Post & Schell P.C.
ATTORNEYS AT LAW

17 North Second Street
12th Floor
Harrisburg, PA 17101-1601
717-731-1970 Main
717-731-1985 Main Fax
www.postschell.com

Garrett P. Lent
Associate

glent@postschell.com
717-612-6032 Direct
717-731-1979 Direct Fax
File #: 180259

September 28, 2020

VIA ELECTRONIC FILING

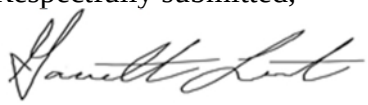
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

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 Replies of Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company to the Exceptions of Verizon Pennsylvania LLC and Verizon North LLC for filing in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,



Garrett P. Lent

GPL/jl
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 **REPLIES TO 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).

VIA E-MAIL ONLY

Suzan D. Paiva, Esquire
Verizon
900 Race Street, 6th Floor
Philadelphia, PA 19107
Suzan.D.Paiva@verizon.com

Curtis L. Groves, Esquire
Verizon
1300 I Street NW
Suite 500 East
Washington, DC 20005
curtis.groves@verizon.com

Claire J. Evans, Esquire
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
cevans@wiley.law

Christopher S. Huther, Esquire
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
chuther@wiley.law

Frank Scaduto, Esquire
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
fscaduto@wiley.law

Date: September 28, 2020

Garrett P. Lent

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	:	

REPLIES OF METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, AND PENNSYLVANIA POWER COMPANY TO THE EXCEPTIONS OF VERIZON PENNSYLVANIA LLC AND VERIZON NORTH LLC

Tori L. Giesler (ID # 207742)
FirstEnergy Service Company
2800 Pottsville Pike
P.O. Box 16001
Reading, PA 19612-6001
Phone: 610-921-6658
E-mail: tgiesler@firstenergycorp.com

David B. MacGregor, Esquire (PA ID #28804)
Anthony D. Kanagy, Esquire (PA ID #85522)
Devin T. Ryan, Esquire (PA ID # 316602)
Garrett P. Lent, Esquire (PA ID #321566)
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101-1601
Phone: (717) 731-1970
Fax: (717) 731-1985
E-mail: dmacgregor@postschell.com
E-mail: akanagy@postschell.com
E-mail: glent@postschell.com

Date: September 28, 2020

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

PUBLIC VERSION – PROPRIETARY INFORMATION REDACTED

Table of Contents

Page

Statutes and Regulations

Pennsylvania Court Decisions

Federal Agency Decisions

Pennsylvania Administrative Agency Decisions

I. INTRODUCTION

Verizon Pennsylvania LLC and Verizon North LLC's ("Verizon") Exceptions to the Recommended Decision issued on September 15, 2020 ("RD") by the Deputy Chief Administrative Law Judge Joel H. Cheskis (the "ALJ") should be denied. In a case of first impression before the Pennsylvania Public Utility Commission ("Commission"), Verizon claims that the novel and unprecedented relief recommended by the RD—which has never been granted by the Federal Communications Commission ("FCC") and provides Verizon's shareholders a substantial windfall at the expense of Pennsylvania electric utility customers—does not go far enough. Verizon asks this Commission to double-down on the errors committed in the RD and further line the pockets of its shareholders with no benefits to rural broadband service and at the expense of the Pennsylvania-based electric service customers of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company (collectively "FirstEnergy" or the "Companies"). As explained in FirstEnergy's Exceptions, Briefs and testimony, Verizon is not entitled to any of the relief it seeks, and the Commission should deny its Complaint in full. In the alternative, the Commission should do what the FCC has done and adopt the old telecom rate as calculated by FirstEnergy.

II. SUMMARY OF REPLIES TO EXCEPTIONS

Verizon's Exceptions expose the lack of merit in its arguments and requests for relief. As explained in FirstEnergy's Briefs and Exceptions, Verizon, the party with the burden of proof on all issues, failed to meaningfully address the following issues:

- Verizon seeks an approximate **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** decrease in pole attachment rates, all of which will go to Verizon's shareholders at the expense of FirstEnergy customers with no increased investment in rural broadband service in rural Pennsylvania.

