by which attachment compliance will be measured. Specifically, the Verizon PAA provides that OTELCO's facilities shall be placed and maintained in accordance with the requirements and specifications of the latest editions of the Blue Book, the National Electrical Code ("NEC"), the NESC, the Occupational Safety and Health Act of 1970 ("OSHA") rules and regulations, and "any governing authority having jurisdiction over the subject matter."[11]

11. On January 18, 2022, OTELCO and National Grid entered into a wired aerial license agreement (the "National Grid Attachment Agreement") to allow OTELCO to "install and operate Wired Aerial Fiber Attachments on Poles where space is available, and it is safe, and where such use will not interfere with or threaten public safety, [National Grid's] or other user's safe use and operation of the Poles or the safety, reliability or integrity of [National Grid's] electric distribution system."[12]

12. OTELCO executed the National Grid Attachment Agreement despite National Grid's rejection of all proposed changes to its form contract after the parties had already exchanged redlines and engaged in phone calls to negotiate changes to the agreement.[13] OTELCO signed the agreement, "reserving all rights, in the interest of commencing its deployment project as soon as possible," but noted that "[t]he agreement

[10] *Id*. at ArtI, § 1.10.

[11] *Id*. at Art VI, § 6.1.

[12] National Grid Attachment Agreement at 1, attached hereto as Exhibit 3.

[13] *Id*.; D. Allen Decl., ¶ 3.

does not reflect the current state of the law and regulation at the national level and in many other states throughout the country. Nevertheless, OTELCO cannot sustain further delay."[14]

13. OTELCO entered into the National Grid Attachment Agreement because the Verizon PAA required it to also obtain permission from the utility in areas specifically served by Verizon in order to attach OTELCO facilities to poles solely owned or jointly owned, or jointly used by the electric company.[15]

14. The National Grid Attachment Agreement defines "Make-Ready Work" as limited to "the work required to accommodate Licensee's Attachment(s) on Pole(s)[.]"[16]

15. The National Grid Attachment Agreement requires that a field survey be conducted for each pole applied for, and that that survey be completed within 45 days following receipt of a complete application.[17]

16. Pursuant to the National Grid Attachment Agreement, all make-ready costs required to support OTELCO's attachments shall be paid by OTELCO. If a pole to which OTELCO seeks to attach is determined to require make-ready to accommodate the attachment, then National Grid is required to inform OTELCO of the estimated cost of the required make-ready within 14 days after providing written notification of the decision to grant access to the Pole. Make-ready work must then commence "within a commercially reasonable timeframe" after acceptance and payment of the estimate.

[14] National Grid Attachment Agreement at 1.

[15] Verizon PAA at 3.

[16] National Grid Attachment Agreement, § 1.16.

[17] *Id*. at § 3.3.

National Grid may determine that additional time is necessary to complete make-ready work.[18]

17. Make-ready work "shall be performed by [National Grid] or [National Grid's] contractor."[19]

18. Additionally, all attachments must be installed and maintained by OTELCO "in accordance with applicable national codes and standards," among other things.[20]

II. Make-Ready Delays and Cost-Overruns on National Grid and Verizon Poles Are Interfering with OTELCO's Ability to Deploy Competitive Broadband in the State.

19. OTELCO currently has 95 active applications pending with National Grid and Verizon for poles located within Belchertown, Northampton, and Palmer, Massachusetts. OTELCO intends to deploy over 1,000 route-miles of network and 115,000 locations in 17 communities across the Western part of the state. However, the issues OTELCO is experiencing with National Grid and Verizon discussed herein reflect larger systemic issues with their process, and are currently directly impacting OTELCO's deployment goals involving 390 of those route-miles of network, and 40,000 of those locations, in eight communities.

20. On or around June 4, 2021, OTELCO jointly submitted 104 applications to install fiber attachments to National Grid and Verizon poles, representing about 153 route-miles of network in communities in Western Massachusetts. OTELCO's last application was

[18] *Id*. at §§ 2.9, 3.6, 3.8, 3.11, 8.3.

[19] *Id*. at §§ 2.9, 3.8.

[20] *Id*. at § 5.1

submitted on or around November 11, 2021. OTELCO subsequently cancelled nine of these applications, leaving 95 applications active with the utilities.

21. As required by regulations, pole owners must grant or deny access within 45 days. 220 CMR 45.03(2). During this 45-day period, pole owners are expected to complete a pre-construction survey of the applied-for poles, the cost of which is billed to the applicant attacher. Where access is granted conditioned upon the completion of make-ready work, both the Verizon and National Grid agreements require OTELCO to pay the pole owner estimated make-ready costs in advance.[21]

22. Neither Verizon nor National Grid have complied with the 45-day access timeline. For instance, OTELCO's first application was submitted on or around June 4, 2021. But the first make-ready estimate invoice was not received from National Grid until almost six months later, on November 24, 2021.

