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February 3, 2020

Via ECFS

Marlene J. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street SW
Washington, DC 20554

Re: Metropolitan Edison Company, Pennsylvania Electric Company, and Penn Power Company's Answer (Proceeding Number 19-354; Bureau ID Number EB-19-MD-008)

Ms. Dortch:

Please find attached the Public Version of Metropolitan Edison Company, Pennsylvania Electric Company, and Penn Power Company's Answer to Complainants Verizon Pennsylvania LLC and Verizon North LLC's Pole Attachment Complaint in Proceeding Number 19-354; Bureau ID Number EB-19-MD-008.

Sincerely,

Timothy A. Doughty
Attorney for Metropolitan Edison Company, Pennsylvania Electric Company, and Penn Power Company

Enclosures

cc: Rosemary McEnery, Enforcement Bureau
Anthony DeLaurentis, Enforcement Bureau

PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Verizon Pennsylvania LLC and Verizon North LLC, *Complainants,*	)	
v.	)	**Proceeding Number 19-354** **Bureau ID Number EB-19-MD-008**
Metropolitan Edison Company, Pennsylvania Electric Company, and Penn Power Company, *Defendants*	)	

TO: ENFORCEMENT BUREAU

METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, AND PENN POWER COMPANY'S ANSWER TO THE POLE ATTACHMENT COMPLAINT OF VERIZON PENNSYLVANIA LLC AND VERIZON NORTH LLC

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Attorneys for
Metropolitan Edison Company
Pennsylvania Electric Company
Penn Power Company

Dated: February 3, 2020

SUMMARY

There are a great number of reasons why Verizon's Complaint is unfounded, and accordingly, the Complaint should either be dismissed or the relief it requests should otherwise be denied.

Verizon was required to terminate its existing joint use agreements with FirstEnergy before filing this Complaint but it failed to do so. Verizon easily could have terminated the existing joint use agreements while preserving its right to take future action pursuant to the Commission's "sign and sue" option for ILECs. Verizon's claim that it lacked the ability to terminate the existing joint use agreements is incorrect, and so Verizon's request to modify existing agreements for Verizon's unilateral benefit should be dismissed for failure to comply with this threshold requirement.

Verizon's illegitimate interpretation of Commission rulings and its intransigence in negotiations with FirstEnergy have led the parties to this complaint proceeding. Verizon improperly demanded that FirstEnergy agree to applying only the new telecom rate despite this unreasonable negotiation position being contrary to the instructions Verizon received in the *Verizon v. FPL* Order. It is apparent that Verizon has been trying to bully FirstEnergy into accepting a very low rental rate with large refunds while maintaining the advantages that Verizon has in the joint use agreements.

The *2018 Third Report and Order* does not apply to this proceeding because the agreements at issue have not been "newly-negotiated" or "newly-renewed." The Commission established distinct conditions under which its new presumptions would apply, and Verizon's tortuous interpretation of those conditions would render those distinctions moot. For this and other reasons, the *2018 Third Report and Order* does not apply to the agreements at issue in this

proceeding. Moreover, Verizon ignores that any such new presumptions or burden of proof, even if they did apply, would apply only with respect to Verizon's claims for relief after the March 11, 2019 effective date of the *2018 Order*.

FirstEnergy does not have, and never did have, bargaining leverage over Verizon—another threshold condition the Commission established for review of joint use rates. In the *2011 Pole Attachment Order*, the Commission reserved its judgment whether a difference in relative pole ownership could constitute bargaining leverage, and like every aspect of the rules governing ILEC/Electric joint use relationships, the Commission determined to analyze on a case-by-case basis whether bargaining power exists. The facts in this proceeding show no bargaining leverage.

Even if any bargaining leverage existed, as indicated by the *2011 Pole Attachment Order*, it is mitigated where there is a "less-costly alternative[s] for the incumbent LEC to pole deployment" which "would reduce any possible disparity in the relative bargaining power of the parties." This is precisely the situation in this case. First, FirstEnergy offered to place Verizon on an equal footing with its CLEC competitors by giving Verizon the CLEC agreement and CLEC rates for all of its attachments, both new and existing, and by transitioning Verizon out of the pole owning business. Verizon did not accept FirstEnergy's offer, but FirstEnergy's offer shows that FirstEnergy did not have bargaining power.

Second, FirstEnergy needs to access Verizon's poles, just as Verizon needs to access FirstEnergy's, and this mutual dependency protects each party from unilateral outcomes as well as from having its attachments abruptly removed from the other's poles. This conclusion is supported by basic economics and the facts of this case, which include evergreen provisions that ensure FirstEnergy cannot ever terminate and remove Verizon's attachments from FirstEnergy's

poles. If there is no feasible option but to continue with the existing joint use arrangement, neither party has bargaining power over the other to dictate disproportionate terms or conditions of joint use.

Finally, the conclusion that neither party has bargaining leverage over the other is further confirmed by Verizon itself. After the rental rates were last negotiated by Verizon, Penelec and Met-Ed in 2009, Verizon's Norman Parrish praised the memorandum of understanding containing the new rates as fair and equitable, stating: "With the execution of this MOU Verizon PA and FirstEnergy can finally have a common rate structure that is fair and equitable for all the Joint Use Agreements between both companies in Pennsylvania." He also noted that the joint use rate issue had been "amiably resolved." This statement of mutual fairness by Verizon is additional evidence in this proceeding that FirstEnergy did not exercise bargaining leverage when the rental rates were last negotiated in 2009.

Even if it were appropriate for Commission to review rates in this case, which it is not, Verizon's joint use agreements with FirstEnergy provide considerable advantages to Verizon relative to competitive LECs, including, among others, much lower make ready expenses, an enormous speed to market advantage, and the ability to profit by serving customers that new entrants cannot.

Verizon's joint use agreements with FirstEnergy allowed a pole distribution network to be constructed that accommodated Verizon's attachments without the need for the same make-ready time and expense that CLECs and other competitors face. This means that for poles owned by Met-Ed, Penelec and Penn Power, Verizon's competitors incur <u>every year</u>, on average, [redacted] more in make-ready costs per attached pole, respectively, than does Verizon. Based on this information alone, Verizon is not similarly-situated to its

competitors. As a result, granting Verizon the same attachment rate that is paid by CLECs, as Verizon is requesting, would give Verizon an even greater financial advantage over its CLEC competitors.

The competitive advantage to Verizon of its "built to order" joint use attachments is also apparent because Verizon need only overlash existing facilities or simply light existing dark fiber capacity to reach new and expanded business opportunities which most, if not all, of Verizon's competitors cannot reach because of the cost and expense of installing new facilities to compete. And for Verizon's relatively few new attachment applications, Verizon need not submit labor-intensive pole profile sheets and photographs of the poles with its applications, and Verizon pays no application fees. Verizon is also subject to much more lenient overlashing rules and avoids the five-year field audit costs that Verizon's competitors must pay.

Moreover, Verizon consumes more pole space and pole loading capacity than its competitors, and the benefit to Verizon of its lowest position on the pole becomes obvious when considering that if Verizon were not the lowest attacher, its facilities would need to be placed 3.5 feet above the lowest attacher, rather than the one foot required of its competitors, so that an additional 2.5 feet of pole space is in effect occupied by Verizon's larger and heavier facilities and cannot be occupied by another attacher.

The negotiating history also demonstrates a lack of bargaining leverage. In addition to offering rate concessions amounting to [redacted] per year, FirstEnergy alternatively offered to place Verizon on an equal footing with its CLEC competitors for all of Verizon's attachments, both new and existing, by giving Verizon the CLEC agreement and CLEC rates and by transitioning Verizon out of the pole owning business. Verizon rejected that offer in favor of its existing joint use agreements. Verizon therefore considers the joint use agreement to be a better

alternative to the CLEC agreements that its competitors receive. As explained by William Zarakas, FirstEnergy's economist expert: "In opting not to accept FirstEnergy's offer to switch Verizon to the leasing arrangement that FirstEnergy provides to non-ILECs, Verizon revealed that it does not consider that the two pole attachment arrangements are similarly situated.

Because Verizon, for all of the reasons explained above, is not comparably situated to its cable and CLEC competitors, then if review is appropriate the Commission would have to look to the pre-existing telecom rate as a "reference point" to determine the appropriate rental rate for Verizon's attachments on FirstEnergy poles. However, the Commission has never ruled exactly how formula rate input variables should be applied in a joint use relationship.

In the event the Commission decides to move forward with an analysis of the rates between FirstEnergy and Verizon, any determination should be prospective in effect only. Because the Commission's rulings provide insufficient guidance, no one can know for certain what the appropriate rates should be until determined by the Commission. As explained below, it would be unfair, arbitrary and capricious, a violation of due process, and contrary to the prohibition on retroactive ratemaking for the Commission to hold the parties in this proceeding to a rate that was impossible to calculate in advance. There should not be a refund "penalty" for failing to achieve a negotiation outcome that neither party could discern *while negotiating*. In any event, since this is not an action for breach of contract but instead is an action contending that the rate is excessive or unjust and unreasonable, the applicable statute of limitations should be two years, consistent with Section 415(b) of the Communications Act, which establishes the nearest Commission alternative statute.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Verizon Pennsylvania LLC and Verizon North LLC, *Complainants,*	)	
v.	)	**Proceeding Number 19-354** **Bureau ID Number EB-19-MD-008**
Metropolitan Edison Company, Pennsylvania Electric Company, and Penn Power Company, *Defendants*	)	

METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, AND PENN POWER COMPANY'S ANSWER TO THE POLE ATTACHMENT COMPLAINT OF VERIZON PENNSYLVANIA LLC AND VERIZON NORTH LLC

Defendants Metropolitan Edison Company, Pennsylvania Electric Company, and Penn Power Company ("FirstEnergy"), pursuant to the Notice of Formal Complaint issued on November 26, 2019 by the FCC Enforcement Bureau in this proceeding and pursuant to Section 1.726 of the Commission's Rules, 47 C.F.R. §1.726, submit the following Answer to Verizon Pennsylvania LLC and Verizon North LLC's ("Verizon") Pole Attachment Complaint (the "Complaint").

As explained below, there are numerous reasons why Verizon's Complaint is unfounded and accordingly, FirstEnergy respectfully requests the Commission either to dismiss Verizon's Complaint or deny the relief Verizon requests.

I. AFFIRMATIVE DEFENSES

A. Verizon's Complaint Should Be Dismissed Because it Failed To Terminate The Existing Joint Use Agreements

1. As explained below, the Commission's *2011 Pole Attachment Order* requires any ILEC seeking to change the terms and conditions of existing joint use agreements to terminate those agreements and seek new negotiated rates, terms and conditions. Verizon did not terminate its agreements, accept FirstEnergy's several offers to terminate and replace the agreements, or make any other attempt to terminate its agreements. Instead, Verizon filed its Complaint asking the Commission to retain the existing agreements but just lower its rates. That is not how the Commission envisioned this process would work.

1. Verizon Was Required To Terminate Its Existing Joint Use Agreements With FirstEnergy

2. The Commission indicates repeatedly in the *2011 Pole Attachment Order* that ILECs seeking new rates, terms and conditions of joint use must first terminate their existing agreements before seeking relief in the form of a pole attachment complaint at the Commission. To begin with, the Commission explained that existing joint use agreements are likely to be reasonable: "the Commission is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable."[1] The Commission explained that joint use agreements were entered into years ago with no expectation they would be second-guessed decades later: "Nothing in the record suggests that existing agreements between incumbent LECs and electric utilities were entered into with the expectation that their provisions would be subject to Commission review."[2]

[1] *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5334 (¶216) (2011) ("*2011 Pole Attachment Order*").
[2] *Id.* at 5335, n.654.

3. The Commission explained that ILECs were capable of terminating their existing joint use agreements: "The record also indicates, however, that both incumbent LECs and other utilities have the ability to terminate existing agreements and seek new arrangements, and that, at times, each type of entity has sought to do so."[3]

4. The Commission then explained how it will review new agreements entered into after adoption of the *2011 Order*: "The Commission will review complaints regarding agreements between incumbent LECs and other utilities entered into following the adoption of this Order based on the totality of those agreements."[4] The Commission explained that "[u]nder any new agreements," the rates of the comparable attacher would apply if the ILEC could demonstrate it was comparably situated.[5] However, the Commission explained that a different rate should apply if a "new pole attachment agreement" includes material advantages to the ILEC.[6]

5. In addition, to the extent that an incumbent LEC can show that it was compelled to sign a new pole attachment agreement with rates, terms, or conditions that it contends are unjust or unreasonable simply to maintain pole access as a result of a utility's unequal bargaining power, the Commission noted that the "sign and sue" rule will apply here in a manner similar to its application in the context of pole attachment agreements between pole owners and either cable operators or telecommunications carriers.[7]

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[3] *Id.* at ¶216.
[4] *Id.* at ¶216.
[5] *Id.* at ¶217 ("Under any new agreements, to the extent that the incumbent LEC demonstrates that it is obtaining pole attachments on terms and conditions that leave them comparably situated to telecommunications carriers or cable operators, we believe it will be appropriate to use the rate of the comparable attacher as the "just and reasonable" rate for purposes of section 224(b).")
[6] *Id.* at ¶218 ("By contrast, if a new pole attachment agreement between an incumbent LEC and a pole owner includes provisions that materially advantage the incumbent LEC vis a vis a telecommunications carrier or cable operator, we believe that a different rate should apply.")
[7] *2011 Pole Attachment Order* at 5335, n.655.

6. The message from these provisions of the *2011 Pole Attachment Order* is clear: before an ILEC can seek Commission review of new rates, terms or conditions, it first must terminate the existing agreements and enter into a new agreement. If it is not satisfied with the result of the new agreement, it can "sign and sue."

2. Verizon Failed To Terminate Its Existing Joint Use Agreements With FirstEnergy

7. Verizon failed to comply with this threshold requirement to terminate its existing joint use agreements before filing its FCC Complaint seeking Commission intervention to reduce its costs. Verizon never even attempted to terminate the agreements, despite several offers from FirstEnergy to do so.[8] It never entered enter into a new arrangement, and it never exercised its right to "sign and sue." Verizon simply skipped the "sign" and went straight to the "sue." As a result, the Complaint should be summarily dismissed for failure to comply with the Commission's filing requirements.

3. Verizon's After-the-Fact Claims That It Could Not Terminate the Existing Agreements Are Incorrect

8. Citing the *2011 Pole Attachment Order* and the *Verizon v. FPL* Order in support, Verizon claims that it could neither terminate the agreements, nor terminate the rates in the agreements, because it lacked the ability to do so.[9] The *2011 Pole Attachment Order* at ¶216 states: "To the extent that an incumbent LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement, the Commission can consider

[8] *See* Email from Stephen F. Schafer, Manager, Joint Use & Cabling Locating, FirstEnergy Services Company, to James Slavin, Senior Manager, Network Operations & Engineering, Verizon Wireline Network (May 11, 2018), attached to *Complaint* at Ex. 28 (VZ00648); *See* Email from Stephen F. Schafer, Manager, Joint Use & Cabling Locating, FirstEnergy Services Company, to James Slavin, Senior Manager, Network Operations & Engineering, Verizon Wireline Network (May 2, 2018), attached to *Complaint* at Ex. 28 (VZ00650-VZ00651).

[9] *See* Pole Attachment Complaint, *Verizon Pennsylvania LLC and Verizon North LLV v. Metropolitan Edison Company, Pennsylvania Power Company, and Penn Power Company*, Proceeding Number 19-354, Bureau ID Number EB-19-MD-008 (filed Nov. 20, 2019) at ¶¶29-36 ("*Complaint*").

that as appropriate in a complaint proceeding."[10] The *Verizon v. FPL* Order, for its part, held that Verizon "genuinely lacks the ability to terminate an existing agreement" where the electric utility can "force Verizon to pay the relatively high Agreement Rates for as long as its attachments remain on [the utility's] poles pursuant to the evergreen clause")."[11] In the *Verizon v. FPL* Order, however, Verizon had argued that it could not terminate the existing agreement and obtain a new one because the utility demanded to keep the current rates for existing attachments and only negotiate a new rate for new attachments: "Verizon argues that it is effectively unable to terminate the Agreement and obtain a new arrangement because Florida Power, in reliance on the Agreement's evergreen clause, has refused to renegotiate Verizon's rates with respect to existing attachments."[12]

9. That is not the case here. As explained in the next section, the parties spent considerable time negotiating the operating terms and conditions of a proposed amended agreement to update and consolidate multiple agreements between Verizon and Met-Ed, based on the template agreement that Verizon offered. In addition, FirstEnergy offered several times to terminate the existing agreements and replace them with FirstEnergy's template CLEC agreement. Both the proposed amended agreement and FirstEnergy's proposed CLEC agreement would apply new rates to all existing and future attachments. All other rate offers by FirstEnergy were for both existing and new attachments.[13] The *Verizon v. FPL* Order is

[10] *2011 Pole Attachment Order* at ¶216.
[11] *Verizon Fla. LLC v. Fla. Power & Light* Co., Mem. Op. and Order, 30 FCC Rcd 1140, 1150 (¶ 25) (EB 2015) ("*Verizon v. FPL Order*").
[12] *Id.* at ¶ 20. Although Verizon did terminate the Agreement, FPL froze in place the rates for existing attachments.
[13] Email from Stephen F. Schafer, Manager, Joint Use & Cabling Locating, FirstEnergy Services Company, to James Slavin, Senior Manager, Network Operations & Engineering, Verizon Wireline Network (May 2, 2018), attached to Complaint at Ex. 28 (VZ00650-VZ00651).

therefore distinguishable, and Verizon is incorrect when it states it had no way to get out of their existing rates, or to terminate its existing agreement.[14]

10. Verizon easily could have terminated the existing joint use agreements while preserving its right to take future action pursuant to the Commission's "sign and sue" option for ILECs. Under "sign and sue," Verizon was free to terminate the existing joint use agreements, enter into new pole attachment agreements (even if on terms and conditions unsatisfactory to Verizon), and file a Complaint at the FCC seeking whatever remedies it felt were appropriate under the *2011 Pole Attachment Order*. Meanwhile, all of Verizon's existing attachments to FirstEnergy's poles would have remained in place, undisturbed. For whatever reason, Verizon failed to follow this clear course laid out by the Commission.

11. In short, Verizon's claim that it lacked the ability to terminate the existing joint use agreements is incorrect. The Complaint seeking to modify existing agreements for Verizon's unilateral benefit should be dismissed for failure to comply with this threshold requirement.

B. Verizon did not Negotiate in Good Faith

12. The Commission requires parties to joint use agreements to negotiate new rates, terms and conditions in good faith: "Indeed, we affirm, pursuant to our authority under Section 224(b) of the Act, that both attachers and utilities have a duty to negotiate the rates, terms, and conditions of attachment in good faith, and to make a good faith effort to resolve disputes prior to seeking relief from the Commission."[15] In a textbook example of blame shifting to distract

[14] As for the *Verizon Va. V. Va. Elec. & Power Co.* Order, the Commission noted that execution of the agreements at issue post-dated the *2011 Pole Attachment Order*. *See Verizon Va. V. Va. Elec. & Power Co.*, 32 FCC Rcd 3750, 3756 (¶12) (EB 2017) ("*Verizon v. Dominion Order*").
[15] *2011 Pole Attachment Order* at ¶123.

from its own unreasonable position, Verizon wrongly accuses FirstEnergy of negotiating in bad faith when in fact it is Verizon that has done so.

13. Although uncertainty remained after the *2011 Pole Attachment Order* as to which rates might apply and under what circumstances, Verizon refused to move off of its contentions that it was entitled to the new telecom rate. In fact, Verizon did not want to negotiate at all unless FirstEnergy agreed to accept their demand for the new telecom rate. Verizon's position was to demand the new telecom rate by contending that by law it must be the new telecom rate.[16]

14. As an example, FirstEnergy contended that the range of just and reasonable rates should be from the rates in the existing agreements down to the old telecom rate. Verizon responded with their initial contention that the range should be between the new telecom rate and the old telecom rate. FirstEnergy noted the overlap at the old telecom rate and proposed the parties use that rate to guide negotiations, since the *2011 Pole Attachment Order* called it a "reference point." Verizon thereafter revoked its contention that a possible range might even exist and, unfortunately, adhered to its demand for the new telecom rate. Verizon stated that if FirstEnergy does not agree to the new telecom rate, then there was no chance to settle this matter.[17] Verizon's intransigence, in fact, has led the parties to this complaint proceeding.

15. Verizon's demand for the new telecom rate shows bad faith. If Verizon had any doubt about the uncertainty of the Commission's regulations, those doubts should have been

[16] For example, the May 30 email from Verizon's VP Brian Trosper to FirstEnergy's VP David Karafa states: "I had mentioned during the call that I would send a counteroffer along with this email. But reflecting on these fundamental areas of disagreement, I didn't think it would be productive since any offer is grounded in First Energy needing to ultimately accept that the new telecom rate formula, with appropriate inputs, applies." Email from Brian Trosper, Verizon, to David Karafa, FirstEnergy Services Company (May 30, 2018), attached to *Complaint* at Ex. 29 (VZ00691-VZ00692).

[17] *Id*. *See also* Letter from Stephen C. Mills, Consultant-Contract Management, Verizon Services Corporation, to Deanna DeWitt, Supervisor-Joint Use and Cable Locating, FirstEnergy (Nov. 2, 2017), attached hereto at Attach. A ("In this respect, the draft license agreement confirms our view that Verizon has been entitled to the FCC's new telecom rental rate since the FCC issued its Pole Attachment Order back in 2011.").

eliminated in the *Verizon v. FPL* proceeding. In that proceeding, unlike here, Verizon at least recognized the possibility that a rate other than the new telecom rate could apply. Further, the Commission made very clear in its decision that the just and reasonable rate could be the new telecom rate, the old telecom rate, something higher than the old telecom rate, or the existing contract rates:

> Second, Verizon has not demonstrated that it should be required to pay no more than the Old Telecom Rate. In Verizon's view, there are only two possible just and reasonable rates for incumbent LEC pole attachments—the New and Old Telecom Rates. But the Commission specifically found in the *Pole Attachment Order* that "just and reasonable pole attachment rates for incumbent LECs are not bound by the formulas in sections 224(d) and (e)."[18]

The Commission explained the uncertainty even more clearly to Verizon:

> In support of applying the Old Telecom Rate, Verizon cites the *Order's* statement that the Commission would consider the Old Telecom Rate "as a reference point" when determining a just and reasonable attachment rate for a "*new agreement*" between an incumbent LEC and a utility. The agreement at issue here is not a new agreement. It is "an historical joint use agreement," which the Commission repeatedly distinguished from "new agreements." Moreover, a "reference point" is not a rule. The Commission plainly stated in the *Order* that it was not adopting "rules governing incumbent LEC pole attachments, finding it more appropriate to proceed on a case-by-case basis.[19]

16. Verizon's insistence that it was entitled by law to the new telecom rate would be unreasonable without the *Verizon v. FPL* Order, but given the instruction Verizon received in that decision, it has been highly objectionable that Verizon would not negotiate off of the new telecom rate.

17. Since the effective date of the *2011 Pole Attachment Order*, Verizon has had the burden of demonstrating that it was similarly-situated to existing cable and CLEC attachers and

[18] *Verizon v. FPL Order* at ¶23 (citing the *2011 Pole Attachment Order* at 5336(⁋217)).
[19] *Id.* at ⁋23 (footnotes omitted) (citing the *2011 Pole Attachment Order* at 5334 (⁋214)).

therefore entitled to the rates FirstEnergy charges these entities. The *Verizon v. FPL* Order also made that burden clear when it dismissed Verizon's complaint for failing to carry its burden.[20] But during this entire period since negotiations began until the filing of its Complaint, Verizon has provided nothing to make any such showing. Instead, as the allegations in Verizon's Complaint illustrate, Verizon's position insisted that all they needed to do was ask FirstEnergy for the new telecom rate to make the burden shift to FirstEnergy to demonstrate that Verizon was not similarly situated to existing cable and CLEC attachers and so should not get the new telecom rate.[21]

18. This unreasonable negotiation stance is particularly unfair and arbitrary considering that in the *Verizon v. FPL* proceeding, Verizon admitted that it received many of the same differences between joint use contract provisions and third party attachment agreement provisions that are at issue in this case. The Commission ruled that these incremental benefits disqualified Verizon from receiving the new telecom rate without proof <u>from Verizon</u> that the incremental rates exceeded the incremental benefits.[22]

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[20] *Id.* at ⁋24 (footnotes omitted):

> Third, we find that Verizon has adduced insufficient evidence to support a finding that the Agreement Rates are unreasonable, or for the Commission to set a just and reasonable rate. Verizon concedes that it received and continues to receive benefits under the Agreement that are not provided to other attachers, but it has not produced any evidence showing that the monetary value of those advantages is less than the difference between the Agreement Rates and the New or Old Telecom Rates over time. Verizon provides no evidence regarding the value of access to Florida Power's poles or occupying the lowest usable space on each pole. Verizon likewise made no attempt to estimate the costs Florida Power incurred by installing taller poles to accommodate Verizon. For its 67,000 attachments, Verizon was not required to pay make-ready costs and post-attachment inspection fees that competitive LECs must pay, yet Verizon has made no attempt to quantify the expenses it avoided under the Agreement. Absent such evidence, we are unable to determine whether the Agreement Rates are just and reasonable.3Verizon's raw comparison of the Agreement Rates to the Old and New Telecom Rates is not sufficient to show that the Agreement Rates are unjust.

[21] Decl. of Stephen F. Schafer at ⁋5, attached hereto at <u>Attach. B</u> (hereinafter "Schafer Decl.").
[22] *Verizon v. FPL Order* at ¶¶21-22 (footnotes omitted) and n.83:

19. This unreasonable negotiation position with FirstEnergy is contrary to the instructions Verizon received in the *Verizon v. FPL* Order. Verizon demanded the best rate formula with the best rate inputs. Verizon effectively camped out on its own goal line, and refused to move anywhere else on the negotiating field. It is apparent that Verizon has been trying to bully FirstEnergy into accepting a very low rental rate with refunds while maintaining the advantages that Verizon has in the joint use agreement. The facts are clear: Verizon was not coerced into signing an unfavorable agreement—it was unsuccessful at coercing FirstEnergy into signing an unfavorable agreement.

20. Notably, Verizon's intransigence regarding the rate was markedly different from the cordial negotiations the parties had while negotiating to update and consolidate multiple agreements using the proposed template agreement that Verizon offered.[23] The parties, in fact, had arrived at final terms and conditions for operational matters and simply needed to add a new

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> In its Response to the Complaint, Florida Power lists the unique advantages the Agreement conferred on Verizon with respect to its existing attachments, including:
>
> •Verizon was not required to file a permit application, pay an initial fee, or wait for approval from Florida Power before attaching.
> •Verizon's attachments were not subject to Florida Power inspection at the time of installation, and Verizon was not required to pay an inspection fee.
> •The Agreement granted Verizon access to the lowest four feet of usable space on each pole, which is easier to access than the space used by competitors between
> Verizon's and Florida Power's attachments. This reduces Verizon's installation and maintenance costs.
> •To accommodate the four feet of space allotted to Verizon, Florida Power installed taller poles at increased cost.
> •The Agreement requires Florida Power to replace poles in certain circumstances to accommodate Verizon; none of Verizon's competitors receive this benefit.
> •Unlike competitive LECs, Verizon is not required to purchase its own insurance, list Florida Power as an insured, or indemnify Florida Power.
>
> Verizon does not deny that it received these benefits, some of which have prospective value.
> ..
> As discussed above, Verizon has already reaped the benefits of the Agreement and will continue to enjoy those benefits into the future. As a result, Verizon is not comparably situated to other Florida Power attachers.

[23] Schafer Decl. at ¶6.

agreed-upon joint use cost-sharing rate. Verizon's intransigence in rate negotiations, however, prevented those updated terms and conditions from ever being able to be executed.[24]

C. The Presumptions in the Third Report and Order Do Not Apply

21. Verizon contends that the *2018 Third Report and Order* applies to establish a presumption that Verizon is comparably situated to their competitors and must be charged the same new telecom rate, to create a burden on FirstEnergy to establish by clear and convincing evidence that Verizon's joint use agreement provides net material advantages over its competitors, and to establish the pre-existing telecom rate as a "hard cap" on what FirstEnergy can charge.[25] Verizon contends the new presumptions apply to "newly-negotiated and newly-renewed joint use agreements," which include those "that are automatically renewed, extended, or placed in evergreen status." Verizon claims that although the initial terms of the agreements all expired in 1993, the provision stating the agreements "shall continue" thereafter means each joint use agreement "automatically renews and extends" the agreement, rendering them instantly subject to the *2018 Third Report and Order*'s new presumptions and burden of proof.[26]

22. In the first place, Verizon ignores that any such new presumptions or burden of proof, even if they did apply, would apply only with respect to Verizon's claims for relief after the March 11, 2019 effective date of the *2018 Third Report and Order*. The *2018 Third Report and Order* made crystal clear that it would apply only on a prospective basis.[27] The April *2011 Pole Attachment Order* must apply to cover the period prior to March 11, 2019, and accordingly for the period prior to March 11, 2019, Verizon has the burden of proof that the joint use rates in

[24] *Id.* at ⁋8.
[25] *Complaint* at ¶12.
[26] *Id.* at ¶¶15-16 (citing *In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7767-70 (¶ 127 & n.475) (2018) ("*2018 Third Report and Order*")).
[27] *2018 Third Report and Order* at 7801 (App'x A, 47 C.F.R. 1.1413(b)).

a new agreement are unjust and unreasonable. Verizon cannot cast a backward net using forward rules.

23. More importantly, the agreements at issue have not been "newly-negotiated" or "newly-renewed," and so the new presumptions and burden in the *2018 Third Report and Order* do not apply at all. Verizon does not claim that the agreements were newly negotiated, but instead claims that they "automatically renewed" and "automatically … extended."[28] Verizon's analysis is mistaken for at least three reasons.

24. First, the relevant language is not that the agreements "automatically renew" or "extend" but instead that the agreements "are automatically renewed" or "extended". In other words, some action by the parties or a triggering event is required before the agreements can become "automatically renewed" or "extended"— the language does not refer to a status that passively exists both before and after the effective date. For example, if the agreements called for automatic renewal at a future date certain absent termination, then the agreements would *become* "automatically renewed" following the effective date of the *2018 Third Report and Order*. Likewise, if the agreements were to expire and the parties, following the effective date of the *2018 Third Report and Order*, decided to "extend" the term, then the agreements would be "extended" following the effective date.

