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July 28, 2020

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

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 for filing is the Main Brief of Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company **(Non-Proprietary Version)** in the above-referenced proceeding.

Copies will be provided as indicated on the Certificate of Service. In addition, pursuant to the instruction of the Administrative Law Judge Joel H. Cheskis (the "ALJ"), a hard copy of the Company's Main Brief will be sent via overnight delivery to the ALJ's home address.

Respectfully submitted,

Garrett P. Lent

GPL/jl
Enclosures

cc: Certificate of Service
Honorable Joel H. Cheskis

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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Date: July 28, 2020

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PUBLIC VERSION - PROPRIETARY INFORMATION REDACTED

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

MAIN BRIEF OF METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, AND PENNSYLVANIA POWER COMPANY

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Date: July 28, 2020

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PUBLIC VERSION - PROPRIETARY INFORMATION REDACTED

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I. INTRODUCTION

Verizon Pennsylvania LLC and Verizon North LLC ("Verizon") initially filed the above-captioned Complaint ("Complaint") against Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company (collectively "FirstEnergy" or the "Companies") with the Federal Communications Commission ("FCC")[1] on November 26, 2019. The Complaint relates to several Joint Use Agreements for pole attachments between Verizon and FirstEnergy. These agreements establish comprehensive terms and conditions under which Verizon and FirstEnergy attach to each other's poles, including interrelated, jointly negotiated, reciprocal rates.

Both Verizon and FirstEnergy are public utilities regulated by the Pennsylvania Public Utility Commission ("Commission") and the Joint Use Agreements, including the rates contained therein, were subject to Commission jurisdiction until 2011, when the FCC assumed jurisdiction over the rates, terms and conditions of the Joint Use Agreements under Section 224 of the Communications Act.[2] During the pendency of the Complaint proceeding before the FCC, the Commission certified to the FCC that it regulates the rates, terms, and conditions for pole attachments.[3] The Commission thereby reassumed jurisdiction over the rates set forth in the Joint Use Agreements. The FCC thereafter transferred the Complaint to the Commission on March 23, 2020.[4]

In its Complaint, Verizon asserts that the negotiated rates charged by FirstEnergy to Verizon under several substantially similar "joint use agreements" dating back to 1958 are "unjust

[1] Proceeding Number 19-354; Bureau ID Number EB-19-MD-008

[2] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, 5331 (Report and Order and Order on Reconsideration dated April 7, 2011) ("*2011 Pole Attachment Order*"), *aff'd, Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013).

[3] *See* States That Have Certified That They Regulate Pole Attachments, WC Docket 10-101, Public Notice, DA 20-302 (WCB Mar. 19, 2020).

[4] *In the Matter of Verizon Pennsylvania LLC and Verizon North LLC v. Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company*, Proceeding Number 19-354; Bureau ID Number EB-19-MD-008 (Order dated Mar. 23, 2020) ("*Transfer Order*").

and unreasonable" under Section 224 of the Communications Act of 1978, more commonly known as the "Pole Attachment Act."[5] Relatedly, Verizon claims that the rates in the Joint Use Agreements should be similar to the rate charged by FirstEnergy to cable companies and competitive local exchange carriers ("CLECs") under pole attachment license agreements (*i.e.*, the "new telecom rate"),[6] and that it is entitled to refunds reflecting the difference between this rate and the amount charged by FirstEnergy to Verizon under the Joint Use Agreements since 2011.[7] Verizon has never amended or updated the Complaint to allege any violation of the Public Utility Code or Commission regulations or orders.

This is a case of first impression in Pennsylvania and will establish precedent for all Pennsylvania incumbent local exchange carriers ("ILECs"), electric distribution companies ("EDCs") and their customers. Due to differences in rate regulation methodologies for electric utilities and telecommunications companies, every dollar of rate reduction granted in this case will be a dollar increase in electric utility rates for FirstEnergy's customers and a dollar of additional income for Verizon's shareholders.[8] In addition, there is no evidence in this record that any rate reduction will do anything to promote broadband service in Pennsylvania. The Commission reverse preempted the FCC and assumed jurisdiction over pole attachment rates, in part, to assure that the interests of electric utilities and their customers were adequately considered and to promote broadband services in the Commonwealth. The relief Verizon seeks will do neither.

As explained in detail below, Verizon has failed to demonstrate that the existing rates in the Joint Use Agreements are unjust and unreasonable under Pennsylvania law or FCC precedent.

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[5] 47 U.S.C. § 224; *2011 Pole Attachment Order*.
[6] *See, e.g.*, Complaint at 1 (citing *In the Matter of Accelerating Wireline Broadband Deployment*, 33 FCC Rcd 7705, 7767-71 (Third Report and Order and Declaratory Ruling dated Aug. 3, 2018) ("*2018 Pole Attachment Order*")).
[7] *See, e.g.*, Complaint at 1.
[8] Importantly, FirstEnergy's EDCs are subject to rate of return regulation by the Commission; conversely, Verizon's Pennsylvania subsidiaries are not.

Verizon has further failed to show that it qualifies for or is entitled to the FCC's new telecom rate. Existing rates reflect a reasonable compromise of competing policy goals and should be continued. If the Commission were to adopt new rates, it should adopt the old telecom rate, which is a middle ground between existing rates and the new telecom rate. And, in event, any relief granted in this proceeding should be prospective only. Verizon has failed to demonstrate that it is entitled to any of the relief requested, and its Complaint should be dismissed for several reasons.

- Pennsylvania law controls this proceeding, and Verizon bears the burden of proof on all issues. The Commission may look to FCC precedent for guidance, but it can and should do so only to the extent that such precedent is consistent with the Public Utility Code and Commission policy. Verizon appears to believe that "nothing changed" when the Commission resumed jurisdiction over pole attachment agreements. The Commission should reject this erroneous and unlawful assumption.

- Verizon's Complaint does not allege any violation of the Public Utility Code, or the Commission regulations or orders as required by Section 701 of the Public Utility Code. Its Complaint therefore should be dismissed for failure to state a claim upon which relief can be granted.

- Verizon has failed to present any evidence that the rates in the Joint Use Agreements are currently unjust and unreasonable under the Public Utility Code or Pennsylvania law. A rate is unjust and unreasonable when it permits a utility to earn more than a fair rate of return. Verizon has presented no evidence upon which the Commission could establish a current market-based cost of common equity, a critical component of fair rate of return, and therefore has provided no basis to determine the reasonableness of current rates.

- The existing rates, in aggregate, are below fully allocated cost of service (using the cost of equity from FirstEnergy's most recent fully litigated base rate proceedings) and therefore just and reasonable. This methodology was specifically approved by the Commission for pole attachment rates in the *NEPTC Order*,[9] and is fully consistent with the *Lloyd*[10] decision which establishes full cost of service as the "polestar" of Pennsylvania rate regulation.

- The new telecom rate requested by Verizon is unjust and unreasonable under Pennsylvania law because such rates are, in aggregate, far below FirstEnergy's cost to serve under the Joint Use Agreements. The new telecom rate therefore would result in unreasonable and

[9] *North-Eastern Pennsylvania Telephone Company v. Pennsylvania Power & Light Company*, Docket No. C-881953, 1992 Pa. PUC LEXIS 68 (Order dated June 9, 1992) ("*NEPTC Order*").
[10] *Lloyd v. Pa. Pub. Util. Comm'n*, 904 A.2d 1010 (Pa. Cmwlth. 2006), *appeal denied*, 916 A.2d 1104 (2007) ("*Lloyd*").

unlawful rate discrimination as between Verizon's shareholders and FirstEnergy's customers.

- Verizon is not entitled to the new telecom rate under FCC precedent because: (1) it failed to terminate the existing Joint Use Agreements; (2) it failed to prove that it is comparably situated to CLECs and cable companies; and (3) the FCC has recently and previously rejected ILEC requests to insert the new telecom rate into joint use agreements.

- Verizon's allegations regarding bargaining power and the history of rate negotiations are irrelevant in determining just and reasonable rates under Pennsylvania law. To the extent these matters are considered, FirstEnergy has no bargaining power over Verizon, and even if it did, such power could not have been exercised because the Joint Use Agreements were regulated by the Commission when they were last negotiated in 2009. FirstEnergy has always negotiated in good faith making multiple offers; Verizon's negotiating position is and has always been its litigation position, i.e., it must have the new telecom rate in the existing Joint Use Agreements. Failure to concede to a party's litigation position, which has been rejected by the FCC, is not and cannot be bad faith negotiation.

- Even if Verizon did otherwise qualify for the new telecom rate, the Commission cannot and should not insert the new telecom rate into the existing Joint Use Agreements because: (1) the new telecom rate is an incremental cost rate and cannot rationally be applied to a fully allocated cost sharing Joint Use Agreement; and (2) to do so the Commission also would have to set new attachments rates for Verizon's poles. Verizon has not requested such relief and has presented no evidence upon which to establish such a rate.

- If the Commission determines for policy reasons new rates should be established, it should approve FirstEnergy's existing rates, which are below fully allocated costs and therefore reflect a reasonable balancing of competing policy interests. In the alternative, the Commission should adopt the FCC's old telecom rate formula, which lies between existing rates and the new telecom rate, and should use up-to-date actual data inputs from FirstEnergy's service territory to establish the number and spacing of attachments.

- The effective date of any rate reduction should be deferred until the effective date of rates in FirstEnergy's next base rate proceeding. In the alternative, FirstEnergy should be allowed to defer and create a regulatory asset for any difference between existing and new rates, and recover this regulatory asset in its next base rate proceeding.

- Verizon's request for refunds back to 2011 should be rejected for several reasons: (1) the Commission has no authority to impose refunds when it reforms a contract under Section 508 of the Public Utility Code, and any such refunds would violate fundamental principles of contract law and various provisions of United States and Pennsylvania Constitutions; (2) there is no evidence in this case that FirstEnergy's current rates are unjust and unreasonable and, therefore, no refunds can be ordered under Section 1312 of the Code; (3) the maximum possible refund period is four years under Section 1312 of the Code and two years under FCC precedent; and (4) any change in rates on this record would be based on a policy decision, a fundamental change in ratemaking methodology and the overruling

of long-standing Commission precedent. Such changes should apply prospectively only, and the Commission should therefore exercise its discretion and deny any refunds.

For these reasons, and as more fully explained below, Verizon's complaint should be dismissed.

II. BACKGROUND AND PROCEDURAL HISTORY

A. POLE ATTACHMENT AGREEMENTS

As explained in more detail below, this proceeding involves the rates paid by an ILEC attached to poles owned by an electric utility. ILECs, who are also pole owners, historically have attached to electric utility poles by way of "joint use agreements," while cable companies, CLECs and other, third-party non-pole-owning entities have attached to electric utility poles by way of third-party attachment agreement.

There are ten substantially similar Joint Use Agreements executed between FirstEnergy and Verizon (i.e., Verizon's predecessors) at issue in this case. (FirstEnergy St. 1-R, p. 7; *see also* Verizon Exhibit SCM-2 (attaching all of the Joint Use Agreements and associated amendments to the direct testimony of Stephen C. Mills).) Specifically, between 1967 and 1973 five agreements between Metropolitan Edison Company ("Met-Ed") and Verizon were executed. (FirstEnergy St. 1-R, p. 7.) Between 1958 through 1988 four agreements between Pennsylvania Electric Company ("Penelec") and Verizon were executed. (FirstEnergy St. 1-R, p. 7.) In 1979, Pennsylvania Power Company ("Penn Power") and Verizon executed one agreement. (FirstEnergy St. 1-R, p. 8.)

Under each of the Joint Use Agreements, the parties are charged reciprocal rates per pole, which are netted during each invoice period based on the number of poles owned by each party. Under the Penelec and Penn Power joint use agreements, each party pays a per pole rate for use of the other party's poles.[11] In contrast, under the Met-Ed joint use agreement, Met-Ed charges Verizon an "annual Deficiency Rate rental fee" for so-called "deficiency poles," which is the

[11] (*See, e.g.*, Verizon Exhibit SCM-3 at VZ00542-547.)

difference between the number of joint use poles Verizon owns (19%) and the higher number of joint use poles Verizon would own if Verizon owned 45% of the joint use poles.[12] For comparative purposes, the annual Deficiency Rate rental fee Met-Ed charges can be converted into "reciprocal" per-pole rental rates, based on the assumption that both parties charge the same per-pole rental rate for use of the other party's poles. *See* Appendix A ¶¶ 2-10 (Stipulated Facts).

The parties negotiated a Memorandum of Understanding ("MOU") to amend the Penn Power Joint Use Agreement in 1999. (FirstEnergy St. 1-R, p. 8.) In 2009, Met-Ed and Penelec and Verizon negotiated an MOU for each of their Joint Use Agreements. (FirstEnergy St. 1-R, p. 8.) In 2009, the parties renegotiated the rates under the Joint Use Agreements. **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** (FirstEnergy St. 1-R, p. 10.)

The Joint Use Agreements and the associated MOUs were executed, and the rates set therein were last re-negotiated, prior to 2011 when the FCC first asserted jurisdiction over joint use agreements between ILECs and EDCs. As explained below, prior to that time joint use rates, terms and conditions were regulated by the Commission.

B. HISTORY OF POLE ATTACHMENT REGULATION

Pole attachment agreements between ILECs and electric utilities were regulated by the Commission as a "rate" for "service" under the Public Utility Code, except from the date of the *2011 Pole Attachment Order* until the Commission certified it was exercising reverse preemption.

[12] (*See, e.g., id.* at VZ00532-541; Verizon Exhibit SCM-2 at VZ00298, VZ00301, VZ00304, VZ00306, VZ00309, VZ00311, VZ00314, VZ00316 (MOUs).)

See 66 Pa.C.S. § 102. Specifically, these agreements were subject to complaint for unreasonable rates or service pursuant to Section 701 of the Public Utility Code 66 Pa.C.S. § 701, and revision pursuant to Section 508 of the Code, *id.* § 508. Over the years, the Commission heard and resolved several complaints regarding joint use agreements. *See* Section V.A.2.b. *infra*.

In 1978, the United States Congress passed the Pole Attachment Act, which added Section 224 to the Communications Act of 1934. Under Section 224, the FCC was provided the authority to regulate the rates, terms and conditions of pole attachment agreements involving cable television providers. However, neither the Pole Attachment Act nor the formula rate established thereunder (i.e., the "cable rate formula") was applicable to the rates charged under joint use agreements between ILECs and electric utilities.

Congress thereafter passed the Telecommunications Act of 1996 and granted providers of telecommunications services (other than ILECs) with non-discriminatory access to poles, conduit and rights-of-way owned or controlled by electric utilities and ILECs. (FirstEnergy St. 2-R, p. 5.) Such providers were known as CLECs. However, neither the Telecommunications Act of 1996 nor the CLEC formula rate (i.e., the "old telecom rate") established thereunder was applicable to joint use agreements between ILECs and electric utilities. The old telecom rate was essentially a fully allocated cost rate with certain adjustments designed to reduce pole attachment rates to reflect FCC policy and allow CLECs to compete with ILECs.

In 2011, the FCC issued the *2011 Pole Attachment Order*, which: (1) created the "new telecom rate" by reducing the apportionment of common pole costs included in the "old telecom rate" formula, such that it was based on incremental costs rather than fully allocated costs; and (2) reinterpreted Section 224 and concluded that the ILECs "are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)." (FirstEnergy St. 2-R, pp. 9-

10 (referencing *2011 Pole Attachment Order* ¶¶ 149, 202, 207, and 216).) Importantly, the FCC undertook these actions as a policy matter to reduce pole attachment rates for CLECs (i.e., non-pole-owning entities) in order to spur greater broadband deployment. *See 2011 Pole Attachment Order* ¶¶ 133-134. While the FCC asserted jurisdiction over the rates, terms and conditions of joint use agreements between ILECs and electric utilities, it strongly suggested ILECs would not be able to receive the incremental cost, "new telecom" rate under existing joint use agreements which were designed as fully allocated cost-sharing agreements between pole owners.

In 2018, the FCC issued further guidance (the *2018 Pole Attachment Order*) regarding its review of joint use agreements between ILECs and electric utilities. Therein, it distinguished between "new," "newly-renewed" and "newly-negotiated" agreements and existing agreements and established certain rebuttal presumptions regarding the rates, terms and conditions for the former. Despite establishing these presumptions, the FCC has never applied the incremental new telecom rate to an existing joint use agreement.

On September 3, 2019, the Commission entered its Final Rulemaking Order in *Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission*, Docket No. L-2018-3002672 (Order entered Sept. 3, 2019) ("*2019 Final Rulemaking Order*"). Therein the Commission reverse preempted the FCC's regulation of pole attachments (including joint use agreements between ILECs and electric utilities), in order to better balance the interests of attachers, electric utilities and electric utility ratepayers in Pennsylvania while furthering broadband deployment in Pennsylvania.

On March 19, 2020, the FCC issued a Public Notice of the receipt of the Commission's certification that it had exercised Section 224 reverse preemption over the regulation of pole attachments.

C. PROCEDURAL HISTORY BEFORE THE FCC

On November 20, 2019, Verizon filed the instant Complaint with the FCC. Also on November 20, 2019, Verizon served its first set of interrogatories, pursuant to the FCC's rules and regulations, upon FirstEnergy.

On November 27, 2019, FirstEnergy filed a Motion to Hold Proceeding in Abeyance pending the Commission's certification to the FCC that it had initiated proceedings to exercise its reverse preemption authority. Also on November 27, 2019, FirstEnergy served its objections to Verizon's first set of interrogatories, pursuant to the FCC's rules and regulations.

On December 4, 2019, FirstEnergy filed an Unopposed Motion to Adjust Deadlines. On December 9, 2010, the FCC granted the Unopposed Motion to Adjust Deadlines.

On December 10, 2019, the FCC issued a Letter Ruling declining to hold the Complaint in abeyance pending the Commission's certification to the FCC that it had exercised its reverse preemption authority.

On January 20, 2020, FirstEnergy served its first set of answers to Verizon's first set of interrogatories, pursuant to the FCC's rules and regulations.

On February 3, 2020, FirstEnergy filed its Answer to the Complaint with the FCC. Also on February 3, 2020, FirstEnergy served its first set of interrogatories, pursuant to the FCC's rules and regulations, upon Verizon.

On February 10, 2020, FirstEnergy served its second set of answers to Verizon's first set of interrogatories, pursuant to the FCC's rules and regulations. Also on February 10, 2020, Verizon served its objections to FirstEnergy's first set of interrogatories, pursuant to the FCC's rules and regulations.

On March 3, 2020, Verizon filed Denials of FirstEnergy's Affirmative Defenses and Reply to FirstEnergy's Answer with the FCC. Verizon also filed a Reply Legal Analysis in Support of its Complaint on that same day.

On March 11, 2020, Verizon served its answers to FirstEnergy's first set of interrogatories, pursuant to the FCC's rules and regulations.

On March 13, 2020, FirstEnergy filed a Motion for Leave to Supplement and Correct its Answer in Proceeding with the FCC. FirstEnergy also filed a Motion for Leave to File a Response to the Reply of Verizon.

On March 17, 2020, Verizon filed an Answer in Opposition to FirstEnergy's Motion for Leave to Supplement and Correct its Answer before the FCC. Verizon also filed an Answer in Opposition to FirstEnergy's Motion for Leave to File a Response to the Reply of Verizon.

On March 18, 2020, pursuant to its *2019 Final Rulemaking Order*, the Commission submitted a certification to the FCC to exercise reverse preemption of Complaints under Section 224(c) of the Communications Act. Also, on March 18, 2020, the parties submitted a Joint Statement in the FCC proceeding. The Joint Statement included certain Stipulated Facts, which are reproduced in paragraph 2-10 of Appendix A, Proposed Findings Of Fact. On March 19, 2020, the FCC issued a Public Notice of the receipt of the Commission's certification. On March 23, 2020, the FCC issued the *Transfer Order*, and transferred this matter to the Commission.

D. PROCEDURAL HISTORY BEFORE THE COMMISSION

On March 24, 2020, the Commission opened the above-captioned docket.

The Administrative Law Judge ("ALJ") issued a Scheduling Order, which established an effective filing date of March 25, 2020, for this proceeding and also established an initial litigation schedule for the proceeding.

On April 17, 2020, FirstEnergy served its first set of interrogatories and requests for production of documents, pursuant to the Commission's rules and regulations, upon Verizon ("FE Set I Discovery").

On April 20, 2020, the Commission issued a Hearing Notice.

On April 21, 2020, Verizon served its written direct testimony, including: (1) Verizon St. 1, the direct testimony of Stephen C. Mills and Exhibits SCM-1 through SCM-7; (2) Verizon St. 2, the direct testimony of Mark S. Calnon and Exhibits MSC-1 through MSC-2; and (3) Verizon St. 3, the direct testimony of Timothy J. Tardiff and Exhibits TJT-1 through TJT-2.

On April 22, 2020, Verizon served its Objections to FE Set I Discovery.

On April 24, 2020, FirstEnergy served its first set of Requests for Admission on Verizon ("FE RFAs Set I"), pursuant to the Commission's rules and regulations. FirstEnergy also served its second set of interrogatories and requests for production of documents, pursuant to the Commission's rules and regulations, upon Verizon ("FE Set II Discovery").

On April 29, 2020, Verizon served Objections to FE RFAs Set I and Objections to FE Set II Discovery. FirstEnergy filed and served a Motion to Compel responses to FE Set I Discovery.

On May 1, 2020, Verizon served its second set of interrogatories and requests for production of documents ("Verizon Set II Discovery"), pursuant to the Commission's regulations, on FirstEnergy,[13] and Answers and Objections to FE Set I Discovery.

On May 7, 2020, FirstEnergy served its third set of interrogatories and requests for production of documents, pursuant to the Commission's rules and regulations, upon Verizon ("FE Set III Discovery"). Verizon also served and filed its Answer to FirstEnergy's Motion to Compel responses to FE Set I Discovery.

[13] Verizon noted in its filing letter that Verizon Set II Discovery was the second set of discovery requests served by Verizon, inclusive of the first set of requests served in the FCC proceeding on November 20, 2020.

On May 11, 2020, the ALJ issued an Order Denying FirstEnergy's Motion to Compel responses to FE Set I Discovery. Verizon also served its Answers and Objections to certain of the FE RFAs Set I and its Answers and Objections to FE Set II Discovery.

On May 12, 2020, Verizon served its Answers and Objections to additional of the FE RFAs Set I. Verizon also served its Objections to FE Set III Discovery.

On May 15, 2020, Verizon served its third set of interrogatories and requests for production of documents ("Verizon Set III Discovery"), pursuant to the Commission's rules and regulations, on FirstEnergy.

On May 18, 2020, FirstEnergy filed a Motion to Compel responses to FE Set III Discovery. Between May 18-20, 2020, FirstEnergy also filed three sets of Responses to Verizon Set II Discovery.

On May 21, 2020, FirstEnergy served its written rebuttal testimony, consisting of: (1) FirstEnergy St. 1-R, rebuttal testimony of Stephen F. Schafer (public and proprietary versions) and Exhibits SFS-1 through SFS-14; (2) FirstEnergy St. 2-R, rebuttal testimony of William P. Zarakas and Exhibit WZ-1; (3) FirstEnergy St. 3-R, rebuttal testimony of Joanne M. Savage and Exhibit JMS-1; (4) FirstEnergy St. 4-R, rebuttal testimony of Randal J. Coleman (public and proprietary versions) and Exhibits RC-1 through RC-3; (5) FirstEnergy St. 5-R, rebuttal testimony of Thomas R. Pryatel; (6) FirstEnergy St. 6-R, rebuttal testimony of Scott Carlin and Exhibit SC-1; and (7) FirstEnergy St. 7-R, rebuttal testimony of Clark Guo (public and proprietary versions) and Exhibit CG-1.

On May 22, 2020, Verizon served its Answers and Objections to FE Set III Discovery. Verizon also filed and served its Motion to Compel responses to certain of Verizon Set II Discovery. FirstEnergy also served responses to additional of Verizon Set II Discovery.

On May 26, 2020, Verizon filed and served its Answer to FirstEnergy's Motion to Compel Responses to FE Set III Discovery.

FirstEnergy provided additional responses to Verizon Set II Discovery on May 27, 2020.

FirstEnergy served Supplemental Responses to certain of Verizon Set II Discovery on May 28, 2020.

On June 1, 2020, FirstEnergy served responses to Verizon Set III Discovery.

On June 2, 2020, FirstEnergy served additional responses to Verizon Set III Discovery. FirstEnergy also served further Supplemental Responses to certain of Verizon Set II Discovery.

On June 3, 2020, the ALJ issued an Order Denying Motion to Compel Filed By First Energy Regarding Interrogatory III-1.

On June 5, 2020, FirstEnergy served a Supplemental Response to certain of the Verizon Set III Discovery.

On June 8, 2020, the ALJ issued a Second Scheduling Order. The Second Scheduling Order revised the litigation schedule and permitted the parties to submit rejoinder and surrejoinder testimony, cancelled evidentiary hearings and established deadlines for Briefs. The Commission also issued a Hearing Cancellation Notice.

On June 18, 2020, Verizon served its written surrebuttal testimony, consisting of: (1) Verizon St. 1.1, surrebuttal testimony of Stephen C. Mills (proprietary and public versions) and Exhibits SCM-8 through 44; (2) Verizon St. 2.1, surrebuttal testimony of Mark S. Calnon (proprietary and public versions) and Exhibits MSC-3 through 21; (3) Verizon St. 3.1, surrebuttal testimony of Timothy J. Tardiff (proprietary and public versions) and Exhibits TJT-3 through 9; and (4) Verizon St. 4.0, surrebuttal testimony of Thomas K. MacNabb.

On June 25, 2020, FirstEnergy served its written rejoinder testimony. FirstEnergy's

rejoinder testimony consisted of: (1) FirstEnergy St. 1-RJ, rejoinder testimony of Stephen F. Schafer (proprietary and public versions) and Exhibit SFS-15; (2) FirstEnergy St. 2-RJ, rejoinder testimony of William P. Zarakas; (3) FirstEnergy St. 3-RJ, rejoinder testimony of Joanne M. Savage; (4) FirstEnergy St. 4-RJ, rejoinder testimony of Randal J. Coleman (public and proprietary versions) and Exhibits RC-4; (5) FirstEnergy St. 6-RJ, rejoinder testimony of Scott Carlin (public and proprietary versions) and Exhibits SC-2; and (6) FirstEnergy St. 7-RJ, rejoinder testimony of Clark Guo (public and proprietary versions).

On July 2, 2020, Verizon served its written surrejoinder testimony. Verizon's surrejoinder testimony consisted of: (1) Verizon St. 1.2, surrejoinder testimony of Stephen C. Mills (proprietary and public versions) and Exhibits SCM-45 to SCM-49; (2) Verizon St. 2.2, surrejoinder testimony of Mark S. Calnon (proprietary and public versions; and (3) Verizon St. 3.2, surrejoinder testimony of Timothy J. Tardiff (proprietary and public versions). Also on July 2, 2020, FirstEnergy served corrected written rebuttal testimony to correct designations of proprietary information in FirstEnergy St. 1-R, Exhibits SFS-3, 8 and 9, and FirstEnergy St. 3-R.

On July 8, 2020, the FirstEnergy filed the parties' Joint Motion to Admit Stipulated Items into Record of Proceeding. In addition, the parties submitted a common brief outline to the ALJ.

Pursuant to the Second Scheduling Order, Main Briefs are due on July 28, 2020, and Reply Briefs are due on August 14, 2020.

III. LEGAL STANDARDS

A. APPLICABLE LAW

As a "creature of statute," the Commission "has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication." *Feingold v. Bell of Pa.*, 383 A.2d 791, 794 (Pa. 1977) (citing *Allegheny Cnty. Port Auth. v. Pa. Pub. Util. Comm'n*, 237 A.2d 602 (Pa. 1967); *Del. River Port Auth. v. Pa. Pub. Util. Comm'n*, 145

A.2d 172 (Pa. 1958)); *see also Application of Sprint Communications Company L.P. For Approval of the Right to Offer, Render, Furnish or Supply Telecommunications Services as a Competitive Local Exchange Carrier to the Public in the Service Territories of Alltel Pennsylvania, Inc., Commonwealth Telephone Company and Palmerton Telephone Company*, Docket Nos. A-310183F0002AMA, et al., 2006 Pa. PUC LEXIS 97 at *59 (Order entered Dec. 1, 2006) (noting that although "the dynamics of the telecommunications industry pose challenges for regulators to keep pace with the changes in telecommunications technology, this Commission is, however, a creature of statute. As a creature of statute, the Commission possesses only those powers which the State Legislature expressly confers upon it, or which may arise as an implied grant from those powers expressly conferred.").

Verizon's Complaint seeks a finding and determination from the Commission that the rates charged to Verizon by FirstEnergy under the Joint Use Agreements are unjust and unreasonable, pursuant to Section 224 of the Communication's Act, the FCC's regulations and the FCC's *2011 Pole Attachment Order* and *2018 Pole Attachment Order*. However, by exercising reverse preemption authority, the Commission has supplanted the FCC's jurisdiction and application of Section 224 of the Communications Act with the Commission's jurisdiction under and application of the Public Utility Code to Pennsylvania pole attachment disputes.

It is axiomatic that the Commission has jurisdiction over a "rate" charged by a public utility for "service." 66 Pa.C.S. § 102 (defining "rate" and "service"). As such, the Commission must review the "rate" charged by FirstEnergy for Verizon to attach to its poles (the "service") consistent with and limited by the authority granted to it under the Public Utility Code.

Exercising this jurisdiction, the Commission has previously had occasion to review the terms and conditions of joint use agreements between telecommunications companies and EDCs

and reviewed those disputes under the Public Utility Code. *See NEPTC Order* (determining whether the cost sharing methodology establishes in an existing joint use agreement was just and reasonable); *see also ALLTEL Pennsylvania, Inc., et al. v. West Penn Power Company*, Docket No. C-00992532, 2001 Pa. PUC LEXIS 27 (Order dated July 26, 2001) ("*ALLTEL Order*") (analyzing disputed modifications to the calculation and allocation of trimming and tree clearing expenses under various joint use pole agreements, pursuant to the Public Utility Code).

Section 224(c)(1) of the Communications Act makes clear that Section 224 shall not "be construed to apply to, or to give the [FCC]…jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State." 47 U.S.C. § 224(c)(1) (emphasis added). In exercising Section 224(c) reverse preemption authority, the Commission explained that "[t]he requirements in the FCC [*2018 Pole Attachment Order*]…are applicable in only those states that chose not to regulate pole attachments, but rather defer…to FCC rules." *2019 Final Rulemaking Order* at 4 (emphasis added).

Moreover, with respect to its review of a Complaint, the Commission explained in the *2019 Final Rulemaking Order* that it:

> maintains in its final form regulations that FCC and court decisions and precedent will be persuasive, and not controlling precedent…the Commission anticipates challenges to the federal rules that may come to the Commission for resolution, which have not yet been adjudicated on the federal level once we assume jurisdiction. Similarly, we can envision instances where an interpretation by the FCC, which is charged with developing a nationwide scheme, may not align with Pennsylvania interests…
>
> [the Commission's regulations do] not preclude the Commission from using its discretion to form separate interpretations to benefit the Commonwealth. FCC orders are persuasive, meaning that they do not establish binding precedent that the Commission would follow regardless of whether any particular application would be rational under a set of given circumstances.

2019 Final Rulemaking Order at 50 (emphasis added). Therefore, although the Commission may look to applicable FCC precedent as "persuasive" authority it is not bound by this precedent and its decisions regarding pole attachments must comply with the Public Utility Code and applicable Pennsylvania law.

B. BURDEN OF PROOF

Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. A litigant's burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence, which is substantial and legally credible. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). The preponderance of evidence standard requires proof by a greater weight of the evidence. *Cmwlth. v. Williams*, 557 Pa. 207, 732 A.2d 1167 (Pa. 1999). Only if the proponent of the rule or order present evidence found to be of greater weight than the other parties, will it have carried its burden of proof. *Morrissey v. Commonwealth*, 225 A.2d 895 (Pa. 1986); *Burleson v. Pa. Pub. Util. Comm'n*, 641 A.2d 1234, 1236 (Pa. 1983); *V.J.R. Bar Corp. v. P.L.C.B.*, 390 A.2d 163 (Pa. 1978); *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217, 1220 (Pa. Cmwlth. 2001).

Consequently, as the party seeking relief, Verizon bears the burden of demonstrating that: (1) the rates charged by FirstEnergy to Verizon under the Joint Use Agreements are unjust and unreasonable under Sections 508 and 1301 of the Public Utility Code, 66 Pa.C.S. §§ 508 and 1301, or are unduly discriminatory under Section 1304, 66 Pa. C.S. § 1304, and/or Pennsylvania law; (2) the Joint Use Agreements should be revised to utilize a different rate methodology other than the methodology currently used in them under Sections 508 and 1309 of the Public Utility Code, 66 Pa.C.S. §§ 508 and 1309; and (3) it is entitled to refunds reflecting the difference from any newly

adopted rate and the rates previously charged under the Joint Use Agreements under Section 1312 of the Public Utility Code, 66 Pa.C.S. § 1312.

