VERIZON PENNSYLVANIA LLC
AND VERIZON NORTH LLC
STATEMENT NO. 3.2

VERIZON PENNSYLVANIA LLC AND
VERIZON NORTH LLC

V.

METROPOLITAN EDISON COMPANY,
PENNSYLVANIA ELECTRIC COMPANY
AND PENN POWER COMPANY

DOCKET NO. C-2020-3019347

VERIZON PENNSYLVANIA LLC
AND VERIZON NORTH LLC

STATEMENT NO. 3.2

(SURREJOINDER TESTIMONY)

WITNESS: Timothy J. Tardiff

DATED: July 2, 2020

PUBLIC VERSION

1 # Table of Contents

2 I. Introduction and Summary 1

3 II. FirstEnergy's Continued Reliance on Its Erroneous Claim that the FCC's Rate
4 Formulas Produce Rates Lower than "Typical" Rate Methodologies Does Not
5 Justify Excessive Rental Rates..4

6 III. Contrary to FirstEnergy's Claims, Make-Ready Costs and Other Joint Use
7 Agreement Terms Do Not Competitively Advantage Verizon.............................6

8 IV. FirstEnergy Used Its Superior Bargaining Power to Secure Unjust and
9 Unreasonable Rental Rates 12

10 V. FirstEnergy's Field Review Results Should Not Be Used to Calculate Rental
11 Rates..16

12

1 **I. Introduction and Summary**

2 **Q. What is your name and address?**

3 A. My name is Timothy J. Tardiff. My business address is 112 Water Street, Boston, MA
4 02109. My qualifications are described in my direct testimony.

5 **Q. Did you previously submit testimony in this matter?**

6 Yes. I submitted direct testimony in this matter on April 21, 2020 ("Tardiff Direct") and
7 surrebuttal testimony on June 18, 2020 ("Tardiff Surrebuttal").

8 **Q. Has your review of FirstEnergy's rejoinder testimony changed the analysis or**
9 **conclusions you described in your prior testimonies?**

10 A. No. It confirmed and reinforced them. In its order that established jurisdiction over pole
11 attachment regulation, this Commission explained that its action will streamline
12 regulation, which is necessary to meet "recent public demand for ubiquitous access to
13 wireline and wireless data technology."[1] A key element of the Federal Communication
14 Commission's (FCC) regulations that the Commission adopted in "turn-key" fashion[2] is a
15 guarantee of just and reasonable rental rates for *all* broadband providers. By ensuring
16 competitive neutrality with respect to rates for use of utility poles, which are essential
17 infrastructure used to provide broadband service, the Commission helps satisfy the
18 public's demand for efficient and ubiquitous broadband access. As I explained in my
19 previous testimonies, FirstEnergy's insistence on charging Verizon rates three times just
20 and reasonable levels results from its continuing exploitation of superior bargaining
21 power, and is inimical to attaining the Commission's broadband objectives, FirstEnergy's
22 protests to the contrary notwithstanding.[3]

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[1] *Assumption of Commission Jurisdiction over Pole Attachments from the Federal Communications Commission*, L-2018-3002672, Final Rulemaking Order (Sept. 3, 2019), p. 1 ("2019 Pennsylvania Pole Order").

[2] *Ibid*., p. 14.

[3] Mr. Zarakas acknowledges the FCC's broadband objective in his presentation of FirstEnergy's version of "fully allocated costs," but he ignores the demand-reducing effect of imposing the higher rental rates that his preferred method would have on broadband deployment. Zarakas Rejoinder, p. 7.

1 Under the Commission's regulations, competitive neutrality among broadband providers
2 requires that Verizon pay the same pole attachment rate (the "new telecom rate")
3 guaranteed to Verizon's broadband competitors—cable companies and competitive local
4 exchange carriers (CLECs)—unless FirstEnergy proves with clear and convincing
5 evidence that FirstEnergy provides Verizon terms and conditions under their joint use
6 agreements that give Verizon a net material advantage relative to the terms and
7 conditions in FirstEnergy's license agreements with cable companies and CLECs.[4]

8 FirstEnergy does not provide any quantification to substantiate its allegation that it
9 provides Verizon *net material* savings under the joint use agreements (compared to costs
10 Verizon would incur under a license agreement) on a per pole basis, but continues to
11 insist that merely listing differences that it falsely claims are "indisputable" and providing
12 an unrepresentative and inflated calculation of alleged make-ready fees Verizon did not
13 require is sufficient to justify the excessive rental rates it has long been charging Verizon.
14 After all the testimony in this case, FirstEnergy has failed to provide any reliable
15 evidence, much less the clear and convincing evidence necessary, to justify charging
16 Verizon a rate higher than the just and reasonable rates charged to cable companies and
17 CLECs, let alone the current rental rate that is triple what those third parties pay.

