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September 22, 2020

VIA ELECTRONIC FILING

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

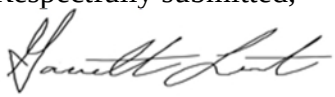
Re: Verizon Pennsylvania LLC and Verizon North LLC v. Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company
Docket No. C-2020-3019347

Dear Secretary Chiavetta:

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

Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,



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GPL/kls
Enclosures

cc: Honorable Joel H. Cheskis
Certificate of Service
Office of Special Assistants

CERTIFICATE OF SERVICE

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

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Date: September 22, 2020

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PUBLIC VERSION – PROPRIETARY INFORMATION REDACTED

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

EXCEPTIONS OF METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, AND PENNSYLVANIA POWER COMPANY

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PUBLIC VERSION – PROPRIETARY INFORMATION REDACTED

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I. INTRODUCTION

Verizon Pennsylvania LLC and Verizon North LLC ("Verizon") initially filed the above-captioned Complaint ("Complaint") against Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company (collectively "FirstEnergy" or the "Companies") with the Federal Communications Commission ("FCC") on November 26, 2019. Therein, Verizon asserted that the negotiated rates charged by FirstEnergy to Verizon under several substantially similar "joint use agreements" dating back to 1958 are "unjust and unreasonable" under Section 224 of the Communications Act of 1978, more commonly known as the "Pole Attachment Act."[1] During the pendency of the Complaint proceeding before the FCC, the Commission certified to the FCC that it regulates the rates, terms, and conditions for pole attachments.[2] The Commission thereby reassumed jurisdiction over the rates set forth in the Joint Use Agreements. The FCC thereafter transferred the Complaint to the Commission on March 23, 2020.[3] Verizon claims that the rates in the Joint Use Agreements should be similar to the rate charged by FirstEnergy to cable companies and competitive local exchange carriers ("CLECs") under pole attachment license agreements (*i.e.*, the "new telecom rate"),[4] and that it is entitled to refunds reflecting the difference between this rate and the amount charged by FirstEnergy to Verizon under the Joint Use Agreements since 2011.[5]

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[1] 47 U.S.C. § 224; *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, 5331 (Report and Order and Order on Reconsideration dated April 7, 2011) ("2011 Pole Attachment Order"), *aff'd*, *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013).

[2] *See* States That Have Certified That They Regulate Pole Attachments, WC Docket 10-101, Public Notice, DA 20-302 (WCB Mar. 19, 2020).

[3] *In the Matter of Verizon Pennsylvania LLC and Verizon North LLC v. Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company*, Proceeding Number 19-354; Bureau ID Number EB-19-MD-008 (Order dated Mar. 23, 2020) ("*Transfer Order*").

[4] *See, e.g.*, Complaint at 1 (citing *In the Matter of Accelerating Wireline Broadband Deployment*, 33 FCC Rcd 7705, 7767-71 (Third Report and Order and Declaratory Ruling dated Aug. 3, 2018) ("*2018 Pole Attachment Order*")).

[5] *See, e.g.*, Complaint at 1. A comprehensive procedural history of the proceeding is set forth on pages 9-14 of FirstEnergy's Main Brief.

In his Recommended Decision issued on September 15, 2020 ("RD"), Deputy Chief Administrative Law Judge Joel H. Cheskis (the "ALJ") accepts virtually every argument presented by Verizon, rejects virtually every argument presented by FirstEnergy, and finds that: (1) the Joint Use Agreements at issue were "entered into or renewed" after the effective date of 47 C.F.R. § 1.1413 and, therefore, (a) Verizon was entitled to a presumption that it is similarly situated to competitive third-parties in its ability to attach to FirstEnergy's poles and (b) Verizon was entitled to a presumption that the new telecom rate formula established under the FCC's regulations should be the basis for determining just and reasonable rates under the Joint Use Agreements; (2) FirstEnergy did not rebut these presumptions and failed to show that Verizon receives benefits under the Joint Use Agreements that materially advantage it over its competitors attaching to FirstEnergy's poles; and (3) Verizon was entitled to refunds dating back to March 11, 2019. However, the RD declined to decide several fully litigated issues necessary to determine new rates even though both parties had a full opportunity to investigate and present evidence on these issues. In particular, the RD deferred resolution of two critical issues, the determination of the current cost of capital and the number of attachments to FirstEnergy's poles, where Verizon, the party with the ultimate burden of proof failed to present any evidence. Rather, the RD proposed a 60-day compliance during which the parties could further investigate actual inputs into the new telecom rate formula, go to mediation and present further evidence at an "abbreviated" evidentiary hearing and file supplemental briefs if the issues cannot be amicably resolved.

The RD commits multiple fundamental errors of law and ignores uncontested facts that, when corrected, demonstrate that Verizon's Complaint should be denied in its entirety. Therefore, as explained herein, the Commission should grant these Exceptions, reverse the RD,

and dismiss Verizon's Complaint with prejudice. Most significantly, the RD decides this case based entirely upon its own "strict" reading of the FCC's regulations and thereby completely ignores the Public Utility Code, controlling Pennsylvania judicial precedent, all FCC precedent and the interests of FirstEnergy's customers. The RD compounds this fundamental error by failing to establish new rates and deferring fundamental issues to further proceedings, which would prevent the Commission from deciding this case under its established schedule and improperly provides Verizon with a "second bite at the apple" to correct its failure to produce any evidence on key issues in this case. For these reasons, the RD should be rejected as it fails to provide meaningful guidance and analysis on the core issues presented in this proceeding.

In the alternative, if the Commission determines that Verizon is entitled to some relief in this proceeding, it should adopt the FCC old telecom rate as calculated by FirstEnergy. In addition, the Commission also should approve FirstEnergy's proposal to defer, create a regulatory asset for, and claim in its next base rate case any costs associated with any rate relief provided to Verizon.

II. SUMMARY OF EXCEPTIONS

This is a case of first impression and of statewide significance involving a dispute over the rates contained in several substantially similar joint use pole attachment agreements between Verizon and FirstEnergy. The RD essentially adopts or fails to decide every argument presented by Verizon and rejects or refuses to decide every argument presented by FirstEnergy. In so doing, the RD relies solely on its own "strict reading" of the FCC's regulations and thereby ignores Pennsylvania law, ignores FCC precedent (which repeatedly has rejected the relief sought by Verizon) and ignores the interests of FirstEnergy's electric customers. This decision cannot be allowed to stand. FirstEnergy respectfully requests that the Commission disregard the

RD and conduct its own de novo review of the facts and the law, in order to correct the following fundamental errors committed in the RD.

1. **The RD Applies The Wrong Legal Standard.** The RD concludes that the FCC regulations are the law to be applied in this case. RD at 46 (indicating that it was "strictly reading" the FCC's regulations and that "the FCC's regulations ***are*** Pennsylvania law" (emphasis in original)). While the FCC's regulations are a part of "the law," as a result of their adoption in Chapter 77 of the Commission's regulation, the regulations do not and cannot trump the Pennsylvania Public Utility Code and applicable judicial precedent. Based on this fundamental error, the RD does not apply or even consider other Pennsylvania law in deciding this case. FirstEnergy presented unrebutted evidence that the rates Verizon pays in the existing Joint Use Agreements are just and reasonable under the Public Utility Code and controlling judicial precedent. FirstEnergy further demonstrated that Section 508 of the Code precludes any award of refunds in this case. The RD simply ignores this evidence and law resulting in a fundamentally flawed and unsustainable result.

2. **The RD Completely Ignores The Interests Of Pennsylvania Electric Utility Customers.** In the *Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission*, Docket No. L-2018-3002672 (Order entered Sept. 3, 2019) ("*2019 Final Rulemaking Order*"), the Commission re-asserted jurisdiction over pole attachments, in part, to consider the interests of Pennsylvania electric ratepayers, as it is required to do under Pennsylvania law. FirstEnergy presented unrebutted evidence that any rate relief to Verizon would go entirely to its shareholders and would be funded/subsidized entirely by FirstEnergy's customers. The RD ignores these issues and simply notes that any rate decrease

to Verizon will be made up "elsewhere." RD at 48. This complete disregard for Pennsylvania electric utility customers should not be sanctioned by the Commission.

3. **The RD Completely Ignores All Relevant FCC Precedent.** As noted above, the RD also relies solely on FCC regulations and completely ignores FCC precedent interpreting those regulations. The FCC has rejected ILECs' requests to insert the new telecom rate into a joint use agreement that was not a new agreement in each of the three cases it has decided on this issue. It most recently issued such a ruling during this proceeding (May 2020) on facts that cannot be distinguished from the instant case. ILECs are 0-3 at the FCC, yet the RD fails to distinguish or even cite to these decisions in its disposition of this case.

