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

REPLY BRIEF OF CRC COMMUNICATIONS LLC, D/B/A OTELCO

September 8, 2022

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The Department should grant the relief requested by CRC Communications LLC, d/b/a OTELCO ("OTELCO") in its entirety. OTELCO's Pole Attachment Complaint and Request for Expedited Treatment ("Complaint"), the pre-filed testimony and all other evidence in the record, and the briefs of OTELCO and the New England Cable and Telecommunications Association ("NECTA"), show definitively that granting the requested relief will facilitate investment in and speed the deployment of needed broadband networks in the Commonwealth, while complying fully with applicable safety codes and regulations. By contrast, the initial briefs submitted by Verizon New England Inc. ("Verizon"), Massachusetts Electric Company d/b/a National Grid ("National Grid") (collectively, the "Pole Owners"), the Massachusetts Department of Public Utilities ("DPU"), and Westfield Gas & Electric ("Westfield"), give the Department no reason to perpetuate the Pole Owners' unlawful, unreasonable, and discriminatory pole attachment policies and practices.

I. INTRODUCTION AND SUMMARY

OTELCO's Complaint seeks relief that will enable it to deploy over 1,000 route-miles of fiber-to-the-premises ("FTTP") broadband to 17 Western Massachusetts communities not yet upgraded to FTTP by Verizon, despite its having provided Fios to more profitable areas in the Commonwealth for nearly 20 years. OTELCO's planned FTTP network would provide more broadband, in more places, for better prices to the benefit of Massachusetts citizens, businesses, and institutions. All the parties to this proceeding appear to agree that broadband has become essential to almost every facet of modern life, including education, employment, health care, and social interaction. Yet, as confirmed by their initial briefs, neither Verizon nor National Grid is willing to make *any* changes to its pole attachment policies to overcome the unreasonably long timeframes and exorbitantly high make-ready costs occasioned by its current practices.

In fact, when confronted with the implausibility of their attachment timeframes and make-ready charges, and OTELCO's proposals for reasonable changes to their practices that would alleviate these unnecessary barriers, the Pole Owners chose to double down on the status quo, insisting their application processing and make-ready practices are reasonable and non-discriminatory. But the record shows otherwise. The Pole Owners' application processing timelines (averaging nine months) and make-ready completion projections (five plus years) cannot be considered reasonable under any measure, including the Pole Owners' own attachment agreements. Verizon itself, in comments filed with the Federal Communications Commission ("FCC") described similar processes as "inefficient" and "impeding broadband deployment." Indeed, despite National Grid's strained interpretation of 220 C.M.R. § 45.03 as requiring only access *denials* in 45 days, its own pole attachment agreement template requires surveys to be conducted in this timeframe (with a 15 day extension for larger projects), consistent with the rule's

actual requirement. Nor can the Pole Owners' combined average make-ready estimate – $70,000 per mile – be considered reasonable given the actual make-ready costs OTELCO incurs in neighboring states. Nor can their refusal to allow boxing or attaching below Verizon be considered to be reasonable and non-discriminatory.

While the record in this case is replete with the Pole Owners' self-serving speculations about the harms that would unfold should any of OTELCO's requested relief be granted, neither pole owner has offered any actual examples to counter OTELCO's far more credible testimony – based in part on its extensive experience in neighboring states – that alternative construction techniques can be used safely and without compromising service reliability or restoration, or increasing pole owner costs. Moreover, in addition to being dependent upon the integrity of the pole structure and the availability of National Grid's electric service (which powers OTELCO's services), OTELCO is bound under its pole attachment agreements with National Grid and Verizon, as it is under publicly filed pole attachment tariffs in Connecticut (where boxing is prevalent and lowest-position attachment are allowed), to maintain insurance and indemnify the pole owners for any injuries or damage arising from its attachments. Thus, not only is OTELCO equally vested in sound construction practices, it would have been made aware of any claims resulting from its use of boxing or attaching below Verizon, had any occurred.

The fact is that if OTELCO had been permitted to use the same construction techniques used by Verizon to deploy its own services, including Fios – such as boxing or attaching in the lowest position on the pole – it already would have built a substantial portion of its network in Massachusetts. OTELCO is not, as the Pole Owners', DPU's and Westfield's briefs claim, looking for a competitive advantage. To be clear, unlike Verizon, OTELCO is not seeking the exclusive right to attach field side or to always occupy the lowest position on the pole. Significantly, the

other attachers in this proceeding, with which OTELCO also competes, support OTELCO's requested relief, even though such relief would lower OTELCO's costs. Nor does OTELCO seek to use boxing or attach below Verizon where doing so would be unsafe or would jeopardize service reliability or restoration. OTELCO requests only to use boxing where a pole is accessible by bucket truck, lift or ladder, and to allow it to attach below Verizon where it can sag in and still maintain required National Electrical Safety Code ("NESC") surface clearance taking into account the state's heavy loading criteria. And it seeks certain safeguards to ensure the Pole Owners do not unfairly shift maintenance and upgrade costs to OTELCO under the guise of make-ready work.

Prior communications attachers have not needed to use alternative construction methods as frequently as today's providers. As an initial attacher, Verizon typically has sufficient space to attach its facilities road-side, although the record shows that Verizon itself has boxed poles, including where it has deployed Fios. The next communications attacher – in many cases the cable companies – typically occupied surplus space on the poles and therefore historically had to replace fewer poles by comparison. But today, the poles are more crowded. And, as recognized by numerous other regulatory bodies, including Maine, New Jersey, New York, and the FCC, among others, opposite side construction should be allowed where, as in Massachusetts, it is used already, and not just in the same precise circumstances in which it has been used by incumbents, since new entrants face different circumstances.

Finally, the Department should reject ill-timed suggestions that a more extensive proceeding than this, or a rulemaking, is required to address OTELCO's claims, and arguments that the Department should abdicate its mission to expand high-quality broadband at just and reasonable rates in deference to National Grid's managerial discretion. The Department and its predecessors have long regulated pole attachments and other matters through proceedings such as

this. The fulsome record developed over the course of this proceeding, available guidance from nearby certified states and the FCC, and high level of stakeholder participation, further underscore that the case – which is one of first impression in this jurisdiction – is ripe for consideration.

II. COMPETITIVE BROADBAND NETWORKS WILL NOT BE BUILT IN MASSACHUSETTS UNLESS THE DEPARTMENT REQUIRES THE POLE OWNERS TO CHANGE THEIR CURRENT APPLICATION PROCESSING AND MAKE-READY PRACTICES

The record in this proceeding conclusively establishes that the Pole Owners' current pole attachment application and make-ready practices take far too long and cost far too much. Nothing in the Pole Owners' briefs even hints otherwise. Indeed, despite Massachusetts' regulations requiring applications to be processed in 45 days[1] and the timelines set forth in the parties' pole attachment agreements,[2] Verizon has taken nearly six months to produce an estimate while Grid has taken nearly nine months. On top of this, National Grid estimates it will take at least ***three years*** just to complete the work for which it has produced an estimate – hardly the "commercially reasonable timeframe" required by its pole attachment agreement.[3] In this case, Verizon suggests that ten years is the norm, since this is what it took to deploy the MBI fiber network after the creation of a four-year long task force (Verizon Panel Testimony at 26:13-16), and does not back away from that position in its brief. Yet, in 2018 advocacy to the FCC, Verizon argued:

> Expediting the make-ready process can reduce payback periods and thus spur increased investment for next-generation networks.