25. Second, Verizon relies on inapposite Pennsylvania law to contend the contracts were "automatically renewed."[29] In the *Otis Elevator* case, an "automatic renewal" existed only where the "further term" was for a specific duration.[30] The *Otis Elevator* case and the cases cited

[28] *Complaint* at ¶16.
[29] *Id.* at ¶16.
[30] In *Otis Elevator*, the Otis Elevator Company contract with the George Washington Hotel Corporation provided that the contract would be renewed automatically for a five-year term unless a party gave notice of an intent to terminate at least 90 days before the end of the contract term. The dispute in the case centered around the fact that the successor in interest to the hotel provided notice to terminate the contract only 31 days prior to the end of the

therein all involved contracts that specifically stated the renewal term length, not contracts like those at issue in this proceeding that "shall continue" for some indefinite period until terminated.

26. Third, Verizon's complicated reasoning misinterprets the language "automatically renewed, extended, or placed in evergreen status" to mean "automatically renewed, [automatically] extended, or [automatically] placed in evergreen status." Verizon further claims "continue" is a synonym of "extend", and then concludes that the agreement provision that the agreements "shall continue" means the agreements "automatically … extended" after the effective date of the 2018 Order.[31]

27. This complicated reasoning is wrong for several reasons. For one thing, the contract says "continue;" it does not say "extend." Regardless of the similarities in meaning that a random dictionary might find, contracts change meaning when words are substituted, and it is inappropriate to make such substitutions.[32] Secondly, as mentioned, the language "automatically renewed, extended, or placed in evergreen status" does not mean "automatically renewed, [automatically] extended, or [automatically] placed in evergreen status, as Verizon believes. Instead, it applies to agreements which, at some time after the effective date of the *2018 Order*, either automatically renewed, were placed into evergreen status by the parties, or were extended by the parties. The relevant question is, were the agreements automatically renewed, were they extended, or were they placed in evergreen status, following the effective date of the *2018 Order*. In this case the answer is none of the above. Instead, when the initial five-year term expired in

extended contract term. In Otis' view, the contract had automatically been renewed for a five-year term. The District Court agreed, and cited *Music, Inc. v. Henry B. Klein Co.*, 213 Pa. Super. 182, 245 A.2d 650 (Pa. Super. 1968), which also involved a further term of definite duration (in that case it was four years). The *Otis Elevator* case and the cases cited therein all involved contracts that specifically stated the renewal term length, not contracts like those at issue in this proceeding that "shall continue" for some indefinite period until terminated.

[31] *Complaint* at ¶16.

[32] Had the agreements instead said they "shall be extended" for additional five-year terms then the agreements would be "extended" at the end of the five-year term following the effective date of the *2018 Third Report and Order*.

1993, more than two decades before the effective date of the 2018 Order, a provision in the agreements required the agreements to continue in effect.[33] Thirdly, Verizon's argument that agreements which "continue" after the effective date of the *2018 Order* also "automatically extend" as soon as the *2018 Order* takes effect, would also apply nonsensically to agreements with five-year extension terms, even though the next scheduled five-year extension would not occur until one to five years after the effective date of the *2018 Order*. Verizon stresses that the word "continue" means "[t]o carry further in time, space or development: extend," and concludes that any contract that continues after the effective date of the *2018 Order* "automatically … extended at that date."[34] Contracts with five-year extension periods, of course, also "carry further in time, space or development" and "extend" as soon as the *2018 Order* takes effect, which would mean according to Verizon's analysis that they nonsensically became subject to the *2018 Order* presumptions well before the expiration of the next five-year term. Verizon's position in effect would mean that every existing joint use agreement within FCC jurisdiction instantly became treated as a new agreement. The *2018 Order*, in fact, already has ruled contrary to Verizon's nonsensical analysis by stating that the *2011 Order* applies to contracts placed into evergreen status prior to *2018 Order*, even though those agreements similarly "carry further in time, space or development" and "extend" as soon as the *2018 Order* takes effect.[35]

[33] Just as you would not apply the *2018 Third Report and Order* to contracts that automatically renewed prior to the effective date of the *2018 Third Report and Order*, you cannot apply the August 2018 Order to contracts that were extended prior to the effective date of the *2018 Order*. Nor can you apply the *2018 Order* to contracts that were placed into evergreen status prior to the effective date of the *2018 Order*, since the Commission specifically held that the *2011 Order* applies to those. (after explaining the *2011 Order* applies to agreements entered into after the *2011 Order* and before the effective date of the *2011 Order*, the Commission stated: "This includes circumstances where an agreement has been terminated and the parties continue to operate under an "evergreen" clause. (*2018 Order* at n. 475).

[34] *Complaint* at ¶16.

[35] *2018 Order* at n. 475. Notably, there would have been no need for the Commission to distinguish as it did between newly entered/newly renewed agreements and existing agreements if *every* agreement instantly became subject to the new treatment.

28. The Commission established distinct conditions under which its new presumptions would apply. Verizon's tortuous interpretation renders those distinctions moot. For all of these reasons, the *2018 Third Report and Order* does not apply to the agreements at issue in this proceeding.

D. Verizon Is Not In An Inferior Bargaining Position Relative To FirstEnergy, Rendering the Existing Contract Rates Just and Reasonable

29. Verizon claims in its Complaint that FirstEnergy has used bargaining leverage over Verizon to extract unjust and unreasonable rates.[36] These claims of bargaining power are based upon Verizon's assertions that FirstEnergy currently owns more poles than Verizon and owned more poles than Verizon when the rates were last negotiated.[37] Verizon also claims that its inability to lower existing joint use rates through negotiation proves FirstEnergy has bargaining leverage.[38] Neither of these claims has merit.

30. As explained elsewhere, Verizon's failure to obtain lower existing rates results from its unreasonable insistence that it has been entitled to the new telecom rate since 2011. Verizon's demand to reduce the rate it is charged in agreements—which remain in full force and effect—down to the new telecom rate is unsupported by the Commission's guidance. FirstEnergy nevertheless was unable to change Verizon's position. And as explained below, FirstEnergy does not have, and never did have, bargaining leverage over Verizon.

[36] *See Complaint* at ⁋⁋27-28.
[37] *See Id.*
[38] *See Id.* at ⁋27. See also Aff. of Timothy J. Tardiff, PH.D. at ⁋6 (VZ00107-VZ00108).

1. The Commission Did Not Hold That A Difference In Relative Pole Ownership Constitutes Bargaining Leverage

31. In the *2011 Pole Attachment Order*, the Commission reserved its judgment whether a difference in relative pole ownership could constitute bargaining leverage. After noting that relative pole ownership levels appear to have changed over the years, the Commission concluded: "Thus, incumbent LECs often *may* not be in an equivalent bargaining position with electric utilities in pole attachment negotiations in some cases."[39] This conclusion that ILECs "often"… "may not be" … "in some cases" in an equivalent bargaining position with electric utilities is a far cry from a blanket pronouncement that an electric utility has bargaining leverage if it owns more poles than an ILEC.

32. Instead, like every aspect of the rules governing ILEC/Electric joint use relationships, the Commission determined to analyze case-by-case whether bargaining power exists: "We therefore decline at this time to adopt comprehensive rules governing incumbent LECs' pole attachments, finding it more appropriate to proceed on a case-by-case basis."[40] Verizon has proceeded in its dealings with FirstEnergy maintaining that a difference in pole ownership automatically entitles Verizon to lower rates regardless of any other characteristic of their relationship. On that basis, apparently, Verizon believed it was entitled to demand the new telecom rate, even after receiving specific instructions from the Commission otherwise in the *Verizon v. FPL* Order. The Commission's rules require a closer case-by-case examination.[41]

[39] *2011 Pole Attachment Order* at ¶206 (emphasis added).
[40] *Id.* at¶ 214.
[41] As explained by FirstEnergy's economist expert witness William Zarakas, the *2011 Pole Attachment Order* "recognized there is more to determining bargaining power than simply looking at relative percentages of pole ownership." Decl. of William Zarakas at ¶4, attached hereto as Attach. C (hereinafter "Zarakas Decl.").

2. Bargaining Leverage From Greater Pole Ownership Requires a Legal Right to Remove an ILEC's Attachments, a Legal Right to Construct Duplicate Pole Lines, and the Economic Feasibility of Building the Duplicate System

33. To support its qualified conclusion that as a result of a difference in relative pole ownership levels, "incumbent LECs often may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations in some cases," the Commission states as follows:

> Standard economic theories of bargaining predict that each party will consider its best alternative to a negotiated agreement when negotiating…. As a hypothetical illustration, if the electric company owned 90% of poles in an area and the incumbent LEC owned 10%, and if the best outside alternative for each party was deploying the remaining needed poles (and having the legal right to do so), the electric utility would face the cost of deploying 10% of poles, while the incumbent LEC would face the cost of deploying 90% of poles. As a result, the incumbent LEC would have less bargaining power than the electric utility. However, if there were less-costly alternatives for the incumbent LEC to pole deployment, or additional costs that the electric utility would need to consider under the best outside alternative, this would reduce the disparity in the relative bargaining power of the parties.[42]

These "standard economic theories" are based on several assumptions. First, that an electric utility has viable alternatives to a negotiated joint use agreement. Second, that an electric utility can exploit the alternative by threatening to exercise the legal right to remove the facilities of the other party. Third, that an electric utility can implement an alternative by constructing its own duplicate pole lines or underground facilities. And fourth, that the "additional costs" the electric utility must consider under any alternative does not eliminate any bargaining leverage the electric utility may have by virtue of its greater pole ownership.

[42] *2011 Pole Attachment Order* at ¶206, n.618.

3. FirstEnergy Has No Legal Right To Remove Verizon Attachments

34. As explained in Verizon's Complaint, Verizon's joint use agreements with FirstEnergy contain so-called "evergreen" provisions, which are common in joint use agreements and provide that termination of the agreements only affects the future granting of joint use – not existing attachments.[43] These evergreen provisions mean that even if FirstEnergy terminated their joint use agreements with Verizon, they would have no legal right to remove Verizon's existing attachments. In negotiations with FirstEnergy, therefore, Verizon has complete legal assurance that FirstEnergy cannot remove Verizon's attachments from any of the 129,421 poles owned by Met-Ed, any of the 146,859 poles owned by Penelec, or any of the 25,595 poles owned by Penn Power, for a total of 301,875 poles.

35. Since Verizon cannot legally be removed from any one of FirstEnergy's poles, there is no basis for the Commission to conclude that FirstEnergy has bargaining leverage over Verizon. As explained by FirstEnergy's economist expert witness William Zarakas:

> [W]hile Verizon claims the evergreen provision included in the joint use agreements hinders them in negotiations, the evergreen provision also prevents FirstEnergy from disconnecting Verizon attachments from its poles. Thus, any bargaining power that FirstEnergy might hold from having more poles than Verizon would be negated because the evergreen provision prevents FirstEnergy from exercising such power.[44]

Accordingly, with no legal right under the evergreen provision to remove any of Verizon's attachments, FirstEnergy could not exercise bargaining leverage over Verizon.

[43] *Complaint at n.93.*
[44] Zarakas Decl. at ¶20.

4. FirstEnergy Has No Legal Right to Construct Duplicate Pole Lines Or to Relocate Its Facilities From Verizon's Poles to New Underground Facilities

36. FirstEnergy is required by law to provide electric service in all of the areas that it serves. Accordingly, if FirstEnergy were to remove Verizon's facilities from FirstEnergy's poles, and, as the Commission anticipates, Verizon were to remove all of FirstEnergy's attachments from Verizon's poles, FirstEnergy would immediately need to find an alternative means to provide electricity to its customers. The only possible alternatives are to construct either another pole line or underground facilities paralleling and duplicating Verizon's pole lines. In either case, FirstEnergy would need to remove its facilities from Verizon's pole lines and transfer them to the newly-constructed duplicate pole line or underground facilities.[45]

37. Setting aside for a moment the sheer magnitude of such an undertaking, neither of these possibilities would likely be permissible by the Pennsylvania Public Utility Commission ("PaPUC"), or other state and local officials in Pennsylvania. The PaPUC might permit the construction of dual pole lines in certain limited circumstances where it is impractical or not possible to share distribution poles, such as areas where there are limits on pole heights near airports, where there are limits on pole heights located under transmission facilities, where area load demographics necessitate them, or on opposite sides of the road to serve new load growth or a specific new bulk load where it is more economical and less intrusive.[46] The PaPUC, Pennsylvania Department of Transportation, and other state and local officials in Pennsylvania likely would not tolerate such wasteful expenditures of resources simply because FirstEnergy

[45] Decl. of Thomas Pryatel at ⁋7, attached hereto as Attach. D (hereinafter "Pryatel Decl.").
[46] *Id.* at ¶4.

and its ILEC joint use partner could not agree to new terms and conditions of a joint use agreement.[47]

38. As an example, responding to complications arising from a joint use dispute between FirstEnergy's Ohio Edison and one of its ILEC joint use partners in Ohio, the Ohio Department of Transportation denied a request for parallel lines and chastised both the electric utility and the ILEC involved for not working out an acceptable joint use arrangement. According to G. Raymond Lorello, Utility and Right of Way Program Manager, Ohio Department of Transportation:

> We do not want multiple pole lines in our right of way. It is the Department's legal opinion that the ORC gives the Director of Transportation jurisdiction over our highway right of way and how utility facilities are installed in that right of way and we are exercising that right. This also supports the PUCO's initiative to eliminate multiple pole lines in the public right of way and their desire to eliminate multiple utility pole lines in general.[48]

It is likely that the Pennsylvania Department of Transportation, as well as the PaPUC, would have a similar reaction if a similar dispute arose between FirstEnergy and Verizon.[49]

39. Because FirstEnergy likely would not be permitted by the PaPUC, or other Pennsylvania state and local officials to bypass Verizon's poles by constructing duplicate pole lines or going underground, it has no legal option but to continue attaching to Verizon's poles. Since it has no choice but to continue to rely on Verizon for access to Verizon's poles, it has no

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[47] *Id.* at ¶¶4-7.

[48] Email from Raymond Lorello to various parties, February 9, 2007, attached as Ex. TC-1 to Pryatel Decl.. "PUCO" is the Public Utilities Commission of Ohio.

[49] Pryatel Decl. at ¶7. As explained by Mr. Zarakas:

> Constructing poles and incorporating them into a pole infrastructure requires gaining and perfecting rights-of-ways, involves procuring approvals and permits from local governments, and tends to disrupt residents, businesses and traffic. It is almost certain that local governments would not allow FirstEnergy or Verizon to construct a duplicative pole network on such a large scale while the original joint use network remains in place and usable.

Zarakas Decl. at ¶19.

bargaining leverage over Verizon when negotiating Verizon's attachment to FirstEnergy's poles. As explained by Mr. Zarakas:

> Verizon's claim that FirstEnergy exerted bargaining power relies on the presumption that, in controlling a majority of pole resources, FirstEnergy could withhold and/or discontinue pole access if Verizon did not agree to the terms and rates that FirstEnergy demands. In practice, however, FirstEnergy would be subject to concomitant foreclosure actions by Verizon if it were to withhold and/or discontinue pole access. As a result, and as I discuss more fully below, FirstEnergy would thus not be able to follow through with any threat of foreclosure, thereby negating any prospect of exerting bargaining power.[50]

40. Despite the difference in the number of poles owned, FirstEnergy is at the mercy of Verizon as much as Verizon is at the mercy of FirstEnergy. Accordingly, neither has bargaining leverage over the other, and both are well positioned to negotiate their joint use agreements at arm's length, as they have for decades.[51]

5. In Addition to Having No Legal Right, it Would Be Prohibitive Economically For FirstEnergy to Remove Its Facilities From Verizon's Poles And to Transfer Its Facilities to a Duplicate Pole Line or Underground

41. Not only does FirstEnergy have no legal right to remove Verizon's attachments from FirstEnergy's poles, and not only would the PaPUC, and other Pennsylvania officials likely not allow FirstEnergy to construct a duplicate pole line or redundant underground facilities, the

[50] Zarakas Decl. at ¶16.

[51] Dr. Bridger M. Mitchell, whose Declaration in a prior FirstEnergy complaint proceeding with similar facts, is attached hereto at Attach. E. As Dr. Mitchell concludes: "With no feasible option to their current joint-use agreement, neither the electric utility nor the ILEC has a basis with which to bargain for a change in the agreement governing existing joint-use poles. Thus, both companies lack bargaining power." Decl. of Dr. Bridger M. Mitchell, *In the Matter of Commonwealth Telephone Company LLC d/b/a Frontier Communications Commonwealth Telephone Company, Frontier Communications of Breezewood, LLC, Citizens Telecommunications Company of West Virginia d/b/a Frontier Communications Company of West Virginia, and Frontier West Virginia Inc. vs. Metropolitan Edison Company, Pennsylvania Electric Company, West Penn Power Company d/b/a Allegheny Power, Monongahela Power Company, and The Potomac Edison Company*, EB-14-MD-008 (July 10, 2014) ("Mitchell Decl.").

construction of duplicate pole lines or underground facilities would be prohibitively expensive in any event.

42. FirstEnergy in 2014 calculated the cost per mile to remove its electric distribution facilities from Verizon's poles and to relocate them to either: (a) new duplicate pole lines constructed by FirstEnergy, or (b) new underground facilities constructed by FirstEnergy.

43. For both new duplicate pole lines and new underground facilities, the costs vary depending on whether the new pole lines are in rural areas (20 customers per mile) or congested areas (120 customers per mile).[52] The costs also vary depending on whether the lines are 35 kV-class high-capacity lines or the far more common 15 kV-class lines. Finally, the costs vary depending on whether the lines are 3-phase lines (used in commercial areas) or the more common single-phase lines (used in residential areas).

44. Whatever the scenario, the costs to remove FirstEnergy's electric facilities and transfer them to a newly-constructed pole or underground distribution system are prohibitively expensive relative to remaining on Verizon's poles, even if the PaPUC or Pennsylvania state and local officials would allow it (which they likely would not).

45. The least costly alternative from an economic perspective would be for FirstEnergy to construct a duplicate pole line next to the existing Verizon pole line and then transfer its facilities from the Verizon poles to the newly-constructed duplicate pole line. Using the simplest 15 kV, single phase facilities in rural areas, the cost per mile would be [redacted]. In a congested area, the cost per mile would be [redacted].[53]

[52] As explained in the attached Declaration of Randal Coleman, FirstEnergy's Manager of Distribution Standards, FirstEnergy assumed an average span between poles of 175 feet, which equates to approximately 30 poles/mile. For this purpose, FirstEnergy considers 20 customers per mile to be "rural" and 120 customers per mile to be "congested." Decl. of Randal J. Coleman at ¶¶10, 16, 17, and 19, attached hereto as Attach. F ("Coleman Decl.").
[53] Coleman Decl. at ¶25.

46. For 35 kV, 3-phase facilities, the rural area and congested area per mile costs to construct a duplicate, adjacent pole line and transfer facilities would be [redacted] and [redacted], respectively.[54]

These calculations for adjacent duplicate pole lines can be summarized as follows:

15 kV, single phase, rural: [redacted]
15 kV, single phase, congested: [redacted]
35 kV, 3-phase, rural: [redacted]
35 kV, 3-phase, congested: [redacted][55]

47. In many cases, however, there would be no room for a new pole line to be constructed adjacent to the existing pole line, and the new line must therefore be installed across the street. In that case, a simple transfer of facilities is not possible so that FirstEnergy would need not only to construct the new pole line but also rebuild its electric distribution facilities (and of course remove its existing facilities from Verizon's poles). In that event, the range of costs for duplicate pole lines across the street would be as follows:

15 kV, single phase, rural: [redacted]
15 kV, single phase, congested: [redacted]
35 kV, 3-phase, rural: [redacted]
35 kV, 3-phase, congested: [redacted][56]

48. The cost of going underground is even worse. FirstEnergy would need to construct underground facilities for its own needs that would be located adjacent to a line of poles owned by Verizon and then transfer its existing electric facilities from the Verizon poles to

[54] *Id.* at ¶24.
[55] *Id.* at ¶25.
[56] *Id.* at ¶26.

the newly-constructed underground facilities. The range of such costs for FirstEnergy to go underground would be as follows:

15 kV, single phase, rural:
15 kV, single phase, congested:
35 kV, 3-phase, rural:
35 kV, 3-phase, congested:

[redacted][57]

49. In all of these scenarios (duplicate adjacent pole line, duplicate pole line across the street, going underground), of course, there would also be an annual cost to own and maintain those poles each year. As explained in the year-end 2018 rate calculations FirstEnergy has attached to its Answer, those annual carrying charges range from [redacted] of the net cost of a bare pole per year.[58]

50. Assuming that FirstEnergy was able to construct duplicate pole lines, then some average of the per-mile costs associated with adjacent vs. across the street pole lines, rural vs. congested, 15 kV vs. 35 kV, and single-phase vs. 3-phase would need to be calculated to determine the estimated per-mile cost for such an undertaking. That figure would likely be considerably higher than [redacted] per mile. But even assuming that every Verizon pole was in a rural area, that they all contain simple 15 kV, single-phase facilities, and that there was room right next to them to construct an adjacent duplicate pole line, it would still cost FirstEnergy [redacted]/mile just to remove and relocate its facilities from Verizon's poles. Afterward,

[57] *Id.* at ¶27.
[58] *See* pole attachment rate calculations, attached hereto at Attach. G. These calculations show carrying charges in Row 55 of page 1 of 30.73%, 23.06%, and 31.75%, for Met-Ed, Penelec, and Penn Power, respectively.

assuming even a low average annual carrying charge of [redacted], it would cost FirstEnergy more than [redacted] per mile per year thereafter to own and maintain those facilities.[59]

51. So how does this low estimate of [redacted] per mile initial cost and [redacted] per mile annual cost compare to the existing cost to FirstEnergy to attach to Verizon's poles? Assuming 30 poles per mile and the relatively high [redacted] per pole that Penn Power pays Verizon, FirstEnergy currently pays Verizon on average no more than [redacted] per mile per year to attach to Verizon's poles under the least favorable of the existing agreements [redacted]).

52. From an economic perspective, it makes no sense whatsoever for FirstEnergy to incur an initial cost of [redacted] per mile and an annual cost thereafter of [redacted] per mile to create duplicate pole facilities when the alternative is to continue attaching to an existing pole line at a per mile cost of no more than [redacted] per year. This is particularly true considering FirstEnergy would not be able to recover that cost from ratepayers.[60] The Commission's underlying assumption that it must make economic sense for an electric utility to bypass an

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[59] [redacted].

[60] As explained by Mr. Zarakas:

> The Pennsylvania PUC routinely reviews FirstEnergy's (specifically, each of FirstEnergy's utility operating companies') revenue requirement during rate case proceedings, in which are set the rates that the FirstEnergy operating utility companies will be able to charge their customers in Pennsylvania. It is exceptionally unlikely that the Pennsylvania PUC would allow higher pole costs (i.e., stemming from FirstEnergy dismantling of its joint use agreements with Verizon) into revenue requirements. FirstEnergy stockholders would therefore have to absorb these costs, which would provide a significant disincentive for FirstEnergy to exert any bargaining power that FirstEnergy may have had due to its ownership of more poles than Verizon.

Zarakas Decl. at ¶18.

ILEC's facilities in order to exercise superior market power, is nowhere close to being satisfied in this case.[61]

53. Another economist hired by AT&T, an ILEC, reached this same conclusion that it is not economically possible to build a duplicate pole network: "As I stated previously, duplicating Alabama Power's pole network is 'neither economically feasible nor socially desirable.' Hence, quantifying the cost of a dystopian world in which there are two poles placed next to each other at every location adds no value to this matter."[62]

54. These economic and legal prohibitions to constructing duplicate facilities are nothing new. When Congress authorized the Commission to regulate pole attachments in 1978, it recognized the "unique economic characteristics" shaping the relationships between pole owners and attachers.[63] Congress concluded that "[o]wing to a variety of factors, including environmental or zoning restrictions" and the very significant costs of erecting a separate pole network or entrenching cable underground, "there is often no practical alternative [for network deployment] except to utilize available space on existing poles."[64] Given the benefits of pole attachments to minimize "unnecessary and costly duplication of plant for all pole users," Congress granted the Commission authority to ensure that pole attachments are provided on just and reasonable rates, terms, and conditions."[65] The wisdom of the Congressional prediction that sharing poles makes more economic sense than constructing duplicate, redundant facilities, is evident in the relationship between FirstEnergy and Verizon.

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[61] Zarakas Decl. at ¶18.
[62] *See* Reply Decl. of Christian M. Dippon, Ph.D. in Support of Pole Attachment Complaint, *BellSouth Telecommunications, LLC, d/b/a AT&T Alabama v. Alabama Power Company*, Proceeding Number 19-119, Bureau ID Number EB-19-MD-002 (filed Jul. 19, 2019) at ¶31 (citing Dippon Initial Aff. at ¶ 18).
[63] *2011 Pole Attachment Order* at ¶4.
[64] *Id*. citing S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977) (1977 Senate Report), reprinted in 1978 U.S.C.C.A.N. 109.
[65] *Id. See also 2011 Pole Attachment Order* at ¶4.

55. Finally, even if such economic and legal barriers could be overcome, there are very real practical and physical barriers as to whether sufficient labor resources are available to perform the work, and how long it would take to accomplish such duplication. FirstEnergy's best estimate is that it would take three years to accomplish any of the above alternatives.[66]

6. For Several Reasons Based On The Facts of This Proceeding, FirstEnergy Has No Bargaining Leverage Allowing FirstEnergy to Dictate Terms And Conditions of a Joint Use Agreement to Verizon

56. For several reasons based on the facts of this proceeding, Verizon is not in an inferior bargaining position relative to FirstEnergy -- even though Verizon is attached to more of FirstEnergy's poles than FirstEnergy is attached to Verizon's.

57. First, as explained above, FirstEnergy needs to access Verizon's poles, just as Verizon needs to access FirstEnergy's. FirstEnergy's and Verizon's mutual dependency protects each party from unreasonable or unjust rates, terms, and conditions or attachment, as well as from having its attachments abruptly removed from the other's poles, as the Commission predicted. Both are well positioned to negotiate joint use agreements in a fair and open market, without Commission oversight, as they have for decades.

58. This conclusion is supported by basic economics. If there is no feasible option but to continue with the existing joint use arrangement, neither party has bargaining power over

[66] Coleman Decl. at ¶30.

the other to dictate any terms or conditions of joint use. This is confirmed by Mr. Zarakas. Based on these facts, Mr. Zarakas concludes:

> Bargaining theory and FirstEnergy's negotiations with Verizon provide strong indications that FirstEnergy does not hold bargaining leverage and did not exert bargaining power. Both parties would face substantial harm if they were unable to access the pole network covered by the joint use agreements. FirstEnergy has no option other than continue its relationship with Verizon. … the inability of FirstEnergy to viably replace its access to Verizon's poles with alternative arrangements erases any bargaining power that FirstEnergy may have had as a result of owning more poles than Verizon (in the pole network under the joint use agreements).[67]

59. This precise same conclusion was reached by Dr. Bridger Mitchell, whose Declaration in a prior FirstEnergy complaint proceeding with similar facts is attached hereto at Attachment E. As Dr. Mitchell concluded:

> With no feasible option to their current joint-use agreement, neither the electric utility nor the ILEC has a basis with which to bargain for a change in the agreement governing existing joint-use poles. Thus, both companies lack bargaining power. Moreover, even if the joint-use agreement were terminated, most of the joint-use poles subject to Verizon's Complaint would continue to be governed by the "evergreen" clause of the relevant agreement that gives each company the continuing right to attach its equipment to those poles at the same attachment rates.[68]

60. Second, even if any bargaining leverage existed, there is a "less-costly alternative[s] for the incumbent LEC to pole deployment" which "would reduce any possible disparity in the relative bargaining power of the parties."[69] FirstEnergy offered to place Verizon on an equal footing with its CLEC competitors by giving Verizon the CLEC agreement and

[67] Zarakas Decl. at ¶21.
[68] Mitchell Decl. at ¶12.
[69] *2011 Pole Attachment Order* at ¶206, n.618.

CLEC rates for all of its attachments, both new and existing, and by transitioning Verizon out of the pole owning business. Specifically, FirstEnergy offered the following:

> As an alternative, if Verizon continues to insist on the CLEC rate, then I suggest we terminate our current Joint Use agreements and Verizon can enter into the standard CLEC agreement, as one of your Directors once proposed. Instead of FirstEnergy buying all of Verizon's poles as Verizon had offered approximately 7 years ago, each FirstEnergy operating company can simply set, pay for, and own all new and replacement poles. After all, FirstEnergy already sets the overwhelming majority of poles during storm restoration, car-pole accidents, and new development construction, so it would be a simple matter of not invoicing Verizon for the cost to replace Verizon's poles as is done under the existing ILEC Joint Use agreements. This accelerated attrition will eventually transition Verizon out of the pole-owning business in FirstEnergy's service territories and place it on equal footing with its CLEC competitors (ignoring the advantageous lowest position on existing poles). Of course, we will need to address the details for FirstEnergy's attachments(s) to Verizon's poles during the transition, but a simple solution could be to use the applicable operational terms and conditions of the existing agreements. I realize this suggestion may be as novel for Verizon as it is for FirstEnergy, but perhaps thinking "outside the box" can lead to creative solutions meeting both our needs.[70]

61. Verizon did not accept FirstEnergy's offer, but FirstEnergy's offer shows that FirstEnergy did not have bargaining power. As explained by Mr. Zarakas:

> Consideration of a less costly alternative, sometimes referred to as an outside option, is an important factor to account for in assessing bargaining power because it can mitigate or negate the bargaining power that a supplier may otherwise hold. In this case, Verizon had, and continues to have a lower cost alternative to the current joint use agreements. FirstEnergy offered to "transition Verizon out of the pole-owning business in FirstEnergy service territories" and provide pole attachments to Verizon under the same arrangements and rates that FirstEnergy charges non-ILECs (i.e., under the FCC's Telecom rates). This provided Verizon with a lower cost alternative (compared to the rates under the joint use agreements) which, as the FCC indicated in its 2011 Pole

[70] Email from Stephen F. Schafer, Manager, Joint Use & Cabling Locating, FirstEnergy Services Company, to James Slavin, Senior Manager, Network Operations & Engineering, Verizon Wireline Network (May 2, 2018), attached to *Complaint* at Ex. 28 (VZ00650-VZ00651).

