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September 22, 2020

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

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

Dear Secretary Chiavetta:

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

Because the Exceptions include certain Proprietary information, the Public Version of the Exceptions is being e-filed, with the Proprietary Version being provided via email.

Very truly yours,

Suzan D. Paiva/sau

Suzan D. Paiva

SDP/sau
Enclosure

Via E-Mail

cc: Office of Special Assistants (ra-OSA@pa.gov)
Attached Certificate of Service

CERTIFICATE OF SERVICE

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

Dated at Philadelphia, Pennsylvania, this 22nd day of September, 2020.

VIA E-MAIL

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

VERIZON'S EXCEPTIONS TO RECOMMENDED DECISION

(PUBLIC VERSION)

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Counsel for Verizon Pennsylvania LLC and Verizon North LLC

Dated: September 22, 2020

Pursuant to 52 Pa. Code § 5.533 and the revised schedule adopted via the Commission's September 15, 2020 Secretarial Letter, Verizon[1] excepts in limited part to the Recommended Decision of Deputy Chief Administrative Law Judge ("ALJ") Joel H. Cheskis issued on September 15, 2020 ("RD") in the formal complaint case brought by Verizon against FirstEnergy.[2]

I. INTRODUCTION

The Commission should grant Verizon's formal complaint in its entirety to end FirstEnergy's near decade-long refusal to comply with the statutory mandate to charge just and reasonable pole attachment rates, resulting in excessive charges that undermine the Commission's broadband deployment goals and violate its pole attachment regulations. The RD reaches sound conclusions about FirstEnergy's excessive pricing and Verizon's right to relief from those unlawful rates and should be adopted with three important exceptions detailed below. The revisions requested in Verizon's exceptions are essential to prevent FirstEnergy from being rewarded for its more than nine years of delay tactics and unlawful conduct by keeping its ill-gotten gains, contrary to the Commission's regulations and pro-consumer efforts to quickly provide the benefits of pole attachment rate reform to Pennsylvanians.

The Commission's new pole attachment regulations are crucial to "spurring investment in, and access to, physical infrastructure used to deliver essential broadband access service to end-user customers" in the Commonwealth.[3] Key to ensuring these consumer benefits is that

[1] "Verizon" refers to Verizon Pennsylvania LLC ("Verizon PA") and Verizon North LLC ("Verizon North").

[2] "FirstEnergy" refers to Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec") and Penn Power Company ("Penn Power").

[3] *Assumption of Comm'n Jurisdiction over Pole Attachments from the FCC*, No. L-2018-3002672, 2019 WL 4345730, at *6 (Aug. 29, 2019) ("*Final Rulemaking Order*").

"rental rates for pole attachments … are as low and close to uniform as possible" when paid by the various competitive entities that deploy facilities supporting broadband service in Pennsylvania.[4] This requirement of competitively neutral pole attachment rates took effect in July 2011,[5] was affirmed by the federal courts,[6] and is part of this Commission's regulations.[7] Yet FirstEnergy has continued to demand Verizon pay pole attachment rates averaging more than [redacted] times the properly calculated "new telecom" pole attachment rate guaranteed Verizon and other broadband providers under the Commission's regulations.

The RD rightly invalidates FirstEnergy's unlawfully high pole attachment rates. The Commission recognized there is a "close relationship between pole attachments and broadband deployment" because "all broadband deployment relies" on pole attachments "to deliver these services to end-user consumers."[8] The Commission thus found consumers will benefit from uniform and competitively neutral pole attachment rates among broadband providers and prompt

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[4] *Id.* at *2.

[5] *See* RD at 8 (Finding of Fact 9) ("[T]he FCC ordered electric utilities to charge competitively neutral rates in 2011 …."); *see also Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5328 (¶ 202) (2011) ("*Pole Attachment Order*") ("[W]here incumbent [local exchange carriers] have … access [to utility poles], they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)."); *id.* at 5317 (¶ 173) ("[Just and reasonable] pole attachment rates promote competitive and technological neutrality, and hence more effective competition, resulting in more efficient investment, innovation, and service provision.").