[1] 220 C.M.R. § 45.03(2).
[2] *See* Complaint Exhibit 2, Verizon Pole Attachment Agreement § 5.1 (survey results to be provided within 45 days of complete license application and survey fee payment) and § 5.4 (requiring make-ready to be performed within six months); *see* Complaint Exhibit 3, National Grid Wired Aerial License Agreement § 3.3 (requiring the field survey to be conducted within 45-60 days following receipt of a complete application depending on the size of the application), § 3.6 (requiring the estimate to be provided within 14 days of the decision to grant access) and § 3.10 (requiring National Grid to use commercially reasonable efforts to complete the make-ready work within 90 to 135 days, depending on the application size).
[3] National Grid Attachment Agreement § 3.8.

> The current process is inefficient; impeding broadband deployment and creating additional burdens for pole owners.[4]

In addition to taking too long, the Pole Owners' make-ready estimates – which average $70,000 per mile – are three times what OTELCO budgeted and several more times what it has actually spent to build its FTTP network in neighboring states. The reality is, competitive, privately funded broadband networks simply will not be built in Massachusetts under these timelines and at this cost.

A. The Pole Owners' Casual Disregard for the Untenable Delay and Cost Per Mile Driven By Their Current Practices Necessitates Department Intervention

Neither Verizon's, National Grid's, nor the DPU's briefs address the fact that the Pole Owners' make-ready estimates are ***seven times*** or more OTELCO's actual make-ready costs in neighboring states. Nor do they express concern over the fact that unless another solution is found, it will take more than ***five years*** for OTELCO to build its state-of-the-art, FTTP network in Western Massachusetts. Whether these omissions were intentional (because they cannot be justified) or simply reflect their lack of understanding of building a privately funded, competitive broadband network, the important question is what can be done to improve access to broadband for Massachusetts citizens, businesses and institutions.

Rather than address OTECLO's reasonable concerns and propose solutions, the Pole Owners chose to use their testimony, Information Request ("IR") responses and opening briefs as opportunities to attack OTELCO's intentions and cast aspersions on its business practices. The Department should look beyond the Pole Owners' unwarranted, unsupported rhetoric and

[4] Verizon Wireline *Ex Parte* Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed Nov. 13, 2017), at Attachment, Nicholas Vantzelfde, Managing Partner, Communications Media Advisors, LLC, *Perspectives on the Current State of Make Ready and the Potential Impact of a One-Touch Make-Ready Policy*, at 4 (2017) (CMA Report).

consider the truth: space exists on the majority of poles to which OTECLO seeks to attach without having to perform costly, time-consuming make-ready work and that space may be used safely and without compromising the pole structure or the facilities attached thereto.

The fact of the matter is that the Pole Owners' application processing and make-ready projected timelines do not comply with Massachusetts rules or the even the terms of their own pole attachment agreements. The Pole Owners argue that all that is required of them by Massachusetts law is that they deny access within 45 days, and that if they do nothing during this timeframe, that access is deemed granted. *See* National Grid Initial Brief at 27-28 (stating "[i]t is not an 'access timeline', it is a 'denial timeline.'"). Yet, even this nonsensical interpretation is belied by the Pole Owners' own pole attachment agreements, which require ***surveys to be performed*** such that access may be granted or denied in 45 days – the correct interpretation of the Massachusetts rule.[5] The FCC, in interpreting its prior rule which employed the same language as rule 45.03, explained "[the 45-day response] rule is functionally identical to a requirement ***for a survey and engineering analysis*** when applied to wired facilities."[6] As a practical matter, however, even when they have not formally denied an application, their failure to follow through to the next steps prevents competitive network deployment just as effectively as a denial. Moreover if, as National Grid insists, access is granted if not denied in 45 days, its own agreement requires it to provide a make-ready "estimate to Licensee" within 14 days after access has been granted, rendering the make-

[5] *See* National Grid Agreement § 3.3; Verizon Agreement § 5.3.

[6] *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, 5254-55 ¶ 24 (Apr. 7, 2011) (emphasis added) (hereinafter "*2011 Order*") (emphasis added); *see also id*. at n.79 (quoting Utility Telecom Council Comments explaining that, under the rule, "an application must be approved or denied in writing within 45 days from the date that it is filed with the utility. The typical process involves reviewing the proposal for completeness, conducting a field survey, conducting an engineering analysis (load and clearance), estimating make-ready and construction costs, submitting the estimate to the applicant and approving the attachment.").

ready estimate due within approximately ***two***, not nine, months of an application being filed.[7] The National Grid Attachment Agreement also requires National Grid to commence make-ready work within a commercially reasonable timeframe after acceptance and payment of the estimate.[8] But National Grid has testified it will take at least three years to complete the work for only those of OTELCO's applications it has already processed, National Grid Panel at 17:4-13; National Grid Initial Brief at 28, a timeframe that is infeasible for a privately funded competitive broadband provider, and as such, not commercially reasonable.

OTELCO does not dispute that its project includes a substantial number of poles or that the Pole Owners' non-negotiable templates afford them leeway to extend the make-ready work timelines in certain circumstances;[9] however, even the pole owners' discretion must be exercised reasonably and without favoring itself or other providers, and cannot be used to justify a delay of any length it sees fit.[10] The FCC's and Maine's timelines – both of which account for larger projects – afford a measure for what is reasonable. *See* OTELCO Initial Brief at 14. A five to ten year attachment process cannot be deemed to meet even the most forgiving interpretation of reasonableness. Nor has National Grid's applicant-directed design model, touted in National Grid's brief as a solution, been able to alleviate these delays and has instead, at times, contributed to them by requiring duplicative work and producing inconsistent results between National Grid and its own contractor "incorrectly" applying National Grid's standards. *See* OTELCO Initial Brief at 29 (citing Allen Direct at 6:21-8:6).

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[7] National Grid Attachment Agreement § 3.6.
[8] *Id.* § 3.8.
[9] National Grid Attachment Agreement § 3.11 (giving National Grid "sole discretion" to extend 90-135 day make-ready timeframes in section 3.10); Verizon Attachment Agreement § 5.4 (requiring Verizon to use "every reasonable effort to complete Make-ready Work within six (6) months").
[10] *See* G.L. c. 166, § 25A; 220 C.M.R. § 45.03; *2011 Order*, 26 FCC Rec. at 5340 ¶ 227 (stating "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.").

The Pole Owners' attempt in their briefs to cast OTELCO as singularly focused on cost and as having no concern for safety or the reliability of the pole owners' networks lacks any foundation (and simply is false). First, as OTELCO has made clear from the outset of this proceeding, it only seeks to avoid unnecessary costs *and delay* (intentionally downplayed by the Pole Owners' briefs) where it can it do so consistent with governing safety standards. *See* Compl. ¶¶ 29, 37, 60, Relief Requested at (a); OTELCO Initial Brief at 56. OTELCO is equally, if not more, vested in ensuring that its attachments do not compromise safety, the pole's integrity, or electric service reliability as are the Pole Owners. After all, its services depend on the poles remaining upright and National Grid's electric services remaining reliable, and OTELCO has contractual liability and indemnification obligations for any damage or injury arising from its attachments.[11] Thus, National Grid's claim that OTELCO has "no stake in the reliability of the electric distribution system" (National Grid Initial Brief at 16) is nothing short of ridiculous. Indeed, OTELCO's network would not be operational if the poles fail or electric service is compromised.

