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July 28, 2020

**Via eFile and Email**

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

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

Dear Secretary Chiavetta:

Enclosed please find Verizon's Initial Brief in the above captioned matter.

Because the Initial Brief includes certain Proprietary information, the Public Version of the Initial Brief is being e-filed, with the Proprietary Version being provided via email.

Very truly yours,

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

Suzan D. Paiva

SDP/sau  
Enclosure

**Via E-Mail**

cc: Attached Certificate of Service

**CERTIFICATE OF SERVICE**

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

Dated at Philadelphia, Pennsylvania, this 28<sup>th</sup> day of July, 2020.

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**VERIZON'S INITIAL BRIEF**

**(PUBLIC VERSION)**

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Dated: July 28, 2020

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## I. INTRODUCTION

This case presents the Commission’s first opportunity to enforce its new pole attachment regulations—binding laws that are crucial to “spurring investment in, and access to, physical infrastructure used to deliver essential broadband access service to end-user customers” in the Commonwealth.<sup>1</sup> Key to ensuring these consumer benefits is that “rental rates for pole attachments ... are as low and close to uniform as possible” when paid by the various competitive entities that deploy facilities supporting broadband service in Pennsylvania.<sup>2</sup> The rates FirstEnergy<sup>3</sup> charges Verizon have failed that basic requirement since it became law in July 2011.<sup>4</sup> They are more than [REDACTED] times the properly calculated “new telecom” pole attachment rate guaranteed to other broadband providers, violate the Commission’s regulations, and undermine the Commission’s broadband objectives.

FirstEnergy cannot demonstrate that its rates comply with the Commission’s regulations, and it does not seriously attempt to do so. Instead, it asks the Commission to ignore or alter its regulations to benefit FirstEnergy and allow it to continue to overcharge Verizon. But “[a]uthorized regulations of an administrative agency have the force and effect of law and bind the agency equally with others.”<sup>5</sup> Pennsylvania law creates a presumption that Verizon is

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<sup>1</sup> *Assumption of Comm’n Jurisdiction over Pole Attachments from the FCC*, No. L-2018-3002672, 2019 WL 4345730, at \*6 (Aug. 29, 2019) (“*Final Rulemaking Order*”).

<sup>2</sup> *Id.* at \*2 (citation omitted).

<sup>3</sup> In this Brief, “FirstEnergy” refers to the three respondents, Metropolitan Edison Company (“Met-Ed”), Pennsylvania Electric Company (“Penelec”) and Penn Power Company (“Penn Power”), and “Verizon” refers to Verizon Pennsylvania LLC and Verizon North LLC.

<sup>4</sup> *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (“*Pole Attachment Order*”); *Pole Attachments Timeline Rules Take Effect*, 26 FCC Rcd 9638 (2011).

<sup>5</sup> *Herdelin v. Greenberg*, 328 A.2d 552, 554 (Pa. Commw. 1974).

entitled to the new telecom rate guaranteed its competitors,<sup>6</sup> so the only way FirstEnergy could lawfully charge Verizon a higher rate is if FirstEnergy rebuts that presumption—which it has not done. And even if FirstEnergy had rebutted the presumption, Pennsylvania law still caps the maximum lawful rate it may charge Verizon at the “old telecom” rate—a rate that is less than [REDACTED] the pole attachment rates FirstEnergy charges Verizon.

By any measure, FirstEnergy’s rates are unlawful and have been for nearly a decade. The Commission adopted rules that benefit consumers through low, uniform pole attachment rates. It should grant Verizon’s complaint to ensure Pennsylvania customers see those benefits. As the Commission has recognized, “a successful telecommunications infrastructure is vital in the 21st century.”<sup>7</sup> “With an expansive and established broadband service, Pennsylvania will be even more attractive to businesses,” will “help schools to provide a more interactive learning environment in order to bridge the digital divide,” and will ensure hospitals and medical facilities have the broadband access they require to meet the challenges of today and tomorrow.<sup>8</sup>

## II. PROCEDURAL HISTORY

Verizon and FirstEnergy jointly use more than 412,000 utility poles in Pennsylvania under the terms and conditions of ten substantially similar joint use agreements that contain the rates, terms, and conditions for each party’s use of the other party’s utility poles.<sup>9</sup> FirstEnergy

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<sup>6</sup> 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224 and 47 C.F.R. §§ 1.1401-1.1415).

<sup>7</sup> VZ St. 1.2 at 3:15-22 (Mills Surrejoinder) (quoting Broadband & High-Speed Internet Service, available at [http://www.puc.pa.gov/consumer\\_info/telecommunications/broadband\\_high\\_speed\\_internet\\_service.aspx](http://www.puc.pa.gov/consumer_info/telecommunications/broadband_high_speed_internet_service.aspx)).

<sup>8</sup> *Id.*; *Assumption of Comm’n Jurisdiction over Pole Attachments from the FCC*, No. L-2018-3002672, Notice of Proposed Rulemaking, 2018 WL 3533538, at \*5 (July 12, 2018) (“*NPRM*”).

<sup>9</sup> VZ St. 1.0, Ex. SCM-2. Five of the ten joint use agreements are with Met-Ed, four are with Penelec, and one is with Penn Power. VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 3).

entered the joint use agreements with Verizon’s predecessor companies between 1958 and 1988 and amended them between 1999 and 2009 to include the current pole attachment rate provisions.<sup>10</sup> FirstEnergy has long owned about three-quarters of the jointly used poles, and it retains its three-to-one pole ownership advantage over Verizon today.<sup>11</sup> FirstEnergy’s pole ownership advantage provides it superior bargaining power in pole attachment rate negotiations with Verizon,<sup>12</sup> which it used to impose and continue charging Verizon exceptionally high pole attachment rates.<sup>13</sup>

Penelec and Penn Power charge Verizon per-pole rates at least [REDACTED] the per-pole rates set by the Commission’s new telecom rate formula, which sets the presumptive “just and reasonable” rate required for Verizon under the Commission’s regulations.<sup>14</sup> Met-Ed reached the same result by charging Verizon an exceptionally high rate for a subset of joint use poles and

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<sup>10</sup> VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 3).

<sup>11</sup> *Id.* (Joint Statement ¶ 4); VZ St. 1.0, Ex. SCM-1 at VZ00005-08, VZ00011-13 (Mills Aff. ¶¶ 9, 14-16, 23-24, 27-28).

<sup>12</sup> *Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 206); *see also Verizon Va. v. Va. Elec. & Power Co.*, 32 FCC Rcd 3750, 3750-51 (¶ 13) (EB 2017) (“*Dominion Order*”); *BellSouth Telecommunications, LLC v. Fla. Power & Light Co.*, Proceeding No. 19-187, 2020 WL 2568977, at \*8 (¶ 18) (EB 2020) (“*FPL 2020 Order*”).

<sup>13</sup> VZ St. 2.1 at 57:6-62:4 (Calnon Surrebuttal); VZ St. 3.0, Ex. TJT-1 at VZ00107-108 (Tardiff Aff. ¶ 6); VZ St. 3.1 at 5:12-6:19, 15:17-23:9 (Tardiff Surrebuttal).

<sup>14</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. §§ 1.1406(d)(2), 1.1413(b)). For the 2011 to 2018 rental years, Penelec charged Verizon [REDACTED] per pole, and Penn Power charged Verizon [REDACTED] per pole. VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 7). For the same rental years, the properly calculated new telecom rates for use of Penelec’s poles were \$6.43, \$6.79, \$7.18, \$5.21, \$6.96, \$7.18, \$7.49, and \$10.49 per pole, and for use of Penn Power’s poles were \$7.30, \$8.47, \$8.51, \$8.21, \$8.94, \$9.40, \$9.08, and \$11.18 per pole. VZ St. 2.0 at 4:10-11 (Calnon Direct).

paying nothing for its use of Verizon’s poles.<sup>15</sup> For purposes of this litigation, the parties agreed that Met-Ed’s rates can be compared to per-pole new telecom rates by converting them into “reciprocal” rates that apply the same per-pole rate to each party for its use of the other party’s poles.<sup>16</sup> When so converted, Met-Ed’s rates, like the per-pole rates charged by the other defendants, have averaged over [REDACTED] times the per-pole competitively neutral new telecom rates required by law since 2011:<sup>17</sup>

	Average Per-Pole Contract Rate (2011-2018)	Average Per-Pole New Telecom Rate (2011-2018)	Average Contract Rate Compared to Average New Telecom Rate <sup>18</sup>
Met-Ed	[REDACTED]	\$ 9.14	[REDACTED]
Penelec	[REDACTED]	\$ 7.22	[REDACTED]
Penn Power	[REDACTED]	\$ 8.89	[REDACTED]
<b>FirstEnergy</b>	[REDACTED]	<b>\$ 8.42</b>	[REDACTED]

Verizon has tried for more than a decade to eliminate this competitive disparity.<sup>19</sup> And so, shortly after the Federal Communications Commission (“FCC”) amended its regulations in 2011 to require electric utilities, including FirstEnergy, to charge Verizon and other ILECs just,

<sup>15</sup> For the 2011 to 2018 rental years, Met-Ed charged Verizon [REDACTED] [REDACTED] for each pole in the subset of joint use poles. VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 7).

<sup>16</sup> VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 7).

<sup>17</sup> For the 2011 to 2018 rental years, the equivalent reciprocal rates are [REDACTED] [REDACTED] per pole, respectively. *Id.* For the same rental years, the properly calculated new telecom rates for use of Met-Ed’s poles were \$8.29, \$9.87, \$10.07, \$5.02, \$9.35, \$8.79, \$9.55, and \$12.20 per pole. *See* VZ St. 2.0 at 4:10-11 (Calnon Direct).

<sup>18</sup> VZ St. 2.0, Ex. MSC-1 at VZ00042, VZ00045-46 (Calnon Aff. ¶¶ 14, 20-21).

<sup>19</sup> VZ St. 1.0, Ex. SCM-1 at VZ00014-47 (Mills Aff. ¶¶ 30-47).

reasonable, and competitively neutral pole attachment rates, Verizon asked FirstEnergy for the just and reasonable rate the law requires.<sup>20</sup>

FirstEnergy would not agree even to discuss new rates unless Verizon paid in full the pole attachment rental invoices it was disputing.<sup>21</sup> So in good faith Verizon paid the invoices as demanded and, shortly thereafter, the parties began their negotiations.<sup>22</sup> But once Verizon paid those invoices, FirstEnergy refused to discuss new rates (or refunds) for the disputed invoices. Instead, it prolonged and delayed negotiations and then—when it finally agreed to discuss new rates—it offered minimal rate reductions and insisted they would apply only to future rental years.<sup>23</sup>

Meanwhile, the FCC continued to issue orders—in 2015, 2017, and 2018—reaffirming that electric utilities were required to reduce rates to competitively neutral levels as of July 2011.<sup>24</sup> When FirstEnergy still refused to comply with the FCC’s orders, Verizon filed a formal complaint at the FCC on November 20, 2019, alleging “that FirstEnergy has charged unlawful and unreasonably high pole attachment rates for years after [it was] directed by the FCC to

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<sup>20</sup> *Id.* at VZ00014-15 (Mills Aff. ¶ 31); VZ St. 1.0, Ex. SCM-5 at VZ00551 (FCC Ex. 17), VZ00557 (FCC Ex. 19).

<sup>21</sup> VZ St. 1.0, Ex. SCM-1 at VZ00015 (Mills Aff. ¶ 32).

<sup>22</sup> *Id.*; *see also, e.g.*, VZ St. 1.0, Ex. SCM-5 at VZ00557 (FCC Ex. 19) (“We believe that the rate that Verizon currently pays is in excess of the rate that PENELEC may charge under the rules established by the FCC in its April 7, 2011 Order. Accordingly, Verizon reserves the right to dispute the rate and seek a refund from PENELEC.”).

<sup>23</sup> VZ St. 1.0, Ex. SCM-1 at VZ00015-21 (Mills Aff. ¶¶ 33-47); *see also* Section V.A.3.a.2, below.

<sup>24</sup> *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) (“*Third Report and Order*”); *Dominion Order*, 32 FCC Rcd 3750; *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order on Reconsideration, 30 FCC Rcd 13731 (2015) (“*Cost Allocator Order*”).

eliminate wide disparities in pole rental rates.”<sup>25</sup> Verizon asked the FCC to order FirstEnergy to charge the just and reasonable new telecom rates required by law and refund the amounts it over-collected in violation of federal law since July 12, 2011.<sup>26</sup> The parties engaged in discovery while the case was pending at the FCC, and FirstEnergy filed an Answer and Verizon filed a Reply.<sup>27</sup>

Meanwhile, this Commission “had taken steps to ‘reverse preempt’ the FCC’s jurisdiction over pole attachment issues in Pennsylvania.”<sup>28</sup> The Commission’s regulations took effect on March 18, 2020, and the FCC recognized the Commission’s jurisdiction over pole attachments the following day.<sup>29</sup> On March 23, 2020, the FCC transferred this case to the Commission,<sup>30</sup> where it was referred to the Office of Administrative Law Judge.<sup>31</sup> The parties have since engaged in extensive discovery, submitted several rounds of pre-served written testimony, stipulated to a written record, and waived cross-examination of witnesses.<sup>32</sup> The record is closed and the case ready for decision on the papers.

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<sup>25</sup> Second Scheduling Order at 1 (June 9, 2020); *see also* Complaint (Nov. 20, 2019).

<sup>26</sup> *See* Second Scheduling Order at 1.

<sup>27</sup> *See id.* at 1-2.

<sup>28</sup> *See id.* at 2 (citing *Final Rulemaking Order*).

<sup>29</sup> *See States That Have Certified That They Regulate Pole Attachments*, Public Notice, No. DA20-302, 2020 WL 1434415 (FCC Mar. 19, 2020); *see also* 47 U.S.C. § 224(c)(2).

<sup>30</sup> *Verizon Pa., et al. v. Met-Ed, et al.*, EB-19-MD-008, 2020 WL 1491501 (Mar. 23, 2020).

<sup>31</sup> *See* Second Scheduling Order at 2.

<sup>32</sup> *See* Joint Motion to Admit Stipulated Items into Record of Proceeding ¶ 1 (July 7, 2020). Verizon served direct testimony on April 21, 2020, surrebuttal testimony on June 18, 2020, and surrejoinder testimony on July 2, 2020. FirstEnergy served rebuttal testimony on May 21, 2020 and rejoinder testimony on June 25, 2020.

### III. LEGAL STANDARDS

This Commission was “resolute in the necessity, especially at first and going forward, to proceed with a turn-key adoption of the FCC’s pole attachment regulations.”<sup>33</sup> This means that, irrespective of whether a case is litigated at the FCC or this Commission, “the same substantive rules [apply] in either venue.”<sup>34</sup> The FCC’s “considerably detailed national rules” are thus the Commission’s regulations.<sup>35</sup> They “have the force and effect of law” and bind the Commission and the parties in this case.<sup>36</sup>

#### A. Historical Background of FCC Rate Regulations

The FCC adopted its pole attachment rate regulations over several decades as cable companies and new types of communications companies entered the market and required space on utility poles to support their wires and other facilities.<sup>37</sup> The newer companies providing telecommunications services generally are known as competitive local exchange carriers, or “CLECs,” whereas Verizon and similar older companies are known as incumbent local exchange carriers, or “ILECs.”

Setting rates based on a company’s regulatory classification created unwarranted disparities in the pole attachment rates competitors paid for use of comparable space to affix comparable facilities on a utility pole to provide competing services in today’s converged voice,

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<sup>33</sup> *Final Rulemaking Order*, 2019 WL 4345730, at \*25.

<sup>34</sup> *Id.* at \*17.

<sup>35</sup> *Id.* at \*23; *see also* 52 Pa. Code § 77.4(a).

<sup>36</sup> *Herdlin*, 328 A.2d at 554; *see also Borough of Bedford v. Commonwealth*, 972 A.2d 53, 61 (Pa. Commw. 2009).

<sup>37</sup> *See, e.g., NPRM*, 2018 WL 3533538, at \*2-5, 8.

data, and video market.<sup>38</sup> In 2011, the FCC found these “artificial, non-cost-based differences” in pole attachment rates created “market distortions that affect attachers’ deployment decisions” and undermine the ability of “consumers to benefit through increased competition, affordability, and availability of advanced communications services, including broadband.”<sup>39</sup> Therefore, “as part of [the FCC’s] fundamental mission to advance the availability and adoption of broadband in America,” the FCC ordered electric utilities to eliminate the rate disparities as of July 12, 2011.<sup>40</sup>

ILECs like Verizon have long paid the highest pole attachment rates among communications companies.<sup>41</sup> They entered the market before there was cable television, broadband Internet, or wireless service—when electric utilities and ILECs were the primary owners and users of utility poles.<sup>42</sup> With a strong municipal preference for a single pole line, electric utilities and ILECs agreed to provide access to each other’s poles under the terms of “joint use agreements.”<sup>43</sup> And as electric utilities reached new neighborhoods first and owned more and more of the jointly used poles, they enjoyed a growing pole ownership advantage that

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<sup>38</sup> See, e.g., *Connecting America: The Nat’l Broadband Plan*, 2010 WL 972375, at \*97 (2010) (“*National Broadband Plan*”).

<sup>39</sup> *Am. Elec. Power Corp. v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013); *Pole Attachment Order*, 26 FCC Rcd at 5295 (¶ 126).

<sup>40</sup> See *Cost Allocator Order*, 30 FCC Rcd at 13741 (¶ 20); *Pole Attachments Timeline Rules Take Effect*, 26 FCC Rcd 9638 (2011) (“[T]he Federal Register has announced the effective date for [the ILEC rate rule, which then appeared at 47 C.F.R. § 1.1424] of July 12, 2011.”).

<sup>41</sup> See, e.g., *National Broadband Plan*, 2010 WL 972375, at \*97.

<sup>42</sup> See *Am. Elec. Power Corp.*, 708 F.3d at 185.

<sup>43</sup> See *Pole Attachment Order*, 26 FCC Rcd at 5334 (¶ 214) (“[I]LECs ... historically have obtained access to other utilities’ poles ... through ‘joint use’ or other agreements.”); see also *id.* at 5242 (¶ 4) (“[o]wing to a variety of factors, including environmental or zoning restrictions ... there is often no practical alternative [for network deployment] except to utilize available space on existing poles.”).

“unquestionably” placed them “in a position to extract monopoly rents ... in the form of unreasonably high pole attachment rates.”<sup>44</sup>

With the advent of cable television in the 1970s, cable companies sought access to existing pole networks for their wires and facilities. Congress recognized that the shared use of utility poles provides significant benefits; for example, it “minimize[s] ‘unnecessary and costly duplication of plant for all pole users.’”<sup>45</sup> But Congress also found pole owners were demanding “monopoly rents” from cable companies.<sup>46</sup> As a result, Congress passed the Pole Attachment Act in 1978 to require “just and reasonable” rates, terms, and conditions for cable company pole attachments.<sup>47</sup>

The FCC set the maximum “just and reasonable” rate for cable companies by a formula known as the cable rate formula,<sup>48</sup> and the United States Supreme Court found the resulting rate fully compensates the pole owner for use of space on its poles.<sup>49</sup> The cable rate formula continues to set the maximum rate for cable companies providing cable services.<sup>50</sup> It produces a rate that is about [REDACTED] the rate FirstEnergy has been charging Verizon.<sup>51</sup>

In 1996, Congress introduced competition to the local telephone market, which created a new set of companies that needed to use space on utility poles—the CLECs. And so Congress

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<sup>44</sup> *Id.* (citation omitted).

<sup>45</sup> S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109.

<sup>46</sup> *Id.*; *see also Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 330 (2002).

<sup>47</sup> 47 U.S.C. § 224(b)(1); *Pole Attachment Order*, 26 FCC Rcd at 5245 (¶ 9).

<sup>48</sup> 47 C.F.R. § 1.1406(d)(1).

<sup>49</sup> *See FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987); *see also Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002).

<sup>50</sup> *See* 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1406(d)(1)).

<sup>51</sup> VZ St. 2.1 at 4:6-9 (Calnon Surrebuttall); VZ St. 2.0, Ex. MSC-1 at VZ00045-46 (Calnon Aff. ¶ 21).

amended the Pole Attachment Act to give CLECs a guaranteed right to use space on the pre-existing network of utility poles electric utilities and ILECs owned at regulated rates.<sup>52</sup> Congress extended this statutory “right of access” to cable companies as well, but did not provide it to ILECs, meaning ILECs continue to depend on joint use agreements to gain access to electric utility poles.<sup>53</sup>

In 1996, Congress also required “just and reasonable” rates, terms, and conditions for the pole attachments of all “provider[s] of telecommunications service.”<sup>54</sup> In 1998, the FCC set the maximum “just and reasonable” rate for CLECs and cable companies providing telecommunications services using a formula that produced “significantly higher pole rental rates than rates derived from the cable rate formula.”<sup>55</sup> ILECs, however, still paid pole attachment rates under joint use agreements that were generally far higher than the CLEC rate.<sup>56</sup>

#### **B. FCC Rate Regulations, Which the Commission Has Adopted**

Nearly a decade ago, the FCC found this arcane pole attachment rate structure was negatively impacting its ability to “ensure that consumers in all regions of the country have access to advanced telecommunications and information services at rates that are just, reasonable and affordable.”<sup>57</sup> Because the lowest of the rates—the cable rate—is “‘just and reasonable’ and fully compensatory” to the pole owner, the FCC amended its regulations in 2011 to require

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<sup>52</sup> See 47 U.S.C. § 224(f); *Pole Attachment Order*, 26 FCC Rcd at 5245-46 (¶ 10).

<sup>53</sup> See 47 U.S.C. § 224(f); *Pole Attachment Order*, 26 FCC Rcd at 5245-46, 5328 (¶¶ 10, 202).

<sup>54</sup> See 47 U.S.C. §§ 224(a)(4), (b)(1).

<sup>55</sup> *Cost Allocator Order*, 30 FCC Rcd at 13734 (¶ 7); see also *Pole Attachment Order*, 26 FCC Rcd at 5247 (¶ 12).

<sup>56</sup> See *National Broadband Plan*, 2010 WL 972375, at \*97.

<sup>57</sup> *Pole Attachment Order*, 26 FCC Rcd at 5241-42 (¶¶ 2-3).

“consistent, cross-industry attachment rates that encourage deployment and adoption of broadband Internet access services ... at the cable-rate level.”<sup>58</sup>

The FCC ordered this harmonization of rates in two ways. *First*, the FCC revised its telecom rate formula in 2011 and 2015 to require reductions to the rates charged CLECs and cable companies providing telecommunications services.<sup>59</sup> The revised formula is known as the “new telecom” formula and it produces a rate that approximates the cable rate.<sup>60</sup> Thus, the maximum rate that may be charged Verizon’s competitors—whether set by the new telecom rate formula or the cable rate formula—is about [REDACTED] the rate FirstEnergy has been charging Verizon.<sup>61</sup> This Commission adopted the new telecom and cable rate formulas in its new regulations.<sup>62</sup> Verizon’s competitors also retain their statutory right of access to FirstEnergy’s poles and, because FirstEnergy does not require them to own and maintain a pole network for FirstEnergy’s use, Verizon’s competitors attach to FirstEnergy’s poles pursuant to “license agreements.”<sup>63</sup>

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<sup>58</sup> *Cost Allocator Order*, 30 FCC Rcd at 13731 (¶ 16); *see also NPRM*, 2018 WL 3533538, at \*2-5 (detailing FCC efforts to “establish rental rates for pole attachments that are as low and close to uniform as possible”) (citations omitted).

<sup>59</sup> *Pole Attachment Order*, 26 FCC Rcd at 5244 (¶ 8); *Cost Allocator Order*, 30 FCC Rcd at 13732 (¶ 3).