4. **The Recommended Decision Provides Verizon The Equivalent Of First-Class Airline Seats At Coach Pricing.** Under the FCC's regulations and applicable precedent, the new telecom rate cannot be inserted into an existing joint use agreement if the ILEC receives material advantages in attaching to an electric utility's poles under a joint use agreement, as compared to non-pole-owning competitors who also attach to the electric utility's poles. FirstEnergy presented overwhelming evidence that Verizon receives such material advantages under the existing Joint Use Agreements and demonstrated that these advantages are identical to those that the FCC has repeatedly relied upon to reject ILEC requests for the new telecom rate. The RD itself appears to agree, stating "the Commission is giving Verizon the benefits of a first-class airline seat at coach prices." RD at 50. Yet, the RD inexplicably ignores this evidence finds that Verizon does not receive net material advantages under the joint use agreements. This erroneous and internally inconsistent ruling cannot rationally be affirmed.

5. **The RD's Ruling On Material Advantages Is A Classic "Catch-22."** The RD also concludes that FirstEnergy failed to meet its burden of proof to quantify the "net" material

benefits Verizon receives under the Joint Use Agreements. This information obviously is within the exclusive control of Verizon, and FirstEnergy repeatedly sought to obtain this information in discovery. Verizon objected and claimed that it did not possess this information and/or that it was irrelevant. Yet, the RD then holds FirstEnergy accountable for Verizon's failures and concludes FirstEnergy failed to meet its burden of proof on this issue. This blatantly inconsistent "Catch-22" should not be tolerated by the Commission and should be summarily rejected.

6. **The New Telecom Rate Cannot Reasonably Be Inserted Into The Existing Joint Use Agreements.** Even assuming that Verizon is entitled to the new telecom rate, there is no basis for inserting this rate into the existing Joint Use Agreements. The new telecom rate is an incremental cost rate, while the rates in the Joint Use Agreements are based on the fully allocated cost of a pole. It would be fundamentally inconsistent to insert an incremental cost rate into a fully allocated cost-sharing agreement. Rather, the new telecom rate should only be used in an equivalent CLEC licensing agreement. The RD failed to address this critical issue.

7. **The RD Does Not And Cannot Calculate New Telecom Rates Based On The Record In This Proceeding.** The RD, for reasons unexplained, declines to decide several critical issues necessary to apply the new telecom rate formula and establish new going forward rates. Notably, all of these "deferred" issues arise where Verizon failed to present any evidence to support its position. In essence, the RD provides Verizon a "second bite of the apple" to correct fundamental flaws in its evidentiary presentation. This is a fundamentally unfair result. Two examples demonstrate this point.

First, it is undisputed that an essential component to calculating the new telecom rate is a determination of FirstEnergy's current cost of capital. Verizon, who has the burden of proof in this proceeding, failed to present any evidence as to the current cost of common equity. There is

therefore no basis on this record to calculate a lawful new telecom rate. While the RD agrees that a determination of the current cost of equity is required, it provides a bail out to Verizon by proposing a "compliance period" to occur after the Commission enters its final order in this proceeding.

Second, in order to apply the FCC rate formulas, it is necessary to know the number of attachments to FirstEnergy's poles. FirstEnergy presented a study determining the actual number of attachments to the poles in its service territory using a statistically valid sample and sampling methodology. Verizon presented no evidence on this issue, instead relying on an FCC rebuttable presumption based on out of date national data. The RD refuses to even consider the merits of FirstEnergy's study and summarily rejects it because it was prepared for litigation. RD at 57 ("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."). Rather, the RD again defers this issue to be addressed in further highly "abbreviated" proceedings. With all due respect, this ruling cannot stand. If adopted, all expert studies presented during the course of a proceeding would be rejected, and parties who fail to present evidence would be rewarded with an additional opportunity to present evidence at a later date. Verizon made a critical mistake in its litigation strategy and should not be bailed out by the Commission at FirstEnergy's expense.

8. **The RD's Refund Proposal Is Unlawful And Unsupported By Any Record Evidence.** The RD also erroneously orders refunds back from March 11, 2019 (i.e., the effective date of 47 C.F.R. § 1.1413. This relief is patently unlawful. It is undisputed that the relief requested here is a revision or reformation of a contract. Section 508 of the Public Utility Code, 66 Pa.C.S. § 508, states on its face that any reformation of a contract can be prospective only, and retroactive revision also would violate the Contract Clauses of the United States and

Pennsylvania Constitutions. The RD, again simply ignoring Pennsylvania law, rejects this argument because "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." RD at 67. This non-sequitur fails to address the issue much less explain how the FCC's regulations can trump the plain language of the Public Utility Code.

9. **The RD Incorrectly Rejects The FCC's Old Telecom Rate.** The RD also rejects FirstEnergy's alternative proposal to adopt the FCC's old telecom rate. This proposal would address, at least in part, many of the legal and factual issues presented in this proceeding and would produce a compromise result that provides Verizon with substantial relief and provides some consideration to FirstEnergy's electric service customers. The RD rejects this alternative proposal, based upon its flawed conclusion that Verizon is entitled to the new telecom rate. Although FirstEnergy submits that the RD's flawed analysis should be rejected and Verizon's Complaint should be denied, alternatively, the old telecom rate could be adopted.

10. **The RD Fails To Adequately Address FirstEnergy's Alternative Deferral And Future Claim Proposal.** If any rate relief is granted in this proceeding, either refunds or ongoing, the Commission should expressly permit FirstEnergy to defer this amount as a regulatory asset for accounting purposes and claim recovery in its next base rate proceeding. The RD simply brushed aside this argument, which subjects FirstEnergy to a substantial risk that it will not be provided a fair opportunity to recover its investment in the joint use poles at issue.

III. EXCEPTIONS

A. THE RD FAILED TO APPLY THE CORRECT LEGAL STANDARDS.

1. Exception No. 1 – The RD Failed to Apply The Pennsylvania Public Utility Code And Controlling Pennsylvania Appellate To Verizon's Complaint. RD at 20, 23-24, 46.

The RD inconsistently and arbitrarily addresses the applicability of Pennsylvania law, the Public Utility Code, the Commission's orders and regulations, and the FCC's regulations. Although the RD claims that it properly considered these legal authorities in concert, the RD's reasoning and disposition of the issues reveal that it views the FCC's regulations as controlling and superseding the Public Utility Code and controlling Pennsylvania judicial decisions. The Commission should reject these erroneous conclusions.

The RD initially suggests that the FCC's regulations "exist in addition to, not in place of, the Commission's existing regulations and the Public Utility Code, where relevant." *See, e.g.*, RD at 20. The RD also appears to accept that "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…[which] 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." RD at 23.

Nevertheless, when analyzing FirstEnergy's arguments in this case, the RD reverses course and concludes that "the FCC's regulations ***are*** Pennsylvania law" and that "[i]n making such arguments, First Energy seeks to relitigate the Commission's Final Rulemaking Order that adopted this regulatory structure." RD at 46 (emphasis in original). Ultimately, the RD refuses to consider the merits of FirstEnergy's arguments under the Public Utility Code, and reasons that "[t]his case is not the time or place for such relitigation [of the Commission's Final Rulemaking

Order]". RD at 46. As a result, the RD misinterprets the *Final Rulemaking Order* and fails to apply or even consider the Public Utility Code and controlling judicial precedent.

First, the RD unlawfully holds that the Commission pre-judged the determination of just and reasonable rates in the *Final Rulemaking Order*. *See* RD at 47 ("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."). However, nowhere in the *Final Rulemaking Order* does the Commission state that the formula rates set forth in the FCC's regulations are just and reasonable. This issue was not before the Commission in the rulemaking proceeding, and the Commission did not decide this issue. Rather, whether the existing or proposed rates are just and reasonable would be resolved through the Commission's complaint process. The Commission properly abstained from declaring in its *Final Rulemaking Order* that existing pole attachment rates are unjust and unreasonable or that the new telecom rates are just and reasonable. Indeed, without an evidentiary record, the Commission cannot "pre-judge" or "pre-determine" whether specific rates are just and reasonable.[6]

Second, the Commission's powers derive from and are limited by the Public Utility Code. As such, the Commission cannot adopt regulations that contravene the Public Utility

[6] For instance, in response to comments from the Office of Consumer Advocate ("OCA") in response to *Alternative Ratemaking Methodologies* at Docket No. M-2015-2518883 (Tentative Order entered Mar. 3, 2017), the Commission specifically elected to adopt a policy statement—rather than a specific rate methodology by regulation—due to concerns regarding the lawfulness of adopting new ratemaking methodologies by regulation rather than through an amendment of the Public Utility Code. *See, e.g., Fixed Utility Distribution Rates Policy Statement*, Docket No. M-2015-2518883, at pp. 10-11 (Proposed Policy Statement Order entered May 23, 2018) (responding to OCA comments by indicating that "in lieu of establishing a specific rate methodology to be applied to all fixed utilities, we are proposing to establish factors that the fixed utilities, complainants, intervenors, and the Commission will consider in any future fixed utility Section 1308 rate proceeding."). However, even after the legislature passed Act 58 of 2018 and added Section 1330 of the Public Utility Code, which expressly granted the Commission the authority to approve alternative ratemaking methodologies, the Commission's rulemaking order made no blanket determination that any of the referenced alternative ratemaking methodologies would be *per se* just and reasonable. *See Implementation of Act 58 of 2018 Alternative Ratemaking for Utilities*, 2019 Pa. PUC LEXIS 140 (Order entered Apr. 25, 2019). Such issues are fact-based determinations that require evidentiary records developed through litigation.

