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September 28, 2020

Via eFile and Email

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

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

Dear Secretary Chiavetta:

Enclosed please find Verizon's Reply to First Energy's Exceptions in the above captioned matter.

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

Very truly yours,

A handwritten signature in blue ink that reads "Suzan D. Paiva".

Suzan D. Paiva

SDP/sau
Enclosure

Via E-Mail

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

CERTIFICATE OF SERVICE

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

Dated at Philadelphia, Pennsylvania, this 28th day of September, 2020.

VIA E-MAIL

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

VERIZON'S REPLY
TO FIRSTENERGY'S EXCEPTIONS TO RECOMMENDED DECISION

(PUBLIC VERSION)

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Dated: September 28, 2020

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I. INTRODUCTION

FirstEnergy's¹ exceptions misstate and mischaracterize the facts, the law, and the Recommended Decision ("RD") as FirstEnergy continues to try to relitigate the Commission's pole attachment rulemaking in this complaint proceeding.² But "[a]uthorized regulations of an administrative agency have the force and effect of law and bind the agency equally with others."³ And, as the RD correctly finds, the Commission's regulations require FirstEnergy to charge Verizon the same competitively neutral "new telecom" rate that FirstEnergy must charge other telecommunications and broadband providers for use of comparable space on its utility poles.

The Commission already decided "rental rates for pole attachments [should be] as low and close to uniform as possible ... to promote broadband deployment" and "spur[] investment in, and access to," utility poles, which are "used to deliver essential broadband access service to end-user customers" throughout Pennsylvania.⁴ Essential to the Commission's broadband deployment efforts is enforcement of the new regulations, which "eliminat[e] outdated disparities between the pole attachment rates incumbent local exchange carriers," including Verizon, pay compared to their competitors.⁵ FirstEnergy asks the Commission to perpetuate those disparities instead, so it can continue charging Verizon pole attachment rates averaging more than [REDACTED] times the lawful, properly calculated new telecom rate set by the Commission's regulations for Verizon and its competitors.⁶ The Commission should reject FirstEnergy's exceptions 1-10 and

¹ "FirstEnergy" refers to Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec") and Penn Power Company ("Penn Power"). "Verizon" refers to Verizon Pennsylvania LLC ("Verizon PA") and Verizon North LLC ("Verizon North").

² RD at 46 ("First Energy's primary argument ... seeks to relitigate the Commission's *Final Rulemaking Order* that adopted this regulatory structure. This case is not the time or place for such relitigation.").

³ *Herdelin v. Greenberg*, 328 A.2d 552, 554 (Pa. Commw. 1974).

⁴ *Assumption of Comm'n Jurisdiction over Pole Attachments from the FCC*, No. L-2018-3002672, 2019 WL 4345730, at *2, 6 (Aug. 29, 2019) ("*Final Rulemaking Order*") (citation omitted).

⁵ *Id.* at *3.

⁶ RD at 8-9 (Findings of Fact 10, 11). FirstEnergy agrees it charges Verizon about [REDACTED] times the new telecom rate. See VZ St. 2.1, Ex. MSC-4 (citing sources).

12-15,⁷ adopt the RD with the revisions requested in Verizon’s exceptions 1-3, and grant Verizon’s formal complaint in its entirety.

II. REPLY TO EXCEPTIONS

A. Reply to FirstEnergy’s Exceptions 1-3: The RD Applies the Correct Legal Standard.

The RD correctly resolves this case under the Commission’s binding pole attachment regulations, which “comprehensively” resolve pole attachment disputes in Pennsylvania using the FCC’s “considerably detailed national rules” that the Commission adopted as its own regulations.⁸ FirstEnergy’s first three exceptions invite the Commission to change the result of last year’s rulemaking so it can continue to collect unlawfully high rates; as the RD finds, FirstEnergy “seeks to relitigate the Commission’s *Final Rulemaking Order* that adopted this regulatory structure.”⁹ The Commission does not have this option. It adopted its pole attachment regulations in a proper rulemaking grounded in undisputed statutory authority.¹⁰ The regulations are binding in this case and good for Pennsylvania.¹¹

Reply to Exception 1. FirstEnergy’s first exception is at odds with the plain language of the RD. FirstEnergy argues that the RD “ignores Pennsylvania law,”¹² but the RD resolves this case under the Commission’s regulations, the Public Utility Code, and judicial precedent. The following table contrasts FirstEnergy’s claims¹³ with what the RD, in fact, says:

⁷ The parties agree the final order should not include a 60-day compliance period to discuss the calculation of new telecom rates and overpayments, but disagree about the reason why. See VZ Exception 2 and FE Exception 11.

⁸ See *Final Rulemaking Order*, 2019 WL 4345730, at *23.

⁹ RD at 46.

¹⁰ See FE Initial Br. at 16, 21 (admitting the Commission has authority under 47 U.S.C. § 224(c) and 66 Pa. C.S. § 1301 to regulate pole attachment rates). The Commission also cited authority at 66 Pa. C.S. §§ 313, 314, 701, 1301, and 1501. *Final Rulemaking Order*, 2019 WL 4345730, at *22 & n.76; see also *id.* at *15, *47.

¹¹ *Herdelin*, 328 A.2d at 554; see also *Borough of Bedford v. Commonwealth*, 972 A.2d 53, 61 (Pa. Commw. 2009); see also, e.g., *Final Rulemaking Order*, 2019 WL 4345730, at *6.

¹² FE Exceptions at 3; see also *id.* at 4, 9-12.

¹³ See FE Exceptions at 4, 9-12 (emphasis in original).

FirstEnergy contends:	The RD states:
“The RD concludes that the FCC regulations are <u>the</u> law to be applied in this case.”	“The offense must be a violation of the Public Utility Code, the Commission’s regulations or an outstanding order of the Commission.” ¹⁴
The RD “views the FCC’s regulations as controlling and superseding the Public Utility Code.”	“The Commission’s regulations at Chapter 77 exist in addition to, not in place of, the Commission’s existing regulations and the Public Utility Code, where relevant.” ¹⁵
“[T]he RD refuses to consider the merits of FirstEnergy’s arguments under the Public Utility Code.”	The RD considers FirstEnergy’s “argument that the Public Utility Code and Pennsylvania law control this dispute” and explains why it “does not negate Verizon’s argument that it is entitled to the new telecom rate.” ¹⁶
“[T]he RD ... fails to apply or even consider ... controlling judicial precedent...” ¹⁷	The RD considers “First Energy’s reliance on past Commission decisions regarding pole attachment rates” and finds they “should be afforded little weight in disposing of Verizon’s complaint because those decisions were issued during a different regulatory regime governing pole attachment rates, i.e., prior to the Commission’s adoption of the FCC’s regulations.” ¹⁸
“[N]owhere in the <i>Final Rulemaking Order</i> does the Commission state that the formula rates set forth in the FCC’s regulations are just and reasonable.” ¹⁹	The RD explains that, “[b]y 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” of the Public Utility Code. ²⁰ The <i>Final Rulemaking Order</i> also found “no reason to deviate from FCC-based rates or ratemaking procedures” as “the rate formulas and procedures

¹⁴ RD at 70 (Conclusion of Law 5).

¹⁵ RD at 20; *see also* RD at 23-24 (“[T]he pole attachment rates First Energy charges Verizon must be both consistent with the FCC’s pole attachment regulations as adopted by the Commission, as well as consistent with, for example, Sections 1301 and 1309 of the Public Utility Code ...”).

¹⁶ RD at 47.

¹⁷ FirstEnergy faults the RD for “depart[ing] from binding appellate precedent,” which it says shows that “cost of service is considered the ‘polestar’ of public utility ratemaking.” FE Exceptions at 12. But the RD explained why cases about “public utility ratemaking” are not binding precedent here—they relate to the traditional “rate base/rate of return form of regulation” and *not* the “pole attachment regulations adopted by the Commission in its *Final Rulemaking Order*.” RD at 48.

¹⁸ RD at 48-49.

¹⁹ FirstEnergy claims it was somehow denied an opportunity to appeal the Commission’s regulation requiring the new telecom rate, *see* FE Exceptions at 12, but electric utilities unsuccessfully appealed the same regulation when it was adopted by the FCC. *See City of Portland v. United States*, 969 F.3d 1020, 1052-53 (9th Cir. 2020).

