COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 22-4 October 11, 2022

CRC Communications LLC d/b/a OTELCO v. Massachusetts Electric Company d/b/a National Grid and Verizon New England Inc.

FINAL ORDER

I. INTRODUCTION AND PROCEDURAL HISTORY

In this Final Order, the Department of Telecommunications and Cable ("Department") grants in part and denies in part the pole attachment complaint ("Complaint")[1] filed on April 14, 2022, by CRC Communications LLC d/b/a OTELCO ("OTELCO") against Massachusetts Electric Company d/b/a National Grid ("National Grid") and Verizon New England Inc. ("Verizon").

National Grid and Verizon (collectively, "the pole owners") filed their responses to the Complaint on May 12, 2022 ("National Grid Response" and "Verizon Response").[2] On June 10, 2022, the Department of Public Utilities ("DPU") and the Office of the Attorney General notified the Department of their interventions in this proceeding. The Department acknowledges those interventions. In addition, Fitchburg Gas and Electric Light Company d/b/a Unitil, Westfield Gas and Electric Light Department ("WG&E"), New England Cable and Telecommunications Association, Inc. ("NECTA"), and NSTAR Electric Company d/b/a Eversource Energy

[1] Accompanying the Complaint was a signed declaration of David Allen ("Allen Decl.").
[2] Accompanying the Verizon Response was an affidavit filed by David L. Wolanin ("Wolanin Aff.").

("Eversource") filed petitions for limited participant status. The Department hereby grants those petitions for limited participant status.

The Department set a procedural schedule based on the feedback of parties at a procedural conference held on June 22, 2022. *See* D.T.C. 22-4, Proposed Procedural Schedule (June 14, 2022); D.T.C. 22-4, Notice of Procedural Conference (June 3, 2022). The Department issued a final procedural schedule on June 23, 2022, which reflected that OTELCO, National Grid, and Verizon each waived their right to a hearing. D.T.C. 22-4, Final Procedural Schedule (June 23, 2022); *see also* G.L. c. 30A, § 10; 220 C.M.R. § 45.04(2)(h); Compl. at 1. The final procedural schedule established a discovery window from June 27 to July 19, 2022.[3] On July 12, 2022, OTELCO submitted pre-filed testimony ("Allen Test.," "Perrone Test.," and "Slavin Test."). On August 1, 2022, OTELCO, National Grid, and Verizon submitted responsive testimony ("Allen Responsive Test.," "Perrone Responsive Test.," "Slavin Responsive Test.," "Verizon Panel Test.," and "National Grid Panel Test."). On August 18, 2022, OTELCO, National Grid, Verizon, DPU, and NECTA filed initial briefs, and WG&E filed comments. On August 23, 2022, OTELCO filed a supplemental response to DTC-OTELCO-1-14. On the same day, Verizon filed a Motion to Exclude the supplemental response from the record. On September 2, 2022, the Hearing Officer granted Verizon's Motion to Exclude, excluding OTELCO's August 23, 2022, supplemental response and a second supplemental response to DTC-OTELCO-1-14 that OTELCO filed on August 26, 2022. *See* Hearing Officer Ruling on

[3] Citations to information requests are in the following format: [Requestor]-[Requestee]-[Round of Discovery]-[Request Number]. For example, DTC-OTELCO-1-1, DTC-VZ-1-1, and DTC-NG-1-1 for DTC requests of OTELCO, Verizon, and National Grid, respectively.

Verizon's Motion (Sept. 2, 2022). On September 8, 2022, OTELCO, National Grid, and Verizon filed reply briefs, Eversource filed comments, and NECTA filed a reply letter.[4]

II. DEPARTMENT JURISDICTION

Federal law grants the Federal Communications Commission ("FCC") the authority to regulate the rates, terms, and conditions for pole attachments except in those states where the state has certified to the FCC that the state regulates such rates, terms, and conditions. 47 U.S.C. § 224(b), (c). Massachusetts regulates pole attachment rates, terms, and conditions and has certified this to the FCC. *See* G.L. c. 166, § 25A; 220 C.M.R. 45.00; *States that have Certified that they Regulate Pole Attachments*, WC Docket No. 20-302, Pub. Notice (FCC Mar. 19, 2020). Pursuant to G.L. c. 166, § 25A and 220 C.M.R. 45.00, the Department and the DPU have joint authority over pole attachments in Massachusetts, subject to the agencies' Memorandum of Agreement on Pole Attachment Jurisdiction ("MOA") executed on October 14, 2008, and most recently renewed on February 7, 2022.

A. Memorandum of Agreement

The MOA provides guidelines to establish the appropriate agency among the Department and the DPU to adjudicate a pole attachment complaint filed in Massachusetts. Pursuant to the MOA, on April 22, 2022, the DPU filed a letter with the Department confirming that the Department is the appropriate agency to adjudicate this Complaint. Letter from Jonathan Goldberg, Gen. Counsel, DPU, to Sean Carroll, Gen. Counsel, Dep't (Apr. 22, 2022) ("DPU Jurisdiction Letter"). On May 20, 2022, the Hearing Officer issued a Notice confirming the Department's jurisdiction to adjudicate the Complaint.

[4] OTELCO and Verizon requested confidentiality of certain of their filings. The Department will rule on these requests at a later time, but consistent with its practice will maintain the confidentiality of this information until such ruling.

B. Suitability for Adjudication

National Grid argues that the issues involved in the Complaint should be addressed in a rulemaking as opposed to a complaint proceeding like this one. National Grid Reply Br. at 2-6. The DPU asserts that a pole attachment complaint proceeding is not the appropriate forum to change longstanding utility pole attachment processes applicable statewide. DPU Br. at 12. Eversource agrees with the DPU. Eversource Comments at 5. For the reasons discussed below, the Department disagrees.

The Department first notes that its rulings in this Final Order will be limited to the parties and facts of this proceeding. Moreover, the Department and the DPU have implemented Massachusetts's pole attachment law with a regulation that has a specific complaint procedure to adjudicate issues like those presented in this case. 220 C.M.R. § 45.04 (implementing G.L. c. 166, § 25A). The regulation lays out the specific requirements for making a complaint and identifies the very types of complaints for adjudication that OTELCO has raised in this proceeding, namely claims of discriminatory access to poles and unreasonable terms and conditions of attachment. *Id.* §§ 45.02 (defining a complaint as an allegation that a term or condition for an attachment is not just and reasonable), 45.03, 45.04(2), 45.07. Indeed, the stated purpose of the regulation is to provide for complaint procedures to ensure nondiscriminatory access to poles with rates, terms, and conditions that are just and reasonable. *Id.* § 45.01.

Furthermore, the Department and its predecessor agencies[5] have often resolved pole attachment complaints about rates, terms, and conditions in adjudicatory proceedings such as this one. For example, the Department established a formula for setting all Massachusetts pole

[5] Pursuant to Chapter 19 of the Acts of 2007, the Department of Telecommunications and Energy ("DTE") was dissolved on April 11, 2007. Jurisdiction over telecommunication and cable matters was placed in the newly established Department. St. 2007, c. 19. Though newly established, the Department was a successor agency to the DTE, and prior to that, the DPU. Accordingly, all previous orders of the DTE and DPU are precedential.

attachment rates in an adjudicatory proceeding. *Cablevision of Boston, Inc. v. Boston Edison Co.*, D.P.U./D.T.E. 97-82, *Order* (Apr. 15, 1998) ("*Cablevision*"). Subsequently, the Department further developed that formula in an adjudication, and it remains applicable to all Massachusetts pole attachments. *A.R. Cable Servs., Inc. v. Mass. Elec. Co.*, D.T.E. 98-52, *Order* (Nov. 6, 1998); *Comcast of Mass. III, Inc. v. Peabody Mun. Light Plant & Peabody Mun. Lighting Comm'n*, D.T.C. 14-2, *Phase I Order* at 1, 4 (Sept. 3, 2014) ("*Peabody*"); *see also Proceeding by the Dep't of Telecomms. & Energy on its own Motion to Develop Requirements for Mass Migrations of Telecomms. Serv. End-Users*, D.T.E. 02-28, *Order* (Aug. 7, 2002) (imposing industry-wide requirements through an adjudication). In *Peabody*, the Department, by adjudication, extended its rate formula to all municipal light plants and municipal lighting commissions established pursuant to G.L. c. 164. *Peabody* at 1. The Department has also adjudicated complaints regarding a pole owner's terms and conditions of attachment, including make-ready terms and conditions like those at issue in this proceeding, with widespread effect. *Cablevision* at 46-51; *In re Fiber Techs. Networks, LLC*, D.T.E. 02-47, *Order of Dismissal without Prejudice* at 6 (Dec. 24, 2002) ("*Fibertech*") (confirming that if an attacher can state a claim "regarding a denial of a specific pole attachment or a specific attachment rate, term, or condition for attachment alleged to be unreasonable, it may request access to that pole or request modification of that specific rate, term, or condition" in an adjudication).

Finally, the Department agrees with OTELCO's additional reasons that the issues in this case are suitable for adjudication. *See* OTELCO Reply Br. at 23-30. OTELCO correctly asserts[6] that each party has had ample opportunity to address OTELCO's requests for relief. *Id.* The record in this case, which has lasted six months, with multiple rounds of discovery, testimony,

[6] With limited exceptions that the Department addresses *infra* section IV.E.

and extensive briefing, is complete and has provided all parties with the opportunity to state their positions and to reply to claims being made against them. Therefore, the Department will adjudicate the issues in this case based on the extensive record in the proceeding. Notably, the Department's determination that these issues are suitable for adjudication is consistent with the DPU's understanding of the proceeding at its outset. *See* DPU Jurisdiction Letter (noting that "the precedential value of the outcome of the proceeding may affect other pole owners not identified in the complaint").

III. STANDARD OF REVIEW

Massachusetts pole attachment law reflects a policy "in favor of competition and consumer choice in telecommunications" and seeks to ensure that "telecommunications carriers and cable system operators have nondiscriminatory access" to utilities' poles at just and reasonable rates, terms, and conditions. 220 C.M.R. § 45.01; *see also* G.L. c. 166, § 25A. In determining whether access is discriminatory, or a term or condition is reasonable, the Department considers, at an individual pole level, pole capacity, safety, reliability, generally applicable engineering standards, and the interests of subscribers of cable television services, telecommunications services, and utility services.[7] *See* G.L. c. 166, § 25A.

