Suzan DeBusk Paiva
Associate General Counsel

verizon

900 Race Street, 6th Floor
Philadelphia, PA 19107

Tel: (267) 768-6184
Suzan.D.Paiva@Verizon.com

August 14, 2020

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

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

Dear Secretary Chiavetta:

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

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

Very truly yours,

Suzan D. Paiva/sau

Suzan D. Paiva

SDP/sau
Enclosure

Via E-Mail

cc: Joel H. Cheskis, Deputy Chief Administrative Law Judge
Attached Certificate of Service

CERTIFICATE OF SERVICE

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

Dated at Philadelphia, Pennsylvania, this 14th day of August, 2020.

VIA E-MAIL

Tori L. Giesler
tgiesler@firstenergycorp.com

David B. MacGregor
dmacgregor@postschell.com

Devin T. Ryan
DRyan@postschell.com

Curtis L. Groves
Curtis.groves@verizon.com

Frank Scaduto
fscaduto@wiley.law

Deputy Chief ALJ Joel H. Cheskis
jcheskis@pa.gov

Anthony D. Kanagy
akanagy@postschell.com

Garrett P. Lent
GLent@postschell.com

Claire J. Evans
Cevans@wileyrein.com

Christopher S. Huther
Cevans@wileyrein.com

Suzan D. Paiva

Suzan D. Paiva
Pennsylvania Bar ID No. 53853
900 Race Street, 6th Floor
Philadelphia, PA 19107
(267) 768-6184

Attorney for Verizon

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

VERIZON'S REPLY BRIEF

(PUBLIC VERSION)

Suzan D. Paiva, I.D. No. 53853
Verizon
900 Race Street, 6th Floor
Philadelphia, PA 19107
(267) 768-6184
suzan.d.paiva@verizon.com

Curtis L. Groves, *pro hac vice* pending
Verizon
1300 I Street NW
Suite 500 East
Washington, DC 20005
(202) 515-2179
curtis.groves@verizon.com

Christopher S. Huther, *pro hac vice* pending
Claire J. Evans, I.D. No. 90091
Frank Scaduto, *pro hac vice* pending
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
chuther@wiley.law
cevans@wiley.law
fscaduto@wiley.law

Counsel for Verizon Pennsylvania LLC and Verizon North LLC

Dated: August 14, 2020

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I. INTRODUCTION

FirstEnergy claims that "Pennsylvania law controls this proceeding,"[1] but its arguments hinge almost entirely on *ignoring* Pennsylvania law. FirstEnergy devotes most of its brief to fabricating an alternative regulatory regime that would preserve FirstEnergy's unlawful rental revenues and replace the fully vetted regulations that control the outcome of this case. Because Pennsylvania law does not permit that, most of FirstEnergy's lengthy brief is irrelevant.

This case is not as complicated or novel as FirstEnergy attempts to make it. The Commission already decided its "rules will consistently mirror those of" the Federal Communications Commission ("FCC") because it is "critical … to provide regulatory certainty rather than additional burdens and expenses" of protracted litigation "where broadband investment is contemplated and desired."[2] The analysis of this case under the Commission's binding regulations is thus straightforward:

- FirstEnergy must charge Verizon, effective July 12, 2011, a just, reasonable, and competitively neutral pole attachment rate.
- The just and reasonable rate is presumptively the new telecom rate guaranteed other broadband providers for use of comparable space on FirstEnergy's poles.
- FirstEnergy did not rebut the presumption that the new telecom rate is the lawful rate.
- Therefore, the Commission must set Verizon's rate as the properly calculated new telecom rate and refund the more than [redacted] FirstEnergy has unlawfully collected from Verizon since 2011 with interest.

[1] Initial Brief of FirstEnergy at 3, 25 (July 28, 2020) ("FE Br."). In this Brief, "FirstEnergy" refers to Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec") and Penn Power Company ("Penn Power"), and "Verizon" refers to Verizon Pennsylvania LLC and Verizon North LLC.

[2] *Assumption of Comm'n Jurisdiction over Pole Attachments from the FCC*, No. L-2018-3002672, 2019 WL 4345730, at *26 (Aug. 29, 2019) ("*Final Rulemaking Order*").

FirstEnergy knows the Commission's regulations require "lower rates for Incumbent Local Exchange Carriers ('ILECs')" such as Verizon under "most existing joint use agreements."[3] The Commission adopted its regulations for that reason; it found consumers will benefit from uniform and competitively neutral pole attachment rates among all broadband providers, consistency with the FCC's comprehensive pole attachment rules, and a faster and less burdensome pole attachment dispute resolution process than is available at the FCC.[4] FirstEnergy's defense of the joint use agreement rates is at odds with each of these requirements. It wants to perpetuate wide rate disparities among broadband providers, supersede the Commission's binding regulations with a previously unvetted Pennsylvania-specific rate methodology that produces higher rates, and turn every pole attachment dispute into a complicated old-style rate proceeding. The Commission cannot accept FirstEnergy's arguments and still achieve its goals for Pennsylvania. The lawful rates for Verizon's use of FirstEnergy's poles are the properly calculated new telecom rates:

New Telecom Rates for Verizon's Use of FirstEnergy's Poles (per pole)[5]									
Rental Year	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Met-Ed poles	$8.29	$9.87	$10.07	$5.02	$9.35	$8.79	$9.55	$12.20	$13.83
Penelec poles	$6.43	$6.79	$7.18	$5.21	$6.96	$7.18	$7.49	$10.49	$9.07
Penn Power poles	$7.30	$8.47	$8.51	$8.21	$8.94	$9.40	$9.08	$11.18	$11.80

[3] Comments of FirstEnergy at 7-8, Docket No. L-2018-3002672 (Oct. 29, 2018) ("FE Rulemaking Comments").

[4] *See Final Rulemaking Order*, 2019 WL 4345730, at *2 ("rental rates for pole attachments [should be] as low and close to uniform as possible … to promote broadband deployment") (citation omitted); *id.* at *6 (the Commission will "spur[ ] investment in, and access to, physical infrastructure used to deliver essential broadband access service to end-user customers by reducing the time and resources spent on disputes … in Pennsylvania as compared to the FCC"); *id.* at *26 ("the Commission's rules will consistently mirror those of the FCC.… to provide regulatory certainty").

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

In a last-ditch effort to preserve its grossly excessive rates, FirstEnergy claims without evidence that electric ratepayers would pay the price, through higher rates, if FirstEnergy complies with Pennsylvania's regulations. The Commission rejected this baseless argument during the rulemaking, and it still does not survive scrutiny. FirstEnergy collects from Verizon more than [redacted], on average, every year in violation of law and in excess of the pole attachment rent it needs to be fully compensated.[6] Ending that unlawful windfall (which amounts to about [redacted] of FirstEnergy's operating revenues) will not "trigger a base rate proceeding" for FirstEnergy, let alone require a rate increase were one filed.[7]

The Commission's regulations are good for consumers, broadband, and Pennsylvania. The Commission should grant Verizon's complaint in its entirety.

II. LEGAL STANDARDS

Pennsylvania law requires the Commission to set the just and reasonable rate for Verizon's use of FirstEnergy's poles as a properly calculated new telecom rate and refund the amounts FirstEnergy has collected in violation of law since July 2011. The Commission's Chapter 77 regulations "adopt the rates, terms and conditions of access to and use of utility poles, ducts, conduits and rights-of-way to the full extent provided for in 47 U.S.C. § 224 and 47 C.F.R. Chapter I, Subchapter A, Part 1, Subpart J (relating to pole attachment complaint procedures), inclusive of future changes as those regulations may be amended."[8] These regulations entitle

[6] *See* VZ St. 2.0, Ex. MSC-1 at VZ00051 (Calnon Aff. ¶ 29).

[7] *See* FE Br. at 50 (discounting as "irrelevant" "[w]hether the reduction in rates would trigger a base rate proceeding" for FirstEnergy); VZ St. 2.1 at 57:1-3 (Calnon Surrebuttal); VZ St. 2.1, Ex. MSC-5.

[8] 52 Pa. Code § 77.4(a).

Verizon to a new telecom rate and refunds because FirstEnergy did not rebut the new telecom rate presumption in the regulations with the required clear and convincing evidence.[9]

The Commission adopted its pole attachment regulations in a proper rulemaking grounded in undisputed statutory authority under the Public Utility Code and federal law.[10] The regulations are binding in this case.[11] FirstEnergy ignores them, reargues the policy decisions behind them, and proposes its own alternate rules. But the Commission decided that just and reasonable pole attachment rates in Pennsylvania will be set using the FCC's regulations and precedent. It cannot second guess that decision here.[12] Verizon can be "in no worse position … than if the Commission did not assume jurisdiction."[13]

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[9] *See id.* (incorporating 47 U.S.C. § 224 and 47 C.F.R. §§ 1.1407(a), 1.1413).

[10] *See* FE Br. at 16, 21 (admitting the Commission has authority under 47 U.S.C. § 224(c) and 66 Pa. C.S. § 1301 to regulate pole attachment rates). The Commission explained it was exercising its authority under 47 U.S.C. § 224(c) to "assume responsibility for the enforcement of 47 U.S.C. § 224 in a manner like that of the FCC," and its "broad authority" under Section 501(a) "to enforce the Public Utility Code and 'the full intent thereof.'" *Final Rulemaking Order*, 2019 WL 4345730, at *9, *22; *see also Popowsky v. Pa. Pub. Util. Comm'n*, 674 A.2d 1149, 1155 (Pa. Commw. 1996) (Section 501 "grant[s] the PUC full powers in regulating services and rates of public utilities"). The Commission also cited authority "found at 66 Pa. C.S. §§ 313 (authority concurrent with United States); 314 (enforcement of federal rates and service); … 701 (ability of affected persons to file complaints with the Commission); 1301 (authority over jurisdictional rates); 1501 (authority over jurisdictional services)." *Final Rulemaking Order*, 2019 WL 4345730, at *22 & n.76; *see also id.* at *15, *47.

[11] *Herdelin v. Greenberg*, 328 A.2d 552, 554 (Pa. Commw. 1974) ("Authorized regulations of an administrative agency have the force and effect of law and bind the agency equally with others."); *see also Borough of Bedford v. Commonwealth*, 972 A.2d 53, 61 (Pa. Commw. 2009).

[12] *See Final Rulemaking Order*, 2019 WL 4345730, at *17 ("If the Commission does find it necessary to amend Chapter 77 to accommodate state-specific changes, the Commission will initiate an appropriate rulemaking"); *id.* at *19 ("[I]f the Commission deems it appropriate to diverge from the federal regulations, it would initiate a rulemaking that would be subject to public comment."); *id.* at *25 ("Such a determination to diverge from the federal regulations would require the Commission to initiate a rulemaking proceeding.").

[13] *Id.* at *25.

FirstEnergy's request for an alternative approach is confusing and irrelevant. The Commission emphasized more than a dozen times in its *Final Rulemaking Order* that it would resolve pole attachment disputes using the same regulations and precedent adopted by the FCC:

- "[T]he Commission will adopt, in whole, the FCC's regulatory regime for pole attachment complaint procedures …. and will uphold the status quo, which will avoid regulatory uncertainty and will promote broadband investment across Pennsylvania."[14]

- "For purposes of uniformity in our turn-key adoption of the FCC's pole attachment regime and consistency with federal law, the Commission will adopt the federal [regulations]."[15]

- "[P]arties will apply the same substantive rules in either venue"— the Commission or the FCC—which "is yet another reason why parity between the Pennsylvania and federal rules benefits stakeholders."[16]

- "[A]dopting the FCC's regulations provides certainty," "supports the cooperative state-federal goal of deployment of broadband across the Commonwealth," and "provid[es] stability and uniformity for broadband investment in Pennsylvania."[17]

- "[T]he Commission … adopts the FCC's pole attachment complaint procedures as the Commission's regulations."[18]

- "[G]iven that matters of pole attachments are critical to deploying broadband in Pennsylvania and are the subject of considerably detailed national rules to date…. the Commission prefers to keep parity with the FCC's rules."[19]

- "[T]he Commission's approach for Pennsylvania is to adopt the FCC's pole attachment regulations …."[20]

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[14] *Id.* at *7.

[15] *Id.* at *9.

[16] *Id.* at *17.

[17] *Id.* at *19.

[18] *Id.*

[19] *Id.* at *23.

[20] *Id.*

- "[T]he Commission is resolute in the necessity, especially at first and going forward, to proceed with a turn-key adoption of the FCC's pole attachment regulations."[21]

- "[T]he Commission will adopt the FCC's pole attachment complaint procedure regulations …."[22]

- "[T]he Commission's rules will consistently mirror those of the FCC. The Commission acknowledges how critical it is to provide regulatory certainty rather than additional burdens and expenses where broadband investment is contemplated and desired."[23]

- "The Commission will apply … existing FCC regulations concerning rates, terms and conditions of pole attachments."[24]

- "The Commission will implement the FCC's regulations in turn-key fashion …."[25]

- "[T]he rate formulas and procedures used to derive rates under FCC rules have been established and govern rates to this date. We see no reason to deviate from FCC-based rates or ratemaking procedures."[26]

The Commission rejected FirstEnergy's argument that the Commission's intention to apply the latest FCC rules and precedent was somehow unclear.[27] It expressly adopted the FCC's 2018 *Third Report and Order* and the new telecom rate presumption incorporated into the Commission's regulations.[28] And it notified electric utilities that it would "eliminate[ ] outdated disparities between the pole attachment rates that [ILECs] pay compared to other similarly-

[21] *Id.* at *25.

[22] *Id.*

[23] *Id.* at *26.

[24] *Id.* at *27.

[25] *Id.* at *47.

[26] *Id.* at *42.

[27] *Id.* at *26 ("The Commission also disagrees with First Energy that the Commission was unclear in its intention about newly adopted … changes to the FCC's regulations.").

[28] *Id.* ("Section 77.4 was clear that the Commission intended future changes to become effective as amendments were approved, as occurred through the FCC *2018 Poles Order* [also known as the *Third Report and Order*]. The Commission also is not inclined to wait until petitions for reconsideration or any appeals of these recent federal changes are settled.").

situated telecommunications attachers" because "rental rates for pole attachments that are as low and close to uniform as possible … promote broadband deployment."[29]

FirstEnergy's effort to create some alternate pole attachment regime for Pennsylvania fails. *First, the Commission adopted the FCC's rules as its own*. FirstEnergy argues that, "by exercising reverse preemption authority, the Commission has supplanted" the FCC scheme because it applies "in only those states that chose not to regulate pole attachments."[30] But in choosing to regulate pole attachments, the Commission adopted FCC regulations and orders, which have been "appropriately vetted both at the FCC and here in Pennsylvania."[31] They apply here because they are Pennsylvania law.

Second, existing FCC rules and orders are controlling. FirstEnergy says FCC orders can only be "persuasive" in Pennsylvania.[32] This is irrelevant because the new telecom rate presumption is in the FCC's—and now this Commission's—binding regulations.[33] FirstEnergy is also wrong about the effect of prior FCC orders on this case. The Commission accepted "the wisdom of long-standing FCC practice and experience to interpret its pole attachment rules," including the precedent set by the FCC's 2011 *Pole Attachment Order* and 2018 *Third Report and Order*.[34] It warned electric utilities *not* "to regularly rehash or reargue determinations of the FCC."[35] And it emphasized that "parties will be in no worse position … than if the Commission

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[29] *Id.* at *2-3 (citations omitted).

[30] FE Br. at 15-16.

