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August 14, 2020

VIA ELECTRONIC FILING

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

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

Dear Secretary Chiavetta:

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

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

Respectfully submitted,

Garrett P. Lent

GPL/kls

Enclosures

cc: Honorable Joel H. Cheskis
Certificate of Service

CERTIFICATE OF SERVICE

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

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PUBLIC VERSION – PROPRIETARY INFORMATION REDACTED

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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

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I. INTRODUCTION

Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company (collectively "FirstEnergy" or the "Company") wish to address five fundamental points in this Reply Brief.

A Blatant Disregard For Pennsylvania Jurisdiction And Law. Verizon Pennsylvania LLC and Verizon North LLC's ("Verizon") Main Brief opens with the surprising and audacious assertion that the Pennsylvania Public Utility Commission ("Commission"), an independent agency of the Commonwealth of Pennsylvania created by the Pennsylvania General Assembly, must decide its Complaint against FirstEnergy, a Pennsylvania public utility subject to the regulatory jurisdiction of the Commission, based solely on federal law and Federal Communications Commission ("FCC") precedent. Verizon argues that the Commission "initially adopted" FCC regulations when it exercised jurisdiction over pole attachment complaints, and that this adoption is "binding" on the Commission,[1] and incredibly, fails to cite any provision of the Public Utility Code or to any Commission[2] or appellate precedent in support of its claim.

There are two critical problems with this assertion. First, any such action by the Commission would be patently and obviously unlawful as the Commission is a creature of statute and can only act pursuant to its delegated authority under the Public Utility Code.

[1] Verizon asserts "The FCC's 'considerably detailed national rules'…'have the force and effect of law' and bind the Commission and the parties in this case," Verizon MB at 7; *see also* Verizon MB at 20 ("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." (emphasis added)).

[2] FirstEnergy notes that the only Commission orders cited by Verizon are the Commission's Final Rulemaking Order in *Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission*, Docket No. L-2018-3002672 (Final Rulemaking Order entered Sept. 3, 2019) ("*2019 Final Rulemaking Order*") the Commission's Notice of Public Rulemaking, *Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission*, Docket No. L-2018-3002672 (Order entered July 13, 2018) ("*PUC NPRM*").

Second, contrary to Verizon's assertions, the Commission did not bind and subjugate itself to the FCC. On the contrary, the Commission specifically stated that federal law and FCC precedent "will be persuasive, and not controlling precedent."[3] It is frankly difficult to understand how Verizon can conscionably argue that the Commission is bound by federal law and precedent, when both the Commission's regulations and the *2019 Final Rulemaking Order* expressly state that it is not. The Commission should not countenance such an affront to its jurisdiction and a blatant and utter disregard for its clear holding that FCC precedent is "not controlling precedent."

The Commission, as stated in the *2019 Final Rulemaking Order*, reasserted jurisdiction over pole attachment rates to provide "Pennsylvania…[a] benefit from a state-level perspective" and balance "the safety and reliability of the electric distribution system, adequate cost recovery for attachments, and the need for timely access to utility infrastructure." *See 2019 Final Rulemaking Order* at 45, 50 (crediting the comments of PPL Electric Utilities Corporation). For this reason, the Commission specifically provided itself the discretion to depart from FCC precedent where the issues raised "have not yet been adjudicated on the federal level" or in "instances where an interpretation by the FCC, which is charged with developing a nationwide scheme, may not align with Pennsylvania interests." *2019 Final Rulemaking Order* at 50 (emphasis added). Verizon ignores all of this and asserts the Commission can only apply FCC precedent to the exclusion of the Public Utility Code, the Commission's regulations and orders, and applicable Pennsylvania law. If this were true, then the Commission would be unable to fulfill

[3] *See 2019 Final Rulemaking Order* at 50 ("…FCC and court decisions and precedent will be persuasive, and not controlling precedent…" (emphasis added)); *see also* 52 Pa. Code § 77.5(b) ("When exercising authority under this chapter the Commission will consider Federal Communications Commission orders promulgating and interpreting Federal pole attachment rules and Federal court decisions reviewing those rules and interpretations as persuasive authority").

its determination to consider local interests, and its reverse preemption of FCC jurisdiction over pole attachments would be a nullity.

Based on this fundamental misrepresentation, Verizon relies solely on federal precedent to argue its case. Not only does Verizon fail to cite any provision of the Public Utility Code, it also fails to cite to any Commission[4] or Pennsylvania appellate precedent in support of its claim. These failures make clear that, in Verizon's view, the Public Utility Code and Pennsylvania law are apparently inapplicable to the resolution of its Complaint. As a result, Verizon has presented no facts and no legal argument to show that FirstEnergy's existing rates are unjust and unreasonable under Pennsylvania law and has presented no evidence to rebut FirstEnergy's demonstration that its existing pole attachment rates are just and reasonable under Pennsylvania law and conform to controlling Commission precedent for establishing rates in Joint Use Agreements. Similarly, Verizon requests refunds dating back to 2011 totaling approximately **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]**, yet fails to even cite Section 508 of the Code, which precludes any refunds in this case, or Section 1312 that would limit any refunds (if they could be granted) to four years. 66 Pa.C.S. §§ 508 and § 1312; *see e.g.*, Verizon MB, Table of Authorities (citing no provision of the Public Utility Code). In this regard, Verizon's Main Brief is either an affront to the Commission and the sovereignty of the Commonwealth, or an egregious case of impermissible sandbagging.

Windfall Profits. Any rate reduction granted to Verizon in this proceeding will directly profit Verizon's shareholders and its shareholders alone. When asked to provide assurance that any reduction would be used to promote the expansion of rural broadband services in

[4] FirstEnergy notes that the only Commission orders cited by Verizon are the *2019 Final Rulemaking Order* and the Commission's Notice of Public Rulemaking, *Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission*, Docket No. L-2018-3002672 (Order entered July 13, 2018) ("*PUC NPRM*").

Pennsylvania, Verizon flatly declined and said this information was irrelevant.[5] Because of the different ratemaking methodologies used for Verizon and FirstEnergy at the Commission, any rate reduction granted in this proceeding will result in a dollar for dollar increase in FirstEnergy's rates and a dollar for dollar of increased profit for Verizon. The Commission should decline Verizon's request for increased profits subsidized by FirstEnergy customers.

Verizon Loses Under FCC Precedent. Even if the Commission views FCC precedent as persuasive, but not controlling, Verizon's arguments are not supported by that precedent. Verizon's proposals to insert either the new telecom rate or the old telecom rate into existing Joint Use Agreements must fail for many reasons, as addressed below and in FirstEnergy's Main Brief.[6]

Verizon Is Not Entitled To the New Telecom Rate. It is neither rational nor lawful to insert an incremental rate (i.e., the new telecom rate) into an agreement based upon the sharing of the fully allocated costs of owning a pole (i.e., the Joint Use Agreements). The primary purpose and intent of a joint use agreement between two pole-owning entities is to share the full cost of pole ownership, including a reasonable allocation of common costs. The new telecom rate is an incremental cost rate, which assigns all common costs to the electric utility and no common costs to the attacher. Inserting an incremental cost-based rate into fully allocated joint use agreements simply makes no sense.

Moreover, the Joint Use Agreements provide Verizon a different service than the third-party license agreements, which justify a different rate. Verizon essentially seeks the benefits of a first-class airline seat—e.g., early boarding (speed-to-market), free drink

[5] (*See* Exhibit JMS-1 (Verizon's Answer to FE to Verizon Set II, No. 8).)

[6] Moreover, FirstEnergy notes that Verizon rejected a proposal to provide it the new telecom rate in a third-party attacher agreement.

services (no up-front work costs), free entertainment (no attachment application fees), and priority seating (better location and reserved space)—for coach prices.

For these reasons, and others discussed below, both the FCC and the Commission have previously rejected incumbent local exchange carriers' ("ILEC") efforts to change rates in joint use agreements. The FCC has consistently and repeatedly rejected an ILEC's request to insert the new telecom rate into a joint use agreement. This issue has arisen three times, and in each case the FCC rejected the exact relief requested by Verizon in this proceeding. ILECs are 0-3 before the FCC; the Commission should make it 0-4.

Similarly, this Commission, in the *NEPTC Order*, upheld the equal (50/50) sharing of common costs in a joint use agreement and rejected an ILEC's proposed 80/20 electric utility/ILEC sharing of common costs. The new telecom rate assigns 100% of common costs to the electric utility and is clearly inconsistent with Commission precedent.

Verizon Is Not Entitled To The Old Telecom Rate. The old telecom rate, unlike the new telecom rate, is based on a fully allocated cost formula, but should be rejected in this case because Verizon did not terminate the existing Joint Use Agreements. In every case where the FCC has adopted the old telecom rate, the underlying agreements were terminated. If the Commission wishes to follow FCC precedent, it should do the same and reject Verizon's request for the old telecom rate.

The old telecom rate also is inconsistent with Pennsylvania precedent in *NEPTC Order* where the Commission held that common costs of common space should be allocated equally in joint use agreements. The old telecom rate formula arbitrarily assigns 1/3 of common costs to the electric utility and allocates the remaining 2/3 to all parties.

Therefore, the old telecom rate formula does not result in equal sharing of common costs, as required by the *NEPTC Order*.

A Middle Path. As explained below and in FirstEnergy's Main Brief, there is no basis to change the methodology used to calculate the rates Verizon pays under the Joint Use Agreements. However, if the Commission wishes to depart from its own precedent and FCC precedent in order to provide Verizon's shareholders a subsidy at the expense of FirstEnergy's customers, then it should adopt the old telecom rate formula using recent actual data for FirstEnergy's service territory in lieu of out-of-date national data promoted by Verizon. The old telecom rate is a fully allocated cost-based rate (although it does not equally share common costs as required by Commission precedent), it presents a middle ground between existing rates and the new telecom rate, and would provide a lower rate to Verizon (although Verizon has flatly refused to commit to use any of the subsidy to expand rural broadband service in Pennsylvania).

If this approach is adopted, however, it is critical that the rate formula inputs for number of attachments and spacing be based on the actual data for FirstEnergy's service territory and not the FCC presumptions. The FCC's rebuttable presumptions are based on out-of-date national data, whereas FirstEnergy's inputs are based on actual data for their service territories. Critically, actual data, confirmed to be 99.3% accurate shows, among other things, that: (a) FirstEnergy's poles are more than two and one half feet taller than the 37.5 feet presumed by the FCC; (b) attachers occupy more than one foot of space on FirstEnergy's poles; and (c) there are approximately 3 attachments on each FirstEnergy pole as compared to the FCC presumption of 5 attachments. *See* FirstEnergy MB at 85-88. Nothing in the record supports the use of the FCC presumptions in FirstEnergy's service territories.

No Refunds. Finally, any change in rates must be prospective only as a matter of law. The Commission exercises its jurisdiction over pole attachment agreements under Section 508 of the Public Utility Code, which only allows for prospective relief. 66 Pa.C.S. § 508 ("Such contract, as modified by the order of the commission, shall become effective 30 days after service of such order upon the parties to such contract."). Moreover, refunds can only be permitted where an existing rate is unjust and unreasonable, and there has been no such showing made be Verizon. Any change in rates would be for policy reasons only and would reflect a direct overruling of long-standing Commission precedent. Under these circumstances, no refunds would be lawful or appropriate.

For these reasons, and the reasons more fully explained below and in FirstEnergy's Main Brief, Verizon's Complaint should be dismissed.

II. COUNTER STATEMENT OF APPLICABLE LEGAL STANDARDS

A. APPLICABLE LAW

Contrary to Verizon's statement that "The FCC's 'considerably detailed national rules'…'have the force and effect of law' and bind the Commission and the parties in this case," Verizon MB at 7, the Commission's regulations make clear that "the Commission will consider Federal Communications Commission orders promulgating and interpreting Federal pole attachment rules and Federal court decisions reviewing those rules and interpretations as persuasive authority." 52 Pa. Code § 77.5(b) (emphasis added). The Commission held in the *2019 Final Rulemaking Order* that FCC precedent is, in fact, "not controlling." *2019 Final Rulemaking Order* at 50. It explained that the Commission:

> maintains in its final form regulations that FCC and court decisions and precedent will be persuasive, and not controlling precedent…the Commission anticipates challenges to the federal

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

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

Moreover, although the Commission has "at first" initially elected to "proceed with a turn-key adoption of the FCC's pole attachment regulations," *see 2019 Final Rulemaking Order* at 37, the Commission "remains a creature of statute," and "has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication." *Feingold v. Bell of Pa.*, 383 A.2d 791, 794 (Pa. 1977); *see also* FirstEnergy MB at 14-15 (citing various authorities). Even in *Herdelin v. Abe Green-Board*, 328 A.2d 552 (Pa. Cmwlth. 1974),[7] the Commonwealth Court recognized that a zoning hearing board's regulations only have the force and effect of law because it was authorized to promulgate those regulations by statute. *Herdelin*, 328 A.2d at 554. Indeed, the case cited by the Commonwealth Court in *Herdelin* recognized that

[7] It is not surprising that Verizon misconstrues, or simply misunderstands the fundamental legal principles underlying *Herdelin*; Verizon's citation to the case contains an error in the caption. *See* Verizon MB at 1 (incorrectly citing the case as "*Herdelin v. Greenberg*, 328 A.2d 552, 554 (Pa. Commw. 1974)" (emphasis added)). Verizon's reliance upon *Borough of Bedford v. Commonwealth*, 972 A.2d 53, 61 (Pa. Commw. 2009) ("*Bedford*") is similarly inapplicable to this issue. In *Bedford*, the Commonwealth Court distinguished between the binding effect of a regulation and a statement of policy. Here, there is no statement of policy at issue; what is at issue is the Commission's statutorily prescribed authority to act under the Public Utility Code.

"the City is a municipal corporation created by the state," so "it possesses only those powers specifically granted by the legislature," and that "[z]oning laws enacted in the exercise of the police power, are likewise governed by specific statutory grant." *School District of Philadelphia v. Zoning Board of Adjustment,* 417 Pa. 277, 281, 207 A.2d 864 (Pa. 1965) (cited in *Herdelin*). Even if the Commission has adopted the FCC's regulations by reference, its authority remains bound by the plain language of the Public Utility Code, and the Commission is not bound by FCC precedent contrary to Verizon's statement of the law.

B. FCC PRECEDENT AND STANDARDS

In its overview of applicable Legal Standards, Verizon attempts to provide an overview of FCC pole attachment precedent. FirstEnergy provided an extensive overview of the historical background of the FCC's regulation of pole attachment rates in its Main Brief and does not repeat this overview here. *See* FirstEnergy MB at Sections II.B. and V.3.a. However, FirstEnergy notes that Verizon continues to advance blatantly inaccurate support of its position through the following misrepresentations of the FCC's regulations and precedent contained in Verizon's description of Legal Standards in its Main Brief.

Verizon asserts that the FCC recognized that "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 'unquestionably' placed them 'in a position to extract monopoly rents … in the form of unreasonably high pole attachment rates.'" Verizon MB at 8-9 (citing *2011 Pole Attachment Order* at ¶¶ 4, 214). However, Verizon rips these quotes from context. The full excerpt of the *2011 Pole Attachment Order* reads:

> In section 224 of the Communications Act of 1934, as amended (Act), Congress directed the Commission to "regulate the rates, terms, and conditions of pole attachments to provide that such rates, terms, and conditions are just and reasonable, and . . . adopt procedures necessary and appropriate to hear and resolve complaints

> concerning such rates, terms, and conditions." When Congress granted the Commission authority to regulate pole attachments, it recognized the unique economic characteristics that shape relationships between pole owners and attachers. Congress concluded that "[o]wing to a variety of factors, including environmental or zoning restrictions" and the very significant costs of erecting a separate pole network or entrenching cable underground, "there is often no practical alternative [for network deployment] except to utilize available space on existing poles." Congress recognized further that there is a "local monopoly in ownership or control of poles," observing that, as found by a Commission staff report, '"public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents . . . in the form of unreasonably high pole attachment rates.'" Given the benefits of pole attachments to minimize "unnecessary and costly duplication of plant for all pole users," Congress granted the Commission authority to ensure that pole attachments are provided on just and reasonable rates, terms, and conditions.

2011 Pole Attachment Order at ¶ 4 (emphasis added). This excerpt makes clear that the FCC was not referring exclusively to the monopoly control of electric utilities owning poles, but rather the monopoly control of all pole owning public utilities, including ILECs such as Verizon. The FCC was not specifically targeting electric utilities, as Verizon asserts.

Verizon further states that "[t]he 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." Verizon MB at 12 (citing *2011 Pole Attachment Order* at ¶ 208). However, paragraph 208 of the *2011 Pole Attachment Order* contains no statement that it expected or required electric utilities to reduce the rates ILECs pay under existing Joint Use Agreements. Rather, it simply "note[s] that incumbent LECs estimate that, in aggregate, they annually pay pole attachment rates that are $320 to $350 million." *2011 Pole Attachment Order* ¶ 208. Furthermore, Verizon's distortion of paragraph 208 flies in the face of the FCC's specific statement that it "is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable." *2011 Pole Attachment Order* ¶ 216. If it is unlikely

that the FCC would find the rates, terms and conditions of existing joint use agreements to be unjust and unreasonable, it strains credulity for Verizon to assert that ILECs are entitled to rate reductions under those existing agreements.

Verizon doubles down on this misrepresentation by claiming that "[t]he FCC amended its regulations in 2018 to include a presumption that ILECs must be charged the new telecom rate under most joint use agreements." Verizon MB at 13 (emphasis added) (citing *2018 Pole Attachment Order* at ¶ 126). The FCC did not apply this presumption to "most joint use agreements." Rather, it explained:

> based on these changed circumstances…for new and newly-renewed pole attachment agreements between utilities and incumbent LECs, we should presume that incumbent LECs are similarly situated to other telecommunications attachers and entitled to pole attachment rates, terms, and conditions that are comparable to the telecommunications attachers. We conclude that, for determining a comparable pole attachment rate for new and newly-renewed pole attachment agreements, the presumption is that the incumbent LEC should be charged no higher than the pole attachment rate for telecommunications attachers calculated in accordance with section 1.1406(e)(2) of the Commission's rules.

2018 Pole Attachment Order ¶ 126 (emphasis added). The FCC's *2018 Pole Attachment Order* clearly only applies to "new" and "newly-renewed" agreements, not "most joint use agreements," and Verizon's attempt to misrepresent that fact should be rejected.

These additional distortions of the FCC precedent by Verizon undermine any reliance on the legal principles set forth in its Main Brief. Therefore, to the extent the Commission relies upon FCC precedent, it should reject Verizon's misrepresentations and adopt the statements of law set forth in Sections III and V.A.3. of FirstEnergy's Main Brief.