A utility is required to provide an attacher with "nondiscriminatory access to any pole . . . owned or controlled by it for the purpose of installing a[n] attachment." *Id.*; 220 C.M.R. § 45.03(1). Notwithstanding this obligation, a utility may deny access to a pole, on a nondiscriminatory basis "only for reasons of inadequate capacity, safety, reliability and generally applicable engineering standards; but upon denial of access for reasons of inadequate capacity,

[7] Although the statute references "wireless" providers and attachments, the definition of "wireless provider" is much broader, encompassing "any person, firm or corporation other than a utility, which provides telecommunications service." G.L. c. 166, § 25A.

the utility shall, at the expense of the [attacher], expand the capacity of its poles . . . where such capacity may be reasonably expanded by rearrangement or replacement." G.L. c. 166, § 25A; 220 C.M.R. § 45.03(1). The regulation states, "If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day." 220 C.M.R. § 45.03(2). Physical access is not required within 45 days, but the Department has refrained from establishing an explicit deemed-granted system if a denial is not issued within 45 days. *Fibertech* at 8; *Order Establishing Complaint & Enforcement Procedures to Ensure That Telecomms. Carriers & Cable Sys. Operators Have Non-Discriminatory Access to Util. Poles, Ducts, Conduits, & Rights-Of-Way & to Enhance Consumer Access to Telecomms. Servs.*, D.T.E. 98-36-A, *Order Promulgating Final Regulations* at 43-44 (July 24, 2000). Further, the administrative and financial burdens of dealing with attachments do not constitute good cause for denying access, again making clear a preference to allow attachers on a pole if possible. *See NextG Networks of N.Y., Inc.*, D.T.C. 08-5, *Order* at 9 (Mar. 5, 2009) ("*NextG*"). The goal of Massachusetts pole attachment law is to provide telecommunications carriers and cable companies with pole access that allows for and enhances competition, with very limited circumstances that justify denial of access. *Id.*

The Department will not review generalized assertions of denial of access or unreasonable terms and conditions. *Fibertech* at 4; *see also, e.g.*, *Boston Edison Co.*, D.P.U./D.T.E. 97-95, *Order* at 98 (Dec. 8, 2001) ("*Boston Edison*") (noting that "the complainants were free to bring a complaint pursuant to the pole attachment statute and regulation about a specific instance of intentional delays" by a utility); *Greater Media, Inc.*, D.P.U. 91-218, *Order* at 26-27 (Apr. 17, 1992) ("*Greater Media*") (denying non-rate relief under the pole attachment statute and regulation because the complainants failed to allege specific

instances of retaliatory activity). A properly filed complaint must state a clear and concise allegation that the complainant has been denied access to a utility's pole or has been subjected to an unreasonable term or condition of attachment. *See Fibertech* at 4 (quoting 220 C.M.R. § 45.02). Accordingly, the complaint must identify specific poles to which access has been denied on a discriminatory basis or must identify a term or condition of attachment that is unreasonable because of the characteristics of a specific pole. *See id.*

When confronted with a pole attachment complaint claiming discriminatory denial of access or unreasonable terms or conditions of attachment, the Department has wide discretion to fashion a remedy if one is needed, with the regulation specifically identifying the following options at its disposal:

1) terminate the unjust and unreasonable rate, term, or condition; and
2) substitute in the attachment agreement the reasonable rate, term or condition established by the Department; or
3) order relief the Department finds appropriate under the circumstances. 220 C.M.R. § 45.07.

IV. ANALYSIS AND FINDINGS

A. Opposite-Side Construction ("Boxing")

Boxing is an attachment method by which a carrier attaches its facility to the opposite side of a utility pole from existing facilities. *See, e.g.*, Compl. at 3; National Grid Response at 21; Wolanin Aff. at Ex. B at 8. OTELCO claims that National Grid and Verizon have categorially denied all OTELCO requests to box poles contained in its current attachment applications. Compl. at 4. OTELCO asks the Department to direct National Grid and Verizon to allow boxing on any pole that is accessible by "bucket truck lift, or ladder." OTELCO Reply Br. at 33.

1. Positions of the Parties

OTELCO

OTELCO asserts that National Grid and Verizon's refusal to allow OTELCO to box any poles is unreasonable.

OTELCO asserts that boxing does not endanger worker safety or cause pole failure and is permitted under the National Electrical Safety Code ("NESC") and other applicable safety manuals. Compl. at 3-4, 16; OTELCO Br. at 17. OTELCO cites to the NESC and the Blue Book Manual of Construction for the proposition that boxing can be done safely. Compl. at 16-17. OTELCO asserts that neither National Grid nor Verizon has shown any instances of boxed poles leading to worker injuries or pole failures. OTELCO Br. at 35; Perrone Responsive Test. at 4. OTELCO contends that NESC standards are generally considered the foremost authority on safety, while acknowledging that individual pole owners may exceed these standards. *See* Compl. at 17.

OTELCO seeks to box poles because this attachment method can avoid pole replacements and other costly make-ready work, resulting in significant cost savings. *Id.* at 3, 13; OTELCO Br. at 26, 30-31. OTELCO claims that boxing quickens the unreasonably long attachment process of Verizon and National Grid, thus providing broadband to underserved areas in Massachusetts more quickly. OTELCO Br. at 27.

OTELCO claims that boxing is allowed by other northeastern states and by the FCC. Compl. at 18-19; OTELCO Br. at 26. OTELCO further claims that Verizon and National Grid are being unreasonable in their denial of OTELCO's boxing requests because the two companies actually box poles in Massachusetts. *See* Allen Decl. at Ex. F; Wolanin Aff. at Ex. E; OTELCO Br. at 29; Verizon Reply Br. at 6-7; National Grid Reply Br. at 7. OTELCO also notes that its

Incumbent Local Exchange Carrier ("ILEC") affiliate in Massachusetts, Granby Telephone Company, has boxed 24 poles on which National Grid is an attacher. DTC-OTELCO-1-4.

National Grid and Verizon

National Grid and Verizon state that boxing is unsafe because placing wires on both the road and field side of a pole creates a potentially hazardous operating condition for employees that service the pole. National Grid Response at 21; Verizon Response at 11-12. National Grid and Verizon assert that safety should not be compromised because OTELCO wants to avoid necessary make-ready work for its attachments. National Grid Response at 21; Verizon Response at 11-12. National Grid and Verizon also assert that boxing makes a pole unclimbable, which can makes restoring service during outages in severe weather more difficult. National Grid Response at 22; Verizon Response at 11-12. National Grid also asserts that boxing creates a weak spot in the pole, potentially leading to pole failure. National Grid Response at 22.

National Grid asserts that the use of boxing techniques adds costs and complexity to the pole replacement process for all users of the pole. *Id.* at 21-22. National Grid states that "[w]hen the pole is boxed, the new pole must be placed out of line with the existing pole making each of the transfers more difficult, affecting every other user of the pole." *Id.* National Grid asserts that "attaching communications entities must use a bucket truck rather than working only from a ladder" to transfer lines from a boxed pole to the replacement pole. DTC-NG-1-25. National Grid asserts it incurs increased costs "by having to relocate its attachments along the line." *Id.*

Verizon asserts that boxed poles require additional stabilization for removal without the old pole flipping, which creates additional costs. DTC-VZ-1-8. Verizon rejected specific poles at issue in this case as unfit for boxing due to support wires increasing the risk of pole flipping during pole replacement. Wolanin Aff. at Ex. E. Verizon also rejected specific poles for boxing

due to the poles being on a steep embankment, making bucket truck access difficult. *Id*. Verizon characterizes boxing as a tradeoff between safety and reliability concerns, and make-ready savings. Verizon Br. at 49.

Verizon acknowledges that boxing can meet NESC standards but argues that those standards are not sufficient to adequately protect the safety, reliability, and integrity of the network. Verizon Response at 11-12. National Grid believes that boxing violates NESC standards because boxing does not allow climbing on a pole. National Grid Response at 23. Specifically, National Grid asserts that boxing poles makes it impossible to climb past the obstruction caused by boxed wires and thus impairs National Grid's ability to repair facilities located above the communication space on the poles. *Id.*

National Grid states that it only allows boxing in very limited circumstances (*e.g.*, when all sides of the pole are accessible by bucket trucks year-round) and that it determines the circumstances in which to allow boxing on a case-by-case basis. *Id.* National Grid will not allow boxing to accelerate a construction schedule or avoid make-ready work. *Id.* National Grid also states that it has not authorized third-party boxing and has not kept records on whether poles covered by OTELCO's applications are boxed. DTC-NG-1-34. Verizon identifies one specific pole as boxed but claims it will unbox the pole when it is replaced. Wolanin Aff. at Ex. E. Otherwise, Verizon does not keep records of the number of poles boxed on its network. OTELCO-VZ-1-3; OTELCO-VZ-2-2.

Finally, Verizon and National Grid assert that the Department is not bound by either FCC decisions or those of other states. Verizon Reply Br. at 24; National Grid Response at 23-24.

DPU

The DPU asserts that boxing a pole will limit the ability of utility workers to access facilities located above the communications space on the pole. DPU Br. at 17. DPU acknowledges that utilities may use bucket trucks to access a pole's facilities, but DPU contends that bucket trucks increase costs and do not automatically provide access to every boxed pole because of difficulty accessing the field side of a pole during extreme weather conditions. *Id.* The DPU posits that boxing could also constrain storm-restoration efforts because of the need for additional bucket trucks. *Id.* at 17-18. The DPU asserts that boxing could also complicate pole replacements "by preventing the use of the current cut-and-kick method and increasing the chances of weaving where multiple replacements are conducted on the same line." *Id.* at 18.

Limited Participants

WG&E questions OTELCO's business practices in the municipalities where OTELCO has obtained pole attachment rights that remain unused. *See* WG&E Comments at 3.

NECTA supports boxing in limited situations. NECTA Br. at 2. NECTA notes that other New England states support boxing. *Id.* at 3. NECTA states that boxing reduces costs and the number of double poles. *Id.* at 4. NECTA also asserts that boxing helps with broadband deployment throughout Massachusetts and thereby increases broadband competition. *Id.* at 5.

Eversource asserts that National Grid and Verizon identify valid public safety and reliability concerns with OTELCO's boxing proposal. *See* Eversource Comments at 4-5. Eversource states that boxing conflicts with current safety standards and may jeopardize worker and network safety by restricting the ability to climb poles, complicating emergency-restoration work, and eliminating the use of the cut-and-kick method for the transfer of facilities and replacement of poles. *Id.* at 5.