Nor is OTELCO seeking to obtain a competitive advantage as Verizon, National Grid, Westfield and the DPU assert. *See, e.g.*, Verizon Initial Brief at 13 (suggesting OTELCO is seeking to "remake Massachusetts pole attachment policy to its own advantage"); National Grid Initial Brief at 10 (arguing OTELCO "is seeking to shift the costs of deploying its networks in Massachusetts to National Grid and its customers"). Indeed, Westfield's unsupported allegation that OTELCO is intentionally submitting applications to prevent it from providing broadband lack any credibility or basis in fact and should be disregarded. Poles today are simply more crowded than they were when existing networks were built. As Dr. Slavin, an expert in pole attachment

[11] *See, e.g.*, Compl. ¶ 11; National Grid Attachment Agreement § 13.0; Verizon PAA §§ 13.4, 13.5.

technique and member of the NESC Advisory Board, testified: "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." Slavin Direct at 7:7-9. Verizon originally attached to poles as a joint owner – when only it and the electric company occupied the poles. Still, Verizon has used alternative construction techniques for its own needs. *See* OTELCO Initial Brief at 29. The Commonwealth's cable companies, which have filed in support of OTELCO's Complaint, historically attached to surplus pole space, thereby reducing the need for costly make-ready, such as pole replacements. Today, however, cable companies too seek to improve the pole owner application and make-ready practices, including through the use of alternative construction techniques. *See generally* Initial Brief of The New England Cable and Telecommunications Association.[12]

That it took MBI *ten* years to build its network (Verizon Panel at 26:13-16), four of which required supervision by a make-ready task force, should not be viewed as an acceptable standard, as Verizon suggests. OTELCO Initial Brief at 14-15. Moreover, Verizon's suggestion that OTELCO's use of alternative construction methods will disadvantage it in its efforts to deploy new broadband services not only is unconvincing, but also shows Verizon's anticompetitive motivation, which its brief reveals quite blatantly:

> Given that Verizon MA has finite resources for outside construction work, imposing new demands on those resources would force Verizon MA to set aside or at least re-prioritize and delay the other work it performs on the network, including expanding Verizon MA's Fios broadband services . . .

[12] *See also* Comments of NCTA – The Internet & Television Association, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, at 32-34 (June 27, 2022).

Verizon Initial Brief at 17. In fact, Verizon has offered Fios since 2004, and completed its first Fios expansion project in Massachusetts in 2008.[13] Yet the FCC's broadband map shows that Verizon still only offers Asymmetric Digital Subscriber Line ("ADSL") in the two Western Massachusetts counties that are the subject of OTELCO's Complaint – Hampshire and Hampden.[14] Clinging to the status quo simply will not suffice if the Commonwealth wants to ensure continued investment by competitive broadband providers actually seeking to deploy broadband to Massachusetts residents, business and institutions in the near future. This is the problem OTELCO is trying to solve.

B. OTELCO's Requested Relief Will Advance the Commonwealth's Goal of Making Ubiquitous, Competitive Broadband Available to Massachusetts Citizens, Businesses, and Institutions Without Compromising Safety or Reliability

1. The prevalence of boxing in Massachusetts and complete lack of evidence that boxing has impaired safety or reliability, or increased costs, compels its allowance when poles are accessible by bucket trucks, lifts or ladders.

Verizon's complete unwillingness to provide the Department with concrete information about the extent to which it has utilized boxing in Massachusetts reveals the true state of affairs: Verizon, not OTELCO, seeks a competitive advantage over other communications service

[13] *See* https://www.verizon.com/about/news/verizon-completes-600-million-network-expansion-projects-massachusetts.

[14] FCC Broadband Map. OTELCO requests that the Department take official notice of the FCC Broadband Map pursuant to 207 C.M.R. § 1.09 which provides that "official notice may be taken of such matters as might be judicially noticed by the courts of the United States or of the Commonwealth … and in addition, the Department may take notice of general, technical, or scientific facts within its specialized knowledge …." Because the content and existence of the FCC Broadband Map is capable of accurate and ready determination by resort to sources that "can be accurately and reasonable determined from a source whose accuracy cannot reasonably be questioned," namely the FCC's official website. *See Sullivan v. Cora Operations, Inc.*, No. SUCV160283BLS2, 2016 WL 6908357, at *2 (Mass. Super. Sept. 8, 2016) ("[A] Court may take judicial notice of facts that cannot be reasonably disputed where they 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'"), *af'f'd*, 92 Mass. App. Ct. 1124, 102 N.E.3d 428 (2018); Fed. R. Evid. 201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it … can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.").

providers. Indeed, the Hearing Officer recently observed that "some of Verizon's responses in this proceeding regarding its lack of information on its own practices may strain credibility …." *See* Sept. 2, 2022, Hearing Officer Ruling on Motion of Verizon to Exclude OTELCO's Supplemental Response to DTC-OTEL 1-14 from the Record at 4. To date, Verizon has used boxing when it serves Verizon's needs, in Massachusetts and other states. *See* OTELCO Initial Brief at 29. Yet when OTELCO requested to use this construction convention, Verizon claimed never to allow its use. Only after OTELCO filed its Complaint, did Verizon concede a slightly more lenient "policy." OTELCO Initial Brief at 19-20. But, when asked whether it boxes poles and to provide examples, Verizon claimed to have no records. *Id*. at 20; Verizon's Responses to DTC-VZ 1-12, 1-21, 1-22, and 1-29; Verizon's Response to OTELCO-VZ 1-3.

Both Verizon and National Grid brandish safety as a weapon, claiming that OTELCO would willingly "jeopardize" public and worker safety by employing construction techniques already in use by Verizon and ubiquitously deployed in other states. *See, e.g.*, National Grid Initial Brief at 4, 5. Yet neither produces a single example of safety issues stemming from the use of opposite side construction, despite its use by Verizon in Massachusetts and elsewhere. They also offer no real-world examples to support their claim that boxing would make the pole weaker and more likely to fail. *See* National Grid Initial Brief at 16; OTELCO Initial Brief at 34 n.59 (citing National Grid Panel at 14:11-15). Instead, National Grid and Verizon talk past OTELCO's witness, NESC Committee member Dr. Slavin, and fail to recognize that other attachments on the pole are more likely than a boxed fiber attachment to impact the poles' physical condition. Slavin Responsive at 1:22-2:4. Moreover, National Grid's claim that it is "unrefuted" that boxing inhibits utility personnel's ability to climb the poles to repair facilities during service interruptions (National Grid Initial Brief at 12) is simply incorrect. Dr. Slavin directly refuted National Grid's

statement concerning climbing, explaining that boxing is consistent with the NESC, which allows for climbing around longitudinal lines. OTELCO Initial Brief at 32 (citing Slavin Direct at 9:9-10:6).[15] For its part, Verizon's statement that boxing would interfere with its ability to climb poles to access its facilities – located in the lowest pole position – is simply not credible (the boxing would be located *above* their facilities) and indicative of the lengths it will go to try to drum up arguments against competition. *See* Verizon Initial Brief at 3, 5. And while Dr. Slavin testified that boxed poles may still be climbed, this issue does not require resolution by the Department since OTELCO only seeks to using boxing where poles are accessible *without* climbing, similar to how it is allowed in Maine. *See* OTELCO Initial Brief at 56-57.

In response to OTELCO's testimony concerning the company's extensive use of boxing in neighboring states, including Connecticut where it has used boxing on over 100,000 poles without a safety incident (OTELCO Initial Brief at 35 (citing Perrone Direct at 4:4-7)), the Pole Owners assert that OTELCO would not have been in a position to know about safety issues stemming from its attachments. National Grid Initial Brief at 15-16; Verizon Initial Brief at 9-10. In fact, National Grid makes the outrageous claim that "OTELCO has displayed complete ignorance of pole construction … and a disregard for safety" in a desperate attempt to undermine Mr. Perrone's testimony that he was unaware of any outages caused by its boxed facilities. National Grid Initial Brief at 15-16. Such a claim is irresponsible and ridiculous. Instead, the record shows that

[15] For instance, Verizon argues in its Initial Brief that boxing compromises safety, and repeats National Grid's misleading reference to NESC Rule 236(a)(1) while ignoring NESC Rule 236G. Verizon Initial Brief at 8-9. As Dr. Slavin explains, NESC Rule 236G states that "[l]ongitudinal runs on racks, or cables on messengers, are not considered as obstructing the climbing space if the location, size, and quantity of the cables permit qualified workers to climb past them." And NESC Interpretation Request 563 explained that while prior versions of that Rule required wires to be covered with protective equipment before climbing past them, this requirement was subsequently removed to reflect that "workers were not covering communication cables when climbing past them *and it was determined that such action was not a safety issue*." Slavin Direct at 9-10 (emphasis added).