²⁰ RD at 47.

	used to derive rates under FCC rules have been established and govern rates to this date.” ²¹
“[T]he 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.”	The RD finds (1) “record evidence in this proceeding demonstrates that the pole attachment rates First Energy charges Verizon under the joint use agreements are unjust and unreasonable and are therefore in violation of the Public Utility Code...” and (2) “[t]he new telecom rate is the just and reasonable competitively neutral rate” and was properly calculated by Verizon. ²²

Reply to Exception 2. FirstEnergy’s second exception is a repeat of its first and fails for the same reason: the Commission’s pole attachment regulations are binding law in this case. FirstEnergy asks the Commission to adopt an alternative rate methodology in this case to produce higher rates. The Commission does not have that option without a new rulemaking.²³ The Commission decided its “rules will consistently mirror those of the FCC” because it is “critical ... to provide regulatory certainty rather than additional burdens and expenses” of protracted litigation “where broadband investment is contemplated and desired.”²⁴ FirstEnergy’s alternate approach is based on decades-old decisions that pre-date the Commission’s binding pole attachment regulations.²⁵ The approach would erase decades of regulatory and technological advancements, preserve exceptionally high rental rates that frustrate competition and thwart broadband deployment, and leave Pennsylvania consumers worse than before the Commission exercised jurisdiction over pole attachments. The Commission asserted jurisdiction

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

²² RD at 8-9 (Findings of Fact 11, 15); RD at 50; *see also* RD at 74 (Conclusion of Law 23).

²³ *See Final Rulemaking Order*, 2019 WL 4345730, at *17 (“If the Commission does find it necessary to amend Chapter 77 to accommodate state-specific changes, the Commission will initiate an appropriate rulemaking”); *id.* at *19 (“[I]f the Commission deems it appropriate to diverge from the federal regulations, it would initiate a rulemaking that would be subject to public comment.”); *id.* at *25 (“Such a determination to diverge from the federal regulations would require the Commission to initiate a rulemaking proceeding.”).

²⁴ *Id.* at *26; *see also* VZ Reply Br. at 3-9.

²⁵ *See* RD at 48 (“First Energy’s reliance on past Commission decisions regarding pole attachment rates should be afforded little weight ... because those decisions were issued during a different regulatory regime governing pole attachment rates, *i.e.*, prior to the Commission’s adoption of the FCC’s regulations.”).

over pole attachments to affirm and accelerate the FCC’s longstanding effort to lower and unify pole attachment rates to promote broadband deployment, not erase them.²⁶

FirstEnergy’s second exception is also factually wrong. It claims Verizon did not offer evidence about the proper cost of common equity for use in calculating pole attachment rates, when Verizon offered into evidence the most recent cost of common equity for each operating company for each rental year, as set by the Commission in an Order or Report on Quarterly Earnings.²⁷ FirstEnergy also claims its proposal for what it refers to as “fully allocated cost-based rates” in place of the new telecom rates required by the Commission’s regulations was un rebutted, when the RD describes Verizon’s detailed and thorough rebuttal.²⁸

Reply to Exception 3. FirstEnergy’s third exception duplicates an argument FirstEnergy unsuccessfully made during the Commission’s rulemaking, specifically that the Commission should let FirstEnergy continue to over-collect from Verizon in violation of law to avoid risking a rate increase for electric ratepayers.²⁹ According to FirstEnergy, by enforcing the Commission’s regulations, the RD “completely disregards the interests of FirstEnergy electric ratepayers.”³⁰ This is a false dichotomy. Pennsylvania’s “electric ratepayers” are also consumers of broadband services; they are one and the same. The Commission already made its

²⁶ *Final Rulemaking Order*, 2019 WL 4345730, at *6; *see also* VZ Reply Br. at 10-11.

²⁷ *See* RD at 57 (“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”); *see also* VZ St. 2.0, Ex. MSC-1 at VZ00040, VZ00089-90 (Calnon Aff. ¶ 21 & Ex. C-4) (calculating weighted cost of capital using current cost of common equity); VZ St. 2.0, Ex. MSC-2 (providing support for cost of common equity).

²⁸ RD at 37 (“Verizon argued First Energy’s arguments are rooted in the past and premised on a hypothetical world in which the Commission never adopted its pole attachment regulations and is free to impose higher fully allocated cost-based rates on broadband providers in Pennsylvania” and also “refuted First Energy’s fully allocated rate analysis by noting that the analysis depends on actual invoice amounts that differ from and are significantly lower than the rates paid by Verizon.”); *see also* VZ Reply Br. at 41-42; VZ St. 1.1 at 60:1-8 (Mills Surrebuttal); VZ St. 2.1 at 45:3-5 (Calnon Surrebuttal).

²⁹ *See* FE Exceptions at 14; *compare with* Comments of FirstEnergy at 7-8, Docket No. L-2018-3002672 (Oct. 29, 2018) (“FE Rulemaking Comments”).

³⁰ FE Exceptions at 14.

policy decision about how to best advance the interests of these Pennsylvania consumers. It adopted the FCC’s regulations as its own to “provide a balanced approach to the competing needs and demands on pole infrastructure between pole owners, pole attachers, and the telecommunications, *electric*, and cable industries in a predictable manner *using federal rules*.”³¹ The RD correctly enforces the federal rules, which are now in the Commission’s regulations.

The RD also describes Verizon’s evidence, which shows electric ratepayers should *not* pay higher rates if FirstEnergy complies with the law.³² Enforcing the Commission’s regulations should not “trigger a base rate proceeding” for FirstEnergy,³³ let alone require a rate increase if one is filed because the amounts at issue average about █████ percent of FirstEnergy’s annual operating revenues.³⁴ And the new telecom rate *does* fully compensate FirstEnergy for Verizon’s use of space on its poles: it is “just, reasonable, and fully compensatory, and ... grounded in sound economic policies,” a fact affirmed by the FCC and United States Supreme Court.³⁵ FirstEnergy’s customers will not subsidize Verizon’s if FirstEnergy complies with the law,³⁶ nor will the RD “unfairly reduce [FirstEnergy’s] revenue from pole attachments.”³⁷ The new telecom rate will instead fully compensate FirstEnergy, while also ensuring the low,

³¹ RD at 12 (quoting *Final Rulemaking Order*, 2019 WL 4345730, at *6) (emphases added).

³² See RD at 37.

³³ See FE Initial Br. at 50 (discounting as “irrelevant” “[w]hether the reduction in rates would trigger a base rate proceeding for FirstEnergy’s EDCs”).

³⁴ VZ St. 2.1 at 56:13-57:3 (Calnon Surrebuttal) and Ex. MSC-5.

³⁵ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5299 (¶ 137) (2011) (“*Pole Attachment Order*”); see also *FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987); *City of Portland*, 969 F.3d at 1053; *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002).

³⁶ *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 182) (“The new telecom rate is compensatory and is designed so that utilities will not be cross-subsidizing attachers, as it ensures that utilities will recover more than the incremental cost of making attachments. The record provides no evidence indicating that there is any category or type of costs that are caused by the attacher that are not recovered through the new telecom rate.”).

³⁷ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order on Reconsideration, 30 FCC Rcd 13731, 13744 (¶ 28) (2015) (“*Cost Allocator Order*”).

uniform, cost-based rates needed to advance the Commission’s deployment objectives for Pennsylvania consumers.³⁸

B. Reply to FirstEnergy’s Exceptions 4-6: The RD Correctly Found Verizon Is Entitled to the Competitively Neutral New Telecom Rate Under Pennsylvania and FCC Regulations and Precedent.

The RD’s application of the Commission’s regulations is correct and straightforward: The Commission’s regulations presume the lawful rate for Verizon is the new telecom rate which is guaranteed Verizon’s competitors.³⁹ FirstEnergy did not rebut the presumption as required by the regulation—with clear and convincing evidence that it provides “Verizon a net material competitive advantage under the joint use agreements” as “compared to the terms and conditions [FirstEnergy] provides Verizon’s competitors” for their use of FirstEnergy’s poles.⁴⁰ Therefore, the “new telecom rate is the just and reasonable competitively neutral rate” required by law.⁴¹ FirstEnergy’s second set of exceptions challenges this determination and should be rejected. They do not undermine the RD’s correct conclusion that the competitively neutral just and reasonable rate is the new telecom rate.

