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January 13, 2021

VIA ELECTRONIC FILING

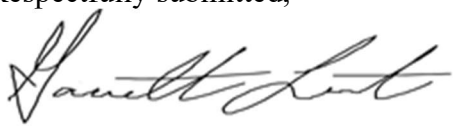
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed please find the Answer of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company to the Petition for Reconsideration of Verizon Pennsylvania LLC and Verizon North LLC, for filing in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service

Respectfully submitted,



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GPL/jl
Enclosures

cc: Honorable Joel H. Cheskis
Certificate of Service
Office of Special Assistants (*via E-mail*)

CERTIFICATE OF SERVICE

(Docket No. C-2020-3019347)

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

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

ANSWER OF METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, AND PENNSYLVANIA POWER COMPANY TO THE PETITION FOR RECONSIDERATION OF VERIZON PENNSYLVANIA LLC AND VERIZON NORTH LLC

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Date: January 13, 2021

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

TABLE OF CONTENTS

Page

I. INTRODUCTION

Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec") and Pennsylvania Power Company ("Penn Power") (collectively, "FirstEnergy" or the "Companies") pursuant to 52 Pa. Code §§ 5.61 and 5.572, hereby respectfully submit this Answer to the Petition for Partial Reconsideration filed by Verizon Pennsylvania LLC and Verizon North LLC (collectively, "Verizon") on January 4, 2021. In its Petition, Verizon seeks reconsideration of the Opinion and Order of the Pennsylvania Public Utility Commission ("Commission") entered in the above-captioned proceeding on December 18, 2020 ("*Order*"), which affirmed in part and modified in part the Recommended Decision ("RD") of Deputy Chief Administrative Law Judge Joel H. Cheskis (the "ALJ") and granted in part and denied in part the Formal Complaint filed by Verizon against FirstEnergy. Specifically, Verizon "requests the Commission reconsider the effective date for refunds" and order "FirstEnergy to refund all amounts" that Verizon alleges were "unlawfully collected from Verizon since July 12, 2011 or, in the alternative, since November 20, 2015." Petition ¶ 33. As explained below, Verizon's Petition should be denied for several reasons: (1) Verizon's Petition fails to even remotely meet the well-established standard for granting reconsideration; (2) Verizon's Petition is premised on the irrational proposition that the Commission erred by granting "middle ground" relief between the proposals advanced by the parties; (3) Verizon's Petition relies primarily on a series of arguments regarding the negotiating history of the parties which are simply and demonstrably false; (4) the Commission erred in granting Verizon any refunds at all; and (5) granting additional refunds will do nothing to promote the expansion of rural broadband service and will only result in further embedded rate increases to FirstEnergy's customers and a concomitant windfall to Verizon and its shareholders.

Verizon utterly fails to meet the standard for granting reconsideration set forth in Section 703(f) and (g) of the Public Utility Code, 66 Pa.C.S. § 703(f)-(g), and *Duick v. Pennsylvania Gas*

and Water Co., 56 Pa. P.U.C. 553, 559 (1982). The Petition simply re-raises arguments that were already considered and rejected by the Commission. Importantly, both Verizon's request for refunds to be calculated back to 2011 or, alternatively, refunds back to November 20, 2015, are not new arguments. Each was considered,[1] and rejected,[2] by both the ALJ and the Commission.

Verizon's assertion that "[n]either the parties nor the ALJ advocated the date of Verizon's complaint as the cutoff date for refunds" is simply false. Petition ¶ 14. Although the Commission incorrectly rejected FirstEnergy's arguments that Verizon was not entitled to refunds, FirstEnergy also argued, in the alternative, that:

> If the Commission determines that FirstEnergy's existing rates are unjust and unreasonable, then it must determine the amount of such refunds and the applicable period for refunds, within the bounds of the Public Utility Code. *See Emporium Water Co.*, 859 A.2d at 24; *see also LP Water & Sewer Co.*, 722 A.2d at 736 and *Riverton Consolidated Water Co.*, 140 A.2d at 125. As explained below, the Commission should exercise its discretion and decline to award refunds in this proceeding or substantially limit the refund period.

FirstEnergy M.B. at 95-96 (emphasis added). Moreover, Verizon's assertion that the Commission lacks the discretion to award relief within the spectrum advocated by the parties is absurd; the Commission routinely considers and awards relief that is within the range of relief proposed by the parties.