23. As of April 4, 2022, the outside contractor approved by National Grid to process pole attachment applications, Osmose Utilities Services, Inc. ("Osmose"), and Verizon's contractor Pike Telecom & Renewables, LLC ("Pike"), had provided only preliminary make-ready determinations for 77 of the 95 joint applications.[22] Only 26 of those have returned and processed by National Grid. And of those 20, OTELCO has only received 18 make-ready invoices from National Grid.

[21] Verizon Agreement at ¶ 3.3.2; National Grid Agreement at ¶ 3.8.

[22] National Grid employs an applicant directed design model, which requires that applicants use one of its approved third-party contractors to do all make-ready design and work on behalf of the utility. Thus, although OTELCO engaged Osmose to complete design and engineering work in connection with accommodating OTELCO's facilities on National Grid's poles, upon information and belief Osmose is fundamentally beholden to National Grid, and performs according to National Grid's standards.

24. After National Grid's reconciliation process was completed – an exercise that involves OTELCO having to submit applications to National Grid and Osmose through National Grid's online portal, after which Osmose provides its analysis to National Grid, who then issues its make-ready invoice – Verizon issued 52 make-ready invoices on the same 95 applications, totaling $1,005,372, which represents an average of approximately $10,843 in make-ready costs per mile.

25. There are a total of 18 applications where OTELCO has received make-ready invoices from both National Grid and Verizon. The total make-ready costs for those applications is $3,175,590 covering 45.57 route miles, which represents an average of approximately $69,686 per mile. This is nearly triple what OTELCO had budgeted based upon its experience constructing networks in other states.

26. The high-cost estimates are driven largely by the pole owners' determinations that poles must be replaced due to a lack of vertical space available to accommodate OTELCO's attachment. Because there are no timeframes for when a pole owner must replace a pole contained in the National Grid Attachment Agreement,[23] the Verizon PAA, or Massachusetts' pole attachment rules, it could be many months, even years, before the poles are replaced. In OTECLO's experience, absent regulation, pole replacements can take at a minimum 6 months and, in many cases, years.[24]

27. In an effort to address the inevitable delays and cost overruns driven by the Owners' attribution of make-ready work to OTELCO, OTELCO engaged a third-party contractor, CHR Solutions, to conduct an independent analysis of OTELCO's

[23] In fact, Section 3.11 of the National Grid Attachment Agreement gives the Licensor the right to extend the make-ready work timeframes, "as necessary with notice," and "in its sole discretion that additional time is necessary to complete Make-Ready Work."

[24] D. Allen Decl., ¶ 16.

applications. CHR Solutions identified far less costly construction alternatives that could be used to avoid extensive make-ready work. For instance, where sufficient space existed below Verizon to attach OTELCO's facilities while maintaining required surface clearance, CHR Solutions proposed attaching below Verizon. Verizon, however, adamantly refused to allow this because it would require giving up its preferred position on the poles.[25]

28. OTELCO also identified NESC-compliant instances where opposite side construction provided a safe alternative and would result in significant cost savings.[26] As an example, on a single pole (National Grid Pole 1 on Main Street on Belchertown) in application BETO C2 (Application Number 30475741), using opposite side construction for OTELCO's attachment would result in a total cost savings of $12,676.30 (for charges otherwise imposed by National Grid), $1,926.46 (for charges otherwise imposed by Verizon), and a total savings in make-ready costs imposed by both pole owners of $14,602.76.[27] Similarly, on another pole (National Grid Pole 1 ion Route 9 in Belchertown) in application BETO A1 (Application Number 30477495), using opposite side construction for OTELCO's attachment would result in a total cost savings of $9,883.51 (for make-ready charges estimated by National Grid), $2,132.16 (for make-ready charges estimated by Verizon), and a total savings in make-ready costs for all joint pole owners of $12,015.67.[28]

[25] D. Allen Decl., ¶ 8, Ex. A.

[26] *Id*. at ¶ 13, Ex. E.

[27] *Id*.

[28] *Id*.

29. According to OTELCO's analysis, opposite side construction would produce similar savings as attaching below Verizon, avoid all make-ready costs, and where proposed, could be done consistent with governing specifications. OTECLO understands that opposite side construction may not work in all circumstances and was willing to consider its use on a case-by-case basis. But when OTELCO proposed using opposite side construction to Verizon and National Grid, both unreasonably refused to even consider this option, instead rejecting it outright in favor of more onerous and expensive solutions, such as replacing poles and upgrading National Grid's open wire secondary lines to triplex.

