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May 7, 2020

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Verizon Pennsylvania LLC and Verizon North LLC v. Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company; Docket No. C-2020-3019347

Dear Secretary Chiavetta:

Enclosed please find Verizon's Opposition to the Motion to Dismiss Objections and Compel Responses to Interrogatories and Requests for Production of Documents – Set I, filed in the above-referenced proceeding.

Should you have any questions or concerns, please contact me.

Very truly yours,

A handwritten signature in blue ink that reads "Suzan D. Paiva/sau".

Suzan D. Paiva

SDP/sau
Enclosures

cc: Honorable Joel Cheskis

CERTIFICATE OF SERVICE

I, Suzan D. Paiva, hereby certify that I have this day served a true copy of Verizon's Opposition to the Motion to Dismiss and Compel, upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 7th day of May, 2020.

VIA E-MAIL

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Attorney for Verizon

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Verizon Pennsylvania LLC and	:	
Verizon North LLC	:	
	:	
v.	:	C-2020-3019347
Metropolitan Edison Company, Pennsylvania	:	
Electric Company and Penn Power Company	:	

**OPPOSITION OF VERIZON PENNSYLVANIA LLC AND VERIZON NORTH LLC TO
MOTION OF METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC
COMPANY, AND PENNSYLVANIA POWER COMPANY TO DISMISS OBJECTIONS
AND COMPEL RESPONSES TO INTERROGATORIES AND REQUESTS FOR
PRODUCTION OF DOCUMENTS – SET I**

Pursuant to 52 Pa. Code § 5.342(g)(1), Verizon Pennsylvania LLC and Verizon North LLC (“Verizon”) oppose the Motion of Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company (“FirstEnergy”) to Dismiss Objections and Compel Responses to Interrogatories and Requests for Production of Documents – Set I.¹

INTRODUCTION

FirstEnergy narrowed its motion to compel to seek responses to three interrogatories: I-1, I-20, and I-21. The Commission should deny FirstEnergy’s motion because these interrogatories seek irrelevant information about non-parties that is confidential to the non-parties and that Verizon cannot lawfully disclose.

This case is not about the non-parties whose information is sought in interrogatories I-1, I-20, and I-21. It is about the lawful rate *FirstEnergy* may charge Verizon for its use of space on

¹ Verizon’s responses to FirstEnergy’s first set of discovery resolved most of FirstEnergy’s motion to compel. On May 5, 2020, FirstEnergy notified Verizon that FirstEnergy would “not pursue further responses to Interrogatories 2 through 19 and 22 through 33 at this time.” *See* Exhibit A. The three remaining Interrogatories (I-1, I-20, and I-21) are addressed at ¶¶ 43-48 and ¶¶ 111-117 of FirstEnergy’s motion to compel and are attached, with Verizon’s objections and responses, as Exhibit B.

FirstEnergy's utility poles. FirstEnergy agrees that “the fundamental issue in this case [is] whether the pole attachment rates that Verizon pays under its Joint Use Agreements *with FirstEnergy* are unjust and unreasonable” as a matter of law. Motion to Compel ¶ 46. The Commission will answer that question based on the federal “just and reasonable” rate standard and the implementing regulations and publicly released decisions of the Federal Communications Commission (“FCC”).²

By statute and regulation, the just and reasonable rate for use of space on FirstEnergy’s utility poles is unique to FirstEnergy. Each pole owner reports its own pole cost investment based on its own cost experience. The FCC’s rate formulas produce a rate that covers the percentage of the pole owner’s annual pole cost investment that the FCC and courts have found “fully compensat[es]” the pole owner for use of space on its poles.³ Because pole costs are company-specific, the rate one electric utility may charge under the FCC formulas is not identical to the rate another electric utility may charge for use of space on its poles. When determining whether a rate is “just and reasonable,” the FCC looks only to the rate that the specific electric utility may charge based on that electric utility’s reported pole cost investment.⁴

FirstEnergy’s interrogatories I-1, I-20, and I-21 seek to expand this case into the facts, circumstances, and costs of *other* pole owners whose rates are not before the Commission. Interrogatory I-1 (as limited in FirstEnergy’s motion to compel) seeks disclosure of the pole attachment rates PECO Energy Company, PPL Electric Utilities Corporation, and Duquesne Light Company charged Verizon under their joint use agreements with Verizon. The rates

² See 52 Pa. Code § 77.4(a).

³ See, e.g., *FCC v. Fla. Power Corp.*, 480 U.S. 245, 253 (1987); *Pole Attachment Order*, 26 FCC Rcd 5240, 5321 (¶ 183) (2011).

⁴ See, e.g., 47 C.F.R. §§ 1.1406(d); 1.1413(b).

charged under joint use agreements with these other companies are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. Rates charged by PECO, PPL, and Duquesne Light are not calculated using FirstEnergy's pole costs and have not been found "just and reasonable" by the Commission or the FCC. As a result, the rates cannot shed light on the "just and reasonable" rate *FirstEnergy* may charge Verizon for use of *FirstEnergy's* poles under *FirstEnergy's* joint use agreements based on *FirstEnergy's* unique pole costs. Efforts to analyze and explain how the rates of these unrelated companies differ from FirstEnergy's required rates would unduly complicate a case that is already complex enough and must be decided under an expedited schedule. Further, the rates PECO, PPL, and Duquesne Light charge are confidential and competitively sensitive information, which Verizon cannot unilaterally disclose. These electric utilities do not know what rates FirstEnergy charges Verizon because they have been given confidential treatment throughout this proceeding. PECO, PPL, and Duquesne Light should have the same right to shield their rates from FirstEnergy's review.

Interrogatories I-20 and I-21 seek production of the confidential information of non-parties that are *not* subject to the Commission's jurisdiction. Specifically, FirstEnergy asks Verizon to produce information the FCC deemed confidential in decisions it issued in 2015 and 2017 in cases involving Verizon's prior Florida affiliate (now the unaffiliated Frontier Florida), Verizon's Virginia affiliates (Verizon Virginia and Verizon South), Florida Power and Light Company, and Dominion Virginia Power. FirstEnergy has access to the public versions of the FCC's decisions but is seeking to compel production of information that the FCC redacted from the decision it released on confidentiality grounds. The information is not relevant because it is *not* information relating to Verizon's operations in Pennsylvania and it was *not* used by Verizon in this case. Verizon is relying solely on the publicly issued FCC decisions, and they are equally

available to FirstEnergy. Verizon's affiliates are also unable to produce the confidential decisions under confidentiality agreements entered in those proceedings and because the FCC has a process for seeking disclosure of confidential information redacted from public decisions. The FCC's rules do not permit FirstEnergy to bypass that process and obtain production from Verizon. The Commission should deny FirstEnergy's motion to compel.

ARGUMENT

I. The Commission Should Deny FirstEnergy's Motion to Compel a Response to Interrogatory I-1.

Interrogatory I-1 (as modified) asks for the pole attachment rates PECO, PPL, and Duquesne Light charge Verizon under their joint use agreements. *See* Motion to Compel ¶¶ 43-48. These rates are not relevant because, as FirstEnergy admits, “the fundamental issue in this case [is] whether the pole attachment rates that Verizon pays under its Joint Use Agreements *with FirstEnergy* are unjust and unreasonable” as a matter of law. *Id.* ¶ 46 (emphasis added). The rates imposed by other electric utilities under other agreements based on other costs do not bear on that question. By statute and regulation, a just and reasonable pole attachment rate is calculated using pole costs specific to the pole owner.⁵ FirstEnergy understands this, as it argued in its Answer that rates for FirstEnergy's use of Verizon's poles *cannot* “be based on anything besides Verizon's costs to own and maintain its pole plant.”⁶ The same is true for setting just and reasonable rates for Verizon's use of FirstEnergy's poles: they must be calculated using

⁵ *See* 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224(e) (stating how a “utility shall apportion the cost of providing space on a pole”) and 47 C.F.R. § 1.1406(d)(2) (calculating rates based on a pole owner's “net cost of a bare pole”)); *see also, e.g., In Re Amendment of Rules & Policies Governing Pole Attachments*, 15 FCC Rcd 6453, 6474 (¶ 36) (2000) (stating that the Commission's rate formula “determin[es] the net cost of a bare pole for electric utilities using FERC Accounts”).

⁶ Answer ¶ 135 (Feb. 3, 2020).

only FirstEnergy's pole costs, and not those of some other electric utility. Moreover, neither the FCC nor this Commission has reviewed those other companies' rates to determine if they comply with the applicable standard. Attempting to analyze the rates of these other companies would bring unneeded additional complexity to this expedited case because it would involve the other companies' cost information and other company-specific factors, such as the rates, terms and conditions that apply to other communications attachers on their poles. It is complicated enough to decide those issues for FirstEnergy's poles, but it makes no sense to attempt to address them for companies that are not even parties to this case.

FirstEnergy ignores the company-specific nature of pole attachment rates in its motion to compel, and instead declares "the rates that Verizon pays other electric utilities under their joint use agreements [are] certainly relevant to Verizon's principal claim that the rates it pays under its Joint Use Agreements with FirstEnergy are too high." Motion to Compel ¶ 46. FirstEnergy provides no reason why. And there is none. As FirstEnergy explained, the "fundamental issue" is whether *FirstEnergy's* rates are unjust and unreasonable as a matter of law. *See id.* That issue is resolved by comparing the rates *FirstEnergy* charges Verizon with the rates *FirstEnergy* charges Verizon's competitors.⁷ The rates PECO, PPL, and Duquesne Light charge Verizon have no relevance. The just and reasonable rate *FirstEnergy* may charge Verizon cannot change because another electric utility has higher (or lower) pole costs or because other electric utilities *also* charge Verizon unjust and unreasonable rates that should be reduced in a separate proceeding. This case depends on FirstEnergy's costs and FirstEnergy's rates; the Commission should not expand the case by requiring disclosure of pole attachment rates charged by other

⁷ *See, e.g.*, 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

electric utilities in Pennsylvania—which would only complicate this case with arguments about whether those rates comply with the law.

Setting aside the relevance issue, the Commission should deny FirstEnergy’s motion because Verizon cannot produce the information absent waivers of confidentiality from PECO, PPL, and Duquesne Light, which FirstEnergy did not provide.⁸ Just as FirstEnergy considers the rates it charges Verizon and other entities attached to its poles to be highly confidential competitively sensitive information, so too are the rates charged by other pole owners not parties to this proceeding. Indeed, throughout this litigation, FirstEnergy has requested that the rates it charges Verizon be maintained in strict confidence, a request Verizon supports. PECO, PPL, and Duquesne Light are entitled to the same confidentiality under their joint use agreements. The Commission should deny FirstEnergy’s motion to compel an answer to interrogatory I-1.

II. The Commission Should Deny FirstEnergy’s Motion to Compel a Response to Interrogatories I-20 and I-21.

Interrogatories I-20 and I-21 seek information that is not permitted to be produced because the FCC withheld it from public view in two prior pole attachment complaints initiated by other Verizon entities that are not parties to this proceeding, specifically “an un-redacted copy of the FCC’s decision in *Verizon Florida LLC v. Florida Power & Light Co.*, 30 FCC Rcd 1140 (F.C.C. Feb. 11, 2015),” and “an un-redacted copy of the FCC’s decision in *Verizon Virginia, LLC v. Virginia Electric and Power Co.*, 32 FCC Rcd 3750 (F.C.C. May 1, 2017).” *See* Motion to Compel ¶¶ 111-117. Publicly available copies of the FCC decisions are attached as Exhibits C and D, respectfully. They are the same publicly released decisions available to FirstEnergy.

⁸ FirstEnergy appears to agree, as its counsel stated that FirstEnergy would not move to compel a response to interrogatory I-1 if Verizon agreed to produce the information so long as “FirstEnergy obtains waivers of confidentiality from the other electric distribution companies.” *See* Ex. A. Verizon could not agree to produce the rates, though, because they are not relevant.

The confidential versions of the decisions are not relevant because Verizon has not and cannot quote, cite, or rely on confidential information from the confidential versions of the FCC's decisions. Verizon and its witnesses have relied in pleadings and testimony solely on the same public decisions available to FirstEnergy.

And the decisions cannot be produced in this proceeding. The FCC redacted information from the public decisions because the FCC deemed it confidential. The FCC has a process for seeking release of confidential information the FCC has withheld from public review.⁹ That process is FirstEnergy's sole avenue for seeking the decisions requested in Interrogatories I-20 and I-21. It cannot bypass the process and demand production of the FCC's decisions here.

FirstEnergy nonetheless argues the decisions should be produced, but its arguments lack merit. *First*, FirstEnergy argues "fundamental fairness and due process demand that Verizon provide un-redacted copies of these decisions to FirstEnergy." Motion to Compel ¶ 114. Not so. FirstEnergy confuses evidence with legal precedent, arguing it must see complete decisions because it has a right "to present [its] case or defense by oral or documentary *evidence*, to submit rebuttal *evidence* and to conduct such cross-examination as may be required for a full and true disclosure of the *facts*." *Id.* ¶ 114 n.24 (quoting 66 Pa.C.S. § 332(c)) (emphases added). The FCC decisions are not evidence; they are legal precedent. And the parties have the same legal precedent to rely upon when presenting their cases. FirstEnergy does not argue otherwise; instead it presumes Verizon's counsel and one of its witnesses "have reviewed and may even have copies of" the confidential 2015 and 2017 decisions. *Id.* ¶ 114. True or not, it is beside the point. The redacted information cannot be used by any participant in this case: Verizon, FirstEnergy, or the Commission when it issues its decision. There is no due process or fairness

⁹ See 47 C.F.R. §§ 0.461, 0.463.

concern when FirstEnergy and Verizon will present their arguments based on the same publicly released FCC decisions.