Beyond Verizon's failure to satisfy *Duick*, the Petition demonstrates the substantive flaws in Verizon's case and the many errors committed by the Commission in its *Order*. The Petition asks the Commission to compound its erroneous award of refunds and step further outside the boundaries of its statutory authority, by relying upon the same arguments that the Commission has

[1] *See, e.g.*, RD at 60 (noting Verizon's argument that it is entitled to refunds dating back to July 12, 2011), at 65-66 (rejecting Verizon's argument that it is entitled to refunds dating back to July 12, 2011).

[2] *See Order* at 58-59 (noting Verizon's argument that it is entitled to refunds of all amounts unlawfully collected during the applicable statute of limitations), 62 (noting Verizon's alternative argument for refunds back to November 2015), and 67 (rejecting alternative dates for the refund period proposed by Verizon and in the RD).

already considered and denied. *See* Petition ¶¶ 16-24. As FirstEnergy has repeatedly shown, and explains again below, Verizon is not entitled to any refunds. Moreover, Verizon's Petition highlights many of the numerous errors committed in the Commission's *Order*. As summarized below, the *Order* is contrary to Pennsylvania law, constitutes an abuse of discretion and is not supported by substantial evidence.[3] Verizon's request for additional refunds in its Petition therefore should be rejected.

In particular, Verizon's claims regarding pre-complaint rate negotiations between the parties are neither new nor accurate. Verizon repeatedly claims that FirstEnergy failed to negotiate in good faith because the new telecom rate, and only the new telecom rate was and is the only "just and reasonable competitively neutral rate required by law."[4] This argument is wrong. The FCC made clear that it was "unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable," and the FCC has never ordered the new telecom rate to be inserted into a joint use agreement between an ILEC and an EDC. Indeed, in its most recent decision involving FirstEnergy's and Verizon's Maryland-based affiliates, the FCC again declined to insert the new telecom rate into similar joint use agreements. Verizon does not and cannot explain why it was unreasonable for FirstEnergy to refuse to agree to the new telecom rate when this rate has been repeatedly rejected by the FCC.

Verizon further contends that FirstEnergy failed to move from its initial litigation position. This argument also is completely and totally false. The record shows that FirstEnergy made repeated offers to reduce Verizon's rate. Yet, Verizon refused to budge from its litigation position. FirstEnergy cannot and should not be penalized for its attempts to negotiate in good faith, where

[3] As of the time of this filing, the appeals period applicable to the *Order* has not yet run, but the only regularly scheduled public meeting for January is scheduled to occur on January 14, 2021. FirstEnergy intends to file a petition for review of the *Order* with the Commonwealth Court.

[4] Petition ¶¶ 3, 6, 12, 28, 29.

the relief sought by Verizon had never been granted and was contrary to all relevant precedent.

Finally, Verizon alleges that additional refunds will advance the Commission's policy goals of rural broadband expansion. This again is simply not the case. Even the Commission has recognized that there is no evidence that any of the rate relief and refunds will actually be used to expand rural broadband service. Likewise, there is simply no record evidence that shows the rate reductions and refunds Verizon has sought and obtained will actually be used to accelerate or expand broadband deployment. Indeed, Verizon explicitly refused to quantify or even make such a commitment in this proceeding. As such, Verizon's request for additional refunds is nothing more than a blatant attempt to secretly siphon additional dollars out of the pockets of FirstEnergy's electric customers in the "hope"[5] that these dollars will somehow mysteriously find their way to promote rural broadband service. Additional refunds will do nothing but further increase electric rates to the detriment of FirstEnergy's customers, and to the benefit of Verizon and its shareholders.

Verizon's only response is to repeat the same false argument that FirstEnergy "profits" from the rates Verizon pays it under the Joint Use Agreements. *See, e.g.*, Petition ¶ 31. FirstEnergy has unequivocally explained and repeatedly demonstrated that the Companies do not profit from the rates Verizon pays; rather, "one hundred percent of the joint use revenues offset the rates to be paid by electric customers." (*See, e.g.*, FirstEnergy St. 3-R, pp. 3-4.) To add insult to injury, the clear harm to FirstEnergy's electric customers from reducing what Verizon pays has been hidden from the public and FirstEnergy's customers through the Commission's refusal to make this telecommunications rate information public, even in an aggregate form.

[5] *Order* at 66, n. 41.

For these reasons, as more fully explained below, FirstEnergy respectfully requests that the Commission deny Verizon's Petition for Partial Reconsideration.

