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September 8, 2022

Shonda Green, Secretary  
Department of Telecommunications and Cable  
1000 Washington Street, Suite 820  
Boston, Massachusetts 02118-6500

***Re: D.T.C. 22-4 – CRC Communications LLC v. Massachusetts Electric***

Dear Secretary Green:

Enclosed for filing in the above matter is the Reply Brief of Verizon MA.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Alex Moore", with a long horizontal flourish extending to the right.

Alexander W. Moore

cc: Service List

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

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Petition of CRC Communications LLC,	)	
d/b/a OTELCO	)	
	)	D.T.C. 22-4
	)	
v.	)	
	)	
Massachusetts Electric Company d/b/a	)	
National Grid, and Verizon New England Inc.	)	
<hr/>	)	

**REPLY BRIEF OF VERIZON MA**

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**Dated: September 8, 2022**

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

## INTRODUCTION

Verizon MA and Massachusetts Electric Company d/b/a National Grid (“National Grid”) demonstrated in their initial briefs that their policies restricting boxing and requiring third parties to attach above Verizon MA’s facilities on the poles are just and reasonable, and that eliminating these policies would degrade the reliability of the pole network, increase the costs to pole owners and other pole attachers of working on the network and service restoration and clean-up following storms and other catastrophic damage to the poles.<sup>1</sup> The Department of Public Utilities (“DPU”) and Westfield Gas & Electric Company, agree that these long-standing practices of the pole owners are just and reasonable.<sup>2</sup>

<sup>2</sup> See Initial Brief of the Department of Public Utilities at 16 (“It is just and reasonable for regulated utilities like National Grid and Verizon to require OTELCO to comply with their existing attachment policies and standards, which do not conflict with existing attachment requirements under Massachusetts law and, based on their

(continued . . . )

Verizon MA and National Grid have also demonstrated that they have charged OTELCO only for work on the poles that is needed solely to accommodate OTELCO's proposed new attachments, and not for the purpose of remediating pre-existing conditions on the poles.<sup>3</sup>

The arguments OTELCO offers in its brief lack merit, and OTELCO has failed to prove the allegations in its Complaint. OTELCO says that Verizon MA's policy on boxing will impede broadband deployment and is discriminatory, but neither of these claims is supported by the record. Verizon MA's policy on boxing is consistent with the law of Massachusetts and all nearby states but one. OTELCO's efforts to sell the alleged benefits of boxing and downplay the significant negative consequences of boxing as a practice are inconsistent with the evidence. *See* Argument Part I below.

OTELCO's attacks on Verizon MA's policy requiring third parties to attach above Verizon MA fare no better. Verizon MA has demonstrated that eliminating this policy is likely to result in mid-span code violations, increase the costs of removing old pole and delay that work and also delay restoration of service when wires are pulled down. OTELCO claims that Verizon MA's position is speculative, but Verizon MA has provided the Department with detailed testimony explaining how OTELCO's proposed policy change will cause these negative consequences. OTELCO has failed to refute Verizon MA's showing that the alleged cost benefits to third parties by attaching below Verizon MA are unlikely to be more than nominal. *See* Argument Part II below.

OTELCO's claim that Verizon MA and National Grid have charged it the costs of remediating pre-existing code violations is groundless. OTELCO offered just five poles as

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(. . . continued)

management's discretion, align with their public service obligations."); Comments of Westfield Gas and Electric Light Department at 2.

<sup>3</sup> *See* Verizon MA Brief Part III; National Grid Brief, Argument Part C.

examples of such alleged billing. The work on those poles for which OTELCO was billed, however, was required solely to make room for OTELCO's new attachments, not to remediate pre-existing code violations. OTELCO's new legal theory that it is nevertheless entitled to a discount on this work because it may also result in an incidental benefit to another pole attacher is inconsistent with the law. *See* Argument Part III below.

Finally, Verizon MA and National Grid have provided a clear and reasonable analysis in support of their longstanding policies restricting boxing and attachments below Verizon MA, and those policies are not inconsistent with any policy of the Department or its goal of promoting broadband deployment in the Commonwealth. As the DPU and National Grid have pointed out, the policies of the pole owners in operating their networks should be given deference in these circumstances. And Verizon and National Grid have shown that, despite OTELCO's claims otherwise, they have processed OTELCO's applications in a timely and reasonable manner. *See* Argument Part IV below.

## **ARGUMENT**

### **I. OTELCO HAS FAILED TO DEMONSTRATE THAT VERIZON MA'S POLICY RESTRICTING BOXING IS UNJUST, UNREASONABLE OR DISCRIMINATORY.**

#### **A. OTELCO's speculation that Verizon MA's policy on boxing impairs deployment of broadband in the Commonwealth is not supported in the record.**

Verizon MA does not dispute OTELCO's claim that boxing all poles accessible by bucket truck would make OTELCO's build faster and cheaper,<sup>4</sup> but OTELCO's conjecture that the pole owners' restrictions on boxing have impaired or will impair broadband deployment in the Commonwealth overall is inconsistent with the record. OTELCO cites to Mr. Perrone's

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<sup>4</sup> *See* OTELCO Brief at 26-29.

testimony speculating that, among other things, “a provider’s level of investment in the state may decrease if it finds other more attractive, cost-effective environments in which to offer services.”<sup>5</sup> That sounds good in theory, but OTELCO has not provided any hard facts backing up its claim. For example, it has offered no statistics or other evidence showing that broadband access is lacking in Massachusetts, either in the absolute sense or in comparison with other states. Nor has it provided any studies showing that the amount of broadband investment in Massachusetts or other states depends on, or even correlates to, whether the state allows widespread boxing.

In contrast, the facts now before the Department show significant and continuing broadband investment and access in the Commonwealth. National Grid noted that, “[T]here are three other broadband providers already attached on National Grid poles in the municipalities where OTELCO has applied to attach – Verizon MA, Comcast, and Charter – that completed their attachments without resorting to boxing.”<sup>6</sup> The DPU summarized “extensive, multi-year efforts by multiple entities and organizations to facilitate broadband deployment and make-ready work in Massachusetts” that ultimately resulted in the installation of 2,000 miles of fiber-optic cable on 40,000 poles and access to high-speed broadband for 28,000 households in 53 communities in western Massachusetts.<sup>7</sup> Indeed, WG&E’s very business model and its success in building fiber-based networks in Westfield and 18 other municipalities in western Massachusetts, all pursuant to the current policies of the pole owners, also refutes OTELCO’s theory.<sup>8</sup>

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<sup>5</sup> *Id.* at 29.

<sup>6</sup> National Grid Brief at 7.

<sup>7</sup> See DPU Brief at 7-8

<sup>8</sup> See WG&E Brief at 2-3.



In sum, the record evidence does not support OTELCO's theory that broadband deployment and access in Massachusetts depends on whether or not third parties are allowing to box large numbers of poles.