Although the factual burden may shift during a proceeding, the proponent of the rule or order (*i.e.*, the complainant) always maintains the overarching burden of proof. If a complainant establishes a prima facie case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, a complainant will prevail. If the utility rebuts a complainant's evidence, the burden of going forward with the evidence shifts back to a complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. *Replogle v. Pennsylvania Electric Company*, 54 Pa. PUC 528, 1980 Pa. PUC LEXIS 20 (Order dated Oct. 9, 1980); *see also Waldron v. Philadelphia Electric Company*, 54 Pa. PUC 98, 1980 Pa. PUC LEXIS 90 (Order dated March 14, 1980).

A rebuttable presumption is a rule of law requiring presumption of one fact (the presumed fact) upon proof of another (the proved fact), in the absence of satisfactory direct evidence of the presumed fact. It places on the adverse party the burden of going forward with further evidence in rebuttal, but it does not affect the ultimate burden of proof. *Pa. Pub. Util. Comm'n v. West Penn Power Company*, Docket No. R-850220, 1987 Pa. PUC LEXIS 316, at *17 (Order entered April 17, 1987) (citing *Sowizral v. Hughes*, 333 F.2d 829 (3rd Cir. 1964); *Johnstone v. Reading Co.*, 284 F.2d 71 (3rd Cir. 1957)). However, and of particular relevance here, if and when the adverse party satisfies its burden of going forward and rebuts the presumption, the presumption per se vanishes because it is not itself evidence and it is, therefore, without evidentiary weight. *Id.*

Finally, any finding of fact necessary to support an adjudication of the Commission must

be based upon substantial evidence. *Met-Ed Indus. Users Group v. Pa. Pub. Util. Comm'n*, 960 A.2d 189, 193 n.2 (Pa. Cmwlth. 2008) (citing 2 Pa.C.S. § 704). Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Borough of E. McKeesport v. Special/Temporary Civil Serv. Comm'n*, 942 A.2d 274, 281 (Pa. Cmwlth. 2008). The "presence of conflicting evidence in the record does not mean that substantial evidence is lacking." *Allied Mechanical and Elec., Inc. v. Pa. Prevailing Wage Appeals Bd.*, 923 A.2d 1220, 1228 (Pa. Cmwlth. 2007) (citation omitted).

C. SECTION 508 OF THE PUBLIC UTILITY CODE

Section 508 of the Public Utility Code empowers the Commission to revise, reform, or vary public utility contracts in certain circumstances. *See* 66 Pa.C.S. § 508. Specifically, Section 508 states as follows:

> The commission shall have power and authority to vary, reform, or revise, upon a fair, reasonable, and equitable basis, any obligations, terms, or conditions of any contract heretofore or hereafter entered into between any public utility and any person, corporation, or municipal corporation, which embrace or concern a public right, benefit, privilege, duty, or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well-being of this Commonwealth. Whenever the commission shall determine, after reasonable notice and hearing, upon its own motion or upon complaint, that any such obligations, terms, or conditions are unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and the general well-being of this Commonwealth, the commission shall determine and prescribe, by findings and order, the just, reasonable, and equitable obligations, terms, and conditions of such contract. Such contract, as modified by the order of the commission, shall become effective 30 days after service of such order upon the parties to such contract.

Id. (emphasis added). Stated otherwise, the Commission can only revise, reform, or vary a public utility contract when: (1) the contract embraces a public right or concerns the public interest and general wellbeing of Pennsylvania; and (2) the contract terms being revised are found to be unjust,

unreasonable, inequitable, or otherwise contrary or adverse to the public interest and general wellbeing of Pennsylvania. *See id.*; *see Shenango Twp. Bd. of Supervisors v. Pa. Pub. Util. Comm'n*, 686 A.2d 910, 913-14 (Pa. Cmwlth. 1996) ("Section 508 does not establish precise guidelines for the exercise of the PUC's contract reformation authority, but it does give the PUC broad and flexible range to find that a contract's terms are 'unjust, unreasonable, inequitable, or otherwise contrary or adverse to public interest.'") (quoting 66 Pa.C.S. § 508).

The Commission's discretionary authority under Section 508 is not unlimited. The Commission can only revise, reform, or vary a public utility contract that is "imbued with the public interest," such as contracts between utilities and ratepayers, service contracts, procurement contracts, and agreements that affect the costs borne by a utility's ratepayers. *Apollo Gas Co. v. Heilman*, 1994 Pa. PUC LEXIS 30, at *17 (Order entered Mar. 10, 1994). Further, "Section 508 must be read *in pari materia* with other sections of the Public Utility Code that may be relevant to determining if a particular factual scenario is a proper subject for the exercise of the PUC's contract reform power." *Shenango*, 686 A.2d at 914 (citing 1 Pa. C.S. § 1932; *White Rock Sewage Corp. v. Pa. Pub. Util. Comm'n*, 578 A.2d 984 (Pa. Cmwlth. 1990)). Moreover, Section 508 does not empower the Commission to vary, reform, or revise a contract provision simply because "the result will be undesirable, aesthetically displeasing, inefficient, or disadvantageous" to a party. *ALLTEL Pennsylvania, Inc., et al. v. West Penn Power Company*, Docket No. C-00992532, 2000 Pa. PUC LEXIS 88 (Initial Decision dated September 26, 2000) ("*ALLTEL ID*"), *adopted as modified*, 2001 Pa. PUC LEXIS 27 (Order entered July 26, 2001).

Finally, and of particular importance to this proceeding, Section 508 expressly provides that any contract changes made by the Commission apply prospectively only, i.e., 30 days after entry of order reforming the contract. 66 Pa.C.S. § 508; *see also Feingold*, 383 A.2d at 793

(recognizing the Commission lacks authority to look backward and award damages under Section 508) and *Apollo Gas Company v. Heilman*, Docket No. C-00924405, 1994 Pa. PUC LEXIS 30, at *35-36 (Order dated March 10, 1994).

D. SECTIONS 1301 AND 1309 OF THE PUBLIC UTILITY CODE

Section 1301(a) of the Public Utility Code states "Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commission." 66 Pa.C.S. § 1301(a). Pursuant to the just and reasonable standard, a utility may obtain "a rate that allows it to recover those expenses that are reasonably necessary to provide service to its customers[,] as well as a reasonable rate of return on its investment." *City of Lancaster (Sewer Fund) v. Pa. Pub. Util. Comm'n*, 793 A.2d 978, 982 (Pa. Cmwlth. 2002). The "cost of service" has been recognized as the "polestar" of utility ratemaking in Pennsylvania. *Lloyd*, 904 A.2d at 1020.

Section 1309(a) of the Public Utility Code further requires that:

> [w]henever the Commission…upon complaint, finds that the existing rates of any public utility for any service are unjust, unreasonable, or in anywise in violation of any provision of law, the commission shall determine the just and reasonable rates, including maximum or minimum rates, to be thereafter observed and in force, and shall fix the same by order…

66 Pa.C.S. § 1309(a). A determination that a utility's rates are unjust or unreasonable usually rests on a factual finding that the imposition of those rates unreasonably benefits the utility's investors at the expense of the utility's ratepayers, that is; that the rates constitute a species of "unlawful taxation." *Nat'l Fuel Gas Distrib. Corp. v. Pa. Pub. Util. Comm'n*, 464 A.2d 546, 564 (Pa. Cmwlth. 1983) (citing *Pa. Pub. Util. Comm'n v. Pennsylvania Gas & Water Company*, 424 A.2d 1213, 1220 (Pa. 1980) *cert. denied*, 454 U.S. 824 (1981)). This finding, in turn, is typically established by evidence that imposition of the challenged rates produces revenues in excess of a

fair return on the fair value of the utility's property used to provide the regulated service. *Nat'l Fuel*, 464 A.2d at 564. That is, the Commission must determine whether the rate is excessive in light of the costs incurred by the utility to provide the associated service. *See Air Products and Chemicals, Inc. v West Penn Power Company*, Docket Nos. R-183; C-20701 et al., 52 Pa. PUC 756, 1978 Pa. PUC LEXIS 9 (Order dated Dec. 14, 1978).

Furthermore, it is well-established that a complainant challenging an existing rate "carries a very heavy burden" to prove that the facts and circumstances have changed so drastically as to render the rate unreasonable. *See Shenango*, 686 A.2d at 914 (citing *Zucker v. Pa. Pub. Util. Comm'n*, 401 A.2d 1377 (Pa. Cmwlth. 1979); *Brockway Glass Co. v. Pa. Pub. Util. Comm'n*, 437 A.2d 1067 (Pa. Cmwlth. 1981)). More specifically, unless a complainant demonstrates that recent significant changes in circumstances since the establishment of the rate have occurred, the rate is prima facia reasonable. *See Zucker*, 401 A.2d at 1380. Furthermore, the Commission has recognized for almost 100 years that when a complainant challenges an existing rate for service, it must prove how the change it desires will affect the utility's revenues. *See Duquesne Light Co. v. Pub. Serv. Comm'n*, 117 A. 63, 66 (Pa. 1922) ("when [complainant] appellants refused to prove how the changes desired would affect [utilities] appellees' revenues, and especially when the companies showed that the effect would be to so reduce those revenues as to result in pro tanto confiscation, the commission should have at once dismissed the complaint…"). Absent such a showing, a complaint made against an existing rate must be denied.

E. SECTION 1304 OF THE PUBLIC UTILITY CODE

Section 1304 of the Public Utility Code states:

> No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference

> as to rates, either as between localities or as between classes of service.

66 Pa.C.S. § 1304.

The burden of proving that an existing rate is discriminatory is on the customer challenging such rate. *See U.S. Steel Corp. v. Pa. Pub. Util. Comm'n*, 390 A.2d 865 (Pa. Cmwlth. 1978). To prove discrimination, the challenging customer must show that the utility was bent on collecting more than a reasonable rate from the customer (and other similarly situated customers) for the purpose of supplying a deficiency created by inadequate rates charged other customers. *See Park Towne v. Pa. Pub. Util. Comm'n*, 433 A.2d 610, 614 (Pa. Cmwlth. 1981) (citing *Alpha Portland Cement Co. v. Pub. Serv. Comm'n*, 84 Pa. Super. 255 (Pa. Super. 1925)).

Pennsylvania appellate courts have also repeatedly held that:

> Differences in rates between classes of customers based on such criteria as the quantity of…[the service] used, the nature of the use, the time of the use . . ., or based on differences of conditions of service, or cost of service are not only permissible but often are desirable and even necessary to achieve reasonable efficiency and economy of operation.

Phila. Suburban Transp. Co. v. Pa. Pub. Util. Comm'n, 281 A.2d 179, 186 (Pa. Cmwlth. 1971). Indeed, mere differences in rates between classes of customers does not establish unreasonable discrimination. *Phila. v. Pa. Pub. Util. Comm'n*, 57 A.2d 613 (Pa. Super. 1948).

F. SECTION 1312 OF THE PUBLIC UTILITY CODE

Section 1312(a) of the Public Utility Code states:

> If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the

> legal rate from the date of each such excessive payment. In making a determination under this section, the commission need not find that the rate complained of was extortionate or oppressive…The commission shall state in any refund order the exact amount to be paid, the reasonable time within which payment shall be made, and shall make findings upon pertinent questions of fact.

66 Pa.C.S. § 1312(a) (emphasis added). Section 1312(a) establishes a "four year statute of limitations" that terminates a party's right to seek refunds beyond four years prior to the date of the filing of a complaint. *Darrell Ross v. PECO Energy Company*, Docket No. C-2008-2060301, 2008 Pa. PUC LEXIS 829, at *10-11 (Initial Decision dated Oct. 14, 2008) *adopted as final without modification* (Order entered Feb. 19, 2009).

Whether to grant refunds, the amount of such refunds and the applicable period for refunds is, within the bounds of the Public Utility Code, a matter within the Commission's discretion. *See Emporium Water Co. v. Pa. Pub. Util. Comm'n*, 859 A.2d 20, 24 (Pa. Cmwlth. 2004) (citing *Nat'l Fuel*, 464 A.2d at 564; *see also LP Water & Sewer Co. v. Pa. Pub. Util. Comm'n*, 722 A.2d 733, 736 (Pa. Cmwlth. 1998) and *Riverton Consolidated Water Co. v. Pa. Pub. Util. Comm'n*, 140 A.2d 114, 125 (Pa. Super. 1958). However, "the Code does not authorize the imposition of a refund of excess revenues and improvident expenditures without consideration of the reasonableness and justice of the rates as a whole." *Nat'l Fuel*, 464 A.2d at 567.

IV. SUMMARY OF ARGUMENT

Verizon contends that: (1) FirstEnergy's existing pole attachment rates are unjust and unreasonable under Section 224 of the Communications Act, the FCC's *2011 Pole Attachment Order* and *2018 Pole Attachment Order*; (2) the existing Joint Use Agreements between the parties therefore should be revised to reflect the FCC's new telecom rate; and (3) FirstEnergy should be required to refund, with interest, the difference between rates currently charged under the Joint

Use Agreements and the new telecom rate, dating back to 2011. Verizon's Complaint should be dismissed, and all of its requested relief should be denied.

This Is A Precedential Case Of First Impression. This is the first pole attachment dispute that has come before the Commission after it issued the *2019 Final Rulemaking Order*, and its decision in this case will likely establish precedent for all ILECs and EDCs in the Commonwealth. The FCC was widely criticized for failing to consider the interests of electric utility customers in setting pole attachment rates, and the Commission specifically noted the need to balance the interests of electric utility customers when it exercised reverse preemption. Every dollar of decrease in pole attachment rates is a dollar increase in electric utility rates. And, conversely, every dollar of decrease in pole attachment fees is a dollar of additional income to Verizon, which, due to its alternative form of rate regulation, it is not required to pass-through to customers. FirstEnergy asks the Commission to proceed cautiously in this case of first impression and decline to establish precedent that would subsidize ILEC shareholders at the expense of electric customers.

Pennsylvania Law Controls. The Public Utility Code and applicable Pennsylvania law control this dispute. While the Commission may look to FCC precedent, it can only treat such precedent as persuasive authority if it is consistent with the Public Utility Code, the Commission's regulations and orders, and applicable Pennsylvania law. Verizon has failed to recognize the controlling effect of the Public Utility Code, failed to amend its Complaint to allege any violation of the Public Utility Code, Commission regulation, rule or order, as required by Section 701 of the Code, 66 Pa.C.S.§ 701, failed in numerous instances to conform its evidence to Pennsylvania law and regulatory policy, and has provided no basis to sustain its complaint before this Commission.

Any Revisions To The Joint Use Agreements Must Reflect Both FirstEnergy's And

Verizon's Pole Attachment Rates. The Joint Use Agreements are reciprocal agreements which contain terms and conditions, including separate, but interrelated rates, under which Verizon may attach to FirstEnergy-owned poles and under which FirstEnergy may attach to Verizon-owned poles. The Commission cannot change one rate without changing both, but Verizon does not allege, and presents no evidence, that the rates FirstEnergy pays are unjust and unreasonable. Verizon's Complaint is fundamentally deficient in this regard and should be dismissed.

Existing Rates Are Just And Reasonable. Under Pennsylvania law, a rate is unjust and unreasonable where a public utility is earning an excessive rate of return on its investment. Verizon has presented no evidence as to what rate of return is being earned on the present pole attachment rates under established Pennsylvania ratemaking procedures, and no evidence whatsoever as to the current fair rate of return. The determination of a fair rate of return and in particular the cost of common equity, is a critical element in determining whether a rate is just and reasonable. Without these critical inputs, there is no factual or legal basis for any conclusion that existing rates are unjust and unreasonable.

Existing Rates Are Below Fully Allocated Service And Are Fully Consistent With Commission Precedent Regarding Pole Attachment Rates. FirstEnergy presented unrebutted evidence that, in aggregate, its current pole attachment rates are below fully allocated cost based on the allowed rate of return in its last fully litigated rate proceedings. Cost of service is the "polestar" of Pennsylvania ratemaking, and the unrebutted evidence demonstrates FirstEnergy's existing pole attachment rates fully comply with this well-established standard and, therefore, are just and reasonable. In the *NEPTC Order*, the Commission specifically upheld an electric utility's proposed rate under a joint use agreement which reflected an equal (i.e., 50/50) share of common costs; which is the same methodology used to calculate the rates in the Joint Use Agreements.

Existing Rates Are Not Unduly Discriminatory; Verizon's Proposed New Telecom Rate Is Unduly Discriminatory. Verizon further contends that the rates it pays under the Joint Use Agreements are discriminatory. However, Verizon has submitted no evidence that the alleged unreasonable rate it pays is being charged by FirstEnergy "to supply a deficiency created by inadequate rates charged" to other FirstEnergy customers. Rather, the new telecom rate proposed by Verizon is well below fully allocated cost of service and would provide Verizon's shareholders an unreasonable and unlawful subsidy, funded by FirstEnergy's electric ratepayers.

Verizon Is Not Entitled To The New Telecom Rate. Verizon contends that the Commission should simply insert the FCC's "new telecom rate" into the existing Joint Use Agreements. This argument should be rejected for several reasons.

First, the new telecom rate is unjust and unreasonable under Pennsylvania law. It is well below fully allocated cost of service and, therefore, is inconsistent with both the *Lloyd* decision and the *NEPTC Order*.

Second, Verizon relies exclusively on FCC precedent, yet never acknowledges that the FCC has never held that an ILEC is entitled to the new telecom rate under an existing joint use agreement. When the FCC first exercised jurisdiction over joint use agreements between ILECs and electric utilities, the FCC said it was "unlikely to find that the rates, terms and conditions in existing joint use agreements unjust or unreasonable." The FCC also recently denied an ILEC's request to insert the new telecom rate into a joint use agreement, which had be terminated by the parties, in *In the Matter of BellSouth Telecommunications, LLC d/b/a/ AT&T Florida v. Florida Power and Light Company,* Proceeding No. 19-187; Bureau ID No. EB-19-MD-006 (Memorandum Opinion and Order adopted May 20, 2020) ("*AT&T v. FPL*"). If the Commission decides to follow FCC precedent in this case (to the extent permitted by Pennsylvania law), it must

reject Verizon's request for the new telecom rate.

Third, Verizon's case for the new telecom rate rests primarily upon the FCC's presumption that an ILEC is similarly situated to non-pole-owning entities in its ability to attach to a utility's poles. In order to obtain this presumption, Verizon was required to terminate the existing Joint Use Agreements and enter into a new agreement, or a "newly-negotiated" or "newly-renewed" agreement. Verizon did not terminate the existing agreements and therefore does not qualify for the presumption.

Even if this presumption did apply, FirstEnergy has fully rebutted it through overwhelming evidence that Verizon, as a pole owner and party to the Joint Use Agreements, is not similarly situated to competing third-party non-pole-owning entities in its ability to attach to poles and has many material competitive advantages under the Joint Use Agreements. As such, the presumption "vanishes" and does not constitute evidence of record, Verizon has failed to meet its burden of proof, and its request for the new telecom rate should be denied.

Perhaps recognizing these fundamental deficiencies, Verizon contends that FirstEnergy has "bargaining power" over Verizon, because FirstEnergy owns more poles than Verizon, and further claims FirstEnergy leveraged such bargaining power during rate negotiations. Even if these allegations were true, and they are not, they do not provide any basis for concluding that FirstEnergy's rates are unjust and unreasonable under Pennsylvania law, and no basis for inserting the new telecom rate (which based upon the incremental costs to attach to a pole) into the existing Joint Use Agreements (which are based upon sharing the fully allocated costs of pole ownership).

Furthermore, FirstEnergy has no bargaining power over Verizon and did not and could not exercise any such power in the negotiation of the Joint Use Agreements. FirstEnergy has demonstrated that relative pole ownership is not evidence of actual bargaining power and,

unsurprisingly, that it has no bargaining power over Verizon, one of the world's largest corporations. In addition, any hypothetical bargaining power was not exercised and could not have been exercised because (1) Verizon had a lower cost alternative to the existing rates; and (2) FirstEnergy would have suffered significant harm if it did exercise any bargaining power. Finally, and perhaps most importantly, when the pole attachment rates were last negotiated, they were regulated by the Commission. Regulation is a substitute for competition, and the Commission's regulation of pole attachment rates fully constrained any hypothetical competitive market bargaining power, as evidenced by the fact that the rates resulting from the 2009 negotiations were below fully allocated cost, as would be expected in a regulated environment.

Regarding rate negotiations, the record evidence also shows FirstEnergy negotiated in good faith and proposed multiple options to attempt to address Verizon's concerns. Even a cursory review of the history of negotiations shows that Verizon's litigation position and negotiating position are and always have been the same, i.e., Verizon wants the new telecom rate and only the new telecom rate and will accept nothing else. It is Verizon, and not FirstEnergy, that has refused to negotiate in good faith prior to filing the Complaint.

The Old Telecom Rate. If the Commission elects not to follow Pennsylvania law and practice, and decides to adopt a new rate formula, then it should adopt the FCC's old telecom rate,[14] which is based on fully allocated costs (except for the direct assignment of a portion of unusable space) and rationally could be inserted into the existing Joint Use Agreements that are similarly based on the sharing of fully allocated costs.

If the Commission pursues this option, it must also decide what inputs to use for number and spacing of attachments. Although the FCC formula rates contain "presumptive inputs" (e.g.,

[14] However, FirstEnergy reserves the right to challenge the Commission's adoption of the old telecom rate on appeal.

a decades-old national presumption as to number of attachments per pole), FirstEnergy rebutted these presumptions with recent actual data from its own service territories. Verizon presented no affirmative evidence of its own as to the actual number of attachments in FirstEnergy's service territory. As a result, FirstEnergy's actual data must be used to calculate rates.

Effective Date And Deferral. All revenues received by FirstEnergy under the Joint Use Agreements are credited to customers through FirstEnergy's base rates on a dollar for dollar basis. FirstEnergy therefore asks that the Commission coordinate any changes it may order to the Joint Use Rates with FirstEnergy's base rates. Specifically, the effective date of the new pole attachment rates should be the same as the effective date of rates in FirstEnergy's next base rate proceeding, or in the alternative, the Commission should permit FirstEnergy to defer and create a regulatory asset for the difference between pole attachment revenues at existing rates and new rates and authorized FirstEnergy to claim and recover the regulatory asset in its next base rate case.

Verizon's Refund Claim Should Be Rejected. Finally, Verizon's request for refunds should be denied for several reasons. First, under Section 508 of the Public Utility Code, any revisions to the Joint Use Agreements would only "become effective" 30 days after the Commission's order revising them; any retroactive revisions to the Joint Use Agreements would violate basic principles of contract law and various provisions of the United States and Pennsylvania Constitutions. Second, no refunds are available under Section 1312 of the Code without a predicate finding that existing rates are unjust and unreasonable. The unrebutted record evidence shows that FirstEnergy's currents pole attachment rates are below fully allocated cost, rendering them per se just and reasonable, and, therefore, not subject to refund. Third, since the existing rates are just and reasonable, any change in rates ordered by the Commission would have to be based on a fundamental change in rate methodology. Fundamental fairness, sound public

policy, the rule against retroactive application of agency decisions, and due process of law, require this new methodology to be applied prospectively. Fourth, it is not rational or lawful to change FirstEnergy's rates without also resetting Verizon's rates. The record contains no information on the reasonableness of Verizon's rates; without this information it is not possible under the Joint Use Agreements to calculate a refund amount. Finally, the maximum refund period under Pennsylvania law is four years, and the maximum refund period under FCC precedent is two years.

For these reasons, and the reasons more fully explained below, Verizon's Complaint should be denied.

V. ARGUMENT

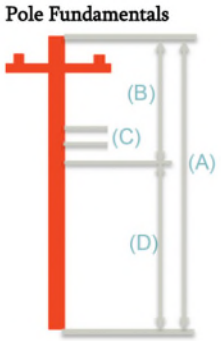
A. Verizon Has Failed To Demonstrate That The Pole Attachment Rates Charged Under The Joint Use Agreements Are Unjust And Unreasonable.

1. Overview Of Pole Attachments And Agreements.

The crux of the dispute in this proceeding is whether the rates Verizon pays FirstEnergy under the Joint Use Agreements are unjust and unreasonable. To understand and properly analyze this issue, it is important to understand pole attachments and the two primary types of pole attachment agreements.

a. Pole Attachments.

FirstEnergy witness Mr. William Zarakas provided the following graphic to depict the general layout of pole infrastructure, from the perspective of attaching entities:



Legend	Average Pole
(A) Total pole length	37.5′
(B) Usable space	13.5′
(C) Space allocated to attaching entity	1.0′
(D) Unusable space	24.0′

(FirstEnergy Exhibit WZ-1, p. 1.)

The primary attachments to a utility pole are the facilities of the pole owner, either the electric utility or the telephone company. However, other entities also may wish to attach to these poles. So, for example, as in this case, telephone companies, ILECs, CLECs and CATV providers may wish to attach to an electric utility's poles. Two different types of agreements govern these attachments: (1) a joint use agreement between two pole-owning entities (i.e., an ILEC and an electric utility); or (2) a third-party attacher agreement between a pole-owning entity and a non-pole-owning entity (e.g., CATV or CLEC). Each of these agreements reflect the parties' different relationships and, as a result, contain substantially different terms and conditions.

b. Joint Use Agreements Are Fundamentally Cost Sharing Agreements.

Historically, both electric utilities and telephone companies owned poles and, where they shared common service areas, sought to share pole infrastructure by way of negotiated "joint use agreements." (FirstEnergy St. 2-R, p. 4.) The primary motivation behind these bilateral contractual arrangements included reducing each parties' individual pole ownership costs by jointlu accessing and sharing in the costs of joint use poles. (FirstEnergy St. 2-R, pp. 4-5.) For example, the recitals in the 1973 agreement between Metropolitan Edison Company and The Bell Telephone Company of Pennsylvania explicitly states:

> WHEREAS, it is the common desire to avoid unnecessary duplication of poles and mutually benefit the Parties to this agreement, Met-ED and Bell have agreed to continue and expand the joint use of poles.

(Verizon Exhibit SCM-2 at VZ00167.) The recitals in 1986 agreement between Pennsylvania Electric Company and The Bell Telephone Company of Pennsylvania similarly state:

> WHEREAS, Penelec and Bell desire to cooperate in keeping pole plant at a minimum in the territory covered by this Agreement and to provide for the joint use of their respective poles when and where

> joint use shall be of mutual advantage in meeting their service requirements.

(Verizon Exhibit SCM-2 at VZ00320.) Similar "cost sharing" language appears throughout each of the Joint Use Agreements.

The fact that the parties to these agreements both owned poles is important, because the rates developed under these agreements reflect the parties' mutual agreement to own and maintain poles and are based upon each parties' full cost of service. (FirstEnergy St. 1-R, pp. 8-9.) Indeed, the FCC has recognized 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." *2011 Pole Attachment Order* ¶ 216, n.654. The Commission itself has similarly recognized this primary purpose of joint use agreements. *NEPTC Order*, at *12; *see also* Section V.A.2.b. *infra* (detailing the Commission's regulation of joint use agreements). As such the rates established under joint use agreements are reciprocal in nature and, more specifically, use cost-of-service based cost-sharing mechanisms to reflect the costs incurred by each pole-owner to own a pole. (*See* FirstEnergy St. 1-R, pp. 9-10.)

c. Third-Party Pole Attachment Agreements Reflect Incremental Costs.

Joint use agreements between pole-owning entities stand in stark contrast to agreements between pole owners and third-party non-pole-owning attachers that "are essentially lease agreements that allow these companies to lease space on utility owned poles but do not have the same benefits of Joint Use Agreements and are based on the incremental cost of the attachments." (FirstEnergy St. 1-R, p. 9.) These agreements, and the rates charged thereunder, do not fully allocate all of the common costs of common space. For example, as explained more fully below, under the FCC's "old telecom rate," third-party attachers only share in the 2/3 of the costs of common space and pole owners are directly assigned 1/3 of the common space cost as well as an

equal share of the remaining 2/3. (FirstEnergy St. 1-R, pp. 13-14.) The "new telecom rate" goes farther and mathematically eliminates the allocation of common costs associated with common space and, for all practical purposes, is an incremental cost rate as opposed to a fully allocated cost-based rate. (FirstEnergy St. 1-R, p. 14.)

d. Verizon Improperly Seeks To Insert A Rate Based On Incremental Costs Into A Joint Use Agreement Based On The Sharing Of The Full Costs Of Pole Ownership.

Verizon (as a pole-owning entity) has asked this Commission to revise the rate it pays under the Joint Use Agreements to attach to FirstEnergy's poles, while maintaining the remaining terms and conditions of the Joint Use Agreements. More specifically, Verizon seeks to remain a pole owner subject to joint use with FirstEnergy, but avoid the cost-of-service based cost-sharing mechanisms that reflect the costs incurred by each pole-owner to own a pole and replace these mechanisms with an incremental cost-based rate (i.e., the "new telecom rate"). As explained below, the proposed insertion of an incremental cost rate into a fully allocated cost sharing agreement reflects a fundamental flaw in Verizon's case.

e. Verizon Does Not Allege And Presents No Evidence That The Rates FirstEnergy Pays Verizon Under The Joint Use Agreements Are Unjust And Unreasonable.

Relatedly, Verizon's Complaint focuses solely on the rates paid by Verizon to attach to FirstEnergy poles and does not allege and provides no evidence that the rates FirstEnergy pays Verizon are unjust or unreasonable. These two rates are interrelated and were jointly negotiated, but Verizon's does not address the interrelated rate FirstEnergy pays Verizon. As explained below, it is not reasonable or lawful to change one part of a reciprocal rate without changing the other and, therefore, the Commission is without basis to grant Verizon the relief it seeks.

2. Verizon Failed To Demonstrate The Rates It Pays Under The Joint Use Agreements Are Unjust And Unreasonable Under Pennsylvania Law.

In order to sustain its burden of proof in this proceeding, Verizon must demonstrate that the rates it pays under the Joint Use Agreements are unjust and unreasonable under the Public Utility Code. *See* 66 Pa.C.S. §§ 508, 1301, 1304, and 1309. Verizon must show that the rates it pays unreasonably benefit FirstEnergy at the expense of Verizon. *Nat'l Fuel*, 464 A.2d at 564. This showing is typically made by evidence that imposition of the challenged rates produces revenues in excess of a fair return on the fair value of the utility's property used in the service. *Id.* That is, Verizon must prove the rate is excessive in light of the costs incurred by the utility to provide the associated service. *See Air Products*, 1978 Pa. PUC LEXIS; *see also Lloyd.*

As explained below, Verizon failed to amend its Complaint upon its transfer to the Commission to recognize the controlling effect of the Public Utility Code and applicable Pennsylvania law, and failed to present any evidence under traditional Pennsylvania ratemaking standards that the rates it pays are unjust and unreasonable. Moreover, FirstEnergy presented unrebutted evidence that the rates Verizon pays under the Joint Use Agreements are below fully allocated cost-based rates and are consistent with long-standing Pennsylvania ratemaking standards. Therefore, Verizon's Complaint should be dismissed.

a. The Public Utility Code And Pennsylvania Law Control This Dispute.

From the date that each of the Joint Use Agreements was executed until the effective date of the FCC's *2011 Pole Attachment Order*, the Commission had jurisdiction over the rates, terms and conditions of joint use agreements between ILECs and electric utilities. The Commission reasserted jurisdiction over these agreements through its *2019 Final Rulemaking Order*, and once again subjected disputes regarding joint use agreements to the Public Utility Code and

Pennsylvania law. Therefore, the Public Utility Code and applicable Pennsylvania law control the disposition of Verizon's Complaint.

The rates charged by FirstEnergy to Verizon under the Joint Use Agreements, and vice versa, constitute a "rate" for public utility "service" under the Public Utility Code. Section 102 of the Public Utility broadly defines "rate" as:

> Every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility, or contract carrier by motor vehicle, made, demanded, or received for any service within this part, offered, rendered, or furnished by such public utility, or contract carrier by motor vehicle, whether in currency, legal tender, or evidence thereof, in kind, in services or in any other medium or manner whatsoever, and whether received directly or indirectly, and any rules, regulations, practices, classifications or contracts affecting any such compensation, charge, fare, toll, or rental.