18 My previous testimonies also described how Verizon's calculations of rental rates
19 specified by the FCC's formulas is economically sound and noted that the new telecom

[4] The FCC explained this standard as follows:

> In the interest of promoting infrastructure deployment, the Commission adopted a policy in 2011 that similarly situated attachers should pay similar pole attachment rates for comparable access. Incumbent LECs allege, however, that electric "utilities continue to charge pole attachment rates significantly higher" than the rates charged to similarly situated telecommunications attachers, and that these higher rates inhibit broadband deployment. To address this problem, we revise our rules to establish a presumption that, for newly-negotiated and newly-renewed pole attachment agreements between incumbent LECs and utilities, an incumbent LEC will receive comparable pole attachment rates, terms, and conditions as a similarly-situated telecommunications carrier or a cable television system (telecommunications attachers). The utility can rebut the presumption with *clear and convincing evidence* that the incumbent LEC receives net benefits under its pole attachment agreement with the utility that materially advantage the incumbent LEC over other telecommunications attachers.

Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket Nos. 17-84 and 17-79, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, ¶ 123, emphasis added ("2018 Third Report and Order").

1 rates FirstEnergy presented in its rebuttal testimonies are generally quite close to what
2 Verizon presented. That is, in light of FirstEnergy's failure to justify charging higher
3 rates to Verizon than it charges third parties to attach it its joint use poles, there is little
4 practical dispute over the amounts of those just and reasonable rates. FirstEnergy
5 continues to defend its use of rate calculation inputs from a flawed field survey, but now
6 admits that survey has errors. It is not sufficiently reliable to calculate rates. Verizon's
7 just and reasonable rate for use of FirstEnergy's poles should be the new telecom rate
8 properly calculated with the default inputs in the Commission's rate formulas.

9 **Q. Please summarize your surrejoinder testimony.**

10 A. FirstEnergy's rejoinder testimonies confirm and strengthen my prior conclusions, as
11 detailed in the following sections. Section II responds to FirstEnergy's continuing
12 erroneous claim that the Commission's rental rate formulas depart from "typical"
13 regulatory practice and subsidize Verizon and other providers of broadband services. To
14 the contrary, the Commission's rental rate formulas are subsidy-free, facilitate ubiquitous
15 broadband access, and if used properly to set rates and refunds for Verizon's attachments
16 would ensure competitive neutrality to promote and expand broadband deployment in
17 Pennsylvania. Section III explains how FirstEnergy's rejoinder testimonies do not
18 change the fact that it has not presented clear and convincing evidence to justify rental
19 rates higher than the new telecom rate, let alone the excessive rates under the current joint
20 use agreements. Section IV explains how FirstEnergy's brief rejoinder to my prior
21 testimony regarding FirstEnergy's continuing exercise of superior bargaining power fails
22 to address most of the reasons why I reached that conclusion and amounts to another
23 attempt to advance its misguided subsidy argument—which, if incorporated into rental
24 rates, would inhibit demand for broadband services. Section V explains how
25 FirstEnergy's rejoinder testimonies provide no basis for concluding that the results from
26 FirstEnergy's field review of poles, which was not limited to the joint use poles at issue
27 in this matter, provide unreliable inputs to be used in place of the FCC's default inputs in
28 rental rate formulas.

1 **II. FirstEnergy's Continued Reliance on Its Erroneous Claim that the**
2 **FCC's Rate Formulas Produce Rates Lower than "Typical" Rate**
3 **Methodologies Does Not Justify Excessive Rental Rates**

4 **Q. What are the implications of FirstEnergy's version of fully allocated costs?**

5 A. FirstEnergy's assertion that the rate formulas this Commission approved by its turn-key
6 adoption of the FCC's procedures create a subsidy from electric users to parties attaching
7 to FirstEnergy's poles is not only wrong as a matter of economics, but it also appears to
8 be a not-so-subtle attempt for approval to charge higher rental rates not only to Verizon,
9 but also to other broadband providers as well. That outcome would exacerbate existing
10 marketplace distortions, increase the cost of and diminish the options for broadband
11 service, and eviscerate the Commission's goal of promoting ubiquitous broadband, all to
12 the benefit of FirstEnergy and the detriment of Pennsylvania consumers.

13 **Q. What is the basis for FirstEnergy's subsidy allegation?**

14 A. FirstEnergy's position is based on its own unique definition of subsidy—namely the
15 unusable space on a pole (or common costs) *must* be evenly allocated to the pole owner
16 and attaching entities and any departure from that particular assignment produces a
17 subsidy.[5] This claim is not grounded in accepted economic theory. Any rate that covers
18 the cost of occupying the space required for an attachment, plus the cost of some amount
19 of unusable space is subsidy-free as a matter of economics and practical interpretation.[6]
20 Mr. Zarakas now agrees that the cable and new telecom rate assign unusable space in
21 proportion to usable space[7] and the FCC itself described the cable rate as based on fully

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[5] Zarakas Rejoinder, p. 9. In his rebuttal testimony, Mr. Zarakas claimed that per-capita assignment is "typical," but neither there nor in his rejoinder does he provided any support for this claim.