**B. The record does not support OTELCO's claim that Verizon MA's policy on boxing is discriminatory.**

OTELCO asserts that Verizon MA ignores its written policy on boxing "in favor of a blanket prohibition on boxing by third-party attachers" while Verizon MA boxes poles itself, citing as evidence a single statement by a Verizon MA representative that the company does not allow boxing and the fact that Verizon MA could not identify any specific instances in which it has allowed a third party to box a pole.<sup>9</sup>

That evidence does not support OTELCO's claim. First, OTELCO overstates the significance of the statement made at the February 2 meeting. Verizon MA's written policy explaining that there are circumstances in which Verizon MA allows boxing was and remains available on its website for all wholesale customers.<sup>10</sup> In addition, the practical consequences of that policy are that Verizon MA allows boxing only "where there is no alternative means of attaching to the pole and it is not possible to upgrade the pole," such as where a line of poles crosses underneath high-power lines or through shade trees that are cannot be trimmed to accommodate taller poles.<sup>11</sup> Accordingly, Verizon MA only rarely allows boxing, by itself or by third parties.

Second, OTELCO's claim that Verizon MA "continues to maintain that ... it will not be allowing boxing on any of the poles for which OTELCO has applied" is simply incorrect. OTELCO has identified only 14 poles that it would like to box,<sup>12</sup> and Verizon MA explained in detail why

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<sup>9</sup> See OTELCO Brief at 20.

<sup>10</sup> See Wolanin Aff. ¶ 10 and Exhibit A thereto.

<sup>11</sup> See Verizon MA response to DTC-VZ 1-22.

<sup>12</sup> See Exhibit E to the Allen Declaration.

those poles do not qualify for boxing under its policy.<sup>13</sup> OTELCO has never proposed any additional poles for boxing, and Verizon MA has not opined on whether any other poles in OTELCO's applications would be appropriate for that treatment.

In addition, OTELCO has not offered any evidence that Verizon MA has ever refused to allow a third party to box a pole under the same circumstances in which Verizon MA would box for its own purposes. To the contrary, Verizon MA has stated that it would allow third parties to box where Verizon MA would box, and that "it has used opposite-side construction on its poles and that third-party attachers have as well."<sup>14</sup> The best OTELCO can do is point to the fact that Verizon MA does not have records allowing it to identify specific instances in which it has allowed a third party to box a pole.<sup>15</sup> OTELCO expresses disbelief at this but fails to explain why Verizon MA (or any other pole owner) would be expected to keep such records, for example by providing an operational or business reason why such records would be needed. The remedy for a boxed pole is to move all facilities to the same side of the pole when the pole is replaced,<sup>16</sup> so there is no operational need for pole owners to track this information.

OTELCO also claims that Verizon MA "clearly recognizes the benefits of boxing, as evidenced by the fact that Verizon uses boxing in the Commonwealth when it suits Verizon."<sup>17</sup> Boxing *is* appropriate in limited circumstances consistent with Verizon MA's policy, but OTELCO's implication that Verizon MA routinely or as a matter of practice boxes poles even outside the confines of its stated policy has no basis in the evidence. The record includes evidence of just nine poles that OTELCO alleges Verizon MA has boxed.<sup>18</sup> Only five of those

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<sup>13</sup> See Wolanin Aff. Exhibit E; Verizon MA Testimony at 12-13.

<sup>14</sup> See Verizon MA responses to DTC-VZ 1-22 and OTEL-VZ 1-8.

<sup>15</sup> See OTELO Brief at 35.

<sup>16</sup> See Verizon MA response to OTEL-VZ 2-7.

<sup>18</sup> See Allen Declaration Exhibit F.

were boxed inconsistent with Verizon MA's policy, but even the nine poles represent just a tiny fraction (one-twenty-fifth of one percent, or .00041) of the 22,000 Verizon MA poles to which OTELCO seeks to attach.<sup>19</sup> A few isolated errors in the field over decades in no way add up to a practice of boxing poles simply "when it suits Verizon," or affording Verizon MA an unfair advantage over its pole licensees. Likewise, OTELCO's claim that Verizon MA boxed five poles in Connecticut as a third-party attacher also falls far short of demonstrating that Verizon MA regularly or routinely "uses" boxing in that state as OTELCO claims.<sup>20</sup> Finally, the fact that Verizon MA boxed poles, and allowed others to box poles, in limited circumstances in Maine before it sold its business.<sup>21</sup> is no basis for a finding of discrimination or for allowing indiscriminate boxing of every pole accessible by bucket truck.

**C. Verizon MA's policy on boxing is consistent with the rules and practices in all nearby jurisdictions but one.**

OTELCO asks the Department to "order National Grid and Verizon to allow boxing on poles accessible by bucket truck, lift or ladder similar to Maine."<sup>22</sup> on the grounds that boxing is common in Connecticut, Maine has implemented such a rule, and because boxing "is permitted by several other nearby states and the FCC."<sup>23</sup> These arguments have no merit, however, and the Department should reject OTELCO's request.

First, the Department should give no weight to OTELCO's argument that widespread boxing in Connecticut has not, to OTELCO's knowledge, caused any damaging effects, because as Verizon MA explained in its Brief, OTELCO has not been in a position to observe those

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<sup>19</sup> See Verizon Brief, at 12.

<sup>20</sup> See OTELCO Brief at 29. Moreover, pole owners in Connecticut routinely allow boxing, as OTELCO has noted.

<sup>21</sup> See *Oxford Networks—Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles*, Maine PUC Dkt. No. 2005-486, 2006 WL 4091227, Order dated October 26, 2006 ("Oxford Networks"), at 7.

<sup>22</sup> OTELCO Brief at 41.

<sup>23</sup> *Id.* at 42.

effects.<sup>24</sup> In addition, and to be clear, boxing is in common use in Connecticut solely because the pole owners there have chosen to allow it, not because of any law or rule of the Public Utilities Regulatory Authority.<sup>25</sup> That is emphatically not the case in Massachusetts, where Verizon MA and National Grid allow boxing only in very limited circumstances, and the record here shows only a handful of boxed poles.

The centerpiece of OTELCO's argument is the presumption in Maine that it is unreasonable for a pole owner to prohibit boxing of poles that are accessible by bucket truck.<sup>26</sup> The rule in a single, largely rural, state, however, is a poor basis for making policy in Massachusetts, especially where that rule is inconsistent with the rules in all neighboring states, as shown below. In addition, the record before the Maine PUC in the *Oxford Networks* case in which it developed its policy appears to have been very different from the record now before the Department, in that the PUC found that boxing was "not an infrequent practice in the State,"<sup>27</sup> whereas the record here, as noted, shows only extremely limited boxing.

Further, and with all due respect to the Maine PUC, its decision with regard to boxing was not well-reasoned in other respects. For example, the PUC based its decision in part on the finding that boxing "is an accepted industry practice,"<sup>28</sup> but that does not show that the practice is accepted in all or most situations, and every other nearby state has implemented reasonable policies that allow pole owners to restrict its use, consistent with the practices they apply to themselves. The Maine PUC also based its decision in part on a finding that "Verizon boxes poles for essentially the same reasons that Oxford desires to box poles—to save time and reduce

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<sup>24</sup> See Verizon Brief at 9-10.

<sup>25</sup> See *id.* at 11, note 30.

<sup>26</sup> See OTELCO Brief at 41-42.

<sup>27</sup> *Oxford Networks* at 15.

