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	: :	

RECOMMENDED DECISION

Before
Joel H. Cheskis
Deputy Chief Administrative Law Judge

***** NON-PROPRIETARY VERSION*****

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I. INTRODUCTION

This decision recommends that a formal complaint filed by an incumbent local exchange carrier (ILEC) against an electric distribution company (EDC) averring that the EDC's rates for the ILEC to attach to its utility poles are unjust and unreasonable will be granted in part and denied in part. The ILEC has satisfied its burden of proof to demonstrate that it is entitled to a rebuttable presumption to have its rates to attach to the utility poles set by the "new telecom rate" methodology under the Federal Communications Commission's regulations recently adopted by the Commission and the EDC has not satisfied its burden to rebut that presumption. Therefore, the complaint will be granted to the extent that the rates paid by the ILEC to the EDC to attach to the EDC's poles will be set going forward based on the "new telecom rate" methodology and the ILEC will be entitled to refunds based on the new telecom rate methodology. The complaint will be denied, however, with regard to the request of the ILEC for refunds going back to July, 2012 for the amounts overpaid to the EDC. Instead, the ILEC will be awarded a refund for rates it overpaid to the EDC dating back to March 11, 2019, the effective date of the rates established under the new telecom rate methodology. The Commission must act on this Recommended Decision no later than its Public Meeting on December 17, 2020.

II. HISTORY OF THE PROCEEDING

On November 20, 2019, Verizon Pennsylvania LLC and Verizon North LLC (collectively "Verizon") filed a formal complaint at the Federal Communications Commission (FCC) against Metropolitan Edison Company (Met-Ed), Pennsylvania Electric Company (Penelec) and Penn Power Company (Penn Power) (collectively "First Energy"). The complaint was docketed by the FCC at docket number 19-354. In its complaint, Verizon averred that Verizon and First Energy jointly use more than 412,000 utility poles in Pennsylvania under terms and conditions of ten substantially similar joint use agreements dating back as far as 1958. Verizon added that it pays First Energy annual pole attachment rent under amendments to those agreements which took effect between 1999 and 2009. Verizon added that First Energy has charged unlawful and unreasonably high contract rates for years even after they were directed by the FCC to eliminate wide disparities in pole rental rates. Verizon asked the FCC to require First

Energy to charge Verizon just and reasonable rates and refund the amounts it determines it was overcharged.

On February 3, 2020, First Energy filed an answer to Verizon's complaint. First Energy argued that Verizon's complaint is unfounded and should either be dismissed or the relief requested should be denied. First Energy argued, among other things, that Verizon was required to terminate its existing joint use agreements with First Energy before filing the complaint but failed to do so. First Energy also argued that Verizon has misinterpreted FCC rulings and that failed negotiations with First Energy led to the complaint being filed. First Energy also argued that Verizon has misconstrued the relevant facts, including whether one party has bargaining leverage over another. First Energy added that, to the extent the case moves forward, any analysis of the rates between First Energy and Verizon should be prospective in effect only. First Energy averred multiple affirmative defenses in its answer and provided specific responses to the averments made by Verizon in its complaint.

On March 3, 2020, Verizon filed a reply to First Energy's answer and a denial of First Energy's affirmative defenses. Among other things, Verizon continued to maintain that it is entitled to just and reasonable pole attachment rates and that it is entitled to a refund of what it believes it has been overcharged by First Energy.

Subsequently, the parties engaged in various and significant activities in litigating the complaint before the FCC.

Concurrently, however, the Pennsylvania Public Utility Commission (Commission) took steps to "reverse preempt" the FCC's jurisdiction over pole attachment issues in Pennsylvania. *See*, Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission, Docket No. L-2018-3002672 (Opinion and Order adopted Aug. 29, 2019). Those efforts culminated in the addition of Chapter 77 to the Commission's regulations, 52 Pa.Code § 77.1, *et seq*., and the Commission certified to the FCC on March 18, 2020, that it regulates the rates, terms and conditions for pole attachments. As a result, on March 23, 2020, the FCC issued an Order indicating that it no longer has jurisdiction

over the complaint Verizon filed against First Energy and all future communications regarding the case should be directed to the Commission. The matter was then transferred to the Commission and referred by the Commission's Secretary's Bureau to the Office of Administrative Law Judge for prompt adjudication. I was assigned as the presiding officer.

Due to the Covid-19 pandemic and the related Emergency Orders issued by Governor Wolf, the Commission has not been able to maintain normal operations.[1] As a result, and in an effort to keep this proceeding moving forward in light of the time constraints on pole attachment cases articulated in Chapter 77, on March 26, 2020, an informal, off-the-record conference call was held with the attorneys for Verizon and First Energy, as well as from the Commission's Mediation Unit, to discuss procedural issues related to this case. Present on the call was Susan Paiva, Esquire, Curtis Groves, Esquire, Christopher S. Huther, Esquire and Claire J. Evans, Esquire for Verizon; Tori L. Giesler, Esquire and Bob Endris, Esquire for First Energy; and Matthew Homsher, Esquire of the Commission's Mediation Unit.

During the call, a discussion was held regarding when the regulatory time constraint for this case starts given that the formal complaint was filed by Verizon in November, 2019 at the FCC but the Commission did not establish jurisdiction over pole attachment issues until March, 2020. A discussion was also held regarding the status of outstanding motions pending before the FCC and the possibility of resolving this matter through either the Commission's Mediation Unit or settlement judge regulations. Finally, a discussion was also held regarding the appropriate manner to proceed with this case – whether to essentially continue the proceeding where the FCC proceeding ended or establish a new litigation schedule under Commission rules. The parties were given an opportunity to informally provide input regarding their position on these various issues no later than March 31, 2020. Additional emails were subsequently exchanged and a final off-the-record conference call was held with the parties on April 14, 2020.

[1] The Commission's offices were closed beginning on March 16, 2020, pursuant to an Executive Order issued by the Pennsylvania Deputy Secretary for Human Resources and Management due to the COVID-19 pandemic. However, the Commission has continued working remotely.

A scheduling order was issued on April 14, 2020, memorializing the resolution of the procedural disagreements between Verizon and First Energy and establishing a procedural schedule for this case. Of note, it was determined that the complaint would be considered filed as of March 23, 2020 for purposes of commencing the time frame within which the Commission must act on this case and that good cause existed for this case to be concluded within 270 days, as allowed for in Chapter 77 of the Commission's regulations. 52 Pa. Code § 77.5(c). A litigation schedule was established so that the case would be completed within 270 days.

Pursuant to the scheduling order, the following testimony was submitted by Verizon on April 21, 2020 and First Energy on May 21, 2020:

Verizon

Verizon St. 1, the direct testimony of Stephen C. Mills and accompanying Exhibits SCM-1 through SCM-7

Verizon St. 2, the direct testimony of Mark S. Calnon and accompanying Exhibits MSC-1 and MSC-2

Verizon St. 3, the direct testimony of Timothy J. Tardiff and accompanying Exhibits TJT-1 and TJT-2

First Energy

First Energy St. 1-R, rebuttal testimony of Stephen F. Schafer and accompanying Exhibits SFS-1 through SFS-14

First Energy St. 2-R, rebuttal testimony of William P. Zarakas and accompanying Exhibit WZ-1

First Energy St. 3-R, rebuttal testimony of Joanne M. Savage and Exhibit JMS-1

First Energy St. 4-R, rebuttal testimony of Randal J. Coleman and accompanying Exhibits RC-1 through RC-3

First Energy St. 5-R, rebuttal testimony of Thomas R. Pryatel

First Energy St. 6-R, rebuttal testimony of Scott Carlin and accompanying Exhibit SC-1

First Energy St. 7-R, rebuttal testimony of Clark Guo and
accompanying Exhibit CG-1

Most of these pieces of testimony were submitted in both proprietary and non-proprietary form.[2]

Subsequently, various procedural matters ensued, including the filing of motions regarding discovery disputes and the concomitant answers to those motions and orders disposing of those motions.

In light of the continued interruption of normal operations as a result of the Covid-19 pandemic, additional informal, off-the-record conference calls with the parties, the mediation unit and the presiding officer were held on June 2, 2020 and June 5, 2020 to discuss logistics for the evidentiary hearings scheduled for June 15-19, 2020. As a result of those conversations, the parties agreed to various modifications to the original scheduling order. Most significantly, the parties agreed that the in-person hearings scheduled would be cancelled and the proceeding would become "paper-only," meaning that, in addition to other agreed upon modifications, additional rounds of pre-served testimony would be allowed, the pre-served written testimony would be admitted into the record of the proceeding via stipulation and cross examination would be waived. Next, the parties would submit briefs in support of their legal arguments. The parties confirmed their agreement via email dated June 8, 2020.

A second scheduling order was issued on June 8, 2020 memorializing the parties' agreement to the revised procedural schedule and other procedural matters. As a result, the following additional pre-served testimony was submitted by Verizon on June 18, 2020, by First Energy on June 25, 2020 and again by Verizon on July 2, 2020:

Verizon

Verizon St. 1.1, surrebuttal testimony of Stephen C. Mills and
accompanying Exhibits SCM-8 through SCM-44

[2] The parties previously agreed that the Protective Order in place in the proceeding before the FCC would govern this proceeding as well.

Verizon St. 2.1, surrebuttal testimony of Mark S. Calnon and accompanying Exhibits MSC-3 through MSC-21

Verizon St. 3.1, surrebuttal testimony of Timothy J. Tardiff and accompanying Exhibits TJT-3 through TJT-9

Verizon St. 4.0, surrebuttal testimony of Thomas K. MacNabb

Verizon St. 1.2, surrejoinder testimony of Stephen C. Mills and accompanying Exhibits SCM-45 through SCM-49

Verizon St. 2.2, surrejoinder testimony of Mark S. Calnon

Verizon St. 3.2, surrejoinder testimony of Timothy J. Tardiff

First Energy

First Energy St. 1-RJ, rejoinder testimony of Stephen F. Schaffer and accompanying Exhibit SFS-15

First Energy St. 2-RJ, rejoinder testimony of William P. Zarakas

First Energy St. 3-RJ, rejoinder testimony of Joanne M. Savage

First Energy St. 4-RJ, rejoinder testimony of Randall J. Coleman and accompanying Exhibit RC-4

First Energy St. 6-RJ, rejoinder testimony of Scott Carlin and accompany Exhibit SC-2

First Energy St. 7-RJ, rejoinder testimony of Clark Guo

Again, most of these pieces of testimony were submitted in both proprietary and non-proprietary form.

On July 7, 2020, the parties submitted a joint motion to admit stipulated items into the record. That motion will be granted as part of this decision and the parties were directed to ensure that the Commission's Secretary's Bureau has the necessary hard copies of the documents for inclusion in the Commission's file.

Pursuant to the second scheduling order, main briefs and reply briefs were filed by both Verizon and First Energy on July 28, 2020 and August 14, 2020, respectively.

The record in this case closed on August 14, 2020, the date reply briefs were filed. The Commission must issue its decision on this recommendation no later than its Public Meeting on December 17, 2020. For the reasons discussed below, it will be recommended that Verizon's complaint will be granted in part and denied in part.

III. FINDINGS OF FACT

1. The complainants in this case are Verizon Pennsylvania LLC and Verizon North LLC.

2. The respondents in this case are Metropolitan Edison Company, Pennsylvania Electric Company and Penn Power Company (collectively "First Energy").

3. Verizon and First Energy are party to ten similar joint use agreements that contain the rates, terms, and conditions for each party's use of the other party's utility poles. Verizon St. 1.0, Exh. SCM-1.

4. First Energy entered the joint use agreements with Verizon's predecessor companies between 1958 and 1988. The joint use agreements were amended between 1999 and 2009 to include the currently operative pole attachment rate provisions. Verizon St. 1.0, Exh. SCM-2.

5. Five of the ten joint use agreements are between Verizon and Met-Ed, four are between Verizon and Penelec, and one is between Verizon and Penn Power. Verizon St. 1.0, Exh. SCM-2.

6. According to First Energy's pole attachment rental invoices, the parties share 412,697 utility poles in Pennsylvania, with First Energy owning 301,854 of the utility poles and Verizon owning 110,843 of the utility poles. Verizon St. 1.0, Exh. SCM-4.

7. The Commission has recognized that broadband and other advanced services provide invaluable opportunities to Pennsylvania consumers. Verizon St. 1.2 at 3.

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

9. When the FCC ordered electric utilities to charge competitively neutral rates in 2011, Verizon had already been in negotiations with First Energy for about two years trying to reduce the annual net rental amounts it pays under the joint use agreements. Verizon St. 1.0, Exh. SCM-1.

10. First Energy charges Verizon on average more than *****BEGIN PROPRIETARY ***** *****END PROPRIETARY***** the new telecom rate set by the Commission's regulations for Verizon's competitors:

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Verizon St. 2.1, Exh. MSC-4.

11. The properly calculated new telecom rates for Verizon's use of First Energy's poles are:

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

Verizon St. 2.0 at 4.

12. The joint use agreements between Verizon and First Energy were renewed after March 11, 2019. Verizon St. 1.0, Exh. SCM-2.

13. First Energy did not rebut the presumption in the Commission's regulations that the new telecom rate applies by demonstrating that Verizon receives material advantages under the joint use agreements.

14. The joint use agreements include "evergreen" provisions that require Verizon to pay the joint use agreement rates even if the joint use agreements are terminated and, as a result, the joint use agreement rates "shall remain in effect" unless and until First Energy agrees to change them. Verizon St. 1.0. Exh. SCM-2.

15. The new telecom rate is the just and reasonable competitively neutral rate because First Energy does not provide Verizon a net material advantage under the joint use agreements as compared to the terms and conditions it provides Verizon's competitors. Verizon St. 1.0, Exh. SCM-1.

16. The joint use agreements are comparable to First Energy's license agreements with Verizon's competitors because Verizon, like its competitors, must bear the costs associated with placing, maintaining, rearranging, transferring, and removing its attachments; make a written application for space on First Energy's poles; comply with First Energy's construction specifications; and accommodate third parties attached to First Energy's poles. Verizon St. 1.0, Exh. SCM-2.

17. The joint use agreements disadvantage Verizon as compared to its competitors because, among other things, unlike its competitors, Verizon must "at its sole expense" determine the condition of more than 110,000 joint use poles that it owns and shares with First Energy, keep them "in a safe and serviceable condition," and replace or repair its poles as they become defective. Verizon St. 1.0, Exh. SCM-1; *see also*, Verizon St. 1.1 at 45 and Verizon St. 2.1 at 41.

18. First Energy does not provide Verizon a net material competitive advantage under the joint use agreements.

19. Since March 11, 2019, Verizon has overpaid First Energy *****BEGIN PROPRIETARY ***** *****END PROPRIETARY*****.

IV. DISCUSSION

A. Introduction

As a case of first impression before this Commission, a brief history of the regulation of pole attachments is helpful.

Both the United States Congress and the Pennsylvania General Assembly have long sought to accelerate the deployment of advanced technologies in the form of various telecommunications services. Utility pole infrastructure that has been built in neighborhoods and communities throughout this country over more than the past century is an excellent resource for achieving those goals. At the same time, Congress and the General Assembly sought to make the markets for various telecommunications services competitive, although it did not make sense for a variety of reasons, and it was not feasible to require competing service providers to deploy a separate set of utility poles to provide their competing services. Therefore, agreements had to be made for pole owners to provide access to their poles to other providers who were providing, at times, competing services. At the heart of much of the tension of accelerating the deployment of broadband services in an increasingly competitive marketplace was the role of the rates charged for

various services amongst competing entities when sharing facilities. Utility poles, and the equipment attached to them, are instrumental in ensuring that the policies and goals of the United States and of the Commonwealth to accelerate the deployment of telecommunications services are achieved. The rates one company charges another company to attach to its poles are fundamental to achieving these policies and goals.