[6] In economic terms, rental rates are not being subsidized when they produce revenue that more than covers the cost of providing the required space. See, for example, William J. Baumol, *Superfairness*, Cambridge: MIT Press, 1986, p. 132 and David W. Price, editor, The MIT Dictionary of Modern Economics, Fourth Edition, Cambridge: MIT Press, 1992, p. 92.

[7] Zarakas Rejoinder, p. 5. However, Mr. Zarakas incorrectly claims that the electric company space occupied in Table 1 of my surrebuttal testimony should be decreased (implying the electric company is paying more of the annual pole cost than my example shows) because the amount of available usable space assumed to be occupied by attaching entities exceeds the 13.5 feet of usable space used to calculate the rental rates produced by the FCC's formulas. (Zarakas Rejoinder, p. 8, note 16). In fact, while the ILEC and the three third-party attachers in the

1 allocated costs.[8] Mr. Zarakas provided no citation in economics or any other area for the
2 proposition that common cost allocations should or must be based on equal per-capita
3 assignment. Indeed, as I described in my surrebuttal testimony, it is well established that
4 collection of a rate that more than covers the cost of providing the occupied space is not
5 subsidizing any other customers.[9] Basing rates on FirstEnergy's false claims to the
6 contrary would preserve and increase the excessive rental stream it imposed on Verizon
7 (and some of its competitors) long ago.

8 **Q. When is an allocation of common costs based on actual usage preferable to**
9 **FirstEnergy's proposed per capita allocation?**

10 A. Subsidy-free allocations, i.e., when users pay for at least as much as the space they
11 actually use (as Mr. Zarakas now concedes a proportional allocation accomplishes),
12 promote other objectives such as this Commission's and the FCC's intent to facilitate
13 broadband deployment. The Commission's subsidy-free allocation is superior to

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examples are assumed to occupy one-foot of space in calculating rental rates, for a total of four feet, they would occupy only three feet—the ILEC's attachment would be at the bottom of the communications space at 18 feet above ground and the other parties' attachments would be attached one foot apart at 19, 20 and 21 feet respectively. Thus, there is no reason to reduce the electric company's occupied space. Further, because rental rates are based on default inputs that are presumptive averages (e.g., space occupied, average pole height), the same rate would apply independent of the actual pole height, which is not 37.5 feet since no such pole exists. Therefore, the amount of total annual pole costs recovered in those rates would apply to every pole. For example, in my example, the new telecom rate results in the electric company paying $105.65 of the $150 total annual pole cost (72 percent), compared to its attachments (requiring an average of 10.5 feet) using 70 percent of the 14.5 feet of space occupied by the 5 attaching entities. In contrast, under Mr. Schafer's "Fully Allocated pre-2011 Rate," the electric company would pay $57.20 of the $150 annual pole cost (only 38 percent), despite using 70 percent of the space occupied by the attaching entities. Accordingly, the space attributed to the electric company should not be decreased.

[8] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245; GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, ¶ 128 ("2011 Report and Order"). That order also observed: "We believe that a just and reasonable rate in such circumstances would be the same proportionate rate charged the electric utility, given the incumbent LEC's relative usage of the pole (such as the same rate per foot of occupied space)" which clearly implies an allocation of unusable space in proportion to space occupied. ¶ 218, note 662. Similarly, as I noted in my surrebuttal testimony, the FCC's TELRIC process allocates spare capacity, which is analogous to unusable pole space, in proportion to capacity used. Tardiff Surrebuttal, p. 12 note 21.

[9] Tardiff Surrebuttal, p. 11, note 16. Mr. Zarakas' rejoinder does not comment on this discussion, but instead disagrees with my conclusion that the new telecom formula provides a subsidy to FirstEnergy's attachments to Verizon's poles. Zarakas Rejoinder, p. 8, citing Tardiff Surrebuttal, p. 10, note 14. My conclusion is correct as a matter of arithmetic. Rather than commenting on what I described in the cited material, Mr. Zarakas makes the claim that a compensatory rate is not necessarily subsidy-free, which is incorrect as a matter of economics and practically meaningless in that it depends on arbitrarily accepting that a particular allocation approach must always be used.

1 FirstEnergy's rigidly-defined allocation mechanism, which undermines such objectives.
2 A simple example illustrates how a subsidy-free proportional allocation is superior to per-
3 capita allocation. Facilities such as hotels and apartment buildings require space for
4 functions such as heating and cooling that cannot be used to house guests or tenants. If
5 rental rates charged each occupant (e.g., the penthouse on the top of the building and the
6 smaller individual units throughout the building) the same amount for the heating and
7 cooling space (and equipment), it would have the effect of improperly increasing prices
8 for the smaller individual units. That would then discourage the large majority of
9 potential occupants from signing leases. FirstEnergy's per-capita allocation approach
10 would have a similar effect on broadband providers.