Code,[7] nor can it apply the regulations in a manner that is inconsistent with or exceeds its statutory authority. FirstEnergy MB at 14-15; FirstEnergy RB at 8-9 (citing authorities and explaining that "[e]ven if the Commission has adopted the FCC's regulations by reference, its authority remains bound by the plain language of the Public Utility Code."). Yet, by concluding that "the FCC's regulations ***are*** Pennsylvania law" (RD at 46), and then refusing to actually apply any of the FirstEnergy's arguments regarding the Public Utility Code or binding Pennsylvania appellate precedent (RD at 46-48), the RD applies the FCC's regulations in a manner that exceeds the Commission's statutory authority.[8]

Consequently, regardless of whether the Commission has adopted the FCC's regulations as its own, the Commission must make specific findings and conclusions to determine that: (1) FirstEnergy's rates are unjust and unreasonable under the Public Utility Code; and (2) the new telecom rate calculated by Verizon is the just and reasonable rate. FirstEnergy MB at Section V.A.2.; FirstEnergy RB at Section IV A.1. Moreover, as the Joint Use Agreements at issue are contracts, the Commission's authority to award relief in this proceeding is limited exclusively to prospective relief under Section 508 of the Public Utility Code. *See* FirstEnergy MB at 19-21, 91-93; FirstEnergy RB at 58-59. By exceeding the provisions of the Code and violating binding Pennsylvania precedent, the RD improperly exceeds its statutory authority.

[7] It is well-established that an administrative agency's regulations that contravene a statute are invalid. *See Public Sch. Employees' Ret. Sys. v. Pa. Sch. Bds. Ass'n*, 682 A.2d 291, 294 (Pa. 1996); *PPL Energyplus, LLC v. Commonwealth*, 800 A.2d 360, 363 (Pa. Cmwlth. 2002). "A statute is the law and trumps an administrative agency's regulations." *Commonwealth v. Kerstetter*, 62 A.3d 1065, 1069 (Pa. Cmwlth. 2013) (citation omitted). Therefore, "the regulation must yield to the statute" if there is an inconsistency between the two. *See Victory Bank v. Commonwealth*, 219 A.3d 1236, 1243 (Pa. Cmwlth. 2019) (citations omitted). "[M]ere administrative ease" also "cannot justify a regulation which is inconsistent with the language and purpose of the statute." *Commonwealth v. Gilmour Mfg. Co.*, 822 A.2d 676, 683 (Pa. 2003).

[8] Establishing such new rates without the requisite findings under Section 1301 would FirstEnergy also constitute an unlawful taking of property without just compensation. *See* FirstEnergy MB at 93 (citing U.S. Const. amend. V; *see also* Pa. Const. art. I, § 10).

Third, under Chapter 13 of the Public Utility Code, cost of service is considered the "polestar" of public utility ratemaking under binding appellate precedent. FirstEnergy MB at 21 (quoting *Lloyd v. Pa. Pub. Util. Comm'n*, 904 A.2d 1010 (Pa. Cmwlth. 2006), *appeal denied*, 916 A.2d 1104 (2007)), 41-42; FirstEnergy RB at 28-29. If the Commission wishes to depart from binding appellate precedent that imposes this requirement, it must obtain the statutory authority to do so. In this regard, the RD's attempt to rely upon Chapter 30 of the Public Utility Code to support this departure is irrelevant because Verizon's Complaint seeks to change the rate FirstEnergy charges Verizon. *See* RD at 12-13 (noting that Verizon is subject to alternative regulation under Chapter 30 and FirstEnergy is regulated under traditional rate base/rate of return regulation), and 50 (concluding that applying the new telecom rate is a "natural outgrowth" of Chapter 30 of the Public Utility Code). The rates charged by FirstEnergy's Pennsylvania EDCs are not subject to Chapter 30 of the Public Utility Code because FirstEnergy is not a telecommunications provider.

Moreover, the Commission obviously made no blanket finding in the *Final Rulemaking Order* that all existing rates contrary to this regulation were unjust and unreasonable or else electric utilities would have been able to appeal the *Final Rulemaking Order* to the Commonwealth Court. Without such declaration by the Commission, any appeal would have been dismissed on the basis that it was seeking pre-enforcement review of the Commission's regulations.[9]

For these reasons, the RD erred by relying exclusively upon the FCC's regulations without regard to the standards imposed by the Public Utility Code and binding Pennsylvania appellate precedent.

[9] If the RD's claim that FirstEnergy is correct, then FirstEnergy's due process rights would be violated because it would be precluded from any of the determination of just and reasonable rates under the Joint Use Agreements.

2. Exception No. 2 – The RD Erroneously Concludes That The Rates Verizon Pays Under The Joint Use Agreements Are Unjust And Unreasonable. RD at 46-49.

The RD declines to conduct any analysis of the rates Verizon currently pays FirstEnergy or the new telecom rate under traditional ratemaking standards embodied in the Public Utility Code and binding Pennsylvania precedent. RD at 47-49. As explained in FirstEnergy's Briefs, Verizon presented no evidence under Pennsylvania Law that the rates it pays under the Joint Use Agreements are unjust and unreasonable. FirstEnergy MB at 41-45; FirstEnergy RB at 18-32. More specifically, Verizon offered no evidence regarding the cost of common equity earned by FirstEnergy under current rates or under proposed rates. FirstEnergy MB at 42-43. And, furthermore, Verizon made no showing that the new telecom rate is consistent with the cost of service principles that are recognized as the polestar of Pennsylvania ratemaking. FirstEnergy MB at 43-45. Due to these failures of proof, the RD errs by ignoring the "very heavy burden"[10] Verizon must carry to demonstrate the rates it pays FirstEnergy are unjust and unreasonable under the Public Utility Code.

Unlike Verizon, FirstEnergy 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. FirstEnergy MB at 45-48; FirstEnergy RB at 29-30. Moreover, FirstEnergy specifically demonstrated that past Commission precedent demonstrates that the rates Verizon pays under the Joint Use Agreements are just and reasonable. FirstEnergy MB at 44-45 (citing *NEPTC Order*); FirstEnergy RB at 24-

[10] *See Shenango Twp. Bd. of Supervisors v. Pa. Pub. Util. Comm'n*, 686 A.2d 910, 914 (Pa. Cmwlth. 1996) (citing *Zucker v. Pa. Pub. Util. Comm'n*, 401 A.2d 1377 (Pa. Cmwlth. 1979); *Brockway Glass Co. v. Pa. Pub. Util. Comm'n*, 437 A.2d 1067 (Pa. Cmwlth. 1981)).

25 (citing the same).[11] The RD rejects all of this evidence as "irrelevant" because it does not appear in the FCC's regulations adopted by the Commission. This is a legally flawed conclusion and should be rejected.

3. Exception No. 3 – The RD Erred By Failing To Consider The Interests of Electric Utility Ratepayers. RD at 48.

The RD should also be reversed because it completely disregards the interests of FirstEnergy electric ratepayers, stating that "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." RD at 48 (emphasis added). This conclusion should be rejected.

Importantly, Verizon is not regulated on a cost-of-service basis (i.e., it is not required to flow through reductions in its expenses to customers), and it presented no evidence or assurance that lowering the rates it pays to FirstEnergy will benefit broadband deployment or expansion. *See* FirstEnergy MB at 50-51. As such, any rate reduction under the Joint Use Agreements will go directly to Verizon's shareholders and, as explained by FirstEnergy, any associated loss of revenues will negatively impact the rates of FirstEnergy's EDC's electric ratepayers. FirstEnergy MB at 48; FirstEnergy RB at 30-32.

The Commission recognized in the *Final Rulemaking Order* that it was reverse preempting FCC jurisdiction over pole attachments to provide "Pennsylvania…[a] benefit from a state-level perspective," given that the Commission is better positioned to "balanc[e] the safety and reliability of the electric distribution system, adequate cost recovery for attachments, and the need for timely access to utility infrastructure" than the FCC. *See 2019 Final Rulemaking Order*

[11] The RD attempts to distinguish the *NEPTC Order* by stating that it pre-dates the implementation of Chapter 77. RD at 48-49. Yet, this distinction appears to ultimately not matter; as explained below, the RD also ignores persuasive FCC authority that post-dates the *Final Rulemaking Order* and concludes Verizon is not entitled to the relief it seeks. *See* Sections III.B.4. and III.B.6.d. *infra*.

at 45, 50 (crediting the comments of PPL Electric Utilities Corporation). The Commission also noted that it will "balance statewide broadband goals against EDCs' concerns for safety and reliability of electric service and infrastructure." *2019 Final Rulemaking Order* at 9. Furthermore, the Commission intended to "create safeguards to ensure that the Commission retains authority to make basic policy choices" regarding pole attachments." *2019 Final Rulemaking Order* at 23.