Second, FirstEnergy argues the parties' protective agreement, or a Commission protective order, should be sufficient if "Verizon is concerned about the public disclosure of the unredacted decisions and the confidential information set forth in those decisions." *Id.* ¶ 115. But the confidential information is not Verizon's to share. The existence of a protective agreement or protective order does not change that fact. The FCC deemed the information confidential in cases involving five non-parties to this case: Frontier Florida,¹⁰ Florida Power and Light Company, Verizon Virginia, Verizon South, and Dominion Virginia Power. The Verizon parties to this case, which are Verizon Pennsylvania and Verizon North, have no legal right to produce the confidential information of these non-parties.

Third, FirstEnergy argues that the Commission should require Verizon to obtain confidential versions of the decisions from its affiliates and produce them here because Verizon relied on two license agreements FirstEnergy entered with different Verizon affiliates. *Id.* ¶ 116 (cross-referencing ¶ 31). But Verizon relied on FirstEnergy's agreements with Verizon's competitive local exchange carrier affiliates operating in Pennsylvania and Maryland because the agreements do *not* include a confidentiality provision.¹¹ These agreements also apply to the same FirstEnergy poles in Pennsylvania and Maryland that are the subject of this and the related case at the FCC. Verizon's Virginia affiliates, in contrast, received information in the prior pole attachment complaint proceedings pursuant to confidentiality agreements and subject to FCC

¹⁰ Frontier Communications Corporation acquired Verizon Florida's local exchange and related business assets in early 2016. *See Applications Filed by Frontier Commc'ns Corp. and Verizon Commc'ns Inc. for the Partial Assignment or Transfer of Control of Certain Assets in California, Florida, and Texas*, 30 FCC Rcd 9812 (FCC 2015).

¹¹ *See* Complaint, Exs. 14 & 15.

regulations and that information does not relate to Pennsylvania or to FirstEnergy. Neither Verizon nor its affiliates can produce confidential information from prior pole attachment complaint proceedings. The Commission should deny FirstEnergy's motion to compel answers to Interrogatories I-20 and I-21.

CONCLUSION

For the foregoing reasons, FirstEnergy's motion to dismiss objections and compel answers to its Set I Interrogatories, as narrowed to seek answers to interrogatories I-1, I-20, and I-21, should be denied.

Respectfully submitted,



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Counsel for Verizon Pennsylvania LLC and
Verizon North LLC

Dated: May 7, 2020

Exhibit A

From: Ryan, Devin <DRyan@PostSchell.com>
Sent: Tuesday, May 5, 2020 4:59 PM
To: Paiva, Suzan D; Evans, Claire; Huther, Christopher; Scaduto, Frank; Curtis L Groves
Cc: Kanagy, Anthony; MacGregor, David; Lent, Garrett; Giesler, Tori
Subject: RE: Verizon's Responses to First Energy's Set I Discovery Requests

Good afternoon,

Per Judge Cheskis's instructions yesterday, FirstEnergy is required to indicate which interrogatories it will continue to pursue in its Motion to Compel.

Based on FirstEnergy's review of Verizon's discovery responses, and in the interest of compromise, FirstEnergy states as follows:

- FirstEnergy will not pursue further responses to Interrogatories 2 through 19 and 22 through 33 at this time.
- For Interrogatory 1, FirstEnergy will not move to compel a response to this discovery request at this time, provided that if FirstEnergy obtains waivers of confidentiality from the other electric distribution companies, then Verizon will produce the requested information.
- FirstEnergy will continue to pursue answers to Interrogatories 20 and 21 pursuant to its Motion to Compel.

Thank you.

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Exhibit B

RESPONSE OF VERIZON TO SET I, REQUEST NO. 1 OF FIRSTENERGY DATED APRIL 17, 2020, SUBMITTED IN DOCKET NO. C-2020-3019347 BEFORE THE PA PUC

ANSWERED BY: Stephen C. Mills

POSITION: Consultant – Contract Management, Wireline Network Operations Division

REQUEST #1:

Identify the joint use rates paid in 2019 pursuant to Verizon’s joint use agreements with other electric utilities.

OBJECTION (4/22/2020):

Verizon objects to this request because it is overly broad, unduly burdensome and seeks information that is neither relevant nor material to the subject matter of this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. Verizon will not respond to this request.

UPDATE TO OBJECTION (5/4/2020):

In its Motion to Compel, FirstEnergy stated that it was “willing to limit the scope of this request to the joint use rates paid in 2019 under Verizon’s joint use agreements with only the other major electric distribution companies (‘EDCs’) in Pennsylvania (*i.e.*, PECO Energy Company, PPL Electric Utilities Corporation, and Duquesne Light Company), instead of all other electric utilities.” Motion to Compel ¶ 48.

The limitation offered in FirstEnergy’s Motion to Compel does not resolve Verizon’s objection because the question remains overly broad and seeks information about pole attachment rates that are not at issue in this proceeding, are not relevant or material to the subject matter of this proceeding, and are not reasonably calculated to lead to the discovery of admissible evidence about the just and reasonable rate for Verizon’s use of FirstEnergy’s poles, which is calculated based on FirstEnergy’s pole costs.

RESPONSE (5/4/2020):

Subject to and without waiving its objections, Verizon further responds as follows:

The pole attachment rates Verizon paid PECO Energy Company, PPL Electric Utilities Corporation, and Duquesne Light Company in 2019 (a) have not been found just and reasonable by the Federal Communications Commission or the Pennsylvania Public Utility Commission, (b) were not based on FirstEnergy’s pole cost investment, and (c) are competitively sensitive and confidential information about entities that are not party to this case, such that their production would require a waiver of confidentiality from PECO Energy Company, PPL Electric Utilities Corporation, and Duquesne Light Company that FirstEnergy has not provided. Verizon cannot otherwise respond to this request.

RESPONSE OF VERIZON TO SET I, REQUEST NO. 20 OF FIRSTENERGY DATED
APRIL 17, 2020, SUBMITTED IN DOCKET NO. C-2020-3019347 BEFORE THE PA PUC

ANSWERED BY: N/A
POSITION: N/A

REQUEST #20:

Reference Formal Complaint ¶ 11 n.27, ¶ 16 n.47, ¶ 21 n.63, ¶ 29 n.94, ¶ 32 n.102, ¶ 37 n.124,
¶ 41 n.137, ¶ 55 n.211, ¶ 58 n.224; Tardiff Affidavit ¶ 8 n.7.

Please provide an un-redacted copy of the FCC's decision in *Verizon Florida LLC v. Florida Power & Light Co.*, 30 FCC Rcd 1140 (F.C.C. Feb. 11, 2015).

OBJECTION (4/22/2020):

Verizon objects to this request because Verizon and Dr. Tardiff did not rely on redacted portions of the FCC's public decision in *Verizon Florida LLC v. Florida Power & Light Co.*, 30 FCC Rcd 1140 (FCC Feb. 11, 2015) and because the confidential decision is not within the possession, custody, or control of the parties here, which are Verizon Pennsylvania or Verizon North. Verizon also objects to this request because FirstEnergy is equally capable of requesting the information from the FCC, which designated the information confidential. Verizon will not respond to this request.

RESPONSE (5/4/2020):

Subject to and without waiving its objections, Verizon responds as follows:

The confidential information FirstEnergy seeks (a) was withheld from public view by the Federal Communications Commission, which has a process for seeking disclosure of confidential information, (b) is competitively sensitive and confidential information about entities that are not party to this case, and (c) was not relied on by Verizon or Dr. Tardiff in this case. Verizon cannot otherwise respond to this request.

RESPONSE OF VERIZON TO SET I, REQUEST NO. 21 OF FIRSTENERGY DATED
APRIL 17, 2020, SUBMITTED IN DOCKET NO. C-2020-3019347 BEFORE THE PA PUC

ANSWERED BY: N/A

POSITION: N/A

REQUEST #21:

Reference Formal Complaint ¶ 4 n.15, ¶ 22 n.67, ¶ 27 n.88, ¶ 33 n.109, ¶ 39 n.131, ¶ 43 n.142, ¶ 45 n.158, ¶ 53, n.207, ¶ 56 n.217; Tardiff Affidavit ¶ 15(3) n.28, ¶ 20 n.39, ¶ 28 n.50.

Please provide an un-redacted copy of the FCC's decision in *Verizon Virginia, LLC v. Virginia Electric and Power Co.*, 32 FCC Rcd 3750 (F.C.C. May 1, 2017).

OBJECTION (4/22/2020):

Verizon objects to this request because Verizon and Dr. Tardiff did not rely on any redacted portions of the FCC's public decision in *Verizon Virginia, LLC v. Virginia Electric and Power Co.*, 32 FCC Rcd 3750 (FCC May 1, 2017) and because the confidential decision is not within the possession, custody, or control of the parties here, which are Verizon Pennsylvania and Verizon North. Verizon also objects to this request because FirstEnergy is equally capable of requesting the information from the FCC, which designated the information confidential. Verizon will not respond to this request.

RESPONSE (5/4/2020):

Subject to and without waiving its objections, Verizon responds as follows:

The confidential information FirstEnergy seeks (a) was withheld from public view by the Federal Communications Commission, which has a process for seeking disclosure of confidential information, (b) is competitively sensitive and confidential information about entities that are not party to this case, and (c) was not relied on by Verizon or Dr. Tardiff in this case. Verizon cannot otherwise respond to this request.

Exhibit C

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	Docket No. 14-216
Verizon Florida LLC,)	File No. EB-14-MD-003
Complainant,)	
)	
v.)	
)	
Florida Power and Light Company,)	
Respondent.)	

MEMORANDUM OPINION AND ORDER

Adopted: February 11, 2015

Released: February 11, 2015

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. Complainant Verizon Florida LLC (Verizon), an incumbent local exchange carrier, alleges that the rates it pays for existing attachments of communications equipment to the poles of Florida Power and Light Company (Florida Power), an electric utility, are unjust and unreasonable. Verizon asks the Commission to order Florida Power to charge Verizon the same rate that Florida Power charges competitive local exchange carriers for their pole attachments. In this Memorandum Opinion and Order, we reject Florida Power’s argument that the Commission’s 2011 *Pole Attachment Order* is unlawfully retroactive. In addition, we dismiss Verizon’s complaint because Verizon has proven neither that the rates established by the governing agreement between Florida Power and Verizon’s predecessor are unjust and unreasonable, nor that Verizon is similarly situated to competitive local exchange carriers. Because the Bureau has not previously applied the 2011 *Pole Attachment Order*, we dismiss without prejudice to allow Verizon the option of refiling its complaint with additional evidentiary support.

2. Specifically, we find that Verizon has not met its burden of proving that the attachment rates established in a 1975 Joint Use Agreement (Agreement), which governs the rates that Verizon must pay to Florida Power (Agreement Rates), are unjust and unreasonable in violation of Section 224(b)(1) of the Communications Act of 1934, as amended.¹ In 2011, the Commission held for the first time in the *Pole Attachment Order* that Section 224(b)(1) applies to attachments by incumbent local exchange carriers (LECs) such as Verizon to electric utility poles.² To show that the Agreement Rates are unreasonable, Verizon compares those rates to the rates competitive LECs pay Florida Power for their attachments and argues that the Agreement Rates are *per se* unlawful. Verizon concedes, however, that it has received significant benefits under the Agreement that are not available to competitive LECs. Verizon makes no attempt to estimate the value of those unique benefits. Consequently, although

¹ 47 U.S.C. § 224(b)(1) (“the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable”).

² See *Implementation of Section 224 of the Act; A National Broadband Plan for our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5327–33, paras. 199–213 (2011) (*Pole Attachment Order or Order*), *aff’d American Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir.), *cert. denied* 134 S.Ct. 118 (2013).

competitive LECs pay lower attachment rates than Verizon, we cannot find on this record that the Agreement Rates are *per se* unjust or unreasonable.

3. We emphasize the narrowness of this ruling. We are not finding that the Agreement Rates are just and reasonable. Rather, we conclude that Verizon has provided insufficient evidence: (a) to support a finding that the Agreement Rates are unreasonable, and (b) for the Commission to set a just and reasonable rate. Because the Bureau has not previously applied the 2011 *Pole Attachment Order*, we dismiss Verizon's Complaint without prejudice. Verizon may refile its complaint and attempt to fill the evidentiary gaps in the current record.

II. BACKGROUND

A. Regulatory History

4. Before it released the *Pole Attachment Order* in 2011, the Commission had consistently held that Section 224(b)(1)'s requirement that pole attachment rates, terms, and conditions must be "just and reasonable" applied only to attachments by cable companies and competitive LECs, and not attachments by incumbent LECs.³ In accordance with subsections 224(d) and (e),⁴ respectively, the Commission established one formula to calculate the rate paid by cable attachers (the Cable Rate), and a separate formula to calculate the rate paid by competitive LEC attachers (the Old Telecom Rate).⁵ The Cable Rate was generally lower than the Old Telecom Rate.⁶

5. In the *Pole Attachment Order*, the Commission adopted a new formula for computing the rate paid by competitive LEC attachers (New Telecom Rate), "thereby reducing the disparity between current telecommunications and cable rates."⁷ In addition, "given the evidence in the record regarding current market realities,"⁸ the Commission concluded for the first time that Section 224(b)(1) applies to the rates, terms and conditions governing attachments by incumbent LECs, such as Verizon.⁹ The record indicated that, although incumbent LECs had in the past owned nearly as many poles as electric utility companies, incumbent LEC pole ownership rates had declined so that, by the time of the *Order*, they owned only about 25 to 30% of joint use poles.¹⁰ As a result, the Commission found that "market forces

³ See *Pole Attachment Order*, 26 FCC Rcd at 5328, para. 205 & n.614.