Reply to Exception 4. FirstEnergy deceives when it claims the FCC “repeatedly has rejected the relief sought by Verizon.”⁴² The FCC has not yet decided a case under the new telecom rate presumption, which took effect in March 2019. This Commission asserted jurisdiction to speed the dispute resolution process “in Pennsylvania as compared to the FCC.”⁴³

FirstEnergy also misrepresents FCC precedent when it claims “ILECs are 0-3 at the FCC” and that the FCC has “rejected ILECs’ requests to insert the new telecom rate into a joint

³⁸ *Final Rulemaking Order*, 2019 WL 4345730, at *2.

³⁹ RD at 73 (Conclusion of Law 18).

⁴⁰ RD at 9-10 (Findings of Fact 13, 15, 18).

⁴¹ RD at 9 (Finding of Fact 15).

⁴² See FE Exceptions at 3.

⁴³ *Final Rulemaking Order*, 2019 WL 4345730, at *6.

use agreement.”⁴⁴ FirstEnergy relies on interim decisions, for which a final decision was not (or has not yet been) issued.⁴⁵ Two of the decisions expressly invalidate joint use agreement rates as “unjust and unreasonable” and all three emphasize that ““competitive neutrality counsels in favor of affording [I]LECs *the same rate* as the comparable [broadband] provider,’ *i.e., the New Telecom Rate*”⁴⁶ where, as here, “FirstEnergy does not provide Verizon a net material competitive advantage under the joint use agreements.”⁴⁷ Perhaps for this reason, FirstEnergy argued in its Briefs that the RD should *not* consider these three prior FCC decisions “controlling precedent” and should find they “are distinguishable from this case.”⁴⁸ The RD nonetheless discusses the cases and FirstEnergy’s arguments about them.⁴⁹ FirstEnergy’s sudden about-face is as disingenuous as it is wrong. The RD does not ignore these FCC decisions as FirstEnergy claims; it considers them and resolves this case consistent with them.

Reply to Exception 5. The Commission’s regulations presumptively require new telecom rates for a broad set of joint use agreements—specifically, all agreements “entered into, renewed,

⁴⁴ FE Exceptions at 5.

⁴⁵ See *BellSouth Telecommc 'ns, LLC v. Fla. Power and Light Co.*, Proceeding No. 19-187, 2020 WL 2568977, at *9 (¶ 1) (EB 2020) (“*FPL 2020 Order*”) (granting in part and staying in part ILEC complaint for the parties “to attempt to resolve their remaining disputes.... Commission staff will conduct any further proceedings necessary, including issuing an appropriate subsequent order, if the parties are not able to settle this case”); *Verizon Va. v. Va. Elec. & Power Co.*, 32 FCC Rcd 3750, 3764 (¶ 30) (EB 2017) (“*Dominion Order*”) (granting in part and staying ILEC complaint for parties “to meet and confer in an effort to resolve the remaining disputes.... If the case cannot be resolved by settlement, Commission staff will conduct any further proceedings necessary to issue a subsequent order resolving all remaining issues and setting a just and reasonable pole attachment rate.”); *Verizon Fla. v. Fla. Power & Light Co.*, 30 FCC Rcd 1140, 1150-51 (¶¶ 26-27) (EB 2015) (“*FPL 2015 Order*”) (dismissing complaint without prejudice for ILEC to “refile its complaint” under new evidentiary standard detailed in the decision).

⁴⁶ *Id.* at 1142 (¶ 7) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217)) (emphases added); see also *FPL 2020 Order*, 2020 WL 2568977, at *2 (¶ 4) (“competitive neutrality counsels in favor of affording the [I]LEC the same rate as the comparable attacher”) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217)) (citation omitted); *Dominion Order*, 32 FCC Rcd at 3758 (¶ 17) (holding “Verizon has met its burden of showing that the rate it pays under the Joint Use Agreements is unjust and unreasonable” and pointing to “the difference between the rate it pays and the [new telecom] rate that [C]LECs pay”).

⁴⁷ RD at 10 (Finding of Fact 18).

⁴⁸ RD at 15 (citing FE Initial Br. at 16), 17 (citing FE Reply Br. at 7-8), 28 (citing FE Initial Br. at 36-39), 40 (citing FE Reply Br. at 48).

⁴⁹ See RD at 30 (“First Energy argued that even if the Commission relies on FCC precedent...”), 34 (“Verizon also refuted First Energy’s argument about a different electric utility’s agreement with a different ILEC” in a different FCC pole attachment complaint proceeding); see also, e.g., RD at 32, 38.

or in evergreen status after [March 11, 2019],” including all “agreements that are automatically renewed, extended, or placed in evergreen status.”⁵⁰ As the RD finds, the parties’ joint use agreements are entitled to the presumption; they “automatically renewed [and] extended” after the March 11, 2019 effective date of the relevant regulation.⁵¹

With its fifth exception, FirstEnergy tries to escape this presumption, but its argument is undermined by the rulemaking comments it filed with the Commission, where it stated:

The FCC’s regulations provide new lower rates for [ILECs] -- primarily traditional telephone utility companies -- that extend not only to new pole attachment agreements but also to existing agreements that are “renewed” after the effective date of the new regulations. **Since the initial term of most existing joint use agreements have expired and are operating on year-to-year renewals, this means that within a year most joint use agreements will be subject to the new rate rules.** For any such new and “renewed” agreements, the ILEC would be presumed to get the FCC’s new lower rate...⁵²

The parties’ joint use agreements fall squarely within this category of agreements. As the RD explains, “because the initial term of each joint use agreement has expired, the agreements govern the parties’ joint use relationship today because they automatically extended and continue to do so until terminated.”⁵³

FirstEnergy’s contrary arguments are “overly technical and formalistic” and would render the presumption incapable of achieving its purpose.⁵⁴ As the RD explains, the presumption “was designed to eliminate outdated rate disparities in the existing agreements in an effort to promote

⁵⁰ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7770 (¶ 127 n.475) (2018) (“*Third Report and Order*”); see also 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)) (“In complaint proceedings challenging utility pole attachment rates ... for pole attachment contracts entered into or renewed after the effective date of this section, ... there is a presumption that [ILECs] may be charged no higher than the rate determined in accordance with [the new telecom rate formula].”).

⁵¹ RD at 9 (Finding of Fact 12); *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475).

⁵² FE Rulemaking Comments at 8.

⁵³ RD at 42; see also VZ Initial Br. at 23-25; VZ Reply Br. at 12-15.

⁵⁴ RD at 42-43.

broadband deployment and the deployment of other advanced technologies.”⁵⁵ And so the presumption must apply to the many joint use agreements that automatically renew following an initial term, because they are the agreements that contain the outdated rate disparities.⁵⁶ It also must apply regardless of the word used in the joint use agreement to describe that renewal or the presumption would irrationally apply different standards of review based on what specific word was used decades ago.⁵⁷ Here, the joint use agreements automatically renewed in the last year because they “continued” to govern absent termination.⁵⁸ The RD correctly holds that the presumption applies to simplify and streamline this litigation as the Commission intended.⁵⁹

Reply to Exception 6. “The new telecom rate is the just and reasonable competitively neutral rate because First Energy does not provide Verizon a net material advantage under the joint use agreements as compared to the terms and conditions it provides Verizon’s competitors.”⁶⁰ FirstEnergy argues otherwise in its sixth exception, but relies on conclusory allegations and incorrect standards that would perpetuate the non-cost-based differences in pole attachment rates that undermine the Commission’s broadband deployment goals.

⁵⁵ *Id.*; see also *Final Rulemaking Order*, 2019 WL 4345730, at *3; see also *Third Report and Order*, 33 FCC Rcd at 7767-68, 7770 (¶¶ 123, 127 n.475).

⁵⁶ See RD at 43; *Final Rulemaking Order*, 2019 WL 4345730, at *3 (“eliminat[ing] outdated disparities between the pole attachment rates that [ILECs] pay compared to other similarly-situated telecommunications attachers”).

⁵⁷ See VZ Reply Br. at 12-15. Notably, the just and reasonable rate would still be the same, but the litigation would be more complicated without the presumption. See 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224, 47 C.F.R. § 1.1413(a)).