30. Furthermore, CHR Solutions and OTELCO identified numerous poles where OTELCO is being improperly billed "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 from open secondary to tri-plex.[29]

31. For instance, OTELCO identified numerous instances where OTELECO 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.[30]

32. In fact, when OTELCO asked Osmose how work is designed to assure that OTELCO is not being billed for the portion of the work that is correcting the pre-existing condition, Osmose replied that, in fact, it was: "If the pole being designed is

[29] D. Allen Decl., ¶ 11, Ex. C.

[30] *Id.*

noncompliant as is but has space to correct the violation, then the work will be billable because there is space to make the pole compliant but no space for the new attachment."[31]

III. National Grid and Verizon's Refusal to Permit OTELCO to Use Alternative Methods of Attachment on Their Poles, and Attribution of Pre-Existing Pole Remediation and Plant Upgrades to OTELCO, is Unjust and Unreasonable.

33. National Grid and Verizon have an affirmative obligation under Massachusetts law to afford OTELCO non-discriminatory access to their poles on just and reasonable terms and conditions. *See* G.L. c. 166, § 25A; 220 CMR § 45.03.

34. The Commonwealth of Massachusetts has been a leader in recognizing that "telecommunications is an important part of the Massachusetts economy, both as jobs-producing industry and as economic infrastructure; and its growth must be not hampered by artificial barriers."[32] In adopting regulations governing attachments, the DTE sought "to adopt regulations that will ensure timely and nondiscriminatory access to poles," recognizing "[r]equests for access are time-sensitive."[33]

35. The DTE first established regulations and asserted its authority to govern rates terms, and conditions of attachments to utility poles and conduits in 1984.[34] 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

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[31] D. Allen Decl., ¶ 12, Ex. D.

[32] *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*, Massachusetts Department of Telecommunications and Energy, 2000 Mass. PUC LEXIS 21, *2 (Mass. D.P.U. July 24, 2000).

[33] *Id*. at *64.

[34] *CATV Rulemaking Order*, D.P.U. 930 (1984).

nondiscriminatory basis, and to ensure that rates, terms, and conditions are just and reasonable."[35]

36. The Owners' construction and make-ready practices do not comply with Massachusetts requirements.

A. The Pole Owners are Unreasonably and Unjustly Refusing to Allow Opposite Side Construction.

37. Opposite side construction can be performed consistent with governing safety codes and construction manuals, without jeopardizing safety or reliability.

38. The NESC is the authoritative source for electrical engineering safety practices. It sets the ground rules for practical safeguarding of persons during the installation, operation, and maintenance of power, telephone, cable TV, and railroad signal systems. It also includes work rules for the construction, maintenance, and operation of electric supply and communication lines and equipment. The NESC does not prohibit attaching stranded communications facilities to opposite sides of the pole.

39. Additionally, the Blue Book – Manual of Construction Procedures ("Blue Book") has long contemplated that under certain circumstances, clearances between communications facilities could be achieved through opposite side construction. For instance, the pre-divestiture, March 1983 edition included the following diagram for how to safely and properly implement opposite side construction of the pole while maintaining adequate clearances:

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[35] *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*, Massachusetts Department of Telecommunications and Energy, 2000 Mass. PUC LEXIS 21, *14 (Mass. D.P.U. July 24, 2000).

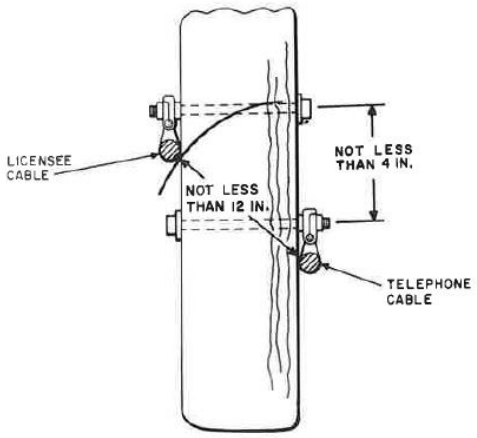
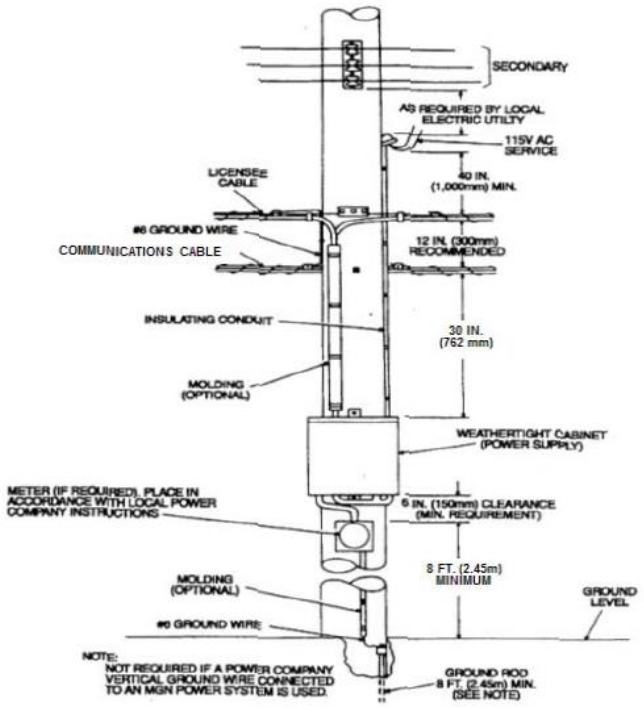