66 Pa.C.S. § 102. Section 102 further defines "service" as:

> Used in its broadest and most inclusive sense, <u>includes any and all</u> acts done, rendered, or performed, and any and all things furnished or supplied, <u>and any and all facilities used, furnished</u>, or supplied by public utilities, or contract carriers by motor vehicle, in the performance of their duties under this part to their patrons, employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them…

Id. (emphasis added). As a result, prior to the FCC's assertion of jurisdiction over the "rates" paid by ILECs under Joint Use Agreements in its *2011 Pole Attachment Order*, an ILEC that was party to a joint use agreement with a Pennsylvania public utility could have filed a complaint challenging the rates, terms and conditions thereof with the Commission.[15]

In fact, ILECs filed such complaints with the Commission in the past. *See NEPTC Order*; *ALLTEL Order*. In the *NEPTC Order*, the Commission denied an ILEC's complaint regarding a

[15] As more fully explained below, the Commission's regulation of these agreements undermines Verizon's allegations that FirstEnergy possessed and leveraged bargaining power. For this reason, any allegation of bargaining power is irrelevant under Pennsylvania law. *See* Section V.A.3.c.ii.1. *infra*.

joint use agreement and upheld an electric utility's cost-sharing methodology as just and reasonable. *See NEPTC Order*, at *12-13. Relatedly, in the *ALLTEL Order*, the Commission disposed of a complaint between an electric utility and several ILECs surrounding the allocation of tree trimming costs under joint use agreements. *See ALLTEL Order*, at *2 and *ALLTEL ID*, at *52. Both the *NEPTC Order* and the *ALLTEL Order* recognized that a request to revise a provision of a joint use agreement is subject to review under the standard set forth in Section 508 of the Public Utility Code. For purposes of this proceeding, this means that Verizon must demonstrate that the rates set forth in the Joint Use Agreements are "unjust and unreasonable" or otherwise "adverse to the public interest and the general well-being of this Commonwealth," in order for the Commission to exercise its authority to vary, reform or revise the rates.[16]

The Commission's history of resolving complaints against rates charged by electric utilities to ILECs under existing joint use agreements further bolsters the Commission's treatment of FCC precedent as non-binding in the *2019 Final Rulemaking Order*. In its Notice of Public Rulemaking, *Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission*, Docket No. L-2018-3002672 (Order entered July 13, 2018) ("*PUC NPRM*"), the Commission identified recent efforts to enhance broadband deployment and further indicated that "asserting state jurisdiction over pole attachments at this time will assist policymakers in their efforts to expand access to both wireline and wireless broadband services…particularly in rural areas of the Commonwealth." *PUC NPRM* at 7.

In exercising reverse preemption, the Commissions further acknowledged that Section 224 of the Communications Act requires that regulators (the FCC and state commissions) consider the interests of both types of customers, but that the Commission itself has "knowledge and expertise

[16] As explained in Section V.A.2. below, Verizon has failed to do so, and its Complaint should be denied.

regarding telecommunications and electric distribution systems, which will allow it to balance statewide broadband goals against EDCs' concerns for safety and reliability of electric service and infrastructure." *2019 Final Rulemaking Order* at 9. Specifically, the Commission highlighted problems that utilities and pole attaching entities faced before the FCC and expressed its intent to "create safeguards to ensure that the Commission retains authority to make basic policy choices and to guide and ensure that the FCC rules to be incorporated have been appropriately vetted both at the FCC and here in Pennsylvania." *2019 Final Rulemaking Order* at 23.

The Commission further noted concerns of pole attaching entities with the FCC's processes, and the forum itself. *2019 Final Rulemaking Order* at 42 (quoting the comments of the PTA, "While the FCC has recently taken strides to improve the situation…the agency has proven not to be an effective venue for adjudicating grievances which [PTA members] may have with pole owners for a variety of reasons..."). The Commission concluded its formal processes "will allow for prompt resolution of disputes and utilize staff knowledgeable about pole attachment issues…[and] the Commission's assertion of jurisdiction will benefit those who often struggle with defending themselves in FCC proceedings." *2019 Final Rulemaking Order* at 47.

Further crediting these concerns, the Commission indicated that it would not be controlled by FCC decisions in resolving pole attachment disputes. It explained:

> maintains in its final form regulations that FCC and court decisions and precedent <u>will be persuasive, and not controlling precedent</u>…the Commission anticipates challenges to the federal rules that may come to the Commission for resolution, which have not yet been adjudicated on the federal level once we assume jurisdiction. <u>Similarly, we can envision instances where an interpretation by the FCC, which is charged with developing a nationwide scheme, may not align with Pennsylvania interests</u>…
>
> [the Commission's regulations do] not preclude the Commission from using its discretion to form separate interpretations to benefit the Commonwealth. <u>FCC orders are persuasive, meaning that they do not establish binding precedent</u> that the Commission would

> follow regardless of whether any particular application would be rational under a set of given circumstances.

2019 Final Rulemaking Order at 50 (emphasis added). Indeed, consistent with the Commission's representations in its *2019 Final Rulemaking Order*, both the FCC's *2011 Pole Attachment Order* and *2018 Pole Attachment Order* are not binding authority in this proceeding.

The Commission's *2019 Final Rulemaking Order* makes clear that the Commission must apply its prior pole attachment dispute precedent in this case, consistent with the Public Utility Code. Failing to do so would not only risk exceeding its statutory authority, but it would undermine one of the fundamental purposes for the Commission to have reverse preempted the FCC: to consider and balance the interests of electric utilities and electric utility ratepayers in the regulation of pole attachments. As FirstEnergy witness Mr. Zarakas explained:

> The joint use agreements under review in the current case involve sharing of a pole network in its entirety, a situation which is amenable to the sharing of all costs, including common costs and unusable space, as reflected in the agreements. However, the rates produced under the FCC's (old and new) telecom rate formulas exclude such common costs, in whole or in part. Accepting the FCC's rate formulas in their entirety would mean the Commission would be precluded from applying the same approach that it applies to electricity rates to the calculation of pole attachment rates.

(FirstEnergy St. 2-R, p. 22 (emphasis added).)

For these reasons, the Commission's review of Verizon's Complaint is controlled by the Public Utility Code and Pennsylvania law. And, as explained below, Verizon has failed to demonstrate it is entitled to relief under the Public Utility Code and Pennsylvania law.

b. Verizon's Complaint Does Not Allege Any Violation Of The Public Utility Code, Or A Commission Regulation Or Order.

Under Section 701 of the Public Utility Code, a complainant "may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any

regulation or order of the commission." 66 Pa.C.S. § 701. Under Section 701, a complainant is "required to allege a violation of the Public Utility Code, our regulations, or our orders." *Ruth McGarvey and Iva Jean Conley v. Verizon Pennsylvania Inc.*, Docket No. C-2009-2111253, 2009 Pa. PUC LEXIS 110, at *18 (Initial Decision dated Nov. 10, 2009), *adopted as final without modification* (Order entered Jan. 12, 2010) (citing 66 Pa. C.S. § 701; 52 Pa. Code § 5.21(a); *West Penn Power Co. v. Pa. P.U.C.*, 478 A.2d 947 (Pa. Cmwlth. 1984)).

Verizon's Complaint, which was transferred to the Commission, is the same Complaint it filed before the FCC; Verizon has never amended the Complaint. Importantly, at no point in Verizon's Complaint does it allege any violation of the Public Utility Code or Commission regulations or orders. Rather, Verizon's Complaint is entirely premised on alleged violations of federal law, FCC regulations and FCC precedent.

While Section 5.92 of the Commission's regulations, 52 Pa. Code § 5.92, permits a party to amend its pleadings to conform to the evidence received under certain conditions, the Commission has specifically declined to permit amendments that "have the effect of broadening the issues in the proceeding by providing an additional regulatory provision upon which the Commission could find a violation…" *See Pa. Pub. Util. Comm'n, Bureau of Investigation & Enforcement v. Charles H. Edwards, Jr.*, Docket No. C-2016-2537014, 2018 Pa. PUC LEXIS 32, at * 28 (Order entered Feb. 8, 2018). In this proceeding, such an amendment would not only "broaden the issues" beyond those alleged in the Complaint, it would also allow Verizon to cure a fundamental, threshold deficiency in its Complaint. Moreover, as explained below, Verizon has, in fact, presented no evidence upon which to conform its Complaint to allege any violation of the Public Utility Code or Commission regulation or order. *See* Sections V.A.2.c.-d. *infra*.

As such, Verizon has failed to meet the threshold requirement of Section 701, to "allege a

violation of the Public Utility Code…[Commission]…regulations, or…[Commission]…orders," and its Complaint should be dismissed.

c. Verizon Presented No Evidence That The Rates It Pays Under The Joint Use Agreements Are Unjust And Unreasonable Under Pennsylvania Law.

Verizon has presented no evidence in this proceeding that the rates it pays under the Joint Use Agreements are unjust and unreasonable under Sections 508, 1301, 1304 and 1309 of the Public Utility Code, 66 Pa.C.S. §§ 508, 1301, 1304 and 1309, or Pennsylvania law. Its Complaint should therefore be denied.

i. Verizon Presented No Evidence That The Rates, Terms And Conditions Of The Joint Use Agreements Are Unjust And Unreasonable Under The Public Utility Code.

To carry its "very heavy burden"[17] Verizon must demonstrate the rates it pays FirstEnergy are unjust and unreasonable under Sections 1301 and 1309 of the Public Utility Code, Verizon must demonstrate that this rate unreasonably benefits FirstEnergy's investors at the expense Verizon. *Nat'l Fuel*, 464 A.2d at 564. Specifically, Verizon must demonstrate that the rates it pays under the Joint Use Agreements exceed FirstEnergy's cost of service, *see Lloyd*, 904 A.2d at 1020, and produce revenues in excess of a fair return on the fair value of the utility's property used to provide the regulated service, *see Nat'l Fuel*, 464 A.2d at 564. Only if the Commission first determines the rate Verizon pays under the Joint Use Agreements is unjust and unreasonable can it "determine the just and reasonable" rate and grant Verizon the relief it seeks.

Verizon presented no evidence that the rates it pays exceed cost of service or produce an excessive rate of return under Pennsylvania law and practice. To make such a showing, it is necessary for Verizon to review the rates it pays and the costs incurred by FirstEnergy under the

[17] *See Shenango*, 686 A.2d at 914 (Pa. Cmwlth. 1996) (citing *Zucker* and *Brockway Glass Co.*).

Joint Use Agreements consistent with the basic ratemaking formula used by this Commission for over 100 years. "The basic ratemaking formula…provides that a utility's revenue requirement (RR) is equal to the amount of proper expenses (E) plus a reasonable rate of return (ROR) on the rate base (RB): RR = E + ROR(RB)." *Pennsylvania Power Co. v. Pa. Pub. Util. Comm'n*, 561 A.2d 43, 46 (Pa. Cmwlth. 1989). Verizon's evidence on this point fails in two critical respects.

1. Verizon Presented No Evidence Regarding The Cost Of Common Equity.

To apply the above-cited formula, one must know the rate of return at present rates and compare that return to a "fair rate of return." Verizon presented no evidence as to either the current rate of return produced by existing rates under Pennsylvania law and practice, or what a fair rate of return would be under current market conditions. Without any of this evidence, it is not possible for the Commission to determine the rates paid by Verizon under the Joint Use Agreements are unjust and unreasonable under Pennsylvania law. *See Met-Ed Indus. Users Group*, 960 A.2d at 193 n.2 (requiring that any finding of fact by the Commission must be supported by substantial evidence). The determination of the cost of common equity capital is a fundamental element of the ratemaking formula and provides the standard for determining whether current rates are just and reasonable. The cost of equity is a market based, investor expected return and is based on a comprehensive review of equity markets and fundamental risk analysis. *See Bluefield Waterworks and Imp. Co. v. P.S.C. of West Virginia*, 262 U.S. 679, 692 (1923) ("a return on the value of the [utility's] property…equal to that generally being made at the same time on investments in other business undertakings which are attended by corresponding risks and uncertainties.")

The Commission relies primarily on the discounted cash flow method for determining the

cost of common equity, with other methods acting as a check.[18] As the Commission has stated: "in most proceedings…the subject of the appropriate cost rate for common equity is a hotly contested issue." *Pa. Pub. Util. Comm'n, et al. v. The Peoples Natural Gas Co.*, Docket No. R-880961, 1989 Pa. PUC LEXIS 36, at *68 (Order dated Jan. 27, 1989). Verizon has failed to present any evidence on the current cost of equity. This constitutes a fundamental flaw in its case, which makes it impossible to show on this record that FirstEnergy's current pole attachment rates are unjust and unreasonable under the Public Utility Code and Pennsylvania law.

Verizon witness Dr. Calnon tacitly admits this absence of proof by attempting to criticize FirstEnergy's calculation of fully allocated cost-based rates under Pennsylvania standards, stating "The [Federal Communications] Commission's rate formulas cannot be inconsistent with Pennsylvania practices because they are the formulas the [Federal Communications] Commission adopted following a thoroughly vetted rulemaking proceeding in which FirstEnergy had ample opportunity to make its arguments." (Verizon St. 2.1, p. 54.) However, the Public Utility Code is binding upon the Commission, *see Feingold*, 383 A.2d at 794, whereas the FCC's rulemaking orders and precedent are non-binding. *See 2019 Final Rulemaking Order* at 50. As such, Verizon is required to present evidence regarding the calculation of rates under the Commission's ratemaking formula, in order to sustain its burden of proof.

2. Verizon's Cost Of Service Calculations Are Inconsistent With Long-Standing And Controlling Pennsylvania Precedent And Should Be Rejected.

Verizon's cost of service calculations are inconsistent with controlling and long-standing Commission precedent and should be rejected. The "cost to serve" is the "polestar" of

[18] *See, e.g., Pa. Pub. Util. Comm'n v. City of DuBois-Bureau of Water*, Docket No. R-2016-2554150, at pp. 96-97 (Order entered March 28, 2017).

Pennsylvania ratemaking. *Lloyd*, 904 A.2d at 1020. The Commission has explicitly applied these concepts to rates charged under joint use agreements, as well. In the *NEPTC Order*, the Commission denied a complaint filed by an ILEC alleging that the cost-sharing methodology for joint-use pole attachments between the ILEC and an electric utility should be revised. *NEPTC Order*, at *1. At issue was a "Joint Use Agreement" that specified "the parties[']reciprocal responsibilities and obligations in joint-use situations." *Id.*, at *2. The crux of this dispute, the Commission concluded, was "the allocation of the common areas of the joint-use pole." *Id.*, at *11. Under the existing terms of the agreement:

> each utility is allocated 100 percent of the costs for their respective areas of attachment with the remaining common areas allocated on a 50/50 basis. This method of allocation results in PP&L being allocated 58 percent of the carrying costs with the remaining 42 percent being allocated to the telephone utility.

Id., at *9. The utility sought to revise these terms such that:

> the annual carrying charge for a joint-use pole is $ 38.00 and, as a result of the foregoing, PP&L pays $ 22.00 per year per pole when attaching its facilities to a telephone utility-owned pole and telephone utilities pay $ 16.00 per year per pole to PP&L when attaching their facilities to a PP&L-owned pole.

Id., at *10. The ILEC, however, sought to revise the cost allocation methodology so that the utility "would assume responsibility for more than eighty (80) percent of the common area of a joint-use pole even though both utilities enjoy an equal benefit from the common area." *Id.*, at *11.

The Commission held that "it is only fair and reasonable to access[sic] the costs of the common area of a joint-use pole on an equal basis" and that the electric utility's "proposed allocation methodology is an appropriate mechanism to allocate joint-use costs and should be approved." *Id.*, at *12. It based this holding on its recognition that:

> [o]ne of the prime reasons for the joint use of poles <u>is to avoid the duplication of facilities wherever possible and realize the attendent[sic] savings by each utility</u>. If a joint-use pole was

> unavailable, each utility would have to bear the full cost of the entire pole including that area of a joint-use pole that is common to both utilities in order to maintain adequate clearance, safety, and support requirements.

Id. (emphasis added). It further explicitly denied the ILEC's argument on exceptions that this allocation methodology violates the requirement that rates be "just and reasonable" under Section 1301 of the Public Utility Code. *Id.*, at *12-13.

The Commission's ruling in the *NEPTC Order* recognizes the fundamental purpose of joint use agreements—*i.e.*, to avoid the duplication of facilities and allow both parties to avoid added costs—and concluded that the methodology proposed by the electric utility that equally shared the common costs of the pole was "reasonable" under the Public Utility Code. Verizon has failed to follow this precedent in two respects. First, as explained in Section V.A.1.c., the FCC new telecom rate proposed by Verizon is an incremental cost rate, not a fully allocated cost-based rate and bears no relationship to the full and equal cost sharing principles adopted by the Commission in the *NEPTC Order*. Second, as explained below, even under the FCC old telecom rate, common costs not equally allocated because the electric utility is directly assigned 1/3 of the unusable space on the pole and an allocated share of the remaining 2/3 of unusable space. Rather, although "the cost categories are reasonably inclusive, the mathematical formulation does not fully allocate pole costs related to the common space." (FirstEnergy St. 2-R, p. 13.) As such, either approach fails to equally allocate common costs and is clearly inconsistent with controlling Commission precedent.

ii. FirstEnergy Demonstrated That The Rates Verizon Pays Under The Joint Use Agreements Are Below Fully Allocated Cost-Based Rates And Are Consistent With Commission Precedent.

Beyond Verizon's failure to demonstrate the rates it pays under the Joint Use Agreements are unjust and unreasonable under Pennsylvania law, FirstEnergy presented unrebutted record evidence that the rates Verizon pays under the Joint Use Agreements are, in aggregate, below fully

allocated cost-based rates determined using traditional Pennsylvania ratemaking practices.[19] In this regard, the rates Verizon pays already adequately balance the interests of Verizon and FirstEnergy and FirstEnergy's electric ratepayers.

Consistent with the above-described long-standing Pennsylvania principles, FirstEnergy demonstrated that the Joint Use Agreements and the rates established thereunder are:

> structured to cover the full cost of owning and maintaining poles, while reflecting the parties' historic mutual agreement on the proportion to be borne by each party…The important common feature is that they are based the full pole cost. This is also consistent with long-standing cost of service rate regulation at the Commission.

(FirstEnergy St. 1-R, p. 15.) Specifically, FirstEnergy calculated fully allocated cost-based rates that reflect the full cost of service with the cost of the common space shared equally among attaching entities, *see NEPTC Order*, and compared those rates to the rates that Verizon pays under the Joint Use Agreements. (FirstEnergy St. 2-R, pp. 17-19.) As reflected in Tables 4-6 in FirstEnergy St. 2-R, which are reproduced below, the rates paid by Verizon under the Joint Use Agreements are, in aggregate, ***below*** the fully allocated cost-based rates.[20]

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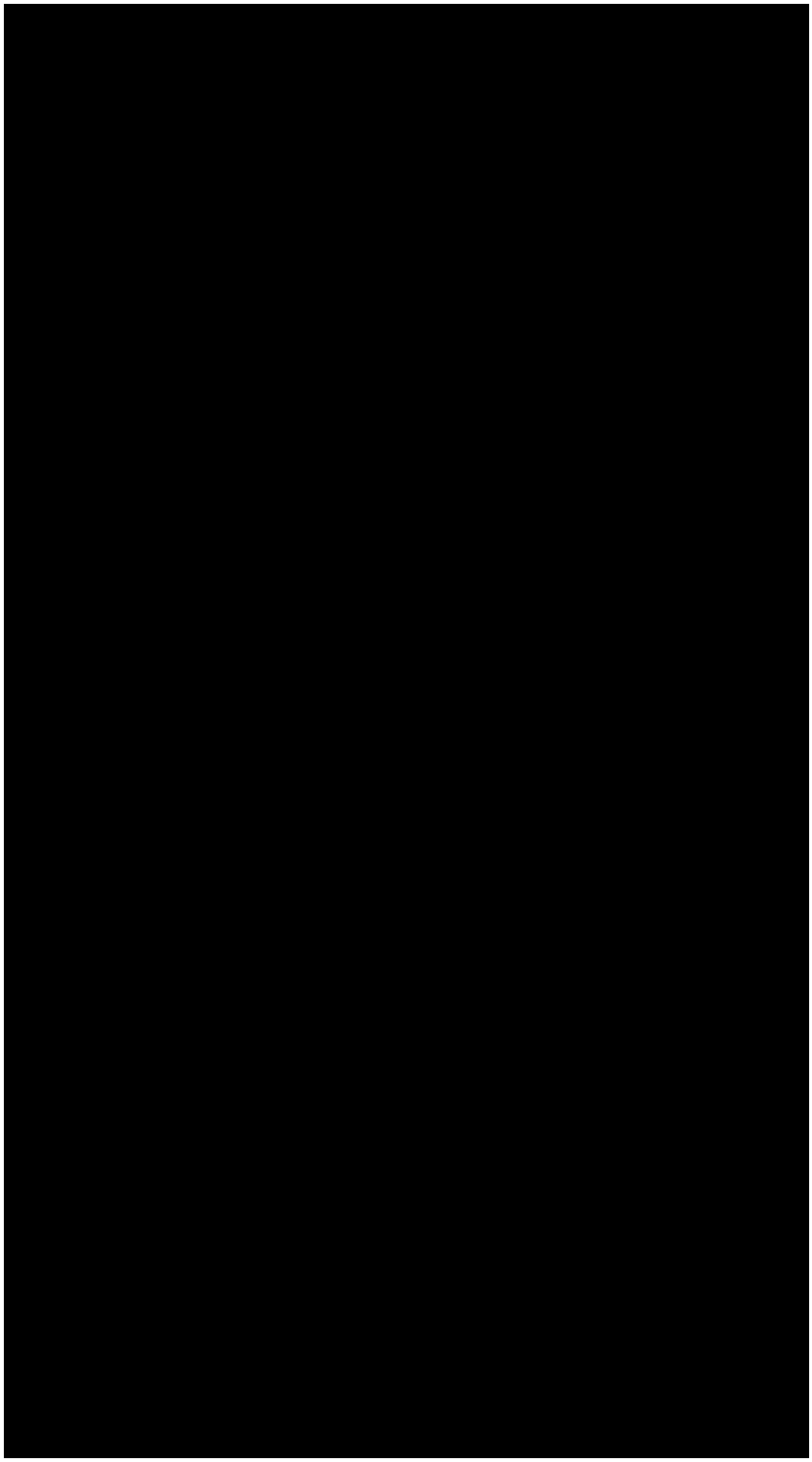
[redacted]

[19] As explained above, Verizon, the party with the burden of proof, presented no evidence that current rates are unjust and unreasonable. In particular, it presented no evidence on the cost of common equity and therefore no basis to judge the reasonableness of current rates. Though not required to do so as it does not have the burden of proof, FirstEnergy calculated fully allocated cost rates using the cost of common equity from its last fully litigated rate proceedings in order to provide affirmative evidence that its pole attachment rates are just and reasonable.

[20] This comparison also adjusts Verizon's rates for FirstEnergy's use of Verizon poles to a fully allocated cost of service rate. (FirstEnergy St. 2-R, p. 18.)



[END PROPRIETARY] Indeed, the rates in the Joint Use Agreements are well below fully allocated cost of service. In total, revenues based on fully allocated costs for the years 2011 through 2019 would have exceeded the revenues from the actual rates by **[BEGIN**

PROPRIETARY] [redacted] **[END PROPRIETARY]**. (FirstEnergy St. 2-R, p. 19.)

Verizon takes umbrage with FirstEnergy's calculation of fully allocated cost-based rates, and erroneously asserts that FirstEnergy is proposing to increase the rates Verizon pays. (Verizon St. 2.1, p. 53.) FirstEnergy is not proposing to modify the rates Verizon pays in the Joint Use Agreements; it advanced these calculations to demonstrate that the rates contained in the Joint Use Agreements are not unjust and unreasonable, and should not be modified as proposed by Verizon.

Moreover, FirstEnergy demonstrated that the rates Verizon pays under the Joint Use Agreements do not unreasonably benefit the utility's investors at the expense of the utility's ratepayers. *Nat'l Fuel*, 464 A.2d at 564. Instead, FirstEnergy showed that the rates Verizon pays under the Joint Use Agreements provide it with substantial material benefits,[21] and that the rates paid by Verizon benefit FirstEnergy's ratepayers and not its investors.

FirstEnergy witness Ms. Joanne M. Savage explained:

> When the Companies file base rate proceedings, joint use and other pole attachment revenues are a credit in the calculation of the total revenue requirement. In other words, this credit acts as an offset to directly reduce the amount of revenues required from the Companies' electric customers. The Companies' rates are designed so the Companies do not profit from providing pole attachment services to Verizon and other third parties as one hundred percent of the joint use revenues offset the rates to be paid by electric customers.

(FirstEnergy St. 3-R, pp. 3-4 (emphasis added).) In this regard, FirstEnergy itself obtains no benefit from the rates its charges Verizon under the Joint Use Agreements. Rather, its electric ratepaying customers do, in the form of decreased electric utility rates.

For the reasons explained above, Verizon has failed to demonstrate the rates it pays under the Joint Use Agreements are unjust and unreasonable under Pennsylvania law. Verizon presented

[21] *See* Section V.A.3.iii. *infra*.

no evidence sufficient to support a finding that the rates are unjust and unreasonable and, moreover, FirstEnergy demonstrated that the rates Verizon pays are lower than the rates Verizon would pay if the Joint Use Agreements were calculated under long-standing Pennsylvania ratemaking principles that have been repeatedly determined to produce just and reasonable rates.

d. Verizon Presented No Evidence That The Rates, Terms And Conditions Of The Joint Use Agreements Are Unduly Discriminatory Under Section 1304 Of The Public Utility Code.

Verizon suggested for the first time in surrebuttal testimony that it may argue the rates it pays under the Joint Use Agreements are discriminatory in violation of the Public Utility Code. (Verizon St. 2.1, pp. 55-56.) To demonstrate the rates it pays are "unduly discriminatory" under Section 1304, Verizon must show FirstEnergy was bent on collecting more than a reasonable rate from Verizon, for the purpose of supplying a deficiency created by inadequate rates charged other customers. *See Park Towne*, 433 A.2d at 614.

FirstEnergy has rebutted Verizon's unfounded claims that it is collecting more than a reasonable rate from Verizon under the Joint Use Agreements under Pennsylvania law. *See* Section V.A.2.c.ii. *supra*. However, Verizon has submitted no evidence at all that the alleged unreasonable rate it pays is being charged by FirstEnergy "to supply a deficiency created by inadequate rates charged" to other FirstEnergy customers.

In fact, the relief Verizon seeks would produce unjust and unreasonable rates and create an unlawful subsidy that violates Section 1304 of the Public Utility Code. Importantly, FirstEnergy demonstrated that the new telecom rate is far below fully allocated cost-based rates. (*See* FirstEnergy St. 1-R, Tables 1-3.)

FirstEnergy also demonstrated that "[a] reduction in joint use fees paid by Verizon will result in lower joint use revenues and therefore a smaller credit to electric ratepayers…resulting in higher base distribution rates than would otherwise be the case absent the reduction in joint use

fees." (FirstEnergy St. 3-R, p. 4.) Any reduction in the rates Verizon pays will, therefore, result in higher rates for Pennsylvania electric rate payers than they would pay otherwise.[22] Stated differently, FirstEnergy would resultantly be forced to collect more revenues from its electric service customers to accommodate (i.e., subsidize)[23] a joint use rate that is inadequate and substantially below a normal cost of service based rate. *Park Towne*, 433 A.2d at 614.

Verizon witness Dr. Calnon attempts to rebut this evidence and asserts that "The overpayment amounts are so minimal in comparison to FirstEnergy's operating revenues, it is impossible to conclude that consumer rates would need to increase were FirstEnergy to charge the competitively neutral pole attachment rates required by law." (Verizon St. 2.1, p. 57.) Whether the reduction in rates would trigger a base rate proceeding for FirstEnergy's EDCs is irrelevant and misrepresents FirstEnergy's testimony. What is relevant is that Verizon's proposed rate reduction would fail to provide FirstEnergy an adequate return from its pole attachment rates and this shortfall inevitably would be subsidized by FirstEnergy's electric service customers. This is unreasonable rate discrimination under Pennsylvania law. (*See* FirstEnergy St. 3-R, p. 7.)

Relatedly, Verizon submits no evidence that the new rate it seeks would benefit broadband deployment in Pennsylvania sufficient to justify the unlawful subsidy it seeks. Verizon specifically objected to a discovery request seeking information regarding how a reduction in the rates FirstEnergy charges Verizon would enhance broadband services or deployment in Pennsylvania as irrelevant. (*See* Exhibit JMS-1 (Verizon's Answer to FE to Verizon Set II, No. 8.) Indeed, Verizon wants a substantial discount under the Joint Use Agreements, and it is happy

[22] Until the FirstEnergy EDCs have a base rate case and recover any rate reductions, they will fail to earn a fair rate of return on their investment in poles. Once the rate case occurs, and FirstEnergy recovers additional revenue from electric ratepayers the rate discrimination will occur. In this regard, FirstEnergy must be allowed to defer for future recovery the full amount of the differences with carrying charges between such modifications and the joint use revenue amounts embedded in its electric rates. (*See* FirstEnergy St. 3-R, p. 7.)

[23] (FirstEnergy St. 1-R, p. 6; *see also* FirstEnergy St. 2-R, pp. 20-22.)

for FirstEnergy's Pennsylvania ratepayers to foot the bill with no assurance that this reduction will actually benefit broadband services or deployment to them or any other Pennsylvanians. Verizon's request directly undermines why the Commission preempted FCC jurisdiction—to balance the interests of pole attachers, electric utilities and electric utilities' ratepayers in facilitating broad band deployment.

For these reasons, Verizon has failed to demonstrate the rates it pays under the Joint Use Agreements are unduly discriminatory under Section 1304 of the Public Utility Code.

3. Even If The Commission Relies Upon Applicable FCC Precedent, Verizon Has Failed To Demonstrate The Joint Use Agreements Are Unjust And Unreasonable.

Verizon has also failed to carry its burden of proof under Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), to demonstrate that the rates it pays under the Joint Use Agreements are unjust and unreasonable under FCC authority. At the outset, Verizon must first demonstrate that it terminated the Joint Use Agreements (or genuinely lacked the ability to do so) and entered into new joint use agreements after the FCC's issuance of its *2011 Pole Attachment Order*. *2011 Pole Attachment Order* ¶ 216. Verizon must also demonstrate that the Joint Use Agreements constitute "new," "newly-negotiated" or "newly-renewed" agreements or that FirstEnergy possessed and leveraged bargaining power during rate negotiations, which prevented Verizon from obtaining a new agreement with the new rate it seeks. *See 2018 Pole Attachment Order* ¶¶ 124-127.

If Verizon makes this showing, it is entitled, under FCC precedent, to a presumption that it is "similarly situated" to its competitors (*i.e.*, third-party non-pole owning attachers) relative to their ability to attach to FirstEnergy's poles and, therefore, must be charged the new telecom rate. *See 2018 Pole Attachment Order* ¶¶ 124-127. However, FirstEnergy can rebut (and has rebutted) this presumption "with clear and convincing evidence that the incumbent LEC receives net benefits

under its pole attachment agreement with the utility that materially advantage the incumbent LEC over other telecommunications attachers." *2018 Pole Attachment Order* ¶ 123. Once FirstEnergy has rebutted the presumption that Verizon is similarly situated to its competitors, it is left "to the parties to negotiate the appropriate rate or tradeoffs to account for such additional benefits," the maximum rate being no more than the old telecom rate. *2018 Pole Attachment Order* ¶¶ 128-129.

a. Overview Of FCC Standards.

Before addressing the merits of Verizon's case under FCC authority, it is important to understand the historical context behind the FCC's regulation of pole attachments. Federal regulation of pole attachments began in 1978 when the U.S. Congress passed the Pole Attachment Act and added Section 224 to the Communications Act of 1934. (FirstEnergy St. 2-R, p. 3.) The Pole Attachment Act was passed due to cable television industry growth and the need for these companies to access the poles owned by ILECs and electric utilities, in order to connect to customers. (FirstEnergy St. 2-R, p. 3.)

Under the 1978 Pole Attachment Act, the FCC was granted the authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable."[24] Section 224(d) of the Communications Act provided a cost-based methodology for attachments "used by a cable television system solely to provide cable service." This became known as the "cable rate formula."[25] However, neither Section 224(d) nor the "cable rate formula" were applicable to the rates charged under joint use agreements between ILECs and electric utilities.

Thereafter, Congress passed the Telecommunications Act of 1996 and granted providers

[24] 47 U.S.C. § 224(b)(1).
[25] (FirstEnergy St. 2-R, p. 3, n.2 (citing various references).)

of telecommunications services (other than ILECs) with non-discriminatory access to poles, conduit and rights-of-way owned or controlled by electric utilities and ILECs. (FirstEnergy St. 2-R, p. 5.) The Telecommunications Act of 1996 also added Section 224(e) to the Communications Act of 1934. Section 224(e) provided that a cost-based methodology be applied to "attachments used by telecommunications carriers to provide telecommunications services" – which became known as the "telecom rate formula," which would subsequently be called the "pre-existing telecom rate" or the "old telecom rate." (First Energy St. 2-R, pp. 5-6.) Again, however, "telecommunications carriers" in this context excluded ILECs. As such, neither Section 224(e) nor the old telecom rate were applicable to the rates charged under joint use agreements between ILECs and electric utilities.

In 2011, however, the FCC issued the *2011 Pole Attachment Order*, the FCC: (1) created the "new telecom rate" by reducing the apportionment of common pole costs included in the "telecom rate formula"; and (2) reinterpreted portions of Section 224 and concluded that the ILECs "are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)." (FirstEnergy St. 2-R, pp. 10-11.) The FCC took these actions in response to the National Broadband Plan. *See 2011 Pole Attachment Order* ¶¶ 133-134.

While this was the first instance where the FCC indicated that it would regulate the rates, terms and conditions of joint use agreements between electric utilities and ILECs, it concluded it would not be appropriate to treat ILECs "identically to telecommunications carrier or cable operator attachers in all circumstances" as the ILECs "often can be differently situated from other attachers, both due to the terms of existing joint use agreements and because of their continuing pole ownership." (FirstEnergy St. 2-R, pp. 10-11.)