[31] *Final Rulemaking Order*, 2019 WL 4345730, at *16; *see also id.* at *23 ("the Commission's approach for Pennsylvania is to adopt the FCC's pole attachment regulations.").

[32] FE Br. at 16-17 (citing *Final Rulemaking Order*, 2019 WL 4345730, at *35).

[33] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

[34] *Final Rulemaking Order*, 2019 WL 4345730, at *1-3, 34.

[35] *Id.* at *17; *see also id.* at *20 ("[T]he Commission should not be required … to expend additional resources that duplicate the efforts undertaken by the FCC."); *id.* at 27 ("Pole owners,

did not assume jurisdiction."[36] In the future, "occasionally, reasons may exist to deviate from the FCC's interpretation" on issues "which have not yet been adjudicated on the federal level."[37] But as far as the law that applies in this case, the Commission "maintain[ed] the status quo."[38]

Third, FirstEnergy must justify its pole attachment rates under the regulations, which it cannot do. FirstEnergy argues Verizon bears a "very heavy" burden when challenging joint use agreement rates.[39] Not so. FirstEnergy admits Verizon need only make a *prima facie* case that FirstEnergy's rates are unlawful before the burden shifts to FirstEnergy to justify its rates with clear and convincing evidence sufficient to rebut the Commission's new telecom rate presumption.[40] Verizon presented far more than a *prima facie* case: Pennsylvania law requires a new telecom rate, and FirstEnergy charges Verizon [redacted] that rate.[41]

Fourth, this case is resolved by the Commission's pole attachment regulations. FirstEnergy argues Verizon needs to prove the joint use agreement rates violate different

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attachers, and other interested parties had an opportunity to place their positions on the record at the FCC prior to the FCC's adoption of its new regime").

[36] *Id.* at *25.

[37] *Id.* at *34-35.

[38] *Id.* at *27.

[39] FE Br. at 17-19, 22, 41.

[40] *Id.* at 18; *see also Waldron v. Philadelphia Elec. Co.*, No. C-77100047, 1980 WL 140964, at *2 (Pa. PUC Mar. 19, 1980) ("When, during the course of a proceeding, a *prima facie* case has been established, the burden of rebutting that *prima facie* case shifts to the adverse party" and "it is then incumbent upon the defensive party to meet the *prima facie* case which has been established."); 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

[41] *See* VZ St. 2.0, Ex. MSC-1 at VZ00045-46 (Calnon Aff. ¶ 21); VZ St. 2.1, Ex. MSC-4 (citing sources); *see also, e.g.*, *Multimedia Cablevision, Inc. v. Sw. Bell Tel. Co.*, 11 FCC Rcd 11202, 11207 (¶ 11) (1996) (A *prima facie* case is established by "a statement of the specific unreasonable pole attachment rate … and all arguments used to support its claim of unreasonableness."); *Selkirk Commc'ns, Inc. v. Fla. Power & Light Co.*, 8 FCC Rcd 387, 389 (¶ 17) (1993) (finding *prima facie* case where complaint alleged that attacher was "required to pay a rate … that is higher than the regulated rate").

statutory provisions and standards discussed in decades-old Pennsylvania cases that pre-date the Commission's adoption of its pole attachment regulations.[42] But the Commission's pole attachment regulations (not cited in FirstEnergy's brief) "*comprehensively* consider pole attachment issues in Pennsylvania."[43] The Commission need not determine whether FirstEnergy's rates *also* violate other provisions of Pennsylvania law.[44] It is enough that they violate the Commission's pole attachment regulations.[45]

III. ARGUMENT

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

The Commission adopted rules that benefit consumers through low, uniform pole attachment rates, but it is undisputed that FirstEnergy charges Verizon more than [redacted] times the new telecom rate.[46] FirstEnergy's rates: (1) are incompatible with the Commission's pro-consumer broadband objectives, (2) violate the Commission's regulations and orders, and (3) cannot be salvaged by FirstEnergy's preference for a different pole attachment regime that produces higher rates.

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[42] FE Br. at 19-24.

[43] *Final Rulemaking Order*, 2019 WL 4345730, at *23 (emphasis added).

[44] FirstEnergy relies on statutes that are consistent with the Commission's pole attachment regulations. For example, charging Verizon excessive pole attachment rates is unjust, unreasonable, and "adverse to the public interest and the general well-being of this Commonwealth" and its broadband deployment needs, FE Br. at 19-21 (quoting 66 Pa. C.S. § 508), not "in conformity with" the Commission's pole attachment regulations, *id.* at 21-22, 41-45 (quoting 66 Pa. C.S. § 1301(a)), and unreasonably discriminatory as compared to the new telecom rates guaranteed other broadband providers in Pennsylvania, *id.* at 22-23, 49-51 (quoting 66 Pa. C.S. § 1304).

[45] *Final Rulemaking Order*, 2019 WL 4345730, at *26 (finding it "critical … to provide regulatory certainty rather than additional burdens and expenses" in litigation).

[46] *See* VZ St. 2.0, Ex. MSC-1 at VZ00045-46 (Calnon Aff. ¶ 21); VZ St. 2.1, Ex. MSC-4 (citing sources).

1. FirstEnergy Seeks to Perpetuate Outdated Rate Disparities that Undermine this Commission's Broadband Policy Objectives.

The Commission has already determined that pole attachments are "essential physical infrastructure used to deliver [broadband] services to end-user consumers," and that low and uniform pole attachment rates for all broadband providers are required to advance the Commission's broadband goals.[47] Ignoring those findings, FirstEnergy argues Verizon should forever pay rates [redacted] times those guaranteed other broadband providers. The Commission exercised jurisdiction over pole attachments to quickly eliminate these outdated and artificial rate disparities, finding they deter investment in Pennsylvania, undermine competition, and threaten the availability and quality of broadband service to Pennsylvania consumers.[48]

The Commission adopted its regulations as the next step in the Commission's "dedicated effort to provide high-speed internet access to every household and business in Pennsylvania."[49] As a policy matter the Commission decided low and uniform pole attachment rates are essential because there is a "close relationship between pole attachments and broadband deployment" given that "all broadband deployment relies" on pole attachments "to deliver these services to end-user consumers."[50] And Pennsylvania's consumers—its residents, businesses, schools, hospitals—need broadband and other advanced services now more than ever.[51] The last message that the Commission should send would be to accept FirstEnergy's arguments and back off from

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[47] *Final Rulemaking Order*, 2019 WL 4345730, at *1-3.

[48] *Id.* at *2-3.

[49] *See Assumption of Comm'n Jurisdiction over Pole Attachments from the FCC*, Notice of Proposed Rulemaking, No. L-2018-3002672, 2018 WL 3533538, at *5 (Pa. PUC July 12, 2018) ("*NPRM*").

[50] *Final Rulemaking Order*, 2019 WL 4345730, at *1-2.

[51] VZ St. 1.2 at 3:13-4:6 (Mills Surrejoinder).

enforcing the Commission's regulations in the first complaint case that has come before it under the new regulations. To the contrary, the Commission should make clear that it will enforce its new regulations promptly and fairly to ensure that "rental rates for pole attachments … are as low and close to uniform as possible."[52] Just as "[l]ower pole rental rates serve to encourage broadband investment," "artificially high pole attachment rates" provide "disincentives to investment" in Pennsylvania.[53]

FirstEnergy agrees that Verizon as an ILEC "currently compete[s] with CLECs and cable companies to provide a range of communications services, notably including broadband internet access, to customers."[54] It also accepts that principles of "[c]ompetitive neutrality suggest[ ] that each should be charged the same price for the same service – in this case, pole attachments."[55] This is reason alone to grant Verizon's complaint. FirstEnergy's many arguments seek to perpetuate uneconomic and unwarranted rate disparities that must be eliminated. FirstEnergy's rates are incompatible with the Commission's regulations, disconnected from the commercial realities of Pennsylvania's broadband marketplace, and contrary to the Commission's work to provide the best technology options for Pennsylvanians.

2. FirstEnergy's Rates Are More Than [redacted] Times the Lawful New Telecom Rate Required by the Commission's Regulations.

The just and reasonable rate for Verizon's use of FirstEnergy's poles is the properly calculated new telecom rate—less than [redacted] of what FirstEnergy has been charging

[52] *Final Rulemaking Order*, 2019 WL 4345730, at *2 (citation omitted).

[53] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order on Reconsideration, 30 FCC Rcd 13731, 13740 (¶ 20) (2015) ("*Cost Allocator Order*").

[54] FE Br. at 54 n.28 (quoting FE St. 2-R at 12 (Zarakas Rebuttal)).

[55] *Id.*

Verizon—because the new telecom rate presumption in the Commission's regulations applies and FirstEnergy did not rebut it with clear and convincing evidence. The regulation's presumption provides "that [Verizon] may be charged no higher than the rate determined in accordance with [the new telecom rate formula]" under any "pole attachment contracts entered into or renewed after" March 11, 2019, the effective date of the regulation.[56] To rebut the presumption, FirstEnergy must come forward with "clear and convincing evidence" to demonstrate that it provides Verizon "net benefits" under the joint use agreements that "materially advantage" Verizon over CLECs and cable companies "providing telecommunications services on the same poles."[57] And where the presumption is rebutted, the old telecom rate is "the maximum rate" that may be charged based on the quantified value of the net material competitive advantages—a rate about [redacted] the rate FirstEnergy charges Verizon.[58]

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

FirstEnergy told the Commission "most existing joint use agreements" would be "renewed" agreements "presumed to get the FCC's new lower rate" if the Commission adopted

[56] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)); *see also* FE Br. at 51 (admitting there is "a presumption that [Verizon] is 'similarly situated' to its competitors … relative to their ability to attach to FirstEnergy's poles and, therefore, must be charged the new telecom rate").

[57] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)); *see also Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7768 (¶ 123) (2018) ("*Third Report and Order*").

[58] *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129). The properly calculated old telecom rates are found at VZ St. 2.0, Ex. MSC-1 at VZ00055-56, VZ00058-87 (Calnon Aff. ¶¶ 36-37 & Exs. C-1 – C-3); *see also* Initial Brief of Verizon at 16 (July 28, 2020) ("VZ Br."). FirstEnergy includes higher alleged old telecom rates in its brief, but they were improperly calculated using incorrect inputs to artificially inflate the resulting rate. *See* VZ St. 2.1 at 42:1-44:7 & Ex. MSC-5 (Calnon Surrebuttal); *see also* Section III.B below; VZ Br., Section V.B.

its regulations.[59] FirstEnergy's joint use agreements with Verizon are no exception; they govern the parties today because they "automatically renewed [and] extended" after the March 11, 2019 effective date of the relevant regulation.[60] FirstEnergy's effort to avoid the presumption fails and is undermined by its own rulemaking comments.

First, the presumption automatically takes effect when joint use agreements renew. FirstEnergy argues the presumption should only apply if *FirstEnergy* chooses to take "some action" after March 11, 2019 to "trigger" the presumption.[61] There is no such requirement in the Commission's regulations. Instead, the presumption applies broadly to "agreements that are *automatically* renewed [or] extended" *without* further affirmative action.[62] This makes sense: the presumption counteracts a continued decline in "[I]LEC bargaining power vis-à-vis utilities."[63] The presumption's effectiveness is not in the hands of electric utilities that, like FirstEnergy, want to avoid it.

Second, the presumption applies regardless of the length of an agreement's renewal term. FirstEnergy argues the presumption should be limited to agreements that specify the length of a renewal term and should exclude agreements that, like the joint use agreements, extend on a day-to-day basis.[64] But the presumption does not distinguish among agreements that renew or extend

[59] *See* FE Rulemaking Comments at 8; *see also* 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

[60] VZ Br. at 23-25.

[61] FE Br. at 64-65.

[62] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475) (emphasis added).

[63] *Id.* at 7769 (¶ 126).

[64] FE Br. at 65.

on a day-to-day, month-to-month, or year-to-year basis[65]; it was adopted to eliminate "outdated [rate] disparities" in all of them.[66]

Third, the presumption applies to renewed agreements regardless of the words used to describe the renewal. FirstEnergy argues the presumption should apply only if the exact words "renew" or "extend" appear in the agreement—and so should not apply here because the joint use agreements use the word "continue," which is a synonym of "extend."[67] This formalistic limitation is not in the Commission's regulations. Because the joint use agreements *in fact* automatically renewed and extended after March 11, 2019, the presumption applies.[68]

Fourth, the presumption is consistent with Pennsylvania law because it is Pennsylvania law. FirstEnergy argues the presumption violates "the Public Utility Code and controlling Commission precedent."[69] This is impossible because the presumption *is* controlling Pennsylvania law given that it is expressly stated in the Commission's regulations.[70] FirstEnergy also claims a new telecom rate "would arguably" violate the takings clause of the federal and

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[65] FirstEnergy agrees "year-to-year renewals" are subject to the presumption. *See* FE Rulemaking Comments at 8.

[66] *See Final Rulemaking Order*, 2019 WL 4345730, at *3; *see also Third Report and Order*, 33 FCC Rcd at 7767-68, 7770 (¶¶ 123, 127 n.475). FirstEnergy's focus on requiring a *renewal* term also misses the mark because the presumption applies to agreements that automatically renew *and* agreements that automatically *extend*. *See Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475) ("renewal includes agreements that are automatically renewed [or] extended").

[67] FE Br. at 65; *see also* Compl. ¶ 16 ("Continue" means "[t]o carry further in time, space or development: extend.").

[68] *See also* VZ Br. at 23-25.

[69] FE Br. at 65-66.

[70] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)); *Final Rulemaking Order*, 2019 WL 4345730, at *22 n.76 (citing Commission authority for regulations); *Herdelin*, 328 A.2d at 554.

Pennsylvania Constitutions.[71] The United States Supreme Court decided otherwise,[72] and "the takings clause in the Pennsylvania Constitution does not provide more extensive protections than those offered by the U.S. Constitution."[73]

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

FirstEnergy argues it rebutted the presumption, but most of its arguments ignore the controlling standard.[74] The remainder rely on conclusory and incorrect allegations that do not prove by clear and convincing evidence or properly quantify any net material competitive benefit justifying a rate higher than the competitively neutral new telecom rate.

1) FirstEnergy Tries to Reduce the Presumption to a Nullity that Cannot Achieve the Commission's Goals.

The Commission, like the FCC, ordered FirstEnergy and other electric utilities to eliminate the outdated disparities between rates charged ILECs and their competitors to "promote and encourage the provision of advanced telecommunications services and broadband deployment in the Commonwealth."[75] This means differences in pole attachment rates require cost-based real-world data that proves a rate differential is warranted.[76] FirstEnergy instead asks

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[71] FE Br. at 66.

[72] *FCC v. Fla. Power Corp*., 480 U.S. 245, 254 (1987); *see also Ga. Power Co. v. Teleport Commc'ns Atlanta, Inc*., 346 F.3d 1033, 1047 (11th Cir. 2003); *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002).

[73] *Machipongo Land & Coal Co. v. Commonwealth*, 569 Pa. 3, 24 n.7 (2002) (citation omitted).

[74] *See* 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)). FirstEnergy changed positions since filing its Answer, where it argued only that the new telecom rate presumption does not apply. *See* FE Answer Br. at i, ¶ 28 & FE Answer to Compl. ¶¶ 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 43, 62, 63 (stating regulation's "presumptions do not apply").

[75] *Final Rulemaking Order*, 2019 WL 4345730, at *2, 3 (citation omitted).

