

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120**

**Verizon Pennsylvania LLC and
Verizon North LLC**

**Public Meeting December 3, 2020
3019347-OSA
Docket No. C-2020-3019347**

v.

**Metropolitan Edison Company, Pennsylvania
Electric Company and Pennsylvania Power
Company**

**JOINT MOTION OF CHAIRMAN GLADYS BROWN DUTRIEUILLE
AND COMMISSIONER JOHN F. COLEMAN, JR.**

Before the Commission is a Recommended Decision in the above-captioned complaint proceeding filed by Verizon Pennsylvania LLC and Verizon North LLC (collectively “Verizon”) against Metropolitan Edison Company (Met-Ed), Pennsylvania Electric Company (Penelec), and Penn Power Company (Penn Power) (collectively “FirstEnergy”).

Introduction

On November 20, 2019, Verizon filed a formal complaint at the Federal Communications Commission (FCC) against FirstEnergy related to pole attachments governed by Section 224 of the federal Communications Act.¹ In its complaint, Verizon avers that Verizon and FirstEnergy jointly use more than 412,000 utility poles in Pennsylvania under ten substantially similar joint use agreements (JUAs) dating back as far as 1958. Verizon further avers that FirstEnergy has charged unlawful and unreasonably high pole attachment rates for years even after being directed by the FCC to eliminate wide disparities in those rates. The pole attachment rates that Verizon relies upon were changed by the FCC in 2019, using a rate methodology that produces rates considerably lower than the rates under the existing JUAs. Verizon asks the FCC to require FirstEnergy to charge just and reasonable pole attachment rates and to require FirstEnergy to refund Verizon the amounts it was overcharged for pole attachments dating back to 2011.

On September 3, 2019, the Commission formally initiated a rulemaking to assert jurisdiction over pole attachment issues in Pennsylvania under federal law. The Commission proposed to adopt the FCC pole attachment rules and to create a working group to address future changes in FCC rules.

¹ 47 U.S.C. § 224. Section 224 authorizes the states to regulate pole attachments but, in those instances where the states do not exercise that authority under the so-called “reverse preemption” authority, the FCC addresses pole attachment disputes arising in a state. The Commission deferred to FCC regulation from 1996 through 2019 when the Commission initiated a rulemaking to regulate pole attachments.

Those rules asserting jurisdiction over pole attachments became binding in Pennsylvania on March 18, 2020,² and the FCC on March 23, 2019 issued an Order ceding authority to the Commission. As a result of this “reverse preemption,” jurisdiction over pole attachment issues in Pennsylvania now lies within the Commission.³ The FCC also formally transferred Verizon’s November 2019 complaint to the Commission on March 23, 2020. The Commission’s Secretary’s Bureau referred the complaint to the Office of Administrative Law Judge for prompt adjudication. A Recommended Decision was issued in this matter on September 15, 2020.

The Recommended Decision sustains the complaint, in part, and denies it, in part. The Decision sustains the complaint that FirstEnergy’s pole attachment rates for Verizon in Pennsylvania are unjust and unreasonable. The Recommended Decision finds that: (1) Verizon is entitled to a rebuttable presumption to have its rates to attach to FirstEnergy’s utility poles in Pennsylvania set by the “new telecom rate” methodology under the FCC’s regulations and (2) based on the evidence presented, FirstEnergy has not rebutted that presumption. The Recommended Decision awards Verizon a refund for pole attachment rates it overpaid to FirstEnergy dating back to March 11, 2019. However, the decision denies Verizon’s request in the complaint for refunds going back to July 12, 2011, the date of the FCC’s first pole attachment order.

The parties filed Exceptions and Replies to Exceptions in response to the Recommended Decision.

Binding Poll

The Commission’s Office of Special Assistants recommends that the Commission conduct a Binding Poll in this matter.⁴ We generally agree with the Administrative Law Judge’s (ALJ) disposition of the issues set forth in the Binding Poll except as discussed in this Joint Motion. Consequently, we will dispose of the Polling Sheets consistent with this Joint Motion.