OTELCO has extensive experience using existing utility poles to deploy its FTTP network, including employing opposite side construction and attaching below Verizon on tens of thousands of poles. *See* OTELCO Initial Brief at 26-27, 35, 43; Perrone Responsive at 4:11-12, 5:3-6. Indeed, just as OTELCO is contractually responsible for carrying insurance that names the Pole Owners as additional insureds, and for injuries and damages stemming from its facilities and practices, through its agreements with Verizon and National Grid in Massachusetts,[16] it is similarly bound by the insurance and indemnification terms and conditions of publicly filed pole attachment tariffs in Connecticut.[17] Accordingly, OTELCO and/or its insurance carrier would have been notified of any claims related to its facilities in the ordinary course. That there were no claims most certainly means there were no incidents. Thus, not being aware of an incident is persuasive evidence that no such incident has arisen. Further, the pole owners' arguments concerning purported detriments of boxing must fail in light of their (likely strategic) blindness in studiously avoiding maintenance of records of when their professed "standards" against the practice are relaxed. If Verizon and National Grid claim to know of no instances whatsoever where boxing has been utilized, how can they simultaneously claim any knowledge of the safety and reliability impact of the practice? If either party had actual evidence (rather than their proffered hypothetical

[16] National Grid Attachment Agreement § 13.0; Verizon PAA §§ 13.4, 13.5.

[17] *See, e.g.*, Verizon Form Connecticut Pole Attachment Agreement, *Liability and Damages*, at Art. VI(2)-(3), *available at* https://www22.verizon.com/wholesale/attachments/pcl/PCL_CT_Pole_Agmt.pdf; The Connecticut Light and Power Company, dba Eversource Energy Wire-Based Telecom Pole Attachment Tariff at 3, https://www.eversource.com/content/docs/default-source/rates-tariffs/ct-electric/telecom-pole-attach-wired.pdf?sfvrsn=399afe62_12 (requiring the "Telecom Operator" to indemnify Eversource against any liability related to "property damage or injury or death to persons … which may arise out of or be caused by the erection, maintenance, presence, use or removal of the Telecom Service facilities or by the proximity of such Telecom Service facilities to the respective cables, wires, apparatus and appliances of the Company, any third party, any joint user of the poles and/or right-of-way structure" and requiring the Telecom Operator to carry insurance to protect Eversource for any such liability).

suppositions) of lack of safety, one can be certain that evidence would be front and center. The "dog that didn't bark" instead provides compelling testimony: boxing is safe.

Failing to show any examples of problems resulting from boxing, the Pole Owners' briefs shift toward arguments focusing on *potential* problems related to service restoration after storms. *See* Verizon Initial Brief at 5-8, 10-11; National Grid Initial Brief at 6, 10-17. However, OTELCO, the only party that admits to having used boxing in this proceeding and which has used it extensively, testified that boxing has not interfered with service restoration. OTELCO Initial Brief at 39-40 (citing Perrone Responsive at 5:1-3). Moreover, in Connecticut, where boxing is prevalent, the PURA recently issued a decision concerning ways to improve electric and communications service restoration after emergency events, such as storms, which does not even mention boxed poles.[18] This is not surprising given PURA's decision issued earlier this year that affirmed the right of attachers to continue boxing poles in Connecticut.[19]

The Pole Owners' briefs also underplay the benefits of using boxing to avoid a premature pole replacement – something they both otherwise claim to be very important. *See, e.g.*, National Grid Initial Brief at 7 (stating electric customers "derive no direct benefit from the premature replacement of existing and functional utility poles …"). Avoiding pole replacements until such time as the pole would lose sufficient strength benefits not only OTELCO and other new attachers, it benefits Verizon and National Grid. *See* OTELCO Initial Brief at 30-31 (discussing recent comments submitted to the FCC by other utilities concerning "net loss" associated with prematurely replacing poles). Other utilities have recognized the clear benefits derived from

[18] *Decision, 2022 PURA Review of Connecticut Public Service Co. Emergency Response Plans*, Docket No. 22-02-10 (Aug. 31, 2022) (available here).
[19] *PURA Investigation of Developments in the Third-Party Pole Attachment Process – Make-Ready*, Docket No. 19-01-52RE01, Decision, at 49-50 (May 11, 2022)

avoiding prematurely replacing poles to accommodate communications attachers.[20] Boxing not only avoids an otherwise unnecessary pole replacement, it frees up the Pole Owners' "finite resources" to focus on their own networks and service needs – again, something they claim to be very important. *See* Verizon Initial Brief at 5 (referencing "limited resources" for "other projects"); *id*. at 7 (stating "extra pole replacement time will materially constrain and impair Verizon MA's resources for other projects"); National Grid Initial Brief 12-13, 25 (referencing "constrained" or limited resources). By reducing the number of premature pole replacements, boxing also benefits the Commonwealth by avoiding unnecessary street closures and municipal oversight, as well as reducing the number of double poles (and their untimely removal), which continue to be a source of frustration for policy-makers. *See, e.g.*, OTELCO Initial Brief at 31 & n.51 (discussing public benefit of reducing double poles). Indeed, despite the existing legal requirement that pole owners remove double poles within 90 days (G.L. c. 164, § 34B), the owners' widespread failure to comply with this requirement has created such a problem that legislation has

[20] *See* Aug. 26 Reply comments of the Coalition of Concerned Utilities in Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, at ii ("prematurely replacing poles for communications companies is time-consuming, resource heavy and a considerable burden and inconvenience to utility pole owners"); *id.* at 4 ("prematurely replacing poles for communications attachers: (1) is time consuming, resource-heavy, onerous and costly; (2) diverts scarce utility resources from other utility priorities; (3) sacrifices essential system reliability and improvement projects; and (4) risks electric system outages."); Aug. 26 Reply comments of Virginia Electric and Power Company d/b/a Dominion Energy Virginia and Dominion Energy North Carolina, Dominion Energy South Carolina, Inc. and Xcel Energy Services Inc., in Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, at 15 ("the record shows that pole replacements performed solely to provide capacity for new communications attachments instead impose substantial costs and burdens on the pole owner and on electric utility operations. … burdens include: the large number of utility and external personnel required for the various steps in the pole replacement process; the impact on utility workflow functions; the impact on a utility's own maintenance and construction schedules; the diversion of personnel and other resources from other utility projects; the need to deenergize electric lines and to coordinate outages with the utility's electric grid operations and with affected customers; the scarcity of qualified contractors, designers, and linemen; and supply chain issues that affect the cost and availability of replacement poles, guy wires, and other essential materials.").

been introduced that would give municipalities the ability to remove the old pole and transfer facilities themselves.[21] Boxing would alleviate these problems.