[76] *See, e.g.*, *Verizon Va. v. Va. Elec. & Power Co.*, 32 FCC Rcd 3750, 3759 (¶ 18) (2017) ("*Dominion Order*") ("[W]e agree with Verizon that Dominion may not 'embed in Verizon's rental rate costs that Dominion does not incur.'").

the Commission to let it slide by on conclusory allegations and the facts of other cases. The Commission's "clear and convincing evidence" standard requires far more,[77] and FirstEnergy failed to deliver.

First, joint use agreements are presumptively comparable to license agreements for rate-setting purposes. FirstEnergy argues that *all* joint use agreements benefit ILECs as compared to license agreements with CLECs and cable companies.[78] This would wipe out the presumption, leaving in place the "outdated" rate disparities.[79] Instead, the Commission's regulations presume joint use agreements *are* comparable to license agreements and should include the same new telecom rate.[80]

Second, allegations about a different electric utility's different agreement with a different ILEC does not justify a higher rate for FirstEnergy. FirstEnergy tries to freeload on an interim decision in a different case, where the FCC's Enforcement Bureau listed "advantages" about a different joint use agreement between a different ILEC and different electric utility.[81] The interim decision did not decide whether the "advantages" were net material competitive advantages sufficient to rebut the new telecom rate presumption in that case—let alone in this case, where the record refutes each one.[82]

Third, *FirstEnergy must prove it incurs relevant annually recurring costs to rebut the presumption.* FirstEnergy says it should not have to prove or quantify costs it claims to incur and

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[77] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

[78] FE Br. at 74; *see also id.* at 31-34.

[79] *Final Rulemaking Order*, 2019 WL 4345730, at *3.

[80] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

[81] FE Br. at 73-74, 82; *see also BellSouth Telecommc'ns, LLC v. Fla. Power and Light Co.*, Proceeding No. 19-187, 2020 WL 2568977, at *1 (EB 2020) ("*FPL 2020 Order*").

[82] *See* VZ Br. at 48-51; *see also* VZ St. 1.1 at 29:3-32:2 (Mills Surrebuttal).

asks the Commission to take it at its word that new telecom rates are "far below FirstEnergy's cost to serve under the Joint Use Agreements."[83] But the new telecom rate formula produces a "rate [that] is just, reasonable, and fully compensatory, and … grounded in sound economic policies," a fact affirmed by the FCC and United States Supreme Court.[84] To justify a higher rate, FirstEnergy must prove it has incurred and properly measured relevant costs; otherwise unlawful and artificial rate disparities will persist and continue to harm Pennsylvanians.[85] The FCC has thus always required electric utilities to accurately quantify relevant costs, as FirstEnergy well knows.[86] FirstEnergy "may not 'embed in Verizon's rental rate costs that [FirstEnergy] does not incur.'"[87]

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[83] *See* FE Br. at 3, 74, 79.

[84] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5299 (¶ 137) (2011) ("*Pole Attachment Order*"); *see also Fla. Power Corp*., 480 U.S. at 254 (finding cable rate—which approximates the new telecom rate—is fully compensatory to the pole owner); *City of Portland v. United States*, No. 18-72689, 2020 WL 4669906, at *21 (9th Cir. Aug. 12, 2020) (stating new telecom and cable rates are "just, reasonable, and allow[ ] full cost recovery").

[85] *See Cost Allocator Order*, 30 FCC Rcd at 13744 (¶ 29) ("The express reason for the statutory imposition of cost-based, regulated rates is to bypass the economic principle that 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.") (citation omitted); *Am. Elec. Power Corp. v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013) ("[The electric utilities] offer neither theory nor fact to contradict the [FCC]'s fundamental proposition that artificial, non-cost-based differences in the prices of inputs among competitors are bound to distort competition ….").

[86] VZ St. 1.2, Ex. SCM-46 (instructing FirstEnergy to provide the "monetary value" of each alleged advantage in pole attachment rate dispute); *see also* VZ St. 1.2 at 22:10-23:7 (Mills Surrejoinder); *FPL 2020 Order*, 2020 WL 2568977, at *7 (¶ 15) (finding "FPL's calculation of the monetary value of these benefits is inflated" and "overstate[d]"); *Dominion Order*, 32 FCC Rcd at 3759 (¶ 20) (finding Dominion "fails to justify" charging higher rates where it "with only a few exceptions, …. [did] not quantify the purported material advantages").

[87] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18).

Fourth, FirstEnergy must prove relevant net material competitive advantages to collect a rate higher than the new telecom rate. Because the joint use agreements do not confer a net material competitive advantage, FirstEnergy tries to change the burden imposed by the Commission's regulations. For example:

- Instead of identifying *real-world* competitive differences, FirstEnergy relies on a flawed comparison of one of the parties' ten joint use agreements with a *draft* license agreement FirstEnergy provides "to requesting CLEC / CATV entities with the understanding that modifications are negotiated;"[88]

- Instead of identifying *competitive* advantages, FirstEnergy argues Verizon is advantaged by FirstEnergy's tree removal and vegetation management program, which clears trees and vegetation around FirstEnergy's facilities and has the same secondary impact on *all* communications facilities on the pole;[89]

- Instead of identifying *net* material competitive advantages, FirstEnergy argues the unique costs FirstEnergy imposes on Verizon, but not on Verizon's competitors, should be ignored;[90] and

- Instead of identifying unreimbursed costs, FirstEnergy points to costs that *are* already reimbursed, such as pole replacement costs and "expenses responding to emergency events."[91]

The Commission's clear and convincing evidence standard requires much more than a collection of unsupported, irrelevant, incomplete, and hypothetical claims.

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[88] FE Br. at 81-82; *see also* VZ St. 1.0, Ex. SCM-5 at VZ00577 (FCC Ex. 23); VZ St. 1.2 at 24:3-28:4 (Mills Surrejoinder); FE Rulemaking Comments at 13 (stating its license agreements "contain provisions specific to individual circumstances"). The Commission also cannot rely on FirstEnergy's comparison because FirstEnergy did not enter it into evidence. *See* Joint Motion to Admit Stipulated Items into Record (July 7, 2020) (omitting FE St. 1-RJ, Ex. SFS-15).

[89] FE Br. at 77, 80; *see also* VZ St. 1.1 at 27:3-22 & Ex. SCM-22 (Mills Surrebuttal); VZ St. 1.2 at 15:13-16:14 (Mills Rejoinder).

[90] FE Br. at 79-80; *see also* VZ St. 1.1 at 17:4-18:9 (Mills Surrebuttal); VZ St. 1.2 at 12:10-14:13, 17:16-18:7 (Mills Surrejoinder).

[91] FE Br. at 80; *see also* VZ St. 1.1 at 40:8-41:3 (Mills Surrebuttal). FirstEnergy claims the expenses are "unreimbursed," but "cannot … confirm whether invoicing was issued or payment was received." VZ St. 1.1, Ex. SCM-28.

Fifth, the discovery process is not to blame for FirstEnergy's evidentiary failures. FirstEnergy says it requires additional discovery to quantify advantages it alleges, even though FirstEnergy propounded discovery when this case was pending at the FCC and was allowed to take unlimited discovery after this case was transferred to the Commission.[92] And FirstEnergy never needed discovery to meet its burden in this case anyway, nor did it use the voluminous discovery it did propound. If FirstEnergy incurs an unreimbursed cost because it provides Verizon a net material competitive advantage under the joint use agreements, FirstEnergy would have the relevant data to substantiate it.[93] FirstEnergy cannot prove and quantify the value of net material competitive advantages because there are none.[94]

2) FirstEnergy Does Not Provide Verizon a Net Material Competitive Advantage Under the Agreements.

Having tried several lists of alleged advantages throughout this case, FirstEnergy settled in its brief on a set of three. They are unsubstantiated, incorrect, and insufficient to rebut the presumption.

1) *Joint Use Agreement Rates*. FirstEnergy claims Verizon is advantaged because Verizon may charge FirstEnergy rates higher than the new telecom rate under the joint use agreements, such that "FirstEnergy pays a large proportion of Verizon's costs to own and

[92] FE Br. at 78-79; *see also* Scheduling Order at 7 (Apr. 14, 2020). FirstEnergy's two motions to compel were denied. *See* Order Denying Motion to Compel Filed by FirstEnergy Regarding Interrogatories I-1, I-20, and I-21 (May 11, 2020); Order Denying Motion to Compel Filed by FirstEnergy Regarding Interrogatories III-1 (June 3, 2020).

[93] *See, e.g.*, VZ St. 1.1 at 11:9-12:2 (Mills Surrebuttal); VZ St. 2.1 at 34:14-35:3 (Calnon Surrebuttal); VZ St. 1.2 at 7:16-8:12 (Mills Surrejoinder).

[94] VZ St. 1.2 at 7:6-8:12 (Mills Surrejoinder).

maintain its pole infrastructure."[95] This is not true,[96] but is also not relevant because the result of this case should be proportional new telecom rates for *both parties*.[97]

2) *"Speed-to-Market."* FirstEnergy relies on its discredited set of "speed to market" allegations, which seek to perpetuate "outdated" rate disparities based on the immutable fact that ILECs deployed some of their facilities half a century ago, before cable companies and CLECs entered the market.[98] This earlier deployment of ILECs, FirstEnergy argues, had a ripple effect creating a series of "advantages" that will forever justify higher rates for ILECs. But the FCC, and now this Commission, do *not* allow electric utilities to charge ILECs higher pole attachment rates simply because they are ILECs.[99] The alleged "speed to market" advantage "associated with Verizon's historical status as an [I]LEC" is not relevant to whether "rates are just and reasonable" under the Commission's regulations.[100]

Reviewed individually, FirstEnergy's arguments about the spillover effect of Verizon's ILEC status also fail to establish a net material competitive advantage.

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[95] FE Br. at 74, 77.

[96] FirstEnergy pays far better rates to use far more space on Verizon's poles than Verizon pays to use far less space on FirstEnergy's poles. *See* VZ Br. at 32-34.

[97] VZ St. 2.0, Ex. MSC-1 at VZ00047-51, VZ00102 (Calnon Aff. ¶¶ 25-29 & Ex. C-6); VZ St. 1.1 at 25:1-10 (Mills Surrebuttal); VZ St. 2.1 at 39:10-40:4 (Calnon Surrebuttal); VZ St. 1.2 at 19:9-20:2 (Mills Surrejoinder); VZ St. 2.2 at 7:9-12 (Calnon Surrejoinder).

[98] *See* FE Br. at 74-77; *see also* VZ Br. at 46.

[99] *Final Rulemaking Order*, 2019 WL 4345730, at *3 ("eliminat[ing] outdated disparities between the pole attachment rates that [ILECs] pay compared to other similarly-situated telecommunications attachers"); *City of Portland*, 2020 WL 4669906, at *20-21 (affirming new telecom rate presumption requiring electric utilities to "remove rate disparities between … so-called incumbent local exchange carriers, or ILECs" and "so-called competitive local exchange carriers, or CLECs").

[100] *See* VZ St. 1.2, Ex. SCM-45 at 3; *see also* VZ St. 2.2 at 17:3-16 (Calnon Surrejoinder).

First, Verizon does not incur fewer make-ready expenses than its competitors.

FirstEnergy claims Verizon incurs fewer make-ready expenses when attaching to FirstEnergy's poles than its competitors incur.[101] This is false. FirstEnergy's claim is based on a biased and incomplete comparison of make-ready costs FirstEnergy charged Verizon to amounts it says it charged licensees requiring the most make-ready work during the last two years.[102]

FirstEnergy inflated the costs it says it charged Verizon's competitors, as evident when the values it erroneously calculated ([redacted] per pole for Met-Ed, [redacted] per pole for Penelec, and [redacted] per pole for Penn Power) are compared to the [redacted] and [redacted] per pole quantifications it provides for some licensees with "the largest number of attachment applications during the past two years."[103] And because FirstEnergy only considered [redacted] licensees per operating company—when it has 185 license agreements—most of FirstEnergy's licensees paid less.[104] FirstEnergy also skewed the analysis by comparing Verizon to companies incurring start-up costs to deploy their networks, including some [redacted] before 2018; Verizon's typical competitors have been deploying extensive networks for decades and incurring comparable costs to deploy additional facilities today.[105]

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[101] *See* FE Br. at 74.

[102] *See* FE St. 1-R at 32:7-15 & Ex. SFS-5 at FE00011 (Schafer Rebuttal); *see also* VZ St. 1.1 at 13:6-19:5 (Mills Surrebuttal).

[103] *See* FE St. 1-R at 32:7-15 & Ex. SFS-5 at FE00011. In their rejoinder testimony, FirstEnergy's witnesses did not attempt to rebut the calculation errors Verizon's witnesses identified in their surrebuttal testimony. *See, e.g.*, VZ St. 1.1 at 18:10-19:5 (Mills Surrebuttal); VZ St. 2.1 at 37:12-38:14 (Calnon Surrebuttal); VZ St. 3.1 at 27:7-28:7 (Tardiff Surrebuttal).

[104] *See* VZ St. 1.1, Ex. SCM-27; *see also* VZ St. 3.1 at 27:7-18 (Tardiff Surrebuttal).

[105] VZ St. 1.1 at 18:10-19:5 (Mills Surrebuttal); VZ St. 2.1 at 37:12-38:14 (Calnon Surrebuttal); VZ St. 3.1 at 27:19-28:7 (Tardiff Surrebuttal); *Dominion Order*, 32 FCC Rcd at 3759 (¶ 20)

FirstEnergy also excluded nearly all of Verizon's make-ready costs from the comparison. Verizon completes much of the make-ready work it requires when making attachments to FirstEnergy's poles, while Verizon's competitors typically pay FirstEnergy to complete that same work at cost.[106] "Where Verizon performs a particular service itself and incurs costs comparable to its competitors in performing that service, … [an electric utility] may not 'embed in Verizon's rental rate costs that [the electric utility] does not incur."[107] Doing so "would effectively double charge Verizon—once when Verizon performs work" and again when Verizon pays its annual rental rate.[108] FirstEnergy also did not account for the significant pole replacement costs and transfer costs FirstEnergy imposes on Verizon but *not* on Verizon's competitors—claiming these unique costs should be disregarded as the mere "cost of doing business" with FirstEnergy.[109] This "failure to weigh, and account for, the different rights *and responsibilities* in joint use agreement[s]" leads to the "marketplace distortions" that harm consumers.[110] FirstEnergy's biased and incomplete make-ready analysis does not differentiate Verizon from its competitors.[111]

(rejecting alleged quantification where electric utility did not show "Verizon has been advantaged relative to a *typical* competitor or an average of its competitors") (emphasis added).

[106] VZ St. 1.0, Ex. SCM-1 at VZ00024 (Mills Aff. ¶ 55); VZ St. 1.1 at 15:17-17:3 (Mills Surrebuttal); *see also* VZ St. 3.1 at 26:3-9 (Tardiff Surrebuttal)

[107] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18).

[108] *Id.* at 3759 (¶ 18 n.67); *see also* VZ St. 2.1 at 36:19-37:11 (Calnon Surrebuttal); VZ St. 2.2 at 17:17-18:2 (Calnon Surrejoinder).

[109] *See* FE St. 1-RJ at 16:9-14 (Schafer Rejoinder); *see also* VZ St. 1.0, SCM-1 at VZ00024-28 (Mills Aff. ¶¶ 55-61); VZ St. 1.1 at 17:4-18:9 (Mills Surrebuttal).

[110] *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654) (emphasis added).

