Before the
Federal Communications Commission
Washington, DC 20554

VERIZON PENNSYLVANIA LLC and VERIZON NORTH LLC, Complainants, v. METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, and PENN POWER COMPANY, Defendants.	Proceeding No. 19-354 Bureau ID No. EB-19-MD-008

REPLY LEGAL ANALYSIS IN SUPPORT OF VERIZON'S POLE ATTACHMENT COMPLAINT

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I. INTRODUCTION AND SUMMARY

The Pole Attachment Act and the Commission's regulations and orders entitle Verizon to "just and reasonable" pole attachment rates and prohibit FirstEnergy[1] from charging Verizon rates higher than the "new telecom rate" guaranteed to Verizon's competitors.[2] FirstEnergy nevertheless demands Verizon continue paying rates more than [redacted] the new telecom rate, so FirstEnergy can continue to profit by more than [redacted] each year.[3] Since at least July 12, 2011, FirstEnergy has charged Verizon unlawful rates. The Commission should grant Verizon's complaint and:

(1) Find the rates in the parties' joint use agreements are unjust, unreasonable, and terminated effective July 12, 2011 (the effective date of the *Pole Attachment Order*);

(2) Set Verizon's rate for use of FirstEnergy's poles at the new telecom rates identified at paragraph 62 of Verizon's complaint, effective July 12, 2011, for the 2011 through 2019 rental years and updated annually thereafter at the per pole new telecom rate properly calculated in accordance with the Commission's rules and orders; and

(3) Order FirstEnergy to refund to Verizon all amounts paid in excess of the new telecom rates since the July 12, 2011 effective date of the *Pole Attachment Order*, plus interest.

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[1] In this Reply Legal Analysis, "FirstEnergy" refers collectively to the three defendants, Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec") and Penn Power Company ("Penn Power") and "Verizon" refers to the two complainants, Verizon Pennsylvania and Verizon North.

[2] 47 U.S.C. § 224; 47 C.F.R. § 1.1413; *In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) ("*Third Report and Order*"); *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 (2011) ("*Pole Attachment Order*").

[3] Compl. Ex. B at VZ00051 (Calnon Aff. ¶ 29) (calculating average annual overpayment).

* * * * *

Almost a decade ago, the Commission directed FirstEnergy and other electric utilities to reduce pole attachment rates to a competitively neutral level, which "will enable consumers to benefit through increased competition, affordability, and availability of advanced communications services, including broadband."[4] But electric utilities, including FirstEnergy, refused to comply, prompting the Commission to adopt a rebuttable presumption in 2018 requiring electric utilities to charge the new telecom rate under agreements like the parties' joint use agreements, which have automatically renewed during the last year.[5]

FirstEnergy still refuses to comply. It declares the Commission's new telecom rate presumption inapplicable, challenges the Commission's long-settled (and affirmed on appeal) authority over pole attachments, criticizes the Commission's policy objectives, and otherwise seeks to evade or postpone rate reductions required by law nearly nine years ago. But by regulation, FirstEnergy must charge a properly calculated new telecom rate unless FirstEnergy rebuts the presumption the Commission adopted in 2018[6]—and FirstEnergy hasn't even tried. The result in this case is straightforward: FirstEnergy must charge Verizon the properly calculated new telecom rate and should refund the more than [redacted] it has collected unlawfully since 2011.

Even if the Commission had not adopted the presumption in 2018 and the 2011 standard still were in effect, the result would be the same. During negotiations, FirstEnergy claimed 24

[4] *Pole Attachment Order*, 26 FCC Rcd at 5295 (¶ 126).

[5] *Third Report and Order*, 33 FCC Rcd at 7767-71 (¶¶ 123-29).

[6] 47 C.F.R. § 1.1413(b).

redundant, hypothetical, and illusory "competitive advantages" justified its rates under the 2011 standard. It now presents a set of just three, but they suffer from the same flaws.

The 2011 standard required FirstEnergy to prove the rate disparity between Verizon and its competitors is justified by the value of any "net material competitive advantages" FirstEnergy provides Verizon under the parties' joint use agreements as compared to the terms and conditions FirstEnergy provides under its license agreements with Verizon's competitors.[7] FirstEnergy's efforts to justify its rate under that standard do not survive scrutiny. FirstEnergy first argues its poles are tall and strong enough to accommodate Verizon's facilities. This attempted justification fails because the same poles are also tall and strong enough to accommodate Verizon's competitors' facilities. FirstEnergy next points to a previously unannounced plan to conduct a field audit of its own network and surmises it may be able to defray the cost by imposing about a [redacted] per pole charge on Verizon's competitors. But FirstEnergy may never conduct such an audit and its license agreements [redacted] on Verizon's competitors. Moreover, the cost itself is guesswork, based on unsubstantiated costs related to an undocumented field audit in Ohio. Finally, FirstEnergy argues Verizon occupies about [redacted] inches of additional space on a pole than Verizon's competitors occupy, but FirstEnergy does not substantiate its claim and, regardless, FirstEnergy illustrates how rates calculated using its flawed data in the "space occupied" input of the new telecom formula still results in rates less than [redacted] the rates FirstEnergy demands. In the end, FirstEnergy fails to distinguish Verizon from its

[7] *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶¶ 217-18); *see also Verizon Va. v. Va. Elec. & Power Co*., 32 FCC Rcd 3750, 3759 (¶ 20 & n.70) (EB 2017) ("*Dominion Order*").

competitors—let alone prove any competitive advantage justifying an annual rental rate more than [redacted] per pole higher.[8]

The relief Verizon seeks—an order requiring that FirstEnergy charge Verizon a properly calculated and competitively neutral new telecom rate and refund the millions it unlawfully collected from Verizon in Pennsylvania—will send a strong and needed message to the industry that the Commission will not tolerate FirstEnergy's tactics. Those tactics increase deployment costs by denying telecommunications providers their statutory right to just, reasonable, and competitively neutral pole attachment rates.

II. LEGAL ANALYSIS

FirstEnergy's Answer[9] confirms Verizon is entitled by law to the properly calculated new telecom rate for Verizon's use of FirstEnergy's poles and has been since July 12, 2011. FirstEnergy's efforts to evade this federal statutory requirement must fail, because FirstEnergy:

(A) Defends its exceptionally high rates for reasons that conflict with the Commission's longstanding deployment and competition goals;

(B) Did not rebut the Commission's new telecom rate presumption, which applies and guarantees Verizon a new telecom rate;

(C) Did not justify the joint use agreement rates even under the standard that would apply if the new telecom rate presumption did not;

[8] *See* Compl. Ex. B at VZ00046 (Calnon Aff. ¶ 21) (calculating average [redacted] per pole rate disparity between Verizon and its competitors).

[9] The Answer consists of 68 pages of merits briefing under the heading "Affirmative Defenses" and 43 pages of responsive pleading under the heading "Response to Complaint Allegations." For ease of reference, throughout its Reply submissions, Verizon refers to the merits briefing as "FE Brief" and the responsive pleading as "Response to Compl." FirstEnergy's attempt to assert affirmative defenses as part of its merits briefing is improper, for reasons addressed in Verizon's accompanying Reply to the Answer.

(D) Unlawfully increased its new telecom rate calculations by misapplying the Commission's formulas and rules; and

(E) Seeks to relitigate settled issues and otherwise delay the just and reasonable rates required since 2011 by law.

The Commission should set the just and reasonable rate for Verizon's use of FirstEnergy's poles, effective July 12, 2011, as the properly calculated new telecom rate and order FirstEnergy to refund with interest the more than [redacted] FirstEnergy has unlawfully collected since then.[10]

A. FirstEnergy's Defense Conflicts with the Commission's Deployment Goals.

One sentence FirstEnergy repeats throughout its Answer puts the rest of its arguments in context: FirstEnergy thinks it is "not good public policy" for the Commission to create "greater rate parity between [I]LECs and their telecommunications competitors" to "energize and further accelerate broadband deployment."[11] And so a decade into the Commission's work to "establish rental rates for pole attachments that are as low and close to uniform as possible … to promote broadband deployment,"[12] FirstEnergy continues to try to evade the Commission's rate reforms because it disagrees with the Commission's decisions—arguing it is uniquely exempt from the

[10] Interest should be awarded at "the current interest rate for Federal tax refunds and additional tax payments." *Cavalier Tel., LLC v. Va. Elec. & Power Co*., 15 FCC Rcd 17962, 17964 (¶ 4 n.16) (2000).

[11] Response to Compl. ¶¶ 13, 19, 59 ("As for 'energizing' and 'accelerating' broadband deployment, FirstEnergy respectfully submits that [reducing rates paid electric utilities] does not further broadband deployment to unserved and underserved areas and is not good public policy."); *see also Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126); *Assumption of Comm'n Jurisdiction over Pole Attachments*, No. L-2018-3002672, 2019 WL 4345730, at *2 (Aug. 29, 2019) ("This [Final Rulemaking Order] is a natural outgrowth of the goals of Chapter 30 of the Public Utility Code, which is intended to promote and encourage the provision of advanced telecommunications services and broadband deployment in the Commonwealth.").

[12] National Broadband Plan at 97.

reforms, inventing insurmountable procedural hurdles the Commission never created, and resting on unsupported and conclusory denials instead of proof of a legitimate cost-based reason for the unreasonably high joint use agreement rates.

And the joint use agreement rates are exceptionally high. The Commission's new telecom rate formula sets the maximum rate FirstEnergy may charge Verizon's competitive local exchange carrier ("CLEC") competitors,[13] and it produces a rental rate that fully compensates FirstEnergy for use of space on FirstEnergy's poles.[14] FirstEnergy instead charges and collects joint use agreement rates from Verizon averaging more than [redacted] *times* the properly calculated new telecom rate—raking in a per-pole surplus of more than [redacted] each year, on average, on over 300,000 utility poles in Pennsylvania.[15] FirstEnergy may "challenge [the Commission's] policy justification" for its rate reforms, but it has "neither theory nor fact to contradict the Commission's fundamental proposition" that such a significant "artificial, non-cost-based difference[ ]" in pole attachment rates impacts deployment decisions and should be eliminated.[16]

Making matters worse, FirstEnergy defends the joint use agreement rates by arguing it *also* collects very high rental rates from some of Verizon's competitors.[17] Claiming it need not comply with the new telecom rate formula absent a Commission decision specific to a particular

[13] 47 C.F.R. § 1.1406(d)(2) ("With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the *maximum* just and reasonable rate *shall be* the higher of the rate yielded by paragraphs (d)(2)(i) or (d)(2)(ii) of this section.") (emphases added); *see also* Section II.D below.

[14] *Pole Attachment Order*, 26 FCC Rcd at 5299 (¶ 137) ("The [new telecom] rate is just, reasonable, and fully compensatory…").

[15] *See* Compl. Ex. B at VZ00046 (Calnon Aff. ¶ 21); Response to Compl. ¶ 4 (admitting FirstEnergy owns 301,854 joint use poles in Pennsylvania).

[16] *Am. Elec. Power*, 708 F.3d at 190 (citation omitted).

[17] FE Brief ¶ 101; Response to Compl. ¶ 11.

company, FirstEnergy admits it forces some CLECs to pay far more than the properly calculated new telecom rate.[18] But the answer is not to penalize Verizon for FirstEnergy's unlawful rates. FirstEnergy should be ordered to charge Verizon the lawful and properly calculated new telecom rate and refund Verizon's overpayments. This will not only remedy FirstEnergy's intentional decision to violate the law until caught but should dissuade FirstEnergy and other electric utilities from imposing the cost and burden of unnecessary pole attachment complaint proceedings on other telecommunications providers—and the Commission.

FirstEnergy's defiance of the legal limits on rental rates reveals another flaw in one of its overarching arguments—specifically, that the joint use agreement rates should stand because Verizon declined to transfer all its poles to FirstEnergy as a precondition for negotiating the just and reasonable rates required by law.[19] There is no requirement that Verizon "transition … out of the pole owning business" to obtain a competitively neutral new telecom rate—let alone a requirement that Verizon *give away* more than 130,000 poles in Pennsylvania and Maryland to have the opportunity to try to negotiate one.[20]

Assuming for argument's sake Verizon had transferred its poles to FirstEnergy, however, that would have resulted in a statewide increase in pole attachment rates. Since 2011, Verizon has charged CLECs and cable companies attached to its poles new telecom rates ranging from [redacted] per pole in Pennsylvania,[21] while FirstEnergy has charged CLECs and cable

[18] FE Brief ¶¶ 101-03.

[19] *See, e.g.*, FE Brief ¶ 97 ("FirstEnergy offered to transition Verizon out of the pole owning business as part of its offer for Verizon to enter a standard CLEC agreement"); *see also* FE Brief at ii, iv, ¶¶ 60-61, 93; Response to Compl. ¶¶ 36, 38, 39.

[20] *See* FE Brief at ii, iv, ¶¶ 60-61, 93, 97; Response to Compl. ¶¶ 36, 38, 39; *see also* Section II.C.2 below.

[21] Compl. Ex. A at VZ00006 (Mills Aff. ¶ 11).

companies attached to its poles rates ranging from [redacted] per pole in Pennsylvania.[22] Had Verizon agreed to transfer its poles to FirstEnergy, that would have *increased* pole attachment rates for CLECs and cable companies attached to those poles throughout Pennsylvania—in direct contravention of the Commission's decision a decade ago that pole attachment rates should be *reduced* to "support the goal of broadband deployment."[23]

The Commission should use this case to again send the message it has repeated regularly over the last decade: "outdated rate disparities" among comparable competitors must be eliminated because "[n]ow, more than ever, access to this vital [utility pole] infrastructure must be … affordable, so that broadband providers can continue to enter new markets and deploy facilities that support high-speed broadband."[24]

B. FirstEnergy Essentially Ignores the Commission's 2018 *Third Report and Order*, Which Resolves this Case and Entitles Verizon to Properly Calculated New Telecom Rates.

FirstEnergy bases its defense of the joint use agreement rates on the standard adopted in the 2011 *Pole Attachment Order*[25] and limits its analysis of the Commission's 2018 *Third Report and Order* to eight paragraphs arguing its new telecom rate presumption should not apply.[26] But the new telecom rate presumption *does apply* to the joint use agreements. It attaches to

[22] FE Brief ¶ 101.

[23] National Broadband Plan at 110; *see also Pole Attachment Order*, 26 FCC Rcd at 5303-04 (¶ 147) ("Notably, [consumer advocates] are interested in keeping the costs of pole attachments down, so as to keep the costs of the[se] services . . . down.").

[24] *Third Report and Order*, 33 FCC Rcd at 7706, 7707, 7767 (¶¶ 1, 3, 123).

[25] *See, e.g.*, Response to Compl. ¶¶ 12, 13, 14, 17, 18, 19, 20 ("the *2011 Pole Attachment Order* applies to all periods at issue in this proceeding").

[26] *See* FE Brief ¶¶ 21-28; *see also* Response to Compl. ¶¶ 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 43, 62, 63 (stating that "the *2018 Third Report and Order* and its presumptions do not apply" and incorporating explanation from FirstEnergy's Brief).

agreements "entered into, renewed, or in evergreen status after the [March 11, 2019] effective date of [the *Third Report and*] *Order*," including "agreements that are automatically renewed, extended, or placed in evergreen status."[27] The joint use agreements "automatically renewed [and] extended" during the past year and so fall squarely within the presumption. In FirstEnergy's words, the joint use agreements "*continue* to govern the parties' joint use relationship" because they "*shall continue* in force" after their initial terms expire "until terminated by either party at any time" upon advance written notice.[28] Because "continue" and "extend" are synonyms,[29] the joint use agreements are operative today *because* they *extended* after the effective date of the *Third Report and Order* to continue to govern the parties' joint use relationship. They are, therefore, "agreements that … [we]re … automatically renewed [or] extended" after the effective date, and the new telecom rate presumption applies.[30]

FirstEnergy's meritless arguments seek to render the presumption incapable of eliminating the "outdated rate disparities" it was adopted to correct.[31]

First, FirstEnergy asks the Commission not to apply the new telecom rate presumption unless the parties, after the effective date of the *Third Report and Order*, agree the presumption will apply.[32] FirstEnergy explains it would require "some action … or a triggering event" such as the following: "the parties, following the effective date of the *2018 Third Report and Order*, decide[ ] to 'extend' the term" or expressly agree "for automatic renewal at a future date

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[27] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475).

[28] Response to Compl. ¶¶ 15, 16 (emphases added).

[29] *See* Compl. ¶ 16 ("'Continue' is a synonym of 'extend,' meaning '[t]o carry further in time, space or development: extend.'") (citation omitted).

[30] *See Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475).

[31] *See id.* at 7767-68 (¶ 123).

[32] FE Brief ¶ 24.

certain."[33] But the Commission broadly applied the presumption to existing "agreements that are *automatically* renewed [or] extended" after the *Order*'s effective date *without* further affirmative action by the parties.[34] This standard made sense: the presumption counteracts a continued decline in "[I]LEC bargaining power vis-à-vis utilities."[35] The Commission did not leave the presumption's effectiveness in the hands of electric utilities that, like FirstEnergy, have incentive to use their superior bargaining power to try to avoid it.

Second, FirstEnergy argues the new telecom rate presumption does not apply because the joint use agreements renewed when their initial terms expired "more than two decades" ago.[36] But the Commission applied its presumption to agreements that, like the joint use agreements, continue to "automatically renew[ ]" and "extend[ ]" each day after their initial term.[37]

Third, FirstEnergy argues the presumption should be limited to agreements that "specifically state the renewal term length" and not to agreements that extend on a day-to-day basis.[38] But the Commission did not distinguish among joint use agreements that renew or extend on a day-to-day, month-to-month, or year-to-year basis; it sought to eliminate "outdated rate disparities" in all of them.[39] And, regardless, FirstEnergy's focus on requiring a "*renewal*

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[33] *Id.*

[34] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475) (emphasis added).

[35] *Id.* at 7769 (¶ 126).

[36] FE Brief ¶ 27.

[37] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475).

[38] FE Brief ¶ 25. The "shall continue" language in the Joint Use Agreements is common throughout the industry. *See, e.g.*, Compl. Ex. 1 at VZ00118, *Verizon Md. v. The Potomac Edison Co.*, No. 19-355 (Nov. 21, 2019); Compl. Ex. 1 at ATT00128, *BellSouth Telecommunications v. Fla. Power and Light Co.*, No. 19-187 (July 1, 2019); Compl. Ex. 1 at ATT00108, *BellSouth Telecommunications v. Ala. Power Co.*, No. 19-119 (Apr. 22, 2019).

[39] *See Third Report and Order*, 33 FCC Rcd at 7767-68, 7770 (¶¶ 123, 127 n.475).

term" misses the mark because the Commission applied its presumption to agreements that renew *and* to agreements that *extend* after the *Third Report and Order*'s effective date.[40]

Fourth, FirstEnergy argues the presumption should apply only if the exact word "extend" appears in a joint use agreement—and so should not apply here because the joint use agreements use the word "continue," which is a synonym of "extend."[41] This formalistic limitation is not in the *Third Report and Order*, which was intended to broadly address "outdated rate disparities."[42] If a joint use agreement has *in fact* automatically renewed or extended after the *Order*'s effective date, the presumption applies.[43]

Fifth, FirstEnergy argues the Commission did not repeat the word "automatically" when describing agreements covered by the presumption so it only applies to agreements that "automatically renew" and to agreements that "extend."[44] FirstEnergy's argument breaks with "generally accepted rules of syntax," as "[m]ost readers expect the first adjective in a series of nouns or phrases to modify each noun or phrase in the following series unless another adjective appears."[45] FirstEnergy's argument is also irrelevant. The joint use agreements "extended" after the effective date of the *Third Report and Order* because the parties chose to extend them.[46]

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[40] *See id.* at 7770 (¶ 127 n.475) ("renewal includes agreements that are automatically renewed [or] extended").

[41] FE Brief ¶ 27 ("the contract says 'continue;' it does not say 'extend.'"); *see also* Compl. ¶ 16 ("Continue" means "[t]o carry further in time, space or development: extend.").

[42] *See Third Report and Order*, 33 FCC Rcd at 7767-68, 7770 (¶¶ 123, 127 n.475).

[43] *See id.* at 7770 (¶ 127 & n.475).

[44] FE Brief ¶ 26; *see also Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475) ("renewal includes agreements that are automatically renewed, extended, or placed in evergreen status").

[45] *Washington Educ. Ass'n v. Nat'l Right to Work Legal Def. Found., Inc.*, 187 F. App'x 681, 682 (9th Cir. 2006) (citation omitted).

[46] *See, e.g.*, Response to Compl. ¶ 16 ("either party at any time" may give notice to terminate).

Sixth, FirstEnergy argues interpreting "automatically renewed [or] extended" to include agreements that extend on a day-to-day basis is "complicated," "nonsensical," and "tortuous."[47] But there is nothing complex, difficult, or illogical about applying the presumption as written.[48] According to FirstEnergy, if a joint use agreement states it "shall be extended" for a renewal term, it "would be 'extended'" within the meaning of the *Order*.[49] There is no legitimate distinction between FirstEnergy's hypothetical and the joint use agreements: they state they "shall continue" (which means they shall be extended)—and provide for them to do so on day-to-day renewal terms.[50] FirstEnergy also incorrectly argues this reading would mean "every existing joint use agreement [was] instantly" within the presumption.[51] Not so. As FirstEnergy noted, an agreement with an express but unexpired five-year renewal term would not automatically renew until its current renewal term expires.[52]

Finally, FirstEnergy argues, even if the presumption applies, the Commission's implementing regulation, 47 C.F.R. § 1.1413(b), is "crystal clear" it cannot be used to determine the "just and reasonable" rate for time periods before the *Third Report and Order*'s March 11, 2019 effective date.[53] The regulation says the opposite: it states the presumption *will* apply to

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[47] FE Brief ¶¶ 26-28.

[48] *See Tilden Mining Co., Inc. v. Sec'y of Labor*, 832 F.3d 317, 324 (D.C. Cir. 2016) ("[A] regulation's ambit comes from the natural import of its text. Disavowals by those on the receiving end of regulation cannot, by themselves, alter a regulation's natural meaning."); *see also Epsilon Elecs., Inc. v. U.S. Dep't of Treasury*, 857 F.3d 913, 920-22 (D.C. Cir. 2017) (rejecting interpretation that would "distort the plain meaning of the regulation").

[49] FE Brief ¶ 27 n.32.

[50] *See* Compl. ¶ 16 n.47 (emphasis added).

[51] FE Brief ¶ 27.

[52] FE Brief ¶ 27 & n.35.

[53] FE Brief ¶ 22 & n.27 (citing 47 C.F.R. § 1.1413(b)); Response to Compl. ¶ 10.

any pole attachment complaint proceeding if the "pole attachment contract [was] entered into or renewed after the effective date,"[54] with renewals including agreements that were "automatically renewed [or] extended."[55] The Commission wisely chose *not* to apply different standards to different portions of the same complaint proceeding, but to apply the presumption to all time periods within its remedial authority.[56] The presumption thus applies across-the-board in this case.