The Pole Owners' attempts to minimize the conclusions of other regulatory bodies – that boxing should be allowed wherever pole owners allow its use – should not persuade the Department to deny OTELCO's requested relief. First, the record shows that Verizon boxes poles, including those jointly owned with National Grid, and therefore "must allow other attachers to do the same."[22] Second, as even Verizon and National Grid recognize, Maine requires pole owners to allow boxing regardless of whether they would otherwise disallow its use. 5-407 CMR Ch. 880, § 2(B); Verizon Initial Brief at 11; National Grid Initial Brief at 12. As the Maine PUC directed Verizon, "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."[23] Third, at the time the FCC adopted its boxing rule (followed by state regulators), pole owners, such as National Grid, had not yet adopted policies disallowing boxing in all but the narrowest of circumstances governed by their sole discretion, as National Grid did in 2012, allowing them to avoid a parity requirement.[24]

Moreover, since then, pole owners' "sky-is-falling" assertions that poles would fail, workers would be injured and electric service would be impaired because of boxing, simply have not come to fruition. At the same time, the street-side of poles have become more crowded. Today, if boxing is not allowed, poles will have to be replaced, despite otherwise "being fit for purpose."

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[21] *See* Mass. Bill H.3258, https://malegislature.gov/Bills/192/H3258.

[22] *Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, 15 FCC Rcd. 9563, 9572 ¶ 19 (CS Bur. 2000) (utility that "uses extension arms and boxing for its own attachments ... must allow other attachers to do the same") (footnote omitted), *vacated on other grounds*, 17 FCC Rcd. 24414, 24420 ¶ 19 (Enf. Bur. 2002).

[23] 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 15 (Oct. 26, 2006) (hereinafter "*Oxford Pole Order*").

[24] *2011 Order*, 26 FCC Rcd. at 5340 ¶ 27.

The FCC and other state regulators have recognized the benefits of allowing boxing, and have even applauded its use.[25] Finally, boxing is prevalent throughout Connecticut, where its use was recently reaffirmed to be a sound construction practice. OTELCO Initial Brief at 43; Decision, Docket 19-01-52RE01, *PURA Investigation of Developments in the Third-Party Pole Attachment Process – Make-Ready*, 49-50 (May 11, 2022) The Connecticut PURA specifically found: "Field Side Attachments Are Permitted …Boxing has existed in Connecticut for a number of years ….the concerns of the attachers largely outweigh the benefits of further restricting boxing." *Id.*

2. Verizon's insistence that its competitors pay to ensure that Verizon remains in the lowest pole position is inherently discriminatory and must not be allowed to continue.

That Verizon has become accustomed to maintaining its facilities in the lowest compliant spot on the pole should not be grounds for allowing this practice to continue to the detriment of competitive broadband deployment. Yes, it is true, that this construction alternative will not save as much time or avoid as much unnecessary, costly make-ready work as would the ability to attach to the clean field side of the pole. Still, the ability to attach immediately below Verizon, without having to wait until Verizon lowers its lines, would help to significantly reduce construction delays, and the arguments against its use are simply unpersuasive. There is no safety issue, since OTELCO would only use this technique if it could sag in and maintain required surface clearance, as it has on thousands of poles in Maine. *See generally* OTELCO Initial Brief at 44-50. Further, OTELCO's own self-interest would prevent unwise or indiscriminate use of this technique. Given OTELCO's interest in ensuring the integrity of its fiber network (and avoiding contractual

[25] *See* *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*, 1991 N.J. AGEN LEXIS 2517, at *17-18, 92 N.J.A.R.2d(BRC) 37 (Oct. 4, 1991) (commending 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").

liability), it would not use this technique if its fiber were likely to come into contact with Verizon's much heavier copper lines. *See id*. at 56-57 (requesting DTC order Pole Owners to allow OTELCO to attach in the lowest position on the pole "where it can do so in compliance with the NESC, including surface clearance and separation requirements"). Additionally, OTELCO would tag its facilities, as it is required to do under its pole attachment agreements, to ensure that its facilities could be identified appropriately in the event of a downed line.[26] Moreover, if allowed to attach below Verizon, OTELCO would ensure that in transitioning positions it does so in a manner that complies with appropriate safety and construction standards, including the NESC and Blue Book. OTELCO Initial Brief at 56-57.[27]

If the Department agrees with Verizon that it should be allowed to maintain its "hierarchical" advantage, the Department could nevertheless require Verizon to commence lowering its facilities now at its own expense to make room for competitive attachers at the time they seek attachment.[28] Doing so would prevent Verizon from imposing unfair costs and delay on its competitors. Alternatively, the Department could adopt a one-touch make-ready ("OTMR") approach like the FCC and other certified states, including nearby Maine, *see* OTELCO Initial Brief at 14, and Vermont.[29] OTMR would allow third party attachers to lower Verizon's facilities

[26] National Grid Attachment Agreement § 3.17; Verizon PAA § 7.1.11.
[27] On more than one occasion, Verizon's Initial Brief mischaracterizes Dr. Slavin's testimony concerning clearance issues if OTELCO were permitted to attach in the lowest position on the pole. First, Dr. Slavin said that *boxed* lines are less likely to come into contact but still should not be a problem due to sagging in. *Compare* Verizon Initial Brief at 15 *with* Slavin Responsive at 2:9-20. Second, in terms of the impact of weather, Dr. Slavin was referring to incremental effect of severe weather conditions, where the subsequent sag (due to incremental increase) "may be essentially the same, or even less, for an already installed heavy copper cables than that of a smaller, lighter fiber cable." *Compare* Verizon Initial Brief at 17 *with* Slavin Direct at 16:1-17.
[28] *Oxford Pole Order*, Order at 14 (finding Verizon's prohibition against third-party attachers placing their cable below Verizon's to be an unreasonable act and practice).
[29] Vermont PUC Rule 3.708(M).

in a timely manner using a qualified contractor.[30] While this would not address the unnecessary expense to attachers of lowering Verizon's facilities, it at least would lessen unnecessary delays. OTMR should cause no problems for Verizon, since it advocated adoption of OTMR in Massachusetts in the 2019 pole attachment rulemaking proceeding: "Verizon agrees with ExteNet and CenturyLink that the Departments should adopt in Massachusetts the FCC's one touch make-ready rules, including rules governing the timeline for access to utility poles, use of contractors, and overlashing set forth in 47 CFR 1.1411, 1.1412, and 1.1415."[31] Verizon also urged adoption of OTMR to Pennsylvania and the FCC, where it advocated to use OTMR for both simple and *complex* make-ready work as well as for work in the power supply space itself.[32]

3. The Department should ensure that pole owners pay for work that benefits them.

The record in this proceeding is clear: pole owners shift costs to attachers for work that benefits the pole owners, and it is something that the Department should not tolerate. Verizon and National Grid would prefer that OTELCO pay to replace their older, shorter poles. They claim, predictably, that they are not seeking to upgrade their many-decades-old plant at OTELCO's expense. *See, e.g.*, National Grid Initial Brief at 18, 22-23. Rather, they argue that expensive, time-consuming make-ready work is simply the cost of entering the broadband market and is the

[30] *See* 47 C.F.R. § 1.1411(j).

[31] *Order Adopting Final Regulation, 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*, Docket No. D.P.U. 19-76-A, D.T.C. 19-4-A, 2021 MASS. PUC LEXIS 400, at *18 (Dec. 7, 2021) (citing Reply Comments of Verizon New England, Inc., available at https://www.mass.gov/doc/dtc-19-4-verizon-new-england-inc-reply-comments/download).