II. BACKGROUND

1. This proceeding was initiated on November 26, 2019, when Verizon filed the above-captioned Formal Complaint against FirstEnergy with the Federal Communications Commission ("FCC"). Therein, Verizon asserted that the negotiated rates charged by FirstEnergy to Verizon under several substantially similar "joint use agreements" dating back to 1958 are "unjust and unreasonable" under Section 224 of the Communications Act of 1978, more commonly known as the "Pole Attachment Act."[6]

2. During the pendency of the Complaint proceeding before the FCC, the Commission certified to the FCC that it regulates the rates, terms, and conditions for pole attachments.[7] The Commission thereby reassumed jurisdiction over the rates set forth in the Joint Use Agreements and the FCC thereafter transferred the Complaint to the Commission on March 23, 2020.[8]

3. On September 15, 2020, the ALJ issued an RD is this proceeding. The RD accepted virtually every argument presented by Verizon and rejected virtually every argument presented by FirstEnergy.

4. On September 22, 2020, both FirstEnergy and Verizon filed and served Exceptions to the RD. The parties thereafter filed Replies to Exceptions on September 28, 2020.

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[6] 47 U.S.C. § 224; *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, 5331 (Report and Order and Order on Reconsideration dated April 7, 2011) ("2011 Pole Attachment Order"), *aff'd, Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013).

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

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

5. On October 15, 2020, FirstEnergy filed a Motion to Unseal Certain Proprietary Information. Verizon filed an Answer to that Motion on October 27, 2020.

6. At the December 3, 2020 Public Meeting, the Commission adopted the Joint Motion of Chairman Gladys Brown Dutrieuille and Commissioner John F. Coleman, Jr. by a vote of 4-0. Therein, the Commission moved that Verizon's Formal Complaint be sustained, in part, and denied, in part.

7. Also on December 3, 2020, the Commission issued an Opinion and Order denying FirstEnergy's Motion to Unseal Certain Proprietary Information ("*Order Denying Motion to Unseal*").

8. On December 18, 2020, the Commission issued the *Order*. Therein, the Commission granted, in part, and denied, in part, FirstEnergy's and Verizon's respective Exceptions, and adopted the RD with certain modifications.

9. On January 4, 2021, Verizon filed the instant Petition.

10. For the reasons explained below, as well as those more fully explained in the Commission's *Order*, Verizon's Petition for Partial Reconsideration should be denied.

III. LEGAL STANDARDS

11. The Commission's standard for granting reconsideration following final orders is set forth in *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553, 559 (1982) (emphasis added):

> A petition for reconsideration, under the provisions of 66 Pa.C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the Court in the Pennsylvania Railroad Company case, wherein it was said that "[p]arties …, cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided

> against them…." What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.

Consequently, for a petition to warrant reconsideration by the Commission, it must demonstrate new and novel arguments that were raised by the petitioner, but not previously considered by the Commission. The Commission has cautioned that the last portion of the operative language of the *Duick* standard (*i.e.*, "by the Commission") focuses on the deliberations of the Commission, not the arguments of the parties. *See Pa. PUC v. PPL Elec. Utils. Corp.*, Docket No. R-2012-2290597, p. 3 (Order entered May 22, 2014). Therefore, a petition for reconsideration cannot be used to raise new arguments or issues that should have been, but were not, previously raised.

12. A petition seeking relief under the *Duick* standard may properly raise any matter designed to convince the Commission that it should exercise its discretion to rescind or amend a prior order in whole or part. Importantly, however, the *Duick* standard does not permit a petitioner to raise issues and arguments considered and decided below such that the petitioner obtains a second opportunity to argue properly-resolved matters. *Id*. Further, as explained by the Pennsylvania Supreme Court, petitions for reconsideration of a final agency order may only be granted judiciously and under appropriate circumstances because such action results in the disturbance of final agency orders. *City of Pittsburgh v. Pa. Dep't of Transp.*, 490 Pa. 264, 416 A.2d 461 (1980).

13. As explained below, Verizon's Petition clearly fails to satisfy the standards for granting reconsideration.

IV. ARGUMENT

A. VERIZON'S REQUEST FOR RECONSIDERATION SHOULD BE DENIED BECAUSE IT FAILS TO SATISFY THE *DUICK* STANDARD.

14. For Verizon to meet the *Duick* standard for granting reconsideration, it cannot simply re-raise the same arguments that were considered and rejected by the Commission. As explained herein, the Commission previously considered and rejected the arguments that Verizon raises in its Petition. Thus, Verizon's Petition should be denied in its entirety.

1. A Range Of Possible Refund Periods Was Already Advocated For By The Parties And Considered By The Commission.

15. Verizon's argument is principally based on its assertion that "[n]either the parties nor the ALJ advocated the date of Verizon's complaint as the cutoff date for refunds." Petition ¶ 14. This statement is, at best, misleading.