> Attachment Order, serves to mitigate any bargaining power differential that might otherwise arise from pole ownership percentages. FirstEnergy's offer is also contrary to the type of behavior that would be expected from a party that indeed holds bargaining power. Instead, a party with bargaining power would not be motivated to provide rate accommodation to a captive counterparty (i.e., a party with no bargaining power).[71]

62. Finally, the conclusion that neither party has bargaining leverage over the other is further confirmed by Verizon itself. After the rental rates were last negotiated by Verizon, Penelec and Met-Ed in 2009, Norman Parrish, who was responsible for Verizon's negotiations at the time, praised the memorandum of understanding with containing the new rates as fair and equitable, stating: "With the execution of this MOU Verizon PA and FirstEnergy can finally have a common rate structure that is fair and equitable for all the Joint Use Agreements between both companies in Pennsylvania." He also noted that the joint use rate issue had been "amiably resolved."[72] This statement of mutual fairness by Verizon is additional evidence in this proceeding that FirstEnergy did not exercise bargaining leverage when the rental rates were last negotiated in 2009. As explained by Mr. Zarakas:

> Verizon's letter to FirstEnergy plainly states that Verizon was satisfied with the results of its negotiations with FirstEnergy and does not convey any view that (in Verizon's opinion) FirstEnergy exerted bargaining power. The percentage of pole ownership, therefore, did not appear to unduly influence the outcome of negotiations in 2009 – which is in line with the FCC's acknowledgement that the percentage of pole ownership alone is not the sole determinant of bargaining power and corresponds with basic economic practicalities (discussed later in this declaration). Verizon did not present any evidence as to why circumstances differ today.[73]

[71] Zarakas Decl. at ¶12.
[72] Letter from Norman L. Parris, Manager-Network Engineering, Verizon, to FirstEnergy, Attn: Joint Use Team (Aug. 12, 2009) attached hereto at Attach. H ("Aug. 12, 2009 Parrish Letter").
[73] Zarakas Decl. at ¶10.

63. There is no reason to believe that in 2009 when the rates were last negotiated, or earlier when the agreements themselves were entered into, FirstEnergy had any more legal or regulatory feasibility to construct duplicate facilities or that it made any more economic sense to do so, and it certainly has always been the case that the "evergreen" provisions prevented FirstEnergy from removing Verizon's facilities from any of the poles at issue in this proceeding.

64. Verizon therefore has failed in this case to demonstrate that FirstEnergy has bargaining leverage now, had such leverage when the contracts were entered into, or had such leverage when the rates were last changed. Instead, ample evidence exists in this proceeding to show neither party has any bargaining leverage over the other. Accordingly, Verizon's claims in this proceeding and under this set of facts that FirstEnergy possessed unequal bargaining leverage, let alone abused it, should be rejected.

E. The Rates Established in the Agreements are Therefore "Just and Reasonable"

65. Since there is ample evidence in this proceeding under this set of facts to show neither party has any bargaining leverage over the other, the Commission should determine that the existing rates established in the Agreements are the just and reasonable rates.

66. In the *2011 Pole Attachment Order*, the Commission observed that different ILECs and electric utilities have differing levels of bargaining power: "We recognize that not all incumbent LECs are similarly situated in terms of their bargaining position relative to other pole owners."[74] Accordingly, the Commission ruled that "[w]here parties are in a position to achieve just and reasonable rates, terms and conditions through negotiation, we believe it generally is appropriate to defer to such negotiations."[75] Furthermore, the Commission stated: "As explained

[74] *2011 Pole Attachment Order* at ¶215.
[75] *Id.*

above, we question the need to second guess the negotiated resolution of arrangements entered into by parties with relatively equivalent bargaining power. Consistent with the foregoing, the Commission is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable."[76]

67. This proceeding is one in which evidence conclusively shows FirstEnergy has no bargaining leverage over Verizon, but instead that the parties have relatively equivalent bargaining power. Consistent with the facts of this case, the Commission should find the rates, terms and conditions of the existing joint use agreements to be just and reasonable. As explained by Verizon's Mr. Parrish, the existing MOUs have provided "a common rate structure that is fair and equitable for all the Joint Use Agreements between both companies in Pennsylvania."[77]

F. Verizon's Complaint Mistakes the Facts and the Law

68. Although based on this set of facts in this proceeding neither party has bargaining leverage over the other so that the existing joint use agreement and rates are both just and reasonable, a fair analysis of the competitive advantages the joint use agreements provide Verizon over its competitors otherwise justifies Verizon paying more to attach than its competitors, as explained below. As is also explained below, Verizon's interpretation of the facts and Commission rulings relevant to these facts is otherwise mistaken.

1. Verizon is Not Comparably Situated to its Cable Company and CLEC Competitors

69. Although the facts in this proceeding show that neither party has bargaining leverage over the other, the Commission laid out the following analysis for those proceedings where bargaining leverage exists. As explained in the *Verizon v. Dominion Order*:

[76] *Id.* at ¶216.
[77] Aug. 12, 2009 Parrish Letter at Attach. H.

> In the Pole Attachment Order, the Commission also recognized the necessity of analyzing incumbent LEC attachment rates "in a manner that accounts for the potential differences between incumbent LECs and telecommunications carrier or cable operator attachers."[11] It noted that incumbent LECs are unique in that they own many poles and have historically obtained access to electric utility poles through "joint use" agreements.[12] The Commission observed that such joint use arrangements typically provide incumbent LECs a number of advantages not afforded to telecommunications carrier and cable attachers, such as guaranteed space on poles, lower make-ready costs, and the ability to attach without obtaining advance approval.[13] In light of those differences, the Commission did not adopt a formula for calculating the rate to be paid by incumbent LECs, opting instead to resolve incumbent LEC disputes on a case-by-case basis in complaint proceedings brought before the Commission.[14] The Commission found it reasonable to use the Old Telecom Rate "as a reference point" in complaint proceedings filed by incumbent LECs to "account for particular arrangements that provide net advantages to incumbent LECs" relative to competitive LECs.[78]

70. Verizon's joint use agreements with FirstEnergy provide considerable advantages to Verizon relative to competitive LECs, including, among others, much lower make ready expenses, an enormous speed to market advantage, and the ability to profit by serving customers that new entrants cannot.

71. Verizon's joint use agreements with FirstEnergy allowed a pole distribution network to be constructed that accommodated Verizon's attachments without the need for the same make-ready time and expense that CLECs and other competitors face. This advantage of the joint use agreements is described in part by Mr. Zarakas as follows:

> In addition to these ongoing benefits, ILECs, such as Verizon, also realized considerable benefits over time, in terms of cost and deployment efficiencies associated with joint pole use arrangements. The joint use agreements formed sharing arrangements through which each party was able to reduce its costs of service without compromising quality. This gave Verizon ready and unfettered access to the joint pole network as if it were its own.

[78] *Verizon v. Dominion Order* at ¶4 (citing the *2011 Pole Attachment Order* at 5328-5337 (¶¶102, 203, 214, 216, 218; and nn.319 and 654)).

> Seamless access to a pole network in the era before implementation of the Telecommunications Act of 1996 also allowed Verizon to establish itself as a reliable service provider in the eyes of its customers, which was a key factor in enabling the company to maintain a strong market share in the evolving market.[79]

72. In all instances where new pole lines were constructed, Verizon needed only to notify FirstEnergy that it wished to attach and the pole line was constructed to suit Verizon's needs for space and strength to accommodate Verizon's attachments.[80] Many of the Agreements conveniently provide a "normal space" allocation of three feet or some similar amount[81] as well as advance notification that a new pole line was being constructed. This joint use system of building new pole lines tall enough and strong enough to accommodate both ILEC and electric facilities is nothing new, but instead has been the common practice of joint use for a century. As a result, this "built to order" system of accommodating Verizon's attachments accounts for the vast majority of FirstEnergy poles to which Verizon is now attached.[82]

73. Rather than having the luxury of a "built to order" system of constructing poles to accommodate their attachments, Verizon's competitors must go through the make-ready process

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[79] Zarakas Decl. at ¶14

[80] *See Agreement between Met-Ed and The Bell Tel. Co. of Pa.* (1973), supplemented in 1983 at Article IV (*Complaint* at Ex. 1 (VZ00169)*; Agreement between Met-Ed and Bethel & Mt. Aetna Tel. and Telegraph Co.* (1968), amended in 1974 at Article VII (*Complaint* at Ex. 2 (VZ00190); *Agreement between Met-Ed and Continental Tel. Co. of Pa.* (1972), amended in 1972 at Article VI (*Complaint* at Ex. 3 (VZ00217); *Agreement between Met-Ed and Quaker State Tel. Co.* (1971) at Article VI (*Complaint* at Ex. 4 (VZ00232); *Agreement between Met-Ed and York Tel. and Telegraph Co.* (1967), amended in 1974 and 1975 at Article V (*Complaint* at Ex. 5 (VZ00247)); *Agreement between Penelec and Bell Tel. Co. of Pa.* (1986) at Article V (*Complaint* at Ex. 7 (VZ00324); *Agreement between Penelec and Continental Tel. Co. of Pa.* (1988) at Article VII (*Complaint* at Ex. 8 (VZ00351)); *Agreement between Penelec and General Tel. Co. of Pa.* (1958), supplemented in 1966 at Article IV (*Complaint* at Ex. 9 (VZ00375); *Agreement between Penelec and Quaker State Telephone Company* (1988) at Article VII (*Complaint* at Ex. 10 (VZ00441)); *Agreement between Penn Power and The Bell Tel. Co. of Pa.* (1978), amended in 1999 at Article VII (*Complaint* at Ex. 12 (VZ000473)).

[81] *Agreement between Penelec and Bell Tel. Co. of Pa.* (1986) at Article II (*Complaint* at Ex. 7 (VZ00322); *Agreement between Penelec and Continental Tel. Co. of Pa.* (1988) at Article II (*Complaint* at Ex. 8 (VZ00348)); *Agreement between Penelec and General Tel. Co. of Pa.* (1958), supplemented in 1966 at Article II (*Complaint* at Ex. 9 (VZ00374); *Agreement between Penelec and Quaker State Telephone Company* (1988) at Article II (*Complaint* at Ex. 10 (VZ00438)).

[82] Schafer Decl. at ¶16.

to accommodate their new attachments. As a result, the difference in make-ready costs per existing attached pole that Verizon's competitors pay compared to the make-ready costs per existing attached pole that Verizon pays is striking. Attached to the Declaration of Stephen Schafer, FirstEnergy Service Company's Manager, Joint Use & Cable Locating, is a chart which compares the make-ready costs incurred by Verizon and to the make-ready costs incurred by some of Verizon's competitors. These Verizon competitors are those which submitted the largest number of attachment applications during the past two years for each of the FirstEnergy operating utilities. The number of poles to which each of these entities is currently attached is also identified. Finally, a calculation was performed to determine the make-ready costs these entities have incurred on a per attached pole basis.

This information indicates that:

For Poles owned by Met-Ed:

(1) Attachers pay on average [redacted] per existing attached pole per year in make-ready expenses.
(2) Verizon pays on average [redacted] per existing attached pole per year in make-ready expenses.
(3) Verizon's competitors thus incur every year, on average, [redacted] more in make-ready costs per attached pole than does Verizon.

For Poles owned by Penelec:

(1) Attachers pay on average [redacted] per existing attached pole per year in make-ready expenses.
(2) Verizon pays on average [redacted] per existing attached pole per year in make-ready expenses.
(3) Verizon's competitors thus incur every year, on average, [redacted] more in make-ready costs per attached pole than does Verizon.

For Poles owned by Penn Power:

(1) Attachers pay on average [redacted] per existing attached pole per year in make-ready expenses.

(2) Verizon pays on average [redacted] per existing attached pole per year in make-ready expenses.
(3) Verizon's competitors thus incur every year, on average, [redacted] more in make-ready costs per attached pole than does Verizon.[83]

74. Based on this information alone, Verizon is not similarly situated to its competitors. As a result, granting Verizon the same attachment rate that is paid by CLECs, as Verizon is requesting, would give Verizon a huge financial advantage over its CLEC competitors.

75. The reason that Verizon has not recently filed many applications to install new attachments to FirstEnergy's poles is because it does not have to. Verizon already has attached to the vast majority of available FirstEnergy poles pursuant to the "built to order" joint use agreement system that its competitors have not had in the past, nor will have in the future, any opportunity to take advantage of.[84]

76. The competitive advantage to Verizon of its "built to order" joint use attachments is apparent not only because its competitors must pay dramatically higher make-ready expenses, but also because it takes Verizon's competitors far longer to reach potential customers than it does Verizon. Having taken full advantage of the joint use agreements to expand its "built to order" joint use attachments, Verizon need only overlash existing facilities or simply light existing dark fiber capacity to reach new customers and to provide additional services that its existing customers require.[85] Overlashing and lighting existing dark fiber capacity, of course, takes far less time than the current make-ready process that Verizon's competitors must follow. As Verizon itself explained in the Commission's recent overlash proceeding:

[83] Schafer Decl. at ¶15.
[84] *Id.* at ¶16.
[85] *Id.* at ¶17.

> When a residential or business customer places a service order, Verizon often must extend (or "drop") facilities from its existing attachment to the customer's location. The extension sometimes requires Verizon to overlash its existing facilities. In these situations, Verizon often will not know until the site visit whether overlashing is necessary. It would be a significant inconvenience to the customer, not to mention costly and inefficient for a provider, if the provider were required to halt the installation in order to provide advance notice of overlashing to the pole owner.[86]

77. As explained by its comments, Verizon believes even advance notice of overlashing that slows deployment by a matter of days is "inconvenient" to its customers, and both "costly" and "inefficient" to Verizon. It is, of course, not at all difficult to imagine the far greater "inconvenience" a new customer would experience waiting several months for one of Verizon's competitors to go through even the streamlined make-ready process that began with the *2011 Pole Attachment Order*. It is also not difficult to imagine the far greater "cost" and "inefficiencies" Verizon's competitors face simply by waiting those extra months. And, of course, these additional costs associated with time delays are in addition to actual average make-ready expenses on a per existing pole basis that are [redacted] greater than what Verizon pays per pole, every year, for attachments to the Met-Ed, Penelec and Penn Power systems, respectively.[87]

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[86] Comments of Verizon on the FNPRM at 19-20, *In the Matter of Accelerating Wireline Broadband Deployment by removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (filed Jan. 17, 2018). Another ILEC explained that overlashing is both quick and cost effective:

> As an attacher, CenturyLink frequently overlashes fiber and incidental equipment to its own or others' attachments, providing a quick and cost effective means to extend fiber to new and existing locations. The overlash takes up no additional space on a pole and can be an expedient method of advanced services deployment, including in areas where CenturyLink is deploying broadband services through the Commission's CAF II program.

Comments of CenturyLink at 6, *In the Matter of Accelerating Wireline Broadband Deployment by removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (filed Jan. 17, 2018).

[87] Schafer Decl. at ¶15.

78. The time-saving advantage of overlashing compared to installing initial attachments was explained by Crown Castle as follows:

> Whereas timelines for initial attachments to utility poles may be quite extensive, overlashing presents a unique opportunity to quickly deploy telecommunications services in a safe and beneficial manner. In many circumstances, the ability to overlash marks the difference between being able to serve a customer's broadband needs within weeks versus six or more months when delivery of service is dependent upon a new attachment.[88]

79. Google Fiber explained the existing competitive disadvantage clearly, by noting an "existing power imbalance," in which incumbent communications attachers can delay and prevent new deployments by competitors.[89] These competing incumbent attachers, of course, are other communications companies and almost always include incumbent ILECs like Verizon.

80. This time-saving advantage of overlashing, by the way, is not lessened by the Commission's new one-touch make-ready ("OTMR") system, since no attacher on FirstEnergy's systems is currently using the one-touch make-ready process due, in large part, to complex make-ready required in any given application proposal.[90]

81. The Fiber Broadband Association cited a study by a consultant for fiber builds that monetized this difference in cost between overlashing and constructing new facilities:

> CTC, a consultant for many fiber builds and a FBA member, explains that overlashing "is significantly cheaper than placement of new cables, because it does not require placement of new strand, reduces the amount of design, and does not require a new attachment to poles or space on the poles." As a result, CTC has estimated that, while the average cost for new aerial construction is approximately $51,000 per mile, the cost for overlashing is less

[88] Comments of Crown International Corp. at 1-2, *In the Matter of Accelerating Wireline Broadband Deployment by removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (filed Jan. 17, 2018).
[89] Ex Parte Letter from Google Fiber Inc. at 2, , *In the Matter of Accelerating Wireline Broadband Deployment by removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (filed Feb. 1, 2018).
[90] Schafer Decl. at ¶18.

> than $15,000 per mile in a metro area and, due to lower labor costs, only about $12,000 per mile in a rural area.[91]

82. Because overlashing and lighting dark fiber are cheaper and faster than installing new attachments, Verizon's "built to order" joint use attachments have given Verizon the opportunity to serve new customers and to expand service to existing customers that most, if not all, of Verizon's competitors lack under their third party attachment agreements. The attachments that Verizon has made pursuant to its "built to order" joint use agreements with FirstEnergy have therefore provided Verizon the additional, and enormous, competitive advantage of being able to exploit new business opportunities—or retain existing business—that most of its competitors, if not all, cannot reach.[92]

83. Verizon even has a speed to market advantage when it must make new attachments on FirstEnergy's poles. Although Verizon is making relatively few requests to install new attachments, its applications to install new facilities requires considerably less upfront work. When filing their applications, Verizon's competitors must submit pole profile sheets and photographs of the poles to which they wish to attach. Verizon does not need to do

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[91] Comments of The Fiber Broadband Association on the Further Notice of Proposed Rulemaking at 3, *In the Matter of Accelerating Wireline Broadband Deployment by removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (filed Jan. 17, 2018). In its Reply Comments, the Fiber Broadband Association stated:

> Sellenriek Construction, an FBA member that overlashes fiber for rural Missouri service providers, reported that overlashing is a key component of almost all of its aerial network expansion work. The company estimated that fiber overlashing results in approximately $8,000 in cost savings per mile compared with installing new pole attachments and takes half the time. By reducing construction work, the company found that fiber overlashing can shorten the overall deployment timeframe for a project by a third or more, freeing up resources for other projects.

Reply Comments of The Fiber Broadband Association on the Further Notice of Proposed Rulemaking at 2, *In the Matter of Accelerating Wireline Broadband Deployment by removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (filed Feb. 16, 2018).

[92] A cable company that already has incurred make-ready expenses to attach to a certain number of poles arguably can compete with Verizon for certain new business by overlashing existing facilities or by lighting spare dark fiber capacity. But cable companies likewise did not share the same "built to order" attachment benefit as Verizon, and therefore unlike Verizon had to pay their share of make-ready expenses. For new CLEC competitors today, seeking to attach to poles that are more congested, their share of make-ready expenses is even greater and more current.

either of these steps nor wait for processing.[93] And Verizon itself acknowledged how much more burdensome this made matters for Verizon's competitors. When this different application process was applied to Verizon's CLEC affiliate, Verizon complained because it "inherently intensifies" its affiliate's obligations and could be "prejudicially detrimental."[94]

84. Verizon's competitors also pay application fees as required by FirstEnergy's electronic application processing system known as SPANS, which Verizon does not need to pay. The fees amount to [redacted] per application plus [redacted] per pole and, like make-ready costs, are not recovered through FirstEnergy's annual rental rates.[95]

85. Verizon is also subject to far more lenient overlashing rules than its CLEC and cable company competitors. Unlike its competitors, Verizon is not obligated to notify FirstEnergy of its overlashing activity or to perform pole loading studies. Verizon's competitors, however, must provide 15-days' advance notice of overlashing, 15-days' notice upon completion of the overlashing, and pole loading studies to support their overlashing.

86. Significant as this speed-to-market competitive advantage is, however, it is impossible for FirstEnergy to quantify without substantial additional discovery of Verizon which the pole attachment complaint rules do not allow, including large amounts of document production and numerous depositions. The limited discovery available in this proceeding makes it impossible to quantify other benefits the joint use agreement gives Verizon over its competitors.[96] However, the inability for an outsider like FirstEnergy to quantify these benefits

[93] Schafer Decl. at ¶19.
[94] Email from Stacey W. Culbreath, Verizon, to Deanna R. DeWitt and Stephen F. Schafer, FirstEnergy (Apr. 17, 2018), attached hereto at Attach. I.
[95] Schafer Decl. at ¶20.
[96] As explained by David Karafa in his June 7, 2018 Email to Brian Trosper, Verizon's competitive advantages include:

without adequate discovery does not mean they do not exist or that they should be ignored—it means the Commission should consider whether due process favors the same reasonable opportunity for a defendant to access the plaintiff's evidence normally afforded in civil litigation. Simply put, how can a lack of harm be proven under any kind of standard without access to the evidence? To the extent Verizon might have met its burden of establishing a prima facie case

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- Pre-planning makes room in advance for Verizon, and Verizon benefits considerably from being the first attacher
  on an unencumbered pole
- Verizon gets lowest attachment height which is easier to access
- And because Verizon gets the lowest position on the pole, it benefits from one additional attachment (i.e. 2 attachments in first 12" of space)
- Verizon is guaranteed a number of feet on each pole
- New attachers that wish to compete with Verizon must contend with already-congested poles
- Verizon's make-ready costs are dramatically lower than its competitors' costs
- Verizon's survey costs are dramatically lower than its competitors' costs
- Verizon's engineering costs are dramatically lower than its competitors' costs
- Verizon does not have to wait for the permitting process to receive permission to attach and so can serve customers faster and with less expense than its competitors
- Unlike new attachers, Verizon can overlash at will without having to wait for the permitting process to receive
- permission to attach in the first place. This allows Verizon to serve customers faster and with far less expense
  than its competitors
- Verizon's speed to market compared to new attachers (and even existing third party attachers) is worth millions
  to Verizon, and costs millions to its competitors
- Pole transfer provisions relieve Verizon of considerable attachment transfer costs that third party attacher
- competitors must incur
- Verizon can attach to FirstEnergy's multi-ground neutrals, unlike Verizon's competitors
- Verizon can attach to FirstEnergy's guys and anchors, unlike Verizon's competitors
- Verizon is not subject to audit costs as are Verizon's competitors
- Verizon need not affix identification tags as do Verizon's competitors
- Verizon is not subject to unauthorized attachment penalties as are Verizon's competitors
- Verizon is not subject to safety violation penalties as are Verizon's competitors
- Verizon need not post bonds or other security, as must Verizon's competitors
- Verizon does not pay any agreement preparation fees as do Verizon's competitors
- Verizon does not pay any attachment application fees as do Verizon's competitors
- Evergreen provisions in our joint use agreements mean Verizon cannot be removed from FirstEnergy poles even
  if the contract is terminated, unlike Verizon's competitors
- Insurance provisions are less burdensome for Verizon than for Verizon's competitors
- Indemnification provisions are more favorable to Verizon, saving Verizon millions in out of court settlements over its competitors

Email from David J. Karafa, FirstEnergy, to Brian Trosper, Verizon (June 7, 2018), attached hereto at Ex. J.

and the burden shifts to FirstEnergy, FirstEnergy should be entitled to obtain and present discovery sufficient to meet its burden.

87. That being said, it is not impossible to calculate reasonable estimations of this advantage. For example, even losing out on the ability to reach a customer and to earn a [redacted] per year profit equates to [redacted] per year per pole for a Verizon competitor who would be attached to 1,000 FirstEnergy poles, losing out on [redacted] per year profit equates to [redacted] per year per pole, and losing out on [redacted] per year profit equates to [redacted] per year per pole.

88. Another quantifiable advantage is that Verizon avoids the five-year field audit costs that Verizon's competitors must pay. FirstEnergy will be conducting field audits on a five-year cycle for all of its operating utilities that is similar to the field audit it has conducted in The Toledo Edison Company's service territory. The costs for that field audit to Verizon competitors were [redacted] per pole. Dividing [redacted] per pole by five years equals a rate difference of [redacted] per pole per year that Verizon's competitors will pay but Verizon will not.[97]

89. Verizon also consumes more capacity on FirstEnergy's poles than do Verizon's competitors. Pole capacity includes both space and loading. While the Commission presumes that existing cable and CLEC attachers occupy one foot of pole space, Verizon's attachments occupy [redacted] feet ([redacted] inches), [redacted] feet ([redacted] inches) and [redacted] feet ([redacted] inches) on Penn Power, Penelec and Met-Ed poles, respectively, as shown by FirstEnergy's statistically-reliable field audit of its systems that is described below in Section 6.[98] Furthermore, FirstEnergy's field audit shows that Verizon's facilities weigh much more than the facilities of

[97] Schafer Decl. at ¶22.
[98] *See* Pole Statistics for FirstEnergy/Verizon Case at 10-11, attached to Decl. of Clark Guo (Attach. L) at Ex. CG-1.

other communications attachers, primarily because of the old copper wire that Verizon has not removed. This additional weight has several effects: (i) the load on the pole created by Verizon's attachments is greater than the load on the pole created by Verizon's competitors, especially when considering ice and wind conditions typically experienced in Pennsylvania; (ii) Verizon's attachments create more sag than do the attachments of Verizon's competitors, thus requiring even more pole space; and (iii) newcomers to the pole are disadvantaged more by Verizon's attachments than by the attachments of other communications companies, because Verizon's attachments use up more loading and space capacity, thus making it more likely the pole will lack available loading or space capacity and must be replaced with a taller or stronger pole by the new attacher.[99]

90. In addition, the benefit to Verizon of this lowest position on the pole is obvious if one considers what would happen if Verizon were not the lowest attacher on the pole but instead there were attachments below Verizon's attachments. In such a case, Verizon's attachments on average would need to be placed on the pole 3.5 feet above the lowest attacher, rather than the one foot required of Verizon's cable company and CLEC competitors. This is true because FirstEnergy's standards require twelve inches of separation between communications attachments mid span, and because Verizon's sag requires such additional pole space in order to meet this mid-span clearance standard.[100] As a result, and additional 2.5 feet of pole space is occupied by Verizon and cannot be occupied by another attacher.

[99] Coleman Decl. at ¶34. By not removing its unused copper wire facilities, Verizon is making it more difficult for new companies to attach, thereby bolstering its competitive advantage.
[100] *Id.* at ¶35.

91. The fact that Verizon's attachments take up more loading capacity and space capacity on FirstEnergy's poles than do its competitors' attachments provides yet another reason Verizon is not comparably situated to its competitors.

92. Because Verizon, for all of the reasons explained above, is not comparably situated to its cable and CLEC competitors, the Commission would have to look to the pre-existing telecom rate as a "reference point" to determine the appropriate rental rate. As explained by the Commission in the *Verizon v. Dominion* Order:

> The Commission observed that such joint use arrangements typically provide incumbent LECs a number of advantages not afforded to telecommunications carrier and cable attachers, such as guaranteed space on poles, lower make-ready costs, and the ability to attach without obtaining advance approval. In light of those differences, the Commission did not adopt a formula for calculating the rate to be paid by incumbent LECs, opting instead to resolve incumbent LEC disputes on a case-by-case basis in complaint proceedings brought before the Commission. The Commission found it reasonable to use the Old Telecom Rate "as a reference point" in complaint proceedings filed by incumbent LECs to "account for particular arrangements that provide net advantages to incumbent LECs" relative to competitive LECs.[101]

2. Verizon's Rejection of FirstEnergy's CLEC Agreement Offer Demonstrates That Verizon Prefers the Joint Use Agreements

93. As explained above, FirstEnergy offered to place Verizon on an equal footing with its CLEC competitors for all of Verizon's attachments, both new and existing, by giving Verizon the CLEC agreement and CLEC rates and by transitioning Verizon out of the pole owning business.[102] Verizon rejected that offer in favor of its existing joint use agreements. Verizon therefore considers the joint use agreement to be a better alternative to the CLEC

[101] *Verizon v. Dominion Order* at ¶4 (citations omitted).

[102] Email from Stephen F. Schafer, Manager, Joint Use & Cabling Locating, FirstEnergy Services Company, to James Slavin, Senior Manager, Network Operations & Engineering, Verizon Wireline Network (May 2, 2018), attached to *Complaint* at Ex. 28 (VZ00650-VZ00651).

agreements that its competitors receive. If Verizon truly believed that the joint use agreements are less advantageous than FirstEnergy's CLEC agreements, then Verizon would have accepted FirstEnergy's offer to terminate its existing joint use agreements, accept the CLEC agreement, and then accept FirstEnergy's proposal to ease out of the pole owning business. As explained by Mr. Zarakas: "In opting not to accept FirstEnergy's offer to switch Verizon to the leasing arrangement that FirstEnergy provides to non-ILECs, Verizon revealed that it does not consider that the two pole attachment arrangements are similarly situated. Otherwise, Verizon would have readily accepted the offer of similarly situated pole attachment arrangements at a lower price."[103]

3. Verizon's Costs to Maintain its Pole Plant Are Irrelevant and Are Reimbursed In Any Event

94. Verizon claims repeatedly that the Commission must analyze the costs that Verizon incurs as a pole owner to determine whether it is comparably situated to its competitors.[104] This analysis of Verizon's costs to maintain its pole plant is improper for a number of reasons.

95. First, it is inappropriate to analyze Verizon's pole ownership costs because many of these costs already are being reimbursed. As identified in the pole attachment rental rate calculations for Verizon North and Verizon Pennsylvania attached hereto at Attachment G, Verizon's annual net cost per pole of owning and maintaining its pole plant are [redacted] for Verizon North and [redacted] for Verizon Pennsylvania. The rental rates paid by FirstEnergy

[103] Zarakas Decl. at ¶5.
[104] *See Complaint* at 33-34, 45-47, 49, 50, 52, 55-62, 68, 71; *See also* Aff. of Stephen C. Mills at ⁋71 (VZ00031) ("Mills Aff."); *See also* Aff. of Mark S. Calnon at ⁋33 (VZ00054); *See also* Aff. of Timothy J. Tardiff at ⁋28 (VZ00123).

under the existing agreements were [redacted] per pole from Penelec, a derived "reciprocal rate" of [redacted] from Met-Ed, and [redacted] from Penn Power.[105] This alone already accounts for more than 100% of Verizon North's annual costs and a significant percentage of Verizon Pennsylvania's annual costs. Furthermore, FirstEnergy's tree removals benefit Verizon's pole plant, and adds another reimbursement of Verizon's pole costs[106] And FirstEnergy inspects Verizon's pole plant because Verizon cannot be relied upon to properly inspect its own pole plant, and this inspection also provides a significant benefit to Verizon.[107] FirstEnergy has also replaced a number of poles for Verizon, at FirstEnergy's expense. FirstEnergy also incurs significant unreimbursed expense responding to emergency events on Verizon-owned poles.[108] And based on the Commission's rate formula, another 7.4% of Verizon's annual costs are reimbursed by cable company attachers, with another 7.4% reimbursement for every additional CLEC attacher.