⁵⁸ Each joint use agreement states that, after an initial term, the agreement “*shall continue* in force thereafter until terminated by either Party at any time” upon advance written notice. See Compl. ¶ 16 n.47 (citing provisions). But continue and extend are synonyms; “continue” means “[t]o carry further in time, space or development: extend.” See *id.* n.48 (citing sources). This provision is also “a so-called automatic *renewal* provision” under Pennsylvania law because it is a “a contractual provision pursuant to which a contract for a term is renewed automatically for a further term unless, before a specified date, one party gives notice of an intent to terminate.” See *Otis Elevator Co. v. George Wash. Hotel Corp.*, 27 F.3d 903, 904 (3d Cir. 1994) (emphasis added).

⁵⁹ RD at 9 (Finding of Fact 12); RD at 42-43; *Final Rulemaking Order*; 2019 WL 4345730, at *6 (“public demand for ubiquitous access to wireline and wireless data technology has increased the desire for more streamlined pole attachment procedures in Pennsylvania to address matters that arise in Pennsylvania more efficiently than the FCC”); see also *see also* VZ Initial Br. at 23-25; VZ Reply Br. at 12-15.

⁶⁰ RD at 9 (Finding of Fact 15).

First, FirstEnergy did not “demonstrate[] that Verizon receives substantial material advantages under the Joint Use Agreements” as it contends.⁶¹ Instead, FirstEnergy stated conclusively in its Answer that the new telecom rate presumption “does not apply to this proceeding.”⁶² FirstEnergy did not argue in the alternative that it could rebut the presumption. FirstEnergy also did not submit the most basic evidence on the issue—its license agreements with Verizon’s competitors and a comparison of their terms to those in the joint use agreements.⁶³ FirstEnergy admitted it did not compare the terms and conditions of its license agreements with those in the parties’ joint use agreements⁶⁴ and claimed it should not have to prove or quantify unique costs it claims to incur in order to charge Verizon a rate higher than the new telecom rate it must charge to Verizon’s competitors.⁶⁵ But FirstEnergy “may not ‘embed in Verizon’s rental rate costs that [FirstEnergy] does not incur.’”⁶⁶ The new telecom rate formula already produces a “rate [that] is just, reasonable, and fully compensatory.”⁶⁷ It is the correct, lawful, and competitively neutral rate for Verizon’s use of FirstEnergy’s poles.

⁶¹ See FE Exceptions at 21.

⁶² Answer Brief at i, ¶ 28; see also Answer to Compl. ¶¶ 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 43, 62, 63 (stating that the regulation’s “presumptions do not apply”).

⁶³ The only FirstEnergy license agreements entered into evidence were provided by Verizon. See VZ St. 1.0, Ex. SCM-3 at VZ00505-530; VZ St. 1.1, Ex. SCM-11. And they confirm Verizon and its competitors attach to FirstEnergy’s poles on materially comparable terms and conditions. See VZ Initial Br. at 38-51; VZ Reply Br. at 19-26.

⁶⁴ VZ St. 1.1, Ex. SCM-13. FirstEnergy ultimately presented a flawed and incomplete comparison of one of the parties’ ten joint use agreements with a draft license agreement FirstEnergy “present[s] to requesting CLEC / CATV entities with the understanding that modifications are negotiated.” FE St. 1-RJ at 36:15-16 (Schafer Rejoinder); VZ St. 1.0, Ex. SCM-5 at VZ00577 (FCC Ex. 23). But draft terms that may not apply to any company cannot prove a real-life competitive advantage, much less a net material competitive advantage as required by the Commission’s regulations. VZ St. 1.0, Ex. SCM-1 at VZ00017 (Mills Aff. ¶ 37); VZ St. 2.0, Ex. MSC-1 at VZ00052 (Calnon Aff. ¶ 31); VZ St. 2.2 at 15:10-16:4 (Calnon Surrejoinder). FirstEnergy’s comparison was also wrong when compared to the executed license agreements in the record, which contain terms and conditions virtually identical to the joint use agreement terms used in FirstEnergy’s analysis. VZ St. 1.2 at 24:12-27:1 (Mills Surrejoinder). And ultimately, FirstEnergy did not offer the comparison into evidence. See Joint Stipulation ¶ 1 (omitting FE St. 1-RJ, Ex. SFS-15).

⁶⁵ See FE Initial Br. at 3, 74, 79.

⁶⁶ *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18).

⁶⁷ *Pole Attachment Order*, 26 FCC Rcd 5240 at (¶ 137); see also *Fla. Power Corp.*, 480 U.S. at 254; *City of Portland*, 969 F.3d at 1053; *Ala. Power Co.*, 311 F.3d at 1370-71.

Second, FirstEnergy has access to all the relevant evidence needed to meet its burden under the Commission’s regulations, which require *FirstEnergy* to rebut the new telecom rate presumption with clear and convincing evidence that *FirstEnergy* provides Verizon terms and conditions under *FirstEnergy*’s agreements with Verizon that give Verizon a net material advantage as compared to the terms and conditions in *FirstEnergy*’s agreements with Verizon’s competitors.⁶⁸ If FirstEnergy incurs an unreimbursed cost because it provides Verizon a net material competitive advantage under its joint use agreements as compared to its license agreements, FirstEnergy would have the relevant data to substantiate it.⁶⁹

FirstEnergy’s complaints about the discovery process are thus irrelevant. They are also factually wrong. FirstEnergy propounded discovery when this case was pending at the FCC and was allowed to take unlimited discovery after this case was transferred to the Commission. It filed two motions to compel; each was correctly denied and neither sought the information FirstEnergy now complains about in its sixth exception.⁷⁰ The information FirstEnergy points to is highly specific information about a segment of Verizon’s network that Verizon does not track and cannot track without significantly increasing its costs.⁷¹ The information is also comparable to information FirstEnergy does not maintain with respect to its own operations; FirstEnergy explained it does not have “specific labor code[s] available to accurately determine the effort and labor costs” involved when it completes work “with internal company labor.”⁷² The discovery process is not to blame for FirstEnergy’s evidentiary failures. FirstEnergy cannot prove and

⁶⁸ See 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

⁶⁹ See, e.g., VZ St. 1.1 at 11:9-12:2 (Mills Surrebuttal); VZ St. 2.1 at 34:14-35:3 (Calnon Surrebuttal); VZ St. 1.2 at 7:16-8:12 (Mills Surrejoinder).

⁷⁰ See Order Denying Motion to Compel Filed by FirstEnergy Regarding Interrogatories I-1, I-20, and I-21 (May 11, 2020); Order Denying Motion to Compel Filed by FirstEnergy Regarding Interrogatory III-1 (June 3, 2020).

⁷¹ VZ St. 1.2 at 8:4-12 (Mills Surrebuttal).

⁷² VZ St. 1.2 at 7:16-8:12 (Mills Surrebuttal) & Ex. SCM-12.

quantify the value of net material competitive advantages it provides Verizon under the joint use agreements because there are none.⁷³

Third, the RD correctly finds that FirstEnergy failed to rebut the new telecom rate presumption and specifically rejected the allegations FirstEnergy relies on in its sixth exception, stating that it “disagree[s] with First Energy’s argument.”⁷⁴ For good reason, FirstEnergy does not provide Verizon a net material advantage under the joint use agreements:

- *Speed to Market.* Verizon should *not* pay higher rates because it, like all ILECs, deployed some of its facilities half a century ago, before cable companies and CLECs entered the market.⁷⁵ The Commission’s regulations eliminate outdated rate disparities premised on history alone.⁷⁶ As the FCC has explained, an alleged “speed to market” advantage “associated with Verizon’s historical status as an [I]LEC” is *not* relevant to whether “rates are just and reasonable” today.⁷⁷
- *Up-front Work Costs.* Verizon does *not* incur fewer make-ready costs than its competitors.⁷⁸ FirstEnergy’s contrary claim was based on a biased and incomplete comparison of make-ready costs FirstEnergy charged Verizon to amounts it says it charged a subset of licensees requiring the most make-ready work during the last two

⁷³ RD at 9-10 (Findings of Fact 13, 15-18).

⁷⁴ RD at 46. The RD includes a confusing sentence or drafting error when it states that, [t]hrough the adoption of the FCC’s regulations as its own, the Commission is giving Verizon the benefits of a first-class airline seat at coach prices.” See RD at 50. The RD’s analysis, its findings of fact, and conclusions of law clarify that Verizon does not receive any better “airline seat” under the joint use agreements than its competitors receive under their joint use agreements. See, e.g., RD at 10 (Finding of Fact 18) (“First Energy does not provide Verizon a net material competitive advantage under the joint use agreements.”); RD at 42 (“the joint use agreements do not materially advantage Verizon”); RD at 46 (“I disagree with First Energy’s argument that ‘in essence, Verizon seeks the benefits of a first-class airline seat.’”). The sentence should be deleted for internal consistency with the RD’s findings of fact, conclusions of law, and supporting analysis.