16. Even if the Commission was not explicitly presented with the option to calculate refunds from the date Verizon filed the Formal Complaint with the FCC, this date was within the range of applicable refund periods advocated for by the parties. Verizon has advocated for refunds dating back to July 12, 2011,[9] and alternatively advocated for refunds dating back to November 20, 2015.[10] On the other hand, FirstEnergy advocated that no refunds should be granted, or, alternatively, that "the Commission should exercise its discretion…[to] substantially limit the refund period."[11]

17. Indeed, the Commission explicitly noted the range of positions advocated by the parties in the *Order* and explained:

> 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

[9] *See, e.g.*, Verizon M.B. at 54-58.
[10] *See* Verizon Exceptions at 9-10.
[11] FirstEnergy M.B. at 95-96.

> 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 [sic] 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.

Order at 66. The Commission clearly has, and regularly does, consider outcomes within a range of proposals advanced by parties to a proceeding (*e.g.*, during a base rate proceeding the Commission may, and regularly does, adopt rates of return, establish customer charges, and set overall revenue increases at levels between the parties' respective positions).[12] Verizon's position that the Commission cannot set a refund amount between the parties' proposals is quite simply untenable and should be summarily rejected.

18. As such, Verizon's Petition raises no new argument or consideration by incorrectly claiming that "[n]either the parties nor the ALJ advocated the date of Verizon's complaint as the cutoff date for refunds." Petition ¶ 14. Rather, it merely repeats its prior arguments and re-asserts alternative refunds periods that were considered and rejected by the Commission. This argument fails to satisfy *Duick* and, therefore, the Petition must be denied.

2. Verizon's Arguments Regarding The Applicable Statute Of Limitations Are Not New And Were Previously Considered and Rejected By The Commission.

19. In addition to misrepresenting the range of refund periods that the Commission considered, Verizon merely re-asserts the same statute of limitation arguments in its Petition that the Commission previously considered and rejected.

[12] [*See, e.g.*, *Pennsylvania Public Utility Commission v. Mechanicsburg Water Co.*, 1993 Pa. PUC LEXIS 112, Docket Nos. R-00922502, *et al* (Order entered July 22, 1993); *Pennsylvania Public Utility Commission v. Duquesne Light Co.*, 1987 Pa. PUC LEXIS 342, Docket Nos. R-860378, *et al* (Order entered Mar. 10, 1987).

20. More specifically, the Commission already considered Verizon's argument that its regulations require refunds to be awarded consistent with the applicable statute of limitations. Petition ¶¶ 16-19. Specifically, the Commission explained that "we find it is inappropriate to direct a refund in this case back to 2011 or 2015 when considering that the relevant FCC regulation was not effective until March 11, 2019." *Order* at 67 (emphasis added). It further considered and rejected Verizon's attempts to reach further back in time and stated, "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." *Id.* (emphasis added). The RD similarly rejected Verizon's arguments in favor of refunds reaching back to 2011. *See* RD at 65-66.

21. In addition, FirstEnergy demonstrated, and continues to assert[13] that the Commission erred in granting Verizon any refunds at all. Nevertheless, and without waiving any rights or arguments, FirstEnergy notes that Verizon misrepresents whether and to what extent Section 1.1407(a)(3) of the FCC's regulations, which are incorporated into Chapter 77 of the Commission's regulations,[14] require the Commission to award refunds. Importantly, Section 1.1407(a)(3) states that "[i]f the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may…or a refund, or payment, if appropriate." 47 C.F.R. § 1.1407(a)(3) (emphasis added). In addition, that regulation describes how the refund or payment will "normally" be calculated. *Id.* Even under the FCC's regulation, both the award and calculation of refunds, once the requisite finding that existing rates are unjust and unreasonable has occurred, is discretionary;

[13] *See* footnote 3 *supra*. FirstEnergy intends to file a petition for review of the *Order* with the Commonwealth Court.]

[14] *See* 52 Pa. Code § 77.4(a).

neither the award itself nor the amount to be awarded is mandatorily prescribed. However, Verizon has failed to demonstrate under the Public Utility Code and applicable Pennsylvania precedent that the rates it pays are unjust and unreasonable.

22. As such, Verizon's argument that the decision to limit Verizon's refunds to the date of the Complaint, rather than the applicable statute of limitations, fails to satisfy the *Duick* standard.