[111] VZ St. 1.1 at 13:6-20:8 (Mills Surrebuttal); VZ St. 2.1 at 36:17-38:14 (Calnon Surrebuttal); VZ St. 3.1 at 25:12-30:17 (Tardiff Surrebuttal).

Second, Verizon is not advantaged by the age of its network. FirstEnergy says Verizon is advantaged by the age of its network because it can reach customers faster by overlashing existing facilities or lighting dark fiber, instead of engaging in the make-ready process required to install new facilities.[112] This is also false. FirstEnergy has no data to support this assertion,[113] and it admits Verizon's competitors with existing facilities can also overlash existing facilities or light dark fiber capacity.[114] Indeed, they have done so for many decades.[115] "By 1978, cable attachments were so common that Congress saw fit to regulate their rates, and, by 1996, section 224 of the [Pole Attachment] Act was amended to provide cable and [C]LECs a statutory right of access."[116] And so, "[c]able companies have, through overlashing, been able for decades to … expand capacity of existing communications facilities, by tying communications conductors to existing, supportive strands of cable on poles."[117] It has also been the consensus of cable

[112] FE Br. at 75. *But see* VZ St. 1.1 at 20:19-21:16 (Mills Surrebuttal); VZ St. 1.2 at 21:15-22:9 (Mills Surrejoinder).

[113] VZ St. 1.1, Exs. SCM-14, SCM-15; VZ St. 1.2, Ex. SCM-45 at 3 ("Potomac Edison does not purport to have, nor has it requested, the same information from Verizon's competitors …").

[114] FE Answer Br. ¶ 82 n.92 ("A cable company that already has incurred make-ready expenses to attach to a certain number of poles arguably can compete with Verizon for certain new business by overlashing existing facilities or by lighting spare dark fiber capacity.").

[115] *See also* VZ St. 1.1 at 69:8-10 (Mills Surrebuttal).

[116] *FPL 2020 Order*, 2020 WL 2568977, at *7 (¶ 15).

[117] *In Re Amendment of Commission's Rules & Policies Governing Pole Attachments*, 16 FCC Rcd 12103, 12140 (¶ 73) (2001); *see also In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (¶ 59) (1998) (*1998 Implementation Order*") ("Overlashing, whereby a service provider physically ties its wiring to other wiring already secured to the pole, is routinely used to accommodate additional strands of fiber or coaxial cable on existing pole attachments.").

companies and CLECs for more than twenty years "that the use of dark fiber is a pro-competitive, environmentally sound and economical use of existing facilities."[118]

Third, there is no material difference between the overlashing rules that FirstEnergy may lawfully apply to Verizon and its competitors. FirstEnergy says it imposed more lenient overlashing rules on Verizon because Verizon's competitors must provide notice of overlashing and supporting pole loading studies.[119] Again, this is false. FirstEnergy assigns no cost to this difference, and there is none. Until early 2018, pole owners had no lawful right to require prior notice before overlashing.[120] And now, when prior notice is required, it may not be used to "require[e] engineering studies" such as pole loading studies.[121] FirstEnergy thus relies on unenforceable requirements that cannot competitively advantage Verizon, but should be lifted for all communications attachers.[122]

Fourth, the Joint Use Agreements do not allow Verizon to install attachments faster than its competitors. FirstEnergy argues Verizon is able to deploy facilities faster than its competitors because, while both must compile the same information when installing new attachments and complete the same work, Verizon does not need to take a photograph of the pole or submit the

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[118] *See In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (¶ 73) (1998).

[119] FE Br. at 76. *But see* VZ St. 1.1 at 23:3-11 (Mills Surrebuttal).

[120] *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002); *Third Report and Order*, 33 FCC Rcd at 7762 (¶ 115) ("adopting a pre-notification option" for overlashing).

[121] *Third Report and Order*, 33 FCC Rcd at 7765 (¶ 119 & n.444) (emphasis added); *see also* 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1415).

[122] *See 1998 Implementation Order*, 13 FCC Rcd 6777 (¶ 62) ("[O]verlashing … facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities. Overlashing promotes competition by accommodating additional telecommunications providers and minimizes installing and financing infrastructure facilities.").

information it compiles on a pole profile sheet.[123] This does not give Verizon a head start. Verizon's competitors can install new attachments far faster than Verizon because they are eligible for the accelerated one-touch-make-ready option in the Commission's regulations and Verizon is not.[124]

Fifth, FirstEnergy does not charge all attachers fees to use its SPANS system, so Verizon has no advantage by using SPANS without charge. FirstEnergy says Verizon is advantaged because FirstEnergy may charge some of Verizon's competitors application fees for use of its electronic application processing system known as SPANS.[125] But FirstEnergy admits it did not implement SPANS until 2014 in its Penn Power service area and 2016 in its Met-Ed and Penelec service areas, so no one could have paid fees before then.[126] And it claims it now charges fees for use of SPANS *if* permitted by a particular license agreement.[127] FirstEnergy did not enter invoices or payment records into evidence. Not one of the six license agreements it attached to its Answer allows FirstEnergy to charge the fees.[128] And FirstEnergy's website describes a "complete application" without mention of application fees.[129]

3) *Possible Optional Field Audit.* FirstEnergy's third alleged advantage changed significantly during discovery. It originally alleged "that Verizon avoids the five-year field audit

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[123] FE Br. at 75. *But see* VZ St. 1.1 at 21:17-22:12 (Mills Surrebuttal); VZ St. 1.2 at 15:3-12, 21:7-14 (Mills Surrejoinder).

[124] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1411); *see also* VZ St. 1.1 at 21:9-22:12, 26:6-10 (Mills Surrebuttal); VZ St. 2.2 at 16:8-17:2 (Calnon Surrejoinder).

[125] FE Br. at 75-76. *But see* VZ St. 1.1 at 22:13-23:2 (Mills Surrebuttal); VZ St. 3.1 at 28:8-29:3 (Tardiff Surrebuttal).

[126] VZ St. 1.1, Ex. SCM-16.

[127] *Id.*

[128] *See* VZ St. 1.1 at 22:13-23:2 (Mills Surrebuttal) & Ex. SCM-11 at FE00206-312.

[129] *See* VZ St. 1.1 at 23:1-2 (Mills Surrebuttal); VZ St. 1.0, Ex. SCM-6 (FCC Ex. 30).

costs that Verizon's competitors must pay,"[130] but admitted in discovery that it "does not have a record of its last field audit"[131] and that any future audits will be *optional* for Verizon's competitors and free for FirstEnergy.[132] FirstEnergy's allegation, as a result, has been reduced to a claim that Verizon "does not even have to bear the risk of incurring" costs for a possible field audit that will *also* be optional for Verizon's competitors.[133] Verizon is not advantaged.[134]

c) FirstEnergy Cannot Avoid the New Telecom Rate by Creating Fictional Hurdles and Exceptions.

Because FirstEnergy did not rebut the new telecom rate presumption, Verizon "may be charged no higher than the rate determined in accordance with [the new telecom rate formula]."[135] That is the end of the matter. FirstEnergy cannot impose additional requirements.

1) Verizon Did Not Need To Terminate the Joint Use Agreements and Compromise Future Deployment.

FirstEnergy informed the Commission last year that lower rates are required for "most *existing* joint use agreements" because they are subject to the new telecom rate presumption.[136] FirstEnergy now argues Verizon needs to terminate its existing joint use agreements to obtain

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[130] FE Answer ¶ 88.

[131] VZ St. 1.1, Ex. SCM-18; *see also* VZ St. 1.1, Ex. SCM-19 ("[N]o field audits of pole attachments have been performed" by "Met-Ed, Penelec or Penn Power since [2011].").

[132] *See* VZ St. 1.1, Ex. SCM-18 at 8 (FirstEnergy's contractor "will negotiate" with "attaching companies" for participation and fees to be paid directly to the contractor).

[133] FE Br. at 76. FirstEnergy says it will force licensees to participate in the audit by threatening to impose fees for unauthorized attachments discovered during the audit if they do not. *Id.* But unauthorized attachment fees are wholly avoidable by either properly permitting the attachment or correcting it after notice is given. *See Pole Attachment Order*, 26 FCC Rcd at 5291 (¶ 115). FirstEnergy also has not charged unauthorized attachment fees during any relevant time period. *See* VZ St. 1.1, Ex. SCM-19.

[134] VZ St. 2.2 at 18:3-9 (Calnon Surrejoinder); *see also* VZ Br. at 47.

[135] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

[136] FE Rulemaking Comments at 8 (emphasis added).

competitively neutral rates.[137] FirstEnergy was correct the first time around. There is no agreement termination requirement in the Commission's regulations. And for good reason: it would complicate deployment and substantially increase costs going forward.[138] Without the joint use agreements, Verizon would need to construct a duplicative pole line or underground its facilities to deploy facilities in the future[139]—prohibitively expensive and practically impossible options given local preferences and restrictions.[140] The Commission adopted pro-deployment and pro-consumer regulations instead.[141]

FirstEnergy claims the FCC's 2011 *Pole Attachment Order* requires termination of agreements, but the 2011 *Order* is not the final word on this issue. The joint use agreements are subject to the new telecom rate presumption and it expressly applies "to existing contracts."[142]

FirstEnergy is also wrong that the 2011 *Pole Attachment Order* required termination of existing joint use agreements. Instead, it established a framework for reviewing *existing* rates in *existing* agreements. It recognized "[I]LECs frequently have access to pole attachments pursuant to joint use agreements," and found "where [I]LECs have such access, they are entitled to rates,

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[137] FE Br. at 56-58.

[138] VZ St. 1.1 at 45:8-15 (Mills Surrebuttal).

[139] *See* FE Answer Br. ¶ 36; *see also* VZ St. 1.1 at 45:8-15 (Mills Surrebuttal).

[140] *See, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5242 (¶ 4) ("Owing 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.") (citations omitted).

[141] *Final Rulemaking Order*, 2019 WL 4345730, at *1; *see also Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Inv*., 2020 WL 4428179, at *1 (2020) ("*Declaratory Ruling*") ("The [FCC]'s top priority is closing the digital divide so that all Americans can enjoy the many benefits of a high-speed broadband Internet connection—whether job opportunities, remote learning, telehealth, or staying connected to family and friends.").

[142] *See Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127).

terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)."[143] The FCC then authorized—without restriction—ILECs to "file complaints with the Commission challenging the rates, terms and conditions of [these] pole attachment agreements with other utilities."[144] And about three months ago, the FCC's Enforcement Bureau declared unlawful an *existing* rate in an *existing* agreement under the *Pole Attachment Order*'s standard.[145]

FirstEnergy ultimately admits the *Pole Attachment Order* provided rate relief under existing agreements where "'an [I]LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement.'"[146] Even if this case were reviewed under the *Pole Attachment Order*'s standard, rate relief is required here.[147]

First, Verizon genuinely lacks the ability to terminate the existing agreement rates because FirstEnergy never offered lawful rates. FirstEnergy argues that the FCC found an ILEC only genuinely lacks the ability to terminate rates in an existing agreement when the electric utility refuses outright to discuss new rates.[148] Not so. FirstEnergy identified the fact pattern of one case. In two other cases, the FCC found the ILEC genuinely lacked the ability to terminate the existing rates where, as here, the electric utility discussed new rates, but was unwilling to provide the rate reductions required by law.[149] Verizon genuinely lacks the ability to terminate

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[143] *Pole Attachment Order*, 26 FCC Rcd at 5328, 5334 (¶¶ 202, 216).

[144] *Id*. at 5328 (¶ 203).

[145] *See FPL 2020 Order*, 2020 WL 2568977, at *4 (¶ 11).

[146] FE Br. at 59 (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216)).

[147] VZ Br. at 35-38.

[148] *See* FE Br. at 59 (citing *Verizon Fla. v. Fla. Power & Light Co.*, 30 FCC Rcd 1140, 1150 (¶ 25) (2015) ("*FPL 2015 Order*")).

[149] *FPL 2020 Order*, 2020 WL 2568977, at *5 (¶ 12) ("AT&T has demonstrated that it 'genuinely lacks the ability to terminate [the JUA] and obtain a new arrangement.' As discussed, the JUA may not be terminated or its rates amended without the agreement of both parties, and AT&T's lower pole ownership ratio places it in an inferior bargaining position. Further, AT&T

the joint use agreement rates because, through more than seven years of negotiations, FirstEnergy never made an offer to materially change the agreement rates and Verizon's annual net rental payment.[150]

Second, Verizon repeatedly demonstrated flexibility in negotiations. FirstEnergy argues Verizon could have negotiated new rates, but "refused to consider, let alone accept, any rate that was higher than the new telecom rate."[151] This is false. Verizon repeatedly asked FirstEnergy to negotiate within the range of rates "between the new telecom rate and the old [or pre-existing] telecom rate" and asked FirstEnergy for copies of its license agreements to see whether their terms and conditions justify a rate higher than the new telecom rate. [152] FirstEnergy continued to insist its excessive rates are the correct rates and refused access to its license agreements until after Verizon filed its formal complaint at the FCC.[153] Regardless, an ability to negotiate "new rates" is not sufficient to avoid Pennsylvania law, which requires just, reasonable, and competitively neutral rates.[154]

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has shown that its attempts to negotiate a new rate with FPL in light of the *Pole Attachment Order* were unsuccessful.") (citation omitted); *Dominion Order*, 32 FCC Rcd at 3756-57 (¶¶ 13-14) (finding an "inability to terminate an agreement" where "Dominion fails to mention that, after four years of intensive rate negotiations, the rate reductions to which it refers were offset by significantly greater rate reductions achieved by Dominion").

[150] *See* VZ Br. at 35-38; *see also* VZ St. 1.1 at 41:5-15, 43:14-16 (Mills Surrebuttal).

[151] FE Br. at 61-63.

[152] FE Answer Br. ¶ 14; VZ St. 1.0, Ex. SCM-1 at VZ00016-17 (Mills Aff. ¶¶ 35-37); VZ St. 1.1 at 41:16-42:19 (Mills Surrebuttal); *see also* VZ St. 1.0, Ex. SCM-5 VZ00593 (FCC Ex. 27) ("our strong preference is for a negotiated resolution"); *id*. at VZ00692 (FCC Ex. 29) ("I continue to hope that we can reach a business deal regarding rental rates").

[153] *See* VZ St. 1.1 at 42:6-9 (Mills Surrebuttal).

[154] *See* 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224(b) and 47 C.F.R. § 1.1413); *Final Rulemaking Order*, 2019 WL 4345730, at *2 (finding "low and close to uniform" rates needed).

Third, FirstEnergy never offered to replace the existing agreement with a "template" agreement. FirstEnergy argues Verizon could have terminated the joint use agreements because FirstEnergy offered "to discuss terminating the existing agreements and replac[ing] them with FirstEnergy's template CLEC agreement."[155] This "offer" was not an offer at all. It was an "outside the box" suggestion that did not guarantee Verizon properly calculated new telecom rates or the continued access to FirstEnergy's poles Verizon requires to further the Commission's deployment objectives.[156] The suggestion also came with an unacceptable precondition: Verizon would have "to completely transition … out of pole ownership."[157] An ILEC is not "required to sell its poles in order to receive a just and reasonable [pole attachment] rate."[158] The law already requires one.[159]

Fourth, there has never been a requirement that joint use agreements be terminated. FirstEnergy claims it put Verizon on notice that the joint use agreements must be terminated to negotiate just and reasonable rates.[160] But there is no such requirement. And the email FirstEnergy relies on—sent about six years into the parties' negotiations—corroborates Verizon's witness's testimony: "Had FirstEnergy raised [this meritless] argument sooner, it

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[155] FE Br. at 59.