² The Commission promulgated Chapter 77 of its regulations, 52 Pa. Code § 77.1, *et seq.*, to reverse preempt the FCC’s jurisdiction over pole attachments and certified to the FCC on March 18, 2020 that the Commission regulates the rates, terms and conditions for pole attachments in Pennsylvania.

³ See *Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission*, Docket No. L-2018-3002672 (Opinion and Order adopted Aug. 29, 2019).

⁴ Before addressing Exceptions and Replies, we note two misstatements in the Recommended Decision. First, the reference that Chapter 30 “deregulated” telecommunications rates is erroneous. R.D. at 13. Some rates were detariffed, and a process was established to determine others to be competitive. However, rates were not and are not deregulated, including just and reasonable rate determinations. See Act 67 of 1993, 66 Pa. C.S. §§ 3001-3009, repealed and reenacted by Act 183 of 2004, 66 Pa. C.S. §§ 3011-3019. Second, in the discussion of the cost of capital applicable to pole attachment rates, the Recommended Decision referred to First Energy’s “guaranteed rate of return.” R.D. at 48. Utilities are not guaranteed rates of return. Rather, through the traditional rate base/rate of return ratemaking formula, they are provided opportunities to earn rates of return, which permit relief when underearning or may incur liability when overearning based on a determined rate of return.

Polling Issue 1a – Legal Standard: Application of Public Utility Code and Pennsylvania Appellate Caselaw to Complaint

Regarding the applicable burden of proof, we do not believe it is accurate to state that Verizon has the “initial” burden of proof in this case that shifts to FirstEnergy if that initial burden is met. Pennsylvania law is clear that as the complaining party, Verizon has the burden of proof in this case.⁵ Pennsylvania law is equally clear that the burden of proof stays with Verizon, as the burden of proof in a case never shifts. Rather, it is the burden of production or going forward with the evidence that can shift in a case.⁶

Regarding the burden of production, Section 1.1413(b) of the FCC’s pole attachment rules adopted by this Commission establishes that for pole attachment agreements entered into or renewed after March 11, 2019, an incumbent local exchange carrier receives a rebuttable presumption that the FCC’s “new telecom rate” methodology applies. A utility can then rebut this presumption by providing clear and convincing evidence that that new rates materially advantage the incumbent local exchange carrier over other telecommunications carriers or cable television systems providing telecommunications services on the same poles.⁷

Applying these rules to this case, Verizon has the burden of proof that FirstEnergy’s existing pole attachment rates warrant a refund because they are unjust and unreasonable in violation of applicable law. For Verizon to receive the benefit of the rebuttable presumption that the FCC’s new, lower pole attachment rates apply, Verizon must show that the JUAs were entered into or renewed after March 11, 2019. If Verizon meets this evidentiary burden, the burden of production then switches to FirstEnergy to produce clear and convincing evidence that Verizon has received material advantages from the JUAs.

Polling Issue 2b – Entitlement to the New Telecom Rate: Agreements Entered Into or Renewed After Effective Date of Section 1.1413 of FCC Regs.

Under the FCC’s rules adopted by the Commission, in complaint proceedings challenging pole attachment rates for contracts entered into or renewed after March 11, 2019, there is a rebuttable presumption that an incumbent local exchange carrier may be charged no higher than the rate determined in accordance with Section 1.1406(d)(2) of the FCC’s rules. The Recommended Decision determines that this rebuttable presumption applies to the JUAs in this proceeding. In making this determination, the ALJ found that initial terms of each agreement have expired and that the JUAs have been automatically extended and will continue as evergreen contracts until terminated. Thus, the ALJ found that the JUAs were entered into and renewed after the effective date of Section 1.1413(b).

⁵ 66 Pa. C.S. § 332(a). This statutory provision provides that the party seeking relief from the Commission has the burden of proof.

⁶ While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

⁷ 47 C.F.R. § 1.1413(b).