- Verizon failed to present any evidence that the rates it pays are unjust and unreasonable under the Pennsylvania Public Utility Code and Pennsylvania law.

FirstEnergy presented unrebutted evidence that its current rates are just and reasonable;

- Verizon's requested relief is contrary to all relevant FCC precedent. The FCC has, in fact, never held that an incumbent local exchange carrier ("ILEC") is entitled to the new telecom rate under an existing joint use agreement;

- Verizon failed to terminate the existing joint use agreements, which were last renewed in 2009, as required by FCC regulations and the plain language of the agreements and, therefore, its Complaint should have been dismissed;

- Verizon receives many material benefits under the current joint use agreements as compared to its competitors and therefore is not entitled to the FCC presumptions on this issue. Even the RD, which found in Verizon's favor on almost every issue in this case, recognized that Verizon is receiving "the benefits of a first-class airline seat at coach prices." RD at 50;

- Verizon, the party with the burden of proof, failed to present any evidence regarding critical inputs in the calculation of rates under the FCC's new telecom formula, including the current cost of common equity. Verizon did not except to the RD's finding that a determination of the current cost of common equity is required. Without this evidence, it is simply impossible to calculate new telecom rates in this proceeding; and

- Verizon asserts that FirstEnergy has delayed Verizon's quest for the new telecom rate and should pay refunds back to 2011, when (1) any delay falls on Verizon, who has not negotiated in good faith and failed to even file its Complaint until 2019; and (2) refunds back to 2011 are beyond the Commission's jurisdiction.

Verizon's attempts to distract the Commission from the RD's novel departure from the Public Utility Code and uniform FCC precedent without sufficient evidentiary support should be rejected, and its Exceptions should be denied.

Due to these failures of law and fact, it is not surprising that Verizon in its Exceptions relies primarily on policy rhetoric and generic claims that its proposals are "pro consumer" and that it only seeks "competitive neutrality." These claims should be rejected.

Regarding consumer benefits, throughout this proceeding, Verizon avoided every inquiry regarding whether the relief it seeks will in fact spur incremental investment in Pennsylvania's rural broadband infrastructure. Verizon objected to FirstEnergy's discovery on this point and

refused to provide any support for its assertions on the basis that this information was "neither relevant nor material to the subject matter of this proceeding nor reasonably calculated to lead to the discovery of admissible evidence." On the other hand, FirstEnergy presented unrebutted evidence that the relief Verizon seeks would negatively impact the rates paid by electric service customers, without any actual commensurate benefits in broadband access and deployment.

Yet, Verizon now asserts that the RD should be modified—to grant it further unlawful and unsupported refunds—in order to spur such investments. Verizon's Exceptions make clear that the consideration of Pennsylvania consumers' interests is only relevant to the extent that it provides Verizon's shareholders a windfall.

Regarding "competitive neutrality," the record is clear that Verizon is not seeking a competitively natural rate. Verizon currently receives a rate that is based upon the fully allocated costs of owning a pole, under the terms and conditions of Joint Use Agreements that reflect equal sharing of these fully allocated costs between two pole owners. Verizon receives several material advantages under these agreements, relative to its competitors, in its ability to attach to FirstEnergy's poles. Verizon essentially seeks an approx. **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** reduction of the rate that it pays under the same terms and conditions it operates under today. This is not competitive neutrality. If the Commission wants to award Verizon the new telecom rate, it should direct Verizon to terminate the existing agreements and negotiate a new agreement using the standard CLEC template for Verizon's attachments and negotiated terms and conditions for FirstEnergy's attachments. Indeed, Competitive neutrality is not served by providing Verizon the same rate as its competitors under dissimilar terms and conditions, based upon Verizon's status as a pole owner. Rather, the Commission would be providing Verizon "the benefits of a first-class airline seat at coach prices."