<sup>60</sup> 47 C.F.R. § 1.1406(d)(2); *Pole Attachment Order*, 26 FCC Rcd at 5305 (¶ 149); *Cost Allocator Order*, 30 FCC Rcd at 13738 (¶ 16); *see also, e.g.*, VZ St. 2.1 at 3:18-4:9 (Calnon Surrebuttal); VZ St. 2.1, Ex. MSC-3. The replaced formula is known as the “pre-existing” or “old” telecom formula. VZ St. 2.1 at 3:18-4:9 (Calnon Surrebuttal).

<sup>61</sup> VZ St. 2.0, Ex. MSC-1 at VZ00045-46 (Calnon Aff. ¶ 21).

<sup>62</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1406(d)(1)-(2)); VZ St. 2.1, Ex. MSC-3.

<sup>63</sup> 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224(f)); *see also* FE St. 1-R at 15:11-13 (Schafer Rebuttal) (“A key difference between Joint Use Agreements and Licensee Agreements is that under the Licensee Agreements, the cable companies and CLECs do not own any of the poles, so there are no reciprocal terms and conditions.”).

*Second*, the FCC ordered reductions to the rates electric utilities charge ILECs so they are the same or, at most, about 1.5 times the rates charged CLECs and cable companies.<sup>64</sup> The FCC explained that ILECs are “providers of telecommunications service” entitled by law to a “just and reasonable” rate.<sup>65</sup> It also found a “just and reasonable” rate must be “competitively neutral.”<sup>66</sup> And so, under the standard the FCC adopted in 2011, if an electric utility provides an ILEC terms and conditions under a joint use agreement that are comparable to the terms and conditions the electric utility provides CLECs and cable companies under their license agreements, “‘competitive neutrality counsels in favor of affording [I]LECs the same rate as the comparable provider,’ *i.e.*, the New Telecom Rate or the Cable Rate.”<sup>67</sup> In contrast, if the electric utility provides the ILEC terms and conditions under a joint use agreement that provide the ILEC a net material advantage as compared to the terms and conditions the electric utility provides CLECs and cable companies, the old telecom rate is a reference point for the “just and reasonable” rate based on the quantified value of the net material competitive advantages.<sup>68</sup>

The FCC expected electric utilities would provide significant rate reductions to ILECs to comply with the *Pole Attachment Order*—collectively reducing the rates they charge ILECs by up to \$350 million annually.<sup>69</sup> But the FCC also confirmed that it would set the “just and

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<sup>64</sup> *Pole Attachment Order*, 26 FCC Rcd at 5328 (¶¶ 202-03), 5336-37 (¶¶ 217-18); *see also* VZ St. 1.1 at 4:14-5:7 (Mills Surrebuttal); VZ St. 2.1 at 3:13-5:2 (Calnon Surrebuttal).

<sup>65</sup> *Pole Attachment Order*, 26 FCC Rcd at 5328 (¶¶ 202-03).

<sup>66</sup> *Third Report and Order*, 33 FCC Rcd at 7767 (¶ 123) (“In the interest of promoting infrastructure deployment, the Commission adopted a policy in 2011 that similarly situated attachers should pay similar pole attachment rates for comparable access”).

<sup>67</sup> *Verizon Fla. v. Fla. Power & Light Co.*, 30 FCC Rcd 1140, 1142 (¶ 7) (2015) (“*FPL 2015 Order*”) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217)).

<sup>68</sup> *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218); VZ St. 1.1 at 4:14-5:7 (Mills Surrebuttal); VZ St. 2.1 at 3:13-5:2 (Calnon Surrebuttal).

<sup>69</sup> *See Pole Attachment Order*, 26 FCC Rcd at 5330-31 (¶ 208).

reasonable” rate for an ILEC, and refund its prior overpayments, if an electric utility refused to negotiate just, reasonable, and competitively neutral rates.<sup>70</sup>

The expected rate reductions did not occur. Electric utilities—including FirstEnergy—resisted reductions to their rates, leading to costly “repeated disputes” following the 2011 rate reforms that thwarted the FCC’s objectives.<sup>71</sup> As a result, in 2017—six years after the 2011 regulations were adopted—the rate disparities persisted. One study showed rates paid by ILECs *increased* from an average of about \$26.00 per pole in 2008 to about \$26.12 per pole in 2017, while rates paid by CLECs *decreased* from about \$4.45 per pole in 2008 to about \$3.75 per pole in 2017.<sup>72</sup>

The ongoing rate disparities prompted the FCC and this Commission to act. The FCC amended its regulations in 2018 to include a presumption that ILECs must be charged the new telecom rate under most joint use agreements.<sup>73</sup> For all other joint use agreements, the 2011 standard continues to apply.<sup>74</sup> The FCC’s 2018 regulations also placed the burden on electric utilities to rebut the presumption with clear and convincing evidence that it provides the ILEC “net benefits” under the joint use agreement “that materially advantage the [I]LEC over other

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<sup>70</sup> *See id.* at 5290 (¶ 112), 5333-38 (¶¶ 214-20).

<sup>71</sup> *See In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Inv.*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266, 3280 (¶ 44) (2017). FirstEnergy was party to a 2014 case filed at the FCC by operating subsidiaries of Frontier Communications Corporation, another ILEC operating in Pennsylvania. *See* VZ St. 1.2, Ex. SCM-46 (Letter to Counsel, *Commonwealth Tel. Co. v. Met-Ed* (Feb. 12, 2015)).

<sup>72</sup> *Third Report and Order*, 33 FCC Rcd at 7768-69 (¶ 125).

<sup>73</sup> 47 C.F.R. § 1.1413(b); *see also Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126).

<sup>74</sup> *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.478) (“[T]he 2011 *Pole Attachment Order*’s guidance regarding review of [I]LEC pole attachment complaints will continue to apply” where the presumption does not).

telecommunications attachers” attached to the same poles.<sup>75</sup> If the electric utility rebuts the presumption, the electric utility may charge a rate that accounts for the ongoing per-pole value of the net material competitive benefits it provides the ILEC—but it cannot charge a rate higher than the old telecom rate.<sup>76</sup>

Under the FCC’s regulations, the following are the maximum rates permitted by law:

<b>Company</b>	<b>Maximum Lawful Rate Under PA and FCC Regulations</b>	<b>What FirstEnergy Charges Verizon</b>
Cable company providing cable services	Cable rate	Approximately [redacted] times the cable rate
CLECs and cable companies providing telecommunications services	New telecom rate (approximates the cable rate)	Approximately [redacted] times the new telecom rate
ILECs	Presumed: New telecom rate Cannot be higher than Old Telecom Rate	Approximately [redacted] times the new telecom rate Approximately [redacted] times the old telecom rate

This Commission also took action to speed enforcement of the FCC’s regulations.<sup>77</sup> It opened a docket in 2018 and issued an order in 2019 to reverse preempt the FCC’s jurisdiction, while “adopt[ing], in whole, the FCC’s regulatory regime for pole attachment complaint procedures.”<sup>78</sup> The Commission rejected FirstEnergy’s arguments, and those of other utilities, against adopting the FCC’s regulations, including the regulations adopted in the FCC’s 2018

<sup>75</sup> *Id.* at 7771 (¶ 128); *see also* 47 C.F.R. § 1.1413(b).

<sup>76</sup> *Third Report and Order*, 33 FCC Rcd at 7771 (¶¶ 128-129).

<sup>77</sup> *See NPRM*, 2018 WL 3533538, at \*7 (proposing “more timely alternative[ ] to the FCC complaint resolution process”).

<sup>78</sup> *Final Rulemaking Order*, 2019 WL 4345730, at \*7.

*Third Report and Order*.<sup>79</sup> The Commission decided the predictability of the federal substantive standards, if enforced faster in Pennsylvania “as compared to the FCC,” would “spur[ ] investment in ... physical infrastructure used to deliver essential broadband access service to end-user customers” in the Commonwealth.<sup>80</sup> And so the Commission warned parties not to “regularly rehash or reargue determinations of the FCC” once it assumed jurisdiction.<sup>81</sup>

**C. FirstEnergy’s Burden of Proof**

The Commission’s regulations<sup>82</sup> presume Verizon must be charged the following properly calculated new telecom rates:

<b>New Telecom Rates for Verizon’s Use of FirstEnergy’s Poles (per pole)<sup>83</sup></b>									
<b>Rental Year</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
Met-Ed poles	\$8.29	\$9.87	\$10.07	\$5.02	\$9.35	\$8.79	\$9.55	\$12.20	\$13.83
Penelec poles	\$6.43	\$6.79	\$7.18	\$5.21	\$6.96	\$7.18	\$7.49	\$10.49	\$9.07
Penn Power poles	\$7.30	\$8.47	\$8.51	\$8.21	\$8.94	\$9.40	\$9.08	\$11.18	\$11.80

The regulations place the burden on FirstEnergy to rebut the presumption that Verizon must be charged these new telecom rates with “clear and convincing evidence” establishing that FirstEnergy provides Verizon “net benefits under its pole attachment agreement[s] with [FirstEnergy] that materially advantage [Verizon] over other telecommunications attachers” that also attach to FirstEnergy’s poles.<sup>84</sup>

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<sup>79</sup> *Id.* at \*13.

<sup>80</sup> *Id.* at \*6.

<sup>81</sup> *Id.* at \*17.

<sup>82</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

<sup>83</sup> VZ St. 2.0 at 4:10-11 (Calnon Direct); VZ St. 2.0, Ex. MSC-1 at VZ00036-42, VZ00058-87 (Calnon Aff. ¶¶ 5-13, Exs. C-1 – C-3).

<sup>84</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)); *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123).

To meet its burden, FirstEnergy must prove by clear and convincing evidence that it provides “significant material benefits [to Verizon] beyond basic pole attachment or other rights given to another telecommunications attacher.”<sup>85</sup> The material benefits must “derive from the terms and conditions of the joint use agreement[s] rather than Verizon’s historical status as an [I]LEC.”<sup>86</sup> They must also be “*net* benefits”—meaning they must account for the unique *costs* FirstEnergy imposes on Verizon under the joint use agreement as compared to FirstEnergy’s license agreements.<sup>87</sup> FirstEnergy must also prove, document, and accurately quantify an annually recurring per-pole value for any net material competitive benefit because FirstEnergy “may not ‘embed in Verizon’s rental rate costs that [FirstEnergy] does not incur.’”<sup>88</sup>

FirstEnergy failed to rebut the presumption, so that is the end of the analysis under the rules. But even if FirstEnergy had rebutted it, FirstEnergy cannot lawfully charge Verizon a pole attachment rate higher than the old telecom rate, which is about 1.5 times the new telecom rate.<sup>89</sup> These properly calculated old telecom rates for Verizon’s use of FirstEnergy’s poles are:

<b>Old Telecom Rates for Verizon’s Use of FirstEnergy’s Poles (per pole)<sup>90</sup></b>									
<b>Rental Year</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
Met-Ed poles	\$12.57	\$14.96	\$15.26	\$7.61	\$14.16	\$13.32	\$14.47	\$18.49	\$20.96
Penelec poles	\$9.74	\$10.29	\$10.89	\$7.89	\$10.54	\$10.88	\$11.35	\$15.90	\$13.75
Penn Power poles	\$11.06	\$12.83	\$12.90	\$12.44	\$13.54	\$14.24	\$13.75	\$16.94	\$17.88

<sup>85</sup> *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128).

<sup>86</sup> *See* VZ St. 1.2, Ex. SCM-45 at 4 (Order, *Verizon Md. v. The Potomac Edison Co.* (May 22, 2020)).

<sup>87</sup> *See Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123); *see also Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654) (“A failure to weigh, and account for, the different rights and responsibilities in joint use agreement could lead to marketplace distortions.”).

<sup>88</sup> *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18).

<sup>89</sup> *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129); *see also* VZ St. 2.0 at 3:17-20 (Calnon Direct).

<sup>90</sup> VZ St. 2.0 at 5:1 (Calnon Direct).

FirstEnergy has instead charged Verizon rates averaging more than [REDACTED] times the new telecom rates and more than [REDACTED] times the old telecom rates:<sup>91</sup>

Rates FirstEnergy Charged Verizon for Use of FirstEnergy's Poles (per pole) <sup>92</sup>									
Rental Year	2011	2012	2013	2014	2015	2016	2017	2018	2019
Met-Ed poles	[REDACTED]								
Penelec poles	[REDACTED]								
Penn Power poles	[REDACTED]								

The Commission's regulations provide for a refund of the unlawful amounts FirstEnergy charged and collected from Verizon in violation of federal, and now Pennsylvania, law.<sup>93</sup>

#### IV. SUMMARY OF ARGUMENT

Almost a decade ago, the FCC directed FirstEnergy and other electric utilities to reduce pole attachment rates charged to ILECs to a competitively neutral level effective July 12, 2011 to “enable consumers to benefit through increased competition, affordability, and availability of advanced communications services, including broadband.”<sup>94</sup> When electric utilities, including FirstEnergy, refused to comply, the FCC in 2018 adopted a rebuttable presumption requiring electric utilities to charge ILECs the new telecom rate under agreements like the parties’ joint use agreements, which have automatically renewed during the last year.<sup>95</sup> But FirstEnergy still refuses to comply. This Commission exercised jurisdiction over pole attachments to break the

<sup>91</sup> VZ St. 2.0, Ex. MSC-1 at VZ00046, VZ00055 (Calnon Aff. ¶¶ 21, 37).

<sup>92</sup> VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 7).

<sup>93</sup> See 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1407(a)(3)).

<sup>94</sup> *Pole Attachment Order*, 26 FCC Rcd at 5295 (¶ 126).

<sup>95</sup> *Third Report and Order*, 33 FCC Rcd at 7767-71 (¶¶ 123-29); see also 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

stalemate and ensure the just and reasonable pole attachment rates required by law are applied in Pennsylvania, which is central to the Commission’s pro-consumer deployment objectives.

By law, FirstEnergy must charge Verizon a properly calculated new telecom rate unless FirstEnergy rebuts the presumption in the Commission’s adopted regulations.<sup>96</sup> FirstEnergy hasn’t even tried. Instead, it argues the presumption does not apply and admits it has not compared the terms and conditions of the joint use agreements with those in its license agreements with Verizon’s competitors—the first step in an attempt to rebut the presumption.<sup>97</sup> The result in this case is, therefore, straightforward: FirstEnergy must charge Verizon the properly calculated new telecom rate under the Commission’s regulations and refund the more than [REDACTED] it has collected unlawfully from Verizon since 2011 with interest.<sup>98</sup>

Even where the presumption does not apply, FirstEnergy must still charge Verizon just and reasonable rates consistent with the FCC’s 2011 *Pole Attachment Order*.<sup>99</sup> And to do so, FirstEnergy must justify charging a rate higher than the new telecom rate with credible cost-based evidence that it provides Verizon a net material advantage under the joint use agreements

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<sup>96</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

<sup>97</sup> VZ St. 1.1, Ex. SCM-13 (“FirstEnergy did not compile a record or comparison of individual provisions ... of the ten joint use agreements between the parties and the 185 license agreements between FirstEnergy and cable and CLEC entities.”); FE St. 1-RJ at 36:15-16 (Schafer Rejoinder) (describing comparison of one joint use agreement and a draft license agreement FirstEnergy “present[s] to requesting CLEC / CATV entities with the understanding that modifications are negotiated,” see VZ St. 1.0, Ex. SCM-5 at VZ00577).

<sup>98</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1407(a)(3)); *Dominion Order*, 32 FCC Rcd at 3761 (¶ 23) (finding “Verizon is entitled to a refund of overpayments made to Dominion ... dating back to the effective date of the *Pole Attachment Order*”); see also VZ St. 2.0 at 4:11-14 (Calnon Direct).

<sup>99</sup> See *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.478).

as compared to the terms and conditions of FirstEnergy’s license agreements.<sup>100</sup> FirstEnergy did not meet this standard either. During negotiations, FirstEnergy claimed 24 redundant, hypothetical, and illusory “competitive advantages” justified its rates under the 2011 standard. It changed to a set of three in its Answer, which suffer the same flaws. And so FirstEnergy added a new set of five in its written testimony—each also belied by the joint use agreements and record assembled in this case.<sup>101</sup> Despite years of negotiations and the subsequent discovery, testimony, and briefing at the FCC and in this case, FirstEnergy failed to prove any net material competitive advantage justifying a rate higher than new telecom rate. For good reason: FirstEnergy does not provide Verizon a net material competitive advantage under the joint use agreements.

And even if FirstEnergy could prove it provides Verizon a net material competitive advantage under the joint use agreements, it still had no lawful right to the rates it charged Verizon. The old telecom rate sets the maximum rate that may be charged an ILEC in such circumstances,<sup>102</sup> and FirstEnergy charges Verizon rates averaging more than [REDACTED] the old telecom rates.<sup>103</sup>

The relief Verizon seeks—an order requiring that FirstEnergy charge Verizon a properly calculated and competitively neutral new telecom rate and refund the [REDACTED] it unlawfully collected from Verizon—will be a substantial first step in the Commission’s pro-consumer effort to ensure the benefits of pole attachment rate reform in Pennsylvania. The FCC considered the

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<sup>100</sup> See *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶¶ 217-218); *FPL 2020 Order*, 2020 WL 2568977, at \*7 (¶ 15); *Dominion Order*, 32 FCC Rcd at 3759-61 (¶¶ 20-22).

<sup>101</sup> See Section V.A.3.b, below.

<sup>102</sup> See *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129); see also *FPL 2020 Order*, 2020 WL 2568977, at \*6 (¶ 14).

<sup>103</sup> See VZ St. 2.0, Ex. MSC-1 at VZ00055 (Calnon Aff. ¶ 37).

interests of electric utility pole owners and their customers when it adopted the new telecom rate formula that is now in the Commission’s regulations, and found the resulting rate is “just, reasonable, and fully compensatory, and ... grounded in sound economic policies.”<sup>104</sup> And this Commission, the FCC, and the courts have all agreed that consumers will benefit if pole attachment rates for all broadband providers—including ILECs—are set at that same just and reasonable new telecom level; it will eliminate artificial rate disparities among competing broadband providers, thereby incentivizing broadband investment, promoting competition, and expanding opportunities for consumers.<sup>105</sup> The Commission should ensure Pennsylvania consumers see the results of its decision to exercise jurisdiction over pole attachment rates to support the ubiquitous access they require to the technology of today and tomorrow.

## V. ARGUMENT

Verizon has been “entitled to pole attachment rates ... that are just and reasonable” since the July 12, 2011 effective date of the FCC’s *Pole Attachment Order*, and has been presumptively entitled to the new telecom rate since the March 11, 2019 effective date of the FCC’s 2018 *Third Report and Order* incorporated in the Commission’s regulations.<sup>106</sup>

FirstEnergy instead has denied Verizon a just and reasonable rate, over-collecting rents by more

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<sup>104</sup> *Pole Attachment Order*, 26 FCC Rcd at 5243, 5299 (¶¶ 6, 137).

<sup>105</sup> *Final Rulemaking Order*, 2019 WL 4345730, at \*2 (“rental rates for pole attachments that are as low and close to uniform as possible ... promote broadband deployment”); *Cost Allocator Order*, 30 FCC Rcd at 13742-43 (¶ 24) (“The Commission also found ‘persuasive the views of consumer advocates ... recommend[ing] that the cable rate [which approximates the new telecom rate] ‘should be used for all pole attachments.’”); *Ameren Corp. v. FCC*, 865 F.3d 1009, 1012, 1014 (8th Cir. 2017) (finding reasonable “the FCC’s choice to ... equalize the Cable and Telecom Rates” to eliminate rate disparities that can “deter telecommunications investment”); *AEP*, 708 F.3d at 190 (agreeing with the FCC that “artificial, non-cost-based differences in the prices of inputs among competitors are bound to distort competition” in the broadband market).

<sup>106</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)); *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126); *Pole Attachment Order*, 26 FCC Rcd at 5331 (¶ 209).

than [REDACTED], on average, each year since 2011.<sup>107</sup> The Commission should provide the long-overdue rate relief and refunds it found central to the “Commonwealth’s efforts to provide advanced telecommunications tools to its citizens.”<sup>108</sup>

**A. The Pole Attachment Rates FirstEnergy Charges Verizon Under the Joint Use Agreements Are Unjust and Unreasonable.**

**1. FirstEnergy’s Rates Are More Than [REDACTED] Times the Lawful Rates.**

The FCC ordered FirstEnergy and other electric utilities to stop charging “[d]ifferent rates for virtually the same resource (space on the pole)” effective July 12, 2011.<sup>109</sup> FirstEnergy refuses to comply. While the FCC’s—and now this Commission’s—regulations guarantee Verizon and its competitors “just and reasonable” rates that are “competitively neutral,”<sup>110</sup> FirstEnergy charges Verizon average more than [REDACTED] times the new telecom rate set by the Commission’s regulations for Verizon’s competitors:

Comparison of Per-Pole Rates <sup>111</sup>	Met-Ed	Penelec	Penn Power
Average rate charged Verizon	[REDACTED]		
Average properly calculated new telecom rate			
Comparison of average rate charged Verizon to properly calculated new telecom rate			

<sup>107</sup> VZ St. 2.0, Ex. MSC-1 at VZ00047 (Calnon Aff. ¶ 23); VZ St. 3.0, Ex. TJT-1 at VZ00107 (Tardiff Aff. ¶ 6).

<sup>108</sup> *NPRM*, 2018 WL 3533538, at \*6.

<sup>109</sup> *National Broadband Plan*, 2010 WL 972375, at \*97; see also *Pole Attachment Order*, 26 FCC Rcd at 5327 (¶ 201); *Third Report and Order*, 33 FCC Rcd at 7767 (¶ 123).

<sup>110</sup> 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224 and 47 C.F.R. §§ 1.1401-1.1415).

<sup>111</sup> VZ St. 2.1, Ex. MSC-4 (citing sources).

The magnitude of this rate disparity is not disputed. FirstEnergy itself calculated two sets of alleged new telecom rates—and each includes rates about [REDACTED] the rates FirstEnergy has been unlawfully charging Verizon:

Comparison of Per-Pole Rates <sup>112</sup>	Met-Ed	Penelec	Penn Power
Average rate charged Verizon	[REDACTED]		
Average new telecom rate alleged in FirstEnergy’s rebuttal testimony <sup>113</sup>			
Average new telecom rate alleged in FirstEnergy’s discovery responses <sup>114</sup>			
Comparison of average rate charged Verizon to FirstEnergy’s alleged new telecom rates			

These rate disparities are incompatible with the Commission’s policy goals and with the letter of its regulations. The Commission exercised jurisdiction over pole attachment rates to “eliminat[e] outdated disparities between the pole attachment rates incumbent local exchange carriers (ILECs) pay compared to other similarly-situated telecommunications attachers”<sup>115</sup> because “greater rate parity between [I]LECs and their telecommunications competitors can energize and further accelerate broadband deployment.”<sup>116</sup> FirstEnergy’s exceptionally high

<sup>112</sup> *Id.* (citing sources).

<sup>113</sup> FE St. 1-R at Tables 1-3 (Schafer Rebuttal); *see also* VZ St. 2.0, Exs. MSC-8, MSC-9, MSC-10.

<sup>114</sup> *See* VZ St. 2.0, Exs. MSC-11, MSC-12, MSC-13, MSC-14.

<sup>115</sup> *Final Rulemaking Order*, 2019 WL 4345730, at \*3.