C. BURDEN OF PROOF

Verizon's Main Brief incorrectly states the burden of proof applicable in complaint proceedings before the Commission. Verizon asserts that "[t]he Commission's regulations[]

presume Verizon must be charged the…new telecom rates" and that "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'…" Verizon MB at 15. Verizon's exclusive reliance on this "presumption" in its statement of the burden of proof misrepresents the law.

Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. Furthermore, it is well-recognized that although the factual burden may shift during a proceeding, the proponent of the rule or order (*i.e.*, the complainant) always maintains the overarching burden of proof. As such, and as more fully explained in FirstEnergy's Main Brief, the burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. *Replogle v. Pennsylvania Electric Company*, 54 Pa. PUC 528, 1980 Pa. PUC LEXIS 20 (Order dated Oct. 9, 1980); *see also Waldron v. Philadelphia Electric Company*, 54 Pa. PUC 98, 1980 Pa. PUC LEXIS 90 (Order dated March 14, 1980).[8]

Furthermore, in order for an ILEC to obtain the presumption that it should "receive comparable pole attachment rates, terms, and conditions as a similarly-situated" attacher, an ILEC is required to demonstrate that the joint use agreement at issue is a new, newly-negotiated or newly-renewed agreement. *See 2018 Pole Attachment Order* ¶ 123. The *2018 Pole Attachment Order* established this presumption for new, newly-negotiated and newly-renewed agreements in order to remedy an alleged disparity in bargaining power between ILECs and electric utilities under joint use agreements. *See id.* ¶ 124. Thus, if an ILEC does not show that the agreement at issue

[8] Furthermore, to the extent that there is any conflict between the Commission's regulations and the Public Utility Code, the Public Utility Code prevails and governs. *See, e.g., Marcellus Shale Coalition v. Dep't of Envtl. Prot. of Pa.*, 216 A.3d 448, 459 (Pa. Cmwlth. 2019) ("When . . . a regulation presents 'an actual conflict with the statute,' we cannot reasonably understand the regulation to be within the agency's ambit of authority, and the statute must prevail.") (citations omitted)).

is a new, newly-negotiated, or newly-renewed agreement and that an electric utility possessed and leveraged bargaining power during rate negotiations, it is not entitled to the *2018 Pole Attachment Order*'s presumption that it should "receive comparable pole attachment rates, terms, and conditions as a similarly-situated" attacher. *See* FirstEnergy MB at Sections V.A.3.c.i.-ii.

It is similarly clear that:

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

FirstEnergy MB at 18 (emphasis added). A complainant cannot simply rely on a presumption—which is not evidence—in order to carry its ultimate burden under the Public Utility Code.

III. SUMMARY OF REPLY ARGUMENT

Verizon's Main Brief is replete with misstatements of law and fact. As explained below, and more fully in FirstEnergy's Main Brief, Verizon is not entitled to any of the relief it seeks under the Public Utility Code, controlling Pennsylvania law and/or precedent from the FCC. To assist the Commission's analysis of this Complaint, FirstEnergy submits that the Commission must resolve the following questions and should do so in the manner set forth below.

1. **What law controls the disposition of Verizon's Complaint?** The Commission must decide this case under the Public Utility Code and Pennsylvania law. However, Verizon fails to allege, address, reference, or even cite to a single provision of the Public Utility Code in its

Complaint or the Main Brief. Verizon, essentially ignoring the sovereignty of the Commonwealth of Pennsylvania, baldly asserts that "[t]he FCC's 'considerably detailed national rules'…'have the force and effect of law' and bind the Commission and the parties in this case."[9] However, the Commission's regulations and the *2019 Final Rulemaking Order* both make clear that "the Commission will consider Federal Communications Commission orders promulgating and interpreting Federal pole attachment rules and Federal court decisions reviewing those rules and interpretations as persuasive authority,"[10] and that FCC precedent is "not controlling."[11] The result is a complete failure of proof requiring dismissal of its Complaint.

2. **Which party maintains the ultimate burden of proof in this proceeding?** Verizon, as the Complainant seeking affirmative relief from the Commission, bears the ultimate burden of proof in this proceeding. Verizon is not entitled to a presumption that it should receive the FCC's new telecom rate under the existing Joint Use Agreements under the Public Utility Code, or even under FCC precedent. And, moreover, even if it was FirstEnergy has rebutted this presumption. The ultimate burden of proof, however, does not shift from Verizon in this proceeding.

3. **Are the rates Verizon pays FirstEnergy under the Joint Use Agreements unjust and unreasonable under the Public Utility Code and controlling Pennsylvania law?** Verizon has failed to demonstrate that the rates it pays under the Joint Use Agreements are unjust and unreasonable under the Public Utility Code and controlling Pennsylvania law. Verizon presents no evidence as to what constitutes the current fair rate of return and, therefore, provides no basis for any determination that current rates are excessive under Pennsylvania

[9] Verizon MB at 7.
[10] 52 Pa. Code § 77.5(b).
[11] *2019 Final Rulemaking Order* at 50 (emphasis added).

law. Furthermore, Verizon proposal that FirstEnergy should bear 100% of common costs of common space on joint use poles (which is the practical effect of the FCC's "new telecom rate") is directly contrary to the Commission's prior rejection of an ILEC's request to adopt an 80/20 allocation of common costs between the EDC and ILEC, respectively, in the *NEPTC Order*. And, finally, Verizon has provided has provided no proof that a reduction in the rates it pays will be passed onto customers and, in fact, has flatly refused to make any commitment that any of the windfall from rate reductions will go to expand broadband service anywhere in the Commonwealth. Any rate reduction granted by the Commission will be a windfall profit to Verizon's shareholders at the expense of FirstEnergy's customers.

4. **Is Verizon entitled to receive the FCC's "new telecom rate" under the existing Joint Use Agreements?** Verizon is not entitled to the "new telecom rate" under the existing Joint Use Agreement. Verizon principally bases this argument upon its assertion that the rates it pays under the Joint Use Agreements are **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** times higher than the new telecom rate. However, all this comparison demonstrates is that the new telecom rate is meant to be inserted into a fundamentally different agreement for a fundamentally different service than Verizon obtains under the Joint Use Agreements.

There are several other problems with Verizon's claim that it is "entitled" to the new telecom rate. As a threshold matter, Verizon failed to terminate the Joint Use Agreements before filing its Complaint and, under FCC precedent, the analysis should end there. Relatedly, Verizon is entitled to no presumption that it is comparably situated to its competitors and should receive the new telecom rate because the Joint Use Agreements are not "new," "newly-renewed," or "newly-renegotiated" agreements and because FirstEnergy never possessed or leveraged bargaining power over Verizon during rate negotiations. Importantly, during the most recent rate

negotiations, the "rates" for "service" set forth in the Joint Use Agreements were regulated by the Commission and such regulation precludes any finding of bargaining power.

In addition, even if Verizon were entitled to a presumption that it were similarly situated, FirstEnergy has fully rebutted that presumption. A cursory review of the Joint Use Agreements and third-party license agreements reveals they are not comparable, and the FCC has repeatedly held these types of agreements are not comparable, including the FCC's most recent *AT&T v. FPL Order* issued during the course of this proceeding. In essence, Verizon seeks the benefits of a first-class airline seat—*e.g.*, early boarding (speed-to-market), free drink services (no up-front work costs), free entertainment (no attachment application fees), and priority seating (better location and reserved space)—for coach prices.

5. **Is Verizon entitled to receive the FCC's "old telecom rate" under the existing Joint Use Agreements?** Verizon is not entitled to the FCC's old telecom rate under the existing Joint Use Agreements for similar reasons to those that show it is not entitled to the new telecom rate.

6. **If the Commission finds the rates Verizon pays under the Joint Use Agreements unjust and unreasonable under FCC precedent or determines to change the rates Verizon pays for policy reasons, what rate should apply?** Although Verizon is not entitled to either the new or old telecom rate under the existing Joint Use Agreement, if the Commission determines to overrule its own past precedent and change the rate Verizon pays then the old telecom rate calculated by FirstEnergy should apply. The old telecom rate represents both a middle ground between existing rates and the new telecom rate, and could, at least, be rationally inserted into the Joint Use Agreements because both the old telecom rate and the agreements embrace fully allocated cost principles. Furthermore, FirstEnergy's inputs should be used to

calculate the old telecom rate. FirstEnergy's inputs are based on actual current conditions in FirstEnergy's service territories instead of the out of date national data used for the FCC's presumptive inputs.

7. **Is Verizon entitled to refunds reaching back to 2011?** Verizon is not entitled to any refunds in this proceeding. Section 508 only empowers the Commission to modify the Joint Use Agreements on a prospective basis, and Section 1312 requires a predicate finding that current rates are unjust and unreasonable rate and even then, imposes a four-year statute of limitations on the Commission's authority to grant refunds. Neither of these provisions are acknowledged or even cited by Verizon.

For these reasons, and the reasons more fully explained below and in FirstEnergy's Main Brief, Verizon has failed to carry its burden of proof on any issue and, therefore, its Complaint must be dismissed.

IV. ARGUMENT

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

Verizon's claim that it has been "entitled" to just and reasonable pole attachment rates since the effective date of the FCC's *2011 Pole Attachment Order* and that it has been "presumptively entitled" to the new telecom rate since the effective date of the FCC's *2018 Pole Attachment Order* utterly disregards Pennsylvania law, misrepresents FCC precedent and mischaracterizes record evidence. Verizon MB at 20-21. Verizon's argument that the rates it pays FirstEnergy under the existing Joint Use Agreements are unjust and unreasonable boils down to its claim that (a) "The FCC's 'considerably detailed national rules'…'have the force and effect of law' and bind the Commission and the parties in this case," Verizon MB at 7, and, therefore, (b)

it is "entitled" to receive "the new telecom rate" under joint use agreements that were not entered into, renegotiated, or renewed after the FCC issued the *2011 Pole Attachment Order,* Verizon MB at 20-21. Contrary to Verizon's claims, the Commission's regulations and the *2019 Final Rulemaking Order* make clear that FCC precedent is only persuasive authority and, in fact, is "not controlling. 52 Pa. Code § 77.5(b); *2019 Final Rulemaking Order* at 50. Moreover, neither the Pennsylvania Public Utility Code, Pennsylvania appellate precedent, the Commission's regulations, the Commission's orders nor FCC precedent establish an "entitlement" or a "presumptive entitlement" for an ILEC to obtain the FCC's new telecom rate under the terms and conditions of an existing Joint Use Agreement such as those at issue here. As explained below, and more fully explained in FirstEnergy's Main Brief, Verizon has failed to carry its burden of proof to demonstrate the rates it pays under the existing Joint Use Agreements are unjust and unreasonable. Its Complaint should, therefore, be dismissed.

1. By Failing To Recognize, Cite Or Address The Public Utility Code, Pennsylvania Law And Controlling Commission Precedent, Verizon's Case Is Fundamentally Flawed And Should Be Dismissed.

In its Main Brief, FirstEnergy explained in detail that, in order to sustain its burden of proof in this proceeding, Verizon must demonstrate that the rates it pays under the Joint Use Agreements are unjust and unreasonable under the Public Utility Code. *See* 66 Pa.C.S. §§ 508, 1301, 1304, and 1309. *See* FirstEnergy MB at Sections III.A. and V.A.2.a. The Commission is "a creature of statute" and has only those powers conferred to it by the General Assembly under the Public Utility Code. *See, e.g.*, *Feingold*, 383 A.2d at 794 (Pa. 1977). There can be no doubt that the transfer of the Complaint from the FCC to the Commission subjected the Complaint to resolution under the Pennsylvania Public Utility Code. Yet, Verizon fails to address or even cite any provision of the Code in support of its Complaint. This is a rudimentary disconnect resulting in a

fundamental failure of proof and the legal impossibility of granting any relief to Verizon in this proceeding

a. Verizon Avoids And Misrepresents The Commission's Regulations And Orders.

Verizon conveniently focuses on only one provision of the Commission's regulations, 52 Pa. Code § 77.4(a), in order to assert that the FCC's regulations and precedent "bind the Commission and the parties in this case" and, therefore, the Commission has no choice but to follow the FCC's precedent in this proceeding. *See* Verizon MB at 7. While Section 77.4(a) states that the Commission "adopts the rates, terms and conditions of access to and use of utility poles, ducts, conduits and rights-of-way" under federal law, 52 Pa. Code § 77.4(a), Section 77.5(b) states "[w]hen exercising authority under this chapter the Commission will consider Federal Communications Commission orders promulgating and interpreting Federal pole attachment rules and Federal court decisions reviewing those rules and interpretations as persuasive authority." 52 Pa. Code § 77.5(b) (emphasis added). As such, the Commission does, in fact, have the discretion to depart from FCC precedent in this case.

Moreover, the Commission specifically stated that FCC precedent "do[es] not establish binding precedent" that the Commission must follow. The Commission clearly intended to maintain the discretion to depart from FCC precedent, as explained in the *2019 Final Rulemaking Order*. It stated:

> maintains in its final form regulations that FCC and court decisions and precedent will be persuasive, and not controlling precedent…the Commission anticipates challenges to the federal rules that may come to the Commission for resolution, which have not yet been adjudicated on the federal level once we assume jurisdiction. Similarly, we can envision instances where an interpretation by the FCC, which is charged with developing a nationwide scheme, may not align with Pennsylvania interests…

> [the Commission's regulations do] not preclude the Commission from using its discretion to form separate interpretations to benefit the Commonwealth. FCC orders are persuasive, meaning that they do not establish binding precedent that the Commission would follow regardless of whether any particular application would be rational under a set of given circumstances.

2019 Final Rulemaking Order at 50 (emphasis added). Indeed, the Commission is not bound by FCC precedent and maintains full discretion to depart from it, as well as the FCC's nationwide scheme, where disputes come to the Commission "which have not yet been adjudicated" by the FCC or "may not align with Pennsylvania interests." *Id.* Verizon's Complaint, which seeks relief that has never been granted by the FCC, is violative of past Commission precedent, and is completely contrary to Pennsylvania electric ratepayers' interests, is precisely such a case.

Verizon attempts to distract from its sleight-of-hand reliance on Section 77.4(a) of the Commission's regulations, by either making unsupported assertions regarding the Commission's decision to reverse preempt FCC regulation of pole attachments or quoting several statements made by the Commission either out of context or in association with propositions that the Commission never addressed in the *PUC NPRM* or the *2019 Final Rulemaking Order*. For example:

- Verizon says, "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." Verizon MB at 2. However, Verizon is not regulated on a cost-of-service basis (i.e., it is not required to flow through reductions in its expenses to customers), and it presented no evidence or assurance that lowering the rates it pays under FirstEnergy will benefit broadband deployment or expansion. *See* FirstEnergy MB at 50-51. Indeed, in discovery, Verizon asserted this consideration is irrelevant to its Complaint, but now asserts in its brief that this information is not only relevant, but a driving force behind the Commission's regulations.

- Verizon says that "[t]he Commission warned parties not to 'regularly rehash or reargue determinations of the FCC' once it assumed jurisdiction. Verizon MB at 15. However, the Commission specifically maintained its discretion to depart from federal precedent where, as here, the issues raised "which have not yet been adjudicated" before the FCC or "may not align with Pennsylvania interests."

- Verizon says, "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'[] because 'greater rate parity between [I]LECs and their telecommunications competitors can energize and further accelerate broadband deployment.'[]" Verizon MB at 22 (footnotes omitted). However, the first quotation refers to the FCC's justifications for actions in the *2018 Pole Attachment Order*, and the second quotation is not a statement by the Commission but rather a statement by the FCC. Verizon misrepresents the Commission's statement in an apparent attempt to conflate the national goals of the FCC and the statewide goals of the Commission.

- Verizon claims that "[t]he 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." Verizon MB at 44. However, what the Commission said was: "This FRM is a natural outgrowth of the goals of Chapter 30 of the Public Utility Code,[] which is intended to promote and encourage the provision of advanced telecommunications services and broadband deployment in the Commonwealth." *2019 Final Rulemaking Order* at 3. The Commission neither orders electric utilities to reduce the rates paid by ILECs under joint use agreements nor cites to any of the FCC's orders. Rather, it reaffirms that its decision to reverse preempt FCC regulation of pole attachments is to conform to the Public Utility Code and its goals under Chapter 30.

Verizon reads 52 Pa. Code § 77.4(a) in insolation from the Public Utility Code, the remainder of Chapter 77 of the Commission's regulations, and the Commission's precedent, and effectively asks the Commission to adopt an interpretation of its regulations that is unlawful and irreconcilable with Sections 508, 1301, 1309 and 1312 of the Public Utility Code. Indeed, as the Commonwealth Court has previously explained:

> When…a regulation presents an actual conflict with the statute, we cannot reasonably understand the regulation to be within the agency's ambit of authority, and the statute must prevail. *AMP Inc. v. Commonwealth*, 814 A.2d 782, 786 (Pa. Cmwlth. 2002), aff'd, 578 Pa. 366, 852 A.2d 1161 (Pa. 2004); *see also Slippery Rock*, 983 A.2d at 1241 ("[A]ll regulations, whether legislative or interpretive[,] 'must be consistent with the statute under which they were promulgated.'" (quoting *Popowsky v. Pa. PUC*, 589 Pa. 605, 910 A.2d 38, 52 (Pa. 2006)).

This initial, fundamental flaw is compounded by errors explained below. It is apparent that Verizon has attempted to hang its hat on misrepresentations or out-of-context quotes of the *PUC*

NPRM and the *2019 Final Rulemaking Order*, and one provision of the Commission's Chapter 77 regulations read in isolation. Verizon's utter disregard of the Public Utility Code asks this Commission to take actions under Chapter 77 of its regulations that would conflict with the statute. The Commission should not and cannot do so and, therefore, Verizon's Complaint should be dismissed.

b. Verizon Does Not Cite, Let Alone Address, A Single Provision Of The Public Utility Code.

Verizon's Main Brief fails to recognize, or even attempt to address, the applicability of the various provisions of the Public Utility Code that apply to this proceeding and control its disposition. As noted above, Verizon's Main Brief does not contain a single citation or reference to the Public Utility Code—not a single one. Verizon does not even argue that the Public Utility Code does not control the resolution of this dispute; it simply makes no reference to the Public Utility Code at all.[12] Verizon's failure to acknowledge the applicability of the Public Utility Code, or cite to a single provision thereunder, constitutes an egregious and fundamental flaw that, standing alone, justifies dismissal of its Complaint. And, as explained in the Sections that follow, Verizon's failure to even once address the Public Utility Code destroys every argument presented in its Main Brief.

c. Verizon Attempts To Unlawfully Shift The Burden Of Proof To FirstEnergy.

In a complaint proceeding before the Commission it is undisputable that the complainant bears the ultimate burden of proof. 66 Pa.C.S. § 332(a). The explicit language of the Public Utility Code establishes this burden, and the precedent of Pennsylvania appellate courts and the

[12] This apparently was Verizon's game plan all along because, as explained in FirstEnergy's Main Brief, Verizon never amended its Complaint to allege specific violations of the Public Utility Code, or the Commission's regulations or orders. *See* FirstEnergy MB at Section V.A.2.b.