In 1978, Congress passed the Pole Attachment Act, 47 U.S.C. § 224. In 1996, Congress provided an overhaul of the entire communications industry with the passage of the federal Telecommunications Act of 1996 (TA-96) that also contained provisions regarding pole attachments. More recently, a decision of the FCC in 2011, In re Implementation of Section 224 of the Act, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (Pole Attachment Order) was issued. The FCC again addressed pole attachment issues in 2018 in its Third Report and Order and Declaratory Ruling. In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84 (FCC, Rel. August 3, 2018) (2018 Pole Attachment Order).

At the state level, in 1993, the Pennsylvania General Assembly similarly added Chapter 30 to the Public Utility Code, 66 Pa.C.S. § 3011, *et seq*. Chapter 30 of the Public Utility Code provides that it is the policy of this Commonwealth to: "[m]aintain universal telecommunications service at affordable rates while encouraging the accelerated provision of advanced services and deployment of a universally available, state-of-the-art, interactive broadband telecommunications network in rural, suburban and urban areas. . . ." 66 Pa.C.S. § 3011(2). In addition, it is the policy of this Commonwealth to "[e]nsure the efficient delivery of technological advances and new services throughout this Commonwealth in order to improve the quality of life for all Commonwealth residents." 66 Pa.C.S. § 3011(6). Despite these Pennsylvania goals, the rates one company could charge another company to attach to their poles was predominantly governed by the FCC.

Therefore, on August 29, 2019, the Commission issued a Final Rulemaking Order formally "reverse preempting" the FCC's jurisdiction over pole attachment issues in Pennsylvania. *See*, Assumption of Commission Jurisdiction Over Pole Attachments from the

Federal Communications Commission, Docket No. L-2018-3002672 (Final Rulemaking Order entered Sept. 3, 2019) (Final Rulemaking Order). In doing so, the Commission noted, in part, that the recent public demand for ubiquitous access to wireline and wireless data technology has increased the need for more streamlined pole attachment procedures in Pennsylvania. The Commission added that the Final Rulemaking Order is "a natural outgrowth of the goals of Chapter 30 of the Public Utility Code, which is intended to promote and encourage the provision of advanced telecommunications services and broadband deployment in the Commonwealth." Id. at 3. The Commission added:

> As noted above, the Commission agrees with those comments urging that we assert jurisdiction over pole attachments to provide a local forum in Pennsylvania for the timely resolution of pole attachment disputes. The Commission's assertion of jurisdiction over pole attachments will assist Pennsylvania pole owners and those entities that seek to utilize pole attachments, including those entities seeking to deploy broadband network access elements across the Commonwealth. The Commission also will be able to address Pennsylvania-specific pole attachment issues, using its expertise regarding Pennsylvania telecommunications and electric utilities as well as safety issues. The Commission believes its assertion of jurisdiction over pole attachments will assist in spurring 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 by resolving Pennsylvania-specific disputes in Pennsylvania as compared to the FCC. In addition, the Commission can provide a balanced approach to the competing needs and demands on pole infrastructure between pole owners, pole attachers, and the telecommunications, electric, and cable industries in a predictable manner using federal rules.

Id. at 9-10. As a result of the adoption of the Final Rulemaking Order, Chapter 77 was added to the Commission's regulations, 52 Pa.Code § 77.1, *et seq*., and, on March 18, 2020, the Commission certified to the FCC that it regulates the rates, terms and conditions for pole attachments in Pennsylvania.

Furthermore, it is noted that Verizon and First Energy operate under vastly different regulatory schemes. For example, for more than two decades, Verizon has been subject to alternative regulation under Chapter 30 of the Public Utility Code which, among other things,

sought to encourage the accelerated deployment of a modernized network that facilitated access to broadband services in exchange for having most of their rates deregulated with the remaining rates being regulated under a streamlined form of regulation using a formula tied to the rate of inflation. Verizon's rates have not been set using the traditional rate base/rate of return methodology for more than two decades. First Energy, on the other hand, continues to have its transmission and distribution rates regulated under the traditional rate base/rate of return form of regulation where it is generally entitled to a fair rate of return on its property that is used and useful in the provision of utility service. First Energy's generation rates have been subject to competition since 1996. Verizon's services are subject to competitive pressures while First Energy continues in a monopoly status for its transmission and distribution service, but not its electric generation service.

Therefore, this case lies at the intersection of two of the largest utilities operating in Pennsylvania in vastly different ways under vastly different circumstances but involving the same rates for physical space on 412,000 utility poles throughout the Commonwealth. Further, this case is litigated against the backdrop of the Commonwealth's policy objective to deploy broadband services without interrupting the concomitant goal of providing safe and adequate utility service at just and reasonable rates.

It is from this general background and these pieces of legislation that this complaint arises.[3] The issues raised in this case are especially significant where, as is the case here, Verizon and First Energy jointly use more than 412,000 utility poles throughout the Commonwealth.

B. Legal Standard

1. Position of the Parties

The parties have disagreed on the burden of proof to be applied to this case.

[3] Both parties provided in their briefs a good discussion of the historical background of pole attachment regulation and the reader is referred to these briefs for more details. *See e.g.*, Verizon M.B. at 7-15 and First Energy M.B. at 6-8.

Resolving this dispute is an essential first step before addressing the underlying issues in Verizon's complaint.

a. Verizon Main Brief

In its main brief, Verizon argued that First Energy has the burden of proof. In doing so, Verizon focused on the FCC's pole attachment regulations and references Section 77.4 of the newly enacted Chapter 77 of the Commission's regulations which incorporates Section 1.1413 of the FCC's regulations. Verizon M.B. at 15. Verizon argued that, according to Section 1.1413 of the FCC's regulations, Verizon must be charged by First Energy the following calculated new telecom rates:

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

Id., *citing*, Verizon St. 2.0 at 4.

Verizon argued that the regulations place the burden on First Energy to rebut the presumption that Verizon must be charged these new telecom rates with "clear and convincing evidence" establishing that First Energy provides Verizon "net benefits under its pole attachment agreement[s] with [First Energy] that materially advantage [Verizon] over other telecommunications attachers" that also attach to First Energy's poles." Verizon M.B. at 15. Verizon then argued that:

> To meet its burden, FirstEnergy must prove by clear and convincing evidence that it provides 'significant material benefits [to Verizon] beyond basic pole attachments or other rights given to another telecommunications attacher.' The material benefits must 'derive from the terms and conditions of the joint use agreement[s] rather than Verizon's historical status as an [I]LEC.' They must also be '*net* benefits' – meaning they must account for the unique

> *costs* FirstEnergy imposes on Verizon under the joint use agreement as compared to FirstEnergy's license agreements. FirstEnergy must also prove, document and accurately quantify an annually recurring per-pole value for any net material competitive benefit because FirstEnergy "may not 'embed in Verizon's rental rate costs that [FirstEnergy] does not incur.'"

Id. at 16 (citations omitted; emphasis in original). Verizon concluded that its complaint should be sustained because First Energy failed to rebut the presumption.

b. First Energy's Main Brief

In its main brief, First Energy argued that, "by exercising reverse preemption authority, the Commission has supplanted the FCC's jurisdiction and application of Section 224 of the Communications Act with the Commission's jurisdiction under and application of the Public Utility Code to the Pennsylvania pole attachment disputes." First Energy M.B. at 15. First Energy noted that the Commission has previously reviewed the terms and conditions of joint use agreements between ILECs and EDCs under the Public Utility Code. Id. at 15-16. First Energy added that Section 224 of TA-96 provides that the FCC does not have jurisdiction "'in any case where such matters are regulated by a State.'" Id. at 16, *quoting* 47 U.S.C. § 224(c) . First Energy notes the Commission's Final Rulemaking Order, *supra*, states that the FCC and court decisions are "persuasive and not controlling precedent." First Energy M.B. at 16, *quoting*, Final Rulemaking Order at 50.

As a result, First Energy argued with regard to burden of proof that Section 332 of the Public Utility Code provides the party seeking a rule or order from the Commission has the burden of proof in that proceeding. Id. at 17, *citing*, 66 Pa.C.S. § 332(a). First Energy added that "a litigant's burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of the evidence, which is substantial and legally credible." Id., *citing*, Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950) (Se-Ling Hosiery). First Energy continued: "The preponderance of the evidence standard requires proof by a greater weight of the evidence. Only if the proponent of the rule or order presents evidence found to be of greater weight than that of the other party, will it have carried its burden

of proof." Id. (citations omitted). First Energy then states that, as the party seeking the relief, Verizon bears the burden of demonstrating that the rates charged by First Energy to Verizon under the joint use agreements violate the Public Utility Code, specifically referencing Sections 508, 1302, 1304, 1309 and 1312 of the Public Utility Code. Id. at 17-18 (citations omitted).

First Energy next argued that, although the factual burden may shift during a proceeding, the proponent of the rule or order always maintains the overarching burden of proof, noting that the burden of going forward with the evidence may shift from one party to another but the burden of proof never shifts, it always remains on the complainant. Id. at 18. First Energy concluded this argument by stating that any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence. Id. at 18-19, *citing*, Met-Ed Indus. Users Group v. Pa. Pub. Util. Comm'n, 960 A.2d 189, 193 n.2 (Pa. Cmwlth. 2008) and 2 Pa.C.S. § 704.

First Energy also discussed Sections 508, 1301, 1304, 1309 and 1312 of the Public Utility Code as part of its argument that Verizon has the burden of proof which it failed to meet and therefore the complaint should be denied. Id. at 19-24.

c. Verizon's Reply Brief

In response to First Energy's argument, Verizon reiterated the argument in its main brief that Chapter 77 of the Commission's regulations adopted the terms, rates and conditions of access to and use of utility poles, ducts, conduits and rights-of-ways to the full extent provided for in Section 224 of TA-96 and 47 CFR, Chapter I, Subchapter A, Part 1, Subpart J. Verizon R.B. at 3. Verizon added that the Commission adopted these regulations in a proper rulemaking and are binding on this case. Id. at 4. Verizon added that First Energy ignores these regulations and reargues the policy decisions behind them and proposes its own alternative rules. Id. Verizon then quotes thirteen different places in the Commission's Final Rulemaking Order in support of its position. Id. at 5-6 (citations omitted).

Verizon then argued that First Energy's effort to create an alternate pole attachment regime for Pennsylvania fails because 1) the Commission has adopted the FCC's regulations, 2) the FCC's rules and orders are controlling and not persuasive, as First Energy argues, because "the Commission accepted 'the wisdom of the long-standing FCC practice and experience to interpret its pole attachment rules,'" and maintained the status quo, 3) the pole attachment rates must be justified by First Energy under the regulations, which First Energy cannot do and 4) the Commission need not determine whether First Energy's rates also violate other provisions of Pennsylvania law, it is enough that they violate the Commission's pole attachment regulations. Id. at 7-9.

d. First Energy's Reply Brief

In response to Verizon's argument, First Energy reiterated in its reply brief that the Commission has made clear that the FCC orders and federal court decisions reviewing those decisions will be "persuasive, and not controlling precedent." First Energy R.B.at 7-8, *quoting,* Final Rulemaking Order. First Energy argued that the Commission's decisions regarding pole attachments must comply with the Public Utility Code and applicable Pennsylvania law. Id. at 8. First Energy further argued that, in its Main Brief, "Verizon continues to advance blatantly inaccurate support of its position through the following misrepresentations of the FCC's regulations and precedent contained in Verizon's descriptions of the legal standards in its Main Brief," in part by misquoting the FCC's 2011 Pole Attachment Order. Id. at 9-10. In contrast, First Energy argued that "Verizon's distortion of paragraph 208 flies in the face of the FCC's specific statement that it is 'unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable.'" Id. at 10.

First Energy also argued that Verizon has misstated the burden of proof applicable in complaint proceedings and that "Verizon's exclusive reliance on this 'presumption' in its statement of the burden of proof misrepresents the law." Id. at 12. First Energy then reiterates its position that Section 332(a) of the Public Utility Code places the burden of proof in this proceeding on Verizon and that Verizon has not demonstrated that it is entitled to the presumption that it should receive comparable pole attachment rates, terms and conditions as a

similarly-situated attacher because it has not demonstrated that the joint use agreement is a new, newly-negotiated or newly-renewed agreement. Id. at 12-13. First Energy argued that Verizon cannot rely on a presumption which is not in evidence in order to carry out its ultimate burden under the Public Utility Code. Id. at 13.

2. Disposition

Verizon and First Energy each contend that the other party bears the burden of proof in this case. I find, however, that Verizon has the initial burden of proof as the complainant, which it has satisfied. Next, having satisfied its initial burden of proof, First Energy has the burden to rebut Verizon's burden of proof, which First Energy has not done. When determining whether pole attachment rates are just and reasonable and in accordance with the provisions of the Public Utility Code, the Commission has indicated that it will use the rules and regulations set forth by the FCC. Both the FCC's and Commission's standards to be applied to pole attachment cases exist mutually and not exclusively.

As noted in Chapter 77 of the Commission's regulations,

> (a) This chapter adopts 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 CFR Chapter I, Subchapter A, Part 1, Subpart J (relating to pole attachment complaint procedures), inclusive of future changes as those regulations may be amended.

52 Pa.Code § 77.4(a). In reverse pre-empting the FCC on pole attachment issues, the Commission has also determined that "persons and entities subject to this chapter may utilize the mediation, formal complaint and adjudicative procedures under 52 Pa. Code Chapters 1, 3 and 5 … of the Commission's regulations to resolve disputes or terminate controversies." 52 Pa.Code § 77.5(a). Likewise, the Commission has also determined 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 . . . ." 52 Pa. Code § 77.5(c).

Consequently, the procedural rules to be followed in this case are set by the Commission in Chapters 1, 3 and 5 of Title 52 of the Pennsylvania Code. However, for purposes of determining the substantive issues in a pole attachment case such as in the instant case, the FCC's regulations coexist with the Public Utility Code. Through the Final Rulemaking Order, the Commission has incorporated the FCC's rules and regulations governing pole attachment cases, with federal court decisions reviewing those rules and interpretations being persuasive, when making such determinations.

In the Commission's Final Rulemaking Order, the Commission determined, with regard to the Commission asserting jurisdiction over pole attachments, that:

> Prior to this determination today, the Commission provided an Annex to its [Notice of Proposed Rulemaking] to establish Chapter 77, *Pole Attachments*, to Title 52 of the Pennsylvania Code. In our initial assertion of jurisdiction over pole attachments, **the Commission will adopt, in whole, the FCC's regulatory regime for pole attachment complaint procedures at Subject J as of the effective date of Chapter 77**. This will avoid a multi-year delay in claiming jurisdiction and will uphold the status quo, which will avoid regulatory uncertainty and will promote broadband investment across Pennsylvania.
>
> In response to IRRC's suggested language change regarding the reference to the FCC's rules, and for reasons elaborated below, the Commission will amend 52 Pa.Code § 77.1 to reference Subpart J. **This will allow the Commission's regulations to exist in parity with the FCC's regulations** and will provide greater certainty to the public about the scope and application of the federal rules.