[156] VZ St. 1.0, Ex. SCM-5 at VZ00650-651 (FCC Ex. 28); *see also* VZ St. 1.1 at 45:16-48:2 (Mills Surrebuttal); VZ St. 2.1 at 60:14-61:2 (Calnon Surrebuttal); VZ St. 3.1 at 18:1-20:2 (Tardiff Surrebuttal); VZ 1.2 at 6:5-12 (Mills Surrejoinder).

[157] FE Br. at 61; *see also* VZ St. 1.1 at 45:16-48:2 (Mills Surrebuttal); VZ St. 2.1 at 60:14-61:2 (Calnon Surrebuttal); VZ St. 3.1 at 18:1-20:2 (Tardiff Surrebuttal).

[158] *FPL 2020 Order*, 2020 WL 2568977, at *5 (¶ 12).

[159] 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224 and 47 C.F.R. § 1.1413).

[160] FE Br. at 60. The email FirstEnergy relies on does not, in fact, state that the joint use agreements must be terminated to negotiate just and reasonable rates; instead it merely points to language in the 2011 *Pole Attachment Order* about the FCC's review of existing rates in existing agreements. *See* VZ St. 1.0, Ex. SCM-5 at VZ00689 (FCC Ex. 29)).

could have crystalized the dispute and clarified the need for FCC intervention" to ensure just and reasonable rates.[161] Termination of joint use agreements would increase costs and set deployment back in Pennsylvania at a time when the Commission is working to move it forward.

2) Although It Was Not Necessary, Verizon Showed the Joint Use Agreement Rates Reflect FirstEnergy's Superior Bargaining Power.

The Commission's regulations require the new telecom rate irrespective of whether the agreement rates were "negotiated at a time of more equal bargaining power between the parties."[162] FirstEnergy argues otherwise, claiming Verizon "is not entitled to the [new telecom rate] presumption … because FirstEnergy did not possess or leverage bargaining power during negotiations."[163] The Commission cannot add this requirement to its rules, which are designed to *remove* "burdens and expenses" associated with litigation.[164]

But the joint use agreement rates *do* reflect FirstEnergy's superior bargaining leverage.[165] FirstEnergy does not dispute it has owned most of the joint use poles at all relevant times, including 73% of the poles the parties currently share in Pennsylvania.[166] The FCC has repeatedly found lesser pole ownership disparities reflect a lack of ILEC bargaining power to

[161] VZ St. 1.1 at 45:4-15 (Mills Surrebuttal).

[162] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127) (adopting 47 C.F.R. § 1.1413, incorporated at 52 Pa. Code § 77.4(a)).

[163] FE Br. at 66; *id.* at 66-72.

[164] *See Final Rulemaking Order*, 2019 WL 4345730, at *26; *see also id.* at *17 ("If the Commission does find it necessary to amend Chapter 77 to accommodate state-specific changes, the Commission will initiate an appropriate rulemaking.").

[165] *See* VZ Br. at 29-34.

[166] VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 4) (admitting FirstEnergy owns 301,854 of 412,697 joint use poles).

negotiate just and reasonable rates.[167] FirstEnergy asks the Commission to reach a different conclusion,[168] but this Commission decided not "to expend additional resources that duplicate the efforts undertaken by the FCC."[169]

FirstEnergy's arguments are also wrong.

First, FirstEnergy had bargaining power, regardless of whether rates were regulated. FirstEnergy argues it did not have bargaining power *before* July 2011 because joint use agreement rates were subject to challenge before this Commission then.[170] But the mere existence of a regulatory scheme does not "offset utility bargaining superiority."[171] And, regardless, this case does not challenge rates charged *before* July 2011. Verizon seeks enforcement of regulations requiring FirstEnergy to reduce its rates as of July 12, 2011.

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[167] *Dominion Order*, 32 FCC Rcd at 3756-57 (¶ 13) (65% pole ownership advantage); *FPL 2020 Order*, 2020 WL 2568977, at *8 (¶ 18) (66% pole ownership advantage); *Pole Attachment Order*, 26 FCC Rcd at 5327, 5329 (¶¶ 199, 206) ("electric utilities appear to own approximately 65-70 percent of poles," meaning "market forces and independent negotiations may not be alone sufficient to ensure just and reasonable rates" for ILECs); *see also Declaratory Ruling*, 2020 WL 4428179, at *6 (¶ 16) ("bargained solutions for pole attachments would rarely, if ever, occur absent the rules, given the uneven bargaining leverage"); *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126) ("[I]LEC bargaining power vis-à-vis utilities" declines as "[I]LEC pole ownership" relative to electric utilities "decline[s].").

[168] FE Br. at 66-72.

[169] *Final Rulemaking Order*, 2019 WL 4345730, at *20.

[170] FE Br. at 67-68. In fact, by 2007, the FCC was considering whether pole attachment rates charged ILECs were within the FCC's exclusive jurisdiction in states that, like Pennsylvania, had not reverse-preempted the FCC's regulation of pole attachment rates at that time. *See In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules & Policies Governing Pole Attachments*, 22 FCC Rcd 20195, 20196 (¶ 3) (2007) ("Specifically, we seek comment on … whether section 224 confers rights on incumbent local exchange carriers (LECs) to regulation of the rates they pay for pole attachments").

[171] *Declaratory Ruling*, 2020 WL 4428179, at *7 (¶ 18). FirstEnergy relies on a case that confirms a "regulatory process" only counterbalances "monopolistic operation" where the Commission weighs in, as the tariff at issue in that case had been approved by the Commission "through at least two rate proceedings." *Brockway Glass Co. v W. Penn Power Co.*, 1980 Pa. PUC LEXIS 25, *30 (Sept. 25, 1980) (cited at FE Br. at 68).

Second, FirstEnergy quotes out of context a 2009 letter that does not demonstrate a lack of bargaining power. FirstEnergy argues a 2009 letter from a Verizon employee shows FirstEnergy did not have bargaining power when the Met-Ed and Penelec agreements were last amended.[172] This is not relevant because only "current, not past, pole ownership ratios" matter when setting rates.[173] And FirstEnergy takes the letter's pleasantries out of context: the employee did not describe the amended rental *rates* as "fair and equitable"—he described a "common *rate structure*" in Pennsylvania as "fair and equitable."[174] Before 2009, Verizon, Met-Ed, and Penelec had seven different rate arrangements in Pennsylvania because of the many legacy joint use agreements and they required Verizon to pay different rental amounts to the same FirstEnergy operating company depending on where poles were located in relation to outdated legacy service area boundaries.[175] Under the 2009 amendments, the parties reduced the seven rate structures to two: one for Met-Ed's service area and one for Penelec's service area.[176] This created administrative efficiencies, but it did not create "fair" or "equitable" rates under any standard, let alone the "just and reasonable" standard first applied to ILECs two years later.[177]

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[172] FE Br. at 68-69.

[173] *FPL 2020 Order*, 2020 WL 2568977, at *8 (¶ 18).

[174] *See* FE St. 1-R, Ex. SFS-1 (Letter from N. Parrish, Verizon, to Joint Use Team, FirstEnergy (Aug. 12, 2009)) ("With the execution of this MOU Verizon Pa and FirstEnergy can finally have a common rate structure that is fair and equitable for all the Joint Use Agreements between both companies in Pennsylvania."); VZ St. 1.1 at 37:5-38:4 (Mills Surrebuttal).

[175] *See* VZ St. 1.1 at 37:5-38:4 (Mills Surrebuttal).

[176] *See id.*; *see also* VZ St. 1.0, Ex SCM-2 (FCC Exs. 6 at VZ00298, VZ00304, VZ00309, VZ00314 & FCC Ex. 11 at VZ00453, VZ00458, VZ00463).

[177] *See* VZ St. 1.1 at 38:5-16 (Mills Surrebuttal). In the Met-Ed territories, Verizon's 2009 rate was about the mid-point of the prior rates; in the Penelec territories, reductions to Verizon's rate were offset by reductions to Penelec's rate for use of Verizon's poles. *Id.* The result preserved FirstEnergy's rental stream, as Verizon was required to make a 2009 net rental payment to Met-Ed and Penelec under the amendments that was about [redacted] *higher* than Verizon's net rental payment to Met-Ed and Penelec in 2008. *Id.* at 38:17-39:2.

Third, FirstEnergy doesn't have a "standard" license agreement and cannot condition discussing lawful rates on a transfer of pole ownership. FirstEnergy claims it mitigated its bargaining power by agreeing to discuss "the very rates [Verizon] seeks in the Complaint … under the same (i.e., comparable) terms and conditions under which its competitors obtain such rates" if Verizon would agree to transition ownership of its poles to FirstEnergy.[178] This is revisionist history. FirstEnergy said it would discuss the possibility of "a CLEC rate" and its "standard" license agreement,[179] when FirstEnergy does not have a "standard" license agreement[180] or a standard "CLEC rate" despite longstanding regulations requiring one.[181] And, FirstEnergy cannot require an asset transfer in exchange for just and reasonable rates anyway.[182]

Fourth, the FCC already rejected FirstEnergy's specious economic argument. FirstEnergy argues it could not leverage its bargaining power because, absent joint use, it would be economically and legally difficult for FirstEnergy to deploy its facilities elsewhere.[183] The FCC rejected this argument based on "[s]tandard economic theories,"[184] and this Commission

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[178] FE Br. at 69-71.

[179] VZ St. 1.0, Ex. SCM-5 at VZ00650-651 (FCC Ex. 28).

[180] VZ St. 1.0, Ex. SCM-5 at VZ00577 (FCC Ex. 23); FE Rulemaking Comments at 13 ("The Companies oppose standardized agreements or tariffs for pole attachments. The Companies currently have a combined total of approximately 291 ILEC, CLEC and CATV pole attachment agreements … affecting Pennsylvania locations…. The agreements are independent of one another and contain provisions specific to individual circumstances and customers not compatible with standardized tariffs."). *But see Declaratory Ruling*, 2020 WL 4428179, at *6 (¶ 16) ("attachers must receive some benefit, other than the right to attach to poles (already guaranteed by section 224), in exchange for agreeing to rule deviations that benefit utilities").

[181] *See* VZ St. 1.1 at 46:11-13 (Mills Surrebuttal); VZ St. 2.1 at 59:3-60:5 & Ex. MSC-20 (Calnon Surrebuttal); VZ St. 3.1 at 43:12-45:6 (Tardiff Surrebuttal).

[182] *FPL 2020 Order*, 2020 WL 2568977, at *5 (¶ 12).

[183] FE Br. at 71-72.

[184] *See Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206 n.618).

need not reconsider it.[185] As difficult as it would be for FirstEnergy to find alternative infrastructure, Verizon would need to find and obtain approval for *three times* the facilities.[186] This alone illustrates FirstEnergy's superior bargaining position, which necessitates enforcement of the Commission's pole attachment regulations.[187]

3) FCC Orders Do Not Exempt the Joint Use Agreements from the Just and Reasonable Rate Requirement.

FirstEnergy also tries to avoid the new telecom rate presumption by cherry-picking isolated quotes from FCC orders to suggest it may continue charging Verizon [redacted] the new telecom rate.[188] Not so.

First, FirstEnergy hasn't rebutted the presumption, so it applies. FirstEnergy says the FCC found it "would not be appropriate to treat ILECs 'identically to telecommunications carrier or cable operator attachers in all circumstances.'"[189] But this meant only that the FCC adopted a new telecom rate "presumption that may be rebutted, rather than a more rigid rule."[190] Where, as here, FirstEnergy did not rebut the presumption, the new telecom rate applies.[191]

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[185] *Final Rulemaking Order*, 2019 WL 4345730, at *17 (instructing electric utilities not to "rehash or reargue determinations of the FCC").

[186] *See, e.g.* FE Answer, Attachment C at FE00021 (Zarakas Decl. ¶ 17) ("[I]t is reasonable to conclude that Verizon would likely realize greater harm" absent the joint use agreement "in that it would need to remedy loss of access to more poles [than] would FirstEnergy"); VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 3) (admitting FirstEnergy owns 301,854 of 412,697 joint use poles).

[187] *See, e.g.*, VZ St. 2.1 at 61:3-11 (Calnon Surrebuttal); VZ St. 3.1 at 6:10-19, 22:11-23:9 (Tardiff Surrebuttal).

[188] *See* FE Br. at 52-56.

[189] *Id.* at 53; *see also Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 203).

[190] *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126).

[191] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

Second, the FCC applied the presumption to older existing agreements irrespective of bargaining power. FirstEnergy says the FCC stated in 2011 that it was "unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable," but that applied *only* if the agreement was "entered into at a time when the parties had more balanced negotiating positions."[192] The parties' joint use agreements (like many joint use agreements) were not entered by parties with relatively equal bargaining power, and "current, not past, pole ownership ratios" have perpetuated the unlawful rates requiring correction.[193] And so the FCC expressly adopted the new telecom rate presumption to reduce rates in existing agreements.[194] Otherwise, the presumption could not eliminate the "outdated" rate disparities it was adopted to correct.[195]

Third, the new telecom rate presumption is binding Pennsylvania law. FirstEnergy says the FCC may not have adopted the new telecom rate presumption had it considered bargaining power arguments FirstEnergy makes in this case.[196] This is irrelevant. The FCC and this Commission adopted the presumption, it was affirmed on appeal, and it is binding.[197]

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[192] FE Br. at 54.

[193] *FPL 2020 Order*, 2020 WL 2568977, at *8 (¶ 18); *see also* VZ St. 1.0, Ex. SCM-1 at VZ00007, VZ00011-13 (Mills Aff. ¶¶ 14, 23, 27); VZ St. 1.1, Ex. SCM-31 at 2 ("existing joint use agreements were not categorically, or even usually, negotiated by parties with relatively equal bargaining power").

[194] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127) ("We disagree with utilities that argue that we should not apply the [new telecom rate] presumption to any existing agreements ….").

[195] *See id.* at 7767-68 (¶ 123); *Final Rulemaking Order*, 2019 WL 4345730, at *3 ("the FCC …. eliminated outdated disparities between the pole attachment rates that [ILECs] pay compared to other similarly situated telecommunications attachers").

[196] FE Br. at 55.

[197] The Commission rejected FirstEnergy's request to delay implementation "until petitions for reconsideration or any appeals of these recent federal changes are settled." *Final Rulemaking Order*, 2019 WL 4345730, at *26. The U.S. Court of Appeals for the Ninth Circuit affirmed the new telecom rate presumption on appeal. *See City of Portland*, 2020 WL 4669906, at *20-21.

FirstEnergy's contention is also not true. FirstEnergy made the same incorrect bargaining power arguments at the FCC.[198]

Fourth, no inference can be drawn because the FCC has not yet decided a case under the presumption that took effect in March 2019. FirstEnergy notes that the FCC has not ordered an electric utility to charge the new telecom rate under the presumption.[199] This is unremarkable. The FCC has not yet decided a case under the presumption, which took effect in March 2019.[200] This Commission asserted jurisdiction to speed the dispute resolution process "in Pennsylvania as compared to the FCC."[201]

Fifth, even if FirstEnergy had rebutted the presumption, rates like FirstEnergy's that exceed the "old telecom rate" are unlawful under any circumstance. FirstEnergy argues the FCC "left it to the parties" to negotiate a rate where the new telecom rate presumption is rebutted.[202] But the FCC created a "hard cap" in that scenario, which prevents FirstEnergy from charging more than the "old telecom rate."[203] FirstEnergy did not rebut the presumption, yet continues to charge Verizon more than [redacted] that "hard cap."[204] There are no circumstances under which FirstEnergy's rates comply with Pennsylvania law.