Fig. 1—Clearance Between Licensees Owned and Telephone Company Cables

40. Likewise, the 2017 edition of the Blue Book includes instructions for installing the power supply for when "the licensee cable is on the opposite side of the pole from the communications company cable":

Figure 14-1 Clearance and Grounding Methods for Power Supply Cabinet - Communications Cable and Licensee Cable on Opposite Sides of Pole



41. The FCC, to which the DTC looks for guidance on pole attachment matters, [36] and nearby certified states, support the use of NESC-compliant opposite side construction.

42. According to the FCC, "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 itself."[37]

43. Nearby certified states similarly support the use of opposite side construction. 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*.[38]

44. 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

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[36] *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 (Aug. 16, 2010) ("*DTC August 2010 Comments*") (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").

[37] *In re Implementation of Section 224 of the Act* at 5340. In 2011, the Federal Communications Commission ("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. 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*.

[38] Code Me. R. tit. 65-407 Ch. 880, § 2(B).

"[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."[39]

45. In New Hampshire, a pole owner must allow opposite side construction if "consistent with the restrictions it places on its own practice of boxing poles … ***or as actually implemented by the company in the normal course of its business***. Such boxing shall be safely accessible by bucket trucks, ladders, or emergency equipment and otherwise consistent with the requirements of applicable codes, including the National Electrical Safety Code."[40]

46. Opposite side construction is also regularly used throughout the state of Connecticut.

47. While Verizon claims it does not ever allow opposite side construction on its poles, in practice it uses and allows others to use alternative forms of attachment, including opposite side construction.[41] Even when confronted with evidence of their own opposite side construction practices on or around January 28, 2022, Verizon declined to even consider allowing opposite side construction on OTELCO's applications.

48. National Grid and Verizon's refusal to permit opposite side construction where safe to do so in order to address exorbitantly high make-ready costs is unjust and unreasonable.

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[39] *In the Matter of a 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, *17-18, 92 N.J.A.R.2d(BRC) 37 (emphasis added).

[40] N.H. Code Admin. R. PUC 1303.10(a) (emphasis added).

[41] D. Allen Decl., ¶ 14, Ex. F.

49. Accordingly, National Grid and Verizon should be compelled to allow OTELCO to employ opposite side construction where safe to do so in order to avoid unnecessary delays and excessive make-ready costs, including associated delays and costs associated with unnecessary pole replacements, and facilitate deployment of competitive broadband service to Massachusetts residents, businesses and institutions.

B. Verizon is Unreasonably and Unjustly Refusing to Allow OTELCO to Attach Below Verizon on the Poles.

50. Massachusetts law requires Verizon to afford non-discriminatory access to its poles.

51. In affording itself preferential positioning on the pole at the cost of its direct competition, Verizon is not complying with its obligation to provide non-discriminatory access.

52. Numerous other regulatory bodies have recognized the detrimental impact of make-ready cost overruns and delays on competitive broadband deployment and have encouraged the use of time and cost saving construction techniques to avoid unnecessary delays and costs.