11 III. Contrary to FirstEnergy's Claims, Make-Ready Costs and Other Joint
12 Use Agreement Terms Do Not Competitively Advantage Verizon

13 **Q. In response to your surrebuttal testimony, Mr. Schafer claims that FirstEnergy has**
14 **quantified (or attempted to quantify) a number of alleged advantages Verizon**
15 **receives under the joint use agreements, including "(1) guaranteed access to**
16 **FirstEnergy's poles; (2) reserved space on FirstEnergy's poles; (3) no permitting**
17 **costs or process to attach to FirstEnergy's poles; (4) no inspection costs post-**
18 **attachment; and (5) access to the lowest space on the pole."[10] Do you agree?**

19 A. No. Since Verizon first sought just and reasonable rental rates from FirstEnergy more
20 than eight years ago, FirstEnergy has quantified none of these benefits it claims justify
21 maintaining the excessive rates it imposed on Verizon. The only benefit for which Mr.
22 Schafer attempted to quantify a recurring per-pole value was an alleged benefit to
23 Verizon from lower make-ready costs. As I described in my surrebuttal testimony,[11] Mr.
24 Schafer's unrepresentative and incorrectly executed make-ready cost calculation falls far
25 short of the requirements necessary to justify FirstEnergy's insistence on maintaining
26 rates far above the just and reasonable rates that would provide for competitive neutrality

[10] Schafer Rejoinder, p. 30.

[11] Tardiff Surrebuttal, pp. 25-28.

1 among broadband providers. Mr. Schafer offers nothing in his rejoinder testimony to
2 rectify, let alone justify, his incorrect claim and flawed calculation.

3 **Q. Mr. Schafer's rejoinder goes on to state: "The AT&T v. FPL Order was issued**
4 **before Verizon served its surrebuttal testimony, and Verizon's continued attempts**
5 **to contest the identified benefits it receives under the Joint Use Agreements in the**
6 **wake of this decision flies in its face and demonstrates that Verizon's position in this**
7 **case is untenable." Was your criticism of Mr. Schafer's alleged benefits incorrect?**

8 A. Absolutely not. The fundamental issue in this matter is whether the rates in the current
9 joint use agreements are just and reasonable. While I was not a part of the FPL
10 proceeding, the FPL Order supports Verizon's claim for significant rental rate reductions
11 and refunds and undermines FirstEnergy's position: "[T]hrough the end of the 2018
12 calendar year … [we] find that, for that period, the rate AT&T paid to attach to FPL's
13 poles was unjust and unreasonable under the *Pole Attachment Order*."[12] As described in
14 my Direct Testimony, the current rates produce annual net payments from Verizon to
15 FirstEnergy that significantly exceed net payments from just and reasonable rates (as
16 produced by the Commission's new telecom rate formula) by [REDACTED] and by [REDACTED]
17 [REDACTED] under the old telecom rate referenced in the FPL Order.[13]

18 **Q. Does challenging FirstEnergy's claim that the joint use agreements provide Verizon**
19 **a net material advantage over its competitors "fly in the face" of the FCC's FPL**
20 **Order?**

21 A. No. The evaluation of whether *net material* advantages are sufficient to justify the
22 continuation of a disputed joint use agreement rental rate requires much more than mere
23 listing of purported advantages. As described in more detail below, the *annual* net
24 monetary amount of any such advantages *per-pole* must be comparable to the amount by
25 which a higher rental rate exceeds the just and reasonable rate charged to third parties.

[12] *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, Order, May 20, 2020, ¶ 1 ("FPL Order"). The "Pole Attachment Order" referenced was the FCC's 2011 Report and Order.

[13] Tardiff Direct, Exhibit TJT-1, ¶ 20.

1 The FCC did not walk away from this standard in its recent FPL Order. In determining
2 FPL's current rates to be unjust and unreasonable, the FCC again noted myriad
3 deficiencies in FPL's attempt to quantify alleged advantages,[14] a discussion similar to my
4 evaluation of the defects in FirstEnergy's parallel claims. In addition, the FCC did not
5 resolve the entire case. It considered whether the electric utility had identified
6 "advantages" under the joint use agreement at issue there based on the evidence
7 submitted in the case. It criticized the electric utility for providing "inflated" valuations
8 of the alleged advantages and directed the parties to try to reach a negotiated resolution
9 before the FCC continued its review. Presumably, the next phase of the review will
10 consider whether the electric utility proved the identified advantages were net material
11 competitive advantages and, if so, whether it quantified a proper per-pole value for them
12 before setting a cost-based just and reasonable rate.

13 FirstEnergy's position that all it has to do is proffer a list of alleged advantages[15] is also
14 inconsistent with the FCC's 2018 Order that requires electric utilities to produce clear
15 and convincing evidence of any such advantages and their associated per-pole value.[16]
16 Perhaps more fundamentally, competitive neutrality among broadband providers requires
17 that to the extent that net material advantages do exist, and have been proven with clear
18 and convincing evidence, a higher rate should be commensurate with annual per pole
19 value of such net advantages.