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[198] *See* Comments of FirstEnergy, et al. at 49-52, FCC Docket No. 17-84 (June 15, 2017); *see also* Section III.A.c.2 above.

[199] FE Br. at 56.

[200] The FCC has found joint use agreement rates "unjust and unreasonable" under its 2011 regulations. *FPL 2020 Order*, 2020 WL 2568977, at *1 (¶ 1); *Dominion Order*, 32 FCC Rcd at 3750 (¶ 1).

[201] *Final Rulemaking Order*, 2019 WL 4345730, at *6.

[202] FE Br. at 56.

[203] *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129 & n.485).

[204] *See* VZ St. 2.0, Ex. MSC-1 at VZ00055-56 (Calnon Aff. ¶¶ 36-37). FirstEnergy alleges higher old telecom rates should apply, but they were improperly calculated using incorrect inputs to artificially inflate the resulting rate. *See* VZ St. 2.1 at 42:1-44:7 & Ex. MSC-5 (Calnon

3. FirstEnergy Cannot Evade the Commission's Regulations by Crafting a Different Pennsylvania Pole Attachment Regime.

The Commission should not waste its time with the rest of FirstEnergy's defense of its joint use agreement rates. It is rooted in the distant past and premised on a hypothetical world in which the Commission never adopted its pole attachment regulations, and so remains free to impose higher "fully allocated cost-based rates" on broadband providers in Pennsylvania.[205] But the Commission's binding regulations require "the rate formulas and procedures used to derive rates under FCC rules."[206] FirstEnergy's alternate approach would erase decades of regulatory and technological advancements, forever preserve exceptionally high rental rates that frustrate competition and thwart broadband deployment, and leave Pennsylvania consumers worse than before the Commission exercised jurisdiction over pole attachments. The Commission asserted jurisdiction over pole attachments to *accelerate* the FCC's longstanding efforts to promote broadband deployment, not erase them.[207]

The Commission's pole attachment regulations eliminate FirstEnergy's remaining arguments. *First, Verizon's formal complaint is proper.* FirstEnergy asks the Commission to dismiss Verizon's complaint because it was not amended to allege a violation of FirstEnergy's alternate pole attachment framework.[208] But there was no need to amend. Verizon's complaint alleges a violation of the operative regulations and provides "information specific enough to

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Surrebuttal); *see also* Section III.B below; VZ Br., Section V.B. And FirstEnergy admits it still would owe Verizon a refund as compared to its inflated old telecom rates. *See* FE Br. at 98.

[205] FE Br. at 31-51.

[206] *Final Rulemaking Order*, 2019 WL 4345730, at *42.

[207] *Id.* at *6; *see also id.* at *25 (finding that "Pennsylvania-specific regulations would be unlikely to provide anything more than incremental improvement above what are well-established installation practices").

[208] FE Br. at 35, 39-41.

allow [FirstEnergy] to understand the allegations against it, in order to conduct a meaningful investigation of the allegations and to prepare a coherent response or defense."[209] The Commission expected there would be "active cases" transferred when it accepted jurisdiction and did *not* require an amendment of the complaint or a re-do of prior work.[210] Instead, it decided to promptly resolve the transferred complaints, using the date the case was transferred in place of the date the "complaint" was filed.[211] For good reason then, FirstEnergy previously agreed there was no need to amend pleadings after their transfer from the FCC.[212]

Second, the correct rates for both parties are the proportional new telecom rates requested in Verizon's complaint. FirstEnergy argues the Commission cannot grant relief because Verizon's complaint "focuses solely on the rates paid by Verizon to attach to FirstEnergy poles and does not allege and provides no evidence that the rates FirstEnergy pays Verizon are unjust and unreasonable."[213] None of this is true. The Commission's regulations entitle Verizon to a just and reasonable rate for use of FirstEnergy's poles irrespective of the rate FirstEnergy pays for use of Verizon's poles.[214] Verizon's complaint nonetheless shows that the

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[209] *Commonwealth v. Respond Power LLC*, No. C-2014-2427659, 2014 WL 4374211, at *8 (Pa. P.U.C. Aug. 20, 2014).

[210] The Commission's regulations are silent on the question of amendment after a complaint is transferred, so the FCC's procedural requirements control. *See* 52 Pa. Code § 77.5. They do not require amendment, but instead transfer "pending cases" to be picked up where the FCC left off. *See* 47 C.F.R. § 1.1405(d).

[211] *Final Rulemaking Order*, 2019 WL 4345730, at *48.

[212] *See* Scheduling Order at 3 (Apr. 14, 2020) ("First Energy … confirmed that it does not intend to file any further answer to the complaint since the complaint was transferred to Commission.").

[213] FE Br. at 34.

[214] 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. §§ 224(b) (guaranteeing "just and reasonable" rates for "pole attachments"), (a)(4) (defining "pole attachment" to include "any attachment by a … provider of telecommunications service to a pole … owned or controlled by a utility").

Pole Attachment Order, 26 FCC Rcd at 5327-8 (¶¶ 202-03) ("Although incumbent LECs have no right of access to utilities' poles pursuant to section 224(f)(1) of the Act, we now conclude

rates FirstEnergy pays under the joint use agreements are far more preferable than the rates FirstEnergy charges Verizon, and requests proportional new telecom rates for Verizon and FirstEnergy, so they both pay "the same proportionate rate" given each company's "relative usage of the pole."[215]

Third, FirstEnergy misquoted Verizon's testimony. FirstEnergy tries to buttress its claim that there is a Pennsylvania-specific rate regime by changing Verizon's testimony about this Commission's decision to adopt the new telecom rate formula into testimony about the "'[Federal Communications] Commission's" decision to adopt the same formula.[216] The actual testimony of Verizon's witness remains true and eliminates FirstEnergy's proposal for a different rate methodology: the new telecom formula "cannot be inconsistent with Pennsylvania practices" because *this Commission* adopted the formula "following a thoroughly vetted rulemaking proceeding in which FirstEnergy had ample opportunity to make its arguments."[217]

Fourth, FirstEnergy's decades-old decision was superseded by the Commission's new regulations. FirstEnergy argues its preferred "fully allocated" rate methodology is supported by a 28-year-old decision, issued before the conditions that inform the Commission's current

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that where incumbent LECs have such access, they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1). We therefore allow incumbent LECs to file complaints with the Commission challenging the rates, terms and conditions of pole attachment agreements with other utilities.").

[215] *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662); *see also* VZ Br. at 32-34; VZ St. 2.0, Ex. MSC-1 at VZ00047-51, VZ00091-102 (Calnon Aff. ¶¶ 25-29 & Exs. C-5, C-6); VZ St. 1.1 at 25:1-10 (Mills Surrebuttal); VZ St. 2.1 at 39:10-40:4 (Calnon Surrebuttal); VZ St. 1.2 at 19:9-20:2 (Mills Surrejoinder); VZ St. 2.2 at 7:9-12 (Calnon Surrejoinder).

[216] *Compare* FE Br. at 43 *with* VZ St. 2.1 at 54:4-9 (Calnon Surrebuttal).

[217] VZ St. 2.1 at 54:6-9 (Calnon Surrebuttal); *see also Final Rulemaking Order*, 2019 WL 4345730, at *27 ("Pole owners, attachers, and other interested parties had an opportunity to place their positions on the record at the FCC prior to the FCC's adoption of its new regime. Parties with Pennsylvania-specific interests have now been given the chance to comment on the Commission's proposals and have provided thoughtful insights about the federal changes").

framework came to be—*e.g.*, before there was a competitive communications market, broadband access, or widespread wireless service.[218] There is no dispute that FirstEnergy's "fully allocated" rate methodology is incompatible with, and has been superseded by, the Commission's current regulations. FirstEnergy's witness explained that the two cannot coexist: "[a]ccepting the FCC's rate formulas in their entirety would mean the Commission would be precluded from applying" FirstEnergy's proposed approach.[219] This Commission adopted the FCC's rate formulas in their entirety and cannot second-guess that decision here.[220]

Fifth, FirstEnergy's "fully allocated" rate analysis depends on indisputably incorrect rental amounts. FirstEnergy says it "presented unrebutted record evidence" that it could have charged Verizon *higher* pole attachment rent under FirstEnergy's preferred "fully allocated" approach.[221] This is irrelevant and false. FirstEnergy's analysis depends on "actual invoice" amounts different from—and sometimes significantly lower than—the [redacted] in pole attachment rent Verizon indisputably paid FirstEnergy.[222] FirstEnergy also hid its math from

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[218] FE Br. at 44-45 (citing *Ne. Pa. Tel. Co. v. Pa. Power & Light Company* ("*NEPTC*"), Docket No. C-881953, 1992 Pa. PUC LEXIS 68 (Order dated June 9, 1992)). FirstEnergy also relies on *Lloyd v. Pa. Pub. Util. Comm'n*, 904 A.2d 1010 (Pa. Cmwlth. 2006), *appeal denied*, 916 A.2d 1104 (2007), a distinguishable case about retail distribution and transmission rates—not pole attachment rates—that predates the Commission's regulations by 14 years. *See* FE Br. at 43-44.

[219] FE Br. at 39 (quoting FE St. 2-R at 15-17 (Zarakas Rebuttal)); *see also* VZ St. 1.1 at 3:3-6, 49:10-50:2 (Mills Surrebuttal); VZ St. 2.1 at 48:13-55:5 (Calnon Surrebuttal); VZ St. 3.1 at 9:16-15:16 (Tardiff Surrebuttal); VZ St. 1.2 at 28:7-15 (Mills Surrejoinder); VZ St. 2.2 at 4:12-13:14 (Calnon Surrejoinder); VZ St. 3.2 at 4:1-6:10 (Tardiff Surrejoinder).

[220] *Final Rulemaking Order*, 2019 WL 4345730, at *42 ("[T]he rate formulas and procedures used to derive rates under FCC rules have been established and govern rates to this date. We see no reason to deviate from FCC-based rates or ratemaking procedures.").

[221] FE Br. at 45-48.

[222] *Compare* FE Br. at 46-47 *with* FE Proposed Findings of Fact ¶ 9; VZ St. 1.1, Ex. SCM-8 (Joint Statement ¶ 8). On page 46 of its brief, for example, FirstEnergy reports that Verizon paid Met-Ed [redacted] for the 2012 rental year, when Verizon in fact paid [redacted]. *Id.*;

Verizon and the Commission, making it impossible to fully identify the problems with its calculations.[223] But one error is patent and determinative: they are based on a rate methodology that cannot be used to set just and reasonable rates in Pennsylvania.[224]

Sixth, FirstEnergy will be fully compensated by new telecom rates. FirstEnergy argues the Commission should adopt its alternate approach because the requested "rate reductions would fail to provide FirstEnergy an adequate return from its pole attachment rates and this shortfall inevitably would be subsidized by FirstEnergy's electric service customers."[225] This is also irrelevant and false. The new telecom rate will fully compensate FirstEnergy for Verizon's use of space on its poles: it is "just, reasonable, and fully compensatory, and … grounded in sound economic policies."[226] FirstEnergy's customers will not subsidize Verizon's if FirstEnergy complies with the law.[227] The regulations should not "trigger a base rate proceeding" for FirstEnergy,[228] let alone require a rate increase if one is filed because the

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VZ St. 1.1 at 60:1-8 & Ex. SCM-30 (Mills Surrebuttal); VZ St. 2.1 at 45:3-5 (Calnon Surrebuttal).

[223] VZ St. 1.1 at 60:9-61:2 (Mills Surrebuttal).

[224] *See, e.g.*, VZ St. 1.1 at 3:3-9, 49:10-50:2 (Mills Surrebuttal); VZ St. 2.1 at 48:13-55:5 (Calnon Surrebuttal); VZ St. 3.1 at 9:16-15:16 (Tardiff Surrebuttal); VZ St. 1.2 at 28:7-15 (Mills Surrejoinder); VZ St. 2.2 at 4:12-13:14 (Calnon Surrejoinder); VZ St. 3.2 at 4:1-6:10 (Tardiff Surrejoinder).

[225] *See* FE Br. at 50.

[226] *Pole Attachment Order*, 26 FCC Rcd at 5299 (¶ 137); *see also Fla. Power Corp*., 480 U.S. at 254; *City of Portland*, 2020 WL 4669906, at *21; *Ala. Power Co.*, 311 F.3d at 1370-71.

[227] *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 182) ("The new telecom rate is compensatory and is designed so that utilities will not be cross-subsidizing attachers, as it ensures that utilities will recover more than the incremental cost of making attachments. The record provides no evidence indicating that there is any category or type of costs that are caused by the attacher that are not recovered through the new telecom rate.").

[228] *See* FE Br. at 50 (discounting as "irrelevant" "[w]hether the reduction in rates would trigger a base rate proceeding for FirstEnergy's EDCs").

amounts at issue average about [redacted] of FirstEnergy's annual operating revenues.[229] And the regulations do not "unfairly reduce [FirstEnergy's] revenue from pole attachments."[230] They instead fully compensate FirstEnergy, while also ensuring the low, uniform, cost-based rates needed to advance the Commission's deployment objectives for Pennsylvania consumers.[231] The Commission's pole attachment regulations must be enforced.

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

The Commission's regulations require a properly calculated new telecom rate because FirstEnergy did not rebut the new telecom rate presumption.[232] These lawful rates are:

New Telecom Rates for Verizon's Use of FirstEnergy's Poles (per pole)[233]									
Rental Year	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Met-Ed poles	$8.29	$9.87	$10.07	$5.02	$9.35	$8.79	$9.55	$12.20	$13.83
Penelec poles	$6.43	$6.79	$7.18	$5.21	$6.96	$7.18	$7.49	$10.49	$9.07
Penn Power poles	$7.30	$8.47	$8.51	$8.21	$8.94	$9.40	$9.08	$11.18	$11.80

FirstEnergy asks the Commission to require Verizon to pay the old telecom rate instead as "a middle ground between the existing rates and the new telecom rate."[234] The Commission does not have that option under its binding regulations and it would be unwise—perpetuating the non-

[229] VZ St. 2.1 at 56:13-57:3 (Calnon Surrebuttal) and Ex. MSC-5.

[230] *Cost Allocator Order*, 30 FCC Rcd at 13744 (¶ 28).

[231] *Final Rulemaking Order*, 2019 WL 4345730, at *2.

[232] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

[233] VZ St. 2.0 at 4:10-11 (Calnon Direct); VZ St. 2.0, Ex. MSC-1 at VZ00036-42, VZ00058-87 (Calnon Aff. ¶¶ 5-13, Exs. C-1 – C-3).

[234] FE Br. at 83-89. In its brief, FirstEnergy describes a formula that is *not* the old telecom formula as the old telecom formula, relying on an exhibit that it did not offer into evidence. *Compare* FE Br. at 84 *with* VZ St. 2.1, Ex. MSC-3 at 7 (Calnon Surrebuttal); *see also* Joint Motion to Admit Stipulated Items into Record (July 7, 2020) (omitting FE St. 2-R, Ex. WZ-1). FirstEnergy's requested old telecom rates are also inflated and improperly calculated. *See* VZ St. 2.1 at 42:1-44:7 & Ex. MSC-5 (Calnon Surrebuttal); *see also* VZ Br., Section V.B.

cost-based rate differences that deter infrastructure investment in Pennsylvania.[235] The new telecom rate must apply.