23. Furthermore, Verizon's argument that the applicable statute of limitations extends back to July 12, 2011, or at least November 20, 2015, is the same argument regarding the time period for refunds raised in Verizon's Briefs and Exceptions. *See* Petition ¶¶ 20-24. Verizon already argued that the statute of limitations for contract actions under Pennsylvania law is four years, as noted by both the RD and the *Order*. RD at 63; *Order* at 62-63. Moreover, Verizon previously argued that the "continuing contract doctrine" should be applied such that the period for refunds reaches back to July 12, 2011. RD at 63; *Order* at 62-63. Importantly, in addition to not being new arguments, Verizon continues to attempt to rely upon a statute of limitations and legal theories associated with a breach of contract. However, these limitations periods have no application here because there is no allegation of any breach of contract by FirstEnergy and FirstEnergy at no time breached the Joint Use Agreements.

24. Through its Petition, Verizon improperly attempts to re-litigate the same arguments that the Commission previously considered and rejected. Therefore, Verizon fails to satisfy the *Duick* standard, and its Petition should be denied.

3. Verizon's Claims Regarding The Negotiation Of The Joint Use Agreements Are Neither New Nor Accurate.

25. Verizon further claims that the *Order*'s refund period should be expanded to reach back to 2011 because FirstEnergy "was required by law to charge Verizon" the new telecom rate

as of July 12, 2011. Petition ¶ 31. Based on this claim, Verizon asserts that during the parties' rate negotiations, FirstEnergy "stalled the parties' rate discussions,"[15] "refused to comply with the law" between 2011 and 2019,[16] and the Commission's *Order* "improperly excuses FirstEnergy's unlawful conduct."[17] However, these claims are neither new nor accurate and, therefore, do not warrant reconsideration.

26. First, Verizon's claim that FirstEnergy's conduct was unlawful or inconsistent with the FCC's regulations or precedent is incorrect. In its *2011 Pole Attachment Order*, the FCC made clear that it was "unlikely to find that the rates, terms and conditions in existing joint use agreements unjust or unreasonable." (FirstEnergy St. 2-R, p. 11 (referencing *2011 Pole Attachment Order* ¶ 207[18]).) Since 2011, the FCC has rejected the request for the new telecom rate to be inserted into an existing joint use agreement four times. In each case, the FCC rejected the exact relief requested by Verizon in this proceeding. ILECs are 0-4 before the FCC.[19]

27. Most recently in *Verizon Maryland LLC v. Potomac Edison Company*, FCC Docket No. 19-355, FCC 20-167 (Memorandum Opinion and Order dated Nov. 23, 2020) ("*Potomac Edison*"),[20] the FCC examined substantially similar joint use agreements between FirstEnergy's and Verizon's respective affiliates, The Potomac Edison Company and Verizon Maryland LLC. Under its own regulations and precedent—which the *Order* claims to apply—the FCC concluded

[15] Petition ¶ 5.

[16] *See* Petition ¶ 7.

[17] *See* Petition ¶¶ 27-28.

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

[19] *See In the Matter of BellSouth Telecommunications, LLC d/b/a/ AT&T Florida v. Florida Power and Light Company*, Proceeding No. 19-187; Bureau ID No. EB-19-MD-006 (Memorandum Opinion and Order adopted May 20, 2020) ("*AT&T v. FPL*") at ¶ 11; *Verizon Va. v. Va. Elec. & Power Co.*, Proceeding No. 15-190; Bureau ID No. EB-15-MD-006, 32 FCC Rcd 3750, 2017 FCC LEXIS 1304 (2017) ("*Dominion Order*") at ¶ 12; *Verizon Fla. v. Fla. Power & Light Co.*, Docket No. 14-216; File No. EB-14-MD-003, 2015 FCC LEXIS 441, 30 FCC Rcd 1140 (2015) ("*FPL 2015 Order*").

[20] Both Verizon Maryland LLC and The Potomac Edison Company filed petitions for reconsideration of this decision on December 23, 2020, which remain pending before the FCC.

that Verizon received several material competitive advantages under substantially similarly joint use agreements and, as such, Verizon was not entitled to the new telecom rate. *Potomac Edison* ¶ 20. Rather, it was only awarded the old telecom rate. *Id.* ¶ 21. Indeed, even under similar agreements to those at issue here, the FCC has still never awarded an ILEC the relief Verizon sought and the additional relief it continues to seek.[21]