<sup>116</sup> *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126) (citation omitted).

rates—averaging over [REDACTED] times the fully compensatory new telecom rate—are unjust, unreasonable, and unlawful.<sup>117</sup>

**2. The New Telecom Rate Is the Just and Reasonable Rate the Commission’s Regulations Require.**

Verizon is entitled to the new telecom rate under the Commission’s regulations because the new telecom rate presumption in the Commission’s regulations applies and FirstEnergy did not rebut it.<sup>118</sup>

**a) The New Telecom Rate Presumption Applies Because the Joint Use Agreements Were Renewed After March 11, 2019.**

The new telecom rate is the presumptive rate for Verizon under the joint use agreements. The Commission’s regulations include “a presumption that an [ILEC] may be charged no higher than the rate determined in accordance with [the new telecom rate formula]” under any “pole attachment contracts entered into or renewed after” March 11, 2019, the effective date of the regulation.<sup>119</sup> This presumption applies to a broad set of joint use agreements—specifically, all agreements “entered into, renewed, or in evergreen status after [March 11, 2019],” including all “agreements that are automatically renewed, extended, or placed in evergreen status.”<sup>120</sup>

The presumption applies to this case because the joint use agreements “automatically ... extended” after March 11, 2019. In particular, each joint use agreement states that, after an initial term, the agreement “*shall continue* in force thereafter until terminated by either Party at

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<sup>117</sup> *Pole Attachment Order*, 26 FCC Rcd at 5299 (¶ 137) (“The [new telecom] rate is just, reasonable, and fully compensatory...”); VZ St. 2.0, Ex. MSC-1 at VZ00045-46 (Calnon Aff. ¶ 21).

<sup>118</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

<sup>119</sup> *Id.*; see also *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 84 Fed. Reg. 2460-01 (2019) (“The amendment to 47 C.F.R. 1.1413 ... is effective March 11, 2019.”).

<sup>120</sup> *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475).

any time” upon advance written notice.<sup>121</sup> “Continue” is a synonym of “extend,” meaning “[t]o carry further in time, space or development: *extend*.”<sup>122</sup> Because the initial term of each joint use agreement has expired,<sup>123</sup> the agreements govern the parties’ joint use relationship today because they “automatically ... extended” during the last sixteen months and will continue to do so until terminated. The new telecom rate presumption in the Commission’s regulations applies.<sup>124</sup>

The new telecom rate presumption also applies because the joint use agreements “automatically renewed” after March 11, 2019.<sup>125</sup> Under Pennsylvania law, “a so-called ‘automatic renewal provision’” is “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.”<sup>126</sup> The joint use agreements include this provision; as

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<sup>121</sup> VZ St. 1.0, Ex. SCM-2 at VZ00180 (Art. XX) (emphasis added). *Accord id.* at VZ00196 (Art. XIX), VZ00223 (Art. XVIII), VZ00239 (Art. XVIII), VZ00253 (Art. XVIII), VZ00333 (Art. XXI), VZ00359 (Art. XXI), VZ00386 (Art. XXII), VZ00449 (Art. XXI), VZ00482 (Art. XXIV).

<sup>122</sup> “Continue,” *Webster’s II New College Dictionary* 244 (2001) (emphasis added); *see also* “Continue,” *Merriam-Webster’s Collegiate Dictionary* 270 (11th ed. 2003) (“to maintain without interruption a condition, course, or action”).

<sup>123</sup> The initial term of the joint use agreements varies from 1 year to 5 years, but the initial term for all of the joint agreements had expired by January 1, 1993. *See, e.g.*, VZ St. 1.0, Ex. SCM-2 at VZ00180 (Art. XX) (1-year initial term), VZ00333 (Art. XXI) (5-year initial term). *See also id.* at VZ00449 (Art. XXI) (stating that initial term would expire “five (5) years from the [January 1, 1988] effective date hereof,” meaning that the initial term expired on January 1, 1993).

<sup>124</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)); *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475).

<sup>125</sup> *Id.*; *see also* “Renew,” *Webster’s II New College Dictionary* 938 (2001); “Renew,” *Merriam-Webster’s Collegiate Dictionary* 990 (10th ed. 1996).

<sup>126</sup> *Otis Elevator Co. v. George Wash. Hotel Corp.*, 27 F.3d 903, 904 (3d Cir. 1994).

FirstEnergy admits, they “continue to govern the parties’ joint use relationship” because neither party has provided written notice of an intent to terminate.<sup>127</sup>

**b) FirstEnergy Did Not Try to Rebut the New Telecom Rate Presumption.**

The new telecom rate presumption simplifies this case because FirstEnergy did not rebut the presumption. Doing so required FirstEnergy to provide clear and convincing evidence that FirstEnergy provides Verizon “net benefits” under the joint use agreements “that materially advantage [Verizon] over other telecommunications attachers.”<sup>128</sup> FirstEnergy instead stated conclusively in its Answer that the new telecom rate presumption “does not apply to this proceeding.”<sup>129</sup> Because FirstEnergy is wrong, this is case-determinative. The new telecom rate presumption applies and Verizon is entitled to the new telecom rate because FirstEnergy did not try to rebut the presumption.

FirstEnergy did not even argue in the alternative that it could rebut the presumption. Nor did it submit the most basic evidence on the issue—its license agreements with Verizon’s competitors and a comparison of their terms to those in the joint use agreements.<sup>130</sup> FirstEnergy admits it has *not* compared the terms and conditions of its license agreements with those in the joint use agreements<sup>131</sup> and presented only a flawed and incomplete comparison of one of the

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<sup>127</sup> See Answer to Compl. ¶¶ 15, 16.

<sup>128</sup> *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123); see also 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

<sup>129</sup> See Answer Brief at i, ¶ 28; see also Answer to Compl. ¶¶ 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 43, 62, 63 (stating that the regulation’s “presumptions do not apply”).

<sup>130</sup> The only FirstEnergy license agreements entered into evidence were provided by Verizon. See VZ St. 1.0, Ex. SCM-3 at VZ00505-30; VZ St. 1.1, Ex. SCM-11. And they confirm Verizon and its competitors attach to FirstEnergy’s poles on materially comparable terms and conditions. See Section V.A.3.b, below.

<sup>131</sup> VZ St. 1.1, Ex. SCM-13.

parties' ten joint use agreements with a *draft* license agreement FirstEnergy “present[s] to requesting CLEC / CATV entities with the understanding that modifications are negotiated.”<sup>132</sup> But draft terms that may not apply to any company cannot prove a real-life competitive advantage, much less a net material competitive advantage.<sup>133</sup> And FirstEnergy’s analysis was wrong compared to FirstEnergy’s executed license agreements, which contain terms and conditions virtually identical to those it pointed to in the joint use agreements.<sup>134</sup> And ultimately, FirstEnergy did not offer its comparison into evidence.<sup>135</sup>

The clear and convincing evidence standard requires much more of FirstEnergy than a collection of conclusory allegations.<sup>136</sup> But even if FirstEnergy could meet its burden,<sup>137</sup> FirstEnergy still could not lawfully charge the rates it has been collecting from Verizon. Where an electric utility rebuts the new telecom rate presumption, the old telecom rate is “the maximum rate” it may charge based on the quantified value of the net material competitive advantages.<sup>138</sup>

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<sup>132</sup> FE St. 1-RJ at 36:15-16 (Schafer Rejoinder); VZ St. 1.0, Ex. SCM-5 at VZ00577 (FCC Ex. 23).

<sup>133</sup> VZ St. 1.0, Ex. SCM-1 at VZ00017 (Mills Aff. ¶ 37); VZ St. 2.0, Ex. MSC-1 at VZ00052 (Calnon Aff. ¶ 31); VZ St. 2.2 at 15:10-16:4 (Calnon Surrejoinder).

<sup>134</sup> VZ St. 1.2 at 24:12-27:1 (Mills Surrejoinder).

<sup>135</sup> Joint Stipulation ¶ 1 (omitting FE St. 1-RJ, Ex. SFS-15).

<sup>136</sup> *See, e.g., Brown v. City of Pittsburgh*, 586 F.3d 263, 285 (3d Cir. 2009) (“clear and convincing evidence means [evidence] that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue”) (citation omitted); *see also Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 102 (2011) (clear and convincing evidence is a “heightened standard of proof”); *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (clear and convincing evidence must “instantly tilt[] the evidentiary scales” when weighed against the other evidence offered).

<sup>137</sup> FirstEnergy cannot meet its burden. *See* Section V.A.3.b, below.

<sup>138</sup> *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129).

FirstEnergy has been charging Verizon more than [REDACTED] the “hard cap” the old telecom formula sets.<sup>139</sup>

	Average Per-Pole Contract Rate (2011-2018)	Average Per-Pole Old Telecom Rate (2011-2018)	Average Contract Rate Compared to Average Old Telecom Rate
Met-Ed	[REDACTED]	\$ 13.86	[REDACTED]
Penelec	[REDACTED]	\$ 10.94	[REDACTED]
Penn Power	[REDACTED]	\$ 13.46	[REDACTED]
<b>FirstEnergy</b>	[REDACTED]	<b>\$ 12.75</b>	[REDACTED]

There is, therefore, no lawful basis for the rates that FirstEnergy charges Verizon. The new telecom rate is the rate that is required under the Commission’s regulations to ensure the “rate parity between [I]LECs and their telecommunications competitors” that can “energize and further accelerate broadband deployment.”<sup>140</sup>

**3. The New Telecom Rate Is Also the Just and Reasonable Rate the FCC Ordered FirstEnergy to Charge in the 2011 Pole Attachment Order.**

The result in this case is straightforward because the joint use agreements were renewed and extended after March 2019 and so are subject to the new telecom rate presumption. But even if the joint use agreements had not renewed or extended, FirstEnergy must still charge just and reasonable rates under the standard the FCC adopted in 2011.<sup>141</sup> And the just and reasonable rate under the 2011 standard is the same just and reasonable rate under the new telecom rate presumption: Verizon is entitled to a competitively neutral new telecom rate because

<sup>139</sup> See VZ St. 2.0, Ex. MSC-1 at VZ00045, VZ00055-56 (Calnon Aff. ¶¶ 20, 36-37).

<sup>140</sup> See *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126).

<sup>141</sup> *Id.* at 7770 (¶ 127 n.478) (“[T]he 2011 *Pole Attachment Order*’s guidance regarding review of [I]LEC pole attachment complaints will continue to apply” where the presumption does not); see also Answer to Compl. ¶¶ 12, 13, 14, 17, 18, 19, 20 (arguing “the 2011 *Pole Attachment Order* applies to all periods at issue in this proceeding”).

FirstEnergy failed to justify charging Verizon a rate higher than the new telecom rate with credible cost-based evidence that FirstEnergy provides Verizon a net material advantage under the joint use agreements as compared to the terms and conditions of FirstEnergy’s license agreements.<sup>142</sup>

**a) The 2011 Pole Attachment Order Required New Rates for Existing Agreements, Including the Joint Use Agreements.**

In 2011, the FCC ordered FirstEnergy and other electric utilities to reduce the rates they charge ILECs under all agreements, including existing agreements like the joint use agreements. The FCC explained that ILECs typically access electric utility poles under the terms of a joint use agreement and held that, “where [I]LECs have such access, they are entitled to rates, terms and conditions that are ‘just and reasonable.’”<sup>143</sup>

The FCC required ILECs to try to negotiate just and reasonable rates for existing agreements before seeking relief at the FCC. But “pole attachment rates cannot be held reasonable simply because they have been agreed to.”<sup>144</sup> And so if an electric utility refuses to negotiate just and reasonable rates, the FCC said it would set the just and reasonable rate in a complaint proceeding.<sup>145</sup> There, the FCC would consider whether the ILEC “genuinely lacks the

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<sup>142</sup> See *Dominion Order*, 32 FCC Rcd at 3758-61 (¶¶ 17-22); *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶¶ 217-218); see also *Heritage Cablevision Assocs. of Dallas, L.P. v. Tex. Utils. Elec. Co.*, 6 FCC Rcd 7099, 7105 (¶ 29) (1991) (stating that the electric utility must “justify ‘the rate ... alleged in the complaint not to be just and reasonable’”); 47 C.F.R. § 1.1407(a) (2011) (“The response should set forth justification for the rate ... alleged in the complaint not to be just and reasonable.”).

<sup>143</sup> *Pole Attachment Order*, 26 FCC Rcd at 5328, 5334 (¶¶ 202, 216) (quoting 47 U.S.C. § 224); see also 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224).

<sup>144</sup> *Selkirk Commc’ns, Inc. v. Fla. Power & Light Co.*, 8 FCC Rcd 387, 389 (¶ 17) (1993).

<sup>145</sup> *Pole Attachment Order*, 26 FCC Rcd at 5333-34 (¶ 214); see also 47 U.S.C. § 224(b)(1) (“[T]he Commission shall ... hear and resolve complaints concerning such rates, terms, and conditions”).

ability to terminate an existing agreement and obtain a new arrangement” through negotiations.<sup>146</sup> This standard does *not* require ILECs to terminate their agreements because ILECs already have a right to just and reasonable rates under their agreements.<sup>147</sup> Instead the FCC considers whether the ILEC is genuinely unable to negotiate just and reasonable rates because (1) the electric utility owns more poles than the ILEC, which gives the electric utility superior bargaining power to impose and refuse to renegotiate unreasonably high pole attachment rates and (2) the ILEC cannot escape the unreasonably high rates by virtue of an “evergreen” provision that requires their payment even if the joint use agreement is terminated.<sup>148</sup> Where these conditions are present—and they are in this case—the ILEC is entitled to have a just and reasonable rate set in a complaint proceeding with a refund of prior overpayments.<sup>149</sup>

**1) FirstEnergy Has Superior Bargaining Power Because of Its Three-to-One Pole Ownership Advantage.**

The FCC, Congress, and the United States Supreme Court have long recognized that unreasonably high rates result when an electric utility’s pole ownership advantage places it “in a position to extract monopoly rents ... in the form of unreasonably high pole attachment rates.”<sup>150</sup> Utility poles are “essential physical infrastructure used to deliver [broadband and

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<sup>146</sup> See *FPL 2020 Order*, 2020 WL 2568977, at \*4 (¶ 11) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5334 (¶ 216)) (explaining 2011 standard).

<sup>147</sup> See *id.*

<sup>148</sup> See *id.* at \*4-5 (¶¶ 11-12).

<sup>149</sup> See *id.*; see also *Pole Attachment Order*, 26 FCC Rcd at 5336, 5289 (¶¶ 110, 216); *Dominion Order*, 32 FCC Rcd at 3761 (¶ 23) (finding “Verizon is entitled to a refund of overpayments made to Dominion ... dating back to the effective date of the *Pole Attachment Order*”).

<sup>150</sup> See *Pole Attachment Order*, 26 FCC Rcd at 5242 (¶ 4) (citing S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977), reprinted in 1978 U.S.C.C.A.N. 109); see also *Gulf Power Co.*, 534 U.S. at 330.

other telecommunications] services to end-user customers.”<sup>151</sup> When an electric utility has “exclusive control over access” to most of them, it also has the ability to impose artificially and unreasonably high rates for their use.<sup>152</sup> As a result, in 2011, the FCC decided it must ensure just and reasonable rates where an electric utility owns most of the poles it shares with an ILEC.<sup>153</sup>

FirstEnergy owns most of the joint use poles, as it did when the current rental rates were imposed.<sup>154</sup> Most recently, FirstEnergy estimated that it owns 73% of the poles that the parties share in Pennsylvania.<sup>155</sup> This nearly three-to-one pole ownership advantage gives FirstEnergy greater bargaining power than justified rate relief under the 2011 *Pole Attachment Order* and subsequent FCC decisions. In the 2011 *Pole Attachment Order*, the FCC recognized that “[I]LECs often may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations” because “electric utilities appear to own approximately 65-70 percent of poles.”<sup>156</sup> Since 2011, the FCC found ILECs entitled to rate reductions where the electric utilities owned about 65% of the shared utility poles—for a “nearly two-to-one pole ownership advantage.”<sup>157</sup> FirstEnergy’s 73% pole ownership advantage is greater.<sup>158</sup>

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<sup>151</sup> *Final Rulemaking Order*, 2019 WL 4345730, at \*1.

<sup>152</sup> *See Pole Attachment Order*, 26 FCC Rcd at 5242 (¶ 4).

<sup>153</sup> *See FPL 2020 Order*, 2020 WL 2568977, at \*8 (¶ 18) (The FCC “in the *Pole Attachment Order* concluded that it should regulate [I]LEC joint use agreements because current, not past, pole ownership ratios had reduced [I]LEC bargaining power.”).

<sup>154</sup> VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 4); VZ St. 1.0, Ex. SCM-1 at VZ00007-08, VZ00011-13 (Mills Aff. ¶¶ 14-16, 23-24, 27-28).

<sup>155</sup> *See* VZ St. 1.0, Ex. SCM-1 at VZ00005 (Mills Aff. ¶ 9); VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 4); *see also* VZ St. 3.0, Ex. TJT-1 at VZ00116-117 (Tardiff Aff. ¶ 16).

<sup>156</sup> *Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206).

<sup>157</sup> *Dominion Order*, 32 FCC Rcd at 3756-57 (¶ 13) (electric utility owned 65%); *FPL 2020 Order*, 2020 WL 2568977, at \*8 (¶ 18) (electric utility owned 66%).

<sup>158</sup> FirstEnergy has been able to leverage its pole ownership advantage at the operating company level as well. Met-Ed has long owned 81% of the poles that it shares with Verizon. Penelec

FirstEnergy agrees it owns most of the joint use poles, but argues its three-to-one pole ownership majority does not evidence bargaining power because, absent joint use, it would be economically and legally difficult for FirstEnergy to deploy its facilities elsewhere.<sup>159</sup> The FCC rejected this argument based on “[s]tandard economic theories.”<sup>160</sup> As difficult as it would be for FirstEnergy to find alternative infrastructure, Verizon would need to find and obtain approval for *three times* the facilities absent joint use.<sup>161</sup> This disparate impact gives FirstEnergy leverage to impose unreasonably high pole attachment rates on Verizon and to refuse to reduce them.<sup>162</sup> FirstEnergy’s witness acknowledged it is “reasonable to conclude that Verizon would likely realize greater harm” absent joint use “in that it would need to remedy loss of access to more poles [than] would FirstEnergy.”<sup>163</sup> And where “the alternatives to the current agreement rates are significantly more costly for one party to the negotiation than to the other, the party that

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continues to benefit from a two-to-one pole ownership advantage. And Penn Power has long owned 78% of the poles it shares with Verizon, reflecting a nearly four-to-one pole ownership advantage. *See* VZ St. 1.0, Ex. SCM-1 at VZ00007-08, VZ00011-13 (Mills Aff. ¶¶ 14-16, 23-24, 27-28); VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 4).

<sup>159</sup> Answer Brief ¶¶ 33-59.

<sup>160</sup> *Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206 n.618) (“Standard economic theories of bargaining predict that each party will consider its best alternative to a negotiated agreement when negotiating. As a hypothetical illustration, if the electric company owned 90% of poles in an area and the [I]LEC owned 10%, and if the best outside alternative for each party was deploying the remaining needed poles (and having the legal right to do so), the electric utility would face the cost of deploying 10% of poles, while the [I]LEC would face the cost of deploying 90% of poles. As a result, the [I]LEC would have less bargaining power than the electric utility.”).

<sup>161</sup> *See* VZ St. 1.2 at 29:16-30:4 (Mills Surrejoinder); VZ St. 2.1 at 61:3-11 (Calnon Surrebuttal); VZ St. 3.1 at 20:20-24 (Tardiff Surrebuttal).

<sup>162</sup> *See FPL 2020 Order*, 2020 WL 2568977, at \*8 (¶ 18); *Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206 n.618); *see also* VZ St. 2.1 at 58:5-59:2 (Calnon Surrebuttal); VZ St. 3.1 at 5:26-6:19, 15:19-16:10 (Tardiff Surrebuttal).

<sup>163</sup> FE Answer Attachment C at FE00021 (Zarakas Decl. ¶ 17).

would suffer the least” from those alternatives—*i.e.*, FirstEnergy—“is in the strongest bargaining position.”<sup>164</sup>

The impact of FirstEnergy’s longstanding superior bargaining power is evident in the rates it charges Verizon. The “just and reasonable” rate for an ILEC is “the same rate” as the new telecom that applies to a comparable CLEC or cable competitor,<sup>165</sup> but FirstEnergy charges Verizon more than [REDACTED] the new telecom rate.<sup>166</sup> At the same time, FirstEnergy has required *better* rates for its use of Verizon’s poles than it provides Verizon. The FCC “anticipat[ed] that [I]LECs and electric utilities would charge each other roughly the same proportionate rate given the parties’ relative usage of the pole.”<sup>167</sup> Here, FirstEnergy “uses significantly more space on each joint use pole than Verizon,”<sup>168</sup> but pays pole attachment rates that do not reflect its greater space requirements.

The Met-Ed rate provision charges Met-Ed nothing for use of Verizon’s poles, and charges Verizon up to [REDACTED] per pole on the difference between the poles Verizon owns and the poles Verizon would own if it owned 45% of the joint use poles.<sup>169</sup> Met-Ed imposed this

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<sup>164</sup> VZ St. 2.1 at 61:8-11 (Calnon Surrebuttal).

<sup>165</sup> *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217); *see also FPL 2015 Order*, 30 FCC Rcd at 1142 (¶ 7).

<sup>166</sup> VZ St. 2.0, Ex. MSC-1 at VZ00045-46 (Calnon Aff. ¶ 21).

<sup>167</sup> *Dominion Order*, 32 FCC Rcd at 3760 (¶ 21 n.78) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662)).

<sup>168</sup> *Id.* at 3760 (¶ 21); *see also* FE St. 7-R, Ex. CG-1 at Table 3 (Guo Rebuttal) (alleging Verizon uses [REDACTED] feet of space on FirstEnergy’s poles); *id.* at Table 4 (alleging FirstEnergy uses [REDACTED] feet of space on Verizon’s poles).

<sup>169</sup> VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 7); VZ St. 1.0, Ex. SCM-2 at VZ00296-317 (FCC Ex. 6).

complex rate methodology in 2009 when Verizon owned 19% of the joint use poles—and then refused to sell Verizon poles to make up the difference.<sup>170</sup>

The unreasonableness of the Met-Ed rate provision is particularly apparent when Verizon’s annual rental payment is converted into a per-pole rate for each Met-Ed pole it uses. For the 2018 rental year, Verizon paid Met-Ed over [REDACTED] in pole attachment rent.<sup>171</sup> Verizon would have paid the same amount if Verizon paid [REDACTED] per pole for each Met-Ed pole to which it was attached and Met-Ed paid nothing for each Verizon pole to which it was attached.<sup>172</sup> In other words, Met-Ed paid nothing for use of at least 10.5 feet of space on Verizon’s poles—but effectively charged Verizon more than [REDACTED] times the applicable 2018 new telecom rate (\$12.20 per-pole) for use of one foot of space on Met-Ed’s poles.<sup>173</sup>

Penelec’s bargaining leverage is similarly evident in the rental provision it imposed, which charges Verizon higher pole attachment rates than Penelec pays. For the 2018 rental year, Penelec charged Verizon [REDACTED] per pole, but paid [REDACTED] per pole to use Verizon’s poles.<sup>174</sup> These rates are upside-down under the space assumptions in the Commission’s regulations, which assume Penelec requires 10.5 feet of space on a pole and Verizon occupies one foot of

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<sup>170</sup> VZ St. 1.0, Ex. SCM-1 at VZ00007 (Mills Aff. ¶¶ 14, 15); *see also* VZ St. 1.0, Ex. SCM-2 at VZ00174 (Art. X), VZ00208 (¶ 1), VZ00294 (¶ 2) (requiring Met-Ed to sell Verizon poles); FE St. 1-R at 11:1-11 (Schafer Rebuttal) (admitting Met-Ed refused to sell Verizon poles).

<sup>171</sup> VZ St. 1.0, Ex. SCM-1 at VZ00009 (Mills Aff. ¶ 20); VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 8).

<sup>172</sup> VZ St. 2.0, Ex. MSC-1 at VZ00043 (Calnon Aff. ¶ 17).