The RD ignores all these reasons for the Commission's assertion of jurisdiction over pole attachments and, instead, subordinates the interests of Pennsylvania EDCs and, more importantly, Pennsylvania electric service ratepayers to the interests of Verizon's (and other ILECs') shareholders. Indeed, the RD recognizes that through this decision "the Commission is giving Verizon the benefits of a first-class airline seat at coach prices." RD at 50. The cost of providing those benefits will be borne by Pennsylvania electric ratepayers with no showing by Verizon that broadband deployment will actually be spurred.[12] The RD appears content to provide Verizon a substantial discount under the Joint Use Agreements and for FirstEnergy's Pennsylvania ratepayers to foot the bill, with absolutely no assurance that this reduction will actually benefit broadband services or deployment to them or any other Pennsylvanians. For these reasons, and the reasons explained in FirstEnergy's Briefs and testimony, the Commission should deny Verizon's Complaint and the RD should be reversed.

B. VERIZON IS NOT ENTITLED TO THE NEW TELECOM RATE UNDER THE FCC'S REGULATIONS AND PRECEDENT.

4. Exception No. 4 – The RD Completely Ignores FCC Precedent That Demonstrates Verizon Is Not Entitled To the Relief It Seeks. RD at 46, 49.

The RD errs by failing to apply any of the "persuasive" FCC authority identified by the

[12] Indeed, Verizon specifically claimed this issue was irrelevant to the Commission's considerations in this case. FirstEnergy MB at 50-51 (citing FirstEnergy Exhibit JMS-1 (Verizon's Answer to FE to Verizon Set II, No. 8)).

parties. RD at 46, 49. In particular, the RD asserts that its analysis is based upon "strictly reading Section 1.1413 adopted by the Commission." RD at 46. The RD further claims that "taking a strict view of Section 1.1413, considering FCC orders as persuasive and not mandatory" simplifies the issues in this case. RD at 46.

However, the FCC's orders should not be ignored here. The FCC has issued three decisions regarding the rates an ILEC pays an electric utility under joint use agreements, and has never ordered the new telecom rate to be inserted into an agreement that is similar to the Joint Use Agreements at issue here. FirstEnergy RB at 48-49 (citing authorities). Importantly, in *In the Matter of BellSouth Telecommunications, LLC d/b/a/ AT&T Florida v. Florida Power and Light Company*, Proceeding No. 19-187; Bureau ID No. EB-19-MD-006 (Memorandum Opinion and Order adopted May 20, 2020) ("*AT&T v. FPL*"), the FCC concluded that "we find that AT&T is not similarly situated to competitive LEC and cable attachers, we also find that the Old Telecom Rate provides a reference point for a "just and reasonable rate" for the period ending with the 2018 pole rental year." *AT&T v. FPL Order* at ¶ 17. Similarly, in *Verizon Va. v. Va. Elec. & Power Co.*, Proceeding No. 15-190; Bureau ID No. EB-15-MD-006, 32 FCC Rcd 3750, 2017 FCC LEXIS 1304 (2017) ("*Dominion Order*"), the FCC explained "We encourage the parties to negotiate an agreed-upon rate that is consistent with the guidance provided herein. Although we do not establish a new pole attachment rate at this time…" *Dominion Order* at ¶ 22. And in *Verizon Fla. v. Fla. Power & Light Co.*, Docket No. 14-216; File No. EB-14-MD-003, 2015 FCC LEXIS 441, 30 FCC Rcd 1140 (2015) ("*FPL 2015 Order*"), the FCC specifically held "that Verizon has adduced insufficient evidence to support a finding that the Agreement Rates are unreasonable, or for the Commission to set a just and reasonable rate." *FPL 2015 Order* at ¶ 24.

Indeed, at no point in its disposition of the appropriate legal standard, the pole attachment rates, the pole attachment rate methodology or refunds does the RD cite to or analyze any of these decisions. The RD simply ignores these cases and adopts novel arguments and relief that are completely unsupported by any prior FCC decision.[13] If these decisions were applied to the instant dispute, then Verizon's Complaint would be denied.

The Commission should not ignore these authorities in the interest of allegedly "simplifying" the issues. Certainly, the Commission has the capability of reviewing and applying three FCC orders to the facts of this case and should not dismiss them merely to simplify the issues before it. For these reasons, and for the reasons more fully explained in FirstEnergy's Briefs, even under FCC precedent and authorities, Verizon has failed to demonstrate that it is entitled to the relief it seeks.

5. Exception No. 5 – The RD Erred By Concluding That The Joint Use Agreements Were "Entered Into Or Renewed" After The Effective Date Of 47 C.F.R. § 1.1413. RD at 41-43.

The RD erroneously concludes that the "the new telecom rate presumption in the Commission's regulations, adopting the FCC's regulations, applies" to the Joint Use Agreements at issue. RD at 40-41. In reaching this conclusion, the RD finds that "the initial term of each joint use agreement has expired" and that "the agreements automatically extended and will continue to do so until terminated." RD at 42.[14] As such, the RD holds that these agreements

[13] The importance of this decision was clearly recognized by the RD as it noted that this is a case of first impression before the Commission. RD at 10. However, the importance is further amplified by the fact that the relief granted by the RD is novel in light of the FCC's own decisions. As such, not only did the RD commit the numerous errors identified in these Exceptions, it also granted Verizon novel relief that the FCC itself has never awarded under its regulations. The implications of this decision, if left unmodified by the Commission, will substantially disrupt joint use agreements between electric utilities and ILECs across the Commonwealth and across the country, in a manner that the FCC itself clearly did not contemplate.

[14] FirstEnergy notes that it is not disputed that the Joint Use Agreements were not entered into after March 11, 2019. Therefore, the material question is whether they were "entered into or renewed" after March 11, 2019. *See* FirstEnergy MB at 64-66; FirstEnergy RB at 38-40, 48-49.

were "entered into or renewed after the effective date of" 47 C.F.R. § 1.1413(b). RD at 43. This conclusion is in error and should be rejected by the Commission for multiple reasons.

First, the plain language of the Joint Use Agreements demonstrates they were not "renewed" after March 11, 2019. Rather, as noted by the RD the Joint Use Agreements state that they "shall continue in force thereafter until terminated." RD at 42 (emphasis added). The RD simply reads the word "continue" out of the agreements and replaces it with the term "renew." It is unlawful to replace the explicit terms of a contract with different terms, and the RD's attempt to do so should be rejected. *See* FirstEnergy MB at 65-66.

Second, the RD's interpretation of the plain language of the Joint Use Agreements reads additional words into Section 1.1413(b) of the FCC's regulations. Section 1.1413(b) clearly states that the presumptions set forth only apply to agreements that were "***entered into or renewed*** after the effective date" of this regulation. 47 C.F.R. § 1.1413(b). The word "continue" does not appear. It is simply capricious for the RD to assert that it is strictly applying the FCC's regulations, and then proceed to read additional words into those regulations.

Third, the RD's assertion that the interpretation of the plain language of the agreements advanced by FirstEnergy "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" disregards the FCC's rulemaking orders. RD at 43. The FCC's order in *In the Matter of Accelerating Wireline Broadband Deployment*, 33 FCC Rcd 7705 (Third Report and Order and Declaratory Ruling dated Aug. 3, 2018) ("*2018 Pole Attachment Order*")explicitly stated the new rules "will impact privately-negotiated agreements and so the presumption will only apply, as it relates to existing contracts, upon renewal of those agreements." FirstEnergy MB at 65-65; FirstEnergy RB at 38-40. The RD

similarly disregards the FCC's statement that it "is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable." FirstEnergy MB at 36. Moreover, the RD's approach would mean essentially every joint use agreement in effect after March 11, 2019, is "renewed" as of March 11, 2019, and entitled to the presumptions set forth in Section 1.1413(b). If that was the FCC's intent in the *2018 Pole Attachment Order*, the FCC would have said so and not bothered to describe at length when presumption applied and when it did not.

Fourth, the RD ignores applicable FCC precedent that declined to insert the new telecom rate into similar agreements. FirstEnergy RB at 48-49 (citing *AT&T v. FPL* ¶ 11; *Dominion Order* ¶ 12; *FPL 2015 Order*). Indeed, the agreements at issue in each of these decisions were each in their secondary terms and neither of the agreements was determined to warrant application of the new telecom rate.