In drawing this distinction between ILECs (such as Verizon) and its competitors, the FCC

further distinguished between existing and new joint use agreements between electric utilities and ILECs. With respect to existing agreements, such as the Joint Use Agreements at issue here, FCC found that such agreements were entered into at a time when the parties had more balanced negotiating positions, and concluded that it was "unlikely to find that the rates, terms and conditions in existing joint use agreements unjust or unreasonable." (FirstEnergy St. 2-R, p. 11 (referencing *2011 Pole Attachment Order* ¶ 207).)[26] With respect to new agreements,[27] FirstEnergy witness Mr. Zarakas explained:

> the FCC found that, when an ILEC can demonstrate that "it is obtaining pole attachments on terms and conditions that leave them comparably situated to telecommunications carriers or cable operators," then "competitive neutrality counsels in favor of affording incumbent LECs the same rate as the comparable provider."[] On the other hand, in circumstances when the pole attachment agreement provides the ILEC with a material advantage over telecommunications carriers or cable operators, the FCC found that a higher rate can be charged, and that the old telecom rate formula (i.e., the telecom rate formula in place prior to the FCC's modification of such in its 2011 Pole Attachment Order) could serve as a reference point in making such a determination.[]

(FirstEnergy St. 2-R, p. 11 (footnotes omitted).)[28] As such, the FCC determined that it would handle complaints regarding joint use agreements on a case by case basis.

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[26] Importantly, these agreements were negotiated and entered into at a time when the Commission possessed the authority to resolve complaints regarding "rates" for pole attachment "service" under joint use agreements and did, in fact, exercise this authority. *See* Section V.A.2.a. *supra*.

[27] *See 2018 Pole Attachment Order* ¶ 123 (establishing "a presumption that, for newly-negotiated and newly-renewed pole attachment agreements between incumbent LECs and utilities, an incumbent LEC will receive comparable pole attachment rates, terms, and conditions as a similarly-situated telecommunications carrier or a cable television system (telecommunications attachers)." (emphasis added)).

[28] FirstEnergy witness Mr. Zarakas further explained the principle of "competitive neutrality," which the FCC relied upon in making this determination as follows:

> competitive neutrality refers to the assurance of a level playing field with respect to input prices. Specifically, ILECs currently compete with CLECs and cable companies to provide a range of communications services, notably including broadband internet access, to customers. Competitive neutrality suggests that each should be charged the same price for the same service – in this case, pole attachments. However, the FCC recognized that the arrangements associated with attaching to poles may differ across contracts, and that superior arrangements

In its *2018 Pole Attachment Order*, the FCC took further steps to "to improve and speed the process of preparing poles for new attachments, or 'make ready'" in order to further facilitate the deployment of broadband services. *See 2018 Pole Attachment Order* ¶ 2. Therein, it further noted that ILECs "may not be in equivalent bargaining position with electric utilities in pole attachment negotiations in some cases" and switched the burden of establishing whether there are similarly situated circumstances from the ILECs to the utilities for purposes of its review of newly-negotiated and newly-renewed pole attachment agreements. (FirstEnergy St. 2-R, pp. 15-16 (referencing *2018 Pole Attachment Order* ¶ 124).) However, the FCC only relied upon the following two findings to conclude that bargaining power for ILECs to negotiate new agreements may have continued to decline: (1) ILECs currently own fewer poles than they did at the onset of the joint use agreements; and (2) ILECs pay higher rates for pole attachment than do other telecommunications providers and cable companies. (FirstEnergy St. 2-R, p. 16.) The FCC did not assess the extent to which the presence of less-costly alternatives and/or outside options available to ILECs reduces any potential disparity in the relative bargaining power of the parties that pole ownership might convey. (FirstEnergy St. 2-R, pp. 16-17.)

As such, the FCC continued its distinction between new and existing joint use agreements and adopted a presumption that, "for newly-negotiated and newly-renewed pole attachment agreements between incumbent LECs and utilities, an incumbent LEC will receive comparable pole attachment rates, terms and conditions as a similarly-situated telecommunications carriers or a cable television system." *2018 Pole Attachment Order* ¶ 123. However, in cases in which the utility is able to rebut the presumption that an ILEC is similarly situated to its competitors, the

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> (from the attacher's standpoint) provide them with greater value than do other pole attachment arrangements, and accordingly should come at a higher price.

(FirstEnergy St. 2-R, p. 12.)

FCC ruled that the "old telecom rate" is the maximum rate that an electric utility and ILEC may negotiate. *2018 Pole Attachment Order* ¶ 129.

The FCC did not, however, clarify its guidance in the *2011 Pole Attachment Order* on resolving complaints by ILECs with respect to the pole attachment rates that they are charged by electric utilities. (FirstEnergy St. 2-R, pp. 17-18.) Rather, with respect to the rates paid by ILECs under new, newly-negotiated and/or newly-renewed agreements, Mr. Zarakas explained:

> the FCC established a range of acceptable rates (with respect to new and newly-renewed agreements) that an electric utility can charge an ILEC. The low end of the range equals the rate produced under the new telecom rate formula and is applicable to circumstances in which the attachment terms and conditions under the joint use agreement are comparable to the leasing arrangements under which non-ILECs are able to attach to electric utility poles. The high end of the range equals the rate produced under the FCC's old telecom rate and is applicable to circumstances in which the ILEC receives net benefits that materially advantage it over other telecommunications attachers. The FCC left it to the parties (i.e., the electric utility and the ILEC) "to negotiate the appropriate rate or tradeoffs to account for such additional benefits."[]

(FirstEnergy St. 2-R, pp. 17-18 (emphasis added) (footnotes omitted).)

Importantly, throughout its regulation of pole attachments and joint use agreements, the FCC has not found the "new telecom rate" to be the just and reasonable rate under an existing joint use agreement, such as the Joint Use Agreements at issue here. As explained below, Verizon fails to demonstrate it is entitled to the new telecom rate under the existing Joint Use Agreements under the FCC's precedent.

b. Verizon Failed To Terminate The Joint Use Agreement And Did Not Demonstrate That It Genuinely Lacked The Ability To Do So.

Under the *2011 Pole Attachment Order*, Verizon was required to terminate the existing Joint Use Agreements before it could permissibly file a complaint with the FCC seeking new rates, terms and conditions of joint use. It has not done so and, at no time after the implementation of

the *2011 Pole Attachment Order*, did Verizon lack the power to terminate the Joint Use Agreements, execute a new joint use agreement with FirstEnergy and, thereafter, file a complaint with the FCC challenging the rates, terms and conditions of the new joint use agreement. Furthermore, although Verizon claims it lacked the ability to terminate the Joint Use Agreements, these claims are unsupported by the record and should be rejected. Therefore, and for the reasons explained below, Verizon's Complaint should be dismissed.

i. Verizon Did Not Terminate The Joint Use Agreements.

The FCC concluded in the *2011 Pole Attachment Order* that it "is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable." *2011 Pole Attachment Order* ¶ 216. The FCC further explained that "both incumbent LECs and other utilities have the ability to terminate existing agreements and seek new arrangements, and that, at times, each type of entity has sought to do so." *Id.* Thus, the FCC concluded that it "will review complaints regarding agreements between incumbent LECs and other utilities entered into following the adoption of this Order based on the totality of those agreements." *Id.* (emphasis added).

It is undisputed that the Joint Use Agreements were not "entered into following the adoption" of the *2011 Pole Attachment Order* and have not been terminated. FirstEnergy witness Mr. Schafer unequivocally stated that "all of the Joint Use Agreements and related amendments were executed prior to 2011, and all of them are currently in full force and effect." (FirstEnergy St. 2-R, p. 8.) Verizon witness Mr. Mills similarly testified:

> Verizon and FirstEnergy are party to ten joint use agreements that have similar terms and conditions and were entered with various Verizon predecessor companies between 1958 and 1988. FirstEnergy charges Verizon pole attachment rent each year using rental rate provisions that were amended between 1999 and 2009.

(Verizon Exh. SCM-1 at VZ00004 (emphasis added).) Indeed, the Joint Use Agreements were "last amended" in 2009—two years prior to the issuance of the *2011 Pole Attachment Order*—and both Verizon and FirstEnergy remain parties to each of these agreements.

The parties further submitted a Joint Statement to the FCC, which was transferred into the record of this proceeding that explained:

> Verizon and FirstEnergy are party to ten joint use agreements that contain the rates, terms, and conditions for each party's use of the other party's utility poles. The joint use agreements were entered into with Verizon's predecessor companies between 1958 and 1988 and were amended between 1999 and 2009 to include the currently operative pole attachment rate provisions. Five of the ten joint use agreements are with Met-Ed,[] four are with Penelec,[] and one is with Penn Power.[] The joint use agreements are still in effect.

Therefore, it is undisputed that the Joint Use Agreements at issue were not "entered into" after the FCC's *2011 Pole Attachment Order* was issued and that the Joint Use Agreements have not been terminated and remain in effect.

ii. Verizon Failed To Demonstrate That It Genuinely Lacks The Ability To Terminate The Agreements.

Despite these undisputed facts, Verizon contends that it lacked the ability to terminate the Joint Use Agreements for three primary reasons. First, Verizon claims that the "evergreen clause" contained in the Joint Use Agreements will require it to pay the contract rates after the agreements are terminated. (*See* Compl. ¶ 29.)[29] Second, Verizon asserted, for the first time in its surrebuttal testimony that FirstEnergy did not suggest during negotiations that "Verizon had to terminate the joint use agreements before it could obtain a just and reasonable rate" and unavailingly criticizes FirstEnergy for this alleged failure. (Verizon St. 2.1, p. 45.) Third, Verizon claims that

[29] Verizon makes specific reference to the FCC's decision in *Verizon Fla. LLC v. Fla. Power & Light Co.*, Docket No. 14-216; File No. EB-14-MD-003, 30 FCC Red 1140 at ¶ 25) (Mem. Op. and Order dated Feb. 22. 2015 ("*Verizon v. FPL Order*").

FirstEnergy negotiated in bad faith during negotiations between 2009 and the filing of the Complaint. (*See* Verizon St. 2.1, pp. 42-48.) Each of these arguments is without merit.

The FCC's *2011 Pole Attachment Order* states that "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." *2011 Pole Attachment Order* ¶ 126. And, in the *Verizon v. FPL Order*, relied upon by Verizon, the FCC credited an argument that an ILEC could not terminate the existing agreement and obtain a new one because the utility refused efforts to re-negotiate the agreements in reliance upon an evergreen clause and demanded to keep the current rates for existing attachments and only negotiate a new rate for new attachments. *Verizon v. FPL Order* ¶ 25.

Contrary to the situation identified in the *2011 Pole Attachment Order* and presented in the *Verizon v. FPL Order*, Verizon has failed to demonstrate that FirstEnergy simply relied on the evergreen clause in the Joint Use Agreements and refused to negotiate new rates for new and existing attachments. "In 2011, FirstEnergy and Verizon began discussions on whether they could consolidate and update all of the terms and conditions of these Joint Use Agreements," after prior amendments to the Joint Use Agreements completed in 2009. (FirstEnergy St. 1-R, p. 24.) In fact, the parties had arrived at final terms and conditions for operational matters and simply needed to add a new agreed-upon joint use cost-sharing rate and, during these negotiations, FirstEnergy made several good faith efforts to significantly reduce Verizon's annual rental payments, including reductions of more than **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per year under the existing agreements. (FirstEnergy St. 1-R, pp. 26-27.) FirstEnergy also offered several times to discuss terminating the existing agreements and replace them with FirstEnergy's template CLEC agreement. (*See* FirstEnergy St. 1-R, pp. 28-29; *see also* FirstEnergy St. 2-R, pp.

29-30.) All of these proposals would have applied to both existing attachments and new attachments. Simply stated, there is no record evidence that FirstEnergy refused to negotiate new rates under the Joint Use Agreements for both new and existing attachments, such that Verizon "genuinely lacked the ability to terminate" the Joint Use Agreements under the *2011 Pole Attachment Order*.

Verizon's second argument is similarly without support and approaches the absurd. In response to FirstEnergy's position that, consistent with the FCC's *2011 Pole Attachment Order*, Verizon must first terminate the existing Joint Use Agreements in order to obtain the new telecom rate, Verizon witness Mr. Mills asserted in his surrebuttal testimony:

> I do not recall anyone at FirstEnergy suggesting Verizon had to terminate the joint use agreements before it could obtain a just and reasonable rate. Had FirstEnergy raised the argument sooner, it could have crystalized the dispute and clarified the need for FCC intervention. At a minimum, Verizon could have discussed the issue with FirstEnergy and pointed out that the FCC did not require termination of existing agreements. Nor should it. Termination of the joint use agreements—without a replacement agreement or the statutory right of access to poles enjoyed by Verizon's competitors—would further disadvantage Verizon and increase the cost of deployment of broadband and other advanced services.

(Verizon St. 2.1, p. 45 (emphasis added).) First, Mr. Mills attempts to obfuscate by referring to obtaining "a just and reasonable rate" instead of referring to Verizon's demand of entitlement to the new telecom rate. According to Verizon, the only "just and reasonable rate" is "the new telecom rate," which is flatly contrary to Pennsylvania law and FCC precedent. Second, and more importantly, Mr. Mills' own exhibit refutes this testimony because FirstEnergy's David Karafa said those exact words in an email to Brian Trosper before the Complaint was filed. (Verizon Exhibit SM-5 at VZ000689 "…the FCC will defer to existing agreements and indicates it will reject complaints about agreements like these that no party has sought to terminate.".)

The FCC explicitly stated in the *2011 Pole Attachment Order* that "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" and, otherwise, concluded that it would only review "agreements between incumbent LECs and other utilities entered into following the adoption of this Order." *2011 Pole Attachment Order* ¶ 216. The *2011 Pole Attachment Order* and the FCC's widely acknowledged "sign and sue" rule, make clear that Verizon was required to terminate the agreement and sign a new one, but it ignored and skipped these steps and elected to "sue."

Verizon's third claim that FirstEnergy negotiated in bad faith during negotiations between 2009 and the filing of the Complaint is also without merit. FirstEnergy always negotiates in good faith. (FirstEnergy St. 1-R, p. 24.) Furthermore, FirstEnergy noted above the several different options that it attempted to explore with Verizon to lower the rates Verizon pays under the Joint Use Agreements for both new and existing attachments. In addition, FirstEnergy went so far as to propose to completely transition Verizon out of pole ownership in accordance with what it understood to be Verizon's previously communicated desire. (FirstEnergy St. 1-R, p. 29.)

Throughout these negotiations, however, Verizon refused to consider, let alone accept, any rate that was higher than the new telecom rate. As summarized by Mr. Schafer:

> Throughout these negotiations, Verizon has insisted on FirstEnergy charging Verizon new rental rates based on the FCC's new telecom formula. Whenever FirstEnergy tried to suggest such formulas be used as only as guidance or reference for negotiation, Verizon reiterated its position that it is entitled to the new telecom rate and that FirstEnergy must concede that argument or else negotiations would be pointless… Indeed, Verizon never submitted an offer to FirstEnergy that was not based on the new telecom rate. Verizon was simply attempting to lower the joint use rate substantially below cost of service and maintain all of the other benefits of the Joint Use Agreements.

(FirstEnergy St. 1-R, pp. 24-25 (emphasis added).)

Verizon's unwillingness to negotiate is crystallized by its lack of testimony responding to the following question and answer in Mr. Schafer's rebuttal testimony:

> **Q. What changes to the rates, terms, and conditions of the Joint Use Agreements were offered by FirstEnergy?**
>
> A. During negotiations, FirstEnergy made several good faith offers to significantly reduce Verizon's annual rental payments, including reductions of more than **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per year under the existing agreements. Verizon's response was a flat rejection. Verizon's lack of movement even when FirstEnergy yielded concessions gave no indication that we could find middle ground.

(FirstEnergy St. 1-R, p. 27.) Verizon presents no evidence that (a) rebuts this offer was made or (b) that it did not flatly reject the offer and simply insist on the new telecom rate.

Furthermore, if Verizon had any doubt about whether it was required to terminate the existing Joint Use Agreements and sign a new agreement before it could demand the new telecom rate in good faith, that doubt was eliminated in 2015 in the *Verizon v. FPL Order*. Therein, the FCC explicitly and unequivocally stated that the just and reasonable rate under an existing joint use agreement could be the new telecom rate, the old telecom rate, something higher than the old telecom rate, or the existing contract rates:

> 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)."

Verizon v. FPL Order ¶ 23 (citing *2011 Pole Attachment Order* ¶ 217). Moreover, the FCC explained:

> 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. 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." 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.

Verizon v. FPL Order ¶ 23 (citing *2011 Pole Attachment Order* ¶ 218 (emphasis supplied)).

The aforementioned evidence and authority from the FCC regarding Verizon's affiliate demonstrate that Verizon did not negotiate in good faith. Rather, it insisted upon a rate that the FCC had indicated to Verizon itself that it was not entitled to and refused to entertain any offer from FirstEnergy other than that rate. These actions demonstrate that Verizon never intended to compromise or move from its initial, untenable position.

For the reasons explained above, Verizon cannot show it "genuinely lacked the ability" to terminate the Joint Use Agreements and, therefore, was required to terminate them before filing the Complaint. Therefore, the Complaint must be dismissed.

c. Verizon Is Not Entitled To The New Telecom Rate Under The Joint Use Agreements.

Verizon asserts it is presumed to be "similarly situated" to its competitors (*i.e.*, third-party non-pole owning attachers) relative to their ability to attach to FirstEnergy's poles and, therefore, must be charged the same new telecom rate under the *2018 Pole Attachment Order*. However, Verizon is not entitled to these presumptions under the terms of the *2018 Pole Attachment Order* and, at any rate, FirstEnergy has demonstrated the Joint Use Agreements provides Verizon net material advantages over its competitors by clear and convincing evidence and successfully rebutted the presumption.

i. Verizon Is Not Entitled To The Presumptions Set Forth In The FCC's *2018 Pole Attachment Order* Because The Joint Use Agreements Are Not "New," "Newly-Negotiated," or "Newly-Renewed" Agreements.

In the *2018 Pole Attachment Order*, the FCC "establish[ed] a presumption that, for newly-negotiated and newly-renewed pole attachment agreements between incumbent LECs and utilities, an incumbent LEC will receive comparable pole attachment rates, terms, and conditions as a similarly-situated" attacher. *See 2018 Pole Attachment Order* ¶ 123 (emphasis added). The FCC further recognized that this presumption "will impact privately-negotiated agreements and so the presumption will only apply, as it relates to existing contracts, upon renewal of those agreements." *2018 Pole Attachment Order* ¶ 127 (emphasis added). Furthermore, the FCC explained that "[a] new or newly-renewed pole attachment agreement is one entered into, renewed, or in evergreen status after the effective date of this Order, and renewal includes agreements that are automatically renewed, extended, or placed in evergreen status. *Id.* at ¶ 127, n.475 (emphasis added).

Verizon asserts that the Joint Use Agreements constitute "newly renewed" agreements, because the Joint Use Agreements each allegedly contain an automatic renewal provision. (Compl. ¶ 16.)[30] However, the relevant language in the *2018 Pole Attachment Order* is not that the agreements "automatically renew" or "extend" but instead that the agreements "are automatically renewed" or "extended." *See 2018 Pole Attachment Order* ¶ 217, n.475. In other words, some action by the parties or a triggering event is required before the agreements can become "automatically renewed" or "extended"— the language does not refer to a status that passively exists both before and after the effective date of the order.

[30] (*See* Verizon Exhibit SCM-2 VZ00180 (Met-Ed-Bell JUA, Art. XX), VZ00196 (Met-Ed-Bethel JUA, Art. XIX), VZ00223 (Met-Ed-Contel JUA, Art. XVIII), VZ00239 (Met-Ed-Quaker JUA, Art. XVIII), VZ00253 (Met-Ed-York JUA, Art. XVIII), VZ00333 (Penelec-Bell JUA, Art. XXI), VZ00359 (Penelec-Contel JUA, Art. XXI), VZ00386 (Penelec-General JUA, Art. XXII), VZ00449 (Penelec-Quaker JUA, Art. XXI), VZ00482 (Penn Power JUA, Art. XXIV).)

For example, if the agreements called for automatic renewal at a future date certain absent termination, then the agreements would become "automatically renewed" subsequent to the effective date of the *2018 Pole Attachment Order*. Likewise, if the agreements were to expire and the parties, after the effective date of the *2018 Pole Attachment Order,* decided to "extend" the term, then the agreements would be "extended" following the effective date. Verizon has presented no record evidence that either of these things has occurred. And, more specifically, each of the Joint Use Agreements states that, after an initial term, the agreement "shall continue in force thereafter until terminated by either Party at any time."[31]

Verizon further argues that:

> Under Pennsylvania law, "a contractual provision pursuant to which a contract for a term is renewed automatically for a further term unless, before a specified date, one party gives notice of an intent to terminate" is "a so-called 'automatic renewal provision.'"

(Comp. ¶ 18 (citing *Otis Elevator Co. v. George Wash. Hotel Corp.*, 27 F.3d 903, 904 (3d Cir. 1994).) However, this case is inapposite, because an "automatic renewal" existed only where the "further term" was for a specific duration. This case is simply not relevant to contracts which, like the Joint Use Agreements, "shall continue" for some indefinite period until terminated.

Furthermore, Verizon simply attempts to read the word "continue" out of the Joint Use Agreements and replace it with either "extend" or "renew." This argument effectively tries to revise the language used in the contract to achieve a specific result, because without the modification Verizon is not entitled to the presumptions it seeks.

Such *post hoc* revisions of contractual terms not only violate Pennsylvania contract law,[32]

[31] *See* footnote 30 *supra*.

[32] *See, e.g., New Charter Coal v. McKee*, 191 A.2d 830, 833 (Pa. 1963) ("the law will not reform a written contract so as to make a contract for the parties that they did not make between themselves and certainly never to rescue a party who did not reasonably foresee the consequences of his bargain.").

but also would violate Section 508 of the Public Utility Code and controlling Commission precedent. *See ALLTEL ID* at *49-51 (declining to modify the termination provisions of a joint use agreement).[33] Among other things, such modification would "have a chilling effect on the willingness of regulated public utilities to enter into contracts" and "would arguably contravene both Federal and Pennsylvania constitutional provisions regarding the impairment of the obligation of contracts and deprivation of property without compensation." *Id.*, at *50; *see also Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) and *First Nat'l Bank v. Flanagan*, 528 A.2d 134 (Pa. 1987).

For these reasons, Verizon has failed to demonstrate the Joint Use Agreements constitute "new," "newly-negotiated," or "newly-renewed" agreements subject to the presumptions established by the FCC in the *2018 Pole Attachment Order*.

ii. Verizon Is Not Entitled To The Presumptions Set Forth In The FCC's *2018 Pole Attachment Order* Because FirstEnergy Did Not Possess Or Leverage Bargaining Power During Rate Negotiations.

As noted above, the *2018 Pole Attachment Order* established the presumptions Verizon seeks in order to remedy an alleged disparity in bargaining power between ILECs and electric utilities in rate negotiations under joint use agreements. *See 2018 Pole Attachment Order* ¶ 124. However, Verizon has not demonstrated that FirstEnergy either possessed or leveraged bargaining power during its rate negotiations with Verizon, such that these presumptions are justified in this proceeding.

Verizon claims that FirstEnergy has used (i.e., leveraged) bargaining power over Verizon

[33] The "Commission does not have the authority to vary, reform, or revise" the term provisions of the Joint Use Agreements under Section 508 of the Public Utility Code "because the result [of their application] will be undesirable, aesthetically displeasing, inefficient, or disadvantageous" to Verizon. *See id.*, at *51. Indeed, Verizon's tortured analysis of these provisions appears to be nothing more than a bald attempt to avoid an "undesirable result" under the application of the FCC's *2018 Pole Attachment Order*—i.e., not obtaining the presumptions set forth in that order.

to extract unjust and unreasonable rates. (Compl. ¶¶ 27-28; *see also* Verizon Exhibit SCM-1 at VZ00005 and Verizon Exhibit TJT-1 at VZ00116-117.) Verizon witnesses Mr. Mills and Mr. Tardiff essentially claim that, because Verizon owns fewer poles in the joint-ownership network shared with FirstEnergy, FirstEnergy possessed and leveraged bargaining power over Verizon. (*See* Verizon St. 1.0, p. 2; *see also* Verizon Exhibit SCM-1, pp. 5-13; *see* FirstEnergy St. 2-R, p. 24 (summarizing Verizon's claims).)

Contrary to Verizon's claims, FirstEnergy does not possess and did not leverage any bargaining power over Verizon during rate negotiations because[34] (1) the "rate" for "service" Verizon pays under the Joint Use Agreements was always subject to complaint before the Commission and, therefore, no bargaining power existed; (2) FirstEnergy's relative pole ownership did not change between 2009 (when the last amendments were agreed to) and the filing of the complaint; (3) Verizon possessed less costly alternatives; and (4) FirstEnergy could not practically leverage any bargaining power without suffering significant harm.

1. FirstEnergy Never Possessed Bargaining Power And Could Not Have Exercised Any Such Bargaining Power Because During The Relevant Time Period Pole Attachment Rates Were Regulated By The Commission.

FirstEnergy never possessed bargaining power over Verizon because the "rate" for the "service" charged under the Joint Use Agreements was subject to complaint before the Commission prior to 2011. Indeed, as explained in Section V.A.2.a. *supra*, the Commission had jurisdiction over the rates, terms and conditions of joint use agreements prior to the *2011 Pole*

[34] The FCC has indicated that it would consider factors other than relative pole ownership when reviewing whether an electric utility possessed or leveraged bargaining power. *2011 Pole Attachment Order* ¶ 208, n.618 ("Standard economic theories of bargaining predict that each party will consider its best alternative to a negotiated agreement when negotiating…However, if there were less-costly alternatives for the incumbent LEC to pole deployment, or additional costs that the electric utility would need to consider under the best outside alternative, this would reduce the disparity in the relative bargaining power of the parties.").

Attachment Order and resolved disputes regarding such agreements between EDCs and ILECs in the past.

Mr. Zarakas explained that the presence of regulation is an additional factor which mitigates or undermines the presence of bargaining power. (FirstEnergy St. 2-RJ, pp. 12-13.) Importantly, bargaining power presupposes a lack of regulation, which serves to diminish or mitigate it entirely; indeed, that is a fundamental purpose of public utility regulation. *Brockway Glass Company, Inc. v West Penn Power Company*, Docket No. C-80021876, 1980 Pa. PUC LEXIS 25, at *30 (Order dated Sept. 25, 1980) ("A chief objective of regulatory process is to secure the efficiency of monopolistic operation without allowing the enterprise to take advantage of its position.").[35] As a result of the availability of regulatory recourse before this Commission, it is not surprising, as explained above in Section V.A.2.c.ii., that the pole attachment rates charged by FirstEnergy to Verizon are consistent with rates calculated pursuant to Pennsylvania ratemaking principles and below fully allocated cost. Verizon does not and cannot explain how FirstEnergy could have had any bargaining power in negotiating the Joint Use Agreements in 2009, or during earlier periods, where those rates and agreements were subject to regulation by the Commission. Notably, Verizon never complained directly to the Commission that the Joint Use Agreement rates with FirstEnergy were unfair, unjust, or unreasonable.

2. FirstEnergy Does Not Possess And Has Not Leveraged Bargaining Power By Owning More Poles Than Verizon.

FirstEnergy witness Mr. Zaraks also explained that the relative pole ownership between Verizon and FirstEnergy has not materially changed since 2009 (*i.e.*, the date of the last rate re-

[35] *See also Borough of Duncannon v. Pa. Pub. Util. Comm'n*, 713 A.2d 737 (Pa. Cmwlth. 1998) ("In return for the service monopoly and freedom from competition, the utility submits itself to the Code and the jurisdiction of the Commission.").

negotiations). (First Energy St. 2-R, p. 27.) This is important because at the conclusion of these negotiations, Verizon indicated that the joint use rate issue was "amiably resolved" and that "Verizon PA and FirstEnergy can finally have a common rate structure that is fair and equitable for all the Joint Use Agreements between both companies in Pennsylvania."[36] Verizon's letter to FirstEnergy plainly states that Verizon was satisfied with the negotiations and does not convey any view that (in Verizon's opinion) FirstEnergy exerted bargaining power. The percentage of pole ownership, therefore, did not appear to be used by FirstEnergy to leverage the outcome of negotiations in 2009 – which is in line with the FCC's acknowledgement that the percentage of pole ownership alone is not the sole determinant of bargaining power and corresponds with basic economic practicalities. Verizon simply fails to present any evidence why FirstEnergy has bargaining power today, based upon a pole ownership percentage that has not changed since the last time the parties amiably resolved negotiations of the rates under the Joint Use Agreements.

3. Verizon's Less Costly Alternatives Undermine Any Bargaining Power FirstEnergy Alleged Possessed.

FirstEnergy witness Mr. Zarakas credibly testified that "a less-costly alternative, sometimes referred to as an "outside option", is an important factor to account for in assessing bargaining power because it can mitigate or negate the bargaining power that a supplier may otherwise hold." (FirstEnergy St. 2-R, p. 29.) He further explained:

> Specifically, FirstEnergy offered to Verizon the opportunity to exit the joint use agreement and for Verizon to receive pole attachments services under the same arrangements and rates that FirstEnergy charges non-ILECs (i.e., under the FCC's telecom rates), and to "transition Verizon out of the pole-owning business in FirstEnergy service territories."[37] This provided Verizon with a lower-cost alternative (compared to the rates under the Joint Use Agreements)

[36] Letter to FirstEnergy Joint Use Team from Norman L. Parish, Verizon, Manager – Network Engineering, August 12, 2009. *See* FirstEnergy Exhibit SFS-1.
[37] (*See* FirstEnergy St. 1-R, Section V.)

> that, as the FCC indicated in its 2011 Pole Attachment Order, serves to mitigate any bargaining power differential that might otherwise arise from pole ownership percentages.

(FirstEnergy St. 2-R, pp. 29-30 (emphasis added).) Mr. Zarakas further concluded that this type of proposal is "also contrary to the type of behavior that would be expected from a party that indeed holds bargaining power…[who] would not be motivated to provide rate accommodation to a captive counterparty (i.e., a party with no bargaining power)." (FirstEnergy St. 2-R, p. 30.)

Verizon takes issue with FirstEnergy's proposal for a number of reasons, including that it was not a "formal offer,"[38] and it did not quantify how an agreement comparable to third-party agreements would result in costs lower than under current joint use rates.[39] Regardless of whether FirstEnergy's proposal was a formal offer, Verizon gave no indication that it was willing even to discuss the idea. When FirstEnergy reiterated the offer during a conference call with Verizon in July 2019, Verizon said it would think about it and get back to the Companies, but never did and instead filed the Complaint. (FirstEnergy St. 2-RJ, p. 7.)

Moreover, the testimony of Verizon witness Dr. Tardiff exposes these criticisms for the façade they are. He states:

> FirstEnergy's offer, therefore, did not guarantee Verizon properly calculated new telecom rates, compensation for Verizon's poles that would be transferred, or any recurring net savings for Verizon. It would, however, ensure FirstEnergy had additional pole assets, even greater leverage over Verizon…

(Verizon St. 3.1, p. 19.) However, the proposal FirstEnergy offered Verizon would have given it the very rates it seeks in the Complaint and would have provided them to Verizon under the same (i.e., comparable) terms and conditions under which its competitors obtain such rates. (*See* FirstEnergy St. 2-RJ, p. 7.) Clearly, Verizon does not want to receive the same rate as its

[38] (Verizon St. 1.1, p. 46.)
[39] (*See* Verizon St. 3.1, p. 18.)

competitors under comparable terms and conditions; it wants to obtain a substantially discounted rate maintaining all of the benefits it receives under the Joint Use Agreements.[40]

4. FirstEnergy Could Not Practically Leverage Any Alleged Bargaining Power Without Suffering Significant Harms.

Mr. Zarakas further concluded that FirstEnergy would not be able to follow through with any threat of foreclosure, thereby negating any prospect of exerting bargaining power for several reasons. First, FirstEnergy would lose access to approximately one-quarter of the poles it currently has access to in Pennsylvania, which would irrationally put FirstEnergy at risk of being unable to meet its service obligations to customers. (FirstEnergy St. 2-R, p. 33.)

Second, the increased costs FirstEnergy would incur, assuming an option to terminate the agreements were logistically feasible, would be much more than is the case today under the Joint Use Agreements. As such, FirstEnergy would be at substantial risk for the Commission to conclude that higher pole costs (i.e., stemming from FirstEnergy dismantling of its joint use agreements with Verizon) were reasonable or prudent expenditures. And further, if the Commission disallowed recovery of these costs, then FirstEnergy stockholders would in turn have to absorb them. (*See* FirstEnergy St. 2-R, p. 33.)

Third, it is highly unlikely that FirstEnergy would be able to actually replace the 27% of poles owned by Verizon, even if FirstEnergy irrationally decided that it was willing to: (1) risk interrupting service to its electricity customers; and (2) forego recovering any cost differential in the rates charged to customers. (FirstEnergy St. 5-R, pp. 3-4.) If all of FirstEnergy's attachments were removed from Verizon's poles, FirstEnergy would instantly need to find an alternative means

[40] FirstEnergy addresses the benefits Verizon obtains under the Joint Use Agreements in Section V.A.3.c.iii. *infra*.

to provide electricity to its customers by duplicating existing facilities, which is general disfavored by state and local government officials across the Commonwealth. (FirstEnergy St. 5-R, pp. 3-4.)