Commission is uniform that the party seeking affirmative relief from the Commission bears the burden of proof.

Despite the explicit language of Section 332(a) and the uniform case law supporting this axiom, Verizon does not, at any point, acknowledge that it maintains the ultimate burden of proof in this proceeding. Rather, it brazenly and repeatedly asserts FirstEnergy bears the burden of proof in this proceeding. *See, e.g.*, Verizon MB at 15 (heading entitled "FirstEnergy's Burden of Proof"). Verizon goes even further and asserts that FirstEnergy bore that burden of proof *during negotiations*.

Verizon instead appears to base this theory on its assumption that the FCC's *2018 Pole Attachment Order* and *2011 Pole Attachment Order* established a presumption that Verizon is entitled to the new telecom rate guaranteed to its competitors. *See, e.g.*, Verizon MB at 2, 15. However, Verizon failed to demonstrate that it meets the threshold requirements to obtain this presumption (i.e., that it terminated the existing Joint Use Agreements or genuinely lacked the ability to do so and has entered into new, newly-negotiated, or newly-renewed joint use agreements). *See* FirstEnergy MB at Sections V.A.3.b-c.; *see also* Section IV.A.2. *infra*. Verizon is simply not entitled to any of the presumptions it seeks, under Commission or FCC precedent.

Moreover, even if Verizon were entitled to these presumptions, FirstEnergy successfully rebutted them[13] by showing that Verizon is not comparably situated to non-pole-owning third-party attachers in their ability to attach to FirstEnergy's poles[14] and that the Joint Use Agreements fundamentally differ from the license agreements executed between FirstEnergy and non-pole-owning third-party attachers.[15] Thus, the presumption per se "vanishes" because a presumption

[13] FirstEnergy responds to Verizon's baseless claim that it did not "try" to rebut this presumption in Section IV.A.2.e below.

[14] FirstEnergy MB at Section V.A.3.c.iii.1-2.

[15] FirstEnergy MB at Section V.A.3.c.iii.3.

itself is not evidence, and it is therefore without evidentiary weight. *Pa. Pub. Util. Comm'n v. West Penn Power Company*, Docket No. R-850220, 1987 Pa. PUC LEXIS 316, at *17 (Order entered April 17, 1987). And, without this presumption, Verizon has presented no evidence and failed to carry its burden of proof under Section 332(a) of the Code. Therefore, Verizon's attempt to impermissibly and unlawfully shift the burden of proof should be rejected, and its Complaint should be dismissed.

d. Verizon Does Not Cite, Let Alone Address, Controlling Commission Precedent.

The dearth of citations to Pennsylvania law and Commission precedent is further highlighted by Verizon's failure to disclose, let alone address, controlling Commission precedent in its Main Brief. As FirstEnergy explained in its Main Brief, the Commission had jurisdiction over the rates, terms and conditions of the Joint Use Agreements from the time each of the Joint Use Agreements was executed until the effective date of the *2011 Pole Attachment Order* because they involve a "rate" for public utility "service." FirstEnergy MB at Section V.A.2.a. Exercising this jurisdiction, the Commission previously adjudicated disputes between ILECs and Pennsylvania EDCs regarding the rates terms and conditions of joint use agreements.

As explained in FirstEnergy's Main Brief, the Commission considered whether the cost allocation methodology used in a joint use agreement between an ILEC and an electric utility was just and reasonable. *NEPTC Order*, at *12-13; FirstEnergy MB at 36-37. Importantly, the Commission rejected the ILEC's request to revise the cost allocation methodology so that the utility "would assume responsibility for more than eighty (80) percent of the common area of a joint-use pole even though both utilities enjoy an equal benefit from the common area." *Id.*, at *11. The Commission held that "it is only fair and reasonable to access[sic] the costs of the common area of a joint-use pole on an equal basis" and that the electric utility's "proposed

allocation methodology is an appropriate mechanism to allocate joint-use costs and should be approved" because joint use agreements are designed to "avoid the duplication of facilities…and realize the attendant[sic] savings by each utility." *Id.*, at *12. And the Commission also explicitly denied the ILEC's argument on exceptions that this allocation methodology violates the requirement that rates be "just and reasonable" under Section 1301 of the Public Utility Code. *Id.*, at *12-13. Of particular import here, the new telecom rate that Verizon seeks to insert into the existing Joint Use Agreements mathematically eliminates the allocation of common costs associated with common space and, for all practical purposes, is an incremental cost rate as opposed to a fully allocated cost-based rate. (FirstEnergy St. 1-R, p. 14.) As the Commission has already rejected an ILEC's proposal to allocate 80% of the common costs of common space, then so too should it reject the new telecom rate which effectively eliminates any allocation of these costs at all and requires the utility pole owner to bear 100% of such costs.

Similarly, in the *ALLTEL Order*, the Commission disposed of a complaint between an electric utility and several ILECs surrounding the allocation of tree trimming costs under joint use agreements. *See ALLTEL Order*, at *2; *ALLTEL Pennsylvania, Inc., et al. v. West Penn Power Company*, Docket No. C-00992532, 2000 Pa. PUC LEXIS 88 (Initial Decision dated September 26, 2000) ("*ALLTEL ID*"), *adopted as modified*, 2001 Pa. PUC LEXIS 27, at *52 (Order entered July 26, 2001). More specifically, the electric utility "revised the allocation of expenses incurred for Initial Capital Right-of-Way Clearing (Initial Clearing) and for Maintenance Right-of-Way Cutting and Clearing Costs (Maintenance Clearing)," and when the ILECs refused to accept the revision, the electric utility "notified the [ILECs]…that it was exercising its right of termination under the Agreement." *ALLTELL Order*, at *2. The telecommunications utilities filed a complaint

and argued, *inter alia*, that the termination should be revised, and that the electric utility should not be permitted to terminate the agreement.

On this issue, the Commission approved the presiding officer's initial decision,[16] which concluded:

> While termination of the Agreements may not be in the joint complainants' interest, they are not without alternatives. Both parties agree that under the terms of the Agreements, existing joint use arrangements will remain in effect. With respect to future potential joint uses, joint complainants can attempt to negotiate new agreements with respondent. Failing that, they are free to construct and maintain their own facilities. See, North-Eastern Pennsylvania Telephone Company v. Pennsylvania Power & Light Company, 1992 Pa. PUC LEXIS 68. The point is, an adverse consequence to joint complainants does not equate to the inclusion of a negotiated termination provision in a contract involving joint complainants with being unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and the general well-being of this Commonwealth. Under 66 Pa.C.S. § 508, the Commission does not have the authority to vary, reform, or revise the Agreements' termination provision because the result will be undesireable[sic], aesthetically displeasing, inefficient, or disadvantageous to the joint complainants. None of these results make the Agreements' termination provision 'adverse to the public interest and the general well-being of this Commonwealth.'

ALLTEL ID, at *52. The presiding officer cogently explained further that:

[16] The presiding officer further relied upon prior Commission precedent to resolve the issue of the EDC's attempt to modify the contracts, and explained:

> Holding a party to the obligations undertaken in a contract serves to reinforce the integrity of written contracts. *United Refining Co. v. Jenkins*, 410 Pa. 126, 189 A.2d 574 (1963). Every business, whether a public utility or not, must be allowed the opportunity to rely upon the integrity of its written contracts so it may understand the extent of its legally enforceable rights and obligations in the conduct of its daily affairs. In the absence of fraud or mutual mistake, the failure to read a contract is not a viable excuse or defense and cannot justify an avoidance, modification or nullification of a contract or any provision thereof. *Standard Venetian Blind Co. v. American Empire Ins. Co.*, 503 Pa. 300, 469 A.2d 563(1983); *Dept. Of Education v. Miller*, 78 Pa.Commw. 1, 466 A.2d 791(1983). 79 PA PUC at 563.

ALLTEL ID, at *40-41 (emphasis added). Verizon's attempt to unilaterally modify the rates it pays under the Joint Use Agreements violates these fundamental principles of contract.

> It must also be remembered that the Commission is not a super board of directors for the Commonwealth's regulated public utility companies…As a general matter, utility management is in the hands of the utility and the Commission may not interfere with lawful management decisions . . . unless, on the basis of record evidence, it finds an abuse of the utility's managerial discretion…Were the Commission to use the provisions of 66 Pa.C.S. § 508 to alter the Agreements' termination provision it would be usurping management's right to exercise lawful discretion in the negotiation of common, legal, contract terms.

Id. (citations and quotations omitted).

At a minimum, the *ALLTEL Order* and *ALLTEL ID* completely undermine the argument that the rates Verizon pays under the Joint Use Agreements were "imposed" by FirstEnergy,[17] or that Verizon "genuinely lacked the ability to terminate" the agreements.[18] Indeed, the *ALLTEL Order* recognized that if an ILEC, such as Verizon, is dissatisfied with a term of a joint use agreement or believes that the rate it mutually negotiated to pay was "undesireable[sic], aesthetically displeasing, inefficient, or disadvantageous" then Verizon possesses the clear alternative to terminate the agreements and prospectively enter into new agreements for new attachments. *See NEPTC Order*, at *23. And, if FirstEnergy attempted to unilaterally prevent Verizon from terminating the agreements—i.e., actually leveraging an alleged bargaining power—Verizon could have filed a complaint and prevented FirstEnergy from making such unilateral modifications, just as its predecessor did in the *ALLTEL Order*.

Taken together, it is clear that Verizon's request to vary, reform, or revise the rates it pays under the Joint Use Agreements is subject to review under the standard set forth in Section 508 of the Public Utility Code. As such, Verizon must demonstrate that the rates set forth in the Joint Use Agreements are "unjust and unreasonable" or otherwise "adverse to the public interest and the

[17] *See* Verizon MB at 32-33 (claiming "Met-Ed imposed" the "complex rate methodology" at issue "in 2009…").

[18] Verizon MB at Section V.A.2.a.2.

general well-being of this Commonwealth," in order for the Commission to exercise its authority to vary, reform or revise the rates.[19]

Curiously, neither the *NEPTC Order* nor the *ALLTEL Order* is referenced in Verizon's Main Brief.[20] Although Verizon may attempt to argue that these orders and a century of Commission jurisdiction were entirely supplanted by approximately eight years and nine months of FCC regulation of joint use agreements under the *2011 Pole Attachment Order*, they still remain controlling precedent before this Commission and require Verizon to demonstrate the rates it pays are unjust and unreasonable under Section 508 of the Public Utility Code. *See* FirstEnergy MB at Sections V.A.2. Verizon's failure to reference, address, or even attempt to distinguish these orders undermines the credibility of its arguments and further demonstrates that its Complaint is without merit.

e. Verizon Presents No Evidence Required To Make A Determination That A "Rate" For "Service" Is Unjust And Unreasonable Under Pennsylvania Law.

FirstEnergy further explained in its Main Brief that Verizon presented no evidence that is required under Pennsylvania law and long-standing ratemaking principles to demonstrate that an existing rate is unjust and unreasonable. FirstEnergy MB at Section V.A.2.c. Verizon was required to demonstrate that the rates it pays under the Joint Use Agreements exceed FirstEnergy's cost of service, *see Lloyd v. Pa. Pub. Util. Comm'n*, 904 A.2d 1010, 1020 (Pa. Cmwlth. 2006), *appeal denied*, 916 A.2d 1104 (2007), and produce revenues in excess of a fair return on the fair

[19] As further explained in Section V.A.2. of FirstEnergy's Main Brief, Verizon has failed to do so and its Pole Attachment Complaint should be denied.

[20] The lack of reference to the *ALLTEL Order* is particularly egregious. Verizon was clearly aware of this case, as its predecessor was one of the named complainants, and the case disposes of a complaint involving disputed changes to a joint use agreement before this Commission.

value of the utility's property used to provide the regulated service, *see Nat'l Fuel Gas Distrib. Corp. v. Pa. Pub. Util. Comm'n*, 464 A.2d 546, 564 (Pa. Cmwlth. 1983).

The absence of this evidence from Verizon's case is complemented by the absence of any argument in its Main Brief that the rates it pays exceed the cost of service or produce an excessive rate of return under Pennsylvania law and practice. Verizon presented no evidence and makes no argument as to either the current rate of return produced by existing rates under Pennsylvania law and practice, or what a fair rate of return would be under current market conditions. *See* FirstEnergy MB at 42-43. Similarly, Verizon presented no evidence and makes no argument that the cost-sharing rates calculated under the Joint Use Agreements do not reflect the cost to serve Verizon. *See* FirstEnergy MB at 43-45.

f. FirstEnergy Presented Credible Evidence That The Rates Verizon Pays Are Just And Reasonable Under The Public Utility Code, Pennsylvania Law, And Long-Standing Ratemaking Principles.

Unlike Verizon's case and its Main Brief, FirstEnergy extensively addressed the applicable provisions of the Public Utility Code, controlling Commission precedent, and longstanding Pennsylvania ratemaking standards. Indeed, it also showed that the rates Verizon pays under the existing Joint Use Agreements are just and reasonable under controlling Commission precedent and traditional Pennsylvania ratemaking standards.

More specifically, FirstEnergy demonstrated that the rates Verizon pays are, in aggregate, below fully allocated cost-based rates. FirstEnergy MB at Section V.A.2.c.ii. FirstEnergy presented unrebutted calculations of fully allocated cost-based rates that reflect the full cost of service and the cost of common space being shared equally among attaching entities. *See NEPTC Order*. Although Verizon took umbrage with FirstEnergy's comparison to these rates in its testimony, any argument regarding this comparison is notably absent from its Main Brief.

In addition, FirstEnergy also showed that the rates Verizon pays under the Joint Use Agreements do not unreasonably benefit the utility's investors at the expense of the utility's ratepayers. *See* FirstEnergy MB at Section V.A.2.c.ii. Rather, the rates Verizon pays under the Joint Use Agreements reduce the amount of revenues required from FirstEnergy's EDC Pennsylvania-based electric ratepayers, as a credit to the calculation of the total revenue requirement used to set those rates. (FirstEnergy St. 3-R, pp. 3-4.) Any consideration of the interests of Pennsylvania electric service ratepayers is notably absent from Verizon's Main Brief.

Relatedly, FirstEnergy showed that Verizon's request to insert the new telecom rate into the existing Joint Use Agreements would produce unjust and unreasonable rates and create an unlawful subsidy that violates Section 1304 of the Public Utility Code. *See* FirstEnergy MB at Section V.A.2.d. Indeed, any reduction in the rates Verizon pays will result in higher rates for Pennsylvania electric rate payers than they would pay otherwise. FirstEnergy MB at 49-50. As such, Verizon's requested relief would force FirstEnergy to collect more revenues from its electric service customers to accommodate (i.e., subsidize)[21] a joint use rate that is inadequate and substantially below a normal cost-of-service-based rate. And, yet again, nothing in Verizon's Main Brief discusses or considers the unreasonable and discriminatory subsidy that would result from Verizon's requested relief.

g. Verizon's Main Brief Is Either An Affront To The Commission And The Sovereignty Of The Commonwealth Or An Egregious Case Of Impermissible Sandbagging.

The utter absence of references to, let alone analysis under, the Public Utility Code and the dearth of references to Pennsylvania law or Commission regulations and order speak volumes of Verizon's intent. Verizon has utterly disregarded the Commission's statutory authority to act in

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

complaint proceedings and ignored the Commission's intent to provide "Pennsylvania…[a] benefit from a state-level perspective" and belief that "balancing the safety and reliability of the electric distribution system, adequate cost recovery for attachments, and the need for timely access to utility infrastructure" may be offered by the Commission because it was less available at the FCC. *See 2019 Final Rulemaking Order* at 45, 50 (crediting the comments of PPL Electric Utilities Corporation). The relief it seeks would instead subordinate the interests of Pennsylvania EDCs and, more importantly, Pennsylvania electric service ratepayers to the interests of Verizon's (and other ILEC's) shareholders. In this regard, Verizon's refusal to address the interests of the Commonwealth or even acknowledge that its Complaint is subject to resolution under the Public Utility Code is an affront to the Commission and the sovereignty of the Commonwealth.[22]

Alternatively, Verizon's decision to not address any provision of the Public Utility Code and substantially avoid the Commission's regulations and order and Pennsylvania law in its Main Brief constitutes a strategic decision designed to limit FirstEnergy's ability to respond to these arguments. Importantly, Verizon could have, and should have, addressed the Public Utility Code and controlling Commission precedent in its Main Brief, given that FirstEnergy repeatedly made clear in its testimony before the Commission that it intended to pursue a defense under the Public Utility Code. (*See* FirstEnergy St. 1-R, pp. 5, 7; FirstEnergy St. 3-R, pp. 3, 6; FirstEnergy St. 1-RJ, pp. 2-3.) Yet, Verizon did not do so despite the fact that the rates were last amended at a time when the Joint Use Agreements were unquestionably subject to the Commission's jurisdiction.

[22] It is axiomatic that "[t]he regulation of public utilities long has been entrusted to state law. Pennsylvania's Public Utilities Code ('the Code') confers administrative and regulatory authority upon the Pennsylvania Public Utilities[sic] Commission..." *PPL Electric Utilities Corp. v. City of Lancaster*, 214 A.3d 639, 641 (Pa. 2019). The General Assembly, and not Congress, establishes the statutory framework applicable to public utility regulation in Pennsylvania; relatedly, the Commission, must regulate public utilities pursuant to the framework established by the General assembly, i.e., the legislative authority state sovereign.

This impermissible "sand-bagging" violates FirstEnergy's due process rights and deprives it of the ability to respond to these arguments in this Reply Brief.

For all of these reasons, and the reasons more fully explained in FirstEnergy's Main Brief, Verizon has utterly and completely failed to carry its burden of proof and demonstrate that the rates it pays under the Joint Use Agreements are unjust and unreasonable under the Public Utility Code, Pennsylvania law, and controlling Commission precedent. Therefore, its Complaint should be dismissed.

2. Verizon Failed To Demonstrate That It Is "Entitled" To The New Telecom Rate Under FCC Precedent.

Verizon's Main Brief is fundamentally premised upon its assertion that "Pennsylvania law creates a presumption that Verizon is entitled to the new telecom rate guaranteed its competitors." Verizon MB at 1. Verizon repeats this assertion throughout its Main Brief and, indeed, this assertion is the only basis upon which Verizon attempts to demonstrate it is entitled to the relief it seeks. *See, e.g.*, Verizon MB at 18 ("By law, FirstEnergy must charge Verizon a properly calculated new telecom rate unless FirstEnergy rebuts the presumption in the Commission's adopted regulations."), 20, and 23 ("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").