53. In 2010, after holding 36 public workshops, drawing more than 10,000 in person and online attendees, and generating some 23,000 comments from more than 7,000 parties, the FCC released its National Broadband Plan, in which it recognized, inter alia, that "make-ready work can be a significant source of cost and delay in building broadband networks" and can be "***the most significant obstacle to the deployment of fiber transport***."[42] The plan specifically recommended giving attachers the right to use

[42] Connecting America: The National Broadband Plan at 111 (emphasis added).

space- and cost- saving techniques such as boxing or extension arms where practical and in a way that is consistent with the pole owners' use of those techniques."[43]

54. New Jersey has long recognized that "the proper focus of make-ready should be to minimize the proper costs of the applicant while avoiding unnecessary work being required of the existing pole users, consistent with all applicable safety standards. … Additionally, make-ready should provide for the most efficient use of the finite space available on utility pole structures."[44]

55. In Maine, "[a] prohibition against attachments below existing attachments, to the extent that space is not available above existing attachments along the proposed route (or most of the route) of the additional attachments" is *presumptively unreasonable*.[45]

56. New Hampshire's pole attachment rules unequivocally state that "[n]o attaching entity shall be denied attachment solely because the only space available for attachment on a pole is below the lowest attached facility."[46]

57. NESC Rule 013.B(3) states that "[w]here conductors or equipment are added … on an existing structure, ***the structure or the facilities on the structure need not be modified or replaced*** if the resulting installation will be in compliance with either (a) the rules that were in effect at the time of the original installation, or (b) the rules in effect

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[43] *Id*.

[44] *Report on the Status of Construction by Shore Cable Co. of New Jersey, Inc. of a New Cable Television System in the Communities of Ventnor, Longport and Margate*, Final Agency Decision, 1992 N.J. AGEN LEXIS 2517 *16 (1991) at

[45] Code Me. R. tit. 65-407 Ch. 880, § 2(B).

[46] N.H. Code Admin. R. PUC 1303.09(a).

in a subsequent edition of the NESC to which the installation has been previously brought into compliance, or (c) the rules of the current NESC edition."[47]

58. This effort to impose remediation costs on new attachers is even more improper, as often, correction of the NESC violation is not required for a new NESC-compliant attachment. Pursuant to NESC Rule 013.B(4), if a new attachment may be made that is, in itself, compliant with the NESC, the NESC does not require immediate correction of the noncompliance before attachment under most circumstances.[48] Accordingly, if there is compliant open space on a pole, but one or more facilities are out of compliance, the new facility may be placed, and the NESC does not require the new attacher, or prior attachers, or the pole owners, to pay to immediately bring the pole into compliance.

59. Verizon's refusal to permit opposite side construction or authorize attachments below its own where safe to do so in order to address exorbitantly high make-ready costs is unjust, unreasonable, and discriminatory, as it disproportionately burdens new attachers that are trying to compete with existing attachers.

60. Instead, National Grid and Verizon should be compelled to allow OTELCO to employ time and cost-saving techniques where it can do so consistent with the NESC in order to address unreasonably high make-ready costs, avoid unnecessary pole replacements, and encourage competition.

C. The Pole Owners are Improperly Charging OTELCO to Correct Pre-Existing Non-Compliance.

[47] NESC Rule 013.B(3) (emphasis added)

[48] "[I]f adding a new item, or replacing or rearranging existing items would not, in itself, either (1) create a structural, clearance, or grounding nonconformance, or (2) worsen an existing non-conformance, then the addition, replacement, or alteration may be performed prior to correcting existing non-compliance items." NESC Rule 013.B(4).

61. Under established cost causation principles, a new attacher is responsible only for actual costs incurred necessitated solely by its attachment, since holding a new attacher liable for preexisting violations would "unfairly penalize[] the new attacher for problems it did not cause."[49]

62. Indeed, in January 2021, the FCC's Wireline Competition Bureau issued a Declaratory Ruling, clarifying that it is unreasonable and inconsistent with section 224 of the Communications Act, the Commission's rules, and past Commission precedent, for utilities to impose the entire cost of a pole replacement on a requesting attacher when the attacher is not the sole cause of a pole replacement.[50] The full FCC affirmed the Bureau's finding as consistent with 47 U.S.C. section 224, FCC rules and past FCC precedent.[51]

63. Here, OTELCO has identified numerous instances where the Owners are charging them for make-ready work to bring them into compliance with the NESC,[52] or assessing make-ready costs to OTELCO where make-ready and/or pole replacements could be avoided completely while still adhering to governing safety standards.[53]

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[49] *See, e.g.*, *Knology, Inv. 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, WC Docket No. 17-84; WT Docket No. 17-79, 33 FCC Rcd. 7705, ¶¶ 121-22 (Aug. 3, 2018) ("*August 2018 Third Report and Order*") *aff'd by City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020)).

[50] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Declaratory Ruling, 36 FCC Rcd 776, 777, at ¶ 3 (WCB 2021) ("*Pole Replacement Declaratory Ruling*").

[51] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Inv.*, WC Docket No. 17-84, 33 F.C.C. Rcd. 7705 (2018) ("*Second Further Notice of Proposed Rulemaking*").