[6] *See Am. Elec. Power Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013); *see also City of Portland v. United States*, 969 F.3d 1020, 1052 (9th Cir. 2020).

[7] 52 Pa. Code § 77.4(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").

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

enforcement of the comprehensive pole attachment rules adopted by the Federal Communications Commission ("FCC"), which are now the Commission's regulations.[9]

The Commission's pole attachment reforms are more essential now than ever. As the Commission recognized, "a successful telecommunications infrastructure is vital in the 21st century."[10] "With an expansive and established broadband service, Pennsylvania will be even more attractive to businesses," will "help schools to provide a more interactive learning environment in order to bridge the digital divide," and will ensure hospitals and medical facilities have the broadband access they require to meet the challenges of today and tomorrow.[11]

But FirstEnergy has illegally collected more than [redacted] from Verizon since July 2011 by demanding payment of its unlawfully high pole attachment rental rates. FirstEnergy persisted in overcharging Verizon despite its own admission in the 2018 rulemaking that the Commission's new regulations require "lower rates for Incumbent Local Exchange Carriers ('ILECs')" such as Verizon under "most existing joint use agreements" that govern the shared use of utility poles.[12]

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

[10] VZ St. 1.2 at 3:15-22 (Mills Surrejoinder) (quoting Broadband & High-Speed Internet Service, *available at* http://www.puc.pa.gov/consumer_info/telecommunications/broadband_high_speed_internet_service.aspx).

[11] *Id.*; *see also Assumption of Comm'n Jurisdiction over Pole Attachments from the FCC*, No. L-2018-3002672, Notice of Proposed Rulemaking, 2018 WL 3533538, at *5 (July 12, 2018) ("*NPRM*").

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

Three changes to the RD will ensure FirstEnergy is not rewarded for violating the law and will align the Commission's final order with its broadband deployment goals. First, the Commission's regulations provide for refunds of all amounts unlawfully collected during the applicable statute of limitations plus interest—a standard that eliminates the incentive for electric utilities such as FirstEnergy to prolong negotiations to avoid rate reductions needed to achieve the Commission's broadband deployment goals. The RD's refund order does not go back for the full statute of limitations period permitted by the Commission's rules. Here, the relevant refund period dates back to the July 2011 effective date of the law requiring new telecom rates, but the RD recommends relief only as of March 2019.[13] It also does not award interest.[14] The Commission should correct these errors. Otherwise, the Commission would reward FirstEnergy for its illegal conduct and encourage other electric utilities to defy the Commission's regulations in the hope of keeping their unjust profits, which will harm consumers and discourage broadband deployment.

Second, the RD correctly specified the lawful and properly calculated new telecom rates under the Commission's regulations and set the refund amount using those rates.[15] The RD nonetheless recommends a 60-day "compliance period" to discuss the calculation of new telecom rates and overpayments, to be followed, if necessary, by further mediation or an evidentiary hearing.[16] This compliance period would violate the Commission's regulations, which require

[13] *See* RD at 64-69; *see also* RD at 10 (Finding of Fact 19); RD at 74 (Conclusions of Law 23, 26); RD at 75-76 (Ordering Paragraphs 3, 6).

[14] *See* RD at 76 (Ordering Paragraph 6).

[15] RD at 8-10 (Findings of Fact 11, 19).

[16] *See* RD at 57, 59, 66, 68-69; *see also* RD at 76 (Ordering Clause 7).

"final action" by December.[17] It would also play into FirstEnergy's hands, giving it another opportunity—after more than nine years of prior delay—to stall the required pole attachment rate reductions and add "additional burdens and expenses" to this litigation contrary to the Commission's effort to streamline, simplify, and reduce the costs of pole attachment litigation.[18] There is no need for a compliance period or additional proceedings; the record is closed, and the properly calculated new telecom rates and resulting overpayments have been determined following extensive evidentiary submissions. The Commission should eliminate the unnecessary compliance period and issue a *final* order by mid-December.