Fourth, while Verizon claims the evergreen provision included in the Joint Use Agreements hinders them in negotiations, the evergreen provision also prevents FirstEnergy from disconnecting Verizon attachments from its poles. Thus, any bargaining power that FirstEnergy might hold from having more poles than Verizon would be negated because the evergreen provision prevents FirstEnergy from exercising such power. (FirstEnergy St. 2-R, pp. 34-35.)

For these reasons, Verizon has failed to demonstrate that FirstEnergy possessed or leveraged bargaining power during rate negotiations, such that the presumptions set forth in the *2018 Pole Attachment Order* should be applied here.

iii. FirstEnergy Has Rebutted The Presumptions Set Forth In The FCC's *2018 Pole Attachment Order* By Demonstrating Verizon Is Not Comparably Situated To Competing Third-Party Attachers.

Even if Verizon were entitled to the presumptions established under the *2018 Pole Attachment Order*, which it is not, FirstEnergy has rebutted those presumptions and demonstrated that Verizon is (a) not comparably situated to its competitors and substantial material benefits under the Joint Use Agreements and (b) not entitled to receive the new telecom rate under the existing Joint Use Agreements. Under the *2018 Pole Attachment Order*, Verizon demonstrates it is entitled to these presumptions—and for the reasons explained above FirstEnergy has demonstrated it is not— then FirstEnergy "can rebut the presumption with clear and convincing evidence that the incumbent LEC receives net benefits under its pole attachment agreement with the utility that materially advantage the incumbent LEC over other telecommunications attachers." *2018 Pole Attachment Order* ¶ 123. Such material benefits may include:

> [p]aying significantly lower make-ready costs; [n]o advance approval to make attachments; [n]o post-attachment inspection

> costs; [r]ights-of-way often obtained by electric company; [g]uaranteed space on the pole; [p]referential location on pole; [n]o relocation and rearrangement costs; and [n]umerous additional rights such as approving and denying pole access, collecting attachment rents and input on where new poles are placed.

2018 Pole Attachment Order ¶ 128.

The FCC recently had occasion to review whether, under its precedent, a utility had demonstrated an ILEC receives net material benefits under a Joint Use Agreement, relative to its competitors. In the *AT&T v. FPL Order*, although the FCC determined the rates at issue were unjust and unreasonable, it specifically held that the ILEC "receives significant benefits under the JUA not afforded competitive LECs and cable attachers." *AT&T v. FPL Order* ¶ 14. The FCC specifically noted the following advantages:

> Guaranteed access. The JUA guarantees AT&T space on FPL's poles,[] including "newpoles" (i.e., "a new pole line or an extension of an existing pole line").[] AT&T's competitors are not guaranteed space on any pole to which they are not already attached.[]
>
> Four feet reserved space. The JUA reserves four feet of space on FPL's poles to AT&T;[] other attachers are restricted to {[ ]}.[] Thus, AT&T has the necessary space to add new attachments, such as fiber optic cable and other advanced services.[]
>
> No permitting. AT&T is not required to obtain advance approval through FPL's permitting process before attaching to FPL poles;[] competitors undergo an expensive and time-consuming permitting process.[]
>
> No inspection. After attaching, AT&T's competitors are subject to a post-attachment inspection by FPL and must pay a post-attachment inspection fee; the JUA imposes no such requirement, even with respect to "new" poles.[]
>
> Lowest space on the pole. AT&T has the right to the lowest spot on the pole,[] so that its employees work in a safer area of the pole, can identify and access AT&T attachments more easily and use less expensive bucket trucks with shorter reach.[]
>
> Payment in arrears. AT&T pays its annual rental fee in arrears (for example, in March 2018 for the 2017 year);[] others pay in advance

> semiannually (for example, in June 2017 for July through December 2017).[]

AT&T v. FPL Order ¶ 14 (citations and redactions omitted). All but the last of these benefits are indisputably provided to Verizon in the JUA. (FirstEnergy St. 1-R, Section VII.) Importantly, the FCC did not reference or credit any dollar value associated with these benefits and did not make any statement that a quantification of an associated dollar amount with each benefit is necessary. Rather, it recognized that these fundamental differences between the joint use agreements of ILECs and electric utilities on the one hand, and third-party attacher agreements between third-party attachers and electric utilities on the other, do benefit ILECs.

1. Verizon Receives Substantial Material Benefits Under The Joint Use Agreements, Compared To Competing Attachers Under FirstEnergy's Pole Attachment License Agreements.

Consistent with the *2018 Pole Attachment Order* and the *AT&T v. FPL Order*, FirstEnergy has demonstrated that Verizon receives several substantial material benefits under the Joint Use Agreements. FirstEnergy witness Mr. Schafer testified that the Joint Use Agreements provide several advantages to Verizon over its cable company and CLEC competitors that have third-party pole attachment license agreements, including that FirstEnergy pays a large proportion of Verizon's costs to own and maintain its pole infrastructure. (FirstEnergy St. 1, pp. 31-37; *see also* Verizon Exhibit SCM-5 at VZ00689.)

More specifically, the Joint Use Agreements have allowed Verizon to construct its communications systems unfettered by significant make-ready expense, while its competitors pay a substantial amount in make-ready to gain access to FirstEnergy's poles. (FirstEnergy St. 1-R, pp. 32-33; FirstEnergy Exhibit SFS-5.) Based on the data available to FirstEnergy these cost savings for Verizon range from approximately **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per existing pole attached per year.

In addition, the Joint Use Agreements have provided Verizon time- and cost-saving advantages over its competitors to reach new customers and to provide additional services to existing customers, because all Verizon needs to do (having attached to the majority of FirstEnergy's poles under the Joint Use Agreements) is overlash its existing facilities or light existing dark fiber capacity to reach those new customers and to provide the additional services that its existing customers might require. (FirstEnergy St. 1-R, pp. 33-34.) Importantly, however, when FirstEnergy sought information regarding its cost-savings associated with overlashing, Verizon responded it "does not track which Verizon distribution cables have been overlashed generally or which Verizon distribution cables attached to FirstEnergy's poles have been overlashed specifically…" and did not provide the information necessary for FirstEnergy to quantify this benefit.

Verizon also avoids up-front work costs and can simply "notify and attach" to FirstEnergy pole, while its competitors must submit attachment application for attachment approval. (FirstEnergy St. 1-R, p. 34.) Third-party cable providers or CLECs are required to submit photographs and the information set forth in pole profile sheets before they can obtain approval to attach to a FirstEnergy pole. In contrast, Verizon may collect this data, but it need not submit it and wait on FirstEnergy approval before attaching. Rather, Verizon regularly attaches to FirstEnergy poles and does not even notify FirstEnergy until after it has done so.[41] Although FirstEnergy did not quantify a specific dollar value associated with the cost savings of this benefit, the FCC has clearly recognized this is a material benefit to ILECs. *AT&T v. FPL Order* ¶ 14.

The Joint Use Agreements have permitted Verizon to avoid costs associated with attachment application fees, which its competitors must pay. (FirstEnergy St. 1-R, pp. 34-35.) The

[41] *See* FirstEnergy's response to Verizon-II-29, Attachment AU.

fees amount to **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per application plus **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per pole and, like make-ready costs, are not recovered through FirstEnergy's annual rates. (FirstEnergy St. 1-R, pp. 34-35.)

Verizon is also subject to more lenient overlashing rules than its competitors. Specifically, under the Joint Use Agreements, Verizon need not provide advance notice of its intent to overlash. (FirstEnergy St. 1-R, p. 35.) Cable company and CLEC attachers, however, must provide 15-days' advance notice of overlashing, 15-days' notice upon completion of the overlashing, and pole loading studies to support their overlashing. (FirstEnergy St. 1-R, p. 35.)

The Joint Use Agreements also allow Verizon to avoid field audit costs that FirstEnergy's CLEC and cable company attachers pay. (FirstEnergy St. 1-R, p. 35.) FirstEnergy explained that it will be conducting field audits on a five-year cycle for all of its operating utilities that is similar to the field audit it has conducted in the Toledo Edison Company's service territory. The costs for that field audit to Verizon competitors were **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per pole. Dividing **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per pole by five years equals a rate difference of **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per pole per year that Verizon's competitors will pay but Verizon will not. (FirstEnergy St. 1-R, p. 35.) FirstEnergy witness Mr. Schafer further explained that regardless of whether their competitors elect to participate in the field audit, Verizon does not even have bear the risk of incurring these costs. (FirstEnergy St. 1-RJ, p. 28.) In addition, if one of Verizon's competitors does not participate in the field audit, FirstEnergy can and will impose penalty fees under the standard cable company/CLEC attacher agreement for any unauthorized attachments discovered during the audit. (FirstEnergy St. 1-RJ, p. 28.) Verizon, unlike its competitors, is not subject to similar penalty fees under the Joint Use Agreements. These costs

are similar to the post-inspection fees recognized in the *AT&T v. FPL Order* as material benefits to ILECs.

It is also important to recognize that Verizon is permitted under the Joint Use Agreements to charge higher rates for FirstEnergy to attach to its poles than it is permitted to charge its competitors to attach to its poles. (FirstEnergy St. 1-R, pp. 35-36.)

In addition, certain of these benefits historically provided, and continue to provide, Verizon with a significant "speed-to-market" advantage over its competitors, which allow Verizon to attract and serve new customers more quickly than its competitors. (FirstEnergy St. 1-R, p. 36.)

Furthermore, Verizon benefits from FirstEnergy's comprehensive vegetation management program, because its competitors do not have pole lines on which they would otherwise incur vegetation management expenses of the kind that Verizon is able to avoid due to FirstEnergy's greater diligence. (FirstEnergy St. 1-R, pp. 36-37.) FirstEnergy's vegetation management program extends to Verizon-owned poles that house FirstEnergy facilities, i.e., FirstEnergy implements its vegetation management program around Verizon poles. Verizon's competitors are not pole owners and, therefore, do not receive the benefit of FirstEnergy's vegetation management program. (FirstEnergy St. 2-RJ, p. 19.)

2. Verizon's Criticisms Of The Benefits It Receives Under The Joint Use Agreements Are Not Credible And Should Be Rejected.

Verizon devoted substantial portions of its direct, surrebuttal and surrejoinder testimony attempting to discredit the net benefits it receives under the Joint Use Agreements. These arguments boil down to two primary criticisms: (1) Verizon asserts that FirstEnergy has not quantified a specific dollar value, or attempts to attack the quantification prepared by

FirstEnergy;[42] and (2) Verizon decries the costs it incurs as a pole owning entity as offsetting any of the benefits it incurs as a pole attaching entity under the Joint Use Agreements.[43] These criticisms are meritless and/or irrelevant.

Throughout this proceeding, FirstEnergy sought discovery of information necessary to quantify the benefits that Verizon receives under the Joint Use Agreements. As detailed in Section II.C., above, this resulted in substantial discovery disputes between the parties, and the filing of several motions to compel. The sum result of these disputes is that FirstEnergy was not able to access much of the financial information necessary to quantify the cost-savings Verizon experiences under the Joint Use Agreements. (*See, e.g.*, FirstEnergy St. 1-R, pp. 39-41 (discussing Verizon's repeated failures to provide supporting data for the assertions made in the Complaint and its direct testimony).)

Having denied FirstEnergy access to this information Verizon then brazenly asserted this *non sequitur*:

> More fundamentally, Mr. Schafer is wrong that discovery from Verizon is needed. If *FirstEnergy* provides Verizon net material benefits under the terms and conditions of *FirstEnergy's* joint use agreements as compared to the terms and conditions of *FirstEnergy*'s license agreements with Verizon's competitors, Mr. Schafer would have access to that information. Mr. Schafer cannot show FirstEnergy provides Verizon a net material competitive benefit under the joint use agreements because FirstEnergy does not provide Verizon a net material competitive benefit under the joint use agreements.

(Verizon St. 1.1, pp. 11-12 (emphasis in original).)

[42] For instance, Verizon witness Mr. Mills asserts that "net benefits must have some quantifiable value and material impact on FirstEnergy's bottom line to justify FirstEnergy's collection of a higher rate" and criticizes FirstEnergy because I rely "on alleged advantages [I]…and FirstEnergy's other witness cannot quantify." (Verizon St. 1.1, p. 9.)
[43] (*See, e.g.*, Verizon St. 2.1, pp. 32-33.)

In order for FirstEnergy to conduct an analysis of *Verizon's cost savings* relative to its competitors, FirstEnergy necessarily must obtain information regarding *Verizon's costs*. Mr. Mills' testimony flouts Verizon's responsibility to track the costs it incurs to attach to poles and cooperate in the Commission's discovery process. If accepted by the Commission, Verizon's position would result in findings and conclusions based upon the absence of information that is (or should be) in Verizon's information and control. This result would turn Section 332(a) of the Public Utility Code, and any concept of a complainant possessing the ultimate burden of proof, on its head. And, more fundamentally, it would deny FirstEnergy its rights to due process.[44]

Furthermore, FirstEnergy is not even required to quantify these benefits under FCC precedent. The *AT&T FPL Order* specifically concluded that many of the aforementioned benefits existed without reference to analysis of any associated dollar amount or a statement that a quantification of an associated dollar amount with each benefit is necessary. *AT&T v. FPL Order* ¶ 14 (crediting the benefits received by an ILEC under a joint use agreement, but not quantifying any of the credited benefits). As such, while it may be difficult to quantify the dollar value of these benefits, it is indisputable that Verizon, at the very least, enjoys the same substantial material benefits under the Joint Use Agreements that the FCC found in its most recent decision.

Verizon's allegations that the costs it incurs as a pole owning entity offset any of the benefits it incurs as a pole attaching entity under the Joint Use Agreements are similarly flawed. The *2018 Pole Attachment Order* is clear that the relevant comparison is whether an ILEC as a pole attaching entity receives material benefits under a joint use agreement in comparison to their

[44] The Commission must provide parties fundamental fairness and due process of law. *See Novak v. Unemp. Compensation Bd. of Review*, 457 A.2d 610, 612 (Pa. Cmwlth. 1983) (citations omitted); *Nuss v. Falls*, 491 A.2d 971, 973 (Pa. Cmwlth. 1985) (citations omitted); *see also* 66 Pa.C.S. § 332(c) (stating that "[e]very party is entitled to present his 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").

competitors as attaching entities under third-party agreements. *See 2018 Pole Attachment Order* ¶¶ 123 ("…an incumbent LEC will receive comparable pole attachment rates, terms, and conditions as a similarly-situated telecommunications carrier or a cable television system (telecommunications attachers)." (emphasis added)), 126 ("…we should presume that incumbent LECs are similarly situated to other telecommunications attachers and entitled to pole attachment rates, terms, and conditions that are comparable to the telecommunications attachers." (emphasis added)). Verizon's costs as a pole owner are irrelevant to the comparison of its costs as an attacher to other non-pole-owning attachers.

In addition, it is inappropriate to analyze Verizon's pole ownership costs because many of these costs already are being reimbursed. As explained by FirstEnergy, the rates it pays Verizon under the Joint Use Agreements already account for these costs.

Finally, FirstEnergy further offsets Verizon's pole ownership costs by taking a number of additional actions. As explained above, FirstEnergy's tree removals benefit Verizon's pole plant, and adds another reimbursement of Verizon's pole costs. (FirstEnergy St. 1-R, pp. 36-37.) FirstEnergy has also replaced a number of poles for Verizon, at FirstEnergy's expense. (FirstEnergy St. 1-R, p. 37.) FirstEnergy also incurs significant unreimbursed expense responding to emergency events on Verizon-owned poles. And, finally, based on the FCC's rate formula, another 7.4% of Verizon's annual costs are reimbursed by cable company attachers, with another 7.4% reimbursement for every additional CLEC attacher. All of these considerations, taken together, overwhelm Verizon's complaints that its choice to own poles should count against FirstEnergy in the quantification of benefits.

3. The Joint Use Agreements Are Fundamentally Different From FirstEnergy's Pole Attachment License Agreements And, Therefore, It Is Not Appropriate To Insert The New Telecom Rate Into The Joint Use Agreements.

The benefits provided to Verizon under the Joint Use Agreements are made all the more apparent by the fundamental differences that exist between the Joint Use Agreements and FirstEnergy's standard cable company/CLEC attacher agreement. FirstEnergy ultimately prepared a comparison of the agreements after due to Verizon's repeated insistence that the agreements were not fundamentally different on their face. (*See, e.g.*, Verizon St. 3.1, p. 2.)

The fundamental differences between these agreements are initially made apparent within the recitals. For example, the "WHEREAS" clause of the 1986 agreement between Pennsylvania Electric Company and The Bell Telephone Company of Pennsylvania states:

> WHEREAS, Penelec and Bell desire to cooperate in keeping pole plant at a minimum in the territory covered by this Agreement and to provide for the joint use of their respective poles when and where joint use shall be of mutual advantage in meeting their service requirements.

(Verizon Exhibit SCM-2 (VZ000320).) The "WHEREAS" clause of the FirstEnergy Third-Party Pole Attachment Agreement, however, states:

[BEGIN PROPRIETARY]

[redacted]

[END PROPRIETARY]

(PROPRIETARY Verizon Exhibit SCM-3 (VZ000489.) The table of contents of each of these agreements, and the remainder of the Joint Use Agreements, similarly betray any assertion that they are "comparable." (FirstEnergy St. 2-RJ, p. 36.)

FirstEnergy provided further details regarding the differences between these agreements, using the 1986 agreement between Pennsylvania Electric Company and The Bell Telephone Company of Pennsylvania and the FirstEnergy Third-Party Pole Attachment Agreement as examples. (PRORIETARY FirstEnergy Exhibit SFS-15.) Although it does not reproduce the comparison of the differences here, certain of the material and fundamental differences noted are directly tied to the benefits identified and credited by the FCC in the *AT&T v. FPL Order*. Specifically:[45]

- **Guaranteed Access –** The 1986 Penelec / Bell Telephone Agreement is broader in scope and not limited to the poles that an attacher must apply for, and obtain, consent to attach to under the FirstEnergy Third-Party Pole Attachment Agreement. Third party attachers are not guaranteed access to any poles that are not the subject of an approved application. (*See* FirstEnergy Exhibit SFS-15 at 2.)

- **Reserved Space –** The 1986 Penelec / Bell Telephone Agreement historically conferred a material advantage to Verizon by reserving 3 feet of space for its attachments. A third-party attacher is not provided a similar benefit under the FirstEnergy Third-Party Pole Attachment Agreement. (*See* FirstEnergy Exhibit SFS-15 at 3.)

- **No Permitting –** Under the FirstEnergy Third-Party Pole Attachment Agreement, a licensee is required to pay a license preparation and administration fee. Verizon pays no such fee under the Joint Use Agreements. (*See* FirstEnergy Exhibit SFS-15 at 5.)

- **No Inspection –** The FirstEnergy Third-Party Pole Attachment Agreement requires an attacher to be subject to inspection and pay for the costs of such inspection. Verizon is not subject to these inspection fees under the Joint Use Agreements. (*See* FirstEnergy Exhibit SFS-15 at 4.)

A comparison of the fundamental differences in the terms of the agreements also reveal additional material benefits.

[45] Each of the identified benefits are listed in paragraph 14 of the *AT&T v. FPL Order*. FirstEnergy provides references to the explanatory commentary set forth in FirstEnergy Exhibit SFS-15.

For all of these reasons, FirstEnergy has rebutted the presumptions set forth in the *2018 Pole Attachment Order* and demonstrated by clear and convincing evidence that Verizon is not similarly situated to its competitors and receives substantial material benefits under the Joint Use Agreements compared to its competitors. Therefore, and for the reasons more fully explained above, Verizon has failed to demonstrate the existing rates are unjust and unreasonable and, even if a new rate is triggered under the 2018 Order, Verizon is not entitled to the new telecom rate.

B. The Pole Attachment Rates FirstEnergy Charges Verizon Should Be The Existing Rates Under The Joint Use Agreements.

As explained in Section V.A., *supra*, Verizon has failed to carry its burden of proof to demonstrate that the existing rates under the Joint Use Agreements are unjust and unreasonable and that it is entitled to the new telecom rate under the existing Joint Use Agreements. Conversely, FirstEnergy has demonstrated that the existing rates Verizon pays under the Joint Use Agreements are, in aggregate, below fully allocated cost-based rates. The Commission, therefore, is without authority to prescribe new "just, reasonable, and equitable obligations, terms, and conditions" under Section 508 of the Public Utility Code and/or to determine new "just and reasonable rates" under Section 1309 of the Public Utility Code. 66 Pa.C.S. §§ 508 and 1309. Therefore, FirstEnergy submits that the existing rates Verizon pays under the Joint Use Agreements should be maintained without modification.

To the extent, however, that the Commission finds and determines these rates are unjust and unreasonable, or sets new rates based on policy grounds (assuming it has the authority to do so), the Commission should not, and cannot, simply insert the incremental-cost-based new telecom rate into the existing Joint Use Agreements. Rather, as explained below, it should adopt the old telecom rate as calculated by FirstEnergy, which constitutes a middle ground between the existing

rates and the new telecom rate and is based, in part, on fully allocated cost principles and, therefore, can rationally be applied to the existing Joint Use Agreements.[46]

1. The Old Telecom Rate Should Be Calculated Using The Actual Data Presented By FirstEnergy.

The "old telecom rate" is essentially a fully allocated cost rate method similar to that used by the Commission with one significant exception. (*See* FirstEnergy St. 2-RJ, p. 4.) For unusable pole space, sometimes referred to as "common space," the Commission, in accordance with well accepted cost causation principles, allocates the cost of unusable space proportionally to all attachers. (FirstEnergy St. 2-RJ, p. 4.) On the other hand, the FCC directly assigns without explanation one third of unusable space to the pole owner and 2/3 to all attachers, including the pole owner. (*See* FirstEnergy St. 1-R, pp. 13-15; FirstEnergy St. 2-RJ, pp. 6-7.) This reduces the pole attachment rate, apparently for policy reasons, but is not consistent with well-established principles of cost causation. (*See* FirstEnergy St. 1-R, pp. 13-15; FirstEnergy St. 2-RJ, p. 7.)

The old telecom formula rate is set forth as follows:

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left(\text{Maintenance and Administrative Carrying Charge Rate}\right)$$

$$\text{Where Space Factor} = \frac{\left(\text{Space Occupied}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}$$

(FirstEnergy Exhibit WZ-1, p. 5) Importantly, the FCC has established rebuttable presumptions for each of the following inputs, for purposes of calculating the "space factor."[47] The FCC has also established a rebuttable presumption regarding the "[Number] of Attaching Entities," based upon

[46] As noted in footnote 14 *supra*, FirstEnergy reserves the right to challenge the Commission's adoption of the old telecom rate on appeal.

[47] The presumptions are that: (1) the space occupied by an attachment is presumed to be one foot; (2) the amount of usable space is presumed to be 13.5 feet; (3) The amount of unusable space is presumed to be 24 feet; and (4) the pole height is presumed to be 37.5 feet. *See* 47 C.F.R. § 1.1410.

whether a utility's service area is considered "urban"[48] or "non-urbanized"[49]; for urban areas, the presumptive average number of attaching entities is five and for non-urban areas, it is three. *See* C.F.R. § 1.1409(c). These presumptions may be rebutted by either party.

If the Commission adopts the old telecom rate for these existing Joint Use Agreements, it should use FirstEnergy's calculated inputs for purposes of establishing a new rate, rather than the FCC's presumed inputs. (*See* FirstEnergy St. 1-R, pp. 21-23.) Importantly, once rebutted, the FCC's presumptive inputs "vanish" and can no longer be relied upon as evidence. *West Penn Power Company*, 1987 Pa. PUC LEXIS 316, at *17.

FirstEnergy believed that the FCC presumptions did not accurately reflect the actual conditions in its service territories. To confirm this belief, FirstEnergy conducted a Field Audit during the course of this proceeding, which gathered actual data regarding the pole facilities that are subject to the Joint Use Agreement and demonstrated the FCC presumptions do not reflect actual conditions in FirstEnergy's service territory.

The results of that audit revealed the following information regarding actual inputs into the old telecom formula rate:

INPUTS	FCC Presumptions	Met-Ed Actuals	Penelec Actuals	Penn Power Actuals
Pole Height (feet)	37.50	43.23	42.57	40.11
Space Occupied (feet)	1	1.29	1.27	1.38
# Attaching Entities	5	3.01	2.96	2.97
Appurtenance Factor YE 2018*	15.00%	15.23%	14.23%	14.50%

As demonstrated above, the actual conditions in FirstEnergy's service territories significantly

[48] "Urban" service areas are defined as having a population of 50,000 or higher population. Importantly, if any part of the utility's service area within the state has a designation of urbanized (50,000 or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities.
[49] "Non-urbanized" services areas are defined as having a population of less than 50,000.

differs from the FCC's presumed inputs. This data represents the only actual data regarding inputs into the FCC formulas presented in this proceeding.

As explained by FirstEnergy witness Mr. Scott Carlin, the audit was conducted from December 2019 to January 2020 and was performed pursuant to the FirstEnergy Random Pole Sample Project Procedures Manual, which was provided as FirstEnergy Exhibit SC-1. (FirstEnergy St. 6-R, p. 3.) The audit was performed in accordance with accepted industry practices. (FirstEnergy St. 6-R, p. 3.) Based on the results of this audit, and the use of FirstEnergy's Geographic Information System ("GIS") to generate to select a random sample of poles of sufficient quantity to be used in a field audit survey, FirstEnergy witness Mr. Clark Guo then calculated statistically reliable average values for each of the variables used in the FCC's rate formulas for poles in service territories of the three FirstEnergy operating utilities that have both FirstEnergy and Verizon attachments. (FirstEnergy St. 7-R, pp. 3-4.) Importantly, Mr. Guo concluded that these averages represented the true population of FirstEnergy's and Verizon's joint use network within a 95% confidence level threshold. (FirstEnergy St. 7-R, p. 4.)

Verizon's criticisms of FirstEnergy's field audit should be rejected. (*See* Verizon St. 1.1, pp. 51-59; Verizon St. 2.1, pp. 21-29; Verizon St. 3.1, pp. 35-40.) FirstEnergy explained that any perceived errors noted by Verizon do not render the audit unreliable. As explained by Mr. Scott Carlin, the "incontrovertible fact is that the validity of the sample, including all attributes verified, is substantially above the industry-accepted standard for accuracy." (FirstEnergy St. 6-RJ, p. 4.) Moreover, "even after counting the actual alleged errors identified by Verizon, the sample still has a 99.30% accuracy rate." (FirstEnergy St. 6-RJ, pp. 4-5.) Verizon insists that decades-old national presumptions must be used instead of recently gathered local Pennsylvania data because it produces a more favorable formula result. Verizon could have, but did not, conduct its own field

audit and instead relied solely upon FCC presumptions that have no application to FirstEnergy's service territory.

Using the recent, local inputs, FirstEnergy calculated rates using both the FCC's old telecom rate formula, and the same formula without the arbitrary direct assignment of one third of the common space ("fully allocated"). These rates are represented in the column titled "ME[PE / PP] Old Telecom Rate Pre-2011" in Tables 1-3 of Mr. Schafer's rebuttal testimony, and are reproduced below for comparison (with the new telecom rate calculations omitted):

Table 1

Met Ed		
Year Billed	**ME Old Telecom Rate (FERC)**	**Fully Allocated Pre-2011**
2011	$ 18.88	$ 26.50
2012	$ 22.43	$ 31.48
2013	$ 23.63	$ 33.17
2014	$ 11.03	$ 15.49
2015	$ 20.25	$ 28.42
2016	$ 18.84	$ 26.44
2017	$ 20.52	$ 28.79
2018	$ 25.79	$ 36.20
2019	$ 28.95	$ 40.62

Table 2

Penelec		
Year Billed	**PN Old Telecom Rate (FERC)**	**Fully Allocated Pre-2011**
2011	$ 14.58	$ 20.49
2012	$ 15.50	$ 21.78
2013	$ 16.57	$ 23.29
2014	$ 11.64	$ 16.36
2015	$ 15.55	$ 21.85

2016	$ 15.86	$ 22.30
2017	$ 16.62	$ 23.27
2018	$ 23.07	$ 32.43
2019	$ 19.85	$ 27.89

Table 3

Penn Power		
Year Billed	**PP Old Telecom Rate (FERC)**	**Fully Allocated Pre-2011**
2011	$ 18.79	$ 26.28
2012	$ 21.12	$ 29.53
2013	$ 21.44	$ 29.97
2014	$ 19.27	$ 26.94
2015	$ 22.30	$ 31.18
2016	$ 23.64	$ 33.05
2017	$ 23.61	$ 33.01
2018	$ 28.94	$ 40.46
2019	$ 30.22	$ 42.25

As explained by Mr. Schafer, although the FCC's formula rates do not fully allocate the use of common space in contrast to the "Fully Allocated Pre-2011," these rates are more reasonable than the new telecom rates because they use actual data and more closely approximate fully allocated costs. (FirstEnergy St. 1-R, pp. 15-17.) Moreover, the old telecom rates are in-between the existing rates and the new telecom rate. In this regard, if the Commission deems it necessary to revise the rates Verizon pays under the Joint Use Agreements, the old telecom rate more adequately balances the interests of Verizon, FirstEnergy and FirstEnergy's electric service ratepayers than the new telecom rate.

2. Verizon's Rate Calculations Contain Significant Errors And Should Be Rejected.

Verizon's rate calculations should similarly be rejected because they contain several

important errors that drastically decrease the rates calculated under the FCC's rate formulas. FirstEnergy explained that Verizon's proposed rate calculations under the FCC's formulas should be rejected for numerous reasons, including:

- Verizon's allocation of Accumulated Deferred Taxes (Electric) to distribution poles is in error. This cost should be allocated based on the ratio: Account 364 Gross Pole Investment ÷ Gross Electric Plant Investment. Instead, Verizon's allocation is based on the ratio: (Account 364 Gross Pole Investment – Depreciation) ÷ (Gross Electric Plant Investment - Depreciation). (FirstEnergy St. 1, p. 20.)

- Verizon used an incorrect pole count. The correct pole count is 528,755. (FirstEnergy St. 1, p. 20.)

- Verizon's allocation of Accumulated Deferred Taxes (Electric) to these overhead Accounts 364, 365 and 369 is in error. This cost should be allocated based on the ratio: Investment in Accounts 364, 365 and 369 ÷ Gross Electric Plant Investment. Instead, Verizon's allocation is based on the ratio: (Investment in Accounts 364, 365 and 369 – Depreciation) ÷ (Gross Electric Plant Investment - Depreciation). (FirstEnergy St. 1, p. 20.)

- Verizon used an incorrect rate of return. It is unclear how Verizon determined the rate of return, but the proper rate of return would the rate most recently approved by the Commission, which is 7.92%. (FirstEnergy St. 1, p. 20.)

- Verizon used FCC presumptions for average pole height, unusable space, usable space, and number of attaching entities. These figures are incorrect and do not reflect actual local data. FirstEnergy performed a statistically reliable audit of its pole plant and added to its calculations the actual figures. (FirstEnergy St. 1, p. 20.)

Importantly, these errors in Verizon's calculations are compounded by the fact that Verizon did not conduct its own field study to calculate inputs into the FCC's formula rates and, therefore, the only actual data regarding these inputs was presented by FirstEnergy.

Therefore, and for the reasons more fully explained above, if the Commission determines the existing rates Verizon pays to be unjust and unreasonable it should only order the parties to re-negotiate the existing Joint Use Agreements using the old telecom rate calculated by FirstEnergy.

3. The Effective Date Of Any Change In Rates Under The Joint Use Agreements Should Be The Effective Date Of New Rates Established In FirstEnergy's Next Base Rate Case, Or Alternatively, FirstEnergy Must Be Permitted To Defer And Record As A Regulatory Asset The Difference Between Existing And New Rates And Recover The Difference In Its Next Base Rate Case.

As explained in several places above, any reduction in the joint use rates paid by Verizon, will ultimately decrease the revenues collected by FirstEnergy associated with the joint use network. In this regard, until the FirstEnergy EDCs have a base rate case and obtain recovery of any such reductions in revenues, they will be denied a fair rate of return on their investment in the joint use poles.

To address this issue, FirstEnergy submits that the Commission should establish the effective date of any new rates established under the Joint Use Agreements to be the effective date of new rates established in the FirstEnergy EDCs' next base rate proceeding. This approach would allow FirstEnergy to earn a reasonable return on its investment in poles, would recognize the interrelationship between pole attachment revenues and FirstEnergy's base rates and equitably balance the impact of a major change in ratemaking methodology between rate cases.

In the alternative, the Commission should allow FirstEnergy to defer and record as a regulatory asset the difference in revenues produced from new rates and existing rates plus carrying charges, and permit FirstEnergy's EDCs to claim and recover this deferred amount in their next base rate case. (*See* FirstEnergy St. 3-R, p. 7.) This approach would insulate FirstEnergy from under-recovery during the period between the effective date of new rates under the Joint Use Agreements and the effective date of new base rates, consistent with Pennsylvania precedent regarding the impact of changes in Commission policy. *See, e.g., Columbia Gas of Pa. v. Pa. Pub. Util. Comm'n*, 613 A.2d 74 (Pa. Cmwlth. 1992) (permitting recovery of certain expenses incurred between rate cases due to a change in Commission directives regarding customer payment plans).