<sup>28</sup> *Id.*

costs.”<sup>29</sup> Yet by equating the limited circumstances in which Verizon allowed boxing in Maine to a system allowing widespread boxing, the PUC ignored the very different consequences of the two approaches. The pole owners have demonstrated here that widespread boxing would degrade the reliability of their networks, increase the costs of working on and replacing poles and delay service restoration in emergencies. That the pole owners in Maine, or in Massachusetts, are willing to tolerate the negative effects of boxing in very limited circumstances where boxing would be particularly helpful to an attacher – any attacher – would in no way justify the exponential increase in those negative effects that would result if boxing were allowed on the great majority of poles as a matter of course.

That reasoning essentially underpins the policies on boxing in all nearby jurisdiction other than Maine. As Verizon MA explained in its Brief, the policy at the FCC and in nearby states is consistent with that in Massachusetts, because they *allow* boxing but do not *require* pole owners to allow third-party attachers to box a pole unless the pole owner also would box that pole. Specifically, no rule or regulation of the FCC or New Jersey, New Hampshire, New York, Pennsylvania, Rhode Island, or Vermont precludes or is inconsistent with Verizon MA’s policy allowing licensees to box a pole only in limited circumstances where Verizon MA too would box the pole.<sup>30</sup>

Thus, OTELCO’s reference to a 1991 New Jersey decision praising a pole owner for allowing an experiment with boxing<sup>31</sup> misses the point. While New Jersey – like Massachusetts – allows boxing, it does not require pole owners to allow boxing other than where the owners too would box a pole. OTELCO’s reference to the FCC<sup>32</sup> is similarly off-base, because while the FCC does not prohibit boxing, it has also held that pole owners may limit the circumstances in

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<sup>29</sup> *Id.* at 16.

<sup>30</sup> *See* Verizon Brief at 11.

<sup>31</sup> OTELCO Brief at 42.

<sup>32</sup> *Id.*

which boxing can be used if those limits apply equally to the pole owner and its licensees.<sup>33</sup> Similarly, the New York PSC’s directive to utilities to require boxing applies only where a multi-factor analysis done on a case-by-case basis warrants it, where the cost of traditional make-ready is “exorbitant,” and where the utility has allowed boxing itself.<sup>34</sup> That directive, moreover, was based in part on a finding that boxing was already “common” in New York,<sup>35</sup> unlike in Massachusetts.

**D. OTELCO vastly overstates the supposed benefits of boxing and disregards the negative consequences associated with boxing.**

OTELCO claims that boxing poles “avoids premature pole replacements” and points to a study submitted to the FCC which OTELCO says shows that pole owners incur a net loss due to prematurely replacing poles.<sup>36</sup> That study, however, shows that pole owners would incur a net loss only if they are not allowed to charge licensees the full costs of pole replacement caused solely by the licensee’s new attachment.<sup>37</sup> Likewise, the pole replacement costs to be saved by boxing would accrue solely to the new attacher, while the additional costs imposed by boxing – by way of more complicated and difficult pole replacements and delays in restoring service in emergencies – would be borne by the pole owners, existing attachers and the general public.<sup>38</sup> This is how allowing OTELCO to box poles as a matter of standard practice would effectively force these other stakeholders to subsidize OTELCO’s build.

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<sup>33</sup> See Verizon MA Brief at 8, citing *In the Matter of Implementation of Section 224 of the Act*, WC Docket No. 07-245, *A National Broadband Plan for our Future*, GN Docket No. 09-51, Report and Order and Order on Reconsideration, ¶ 236 (“*Implementation of Section 224 of the Act*”) (quoting 2010 Pole Attachment Order).

<sup>34</sup> *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, New York Public Service Commission, Case 03-M-0432, Order Adopting Policy Statement on Pole Attachments, (August 6, 2004), Appendix A, at 6.

<sup>35</sup> See OTELCO Brief at 43.

<sup>36</sup> *Id.* at 30.

<sup>37</sup> See Comments of Southern Company, Oncor Electric Delivery Company LLC, Entergy Corporation, Duke Energy Corporation, American Electric Power Service Corporation, and Ameren Services Company, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Second Further Notice of Proposed Rulemaking, at 8 (filed June 27, 2022).

<sup>38</sup> See e.g., Verizon MA Brief at 5-8.

OTELCO's argument that boxing will reduce the incidents of double poles and that the issue "has attracted the specific attention of the Massachusetts Legislature,"<sup>39</sup> is long out of date. The Department can take notice from the annual double pole reports in its records that beginning in 2017, pole owners have re-energized their focus on this issue and have reduced both the embedded base and the total number of double poles in Massachusetts by tens of thousands.<sup>40</sup> Pole owners will of course continue to work to remove old poles and eliminate double poles, but at this point, it is entirely unnecessary to allow third parties to box poles as a means of reducing double poles, and the benefit of doing so would be minor at best.

OTELCO attempts to minimize the negative impacts and costs of boxing, but its arguments have no merit. It argues that boxing does not cause safety issues, pointing to Mr. Slavin's testimony.<sup>41</sup> Verizon MA and National Grid have both testified, however, that their technicians cannot safely climb a boxed pole and that boxing will delay restoration of service in emergencies.<sup>42</sup>

OTELCO also argues that the lack of evidence of accidents associated with boxed poles in Massachusetts proves that boxing is safe.<sup>43</sup> But that absence is because the pole owners allow boxing so rarely and do not have records showing which poles are boxed, so it does not support a finding that widespread boxing would not result in safety issues on the poles. OTELCO is unhappy that the pole owners do not have records of boxed poles,<sup>44</sup> but as noted above, OTELCO has not offered any business reason why the pole owners would keep such records.

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<sup>39</sup> ORELCO Brief at 32.

<sup>40</sup> See also Verizon MA response to OTEL-VZ 1-22, showing a large surge in pole removals beginning in 2017.

<sup>41</sup> See OTELCO Brief at 34.

<sup>42</sup> See Verizon MA Brief at 7, 8-9.

<sup>43</sup> OTELCO Brief at 35.

<sup>44</sup> *Id.*

Also as explained above, the Department should give no weight to OTELCO's claim that its boxing in Connecticut has not caused issues for pole owners or others.<sup>45</sup>

The Department should give no weight to OTELCO's argument that the pole owners have not provided "actual" evidence that boxing will increase costs.<sup>46</sup> OTELCO contradicts itself in the very next paragraph of its Brief, however, stating that "it is acknowledged that boxing may add to the time and cost of replacing boxed poles."<sup>47</sup> And OTELCO's expert witness admitted to such additional costs as well.<sup>48</sup> In addition, the pole owners' testimony that boxing will increase their costs is based on many years' experience managing the poles and their networks, and that testimony provides extensive hard facts explaining exactly how and why boxing increases pole replacement time and costs, including by requiring existing attachers to re-align their attachment hardware to the new location of the replacement pole, requiring coordination of pole replacement jobs with the boxing party, requiring National Grid to devote two bucket trucks and more person-power, rather than a single truck, to work on boxed poles, imposing constraints on pole owners' resources available to accomplish other work, and by delaying restoration of service due to storm damage or other damage to the poles.<sup>49</sup> On these facts, a finding that boxing will increase the costs of working on the poles is not only a reasonable conclusion but is the only reasonable conclusion, and is in no way speculative.