Fifth, the RD violates Commission precedent and Pennsylvania law by reforming the explicit terms of the Joint Use Agreements in order to determine that they qualify for the presumptions set forth in Section 1.1413 of the FCC's regulations, contrary to Pennsylvania law. FirstEnergy MB at 65-66 (citing *New Charter Coal v. McKee*, 191 A.2d 830, 833 (Pa. 1963) ("[T]he law will not reform a written contract so as to make a contract for the parties that they did not make between themselves and certainly never to rescue a party who did not reasonably foresee the consequences of his bargain."); FirstEnergy RB at 23-28 (describing the *ALLTEL ID*). Importantly, in the *ALLTEL ID*, the Commission specifically declined to revise the termination provisions of a joint use agreement simply and adopted the presiding officer's reasoning that:

> The point is, an adverse consequence to joint complainants does not equate to the inclusion of a negotiated termination provision in

> a contract involving joint complainants with being unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and the general well-being of this Commonwealth. Under 66 Pa.C.S. § 508, the Commission does not have the authority to vary, reform, or revise the Agreements' termination provision because the result will be undesireable[sic], aesthetically displeasing, inefficient, or disadvantageous to the joint complainants. None of these results make the Agreements' termination provision 'adverse to the public interest and the general well-being of this Commonwealth.'

ALLTEL ID, at *52. Here, the RD recommends the Commission do precisely what it declined to do in the *ALLTEL ID* proceeding: modify the termination provision of a joint use agreement because an ILEC is dissatisfied with its explicit terms.

If the RD's conclusion that the Joint Use Agreements were "renewed" after March 11, 2019 is corrected, then Verizon is not entitled to the presumptions it seeks under Section 1.1413(b). As explained in FirstEnergy's Briefs, without the presumptions set forth in Section 1.1413(b), Verizon has utterly failed to carry its burden of proof under the FCC's regulations and precedent and its Complainant must be dismissed. FirstEnergy MB at Section V.A.3.; FirstEnergy RB at Section V.A.2. For these reasons, and the reasons more fully explained in FirstEnergy's Briefs and testimony, the Commission should deny Verizon's Complaint.

6. Exception No. 6 – The RD Erred By Concluding That FirstEnergy Failed To Demonstrate That Verizon Receives Quantifiable Material Advantages Under The Joint Use Agreements. RD at 44-46.

The RD further errs by concluding 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." RD at 44. In reaching this conclusion, the RD incorrectly rejected all of FirstEnergy's arguments regarding the material advantages, ignored FCC

precedent and, by its own candid admission, gives "Verizon the benefits of a first-class airline seat at coach prices." RD at 44-46, 50.

As explained below, the RD's finding warrants reversal for four specific reasons. FirstEnergy has demonstrated that Verizon receives substantial material advantages under the Joint Use Agreements and, therefore, is not entitled to the presumptions that it is similarly situated to its competitors or should receive the new telecom rate.

a. The Commission Should Not Endorse Verizon's Attempts To Withhold Critical Information Related To The Material Advantages It Receives Under the Joint Use Agreements.

The RD concludes that FirstEnergy failed to meet its burden of proof because it failed to adequately quantify Verizon's net material benefits under the Joint Use Agreements. RD at 44-46. However, the RD fails to acknowledge that such evidence is within Verizon's exclusive control, that FirstEnergy repeatedly sought such information from Verizon in discovery, that Verizon objected to providing this information or said it does not exist, and then Verizon blamed FirstEnergy for failing to present this evidence. As a result, FirstEnergy was not able to access critical financial information necessary to quantify the cost-savings or revenue advantages Verizon experiences under the Joint Use Agreements. (*See, e.g.*, FirstEnergy St. 1-R, pp. 39-41 (discussing Verizon's repeated failures to provide supporting data for the assertions made in the Complaint and its direct testimony).)

FirstEnergy sought substantial discovery from Verizon regarding the alleged cost-savings and revenue benefits associated with the benefits it receives under the Joint Use Agreements. Despite the fact that any analysis of *Verizon's cost savings* relative to its competitors, necessarily requires information regarding *Verizon's costs*, Verizon repeatedly failed to provide this information. FirstEnergy MB at 78-79. More specifically:

- Although Verizon claimed that the advantage provided by having the guaranteed lowest position on the pole was actually a disadvantage not an advantage, it produced no data to verify this claim. In fact, Verizon stated that it "does not separately track the costs it incurs and is not aware of any costs it avoids because of the location of its facilities on a utility pole." (FirstEnergy St. 1-R, p. 39.[15])

- Although Verizon claimed that it "receives more requests to raise its cables to accommodate oversize loads that exceed standard vertical clearance requirements," Verizon responded in discovery that it "does not generally track or document requests to raise its cables, and does not do so by the owner of the pole to which the cable was attached." (FirstEnergy St. 1-R, p. 40.[16])

- Although Verizon claimed that it "incurs increased pole transfer costs" because its facilities have the lowest position on FirstEnergy's poles, it again responded to discovery that it does not track the requested information. (FirstEnergy St. 1-R, p. 40.[17])

- Although Verizon claimed it incurs comparable make ready costs to its competitors, Verizon responded in discovery that it "does not separately track the time required or cost incurred to complete the specific tasks." (FirstEnergy St. 1-R, p. 41.[18])

- And although Verizon claimed it incurred "comparable costs" to its competitors to perform "its own safety checks, at no cost to FirstEnergy," Verizon stated that it "does not separately track the time required or cost incurred by Verizon to perform the safety checks of its facilities." (FirstEnergy St. 1-R, p. 41[19])

Moreover, when pressed about its failure to produce any information to verify its claims, and after repeated objections to FirstEnergy's discovery regarding the cost-savings or revenue benefits associated with attaching to FirstEnergy's poles, Verizon blithely asserted that FirstEnergy should have been able to track Verizon's costs and revenues to quantify these benefits. *See* FirstEnergy MB at 78 (quoting Verizon St. 1.1, pp. 11-12). The RD considered none of these arguments and, instead, made findings and conclusions based upon the absence of information that is (or should be) in Verizon's information and control. As a result, the RD turns Section 332(a) of the Public Utility Code, and any concept of a complainant possessing the

[15] FirstEnergy Exhibit SFS-8 (CONFIDENTIAL) (Verizon's Answer to FE to Verizon Set I, No. 14).
[16] FirstEnergy Exhibit SFS-11 (Verizon's Answer to FE to Verizon Set I, No. 17.)
[17] FirstEnergy Exhibit SFS-12 (Verizon's Answers to FE to Verizon Set I, Nos. 18 and 19.)
[18] FirstEnergy Exhibit SFS-13 (Verizon's Answer to FE to Verizon Set I, No. 11.)
[19] FirstEnergy Exhibit SFS-14 (Verizon's Answer to FE to Verizon Set I, No. 12.)

ultimate burden of proof, on its head. And, more fundamentally, unless it is modified, the RD denies FirstEnergy its rights to due process of law.[20]

By disregarding these claims, the RD places FirstEnergy into a classic "catch-22" scenario.[21] The only way for FirstEnergy to demonstrate that Verizon experiences cost-savings or revenue benefits in comparison to its competitors is by obtaining information from Verizon regarding the costs it incurs and the revenues associated with attaching to FirstEnergy's poles. However, FirstEnergy cannot make this showing if, as Verizon repeatedly asserted, it does not track or possess that information. The RD ignores this catch-22 and, therefore, erroneously concludes that FirstEnergy failed to meet its burden of proof.

b. FirstEnergy Demonstrated That Verizon Receives Material Advantages Under The Joint Use Agreements.

The RD further erred by simply rejecting all of the material advantages identified by FirstEnergy. RD at 44-46. FirstEnergy demonstrated that Verizon receives numerous material benefits (FirstEnergy MB at 74-77; FirstEnergy RB at 42-45), and at one point the RD candidly agrees stating that it "is giving Verizon the benefits of a first-class airline seat at coach prices." RD at 50.

Specifically, the evidence demonstrates that:

> [T]he rate Verizon pays under the Joint Use Agreements and the new telecom rate were each developed for very different services. Verizon receives several important advantages under the Joint Use Agreements. For example, Verizon (a) obtained a speed-to-market advantage, (b) does not pay certain up-front work costs, (c) avoids

[20] The Commission must provide parties fundamental fairness and due process of law. *See Novak v. Unemp. Compensation Bd. of Review*, 457 A.2d 610, 612 (Pa. Cmwlth. 1983) (citations omitted); *Nuss v. Falls*, 491 A.2d 971, 973 (Pa. Cmwlth. 1985) (citations omitted); *see also* 66 Pa.C.S. § 332(c) (stating that "[e]very party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts").

[21] The phrase "catch-22" is famously associated with Jospeh Heller's novel of the same name and is commonly understood to mean "a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule." *Catch-22*, Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/catch-22.