Importantly, however, Verizon must demonstrate that this presumption applies to the existing Joint Use Agreements at issue. As explained in FirstEnergy's Main Brief, Verizon has failed to do so. *See* FirstEnergy MB at Sections V.A.3.b.-c. Moreover, even if the presumption did apply, FirstEnergy rebutted the presumption. *See* FirstEnergy MB at Section V.A.3.c.iii. Indeed, FirstEnergy fully explained in its Main Brief that, even under the FCC's precedent, Verizon is not entitled to the new telecom rate.

Verizon's argument that the rates it pays are unreasonable because they are approximately **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** times the new telecom rate, is fundamentally premised on its assertion that it is entitled to the new telecom rate. However, FirstEnergy explained that the new telecom rate is substantially below fully allocated cost-based rates and inconsistent with Pennsylvania law and long-standing ratemaking principles. And, under any set of rules, Verizon it is not "entitled" to the new telecom rate.

Below, FirstEnergy addresses the following six critical points raised in Verizon's Main Brief, which put to rest the question of whether Verizon is "entitled to the new telecom rate" and demonstrate that it is not.

- First, the new telecom rate is inconsistent with long-standing Pennsylvania ratemaking principles and controlling Commission precedent and, if inserted into the existing Joint Use Agreements, would deprive FirstEnergy's EDCs of a fair opportunity to recover their investment in the joint-use poles at issue and would be confiscatory and unconstitutional.

- Second, Verizon continues to seek to avoid its fundamental failure to terminate the Joint Use Agreements. Because it failed to terminate the agreements and did not demonstrate it genuinely lacked the ability to do so, Verizon is not entitled to the new telecom rate.

- Third, the FCC's presumption, set forth in the *2018 Pole Attachment Order*, only applies to "new," "newly-renewed," or "newly-renegotiated" joint use agreements, and the Joint Use Agreements at issue are none of these things. Verizon's tortured interpretation of the term of the Joint Use Agreements is unreasonable and, if adopted, would result in the absurd outcome of deeming essentially all long-standing Joint Use Agreements to automatically be considered "new," "newly-renewed," or "newly-renegotiated."

- Fourth, Verizon has failed to demonstrate that the rates it pays under the Joint Use Agreements are the result of actual bargaining power that was leveraged by FirstEnergy while negotiating the rates. Relative pole ownership is a condition, not a behavior.

- Fifth, even if Verizon were entitled to the presumption it seeks, FirstEnergy conclusively rebutted that presumption and demonstrated that Verizon is not comparably situated to its competitors and that the Joint Use Agreements are fundamentally different from the pole attachment agreements between its competitors and FirstEnergy.

- And, sixth, neither the FCC's regulations nor FCC precedent requires the new telecom rate to be inserted into an existing Joint Use Agreement. Indeed, neither the FCC nor any other regulatory body has ever ordered the new telecom rate to be inserted into an existing joint

use agreement between an ILEC and an electric utility—even in circumstances where the FCC deemed the existing rate to be unjust and unreasonable.

For these reasons, and the reasons more fully explained in FirstEnergy's Main Brief, Verizon has failed to demonstrate that the rates it pays under the existing Joint Use Agreements are unjust and unreasonable under FCC precedent. Therefore, the Complaint should be dismissed.

a. Verizon's "Raw Comparison" Of The Rates It Pays Under The Joint Use Agreements To The New Telecom Rate Does Not Demonstrate An Entitlement To The New Telecom Rate.

FirstEnergy explained in its Main Brief that the rates Verizon pays under the Joint Use Agreements are, in aggregate, below fully allocated cost-based rates calculated using long-standing Pennsylvania ratemaking standards. FirstEnergy MB at Section V.A.2.d. Verizon attempts to sidestep these concepts by simply arguing that the rates it pays are approximately **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** times the FCC's new telecom rate. *See* Verizon MB at Section V.A.1. This argument does not support Verizon's Complaint. On the contrary, it aptly demonstrates several reasons why Verizon's Complaint should be denied.

First, Verizon is comparing "apples to oranges." The existing rates it pays are part of a full cost sharing joint use agreement and are based the total cost of pole ownership, including common costs and unusable space. *See* FirstEnergy MB at Section V.A.1.b. The new telecom rate, on the other hand, is an incremental cost-based rate and includes assigns all of the common costs of unusable space to the electric utility. *See* FirstEnergy MB at Section V.A.1.c. It is hardly surprising then that the new telecom rate is substantially different; it is calculated on a completely different basis and is not intended to be inserted into an agreement premised on sharing the fully allocated costs of pole ownership.

Second, the rate Verizon pays under the Joint Use Agreements and the new telecom rate were each developed for very different services. Verizon receives several important advantages

under the Joint Use Agreements. For example, Verizon (a) obtained a speed-to-market advantage, (b) does not pay certain up-front work costs, (c) avoids attachment application fees, and (d) occupied better locations on FirstEnergy's poles, among many other benefits. *See* FirstEnergy MB at Section V.A.3.c.iii. (citing record evidence of the material benefits Verizon receives). These benefits are simply not available to its competitors who also attach to FirstEnergy's poles under third-party licensing agreements. In essence, Verizon seeks the benefits of a first-class airline seat—*e.g.*, early boarding (speed-to-market), free drink services (no up-front work costs), free entertainment (no attachment application fees), and priority seating (better location and reserved space)—for coach prices. This is a clearly unreasonable result.

Third, FirstEnergy's rates are, in aggregate, below fully allocated cost and are fully consistent with controlling Commission precedent. FirstEnergy's rates are clearly not too high; rather, the new telecom rates proposed by Verizon are clearly too low and not compensatory for the service provided. Inserting the new telecom rate into the existing Joint Use Agreements would deprive FirstEnergy of a fair opportunity to recover its investment in joint use poles. Decreasing the rates Verizon pays to approximately **[BEGIN PROPRIETARY]** ■ **[END PROPRIETARY]** the cost of service (*see* Tables 4-6 of FirstEnergy St. 1-R), would resultantly force FirstEnergy to collect more revenues from its electric service customers to accommodate (i.e., subsidize) a joint use rate that is inadequate and substantially below a normal cost of service based rate.[23] For these reasons, and the reasons more fully explained in FirstEnergy's Briefs, Verizon is simply not entitled to the new telecom rate under Pennsylvania law.

[23] Moreover, the FCC has clearly explained that a "raw comparison of the Agreement Rates to the Old and New Telecom Rates is not sufficient to show that the Agreement Rates are unjust." *See 2015 FPL Order* ¶ 24 (concluding Verizon had failed to demonstrate certain joint use agreements rates were unjust and unreasonable).

b. Verizon Failed To Terminate The Joint Use Agreements At Issue.

FirstEnergy fully explained in its Main Brief that Verizon failed to terminate the existing Joint Use Agreements. FirstEnergy MB at Section V.3.b. As the FCC concluded in the *2011 Pole Attachment Order*, it "is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable," and "both incumbent LECs and other utilities have the ability to terminate existing agreements and seek new arrangements." *See 2011 Pole Attachment Order* ¶ 216. Therefore, Verizon must terminate the existing agreements before it can properly complain of the rates, terms and conditions of the Joint Use Agreements. Here, however, it is undisputed that Verizon has failed to do so, and that the Joint Use Agreements were entered into prior to the effective date of the *2011 Pole Attachment Order* and remain in effect. FirstEnergy MB at Section V.3.b.i. Importantly, Verizon's failure to terminate the Joint Use Agreements fundamentally undermines its request for any relief at all. Verizon must terminate and execute a new agreement before it can obtain the old telecom rate, let alone the new telecom rate.

Predictably, Verizon instead argues that it "it lacked the ability to terminate" the Joint Use Agreements. *See* Verizon MB at 35-38. Verizon attempts to bury this threshold argument in its Main Brief and FirstEnergy submits that it does so because it has utterly failed to make this showing, for the reasons explained in Section V.A.3.b.ii. of FirstEnergy's Main Brief.[24] Three additional points in Verizon's Main Brief bear addressing.

[24] Furthermore, Verizon's argument that it lacks the ability to terminate the agreements flies in the face of controlling Pennsylvania precedent. Indeed, in the *ALLTEL ID*, the presiding officer concluded that, where the parties to a joint use agreement were dissatisfied with its terms, they were free to pursue other alternatives included the termination of the agreement or construction of its own pole structure. *ALLTEL ID*, at *52. The termination provisions at issue here are substantially similar to the provisions at issue in the *ALLTEL ID* and *ALLTEL Order*, and only require the parties to provide sufficient notice of their intent to terminate. (*See, e.g.*, Verizon Exhibit SCM-2 at VZ00180 ("this Agreement…shall continue in force thereafter until terminated by either Party at any time upon sixty (60) days notice in writing to the other Party…").)

First, Verizon principally rests on the presence of the "evergreen" clause contained in the Joint Use Agreements and asserts that, allegedly as in the *FPL 2015 Order*, FirstEnergy can and did force Verizon to pay higher agreement rates. Verizon MB at 35. Verizon's quote of the *FPL 2015 Order* is misrepresentative and divorced from context. In fact, while dismissing Verizon's complaint in that case, the FCC stated: "Because the Bureau has not previously applied the *2011 Pole Attachment Orde*r, and dismissal with prejudice could force Verizon to pay the relatively high Agreement Rates for as long as its attachments remain on Florida Power's poles pursuant to the evergreen clause, we dismiss Verizon's Complaint without prejudice." *FPL 2015 Order* at ¶ 25. Indeed, the FCC never made the finding that the evergreen clause did force Verizon to pay unjust and unreasonable rates, only that it could. Here, contrary to Verizon's assertions, FirstEnergy did not rely on the evergreen clause in the Joint Use Agreements to refuse to negotiate rates for new and existing attachments. *See* FirstEnergy MB at 58-59.

Second, Verizon doubles down on its duplicity by asserting that "FirstEnergy proved throughout the parties' negotiations it is unwilling to agree to just and reasonable rates." Verizon MB at 35. The critical error with Verizon's claim is its belief that, despite all precedent and evidence to the contrary, the new telecom rate is the only just and reasonable rate. The FCC has made clear, repeatedly, that this is not the case[25] and, in fact, has never ordered the new telecom rate to be inserted into an existing joint use agreement.

Verizon's untenable position is further highlighted by FirstEnergy's several good faith efforts to significantly reduce Verizon's annual rental payments, including reductions of more than **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** per year under the existing agreements. (FirstEnergy St. 1-R, pp. 26-27.) Indeed, FirstEnergy proposed to reduce Verizon's

[25] *See* Section IV.A.2.f. *infra*.

net payments under the Joint Use Agreements by almost 30%. Verizon's Main Brief, like its testimony, does not address or respond to this offer, and attempts to mischaracterize the parties' attempts to convert the deficiency payment structure under the Met-Ed specific agreements into a reciprocal rate structure. (*See* FirstEnergy St. 1-R, pp. 27-28.) Verizon simply wants the new telecom rate and bemoans and mischaracterizes any attempt FirstEnergy made to negotiate any other reduced rate for Verizon.

Third, Verizon argues in passing that it lacked the ability to terminate the agreements because FirstEnergy "used its superior bargaining power to deny Verizon its legal right to just and reasonable rates." Verizon MB at 38. FirstEnergy demonstrated in its Main Brief that it neither possessed nor leveraged bargaining power over Verizon during rate negotiations, and further addresses this absurd claim in Section IV.A.2.d. below.

For all of these reasons, and the reasons more fully explained in FirstEnergy's Main Brief, Verizon failed to terminate the Joint Use Agreements and failed to demonstrate it genuinely lacks the ability to do so. Therefore, Verizon's Complaint should be dismissed.

c. The Joint Use Agreements Are Not New, Newly-Negotiated or Newly-Renewed Agreements.

As explained in FirstEnergy's Main Brief, the *2018 Pole Attachment Order* "establish[ed] a presumption that, for newly-negotiated and newly-renewed pole attachment agreements between incumbent LECs and utilities, an incumbent LEC will receive comparable pole attachment rates, terms, and conditions as a similarly-situated" attacher. *See 2018 Pole Attachment Order* ¶ 123 (emphasis added). The FCC further recognized that this presumption "will impact privately-negotiated agreements and so the presumption will only apply, as it relates to existing contracts, upon renewal of those agreements." *2018 Pole Attachment Order* ¶ 127 (emphasis added). Furthermore, the FCC explained that "[a] new or newly-renewed pole attachment agreement is

one entered into, renewed, or in evergreen status after the effective date of this Order, and renewal includes agreements that are automatically renewed, extended, or placed in evergreen status. *Id.* at ¶ 127, n.475 (emphasis added).

Verizon argues that this presumption applies because "the joint use agreements 'automatically … extended' after March 11, 2019." Verizon MB at 23-25. FirstEnergy fully addressed each of the arguments raised by Verizon's Main Brief on this issue and demonstrated that its arguments should be rejected. FirstEnergy MB at Section V.A.3.c.i. Importantly, Verizon's proposed interpretation would read specific words out of the Joint Use Agreements and constitute an unlawful post hoc revision of contractual terms.[26]

FirstEnergy further submits that Verizon's position that the term "shall continue" used in the Joint Use Agreements is equivalent to the terms "are automatically renewed" or "extended" used in *2018 Pole Attachment Order*, then every single joint use agreement that passively continues from one day to the next would be "automatically renewed" on March 11, 2019. This is an absurd result and is also unsupported by the FCC's extensive discussion in the *2018 Pole Attachment Order* regarding which agreements qualified for the presumption of comparability. Verizon's position is nothing more than a transparent attempt to obtain a ruling by the Commission that all joint use agreements—regardless of whether or not they are new agreements—are subject to the *2018 Pole Attachment Order*'s presumption, which it will then attempt to leverage in rate

[26] *See, e.g.*, *New Charter Coal v. McKee*, 191 A.2d 830, 833 (Pa. 1963) ("[T]he law will not reform a written contract so as to make a contract for the parties that they did not make between themselves and certainly never to rescue a party who did not reasonably foresee the consequences of his bargain."). *See ALLTEL ID* at *49-51 (declining to modify the termination provisions of a joint use agreement). In addition, such modification would "have a chilling effect on the willingness of regulated public utilities to enter into contracts" and "would arguably contravene both Federal and Pennsylvania constitutional provisions regarding the impairment of the obligation of contracts and deprivation of property without compensation." *Id.*, at *50; *see also Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) and *First Nat'l Bank v. Flanagan*, 528 A.2d 134 (Pa. 1987).

negotiations and other pole attachment disputes in other forums. Therefore, and for the reasons more fully explained in FirstEnergy's Main Brief, the Commission should reject Verizon's position.

d. FirstEnergy Did Not Possess And Did Not Leverage Bargaining Power In Rate Negotiations.

As explained in FirstEnergy's Main Brief, the *2018 Pole Attachment Order* and the *2011 Pole Attachment Order* are fundamentally based on the FCC's attempt to address an alleged disparity in bargaining power between ILECs and electric utilities in their negotiations of joint use agreements. *See* FirstEnergy MB at Section V.A.3.c.ii. Indeed, if FirstEnergy does not possess and did not leverage bargaining power during rate negotiations with Verizon, then there is no basis to conclude that the rates Verizon pays are unjust and unreasonable.

Verizon's principle argument that FirstEnergy possessed and leveraged bargaining power during rate negotiations is its claim that "FirstEnergy owns most of the joint use poles [now], as it did when the current rental rates were imposed." Verizon MB at 30. FirstEnergy fully rebutted any claim that it possessed or leveraged bargaining power in its Main Brief. FirstEnergy MB at Section V.A.3.c.ii. However, three points raised in Verizon's Main Brief bear addressing once again.

First, Verizon's assertion that FirstEnergy's ownership of more poles <u>at the time the current rental rates were negotiated</u> torpedoes its arguments regarding bargaining power. Importantly, the rates Verizon pays under the Joint Use Agreement were last negotiated in 2009—i.e., during a period where the Commission regulated the rates, terms and conditions of the Joint Use Agreements and had, in fact, resolved disputes regarding joint use agreements. FirstEnergy MB at Sections V.A.2.a. and V.A.3.c.ii.1. Indeed, regulation by the Commission secures "the efficiency of monopolistic operation without allowing the enterprise to take advantage of its position." *Brockway Glass Company, Inc. v West Penn Power Company*, Docket No. C-80021876,

1980 Pa. PUC LEXIS 25, at *30 (Order dated Sept. 25, 1980). FirstEnergy did not possess and could not leverage bargaining power during rate negotiations because the Joint Use Agreements were clearly and indisputably subject to regulation by the Commission. If Verizon felt that the disparity in pole ownership allowed FirstEnergy "to take advantage of its position," it could have filed a complaint with the Commission and asserted it was entitled to a different rate at any time prior to 2011; it simply did not do so.[27] Verizon does not and cannot explain how FirstEnergy could have had any bargaining power due to owning more poles in negotiating the Joint Use Agreements in 2009, or during earlier periods, where those rates and agreements were subject to regulation by the Commission.

Second, Verizon attempts to diminish the practical considerations that prohibit FirstEnergy from leveraging any alleged bargaining power, by arguing that "[a]s 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." Verizon MB at 31. The statement is irrelevant and misplaced. Verizon's argument is analogous to two corpses arguing which of them is more dead; it matters not because both are. Similarly, it does not matter that Verizon would have to find and obtain approval to locate more poles than FirstEnergy because FirstEnergy would still be in the untenable possession of being required to construct or obtain alternative facilities as well. *See* FirstEnergy MB at Section V.A.3.c.ii.4.

Third, Verizon asserts that "FirstEnergy has required better rates for its use of Verizon's poles than it provides Verizon…because FirstEnergy '<u>uses significantly more space</u> on each joint use pole than Verizon,' but pays pole attachment rates that do not reflect its greater space

[27] As noted above, Verizon previously availed itself of the Commission's regulatory authority over joint use agreements. *See ALLTEL ID* and *ALLTEL Order* (specifically noting Bell Atlantic-Pennsylvania, Inc., had recently changed its name to Verizon Pennsylvania LLC and was a party to this complaint proceeding).

requirements." Verizon MB at 32 (emphasis added) (referencing FirstEnergy's field audit data). The disingenuity of Verizon's arguments is perfectly encapsulated in this argument. Verizon argues that FirstEnergy is not paying rates reflecting the space it occupies, which is essentially an argument that FirstEnergy is paying rates that do not reflect the fully allocated costs of service. However, Verizon specifically seeks to pay FirstEnergy an incremental cost-based rate and asserts that this is the sole just and reasonable rate. Furthermore, Verizon only makes this argument by relying on the actual field data gathered by FirstEnergy, *see* Verizon MB at 32, n.168 (citing FirstEnergy St. 7-R), which it subsequently argues does not reflect actual conditions and does not rebut the FCC's presumptive inputs into its rate formulas. *See* Verizon MB at 51-53. These duplicitous arguments evoke the old adage that "what is good for the goose is good for the gander." If it is reasonable for FirstEnergy to pay Verizon rates that reflect the fully allocated costs of service under the Joint Use Agreements, it is reasonable for Verizon to also pay rates that reflect the fully allocated costs of service; and, similarly, if it is reasonable for Verizon to rely on FirstEnergy's field data regarding the amount of space Verizon and FirstEnergy occupy on each other's poles, then it is reasonable for the Commission to rely on FirstEnergy's field data for purposes of determining inputs into any rate calculations. Verizon simply wants, but cannot have, it both ways, and its arguments should be rejected.

e. FirstEnergy Conclusively Rebutted The New Telecom Rate Presumption.