28. Once Verizon's misrepresentations of FCC precedent are exposed, its claim that FirstEnergy stalled rate negotiations or refused to comply with the law during rate negotiations is likewise shown to be untrue. *See* Petition ¶¶ 5, 7, 27-28. During rate negotiations, FirstEnergy made repeated attempts to renegotiate the rate Verizon paid. *See* FirstEnergy M.B. at 6, 58-63 (summarizing FirstEnergy's efforts to re-negotiate the rates); *see also* FirstEnergy R.B. at 37-38 (summarizing the same). Among these efforts, FirstEnergy went so far as to propose to completely transition Verizon out of pole ownership, in accordance with what it understood to be Verizon's previously communicated desire, which would have permitted Verizon to attach to FirstEnergy's poles under similar rates, terms and conditions to its competitors. (FirstEnergy St. 1-R, p. 29.) Verizon, however, refused to consider, let alone accept, any rate that was higher than the new telecom rate. *See* FirstEnergy M.B. at 61-62.

29. Verizon's attempts to mischaracterize the history of the parties' rate negotiations should be flatly rejected. It is neither supported by the record nor a rational basis upon which its Petition can be granted. Therefore, the Petition should be denied.

4. Verizon's Additional Policy Arguments Are Not New And Were Previously Considered and Rejected By The Commission.

[21] The juxtaposition of the FCC's decision in *Potomac Edison* and the *Order* makes clear that the Commission has failed to regulate such that "parties apply the same substantive rules in either venue." *Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission*, Docket No. L-2018-3002672, at 25 (Order entered Sept. 3, 2019) ("*2019 Final Rulemaking Order*").

30. Verizon's final argument is that the *Order*'s establishment of a refund period dating to November 20, 2019, "would undermine the Commission's deployment goals and needlessly increase pole attachment litigation in Pennsylvania." Petition ¶¶ 25-26. However, its policies arguments are neither new nor novel and do not satisfy the *Duick* standard.

31. Importantly, Verizon previously argued in its Main Brief that awarding refunds back to July 12, 2011, is consistent with the Commission's policies. *See, e.g.*, Verizon MB at 57-58. Verizon reiterated this argument in its Exceptions, where it claimed the ALJ erred because the Commission should correct the RD's refund determinations because it would otherwise "encourage other electric utilities to defy the Commission's regulations in the hope of keeping their unjust profits." *See, e.g.*, Verizon Exceptions at 4, 10-11. Therefore, these are not "new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission." *See Duick* at 559.

32. Furthermore, to the extent that Verizon raises additional policy arguments that it did not raise in its Briefs or Exceptions, those arguments also do not satisfy the standard for granting reconsideration. *See Pa. PUC v. PPL Elec. Utils. Corp.*, Docket No. R-2012-2290597, p. 3 (Order entered May 22, 2014). Any arguments that could have been raised in Exceptions, but were not, are deemed waived. *See Merritt v. Duquesne Light Co.*, 2011 Pa. PUC LEXIS 1197, at *9-10 (Order entered Mar. 31, 2011) (finding that "the Complainant waived his arguments by failing to raise them in Exceptions").

33. Here, Verizon clearly had the opportunity to raise all of its policy arguments in its Briefs and Exceptions. Any new arguments raised at this time are simply improper and are not grounds for granting reconsideration.

34. Finally, as explained in Section IV.C below, even assuming *arguendo* that Verizon's policy arguments satisfy the *Duick* standard, they are premised upon the falsehood that FirstEnergy profits from the pole attachment rates that Verizon pays. In actuality, FirstEnergy's pole attachment rates provide revenues that, if decreased, result in a dollar-for-dollar increase in the rates that FirstEnergy's electric utility customers pay.

B. VERIZON'S PETITION HIGHLIGHTS THE LEGAL AND FACTUAL ERRORS COMMITTED IN THE COMMISSION'S *ORDER*.

1. The Commission Erred By Awarding Verizon Any Refunds At All And, Therefore, Verizon's Request For Additional Refunds Should Be Rejected.

35. Verizon claims that the Commission's award of the new telecom rate and refunds was "consistent with its regulations" and that additional refunds are necessary to "remove the incentive for similarly protracted and costly disputes…to the benefit of the Commission's deployment goals and Pennsylvania consumers." Petition ¶¶ 12, 32. As explained above, Verizon's Petition simply re-raises the same flawed arguments in support of its request for additional refunds that the Commission previously considered and rejected. None of the arguments advanced by Verizon in its Petition or before the Commission demonstrate that the award of refunds is consistent with the Commission's regulations, the Public Utility Code or Pennsylvania law. Rather, as explained by FirstEnergy previously, the Commission's award of refunds violates the Public Utility Code, basic principles of contract law, and various provisions of the United States and Pennsylvania Constitutions, constitutes an abuse of discretion and error of law, and is not based upon substantial evidence.[22] For these reasons and others, Verizon's Petition should be rejected, and the Commission should reject any request that Verizon be awarded refunds in this matter.