<sup>173</sup> *See* VZ St. 2.0 at 4:10-11 (Calnon Direct); VZ St. 1.1 at 54:3-57:6 (Mills Surrebuttal); *see also* FE St. 7-R, Ex. CG-1 at Table 4 (Guo Rebuttal) (alleging Met-Ed uses [REDACTED] feet of space on Verizon’s poles).

<sup>174</sup> VZ St. 1.0, Ex. SCM-1 at VZ00011 (Mills Aff. ¶ 25); VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 7).

space.<sup>175</sup> They are also upside-down when compared to field review data FirstEnergy recently collected. FirstEnergy inflated the space assigned to Verizon during its field review—and still found FirstEnergy requires about [REDACTED] times the space on a pole as Verizon.<sup>176</sup> Yet Verizon pays Penelec a pole attachment rate that is almost [REDACTED] higher per pole than the rate Penelec pays for at least [REDACTED] times the space.<sup>177</sup>

Penn Power also leveraged its bargaining power to achieve preferable rates for itself. For the 2018 rental year, Penn Power charged Verizon [REDACTED] per pole but paid [REDACTED] per pole for use of Verizon’s poles.<sup>178</sup> Penn Power thus paid [REDACTED] times the rate Verizon paid—even though FirstEnergy’s recent field audit assigned [REDACTED] times the space on a pole to Penn Power as its inflated measurements reported for Verizon.<sup>179</sup> Across the board, then, FirstEnergy’s superior bargaining power is apparent in the grossly disproportional rates it imposed and continues to demand from Verizon, which are nowhere near “the same proportionate rate” charged FirstEnergy given its “relative usage of the pole.”<sup>180</sup>

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<sup>175</sup> See 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. §§ 1.1409, 1.1410); see also VZ St. 1.0, Ex. SCM-1 at VZ00029 (Mills Aff. ¶ 64); VZ St. 1.1 at 63:16-18 (Mills Surrebuttal).

<sup>176</sup> See VZ St. 1.1 at 54:3-57:6 (Mills Surrebuttal); VZ St. 1.2 at 39:1-16 (Mills Surrejoinder); FE St. 7-R, Ex. CG-1 at Tables 3 & 4 (Guo Rebuttal) (alleging Penelec uses [REDACTED] feet of space on Verizon’s poles and Verizon uses [REDACTED] feet of space on Penelec’s poles).

<sup>177</sup> VZ St. 2.0, Ex. MSC-1 at VZ00046 (Calnon Aff. ¶ 22).

<sup>178</sup> VZ St. 1.0, Ex. SCM-1 at VZ00013-14 (Mills Aff. ¶ 29); VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 7).

<sup>179</sup> VZ St. 2.0, Ex. MSC-1 at VZ00046 (Calnon Aff. ¶ 22); FE St. 7-R, Ex. CG-1 at Tables 3 & 4 (Guo Rebuttal) (alleging Penn Power uses [REDACTED] feet of space on Verizon’s poles and Verizon uses [REDACTED] feet of space on Penn Power’s poles).

<sup>180</sup> See *Dominion Order*, 32 FCC Rcd at 3760 (quoting *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662)).

**2) Verizon Genuinely Lacks the Ability to Terminate FirstEnergy’s Unlawful Rates and Obtain Just and Reasonable Rates Through Negotiations.**

Rate relief is also justified under the standard adopted in the 2011 *Pole Attachment Order* because Verizon “genuinely lacks the ability to terminate” the current rates on account of “evergreen” clauses that require payment of the contract rates after the joint use agreements are terminated.<sup>181</sup> The FCC previously recognized Verizon “genuinely lacks the ability to terminate an existing agreement” where, as here, the electric utility can “force Verizon to pay the relatively high Agreement Rates for as long as its attachments remain on [the utility’s] poles pursuant to the evergreen clause.”<sup>182</sup> Without a decision from this Commission, Verizon has no way to escape FirstEnergy’s exceptionally high rates.<sup>183</sup> They “shall remain in effect” unless and until FirstEnergy agrees to change them.<sup>184</sup>

And FirstEnergy proved throughout the parties’ negotiations it is unwilling to agree to just and reasonable rates. Since early 2012, Verizon has tried unsuccessfully to negotiate just and reasonable rates with FirstEnergy through face-to-face meetings, telephone conferences, and correspondence.<sup>185</sup> FirstEnergy first claimed Verizon was not eligible for rate relief because the

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<sup>181</sup> See *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216); see also *FPL 2020 Order*, 2020 WL 2568977, at \*4 (¶ 11). The evergreen clauses provide, in essentially identical words, that “notwithstanding such termination [of the agreement] this agreement shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination.” VZ St. 1.0, Ex. SCM-2 at VZ00196 (Art. XIX); see also *id.* at VZ00223 (Art. XVIII), VZ00239 (Art. XVIII), VZ00253 (Art. XVIII), VZ00333 (Art. XXI), VZ00359 (Art. XXI), VZ00386 (Art. XXII), VZ00449 (Art. XXI), VZ00482 (Art. XXIV).

<sup>182</sup> *FPL 2015 Order*, 30 FCC Rcd at 1150 (¶ 25) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216)).

<sup>183</sup> See *FPL 2020 Order*, 2020 WL 2568977, at \*4 (¶ 11).

<sup>184</sup> *Id.*; see also VZ St. 1.0, Ex. SCM-1 at VZ00299, VZ00305, VZ00310, VZ00315, VZ00454, VZ00459, VZ00464, VZ00484.

<sup>185</sup> VZ St. 1.0, Ex. SCM-1 at VZ00014-21 (Mills Aff. ¶¶ 30-47).

joint use agreements pre-date the 2011 *Pole Attachment Order*<sup>186</sup>—an argument the FCC has rejected.<sup>187</sup> FirstEnergy then stalled rate discussions by insisting the companies first discuss new operational terms.<sup>188</sup> And finally, when FirstEnergy discussed rates, it made rate offers that failed to change Verizon’s annual net rental payment in any material respect.<sup>189</sup>

For example, five years into the negotiations, FirstEnergy suggested the parties agree to reciprocal rates that would have reduced Verizon’s then nearly [REDACTED] annual net rental obligation to Met-Ed by just \$465.<sup>190</sup> FirstEnergy’s next offer was for about a 1.5% discount off a [REDACTED] annual net rental amount, so that Verizon would pay about [REDACTED] in net rent to Met-Ed.<sup>191</sup> Properly calculated new telecom rental rates that year would have resulted in a net rental payment to Met-Ed of about \$739,000.<sup>192</sup>

FirstEnergy’s offers did not materially improve. In May 2018, FirstEnergy made an offer that paired lower rates for FirstEnergy to pay Verizon ([REDACTED] per pole) with higher rates for Verizon to pay FirstEnergy ([REDACTED] per pole to Met-Ed, [REDACTED] per pole to Penelec, and [REDACTED]

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<sup>186</sup> See VZ St. 1.0, Ex. SCM-5 at VZ00562 (FCC Ex. 20) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216)).

<sup>187</sup> See *FPL 2015 Order*, 30 FCC Rcd at 1145 (¶ 17) (“Florida Power makes a threshold argument that the just and reasonable rate requirement in Section 224(b)(1) cannot be applied to the Agreement Rates because the Agreement pre-dates the Order. Florida Power is mistaken...”).

<sup>188</sup> VZ St. 1.0, Ex. SCM-1 at VZ00014 (Mills Aff. ¶ 33).

<sup>189</sup> *Id.* at VZ00018 (Mills Aff. ¶ 39); VZ St. 1.1 at 41:12-15, 43:14-44:17 (Mills Surrebuttal).

<sup>190</sup> VZ St. 1.0, Ex. SCM-1 at VZ00008-9, VZ00016 (Mills Aff. ¶¶ 18-19, 35); VZ St. 1.0, Ex. SCM-5 at VZ00570-572 (FCC Ex. 21); VZ St. 1.1 at 43:16-21 (Mills Surrebuttal).

<sup>191</sup> VZ St. 1.0, Ex. SCM-1 at VZ00018 (Mills Aff. ¶ 39); VZ St. 1.0, Ex. SCM-5 at VZ00577 (FCC Ex. 23).

<sup>192</sup> VZ St. 2.0, Ex. MSC-1 at VZ00048-49 (Calnon Aff. ¶ 26).

per pole to Penn Power) even though FirstEnergy uses much more space on a pole.<sup>193</sup> The offer also limited rate relief to just two of the four FirstEnergy companies, as it would have *increased* Verizon’s annual rental obligation to Penn Power by more than [REDACTED] and to Maryland affiliate Potomac Edison, by more than [REDACTED].<sup>194</sup>

In November 2017, Verizon tried to change the dynamic by engaging executives at both companies in the discussions.<sup>195</sup> FirstEnergy first asked “whether [Verizon] insist[s] on proceeding to executive level discussions,”<sup>196</sup> but ultimately agreed to schedule the meeting after Verizon reiterated its request and provided a copy of its new telecom rate calculations.<sup>197</sup>

The parties’ executives met on April 11, 2018 and continued discussions thereafter.<sup>198</sup> FirstEnergy continued to claim the contract rates were just and reasonable and stated that Verizon would not be eligible for a new telecom rate unless it “transition[s] ... out of the pole-owning business in FirstEnergy service territories.”<sup>199</sup> But—as the FCC recently confirmed—an ILEC “should not be required to sell its poles in order to receive a just and reasonable rate.”<sup>200</sup> It already has the right to one.

The Commission, therefore, must set the just and reasonable rate for Verizon’s use of FirstEnergy’s poles even if the applicable standard is the one the FCC adopted in 2011. This is a

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<sup>193</sup> VZ St. 1.0, Ex. SCM-5 at VZ00650 (FCC Ex. 28); FE St. 7-R, Ex. CG-1 at Tables 3 & 4 (Guo Rebuttal).

<sup>194</sup> VZ St. 1.0, Ex. SCM-1 at VZ00020 (Mills Aff. ¶ 45).

<sup>195</sup> VZ St. 1.0, Ex. SCM-5 at VZ00588 (FCC Ex. 25).

<sup>196</sup> VZ St. 1.0, Ex. SCM-5 at VZ00591 (FCC Ex. 26).

<sup>197</sup> VZ St. 1.0, Ex. SCM-5 at VZ00593-594 (FCC Ex. 27).

<sup>198</sup> VZ St. 1.0, Ex. SCM-1 at VZ00019-20 (Mills Aff. ¶ 43).

<sup>199</sup> VZ St. 1.0, Ex. SCM-5 at VZ00648, VZ00651 (FCC Ex. 28).

<sup>200</sup> *FPL 2020 Order*, 2020 WL 2568977, at \*5 (¶ 12).

case where Verizon’s extensive efforts “to negotiate a new rate with [FirstEnergy] in light of the *Pole Attachment Order* were unsuccessful” because FirstEnergy used its superior bargaining power to deny Verizon its legal right to just and reasonable rates.<sup>201</sup>

**b) The New Telecom Rate Is the Just and Reasonable Rate Because the Joint Use Agreements Do Not Provide Verizon a Net Material Advantage Over Its Competitors.**

Under the principle of “competitive neutrality” adopted in 2011, FirstEnergy should have charged Verizon “the same rate” that applies to Verizon’s competitors (meaning the new telecom rate) effective July 12, 2011 because Verizon does not receive net material competitive benefits under the joint use agreements that justify a higher rate.<sup>202</sup> FirstEnergy has not, and cannot, show a recurring annual per-pole premium above the new telecom rate is justified by net material competitive benefits it provides Verizon under the joint use agreements.

FirstEnergy cannot prove it provides Verizon a net material competitive advantage under the joint use agreements because it does not provide one.<sup>203</sup> Instead, the joint use agreements contain some terms and conditions that are comparable to those in FirstEnergy’s license agreements, and others that significantly *disadvantage* Verizon relative to FirstEnergy’s license agreements. For example, the joint use agreements are similar to FirstEnergy’s license agreements in that Verizon, like its competitors, must bear the costs associated with placing, maintaining, rearranging, transferring, and removing its attachments.<sup>204</sup> Verizon is also required,

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<sup>201</sup> *Id.* at \*5, \*8 (¶¶ 12, 18).

<sup>202</sup> *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217); *FPL 2015 Order*, 30 FCC Rcd at 1142 (¶ 7).

<sup>203</sup> *See* VZ St. 1.1 at 11:19-12:2 (Mills Surrebuttal); VZ St. 1.2 at 7:8-9 (Mills Surrejoinder).

<sup>204</sup> For Met-Ed, *see* VZ St. 1.0, Ex. SCM-2 at VZ00190 (Art. V(A)) (“Each party shall place, transfer and rearrange its own attachments ....”); *id.* at VZ00169, VZ00171 (Arts. IV(C), VI(B)), VZ00216 (Art. V(c)), VZ00232 (Art. V(c)), VZ00247 (Art. IV(c)). For Penelec and Penn Power, *see id.* at VZ00324 (Art. VI(B)) (“Each party shall be responsible for placing,

like its competitors, to make a written application for space on FirstEnergy's poles,<sup>205</sup> to comply with FirstEnergy's construction specifications,<sup>206</sup> and to accommodate third parties attached to FirstEnergy's poles.<sup>207</sup>

But there are also terms and conditions in the joint use agreements that *disadvantage* Verizon as compared to its competitors. For example, unlike its competitors, Verizon must “at its sole expense” monitor the condition of more than 110,000 joint use poles that it owns and shares with FirstEnergy, keep them “in a safe and serviceable condition,” and replace or repair its poles as they become defective.<sup>208</sup> FirstEnergy has itself recognized that this unique pole ownership requirement imposes “substantial” costs on ILECs, including Verizon, that are not

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transferring and rearranging its own facilities.”); *id.* at VZ00350 (Art. VI(B)), VZ00375 (Art. IV(c)), VZ00440 (Art. VI(B)), VZ00473 (Art. VI(B)). For comparable license agreement provisions, *see* VZ St. 1.0, Ex. SCM-3 at VZ00520 (¶ 4) (“Licensee shall repair, maintain and remove its cable facilities ...”); *id.* at VZ00507 (Art. IV(1a)).

<sup>205</sup> For Met-Ed, *see* VZ St. 1.0, Ex. SCM-2 at VZ00170 (Art. V(A)) (“Whenever either party desires to make attachments on any pole owned by the other party, it shall make written request therefor ...”); *id.* at VZ00189 (Art. VI(a)), VZ00216 (Art. V(a)), VZ00232 (Art. V(a)), VZ00246 (Art. IV(a)). For Penelec and Penn Power, *see id.* at VZ00324 (Art. VI(A)) (“Whenever either party desires to make an initial attachment to or reserve space on any pole owned by the other party, it shall make written application ...”); *id.* at VZ00350 (Art. VI(A)), VZ00375 (Art. IV(a)), VZ00440 (Art. VI(A)), VZ00472 (Art. VI(A)). For comparable license agreement provisions, *see* VZ St. 1.0, Ex. SCM-3 at VZ00506 (Art. I(3)) (“Licensee may also from time to time make attachments to additional poles of Owner ... by submitting further application ...”); *id.* at VZ00520 (¶ 3).

<sup>206</sup> *See* VZ St. 1.0, Ex. SCM-2 at VZ00168 (Art. III), VZ00188 (Art. III), VZ00215 (Art. III), VZ00231 (Art. III), VZ00246 (Art. III), VZ00323 (Art. III), VZ00349 (Art. III), VZ00375 (Art. III), VZ00439 (Art. III), VZ00471 (Art. III); *see also* VZ St. 1.0, Ex. SCM-3 at VZ00508 (Art. IV(2)), VZ00522 (¶ 7(b)).

<sup>207</sup> *See* VZ St. 1.0, Ex. SCM-2 at VZ00177 (Art. XIV), VZ00194 (Art. XIV), VZ00221 (Art. XIII), VZ00237 (Art. XIII), VZ00251 (Art. XIII), VZ00328 (Art. XIII), VZ00354 (Art. XIII), VZ00383 (Art. XIV), VZ00444 (Art. XIII), VZ00477 (Art. XV); *see also* VZ St. 1.0, Ex. SCM-3 at VZ00511 (Art. IX(1)), VZ00520-521 (¶ 5).

<sup>208</sup> VZ St. 1.0, Ex. SCM-2 at VZ00172 (Art. VIII(A)), VZ00191 (Art. IX(a)), VZ00217 (Art. VIII(a)), VZ00233 (Art. VIII(a)), VZ00248 (Art. VII(a)), VZ00326 (Art. VIII(A)), VZ00352 (Art. VIII(A)), VZ00377 (Art. VII(a)), VZ00442 (Art. VIII(A)), VZ00474 (Art. VIII(A)).

imposed on their competitors.<sup>209</sup> Its witness describes the costs as the “cost of doing business [for Verizon] as a pole owner” under the joint use agreements—while admitting “Verizon’s competitors are not pole owners” so do not incur similar pole ownership costs under their license agreements.<sup>210</sup>

Verizon is subject to other unique costs as well, as Verizon must provide FirstEnergy access to Verizon’s poles under the same terms and conditions that apply to Verizon’s use of FirstEnergy’s poles.<sup>211</sup> These unique costs are also undisputed. In a prior docket at the FCC, FirstEnergy admitted that Verizon is subject to “burdens and obligations” that are *not* imposed on Verizon’s competitors because joint use agreements, but not license agreements, “impose[ ] mutual obligations on both parties.”<sup>212</sup> In this case, FirstEnergy’s witness agreed it is “[a] key difference between Joint Use Agreements and Licensee Agreements” that “under the Licensee Agreements, the cable companies and CLECs do not own any of the poles, so there are no reciprocal terms and conditions.”<sup>213</sup> As a result, Verizon pays FirstEnergy “in kind” for terms or

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<sup>209</sup> See Comments of FirstEnergy et al. at 131, *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245 (Aug. 16, 2010) (“Unlike cable companies and CLECs, which do not own their own distribution poles, ILECs do own and control millions of distribution poles across the country.”); *id.* at 5 (“For decades, [CLECs and cable companies] have attached their facilities to tens of millions of utility poles ... without incurring the *substantial cost and inconvenience of constructing and maintaining their own distribution systems.*”) (emphasis added); see also Reply Comments of FirstEnergy et al. at 35, *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245 (Oct. 4, 2010) (“One of the ‘burdens’ for Verizon and other ILEC pole owners in joint use agreements is that they need to pay more pole costs than they would if they were not joint pole owners.”) (“2010 Reply Comments”).

<sup>210</sup> FE St. 1-RJ at 16:13-14, 19:19 (Schafer Rejoinder).

<sup>211</sup> See *Dominion Order*, 32 FCC Rcd at 3760 (¶ 21) (“By identifying as alleged ‘benefits’ to Verizon services that Verizon is likewise required to extend to Dominion under the Joint Use Agreements, Dominion has failed to show that Verizon receives a disproportionate benefit ....”).

<sup>212</sup> 2010 Reply Comments at 35 (citing Comments of Verizon at 18 (Aug. 16, 2010)).

<sup>213</sup> FE St. 1-R at 15:11-13 (Schafer Rebuttal).

conditions received under its agreements with FirstEnergy, but its competitors make no similar “in kind” payment.<sup>214</sup> The far higher costs this imposes on Verizon is particularly apparent in the make-ready costs FirstEnergy imposes on Verizon to accommodate FirstEnergy’s facilities: over about a five-year period, it is undisputed that Verizon incurred the cost to replace 541 poles and transfer facilities from 3,687 poles to accommodate FirstEnergy’s facilities—and that Verizon would not have incurred these same costs under FirstEnergy’s license agreements.<sup>215</sup>

Verizon is also disadvantaged under the joint use agreements with respect to access to FirstEnergy’s poles. As FirstEnergy’s witness explained, “ILECs ‘have no statutory right to nondiscriminatory pole access,’ although CLECs and cable companies have an ongoing and statutorily protected right to use FirstEnergy’s poles.”<sup>216</sup> This is a significant disadvantage for Verizon as compared to its competitors.<sup>217</sup> Without a statutory right of access, Verizon is dependent on the joint use agreements, which FirstEnergy may terminate at any time.<sup>218</sup> If FirstEnergy terminates the joint use agreements, Verizon would not be permitted to attach to new FirstEnergy pole lines, which would complicate and increase Verizon’s deployment costs.<sup>219</sup> It is self-evident this provides FirstEnergy significant leverage in its negotiations with Verizon and

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<sup>214</sup> VZ St. 3.0, Ex. TJT-1 at VZ00122 (Tardiff Aff. ¶ 28); VZ St. 1.1 at 8:5-9:2 (Mills Surrebuttal).

<sup>215</sup> See VZ St. 1.0, Ex. SCM-1 at VZ00025-28 (Mills Aff. ¶¶ 57-61); VZ St. 1.1 at 17:8-18:9 (Mills Surrebuttal).

<sup>216</sup> FE St. 2-R at 10:6-7 (Zarakas Rebuttal); see also 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224(f)).

<sup>217</sup> VZ St. 3.1 at 29:4-22 (Tardiff Surrebuttal).

<sup>218</sup> VZ St. 1.0, Ex. SCM-2 at VZ00180 (Art. XX), VZ00196 (Art. XIX), VZ00223 (Art. XVIII), VZ00239 (Art. XVIII), VZ00253 (Art. XVIII), VZ00333 (Art. XXI), VZ00359 (Art. XXI), VZ00386 (Art. XXII), VZ00449 (Art. XXI), VZ00482 (Art. XXIV).

<sup>219</sup> VZ St. 1.1 at 45:8-15 (Mills Surrebuttal).

sets Verizon at a significant disadvantage as compared to CLECs and cable companies, whose ongoing access to FirstEnergy’s poles is guaranteed by law.<sup>220</sup>

Because the terms and conditions of the joint use agreements are comparable or less advantageous than those in FirstEnergy’s license agreements,<sup>221</sup> FirstEnergy does not provide Verizon a net material competitive advantage under the joint use agreements and the new telecom rate is the “just and reasonable” rate under the standard the FCC adopted in 2011.<sup>222</sup> FirstEnergy insists it can continue to charge far higher rates under that standard based on scattershot and ever-changing lists of purported “advantages.” It cannot. Despite lengthy negotiations, extensive discovery, and several rounds of written testimony, FirstEnergy has still not proven it provides Verizon a net material competitive advantage under the joint use agreements.<sup>223</sup> There is a good reason for this—it is because “FirstEnergy does *not* provide Verizon a net material competitive advantage under the joint use agreements.”<sup>224</sup>

FirstEnergy’s allegations of competitive advantages have resembled a game of whack-a-mole—each time Verizon identifies the flaws in one list, FirstEnergy comes up with a new list. There are now three flawed lists: one FirstEnergy relied on during negotiations, one FirstEnergy included in its Answer, and one FirstEnergy added to its written testimony. But FirstEnergy has still not compared the terms and conditions in its executed license agreements to the terms and

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<sup>220</sup> VZ St. 2.1 at 41:6-12 (Calnon Surrebuttal); *see also* 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224(f)).

<sup>221</sup> VZ St. 1.0, Ex. SCM-1 at VZ00017 (Mills Aff. ¶ 38); VZ St. 2.0, Ex. MSC-1 at VZ00051-56 (Calnon Aff. ¶¶ 30-35); VZ St. 3.0, Ex. TJT-1 at VZ00122-125 (Tardiff Aff. ¶ 28).

<sup>222</sup> *See Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217).

<sup>223</sup> *See Dominion Order*, 32 FCC Rcd at 3758 (¶ 17) (requiring electric utility to justify charging a rate higher than the new telecom rate).