[32] *See* Comments of the Verizon Companies, Pennsylvania PUC Docket L-2018-3002672, *Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission* (Oct. 29, 2018) at 4, 6; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd. 7705, 7716 (2018) ¶ 17 (citing Verizon in support of self-help for simple makeready) and ¶ 20 (citing Verizon in support of self-help for complex make-ready and work in the power supply space).

only way to avoid their own customers' subsidizing OTELCO's network. *See, e.g.*, National Grid Initial Brief at 21; Verizon Initial Brief at 8. But, as set forth above, prior attachers have not faced similar obstacles to deployment and thus, where efficient construction alternatives exist to avoiding costly make-ready, they should be allowed where doing so is consistent with governing safety standards. Where construction work is necessary to make a pole compliant with governing standards, and would benefit the pole owner by, for example, replacing an older, shorter pole with a brand new taller pole, and/or by also correcting existing non-compliance (admittedly present on 6.7 percent of the poles to which OTELCO seeks to attach (National Grid Panel at 27 19-20)), the pole owner should contribute to the costs. Contrary to the Pole Owners' claims, the pole owners themselves (as compared to attachers) often cause pre-existing non-compliance when, for example, they modify their attached facilities or, in the case of electric pole owners, add uncovered risers or transformers subsequent to the third party attacher, creating a separation violation. Indeed, requiring pole owners to pay their fair share of poles replaced during the make-ready process is likely the only way to ensure that they think creatively about solving the current state of play; i.e., untenable delays and costs for new broadband providers.

National Grid goes so far as to claim its right to charge OTELCO for its upgrade from open secondary to triplex, suggesting this benefits attachers more than itself. National Grid Initial Brief at 23. In fact, Triplex enables National Grid to meet other NESC conditions including reduced clearances relevant to NESC rules 232 and 234 (including horizontal clearances not of benefit to communications suppliers), as well as the difficult to maintain Rule 235G3 midspan clearance between the individual secondary wires, and may also reduce the applicable construction grade for the line. National Grid also benefits from the additional space a triplex upgrade occasions by facilitating rental income while avoiding a premature pole replacement. *See id*. at 22-23.

Moreover, in their haste to minimize OTELCO's concerns, the Pole Owners dismiss OTELCO's additional examples of misallocation of costs to OTELCO for the correction of pre-existing non-compliance by arguing (after the fact) that the make-ready design process had not yet been completed. National Grid Initial Brief at 24; OTELCO's Response to DTC-OTEL 1-10. In fact, based on the record in this proceeding, there is no reason to believe the Pole Owners would have caught these mistakes in their review process. But even assuming this were true, it would be preferable to have clear guidance from the Department that new attachers not be required to pay to correct pre-existing non-compliance and should be credited for work they perform that corrects pre-existing non-compliance to ensure clarity and consistency to attachers, and to motivate the Pole Owners to accurately allocate costs from the get-go.

4. National Grid should be required to provide itemized invoices with pole by pole accounting of make-ready costs to ensure that attachers have the information needed to build efficiently.

National Grid has offered no good reason why it should not be required to provide fully-detailed estimates. It provides more detailed make-ready estimates in New York, where it is required to do so. National Grid Initial Brief at 24-25. It does not dispute that Verizon provides detailed make-ready invoices in Massachusetts, or that additional cost detail would help attachers in deciding whether to re-route to avoid the costliest poles. Instead, National Grid simply claims that make-ready costs could increase if it were required to provide more detailed cost estimates – something it wants to avoid (although, seemingly, these costs would be passed on to attachers that are required to reimburse for the make-ready surveys and engineering work). The argument is essentially "Give me your money, and if you ask, 'what for?' we will make you pay even more money." National Grid asserts that it will provide additional detail to avoid the most costly make-ready upon request, but record evidence shows that it refused to do so when requested by OTELCO. National Grid Initial Brief at 23; OTELCO Initial Brief at 15. There is simply zero

reason to allow National Grid to continue with its current practice. OTELCO therefore urges the Department to require National Grid to provide the same level of billing detail in Massachusetts as it does in New York.

III. THE DEPARTMENT MAY AND SHOULD GRANT OTELCO'S REQUESTED RELIEF IN THIS COMPLAINT PROCEEDING

A. This Complaint Proceeding Affords the Precise "Thorough Investigation" Contemplated by the Department and the DPU When it Declined to Revise its Pole Attachment Rules in the 2019 Rulemaking Proceeding

The DPU and National Grid suggest for the first time in opening briefs that the Department should refrain from granting OTELCO's requested relief in a complaint proceeding, citing the need for a "thoughtful, comprehensive review" and implying that such a review requires a rulemaking. DPU Initial Brief at 10-12 (citing *Joint Investigation Instituting a Rulemaking Pursuant to Executive Order No. 562*, D.T.C. 19-4/D.P.U. 19-76, at 33 (2021) ("Joint Investigation Order" and need for "joint action by the DPU and DTC to develop and promulgate" rules)); National Grid Initial Brief at 3-4. Not only is this suggestion ill-timed, the fact is that this proceeding, in which all of the Commonwealth's investor-owned utilities have joined as parties,[33] attacher interests are broadly represented,[34] and a fulsome record on which to render a decision has been developed, affords the precise forum contemplated by the Joint Investigation Order.

1. The time for suggesting a rulemaking was at the outset of this proceeding.

The case has been pending since April 15, 2022, and is scheduled to be decided by October 11, 2022. Until now, no one has raised the issue of a rulemaking by a motion to dismiss

[33] In addition to Verizon and National Grid, Fitchburg Gas and Electric Light Company d/b/a Unitil and NSTAR Electric Company d/b/a Eversource Energy have intervened in this proceeding, opting for limited party status. A municipal pole owner, Westfield Gas & Electric Light Department, also intervened and filed an opening brief.

[34] The New England Cable and Telecommunications Association, which represents the state's cable operators, also intervened in this proceeding.

or for summary judgment, declaratory ruling, or any other form of relief. Indeed, the DPU affirmatively concluded that the Department had the requisite "authority to adjudicate this complaint."[35] The DPU's last minute attempt to change this proceeding to a "joint action by the DPU and DTC to develop and promulgate appropriate regulations" (DPU Initial Brief at 12 n.7) is extremely unfair – OTELCO has invested significant resources in producing witnesses and evidence in support of its Complaint which included details and legal argument to support its requested relief. And, despite ample opportunity to raise the issue at the June 22, 2022, procedural conference, no one did so. Five months have now passed out of the six months scheduled for the case. It is simply too late to raise so fundamental an issue now.

2. All potentially impacted parties have had ample opportunity to address any concerns raised by OTELCO's requested relief, as reflected by the fulsome record in this proceeding.

The suggestion that this proceeding has not afforded relevant stakeholders with the opportunity to "thoroughly investigate the potential impacts" of a new policy pertaining to pole attachments (*see* National Grid Initial Brief at 3), is belied by the record in this case. At the outset, OTELCO included evidence and a sworn declaration along with its Complaint. Verizon and National Grid countered with their own evidence and declarations in their responses. The Department then invited "any person who desire[d] to participate as a party" to intervene in this proceeding.[36] Numerous parties accepted the Department's invitation, including the Commonwealth's investor-owed pole owners, a municipal pole owner, NECTA, the DPU, and the

[35] D.T.C. 22-4, *CRC Communications LLC d/b/a OTELCO v. Massachusetts Electric Co. d/b/a National Grid and Verizon New England Inc.*, Hearing Officer Notice at 1 (May 20, 2022) (hereinafter *May 20, 2022 Hearing Officer Notice*). Significantly, to maintain their certified status, the Department and DPU, together, must consider both the interests of subscribers offered via pole attachments as well as the interests of consumers of the utility services. *See* 47 U.S.C. § 224(c)(2)(B). The DPU makes several assertions to the effect that its primary obligation is to consider the potential impacts on electric service. DPU Brief, *passim*.
[36] *May 20, 2022 Hearing Officer Notice* at 2.

Attorney General's office. Discovery was also robust. As recited in National Grid's own words, the record in this case consists of responses to hundreds of information requests propounded by the Department, the DPU, and the parties, and evidence submitted in support of those responses:

> Throughout discovery, National Grid responded to 106 information requests propounded by the DTC, the Department of Public Utilities ("DPU"), and OTELCO. Verizon responded to 99 information requests. OTELCO responded to 61 information requests. In addition, OTELCO submitted initial and rebuttal testimonies from David Allen, Lawrence Slavin and Thomas Perrone. National Grid submitted joint rebuttal testimony from G. Paul Anundson, Joy A. Banks, and Fredrick Griffin. Verizon submitted joint testimony from David L. Wolanin and John P. Gallagher.