Third, the record shows FirstEnergy's ownership of most of the utility poles shared by two companies gives it superior bargaining power to impose and continue charging unreasonably high pole attachment rates. The RD correctly found that the Commission's regulations do not require proof of an electric utility's superior bargaining power; the lawful rate is the new telecom rate regardless of relative pole ownership numbers.[19] But the RD went further and stated that FirstEnergy's three-to-one pole ownership advantage does *not* give it superior bargaining power.[20] This finding should be deleted from the final order. It is not necessary to resolve this case. It also conflicts with the evidence, FCC precedent, and the Commission's prior recognition

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[17] *See* 52 Pa. Code § 77.5(d); 47 U.S.C. § 224(c)(3)(b)(ii); *see also* RD at 1 ("The Commission must act on this Recommended Decision no later than its Public Meeting on December 17, 2020.").

[18] *Final Rulemaking Order*, 2019 WL 4345730, at *26 ("The Commission acknowledges how critical it is to provide regulatory certainty rather than additional burdens and expenses where broadband investment is contemplated and desired.").

[19] RD at 49 ("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.").

[20] *Id.* ("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.").

that pole attachment rates are regulated because a "decline in ILEC pole ownership" requires "oversight to ensure just and reasonable rates, terms, and conditions that might not otherwise result from arm-length negotiations with [electric distribution companies]."[21]

With these three revisions, the Commission's final order will further its pro-consumer policies, properly implement its new pole attachment regulations, and prevent FirstEnergy from profiting at the expense of the Commission's broadband deployment goals.

II. EXCEPTIONS

Verizon Exception #1: Verizon Excepts to the RD's Recommendation to Let FirstEnergy Profit From Its Unlawful Conduct by Cutting Short the Relevant Refund Period and Omitting an Interest Award.

The Commission's regulations redress unlawfully collected pole attachment rates through an award of refunds "plus interest, consistent with the applicable statute of limitations."[22] The RD correctly finds that refunds are necessary and appropriate, but incorrectly reduces the refunds by nearly [redacted] and omits an interest award.[23]

1. The RD Should Have Awarded Refunds of Unlawfully Collected Amounts Starting July 12, 2011 Rather than March 11, 2019.

Effective July 12, 2011, "the FCC ordered electric utilities to charge competitively neutral rates,"[24] but FirstEnergy charged Verizon far higher rates. As the RD confirms, "[t]he new telecom rate is the just and reasonable competitively neutral rate," but from 2011 forward FirstEnergy charged Verizon rates "on average more than [redacted] the new telecom rate set by

[21] *NPRM*, 2018 WL 3533538, at *3.

[22] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1407(a)(3)).

[23] *See* RD at 64-69; *see also* RD at 10 (Finding of Fact 19), 74 (Conclusions of Law 23, 26), 75-76 (Ordering Paragraphs 3, 6).

[24] *See* RD at 8 (Finding of Fact 9).

the Commission's regulations."[25] The Commission's regulations provide for *all* of [redacted] FirstEnergy unlawfully collected since then to be refunded to Verizon, but the RD incorrectly limits the refunds to [redacted] unlawfully collected since March 11, 2019.[26]

The RD limited the refund period based on a legal error; it incorrectly reads the Commission's regulations to require FirstEnergy to charge Verizon competitively neutral pole attachment rates only beginning March 11, 2019.[27] But the applicable law required those just and reasonable rates as of July 12, 2011. The Commission's regulations incorporate "the full extent" of the rate requirements of 47 U.S.C. § 224,[28] and the Commission has pledged to enforce that statute. The Commission, the RD, Verizon, and FirstEnergy all agree that, as of mid-2011, "ILECs [we]re entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)."[29]

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[25] *See* RD at 8-9 (Finding of Fact 10, 15); *see also* RD at 56 ("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.").