⁴ 47 U.S.C. § 224(d), (e).

⁵ See *Pole Attachment Order*, 26 FCC Rcd at 5296–97, paras. 129–31.

⁶ *Id.* at 5297, para. 131.

⁷ *Id.* at 5244, para. 8. The Old Telecom Rate compensated pole owners for "fully allocated costs," which are the costs a pole owner incurs in installing and maintaining poles even if there are no other attachers. The New Telecom Rate excludes recovery for a number of these costs, and usually results in a rate that is closer to the Cable Rate. See *id.* at 5300–1, paras. 141–142. By reducing the disparity between the Cable Rate and Old Telecom Rate, the *Pole Attachment Order* alleviated the "uncertainty result[ing] from the risk that, by offering services that potentially could be classified as 'telecommunications services,' a higher telecom rental rate might then be applied to the broadband provider's entire network." *Id.* at 5298, para. 134.

⁸ *Id.* at 5328, para. 206.

⁹ See *id.* at 5331, para. 209 ("incumbent LECs are entitled to pole attachment rates, terms and conditions that are just and reasonable pursuant to Section 224(b)(1)"); see also *id.* at 5243, 5327, 5330, paras. 8, 202, 208. Unlike cable and competitive LEC attachers, incumbent LECs have no right of access to utilities' poles pursuant to Section 224(f)(1). *Id.* at 5328–29, 5332–33, paras. 202, 207, 212 & n.643. The Commission concluded, however, that "the absence of a statutory right of nondiscriminatory pole access for incumbent LECs under section 224(f) is not incompatible with the Commission's exercise of authority to ensure just and reasonable rates, terms and conditions in situations where incumbent LECs are able to obtain access to poles." *Id.* at 5332, para. 212.

¹⁰ *Id.* at 5328, para. 206.

and independent negotiations may not be alone sufficient to ensure just and reasonable rates, terms and conditions for incumbent LEC pole attachments.”¹¹ The *Order* identified “a need for targeted Commission oversight [of incumbent LEC attachment agreements] to ensure just and reasonable rates, terms, and conditions that might not otherwise result from negotiations standing alone.”¹²

6. The Commission recognized that it should exercise its authority to regulate incumbent LEC attachment rates “in a manner that accounts for the potential differences between incumbent LECs and competitive LEC and cable attachers.”¹³ It noted that incumbent LECs own many poles and historically obtained access to electric utility poles through joint use agreements. Those agreements provide incumbent LECs a number of advantages not afforded to cable operator and competitive LEC attachers, such as guaranteed space on a pole, lower make-ready costs, and no need to obtain advance attachment approval.¹⁴ In light of those differences, the Commission did not adopt a formula for calculating the rate to be paid by incumbent LECs, deciding instead to resolve incumbent LEC complaints on a case-by-case basis.¹⁵ Moreover, the Commission specifically noted that “just and reasonable pole attachment rates for incumbent LECs are not bound by the formulas in sections 224(d) or (e).”¹⁶

7. The Commission identified several factors it would consider in resolving such complaints, including (i) the relative bargaining power of incumbent LECs and electric utilities,¹⁷ and (ii) the age of the relevant joint use agreement. The Commission distinguished existing joint use agreements from new agreements executed by an incumbent LEC and a utility after release of the *Order*. If an incumbent LEC entering into a new agreement demonstrates that it attaches on terms and conditions that leave it “comparably situated” to competitive LEC or cable attachers, “competitive neutrality counsels in favor of affording incumbent LECs the same rate as the comparable provider,” *i.e.*, the New Telecom Rate or the Cable Rate.¹⁸ But if a new agreement “includes provisions that materially advantage the incumbent LEC” vis-à-vis other attachers, it is reasonable to look to the Old Telecom Rate as “a reference point” for determining an appropriate rate.¹⁹ The Commission also stated that, in evaluating an incumbent LEC complaint, it would consider the rates, terms and conditions the incumbent LEC offers the utility or other attachers for access to its own poles.²⁰

¹¹ *Id.* at 5327, para. 199.

¹² *Id.* at 5243, para. 8.

¹³ *Id.* at 5333, para. 214.

¹⁴ *Id.* at 5335, para. 216 n.654.

¹⁵ *Id.* at 5334, para. 214 (“We therefore decline at this time to adopt comprehensive rules governing incumbent LECs’ pole attachments, finding it more appropriate to proceed on a case-by-case basis”), 5328, para. 203 (“Given that incumbent LECs often can be differently situated from other attachers . . . we conclude that it would not be appropriate to treat them identically to [competitive LEC] or cable operator attachers in all circumstances.”).

¹⁶ *Id.* at 5336, para. 217.

¹⁷ “[I]n evaluating incumbent LEC pole attachment complaints, the Commission will consider the incumbent LEC’s evidence that it is in an inferior bargaining position to the utility” because the utility owns significantly more poles. *Id.* at 5334, para. 215. On the other hand, “[w]here parties are in a position to achieve just and reasonable rates, terms and conditions through negotiation, we believe it generally is appropriate to defer to such negotiations.” *Id.*

¹⁸ *Id.* at 5336, para. 217.

¹⁹ *Id.* at 5336, para. 218.

²⁰ *Id.* at 5337, para. 219. The Commission added that it would be “skeptical of a complaint by an incumbent LEC seeking a proportionately lower rate to attach to an electric utility’s poles than the rate the incumbent LEC is charging the electric utility to attach to its poles.” *Id.* at 5337, para. 218. In a joint use arrangement, a just and reasonable rate would be “the same proportionate rate charged the electric utility, given the incumbent LEC’s relative usage of the pole (such as the same rate per foot of occupied space.)” *Id.* at para. 218 n.662.

8. The Commission expressed reluctance to adjust attachment rates in joint use agreements entered into before the *Order*'s release. The Commission found that “[n]othing in the record suggests that [joint use] agreements . . . were entered into with the expectation that their provisions would be subject to Commission review.”²¹ Based on evidence in the record, the Commission observed that incumbent LECs typically owned nearly as many poles as the electric utilities at the time the parties negotiated many of these agreements, and therefore were in a roughly equal bargaining position. “[W]e question the need to second guess the negotiated resolution of arrangements entered into by parties with relatively equal bargaining power.”²² In addition, while competitive LEC and cable agreements are usually structured as lease or license agreements, joint use agreements “reflect a decades-old contractual responsibility of incumbent LECs to share in infrastructure costs and also account for the fact that incumbent LECs still own many poles today.”²³ The Commission concluded that “[a] failure to weigh, and account for, the different rights and responsibilities in joint use agreements could lead to marketplace distortions,” and it “therefore reject[ed] arguments that rates for pole attachments by incumbent LECs should always be identical to those of [competitive LECs] or cable operators.”²⁴

9. The *Order* suggested that the Commission might, however, be willing to adjust attachment rates in existing joint use agreements that cannot be terminated. Specifically, it noted that, “[t]o the extent that an incumbent LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement, the Commission can consider that as appropriate in a complaint proceeding.”²⁵

B. The Parties’ Dispute

10. Florida Power and a predecessor to Verizon executed the Agreement in 1975 and amended it in 1978.²⁶ The Agreement reserves the uppermost six feet of usable space on each pole to Florida Power and the lowest four feet of usable space to Verizon.²⁷ As amended, the Agreement provides that each party pays fifty percent of the annual costs of owning and maintaining the joint use poles.²⁸ By June 30 of each year, “the party owning the majority of the jointly used poles will send to the other party their documentation for the annual charge rate for that year for review and acceptance.”²⁹

11. The record suggests that Florida Power has at all times relevant to this proceeding owned the vast majority of the parties’ joint use poles.³⁰ The most recent estimates in the record indicate that

²¹ *Id.* at 5335, para. 216 n.654.

²² *Id.* at 5335, para. 215.

²³ *Id.* at 5335, para. 216 n.654. *See id.* at 5334, para. 216 n.651 (discussing the difference between joint use agreements and competitive LEC attachment agreements).

²⁴ *Id.* at 5335, para. 216 n.654.

²⁵ *Id.* at 5335, para. 216.

²⁶ Pole Attachment Complaint, File No. EB-14-MD-003 (filed Jan. 31, 2014) (Complaint) Ex. 1 (Agreement); Ex. 2 (Agreement amendment).

²⁷ Complaint Ex. 1 at 3, § 1.1.7.

²⁸ *See* Complaint Ex. 2 at para. 1 (attachment rate is “one half of the average annual cost of joint use poles for the next preceding year as determined by the party owning the majority of joint use poles”).

²⁹ *Id.*

³⁰ *See* Respondent Florida Power and Light Company’s Response to Verizon Florida LLC’s Complaint, File No. EB-14-MD-003 (filed Apr. 4, 2014) (Response) Ex. A (Kennedy Dec’l) at 3, para. 9.

Florida Power currently owns roughly 90% of 74,000 joint use poles.³¹ Verizon has attachments on approximately 67,000 Florida Power poles.³²

12. Article XI of the Agreement provides that the attachment rate “shall be subject to renegotiation at the request of either party.”³³ Article XI also includes an “evergreen” clause providing that if the parties cannot reach a new agreement within six months after such a request,

this Agreement shall terminate and be of no further force and effect insofar as the making of attachments to additional poles. All other terms and provisions of this Agreement shall remain in full force and effect solely and only for the purpose of governing and controlling the rights and obligations of the parties herein with respect to existing joint use poles.³⁴

In addition, Article XVI authorizes either party to terminate the Agreement by providing notice in writing of intent to terminate six months in advance.³⁵ It further provides that, “notwithstanding any such termination, other applicable provisions of this Agreement shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination.”³⁶

13. On June 27, 2011, shortly after the Commission released the *Pole Attachment Order*, Verizon sent a letter to Florida Power requesting a meeting to negotiate a new joint use agreement or a “new method for computing pole attachment rates.”³⁷ Florida Power refused to lower the rate for Verizon’s existing attachments, relying on the Agreement’s evergreen clause, but offered to lower the rate for future attachments. On December 9, 2011, Verizon sent Florida Power a letter announcing Verizon’s intent to terminate the Agreement pursuant to Articles XI and XVI.³⁸ In its Complaint, Verizon contends that the Agreement terminated on June 9, 2012.³⁹

14. Florida Power billed Verizon for its attachments to Florida Power’s poles in 2011 and 2012 at the rates applicable under the Agreement, namely, \$35.465 per pole for 2011 and \$36.225 per pole for 2012. Verizon paid the invoices in full for the period up to the July 12, 2011 effective date of the *Pole Attachment Order*. For the period after that date, Verizon applied the New Telecom Rate formula and paid \$8.52 per pole.⁴⁰ In April 2013, Florida Power brought a collections action in Florida state court seeking to compel Verizon to pay the outstanding balance of the invoice.⁴¹

15. In its Complaint, Verizon contends that the Agreement Rate violates Section 224(b) of the Act because it is unjust and unreasonable. Verizon argues alternatively that it is entitled to pay either (a) the New Telecom Rate because it is comparably situated to competitive LEC attachers, or (b) the higher Old Telecom Rate if the terms and conditions of the Agreement provide Verizon an advantage

³¹ Complaint at 9, para. 17; Response Ex. A (Kennedy Dec’1) at 3, paras. 9, 16.

³² Complaint at 9, para. 17; Response at 33.

³³ Agreement at 13, Article XI, § 11.1.

³⁴ *Id.*, § 11.2.

³⁵ *Id.* at 16, Article XVI.

³⁶ *Id.*

³⁷ Complaint Ex. 4 (Letter from Verizon to Florida Power dated June 27, 2011).

³⁸ See Complaint Ex. 5 (Letter from Verizon to Florida Power dated Dec. 9, 2011).

³⁹ See Complaint at 11–12, paras. 24–27; Response at 7.

⁴⁰ See Complaint at 7, 13–14, paras. 11–12, para. 32–33; Response at 7–9 & Ex. A (Kennedy Dec’1) at 10, paras. 50–51.

⁴¹ Complaint at 14, para. 34; Response at 9.

relative to competitive LEC attachers.⁴² Both the New Telecom Rate and the Old Telecom Rate would be substantially lower than the rate specified in the Agreement. Verizon states that it will charge Florida Power a proportionally lower rate for its attachments to Verizon's poles.⁴³ Verizon argues that it is, and always has been, in an inferior bargaining position with Florida Power because Florida Power has always owned approximately 90% of the joint use poles.⁴⁴

16. As a threshold matter, Florida Power argues that due process prohibits retroactive application of the just and reasonable rate requirement in Section 224(b)(1) to Verizon's existing attachments to Florida Power's poles. Florida Power further argues that the Agreement Rate is reasonable even though it is higher than the New and Old Telecom Rates because Verizon receives a number of benefits under the Agreement that are not provided to other attachers.⁴⁵ In particular, Florida Power notes that the Agreement reserves to Verizon the lowest four feet of usable space on the pole, and that Verizon is not required to receive advance approval before attaching to Florida Power's poles or to pay application or inspection fees.⁴⁶ Florida Power does not agree that Verizon is in an unequal bargaining position, noting that Verizon is one of the largest corporations in the world, and asserting that Florida Power needs Verizon's poles as much as Verizon needs Florida Power's poles.⁴⁷

III. DISCUSSION

A. The Pole Attachment Order Is Not Unlawfully Retroactive.

17. Florida Power makes a threshold argument that the just and reasonable rate requirement in Section 224(b)(1) cannot be applied to the Agreement Rates because the Agreement pre-dates the *Order*.⁴⁸ Florida Power is mistaken for two reasons. First, the *Pole Attachment Order* does not apply retroactively. The *Order* plainly states that the rate paid by incumbent LECs may be adjusted only *after* the effective date of the *Order*.⁴⁹ Accordingly, Verizon's Complaint requests a refund only from the period following the *Order*'s effective date.⁵⁰ This is not a case of unlawful "primary" retroactivity because the *Order* does not alter the past legal consequences of past actions.⁵¹

⁴² Complaint at 23–24, paras. 59–62.