⁷⁵ See RD at 35 (“Verizon also rebutted First Energy’s ‘speed to market’ argument, noting that ... Verizon is not advantaged by the age of its network...”); RD at 44 (“Any benefit that Verizon receives as a result of overlashing is as a result of Verizon placing its original facilities on the poles in the first place. This effort should not harm Verizon in its efforts to obtain the new telecom rate but Verizon should be commended for taking advantage of its existing facilities to serve new customers by overlashing.”); see also VZ Initial Br. at 46; VZ Reply Br. at 20.

⁷⁶ *Final Rulemaking Order*, 2019 WL 4345730, at *3 (“eliminat[ing] outdated disparities between the pole attachment rates that [ILECs] pay compared to other similarly-situated telecommunications attachers”); *City of Portland*, 969 F.3d at 1052-53 (affirming new telecom rate presumption requiring electric utilities to “remove rate disparities between ... so-called incumbent local exchange carriers, or ILECs” and “so-called competitive local exchange carriers, or CLECs”).

⁷⁷ See RD at 35 (“Verizon also rebutted First Energy’s ... argument, noting that Verizon does not incur fewer make-ready expenses than its competitors”); see also VZ St. 1.2, Ex. SCM-45 at 3; see also VZ St. 2.2 at 17:3-16 (Calnon Surrejoinder).

⁷⁸ See VZ Reply Br. at 21-22.

years.⁷⁹ The analysis also excluded nearly all of the costs Verizon incurred from performing make-ready work itself from the comparison and did not account for significant pole replacement and transfer costs FirstEnergy imposes on Verizon, but *not* on Verizon’s competitors.⁸⁰

- *Application Fees.* Verizon does *not* have a competitive advantage with respect to application fees because FirstEnergy does *not* charge application fees to Verizon or other attachers.⁸¹ FirstEnergy did not offer invoices for application fees or payment records into evidence and does not have the right to charge application fees under license agreements in the record.⁸²
- *Location on the Pole.* The location of Verizon’s facilities on FirstEnergy’s poles does *not* provide Verizon an advantage over its competitors. To the contrary, it is a competitive *disadvantage*.⁸³ Verizon’s facilities are exposed to more damage from oversized vehicles, vandalism, and similar hazards.⁸⁴ They are damaged more frequently by gaffs, ladders, bucket trucks, and contractors who work in the space above Verizon’s facilities—as FirstEnergy explained, individuals working higher on a pole must take “extra care to avoid damaging the attachments of lower communications facilities.”⁸⁵ The evidence confirmed this does not always occur.⁸⁶
- *Reserved space on the pole.* First Energy’s claim that Verizon enjoys an advantage over competitors by reserving space on the pole is false.⁸⁷ Verizon is *not* reserved space on FirstEnergy’s poles under the terms of the joint use agreements⁸⁸ and by law has not been able to reserve space on an electric utility’s poles since 1996.⁸⁹

⁷⁹ VZ Reply Br. at 21; VZ St. 1.1 at 18:10-19:5 (Mills Surrebuttal); VZ St. 2.1 at 37:12-38:14 (Calnon Surrebuttal); VZ St. 3.1 at 27:19-28:7 (Tardiff Surrebuttal).

⁸⁰ VZ St. 1.0, Ex. SCM-1 at VZ00024 (Mills Aff. ¶ 55); VZ St. 1.1 at 15:17-17:3 (Mills Surrebuttal); see also VZ St. 3.1 at 26:3-9 (Tardiff Surrebuttal); see also *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18) (“Where Verizon performs a particular service itself and incurs costs comparable to its competitors in performing that service, ... [an electric utility] may not ‘embed in Verizon’s rental rate costs that [the electric utility] does not incur.’”).

⁸¹ See RD at 35 (“Verizon also rebutted First Energy’s ... argument, noting that ... First Energy does not charge all attachers fees to use its SPANS system, so Verizon has no advantage by using SPANS without charge.”); see also VZ Reply Br. at 25.

⁸² See VZ St. 1.1 at 22:13-23:2 (Mills Surrebuttal) & Ex. SCM-11 at FE00206-312.

⁸³ RD at 46 (“I disagree with First Energy’s argument that ... Verizon seeks ... [a] better location” at a lower price); see also VZ Initial Br. at 50-51; see also VZ St. 1.0, Ex. SCM-1 at VZ00030-31 (Mills Aff. ¶¶ 66-69); VZ St. 1.1 at 30:8-31:10 (Mills Surrebuttal); VZ St. 1.2 at 18:8-19:2 (Mills Surrejoinder).

⁸⁴ VZ St. 1.0, Ex. SCM-1 at VZ00030 (Mills Aff. ¶ 66); FE St. 1-R, Exs. SFS-8, SFS-9 (VZ damage reports).

⁸⁵ VZ St. 1.0, Ex. SCM-1 at VZ00030 (Mills Aff. ¶ 66); VZ St. 1.1 at 30:8-14 & Ex. SCM-24 (Mills Surrebuttal).

⁸⁶ See VZ St. 1.0, Ex. SCM-1 at VZ00030-31 (Mills Aff. ¶¶ 66-69); VZ St. 1.1 at 30:8-31:10 (Mills Surrebuttal); VZ St. 1.2 at 18:8-19:2 (Mills Surrejoinder); see also FE St. 1-R, Exs. SFS-8, SFS-9 (VZ damage reports).

⁸⁷ RD at 46 (“I disagree with First Energy’s argument that ... Verizon seeks ... reserved space” at a lower price).

⁸⁸ See VZ St. 1.1 at 29:9-10 (Mills Surrebuttal) (citing agreements).

⁸⁹ See 52 Pa. Code § 77.4(a) (incorporating 47 U.S.C. § 224(f)); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16053 (¶ 1170) (1996) (“Permitting an [I]LEC, for example, to reserve space for local exchange service ... would favor the future needs of the [I]LEC over

The RD is thus correct to find FirstEnergy did not meet its burden. FirstEnergy built its case, like its exceptions, primarily on the flawed and conclusory claim that higher rates are justified simply because Verizon is an ILEC, and so is party to “joint use agreements” instead of the “license agreements” that are available to Verizon’s competitors.⁹⁰ The Commission’s regulations instead presume joint use agreements and license agreements *are* comparable and should include the same new telecom rate absent proof otherwise.⁹¹ Because FirstEnergy did not provide that evidence, the RD correctly enforces the Commission’s regulations and sets the new telecom rate as the competitively neutral, just and reasonable rate.

Fourth, a “failure to weigh, and account for, the different rights *and responsibilities* in joint use agreement[s]” as compared to license agreements leads to “marketplace distortions” that harm consumers.⁹² The RD is therefore correct to consider the costs FirstEnergy imposes on Verizon, but not on Verizon’s competitors, when deciding whether FirstEnergy provides Verizon a net material competitive advantage under the joint use agreements.⁹³ FirstEnergy seeks to avoid inquiry into the unique costs it requires Verizon to incur, arguing that the RD should have ignored the significant pole ownership, maintenance, and disposal costs FirstEnergy imposes on Verizon, but not on Verizon’s competitors.⁹⁴ But FirstEnergy admits the costs are uniquely imposed on Verizon and are “substantial.”⁹⁵ These unique costs incurred by Verizon to deploy

the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.”).

⁹⁰ See FE Exceptions at 24.

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

⁹² See *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654) (emphasis added).

⁹³ RD at 44, 45; see also RD at 10 (Finding of Fact 17).

⁹⁴ See FE Exceptions at 25; see also VZ Initial Br. at 39 (citing agreements).