With respect to Verizon's claim that the Commission should award refunds reaching back to July 2011 is completely contrary to the Public Utility Code. As an initial matter, Section 508 of the Public Utility Code, 66 Pa.C.S. § 508, precludes the Commission from granting any refunds in this case. Section 508 is the only provision of the Public Utility Code which provides the Commission with the authority to revise a public utility contract. Verizon's requested relief is a revision of the rates it pays under the Joint Use Agreements and, therefore, is subject to Section 508. As a plain matter of law, changes to contracts under Section 508 can only be applied prospectively. Therefore, no refunds can be granted to Verizon based on revisions to the rates in existing Joint Use Agreements. In addition, Verizon ignores the fact that, even if refunds could be granted, Section 1312(a) is the applicable statute of limitations, and it expressly limits the refund period to no more than four years. Section 1312(a) also grants the Commission discretion to limit refunds to less than the four-year period, and FirstEnergy demonstrated that substantial legal and policy reasons exist for doing so.

Moreover, Verizon's assertion that an award of refunds is necessary to "remove the incentive for similarly protracted and costly disputes and will encourage the industry to comply with the Commission's regulations" is not credible does not demonstrate that refunds should be awarded. Verizon could have filed its Complaint at any time since 2011, but it chose to wait until November 2019 to do so. FirstEnergy should not be penalized for Verizon's decisions in this matter, especially when the FCC had clearly stated that it "is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable"[1] and when the FCC has

[1] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, 5331 at ¶ 216 (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).

rejected every request by an ILEC to insert the new telecom rate into a joint use agreement.[2] And Verizon's outrageous argument that it is necessary for the Commission to make an example out of FirstEnergy in order to curb the behavior of other EDCs in Pennsylvania is doubly egregious since Verizon refused to answer any discovery whatsoever about its Joint Use Agreements with other EDCs, and the ALJ declined to compel Verizon to answer such requests. Having foreclosed such evidence from the record, the Commission should reject Verizon's inflammatory, self-serving, and unsupported allegations. Worse, Verizon insinuates this Commission should be obligated to curb the behavior of "the industry" beyond the borders of this Commonwealth and urges a gross abuse of the Commission's jurisdiction so as to advance Verizon's national strategy.

Regarding Verizon's claim that a 60-day compliance period is not necessary; FirstEnergy agrees. The RD expressly states that the purpose of this period is to provide Verizon with the opportunity to "further investigate" the cost of capital and the other actual inputs to be used in the FCC's new telecom rate formula. Importantly, Verizon presented no evidence—at all—regarding the current cost of common equity, as noted by the RD. Furthermore, Verizon did not present evidence regarding these actual inputs. On the other hand, FirstEnergy conducted a field audit and presented evidence of these inputs with a 99.3% accuracy rate. The Commission should decide this case on the actual evidence of record and not provide Verizon with a chance to cure its evidentiary shortcomings. Therefore, the 60-day compliance period is not necessary or proper and, instead, the Commission should deny Verizon's Complaint entirely or otherwise use the inputs presented by FirstEnergy in its calculation of rates.

Finally, Verizon takes issue with the RD's determination that FirstEnergy does not possess bargaining power due to the number of poles it owns. Verizon incorrectly asserts that

[2] FirstEnergy RB at 48-49.

this finding is dicta. If Verizon is not entitled to the presumption that it seeks under the FCC's *2018 Pole Attachment Order*,[3] and it is not,[4] then Verizon must demonstrate that FirstEnergy possessed and leveraged bargaining power during rate negotiations as stated in the FCC's *2011 Pole Attachment Order*.[5] Verizon's claim that this finding is dicta exposes the central flaw in the RD's reasoning; without going to the great lengths to ignore the FCC's precedent and the Public Utility Code to provide Verizon the presumptions set forth in 47 C.F.R. § 1.1413, Verizon must prove its case under the *2011 Pole Attachment Order*. Verizon failed to do so and, therefore, the RD's finding regarding bargaining power demonstrates that Verizon's Complaint should be denied.

For these reasons and the reasons more fully explained in FirstEnergy's Briefs and Exceptions, the Commission should deny Verizon's Exceptions, modify and/or reverse the RD consistent with FirstEnergy's Exceptions, and deny Verizon's Complaint.