96. Second, as explained above, Verizon has such a significant advantage over its cable company and CLEC competitors that the costs to Verizon as a pole owner are small when considering that Verizon enjoys the same speed to market advantage on its own poles that it does on FirstEnergy's poles.

97. Third, FirstEnergy offered to transition Verizon out of the pole owning business as part of its offer for Verizon to enter a standard CLEC agreement. Specifically, FirstEnergy offered to set all new poles and to set and take ownership every time a Verizon pole must be replaced due to storm damage, car-pole accidents, age, condition, or the need to increase capacity

[105] Mills Aff. at ¶¶26, 18 and 29, respectively (VZ00009-VZ00014).
[106] Schafer Decl. at ⁋22.
[107] *Id.* at ⁋23.
[108] *Id.* at ⁋24.

for new attachers. FirstEnergy described this as an "accelerated transition." Verizon, however, ignored repeated direct requests for a response to these offers, instead choosing to file this Complaint, apparently deciding that the benefits of pole ownership (and joint use on FirstEnergy's poles) outweighs the costs.[109]

98. Finally, if FirstEnergy owns 73% of the joint use poles and Verizon owns 27%,[110] then FirstEnergy owns nearly three times as many poles, so that all else being equal, FirstEnergy is incurring more than three times the costs that Verizon incurs.[111] FirstEnergy incurs costs under the joint use agreement that it does not incur under its third party agreements with Verizon's competitors. Just as it is not appropriate for the Commission to try to determine FirstEnergy's joint use agreement costs when deciding what FirstEnergy should pay to attach to Verizon's poles, it is not appropriate to calculate Verizon's joint use agreement costs when determining what Verizon should pay to attach to FirstEnergy's poles.[112]

4. Even if Bargaining Leverage Existed and Verizon Could Establish it is Similarly Situated to Existing Telecom and Cable Attachers, the April *2011 Pole Attachment Order* Would Entitle Verizon to the Rates Actually Charged Those Entities, Not Rates Calculated Pursuant to FCC Formulas

[109] Schafer Decl. at ⁋10. *See also* Email from Stephen F. Schafer, Manager, Joint Use & Cabling Locating, FirstEnergy Services Company, to James Slavin, Senior Manager, Network Operations & Engineering, Verizon Wireline Network (May 2, 2018), attached to *Complaint* at Ex. 28 (VZ00650-VZ00651).
[110] *Complaint* at ¶4.
[111] FirstEnergy's pole ownership costs are considerably higher than Verizon's, as explained below.
[112] Verizon's witness Steve Mills contends without written support that he performed an analysis of Penn Power, Met-Ed and Verizon's respective pole replacement requests, and determined Verizon required far fewer pole replacements than the number of pole replacements it was required to pay for. *See* Mills Aff. at ¶¶ 58-59 (VZ00026). For some unexplained reason, Mr. Mills did not perform this analysis for Penelec poles or Potomac Edison poles. FirstEnergy analyzed Verizon's claim that Met-Ed made 135 requests to attach to Verizon's poles and that 66 of those required Verizon to incur pole replacement costs. It turns out that 15 of those pole replacements were the result of FirstEnergy asking Verizon to replace Verizon poles that Verizon did not know were dangerous or deteriorated, which means that Verizon was not inspecting its own pole plant and FirstEnergy had to inform them of the dangerous conditions of their own pole plant. In addition, it turns out that 13 more of these pole replacement requests were nothing more than a forwarding of government or highway project requests. As a result, these highway project and deteriorated Verizon poles were replaced not simply for FirstEnergy's benefit, as Verizon implies. Schafer Decl. at ⁋25.

99. Because Verizon believes it is similarly situated to its competitors, Verizon has requested that the Commission determine the new telecom rate is the appropriate rate.[113] As explained above, Verizon is not similarly situated to its competitors. But even if it were, the *2011 Pole Attachment Order* would require that the existing rates charged Verizon's similarly-situated competitors apply, which is not necessarily the new telecom rate. As explained by the 2011 Order:

> Under any new agreements, to the extent that the incumbent LEC demonstrates that it is obtaining pole attachments on terms and conditions that leave them comparably situated to telecommunications carriers or cable operators, we believe it will be appropriate to use the rate of the comparable attacher as the "just and reasonable" rate for purposes of section 224(b).[114]

100. Although the Commission expected that rate generally to be equal to or similar to the cable rate, the requirement was that the existing rates apply, not the cable or new telecom rate:

> Where incumbent LECs are attaching to other utilities' poles on terms and conditions that are comparable to those that apply to a telecommunications carrier or a cable operator—which generally will be paying a rate equal or similar to the cable rate under our rules—competitive neutrality counsels in favor of affording incumbent LECs the same rate as the comparable provider (whether the telecommunications carrier or the cable operator).[115]

[113] *Complaint* at ¶65.
[114] *2011 Pole Attachment Order* at ¶217.
[115] *Id.* The *FPL Order* slightly misconstrues these rulings by stating "the Commission specified in the Pole Attachment Order that when an incumbent LEC enters into a new attachment agreement, the New Telecom Rate may be appropriate if the LEC attaches on terms and conditions that leave it 'comparably situated' to competitive LECs." *Verizon v. FPL Order* at 1147 (¶20). In addition, both Verizon v. FPL and Verizon v. Dominion explicitly declined to establish a formula rate for ILEC joint use attachments. *See Verizon v. FPL Order* at 1149 (¶24); *Verizon v. Dominion Order* at 3761 (¶22). The Commission declined to set either a rate or a refund amount in *Dominion*, emphasizing instead that the parties should negotiate that amount. *See Verizon v. Dominion Order* at 3764 (¶29).

101. The rates that FirstEnergy charges existing cable and CLEC attachers differ as follows. Met-Ed's rate to cable companies was [redacted], and ranged from [redacted] to [redacted] for CLECs. Penelec's rates to cable companies range from [redacted] to [redacted], and from [redacted] to [redacted] for CLECs. Penn Power's rate to cable companies was [redacted], and ranged from [redacted] to [redacted] for CLECs.

102. These fees are appropriate, as they were agreed to by FirstEnergy and its attachers along with other bargained-for rates, terms and conditions. The Commission's rules specify any such negotiated rates are appropriate, and will rule otherwise only if a complaint is filed and it determines following a complaint proceeding that another rate is instead just and reasonable.[116]

103. If Verizon contends that its joint use agreements render it comparably situated to its cable company or CLEC competitors, then its allegation implicates a range of rates which would be applicable to Verizon. If comparing the terms and conditions of Verizon's joint use agreement to the terms and conditions of any of these cable company and CLEC agreements renders it comparably situated, then it would be comparably situated to them all because the agreements at issue predominantly share the same common non-rate provisions.[117] Verizon's

[116] *2018 Third Report and Order* at ¶13 ("But at the outset, we emphasize that parties are welcome to reach bargained solutions that differ from our rules. Our rules provide processes that apply in the absence of a negotiated agreement, but we recognize that they cannot account for every distinct situation and encourage parties to seek superior solutions for themselves through voluntary privately-negotiated solutions.")

[117] For example, comparing agreements for several of the entities identified in the make-ready expense chart attached to the Schafer Declaration at Ex. SFS-1, FirstEnergy's pole attachment license agreements with CLEC-2; CATV-2; CATV-4; CLEC-5; CLEC-6; and CATV-7 all contain nearly identical provisions such as [redacted] All of the license agreements except CATV-2 also contain [redacted]. All of the license agreements except CATV-4 contain notice provisions. All of the license agreements except CLEC-6 and CLEC-5 have [redacted]

claim that it is comparably situated to its cable company and CLEC competitors, even if true, therefore requires that several rates be applicable to Verizon.

5. Verizon's Rate Calculations Are Inconsistent With How Cable Company And CLEC Attachment Rates Are Calculated

104. Even if FCC rental rates applied, Verizon's calculations contain several errors. In order to better identify and explain additional errors in Verizon's calculations of the annual costs used in Verizon's pole attachment rate calculations, FirstEnergy calculated its annual pole attachment costs and the remainder of its cable television, pre-existing and new telecommunications rate calculations for Met-Ed, Penelec and Penn Power using year-end 2018 data, and then compared its calculation to Verizon's year-end 2018 calculations.

105. The errors explained below with respect to Verizon's calculations using FirstEnergy's year-end 2018 costs seem to have been repeated in all of Verizon's calculations:[118] Referencing the FirstEnergy calculation of year-end 2018 rates for Penelec, attached hereto at Attachment G, to the Verizon calculation at VZ00077:

- In Line 19 (Accumulated Deferred Taxes (Accounts 190, 281-283)(Poles), Verizon's allocation of Accumulated Deferred Taxes (Electric) to distribution poles is in error. This cost should be allocated based on the ratio: Account 364 Gross Pole Investment ÷ Gross Electric Plant Investment. Instead, Verizon's allocation is based on the ratio: (Account 364 Gross Pole Investment – Depreciation) ÷ (Gross Electric Plant Investment - Depreciation).

- In Line 23, Verizon used an incorrect pole count. The correct pole count is 528,755.

- In Line 38, ("Accumulated Deferred Income Taxes for 364, 365 & 369"), Verizon's allocation of Accumulated Deferred Taxes (Electric) to these overhead Accounts 364,

[redacted]. All of the license agreements except those with CATV-4 and CATV-2 have [redacted]. All of the license agreements except those with CATV-7; CATV-4, and CATV-2 contain provisions [redacted], and all of the license agreements except CATV-7 [redacted]. A copy of these agreements is attached hereto at Attach. P.

[118] FirstEnergy reserves the right to perform further analysis should the Commission decide to go forward with this Complaint proceeding and also to grant Verizon retroactive relief.

365 and 369 is in error. This cost should be allocated based on the ratio: Investment in Accounts 364, 365 and 369 ÷ Gross Electric Plant Investment. Instead, Verizon's allocation is based on the ratio: (Investment in Accounts 364, 365 and 369 – Depreciation) ÷ (Gross Electric Plant Investment - Depreciation).

- In Line 52, Verizon used an incorrect rate of return. It is unclear how Verizon determined the rate of return, but the proper rate of return is the rate most recently approved by the PaPUC, which is 7.92%.

- Verizon used FCC presumptions for average pole height, unusable space, usable space, and number of attaching entities. These figures are incorrect. As explained below, FirstEnergy performed a statistically reliable audit of its pole plant and added to its calculations the actual figures.

106. Changes to the inputs identified above are responsible for the differences between Verizon's annual cost calculations and FirstEnergy's annual cost calculations.

107. Not only are Verizon's calculations of FirstEnergy's rates for Verizon attachments mistaken, Verizon's calculations of Verizon's rates for FirstEnergy's attachments are also mistaken, for the following reasons:

- Verizon combined ARMIS data for all four of its study areas in Pennsylvania to come up with a statewide rate. Instead, Verizon is required to develop different rates for each study area.

- For year-end 2018 rates, Verizon failed to explain how it properly transitioned from ARMIS data to GAAP data comports with the Commission's directive to increase or decrease its GAAP-based rates by the "Implementation Rate Difference."[119]

[119] 47 CFR §1.1409(g) states:

> A price cap company opting-out of Part 32 may calculate attachment rates for its poles, conduits, and rights of way using either Part 32 accounting data or GAAP accounting data. A price cap company using GAAP accounting data to compute rates to attach to its poles, conduits, and rights of way in any of the first twelve years after opting-out must adjust (increase or decrease) its annually computed GAAP-based rates by an Implementation Rate Difference for each of the remaining years in the period. The Implementation Rate Difference means the difference between attachment rates calculated by the price cap carrier under Part 32 and under GAAP as of the last full year preceding the carrier's initial opting-out of Part 32 USOA accounting requirements.

- Verizon did not use the actual figures for pole height, space occupied and the amount of usable space, which FirstEnergy was able to derive from its statistically-reliable field audit.

108. Proper calculations using the pre-existing telecom rate for FirstEnergy's attachments to Verizon's poles for Verizon Pennsylvania (PAPA) and Verizon North (GTPA), the two Verizon study areas with by far the most FirstEnergy attachments, using year-end 2017 data, are attached at Attachment G, along with a chart explaining which FirstEnergy/Verizon joint use agreements are associated with which rate. FirstEnergy has also calculated cable television, pre-existing telecommunications, and new telecommunications rates using year-end 2018 data for Met-Ed, Penelec and Penn Power. These calculations are attached at Attachment G.

109. FirstEnergy provides these calculations not because it believes the Commission should apply any of them in this particular case, but to provide guidance should the Commission find it helpful. FirstEnergy is willing and able, and reserves the right, to perform any additional calculations that the Commission might deem appropriate.

110. The results of these calculations for Met-Ed, Penelec and Penn Power are summarized in the following chart:

FirstEnergy Operating Utility	Last Invoiced Rate for Verizon Attachments to FirstEnergy Poles	Pre-Existing Telecom Rate	Cable Rate	New Telecom Rate
Met-Ed	[redacted]	[redacted]	[redacted]	[redacted]
Penelec	[redacted]	[redacted]	[redacted]	[redacted]
Penn Power	[redacted]	[redacted]	[redacted]	[redacted]

6. FirstEnergy's Statistically-Reliable Field Audit Determines Several Important Components of the Rental Rate Calculations

111. In order to better understand the factors to be used in any FCC rate calculation, especially since the Commission has never before applied its rate formulas in joint use relationships, FirstEnergy hired the firm Precision Consulting, Inc. ("PCI"). Using FirstEnergy's GIS data files, PCI developed statistically-reliable samples of Penelec, Met-Ed and Penn Power poles to which Verizon is attached, and statistically-reliable samples of Verizon poles to which Penelec, Met-Ed and Penn Power are attached.[120] FirstEnergy then hired the firm Davey Resource Group ("DRG") to perform a field audit of those poles on each of the lists.

112. The Procedures Document used to describe the DRG field audit is attached to the Declaration of DRG Vice President Scott Carlin at Attachment K, Exhibit SC-1. The Declaration of Clark Guo, President of PCI, is attached at Attachment L, along with his report which provides his list of sample poles and the field audit designed to produce pole data values for the rate formula input variables at a 95% confidence level. Mr. Guo declares that his sample

[120] Schafer Decl. at ¶27.

fully comports with Commission Rule 47 C.F.R. 1.363, regarding the introduction of statistical data.[121]

7. The Applicable Statute of Limitations in Pole Attachment Complaint Proceedings is Two Years

113. The Commission regulation providing a refund remedy for pole attachment complaint cases states: "The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations."[122] No further explanation is

[121] 47 CFR §1.363 states:

> (a) All statistical studies, offered in evidence in common carrier hearing proceedings, including but not limited to sample surveys, econometric analyses, and experiments, and those parts of other studies involving statistical methodology shall be described in a summary statement, with supplementary details added in appendices so as to give a comprehensive delineation of the assumptions made, the study plan utilized and the procedures undertaken. In the case of sample surveys, there shall be a clear description of the survey design, including the definition of the universe under study, the sampling frame, and the sampling units; an explanation of the method of selecting the sample and the characteristics measured or counted. In the case of econometric investigations, the econometric model shall be completely described and the reasons given for each assumption and statistical specification. The effects on the final results of changes in the assumptions should be made clear. When alternative models and variables have been employed, a record shall be kept of these alternative studies, so as to be available upon request. In the case of experimental analyses, a clear and complete description of the experimental design shall be set forth, including a specification of the controlled conditions and how the controls were realized. In addition, the methods of making observations and the adjustments, if any, to observed data shall be described. In the case of every kind of statistical study, the following items shall be set forth clearly: The formulas used for statistical estimates, standard errors and test statistics, the description of statistical tests, plus all related computations, computer programs and final results. Summary descriptions of input data shall be submitted. Upon request, the actual input data shall be made available.
>
> (b) In the case of all studies and analyses offered in evidence in common carrier hearing proceedings, other than the kinds described in paragraph (a) of this section, there shall be a clear statement of the study plan, all relevant assumptions and a description of the techniques of data collection, estimation and/or testing. In addition, there shall be a clear statement of the facts and judgments upon which conclusions are based and a statement of the relative weights given to the various factors in arriving at each conclusion, together with an indication of the alternative courses of action considered. Lists of input data shall be made available upon request.

[122] 47 C.F.R. § 1.1410(a)(3).

provided, and the D.C. Circuit has noted that the regulation "does not appear to specify what makes a limitations period applicable."[123]

114. Verizon provides its own explanation, contending that the statute of limitations in Pennsylvania for contracts is four years, and that there is also some "continuing contract doctrine" in Pennsylvania allowing refunds all the way back the effective date of the *2011 Pole Attachment Order*.[124] This interpretation is incorrect for several reasons.

115. First, this is not an action for breach of contract; it is an action contending that the rate is excessive or unjust and unreasonable. The Commission does not resolve contract disputes and is not in the business of enforcing existing agreements. These are matters the Commission leaves for courts to decide.[125] As for the *Verizon v. Dominion* Order that Verizon cites, the complaining party suggested a state contract-action statute of limitations and the defendant did "not dispute" that statute. [126]

116. Second, the *Beltz* and *Thorpe* cases Verizon cites to support the "continuing contract doctrine" in Pennsylvania are inapplicable to the facts of this case. *Beltz* and *Thorpe* state that if services are rendered under an agreement that does not fix any certain time for payment or for the termination of the services, then the contract will be treated as continuous.[127] All of the contracts at issue here can be terminated by either party upon notice,[128] and all of them

[123] *American Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013).
[124] *Complaint* at ¶57.
[125] *See, e.g., Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (noting the FCC's "longstanding policy of refusing to adjudicate private contract law questions for which a forum exists in the state courts").
[126] *See Verizon v. Dominion Order* at 3764 (n.104).
[127] *See Beltz v. Erie Indem. Co.*, 279 F. Supp. 3d 569, 580 (W.D. Pa. 2017), aff'd, 733 F. App'x 595 (3d Cir. 2018); *See also Thorpe v. Schoenbrun*, 195 A.2d 870, 872 (Pa. Super. Ct. 1963).
[128] *See Agreement between Met-Ed and The Bell Tel. Co. of Pa.* (1973), supplemented in 1983 at Article XIX (*Complaint* at Ex. 1 (VZ00180)*; Agreement between Met-Ed and Bethel & Mt. Aetna Tel. and Telegraph Co.* (1968), amended in 1974 at Article XIX (*Complaint* at Ex. 2 (VZ00196); *Agreement between Met-Ed and Continental Tel. Co. of Pa.* (1972), amended in 1972 at Article XVIII (*Complaint* at Ex. 3 (VZ00223); *Agreement between Met-Ed and Quaker State Tel. Co.* (1971) at Article XIX (*Complaint* at Ex. 4 (VZ00239); *Agreement between Met-Ed and York Tel. and Telegraph Co.* (1967), amended in 1974 and 1975 at Article XVIII (*Complaint* at

similarly specify a certain time for payment.[129] Furthermore, even for such contracts with no payment or termination provisions, both cases specify the four-year Pennsylvania limitations period runs from the date of breach.[130]

117. Third, the most relevant provision under the Communications is Section 415(b), which governs private complaints against carriers, and which sets a two-year limitations period.[131] Thus, even if Verizon were entitled to any refunds at all, which it is not, Verizon might at most recover two years' worth of refunds.

G. Any New Rate Determination Should Only Be Applied Prospectively

118. In the event the Commission decides to move forward with an analysis of the rates between FirstEnergy and Verizon, any determination should be prospective in effect only. The existing rules regarding the rates each joint use pole owner may charge the other for attachments do not provide the parties with sufficient guidance to determine for themselves what

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Ex. 5 (VZ00253)); *Agreement between Penelec and Bell Tel. Co. of Pa.* (1986) at Article XXII (*Complaint* at Ex. 7 (VZ00333); *Agreement between Penelec and Continental Tel. Co. of Pa.* (1988) at Article XXI (*Complaint* at Ex. 8 (VZ00359)); *Agreement between Penelec and General Tel. Co. of Pa.* (1958), supplemented in 1966 at Article XXII (*Complaint* at Ex. 9 (VZ00386); *Agreement between Penelec and Quaker State Telephone Company* (1988) at Article XXI (*Complaint* at Ex. 10 (VZ00449)); *Agreement between Penn Power and The Bell Tel. Co. of Pa.* (1978), amended in 1999 at Article XXIV (*Complaint* at Ex. 12 (VZ000482)).

[129] For example, the Penelec-Quaker JUA states: "Payments of all compensation under this Agreement shall be due and payable as of March 31 of each year during the continuance of this Agreement, and will be based on the number of poles jointly used as of the last day of the preceding December." *Agreement between Penelec and Quaker State Telephone Company* (1988) at Article XVI (*Complaint* at Ex. 10 (VZ00447)). The Penn Power JUA states: "An annual attachment fee shall be paid by Licensee to Owner for each pole on which Licensee has reserved space…Each Party shall submit to the other not later than the 30th day of September of each year, a statement of the use of its poles by the other Party for which fees are to be charged as of the 30th day of June of that year." *Agreement between Penn Power and The Bell Tel. Co. of Pa.* (1978), amended in 1999 at Article XVIII (*Complaint* at Ex. 12 (VZ00480)).

[130] The defendants in in Beltz cited a case (*Welch Foods Inc. v. Borough of N.E.*), to support their argument on the "continuing contract" doctrine. *See Beltz*, 279 F. Supp. 3d at 579. In *Welch*, a plaintiff alleged that in 1978 the defendant violated their 1975 contract by increasing the cost of waste treatment obligations, and subsequently breached their contract each and every time it billed the plaintiff. The 1975 contract was still valid when the lawsuit was commenced, so the plaintiff argued that it was "continuing." The court disagreed and stated, "Thorpe states that even for continuing contracts, the statute of limitations begins to run from the date of breach…" *Welch Foods Inc. v. Borough of N.E.*, No. CIV.A. 98-246 ERIE, 2001 U.S. Dist. LEXIS 3287, 2001 WL 311204 (W.D. Pa. Feb. 6, 2001), aff'd 46 F. App'x 678 (3d Cir. 2002).

[131] *See* 47 U.S.C. § 415.

those rates should be--especially for existing agreements. Without further guidance established in individual complaint proceedings, negotiating parties are unable to know the formula to use (if any) for the rate calculations.

1. The Commission's Existing Rate Regulation Guidance Is Incomplete and Subject To Multiple Interpretations

a) It is unclear which rate formula, or if any rate formula, may apply in any given case

119. In the *2011 Pole Attachment Order*, the Commission indicated that ILECs should terminate their existing agreements before seeking relief from the Commission and provided guidance regarding the rates that may be applicable under any new agreement. The Commission posed two different scenarios, indicating that different rates should apply under the two different scenarios. Identifying the first scenario, the Commission indicated that:

> Under any new agreements, to the extent that the incumbent LEC demonstrates that it is obtaining pole attachments on terms and conditions that leave them comparably situated to telecommunications carriers or cable operators, we believe it will be appropriate to use the rate of the comparable attacher as the "just and reasonable" rate for purposes of section 224(b).[132]

120. Of course, as explained earlier, applying this standard to "new" agreements indicates Verizon was required to terminate its existing agreements for the *2011 Pole Attachment Order* to apply at all. But leaving that aside, this language alone is difficult for joint users negotiating new rates for a new agreement to understand. It is not at all clear what showing is needed for an ILEC to demonstrate that it is "comparably situated," what it means to be "comparably situated" when ILECs own poles and cable company and CLEC attachers do not, which factors prove that ILECs are comparably situated, and what kind of evidence is required to support that showing. And if the ILEC somehow can meet its burden of proof that it is

[132] *2011 Pole Attachment Order* at ¶217 (emphasis added).

"comparably situated," which comparable attachers rate do you apply when, as in this case, multiple comparable attacher rates apply?

121. In short, even in instances where one party actually has bargaining leverage over the other, which FirstEnergy does not, there is not enough guidance in the *2011 Pole Attachment Order* for the parties to negotiate a resolution of this issue without a pole attachment complaint proceeding establishing whether the ILEC in any particular case is "comparably situated".

122. In the other scenario posed by the Commission that the ILEC is not "comparably situated, a second scenario applies, where the pre-existing telecom rate is a "reference point":

> By contrast, if a new pole attachment agreement between an incumbent LEC and a pole owner includes provisions that materially advantage the incumbent LEC vis a vis a telecommunications carrier or cable operator, we believe that a different rate should apply. Just as considerations of competitive neutrality counsel in favor of similar treatment of similarly situated providers, so too should differently situated providers be treated differently. In particular, we find it reasonable to look to the pre-existing, high-end telecom rate as a reference point in complaint proceedings involving a pole owner and an incumbent LEC attacher that is not similarly situated, or has failed to show that it is similarly situated to a cable or telecommunications attacher.[133]

123. This reference to "material advantages" requires the same nebulous analysis as the phrase "comparably situated," and it raises similar questions about what those "material advantages" may be. As with the phrase "comparably situated," a pole attachment complaint proceeding is needed to determine just what that may mean in any particular case and what showing is required. While the parties may attempt to figure this out for themselves during negotiations, in reality neither party knows for sure absent further guidance.

124. Another difficulty with this guidance is that it does not require that the pre-existing telecommunications rate apply. Instead, it states only that in a complaint proceeding,

[133] *Id.* at ¶218.

the Commission will "look to" the pre-existing telecommunications rate as a "reference point." Despite Verizon's assertions to the contrary, this language does not state that the Commission will in all cases apply the pre-existing telecom rate if "material advantages" are established. Instead, this language allows the Commission to look beyond this "reference point" in any particular complaint proceeding, to weigh the nature of the advantages received by the ILEC that are not available to the cable operator or CLEC, and to fashion whatever rate remedy it deems appropriate. There seems to be no limit to the number of possible outcomes the Commission may deem appropriate in any particular proceeding. Indeed, in the lone complaint proceeding with a Commission determination that the rates in new agreements were unjust and unreasonable, *Verizon v. Dominion*, the Commission declined to set a rate or a refund, and did not even prescribe a formula. The Commission's heavily redacted order may have given those two parties some guidance to narrow the range of possibilities to assist negotiation efforts, but non-parties were left in the dark.

b) The FCC's rate regulations specifically exclude ILECs, and the space occupied rebuttable presumption was never established for ILEC attachments

125. Even if the Commission were to apply to Verizon its pre-existing telecommunications rate formula, the new telecommunications rate formula, or the cable rate formula, there are still a number of unresolved issues making it impossible to calculate the rate without further guidance from the Commission as to how those formulas are supposed to operate in a joint use environment. Arguably, such guidance requires a further rulemaking by the Commission to revise the regulations.[134]

[134] FirstEnergy, along with several other electric utilities sought such guidance from the Commission in a Petition for Reconsideration which the Commission has yet to rule on. *See* Petition for Reconsideration of the Coalition of Concerned Utilities, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to*

126. For example, there is insufficient guidance with respect to the FCC's rebuttable presumptions as to the number of attaching entities,[135] the average pole height, the amount of usable and unusable space, and the amount of space occupied by the attacher when those concepts are to be applied to ILECs.[136] Those presumptions apply to the cable rate formula and telecommunications rate formula as specified in the regulations, but neither applies to ILECs by rule. In fact, those presumptions were established more than ten years before the Commission asserted jurisdiction over ILEC attachments in its *2011 Pole Attachment Order*.[137]

127. The applicability of these presumptions to ILEC attachments is therefore unclear at best. Of particular concern to FirstEnergy is the presumption that an attaching entity occupies only one foot of space on FirstEnergy's poles.[138] The Commission determined that presumption was appropriate for cable company attachments and then later for CLEC attachments, but neither of these entities typically attaches as much equipment to utility poles as do ILECs.[139] Perhaps more importantly, cable companies and CLECs both typically occupy the "middle" space on the pole above the ILEC attachments and below electric utility attachments. This difference in location on the pole is very significant in determining the presumed amount of space occupied by an attacher. The ILEC attachments must maintain the mid-span clearance of 15'6" above the ground that is required by the National Electrical Safety Code.[140] FirstEnergy includes this mid-

Infrastructure Investment; In the Matter of Accelerating Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, WT Docket No. 17-79, at 7 (filed Oct. 15, 2018).
[135] 47 C.F.R. §1.1417(c).
[136] *Id. at* §1.1418.
[137] *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, FCC 98-20, ¶22 (Feb. 6, 1998). Section (formerly "Allocation of usable space costs") retitled and revised by *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of The Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, FCC 01-170 (May 25, 2001).
[138] 47 C.F.R. §1.1418.
[139] Coleman Decl. at ¶31.
[140] *Id.* at ¶32.

span clearance requirement in its engineering standards.[141] In order to maintain this clearance mid-span, ILECs often attach their facilities higher than the 18 feet above ground level, particularly when their heaviest wires are used. This height of 18 feet was used by the Commission when it established its presumptive 37.5-foot average pole height with 24 feet of unusable space. The unusable space portion was determined by assuming that six feet of the pole would be underground and the first 18 feet would be required for clearance. ILECs that typically attach their facilities at a height above 18 feet would be occupying that much more of the pole's "usable" space and should therefore be presumed to be occupying such additional space required above 18 feet for clearance.

128. Verizon is no exception. As explained by Randy Coleman, FirstEnergy's Manager of Distribution Standards, and as verified by FirstEnergy's statistically valid field audit, Verizon is almost always the lowest attacher on joint use poles shared with Met-Ed, Penelec, and Penn Power, and its lowest attachments on these joint use poles frequently are located higher than 18 feet above ground level. In fact, Verizon's lowest attachments are located an average of [redacted] feet above ground level.[142]

129. If it is decided that this rate calculation should be performed, then any rate relief should be prospective in effect and based on the statistically-reliable field audit that FirstEnergy has just performed.