[26] RD at 10 (Finding of Fact 19), 64-68, 74 (Conclusions of Law 23, 26); 75-76 (Ordering Paragraphs 3, 6); *see also* Verizon Initial Brief at 54-58; Verizon Reply Brief at 45-47.

[27] *See, e.g.*, RD at 65-66 (relying on effective date of 47 C.F.R. § 1.1413).

[28] 52 Pa. Code § 77.4(a).

[29] *NPRM*, 2018 WL 3533538, at *3; *see also* RD at 8 (Finding of Fact 9) ("[T]he FCC ordered electric utilities to charge competitively neutral rates in 2011"); FE St. 2-R at 10:13-15 (Zarakas Rebuttal Testimony) ("[I]n its 2011 Pole Attachment Order, the FCC … concluded that the ILECs 'are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1).'"). Indeed, because "the FCC ordered electric utilities to charge competitively neutral rates in 2011," RD at 8 (Finding of Fact 9), the Commission must delete two sentences from page 65 of the RD in its final order. Those sentences state that, "[p]rior 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

The March 2019 date cited in the RD is the effective date of a subsequent regulation that sought to accelerate the realization of the just and reasonable rate mandated nearly eight years earlier by making a procedural change. Based on reports that electric utilities "continue[d] to charge pole attachment rates significantly higher" than the law required, the March 2019 regulation added a presumption to streamline negotiations and litigation to accelerate rate reductions.[30] But the March 2019 regulation left the remedy in place for prior unlawful conduct: refunds "will normally be 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 Commission, plus interest, *consistent with the applicable statute of limitations*."[31]

The applicable statute of limitations in this case covers the entire [redacted] FirstEnergy unlawfully collected since July 12, 2011. The regulation looks to the general contract law statute of limitations to determine the refund period.[32] And while the traditional statute of limitations for contract actions in Pennsylvania is four years,[33] Pennsylvania adheres to the continuing contract doctrine, which extends the relevant limitations period to provide refunds

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reasonable rates," RD at 65. But the RD confirms the rates established under the joint use agreements have not been just or reasonable at any relevant time. Since "the FCC ordered electric utilities to charge competitively neutral rates in 2011," RD at 8 (Finding of Fact 9), FirstEnergy charged Verizon rates that were "on average more than [redacted] the new telecom rate set by the Commission's regulations for Verizon's competitors," *id.* (Finding of Fact 10), even though "[t]he new telecom rate is the just and reasonable competitively neutral rate," *id.* at 9 (Finding of Fact 15).

[30] *See* 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1414)).

[31] 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1407(a)(3)) (emphasis added).

[32] *See, e.g.*, *Verizon Va. v. Va. Elec. & Power Co.*, 32 FCC Rcd 3750, 3761-63 (Section C) (EB 2017) ("*Dominion Order*") (finding another ILEC "is entitled to a refund of overpayments … dating back to the [July 12, 2011] effective date of the *Pole Attachment Order*" and citing the relevant State's general contract statute of limitations).

[33] *See* 42 Pa. C.S. § 5525.

for all time periods covered by the parties' agreements, plus a four-year period following their termination.[34] The parties' agreements date back as far as 1958, but Verizon sought refunds of overpayments beginning in July 2011—totaling more than [redacted] unlawfully collected within the applicable statute of limitations.[35] Verizon would be eligible for this full award were this case resolved at the FCC—and this Commission already decided Verizon can be "in no worse position … than if the Commission did not assume jurisdiction" over pole attachments.[36] Yet the RD recommends a much shorter refund period.