⁴³ *Id.* at 4.

⁴⁴ *Id.* at 9–10.

⁴⁵ Response at 27–30.

⁴⁶ *Id.* at 27–29.

⁴⁷ *Id.* at 23–27.

⁴⁸ *Id.* at 3, 10–14.

⁴⁹ See *Pole Attachment Order*, 26 FCC Rcd at 5334, para. 214 n.647 (“We decline to apply our new interpretation of section 224 retroactively, and make clear that incumbent LECs only can get refunds of amounts paid subsequent to the effective date of this Order.”).

⁵⁰ Complaint at 23, para. 50, 24, para. 62.

⁵¹ See *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219–220 (1988) (Scalia, J., concurring)); see also *Landgraf v. U.S. Film Products*, 511 U.S. 244, 269 (1994) (“A statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment . . . , or upsets expectations based in prior law.”). Therefore, the primary retroactivity cases cited by Florida Power are inapposite. See Response at 10–14. Indeed, Florida Power appears to recognize the *Pole Attachment Order* is not primarily retroactive, acknowledging that a rule “‘does not operate retroactively merely because it applies to prior conduct.’” See Response at 13 (quoting *Georgia Power Co. v. Teleport Commc'ns*, 346 F.3d 1033, 1042 (11th Cir. 2003)).

18. Second, Florida Power has not met its burden of showing that prospectively applying a just and reasonable rate would be unlawful because it is “secondarily” retroactive.⁵² Florida Power bears a heavy burden. A rule that operates prospectively but affects transactions entered into before its promulgation is invalid only if it is arbitrary and capricious.⁵³ Florida Power asserts that applying Section 224(b)(1) to reduce the Agreement rates “makes worthless” Florida Power’s “substantial and decades-long investments in pole plant to accommodate Verizon.”⁵⁴ In particular, Florida Power notes that, because the Agreement reserves four feet of space to Verizon, Florida Power paid for poles that were taller and stronger than necessary for its own use, and therefore incurred installation costs that were fifty percent higher than would otherwise have been necessary.⁵⁵

19. We are not persuaded. The D.C. Circuit upheld the Commission’s finding that Section 224(b)(1) applies to incumbent LECs.⁵⁶ Florida Power does not explain how lawfully applying a statutory provision that requires “just and reasonable” rates on a prospective basis could be “arbitrary and capricious.” “Just and reasonable” and “arbitrary and capricious” are mutually exclusive concepts. Moreover, adopting a just and reasonable rate would not render Florida Power’s investment in poles “worthless.” Florida Power has collected rates under the Agreement for nearly 40 years and would be paid a just and reasonable rate going forward. The Commission made clear in the *Pole Attachment Order* that applying Section 224(b)(1) to incumbent LEC attachments will not result in unreasonably low rates. The *Order* stressed that an appropriate rate is one that incentivizes utility companies to invest in poles, and ensures that electric customers are not burdened by excessive rates.⁵⁷ The *Order* also warned against “a failure to weigh, and account for” the special rights received, and responsibilities assumed, by incumbent LECs under joint use agreements.⁵⁸ In addition, Florida Power generates revenue by renting space to cable companies and competitive LECs.⁵⁹ For all of these reasons, we are confident that a just

⁵² See Response at 11–12.

⁵³ See e.g., *Bowen*, 488 U.S. at 219-220 (Scalia, J., concurring) (describing “secondary retroactivity” as a “rule with exclusively future effect [that] can . . . affect past transactions”); *DirectTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997) (“A rule that upsets expectations . . . may be sustained ‘if it is reasonable,’ i.e., if it is not ‘arbitrary’ or ‘capricious.’”) (citations omitted); *Bell Atlantic Tel. Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996); *accord Nat’l Cable & Telecomm. Ass’n*, 567 F.3d at 670 (FCC’s rule forbidding enforcement of existing exclusivity contracts between cable operators and apartment building owners was merely secondarily retroactive and was lawful under the “deferential standard of review”).

⁵⁴ Response at 12.

⁵⁵ Response at 16, Ex. A (Kennedy Dec’1) at 4, para. 17.

⁵⁶ See *American Elec. Power Serv.*, 708 F.3d at 187–88.

⁵⁷ *Pole Attachment Order*, 26 FCC Rcd at 5303, para. 146 (“We recognize . . . that pole rental rates historically have helped support the investment utilities make in their pole infrastructure, and acknowledge the utilities’ policy concerns about shifting that burden to utility ratepayers.”), 5304, para. 148 (acknowledging “the policy interests in utility pole investment and of utility ratepayers”). Thus, in establishing the New Telecom Rate, the Commission was “mindful of the potential burden of reform on utility ratepayers and the incentives of utilities to continue investing in pole infrastructure,” *id.* at 5321, para. 181, and therefore concluded that the New Telecom Rate should include recovery of some capital costs incurred by pole owners addition to those recovered through make-ready fees. *Id.* at 5304-5306, paras. 149-151 (defining “cost” for purposes of section 224(e) of the Act to include 44 or 66 percent of the fully allocated costs used to calculate the Old Telecom Rate, depending on whether the poles are in urban or non-urban areas).

⁵⁸ See *id.* at 5335 n.654 (rejecting “arguments that rates for pole attachments by incumbent LECs should always be identical to those of [competitive LECs] or cable operators”).

⁵⁹ See Complaint Ex. A (Lindsay Aff.) at 3, para. 9 (Florida Power collects and retains rent from third party attachers); Response Ex. A (Kennedy Dec’1) at 7, para. 37 (admitting that Florida Power receives revenues from third party attachers, including attachers in the space reserved for Verizon).

and reasonable rate under Section 224 will adequately compensate Florida Power.⁶⁰ We therefore find that applying the just and reasonable standard to the Agreement is neither arbitrary nor capricious.⁶¹

B. Verizon Has Not Met Its Burden of Showing that the Agreement Rates Are Unjust and Unreasonable.

20. In its Complaint, Verizon argues that it is effectively unable to terminate the Agreement and obtain a new arrangement because Florida Power, in reliance on the Agreement's evergreen clause, has refused to renegotiate Verizon's rates with respect to existing attachments.⁶² Verizon contends that, because Florida Power has always owned approximately 90% of the poles subject to the Agreement, Verizon is in an inferior bargaining position vis-à-vis Florida Power.⁶³ To show that the attachment rates under the Agreement are unjust and unreasonable, Verizon relies on the following comparison of 2012 rates:

2012 Agreement Rate	\$36.22 per pole
Old Telecom Rate	\$12.91 per foot of space occupied per pole
New Telecom Rate	\$8.52 per foot of space occupied per pole ⁶⁴

Verizon claims that because the 2012 Agreement Rate is several times higher than the Old and New Telecom Rates, the Agreement Rate is per se unreasonable.⁶⁵ As noted above, the Commission specified in the *Pole Attachment Order* that when an incumbent LEC enters into a new attachment agreement, the New Telecom Rate may be appropriate if the LEC attaches on terms and conditions that leave it "comparably situated" to competitive LECs,⁶⁶ while the Old Telecom Rate serves as a "a reference point" if the new agreement "includes provisions that materially advantage the incumbent LEC" vis-à-vis competitive LECs or other attachers.⁶⁷ Verizon asserts that it is comparably situated to competitive LECs

⁶⁰ Florida Power also argues that Section 224 of the Act "provides the Commission no jurisdiction over [incumbent] LEC attachments." Response at 4, 40–41. The D. C. Circuit rejected that argument in its opinion affirming the *Pole Attachment Order*. See *American Elec. Serv. Power v. FCC*, 708 F.3d at 186–88.

⁶¹ The Commission has applied a new rate to existing pole attachments on many occasions and has been upheld on appeal. See *Georgia Power Co. v. FCC*, 346 F.3d 1033 (11th Cir. 2003) (affirming *Teleport Commc'ns Atlanta, Inc. v. Georgia Power Co.*, Order, 16 FCC Rcd 20238, 20239, para. 4 (Deputy Chief, Cable Services Bur. 2001) (reducing pole rental rate from \$53.35 to \$6.56)); *Time Warner Entertainment v. Florida Power & Light Co.*, Order, 14 FCC Rcd 9149, 9154, para. 14 (Chief, Cable Service Bur. 1999) (substituting new rental rate "for the existing rate in the Agreements"); *Teleprompter of Fairmont, Inc. v. Chesapeake & Potomac Tel. Co.*, Memorandum Opinion and Order, 85 FCC2d 243, 244, para. 2 (1981) ("substitut[ing] the maximum just and reasonable rate for the \$4.00 rate set in the contract between the parties").

⁶² See Complaint at 9–16, paras. 16–38.

⁶³ *Id.* at 9–10, paras. 17–20.

⁶⁴ *Id.* at 7–8, paras. 11–13. Florida Power contends that, properly calculated, the Old and New Telecom Rates for 2012 would be slightly higher (\$14.83 and \$9.78, respectively). Response at 4, 23, 35.

⁶⁵ Complaint at 7–8, paras. 11–13; Pole Attachment Complaint Reply, File No. EB-14-003 (filed Apr. 24, 2014) (Reply) at 1, 5.

⁶⁶ *Pole Attachment Order*, 26 FCC Rcd at 5336, para. 217.

⁶⁷ *Id.* at 5336, para. 218.

and should therefore pay the New Telecom Rate for its existing attachments.⁶⁸ In the alternative, Verizon argues that if it is not similarly situated to competitive attachers, it should pay the Old Telecom Rate.⁶⁹

21. Although the 2012 Agreement Rate exceeds the Old and New Telecom Rates, this fact alone does not establish that the Agreement Rate is unjust and unreasonable. We find that Verizon has failed to meet its burden of proof that the rate is unjust and unreasonable for three reasons.⁷⁰ First, because Verizon has received, and continues to receive, unique benefits under the Agreement, we find that Verizon is not similarly situated to competitive LECs and therefore is not entitled to pay the New Telecom Rate. In the *Pole Attachment Order*, the Commission repeatedly noted that joint use agreements are not analogous to lease agreements between competitive LECs and electric utilities because (a) unlike competitive LECs, incumbent LECs have no statutory right of access to utility poles;⁷¹ and (b) incumbent LECs receive unique benefits under joint use agreements that are not available to competitive LECs.⁷² In its Response to the Complaint, Florida Power lists the unique advantages the Agreement conferred on Verizon with respect to its existing attachments, including:

- Verizon was not required to file a permit application, pay an initial fee, or wait for approval from Florida Power before attaching.
- Verizon’s attachments were not subject to Florida Power inspection at the time of installation, and Verizon was not required to pay an inspection fee.
- The Agreement granted Verizon access to the lowest four feet of usable space on each pole, which is easier to access than the space used by competitors between

Verizon’s and Florida Power’s attachments. This reduces Verizon’s installation and maintenance costs.

- To accommodate the four feet of space allotted to Verizon, Florida Power installed taller poles at increased cost.
- The Agreement requires Florida Power to replace poles in certain circumstances to accommodate Verizon; none of Verizon’s competitors receive this benefit.
- Unlike competitive LECs, Verizon is not required to purchase its own insurance, list Florida Power as an insured, or indemnify Florida Power.⁷³

22. Verizon does not deny that it received these benefits, some of which have prospective value.⁷⁴ Verizon likewise does not deny that these benefits remain in effect because, despite its

⁶⁸ *Id.* at 17–19, paras. 40–46.

⁶⁹ *Id.* at 22, para. 53.

⁷⁰ See 47 C.F.R. § 1.1404(f) (complainant alleging that a term in a pole attachment agreement is unjust or unreasonable must “specify all information and argument relied upon to justify said claim”); *Knology v. Ga. Power*, 18 FCC Rcd 24615, 24635 (2003) (complainant in a pole attachment proceeding bears the burden of proof).

⁷¹ See *supra* n.9.

⁷² *Pole Attachment Order*, 26 FCC Rcd at 5333, 5335–37, paras. 214, 216 nn.651, 654, & para. 217.

⁷³ Response at 16, 27–29; Response Ex. A (Kennedy Dec’1) at 4–6, paras. 17–36; Agreement at 3, 5, 7, 9, Article I, § 1.1.7, Article III, §§ 3.1–3.2, Article IV, § 4.4, Article V.

⁷⁴ Verizon claims that its “allocated space is not alone responsible for the height and strength of [Florida Power’s] pole network.” Reply at 6. That is not Florida Power’s argument. Rather, Florida Power contends that accommodating the space allotted to Verizon under the Agreement drove up its pole installation costs significantly.

(continued....)

termination, the Agreement continues to govern Verizon's attachments to Florida Power's poles.⁷⁵ In its Complaint, Verizon does not argue that the Agreement's evergreen clause is unenforceable.⁷⁶ Verizon asserts in its Reply that Florida Power cannot rely on the evergreen clause because Florida Power "failed to renegotiate the rental rate and rate formula in good faith," but Verizon cites no legal support for that proposition.⁷⁷ Verizon concedes that Florida Power engaged in face-to-face negotiations [REDACTED]⁷⁸ Florida Power's reliance on the plain language of the evergreen clause is not evidence of bad faith.