OTELCO falls back to argue that, while boxing will increase costs, those costs may not be significant.<sup>50</sup> OTELCO points to Verizon MA's estimate that boxing would increase costs of replacing a pole by \$180–\$281 but ignores that this is the bare minimum incremental increase

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<sup>45</sup> See Verizon Brief at 9-10.

<sup>46</sup> OTELCO Brief at 36.

<sup>47</sup> *Id.*

<sup>48</sup> See Slavin Testimony at 13.

<sup>49</sup> See Verizon Direct Testimony at 7-8; National Grid Brief at 10-12.

<sup>50</sup> OTELCO Brief at 37.



and Verizon MA's explanation that costs may vary substantially based on the circumstances of individual poles.<sup>51</sup> In addition, Verizon MA's witnesses also testified that "the more attachments on a pole ...the more time it will take to relocate them to the new pole" increasing the costs of replacing a boxed pole.<sup>52</sup> Verizon MA's witnesses also explained that replacing a boxed pole that supports lines running in multiple directions would be especially costly and time-consuming, due to the need to coordinate the work with both the other pole owner and the third-party attacher that boxed the pole.<sup>53</sup> In any event, the lion's share of the costs of replacing boxed poles is incurred not by Verizon MA but by National Grid, which installs the new pole and usually has more, and more complicated and dangerous, facilities to transfer to the new pole than does Verizon MA. Those costs are likely to be multiple times greater than the costs incurred by Verizon MA.<sup>54</sup>

Verizon MA has also demonstrated that the additional time to replace boxed poles is especially troubling in the context of work to restore service following a storm or other catastrophic damage to the poles, and that boxing "could significantly delay restoring service to customers and clearing roadways for public use."<sup>55</sup> OTELCO does not dispute this but instead seeks to misdirect the Department on this issue. For example, OTELCO asserts that there is no record evidence "of boxing leading to storm related outages,"<sup>56</sup> but no party in this proceeding claims that boxing causes storm-related outages. Likewise, OTELCO asserts that the pole owners have not demonstrated "that boxing will increase storm restoration times any more than other facilities that may be attached to a pole," comparing boxing to the presence of a transformer or

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<sup>51</sup> See Verizon MA response to DTC-VZ 1-3.

<sup>52</sup> Verizon MA Testimony at 6.

<sup>53</sup> See Verizon Brief at 6, *citing* Verizon MA Testimony at 7.

<sup>54</sup> See e.g., Allen Declaration, Exhibits C and E, which purport to list separately the make-ready costs assessed to OTELCO by Verizon MA and National Grid for certain poles.

<sup>55</sup> See Verizon MA Brief at 7; Verizon MA Testimony at 8.

<sup>56</sup> OTELCO Brief at 39-40.

multiple lines on a pole.<sup>57</sup> Transformers and lines running in multiple directions are necessary to provide electrical and communications services, however, while boxing is not. So while the general public may have to tolerate the time it takes to restore service when poles holding transformers or multiple lines are down and need to be replaced, it should not have to tolerate the extra time to restore service because OTELCO has boxed poles in order to reduce its construction costs.

**II. OTELCO HAS FAILED TO DEMONSTRATE THAT VERIZON MA'S POLICY REQUIRING THIRD PARTIES TO ATTACH ABOVE VERIZON MA IS NOT JUST AND REASONABLE.**

**A. Verizon MA has offered substantial evidence based on years of experience in the field that allowing OTELCO to place its lighter cables below Verizon MA's heavier ones will likely result in midspan violations and damage to facilities. OTELCO's responses to that evidence have no merit.**

Verizon MA has demonstrated that allowing third-party attachers to install lighter fiber cables below Verizon MA's heavier cables on the poles is likely to result in mid-span violations and potentially damage facilities due to chafing against each other.<sup>58</sup> In particular, Verizon MA's witnesses explained that even initially compliant installations are not likely to remain that way, because:

our experience managing and working on the actual Verizon MA network in Massachusetts is that copper cables commonly sag more in the summer heat than fiber-optic cables. The larger copper cables also sag more under snow and ice loading due to winter storms than the smaller fiber-optic cables.<sup>59</sup>

That is why the Blue Book concludes that "locating these metallic cables as the lowest on the pole will provide an additional safety factor to avoid physical contact or interference between

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<sup>57</sup> OTELCO Brief at 40.

<sup>58</sup> See Verizon MA Brief at 13-15, Verizon MA Testimony at 17-18.

<sup>59</sup> Verizon MA Testimony at 18.

different communications cables and between cable plant of different telecom carrier companies.”<sup>60</sup>

OTELCO would have the Department ignore this evidence because Verizon MA has not also provided evidence of “actual problems” arising from placing lighter cables below heavier ones.<sup>61</sup> It is undisputed, however, that Verizon MA does not allow third-parties to attach their cables below Verizon MA’s on the poles,<sup>62</sup> so there has been little opportunity for such problems to have developed, and the absence of such evidence affords no basis for discounting Verizon MA’s testimony. Nor does it render that testimony speculative, as OTELCO claims.<sup>63</sup> As shown above, Verizon MA has offered hard evidence, based on its witnesses’ “experience managing and working on the actual Verizon MA network” that copper cables “commonly sag more in the summer heat” and “sag more under snow and ice loading due to winter storms” than do fiber-optic cables. It is reasonable to conclude from these facts that if OTELCO is allowed to install fiber-optic cables underneath Verizon MA’s copper cables, even many of the installations that initially meet the minimum mid-span clearance requirement will eventually fail to meet that requirement over time, potentially damaging the cables.

That conclusion is buttressed by Blue Book’s recommendation, quoted above and at greater length in Verizon MA’s Brief at 19, to preserve the standard hierarchy and place lighter cables above heavier ones. OTELCO argues that “the *Blue Book* recognizes that exceptions can

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<sup>60</sup> *Id.* at 19. Contrary to OTELCO’s contention in its Brief, at 46, Verizon MA makes no concession of a “common practice of sagging in to avoid contact between lines in the context of overlashing existing lines.” Information request DTC-VZ 1-20 notes that Verizon MA had stated that its copper cable is heavier than any other cable in the communications space on the poles “in almost every instance” and asked for examples of when Verizon MA’s is not the heaviest on the poles. In response, Verizon MA explained that a third-party attacher may overlash a new cable to its existing one, creating a cable heavier than Verizon MA’s cable, and that in such event Verizon MA may require the attacher to sag-in. As the Department’s information request makes clear, this is by no means a “common practice” but explains the rare instance in which Verizon MA’s cable is not the heaviest one on a pole.

<sup>61</sup> See OTELCO Brief at 45.

<sup>62</sup> See Wolanin Aff. ¶ 14.

<sup>63</sup> See OTELCO Brief at 45.

and will be made and that separation from power is the most important part of the hierarchy,”<sup>64</sup> apparently referring to the statement in the Blue Book that lighter cables should be placed above heavier ones “as long as this is possible without compromising the 40 inches of separation between communications space and electrical power space on the pole.”<sup>65</sup> Requiring OTELCO to attach above Verizon MA does not compromise the neutral zone, however, because the existing attachers can rearrange their facilities to make room for OTELCO or, failing that, the pole can be replaced to provide additional space.