Final Rulemaking Order at 10 (emphasis added in bold). Similarly, in discussing the adoption of FCC regulations in Section 77.4 and the possibility of cases reverting back to the FCC if the Commission does not act on them in a timely manner, the Commission again noted that, "While the Commission does not anticipate losing jurisdiction over specific complaints in this manner, should it occur, parties will apply the same substantive rules in either venue. This is yet another reason why parity between the Pennsylvania and federal rules benefits stakeholders." Id. at 25. The Commission further explained:

> In any event, adopting the FCC's regulations provides certainty that Pennsylvania's pole attachment regulations conform to the base-line federal standards required to retain state authority over pole attachments. Adoption of the federal rules, including the proposed mechanism for adopting future changes to those rules, supports the cooperative state-federal goal of deployment of broadband across the Commonwealth, while also considering the safety, adequacy, and reliability of electric service in a manner that is consistent with due process… [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 27-28; *see also*, Id. at 34 ("the Commission's approach for Pennsylvania is to adopt the FCC's pole attachment regulations at Subpart J, as amended from time to time.").

As a result, both Verizon and First Energy are correct in their arguments regarding the legal standard to be applied to this case. The Commission's regulations at Chapter 77 incorporate the FCC's regulations in 47 CFR Chapter I, Subchapter A, Part 1, Subpart J as its own. These regulations exist in addition to, not in place of, the Commission's existing regulations and the Public Utility Code, where relevant. In its Final Rulemaking Order, the Commission could have reiterated verbatim the FCC's rules and regulations on pole attachments that it was adopting but, instead, chose to incorporate those rules and regulations by reference.

Therefore, in this case, as the complainant, Verizon has the initial burden of proof. To meet its initial burden of proof, Verizon has argued that "the Commission's regulations presume Verizon must be charged the following properly calculated new telecom rates," citing to Section 1.1413(b) in support of its position. Section 1.1413 of the FCC's regulations provides:

> **§ 1.1413 Complaints by incumbent local exchange carriers**
>
> (b) In 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, there is a presumption that an incumbent local exchange carrier (or an association of incumbent local exchange carriers) is similarly situated to an attached 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). 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.

47 C.F.R. § 1.1413(b).

Section 1.1406(d)(2)[4] provides a complicated formula that will be applied for determining the maximum just and reasonable rate. With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate is the higher of rates set by two formulas. 47 C.F.R. § 1.1406(d)(2). The formula in § 1.1406(d)(2)(i) is:

> Rate = Space Factor Cost
> Where Cost
>
> in Service Areas where the number of Attaching Entities is 5 =
> 0.66 X (Net Cost of a Bare Pole X Carrying Charge Rate)
>
> in Service Areas where the number of Attaching Entities is 4 =
> 0.56 X (Net Cost of a Bare Pole X Carrying Charge Rate)
>
> in Service Areas where the number of Attaching Entities is 3 =
> 0.44 X (Net Cost of a Bare Pole X Carrying Charge Rate)
>
> in Service Areas where the number of Attaching Entities is 2 =
> 0.31 X (Net Cost of a Bare Pole X Carrying Charge Rate)

[4] Upon further review, the reference to Section 1.1406(e)(2) of the FCC's regulations in 47 C.F.R. § 1.1413(b) cited above appears to be a typographical error. There is a Section 1.1406(d)(2) and a Section 1.1406(e) in 47 C.F.R., but there is no Section 1.1406(e)(2).

in Service Areas where the number of Attaching Entities is not a whole number = N X (Net Cost of a Bare Pole X Carrying Charge Rate), where N is interpolated from the cost allocator associated with the nearest whole numbers above and below the number of Attaching Entities.

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

The formula in § 1.1406(d)(2)(ii) is:

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

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

Verizon, therefore, has the initial burden of proof in this case because it is the complainant. Verizon's complaint proceeds under Section 1.1413 which gives Verizon the burden of proof to demonstrate that the joint use agreements are renewed or entered into after the effective date of Section 1.1413. To the extent that Verizon can satisfy this burden, the burden then shifts to First Energy to prove that Verizon has received material advantages as a result of the joint use agreements.

This approach is consistent with Section 332(a) of the Public Utility Code that provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a). As with most complaint cases, as a matter of law, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. Patterson v. Bell Tel. Co. of Pa., 72 Pa. PUC 196 (1990). "Burden of proof" means a

duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery. The offense must be a violation of the Public Utility Code, the Commission's regulations or an outstanding order of the Commission. 66 Pa.C.S. § 701.

Furthermore, as with all complaint cases, if a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa.Cmwlth. 2001); *see also*, Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa.Cmwlth. 1982). In addition, decisions of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 166 A.2d 96 (Pa.Super. 1961); and Pa. Dept. of Public Welfare, White Haven Center, 480 A.2d 382 (Pa.Cmwlth.1984).

First Energy is also correct that other provisions of the Public Utility Code apply to this proceeding. As First Energy argued, First Energy's pole attachment rates it charges Verizon must also be consistent with Sections 508, 1301, 1304, 1309 and 1312 of the Public Utility Code. These sections of the Public Utility Code coexist with the FCC's pole attachment regulations that the Commission has adopted and the outcome of this proceeding must also be examined with these statutes in mind. That is, the pole attachment rates First Energy charges Verizon must be both consistent with the FCC's pole attachment regulations as adopted by the Commission, as well as consistent with, for example, Sections 1301 and 1309 of the Public Utility Code that require that "every rate made, demanded or received by any public utility, or by

any two or more public utilities, shall be just and reasonable, and in conformity with regulations or orders of the Commission." 66 Pa.C.S. § 1301(a).

As a result, Verizon bears the initial burden of proof in this proceeding. Verizon must demonstrate that First Energy's pole attachment rates violate the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of First Energy. This includes not only Chapter 13 of the Public Utility Code, but also Chapter 77 of the Commission's regulations, which incorporates by reference the FCC's pole attachment regulations. Verizon can meet its initial burden under Section 1.1413 of the FCC's regulations by showing that the joint use agreements were renewed or entered into after the effective date of that Section. Once Verizon demonstrated that the joint use agreements were renewed after the effective date of Section 1.1413, the burden then shifts to First Energy to determine that its rates are just and reasonable because Verizon receives material advantages under the joint use agreements.

C. The Pole Attachment Rates

1. Position of the Parties

a. Verizon's Main Brief

In its main brief, Verizon made three arguments in support of its position that the pole attachment rates First Energy charges Verizon under the joint use agreements are unjust and unreasonable.

First, Verizon argued that, while the FCC's regulations, adopted by this Commission, guarantee Verizon and its competitors just and reasonable rates that are competitively neutral, First Energy charges Verizon on average more than *****BEGIN PROPRIETARY *** ***END PROPRIETARY***** the new telecom rate set by the Commission's regulations for Verizon's competitors:

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Verizon M.B. at 21, *citing*, Verizon St. 2.1, Exh. MSC-4. Verizon further claims that the magnitude of this disparity is not disputed as First Energy itself calculated two sets of alleged new telecom rates and each includes rates about *****BEGIN PROPRIETARY ***** *****END PROPRIETARY***** the rates First Energy has been charging Verizon. Id. at 22. Verizon claimed that the rate disparities are incompatible with the Commission's policy goals and letter of the regulations and First Energy's rates are unjust, unreasonable and unlawful. Id. at 22-23.

Second, Verizon argued that the pole attachment rates First Energy charges Verizon under the joint use agreements are unjust and unreasonable because it is entitled to the new telecom rate under the Commission's regulations since the new telecom rate presumption in the Commission's regulations applies and First Energy did not rebut it. Verizon argued that the Commission's regulations include a presumption that an ILEC may be charged no higher than the rate determined in accordance with the new telecom rate formula under any pole attachment contracts entered into or renewed after March 11, 2019 when the rate became effective. Id. at 23. Verizon added that this presumption applies to a broad set of joint use agreements, including the joint use agreements in this case because those agreements automatically extended after March 11, 2019. Id. at 23-24; *citing*, Verizon St. 1.0 at Exh. SCM-2. Verizon added that First Energy admitted that the agreements automatically renewed by stating in their answer to the complaint that neither party has provided written notice of an intent to terminate the agreements. Id. at 24-25.

Verizon added that First Energy did not attempt to rebut the new telecom rate presumption which would have required First Energy to provide clear and convincing evidence that First Energy provides Verizon net benefits under the agreements that materially advantage Verizon over other telecommunications attachers. Id. at 25. Verizon argued instead that First Energy stated conclusively that the new telecom rate presumption does not apply to this proceeding. Id. Verizon argued that because First Energy is wrong and did not even argue in the alternative that it could rebut the presumption, this is case-determinative. Id. at 25-26.

Third, Verizon also provided extensive argument that the pole attachment rates First Energy charges Verizon under the joint use agreements are unjust and unreasonable because the FCC ordered First Energy to charge the new telecom rate in the 2011 Pole Attachment Order, *supra*. Here, Verizon first argued that the FCC ordered First Energy and other electric utilities to reduce the rates they charge ILECs under all agreements, including existing agreements because "pole attachment rates cannot be held reasonable simply because they have been agreed to." Id. at 28. Rather, Verizon argued that the FCC required an examination of whether the electric utility owns more poles than the ILEC thereby giving the electric utility superior bargaining power and whether the ILEC cannot escape the unreasonably high rates by virtue of an "evergreen" provision that requires the ILEC to pay the rates even if the agreement is terminated. Id. at 29, *citing*, 2011 Pole Attachment Order.

Verizon argued that First Energy satisfies both of these requirements because (1) First Energy has a three-to-one pole ownership advantage over Verizon and thereby superior bargaining power, id. at 29-34; and (2) Verizon genuinely lacks the ability to terminate First Energy's unlawful rates and obtain just and reasonable rates through negotiation because the FCC has previously determined that Verizon genuinely lacks the ability to terminate an existing agreement and First Energy can force Verizon to pay the relatively high agreement rates for as long as its attachments remain on the poles pursuant to the evergreen agreement. Id. at 35-38. Verizon provided real dollar value impacts to support both of these arguments. Id.

Verizon next argued that the pole attachment rates First Energy charges Verizon under the joint use agreements are unjust and unreasonable because the FCC ordered First

Energy to charge the new telecom rate in the 2011 Pole Attachment Order since the joint use agreements do not provide a net material advantage to Verizon over its competitors. Verizon argued that First Energy should have charged the same rate that it applies to Verizon's competitors under the principle of competitive neutrality because Verizon does not receive net material competitive benefits that justify a higher rate. Id. at 38. Verizon added that First Energy cannot show a recurring annual per-pole premium above the new telecom rate. Id. Verizon added that there are some terms and conditions that are comparable to those in First Energy's license agreements and some that ***disadvantage*** Verizon relative to First Energy's license agreement. Id. at 38-42 (emphasis supplied). Verizon continued:

> Because the terms and conditions of the joint use agreements are comparable or less advantageous than those in First Energy's license agreements, First Energy does not provide Verizon a net material competitive advantage under the joint use agreements and the new telecom rates is the "just and reasonable" rate under the standard the FCC adopted in 2011.

Id. at 42, *citing*, Pole Attachment Order at 5336 (¶ 217). Verizon then refutes the competitive advantages that First Energy asserts exists and argues that the just and reasonable rate for Verizon's use of First Energy's poles is the new telecom rate. Id. at 42-51.

b. First Energy's Main Brief

In its main brief, First Energy argued that Verizon has failed to demonstrate that the pole attachment rates charged under the joint use agreements are unjust and unreasonable. First Energy began with an overview of pole attachments and agreements, noting that third-party pole attachment agreements reflect incremental costs and that, as a pole-owning entity, Verizon is improperly attempting to insert a rate based on incremental costs into a joint use agreement based on the sharing of the full costs of pole ownership. First Energy M.B. at 31-34. First Energy's argument on this issue is organized into two sections: the first section pertains to Verizon's alleged failure to demonstrate that the rates charged by First Energy under the joint use agreement are unjust and unreasonable under Pennsylvania law, and the second section

pertains to Verizon's alleged failure to demonstrate that the rates charged by First Energy under the joint use agreement are unjust and unreasonable under federal law.

With regard to Pennsylvania law, First Energy argued that the Public Utility Code and Pennsylvania law control this dispute. Id. at 35-39. First Energy argued that from the date that each joint use agreement was executed until the effective date of the 2018 Pole Attachment Order, the Commission had jurisdiction over the rates, terms and conditions of those agreements between ILECs and electric utilities. Id. at 35. First Energy added that the Commission reasserted jurisdiction over those agreements through the Final Rulemaking Order and "once again subjected disputes regarding joint use agreements to the Public Utility Code and Pennsylvania law." Id. at 35-36. First Energy argued, therefore, that the Public Utility Code and applicable Pennsylvania law control the disposition of Verizon's complaint, noting as well other proceedings in which the Commission exercised jurisdiction over pole attachment issues and quoting the language of the Final Rulemaking Order stating that FCC and court decisions and precedent will be persuasive and not controlling. Id. at 36-39.

Second, with regard to Pennsylvania law, First Energy argued that Verizon never alleged in its complaint any violation of the Public Utility Code or a Commission order as required by Section 701 of the Public Utility Code. Id. at 39-41, *citing*, 66 Pa.C.S. § 701. First Energy argued that this is true because the complaint pending before the Commission is the same complaint that was filed at the FCC and, even though Commission regulations allow for amendments to pleadings, Verizon never amended its complaint. Id. at 40.

Third, with regard to Pennsylvania law, First Energy added that, in addition to Verizon not alleging any violation of the Public Utility Code in its complaint, "Verizon must demonstrate that the rates it pays under the Joint Use Agreements exceed First Energy's cost of service and produce revenues in excess of a fair return on the fair value of the utility's property used to provide the regulated service." Id. at 41, *citing*, Lloyd v. Pa. Pub. Util. Comm'n, 904 A.2d 1010, 1020 (Pa. Cmwlth. 2006), *app. den.*, 916 A.2d 1104 (Pa. 2007) and Nat'l Fuel Gas Distrib. Corp. v. Pa. Pub. Util. Comm'n, 464 A.2d 546, 564 (Pa. Cmwlth. 1983) (Nat'l Fuel).

First Energy argued that Verizon produced no evidence that the rate it pays exceeds cost of service or produces an excessive rate of return under Pennsylvania law and practice. Id. More specifically, First Energy added that Verizon has failed to present any evidence on the current cost of equity which "constitutes a fundamental flaw in its case, which makes it impossible to show on this record that First Energy's current pole attachment rates are unjust and unreasonable under the Public Utility Code and Pennsylvania law." Id. at 41-43. First Energy said this requirement is binding on the Commission. Id. at 43. Similarly, First Energy argued that Verizon's cost of service calculations are inconsistent with controlling and long-standing Commission precedent and should be rejected, noting, among other things, that the "cost of service" is the "polestar" of Pennsylvania ratemaking, again citing to past Commission decisions on the cost-sharing methodology for joint-use pole attachments. Id. at 43-44, *citing*, North-Eastern Pa. Tel. Co. v. Pa. Power & Light Co., Docket No. C-881953 (Order dated June 9, 1992) (NEPTCO).

Furthermore, First Energy argued that it presented unrebutted record evidence that the rates Verizon pays under the joint use agreements are, in aggregate, below fully allocated cost-based rates determined using traditional Pennsylvania ratemaking practices. Id. at 45-46. In doing so, First Energy stated that it calculated the fully allocated cost-based rates that reflect the full cost of service with the cost of common space shared equally among attaching entities and compared those rates to the rates Verizon pays under the joint use agreements. Id. at 46, *citing*, NEPTCO. First Energy concluded that "the rates paid by Verizon under the joint use agreements are, in aggregate, ***below*** the fully allocated cost-based rates." Id. at 46-48 (emphasis supplied). First Energy added that this analysis demonstrates that the rates that Verizon pays under the joint use agreements do not unreasonably benefit First Energy's investors at the expense of First Energy's ratepayers. Id. at 48, *citing*, Nat'l Fuel at 564.