23. Second, Verizon has not demonstrated that it should be required to pay no more than the Old Telecom Rate. In Verizon's view, there are only two possible just and reasonable rates for incumbent LEC pole attachments—the New and Old Telecom Rates. But the Commission specifically found in the *Pole Attachment Order* that "just and reasonable pole attachment rates for incumbent LECs are not bound by the formulas in sections 224(d) and (e)."⁷⁹ In support of applying the Old Telecom Rate, Verizon cites the *Order's* statement that the Commission would consider the Old Telecom Rate "as a reference point" when determining a just and reasonable attachment rate for a "new agreement" between an incumbent LEC and a utility.⁸⁰ The agreement at issue here is not a new agreement. It is "an historical joint use agreement," which the Commission repeatedly distinguished from "new agreements."⁸¹ Moreover, a "reference point" is not a rule. The Commission plainly stated in the *Order* that it was not adopting "rules governing incumbent LEC pole attachments, finding it more appropriate to proceed on a case-by-case basis."⁸²

24. Third, we find that Verizon has adduced insufficient evidence to support a finding that the Agreement Rates are unreasonable, or for the Commission to set a just and reasonable rate. Verizon concedes that it received and continues to receive benefits under the Agreement that are not provided to other attachers, but it has not produced any evidence showing that the monetary value of those advantages is less than the difference between the Agreement Rates and the New or Old Telecom Rates over time.

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Response at 16; Response Ex. A (Kennedy Dec'l) at 4, para. 17. Although we need not decide this issue now, it appears that at least some of those costs are attributable to Verizon's allotted space on the poles.

⁷⁵ See Agreement at 13, Article XI, § 11.2; see also *id.* at 17, Article XVI. In its Reply, Verizon argued that "[Florida Power] asserts that Verizon relinquished rights under the Agreement when it was terminated." Reply at 9. Not so. The evidence Verizon cites—a declaration submitted on behalf of Florida Power—related to future pole installations, not attachments in place at the time the Agreement terminated. See Response Ex. A (Kennedy Decl.) at 8, para. 43 (noting that as of June 9, 2012, "Verizon relinquished its contractual right to have [Florida Power] install poles tall enough to avoid make-ready work when Verizon intends to attach").

⁷⁶ We note that in other circumstances courts have enforced evergreen clauses. See, e.g., *United Mine Workers of America 1974 Pension v. Pittston Co.*, 984 F.2d 469, 473 (D.C. Cir. 1993) (evergreen clause construed to impose "perpetual obligation" on employer to contribute to union pension fund, even though employer did not sign successor agreement to the collective bargaining agreement that established the fund); *Masonry Institute v. McNeela*, 67 F.3d 301 (7th Cir. 1995); *Flynn v. Beeler Barney Assoc's Masonry Contractors, Inc.*, 2004 WL 3712630 (D.D.C. 2004).

⁷⁷ Reply at 7.

⁷⁸ See Complaint at 11–13, paras. 22, 24, 28–31.

⁷⁹ *Pole Attachment Order*, 26 FCC Rcd at 5336, para. 217.

⁸⁰ *Id.* at 5336–37, para. 218 (emphasis added).

⁸¹ See *id.* at 5334–37, paras. 216–219; see also *id.* at 5336, para. 217 ("historical joint use agreements between incumbent LECs and other utilities implicate rights and responsibilities that differ from those in typical pole lease agreements with [competitive LECs] or cable operators").

⁸² *Id.* at 5334, para. 214.

Verizon provides no evidence regarding the value of access to Florida Power's poles or occupying the lowest usable space on each pole. Verizon likewise made no attempt to estimate the costs Florida Power incurred by installing taller poles to accommodate Verizon. For its 67,000 attachments, Verizon was not required to pay make-ready costs and post-attachment inspection fees that competitive LECs must pay, yet Verizon has made no attempt to quantify the expenses it avoided under the Agreement. Absent such evidence, we are unable to determine whether the Agreement Rates are just and reasonable.⁸³ Verizon's raw comparison of the Agreement Rates to the Old and New Telecom Rates is not sufficient to show that the Agreement Rates are unjust.

C. Verizon's Complaint Should Be Dismissed Without Prejudice.

25. Because Verizon has failed to meet its burden of proof, we do not grant the Complaint.⁸⁴ That does not necessarily mean, however, that Verizon must pay the Agreement Rates in perpetuity. As contemplated in the *Pole Attachment Order*, this appears to be a case in which "an incumbent LEC . . . genuinely lacks the ability to terminate an existing agreement."⁸⁵ Because the Bureau has not previously applied the 2011 *Pole Attachment Order*, and dismissal with prejudice could force Verizon to pay the relatively high Agreement Rates for as long as its attachments remain on Florida Power's poles pursuant to the evergreen clause, we dismiss Verizon's Complaint without prejudice. "The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."⁸⁶ When a complainant fails to meet its burden of showing that a term in a pole attachment agreement is unjust or unreasonable,⁸⁷ "the Commission may dismiss the complaint."⁸⁸ If the Commission elects to do so, dismissal "will be with prejudice if the complaint has been dismissed previously."⁸⁹ Because the Commission has not previously dismissed Verizon's complaint, in this instance we dismiss without prejudice.

26. The *Order* established that the just and reasonable standard in Section 224(b)(1) applies to incumbent LEC pole attachments. The *Order* did not adopt a rate formula for existing joint use agreements, nor did it specify the type of evidence required to establish that the Agreement Rates are unjust and unreasonable. Although Verizon received benefits under the Agreement that were not available to other attachers, it is possible that the value of those benefits does not justify Florida Power

⁸³ Verizon argues in its Reply that the advantages provided by the Agreement are irrelevant because it "seeks to be comparably situated to a [competitive] LEC attacher by attaching based on the terms and conditions of Florida Power's license agreement with Verizon's [competitive] LEC affiliate." Reply at 9. As discussed above, Verizon has already reaped the benefits of the Agreement and will continue to enjoy those benefits into the future. As a result, Verizon is not comparably situated to other Florida Power attachers.

⁸⁴ The Complaint also fails because it does not provide evidence as to the rate Verizon charges cable companies and competitive LECs to attach to its poles. See *Pole Attachment Order*, 26 FCC Rcd at 5337, para. 218 ("[I]n evaluating an incumbent LEC's complaint, the Commission may also consider the rates, terms and conditions that the incumbent LEC offers to . . . other attachers for access to the incumbent LEC's poles.").

⁸⁵ *Pole Attachment Order*, 26 FCC Rcd at 5336, para. 216.

⁸⁶ 47 U.S.C §154(j); see 47 C.F.R. § 1.1415.

⁸⁷ See *supra* paras. 21–24; see 47 C.F.R. § 1.1404(f)–(g).

⁸⁸ *Id.* § 1.1406(b). In the alternative, the Commission "may require the complainant to file additional information." *Id.* We view these alternatives—dismissing without prejudice or asking the complainant to supplement the record—as functionally equivalent. In either case, the Commission has made a determination that the record is insufficient to warrant granting the Complaint. In this Order, we exercise our discretion to dismiss without prejudice rather than requesting additional information.

⁸⁹ *Id.* § 1.1406(d).

charging Verizon higher contractual rates for as long as Verizon's attachments remain on Florida Power's poles. Verizon may refile its complaint and attempt to fill the evidentiary gaps in the current record.

IV. ORDERING CLAUSE

27. Accordingly, **IT IS ORDERED**, pursuant to Sections 4(i), 4(j) and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 224 that the Complaint is **DISMISSED WITHOUT PREJUDICE**, and that **THIS PROCEEDING IS TERMINATED**.

FEDERAL COMMUNICATIONS COMMISSION

Travis LeBlanc
Chief, Enforcement Bureau

Exhibit D

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Verizon Virginia, LLC and Verizon South, Inc.,)	Proceeding No. 15-190
)	Bureau ID No. EB-15-MD-006
Complainants,)	
)	
v.)	
)	
Virginia Electric and Power Company)	
d/b/a Dominion Virginia Power,)	
)	
Respondent.)	

ORDER

Adopted: May 1, 2017

Released: May 1, 2017

By the Acting Chief, Market Disputes Resolution Division:

I. INTRODUCTION

1. In this interim Order, we address two threshold issues raised in a pole attachment complaint by Verizon Virginia, LLC and Verizon South, Inc. (collectively, Verizon) against Dominion Virginia Power (Dominion), challenging the contractual rates that Verizon pays to attach to Dominion’s electric utility poles. First, we find that the rates Verizon pays for its attachments to Dominion’s poles are not just and reasonable, in violation of Section 224(b)(1) of the Communications Act. Second, we conclude that Verizon is entitled to a refund of overpayments it may have made prior to filing its Complaint, subject to true up of the post-Complaint period in question. We issue this interim order on two threshold issues to expedite final resolution of this case in a subsequent order or by settlement.¹

II. BACKGROUND

A. Legal Framework

2. Pole attachment rates are the charges that owners of utility poles, including electric utility companies, assess when cable television operators, telecommunications carriers, and others attach their lines to utility poles. Section 224(b)(1) of the Communications Act of 1934, as amended (Act), authorizes the Commission to adopt rules to ensure, *inter alia*, that the rates, terms, and conditions of “pole attachments” are “just and reasonable.”² Prior to 2011, the Commission construed the “just and reasonable” requirement of Section 224(b)(1) to apply to attachments by cable companies and competitive local exchange carriers (LECs), but not to attachments by incumbent LECs, like Verizon.³

¹ We express no views at this time with respect to the remaining issues raised in the Complaint.

² 47 U.S.C. § 224(b)(1); *id.*, § 224(a)(4) (definition of “pole attachment”). *See also* 47 CFR §§ 1.1401-1.1424 (Pole Attachment Complaint Procedures).

³ *Implementation of Section 224; A National Broadband Plan for our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5328, para. 205 & n.614 (2011) (*Pole Attachment Order*), *aff’d sub nom. Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013).

Under separate provisions codified in subsections 224(d) and (e),⁴ respectively, the Commission established formulas to calculate just and reasonable pole attachment rates for cable attachers (Cable Rate) and competitive LEC attachers (Old Telecom Rate).⁵

3. In 2011, the Commission released the *Pole Attachment Order*, in which it adopted a revised formula under Section 224(e) for computing the pole attachment rate paid by competitive LECs (New Telecom Rate), “thereby reducing the disparity between current telecommunications and cable rates.”⁶ The Commission also concluded for the first time that the “just and reasonable” requirement of Section 224(b)(1) applies to the rates, terms, and conditions governing attachments by incumbent LECs, such as Verizon.⁷ The record indicated that, although incumbent LECs had in the past owned nearly as many poles as electric utility companies, incumbent LEC pole ownership rates had declined,⁸ leading the Commission to conclude that “market forces and independent negotiations may not be alone sufficient to ensure just and reasonable rates, terms and conditions for incumbent LEC[] pole attachments.”⁹ The order identified “a need for targeted Commission oversight” of incumbent LEC attachment agreements “to ensure just and reasonable rates, terms, and conditions that might not otherwise result from negotiations standing alone.”¹⁰

4. In the *Pole Attachment Order*, the Commission also recognized the necessity of analyzing incumbent LEC attachment rates “in a manner that accounts for the potential differences between incumbent LECs and telecommunications carrier or cable operator attachers.”¹¹ It noted that incumbent LECs are unique in that they own many poles and have historically obtained access to electric utility poles through “joint use” agreements.¹² The Commission observed that such joint use arrangements typically provide incumbent LECs a number of advantages not afforded to telecommunications carrier and cable attachers, such as guaranteed space on poles, lower make-ready costs, and the ability to attach without obtaining advance approval.¹³ In light of those differences, the Commission did not adopt a

⁴ 47 U.S.C. § 224(d) (describing cable rate formula); *id.* § 224(e) (describing telecommunications carrier rate formula).

⁵ *Pole Attachment Order*, 26 FCC Rcd at 5296-97, paras. 129-31 (discussing adoption of separate formulas for determining maximum allowable just and reasonable pole attachment rates for providers of cable service and telecommunications carriers). For purposes of Section 224, the term “telecommunications carrier”- which is otherwise defined as “any provider of telecommunications services,” 47 U.S.C. § 153(51) - “does not include any incumbent local exchange carrier.” *See* 47 U.S.C. § 224(a)(5).

⁶ *Pole Attachment Order*, 26 FCC Rcd at 5244, para. 8. The Old Telecom Rate compensated pole owners for “fully allocated costs,” which are the costs a pole owner incurs in installing and maintaining poles even if there are no other attachers. The New Telecom Rate excludes recovery for a number of these costs, and usually results in a rate that is closer to the Cable Rate. *Id.*, 26 FCC Rcd at 5300-01, paras. 141-42.

⁷ *See id.*, 26 FCC Rcd at 5331, para. 209 (“incumbent LECs are entitled to pole attachment rates, terms and conditions that are just and reasonable pursuant to Section 224(b)(1)”); *see also id.* at 5243-44, 5327-28, 5330, paras. 8, 202, 208. Unlike cable and competitive LEC attachers, however, incumbent LECs have no right of access to utilities’ poles pursuant to Section 224(f)(1). *Id.* at 5328, 5329-30, 5332-33, paras. 202, 207, 212 & n.643.

⁸ *Id.* at 5328-29, para. 206.

⁹ *Id.* at 5327, para. 199.

¹⁰ *Id.* at 5244, para. 8.

¹¹ *Id.* at 5333, para. 214.

¹² *Id.* at 5334, para. 214.

