COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

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

OPPOSITION TO MOTION OF VERIZON MA TO EXCLUDE OTELCO'S SUPPLEMENTAL RESPONSE TO DTC-OTEL 1-14 FROM THE RECORD

Verizon New England Inc.'s ("Verizon") Motion begs the Department to disregard evidence concerning the prevalence of boxing on Verizon poles – primarily by Verizon itself – in Massachusetts. It's request is understandable – Verizon prefers to continue hiding behind its claimed lack of records concerning the extent to which it has boxed and allowed others to box poles. However, it is critical that the Department base its decision in this case on all available relevant information about Verizon's actual attachment practices in the field, particularly when that information directly contradicts Verizon's representations to OTELCO before the Complaint was filed, and its subsequent statements in this proceeding.

OTELCO is under a continuing obligation to supplement its responses to discovery where it "receives *or generates additional information*" prior to the "close of the record in this proceeding." DTC's First Set of Information Requests, Instructions at ¶ 2 (emphasis added); 220 C.M.R. § 1.06(5)(c)(5) ("A party is under a continuing duty to amend seasonably an earlier response if it obtains information that the response was incorrect or incomplete when made, or that the response, though correct when made, is no longer true or complete."). "The purpose of

discovery is to permit the parties and the Department 'to gain access to all *relevant* information in an efficient and timely manner.'" *In Re Fiber Techs. Networks, LLC.*, No. D.T.E. 01-70, 2002 WL 32101642 *10 (Dec. 24, 2002) (emphasis in original) . *See also In Re Fitchburg Gas & Elec. Co.*, No. D.T.E. 02-24/25, 2002 WL 31958793 *12 (Dec. 2, 2002) ("We take this opportunity to remind the Company that it is under a continuing obligation to amend seasonably its responses to discovery, direct examination, and cross-examination if it later obtains information that the response was incorrect or incomplete, or if the response, though correct when made, is no longer true or complete.")

Faced with assertions made for the first time in Verizon's Initial Brief that examples of boxing on poles in Massachusetts represent "only isolated errors on the part of Verizon" (Verizon Initial Brief at 12), OTELCO conducted ride-outs of Verizon poles over a period of just four hours on August 22, 2022, and gathered approximately 100 additional examples where Verizon has used or permitted boxing on poles in Belchertown, Holliston, Millis, Natick, Northampton, Palmer, Sherborn, and Wellesley, Massachusetts. *See* Suppl. Response to DTC-OTEL 1-14 and Exhibits 1-8. These examples not only undermine statements made in Verizon's Initial Brief disclaiming the "widespread [use of] boxing" and alleging that its "longstanding policy against boxing poles" is due to safety concerns (Verizon Initial Brief at 5, 12), but they also necessarily supplement discovery responses already in the record to ensure that this tribunal has a full and accurate understanding of the current use of boxing on poles in Massachusetts.

Tellingly, Verizon does not dispute the relevance of this information, and even recognizes the Department's "historical reluctance to exclude information from the record." Mot. at ¶ 10. Instead, Verizon argues that OTELCO's Supplemental Response should not even be considered because it would be "highly prejudicial" to do so (Mot. at ¶ 7), and because OTELCO improperly

"delay[ed]" submitting this "new information" until after Initial Briefs were filed and discovery was – in its opinion – "closed." Verizon Initial Brief at 12; Mot. at ¶¶ 6-7. Verizon's arguments are unpersuasive, and its Motion should be denied outright.

First, far from being "highly prejudicial" (Mot. at ¶ 7), at a minimum information *concerning Verizon's own boxing practices* is (and has always been) equally available to Verizon, and is entirely within the control of the pole owners. Any suggestion that information about its own pole attachment practices is "new" or comes as a surprise to Verizon is simply not believable.