III. REPLIES TO VERIZON'S EXCEPTIONS

1. Reply to Verizon Exception No. 1 – The Commission Should Decline To Grant Any Refunds In This Proceeding. Verizon Exceptions at 6-11.

Verizon's claim that the Commission's regulations permit the entirety of its claim for refunds, i.e., **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]**, to be awarded in this proceeding should be rejected. Verizon Exceptions at 6-11. Verizon argues that (a) the Commission's regulations, which incorporate the FCC's regulations, permit refunds calculated from July 2011 (Verizon Exceptions at 7-8), (b) the "general contract law statute of limitations" and the "continuing contract doctrine" should be used to determine the refund period

[3] *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*").

[4] FirstEnergy MB at Section V.A.3.; FirstEnergy RB at IV.A.2.

[5] FirstEnergy MB at 66-72; FirstEnergy RB at 40-42; *see also 2011 Pole Attachment Order*.

(Verizon Exceptions at 8-9), (c) the "RD must be revised for internal consistency to require a four-year refund period" (Verizon Exceptions at 9-10), and (d) "[a] full and complete refund award is critical to achieve the Commission's objectives" (Verizon Exceptions at 10-11). Each of these arguments is without foundation and should be rejected.

At the outset, FirstEnergy notes that Verizon cannot make the rate it pays under the Joint Use Agreements "unlawful" by rhetoric alone. *See* Verizon Exceptions at 5-6. Indeed, the FCC never has said that it is unlawful for an electric utility to charge an ILEC any rate other than the new telecom rate under a joint use agreement. To the contrary, the FCC concluded in the *2011 Pole Attachment Order* that it "is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable." *2011 Pole Attachment Order* ¶ 216. The FCC issued only two decisions applying this guidance, and neither one ordered the new telecom rate to be used.[6] Subsequently, in the *2018 Pole Attachment Order*, the FCC recognized that the presumptions it established in 47 C.F.R. § 1.1413 "will impact privately-negotiated agreements and so the presumption will only apply, as it relates to existing contracts, upon renewal of those agreements." *2018 Pole Attachment Order* ¶ 127 (emphasis added). As such, the presumptions were established only "for newly-negotiated and newly-renewed pole attachment agreements between incumbent LECs and utilities. *See 2018 Pole Attachment Order* ¶ 123 (emphasis added). Verizon's claim that any other rate but the new telecom rate is "unlawful" flies in the face of all applicable FCC precedent and should be rejected.

Consistent with these explanations, the FCC never has held that an ILEC is entitled to the new telecom rate under an existing joint use agreement, such as the Joint Use Agreements at issue here. FirstEnergy MB at Section V.A.3.; FirstEnergy RB at 48-49; FirstEnergy Exceptions

[6] Notably, 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 allowed the existing contract rates to stand when it dismissed Verizon's complaint.

at 15-17. The new telecom rate is only a "competitively neutral rate" if the terms and conditions of the Joint Use Agreements are comparable to the terms and conditions of the agreements between third-party attachers and FirstEnergy. Fundamental differences exist between these agreements, which materially advantage Verizon.[7] FirstEnergy MB at 72-83; FirstEnergy RB at 42-48; FirstEnergy Exceptions at 20-27. Indeed, Verizon does not seek a "competitively neutral rate"; rather, it seeks a substantial rate discount on terms and conditions that already advantage it over its competitors.[8] As the RD noted, Verizon seeks "the benefits of a first-class airline seat at coach prices." RD at 50. This is not "competitively neutral" service at "competitively neutral rates."