2. Analysis

OTELCO claims that it should be allowed to box any pole that is accessible by "bucket truck, lift, or ladder." OTELCO Reply Br. at 33. OTELCO also claims that National Grid's and Verizon's refusal to permit opposite side construction is unjust and unreasonable. OTELCO Compl. at 19. The Department denies this request as more fully discussed below.

Fibertech makes clear that the Department will not consider generalized assertions of unreasonableness under the pole attachment statute. *Fibertech* at 4; *see also Boston Edison* at 98; *Greater Media* at 26-27. Thus, the Department considers the question of whether it is reasonable to refuse to box a pole for reasons of reliability, safety, or generally applicable engineering standards at the individual pole level. *See* G.L. c. 166, § 25A; *Fibertech* at 4; *Boston Edison* at 98; *Greater Media* at 26-27. National Grid and Verizon must examine OTELCO's requests to box on a pole-specific basis. Although poles inevitably have similarities, there are differences in poles' surroundings and characteristics that make it appropriate to ask whether Verizon and National Grid have applied a reasonable term or condition of attachment related to boxing on a particular pole. All poles are unique and are treated as such under Massachusetts pole attachment law.

Here, OTELCO has made a general claim for boxing but has also identified 14 specific poles for which the pole owners refused its request to box. *See* Allen Decl. at Ex. E. The Department addresses the reasons given for not boxing these specific poles, as well as the pole owners' general reasons against boxing below. In doing so, the Department implements the "legislative policy in favor of competition and consumer choice in telecommunications" by balancing OTELCO's desire to limit make-ready costs to ease expansion of broadband access in

Massachusetts with the needs of the pole owners to ensure the safety and reliability of the network. *See* G.L. c. 166, 25A; 220 C.M.R. § 45.01.

a. Wolanin Affidavit, Exhibit E, Poles 2, 3, 4, and 10[8]

In this section, the Department reviews the pole owners' decision not to box Poles 2, 3, 4, and 10, first by discussing the reasons Verizon[9] gives that are specific to these poles and then by addressing the pole owners' general arguments against OTELCO's boxing request.

The explanations that Verizon gives in Exhibit E of the Wolanin Affidavit for declining to box Poles 2, 3, 4 and 10 are insufficient without more for the Department to deem the denial of boxing reasonable. For each of these poles, Verizon states that it will not box the pole because the pole is not already boxed and because the make-ready work "that could be avoided by boxing is not overly complicated, such as requiring major facilities relocation or a service outage for customers." Wolanin Aff. at Ex. E. This reasoning is general and lacks the needed specificity as to why each pole should not be boxed for reasons of reliability, safety, or generally applicable engineering standards. *See* G.L. c. 166, § 25A; *Fibertech* at 4; *Boston Edison* at 98; *Greater Media* at 26-27. This reasoning demonstrates merely a generalized preference for pole replacement. The Department finds that this generalized preference, without more, is not a reasonable term of attachment. *See* G.L. c. 166, § 25A; 220 C.M.R. § 45.07 (granting the Department the authority to order relief it finds appropriate under the circumstances).

Having found that Verizon's reasons given for each of these specific poles are inadequate absent pole-specific justification, the also Department reviews the other general reasons to deny

[8] The Department will refer to these poles by their numbers given in Exhibit E of the Wolanin Affidavit, which contains Verizon's explanations for denying the boxing requests. Exhibit E of the Wolanin Affidavit refers to the same poles originally identified in Exhibit E of the Allen Declaration.
[9] National Grid did not respond directly to OTELCO's identification of Poles 2, 3, 4, and 10 as poles it requested to box.

boxing that the pole owners have offered throughout the proceeding to explain why these reasons are inadequate as well. These include generalized claims of safety and generalized claims of network reliability, including increased storm-restoration timelines and increased costs due to boxing. Based on *Fibertech*, *Boston Edison*, and *Greater Media*, and for the reasons discussed below, these general reasons are insufficient for the Department to find that the denial of boxing on these four poles is reasonable. *See* G.L. c. 166, § 25A; 220 C.M.R. § 45.07 (granting the Department the authority to order relief it finds appropriate under the circumstances).

The pole owners' generalized safety argument falls short not only because it is general but because the pole owners have acknowledged that although it is unsafe for workers to climb a pole beyond a boxed wire, they direct workers not to do that but to use bucket trucks instead. *See* National Grid Response at 23; DTC-NG-2-3 ("OTELCO's boxing will restrict pole climbing."); Verizon Panel Test. at 5. Indeed, OTELCO seeks to box only poles that are accessible without climbing, rendering the pole owners' concerns about climbing safety inapposite. OTELCO Reply Br. at 13. Thus, the safety argument, in addition to being too general, is flawed because workers will not encounter the situation on which National Grid and Verizon rely. Further, there is no evidence in the record of boxed poles leading to worker injuries or pole failures. *See, e.g.*, OTELCO Br. at 35. Likewise, there is not sufficient evidence in the record to support National Grid's claim that weak spots in the pole caused by boxing will lead to pole failure. *See* National Grid Response at 22; Perrone Responsive Test. at 4; NG-OTELCO-2-1; OTELCO Br. at 25; National Grid Reply Br. at 13. Finally, the Department finds that boxing conducted under the guidance of this Final Order, if any, will not be inconsistent with the safety standards of the NESC given the discretion the Department has left to the pole owners to deny boxing with reasonable justification. *See* Verizon Response at 11-12 (admitting that boxing can be done

consistent with the NESC). Indeed, a claim of safety that is specific to a pole due to the pole's individual situation could constitute a reasonable decision not to box the pole. *See infra* section IV.A.2.b; *cf.* G.L. c. 166, § 25A (referencing safety as a reason that a pole owner could deny access to a pole).

National Grid and Verizon also assert generally that network reliability will be harmed because service restoration during storms will take longer due to boxed poles requiring more coordination and additional bucket trucks. DTC-NG-1-23; DPU-NG-1-2; Verizon Panel Test. at 4, 8. However, there is no dispute that there are in fact boxed poles in Massachusetts. *See* Allen Decl. at Ex. F; Wolanin Aff. at Ex. E; OTELCO Br. at 29; Verizon Reply Br. at 6-7; National Grid Reply Br. at 7. Accordingly, reasonable network management already requires the pole owners to prepare for dealing with boxed poles during storm-restoration activities. *See* Slavin Test. at 8-9 (acknowledging that boxed poles require bucket truck access but stating that bucket trucks are in widespread use by pole owners); Perrone Responsive Test. at 5 (stating that boxing does not increase storm-restoration times even where boxing is prevalent). Processes, including third-party coordination that National Grid and Verizon describe as necessary for storm service restoration when dealing with boxed poles, are neither exceptional nor unique to boxed poles, which the pole owners must already consider as existing in their network. Verizon Panel Test. at 8-9; National Grid Panel Test. at 10-11.[10]

Further, any boxed OTELCO wires added to the network would not substantially increase the existing network burden given the small number of poles under discussion. The record

[10] Any added network burden that is specific to the practice of boxing and beyond normal network maintenance, as opposed to the general costs a new attachment adds to the network, may be recovered by the pole owners via make-ready costs. *See* G.L. c. 166, § 25A (stating that make-ready costs are "at the expense of" the attacher). Such added costs may include specific added work anticipated in the future such as the added costs of replacing a boxed pole as compared to a pole that is not boxed. For a full discussion of this cost issue, see *infra* pp. 18-19.

reflects that OTELCO requests boxing only on poles that would otherwise need to be replaced. *See* Allen Decl. at Ex. E; Allen Test. at 16. By National Grid's own estimate, "the percentage of poles that would need to be replaced as part of make-ready work for OTELCO is not high." National Grid Reply Br. at 10. This statement identifying only a small number of poles at issue is even more notable given National Grid's opinion of the magnitude of OTELCO's project. National Grid Response at 9-10 ("The significant scope of OTELCO's pending pole attachment projects in National Grid's service territory cannot be overstated."). Further, that small number includes all poles that OTELCO seeks to box. As the Department makes clear, it is not requiring the pole owners to allow boxing on all poles that OTELCO seeks to box but is permitting the pole owners to deny boxing with sufficient reasoning. Thus, the record indicates that the general additional burden on the network caused by boxing, if any, will be *de minimis*. As with safety, however, a claim of reliability or network burden that is specific to a pole due to its individual situation could constitute a reasonable decision not to box that pole. *See infra* section IV.A.2.b; *cf.* G.L. c. 166, § 25A (referencing reliability as a reason that a pole owner could deny access to a pole).

Further, National Grid's assertion that claimed added administrative burdens of boxing, including revising the company's vegetation schedule, emergency response plan, and union contracts amount to a reasonable justification to deny boxing is inapposite or otherwise falls short also because (1) *NextG* counsels against the Department permitting utilities to rely on generalized claims of administrative burden to support the reasonableness of an attachment term or condition, and (2) this Final Order does not necessarily require the pole owners to box any poles. *See* DPU-NG-1-2; *NextG* at 9.

The parties do not dispute that boxing will increase various costs. Slavin Test. at 6; DTC-VZ-1-8; DTC-NG-1-25; OTELCO Br. at 37. However, the Department reminds the pole owners that in the event they permit OTELCO to box poles, they can bill OTELCO for the increased costs that boxing causes. *See* G.L. c. 166, § 25A (requiring pole owners to expand the capacity of poles "at the expense of the [attacher]" and allowing pole owners to recover from attachers "the proportional capital and operating expenses of the utility attributable to that portion of the pole, duct or conduit occupied by the attachment"); Slavin Test. at 6, 13; DPU-VZ-1-5 (acknowledging that the pole owners can charge OTELCO for the additional costs incurred for replacing or performing work on a boxed pole).

The pole owners assert that capturing and allocating the incremental costs will be difficult. Verizon Panel Test. at 7-8; DTC-NG-2-3. The pole owners argue that the calculation of the added costs would be burdensome. Verizon Panel Test. at 7-8 (taking issue with a system by which it would charge OTELCO for any added costs of any boxed OTELCO wires); DTC-NG-2-3 (asserting that Dr. Slavin's "cost-causer" approach would be administratively burdensome). However, the claim that the costs are difficult to calculate is belied by Verizon's calculation of such costs within the 10 days it had to respond to the Department's information request on the issue. *See* DTC-VZ-1-3 (identifying pole replacement as the "key added expense" due to boxing and estimating that such costs may increase by a minimum of $188 to $281 per pole). In addition, any administrative burden of calculating such costs is not a valid reason under *NextG*. *NextG* at 9.

