COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 22-4 August 12, 2024

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

PHASE II ORDER

I. INTRODUCTION

On April 14, 2022, CRC Communications LLC d/b/a OTELCO ("OTELCO") filed a pole attachment complaint ("Complaint") against Massachusetts Electric Company d/b/a National Grid ("National Grid") and Verizon New England Inc. ("Verizon") (collectively, "the pole owners"). On August 22, 2023, the Department of Telecommunications and Cable ("DTC") granted reconsideration of its October 11, 2022, Order ("Phase I Order") for the limited purpose of clarifying how the parties should implement DTC's Order. On reconsideration, DTC hereby rules on the permissibility of the pole owners requiring resurveys of the poles included in OTELCO's applications.[1]

For the reasons outlined below, DTC finds that:

[1] Although the pole owners have already agreed to waive any additional application fees after OTELCO objected, DTC takes this opportunity to offer guidance that a second application fee would be unreasonable in the present circumstances. *See e.g.* National Grid Response to Motion for Enforcement at 2. DTC also takes the opportunity to clarify that OTELCO's pole requests should be processed from the date of the original applications. National Grid has assured OTELCO that its applications will be scheduled as soon as possible and run in parallel with work on other projects. *See* National Grid Response to OTELCO's Motion for Enforcement at 3. DTC agrees that OTELCO's application should be processed based on the original date.

1. The pole owners may require resurveys of any poles included in OTLECO's applications for which the pole owners believe more information is needed to determine the appropriate make ready work.
2. OTELCO must pay for the resurveys because OTLECO is the cost causer under M.G.L. c. 166 §25A.[2]

II. PROCEDURAL HISTORY

On October 11, 2022, DTC issued its Final Order ("Phase I Order") granting in part and denying in part OTELCO's Complaint. Specifically, DTC held that:

1. Opposite-Side Construction ("Boxing"): DTC found that "National Grid and Verizon must examine OTELCO's requests to box on a pole-specific basis." Phase I Order at 13. DTC found that the pole owners' decision not to box Poles 1, 5, 6, 7, 8, 9, 11, 12, 13, and 14 was reasonable because Verizon provided specific safety, reliability, or generally applicable engineering reasons for denying boxing. Phase I Order at 22. However, DTC ordered both Verizon and National Grid to give specific reasons on a pole-by-pole basis for why they would not allow boxing on jointly-owned Poles 2, 3, 4, and 10. Phase I Order at 21.[3] Upon this secondary review, if the pole owners decided that these poles should not be boxed, DTC allowed the pole owners to deny OTLECO's boxing request, provided that the pole owners provided specific explanations to OTELCO

[2] Throughout the pendency of this proceeding, OTELCO has raised several policy considerations which suggest that amendments to the Massachusetts pole regulations, 220 C.M.R. 45.00, should be considered. DTC and the Department of Public Utilities ("DPU") share joint authority over pole attachments in Massachusetts under the agencies' Memorandum of Agreement on Pole Attachment Jurisdiction. Under the MOA, neither agency may amend the pole attachment regulations or related policies outside of a joint rulemaking.

[3] National Grid subsequently gave specific reasons on a pole-specific basis for why they would not allow boxing on Poles 2, 3, 4, and 10 in compliance with DTC's Order. Therefore, DTC finds that National Grid has complied with this aspect of DTC's Phase I Order.

regarding why the pole owners were denying the request on a pole-by-pole basis. *Id*. Finally, DTC did not order National Grid to amend its boxing policy for jointly owned poles. Phase I Order at 13-23.

2. Lowest Attachment: Having found that Verizon's policy that it must be the lowest attacher was reasonable and nondiscriminatory, DTC denied OTELCO's request for relief on this issue. Phase I Order at 29. DTC also encouraged Verizon to, moving forward, consistently attach no higher than necessary to comply with applicable clearance standards, though that issue was not before DTC in this proceeding. Phase I Order at 29.
3. Pre-existing Conditions, Other Facilities Management, and Claims of Charges for Non-Make Ready Work: DTC granted OTELCO's general request to attach on poles, despite pre-existing noncompliance of other attachers, as long as OTELCO could safely attach in compliance with the NESC without worsening the noncompliance, but only in instances where no make ready work was needed, and subject to the pole owners' other lawfully imposed attachment terms and conditions as further defined in the Order. Phase I Order at 31. DTC confirmed that the pole owners should bill OTELCO only for the work needed to make a pole ready for OTELCO's attachment. Phase I Order at 35-36. Finally, DTC denied OTELCO's request for a discount on the total make ready work where the pole owners receive an incidental benefit from that make ready work, holding that OTELCO was responsible for the full cost of the make ready expenses as OTELCO was the cost causer under the statute. Phase I Order at 41.