OTELCO also cites the Maine PUC’s decision in the *Oxford Networks* case in support of its assertion that allowing it to attach below Verizon MA will not result in code violations,<sup>66</sup> but the Department should not give that decision weight. As noted above with respect to boxing, the record on which the PUC made its decision in *Oxford Networks* in 2007 was very different than the record now before the Department. First, as OTELCO says, the Maine PUC found “no evidence of industry concerns or literature regarding actual or potential problems resulting from the placement of lighter cables below heavier cable....”<sup>67</sup> Apparently, no party in that case pointed out to the PUC the provisions of the Blue Book quoted above and in Verizon MA’s testimony, in which an accepted authority clearly states industry concerns with placing lighter cables below heavier ones and recommends against it. Second, the decision in *Oxford Networks* was also based on findings that “cable movement at mid-span caused by wind is unlikely to significantly affect linemen working on facilities that are on the poles and that telecommunications cable are difficult to damage.”<sup>68</sup> The Verizon MA makes no claim in the

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<sup>64</sup> OTELCO Brief at 45.

<sup>65</sup> Telcordia Blue Book (2017 Edition), § 3.2.1.

<sup>66</sup> See OTELCO Brief at 46-47.

<sup>67</sup> *Id.*, quoting *Oxford Networks*, at 13.

<sup>68</sup> *Id.*

instant proceeding that wind causes fiber-optic cable to harm linemen. Rather, it has offered substantial evidence, catalogued above, that allowing lighter cable to be placed below Verizon MA's copper cable will result in mid-span clearance violations and potentially damage the facilities as they chafe against one another. Had the Maine PUC had such evidence before it, the outcome in *Oxford Networks* may have been, and should have been, different.

**B. OTELCO has not offered any valid response to Verizon MA's showing that allowing third parties to attach below Verizon MA would delay pole replacements and make them more costly. Requiring OTELCO to pay Verizon MA to move OTELCO's attachment is an incomplete remedy and would unfairly drain Verizon MA's resources available for other work.**

Verizon MA has demonstrated that allowing third parties to attach below Verizon MA would force Verizon MA to dispatch its crews twice to accomplish work that today is done in a single trip.<sup>69</sup> As Verizon MA's witnesses explained:

... when a pole is replaced, a Verizon MA crew will normally transfer the company's facility to the new pole and also remove the old pole in a single trip, but a third-party facility attached below Verizon MA would require two trips – one to transfer Verizon MA's facility and another to remove the old pole after the third-party has transferred its own facility..<sup>70</sup>

This inefficiency would increase the costs to Verizon MA of removing old poles and would also delay removal of the old pole as Verizon MA waits for the intervening third-party attacher to transfer its facilities to the new pole..<sup>71</sup>

Despite this evidence, OTELCO argues that “there is no evidence in the record that Verizon currently *regularly* makes only one trip to the pole,” apparently objecting to Verizon MA's use of “normally” in the passage quoted above..<sup>72</sup> The Department should ignore OTELCO's game of semantics. “Regularly” and “normally” are synonyms, and OTELCO

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<sup>69</sup> See Verizon MA Brief at 15.

<sup>70</sup> See Verizon MA Testimony at 14.

<sup>71</sup> See Verizon MA Brief at 15; see also National Grid Testimony at 30.

<sup>72</sup> OTELCO Brief at 47 (emphasis added).

doesn't explain why "regularly" is acceptable but "normally" is not. Further, National Grid has testified that being the lowest attacher on the pole allows Verizon MA to "control this work [removal of the old pole] by scheduling it in conjunction with its transfers to the new pole."<sup>73</sup> And OTELCO has offered no evidence that Verizon MA does not regularly or normally transfer its facilities and remove the old pole in a single dispatch. That Verizon MA's witnesses did not testify in absolutist terms – for example, by claiming that the company "always" does all this work with a single dispatch – merely leaves room for the possibility that this is not the case on every single pole removal, not that Verizon MA does not "regularly" dispatch just once.

OTELCO also argues in favor of its offer to pay Verizon MA to transfer OTELCO's facility when a pole on which OTELCO is attached below Verizon MA is replaced.<sup>74</sup> As Verizon MA has explained, however, OTELCO's proposal does not address the other problems caused by a third party attaching below Verizon MA, and foisting additional construction work onto Verizon MA would impair the company's ability to complete other projects, for itself and for other third parties, such as municipal projects.<sup>75</sup>

OTELCO's arguments in support of its proposal have no merit. OTELCO claims that Verizon MA "concedes that it 'will move the facilities of other attachers,'"<sup>76</sup> but it intentionally omits Verizon MA's testimony that it will do this only "in limited circumstances" in emergencies or where the third party's failure to act is delaying other work.<sup>77</sup> OTELCO's argument regarding Verizon MA and National Grid's short-lived single stream transfer pilot program is likewise groundless. That program involved using an independent administrator to transfer

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<sup>73</sup> National Grid Testimony at 30.

<sup>74</sup> See OTELCO Brief at 47.

<sup>75</sup> See Verizon MA Testimony at 21.

<sup>76</sup> OTELCO Brief at 48, quoting Verizon MA Testimony at 21.

<sup>77</sup> See Verizon MA Testimony at 21.

third-party attachments on the poles and did not add work to Verizon MA's workload.<sup>78</sup> Finally, OTELCO cites once again to the Maine PUC's decision in *Oxford Networks*,<sup>79</sup> but its claim that that decision was "based on a similar record to that of this proceeding," is untrue. In that case, the PUC found in that, "[t]here was some conflicting evidence regarding whether Verizon actually transfers its cable and removes the old pole at the same time."<sup>80</sup> That is not the case here, where the record does not include any evidence tending to show that Verizon MA does not transfer its cable and removes the old pole at the same time. OTELCO's quibbling over "regularly" versus "normally" is not only groundless, but it is not evidence.

**C. OTELCO's efforts to rehabilitate the CHR cost study have no merit.**

Verizon MA has demonstrated that the CHR cost study submitted by OTELCO is fatally flawed and that allowing OTELCO to attach below Verizon MA instead of above would not save space on a pole or eliminate pole replacements, which accounted for the vast bulk of the alleged savings in the CHR study.<sup>81</sup> Verizon MA also explained that the CHR study likely applied ground clearance requirements from other states to achieve its savings, rather than the heavy storm loading clearance requirements used in Massachusetts, and that with application of the proper clearances, "the cost savings to OTELCO ... if any, would be minor."<sup>82</sup> OTELCO has subsequently admitted that it did indeed use the wrong ground clearance requirements.<sup>83</sup>

The Department should ignore OTELCO's assertion that Verizon MA's heavy storm loading ground clearance requirements are "purely self-serving" and "unnecessary."<sup>84</sup> The first

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<sup>78</sup> See Verizon MA response to DTC-VZ 2-12. Moreover, as Verizon MA explained, "The results of the pilot were inconclusive, and plans for further pilots were suspended." *Id.*

<sup>79</sup> See OTELCO Brief at 48.

<sup>80</sup> *Oxford Networks*, at 14.

<sup>81</sup> See Verizon Testimony at 18-19.

<sup>82</sup> *Id.*

<sup>83</sup> See OTELCO Brief at 49.