National Grid Initial Brief at 2. As was its obligation, OTELCO supplemented its responses to certain information requests with additional evidence on more than one occasion. *See* OTELCO's Supplemental Responses to DTC-OTEL 1-21. All Parties were further afforded the opportunity to file direct and responsive testimony. OTELCO therefore submitted both direct and responsive testimony from three different witnesses. While Verizon and National Grid chose not to file direct testimony, they fully engaged on the issues in responsive testimony. *See id*. The stakeholders in this case are represented, and the record is well-developed. It is hard to imagine that another proceeding would develop a fuller and more extensive record on which to base a decision.

3. The Commission routinely regulates other than through rulemaking proceedings.

In declining to codify certain rules in the Joint Investigation Order, the Department and DPU cited their interest in maintaining flexibility to address issues as they arise, consistent with prior cases in which pole attachment rate formulas were applied. *See* Joint Investigation Order at 32-33 (citing *Cablevision of Boston, Inc. v. Boston Edison Co.*, D.P.U./D.T.E. 97-82 (1998), *A-R Cable Services, Inc., v. Massachusetts Electric Co.*, D.T.E. 98-52 (1998), and *Greater Media et al. v. New England Telephone & Telegraph Col*, D.P.U. 91-218 (1992)). Doing so is consistent

with the Department's historic practice of utilizing adjudicatory, investigatory, and tariff proceedings to accomplish regulatory objectives. In the area of utility poles and pole attachments, the Department and DPU routinely have used adjudicatory or other non-rulemaking proceedings to establish industry wide requirements. Examples include:

(1) *Cablevision v. Boston Edison* (D.P.U./D.T.E. 97-82)

In *Cablevision of Boston, Inc. v. Boston Edison Co.*, D.P.U./D.T.E. 97-82 (Apr. 15, 1998),[37] the Department's predecessor adopted the fundamental "Massachusetts Formula" for setting pole attachment rates in response to a complaint filed by a group of cable operators "against Boston Edison Company ("BECo") seeking relief from BECo's cable television ("CATV") pole attachment rates, terms and conditions." *Id.* at 1. No other electric company or pole owner was a party to that proceeding. Despite its not being a formal rulemaking, in that case "the Department established the Massachusetts Formula as its legal standard." *Comcast of Massachusetts III, Inc. v. Peabody Municipal Light Plant and Peabody Municipal Lighting Commission*, D.T.C. 14-2, Phase I Order at 4 (Sept. 3, 2014).[38]

(2) *A-R Cable*, D.T.E. 98-52

Similarly to *Cablevision, A.R. Cable Services, Inc., v. Massachusetts Electric Company*, D.T.E. 98-52 (Nov. 6, 1998)[39] began with a complaint by a number of cable operators against Massachusetts Electric Company "seeking relief from MECo's cable television ("CATV") pole attachment rates." One other electric company, Boston Edison, was granted limited participant status. *Id.* at 1. Nevertheless, in that case the Department announced that general rule that a

[37] https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/9233326
[38] https://www.mass.gov/doc/dtc-14-2-phase-i-order/download
[39] https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/9323863

rebuttable presumption rather than a blanket percentage should apply to the cost of appurtenances in calculating attachment rates. *Id.* at 12-14.

(3) *Comcast v. Peabody*, D.T.C. 14-2

Comcast of Massachusetts III, Inc. v. Peabody Municipal Light Plant and Peabody Municipal Lighting Commission, D.T.C. 14-2, Phase I Order (Sept. 3, 2014), arose from a complaint brought by Comcast against one municipality. The only other parties were the DPU, a full intervener, and the Ashburnham Municipal Light Plant, a limited participant. *Id.* at 2. In that case, the Department ruled that the "Massachusetts Formula" applied to municipal utilities, in general, statewide:

> In this Order, the Department of Telecommunications and Cable finds that the formula (the "Massachusetts Formula") adopted in D.P.U./D.T.E. 97-82, *Cablevision of Boston Co. et al. v. Boston Edison Co.*, 1998 WL 35235111 (Apr. 15, 1998) ("*Cablevision*"), and further developed in D.T.E. 98-52, *A-R Cable Servs. Inc. v. Mass. Elec. Co.* (Nov. 6, 1998) ("*A-R Cable*") for establishing the maximum permitted pole attachment rates of utility companies, applies to municipal light plants ("MLPs") and municipal lighting commissions established pursuant to G.L. c. 164.

Id. at 1 (footnote omitted).

(4) Double Poles (D.T.E. 03-87).

In late 2003, the DTE imposed upon all pole owners various requirements to eliminate an extensive double-pole problem throughout the Commonwealth. Among the requirements was an obligation to file semi-annual reports updating their progress toward elimination and removal of the backlog of double poles and demonstrating compliance with the 90-day deadline for the removal of new double poles. This obligation persists to this day.[40]

[40] *See, e.g.*, the compliance filings by National Grid dated May 27, 2022 (https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/15005102) and by Verizon, National Grid, and other electric companies dated November 17, 2021 (https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/14203677).

The reporting obligation, however, was never contained in any Order issued by the Department. Instead, it was described in a November 2003 report to the Legislature's Committees on Ways and Means and the Joint Committee on Government Regulations.[41] In a subsequent, June 2005 procedural Order, the Hearing Officer in that case cited the report to the legislative committees as the source of the reporting obligation: "[T]he Department directed each pole owner to provide semi-annual reports (1) updating their progress towards elimination of the double pole backlog and (2) demonstrating their compliance with the 90-day removal deadline for new double poles pursuant to Section 34B. D.T.E. 03-87 at 15-16."[42] The Hearing Officer's procedural ruling a year and a half later in June 2005, specified a standard format for the semi-annual reports and the time and manner of filing.[43]

Thus, this industry-wide reporting obligation that has been in effect for nearly nineteen years has not been contained in any formal Department regulation or even an Order issued by the Department Commissioners. At most, certain matters of form have been the subject of Hearing Officer procedural rulings.

In other issue areas as well, the Department has established requirements generally applicable in the telecommunications industry through procedures other than rulemakings. Examples include:

[41] *Report of the Department of Telecommunications and Energy relative to reducing the number of double utility poles within the Commonwealth, pursuant to Chapter 46 of the Acts of 2003, Section 110*, D.T.E. 03-87 (Nov. 28, 2003) (https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/9317607).
[42] *Id.*, Hearing Officer Procedural Ruling on Standardized Filing Format for Semi-Annual Double Pole Reports, at 2 (June 16, 2005) (https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/9313920).
[43] *Id.* at 2-4.

(5) Mass Migration Guidelines (D.T.E. 02-28).