Consistent with this precedent, Verizon's assertion that an award of refunds is necessary to "remove the incentive for similarly protracted and costly disputes and will encourage the industry to comply with the Commission's regulations" should be rejected. Verizon Exceptions at 10. It is reasonable for FirstEnergy to rely upon the guidance that the FCC provided during rate negotiations, whereas Verizon's negotiating position flies in the face of that precedent. Furthermore, FirstEnergy negotiated in good faith and repeatedly advanced proposals to lower the rates Verizon pays under the Joint Use Agreements. FirstEnergy MB at 59-63; FirstEnergy RB 36-38. Yet, Verizon refused to accept any rate except for the new telecom rate as calculated by Verizon. To the extent that Verizon disagreed with FirstEnergy's reliance upon FCC

[7] *See In the Matter of BellSouth Telecommunications, LLC d/b/a/ AT&T Florida v. Florida Power and Light Company*, Proceeding No. 19-187; Bureau ID No. EB-19-MD-006 (Memorandum Opinion and Order adopted May 20, 2020) ("*AT&T v. FPL*") (not requiring any quantification of the differences between the agreements at issue to find that material advantages existed).

[8] FirstEnergy further notes that the RD does not consider the fact that FirstEnergy offered several times to discuss terminating the existing agreements and replace them with FirstEnergy's template CLEC agreement. (*See* FirstEnergy St. 1-R, pp. 28-29; *see also* FirstEnergy St. 2-R, pp. 29-30.) This proposal would have given Verizon the very rates it seeks in the Complaint and would have provided them to Verizon under the same (i.e., comparable) terms and conditions under which its competitors obtain such rates. (*See* FirstEnergy St. 2-RJ, p. 7.) Verizon rejected this proposal and, as such, revealed its preference for the advantages provided under the Joint Use Agreements. (FirstEnergy St. 2-R, pp. 26-27.)

precedent on this issue, it could have filed its Complaint at any time since 2011. However, it chose to wait until November 2019 to do so—long after the Commission's reverse pre-emption proceeding had been initiated. FirstEnergy should not be penalized for Verizon's delay in filing a complaint.

In addition, Verizon once again fails to acknowledge that Section 508 of the Public Utility Code, 66 Pa.C.S. § 508, controls this dispute over refunds. FirstEnergy has repeatedly explained that Section 508 precludes the Commission from awarding refunds because Section 508 only authorizes the "contract, as modified by the order of the commission, shall become effective 30 days after service of such order upon the parties to such contract." 66 Pa.C.S. § 508 (emphasis added). As such, the Commission cannot 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. *See* FirstEnergy MB at 19-21, 91-93; FirstEnergy RB at 58-59; FirstEnergy Exceptions at 33-34.

Similarly flawed is Verizon's assertion that the "general contract law statute of limitations" and the "continuing contract doctrine" should be used to determine the refund period. Verizon Exceptions at 8-9. The Public Utility Code both authorizes and limits the Commission's authority to grant refunds in this case. *See* 66 Pa.C.S. §§ 508, 1312(a). The Commission cannot, through its regulations, adopt a statute of limitations that conflicts with and expands its powers beyond the provisions in the Public Utility Code. According to Verizon, however, the Commission did just that by "incoporat[ing] 'the full extent' of the rate requirements of 47 U.S.C. § 224." Verizon Exceptions at 7. Obviously, the Commission cannot regulate around the Public Utility Code and adopt a statute of limitations that conflicts with the

Public Utility Code.[9] Only the Pennsylvania General Assembly has the power to impose a different statute of limitations for these types of Commission proceedings. Therefore, the general contract law statute of limitations absolutely does not apply here. *See* FirstEnergy RB at 57-60.[10] Moreover, a "general contract" is not at issue in this case. Rather, at issue is a contract under which a public utility charges a "rate" for a "service" which affects the public interest. FirstEnergy MB at Section V.A.2.a (explaining how Verizon's Complaint disputes a "rate" charged by FirstEnergy for a "service" under the Joint Use Agreements). As such, the Commission should reject Verizon's claim for refunds because it is based on statutes other than the Public Utility Code.

Next, Verizon's claim that "the RD must be revised for internal consistency to require a four-year refund period" should also be denied. Verizon Exceptions at 9-10. Verizon's claim ignores fundamental principles of statutory construction, which dictate that the special provision of Section 508 should prevail over the general provision of Section 1312. *See* FirstEnergy MB at 92-93.