[52] D. Allen Decl., ¶ 11, Ex. C.

[53] *Id*. at ¶ 13, Ex. E.

64. Numerous other states have similarly ruled that new attachers should not be responsible for the cost of correcting pre-existing non-compliance.

65. For example, in its recently amended rules, Maine provides: "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."[54]

66. Connecticut has ruled that costs arising during the make-ready process "should be borne by the cost causers,"[55] and corrected "by the responsible party" within 14 days of notification or by the pole owner, "at the expense of the responsible party."[56]

67. 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."[57]

68. 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. [58]

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[54] 65-407 Me. Code R. § 880-2 (11)

[55] Docket No. 11-03-07, DPUC Investigation into the Appointment of a Third Party Statewide Utility Pole Administrator for the State of Connecticut, Decision, (October 8, 2014) at p. 15.

[56] Docket No. 07-02-13 DPUC Review of the State's Public Service Company Utility Pole Make-Ready Procedures – Phase I, Decision (April 30, 2008), p. 15.

[57] 18-1 Vt. Code 8:3.708(I)(1)

[58] 807 Ky. Admin. Regs. 5:015, Section 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

69. Massachusetts should follow the lead of nearby certified states, and the FCC.[59] While Massachusetts is a certified state, and the Commission is free to forge its own path, it has found the FCC's guidance to be instructive on other important topics.[60] Indeed, the Massachusetts regulations incorporate the federal cost causation principle, providing that an attacher should not be required to bear costs "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…)"[61]

D. National Grid is Unreasonably Refusing to Provide Pole-By-Pole Cost Detail on Make-Ready Estimates.

70. 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 …"[62]

71. Maine's rules largely track the FCC: "Where a request for access is not denied, a pole owner must present to a requesting party an estimate of charges to perform

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prior to the new attachment."); *In the Matter of a 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*, 92 N.J.A.R. 2d (BRC) 37 (October 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. Utilities 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; 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.").

[59] *See, e.g.*, *Knology*, 18 FCC Rcd 24615 (2003); *August 2018 Third Report and Order*.

[60] *DTC August 2010 Comments* at 3.

[61] *Second Further Notice of Proposed Rulemaking* at ¶ 75.

[62] 47 CFR 1.1411(d).

all necessary make-ready work … The estimate must be detailed and include documentation sufficient to determine the basis for all charges." [63]

72. OTELCO already receives this type of detailed itemization of such costs from Verizon.

73. However, as discussed further below, National Grid has unreasonably refused to provide OTELCO with similar make-ready cost details, which are necessary for OTELCO to determine whether some costs to correct pre-existing non-compliance are being improperly classified as make-ready, as OTELCO suspects they are.

IV. OTELCO's Good-Faith Attempts to Resolve the Parties' Make-Ready Disputes Have Been Rebuffed by National Grid and Verizon.

74. Faced with exorbitant and unreasonable make-ready costs and delays, and consistent with the dispute resolution procedures in the Verizon PAA and the National Grid Attachment Agreement, OTELCO sought to collaborate with the pole owners to identify ways in which to reduce make-ready costs and other issues, while still meeting OTELCO's deployment goals.[64]

75. For example, in December 2021 OTELCO requested that National Grid provide it with a detailed breakdown of make-ready costs, similar to the type of detailed breakdown provided by Verizon. As received, the invoices only provided OTELCO with the sum total of make-ready being attributed to them. David Allen, Vice President of Network Operations, explained that OTELCO required this data in order to understand, for instance, "what is driving a make ready cost of $347K for 59 poles (nearly $6,000 per pole)" on two of the applications for which OTELCO had received National Grid's

[63] 65-407-880 Me. Code R. § 2(A)(4).

[64] Verizon PAA, Art. 15, § 15.10; National Grid Attachment Agreement, § 15.0.

make-ready invoices.[65] National Grid responded that "[w]e do not provide detailed charges for Make ready."[66]

76. Attempting to engage in meaningful discourse with National Grid, OTELCO explained that "[t]he issue is … [w]e have no way to know what was agreed upon as non-billable is in fact non-billable. Most other utilities provide a unit cost by item or task and that is what we are asking for."[67] But rather than fully address OTELCO's concerns, National Grid only provided them with the total cost of the make-ready for each pole (rather than a price for each task) and only on seven out of 95 applications. National Grid representatives Joy Bank also indicated that they had no intention of providing even this level of detail on a prospective basis.