20 **Q. How would one quantify the per–pole value of net material competitive advantages?**

21 A. The framework and examples in my prior testimonies are instructive to illustrating how
22 FirstEnergy's claims fall short and how Mr. Schafer's rationales in his rejoinder
23 testimony miss the mark. My surrebuttal testimony presented the following simple
24 example.[17]

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[14] FPL Order, ¶ 15. The FCC's Dominion Order described similar deficiencies in the electric utility's attempt to quantify the value of alleged advantages. *Verizon Virginia, LLC and Verizon South, Inc., Complainant v. Virginia Electric and Power Company d/b/a Dominion Virginia Power, Respondent*, Proceeding No. 15-190, Bureau ID No. EB-15-MD-006, Order, 30 FCC Rcd 1140, ¶¶ 18, 20, and 21 ("Dominion Order").

[15] "[N]or is such quantification required under FCC precedent." Schafer Rejoinder, p. 4.

[16] 2018 Third Report and Order, ¶ 123.

[17] Tardiff Surrebuttal, p. 7, note 9.

> [S]uppose installing new attachments on FirstEnergy's poles required FirstEnergy to undertake one-time activities that cost $100 per pole. In this example, assume that all of FirstEnergy's third-party agreements include a $100 charge for these activities, while the agreements with Verizon do not. Also assume Verizon does not incur the same $100 per pole cost when FirstEnergy installs new attachments on Verizon's poles. In this example, if the FirstEnergy poles needing new attachments accounted for one percent of the poles to which Verizon is attached, then a $100 one-time charge would be the same as a $1 increase to an annual per pole rental rate for that year. To illustrate, assume Verizon had attachments to 1,000 FirstEnergy poles and FirstEnergy charged third parties $10 per pole per year. If Verizon paid $11 per pole for one year, Verizon would pay FirstEnergy $11,000 ($11 x 1,000). But Verizon would also pay $11,000 if Verizon paid $10 per pole for its attachments to 1,000 FirstEnergy poles plus a one-time charge of $100 for the 10 poles with new attachments (one percent of 1,000 in this example) (($10 x 1,000) + ($100 x 10)).

To carry out such a calculation, it is first necessary to determine whether FirstEnergy charges Verizon's competitors for work it also performs to accommodate Verizon's attachments but for which Verizon does not pay in any of the ways Verizon incurs costs for work under the joint use agreements, which include (1) with a cash payment to FirstEnergy, (2) by performing the work and incurring the cost itself, and/or (3) by performing similar work at its own cost to accommodate FirstEnergy's attachments to Verizon's poles.[18] Mr. Schafer's rejoinder did not comment on this framework and his defense of his claimed advantages further illustrate their deficiencies.

Q. Please provide examples where Mr. Schafer fails to consider all of the items that must be included in a proper evaluation of *whether* net material benefits *exist*.

A. Mr. Schafer's rejoinder testimony demonstrates how he ignores that (1) Verizon performs similar (and thereby offsetting) functions for FirstEnergy under the terms of the joint use agreements[19] and (2) Verizon performs many of these activities itself.[20] As to this latter

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[18] Tardiff Surrebuttal, p. 7

[19] In his refusal to account for such reciprocal benefits, Mr. Schafer has gone so far as to advise this Commission to ignore recent FCC Orders to the contrary:

> In this regard, [Dr. Tardiff's] comparison is simply a non-sequitur; regardless of whether the benefit is conferred upon Verizon due to a reciprocal term in the Joint Use Agreement, its competitors do not enjoy such terms under the standard cable company/CLEC attacher agreement. As such, the Commission should reject his claims.

1 point, Mr. Schafer admits Verizon performs work itself, and thereby imposes no cost on
2 FirstEnergy, but FirstEnergy ignores the costs Verizon incurs because they do not show
3 up in FirstEnergy's billing system.[21]

4 **Q. Please comment on Mr. Schafer's "speed-to-market" claims.**

5 A. Mr. Schafer's catch-all "speed-to-market" alleged advantage illustrates the inadequacies
6 in his claims of net material advantages.[22] Mr. Schafer in effect combines the one alleged
7 benefit for which he produced an incorrect per-pole value with other alleged, but
8 unquantified, benefits to advocate maintaining excessive rental rates for Verizon in order
9 to favor new competitors. Justifying substantially higher rates for Verizon alone, based
10 on what are essentially start-up costs that Verizon and established third parties have
11 already incurred (as illustrated by Mr. Schafer's use of the most active third-parties
12 requesting make-ready activity) is inimical to ensuring the competitive neutrality
13 conditions that promote efficient competition to serve consumers' demand for ubiquitous
14 broadband service today. Verizon's cable company competitors have led and continue to
15 lead in the provision of broadband services through well-established networks.[23] But Mr.
16 Schafer insists that FirstEnergy should charge Verizon higher rates because there are new
17 entrants to the broadband market that require make-ready (start-up) costs, which Verizon
18 incurred decades ago providing it the ability to overlash new attachments over existing
19 facilities.[24] Mr. Schafer's theory would effectively charge Verizon a second time for
20 start-up costs Verizon already incurred. And, because Verizon's established competitors

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Schafer Rejoinder, p. 33. The FCC's Dominion Order clearly states exactly the opposite: "By identifying as alleged 'benefits' to Verizon services that Verizon is likewise required to extend to Dominion under the Joint Use Agreements, Dominion has failed to show that Verizon receives a disproportionate benefit…" Dominion Order ¶ 21.