At a minimum, the RD must be revised for internal consistency to require a four-year refund period, under which FirstEnergy would refund [redacted].[37] The RD finds that "[p]roviding a refund in this case is consistent with Section 1312 of the Public Utility Code" and its four-year statute of limitations:[38]

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[34] The continuing contract doctrine applies to the parties' joint use agreements because they do not have a fixed termination date. *See Beltz v. Erie Indem. Co*., 279 F. Supp. 3d 569, 578-80 (W.D. Pa. 2017), *aff'd*, 733 F. App'x 595 (3d Cir. 2018) (applying Pennsylvania contract law); *see also Thorpe v. Schoenbrun*, 195 A.2d 870 (Pa. Super. Ct. 1963) ("If services are rendered under an agreement which does not fix any certain time for payment or for the termination of the services, the contract will be treated as continuous, and the statute of limitations does not begin to run until the termination of the contractual relationship between the parties.") (internal quotation omitted). The continuing contract doctrine thus extends the period covered by the traditional breach of contract statute of limitations, which accrues as of the date of the breach. *See Beltz*, 279 F. Supp. 3d at 578.

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

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

[37] *See* RD at 65 (quoting 66 Pa. C.S. § 1312(a)); RD at 74 (Conclusion of Law 25); *see also* RD at 66 & n.6 (calculating [redacted] overpayment per month). This formal complaint has been pending for 10 months (since November 2019), so a refund based on Section 1312 would total [redacted] through September 2020 using the RD's monthly overpayment amount (48 months + 10 months * [redacted] per month).

[38] *See* RD at 65 (citing 66 Pa.C.S. § 1312(a)) (emphasis added); *see also* RD at 74 (Conclusion of Law 25).

> (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, … 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….[39]

This formal complaint was filed on November 20, 2019,[40] justifying refunds back to November 2015 under this provision. The RD instead cuts them off at March 11, 2019.

A full and complete refund award is critical to achieve the Commission's objectives. The Commission exercised jurisdiction over pole attachments to quickly and comprehensively achieve pole attachment rate reform for Pennsylvania consumers.[41] A full refund award will be a substantial step forward in that effort. By ensuring FirstEnergy is not rewarded for its longstanding defiance of law, the Commission will remove the incentive for similarly protracted and costly disputes and will encourage the industry to comply with the Commission's regulations. FirstEnergy has been required by law to charge Verizon just and reasonable competitively neutral rates since July 2011 and was on express notice in 2012 that Verizon would seek refunds of the unlawful amounts FirstEnergy continued to demand if a complaint proceeding was required.[42] It would set a counterproductive precedent to allow FirstEnergy to profit from its near decade-long violation of law to the detriment of Pennsylvania consumers.

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[39] *See* RD at 65 (quoting 66 Pa.C.S. § 1312(a)) (emphasis added); *see also* RD at 74 (Conclusion of Law 25).

[40] *See* RD at 1.

[41] *See, e.g.*, *Final Rulemaking Order*, 2019 WL 4345730, at *23 ("matters of pole attachments are critical to deploying broadband in Pennsylvania").

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

The Commission's order should make Verizon whole for the full period authorized by the statute of limitations and not reward FirstEnergy's illegal conduct with an unjustified windfall.

2. The RD Should Have Awarded Interest on the Refund Award.

The RD should be revised to award interest consistent with Commission regulations. The omission of an interest award appears to have been an oversight. The RD correctly awards refunds consistent with the Commission's pole attachment regulations, which provide for a refund "plus interest," and with Section 1312 of the Public Utility Code, which authorizes a refund "together with interest at the legal rate."[43] The relevant Ordering Paragraph, however, only includes the principal refund amounts.[44] It should be revised to add interest at the legal rate, which is six percent.[45]

Verizon Exception #2: Verizon Excepts to the RD's Recommendation for an Unnecessary 60-Day "Compliance Period" To Discuss the New Telecom Rates Already Found Just and Reasonable on a Robust Evidentiary Record.

The RD correctly found the lawful and properly calculated new telecom rates and determined Verizon's monthly overpayment using those rates.[46] No further determination is needed to issue a final order in this case. The Commission should reject the RD's

[43] *See* RD at 64-65 (quoting 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1407(a)(3)); RD at 65 (quoting 66 Pa. C.S. § 1312(a)); RD at 74 (Conclusions of Law 24, 25).