FirstEnergy also asks the Commission to forgo the rate calculation inputs in its regulations in favor of "FirstEnergy's calculated inputs."[236] The Commission does not have this option either. Inputs that vary from the regulations must be supported by valid and "probative direct evidence" about the poles for which rates are being set.[237] FirstEnergy did not provide "probative direct evidence." It did not enter any data into evidence,[238] only a summary of the error-riddled results of its hurried and litigation-motivated post-hoc review of, at most, [redacted] of the poles shared by the parties in Pennsylvania, including poles to which Verizon is *not* attached.[239] FirstEnergy's sole response is that the Commission should overlook the manifest methodological and data collection errors when calculating rates.[240] The Commission cannot. Its regulations include

[235] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

[236] FE Br. at 85-89.

[237] *See, e.g.*, *In the Matter of Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Util. Poles*, 2 FCC Rcd 4387, 4394 (¶ 52 n.27) (1987); *see also In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12139 (¶ 70) (2001) ("*Consolidated Partial Order*").

[238] *But see Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co.*, 17 FCC Rcd 19859, 19865-66 (¶¶ 16, 18) (2002) (stating the "survey should be submitted").

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

[240] *See, e.g.*, FE Br. at 86.

presumptive inputs, which were adopted to provide "predictability, efficiency and fairness" when calculating rates.[241] The presumptive inputs must be used.[242]

C. The Commission Should Award Refunds to Verizon.

Since July 2011, FirstEnergy has been charging Verizon rates that violate the law. The Commission's regulations provide the appropriate remedy: terminate the unjust and unreasonable rate, substitute in the pole attachment agreement the just and reasonable rate established by the Commission, and refund "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."[243] This requires refunds of the more than [redacted] FirstEnergy has unlawfully collected from Verizon since July 2011, with interest.[244]

FirstEnergy asks the Commission to excuse its violation of law and let it reap the benefits of its longstanding defiance of the FCC's and Commission's pole attachment regulations by setting rates on a prospective-only basis.[245] FirstEnergy's request ignores the remedy provision in the Commission's pole attachment regulations,[246] unnecessarily reargues retroactivity

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[241] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. §§ 1.1409, 1.1410); *see also 1998 Implementation Order*, 13 FCC Rcd 6777 (¶ 74).

[242] VZ Br. at 53-54. The remainder of FirstEnergy's analysis of rates amounts to a bullet-point conclusory claim that Verizon calculated rates using improper inputs. *See* FE Br. at 88-89. These arguments fail for reasons detailed in Verizon's initial brief. *See* VZ Br. at 51-53.

[243] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1407(d)).

[244] VZ Br. at 54-58; *see also* VZ St. 2.0 at 4:11-14 (Calnon Direct); VZ St. 2.0 at Ex. MSC-1 at VZ00050-51, VZ00102 (Calnon Aff. ¶ 28 & Ex. C-6).

[245] FE Br. at 90-98.

[246] *See id.* at 91-94 (arguing the Commission should instead consider whether refunds are available under other provisions of Pennsylvania law).

arguments the FCC already rejected,[247] and rests on a counterfactual claim that there was some "major change in ratemaking methodology" since its 2014 and 2016 base rate cases.[248] FirstEnergy has been required by law to charge Verizon new telecom rates since July 2011, and was on express notice in 2012 that Verizon would seek refunds of the unlawful amounts FirstEnergy continued to demand if a complaint proceeding was required.[249] Presumably, FirstEnergy accounted for the risk of failing to lower its rates as required by law. If it chose not to, Pennsylvania's broadband consumers should not be harmed as a result of its decision.

FirstEnergy's back-up request is for an order requiring two years of refunds based on 47 U.S.C. § 415, a statute that cannot be the "applicable statute of limitations." Section 415 applies only to actions *by* a carrier to recover its *lawful* charges and actions *against* a carrier to recover damages and overcharges.[250] This dispute is neither.[251] FirstEnergy also admits the Commission can award at least four years of refunds when a rate is unjust and unreasonable.[252] The continuing contract doctrine extends that refund period back to July 2011 because—as FirstEnergy admits—the parties' contracts govern today because they are continuing contracts.[253]

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[247] *Id.* at 94-95; *see also FPL 2015 Order*, 30 FCC Rcd at 1145-46 (¶¶ 17-19) (rejecting retroactivity arguments).

[248] FE Br. at 90.

[249] *See* VZ St 1.0 at 2:13-16 (Mills Direct), Ex. SCM-1 at VZ00014-15 (Mills Aff. ¶ 31), Ex. SCM-5 at VZ00549-555 (FCC Exs. 17 & 18).

[250] 47 U.S.C. § 415.

[251] FirstEnergy is not a carrier, so this is not an action *against* a carrier to recover damages and overcharges. *See* 47 U.S.C. § 415(b)-(c). And, while Verizon is a carrier, this action does not seek recovery of *Verizon's* lawful charges, *see id.* § 415(a), but FirstEnergy's unlawful overcharges.

[252] FE Br. at 93-94 (admitting that 66 Pa. Con. Stat. § 1312 authorizes refunds for unjust or unreasonable rates). Section 1312's grant of authority contains a four-year statute of limitations.

[253] *See* FE Answer Br. at 13 ("the contract says 'continue'"); *see also* VZ Br. at 54-58.

The Commission already decided that Verizon can be "in no worse position … than if the Commission did not assume jurisdiction."[254] The FCC previously found Verizon "entitled to a refund of overpayments made" under an unjust and unreasonable pole attachment provision "dating back as far as the July 12, 2011 effective date" of the *Pole Attachment Order*.[255] Pennsylvanians deserve the same remedy: ensuring low and uniform pole attachment rates effective July 2011 "will enable consumers to benefit through increased competition, affordability, and availability of advanced communications services, including broadband" in Pennsylvania.[256]

IV. CONCLUSION

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

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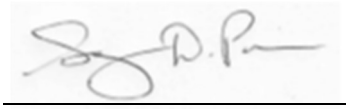
[254] *Final Rulemaking Order*, 2019 WL 4345730, at *25.

[255] *Dominion Order*, 32 FCC Rcd at 3761-64 (Section C). The relevant overpayments here exceed [redacted], plus interest. *See* VZ Br. at 54-58; VZ St. 2.0 at 4:11-14 (Calnon Direct); VZ St. 2.0, Ex. MSC-1 at VZ00047, VZ00050-51 (Calnon Aff. ¶¶ 23, 28). FirstEnergy claims refunds should instead amount to "approximately" $1.8 million plus interest per year, but offered no support for its calculation, which was not previously disclosed in discovery or testimony. *See* FE Br. at 98. The calculation is apparently based on FirstEnergy's old telecom rate calculations, *id.*, but the old telecom rate does not apply and FirstEnergy's old telecom rates are inflated and improperly calculated. *See* VZ St. 2.1 at 42:1-44:7 (Calnon Surrebuttal).

[256] *Pole Attachment Order*, 26 FCC Rcd at 5295 (¶ 126); *see also Final Rulemaking Order*, 2019 WL 4345730, at *2.

Respectfully submitted,

By: 

Suzan D. Paiva, I.D. No. 53853
Verizon
900 Race St., 6th Floor
Philadelphia, PA 19107
(267) 768-6184
suzan.d.paiva@verizon.com

Curtis L. Groves, *pro hac vice* pending
Verizon
1300 I Street NW
Suite 500 East
Washington, DC 20005
(202) 515-2179
curtis.groves@verizon.com

Christopher S. Huther, *pro hac vice* pending
Claire J. Evans, I.D. No. 90091
Frank Scaduto, *pro hac vice* pending
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
chuther@wiley.law
cevans@wiley.law
fscaduto@wiley.law

Counsel for Verizon Pennsylvania LLC and Verizon North LLC

Dated: August 14, 2020

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

VERIZON'S SUPPLEMENTAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

(PUBLIC VERSION)

Pursuant to 52 Pa. Code § 5.501, Verizon Pennsylvania LLC and Verizon North LLC ("Verizon") hereby submit their supplemental proposed findings of fact and conclusions of law, addressing issues from Verizon's reply brief.

I. APPENDIX A – SUPPLEMENTAL PROPOSED FINDINGS OF FACT

1. The Commission's intent in adopting its regulations at Chapter 77 of Title 52 of the Pennsylvania Code was that the same rules and formulas would apply to determining pole attachment rates under this Commission's jurisdiction as would apply if the case were before the FCC.[1]

2. The Commission determined that, through its adoption of the FCC rules, parties seeking relief from excessive pole attachment rates would be "in no worse position … than if the Commission did not assume jurisdiction."[2]

3. The Commission intended to apply the same rules in the same manner as the FCC to provide "stability and uniformity for broadband investment in Pennsylvania," and noted that

[1] *Assumption of Comm'n Jurisdiction over Pole Attachments from the FCC*, No. L-2018-3002672, 2019 WL 4345730, at *26 (Aug. 29, 2019) ("*Final Rulemaking Order*").

[2] *Id.* at *25.

"if the Commission deems it appropriate to diverge from the federal regulations, it would initiate a rulemaking that would be subject to public comment."[3]

4. Pennsylvania consumers will benefit by maintaining the status quo and applying the FCC rules in Pennsylvania the same as they are interpreted and enforced by the FCC, to ensure regulatory certainty and avoid creating a disincentive to broadband investment in Pennsylvania.[4]

5. If the Commission accepted FirstEnergy's argument for an alternative methodology to set ILEC pole attachment rates in Pennsylvania instead of the FCC's rules the Commission adopted, it would leave Pennsylvania consumers worse off than they would have been before the Commission exercised jurisdiction over pole attachments. Adoption of FirstEnergy's argument would create an industry incentive to divert broadband investment to states where there is regulatory certainty that the FCC rules will be enforced.

6. The Commission's rules were intended to establish "rates for pole attachments that are as low and close to uniform as possible," enforced in a climate of regulatory certainty with minimal burdens of litigation. This framework is key to encouraging broadband deployment in Pennsylvania.[5]

7. Allowing FirstEnergy to complicate the analysis and to create uncertainty over the applicable standards would send the wrong message in the Commission's first pole attachment complaint case under the new rules. The Commission's intent was to reduce the burdens of

[3] *Id.* at *19.

[4] *Id.* at *7.

[5] *Id.* at *2-3.

litigation and to resolve substantive disputes quickly and efficiently while providing regulatory certainty that the FCC rules would apply.[6] FirstEnergy's arguments undermine those goals.

8. The Commission expressly rejected requests for Pennsylvania-specific rates or methodologies to replace the federal framework.[7]

9. In its *Final Rulemaking Order*, the Commission cautioned electric utilities not to "rehash or reargue determinations of the FCC."[8] The Commission specifically rejected FirstEnergy's argument that the Commission was "unclear in its intention" to mirror the FCC rules and that it somehow invited re-argument of settled requirements.[9]

10. FirstEnergy's assertion that "[e]very dollar of decrease in pole attachment rates is a dollar increase in electric utility rates"[10] is wrong. The amounts at issue average about [redacted] of FirstEnergy's annual operating revenues.[11]

11. FirstEnergy's assertion that "every dollar of decrease in pole attachment fees is a dollar of additional income to Verizon, which, due to its alternative form of rate regulation, it is not required to pass-through to customers,"[12] reflects a fundamental misunderstanding of the Commission's broadband policy and the highly competitive nature of the market for telecommunications and broadband services. Verizon is not rate-of-return regulated precisely

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[6] *Id.* at *26.

[7] *Id.* at *25 (finding that "Pennsylvania-specific regulations would be unlikely to provide anything more than incremental improvement above what are well-established installation practices").

[8] *Id.* at *17.

[9] *Id.* at *17, 26.

[10] FE Br. at 25.

[11] VZ St. 2.1 at 56:13-57:3 (Calnon Surrebuttal) and Ex. MSC-5.

[12] FE Br. at 25.

because the services it offers are part of a highly competitive market.[13] The Commission has already made the policy decision that reducing the cost of pole attachments in this competitive market will encourage investment in broadband deployment.

12. FirstEnergy does not provide Verizon a net material competitive advantage under the joint use agreements.[14]

II. APPENDIX B – SUPPLEMENTAL PROPOSED CONCLUSIONS OF LAW

1. Under the Telecommunications Act of 1996, ILECs are entitled to just and reasonable rates, terms and conditions for attachment to electric utility poles.[15]

2. The Commission adopted its pole attachment regulations in a proper rulemaking grounded in undisputed statutory authority. The Commission's regulations at Chapter 77 of Title 52 of the Pennsylvania Code were issued both under the authority of the Public Utility Code and the authority provided to this Commission under federal law by the Telecommunications Act of 1996, 47 U.S.C. § 224.[16]

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[13] *See* 66 Pa. C.S. § 3011, *et seq*.

[14] *See* VZ Reply Br., Section III.A.2.b; *see also* VZ Initial Br., Section V.A.3.b.

[15] *See Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183, 188 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 118 (2013) ("[W]e uphold the [FCC's] view that ILECs are 'providers of telecommunications services' for purposes of § 224(a)(4)" and "we very much doubt if the prior interpretation [excluding ILECs from § 224(a)(4)] was reasonable.").

[16] *See Final Rulemaking Order*, 2019 WL 4345730, at *22 ("[T]he subject matter of Chapter 77 - pole attachments - clearly is within the Commission's power to regulate, pursuant to both state law under the Public Utility Code and federal law under Section 224(c) of the PAA."); *Assumption of Comm'n Jurisdiction over Pole Attachments from the FCC*, Notice of Proposed Rulemaking, No. L-2018-3002672, 2018 WL 3533538, at *7 (July 12, 2018) ("*NPRM*") ("In addition to the federal authority provided under 47 U.S.C. § 224, … [a]mong other sections of the Public Utility Code, 66 Pa. C.S. § 501(a) provides broad authority for the PUC to act to enforce the Public Utility Code and 'the full intent thereof.'").

3. The Telecommunications Act of 1996 operates as a statutory source of authority for this Commission's actions in addition to the Public Utility Code.[17]

4. Section 224 continues to apply to the pole attachment rates in this case and this Commission has authority to enforce it. As the Commission stated in its Final Rulemaking Order, this Commission "must certify to the FCC that it will assume responsibility for the enforcement of 47 U.S.C. § 224 in a manner like that of the FCC."[18]

5. Section 1301(a) of the Public Utility Code requires that "[e]very rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commission."[19] The Public Utility Code provides a separate source of authority for the Commission's adoption of Chapter 77 of Title 52 of the Pennsylvania Code, which provides the regulations that define a just and reasonable rate for pole attachments. Section 1301(a) requires FirstEnergy's rates to be in conformity with these regulations.

6. The Commission's regulations at Chapter 77 of Title 52 of the Pennsylvania Code are binding in this case.[20]

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[17] *See, e.g., Petition of NEXTLINK Pennsylvania, L.L.P., for Arbitration of an Interconnection Agreement with Bell Atlantic - Pennsylvania, Inc., Pursuant to the Telecommunications Act of 1996*, Docket No. A-310260; F0002, 1998 Pa. PUC LEXIS 53 (Opinion and Order entered July 15, 1998) at *35-36 ("[T]his Commission derives its authority to resolve the issue from federal law without limitations imposed by cases decided only under Commonwealth law and/or previous to TA-96.").

[18] *Final Rulemaking Order*, 2019 WL 4345730, at *9.

[19] 66 Pa. C.S. § 1301(a).

[20] *Herdelin v. Greenberg*, 328 A.2d 552, 554 (Pa. Commw. 1974) ("Authorized regulations of an administrative agency have the force and effect of law and bind the agency equally with others."); *see also Borough of Bedford v. Commonwealth*, 972 A.2d 53, 61 (Pa. Commw. 2009).