[20] "Verizon can either *perform this work itself* or overlash its own existing attachments." Schafer Rejoinder, p. 26, emphasis added.

[21] Mr. Schafer states "FirstEnergy's data clearly shows that new or enhanced broadband deployment incurs significant make-ready costs billed by FirstEnergy to third party attachers. Verizon, on the other hand, is rarely if ever *billed* for make-ready work by FirstEnergy." Schafer Rejoinder, p. 15, emphasis added. But as noted in the prior footnote, "Verizon can either *perform this work itself* or overlash its own existing attachments." Schafer Rejoinder, p. 26, emphasis added. That leaves nothing for FirstEnergy to bill.

[22] See, for example, his rejoinder to my surrebuttal testimony. Schafer Rejoinder, pp. 34-35.

[23] Tardiff Surrebuttal, p. 32.

[24] Schafer Rejoinder, pp 34-35.

1 also already incurred start-up costs and have the same ability to overlash existing
2 facilities,[25] it would perpetuate artificial rate disparities that stifle competition, thwart
3 innovation, and reduce consumer choice.[26]

4 **Q. Do you have any other observations on Mr. Schafer's net material advantage**
5 **claims?**

6 Y. Yes. First, Mr. Schafer provides an incorrect and confusing description of how reciprocal
7 benefits under the joint use agreements should be handled when determining material net
8 benefits. Mr. Schafer said Verizon receives a benefit because FirstEnergy conducts
9 inspections of FirstEnergy's poles to which Verizon is attached, but disregards the costs
10 Verizon incurs to inspect Verizon's poles to which FirstEnergy is attached. He says:[27]

> 11 The pole owner (here, Verizon) collects rent from third-party attachers to
> 12 defray the costs of said program. Therefore, while Verizon's CLEC and cable
> 13 company competitors may not incur pole inspection costs, those competitors
> 14 do not receive pole attachment revenues like Verizon that would cover those
> 15 costs either.

16 Mr. Schafer thus confirms Verizon incurs inspection costs its competitors do not incur,
17 but that Mr. Schafer did not consider in its analysis. He also proposes an approach that
18 treats something as a benefit when FirstEnergy performs an activity for Verizon, but
19 Verizon's parallel activities on behalf of FirstEnergy don't count. Of course, they must.[28]

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[25] Mills Surrejoinder, p. 10.

[26] In the parallel FCC complaint proceeding between FirstEnergy's Maryland affiliate and Verizon, the FCC observed: "Potomac Edison has not adequately demonstrated that the alleged 'speed to market' and cost advantages associated with Verizon's historical status as an incumbent LEC are relevant to determine whether Potomac Edison's rates are just and reasonable under the Commission's orders and rules." *Verizon Maryland LLC, Complainant v. The Potomac Edison Company, Defendant*, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009, May 22, 2020, p. 3.

[27] Schafer Rejoinder, p. 21.

[28] Mr. Schafer's claim has been rejected by the FCC in both the FPL and Dominion matters cited above. "FPL overlooks the fact that AT&T must provide FPL many of the same advantages that FPL provides AT&T." FPL Order, ¶ 17. "By identifying as alleged 'benefits' to Verizon services that Verizon is likewise required to extend to Dominion under the Joint Use Agreements, Dominion has failed to show that Verizon receives a disproportionate benefit…" Dominion Order ¶ 21. The FCC's determinations in those complaint proceedings follow the guidelines established in the 2011 Report and Order: "A failure to weigh, and account for, the different rights *and responsibilities* in joint use agreement[s] could lead to marketplace distortions." 2011 Report and Order, ¶ 216 n.654 (emphasis added).

1 Second, to the extent Mr. Schafer claimed I failed to address certain topics in my
2 surrebuttal testimony, I note that I did address SPANS fees paid by third-parties[29] by
3 stating that annual per-pole amounts of such fees are *de minimis*.[30] Likewise, I responded
4 to Mr. Schafer's claim that Verizon has benefitted from FirstEnergy's tree removal
5 activities.[31] Based on information FirstEnergy provided in response to Verizon's
6 discovery requests, such removals impact a tiny fraction of Verizon's joint use poles and
7 clear vegetation around FirstEnergy's facilities, providing only a possible secondary
8 benefit to all communications facilities on the pole.[32]

9 IV. FirstEnergy Used Its Superior Bargaining Power to Secure Unjust and 10 Unreasonable Rental Rates

11 **Q. Have FirstEnergy's witnesses addressed your analysis of FirstEnergy's exercise of**
12 **superior bargaining power?**

13 A. Only in a cursory manner and based on a misinterpretation of my surrebuttal testimony as
14 I will explain below. In particular, Mr. Zarakas did not comment on, much less rebut, the
15 rationale for my evaluation of bargaining power, nor on my specific responses to his
16 arguments supporting FirstEnergy's position.