C. Verizon Has Failed To Demonstrate That It Is Entitled To Refunds.

Verizon claims that it is entitled to refunds in amount of **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** calculated from the effective date of the FCC's *2011 Pole Attachment Order* (July 12, 2011) to present. (Compl. ¶¶ 57, 62; *see also* Verizon St. 2.0, p. 5 and Verizon Exhibit MSC-1 at VZ00047, VZ00051.) According to Verizon, the "applicable statute of limitations in Pennsylvania permits recovery as far back as the July 12, 2011 effective date" of the *2011 Pole Attachment Order*. (Verizon Exhibit MSC-1 at VZ00047.) Verizon further claims that it "calculated refunds of overpayments using proportional rates for Verizon and FirstEnergy—not new telecom rates for Verizon and joint use agreement rates for FirstEnergy." (Verizon St. 2.1, p. 40.)

Verizon is not entitled to any refund associated with the rates it pays under the Joint Use Agreements. First, Verizon seeks the revision of a contract rate—not a tariff rate. Under the express terms of Section 508, any revision to a contract is prospective only. Second, as explained in Sections V.A.2-3. *supra*, Verizon has failed to demonstrate that the rates it pays under the Joint Use Agreements are unjust and unreasonable, and the lack of this predicate finding precludes refunds under Section 1312(a) of the Public Utility Code. Moreover, even if Verizon had demonstrated that it qualified for refunds, and it has not, the Commission should exercise its discretion and deny Verizon's claim for refunds or appropriately limit the refund period.

1. The Commission Can Only Reform Contracts On A Prospective Basis.

Importantly, the rates that are the subject of the Complaint are contained in a contract (i.e., the Joint Use Agreements) and not any tariff of any of the FirstEnergy EDCs. Therefore, any refunds associated with a finding that such rates are unjust and unreasonable, can only result in prospective relief.

Section 508 expressly provides that any contract changes made by the Commission apply prospectively only, i.e., 30 days after entry of order reforming the contract. 66 Pa.C.S. § 508; *see also Feingold*, 383 A.2d at 793 (recognizing the Commission lacks authority to look backward and award damages under Section 508) and *Apollo Gas*, 1994 Pa. PUC LEXIS 30, at *35-36. Conversely, Chapter 13 of the Public Utility Code and, in particular, the refund authority granted under Section 1312 of the Public Utility Code, 66 Pa.C.S. § 1312, are only applicable to tariffed (not contract) rates. *See Nat'l Fuel*, 464 A.2d at 567 ("If a utility's rates are, as in this case, lawful and in conformance with the applicable tariff, Code Section 1312 authorizes retroactive rate relief in the form of a refund only if the utility's rates are unreasonable or unjust." (emphasis added)).

Under Section 1933 of the Pennsylvania statutory construction act:

> [w]henever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.

1 Pa. C.S. § 1933 (emphasis added). Here, the explicit terms of Section 508 (i.e., "Such contract, as modified by the order of the commission, shall become effective 30 days after service of such order upon the parties to such contract"), constitutes the special provision and must prevail over the more general terms of Section 1312.

In addition, it is important to note that there is no allegation that FirstEnergy has breached any term of the Joint Use Agreements, including the applicable rates. Any relief granted in this proceeding would be an amendment/reformation of the Joint Use Agreements. Under basic

principles of contract law, contracts amendments should only apply prospectively. Otherwise, the parties would be denied the basic benefit of their bargain.[50]

Similarly, granting refunds based on the revision of an existing contract would constitute an impermissible and unconstitutional impairment of contract, in violation of the contracts clause of the United States Constitution (U.S. Const. art. I, § X, cl. 1) and the Pennsylvania Constitution (Pa. Const. art. I, § 17). *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) and *First Nat'l Bank v. Flanagan*, 528 A.2d 134 (Pa. 1987). It would also constitute an unlawful taking of property without just compensation. *See* U.S. Const. amend. V; *see also* Pa. Const. art. I, § 10. Indeed, the Commission has previously recognized that *post hoc* such modification would "have a chilling effect on the willingness of regulated public utilities to enter into contracts" and "would arguably contravene both Federal and Pennsylvania constitutional provisions regarding the impairment of the obligation of contracts and deprivation of property without compensation." *ALLTEL ID* at *50. Therefore, the Commission cannot revise the Joint Use Agreements on a retroactive basis and Verizon's request for refunds should be denied.

2. Verizon Has Failed To Demonstrate That The Existing Rates Under The Joint Use Agreements Are Unjust And Unreasonable.

Under Section 1312(a) of the Public Utility Code, the Commission has the discretion to grant refunds only if it shall first determine that a "rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission…" 66 Pa.C.S. § 1312(a); *see also Emporium Water Co.*, 859 A.2d at 24. As explained in Sections V.A.2-3 above, Verizon is not entitled to any refunds under Section 1312(a) because Verizon has failed to demonstrate the rates it pays under the Joint Use Agreements are unjust or unreasonable. *See Nat'l Fuel*, 464 A.2d at 567 ("the Code does not authorize the imposition of a refund of excess revenues

[50] *See, e.g., New Charter Coal*, 191 A.2d at 833.

and improvident expenditures without consideration of the reasonableness and justness of the rates as a whole.") Rather, Verizon presented no evidence that the rates it pays under the Joint Use Agreements are unjust and unreasonable and FirstEnergy demonstrated that, in aggregate, the rates Verizon pays are below fully allocated cost-based rates and consistent with Commission precedent. *See* Section V.A.2.c.ii. *supra*. Furthermore, Verizon presented no evidence upon which the Commission could establish a new rate for FirstEnergy to pay Verizon and, without such a showing, the Commission cannot revise the reciprocal rate structure of the Joint Use Agreements. *See* Section V.A.1.e. *supra*. Lacking the second part of this equation, the Commission cannot rationally calculate any refunds in this proceeding.

Therefore, and for the reasons more fully explained above, Verizon is not entitled to any refunds under Section 1312(a) of the Public Utility Code.

3. An Award Of Refunds In This Proceeding Would Violate Well-Established Rules Against Retroactive Application of Agency Decisions.

The law generally prohibits retroactive application of changes in an agency's regulations, rules or policies. *See Jenkins Unemployment Compensation Case*, 56 A.2d 686 (Pa Super. 1948) (applying 1 Pa.C.S. § 1926 to administrative regulations);[51] *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1998) ("congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").[52] Importantly, the Commission acts "in its quasi legislative capacity" when it establishes a new rate. *Cheltenham &*

[51] 1 Pa.C.S. § 1926 ("No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly.").

[52] The D.C. Circuit Court has similarly held that the court held that "[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broadcasting Co., Inc. v, FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987)

Abington Sewerage Co. v. Pa. Pub. Util. Comm'n, 25 A.2d 334, 336 (Pa 1942). As such, the prohibition against retroactive application applies to Commission orders setting rates.[53]

An award of refunds would alter the Commission's long-standing ratemaking principles, as applied to the Joint Use Agreements.[54] Indeed, it would effectively overrule the Commission's prior application of fully allocated cost principles to joint use agreements and fundamentally alter the rates that may be charged under such agreements in Pennsylvania. *See NEPTC Order*, at *12. And, importantly, the Commission previously approved the calculation of the rates an ILEC pays under a joint use agreement, using a cost allocation methodology that is materially identical to the method used in the existing Joint Use Agreements here.[55] Verizon's request for refunds effectively requests the Commission to unlawfully exercise its quasi-legislative function to apply a newly established rate to prior periods and should be denied.

For these reasons, an award of refunds would violate well-established principles that generally prohibit retroactive application of an agency's rules and policy.

4. The Commission Should Exercise Its Discretion And Decline To Award Refunds Or Substantially Limit The Refund Period.

If the Commission determines that FirstEnergy's existing rates are unjust and

[53] Relatedly, the award of refunds would retroactively revise a "rate" for "service" and violate the general rule recognizing that ratemaking in prospective and prohibiting retroactive ratemaking. *See, e.g., Phila. Electric Co. v. Pa. Pub. Util. Comm'n*, 502 A.2d 722, 727-728 (Pa. Cmwlth. 1985). Although the rule prohibiting retroactive ratemaking has traditionally been applied to "Commission-made rates," the prospective reformation of contracts under Section 508(a) of the Public Utility Code strongly suggests that the principles and considerations underlying the general prohibition against retroactive ratemaking should apply here.

[54] While the Commission is not bound by the rule of stare decisis, it must render consistent opinions and should either follow, distinguish or overrule its own precedent. *See Bell Atlantic-Pennsylvania, Inc. v. Pa. Pub. Util. Comm'n*, 672 A.2d 352, 354 (Pa. Cmwlth. 1995). The Commission has an obligation to provide explicit standards and explain its divergence from earlier decisional law. *Nat'l Fuel Gas Distrib. Corp. v. Pa. Pub. Util. Comm'n*, 677 A.2d 861, 865 (Pa. Cmwlth. 1996). As such, any change in the calculation of rates under the Joint Use Agreements should only be done on a prospective basis.

[55] *See* footnote 22 *supra*. Verizon's requested relief would result in FirstEnergy underearning on its investment in the joint use poles until its next base rate case and, after that rate case, would result in an unlawful subsidy. The same outcomes would result from any grant of refunds in this proceeding and, therefore, FirstEnergy should similarly be permitted to for future recovery the full amount of any refunds granted in this proceeding.

unreasonable, then it must determine the amount of such refunds and the applicable period for refunds, within the bounds of the Public Utility Code. *See Emporium Water Co.,* 859 A.2d at 24; *see also LP Water & Sewer Co.,* 722 A.2d at 736 and *Riverton Consolidated Water Co.,* 140 A.2d at 125. As explained below, the Commission should exercise its discretion and decline to award refunds in this proceeding or substantially limit the refund period.

First, as explained above, FirstEnergy's rates are below fully allocated cost-based rates and are fully consistent with the *NEPTC Order*, which upheld a cost allocation methodology that is identical in all relevant aspects to the methodology used by the Joint Use Agreements. Notably, Verizon never complained to the Commission that the Joint Use Agreement were unjust and unreasonable until after the FCC lowered the rates to other attachers even further below FirstEnergy's cost of service and simultaneously preempted the Commission's jurisdiction. As a result, any change in rates in this proceeding would be a stark and dramatic departure from well-establish Commission precedent. For this reason alone, it would be inequitable to award refunds.

Second, granting Verizon's request for refunds would result in a significant increase in FirstEnergy's electric rates. Revenues from pole attachment fees are credited dollar for dollar to FirstEnergy's customers. (FirstEnergy St. 3-R, pp. 3-4.) If Verizon's request were granted, FirstEnergy's customers would experience an annual increase of **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** and a one-time increase of **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** reflecting Verizon's refund request.[56] As the Commission knows, stakeholders in utility base rate cases litigate ardently over much smaller amounts. Importantly, these increases in electric customer rates only reflect

[56] *See* footnotes 22 and 55 *supra*.

pole attachment revenue from Verizon and does not include other ILECs in FirstEnergy's territory or the impact on the customers of all other EDCs in the Commonwealth.

Third, Verizon's request for refunds essentially requests the Commission to ignore the fundamental purposes of the Commission reverse preempting FCC regulation of pole attachment disputes, which were recognized in the *2019 Final Rulemaking Order*. As noted above, Verizon has presented no evidence in this proceeding that the subsidization it would be provided by FirstEnergy's customers via decreased rates under the Joint Use Agreements will in fact enhance the deployment of broadband in Pennsylvania. As such, the Commission should decline to grant refunds that will not benefit Pennsylvania residents, but will instead grant a windfall to Verizon.

Fourth, to the extent the Commission relies on FCC precedent to revise existing rates the appropriate refund period would be two years. Section 415(b) of the Communications Act, which governs private complaints against carriers, sets a two-year limitations period. *See* 47 U.S.C. § 415(b). Although Section 415 of the Communications Act does not control the Commission's authority to award refunds, to the extent that the Commission relies on FCC precedent and grants any refunds, such refunds should be limited to the two-year statute of limitations applicable to the FCC.

For all these reasons, the Commission should decline to exercise its discretion to award refunds.

5. If The Commission Determines To Grant Refunds, It Should Reject Verizon's Refund Calculations.

If the Commission determines to grant refunds, then the amount should be based on the difference between the existing and newly established pole attachment rates for an applicable refund period. The refund calculation presented by Verizon is based on its calculation of the new telecom rate and goes back to 2011 when the FCC asserted jurisdiction over Joint Use Agreements.

This calculation should be rejected for the many reasons previously set forth in this Brief, i.e., Verizon has failed to demonstrate the rates it pays are unjust and unreasonable, Verizon has not demonstrated it is entitled to the FCC's new telecom rate, and any new rates set in this proceeding can, and should, only be prospective in nature. Moreover, Verizon's calculation of refunds is based upon breach of contract theories and associated statutes of limitations These limitations periods have no application here because there is no allegation of any breach of contract by FirstEnergy. Moreover, the remedy for a breach of contract is damages, and the Commission has no authority to award damages. *See Feingold*, 383 A.2d at 793.

6. Any Refunds Should Be Based On The Difference Between Existing Rates And The Old Telecom Rate Calculated By The Company.

Finally, if the Commission determines to grant refunds in this case, the calculation should be based on the difference between existing rates and the old telecom rate as calculated by FirstEnergy. This would amount to annual refund (before interest) of approximately $1.8 million based on the most-recent billing year.

D. Motion(s) To Strike.

Pursuant to the agreement of the parties, any Motion(s) to Strike testimony or exhibits would be addressed in their respective Main and Reply Briefs.

At this time, FirstEnergy is not moving to strike any portion of Verizon's testimony or exhibits. However, to the extent that Verizon moves to strike any portion of FirstEnergy's testimony and/or exhibits, FirstEnergy fully reserves its rights to answer such motion in its Reply Brief. In addition, FirstEnergy also reserves its rights to move to strike any portion of Verizon's Main Brief which addresses facts or issues that are outside the scope of the parties' testimony and exhibits, which were offered into evidence via the parties' Joint Motion to Admit Stipulated Items into Record of Proceeding.

VI. CONCLUSION

WHEREFORE, Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company respectfully request that the Commission deny, with prejudice, the above-captioned Complaint filed by Verizon Pennsylvania LLC and Verizon North LLC.

Respectfully submitted,

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APPENDIX A
PROPOSED FINDINGS OF FACT

Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company (collectively "FirstEnergy" or the "Company") propose the following findings of fact:

A. STIPULATED FACTS

1. On March 18, 2020, the parties submitted a Joint Statement to the Federal Communications Commission ("FCC"), which stipulated to the facts set forth in the following paragraphs 2-10.

2. Complainants Verizon Pennsylvania LLC and Verizon North LLC (collectively, "Verizon") are incumbent local exchange carriers ("ILECs") that provide telecommunications and other services in areas of Pennsylvania.

3. Defendants Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec"), Pennsylvania Power Company ("Penn Power") (collectively, "FirstEnergy") are operating subsidiaries of FirstEnergy Corp. Defendants are utilities within the meaning of 47 U.S.C. § 224(a)(1) because each is an electric utility that owns or controls poles used, in whole or in part, for wire communications. Defendants are not owned by any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

4. Verizon and FirstEnergy are party to ten joint use agreements that contain the rates, terms, and conditions for each party's use of the other party's utility poles. The joint use agreements were entered into with Verizon's predecessor companies between 1958 and 1988 and were amended between 1999 and 2009 to include the currently operative pole attachment rate

provisions. Five of the ten joint use agreements are with Met-Ed,[1] four are with Penelec,[2] and one is with Penn Power.[3] The joint use agreements are still in effect.

5. The 2018 rental year is the most recent year that all three defendants—Met-Ed, Penelec, and Penn Power—invoiced and collected annual pole attachment rental fees or an "annual Deficiency Rate rental fee" from Verizon. (Penn Power has also invoiced and collected a pole attachment rental fee for the 2019 rental year). The 2018 invoices cover 412,697 poles jointly used by the parties, with FirstEnergy owning 301,854 (73%) and Verizon owning 110,843 (27%). The 2018 invoices associated with Met-Ed's service area cover 159,448 poles jointly used by the parties, with Met-Ed owning 129,421 (81%) and Verizon owning 30,027 (19%), and with the annual Deficiency Rate rental fee being applied only to so-called "deficiency poles"; the 2018 invoices associated with Penelec's service area cover 220,259 poles jointly used by the parties, with Penelec owning 146,859 (67%) and Verizon owning 73,400 (33%); and the 2018 invoices associated with Penn Power's service area cover 32,990 poles jointly used by the parties, with Penn Power owning 25,574 (78%) and Verizon owning 7,416 (22%).

6. Met-Ed sends Verizon five annual invoices based on four Memoranda of Understanding entered in 2009. (Verizon Exhibit SCM-2 at VZ00296-317.) Penelec sends Verizon five annual invoices based on four Memoranda of Understanding entered in 2009. (Verizon Exhibit SCM-2 at VZ00451-466.) Penn Power and Verizon send each other one annual invoice based on an amendment to the joint use agreement entered in 1999. (Verizon Exhibit SCM-2 at VZ00484-485.)

7. Under the Penelec and Penn Power joint use agreements, each party pays a per pole rate for use of the other party's poles.[4] In contrast, under the Met-Ed joint use agreement,

[1] (Verizon Exhibit SCM-2 at VZ00165-317.)
[2] (Verizon Exhibit SCM-2 at VZ00318-466.)
[3] (Verizon Exhibit SCM-2 at VZ00467-485.)

Met-Ed charges Verizon an "annual Deficiency Rate rental fee" for so-called "deficiency poles," which is the difference between the number of joint use poles Verizon owns (19%) and the higher number of joint use poles Verizon would own if Verizon owned 45% of the joint use poles.[5] For comparative purposes, the annual Deficiency Rate rental fee Met-Ed charges can be converted into "reciprocal" per-pole rental rates that can be calculated based on the assumption that both parties charge the same per-pole rental rate for use of the other party's poles.

8. For the 2011 to 2018 rental years, Penelec charged Verizon pole attachment rental rates of **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per pole; Penn Power charged Verizon pole attachment rental rates of **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per pole; and Met-Ed charged Verizon "annual Deficiency Rate rental fees" for so-called "deficiency poles" of **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per "deficiency" pole. For comparative purposes, these Met-Ed rental fees are the same as "reciprocal" pole attachment rental rates of **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per pole, respectively, assuming both parties charge the same per-pole rental rate for use of the other party's poles.

9. The following table shows the total net rental amounts FirstEnergy charged and Verizon paid to date for the 2011 through 2019 rental years:

Rental Year	Met-Ed	Penelec	Penn Power	Total
2011	[redacted]			

[4] (*See, e.g.*, Verizon Exhibit SCM-3 at VZ00542-547.)
[5] (*See, e.g., id.* at VZ00532-541; Verizon Exhibit SCM-2 at VZ00298, VZ00301, VZ00304, VZ00306, VZ00309, VZ00311, VZ00314, VZ00316 (MOUs).)

2012	[redacted]
2013	
2014	
2015	
2016	
2017	
2018	
2019	

10. Executives of Verizon and FirstEnergy met on April 11, 2018, and continued discussions thereafter. Verizon and one or more of the defendant FirstEnergy utilities also exchanged correspondence about their rate negotiations before and after the April 11, 2018 meeting, including without limitation correspondence attached to Verizon's Complaint as Exhibits 17 through 29 at VZ00549-692,[6] and attached to FirstEnergy's Answer as Attachments A, J, and N at FE0002-3, FE00117-120, and FE00200-201.[7]

B. THE PARTIES

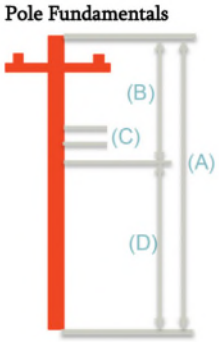
11. Each of the FirstEnergy EDCs is a "public utility" and "electric distribution company" as those terms are defined in Sections 102 and 2803 of the Public Utility Code. 66 Pa.C.S. §§ 102 (defining "public utility") and 2803 (defining "electric distribution company").

12. Verizon Pennsylvania LLC and Verizon North LLC are each a "public utility" as defined in Section 102 of the Public Utility Code. 66 Pa.C.S. § 102 (defining "public utility")

C. POLE ATTACHMENTS

[6] (Verizon Exhibit SCM-5.)
[7] (*See* FirstEnergy Exhibit SFS-3.)

13. Executives of Verizon and FirstEnergy met on April 11, 2018, and continued discussions thereafter. Mr. William Zarakas provided the following graphic to depict the general layout of pole infrastructure, from the perspective of attaching entities:



Legend	Average Pole
(A) Total pole length	37.5′
(B) Usable space	13.5′
(C) Space allocated to attaching entity	1.0′
(D) Unusable space	24.0′

(FirstEnergy Exhibit WZ-1, p. 1.)

14. The primary attachments to a utility pole are the facilities of the pole owner, either the electric utility or the telephone company. (*See* FirstEnergy Exhibit WZ-1.)

15. However, other entities also may wish to attach to these poles. So, for example, as in this case, telephone companies, both ILECs and CLECs, and CATV providers, may wish to attach their facilities to an electric utility's poles. (*See* FirstEnergy St. 2-R, pp. 3-4.)

16. Two different types of pole attachment agreements govern these attachments: (1) a joint use agreement between two pole-owning entities (i.e., an ILEC and an electric utility; or (2) a third-party attacher agreement between a pole-owning entity and a non-pole-owning entity (e.g., CATV or CLEC). (FirstEnergy St. 1-R, pp. 8-9.)

D. POLE ATTACHMENT AGREEMENTS

17. The ten Joint Use Agreements at issue in this case are substantially similar. (FirstEnergy St. 1-R, p. 7; *see also* Verizon Exhibit SCM-2 (attaching all of the Joint Use Agreements and associated amendments to the direct testimony of Stephen C. Mills).)

18. The Joint Use Agreements and the associated MOUs were executed, and the rates set therein were last re-negotiated, prior to 2011 when the FCC first asserted jurisdiction over pole rates for ILECs.

19. Historically, both electric utilities and telephone companies owned poles and, where they shared common service areas, sought to share pole infrastructure by way of negotiated "joint use agreements." (FirstEnergy St. 2-R, p. 4.)

20. The primary motivation behind these bilateral contractual arrangements included reducing each parties' individual pole ownership costs by joint accessing and sharing in the costs of joint use poles. (FirstEnergy St. 2-R, pp. 4-5.)

21. For example, the recitals in the 1973 agreement between Metropolitan Edison Company and The Bell Telephone Company of Pennsylvania explicitly states:

> WHEREAS, it is the common desire to avoid unnecessary duplication of poles and mutually benefit the Parties to this agreement, Met-ED and Bell have agreed to continue and expand the joint use of poles.

(Verizon Exhibit SCM-2 at VZ00167.) The recitals in 1986 agreement between Pennsylvania Electric Company and The Bell Telephone Company of Pennsylvania similarly state:

> WHEREAS, Penelec and Bell desire to cooperate in keeping pole plant at a minimum in the territory covered by this Agreement and to provide for the joint use of their respective poles when and where joint use shall be of mutual advantage in meeting their service requirements.

(Verizon Exhibit SCM-2 at VZ00320.)

22. Similar "cost sharing" language repeats throughout each of the Joint Use Agreements at issue.

23. The rates developed under these agreements reflect the mutual agreement of the parties to own and maintain poles and are based upon each parties' full cost of service. (FirstEnergy St. 1-R, pp. 8-9.)

24. The rates established under joint use agreements are reciprocal in nature—more specifically, and use of cost-of-service based sharing mechanisms to reflect the costs incurred by each pole-owner to own a pole. (*See* FirstEnergy St. 1-R, pp. 9-10.)

25. Joint use agreements between pole-owning entities stand in stark contrast to agreements between pole owners and third-party non-pole-owning attachers that "are essentially lease agreements that allow these companies to lease space on utility owned poles but do not have the same benefits of Joint Use Agreements and are based on the incremental cost of the attachments." (FirstEnergy St. 1-R, p. 9.)

26. Third-party attacher agreements, and the rates charged thereunder, do not fully allocate all of the common costs of common space. Rather, under the "old telecom rate," third-party attachers only share in the 2/3 of the costs of common space and pole owners are effectively directly assigned 1/3 of the common space cost as well as an equal share of the remaining 2/3. (FirstEnergy St. 1-R, pp. 13-14.)

27. The "new telecom rate" goes farther and mathematically eliminates the allocation of common costs associated with common space and, for all practical purposes, is an incremental cost rate as opposed to a fully allocated cost-based rate. (FirstEnergy St. 1-R, p. 14.)

E. HISTORY OF POLE ATTACHMENT REGULATION

28. Pole attachment agreements between ILECs and electric utilities were regulated by the Commission as a "rate" for "service" under the Public Utility Code, except from the date of the *2011 Pole Attachment Order* until the Commission certified it was exercising reverse preemption. *See* 66 Pa.C.S. § 102.

29. At the federal level, in 1978, the United States Congress passed the Pole Attachment Act, which added Section 224 to the Communications Act of 1934. Under Section 224, the FCC was provided the authority to regulate the rates, terms and conditions of pole attachment agreements involving cable television providers. However, neither the Pole Attachment Act nor the formula rate established thereunder (i.e., the "cable rate formula") was applicable to the rates charged under joint use agreements between ILECs and electric utilities. (FirstEnergy St. 2-R, pp. 3-4.)

30. The Telecommunications Act of 1996 granted providers of telecommunications services (other than ILECs) with non-discriminatory access to poles, conduit and rights-of-way owned or controlled by electric utilities and ILECs. The Telecommunications Act of 1996 also added Section 224(e) to the Communications Act of 1934. Section 224(e) provided that a cost-based methodology be applied to "attachments used by telecommunications carriers to provide telecommunications services" – which became known as the "telecom rate formula." "Telecommunications carriers" in this context, however, excluded ILECs. (FirstEnergy St. 2-R, p. 5.)

31. A key difference between the cable formula rate and the telecom formula rate methodologies concerned the allocation of common pole costs; that is, the space on a pole that is necessarily unusable to any attacher. Under the cable rate formula, the cost of unused space on a pole is borne by the electric utility, with a portion of the cost of unused space (i.e., 2/3rds) included in the telecom rate formula. This resulted in the telecom formula rate producing a higher pole attachment rate than did the cable rate formula for the same jurisdiction. However, the pole attachment rates produced under the telecom rate formula were nonetheless less than the

rates that would have been produced under a fully allocated cost methodology.[8] (FirstEnergy St. 2-R, pp. 8-9.)

32. In 2011, the FCC issued the *2011 Pole Attachment Order*. In it the FCC: (1) created the "new telecom rate" by reducing the apportionment of common pole costs included in the "telecom rate formula"; and (2) reinterpreted portions of Section 224 and concluded that the ILECs "are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)." (FirstEnergy St. 2-R, pp. 10-11.)

33. While this was the first instance where the FCC indicated that it would regulate the rates, terms and conditions of joint use agreements between electric utilities and ILECs, it concluded it would not be appropriate to treat ILECs "identically to telecommunications carrier or cable operator attachers in all circumstances" as the ILECs "often can be differently situated from other attachers, both due to the terms of existing joint use agreements and because of their continuing pole ownership." (FirstEnergy St. 2-R, pp. 10-11.)

34. In drawing this distinction between ILECs (such as Verizon) and its competitors, the FCC further distinguished between existing and new joint use agreements between electric utilities and ILECs. With respect to existing agreements, such as the Joint Use Agreements at issue here, FCC found that such agreements were entered into at a time when the parties had more balanced negotiating positions, and concluded that it was "unlikely to find that the rates, terms and conditions in existing joint use agreements unjust or unreasonable." (FirstEnergy St. 2-R, p. 11 (referencing *2011 Pole Attachment Order* ¶ 207).)

35. With respect to <u>new</u> agreements,[9] FirstEnergy witness Mr. Zarakas explained:

[8] The FCC discussed the difference between the approach included in its telecom rate formula and rates produced under a fully allocated cost methodology in the 2011 Pole Attachment Order, ¶¶ 155-166. The FCC noted that "The formula itself and the basis for Congress' selection of the two-thirds allocator for unusable space are not explained in the legislative history; rather it appears to be the unexplained result of a political compromise." 2011 Pole Attachment Order, ¶ 163.

> the FCC found that, when an ILEC can demonstrate that "it is obtaining pole attachments on terms and conditions that leave them comparably situated to telecommunications carriers or cable operators," then "competitive neutrality counsels in favor of affording incumbent LECs the same rate as the comparable provider."[] On the other hand, in circumstances when the pole attachment agreement provides the ILEC with a material advantage over telecommunications carriers or cable operators, the FCC found that a higher rate can be charged, and that the old telecom rate formula (i.e., the telecom rate formula in place prior to the FCC's modification of such in its 2011 Pole Attachment Order) could serve as a reference point in making such a determination.[]

(FirstEnergy St. 2-R, p. 11 (footnotes omitted).)[10]

36. In its 2018 Pole Attachment Order, the FCC took further steps to "to improve and speed the process of preparing poles for new attachments, or 'make ready'" in order to further facilitate the deployment of broadband services. Therein, it further noted that ILECs "may not be in equivalent bargaining position with electric utilities in pole attachment negotiations in some cases" and switched the burden of establishing whether there are similarly situated circumstances from the ILECs to the utilities for purposes of its review of newly-negotiated and newly-renewed pole attachment agreements. (FirstEnergy St. 2-R, pp. 15-16.)

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[9] *See 2018 Pole Attachment Order* ¶ 123 (establishing "a presumption that, for newly-negotiated and newly-renewed pole attachment agreements between incumbent LECs and utilities, an incumbent LEC will receive comparable pole attachment rates, terms, and conditions as a similarly-situated telecommunications carrier or a cable television system (telecommunications attachers)." (emphasis added)).

[10] FirstEnergy witness Mr. Zarakas further explained the principle of "competitive neutrality," which the FCC relied upon in making this determination as follows:

> competitive neutrality refers to the assurance of a level playing field with respect to input prices. Specifically, ILECs currently compete with CLECs and cable companies to provide a range of communications services, notably including broadband internet access, to customers. Competitive neutrality suggests that each should be charged the same price for the same service – in this case, pole attachments. However, the FCC recognized that the arrangements associated with attaching to poles may differ across contracts, and that superior arrangements (from the attacher's standpoint) provide them with greater value than do other pole attachment arrangements, and accordingly should come at a higher price.

(FirstEnergy St. 2-R, p. 12.)

37. However, the FCC only relied upon the following two findings to conclude that bargaining power for ILECs to negotiate new agreements may have continued to decline: (1) ILECs currently own fewer poles than they did at the onset of the joint use agreements; and (2) ILECs pay higher rates for pole attachment than do other telecommunications providers and cable companies. (FirstEnergy St. 2-R, p. 16.)

38. The FCC did not assess the extent to which the presence of less-costly alternatives and/or outside options available to ILECs reduces any potential disparity in the relative bargaining power of the parties that pole ownership might convey. (FirstEnergy St. 2-R, pp. 16-17.)

39. The FCC did not, however, clarify its guidance in the *2011 Pole Attachment Order* on resolving complaints by ILECs with respect to the pole attachment rates that they are charged by electric utilities. (FirstEnergy St. 2-R, pp. 17-18.) Rather, with respect to the rates paid by ILECs under new, newly-negotiated and/or newly-renewed agreements, Mr. Zarakas explained:

> the FCC established a range of acceptable rates (with respect to new and newly-renewed agreements) that an electric utility can charge an ILEC. The low end of the range equals the rate produced under the new telecom rate formula and is applicable to circumstances in which the attachment terms and conditions under the joint use agreement are comparable to the leasing arrangements under which non-ILECs are able to attach to electric utility poles. The high end of the range equals the rate produced under the FCC's old telecom rate and is applicable to circumstances in which the ILEC receives net benefits that materially advantage it over other telecommunications attachers. The FCC left it to the parties (i.e., the electric utility and the ILEC) "to negotiate the appropriate rate or tradeoffs to account for such additional benefits."[]

(FirstEnergy St. 2-R, pp. 17-18 (emphasis added) (footnotes omitted).)

40. On September 3, 2019, the Commission entered its Final Rulemaking Order in *Assumption of Commission Jurisdiction Over Pole Attachments from the Federal*

Communications Commission, Docket No. L-2018-3002672 (hereinafter the "*2019 Final Rulemaking Order*").

41. On March 19, 2020, the FCC issued a Public Notice of the receipt of the Commission's certification that it had exercised Section 224 reverse preemption over the regulation of pole attachments.

F. VERIZON FAILED TO DEMONSTRATE THE RATES IT PAYS ARE UNJUST OR UNREASONABLE UNDER PENNSYLVANIA LAW

42. Verizon's Complaint contains no allegation that the rate it pays under the Joint Use Agreements violates the Public Utility Code, or the Commission's regulations or orders.

43. Verizon did not amend its Complaint after it was transferred by the FCC to the PUC.

44. Verizon's Complaint contains no allegation that the rate FirstEnergy pays under the Joint Use Agreements violates the Public Utility Code, or the Commission's regulations or orders.