<sup>224</sup> VZ St. 1.2 at 28:1-3 (Mills Surrejoinder).

conditions in the joint use agreements.<sup>225</sup> It failed to quantify a per-pole value for most of its allegations and did not offer evidence substantiating numbers it did allege.<sup>226</sup> It relied on advantages that existed—if ever—decades ago,<sup>227</sup> that are not and have never been *competitive* advantages,<sup>228</sup> and that have no impact on FirstEnergy’s bottom line.<sup>229</sup> FirstEnergy provides incomplete comparisons,<sup>230</sup> admits many of its allegations are unfounded,<sup>231</sup> and asks the Commission to “imagine” Verizon is competitively advantaged.<sup>232</sup> FirstEnergy also focuses on only half of the equation—alleging Verizon is advantaged under the joint use agreements and arguing Verizon’s disadvantages under the agreements should be disregarded as mere costs of

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<sup>225</sup> See FE St. 1-RJ at 36:2-6 (Schafer Rejoinder) (claiming “no specific comparison is necessary” of the terms and conditions in joint use agreements and license agreements); VZ St. 1.1, Ex. SCM-13 (“FirstEnergy did not compile a record or comparison of individual provisions for ... the ten joint use agreements between the parties and the 185 license agreements between FirstEnergy and cable and CLEC entities.”).

<sup>226</sup> See FE St. 1-RJ at 32:17-19 (Schafer Rejoinder) (claiming it should not be “necessary for FirstEnergy to quantify the benefits” FirstEnergy alleges).

<sup>227</sup> See FE St. 1-RJ at 20:8-10 (Schafer Rejoinder) (relying on allegations about “the time the Joint Use Agreements were executed until 1996”).

<sup>228</sup> See FE St. 1-RJ at 32:1 (Schafer Rejoinder) (relying on allegation that “all attaching parties benefit” from).

<sup>229</sup> See, e.g., VZ St. 1.1, Ex. SCM-18 (admitting “[t]here will be no direct cost to Met-Ed, Penelec, or Penn Power” associated with the alleged benefit); VZ St. 1.1, Ex. SCM-38 (admitting “FirstEnergy neither provides nor charges” any attacher for the alleged benefit).

<sup>230</sup> See, e.g., FE St. 1-RJ at 16:9-14 (Schafer Rejoinder) (admitting make-ready analysis omits “pole replacement costs and transfer costs FirstEnergy imposed on Verizon but not on Verizon’s competitors”).

<sup>231</sup> Compare FE St. 1-R at 31:16 n.5 (“Verizon’s competitive advantages include... Verizon can attach to FirstEnergy’s multi-ground neutrals ... Verizon can attach to FirstEnergy’s guys and anchors ... Verizon need not affix identification tags”) with Answer to Compl. ¶ 47 (“FirstEnergy admits that affixing a tag, attaching to FirstEnergy’s multi-ground neutrals, and attaching to FirstEnergy’s guys are not differences that give Verizon a material net advantage over its competitors.”).

<sup>232</sup> Answer Brief ¶ 77; see also VZ St. 1.1, Ex. SCM-20 (“Paragraph 87 of FirstEnergy’s [Answer] describes a hypothetical...”); VZ St. 1.1, Ex. SCM-37 (“FirstEnergy did not find it useful to conduct analysis...”).

doing business.<sup>233</sup> In FirstEnergy’s view, joint use agreements are “simply different” from license agreements, so further analysis should be unnecessary.<sup>234</sup>

FirstEnergy’s position is incompatible with the Commission’s regulations and goals and FCC precedent. The Commission, like the FCC, ordered FirstEnergy and other electric utilities to eliminate the outdated disparities between rates charged ILECs and their competitors in order to “promote and encourage the provision of advanced telecommunications services and broadband deployment in the Commonwealth.”<sup>235</sup> This means differences in rates require cost-based real-world data that substantiates the rate differential.<sup>236</sup> FirstEnergy instead asks the Commission to assume differences exist between ILECs and their competitors, so FirstEnergy can continue to profit from rate disparities in Pennsylvania. The Commission’s broadband and competition goals require it to reject FirstEnergy’s request.

A closer look at the individual allegations in FirstEnergy’s three lists of alleged benefits confirms FirstEnergy has not identified a net material competitive advantage that justifies charging Verizon a rate higher than the new telecom rate:

1) *FirstEnergy’s Allegations During Negotiations.* FirstEnergy sent its first list of alleged benefits about six years into the parties’ negotiations.<sup>237</sup> FirstEnergy has since admitted there was no basis for most of the allegations:

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<sup>233</sup> See, e.g., FE St. 1-RJ at 16:13-14 (Schafer Rejoinder) (“Replacing poles at the request of the joint use partner is a cost of doing business as a pole owner.”).

<sup>234</sup> See *id.* at 36:5-7.

<sup>235</sup> *Final Rulemaking Order*, 2019 WL 4345730, at \*2, 3 (citing *Third Report and Order*, 33 FCC Rcd at 7707 (¶ 3)).

<sup>236</sup> See, e.g., *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18) (“[W]e agree with Verizon that Dominion may not ‘embed in Verizon’s rental rate costs that Dominion does not incur.’”).

<sup>237</sup> VZ St. 1.0, Ex. SCM-1 at VZ00020-21 (Mills Aff. ¶ 46).

FirstEnergy Allegation <sup>238</sup>	FirstEnergy Subsequent Admission <sup>239</sup>
“Verizon is guaranteed a number of feet on each pole.”	“[I]t is true that FCC regulations prohibit pole owners from reserving space except under certain conditions.”
“Verizon can attach to FirstEnergy’s multi-ground neutrals, unlike Verizon’s competitors”	“FirstEnergy admits that attaching to FirstEnergy’s multi-ground neutrals ... [is] not [a] difference[ ] that give[s] Verizon a material net advantage over its competitors.”
“Verizon can attach to FirstEnergy’s guys and anchors, unlike Verizon’s competitors”	“FirstEnergy admits that ... attaching to FirstEnergy’s guys [is] not [a] difference[ ] that give[s] Verizon a material net advantage over its competitors.”
“Verizon is not subject to audit costs, while its competitors are subject to those costs”	“FirstEnergy does not have a record of its last field audit.”
“Verizon need not affix identification tags, unlike its competitors”	“FirstEnergy admits that affixing a tag ... [is] not [a] difference[ ] that give[s] Verizon a material net advantage over its competitors.” “FirstEnergy neither provides nor charges for identification tags.”
“Verizon is not subject to unauthorized attachment penalties, unlike its competitors”	“[N]ot all, FirstEnergy contracts with cable companies and CLECs, permit FirstEnergy to impose unauthorized attachment ... fees.” “Unauthorized attachment fees have not been charged by Met-Ed, Penelec or Penn Power since 2011.”
“Verizon is not subject to safety violation penalties, unlike its competitors”	“[N]ot all, FirstEnergy contracts with cable companies and CLECs, permit FirstEnergy to impose ... safety violation fees.” “No safety violation fees have been charged to entities by Met-Ed, Penelec, or Penn Power since 2011.”
“Verizon need not post bonds or other security, unlike Verizon’s competitors”	“[N]ot all, FirstEnergy contracts with cable companies and CLECs, require them to post a security bond.” “FirstEnergy has not compiled a list or record of each entity that has posted a security bond.”
“Verizon does not pay any agreement preparation fees, unlike its competitors”	“The ‘agreement preparation fee’” is “not in FirstEnergy’s template CLEC agreement.”

<sup>238</sup> See VZ St. 1.0, Ex. SCM-5 at VZ00690 (FCC Ex. 29); FE St. 1-R at 31:16 n.5 (Schafer Rebuttal).

<sup>239</sup> See VZ St. 1.1 at 32:9-34:4 (Mills Surrebuttal) (citing sources).

“[T]he insurance provisions are less burdensome for Verizon as compared to its competitors”	“FirstEnergy has not compiled a list comparing insurance provisions.”
“[T]he indemnification provisions are more favorable to Verizon, saving it millions of dollars in out of court settlements over its competitors”	“FirstEnergy has not compiled a list or record comparing the indemnification provisions.”

2) *FirstEnergy’s Allegations in its Answer.* FirstEnergy next relied on a list of three alleged benefits in its Answer, but each of those was fundamentally flawed as well. First, FirstEnergy argued Verizon is competitively advantaged because the joint use agreements gave Verizon “[s]eamless access to a pole network in the era before implementation of the Telecommunications Act of 1996.”<sup>240</sup> This unavoidable historical fact, FirstEnergy argued, had a ripple effect creating a series of “speed to market” and other “advantages” that will forever justify charging Verizon higher rates.<sup>241</sup> But this Commission, like the FCC, eliminated FirstEnergy’s ability to perpetuate “outdated” rate disparities based on the immutable fact that ILECs deployed some of their facilities half a century ago, before cable companies and CLECs entered the market.<sup>242</sup> As a result, when this same argument was pressed by FirstEnergy’s Maryland affiliate, the FCC’s Enforcement Bureau found it had not shown “the alleged ‘speed to market’ and cost advantages associated with Verizon’s historical status as an [I]LEC are relevant to determine whether Potomac Edison’s rates are just and reasonable under the [FCC]’s orders and rules.”<sup>243</sup>

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<sup>240</sup> Answer Brief ¶ 71.

<sup>241</sup> See *id.* ¶¶ 71-84.

<sup>242</sup> See *Final Rulemaking Order*, 2019 WL 4345730, at \*3 (citing *Third Report and Order*, 33 FCC Rcd at 7707 (¶ 3)).

<sup>243</sup> See VZ St. 1.2, Ex. SCM-45 at 3, 4.

Second, FirstEnergy argued Verizon is competitively advantaged because Verizon is not contractually required to participate in, or pay costs associated with, five-year field audits of FirstEnergy’s system.<sup>244</sup> This was a speculative, made-for-litigation advantage that does not exist. FirstEnergy does not know when it last had a field audit in Pennsylvania.<sup>245</sup> And while FirstEnergy claims that it plans to conduct future field audits, they will be *optional* for Verizon’s competitors and free for FirstEnergy.<sup>246</sup> Verizon and its competitors will thus be treated comparably—no company needs to participate or pay costs for a field audit.<sup>247</sup> And regardless of whether or not a company agrees to participate, FirstEnergy will not incur any costs.<sup>248</sup> There will be no cost incurred by FirstEnergy to include in Verizon’s rental rate.<sup>249</sup>

Third, FirstEnergy claimed Verizon uses about four inches of additional space on FirstEnergy’s poles than its competitors are presumed to occupy.<sup>250</sup> This is both irrelevant and untrue. It is irrelevant because the amount of space Verizon occupies on a pole cannot justify a rate *higher* than the new telecom rate since the new telecom rate formula already includes a “space occupied” input.<sup>251</sup> The allegation is also untrue because Verizon does *not* occupy

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<sup>244</sup> Answer Brief ¶ 88 (emphasis added).

<sup>245</sup> VZ St. 1.1, Ex. SCM-18 (“FirstEnergy does not have a record of its last field audit.”); VZ St. 1.1, Ex. SCM-19 (“[N]o field audits of pole attachments have been performed” by “Met-Ed, Penelec or Penn Power since 2011.”).

<sup>246</sup> See VZ St. 1.1, Ex. SCM-18 at p.8 (FirstEnergy’s contractor “will negotiate” with “attaching companies” for participation and fees to be paid directly to the contractor).

<sup>247</sup> See FE St. 1-RJ at 28:7-9 (Schafer Rejoinder) (“Regardless of whether [Verizon’s] competitors elect to participate in the field audit, Verizon does not even have to bear the risk of incurring these costs.”); see also VZ St. 1.1 at 24:4-6 (Mills Surrebuttal).

<sup>248</sup> See VZ St. 1.1, Ex. SCM-18 at p.8 (negotiated fees will be paid directly to the contractor).

<sup>249</sup> See *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18) (“we agree with Verizon that Dominion may not ‘embed in Verizon’s rental rate costs that Dominion does not incur.’”).

<sup>250</sup> See Answer Brief ¶¶ 89-91.

<sup>251</sup> See 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1406(d)(2)); VZ St. 2.1, Ex. MSC-3.

materially more space than its competitors on FirstEnergy's poles.<sup>252</sup> Verizon and its competitors deploy facilities of comparable size and require comparable space on a pole.<sup>253</sup> FirstEnergy does not have proof showing otherwise. Instead, it compared a *presumptive* one-foot space occupied input in the Commission's regulations to field audit data that stacked the deck against Verizon: it deemed Verizon to occupy *at least* one foot of space on every pole, including six inches of "unusable space" for which FirstEnergy is already paid.<sup>254</sup> Verizon does not occupy one foot or more of space on every pole, and when the extra six inches are subtracted from FirstEnergy's measurements, the measurements for Verizon are lower than the one foot of space the Commission's regulations assume for Verizon and its competitors.<sup>255</sup>

3) *FirstEnergy's Allegations in its Written Testimony.* FirstEnergy changed course yet again in its written testimony, claiming a recent decision from the FCC's Enforcement Bureau established all ILECs receive five advantages under joint use agreements that justify a rate higher than the new telecom rate, specifically: "(1) guaranteed access to FirstEnergy's poles; (2) reserved space on FirstEnergy's poles; (3) no permitting costs or process to attach to FirstEnergy's poles; (4) no inspection costs post-attachment; and (5) access to the lowest space on the pole."<sup>256</sup> The decision says nothing of the sort. It is an interim decision in which the

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<sup>252</sup> VZ St. 1.1 at 54:3-57:6 (Mills Surrebuttal); VZ St. 1.2 at 10:5-8, 32:8-33:2 (Mills Surrejoinder)

<sup>253</sup> See, e.g., VZ St. 1.1 at 14:13-15 (Mills Surrebuttal).

<sup>254</sup> Specifically, FirstEnergy "deemed [Verizon] to occupy six (6) inches of clearance above its highest usable space attachment and six (6) inches below its lowest usable space attachment. For example, if Verizon has two adjacent attachments separated by ten (10) inches, then Verizon is deemed to occupy 10" + 6" below + 6" above for a total of 22." FE St. 6-R, Ex. SC-1 at FE 00135 (Carlin Rebuttal). *But see* VZ St. 1.1 at 56:2-57:6 (Mills Surrebuttal).

<sup>255</sup> VZ St. 1.1 at 57:4-6 (Mills Surrebuttal).

<sup>256</sup> See FE St. 1-RJ at 30:11-16 (Schafer Rejoinder).

FCC’s Enforcement Bureau found pole attachment rates charged by the Florida electric utility were unlawfully high, narrowed the electric utility’s list of alleged “advantages,” and rejected its inflated and overstated quantifications of them.<sup>257</sup> The FCC’s Enforcement Bureau reserved decision on all other issues to give the parties thirty days to try to settle the case.<sup>258</sup> They did not, so the FCC’s Enforcement Bureau will consider the remaining issues on the record developed in that case, including whether the “advantages” cited in the interim decision are net material competitive advantages that justify a rate higher than the new telecom rate.

The five alleged advantages are *not* competitive advantages—let alone net material competitive advantages—on the facts of this case. *First*, Verizon is not “guaranteed access to FirstEnergy’s poles” because Verizon does not have a statutory right of access to FirstEnergy’s poles like its competitors and FirstEnergy may deny Verizon access to its poles under the plain terms of the joint use agreements.<sup>259</sup> *Second*, Verizon is not “reserved space on FirstEnergy’s poles” under the terms of the joint use agreements<sup>260</sup> and by law has not been able to reserve space on an electric utility’s poles since 1996.<sup>261</sup>

*Third*, Verizon and its competitors follow a comparable process to permit new attachments to FirstEnergy’s poles, performing the same tasks at comparable cost and using the

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<sup>257</sup> *FPL 2020 Order*, 2020 WL 2568977, at \*6-7 (¶¶ 13-15).

<sup>258</sup> *See id.* at \*9 (¶ 20).

<sup>259</sup> *See* 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224(f)); VZ St. 1.1 at 29:7-9 (Mills Surrebuttal) (citing agreements).

<sup>260</sup> *See* VZ St. 1.1 at 29:9-10 (Mills Surrebuttal) (citing agreements).

<sup>261</sup> *See* 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224(f)); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16053 (¶ 1170) (1996) (“Permitting an [I]LEC, for example, to reserve space for local exchange service ... would favor the future needs of the [I]LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.”).

same electronic notification system to notify FirstEnergy of new attachments.<sup>262</sup> *Fourth*, Verizon has significant inspection costs post-attachment,<sup>263</sup> so is not competitively advantaged by “no inspection costs post-attachment.”<sup>264</sup>

*Fifth*, the location of Verizon’s facilities on FirstEnergy’s poles is a competitive *disadvantage*.<sup>265</sup> Verizon’s facilities are typically at the lowest location on the pole due to standard construction practices that pre-date third-party attachers, which—according to FirstEnergy—“benefits Verizon and its competitors equally” as it eliminates the crossover of facilities that would occur mid-span if facilities were located in different locations on different poles.<sup>266</sup> And Verizon’s typical location as the lowest attacher is a costlier location. Verizon’s facilities are exposed to more damage from oversized vehicles, vandalism, and similar hazards.<sup>267</sup> They are damaged more frequently by gaffs, ladders, bucket trucks, and contractors who work in the space above Verizon’s facilities—as FirstEnergy explained, individuals working higher on a pole must take “extra care to avoid damaging the attachments of lower communications facilities.”<sup>268</sup> So while FirstEnergy does not think it “makes sense” that

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<sup>262</sup> See VZ St. 1.0, Ex. SCM-1 at VZ00024 (Mills Aff. ¶ 54); VZ St. 1.1 at 21:17-23:2, 30:1-4 (Mills Surrebuttal).

<sup>263</sup> See VZ St. 1.0, Ex. SCM-1 at VZ00022, VZ00024 (Mills Aff. ¶¶ 49, 55); VZ St. 1.1 at 28:1-10, 30:4-7 (Mills Surrebuttal); VZ St. 4.0 at 2:19-5:15 (MacNabb Surrebuttal); VZ St. 1.2 at 17:16-18:7 (Mills Surrejoinder).

<sup>264</sup> See FE St. 1-RJ at 30:14 (Schafer Rejoinder).

<sup>265</sup> See VZ St. 1.0, Ex. SCM-1 at VZ00030-31 (Mills Aff. ¶¶ 66-69); VZ St. 1.1 at 30:8-31:10 (Mills Surrebuttal); VZ St. 1.2 at 18:8-19:2 (Mills Surrejoinder); FE St. 1-R, Exs. SFS-8, SFS-9.

<sup>266</sup> Answer to Compl. ¶ 50; *see also* VZ St. 1.0, Ex. SCM-1 at VZ00031 (Mills Aff. ¶ 69).

<sup>267</sup> See, e.g., VZ St. 1.0, Ex. SCM-1 at VZ00030 (Mills Aff. ¶ 66). The interim decision FirstEnergy relies on stated that the record did not include evidence of damage. *See FPL 2020 Order*, 2020 WL 2568977 at \*7 (¶ 14 n.59). The record here includes testimony and damage reports. *See* FE St. 1-R, Exs. SFS-8, SFS-9.

<sup>268</sup> VZ St. 1.1, Ex. SCM-24.

Verizon would incur higher costs because of the location of its facilities on a pole,<sup>269</sup> the record proves otherwise.<sup>270</sup>

Thus, despite all the discovery, testimony, and briefing in this case, FirstEnergy still has not identified—let alone proven—a net material competitive advantage it provides Verizon under the joint use agreements that justifies a rate higher than the competitively neutral new telecom rate required by the Commission’s regulations. The just and reasonable rate for Verizon’s use of FirstEnergy’s poles is the new telecom rate.

**B. The Pole Attachment Rates FirstEnergy Charges Verizon Should Be Set Using the New Telecom Rate Methodology.**

Because FirstEnergy failed to justify its rental rates, the just and reasonable rate is a properly calculated new telecom rate under the presumption adopted in 2018 *and* the principle of competitive neutrality adopted in 2011. The properly calculated new telecom rates under the Commission’s regulations are:

<b>New Telecom Rates for Verizon’s Use of FirstEnergy’s Poles (per pole)<sup>271</sup></b>									
<b>Rental Year</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
Met-Ed poles	\$8.29	\$9.87	\$10.07	\$5.02	\$9.35	\$8.79	\$9.55	\$12.20	\$13.83
Penelec poles	\$6.43	\$6.79	\$7.18	\$5.21	\$6.96	\$7.18	\$7.49	\$10.49	\$9.07
Penn Power poles	\$7.30	\$8.47	\$8.51	\$8.21	\$8.94	\$9.40	\$9.08	\$11.18	\$11.80

<sup>269</sup> See FE St. 1-RJ at 22:5-8 (Schafer Rejoinder).

<sup>270</sup> VZ St. 1.0, Ex. SCM-1 at VZ00030-31 (Mills Aff. ¶¶ 66-69); VZ St. 1.1 at 30:8-31:10 (Mills Surrebuttal); VZ St. 1.2 at 18:8-19:2 (Mills Surrejoinder); FE St. 1-R, Exs. SFS-8, SFS-9. In addition to extra damage, the lowest location leads to more requests to raise Verizon’s cables to accommodate oversize loads, such as house and equipment moves, and higher transfer costs because facilities are transferred from a pole to a replacement pole sequentially from the top of the pole to bottom—which often requires Verizon to make multiple trips to a pole before it can transfer its facilities. See VZ St. 1.0, Ex. SCM-1 at VZ00030-31 (Mills Aff. ¶¶ 67-68).

<sup>271</sup> VZ St. 2.0 at 4:8-10 (Calnon Direct); VZ St. 2.0, Ex. MSC-1 at VZ00036-42, VZ00058-87 (Calnon Aff. ¶¶ 5-13, Exs. C-1 – C-3).

FirstEnergy’s testimony includes different “new telecom” rates,<sup>272</sup> but they were not properly calculated under the Commission’s regulations.<sup>273</sup> There are three main differences in the parties’ calculations.<sup>274</sup>

*First*, the actual “weighted average cost of debt and equity is the proper cost of capital figure”<sup>275</sup> when calculating new telecom rates because it ensures “the utility is fully compensated for the capital investment that is being used by the attacher.”<sup>276</sup> FirstEnergy did not use its current cost of capital—it used outdated values set in 2007, 1988 and possibly earlier—when it has had rate cases in 2014 and 2016.<sup>277</sup> FirstEnergy admits it should “use[ ] the rate of return approved in the respective utility’s last rate case, as instructed by Commission rules.”<sup>278</sup> And so its 2014 and 2016 rate cases must be used to determine its current rate of return, even if that value was not publicly announced by the Commission.<sup>279</sup> FirstEnergy’s reliance on its outdated

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<sup>272</sup> FE St. 1-R at 16:5-17:2 (Schafer Rebuttal).

<sup>273</sup> VZ St. 2.1 at 14:62-31:6 (Calnon Surrebuttal); VZ St. 3.1 at 31:1-43:11 (Tardiff Surrebuttal).

<sup>274</sup> *See* VZ St. 2.1 at 15:7-16:9, 17:4-31:6 (Calnon Surrebuttal). FirstEnergy’s witness also criticizes Verizon’s allocation of accumulated deferred taxes and distribution pole count inputs, FE St. 1-R at 20:3-16 (Schafer Rebuttal), but Verizon’s inputs were appropriate, *see* VZ St. 2.1 at 14:8-15:6, 16:10-17:3 (Calnon Surrebuttal); VZ St. 3.1 at 33:10-34:17 (Tardiff Surrebuttal). Each difference is also evident in the parties’ old telecom rate calculations. *See* VZ St. 2.1 at 42:1-44:7 (Calnon Surrebuttal).

<sup>275</sup> *See Multimedia Cablevision, Inc. v. Sw. Bell Tel. Co.*, 11 FCC Rcd 11202, 11215 (¶ 36) (1996).

<sup>276</sup> *See In the Matter of Amendment of Commission’s Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12161 (¶ 120) (2001) (“*Consolidated Partial Order*”).