[141] *Id.*
[142] *Id.* at ¶33.

c) There is insufficient guidance regarding the rates ILECs may charge electric utilities to attach to ILEC poles

130. As is the case with ILEC rates while attaching to electric utility poles, it is also unclear how to determine the appropriate rate that ILECs may charge electric utilities to attach to ILEC poles. In this proceeding, Verizon has determined, with no guidance from the Commission and based on its limited review of FirstEnergy's attachments to Verizon's poles, that FirstEnergy occupies 10.5 feet of space on Verizon's poles.[143] Verizon even calls this figure an "FCC presumption."[144] The Commission's pole attachment rate regulations include no provision addressing electric utility attachments to ILEC poles, and do not include any presumption about the amount of space electric utilities occupy on ILEC poles. In fact, the FCC has never even discussed the appropriate rate formula inputs or even if any rate formula should apply to establish the maximum rate that an ILEC may charge an electric utility.[145]

131. Verizon nevertheless presumed to calculate FirstEnergy's attachment rates to Verizon's poles based on this 10.5-foot assumption. The Declaration of Verizon's Mark Calnon, which is Exhibit B to Verizon's Complaint, includes these calculations.[146] Verizon's Complaint itself does not specifically request a Commission ruling regarding the rate Verizon may charge FirstEnergy to attach to Verizon's poles, but its request for refunds of *net* payments depends on such a ruling. Without such a ruling Verizon could simply receive a one-sided ruling for its

[143] *See* 2011-2019 Per-Pole Rate for Met-Ed's, Penelec's, and Penn Power's Use of Verizon's Poles, attached to Complaint at Ex. C-5 (VZ00092-VZ00100).
[144] *Id.*
[145] *See generally 2011 Pole Attachment Order* and *2018 Third Report and Order*. This could be because the FCC arguably has no direct jurisdiction over such rates.
[146] *See* Aff. of Mark S. Calnon, Ph.D., Nov. 19, 2019 at Ex. B ⁋⁋19-29 (VZ00045-VZ00051).

attachments while Verizon proceeds to calculate on its own whatever rates it wants to charge FirstEnergy to attach to its poles.[147]

132. There is no fairness to a regulatory proceeding, however, where only one party's rate is subject to regulatory oversight and a maximum, while the other party is free to charge whatever it wants. To the contrary, the Commission indicated that it would look at the rates ILECs charge electric utilities: "For example, we would be skeptical of a complaint by an incumbent LEC seeking a proportionately lower rate to attach to an electric utility's poles than the rate the incumbent LEC is charging the electric utility to attach to its poles."[148]

133. FirstEnergy therefore specifically requests a ruling regarding the just and reasonable rates that Verizon may charge FirstEnergy to attach to Verizon's poles. Should additional information or calculations be required, FirstEnergy is willing and able to provide it, and reserves its rights to do so.

134. Just how the parties are supposed to calculate that rate is another unanswered question. The only further comment from the Commission regarding this calculation of attachment rates for electric utilities on ILEC poles was the following: "We believe that a just and reasonable rate in such circumstances would be the same proportionate rate charged the electric utility, given the ILEC's relative usage of the pole (such as the same rate per foot of occupied space)."[149]

135. This language is unclear because "proportionate," "relative usage," and "same rate per foot" do not refer to anything specific. It seems to indicate the amount of space

[147] Or to leave the existing agreement rates in place. This would create the worrisome potential for Verizon and other ILECs to exert significant leverage over electric utilities, in a situation in which electric utilities must charge a regulated rate but ILECs can charge whatever they want.
[148] *2011 Pole Attachment Order* at ¶218.
[149] *Id.* at ¶218, n. 662. This "relative" guidance is vague and general in nature and does not address differences in pole owners' respective cost structure.

occupied must be considered but no other guidance is provided. And it is unclear why Verizon's per-foot charge to FirstEnergy might somehow be based on anything besides Verizon's costs to own and maintain its pole plant, when Verizon's costs, not FirstEnergy's costs, are used to calculate Verizon's regulated rates for cable and CLEC entities to attach to Verizon poles.

d) Without further guidance, it is impossible for ILECs and electric utilities to know how to determine joint use rates

136. In sum, there are numerous unresolved issues pertaining to the Commission's regulation of the ILEC/Electric joint use relationship and the rates that the Commission may find appropriate in any one proceeding. Without further guidance, it is impossible for the parties to know with any certainty the rates that should apply to new joint use agreements. There is even less guidance regarding how rates for existing agreements should be modified, if at all.

2. The Lack of Guidance For Joint Use Agreements Raises Fundamental Concerns About Fairness, Due Process And Retroactive Ratemaking

137. Because the Commission's rulings provide insufficient guidance, no one can know for certain what the appropriate rates should be until determined by the Commission. As explained below, it would be unfair, arbitrary and capricious, a violation of due process, and contrary to the prohibition on retroactive ratemaking for the Commission to hold the parties in this proceeding to a rate that was impossible to calculate in advance. There should not be a refund "penalty" for failing to achieve a negotiation outcome that neither party could discern *while negotiating*.

138. Considerations of due process require that regulations be implemented only after the agency provides fair notice of the regulations.[150] This requirement of fair notice was the subject of the D.C. Circuit's recent *FCC v. Fox Television* case involving broadcast indecency, in

[150] U.S. CONST. AMEND V ("No person shall be … deprived of life, liberty, or property, without due process of law.").

which the court stated: "[A] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[151] In an earlier D.C. Circuit decision involving the Commission, the court held that "[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule."[152] In yet another D.C. Circuit case, the court held that "elementary fairness compels clarity in the notice of the material required as a condition for consideration."[153]

139. Similarly, in this proceeding, a prescription for the future of joint use rates needs to be clear enough so that those entities subject to the rates know what is being prescribed. The lack of guidance on when and whether any rate formula applies, and then on how properly to calculate any such rate formula, means that fair notice has not been provided in this case.

140. The Supreme Court has held that regulations must be clear in order to be enforced. In *FCC v. Fox Television*, the D.C. Circuit cited the Supreme Court's determination that the "requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment" and "requires the invalidation of laws that are impermissibly vague."[154] The Circuit Court went on to explain that, "a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved."[155]

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[151] *FCC et al v. Fox Television Stations, Inc. et al*, 132 S. Ct. 2307, 2317 (2012) (*citing Connally v. General Constr. Co.*, 269 U.S. 385 (1926) (In *Fox*, the Court overturned FCC fines because the broad language used by the Commission to justify its enforcement did not constitute fair notice that a fleeting expletive could be "actionably indecent.").

[152] *Satellite Broadcasting Co., Inc. v, FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987) (holding that the FCC could not dismiss applications to operate microwave radio stations if it did not give clear notice of where there applications were to be filed).

[153] *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968).

[154] *FCC et al v. Fox Television Stations, Inc. et al*, 132 S. Ct. 2307, 2317 (2012) (*citing Connally v. General Constr. Co.*, 269 U.S. 385 (1926)).

[155] *Id. at* 2317 (citing United States v. Williams, 553 U.S. 285, 304 (2008)).

141. Here the Commission has failed to explain adequately when the attachment rates in joint use agreements must be changed, under what circumstances they should be changed, the formula (if any) to apply when the rates are changed, or how to determine the inputs that go into whatever formula the Commission deems appropriate. As noted above, neither of the two joint use complaint decisions applied a formula to establish a joint use rate.[156] Because the new system for calculating joint use attachment rates has yet to be explained, application of a new rate to attachments before the Commission provides additional guidance on how rates should be determined would fail to provide FirstEnergy fair notice and constitute a prohibited retroactive application of a legislative rule.

142. Supreme Court precedent makes clear that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[157] The Commission recently agreed, stating, "[a]s a general rule, in the absence of statutory authority, rules adopted pursuant to a rulemaking proceeding may only be applied prospectively."[158] Nothing in the Pole Attachment Act allows for retroactive rules and the FCC has, in the past, rejected retroactive application of its pole attachment rates.[159]

143. Verizon has asked that the Commission apply new joint use attachment rates to cover attachments during a time frame before the Commission has fully explained how those

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[156] *See Verizon v. FPL Order* at 1149 (¶24); *Verizon v. Dominion Order* at 3761 (¶22). The Commission declined to set either a rate or a refund amount in *Dominion*, emphasizing instead that the parties should negotiate that amount. *See Verizon v. Dominion Order* at 3764 (¶29).

[157] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1998).

[158] Letter from Carol E. Mattey, Deputy Chief, Wireline Competition Bureau, Federal Communications Commission, to Richard A. Belden, Chief Operating Officer, Interim chief Executive Officer, Universal Service Administrative Company re WC Docket Nos. 10-90, 05-337 and 06-122; CC Docket No. 96-45, DA 14-661 (May 2, 2014) (*citing Bowen,* 488 U.S. at 208).

[159] *Georgia Power Co. v. Teleport Communications Atlanta, Inc.*, 346 F.3d 1033, 1041 (11th Cir. 2003) (The Court noted that the FCC disavowed the Cable Service Bureau's retroactive application of the presumptive averages of the number of attachers, but upheld the FCC's adoption of those averages on separate grounds) (*citing Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, Order On Review, File No. PA 00-005 ¶ 20 (rel. Oct. 8, 2002)).

rates should be determined. The Pole Attachment Act does not provide the Commission the authority to adopt retroactive rules, and the refund request by Verizon would apply the Commission's yet-to-be-explained rules retroactively. The Commission should require Verizon to pay the full amount owed under the existing agreements, at least up to the date on which the Commission, if it decides it is just and reasonable, provides more certainty regarding how the rates in this particular case, should be calculated.

H. The Commission Lacks Any Statutory Authority To Regulate Joint Use Rates

144. The Pole Attachment Act, 47 U.S.C. Section 224, grants the Commission jurisdiction to regulate the rates, terms and conditions of "pole attachments," which are defined as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."[160] Under the Act, the terms "telecommunications carrier" and "provider of telecommunications services" are synonyms:

> The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.[161]

145. The term "telecommunications carrier," therefore, is defined in the Communications Act as "any provider of telecommunications services" (except for aggregators of telecommunications services). An entity, therefore, cannot be a provider of telecommunications services without also being a telecommunications carrier. Except in the

[160] 47 U.S.C. §224(a)(4).
[161] *Id. at* § 153(44).

limited case where an entity qualifies as an aggregator of telecommunications services, the two phrases are absolutely synonymous, and ILECs are not aggregators of telecommunications services.

146. Since they are exempt from the definition of "telecommunications carrier," which is a synonym for "provider of telecommunications services," attachments by ILECs to utility poles are not subject to FCC jurisdiction under the Pole Attachment Act.

II. RESPONSE TO COMPLAINT ALLEGATIONS

Verizon 1: *Complainants Verizon Pennsylvania LLC and Verizon North LLC (collectively, "Verizon") are incumbent local exchange carriers ("ILECs") that provide telecommunications and other services in areas of Pennsylvania. They are Delaware limited liability companies with a principal place of business at 900 Race Street, Philadelphia, PA 19107. Verizon may be reached through counsel at (202) 515-2179.*

> **FirstEnergy Answer:** FirstEnergy denies the allegations in Paragraph 1 of the Complaint for lack of knowledge or information sufficient to form a belief as to their truth. Verizon Pennsylvania LLC and Verizon North LLC are subsidiaries of Verizon Communications Inc. In its latest Securities and Exchange Commission (SEC) Form 10-K Annual Report, Verizon Communications Inc. reported that as of December 31, 2018 its wireless and wireline communications products and services reported revenues of approximately $121.5 billion.[162] As of January 24, 2020, Verizon Communications Inc.'s market capitalization was $249.305 billion.[163]

Verizon 2: *Defendants are three operating subsidiaries of FirstEnergy Corporation, "one of the nation's largest investor-owned electric systems." Defendants Metropolitan Edison Company ("Met-Ed") and Pennsylvania Electric Company ("Penelec") are Pennsylvania corporations located at 2800 Pottsville Pike, P.O. Box 16001, Reading, PA 19612. Defendant Pennsylvania Power Company ("Penn Power") is a Pennsylvania corporation located at 233 Frenz Drive, New Castle, PA 16101.9 Defendants are referred to collectively as "FirstEnergy."*

> **FirstEnergy Answer:** FirstEnergy denies that there is any such entity called "FirstEnergy Corporation." FirstEnergy admits that FirstEnergy Corp. is one of the nation's largest investor-owned electric systems, only if Verizon's parent company Verizon Communications Inc. is one of the nation's largest communications companies. FirstEnergy Corp.'s reported revenue for Fiscal Year 2018 was approximately $11.26 billion.[164] As of January 24, 2020, FirstEnergy Corp.'s market capitalization was $27.27 billion.[165] In terms of reported revenues and market capitalization, Verizon Communications Inc. is approximately ten times the size of FirstEnergy Corp.

Verizon 3: *FirstEnergy and Verizon are party to ten substantially similar joint use agreements that contain the rates, terms, and conditions for each party's use of the other party's utility poles. The joint use agreements were entered with Verizon's predecessor companies between*

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[162] *See* Verizon Communications Inc., Form 10-K For the Fiscal Year Ended Dec. 31, 2018 at pp, 3, 6, available at: http://verizon.api.edgar-online.com/EFX_dll/EdgarPro.dll?FetchFilingConvPDF1?SessionID=0zjjUIzr74z-YE5&ID=13233286 ("Verizon Communications 10-K").

[163] Verizon Communications Inc. (VZ), Profile, Business Summary. *Yahoo! Finance*, available at https://finance.yahoo.com/quote/VZ/ (Jan. 25, 2020).

[164] FirstEnergy Corp., Form 10-K For the Fiscal Year Ended Dec. 31, 2018 at p. 37, available here: https://www.sec.gov/Archives/edgar/data/1031296/000103129619000010/fe-12312018x10k.htm ("FirstEnergy Corp. 10-K").

[165] FirstEnergy Corp. (FE), Profile, Business Summary. *Yahoo! Finance*, available at https://finance.yahoo.com/quote/FE?p=FE&.tsrc=fin-srch (Jan. 25, 2020).

1958 and 1988 and were amended between 1999 and 2009 to include the currently operative pole attachment rate provisions. Five of the ten joint use agreements are with Met-Ed, four are with Penelec, and one is with Penn Power.

FirstEnergy Answer: FirstEnergy admits there are ten agreements, that they were entered into with Verizon's predecessor companies between 1958 and 1988, and that they were amended between 1999 and 2009 to include the currently operative rates. FirstEnergy admits five are with Met-Ed, four are with Penelec and one is with Penn Power. FirstEnergy denies the agreements are "substantially similar."

Verizon 4: *The 2018 rental year is the most recent year that all three defendants have invoiced Verizon for pole attachment rent. According to the 2018 invoices, the joint use agreements cover 412,697 poles jointly used by the parties, with FirstEnergy owning 301,854 and Verizon owning 110,843. FirstEnergy, therefore, owns 73% of the poles that the parties currently share—reflecting a three-to-one pole ownership advantage.*

FirstEnergy Answer: FirstEnergy admits that the joint use agreements cover 412,697 poles jointly used by the parties, with FirstEnergy owning 301,854 and Verizon owning 110,843. For the reasons explained in its Affirmative Defenses, FirstEnergy denies the allegation in footnote 15 that it has any unequal bargaining power at all. FirstEnergy otherwise denies the allegations in Paragraph 4.

Verizon 5: *The Commission has jurisdiction over this pole attachment rate dispute under 47 U.S.C. § 224.*

FirstEnergy Answer: FirstEnergy denies the allegation in Paragraph 5. As explained in its Affirmative Defenses, FirstEnergy contends the FCC lacks jurisdiction to resolve this Complaint.

Verizon 6: *Defendants are "utilities" within the meaning of 47 U.S.C. § 224(a)(1) because each is an electric utility that owns or controls poles used, in whole or in part, for wire communications. Defendants are not owned by any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.*

FirstEnergy Answer: FirstEnergy admits the allegations in Paragraph 6.

Verizon 7: *The Commonwealth of Pennsylvania has not certified to the Commission that it regulates the rates, terms, and conditions for pole attachments and so has not reverse-preempted the Commission's jurisdiction under 47 U.S.C. § 224(c).*

FirstEnergy Answer: FirstEnergy admits that publication of the PaPUC's Order to reverse pre-empt the FCC and self-regulate pole attachments has not yet been accompanied by a letter certifying the same to the Commission.

Verizon 8: *This is one of two related Complaints being filed with the Commission based, at least in part, on the same claims and same set of facts. Verizon's affiliate, Verizon Maryland LLC, is*

filing the related Complaint against FirstEnergy's affiliate, The Potomac Edison Company. A separate action between the parties has not been filed with any court or other government agency based on the same claims or same set of facts, in whole or in part, and Verizon does not seek prospective relief that is identical to the relief proposed or at issue in a notice-and-comment rulemaking proceeding that is currently before the Commission.

FirstEnergy Answer: FirstEnergy admits the allegations in the first two sentences. FirstEnergy denies the allegations in the second two sentences for lack of knowledge or information sufficient to form a belief as to their truth. FirstEnergy admits the allegations in Footnote 18. FirstEnergy denies the allegation in Footnote 20 that that the Commission's new telecom rate presumption applies to the pole attachment agreements at issue in this proceeding.

Verizon 9: *Before filing this complaint, Verizon notified FirstEnergy in writing of the allegations that form the basis of this complaint and invited a response within a reasonable period of time. Verizon also, in good faith, engaged in face-to-face executive-level discussions and had many discussions with FirstEnergy and its Maryland affiliate about the possibility of a settlement.*

FirstEnergy Answer: FirstEnergy admits that parents of Verizon and FirstEnergy held negotiations about Met-Ed and Penelec, but denies that any of these negotiations covered Penn Power or Potomac Edison until the undated letter FirstEnergy received in December 2017 at VZ00593-VZ00646. For the reasons explained in FirstEnergy's Affirmative Defenses, FirstEnergy denies that Verizon negotiated in good faith.

A. Verizon Receives Just and Reasonable Attachment Rates

Verizon 10: *Verizon has been "entitled to pole attachment rates … that are just and reasonable" under 47 U.S.C. § 224(b)(1) since the July 12, 2011 effective date of the Commission's Pole Attachment Order, and has been presumptively entitled to the new telecom rate since the March 11, 2019 effective date of the Commission's Third Report and Order. FirstEnergy instead has denied Verizon a just and reasonable rate, over-collecting rents by more than* [redacted]*, on average, each year since 2011. Because FirstEnergy has refused to negotiate just and reasonable rates, the Commission should apply its new telecom rate presumption and provide Verizon long-overdue rental rate relief and refunds of its prior overpayments.*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 10.

As explained in FirstEnergy's Affirmative Defenses: (i) FirstEnergy contends the FCC lacks jurisdiction to resolve this Complaint; (ii) Verizon does not meet the threshold contract termination condition for Commission modification of these pre-2011 joint use agreements; (iii) to the extent the FCC has jurisdiction, the just and reasonable rates are established under the existing joint use agreements because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (iv) Verizon acknowledged after negotiations were completed in 2009 that the new rates were "fair and equitable" and that

the joint use rates issue had been "amiably resolved;" (v) the *2018 Third Report and Order* and its presumptions do not apply; (vi) the applicable statute of limitations is two years; (vii) refunds are not appropriate in this proceeding in any event; (viii) Verizon negotiated in bad faith; and (ix) Verizon miscalculated both the preexisting telecom rate and the new telecom rate.

FirstEnergy denies it over-collected any rents, and denies that it ever refused to negotiate just and reasonable rates.

Furthermore, as explained in FirstEnergy's Affirmative Defenses: (i) although the presumptions from the *2018 Third Report and Order* do not apply, if they did they would only apply from the March 11, 2019 effective date of the order forward, not for any period prior to that date; (2) the *2011 Pole Attachment Order* applies to that earlier period; and (3) FirstEnergy made several settlement offers with incrementally lower rates—Verizon never offered any rate incrementally higher than the new telecom rate.

Verizon 11: *For nearly a decade, the Commission has worked to ensure that pole attachment rates are "as low and close to uniform as possible" and has directed FirstEnergy and other electric utilities to stop charging "[d]ifferent rates for virtually the same resource (space on the pole)." In its 2011 Pole Attachment Order, the Commission took the first step to reduce the pole attachment rates that ILECs like Verizon pay. There, the FCC held ILECs are entitled to a "competitively neutral" rate, meaning "'the same rate as [a] comparable provider,' i.e., the New Telecom Rate or the Cable Rate," if the ILEC is "attaching to other utilities' poles on terms and conditions that are comparable to those that apply to a telecommunications carrier or a cable operator." The Commission also set the pre-existing telecom rate as a "reference point" for the rate that may be charged if an ILEC attaches under terms and conditions that give it a net material advantage over its competitors.*

FirstEnergy Answer: FirstEnergy responds that Commission rulings speak for themselves.

In addition, FirstEnergy admits that the *2011 Pole Attachment Order* stated if ILECs attach on terms and conditions that are comparable to existing cable and CLEC attachers, they should get the same rate as those comparable attachers. But as explained in its Affirmative Defenses, FirstEnergy denies that the rate will always be the cable rate or the new telecom rate, or that the 2011 Order states anywhere that there is any ILEC entitlement to the cable rate or the new telecom rate except under narrow conditions for which ILECs hold the burden of proof. Although applying the telecom rate might have been reasonable for the Enforcement Bureau to decide based on the facts in the *Verizon v. FPL* case, it is not reasonable here. As explained in FirstEnergy's Affirmative Defenses: (i) some of FirstEnergy's rates are different from the cable rate and new telecom rate, and for good reasons; and (ii) Verizon is not comparably situated to other telecommunications or cable company attachers in any event.

FirstEnergy admits that the Commission set the pre-existing telecom rate as a "reference point," but it was not established as "the rate that may be charged"

FirstEnergy otherwise denies the allegations in Paragraph 11.

Verizon 12: *In spite of the 2011 Pole Attachment Order, electric utilities including FirstEnergy "continue[d] to charge [ILECs] pole attachment rates significantly higher than the rates charged to similarly situated telecommunications attachers." As a result, in 2018, the Commission took the next step toward achieving rate reductions that should have occurred at least seven years earlier. In the 2018 Third Report and Order, the Commission adopted a presumption that, for "new and newly-renewed pole attachment agreements," ILECs are comparable to their competitors and must be charged the same new telecom rate. While the presumption is rebuttable, doing so requires clear and convincing evidence from the electric utility that the ILEC attaches to the utility's poles under a joint use agreement that gives the ILEC a net material advantage over its competitors. If the presumption is rebutted, the pre-existing telecom rate sets a "hard cap" on the rate that may be charged. This means that, as of the March 11, 2019 effective date of the 2018 Third Report and Order, FirstEnergy and other electric utilities cannot under any circumstances lawfully charge ILECs more than the pre-existing telecom rate under a joint use agreement that, like the joint use agreements at issue here, is "new or newly renewed."*

FirstEnergy Answer: FirstEnergy responds that Commission rulings speak for themselves.

As explained in FirstEnergy's Affirmative Defenses: (i) the *2018 Third Report and Order* and its presumptions do not apply because the agreements are not "new or newly renewed;" (ii) the *2011 Pole Attachment Order* applies to all periods at issue in this proceeding; (iii) the *2011 Pole Attachment Order* does not have any "hard cap;" and (iv) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; and (v) Verizon acknowledged after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved."

Verizon 13: *FirstEnergy, however, has not reduced the rates it charges Verizon despite years of negotiations. The Commission's intervention is needed to prevent FirstEnergy's continuing disregard of the Pole Attachment Act and Commission precedent. The Commission should apply its new telecom rate presumption and set the rate for Verizon's use of FirstEnergy's poles using the new telecom rate formula. That is the correct rate under the presumption adopted in the 2018 Third Report and Order, as well as under the 2011 Pole Attachment Order's standard of competitive neutrality. By enforcing Verizon's right to the new telecom rate in this case, the Commission will free at least* [redacted] *in annual pole attachment rent overpayments and ensure "greater rate parity between [I]LECs and their telecommunications competitors," which "can energize and further accelerate broadband deployment."*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 13.

As explained in FirstEnergy's Affirmative Defenses: (i) Verizon does not meet the threshold contract termination condition for Commission modification of these pre-2011

joint use agreements; (ii) the *2018 Third Report and Order* and its presumptions do not apply because the agreements are not "new or newly renewed;" (iii) the *2011 Pole Attachment Order* applies to all periods at issue in this proceeding; (iv) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (v) Verizon acknowledged after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" (vi) even if the current agreement rates were not just and reasonable, Verizon is not similarly situated to other telecommunications providers or cable companies and so is not entitled to the same rate they are charged; (vii) the applicable statute of limitations is two years; (viii) refunds are not appropriate in this proceeding in any event; (ix) Verizon made no mention of Penn Power or Potomac Edison until the undated letter FirstEnergy received from Verizon in December of 2017 at VZ00593-VZ00646; and (x) Verizon has miscalculated the new telecom rate.

FirstEnergy denies it over-collected any rents, since correct rates under the *2011 Pole Attachment Order*'s standard of competitive neutrality are the contract rates. Because Verizon has competitive advantages has over its competitors, it should not be further advantaged at the expense of its competitors with unwarranted reduced rental rates. As for "energizing" and "accelerating" broadband deployment, FirstEnergy respectfully submits that extracting undeserved payments from electric ratepayers to fund Verizon's profits to the detriment of its current and potential new competitors does not further broadband deployment to unserved and underserved areas and is not good public policy.

1. The *2018 Third Report and Order* Does Not Apply

Verizon 14: *Although Verizon is presumptively entitled to the new telecom rate under the Third Report and Order, Verizon has been paying FirstEnergy rates* [redacted] *times as high on average because FirstEnergy refuses to negotiate just and reasonable rates. Penelec and Penn Power charge Verizon per-pole rates that are at least* [redacted] *the per-pole new telecom rates that presumptively apply. Met-Ed reaches the same result by charging Verizon an exceptionally high rate for a subset of joint use poles (sometimes referred to as "deficiency" poles), and by paying nothing for its use of Verizon's poles. For comparative purposes, and as Met-Ed has acknowledged, these contract rates can be readily converted into "reciprocal" per-pole rates that charge both parties the same per-pole rate for use of the other party's poles. When so converted, Met-Ed's rates, like the per-pole rates charged by the other defendants, have averaged more than* [redacted] *times the per-pole new telecom rates required by law since the effective date of the 2011 Pole Attachment Order:*

	Average Per-Pole Contract Rate (2011-2018)[43]	***Average Per-Pole New Telecom Rate (2011-2018)***[44]	***Average Contract Rate Compared to Average New Telecom Rate***
Met-Ed	[redacted]	*$ 9.14*	[redacted]
Penelec	[redacted]	*$ 7.22*	[redacted]

Penn Power	[redacted]	*$ 8.89*	[redacted]
FirstEnergy	[redacted]	***$ 8.42***	[redacted]

FirstEnergy Answer: As explained in FirstEnergy's Affirmative Defenses: (i) Verizon does not meet the threshold contract termination condition for Commission modification of these pre-2011 joint use agreements; (ii) the *2018 Third Report and Order* and its presumptions do not apply because the agreements are not "new or newly renewed;" (iii) the *2011 Pole Attachment Order* applies to all periods at issue in this proceeding; (iv) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (v) Verizon acknowledged after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" (vi) even if the current agreement rates were not just and reasonable, Verizon is not similarly situated to other telecommunications providers or cable companies and so is not entitled to the same rates they are charged; and (vii) Verizon has miscalculated the new telecom rate.

As for converting Met-Ed's rates into "reciprocal" per-pole rates that charge both parties the same per-pole rate for use of the other party's poles, FirstEnergy admits this was FirstEnergy's idea and is useful to compare Met-Ed's deficiency payment to per pole rental rates each party would charge the other. This was the purpose of FirstEnergy's conversion of Met-Ed's rates into "reciprocal" per poles rates.[166] No suggestion was ever made by FirstEnergy to Verizon that this was a settlement proposal "to reduce Verizon's annual net rental obligations by just $465," as Verizon's witness Mr. Mills improperly contends.[167] And since the annual charge is a deficiency payment not a rental rate, it is inaccurate to claim rental rates were paid or not paid by either party on any poles.

FirstEnergy admits that it charged the contract rates specified in Footnotes 40 and 41.

FirstEnergy otherwise denies the allegations in Paragraph 14.

Verizon 15: *The Commission applied its new telecom rate presumption to "newly-negotiated and newly-renewed joint use agreements," including joint use agreements "that are automatically renewed, extended, or placed in evergreen status." Here, the initial term of each joint use agreement has expired, and the agreements continue to govern the parties' joint use relationship in accordance with a provision in each joint use agreement that automatically renews and extends the agreement until it is terminated. The new telecom rate presumption, therefore, applies.*

FirstEnergy Answer: FirstEnergy denies that the Commission has applied its *2018 Third Report and Order* presumptions to any complaint or controversy, as there have been no decisions rendered by the FCC subsequent to the effectiveness of those provisions. Further, as explained in FirstEnergy's Affirmative Defenses: (i) the *2018 Third Report and Order* and its presumptions do not apply because the agreements are

[166] Schafer Decl. at ¶9.
[167] Mills Aff. at ¶34 (VZ00016).

not "newly-negotiated or newly-renewed;" and (ii) Verizon's claim that a provision exists that "automatically renews and extends" is mistaken for several reasons.

FirstEnergy admits the agreement continue to govern the parties' joint use relationship.

FirstEnergy otherwise denies the allegations in Paragraph 15.

Verizon 16: *In particular, each joint use agreement states that, after an initial term, the agreement "shall continue in force thereafter until terminated by either Party at any time" upon advance written notice. "Continue" is a synonym of "extend," meaning "[t]o carry further in time, space or development: extend." The agreements, as a result, "automatically … extended" after the Third Report and Order took effect. They also "automatically renewed" as their terms and conditions have "repeat[ed] so as to reaffirm" since the effective date. Under Pennsylvania law, "a contractual provision pursuant to which a contract for a term is renewed automatically for a further term unless, before a specified date, one party gives notice of an intent to terminate" is "a so-called 'automatic renewal provision.'" The joint use agreements are thus newly renewed and entitled to the Commission's new telecom rate presumption.*

FirstEnergy Answer: FirstEnergy admits that the joint use agreements state that, after the initial term, the agreements "shall continue in force thereafter until terminated by either party at any time" upon advance written notice.

As explained in FirstEnergy's Affirmative Defenses: (i) the *2018 Third Report and Order* and its presumptions do not apply because the agreements are not "newly-negotiated or newly-renewed;" (ii) Verizon's claims that the agreements "automatically … extended" or "automatically renewed" are mistaken for several reasons; and (iii) Verizon misconstrued the caselaw it cited, which does not apply to these agreements.

FirstEnergy otherwise denies the allegations in Paragraph 16.

Verizon 17: *FirstEnergy, therefore, must charge Verizon the new telecom rate unless FirstEnergy can rebut the Commission's newly enacted presumption with "clear and convincing evidence that [Verizon] receives net benefits under its pole attachment agreement[s] with [FirstEnergy] that materially advantage [Verizon] over other telecommunications attachers." FirstEnergy cannot meet this standard, and it has not tried. Instead, FirstEnergy said—more than six years into rate discussions—that it was "willing to discuss" competitive advantages it thinks it provides Verizon. The clear and convincing evidence standard requires much more.*

FirstEnergy Answer: As explained in FirstEnergy's Affirmative Defenses: (i) the *2018 Third Report and Order* and its presumptions and "clear and convincing" standard do not apply because the agreements are not "newly-negotiated or newly-renewed;" (ii) the *2011 Pole Attachment Order* applies to all periods at issue in this proceeding; (iii) the *2011 Pole Attachment Order* places the burden on Verizon, not FirstEnergy, to demonstrate the value of the benefits Verizon receives compared to its competitors; (iv) Verizon did not even attempt to meet that burden until it filed its Complaint; (v) as explained in this Answer, Verizon does in fact receive considerable benefits over its competitors that

materially advantage Verizon; and (vi) Verizon made no mention of Penn Power or Potomac Edison until the undated letter FirstEnergy received from Verizon in December of 2017 at VZ00593-VZ00646.