[22] *See* footnote 3 *supra*.

2. The *Order* Commits Several Other Legal Errors, Constitutes An Abuse Of Discretion, And Is Not Supported By Substantial Evidence.

36. Verizon further requests additional refunds based on its claim that the Commission's award of the new telecom rate and refunds "made clear that it will enforce its regulations"[23] and was "consistent with its regulations."[24] However, the Commission's application of its regulations is fraught with errors, unlawful under the Public Utility Code and Pennsylvania precedent, and is not supported by substantial evidence. These errors in the *Order* highlight why Verizon's request for additional relief in the Petition should be rejected. The *Order* itself is fundamentally flawed and does not constitute a lawful, logical, or reasonable basis upon which Verizon's Formal Complaint could be sustained. Therefore, and for the reasons more fully explained previously, Verizon's request for additional refunds in its Petition should be denied.

C. VERIZON'S REQUEST FOR RECONSIDERATION SHOULD BE DENIED BECAUSE IT CONSTITUTES POOR PUBLIC POLICY.

1. Verizon's Request For Additional Refunds Will Increase The Harm To FirstEnergy's Electric Utility Customers.

37. Verizon's Petition asserts that its request for additional refunds will benefit the Commission's broadband "deployment goals and Pennsylvania consumers," by not permitting "FirstEnergy to profit" from the rates Verizon pays under the Joint Use Agreements. *See* Petition ¶¶ 31-32. However, Verizon's claims are based on the same falsehood it advanced in testimony and in Briefs: that FirstEnergy "profits" from the rates Verizon pays it under the Joint Use Agreements. *See* Petition ¶¶ 15 (arguing that electric utilities are encouraged "to impeded pre-litigation negotiations without risk of financial penalty"), 31 (arguing the *Order* will "allow FirstEnergy to profit" from its allegedly unjust and unreasonable rates). Once this façade falls, it

[23] Petition at 1.
[24] Petition ¶ 12.

is clear that awarding Verizon any relief, let alone the additional refunds requested in its Petition, is contrary to the interests of Pennsylvania consumers and will, in fact, harm FirstEnergy's electric utility service customers.

a. FirstEnergy does not profit from the rates Verizon, or any ILEC, pays to attach to its poles under joint use agreements.

38. Throughout this proceeding, FirstEnergy unequivocally and repeatedly explained how the rates Verizon pays under the Joint Use Agreement act as an offset to electric customers' utility service rates. FirstEnergy explained that "[a] reduction in joint use fees paid by Verizon will result in lower joint use revenues and therefore a smaller credit to electric ratepayers…resulting in higher base distribution rates than would otherwise be the case absent the reduction in joint use fees." (FirstEnergy St. 3-R, p. 4.) Any reduction in the rates Verizon pays will, therefore, result in higher rates for FirstEnergy's electric ratepayers.[25] Stated differently, FirstEnergy would be forced to collect more revenues from its electric service customers to accommodate (*i.e.*, subsidize)[26] a joint use rate that is inadequate and substantially below a normal, fully-allocated cost-of-service-based rate.

39. In addition, FirstEnergy recognized the potential impact that the relief Verizon sought would have on its electric utility customers' rates. As a result, the Companies requested that the Commission either: (a) set the effective date of any new rates established under the Joint Use Agreements as the effective date of new rates established in the Companies' next base rate proceeding; or (b) allow FirstEnergy to defer and record as a regulatory asset the difference in

[25] Relatedly, until the Companies have a base rate case and recover any rate reductions, they will fail to earn a fair rate of return on their investment in poles. Once the rate case occurs, and FirstEnergy recovers additional revenue from electric ratepayers, the rate discrimination will occur. In this regard, FirstEnergy must be allowed to defer for future recovery the full amount of the differences with carrying charges between such modifications and the joint use revenue amounts embedded in its electric rates. (*See* FirstEnergy St. 3-R, p. 7.)

[26] (FirstEnergy St. 1-R, p. 6; *see also* FirstEnergy St. 2-R, pp. 20-22.)

revenues produced from the new rates and existing rates plus carrying charges, and permit the Companies to claim and recover this deferred amount in their next base rate case. *See, e.g.*, FirstEnergy M.B. at 90-91. However, Verizon actively opposed this proposal, and the Commission incorrectly found that these issues could be put off until FirstEnergy's next base rate case. *See* Verizon R.B., Appendix B at ¶ 28; *see also Order* at 75 ("FirstEnergy's base rate arguments can be deferred to the Companies' next base rate proceedings where the issues can be fully vetted.").

b. There is no record evidence that shows Verizon's request for lower rates and/or refunds will expand broadband deployment.