<sup>277</sup> VZ St. 2.0, Ex. MSC-1 at VZ00040, VZ00088-90 (Calnon Aff. ¶ 12 & Ex. C-4); VZ St. 2.0, Ex. MSC-2; VZ St. 2.1 at 17:14-18:9 (Calnon Surrebuttal); *see also* VZ St. 2.1, Ex. MSC-8, MSC-9, MSC-10 (showing FirstEnergy’s incorrect rate calculations).

<sup>278</sup> FirstEnergy Response to Verizon Interrogatory No. 9 (Jan. 20, 2020).

<sup>279</sup> *Multimedia Cablevision, Inc.*, 11 FCC Rcd at 11215 (¶ 36).

rates of return—including one 32 years old—artificially increases the rates FirstEnergy calculates and would allow it to continue to over-recover.<sup>280</sup>

*Second*, a presumptive 15 percent input for the appurtenance factor must be used to ensure pole attachment rates are calculated based on an electric utility’s investment in poles—and not in crossarms and other non-pole related items.<sup>281</sup> FirstEnergy departed from the presumption to increase the amount of its investment (and resulting rates), but provided no evidence—let alone the “probative, direct evidence” required—about its “actual investment in non-pole-related appurtenances” to rebut the presumption.<sup>282</sup>

*Third*, the Commission’s regulations include presumptions about pole height, space occupied, unusable space, and average number of attaching entities to provide “predictability, efficiency and fairness” when calculating just and reasonable rates.<sup>283</sup> The presumptive inputs must be used in this case because FirstEnergy does not have “probative direct evidence” sufficient to rebut the presumptions.<sup>284</sup>

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<sup>280</sup> VZ St. 2.1 at 17:4-20:11 (Calnon Surrebuttal); VZ St. 3.1 at 34:18-35:13 (Tardiff Surrebuttal).

<sup>281</sup> VZ St. 2.1 at 15:7-13 (Calnon Surrebuttal); *see also Consolidated Partial Order*, 16 FCC Rcd at 12122 (¶ 32).

<sup>282</sup> *Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Util. Poles*, Report and Order, 2 FCC Rcd 4387, 4390 (¶ 19) (1987) (*1987 Pole Attachment Order*); VZ St. 2.1 at 15:14-16:9 (Calnon Surrebuttal); VZ St. 3.1 at 42:6-43:11 (Tardiff Surrebuttal). FirstEnergy did not even submit its rate calculations into evidence, so they were provided by Verizon to assist the Commission’s review. *See* VZ St. 2.1 at 9:5-10-3 (Calnon Surrebuttal).

<sup>283</sup> *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (¶ 74) (1998).

<sup>284</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. §§ 1.1409 (presumptive average of 5 attaching entities), 1.1410 (presumptions that space occupied by a communications provider is 1 foot, unusable space is 24 feet, and pole height is 37.5 feet)); *see also 1987 Pole Attachment Order*, 2 FCC Rcd at 4394 (¶ 52 n.27); *Consolidated Partial Order*, 16 FCC Rcd at 12139 (¶ 70).

FirstEnergy’s witness calculated rates using data its contractor quickly gathered during an unreliable and litigation-motivated review of a small set of poles, but that data does not rebut the presumptive inputs. The data was collected in December 2019 and January 2020,<sup>285</sup> so cannot constitute “direct evidence” about the joint use poles for prior years, particularly when FirstEnergy’s witness concedes there is a “dynamic nature of the attachments being present (or not) on the poles.”<sup>286</sup> The data is also not reliable for setting rates going forward. It was collected on, at most, [REDACTED] of the poles shared by the parties in Pennsylvania; it includes data about poles to which Verizon is not attached; and the hurried review produced data with so many admitted errors that FirstEnergy’s witnesses concede they reduce the “confidence level” of the reported results.<sup>287</sup> Properly calculated new telecom rates must use the Commission’s presumptive inputs because there is no “probative direct evidence” about the poles at issue in this case.<sup>288</sup>

### **C. The Commission Should Award Refunds to Verizon.**

Verizon is “entitled to pole attachment rates, terms and conditions that are just and reasonable” effective July 12, 2011.<sup>289</sup> Here, that just and reasonable rate should be the new telecom rate, which requires a refund from FirstEnergy of the over [REDACTED] in net rent that

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<sup>285</sup> FE St. 6-R at 3:4-5 (Carlin Rebuttal).

<sup>286</sup> VZ St. 2.2 at 19:12-17 (Calnon Surrejoinder) (quoting FE St. 1-RJ at 37:17-19 (Schafer Rejoinder)); *see also* VZ St. 2.1 at 22:7-23:3 (Calnon Surrebuttal).

<sup>287</sup> *See* VZ 1.1 at 50:3-59:6 (Mills Surrebuttal); VZ 1.2 at 34:8-42:14 (Mills Surrejoinder); VZ St. 2.1 at 23:4-30:2 (Calnon Surrebuttal); VZ St. 2.2 at 18:10-19:17 (Calnon Surrejoinder); VZ St. 3.1 at 35:14-42:5 (Tardiff Surrebuttal); VZ St. 3.2 at 16:1-17:5 (Tardiff Surrejoinder).

<sup>288</sup> *See* 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. §§ 1.1409(c), 1.1410); *see also* VZ St. 2.1 at 30:3-5 (Calnon Surrebuttal).

<sup>289</sup> *See FPL 2015 Order*, 30 FCC Rcd at 1141 (¶ 5 n.9) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5331 (¶ 209)).

it collected to date from Verizon in violation of law “plus interest, consistent with the applicable statute of limitations.”<sup>290</sup> But even if the Commission determines Verizon is not entitled to the new telecom rate, the just and reasonable rate cannot exceed the old telecom rate, which would require a refund of over [REDACTED] in net rent FirstEnergy has over-collected to date from Verizon since July 12, 2011.<sup>291</sup>

Historically, the FCC required electric utilities to refund overpayments they unlawfully collected during the pendency of a complaint proceeding.<sup>292</sup> In 2011, the FCC found a lengthier refund period was needed to meet its objectives. It explained that setting just and reasonable rates as of the date a complaint is filed “discourages pre-complaint negotiations between the parties,” “fails to make injured attachers whole, and is inconsistent with the way that claims for monetary recovery are generally treated under the law.”<sup>293</sup> “Generally speaking, a plaintiff is entitled to recompense going back as far as the applicable statute of limitations allows”—and the FCC found no valid “justification for treating pole attachment disputes differently.”<sup>294</sup>

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<sup>290</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1407(a)(3)); VZ St. 2.0 at 4:11-14 (Calnon Direct); VZ St. 2.0, Ex. MSC-1 at VZ00047, VZ00050-51 (Calnon Aff. ¶¶ 23, 28) (calculating overpayment of [REDACTED] to date as compared to proportional new telecom rates).

<sup>291</sup> VZ St. 2.0 at 5:1-4 (Calnon Direct); VZ St. 2.0, Ex. MSC-1 at VZ00056-57 (Calnon Aff. ¶¶ 38-40) (calculating overpayment of [REDACTED] to date as compared to proportional old telecom rates).

<sup>292</sup> *Pole Attachment Order*, 26 FCC Rcd at 5289 (¶ 110); *see also, e.g., Rcn Telecom Servs. of Philadelphia, Inc. v. PECO Energy Co.*, 17 FCC Rcd 25238, 25243 (¶ 13) (2002); *Cavalier Tel., LLC v. Va. Elec. and Power Co.*, 15 FCC Rcd 17962, 17964 (¶ 8) (2000).

<sup>293</sup> *Pole Attachment Order*, 26 FCC Rcd at 5289 (¶ 110).

<sup>294</sup> *See In the Matter of Implementation of Section 224 of the Act; A Nat’l Broadband Plan for Our Future*, 25 FCC Rcd 11864, 11902 (¶ 88) (2010).

As a result, the FCC amended its regulations to provide for refunds extending as far back the applicable statute of limitations allows.<sup>295</sup> By incorporating the “applicable statute of limitations,” the FCC “borrowed and applied” the “general contract law statute of limitations” from State law because “contract law provides the best analogy” in this context.<sup>296</sup> The FCC has since enforced its refund regulation in another rate dispute, where it agreed “Verizon is entitled to a refund of overpayments ... of any amounts it is determined to have overpaid dating back to the effective date of the *Pole Attachment Order*.”<sup>297</sup>

Verizon is also entitled to refunds dating back to the July 12, 2011 effective date of the *Pole Attachment Order* in this case. This Commission adopted the FCC’s regulation providing for refunds consistent with the general contract law statute of limitations,<sup>298</sup> which means Verizon should be refunded its overpayments since the July 12, 2011 effective date of the *Pole Attachment Order*.<sup>299</sup> The traditional statute of limitations for contract actions in Pennsylvania is four years,<sup>300</sup> but Pennsylvania adheres to the continuing contract doctrine for contracts that, like

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<sup>295</sup> 47 C.F.R. § 1.1407(a)(3).

<sup>296</sup> *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1101 (9th Cir. 2018) (quoting *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240 (1985)). See also *Spiegler v. District of Columbia*, 866 F.2d 461, 463-64 (D.C. Cir. 1989) (“When Congress has not established a statute of limitations for a federal cause of action, it is well-settled that federal courts may ‘borrow’ one from an analogous state cause of action, provided that the state limitations period is not inconsistent with underlying federal policies.”); *Dominion Order*, 32 FCC Rcd at 3764 (¶ 28 n.104) (citing general contract law statute of limitations).

<sup>297</sup> *Dominion Order*, 32 FCC Rcd at 3761 (¶ 23).

<sup>298</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1407(a)(3)).

<sup>299</sup> See *Dominion Order*, 32 FCC Rcd at 3764 (¶ 28) (stating that “refunds [may] extend back as far as the applicable statute of limitations allows, but no earlier than the *Pole Attachment Order* effective date”).

<sup>300</sup> See 42 Pa. Cons. Stat. § 5525.

the joint use agreements, do not have a fixed termination date.<sup>301</sup> Under the continuing contract doctrine, damages are available for the time period covered by the continuing contract, plus a four-year period following termination of the contract.<sup>302</sup> Thus, all time periods since the July 12, 2011 effective date of the *Pole Attachment Order* are covered by the applicable statute of limitations in this case.

Awarding the full relief afforded by the Commission’s regulations is necessary and appropriate in this case. In April 2011, the FCC directed FirstEnergy to reduce its rates effective July 12, 2011. FirstEnergy refused to even discuss new rental rates unless Verizon paid the disputed invoices in full.<sup>303</sup> By 2012, Verizon expressly placed FirstEnergy on notice that—if the negotiations failed—Verizon would “dispute the rate and seek a refund.”<sup>304</sup> Yet FirstEnergy prolonged the negotiations further, all the while collecting exceptionally high pole attachment rates.<sup>305</sup> To date, FirstEnergy has unlawfully diverted over [REDACTED] from the communications market in Pennsylvania.<sup>306</sup> The Commission should return those funds to their

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<sup>301</sup> See *Beltz v. Erie Indem. Co.*, 279 F. Supp. 3d 569, 578-80 (W.D. Pa. 2017), *aff’d*, 733 F. App’x 595 (3d Cir. 2018) (applying Pennsylvania contract law); see also *Thorpe v. Schoenbrun*, 195 A.2d 870 (Pa. Super. Ct. 1963) (“If services are rendered under an agreement which does not fix any certain time for payment or for the termination of the services, the contract will be treated as continuous, and the statute of limitations does not begin to run until the termination of the contractual relationship between the parties.”) (internal quotation omitted).

<sup>302</sup> See *Beltz*, 279 F. Supp. 3d at 578-80. The continuing contract doctrine thus extends the period covered by the traditional breach of contract statute of limitations, which accrues as of the date of the breach. See *id.* at 578.

<sup>303</sup> See VZ St. 1.0, Ex. SCM-1 at VZ00015 (Mills Aff. ¶ 32).

<sup>304</sup> See VZ St. 1.0, Ex. SCM-5 at VZ00557 (FCC Ex. 19).

<sup>305</sup> See VZ St. 1.0, Ex. SCM-1 at VZ00015 (Mills Aff. ¶ 32).

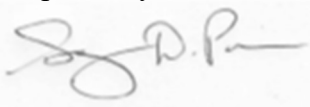
<sup>306</sup> VZ St. 2.0 at 4:11-14 (Calnon Direct); VZ St. 2.0, Ex. MSC-1 at VZ00047, VZ00050-51 (Calnon Aff. ¶¶ 23, 28) (calculating overpayment of [REDACTED] to date as compared to proportional new telecom rates).

lawful place, consistent with the Commission's stated intent to quickly provide the pole attachment rate reform it and the FCC found necessary to promote broadband deployment, incentivize investment, encourage competition, and expand opportunities for consumers.<sup>307</sup>

## VI. CONCLUSION

For the reasons stated above, the Commission should grant Verizon's complaint in its entirety and grant the relief sought by adopting the proposed findings of fact, conclusions of law, and ordering paragraphs provided in the accompanying Appendix.

Respectfully submitted,

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<sup>307</sup> *Final Rulemaking Order*, 2019 WL 4345730, at \*2; *Pole Attachment Order*, 26 FCC Rcd at 5295 (¶ 126) (“Removing these barriers to telecommunications and cable deployment will enable consumers to benefit through increased competition, affordability, and availability of advanced communications services, including broadband.”).

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*Counsel for Verizon Pennsylvania LLC and  
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Dated: July 28, 2020

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**VERIZON’S PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDERING PARAGRAPHS**  
**(PUBLIC VERSION)**

Pursuant to 52 Pa. Code § 5.501, Verizon Pennsylvania LLC and Verizon North LLC hereby submit their proposed findings of fact, conclusions of law and ordering paragraphs.

**I. APPENDIX A – PROPOSED FINDINGS OF FACT**

**A. The Parties**

1. Complainants Verizon Pennsylvania LLC and Verizon North LLC (collectively, “Verizon”) are incumbent local exchange carriers (“ILECs”) that own utility poles and provide telecommunications, broadband, and other services in areas of Pennsylvania.<sup>1</sup>

2. Respondents Metropolitan Edison Company (“Met-Ed”), Pennsylvania Electric Company (“Penelec”), and Pennsylvania Power Company (“Penn Power”) (collectively, “FirstEnergy”) are operating subsidiaries of FirstEnergy Corp. Each is an electric utility that owns or controls poles used, in whole or in part, for wire communications. They are not cooperatively organized, owned by a railroad, or owned by the Federal Government or a State.<sup>2</sup>

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<sup>1</sup> VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶¶ 1, 3).

<sup>2</sup> *Id.* (Joint Statement ¶ 2).

3. Verizon and FirstEnergy are party to ten similar joint use agreements that contain the rates, terms, and conditions for each party’s use of the other party’s utility poles.<sup>3</sup>

4. FirstEnergy entered the joint use agreements with Verizon’s predecessor companies between 1958 and 1988. The joint use agreements were amended between 1999 and 2009 to include the currently operative pole attachment rate provisions.<sup>4</sup>

5. Five of the ten joint use agreements are between Verizon and Met-Ed, four are between Verizon and Penelec, and one is between Verizon and Penn Power.<sup>5</sup>

6. According to FirstEnergy’s pole attachment rental invoices, the parties share 412,697 utility poles in Pennsylvania, with FirstEnergy owning 301,854 of the utility poles and Verizon owning 110,843 of the utility poles.<sup>6</sup>

	FirstEnergy	Verizon	Total
Met-Ed territory	129,421 (81%)	30,027 (19%)	159,448
Penelec territory	146,859 (67%)	73,400 (33%)	220,259
Penn Power territory	25,574 (78%)	7,416 (22%)	32,990
Total	301,854 (73%)	110,843 (27%)	412,697

**B. Pole Attachment Rates for Broadband Providers in Pennsylvania**

7. The Commission has recognized that broadband and other advanced services provide invaluable opportunities to Pennsylvania consumers: “With an expansive and established broadband service, Pennsylvania will be even more attractive to businesses; and, a wide-reaching broadband network will help schools to provide a more interactive learning

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<sup>3</sup> VZ St. 1.0, Ex. SCM-1 at VZ00004 (Mills Aff. ¶ 6); VZ St. 1.0, Ex. SCM-2; VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 3).

<sup>4</sup> VZ St. 1.0, Ex. SCM-2; VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 3).

<sup>5</sup> VZ St. 1.0, Ex. SCM-2; VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 3).

<sup>6</sup> VZ St. 1.0, Ex. SCM-4; VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 4).

environment in order to bridge the digital divide. Increased telecommunication through broadband has many implications – some of which haven’t even been discovered yet.”<sup>7</sup>

8. Utility poles are “network elements upon which all broadband deployment relies—essential physical infrastructure used to deliver these services to end-user consumers.”<sup>8</sup>

9. At least three types of wireline communications companies compete in today’s broadband marketplace: older telecommunications companies known as incumbent local exchange carriers or “ILECs,” newer telecommunications companies known as competitive local exchange carriers or “CLECs,” and cable companies.<sup>9</sup> ILECs, CLECs, and cable companies attach comparable facilities to utility poles to serve customers.<sup>10</sup>

10. Until 2011, the FCC interpreted federal law to allow electric utilities to charge ILECs, CLECs, and cable companies different rates for use of comparable space on utility poles. ILECs typically paid the highest rates. Cable companies were entitled to the lowest rates. And CLECs were entitled to a rate that was about 1.5 times the cable rate.<sup>11</sup>

11. In 2011, the FCC found the disparate pole attachment rates created market distortions that negatively impacted its work to “ensure that consumers in all regions of the country have access to advanced telecommunications and information services at rates that are

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<sup>7</sup> VZ St. 1.2 at 3:15-22 (Mills Surrejoinder) (quoting Broadband & High-Speed Internet Service, available at [http://www.puc.pa.gov/consumer\\_info/telecommunications/broadband\\_high\\_speed\\_internet\\_service.aspx](http://www.puc.pa.gov/consumer_info/telecommunications/broadband_high_speed_internet_service.aspx)); see also *Assumption of Comm’n Jurisdiction over Pole Attachments from the FCC*, No. L-2018-3002672, 2019 WL 4345730, at \*1 (Aug. 29, 2019) (“*Final Rulemaking Order*”).

<sup>8</sup> *Final Rulemaking Order*, 2019 WL 4345730, at \*1.

<sup>9</sup> VZ St. 2.0 at 2:18-3:3 (Calnon Direct); VZ St. 1.1 at 2:11-16, 20:13-15 (Mills Surrebuttal).

<sup>10</sup> VZ St. 1.1 at 2:16-17, 14:13-14, 69:69:6 (Mills Surrebuttal).

<sup>11</sup> *Connecting America: The National Broadband Plan*, 2010 WL 972375, at \*97 (2010); see also VZ St. 2.1 at 3:10-4:9 (Calnon Surrebuttal).

just, reasonable and affordable.”<sup>12</sup> As a result, the FCC ordered “consistent, cross-industry attachment rates that encourage deployment and adoption of broadband Internet access services ... at the cable-rate level.”<sup>13</sup> The FCC rejected the arguments of electric utilities for higher rates, in part because the United States Supreme Court found the cable rate is “‘just and reasonable’ and fully compensatory” to electric utilities.<sup>14</sup>

12. Effective July 12, 2011, the FCC ordered electric utilities to reduce the rates they charge broadband providers in two ways.<sup>15</sup> *First*, the FCC revised the rate formula that previously applied to CLECs (the “old telecom” rate formula). The revised “new telecom” rate formula requires electric utilities to charge CLECs a rate that approximates the cable rate.<sup>16</sup> *Second*, the FCC required electric utilities to charge ILECs “competitively neutral” rates, meaning the electric utility must charge the ILEC the new telecom rate if it attaches to the electric utility’s poles under terms and conditions that are comparable to the terms and conditions in the electric utility’s license agreements with CLECs and cable companies. If instead the electric utility provides the ILEC terms and conditions that give the ILEC a net material

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<sup>12</sup> *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5241-42 (¶¶ 2-3) (2011) (“*Pole Attachment Order*”).

<sup>13</sup> *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order on Reconsideration, 30 FCC Rcd 13731, 13738 (¶ 16) (2015) (“*Cost Allocator Order*”) (describing *Pole Attachment Order*); see also *Assumption of Comm’n Jurisdiction over Pole Attachments from the FCC*, No. L-2018-3002672, Notice of Proposed Rulemaking, 2018 WL 3533538, at \*2-5 (July 12, 2018) (“*NPRM*”) (detailing FCC efforts to “establish rental rates for pole attachments that are as low and close to uniform as possible”) (citations omitted).

<sup>14</sup> *Pole Attachment Order*, 26 FCC Rcd at 5321-22 (¶¶ 183-84) (citing *FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987)).

<sup>15</sup> See *Pole Attachments Timeline Rules Take Effect*, 26 FCC Rcd 9638 (2011).

<sup>16</sup> 47 C.F.R. § 1.1406(d); *Pole Attachment Order*, 26 FCC Rcd at 5304-05 (¶ 149); VZ St. 2.1, Ex. MSC-3 at p.6.

advantage as compared to the terms and conditions of the utility’s license agreements with CLECs and cable companies, the electric utility may charge a rate that accounts for the per-pole value of those advantages up to, but no higher than, the “old telecom” rate.<sup>17</sup>

13. The FCC issued subsequent orders in 2015, 2017, and 2018 reinforcing its requirement that electric utilities charge competitively neutral pole attachment rates effective July 12, 2011.<sup>18</sup> Under the FCC’s current regulations, which this Commission adopted, the following are the maximum rates permitted by law:<sup>19</sup>

Company	Maximum Lawful Rate Under PA and FCC Regulations <sup>20</sup>
Cable company providing cable services	Cable rate
CLECs and cable companies providing telecommunications services	New telecom rate (approximates the cable rate)
ILECs	Presumed: new telecom rate Cannot be higher than old telecom rate

**C. Verizon’s Pole Attachment Rental Dispute with FirstEnergy**

14. When the FCC ordered electric utilities to charge competitively neutral rates in 2011, Verizon had already been in negotiations with FirstEnergy for about two years trying to reduce the exceptionally high annual net rental amounts it pays under the joint use agreements.<sup>21</sup>

<sup>17</sup> *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶¶ 217-18); VZ St. 2.1, Ex. MSC-3, at pp. 6-7.

<sup>18</sup> See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) (“*Third Report and Order*”); *Verizon Va. v. Va. Elec. & Power Co.*, 32 FCC Rcd 3750 (EB 2017) (“*Dominion Order*”); *Cost Allocator Order*, 30 FCC Rcd 13731 (2015).

<sup>19</sup> 52 Pa. Code § 77.4 (incorporating 47 U.S.C. § 224 and 47 C.F.R. §§ 1.1401-1.1415).

<sup>20</sup> See VZ St. 2.1, Ex. MSC-3.

<sup>21</sup> VZ St. 1.0, Ex. SCM-1 at VZ00007-08, VZ00014-15 (Mills Aff. ¶¶ 15, 31).

15. FirstEnergy has long owned about three-quarters of the jointly used poles,<sup>22</sup> and this pole ownership advantage provides FirstEnergy superior bargaining power in pole attachment rate negotiations with Verizon.<sup>23</sup> FirstEnergy used its superior bargaining power to impose and continue charging Verizon exceptionally high pole attachment rates.<sup>24</sup>

16. Penelec and Penn Power charge Verizon per-pole rates at least [REDACTED] the new telecom rates.<sup>25</sup> Met-Ed reached the same result by charging Verizon an exceptionally high rate for a subset of joint use poles and paying nothing for its use of Verizon's poles.<sup>26</sup> For purposes of this litigation, the parties agreed that Met-Ed's rates can be compared to per-pole new telecom rates by converting them into "reciprocal" rates that apply the same per-pole rate to each party for its use of the other party's poles.<sup>27</sup> When so converted, Met-Ed's rates, like the per-pole rates charged by the other defendants, have averaged over [REDACTED] times the per-pole competitively neutral new telecom rates required by law since 2011:<sup>28</sup>

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<sup>22</sup> VZ St. 1.0, Ex. SCM-1 at VZ00005-08, VZ00011-13 (Mills Aff. ¶¶ 9, 14-16, 23-24, 27-28); VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 4).