[44] *See* RD at 76 (Ordering Paragraph 6).

[45] *See* 41 Pa. Stat. Ann. § 202 ("Reference in any law or document enacted or executed heretofore or hereafter to 'legal rate of interest' and reference in any document to an obligation to pay a sum of money "with interest" without specification of the applicable rate shall be construed to refer to the rate of interest of six per cent per annum."); *see also Auditors Report on Columbia Gas of Pennsylvania Inc. Purchased Gas Cost Collections for the Twelve-Month Periods Ended Jan. 31, 2018 & Jan. 31, 2017*, No. D-2018-3004889, 2020 WL 1974129, at *6 n.18 (Pa. PUC Apr. 16, 2020) (noting that the legal rate of interest referenced in the refunds provision of section 1312(a) is the 6% rate found in 41 Pa. Stat. Ann. § 202).

[46] RD at 8-10 (Findings of Fact 11, 19).

recommendation to extend this case with a 60-day "compliance period" followed, if necessary, by further mediation or an evidentiary hearing.[47]

The parties assembled an extensive record in this case that included direct testimony, rebuttal testimony, surrebuttal testimony, rejoinder testimony, and surrejoinder testimony.[48] At all times, the proper calculation of new telecom rates and overpayments was a disputed issue. Verizon included its new telecom rate and overpayment calculations in its Complaint and supported them in direct, surrebuttal, and surrejoinder testimony.[49] FirstEnergy summarily stated that slightly different (and at times lower) new telecom rates should apply, but did not enter its calculations into evidence or provide an alternate overpayment calculation based on new telecom rates.[50] The RD thus reasonably found the properly calculated and lawful new telecom rates and associated overpayment amounts are those submitted and supported by Verizon.[51]

The RD nonetheless recommends further proceedings to "resolve any differences in calculating the specific rates"[52] and to "determine the appropriate amount that Verizon has overpaid First Energy to attach to its poles."[53] This is not necessary. It is also not good policy. To open the door to further pleadings and arguments *after* an extensive record was compiled and closed and the Commission has made its decision would add costs and burdens to this

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[47] *See* RD at 57, 59, 66, 68-69; *see also* RD at 76 (Ordering Clause 7). No party requested a compliance period, so there is no prior briefing on this issue.

[48] *See* RD at 4-5.

[49] *See* VZ St. 2.0 at 4:8-14 & Ex. MSC-1 (Calnon Direct Testimony); VZ St. 2.1 at 8:13-31:6 (Calnon Surrebuttal Testimony); VZ St. 2.2 at 18:10-19:17 (Calnon Surrejoinder Testimony).

[50] *See* VZ St. 2.1, Ex. MSC-4.

[51] *See* RD at 8-10 (Findings of Fact 11, 19).

[52] RD at 59; *see also* RD at 57.

[53] RD at 68.

litigation,[54] further delay the rate reductions essential to the Commission's pro-consumer broadband deployment goals,[55] and invite gamesmanship in future proceedings. If rate reductions are delayed to allow for further negotiations and evidentiary hearings, electric utilities will drag out proceedings and take another run at achieving inflated rates after the Commission's final order is entered—imposing additional cost and expense on broadband providers and Pennsylvania consumers. But the Commission's dispute resolution process has already ensured a "fully-developed evidentiary record on which to base decisions."[56] It is time to enter the final order and achieve the rate reductions promised Pennsylvania consumers nearly a decade ago.