<sup>84</sup> *Id.* at 48.

claim rests on Verizon MA's testimony that it commonly reduces its standard 18' clearance requirement for residential driveways to 16' for residential driveways that are not used by trucks or commercial equipment.<sup>85</sup> Far from being self-serving, however, Verizon MA's practice acknowledges that the higher 18' standard is not needed in this situation, where taller commercial traffic is unlikely to pull down its wires, with the result that there is more room on the affected pole for all attachers, not just Verizon MA. Likewise, the sole grounds OTELCO offers for its bare claim that the heavy storm loading clearance requirements are not necessary in Massachusetts is that Consolidated agreed to use a different standard in Maine.<sup>86</sup> That is nowhere near sufficient basis for overturning longstanding standards that were adopted "to protect the safety of the public and the network under heavy storm loading conditions on the poles."<sup>87</sup>

Furthermore, the reasonableness of the Massachusetts heavy storm loading clearance requirements is not properly before the Department in this proceeding. OTELCO's Complaint does not even mention the heavy storm loading clearance requirements, much less state a claim that they are unjust or unreasonable. As a result, neither the active parties in this proceeding nor potentially interested stakeholders have been given notice that the Department would address such a claim in this case, and other than as summarized above, no party has offered testimony or other evidence as to the reasonableness of those requirements.

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<sup>85</sup> See Verizon MA Testimony at 20.

<sup>86</sup> See OTELCO Brief at 49.

<sup>87</sup> Verizon MA Testimony at 20.



**D. OTELCO has failed to refute Verizon MA's testimony that allowing third parties to attach below Verizon MA will make make-ready surveys and work more complicated and expensive and will likely delay service restoration and clearing of roads when lines are pulled down.**

Verizon MA's witnesses testified that allowing OTELCO to attach below Verizon MA on some poles and above it on others would make the pole owners' make-ready surveys significantly more complicated and therefore increase the costs and the time it would take to complete the surveys, because "the surveyors would need to identify different heights for the new attachments on different poles and, if dead-ending is to be used, which poles could support that technique."<sup>88</sup> OTELCO asserts that this testimony "lacks any evidentiary support and is illogical on its face,"<sup>89</sup> but it does not explain the basis for its assertion. If OTELCO intends to decide whether to attach above or below Verizon MA based on which choice would generate more moves of existing attachments up or down the poles, that would still require the surveyors to identify multiple height options on the poles and, again, complicate the survey process. And OTELCO would still eventually have to connect the cable it attaches at a lower position on some poles to the cable it attaches at a higher position on other poles, thereby crossing other attachers' facilities and likely resulting in clearance violations.<sup>90</sup>

Verizon MA's witnesses also testified that allowing third-parties to attach below Verizon MA on some poles and above Verizon MA on others would result in more costly and less efficient make-ready work for future attachers, because Verizon MA would have to make any required moves on one set of poles *before* OTELCO moves its facilities and then return to the field to move its attachments on other poles *after* OTELCO completes its moves, thereby

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<sup>88</sup> See Verizon MA Testimony at 15

<sup>89</sup> OTELCO Brief at 49

<sup>90</sup> See Verizon MA Testimony at 15.

requiring two trips where only one is needed today.<sup>91</sup> OTELCO says this is unlikely, because in this situation “chances are neither party will have to move for the next entity as boxing or a pole replacement would likely be the only remaining options.”<sup>92</sup> But like moves, transfers too are performed based on the height of the attachments on the poles,<sup>93</sup> so allowing third parties to attach in the manner OTELCO seeks would increase the time and cost of make-ready work whether it consists of moves or transfers.

Finally, Verizon MA offered testimony that allowing third-party attachments below Verizon MA is likely to delay restoration of service and clearing of public ways when a truck pulls down a wire, because municipal officials will not know who to notify to repair the facility.<sup>94</sup> OTELCO says that “this is why companies place identification tags on their lines,”<sup>95</sup> but companies often fail to do this.<sup>96</sup> OTELCO also says that the prospect of delayed restoration of downed lines is “a risk OTELCO is willing to assume.”<sup>97</sup> OTELCO entirely fails to recognize that downed wires across a roadway also pose a risk and inconvenience to the general public as well, and it does not explain why the public should be subjected to such delays.

### **III. OTELCO HAS FAILED TO PROVE THAT VERIZON MA AND NATIONAL GRID CHARGED IT TO REMEDIATE PRE-EXISTING CONDITIONS ON THE POLES, AND OTELCO’S LEGAL THEORY THAT IT CANNOT BE CHARGED FOR MAKE-READY WORK SOLELY CAUSED BY OTELCO IF THAT WORK INCIDENTALLY BENEFITS OTHERS IS INCONSISTENT WITH THE LAW.**

OTELCO insists that it “has presented evidence of representative poles where it is improperly being charged make-ready for work that was needed in order to correct pre-existing

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<sup>91</sup> *Id.* at 16.

<sup>92</sup> OTELCO Brief at 49-50.

<sup>93</sup> *See* Verizon MA response to DTC-VZ 1-9.

<sup>94</sup> *See* Verizon MA Testimony at 16.

<sup>95</sup> OTELCO Brief at 50.

<sup>96</sup> *See* Verizon MA response to OTEL-VZ 2-9, explaining that while Verizon MA does affix identifying tags to its lines, “other attachers are inconsistent in following this practice.”

<sup>97</sup> OTELCO Brief at 50.

NESC violations....”<sup>98</sup> Verizon MA and National Grid have demonstrated, however, that none of the five poles OTELCO relies on need to be replaced in order to remediate pre-existing violations, and that none of them have enough room for OTELCO’s additional attachment, so the only reason these poles need to be replaced is to accommodate OTELCO, not to remediate pre-existing conditions.<sup>99</sup> In addition, National Grid has shown that the work on six other poles cited by OTELCO was included only in a preliminary estimate by National Grid’s contractor and that the pole owners did not bill OTELCO for any work on those poles.<sup>100</sup> Thus, there is no evidence in the record that the pole owners have charged OTELCO for work that was needed to remediate pre-existing code violations on the poles.

OTELCO has never attempted to refute the above showing by the pole owners, for example by offering expert testimony that the code violations on three of the poles at issue cannot be remediated without installing a new pole. Instead, OTELCO changes the legal theory underpinning its claim. OTELCO argued in its Complaint that the applicable rule of law is that the cost causer pays only for the work it causes:

Under established cost causation principles, a new attacher is responsible only for actual costs incurred necessitated solely by its attachment, since holding a new attacher liable for preexisting violations would “unfairly penalize[] the new attacher for problems it did not cause.”<sup>101</sup>

Now that the pole owners have demonstrated that they are in fact charging OTELCO only for the make-ready costs “necessitated solely by its attachment,” OTELCO has revised its theory. It now argues that it should not be required to pay for make-ready work, even work that is caused

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<sup>98</sup> *Id.*

<sup>99</sup> *See* Verizon MA Brief at 20.

<sup>100</sup> *See* National Grid Brief at 24; *see also* Verizon MA Testimony at 24 and Exhibit VZ-1.