¹³ *Id.* at 5335, para. 216 n.654.

formula for calculating the rate to be paid by incumbent LECs, opting instead to resolve incumbent LEC disputes on a case-by-case basis in complaint proceedings brought before the Commission.¹⁴ The Commission found it reasonable to use the Old Telecom Rate “as a reference point” in complaint proceedings filed by incumbent LECs to “account for particular arrangements that provide net advantages to incumbent LECs” relative to competitive LECs.¹⁵

B. The Joint Use Agreements and the Parties’ Dispute

5. Dominion and both Verizon South and Verizon Virginia have longstanding relationships as joint users of poles owned by Dominion or Verizon in the parties’ overlapping service areas in Virginia.¹⁶ The record reflects that Dominion has at all times relevant to this proceeding owned approximately 65 percent of the parties’ joint use poles.¹⁷ In 2006, Dominion and Verizon South began negotiating a new joint use agreement to replace a prior agreement in effect since 1978.¹⁸ Thereafter, Dominion and Verizon Virginia similarly agreed to replace their prior joint use agreement in effect since 1992.¹⁹ Although the parties concluded negotiations and reached an agreement in principal in late 2010, Dominion and Verizon executed virtually identical agreements (Joint Use Agreements)²⁰ in May and August 2011, respectively,²¹ with an effective date of January 1, 2011.²²

¹⁴ *Id.* at 5328, 5334, paras. 203, 214. *See also id.* at 5287, para. 102 & n.319 (indicating that in order to expedite pole attachment complaints, “whenever possible, the Enforcement Bureau will resolve pole attachment complaints itself, to the extent permitted by its delegated authority.”).

¹⁵ *Id.* at 5337, para. 218.

¹⁶ *See Verizon Virginia LLC and Verizon South Inc. v. Virginia Electric and Power Company d/b/a/ Dominion Virginia Power*, Proceeding No. 15-190, Bureau ID No. EB-15-MD-006, Pole Attachment Complaint, at 42, para. 90 (Aug. 3, 2015) (Compl.) (referencing the parties’ decades-old relationship); *Verizon Virginia LLC and Verizon South Inc. v. Virginia Electric and Power Company d/b/a/ Dominion Virginia Power*, Proceeding No. 15-190, Bureau ID No. EB-15-MD-006, Response to Pole Attachment Complaint, at 4 (Nov. 18, 2015) (Resp.) (referencing a succession of reciprocal attachment agreements dating back over seventy years). Any reference to the parties’ historic joint use agreements includes any predecessor companies of the parties, as relevant.

¹⁷ The shared Dominion-Verizon network consists of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] poles, with Dominion owning or controlling [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] poles (65 percent) and Verizon owning or controlling [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] poles (35 percent). *See* Compl. at 6-7, para. 6; Resp., Exh. B (Declaration of William Zarakas) at 3, para. 4 (Zarakas Decl.); Resp. at 13 (“[T]he parties agree that the balance of pole ownership between Dominion and Verizon has not varied over the last several decades of their joint use relationship.”); *see also* Reply at 11.

¹⁸ Compl., Exh. B (Affidavit of Stephen Mills) at 4, para. 10 (Mills Aff.); Resp., Exh. A (Declaration of Michael Graf) at 3, 5, paras. 5, 10 (Graf Decl.).

¹⁹ Compl., Exh. B (Mills Aff.) at 4, para. 10; Resp., Exh. A (Graf Decl.) at 5, para. 10 n.9.

²⁰ *See* Compl., Exh. 1, General Joint-Use Agreement Between Verizon Virginia and Dominion (Jan. 1, 2011) (Verizon Virginia Agreement); Compl., Exh. 2, General Joint-Use Agreement Between Verizon South and Dominion (Jan. 1, 2011) (Verizon South Agreement).

²¹ Compl. at 6, para. 5 & n.17; Resp. at 5 & n.14; *id.*, Exh. A (Graf Decl.) at 3, 5, 6, 7, paras. 5, 10, 14, 16; Compl., Exh. B (Mills Aff.) at 4, 6-7, paras. 10, 18. Although Verizon does not indicate when the Joint Use Agreements were executed, it does not dispute Dominion’s representation that they were executed by Dominion and Verizon in May and August 2011, respectively.

²² *See* Joint Use Agreements, Recitals.

6. The Joint Use Agreements reserve [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of usable space on each pole to Dominion and [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of usable space to Verizon.²³ They also include, *inter alia*, [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]²⁴ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]²⁵ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]²⁶ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]²⁷ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]²⁸ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]²⁹

7. In a letter dated October 8, 2013, Verizon notified Dominion of its request for [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]²⁷ Over the next several months, the parties participated in extensive negotiations, including private mediation, in an effort to resolve their differences regarding the annual pole rental rates.²⁸ In light of their failure to agree on an alternative rate framework, Dominion has continued to bill Verizon for its attachments to Dominion's poles in accordance with the Joint Use Agreements.²⁹

²³ Joint Use Agreements, Exh. D; Compl. at 10, para. 13; Resp. at 18.

²⁴ Joint Use Agreements, Art. 33 & Exhs. A-F. [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] *Id.*

²⁵ Joint Use Agreements, Art. 11.01.

²⁶ *Id.* Art. 11.02 states, however, that [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] Joint Use Agreements, Art. 11.02.

²⁷ Compl., Exh. 13 (Letter from Stephen Mills, Verizon, to Arlie Hahn, Dominion (Oct. 8, 2013) (October 2013 Letter)). Article 33.08 of the Joint Use Agreements states:

[BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] Joint Use Agreements, Art. 33.08.

²⁸ Compl. at 13-17, paras. 21-30; Resp. at 7-9. These discussions concluded on May 29, 2015. *See* Compl., Exh. 23 (Email from John Douglass, private mediator, to Christopher Huther, Counsel for Verizon, and Brett Heather Freedson, Counsel for Dominion (June 2, 2015)). Most recently, the parties participated in staff supervised mediation at the Commission. *See* Letter from Lisa Boehley, FCC, to Christopher Huther and Claire Evans, Verizon, and Brett Heather Freedson, Charles Zdebski, and Robert Gastner, Dominion (June 23, 2016) (commencing Mediation Process); Letter from Rosemary McEnery, FCC, to Christopher Huther and Claire Evans, Verizon, and Brett Heather Freedson, Charles Zdebski, and Robert Gastner, Dominion (Nov. 17, 2016) (concluding Mediation Process).

²⁹ Resp. at 9 & n.39 (referencing Joint Use Agreements, Arts. 33.07, 33.08). For their attachments on Dominion-owned poles, Verizon Virginia and Verizon South were charged under the Joint Use Agreements the following per pole rental rates for 2011 through 2015, respectively: [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] For its attachments on Verizon Virginia-owned poles during this same time

8. [BEGIN CONFIDENTIAL] [REDACTED]

[END CONFIDENTIAL]³² In October 2016, Dominion provided to Verizon a “Notice of Default” alleging *inter alia* that Verizon had failed to remit full payment for annual pole rental fees for the 2015 and 2016 rate years.³³ Dominion alleges that Verizon has withheld more than \$10 million of annual pole rental fees owed to Dominion under the parties’ agreements.³⁴

C. The Pole Attachment Complaint

9. In its Complaint, Verizon alleges that the annual pole rental rate in the Joint Use Agreements is unjust and unreasonable under Section 224 and the Commission’s pole attachment rules.³⁵ According to Verizon, the “exorbitant” rate in the Joint Use Agreements “resulted from Dominion’s superior bargaining power and the insufficiency of ‘market forces and independent negotiations . . . to ensure just and reasonable rates.’”³⁶ Verizon maintains that it does not receive under the Joint Use Agreements “any unique benefits” that would justify a higher rate than the rates paid by other carriers that attach to Dominion’s poles, and therefore asks the Commission to set its rate at the “properly calculated” New Telecom Rate and to refund to Verizon any “overpayments” it has made under the agreements since the

period, Dominion was charged under the Joint Use Agreements the following per pole rental rates: [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] For its attachments on Verizon South-owned poles, Dominion was charged under the Joint Use Agreements the following per pole rental rates: [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

³⁰ Resp. at 23; Reply at 3, 56-57.

³¹ Resp. at 23; Reply at 3, 5, 57. Dominion states that Verizon’s 2015 payment represents 11 percent of the total annual pole rental fees invoiced for that year pursuant to the Joint Use Agreements. Resp. at 9.

³² Resp. at 23; Reply at 3, 57. In November 2015, Dominion brought a state court action against Verizon in an effort to enforce the Joint Use Agreement rates. See *Compl., Va. Elec. and Power Co. v. Verizon Virginia LLC and Verizon South Inc.*, Case No. CL15-3029-00 (Va. Cir. Ct. Nov. 18, 2015) (pending).

³³ Letter from Anthony Barni, Dominion, to Verizon Virginia and Verizon South at 1-2 (Oct. 13, 2016) (providing Verizon 60 days under Article 13.03 of the Joint Use Agreements to “cure the above defaults”). Over Verizon’s objections, Dominion notified Verizon upon expiration of the 60-day “cure period” of its plan, “effective immediately, [to decline] to authorize any additional attachments requested by Verizon” under the Joint Use Agreements. See Letter from Anthony Barni, Dominion, to Verizon South and Verizon Virginia at 1 (Dec. 13, 2016) (also reserving “the right to remove, without any further notice to Verizon . . . any attachment made without Dominion’s authorization in violation of this mandate”); see also Letter from David Gudino, Verizon, to Anthony Barni, Dominion at 1 (Nov. 1, 2016); Letter from Christopher Huther, Verizon, to Brett Heather Freedson, Dominion at 1-2 (Dec. 9, 2016).

³⁴ Letter from Brett Heather Freedson, Dominion, to Christopher Killion, FCC at 1-2 (Jan. 6, 2017).

³⁵ *Compl.* at 5, 7-8, 50, paras. 1 (citing 47 U.S.C. § 224 and 47 CFR §§ 1.1401-1.1424), 8-9, 107. Both parties note that the Commonwealth of Virginia has not certified that it regulates the rates, terms, and conditions for pole attachments in the manner established by Section 224, such as would preempt the Commission’s jurisdiction over pole attachments in Virginia. See *Compl.* at 5, para. 4; *Resp.* at 3.

³⁶ *Compl.* at 7-8, para. 8 (quoting *Pole Attachment Order*, 26 FCC Rcd at 5327, para. 199); *Reply* at 22.

July 12, 2011 effective date of the *Pole Attachment Order*.³⁷ In the alternative, if the Joint Use Agreements *do* provide Verizon a material advantage relative to competitive attachers, Verizon argues that it should pay no more than the Old Telecom Rate.³⁸

III. DISCUSSION

A. Standards for Commission Review of Incumbent LEC Complaints

10. In the *Pole Attachment Order*, the Commission held that incumbent LEC attachers are entitled to the protections of Section 224(b), but “decline[d] . . . to adopt comprehensive rules governing” incumbent LEC pole attachments, opting instead “to proceed on a case-by-case basis.”³⁹ The Commission identified certain factors that it would consider, however, in determining the “need for targeted Commission oversight to ensure just and reasonable rates, terms, and conditions” including, whether a particular joint use agreement pre or post-dates the *Pole Attachment Order*.⁴⁰ In particular, the Commission expressed reluctance to disturb terms or conditions in joint use agreements that were entered into prior to the adoption of the *Pole Attachment Order* between parties with relatively equal bargaining power, and indicated that it would be “unlikely to find the rates, terms and conditions in [such] *existing* joint use agreements unjust or unreasonable.”⁴¹ By contrast, the Commission stated that it would review *new* joint use agreements, *i.e.*, those entered into following adoption of the *Pole Attachment Order*, “based on the totality of those agreements,” and consistent with the Commission’s directives regarding similar treatment of similarly situated providers.⁴²

11. In this case, Dominion asserts that the Joint Use Agreements are “existing” agreements, “entitled to the presumption of having resulted from balanced arms-length negotiations between Dominion and Verizon.”⁴³ Dominion notes that the negotiations, which spanned several years, concluded prior to the *Pole Attachment Order* and that the effective date in the agreements predates the *Pole Attachment Order* by several months.⁴⁴ Dominion therefore urges the Commission “to defer to the negotiated terms and conditions” in those agreements.⁴⁵ In its Reply, Verizon argues that, unlike the “historic” joint use agreements contemplated in the Commission’s discussion, the present agreements are not long-standing and were not signed until after the date of the *Pole Attachment Order*, giving the parties

³⁷ Compl. at 7-8, 17-39, 43-46, paras. 8, 32-84, 93-98; *see also Verizon Virginia LLC and Verizon South Inc. v. Virginia Electric and Power Company d/b/a/ Dominion Virginia Power*, Proceeding No. 15-190, Bureau ID No. EB-15-MD-006, Pole Attachment Complaint Reply at 77 (Feb. 9, 2016) (Reply). [BEGIN CONFIDENTIAL]

[REDACTED] [END CONFIDENTIAL] Compl. at 3-4 & n.11; Reply at 22-23, 58-59.

³⁸ Compl. at 48-49, paras. 101-104; Reply at 83 n.462.

³⁹ *Pole Attachment Order*, 26 FCC Rcd at 5334, para. 214.

⁴⁰ *Id.*, 26 FCC Rcd at 5243-44, 5328, 5333-37, paras. 8, 203, 214-19.

⁴¹ *Id.*, 26 FCC Rcd at 5334-35, para. 216 (emphasis added) & n.654 (“Nothing in the record suggests that existing agreements between incumbent LECs and electric utilities were entered into with the expectation that their provisions would be subject to Commission review.”).

⁴² *Id.*, 26 FCC Rcd at 5336, para. 216 & n.656.

⁴³ Resp. at 12.