Because the new telecom rate presumption applies, it simplifies the Commission's work. Most of FirstEnergy's remaining arguments are not just wrong,[57] but also irrelevant. Because FirstEnergy did not try to rebut the presumption—let alone provide "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"[58]—Verizon "may be charged no higher than the rate determined in accordance with [the new telecom rate formula]."[59] That is the end of the matter.

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[54] 47 C.F.R. § 1.1413(b) ("In complaint proceedings challenging utility pole attachment rates, terms, and conditions for pole attachment contracts entered into or renewed after the effective date of this section, there is a presumption…").

[55] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475).

[56] *See* 47 C.F.R. § 1.1407(a). There are no retroactivity concerns with applying the presumption to all relevant time periods and FirstEnergy waived such an argument. *See* FE Brief ¶ 22. A "regulation does not operate retroactively merely because it applies to prior conduct," but it must also impair rights FirstEnergy had at that time, increase FirstEnergy's liability for that time period, or impose new duties retroactively. *See Ga. Power Co. v. Teleport Commc'ns Atlanta, Inc.*, 346 F.3d 1033, 1042-43 (11th Cir. 2003) (quoting *Landgraf v. USI Film Prods*., 511 U.S. 244, 280 (1994)). FirstEnergy cannot meet that standard. It has been just as bound by the "just and reasonable" rate requirement since 2011, faced equal liability for rent collected in violation of federal law, and was subject to a comparable obligation to justify the rates it charged. *See Dominion Order*, 32 FCC Rcd at 3759-61 (¶¶ 20-22) (requiring electric utility to justify its rates).

[57] *See* Section II.C, II.D, II.E below.

[58] *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123).

[59] 47 C.F.R. § 1.1413(b).

And there is no question FirstEnergy did not rebut the presumption. In more than 100 pages of arguments and denials, FirstEnergy never stated it *was* rebutting the presumption or that it wanted to try. Instead, FirstEnergy repeated its contention that "the *2018 Third Report and Order* and its presumptions do not apply."[60]

FirstEnergy's Answer thus focuses on arguments unique to the standard the Commission adopted in 2011 and that are no longer relevant under the standard adopted in 2018, which focuses solely on whether a utility has rebutted the new telecom rate presumption. For example:

- FirstEnergy claims the "*2011 Pole Attachment Order* requires any ILEC seeking to change the terms and conditions of existing joint use agreements to terminate those agreements."[61] Not true,[62] but also not relevant: In 2018, the Commission applied the new telecom rate presumption to "existing agreements."[63]

- FirstEnergy argues the agreement rates are permitted under the 2011 *Order* "because under the facts of this case, FirstEnergy lacks bargaining leverage over Verizon."[64] Not true,[65] but also not relevant: In 2018, the Commission applied the new telecom rate presumption to "existing joint use agreements" regardless of whether or not they were "negotiated at a time of more equal bargaining power between the parties."[66]

- FirstEnergy states the 2011 *Order*, at best, entitles Verizon to unlawfully high rates FirstEnergy imposes on some of Verizon's competitors, which exceed the maximum rate set by the Commission's new telecom rate formula.[67] Not true,[68] but also not relevant: In 2018, the Commission clarified, where an electric utility fails to rebut the

[60] *See, e.g.*, Response to Compl. ¶¶ 12, 13, 14, 17, 18, 19, 20.

[61] *See* FE Brief ¶ 1; *see also id.* ¶¶ 2-11; Response to Compl. ¶¶ 10, 13, 14, 18, 19, 20, 24, 29, 36, 37, 41, 55, 58, 59, 62, 63.

[62] *See* Section II.C.1.

[63] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127).

[64] *See* Anwer to Compl. ¶¶ 10, 12, 13, 14, 18, 19, 20, 21, 23, 24, 27, 28, 30, 31, 32, 33, 36, 37, 40, 41, 55, 58, 59, 62, 63; *see also* FE Brief ¶¶ 29-67.

[65] *See* Section II.C.2.

[66] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127).

[67] *See* FE Brief ¶¶ 99-103; Response to Compl. ¶ 11.

[68] *See* Section II.D.

> presumption, the ILEC "may be charged no higher than the rate determined in accordance with [the new telecom rate formula at 47 C.F.R.] § 1.1406(e)(2)."[69]

The presumption thus allows the Commission to cut to the chase: because FirstEnergy did not rebut the presumption, Verizon is entitled to the properly calculated new telecom rate, which has averaged about $8.40 per pole during the applicable statute of limitations.[70]

C. Even if the 2011 *Pole Attachment Order* Provides the Relevant Standard, the New Telecom Rate Is the Just and Reasonable Rate.

Despite its reliance on the 2011 *Pole Attachment Order*, FirstEnergy failed to justify the unreasonably high joint use agreement rates even under the standard adopted in 2011. Instead of providing credible, verifiable data of some cost-based justification for charging Verizon [redacted] times the properly calculated new telecom rate, FirstEnergy argues the agreement rates should stand because of invented technicalities and its own say-so. Much more was required; as FirstEnergy admits, it has the burden to justify the lawfulness of its rates under the standard adopted in 2011 once Verizon makes a *prima facie* case of their unreasonableness.[71] Verizon made that showing and FirstEnergy does not argue otherwise.[72] Yet FirstEnergy failed to come forward with anything that could "remotely justify the difference between the rate [Verizon] pays and the rate that competitive LECs" may pay to attach to FirstEnergy's poles.[73] The new

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[69] 47 C.F.R. § 1.1413(b).

[70] *See* Compl. Ex. B at VZ00046 (Calnon Aff. ¶ 21).

[71] *See* FE Brief ¶ 86 (If Verizon made "a prima facie case, … the burden shifts to FirstEnergy"); *see also Dominion Order*, 32 FCC Rcd at 3759-61 (¶¶ 20-22) (requiring electric utility to justify its rates under the standard adopted in 2011).

[72] *See Multimedia Cablevision, Inc. v. Sw. Bell Tel. Co*., 11 FCC Rcd 11202, 11207 (¶ 11) (1996) (A *prima facie* case is established by "a statement of the specific unreasonable pole attachment rate, term or condition and all arguments used to support its claim of unreasonableness.").

[73] *See Dominion Order*, 32 FCC Rcd at 3758 (¶ 17).

telecom rate is, therefore, also the just and reasonable rate under the standard the Commission adopted in 2011.

1. Verizon Did Not Need To Terminate the Joint Use Agreements and Compromise Future Deployment To Seek Rate Relief.

FirstEnergy invents a "threshold contract termination" requirement and seeks dismissal of this case until the joint use agreements are terminated.[74] But there is no "contract termination" requirement in the *Pole Attachment Order*, and for good reason: it would complicate deployment and substantially increase costs going forward. As FirstEnergy explains, without the joint use agreements, Verizon would need to construct a duplicative pole line or underground its facilities to deploy facilities in the future[75]— prohibitively expensive and practically impossible options given local preferences and restrictions.[76] The Commission did not require such a costly and time-consuming burden when it "improve[d] the efficiency and reduce[d] the potentially excessive costs of deploying telecommunications, cable, and broadband networks."[77]

Although a termination requirement does not exist in the *Pole Attachment Order*, FirstEnergy declares the "message" of select sentences "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."[78] But the *Pole Attachment Order* expressly

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[74] *See* Response to Compl. ¶¶ 13, 14, 18, 19, 20, 24, 29, 36, 37, 41, 55, 58, 59, 62, 63; *see also* FE Brief ¶¶ 1-11.

[75] *See* FE Brief ¶ 36.

[76] *See, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5242 (¶ 4) ("Owing 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.") (citations omitted).

[77] *Id.* at 5241 (¶ 1).

[78] FE Brief ¶ 6 (emphasis added). FirstEnergy otherwise considers the *Pole Attachment Order* "unclear," "incomplete and subject to multiple interpretations." *See id.* ¶¶ 119-143.

established a framework for reviewing *existing* rates in *existing* agreements. Recognizing "[I]LECs frequently have access to pole attachments pursuant to joint use agreements," the Commission found "where [I]LECs have such access, they are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)."[79] The Commission then authorized—without restriction—ILECs to "file complaints with the Commission challenging the rates, terms and conditions of [these] pole attachment agreements with other utilities."[80]

The right to challenge rates in existing agreements is consistent with the Commission's "sign and sue" rule, "which allows an attacher to challenge the lawfulness of terms in an executed pole attachment agreement."[81] There is no time restriction on such a challenge after an agreement is signed: "pole attachment rates cannot be held reasonable simply because they have been agreed to."[82] The Commission is required by statute to ensure "just and reasonable" rates; it "would not be fulfilling that duty if it were to substitute the requirements of contract law for the dictates of section 224."[83]

FirstEnergy also rebuts its own termination requirement, admitting rates in at least *some* existing agreements may be challenged. FirstEnergy denies suggesting "Verizon is *not* eligible

[79] *Pole Attachment Order*, 26 FCC Rcd at 5328, 5334 (¶¶ 202, 216).

[80] *Id*. at 5328 (¶ 203).

[81] *Id.* at 5292 (¶ 119); *see also S. Co. Servs. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002) ("sign and sue" applies where "the attacher has agreed, for one reason or another, to pay a rate above the statutory maximum …") (citation omitted).

[82] *Selkirk Commc'ns, Inc. v. Fla. Power & Light Co.*, 8 FCC Rcd 387, 389 (¶ 17) (1993).

[83] *In re Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, NPRM*, 25 FCC Rcd 11864, 11908 (¶ 105) (2010) ("*Pole Attachment Order NPRM*") (cited with approval at *Pole Attachment Order*, 26 FCC Rcd at 5292 (¶ 119 n.368)).

for rate relief for joint use agreements which predate the *2011 Pole Attachment Order*."[84] And FirstEnergy concedes review of existing rates in existing agreements is justified "'[t]o the extent that an [I]LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement.'"[85]

The joint use agreements fall within this category of existing agreements. Verizon "genuinely lacks the ability to terminate" the current rates on account of "evergreen" clauses that require payment of the agreement rates after the joint use agreements are terminated.[86] FirstEnergy admits this justified review in the *Florida Power and Light* proceeding.[87] But FirstEnergy asks for a different result here, arguing it agreed to discuss new rates for Verizon's existing attachments when Florida Power and Light did not.[88] This distinction is irrelevant. As the Commission explained in the *Dominion* proceeding, Verizon genuinely lacked the ability to terminate the existing rates because of an evergreen provision when the electric utility—though

[84] *See* Response to Compl. ¶ 32. FirstEnergy claims it previously took the position pre-2011 agreements must be terminated, but only points to a 2013 letter that does not mention termination and a 2018 email that "suggest[s]" termination as a possible "alternative." *See* FE Brief ¶ 9 n.13 (relying on Compl. Ex. 28 at VZ00650-51 (Email from S. Schafer, FirstEnergy to S. Mills, Verizon (May 2, 2018))); *see also* Response to Compl. ¶ 32; Compl. Ex. 20 at VZ00562 (Letter from T. Magee, Counsel for FirstEnergy, to W. Balcerski, Verizon (Jan. 25, 2013)).

[85] FE Brief ¶ 8 (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216)).

[86] *See* Compl. ¶¶ 29-36; *Pole Attachment Order*, 26 FCC Rcd at 5335-36 (¶ 216); *Verizon Fla. LLC v. Fla. Power & Light Co.*, Mem. Op. and Order, 30 FCC Rcd 1140, 1150 (¶ 25) (EB 2015) ("*FPL Order*").

[87] FE Brief ¶ 8 (quoting *FPL Order*, 30 FCC Rcd at 1150 (¶ 25)) ("The *Verizon v. FPL* Order … 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.").

[88] Response to Compl. ¶¶ 29, 54; FE Brief ¶ 9 (quoting *FPL Order*, 30 FCC Rcd at 1147 (¶ 20)).

willing to negotiate new rates for existing attachments—was *not* willing to negotiate the rate reductions required by law.[89]

So too here. Through more than seven years of negotiations, FirstEnergy refused to make an offer that would materially change the joint use agreement rates and the net rental payment it receives.[90] FirstEnergy "contended that the range of just and reasonable rates should [include] the rates in the existing agreements."[91] And its offers showed minimal deviation from those rates; after five years of negotiations, FirstEnergy offered about a 1.5% discount off a [redacted] annual net rental amount, when proportional new telecom rates required about a [redacted] discount.[92] FirstEnergy's next offer sought far greater rate reductions for its use of Verizon's poles than it was willing to give Verizon even though FirstEnergy "uses more space on Verizon's poles than Verizon uses on FirstEnergy's poles."[93] And finally, when FirstEnergy said it would discuss the possibility of new telecom rates with Verizon, FirstEnergy included an important caveat: Verizon would need to transfer to FirstEnergy more than 130,000 Verizon-owned poles in Pennsylvania and Maryland.[94] FirstEnergy's negotiations thus confirm Verizon

[89] *Dominion Order*, 32 FCC Rcd at 3756-57 (¶¶ 13-14) (finding an "inability to terminate an agreement" where "Dominion fails to mention that, after four years of intensive rate negotiations, the rate reductions to which it refers were offset by significantly greater rate reductions achieved by Dominion").

[90] *See* Compl. ¶¶ 30-36.

[91] FE Brief ¶ 14.

[92] *See* Compl. ¶ 32.

[93] *See* Compl. ¶ 33; Response to Compl. ¶ 33.

[94] *See* FE Brief ¶ 9; *see also* Compl. Ex. 28 at VZ00650-51 (Email from S. Schafer, FirstEnergy to S. Mills, Verizon (May 2, 2018)) (requiring Verizon to agree to "transition … out of the pole-owning business").

"genuinely lacks the ability to terminate" the existing rates and "obtain a new arrangement" that complies with the law.[95]

2. The Joint Use Agreement Rates Are the Result of FirstEnergy's Superior Bargaining Power.

FirstEnergy does not dispute it has owned most of the joint use poles at all relevant times, including 73% of the poles the parties currently share in Pennsylvania.[96] The Commission has repeatedly found this pole ownership disparity reflects a lack of ILEC bargaining power to negotiate just and reasonable rates. In 2011, the Commission found "electric utilities appear to own approximately 65-70 percent of poles," meaning "market forces and independent negotiations may not be alone sufficient to ensure just and reasonable rates" for ILECs.[97] In 2017, the Enforcement Bureau confirmed an electric utility's relatively high rates and "nearly two-to-one pole ownership advantage" were "probative evidence" of the electric utility's bargaining power.[98] And in 2018, the Commission explained "[I]LEC bargaining power vis-à-vis utilities" declines as "[I]LEC pole ownership" relative to electric utilities "decline[s]."[99] FirstEnergy asks the Commission to find the parties' joint use relationship is the exception to the rule and that its three-to-one pole ownership disparity did not provide it bargaining power.[100]

FirstEnergy's overarching argument is that its pole ownership majority does not show bargaining power because, absent joint use, it would be economically and legally difficult for

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[95] *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216); *Dominion Order*, 32 FCC Rcd at 3756-57 (¶¶ 13-14).

[96] Response to Compl. ¶ 4 (admitting FirstEnergy owns 301,854 of 412,697 joint use poles); *see also* Response to Compl. ¶¶ 27-28 (failing to rebut alleged pole ownership numbers).

[97] *Pole Attachment Order*, 26 FCC Rcd at 5327, 5329 (¶¶ 199, 206).

[98] *Dominion Order*, 32 FCC Rcd at 3756-57 (¶ 13).

[99] *See Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126).

[100] FE Brief ¶¶ 31-64.

FirstEnergy to deploy its facilities elsewhere.[101] The Commission rejected this argument based on "[s]tandard economic theories."[102] FirstEnergy's witness agrees: he accepts there are "analyses of bargaining power based on relative harm from foreclosure (i.e., which party has more to lose)."[103] And he concedes "the theoretical harm (resulting from foreclosure) would be greater for Verizon than it would be for FirstEnergy."[104] Indeed, as difficult as it would be for FirstEnergy to find alternative infrastructure, Verizon would need to find and obtain approval for *three times* the facilities.[105] This alone illustrates FirstEnergy's superior bargaining position.[106]

But FirstEnergy asks the Commission to find its bargaining power was "erased" for three meritless reasons.[107] *First*, FirstEnergy argues its bargaining power does not pose a credible threat because FirstEnergy cannot force Verizon to relocate its existing facilities because of the evergreen provisions in the joint use agreements and because regulatory authorities would frown upon duplicative pole lines.[108] But FirstEnergy's bargaining power derives not only from whether Verizon can, or cannot, keep its existing facilities on FirstEnergy's poles.[109] The far

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[101] FE Brief ¶¶ 33-59.

[102] *See Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206 n.618).

[103] *See* Answer Attachment C at FE00021 (Zarakas Decl. ¶ 17).

[104] *See* Answer Attachment C at FE00021 (Zarakas Decl. ¶ 17).

[105] *See* Answer Attachment C at FE00021 (Zarakas Decl. ¶ 17) ("[I]t is reasonable to conclude that Verizon would likely realize greater harm" absent the joint use agreement "in that it would need to remedy loss of access to more poles [than] would FirstEnergy"); *see also* Response to Compl. ¶ 4 (admitting FirstEnergy owns 301,854 of 412,697 joint use poles).

[106] *See, e.g.*, Reply Ex. B at VZ00850 (Reply Aff. of Mark S. Calnon, Ph.D., Mar. 2, 2020 ("Calnon Reply Aff.") ¶ 44); Reply Ex. C at VZ00864-865 (Reply Aff. of Timothy J. Tardiff, Ph.D. ("Tardiff Reply Aff.") ¶ 16).

[107] *See* Answer Attachment C at FE00021 (Zarakas Decl. ¶ 17).

[108] FE Brief ¶¶ 34-40.

[109] See, e.g., Reply Ex. B at VZ00850-854 (Calnon Reply Aff. ¶¶ 43-52); Reply Ex. C at VZ00861-867 (Tardiff Reply Aff. ¶¶ 11-20).

higher cost to relocate Verizon's facilities as compared to the cost of staying on the poles—that is, Verizon's "best alternative to a negotiated [rate] agreement"—also provides FirstEnergy's bargaining power.[110] FirstEnergy explains why this is so: because Verizon's alternative to the joint use agreement rates is exponentially costlier, "[f]rom an economic perspective, it makes no sense whatsoever" for Verizon to incur the alternate costs instead.[111] FirstEnergy, therefore, has the bargaining leverage to perpetuate the status quo and refuse reductions to its unjust and unreasonable rates.[112]

Second, FirstEnergy claims it mitigated its bargaining power by offering to discuss new telecom rates with Verizon.[113] But FirstEnergy only "suggest[ed]" the parties discuss its template license agreement, which does not establish FirstEnergy would have agreed to the agreement, properly calculated new telecom rates, or guaranteed continued access to FirstEnergy's poles.[114] FirstEnergy also paired the offer with a precondition designed to *increase* FirstEnergy's bargaining leverage.[115] Under FirstEnergy's plan, Verizon would be required to "transition … out of the pole-owning business in FirstEnergy service territories," meaning it would have to transfer to FirstEnergy (not sell) more than 130,000 poles in

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[110] *Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206 n.618); *see also* Reply Ex. B at VZ00853 (Calnon Reply Aff. ¶ 50); Reply Ex. C at VZ00867 (Tardiff Reply Aff. ¶ 20).

[111] *See* FE Brief ¶ 52; *see also* FE Brief ¶¶ 45-59.

[112] *See* Reply Ex. B at VZ00854 (Calnon Reply Aff. ¶ 52); Reply Ex. C at VZ00864-867 (Tardiff Reply Aff. ¶¶ 16-20).

[113] FE Brief ¶¶ 60-61; Answer Attachment C at FE00019 (Zarakas Decl. ¶ 12).

[114] Answer Attachment B at FE00006 (Schafer Decl. ¶ 10) ("FirstEnergy offered to transition Verizon out of the pole owning business as part of its offer for Verizon to enter a standard CLEC agreement."); Response to Compl. ¶ 54 (describing license agreements as providing "potential relief in the form of attachment removal"); Answer Attachment C at FE00017, FE00020 (Zarakas Decl. ¶¶ 6, 12) (Verizon has "no statutory right to nondiscriminatory pole access.").

[115] *See, e.g.*, Reply Ex. B at VZ00851 (Calnon Reply Aff. ¶ 45); Reply Ex. C at VZ00863 (Tardiff Reply Aff. ¶ 14).

Pennsylvania and Maryland.[116] FirstEnergy's witness describes the inevitable result: FirstEnergy would own *all* the joint use poles, which would provide such "bargaining power [that it] would *not* be motivated to provide [any] rate accommodation to a captive counterparty (*i.e.*, a party with no bargaining power)."[117]

Finally, FirstEnergy argues a 2009 letter from a Verizon employee confirms FirstEnergy did not have bargaining power when the Met-Ed and Penelec agreements were last amended.[118] But FirstEnergy takes the letter's pleasantries out of context: the employee did not describe the new rental *rates* as "fair and equitable"—he described the "common *rate structure*" as "fair and equitable."[119] Before 2009, Verizon, Met-Ed, and Penelec had seven different rate arrangements in Pennsylvania because of the many legacy joint use agreements and they required Verizon to pay different rental amounts to the same FirstEnergy operating company depending on where poles were located in relation to outdated legacy service area boundaries.[120] The 2009 amendments reached an "amiable resol[ution]" of that issue, which had complicated Verizon's

[116] Answer Attachment C at FE00019 (Zarakas Decl. ¶ 12); *see also* Compl. Ex. 28 at VZ00651 (Email from S. Schafer, FirstEnergy to S. Mills, Verizon (May 2, 2018)).

[117] Answer Attachment C at FE00019 (Zarakas Decl. ¶ 12) (emphasis added); *see also* Reply Ex. B at VZ00851 (Calnon Reply Aff. ¶ 45); Reply Ex. C at VZ00863 (Tardiff Reply Aff. ¶ 14).

[118] FE Brief ¶¶ 62-63; *see also* Response to Compl. ¶¶ 10, 12, 13, 14, 18, 19, 20, 21, 23, 24, 27, 28, 30, 31, 32, 33, 36, 37, 40, 41, 55, 58, 59, 62, 63.

[119] *See* Answer Attachment H at FE00109 (Letter from N. Parrish, Verizon, to Joint Use Team, FirstEnergy (Aug. 12, 2009)) ("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."); Reply Ex. A at VZ00818-820 (Reply Aff. of Stephen C. Mills, Mar. 3, 2020 ("Mills Reply Aff.") ¶¶ 15-19).