17 **Q. Please summarize your analysis of FirstEnergy's superior bargaining power and**
18 **Mr. Zarakas' rejoinder.**

19 A. In my direct testimony, I explained that (1) FirstEnergy's ownership of three-quarters of
20 the joint use poles provides FirstEnergy the ability to exercise superior bargaining power,
21 (2) the demanded rates indicate an exercise of superior bargaining power because they
22 impose a disproportionate share of the costs of every joint use pole on Verizon, and as a
23 result are ████ multiples of the maximum rate FirstEnergy may lawfully charge third

[29] Schafer Rejoinder, pp. 33-34.

[30] Tardiff Surrebuttal, p. 30 and note 70.

[31] Schafer Rejoinder, p. 32.

[32] Tardiff Surrebuttal, p. 20 note 36; Mills Surrebuttal, p. 27.

1 party cable and CLEC attachers, and (3) FirstEnergy's negotiations over several years
2 confirm its superior bargaining power because it failed to move its rate offer within
3 striking distance of just and reasonable rates—which signifies that negotiations with
4 FirstEnergy have not produced, and were not able to produce, just and reasonable rates.

5 In my surrebuttal testimony, I explained why Mr. Zarakas' responsive arguments were
6 mistaken, beside the point, and failed to "reduce" or "negate" FirstEnergy's superior
7 bargaining power as Mr. Zarakas contended. I also described how FirstEnergy's
8 charging certain CLECs rental rates greatly in excess of just and reasonable levels is an
9 additional indication of FirstEnergy's exercising its superior bargaining power.

10 Mr. Zarakas for the most part does not offer a rejoinder. Instead, he now argues
11 FirstEnergy would seek exceptionally high rates even if FirstEnergy were in "a position
12 of equivalent bargaining power (with Verizon)."[33]

13 **Q. On what specific observation did Mr. Zarakas base his suggestion that negotiated**
14 **rates would be even higher than the current contract rates?**

15 A. Mr. Zarakas misinterpreted a point I made in my surrebuttal testimony. I described the
16 consequences of the prior lack of adequate regulation and FirstEnergy's exercise of its
17 superior bargaining power to impose the disputed rates on Verizon by explaining that,
18 even if Mr. Zarakas could show both parties lack bargaining power today (he cannot),
19 "FirstEnergy would never negotiate an agreement that moved rates towards the FCC's
20 just and reasonable range."[34] This would mean "the status quo would prevail and the
21 status quo vis-à-vis [current] rental rates substantially favors FirstEnergy."[35]

22 Mr. Zarakas says he disagrees that negotiation between two parties "assuming that
23 neither has outsized bargaining leverage over the other, will inevitably result in a
24 continuation of the status quo."[36] My testimony did not include a generic statement
25 applicable to all negotiations. Instead I described the effect of FirstEnergy's exercise of

[33] Zarakas Rejoinder, p. 11.

[34] Tardiff Surrebuttal, p. 21.

[35] *Ibid.*

[36] Zarakas Rejoinder, p. 10.

1 superior bargaining power to impose exceptionally high rates in the past, which renders
2 Verizon unable to achieve just and reasonable rates through negotiations today even
3 accepting Mr. Zarakas' inaccurate bargaining power arguments.[37] I also never suggested
4 Verizon possesses comparable bargaining power when negotiating rental rates with
5 FirstEnergy. The facts of this case prove that is not true, as I summarized above.

6 Mr. Zarakas uses my rebuttal analysis as a springboard to posit a world in which business
7 parties negotiated an agreement with comparable bargaining power and without
8 regulatory oversight. He imagines the business parties in that hypothetical would agree
9 to FirstEnergy's misguided notion of how the respective parties would split the cost of
10 unusable space. That such an outcome would result from a negotiation of parties with
11 comparable bargaining power is akin to believing that the tenants occupying smaller units
12 in my earlier hotel example would agree to pay rates that captured a disproportionately
13 high share of the building's heating and cooling costs to the benefit of the landlord or
14 penthouse occupant. It simply would not occur. The reason FirstEnergy was able to
15 impose similarly high joint use agreement rates is because FirstEnergy has and exercised
16 its superior bargaining power.

17 **Q. Was there other testimony on issues related to bargaining power?**

18 A. Yes, but not much. Mr. Zarakas again claims that the cost of replacing Verizon's joint
19 use poles renders that option unviable.[38] Mr. Schafer makes essentially the same claim,
20 alleging the risk it would have to replace Verizon's poles "make[s] it abundantly clear
21 that FirstEnergy cannot use the threat of termination [of the joint use agreements] as
22 'leverage' in negotiations with Verizon."[39] In fact, the FCC observed that electric
23 utilities in Virginia and Florida have threatened termination during rate negotiations.[40]

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[37] In addition, as I described in my previous testimonies, when superior bargaining power has been previously exercised, as reflected in rates well in excess of a just and reasonable level, "evergreen provisions have been used to perpetuate the imbalance in rental payments and are an important contributor to Verizon's inability to terminate existing rental rate provisions and secure new just and reasonable rates." Tardiff Direct, Exhibit TJT-1, ¶ 28 and Tardiff Surrebuttal, p. 21 note 45..