45. Under the Joint Use Agreements, each party pays the other interrelated and reciprocal rates to attach to each other's poles. (*See, e.g.*, FirstEnergy St. 1-R, pp. 8-9.)

46. Verizon presented no evidence demonstrating that the rate FirstEnergy pays under the Joint Use Agreements violates the Public Utility Code, or the Commission's regulations or orders.

47. Verizon presented no evidence that the rates it pays exceed cost of service or produce an excessive rate of return under Pennsylvania law and practice.

48. It is necessary for Verizon to review the rates it pays and the costs incurred by FirstEnergy under the Joint Use Agreements consistent with the basic ratemaking formula used by this Commission for over 100 years. "The basic ratemaking formula…provides that a

utility's revenue requirement (RR) is equal to the amount of proper expenses (E) plus a reasonable rate of return (ROR) on the rate base (RB): RR = E + ROR(RB)." *Pennsylvania Power Co. v. Pa. Pub. Util. Comm'n*, 127 Pa. Commw. 97, 561 A.2d 43, 46 (Pa. Cmwlth. 1989).

49. To apply this formula, one must know the rate of return at present rates and compare that return to a "fair rate of return."

50. Verizon presented no evidence as to either the current rate of return produced by existing rates or what a fair rate of return would be under current market conditions.

51. Verizon admits this absence of proof by attempting to criticize FirstEnergy's calculation of fully allocated cost based rates under Pennsylvania standards, stating "The [Federal Communications] Commission's rate formulas cannot be inconsistent with Pennsylvania practices because they are the formulas the [Federal Communications] Commission adopted following a thoroughly vetted rulemaking proceeding in which FirstEnergy had ample opportunity to make its arguments." (Verizon St. 2.1, p. 54.)

52. Without presenting any evidence regarding the costs incurred by FirstEnergy under the Joint Use Agreements, it is impossible for Verizon to demonstrate it is paying rates that do not reflect the cost to serve it under the Joint Use Agreements.

53. Verizon presents no evidence that the rates it pays do not fairly and reasonably allocate the costs of a joint-use pole with respect to either parties' avoided costs associated with the duplication of facilities in the parties' joint use network.

54. The FCC's formula rates do not reflect the full cost of service. Rather, although "the cost categories are reasonably inclusive, the mathematical formulation does not fully allocate pole costs related to the common space." (FirstEnergy St. 2-R, p. 13.)

55. Consistent cost of service principles the FirstEnergy demonstrated that Joint Use Agreements are:

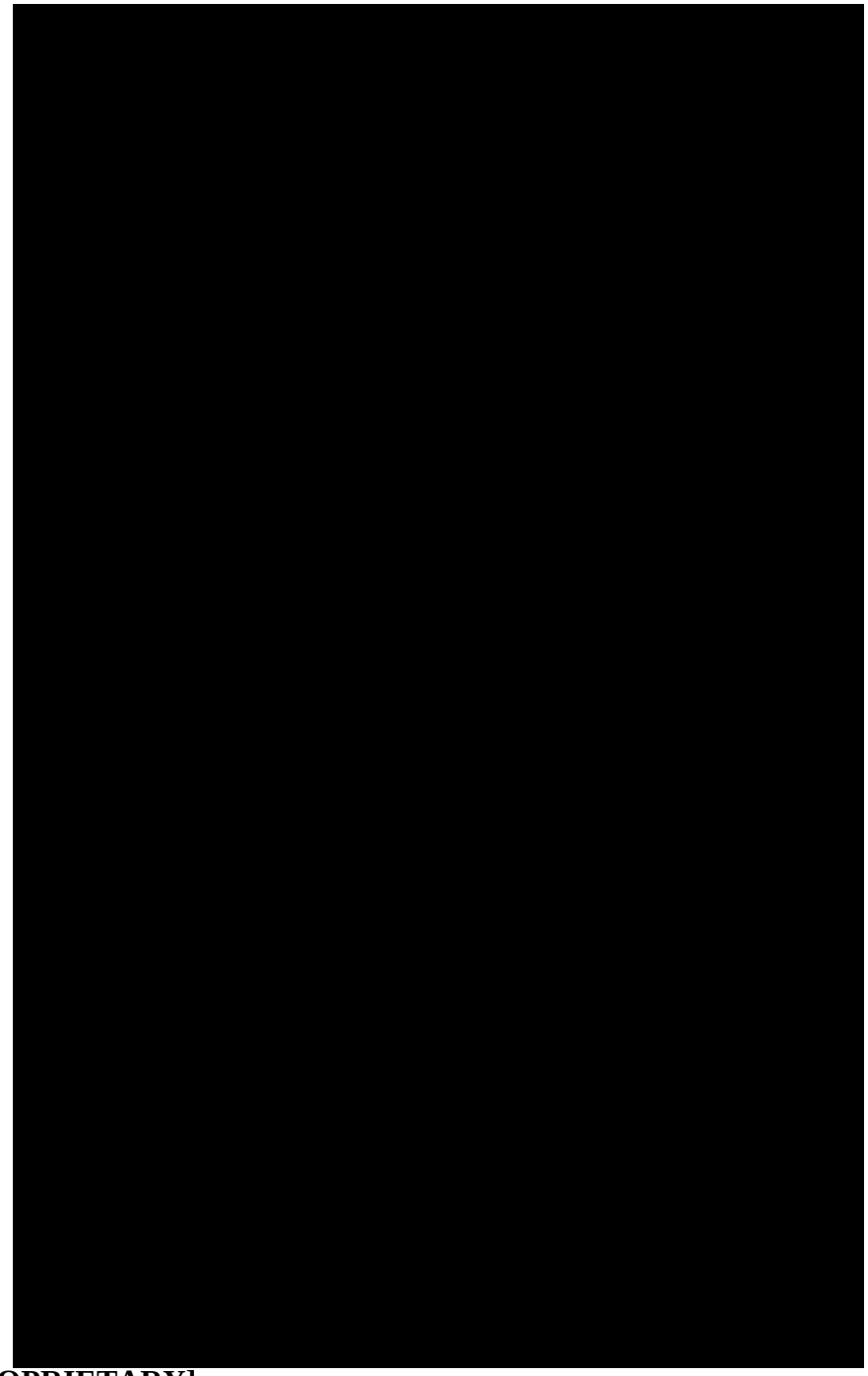
> structured to cover the full cost of owning and maintaining poles, while reflecting the parties' historic mutual agreement on the proportion to be borne by each party…The important common feature is that they are based the full pole cost. This is also consistent with long-standing cost of service rate regulation at the Commission.

(FirstEnergy St. 1-R, p. 15.)

56. FirstEnergy calculated fully allocated cost based rates that reflect the full cost of service with the cost of the common space shared equally among attaching entities, *see NEPTC Order* and compared those rates to the rates that Verizon pays under the Joint Use Agreements. (FirstEnergy St. 2-R, pp. 17-19.)

57. Tables 4 through 6 in FirstEnergy St. 1-R, reproduced below, are the annual rental amounts that would be produced using the fully allocated cost of service rates for each operating company compared to the actual invoiced amounts. This comparison also adjusts Verizon's rates for FirstEnergy's use of Verizon poles to a fully allocated cost of service rate.

[BEGIN PROPRIETARY]



[END PROPRIETARY]

(FirstEnergy St. 1-R, pp. 17-19.)

58. The rates in the Joint Use Agreements are well below fully allocated cost of service. In total, revenues based on fully allocated costs for the years 2011 through 2019 would have exceeded the revenues from the actual rates by **[BEGIN PROPRIETARY]** [redacted]

[END PROPRIETARY], as summarized by Table 7 in FirstEnergy St. 1-R, reproduced below.

[BEGIN PROPRIETARY]

[END PROPRIETARY]

(FirstEnergy St. 1-R, p. 19.)

59. FirstEnergy itself obtains no benefit from the rates it charges Verizon under the Joint Use Agreements. FirstEnergy witness Ms. Joanne M. Savage explained:

> When the Companies file base rate proceedings, joint use and other pole attachment revenues are a credit in the calculation of the total revenue requirement. In other words, this credit acts as an offset to directly reduce the amount of revenues required from the Companies' electric customers. The Companies' rates are designed so the Companies do not profit from providing pole attachment services to Verizon and other third parties as one hundred percent of the joint use revenues offset the rates to be paid by electric customers.

(FirstEnergy St. 3-R, pp. 3-4 (emphasis added).)

G. VERIZON FAILED TO DEMONSTRATE THAT THE RATES IT PAYS ARE UNDULY DISCRIMINATORY UNDER PENNSYLVANIA LAW

60. Verizon suggested for the first time in surrebuttal testimony that it may argue the rates it pays under the Joint Use Agreements are discriminatory in violation of the Public Utility Code. (Verizon St. 2.1, pp. 55-56.)

61. Verizon has submitted no evidence that the alleged unreasonable rate it pays is being charged by FirstEnergy "to supply a deficiency created by inadequate rates charged" to other FirstEnergy customers.

62. The relief Verizon seeks would actually constitute unjust and unreasonable rates and create an unlawful subsidy that violates Section 1304 of the Public Utility Code. The new telecom rate is far below fully allocated cost based rates. (*See* FirstEnergy St. 1-R, Tables 1-3.)

63. "A reduction in joint use fees paid by Verizon will result in lower joint use revenues and therefore a smaller credit to electric ratepayers…resulting in higher base distribution rates than would otherwise be the case absent the reduction in joint use fees." (FirstEnergy St. 3-R, p. 4.)

64. Any reduction in the rates Verizon pays will, therefore, result in higher rates for Pennsylvania electric rate payers than they would pay otherwise.[11] (*See* FirstEnergy St. 3-R, p. 7.)

65. FirstEnergy would resultantly be forced to collect more revenues from its electric service customers to accommodate (i.e., subsidize) a joint use rate that is inadequate and substantially below a normal cost of service based rate. (FirstEnergy St. 1-R, p. 6; *see also* FirstEnergy St. 2-R, pp. 20-22.)

66. Verizon's proposed rate reduction would fail to provide FirstEnergy an adequate return from its pole attachment rates and this shortfall inevitably would be subsidized by FirstEnergy's electric service customers. This is unreasonable rate discrimination under Pennsylvania law. (*See* FirstEnergy St. 3-R, p. 7.)

67. Verizon submitted no evidence that the new rate it seeks would benefit broadband deployment in Pennsylvania sufficient to justify the unlawful subsidy it seeks.

[11] In this regard, until the FirstEnergy EDCs have a base rate case and get recovery of any rate reductions, they will fail to earn a fair rate of return on their investment in poles. Once the rate case occurs, and FirstEnergy recovers additional revenue from electric ratepayers the rate discrimination will occur. In this regard, FirstEnergy must be allowed to defer for future recovery the full amount of the differences with carrying charges between such modifications and the joint use revenue amounts embedded in its electric rates. (*See* FirstEnergy St. 3-R, p. 7.)

68. Verizon specifically objected to a discovery request seeking information regarding how a reduction in the rates FirstEnergy charges Verizon would enhance broadband services or deployment in Pennsylvania as irrelevant. (*See* Exhibit JMS-1 (Verizon's Answer to FE to Verizon Set II, No. 8.)

H. VERIZON FAILED TO DEMONSTRATE IT IS ENTITLED TO THE NEW TELECOM RATE

1. VERIZON DID NOT TERMINATE THE EXISTING JOINT USE AGREEMENTS.

69. "[A]ll of the Joint Use Agreements and related amendments were executed prior to 2011, and all of them are currently in full force and effect." (FirstEnergy St. 2-R, p. 8.)

70. Verizon witness Mr. Mills similarly testified:

> Verizon and FirstEnergy are party to ten joint use agreements that have similar terms and conditions and were entered with various Verizon predecessor companies between 1958 and 1988. FirstEnergy charges Verizon pole attachment rent each year using rental rate provisions that were amended between 1999 and 2009.

(Verizon Exh. SCM-1 at VZ00004 (emphasis added).)

71. The Joint Use Agreements are still in effect.

72. It is undisputed that the Joint Use Agreements at issue were not "entered into" after the FCC's *2011 Pole Attachment Order* was issued and that the Joint Use Agreements have not been terminated and remain in effect.

73. Verizon has failed to demonstrate that FirstEnergy simply relied on the evergreen clause in the Joint Use Agreements and refused to negotiate new rates for new and existing attachments.

74. "In 2011, FirstEnergy and Verizon began discussions on whether they could consolidate and update all of the terms and conditions of these Joint Use Agreements," after prior amendments to the Joint Use Agreements completed in 2009. (FirstEnergy St. 1-R, p. 24.)

75. The parties had arrived at final terms and conditions for operational matters and simply needed to add a new agreed-upon joint use cost-sharing rate and, during these negotiations, FirstEnergy made several good faith efforts to significantly reduce Verizon's annual rental payments, including reductions of more than **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per year under the existing agreements. (FirstEnergy St. 1-R, pp. 26-27.)

76. FirstEnergy also offered several times to discuss terminating the existing agreements and replace them with FirstEnergy's template CLEC agreement. (*See* FirstEnergy St. 1-R, pp. 28-29; *see also* FirstEnergy St. 2-R, pp. 29-30.)

77. FirstEnergy's David Karafa stated Verizon was required to terminate the existing joint use agreement an email to Brian Trosper more than a year before the Complaint was filed. (Verizon Exhibit SM-5 at VZ000689 "…the FCC will defer to existing agreements and indicates it will reject complaints about agreements like these that no party has sought to terminate.".)

78. FirstEnergy always negotiates in good faith. (FirstEnergy St. 1-R, p. 24.)

79. FirstEnergy noted above the several different options that it attempted to explore with Verizon to lower the rates Verizon pays under the Joint Use Agreements for both new and existing attachments. FirstEnergy went so far as to propose to completely transition Verizon out of pole ownership in accordance with what it understood to be Verizon's previously communicated desire. (FirstEnergy St. 1, p. 29.)

80. Verizon refused to consider, let alone accept, any rate that was higher than the new telecom rate. As summarized by Mr. Schafer:

> Throughout these negotiations, Verizon has insisted on FirstEnergy charging Verizon new rental rates based on the FCC's new telecom formula. Whenever FirstEnergy tried to suggest such formulas be used as only as guidance or reference for negotiation, Verizon

> reiterated its position that it is entitled to the new telecom rate and that FirstEnergy must concede that argument or else negotiations would be pointless… Indeed, Verizon never submitted an offer to FirstEnergy that was not based on the new telecom rate. Verizon was simply attempting to lower the joint use rate substantially below cost of service and maintain all of the other benefits of the Joint Use Agreements.

(FirstEnergy St. 1-R, pp. 24-25 (emphasis added).)

81. Mr. Schafer further testified:

> **Q. What changes to the rates, terms, and conditions of the Joint Use Agreements were offered by FirstEnergy?**
>
> A. During negotiations, FirstEnergy made several good faith offers to significantly reduce Verizon's annual rental payments, including reductions of more than **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per year under the existing agreements. Verizon's response was a flat rejection. Verizon's lack of movement even when FirstEnergy yielded concessions gave no indication that we could find middle ground.

(FirstEnergy St. 1-R, p. 27.) Verizon presents no evidence that (a) rebuts this offer was made or (b) that it did not flatly reject the offer and simply insist on the new telecom rate.

2. VERIZON IS NOT ENTITLED TO ANY OF THE PRESUMPTIONS SET FORTH IN THE *2018 POLE ATTACHMENT ORDER*.

82. Verizon has failed to demonstrate the Joint Use Agreements constitute "new," "newly-negotiated," or "newly-renewed" agreements.

83. Verizon has also failed to demonstrate that FirstEnergy possessed and leveraged bargaining power during rate negotiations.

84. Verizon's claim that FirstEnergy has bargaining power is without foundation. Verizon has based its conclusion concerning bargaining power on a cursory review of the number of poles (i.e., FirstEnergy has more poles than Verizon). (FirstEnergy St. 2-R, p. 25.)

85. There is more to determining bargaining power than simply looking at relative percentages of pole ownership. (FirstEnergy St. 2-R, p. 25.)

86. The presence of regulation mitigates or undermines the presence of bargaining power. (FirstEnergy St. 2-RJ, pp. 12-13.)

87. Consideration of the following factors serves to negate assertions that FirstEnergy holds bargaining leverage and is able to exercise bargaining power in negotiating pole attachment rates with Verizon.

- Verizon has a less-costly alternative to attaching to FirstEnergy's poles under the Joint Use Agreements. FirstEnergy offered to provide pole attachments to Verizon under the leasing arrangements provided to non-ILECs and charge Verizon the associated lower rate. Verizon rejected FirstEnergy's offer.

- FirstEnergy would suffer considerable harm if it was unable to connect to Verizon's poles, which makes dissolution of mutual pole attachment agreements impractical. Theoretically, Verizon would realize even more harm (than would FirstEnergy) if both parties were unable to attach to each other's poles. However, the disruption and harm to FirstEnergy would be unprecedented and unacceptable, as FirstEnergy stated publicly in a prior Complaint proceeding before the FCC. As a result, Verizon was fully aware that FirstEnergy would be unable to act on any threat to dismantle the pole sharing arrangement.

- Economic and practical factors also negate the potential of FirstEnergy exercising bargaining power. Constructing a duplicate pole network is an expensive undertaking and likely an impossible one. Even if FirstEnergy was able to replace Verizon's poles, it would be highly unlikely that the Commission would deem expenditures to construct a duplicate pole network to be prudent or reasonable, as explained in the rebuttal testimony of Thomas R. Pryatel (FirstEnergy Statement No. 5-R).

- Finally, the evergreen provision in the current Joint Use Agreements prevents FirstEnergy from unilaterally disconnecting Verizon's attachments from its poles. This means that FirstEnergy could not actually take any actions that are typically associated with the exercise of bargaining power.

(FirstEnergy St. 2-R, pp. 25-26.)

88. In addition, Verizon's argument is severely undercut by its preference for the terms and conditions included in the Joint Use Agreements over switching to a leasing arrangement. By not accepting FirstEnergy's offer to switch Verizon to the leasing arrangement

that FirstEnergy provides to non-ILECs, Verizon has revealed that it does not consider the two pole attachment arrangements to be similarly-situated. Otherwise, Verizon would have readily accepted, or at least explored, the offer of similarly-situated pole attachment arrangements at a lower price. (FirstEnergy St. 2-R, pp. 26-27.)

89. The percentages of pole ownership under the Joint Use Agreements have not materially changed since the time of the last negotiation between Verizon and FirstEnergy for joint use rates in 2009, two years before the FCC asserted its jurisdiction to include the pole attachment rates between electric utilities and ILECs under joint use agreements.[12] (FirstEnergy St. 2-R, p. 27.)

90. At that time, Verizon indicated that the joint use rate issue was "amiably resolved" and that "Verizon PA and FirstEnergy can finally have a common rate structure that is fair and equitable for all the Joint Use Agreements between both companies in Pennsylvania."[13] (FirstEnergy St. 2-R, p. 27.)

91. Verizon's letter to FirstEnergy plainly states that Verizon was satisfied with the results of its negotiations with FirstEnergy and does not convey any view that (in Verizon's opinion) FirstEnergy exerted bargaining power. (FirstEnergy St. 2-R, pp. 27-28.)

92. The percentage of pole ownership, therefore, did not appear to unduly influence the outcome of negotiations in 2009 and Verizon has failed to present any evidence as to why circumstances differ today. (FirstEnergy St. 2-R, p. 28.)

93. . Verizon had, and continues to have, a lower-cost alternative to the current Joint Use Agreements with FirstEnergy. (FirstEnergy St. 2-R, p. 29.) Specifically, FirstEnergy

[12] In 2009, Verizon owned 27% and FirstEnergy owned 73% of the combined poles. Likewise, in 2019, Verizon owned 27% and FirstEnergy owned 73% of the combined poles.

[13] Letter to FirstEnergy Joint Use Team from Norman L. Parish, Verizon, Manager – Network Engineering, August 12, 2009. *See* FirstEnergy Exhibit SFS-1.

offered to Verizon the opportunity to exit the joint use agreement and for Verizon to receive pole attachments services under the same arrangements and rates that FirstEnergy charges non-ILECs (i.e., under the FCC's telecom rates), and to "transition Verizon out of the pole-owning business in FirstEnergy service territories" (FirstEnergy St. 2-R, p. 29.)

94. This provided Verizon with a lower-cost alternative (compared to the rates under the Joint Use Agreements) that, as the FCC indicated in its 2011 Pole Attachment Order, serves to mitigate any bargaining power differential that might otherwise arise from pole ownership percentages.

95. FirstEnergy's offer is also contrary to the type of behavior that would be expected from a party that indeed holds bargaining power. Instead, a party with bargaining power would not be motivated to provide rate accommodation to a captive counterparty (i.e., a party with no bargaining power). (FirstEnergy St. 2-R, pp. 29-30.)

96. Even if FirstEnergy possessed bargaining power, it could never leverage it and would be unable to follow through with any threat of foreclosure, thereby negating any prospect of exerting bargaining power. (FirstEnergy St. 1-R, p. 32.)

97. FirstEnergy would be subject to significant harm if the joint use arrangements were terminated, even if Verizon would theoretically suffer even more harm. Losing access to approximately one-quarter of the poles it currently has access to in Pennsylvania would be unprecedented and would be damaging to FirstEnergy, making it exceptionally irrational for FirstEnergy to accept the risk of being unable to meet its service obligations to customers. (FirstEnergy St. 1-R, p. 33.)

98. Second, the increased costs FirstEnergy would incur, assuming an option to terminate the agreements were logistically feasible, would be much more than is the case today

under the Joint Use Agreements. FirstEnergy would be at substantial risk for the Commission to conclude that higher pole costs (i.e., stemming from FirstEnergy dismantling of its joint use agreements with Verizon) were reasonable or prudent expenditures. And further, if the Commission disallowed recovery of these costs, then FirstEnergy stockholders would in turn have to absorb them. (*See* FirstEnergy St. 2-R, p. 33.)

99. Third, it is highly unlikely that FirstEnergy would be able to actually replace the 27% of poles owned by Verizon, even if FirstEnergy irrationally decided that it was willing to: (1) risk interrupting service to its electricity customers; and (2) forego recovering any cost differential in the rates charged to customers. (FirstEnergy St. 5-R, pp. 3-4.) If all of FirstEnergy's attachments were removed from Verizon's poles, FirstEnergy would instantly need to find an alternative means to provide electricity to its customers by duplicating existing facilities, which is general disfavored by state and local government officials across the Commonwealth. (FirstEnergy St. 5-R, pp. 3-4.)

100. Fourth, while Verizon claims the evergreen provision included in the Joint Use Agreements hinders them in negotiations, the evergreen provision also prevents FirstEnergy from disconnecting Verizon attachments from its poles. Thus, any bargaining power that FirstEnergy might hold from having more poles than Verizon would be negated because the evergreen provision prevents FirstEnergy from exercising such power. (FirstEnergy St. 2-R, pp. 34-35.)

101. Verizon has failed to demonstrate that FirstEnergy possessed and leveraged bargaining power during rate negotiations.

3. FIRSTENERGY REBUTTED THE PRESUMPTIONS SET FORTH IN THE *2018 POLE ATTACHMENT ORDER* AND DEMONSTRATED THAT VERIZON IS NOT SIMILARLY SITUATED TO ITS COMPETITORS

102. The Joint Use Agreements provide several advantages to Verizon over its cable company and CLEC competitors that have third-party pole attachment license agreements, including that FirstEnergy pays a large proportion of Verizon's costs to own and maintain its pole infrastructure. (FirstEnergy St. 1, pp. 31-37; *see also* Verizon Exhibit SCM-5 at VZ00689.)

103. The Joint Use Agreements have allowed Verizon to construct its communications systems unfettered by significant make-ready expense, while its competitors pay a substantial amount in make-ready to gain access to FirstEnergy's poles. (FirstEnergy St. 1-R, pp. 32-33; FirstEnergy Exhibit SFS-5.)

104. Based on the data available to FirstEnergy these cost savings for Verizon range from approximately **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per existing pole attached per year.

105. The Joint Use Agreements have provided Verizon time- and cost-saving advantages over its competitors to reach new customers and to provide additional services to existing customers, because all Verizon needs to do (having attached to the majority of FirstEnergy's poles under the Joint Use Agreements) is overlash its existing facilities or light existing dark fiber capacity to reach those new customers and to provide the additional services that its existing customers might require. (FirstEnergy St. 1-R, pp. 33-34.)

106. When FirstEnergy sought information regarding its cost-savings associated with overlashing, Verizon responded it "does not track which Verizon distribution cables have been overlashed generally or which Verizon distribution cables attached to FirstEnergy's poles have

been overlashed specifically…" and did not provide the information necessary for FirstEnergy to quantify this benefit.

107. Verizon also avoids up-front work costs and can simply "notify and attach" to FirstEnergy pole, while its competitors must submit attachment application for attachment approval. (FirstEnergy St. 1-R, p. 34.) Third-party cable providers or CLECs are required to submit photographs and the information set forth in pole profile sheets before they can obtain approval to attach to a FirstEnergy pole. In contrast, Verizon may collect this data, but it need not submit it and wait on FirstEnergy approval before attaching. Rather, Verizon regularly attaches to FirstEnergy poles and does not even notify FirstEnergy until after it has done so.

108. The Joint Use Agreements have permitted Verizon to avoid costs associated with attachment application fees, which its competitors must pay. (FirstEnergy St. 1-R, pp. 34-35.) The fees amount to **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per application plus **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per pole and, like make-ready costs, are not recovered through FirstEnergy's annual rental rates. (FirstEnergy St. 1-R, pp. 34-35.)

109. Verizon is also subject to more lenient overlashing rules than its competitors. Specifically, under the Joint Use Agreements, Verizon need not provide advance notice of its intent to overlash. (FirstEnergy St. 1-R, p. 35.) Cable company and CLEC attachers, however, must provide 15-days' advance notice of overlashing, 15-days' notice upon completion of the overlashing, and pole loading studies to support their overlashing. (FirstEnergy St. 1-R, p. 35.)

110. The Joint Use Agreements also allow Verizon to avoid field audit costs that FirstEnergy's CLEC and cable company attachers pay. (FirstEnergy St. 1-R, p. 35.)

111. FirstEnergy explained that it will be conducting field audits on a five-year cycle for all of its operating utilities that is similar to the field audit it has conducted in the Toledo Edison Company's service territory. The costs for that field audit to Verizon competitors were **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per pole. Dividing **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per pole by five years equals a rate difference of **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per pole per year that Verizon's competitors will pay but Verizon will not. (FirstEnergy St. 1-R, p. 35.)

112. FirstEnergy further explained that regardless of whether their competitors elect to participate in the field audit, Verizon does not even have bear the risk of incurring these costs. (FirstEnergy St. 1-RJ, p. 28.)

113. In addition, if one of Verizon's competitors does not participate in the field audit, FirstEnergy can and will impose penalty fees under the standard cable company/CLEC attacher agreement for any unauthorized attachments discovered during the audit. (FirstEnergy St. 1-RJ, p. 28.) Verizon, unlike its competitors, is not subject to similar penalty fees under the Joint Use Agreements.

114. Verizon is permitted under the Joint Use Agreements to charge higher rates for FirstEnergy to attach to its poles, than it is permitted to charge its competitors to attach to its poles. (FirstEnergy St. 1-R, pp. 35-36.)

115. Certain of the aforementioned benefits historically provided, and continue to provide, Verizon with a significant "speed-to-market" advantage over its competitors, which allow Verizon to attract and serve new customers more quickly than its competitors. (FirstEnergy St. 1-R, p. 36.)

116. Verizon benefits from FirstEnergy's comprehensive vegetation management program, because its competitors do not have pole lines on which they would otherwise incur vegetation management expenses of the kind that Verizon is able to avoid due to FirstEnergy's greater diligence. (FirstEnergy St. 1-R, pp. 36-37.)

117. FirstEnergy's vegetation management program extends to Verizon-owned poles that house FirstEnergy facilities, i.e., FirstEnergy implements its vegetation management program around Verizon poles. Verizon's competitors are not pole owners and, therefore, do not receive the benefit of FirstEnergy's vegetation management program. (FirstEnergy St. 2-RJ, p. 19.)

118. Throughout this proceeding, FirstEnergy sought discovery of information necessary to quantify the benefits that Verizon receives under the Joint Use Agreements. As detailed in Section II.C., above, this resulted in substantial discovery disputes between the parties, and the filing of several motions to compel. The sum result of these disputes is that FirstEnergy was not able to access much of the financial information necessary to quantify the cost-savings Verizon experiences under the Joint Use Agreements. (*See, e.g.*, FirstEnergy St. 1-R, pp. 39-41 (discussing Verizon's repeated failures to provide supporting data for the assertions made in the Complaint and its direct testimony).)

119. The rates FirstEnergy pays Verizon under the Joint Use Agreements already account for these costs.

120. FirstEnergy's tree removals benefit Verizon's pole plant, and adds another reimbursement of Verizon's pole costs. (FirstEnergy St. 1-R, pp. 36-37.)

121. FirstEnergy has also replaced a number of poles for Verizon, at FirstEnergy's expense. (FirstEnergy St. 1-R, p. 37.)

122. FirstEnergy also incurs significant unreimbursed expense responding to emergency events on Verizon-owned poles.

123. Based on the FCC's rate formula, another 7.4% of Verizon's annual costs are reimbursed by cable company attachers, with another 7.4% reimbursement for every additional CLEC attacher.

124. Verizon's criticisms of FirstEnergy's quantifications of cost savings or lack thereof are not credible because FirstEnergy sought discovery of information necessary to quantify the benefits that Verizon receives under the Joint Use Agreements. This resulted in substantial discovery disputes between the parties, and the filing of several motions to compel. The sum result of these disputes is that FirstEnergy was not able to access much of the financial information necessary to quantify the cost-savings Verizon experiences under the Joint Use Agreements. (*See, e.g.*, FirstEnergy St. 1-R, pp. 39-41 (discussing Verizon's repeated failures to provide supporting data for the assertions made in the Complaint and its direct testimony).)

125. The fundamental differences between Verizon's Joint Use Agreement and FirstEnergy's standard third-party attacher agreements are initially made apparent within the recitals. For example, the "WHEREAS" clause of the 1986 agreement between Pennsylvania Electric Company and The Bell Telephone Company of Pennsylvania states:

> WHEREAS, Penelec and Bell desire to cooperate in keeping pole plant at a minimum in the territory covered by this Agreement and to provide for the joint use of their respective poles when and where joint use shall be of mutual advantage in meeting their service requirements.

(Verizon Exhibit SCM-2 (VZ000320).) The "WHEREAS" clause of the FirstEnergy Third-Party Pole Attachment Agreement, however, states:

[BEGIN PROPRIETARY]

[END PROPRIETARY]

(PROPRIETARY Verizon Exhibit SCM-3 (VZ000489.)

126. The table of contents of each of these agreements, and the remainder of the Joint Use Agreements, similarly betray any assertion that they are "comparable." (FirstEnergy St. 2-RJ, p. 36.)

127. FirstEnergy provided further details regarding the differences between these agreements, using the 1986 agreement between Pennsylvania Electric Company and The Bell Telephone Company of Pennsylvania and the FirstEnergy Third-Party Pole Attachment Agreement as examples. (PRORIETARY FirstEnergy Exhibit SFS-15.)

128. Certain of the material and fundamental differences noted are directly tied to the benefits identified and credited by the FCC in the *AT&T v. FPL Order*. Specifically:

- Guaranteed Access – The 1986 Penelec / Bell Telephone Agreement is broader in scope and not limited to the poles that an attacher must apply for, and obtain, consent to attach to under the FirstEnergy Third-Party Pole Attachment Agreement. Third party attachers are not guaranteed access to any poles that are not the subject of an approved application. (*See* FirstEnergy Exhibit SFS-15 at 2.)

- Reserved Space – The 1986 Penelec / Bell Telephone Agreement historically conferred a material advantage to Verizon by reserving 3 feet of space for its attachments. A third-party attacher is not provided a similar benefit under the FirstEnergy Third-Party Pole Attachment Agreement. (*See* FirstEnergy Exhibit SFS-15 at 3.)

- No Permitting – Under the FirstEnergy Third-Party Pole Attachment Agreement, a licensee is required to pay a license preparation and administration fee. Verizon pays no such fee under the Joint Use Agreements. (*See* FirstEnergy Exhibit SFS-15 at 5.)

- No Inspection – The FirstEnergy Third-Party Pole Attachment Agreement requires an attacher to be subject to inspection and pay for the costs of such inspection. Verizon is not subject to these inspection fees under the Joint Use Agreements. (*See* FirstEnergy Exhibit SFS-15 at 4.)

129. Verizon's rejection of the less-costly alternative also provides a practical test as to whether the attachment arrangements of the joint use agreements are similarly situated to those provided to non-ILECs under the telecom rate. (FirstEnergy St. 2-R, p. 30.)

130. Verizon rejected FirstEnergy's offer to transition Verizon out of the pole-owning business and provide pole attachments under the same conditions and rates that are provided to non-ILEC attachers. (FirstEnergy St. 2-R, p. 30.) Thus, Verizon must have recognized that it receives net benefits under the Joint Use Agreements that are above and beyond those that it would receive under the leasing arrangements that FirstEnergy provides to non-ILECs. (FirstEnergy St. 2-R, p. 30.)