<sup>101</sup> Complaint ¶ 61 (citations omitted). OTELCO also cited precedent at the FCC and in Maine, Vermont and Connecticut for the proposition that make-ready costs “should be borne by the cost causers....” *See id.* ¶¶ 62, 65, 66, 67.

solely by OTELCO, if another attacher would receive an incidental benefit from the work. As OTELCO now phrases it:

Under widely accepted cost-causation principles applicable to pole attachments, attachers should pay only for costs caused solely by their attachments, ***and not for benefits incurred by the pole owner or another attacher***, since holding a new attacher liable for preexisting violations would “unfairly penalize[] the new attacher for problems it did not cause.”<sup>102</sup>

OTELCO’s revised theory giving itself a discount if someone else benefits from the make-ready work is inconsistent with Massachusetts law and is not supported by the sources OTELCO cites. As National Grid pointed out in its Brief, at 8, the Massachusetts pole attachment statute, M.G.L. C. 166, § 25A, requires OTELCO to pay the costs of expanding the capacity of Verizon MA’s poles to accommodate OTELCO’s new attachment. The statute provides that where a utility would deny access due to inadequate capacity, “the utility shall, ***at the expense of the wireless provider***, expand the capacity of its poles, ducts, conduits, or rights-of-way to allow access by the wireless provider ....”<sup>103</sup> The statute creates a simple rule that the new attacher pays for the costs it causes. It does not provide for any exception or discount if the expansion of capacity on the pole also happens to confer a benefit on another attacher, and it does not assign any portion of the costs of that work to any other party.

OTELCO cites authority from the FCC and other states in support of its revised theory. While these authorities do not apply in Massachusetts, it is nevertheless instructive that they hold only that a new attacher should only pay for the costs it causes, not that the costs of make-ready work must be allocated based on an analysis of who might benefit from the work. Verizon MA’s assessments to OTELCO are consistent with those authorities.

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<sup>102</sup> OTELCO Brief, at 50 (emphasis added).

<sup>103</sup> M.G.L. c. 166, § 25A (emphasis added).

For example, OTELCO cites to the FCC’s decision in *Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd. 24615 (2003),<sup>104</sup> but the issue in that case was not whether a new attacher must pay the costs of replacing poles with pre-existing code violations where the violations did not require pole replacement but the poles needed to be replaced solely to accommodate the new attachment. Rather, the claim by the new attacher in *Knology* was that it should not have to pay for pole replacements that were needed even in the absence of a new attachment, and not surprisingly the FCC agreed with the new attacher.<sup>105</sup>

OTELCO also cites to an FCC order stating that a new attacher is not responsible for the cost of bringing poles or third-party equipment on the poles into compliance with applicable codes, because “[h]olding the new attacher liable for preexisting violations unfairly penalizes the new attacher for problems it did not cause....”<sup>106</sup> In the instant proceeding, however, none of the poles cited by OTELCO needs to be replaced in order to remediate the preexisting violations, but they do need to be replaced to make enough room for OTELCO. Accordingly, the cost of replacing the poles assessed to OTELCO is the same amount OTELCO would be assessed if the attachments on the pole had been code-complaint. OTELCO is not being assessed an extra amount or penalized for problems it did not cause.

OTELCO’s reliance on the FCC’s rule at 47 C.F.R. § 1.1411(d)(4)<sup>107</sup> is similarly unavailing. The rule provides in part that, “A utility may not charge a new attacher to bring poles, attachments, or third-party equipment into compliance with current published safety, reliability, and pole owner construction standards guidelines ....” As Verizon MA has

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<sup>104</sup> See OTELCO Brief at 50.

<sup>105</sup> See *Knology*, ¶ 38.

<sup>106</sup> See OTELCO Brief at 50, citing Third Report and Order and Declaratory Ruling in *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd. 7705, 7766-67 ¶¶ 121-22 (Aug. 3, 2018) (*Third Report and Order*) ¶ 121.

<sup>107</sup> See OTELCO Brief at 51.

demonstrated, the sole purpose of replacing the five poles at issue is to make room for OTELCO's attachments; that work is not needed to bring the poles into compliance.<sup>108</sup>

OTELCO apparently reads this rule extremely expansively, to prohibit a utility from charging a new attacher not only for work "to" bring poles into compliance, meaning work the purpose of which is to bring the pole into compliance, but also to prohibit it from charging for any work done for any other purpose, such as accommodating the new attachment, if the pole is brought into compliance as an incidental by-product of the work. No language in this or any other federal rule supports such a reading.

The only authority cited by OTELCO that even discusses allocating the costs of make-ready work based on who benefits from the work is the FCC rule at 47 C.F.R. § 1.1408(b), which provides that the costs of modifying a facility such as a pole "shall be borne by all parties that obtain access to the facility as a result ... and by all parties that directly benefit from the modification."<sup>109</sup> The rule, however, goes on to clarify that the owner of a pre-existing attachment only "directly benefit[s]" from a modification if it "adds to or modifies its attachment." That is not the case here. The rule also provides that such an owner "shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment ... sought by another party." That *is* the case here, where the work that is in dispute – the transfer of pre-existing attachments to the new pole – is necessitated solely as a result of OTELCO's new attachment.

OTELCO also states that "[n]umerous other states have [] ruled that new attachers should not be responsible for the cost of correcting pre-existing non-compliance" citing Maine,

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<sup>108</sup> See Verizon Testimony at 23.

<sup>109</sup> See OTELCO Brief at 51.

Connecticut and Vermont among others..<sup>110</sup> Verizon MA's charges to OTELCO for the work of replacing the poles at issue are entirely consistent with these rules, because the work is needed solely to accommodate OTELCO's new attachment, and is not needed to correct pre-existing non-compliance on the poles.

OTELCO also seems to argue in its Brief that it should not be required to pay the full cost of a pole replacement, required solely to make room for OTELCO, even in the absence of pre-existing violations..<sup>111</sup> OTELCO argues that studies filed in a pending FCC proceeding "support allocating costs to attachers and pole owners based on the remaining life of pole," but it also acknowledges that other studies before the FCC in that proceeding show that such an allocation would result in large net losses to electric company pole owners which would be paid by their ratepayers..<sup>112</sup>

More importantly, this issue may be pending before the FCC, but it is not pending before the Department in this case. The Complaint claims that "[t]he pole owners are improperly charging OTELCO to correct pre-existing non-compliance,"<sup>113</sup> but does not assert, anywhere, that OTELCO should not have to pay the full cost of a pole replacement required to accommodate its attachment even where the pole is code-complaint. The Complaint does not even begin to state a claim that Verizon MA's policy of charging for such costs is in any way unjust or unreasonable, and neither Verizon MA nor National Grid addressed such a claim in their responses to the Complaint or in testimony. The Department should limit OTELCO to the claims stated in its Complaint and decline to address wholly new matters not properly raised or noticed.

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<sup>110</sup> OTELCO Brief at 53.

<sup>111</sup> See OTELCO Brief at 51.

<sup>112</sup> *Id.* and *Id.* at 30.

<sup>113</sup> Complaint at 22; see also *id.* ¶ 63.