4. Request for Detailed Cost Breakdown: DTC found that National Grid's refusal to provide detailed cost breakdowns was not a reasonable condition of attachment. Phase I Order at 46. Accordingly, DTC ordered National Grid to provide cost breakdowns to OTELCO on a task-specific and pole-specific level, where requested by OTELCO. *Id*.
5. Other Issues: Finally, DTC denied OTELCO's requests regarding make ready timeframes, a stay, and attorney's fees on procedural grounds. Phase I Order at 46-50.

On February 21, 2023, OTELCO filed with DTC a Motion for Enforcement of the Order. After responses were filed by the other parties, OTELCO filed a Motion for Leave to File a Reply ("Reply") and Supporting Evidentiary Material ("New Evidence") along with its Reply and New Evidence on April 18, 2023. On August 22, 2023, DTC granted reconsideration of its October 11, 2022, Order for the limited purpose of clarifying how the parties should implement DTC's Order. DTC also granted OTELCO's Motion for Leave to File a Reply and Supporting Evidentiary Material, as DTC found that additional evidence would likely assist DTC in resolving the resurvey issue.

On August 29, 2023, the pole owners appealed the Hearing Officer's Ruling to the Commissioner and requested a stay of the proceedings during the pendency of the appeal. DTC granted a stay of the proceedings on September 5, 2023. During October and November of 2024, the parties informed DTC's General Counsel that settlement conversations were occurring directly between the parties. When those discussions did not result in an agreement, DTC appointed a mediator on December 5, 2024, and ordered the parties to participate in mediation. On April 11, 2024, the hearing officer issued a ruling on several motions for protective treatment.

After several months of mediation sessions failed to resolve the parties' disputes, the Commissioner issued an Order on April 26, 2024, denying the pole owners' appeal. On May 1, 2024, DTC issued a new procedural schedule with deadlines to answer additional discovery, supplement the record with additional evidence and supply additional briefs in order to assist DTC in resolving the resurvey issue. All parties complied with the procedural schedule. DTC now issues a Phase II Order on the question of whether resurveys are permissible and, if they are permissible, which party should pay for them.

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, DTC 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.[4] *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,

[4] 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 DTC 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 marking clear a preference for allowing attachment 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.*

DTC 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, DTC 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 DTC; or
3) Order relief DTC finds appropriate under the circumstances. 220 C.M.R. § 45.07.

IV. POSITIONS OF THE PARTIES

The parties disagree on whether fresh field surveys of the poles included in OTELCO's applications ("resurveys") are necessary. National Grid and Verizon assert that potential changes to the conditions of the poles due to weather and positional availability make resurveys crucial. Furthermore, National Grid and Verizon assert that resurveys are necessary because the original field surveys did not provide all of the information necessary to evaluate boxing requests. OTELCO contends that resurveys are not necessary because the original surveys contain all the information necessary to evaluate boxing requests and that any discrepancy between the original

surveys and the conditions of the poles in the field can be rectified when the contractors are in the field.

National Grid contends that OTELCO's approach of adjusting make ready plans in the field would be an inefficient and costly process because of likely changes in field conditions. NG-Resurvey-1 at 11-12. "This is an inefficient way to conduct field work and the result would be inefficient delays, wasted time and resources, and redesigns." *Id.* Verizon asserts that a lengthy process occurs when a technician is assigned to perform make ready work and the work order cannot be fulfilled because conditions on the pole have changed, such as new attachments on the pole, since the completion of the original survey. *See* DTC-Verizon-3-9. Verizon notes that the technician will report the conditions on the pole have changed and the work order could not be completed. *Id.* Verizon asserts it will then send an engineer out to the field to review the new conditions on the pole, resulting in the need for a new make ready plan for that particular pole. Verizon contends the engineer will need to revise the work order for the pole and send it back to construction before a technician or crew can perform work on the poles. *Id.* "All of this additional work adds cost to the project and delays its completion." *Id.* Furthermore, Verizon asserts that Verizon's and National Grid's contractors must agree on the perspective work to be completed before engaging in make ready work. DTC-Verizon-3-5 (A).

1. Pole Conditions

Verizon asserts that past storms could have a substantial effect on the condition of poles. *See* Wolanin testimony at 4. For example, Wolanin articulates that there could be greater sag in the lines hit by falling tree limbs. *See* Wolanin testimony at 4. National Grid's expert Joy Banks states that there have been 68 storm restoration events in the relevant area since the last resurveys occurred. DTC-NG-3-10. Damage from these events can include downed wires for both

telecommunications attachers and electric service, damaged or broken poles which need to be replaced, pole mounted transformers may need to be adjusted, and other adjustments to distribution infrastructure. NG-Resurvey-1 at 9.

OTELCO's experts acknowledges that changed pole conditions may have occurred since the original surveys, while asserting that the changes are not substantial enough to necessitate resurveys. Allen Testimony at 7-8; *see also* Teed Testimony at 8 (emphasis added) ("[S]torm restorations does not *tend* to change the pole conditions in a way that impacts communications attachments unless the pole is replaced.").