[120] *See* Reply Ex. A at VZ00818-819 (Mills Reply Aff. ¶¶ 15-16).

recordkeeping each year.[121] Under the 2009 amendments, the parties reduced the seven rate structures to two: one for Met-Ed's service area and one for Penelec's service area.[122]

But the rental rates in the 2009 amendments were not "fair" or "equitable" under any standard, let alone the "just and reasonable" standard first applied to ILECs two years later.[123] In the Met-Ed territories, the 2009 rate was about the mid-point of the prior rates; in the Penelec territories, reductions to Verizon's rate were offset by reductions to Penelec's rate for use of Verizon's poles.[124] As a result, Verizon's 2009 net rental payment to Met-Ed and Penelec under the amendments was about [redacted] *higher* than Verizon's net rental payment to Met-Ed and Penelec in 2008.[125]

Verizon signed the 2009 amendments to achieve the administrative efficiencies of a common rate structure, but also based on an understanding that FirstEnergy would sell poles to Verizon, which would necessarily reduce Verizon's annual rental obligation.[126] And so, before the amendments were signed, Verizon asked FirstEnergy to meet to "negotiate, plan and execute

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[121] Reply Ex. A at VZ00819 (Mills Reply Aff. ¶¶ 16-17).

[122] *See* Reply Ex. A at VZ00819 (Mills Reply Aff. ¶ 16); *see also* Compl. Ex. 6 at VZ00298, VZ00304, VZ00309, VZ00314 (Met-Ed MOUs); Compl. Ex. VZ00453, VZ00458, VZ00463 (Penelec MOUs).

[123] *See* Reply Ex. A at VZ00819-820 (Mills Reply Aff. ¶ 18). FirstEnergy argues Verizon also considered rates higher than the new telecom rate reasonable in a pre-2011 filing where Verizon proposed a rental rate formula for broadband attachments that was based on the pre-existing telecom rate formula. *See* Response to Compl. ¶ 39. But the only telecom rate formula at that time *was* the pre-existing telecom rate formula. Verizon thus advocated that all broadband "providers should pay the same pole attachment rate for all attachments used for broadband service." *See* Letter from S. Guyer, Verizon, and R. Quinn, AT&T, to M. Dortch, WC Docket No. 07-245 (Oct. 21, 2008) (citation omitted).

[124] *See* Reply Ex. A at VZ00819-820 (Mills Reply Aff. ¶ 18).

[125] *See id.*

[126] *See* Compl. Ex. A at VZ00007-08 (Mills Aff. ¶ 15); Reply Ex. A at VZ00820 (Mills Reply Aff. ¶ 19); *see also* Compl. ¶ 23.

a Pole Purchase(s) program."[127] FirstEnergy refused to sell.[128] FirstEnergy tries without support to justify its refusal by alleging Verizon's pole purchase effort was not in "good faith."[129] But Verizon tried for more than two years to purchase poles, identified the quantity it sought, and offered to facilitate the transfer using a standard pole purchase process.[130]

FirstEnergy's counsel tried to avoid a sale with unfounded claims about Verizon's maintenance of its pole plant, and FirstEnergy makes similar allegations now.[131] The criticism is misplaced.[132] Verizon has a robust wood pole inspection and maintenance program and prioritizes the safety and reliability of its pole network.[133] But in refusing the sale of its poles, FirstEnergy was able to preserve the bargaining leverage it enjoys as the owner of three out of four joint use poles.[134] The 2009 amendments thus further confirm FirstEnergy has superior bargaining power and has used it to preserve unjust and unreasonable rates.[135]

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[127] Answer Attachment H at FE00110 (Letter from N. Parrish, Verizon, to Joint Use Team, FirstEnergy (Aug. 12, 2009)).

[128] *See* Compl. Ex. A at VZ00007-8 (Mills Aff. ¶ 15); Compl. Ex. 17 at VZ00550 (Letter from W. Balcerski, Verizon to M. Wolfe, FirstEnergy (Apr. 30, 2012)).

[129] Response to Compl. ¶¶ 23, 31.

[130] *See* Compl. Ex. 17 at VZ00550-551 (Letter from W. Balcerski, Verizon to M. Wolfe, FirstEnergy (Apr. 30, 2012)).

[131] *See* Response to Compl. ¶¶ 23, 31, Attachment M; Compl. Ex. 20 at VZ00560-62 (Letter from T. Magee, Counsel for FirstEnergy, to W. Balcerski, Verizon (Jan. 25, 2013)).

[132] Reply Ex. D at VZ00881-884 (Reply Aff. of Donald M. Austin ("Austin Reply Aff.") ¶¶ 3-9).

[133] *Id.* at VZ00882 (Austin Reply Aff. ¶ 5). Verizon disputed allegations about its pole plant from the 2015 petition FirstEnergy attached to its Answer, but committed to additional operational, safety, and maintenance actions in response. *See* Settlement Agreement, PaPUC Docket No. P-2015-2509336 (June 2, 2017).

[134] *See* Response to Compl. ¶ 4; Reply Ex. A at VZ00820 (Mills Reply Aff. ¶ 19).

[135] *Pole Attachment Order*, 26 FCC Rcd at 5327 (¶ 199); Reply Ex. B at VZ00851 (Calnon Reply Aff. ¶ 45). FirstEnergy is also wrong that the Commission found rates automatically "just and reasonable" if agreed to by parties with equivalent bargaining power. *See* FE Brief ¶¶ 65-67. The Commission instead noted it was "unlikely" it would "second guess" such rates, *Pole*

3. FirstEnergy Has Not Identified An Agreement Provision That Provides Verizon a Net Material Advantage Over Its Competitors.

Rate relief is also required under the standard adopted in 2011 because FirstEnergy did not provide credible, relevant evidence that the joint use agreement rates are just and reasonable.[136] FirstEnergy walked away from the 24 alleged advantages it insisted upon in June 2018[137] and now points to just three.[138] FirstEnergy's new set is no more successful in establishing a real-world, current-day material difference between Verizon and its competitors.

a) FirstEnergy Abandoned Its Prior List of Twenty-Four Alleged Advantages.

FirstEnergy's Answer confirms FirstEnergy has for years "deployed stalling tactics and offered evolving … explanations in a coordinated effort to maintain its excessive pole rent income stream."[139] Once faced with Verizon's complaint, FirstEnergy changed its tune again—now claiming the joint use agreement rates are justified by three alleged advantages and not the 24 it asserted when the parties were negotiating.[140]

FirstEnergy has two answers for its course change. *First*, FirstEnergy admits there was no basis for many of its allegations. It relied on a one-time $1,000 agreement preparation fee, but admits the fee is "not in FirstEnergy's template license agreement" and "is insignificant

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Attachment Order, 26 FCC Rcd at 5335 (¶ 216), but has emphasized federal law "may not be defeated by private contractual provisions," *Third Report and Order*, 33 FCC Rcd at 7731 (¶ 50).

[136] *See Implementation of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 22497, 22617 (¶ 295) (1997) (It is "incumbent upon a defendant … to respond fully to any *prima facie* showing made by a complainant, with full legal and evidentiary support.").

[137] *See* Compl. Ex. 29 at VZ00690 (Email from D. Karafa, FirstEnergy to B. Trosper, Verizon (June 7, 2018)).

[138] FE Brief ¶¶ 69-92.

[139] *See* Compl. at 2.

[140] *See* Compl. Ex. 29 at VZ00689-90 (Email from D. Karafa, FirstEnergy to B. Trosper, Verizon (June 7, 2018)); Reply Ex. A at VZ00812-813 (Mills Reply Aff. ¶¶ 3-4).

when compared to the approximately [300,000] FirstEnergy poles to which Verizon is attached."[141] FirstEnergy alleged operational differences related to tagging attachments and attaching to multi-ground neutrals and guys, but now "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."[142] FirstEnergy also pointed to a range of fees and costs—unauthorized attachment fees, safety violation fees, security bond requirements—but now admits it has no right to impose them on each of Verizon's competitors either.[143]

Second, FirstEnergy claims it would be too "difficult" to quantify the rest of the previously alleged advantages "without substantial additional discovery of Verizon which the pole attachment complaint rules do not allow, including large amounts of document production and numerous depositions."[144] But FirstEnergy *has* the relevant evidence: the joint use agreements and FirstEnergy's own license agreements with Verizon's competitors. If the joint use agreements provide Verizon net material advantages as compared to the license agreements, FirstEnergy is in the best position to show that.[145]

FirstEnergy would prefer to increase the burden on Verizon by subjecting it to extensive discovery into irrelevant issues. FirstEnergy claims it needs "a thorough inspection of all of

[141] Response to Compl. ¶ 43. FirstEnergy's Response to Compl. ¶ 43 includes an apparent typographical error because it refers to the over 79,000 FirstEnergy poles Verizon is attached to in Maryland, instead of the 301,854 poles it owns in Pennsylvania. *See id.* ¶ 4.

[142] *Id.* ¶ 47.

[143] *Id.* ¶¶ 51, 53.

[144] FE Brief ¶ 86; *see also* Response to Compl. ¶¶ 51, 52, 54.

[145] *See* Reply Ex. A at VZ00812 (Mills Reply Aff. ¶ 3); Reply Ex. B at VZ00841 (Calnon Reply Aff. ¶ 28).

the[ ] facilities" of "both Verizon and its competitors,"[146] an analysis of "confidential and highly sensitive claims settlement information" for "both Verizon and its competitors,"[147] and "depositions of key Verizon personnel and extensive document production" to see whether FirstEnergy is better able "to modify the terms and conditions of its license agreements with cable company and CLEC attachers" than it is able to modify the terms of the joint use agreements.[148] FirstEnergy does not explain how these topics are relevant and did *not* ask about them in its interrogatories.[149] The Commission should ignore FirstEnergy's desire for a fishing expedition that would impose an even more "time- and resource-consuming complaint process."[150]

b) FirstEnergy's Three New Alleged Advantages Do Not Provide Verizon a Net Material Competitive Advantage.

FirstEnergy's new three-advantage approach still does not identify any material competitive advantage Verizon enjoys under the joint use agreements.[151] FirstEnergy relies on conclusory allegations and incomplete comparisons.[152] It fails to quantify most of its claims, provides no back-up documentation or substantiation for its numbers,[153] and asks the

[146] Response to Compl. ¶ 51.

[147] *Id.* ¶ 52.

[148] *Id.* ¶ 54.

[149] *See* FirstEnergy's First Set of Interrogatories to Verizon (Feb. 3, 2020).

[150] *See Pole Attachment Order*, 26 FCC Rcd at 5266 (¶ 50).

[151] FE Brief ¶¶ 69-92.

[152] *Id.* ¶¶ 89-91. *But see Dominion Order*, 32 FCC Rcd at 3759 (¶ 20) (faulting electric utility for "omitting the information needed to analyze whether, and if so, the extent to which, Verizon has been advantaged relative to a typical competitor or an average of its competitors").

[153] *See Knology, Inc. v. Ga. Power Co.*, 18 FCC Rcd 24615, 24636 (¶ 50) (2003) ("Georgia Power does not provide any discernable backup or itemization…. Without such evidence, we cannot conclude that such costs are reasonable and will not require Knology to pay them.").

Commission to "imagine" Verizon is competitively advantaged.[154] FirstEnergy does "not remotely justify" with clear and convincing evidence a greater than [redacted] per pole difference between the joint use agreement rates and the new telecom rates that apply to Verizon's competitors.[155]

1) "Built-to-Order" Pole Network

FirstEnergy first argues Verizon is competitively advantaged because the joint use agreements gave Verizon "[s]eamless access to a pole network in the era before implementation of the Telecommunications Act of 1996."[156] This unavoidable historical fact, FirstEnergy argues, had a ripple effect creating a series of "advantages" that will forever justify the joint use agreement rates.[157]

FirstEnergy's argument fails at the foundation. The Commission has worked for a decade to eliminate what FirstEnergy seeks to perpetuate: "[d]ifferent rates for virtually the same resource (space on a pole), based solely on the regulatory classification of the attaching provider."[158] It is no secret ILECs entered the market before CLECs and cable companies,[159] but the Commission sought to rationalize rates in 2011 so ILECs pay "the same rate" that applies to their competitors "*i.e.*, the New Telecom Rate" when they attach to utility poles under materially

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[154] *See* FE Brief ¶ 77.

[155] *See Dominion Order*, 32 FCC Rcd at 3758 (¶ 17); *see also* Compl. Ex. B at VZ00046 (Calnon Aff. ¶ 21).

[156] FE Brief ¶ 71.

[157] *See id.* ¶¶ 71-84.

[158] *See* National Broadband Plan at 110; *see also Third Report and Order*, 33 FCC Rcd at 7767 (¶ 123) ("[T]he Commission adopted a policy in 2011 that similarly situated attachers should pay similar pole attachment rates for comparable access").

[159] *See, e.g.*, *Am. Elec. Power*, 708 F.3d at 185 ("Before the advent of cable television, utilities—including power companies and ILECs—owned and operated extensive networks of poles that carried their wires, cables, and other network equipment.").

comparable terms and conditions today.[160] FirstEnergy cannot forever deny Verizon rates it is entitled to just because Verizon bears the immutable characteristics of an ILEC.

Reviewed individually, FirstEnergy's arguments about the spillover effect of Verizon's ILEC status also fail to establish a material competitive advantage. *First*, FirstEnergy argues the joint use agreements "allowed a pole distribution network to be constructed that accommodated Verizon's attachments" because they required "new pole lines tall enough and strong enough to accommodate both [Verizon's facilities] and electric facilities."[161] But the joint use agreements also required Verizon to deploy a joint pole network tall and strong enough to accommodate FirstEnergy's facilities. FirstEnergy nevertheless reasons the joint use agreements created a "built to order" pole network only for Verizon and, in so doing, eliminated Verizon's "need for the same make-ready time and expense that CLECs and other competitors face" today.[162] Not so. FirstEnergy's materials show its pole network is *also* tall enough and strong enough to accommodate Verizon's competitors. "A 30 foot electric utility pole can accommodate two communications attachments or more with overlashing;"[163] a 37.5-foot pole is presumed to hold four communications attachers.[164] FirstEnergy's poles are taller. FirstEnergy says the mean height of its poles exceeds [redacted] feet,[165] it photographed 40- and 45-foot poles,[166] and it included a

[160] *See FPL Order*, 30 FCC Rcd at 1142 (¶ 7) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217)).

[161] *See* FE Brief ¶ 72.

[162] *Id.* ¶ 71; *see also* Response to Compl. ¶¶ 38, 44, 45, 48.

[163] *In Re Amendment of Rules & Policies Governing Pole Attachments*, 15 FCC Rcd. 6453, 6470 (¶ 26) (2000).

[164] Reply Ex. A at VZ00813-814 (Mills Reply Aff. ¶ 5); 47 C.F.R. §§ 1.1409(c), 1.1410.

[165] Answer Attachment L at FE00161 (Guo Declaration, Ex. CG-1).

[166] Answer Attachment F at FE00058, FE00059 (Coleman Decl., Attachment RC-1); Answer Attachment K at FE00143, FE00145 (Carlin Decl, Ex. SC-1).

45-foot pole in its Field Reference Guide.[167] At the same time, FirstEnergy claims there are only about [redacted] attaching entities on its joint use poles ([redacted]),[168] installed a 45-foot pole where Verizon is not attached,[169] and documented the ample space available on a 40- or 45-foot pole after FirstEnergy and Verizon have attached.[170] Given the claimed lack of congestion on FirstEnergy's poles, there should be little need for make-ready for Verizon or its competitors today.[171] And where make-ready is required, it should affect Verizon and its competitors comparably as they seek to attach comparable facilities to the same poles with the same existing attachments.[172] FirstEnergy's installation of poles tall enough to accommodate Verizon does not competitively advantage Verizon because FirstEnergy's poles are also tall enough to accommodate Verizon's competitors.[173]

Second, FirstEnergy tries to buttress its make-ready analysis with a table of make-ready costs FirstEnergy says it charged Verizon as compared to the [redacted] FirstEnergy licensees requiring the most make-ready work during the last two years.[174] FirstEnergy's analysis is biased,

[167] Compl. Ex. 30 at VZ00695 (FirstEnergy Field Reference Guide).

[168] Answer Attachment L at FE00163-64 (Guo Declaration, Ex. CG-1).

[169] Compl. Ex. 30 at VZ00695 (FirstEnergy Field Reference Guide).

[170] Answer Attachment F at FE00058, FE00059 (Coleman Decl., Attachment RC-1).

[171] Reply Ex. A at VZ00814 (Mills Reply Aff. ¶ 6).

[172] *Id.*

[173] Reply Ex. A at VZ00813-814 (Mills Reply Aff. ¶ 5); Reply Ex. B at VZ00842 (Calnon Reply Aff. ¶ 31).

[174] *See* FE Brief ¶ 73; Response to Compl. ¶¶ 38, 44, 45; Answer Attachment B at FE00007, FE00010 (Schafer Decl. ¶¶ 14-15 & Ex. SFS-1).

unsupported, incomplete, and unable to show "Verizon has been advantaged relative to a typical competitor or an average of its competitors."[175]

FirstEnergy has inflated its make-ready allegations, as evident when its new numbers ([redacted] per pole for Met-Ed, [redacted] per pole for Penelec, and [redacted] per pole for Penn Power)[176] are compared to the numbers FirstEnergy previously provided to the Commission. In 2009, FirstEnergy represented ILECs "incur $11.50 less per pole … in annual make-ready expenses than their CLEC competitors, and $0.88 less per pole … than their Cable Company competitors."[177] FirstEnergy's 2009 numbers are also inflated; FirstEnergy now admits some licensees with "the largest number of attachment applications during the past two years" required [redacted] of make-ready when converted into a per-pole charge.[178] Because FirstEnergy has license agreements with over [redacted] licensees, many of which have established networks, most of FirstEnergy's licensees paid even less.[179]

FirstEnergy did not provide "backup or itemization" to verify its claims, show what work was performed, or prove the amounts charged were paid, making it impossible to know the full extent of the flaws in its analysis.[180] But some are self-evident. FirstEnergy made no effort to exclude costs it charged Verizon's competitors based on work FirstEnergy performed where

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[175] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 20).

[176] FE Brief ¶ 73.

[177] Letter from T. Magee, Counsel for FirstEnergy, to M. Dortch, FCC, Docket No. 07-245 (Dec. 8, 2009).

[178] *See* Answer Attachment B at FE00007, FE00011 (Schafer Decl. ¶ 14 & Ex. SFS-1).

[179] *See* Reply Ex. A at VZ00812 (Mills Reply Aff. ¶ 2) (stating FirstEnergy provided [redacted] Met-Ed license agreements, [redacted] Penelec licensee agreements, and [redacted] Penn Power license agreements).

[180] *See Knology, Inc.*, 18 FCC Rcd at 24636 (¶ 50); *see also In Re Applications of John D. Bomberger*, 7 FCC Rcd 1849, 1852 (¶ 31 n.15) (1992) (finding data unreliable where party "did not produce any back-up documents to his written but factually unsupported cost estimates").

FirstEnergy does not perform comparable work for Verizon.[181] This is improper: "[w]here Verizon performs a particular service itself and incurs costs comparable to its competitors in performing that service, … [an electric utility] may not 'embed in Verizon's rental rate costs that [the electric utility] does not incur."[182] Doing so "would effectively double charge Verizon—once when Verizon performs work" and again when Verizon pays its annual rental rate.[183] FirstEnergy also included only licensees with "the largest number of attachment applications during the past two years" in its analysis,[184] "thus omitting the information needed to analyze whether, and, if so, the extent to which, Verizon has been advantaged *relative to a typical competitor or an average of its competitors*."[185] FirstEnergy's list includes licensees that [redacted] before 2018 when most of Verizon's competitors have longstanding networks.[186] FirstEnergy further inflated its calculation by performing [redacted] of make-ready costs for networks of very different sizes: [redacted].[187] Had FirstEnergy calculated

[181] *See* Compl. Ex. A at VZ00024 (Mills Aff. ¶ 55) ("Verizon completes much of this work itself, and so incurs the cost associated with the work just like its competitors do."); *see also* Reply Ex. C at VZ00868 (Tardiff Reply Aff. ¶ 24).

[182] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18).

[183] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18 n.67).

[184] Answer Attachment B at FE00007 (Schafer Decl. ¶ 14).

[185] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 20) (emphasis added).

[186] *See* Answer Attachment B at FE00011 (Schafer Decl., Ex. SFS-1) ([redacted]); *see also* Reply Ex. A at VZ00815 (Mills Reply Aff. ¶ 9); Reply Ex. C at VZ00869 (Tardiff Reply Aff. ¶ 27).

[187] *See* Answer Attachment B at FE00011 (Schafer Decl., Ex. SFS-1).

the *weighted* average of make-ready for these very different networks, the result changes dramatically: Met-Ed's [redacted] per pole value drops nine-fold to [redacted] per-pole.[188] But this does not cure the unrepresentative nature of the competitors included or account for the *lower* costs incurred by about another [redacted] FirstEnergy licensees.[189] It also omits the unique make-ready costs FirstEnergy imposes on Verizon but not on Verizon's competitors.[190] Except for 28 pole replacements, FirstEnergy does not challenge Verizon's data, which shows FirstEnergy required Verizon to incur the cost to replace 569 more poles and to complete 3,687 more transfers than Verizon required of FirstEnergy over about a five-year period.[191] FirstEnergy could not impose similar costs on Verizon's competitors because its license agreements [redacted].[192] These unique costs incurred by Verizon, therefore, must be accounted for in the analysis.[193] When they are, FirstEnergy's asserted make-ready advantage disappears.[194]

Third, FirstEnergy argues Verizon is advantaged by the age of its network because it can reach customers faster by overlashing existing facilities or lighting dark fiber, instead of

[188] Reply Ex. B at VZ00843 (Calnon Reply Ex. ¶ 32); Reply Ex. C at VZ00869 (Tardiff Reply Aff. ¶ 28).

[189] Reply Ex. A at VZ00812 (Mills Reply Aff. ¶ 2) (stating FirstEnergy provided [redacted] Met-Ed license agreements, [redacted] Penelec licensee agreements, and [redacted] Penn Power license agreements).

[190] *See, e.g.*, Compl. Ex. A at VZ00024-28 (Mills Aff. ¶¶ 55-61).

[191] *See* Compl. Ex. A at VZ00025-28 (Mills Aff. ¶¶ 57-61); *see also* Response to Compl. ¶ 46; Answer Attachment B at FE00009, FE00013 (Schafer Decl. ¶ 25 & Ex. SFS-2).

[192] Answer Attachment P at FE00206-312 (License Agreements).

[193] *See Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654) ("A failure to weigh, and account for, the different rights and responsibilities in joint use agreement could lead to marketplace distortions.").