The Department should also reject OTELCO request that it “clarify” that Verizon MA and National Grid cannot charge OTELCO for replacing poles that would need to be replaced even without OTELCO’s new attachment.<sup>114</sup> No clarification is needed because, as OTELCO acknowledges, both pole owners have confirmed that they do not charge for such pole replacements<sup>115</sup> and OTELCO has not offered any evidence to the contrary. Instead, OTELCO tries to shift to the pole owners the burden that OTELCO, as the complainant, bears to prove its claims, arguing that “neither pole owner has provided any evidence that it considered whether any of the poles included in OTELCO’s applications required replacement due to diminished strength.”<sup>116</sup> In the absence of any evidence that the pole owners billed OTELCO to replace such poles, there is no burden on the pole owners to offer such evidence. As it happens, however, Verizon MA has provided exactly that evidence, explaining that its make-ready surveys “will also identify any poles that need to be replaced due to their condition unrelated to the new attachment, such as damage, rot or lean, and the contractor will exclude the work to replace such poles from the make-ready estimate to the new attacher.”<sup>117</sup>

#### **IV. THE REASONABLE JUDGMENTS OF THE POLE OWNERS REGARDING OPERATION OF THEIR NETWORKS ARE ENTITLED TO DEFERENCE.**

##### **A. Verizon MA and National Grid have provided a clear and reasonable analysis for their policies restricting boxing and attaching below Verizon MA, and these policies are not inconsistent with any policy of the Department.**

The DPU recognized in its Brief that Verizon and National Grid’s “long-established processes and agreements” exist to care for “valid public safety and reliability concerns,” and that Massachusetts law is clear that “within a substantial range, business decisions are matters for

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<sup>114</sup> See OTELCO Brief at 54.

<sup>115</sup> *Id.*; see also Verizon MA Brief at 19 and Verizon MA Testimony at 25.

<sup>116</sup> OTELCO Brief at 55.

<sup>117</sup> Verizon MA response to DTC-VZ 1-23; see also Verizon MA response to OTEL-VZ 2-11 (a) and (b).



a utility company's determination.”<sup>118</sup> Similarly, National Grid provides substantial case law holding that the regulatory agency will defer to a regulated company “when it comes to operating and maintaining their systems safely and reliably.”<sup>119</sup> As demonstrated above, Verizon MA's policies restricting boxing and requiring third parties to attach their facilities above Verizon MA's attachments go directly to the safe and reliable operation and maintenance of its network. Verizon MA therefore agrees with the DPU and National Grid that those policies are entitled to deference and should not be overturned on the record before the Department.

OTELCO points out that even with respect to business and operational management decisions, a regulated company must “prove its case before the Department by a clear and reasonable analysis” and provide “evidence to explain its decisions and show that they are not inconsistent with valid policies enforced by the Department.”<sup>120</sup> OTELCO goes on to assert that National Grid's policy against boxing is “inconsistent with the Department's policy to expand broadband deployment in the Commonwealth” and that National Grid has failed to justify its safety concerns.<sup>121</sup>

OTELCO's argument is groundless. As catalogued above and in their initial briefs, Verizon MA and National Grid have provided a “clear and reasonable analysis” based on record evidence that boxing of poles negatively affects the reliability of the network, increases the costs and time it takes to replace poles, and will delay restoration of service following storms or other catastrophic damage to the poles. They have provided a clear and reasonable analysis showing that allowing third parties to attach below Verizon MA will likely result in code violations on the poles,

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<sup>118</sup> DPU Brief at 9-11 (*citations omitted*).

<sup>119</sup> National Grid Brief at 14-15

<sup>120</sup> OTELCO Brief at 22, *quoting Fitchburg Gas and Electric Light Co. v. Department of Public Utilities*, 375 Mass. 571 (1978).

<sup>121</sup> OTELCO Brief at 22-23.

will increase the cost of removing old poles and will likely delay restoration and clean-up when lines are pulled down. The DPU and WG&E agree.<sup>122</sup> Moreover, expanding broadband deployment may be a general goal of the Department, but the Department has never articulated specific policies limiting the ability of pole owners from applying non-discriminatory policies restricting boxing or the order of attachments on the poles, in order to promote broadband expansion or for any other reason. OTELCO's argument rests on the false dichotomy that expanding broadband deployment and the public's interest in safe and reliable delivery of electrical power and communications services are competing goals, when in fact Verizon MA and National Grid's attachment policies balance those concerns in a fair and nondiscriminatory way.

Indeed, as OTELCO acknowledges, the FCC updated its pole attachment rules in 2011 with the specific goal of accelerating broadband buildout.<sup>123</sup> But the FCC did not, then or later, prohibit pole owners from enforcing nondiscriminatory policies restricting boxing or requiring third parties to attach above the pole owner. The FCC clearly found no inconsistency between such pole owner policies and its policy to encourage expansion of broadband. The Department should follow suit and should reject the false notion that the pole owners' attachment policies are inconsistent with the promotion of broadband expansion in Massachusetts.

**B. Verizon MA has processed OTELCO's applications fairly and timely.**

OTELCO points to the difference between its deployment costs in Maine and its deployment costs in Massachusetts as evidence that the pole owners' attachment policies are unfair and unreasonable.<sup>124</sup> But OTELCO admits that its budget for its Massachusetts deployment was not based on the assumptions that it would be able to box poles or attach below

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<sup>122</sup> See DPU Brief at 9; WG&E Brief at 2.

<sup>123</sup> See OTELCO Brief at 43, note 69, citing *Implementation of Section 224 of the Act*.

<sup>124</sup> OTELCO Brief at 10.

Verizon MA,<sup>125</sup> so whatever the reason for the discrepancy between OTELCO's budgeted costs and its actual costs, it is not because of the pole owner's restrictions on these attachment techniques.

OTELCO also complains that Verizon MA and National Grid are unreasonably slow to process its applications, speculating that broadband networks “will not be built in Massachusetts under Verizon and National Grid's pole access timelines.”<sup>126</sup> And yet, multiple, widely-available broadband networks have been built in Massachusetts and continue to expand.<sup>127</sup> OTELCO compares the pole owners' performance to the FCC rule requiring that large orders (up to 3,000 poles) be processed in no more than three months.<sup>128</sup> That deadline, however, would not apply to OTELCO's massive request to attach to 22,000 poles. For such projects, the FCC's rules provide that “[a] utility shall negotiate in good faith the timing of all requests for attachment larger than ... 3000 poles,” in recognition of the fact that very large projects like OTELCO's take time to complete.<sup>129</sup> While OTELCO claims that the make-ready process takes only 45 days under the FCC and Maine One-Touch-Make-Ready (“OTMR”) rules, those rules apply to simple make-ready only, not to pole replacements. In any event, the Department and the DPU have not adopted OTMR in Massachusetts, and OTELCO has not petitioned them to do so.

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<sup>125</sup> *Id.*

<sup>126</sup> OTELCO Brief at 13.

<sup>127</sup> See discussion in Part I.A, above.

<sup>128</sup> OTELCO Brief at 13-14.

<sup>129</sup> See 47 C.F.R. 1.1411(g)(4). The rule in Maine is the same. See Maine PUC Rule, Chapter 880, Rule 2.A.7.d.

## CONCLUSION

For the reasons stated above, the Department should reject OTELCO's Complaint and deny its requests to amend Verizon MA's pole attachment policies, practices and procedures.

Respectfully submitted,

VERIZON NEW ENGLAND INC., D/B/A VERIZON  
MASSACHUSETTS

By their attorneys,

A handwritten signature in black ink, appearing to read "Alex Moore", written in a cursive style.

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