Verizon baldly asserts "FirstEnergy Did Not Try To Rebut the New Telecom Rate Presumption." Verizon MB at 25. Verizon even goes one step further and asserts that FirstEnergy only argued that the new telecom rate presumption does not apply in this case and "did not even argue in the alternative that it could rebut the presumption." Verizon MB at 25. These statements are intentionally deceptive.

At the outset, Verizon is correct that FirstEnergy did argue that the new telecom rate presumption does not apply to this case. *See, e.g.*, FirstEnergy MB at Sections V.A.3.b. and V.A.3.c.i.-ii. FirstEnergy also repeatedly argued in its Answer, its testimony, and its Main Brief, that, even if this presumption applied, which it does not, FirstEnergy had rebutted the presumption by demonstrating that (a) Verizon was not comparably situated to its competitors and (b) the Joint Use Agreements at issue fundamentally differ from the agreements between Verizon's competitors and FirstEnergy. *See* Answer at Section I.F.1; *see, e.g.*, FirstEnergy St. 1-R, Section VII and *see generally* FirstEnergy St. 1-RJ; and *see also* FirstEnergy MB at Section V.A.3.c.iii. Verizon's false and deceptive statements in its Main Brief should signal to the Commission that it cannot trust any of Verizon's claims and arguments on this issue, and the Commission should outright reject Verizon's arguments for this reason alone.

Moreover, FirstEnergy went to great lengths in discovery, its testimony, and its Main Brief[28] to rebut the new telecom rate presumption. Indeed, FirstEnergy identified and quantified,[29] or attempted to quantify,[30] numerous substantial and material competitive benefits that Verizon receives under the Joint Use Agreements compared to competing third-party attachers. These advantages are evident on the face of the agreements and under their plain terms.[31] For example:[32]

- The fundamental purpose for the parties to enter into these agreements differs. The 1986 Penelec / Bell Telephone Agreement evidences a desire to cooperate to minimize duplicative plant and costs (*see* Verizon Exhibit SCM-2 (VZ000320)) and the FirstEnergy

[28] *See* FirstEnergy MB at Section V.A.3.c.iii.
[29] (FirstEnergy St. 1-R, pp. 31-37.)
[30] (FirstEnergy St. 1-R, pp. 34, 39-41.)
[31] (FirstEnergy St. 1-RJ, pp. 35-37.)
[32] *See also* FirstEnergy Exhibit SFS-15. Although FirstEnergy may have inadvertently omitted Exhibit SFS-15 from the Joint Motion to Admit Stipulated Items into Record of Proceeding, Exhibit SFS-15 constitutes a demonstrative exhibit designed to make the comparison of evidence already admitted (i.e., certain of the joint use agreements themselves) easier to conduct. Furthermore, as an aid to the ALJ and the Commission, FirstEnergy attaches hereto copies of the 1986 agreement between Pennsylvania Electric Company and The Bell Telephone Company of Pennsylvania (Verizon Exhibit SCM-2 (VZ00318-VZ00334) and the form pole attachment agreement between FirstEnergy and a third-party attacher (Verizon Exhibit SCM-13 (VZ00487-VZ00503)) as **Appendix A** and PROPRIETARY **Appendix B**.

Third-Party Pole Attachment Agreement is the sale of a service from the pole owner to an attacher (*see* PROPRIETARY Verizon Exhibit SCM-3 (VZ000489)).

- The 1986 Penelec / Bell Telephone Agreement is broader in scope and not limited to the poles that an attacher must apply for, and obtain, consent to attach to under the FirstEnergy Third-Party Pole Attachment Agreement. Third party attachers are not guaranteed access to any poles that are not the subject of an approved application. (*Compare* Verizon Exhibit SCM-2 (VZ000320) *with* PROPRIETARY Verizon Exhibit SCM-3 (VZ000491).)[33]

- The 1986 Penelec / Bell Telephone Agreement historically conferred a material advantage to Verizon by reserving 3 feet of space for its attachments. (*See* Verizon Exhibit SCM-2 (VZ000322).) A third-party attacher is not provided a similar benefit under the FirstEnergy Third-Party Pole Attachment Agreement. (*See* PROPRIETARY Verizon Exhibit SCM-3 (VZ000491).)[34]

- The FirstEnergy Third-Party Pole Attachment Agreement requires an attacher to pay for the cost of replacing a pole (PROPRIETARY Verizon Exhibit SCM-3 (VZ000493)); the 1986 Penelec / Bell Telephone Agreement does not, thereby enabling Verizon to avoid costs that other attachers must pay with respect to FirstEnergy-owned poles.

- The FirstEnergy Third-Party Pole Attachment Agreement requires an attacher to be subject to inspection and pay for the costs of such inspection. (*See* PROPRIETARY Verizon Exhibit SCM-3 (VZ000493).) Verizon is not subject to these inspection fees under the Joint Use Agreements.[35]

- The FirstEnergy Third-Party Pole Attachment Agreement subjects an attacher to an unauthorized attachment fee. (*See* PROPRIETARY Verizon Exhibit SCM-3 (VZ000493).) Verizon is not subject to such fees under the Joint Use Agreements.

- Under the 1986 Penelec / Bell Telephone Agreement, Verizon may purchase an abandoned pole from FirstEnergy. (*See* Verizon Exhibit SCM-2 (VZ000329).) CLEC and cable company attachers are not provided a similar contractual right by the FirstEnergy Third-Party Pole Attachment Agreement. (*See* PROPRIETARY Verizon Exhibit SCM-3 (VZ000494).)

- Under the FirstEnergy Third-Party Pole Attachment Agreement, a licensee is required to pay a license preparation and administration fee. (*See* PROPRIETARY Verizon Exhibit SCM-3 (VZ000498).) Verizon pays no such fee under the Joint Use Agreements.[36]

- The method of calculating compensation under each agreement is completely different.

[33] This difference was recognized as a benefit in the *AT&T v. FPL Order* at paragraph 14.
[34] This difference was recognized as a benefit in the *AT&T v. FPL Order* at paragraph 14.
[35] This difference was recognized as a benefit in the *AT&T v. FPL Order* at paragraph 14.
[36] This difference was recognized as a benefit in the *AT&T v. FPL Order* at paragraph 14.

Furthermore, to the extent that FirstEnergy did not identify a specific dollar amount with each benefit, this is because FirstEnergy was not able to access much of the financial information necessary to quantify the cost-savings Verizon experiences under the Joint Use Agreements. (*See, e.g.*, FirstEnergy St. 1-R, pp. 39-41 (discussing Verizon's repeated failures to provide supporting data for the assertions made in the Complaint and its direct testimony).) Indeed, for FirstEnergy to conduct an analysis of *Verizon's cost savings* relative to its competitors, FirstEnergy necessarily must obtain information regarding *Verizon's costs*. Like its testimony, Verizon's Main Brief flouts its responsibility to track the costs it incurs to attach to poles and cooperate in the Commission's discovery process. *See* Verizon MB at 51 ("[D]espite 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…). FirstEnergy has already explained why Verizon's actions should be rejected.

Although Verizon asserts that FirstEnergy did not rebut the new telecom rate presumption, it goes to great lengths to undercut all of the evidence FirstEnergy offered to rebut this presumption. *See* Verizon MB at 38-51. FirstEnergy will not repeat the litany of evidence and arguments it offered on this point, which are fully set forth in Section V.A.3.c.iii. of its Main Brief and the testimony cited therein. However, there are several points raised in Verizon's Main Brief to which correction or clarification is necessary.

Verizon's attempt to argue that it is disadvantaged as an attacher to FirstEnergy's poles relative to competing attachers to FirstEnergy's poles due to its status as a pole owner is irrelevant and should be rejected. Verizon MB at 39-41. This assertion completely disregards the FCC's discussion of the comparison necessary to rebut the presumptions established by the *2018 Pole Attachment Order*. The FCC specifically explained that the relevant comparison is whether "…an

incumbent LEC will receive comparable pole attachment rates, terms, and conditions as a similarly-situated telecommunications carrier or a cable television system (telecommunications attachers," *see 2018 Pole Attachment Order* ¶ 123 (emphasis added)), and that it "…should presume that incumbent LECs are similarly situated to other telecommunications attachers and entitled to pole attachment rates, terms, and conditions that are comparable to the telecommunications attachers," *see id.* ¶ 126 (emphasis added). Moreover, the entire theory of competitive neutrality that Verizon attempts to espouse is fundamentally based on the historical advantages conferred to pole-owning utilities (such as Verizon) as compared to non-pole-owning attachers.

Verizon further argues that it is disadvantaged under the Joint Use Agreements because Congress has not provided Verizon with a statutory right of access to FirstEnergy's poles. Verizon MB at 41. This comparison amounts to the absurd argument that Congress has asserted bargaining power over Verizon in its private negotiation of the Joint Use Agreements with FirstEnergy and should be rejected.

Verizon further argues that the advantages identified by FirstEnergy are not advantages because they "have no impact on FirstEnergy's bottom line." Verizon MB at 43. This argument should be rejected as a non-sequitur. The question is whether Verizon is advantaged, i.e., whether its bottom line is affected by avoided costs or additional earnings; not whether FirstEnergy is advantaged.

Again, Verizon repeats the charade that FirstEnergy seeks to maintain the existing rates so it "can continue to profit from rate disparities in Pennsylvania." Verizon MB at 44. FirstEnergy has repeatedly explained that "the Companies do not profit from providing pole attachment services to Verizon and other third parties as one hundred percent of the joint use revenues offset

the rates to be paid by electric customers." (*See, e.g.*, FirstEnergy St. 3-R, pp. 3-4.) FirstEnergy itself obtains no benefit from the rates it charges Verizon under the Joint Use Agreements; however, Verizon's request will, in fact, harm FirstEnergy's ratepayers by ultimately increasing the electric utility rates that they pay. *See* FirstEnergy MB at pp. 48-49.

Finally, Verizon asserts that the competitive advantages identified by FirstEnergy in its rejoinder testimony, which were recognized to constitute benefits by the FCC in the *AT&T v. FPL Order*, do not constitute benefits because the FCC's Enforcement Bureau only gave the parties additional time to settle the case, and since the parties did not settle, "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." Verizon MB at 49. This argument is immediately suspect because any settlement discussions and the results thereof, do not constitute public information that is available to FirstEnergy or the Commission. As such, it appears that Verizon may be utilizing confidential (and possibly privileged) information that is not a part of the record in this proceeding to attempt to undercut the FCC's explicit statement that "AT&T receives significant benefits under the JUA not afforded competitive LECs and cable attachers, and that it therefore is entitled to the Old Telecom Rate, and not the New Telecom Rate." *AT&T v. FPL Order* ¶ 14. Verizon's argument should, therefore, be rejected.

For all of these reasons, and the reasons more fully explained in FirstEnergy's Main Brief, FirstEnergy has fully and completely rebutted the presumption that Verizon is comparably situated to its competitors. Verizon attaches to FirstEnergy's poles under fundamentally different agreements from its competitors and, moreover, the Joint Use Agreements substantially and

materially advantage Verizon in its ability to attach to FirstEnergy's poles relative to its competitors. As such, Verizon's Complaint should be dismissed.

f. The FCC Has Never Required The New Telecom Rate To Be Inserted Into An Existing Joint Use Agreement As The Exclusive Just And Reasonable Rate.

Finally, despite its exclusive reliance on FCC precedent, Verizon fails to recognize that the FCC has only issued three decisions regarding the rates an ILEC pays an electric utility under joint use agreements ever. *See In the Matter of BellSouth Telecommunications, LLC d/b/a/ AT&T Florida v. Florida Power and Light Company*, Proceeding No. 19-187; Bureau ID No. EB-19-MD-006 (Memorandum Opinion and Order adopted May 20, 2020) ("*AT&T v. FPL*"); *Verizon Va. v. Va. Elec. & Power Co.*, Proceeding No. 15-190; Bureau ID No. EB-15-MD-006, 32 FCC Rcd 3750, 2017 FCC LEXIS 1304 (2017) ("*Dominion Order*"); *Verizon Fla. v. Fla. Power & Light Co.*, Docket No. 14-216; File No. EB-14-MD-003, 2015 FCC LEXIS 441, 30 FCC Rcd 1140 (2015) ("*FPL 2015 Order*"). Importantly:

- **None** of these decisions involved a non-terminated agreement, or agreement that the ILEC genuinely lacked the ability to terminate that pre-dated the *2011 Pole Attachment Order*. *See AT&T v. FPL* ¶ 11; *Dominion Order* ¶ 12; *FPL 2015 Order*.

- **None** of these decisions concluded that the new telecom rate was the appropriate rate and ordered the parties to insert this rate into the agreement at issue. *See AT&T v. FPL* ¶¶ 15, 20; *Dominion Order* ¶ 22 ("We encourage the parties to negotiate an agreed-upon rate that is consistent with the guidance provided herein…we do not establish a new pole attachment rate…); *FPL 2015 Order* ¶ 27 (dismissing Verizon's complaint without prejudice).

- **None** of these decisions made a finding regarding a specific refund amount calculation. *See AT&T v. FPL* ¶¶ 15, 20; *Dominion Order* ¶ 29; *FPL 2015 Order* ¶ 27 (dismissing Verizon's complaint without prejudice).

Verizon's arguments and the relief it seeks are completely novel and unsupported by any prior FCC decision.[37] Therefore, and for the reasons more fully explained in FirstEnergy's Main Brief,

[37] The novelty of Verizon's requests for relief is additionally important for the reasons stated in the *2019 Final Rulemaking Order*. Specifically, the Commission indicated it would not be bound by FCC precedent in matters

Verizon has failed to demonstrate that it is entitled to the new telecom rate, even under the FCC's precedent.

B. Verizon Has Failed To Demonstrate That The New Telecom Rate Should Be Inserted Into The Existing Joint Use Agreements.

Even if Verizon demonstrates that the rates it pays FirstEnergy under the existing Joint Use Agreements are unjust and unreasonable—which it has not done—it has failed to show that the rate methodology used in the Joint Use Agreements should be revised to reflect the new telecom rate. FirstEnergy fully explained why the existing rates Verizon pays under the Joint Use Agreements should be maintained in its Main Brief. *See* FirstEnergy MB at Section V.B. In summary, Verizon failed to demonstrate that the rates it pays are unjust and unreasonable and, therefore, the Commission is without authority to prescribe new "just, reasonable, and equitable obligations, terms, and conditions" under Section 508 of the Public Utility Code to determine new "just and reasonable rates" under Section 1309 of the Public Utility Code, or both. 66 Pa.C.S. §§ 508 and 1309. FirstEnergy MB at 83-84. In addition, FirstEnergy demonstrated that, even if the Commission determined to change the rates Verizon pays under the Joint Use Agreements, Verizon's rate calculations were not credible and could not serve as the basis for new rates. FirstEnergy MB at Section V.B.2. FirstEnergy also demonstrated that the only alternative rate that could be reasonably and rationally inserted into the existing Joint Use Agreements is the old telecom rate calculated using the inputs FirstEnergy developed using actual field data. FirstEnergy MB at Section V.B.1.

raised "have not yet been adjudicated on the federal level" or in "instances where an interpretation by the FCC, which is charged with developing a nationwide scheme, may not align with Pennsylvania interests." *2019 Final Rulemaking Order* at 50. As the only three FCC orders addressing the rates to be paid by an ILEC under a joint use agreement neither resolved nor addressed the facts and issues raised in this proceeding, the Commission cannot and should not exclusively rely on FCC authority to determine this case.

Verizon's Main Brief commits three fatal errors with respect to this issue, which FirstEnergy addresses below. First, Verizon unlawfully and improperly attempts to reverse the burden of proof by arguing that FirstEnergy must justify the existing rates or that the just and reasonable rate is the new telecom rate. Verizon MB at 51. Second, Verizon fails to address the applicability of the old telecom rate. And third, Verizon unavailingly criticizes FirstEnergy's calculation of the old telecom rates using actual field data but presents no contrary data of its own. Verizon MB at 53-54. For all of these reasons, and the reasons more fully explained in FirstEnergy's Main Brief, Verizon has failed to demonstrate that the new telecom rate should be inserted into Joint Use Agreements.

1. Verizon Unlawfully Attempts To Shift The Burden Of Proof.

At the outset, FirstEnergy notes that Verizon boldly and improperly attempts to shift the burden of proof regarding the rate methodology used in the Joint Use Agreements to FirstEnergy. Verizon argues that "[b]ecause FirstEnergy failed to justify its rental rates, the just and reasonable rate is a properly calculated new telecom rate…" Verizon MB at 51 (emphasis added). Verizon's attempt to shift the burden of proof should be rejected

As explained above and in FirstEnergy's Main Brief, it is axiomatic that the party seeking affirmative relief from the Commission, i.e., a complainant, bears the burden of proof. 66 Pa.C.S. § 332(a). FirstEnergy is not the Complainant in this proceeding and, therefore, does not have the burden of proof. Conversely, Verizon is the Complainant and does have the ultimate burden of proof.

Once again, Verizon's erroneous position appears tethered to its failure to cite to any provision of the Public Utility Code and the dearth of Pennsylvania case law included in its Main Brief. Verizon simply rests on its assertion that it is entitled to a presumption that the rates it pays is unjust and unreasonable. *See, e.g.*, Verizon MB at 1. However, the presumption only shifts the

"burden of going forward"; the burden of proof always remains on a Complainant. *Replogle v. Pennsylvania Electric Company*, 54 Pa. PUC 528, 1980 Pa. PUC LEXIS 20 (Order dated Oct. 9, 1980); *see also Waldron v. Philadelphia Electric Company*, 54 Pa. PUC 98, 1980 Pa. PUC LEXIS 90 (Order dated March 14, 1980). Moreover, a presumption is not evidence and, once rebutted, it per se vanishes. *Pa. Pub. Util. Comm'n v. West Penn Power Company*, Docket No. R-850220, 1987 Pa. PUC LEXIS 316, at *17 (Order entered April 17, 1987) (citing *Sowizral v. Hughes*, 333 F.2d 829 (3rd Cir. 1964); *Johnstone v. Reading Co.*, 284 F.2d 71 (3rd Cir. 1957)). Verizon is not, and was never, entitled to the presumption it seeks and, at any rate, FirstEnergy rebutted the presumption. *See* FirstEnergy MB at Section V.3.b.-c. Therefore, Verizon is simply incorrect that FirstEnergy bears the burden of proof with respect to any issue in this case, and its attempt to shift the burden of proof to FirstEnergy should be denied.