[194] *See, e.g.*, Reply Ex. B at VZ00843 (Calnon Reply Ex. ¶ 32); Reply Ex. C at VZ00868 (Tardiff Reply Aff. ¶ 24).

engaging in the make-ready process required to install new facilities.[195] But FirstEnergy admits Verizon's competitors with existing facilities can *also* overlash existing facilities or light dark fiber capacity.[196] And they have done so for many decades. Nearly two decades ago, the Commission explained "[c]able companies have, through overlashing, been able for decades to … expand capacity of existing communications facilities, by tying communications conductors to existing, supportive strands of cable on poles."[197] In 1998, the Commission also recognized the consensus of "[c]able operators, telecommunications carriers, and utility pole owners … that the use of dark fiber is a pro-competitive, environmentally sound and economical use of existing facilities."[198]

Fourth, FirstEnergy purports to provide Verizon "far more lenient overlashing rules than its CLEC and cable company competitors" because they must "provide 15-days' advance notice of overlashing, 15-days' notice upon completion of the overlashing, and pole loading studies to support their overlashing."[199] FirstEnergy assigns no cost to this difference, and there is none. Until early 2018, pole owners had no lawful right to require prior notice before overlashing.[200]

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[195] *See* FE Brief ¶¶ 76-82.

[196] *See* FE Brief ¶ 82 n.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.").

[197] *In Re Amendment of Commission's Rules & Policies Governing Pole Attachments*, 16 FCC Rcd 12103, 12140 (¶ 73) (2001); *see also In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (¶ 59) (1998) (*1998 Implementation Order*") ("Overlashing, whereby a service provider physically ties its wiring to other wiring already secured to the pole, is routinely used to accommodate additional strands of fiber or coaxial cable on existing pole attachments.").

[198] *See In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (¶ 73) (1998).

[199] FE Brief ¶ 85; Response to Compl. ¶ 44.

[200] *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002); *Third Report and Order*, 33 FCC Rcd at 7762 (¶ 115) ("adopting a pre-notification option" for overlashing).

And now, when prior notice is required, it may not be used "to impose quasi-application or quasi-pre-approval requirements, *such as requiring engineering studies*" such as pole loading studies.[201] FirstEnergy thus relies on unenforceable requirements that cannot competitively advantage Verizon, but should be lifted for all communications attachers.[202]

Fifth, FirstEnergy argues Verizon is able to deploy faster than its competitors—and thus has a "speed to market advantage"—when installing new attachments because it does not need to submit the same "pole profile sheets and photographs of the poles to which" it will attach.[203] FirstEnergy also assigns no cost to this difference, and there is none. The pole profile sheets and photographs document the existing attachments on a pole—information that Verizon must also obtain before attaching to a pole.[204] And Verizon did not, as FirstEnergy alleges, refer to these routine paperwork tasks as "prejudicially detrimental" to an attacher's ability to quickly deploy.[205] Instead, Verizon challenged FirstEnergy's attempt to impose pre-approval and engineering study requirements before "overlashing to an existing cable"—requirements which, as detailed above, are unlawful.[206]

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[201] *Third Report and Order*, 33 FCC Rcd at 7765 (¶ 119 & n.444) (emphasis added).

[202] *See 1998 Implementation Order*, 13 FCC Rcd 6777 (¶ 62) ("[O]verlashing … facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities. Overlashing promotes competition by accommodating additional telecommunications providers and minimizes installing and financing infrastructure facilities.").

[203] FE Brief ¶ 83; *see also* Response to Compl. ¶¶ 38, 44, 45.

[204] *See* Compl. Ex. 30 at VZ00694-95 (FirstEnergy Field Reference Guide); [redacted]; *see also* Compl. Ex. A at VZ00024 (Mills Aff. ¶ 54); Reply Ex. A at VZ00815-816 (Mills Reply Aff. ¶ 10).

[205] *See* FE Brief ¶ 83; *see also* Reply Ex. A at VZ00815-816 (Mills Reply Aff. ¶ 10).

[206] *See* Answer Attachment I at FE00113-115 (Email from S. Culbreath, Verizon, to D. DeWitt, FirstEnergy (Apr. 17, 2018)); *see also* Reply Ex. A at VZ00815-816 (Mills Reply Aff. ¶ 10).

Sixth, FirstEnergy argues Verizon is advantaged because it does not pay application fees when it deploys new facilities because "Verizon is not using SPANS," FirstEnergy's electronic application processing system.[207] But Verizon *is* using SPANS, as FirstEnergy's witness confirms.[208] And FirstEnergy provided nothing to substantiate fees it says "amount to [redacted] per application plus [redacted] per pole."[209] FirstEnergy provided no invoices or billing records; the license agreements it attached [redacted].[210] At the same time, FirstEnergy described a "complete application" without mentioning any application fees.[211]

Finally, FirstEnergy argues this series of alleged differences provides Verizon "an enormous speed to market advantage."[212] FirstEnergy provides no actual support for this fantasy. Instead, it hypothesizes that if a customer chose Verizon because Verizon could deploy its facilities faster, and if the customer provided "[redacted] per year profit," it would "equate[ ] to [redacted] per year per pole" if Verizon were "attached to 1,000 FirstEnergy poles."[213] Using the same math, FirstEnergy calculates [redacted] per pole and [redacted] per pole values if the customer provided [redacted] per year in profit or [redacted] per year in profit.[214] The whole exercise has no factual

[207] *See* FE Brief ¶ 84; Response to Compl. ¶ 44.

[208] *See* Answer Attachment B at FE00009, FE00013 (Schafer Decl. ¶ 25 & Ex. SFS-2) (analyzing Verizon's "SPANS data for January 1, 2014 through September 30, 2019); *see also* Compl. Ex. A at VZ00024-28 (Mills Aff. ¶¶ 54, 57-61) (detailing Verizon's use of SPANS).

[209] *See* FE Brief ¶ 84; *see also* Answer Attachment B at FE00008 (Schafer Decl. ¶ 20).

[210] *See* Answer Attachment P at FE00206-312 (License Agreements).

[211] *See* Compl. Ex. 30 at VZ00694 (FirstEnergy Field Reference Guide).

[212] FE Brief ¶¶ 70, 86-87.

[213] *Id.* ¶ 87.

[214] *Id.*

basis.[215] FirstEnergy has not identified a real-world difference—let alone a net material advantage—that justifies charging Verizon over [redacted] per pole more each year as compared to properly calculated new telecom rates.[216]

2) Five-Year Field Audits

FirstEnergy next argues Verizon is competitively advantaged because FirstEnergy "will be conducting field audits on a five-year cycle" and apparently plans to charge Verizon's competitors for some of the audit costs.[217] This brand new, made-for-litigation alleged advantage is based on speculation and prediction.[218] And even if FirstEnergy were to undertake such audits, and were able to charge its licensees some of those costs, it still would not justify the [redacted] per pole annual rental rate disparity between Verizon and its competitors.

FirstEnergy does not provide evidence of any field audits in Pennsylvania, let alone evidence it has charged Pennsylvania licensees for a share of its field audit costs or evidence FirstEnergy may charge such costs under its license agreements, [redacted].[219] Instead, FirstEnergy announces a plan to conduct field audits in Pennsylvania "similar to the field audit it has conducted in The Toledo Edison Company's service territory," which, FirstEnergy says, cost Ohio companies [redacted] per pole (or [redacted] per pole spread across five years).[220] FirstEnergy does not explain what data was collected in Ohio, how many poles were

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[215] *See, e.g.*, *In re Applications of Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (¶ 7) (1989) ("General conclusory allegations and speculation simply are not sufficient.").

[216] *See* Compl. Ex. B at VZ00046 (Calnon Aff. ¶ 21).

[217] FE Brief ¶ 88; Answer Attachment B at FE00008 (Schafer Decl. ¶ 21).

[218] FE Brief ¶ 88; Answer Attachment B at FE00008 (Schafer Decl. ¶ 21).

[219] FE Brief ¶ 88; Answer Attachment B at FE00008 (Schafer Decl. ¶ 21); Answer Attachment P at FE00206-312 (License Agreements); *see also* Reply Ex. A at VZ00816 (Mills Reply Aff. ¶ 11).

[220] FE Brief ¶ 88; Answer Attachment B at FE00008 (Schafer Decl. ¶ 21).

involved, how the contractor and pricing arrangements were selected, how costs were allocated among licensees, whether its Ohio license agreements required payment of field audit costs, or even when the field audit occurred.[221] Its alleged advantage is instead based on mere "conclusory allegations and speculation," which "simply are not sufficient" to justify FirstEnergy's unreasonably high rental rates.[222]

3) Pole Space Occupied

FirstEnergy's final alleged advantage fails because the amount of space Verizon occupies on a pole cannot justify a rate *higher* than the new telecom rate since the new telecom rate formula already includes a "space occupied" input.[223] The alleged advantage also fails because FirstEnergy has not shown Verizon in fact occupies materially more space than its competitors, which are presumed to occupy one foot of space on FirstEnergy's poles.[224]

First, FirstEnergy alleges Verizon occupies about [redacted] feet of space on an undisclosed set of about [redacted] FirstEnergy poles.[225] FirstEnergy's allegation is noteworthy, as it insisted Verizon pay for three feet of space throughout the parties' negotiations, even though Verizon

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[221] FE Brief ¶ 88; Answer Attachment B at FE00008 (Schafer Decl. ¶ 21); *see also* Reply Ex. A at VZ00816 (Mills Reply Aff. ¶ 11).

[222] *In re Applications of Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (¶ 7) (1989); *In Re Application of Valley Pub. Television, Inc*., 12 FCC Rcd 22795, 22796 (¶¶ 5-6) (1998) (rejecting argument where company "did not provide financial statements to substantiate [its] figures"); *see also* Reply Ex. A at VZ00813 (Mills Reply Aff. ¶ 4).

[223] *See* 47 C.F.R. § 1.1406(d)(2).

[224] *See* 47 C.F.R. § 1.1410.

[225] FE Brief ¶ 89 (alleging Verizon occupies [redacted] feet on Met-Ed's poles, [redacted] feet on Penelec's poles, and [redacted] feet on Penn Power's poles); *see also* Answer Attachment L at FE00163-164 (Guo Decl., Table 3); Reply Ex. B at VZ00833 (Calnon Reply Aff. ¶ 14) (noting inconsistency between [redacted] FirstEnergy poles reviewed and scope of field review, which included 1,519 FirstEnergy poles).

"does not want, require, or occupy 3 feet of space or more on FirstEnergy poles."[226] FirstEnergy's own best-case-scenario now shows Verizon occupies—at most—about [redacted] of space on less than [redacted] percent of FirstEnergy's poles.[227] Equally important, FirstEnergy does *not* show this distinguishes Verizon from its competitors.[228] FirstEnergy instead compares field measurements of Verizon's facilities with the Commission's *presumptive* one-foot space occupied input—even though FirstEnergy's contractor collected measurements of the space occupied "[f]or each non-[FirstEnergy] attacher on the pole."[229] Making matters worse, FirstEnergy designed its field review to ensure Verizon would occupy more space than the one-foot space occupied presumption: it "deemed [Verizon] to occupy six (6) inches of clearance above its highest usable space attachment and six (6) inches below its lowest usable space attachment."[230] This had the effect of adding six inches to the space Verizon occupied, as FirstEnergy already collects rent for the six inches of unusable space below Verizon's lowest attachment.[231] When those six inches are subtracted from the approximately [redacted]

[226] *See* Compl. Ex. A at VZ00029 (Mills Aff. ¶ 64); *see also* Compl. Ex. 24 at VZ00584 (Email from D. DeWitt, FirstEnergy to S. Mills, Verizon (Aug. 11, 2017)); Compl. Ex. 25 at VZ00588 (Letter from S. Mills, Verizon, to D. DeWitt, FirstEnergy (Nov. 2, 2017)); Compl. Ex. 28 at VZ00654-655, VZ00658-659, VZ00662-663 (Email from S. Schafer, FirstEnergy to J. Slavin, Verizon (May 2, 2018)).

[227] *See* FE Brief ¶ 89 (alleging Verizon occupies [redacted] inches on Met-Ed's poles, [redacted] inches on Penelec's poles, and [redacted] inches on Penn Power's poles); *see also* Answer Attachment K at FE00134 (Carlin Decl., Ex. SC-1) (describing field review of 1,519 FirstEnergy poles); Reply Ex. B at VZ00833 (Calnon Reply Aff. ¶ 14) (describing scope of field review).

[228] Additional problems with FirstEnergy's field review are detailed in Section II.D below.

[229] *See* 47 C.F.R. § 1.1410; FE Brief ¶ 89; Answer Attachment K at FE00135 (Carlin Decl., Ex. SC-1); Answer Attachment L at FE00163-64 (Guo Decl., Ex. CG-1).

[230] Answer Attachment K at FE00135 (Carlin Decl., Ex. SC-1).

[231] *See* Reply Ex. A at VZ00817 (Mills Reply Aff. ¶ 12).

FirstEnergy assigns to Verizon, FirstEnergy's own data confirms Verizon occupies pole space comparable to the one-foot space occupied input applicable to Verizon and its competitors.[232]

Second, FirstEnergy alleges its "field audit shows Verizon's facilities weigh much more than the facilities of other communications attachers."[233] FirstEnergy reasons Verizon's facilities must therefore add more load to the pole and require installation at a higher location on the pole to account for mid-span sag.[234] FirstEnergy does not support this with evidence; it does not provide the alleged weight measurements for Verizon or its competitors.[235] At the same time, FirstEnergy provides a scope of work for the field review that did *not* include weight measurements,[236] presumes Verizon's lowest attachment should be about eighteen feet above ground level, and photographed Verizon's attachments at that level.[237] There is no reason to conclude Verizon has required more space or more load capacity than its competitors.[238]

But even if there were some distinction, it would not justify charging Verizon a higher rental rate. The Commission sets just and reasonable rates based on "space *occupied*," meaning the space occupied by the "actual physical attachment" to the pole.[239] It has rejected repeated requests to increase rates based on additional load or mid-span sag, and should do so again

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[232] *See* Reply Ex. A at VZ00817 (Mills Reply Aff. ¶ 12); 47 C.F.R. § 1.1410.

[233] FE Brief ¶ 89; *see also* Answer Attachment F at FE00055 (Coleman Decl. ¶ 34).

[234] FE Brief ¶ 89; *see also* Answer Attachment F at FE00055 (Coleman Decl. ¶ 34). *But see* Reply Ex. A at VZ00817-818 (Mills Reply Aff. ¶ 13).

[235] *See* Answer Attachment L at FE00163-64 (Guo Decl., Ex. CG-1).

[236] *See* Answer Attachment K at FE00134-35 (Carlin Decl., Ex. SC-1).

[237] *See* Answer Attachment F at FE00058-59 (Coleman Decl., Ex. RC-1) (showing Verizon's attachment at 17.3 feet and 18.5 feet); Answer Attachment K at FE00134 (Carlin Decl., Ex. SC-1) (presuming 18 feet above ground is "unusable space");

[238] Reply Ex. A at VZ00817-818 (Mills Reply Aff. ¶¶ 12-13).

[239] *See Television Cable Serv., Inc. v. Monongahela Power Co.*, 88 FCC.2d 63, 68 (¶ 11) (CCB 1981).

here.[240] "The statutory language prescribes that we allocate costs based on space occupied, not load capacity."[241] Any additional load or mid-span sag, which is endemic to all wireline aerial facilities, does "not increase the amount of space actually occupied by the attachment" on the pole.[242] The just and reasonable rate remains the properly calculated new telecom rate.[243]

c) FirstEnergy Cannot Eliminate the Unique Costs That Verizon Bears from an Analysis of Competitive Neutrality.

FirstEnergy did not identify a competitive *advantage* "remotely justify[ing] the difference" between the rates it has collected from Verizon (averaging [redacted] per pole) and the new telecom rates applicable to Verizon's competitors (averaging $8.42 per pole).[244] But FirstEnergy also failed to account for the other half of the analysis—the unique *disadvantages* under the joint use agreements as compared to FirstEnergy's license agreements. "A failure to

[240] *See, e.g.*, *In Re Amendment of Rules & Policies Governing Pole Attachments*, 15 FCC Rcd 6453, 6471 (¶ 28) (2000) ("Consideration of loading, including weight and wind load, relates to engineering of the pole structure.… We do not believe that an attachment 'burden on the pole' relates to anything other than an assessment of need for make-ready changes to the pole structure, including pole change-out, to meet the strength requirements of the NESC."); *see also id.* at 6472 (¶ 29) (rejecting request to consider "'burden on the pole' due to weight and wind load … an additional factor for consideration in the determination of the amount of space occupied").

[241] *See Consolidated Partial Order*, 16 FCC Rcd at 12143 (¶ 77).

[242] *See id.* at 12143 (¶ 78); *see also 1998 Implementation Order*, 13 FCC Rcd at 6807-08 (¶ 64) ("[O]verlashing one's own pole attachment should be permitted without additional charge. To the extent that the overlashing does create an additional burden on the pole, any concerns should be satisfied by compliance with generally accepted engineering practices.").

[243] *See In Re Amendment of Rules & Policies Governing Pole Attachments*, 15 FCC Rcd 6453, 6472 (¶ 30) (2000) ("the inclusion of factors such as wind and weight load" when calculating rental rates "could lead to unacceptable over-recovery").

[244] *See Dominion Order*, 32 FCC Rcd at 3758 (¶ 17); Compl. Ex. B at VZ00046 (Calnon Aff. ¶ 21); *see also* Section II.C.3.

weigh, and account for, the[se] different … responsibilities in joint use agreement[s] could lead to marketplace distortions."[245]

There are five meritless reasons why FirstEnergy thinks "it is inappropriate" to apply the Commission's standard and consider Verizon's unique costs "when determining whether its attachments on FirstEnergy's poles are treated comparably to attachments of Verizon's competitors."[246] *First*, FirstEnergy argues some of Verizon's costs as a pole owner are reimbursed through the rates Verizon charges other attachers, including FirstEnergy.[247] This argument provides further support for Verizon's request to set pole attachment rates at the new telecom level for Verizon *and* FirstEnergy because doing so will ensure both parties are fully compensated for use of their poles, but not overcompensated as FirstEnergy is now.[248] *Second*, FirstEnergy argues it reduces Verizon's costs as a pole owner because FirstEnergy cares for its own facilities on Verizon's poles through tree trimming, inspections, and emergency repairs.[249] By asserting it lowers Verizon's pole ownership costs (an allegation FirstEnergy does not substantiate),[250] FirstEnergy admits Verizon in fact bears unique costs as a pole owner, and so they must be accounted for in an analysis of competitive neutrality.[251] *Third*, FirstEnergy asks

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[245] *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654); *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123) ("The utility can rebut the presumption with clear and convincing evidence that the [I]LEC receives *net benefits* under its pole attachment agreement with the utility that materially advantage the [I]LEC over other telecommunications attachers.") (emphasis added).

[246] Response to Compl. ¶ 43, 46, 47, 52.

[247] FE Brief ¶ 95; *see also* Response to Compl. ¶¶ 43, 46, 47, 52.

[248] *See, e.g.*, Compl. Ex. B at VZ00047 (Calnon Aff. ¶ 25).

[249] FE Brief ¶ 95; *see also* Response to Compl. ¶¶ 43, 46, 47, 52.

[250] FirstEnergy's criticism about Verizon's maintenance of its pole network is unfounded. *See* Reply Ex. D at VZ00881-884 (Austin Reply Aff. ¶¶ 3-9).

[251] *See, e.g.*, Compl. Ex. A at VZ00022 (Mills Aff. ¶ 49).

the Commission to ignore Verizon's unique disadvantages as a pole owner because FirstEnergy thinks them "small" when compared to the competitive advantages it has alleged.[252] But FirstEnergy cannot revise the principle of competitive neutrality, which weighs both advantages *and* disadvantages.[253] And regardless, FirstEnergy has not identified a material competitive advantage it provides Verizon under the joint use agreements.[254]

Fourth, FirstEnergy argues the Commission should ignore Verizon's unique costs as a pole owner because Verizon did not agree to transfer more than 130,000 poles in Pennsylvania and Maryland to FirstEnergy.[255] But Verizon does not need to transfer its poles to obtain a just and reasonable rate; it is already entitled to one.[256] Nor did FirstEnergy guarantee a just and reasonable rate in exchange for the transfer FirstEnergy proposed: FirstEnergy only agreed to discuss its template license agreement and the possibility of new rates.[257] *Finally*, FirstEnergy argues reciprocal provisions in the joint use agreements may not apply equally to the parties because FirstEnergy owns three-quarters of the jointly used poles.[258] But FirstEnergy relied on alleged advantages during negotiations that applied to the parties equally despite their different

[252] FE Brief ¶ 96; *see also* Response to Compl. ¶¶ 43, 46, 47, 52.

[253] *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654).

[254] *See* Section II.C.3.

[255] FE Brief ¶¶ 93, 97.

[256] *See Pole Attachment Order*, 26 FCC Rcd at 5328, 5334 (¶¶ 202, 214) (ILECs "own many poles" and "are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)").

[257] *See* Compl. Ex. 28 at VZ00651 (Email from S. Schafer, FirstEnergy to S. Mills, Verizon (May 2, 2018)); *see also* Reply Ex. B at VZ00853 (Calnon Reply Aff. ¶ 49); Reply Ex. C at VZ00863-864 (Tardiff Reply Aff. ¶ 14).

[258] FE Brief ¶ 98; *see also* Response to Compl. ¶ 39.

pole ownership numbers, such as a $1,000 agreement preparation fee.[259] And, even if some offset were required for the different pole ownership numbers, it would still not validate FirstEnergy's decision to ignore the cost of "alleged 'benefits' … that Verizon is likewise required to extend to [FirstEnergy] under the Joint Use Agreements."[260] Verizon's unique costs under the joint use agreements far exceed the unsupported, conclusory, and legally flawed "advantages" FirstEnergy has alleged.[261]

D. Verizon Is Entitled to a Properly Calculated New Telecom Rate.

Because FirstEnergy failed to justify its rental rates, the just and reasonable rate is a properly calculated new telecom rate under the presumption adopted in 2018 *and* the principle of competitive neutrality adopted in 2011. FirstEnergy admits it most recently charged some of Verizon's competitors rates in the [redacted] per pole range,[262] but asks the Commission to impose per-pole rates on Verizon as high as [redacted].[263] The Commission should deny FirstEnergy's request to continue profiting through artificially inflated rates.

First, FirstEnergy asks to charge Verizon rental rates as high as the unlawful rates FirstEnergy has imposed on some of Verizon's competitors.[264] This argument is a non-starter under the Commission's regulation, which states Verizon must be "charged no higher than the

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[259] *See, e.g.*, Compl. Ex. 29 at VZ00690 (Email from D. Karafa, FirstEnergy, to B. Trosper, Verizon (June 7, 2018)).

[260] *Dominion Order*, 32 FCC Rcd at 3760 (¶ 21).

[261] *See* Compl. Ex. B at VZ00052-53 (Calnon Aff. ¶ 32); Reply Ex. A at VZ00812-813 (Mills Reply Aff. ¶¶ 2-4); Reply Ex. B at VZ00842 (Calnon Reply Aff. ¶ 30).