National Grid next claims that the compensation it can receive for certain added costs of boxing may come from National Grid's customers. DPU-NG-1-2. National Grid does not quantify this, but the Department addresses this because it is required to consider the interests of

electric subscribers in fashioning reasonable attachment terms and conditions. *See* G.L. c. 166, § 25A. Again, however, contrary to National Grid's contention, the Department allows for fully allocated costs, including maintenance and administration costs. *Id.* (allowing pole owners to recover from attachers expenses attributable to that portion of the pole used by the attachers); *Cablevision* at 16, 32-36. Indeed, neither National Grid nor Verizon provide evidence demonstrating that they cannot recover costs related to boxing via make-ready costs or pole attachment rates as they are with other attachments. *See NextG* at 10 (rejecting a conduit owner's claim of added costs because those "financial interests [are] already taken into account in the statute and regulations"). Although recovering the costs of boxing through pole attachment rates may increase such rates, the impact should be *de minimis* given the limited number of poles, if any, that the Department anticipates will ultimately be boxed because of this Final Order. *See supra* p. 17; NECTA Br. at 2 (representing other third-party attachers that may pay more in attachment rates due to boxing but nevertheless supporting the use of boxing). In sum, because the pole owners will be compensated for any costs that boxing adds, any such added costs do not constitute a reasonable justification to deny boxing. G.L. c. 166, § 25A; *NextG* at 10.

Finally, the Department finds that claims that the Department cannot substitute its judgment for that of the utilities in this case are invalid. *See* DPU-NG-1-5; National Grid Reply Br. at 5-6; DPU Br. at 11-12 (citing, among others, *Fitchburg Gas & Elec. Light Co. v. Dep't of Pub. Utils.*, 375 Mass. 571, 578 (1978)). National Grid relies on *New England Tel. & Tel. Co., v. Dep't of Pub. Utils.*, 262 Mass. 137, 148 (1928), to argue that the Department cannot substitute its judgment for that of a utility. National Grid Reply Br. at 5. However, *New England Telephone* dealt with a Department requirement that the utility take ownership of certain property. *New England Tel.*, 262 Mass. at 148. There is, of course, no such requirement stemming from this

Final Order as the Department is not requiring the pole owners to take ownership of any property. Further, the *New England Telephone* court stated that in that case the Department failed to show a general condition of public necessity for its order. *Id.* To the contrary here, Massachusetts law makes clear that there is a public interest in increased access to poles. G.L. c. 166, § 25A; 220 C.M.R. § 45.01 (effecting "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 . . . with rates, terms and conditions that are just and reasonable.").

Similarly, the other cases cited by National Grid and the DPU are also distinguishable. First, none of these cited cases involve pole attachments and none involve the statute and regulation that must be applied to OTELCO's Complaint. *See* G.L. c. 166, § 25A; 220 C.M.R. 45.00. These cases largely involved the practices of a single utility before the Department, as opposed to this case in which there are adversarial parties with one party seeking attachment rights on the other parties' poles. Further, although *Fitchburg* stated that business decisions are matters for an electric utility's determination, it also stated that such decisions must have a proper rationale and cannot be inconsistent with the Department's policies. *Fitchburg*, 375 Mass. at 578-79. In fact, the *Fitchburg* court found that the utility's business decision at issue did not meet this standard and upheld the Department's rejection of the utility's business decision. *Id.* at 578-83. As explained above, the decision not to box Poles 2, 3, 4, and 10 in Exhibit E of the Wolanin Affidavit is inconsistent with the Department's policy of reasonable pole attachment terms and conditions. G.L. c. 166, § 25A; 220 C.M.R. § 45.01. Therefore, *Fitchburg* actually supports the Department's holding in this case. The Department is not substituting its judgment for that of the pole owners regarding their management regarding network reliability. *See*

National Grid Reply Br. at 5. To the contrary, the Department is making clear that if the pole owners have specific safety, reliability, or engineering issues regarding a specific pole, they can deny OTELCO's request to box that pole, and that denial would be reasonable. 220 C.M.R. § 45.07.

Consistent with the foregoing, the line of precedent that National Grid and the DPU rely on does not apply in this case. But even if it did, this Final Order is in the public interest and otherwise consistent with Massachusetts pole attachment law and policy.

In conclusion, the Department requires the pole owners to give specific reasons on a pole-specific basis as to why they will not box Poles 2, 3, 4, and 10 when requested to do so by OTELCO, and these reasons must be more than a general preference for pole replacement, general claims of additional network burden, or claims of additional financial burden. *See* 220 C.M.R. § 45.07; *Fibertech* at 4; *Boston Edison* at 98; *Greater Media* at 26-27; *infra* section IV.A.2.b. To clarify, the Department is not directing the pole owners to box these four poles. Rather, the Department finds that the pole owners' decision not to box these poles was unreasonable based on the information given to OTELCO as presented in the record, without more. *See* Wolanin Aff. at Ex. E. The Department will afford the pole owners the opportunity to revisit these poles. If the pole owners maintain their position that these poles should not be boxed, they will have the opportunity to provide sufficient, specific reasoning to OTELCO, which amounts to more than a general preference for pole replacement, general claims of additional network burden, or claims of additional financial burden. *See* National Grid Reply Br. at 4 (quoting *Boston Gas Co. v. Dep't of Pub. Utils.*, 405 Mass. 115, 121 (1989) (stating that if a state agency adopts a new standard in an adjudicatory proceeding, "it must grant the party or parties to [the] adjudicatory proceeding the opportunity to satisfy the requirements of a new rule

once that rule . . . is announced.")); DPU Br. at 12 (mentioning needed warning to affected utilities of a major change to a regulatory standard). Although the Department does not believe that this Final Order results in a major change to a regulatory standard, the Department nevertheless affords the pole owners an opportunity to satisfy the Final Order's provisions.

b. Wolanin Affidavit, Exhibit E, Poles 1, 5, 6, 7, 8, 9, 11, 12, 13, and 14

In contrast, the pole owners' decision not to box Poles 1, 5, 6, 7, 8, 9, 11, 12, 13, and 14 was reasonable. *See* G.L. c. 166, § 25A. For these poles, Verizon[11] provides specific safety, reliability, or generally applicable engineering reasons for denying boxing. *See id.*; Wolanin Aff. at Ex. E. The Department addresses the poles in turn.

Poles 1 and 8 have sidetaps and guy-wire support making bucket-truck access, which is required for boxed poles, more difficult than it is for a normal pole and less safe. Wolanin Aff. at Ex. E. Similarly, for Poles 5, 9, 13, and 14, Verizon states that the poles are corner poles, "guyed to help counter the resulting tension on the pole[s]." *Id.* The Department agrees with Verizon that boxing would add even more tension on these corner poles, potentially causing the poles to flip when they are replaced. *Id.* Verizon also provides a reasonable explanation for Poles 6 and 12, stating that these poles should not be boxed because of a steep embankment making bucket truck access more difficult and less safe. *Id.* Finally, Verizon's decision not to box Poles 7 and 11 was also reasonable because boxing is not needed to avoid replacing these poles. *Id.*; *see also* Allen Decl. at Ex. E; Allen Test. at 16 (discussing avoiding pole replacement as the reason for boxing).

In sum, Verizon provides safety, network-reliability, and engineering reasons for not boxing Poles 1, 5, 6, 7, 8, 9, 11, 12, 13, and 14 that are specific to these poles and are not

[11] Although National Grid does not provide specific reasoning for declining to box these poles, the Department finds that Verizon's reasoning not to box the poles is sufficient.

generalized claims of safety or network reliability, or a general preference for pole replacement. Therefore, the rationale is reasonable. G.L. c. 166, § 25A.

c. OTELCO's Specific Request for Boxing Relief is Denied

As fully described above, it was reasonable for the pole owners to deny OTELCO's request to box a pole when they did so with specific reasons that amounted to more than merely a general preference for pole replacement, general claims of additional network burden, or general claims of additional financial burden. *See* G.L. c. 166, § 25A. Accordingly, the Department denies OTELCO's request that the Department order National Grid and Verizon to employ boxing on all poles that are accessible by bucket truck, lift, or ladder. *See* OTELCO Reply Br. at 33. As evidenced by the Department's discussion of Poles 1, 5, 6, 7, 8, 9, 11, 12, 13, and 14, there are many instances where a pole may be theoretically accessible by bucket truck, lift, or ladder, but a decision not to box the pole would still be reasonable. *See supra* section IV.A.2.b; DPU Br. at 17 (stating that bucket trucks do not automatically provide access to every boxed pole). In other words, the pole owners could attempt to access some or all these poles by bucket truck if they were boxed, but doing so would not be safe or would jeopardize the reliability of the network due to the poles' specific circumstances. The pole owners' decision to decline to box these poles was reasonable. *See supra* section IV.A.2.b; G.L. c. 166, § 25A.

Moreover, OTELCO's general request for boxing is inconsistent with Department precedent. The Department will not consider generalized assertions of unreasonableness under the pole attachment statute. *Fibertech* at 4; *Boston Edison* at 98; *Greater Media* at 26-27. Therefore, OTELCO's request for general boxing relief is denied.

B. Lowest Attachment

1. Positions of the Parties

OTELCO

OTELCO claims that Verizon's policy that it be the lowest attacher on a pole is both unreasonable and discriminatory. Compl. at 20; OTELCO Br. at 44; OTELCO Reply Br. at 18. OTELCO asserts that Verizon's policy affords Verizon "preferential positioning on the pole at the cost of its direct competition." Compl. at 20. OTELCO asserts it should be permitted to attach below Verizon on the pole as long as it can do so in compliance with the NESC, stating that the practice would avoid rearranging existing facilities and would significantly reduce its make-ready costs, particularly when Verizon attaches above NESC standards. *Id.* at 4; DTC-OTELCO-1-13; OTELCO Br. at 4; OTELCO Reply Br. at 18. In response to Verizon's position about the weight of Verizon's cables, OTELCO offers a situation under which it claims a fiber cable could attach below Verizon's copper and still be NESC-compliant. *See* Slavin Test. at 16. Finally, as with boxing, OTELCO identifies other states in which it has found attachments below an ILEC's. Compl. at 21; DTC-OTELCO-1-7; OTELCO Br. at 4-5; OTELCO Reply Br. at 19.

Verizon

Verizon claims that its policy that it be the lowest attacher on a pole is both reasonable and nondiscriminatory. Verizon Br. at 13-19. Verizon has no history of third parties attaching below it on poles. DTC-VZ-1-10. Verizon asserts that its copper cable is heavier than the other attachments in the communications space and requires clearance for sag below its line. Verizon Response at 9. Verizon states that while it is possible for a third party to attach a lighter cable below Verizon's heavy copper line and match the sag of the heavier line initially, the sag of the

lighter cable during extreme weather is not likely to continue to match that of the heavier cable, potentially causing mid-span clearance violations. OTELCO-VZ-2-1.