And the Commission must enter a final order in 2020 under its regulations, something that would be impossible if a sixty-day compliance period is added on, followed by mediation or an evidentiary hearing. The Commission's regulations require "final action" within 270 days of the March 23, 2020 transfer of this case to the Commission, meaning the Commission must issue a final order on the required rates and overpayments "no later than its Public Meeting on December 17, 2020."[57] The recommended "compliance period" is thus unnecessary, but also inconsistent with the Commission's regulations and its intention to streamline, simplify, and

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[54] *See, e.g.*, *Final Rulemaking Order*, 2019 WL 4345730, at *26 ("The Commission acknowledges how critical it is to provide regulatory certainty rather than additional burdens and expenses where broadband investment is contemplated and desired.").

[55] *See id.* at *6 ("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 … as compared to the FCC.").

[56] *See Final Rulemaking Order*, 2019 WL at 4345730, at *30 (citing FE Rulemaking Comments at 12).

[57] *See* RD at 1; *see also* 52 Pa. Code § 77.5(d); 47 U.S.C. § 224(c)(3)(B)(ii); *Final Rulemaking Order*, 2019 WL 4345730, at *44 ("Regarding cases transferred to the Commission by the FCC, the Commission will take final action within 180 days unless good cause is shown. If such cause is shown, the Commission will issue a final order no later than 270 days from the transfer.").

reduce the cost of pole attachment litigation. The Commission should eliminate the compliance period from its final order. Adoption of the RD will then resolve with finality the new telecom rates and monthly overpayment amounts required by law.

Verizon Exception #3: Verizon Excepts to the RD's Unnecessary and Incorrect Finding that FirstEnergy's Ownership of Three Times the Utility Poles Essential to Broadband Deployment Does Not Provide FirstEnergy Superior Bargaining Power.

The FCC, Congress, and the United States Supreme Court have long recognized that unreasonably high rates result when an electric utility's pole ownership advantage places it "in a position to extract monopoly rents … in the form of unreasonably high pole attachment rates.'"[58] Utility poles are "essential physical infrastructure used to deliver [broadband and other telecommunications] services to end-user consumers."[59] When an electric utility has "exclusive control over access" to most of them, it also has the ability to impose artificially and unreasonably high rates for their use.[60] As a result, the "decline in ILEC pole ownership" requires Commission "oversight to ensure just and reasonable rates, terms, and conditions that might not otherwise result from arm-length negotiations with [electric distribution companies]."[61]

The RD correctly found that ILECs do not need to prove an electric utility has superior bargaining power to obtain just and reasonable rates. As it explains, the Commission's regulations "simplify[ ] the issues in this case" by presuming the just and reasonable rate is the

[58] *See Pole Attachment Order*, 26 FCC Rcd at 5242 (¶ 4) (citing S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977), reprinted in 1978 U.S.C.C.A.N. 109); *see also Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co*., 534 U.S. 327, 330 (2002).

[59] *See Final Rulemaking Order*, 2019 WL 4345730, at *1.

[60] *See Pole Attachment Order*, 26 FCC Rcd at 5242 (¶ 4).

[61] *NPRM*, 2018 WL 3533538, at *3.

new telecom rate regardless of an inquiry into bargaining power.[62] But the RD went a step further and incorrectly stated that "FirstEnergy 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."[63] This factually incorrect statement should be deleted. It is dicta that is not necessary to resolve this case. It also conflicts with standard economic theories, FCC precedent, and the evidence presented.[64]

In 2011, the FCC recognized that ILECs "often may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations" because "electric utilities appear to own approximately 65-70 percent of poles."[65] Since 2011, the FCC found ILECs entitled to rate reductions where the electric utilities owned about 65% of the shared utility poles—for a "nearly two-to-one pole ownership advantage."[66] FirstEnergy's 73% pole ownership advantage is greater.[67]

"Standard economic theories of bargaining predict that each party will consider its best alternative to a negotiated agreement when negotiating."[68] In the pole attachment rate context, as difficult as it would be for FirstEnergy to find alternative infrastructure absent joint use,

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[62] RD at 49.

[63] *Id.*

[64] *See* Verizon Initial Brief at 29-34; Verizon Reply Brief at 31-35.

[65] *Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206).