Fourth, with regard to Pennsylvania law, First Energy concluded its argument that the rates that Verizon pays under the joint use agreement are just and reasonable under Pennsylvania law by arguing that Verizon has submitted no evidence that the alleged unreasonable rate it pays violates Section 1304 of the Public Utility Code because the rate is being charged to supply a deficiency created by inadequate rates charged to other First Energy

customers. Id. at 49-51. First Energy added that it has rebutted Verizon's unfounded claim that it is collecting more than a reasonable rate from Verizon and, in fact, the relief Verizon seeks would produce unjust and unreasonable rates and create an unlawful subsidy in violation of Section 1304 because the rate sought by Verizon is far below fully allocated cost-based rates. Id. at 49. First Energy added that Verizon also did not submit any evidence that the new rate it seeks would benefit broadband deployment in Pennsylvania sufficient to justify the unlawful subsidy it seeks. Id. at 50.

With regard to federal law, First Energy argued that even if the Commission relies on FCC precedent, Verizon has failed to demonstrate that the joint use agreements are unjust and unreasonable. First Energy begins this argument with an overview of the historical context behind the FCC's regulation of pole attachments. This includes a discussion of the 1978 Pole Attachment Act, TA-96, and the 2011 Pole Attachment Order. Id. at 52-56. First Energy concluded this recitation by stating:

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

Id. at 56.

First Energy's first argument with regard to Verizon failing to demonstrate even under federal law that the rates First Energy charges are unjust and unreasonable is that, under the FCC's 2011 Pole Attachment Order, Verizon was required to terminate the existing joint use agreement before it could permissibly file a complaint with the FCC seeking new rates, terms and conditions of use but it has not done so, nor has it demonstrated that it lacked the ability to do so. Id. at 56-57. First Energy noted that it is undisputed that the joint use agreements here were not entered into following the adoption of the 2011 Pole Attachment Order as they were last amended in 2009. Id. at 57-58. Furthermore, First Energy argued that Verizon's argument that it could not terminate the agreement because of the "evergreen clause" does not consider

that the FCC has previously addressed that issue in Verizon Fla, LLC v. Fla. Power & Light Co., Docket No. 14-216, 30 FCC Rcd 1140 (Mem. Opinion and Order dated Feb. 22, 2015). First Energy also refuted Verizon's argument that First Energy did not suggest during negotiations that Verizon had to terminate the joint use agreement before it could obtain a just and reasonable rate by arguing that it contradicts the 2011 Pole Attachment Order and Verizon's own witness in this proceeding. Id. at 60-61, *quoting*, Verizon St. 2.1 at 45. Finally, First Energy refuted Verizon's argument that First Energy negotiated in bad faith by noting that First Energy attempted to explore several different options with Verizon to lower the rates Verizon pays under the joint use agreement, even going so far as to propose completely transitioning Verizon out of pole ownership if Verizon so desired, but that it was Verizon who was negotiating in bad faith by insisting on a rate that the FCC had indicated to Verizon itself that it was not entitled to and refusing to entertain any offer from First Energy other than that rate. Id. at 61-63.

First Energy's second argument that, even under federal law, Verizon has failed to demonstrate that the rates First Energy charges are unjust and unreasonable, is that Verizon is not entitled to the "new telecom rate" under the joint use agreements. First, First Energy argued that Verizon's arguments that the joint use agreements constitute "newly renewed" agreements because they allegedly contain an automatic renewal provision is not consistent with the 2018 Pole Attachment Order which requires that the agreements "'***are*** automatically renew***ed***' or 'extend***ed***'." Id. at 64 (emphasis supplied). First Energy added that some action by the parties or a triggering event is required before the agreements can become "automatically renewed" or "extended." Id. Second, First Energy argued that Verizon is not entitled to the new telecom rate under the joint use agreement because Verizon is not entitled to the presumptions set forth in the 2018 Pole Attachment Order, as First Energy does not possess or leverage bargaining power during the rate negotiations. Here, First Energy argued that it could not have bargaining power or leverage in negotiating the joint use agreement in 2009 because those rates and agreements were subject to regulation by the Commission and Verizon could have filed a complaint with the Commission had it believed the rates were unfair, unjust and unreasonable. Id. at 67-68. First Energy added that it does not possess bargaining power because it owns more poles than Verizon as Verizon had indicated after the negotiations that led to the 2009 joint use agreements that it was satisfied with the negotiations. Id. at 68-69; *citing*, First Energy Exh. SFS-1. Third, First

Energy argued that it does not have bargaining power over Verizon because there was a less-costly alternative available to Verizon but that Verizon never responded to that offer instead, First Energy argued, seeking to obtain a substantially discounted rate maintaining all the benefits it receives under the joint use agreements. Id. at 69-71. Finally, First Energy argued that it does not have bargaining power because it would lose poles, increase its costs and not be able to replace the poles owned by Verizon if it tried to exercise such power. Id. at 71-72.

Lastly, First Energy's argument that Verizon is not entitled to the "new telecom rate" under the joint use agreements is that, even if Verizon were entitled to the presumptions under the 2018 Pole Attachment Order, which First Energy says it is not, First Energy has rebutted those presumptions and demonstrated that Verizon is not comparably situated to its competitors and that it realizes substantial material benefits under the existing joint use agreements. Therefore, Verizon is not entitled to receive the new telecom rate under the existing joint use agreements. First Energy argued that Verizon receives substantial benefits under the joint use agreements compared to competing attachers, including that First Energy pays a large portion of Verizon's costs to own and maintain its pole structure and the joint use agreements provide other time and cost-savings advantages over its competitors to reach new customers and provides additional services such as overlashing and also benefitting from First Energy's vegetation management program. Id. at 74-77.

In addition, First Energy argued that it has demonstrated that Verizon is not comparably situated to competing third-party attachers and the Commission should reject as meritless or irrelevant Verizon's claims that First Energy has not quantified a specific dollar value of the benefit and that the costs Verizon incurs as both a pole owning entity as offsetting any of the benefits as a pole attaching entity. First Energy points out that Verizon refused to provide answers to discovery that would have enabled First Energy to analyze the cost-savings Verizon experiences under the joint use agreements; moreover, First Energy argues that is not even required to quantify those benefits under FCC precedent. Id. at 77-80. Lastly, First Energy argued that Verizon is not comparably situated to competing third-party attachers because the joint use agreements with Verizon are different from First Energy's pole attachment license

agreements and a comparison of the fundamental differences reveal additional material benefits. Id. at 81-82.

c. Verizon's Reply Brief

In its reply brief, Verizon argued that the Commission adopted rules that benefit consumers through low, uniform pole attachment rates and that it is undisputed that First Energy charges Verizon more than *****BEGIN PROPRIETARY *** ***END PROPRIETARY***** the new telecom rate. Verizon R.B. at 9. Verizon also argued that First Energy's rates 1) are incompatible with the Commission's broadband objectives, 2) violate the Commission's regulations and orders and 3) cannot be salvaged by First Energy's preference for a different pole attachment regime that produces higher rates. Id.

First, with regard to the impact of First Energy's pole attachment rates on the Commission's broadband policy objectives, Verizon argued that "First Energy'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." Id. at 10-11. Verizon added that "First Energy's many arguments seek to perpetuate uneconomic and unwarranted rate disparities that must be eliminated." Id. at 11.

Second, with regard to the Commission's regulations and orders, Verizon provided three arguments in support of the use of the new telecom rate it claims are required by the Commission's regulations. To begin, Verizon argued First Energy's effort to avoid the presumption that the new telecom rate applies fails and is undermined by its own rulemaking comments. Id. at 12-19. For example, Verizon refuted First Energy's argument that the presumption should apply only if First Energy chooses to take some action to trigger the presumption, noting that the presumption's effectiveness is not in the hands of the electric utilities that want to avoid it. Id. at 13. Verizon next refuted First Energy's argument that the presumption should be limited to agreements that specify the length of a renewal term and should exclude agreements that extend on a day-to-day basis by arguing that the presumption

was adopted to eliminate outdated rate disparities. Id. at 13-14. Verizon also refuted First Energy's argument that the presumption should apply only if the exact words "renew" or "extend" appear in the agreement by arguing that this formalistic limitation is not in the Commission's regulations. Id. at 14. Finally, Verizon refuted First Energy's argument that the presumption violates the Public Utility Code and controlling Commission precedent by noting that the presumption ***is*** controlling law. Id. (emphasis supplied).

Verizon then argued that First Energy did not rebut in its main brief the new telecom rate presumptions but ignored the controlling standard or relied on conclusory or incorrect allegations. Verizon refuted First Energy's argument that all joint use agreements benefit ILECs as compared to licensing agreements with competitive local exchange carriers and cable companies by noting that this argument would wipe out the presumptions and leave in place outdated rate disparities. Id. at 16. Verizon also refuted First Energy's argument about a different electric utility's agreement with a different ILEC noting that agreement does not justify a higher rate for First Energy. Id. Verizon then refuted First Energy's argument that it should not have to prove or quantify costs it claims to incur by arguing that First Energy must provide costs it has incurred, and that properly measured relevant costs or unlawful and artificial rate disparities will persist and continue to harm Pennsylvanians. Id. at 16-17.

Verizon next refuted First Energy's argument that, because the joint use agreements do not confer a net material competitive advantage, the burden imposed by the Commission's regulations should be changed by arguing that the Commission's clear and convincing evidence standard requires "much more than a collection of unsupported, irrelevant, incomplete and hypothetical claims." Id. at 18. Finally, Verizon refuted First Energy's argument that it requires additional discovery to quantify advantages it alleges by noting that First Energy propounded discovery when this case was pending at the FCC and was allowed to take unlimited discovery after the case was transferred to the Commission. Id. at 19.

In addition, Verizon rebutted the three alleged benefits that First Energy argued in its brief support finding a net material competitive advantage for Verizon under the agreements. Verizon argued that First Energy's argument that it pays a large portion of Verizon's costs to

own and maintain its pole structure is neither true nor relevant because the result of this case should be proportional new telecom rates for both parties. Id. at 19-20. Verizon also rebutted First Energy's "speed to market" argument, noting that Verizon does not incur fewer make-ready expenses then its competitors, Verizon is not advantaged by the age of its network, there is no material difference between the overlashing rules that First Energy may lawfully apply to Verizon and its competitors, the joint use agreements do not allow Verizon to install attachments faster than its competitors, and First Energy does not charge all attachers fees to use its SPANS system, so Verizon has no advantage by using SPANS without charge. Id. at 19-25.

Third, Verizon rebutted First Energy's argument that its pole attachment rates are just and reasonable by arguing that First Energy cannot avoid the new telecom rate by creating fictional hurdles. Here, Verizon argued that Verizon may be charged no higher than the rate determined in accordance with the new telecom rate formula because First Energy did not rebut the new telecom rate presumption and, therefore, "that is the end of the matter. First Energy cannot impose additional requirements." Id. at 26. Verizon argued that it did not need to terminate the joint use agreements to obtain competitively neutral rates because doing so would complicate deployment and substantially increase costs going forward, and the 2011 Pole Attachment Order does not require termination. Id. at 26-27. Verizon added that it genuinely lacks the ability to terminate the existing agreement rates because First Energy never offered lawful rates, contrary to First Energy's argument. Id. at 28-29. Verizon also added that First Energy's argument that Verizon refused to consider, let alone accept, in negotiations any rate that was higher than the new telecom rate is false as Verizon repeatedly asked First Energy to negotiate with the range of rates between the new telecom rate and the old telecom rate. Id. at 29.

Verizon also refuted First Energy's argument that it offered to replace the existing agreement with a template agreement because the offer was just a suggestion and came with an unacceptable precondition that Verizon would have to transition out of pole ownership. Id. at 30. Lastly, Verizon refuted First Energy's argument that it put Verizon on notice that the joint use agreements must be terminated to negotiate just and reasonable rates by arguing that there was

no such requirement and such requirement would increase costs and set broadband deployment back at a time when the Commission is working to move deployment forward. Id. at 30-31.

Another fictional hurdle that Verizon claimed First Energy has created is that Verizon is not entitled to the new telecom presumption because First Energy did not possess or leverage bargaining power during the negotiations. Verizon argued that, although it was not necessary, Verizon showed the joint use agreement rates reflect First Energy's superior bargaining power. Verizon argued that First Energy is adding this requirement to the Commission's regulations which it cannot do. Id. at 31. Verizon argued that First Energy had bargaining power regardless of whether rates were regulated because the mere existence of a regulatory scheme does not offset utility bargaining superiority. Id. at 32. Verizon also argued that First Energy's argument that a 2009 letter from a Verizon employee shows First Energy did not have bargaining power is not relevant because only current, not past, pole ownership ratios matter when setting rates. Id. at 33. Verizon also claimed the letter was taken out of context. Id. Verizon also refuted First Energy's claim that it mitigated bargaining power through the use of standard license agreements as revisionist history. Id. at 34. Finally, Verizon refuted First Energy's argument that First Energy could not leverage its bargaining power because, absent joint use, it would be economically and legally difficult for First Energy to deploy its facilities by noting that the FCC has already rejected this argument. Id. at 34-35 (citation omitted).

The last fictional hurdle that Verizon rebutted was First Energy's attempts to avoid the new telecom rate presumption by cherry-picking isolated quotes from FCC orders to suggest that it may continue charging Verizon the higher rates. Verizon reiterated that First Energy has not rebutted the presumption so it, therefore, applies. Id. at 35. Verizon argued that the FCC applied the presumption to older existing agreements irrespective of bargaining power and that it is irrelevant whether the FCC adopted the new telecom rate presumption had it considered bargaining power arguments First Energy makes in this case. Id. at 36. Verizon then refuted First Energy's argument that the FCC has not yet decided a case under the presumption because the presumption only took effect in March 2019. Id. at 37. Verizon also refuted First Energy's argument by noting that the FCC has created a "hard cap" which prevents First Energy from charging more than the old telecom rate. Id.

Verizon refuted First Energy's arguments that its pole attachment rates are just and reasonable by arguing that First Energy cannot evade the Commission's regulations by crafting a different pole attachment regime in Pennsylvania. Here, Verizon argued First Energy's arguments are rooted in the past and premised on a hypothetical world in which the Commission never adopted its pole attachment regulations and is free to impose higher fully allocated cost-based rates on broadband providers in Pennsylvania. Id. at 38. Verizon argues that, instead, First Energy must use the rate formulas and procedures under the FCC rules. Id. Verizon refuted First Energy's arguments that it should have amended its complaint to allege a violation of First Energy's alternate pole attachment framework by claiming that there was no need for an amendment and the Commission expected that there would be active cases transferred to it from the FCC when it accepted jurisdiction. Id. at 38-39.

Verizon also refuted First Energy's argument that the Commission cannot grant relief because Verizon's complaint focusses solely on the rates paid by Verizon to attach to First Energy's poles by noting that it is entitled to just and reasonable rates irrespective of the rate First Energy pays Verizon for use of its poles. Id. at 39. Verizon also argued that First Energy's argument misquoted testimony from a Verizon witness and that First Energy's argument relies on a decades-old decision that was superseded by the Commission's new regulations. Id. at 40-41. Finally, Verizon refuted First Energy's fully allocated rate analysis by noting that the analysis depends on actual invoice amounts that differ from and are significantly lower than the rates paid by Verizon. Verizon also refuted First Energy's argument that its revenue shortfall will inevitably be subsidized by First Energy's electric service customers by noting that the regulations should not trigger a base rate case for First Energy because the amounts at issue average about *****BEGIN PROPRIETARY ***** *****END PROPRIETARY***** of First Energy's annual operating revenues. Id. at 41-43.

d. First Energy's Reply Brief

In its reply brief, First Energy provided two arguments in support of its position that Verizon failed to demonstrate that the pole attachment rates charged under the joint use agreements are unjust and unreasonable. First, First Energy argued that Verizon's case is

fundamentally flawed and should be dismissed because Verizon fails to recognize, cite or address the Public Utility Code, Pennsylvania law or controlling Commission precedent. Second, First Energy argued that Verizon failed to demonstrate that it is entitled to the new telecom rate under FCC precedent.