We agree with this disposition. We believe a “renewed” contract as that term is used in Section 1.1413(b) of the FCC’s rules includes one that is in evergreen status after March 11, 2019. Upon review, the ten JUAs in this case are evergreen contracts.⁸ As evergreen contracts, they were extended indefinitely upon the expiration of their original 1-year or 5-year terms until terminated by one of the parties, which has not occurred with any of the agreements.⁹ Thus, the JUAs were evergreen contracts after March 11, 2019, which means that “new telecom rate” presumption applies in this case.

Our disposition is consistent with applicable state and federal law. The proposed resolution of this issue is consistent with the Commission’s authority under Section 508 of the Public Utility Code and with Commission precedent on evergreen contracts; namely, the *DEBM* decision in which the Commission concluded that contracts continuing or extending indefinitely until one of the parties terminated the agreement were evergreen contracts. Finally, the proposed resolution of this issue is consistent with federal law, including relevant FCC precedent that treats evergreen contracts as renewed contracts under Section 1.1413(b) of the FCC’s rules, which triggers the application of the rebuttable presumption in favor of new, lower pole attachment rates.¹⁰

Polling Issue 2c – Entitlement to the New Telecom Rate: Demonstrating Quantifiable Material Advantages Under the Agreements.

The Recommended Decision determines that based on the record evidence, FirstEnergy has failed to show Verizon receives benefits under the JUAs that materially advantage it over other entities providing telecommunications services on the same poles. Thus, the Decision concludes that FirstEnergy has failed to rebut the presumption that Verizon is entitled to the new pole attachment rates under Section 1.1413(b) of the FCC’s rules.

Based on the record evidence in this case, we agree with the Recommended Decision that FirstEnergy failed to rebut the presumption Verizon is entitled to the new, lower pole attachment rates. However, we do not agree with the dictum in the Decision, which is contrary to the conclusion in the Decision, that by applying the FCC’s new pole attachments rates, we are giving Verizon the benefits of a first-class airline seat at coach prices. In this decision, we are applying

⁸ See *Joint Petition of Direct Energy Business Marketing, LLC and Community Energy, Inc. to Certify Electric Production From Ten Out-Of-State Facilities through Reporting Year 2019 as Eligible to Satisfy Tier I Solar Photovoltaic Share Alternative Energy Credits Requirements*, Docket No. P-2019-3007245 (Order entered April 30, 2020) (*DEMB*). In that case, the Commission concluded that the relevant contracts were evergreen contracts because they extended indefinitely, in one-year periods, until one of the parties terminated the agreements.

⁹ According to the record evidence in this case, the initial term of the last of these contracts expired in 1993, and none of them have been terminated by either party.

¹⁰ See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Development*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018), para. 127, note 475; see also *Verizon Maryland LLC v. Potomac Edison Company*, Docket No. 19-355, FCC 20-167, Memorandum Opinion and Order rel. November 23, 2020, para. 7, note 20. According to the FCC, a new or newly-renewed pole attachment agreement is one entered into, renewed, or in evergreen status after March 11, 2019, and renewal includes agreements that are automatically renewed, extended, or placed in evergreen status.

applicable law and in accordance with that law, determining resulting rates. Therefore, we reject this voluntary, unnecessary, and unsupported statement.

Polling Issue 2d – Entitlement to the New Telecom Rate: Bargaining Power

The Recommended Decision notes that Verizon and FirstEnergy raised issues that are not relevant to the key issues in this proceeding, one of which was Verizon’s argument that FirstEnergy has superior bargaining power because of its three-to-one pole ownership advantage. The Decision then addresses the merits of the issue. We believe the ALJ properly dismissed claims of bargaining power inequities. However, we see no need to address the merits of the bargaining power issue. Based on the facts and circumstances in this case, that issue is not relevant to resolving this particular contractual dispute involving an evergreen agreement about when, if ever, a new, lower rate arising from a rebuttable presumption is applicable.