[66] *Dominion Order*, 32 FCC Rcd at 3756-57 (¶ 13) (electric utility owned 65%); *BellSouth Telecomm., LLC v. Fla. Power & Light Co*., Proceeding No. 19-187, 2020 WL 2568977, at *8 (¶ 18) (EB 2020) ("*FPL 2020 Order*") (electric utility owned 66%).

[67] *See* RD at 8 (Finding of Fact 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.").

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

Verizon would need to find and obtain approval for *three times* the facilities. It is this disparate impact that gives FirstEnergy leverage to impose unreasonably high pole attachment rates on Verizon and to refuse to reduce them.[69] FirstEnergy's witness acknowledged it is "reasonable to conclude that Verizon would likely realize greater harm" absent joint use "in that it would need to remedy loss of access to more poles [than] would FirstEnergy."[70] And where "the alternatives to the current agreement rates are significantly more costly for one party to the negotiation than to the other, the party that would suffer the least" from those alternatives—*i.e.*, FirstEnergy—"is in the strongest bargaining position."[71]

The unlawfully high rates FirstEnergy imposed on Verizon reflect FirstEnergy's superior bargaining position. FirstEnergy required Verizon to pay more than [redacted] the lawful new telecom rate for use of one foot of space on FirstEnergy's poles—while requiring better rates for its own use of far more space on Verizon's poles.[72] In one service area, for example, FirstEnergy charged Verizon almost [redacted] more per pole for use of one foot of space on FirstEnergy's poles than FirstEnergy was willing to pay for use of at least [redacted] times that space on Verizon's poles.[73] FirstEnergy had superior bargaining power when setting pole attachment rates, relied on that leverage to perpetuate unlawfully high rates, and ultimately forced this Commission to intervene to force a reduction of its excessive rates to the levels required by law and needed to support the Commission's broadband goals.

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

[70] FE Answer Attachment C at FE00021 (Zarakas Decl. ¶ 17).

[71] VZ St. 2.1 at 61:8-11 (Calnon Surrebuttal Testimony).

[72] *See* Verizon Initial Brief at 32-34.

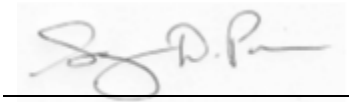
[73] *See* VZ St. 2.0, Ex. MSC-1 at VZ00046 (Calnon Aff. ¶ 22).

The Commission need not take a position on bargaining power in this case, but if it does, it should not part ways with FCC precedent on the issue. The Commission decided not "to expend additional resources that duplicate the efforts undertaken by the FCC."[74] The FCC has repeatedly and definitively found that a pole ownership advantage provides superior bargaining power.[75] The Commission should delete the contrary and incorrect conclusion from its final order.

III. CONCLUSION

For the foregoing reasons, the Commission should adopt the RD with the revisions discussed above. These changes will bring the Commission's final order into conformance with applicable orders and regulations and will further the Commission's important deployment goals.

Respectfully submitted,



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

[75] *See Dominion Order*, 32 FCC Rcd at 3756-57 (¶ 13) (65% pole ownership advantage); *FPL 2020 Order*, 2020 WL 2568977, at *8 (¶ 18) (66% pole ownership advantage); *Pole Attachment Order*, 26 FCC Rcd at 5327, 5329 (¶¶ 199, 206) ("electric utilities appear to own approximately 65-70 percent of poles," meaning "market forces and independent negotiations may not be alone sufficient to ensure just and reasonable rates" for ILECs); *see also Declaratory Ruling*, 2020 WL 4428179, at *6 (¶ 16) ("bargained solutions for pole attachments would rarely, if ever, occur absent the rules, given the uneven bargaining leverage") (quotation omitted); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7769 (¶ 126) (2018) ("*Third Report and Order*") ("[I]LEC bargaining power vis-à-vis utilities" declines as "[I]LEC pole ownership" relative to electric utilities "decline[s].").

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