⁹⁵ FirstEnergy’s witness describes the added costs as the “cost of doing business [for Verizon] as a pole owner” under the joint use agreements—while admitting “Verizon’s competitors are not pole owners” so do not incur similar pole ownership costs under their license agreements. FE St. 1-RJ at 16:13-14, 19:19 (Schafer Rejoinder); see also Comments of FirstEnergy et al. at 131, *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245 (Aug. 16, 2010) (“Unlike cable companies and CLECs, which do not own their own distribution poles, ILECs do own and control millions of distribution poles across the country.”); *id.*

and maintain facilities on FirstEnergy’s poles must be accounted for or rates will not be competitively neutral as needed to achieve the Commission’s deployment goals.⁹⁶

Fifth, FirstEnergy relies on an interim FCC decision about a different electric utility’s different agreement with a different ILEC in a different case, but this interim decision does not justify higher rates for FirstEnergy.⁹⁷ The interim decision identified certain alleged “advantages” in a different agreement between different parties, but did not decide whether the “advantages” were net material competitive advantages sufficient to rebut the new telecom rate presumption in that case—let alone in this case, where the record refutes each one.⁹⁸ The RD correctly held FirstEnergy to its burden under the Commission’s regulations; because “First Energy did not rebut the presumption in the Commission’s regulations that the new telecom rate applies” with clear and convincing evidence it provides Verizon net material competitive advantages under the joint use agreements,” the “new telecom rate is the just and reasonable competitively neutral rate.”⁹⁹

C. Reply to FirstEnergy’s Exceptions 7-11: The RD Correctly Determines the Properly Calculated New Telecom Rates.

The Commission’s new telecom rate formula sets fully compensatory per-pole rates using a pole owner’s prior-year reported cost data and presumptive inputs that are in the Commission’s

at 5 (“For decades, [CLECs and cable companies] have attached their facilities to tens of millions of utility poles ... without incurring the substantial cost and inconvenience of constructing and maintaining their own distribution systems.”) (emphasis added); see also Reply Comments of FirstEnergy et al. at 35, *Implementation of Section 224 of the Act: A National Broadband Plan for Our Future*, WC Docket No. 07-245 (Oct. 4, 2010) (“One of the ‘burdens’ for Verizon and other ILEC pole owners in joint use agreements is that they need to pay more pole costs than they would if they were not joint pole owners.”).

⁹⁶ See *Final Rulemaking Order*, 2019 WL 4345730, at *2 (“rental rates for pole attachments [should be] as low and close to uniform as possible ... to promote broadband deployment”) (citation omitted); see also *Dominion Order*, 32 FCC Red at 3760 (¶ 21).

⁹⁷ See FE Exceptions at 25-27 (citing *FPL 2020 Order*).

⁹⁸ See RD at 34 (“Verizon also refuted First Energy’s argument about a different electric utility’s agreement with a different ILEC noting that agreement does not justify a higher rate for First Energy”); see also VZ Initial Br. at 48-51; VZ St. 1.1 at 29:3-32:2 (Mills Surrebuttal).

⁹⁹ RD at 9 (Findings of Fact 13, 15).

regulations.¹⁰⁰ The RD correctly finds the “properly calculated new telecom rates for Verizon’s use of FirstEnergy’s poles” during the years for which relevant cost data is available are:¹⁰¹

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

The RD then provides that “the rates going forward” will be “the same”—meaning they will be calculated in the same manner when the relevant cost data becomes available.¹⁰² FirstEnergy’s third set of exceptions challenge these conclusions, but the rates set by the RD are required by the Commission’s regulations and the record.

Reply to Exception 7. The Commission’s regulations presume the lawful rate under existing joint use agreements is the new telecom rate.¹⁰³ The Commission should therefore reject FirstEnergy’s seventh exception, where it argues that Verizon must be party to “FirstEnergy’s standard third-party attacher license agreement” before it can obtain the new telecom rate.¹⁰⁴ FirstEnergy admits the FCC “explicitly stated” the new telecom rate presumption in its regulations will apply “to existing contracts.”¹⁰⁵ And this Commission already decided that Verizon can be “in no worse position ... than if the Commission did not assume jurisdiction.”¹⁰⁶

¹⁰⁰ See 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. §§ 1.1406(d)(2), 1.1409, 1.1410).

¹⁰¹ RD at 8-9 (Finding of Fact 11); see also VZ St. 2.0 at 4:10-11 (Calnon Direct); VZ St. 2.0, Ex. MSC-1 at VZ00036-42, VZ00058-87 (Calnon Aff. ¶¶ 5-13, Exs. C-1 – C-3).

¹⁰² RD at 66; see also RD at 69 (“The rates that Verizon pays First Energy to attach to its poles will be determined using the new telecom rate methodology going forward.”).

¹⁰³ See 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)).

¹⁰⁴ FE Exceptions at 27. This argument also fails because FirstEnergy does not have a “standard third-party attacher license agreement.” It has a draft agreement it “present[s] to requesting CLEC / CATV entities with the understanding that modifications are negotiated.” VZ St. 1.0, Ex. SCM-5 at VZ00577; see also FE Rulemaking Comments at 13 (stating its license agreements “contain provisions specific to individual circumstances”).

¹⁰⁵ See FE Exceptions at 18 (quoting *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127)).

¹⁰⁶ *Final Rulemaking Order*, 2019 WL 4345730, at *25.

The lawful rate under the joint use agreements is, therefore, the new telecom rate. Consistent with the Commission’s regulations, the RD correctly “[s]ubstitute[s] in the pole attachment agreement the just and reasonable rate ... established by the Commission.”¹⁰⁷

Reply to Exception 8. The Commission’s regulations include presumptions about inputs for use in calculating rates (pole height, space occupied, unusable space, and average number of attaching entities) to provide “predictability, efficiency and fairness.”¹⁰⁸ FirstEnergy asks the Commission to forgo these inputs in favor of inputs FirstEnergy prefers. But FirstEnergy bears the burden to justify inputs that vary from the regulation’s presumptions, and FirstEnergy failed to meet that burden with valid and “probative direct evidence” about the poles for which rates are being set.¹⁰⁹ FirstEnergy did not enter *any* data into evidence,¹¹⁰ only a summary of data it says its contractor collected during a quick, litigation-motivated review of, at most, ■■■ percent of the poles shared by the parties in Pennsylvania.¹¹¹ The data includes poles to which Verizon is *not* attached and FirstEnergy’s witnesses admitted Verizon identified so many errors in the data that they reduced the “confidence level” of the reported results.¹¹² Thus, FirstEnergy did *not* offer “unrebutted actual inputs,” and the RD does not reject them solely because they were produced in response to litigation.¹¹³ Instead, it rejects FirstEnergy’s attempt to increase rates using “data

¹⁰⁷ 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1407(a)(2)); *see also* RD at 74 (Conclusion of Law 24).

¹⁰⁸ *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (¶ 74) (1998).

¹⁰⁹ *See, e.g., In the Matter of Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Util. Poles*, 2 FCC Rcd 4387, 4394 (¶ 52 n.27) (1987); *see also In the Matter of Amendment of Commission’s Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12139 (¶ 70) (2001) (“*Consolidated Partial Order*”).

¹¹⁰ *But see Teleport Commc’ns Atlanta, Inc. v. Ga. Power Co.*, 17 FCC Rcd 19859, 19865-66 (¶¶ 16, 18) (2002) (stating the “survey should be submitted”).

¹¹¹ *See* VZ St. 1.1 at 50:3-59:6 (Mills Surrebuttal); VZ St. 1.2 at 34:8-42:14 (Mills Surrejoinder); VZ St. 2.1 at 23:4-30:2 (Calnon Surrebuttal); VZ St. 2.2 at 18:10-19:17 (Calnon Surrejoinder); VZ St. 3.1 at 35:14-42:5 (Tardiff Surrebuttal); VZ St. 3.2 at 16:1-17:5 (Tardiff Surrejoinder).

¹¹² *See id.*

¹¹³ FE Exceptions at 28-29.

quickly gathered during a review of a small set of poles in response to litigation.”¹¹⁴ In short, FirstEnergy’s hastily assembled and faulty “study” was not sufficient evidence to rebut the presumption that the uniform inputs required by the Commission’s regulations must be used.