Finally, Verizon's claim that "[a] full and complete refund award is critical to achieve the Commission's objectives" should be rejected. Verizon Exceptions at 10-11. The rate relief that

[9] As explained in FirstEnergy's Exceptions, 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). Thus, "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). Therefore, to the extent that the Commission finds that it incorporated this "general contract law statute of limitations" through the promulgation of 52 Pa. Code § 77.4(a) or any of its other pole attachment regulations, such regulations are invalid as a matter of law.

[10] The statute cited by Verizon is also for a breach of contract action. *See* 42 Pa. C.S. § 5525. However, there is no allegation that FirstEnergy has breached any term of the Joint Use Agreements, including the applicable rates. Any relief granted in this proceeding would be an amendment/reformation of the Joint Use Agreements. FirstEnergy MB at 92-93; FirstEnergy RB at 58. Moreover, the remedy for a breach of contract is the award of damages, and the Commission has no jurisdiction to award damages. *Feingold v. Bell of Pa.*, 383 A.2d 791, 793 (Pa. 1977).

Verizon seeks only benefits the Commission's objectives to accelerate and expand broadband deployment, if Verizon uses the refunded amounts for incremental investments in broadband deployment. Verizon submitted no evidence that the new rate it seeks would benefit broadband deployment in Pennsylvania. FirstEnergy MB at 50-51. Rather, it specifically objected to a discovery request seeking information regarding how a reduction in the rates FirstEnergy charges Verizon would enhance broadband services or deployment in Pennsylvania as irrelevant. FirstEnergy MB at 50-51 (citing Exhibit JMS-1 (Verizon's Answer to FE to Verizon Set II, No. 8)). Verizon cannot now claim that the improper rate relief it seeks will "achieve the Commission's objectives" after it claimed during the course of this proceeding that any consideration of those objectives was irrelevant.

For these reasons, and the reasons more fully explained in FirstEnergy's Briefs and testimony, the Commission should deny Verizon's Exception No. 1 and decline to grant any award of refunds in this proceeding.

2. Reply to Verizon Exception No. 2 – The Commission Should Decline To Implement The 60-Day Compliance Period Because Verizon Should Not Receive A Second Opportunity To Gather and Present Evidence Needed To Sustain Its Burden Of Proof. Verizon Exceptions at 11-14.

Although FirstEnergy agrees that the RD's proposed 60-day compliance period should be denied, the Commission should reject Verizon's arguments for doing so. Importantly, FirstEnergy explained in its Exceptions that the RD's recommendation would improperly provide Verizon with additional time after the record in this proceeding has closed to present more evidence and arguments regarding the inputs into the FCC's new telecom formula rate, which could have and should have been presented during the course of this proceeding. *See*

FirstEnergy Exceptions at 32-33. As the party with the ultimate burden of proof,[11] Verizon should not be provided another opportunity to present this evidence; rather, its Complaint should be denied.

FirstEnergy also highlighted the fact that Verizon presented no evidence, at all, regarding the cost of capital, including the cost of common equity. *See* FirstEnergy Exceptions at 29-30. As explained by FirstEnergy, the determination of the cost of common equity capital is a fundamental element of ratemaking and provides the standard for determining whether current rates are just and reasonable. FirstEnergy MB at 42. The FCC's rate formulas (set forth on pages 21-22 of the RD) necessarily require the cost of capital to be known in order to calculate a rate. However, the RD acknowledges the utter lack of evidence presented by Verizon regarding the current cost of capital. *See* RD at 57. As a result, the RD should have denied the Complaint because without such evidence it is impossible for Verizon to prove that FirstEnergy's current pole attachment rates are unjust and unreasonable and that Verizon's calculations of the new telecom rates are just and reasonable under the Public Utility Code and Pennsylvania law.[12]

FirstEnergy also submitted detailed and reliable evidence on the other actual inputs that should be used for the rate calculations here. Specifically, FirstEnergy presented actual data regarding the calculation of the "space factor" (i.e., (1) 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) and the number of attaching entities to FirstEnergy's poles. FirstEnergy MB at 84-88. Moreover, the sample used to calculate this information has a 99.30%

[11] *See* RD at 22-23; 66 Pa.C.S. § 332(a).