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

FirstEnergy RB at 34-35 (emphasis added).

In addition, FirstEnergy explained why each of Verizon's criticisms of these benefits is without merit. FirstEnergy MB at 77-80; FirstEnergy RB at 45-48. Moreover, with respect to its comparison of the advantages that Verizon receives under the Joint Use Agreements compared to its competitors who attach to FirstEnergy's poles under third-party license agreements, the RD did not even undertake a cursory analysis of the fundamental differences that exist between the two agreements. As explained by FirstEnergy, the fundamental differences between these types of agreements further demonstrates the numerous advantages that Verizon receives. *See* FirstEnergy RB at 43-44 (explaining the numerous fundamental differences between the 1986 Penelec / Bell Telephone Agreement, which is substantially similar to the other Joint Use Agreements, and the FirstEnergy Third-Party Pole Attachment Agreement); *see also* FirstEnergy MB at 81-83. Without conducting this analysis, the RD could not rationally conclude that Verizon is able to attach to FirstEnergy's poles in a manner that is comparable to its competitors.

c. The RD Errs By Relying Upon Verizon's Status As A Pole Owner When Analyzing Its Alleged Disadvantages.

The RD further errs by considering the alleged disadvantages that Verizon receives under the Joint Use Agreements as a pole owner. RD at 45. As the RD states: "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." RD at 45. This "disadvantage" has nothing to do with Verizon's status as an attacher under the Joint Use Agreements; it is only relevant to its status as a pole owner.

FirstEnergy explained that the *2018 Pole Attachment Order* is clear that the relevant comparison is whether an ILEC as a pole attaching entity receives material benefits under a joint use agreement in comparison to their competitors as attaching entities under third-party agreements. *See* FirstEnergy MB at 79-80 (quoting *2018 Pole Attachment Order* ¶¶ 123 ("…an incumbent LEC will receive comparable pole attachment rates, terms, and conditions as a similarly-situated telecommunications carrier or a cable television system (telecommunications attachers)." (emphasis added)), 126 ("…we should presume that incumbent LECs are similarly situated to other telecommunications attachers and entitled to pole attachment rates, terms, and conditions that are comparable to the telecommunications attachers." (emphasis added))). Moreover, the specific language of Section 1.1413 states the question is whether Verizon "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) (emphasis added). Verizon's costs as a pole owner are simply irrelevant to the comparison of its costs as an attacher to other non-pole-owning attachers, and the RD erred in concluding these costs offset the benefits Verizon receives under the Joint Use Agreements.

Moreover, the RD's analysis ignores the advantages of pole ownership. For instance, Verizon as a pole owner receives substantial revenues from those who attach to its poles, including Verizon's own competitors. To the extent that pole ownership disadvantages are relevant, they are outweighed by the benefits Verizon receives via pole ownership.

d. The RD Completely Disregards FCC Precedent.

Finally, the RD erred in his analysis of the material advantages that Verizon receives

under the Joint Use Agreements by failing to consider or analyze the FCC's recent decision in the *AT&T v. FPL Order*. *See* RD at 44-46. Indeed, in the disposition of this issue, the *AT&T v. FPL Order* is not even referenced, let alone analyzed.

Importantly, when considering several of the benefits that FirstEnergy identified Verizon receives under the Joint Use Agreements in another proceeding, the FCC concluded that "AT&T receives significant benefits under the JUA not afforded competitive LECs and cable attachers, and that it therefore is entitled to the Old Telecom Rate, and not the New Telecom Rate." *AT&T v. FPL Order* ¶ 14. As explained in FirstEnergy's Reply Brief, the following benefits (identified in FirstEnergy's comparison of the Joint Use Agreements and the FirstEnergy Third-Party Pole Attachment Agreement, were specifically recognized by the FCC in the *AT&T v. FPL Order*:

Material Advantage	***AT&T v. FPL Order*?**[22]	**Verizon-FirstEnergy Joint Use Agreements?**[23]
Guaranteed Access	Yes	Yes
Reservation Of Space	Yes	Yes
ILEC Not Subject To Inspection Fees	Yes	Yes
ILEC Not Subject TO License Preparation And Admin Fees	Yes	Yes

The *AT&T FPL Order* also specifically concluded that the aforementioned benefits existed without an analysis of any associated dollar amount or a statement that a quantification of an associated dollar amount with each benefit is necessary. *AT&T v. FPL Order* ¶ 14 (crediting the benefits received by an ILEC under a joint use agreement, but not quantifying any of the credited benefits). Therefore, these advantages are material and sufficient to meet any burden of FirstEnergy to rebut the presumption established by the FCC's regulations.

The RD aptly described the problem with disregarding the *AT&T v. FPL Order* when it concluded Verizon is entitled to the presumption afforded under Section 1.1413 of the FCC's

[22] Each of these benefits was recognized as a material advantage in the *AT&T v. FPL Order* at paragraph 14.
[23] Each of these benefits' locations in the record is located at FirstEnergy RB at 43-44.

regulations and that FirstEnergy did not rebut this presumption. RD at 50. However, by disregarding FirstEnergy's evidence and the *AT&T v. FPL Order*, the RD awards Verizon relief that has never been granted by the FCC at the expense of FirstEnergy's electric customers.

For these reasons, and the reasons more fully explained in FirstEnergy's Briefs and testimony, FirstEnergy carried its burden to rebut the presumptions set forth in Section 1.1413(b) of the FCC's regulations. Therefore, FirstEnergy demonstrated that Verizon was not entitled to the new telecom rate under the FCC's regulations and applicable precedent.

C. THE RD ERRED BY INSERTING THE NEW TELECOM RATE INTO THE EXISTING JOINT USE AGREEMENTS.

7. Exception No. 7 – The RD Erred By Inserting The New Telecom Rate Into A Joint Use Agreement. RD at 49-50.

The RD concludes that the new telecom rate should simply be inserted into the existing joint use agreements. This recommendation ignores the undisputed facts that the rates in the Joint Use Agreements are fully allocated cost rates designed to allocate the full cost of pole ownership to attachers, while the new telecom rate is an incremental cost rate that makes no attempt to allocate common costs. *See* FirstEnergy MB at 32-34. To the extent that the Commission seeks to use the new telecom rate in the pole attachment agreements between Verizon and FirstEnergy, it should order that FirstEnergy's standard third-party attacher license agreement be used. *See* FirstEnergy MB at 81-82 (describing the fundamental differences between the Joint Use Agreements and third-party attacher license agreements); FirstEnergy RB at 16. In this regard, Verizon would receive the new telecom rate (i.e., the same rate Verizon's competitors pay FirstEnergy to attach to FirstEnergy's poles) under truly comparable terms and conditions to its competitors.

8. Exception No. 8 – The RD Erred By Rejecting The Unrebutted Actual Inputs Into The FCC Rate Formulas Prepared By FirstEnergy. RD at 57.

Having erroneously concluded that the FCC's new telecom rate formula should be used to determine the rates Verizon pays FirstEnergy under the Joint Use Agreements going forward, the RD compounds this error by rejecting FirstEnergy's unrebutted evidence of the actual formula inputs. *See* RD at 57. Importantly, FirstEnergy specifically explained that the FCC's presumptive inputs for the "space factor" (i.e., the space occupied by an attachment; (2) the amount of usable space on a pole; (3) the amount of unusable space on a pole is presumed to be 24 feet; and (4) the pole height) as well as the number of attaching entities to FirstEnergy's pole, were not reflective of actual current conditions in FirstEnergy's territory and presented actual inputs with respect to each of these factors. FirstEnergy MB at 84-88. Critically, FirstEnergy demonstrated that there are approximately 3 attachments on each of its poles (rather than the FCC's presumed 5 attachments) and that each attachment occupies approximately 1.3 feet of space (rather than the FCC's presumed 1 foot). FirstEnergy MB at 85.

The RD's rejection of FirstEnergy's unrebutted actual inputs solely because the data was "quickly gathered during a review of a small set of poles in response to litigation" should not be affirmed. First, the sample size used is irrelevant because as explained by FirstEnergy witness Mr. Scott Carlin, the "incontrovertible fact is that the validity of the sample, including all attributes verified, is substantially above the industry-accepted standard for accuracy." (FirstEnergy St. 6-RJ, p. 4.) Indeed, "even after counting the actual alleged errors identified by Verizon, the sample still has a 99.30% accuracy rate." (FirstEnergy St. 6-RJ, pp. 4-5.) The RD, like Verizon, ultimately appears to "take[] issue with FirstEnergy not scoring 100% on a test, where a 99.3% is still an A+ grade." *See* FirstEnergy RB at 53-54. In this regard, the RD is

completely divorced from widely accepted concepts of statistical validity and should not be affirmed.