With regard to First Energy's argument that Verizon's complaint should be dismissed because Verizon fails to recognize, cite or address Commission precedent, First Energy first argued that "there can be no doubt that the transfer of the complaint from the FCC to the Commission subjected the complaint to resolution under the Pennsylvania Public Utility Code. Yet Verizon fails to address or even cite any provision of the Code in support of its complaint." First Energy R.B. at 18. First Energy argued that the Commission intended to maintain the discretion to depart from FCC precedent as explained in the Pole Attachment Order and that Verizon's complaint seeks relief that has never been granted by the FCC, is violative of past Commission precedent and is completely contrary to Pennsylvania electric ratepayers' interests. Id. at 19-20. First Energy then responds to several statements that Verizon makes in its main brief that it claims are a "sleight-of-hand" distraction. Id. at 20-21. First Energy argued that Verizon cannot read Section 77.4 of the Commission's regulations in isolation from the rest of the Public Utility Code and Chapter 77. Id. at 21. First Energy criticizes Verizon's main brief because it does not contain a single citation or reference to the Public Utility Code which it calls "an egregious and fundamental flaw that, standing alone, justifies dismissal of the complaint." Id. at 22.

First Energy also argued with regard to Verizon's failure to recognize, cite or address Pennsylvania law that, in doing so, and despite the language of Section 332(a), Verizon does not at any point acknowledge that it maintains the burden of proof in this proceedings but "brazenly and repeatedly asserts First Energy bears the burden of proof." Id. at 23. First Energy also addressed what it considered to be "the dearth of citations to Pennsylvania law and Commission precedent" in Verizon's brief by providing a summary of some Commission cases it believes are relevant to this case. Id. at 24-28. First Energy further argued that Verizon failed to demonstrate in its main brief that the rates it pays under the joint use agreement exceed First Energy's cost of service and produce revenues in excess of fair return on the fair value of First

Energy's property use to provide regulated service. Id. at 28-29. First Energy also noted that Verizon failed in its main brief to rebut First Energy's calculations of fully allocated cost-based rates that reflect the full cost of service or that the rates Verizon pays under the joint use agreements do not unreasonably benefit First Energy's investors at the expense of First Energy's ratepayers or would provide a subsidy. Id. at 29-30. Lastly, First Energy criticized Verizon's lack of reference or analysis of Pennsylvania law is "an affront to the Commission and the sovereignty of the Commonwealth" or a violation of First Energy's due process rights since it deprives First Energy of the ability to respond to such arguments in the Reply Brief. Id. at 30-32.

With regard to First Energy's argument that Verizon's complaint should be dismissed because Verizon has failed to demonstrate that it is entitled to the new telecom rate under FCC precedent, First Energy argued that, even if Verizon did demonstrate that the presumption applied, which First Energy believes does not, First Energy has rebutted the presumption. Id. at 32. First Energy argued that the new telecom rate is substantially below fully allocated cost-based rates and inconsistent with Pennsylvania law and long-standing ratemaking principles. Id. at 33.

More specifically, First Energy refuted Verizon's argument that it is entitled to the new telecom rate by arguing that Verizon is comparing "apples to oranges" as the rates Verizon pays under the joint use agreements provides several important advantages such as better locations on First Energy's poles. Id. at 34-35. First Energy also argued that its rates are not too high; rather, the new telecom rates proposed by Verizon are too low and not compensatory for the service provided. Id. at 35. First Energy also refuted Verizon's argument that it lacked the ability to terminate the joint use agreements by arguing that the FCC never made a finding that the "evergreen clause" did force Verizon to pay unjust and unreasonable rates, only that it could, that First Energy has made several good faith efforts to significantly reduce Verizon's rental payments and, again, that First Energy does not have bargaining power. Id. at 37-38. First Energy also argued that Verizon's interpretation of the joint agreements as "new," "newly negotiated" or "newly-renewed" agreements would read the specific terms out of

the joint use agreements and constitute an unlawful post hoc revision of contractual terms and an absurd result. Id. at 38-39.

First Energy also refuted Verizon's arguments that it demonstrated that it is entitled to the new telecom rate by arguing that Verizon does not and cannot explain how First Energy could have had any bargaining power due to owning more poles in negotiating the joint use agreements in 2009, or during earlier periods, when those rates and agreements were subject to regulation by the Commission, that Verizon's argument that it would have to find and obtain approval to locate more poles than First Energy "is analogous to two corpses arguing which is more dead" and that Verizon's argument that if it is reasonable for First Energy to pay rates that reflect the fully allocated costs of service under the joint use agreements, it is reasonable for Verizon to also pay rates that reflect the fully allocated costs of service. Id. at 40-42.

First Energy also refutes Verizon's arguments that it did not try to rebut the new telecom rate presumption as being intentionally deceptive and that "Verizon's false and deceptive statements in its Main Brief should signal to the Commission that it cannot trust any of Verizon's claims and arguments on this issue." Id. at 43. First Energy then provided responses to several arguments Verizon made it believes require correction or clarification. Id. at 45-48. Lastly, First Energy refuted Verizon's exclusive reliance on FCC precedent by arguing that the FCC has only issued three decisions regarding the rates an ILEC pays an electric utility under a joint use agreement and those cases are distinguishable from this case. Id. at 48.

2. Disposition

Record evidence in this proceeding demonstrates that the pole attachment rates First Energy charges Verizon under the joint use agreements are unjust and unreasonable and are therefore in violation of the Public Utility Code and the Commission's orders and regulations. Therefore, Verizon's complaint will be sustained in part.

I agree with Verizon that the "new telecom rate" is the just and reasonable rate because the new telecom rate presumption in the Commission's regulations, adopting the FCC's

regulations, applies and First Energy did not rebut the presumption. *See*, Verizon M.B. at 23-27, *citing*, 52 Pa.Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)). As discussed above, through the addition of Chapter 77 to the Commission's regulations, the Commission has adopted "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 CFR Chapter I, Subchapter A, Part 1, Subpart J (relating to pole attachment complaint procedures), inclusive of future changes as those regulations may be amended." 52 Pa.Code § 77.4(a).

Most significantly, as Verizon noted, this includes Section 1.1413 of the FCC's regulations, which pertains to complaints filed by ILECs such as Verizon. This provision provides 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, 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" and that "[i]n 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)." 47 C.F.R. § 1.1413(b) (emphasis added). This Section then provides that "[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." Id. (emphasis added).

As a result, the two questions to be addressed when disposing of Verizon's complaint are: 1) whether the joint use agreements between Verizon and First Energy were "entered into or renewed" after the effective date of Section 1.1413(b), which was March 11, 2019, and, if so, 2) whether the joint use agreements provide Verizon material advantages over other similarly providers. If the joint use agreements were not renewed or entered into after the

effective date of Section 1.1413(b), then there is nothing for First Energy to rebut and the new telecom rate does not apply. If the joint use agreements were renewed or entered into after March 11, 2019, and Verizon receives material advantages by the joint use agreements compared to similarly situated carriers, then First Energy has rebutted the presumption granted to Verizon and the new telecom rate does not apply. If the joint use agreements were renewed or entered into after March 11, 2019 and Verizon does not receive materially advantages, then First Energy has not rebutted the presumption granted to Verizon and the new telecom rate applies.

Because I find 1) that the joint use agreements were renewed after the effective date of Section 1.1413(b), and 2) because the joint use agreement do not materially advantage Verizon, the new telecom rate applies.

With regard to whether the joint use agreements were entered into or renewed after the effective date of Section 1.1413(b), which was March 11, 2019, as Verizon noted, the initial term of each joint use agreement has expired and the agreements automatically extended and will continue to do so until terminated. Verizon added that "each joint use agreement states that, after an initial term, the agreement '***shall*** continue in force thereafter until terminated by either party at any time' upon advance written notice." Verizon M.B. at 24, *citing*, Verizon St. 1.0 Exh. SCM-2. Verizon admitted into the record of this proceeding the joint use agreements and noted the specific provisions that support its position that the agreement continues in effect until terminated by either party. Id. I agree with Verizon that because the initial term of each joint use agreement has expired, the agreements govern the parties' joint use relationship today because they automatically extended and continue to do so until terminated.

First Energy's argument to the contrary is without merit and will be rejected. First Energy's argument that some action by the parties or a triggering event is required before the agreement can become automatically renewed or extended because the FCC's 2018 Pole Attachment Order does not state that the agreements "automatically renew" or extend but instead that the agreements "***are*** automatically renew***ed***" or "extend***ed***" is overly technical and formalistic. To require a party to take an affirmative action to renew each agreement each time they expired would negate the benefit of the automatic renewal. I do not believe that the FCC

intended to require a party to take an affirmative step to renew an existing contract in order for that party to receive the benefit of the new telecom rate for "contracts entered into or renewed after the effective date" of Section 1.1413(b). This requirement would negate the benefit of the regulation as there are probably hundreds, if not thousands, of agreements across the country between pole owners and pole attachers that renew automatically. Those agreements would lose the benefit of the pole attachment regulations if ILECs had to renegotiate the agreements in order to obtain the benefit of the new telecom rate. It is more reasonable that the automatic renewal provision identified by Verizon complies with the "entered into or renewed" requirement of Section 1.1413.

To require the parties to enter into or renew such contracts in order for Verizon to obtain the presumption would negate the presumption. The presumption would be of little benefit if Verizon had to negotiate for it anyway when entering into or renewing the agreements. The same would be true for all ILECs to which Section 1.1413 applies. I do not believe that the FCC and this Commission, by virtue of adopting the FCC's regulations, wished to require such efforts by the parties. In contrast, I believe that the regulation was designed to eliminate outdated rate disparities in the existing agreements in an effort to promote broadband deployment and the deployment of other advanced technologies and therefore the automatic renewal in the joint use agreements at issue in this proceeding is sufficient to warrant the presumption. I do not find that this result is absurd, as First Energy argued, but rather to the extent that an agreement continues until terminated after an initial term, as is the case here, the agreement is automatically renewed and eligible for the new telecom rate presumption.

Therefore, I find that the joint use agreements at issue in this proceeding were "entered into or renewed after the effective date" of Section 1.1413.

Having found that the joint use agreements at issue this proceeding are eligible for the new telecom rate presumption, it is next necessary to determine whether First Energy has rebutted that presumption by demonstrating that Verizon receives "material advantages" under those agreements that benefit Verizon compared to other telecommunications carriers or cable television systems providing telecommunications service on the same poles.

As a preliminary matter, I note that the parties frequently use the phrase in their main briefs "***net*** material advantage." Section 1.1413, however, does not use the term "net." Using the term "net" would require a balancing of material advantages against material disadvantages. If the material advantages were greater than the material disadvantages, then a "net" material advantage is provided. Without using the term "net," the presumption afforded in Section 1.1413 would be rebutted if just one material advantage existed, regardless of how many material disadvantages existed. When strictly reading Section 1.1413 alone, I do not believe that the FCC regulation, and the Commission's adoption of the FCC regulation, envisioned allowing one material advantage to outweigh a potential multitude of material disadvantages. Therefore, I will examine this case as if the term "net" were included in Section 1.1413 and evaluate whether the joint use agreement entered into between Verizon and First Energy provides Verizon more material advantages than material disadvantages.

Record evidence demonstrates that First Energy has failed to prove by a preponderance of the evidence that it has rebutted the presumption that Verizon has demonstrated it is entitled to by showing that the joint use agreements provide Verizon material advantages under Section 1.1413.

Both parties have presented evidence that demonstrates various advantages and disadvantages that Verizon realizes as a result of the joint use agreements. Overall, the advantages First Energy claims materially benefit Verizon are outweighed by the disadvantages. For example, First Energy's argument that Verizon is materially advantaged because Verizon can overlash its existing facilities or light existing dark fiber capacity to reach new customers will be rejected. Any benefit that Verizon receives as a result of overlashing is as a result of Verizon placing its original facilities on the poles in the first place. This effort should not harm Verizon in its efforts to obtain the new telecom rate but Verizon should be commended for taking advantage of its existing facilities to serve new customers by overlashing. In addition, First Energy's arguments that Verizon materially benefits because it avoids up-front work costs and can simply "notify and attach" to First Energy poles is also insufficient to rebut Verizon's presumption. This benefit alone, or in conjunction with other benefits, is not sufficient to warrant finding that First Energy has rebutted Verizon's presumption.

Similarly, the field audit costs that First Energy argued Verizon does not have to pay that its competitors pay is also not sufficient to warrant rebutting Verizon's presumption that it is entitled to the new telecom rate. First Energy's argument that the cost of *****BEGIN PROPRIETARY *** ***END PROPRIETARY***** per pole per year also does not individually or collectively warrant denying Verizon the new telecom rate presumption under Section 1.1413. Finally, First Energy's argument that First Energy's comprehensive vegetation management program is also a material advantage to Verizon will also be rejected. Managing vegetation around poles and wires benefits all attachers to the poles and therefore cannot be considered as a material advantage to one particular attacher.

Likewise, First Energy's arguments that Verizon is advantaged because First Energy pays a large proportion of Verizon's costs to own and maintain its pole infrastructure and Verizon is unfettered by significant make-ready expenses that its competitors pay are insufficient to support First Energy's burden of demonstrating that Verizon receives material advantages by the joint use agreements enough to rebut the presumption that Verizon is entitled to the new telecom rate.

This is particularly true when considering the disadvantages that Verizon has demonstrated it faces as a result of the joint use agreements. For example, Verizon has 110,000 joint use poles of its own that it shares with First Energy that Verizon's competitors do not have to maintain and for which Verizon provides First Energy access under the same terms and conditions. Verizon's lack of statutory right to nondiscriminatory pole access also presents a disadvantage to Verizon over its competitors who do have statutory right of nondiscriminatory pole access. These issues factor in to the "net" material advantages determination and further support finding that First Energy has not presented substantial evidence sufficient to warrant finding that First Energy has rebutted Verizon's presumption and that Verizon, therefore, is not entitled to the new telecom rate for its attachments to First Energy's poles.

As First Energy noted in its main brief: "[t]he preponderance of the evidence standard requires proof by a greater weight of the evidence. Only if the proponent of the rule or order presents evidence found to be of greater weight than the other parties, will it have carried

its burden of proof." First Energy M.B. at 17, *citing*, Se-Ling Hosiery, *supra*. In this situation, it cannot be said that the evidence presented by First Energy is of greater weight than the evidence presented by Verizon on the issue of whether Verizon receives material advantages from the joint use agreements. Therefore, First Energy cannot be found to have satisfied its burden of proof to rebut the presumption under Section 1.1413(b) as adopted by the Commission and applied to Verizon that Verizon receives material advantages by the joint use agreements and therefore not entitled to the presumption of the new telecom rate.

As such, First Energy has failed to demonstrate by a preponderance of the evidence that Verizon receives material advantages by the joint use agreements sufficient to rebut Verizon's demonstration that it is entitled to the new telecom rate when attaching to First Energy's poles. I disagree with First Energy's argument that "in essence, Verizon seeks the benefits of a first-class airline seat – e.g., early boarding (speed to market), free drink services (no up-front work costs), free entertainment (no attachment application fees) and priority seating (better location and reserved space) – for coach prices."