Polling Issues 3c, 3d, and 3e – Inserting the New Telecom Rate into the Existing Agreements: Current Cost of Capital in Computing Rates under the Agreements, Rulings on the Correct Rates Going Forward and 60-Day Compliance Period to Calculate New Rates

The parties claim that there are errors in the specific rate calculations, and they dispute what date should apply if the rebuttable presumption regarding the new pole attachment rates is determined to apply to this dispute. The Recommended Decision determines that the cost of capital used in determining the new pole attachment rate should be the cost of capital as of March 11, 2019, ostensibly because of the effective date of the FCC’s “new telecom rate” methodology. Additionally, the Decision recommends a 60-day compliance phase during which a further investigation would be conducted to properly determine all inputs when establishing rates going forward and a refund created through the use of the “new telecom rate” methodology for pole attachments.

Upon review, we propose to adopt Verizon’s pole attachments rate inputs to calculate the “new telecom rate.” We believe the record is sufficient to determine the correct pole attachment rates going forward. The record shows that Verizon relied upon the Commission’s Quarterly Earnings Report from the 2nd quarter of 2017 to propose a 9.55% rate of return as the basis for its cost of capital. The Commission’s Quarterly Earnings Reports are reasonable, and in this case, persuasive vehicles to establish a cost of capital. In this case, a reasonable proposed rate of return is already in the record and should be used.¹¹

FirstEnergy argues that Verizon erred in its allocation of accumulated deferred taxes. Verizon allocates accumulated deferred income taxes in proportion to depreciated investment (gross investment less accumulated depreciation), while FirstEnergy allocates in proportion to original (gross) investment. Verizon’s approach is consistent with similar regulatory approaches. Furthermore, use of original (gross) investment produces a difference in rates measured only in pennies.

¹¹ As a check to its reasonableness as a proxy, we note that the 2017 2nd quarter rate of return proposed by Verizon compares favorably to the Commission’s 2020 2nd quarter rate of return of 9.45%, as set forth in the Commission’s most recent Quarterly Earnings Report.

Next, First Energy argues that Verizon used an incorrect pole count. Verizon explained that it calculated rates using pole count information provided by FirstEnergy in May 2018. FirstEnergy challenges the use of these pole counts, proposing that slightly higher distribution pole count values be used. The use of Verizon's values appears to be reasonable and favors FirstEnergy, given that FirstEnergy's new numbers would produce a marginally lower rate than Verizon calculated, due to the modest increase FirstEnergy proposes in the number of poles.

FirstEnergy also argues that Verizon used an incorrect rate of return. However, Verizon calculated, as accurately as possible, a rate of return for rental year 2019 based on the most recent data available in the 2016 FirstEnergy base rate cases. For Example, Verizon utilized Met-Ed's requested capital structure ratio of 48.8% long-term debt and 51.2% equity, as well as its projected weighted average long-term debt cost rate of 5.25% from its 2016 base rate proceeding, and a 9.55% return on common equity taken from its Quarterly Earnings Report dated June 30, 2017. In our view, Verizon's rate of return input in the rate formula is reasonable.

Last, FirstEnergy argues that Verizon used an incorrect pole height, contending that a departure from the FCC's presumptive inputs for average number of attaching entities, space occupied, unusable space, and pole height is justified because FirstEnergy claims the conditions in its service territory are significantly different from the FCC's presumed inputs. However, we agree with Verizon that FirstEnergy has not provided "probative direct evidence" sufficient to rebut the FCC's presumptions regarding pole height. Moreover, to the extent that deployment of advanced networks for voice and broadband services may trigger the need for additional or higher poles, the FCC's conclusions properly reflect consideration of that probability.

Also, we do not believe that a compliance period is necessary or relevant here, given the sufficiency of the evidentiary record to determine the correct pole attachment rates and our rejection of FirstEnergy's criticisms of the Verizon rate inputs and calculation.

Polling Issues 4b and 4c – Refunds: Calculation of the Refund Amount and Refund Period and Interest Award

The Recommended Decision calculates the refund award by prorating the amount sought in Verizon's complaint from the effective date of the relevant FCC regulations on March 11, 2019 to the time of the issuance of the Decision. The Decision further recommends that to the extent the parties disagree with the refund calculations, such issues could be raised during the recommended 60-day compliance period. At the same time, the Recommended Decision determines that Verizon is entitled to a refund of the amounts Verizon paid FirstEnergy in excess of the "new telecom rate" from March 11, 2019, to the present, but denies Verizon's Complaint to the extent that it requests earlier refunds.