[12] FirstEnergy further notes that Verizon does not specifically except to the RD's determination that the current cost of capital should be used in the rate calculations. Because Verizon failed to present any evidence on this issue, and did not except to this determination, Verizon has waived its arguments regarding the use of the current cost of capital. *See Merritt v. Duquesne Light Co.*, 2011 Pa. PUC LEXIS 1197, at *9-10 (Order entered Mar. 31, 2011) (explaining how a party "waive[s] its argument . . . by not including that argument in its Exceptions") (quoting *Generic Investigation Regarding Transp. Assessments*, Docket No. I-2008-2022003 (Order entered Aug. 26, 2008)).

accuracy rate. FirstEnergy Exceptions at 28. Due to Verizon's fundamental failure of proof regarding these inputs, the RD should have either used FirstEnergy's inputs or denied Verizon's Complaint for failure to carry its burden of proof regarding the calculation of new rates going forward.

Verizon's further arguments that the 60-day compliance period "would add costs and burdens to this litigation,[] delay the rate reductions essential to the Commission's pro-consumer broadband deployment goals,[] and invite gamesmanship in future proceedings[]," should be rejected. Verizon Exceptions at 13. As explained above, it is duplicitous for Verizon to now assert that the relief it seeks will benefit broadband deployment, where Verizon refused to provide any evidence on this issue and claimed that this issue was irrelevant to the resolution of its Complaint.[13] Similarly, it is duplicitous for Verizon to claim that gamesmanship will be invited in future proceedings, where Verizon itself chose to wait approximately nine years to file its Complaint.

For these reasons, and those more fully explained in FirstEnergy's Exceptions, the Commission should deny Verizon's Exception No. 2 but still eliminate the 60-day compliance period proposed by the RD.

3. Reply to Verizon Exception No. 3 – The Commission Should Affirm The RD's Determination That FirstEnergy Does Not Possess And Did Not Leverage Bargaining Power Over Verizon During Rate Negotiations. Verizon Exceptions at 14-17.

The RD correctly concluded that FirstEnergy does not possess bargaining power and did not leverage bargaining power in rate negotiations with Verizon. RD at 49. Verizon argues that the RD goes too far in reaching this conclusion, claims that it is dicta not necessary to resolve the

[13] Similarly, Verizon presented no evidence that rate reductions Verizon seeks will actually result in rate reductions for Pennsylvania consumers, and Verizon cites no such evidence. On the other hand, FirstEnergy demonstrated that the rate reductions Verizon seeks will increase rates for FirstEnergy's Pennsylvania electric service customers. FirstEnergy MB at 49-51; FirstEnergy RB at 29-30.

case, and re-argues the evidence it presented on this point. Verizon Exceptions at 14-17. None of Verizon's arguments warrant revising the RD's conclusion, and this exception should be denied.

Regarding Verizon's claim that RD's conclusion is dicta, this would only be true to the extent that the RD found, improperly, that Verizon is entitled to the presumptions set forth in Section 1.1413 of the FCC's regulations by also finding the Joint Use Agreements were renewed on the effective date of Section 1.1413. If—as FirstEnergy demonstrated—Verizon is not entitled to these presumptions, then the conclusion that FirstEnergy does not possess bargaining power over Verizon warrants dismissal of its Complaint. *See* FirstEnergy MB at 66-72; FirstEnergy RB at 40-42. As explained in FirstEnergy's Exceptions, Verizon is not entitled to the presumptions afforded by the RD for numerous reasons. FirstEnergy Exceptions 15-20; *see also* FirstEnergy MB at 63-66; FirstEnergy RB at 38-40. Therefore, Verizon's Complaint should be dismissed because it cannot demonstrate that the rates it pays under the Joint Use Agreements were established as a result of FirstEnergy possessing or leveraging bargaining power.