<sup>23</sup> *Pole Attachment Order*, 26 FCC Rcd at 5328-29 (¶ 206 & n.618); see also *Verizon Va. v. Va. Elec. & Power Co.*, 32 FCC Rcd 3750, 3750-51 (¶ 13) (2017) ("*Dominion Order*"); *BellSouth Telecommunications, LLC v. Fla. Power and Light Co.*, Proceeding No. 19-187, 2020 WL 2568977, at \*8 (¶ 18) (EB 2020) ("*FPL 2020 Order*").

<sup>24</sup> VZ St. 2.1 at 57:6-62:3 (Calnon Surrebuttal); VZ St. 3.1 at 5:12-6:19, 15:17-23:9 (Tardiff Surrebuttal); see also VZ St. 3.0, Ex. TJT-1 at VZ00107-108 (Tardiff Aff. ¶ 6).

<sup>25</sup> VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 7); VZ St. 2.0 at 4:10-11 (Calnon Direct); VZ St. 2.1, Ex. MSC-4.

<sup>26</sup> VZ St. 1.0, Ex. SCM-1 at VZ00006-10 (Mills Aff. ¶¶ 13-21); VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 7).

<sup>27</sup> VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 7).

<sup>28</sup> VZ St. 2.0, Ex. MSC-1 at VZ00045-46 (Calnon Aff. ¶ 21).

	Average Per-Pole Contract Rate (2011-2018)	Average Per-Pole New Telecom Rate (2011-2018)	Average Contract Rate Compared to Average New Telecom Rate
Met-Ed		\$ 9.14	
Penelec		\$ 7.22	
Penn Power		\$ 8.89	
<b>FirstEnergy</b>		<b>\$ 8.42</b>	

17. Shortly after the FCC amended its regulations in 2011, Verizon asked FirstEnergy for the just and reasonable rates to which it was entitled.<sup>29</sup> FirstEnergy would not agree even to discuss new rates unless Verizon paid in full the pole attachment rental invoices it was disputing.<sup>30</sup> So in good faith Verizon paid the invoices as demanded and, shortly thereafter, the parties began their negotiations.<sup>31</sup>

18. Once Verizon paid the invoices, FirstEnergy refused to discuss new rates (or refunds) for the disputed invoices. Instead, it prolonged and delayed negotiations and then—when it finally agreed to discuss new rates—it offered minimal rate reductions and insisted they would apply only on to future rental years.<sup>32</sup>

<sup>29</sup> VZ St. 1.0, Ex. SCM-1 at VZ00014-15 (Mills Aff. ¶ 31); VZ St. 1.0, Ex. SCM-5 at VZ00551 (FCC Ex. 17), VZ00557 (FCC Ex. 19).

<sup>30</sup> VZ St. 1.0, Ex. SCM-1 at VZ00015 (Mills Aff. ¶ 32).

<sup>31</sup> *Id.*; see also, e.g., VZ St. 1.0, Ex. SCM-5 at VZ00557 (FCC Ex. 19) (“We believe that the rate that Verizon currently pays is in excess of the rate that PENELEC may charge under the rules established by the FCC in its April 7, 2011 Order. Accordingly, Verizon reserves the right to dispute the rate and seek a refund from PENELEC.”).

<sup>32</sup> VZ St. 1.0, Ex. SCM-1 at VZ00015-21 (Mills Aff. ¶¶ 33-47); VZ St. 1.1 at 41:5-48:2 (Mills Surrebuttal); VZ St. 1.2 at 6:3-17 (Mills Surrejoinder).

19. Verizon has thus continued to pay FirstEnergy far higher pole attachment rates than the rates set by formula in the Commission’s regulations.<sup>33</sup> The properly calculated new telecom rates for Verizon’s use of FirstEnergy’s poles are:

<b>New Telecom Rates for Verizon’s Use of FirstEnergy’s Poles (per pole)<sup>34</sup></b>									
<b>Rental Year</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
Met-Ed poles	\$8.29	\$9.87	\$10.07	\$5.02	\$9.35	\$8.79	\$9.55	\$12.20	\$13.83
Penelec poles	\$6.43	\$6.79	\$7.18	\$5.21	\$6.96	\$7.18	\$7.49	\$10.49	\$9.07
Penn Power poles	\$7.30	\$8.47	\$8.51	\$8.21	\$8.94	\$9.40	\$9.08	\$11.18	\$11.80

20. Properly calculated old telecom rates for Verizon’s use of FirstEnergy’s poles are, by definition, about 1.5 times the properly calculated new telecom rates.<sup>35</sup> The properly calculated old telecom rates for Verizon’s use of FirstEnergy’s poles are:

<b>Old Telecom Rates for Verizon’s Use of FirstEnergy’s Poles (per pole)<sup>36</sup></b>									
<b>Rental Year</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
Met-Ed poles	\$12.57	\$14.96	\$15.26	\$7.61	\$14.16	\$13.32	\$14.47	\$18.49	\$20.96
Penelec poles	\$9.74	\$10.29	\$10.89	\$7.89	\$10.54	\$10.88	\$11.35	\$15.90	\$13.75
Penn Power poles	\$11.06	\$12.83	\$12.90	\$12.44	\$13.54	\$14.24	\$13.75	\$16.94	\$17.88

21. FirstEnergy has instead charged Verizon rates averaging more than [REDACTED] times the new telecom rates and more than two [REDACTED] the old telecom rates:<sup>37</sup>

<sup>33</sup> VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 8) (showing rent Verizon paid FirstEnergy for the 2011 through 2019 years); VZ St. 2.0, Ex. MSC-1 at VZ00102 (Calnon Aff., Ex. C-6).

<sup>34</sup> VZ St. 2.0 at 4:10-11 (Calnon Direct); VZ St. 2.0, Ex. MSC-1 at VZ00036-42, VZ00058-87 (Calnon Aff. ¶¶ 5-13, Exs. C-1 – C-3).

<sup>35</sup> VZ St. 2.0 at 3:17-20 (Calnon Direct); VZ St. 2.1, Ex. MSC-3 at p.7.

<sup>36</sup> VZ St. 2.0 at 5:1 (Calnon Direct); VZ St. 2.0, Ex. MSC-1 at VZ00055, VZ00058-87 (Calnon Aff. ¶ 36, Exs. C-1 – C-3).

<sup>37</sup> VZ St. 2.0, Ex. MSC-1 at VZ00046, VZ00055 (Calnon Aff. ¶¶ 21, 37).

Rates FirstEnergy Charged Verizon for Use of FirstEnergy's Poles (per pole) <sup>38</sup>									
Rental Year	2011	2012	2013	2014	2015	2016	2017	2018	2019
Met-Ed poles									
Penelec poles									
Penn Power poles									

22. FirstEnergy's overcharges have had a significant anti-competitive impact. Each year since 2011, FirstEnergy has collected, on average, over [REDACTED] more in pole attachment rent from Verizon than permitted at new telecom rates—for a total overpayment of [REDACTED] to date in excess of the pole attachment rent permitted by law.<sup>39</sup>

**D. Procedural History**

23. After years of negotiations, Verizon filed a formal complaint at the FCC on November 20, 2019, alleging “that FirstEnergy has charged unlawful and unreasonably high pole attachment rates for years after [it was] directed by the FCC to eliminate wide disparities in pole rental rates.”<sup>40</sup>

24. Verizon asked the FCC to order FirstEnergy to charge the just and reasonable new telecom rates required by law and refund the amounts it over-collected in violation of federal law since July 12, 2011.<sup>41</sup>

25. The parties engaged in discovery while the case was pending at the FCC, and FirstEnergy filed an Answer and Verizon filed a Reply.<sup>42</sup>

<sup>38</sup> VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 7).

<sup>39</sup> VZ St. 2.0 at 4:11-14 (Calnon Direct); VZ St. 2.0, Ex. MSC-1 at VZ00047-51, VZ000102 (Calnon Aff. ¶¶ 23-29, Ex. C-6).

<sup>40</sup> Second Scheduling Order at 1 (June 9, 2020); *see also* Complaint (Nov. 20, 2019).

<sup>41</sup> Second Scheduling Order at 1.

<sup>42</sup> *Id.* at 1-2.

26. Meanwhile, this Commission “had taken steps to ‘reverse preempt’ the FCC’s jurisdiction over pole attachment issues in Pennsylvania.”<sup>43</sup>

27. The Commission’s regulations took effect on March 18, 2020, and the FCC recognized the Commission’s jurisdiction over pole attachments the following day.<sup>44</sup>

28. On March 23, 2020, the FCC transferred this case to the Commission,<sup>45</sup> where it was referred to the Office of Administrative Law Judge.<sup>46</sup>

29. The parties have since engaged in extensive discovery, submitted several rounds of pre-served written testimony, stipulated to a written record, and waived cross-examination of witnesses.<sup>47</sup>

30. The record is closed and the case ready for decision on the papers.

**E. The New Telecom Rate is the Just and Reasonable Rate**

31. The Commission’s regulations include a presumption that ILECs must be charged a new telecom rate under joint use agreements “entered into or renewed after the effective date” of the regulation, which was March 11, 2019.<sup>48</sup>

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<sup>43</sup> See *id.* at 2 (citing *Final Rulemaking Order*).

<sup>44</sup> See *States That Have Certified That They Regulate Pole Attachments*, No. DA20-302, 2020 WL 1434415 (Mar. 19, 2020); see also 47 U.S.C. § 224(c)(2).

<sup>45</sup> *Verizon Pa., et al. v. Met-Ed, et al.*, EB-19-MD-008, 2020 WL 1491501 (Mar. 23, 2020).

<sup>46</sup> See Second Scheduling Order at 2.

<sup>47</sup> See Joint Motion to Admit Stipulated Items into Record of Proceeding ¶ 1 (July 7, 2020). Verizon served direct testimony on April 21, 2020, surrebuttal testimony on June 18, 2020, and surrejoinder testimony on July 2, 2020. FirstEnergy served rebuttal testimony on May 21, 2020 and rejoinder testimony on June 25, 2020.

<sup>48</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)); see also *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 84 Fed. Reg. 2460-01 (2019) (“The amendment to 47 C.F.R. 1.1413 ... is effective March 11, 2019.”).

32. The joint use agreements were renewed after March 11, 2019.<sup>49</sup>

33. FirstEnergy did not attempt to rebut the presumption in the Commission's regulations but argued only that the presumption does not apply.<sup>50</sup>

34. The new telecom rate is the just and reasonable rate even if the presumption does not apply.<sup>51</sup>

35. Verizon requires relief from the rates FirstEnergy charges because it genuinely lacks the ability to terminate the rates and negotiate just and reasonable rates.<sup>52</sup>

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<sup>49</sup> See Answer to Compl. ¶¶ 15, 16 (admitting joint use agreements “continue to govern the parties’ joint use relationship” after their initial terms expired because neither party has provided written notice of an intent to terminate); see also VZ St. 1.0, Ex. SCM-2 at VZ00180 (Art. XX), VZ00196 (Art. XIX), VZ00223 (Art. XVIII), VZ00239 (Art. XVIII), VZ00253 (Art. XVIII), VZ00333 (Art. XXI), VZ00359 (Art. XXI), VZ00386 (Art. XXII), VZ00449 (Art. XXI), VZ00482 (Art. XXIV).

<sup>50</sup> See Answer Brief at i, ¶ 28; see also Answer to Compl. ¶¶ 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 43, 62, 63 (stating that the regulation’s “presumptions do not apply”).

<sup>51</sup> See *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.478) (“[T]he 2011 *Pole Attachment Order*’s guidance regarding review of [I]LEC pole attachment complaints will continue to apply” where the presumption does not); Answer to Compl. ¶¶ 12, 13, 14, 17, 18, 19, 20 (arguing “the 2011 *Pole Attachment Order* applies to all periods at issue in this proceeding”); see also VZ St. 1.0, Ex. SCM-1 at VZ00017, VZ00021-32 (Mills Aff. ¶¶ 38, 48-73); VZ St. 2.0, Ex. MSC-1 at VZ00051-55 (Calnon Aff. ¶¶ 30-35); VZ St. 3.0, Ex. TJT-1 at VZ00107, VZ00119-125 (Tardiff Aff. ¶¶ 5, 21-28); VZ St. 1.1 at 7:3-35:19 (Mills Surrebuttal); VZ St. 2.1 at 32:1-41:14 (Calnon Surrebuttal); VZ St. 3.1 at 23:10-30:17 (Tardiff Surrebuttal); VZ St. 4.0 at 2:16-5:22 (MacNabb Surrebuttal); VZ St. 1.2 at 7:1-28:4 (Mills Surrejoinder); VZ St. 2.2 at 14:1-18:9 (Calnon Surrejoinder); VZ St. 3.2 at 6:11-12:8 (Tardiff Surrejoinder).

<sup>52</sup> See *FPL 2020 Order*, 2020 WL 2568977, at \*4-5 (¶¶ 11-12); see also VZ St. 1.0, Ex. SCM-1 at VZ0004-21 (Mills Aff. ¶¶ 7-47); VZ St. 1.1 at 41:4-48:2 (Mills Surrebuttal); VZ St. 2.1 at 57:4-62:3 (Calnon Surrebuttal); VZ St. 3.1 at 5:26-6:19, 15:19-23:9 (Tardiff Surrebuttal); VZ St. 1.2 at 6:3-17 (Mills Surrejoinder); VZ St. 3.2 at 12:9-15:25 (Tardiff Surrejoinder); VZ St. 1.0, Ex. SCM-2 at VZ00196 (Art. XIX), VZ00223 (Art. XVIII), VZ00239 (Art. XVIII), VZ00253 (Art. XVIII), VZ00333 (Art. XXI), VZ00359 (Art. XXI), VZ00386 (Art. XXII), VZ00449 (Art. XXI), VZ00482 (Art. XXIV).

36. The joint use agreements include “evergreen” provisions that require Verizon to pay the joint use agreement rates even if the joint use agreements are terminated.<sup>53</sup> As a result, the joint use agreement rates “shall remain in effect” unless and until FirstEnergy agrees to change them.<sup>54</sup>

37. FirstEnergy proved throughout the parties’ negotiations it is unwilling to agree to just and reasonable rates despite multiple FCC decisions and this Commission’s assertion of jurisdiction over pole attachments.<sup>55</sup>

38. The new telecom rate is the just and reasonable competitively neutral rate because FirstEnergy does not provide Verizon a net material advantage under the joint use agreements as compared to the terms and conditions it provides Verizon’s competitors.<sup>56</sup>

39. The joint use agreements are not more advantageous than FirstEnergy’s license agreements.<sup>57</sup>

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<sup>53</sup> The evergreen clauses provide, in essentially identical words, that “notwithstanding such termination [of the agreement] this agreement shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination.” VZ St. 1.0, Ex. SCM-2 at VZ00196 (Art. XIX); *see also id.* at VZ00223 (Art. XVIII), VZ00239 (Art. XVIII), VZ00253 (Art. XVIII), VZ00333 (Art. XXI), VZ00359 (Art. XXI), VZ00386 (Art. XXII), VZ00449 (Art. XXI), VZ00482 (Art. XXIV).

<sup>54</sup> VZ St. 1.0, Ex. SCM-2 at VZ00299, VZ00305, VZ00310, VZ00315, VZ00454, VZ00459, VZ00464, VZ00484.

<sup>55</sup> VZ St. 1.0, Ex. SCM-1 at VZ00014-21 (Mills Aff. ¶¶ 30-47); VZ St. 1.1 at 41:4-48:2 (Mills Surrebuttal); VZ St. 1.2 at 6:3-17 (Mills Surrejoinder).

<sup>56</sup> VZ St. 1.0, Ex. SCM-1 at VZ00021-32 (Mills Aff. ¶¶ 48-73); VZ St. 2.0, Ex. MSC-1 at VZ00051-55 (Calnon Aff. ¶¶ 30-35); VZ St. 3.0, Ex. TJT-1 at VZ00107, VZ00119-125 (Tardiff Aff. ¶¶ 5, 21-28); VZ St. 1.1 at 7:3-35:19 (Mills Surrebuttal); VZ St. 2.1 at 32:1-41:14 (Calnon Surrebuttal); VZ St. 3.1 at 23:10-30:17 (Tardiff Surrebuttal); VZ St. 4.0 at 2:16-5:22 (MacNabb Surrebuttal); VZ St. 1.2 at 7:1-28:4 (Mills Surrejoinder); VZ St. 2.2 at 14:1-18:9 (Calnon Surrejoinder); VZ St. 3.2 at 6:11-12:8 (Tardiff Surrejoinder).

<sup>57</sup> VZ St. 1.0, Ex. SCM-1 at VZ00017, VZ00021-32 (Mills Aff. ¶¶ 38, 48-73); VZ St. 2.0, Ex. MSC-1 at VZ00051-55 (Calnon Aff. ¶¶ 30-35); VZ St. 3.0, Ex. TJT-1 at VZ00107, VZ00119-125 (Tardiff Aff. ¶¶ 5, 21-28); VZ St. 1.1 at 7:3-35:19 (Mills Surrebuttal); VZ St. 2.1 at 32:1-41:14 (Calnon Surrebuttal); VZ St. 3.1 at 23:10-30:17 (Tardiff Surrebuttal); VZ St. 4.0 at 2:16-

40. In some ways, the joint use agreements are comparable to FirstEnergy’s license agreements with Verizon’s competitors. Verizon, like its competitors, must bear the costs associated with placing, maintaining, rearranging, transferring, and removing its attachments;<sup>58</sup> make a written application for space on FirstEnergy’s poles;<sup>59</sup> comply with FirstEnergy’s construction specifications;<sup>60</sup> and accommodate third parties attached to FirstEnergy’s poles.<sup>61</sup>

41. In other ways, the joint use agreements *disadvantage* Verizon as compared to its competitors. Unlike its competitors, Verizon must “at its sole expense” determine the condition

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5:22 (MacNabb Surrebuttal); VZ St. 1.2 at 7:1-28:4 (Mills Surrejoinder); VZ St. 2.2 at 14:1-18:9 (Calnon Surrejoinder); VZ St. 3.2 at 6:11-12:8 (Tardiff Surrejoinder).

<sup>58</sup> For Met-Ed, *see* VZ St. 1.0, Ex. SCM-2 at VZ00190 (Art. V(A)) (“Each party shall place, transfer and rearrange its own attachments ....”); *id.* at VZ00169, VZ00171 (Arts. IV(C), VI(B)), VZ00216 (Art. V(c)), VZ00232 (Art. V(c)), VZ00247 (Art. IV(c)). For Penelec and Penn Power, *see id.* at VZ00324 (Art. VI(B)) (“Each party shall be responsible for placing, transferring and rearranging its own facilities.”); *id.* at VZ00350 (Art. VI(B)), VZ00375 (Art. IV(c)), VZ00440 (Art. VI(B)), VZ00473 (Art. VI(B)). For comparable license agreement provisions, *see* VZ St. 1.0, Ex. SCM-3 at VZ00520 (¶ 4) (“Licensee shall repair, maintain and remove its cable facilities ...”); *id.* at VZ00507 (Art. IV(1a)).

<sup>59</sup> For Met-Ed, *see* VZ St. 1.0, Ex. SCM-2 at VZ00170 (Art. V(A)) (“Whenever either party desires to make attachments on any pole owned by the other party, it shall make written request therefor ...”); *id.* at VZ00189 (Art. VI(a)), VZ00216 (Art. V(a)), VZ00232 (Art. V(a)), VZ00246 (Art. IV(a)). For Penelec and Penn Power, *see id.* at VZ00324 (Art. VI(A)) (“Whenever either party desires to make an initial attachment to or reserve space on any pole owned by the other party, it shall make written application ...”); *id.* at VZ00350 (Art. VI(A)), VZ00375 (Art. IV(a)), VZ00440 (Art. VI(A)), VZ00472 (Art. VI(A)). For comparable license agreement provisions, *see* VZ St. 1.0, Ex. SCM-3 at VZ00506 (Art. I(3)) (“Licensee may also from time to time make attachments to additional poles of Owner ... by submitting further application ...”); *id.* at VZ00520 (¶ 3).

<sup>60</sup> *See* VZ St. 1.0, Ex. SCM-2 at VZ00168 (Art. III), VZ00188 (Art. III), VZ00215 (Art. III), VZ00231 (Art. III), VZ00246 (Art. III), VZ00323 (Art. III), VZ00349 (Art. III), VZ00375 (Art. III), VZ00439 (Art. III), VZ00471 (Art. III); *see also* VZ St. 1.0, Ex. SCM-3 at VZ00508 (Art. IV(2)), VZ00522 (¶ 7(b)).

<sup>61</sup> *See* VZ St. 1.0, Ex. SCM-2 at VZ00177 (Art. XIV), VZ00194 (Art. XIV), VZ00221 (Art. XIII), VZ00237 (Art. XIII), VZ00251 (Art. XIII), VZ00328 (Art. XIII), VZ00354 (Art. XIII), VZ00383 (Art. XIV), VZ00444 (Art. XIII), VZ00477 (Art. XV); *see also* VZ St. 1.0, Ex. SCM-3 at VZ00511 (Art. IX(1)), VZ00520-521 (¶ 5).

of more than 110,000 joint use poles that it owns and shares with FirstEnergy, keep them “in a safe and serviceable condition,” and replace or repair its poles as they become defective.<sup>62</sup>

42. Verizon is subject to other unique costs under the joint use agreements. Verizon must provide FirstEnergy access to Verizon’s poles under the same terms and conditions that apply to Verizon’s use of FirstEnergy’s poles.<sup>63</sup> As a result, Verizon pays FirstEnergy “in kind” for terms or conditions received under its agreements with FirstEnergy, but its competitors make no similar “in kind” payment.<sup>64</sup>

43. Verizon is also disadvantaged under the joint use agreements with respect to access to FirstEnergy’s poles. CLECs and cable companies that attach to FirstEnergy’s poles under the terms of license agreements have an ongoing and statutorily protected right to use FirstEnergy’s poles.<sup>65</sup> Verizon does not have this right, so is dependent on the joint use agreements, which FirstEnergy may terminate at any time.<sup>66</sup> If FirstEnergy terminates the joint use agreements, Verizon would not be permitted to attach to new FirstEnergy pole lines, which would complicate and increase Verizon’s deployment costs.<sup>67</sup> This provides FirstEnergy significant leverage in its negotiations with Verizon and sets Verizon at a significant

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<sup>62</sup> See VZ St. 1.0, Ex. SCM-2 at VZ00172 (Art. VIII(A)), VZ00191 (Art. IX(a)), VZ00217 (Art. VIII(a)), VZ00233 (Art. VIII(a)), VZ00248 (Art. VII(a)), VZ00326 (Art. VIII(A)), VZ00352 (Art. VIII(A)), VZ00377 (Art. VII(a)), VZ00442 (Art. VIII(A)), VZ00474 (Art. VIII(A)).

<sup>63</sup> VZ St. 1.1 at 8:5-9:2 (Mills Surrebuttal); VZ St. 3.1 at 25:1-11 (Tardiff Surrebuttal).

<sup>64</sup> VZ St. 3.0, Ex. TJT-1 at VZ00122 (Tardiff Aff. ¶ 28).

<sup>65</sup> FE St. 2-R at 10:6-7 (Zarakas Rebuttal); *see also* 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224(f)).

<sup>66</sup> VZ St. 1.0, Ex. SCM-2 at VZ00180 (Art. XX), VZ00196 (Art. XIX), VZ00223 (Art. XVIII), VZ00239 (Art. XVIII), VZ00253 (Art. XVIII), VZ00333 (Art. XXI), VZ00359 (Art. XXI), VZ00386 (Art. XXII), VZ00449 (Art. XXI), VZ00482 (Art. XXIV).