⁴⁴ *Id.*

⁴⁵ *Id.* at 11 (noting that the Commission has “repeatedly stated its intent to defer to the negotiated terms and conditions of historic joint use agreements, such as those governing the relationship between Dominion and Verizon”).

reason to expect that their provisions would be subject to Commission review.⁴⁶

12. Due to the unique circumstances presented here, we conclude that the Joint Use Agreements should be considered “new” agreements, notwithstanding their pre-*Pole Attachment Order* effective date, because (1) they were executed several months after the Commission released the *Pole Attachment Order*, thus affording both parties the opportunity to assess their rights and responsibilities under that order,⁴⁷ and (2) they were not simply extensions of long-standing agreements, [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]⁴⁸

13. Although Dominion concedes that an incumbent LEC’s inferior bargaining position and inability to terminate an agreement are also factors the Commission may consider in evaluating an incumbent LEC’s pole attachment complaint, it claims that Verizon has demonstrated neither circumstance.⁴⁹ We disagree. While pointing to rate reductions accorded Verizon in the Joint Use Agreements as evidence of Verizon’s bargaining power, Dominion fails to mention that, after four years of intensive rate negotiations, the rate reductions to which it refers were offset by significantly greater rate reductions achieved by Dominion.⁵⁰ After four years of negotiations, the record reflects that the per-pole rate charged to Verizon [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] even though Dominion uses significantly more space on each joint use pole than Verizon.⁵¹ The record also reflects a consistent disparity in relative pole ownership levels throughout the course of the parties’ joint use relationship, with Dominion owning 65 percent and Verizon owning 35 percent of the joint use poles at all relevant times.⁵² Recognizing the Commission’s

⁴⁶ Reply at 8-10; *id.* at 10 (“The Joint Use Agreement[s] remain[] 2011 agreement[s] signed with complete knowledge of the Commission’s rate reforms.”).

⁴⁷ Compl. Exh. 18 (Letter from Steven Mills, Verizon, to Arlie Hahn, Dominion at 1 (March 25, 2014) (noting that “the current agreements were signed a few months after the FCC 11-50 ruling”) (March 2014 Letter)); Resp., Exh. A (Graf Decl.) at 7, para. 16 (noting that Dominion signed the Joint Use Agreements in May 2011, but did not receive the countersigned documents from Verizon until August 1, 2011).

⁴⁸ See, e.g., Resp., Exh. A (Graf Decl.) at 3, paras. 5, 6 (noting that the Joint Use Agreements were the “first identical agreements that Dominion authorized for both of Verizon’s operating companies within the parties’ shared service area[.]” [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]; Resp., Exh. C (Declaration of Michael Roberts) at 3, para. 7 (Roberts Decl.) [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

⁴⁹ Resp. at 11.

⁵⁰ Resp. at 13 (stating that the Joint Use Agreements resulted in a [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

⁵¹ See Section III.B *infra*.

⁵² Compl. at 11, para. 16; Resp. at 4-5. Although Dominion faults Verizon for not doing more to increase its own pole ownership stake in the parties’ joint use network, it concedes that Verizon [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] See Resp. at 13-14; Resp., Exh. A (Graf Decl.) at 5-6, paras. 12-13. Dominion also claims that Verizon could have increased its pole

concern that an incumbent LEC's minority pole ownership status may negatively impact the incumbent LEC's bargaining position, we find that Dominion's nearly two-to-one pole ownership advantage, along with the significant disparity in the per-pole rates charged to each party, constitutes probative evidence of Verizon's inferior bargaining position relative to Dominion.⁵³

14. Finally, review of the Joint Use Agreements is appropriate based on evidence demonstrating that Verizon "genuinely lacks the ability to terminate [the agreements] and obtain a new arrangement."⁵⁴ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] we agree with Verizon that it "genuinely lacks the ability to terminate" the agreements.⁵⁵

B. The Joint Use Agreement Rate Is Not Just and Reasonable Under Section 224(b)

15. Verizon offers two main arguments to support its claim that the Joint Use Agreement rates are not just and reasonable. First, Verizon argues that any unique advantages that it receives under the Joint Use Agreements do not justify a rate that it contends is [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] According to Verizon, the 2015 New and Old Telecom Rates were \$6.51 and \$9.87 "per pole," respectively.⁵⁶ By Verizon's calculations, the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] per pole rate that it pays under the Joint Use Agreements therefore exceeds the New Telecom Rate by approximately [BEGIN

ownership stake by [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

⁵³ *Pole Attachment Order*, 26 FCC Rcd at 5327, para. 199 (noting potential impact of disparate pole ownership on parties' relative bargaining power); *see also id.* at 5329, para. 206 & n.618 (expressing concern that, because electric utilities, in the aggregate, own approximately 65-70 percent of all poles today, "incumbent LECs . . . may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations in some cases"). Dominion asserts that, because the parties' relative ownership percentages have not varied over the years, the 65-35 ratio here does not implicate Commission concerns about unequal bargaining power given that the Commission stated a concern only with respect to *increasing* pole ownership disparities between utilities and incumbent LECs. Resp. at 12-13. The Commission, however, did not limit its holding to situations in which a pole ownership disparity was increasing, and we reject the suggestion that such a limitation was intended given that it would deny relief to incumbent LECs whose inferior bargaining positions have continuously impacted their ability to negotiate a just and reasonable rate over time. *See Pole Attachment Order*, 26 FCC Rcd at 5334-35, para. 216 (noting that "long-standing agreements *generally* were entered into at a time when incumbent LECs . . . were in a more balanced negotiating position with electric utilities, at least based on relative pole ownership.") (emphasis added).

⁵⁴ *See Pole Attachment Order*, 26 FCC Rcd at 5335-36, para. 216 ("To the extent that an incumbent LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement, the Commission can consider that as appropriate in a complaint proceeding.")

⁵⁵ *See Joint Use Agreements*, Art. 11.01 (stating in relevant part: [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] Compl. at 6, para. 5 (quoting *Pole Attachment Order*, 26 FCC Rcd at 5335-36, para. 216); *see also id.* at 6 n.19; Reply at 11.

⁵⁶ *See Reply* at 83 & n.462.

CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] per pole and exceeds the Old Telecom Rate by approximately [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] per pole.⁵⁷

16. In its Response, Dominion contends that the 2015 New and Old Telecom Rates were instead [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] respectively.⁵⁸ We note, however, that pole attachment rates are correctly calculated [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]⁵⁹ Thus, even under Dominion's calculations, the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] Joint Use Agreement rate is [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] the New Telecom Rate,⁶⁰ and is [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] than the Old Telecom Rate – which the Commission highlighted as a reference point to account for differences between competitive LEC and incumbent LEC attachments.⁶¹

17. Verizon has adduced substantial evidence in support of its argument that any advantages it obtains under the Joint Use Agreements do not remotely justify the difference between the rate it pays and the rate that competitive LECs pay to attach to Dominion's poles.⁶² Based on that evidence, we find that Verizon has met its burden of showing that the rate it pays under the Joint Use Agreements is unjust and unreasonable. Any unique advantages Verizon receives under those agreements do not justify a rate that is [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] the Old and New Telecom Rates.⁶³

18. Although Dominion maintains that unique benefits provided to Verizon under the Joint Use Agreements justify the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] that it charges Verizon, our review of the record suggests that Dominion has overstated the value of a number of such alleged benefits.⁶⁴ For example, Dominion identifies as a financial benefit the fact that Verizon [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

⁵⁷ Reply, Exh. A (Calnon Aff.) at 2, para. 2 & n.3; Reply, Exh. 8 (2015 invoice). The Joint Use Agreement rate that Dominion charged Verizon in 2015 was [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] per pole, which is the most recent rate year included in the record.

⁵⁸ See Resp. at 32; Resp., Exh. C (Roberts Decl.), Exh. MCR-1.

⁵⁹ Dominion's argument that the Old and New Telecom Rates should be applied on a [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

⁶⁰ Resp., Exh. C (Roberts Decl.), Exh. MCR-1.

⁶¹ See *Pole Attachment Order*, 26 FCC Rcd at 5337, para. 218; Compl. at 9, para. 12.

⁶² See, e.g., Compl. at 7-8, 20-39, paras. 8, 37-84; Reply at 23-62.

⁶³ Verizon asserts that, [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] Compl. at 21, para. 38; Reply at 58. We express no view on that claim in this interim Order.

⁶⁴ Resp. at 2.

[REDACTED] [END CONFIDENTIAL]⁶⁵ The Joint Use Agreements, however, [BEGIN CONFIDENTIAL]
 [REDACTED]
 [REDACTED] [END CONFIDENTIAL]⁶⁶ Where Verizon performs a particular service itself and incurs costs comparable to its competitors in performing that service, we agree with Verizon that Dominion may not “embed in Verizon’s rental rate costs that Dominion does not incur.”⁶⁷

19. In addition, although Dominion argues that it is [BEGIN CONFIDENTIAL] [REDACTED]
 [REDACTED] [END
 CONFIDENTIAL]⁶⁸ [REDACTED]
 [REDACTED]
 [REDACTED] [END CONFIDENTIAL]

20. Moreover, with only a few exceptions, Dominion does not quantify the purported material advantages that Verizon receives under the Joint Use Agreements and therefore fails to justify charging rates [BEGIN CONFIDENTIAL] [REDACTED] [END
 CONFIDENTIAL]⁷⁰ Where Dominion does attempt to assign a monetary value to particular purported advantages, it generally presents those values as the amount that all of its licensees “collectively” paid, thus omitting the information needed to analyze whether, and, if so, the extent to which, Verizon has been advantaged relative to a typical competitor or an average of its competitors.⁷¹

⁶⁵ See Resp. at 19-20; Resp., Exh. A (Graf Decl.), Exh. MAG-1 at 1-2 [BEGIN CONFIDENTIAL] [REDACTED]
 [REDACTED] [END CONFIDENTIAL]

⁶⁶ See Joint Use Agreements, Art. 15.03 [BEGIN CONFIDENTIAL] [REDACTED]
 [REDACTED] [END CONFIDENTIAL]; Compl., Exh. C (Hansen Aff.) at 3-4, para. 8 [BEGIN
 CONFIDENTIAL] [REDACTED] [END
 CONFIDENTIAL]

⁶⁷ Reply at 32; *id.* at 31-33 (arguing that where Verizon pays for its own [BEGIN CONFIDENTIAL] [REDACTED]
 [REDACTED] [END CONFIDENTIAL] by performing the work itself, and Dominion does not identify any costs that Verizon has not covered, Dominion may not justify charging higher rates to Verizon based on costs that only Verizon incurs). To charge a higher rate on this basis would effectively double charge Verizon – once when Verizon performs work [BEGIN CONFIDENTIAL] [REDACTED]
 [REDACTED] [END CONFIDENTIAL]

⁶⁸ See, e.g., Resp., Exh. A (Graf Decl.), Exh. MAG-1 at 2 (citing Joint Use Agreements, Arts. 17.01, 20.01, 21.01).

⁶⁹ Compl., Exh. A (Affidavit of Mark S. Calnon) at 37, paras. 77-79 (Calnon Aff.); Reply at 36-37; Joint Use Agreements, Art. 26.01 [BEGIN CONFIDENTIAL] [REDACTED]
 [REDACTED] [END CONFIDENTIAL]

⁷⁰ Once a *prima facie* showing has been made by the complainant, the Commission’s pole attachment complaint rules require the respondent to “set forth justification for the rate, term or condition alleged in the complaint not to be just and reasonable.” See 47 CFR § 1.1407(a).

⁷¹ See, e.g., Resp. at 19 (“Dominion estimates that [BEGIN CONFIDENTIAL] [REDACTED]
 [REDACTED] [END
 CONFIDENTIAL]; Resp., Exh. A (Graf Decl.), Exh. MAG-1 at 5 (“Over the 2011-2014 time frame, [BEGIN
 CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

21. Verizon next argues that the per-pole rate that Dominion charges Verizon is unjust and unreasonable because it far exceeds the per-pole rates that Verizon charges Dominion, despite the fact that Dominion uses significantly more space on each joint use pole than Verizon.⁷² In fact, the record reflects that the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] rate charged to Verizon in 2015 was [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] than the rate charged to Dominion to attach to Verizon Virginia poles (which account for 91 percent of the joint use poles belonging to Verizon), and [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] than the rate charged to Dominion to attach to Verizon South poles (which account for nine percent of the joint use poles belonging to Verizon).⁷³ The record confirms that, although Dominion's space allocation is [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] that of Verizon, Dominion pays [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] under the Joint Use Agreements for its use of that space.⁷⁴ Dominion argues that a simple comparison of annual pole rates "ignores that the parties divide costs associated with their combined pole network in direct proportion to the benefits that each derives from the joint use arrangement."⁷⁵ It concedes, however, that the parties enjoy "reciprocal" rights under the Joint Use Agreements.⁷⁶ By identifying as alleged "benefits" to Verizon services that Verizon is likewise required to extend to Dominion under the Joint Use Agreements, Dominion has failed to show that Verizon receives a disproportionate benefit that would account for the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] between the parties.⁷⁷ We therefore conclude that Dominion has not justified charging Verizon a rate [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] the rates charged to Dominion under the Joint Use Agreements.⁷⁸

⁷² Compl. at 10-11, para. 13.

⁷³ For Verizon's attachments on Dominion poles from 2011-2015, Dominion charged, under the Joint Use Agreements, the following per pole rates: [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] For Dominion's attachments on Verizon Virginia poles from 2011-2015, Verizon charged the following per-pole rates: [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] For Dominion's attachments on Verizon South poles from 2011-2015, Verizon charged the following per-pole rates: [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

⁷⁴ The Joint Use Agreements allocate [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of space on each joint use pole to Dominion and [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of space on each joint use pole to Verizon.

⁷⁵ Resp. at 28.