77. Then on February 2, 2022, OTELCO presented Verizon with the results of CHR Solutions' detailed make-ready analysis on 385 poles across four applications. That presentation included a series of case studies using representative poles, and identified tremendous cost and time savings that could be achieved if OTELCO were permitted to attach below Verizon where sufficient ground clearance existed on a run of poles. Verizon unreasonably refused to consider this option in favor of maintaining its preferred position on the poles.

78. OTELCO identified another method of attachment that similarly eliminated the need for costly make-ready to achieve the required clearance: opposite side construction. OTELCO posited that opposite side construction should be permitted on certain poles where the cost of conventional attachments is exorbitant, and only where

[65] D. Allen Decl., ¶ 9, Ex. B.

[66] *Id.*

[67] *Id.*

the opposite side attachment would comply with applicable safety requirements and would not compromise safety. Indeed, OTELCO stressed that it was committed to performing its work safely and in compliance with the NESC.[68]

79. But rather than work with OTELCO to find solutions for lowering the cost of attaching to its poles to facilitate the advancement of broadband deployment, Verizon unequivocally struck down this suggested solution as well. Specifically, Verizon informed OTELCO that it will not and does not ever allow opposite side construction on poles, and will not authorize attachments below their own. Verizon also disputed some of the conclusions of OTELCO's outside assessment.[69]

80. However, OTELCO has identified numerous examples where Verizon has used and/or permitted opposite side construction on its poles. For instance, photographs taken by OTELCO show boxed Verizon poles located in Easthampton, Northampton, and Palmer, Massachusetts.[70]

81. OTELCO participates in a bi-weekly operations meeting with National Grid to discuss the status of its applications. During those meetings, OTELCO has suggested alternative methods of attachment, including opposite side construction, as a way in which to lower exorbitant make-ready costs and/or avoid unnecessary pole replacements.

82. Like Verizon, on April 6, 2022, National Grid unequivocally refused to negotiate make-ready determinations with OTELCO. National Grid representatives Joy Banks and Keith Amelin also stated that they would be cancelling OTELCO's

[68] *Id*. at ¶ 8, Ex. A.

[69] *Id*.

[70] *Id*. at ¶ 14, Ex. F.

applications for non-payment of make-ready unless payment is received by April 15, 2022.[71]

83. In order for OTELCO to be able to provide competitive, high-speed broadband service to underserved residents in Western Massachusetts in a timely manner and without further delay, it is necessary for this pole attachment dispute to be resolved as quickly as possible.

Count I – Unjust and Unreasonable Terms and Conditions of Attachment

84. OTELCO incorporates by reference as if fully set forth herein paragraphs 1 through 83 of this Complaint.

85. Facing unreasonably high make-ready costs in its effort to deploy competitive, high quality, high-speed broadband internet access to numerous communities throughout Western Massachusetts, OTELCO proposed using opposite side construction on poles owned or controlled by National Grid and/or Verizon where the cost of proposed make-ready was exorbitant, and only where opposite side construction would comply with applicable safety requirements or compromise network reliability.

86. Additionally, OTELCO proposed that in certain instances where sufficient space exists to maintain required surface, OTELCO should be permitted to attach its facilities below Verizon.

87. Neither the National Grid Attachment Agreement nor the Verizon PAA expressly prohibit opposite side construction or making attachments below existing attachments on the poles.

[71] D. Allen Decl., ¶ 17.

88. National Grid and Verizon's blanket denial of OTELCO's proposals constitute unjust and unreasonable terms and conditions imposed on OTELCO for attaching to National Grid and Verizon owned or controlled poles, in contravention of G.L. c. 166, § 25A and 220 CMR § 45.03.

89. Additionally, 220 CMR § 45.07 provides for "sign and sue." Accordingly, even if National Grid or Verizon purport to rely upon the broad discretion they may assert is reserved to themselves in their non-negotiable agreements, the Commission is free to conclude that such unbridled discretion is unjust, unreasonable, and discriminatory.

90. As a result of National Grid and Verizon's imposition of unjust, unreasonable, and discriminatory terms and conditions, OTELCO is suffering irreparable harm and will continue to suffer harm to its business.[72]

Count II – Unjust and Unreasonable Assessment of Make-Ready Work to Cover Pre-existing Non-Compliance

91. OTELCO incorporates by reference as if fully set forth herein paragraphs 1 through 90 of this Complaint.

92. As set forth above, National Grid and Verizon have engaged in a practice of shifting routine maintenance costs onto OTELCO under the guise of make-ready costs for work not caused or made necessary by OTELCO's attachments.

93. Under established principles of cost causation governing pole attachments, incorporated in the Massachusetts rules, OTELCO may not be charged to correct pre-existing non-compliance or for pole and/or plant upgrades.

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[72] *Id*.