The parties dispute what date, if any, should be used to apply the new, lower pole attachment rates and calculate the refund owed in this case. Verizon alleges that the FCC's new, lower pole attachment rates apply under its existing JUAs with FirstEnergy and that it should have the benefit of the lower pole attachment rates going back to 2011. First Energy alleges that the FCC's new pole attachment rates do not apply to its existing JUAs with Verizon and that

FirstEnergy is entitled to receive compensation in accordance with existing, higher pole attachment rates.¹²

We agree with the decision to direct a refund to Verizon but believe the refund should be prorated from November 20, 2019, which was the date Verizon filed its complaint at the FCC. As such, we propose to establish November 20, 2019 as the effective date on which the new pole attachment rates were applicable under the ten evergreen JUAs between Verizon and FirstEnergy. In addition, we direct that the refund include interest.¹³ Moreover, as previously discussed, we do not agree that a 60-day compliance period is necessary as the parties may apply inputs that result from this Joint Motion and its subsequent Opinion and Order to develop appropriate rates.

The alternative dates for the application of a lower pole attachment rate are 2011, November 2015, or March 11, 2019. However, we do not believe it is appropriate to direct a refund in this case back to 2011 or 2015 when considering the relevant FCC regulation was not effective until March 11, 2019. By the same token, the March 11, 2019 effective date is not the appropriate refund date either, given that Verizon never formally challenged those rates until November 20, 2019. Using a prior effective date other than November 20, 2019 would mean applying the new rates during a period when the parties were still engaged in good-faith efforts to negotiate the applicability of the rebuttable presumption and the new rates. Moreover, the March 11, 2019 date controls whether an ILEC has a rebuttable presumption that the FCC's new pole attachment rates apply under an existing contract or, in other words, *whether* the new rates apply. However, the March 11th date does not necessarily control *when* the new rates are effective.

Regarding the remaining polling issues not specifically addressed in this Joint Motion – Issues 1b, 1c, 2a, 3a, 3b, 4a, 5, and 6, we propose that the Commission adopt the ALJ's disposition of the issues. Furthermore, any argument or Exception that we do not specifically address shall be deemed to have been duly considered and denied without further discussion.

THEREFORE, WE MOVE THAT:

1. The Formal Complaint filed by Verizon against FirstEnergy at the above-captioned docket be sustained, in part, and denied, in part, consistent with this Joint Motion;

¹² The revenue impact on both Verizon and FirstEnergy is proprietary and will not be disclosed here. It is worth noting, however, that the FCC has noted that pole attachments are a major impediment to deploying advanced networks that can provide broadband service. We would hope that providers who benefit considerably from any pole attachment rate reductions commit a portion of those savings to making broadband available and affordable in Pennsylvania.

¹³ Under the Commission's pole attachment regulations, refunds are "normally the difference between the amount paid under the unjust and/or unreasonable rate ... and the amount that would have been paid under the rate ... established by the Commission, plus interest ..." 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1407(a)(3)). Under Section 1312 of the Public Utility Code, the interest rate to be used with a refund is the legal rate. As with the effective date of the new rates, the effective date for the interest calculation arising from this dispute is November 20, 2019.

2. The effective trigger date for applying the new pole attachment rates and calculating the refund for past amounts owed to Verizon is November 20, 2019;
3. Within 90 days of entry of an Opinion and Order resulting from this Joint Motion, the parties are to determine refund amounts owed to Verizon based on the application of the new pole attachment rates, dating back to November 20, 2019;
4. The parties are to revise the respective evergreen contracts at issue in this proceeding to reflect applicability of the new pole attachment rates dating back to November 20, 2019;
5. The Office of Special Assistants prepare an Opinion and Order consistent with this Joint Motion.



GLADYS BROWN DUTRIEUILLE
CHAIRMAN



JOHN F. COLEMAN, JR.
COMMISSIONER

Date: December 3, 2020