Second, the RD improperly rejects FirstEnergy's study because it was prepared during the course of litigation. If this alone were a valid basis for rejecting expert testimony—and it is not—then the opinion of an expert retained to prepare a study and provide testimony during the course of litigation could never be considered credible and substantial evidence.

Therefore, to the extent that the Commission uses the FCC's formula rates to calculate new rates under the Joint Use Agreements, it must use FirstEnergy's actual input data.

9. Exception No. 9 – The RD Failed To Determine The Current Cost Of Capital In Computing The Rates Under The Joint Use Agreements. RD at 57.

The RD further failed to deny Verizon's Complaint due to its complete failure to present any evidence regarding the current cost of capital. RD at 57. FirstEnergy specifically highlighted Verizon's failure to present evidence regarding these inputs including the cost of common equity.[24]

Importantly, FirstEnergy's Main Brief specifically explained that it is a central tenet of ratemaking under the Public Utility Code and Pennsylvania that "one must know the rate of return at present rates and compare that return to a 'fair rate of return'" in order to evaluate whether a public utility's rates are just and reasonable. FirstEnergy MB at 41-43. Faced with the utter absence of any evidence being presented on this issue, the RD capriciously rejects FirstEnergy's arguments on this point—which demonstrate that Verizon has failed to carry its burden of proof in this proceeding—yet later accepts Verizon's argument that the "cost of

[24] *See* FirstEnergy MB 42-43 (arguing that Verizon presented no evidence, at all, regarding the current cost of capital and rate of return earned by FirstEnergy associated with the joint use poles); FirstEnergy RB at 53-54 (explaining that "Verizon presented no evidence regarding actual conditions on FirstEnergy's poles during 2019 and 2020 and no evidence regarding actual conditions for prior years."). Similarly, Verizon presented no evidence regarding the cost of capital during in prior, historical periods.

capital" factor used in the FCC rate formula should be current. The RD cannot have it both ways and, in this regard, the RD is arbitrary, capricious, and violative of FirstEnergy's due process rights.

For these reasons, and the reasons more fully explained in FirstEnergy's Briefs and testimony, Verizon's Complaint should be denied due to its failure to present any evidence on this critical issue.

10. Exception No. 10 – The RD Erred By Making Inconsistent Rulings On The Correct Rates Going Forward. RD at 8-9 (FoF 11), 59-60.

The RD continues its pattern of inconsistent findings and conclusions, by rendering contradictory findings and conclusions regarding the new rate it recommends Verizon should pay going forward. In its Findings of Fact, the RD concludes that:

> 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.

RD at 8-9 (Finding of Fact 11). Yet, the RD subsequently concludes that "[w]ith 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." RD at 57 (emphasis added). Based on this conclusion, the RD recommends the Commission order a "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." RD at 57 (emphasis added). Verizon's rate calculations cannot

credibly be found to be the appropriate rate going forward, where the RD simultaneously concludes that additional investigation into the new telecom rate formula inputs is necessary.

Highlighting these issues with the RD's findings is the fact that despite concluding that "factors such as the cost of capital should be current," the RD completely ignored FirstEnergy's arguments that Verizon presented no evidence regarding these factors, including the cost of common equity. *See* FirstEnergy MB at 41-43. The RD even goes one step further and actually rejects FirstEnergy's arguments regarding Verizon's failure to present this evidence, stating:

> 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.

RD at 48 (emphasis added).

No additional time is needed for a "larger investigation" into other factors. As explained above, FirstEnergy presented unrebutted evidence regarding the actual inputs into the FCC's rate formulas based upon a field audit. *See* Section III.C.8. *supra*. Verizon, on the other hand, presented no evidence on these factors. The record already contains the evidence needed to resolve these issues, yet the RD's inconsistent decisions regarding the calculation of the new rates going forward demonstrate that the RD appears to be nothing more than an attempt to provide Verizon a second bite at the apple and present the evidence it failed to present during the course of this proceeding. Moreover, Verizon was provided the opportunity to present evidence regarding the current cost of capital, but failed to do so. *See* Section III.C.9. *supra*.

Therefore, and for the reasons more fully explained in FirstEnergy's Briefs, Verizon's calculations of the new telecom rates going forward should be rejected and the RD should be reversed on this issue.

11. Exception No. 11 – The RD Erred By Imposing A 60-Day Compliance Period To Calculate New Rates. RD at 59-60.

The RD's recommended "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" should be rejected. RD at 57; *see also* RD at 59-60.

As explained above, the RD errs by essentially providing Verizon additional time after the record in this proceeding has closed to present additional evidence and additional arguments regarding the inputs into the FCC's new telecom formula rate that it could have, and should have, presented during the course of this proceeding. *See* Sections III.C.8-9. *supra*. Moreover, to the extent that the RD deemed the evidentiary record insufficient to determine the current amounts for "all inputs"[25] including "other factors such as the cost of capital" to be insufficient, the RD should have denied Verizon's Complaint. Verizon is the party with the ultimate burden of proof in this proceeding. *See* 66 Pa.C.S. § 332(a). Its failure to present sufficient evidence on these factors is not a reason for the RD to provide additional time to investigate these factors; rather, it is a reason for dismissing the Complaint. For this reason alone, the recommended 60-day compliance period constitutes an error and should be rejected by the Commission.

In addition, the 60-day compliance period recommended by the RD is neither a rational nor workable solution. Importantly, as noted in FirstEnergy's Briefs, at no point in the parties' pre-Complaint negotiations or the litigation has Verizon indicated it will accept anything other than the rate it has calculated using the new telecom rate formula. *See* FirstEnergy MB at 61-62; FirstEnergy RB at 37. The 60-day compliance period simply provides Verizon an additional opportunity to contest the actual inputs used to calculate the new telecom rates, an issue that

[25] As explained above, there was sufficient and credible evidence presented to determine the inputs regarding the "space factor" (i.e., the space occupied by an attachment; (2) the amount of usable space on a pole; (3) the amount of unusable space on a pole is presumed to be 24 feet; and (4) the pole height) as well as the number of attaching entities to FirstEnergy's poles. *See also* FirstEnergy MB at 84-85.

could have, and indeed should have, been resolved on the basis of the unrebutted evidence presented by FirstEnergy.

Furthermore, it is simply not realistic to expect both Verizon and FirstEnergy to conduct cost of capital studies to determine the actual cost of capital to be used in the FCC's new telecom rate formula within 60-days. Indeed, as noted in FirstEnergy's Main Brief, "[t]he cost of equity is a market based, investor expected return and is based on a comprehensive review of equity markets and fundamental risk analysis." FirstEnergy MB at 42. Even if the parties are able to complete these comprehensive reviews within 60-days, it is not reasonable to expect a final determination regarding the cost of capital to be reached in that period.

D. THE RD UNLAWFULLY AND INCORRECTLY AWARDED VERIZON REFUNDS.

12. Exception No. 12 – Section 508 Of The Public Utility Code Precludes The Award Of Refunds In This Matter. RD at 59, 67-69.

The RD commits a further fundamental error of by awarding Verizon refunds. RD at 59, 67-69. As explained by FirstEnergy, the Commission can only reform the Joint Use Agreement (i.e., contracts) on a prospective basis. FirstEnergy MB at 19-21, 91-93; FirstEnergy RB at 58-59. The plain language of Section 508 makes clear that any revision of the Joint Use Agreements—such as a revision to the rate Verizon pays FirstEnergy—"shall become effective 30 days after service of such order upon the parties to such contract." 66 Pa.C.S. § 508. Indeed, not only is this conclusion evident in the plain language of Section 508, it is also consistent with principles of statutory construction and avoids an impairment of the contracts, in violation of the contracts clause of the United States Constitution and the Pennsylvania Constitution. FirstEnergy MB at 91-93.[26]

[26] FirstEnergy also explained that awarding refunds would also constitute an unlawful taking of property without just compensation. *See* FirstEnergy MB at 93 (citing U.S. Const. amend. V; *see also* Pa. Const. art. I, § 10).

The RD fails to provide a reasoned analysis of this issue, simply stating that "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." RD at 67. However, this is precisely FirstEnergy's point: the rate Verizon pays FirstEnergy is set forth in a contract, rather than a tariff. As such, Section 508 of the Public Utility Code governs the Commission's authority to revise the Joint Use Agreements and explicitly limits this authority to revising the contracts on a prospective basis. *See* FirstEnergy MB at 91-93. The RD's suggestion that the Commission can side-step the limitations imposed by Section 508 of the Public Utility Code and retroactively revise the terms of a contract in order to grant Verizon refunds constitutes an unlawful and constitutional error that the Commission should not adopt.

Therefore, and for the reasons more fully explained in FirstEnergy's Briefs and testimony, the Commission should decline to award Verizon any refunds in this proceeding.

13. Exception No. 13 – The RD Erred Because It Did Not Establish A Just And Reasonable Rate Upon Which Refunds Can Be Properly Calculated. RD at 65-66, 68.