FirstEnergy otherwise denies the allegations in Paragraph 17.

Verizon 18: *But even if FirstEnergy could meet its burden, FirstEnergy still could not lawfully charge the rates it has been collecting from Verizon. The pre-existing telecom rate is "the maximum rate" an electric utility may charge if it is able to rebut the new telecom rate presumption. FirstEnergy has instead charged Verizon rates since the effective date of the 2011 Pole Attachment Order that have been more than* [redacted] *the "hard cap" the pre-existing telecom formula sets:*

	Average Per-Pole Contract Rate (2011-2018)[58]	***Average Per-Pole Pre-Existing Telecom Rate (2011-2018)***[59]	***Average Contract Rate Compared to Average Pre-Existing Telecom Rate***
Met-Ed	[redacted]	*$ 13.86*	[redacted]
Penelec	[redacted]	*$ 10.94*	[redacted]
Penn Power	[redacted]	*$ 13.46*	[redacted]
FirstEnergy	[redacted]	***$ 12.75***	[redacted]

FirstEnergy Answer: As explained in FirstEnergy's Affirmative Defenses: (i) Verizon does not meet the threshold contract termination condition for Commission modification of these pre-2011 joint use agreements; (ii) the *2018 Third Report and Order* and its presumptions, including the "hard cap" pre-existing telecom rate do not apply because the agreements are not "new or newly renewed;" (iii) the *2011 Pole Attachment Order* applies to all periods at issue in this proceeding; (iv) the *2011 Pole Attachment Order* does not have a "hard cap;" (v) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (vi) Verizon acknowledged after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" and (vii) Verizon has miscalculated the pre-existing telecom rate.

FirstEnergy otherwise denies the allegations in Paragraph 18.

Verizon 19: *There is, therefore, no lawful basis for the rates that FirstEnergy charges Verizon—rates that have been, on average, more than* [redacted] *per pole higher than the presumptive new telecom rate and almost* [redacted] *per pole higher than the maximum rate FirstEnergy could charge even if it could rebut the presumption. The Commission should enforce its new telecom rate presumption to achieve the "rate parity between incumbent LECs and their telecommunications competitors" that "can energize and further accelerate broadband deployment."*

FirstEnergy Answer: As explained in FirstEnergy's Affirmative Defenses: (i) Verizon does not meet the threshold contract termination condition for Commission modification of these pre-2011 joint use agreements; (ii) the *2018 Third Report and Order* and its presumptions, including the "hard cap" pre-existing telecom rate do not apply because the agreements are not "new or newly renewed;" (iii) the *2011 Pole Attachment Order* applies to all periods at issue in this proceeding; (iv) the *2011 Pole Attachment Order* does not have a "hard cap;" (v) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (vi) Verizon acknowledged after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" and (vii) Verizon has miscalculated both the new telecom rate and the pre-existing telecom rate.

FirstEnergy denies it over-collected any rents. Verizon has competitive advantages over its competitors which FirstEnergy demonstrates in this Answer, and Verizon should not be further subsidized with lower rental rates at the expense of its competitors. As for "energizing" and "accelerating" broadband deployment, FirstEnergy respectfully submits that extracting undeserved payments from electric ratepayers to fund Verizon's profits to the detriment of its current and potential new competitors does not further broadband deployment to unserved and underserved areas and is not good public policy.

FirstEnergy otherwise denies the allegations in Paragraph 19.

2. Verizon Is Also Not Entitled To The New Telecom Rate Using *2011 Pole Attachment Order* Standards

Verizon 20: *Verizon is entitled to new telecom rates under the presumption adopted in the 2018 Third Report and Order—but it has also been entitled to those same new telecom rates for over seven years under the standard the Commission adopted in the 2011 Pole Attachment Order. This case presents the characteristics that justified rate relief as of the Pole Attachment Order's July 12, 2011 effective date: (a) the rates are unjust and unreasonable, (b) FirstEnergy has long had a three-to-one pole ownership advantage, (c) Verizon genuinely lacks the ability to terminate the rates and obtain new just and reasonable rates through negotiations, and (d) the joint use agreements do not provide Verizon a net material advantage over its competitors that supports a rate higher than the new telecom rate.*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 20.

As explained in FirstEnergy's Affirmative Defenses: (i) Verizon does not meet the threshold contract termination condition for Commission modification of these pre-2011 joint use agreements; (ii) the *2018 Third Report and Order* and its presumptions do not apply because the agreements are not "new or newly renewed;" (iii) the *2011 Pole Attachment Order* applies to all periods at issue in this proceeding; (iv) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (v) under the facts of this case, greater pole ownership is not an advantage; (vi) Verizon acknowledged after negotiations were

completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" (vii) even if the current agreement rates were not just and reasonable, Verizon is not similarly situated to other telecommunications providers or cable companies and so is not entitled to the same rate they are charged; (viii) Verizon does not lack the ability to terminate the agreements; (ix) the applicable statute of limitations is two years; and (x) refunds are not appropriate in this proceeding in any event.

a) FirstEnergy's Rates Already Are Just and Reasonable

Verizon 21: *The rates FirstEnergy charges Verizon violate the principle of "competitive neutrality" the Commission adopted in the 2011 Pole Attachment Order, under which the "just and reasonable" rate for an ILEC is "the same rate" as the new telecom or cable rate that applies to a comparable cable or telecommunications provider. Verizon has paid FirstEnergy more than* [redacted] *the new telecom rate and more than* [redacted] *the pre-existing telecom rate, which the Pole Attachment Order set as the upper-bound "reference point" on the rate that could be charged an ILEC that has a net material advantage over its competitors. FirstEnergy's rates are thus "unjust and unreasonable" under the standard adopted in 2011.*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 21.

The rates FirstEnergy charges Verizon do not violate the principle of "competitive neutrality" because, as explained in FirstEnergy's Affirmative Defenses: (i) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (ii) Verizon acknowledged after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" (iii) even if the current agreement rates were not just and reasonable, Verizon is not similarly situated to other telecommunications providers or cable companies and so is not entitled to the same rate they are charged; (iv) as Verizon should know from the *Verizon v. FPL* Order, the pre-existing telecom rate is a "reference point," not an upper-bound rate; and (v) Verizon has miscalculated both the new telecom rate and the pre-existing telecom rate.

Verizon 22: *FirstEnergy charges Verizon rates that are also unjust and unreasonable as compared to the rates FirstEnergy pays for use of Verizon's poles. The Commission has found rate relief warranted where there was a "significant disparity in the per-pole rates charged to each party" because it "anticipat[ed] that incumbent LECs and electric utilities would charge each other roughly the same proportionate rate given the parties' relative usage of the pole." Here, FirstEnergy also "uses significantly more space on each joint use pole than Verizon," but pays rental rates that do not reflect its greater space requirements.*

FirstEnergy Answer: FirstEnergy responds to Paragraph 22 in part by stating that Commission rulings speak for themselves, but that the limited discussion in the *2011 Pole Attachment Order* regarding what rate ILECs may charge electric utilities to attach to ILEC poles is confusing. As explained in FirstEnergy's Affirmative Defenses: (i) the limited discussion in the *2011 Pole Attachment Order* regarding what rate ILECs may

charge electric utilities is subject to multiple interpretations; (ii) FirstEnergy, as a member of the Coalition of Concerned Utilities, specifically petitioned the Commission to reconsider both the *2011 Pole Attachment Order* and the *2018 Third Report and Order* regarding the insufficient clarity for determining what rate an ILEC may charge to an electric utility for joint use attachments; and (iii) FirstEnergy specifically requests a ruling from the Commission in this proceeding regarding the just and reasonable rates that Verizon may charge FirstEnergy to attach to Verizon's poles, because otherwise Verizon will have an unfair advantage.

FirstEnergy admits that FirstEnergy uses more space on Verizon's poles than Verizon uses on FirstEnergy's poles, but as explained in FirstEnergy's Affirmative Defenses: (i) FirstEnergy's contract rates are just and reasonable since neither Verizon nor FirstEnergy has negotiating leverage over the other; and (ii) differences in rental rates calculated pursuant to pole attachment rental rate formulas are also largely attributable to the differences in the significantly lower costs that Verizon incurs to own and maintain Verizon's pole plant compared to the significantly higher costs that FirstEnergy incurs to own and maintain FirstEnergy's pole plant.

As reflected in FirstEnergy's rental rate calculations attached hereto at Attachment G: (i) the pre-existing telecom rate calculations for FirstEnergy attachments to Verizon's poles is in line with the existing contract rates; (ii) the pre-existing telecom rate calculations for Verizon's attachments to FirstEnergy's poles is in line with the existing contract rates; and (iii) the pre-existing telecom rate calculations for FirstEnergy attachments to Verizon's poles is in line with the pre-existing telecom rate calculations for Verizon's attachments to FirstEnergy's poles.

FirstEnergy otherwise denies the allegations in Paragraph 22.

Verizon 23: *Worse, Met-Ed has required Verizon to pay rent under a rate provision that does not charge Met-Ed anything for use of Verizon's poles. Verizon has paid Met-Ed up to* [redacted] *per pole on the difference between the poles Verizon owns and the poles Verizon would own if it owned 45% of the joint use poles. Met-Ed imposed this complex rate methodology in 2009 when it owned 81% of the joint use poles. Verizon then for years tried unsuccessfully to purchase some of those poles under its contractual "right to purchase from time to time from the other Party poles…in an attempt to balance ownership of jointly used poles." Met-Ed refused to sell.*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 23.

Met-Ed and Verizon entered into agreements that calculate a pole deficiency payment, not an annual rental rate. Since the charge is a deficiency payment not a rental rate, it is inaccurate to claim rents were paid or not paid by either party on any poles.

Instead, to make a rental rate comparison, it is appropriate to convert Met-Ed's rates into "reciprocal" per-pole rates that charge both parties the same per-pole rate for use of the other party's poles, as Verizon explained in Paragraph 14. FirstEnergy admits this was FirstEnergy's idea and is useful to compare Met-Ed's deficiency payment to per pole

rental rates each party would charge the other. This was the purpose of FirstEnergy's conversion of Met-Ed's rates into "reciprocal" per poles rates.[168] No suggestion was ever made by FirstEnergy to Verizon that this was a settlement proposal "to reduce Verizon's annual net rental obligations by just $465," as Verizon's witness Mr. Mills improperly contends.[169]

FirstEnergy denies that there is anything complex or unusual about deficiency payment provisions in joint use agreements.

FirstEnergy denies that Met-Ed "imposed" anything on Verizon. As explained in FirstEnergy's Affirmative Defenses: (i) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (ii) under the facts of this case, greater pole ownership is not an advantage; and (iii) Verizon acknowledged after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved."

FirstEnergy denies that Verizon tried in good faith to purchase poles from Met-Ed. Instead, as the January 25, 2013 letter from FirstEnergy's counsel to Verizon's counsel explains, "Despite the parties' ongoing discussions and repeated requests from Met-Ed, Verizon to date has provided no evidence that it has established any wood pole inspection and maintenance ("I&M") program, or that it is capable of setting taller replacement poles or responding in a timely fashion to down poles in an emergency." The letter also noted the Pennsylvania Public Utility Commission would require such commitments by Verizon before approving any sale.[170] Verizon's failure to make any such commitments means that its offer to purchase poles from Met-Ed was never a bona fide offer. The letter also notes that two of the five agreements made the pole sale optional and the other three permitted FirstEnergy's refusal to sell for "good cause," which was certainly the case when the requested commitments were not forthcoming.[171]

Verizon 24: *The unreasonableness of the Met-Ed rate provision is particularly apparent when Verizon's annual rental payment is converted into a per-pole rate for each Met-Ed pole. For example, Verizon paid Met-Ed over* [redacted] *in pole attachment rent for the 2018 rental year. Verizon would have paid the same amount if Verizon paid* [redacted] *per pole for each Met-Ed pole to which it was attached and Met-Ed paid nothing for each Verizon pole to which it was attached. Under this scenario, Met-Ed paid nothing for use of at least 10.5 feet of space on*

[168] Schafer Decl. at ¶9.
[169] Mills Aff. at ¶34 (VZ00016).
[170] *See* Letter from Thomas B. Magee, Counsel to FirstEnergy, to William J. Balcerski, Assistant General Counsel, Verizon (Jan. 25, 2013) attached to *Complaint* at Ex. 20 (VZ00560-VZ00562). The PaPUC is well aware of potential problems with Verizon's pole plant, since the Communications Workers of America filed a petition in October 2015 asking the PaPUC to investigate the safety and condition of Verizon's pole plant in Pennsylvania, providing photographs and explanations of the poor quality of that plant. *See Petition of Communications Workers of American for a Public, On-the-Record Commission Investigation of the Safety, Adequacy, and Reasonableness of Service Provided by Verizon Pennsylvania LLC*, P-2015-2509336, attached hereto at Attach. M.
[171] Letter from Thomas B. Magee, Counsel to FirstEnergy, to William J. Balcerski, Assistant General Counsel, Verizon at 2 (Jan. 25, 2013) attached to *Complaint* at Ex. 20 (VZ00561).

Verizon's poles—but charged Verizon more than [redacted] *times the applicable $12.20 per-pole new telecom rate for use of one foot of space on Met-Ed's poles.*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 24.

Met-Ed and Verizon entered into agreements that calculate a pole deficiency payment, not an annual rental rate. Since the charge is a deficiency payment not a rental rate, it is inaccurate to claim rents were paid or not paid by either party on any poles.

Instead, to make a rental rate comparison, it is appropriate to convert Met-Ed's rates into "reciprocal" per-pole rates that charge both parties the same per-pole rate for use of the other party's poles, as Verizon explained in Paragraph 14. FirstEnergy admits this was FirstEnergy's idea and is useful to compare Met-Ed's deficiency payment to per pole rental rates each party would charge the other. This was the purpose of FirstEnergy's conversion of Met-Ed's rates into "reciprocal" per poles rates.[172]

Met-Ed denies that contorting the deficiency payment to result in Met-Ed paying no rents to attach to Verizon poles provides any meaningful comparison. Such a contortion is no more useful than imagining how rental rates paid by both parties in some other joint use arrangement would change if one party paid nothing to attach to the other party's poles.

Finally, as explained in FirstEnergy's Affirmative Defenses: (i) Verizon does not meet the threshold contract termination condition for Commission modification of these pre-2011 joint use agreements; (ii) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (iii) Verizon acknowledged after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" (iv) the limited discussion in the *2011 Pole Attachment Order* regarding what rate ILECs may charge electric utilities to attach to ILEC poles is subject to multiple interpretations; and (v) FirstEnergy specifically requests a ruling from the Commission in this proceeding regarding the just and reasonable rates that Verizon may charge FirstEnergy to attach to Verizon's poles.

Verizon 25: *Penelec similarly charges Verizon higher pole attachment rates than Penelec is willing to pay Verizon for use of more space on Verizon's poles. For the 2018 rental year, for example, Penelec charged Verizon* [redacted] *per pole, but paid* [redacted] *per pole to use Verizon's poles. These rates are upside-down under the Commission's space presumptions, which assume Penelec requires 10.5 feet of space on a pole and that Verizon requires one foot of space. Requiring Verizon to pay a higher rate than Penelec pays is also incompatible with the space allocations in Verizon's joint use agreements with Penelec, which assign Penelec up to 9.66 feet of space on a joint use pole and designate three feet of space as "telephone space." Penelec uses more space than it is allocated, and Verizon uses far less space than it is allocated, sharing the "telephone space" with its competitors who pay additional rent to Penelec. But the*

[172] Schafer Decl. at ¶9.

rates Penelec charges are unreasonable even under these unrealistic space allocations. Verizon is allocated less than one-third the space as Penelec but pays almost [redacted] *more per pole.*

FirstEnergy Answer: As explained in FirstEnergy's Affirmative Defenses: (i) under the facts in this case, FirstEnergy has no bargaining leverage over Verizon, and so Penelec cannot decide on its own whether or not it is "willing" to pay Verizon; (ii) FCC rules contain no space presumptions at all that apply to electric utility attachments or to ILEC attachments, but instead the Commission's space presumptions apply only to cable companies and CLECs; (iii) the limited discussion in the *2011 Pole Attachment Order* regarding what rate ILECs may charge electric utilities to attach to ILEC poles is subject to multiple interpretations; (iv) FirstEnergy specifically requests a ruling from the Commission in this proceeding regarding the just and reasonable rates that Verizon may charge FirstEnergy to attach to Verizon's poles.

FirstEnergy admits that Penelec uses more space on Verizon's poles than Verizon uses on Penelec's poles, but as further explained in FirstEnergy's Affirmative Defenses: (i) FirstEnergy's contract rates are just and reasonable since under the facts in this case, neither Verizon nor FirstEnergy has negotiating leverage over the other; and (ii) differences in rental rates calculated pursuant to pole attachment rental rate formulas are also largely attributable to the differences in the significantly lower costs that Verizon incurs to own and maintain Verizon's pole plant compared to the significantly higher costs that FirstEnergy incurs to own and maintain FirstEnergy's pole plant.

As reflected in FirstEnergy's rental rate calculations attached hereto at Attachment G: (i) the pre-existing telecom rate calculations for FirstEnergy attachments to Verizon's poles is in line with the existing contract rates; (ii) the pre-existing telecom rate calculations for Verizon's attachments to FirstEnergy's poles is in line with the existing contract rates; and (iii) the pre-existing telecom rate calculations for FirstEnergy attachments to Verizon's poles is in line with the pre-existing telecom rate calculations for Verizon's attachments to FirstEnergy's poles.

FirstEnergy otherwise denies the allegations in Paragraph 25.

Verizon 26: *Penn Power also imposes rates that do not reflect its greater space needs. For the 2018 rental year, Penn Power charged Verizon* [redacted] *per pole but paid* [redacted] *per pole for use of Verizon's poles. Penn Power thus paid* [redacted] *times the rate Verizon paid—even though it is allocated more than 2.5 times the space that is allocated to Verizon on a 40-foot pole under the joint use agreements. And the real-world disparity is far worse, as the agreement allocates less space to Penn Power than it requires and uses, while Verizon is allocated more space that it uses or desires, including space that it shares with its competitors.*

FirstEnergy Answer: As explained in FirstEnergy's Affirmative Defenses: (i) under the facts in this case, FirstEnergy has no bargaining leverage over Verizon, and so Penn Power cannot "impose" anything on Verizon; (ii) the limited discussion in the *2011 Pole Attachment Order* regarding what rate ILECs may charge electric utilities to attach to

ILEC poles is subject to multiple interpretations; (iv) FirstEnergy specifically requests a ruling from the Commission in this proceeding regarding the just and reasonable rates that Verizon may charge FirstEnergy to attach to Verizon's poles.

FirstEnergy admits that Penn Power uses more space on Verizon's poles than Verizon uses on Penn Power's poles, but as further explained in FirstEnergy's Affirmative Defenses: (i) FirstEnergy's contract rates are just and reasonable since under the facts in this case, neither Verizon nor FirstEnergy has negotiating leverage over the other; and (ii) differences in rental rates calculated pursuant to pole attachment rental rate formulas are also largely attributable to the differences in the significantly lower costs that Verizon incurs to own and maintain Verizon's pole plant compared to the significantly higher costs that FirstEnergy incurs to own and maintain FirstEnergy's pole plant.

As reflected in FirstEnergy's rental rate calculations attached hereto at Attachment G: (i) the pre-existing telecom rate calculations for FirstEnergy attachments to Verizon's poles is in line with the existing contract rates; (ii) the pre-existing telecom rate calculations for Verizon's attachments to FirstEnergy's poles is in line with the existing contract rates; and (iii) the pre-existing telecom rate calculations for FirstEnergy attachments to Verizon's poles is in line with the pre-existing telecom rate calculations for Verizon's attachments to FirstEnergy's poles.

FirstEnergy otherwise denies the allegations in Paragraph 26.

b) Under This Set of Facts, Neither Party Has Bargaining Leverage Over The Other

Verizon 27: *At all relevant times, FirstEnergy has owned most of the joint use poles, an advantage that FirstEnergy leveraged to obtain the rates it charges and to continue charging them. Most recently, FirstEnergy estimated that it owns 73% of the poles that the parties share in Pennsylvania. This nearly three-to-one pole ownership advantage gives FirstEnergy greater bargaining power than justified rate relief in the Dominion Order, where the power company owned 65% of the shared utility poles for a "nearly two-to-one pole ownership advantage." It also gives FirstEnergy greater bargaining power than supported the Commission's conclusion in the 2011 Pole Attachment Order that ILECs "may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations" because "electric utilities appear to own approximately 65-70 percent of poles."*

FirstEnergy Answer: FirstEnergy denies that it has any advantage, or that it can "leverage" anything to set rates. As explained in FirstEnergy's Affirmative Defenses: (i) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (ii) under the facts of this case, greater pole ownership is not an advantage; and (iii) Verizon acknowledged after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved."

In addition, FirstEnergy responds that FCC rulings speak for themselves.

FirstEnergy otherwise denies the allegations in Paragraph 27.

Verizon 28: *FirstEnergy has always been able to leverage its pole ownership advantage at the operating company level as well. During all relevant periods—in 2009 when the current rate provision was adopted and throughout the parties' post-2011 rate negotiations—Met-Ed owned 81% of the poles that it shares with Verizon. Penelec has benefited from a two-to-one pole ownership at all relevant times; it owned 66% of the joint use poles when the rate provision was adopted in 2009 and now owns 67%. Penn Power has owned 78% of the poles that it shares with Verizon, reflecting nearly a four-to-one pole ownership advantage that Penn Power continues to hold today.*

FirstEnergy Answer: FirstEnergy denies that it has any advantage, or that it can "leverage" anything to set rates. As explained in FirstEnergy's Affirmative Defenses: (i) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (ii) under the facts of this case, greater pole ownership is not an advantage; and (iii) Verizon acknowledged after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved."

FirstEnergy otherwise denies the allegations in Paragraph 28.

c) Verizon Does Not Lack the Ability to Terminate FirstEnergy's Rates and Obtain Just and Reasonable Rates Through Negotiations

Verizon 29: *Rate relief is also justified under the standard adopted in the 2011 Pole Attachment Order because Verizon "genuinely lacks the ability to terminate" the current rates on account of "evergreen" clauses that require payment of the contract rates after the joint use agreements are terminated. The Enforcement Bureau previously recognized Verizon "genuinely lacks the ability to terminate an existing agreement" where, as here, the electric utility can "force Verizon to pay the relatively high Agreement Rates for as long as its attachments remain on [the utility's] poles pursuant to the evergreen clause."*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 29.

As explained in FirstEnergy's Affirmative Defenses: (i) ILECs seeking new rates, terms and conditions of joint use must first terminate their existing agreements before seeking relief in the form of a pole attachment complaint at the Commission; (ii) Verizon failed to terminate its joint use agreements with FirstEnergy; and (iii) FirstEnergy does not have bargaining leverage over Verizon and so cannot "force" Verizon to do anything.

FirstEnergy denies that Verizon could not terminate the existing joint use agreements. As explained in FirstEnergy's Affirmative Defenses: (i) FirstEnergy offered many times to terminate the existing rate and replace it with a new rate that covered all existing attachments, including those that would be covered by an evergreen provision; (ii) FirstEnergy offered many times to terminate the existing agreement and replace it with a

new agreement that covered all existing attachments, including those that would be covered by an evergreen provision; (iii) FirstEnergy's offers to include all existing poles that would be covered by an evergreen provision shows the evergreen provisions are not an obstacle to Verizon obtaining new rates or a new agreement; and (iv) the *Verizon v. FPL* proceeding that Verizon cites is different, since the utility refused to apply the new rates or agreement to poles already in evergreen status.

Verizon 30: *Verizon also genuinely lacks the ability to renegotiate the rental rate provisions to obtain just and reasonable rates. Verizon has sought rate relief from FirstEnergy for years, focusing first on the rates imposed by Met-Ed and later expanding the discussions to include Penelec, Penn Power, and their Maryland affiliate, The Potomac Edison Company. Because FirstEnergy has refused to agree to just and reasonable rates, FirstEnergy continues to overcharge Verizon by more than* [redacted]*, on average, each year in Pennsylvania.*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 30.

FirstEnergy denies the allegation that Verizon cannot renegotiate the rental rate provision to obtain just and reasonable rates. As explained in FirstEnergy's Affirmative Defenses: (i) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (ii) Verizon acknowledged right after negotiations for the existing Met-Ed and Penelec rates were complete that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" (iii) Verizon made no mention of Penn Power or Potomac Edison until the undated letter FirstEnergy received from Verizon in December of 2017 at VZ00593-VZ00646; and (iv) Verizon in bad faith consistently demanded the new telecom rate and no other, mistakenly posturing that it was the only possible just and reasonable rate.

FirstEnergy denies it overcharged Verizon anything. As explained in FirstEnergy's Affirmative Defenses: (i) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (ii) Verizon acknowledged right after negotiations for the existing Met-Ed and Penelec rates were complete that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" (iii) even if the current agreement rates were not just and reasonable, Verizon is not similarly situated to other telecommunications providers or cable companies and so is not entitled to the same rate they are charged; (iv) the applicable statute of limitations is two years; (v) refunds are not appropriate in this proceeding in any event; and (vi) Verizon has miscalculated the new telecom rate.

Verizon 31: *Verizon's current effort to reduce its annual rental obligation began with a pole purchase initiative in 2009, two years before the Commission issued the Pole Attachment Order. Three of Verizon's agreements with Met-Ed include a "right to purchase" poles from Met-Ed, which Verizon sought to exercise in a way that would balance the parties' pole ownership numbers. Met-Ed refused to sell any poles. As a result, after the Pole Attachment Order took effect, Verizon paired its pole purchase request with a request for "just and reasonable" pole attachment rates.*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 31.

FirstEnergy denies that Verizon tried in good faith to purchase poles from Met-Ed. Instead, as the January 25, 2013 letter from FirstEnergy's counsel to Verizon's counsel explains, "Despite the parties' ongoing discussions and repeated requests from Met-Ed, Verizon to date has provided no evidence that it has established any wood pole inspection and maintenance ("I&M") program, or that it is capable of setting taller replacement poles or responding in a timely fashion to down poles in an emergency." The letter also noted the Pennsylvania Public Utility Commission would require such commitments by Verizon before approving any sale.[173] Verizon's failure to make any such commitments means that its offer to purchase poles from Met-Ed was never a bona fide offer. The letter also notes that two of the agreements made the pole sale optional and the other three agreements permitted FirstEnergy's refusal to sell for "good cause," which was certainly the case.[174]

FirstEnergy denies that Verizon is not already receiving just and reasonable rates. As explained in FirstEnergy's Affirmative Defenses: (i) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (ii) under the facts of this case, greater pole ownership is not an advantage; and (iii) Verizon acknowledged right after negotiations for new Met-Ed and Penelec rates that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved."

Verizon 32: *Since early 2012, Verizon has tried unsuccessfully to negotiate just and reasonable rates with FirstEnergy through face-to-face meetings, telephone conferences, and correspondence. FirstEnergy has claimed that Verizon is not eligible for rate relief because the joint use agreements pre-date the 2011 Pole Attachment Order—an argument the Commission has rejected. It has stalled rate discussions by insisting the companies first discuss new operational terms. And it has made rate offers that failed to change Verizon's annual net rental payment in any material respect. For example, five years into the negotiations, FirstEnergy made an offer that would have reduced Verizon's nearly* [redacted] *annual net rental obligation to Met-Ed by just $465. Its next offer was for about a 1.5% discount off that* [redacted] *annual net rental amount, so that Verizon would pay about* [redacted] *in net rent to Met-Ed. Properly calculated new telecom rental rates that year would have resulted in a net rental payment to Met-Ed of about* [redacted].

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 32.

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[173] *See* Letter from Thomas B. Magee, Counsel to FirstEnergy, to William J. Balcerski, Assistant General Counsel, Verizon (Jan. 25, 2013) attached to *Complaint* at Ex. 20 (VZ00560-VZ00562). The PaPUC is well aware of potential problems with Verizon's pole plant, since the Communications Workers of America filed a petition in October 2015 asking the PaPUC to investigate the safety and condition of Verizon's pole plant in Pennsylvania, providing photographs and explanations of the poor quality of that plant. *See Petition of Communications Workers of American for a Public, On-the-Record Commission Investigation of the Safety, Adequacy, and Reasonableness of Service Provided by Verizon Pennsylvania LLC*, P-2015-2509336, attached hereto at Attach. M.

[174] Letter from Thomas B. Magee, Counsel to FirstEnergy, to William J. Balcerski, Assistant General Counsel, Verizon at 2 (Jan. 25, 2013) attached to *Complaint* at Ex. 20 (VZ00561).

FirstEnergy denies that Verizon tried to negotiate just and reasonable rates. As explained in FirstEnergy's Affirmative Defenses: (i) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (ii) Verizon acknowledged right after negotiations for new rates that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" (iii) Verizon in bad faith consistently demanded the new telecom rate and no other, mistakenly posturing that it was the only possible just and reasonable rate; (iv) FirstEnergy did not claim that Verizon is not eligible for rate relief for joint use agreements which predate the *2011 Pole Attachment Order*, but instead argued that such pre-2011 Order agreements needed to be terminated before relief can be requested in a complaint proceeding;[175] and (v) Verizon made no mention of Penn Power or Potomac Edison until the undated letter FirstEnergy received from Verizon in December of 2017 at VZ00593-VZ00646.

FirstEnergy denies it ever made an offer to reduce Verizon's payments to Met-Ed by just $465. Instead, to make a rental rate comparison, it is appropriate to convert Met-Ed's rates into "reciprocal" per-pole rates that charge both parties the same per-pole rate for use of the other party's poles, as Verizon explained in Paragraph 14. This was FirstEnergy's idea and is useful to compare Met-Ed's deficiency payment to per pole rental rates each party would charge the other. This was the sole purpose of FirstEnergy's conversion of Met-Ed's rates into "reciprocal" per poles rates and no suggestion was ever made by FirstEnergy to Verizon that this was a settlement proposal.