First Energy's other arguments that Verizon is not entitled to the new telecom rate are without merit and will be rejected. This is particularly true when strictly reading Section 1.1413 adopted by the Commission and noting that the Commission has indicated that the FCC orders or court decisions interpreting those orders are persuasive and not mandatory authority. *See*, Final Rulemaking Order at 50.

First Energy's primary argument in this case has been that other provisions of the Public Utility Code, such as Sections 1301, 1304 and 1309, govern the disposition of Verizon's complaint, and that Verizon failed to aver any violation of Pennsylvania law because it never amended the complaint filed at the FCC when it was transferred to the Commission. As discussed above, these facts are not dispositive to Verizon's complaint because, as Verizon argued, the FCC's regulations ***are*** Pennsylvania law. In making such arguments, First Energy seeks to relitigate the Commission's Final Rulemaking Order that adopted this regulatory structure. This case is not the time or place for such relitigation.

First Energy's argument that the Public Utility Code and Pennsylvania law control this dispute does not negate Verizon's argument that it is entitled to the new telecom rate. Section 1.1413 of the FCC's regulations is now Pennsylvania law because the Commission adopted it as such through its Final Rulemaking Order. First Energy's arguments regarding Sections 508, 1301, 1304 and 1309 of the Public Utility Code, among other things, do not recognize that, now that the Commission has adopted Section 1.1413 as its own, to the extent that a pole attachment rate satisfies Section 1.1413 it also is, for example, the just and reasonable rate as is required by Section 1301 of the Public Utility Code. Section 1301 provides that "every rate made, demanded or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the Commission." 66 Pa.C.S. § 1301. By adopting Section 1.1413 of the FCC's regulations, the Commission has determined that pole attachment rates that satisfy Section 1.1413 are just and reasonable under Section 1301. Similarly, Section 1304 of the Public Utility Code provides that no public utility can make any rate that provides any unreasonable prejudice or disadvantage or that provides any unreasonable difference as to rates between classes of service. 66 Pa.C.S. § 1304. As with Section 1301, by adopting Section 1.1413 of the FCC's regulations, the Commission has determined that pole attachment rates that satisfy Section 1.1413 are non-discriminatory under Section 1304, as well.

Likewise, the fact that Verizon's complaint does not allege any violation of the Public Utility Code or a Commission order or regulation, as First Energy argues, is without merit. This is particularly true given that Verizon's argument that First Energy's rates violate Section 1.1413 of the FCC's regulations is an allegation that First Energy is violating a Commission regulation since the Commission adopted the FCC's regulations, including Section 1.1413. Similarly, the fact Verizon did not amend the complaint it filed at the FCC when it was transferred to the Commission after the Commission reverse pre-empted the FCC's pole attachment jurisdiction also is without merit because Verizon is not required to amend its complaint in order to aver a violation of the Public Utility Code or a Commission order or regulation. By averring in the original complaint filed to the FCC that First Energy's pole attachment rates violate Section 1.1413 of the FCC's regulations, Verizon did aver a violation of the Commission regulation.

Also without merit is the argument that Verizon presented no evidence regarding the cost of common equity or cost of service calculations consistent with long-standing Pennsylvania precedent or that First Energy demonstrated that the rates Verizon pays under the joint use agreements are below fully allocated cost-based rates. These issues are predominant in the traditional rate base/rate of return regulation that First Energy operates under for its transmission and distribution services in Pennsylvania. Certainly, those factors are important when considering First Energy's ability to provide safe and adequate utility service at just and reasonable rates. The concepts of cost of common equity, cost of service and fully allocated cost-based rates, however, are secondary to the FCC's pole attachment regulations adopted by this Commission.

Similarly, seminal cases such as Bluefield Waterworks and Imp. Co. v. Pub. Serv. Comm'n of West Virginia, 262 U.S. 679, 692 (1923), Pa. Pub. Util. Comm'n v. Peoples Natural Gas Co., Docket No. R-880961 (Order entered Jan. 27, 1989) and Lloyd v. Pa. Pub. Util. Comm'n, 904 A.2d 2020 (Pa Cmwlth. 2006), *app. den.*, 916 A.2d 1104 (Pa. 2007), in the rate base/rate of return form of regulation, that First Energy relies on, must be viewed in light of the alternative form of regulation which Verizon operates under and through the FCC's pole attachment regulations adopted by the Commission in its Final Rulemaking Order. This is not to say that First Energy should suffer a lower return on its investment or not receive its guaranteed rate of return as a result of using the new telecom rate methodology to determine the rates First Energy can charge Verizon to attach to its poles. Instead, any loss of revenue First Energy experiences as a result of charging Verizon the new telecom rate must be recouped elsewhere. Such issues can be addressed in First Energy's next base rate proceeding where these additional concepts and case precedent can be fully vetted.

Likewise, I find First Energy's reliance on past Commission decisions regarding pole attachment rates should be afforded little weight in disposing of Verizon's complaint because those decisions were issued during a different regulatory regime governing pole attachment rates, i.e., prior to the Commission's adoption of the FCC's regulations. Once the Commission adopted the FCC's regulations through the Final Rulemaking Order, which became effective on March 18, 2020, the Commission's past decisions regarding pole attachment rates

must also be viewed in light of the new regulatory regime when making the Commission's future decisions regarding pole attachment rates, such as this one. This is not to say that those decisions should be disregarded in their entirety, but when the regulatory regime has changed, as it has done here, the new regulatory regime predominates, and past decisions are viewed differently.

The parties have raised additional issues beyond whether the joint use agreements were renewed or effective after March 11, 2019, and whether the joint use agreements provide Verizon with material advantages. Most of those arguments are not relevant to these key issues in this case when taking a strict view of Section 1.1413, considering FCC orders as persuasive and not mandatory, and simplifying the issues in this case.

For example, Verizon argued that First Energy has superior bargaining power because of its three-to-one pole ownership advantage. First Energy does not possess or leverage bargaining power during rate negotiations because, among other things, owning more poles than Verizon does not give First Energy bargaining power and Verizon has less costly alternatives. This is particularly true when looking at any bargaining power a party might have had at the time the current rates were negotiated. Since both Verizon and First Energy own poles and provide access to the other through separate pole attachment agreements, it cannot be said that one has bargaining power or leverage over the other based on the number of poles each owns. Given the large number of poles owned by both Verizon and First Energy throughout the Commonwealth, any loss of access by one party to the other party's poles would be detrimental and difficult to replace. The purpose of the pole attachment agreement is to ensure Verizon and First Energy work together to provide safe and adequate utility services and just and reasonable rates to as many Pennsylvanians as possible while deploying broadband services. Either party losing the opportunity to do this would be unfortunate. Considering bargaining power of one party over the other unnecessarily complicates the issues in this case and takes the focus away from whether the requirements in Section 1.1413, as adopted by the Commission, have been satisfied.

In conclusion, Verizon has demonstrated that it is entitled to the new telecom rate under the FCC's regulations that the Commission has adopted because the joint use agreements

were renewed after March 11, 2019 and because First Energy failed to rebut this presumption by showing that the joint use agreements provide Verizon material advantages. This determination is consistent with the Commission's goal in its Final Rulemaking Order that reverse pre-empting the FCC's pole attachment authority will help to promote the deployment of broadband services in Pennsylvania. As discussed above, the Commission has noted that reverse pre-empting the FCC's jurisdiction over pole attachments "is a natural outgrowth of the goals of Chapter 30 of the Public Utility Code, which is intended to promote and encourage the provision of advanced telecommunications services and broadband deployment in the Commonwealth" and that "its assertion of jurisdiction over pole attachments will assist in spurring investment in, and access to, physical infrastructure used to deliver essential broadband access service to end-user customers." The use of the new telecom rate will help to achieve these goals and, with lower pole attachment rates ordered through this decision, help Verizon increase its deployment of broadband services throughout Pennsylvania.

As such, record evidence in this proceeding demonstrates that the pole attachment rates First Energy charges Verizon under the joint use agreements are unjust and unreasonable and are therefore in violation of the Public Utility Code and the Commission's orders and regulations because they were not set using the new telecom rate in Section 1.1406(d)(2) of the FCC's regulations. Verizon has shown that it is entitled to the presumption afforded to ILECs under Section 1.1413 and First Energy has not rebutted that presumption. Through the adoption of the FCC's regulations as its own, the Commission is giving Verizon the benefits of a first-class airline seat at coach prices.

D. The Pole Attachment Rate Methodology

1. Position of the Parties

a. Verizon's Main Brief

In its main brief, Verizon argued that the pole attachment rates First Energy charges Verizon should be set using the new telecom rate methodology. Verizon argued that

"because First Energy failed to justify its rental rates, the just and reasonable rate is a properly calculated new telecom rate under the presumption adopted in 2018 ***and*** the principle of competitive neutrality adopted in 2011." Verizon M.B. at 51. Verizon then provided that the properly calculated new telecom rates under the Commission's regulations are:

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

Id., *citing*, Verizon St. 2.0 at 4.

Verizon argued that the new telecom rates presented by First Energy were not calculated correctly for three reasons. First, First Energy used cost of capital from 2007, 1988 and possibly earlier instead of its recent rate cases in 2014 and 2016 and that First Energy's reliance on its outdated rates of return artificially increases the rates First Energy calculates and would allow it to continue to recover. Id. at 52-53; *citing*, Verizon St. 2.1 at 17. Second, First Energy departed from the presumptive 15% input for the appurtenance factor that must be used to ensure pole attachment rates are calculated based on an electric utility's investment in poles and not in cross arms and other non-pole related items. Id. at 53. Third, First Energy's witness calculated rates using data its contractor, among other things, quickly gathered during an unreliable and litigation-motivated review of a small set of poles, that data does not rebut the presumptive inputs and is not reliable for rates going forward. Id. at 53-54. Verizon stated that properly calculated new telecom rates must use the Commission's presumptive inputs because there is no "probative direct evidence" about the poles at issue in this case. Id. at 54.

b. First Energy's Main Brief

In its main brief, First Energy argued that the pole attachment rates that First Energy charges Verizon should be the existing rates under the joint use agreements. First Energy argued that Verizon has failed to carry its burden of proof to demonstrate that the existing rates

under the joint use agreement are unjust and unreasonable and that it is entitled to the new telecom rate. First Energy M.B. at 83. First Energy argued that, conversely it has demonstrated that the existing rates Verizon pays under the joint use agreements are, in aggregate, below fully cost-based rates and the Commission is, therefore, without authority to prescribe new rates under Section 508 of the Public Utility Code or determine new just and reasonable rates under Section 1309. Id., *citing*, 66 Pa. Code §§ 508 and 1309.

First Energy argues, however, that, to the extent that the Commission determines these rates are unjust and unreasonable, or sets new rates on policy grounds, the Commission should not, and cannot, simply insert the incremental-cost-based new telecom rate into the existing joint use agreements, but should adopt the "old telecom rates" as calculated by First Energy, which it describes as a "middle ground" between the existing rates and the new telecom rates. Id. at 83-84. First Energy then explained that the old telecom rate is essentially a fully allocated cost rate method similar to that used by the Commission except that for unusable pole space, sometimes referred to as "common space," the Commission allocates the cost of unusual space proportionally to all attached in accordance with well accepted cost causation principles. Id. at 84, *citing*, First Energy St. 2-RJ at 4. First Energy added that, if the Commission adopts the old telecom rate for the existing joint use agreements, it should use First Energy's calculated inputs for purposes of establishing a new rate, rather than the FCC's presumed inputs, in part because the actual conditions in First Energy's service territories significantly differs from the FCC's presumed inputs. Id. at 85-86.

First Energy then provides the following rates it calculated using both the FCC's old telecom rate formula and the same formula without the arbitrary direct assignment of one third of the common space as follows:

Table 1

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

Table 2

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

Table 3

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

Id. at 87-88. First Energy argued that these rates are more reasonable than the new telecom rates because they use actual data and more closely approximate fully allocated costs. Id. at 88.

Next, First Energy argued that Verizon's rate calculations should be rejected because they contain several important errors that drastically decrease the rates calculated under the FCC's rate formulas. These errors pertain to Verizon's allocation of accumulated deferred taxes, Verizon used an incorrect pole count, Verizon used an incorrect rate of return and Verizon used FCC presumptions for average pole height, among other things. Id. at 89, *citing*, First Energy St. 1 at 20. First Energy argued that these errors are compounded by the fact that Verizon did not conduct its own field study to calculate inputs into the FCC's formula rates. Id.

Lastly, First Energy argued that the effective date of any change in rates under the joint use agreements should be the effective date of new rates established in First Energy's next base rate case, or in the alternative, First Energy should be permitted to defer and record as a regulatory asset the difference between the existing and new rates and recover the difference in its next base rate case. Id. at 90. First Energy argued that this is because any reduction in the joint use rates paid by Verizon will ultimately decrease the revenues collected by First Energy associated with the joint use network. Id.

c. Verizon's Reply Brief

In its reply brief, Verizon continued to maintain that the Commission's regulations require a properly calculated new telecom rate because First Energy did not rebut the new telecom rate presumption. Verizon R.B. at 43. Verizon then refuted First Energy's argument that the Commission should require Verizon to pay the old telecom rate as a middle ground between the existing rates and the new telecom rates by noting that the Commission does not have that option under its regulations and that such cost-based rates would deter infrastructure investment in Pennsylvania. Id. at 43-44. Verizon next argued that First Energy did not provide "probative direct evidence" but only a summary of "error-riddled results of its hurried and litigation motivated post-hoc review of *****BEGIN PROPRIETARY *****

*****END PROPRIETARY***** of the poles shared by the parties in Pennsylvania." Id. at 44. Verizon added that the presumptive inputs must be used. Id. at 45.

d. First Energy's Reply Brief

In its reply brief, First Energy argued that Verizon has failed to demonstrate that the new telecom rate should be inserted into the existing joint use agreements. First Energy argued that Verizon is wrong because it "boldly and improperly attempts to shift the burden of proof regarding the rate methodology used in the joint use agreements to First Energy," arguing again that it is axiomatic that Verizon, as the complainant, has the burden of proof. First Energy R.B. at 50-51. In addition, First Energy argued that "the problem with Verizon's request is it not only seeks to maintain pole ownership rights and the joint use agreements' existing terms and conditions but also inserts an incremental cost based rate into agreements that are fundamentally not designed around the sharing of incremental costs," seeking to avoid the cost-of-service based cost-sharing mechanisms that reflect the costs incurred by each pole-owner to own a pole under the joint use agreements. Id. at 51-52. First Energy then addresses differences identified by Verizon as supporting its new telecom rate as being properly calculated, noting that such differences hinder, rather than help, Verizon's rate calculations. Id. at 52-53. First Energy reiterates that Verizon's calculations are not credible and do not justify the insertion of the new telecom rate into existing joint use agreements. Id. at 54.

In addition, First Energy also argued that Verizon has failed to demonstrate that the new telecom rate should be inserted into the existing joint use agreements by reiterating that, if the Commission decides to revise the rates Verizon pays under the joint use agreements, the old telecom rate should apply. Id. at 55-56. In doing so, First Energy argued that Verizon's calculations of the old telecom rate, like its calculation of the new telecom rates, rely upon the FCC's presumptive inputs and a fundamentally flawed cost of capital. Id. at 56. Lastly, First Energy also reiterated that the effective date of any change in rates under the joint use agreements should be the effective date of new rates established in First Energy's next base rate case, or alternatively First Energy must be permitted to defer and record as a regulatory asset the difference between the existing and new rates and recover the difference in its next base rate case. Id. at 57.