[262] *See* FE Brief ¶ 101 (Met-Ed charged cable companies [redacted] per pole and some CLECs [redacted] per pole; Penelec charged some cable companies and some CLECs [redacted] per pole; Penn Power charged cable companies and some CLECs [redacted] per pole).

[263] *See* FE Brief ¶¶ 101, 103, 110.

[264] FE Brief ¶¶ 99-103.

rate determined in accordance with [47 C.F.R.] § 1.1406(e)(2)."[265] The argument is also a non-starter because "competitive neutrality counsels in favor of affording [I]LECs … *the New Telecom Rate*" in these circumstances.[266]

Second, FirstEnergy argues it should be able to manipulate the Commission's new telecom rate formula to charge Verizon a 2019 new telecom rate in the [redacted] per pole range (based on 2018 cost data).[267] FirstEnergy does not specifically challenge Verizon's rate calculations for the 2011 through 2018 rental years, although it purports to "reserve[] the right to perform further analysis."[268] The Commission's rules, however, required FirstEnergy to include its full and complete defense in its Answer, and to "respond specifically to all material allegations of the complaint."[269] The Commission, should, therefore, accept Verizon's 2011 through 2018 rate calculations as uncontested, and reject FirstEnergy's request to improperly inflate rates for the 2019 rental year. By rule, Verizon "may be charged no higher than the rate determined in accordance with [47 C.F.R.] § 1.1406(e)(2)."[270]

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[265] 47 C.F.R. § 1.1413(b).

[266] *FPL Order*, 30 FCC Rcd at 1142 (¶ 7) (emphasis added). Competitive neutrality also counsels in favor of ensuring Verizon's competitors also pay a properly calculated new telecom rate because it is the "*maximum* just and reasonable rate" for their use of FirstEnergy's poles. *See* 47 C.F.R. § 1.1406(d).

[267] *See* FE Brief ¶ 110 (arguing FirstEnergy should charge Verizon the following new telecom rates: [redacted] per pole (Met-Ed), [redacted] per pole (Penelec), and [redacted] per pole (Penn Power)); *see also* Reply Ex. B at VZ00829-840 (Calnon Reply Aff. ¶¶ 7-26) & Reply Ex. C at VZ00871-877 (Tardiff Reply Aff. ¶¶ 30-41) (detailing flaws in FirstEnergy's calculations).

[268] FE Brief ¶ 105 n.118.

[269] 47 C.F.R. § 1.726(b).

[270] 47 C.F.R. § 1.1413(b).

There are two main flaws with FirstEnergy's 2019 rate calculations.[271] The first involves FirstEnergy's use of outdated 1988 and 2007 rates of return, when its actual "weighted average cost of debt and equity is the proper cost of capital figure."[272] FirstEnergy has had two rate proceedings since 2007 and admits it should "use[ ] the rate of return approved in the respective utility's last rate case, as instructed by Commission rules."[273] But FirstEnergy ignores its 2014 and 2016 rate proceedings and their effect on its actual rates of return, presumably because a new rate of return was not publicly announced in those proceedings.[274] The proper rate of return, however, remains the "weighted average cost of debt and equity" even where those numbers are no longer publicly announced by a State commission.[275]

The second main flaw in FirstEnergy's 2019 rate calculations is its reliance on an unreliable and hurried review of a small subset of unidentified poles.[276] Using data from this field review, FirstEnergy seeks to depart from the Commission's presumptive inputs for average

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[271] *See* Reply Ex. B at VZ00831-839 (Calnon Reply Aff. ¶¶ 11-25); Reply Ex. C at VZ00873-877 (Tardiff Reply Aff. ¶¶ 36-41). FirstEnergy also criticizes Verizon's allocation of accumulated deferred taxes and distribution pole count inputs, *see* FE Brief ¶ 105, but Verizon's inputs were appropriate, *see* Reply Ex. B at VZ00830-831 (Calnon Reply Aff. ¶¶ 9-10); Reply Ex. C at VZ00872-873 (Tardiff Reply Aff. ¶¶ 34-35).

[272] *See Multimedia Cablevision, Inc*., 11 FCC Rcd at 11215 (¶ 36); *see also* FE Brief ¶ 105; Answer Attachment G at FE00090, FE00095, FE00100 (FirstEnergy rate calculations); Compl. Ex. 36 at VZ00735 (Excerpt from Opinion and Order, Docket Nos. R-00061366, R-00061367 (Pa. PUC Jan. 11, 2007)); Compl. Ex. 37 at VZ00747 (Excerpt from Opinion and Order, Docket No. R-870732, 1998 Pa. PUC LEXIS 407 (Pa. PUC May 3, 1988)).

[273] FirstEnergy Response to Verizon Interrogatory No. 9.

[274] *See, e.g.*, Compl. Ex. B at VZ00040, VZ00089-90 (Calnon Aff. ¶ 12 & Ex. C-4); Compl. Ex. C at VZ00112-113 (Tardiff Aff. ¶ 13).

[275] *Multimedia Cablevision, Inc*., 11 FCC Rcd at 11215 (¶ 36); *see also* Reply Ex. B at VZ00831-832 (Calnon Reply Aff. ¶¶ 11-13); Reply Ex. C at VZ00873-874 (Tardiff Reply Aff. ¶ 36).

[276] *See* FE Brief ¶¶ 105, 111-12.

number of attaching entities, space occupied, unusable space, and pole height.[277] But FirstEnergy's alternate inputs are not valid and "probative direct evidence" sufficient to rebut the Commission's presumptions.[278]

As an initial matter, FirstEnergy implicitly admits it did not have data to rebut the Commission's presumptive inputs during the 2019 rental year (or any prior year) because it did not begin its field review until December 2019 or January 2020; FirstEnergy cannot retroactively create data to inflate rates for prior years.[279] But more importantly, FirstEnergy's new data fails to rebut the Commission's presumptions for any year.

FirstEnergy cannot rebut the presumptive inputs because it did not include the data in its Answer, instead submitting only a high-level summary of the field review's design and a statement of its alleged results.[280] But the "survey should be submitted."[281] FirstEnergy received a master spreadsheet, photographs, and additional information from its contractor,[282] and Verizon

[277] FE Brief ¶¶ 111-12; *see also* Answer Attachment G at FE00092 ([redacted] attaching entities and [redacted] feet of space occupied), FE00097 ([redacted] attaching entities and [redacted] feet of space occupied), FE00102 ([redacted] attaching entities and [redacted] feet of space occupied). *But see* 47 C.F.R. §§ 1.1409(c), 1.1410.

[278] *See In the Matter of Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Util. Poles*, 2 FCC Rcd 4387, 4394 (¶ 52 n.27) (1987); *see also Consolidated Partial Order*, 16 FCC Rcd at 12139 (¶ 70); Reply Ex. B at VZ00833-840 (Calnon Reply Aff. ¶¶ 14-26); Reply Ex. C at VZ00874-877 (Tardiff Reply Aff. ¶¶ 37-41).

[279] *See* Answer Attachment K at FE00122 (Carlin Decl. ¶ 4); *see also id.* at FE00126 (Carlin Decl., Ex. SC-1) (showing January 6, 2020 date on field review procedures manual).

[280] *See* Answer Attachment Ex. L at FE00148-167 (Guo Decl. & Ex. CG-1).

[281] *Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co*., 17 FCC Rcd 19859, 19865-66 (¶¶ 16, 18) (2002). FirstEnergy claims its summary approach "comports with" 47 C.F.R. § 1.363, but that rule does not apply to pole attachment complaint proceedings, *see* 47 C.F.R. § 1.201, and requires "the actual input data" when it is requested, *see* 47 C.F.R. § 1.363, which Verizon did, *see* Verizon's Interrogatory No. 10 (requesting "all survey, audit or sampling data").

[282] *See* Answer Attachment K at FE00135-37 (Carlin Decl., Ex. SC-1).

asked FirstEnergy to produce them.[283] FirstEnergy instead withheld the information, making it impossible for Verizon or the Commission to test FirstEnergy's data for accuracy and reliability.[284] A quality check is critical; the field review was completed in about a month's time by a contractor that admits "[t]hings like time pressure … are error precursors that can create situations ripe for error to occur"[285] and summarized by a different contractor that [redacted].[286]

FirstEnergy also cannot rebut the presumptions because it did not design its field review to include "*only* those poles in areas where [Verizon] is actually affixed" as required.[287] FirstEnergy admits the joint use agreements in Pennsylvania and Maryland cover 513,595 poles the parties jointly use, with FirstEnergy owning 381,118 and Verizon owning 132,477,[288] but chose poles for the field review based on a set of [redacted] poles (about [redacted] more than the joint use network) that contained [redacted] FirstEnergy poles (about [redacted] more than

[283] *See* Verizon Interrogatory No. 10 (requesting "all data regarding poles jointly used by Verizon and FirstEnergy, including all survey, audit or sampling data, concerning pole height, the average number of attaching entities, the space occupied by Verizon, FirstEnergy, and any other entity").

[284] *Consolidated Partial Order*, 16 FCC Rcd at 12139 (¶ 70); see also *id*. at 12139 (¶ 70 n.246) (citing *In the Matter of Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd 4387, 4390, 4394 (¶¶ 19, 52 n.27) (1987) (requiring "probative direct evidence" to rebut a Commission presumption)); *see also* Reply Ex. B at VZ00834 (Calnon Reply Aff. ¶ 16); Reply Ex. C at VZ00874 (Tardiff Reply Aff. ¶ 39).

[285] *See* Answer Attachment K at FE00132 (Carlin Decl., Ex. SC-1).

[286] *See* Answer Attachment L at FE00160 (Guo Decl., Ex. CG-1).

[287] *Teleport Commc'ns Atlanta, Inc.*, 17 FCC Rcd at 19869 (¶ 25) (emphasis added).

[288] Response to PA Compl. ¶ 4 (admitting FirstEnergy owns 301,854 joint use poles and Verizon owns 110,843 joint use poles in Pennsylvania); Response to MD Compl. ¶ 4 (admitting FirstEnergy owns 79,264 joint use poles and Verizon owns 21,634 joint use poles in Maryland).

FirstEnergy owns in the joint use network) and [redacted] Verizon poles (about [redacted] more than Verizon owns in the joint use network).[289]

FirstEnergy also did not identify the poles its contractor reviewed, making it impossible to know whether they were ultimately in the parties' joint use network. And even if they were, the data would not rebut the Commission's presumptions. FirstEnergy's contractor reviewed [redacted] FirstEnergy poles, representing less than [redacted] of FirstEnergy's 381,118 joint use poles in Pennsylvania and Maryland[290]—a percentage significantly lower than the 45% of poles the Commission previously considered "incomplete" and insufficient to rebut the presumptive inputs.[291] FirstEnergy also developed and collected the data without "coordination with" Verizon,[292] followed different approaches depending on whether a pole was owned by Verizon or by FirstEnergy,[293] and relied on facially incomplete data.[294] FirstEnergy has not rebutted the Commission's presumptions, so properly calculated new telecom rates must use the Commission's presumptive inputs.[295] The just and reasonable rates are the properly calculated rates Verizon provided.[296]

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[289] *See* Answer Attachment L at FE00155 (Guo Decl., Ex. CG-1); *see also* Reply Ex. B at VZ00835 (Calnon Reply Aff. ¶¶ 18-19); Reply Ex. C at VZ00875-876 (Tardiff Reply Aff. ¶ 40).

[290] *See* Reply Ex. B at VZ00834 (Calnon Reply Aff. ¶ 17).

[291] *Nevada State Cable Television Ass'n v. Nevada Bell*, 13 FCC Rcd 16774 (¶¶ 12-13) (1998).

[292] *Id.* at 16774 (¶ 13); *see also* Reply Ex. C at VZ00874 (Tardiff Reply Aff. ¶ 38).

[293] *See* Answer Attachment K at FE00134-35 (Carlin Decl., Ex. SC-1); Reply Ex. B at VZ00836 (Calnon Reply Aff. ¶ 21).

[294] *See* Reply Ex. B at VZ00837-838 (Calnon Reply Aff. ¶¶ 23-24).

[295] *See* 47 C.F.R. §§ 1.1409(c), 1.1410; *see also* Reply Ex. B at VZ00839-840 (Calnon Reply Aff. ¶ 26); Reply Ex. C at VZ00874-877 (Tardiff Reply Aff. ¶¶ 37-41).

[296] *See* Reply Ex. B at VZ00840 (Calnon Reply Aff. ¶ 27); Reply Ex. C at VZ00871 (Tardiff Reply Aff. ¶ 31). For the 2011 to 2019 rental years, the properly calculated new telecom rates for Verizon's use of (1) Met-Ed's poles are $8.29, $9.87, $10.07, $5.02, $9.35, $8.79, $9.55, $12.20, and $13.83 per pole, (2) Penelec's poles are $6.43, $6.79, $7.18, $5.21, $6.96, $7.18,

E. FirstEnergy's Other Attempts To Avoid or Delay Rate Reductions Fail.

1. Verizon Exhaustively and in Good Faith Sought To Resolve This Dispute Through Negotiations.

FirstEnergy argues the Commission should delay rate relief because Verizon did not "make a good faith effort to resolve" this dispute "prior to seeking relief from the Commission."[297] In reality, *for more than seven years*, Verizon sought to resolve this dispute through correspondence, informal negotiations, and executive-level discussions.[298] And after all those efforts, FirstEnergy now confirms no deal was ever forthcoming: it feels 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."[299]

FirstEnergy nonetheless casts aspersions on Verizon, arguing Verizon negotiated in bad faith because it "demanded" a new telecom rate and "refused to move off its contention[] that it was entitled to the new telecom rate."[300] But Verizon's confidence in the merits of its argument is not "bad faith," particularly when Verizon consistently tried to understand whether a higher rate was justified by the principle of competitive neutrality.[301] From the start of the negotiations in 2012, Verizon sought copies of FirstEnergy's license agreements to better assess "the

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$7.49, $10.49, and $9.07 per pole, and (3) Penn Power's poles are $7.30, $8.47, $8.51, $8.21, $8.94, $9.40, $9.08, $11.18, and $11.80 per pole. *See* Compl. Ex. B at VZ00041-42, VZ00059-87 (Calnon Aff. ¶ 13 & Ex. C-1).

[297] FE Brief ¶¶ 12-20. Tellingly, FirstEnergy never cites the Commission's rule requiring executive-level discussions, 47 C.F.R. § 1.722(g), or asserts that Verizon failed to satisfy it. FirstEnergy's argument on this point is rooted entirely in 2011 *Pole Attachment Order*'s statement that parties must "make a good faith effort to resolve disputes prior to seeking relief from the Commission." *Id.* ¶ 12 (citing *Pole Attachment Order*, 26 FCC Rcd at 5294 (¶ 123)).

[298] Compl. ¶¶ 30-36.

[299] FE Brief ¶ 121.

[300] FE Brief ¶¶ 13-20; *see also*, Response to Compl. ¶¶ 30, 31, 36.

[301] *See* Reply Ex. A at VZ00821 (Mills Reply Aff. ¶ 22).

appropriate rate," "repeatedly acknowledged that the 2011 *Pole Attachment Order* permits a higher rate if a Joint Use Agreement provides an ILEC net material advantages over its competitors," and regularly "asked FirstEnergy to let us know if it disagrees, and to detail any competitive advantages that it thinks would support a rate higher than the new telecom rate."[302] FirstEnergy never provided a license agreement until after it filed its Answer to Verizon's Complaint[303] and waited until June 2018 to allege competitive advantages it now has abandoned for lack of proof.[304]

FirstEnergy also is flat wrong that "Verizon never offered any rate incrementally higher than the new telecom rate."[305] FirstEnergy admits Verizon asked to negotiate within the range of rates "between the new telecom rate and the old [or pre-existing] telecom rate."[306] The record shows Verizon consistently sought a compromise business deal,[307] and the parties' confidential settlement discussions confirm Verizon "in good faith, discussed or attempted to discuss the possibility of settlement with each defendant prior to the filing of [its] complaint."[308] The Commission should reject FirstEnergy's effort to prolong the parties' negotiations even more.

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[302] *See, e.g.*, Compl. Ex. 17 at VZ00551 (Letter from W. Balcerski, Verizon to M. Wolfe, FirstEnergy (Apr. 30, 2012)); Compl. Ex. 19 at VZ00557 (Email from N. Parrish, Verizon, to L. Chapman, FirstEnergy (Sept. 10, 2012)); Compl. Ex. 28 at VZ00649 (Email from J. Slavin, Verizon, to S. Schafer, FirstEnergy (May 4, 2018)).

[303] Response to Compl. ¶ 34.

[304] Compl. Ex. 29 at VZ00690 (Email from D. Karafa, FirstEnergy, to B. Trosper, Verizon (June 7, 2018); *see also* Reply Ex. A at VZ00821 (Mills Reply Aff. ¶ 22); Section II.C.3.a.

[305] Response to Compl. ¶ 10.

[306] FE Brief ¶ 14.

[307] *See, e.g.*, Compl. Ex. 27 at VZ00593 (Letter from B. Trosper, Verizon, to S. Strah, FirstEnergy (Dec. 20, 2017)) ("But our strong preference is for a negotiated resolution"); Compl. Ex. 29 at VZ00692 (Email from B. Trosper, Verizon, to D. Karafa, FirstEnergy (May 30, 2018)) ("I continue to hope that we can reach a business deal regarding rental rates").

[308] *See* 47 C.F.R. § 1.722(g); *see also* Reply Ex. A at VZ00820-821 (Mills Reply Aff. ¶¶ 20, 23).

2. The Applicable Statute of Limitations Extends Back to the Effective Date of the 2011 *Pole Attachment Order*.

The Commission should also reject FirstEnergy's effort to limit the Commission's remedial authority to a two-year period set by 47 U.S.C. § 415, which does not apply here.[309] Section 415 applies only to actions by a carrier to recover *lawful* charges and actions *against* a carrier to recover damages and overcharges.[310] This dispute is neither. And FirstEnergy does not argue otherwise; it merely calls the statute "relevant" because it "governs private complaints against carriers."[311] But FirstEnergy is not a "carrier," and so the statute cannot be the "applicable statute of limitations" for purposes of the Commission's remedies rule.[312]

The Commission chose not to incorporate Section 415 or any other one-size-fits-all statute into its remedies rule, but to look to a case-specific "applicable statute of limitations" consistent "with the way that claims for monetary recovery are generally treated under the law."[313] This decision was reasonable[314] and consistent with a long line of precedent under which State contract law determines the applicable statute of limitations "when there is no statute of limitations expressly applicable to a federal statute."[315] FirstEnergy has no answer to this

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[309] *See* FE Brief ¶¶ 113-117; Response to Compl. ¶¶ 10, 13, 20, 30, 55, 62, 63.

[310] 47 U.S.C. § 415.

[311] *See* FE Brief ¶ 117.

[312] 47 C.F.R. § 1.1407(a)(3).

[313] 47 C.F.R. § 1.1407(a)(3); *Pole Attachment Order*, 26 FCC Rcd at 5289-90 (¶¶ 110-12); *see also Pole Attachment Order NPRM*, 25 FCC Rcd at 11902 (¶ 88) ("Generally speaking, a plaintiff is entitled to recompense going back as far as the applicable statute of limitations allows. There does not appear to be a justification for treating pole attachment disputes differently.").

[314] *See Am. Elec. Power*, 708 F.3d at 190.

[315] *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1101 (9th Cir. 2018) (citing cases); *see also Spiegler v. District of Columbia*, 866 F.2d 461, 463-64 (D.C. Cir. 1989) ("When Congress has not established a statute of limitations for a federal cause of action, it is well-settled that federal

general rule, except to say "this is not an action for breach of contract."[316] But this *is* a dispute about the rental rates FirstEnergy may lawfully impose under a contract, and so "contract law provides the best analogy."[317] The Commission should, therefore, "adopt the general contract law statute of limitations" from Pennsylvania,[318] and provide relief back to the July 12, 2011 effective date of the *Pole Attachment Order*.[319]

FirstEnergy argues the Pennsylvania statute of limitations, if it applies, should be reduced to four years to reflect Pennsylvania's traditional statute of limitations for contract actions.[320] But Pennsylvania has a continuing contract doctrine and—as FirstEnergy concedes—the joint use agreements "*continue* to govern the parties' joint use relationship" because they "*shall continue* in force … until terminated by either party at any time" upon advance written notice.[321] The joint use agreements are, therefore, within Pennsylvania's continuing contract doctrine and damages are available for all time periods covered by the agreements, plus a four-year period following their termination.[322]

FirstEnergy would apply the doctrine differently, arguing the continuing contract doctrine "specif[ies] the four-year Pennsylvania limitations period runs from the date of breach" and so limits the refund period here to four years.[323] But the case FirstEnergy cites refutes its argument:

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courts may 'borrow' one from an analogous state cause of action, provided that the state limitations period is not inconsistent with underlying federal policies.").

[316] FE Brief ¶ 115.

[317] *See Hoang*, 910 F.3d at 1101.

[318] *Id.*

[319] Compl. ¶ 57.

[320] *See* FE Brief ¶ 116; *see also* 42 Pa. Cons. Stat § 5525.

[321] Response to Compl. ¶¶ 15, 16 (emphases added).

[322] *See* Compl. ¶ 57 (citing cases).

[323] *See* FE Brief ¶ 116.

that case explains "even a cursory reading of [Pennsylvania caselaw] reveals that the continuing contract doctrine is meant to carve out an exception to the general rule that the statute of limitations begins to run on the date of breach" by authorizing damages for the time period covered by the contract and an additional four years following the date "the contract is terminated, not from the time of breach."[324] Just and reasonable rates should be set effective July 12, 2011.[325]

3. FirstEnergy's Purported "Confusion" About the *Pole Attachment Order* Does Not Justify a Delay of Just and Reasonable Rates.

Despite the Commission's decision to provide refunds "consistent with the applicable statute of limitations,"[326] FirstEnergy accuses the Commission of poor drafting in 2011 and asks it to award purely prospective relief to account for its professed confusion.[327] FirstEnergy's claim of confusion is belied by its active engagement on these issues; it appealed the 2011 *Pole Attachment Order*, was party to a prior pole attachment complaint proceeding, and was an active participant in the rulemaking that produced the 2018 *Third Report and Order*.[328] FirstEnergy's arguments are also meritless. The Commission should reject FirstEnergy's bizarre claim that the

[324] *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).

[325] *See Dominion Order*, 32 FCC Rcd at 3764 (¶ 28) (The Commission "authoriz[ed] refunds to extend back as far as the applicable statute of limitations allows, but no earlier than the *Pole Attachment Order* effective date.") (citation omitted).

[326] 47 C.F.R. § 1.1407(c).

[327] FE Brief ¶¶ 118-136.