Reply to Exception 9. FirstEnergy’s current “weighted average cost of debt and equity is the proper cost of capital figure”¹¹⁵ when calculating new telecom rates under the Commission’s regulations because it ensures FirstEnergy “is fully compensated for the capital investment that is being used by the attacher.”¹¹⁶ Verizon offered into evidence its calculations of FirstEnergy’s cost of capital for each, including the cost of equity,¹¹⁷ and FirstEnergy addressed Verizon’s evidence, arguing outdated values set in 2007, 1988 and possibly earlier should be used instead.¹¹⁸ But FirstEnergy also admitted the “proper” cost of capital *is* one that was “most recently approved by the Commission,”¹¹⁹ and FirstEnergy’s most recent rate cases were in 2014 and 2016. The RD thus correctly finds Verizon’s rate calculations are correct under the Commission’s regulations and “agree[s] with Verizon that ... the cost of capital should be current.”¹²⁰ FirstEnergy’s ninth exception—that Verizon “complete[ly] fail[ed] to present any evidence regarding the current cost of capital”—is thus confusing and wrong.¹²¹

Reply to Exception 10. The RD correctly determines the “properly calculated new telecom rates for Verizon’s use of FirstEnergy’s poles” for the 2011 through 2019 rental

¹¹⁴ RD at 57.

¹¹⁵ See *Multimedia Cablevision, Inc. v. Sw. Bell Tel. Co.*, 11 FCC Rcd 11202, 11215 (¶ 36) (1996).

¹¹⁶ See *Consolidated Partial Order*, 16 FCC Rcd at 12161 (¶ 120).

¹¹⁷ See VZ St. 2.0, Ex. MSC-1 at VZ00040, VZ00089-90 (Calnon Aff. ¶ 12 & Ex. C-4); VZ St. 2.0, Ex. MSC-2; VZ St. 2.1 at 17:4-20:11 (Calnon Surrebuttal).

¹¹⁸ VZ St. 2.0, Ex. MSC-2; VZ St. 2.1 at 17:14-18:9 (Calnon Surrebuttal).

¹¹⁹ FE Initial Br. at 89.

¹²⁰ See RD at 8-9 (Finding of Fact 11); RD at 57; see also VZ St. 2.0, Ex. MSC-1 at VZ00040, VZ00089-90 (Calnon Aff. ¶ 21 & Ex. C-4) (calculating cost of capital); VZ St. 2.0, Ex. MSC-2 (providing support for cost of capital).

¹²¹ FE Exceptions at 29.

years¹²²—years for which all relevant cost data is available—and requires new telecom rates going forward to be calculated in “the same” manner using “current” data.¹²³ This is consistent with the Commission’s regulations, which require FirstEnergy to charge Verizon’s competitors annually calculated new telecom rates using FirstEnergy’s prior-year reported cost data.¹²⁴ The RD, therefore, does *not* “render contradictory findings and conclusions regarding the new rate it recommends Verizon should pay going forward” as FirstEnergy contends.¹²⁵

Reply to Exception 11. Verizon agrees with FirstEnergy that a compliance period is not needed to determine the properly calculated new telecom rates, but disagrees about the reason why. As FirstEnergy states, neither party should be able to “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.”¹²⁶ But FirstEnergy is wrong when it argues the compliance period would be used to remedy some deficiency in Verizon’s rate calculations. Verizon’s rate calculations already are the “properly calculated new telecom rates for Verizon’s use of FirstEnergy’s poles.”¹²⁷ They are the only rate calculations in evidence that comply with the Commission’s regulations and are supported by direct, surrebuttal, and surrejoinder testimony.¹²⁸

¹²² RD at 8-9 (Finding of Fact 11).

¹²³ RD at 66; *see also* RD at 57 (“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 69 (“The rates that Verizon pays First Energy to attach to its poles will be determined using the new telecom rate methodology going forward.”).

¹²⁴ *See, e.g.*, VZ St. 2.0, Ex. MSC-1 at VZ00039 (Calnon Aff. ¶ 10); VZ St. 2.1, Ex. MSC-3.

¹²⁵ FE Exceptions at 30. Verizon agrees with FirstEnergy that a compliance period is not needed to determine the properly calculated new telecom rates, but disagrees about the reason why. *See* VZ Exception 2; VZ Reply to FE Exception 11. FirstEnergy also argues in Exception 10 that “Verizon presented no evidence” regarding the “cost of common equity.” As detailed in Verizon’s reply to Exceptions 2 and 9, Verizon presented the relevant evidence for each year in dispute based on FirstEnergy’s most recent rate proceedings.

¹²⁶ *See* FE Exceptions at 32; *see also* VZ Exception 2.

¹²⁷ RD at 8-9 (Finding of Fact 11).

¹²⁸ *See* VZ St. 2.0 at 4:8-14 & Ex. MSC-1 (Calnon Direct Testimony); VZ St. 2.1 at 8:13-31:6 (Calnon Surrebuttal Testimony); VZ St. 2.2 at 18:10-19:17 (Calnon Surrejoinder Testimony). FirstEnergy, in contrast, summarily stated that slightly different (and at times lower) new telecom rates should apply. It did not enter its calculations into

FirstEnergy continues to resist the new telecom rates required by law and set by the RD, which shows why the Commission’s final order should not give FirstEnergy the opportunity to further delay the required rate reductions, drive up Verizon’s litigation costs, and try to impose inflated rates contrary to the Commission’s final order.¹²⁹ Despite the RD’s express finding that Verizon correctly calculated the new telecom rates required by law,¹³⁰ FirstEnergy twice complains that Verizon seeks those lawful new telecom rates in this litigation, which followed a near-decade of rate negotiations.¹³¹ The Commission already found consumers will benefit from new telecom rates, simplified pole attachment complaint proceedings, and prompt enforcement of its new pole attachment regulations.¹³² The final order should require FirstEnergy to comply with the lawful rates set by the RD without further delay.

D. Reply to FirstEnergy’s Exceptions 12-13: The RD Correctly Requires FirstEnergy to Refund Amounts It Unlawfully Collected.

Reply to Exception 12. FirstEnergy’s twelfth exception ignores the Commission’s refund authority, arguing it may only reform contracts prospectively. But the Commission has authority to require just and reasonable rates *and* to award refunds of amounts previously collected in violation of law. Under its pole attachment regulations, the Commission may “[t]erminate the unjust and/or unreasonable rate,” “[s]ubstitute in the pole attachment agreement the just and

evidence, fully address Verizon’s calculations, or respond to much of Verizon’s testimony explaining the consistency of Verizon’s rate calculations with the Commission’s regulations. *See, e.g.*, VZ St. 2.1 at 9:7-21:5 (Calnon Surrebuttal); VZ St. 2.2 at 1:19-3:14 (Calnon Surrejoinder).

¹²⁹ *See* VZ Exception 2.

¹³⁰ RD at 8-9 (Finding of Fact 11).

¹³¹ FE Exceptions at 32, 36 (“[A]t 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.”). FirstEnergy’s characterization of the parties’ negotiation is false. *See, e.g.*, VZ Reply Br. at 29; VZ St. 1.1 at 41:5-42:19 (Mills Surrebuttal).

¹³² *See, e.g., Final Rulemaking Order*, 2019 WL 4345730, at *26 (“The Commission acknowledges how critical it is to provide regulatory certainty rather than additional burdens and expenses where broadband investment is contemplated and desired.”).

reasonable rate ... established by the Commission,” *and* “[o]rder a refund.”¹³³ Under the Public Utility Code, the Commission may “determine and prescribe, by findings and order, the just, reasonable, and equitable obligations, terms, and conditions” of contracts *and* refund “the amount of any excess paid ... together with interest...” in “any proceeding involving rates.”¹³⁴ Section 1312 is not limited to tariffed rates; it applies to “any rate received by a public utility” that was “unjust or unreasonable” or in violation of a Commission “regulation.”¹³⁵ The law has *required* FirstEnergy to charge just and reasonable rates under the parties’ agreements since mid-2011.¹³⁶ And so the final order—consistent with the Commission’s regulations and the Public Utility Code—should set the new telecom rate prospectively *and* award refunds of all amounts FirstEnergy unlawfully collected during the near-decade it has refused to comply with the law.¹³⁷

Reply to Exception 13. The RD includes as findings of fact the lawful rates for Verizon’s use of FirstEnergy’s poles during the 2011 through 2019 years and the monthly and total amounts Verizon overpaid during that period.¹³⁸ The overpayment accounts were calculated using properly calculated new telecom rates for Verizon’s use of FirstEnergy’s poles *and* for FirstEnergy’s use of Verizon’s poles.¹³⁹ Thus, contrary to First Energy’s assertion, the refund

¹³³ 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1407(a)).