Second, there is no validity to Verizon's claim that OTELCO "delay[ed]" providing this Supplemental Response such that Verizon has been deprived of a fair opportunity to respond. Mot. at ¶¶ 7, 9. On numerous occasions Verizon was asked during discovery to provide this type of specific information concerning its use of boxing in Massachusetts. *See* DTC-VZ 1-12 (seeking "the number of boxing requests Verizon has received over the past 10 years and the number of instances in which Verizon approved the request and boxed the pole"), 1-21 (requesting "five examples of poles in Massachusetts on which Verizon employs boxing for third-party attachments"), 1-22 (requesting "five examples of poles in Massachusetts on which Verizon employs boxing of its own attachments"), and 1-29 (requesting "the percentage of Verizon-owned or jointly owned poles covered by OTELCO's applications which are currently boxed"); OTELCO-VZ 1-3 (asking Verizon to identify boxed poles). In each instance, Verizon responded that it did not have records concerning its use of boxing, and "does not have sufficient information to respond." *See* Responses to DTC-VZ 1-12, 1-21, 1-22, and 1-29; Response to OTELCO-VZ 1-3. Similar information requests were posed to National Grid who also responded that it lacked any records." *See* Response to OTELCO-NG-3; Responses to DTC 1-5, 1-6.

Given its purported lack of records and information regarding its own boxing practices, one might expect that Verizon would do precisely what OTELCO did – i.e., spend a few hours in the field to gather information concerning currently-used attachment methods on its own poles. It did not. Instead, Verizon appears to have failed to conduct even a cursory investigation prior to responding to discovery and refrained from submitting any initial testimony in this case where it could have affirmatively addressed its permissiveness of boxing on specific poles in the Commonwealth. National Grid expressly declined to do so. *See* Response to OTELCO NG 1-3. Rather than pursue answers to discovery requests as required, however, Verizon seeks to leverage its own patent failure to conduct even a superficial investigation *of its own facilities* in order to exclude relevant evidence that minimal diligence would have revealed.

Third, Verizon's claim that it "has no procedural means of offering additional facts into the record" and has been deprived of a fair opportunity to respond is simply inaccurate. Mot. at ¶¶ 7, 9. If Verizon would now like to supplement its own discovery responses with additional information prior to when Reply briefs are due, it may – and is in fact obligated to – do so until such time as the record is closed. *See* DTC's First Set of Information Requests, Instructions at ¶ 2; 220 C.M.R. § 1.06(5)(c)(5). Indeed, had OTELCO simply provided these boxing examples to Verizon, *Verizon* would have been obligated to produce them to the Department. *See* 220 C.M.R. § 1.06(5)(c); *Fitchburg Gas & Elec. Co.*, No. D.T.E. 02-24/25, 2002 WL at *12. Furthermore, as Verizon points out there are still more than two weeks left until Reply briefs are due on September 8, 2022, (Mot. at ¶ 7), and any response it wishes to provide to OTELCO's Supplemental Response may be sufficiently addressed within its Reply. *See* Mot. at ¶ 10 (requesting "until September 8 – the date that reply briefs are due – to submit a response to OTELO's Supplemental Response").

OTELCO would be opposed, however, to additional rounds of testimony, particularly given Verizon's decision not to file opening testimony.

Fourth, while Verizon cites to 207 CMR 1.10(8) to support its argument that the record should have been considered closed after the parties submitted their final round of testimony (Mot. at ¶ 8), it fails to cite any authority as to when the record closes in a case such as this one, where there is no hearing. Still, OTELCO does agree that "[t]here has to be some point at which the Department will no longer accept new information in this case." Mot. at ¶ 7. Respectfully, OTELCO suggests that the Department should establish September 2, 2022 as that date so the parties have sufficient time to address any new information in replies.

Finally, the Motion also indicates that National Grid supports the arguments and relief requested by Verizon. Mot. at ¶ 12. National Grid's support of Verizon's Motion is perplexing, given that throughout this proceeding, it has stated that its primary concern is the safe and reliable provision of electricity to its customers, and that boxing constitutes a per-se and unacceptable violation of safety standards. Yet when shown approximately 100 examples of this allegedly unsafe practice currently in use in Massachusetts, National Grid chose to join Verizon in its bid to exclude such evidence from the record in this proceeding.

For all of the foregoing reasons, the Motion lacks merit and should be denied.

Respectfully submitted,

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