[328] *See* Docket, *Am. Elec. Serv. Corp. v. FCC*, Case No. 11-1146 (D.C. Circuit) (listing FirstEnergy as intervenor for petitioner); Pole Attachment Complaint, *Commonwealth Tel. Co., et al. v. Metropolitan Edison Co., et al.*, Docket No. 14-218, File No. EB-14-MD-008.

Pole Attachment Order is too "difficult for joint users negotiating new rates … to understand" and "impossible" to apply.[329]

First, FirstEnergy's argument fails because the 2018 *Third Report and Order* applies and provides whatever clarity FirstEnergy claims was missing from the 2011 *Pole Attachment Order*. FirstEnergy questions "what showing is needed" for an ILEC to be "comparably situated" to its competitors.[330] The *Third Report and Order* explains "clear and convincing evidence" is needed "that the [I]LEC receives net benefits under its pole attachment agreement with the utility that materially advantage the [I]LEC over other telecommunications attachers."[331] FirstEnergy also complains of confusion because the 2011 *Pole Attachment Order* describes the pre-existing telecom rate as a "reference point" when an ILEC has net material advantages over its competitors.[332] In 2018, the Commission "remove[d] the potential for uncertainty caused by considering the [pre-existing telecom] rate merely as a 'reference point;'" if a utility rebuts the new telecom rate presumption, the pre-existing telecom rate is a "hard cap."[333]

Second, FirstEnergy is wrong that the Commission's 2011 *Pole Attachment Order* was impossible to understand or apply because the Commission did not also revise its regulations to apply the new telecom rate formula and its presumptive inputs to ILECs.[334] The decision to proceed on a case-by-case basis—instead of guaranteeing ILECs the new telecom rate in every case—was an accommodation to FirstEnergy and other utilities, which "contend[ed] that joint

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[329] FE Brief ¶¶ 120, 136.

[330] FE Brief ¶ 120.

[331] *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123).

[332] FE Brief ¶ 124.

[333] *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129).

[334] *See, e.g.*, FE Brief ¶¶ 125-129.

use agreements give [I]LECs advantages that offset any increased rates they might pay for pole access in certain circumstances."[335] FirstEnergy should not be heard to complain that the Commission proceeded exactly as it preferred.

Third, FirstEnergy claims it is "impossible" to calculate the rates for ILECs and electric utilities under the *Pole Attachment Order* and the Commission's rate formulas—while also arguing it has "properly calculated" those rates.[336] FirstEnergy bases this argument on three incredible concerns. It first suggests Verizon seeks "a one-sided ruling for its attachments while Verizon proceeds to calculate on its own whatever rates it wants to charge FirstEnergy to attach to its poles."[337] But Verizon calculated the rates it would charge FirstEnergy if awarded the new telecom rental rates it seeks, and did so consistently with the Commission's "anticipation that [I]LECs and electric utilities would charge each other roughly the same proportionate rate given the parties' relative usage of the pole."[338] FirstEnergy next criticizes Verizon for calculating rates for FirstEnergy's use of 10.5 feet of space on Verizon's poles, which reflects the amount of space for an electric utility under the Commission's default presumptions.[339] But Verizon's

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[335] *See Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654); *see also id.* at 5334 (¶ 214) ("We therefore decline at this time to adopt comprehensive rules governing [I]LECs' pole attachments, finding it more appropriate to proceed on a case-by-case basis"); *id.* at 5336 (¶ 217) (describing principle of competitive neutrality).

[336] *See* FE Brief ¶¶ 104-112, 125-135.

[337] *See* FE Brief ¶ 131.

[338] *See Dominion Order*, 32 FCC Rcd at 3760 (¶ 78) (citing *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662)); *see also* Compl. Ex. B at VZ00047-51, VZ00056-57, VZ000102-103 (Calnon Aff. ¶¶ 23-29, 38-41 & Ex. C-6) (detailing proportional rate calculations and calculating "net" overpayment amount accounting for Verizon's rent for use of FirstEnergy's poles *and* FirstEnergy's rent for use of Verizon's poles); Reply Ex. B at VZ00847-850 (Calnon Reply Aff. ¶¶ 38-42).

[339] *See* Compl. Ex. A at VZ00029-30 (Mills Aff. ¶ 65).

input was conservative: FirstEnergy claims its facilities require [redacted] feet of space[340] without the additional 3.33 feet of "safety space" the Commission found is "usable and used by the electric utility."[341] FirstEnergy also finds it "unclear why Verizon's per-foot charge might somehow be based on anything besides Verizon's costs to own and maintain its pole plant."[342] FirstEnergy's musings are irrelevant; Verizon calculated the proportional rates for FirstEnergy based on Verizon's reported pole cost data.[343]

4. The Commission and Courts Have Rejected FirstEnergy's Retroactivity and Authority Arguments.

FirstEnergy finishes its Answer with three arguments the Commission has previously rejected. *First,* FirstEnergy argues it would be "unfair, arbitrary and capricious, a violation of due process, and contrary to the prohibition on retroactive ratemaking" if the just and reasonable rate takes effect consistent with the applicable statute of limitations.[344] The Enforcement Bureau rejected this argument in 2015, and there is no need to reconsider it here.[345] There is no problem with unlawful "primary" retroactivity because the just and reasonable rates will take effect, and amounts refunded, for periods "*after* the effective date of the [*Pole Attachment*] *Order*."[346] There is no problem with unlawful "secondary" retroactivity because it cannot be "arbitrary and capricious" for the Commission to ensure compliance with "a statutory provision that requires

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[340] *See* Answer Attachment G at FE00106-07 (FirstEnergy Rate Calculations); *see also* Answer Attachment L at FE00166-67 (Guo Decl., Ex. CG-1).

[341] *See Consolidated Partial Order*, 16 FCC Rcd at 12130 (¶ 51) (holding "the 40-inch safety space … is usable and used by the electric utility"); *see also* Reply Ex. B at VZ00844, VZ00849 (Calnon Reply Aff. ¶¶ 34, 42).

[342] FE Brief ¶ 135.

[343] *See* Compl. Ex. B at VZ00047, VZ00091-100 (Calnon Aff. ¶¶ 25-26 & Ex. C-5).

[344] FE Brief ¶¶ 137-143.

[345] *See FPL Order*, 30 FCC Rcd at 1145-47 (¶¶ 17-19).

[346] *Id.* at 1145 (¶ 17).

'just and reasonable' rates" here.[347] And there are no due process concerns. At all times, FirstEnergy was on notice it was required by law to charge Verizon a "just and reasonable" rate.[348] The Commission has broad authority "to take whatever action it deems 'appropriate and necessary' [when] it finds a particular rate … to be unjust or unreasonable,"[349] including authority to "[o]rder a refund."[350] Thus, "[t]he Commission has applied a new rate to existing pole attachments under existing agreements on many occasions and has been upheld on appeal."[351] The Commission should follow the same course here.

Second, FirstEnergy asks the Commission to postpone any rate relief until the date the Commission decides this case.[352] FirstEnergy thus seeks for itself a better result (rate reductions as of the date of the Commission's decision) than the Commission *rejected* in 2011 (rate reductions as of the date a complaint is filed) because it "fails to make injured attachers

[347] *Id.* at 1146 (¶ 19); *see also FPL Order*, 30 FCC Rcd at 1145-46 (¶¶ 18-19) ("Florida Power bears a heavy burden. A rule that operates prospectively but affects transactions entered into before its promulgation is invalid only if it is arbitrary and capricious.… 'Just and reasonable' and 'arbitrary and capricious' are mutually exclusive concepts.") (citing cases).

[348] *See Pole Attachment Order*, 26 FCC Rcd at 5328 (¶ 202) (ILECs "are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1).").

[349] *See Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 77 FCC 2d 187, 195 (¶ 22) (1980); *see also Monongahela Power Co. v. FCC*, 655 F.2d 1254, 1257 (D.C. Cir. 1981) ("The Commission may proceed 'to hear and resolve complaints …,' including those involving preexisting contracts, using the methods for calculating and apportioning costs that it has prescribed.") (internal citation omitted).

[350] 47 C.F.R. § 1.1407(a).

[351] *FPL* Order, 30 FCC Rcd at 1147 n.61 (quoting Ga. *Power Co. v. Teleport Commc'ns Atlanta, Inc*., 346 F.3d 1033 (11th Cir. 2003) (affirming *Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co*., 16 FCC Rcd 20238, 20239 (¶ 4) (Deputy Chief, Cable Services Bur. 2001)); *see also Teleprompter of Fairmont, Inc. v. Chesapeake & Potomac Tel. Co*., 85 FCC 2d 243, 244 (¶ 2) (1981); *Time Warner Entm't v. Fla. Power & Light Co*., 14 FCC Rcd 9149, 9154-55 (¶¶ 14, 15) (Chief, Cable Service Bur. 1999).

[352] FE Brief ¶ 143.

whole."[353] The Commission authorized rate relief as far back as the statute of limitations allows, and the D.C. Circuit affirmed, finding it "hard to see any legal objection to the Commission's selection" of this "reasonable period for accrual of compensation for overcharges or other violations of the statute or rules."[354] The Commission must reject FirstEnergy's request, which would fail to remedy its unjust and unreasonable rates *and* invite other utilities to drag out negotiations to postpone the rate reductions required by law.

Finally, FirstEnergy seeks to relitigate the Commission's decision that ILECs, including Verizon, are "providers of telecommunications service," and are, therefore, statutorily entitled to just and reasonable pole attachment rates under Section 224.[355] But the D.C. Circuit affirmed the Commission's conclusion, expressing "very much doubt" that any other statutory interpretation would be reasonable.[356] This proceeding is not the forum to "relitigate settled matters" that were "already fully … considered and rejected by the Commission."[357] The Commission should reject FirstEnergy's continued defiance of the Commission's 2011 *Pole Attachment Order*, finally provide Verizon the just and reasonable, competitively neutral, properly calculated new telecom

[353] *Pole Attachment Order*, 26 FCC Rcd at 5289-90 (¶¶ 110-12).

[354] *Am. Elec. Power*, 708 F.3d at 190.

[355] FE Brief ¶¶ 144-146.

[356] *Am. Elec. Power*, 708 F.3d at 188.

[357] *See In the Matter of Improving Pub. Safety Commc'ns in the 800 Mhz Band New 800 Mhz Band Plan for Puerto Rico & the U.S. Virgin Islands*, 26 FCC Rcd 1058, 1063 (¶¶ 12-13) (2011).

rates that should have taken effect almost nine years ago,[358] and order FirstEnergy to refund, with interest, the over [redacted] million it has collected unlawfully.[359]

III. CONCLUSION

The Commission should grant Verizon's complaint and find FirstEnergy unlawfully charged and continues to unlawfully charge Verizon unjust and unreasonable pole attachment rates. Verizon further respectfully requests the Commission:

(1) order the unjust and unreasonable rate provisions in the parties' joint use agreements are terminated effective July 12, 2011,

(2) substitute for the unjust and unreasonable rate provisions in the parties' joint use agreements a provision effective July 12, 2011 that sets Verizon's just and reasonable rate for use of FirstEnergy's poles as (a) the new telecom rates identified at paragraph 62 of Verizon's complaint for the 2011 through 2019 rental years and (b) updated annually thereafter at the per pole rate properly calculated in accordance with the Commission's new telecom formula using the presumptions of 47 C.F.R. §§ 1.1417 and 1.1418 and FirstEnergy's then-current "weighted average cost of debt and equity," and

(3) order FirstEnergy to refund to Verizon all amounts paid in excess of the just and reasonable rates for all time periods since the July 12, 2011 effective date of the

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[358] For the 2011 to 2019 rental years, the properly calculated new telecom rates for Verizon's use of (1) Met-Ed's poles are $8.29, $9.87, $10.07, $5.02, $9.35, $8.79, $9.55, $12.20 and $13.83 per pole, (2) Penelec's poles are $6.43, $6.79, $7.18, $5.21, $6.96, $7.18, $7.49, $10.49, and $9.07 per pole, and (3) Penn Power's poles are $7.30, $8.47, $8.51, $8.21, $8.94, $9.40, $9.08, $11.18, and $11.80 per pole. *See* Compl. Ex. B at VZ00041-42, VZ00059-87 (Calnon Aff. ¶ 13 & Ex. C-1). To date, FirstEnergy has collected over [redacted] from Verizon in excess of these rates. *Id.* at VZ00037-38 (Calnon Aff. ¶ 8) (calculating overpayment of [redacted] to date within the applicable Pennsylvania statute of limitations period as compared to proportional new telecom rates).

[359] In no event should Verizon's rate exceed the rate that results from a proper application of the pre-existing telecom formula. For the 2011 to 2019 rental years, the properly calculated pre-existing telecom rates for Verizon's use of (1) Met-Ed's poles are $12.57, $14.96, $15.26, $7.61, $14.16, $13.32, $14.47, $18.49, and $20.96 per pole; (2) Penelec's poles are $9.74, $10.29, $10.89, $7.89, $10.54, $10.88, $11.35, $15.90 and $13.75 per pole; and (3) Penn Power's poles are $11.06, $12.83, $12.90, $12.44, $13.54, $14.24, $13.75, $16.94 and $17.88 per pole. Compl. Ex. B at VZ00055, VZ00059-87 (Calnon Aff. ¶ 36 & Ex. C-1). To date, FirstEnergy has collected over [redacted] from Verizon in excess of these rates. *Id.* at VZ00056 (Calnon Aff. ¶ 40) (calculating overpayment of [redacted] to date within the applicable Pennsylvania statute of limitations period as compared to proportional pre-existing telecom rates).

Pole Attachment Order, plus interest. To date, Verizon's overpayment totals [redacted] which reflects Verizon's net rental overpayment when FirstEnergy's rate is also set at a just and reasonable proportionate new telecom rate.

Respectfully submitted,

By: _____

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Attorneys for Verizon Pennsylvania LLC and Verizon North LLC

Dated: March 3, 2020

INFORMATION DESIGNATION

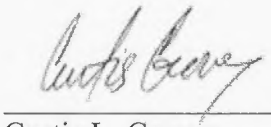
1. The Verizon employees and former employees with relevant information about this rental rate dispute are identified in Verizon's Pole Attachment Complaint, Pole Attachment Complaint Reply and Legal Analysis, and their supporting Affidavits and Exhibits.

2. Attached to Verizon's Pole Attachment Complaint Reply and Legal Analysis are Affidavits from individuals who were involved in or supported Verizon's rate negotiations and an Affidavit from outside expert Timothy J. Tardiff, Ph.D.

3. Verizon reserves the right to rely on information that is not appended to its Pole Attachment Complaint Reply and Legal Analysis as additional information becomes available.

RULE 1.721(M) VERIFICATION

I, Curtis L. Groves, as signatory to this submission, hereby verify that I have read this Reply Legal Analysis in Support of Verizon's Pole Attachment Complaint and, to the best of my knowledge, information, and belief formed after reasonably 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.



Curtis L. Groves

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2020, I caused a copy of the foregoing Reply Legal Analysis in Support of Verizon's Pole Attachment Complaint to be served on the following (service method indicated):

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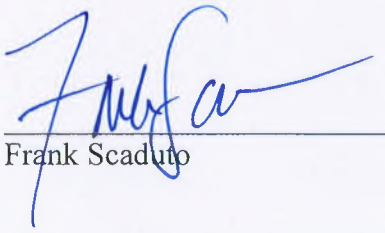

Frank Scaduto

Before the
Federal Communications Commission
Washington, DC 20554

VERIZON PENNSYLVANIA LLC and VERIZON NORTH LLC, Complainants, v. METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, and PENN POWER COMPANY, Defendants.	Proceeding No. 19-354 Bureau ID No. EB-19-MD-008

Reply Affidavits

A. Reply Affidavit of Stephen C. Mills (Mar. 3, 2020).

B. Reply Affidavit of Mark S. Calnon, Ph.D. (Mar. 2, 2020).

C. Reply Affidavit of Timothy J. Tardiff, Ph.D. (Mar. 3, 2020).

D. Reply Affidavit of Donald M. Austin, Jr. (Mar. 2, 2020).

Reply Exhibit A

Before the
Federal Communications Commission
Washington, DC 20554

VERIZON PENNSYLVANIA LLC and VERIZON NORTH LLC, Complainants, v. METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, and PENN POWER COMPANY, Defendants.	Proceeding No. 19-354 Bureau ID No. EB-19-MD-008

REPLY AFFIDAVIT OF STEPHEN C. MILLS

COMMONWEALTH OF VIRGINIA)
) ss.
COUNTY OF CULPEPER)

I, STEPHEN C. MILLS, being sworn, depose and say:

1. I am a Consultant – Contract Management in Verizon's Wireline Network Operations Division. I filed an Affidavit dated November 19, 2019 supporting the Pole Attachment Complaint of Verizon Pennsylvania LLC ("Verizon Pennsylvania") and Verizon North LLC ("Verizon North") (collectively, "Verizon") against the Pennsylvania operating subsidiaries of FirstEnergy Corp. known as Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec"), and Pennsylvania Power Company ("Penn Power") (collectively, "FirstEnergy").[1] I am executing this Reply Affidavit to respond to assertions FirstEnergy made in its February 3, 2020 Answer to Verizon's Pole Attachment Complaint. I

[1] *See* Compl. Ex. A at VZ00001-32 (Aff. of Stephen C. Mills, Nov. 19, 2019).

know the following of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

A. Verizon's Comparability to Its Competitors.

2. In my Affidavit, I explained my conclusion that Verizon attaches to FirstEnergy's poles on terms and conditions comparable to those that apply to its competitors, and that FirstEnergy therefore should charge Verizon the same properly calculated new telecom rate. I have now reviewed more than [redacted] partially redacted license agreements ([redacted] Met-Ed agreements, [redacted] Penelec agreements, and [redacted] Penn Power agreements) FirstEnergy provided to Verizon after FirstEnergy filed its Answer. The redactions did not prevent me from comparing the non-rental rate terms and conditions that apply to Verizon's competitors when they attach to FirstEnergy's poles to the terms and conditions of the joint use agreements that apply to Verizon. I did not see anything in the license agreements that provides Verizon a net material advantage over its competitors. It remains my belief that FirstEnergy should charge Verizon the same properly calculated new telecom rate that applies to Verizon's competitors.

3. FirstEnergy continues to allege Verizon should pay more than its competitors based on "competitive advantages" it claims to provide Verizon. My Affidavit explained why the 24 alleged advantages FirstEnergy relied on during negotiations did not, in fact, provide Verizon a net material advantage over its competitors.[2] FirstEnergy abandoned that list in its Answer, although it continues to claim it includes advantages that it cannot quantify without additional information from Verizon and its competitors. This is false. By definition, FirstEnergy has access to relevant information about the terms and conditions FirstEnergy

[2] Compl. Ex. A at VZ00021-32 (Mills Aff. ¶¶ 48-73).

provides companies attached to its poles. FirstEnergy cannot prove Verizon receives a net material advantage from the 24 previously alleged advantages because Verizon does *not* receive a net material advantage from them.

4. FirstEnergy alleged three new advantages in its Answer, but they do not provide Verizon a net material advantage over its competitors either. FirstEnergy provided very little support for its allegations. It did not cite, quote, or compare specific language in the joint use agreements to the terms and conditions of its license agreements. It did not provide documentation to substantiate its allegations or any alleged costs. It also omitted consideration of Verizon's unique pole ownership costs, even though FirstEnergy's license agreements do not include similar pole ownership obligations.

5. I disagree that any of FirstEnergy's new alleged advantages provide Verizon a competitive advantage that would warrant a rate higher than the properly calculated new telecom rate. *First*, FirstEnergy alleges it "built-to-order" a pole network tall enough for Verizon to attach.[3] Setting aside the inaccuracy of the suggestion that FirstEnergy built a network specifically to accommodate Verizon's service needs, FirstEnergy ignores that Verizon also built a pole network tall enough for FirstEnergy to attach. I disagree that the height of FirstEnergy's poles provides Verizon a *competitive* advantage. A 35-foot pole can accommodate FirstEnergy, Verizon, and at least one other communications attacher. The FCC's rules presume a 37.5-foot

[3] FE Brief ¶ 71; *see also* Response to Compl. ¶¶ 38, 44, 45, 48.

pole can accommodate FirstEnergy and four communications attachers.[4] FirstEnergy claims it has installed taller poles.[5]

6. I also disagree Verizon avoids make-ready that its competitors require. FirstEnergy claims there are only about [redacted] attaching entities on its joint use poles ([redacted]).[6] With so little reported congestion on FirstEnergy's poles, there should be little need for make-ready when Verizon or its competitors seek to attach. Also, when make-ready is required, the time and work required should be about the same for Verizon and its competitors because Verizon and its competitors would require the same work to attach facilities of comparable size to the same poles with the same existing attachments.

7. FirstEnergy tries to create an illusion of make-ready value in an incomplete, unsupported table. The lack of make-ready invoices, work orders, or other supporting information makes it impossible to understand what costs FirstEnergy included and what work was performed. As I detailed in my Affidavit, Verizon completes much of the engineering, make-ready, and survey work it requires when making attachments to FirstEnergy's poles and incurs the cost to do so. It is therefore incorrect to claim, as FirstEnergy does, that Verizon had [redacted] in make-ready costs during the last two years.[7] It is incomplete and misleading to

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[4] 47 C.F.R. §§ 1.1409(c), 1.1410.

[5] *See* Answer Attachment L at FE00161 (Guo Declaration, Ex. CG-1) (reporting mean height of FirstEnergy poles exceeds [redacted] feet); *see also* Answer Attachment F at FE00058, FE00059 (Coleman Decl., Attachment RC-1) (showing photographs of 40- and 45-foot poles); Compl. Ex. 30 at VZ00695 (FirstEnergy Field Reference Guide) (showing a 45-foot pole).

[6] Answer Attachment L at FE00163-64 (Guo Declaration, Ex. CG-1).

[7] FE Brief ¶ 73.

compare work FirstEnergy completes for Verizon with work FirstEnergy completes for Verizon's competitors. Verizon is not advantaged over its competitors where it incurs the same costs in a different way.

8. FirstEnergy's make-ready analysis also does not account for my analysis of pole replacement costs and transfer costs that FirstEnergy has imposed on Verizon.[8] But FirstEnergy accepts most of my analysis, which established that FirstEnergy has disproportionately imposed costs on Verizon. FirstEnergy only questioned 28 pole replacements in my analysis,[9] which showed FirstEnergy required Verizon to incur the cost to replace 569 more poles and to complete 3,687 more transfers than Verizon required of FirstEnergy over about a five-year period.[10]

9. FirstEnergy's make-ready analysis is also flawed because it compares Verizon to a small subset of FirstEnergy's licensees that rapidly deployed their networks in the last two years. Some on the list [redacted]. This is not typical of Verizon's competitors, many of which, like Verizon, have been deploying extensive networks for decades.