40. No evidence exists that the new rate Verizon seeks would incrementally benefit broadband deployment in Pennsylvania. While FirstEnergy sought to obtain this information, Verizon specifically objected to a discovery request seeking information regarding how a reduction in the rates FirstEnergy charges Verizon would enhance broadband services or deployment in Pennsylvania as irrelevant. (*See* Exhibit JMS-1 (Verizon's Answer to FE to Verizon Set II, No. 8.)

41. Indeed, the Commission candidly recognized that there was no evidence that the relief it granted Verizon would be anything but a windfall for Verizon's shareholders, when it stated:

> The revenue impact on both Verizon and FirstEnergy is proprietary and is discussed elsewhere in this Opinion and Order. It is worth noting, however, that the FCC has indicated 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.

Order at 66, n. 41 (emphasis added).

42. The Commission's "hope" for the refund and rate reductions is not sound decision-making, nor is it based on any evidence. Moreover, the Commission's "hope" is so disconnected from the public interest that the Commission does not even "hope" that Verizon will commit all of the refund and rate reductions to making broadband available and affordable in Pennsylvania. The Commission only "hope[s]" that Verizon will dedicate an unspecified portion to that purpose. *Id.*

43. FirstEnergy's electric utility customers will be harmed by the relief granted by the *Order*, and the Commission will only exacerbate that harm if it grants the additional relief sought by Verizon in the Petition. Therefore, and for the reasons FirstEnergy has previously explained, Verizon's request for refunds should be rejected.

2. The Amount Of Refunds Already Obtained By Verizon, And The Amount Of Additional Refund Sought, Are Unknown To The Public.

44. The harm to FirstEnergy's electric utility customers caused by granting Verizon any of its requested relief is even more egregious because the Commission has treated the refund amount and rate reductions as "proprietary" and "non-public." In this regard, the actual potential impact on FirstEnergy's electric utility service customers of the relief granted in the *Order* and the additional relief Verizon seeks in the Petition are unknown to the public.

45. Although FirstEnergy wanted to inform the public and, in particular, its electric utility customers about the potential impacts the *Order* would have on the Companies' electric service rates, Verizon actively sought to keep this information sealed. In particular, FirstEnergy again warned that the rate reductions and refunds sought by Verizon would result in a dollar-for-dollar decrease in pole attachment revenues and an associated dollar-for-dollar increase in the Companies' electric service customers' rates. *See* FirstEnergy Motion to Unseal at 10-11. FirstEnergy also explained that Verizon's requested relief, if granted, would effectively result in a

stealth rate increase for the Companies' Pennsylvania electric service customers, with no showing that this rate increase would actually result in any tangible benefits regarding broadband deployment. *See* FirstEnergy Motion to Unseal at 12-12.

46. Despite these warnings, the Commission indulged Verizon's request to keep the impact of this proceeding on electric utility customers secret and declined to make the rate impact information public. *See Order Denying Motion to Unseal* at 14-15. Now, after successfully maintaining a veil of secrecy regarding the potential rate impacts of Verizon's requested relief on FirstEnergy's electric customers, Verizon asks for more. *See* Petition ¶¶ 25-26.

47. Verizon's request in its Petition effectively asks the Commission to double-down on providing Verizon with a stealth subsidy and imposing an embedded rate increase upon FirstEnergy's electric utility customers, with zero evidence that these customers will benefit from expanded or accelerated broadband deployment. As previously explained by FirstEnergy, this sort of rate increase specifically frustrates "the General Assembly's desire to effectuate transparency, above and beyond that which is required by the RTKL, in the government's dealings with public utilities" and the "particular importance" that transparency plays "in the context of the PUC's governing relationship with public utilities." *See Pa. PUC v. Seder*, 139 A.3d 165, 174-75 (Pa. 2016).

48. Therefore, and for the reasons more fully explained above the Commission should deny the Petition for Partial Reconsideration.

V. CONCLUSION

WHEREFORE, for all the foregoing reasons, Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company respectfully request that the Pennsylvania Public Utility Commission deny the Petition for Partial Reconsideration filed by Verizon Pennsylvania LLC and Verizon North LLC in its entirety.

Respectfully submitted,

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