131. Otherwise, Verizon would have readily accepted what it perceived to be the same treatment (i.e., similarly-situated arrangements) for a lower price. (FirstEnergy St. 2-R, p. 30.)

132. FirstEnergy has demonstrated that Verizon is not similarly situated to its competitors and receives substantial material benefits under the Joint Use Agreements.

I. THE POLE ATTACHMENT RATES FIRST ENERGY CHARGES VERSION SHOULD BE THE EXISTING RATES

1. VERIZON FAILED TO DEMONSTRATE THE RATES IT PAYS ARE UNJUST AND UNREASONABLE, OR THAT IT CORRECTLY CALCULATED NEW RATES.

133. Verizon has not demonstrated that the existing rates it pays under the Joint Use Agreements are unjust and unreasonable and, therefore, it should not receive a new rate under the existing Joint Use Agreements.

134. Verizon's rate calculations also contain numerous errors. (FirstEnergy St. 1, p. 20.)

135. Verizon's allocation of Accumulated Deferred Taxes (Electric) to distribution poles is in error. This cost should be allocated based on the ratio: Account 364 Gross Pole Investment ÷ Gross Electric Plant Investment. Instead, Verizon's allocation is based on the ratio: (Account 364 Gross Pole Investment – Depreciation) ÷ (Gross Electric Plant Investment - Depreciation). (FirstEnergy St. 1, p. 20.)

136. Verizon used an incorrect pole count. The correct pole count is 528,755. (FirstEnergy St. 1, p. 20.)

137. Verizon's allocation of Accumulated Deferred Taxes (Electric) to these overhead Accounts 364, 365 and 369 is in error. This cost should be allocated based on the ratio: Investment in Accounts 364, 365 and 369 ÷ Gross Electric Plant Investment. Instead, Verizon's allocation is based on the ratio: (Investment in Accounts 364, 365 and 369 – Depreciation) ÷ (Gross Electric Plant Investment - Depreciation). (FirstEnergy St. 1, p. 20.)

138. Verizon used an incorrect rate of return. It is unclear how Verizon determined the rate of return, but the proper rate of return would the rate most recently approved by the Commission, which is 7.92%. (FirstEnergy St. 1, p. 20.)

139. Verizon used FCC presumptions for average pole height, unusable space, usable space, and number of attaching entities. These figures are incorrect and do not reflect actual local data. FirstEnergy performed a statistically reliable audit of its pole plant and added to its calculations the actual figures. (FirstEnergy St. 1, p. 20.)

140. These errors in Verizon's calculations are compounded by the fact that Verizon did not conduct its own field study to calculate inputs into the FCC's formula rates and, therefore, the only actual data regarding these inputs was presented by FirstEnergy.

2. FIRSTENERGY DEMONSTRATED THAT, TO THE EXTENT THE COMMISSION DETERMINES TO REVISE THE RATES VERZION PAYS UNDER THE JOINT USE AGREEMENTS, IT SHOULD USE THE OLD TELECOM RATE.

141. The "old telecom rate" is essentially a fully allocated cost rate method similar to that used by the Commission with one significant exception. (See FirstEnergy St. 2-RJ, p. 4.)

142. For unusable pole space, sometimes referred to as "common space," the Commission, in accordance with well accepted cost causation principles, allocates the cost of unsuable space proportionally to all attachers. (FirstEnergy St. 2-RJ, p. 4.)

143. On the other hand, the FCC directly assigns without explanation one third of unusable space to the pole owner and 2/3 to all attachers, including the pole owner. (See FirstEnergy St. 1-R, pp. 13-15; FirstEnergy St. 2-RJ, pp. 6-7.)

144. This reduces the pole attachment rate, apparently for policy reasons, but is not consistent with well-established principles of cost causation. (See FirstEnergy St. 1-R, pp. 13-15; FirstEnergy St. 2-RJ, p. 7.)

145. The old telecom formula rate is set forth as follows:

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left(\text{Maintenance and Administrative Carrying Charge Rate}\right)$$

$$\text{Where Space Factor} = \frac{\left(\text{Space Occupied}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}$$

(FirstEnergy Exhibit WZ-1.)

146. The FCC has established rebuttal presumptions for each of the following inputs, for purposes of calculating the "space factor."[14]

147. The FCC has also established a rebuttable presumption regarding the "[Number] of Attaching Entities," based upon whether a utility's service area is considered "urban"[15] or "non-urbanized"[16]; for urban areas, the presumptive average number of attaching entities is five and for non-urban areas, it is three. *See* C.F.R. § 1.1409(c).

148. These presumptions may be rebutted by either party.

149. FirstEnergy calculated inputs for purposes of establishing a rate cap, rather than the FCC's presumed inputs, under the old telecom rate. (*See* FirstEnergy St. 1-R, pp. 21-23.)

150. FirstEnergy believed that the FCC presumptions did not accurately reflect the actual conditions in its service territories.

151. To confirm this belief, FirstEnergy conducted a Field Audit during the course of this proceeding, which gathered actual data regarding the pole facilities that are subject to the Joint Use Agreement and demonstrated.

152. The audit was conducted from December 2019 to January 2020 and was performed pursuant to the FirstEnergy Random Pole Sample Project Procedures Manual, which was provided as FirstEnergy Exhibit SC-1. (FirstEnergy St. 6-R, p. 3.)

153. The audit was performed in accordance with accepted industry practices. (FirstEnergy St. 6-R, p. 3.)

[14] The presumptions are that: (1) the space occupied by an attachment is presumed to be one foot; (2) the amount of usable space is presumed to be 13.5 feet; (3) The amount of unusable space is presumed to be 24 feet; and (4) the pole height is presumed to be 37.5 feet. *See* 47 C.F.R. § 1.1410.

[15] "Urban" service areas are defined as having a population of 50,000 or higher population. Importantly, if any part of the utility's service area within the state has a designation of urbanized (50,000 or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities.

[16] "Non-urbanized" services areas are defined as having a population of less than 50,000.

154. Based on the results of this audit, and the use of FirstEnergy's Geographic Information System ("GIS") to generate to select a random sample of poles of sufficient quantity to be used in a field audit survey, FirstEnergy witness Mr. Clark Guo then calculated statistically reliable average values for each of the variables used in the FCC's rate formulas for poles in service territories of the three FirstEnergy operating utilities that have both FirstEnergy and Verizon attachments. (FirstEnergy St. 7-R, pp. 3-4; *see also* FirstEnergy Exhibit CG-1.)

155. Importantly, Mr. Guo concluded that these averages represented the true population of FirstEnergy's and Verizon's joint use network within a 95% confidence level threshold. (FirstEnergy St. 7-R, p. 4.)

156. Although Verizon attempted to criticize the results of FirstEnergy's field audit, those criticisms should be rejected. (See Verizon St. 1.1, pp. 51-59; Verizon St. 2.1, pp. 21-29; Verizon St. 3.1, pp. 35-40.) FirstEnergy explained that any perceived errors noted by Verizon do not render the audit unreliable. Evidence establishes the "incontrovertible fact is that the validity of the sample, including all attributes verified, is substantially above the industry-accepted standard for accuracy." (FirstEnergy St. 6-RJ, p. 4.)

157. Moreover, "even after counting the actual alleged errors identified by Verizon, the sample still has a 99.30% accuracy rate." (FirstEnergy St. 6-RJ, pp. 4-5.)

158. Using the recent, local inputs, FirstEnergy calculated rates using both the FCC's old telecom rate formula, and the same formula without the arbitrary direct assignment of one third of the common space ("fully allocated"). These rates are represented in the column titled "ME[PE / PP] Old Telecom Rate Pre-2011" in Tables 1-3 of FirstEnergy St-1R, and are reproduced below for comparison (with the new telecom rate calculations omitted):

Table 1

Met Ed		
Year Billed	**ME Old Telecom Rate (FERC)**	**Fully Allocated Pre-2011**
2011	$ 18.88	$ 26.50
2012	$ 22.43	$ 31.48
2013	$ 23.63	$ 33.17
2014	$ 11.03	$ 15.49
2015	$ 20.25	$ 28.42
2016	$ 18.84	$ 26.44
2017	$ 20.52	$ 28.79
2018	$ 25.79	$ 36.20
2019	$ 28.95	$ 40.62

Table 2

Penelec		
Year Billed	**PN Old Telecom Rate (FERC)**	**Fully Allocated Pre-2011**
2011	$ 14.58	$ 20.49
2012	$ 15.50	$ 21.78
2013	$ 16.57	$ 23.29
2014	$ 11.64	$ 16.36
2015	$ 15.55	$ 21.85
2016	$ 15.86	$ 22.30
2017	$ 16.62	$ 23.27
2018	$ 23.07	$ 32.43
2019	$ 19.85	$ 27.89

Table 3

Penn Power		
Year Billed	**PP Old Telecom Rate (FERC)**	**Fully Allocated Pre-2011**
2011	$ 18.79	$ 26.28
2012	$ 21.12	$ 29.53
2013	$ 21.44	$ 29.97
2014	$ 19.27	$ 26.94
2015	$ 22.30	$ 31.18
2016	$ 23.64	$ 33.05
2017	$ 23.61	$ 33.01
2018	$ 28.94	$ 40.46
2019	$ 30.22	$ 42.25

159. Although the FCC's formula rates do not fully allocate the use of common space in contrast to the "Fully Allocated Pre-2011," these rates are more reasonable because they use actual data and more closely approximate a correct, full allocation of common costs associated with common space than the new telecom rates. (FirstEnergy St. 1-R, pp. 15-17.)

160. The old telecom rates are in-between the existing rates and the new telecom rate. (*See* FirstEnergy St. 1-R, Tables 1-3.)

161. If the Commission deems it necessary to revise the rates Verizon pays under the Joint Use Agreements, the old telecom rate more adequately balances the interests of Verizon, FirstEnergy and FirstEnergy's electric service ratepayers than the new telecom rate.

J. VERIZON FAILED TO DEMONSTRATE IT IS ENTITLED TO REFUNDS

162. Verizon is not entitled to refunds because it failed to demonstrate the rates it pays under the existing Joint Use Agreements are unjust and unreasonable.

163. Verizon's requested relief would result in FirstEnergy underearning on its investment in the joint use poles until its next base rate case and, after that rate case, would result in an unlawful subsidy. Therefore, FirstEnergy should similarly be permitted to for future recovery the full amount of any refunds grants in this proceeding. (*See* FirstEnergy St. 3-R.)

164. Verizon's request for refunds would result in a significant increase in FirstEnergy's electric rates. Revenues from pole attachment fees are credited dollar for dollar to FirstEnergy's customers. (FirstEnergy St. 3-R, pp. 3-4.) If Verizon's request were granted, FirstEnergy's customers would experience an annual increase of **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** and a one-time increase of **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** reflecting Verizon's refund request.

165. If the Commission determines to grant refunds in this case, the calculation should be based on the difference between existing rates and the old telecom rate as calculated by FirstEnergy. This would amount to annual refund (before interest) of approximately $1.8 million based on the most-recent billing year.

APPENDIX B
PROPOSED CONCLUSIONS OF LAW

Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company (collectively "FirstEnergy" or the "Company") propose the following conclusions of law:

1. The Pennsylvania Public Utility Commission ("Commission") has jurisdiction over the parties and issues in this proceeding.

2. The Commission has jurisdiction over a "rate" charged by a public utility for "service." 66 Pa.C.S. § 102.

3. The Commission had jurisdiction over joint use agreements between electric utilities and incumbent local exchange carriers from the time the Joint Use Agreements in this proceeding were executed until the effective date of *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, 5331 (Report and Order and Order on Reconsideration dated April 7, 2011) ("*2011 Pole Attachment Order*"), *aff'd*, *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013). *See North-Eastern Pennsylvania Telephone Company v. Pennsylvania Power & Light Company*, Docket No. C-881953, 1992 Pa. PUC LEXIS 68 (Order dated June 9, 1992) ("*NEPTC Order*") (determining whether the cost sharing methodology establishes in an existing joint use agreement was just and reasonable); *see also ALLTEL Pennsylvania, Inc., Bell Atlantic-Pennsylvania, Inc., The Citizens Telephone Company of Kecksburg, Marianna & Scenery Hill Telephone Company, North Pittsburgh Telephone Company, and The United Telephone Company of Pennsylvania, t/d/b/a Sprint v. West Penn Power Company*, Docket No. C-00992532, 2001 Pa. PUC LEXIS 27 (Order dated July 26, 2001) ("*ALLTEL Order*")

4. From the effective date of the *2011 Pole Attachment Order* until the Commission certified to the Federal Communications Commission ("FCC") that it regulates the rates, terms, and conditions for pole attachments pursuant to *Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission*, Docket No. L-2018-3002672 (hereinafter the "*2019 Final Rulemaking Order*"), the FCC had jurisdiction over disputes regarding the Joint Use Agreements at issue.

5. After the Commission certified to the FCC it regulates the rates, terms, and conditions for pole attachments pursuant to the *2019 Final Rulemaking Order*, it re-established jurisdiction over the instant Joint Use Agreements.

6. As a "creature of statute," the Commission "has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication." *Feingold v. Bell of Pa.*, 383 A.2d 791, 794 (Pa. 1977) (citing *Allegheny Cnty. Port Auth. v. Pa. Pub. Util. Comm'n*, 237 A.2d 602 (Pa. 1967); *Del. River Port Auth. v. Pa. Pub. Util. Comm'n*, 145 A.2d 172 (Pa. 1958)).

7. Section 224 of the Communications Act shall not "be construed to apply to, or to give the [FCC]…jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments <u>in any case where such matters are regulated by a State</u>." 47 U.S.C. § 224(c)(1).

8. FCC regulations and applicable court decisions "are persuasive, meaning that they do not establish binding precedent" for the Commission in pole attachment disputes. *2019 Final Rulemaking Order* at 50.

9. The Public Utility Code and applicable Pennsylvania law control this dispute.

10. Under Section 701 of the Public Utility Code, a complainant "may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission." 66 Pa.C.S. § 701.

11. Under Section 701, a complainant is "required to allege a violation of the Public Utility Code, our regulations, or our orders." *Ruth McGarvey and Iva Jean Conley v. Verizon Pennsylvania Inc.*, Docket No. C-2009-2111253, 2009 Pa. PUC LEXIS 110, at *18 (Initial Decision dated Nov. 10, 2009), *adopted as final without modification* (Order entered Jan. 12, 2010) (citing 66 Pa. C.S. § 701; 52 Pa. Code § 5.21(a); *West Penn Power Co. v. Pa. Pub. Util. Comm'n*, 478 A.2d 947 (Pa. Cmwlth. 1984)).

12. Verizon has failed to meet the threshold requirement of Section 701, to "allege a violation of the Public Utility Code…[Commission]…regulations, or…[Commission]…orders," and its Complaint should be summarily dismissed.

13. The party seeking a rule or order from the Commission has the burden of proof in that proceeding. 66 Pa. C.S. § 332(a).

14. A litigant's burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence, which is substantial and legally credible. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). The preponderance of evidence standard requires proof by a greater weight of the evidence. *Cmwlth. v. Williams*, 732 A.2d 1167 (Pa. 1999). Only if the proponent of the rule or order present evidence found to be of greater weight than the other parties, will it have carried its burden of proof. *Morrissey v. Commonwealth*, 225 A.2d 895 (Pa. 1986); *Burleson v. Pa. Pub. Util.*

Comm'n, 641 A.2d 1234, 1236 (Pa. 1983); *V.J.R. Bar Corp. v. P.L.C.B.*, 390 A.2d 163 (Pa. 1978); *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217, 1220 (Pa. Cmwlth. 2001).

15. Although the factual burden may shift during a proceeding, the proponent of the rule or order (i.e., the complainant) always maintains the overarching burden of proof. If a complainant establishes a prima facie case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, a complainant will prevail. If the utility rebuts a complainant's evidence, the burden of going forward with the evidence shifts back to a complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. *Replogle v. Pennsylvania Electric Company*, 54 Pa. PUC 528, 1980 Pa. PUC LEXIS 20 (Order dated Oct. 9, 1980); *see also Waldron v. Philadelphia Electric Company*, 54 Pa. PUC 98, 1980 Pa. PUC LEXIS 90 (Order dated March 14, 1980).

16. A rebuttable presumption is a rule of law requiring presumption of one fact (the presumed fact) upon proof of another (the proved fact), in the absence of satisfactory direct evidence of the presumed fact. It places on the adverse party the burden of going forward with further evidence in rebuttal, but it does not affect the ultimate burden of proof. *Pa. Pub. Util. Comm'n v. West Penn Power Company*, Docket No. R-850220, 1987 Pa. PUC LEXIS 316, at *17 (Order entered April 17, 1987) (citing *Sowizral v. Hughes*, 333 F.2d 829 (3rd Cir. 1964); *Johnstone v. Reading Co.*, 284 F.2d 71 (3rd Cir. 1957)).

17. If and when the adverse party satisfies its burden of going forward and rebuts the presumption, the presumption per se vanishes because it is not itself evidence and it is, therefore,

without evidentiary weight. *Pa. Pub. Util. Comm'n v. West Penn Power Company*, Docket No. R-850220, 1987 Pa. PUC LEXIS 316, at *17 (Order entered April 17, 1987)

18. Any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence. *Met-Ed Indus. Users Group v. Pa. Pub. Util. Comm'n*, 960 A.2d 189, 193 n.2 (Pa. Cmwlth. 2008) (citing 2 Pa. C.S. § 704). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Borough of E. McKeesport v. Special/Temporary Civil Serv. Comm'n*, 942 A.2d 274, 281 (Pa. Cmwlth. 2008). The "presence of conflicting evidence in the record does not mean that substantial evidence is lacking." *Allied Mechanical and Elec., Inc. v. Pa. Prevailing Wage Appeals Bd.*, 923 A.2d 1220, 1228 (Pa. Cmwlth. 2007) (citation omitted).

19. Verizon bears the burden of demonstrating by substantial evidence that: (1) the rates charged by FirstEnergy to Verizon under the Joint Use Agreements are unjust and unreasonable under Sections 508 and 1301 of the Public Utility Code, 66 Pa.C.S. §§ 508 and 1301, unduly discriminatory under Section 1304, 66 Pa. C.S. § 1304, and/or Pennsylvania law; (2) the Joint Use Agreements should be revised to utilize a different rate methodology other than the methodology currently used in them under Sections 508 and 1309 of the Public Utility Code, 66 Pa.C.S. §§ 508 and 1309; and (3) it is entitled to refunds reflecting the difference from any newly adopted rate and the rates previously charged under the Joint Use Agreements under Section 1312 of the Public Utility Code, 66 Pa.C.S. § 1312.

20. Verizon has failed to meet its burden of proof in this proceeding under the Public Utility Code and Pennsylvania law.

21. The Commission can only revise, reform, or vary a public utility contract when: (1) the contract embraces a public right or concerns the public interest and general wellbeing of

Pennsylvania; and (2) the contract terms being revised are found to be unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and general wellbeing of Pennsylvania. 66 Pa.C.S. § 508; *see also Shenango Twp. Bd. of Supervisors v. Pa. Pub. Util. Comm'n*, 686 A.2d 910, 913-14 (Pa. Cmwlth. 1996).

22. Section 508 does not empower the Commission to vary, reform, or revise a contract provision simply because "the result will be undesirable, aesthetically displeasing, inefficient, or disadvantageous" to a party. *ALLTEL ID*, at *52, *adopted as modified*, 2001 Pa. PUC LEXIS 27, at *24-25 (Order entered July 26, 2001).

23. Section 508 expressly provides that any contract changes made by the Commission apply prospectively only, i.e., 30 days after entry of order reforming the contract. 66 Pa.C.S. § 508; *see also Feingold*, 383 A.2d at 793 (recognizing the Commission lacks authority to look backward and award damages under Section 508) and *Apollo Gas Company v. Heilman*, Docket No. C-00924405, 1994 Pa. PUC LEXIS 30, at *35-36 (Order dated March 10, 1994).

24. Verizon has failed to carry its burden of proof under Section 508 to demonstrate that the rates it pays under the Joint Use Agreements are unjust and unreasonable, and has failed to demonstrate that the rate it pays should be revised to the new telecom rate under the Public Utility Code and Pennsylvania law.

25. Section 1301(a) of the Public Utility Code states "Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commission." 66 Pa.C.S. § 1301(a). Pursuant to the just and reasonable standard, a utility may obtain "a rate that allows it to recover those expenses that are reasonably necessary to provide service to its customers[,] as

well as a reasonable rate of return on its investment." *City of Lancaster (Sewer Fund) v. Pa. Pub. Util. Comm'n*, 793 A.2d 978, 982 (Pa. Cmwlth. 2002). The "cost of service" has been recognized as the "polestar" of utility ratemaking in Pennsylvania. *Lloyd v. Pa. Pub. Util. Comm'n*, 904 A.2d 1010 (Pa. Cmwlth. 2006), appeal denied, 916 A.2d 1104 (2007) ("*Lloyd*").

26. Section 1309(a) of the Public Utility Code further requires that:

> [w]henever the Commission…upon complaint, finds that the existing rates of any public utility for any service are unjust, unreasonable, or in anywise in violation of any provision of law, the commission shall determine the just and reasonable rates, including maximum or minimum rates, to be thereafter observed and in force, and shall fix the same by order…

66 Pa.C.S. § 1309(a).

27. A determination that a utility's rates are unjust or unreasonable usually rests on a factual finding that the imposition of those rates unreasonably benefit the utility's investors at the expense of the utility's ratepayers, that is; that the rates constitute a species of "unlawful taxation." *Nat'l Fuel Gas Distrib. Corp. v. Pa. Pub. Util. Comm'n*, 464 A.2d 546, 564 (Pa. Cmwlth. 1983) (citing *Pa. Pub. Util. Comm'n v. Pennsylvania Gas & Water Company*, 492 Pa. 326, 339, 424 A.2d 1213, 1220 (Pa. 1980) *cert. denied*, 454 U.S. 824 (1981)). This finding, in turn, is typically established by evidence that imposition of the challenged rates produces revenues in excess of a fair return on the fair value of the utility's property used to provide the regulated service. *Nat'l Fuel*, 464 A.2d at 564. That is, the Commission must determine whether the rate is excessive in light of the costs incurred by the utility to provide the associated service. *See Air Products and Chemicals, Inc. v West Penn Power Company*, Docket Nos. R-183; C-20701 et al., 52 Pa. PUC 756, 1978 Pa. PUC LEXIS 9 (Order dated Dec. 14, 1978).

28. A complainant challenging an existing rate "carries a very heavy burden" to prove that the facts and circumstances have changed so drastically as to render the rate unreasonable.

See Shenango Twp. Bd. of Supervisors v. Pa. Pub. Util. Comm'n, 686 A.2d 910, 914 (Pa. Cmwlth. 1996) (citing *Zucker v. Pa. Pub. Util. Comm'n*, 401 A.2d 1377 (Pa. Cmwlth. 1979); *Brockway Glass Co. v. Pa. Pub. Util. Comm'n*, 437 A.2d 1067 (Pa. Cmwlth. 1981)).

29. Verizon has failed to carry its burden of proof under Sections 1301 and 1309 of the Public Utility Code to demonstrate that the rate it pays under the Joint Use Agreements is unjust and unreasonable, and has failed to demonstrate that the new telecom rate constitutes a just and reasonable rate under the Public Utility Code and Pennsylvania law.

30. Section 1304 of the Public Utility Code states:

> No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, either as between localities or as between classes of service.

66 Pa.C.S. § 1304.

31. The burden of proving that an existing rate is discriminatory is on the customer challenging such rate. *See U.S. Steel Corp. v. Pa. Pub. Util. Comm'n*, 390 A.2d 865 (Pa. Cmwlth. 1978). To prove discrimination, the challenging customer show that the utility was bent on collecting more than a reasonable rate from the customer (and other similarly situated customers) for the purpose of supplying a deficiency created by inadequate rates charged other customers. *See Park Towne v. Pa. Pub. Util. Comm'n*, 433 A.2d 610, 614 (Pa. Cmwlth. 1981) (citing *Alpha Portland Cement Co. v. Public Service Commission*, 84 Pa. Super. 255 (Pa. Super. 1925)).

32. Verizon has failed to carry its burden of proof to demonstrate that the rates it pays FirstEnergy under the Joint Use Agreements are unduly discriminatory, and has failed to

demonstrate that the new telecom rate does not constitute an unduly discriminatory rate under Public Utility Code and Pennsylvania law.

33. Section 1312(a) of the Public Utility Code states:

> If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. In making a determination under this section, the commission need not find that the rate complained of was extortionate or oppressive…The commission shall state in any refund order the exact amount to be paid, the reasonable time within which payment shall be made, and shall make findings upon pertinent questions of fact.

66 Pa.C.S. § 1312(a) (emphasis added). Section 1312(a) establishes a "four year statute of limitations" that terminates a party's right to seek refunds beyond four years prior to the date of the filing of a complaint. *Darrell Ross v. PECO Energy Company*, Docket No. C-2008-2060301, 2008 Pa. PUC LEXIS 829, at *10-11 (Initial Decision dated Oct. 14, 2008) *adopted as final without modification* (Order entered Feb. 19, 2009).

34. Whether to grant refunds, the amount of such refunds and the applicable period for refunds is, within the bounds of the Public Utility Code, a matter within the Commission's discretion. *See Emporium Water Co. v. Pa. Pub. Util. Comm'n*, 859 A.2d 20, 24 (Pa. Cmwlth. 2004) (citing *Nat'l Fuel*, 464 A.2d at 564); *see also LP Water & Sewer Co. v. Pa. Pub. Util. Comm'n*, 722 A.2d, 733 736 (Pa. Cmwlth. 1998) and *Riverton Consolidated Water Co. v. Pa. Pub. Util. Comm'n*, 140 A.2d 114, 125 (Pa. Super. 1958).

35. "[T]he Code does not authorize the imposition of a refund of excess revenues and improvident expenditures without consideration of the reasonableness and justice of the rates as a whole." *Nat'l Fuel*, 464 A.2d at 567.

36. The law generally prohibits retroactive application of changes in an agency's regulations, rules or policies. *See Jenkins Unemployment Compensation Case*, 56 A.2d 686 (Pa Super. 1948) (applying 1 Pa.C.S. § 1926 to administrative regulations);[1] *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1998) ("congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").[2]

37. When the Commission establishes a new rate, it is acting "in its quasi legislative capacity." *Cheltenham & Abington Sewerage Co. v. Pa. Pub. Util. Comm'n*, 25 A.2d 334, 336 (Pa 1942).

38. The prohibition against retroactive application applies to Commission orders establishing rates.[3]

39. Verizon's request for refunds requests the Commission to unlawfully exercise its quasi-legislative function to apply a newly established rate to prior periods.

40. Verizon has failed to carry its burden of proof to demonstrate that it is entitled to any refunds in this proceeding under the Public Utility Code and Pennsylvania law.

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[1] 1 Pa.C.S. § 1926 ("No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly.").

[2] The D.C. Circuit Court has similarly held that the court held that "[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broadcasting Co., Inc. v, FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987)

[3] Relatedly, the award of refunds would retroactively revise a "rate" for "service" and violate the general rule recognizing that ratemaking in prospective and prohibiting retroactive ratemaking. *See, e.g., Philadelphia Electric Co. v. Pa. Pub. Util. Comm'n*, 502 A.2d 722, 727-728 (Pa. Cmwlth. 1985). Although the rule prohibiting retroactive ratemaking has traditionally been applied to "Commission-made rates," the prospective reformation of contracts under Section 508(a) of the Public Utility Code strongly suggests that the principles and considerations underlying the general prohibition against retroactive ratemaking should apply here.

41. Even if FCC precedent applies, Verizon maintains the burden of proof under Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), to demonstrate that the rates it pays under the Joint Use Agreements are unjust and unreasonable under FCC authority.

42. Verizon must demonstrate that it terminated the Joint Use Agreements (or genuinely lacked the ability to do so) and entered into new joint use agreements after the FCC's issuance of its *2011 Pole Attachment Order*. *2011 Pole Attachment Order* ¶ 216.

43. The FCC "is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable." *2011 Pole Attachment Order* ¶ 216.

44. "[B]oth incumbent LECs and other utilities have the ability to terminate existing agreements and seek new arrangements, and that, at times, each type of entity has sought to do so." *Id.* The FCC "will review complaints regarding agreements between incumbent LECs and other utilities entered into following the adoption of this Order based on the totality of those agreements." *2011 Pole Attachment Order* ¶ 216 (emphasis added).

45. "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." *2011 Pole Attachment Order* ¶ 126.

46. Verizon failed to carry its burden of proof to demonstrate it terminated the Joint Use Agreements or genuinely lacked the ability to terminate the Joint Use Agreements.

47. The *2018 Pole Attachment Order* "establish[ed] a presumption that, for newly-negotiated and newly-renewed pole attachment agreements between incumbent LECs and utilities, an incumbent LEC will receive comparable pole attachment rates, terms, and conditions as a similarly-situated" attacher. *See In the Matter of Accelerating Wireline Broadband*

Deployment, 33 FCC Rcd 7705, 7767-71 at ¶ 123 (Third Report and Order and Declaratory Ruling dated Aug. 3, 2018) ("*2018 Pole Attachment Order*") (emphasis added).

48. "A new or newly-renewed pole attachment agreement is one entered into, renewed, or in evergreen status after the effective date of this Order, and renewal includes agreements that are automatically renewed, extended, or placed in evergreen status. *2018 Pole Attachment Order* at ¶ 127, n.475 (emphasis added).

49. Verizon has failed to demonstrate that the Joint Use Agreements constitute "new," "newly-negotiated," or "newly-renewed" agreements and, therefore, it is not entitled to a presumption that it is similarly situated to its competitors.

50. The *2018 Pole Attachment Order* established the presumptions that an ILEC is similarly situated to its competitor and entitled to the new telecom rate order to remedy an alleged disparity in bargaining power between ILECs and electric utilities in rate negotiations under joint use agreements. *See 2018 Pole Attachment Order* ¶ 124.

51. Bargaining power presupposes a lack of regulation, which serves to diminish or mitigate it entirely; indeed, that is a fundamental purpose of public utility regulation. *Brockway Glass Company, Inc. v West Penn Power Company*, Docket No. C-80021876, 1980 Pa. PUC LEXIS 25, at *30 (Order dated Sept. 25, 1980) ("A chief objective of regulatory process is to secure the efficiency of monopolistic operation without allowing the enterprise to take advantage of its position.").

52. During the parties' rate negotiations in 2009 or during earlier periods, the rates, terms and conditions of the Joint Use Agreements were subject to regulation by the Commission as a "rate" for "service."

53. Verizon has failed to carry its burden of proof to demonstrate that FirstEnergy possessed and leveraged bargaining power during rate negotiations and, therefore, is not entitled to the presumption that it is similarly situated to its competitors or entitled to the new telecom rate.

54. If an ILEC demonstrates they are entitled to the presumptions then the electric utility "can rebut the presumption with clear and convincing evidence that the incumbent LEC receives net benefits under its pole attachment agreement with the utility that materially advantage the incumbent LEC over other telecommunications attachers." *2018 Pole Attachment Order* ¶ 123.

55. FirstEnergy has demonstrated that Verizon receives substantial material benefits under the Joint Use Agreements, consistent with the FCC's recent ruling in *In the Matter of BellSouth Telecommunications, LLC d/b/a/ AT&T Florida v. Florida Power and Light Company*, Proceeding No. 19-187; Bureau ID No. EB-19-MD-006 (Memorandum Opinion and Order adopted May 20, 2020) ("*AT&T v. FPL*").

56. Therefore, the presumption per se vanishes and cannot be considered evidence. *Pa. Pub. Util. Comm'n v. West Penn Power Company*, Docket No. R-850220, 1987 Pa. PUC LEXIS 316, at *17 (Order entered April 17, 1987).

57. Verizon has failed to carry its burden of proof to demonstrate that the rates it pays under the Joint Use Agreements are unjust and unreasonable, and failed to demonstrate that it is entitled to the new telecom rate under persuasive FCC authority.

58. Verizon failed to carry its burden of proving by substantial evidence that, under either binding Pennsylvania law or persuasive FCC precedent: (1) the rates charged by FirstEnergy to Verizon under the Joint Use Agreements are unjust and unreasonable or unduly

discriminatory; (2) the Joint Use Agreements should be revised to utilize a different rate methodology other than the methodology currently used in them; and (3) it is entitled to refunds reflecting the difference from any newly adopted rate and the rates previously charged under the Joint Use Agreements.

APPENDIX C
PROPOSED ORDERING PARAGRAPHS

Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company (collectively "FirstEnergy" or the "Company") propose the following ordering paragraphs:

1. Verizon Pennsylvania LLC and Verizon North LLC ("Verizon") has failed to carry its burden of proof under the Public Utility Code to demonstrate that the existing rate it pays FirstEnergy under the Joint Use Agreements are unjust and unreasonable or unduly discriminatory.

2. Verizon has failed to carry its burden of proof under the Public Utility Code to demonstrate that it is entitled to receive the "new telecom rate" under the Joint Use Agreements.

3. Verizon has failed to carry its burden of proof under the Public Utility Code to demonstrate that it is entitled to refunds.

4. The above-captioned Pole Attachment Complaint is dismissed with prejudice. The Commission's Docket at Docket No. C-2020-3019347 is hereby marked closed.