10. I also disagree Verizon has a competitive advantage because it does not complete and submit the same "pole profile sheets" and pole photographs to FirstEnergy before it attaches to a FirstEnergy pole.[11] Based on my review of [redacted] and FirstEnergy's Field Reference Guide, FirstEnergy's licensees use pole profile sheets and photographs to document

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[8] *See* Compl. Ex. A at VZ00025-00028 (Mills Aff. ¶¶ 57-61).

[9] FE Brief ¶ 98 n.112. FirstEnergy also states that "[f]or some unexplained reason," I did not perform the analysis for poles owned by Penelec, *id.*, but I explained the reason in my prior Affidavit, *see* Compl. Ex. A at VZ00025 (Mills Aff. ¶ 56).

[10] Compl. Ex. A at VZ00026-28 (Mills Aff. ¶¶ 60-61).

[11] FE Brief ¶ 83; *see also* Response to Compl. ¶¶ 38, 44, 45.

the existing attachments on a pole.[12] Verizon must obtain and document this same information before attaching to a pole. I disagree this routine paperwork somehow "intensifies" an attacher's obligations or is "prejudicially detrimental" if required of an attacher.[13] FirstEnergy claims Verizon said otherwise in an email, but the email was about FirstEnergy's attempt to impose overlashing pre-approval requirements that were not permitted under FCC precedent. Setting aside unenforceable requirements FirstEnergy may try to impose on attachers, Verizon and its competitors must complete the same tasks before they attach to a FirstEnergy-owned pole. FirstEnergy's series of alleged competitive "advantages" related to make-ready and the height of its poles is unsubstantiated and incorrect.

11. *Second*, FirstEnergy relies on plans for a field audit it suddenly claims it may conduct in Pennsylvania. This does not establish Verizon has an advantage over its competitors. The field audit has not happened and may never happen. I also did not see provisions in FirstEnergy's license agreements [redacted]. The cost of a field audit also can vary significantly based on scope, location, the data being collected, the standards being applied, and time constraints. FirstEnergy does not provide information about the Ohio field audit it seeks to base its quantification of this advantage on, which makes it unreliable, irrelevant, and impossible to assess how it compares to a possible future audit in Pennsylvania.

[12] *See* Compl. Ex. 30 at VZ00694-95 (FirstEnergy Field Reference Guide); [redacted].

[13] *See, e.g.*, Response to Compl. ¶ 38.

12. *Third*, FirstEnergy claims Verizon requires about [redacted] inches of additional space on FirstEnergy's poles than Verizon's competitors require.[14] I was surprised by this allegation because Verizon and its competitors deploy comparably sized facilities on FirstEnergy's poles. When I reviewed the standard for the field review, the flaw in FirstEnergy's claim became clear. FirstEnergy claims Verizon requires more space on its poles by comparing the Commission's 1-foot space occupied presumption to field measurements that *assumed* Verizon occupies at least 1 foot of space on every pole. In particular, the field review "deemed [Verizon] to occupy six (6) inches of clearance above its highest usable space attachment and six (6) inches below its lowest usable space attachment."[15] This added six inches to the space occupied by Verizon because the space below Verizon's lowest attachment is *unusable* space, for which FirstEnergy is already compensated when rates are properly calculated under the new telecom rate formula. Had FirstEnergy properly measured the space used by Verizon's facilities, FirstEnergy's data would have confirmed Verizon's facilities occupy space comparable to the Commission's one-foot space occupied presumption.

13. I also disagree Verizon's facilities are generally heavier, sag more, or place materially greater load on FirstEnergy's poles than Verizon's competitors' facilities. FirstEnergy does not provide data to support this claim. Verizon and its competitors today deploy comparable lightweight facilities. And while FirstEnergy complains Verizon installed copper cable decades ago to which it has overlashed fiber, Verizon's competitors have overlashed their facilities for decades, creating bundles of comparable size. I also disagree Verizon occupies

[14] FE Brief ¶ 89 (alleging Verizon occupies [redacted] feet on Met-Ed's poles, [redacted] feet on Penelec's poles, and [redacted] feet on Penn Power's poles).

[15] Answer Attachment K at FE00135 (Carlin Decl., Ex. SC-1).

more space on a pole because of sag in its facilities. All aerial facilities sag to some extent, but they do so mid-span; the space occupied on the pole remains the same.

14. I continue to disagree with FirstEnergy's unsupported claim that Verizon's lowest location on the pole somehow provides Verizon a competitive advantage. Verizon's location on the pole carries significant unique costs related to oversized loads, vandalism, and damage from work in the space above Verizon's facilities. FirstEnergy ignores these costs and claims Verizon's location is an advantage because it can experience additional sag and can access its facilities by ladder instead of bucket truck. But Verizon must maintain its facilities to ensure proper ground clearance and has comparable access to its facilities to its competitors' access to facilities located about 1 foot higher on the pole. Verizon's location on the pole is not a competitive advantage. Even FirstEnergy admits Verizon's location on the pole preventing facilities from crisscrossing midspan "benefits Verizon and its competitors equally."[16]

B. FirstEnergy Presents a False Account of the Parties' Negotiations for the 2009 Amendments.

15. FirstEnergy repeatedly quotes a 2009 letter from a former Verizon employee to suggest misleadingly that Verizon viewed the rental rates set by the 2009 amendments with Met-Ed and Penelec to be "fair and equitable."[17] FirstEnergy is wrong. I was aware of and supported the negotiations that led to the 2009 amendments and, as the letter states, Verizon only viewed "common rate structure" across Pennsylvania to be "fair and equitable" and was pleased only to

[16] Response to Compl. ¶ 50.

[17] *See* Answer Attachment H at FE00109 (Letter from N. Parrish, Verizon, to Joint Use Team, FirstEnergy (Aug. 12, 2009)); FE Brief ¶¶ 62-63; *see also* Response to Compl. ¶¶ 10, 12, 13, 14, 18, 19, 20, 21, 23, 24, 27, 28, 30, 31, 32, 33, 36, 37, 40, 41, 55, 58, 59, 62, 63.

resolve a logistical and administrative nightmare that resulted from having seven different rate arrangements for the two FirstEnergy operating companies.

16. The seven rate arrangements resulted from many legacy joint use agreements, which set rates based on where poles were in relation to outdated legacy service area boundaries. This added unnecessary administrative burdens, requiring recordkeeping that tracked where poles were in relation to those service areas. The 2009 amendments streamlined the rate structure, creating one rate structure for Met-Ed and one for Penelec.[18]

17. The 2009 letter was sent against this backdrop. In thanking the FirstEnergy team for getting the MOUs done, my colleague wrote: "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."[19] His comments were directed at the "common rate structure"—not the resulting rates.

18. Verizon was not pleased with the rental rates that resulted from the 2009 amendments because they did not provide Verizon relief from the prior net rental payments, which were unreasonably high. In the Met-Ed territories, Verizon had paid Met-Ed four different "deficiency" rates in 2008 (before the amendment): [redacted]. In 2009 (after the amendment), Verizon paid Met-Ed one "deficiency" rate, which was essentially at the mid-point of the prior rates: [redacted]. In the Penelec territories, Verizon paid Penelec net rent in 2008 (before the amendment) calculated under three rate structures that required Verizon to pay Penelec [redacted] per pole and charged different rates to Penelec depending on location: [redacted]. In 2009 (after the amendment), Verizon's

[18] *See* Compl. Exs. 6, 11.

[19] Answer Attachment H at FE00109 (emphasis added).

rate to Penelec was lowered to [redacted], but all of Penelec's rates were reduced to [redacted]. This had the effect of giving Penelec equal or greater rate reductions than Verizon received. As a result, Verizon's total net rental payment to Met-Ed and Penelec in 2008 was [redacted]. The following year, under the amendments, Verizon's total net rental payment to Met-Ed and Penelec was [redacted]—about [redacted] higher.

19. Despite the lack of rental relief, Verizon signed the 2009 amendments to obtain the common rate structure. Verizon also understood FirstEnergy would sell Verizon poles, and Verizon sought to begin pole purchase negotiations immediately. Before the Commission had recognized Verizon's right to just and reasonable rates, a pole purchase seemed the only way to reduce Verizon's annual net rental payment obligation and FirstEnergy's bargaining power. Nevertheless, as I detailed in my Affidavit, FirstEnergy refused to sell poles despite Verizon's years-long effort to purchase them. The only positive aspect of the 2009 amendments, therefore, was the common rate structure.

C. FirstEnergy Is Wrong About the Parties' Pre-Complaint Negotiations.

20. I was particularly disheartened to see FirstEnergy's allegation that Verizon negotiated in bad faith during the more than seven years that Verizon sought to negotiate a just and reasonable rental rate with FirstEnergy. I participated in many discussions, email exchanges, and in-person meetings, and I did so in good faith, with the goal of reaching a business deal. The rest of the team at Verizon also tirelessly sought to negotiate in good faith with FirstEnergy and avoid the need for a complaint proceeding. Despite all the effort, FirstEnergy never made an offer that would have materially changed the agreement rates and the annual net rental payment Verizon would have to pay.

21. I disagree with FirstEnergy's version of our negotiations. It is not accurate to say the parties had agreed upon operational terms for a new consolidated agreement and "simply

needed to add a new" rate term. Verizon could not commit to operational terms without knowing what rate FirstEnergy would negotiate and whether it would be comparable to the rate charged Verizon's competitors. I was on the conference call when FirstEnergy proposed that the parties agree to new reciprocal rental rates that would have reduced Verizon's annual rental payment to Met-Ed by $465, even if FirstEnergy later claimed its proposal was not really an offer.[20] I also attended the executive-level meeting with FirstEnergy and was discouraged to learn that most of FirstEnergy's executives that attended had not reviewed the detailed rate calculations our Vice President had sent almost four months earlier.

22. I also disagree Verizon at all times "demanded" a new telecom rate.[21] From the beginning of our negotiations, I sought a just and reasonable rate for Verizon. It was my expectation based on experience that Verizon is comparable to its competitors when attaching to FirstEnergy's poles, so Verizon should pay the same properly calculated new telecom rate guaranteed to Verizon's competitors. But I always sought to understand whether a rate higher than the new telecom rate might be justified. Beginning in 2012, the Verizon team asked for copies of FirstEnergy's license agreements with CLECs and cable companies. We also asked FirstEnergy to provide a list of alleged competitive advantages it thought would support a higher rate. FirstEnergy did not provide a list of alleged advantages until June 2018, and it has now chosen not to defend those alleged advantages in this proceeding.

23. Despite the lack of information supporting a higher rate, Verizon still offered to negotiate within the range of rates made relevant by the Commission's 2011 *Pole Attachment*

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[20] *See* Response to Compl. ¶ 32; Compl. Ex. 26 at VZ00590.

[21] FE Brief ¶¶ 13-20; *see also* Response to Compl. ¶¶ 30, 31, 36.

Order. It is untrue that "Verizon never offered any rate incrementally higher than the new telecom rate."[22] FirstEnergy admits in another part of its Answer, as it must, that Verizon asked to negotiate "between the new telecom rate and the old telecom rate."[23] My Affidavit also documents the parties' extensive effort to negotiate a compromise business deal and explains that some of the parties' communications were exchanged as confidential settlement communications. Verizon negotiated in good faith and with the goal of reaching a negotiated deal within the parameters set by the Commission in the 2011 *Pole Attachment Order*, the 2015 *Florida Power and Light Order*, the 2017 *Dominion Order*, and the 2018 *Third Report and Order*.

24. Throughout our negotiations, I do not recall FirstEnergy suggesting Verizon had to terminate the joint use agreements before it could obtain a just and reasonable rate.[24] Had FirstEnergy raised that argument sooner, it also could have crystalized the dispute and clarified the need for Commission intervention. At a minimum, Verizon could have discussed the issue with FirstEnergy and pointed out that the Commission did not require termination of existing agreements. Nor should it. Termination of the joint use agreements—without a replacement agreement or the statutory right of access enjoyed by Verizon's competitors—would further disadvantage Verizon and increase the cost of deployment of broadband and other advanced services. If the joint use agreements were terminated, Verizon would lose the right to deploy facilities on new FirstEnergy pole lines and would have to identify and obtain approval to use

[22] Answer to Compl. ¶ 10.

[23] FE Brief ¶ 14. *See* Compl. Ex. A at VZ00014-21 (Mills Aff. ¶¶ 30-47); Compl. Exs. 17-29.

[24] *See, e.g.*, FE Brief ¶¶ 1-11.

alternate infrastructure, such as constructing a duplicative pole line or undergrounding its facilities. Obtaining the approvals, if possible, would take substantial time.

25. I was also surprised to see FirstEnergy's repeated reliance on emails from May and June 2018 (after the parties' April 2018 executive level meeting) in which FirstEnergy stated it would discuss the possibility of "a CLEC rate" if Verizon agreed to "transition … out of the pole-owning business in FirstEnergy service territories" by transferring ownership of Verizon's poles to FirstEnergy.[25] FirstEnergy claims this was an "offer," that the mere act of making the "offer" shows FirstEnergy lacked bargaining power, and that Verizon must consider the joint use agreements superior because it did not accept the "offer."[26] I disagree. First, FirstEnergy never made a formal offer for Verizon to accept. And FirstEnergy's proposal was designed to increase FirstEnergy's superior bargaining power. Had Verizon accepted such an offer, FirstEnergy would have owned all the joint use poles, which would further increase FirstEnergy's superior bargaining power and ability to impose unreasonable rates, terms, and conditions on Verizon.

26. The "offer" also would not have placed Verizon "on equal footing" with its competitors as FirstEnergy claims.[27] FirstEnergy was insisting that rates for Verizon's use of FirstEnergy's poles be calculated using inflated inputs (such as three feet of space occupied) that do not reflect real-world conditions even under the flawed data FirstEnergy provided with its

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[25] *See* Compl. Ex. 28 at VZ00650-651 (Email from S. Schafer, FirstEnergy, to J. Slavin, Verizon (May 11, 2018)); Compl. Ex. 29 at VZ00690 (Email from D. Karafa, FirstEnergy, to B. Trosper, Verizon (June 7, 2018)).

[26] *See, e.g.*, Response to Compl. ¶ 38; FE Brief ¶ 61.

[27] *See* Compl. Ex. 28 at VZ00650-651 (Email from S. Schafer, FirstEnergy, to J. Slavin, Verizon (May 11, 2018)).

Answer.[28] The offer also did not include a guarantee of continued access to FirstEnergy's poles. FirstEnergy's proposal would have further disadvantaged Verizon relative to its competitors: Verizon would pay rates higher than the properly calculated new telecom rates and would not have the guarantee of continued pole access that is statutorily provided to Verizon's competitors. FirstEnergy's proposal was a non-starter.

27. Finally, I was discouraged to learn that despite the years of effort I devoted to seeking a good faith settlement, FirstEnergy never considered a deal possible. I learned for the first time reading FirstEnergy's Answer that it thinks "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.'"[29] Had FirstEnergy informed Verizon of that position in 2012, Verizon could have sought relief then instead of devoting so much time and effort in pursuit of a negotiated resolution to which FirstEnergy would never agree.

Stephen C. Mills

Sworn to before me on
this 3rd day of March, 2020

Notary Public

MICHAEL DUSTIN RHODES
NOTARY PUBLIC
REG. #7595785
MY COMMISSION EXPIRES
4/30/2022
COMMONWEALTH OF VIRGINIA

[28] *See* ¶ 12 above; *see also* Compl. Ex. 25 at VZ00588 (Letter from S. Mills, Verizon, to D. DeWitt, FirstEnergy (Nov. 2, 2017)).

[29] FE Brief ¶ 121.

Reply Exhibit B

Before the
Federal Communications Commission
Washington, DC 20554

VERIZON PENNSYLVANIA LLC and VERIZON NORTH LLC, Complainants, v. METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, and PENN POWER COMPANY, Defendants.	Proceeding No. 19-354 Bureau ID No. EB-19-MD-008

AFFIDAVIT OF MARK S. CALNON, PH.D.

COMMONWEALTH OF PENNSYLVANIA)
) ss.
COUNTY OF BUCKS)

I, MARK S. CALNON, being sworn, depose and say:

1. I am a senior consultant on economic and regulatory policy supporting Verizon's Network Operations & Engineering Group. I filed an Affidavit dated November 19, 2019 supporting the Pole Attachment Complaint of Verizon Pennsylvania LLC ("Verizon Pennsylvania") and Verizon North LLC ("Verizon North") (collectively, "Verizon") against the Pennsylvania operating subsidiaries of FirstEnergy Corp. known as Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec"), and Pennsylvania Power Company ("Penn Power") (collectively, "FirstEnergy").[1]

[1] *See* Compl. Ex. B at VZ000033-103 (Aff. of Mark S. Calnon, Ph.D., Nov. 19, 2019).

2. I am executing this Reply Affidavit to respond to assertions FirstEnergy made in its February 3, 2020 Answer to Verizon's Pole Attachment Complaint. I know the following of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

3. I have reviewed FirstEnergy's Answer and its Attachments, FirstEnergy's responses to Verizon's interrogatories, and FirstEnergy's subsequent production of partially redacted license agreements. In this Affidavit, I explain: (A) the 2011 through 2019 new telecom rental rates I provided are the properly calculated new telecom rates; (B) FirstEnergy does not provide Verizon a net material advantage under the joint use agreements as compared to FirstEnergy's license agreements, so it should charge Verizon the same properly calculated new telecom rate guaranteed Verizon's competitors; (C) the calculation of pre-existing telecom rates is irrelevant because FirstEnergy should charge Verizon the new telecom rate, but the 2011 through 2019 pre-existing telecom rental rates I provided are the properly calculated pre-existing telecom rates; (D) my overpayment calculations are correct and were not rebutted by FirstEnergy; and (E) the joint use agreement rates are not justified by FirstEnergy's claims about bargaining power.

A. The New Telecom Rates In My Affidavit Are the Correctly Calculated New Telecom Rates.

4. FirstEnergy criticizes my 2011 through 2019 new telecom rate calculations, but it focuses its argument on my 2019 Penelec rate calculation, only attaches alternative Met-Ed, Penelec, and Penn Power rate calculations for the 2019 rental year, and does not support its criticism with reference to Commission rules, orders, or testimony explaining FirstEnergy's

alternative 2019 calculations.[2] I have nonetheless considered each of its criticisms. For the following three reasons, the new telecom rates Verizon requested in the Complaint are the properly calculated new telecom rates for Verizon's use of FirstEnergy's poles during the 2011 through 2019 rental years[3] and the alternative rates FirstEnergy proposed for the 2019 rental year are not correctly calculated and should be rejected.

5. *First*, FirstEnergy did not rebut my calculations for the 2011 through 2018 rental years with argument or alternative calculations. FirstEnergy instead identified alleged "errors" in my calculation of the 2019 rate for use of Penelec's poles and claimed the alleged "errors … seem to have been repeated" in other calculations.[4] This is insufficient to challenge my 2011 through 2018 rate calculations (or my calculation of 2019 rates for use of Met-Ed's or Penn Power's poles) because rental rates are calculated under the FCC's formulas based on company-specific data for each relevant rental year. For example, FirstEnergy criticizes the inputs I used for "pole count" and "rate of return" in my calculation of 2019 rates for use of Penelec's poles, but FirstEnergy uses different values (as it must) in its calculation of 2019 rates for use of Met-Ed's poles and Penn Power's poles.[5]

6. FirstEnergy states it "reserves the right to perform further analysis" regarding my 2011 through 2018 rate calculations.[6] But FirstEnergy had all the information required to

[2] *See* FE Brief ¶¶ 104-106; *see also* Answer Attachment G at FE00089-107.

[3] *See* Compl. Ex. B at VZ00058-87 (Calnon Aff., Exs. C-1, C-2, C-3).

[4] *See* FE Brief ¶ 105.

[5] *See* FE Brief ¶ 105 (stating the "correct pole count is 528,755" and the "proper rate of return … is 7.92%"); Answer Attachment G at FE00090 (calculating rates for use of Met-Ed's poles using pole count of [redacted] and rate of return of [redacted]), FE00100 (calculating rates for use of Penn Power's poles using pole count of [redacted] and rate of return of [redacted]).

[6] *See* FE Brief ¶ 105 & n.118.

provide that analysis in a timely manner. FirstEnergy is required to charge Verizon's competitors rates properly calculated under the new telecom rate formula, and so should have performed those calculations for the 2011 through 2018 rental years.[7] FirstEnergy also received copies of Verizon's rate calculations for several years during the parties' negotiations and itself provided rate calculations for the 2017 rental year (using 2016 cost data) although it has now effectively conceded it used improper methodology and inputs to inflate the resulting rate.[8]

7. *Second*, while FirstEnergy criticizes my calculations of new telecom rates for the 2019 rental year, it does *not* calculate alternative rates that vary greatly from the rates I calculated or in any way validate the agreement rates it charges Verizon. The following table compares the agreement rates FirstEnergy most recently charged Verizon with the alternative 2019 new telecom rates FirstEnergy calculated for Verizon, rates FirstEnergy says it charged some CLECs in Pennsylvania, and my properly calculated 2019 new telecom rate:

[7] *See* 47 C.F.R. § 1.1406(d).

[8] *See, e.g.*, Compl. Ex. 27 at VZ000592-646; Compl. Ex. 28 at VZ00647-00687. For example, the calculations FirstEnergy has now provided show FirstEnergy was incorrect during negotiations when it [redacted]. *See* Answer Attachment G at FE00090-104.

Comparison of 2019 Per-Pole Rates	Met-Ed	Penelec	Penn Power
Agreement rate most-recently charged Verizon[9]	[redacted]	[redacted]	[redacted]
FirstEnergy's new telecom rate calculated for Verizon[10]	[redacted]	[redacted]	[redacted]
Rate FirstEnergy charged some CLECs[11]	[redacted]	[redacted]	[redacted]
Properly calculated new telecom rate[12]	$13.83	$9.07	$11.80

This analysis shows, even under FirstEnergy's own calculations, FirstEnergy demands Verizon pay [redacted] times the new telecom rate. It also confirms the new telecom rates I calculated are reasonable, as they were slightly higher than the rates FirstEnergy calculated for use of Met-Ed's and Penelec's poles.

8. *Third*, FirstEnergy's calculation of 2019 new telecom rates differs from mine in four respects, but in each case, my selection was correct and proper. As a result, the rates I calculated are the properly calculated rates and the rates FirstEnergy calculated are not.

9. FirstEnergy first challenges the total distribution pole counts I used in my calculation of rates for Penelec ([redacted]), stating the "correct pole count is 528,755."[13] This was not an error because I used the pole count value FirstEnergy provided in May 2018.[14] FirstEnergy does not substantiate its new number and, regardless, FirstEnergy's higher pole

[9] FE Brief ¶ 110.

[10] FE Brief ¶ 110; Answer Attachment G at FE00089-104.

[11] FE Brief ¶ 101. This number reflects the lowest in the range of rates FirstEnergy reports, which appears to be the rate FirstEnergy would calculate under the new telecom formula absent the case-specific inputs it seeks to apply to Verizon, which I address in this Affidavit.