FirstEnergy denies that any rate proposal it made to Verizon was unreasonable or that it stalled negotiations. And as explained in FirstEnergy's Affirmative Defenses, Verizon has miscalculated both the new telecom rate and the pre-existing telecom rate.

Verizon 33: *FirstEnergy's offers did not materially improve. In May 2018, FirstEnergy made an offer that paired lower rates for FirstEnergy to pay Verizon ([redacted] per pole) with higher rates for Verizon to pay First Energy ([redacted] per pole to Met-Ed, [redacted] per pole to Penelec, and [redacted] per pole to Penn Power) even though FirstEnergy uses much more space on a pole, and the Commission "anticipat[ed] that incumbent LECs and electric utilities would charge each other roughly the same proportionate rate given the parties' relative usage of the pole." The offer also limited rate relief to just two of the four FirstEnergy companies, as it would have increased Verizon's annual rental obligation to Penn Power by more than [redacted] and to Maryland affiliate Potomac Edison, by more than [redacted].*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 33.

[175] The Commission noted in the *Verizon v. FPL* Order that the agreements in question had been terminated and placed into evergreen status; As for the *Verizon v. Dominion Order*, the Commission noted that execution of the agreements at issue post-dated the *2011 Pole Attachment Order*. *See Verizon v. Dominion Order* at 3756 (¶12).

FirstEnergy denies that any rate proposal it made to Verizon was unreasonable. As explained in FirstEnergy's Affirmative Defenses: (i) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (ii) under the facts of this case, greater pole ownership is not an advantage; (iii) Verizon acknowledged right after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" (iv) even if the current agreement rates were not just and reasonable, Verizon is not similarly situated to other telecommunications providers or cable companies and so is not entitled to the same rate they are charged; (v) it was Verizon who demanded that new rates be based upon rate formulas; and (vi) Verizon has miscalculated both the new telecom rate and the pre-existing telecom rate.

FirstEnergy admits that FirstEnergy uses more space on Verizon's poles than Verizon uses on FirstEnergy's poles, but as further explained in FirstEnergy's Affirmative Defenses, differences in rental rates calculated pursuant to pole attachment rental rate formulas are also largely attributable to the differences in the significantly lower costs that Verizon incurs to own and maintain Verizon's pole plant compared to the significantly higher costs that FirstEnergy incurs to own and maintain FirstEnergy's pole plant.

As reflected in FirstEnergy's rental rate calculations attached hereto at Attachment G: (i) the pre-existing telecom rate calculations for FirstEnergy attachments to Verizon's poles is in line with the existing contract rates; (ii) the pre-existing telecom rate calculations for Verizon's attachments to FirstEnergy's poles is in line with the existing contract rates; and (iii) the pre-existing telecom rate calculations for FirstEnergy attachments to Verizon's poles is in line with the pre-existing telecom rate calculations for Verizon's attachments to FirstEnergy's poles.

Verizon 34: *FirstEnergy also avoided discussion of alleged competitive benefits, finally providing an unsupported and conclusory list of purported benefits in June 2018. FirstEnergy did not distinguish among FirstEnergy operating companies and has still not provided an executed license agreement to support its claim, even though Verizon has been asking for copies of license agreements since 2012. FirstEnergy instead relied on an unsigned "template" agreement* [redacted] *and said that "modifications" to the draft agreement "are negotiated" with Verizon's competitors. Verizon has access to two license agreements that FirstEnergy entered with Verizon's affiliates, and each bears little resemblance to the draft agreement FirstEnergy produced. But even a review of the draft license agreement, which at best reflects FirstEnergy's starting point during negotiations, confirmed the joint use agreements do not provide Verizon a net material advantage over its competitors.*

FirstEnergy Answer: FirstEnergy admits that FirstEnergy provided Verizon a list of benefits in June 2018, but notes that it was Verizon's burden to show that none of these advantages provided Verizon with material benefits over its competitors in an amount greater than the rate differential. As explained in FirstEnergy's Affirmative Defenses: (i) FirstEnergy provided Verizon a list of benefits to Verizon in order to help Verizon recognize these advantages and finally start meaningfully negotiating with FirstEnergy;

(ii) it was Verizon's burden, not FirstEnergy's burden, to explain how these alleged advantages did not justify a higher rate; (iii) Verizon did not even attempt to meet that burden; and (iv) Verizon unfortunately opted not to negotiate meaningfully with FirstEnergy.

FirstEnergy denies that its draft license agreement, which FirstEnergy uses to negotiate new agreements with Verizon's competitors, does not provide Verizon with advantages over its competitors. As explained elsewhere in this Answer, Verizon's joint use agreement provides benefits to Verizon over its competitors that advantage Verizon considerably.

FirstEnergy has agreed to provide Verizon's counsel copies of all FirstEnergy agreements with its CLEC and cable company attachers, but only after the parties enter into a Protective Agreement which shields competitively sensitive information from Verizon personnel. FirstEnergy did not provide copies earlier because Verizon has no right to see competitively sensitive information about its competitors, and because it timely complied with Verizon's in-the-alternative request to provide its CLEC agreement template.[176]

FirstEnergy otherwise denies the allegations in Paragraph 34.

Verizon 35: *In November 2017, Verizon tried to change the dynamic by engaging executives at both companies in the discussions. FirstEnergy first asked "whether [Verizon] insist[s] on proceeding to executive level discussions," but ultimately agreed to schedule the meeting after Verizon reiterated its request and provided a copy of its new telecom rate calculations.*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 35.

The letter from FirstEnergy which Verizon referenced and attached at VZ00590-VZ00591 expressed surprise that Verizon would ask for executive-level meeting, mentioned rental rate negotiations had not run their course, expressed a willingness to set up such a meeting, and proposed further negotiations in advance of such a meeting. Verizon's response, which Verizon referenced and attached at VZ00593-VZ00594, flatly rejected that proposal.

Verizon 36: *The parties' executives met on April 11, 2018 and continued discussions thereafter. FirstEnergy continued to claim the contract rates are "just and reasonable" and that Verizon cannot be eligible for a new telecom rate unless it "transition[s] … out of the pole- owning business in FirstEnergy service territories." FirstEnergy's conduct makes clear it intends to continue to charge Verizon contract rates more than* [redacted] *times the new telecom rates that FirstEnergy may charge Verizon's competitors until the Commission orders it to stop. Verizon "genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement."*

[176] *See* Email from Stephen C. Mills, Consultant-Contract Management, Verizon Services Corporation, to Deanna DeWitt, Supervisor-Joint Use and Cable Locating, FirstEnergy (July 7, 2017), attached hereto at Attach. N.

FirstEnergy Answer: FirstEnergy admits that executives of Verizon and FirstEnergy met on April 11, 2018, and continued discussions thereafter.

FirstEnergy denies that its contract rates are not just and reasonable and that Verizon is otherwise entitled to the new telecom rate. As explained in FirstEnergy's Affirmative Defenses: (i) Verizon does not meet the threshold contract termination condition for Commission modification of these pre-2011 joint use agreements; (ii) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (iii) Verizon acknowledged right after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" and (iv) even if the current agreement rates were not just and reasonable, Verizon is not similarly situated to other telecommunications providers or cable companies and so is not entitled to the same rate they are charged.

FirstEnergy further denies that it claimed that Verizon cannot be *eligible* for a new telecom rate—it claimed that Verizon was not *entitled* to the new telecom rate. FirstEnergy's participation in negotiations and offers to significantly reduce Verizon's net payments makes clear that Verizon's claim is simply untrue.

As explained in the email Verizon cited, FirstEnergy offered to calculate each party's rates using the pre-existing telecom formula. As an alternative, FirstEnergy offered to place Verizon on an equal footing with its CLEC competitors by giving Verizon the CLEC agreement and CLEC rates and by transitioning Verizon out of the pole owning business. As the email Verizon cites explains:

> As an alternative, if Verizon continues to insist on the CLEC rate, then I suggest we terminate our current Joint Use agreements and Verizon can enter into the standard CLEC agreement, as one of your Directors once proposed. Instead of FirstEnergy buying all of Verizon's poles as Verizon had offered approximately 7 years ago, each FirstEnergy operating company can simply set, pay for, and own all new and replacement poles. After all, FirstEnergy already sets the overwhelming majority of poles during storm restoration, car-pole accidents, and new development construction, so it would be a simple matter of not invoicing Verizon for the cost to replace Verizon's poles as is done under the existing ILEC Joint Use agreements. This accelerated attrition will eventually transition Verizon out of the pole-owning business in FirstEnergy's service territories and place it on equal footing with its CLEC competitors (ignoring the advantageous lowest position on existing poles). Of course, we will need to address the details for FirstEnergy's attachments(s) to Verizon's poles during the transition, but a simple solution could be to use the applicable operational terms and conditions of the existing agreements. I realize this suggestion may be as novel for Verizon as it is for

> FirstEnergy, but perhaps thinking "outside the box" can lead to creative solutions meeting both our needs.[177]

In addition, as explained in FirstEnergy's Affirmative Defenses: (i) Verizon in bad faith consistently demanded the new telecom rate and no other, mistakenly posturing that it was the only possible just and reasonable rate; (ii) Verizon has miscalculated both the new telecom rate and the pre-existing telecom rate; and (iii) Verizon does not lack the ability to terminate the agreements.

FirstEnergy otherwise denies the allegations in Paragraph 36.

d) Verizon Has Net Material Advantages Over Its Competitors

Verizon 37: *Under the principle of "competitive neutrality" adopted in 2011, FirstEnergy should have charged Verizon "the same rate" that applies to Verizon's competitors (meaning the new telecom rate) because Verizon does not receive net competitive benefits under the joint use agreements that justify a higher rate—let alone rates averaging over* [redacted] *more per pole. FirstEnergy has not, and cannot, show that this recurring annual per-pole premium is justified.*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 37.

As explained in FirstEnergy's Affirmative Defenses: (i) Verizon does not meet the threshold contract termination condition for Commission modification of these pre-2011 joint use agreements; (ii) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (iii) Verizon acknowledged right after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" (iv) even if the current agreement rates were not just and reasonable, Verizon is not similarly situated to other telecommunications providers or cable companies and so is not entitled to the same rate they are charged; (v) Verizon receives net benefits under the joint use agreement that justifies a higher rate; and (vi) Verizon has miscalculated both the new telecom rate and the pre-existing telecom rate.

Verizon 38: *In some ways, the joint use agreements are comparable to FirstEnergy's license agreements, but in other ways they are less advantageous. For example, the joint use agreements are similar to FirstEnergy's license agreements in that Verizon, like its competitors, must bear the costs associated with placing, maintaining, rearranging, transferring, and removing its attachments. Verizon is also required, like its competitors, to make a written application for space on FirstEnergy's poles, to comply with FirstEnergy's construction specifications, and to accommodate third parties attached to FirstEnergy's poles.*

FirstEnergy Answer: FirstEnergy denies that the joint use agreements are comparable to FirstEnergy's license agreements. FirstEnergy also denies that the joint use

[177] Email from Stephen F. Schafer, Manager, Joint Use & Cabling Locating, FirstEnergy Services Company, to James Slavin, Senior Manager, Network Operations & Engineering, Verizon Wireline Network (May 2, 2018), attached to *Complaint* at Ex. 28 (VZ00650-VZ00651).

agreements are less advantageous than FirstEnergy's license agreements. If that were true, Verizon would have accepted FirstEnergy's offer to terminate its existing joint use agreements, accept the CLEC agreement, and then accept FirstEnergy's proposal to ease out of the pole owning business, as such offer was explained in response to Paragraph 36.

As explained in FirstEnergy's Affirmative Defenses: (i) a "built to order" system of accommodating Verizon's attachments pursuant to the joint use agreements accounts for the vast majority of FirstEnergy poles to which Verizon is now attached, while Verizon's competitors must slog through a time-consuming and expensive make-ready process to install their new attachments; (ii) as a result, the make-ready engineering and make-ready construction costs to Verizon's competitors is approximately [redacted] per attached pole per year for poles owned by Met-Ed and Penelec, and approximately [redacted] per attached pole per year for poles owned by Penn Power while Verizon's make-ready engineering and make-ready construction costs is either nothing or [redacted] per attached pole per year; (iii) Verizon's "built to order" joint use attachments also allow Verizon to reach potential customers much faster and at far less cost than it takes Verizon's competitors; (iv) for a Verizon competitor seeking to attach to 1,000 FirstEnergy poles, losing out to Verizon on new business worth [redacted] per year in profit equates to [redacted] per year per pole; (v) Verizon does not pay the survey charges its competitors must pay, which amount to [redacted] per attached pole per year; (vi) Verizon's attachments consume more capacity on FirstEnergy's poles than attachments of Verizon's competitors, justifying a higher rate; and (vii) Verizon's costs to maintain its pole plant are irrelevant, far less than FirstEnergy's costs, and largely reimbursed in any event.

FirstEnergy admits that Verizon must submit applications to attach to FirstEnergy's poles, but notes that Verizon's "built to order" joint use attachments and the ability to quickly overlash or light available fiber capacity have resulted in Verizon needing to submit very few applications. In addition, as explained in FirstEnergy's Affirmative Defenses: (i) Verizon has a faster and easier application process than its CLEC and cable company competitors because unlike its competitors, Verizon does not need to submit pole profile sheets or pole photographs with its applications; and (ii) Verizon complained about the different application process applicable to Verizon's competitors when that process was applied to Verizon's CLEC affiliate, because it "inherently intensifies" its affiliate's obligations and could be "prejudicially detrimental."

FirstEnergy admits that Verizon is required to comply with FirstEnergy's construction standards. FirstEnergy denies that the joint use agreements all contain similar provisions regarding third parties.

FirstEnergy otherwise denies the allegations in Paragraph 38.

Verizon 39: *There are terms and conditions in the joint use agreements that disadvantage Verizon as compared to its competitors. For example, unlike its competitors, Verizon must "at its sole expense" determine the condition of more than 110,000 joint use poles that it owns and shares with FirstEnergy, keep them "in a safe and serviceable condition," and replace or repair*

its poles as they become defective. FirstEnergy has itself recognized that this unique pole ownership requirement imposes "substantial" costs on ILECs, including Verizon, that are not imposed on their competitors. Verizon is subject to other unique costs as well, as Verizon must provide FirstEnergy access to Verizon's poles under the same terms and conditions that apply to Verizon's use of FirstEnergy's poles. On this point, FirstEnergy agreed with Verizon in Reply Comments it filed with the Commission, admitting that Verizon is subject to "burdens and obligations" that are not imposed on Verizon's competitors because joint use agreements, but not license agreements, "impose[ ] mutual obligations on both parties.

FirstEnergy Answer: FirstEnergy denies that the joint use agreements are less advantageous than FirstEnergy's license agreements. If that were true, Verizon would have accepted FirstEnergy's offer to terminate its existing joint use agreements, accept the CLEC agreement, and then accept FirstEnergy's proposal to ease out of the pole owning business, as such offer was explained in response to Paragraph 36.

As explained in FirstEnergy's Affirmative Defenses, Verizon's costs to maintain its pole plant are irrelevant, far less than FirstEnergy's costs, and largely reimbursed in any event.

FirstEnergy also notes that Verizon owns more than a million poles in Pennsylvania, while FirstEnergy is attached to just 110,842 of them. Verizon's joint use agreements with FirstEnergy are clearly not the reason why Verizon owns poles.

As for citing comments FirstEnergy filed as part of a coalition in 2010, FirstEnergy notes that Verizon and AT&T in October 2008 together proposed that the Commission adopt a rental rate formula for all broadband attachments, including their own attachments on electric utility poles, which was based on the preexisting telecom rate formula but was substantially modified to produce rental rates much higher than the preexisting telecom rate. Verizon contended that this rate higher than the pre-existing telecom rate was "just and reasonable," "demonstrably equitable," and "achieved the Commission's goals of competitive parity."[178]

FirstEnergy denies the remaining allegations in Paragraph 39.

Verizon 40: *Because the terms and conditions in the joint use agreements are comparable or less advantageous than those in FirstEnergy's license agreements, it is "appropriate to use the rate of the comparable attacher as the 'just and reasonable' rate for purposes of section 224(b)."*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 40.

As explained in FirstEnergy's Affirmative Defenses: (i) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (ii) Verizon acknowledged right after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates

[178] Email from Stacey W. Culbreath, Verizon, to Deanna R. DeWitt and Stephen F. Schafer, FirstEnergy (Apr. 17, 2018), attached hereto at Attach. I.

issue had been "amiably resolved;" (iii) even if the current agreement rates were not just and reasonable, Verizon is not similarly situated to other telecommunications providers or cable companies and so is not entitled to the same rate they are charged.

Verizon 41: *FirstEnergy has insisted it can continue to charge far higher rates based on a scattershot list of twenty-four purported "advantages." FirstEnergy did not distinguish among operating companies or quantify the value of the alleged advantages. But even based on the information available to Verizon, FirstEnergy's list fails to identify anything that provides Verizon a net material advantage over its competitors that would justify charging Verizon rates that have been over* [redacted] *more per pole than the properly calculated new telecom rates.*

FirstEnergy Answer: FirstEnergy admits that FirstEnergy provided Verizon a list of advantages in June 2018, but notes that it was Verizon's burden to show that these advantages provided Verizon with material benefits over its competitors, the value of which collectively exceeded by the rate differential. As explained in FirstEnergy's Affirmative Defenses: (i) FirstEnergy provided Verizon a list of benefits to Verizon in order to help Verizon recognize these advantages and finally start meaningfully negotiating with FirstEnergy; (ii) it was Verizon's burden, not FirstEnergy's burden, to explain how these alleged advantages did not justify a higher rate; (iii) Verizon did not even attempt to meet that burden; and (iv) Verizon unfortunately opted not to negotiate meaningfully with FirstEnergy.

As further explained in FirstEnergy's Affirmative Defenses: (i) Verizon does not meet the threshold contract termination condition for Commission modification of these pre-2011 joint use agreements; (ii) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (iii) Verizon acknowledged right after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" (iv) even if the current agreement rates were not just and reasonable, Verizon is not similarly situated to other telecommunications providers or cable companies and so is not entitled to the same rate they are charged; and (v) Verizon has miscalculated both the new telecom rate and the pre-existing telecom rate.

FirstEnergy otherwise denies the allegations in Paragraph 41.

Verizon 42: *FirstEnergy's list of twenty-four claimed advantages is repetitive, often listing the same alleged "advantage" multiple times as though to increase its value. Without the duplication, FirstEnergy's list boils down to ten alleged advantages.*

FirstEnergy Answer: As explained in FirstEnergy's Affirmative Defenses: (i) FirstEnergy provided Verizon a list of benefits to Verizon in order to help Verizon recognize these advantages and finally start meaningfully negotiating with FirstEnergy; (ii) it was Verizon's burden, not FirstEnergy's burden, to explain how these alleged advantages did not justify a higher rate; (iii) Verizon did not even attempt to meet that burden; and (iv) Verizon unfortunately opted not to negotiate meaningfully with FirstEnergy.

FirstEnergy denies that its list of advantages is repetitious or that it was made repetitious to increase their value.

FirstEnergy otherwise denies the allegations in Paragraph 42.

Verizon 43: *First, FirstEnergy relies on a one-time $1,000 "agreement preparation fee" that it claims to collect from Verizon's competitors, although the fee does not appear in all of FirstEnergy's license agreements. But even if FirstEnergy consistently collected this one-time fee from Verizon's competitors, it would not justify continuing to charge Verizon a higher rental rate—let alone a higher, annually recurring rental rate for each of the more than 301,000 FirstEnergy poles to which Verizon is attached in Pennsylvania. And while Verizon may not have paid FirstEnergy a one-time "agreement preparation fee" to access FirstEnergy's poles, FirstEnergy also did not pay the "agreement preparation fee" to access Verizon's poles. As a result, any value to Verizon from not paying the fee was entirely offset by the same value that Verizon provided FirstEnergy, resulting in no "net" benefit to Verizon.*

FirstEnergy Answer: The "agreement preparation fee" exists in some of FirstEnergy's older license agreements but not in FirstEnergy's template CLEC agreement. FirstEnergy agrees that this one-time $1,000 fee is insignificant when compared to the approximately 79,000 FirstEnergy poles to which Verizon is attached. It is more significant to Verizon's competitors, who must pay this fee before being allowed to attach to any FirstEnergy poles in order to compete with Verizon, and so establishes that Verizon is not similarly-situated to new competitors. But since this one-time $1,000 payment is fee is small, FirstEnergy will make no attempt to associate it with a per pole rental rate.

Verizon misstates the "net" benefit analysis required by the Commission. Rather than comparing the "net" benefit between the ILEC and electric utility pole owners in the joint use agreement, the "net" benefit compares Verizon with its competitors.[179] Furthermore, as explained in FirstEnergy's Affirmative Defenses: (i) it is inappropriate for Verizon to factor in its costs as a pole owner when determining whether its attachments on FirstEnergy's poles are treated comparably to attachments of Verizon's competitors; (ii) the benefits Verizon has in its joint use agreement far outweigh any of the costs Verizon incurs as a pole owner; (iv) Verizon benefits from easy access, speed to market and low make-ready costs not only on all the poles that FirstEnergy owns, but Verizon also benefits from easy access, speed to market, and low make-ready costs on all of the poles that Verizon itself owns; and (v) many of the costs Verizon incurs as a pole owner are offset by pole attachment rental rates and other reimbursements.

[179] Verizon cites language from the *2018 Third Report and Order*, which does not apply since these agreements are not new or newly-renewed. But even if they were, the regulation promulgated by the order does not support Verizon's contention. See 47 C.F.R. §1.1413(b) (The new presumptions from the *2018 Third Report and Order*, as they apply to new and newly-renewed agreements, can be rebutted with evidence "that the incumbent local exchange carrier receives benefits under its pole attachment agreement with a utility that materially advantages the incumbent local exchange carrier other telecommunications carriers or cable television systems providing telecommunications services on the same poles.")

FirstEnergy otherwise denies the allegations in Paragraph 43.

Verizon 44: *Second, FirstEnergy points to non-existent differences in the permitting process, claiming Verizon has been provided "speed to market" worth "millions" because Verizon does not pay FirstEnergy application fees and need not wait for FirstEnergy's permitting process to attach or overlash. These claims are unfounded. It is not clear that Verizon's competitors pay application fees either, especially since FirstEnergy cannot impose such fees unless it can show that it does not already recover such costs through its annual rate calculation. And Verizon and its competitors wait a comparable amount of time to attach comparable facilities. The same notifications and work are required before an attachment and the same make-ready timelines and overlashing rules apply. There is, therefore, no material difference between Verizon and its competitors in the one-time permitting process that would justify charging Verizon a higher rate for every pole every year.*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 44.

As explained in FirstEnergy's Affirmative Defenses: (i) a "built to order" system of accommodating Verizon's attachments pursuant to the joint use agreements accounts for the vast majority of FirstEnergy poles to which Verizon is now attached, while Verizon's competitors must slog through a time-consuming and expensive make-ready process to install their new attachments; (ii) as a result, the make-ready engineering and make-ready construction costs to Verizon's competitors is approximately [redacted] per attached pole per year for poles owned by Met-Ed and Penelec, and approximately [redacted] per attached pole per year for poles owned by Penn Power while Verizon's make-ready engineering and make-ready construction costs is either nothing or [redacted] per attached pole per year; (iii) Verizon complained about the different application process applicable to Verizon's competitors when that process was applied to Verizon's CLEC affiliate, because it "inherently intensifies" its affiliate's obligations and could be "prejudicially detrimental." (iv) Verizon's "built to order" joint use attachments also allow Verizon to reach potential customers much faster and at far less cost than it takes Verizon's competitors; and (v) for a Verizon competitor seeking to attach to 1,000 FirstEnergy poles, losing out to Verizon on new business worth [redacted] per year in profit equates to [redacted] per year per pole.

As explained in FirstEnergy's Affirmative Defenses: (i) Verizon's competitors pay application fees as required by FirstEnergy's electronic application processing system known as SPANS; (ii) these fees are paid by Verizon's competitors but not Verizon, since Verizon is not using SPANS; (iii) the fees amount to [redacted] per application and [redacted] per pole; (iv) these fees, like make-ready costs, are not recovered through FirstEnergy's annual rental rates; (v) Verizon is subject to far more lenient overlashing rules as its CLEC and cable company competitors, since Verizon is not obligated to notify FirstEnergy of its overlashing activity or perform pole loading studies, while Verizon's competitors need to provide 15-days' advance notice, 15-days' notice upon completion and pole loading studies; and (vi) Verizon has a faster and easier application process than its CLEC and cable company competitors because unlike its competitors, Verizon need not submit pole profile sheets and pole photographs with its applications.

Verizon 45: *Third, FirstEnergy incorrectly claims Verizon incurs lower engineering, make-ready, and pre-and post-installation survey costs. Verizon completes much of this work itself, surveying a pole to determine what make-ready is required, completing the engineering necessary to accommodate its attachment, transferring its facilities when required, and reviewing its attachments post-installation to ensure they comply with applicable standards. FirstEnergy follows a comparable approach under its license agreements, which require "Licensee [to] submit with each application a survey of the subject poles," place on Licensee an obligation to "transfer its facilities," and clarify that the "Licensee [may] engineer all new line extensions and any rebuild of existing facilities on [FirstEnergy]'s poles." Verizon's competitors may also complete their own engineering, survey, and simple make-ready work under the Commission's one-touch make-ready rules. And, if FirstEnergy does perform some of this work for Verizon's competitors, FirstEnergy still could not rely on that difference to collect higher rentals from Verizon. FirstEnergy's draft license agreement, for example, merely reserves the right* [redacted] *If such costs are ever incurred by Verizon's competitor's, Verizon incurs comparable costs because it performs its own safety checks, at no cost to FirstEnergy. And where Verizon "performs [that] particular service itself and incurs costs comparable to its competitors in performing that service," FirstEnergy may not increase Verizon's rental rate based on "costs that [FirstEnerg] does not incur."*

FirstEnergy Answer: FirstEnergy denies that Verizon does not incur lower engineering, make-ready, and pre-and post-installation survey costs, because the engineering and make-ready construction costs to Verizon's competitors are far higher. As explained in FirstEnergy's Affirmative Defenses: (i) a "built to order" system of accommodating Verizon's attachments accounts for the vast majority of FirstEnergy poles to which Verizon is now attached, while Verizon's competitors must slog through a time-consuming and expensive make-ready process to install their new attachments; (ii) as a result, the make-ready engineering and make-ready construction costs to Verizon's competitors is approximately [redacted] per attached pole per year for poles owned by Met-Ed and Penelec, and approximately [redacted] per attached pole per year for poles owned by Penn Power while Verizon's make-ready engineering and make-ready construction costs is either nothing or [redacted] per attached pole per year.

This dramatic difference in make-ready engineering and construction costs is not because Verizon incurs these costs itself. Instead, as explained in FirstEnergy's Affirmative Defenses: (i) Verizon is making relatively few requests to install new attachments; (ii) Verizon's "built to order" joint use attachments and the ability to quickly overlash or light available fiber capacity have resulted in Verizon needing to submit very few applications.

Even to the limited extent that Verizon must install new attachments, Verizon claims that it completes much of this same survey, engineering, transfer, and post-installation review work itself. But Verizon's competitors must also perform this work, if not more, as well as pay for FirstEnergy's make ready engineering costs. FirstEnergy's Affirmative

Defenses explain that Verizon has a faster and easier application process than its CLEC and cable company competitors because unlike its competitors, Verizon need not submit pole profile sheets and pole photographs with its applications. These pole profile sheets and pole photograph require considerable up-front time commitments that Verizon can avoid.

As for the Commission's one-touch make-ready rules, no attaching entity in FirstEnergy's service area has opted to use that process, and so it is irrelevant.[180]

In response to Verizon's contention about periodic inspection costs, and as explained in FirstEnergy's Affirmative Defenses, Verizon does not pay the survey charges its competitors must pay, which amount to a benefit to Verizon of [redacted] per attached pole per year. This cost is not otherwise recovered in FirstEnergy's pole attachment rental rate. FirstEnergy denies that Verizon performs its own pole inspections, as Verizon has provided no evidence to explain the frequency of such inspections or how much cost was incurred to perform them.

FirstEnergy otherwise denies the allegations in Paragraph 45.

Verizon 46: *When FirstEnergy does perform make-ready work at Verizon's request, Verizon is not advantaged over its competitors. In the Penelec territory, FirstEnergy invoices Verizon— as FirstEnergy apparently invoices Verizon's competitors—using a cost-causer approach that requires Verizon to pay for make-ready that FirstEnergy completes to accommodate Verizon's attachments. In the Met-Ed and Penn Power territories, FirstEnergy instead treats make-ready as a reciprocal obligation—something that has imposed higher costs on Verizon than the cost-causer approach that applies to Verizon's competitors. Under this reciprocal approach, Verizon incurs the make-ready costs FirstEnergy causes, instead of the far lower make-ready costs Verizon has required. For example, since 2014, FirstEnergy has required more than seven times the pole replacements that Verizon has required in the Met-Ed and Penn Power territories, meaning Verizon has incurred the cost to replace 660 poles for FirstEnergy when Verizon would have paid for just the 91 pole replacements that Verizon required under the cost causer approach enjoyed by Verizon's competitors. There is thus no competitive difference related to make-ready that justifies a higher rate for Verizon.*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 46.

FirstEnergy does not know where Verizon got its statistics from, but they appear not to provide an accurate picture of "cost-causing." FirstEnergy investigated Verizon's claim that Met-Ed made 135 requests to attach to Verizon's poles and that 66 of those required Verizon to incur pole replacement costs.[181] It turns out that 15 of those pole replacements were the result of FirstEnergy asking Verizon to replace Verizon poles that Verizon did not know were dangerous or deteriorated, which means that Verizon was not inspecting its own pole plant and FirstEnergy had to inform them of the dangerous conditions of their own pole plant. In addition, it turns out that 13 more of these pole replacement

[180] Schafer Decl. at ⁋18.
[181] Mills Aff. at ¶58 (VZ00026).

requests were nothing more than a forwarding of government or highway project requests. As a result, these highway project and deteriorated Verizon poles were replaced not simply for FirstEnergy's benefit, as Verizon implies.[182]

Not only is the credibility of Verizon's information suspect, Verizon is misstating the "net" benefit analysis required by the Commission. As explained in FirstEnergy's Affirmative Defenses: (i) the "net" benefit is a comparison of Verizon and its competitors, not between Verizon and FirstEnergy; (ii) it is inappropriate for Verizon to factor in its costs as a pole owner when determining whether its attachments on FirstEnergy's poles are treated comparably to attachments of Verizon's competitors; (iii) the benefits Verizon has in its joint use agreement far outweigh any of the costs Verizon incurs as a pole owner anyway; (iv) Verizon benefits from easy access, speed to market, and low make-ready costs on all of the poles it owns, at least as much as it benefits from easy access, speed to market and low make-ready costs on all the poles that FirstEnergy owns; and (v) many of the costs Verizon incurs as a pole owner are offset by pole attachment rental rates and other reimbursements.