Additionally, because Verizon is responsible for the final step of removing an old pole after a pole replacement, OTELCO attaching below Verizon would require Verizon to make multiple trips to the pole during a replacement—one to move its wire to the new pole and a second to remove the old pole—when currently it only makes one trip. Verizon Response at 17; Verizon Panel Test. at 2. Verizon states it is the lowest attacher on every pole in Massachusetts on which it has facilities, and it has not allowed another operator to attach below its facilities. OTELCO-VZ-1-5; OTELCO-VZ 1-12. Verizon contends that being the lowest attacher adds certainty to downed-wire response, explaining that in many instances when a vehicle pulls a line down, it is often the lowest line that is pulled down. Verizon Panel Test. at 16. Verizon explains that municipal officials know who to notify for emergency response because Verizon is always the lowest attacher, and allowing OTELCO's request would add confusion and delay into this established notification and response protocol. *Id.*

Verizon also is concerned about wires crossing mid-span if OTELCO were to attach below Verizon on some poles in a line but there is not enough room for it to attach below Verizon on other poles in the line. *Id.* at 15. Verizon notes that this situation is not only unsafe but would add complexity to pre-construction surveys and potentially violate NESC requirements for clearances between facilities on poles. *Id.*

National Grid

National Grid supports Verizon's policy that Verizon be the lowest attacher. *See, e.g.*, National Grid Br. at 31-32. Like Verizon, National Grid states that OTELCO attaching below

Verizon would complicate and prolong pole replacements given Verizon's role in removing the old pole. *Id.*; National Grid Panel Test. at 30.

DPU

The DPU supports Verizon's policy that Verizon be the lowest attacher. *See* DPU Br. at 18. DPU asserts that the standard hierarchy of facilities involves placing electric facilities at the top of the pole, followed by a neutral zone, municipal space, other third-party-communications attachments, and finally a telephone provider at the bottom. *Id.* DPU asserts that this order is essential to identifying facilities during emergency-restoration efforts. *Id.* DPU also notes that this system provides an orderly process for pole attachment transfers. *Id.*

Limited Participants

NECTA supports placement of third-party facilities below the ILEC where there is sufficient space to comply with applicable safety standards. NECTA Br. at 6. Eversource urges the Department to deny OTELCO's requested relief regarding the lowest attachment. Eversource Comments at 6.

2. Analysis

a. Verizon's Lowest-Attachment Policy is Reasonable

OTELCO seeks to be able to be the lowest attacher on the pole in the face of Verizon's policy that only Verizon can be the lowest attacher. OTELCO Br. at 44; DTC-VZ-1-10. The Department finds that Verizon's policy that it must be the lowest attachment is reasonable and nondiscriminatory. *See* G.L. c. 166, § 25A. Accordingly, OTELCO's request for relief on this issue is denied.

Verizon provides several compelling reasons demonstrating the reasonableness of its lowest-attachment policy. First, the record demonstrates that Verizon's copper cable is heavier

than other cables in the communications space. *See* Verizon Response at 4, 17-18; Verizon Panel Test. at 18. OTELCO does not dispute this fact. *See* Slavin Test. at 15-16. As a result, Verizon's wire sags more than other cables, particularly in severe weather conditions. Verizon Panel Test. at 18. This situation demands that Verizon has sufficient clearance below its line to account for this potential for significant sag. *Id.*; OTELCO-VZ-2-1. Dr. Slavin presents a scenario under which he claims a fiber cable could attach below Verizon's copper wire and still be NESC-compliant. Slavin Test. at 16. However, the support for this claim is an unsupported assertion that the increase in sag due to weather "*may be* essentially the same, or even less, for an already installed heavy copper" wire than for fiber cables. *Id.* (emphasis added). The Department is not convinced by this conclusory testimony. The Department agrees with Verizon that if it were not the lowest attacher, it would increase the possibility of mid-span clearance violations, creating potential safety and reliability issues. *See* Verizon Br. at 15.

Second, when a pole is replaced, facilities transfers happen from top to bottom, with Verizon being last to transfer its wires to the new pole as well as the party responsible for the removal of the old pole. Verizon Response at 17-18; Wolanin Aff. at Ex. B at 6; Verizon Br. at 13-14 (citing Verizon Panel Test. at 14 and Telcordia Blue Book (2017 Ed.), Section 3.2.1); DPU Br. at 18. This is a streamlined process with Verizon executing both of its tasks on the same trip to the pole. In contrast, if OTELCO attached below Verizon, it would make the pole replacement process more burdensome and more expensive because Verizon would need to make multiple trips to the pole, one to transfer its wires to the new pole and a second to go back to remove the old pole after OTELCO transfers its wires. Verizon Response at 17; *see also* G.L. c. 166, § 25A (directing the Department to consider the interests of telecommunications subscribers). The time and money saved by this standard pole replacement process, although not

determinative, provides further support for the reasonableness of Verizon's policy that it must be the lowest attacher. *See* G.L. c. 166, § 25A.

Finally, the Department finds that if OTELCO is allowed to attach below Verizon on some poles in a line but continues to attach above Verizon on other poles in the line because Verizon is already at the minimum clearance on those poles, it would likely result in OTELCO's and Verizon's wires crisscrossing between poles. *See* Verizon Panel Test. at 2, 15. This would be a safety hazard, would likely result in clearance violations, and would make surveying the poles more difficult. *See id.*; Verizon Br. at 18; Verizon Reply Br. at 21.

In short, OTELCO has not demonstrated that Verizon's policy that it be the lowest attacher on a pole is unreasonable. The Department finds that the policy is reasonable. *See* G.L. c. 166, § 25A.

In addition to being reasonable, Verizon's policy of being the lowest attacher is nondiscriminatory. *See* G.L. c. 166, § 25A. Verizon's lowest-attacher policy applies to all attachers equally and applies on all its poles. Verizon Response at 17; DTC-VZ-1-10. Indeed, OTELCO cannot identify any instances in Massachusetts where its attachments have been attached below the ILEC. DTC-OTELCO-1-6. Further, the Department finds that OTELCO's claim that Verizon's policy is discriminatory because it gives Verizon preferential treatment on the pole lacks merit. *See* Compl. at 20. Verizon is uniquely situated as both a pole owner and attacher on these poles, and OTELCO has not explained why Verizon's policy is discriminatory in the context of Verizon's unique situation. Further, OTELCO has not provided any support for its claim that being the lowest attacher provides any *competitive* benefit to Verizon as a telecommunications provider that may compete with OTELCO. *See* Compl. at 20. Verizon's policy that it be the lowest attacher on a pole is nondiscriminatory. *See* G.L. c. 166, § 25A.

Having found that Verizon's policy that it must be the lowest attachment is reasonable and nondiscriminatory, the Department denies OTELCO's request for relief on this issue.[12]

b. Verizon Attachments to New Poles Moving Forward

The above analysis notwithstanding, given the proliferation of additional attachments for broadband and other purposes in recent years, the Department addresses Verizon's occasional practice of attaching at a "height on the pole above the bare minimum required to meet the applicable clearance standard, when there was sufficient room on the pole to do so." DTC-Verizon 2-5. Verizon does not provide persuasive reasoning as to why it attaches in certain circumstances above both the NESC standard and even its own heavy storm loading clearance requirements. *See id.* This practice, however, is not before the Department in this proceeding. Nevertheless, the Department encourages Verizon moving forward to consistently attach no higher than is required by applicable clearance standards. *See* 220 C.M.R. § 45.07 (granting the Department the authority to order relief it finds appropriate under the circumstances). This consistency will help Verizon ensure that its lowest attachments are not discriminatory to third-party attachers. Further, it will ensure that the Commonwealth's policy "in favor of competition and consumer choice in telecommunications" will not be impeded, by maximizing space on a pole for new attachments. 220 C.M.R. § 45.01.

[12] The Department notes that where there is room to do so, Verizon will move its wires down to make room for OTELCO's attachments above it, at the expense of OTELCO. This step simply reinforces the standard make-ready process and is consistent with Massachusetts law. *See* 220 C.M.R. § 45.03; DTC-VZ-1-5 (providing the circumstances under which Verizon will move its wire down the pole).

C. Pre-existing Conditions, Other Facilities Management, and Claims of Charges for Non-Make-Ready Work

1. Poles with Pre-existing Non-compliance but Space for an Additional Attachment

a. Positions of the Parties

OTELCO

OTELCO states that it should be allowed to attach on a pole even if there is pre-existing noncompliance on the pole as long as OTELCO can safely attach in compliance with the NESC without worsening the noncompliance. *See* Compl. at 32-33; OTELCO Br. at 57; OTELCO Reply Br. at 33. OTELCO argues that under most circumstances, the NESC does not require immediate remediation of a pre-existing condition prior to another attachment. Compl. at 21-22; Perrone Test. at 7. OTELCO specifically references boxing as an attachment method that the NESC permits prior to remediation of noncompliance. Perrone Test. at 7.

Verizon and National Grid

Verizon agrees with OTELCO that there are circumstances when attachment requests may be accommodated despite third-party violations present on a pole. *See* Verizon Panel Test. at 23. Specifically in response to Mr. Perrone, Verizon states that it "agrees that where there is preexisting noncompliance on a pole, but there is nevertheless room on the pole to accommodate a new attachment in compliance with applicable requirements, the preexisting condition does not require immediate remediation." *Id.* Verizon states, however, that where a pole with pre-existing noncompliance would require make-ready work to accommodate a new attachment even in the absence of such noncompliance, the new attacher is obligated to pay for that make-ready work. Verizon Response at 19. National Grid did not respond to this request for relief.

b. Analysis

OTELCO requests that it be allowed to attach to the pole owners' poles even if there is a pre-existing NESC violation, so long as OTELCO can do so in compliance with the NESC and without worsening the pre-existing noncompliance, as allowed by the NESC. OTELCO Reply Br. at 33. National Grid did not respond to this request, and Verizon states that it agrees that remediation is not required prior to OTELCO's attachment when no make-ready work is needed to accommodate a new attachment. *See* Verizon Response at 19; Verizon Panel Test. at 23. The Department grants OTELCO's request in part as described below. *See* 220 C.M.R. § 45.07.