2. Disposition

In this case, Verizon has argued that the new telecom rate should be used to establish the rates that First Energy charges Verizon to attach to its poles, while First Energy has argued that the existing rates in the joint use agreements should be used or, in the alternative, what is referred to as the "old telecom rate." As discussed extensively above, substantial record evidence in this proceeding demonstrates that the pole attachment rates that First Energy charges Verizon are unjust and unreasonable under the joint use agreements because they are not determined using the new telecom rate, pursuant to Sections 1.1413(b) and 1.1406(d)(2) of the FCC's regulations as adopted by the Commission in Section 77.4 of the Commission's regulations. Verizon is entitled to have the rates charged by First Energy to attach to its poles determined by the new telecom rate based on a plain reading of the regulations. Therefore, Verizon's complaint will be sustained in part on this issue.

For the reasons discussed above, going forward, the rates that First Energy charges Verizon to attach to its poles should be determined based on the new telecom rates. Doing so would be consistent with Section 1.1407(a)(2) of the FCC's regulations adopted by the Commission through the Final Rulemaking Order. Section 1.1407(a)(2) provides that:

§ 1.1407 Remedies.

(a) If the Commission determines that the rate, term or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term or condition and may:

***

(2) Substitute in the pole attachment agreement the just and reasonable rate, term or condition established by the Commission.

See, 52 Pa.Code § 77.4(a)(incorporating 47 C.F.R. § 1.1407(a)(2)). The new telecom rate should therefore be substituted into the joint use agreements and govern Verizon's attachment to First Energy's poles going forward. The parties' arguments to the contrary should be rejected.

With regard to the parties' arguments that there are errors in the specific rate calculations that should be rejected, I agree with Verizon that, to the extent required in the new telecom rate formula, factors such as the cost of capital should be current. As discussed further below, the new telecom rate was effective March 11, 2019. Therefore, the cost of capital used in determining the new telecom rate should be the cost of capital as of March 11, 2019. I further agree with Verizon that the data used to calculate the rates should not be data quickly gathered during a review of a small set of poles in response to litigation. As part of this decision, I am recommending a compliance phase during which time a larger investigation should be conducted to properly determine all inputs when establishing the rates under the new telecom formula. At the same time, the errors that First Energy argued are present in Verizon's rate calculations which it claims "drastically decrease the rates calculated under the FCC's rate formulas," can also be addressed.

First Energy's argument that the "old telecom rate" should be used instead of the new telecom rate, if the Commission decides that the existing rates under the joint use agreement are not just and reasonable, will also be rejected. The "old telecom rate" is established using the following formula:

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

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

See, First Energy M.B. at 84, *citing*, First Energy Exh. WZ-1. As First Energy explained, the old telecom rate is a fully allocated cost rate method similar to that used by the Commission except that for unusable pole space, the Commission allocates the cost of unusable space proportionately to all attachers. Id., *citing*, First Energy St. 2-RJ at 4.

The old telecom rate, however, should not be used to determine the rates First Energy charges Verizon to attach to its poles because record evidence in this proceeding demonstrates that the new telecom rate should be used. As a result, any rate other than the new telecom rate, including the old telecom rate, will not be just and reasonable. This is true in particular because, as noted above, the Commission conducted an extensive rulemaking proceeding wherein it concluded when adding Chapter 77 to its regulations that it adopted the FCC's pole attachment regulations. To now adopt a different outcome than the one followed above that identifies the new telecom rate as the just and reasonable rate would undo the rulemaking proceeding. First Energy participated in the Commission's rulemaking proceeding and had an opportunity to advocate for its positions at that time. The Commission has subsequently determined to adopt the FCC's regulations which, in this case, determines the new telecom rate to be just and reasonable. To use the old telecom rate because First Energy believes that it "constitutes a middle ground between the existing rate and the new telecom rate," as First Energy argued, is not reasonable when it is the new telecom rate that is the just and reasonable rate. Therefore, First Energy's arguments in support of the old telecom rate will be denied.

First Energy's argument again that Verizon attempts to shift the burden of proof with regard to specific rates will again be rejected for the reasons discussed above. Verizon has satisfied its initial burden of proof as an ILEC filing a complaint regarding pole attachment rates

and conditions because the joint use agreements were renewed or entered into after the effective date of Section 1.1413(b), and First Energy has failed to rebut that presumption by demonstrating that Verizon receives material advantages under the joint use agreement when compared to similarly situated carriers. First Energy's arguments to the contrary in its reply brief will be rejected. Likewise, First Energy's arguments that Verizon has failed to demonstrate that it is entitled to the old telecom rate, or that the old telecom rate should apply, will also be rejected because, as addressed above, Verizon is entitled to the new telecom rate.

With regard to First Energy's argument that the effective date of any change in rates under joint use agreements should be the effective date of new rates established under First Energy's next base rate case, this argument will be rejected. As discussed above, First Energy should have been charging Verizon the new telecom rate as of March 11, 2019. Therefore, the effective date of the new rates will be March 11, 2019 and Verizon will be entitled to refunds beginning with that date, as discussed below. To the extent that First Energy wishes to defer and record as a regulatory asset the difference between the existing rates and the new rates and recover the difference in its next base rate case, First Energy is free to make such an argument during its next base rate proceeding.

As a result, now that a determination has been made that the new telecom rate formula should be applied to the rates that First Energy charges Verizon to attach to its poles, it is recommended as part of this decision that the parties be given a 60-day compliance period following the entry of a final Commission order in which they are to meet and resolve any differences in calculating the specific rates, based on the determinations made in this recommendation. To the extent that the parties are unable to agree on the calculation of the specific rates as part of the compliance phase of this proceeding, any disagreements can be referred to the Commission's mediation unit for mediation review or, in the alternative, an expedited evidentiary hearing may be held.

Record evidence in this proceeding demonstrates that the new telecom rate methodology set forth in Section 1.1406(d)(2) of the FCC's regulations, and adopted by the Commission in Section 77.4 of the Commission's regulations, is the just and reasonable rate that

should be used when determining the rate Verizon pays First Energy to attach to its poles. The parties will be given 60 days following the entry of a final Commission order in this case to resolve any differences that arise in establishing the specific rates created through the use of the new telecom methodology based on the discussion above.

E. Refunds

1. Position of the Parties

a. Verizon's Main Brief

In its main brief, Verizon argued that it should be refunded *****BEGIN PROPRIETARY *** ***END PROPRIETARY***** in net rent that First Energy collected to date from Verizon in violation of law, plus interest consistent with the applicable statute of limitations. Verizon M.B. at 54-55, *citing*, Verizon St. 2.0 at Exh. MCS-1. Verizon argued that it is entitled to pole attachment rates, terms and conditions that are just and reasonable effective July 12, 2011. Id. at 54. Verizon recognized the four-year statute of limitations in Pennsylvania for contract actions, but argued that the FCC has required electric utilities to refund overpayments unlawfully collected during the pendency of a proceeding and that the 2011 Pole Attachment Order found a lengthier refund period was needed to meet its objectives. Id. at 55. Specifically, Verizon argued that it is entitled to refunds dating back to July 12, 2011, the effective date of the Pole Attachment Order. Id. at 56.

Verizon argued that awarding the full relief afforded by the Commission's regulations is necessary and appropriate in this case because First Energy was placed on notice as far back as 2012 that Verizon would be disputing the rates and seeking a refund and because the amount overpaid has been "unlawfully diverted … from the communications market in Pennsylvania." Id. at 57.

b. First Energy's Main Brief

In its main brief, First Energy argued Verizon is not entitled to any refund associated with the rates it pays under the joint use agreements. First Energy argued that Verizon seeks to revise a contract rate, not a tariff rate, and that under Section 508 of the Public Utility Code, any revision to a contract can only be prospective. First Energy M.B. at 91-93. First Energy added that there is no allegation that First Energy has breached any term of the joint use agreement, including the applicable rates, and that any relief granted in this proceeding would be an amendment/reformation of the joint use agreements. Id. at 92. First Energy argued that granting refunds based on a contract revision would be an impermissible and unconstitutional impairment of contract in violation of the contract clause of the United States Constitution. Id. at 93.

In addition, First Energy argued that Verizon has failed to demonstrate that the rates it pays under the joint use agreements are unjust and unreasonable and therefore lack the predicate under Section 1312 of the Public Utility Code. Id. at 93-94. First Energy also argued that any award of refunds in this case would alter the Commission's long-standing ratemaking principles as applied to joint use agreements that prohibit retroactive application of agency decisions and would be an unlawful exercise of quasi-legislative functioning to apply a newly established rate to prior periods. Id. at 94-95.

First Energy next raised additional arguments why Verizon has failed to demonstrate that it is entitled to refunds. First Energy argued that, if the Commission determines that First Energy's existing rates are unjust and unreasonable, then it must determine the amount of such refunds and the applicable period for refunds within the bounds of the Public Utility Code. Id. at 95-96. First Energy noted that granting Verizon's request for refunds would result in a significant increase in First Energy's electric rates as revenues from pole attachment fees are credited dollar for dollar to First Energy's customers. Id. at 96, *citing*, First Energy St. 3-R at 3-4. First Energy added that if Verizon's request were granted, First Energy's customers would experience an annual increase of *****BEGIN PROPRIETARY *** ***END PROPRIETARY***** and a one-time increase of approximately *****BEGIN PROPRIETARY**

*** ***END PROPRIETARY*** reflecting Verizon's refund request. Id. First Energy also added that Verizon has presented no evidence that the refund it requests would in fact enhance the deployment of broadband in Pennsylvania. Id. at 97.

Lastly, First Energy argued that if the Commission orders refunds, it should reject Verizon's refund calculations, noting that if refunds are granted then the amount should be based on the difference between existing and newly established pole attachment rates for an applicable refund period and not the refund presented by Verizon based on its calculation of the new telecom rate that goes back to 2011. Id. First Energy concluded that any refunds should be based on the difference between existing rates and the old telecom rate which would be an annual refund before interest of approximately $1.8 million based on the most-recent billing year. Id. at 98.

c. Verizon Reply Brief

In its reply brief, Verizon reiterated its argument that First Energy has been charging Verizon rates that violate the law since July 2011 and that the unjust and unreasonable rate should be terminated, the just and reasonable rate established by the Commission should be substituted and 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" should be refunded. Verizon R.B. at 45.

Verizon then refuted First Energy's argument that the rates set by the Commission should be prospective-only as the FCC has already rejected retroactivity by arguing that First Energy should have been charging the new telecom rate since July 2011. Id. at 46. Verizon also responded to First Energy's back-up request for an order requiring two years of refunds based on Section 415 of TA-96 by arguing that Section 415 is inapplicable because of the "continuing contract doctrine" that extends the refund period back to July 2011 because the parties' contracts are continuing contracts. Id. (citation omitted).

d. First Energy's Reply Brief

In its reply brief, First Energy argued that, as with the rest of its case, Verizon has failed to cite in its main brief, let alone address, whether and to what extent the Commission may award refunds under Sections 508 and 1312 of the Public Utility Code. First Energy R.B. at 57. First Energy argued that "the general contract principles that Verizon asserts apply and govern the Commission's calculations of refunds, in fact, counsel against the award of refunds" because, in part, Verizon has not alleged that First Energy has breached any term of the joint use agreements, including applicable rates. Id. at 58. First Energy noted that any relief granted would be an amendment/reformation to the joint use agreements which can only be done prospectively or the parties would be denied the benefit of their bargain. Id. First Energy added that doing so would be consistent with Commission precedent. Id. at 58-59 (citations omitted).

First Energy further refuted Verizon's argument that general contract law statute of limitations applies and allows the Commission to reach back to 2011 to calculate refunds by noting that the Public Utility Code clearly establishes a statute of limitations in Section 1312 which Verizon fails to acknowledge. Id. at 59-60. Finally, First Energy responded to Verizon's argument that FCC precedent requires or entitles Verizon to a refund by noting that none of the FCC precedent cited by Verizon mandated the award of refunds or established a refund amount. First Energy argued that neither of the authorities cited by Verizon entitle it to the refunds it seeks. Id. at 60-61. First Energy noted that Section 1.1407(a)(3) that Verizon relies on uses the permissive term "may" that does not require the relief Verizon seeks. Id. at 61, *citing*, 47 U.S.C. § 1.1407(a)(3). Similarly, First Energy noted that precedent cited by Verizon did not establish a dollar amount for refunds but ordered "the parties to meet and confer in an effort to resolve the remaining disputes" and explicitly stated the FCC did "not establish a new pole attachment rate at this time" which is a necessary determination before refunds can be properly calculated and awarded. Id. at 62.

2. Disposition

Having determined 1) the correct legal standard to apply to this case, 2) that the pole attachment rates that First Energy charges Verizon under the joint use agreement are unjust and unreasonable, and 3) that the pole attachment rates that First Energy charges Verizon going forward should be set using the new telecom rate methodology, it is now time to turn to whether the Commission should award refunds to Verizon and, if so, how much.

Substantial record evidence in this case demonstrates that Verizon is entitled to refunds for amounts it overpaid to First Energy for attaching to its poles based on rates that were not set using the new telecom rate methodology, and therefore are unjust and unreasonable, after March 11, 2019, not July 12, 2011 as Verizon argued. As a result, Verizon's complaint will be denied in part.

Of note, Section 1.1407 of the FCC's regulations, and adopted by the Commission through the Final Rulemaking Order, provides that:

> **§ 1.1407 Remedies.**
>
> (a) If the Commission determines that the rate, term or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term or condition and may:
>
> (1) Terminate the unjust and/or unreasonable rate, term or condition;
>
> (2) Substitute in the pole attachment agreement the just and reasonable rate, term or condition established by the Commission; and/or
>
> (3) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term or condition, and the amount that would have been paid under the rate, term or condition established by the Commission, plus interest,

> consistent with the applicable statute of limitations.

See, 52 Pa.Code § 77.4(a)(incorporating 47 C.F.R. § 1.1407(a)(1)-(3)). As a result, because First Energy has been charging Verizon rates that are unjust and unreasonable, based on the above discussion, a refund in the amount of the difference between the amount paid under the unjust and/or unreasonable rate and the amount that would have been paid under the rate established by the new telecom rate formula is appropriate.

Providing a refund in this case is consistent with Section 1312 of the Public Utility Code in this regard which provides:

> **§ 1312. Refunds.**
>
> **(a)** ***General rule. —*** If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. . . .

66 Pa.C.S. § 1312(a).

Verizon's argument in this case that it is entitled to *****BEGIN PROPRIETARY ***** *****END PROPRIETARY***** in net rent that First Energy collected to date from Verizon, however, will be rejected. Verizon's argument is that it is entitled to refunds from July 12, 2011 – the effective date of the FCC's 2011 Pole Attachment Order. This argument will be rejected and the date after which Verizon will be entitled to refunds will be March 11, 2019 – the effective date of Section 1.1413. Prior to the date the existing joint use agreements were renewed, the rates established under the joint use agreements were just and reasonable. Effective March 11, 2019, those rates were no longer just and reasonable but the rates established using the new telecom rate methodology became the just and reasonable rates. In part, this is true based

on a strict reading of the FCC's regulations that were adopted by the Commission in the Final Rulemaking Order. Using the July 12, 2011 date is based on the FCC's order which the Commission has determined is persuasive authority, not mandatory authority.