Verizon 47: *Fourth, FirstEnergy claims Verizon is advantaged when it attaches to FirstEnergy's poles because Verizon is not contractually required to affix a tag that identifies its facilities and can also attach to FirstEnergy's multi-ground neutrals, guys, and anchors. These are not differences that give Verizon a net advantage over its competitors. It is a Verizon company policy to tag its facilities, so Verizon incurs comparable tagging costs to its competitors even if they are not contractually imposed. It is not clear why Verizon's competitors would not also be connected to FirstEnergy's multi-ground neutral since their "interconnection … with the Electric Company's neutral" must also be "desirable as part of the inductive and protective measures required" to share use of poles with an electric utility. And, in situations in which a guy or anchor is required, Verizon also is not advantaged. Under FirstEnergy's license agreements, FirstEnergy has agreed to "itself provide such guying or bracing" for its licensee and has granted "the nonexclusive right to attach to [its] anchors." But unlike the license agreements, Verizon has agreed to let FirstEnergy attach to Verizon's guys and anchors as well—further eliminating any suggestion of a "net" competitive benefit to Verizon.*

FirstEnergy Answer: In light of Verizon's factual allegations in Paragraph 47, FirstEnergy admits that affixing a tag, attaching to FirstEnergy's multi-ground neutrals, and attaching to FirstEnergy's guys are not differences that give Verizon a material net advantage over its competitors.

FirstEnergy denies the allegation in the final sentence because Verizon is misstating the "net" benefit analysis required by the Commission. As explained in FirstEnergy's Affirmative Defenses: (i) the "net" benefit is a comparison of Verizon and its competitors, not between Verizon and FirstEnergy; (ii) it is inappropriate for Verizon to factor in its costs as a pole owner when determining whether its attachments on FirstEnergy's poles are treated comparably to attachments of Verizon's competitors; (iii) the benefits Verizon has in its joint use agreement far outweigh any of the costs Verizon incurs as a pole owner anyway; (iv) Verizon benefits from easy access, speed to market,

[182] Schafer Decl. at ¶25 and Ex. SFS-2.

and low make-ready costs on all of the poles it owns, at least as much as it benefits from easy access, speed to market and low make-ready costs on all the poles that FirstEnergy owns; and (v) many of the costs Verizon incurs as a pole owner are offset by pole attachment rental rates and other reimbursements.

FirstEnergy otherwise denies the allegations in Paragraph 47.

Verizon 48: *Fifth, FirstEnergy claims Verizon is guaranteed more space on each pole than is guaranteed Verizon's competitors. But the joint use agreements do not guarantee space to Verizon (although they do guarantee space to FirstEnergy due to the nature of its facilities) and cannot guarantee space to Verizon given the statutory right of access provided to Verizon's competitors. At most, certain of the joint use agreements designate three feet of space as "communications space" and expressly allow FirstEnergy and third parties to attach within that space. The joint use agreements with Penelec even include a graphic that shows that Verizon must pay for the entire communications space on Penelec's poles as though third-party attachers are not also attached. But FirstEnergy has rented segments of the communications space to Verizon's competitors, collecting additional rent from them without offset to Verizon. Thus, the mere fact that certain of the joint use agreements designate three feet of space as "communications space" does not advantage Verizon. Verizon does not want, require, or occupy three feet of space on FirstEnergy's poles. Verizon and its competitors now deploy similarly-sized lightweight copper and fiber optic cables that occupy comparable space on FirstEnergy's poles. Verizon is not advantaged.*

FirstEnergy Answer: The reservation of Verizon space on FirstEnergy's poles has helped to enable a pole distribution network to be constructed that accommodated Verizon's attachments in a "built to order" fashion without the need for the same make-ready time and expense that CLECs and other competitors face.

FirstEnergy denies that space is guaranteed to FirstEnergy under the joint use agreement. Since FirstEnergy, like Verizon, cannot permanently reserve any space allocated under the joint use agreements if such space is required to accommodate a new cable company or CLEC attacher, the joint use agreement cannot guarantee such space. And like Verizon, FirstEnergy does not require all of the space to which it is allocated under the joint use agreement. However, until such space is requested by a third party attacher, the agreement-allotted space is fully available to Verizon and the Commission has recognized that prospective benefits may be included in the comparative analysis.[183]

FirstEnergy denies Verizon's claim that "Verizon and its competitors now deploy similarly-sized lightweight copper and fiber optic cables that occupy comparable space on FirstEnergy's poles." The glaring problem with this statement is that Verizon's new installations are overlashed over Verizon's existing installations, which include heavy copper wiring and strand that Verizon does not bother to remove. As a result, and as explained in FirstEnergy's Affirmative Defenses, Verizon's attachments sag considerably more than its competitors' attachments, and Verizon uses up considerably more space on the pole that Verizon's competitors.

[183] *Verizon v. FPL Order* at ¶22.

FirstEnergy otherwise denies the allegations in Paragraph 48.

Verizon 49: *Sixth, FirstEnergy claims Verizon is advantaged because its facilities are placed at the lowest location on FirstEnergy's poles. In fact, Verizon's location on FirstEnergy's poles increases its costs and sets it at a competitive disadvantage. Its facilities have the highest exposure to damage from oversized vehicles, vandalism, and similar hazards. Verizon's facilities also suffer more harm from those that work above. It has experienced damage from gaffs, ladders, and bucket trucks, has had holes poked in its cables, and has had support wires broken because of its lowest location on the pole. Verizon also receives more requests to raise its cables to accommodate oversize loads that exceed standard vertical clearance requirements. And Verizon incurs increased pole transfer costs because it must be the last company to transfer its facilities to a replacement pole. Verizon often makes more than one trip to the replacement pole because others have not completed their transfers as scheduled.*

FirstEnergy Answer: Verizon is advantaged by having the lowest attachment on the pole because such attachments are easier to access. Given the difficulty of monetizing that ease of access benefit, FirstEnergy will make no such showing here. As for Verizon's allegations that the lowest position sets it at a competitive disadvantage, no evidence about Verizon's costs or its competitors' costs was provided for FirstEnergy to refute.

Most importantly, however, Verizon's location at the lowest point on the pole allows Verizon's heavier cables to sag more than other communications attachers. As explained in FirstEnergy's Affirmative Defenses, this additional sag results in Verizon's attachments occupying more space on the pole than the more lightweight attachments of Verizon's competitors.

FirstEnergy otherwise denies the allegations in Paragraph 49.

Verizon 50: *The increased costs associated with Verizon's lowest pole position are not offset by any alleged benefit from "easier … access." There is little measurable difference between the time and effort required to work at the lowest location on a pole and at the location just above. The same safety measures and preparation are required. Nor are the increased costs offset by Verizon's ability to make "2 attachments in first 12 [inches] of space." Verizon's competitors are also presumed to occupy 12 inches of space, and FirstEnergy has not explained why two attachments could not also be located within 12 inches of space located higher on the pole. Nor could it, as FirstEnergy included a photograph in its Field Reference Guide depicting two non-ILEC attachments within 12 inches of space. And even if there were some minimal benefit to Verizon from its location, it is offset by the benefit enjoyed by Verizon's competitors because Verizon is lowest on the pole. Verizon's location is the result of standard construction practices that pre-date third-party attachers. Maintaining that pole location eliminates ambiguity about the ownership of particular facilities on the pole and ensures that communications facilities do not crisscross mid-span. It does not justify charging Verizon a higher rate than its competitors.*

FirstEnergy Answer: Although Verizon's lowest attachment location allows Verizon to reach its facilities more easily by using only a ladder instead of a bucket truck, the primary advantage to Verizon of its lowest attachment location is the accommodation of the additional sag required by Verizon's heavier attachments, as explained in FirstEnergy's Affirmative Defenses.

As for First Energy's Field Reference Guide, that guide depicts what information is required to be supplied in an application by third party attachers, it is not, nor is it intended to be a FirstEnergy construction standard.[184] And regarding eliminating crisscrossing mid-span, FirstEnergy notes that eliminating that problem benefits Verizon and its competitors equally.

FirstEnergy otherwise denies the allegations in Paragraph 50.

Verizon 51: *Seventh, FirstEnergy relies on wholly avoidable fees it may try to charge some of Verizon's competitors for unauthorized attachments and safety violations. It has no right to impose safety violation fees under the license agreements Verizon has reviewed, and FirstEnergy's draft license agreement clarifies Verizon's competitors* [redacted] *Verizon's competitors may also avoid unauthorized attachment fees, either by properly reporting their attachments in the first instance or by correcting the violation within six months of notification. There is, therefore, no reason to charge Verizon a higher rate based on fees that its competitors should never pay.*

FirstEnergy Answer: Many, but not all, FirstEnergy contracts with cable companies and CLECs, permit FirstEnergy to impose unauthorized attachment and safety violation fees.[185] These fees are designed to act as a deterrent to cable and CLEC companies who might otherwise be inclined to attach their facilities without permission, in an unsafe manner, or in an attempt to avoid paying make-ready costs. FirstEnergy's joint use agreement with Verizon contains no such penalties, thus giving Verizon less incentive to comply with the permitting process and to install its facilities in an unsafe manner. It is difficult if not impossible to quantify this benefit without significant discovery of both Verizon and its competitors, which the Commission's complaint process does not allow, and without a thorough inspection of all of their facilities, which has not yet occurred. Only with this information could FirstEnergy show the extent to which Verizon's unauthorized and unsafe attachments exceed those of its competitors. FirstEnergy therefore cannot properly monetize this advantage.

Verizon 52: *Eighth, FirstEnergy claims Verizon is advantaged by more favorable insurance and indemnification provisions than apply to Verizon's competitors. But Verizon has the insurance FirstEnergy's draft license agreement requests and is subject to indemnification provisions that, like those in FirstEnergy's license agreements, assign liability based on fault. But even if there*

[184] Schafer Decl. at ¶26.

[185] *See, e.g.*, Draft Pole Attachment Agreement Between Metropolitan Edison Company and Attaching Company Name, attached to Complaint at Ex. 13 (VZ00486-VZ00503).

were some difference between the joint use agreement and license agreement provisions, it would not justify an increase to Verizon's rental rate. Only the joint use agreement provisions are reciprocal: unlike its competitors, Verizon must extend to FirstEnergy the same insurance and indemnification provisions for its use of Verizon's poles. These additional obligations must be "weigh[ed], and account[ed] for" in the analysis of competitive neutrality. When they are, the reciprocal provisions cannot provide Verizon a net material benefit that warrants a higher rental rate.

> **FirstEnergy Answer:** Although differences exist between the insurance and indemnification provisions that apply to Verizon and those that apply to Verizon's competitors, and although FirstEnergy believes such differences benefit Verizon, it is difficult if not impossible to quantify these benefits without significant discovery of both Verizon and its competitors, which the Commission's complaint process does not allow, and without divulging confidential and highly sensitive claims settlement information. FirstEnergy therefore cannot properly monetize these advantages.
>
> FirstEnergy denies that an analysis is required of the insurance and indemnification provisions that apply to FirstEnergy. Verizon misunderstands its quote of the *2011 Pole Attachment Order*, which did not call for an examination of Verizon's reciprocal obligations to FirstEnergy, but instead calls only for a comparison of Verizon's rights and responsibilities with the rights and responsibilities of its cable company and CLEC competitors.[186] Moreover, as explained in FirstEnergy's Affirmative Defenses: (i) it is inappropriate for Verizon to factor in its costs as a pole owner when determining whether its attachments on FirstEnergy's poles are treated comparably to attachments of Verizon's competitors; (ii) the benefits Verizon has in its joint use agreement far outweigh any of the costs Verizon incurs as a pole owner anyway; (iii) Verizon benefits from easy access, speed to market, and low make-ready costs on all of the poles it owns, at least as much as it benefits from easy access, speed to market and low make-ready costs on all the poles that FirstEnergy owns; and (iv) many of the costs Verizon incurs as a pole owner are offset by pole attachment rental rates and other reimbursements.
>
> FirstEnergy otherwise denies the allegations in Paragraph 52.

Verizon 53: *Ninth, FirstEnergy argues Verizon is not required to post a security bond as its competitors must. But* [redacted] *and at least one executed license agreement do not include a security bond requirement. And even if FirstEnergy imposes a security bond requirement on some of Verizon's competitors, it would still not provide Verizon a "net advantage" relative to its competitors because the treatment of security bonds in the joint use agreements is reciprocal. Since "Verizon is likewise required to extend to [FirstEnergy] under the Joint Use Agreements" the same security bond provision that FirstEnergy extends to Verizon, the "alleged benefit[ ]" cannot increase the rate Verizon pays.*

[186] The full quote Verizon omitted is: "A failure to weigh, and account for, the different rights and responsibilities in joint use agreement could lead to marketplace distortions. We therefore reject arguments that rates for pole attachments by incumbent LECs should always be identical to those of telecommunications carriers or cable operators." *2011 Pole Attachment Order* at n.654.

FirstEnergy Answer: Some, but not all, FirstEnergy contracts with cable companies and CLECs, require them to post a security bond. Contrary to Verizon's allegation, the joint use agreement contains no such provision. The absence of a security bond requirement is therefore another example of how Verizon is not similarly situated to some, but not all, of its competitors. Given the difference applies to some, but not all, of Verizon's competitors, and given the difficulties associated with monetizing this cost, FirstEnergy makes no attempt at such monetization.

Verizon 54: *Finally, FirstEnergy relies on the evergreen provisions in the joint use agreements, noting they give Verizon access to FirstEnergy's poles after the joint use agreements are terminated. This does not advantage Verizon over its competitors, as Verizon's competitors have ongoing and statutorily protected access to FirstEnergy's poles due to their federal right of access. And, regardless, Verizon has provided FirstEnergy the same evergreen protection so it can continue to use Verizon's poles after termination. Thus, the evergreen provisions—which FirstEnergy has misused to try to lock in outdated rentals that provide it an over* [redacted] *recurring annual premium-are in no way a net competitive benefit provided Verizon.*

FirstEnergy Answer: The evergreen provision in FirstEnergy's joint use agreement is an advantage to Verizon because no matter how egregious Verizon's behavior, FirstEnergy cannot remove Verizon from FirstEnergy's poles even if Verizon terminates the agreement. CLEC and cable company competitors, however, are subject to FCC regulations and complaint processes, which offer potential relief in the form of attachment removal or termination of pole attachment agreements. For example, in the *Salsgiver v. Penelec* proceeding, Penelec threatened to remove Salsgiver's attachments and Salsgiver filed at the FCC for an emergency stay. The FCC in response denied the stay, stating it could not condone Salsgiver's behavior in this instance.[187]

FirstEnergy also is powerless to modify joint use agreements without Verizon's consent. By comparison, FirstEnergy has considerable ability to modify the terms and conditions of its license agreements with cable company and CLEC attachers, subject only to the limitations imposed by FCC regulations. Verizon to the contrary appears to assert that it need not agree to any provision that Verizon itself does not consider to be just and reasonable, no matter what the Commission might say. And as explained in FirstEnergy's Affirmative Defenses, this proceeding shows that FirstEnergy certainly has no bargaining leverage over Verizon sufficient to require Verizon to do anything it does not want to do.

It is therefore incorrect to assert that the evergreen provisions in Verizon's joint use agreements do not provide a competitive advantage to Verizon. Like other advantages, however, it is impossible to quantify that advantage accurately without significant discovery of Verizon, including depositions of key Verizon personnel and extensive document production, none of which is permitted by the FCC's pole attachment complaint rules. FirstEnergy therefore cannot monetize this benefit.

[187] *Petition of Salsgiver Telecom, Inc. for Temporary Stay Pursuant to Section 1.1403(d) of the Federal Communications Commission Rules*, File No. EB-14-MD-005, Letter Order (Apr. 4, 2014) attached hereto at Attach. O.

FirstEnergy denies that it has in any way "misused" the evergreen provision. Instead, as explained in FirstEnergy's Affirmative Defenses, (i) FirstEnergy offered many times to terminate the existing rate and replace it with a new rate that covered all existing attachments, including those that would be covered by an evergreen provision; (ii) FirstEnergy offered many times to terminate the existing agreement and replace it with a new agreement that covered all existing attachments, including those that would be covered by an evergreen provision; (iii) FirstEnergy's offers to include all existing poles that would be covered by an evergreen provision shows the evergreen provisions are not an obstacle to Verizon obtaining new rates or a new agreement; and (iv) the *Verizon v. FPL* proceeding cited by Verizon is different, since the utility refused to apply the new rates or agreement to poles already in evergreen status.

FirstEnergy otherwise denies the allegations in Paragraph 54.

B. The Commission Should Affirm That the Just and Reasonable Rate Are the Rates Established in the Joint Use Agreement

Verizon 55: *Verizon is "entitled to pole attachment rates, terms and conditions that are just and reasonable pursuant to Section 224(b)(1)" as of the July 12, 2011 effective date of the Pole Attachment Order. Here, that just and reasonable rate should be the new telecom rate, which will start to set Verizon on par with its comparable competitors if FirstEnergy is ordered to refund the over* [redacted] *in net rent that Verizon has overpaid to date in Pennsylvania "plus interest, consistent with the applicable statute of limitations." But even if the Commission determines Verizon is not entitled to the new telecom rate, the just and reasonable rate cannot exceed the pre-existing telecom rate, which also would require a refund of over* [redacted] *in net rent overpaid by Verizon to date during the applicable statute of limitations in Pennsylvania.*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 55.

As explained in FirstEnergy's Affirmative Defenses: (i) Verizon does not meet the threshold contract termination condition for Commission modification of these pre-2011 joint use agreements; (ii) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (iii) Verizon acknowledged right after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" (iv) even if the current agreement rates were not just and reasonable, Verizon is not similarly situated to other telecommunications providers or cable companies and so is not entitled to the same rate they are charged; (v) as Verizon should know from the *Verizon v. FPL* Order, the pre-existing telecom rate is a "reference point," not an upper-bound rate or a rule; (vi) the applicable statute of limitations is two years; (vii) refunds are not appropriate in this proceeding in any event; and (viii) Verizon has miscalculated both the pre-existing telecom rate and the new telecom rate.

Verizon 56: *State law provides the applicable statute of limitations for violations of Section 224 because the Commission decided to treat claims that a pole attachment agreement's rates, terms,*

and conditions are "unjust and unreasonable" consistently "with the way that claims for monetary recovery are generally treated under the law." This follows from a long line of precedent that "[w]hen there is no statute of limitations expressly applicable to a federal statute, …. 'the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim.'" And where, as here, the federal claim involves a contract, "contract law provides the best analogy" and the court should "adopt the general contract law statute of limitations." Thus, in the Dominion Order, the Enforcement Bureau cited the parties' agreement to the applicability of a five-year statute of limitations for actions involving a Virginia contract.

FirstEnergy Answer: As explained in FirstEnergy's Affirmative Defenses: (i) the Commission has provided no guidance regarding the applicable statute of limitations; (ii) state law breach of contract statutes should not apply because this proceeding involves no breach of contract; (iii) the most appropriate statute of limitations is the two-year statute of limitations in Section 415(b) of the Communications Act; and (iv) regarding the *Verizon Virginia v. Virginia Elec. Power Co.* Order that Verizon cites, the complaining party suggested a state contract-action statute of limitations and the defendant did "not dispute" that statute.

FirstEnergy otherwise denies the allegations in Paragraph 56.

Verizon 57: *The applicable statute of limitations in Pennsylvania permits recovery back to the July 12, 2011 effective date of the Pole Attachment Order. The traditional statute of limitations for contract actions in Pennsylvania is four years. But Pennsylvania adheres to the continuing contract doctrine for contracts that, like the joint use agreements, do not have a fixed termination date. Under the continuing contract doctrine, damages are available for the time period covered by the continuing contract, plus a four-year period following termination of the contract. Thus, all time periods since the July 12, 2011 effective date of the Pole Attachment Order are covered by the applicable statute of limitations in Pennsylvania.*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 57.

As explained in FirstEnergy's Affirmative Defenses: (i) the *Beltz* and *Thorpe* cases which Verizon cites are inapplicable to the facts of this case; (ii) unlike the *Beltz* and *Thorpe* facts, all of the contracts at issue here can be terminated by either party upon notice, and all of them specify a certain time for payment; and (iii) even for such contracts with no payment or termination provisions, both cases specify the four-year Pennsylvania limitations period runs from the date of breach.

Verizon 58: *A refund of the amounts that Verizon has overpaid since July 12, 2011 will be consistent with the Commission's intention that "monetary recovery in a pole attachment action extend as far back in time as the applicable statute of limitations allows." Any other result "discourages pre-complaint negotiations between the parties," "fails to make injured attachers whole, and is inconsistent with the way that claims for monetary recovery are generally treated under the law." And here, Verizon should be made as whole as possible. It has paid FirstEnergy unjust and unreasonable rates for years while FirstEnergy thwarted Verizon's efforts—which*

began before the Pole Attachment Order's July 12, 2011 effective date—to reduce Verizon's annual pole attachment rent.

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 58.

As explained in FirstEnergy's Affirmative Defenses: (i) Verizon does not meet the threshold contract termination condition for Commission modification of these pre-2011 joint use agreements; (ii) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (iii) Verizon acknowledged right after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" (iv) even if the current agreement rates were not just and reasonable, Verizon is not similarly situated to other telecommunications providers or cable companies and so is not entitled to the same rate they are charged; and (v) Verizon negotiated in bad faith.

Verizon 59: *The new telecom rates for Verizon should be properly calculated using the Commission's presumptive inputs. Although FirstEnergy has asserted it can charge new telecom rates that are higher than the rates that Verizon seeks, FirstEnergy has not provided evidence that would rebut the Commission's presumptions, and Verizon is not aware of any that exists. The Commission should thus find the "just and reasonable" rate for Verizon is the per- pole new telecom rate that results from a proper application of the Commission's rate formulas. By enforcing Verizon's right to this just and reasonable rate, the Commission will advance its deployment goals by eliminating outdated rate disparities and creating a more competitive market for deployment of broadband and other advanced services.*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 59.

As explained in FirstEnergy's Affirmative Defenses: (i) Verizon does not meet the threshold contract termination condition for Commission modification of these pre-2011 joint use agreements; (ii) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (iii) Verizon acknowledged right after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" (iv) even if the current agreement rates were not just and reasonable, Verizon is not similarly situated to other telecommunications providers or cable companies and so is not entitled to the same rate they are charged; and (v) Verizon's joint use agreement grants Verizon a competitive advantage over its cable company and CLEC competitors that further justifies a higher rate.

As for creating a more competitive marketplace for broadband and other services, FirstEnergy respectfully submits that extracting undeserved payments from electric ratepayers to fund Verizon's profits to the detriment of its current and potential new competitors does not further broadband deployment to unserved and underserved areas and is not good public policy.

Verizon 60: *Verizon incorporates paragraphs 1 through 59 of this complaint as if set forth fully herein.*

FirstEnergy Answer: Paragraph 60 contains no allegations that require an answer.

Verizon 61: *The Commission has authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."*

FirstEnergy Answer: FirstEnergy responds that the Commission's regulations speak for themselves.

Verizon 62: *A properly calculated new telecom rate is the just and reasonable rate for Verizon's use of FirstEnergy's poles under the presumption adopted in the 2018 Third Report and Order and under the principle of competitive neutrality adopted in the 2011 Pole Attachment Order. During the applicable statute of limitations, the properly calculated new telecom rates for Verizon's use of FirstEnergy's poles are:*

- *$8.29, $9.87, $10.07, $5.02, $9.35, $8.79, $9.55, $12.20, and $13.83 per pole for Verizon's use of Met-Ed's poles during the 2011 to 2019 rental years;*
- *$6.43, $6.79, $7.18, $5.21, $6.96, $7.18, $7.49, $10.49, and $9.07 per pole for Verizon's use of Penelec's poles during the 2011 to 2019 rental years; and*
- *$7.30, $8.47, $8.51, $8.21, $8.94, $9.40, $9.08, $11.18, and $11.80 per pole for Verizon's use of Penn Power's poles during the 2011 to 2019 rental years.*

FirstEnergy's refusal to charge Verizon a rental rate properly calculated under the FCC's new telecom formula has denied Verizon a just and reasonable rate in violation of 47 U.S.C. § 224 and the Commission's implementing regulations and orders and has taken over [redacted] *from Verizon to date in violation of federal law.*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 62.

As explained in FirstEnergy's Affirmative Defenses: (i) Verizon does not meet the threshold contract termination condition for Commission modification of these pre-2011 joint use agreements; (ii) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (iii) Verizon acknowledged right after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" (iv) the *2018 Third Report and Order* and its presumptions do not apply; (v) even if the current agreement rates were not just and reasonable, Verizon is not similarly situated to other telecommunications providers or cable companies and so is not entitled to the same rate they are charged; (vi) the applicable statute of limitations is two years; (vii) refunds

are not appropriate in this proceeding in any event; and (viii) Verizon has miscalculated the new telecom rate.

Verizon 63: *Alternatively, if FirstEnergy shows that Verizon attaches to FirstEnergy's poles on terms and conditions that provide it a net material advantage as compared to other telecommunications attachers, the just and reasonable rate for Verizon's use of FirstEnergy's poles is no higher than the properly calculated pre-existing telecom rate. During the applicable statute of limitations, the properly calculated pre-existing telecom rates for Verizon's use of FirstEnergy's poles are:*

- *$12.57, $14.96, $15.26, $7.61, $14.16, $13.32, $14.47, $18.49, and $20.96 per pole for Verizon's use of Met-Ed's poles during the 2011 to 2019 rental years;*

- *$9.74, $10.29, $10.89, $7.89, $10.54, $10.88, $11.35, $15.90, and $13.75 per pole for Verizon's use of Penelec's poles during the 2011 to 2019 rental years; and*

- *$11.06, $12.83, $12.90, $12.44, $13.54, $14.24, $13.75, $16.94, and $17.88 per pole for Verizon's use of Penn Power's poles during the 2011 to 2019 rental years.*

Under these alternative circumstances, FirstEnergy's refusal to offer Verizon a rental rate that is not higher than the rate properly calculated under the FCC's pre-existing telecom formula has denied Verizon a just and reasonable rate in violation of 47 U.S.C. § 224 and the Commission's implementing regulations and orders and has taken over [redacted] *from Verizon to date in violation of federal law.*

FirstEnergy Answer: FirstEnergy denies the allegations in Paragraph 63.

As explained in FirstEnergy's Affirmative Defenses: (i) Verizon does not meet the threshold contract termination condition for Commission modification of these pre-2011 joint use agreements; (ii) the current agreement rates are just and reasonable because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon; (iii) Verizon acknowledged right after negotiations were completed in 2009 that the new rates were "fair and equitable" and that the joint use rates issue had been "amiably resolved;" (iv) the *2018 Third Report and Order* and its presumptions do not apply; (v) even if the current agreement rates were not just and reasonable, Verizon is not similarly situated to other telecommunications providers or cable companies and so is not entitled to the same rate they are charged; (vi) as Verizon should know from the *Verizon v. FPL Order*, the pre-existing telecom rate is a "reference point," not an upper-bound rate; (vii) the applicable statute of limitations is two years; (viii) refunds are not appropriate in this proceeding in any event; and (ix) Verizon has miscalculated the pre-existing telecom rate.

Verizon 64: *Verizon respectfully requests that the Commission order that the unjust and unreasonable rate provision in the parties' Joint Use Agreement, as amended, is terminated consistent with the applicable statute of limitations.*

FirstEnergy Answer: Paragraph 64 contains no allegations that require an answer.

Verizon 65: *Verizon respectfully requests that the Commission prescribe the rate that is properly calculated in accordance with the Commission's new telecom formula as the just and reasonable rate in a new agreement that applies to Verizon's existing and future attachments.*

FirstEnergy Answer: Paragraph 65 contains no allegations that require an answer.

Verizon 66: *Alternatively, if the Commission concludes that FirstEnergy has shown that the terms and conditions of the parties' joint use agreements provide Verizon a net material advantage relative to its competitors, then Verizon requests that the Commission prescribe as the just and reasonable rate a rate no higher than the rate properly calculated in accordance with the Commission's pre-existing telecom formula.*

FirstEnergy Answer: Paragraph 66 contains no allegations that require an answer.

Verizon 67: *Verizon respectfully requests that the Commission order FirstEnergy to refund all amounts paid in excess of a just and reasonable rate during the applicable statute of limitations period and grant Verizon such other relief as the Commission deems just, reasonable, and proper.*

FirstEnergy Answer: Paragraph 67 contains no allegations that require an answer.

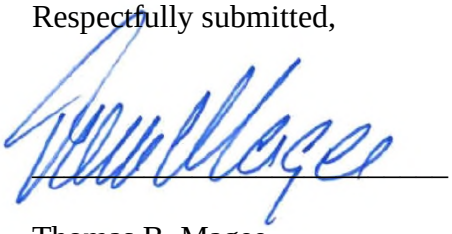
III. INFORMATION DESIGNATION

The FirstEnergy employees and former employees with relevant information about this Answer are identified in this Pole Attachment Answer and its supporting Attachments and Exhibits.

IV. CONCLUSION

WHEREFORE, Metropolitan Edison Company, Pennsylvania Electric Company, and Penn Power Company request that the Commission deny Verizon Maryland's Complaint for the reasons stated herein.

Respectfully submitted,



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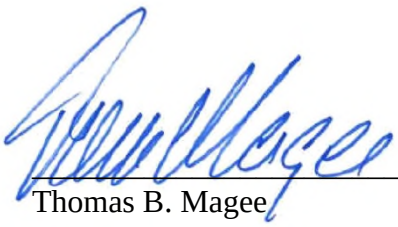
Penn Power Company

Dated: February 3, 2020

Privileged and Confidential
DRAFT 2-3-2020

RULE 1.721(M) VERIFICATION

I, Thomas B. Magee, as signatory to this submission, hereby verify that I have read this Answer and, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.



Thomas B. Magee

CERTIFICATE OF SERVICE

I, Timothy A. Doughty, hereby certify that on this 3rd day of February 2020, a true and authorized copy of Metropolitan Edison Company, Pennsylvania Electric Company, and Penn Power Company's Answer to Complainants Verizon Pennsylvania LLC and Verizon North LLC's Pole Attachment Complaint was served on the parties listed below via electronic mail and was filed with the Commission via ECFS and via Hand Delivery (Confidential Version).

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/s/
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