Verizon also incorrectly argues that the FCC has concluded "ILECs [are] entitled to rate reductions where electric utilities owned about 65% of poles." Verizon Exceptions at 15 (emphasis added). Pole disparity only has led to rate review. The FCC has made clear that it considers factors in addition to pole ownership when reviewing bargaining power, such as less costly alternatives that are available to ILECs. *See* FirstEnergy MB at 69-71.

FirstEnergy demonstrated that less costly alternatives exist, which bolsters the RD's conclusion that FirstEnergy did not possess bargaining power. In addition, FirstEnergy demonstrated that: (a) when the rates were last negotiated, the Joint Use Agreements constituted a "rate" for "service" subject to Commission regulation (FirstEnergy MB at 67-68); (b) Verizon

cotemporaneous exuded its satisfaction with those arms-length rate negotiations (FirstEnergy MB at 68-69; and (c) FirstEnergy could not practically leverage any alleged bargaining power (FirstEnergy MB at 71-72, FirstEnergy RB at 41-42).

FirstEnergy also explained that it repeatedly sought to negotiate lower rates under the Joint Use Agreements with Verizon, but Verizon declined to consider any offer other than the new telecom rate as calculated by Verizon. *See* FirstEnergy MB at 61-62; FirstEnergy RB at 37. At no time has FirstEnergy possessed or leveraged bargaining power over Verizon.

Moreover, as explained above, the Commission should reject Verizon's claim that the new telecom rate is the only lawful rate under the Joint Use Agreements. If and only if certain conditions are met, then the new telecom rate is considered the maximum rate. As explained by FirstEnergy, Verizon does not meet those conditions. Furthermore, to the extent that the Commission seeks to replace the existing cost-sharing agreement and impose the new telecom rate in the pole attachment agreements between Verizon and FirstEnergy for reasons of "competitive neutrality," it should order the parties to use FirstEnergy's standard third-party attacher license agreement for Verizon's attachments to FirstEnergy's poles. *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.

Finally, Verizon's plea for the Commission to "not part ways with FCC precedent on the issue" of bargaining power highlights the RD's failure to rely upon any FCC precedent at all. As explained in FirstEnergy's Exceptions (and further in its Briefs), the FCC has never granted the relief that Verizon seeks. FirstEnergy at 15-17. The RD simply ignores each of those prior cases

and adopts novel arguments and relief that are completely unsupported by any prior FCC decision. Therefore, if the Commission deems it appropriate to rely upon FCC precedent for purposes of determining bargaining power using only pole counts, so too must the Commission rely on FCC precedent when it analyzes the remainder of Verizon's claims. Under such an analysis, Verizon is not entitled to any of the relief it seeks, and its Complaint should be denied.

For these reasons, and the reasons more fully explained in FirstEnergy's Briefs and testimony, Verizon's Exception No. 3 should be denied, and the Commission should conclude that FirstEnergy did not possess bargaining power over Verizon during rate negotiations involving the Joint Use Agreements.

IV. CONCLUSION

WHEREFORE, Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company respectfully request that the Pennsylvania Public Utility Commission (1) deny the Exceptions filed by Verizon Pennsylvania LLC and Verizon North LLC, (2) grant the Exceptions filed Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company, (3) reject and/or modify the Recommended Decision of Deputy Chief Administrative Law Judge Joel H. Cheskis consistent with the Exceptions filed Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company, and (4) deny, with prejudice, the above-captioned Complaint filed by Verizon Pennsylvania LLC and Verizon North LLC.

Respectfully submitted,

Tori L. Giesler (ID # 207742)
FirstEnergy Service Company
2800 Pottsville Pike
P.O. Box 16001
Reading, PA 19612-6001
Phone: 610-921-6658
E-mail: tgiesler@firstenergycorp.com

David B. MacGregor, Esquire (PA ID #28804)
Anthony D. Kanagy, Esquire (PA ID #85522)
Devin T. Ryan, Esquire (PA ID # 316602)
Garrett P. Lent, Esquire (PA ID #321566)
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101-1601
Phone: (717) 731-1970
Fax: (717) 731-1985
E-mail: dmacgregor@postschell.com
E-mail: akanagy@postschell.com
E-mail: glent@postschell.com

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

Date: September 28, 2020