<sup>67</sup> VZ St. 1.1 at 45:8-15 (Mills Surrebuttal).

disadvantage as compared to CLECs and cable companies, whose ongoing access to FirstEnergy's poles is guaranteed by law.<sup>68</sup>

44. FirstEnergy has relied on conclusory and ever-changing lists of alleged advantages during the parties' negotiations and this litigation, but it has not documented or properly quantified a single net material benefit it provides Verizon under the joint use agreements as compared to the terms and conditions of its license agreements.<sup>69</sup>

45. FirstEnergy did not even offer its license agreements into evidence and admitted it has *not* compared the terms and conditions of its license agreements with the terms and conditions of its joint use agreements.<sup>70</sup>

46. The only comparison FirstEnergy prepared was a flawed and incomplete comparison of one of the parties' ten joint use agreements with a *draft* license agreement.<sup>71</sup> FirstEnergy provides the draft license agreement "to requesting CLEC / CATV entities with the understanding that modifications are negotiated."<sup>72</sup> The analysis was wrong when compared to FirstEnergy's executed license agreements, which contain terms and conditions virtually

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<sup>68</sup> VZ St. 2.1 at 41:6-12 (Calnon Surrebuttal); VZ St. 3.1 at 29:4-22 (Tardiff Surrebuttal).

<sup>69</sup> VZ St. 1.0, Ex. SCM-1 at VZ00021-32 (Mills Aff. ¶¶ 48-73); VZ St. 2.0, Ex. MSC-1 at VZ00051-55 (Calnon Aff. ¶¶ 30-35); VZ St. 3.0, Ex. TJT-1 at VZ00119-125 (Tardiff Aff. ¶¶ 21-28); VZ St. 1.1 at 7:3-35:19 (Mills Surrebuttal); VZ St. 2.1 at 32:1-41:14 (Calnon Surrebuttal); VZ St. 3.1 at 23:10-30:17 (Tardiff Surrebuttal); VZ St. 4.0 at 2:16-5:22 (MacNabb Surrebuttal); VZ St. 1.2 at 7:1-28:4 (Mills Surrejoinder); VZ St. 2.2 at 14:1-18:9 (Calnon Surrejoinder); VZ St. 3.2 at 6:11-12:8 (Tardiff Surrejoinder).

<sup>70</sup> VZ St. 1.1, Ex. SCM-13.

<sup>71</sup> FE St. 1-RJ at 36:15-16 (Schafer Rejoinder).

<sup>72</sup> VZ St. 1.0, Ex. SCM-5 at VZ00577 (FCC Ex. 23).

identical to those it pointed to in the joint use agreements.<sup>73</sup> And ultimately, FirstEnergy did not offer its comparison into evidence.<sup>74</sup>

47. But even if FirstEnergy were able to show some net material competitive advantage it provides Verizon under the joint use agreements as compared to its license agreements, it charges Verizon rates more than [REDACTED] the old telecom rates that set the maximum rate for Verizon in that scenario:<sup>75</sup>

	Average Per-Pole Contract Rate (2011-2018)	Average Per-Pole Pre-Existing Telecom Rate (2011-2018)	Average Contract Rate Compared to Average Pre-Existing Telecom Rate
Met-Ed	[REDACTED]	\$ 13.86	[REDACTED]
Penelec	[REDACTED]	\$ 10.94	[REDACTED]
Penn Power	[REDACTED]	\$ 13.46	[REDACTED]
<b>FirstEnergy</b>	[REDACTED]	<b>\$ 12.75</b>	[REDACTED]

48. Since July 2011, Verizon has overpaid FirstEnergy by [REDACTED] to date in excess of pole attachment rent calculated using these pre-existing telecom rates.<sup>76</sup>

## II. APPENDIX B – PROPOSED CONCLUSIONS OF LAW

### A. Burden of Proof

1. The Commission adopted the FCC’s pole attachment regulations, which bind the Commission and the parties in this case.<sup>77</sup>

<sup>73</sup> VZ St. 1.2 at 24:12-27:1 (Mills Surrejoinder).

<sup>74</sup> Joint Stipulation ¶ 1 (omitting FE St. 1-RJ, Ex. SFS-15).

<sup>75</sup> VZ St. 2.0, Ex. MSC-1 at VZ00055-56 (Calnon Aff. ¶¶ 36-37).

<sup>76</sup> VZ St. 2.0 at 5:1-4 (Calnon Direct); VZ St. 2.0, Ex. MSC-1 at VZ00056-57, VZ00103 (Calnon Aff. ¶¶ 38-41, Ex. C-6).

<sup>77</sup> *Final Rulemaking Order*, 2019 WL 4345730, at \*24; *see also* 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224 and 47 C.F.R. §§ 1.1401-1.1415).

2. Pennsylvania law requires electric utilities to charge ILECs “just and reasonable” pole attachment rates effective July 12, 2011.<sup>78</sup>

3. The Commission’s regulations include a presumption that the “just and reasonable” pole attachment rate is the properly calculated new telecom rate under joint use agreements that, like the parties’ joint use agreements, were renewed after March 11, 2019, the effective date of the operative regulation.<sup>79</sup>

4. The Commission’s regulations place the burden on FirstEnergy to rebut the presumption with “clear and convincing evidence” establishing that FirstEnergy provides Verizon “net benefits under its pole attachment agreement[s] with [FirstEnergy] that materially advantage [Verizon] over other telecommunications attachers” that also attach to FirstEnergy’s poles.<sup>80</sup>

5. To meet this burden, FirstEnergy requires clear and convincing evidence that it provides “significant material benefits [to Verizon] beyond basic pole attachment or other rights given to another telecommunications attacher.”<sup>81</sup>

6. Material competitive benefits must “derive from the terms and conditions of the joint use agreement[s] rather than Verizon’s historical status as an [I]LEC.”<sup>82</sup>

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<sup>78</sup> 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224(b)).

<sup>79</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)); VZ St. 2.1, Ex. MSC-3 at p.6; *see also Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475); *see also Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 84 Fed. Reg. 2460-01 (2019) (“The amendment to 47 C.F.R. 1.1413 ... is effective March 11, 2019.”).

<sup>80</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)); *see also Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123).

<sup>81</sup> *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128).

<sup>82</sup> *See VZ St. 1.2, Ex. SCM-45 at 4 (Order, Verizon Md. v. The Potomac Edison Co. (May 22, 2020))*.

7. Material competitive benefits must be “*net* benefits”—meaning they must account for the unique *costs* and obligations FirstEnergy imposes on Verizon under the joint use agreement as compared to FirstEnergy’s license agreements.<sup>83</sup>

8. FirstEnergy must prove, document, and accurately quantify an annually recurring per-pole value for any net material competitive benefit because FirstEnergy “may not ‘embed in Verizon’s rental rate costs that [FirstEnergy] does not incur.’”<sup>84</sup>

9. Where an electric utility rebuts the presumption, it may charge a pole attachment rate that accounts for the properly quantified ongoing per-pole value of any net material competitive benefits, but it may not lawfully charge the ILEC a rate that exceeds the old telecom rate, which is about 1.5 times the new telecom rate.<sup>85</sup>

**B. The New Telecom Rate Is the Just and Reasonable Rate the Commission’s Regulations Require.**

10. Effective July 12, 2011, FirstEnergy was required by law to charge Verizon a “just and reasonable” pole attachment rate for Verizon’s use of FirstEnergy’s utility poles.<sup>86</sup>

11. Since July 12, 2011, FirstEnergy has charged Verizon unjust and unreasonable rates.

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<sup>83</sup> See *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123); see also *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654) (“A failure to weigh, and account for, the different rights and responsibilities in joint use agreement could lead to marketplace distortions.”).

<sup>84</sup> *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18).

<sup>85</sup> *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129); see also VZ St. 2.0 at 3:17-20 (Calnon Direct); VZ St. 2.1, Ex. MSC-3 at p.7.

<sup>86</sup> 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224(b)); *NPRM*, 2018 WL 353338, at \*3; *Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 202).

12. The Commission’s regulations include a presumption that the “just and reasonable” pole attachment rate for an ILEC’s use of an electric utility’s poles is the properly calculated new telecom rate.<sup>87</sup>

13. The Commission’s presumption applies to agreements “entered into or renewed” after March 11, 2019, the effective date of the operative regulation.<sup>88</sup>

14. The presumption applies to the parties’ joint use agreements because they were renewed after March 11, 2019. Agreements renewed after March 11, 2019 include all “agreements that are automatically renewed, extended, or placed in evergreen status.”<sup>89</sup>

15. The joint use agreements were “automatically ... extended” after March 11, 2019 under provisions in the joint use agreements stating that, after an initial term, the agreement “*shall continue* in force thereafter until terminated by either Party at any time” upon advance written notice.<sup>90</sup> Because the initial term of each joint use agreement has expired,<sup>91</sup> the agreements govern the parties’ joint use relationship today because they “automatically ... extended” during the last sixteen months and will continue to do so until terminated.

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<sup>87</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

<sup>88</sup> *Id.*; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 84 Fed. Reg. 2460-01 (2019) (“The amendment to 47 C.F.R. 1.1413 ... is effective March 11, 2019.”).

<sup>89</sup> *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475).

<sup>90</sup> VZ St. 1.0, Ex. SCM-2 at VZ00180 (Art. XX) (emphasis added). *Accord id.* at VZ00196 (Art. XIX), VZ00223 (Art. XVIII), VZ00239 (Art. XVIII), VZ00253 (Art. XVIII), VZ00333 (Art. XXI), VZ00359 (Art. XXI), VZ00386 (Art. XXII), VZ00449 (Art. XXI), VZ00482 (Art. XXIV).

<sup>91</sup> The initial term of the joint use agreements varies from 1 year to 5 years, but the initial term for all of the joint agreements had expired by January 1, 1993. *See, e.g.*, VZ St. 1.0, Ex. SCM-2 at VZ00180 (Art. XX) (1-year initial term), VZ00333 (Art. XXI) (5-year initial term). *See also id.* at VZ00449 (Art. XXI) (stating that initial term would expire “five (5) years from the [January 1, 1988] effective date hereof,” meaning that the initial term expired on January 1, 1993).

16. The use agreements were “automatically renewed” after March 11, 2019 under “so-called ‘automatic renewal’” provisions in the joint use agreements “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.”<sup>92</sup> As FirstEnergy admits, the joint use agreements “continue to govern the parties’ joint use relationship” presently because neither party has provided written notice of an intent to terminate.<sup>93</sup>

17. FirstEnergy did not rebut the presumption that the new telecom rate is the lawful just and reasonable rate under the joint use agreements because it did not provide clear and convincing evidence that FirstEnergy provides Verizon net benefits under the joint use agreements that materially advantage Verizon over the terms and conditions of FirstEnergy’s license agreements with other telecommunications attachers attached to its poles.<sup>94</sup>

18. Because FirstEnergy did not rebut the presumption, the just and reasonable rate for Verizon’s use of FirstEnergy’s poles under the joint use agreements is the properly calculated new telecom rate.<sup>95</sup>

19. The properly calculated per-pole new telecom rates for Verizon’s use of FirstEnergy’s poles are:

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<sup>92</sup> See *Otis Elevator Co. v. George Wash. Hotel Corp.*, 27 F.3d 903, 904 (3d Cir. 1994).

<sup>93</sup> See Answer to Compl. ¶¶ 15, 16.

<sup>94</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)); see also *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123).

<sup>95</sup> 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

<b>New Telecom Rates for Verizon’s Use of FirstEnergy’s Poles (per pole)<sup>96</sup></b>									
<b>Rental Year</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
Met-Ed poles	\$8.29	\$9.87	\$10.07	\$5.02	\$9.35	\$8.79	\$9.55	\$12.20	\$13.83
Penelec poles	\$6.43	\$6.79	\$7.18	\$5.21	\$6.96	\$7.18	\$7.49	\$10.49	\$9.07
Penn Power poles	\$7.30	\$8.47	\$8.51	\$8.21	\$8.94	\$9.40	\$9.08	\$11.18	\$11.80

20. Since July 12, 2011, FirstEnergy charged Verizon rates that far exceed the properly calculated per-pole new telecom rates required by the Commission’s regulations.<sup>97</sup>

21. FirstEnergy failed to rebut the presumption, so that is the end of the rate analysis under the Commission’s rules. But even if FirstEnergy had rebutted the presumption, FirstEnergy could not lawfully charge Verizon a pole attachment rate higher than the old telecom rate, which is about 1.5 times the new telecom rate.<sup>98</sup> The properly calculated per-pole old telecom rates for Verizon’s use of FirstEnergy’s poles are:

<b>Old Telecom Rates for Verizon’s Use of FirstEnergy’s Poles (per pole)<sup>99</sup></b>									
<b>Rental Year</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
Met-Ed poles	\$12.57	\$14.96	\$15.26	\$7.61	\$14.16	\$13.32	\$14.47	\$18.49	\$20.96
Penelec poles	\$9.74	\$10.29	\$10.89	\$7.89	\$10.54	\$10.88	\$11.35	\$15.90	\$13.75
Penn Power poles	\$11.06	\$12.83	\$12.90	\$12.44	\$13.54	\$14.24	\$13.75	\$16.94	\$17.88

22. Since July 12, 2011, even if FirstEnergy had rebutted the presumption, FirstEnergy charged Verizon rates that far exceed the properly calculated old telecom rates that set a “hard cap” on the rate FirstEnergy may lawfully charge.<sup>100</sup>

<sup>96</sup> VZ St. 2.0 at 4:10-11 (Calnon Direct); VZ St. 2.0, Ex. MSC-1 at VZ00058-87 (Calnon Aff., Exs. C-1 – C-3).

<sup>97</sup> See VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶¶ 7-8).

<sup>98</sup> *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129); see also VZ St. 2.0 at 3:17-20 (Calnon Direct); VZ St. 2.1, Ex. MSC-3 at p.7.

<sup>99</sup> VZ St. 2.0 at 5:1 (Calnon Direct); VZ St. 2.0, Ex. MSC-1 at VZ00058-87 (Calnon Aff., Exs. C-1 – C-3).

<sup>100</sup> See VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶¶ 7-8).

**C. The New Telecom Rate Is Also the Just and Reasonable Rate the FCC Ordered FirstEnergy to Charge in the 2011 *Pole Attachment Order*.**

23. Alternatively, if the presumption in the Commission’s regulations did not apply, FirstEnergy was still required to charge Verizon just and reasonable rates effective July 12, 2011 consistent with the FCC’s 2011 *Pole Attachment Order*.<sup>101</sup>

24. Since July 12, 2011, FirstEnergy has charged Verizon unjust and unreasonable rates under the standard adopted in the 2011 *Pole Attachment Order*.

25. The joint use agreements are existing agreements entitled to rate relief under the standard adopted in 2011 because Verizon genuinely lacks the ability to terminate the current rates and negotiate just and reasonable rates: FirstEnergy has superior bargaining power by virtue of its ownership of 73 percent of the utility poles the parties share in Pennsylvania; without FirstEnergy’s consent, Verizon cannot escape the unreasonably high rates FirstEnergy charges because of “evergreen” provisions in the joint use agreements that require Verizon to pay the rates even if the joint use agreement is terminated; and FirstEnergy was unwilling to agree to just and reasonable rates during the parties’ negotiations.<sup>102</sup>

26. The just and reasonable rate under the standard adopted in the 2011 *Pole Attachment Order* is the properly calculated new telecom rate because FirstEnergy failed to “justify the difference between the rate” Verizon pays and the new telecom rate with credible

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<sup>101</sup> *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.478) (“[T]he 2011 *Pole Attachment Order*’s guidance regarding review of [I]LEC pole attachment complaints will continue to apply” where the presumption does not); *see also* Answer to Compl. ¶¶ 12, 13, 14, 17, 18, 19, 20 (arguing “the 2011 *Pole Attachment Order* applies to all periods at issue in this proceeding”).

<sup>102</sup> *See FPL 2020 Order*, 2020 WL 2568977, at \*4-5 (¶¶ 11-12).

cost-based evidence that FirstEnergy provides Verizon a net material advantage under the joint use agreements as compared to the terms and conditions of FirstEnergy’s license agreements.<sup>103</sup>

27. The properly calculated per-pole new telecom rates for Verizon’s use of FirstEnergy’s poles are:

<b>New Telecom Rates for Verizon’s Use of FirstEnergy’s Poles (per pole)<sup>104</sup></b>									
<b>Rental Year</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
Met-Ed poles	\$8.29	\$9.87	\$10.07	\$5.02	\$9.35	\$8.79	\$9.55	\$12.20	\$13.83
Penelec poles	\$6.43	\$6.79	\$7.18	\$5.21	\$6.96	\$7.18	\$7.49	\$10.49	\$9.07
Penn Power poles	\$7.30	\$8.47	\$8.51	\$8.21	\$8.94	\$9.40	\$9.08	\$11.18	\$11.80

28. Since July 12, 2011, FirstEnergy has charged Verizon rates that far exceed the properly calculated per-pole new telecom rates that are just and reasonable under the standard adopted in the 2011 *Pole Attachment Order*.<sup>105</sup>

29. FirstEnergy failed to justify charging Verizon a rate higher than the new telecom rate, so that is the end of the rate analysis under the 2011 *Pole Attachment Order*. But even if FirstEnergy had proven and quantified a net material competitive advantage it provides Verizon under the joint use agreements, the old telecom rate served as a reference point for the just and reasonable rate under the 2011 *Pole Attachment Order*.<sup>106</sup> The properly calculated per-pole old telecom rates for Verizon’s use of FirstEnergy’s poles are:

<sup>103</sup> See *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶¶ 217-218); *FPL 2020 Order*, 2020 WL 2568977, at \*7 (¶ 15); *Dominion Order*, 32 FCC Rcd at 3758-61 (¶¶ 17-22); see also *Heritage Cablevision Assocs. of Dallas, L.P. v. Tex. Utils. Elec. Co.*, 6 FCC Rcd 7099, 7105 (¶ 29) (1991) (stating that the electric utility must “justify ‘the rate ... alleged in the complaint not to be just and reasonable’”); 47 C.F.R. § 1.1407(a) (2011) (“The response should set forth justification for the rate ... alleged in the complaint not to be just and reasonable.”).

<sup>104</sup> VZ St. 2.0 at 4:10-11 (Calnon Direct); VZ St. 2.0, Ex. MSC-1 at VZ00058-87 (Calnon Aff., Exs. C-1 – C-3).

<sup>105</sup> See VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶¶ 7-8).

<sup>106</sup> *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218).

<b>Old Telecom Rates for Verizon’s Use of FirstEnergy’s Poles (per pole)<sup>107</sup></b>									
<b>Rental Year</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
Met-Ed poles	\$12.57	\$14.96	\$15.26	\$7.61	\$14.16	\$13.32	\$14.47	\$18.49	\$20.96
Penelec poles	\$9.74	\$10.29	\$10.89	\$7.89	\$10.54	\$10.88	\$11.35	\$15.90	\$13.75
Penn Power poles	\$11.06	\$12.83	\$12.90	\$12.44	\$13.54	\$14.24	\$13.75	\$16.94	\$17.88

30. Since July 12, 2011, even if FirstEnergy had proven and quantified a net material competitive advantage it provides Verizon under the joint use agreements, FirstEnergy has charged Verizon rates that far exceed the properly calculated old telecom rates, which were the high-end reference point for rate FirstEnergy could lawfully charge under the 2011 *Pole Attachment Order*.<sup>108</sup>

**D. Verizon Is Entitled to Refunds for Amounts FirstEnergy Collected in Violation of Law.**

31. As of July 12, 2011, FirstEnergy was required by law to charge Verizon just and reasonable pole attachment rates.<sup>109</sup>

32. The Commission’s regulations provide for refunds “plus interest, consistent with the applicable statute of limitations,” which authorizes an award of refunds for all amounts collected in violation of law since July 12, 2011 because the joint use agreements are continuing contracts.<sup>110</sup>

<sup>107</sup> VZ St. 2.0 at 5:1 (Calnon Direct); VZ St. 2.0, Ex. MSC-1 at VZ00058-87 (Calnon Aff., Exs. C-1 – C-3).

<sup>108</sup> See VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶¶ 7-8).

<sup>109</sup> 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224(b)); *NPRM*, 2018 WL 353338, at \*3; *Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 202).

<sup>110</sup> See 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1407(a)(3)); see also 42 Pa. Cons. Stat. § 5525; See *Beltz v. Erie Indem. Co.*, 279 F. Supp. 3d 569, 578-80 (W.D. Pa. 2017), *aff’d*, 733 F. App’x 595 (3d Cir. 2018) (applying Pennsylvania contract law); see also *Thorpe v. Schoenbrun*, 195 A.2d 870 (Pa. Super. Ct. 1963).

33. Interest should be awarded at “the current interest rate for Federal tax refunds and additional tax payments.”<sup>111</sup>

34. FirstEnergy must refund to Verizon of [REDACTED], plus interest, which reflects the net rental amount FirstEnergy has collected to date from Verizon in violation of law.<sup>112</sup>

### III. APPENDIX C – PROPOSED ORDERING PARAGRAPHS

1. Verizon’s formal complaint against FirstEnergy at Docket No. C-2020-3019347 is granted in its entirety.

2. The unjust and unreasonable pole attachment rates FirstEnergy charges Verizon under the Joint Use Agreements, as amended, are terminated effective July 12, 2011 and replaced with the just and reasonable rate required by law.

3. Effective July 12, 2011, the just and reasonable pole attachment rate required by law for Verizon’s use of FirstEnergy’s poles is the per-pole new telecom rate properly calculated and updated annually in accordance with the Commission’s regulations, which incorporate the new telecom rate formula of 47 C.F.R. § 1.1406(d)(2) at 52 Pa. Code § 77.4(a). For the July 12, 2011 through 2019 rental years, the following rates are the per-pole new telecom rates properly calculated for Verizon’s use of FirstEnergy’s poles in accordance with the Commission’s regulations:

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<sup>111</sup> *Cavalier Tel., LLC v. Va. Elec. & Power Co.*, 15 FCC Rcd 17962, 17964 (¶ 4 n.16) (2000).

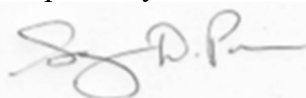
<sup>112</sup> *See* VZ St. 2.0, Ex. MSC-1 at VZ00047, VZ00050-51 (Calnon Aff. ¶¶ 23, 28). Alternatively, if the Commission concludes the old telecom rates apply, FirstEnergy must refund to Verizon [REDACTED], plus interest, which reflects the net rental amount FirstEnergy has over-collected to date from Verizon under this alternative scenario. *See* VZ St. 2.0, Ex. MSC-1 at VZ00056-57 (Calnon Aff. ¶¶ 38-40).

New Telecom Rates for Verizon's Use of FirstEnergy's Poles (per pole)									
Rental Year	2011	2012	2013	2014	2015	2016	2017	2018	2019
Met-Ed poles	\$8.29	\$9.87	\$10.07	\$5.02	\$9.35	\$8.79	\$9.55	\$12.20	\$13.83
Penelec poles	\$6.43	\$6.79	\$7.18	\$5.21	\$6.96	\$7.18	\$7.49	\$10.49	\$9.07
Penn Power poles	\$7.30	\$8.47	\$8.51	\$8.21	\$8.94	\$9.40	\$9.08	\$11.18	\$11.80

4. Within thirty (30) days of entry of this Order, FirstEnergy shall refund to Verizon , reflecting all amounts paid in excess of the properly calculated new telecom rates required by law for rental periods since July 12, 2011, plus interest to the date of refund calculated at the current interest rate for Federal tax refunds and additional tax payments.

5. This case is marked closed, but the Commission retains jurisdiction to monitor and enforce compliance with the terms of this Opinion and Order.

Respectfully submitted,



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