2. Verizon Has Not Demonstrated, And Cannot Demonstrate, That The Incremental Cost-Based New Telecom Rate Should, Or Rationally Could, Be Inserted Into The Existing Joint Use Agreements.

Verizon argues that "[b]ecause 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." Verizon MB at 51. Verizon then asserts that it has properly calculated the new telecom rates, and that these rates should be inserted into the existing Joint Use Agreements. Verizon MB at 51-53.

FirstEnergy explained in its Main Brief that the Joint Use Agreements are fundamentally cost-sharing agreements that were negotiated on the basis of Verizon and FirstEnergy sharing in the fully allocated costs of owning a given pole. *See* FirstEnergy MB at Section V.A.1.b. The new telecom rate, however, is an incremental cost-based rate, which eliminates the allocation of common costs associated with common space; it is not a fully allocated cost-based rate. (FirstEnergy St. 1-R, p. 14.) The problem with Verizon's request is it not only seeks to maintain

pole ownership rights and the Joint Use Agreements' existing terms and conditions, but also inserts an incremental cost based rate into agreements that are fundamentally not designed around the sharing of incremental costs. Thus, Verizon seeks to avoid the cost-of-service based cost-sharing mechanisms that reflect the costs incurred by each pole-owner to own a pole under the Joint Use Agreements. This result is neither reasonable nor rational and should be rejected.

Verizon further takes issue with FirstEnergy's rate calculations and asserts that Verizon has "properly calculated" the new telecom rate. Verizon MB at 51-53. However, FirstEnergy explained the critical flaws in Verizon's rate calculations in its Main Brief, which show that Verizon's rate calculations are not credible and cannot support any finding of fact in this proceeding. FirstEnergy MB at Section V.B.2. The "three main differences" identified by Verizon in its Main Brief hinder, rather than help, its rate calculations.

First, Verizon asserts that the "weighted average cost of debt and equity is the proper cost of capital figure" when calculating the new telecom rate and claims that FirstEnergy's " 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." Verizon MB at 52. However, FirstEnergy explained the flaw with this assertion by Verizon; Verizon is using the as-filed costs of capital set forth in the initial filing by each of the FirstEnergy EDCs in their last rate cases. (*See* FirstEnergy St. 1-R, p. 20.) Every one of those rate cases settled pursuant to a "black box settlement" that does not establish an actual cost of capital to calculate the settled-upon revenue requirement.[38] Verizon's attempt to use the as-filed cost of capital from a case where the ultimate revenue requirement is set forth in a "black box settlement" is flawed and further highlights its willingness to ignore

[38] *See* Docket Nos. R-2014-2428745 (Met-Ed 2014), R-2014-2428743 (Penelec 2014), R-2014-2428744 (Penn Power 2014), R-2016-2537349 (Met-Ed 2016), R-2016-2537352 (Penelec 2016) and R-2016-2537355 (Penn Power 2016).

Pennsylvania ratemaking concepts to obtain a more favorable rate. Thus, Verizon's argument should be rejected.

Second, Verizon asserts that the FCC's presumptive 15 percent input for the appurtenance factor "must be used." Verizon MB at 53. However, FirstEnergy based its appurtenance factor upon the actual conditions existing within its service territories. *See* FirstEnergy MB at V.B.1. As such, the FCC's presumptive input based on national conditions, rather than actual, local conditions within FirstEnergy's service territories, was rebutted and cannot credibly be used. Importantly, Verizon presented no evidence at all of local conditions that demonstrates FirstEnergy's appurtenance factor calculation is not credible. Verizon merely asserts that FirstEnergy's appurtenance factor calculation should be rejected without presenting any evidence to the contrary. *See* Verizon MB at 52 (citing no record evidence of data collected by Verizon to calculate the appurtenance factor).

Third, Verizon takes umbrage with FirstEnergy's field audit and the actual data reflecting pole height, space occupied, unusable space, and average number of attaching entities. Verizon MB at 52-53. Verizon specifically argues that FirstEnergy's field audit was "motivated by litigation" and is not reliable due the sample size and certain alleged errors. Verizon MB at 53. None of these criticisms undermine FirstEnergy's field audit and should be rejected.

Verizon's assertion that FirstEnergy's field audit was motivated by litigation completely lacks merit. The timing of the field audit does not matter, because it is the only evidence of record regarding the actual conditions existing in FirstEnergy's territories. Moreover, Verizon's assertion that the field audit is not reflective of prior years' conditions is an unsupported conclusory statement. Verizon MB at 53. Verizon presented no evidence regarding actual conditions on

FirstEnergy's poles during 2019 and 2020 and no evidence regarding actual conditions for prior years.

Furthermore, Verizon's attempt to nit-pick and allege that "errors" occurred in the field audit is disingenuous and absurd. FirstEnergy explained in its Main Brief:

> Verizon's criticisms of FirstEnergy's field audit should be rejected. (*See* Verizon St. 1.1, pp. 51-59; Verizon St. 2.1, pp. 21-29; Verizon St. 3.1, pp. 35-40.) FirstEnergy explained that any perceived errors noted by Verizon do not render the audit unreliable. As explained by Mr. Scott Carlin, the "incontrovertible fact is that the validity of the sample, including all attributes verified, is substantially above the industry-accepted standard for accuracy." (FirstEnergy St. 6-RJ, p. 4.) Moreover, "even after counting the actual alleged errors identified by Verizon, the sample still has a 99.30% accuracy rate." (FirstEnergy St. 6-RJ, pp. 4-5.)

FirstEnergy MB at 86. Indeed, Verizon takes issue with a field audit that has an accuracy rate of 99.30%, which exceeds every benchmark of statistical reliability. Essentially, Verizon takes issue with FirstEnergy not scoring 100% on a test, where a 99.3% is still an A+ grade.

For all of these reasons, and the reasons more fully explained in FirstEnergy's Main Brief, Verizon's rate calculations are not credible, and Verizon has not justified the insertion of the new telecom rate into the existing Joint Use Agreements. FirstEnergy conclusively demonstrated that within the FirstEnergy EDCs' territories: (a) the actual average pole height exceeds the FCC presumption of 37.50 and ranges from 40.11-43.23 feet; (b) the actual average space occupied by each attacher exceeds the FCC presumption of 1 foot and ranges from 1.29-1.38 feet; (c) the number of attaching entities is below the FCC presumption of 5 and ranges from 2.96-3.01; and (d) the actual average appurtenance factor differs from the FCC presumption of 15% and ranges from 14.23% to 15.23%. FirstEnergy MB at 85. Therefore, to the extent the Commission adopts the old telecom rate, FirstEnergy's actual and unrebutted inputs should be used.

3. Verizon Has Failed To Demonstrate That It Is "Entitled" To The Old Telecom Rate.

Verizon has similarly failed to carry its burden of proof to show that the old telecom rate should be inserted into the existing Joint Use Agreements. Under Pennsylvania law, Verizon must make a threshold showing that the existing rate it pays under the Joint Use Agreements is unjust and unreasonable before the Commission can revise the rate; as explained above, it has not done so. *See* Section IV.A.1. *supra*. Furthermore, the old telecom rate does not allocate an equal share of common costs associated with common space among the pole owner and attachers and, therefore, conflicts with the Commission's directives in the *NEPTC Order*. *See* Section IV.A.1.d. Finally, as with the new telecom rate, Verizon was required to terminate the Joint Use Agreements before it filed a Complaint seeking to revise the rates; it did not do so and, therefore, is entitled to no revision of the rates. *See* Section IV.A.2.b. *supra*.

4. FirstEnergy Demonstrated That, If The Commission Decides To Revise The Rates Verizon Pays Under The Joint Use Agreements, The Old Telecom Rate Calculated By FirstEnergy Should Apply.

To the extent, however, that the Commission determines that the existing rates Verizon pays under the Joint Use Agreements rates are unjust and unreasonable, or sets new rates based on policy grounds (assuming it has the authority to do so), the Commission should adopt the old telecom rate as calculated by FirstEnergy. FirstEnergy MB at Section V.B.1. Importantly, the old telecom rate constitutes a middle ground between the existing rates and the new telecom rate and is based, in part, on fully allocated cost principles. Therefore, the old telecom rate could rationally be applied to the existing Joint Use Agreements.

Despite the fact that FirstEnergy raised this argument in its testimony (*see* FirstEnergy St. 1-R, pp. 15-17), Verizon does not seriously address the potential applicability of the old telecom rate other than to argue that it established a "cap" if FirstEnergy rebuts the FCC's presumptions,

and assert that it "properly calculated" the old telecom rates. *See, e.g.*, Verizon MB at 16-17. Importantly, however, Verizon's calculations of the old telecom rates, like its calculations of the new telecom rates, rely upon the FCC's presumptive inputs and a fundamentally flawed cost of capital. *See* Section IV.B.3. *supra*; *see also* FirstEnergy MB at Sections V.B.1-2. On the other hand, FirstEnergy's calculations of the old telecom rate use inputs based on unrebutted evidence—and indeed the only evidence—of the actual conditions existing in the service territories of the FirstEnergy EDCs. *See* Section IV.B.3. *supra*; *see also* FirstEnergy MB at Sections V.B.1.

Moreover, while the new telecom rate is completely divorced from the principle of parties equally sharing the common costs of common space set forth in the *NEPTC Order*, the old telecom rate is at least based upon these principles. The new telecom rate exceeds the percentage of common costs allocated to an electric utility that was rejected in the *NEPTC Order*. *See NEPTC Order*, at *12-13 (rejecting ILEC's proposal to revise the cost allocation methodology under a joint use agreement to require an EDC to bear 80% of the common costs associated with common space). And, although the old telecom rate would require the FirstEnergy EDC's to bear more than an equal share of the common costs of common space, i.e., approximately 55.5% of the common costs (the EDC is directly allocated 1/3 of the common costs, and then all three[39] attaching entities, including the EDC, are allocated 2/3 of the common costs),[40] this number more closely approximates the allocation previously upheld by the Commission. *See NEPTC Order* at *12-13.

For these reasons, and the reasons more fully explained in FirstEnergy's Main Brief, if the Commission determines the existing rates Verizon pays to be unjust and unreasonable it should

[39] It is appropriate to use this number as it is representative of the actual average number of attaching entities in the FirstEnergy EDC's respective territories.

[40] FirstEnergy's share calculated as (1/3 + (1/3 x 2/3)) = 5/9) or approximately 55.5%. The other attaching entities' respective shares would, on average, be 22.2%. As such, Verizon would effectively be allocated approximately 22.2% of the common costs of common space rather than a co-equal share of these costs.

only order the parties to re-negotiate the existing Joint Use Agreements using the old telecom rate calculated by FirstEnergy.

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

FirstEnergy explained in its Main Brief that, any reduction in the joint use rates paid by Verizon, will ultimately decrease the revenues collected by FirstEnergy associated with the joint use network. FirstEnergy presented two, alternative, proposals to address the fact that, as a result of this revenue reduction, until the FirstEnergy EDCs have a base rate case and obtain recovery of any such reductions in revenues, they will be denied a fair rate of return on their investment in the joint use poles. FirstEnergy MB at 90-91. Although Verizon did not address this issue in its Main Brief, FirstEnergy submits that any determination by this Commission that establishes new rates under the Joint Use Agreements should be implemented consistent with one of the proposals in FirstEnergy's Main Brief.

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

Verizon is not entitled to any refunds associated with the rates it paid under the Joint Use Agreements. FirstEnergy MB at Section V.C. As with the rest of Verizon's case, and its other arguments on brief, Verizon's Main Brief fails to cite, let alone address, whether and to what extent the Commission may award refunds under Sections 508 and 1312 of the Public Utility Code. 66 Pa.C.S. §§ 508, 1312. In addition to the reasons more fully explained in FirstEnergy's Main Brief, Verizon's request for refunds should be denied for the additional reasons highlighted below.

1. Section 508 Of The Public Utility Code Precludes Verizon From Receiving Refunds Associated With The Revision Of A Contract.

Verizon's Main Brief makes no reference to, or argument addressing, Section 508 with respect to its request for refunds. As explained in FirstEnergy's Main Brief, the Commission can only provide prospective relief under Section 508 of the Public Utility Code. FirstEnergy MB at Section V.C.1. 66 Pa.C.S. § 508. Section 508 further only provides that any contract changes made by the Commission apply prospectively only, i.e., 30 days after entry of order reforming the contract. 66 Pa.C.S. § 508; *see also Feingold*, 383 A.2d at 793 (recognizing the Commission lacks authority to look backward and award damages under Section 508).

The general contract principles that Verizon asserts apply and govern the Commission's calculation of refunds, in fact, counsel against the award of refunds. As explained in FirstEnergy's Main Brief, Verizon never alleged that FirstEnergy has breached any term of the Joint Use Agreements, including the applicable rates. Any relief granted in this proceeding would be an amendment/reformation of the Joint Use Agreements. Under basic principles of contract law, contract amendments should only apply prospectively. Otherwise, the parties would be denied the basic benefit of their bargain.[41]

Moreover, FirstEnergy notes that the Commission recognized these principles should temper its authority to reform contracts under Section 508 and only do so in a prospective manner. *See ALLTEL ID*, at *39-4, 50-51; *see also ALLTEL Order*, at *23 (confirming that the exercise of termination rights under the agreements was prospective only). Indeed, as explained in the *ALLTEL ID*, the retroactive application of any modifications to a joint use agreement would "have a chilling effect on the willingness of regulated public utilities to enter into contracts" and "would

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

arguably contravene both Federal and Pennsylvania constitutional provisions regarding the impairment of the obligation of contracts and deprivation of property without compensation." *ALLTEL ID*, at *50.

For these reasons, and the reasons more fully explained in FirstEnergy's Main Brief, the Commission cannot revise the Joint Use Agreements on a retroactive basis and Verizon's request for refunds should be denied.

2. Verizon's Completely Fails To Acknowledge Section 1312 Exists And, Ultimately, Controls The Commission's Authority To Calculate And Award Refunds.

Verizon's argument that it is entitled to refunds is ultimately damned by its assertion that the "FCC amended its regulations to provide for refunds extending as far back as the applicable statute of limitations allows." Verizon MB at 56 (citing 47 C.F.R. § 1.1407(a)(3)) (emphasis added). Verizon thereafter goes to great lengths to argue that a general contract law statute of limitations applies and allows the Commission to reach back to 2011 to calculate refunds. *See* Verizon MB at 56-57.

The Public Utility Code clearly and conclusively establishes the applicable statute of limitations. 66 Pa.C.S. § 1312. Not only does Section 1312 establish the applicable statute of limitations for refunds under the Public Utility Code, it is the only provision of the Public Utility Code that authorizes the Commission to award refunds where a public utility has charged rates determined to be unjust and unreasonable. A "general contract" is not at issue in this case; a contract whereunder a public utility charges a "rate" for a "service" which affects the public interest is at issue. FirstEnergy MB at Section V.A.2.a (explain Verizon's Complaint disputes a "rate" charged by FirstEnergy for a "service" under the Joint Use Agreements). As such, Section 1312 of the Public Utility Code is the applicable and controlling statute of limitations for purposes of determining any refunds in this proceeding.

Verizon does not cite, reference or raise a single argument for refunds under Section 1312 of the Public Utility Code. *See, e.g.,* Verizon MB at Section V.C. Its failure to even acknowledge Section 1312 exists, let alone controls the disposition of its request for refunds, cripples its arguments in support of this relief. Therefore, Verizon's request for refunds should be denied and its Complaint dismissed.

3. None Of The FCC Precedent Cited By Verizon Mandated The Award Of Refunds.

In addition to the above-described failings under the Public Utility Code and Pennsylvania law, Verizon's argument that FCC precedent "requires" or "entitles" Verizon to refunds is meritless. Verzion MB at 54-55. Verizon cites to two federal authorities in support of its argument that it is entitled to refunds: (1) the *FPL 2015 Order* and (2) 47 C.F.R. § 1.1407(a)(3) (incorporated by 52 Pa. Code § 77.4(a)). Neither of these authorities entitle Verizon to the refunds it seeks.

The FCC concluded in the *FPL 2015 Order* that Verizon "provided insufficient evidence: (a) to support a finding that the Agreement Rates are unreasonable, and (b) for the Commission to set a just and reasonable rate." *FPL 2015 Order* at ¶ 3. Indeed, without carrying its burden in either of these respects, there was no basis upon which the FCC could award refunds and it did not do so. The *FPL 2015 Order* simply provides no support for Verizon's request for refunds in this case.

Furthermore, 47 C.F.R. § 1.1407(a)(3) explicitly states:

> (a) If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:
>
> …
>
> (3) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition

> established by the Commission, plus interest, consistent with the applicable statute of limitations.

47 C.F.R. § 1.1407(a)(3) (emphasis added). Contrary to Verizon's assertion that Section 1.4107(a)(3) "requires" a refund to be granted, the word "may" is a permissive term that does not require the relief Verizon seeks. Verizon's assertion that the Commission is "required" to grant refunds misrepresents the law and demonstrates its arguments are not credible.

4. None Of The FCC Precedent Cited By Verizon Established A Refund Amount.

Finally, none of the FCC precedent cited by Verizon established a specific refund amount. Therefore, FCC precedent provides no guidance, at all, as to the amount of refunds that can or should be awarded under FCC precedent.

As noted above, the FCC concluded in the *FPL 2015 Order* that Verizon had failed to maintain its burden of proof. The FCC, therefore, declined to make a determination that the rates Verizon paid were unjust and unreasonable and it declined to establish a new rate. *FPL 2015 Order* ¶¶ 3, 25.

The FCC's decision the *Dominion Order* is similarly unsupportive of Verizon's case for three reasons. First, unlike in this Complaint, the *Dominion Order* involved a dispute regarding two "new" agreements. *Dominion Order* at ¶ 12. Importantly, the two agreements were respectively executed in May and August 2011, *id.* at ¶ 5, and the FCC concluded that:

> due to the unique circumstances presented here, we conclude that the Joint Use Agreements should be considered "new" agreements, notwithstanding their pie-Pole Attachment Order effective date, because (1) they were executed several months after the Commission released the Pole Attachment Order, thus affording both parties the opportunity to assess their rights and responsibilities under that order and (2) they were not simply extensions of long-standing agreements…

Id. at ¶ 12 (emphasis added). The Joint Use Agreements at issue in this proceeding were last re-negotiated in 2009 and are, in fact, extensions of long-standing agreements. Second, although the *Dominion Order* concluded that refunds associated with these new agreements were warranted; it did not establish a dollar amount for such refunds. Rather, it ordered "the parties to meet and confer in an effort to resolve the remaining disputes" including the determination of "an agreed-upon rate that is consistent with the guidance provided herein." *See id.* at ¶¶ 22, 29. Indeed, the FCC explicitly stated, "we do not establish a new pole attachment rate at this time," which is a necessary determination before refunds can be properly calculated and awarded.