2. Positional Availability

Verizon asserts that unauthorized fiber attachments from municipalities or other third parties could exist on the poles where OTELCO seeks to attach, which could change the available space for OTELCO. DTC-Verizon-3-12 (A); Wolanin Testimony at 5. Furthermore, National Grid asserted that it has completed numerous capital projects in the past few years that could affect the composition of poles with items such as risers, crossarms, and transformers that did not exist at the time of the original surveys. NG-Survery-1 at 8-9.

OTELCO's position is that the relevant inquiry is not whether there have been any changes in the pole's conditions, but whether such changes would materially impact OTELCO's attachment requests, whether the pole owners should be aware of such changes and whether modifications can be made in the field to address such changes. Allen Testimony at 7.

3. Boxing

Verizon argues that the pole owners should be allowed to conduct resurveys on poles that OTELCO seeks to box, and relevant neighboring poles to avoid safety concerns. *See* Wolanin Testimony at 7. National Grid asserts that they did not collect all of the necessary information to

ensure boxing is safe, like various spacing requirements, in the initial surveys because they lacked notice that DTC would require them to consider boxing on a pole-specific basis. NG-Resurvey-1 at 6.

OTELCO asserts that the pole owners already have in their possession sufficient information, such as O'Calc reports, to evaluate boxing requests. *See* Allen Testimony at 3. National Grid responds that the O'Calc reports are insufficient because there are several factors they fail to reveal that a resurvey would uncover, such as clearance details or backside pole analysis. DTC-NG-3-10.

Finally, OTELCO asserts that desktop engineering, based on the existing survey information, could be used in lieu of resurveys to evaluate whether each pole is suitable for boxing. *See* Joseph Teed Testimony ("Teed Testimony") at 4. The pole owners, on the other hand, argue that updating the make ready plans ahead of time will result in a more efficient process overall. National Grid states that when there is a discrepancy between the survey and the conditions in the field it is a time-consuming process to rectify the problem and adaptation in the field can have a significant effect on project completion timelines. DTC-NG-3-12. Thus, National Grid asserts it will be more efficient if resurveys occur upfront. *See* NG-Resurvey-1 at 12-13. Verizon asserts that "moving forward with make ready work on the basis of surveys that are two to three years old will likely result in significant delays, cost escalation and very inefficient use of Verizon MA's personnel resources." David Wolanin Rebuttal Testimony ("Wolanin Testimony") at 6.

V. ANALYSIS AND FINDINGS

A. The pole owners may require resurveys of any poles included in OTLECO's applications for which the pole owners believe more information is needed to determine the appropriate make ready work.

DTC must apply the Pole Attachment Statute, particularly the relevant portion which states that attachers must receive reasonable non-discriminatory access to the poles. G.L. c.166 § 25A.

National Grid reviews the viability of make ready work 180 days after an initial survey is complete if the make ready work has not progressed to scheduling. *Id.* National Grid states that it applies this standard to all similarly situated applicants in a non-discriminatory manner. *See* DTC-NG-3-14(b). Similarly, Verizon routinely requires prospective attachers to resurvey to account for changes in the field or changes to the work sought by the applicant. Wolanin testimony at 8. Verizon once required a prospective attacher to pay for resurveys where the make ready estimates were 18 months old. *Id;* DTC-Verizon-3-6.

The surveys in this case are anywhere from 800 to 1059 days old as of May 15, 2024. NG-Resurvey-1 at 8. Nothing in the record indicates that the pole owners are requiring the resurveys for any reason other than a significant amount of time has elapsed. *See* DTC-NG-3-14(a). For these reasons, DTC finds that resurveys are permissible because the pole owners are not discriminating against OTELCO when compared to other potential attachers in similar circumstances. Therefore, the pole owners may require resurveys of any poles included in OTLECO's applications for which the pole owners believe more information is needed to determine the appropriate make ready work.

B. OTELCO must pay for the resurveys.

DTC also holds that OTELCO must pay for any resurveys. The Pole Attachment Statute clearly states that a pole owner "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. The statute makes clear that all make ready costs caused by the attachers' application are to be incurred by the prospective attacher. In this case, that includes the cost of

any field surveys and resurveys, in addition to the resulting make ready work. As OTELCO is the party requesting to attach on the poles, the cost of the resurveys which DTC allows in this Order are the responsibility of OTELCO.

VI. CONCLUSION

On reconsideration of its Phase I Order, DTC rules that resurveys are permissible because the pole owners are not discriminating against OTELCO when compared to other potential attachers in similar circumstances. The pole owners may require resurveys of any poles included in OTLECO's applications for which the pole owners believe more information is needed to determine the appropriate make ready work. DTC also holds that OTELCO must pay for the resurveys because OTELCO is the cost causer under the Pole Attachment Statute.

VII. ORDER

Accordingly, after due notice, opportunity to be heard, and consideration, it is hereby ORDERED: The pole owners shall determine, within a reasonable time, the poles they wish to resurvey and notify OTELCO regarding these poles and the attendant cost of the resurveys.

By Order of the Department,

Karen Charles

Karen Charles
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.