Pursuant to an Order rather than adopted regulations, the Department imposed extensive notification and reporting requirements on telecommunications carriers that were going out of business or otherwise seeking to transfer their customer bases *en masse* to other carriers.[44] The Department specifically declined a suggestion that the procedures "be interpreted as voluntary objectives to serve only as a guide to Massachusetts carriers. Rather, in order to provide certainty and consistency, we will *require all carriers to comply* with the mass migration requirements established here."[45] The Department ordered "That all telecommunications carriers doing business in Massachusetts shall comply with all requirements therein."[46]

Notably, in its Order Opening Investigation, the Department announced that it did not intend to issue formal regulations, but instead would impose its industry-wide requirements by Order issued after what the Department characterized as "the adjudicatory phase of this proceeding:"

> When the Department receives the draft guidelines from the collaborative, we will begin the adjudicatory phase of this proceeding, allowing all those affected by the issues addressed in the draft guidelines to petition to intervene for the purpose of submitting written comments on the draft guidelines. The Department will then issue an order addressing these matters and establishing final requirements with which telecommunications providers must comply when they go out of business, file for bankruptcy, or otherwise terminate service in some or all markets in Massachusetts.[47]

[44] *Proceeding by the Department of Telecommunications and Energy on its own Motion to Develop Requirements for Mass Migrations of Telecommunications Service End-Users*, D.T.E. 02-28, Order, 2002 Mass. PUC LEXIS 52, at *13, *18, 219 P.U.R.4th 517 (Mass. D.T.E. Aug. 7, 2002).
[45] *Id.* at *13.
[46] *Id.* at *18.
[47] *Id.*, Order Opening Investigation at 5, 2002 Mass. PUC LEXIS 7 (Mass. D.T.E. Apr. 22, 2002).

(6) ETC Certifications (D.T.C. 13-4).

The Department imposed numerous reporting and consumer protection requirements upon all eligible telecommunications carriers in an order issued in August 2014.[48] In that Order, the Department specifically superseded any requirements to which an individual provider had previously been subject, even if those requirements had been developed in individual agreements. "In this Order, the Department adopts final Lifeline requirements in Massachusetts. To the extent that Lifeline requirements previously agreed upon in individual proceedings are inconsistent with the requirements adopted herein, the requirements herein prevail."[49]

Despite imposing blanket requirements across a significant segment of the industry and expressly overruling previous requirements, this Order was not the result of a rulemaking. Instead, it was issued in a proceeding initiated by an April 2013 Notice of Investigation ("NOI").[50] The NOI stated that the objective of the proceeding was "to implement rules, consistent with those of the FCC, to 'preserve and advance universal service,' as well as to provide 'additional definitions and standards to preserve and advance universal service within that State.'"[51] No formal Department regulations were issued as the result of the proceeding. Instead, the resulting requirements were contained in the August 2014 Order.

[48] *Investigation by the Department on its Own Motion into the Implementation in Massachusetts of the Federal Communications Commission's Order Reforming the Lifeline Program*, D.T.C. 13-4, Order Implementing Requirements and Further Request for Comment, at 3-22 (Aug. 1, 2014) (https://www.mass.gov/doc/dtc-13-4-order-implementing-requirements-and-further-request-for-comment/download).
[49] *Id.* at 3.
[50] *Id.*, Order Opening Investigation (Apr. 1, 2013) (https://www.mass.gov/doc/dtc-13-4-order-opening-investigation/download).
[51] *Id.* at 4.

(7) Statement of Business Operations.

The initial, most basic regulatory requirement imposed upon all telecommunications providers in the Commonwealth is to file a Statement of Business operations. This requirement is not set forth in any regulation. It is not even set forth in an Order. Rather, the requirement is contained in a guidance document published on the Department's web site.[52]

In light of this general history and the procedural history of this case, the Department should decide the issues on the extensive record before it in this proceeding.

B. National Grid's Take It Or Leave it Approach, Combined With its Lack of Knowledge Concerning the Actual Attachment Practices Employed on its Poles, Underscores the Need for Regulation of its Management's Discretion

As set forth in OTELCO's Initial Brief, and consistent with prior decisions, the Department should not defer to National Grid's managerial discretion where, as here, the company has failed to "clearly and reasonably" justify its exercise of that discretion. OTECLO Initial Brief at 21-24. National Grid has failed to support its hypothetical concerns over the safety of the alternative attachment arrangements proposed by OTELCO, and failed to establish that its blanket refusal to permit such attachment arrangements reasonably justifies impeding broadband deployment in the Commonwealth. Indeed, the Pole Owners have submitted no evidence of safety incidents, reliability issues, belated service restoration, or increased operational costs caused by boxing. Instead, National Grid's insistence that it is acceptable to take nearly a year to process a pole attachment application, and many more years to perform unnecessary make-ready work, further illustrates that it has no consideration for the Department's efforts to expand broadband deployment in the Commonwealth, "promote sustainable competition which will increase the welfare of all Massachusetts residents and businesses," and "ensure that consumers receive high-

[52] https://www.mass.gov/doc/general-information-and-filing-instructions-for-registrationsbo/download.

quality communications at just and reasonable rates."[53] Competitive broadband networks simply will not be built if National Grid is permitted to maintain the status quo in Massachusetts, which as defined by National Grid and Verizon means that Verizon may box poles when it sees fit and National Grid has allowed it, but other entities may not. *See* Allen Direct at 14:10-13 (citing Exhibit DA-1 and Ex. F); Exhibit DA-5; OTELCO's Supplemental and Second Supplemental Responses to DTC-OTEL 1-14.[54] A robotic deference to the unfettered discretion of National Grid, in light of National Grid's own demonstrated lack of knowledge regarding boxing of its own poles, would amount to an abdication of the Commonwealth's own assertion of jurisdiction in pole attachment matters, which requires the Commonwealth to certify that it, not National Grid, regulates pole attachment rates, terms, and conditions; and that in so regulating such rates, terms, and conditions, the Commonwealth, not National Grid, has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services. 47 U.S.C. § 224(c)(2).

Nor should the Department afford any weight to National Grid's specious claim that "OTELCO cites to no Massachusetts caselaw or authority" and relies only on "inapposite" FCC precedent and decisions of other states. National Grid Initial Brief at 3. In fact, OTELCO's Complaint is premised on the Department's rules, set forth in 220 C.M.R. § 45.01 *et seq.*, which require the Pole Owners 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.[55] OTELCO Initial Brief at 9. *See generally* Compl. That OTELCO does not cite to Massachusetts

[53] MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE FISCAL YEAR 2019 ANNUAL REPORT NOVEMBER 2019, at 2, https://www.mass.gov/doc/dtc-fy-2019-annual-report/download.
[54] Even if National Grid did not intend to allow boxing on these poles, changes are still necessary to ensure the timely deployment of competitive broadband networks.
[55] 220 C.M.R. § 45.03.

authority directly addressing boxing, for instance, simply underscores that this is a case of first impression in this jurisdiction, and highlights why guidance from nearby certified states and the FCC is so important. *See* OTELCO Initial Brief at 41-43; 50-53.

IV. CONCLUSION

For the foregoing reasons, and the reasons set forth in OTELCO's Complaint, testimony, and Initial Brief, OTELCO requests the Department to order National Grid and Verizon:

(1) To comply with 220 C.M.R. § 45.03 and the parties' pole attachment agreements, which require performance of pre-construction surveys and engineering in 45 days;

(2) To require performance of make-ready work in commercially reasonable timeframes, as required by National Grid's pole attachment agreement, which should be measured according to timeframes adopted by other regulatory bodies experienced in pole attachment matters, including Maine and the FCC;

(3) To allow OTELCO to employ NESC-compliant opposite side construction on poles that are accessible by bucket truck, lift, or ladder;

(4) To allow OTELCO to occupy the lowest position on the pole where it can do so consistent with governing safety standards, including surface clearance and separation requirements;

(5) To allow OTELCO to attach to poles even if there is pre-existing non-compliance on the poles, so long as OTELCO can do so in compliance with the NESC and without worsening any pre-existing non-compliance, as allowed by the NESC;

(6) To refrain from charging OTELCO for work that benefit the Pole Owners, including work associated with correction of pre-existing noncompliance, and the full cost of replacement poles at or near the end of their useful lives; and

(7) To require National Grid to provide invoices to OTELCO breaking down costs on a pole-by-pole and task-by-task basis.

Respectfully submitted,

CRC Communications LLC d/b/a OTELCO

By its Attorneys:

/s/

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