For the reasons more fully explained above, neither of these FCC orders support Verizon's assertion that it is entitled to a refund. Therefore, and for the reasons more fully explained in FirstEnergy's Main Brief, Verizon's request for refunds should be denied and its Complaint should be dismissed.

D. Motion(s) To Strike.

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

At this time, FirstEnergy is not moving to strike any portion of Verizon's Main Brief. However, to the extent that Verizon moves to strike any portion of FirstEnergy's Main Brief, FirstEnergy fully reserves its rights to answer such motion. In addition, FirstEnergy also reserves its rights to move to strike any portion of Verizon's Reply Brief which addresses facts or issues that (a) are outside the scope of the parties' testimony and exhibits, (b) are outside the scope of the issues raised in FirstEnergy's Main Brief, and/or (c) should have been raised in Verizon's Main Brief. Moreover, FirstEnergy submits that Verizon has waived its right to present any arguments under the Public Utility Code in its Reply Brief because it could have, and should have, raised such arguments in its Main Brief. Moreover, FirstEnergy submits that Verizon had a full and fair

opportunity to raise arguments under the Public Utility Code in its Main Brief; however, it chose not to do so. Therefore, to the extent Verizon attempts to raise them in its Reply Brief, FirstEnergy submits such arguments should be stricken or FirstEnergy must be provided the opportunity to respond to those arguments or its due process rights will have been violated.

V. CONCLUSION

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

Respectfully submitted,

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Date: August 14, 2020

Attorneys for Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company.

Appendix A

Exhibit 7

GENERAL AGREEMENT

FOR THE

JOINT USE OF POLES

BETWEEN

PENNSYLVANIA ELECTRIC COMPANY

AND

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA

(EFFECTIVE APRIL 1, 1986)

INDEX

This Agreement made this 12th day of May 1986 between The Bell Telephone Company of Pennsylvania, a public utility corporation of the Commonwealth of Pennsylvania, a Pennsylvania corporation having its principal office in the City and County of Philadelphia, hereinafter called Bell, and Pennsylvania Electric Company, a public utility corporation of the State of Pennsylvania, hereinafter called Penelec, a Pennsylvania Corporation having its principal office in the City of Johnstown, County of Cambria, Pa.

WITNESSETH:

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

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, the parties hereto, for themselves, their successors and assigns, do hereby covenant and agree as follows:

ARTICLE I

SCOPE OF AGREEMENT

A. This Agreement shall be in effect in all of the territory of the Commonwealth of Pennsylvania in which both parties to this agreement now or may hereafter operate in common, and shall cover all poles of each party in the territory, when said poles are brought hereunder in accordance with the procedures hereinafter provided.

B. Each party reserves the right to exclude from joint use (1) poles which, in Owner's judgment, are necessary for its own sole use; (2) poles which carry, or are intended to carry, circuits of such character that in the Owner's judgment the proper rendering of its service now or in the future makes joint use of such poles undesirable; and (3) poles where, in the Owner's judgment, joint use would not prove economical.

ARTICLE II

DEFINITIONS

For the purpose of this Agreement, the following terms shall mean:

ATTACHMENTS means all wires, cables, appliances, apparatus, fixtures and appurtenances of every description now or hereafter used on poles of either party in its business.

JOINT USE POLE means a pole which under this Agreement is occupied by attachments of both parties at the time of execution of this Agreement or thereafter and includes steel I-Beam stub poles.

LICENSEE means the party to whom the right of joint use of any pole has been granted by the Owner.

NORMAL SPACE is the following described space on a joint use pole for the use of each party, respectively, except that attachments of one party may be located in the space normally set aside for the other party so long as such attachments are made in accordance with Article III - Specifications:

1. A space of nineteen (19) feet above the ground line shall be for the common use of both parties. The next three (3) feet shall be designated telephone space, above which shall be the standard separation space as established by the National Electrical Safety Code in effect at the time the pole became a joint use pole between communication facilities and power facilities. The remaining space to the top of the pole shall be designated power space.

OWNER means the party having title to and full ownership of any pole.

ISOLATED SERVICE NEUTRAL is a customer service neutral (electrical) which is not interconnected with the common neutral (electrical) of the primary distribution circuit.

ARTICLE III

SPECIFICATIONS

Each of the parties hereto shall construct and maintain its jointly used poles and its attachments on all jointly used poles in accordance with the applicable edition of the National Electrical Safety Code, except where the lawful requirements of public authorities may be more stringent, in which case the latter will govern.

Any existing joint use construction of the parties completed prior to this agreement, which does not conform to these requirements shall be brought into conformity therewith as soon as practicable.

ARTICLE IV

ADMINISTRATIVE COMMITTEE

A. An Administrative Committee shall be established consisting of four members, two from each company. It shall be the responsibility of the Administrative Committee to interpret the Agreement, arbitrate questions, and to resolve problems arising from the operation of the Agreement. The Administrative Committee shall also be responsible for:

1. Establishing such applications and permitting forms and procedures required in the licensing and recording of joint pole usage.

2. Recalculation of pole compensation rates as prescribed in Article XVI.

3. Publication and maintenance of any interpretations, practices, and administrative procedures necessary to implement the administration of the Agreement, consistent with the terms hereof.

4. Establishing a schedule of rates for billing purposes.

B. The Administrative Committee will meet as often as required but must meet at least once annually. The Chairmanship of the Committee shall be rotated between the companies on a yearly basis.

ARTICLE V

ESTABLISHING JOINT USE OF NEW POLES

A. Whenever either party requires new pole facilities, either as an additional pole, a new pole line, or an extension of any existing pole line, where neither party has existing pole facilities, it shall promptly notify the other party's local representative, in writing, in order to determine the desirability of joint use. The other party shall promptly respond. Both parties shall make a good faith effort to give advance oral notification.

B. If joint use is agreed upon, the parties shall cooperate in designing the proposed construction to meet the needs of both parties. Ownership of new pole structures will be determined by mutual agreement. The party which is to become Licensee will submit to Owner an application for joint use in such form and manner as may be agreed upon and established by the Administrative Committee. An authorized representative shall signify his authorization of the proposed joint use by promptly signing and returning the application as soon as the new pole structure is in place, the signed document thereby constituting a license for joint use.

C. If joint use cannot be agreed upon, the parties shall cooperate to determine the most practical and economical method of effectively providing separate lines.

ARTICLE VI

ESTABLISHING JOINT USE OF EXISTING POLES

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 in such form and manner as may be agreed upon and established by the Administrative Committee. The Owner shall signify his authorization of the proposed joint use by promptly signing and returning the application, it thereby constituting a license for joint use. Either party has permission to attach to the other party's poles, without prior notification except those excluded from joint use as determined by the company representatives and only if the pole is of sufficient height, strength, and proper clearances to accommodate joint use provided, however, that written application for joint use shall be made to the Owner within ten (10) working days thereafter.

B. If the pole is available for joint use but requires rearrangement of the Owner's facilities, the Owner will cooperate to make such rearrangements as may be necessary to allow the existing pole to be brought into joint use. Where the pole is inadequate and such rearrangement is not reasonable, the pole shall be replaced. Each party shall be responsible for placing, transferring and rearranging its own facilities.

C. The parties hereto recognize that projects by either party which require large numbers of pole replacements could significantly affect the financial and manpower capacities of the other party. Each, therefore, agrees to give maximum notice of any such plans so as to provide sufficient interval for preparations. Neither party, as Owner, is obligated by the Agreement to replace poles for Licensee in such numbers as would be, in Owner's judgment, prejudicial to Owner.

D. A disagreement which cannot be resolved by the supervisors of each party shall be referred to the Administrative Committee.

ARTICLE VII

JOINT USE - ADDITIONAL REQUIREMENTS

A. A cooperative effort shall be made by both parties to fully utilize an existing joint use pole by adjusting facilities before a pole replacement is made. Whenever a joint pole replacement is required, the location of the new pole shall be mutually acceptable.

B. When a joint use pole must be replaced due to requirements of Owner, Owner shall notify Licensee, in writing, of the pending replacement. Licensee shall promptly respond, in writing, stating whether or not any special considerations are desired. Both parties shall make a good faith effort to give advance oral notification.

C. When a joint use pole must be replaced due to requirements of Licensee, Licensee shall request Owner, in writing, to replace such pole. If Owner cannot make such replacement, then Licensee may, with Owner's permission, make the replacement and Owner will transfer its facilities. Owner will retain ownership unless otherwise mutually agreed to and Licensee will be reimbursed by Owner in accordance with a schedule of rates established by the Administrative Committee. The replacement of large numbers of poles shall be as stated in Article VI.

D. If any joint use pole requires relocation or replacement for reasons for which neither party is solely responsible, including requirements of public authority, Owner shall at its own cost make such relocation or replacement and each party shall be responsible for the transfer of its facilities. Removal of the old pole shall be in accordance with Paragraph F, below.

E. If either party requires an additional joint use pole to be installed in an existing line, the placing and ownership of the pole shall be determined by mutual agreement.

F. Each party will assume its own transfer charges. However, the parties recognize the need for cooperation in locating replacement poles so that both parties' facilities are adequately provided for and transfer costs minimized. The last party to transfer from the old pole will remove and dispose of the old pole unless otherwise instructed by Owner. Responsibility for third party attachments shall be as specified in Article XIII.

G. When a pole is replaced, the replacing party shall notify the other party when the replacement is completed.

H. When mutually agreeable, additional pole height may be provided by a pole top extension in order to defer a pole replacement. Penelec will supply and install pole top extensions at the expense of the party requiring the additional joint use pole height. Each party shall make such rearrangement of its facilities as may be required, at its own cost and expense, in order to permit the use of a pole top extension.

ARTICLE VIII

MAINTENANCE

A. Owner shall, at its sole expense, maintain its joint use poles in a safe and serviceable condition and in accordance with the specifications of Article III.

B. When replacing a jointly used pole carrying terminals of aerial cable, underground connections, or transformer equipment, the new pole shall be set as near as practicable to the hole which the replaced pole occupied unless special conditions make it necessary or mutually desirable to set it in a different location.

C. Owner shall give Licensee written notice of all pending joint use pole replacements and Licensee shall reply within ten (10) working days whether or not any special considerations are desired. Emergency replacements by owner which do not permit sufficient interval for written notification are excepted.

D. Each party will assume its own transfer charges. However, the parties recognize the need for cooperation in locating replacement poles so that both parties' facilities are adequately provided for and transfer costs minimized. The last party to transfer from the replaced pole will remove and dispose of the replaced pole unless otherwise instructed by Owner. Responsibility for third party attachments shall be as specified in Article XIII.

ARTICLE IX

RIGHT OF WAY

No guarantee is given by Owner for permission from property owners, municipalities or any other party for the use of its poles by Licensee. Licensee shall, at its own expense, secure all necessary rights of permissions from the owners of property and public authorities involved for use of Owner's poles by Licensee. The parties may, if mutually agreeable, elect to secure joint rights of way or permissions.

ARTICLE X

GUYING

A. Each party shall place, at its own expense, guy wires required for the support of its own wires and appliances on joint use poles.

B. In connection with the erection of poles for joint use either as an additional line, line extension or reconstruction of an existing line, Owner shall place, at its own expense, multi-eye anchors of sufficient strength for mutual use at common guying points.

C. Authorized company representatives will determine required strength of joint use anchors.

D. Anchors required solely for the purposes of one of the parties shall be placed by and at the expense of that party.

ARTICLE XI

TRIMMING AND CLEARING

Each of the parties shall be responsible for the initial and/or maintenance trimming or cutting of trees as may be necessary to clear its own wires and attachments on jointly used poles provided, however, that the parties may agree, in cases mutually advantageous, that one of the parties will arrange for trimming to clear the wires and appliances of both parties, the cost thereof to be shared upon such basis as has been agreed upon prior to the start of work.

ARTICLE XII

BONDING & GROUNDING

A. In connection with the joint use of poles hereunder, inductive and protective coordination measures make desirable the interconnection of Bell's cable plant and/or protective equipment with Penelec's system neutral. In no case shall interconnection be made to a ground wire that is not connected to a system neutral, such as a lightning arrester, or any other ground where the connection to the system neutral is not clearly visible. Caution shall be exercised by both parties to prevent nullification of an isolated service neutral (electrical) at a customer location.

B. At a pole where there is an existing vertical ground wire connected to Penelec's system neutral, Bell may place bond wire connecting its cable strand and/or guy to the vertical wire at telephone grade location.

C. At a pole where there is not an existing ground wire connected to Penelec's system neutral, Bell may place a coiled length of bond wire connected to its cable strand and/or guy and request Penelec to connect bond wire to the system neutral.

D. Bonding as may be required between a Bell guy and a Penelec guy not attached to the same anchor rod may be placed and connected by either party.

ARTICLE XIII

THIRD PARTY ATTACHMENTS

A. Each party shall be solely responsible for facilities owned by its respective customers which are attached to jointly used poles. Such customer-owned attachments shall be limited, as to any pole, to such number as will not interfere with the use of the pole by both Owner and Licensee. Customer owned facilities are those which are owned by the customer and used solely for the purpose of providing service to the customer residence or building. It is understood and agreed that the general license granted hereunder is intended to include such customer-owned facilities.

B. Each party consents to the attachment of a third party when attachments of the third party are made in accordance with the National Electrical Safety Code and the specific requirements of both Owner and Licensee.

C. All contracts covering the attachment to joint use poles by third parties, other than customers of the Licensee, shall be made by Owner.

D. The attachments by third parties are, for the purpose of this Agreement, considered to be the responsibility of Owner.

ARTICLE XIV

SERVICE REQUIREMENTS & EMERGENCY SITUATIONS

A. In the event Owner of existing joint use poles or the party to become Owner of new joint use poles does not install, replace or relocate such poles in time to meet the service requirements of Licensee, Licensee may request permission from Owner to proceed with such work as is necessary to meet Licensee's service requirements and, if granted, complete such work and bill Owner according to the schedule of rates established by the Administrative Committee.

B. In the event of emergency situations, Licensee may, upon notice to Owner, install, replace or relocate such poles as may be necessary to alleviate said emergency conditions. Upon completion of such work, Owner shall reimburse Licensee in accordance with the schedule of pole rates referred to in paragraph A, provided the ownership of the pole does not change.

ARTICLE XV

CHANGES IN OR REMOVAL OF WIRES AND ATTACHMENTS

A. Whenever either party desires to change the character of its circuits on any joint use poles and such change might affect the inductive nature of the facility, or which will result in increased or decreased clearance separations as provided in Article III, that party shall notify the other party in writing of such contemplated change and the joint use of such poles shall continue with such changes in construction as may be required to meet the terms of Article III. Should the parties fail to agree upon conditions which would permit continued joint use, they shall then cooperate to determine the most practical and economical method of effectively providing for separate lines and the equitable apportionment of the net expense involved. In the event that the parties cannot agree as to the method of effectively providing for separate lines, Licensee shall remove its attachments from the jointly used poles at its expense.

B. Licensee may, at any time, remove all of its wires and appliances from any of Owner's poles. Any liabilities, fees or charges incurred under this agreement prior to the removal shall not be terminated or affected thereby.

C. Owner may, at any time, abandon the use of any licensed joint use pole. If Owner is not obligated to remove such pole, Owner shall give Licensee thirty (30) days notice in writing to remove its attachments or purchase such pole for an equitable sum as may be agreed upon by parties. If Licensee elects to purchase said pole, Owner shall deliver to Licensee an appropriate instrument transferring title thereto. If Owner is obligated to remove such pole upon abandonment by it or if Licensee elects not to purchase, Licensee shall remove its facilities.

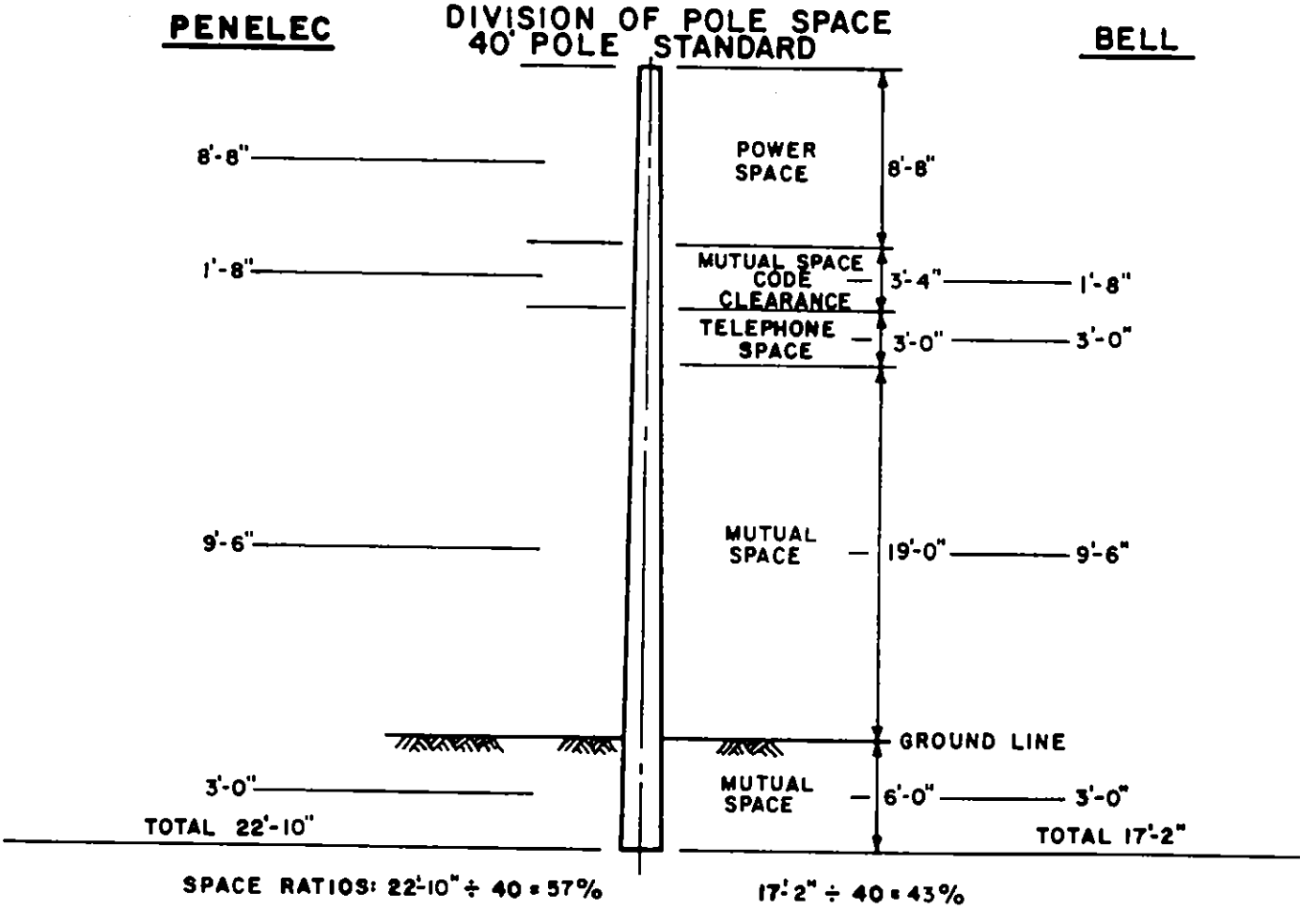
D. Upon such transfer of ownership, the party to whom the ownership of poles is transferred shall thereafter defend and save harmless the party from whom the ownership is transferred from all detriment, damage, losses, liability, claims, demands, suits, costs and expenses of every kind and description, by reason of or in any way resulting from the presence, maintenance, operation or removal of said transferred poles or the wires and appliances thereon, or by reason of the acts or negligence of the agents or employees of the party to whom the ownership is transferred in maintaining, operating or removing said transferred poles and the wires and appliances thereon, or their acts or negligence while engage in such work provided, however, that any liability incurred prior to the transfer of ownership shall not be terminated or affected thereby.