The Department notes that OTELCO implicitly includes boxing in its request. *See* Perrone Test. at 7 ("If there is an existing NESC violation caused by a pole owner, current NESC rules allow for a new attacher to attach to the field-side, in an NESC compliant manner, without the pole owner being required to correct its NESC violation."). The Department fully addresses OTELCO's boxing claims above in section IV.A and thus need not revisit that issue. The Department also acknowledges Verizon's reasonable position that where a pole with pre-existing noncompliance would require make-ready work to accommodate OTELCO's new attachment even in the absence of such noncompliance, OTELCO is obligated to pay for that make-ready work. *See* Verizon Response at 19; *infra* section IV.C.2-3.

Accordingly, the Department grants OTELCO's request to attach on a pole even if there is pre-existing noncompliance on the pole as long as OTELCO can safely attach in compliance with the NESC without worsening the noncompliance, but only in instances where no make-ready work is needed, and subject to National Grid's and Verizon's other lawfully imposed attachment terms and conditions as further defined in this Final Order. *See, e.g.*, *supra* section

IV.A; 220 C.M.R. § 45.07 (granting the Department the authority to order relief it finds appropriate under the circumstances).

2. Cost to Remedy Pre-existing Non-compliance

a. Positions of the Parties

OTELCO

OTELCO asserts it is being improperly billed, under the guise of make-ready, for work that is needed to correct pre-existing NESC violations. Compl. at 23; Allen Decl. at 4, Ex. C; DTC-OTELCO-1-10. OTELCO contends that such billing unfairly penalizes the company for problems it did not cause. Compl. at 23.

OTELCO claims that it has been unreasonably charged for new poles when an existing pole already exceeds capacity and also when an existing pole shows excessive signs of deterioration. *See* Compl. at 14; Allen Decl. at Ex. C; Allen Test. at 11-13; DTC-OTELCO-1-10. Specifically, OTELCO claims that if a third-party attachment is noncompliant, but there is no capacity on the pole to bring the attachment into compliance, OTELCO is being charged to bring the pole into compliance. *See* Compl. at 14; Allen Decl. at Ex. C; Allen Test. at 11-12; DTC-OTELCO-1-10. Likewise, OTELCO claims that if there is a pole-condition issue, such as diminished strength, that requires pole replacement, OTELCO is being charged improperly for that replacement. Compl. at 14; Allen Decl. at Ex. C; Allen Test. at 12-13.

OTELCO also asserts that it is being billed both to be on a pole and to correct pre-existing noncompliance on the pole. DTC-OTELCO-1-18. If current attachments must be moved to make a pole compliant, and then moved again to make space for OTELCO, OTELCO contends that there should be a cost concession for the compliance correction. *Id*. OTELCO

claims that if National Grid identifies a pole needing replacement, OTELCO is billed for all material and labor from all parties for that replacement. *Id.*

OTELCO states that following receipt of a preliminary estimate of work from National Grid's contractor, Osmose Utilities Services, Inc. ("Osmose"), OTELCO identified pre-existing conditions that Osmose initially marked as chargeable to OTELCO. DTC-OTELCO-1-10. OTELCO notes, however, that in response to its notifying National Grid of the issue, National Grid changed certain work initially marked as billable to non-billable. *Id.* OTELCO asserts that if it did not complete this internal review process, non-billable work would inaccurately be billed as make-ready. *Id.* OTELCO also lists several other examples where it successfully had work reclassified as non-billable after identifying pre-existing conditions listed as billable. *See id.*; Allen Test. at 11-12 ("In response to OTELCO's challenge, National Grid changed certain conditions initially marked as billable to non-billable."); VZ-OTELCO-1-2.

National Grid

National Grid states that if there is a pre-existing NESC violation on a pole where a third-party wants to add an attachment, the company follows this practice: (a) if there is no space on the existing pole to resolve the noncompliance, National Grid does not charge the applicant for a new, taller pole, because a new, taller pole would have been necessary anyway to fix the noncompliance, and (b) if there is space on the existing pole to resolve the noncompliance and a new, taller pole is thus needed to accommodate OTELCO's attachment irrespective of the noncompliance, then OTELCO will bear the cost of the new pole as the cost-causer. National Grid Response at 17; OTELCO-NG-1-19; National Grid Panel Test. at 23-24. National Grid further explains it does not bill OTELCO for a new pole to correct third-party noncompliance. DTC-NG-2-22; DTC-NG-2-10. In cases where there is existing noncompliance on the pole and a

new pole is not needed to both remedy the noncompliance and add OTELCO's attachment, National Grid claims OTELCO is not charged to make the pole compliant and is only responsible for make-ready work required after the noncompliance is remediated. DTC-NG-1-19; DTC-NG-2-10. National Grid contends that for several of OTELCO's allegations of improper billing, there is room to correct the third-party noncompliance consistent with the NESC, but there is no room for OTELCO's new attachment after bringing the existing attachments into compliance, thus putting OTELCO on the hook for the new pole. National Grid Response at Ex. NG-4.

Verizon

Verizon makes similar arguments to National Grid. Verizon's policy is to charge an applicant only for the make-ready work that is needed to prepare the pole to accommodate the applicant's attachment. Verizon Response at 12. Verizon states that it does "not charge a third-party attacher to replace a pole where the make-ready survey shows that it already needs to be replaced, due perhaps to damage, rot or excessive lean. In those cases, Verizon MA and its joint pole owner absorb the cost of replacing the pole." Verizon Panel Test. at 25. Verizon explains that it does not bill OTELCO for a new pole to correct third-party noncompliance. Wolanin Aff. at 2. Like National Grid, Verizon contends that for several of OTELCO's allegations of improper billing, there is room to correct the third-party noncompliance consistent with the NESC, but there is no room for OTELCO's new attachment after bringing the existing attachments into compliance. Wolanin Aff. at Ex. C. Verizon admits that it may err in its make-ready assessments but states that it made clear to OTELCO that it is willing to review any such alleged errors and to revise its make-ready invoices as necessary. Verizon Response at 12.

DPU

The DPU asserts that the record demonstrates that National Grid and Verizon have not improperly charged OTELCO for remediation of pre-existing NESC violations. DPU Br. at 18. DPU asserts that the attaching entity should only be responsible for the work that it causes. *Id.* at 19.

Limited Participants

NECTA agrees with OTELCO that pole owners should not charge a new attacher for correcting pre-existing noncompliance, or for the full cost of pole replacement where there is an existing noncompliant pole condition. NECTA Br. at 8-9.

b. Analysis

OTELCO alleges that it is being charged to rectify pre-existing noncompliance and imminently needed capital replacement under the guise of make-ready and wants to ensure that this does not occur. Compl. at 3, 30; Allen Decl. at 4, Ex. C. National Grid and Verizon assert that OTELCO is only being charged for attachment work for which it is the cost-causer. National Grid Response at 17; Verizon Response at 12. The Department grants OTELCO's request as fully described below and in section IV.C.3, *infra*. *See* 220 C.M.R. § 45.07 (granting the Department the authority to order relief it finds appropriate under the circumstances). Specifically, OTELCO should be billed only for the work needed to make a pole ready for its attachment.

The Department confirms that the pole owners should bill OTELCO only for the work needed to make a pole ready for OTELCO's attachment. *See* G.L. c. 166, § 25A (stating that a new attacher should be billed for work needed to expand the capacity of the pole to accommodate the new attachment); 220 C.M.R. § 45.07. OTELCO and the pole owners agree

with OTELCO that OTELCO is not responsible for costs associated purely with fixing pre-existing noncompliance. National Grid Response at 17; OTELCO-NG-1-19; National Grid Panel Test. at 23-24; Verizon Response at 12; Wolanin Aff. at 2. The pole owners similarly agree that OTELCO is not responsible for costs associated with replacing poles that already would have required replacement due to pole conditions such as damage, rot, or age. National Grid Response at 17; DTC-NG-1-3; DTC-VZ-1-23; Verizon Panel Test. at 25. Indeed, OTELCO transitioned its argument as the proceeding progressed once it became clear that there was agreement on these issues, culminating in a request focused solely on cost-shifting related to incidental benefits. *Compare* Compl. at 30-31 (claiming that OTELCO was being charged "to correct pre-existing non-compliance"), *with* OTELCO Reply Br. at 20, 33 (asking the Department to directly the pole owners to "refrain from charging OTELCO for *work that benefit* [sic] *the Pole Owners*, including work *associated with* correction of pre-existing noncompliance") (emphasis added). The Department addresses incidental benefits in section IV.C.3, *infra*, but confirms here that pole owners should bill OTELCO only for the work needed to make a pole ready for OTELCO's attachment.

The Department notes that when OTELCO has notified the pole owners about being erroneously billed for pre-existing noncompliance, OTELCO acknowledges that the pole owners have corrected these invoices. VZ-OTELCO-1-2 (conceding that, "In the additional examples identified in VA-O 1-1 [sic], after OTELCO's review and challenge to pre-existing conditions that were listed as billable, Verizon updated their tasks for those poles to non-billable."); Allen Test. at 10-11. The Department encourages the parties to continue to work together to identify and correct any such instances. *See infra* section IV.D.2 (requiring detailed cost breakdowns that will assist with such identification).

3. Incidental Benefits

a. Positions of the Parties

OTELCO

Throughout the course of the proceeding, OTELCO introduces many assertions in various filings that pole owners and third-party attachers receive incidental benefits when OTELCO pays for the work needed to make a pole ready for its attachment. *See, e.g.*, OTELCO Reply Br. at 20.

Many of these assertions are related to pole replacements. First, OTELCO contends that it should not be charged in full for pole replacements in cases where the existing pole has NESC violations. DTC-OTELCO-1-18. OTELCO argues the existing attachers should address the NESC compliance issues outside of OTELCO's request for attachment. *Id.* OTELCO states that the current practice is for NESC compliance issues to be addressed when existing attachments are transferred to the new pole. *Id.* OTELCO contends that this result benefits the noncompliant attacher as well as National Grid and Verizon because they avoid having to address the NESC violation on the existing pole. *Id.* Second, OTELCO contends that the pole owners benefit from pole replacements needed to accommodate OTELCO's attachment when the existing pole exhibits deteriorated strength or is generally older and is replaced with a newer, stronger pole. DTC-OTELCO-2-3. Again here, OTELCO claims that the pole owners are reaping a benefit for which OTELCO is paying. *Id.* Third, OTELCO claims that pole owners benefit when OTELCO pays for a taller pole to accommodate its attachment. *Id.* In this situation, OTELCO believes that it is improperly paying for added pole capacity for the pole owners' own needs and for additional third-party rentals. *Id.*; OTELCO Reply Br. at 54.