94. Moreover, nothing in the parties' agreements alters established principles of cost causation by relieving National Grid or Verizon of their liability for their share of these costs. Indeed, the National Grid Attachment Agreement defines "Make-Ready Work" as limited to "the work required to accommodate *Licensee's* Attachment(s) on Pole(s)[.]"[73] Likewise, the Verizon PAA defines "Make-ready Work" as "[a]ll work … required to accommodate the attachment of *licensee's* facilities to a pole or anchor."[74]

95. National Grid and Verizon's improper assessment of make-ready work to OTELCO to cover pre-existing non-compliance and/or to reinforce or replace aging plant, as well as National Grid's refusal to provide OTELCO with a detailed breakdown of make-ready costs, constitutes unjust and unreasonable terms and conditions imposed on OTELCO for attaching to National Grid and Verizon owned or controlled poles, in contravention of G.L. c. 166, § 25A and 220 CMR § 45.03.

96. Additionally, 220 CMR § 45.07 provides for "sign and sue." Accordingly, even if National Grid or Verizon purport to rely upon the broad discretion they may assert is reserved to themselves in their non-negotiable agreements, the Commission is free to conclude that such unbridled discretion is unjust, unreasonable, and discriminatory.

97. As a result of National Grid and Verizon's imposition of unjust, unreasonable, and discriminatory terms and conditions, OTELCO is suffering irreparable harm and will continue to suffer harm to its business.[75]

Count III – Refusal to Provide Pole-By-Pole Cost Detail on Make-Ready Estimates

[73] National Grid Attachment Agreement, § 1.16 (emphasis added).

[74] Verizon PAA, § 1.10 (emphasis added).

[75] D. Allen Decl., ¶ 17.

98. OTELCO incorporates by reference as if fully set forth herein paragraphs 1 through 97 of this Complaint.

99. As set forth above, since December 2021, OTELCO has requested that National Grid provide it with a detailed breakdown of make-ready costs.

100. OTELCO seeks such detail so that they may determine whether some costs to correct pre-existing non-compliance are being improperly classified as make-ready, as OTELCO suspects they are.

101. OTELCO already receives a detailed breakdown of such costs from Verizon.

102. Yet National Grid has unreasonably refused OTELCO's request that it provide OTELCO with a detailed breakdown of make-ready costs.

Relief Requested

WHEREFORE, for the foregoing reasons, OTELCO respectfully requests that the DTC assert its jurisdiction over all matters raised in this Complaint and grant expedited treatment of this matter in order to promptly resolve all outstanding pole attachment issues between OTELCO, National Grid, and Verizon, and ORDER that:

a. National Grid and Verizon must allow OTELCO to attach where there is open space on the pole when it can do so consistent with governing safety specifications, and notify OTELCO that such space is available within 45 days of permit application;

b. National Grid and Verizon must allow OTELCO to attach to their poles even if there is pre-existing non-compliance on the poles so long

as OTELCO can safely attach in compliance with NESC Rule 013B without worsening pre-existing non-compliance;

c. National Grid and Verizon must allow OTELCO to use opposite side construction on poles where possible and safe in order to avoid costly make-ready work such as upgrading open wire to triplex or a pole replacement;

d. National Grid and Verizon must allow OTELCO to occupy the lowest position on the pole – including below the ILEC – as long as OTELCO can do so in compliance with the NESC, including surface clearance and separation requirements;

e. National Grid must provide invoices to OTELCO breaking down costs on a pole-by-pole basis;

f. DTC stay any attempt by National Grid to cancel OTELCO's pending applications;

g. OTELCO's attorneys be awarded attorneys' fees and costs associated with bringing this Complaint; and

h. Award any such other relief as the DTC deems just, reasonable and proper.

Respectfully submitted,

CRC Communications LLC d/b/a OTELCO

By its Attorneys:

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Date submitted: April 14, 2022

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2022, I caused a copy of the foregoing Pole Attachment Complaint and Request for Expedited Treatment and accompanying declaration and exhibits to be served via U.S. mail, first-class postage prepaid, in accordance with the requirements of 220 CMR § 1.05(1) on the following:

National Grid
Attn: Joy Banks
Manager, Third Party Attachments
40 Sylvan Road
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Joy.banks@nationalgrid.com
Tel.: 617-949-6134
(also sent via email)

National Grid
Attn: Commercial Legal
Legal Department
40 Sylvan Road
Waltham, MA 02451

Verizon New England, Inc.
Manager – License Administration Group
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Boston, Massachusetts 02114
Attention: Terrence Toland
Title: Agreement Manager
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___/s/ Maria T. Browne_____
Maria T. Browne