The RD compounds its error in awarding refunds by failing to make the findings necessary to award refunds. *See* RD at 65-66, 68. The RD ultimately calculates its refund award by prorating the **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** sought in Verizon's Complaint from March 2019 to present. RD at 66. Rather than calculating refunds based upon the new rate going forward,[27] the RD accepts Verizon's total claimed refund amount, divides it by 112 months and multiples this number by 18. RD at 66. The RD creates further problems by then stating:

[27] Indeed, as explained above, the RD does not even conclude a final determination as to the new rate going forward. Instead, it recommends a 60-day compliance period during which the parties are to recalculate the actual inputs into the new telecom formula rate and establish a new rate.

> 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.

RD at 66 (emphasis added).

Section 1312(a) of the Public Utility Code explicitly states that "[t]he commission shall state in any refund order the exact amount to be paid, the reasonable time within which payment shall be made, and shall make findings upon pertinent questions of fact." 66 Pa.C.S. § 1312(a) (emphasis added). The RD fails to satisfy requirements of Section 1312(a) in three ways.

First, the RD did not actually establish a new rate that Verizon must pay going forward. Instead, it determined that the new telecom rate formula applies and ordered the parties to determine within the recommended 60-day compliance period the exact rate to be paid based upon actual inputs into the FCC's formula. *See* RD at 59-60, 66. As such, although the RD indicates the "just and reasonable" rate formula for the rates Verizon pays FirstEnergy is the new telecom rate an actual "just and reasonable" rate has not yet been determined.

Second, although the RD states that refunds should be calculated using the new telecom rate with respect to the rates Verizon pays, FirstEnergy notes that under each of the Joint Use Agreements the parties are charged reciprocal rates per pole, which are netted during each invoice period based on the number of poles owned by each party. FirstEnergy MB at 5-6. As such, the refund either has to apply both ways or the Commission should not disturb fundamental

cost-sharing aspects of the Joint Use Agreements by altering the rate Verizon pays without also modifying the rate FirstEnergy pays. FirstEnergy MB at 34 (explaining that it is not reasonable or lawful to change one part of a reciprocal rate without changing the other). The RD does not address the argument at all and makes no findings or conclusions regarding the rate FirstEnergy pays Verizon. As such, no refund amount can be calculated based upon the record in this proceeding.

Third, the RD's imposition of a 60-day compliance period where, if the parties are unable to agree on the specific refund amount that is different than the approximate amount recommended by the RD, FirstEnergy will continue to accrue interest on the refunds it may be ordered to pay produces an absurd and unreasonable result. 66 Pa.C.S. § 1312(a) (a refund amount will be calculated "together with interest at the legal rate from the date of each such excessive payment"). As explained in FirstEnergy's Briefs, at no point in the parties' pre-Complaint negotiations or the litigation has Verizon indicated it will accept anything other than the rate it has calculated using the new telecom rate formula. *See* FirstEnergy MB at 61-62; FirstEnergy RB at 37. The RD's proposed 60-day compliance period simply provides Verizon an additional opportunity and incentive to stonewall rate negotiations and, as a result, extract a greater refund amount than it would otherwise receive without the compliance period.

For these reasons, and those more fully explained in FirstEnergy's Briefs and testimony, Verizon should not be granted refunds in this proceeding and the RD should be reversed.

E. THE RD ERRED BY REJECTING FIRSTENERGY'S ALTERNATIVE PROPOSAL TO USE THE OLD TELECOM RATE, IF THE COMMISSION DEEMED IT NECESSARY TO REVISE THE JOINT USE AGREEMENTS.

14. Exception No. 14 – If The Commission Determines To Revise The Rates Verizon Pays Under The Joint Use Agreements, It Should Use The Old Telecom Rate Calculated By FirstEnergy. RD at 57-59.

The RD also incorrectly rejects FirstEnergy's argument that, to the extent the Commission decides to revise the rates Verizon pays under the Joint Use Agreements, then the old telecom rate should be used. RD at 57-58. The RD asserts that (a) the old telecom rate cannot be used because the new telecom rate is the just and reasonable rate under Chapter 77, which incorporates the FCC's regulations, and (b) "record evidence in this proceeding demonstrates that the new telecom rate should be used." RD at 58.

However, the new telecom rate is only considered the just and reasonable rate if Verizon demonstrates that it is entitled to it. *See* Section III.B. *supra*. Verizon utterly failed to make this showing, and the RD committed significant errors in its analysis of this issue.

In addition, record evidence in this proceeding does not demonstrate that the new telecom rate should be used. *See* Section III.B. *supra*. As such, consistent with the FCC's *2018 Pole Attachment Order*, the RD should have left it "to the parties to negotiate the appropriate rate or tradeoffs to account for such additional benefits," with the maximum rate being no more than the old telecom rate. FirstEnergy MB at 52 (citing *2018 Pole Attachment Order* ¶¶ 128-129).

Furthermore, the RD ignores that this proposal would address, at least in part, many of the legal and factual issues presented in this proceeding and would produce a compromise result that provides Verizon with substantial relief and provides some consideration to FirstEnergy's electric service customers. *See* FirstEnergy MB at Section V.B.1; FirstEnergy RB at Section IV.B.4.

Therefore, and for the reasons more fully explained in FirstEnergy's Briefs and testimony, to the extent the Commission decides to revise the rates Verizon pays under the Joint Use Agreements, then the old telecom rate should be used.

F. IF THE COMMISSION DETERMINES TO REVISE THE RATES VERIZON PAYS UNDER THE JOINT USE AGREEMENTS, FIRSTENERGY MUST BE PERMITTED TO DEFER AND RECORD AS A REGULATORY ASSET THE DIFFERENCE BETWEEN EXISTING AND NEW RATES AND RECOVER THE DIFFERENCE IN ITS NEXT BASE RATE CASE.

15. Exception No. 15 – The RD Erred By Failing To Adopt FirstEnergy's Deferral Proposal. RD at 59.

FirstEnergy repeatedly explained in testimony and in its briefs that "any reduction in the joint use rates paid by Verizon, will ultimately decrease the revenues collected by FirstEnergy associated with the joint use network." *See*, e.g., FirstEnergy MB at 90; FirstEnergy RB at 57. As such, FirstEnergy proposed, among other things, that "the Commission should allow FirstEnergy to defer and record as a regulatory asset the difference in revenues produced from new rates and existing rates plus carrying charges, and permit FirstEnergy's EDCs to claim and recover this deferred amount in their next base rate case." FirstEnergy MB at 90. FirstEnergy's request applies to any ongoing difference in new rates and any refund.

The RD summarily overlooked this proposal and reasoned that (1) "FirstEnergy should have been charging Verizon the new telecom rate as of March 11, 2019" and (2) FirstEnergy was free to make the argument that it should be permitted to "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" as a part of its next base rate proceeding. RD at 59. Although the RD also recognized that it was not saying 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," the lack of clarity

around the relief ordered by the RD in fact creates this very problem. *See* FirstEnergy MB at 50, 90. Importantly, as explained by FirstEnergy Verizon's proposed rate reduction would fail to provide FirstEnergy EDCs an adequate return from its pole attachment rates. FirstEnergy MB at 50. As explained in the unrebutted testimony of FirstEnergy witness Ms. Joanne Savage:

> Because any change in these revenues will be the direct result of a Commission action, the Companies should be permitted to defer, on an ongoing basis with carrying costs, any annual reductions in joint use revenues received and be permitted to seek recovery of these lost revenues in the Companies' next base rate proceedings. If joint use fees were reduced at any time other than when new base rates are set, the Companies' electric customers would continue paying less than they otherwise would have to pay because the existing offset to the revenue requirement would be higher than the joint use revenues received, thus creating a revenue shortfall for the Companies. If a refund is ordered, the Companies also should be permitted to defer the refund on its books for accounting purposes with carrying costs for recovery in their next base rate proceedings.

(FirstEnergy St. 3-R, p. 5-6.)

The RD errs by ignoring this testimony and utterly failing to consider the impact that the relief it orders will have on the FirstEnergy EDCs' opportunity to earn a fair rate of return on their investment in the joint-use poles. Therefore, and for the reasons more fully explained in FirstEnergy's Briefs and testimony, to the extent the Commission determines the rate Verizon pays FirstEnergy under the Joint Use Agreements should be revised or requires FirstEnergy to provide a refund to Verizon, the RD should be modified to clearly reflect FirstEnergy's deferral proposal.

IV. CONCLUSION

WHEREFORE, Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company respectfully request that the Pennsylvania Public Utility Commission (1) reject and/or modify the Recommended Decision of Deputy Chief Administrative Law Judge Joel H. Cheskis, and (2) deny, with prejudice, the above-captioned Complaint filed by Verizon Pennsylvania LLC and Verizon North LLC.

Respectfully submitted,

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