In addition, like the pole replacement example above whereby a pole replacement can inherently remedy a noncompliant attachment, OTELCO asserts that if an existing noncompliant attachment must be moved to come into compliance, and then moved again to make space for OTELCO, OTELCO should receive a cost concession for the compliance-correction portion of this make-ready. DTC-OTELCO-1-18.

OTELCO also asserts that it is being billed for work that facilitates National Grid's upgrade of its electrical facilities from open secondary to triplex, thus benefitting National Grid. Compl. at 14.

Finally, OTELCO asserts that it is being billed for full pre-construction survey costs when the surveys benefit the pole owners beyond the surveys' direct relation to the make-ready work necessary for OTELCO's attachments. DTC-OTELCO-1-8. For example, OTELCO claims that the surveys facilitate the collection of information that Verizon needs irrespective of OTELCO's attachments. *Id.*

National Grid

National Grid states that it is responsible for the cost of replacing a pole if the pole is beyond its useful life. National Grid Response at 17. Additionally, National Grid states that it does not charge OTELCO for replacing a pole that has a pre-existing violation that would prevent installation of OTELCO's new attachment. *See id.* In such instances, however, National Grid bears the cost of installing a new pole of the same height and class as the old pole, and OTELCO would assume the incremental costs, if any, of a taller pole needed to accommodate its attachment. *Id.*; *see also* DTC-NG-2-1 (quantifying the incremental cost of taller poles). To determine cost responsibility, National Grid states it uses the following guidelines: 1) if a new pole is required due to damage to the old pole, the pole owners are responsible for the cost; 2) if

a new pole is required due to a NESC violation, the applicant will be responsible for the cost if the applicant's attachment is the cause of the violation; and 3) if a new pole is required because of overloading, the applicant will be responsible for the cost when the applicant's attachment is the cause of the overload. DTC-NG-1-3.

Regarding upgrades to triplex, National Grid asserts that if a triplex upgrade occurs primarily to create additional space to enable OTELCO's new attachment, then OTELCO covers the cost. DTC-NG-1-18. However, if a triplex upgrade is not needed to create new space to accommodate the new attachment but National Grid decides to perform the upgrade on a new pole required by the attachment, then National Grid covers the cost of the upgrade. DTC-NG-1-22.

Verizon

Verizon asserts that if remediating pre-existing noncompliance would require replacing the pole with a taller one, it would not bill the cost of the pole replacement to OTELCO because OTELCO did not cause that expense. Verizon Response at 13; DTC-VZ-1-31. In contrast, according to Verizon, if remediation of pre-existing noncompliance on a pole can be accomplished without replacing the pole, but the remediated pole would not be tall enough to accommodate OTELCO's new attachment, then OTELCO would be required to pay for the pole replacement, because OTELCO's new attachment makes that replacement necessary. Verizon Response at 13; DTC-VZ-1-31.

Regarding its make-ready surveys, Verizon states that the purpose is to determine the make-ready work needed to accommodate OTELCO's attachment. DTC-VZ-2-8. The field surveys may also identify any poles that need to be replaced unrelated to OTELCO's new attachment and may identify any pre-existing NESC violations on a pole. DTC-VZ-1-23. In such

cases, Verizon's contractor excludes the work to replace such poles and remedy such violations from the make-ready estimate provided to OTELCO. *Id.* Verizon states that it charges OTELCO for the make-ready survey because OTELCO "caused the need for the survey work by requesting to attach additional facilities to the pole." OTELCO-VZ-1-23.

DPU

The DPU asserts that the record demonstrates that National Grid and Verizon have not improperly charged OTELCO for plant upgrades. DPU Br. at 18-19. Furthermore, DPU asserts that National Grid and Verizon have procedures in place to ensure that OTELCO is not charged for work that it does not cause. *Id.* at 19. DPU contends that when OTELCO was not the cost-causer of pole work, proper adjustments were made by the pole owners. *Id.*

Limited Participants

NECTA argues that pole owners should not charge a new attacher for the full cost of a pole replacement when there is an existing noncompliant pole condition. NECTA Br. at 8-9.

b. Analysis

OTELCO states that it should receive a cost concession for make-ready work that results in incidental benefits for pole owners or third parties. *See, e.g.*, DTC-OTELCO-1-18; OTELCO Reply Br. at 20. Identified incidental benefits include upgrades to triplex, pole replacements, correction of pre-existing NESC violations resulting from a transfer to a new pole or movement to make space for OTELCO's new attachment, and information gathered in pre-construction surveys. National Grid and Verizon claim that in each of these scenarios, OTELCO is paying only for the work for which it is responsible. The Department agrees. The statute makes clear that when utilities make space on a pole for a new attacher, that new attacher is responsible for the cost. G.L. c. 166, § 25A (requiring utilities to, at the expense of the attacher, expand the

capacity of their poles to accommodate new attachments). In short, the identified incidental benefits to pole owners or third-party attachers do not negate or diminish OTELCO's cost responsibility to make a pole ready for its attachments. *See id.* Thus, even though National Grid, Verizon, or a third party might incidentally benefit from OTELCO's make-ready work, that work would not occur but for OTELCO's new attachment. Therefore, OTELCO is responsible for the full cost of the make-ready because OTELCO is the cost-causer, and OTELCO's attachment is the primary reason the work is being completed. *See id.* Accordingly, the statute requires that OTELCO's request for relief on this issue is denied.[13]

D. Request for Detailed Cost Breakdown

1. Positions of the Parties

OTELCO

OTELCO asserts that National Grid has unreasonably refused to provide OTELCO with make-ready cost details, which are necessary for OTELCO to determine whether some costs to correct pre-existing noncompliance are being improperly classified as make-ready, among other reasons. Compl. at 26; DTC-OTELCO-1-15. OTELCO states that National Grid's initial invoices provided OTELCO with only the total estimated cost of make-ready for each pole application. Compl. at 26; OTELCO Br. at 15. OTELCO asserts that rather than fully address its concerns, National Grid provided OTELCO with only the total make-ready cost for each pole (rather than a cost for each task) and provided this information for only seven out of 95 of OTELCO's applications. Compl. at 27. According to OTELCO, National Grid stated that it had no intention of providing pole-level detail on a prospective basis. *Id.* Indeed, OTELCO states that National

[13] This Final Order should not be construed in any way to excuse facilities being attached in a manner that is not compliant with applicable codes.

Grid has told OTELCO that it "do[es] not provide detailed charges for Make ready [sic]." Allen Decl. at 3, Ex. B.

According to OTELCO, Verizon and National Grid both provide "make-ready determinations [which] outline pole-by-pole what make-ready work requires completion." DTC-OTELCO-1-15. However, unlike National Grid, Verizon also provides OTELCO with a task code and a legend to identify the cost associated with each task code. *Id.* OTELCO states that it requires the same or similar detail on invoices from National Grid. *Id.* OTELCO further claims that when it received detailed cost estimates from National Grid, it identified errors resulting in National Grid recategorizing certain items from billable make-ready to non-billable. *See* OTELCO Br. at 15; Allen Test. at 10, 11.

National Grid

National Grid does not dispute that it does not provide detailed cost breakdowns. *See* National Grid Response at 16. Rather, National Grid asserts that not providing a detailed cost breakdown does not violate Massachusetts law because there is no such requirement in the pole attachment regulations, Department precedent, or National Grid's attachment agreement. *Id.* National Grid asserts that the level of detail it provides OTELCO is consistent with National Grid's standard practice. DTC-NG-1-29. National Grid states that it describes the necessary work by pole. *Id.* National Grid further asserts it also provides job-level make-ready costs for any miscellaneous charges that are not calculated in National Grid's work management system. *Id.*

National Grid states that it does not provide granular cost detail because the cost units constantly change based on materials inventory and because such detail would result in delays and increased costs to OTELCO. DTC-NG-1-30; DTC-NG-2-6. National Grid explains that it calculates its make-ready estimate based on the available cost units at the time of design

completion. DTC-NG-2-16. National Grid acknowledges that it receives itemized cost breakdowns for make-ready work performed by its contractors. DTC-NG-1-31.

DPU

DPU asserts that "the record reflects that National Grid has provided sufficient detail for its make-ready cost estimates as well as a detailed breakdown of the estimated costs required for a sample of applications for OTELCO to use for comparative purposes, consistent with its existing practices in Massachusetts for third-party attachments." DPU Br. at 19.

2. Analysis

OTELCO requests that the Department order National Grid to provide cost breakdowns at the task-specific and pole-specific level as opposed to the aggregated application level. OTELCO Reply Br. at 33. OTELCO asserts that it already receives this type of detailed cost breakdown from Verizon. OTELCO Br. at 15. The Department holds that National Grid's term of OTELCO's attachment by which it refuses to provide a detailed breakdown of make-ready costs after being asked to do so is unreasonable. *See* G.L. c. 166, § 25A; 220 C.M.R. § 45.01.

At a fundamental level, it is reasonable for OTELCO to receive this information because a buyer should be entitled to be aware of what, exactly, it is paying for. *Cf.* 207 C.M.R. § 10.03(1) (requiring a detailed breakdown of charges assessed to cable subscribers). More specifically in the context of pole attachments, the lack of this information would impede OTELCO's ability to make effective business decisions. For example, OTELCO could use detailed cost information to find alternative, less costly network routes, or to focus its efforts on analyzing bills to identify improper billing on the costliest poles. *See* G.L. c. 166, § 25A (requiring consideration of the interests of telecommunications subscribers, such as OTELCO's future customers). Indeed, this information has proved to be useful to OTELCO in the past. *See*

Allen Test. at 10-11 ("On several occasions, following receipt of the preliminary solution from Osmose, OTELCO identified pre-existing conditions to Osmose that were initially marked as billable (that is, chargeable to OTELCO). In response to OTELCO's challenge, National Grid changed certain conditions initially marked as billable to non-billable. If OTELCO did not complete this internal review process, non-billable work would inaccurately be billed as make-ready.").

Moreover, National Grid already describes in detail the necessary work by pole for OTELCO and concedes that it receives itemized cost breakdowns for the make-ready work performed by its contractors. DTC-NG-1-29; DTC-NG-1-31. In other words, National Grid already has cost-breakdown information in its possession that it uses to estimate costs for OTELCO's applications, making the refusal to provide such information to OTELCO that much more unreasonable. *See* DTC-NG-1-29; DTC-NG-1-31. Any added burden of providing OTELCO what National Grid already possesses would be *de minimis*. Also, *NextG* counsels against using generalized claims of administrative burden as support for the reasonableness of an attachment term or condition. *NextG* at 9.