Therefore, Verizon is not entitled to *****BEGIN PROPRIETARY *** ***END PROPRIETARY***** in refunds but a figure much less. In prorating the *****BEGIN PROPRIETARY *** ***END PROPRIETARY***** that Verizon believes it is owed since July, 2011, or approximately 112 months ago (July 2011 to September 2020), the approximate refund that Verizon is entitled to from March, 2019 to now, or approximately 18 months ago, is *****BEGIN PROPRIETARY ***** [5] *****END PROPRIETARY*****. This figure will increase *****BEGIN PROPRIETARY ***** [6] *****END PROPRIETARY***** per month beyond September 2020 until the refund is paid. To the extent the parties disagree with these calculations of a refund amount, they are encouraged to address the issue of a specific refund amount during the 60-day compliance phase recommended above that will be used to establish the specific rates to be used going forward under the new telecom methodology in conjunction with the determinations above. The rates going forward should be the same as the rates used to determine the appropriate refund from March 11, 2019 to the present. As noted above, to the extent the parties are unable to agree to an appropriate refund amount if different than the above, any disagreements can be referred to the Commission's mediation unit for mediation review or, in the alternative, an expedited evidentiary hearing may be held to resolve any such disagreements.

Verizon's argument that it is entitled to refunds effective July 12, 2011 because the FCC directed First Energy to reduce its rates effective by that date and because Verizon placed First Energy on notice by 2012 that it would dispute the rates and seek a refund does not warrant granting refunds beginning at a point earlier than March 11, 2019 because Verizon was not entitled to the lower rates under the Commission's regulations until March 11, 2019. Again,

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[5] *****BEGIN PROPRIETARY *** ***END PROPRIETARY*****

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a strict reading of the FCC's regulations as adopted by the Commission in the Final Rulemaking Order, and considering the FCC orders as only persuasive, the appropriate effective date of the new telecom rate is March 11, 2019. Therefore, it is appropriate for First Energy to refund to Verizon the amounts overpaid to attach to its poles as of that date, not July 12, 2011.

Similarly, First Energy's argument that Verizon is not entitled to any refund because, under Section 508 of the Public Utility Code, the Commission can only reform contracts on a prospective basis and the rates in the joint use agreements are contained in a contract and not in any First Energy tariff will be rejected. Section 508 provides:

> **§ 508. Power the commission to vary, reform and revise contracts.**
>
> The commission shall have power to vary, reform, or revise, upon a fair, reasonable and equitable basis, any obligations, terms or conditions of any contract heretofore or hereafter entered into between any public utility and any person, corporation, or municipal corporation, which embrace or concern a public right, benefit, privilege, duty or franchise, or the grant therefore, or are otherwise affected or concerned with the public interest and the general well-being of this Commonwealth. . . .

66 Pa.C.S. § 508. However, Section 1.1407 of the FCC's regulations as adopted by the Commission in the Final Rulemaking Order is not limited to tariffed rates only. Section 1.1407 refers generally to "the rate, term or condition complained of" and does not require that the rate be a tariffed rate. Therefore, First Energy's argument to the contrary will be rejected.

Furthermore, First Energy's other arguments also fail to warrant denying Verizon a refund in this case. For example, First Energy's argument that Verizon is not entitled to a refund because Verizon has failed to demonstrate that the rates it paid First Energy to attach to its poles are unjust and unreasonable has been refuted above wherein it was determined that the rates are unjust and unreasonable as of March 11, 2019, because they were not determined using the new telecom rate methodology from that date. Similarly, First Energy's argument that awarding refunds would violate well-established rules against retroactive application of agency decisions is rejected because it is inconsistent with Section 1312 which allows refunds within

four years of the filing of a complaint. First Energy's argument that Verizon's request for refunds will result in a significant increase in First Energy's electric rates will be rejected because it is not reasonable in this case to deny Verizon the just and reasonable rate to attach to First Energy's poles because it would require one class of customers to pay unjust and unreasonable rates so that other customers can pay lower rates. Such an analysis can be done in First Energy's next base rate case. Likewise, First Energy's other arguments regarding lack of evidence that refunds would increase deployment of broadband, that Verizon's calculations should be rejected and the old telecom rate should be used when determining any refund are all rejected based on the discussions above.

Finally, the FCC and Commission precedent cited by First Energy also do not warrant finding that Verizon is not entitled a refund because the FCC precedent is persuasive only, and not mandatory, and the Commission precedent is distinguishable because it does not reflect the Commission's new regulatory regime created by the Final Rulemaking Order.

As such, record evidence in this proceeding demonstrates that Verizon is entitled to a refund of amounts Verizon paid First Energy in excess of the new telecom rate from March 11, 2019 to the present. As of September, 2020, this amount is approximately ***BEGIN PROPRIETARY *** ***END PROPRIETARY*** with an additional ***BEGIN PROPRIETARY *** ***END PROPRIETARY*** due per month beyond September 2020 until the refund is paid. As noted above, the new telecom rate methodology set forth in Section 1.1406(d)(2) of the FCC's regulations, and adopted by the Commission in Section 77.4 of the Commission's regulations, is the just and reasonable rate that should be used when determining the rate Verizon pays First Energy to attach to its poles. As with the new rates First Energy must charge Verizon to attach to its poles going forward, it is recommended that the parties be given 60 days following the entry of a final Commission order in this case as a compliance phase of this proceeding to determine the appropriate amount that Verizon has overpaid First Energy to attach to its poles from March 11, 2019 to the extent that parties disagree with this calculation. To the extent that the parties are unable to agree on the calculation of the specific rates as part of the compliance phase of this proceeding, any

disagreements can be referred to the Commission's mediation unit for mediation review or, in the alternative, an expedited evidentiary hearing may be held.

F. Conclusion

In conclusion, Verizon has satisfied its initial burden of demonstrating that it is entitled to the "new telecom rate" when determining the rates it pays First Energy to attach to its poles. Record evidence in this proceeding demonstrates that the joint use agreements at issue in this case were entered into or renewed after the effective date of Section 1.1413(b) of the FCC's regulations as adopted by the Commission and, therefore, Verizon is entitled to the rebuttal presumption that it is entitled to the new telecom rate as of March 11, 2019. First Energy, however, has not carried its burden in response to Verizon that Verizon is not entitled to the new telecom rate because Verizon receives benefits under the joint use agreements that provides Verizon with material advantages. Therefore, Verizon is entitled to the new telecom rate and its complaint will be sustained with regard to this issue. These determinations are based on a strict reading of the FCC's regulations as adopted by the Commission in the Final Rulemaking Order and treating FCC orders as persuasive and not mandatory as allowed under the Final Rulemaking Order. Doing so simplifies the analysis in this case by focusing on the FCC regulations adopted by the Commission. The rates that Verizon pays First Energy to attach to its poles will be determined using the new telecom rate methodology going forward.

In addition, as a result of Verizon being entitled to the new telecom rate as of March 11, 2019, Verizon is also entitled to a refund, as of September, 2020, of approximately *****BEGIN PROPRIETARY ***** *****END PROPRIETARY***** with an additional *****BEGIN PROPRIETARY ***** *****END PROPRIETARY***** due per month beyond September 2020 until the refund is paid. Verizon's complaint will be denied to the extent that it seeks refunds earlier than March 11, 2019.

The parties will be given a 60-day compliance period following the entry of a final Commission order in this case in which they are to meet to resolve any differences in calculating the specific rates and refunds, based on the determinations made in this decision. To

the extent that the parties are unable to agree on the calculation of the specific rates and refund as part of the compliance phase of this proceeding, any disagreements can be referred to the Commission's mediation unit for mediation review or, in the alternative, an expedited evidentiary hearing may be held. Doing so will help advance the federal and state policies and goals to accelerate the deployment of broadband services and is consistent with the Public Utility Code and Commission's regulations.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. § 701; 52 Pa.Code § 77.4(d).

2. Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).

3. A complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. Patterson v. Bell Tel. Co. of Pa., 72 Pa. PUC 196 (1990).

4. "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950).

5. The offense must be a violation of the Public Utility Code, the Commission's regulations or an outstanding order of the Commission. 66 Pa.C.S. § 701.

6. If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift

from one party to another, but the burden of proof never shifts; it always remains on a complainant. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa.Cmwlth. 2001); *see also*, Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa.Cmwlth. 1982).

7. The decision of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704.

8. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 194 Pa.Super. 278, 166 A.2d 96 (1961); and Murphy v. Pa. Dept. of Public Welfare, White Haven Center, 85 Pa.Cmwlth. 23, 480 A.2d 382 (1984).

9. In 1996, Congress provided an overhaul of the entire communications industry with the passage of the federal Telecommunications Act of 1996 (TA-96) that also contained provisions regarding pole attachments. 47 U.S.C. § 201, *et seq.*

10. It is the policy of this Commonwealth to: "[m]aintain universal telecommunications service at affordable rates while encouraging the accelerated provision of advanced services and deployment of a universally available, state-of-the-art, interactive broadband telecommunications network in rural, suburban and urban areas. . . ." 66 Pa.C.S. § 3011(2).

11. It is the policy of this Commonwealth to "[e]nsure the efficient delivery of technological advances and new services throughout this Commonwealth in order to improve the quality of life for all Commonwealth residents." 66 Pa.C.S. § 3011(6).

12. On August 29, 2019, the Commission issued a Final Rulemaking Order formally "reverse preempting" the FCC's jurisdiction over pole attachment issues in Pennsylvania noting, in part, that the recent public demand for ubiquitous access to wireline and

wireless data technology has increased the need for more streamlined pole attachment procedures in Pennsylvania. Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission, Docket No. L-2018-3002672 (Final Rulemaking Order entered Sept. 3, 2019).

13. The Commission's assertion of jurisdiction over pole attachments will assist in spurring 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 by resolving Pennsylvania-specific disputes in Pennsylvania as compared to the FCC and that the Commission can provide a balanced approach to the competing needs and demands on pole infrastructure between pole owners, pole attachers, and the telecommunications, electric, and cable industries in a predictable manner using federal rules. Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission, Docket No. L-2018-3002672 (Final Rulemaking Order entered Sept. 3, 2019).

14. The Commission has adopted 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 CFR Chapter I, Subchapter A, Part 1, Subpart J (relating to pole attachment complaint procedures), inclusive of future changes as those regulations may be amended. 52 Pa.Code § 77.4(a).

15. When exercising authority under Chapter 77, 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. 52 Pa. Code § 77.5(c).

16. Adopting the FCC's regulations provides certainty that Pennsylvania's pole attachment regulations conform to the base-line federal standards required to retain state authority over pole attachments. Adoption of the federal rules, including the proposed mechanism for adopting future changes to those rules, supports the cooperative state-federal goal of deployment of broadband across the Commonwealth, while also considering the safety, adequacy, and reliability of electric service in a manner that is consistent with due process.

Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission, Docket No. L-2018-3002672 (Final Rulemaking Order entered Sept. 3, 2019) at 25.

17. In complaint proceedings brought by incumbent local exchange carriers challenging utility pole attachment rates, terms and conditions for pole attachment contracts entered into or renewed after the effective date of this section, 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. 47 C.F.R. § 1.1413(b).

18. In complaint proceedings brought by incumbent local exchange carriers challenging utility 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). 47 C.F.R. § 1.1413(b).

19. In complaint proceedings brought by incumbent local exchange carriers challenging utility pole attachment rates, 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. 47 C.F.R. § 1.1413(b).

20. With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate is the higher of rates set by two formulas. 47 C.F.R. § 1.1406(d)(2).

21. Every rate made, demanded or received by any public utility, or by any two or more public utilities, shall be just and reasonable, and in conformity with regulations or orders of the Commission. 66 Pa.C.S. § 1301(a).

22. No public utility can make any rate that provides any unreasonable prejudice or disadvantage or that provides any unreasonable difference as to rates between classes of service. 66 Pa.C.S. § 1304.

23. Verizon has satisfied its burden of demonstrating that the rates charged by First Energy to attach to its poles are unjust and unreasonable after March 11, 2019 because they were not established using the "new telecom rate" methodology.

24. If the Commission determines that the rate, term or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term or condition and may: (1) Terminate the unjust and/or unreasonable rate, term or condition; (2) Substitute in the pole attachment agreement the just and reasonable rate, term or condition established by the Commission; and/or (3) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term or condition, and the amount that would have been paid under the rate, term or condition established by the Commission, plus interest, consistent with the applicable statute of limitations. 52 Pa.Code § 77.4(a)(incorporating 47 C.F.R. § 1.1407(a)(1)-(3)).

25. If, in any proceeding involving rates, the Commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the Commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the Commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. 66 Pa.C.S. § 1312(a).

26. Verizon has satisfied its burden of demonstrating that it is entitled to a refund of ***BEGIN PROPRIETARY *** ***END PROPRIETARY*** as of September, 2020, with an additional ***BEGIN PROPRIETARY *** ***END PROPRIETARY*** due per month beyond September 2020 until the refund is paid for overcharges it paid First Energy to attach to its poles from March 11, 2019.

VI. ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the formal complaint filed by Verizon Pennsylvania LLC and Verizon North LLC against Metropolitan Edison Company, Pennsylvania Electric Company and Penn Power Company at docket number C-2020-3019347 is hereby granted in part and denied in part.

2. That the Joint Motion to Admit Stipulated Items into Record of Proceeding filed by Metropolitan Edison Company, Pennsylvania Electric Company, Penn Power Company, Verizon Pennsylvania LLC and Verizon North LLC on July 7, 2020 is granted and two copies of the documents contained therein shall be provided to the Commission's Secretary's Bureau for inclusion in the official record of this proceeding.

3. That the formal complaint filed by Verizon Pennsylvania LLC and Verizon North LLC against Metropolitan Edison Company, Pennsylvania Electric Company and Penn Power Company at docket number C-2020-3019347 is granted to the extent that Verizon Pennsylvania LLC and Verizon North LLC are charged by Metropolitan Edison Company, Pennsylvania Electric Company and Penn Power Company to attach to their utility poles using a rate other than the new telecom rate since March 11, 2019.

4. That the formal complaint filed by Verizon Pennsylvania LLC and Verizon North LLC against Metropolitan Edison Company, Pennsylvania Electric Company and Penn Power Company at docket number C-2020-3019347 is denied to the extent that Verizon Pennsylvania LLC and Verizon North LLC seeks refunds dating back beyond March 11, 2019.

5. That the rates charged by Metropolitan Edison Company, Pennsylvania Electric Company and Penn Power Company to Verizon Pennsylvania LLC and Verizon North

LLC to attach to its utility poles will be established going forward using the "new telecom rate" methodology as set forth in 47 C.F.R. § 1.1406(d)(2) as adopted by the Commission by 52 Pa.Code § 77.4(d).

6. That Metropolitan Edison Company, Pennsylvania Electric Company and Penn Power Company shall refund to Verizon Pennsylvania LLC and Verizon North LLC approximately ***BEGIN PROPRIETARY *** ***END PROPRIETARY*** as of September, 2020, with an additional ***BEGIN PROPRIETARY *** ***END PROPRIETARY*** due per month beyond September 2020 until the refund is paid.

7. That the parties will be given sixty (60) days following the entry of a final Commission order in this case to resolve any differences that arise in establishing the specific rates and refund created through the use of the new telecom methodology based on the discussion above and, to the extent that such differences cannot be resolved, can afford themselves of the Commission's mediation unit for mediation review or request a further expedited evidentiary hearing on the remaining disputed issues.

8. That upon payment by of the refund identified in Ordering Paragraph 3 by Metropolitan Edison Company, Pennsylvania Electric Company and Penn Power Company to Verizon Pennsylvania LLC and Verizon North LLC, this matter shall be marked closed.

Date: September 15, 2020

/s/
Joel H. Cheskis
Deputy Chief Administrative Law Judge