⁷⁶ *Id.* at 4.

⁷⁷ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] See Resp., Exh. B (Zarakas Decl.) at 8, para. 14.

⁷⁸ See *Pole Attachment Order*, 26 FCC Rcd at 5337, para. 219 ("[I]n evaluating an incumbent LEC's complaint, the Commission may also consider the rates, terms and conditions that the incumbent LEC offers to the electric utility or other attachers for access to the incumbent LEC's poles, including whether they are more or less favorable than the rates, terms and conditions the incumbent LEC is seeking."); see also *id.*, 26 FCC Rcd at 5337, para. 218 n.662 (anticipating that incumbent LECs and electric utilities would charge each other roughly the same proportionate rate given the parties' relative usage of the pole "such as the same rate per foot of occupied space"). Verizon asserts that the rate it is charged under the Joint Use Agreements also [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

22. Accordingly, because Dominion has provided insufficient justification for the Joint Use Agreement rates, we conclude that the rate charged to Verizon under those agreements is unjust and unreasonable. We encourage the parties to negotiate an agreed-upon rate that is consistent with the guidance provided herein. Although we do not establish a new pole attachment rate at this time, we commit to doing so in a subsequent order if the parties are unable to achieve a negotiated resolution of the issues in dispute.⁷⁹

C. Verizon Is Entitled to a Refund of Overpayments Made to Dominion

23. Verizon contends that the “sign and sue rule” permits it to challenge the unjust and unreasonable rates in the Joint Use Agreements and to seek a refund under Rule 1.1410(a)(3)⁸⁰ of any amounts it is determined to have overpaid dating back to the effective date of the *Pole Attachment Order*.⁸¹ We agree.⁸²

24. Under the Commission’s “sign and sue rule,” “an attacher may execute a pole attachment agreement with a utility, and then later file a complaint challenging the lawfulness of a provision of that agreement.”⁸³ The rule was adopted at a time when only cable operators and competitive LECs, and not incumbent LECs, were deemed to have a right to just and reasonable rates, terms, and conditions under Section 224(b). In adopting the sign and sue rule, the Commission expressed concern that utilities’ “monopoly control” over poles could force attachers to accept unreasonable terms as a condition for gaining timely access to utility poles.⁸⁴ The Commission also has observed a need for the sign and sue

END CONFIDENTIAL]

⁷⁹ See Section IV *infra*.

⁸⁰ 47 CFR § 1.1410(a)(3) (stating that if the Commission determines that a rate is unjust and unreasonable, it may order a refund of “the difference between the amount paid under the unjust and/or unreasonable rate . . . and the amount that would have been paid under the rate . . . established by the Commission, plus interest, consistent with the statute of limitations”).

⁸¹ Compl. at 7-8, para. 8 (arguing that it was compelled to enter into agreements as a result of “Dominion’s superior bargaining power and the insufficiency of market forces and independent negotiations” to ensure just and reasonable rates) (internal quotations omitted); see also *id.* at 11-17, 42-43, 46, paras. 15-31, 91, 98; Reply at 9, 77 (asking the Commission to “set Verizon’s just and reasonable rate as of July 12, 2011 at the properly calculated new telecom rate and order Dominion to refund [the amount of any] net rentals that Verizon has since overpaid.”). Verizon also asks the Commission to impose new just and reasonable rates on a prospective basis.

⁸² Any rate relief for the pre-Complaint period is subject to true up and therefore must take into account all amounts invoiced and paid after July 12, 2011.

⁸³ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11905, para. 99 (2010); *Southern Co. Servs. v. FCC*, 313 F.3d 574, 578 (D.C. Cir. 2002) (under the “sign and sue” rule, “an attacher may ‘sign’ a contract with a utility and later file a complaint with the FCC to contest an element of that agreement deemed to be unfair”).

⁸⁴ See, e.g., *Amendment of the Commission’s Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12112, para. 13 (2001) (noting that “the original purpose of the Pole Attachment Act” was “to prevent utilities from charging monopoly rents to attach to their bottleneck facilities” and that “[n]othing in the record demonstrates that the utilities’ monopoly over poles has since changed”); *Pole Attachment Order*, 26 FCC Rcd at 5294, para. 123 (“the sign and sue rule was adopted in recognition that in some situations . . . an attacher may be

rule in situations where an attacher “acquiesces in a utility’s ‘take it or leave it’ demand that it pay more than the statutory maximum . . . without any *quid pro quo* other than the ability to attach its wires on unreasonable or discriminatory terms.”⁸⁵

25. When the Commission first held in the *Pole Attachment Order* that incumbent LEC attachers are entitled to just and reasonable rates, terms, and conditions under Section 224(b), it recognized the need to “account[] for the potential differences between incumbent LECs and telecommunications carrier or cable operator attachers[.]” including with respect to applying the sign and sue rule to incumbent LECs.⁸⁶ At that time, the Commission considered it unlikely that electric utilities would attempt to coerce incumbent LECs to accept unreasonable terms by threatening a loss of access to the utilities’ poles, “given the likelihood that incumbent LECs [as pole owners themselves] would, in response, deny electric utilities access to their poles.”⁸⁷ Nonetheless, the Commission allowed for the possibility that incumbent LEC attachers, like cable and competitive LEC attachers, may be coerced to enter pole attachment agreements that include unjust and unreasonable terms as a result of a utility’s unequal bargaining power.⁸⁸ In such a case, the Commission determined that “the ‘sign and sue’ rule will apply [] in a manner similar to its application in the context of pole attachment agreements between pole owners and either [cable or competitive LEC attachers].”⁸⁹

26. The record reveals that, after years of intensive rate negotiations, Verizon faced a choice to accept what it believed were unjust and unreasonable rates under the Joint Use Agreements or [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]⁹⁰ While the record does not suggest that Dominion threatened Verizon with loss of access to its poles, the evidence reflects that Verizon nonetheless was coerced into signing the Joint Use Agreements as a result of Dominion’s superior bargaining position.⁹¹ In particular, years of rate negotiations had failed to achieve [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] in Verizon’s net per pole rate,⁹² and Verizon’s leverage and options were further constrained by [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]⁹³ That is, [BEGIN CONFIDENTIAL] [REDACTED]

forced to execute a pole attachment agreement containing what it believes to be unjust and unreasonable terms in order to gain timely access to the utility’s poles.”)

⁸⁵ See *Pole Attachment Order*, 26 FCC Rcd at 5294, para. 123 n.380 (quoting *Southern Co. Servs.*, 313 F.3d at 583 (quoting Commission Brief with approval); see also *Southern Co. Servs.*, 313 F.3d at 583 (“sign and sue” is likely to arise where “the attacher has agreed, for one reason or another, to pay a rate above the statutory maximum . . . to which it is entitled under the Pole Attachments Act and the Commission’s rules”).

⁸⁶ *Pole Attachment Order*, 26 FCC Rcd at 5333, para. 214; *id.* at 5335, para. 216 n.655.

⁸⁷ *Id.* at 5335, para. 216 n.655.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ In 2010, Verizon Virginia and Verizon South paid a gross rate of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] under the parties’ prior agreements. See Resp. at 13; Compl. at 41, para. 88 & n.221.

⁹¹ Denial of access to a utility’s poles represents one possible scenario that may support an attacher’s right to sign and sue. *Pole Attachment Order*, 26 FCC Rcd at 5335, para. 216 n.655.

⁹² See Section III.B *supra*.

⁹³ Compl., Exh. 5 (Verizon Virginia predecessor agreement), Art. 8; *id.*, Exh. 7 (Verizon South predecessor agreement), Art. VIII [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL].

[REDACTED]
[REDACTED] [END CONFIDENTIAL]⁹⁴ Verizon's choices were reduced to accepting the Joint Use Agreement rates or remaining locked into even higher rates indefinitely pending final resolution of any formal proceedings brought to challenge those rates. Under these circumstances, Verizon's decision to sign the Joint Use Agreements and then file a complaint challenging the agreement rates, constitutes a valid exercise of its sign and sue rights.⁹⁵

27. Dominion argues that, even if the sign and sue rule were applicable here, Verizon did not properly invoke the sign and sue rule or take steps necessary to preserve its sign and sue rights.⁹⁶ For example, Dominion suggests that, after release of the *Pole Attachment Order*, Verizon was required to notify it before signing the Joint Use Agreements, if Verizon believed that the agreement rates were unlawful under that order.⁹⁷ The *Pole Attachment Order* expressly rejected a proposed rule that would have required an attachers to provide a utility written notice of its objections to a proposed pole attachment agreement, during contract negotiations, as a prerequisite to later bringing a complaint challenging the executed agreement.⁹⁸

28. Dominion's suggestion that the requested relief should be rejected because Verizon unduly delayed filing its complaint is similarly without merit.⁹⁹ In the *Pole Attachment Order*, the Commission declined to impose time limits on the filing of pole attachment complaints and, instead, determined to allow monetary recovery dating back as far as the July 12, 2011 effective date of the order, "consistent with the applicable statute of limitations."¹⁰⁰ In this case, it appears that Verizon signed the Joint Use Agreements in August of 2011¹⁰¹ and, at the earliest opportunity permitted under the agreements, [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]¹⁰² The

⁹⁴ Compl., Exh. 5 (Verizon Virginia predecessor agreement), Art. 3; *id.*, Exh. 7 (Verizon South predecessor agreement), Art. III [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL].

⁹⁵ See generally *Pole Attachment Order*, 26 FCC Rcd at 5333, 5335, paras. 214, 216 n.655 (recognizing the need to "account[] for the potential differences between incumbent LECs and telecommunications carrier or cable operator attachers[,] including with respect to applying the sign and sue rule to incumbent LECs); *id.* at 5335-36, para. 216 ("To the extent that an incumbent LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement, the Commission can consider that as appropriate in a complaint proceeding.").

⁹⁶ Resp. at 17 n.79; *id.* at 16-17 (suggesting that, if Verizon believed the Joint Use Agreement rates were unjust and unreasonable, it could have demanded further negotiations before signing them or it could have signed them and then exercised its "sign and sue" rights thereafter, and asserting that "Verizon did neither").

⁹⁷ Resp. at 16.

⁹⁸ *Pole Attachment Order*, 26 FCC Rcd at 5292-95, paras. 119-25.

⁹⁹ See Resp. at 17.

¹⁰⁰ *Pole Attachment Order*, 26 FCC Rcd at 5287-90, 5334, paras. 106, 110-12, 214 & nn.343, 345, 647; *id.* at 5289, para. 110 (reasoning that the former rule, which allowed recovery only from the date the complaint was filed, fails to make injured attachers whole, and is inconsistent with the way claims for monetary recovery are generally treated under the law).

¹⁰¹ Resp. at 5 (citing Graf Decl., para. 16); Reply at 8-9.

¹⁰² Compl., Exh. 13 (October 2013 Letter); Joint Use Agreements, Art. 33.08 [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL].

record shows that the parties then embarked on another 20 months of rate negotiations that concluded on May 29, 2015 without resolving the contested issues, and that Verizon then filed its Complaint on August 3, 2015.¹⁰³ Consistent with the Commission's decision authorizing refunds to extend back as far as the applicable statute of limitations allows,¹⁰⁴ but no earlier than the *Pole Attachment Order* effective date, we reject the suggestion that, by waiting until August 3, 2015, Verizon unduly delayed filing its Complaint.¹⁰⁵

IV. CONCLUSION

29. In light of our interim findings that the Joint Use agreement rate is not just and reasonable, we direct the parties to meet and confer in an effort to resolve the remaining disputes. The parties should report to Commission staff within 30 days as to their progress. If the case cannot be resolved by settlement, Commission staff will conduct any further proceedings necessary to issue a subsequent order resolving all remaining issues and setting a just and reasonable pole attachment rate.

30. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 4(i), 4(j), 208, 224, 301, 303, 304, 309, 316, and 332 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 208, 224, 301, 303, 304, 309, 316, and 332, and Sections 0.111(a)(12), 0.311, 1.720-1.735, and 1.1401-1.1424 of the Commission's rules, 47 CFR §§ 0.111(a)(12), 0.311, 1.720-1.735, and 1.1401-1.1424, that the Complaint is GRANTED, in part, to the extent set forth in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Rosemary H. McEnery
Acting Chief
Market Disputes Resolution Division

¹⁰³ Compl. at 13-17, paras. 21-30; Resp. at 7-9; Compl., Exh. 23 [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] (May 29, 2015).

¹⁰⁴ Verizon contends that Section 8.01-246(2) of the Virginia Code provides the applicable statute of limitations in this case and that its Complaint was filed within the five-year limitations period specified therein. *See* Reply at 9 n.33. Dominion does not dispute this contention.

¹⁰⁵ We also reject Dominion's claim that Verizon's alleged failure to comply with Rule 1.1404(k) offers a basis to deny the requested relief. Resp. at 38-40. Dominion does not dispute that Verizon engaged in extensive executive-level discussions, [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] in a serious effort to resolve the parties' dispute prior to filing its Complaint. Contrary to Dominion's claim, however, the record reflects that Verizon's March 25, 2014 letter, in conjunction with other correspondence within the same timeframe, fully outlined the basis for Verizon's demand for a just and reasonable rate under Section 224(b) and the *Pole Attachment Order*. *See, e.g.*, Compl., Exhs. 13, 14, 16, 18, 22, 23. Based on evidence that Verizon fully complied with the substantive goals and requirements of Rule 1.1404(k) (i.e., executive-level, pre-Complaint coordination and preview of substantive allegations), we find good cause to waive any procedural aspect of the rule with which Verizon may not have strictly complied. *See* 47 CFR § 1.3 (allowing waiver of Commission rule for "good cause shown").