ARTICLE XVI

COMPENSATION

A. Compensation shall be paid to Owner by Licensee for each of Owner's poles to which Licensee is attached except clearance attachments as stated in Paragraph E. Push braces are considered to be guys.

B. The amount of compensation will be based upon the annual carrying cost applicable to distribution poles of both parties and the relative usage by each party of an average joint use pole expressed as a percentage. For the purpose of calculating compensation, an average joint use pole is established as being a forty foot (40') wood pole with 43% of such pole being utilized by Bell and 57% of such pole being utilized by Penelec. Thus, Bell will annually pay to Penelec an amount equal to 43% of the Penelec annual carrying cost for each pole owned by Penelec to which it is attached. Penelec will annually pay to Bell an amount equal to 57% of the Bell annual carrying cost for each pole owned by Bell to which it is attached. Pole space utilization has been determined by the following drawing and associated computation:



ARTICLE XVI

COMPENSATION
(Continued)

C. On or before the first day of May of each year, the Administrative Committee will calculate the pole compensation fees for that year as follows:

1. Each Company will calculate its average Annual Carrying Cost (ACC) for distribution poles.

2. Calculating of the compensation fees:

C_T = ACC x .57

C_P = ACC x .43

Where:

C_T = Compensation for Bell owned poles to which Penelec is attached.

C_P = Compensation for Penelec owned poles to which Bell is attached.

D. Payments of all compensation under this Agreement shall be due and payable as of June 30th of each year during the continuance of this Agreement, and will be based on the number of poles jointly used as of the last day of the preceding March. The party having the net credit balance shall render a bill therefore to the other party.

E. No compensation shall be paid by the Licensee for the joint use of any pole of the Owner where such use consists only in attaching thereto wires or cable of the Licensee for the purpose of providing clearance between the pole and such wires or cables and not for the purpose of supporting the said wires or cables.

ARTICLE XVII

PAYMENT OF TAXES

Owner shall pay all taxes and fees legally levied on joint use poles except where authorites levy taxes or fees legally on each party in which case each shall be responsible for payment as stipulated by law.

ARTICLE XVIII

ASSIGNMENT OF RIGHTS

Neither party shall assign or otherwise dispose of this Agreement or its rights or interests hereunder or in any of the poles or attachments covered by this Agreement without the prior written consent of the other party, which consent shall not be unreasonably withheld provided, however, that nothing herein shall prevent or limit the right of either party, nor shall such written consent be required, to make a lease or transfer any or all its property, rights, privileges and franchises to another corporation organized for the purpose of conducting a business of the same general character as that of the lessor or transferor, or to enter into any lawful merger or consolidation, or to make a general mortgage of all its property, rights, merger, consolidation or mortgage, the rights and obligations acquired under this Agreement shall pass to the lessee, assignee, merging or consolidating company or trustee under such mortgage. All liabilities hereunder shall bind and all rights acquired hereunder shall inure to the successors and assigns of the parties to the extent in this Article provided.

ARTICLE XIX

WAIVER OF TERMS OR CONDITIONS

The failure of either party to enforce or insist upon compliance with any of the terms or conditions of this Agreement shall not constitute a general waiver or relinquishment of any other such terms or conditions, but the same shall be and remain at all times in full force and effect.

ARTICLE XX

DEFAULTS

A. If Licensee shall be in default in any of its obligations stipulated herein, and such default continues for a period of ninety (90) days subsequent to written notice given by Owner, Owner may, if it so elects, permanently terminate Licensee's right to attach to poles with respect to which such default exists, in which event Licensee shall promptly remove its attachments from such poles at its expense and upon the failure of Licensee to so remove its attachments Owner may remove such attachments and Licensee shall pay Owner the cost of such removal. Such termination shall not be construed as a waiver of the right to enforce any liabilities for costs incurred or to be incurred for the collection of any sums theretofore or thereafter due.

B. If Owner shall be in default in any obligations stiuplated herein, and such default continues for a period of ninety (90) days subsequent to written notice thereof given by Licensee, Owner hereby agrees to pay in connection with such default, all costs and expenses reasonably incurred by Licensee as a result of such default in assuring the safety and adequacy of its service.

ARTICLE XXI

TERM OF AGREEMENT

This Agreement shall become effective on April 1, 1985 and, subject to the conditions of Article XX, DEFAULTS, herein, this Agreement may be terminated, so far as concerns further granting of joint use, by either party hereto at the expiration of five (5) years from the effective date hereof upon one (1) year's notice in writing to the other party of an intention so to terminate it; provided, that if not so terminated, it shall continue thereafter until terminated by either party at any time upon one (1) year's notice in writing to the other party as aforesaid: and provided further that notwithstanding such termination, this Agreement shall remain in full force and effect with respect to all poles jointly used by the parties hereto at the time of such terminations and to any replacement of such poles.

ARTICLE XXII

CANCELLATION OF PREVIOUS AGREEMENTS

The Agreement dated April 1, 1947, and the supplemental agreements dated March 9, 1961, April 18, 1967, May 3, 1971 and April 5, 1984, and any other such agreement or supplement, between the parties or their predecessors for the joint use of poles within the territory covered by this Agreement are considered to be terminated individually according to the terms of each agreement involved and after the effective date of this Agreement shall be, and the same hereby are null, void, and of no further force and effect and all existing joint use poles are hereby brought under and subject to the terms and conditions of this Agreement provided, however, that any liability that had been incurred under such existing agreements prior to the date of termination shall be established as provided in that Agreement, except that ownership shall be determined as of the date such liability was incurred.

In witness whereof, the parties have caused this Agreement to be duly executed the day and year first above written.

Pennsylvania Electric Company

Attest:

Assistant Secretary

by

J. A. Poole - Vice President

The Bell Telephone Company of Pennsylvania

Attest:

Assistant Secretary

by

President & CEO

GUIDE TO PRACTICE

Interpretation and Administration Procedures

of

General Joint Use Agreement

between

Pennsylvania Electric Company

and

The Bell Telephone Company of Pennsylvania

Dated: April 1, 1986

INDEX OF GUIDE TO PRACTICE

GENERAL JOINT USE AGREEMENT

BETWEEN

PENNSYLVANIA ELECTRIC COMPANY

AND

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA

Issue No. 4 8-1-88

GUIDE TO PRACTICE

In Connection With General Joint Use Agreement Between

Pennsylvania Electric Company
and
The Bell Telephone Company of Pennsylvania

Dated: May 12, 1986
Effective: April 1, 1986

- - - - - - -

To establish uniform practices and procedures applying to joint use of poles under the terms of the General Joint Use Agreement dated (Effective date April 1, 1986) between Pennsylvania Electric Company (Penelec) and The Bell Telephone Company of Pennsylvania (Bell) the following interpretation of the terms of the Agreement and working practices are herein set forth. It is understood that nothing herein contained shall alter or cancel any part or parts of this Agreement, and furthermore, that these interpretations may be changed at any time by mutual consent upon request of either party.

INTERPRETATION OF AGREEMENT

I. Article IV - Administrative Committee

No. 1 Forms and Procedures

DN-89 Joint Use Source Document shall be the form used by both companies for attachments to each others poles (Exhibit I). See the attached instructions for using this document.

DN-24 Notice of Abandonment of Joint Poles and Transfer of Ownership shall be the document used to transfer ownership of poles from the Owner to the Licensee (Exhibit II).

No. 2 Compensation - Refer to Article XVI on Agreement Pages 10 and 11.

Both companies shall include the following cost factors in the compensation calculation:

A. Depreciation Expense
B. Operation and Maintenance Expense
C. Rate of Return
D. Income Taxes
E. PA Capital Stock Tax
F. Administrative and General Expense

EXAMPLE

	Poles		Annual Carrying Cost		Usage Ratio		Compensation
Poles Owned By Penelec	75179	X	$ 44.13	X	.43	=	$1,426,589.19
Poles Owned By Bell	41360	X	$ 43.70	X	.57	=	$1,030,236.24
					Net Compensation Due Penelec		$ 396,352.95

I. Article IV - Administrative Committee (Continued)

No. 3 Accounting for Pole Change Out Costs

Costs incurred by Pennsylvania Electric Company will be accumulated on a Miscellaneous Sales Order in conjunction with a blanket work order and billed on the Miscellaneous Sales Order.

Costs incurred by Bell Atlantic - Pennsylvania will be accumulated and billed on a custom work order.

Pole change out costs between the two companies will be billed in accordance with the pole price schedule that is listed below.

No.4 Pole Price Schedule for Change Outs - refer to Article XIV on Agreement Page No. 8

The following price schedule has been agreed upon by the parties for use in connection with operations under the Agreement and should be revised annually, as required.

Schedule of Prices - All Kinds of Poles - 100% Condition

	Reciprocal Price Schedule	
Pole Size	Service Related	Emergency Related
35'	$ 633.00	Actual Costs*
40'	682.00	Actual Costs*
45'	711.00	Actual Costs*
50'	826.00	Actual Costs*
55'	884.00	Actual Costs*
60'	1,162.00	Actual Costs*
65'	1,812.00	Actual Costs*

*All direct and indirect costs associated with a pole relocation or replacement, including but not limited to appropriate overheads, meals and transfer costs.

II. Article V - Establishing Joint Use of New Poles

The work order or sketch shall be the written document to notify the other company of joint use construction. A direct verbal contact should be conveyed to the other company in advance of the work order notification to enable the other company to determine if joint use is desirable. An "Approved For Joint Use" stamp (Exhibit III) must be placed on the work order to verify that both parties have knowledge of the pending construction. If the Licensee desires to reserve space on the new pole(s), the Licensee must notify the Owner in a manner which is clearly understood. The pole numbers which are to be reserved for joint use should be circled in red on the work order sketch. This will eliminate any doubt by the Owner as to which poles are to be reserved for joint use. The company desiring to reserve space on the new facilities must reply within thirty (30) days.

VZ00338

III. Article VII - Paragraph D

This article refers only to circumstances where a third party requests the change out. Vehicle accidents are covered under Article XIV.

IV. Article IX - Right-of-Way

At the time of execution of Form DN-24, Notice of Abandonment of Joint Poles and Transfer of Ownership, right-of-way which was obtained in conjunction with the pole which is to be abandoned should be conveyed to the purchasing company. If the right-of-way is not available or may not legally be assigned, the new Owner must be notified.

V. Articles XI - Trimming and Clearing

When building new lines, it is usually mutually advantageous to have one contractor trim or clear the right-of-way for both companies. It is recommended by the Administrative Committee that both parties agree to the sharing of costs prior to construction.

VI. Article XV - Paragraph C

Use this schedule for pricing pole abandonments.

Present Value in Place - Percent of "New" Full Value Based on 30 Year Life

25 years or more	remaining life -	100%
20 through 24 years	remaining life -	80%
15 through 19 years	remaining life -	60%
10 through 14 years	remaining life -	40%
6 through 9 years	remaining life -	20%
3 through 5 years	remaining life -	10%
less than 3 years	remaining life -	0%

Example

40' wood pole with 15 thru 19 years of remaining life = $535.00 X .60 = $321.00 remaining life value. Licensee will be billed $321.00 on the transfer of ownership (Form DN24).

JOINT USE SOURCE DOCUMENT

FIELD CHECKED: ☐ YES ☐ NO | SERVICE DATE | FIELD CHECKED: ☐ YES ☐ NO | SOURCE NO.

PENNSYLVANIA ELECTRIC COMPANY — DATE | TELEPHONE COMPANY — DATE

PENELEC DIST	PENELEC POLE NUMBER	TELEPHONE COMPANY EXCHANGE	TELEPHONE CO. POLE NO: ALPHA	TELEPHONE CO. POLE NO: LEAD/SECTION NO	TELEPHONE CO. POLE NO: POLE NO			POLE SIZE			EAT MGT	REM LIFE	REMOVAL	LESS SALVAGE	MISC	ADD ANCHOR	TOTAL BILLING	PENELEC ORDER NUMBER	TELE CO ORDER NUMBER
3	11	12 16	17	18 22	23 26	27	28 30	31	32	33 34 35	36	37	50 53	54 58	59 63	64 67	68 71	72 75	76 80		

← NO INFORMATION REQUIRED →

NOTE #1 COLUMN 27 FRACTION CODES

CODE	FRACTION
	0
2	1/8
3	1/4
4	1/3
5	1/2
6	2/3
7	3/4
8	7/8
9	9

NOTE #2 COLUMN 31 OWNER STATUS CODES

CODE	OWNER	STATUS
1	PENELEC	NEW ATTACHMENT
2	PENELEC	REPLACE POLE
3	PENELEC	REMOVE ATTACHMENT
4	PENELEC	NON RENTAL
5	TELEPHONE	NEW ATTACHMENT
6	TELEPHONE	REPLACE POLE
7	TELEPHONE	REMOVE ATTACHMENT
8	TELEPHONE	NON RENTAL
9	BOTH	RECORD CORRECTION

NOTE #3 COLUMN 37 REQUIREMENTS CODES

CODE	BILLING
0	BILL OWNER NON RETIRE AND OR OTHER COSTS
1	BILL LICENSEE ADDITIONAL WEIGHT
2	BILL LICENSEE NON RETIREMENT
4	BILL LICENSEE ADDITIONAL WEIGHT NON RETIREMENT
8	BILL LICENSEE ADDITIONAL ANCHOR
9	BILL LICENSEE OTHER COSTS

ACCOUNTING DEPT.

678

DN 89 268

V200340

EXHIBIT NO. 1

INSTRUCTIONS

Joint Use Source Document (See Page 1 of the Guide to Practice)

The basic document is a three-part form which is originated by the Licensee to record new attachments to the owner's pole, removal of attachments, etc. Penelec and Bell division or district engineering personnel will prepare the "Joint Use Source Document." When completed, the "Joint Use Source Document" contains the information necessary for establishing a "Master Run" for the pole and its attachments.

For Penelec, the original copy of the "Joint Use Source Document" is forwarded to the Joint Use Department.

Personnel of the Joint Use Department will audit the information on the "Joint Use Source Document." Copy number two (owner's copy) of the "Joint Use Source Document" is mailed to Bell on a weekly basis. This copy may be used as a district file. Copy number three will be retained by the Licensee for a district file. At the end of the month the "Joint Use Source Documents" from the Penelec "System" are sent to the Keypunch Department for punching. The "Joint Pole Cards" and the "Joint Use Source Documents" are returned to the Joint Use Department. The "Joint Use Source Document" is stamped card cut and returned to the division and district offices.

For Bell, the Engineering Department forwards the original copy of the "Joint Use Source Document" to the Keypunching Department. The "Joint Use Source Document" is returned to the Engineering Department and the "Joint Pole Cards" are mailed to the Penelec Joint Use Source Department in Johnstown.

Copy number two (owner's copy) of the "Joint Use Source Document is mailed to Penelec on a weekly basis. This copy may be used as a District file. Copy number three will be retained by the Licensee for a District file.

After receiving Bell Telephone's "Joint Use Cards" from both Harrisburg and Pittsburgh, personnel from the Penelec Joint Use Department merge the "Joint Use Cards" of Bell and Penelec and send them to the Penelec Data Processing Center. The cards are input into the data process equipment, which produces a six-part run.

The six-part run is distributed as follows. One copy is retained by the Penelec Joint Use Department and one copy is separated into Penelec divisions and districts and distributed to the Penelec division and district offices. The last four copies are mailed to Bell offices in Altoona, Bellefonte, Indiana and Warren.

The above procedure is completed on a monthly basis. There is also a semi-annual run (master run) which is generated from the information which is collected on the monthly runs. The semi-annual run (master run) contains all of the information which has been collected on the monthly runs to date. The semi-annual run is distributed in the same manner as the monthly run.

EXHIBIT NO. II

Number_____

NOTICE OF ABANDONMENT OF JOINT POLES AND TRANSFER OF OWNERSHIP

_____ to _____
(Owner) (Licensee)

Under the terms of an agreement dated _____ you maintain wires and appliances on pole(s) of Owner as follows:

Location of pole(s) _____
City, Borough or Township, and County

Location Number	Pole Numbers	Pole Length	Present Value	Location Number	Pole Numbers	Pole Length	Present Value
1				13			
2				14			
3				15			
4				16			
5				17			
6				18			
7				19			
8				20			
9				21			
10				22			
11				23			
12				24			

Kindly advise within thirty (30) days from this date if you desire to assume ownership thereof in accordance with and subject to the provisions of said agreement.

Check Applicable Paragraph

☐ Licensee accepts ownership of the pole(s) designated in accordance with and subject to the provisions of said agreement dated _____

☐ Licensee declines the within tender of title and has removed or will remove all its wires and appliances from said pole(s).

_____
(Licensee)

By _____

Title _____

Date _____

For and in consideration of the sum of One Dollar and other good and sufficient consideration, receipt whereof is hereby acknowledged, Owner hereby sells, transfers, assigns and sets over to Licensee, its successors and assigns, effective _____, all of its interest in the pole(s) designated above, and for itself, its successors and assigns, covenants and agrees with Licensee, its successors and assigns, that it will warrant and defend the same against all and every person or persons whomsoever lawfully claiming the same or any part thereof, but Owner does not warrant any right in Grantee to maintain said pole(s).

_____
(Owner)

By _____

Title _____

Date _____

EXHIBIT NO. III

APPROVED FOR JOINT USE

- ☐ As Submitted
- ☐ With Exceptions as Noted
- ☐ Clearing R/W. Billing Authorized
- ☐ Does Not Desire to Reserve Space

COMPANY_____

SIGNATURE_____

DATE_____

PROPRIETARY

Appendix B

(No Public Version Available)