National Grid argues that it should not be required to provide cost detail to OTELCO because cost units constantly change based on materials inventory. DTC-NG-1-30. This claim, however, does not stand up to the realities of what an estimate is. An estimate is, by definition, "a rough or approximate calculation" that is subject to change. *Estimate*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/estimate (last visited Oct. 5, 2022). Thus, the fact that make-ready costs may change after National Grid provides an estimate to OTELCO is simply what makes the estimate an estimate and is not a reason not to provide details of that estimate.

National Grid offers further support for its position by claiming that providing the requested detailed cost breakdown would increase delays and add costs to the make-ready process. DTC-NG-1-30; DTC-NG-2-6. But this claim, even if true, is diminished by OTELCO's obvious desire for the cost detail even in light of these time- and cost-warnings from National Grid. OTELCO Reply Br. at 33; *see also* NECTA Br. at 10-11 (supporting OTELCO's position that pole owners should provide new attachers with a detailed breakdown of make-ready costs).

Further, the unreasonableness of National Grid's practice is more apparent when compared with like circumstances on an intrastate and intracompany basis. First, National Grid's joint owner, Verizon, provides OTELCO's requested level of cost detail in Massachusetts. OTELCO Br. at 15. Second, National Grid itself provides task-level cost detail to attachers in New York. DTC-NG-2-5. The Department does not see any reason why National Grid cannot provide at least the same level of cost detail in Massachusetts that it does in New York. National Grid asserts that it is under a different regulatory regime in New York and therefore it is not an apples-to-apples comparison. *Id.* For example, National Grid contends that it dedicates additional resources to its New York make-ready work. *Id.* This extra work, per National Grid, leads to increased costs for the attacher. *Id.* As noted above, however, that possibility does not seem to deter OTELCO or NECTA. National Grid's claim that this practice is reasonable is flawed given that Verizon already provides the desired level of cost detail in Massachusetts and National Grid already provides cost detail in New York.

The Department may see this term of OTELCO's attachments in a different light if National Grid informed OTELCO that it would perform true ups of its costs estimates after the work as does Verizon. *See* Verizon Response at 7-8. National Grid, however, does not do this.

Compl. at Ex. 3, Section 8.3; DTC-NG-2-17. The combination of refusing to provide detailed cost estimates up front and providing no true-up mechanism on the backend is unreasonable.[14]

National Grid claims that its refusal to provide detailed cost breakdowns does not violate Massachusetts law because "[t]here is no requirement in the pole attachment regulations, in DTC precedent, or in National Grid's Attachment Agreement to provide detailed cost estimates." National Grid Response at 16. Absent from National Grid's list, however, is the pole attachment statute, which requires reasonable terms and conditions of attachment. G.L. c. 166, § 25A. National Grid's refusal to provide detailed cost breakdowns is not a reasonable condition of attachment. Accordingly, the Department grants OTELCO's requested relief. National Grid must provide cost breakdowns to OTELCO on a task-specific and pole-specific level, if requested by OTELCO.

E. Make-Ready Timelines

1. 45-Day Access

a. Positions of the Parties

OTELCO

Relying on 220 C.M.R. § 45.03(2), OTELCO asserts that within 45 days of its request to attach to a pole, it should receive an answer from the pole owners. Compl. at 11; OTELCO Reply Br. at 33. OTELCO asserts that the pole owners have not complied with this provision and asks the Department to order the pole owners 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." OTELCO Reply Br. at 33.

[14] National Grid states that "(b)ased on experience in recent years, actual make-ready costs are more than the amount that attachers paid based on estimated costs." DTC-NG-2-17. Although the issue of the lack of true ups is not before the Department, the Department questions whether this lack of a true up may result in an undue burden to National Grid's customers. G.L. c. 166, § 25A (requiring the Department to consider the interests of utility subscribers).

Verizon and National Grid

Verizon and National Grid assert that the 45-day window in 220 C.M.R. § 45.03(2) is simply a denial timeline and that if the pole owners are planning on denying access they must do so within that timeframe. National Grid Response at 13; National Grid Br. at 27-28; Verizon Response at 7. The pole owners state further that they are not denying any of OTELCO's applications at issue in this proceeding. National Grid Response at 13; Verizon Response at 7. Finally, Verizon states that the regulation does not impose an obligation to conduct pre-construction surveys and engineering within 45 days. Verizon Response at 7.

b. Analysis

On this issue, OTELCO offers a variety of positions throughout the proceeding, culminating in a request that the Department order the pole owners 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." OTELCO Reply Br. at 33. The Department addresses OTELCO's requests in turn.

The regulation states in its relevant part: "If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day." 220 C.M.R. § 45.03(2).

First, OTELCO's request that it receive notice of access to the pole owners' poles within 45 days of its pole applications is moot. *See* Compl. at 32. The pole owners have stated they are not denying any of OTELCO's applications at issue in this proceeding. National Grid Response at 13; Verizon Response at 7. The Department stated in *Fibertech* that a denial-of-access complaint must state a "clear and concise allegation that '[the complainant] has been denied access to a pole, duct, conduit, or [right-of-way]' owned or controlled by a utility." *Fibertech* at

6 (quoting 220 C.M.R. § 45.02) (emphasis in original); *see also Boston Edison* at 98; *Greater Media* at 26-27. Here, National Grid and Verizon have made clear that they have granted access to OTELCO. National Grid Response at 13; Verizon Response at 7; *see also* 220 C.M.R. § 45.04(e) (discussing the requirements of a denial-of-access complaint). Accordingly, OTELCO has failed to state a clear and concise allegation that it has been denied access to a pole. Although the Department has not explicitly adopted a deemed-granted access system, there nevertheless is no relief that it can grant OTELCO in this situation because it has been granted access to the poles. *See Fibertech* at 6-8. This request is denied.

Second, OTELCO requests that the Department require the pole owners to comply with the parties' pole attachment agreements, which, according to OTELCO, require performance of pre-construction surveys and engineering within 45 days. OTELCO Reply Br. at 33. The Department denies this request. OTELCO makes this request for the first time in its Reply Brief. *See id.* OTELCO did not make this request in the Complaint. *See Generally* Compl. Indeed, in the Complaint, OTELCO requests only that the pole owners notify OTELCO that space is available to attach within 45 days of OTELCO's application. *Id.* at 32. The Department addresses this request in section IV.E.1, *supra*. The Complaint did not recite this surveys and engineering allegation as a "Count" and did not include this request for relief in the section entitled "Relief Requested." *Id.* at 32-33. As a result, the pole owners did not have a full and fair opportunity to respond to this request. Further, the Department has only 180 days within which to rule on a pole attachment complaint. 220 C.M.R. § 45.08 ("The Department shall issue a final Order ***on the complaint filed*** . . . within 180 days after the complaint is filed.") (emphasis added). The Department is required to rule on any complaint, "which is a clear and concise allegation" of denial of access. *Fibertech* at 6; *see also Boston Edison* at 98; *Greater Media* at

26-27. The Department is not required to rule on claims added during the pendency of a complaint proceeding. Notably, OTELCO did not seek to amend its Complaint to add this request for relief. The Department declines to permit the addition of this claim to OTELCO's Complaint. Accordingly, this request is denied.

2. Commercially Reasonable Timeframe

a. Analysis

OTELCO requests in its Reply Brief for the first time in its pleadings that the Department "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." OTELCO Reply Br. at 33. The Department denies this request for reasons discussed in the preceding section. *See supra* pp. 48-49. OTELCO did not make this request in the Complaint. *See Generally* Compl. The only mention of "commercially reasonable timeframes" in the Complaint is a factual statement about a pole attachment agreement. *Id.* at 9. The Complaint did not recite this allegation as a "Count" and did not include this request for relief in the section entitled "Relief Requested." *Id.* at 32-33. As a result, the pole owners did not have a full and fair opportunity to respond to this request. Further, as noted above, the Department has only 180 days within which to rule on a pole attachment complaint. 220 C.M.R. § 45.08 ("The Department shall issue a final Order ***on the complaint filed*** . . . within 180 days after the complaint is filed.") (emphasis added). The Department is not required to rule on claims added during the pendency of a complaint proceeding. Also as noted above, OTELCO has not sought to amend its Complaint at any point in this proceeding to add this request. The

Department will not permit this added claim almost five months into a six-month proceeding. *See id.* Therefore, OTELCO's request is denied.

V. OTHER ISSUES

A. Stay Request

In its Complaint, OTELCO requests that the DTC stay any attempt by National Grid to cancel OTELCO's pending attachment applications. Compl. at 33. OTELCO states that National Grid informed OTELCO that it would cancel OTELCO's applications for non-payment of make-ready unless National Grid received payment by April 15, 2022. *Id.* at 28-29. This date has passed, and OTELCO has not updated the Department on the issue of National Grid cancelling its applications. Further, OTELCO did not provide any support for its request for a stay, either factual or legal. Accordingly, OTELCO has not demonstrated that it is entitled to relief on this issue, and OTELCO's request is denied.

B. Attorneys' Fees

In its complaint, OTELCO asks that the Department require the pole owners to pay OTELCO's attorneys' fees and costs associated with bringing the Complaint. Compl. at 33. OTELCO did not provide support for this request and did not raise this issue again in the proceeding. Accordingly, OTELCO has not demonstrated that it is entitled to relief on this issue, and OTELCO's request is denied.

VI. ORDER

Accordingly, after due notice, opportunity to be heard, and consideration, it is hereby

ORDERED: that OTELCO's Complaint is GRANTED in part and DENIED in part, as detailed herein.

By Order of the Department,

Karen Charles Peterson
Commissioner

RIGHT OF APPEAL

Pursuant to G.L. c. 25, § 5, and G.L. c. 166A, § 2, an appeal as to matters of law from any final decision, order or ruling of the Department may be taken to the Supreme Judicial Court for the County of Suffolk by an aggrieved party in interest by the filing of a written petition asking that the Order of the Department be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Department within twenty (20) days after the date of service of the decision, order or ruling of the Department, or within such further time as the Department may allow upon request filed prior to the expiration of the twenty (20) days after the date of service of said decision, order or ruling. Within ten (10) days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court for the County of Suffolk by filing a copy thereof with the Clerk of said Court. Appeals of Department Orders on basic service tier cable rates, associated equipment, or whether a franchising authority has acted consistently with the federal Cable Act may also be brought pursuant to 47 C.F.R. § 76.944.