7. The Commission's 2020 adoption of Chapter 77 of Title 52 of the Pennsylvania Code to define just and reasonable rates for pole attachments supersedes any inconsistent previous decisions regarding rates or ILEC pole attachment rates, including but not limited to *North-Eastern Pennsylvania Telephone Company v. Pennsylvania Power & Light Company*, Docket No. C-881953, 1992 Pa. PUC LEXIS 68 (Order dated June 9, 1992) and *Lloyd v. Pa. Pub. Util. Comm'n*, 904 A.2d 1010 (Pa. Cmwlth. 2006), *appeal denied*, 916 A.2d 1104 (2007).

8. For ILEC pole attachment rates, the standard for determining if the rate is unjust and unreasonable is set forth in the Commission's regulations at Chapter 77 of Title 52 of the Pennsylvania Code. As the Commission stated in its *Final Rulemaking Order*, "the rate formulas and procedures used to derive rates under FCC rules have been established and govern rates to this date. We see no reason to deviate from FCC-based rates or ratemaking procedures."[21]

9. Verizon's complaint properly alleges that FirstEnergy has violated the Commission regulations at Chapter 77 of Title 52 of the Pennsylvania Code, which incorporate the Federal Communications Commission's regulations at "47 U.S.C. § 224 and 47 CFR Chapter I, Subchapter A, Part 1, Subpart J (relating to pole attachment complaint procedures)."[22] Verizon was not required to amend its complaint when this case was transferred from the FCC to this Commission. The pleadings were closed at that point and in any event the complaint states a claim that is within this Commission's authority to address. Verizon's complaint as pled meets the flexible notice pleading standard of 66 Pa. C.S. § 701 and 52 Pa. Code § 5.22.

10. Pole attachment rates are not regulated based on rate of return in the same manner as retail electric rates. FirstEnergy's pole attachment rates charged to Verizon under a joint use

[21] *Final Rulemaking Order*, 2019 WL 4345730, at *42.

[22] 52 Pa. Code § 77.4(a).

agreement are not deemed to be just and reasonable based on whether they allow FirstEnergy to earn more than a fair rate of return. They must comply with the specific requirements of the Commission's Chapter 77 regulations and FCC precedent.

11. FirstEnergy's "fully allocated cost of service" calculations are not relevant to determining a just and reasonable pole attachment rate for Verizon.

12. The Commission expressly adopted the FCC's 2018 *Third Report and Order* and the new telecom rate presumption into the Commission's regulations.[23]

13. The FCC's 2018 *Third Report and Order* and the new telecom rate presumption were affirmed on appeal.[24]

14. The Commission determined through its 2020 adoption of Chapter 77 of Title 52 of the Pennsylvania Code that the new telecom rate requested by Verizon is the just and reasonable pole attachment rate under Pennsylvania law for competitive local exchange carriers ("CLECs"), which are telecommunications carriers as defined in 47 U.S.C. 251(a)(5), cable companies providing telecommunications services, and ILECs. An electric utility may only lawfully charge an ILEC a rate higher than the new telecom rate—up to the old telecom rate, which is about 1.5 times the new telecom rate—if the electric utility proves by clear and convincing evidence that it provides the ILEC "net benefits" under a joint use agreement that materially advantage the ILEC as compared to the terms and conditions the electric utility provides CLECs and cable companies.[25]

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[23] *Final Rulemaking Order*, 2019 WL 4345730, at *26 ("The Commission also is not inclined to wait [to adopt the rules from the *2018 Poles Order*] until petitions for reconsideration or any appeals of these recent federal changes are settled.").

[24] *City of Portland v. United States*, No. 18-72689, 2020 WL 4669906 (9th Cir. Aug. 12, 2020).

[25] *Third Report and Order*, 33 FCC Rcd at 7767-68, 7771 (¶¶ 123, 129).

15. The new telecom rate is "just, reasonable, and fully compensatory, and … grounded in sound economic policies."[26] The old telecom rate also cannot "result in [a pole owner's] incomplete recovery of costs" because it is higher than the new telecom rate, which is "just, reasonable, and allow[s] full cost recovery."[27]

16. The Commission's regulations provide that "[i]n complaint proceedings challenging utility pole attachment rates, terms, and conditions for pole attachment contracts entered into or renewed after the effective date of this section [March 11, 2019], there is a presumption that an incumbent local exchange carrier (or an association of incumbent local exchange carriers) is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system providing telecommunications services for purposes of obtaining comparable rates, terms, or conditions. In such complaint proceedings challenging pole attachment rates, there is a presumption that incumbent local exchange carriers (or an association of incumbent local exchange carriers) may be charged no higher than the rate determined in accordance with § 1.1406(e)(2) [the new telecom rate]. A utility can rebut either or both of the two presumptions in this paragraph (b) with clear and convincing evidence that the incumbent local exchange carrier receives benefits under its pole attachment agreement with a utility that materially advantages the incumbent local exchange carrier over other telecommunications carriers or cable television systems providing telecommunications services on the same poles."[28]

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[26] *Pole Attachment Order*, 26 FCC Rcd at 5299 (¶ 137); *see also FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987); *see also Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002).

[27] *City of Portland*, 2020 WL 4669906, at *21.

[28] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

17. The new telecom rate presumption applies because the joint use agreements were renewed after March 11, 2019.[29]

18. Verizon made a *prima facie* case that FirstEnergy's rates are unlawful, and the burden shifted to FirstEnergy to justify its rates with clear and convincing evidence sufficient to rebut the Commission's new telecom rate presumption.

19. FirstEnergy did not rebut the new telecom rate presumption because it did not present clear and convincing evidence that Verizon receives net benefits under its pole attachment agreements with FirstEnergy that materially advantage Verizon over CLECs or cable companies providing telecommunications services on the same poles.[30]

20. Because FirstEnergy did not rebut the new telecom rate presumption, Verizon "may be charged no higher than the rate determined in accordance with [the new telecom rate formula]."[31] The just and reasonable rate for Verizon's use of FirstEnergy's poles is the properly calculated new telecom rate.[32] The properly calculated new telecom rates are:

New Telecom Rates for Verizon's Use of FirstEnergy's Poles (per pole)[33]									
Rental Year	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Met-Ed poles	$8.29	$9.87	$10.07	$5.02	$9.35	$8.79	$9.55	$12.20	$13.83
Penelec poles	$6.43	$6.79	$7.18	$5.21	$6.96	$7.18	$7.49	$10.49	$9.07
Penn Power poles	$7.30	$8.47	$8.51	$8.21	$8.94	$9.40	$9.08	$11.18	$11.80

[29] *See* VZ Reply Br., Section III.A.2.a; *see also* VZ Initial Br., Section V.A.2.a.

[30] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)); VZ Reply Br., Section III.A.2.b; *see also* VZ Initial Br., Section V.A.2.b & 3.b.

[31] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

[32] *Id.*; Verizon Reply Br., Section III.B; *see also* Verizon Initial Br., Section V.B.

[33] VZ St. 2.0 at 4:8-11 (Calnon Direct); VZ St. 2.0, Ex. MSC-1 at VZ00036-42, VZ00058-87 (Calnon Aff. ¶¶ 5-13, Exs. C-1 – C-3).

21. Verizon was not required to terminate the joint use agreements to obtain the benefit of the Commission's regulations and the presumptions set forth at 52 Pa. Code § 77.4(a) and 47 C.F.R. § 1.1413(b).[34]

22. Verizon was not required to show that the joint use agreement rates reflect FirstEnergy's superior bargaining power to obtain the benefit of the Commission's regulations and the presumptions set forth at 52 Pa. Code § 77.4(a) and 47 C.F.R. § 1.1413(b). However, Verizon did make that showing.[35]

23. To obtain the just and reasonable pole attachment rates required by this Commission's regulations at Chapter 77 of Title 52 of the Pennsylvania Code, Verizon was not required to demonstrate the effect that the specific pole attachment rate reductions and/or refunds in this case will have on broadband deployment. The Commission already made the policy decision that enforcing the FCC regulations uniformly for all pole attachments will "avoid regulatory uncertainty and will promote broadband investment across Pennsylvania" and adopted its regulations on that basis.[36] The Commission concluded that "rental rates for pole attachments that are as low and close to uniform as possible … promote broadband deployment."[37]

24. The Commission's regulations include presumptive inputs, which were adopted to provide "predictability, efficiency and fairness" when calculating rates.[38] Inputs that vary from the regulations must be supported by valid and "probative direct evidence" about the poles for

[34] *See* VZ Reply Br., Section III.A.2.c.1; *see also* VZ Initial Br., Section V.A.3.a.

[35] *See* VZ Reply Br., Section III.A.2.c.2; *see also* VZ Initial Br., Section V.A.3.a.

[36] *Final Rulemaking Order*, 2019 WL 4345730, at *7.

[37] *Id.* at *2 (citation omitted).

[38] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. §§ 1.1409, 1.1410).

which rates are being set.[39] FirstEnergy did not provide "probative direct evidence" sufficient to deviate from the presumptive inputs. It did not enter any data into evidence, only a summary of the error-riddled results of its hurried and litigation-motivated post-hoc review of, at most, [redacted] of the poles shared by the parties in Pennsylvania, including poles to which Verizon is *not* attached.[40] The presumptive inputs must be used.

25. The Commission's regulations state that "[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 in construing the provisions of 47 U.S.C. § 224 and 47 CFR Chapter I, Subchapter A, Part 1, Subpart J."[41] There is no reason to deviate from FCC and/or federal court precedent in this case.

26. The effect of any rate reductions or refunds required in this case on the utility rates paid by FirstEnergy's customers is not a relevant issue in this case.[42]

27. The effective date of any rate reduction will not be deferred until the effective date of rates in FirstEnergy's next base rate proceeding. To the contrary, within thirty (30) days of entry of this Order, FirstEnergy shall reduce its rates and provide a refund to Verizon reflecting all amounts paid in excess of the properly calculated new telecom rates required by

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[39] *See, e.g.*, *In the Matter of Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Util. Poles*, 2 FCC Rcd 4387, 4394 (¶ 52 n.27) (1987); *see also In the Matter of Amendment of Commission's Rules & Policies Governing Pole Attachments*, 16 FCC Rcd 12103, 12139 (¶ 70) (2001).

[40] *See* VZ Reply Br., Section III.B; *see also* VZ Initial Br., Section V.B.

[41] 52 Pa. Code § 77.5(c).

[42] *See* VZ Reply Br., Section III.A.3.

law for rental periods since July 12, 2011, plus interest to the date of refund. As of August 14, 2020, Verizon's overpayments equal [redacted].

28. If FirstEnergy seeks to defer and create a regulatory asset for any difference between its unlawful rates and the lawful rates set in this proceeding so that it may argue for recovery of the difference as a regulatory asset in its next base rate proceeding, it should file a separate petition seeking that relief. This issue will not be addressed in this case and its disposition will not delay rate relief to Verizon.

29. The Commission's regulations entitle Verizon to a just and reasonable rate for use of FirstEnergy's poles irrespective of the rate FirstEnergy pays for use of Verizon's poles.[43] Verizon's complaint nonetheless shows that the rates FirstEnergy pays under the joint use agreements are far more preferable than the rates FirstEnergy charges Verizon, and requests proportional new telecom rates for Verizon and FirstEnergy, so they both pay "the same proportionate rate" given each company's "relative usage of the pole."[44] The properly calculated proportional new telecom rates for the 2011 to 2019 rental years are:

- $8.29, $9.87, $10.07, $5.02, $9.35, $8.79, $9.55, $12.20, and $13.83 per pole for Verizon's use of Met-Ed's poles during the 2011 to 2019 rental years;
- $6.43, $6.79, $7.18, $5.21, $6.96, $7.18, $7.49, $10.49, and $9.07 per pole for Verizon's use of Penelec's poles during the 2011 to 2019 rental years; and
- $7.30, $8.47, $8.51, $8.21, $8.94, $9.40, $9.08, $11.18, and $11.80 per pole for Verizon's use of Penn Power's poles during the 2011 to 2019 rental years.
- $9.63, $9.71, $12.44, $12.15, $15.70, $12.48, $14.70, $19.11, and $18.28 per pole for Met-Ed's, Penelec's, and Penn Power's use of Verizon's poles during the 2011 to 2019 rental years.

[43] 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224(a)(4) (defining "pole attachment" to include "any attachment by a … provider of telecommunications service to a pole … owned or controlled by a utility")).

[44] *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662); VZ Reply Br., Section III.A.3.

The properly calculated proportional new telecom rates for 2020 and future rental years will be calculated using the same inputs that Verizon's witness Dr. Calnon used to calculate these rates, except that the parties will use updated cost data and the then-effective rate of return.

30. FirstEnergy's customers will not subsidize Verizon's if FirstEnergy complies with the law. "The new telecom rate is compensatory and is designed so that utilities will not be cross-subsidizing attachers, as it ensures that utilities will recover more than the incremental cost of making attachments. The record provides no evidence indicating that there is any category or type of costs that are caused by the attacher that are not recovered through the new telecom rate."[45]

31. The Commission has authority to require a refund under its regulations at Chapter 77 of Title 52 of the Pennsylvania Code, adopting 47 C.F.R. § 1.1407(a), which states that, "[i]f 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 … [o]rder 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." Under Pennsylvania law, the continuing contract doctrine extends that refund period under the applicable statute of limitations back to July 2011 because the parties' contracts govern today because they are continuing contracts.[46]

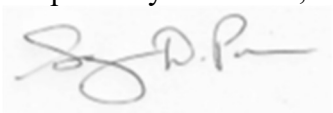
[45] *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 182).

[46] *See* VZ Reply Br., Section III.C; *see also* VZ Initial Br., Section V.C.

32. The Commission already decided that Verizon can be "in no worse position … than if the Commission did not assume jurisdiction."[47] The FCC previously found Verizon "entitled to a refund of overpayments made" under an unjust and unreasonable pole attachment provision "dating back as far as the July 12, 2011 effective date" of the *Pole Attachment Order*.[48] Pennsylvanians deserve the same remedy.

33. By its terms, 47 U.S.C. § 415 applies only to actions *by* a carrier to recover its lawful charges and actions against a *carrier* to recover damages and overcharges. This dispute is neither: FirstEnergy is not a carrier, so this is not an action *against* a carrier to recover damages and overcharges. *See* 47 U.S.C. § 415(b)-(c). And, while Verizon is a carrier, this action does not seek recovery of *Verizon's* lawful charges, *see id.* § 415(a), but FirstEnergy's unlawful overcharges.

Respectfully submitted,



Suzan D. Paiva, I.D. No. 53853
Verizon
900 Race Street, 6th Floor
Philadelphia, PA 19107
(267) 768-6184
suzan.d.paiva@verizon.com

Curtis L. Groves, *pro hac vice* pending
Verizon
1300 I Street NW
Suite 500 East
Washington, DC 20005
(202) 515-2179
curtis.groves@verizon.com

Christopher S. Huther, *pro hac vice* pending
Claire J. Evans, I.D. No. 90091

[47] *Final Rulemaking Order*, 2019 WL 4345730, at *25.

[48] *Dominion Order*, 32 FCC Rcd at 3761-64.

Frank Scaduto, *pro hac vice* pending
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
chuther@wiley.law
cevans@wiley.law
fscaduto@wiley.law

Counsel for Verizon Pennsylvania LLC and Verizon North LLC

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