[38] Zarakas Rejoinder, p. 12.

[39] Schafer Rejoinder, p. 29.

[40] Dominion Order, ¶ 8 note 33; FPL Order, ¶ 8.

1 **Q. Your surrebuttal testimony commented on the replacement cost estimates upon**
2 **which Mr. Zarakas and other witnesses relied to support the claim that the**
3 **replacement option is prohibitively expensive. Were there any rejoinders to your**
4 **comments?**

5 A. Yes. My surrebuttal testimony noted that the replacement cost per mile is undocumented
6 and Mr. Coleman provided no explanation for how he used the multiple costs in his
7 supporting exhibit to produce the single cost per mile figure in his rebuttal testimony.[41]
8 In particular, Mr. Coleman presented ███ cost estimates for replacement pole lines that
9 ranged from about ███ per mile to ███ per mile and ███ additional estimates
10 for underground facilities,[42] but then reported a single value with no explanation of how
11 the individual estimates were used to produce that estimate. Although Mr. Coleman
12 disputes my characterization, the fact remains that FirstEnergy provided no information
13 other than Mr. Coleman's sparsely document exhibit, which by itself is not sufficient for
14 an evaluation of FirstEnergy's cost claims.

15 **Q. Did Mr. Coleman provide new information on replacement costs?**

16 A. Yes. Mr. Coleman for the first time provides a per-mile estimate of Verizon's costs to
17 replace FirstEnergy's joint use poles that is on the order of ███ of the per-mile
18 estimate he previously made for FirstEnergy to replace Verizon's joint use poles.[43]
19 Further, rather than being unambiguously lower than the costs Mr. Coleman previously
20 presented in his rebuttal testimony, his new cost estimate for Verizon's poles is ███
21 ███ he presented for replacement pole line facilities. The basis for Mr. Coleman's
22 result—Exhibit RC-4—appears to be ███
23 ███. Once again,
24 the information provided is limited, unexplained, and not sufficient for an independent
25 evaluation of the bottom-line result.

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[41] Tardiff Surrebuttal, pp. 22-23, citing Coleman Rebuttal, Attachment RC-3.

[42] Coleman Rebuttal, pp. 7-8.

[43] Verizon's 2018 gross pole investment is 55 percent of the corresponding FirstEnergy investment.

1 **V. FirstEnergy's Field Review Results Should Not Be Used to Calculate**
2 **Rental Rates**

3 **Q. Your surrebuttal testimony explained that FirstEnergy's field review sampled poles**
4 **from a substantially larger set of poles than the "universe" of joint use poles at issue**
5 **in this matter. Did Messrs. Carlin and Guo respond to this criticism?**

6 A. Not really. Mr. Guo describes how the sample was designed to obtain a certain
7 confidence level (95 percent) and concedes that it failed to do so. However, in an attempt
8 to justify his flawed work product, Mr. Guo neglects to address the inherent problem of
9 sampling from a different universe and simply *assumes* that there are no differences
10 between the list from which the sample was drawn and the relevant universe of joint use
11 poles.[44] Absent the correct universe, confidence levels are essentially meaningless. For
12 example, a survey of rural voters, no matter how carefully designed, is extremely unlikely
13 to provide useful information on the voting patterns of urban residents.[45]

14 **Q. Mr. Guo also claims that the mismatch between the larger set of poles and the joint**
15 **use universe of poles is "tiny." Is he correct?**

16 A. No. The difference is not tiny, especially for the Verizon's poles in the field review.
17 Table 3 of my surrebuttal testimony shows that lists from which the poles were selected
18 contained 18 percent more FirstEnergy poles and 59 percent more Verizon poles than the
19 number of joint use poles at issue in this proceeding.

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[44] Guo Rejoinder, p. 6: "This is a concern only if there is some fundamental difference between these types of poles, and there is no evidence of that." In fact, Mr. Guo presented no evidence to support this assertion.

[45] In his rejoinder to my surrebuttal testimony, Mr. Carlin states: "DRG's field audit study was performed consistent with best practices for the industry and produced reliable and accurate results that should not be disregarded in this proceeding." Carlin Rejoinder, p. 13. Yet, Mr. Carlin concedes there are numerous errors in his study and provided no response to or explanation for the fact that the lists of poles from which the field review samples were drawn had substantially more poles than the number of joint use poles at issue in this matter, as explained in a December 11, 2019 memo from Mr. Schafer to Mr. Carlin. Tardiff Surrebuttal, p. 37 note 99.

1 **Q. Does FirstEnergy's rejoinder testimony change your conclusion that the field audit**
2 **results are unreliable?**

3 A. No. The rejoinder testimony reinforced my concerns. The results from the field review
4 are of insufficient reliability to warrant replacement of the FCC's default inputs for
5 calculating rental rates with the FCC's rate formulas.

6 **Q. Does this conclude your testimony?**

7 A. Yes, although I reserve the right to supplement my surrejoinder testimony if appropriate.