¹³⁴ 66 Pa. C.S. §§ 508, 1312(a); *see also DiSanto v. Dauphin Consol. Water Supply Co.*, 436 A.2d 197, 202 (1981) (“[T]he Commission can vary and reform the contract ... under 66 P.S. § 1360 (now 66 Pa. C.S. § 508), determine the just and reasonable rate to be charged under 66 P.S. § 1148(c) (now 66 Pa. C.S. § 1308(c)), [and] order Dauphin to pay a refund of the excessive rates charged plus interest under 66 P.S. § 1153 (now 66 Pa.C.S. § 1312)”).

¹³⁵ 66 Pa. C.S. § 1312(a).

¹³⁶ *See* RD at 8 (Finding of Fact 9) (“the FCC ordered electric utilities to charge competitively neutral rates in 2011”); *Pole Attachment Order*, 26 FCC Rcd at 5334 (¶ 216) (“[I]LECs frequently have access to pole attachments pursuant to joint use agreements today.”); *id.* at 5327-28 (¶ 202) (“[W]here [I]LECs have such access [to poles], they are entitled to rates, terms and conditions that are ‘just and reasonable’ in accordance with section 224(b)(1).”).

¹³⁷ *See* RD at 75-76 (Ordering Clause 5) (“[T]he rates charged by [FirstEnergy] to [Verizon] to attach to its utility poles will be established *going forward* using the ‘new telecom rate’ methodology”) (emphasis added); RD at 76 (Ordering Clause 6) (ordering refund); *see also* VZ Exception 1 (explaining why longer refund period is required).

¹³⁸ RD at 8-9 (Finding of Fact 11); RD at 10 (Finding of Fact 19).

¹³⁹ *See* VZ Reply Br. at 39-40; *see also* VZ St. 2.0, Ex. MSC-1 at VZ00047-51, VZ00091-102 (Calnon Aff. ¶¶ 25-29 & Exs. C-5, C-6); VZ St. 1.1 at 25:1-10 (Mills Surrebuttal); VZ St. 2.1 at 39:10-40:4 (Calnon Surrebuttal); VZ St. 1.2 at 19:9-20:2 (Mills Surrejoinder).

was calculated both “by altering the rate Verizon pays” and also “modifying the rate FirstEnergy pays.”¹⁴⁰ FirstEnergy’s thirteenth exception—that the RD “fail[s] to make the findings necessary to award refunds” and “makes no findings or conclusions regarding the rate FirstEnergy pays Verizon”—must be rejected.¹⁴¹ FirstEnergy is correct, however, that the final order should expressly provide that the refund “will be calculated ‘together with interest at the legal rate.’”¹⁴²

FirstEnergy also faults the RD because it did not determine “an actual ‘just and reasonable’ rate” for future years.¹⁴³ But the RD sets prospective new telecom rates as they must be set—by requiring compliance with the Commission’s cost-based new telecom rate formula.¹⁴⁴ The exact new telecom rate for a future year cannot yet be calculated; it will be based on FirstEnergy’s annually reported pole costs.¹⁴⁵ FirstEnergy’s draft license agreement, therefore, says future rates will be determined using the “FCC *annual* rate formula”¹⁴⁶ and FirstEnergy, in fact, charges many of Verizon’s competitors pole attachment rates that change each year as its pole costs change.¹⁴⁷

E. Reply to FirstEnergy’s Exception 14: The RD Correctly Rejected FirstEnergy’s Request for the Old Telecom Rate.

The Commission’s regulations require a properly calculated new telecom rate because FirstEnergy did not rebut the new telecom rate presumption in the regulations.¹⁴⁸ FirstEnergy asks the Commission to require Verizon to pay a higher rate—the so-called “old telecom” rate—

¹⁴⁰ FE Exceptions at 36.

¹⁴¹ *Id.* at 34.

¹⁴² *Id.* at 36 (quoting Pa. C.S. § 1312(a)); *see also* VZ Exception 1.

¹⁴³ *Id.* at 35 (emphasis in original).

¹⁴⁴ RD at 75-76 (Ordering Paragraph 5).

¹⁴⁵ FirstEnergy’s witness agrees. *See* FE Statement 2-R at 8:8-19 (Zarakas Rebuttal).

¹⁴⁶ VZ St. 1.0, Ex. SCM-3 at VZ00498 (FCC Ex. 13) (emphasis added).

¹⁴⁷ VZ St. 2.1, Ex. MSC-20 (rates charged by FirstEnergy).

¹⁴⁸ 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1413(b)); *see also* RD at 9 (Finding of Fact 13).

as a “compromise result.”¹⁴⁹ The Commission does not have that option under its binding regulations and it would be unwise—perpetuating the non-cost-based rate differences that deter infrastructure investment in Pennsylvania.¹⁵⁰ The new telecom rate must apply.

F. Reply to FirstEnergy’s Exception 15: The RD Correctly Deferred FirstEnergy’s Base Rate Arguments for its Next Base Rate Proceeding.

FirstEnergy has been required by law to charge Verizon new telecom rates since July 2011 and was on express notice in 2012 that Verizon would seek refunds of the unlawful amounts FirstEnergy continued to demand if a complaint proceeding was required—years before its 2014 and 2016 base rate cases.¹⁵¹ Presumably, FirstEnergy accounted for the risk of failing to lower its rates as required by law. But if it did not, the RD still gives FirstEnergy the opportunity to argue about whether it may recover the difference between its unlawful rates and the lawful rates “in First Energy’s next base rate proceeding where these additional concepts and case precedent can be fully vetted.”¹⁵²

This is the correct result. It is not apparent that the RD will “trigger a base rate proceeding” for FirstEnergy,¹⁵³ let alone require a rate increase if one is filed because the overpayments at issue average about [REDACTED] percent of FirstEnergy’s annual operating revenues.¹⁵⁴ There is no need to prematurely resolve an issue that has nothing to do with the lawful pole

¹⁴⁹ See FE Exceptions at 37. The properly calculated old telecom rates are found at VZ St. 2.0, Ex. MSC-1 at VZ00055-56, VZ00058-87 (Calnon Aff. ¶¶ 36-37 & Exs. C-1 – C-3). FirstEnergy alleged higher old telecom rates in its briefs, but they were improperly calculated using incorrect inputs to artificially inflate the resulting rate. See VZ St. 2.1 at 42:1-44:7 & Ex. MSC-5 (Calnon Surrebuttal); see also VZ Initial Br. at 51-54; VZ Reply Br. at 43-45.

¹⁵⁰ *Final Rulemaking Order*, 2019 WL 4345730, at *2 (“rental rates for pole attachments [should be] as low and close to uniform as possible ... to promote broadband deployment”) (citation omitted); *id.* at *7 (“The Commission will adopt, in whole, the FCC’s regulatory regime for pole attachment complaint procedures ... and will uphold the status quo, which will avoid regulatory uncertainty and will promote broadband investment across Pennsylvania.”).

¹⁵¹ See VZ St 1.0 at 2:13-16 (Mills Direct), Ex. SCM-1 at VZ00014-15 (Mills Aff. ¶ 31), Ex. SCM-5 at VZ00549-555 (FCC Exs. 17 & 18).

¹⁵² RD at 48.

¹⁵³ See FE Initial Br. at 50 (discounting as “irrelevant” “[w]hether the reduction in rates would trigger a base rate proceeding for FirstEnergy’s EDCs”).

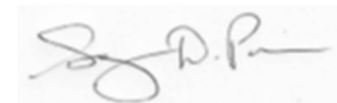
¹⁵⁴ VZ St. 2.1 at 56:13-57:3 (Calnon Surrebuttal) and Ex. MSC-5.

attachment rates required by the Commission’s regulations, or delay this proceeding with an inquiry into it. Without further delay, Pennsylvanians deserve the low and uniform new telecom pole attachment rates promised in 2011, which “will enable consumers to benefit through increased competition, affordability, and availability of advanced communications services, including broadband” in Pennsylvania.¹⁵⁵

III. CONCLUSION

The Commission should deny FirstEnergy’s exceptions and adopt the RD with the revisions discussed in Verizon’s Exceptions to bring the Commission’s final order into conformance with applicable orders and regulations and further its important deployment goals.

Respectfully submitted,



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¹⁵⁵ See *Pole Attachment Order*, 26 FCC Rcd at 5295 (¶ 126); *Final Rulemaking Order*, 2019 WL 4345730, at *2.