[12] Compl. Ex. B at VZ00067, VZ00077, VZ00087 (Calnon Aff., Exs. C-1, C-2, C-3).

[13] FE Brief ¶ 105, bullet point 2.

[14] *See* Compl. Ex. 28 at VZ00657.

count value would *reduce* the resulting new telecom rental rates. My use of the value FirstEnergy provided in 2018 is a conservative approach that favors FirstEnergy.

10. FirstEnergy's second challenge involves my allocation of values reported on a total company basis to the amount associated with distribution poles on a net basis instead of a gross basis.[15] This was not an error either. FirstEnergy has not identified a Commission rule or order requiring its approach. Regardless, the effect on the resulting rate from the two approaches is minimal, further confirming the reasonableness of the net basis approach to allocation that I used.[16]

11. FirstEnergy's third criticism is that "[i]t is unclear how Verizon determined the rate of return," but that I should have used older rate of return values.[17] As an initial matter, my Affidavit explained my rate of return analysis and attached my calculation of the appropriate input based on public filings also attached to Verizon's Complaint.[18] And my analysis was correct. FirstEnergy relies on outdated rates of return set in 2007 for Met-Ed (7.53%) and Penelec (7.92%) and in 1988 for Penn Power (11.14%).[19] It states it may use these outdated values because they are the rates of return "most recently approved by the PaPUC."[20] But FirstEnergy has had two rate proceedings since these rates of return were adopted—one in 2014 and one in 2016.[21] It therefore appears FirstEnergy is relying on the "black box" confidential

[15] FE Brief ¶ 105, bullet points 1, 3.

[16] *See* Reply Ex. C at VZ00873 (Reply Aff. of Timothy J. Tardiff, Ph.D., Mar. 2, 2020 ¶ 35).

[17] FE Brief ¶ 105, bullet point 4.

[18] *See* Compl. Ex. B at VZ00040, VZ00089 (Calnon Aff. ¶ 12 & Ex. C-4); Compl. Exs. 36-43 at VZ00710-809.

[19] FirstEnergy's Response to Verizon's Interrogatory No. 9, Exs. A & B.

[20] FE Brief ¶ 105, bullet point 4; Answer Attachment G at FE00090, FE00095, FE00100.

[21] *See* Compl. Ex. B at VZ00088-90 (Calnon Aff., Ex. C-4).

settlement of those proceedings to try to avoid an update to the rate of return used in its rate calculations. This would inappropriately allow FirstEnergy to recover at a higher rate of return on its poles than has been authorized in its rate proceedings, even if the results of the rate proceedings are not published. For this reason, and as I explained in my Affidavit, the proper rate of return is FirstEnergy's current "weighted average cost of capital, both debt and equity," even if that value is "no longer announce[d]" by a State Commission.[22]

12. The current values I calculated based on publicly available documents do not vary significantly from the values FirstEnergy asserts for Met-Ed and Penelec. In particular, I calculated a 7.45% rate of return for Met-Ed for the 2019 rental year and FirstEnergy claims it should be 7.53%, and I calculated a 7.66% rate of return for Penelec and FirstEnergy claims it should be 7.92%.[23] In contrast, the 7.72% rate of return I calculated for Penn Power for 2019 is materially different from the 31-year-old 11.14% rate of return FirstEnergy seeks to use.[24]

13. FirstEnergy presents no economic or financial justification for using this 11.14% outdated rate of return for Penn Power. Under FirstEnergy's proposal, Penn Power would receive a premium of 48% over Met-Ed and 41% over Penelec, in contrast to more contemporaneous materials showing the rates of return for the three companies should be relatively comparable. For example, in 2016 rate cases, Penn Power requested an 8.7% rate of return, Met-Ed requested an 8.14% rate of return, and Penelec requested an 8.58% rate of

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

[23] *Compare* Compl. Ex. B at VZ00089 (Calnon Aff., Ex. C-4) *with* Answer Attachment G at FE00090, FE00095.

[24] *Compare* Compl. Ex. B at VZ00090 (Calnon Aff., Ex. C-4) *with* Answer Attachment G at FE00100.

return.[25] Had these rates of return been authorized, Penn Power would have received a premium of less than 7% over Met-Ed and a premium of just over 1% as compared to Penelec. Penn Power's 2016 request also shows the unreasonableness of its use of an 11.14% rate of return, as Penn Power *requested* an 8.7% rate of return that is 22% lower than the 11.14% rate of return authorized in 1988 and used in FirstEnergy's 2019 rate calculations.[26]

14. FirstEnergy's final criticism of my 2019 rental rates is that I used FCC presumptive inputs for average pole height (37.5 feet), unusable space (24 feet), usable space (13.5 feet), space occupied by Verizon (1 foot), and average number of attaching entities (5).[27] FirstEnergy claims I should have calculated 2019 rental rates using values FirstEnergy bases on data hastily collected for litigation purposes from [redacted] or fewer FirstEnergy poles *after* Verizon filed its Complaint.[28]

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[25] *See* Compl. Ex. B at VZ00090 (Calnon Aff., Ex. C-4); *see also* Compl. Ex. 40 at VZ00780 (Direct Testimony of Joseph Dipre, Statement No. 9 in Docket No. R-2016-2537349 (Met Ed)); Compl. Ex. 41 at VZ00790 (Direct Testimony of Joseph Dipre, Statement No. 9 in Docket No. R-2016-2537352 (Penelec)); Compl. Ex. 42 at VZ00800 (Direct Testimony of Joseph Dipre, Statement No. 9 in Docket No. R-2016-2537355 (Penn Power)).

[26] *See* Compl. Ex. 42 at VZ00800 (Direct Testimony of Joseph Dipre, Statement No. 9 in Docket No. R-2016-2537355 (Penn Power)).

[27] FE Brief ¶ 105, bullet point 5.

[28] FE Brief ¶ 105, bullet point 5; *see also* Answer Attachment K at FE00122 (Carlin Decl. ¶ 4) (stating data was collected from "December 2019 to January 2020"). FirstEnergy's documents include inconsistent pole counts associated with the field review without any explanation for the inconsistencies. FirstEnergy's contractor Precision Consulting stated [redacted]. Answer Attachment L at FE00158 (Guo Decl., Ex. CG-1, Table 2). FirstEnergy's field contractor Davey Resource Group then stated it would "visit each of 1,519 poles owned by FirstEnergy" and "each of 1,519 poles owned by Verizon" as "provided as a source material by FirstEnergy @95%." Answer Attachment K at FE00134 (Carlin Decl., Ex. SC-1). Precision Consulting then reported some results about [redacted] FirstEnergy poles, some results about [redacted] FirstEnergy poles, *see* Answer Attachment L at FE00163-164 (Guo Decl., Ex. CG-1, Table 3), some results about [redacted] Verizon poles, and some results about [redacted] Verizon poles, Answer Attachment L at FE00166-167 (Guo Decl., Table 4). FirstEnergy thus seeks to rebut the Commission's presumptions with

15. Use of the presumptive values was correct—and necessary—because FirstEnergy does not have sufficiently reliable or credible data to rebut the presumptive inputs. FirstEnergy does not have contemporaneous data about the joint use poles during the 2011 through 2019 rental years. Its contractor states the field review was "conducted from December 2019 to January 2020."[29] FirstEnergy thereby acknowledged it cannot rebut the Commission's presumptive inputs for any time before January 2020.

16. Use of the data to calculate rates for any time after January 2020 is also improper because FirstEnergy did not produce valid and reliable data regarding the joint use poles. FirstEnergy provided only a very high-level summary of the work performed and the results alleged. It did not identify the poles that were reviewed, produce data that was collected (including the master spreadsheet and photographs provided by its contractor) or provide insight into another contractor's compilation of the results. It is therefore impossible to assess the data's accuracy and reliability.

17. The limited information FirstEnergy provided, however, shows many flaws in FirstEnergy's analysis that make it unreliable and unusable for calculating rental rates. FirstEnergy's contractor reported results for, at most, [redacted] poles owned by FirstEnergy and [redacted] poles owned by Verizon in Pennsylvania and Maryland.[30] At most, then, the results

information about, at most, [redacted] FirstEnergy poles and [redacted] Verizon poles without any explanation for the smaller set of poles than was recommended for review.

[29] Answer Attachment K at FE00122 (Carlin Decl. ¶ 4).

[30] *See* Answer Attachment L at FE00163-164, FE00166-167 (Guo Decl., Tables 3 & 4); *see also* footnote 28 above.

involve [redacted] of FirstEnergy's 381,118 joint use poles and [redacted] of Verizon's 132,477 joint use poles in Pennsylvania and Maryland.[31]

18. The study was not designed, however, to review *only* poles within the parties' joint use network. FirstEnergy admits the parties jointly use 513,595 poles in Pennsylvania and Maryland,[32] but FirstEnergy's contractor selected poles from a set of [redacted].[33] FirstEnergy also admits FirstEnergy owns 381,118 joint use poles and Verizon owns 132,477 joint use poles in Pennsylvania and Maryland.[34] FirstEnergy's contractor, however, selected poles from a set of [redacted] FirstEnergy poles and [redacted] Verizon poles in Pennsylvania and Maryland.[35]

19. This flaw existed across the operating companies. Because FirstEnergy agreed with the total pole ownership numbers in paragraph 18 above, it implicitly agreed to the underlying company-specific numbers invoiced by FirstEnergy and included in Mr. Mills' prior affidavits.[36] The following table compares the company-specific invoiced numbers with the number of poles used by FirstEnergy's contractor to select poles for the field review:[37]

[31] *See* Response to PA Compl. ¶ 4 (admitting FirstEnergy owns 301,854 joint use poles and Verizon owns 110,843 joint use poles in Pennsylvania); Response to MD Compl. ¶ 4 (admitting FirstEnergy owns 79,264 joint use poles and Verizon owns 21,634 joint use poles in Maryland).

[32] Response to PA Compl. ¶ 4 ("FirstEnergy admits that the joint use agreements cover 412,697 poles jointly used by the parties"); Response to MD Compl. ¶ 4 ("Potomac Edison admits that the joint use agreement covers 100,898 poles jointly used by the parties").

[33] Answer Attachment L at FE00155 (Guo Decl., Ex. CG-1).

[34] Response to PA Complaint ¶ 4; Response to MD Complaint ¶ 4.

[35] Answer Attachment L at FE00155 (Guo Decl., Ex. CG-1).

[36] *See* PA Compl. Ex. A at VZ00010, VZ00012, VZ00013 (Mills Aff. ¶¶ 20, 25, 28); MD Compl. Ex. A at VZ00004 (Mills Aff. ¶ 6).

[37] *Compare* PA Compl. Ex. A at VZ00010, VZ00012, VZ00013 (Mills Aff. ¶¶ 20, 25, 28) & MD Compl. Ex. A at VZ00004 (Mills Aff. ¶ 6) *with* Answer Attachment L at FE00155 (Guo Declaration, Ex. CG-1.

	FirstEnergy Joint Use Pole Counts			Verizon Joint Use Pole Counts		
	Invoice	Guo Decl.	Difference	Invoice	Guo Decl.	Difference
Met-Ed (MED)	129,421	[redacted]	[redacted]	30,027	[redacted]	[redacted]
Penelec (PND)	146,859	[redacted]	[redacted]	73,400	[redacted]	[redacted]
Penn Power (PPD)	25,574	[redacted]	[redacted]	7,416	[redacted]	[redacted]
Potomac Edison (PED)	79,264	[redacted]	[redacted]	21,634	[redacted]	[redacted]
Total	381,118	[redacted]	[redacted]	132,477	[redacted]	[redacted]

20. On a total basis, [redacted] of the FirstEnergy poles and [redacted] of the Verizon poles used to determine the set of about [redacted] poles for the field review were not joint use poles.[38] This failure to ensure the field review reflected only joint use poles renders the results of the study unusable to set rates for the joint use poles.

21. The field review had other flaws. Without explanation, FirstEnergy's contractor collected different information based on whether FirstEnergy or Verizon owned a pole.[39] Far more information was collected about poles FirstEnergy owned, including the space occupied by "each non-[FirstEnergy Operating Company] attacher on the pole."[40] FirstEnergy did not provide the data it collected and only summarized the results it seeks to use in its rental rate calculations. This denied Verizon the ability to assess whether the data collected about Verizon was comparable to data collected about Verizon's competitors.

[38] [redacted]. As detailed in footnote 28 above, the number of poles selected for the field review is not clear. FirstEnergy's contractor Precision Consulting [redacted], but FirstEnergy's field contractor Davey Resource Group defined the scope as including 3,038 poles and Precision Consulting reported information about, at most, [redacted] FirstEnergy poles and [redacted] Verizon poles ([redacted] poles). *See* Answer Attachment K at FE00134 (Carlin Decl., Ex. SC-1); Answer Attachment L at FE00158, FE00163-164, FE00166-167 (Guo Decl., Tables 2-4).

[39] Answer Attachment K at FE00134-135 (Carlin Decl., Ex. SC-1).

[40] Answer Attachment K at FE00135 (Carlin Decl., Ex. SC-1).

22. FirstEnergy's data collection standards also produced inconsistent and unreliable results. For example, FirstEnergy states it has rebutted the Commission's presumption that the unusable space averages 24 feet,[41] but did not have its contractor measure the unusable space. Instead, the contractor "calculate[d] the unusable space as 10% final pole length + 2 feet + 18 feet of presumptive height above ground level."[42] FirstEnergy also claims it rebutted the Commission's presumption that Verizon occupies on average 1 foot of space,[43] but its contractor assumed Verizon always occupied at least 1 foot of space because Verizon was "deemed to occupy six (6) inches of clearance above its highest usable space attachment and six (6) inches below its lowest usable space attachment."[44] FirstEnergy did not include similar minimum space assumptions for its own facilities and *excluded* from its measurement the 3.33 feet of safety space that is "usable and used by the electric utility."[45]

23. The results FirstEnergy reported are also unreliable because [redacted], without explanation. The following table compares [redacted]:[46]

[41] *See* 47 C.F.R. § 1.1410.

[42] Answer Attachment K at FE00134 (Carlin Decl., Ex. SC-1).

[43] *See* 47 C.F.R. § 1.1410.

[44] Answer Attachment K at FE00135 (Carlin Decl., Ex. SC-1).

[45] Answer Attachment K at FE00134 (Carlin Decl., Ex. SC-1); *see also In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12130 (¶ 51) (2001) ("the 40-inch safety space … is usable and used by the electric utility") ("*Consolidated Partial Order*").

[46] Answer Attachment L at FE00158, FE00163-164 (Guo Decl., Ex. CG-1, Tables 2 & 3).

FirstEnergy Poles			
	Poles in Field Review	Poles in Reported Results	Percent
Pole height and average number of attaching entities			
Met-Ed territory (MED)	[redacted]	[redacted]	[redacted]
Penelec territory (PND)	[redacted]	[redacted]	[redacted]
Penn Power territory (PPD)	[redacted]	[redacted]	[redacted]
Potomac Edison territory (PED)	[redacted]	[redacted]	[redacted]
Space occupied by Verizon and height of Verizon's lowest attachment			
Met-Ed territory (MED)	[redacted]	[redacted]	[redacted]
Penelec territory (PND)	[redacted]	[redacted]	[redacted]
Penn Power territory (PPD)	[redacted]	[redacted]	[redacted]
Potomac Edison territory (PED)	[redacted]	[redacted]	[redacted]

24. In contrast, FirstEnergy's contractor [redacted] [redacted]:[47]

Verizon Poles			
	Poles in Field Review	Poles in Reported Results	Percent
Pole height and space occupied by FirstEnergy			
Met-Ed territory (MED)	[redacted]	[redacted]	[redacted]
Penelec territory (PND)	[redacted]	[redacted]	[redacted]
Penn Power territory (PPD)	[redacted]	[redacted]	[redacted]
Potomac Edison territory (PED)	[redacted]	[redacted]	[redacted]
Space required by FirstEnergy			
Met-Ed territory (MED)	[redacted]	[redacted]	[redacted]
Penelec territory (PND)	[redacted]	[redacted]	[redacted]
Penn Power territory (PPD)	[redacted]	[redacted]	[redacted]
Potomac Edison territory (PED)	[redacted]	[redacted]	[redacted]

25. FirstEnergy's contractor [redacted]. He also acknowledges [redacted]

[47] Answer Attachment L at FE00158, FE00166-167 (Guo Decl., Ex. CG-1, Tables 2 & 4).

[redacted].[48]

There is no discussion from FirstEnergy [redacted] about routine review of the data to identify obvious errors, outliers, or extreme values. Mr. Guo [redacted]

[redacted]"[49] This assumption is not well-founded. In addition to the errors identified above, a review of the summary data includes extreme values that strongly suggest mistakes in the data collected and results reported.[50]

26. The Commission's presumptive inputs must be used where there is no accurate, comprehensive, and reliable data about the parties' joint use poles. Had FirstEnergy used the presumptive inputs to calculate new telecom rental rates, it would have calculated rates very similar to the rates I calculated, as shown in the following table:

Verizon's Use of Met-Ed's Poles		
Rental Year 2019 Using data from 2018	FirstEnergy Inputs with Default Space Factor	Verizon Calculation
Space Factor	0.1120	0.1120
multiplied by		
Net Investment per Distribution Pole	[redacted]	$605.68
multiplied by		
Capital Carrying Charge Rate	[redacted]	30.89%
multiplied by		
Urbanized Service Area Cost Allocator	[redacted]	0.66
Equals		
New Telecom Rate: Met-Ed (per pole)	[redacted]	**$13.83**

[48] Answer Attachment L at FE00154 (Guo Decl., Ex. CG-1).

[49] Answer Attachment L at FE00160 (Guo Decl., Ex. CG-1).

[50] Answer Attachment L at FE00163-164 (Guo Decl., Ex. CG-1).

Verizon's Use of Penelec's Poles		
Rental Year 2019 Using data from 2018	FirstEnergy Inputs with Default Space Factor	Verizon Calculation
Space Factor	0.1120	0.1120
multiplied by		
Net Investment per Distribution Pole	[redacted]	$537.04
multiplied by		
Capital Carrying Charge Rate	[redacted]	22.86%
multiplied by		
Urbanized Service Area Cost Allocator	[redacted]	0.66
Equals		
New Telecom Rate: Penelec (per pole)	[redacted]	**$9.07**
Verizon's Use of Penn Power's Poles		
Rental Year 2019 Using data from 2018	FirstEnergy Inputs with Default Space Factor	Verizon Calculation
Space Factor	0.1120	0.1120
multiplied by		
Net Investment per Distribution Pole	[redacted]	$562.75
multiplied by		
Capital Carrying Charge Rate	[redacted]%[51]	28.37%
multiplied by		
Urbanized Service Area Cost Allocator	[redacted]	0.66
Equals		
New Telecom Rate: Penn Power (per pole)	[redacted]	**$11.80**

27. It therefore remains my conclusion that, for the 2011 to 2019 rental years, the properly calculated new telecom rates for Verizon's use of (1) Met-Ed's poles are $8.29, $9.87, $10.07, $5.02, $9.35, $8.79, $9.55, $12.20 and $13.83 per pole, (2) Penelec's poles are $6.43, $6.79, $7.18, $5.21, $6.96, $7.18, $7.49, $10.49, and $9.07 per pole, and (3) Penn Power's poles are $7.30, $8.47, $8.51, $8.21, $8.94, $9.40, $9.08, $11.18, and $11.80 per pole.

[51] FirstEnergy's carrying charge rate includes the inflated 11.14% rate of return I addressed above. If the rate of return is corrected in FirstEnergy's calculation, the resulting new telecom rate is [redacted] per pole.

B. FirstEnergy Has Not Identified a Net Material Competitive Advantage That Would Justify Charging Verizon a Rate Higher Than the New Telecom Rate.

28. In my Affidavit, I identified foundational flaws that led me to conclude FirstEnergy had not identified an alleged "competitive advantage" in its list of 24 alleged advantages that justified charging Verizon a rental rate higher than the properly calculated new telecom rate.[52] FirstEnergy abandoned that list of advantages when it filed its Answer, although it continues to allege without support or quantification that some items on the list are competitive "advantages."[53] I disagree for reasons I detailed in my Affidavit. I also disagree with FirstEnergy's suggestion that it is unable to quantify some alleged advantages because it does not have sufficient information from Verizon and its competitors. The Commission adopted a principle of competitive neutrality that ensures FirstEnergy has all the relevant information it requires to prove an alleged advantage, as the proper inquiry looks to whether *FirstEnergy* provides Verizon "net benefits" under the joint use agreement that "materially advantage the [ILEC] over other telecommunications providers" that attach to the *FirstEnergy*'s poles under the terms and conditions of *FirstEnergy*'s license agreements.[54]

29. FirstEnergy did not cite or quote a single term or condition in the joint use agreements or its license agreements when it alleged Verizon is materially advantaged over its competitors. I nonetheless reviewed the partially redacted set of license agreements FirstEnergy produced. The license agreements do not include terms and conditions that, when compared to

[52] *See* Compl. Ex. B at VZ00051-55 (Calnon Aff. ¶¶ 30-35).

[53] *See, e.g.*, Response to Compl. ¶¶ 49, 53, 54.

[54] *In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7770-71 (¶¶ 127-29) (2018) ("*Third Report and Order*"); *see also* 47 C.F.R. § 1.1413(b).

the joint use agreements, provide Verizon a material advantage, much less a net material advantage, as compared to Verizon's competitors.

30. I also considered the three advantages FirstEnergy now alleges and conclude they have the same foundational flaws I identified in FirstEnergy's prior list. FirstEnergy still doesn't account for disadvantages to Verizon as compared to its competitors, although it admits Verizon has pole ownership responsibilities that Verizon's competitors do not have. For example, except for 28 pole replacements, FirstEnergy does not challenge Verizon's data showing FirstEnergy required Verizon to incur the cost to replace 569 more poles and to complete 3,687 more transfers than Verizon required of FirstEnergy over about five years.[55] FirstEnergy could not impose similar costs on Verizon's competitors because FirstEnergy's license agreements [redacted].

31. Each of the individual allegations fails to substantiate a net material advantage that would justify a rate higher than the properly calculated new telecom rate guaranteed Verizon's competitors. FirstEnergy first alleges it installed a pole network that is tall enough to accommodate Verizon, but this is not a competitive "benefit" because it is not uniquely enjoyed by Verizon. Verizon's competitors are also able attach facilities to FirstEnergy's poles, which it claims are over [redacted]-feet tall and have only about [redacted] attaching entities.[56] The principle of competitive neutrality requires consideration of only those items that *uniquely* advantage or disadvantage Verizon as compared to its competitors, and the height of FirstEnergy's poles does not.

[55] *See* Compl. Ex. A at VZ00025-28 (Mills Aff. ¶¶ 57-61); *see also* Response to Compl. ¶ 46; Answer Attachment B at FE00009, FE00013 (Schafer Decl. ¶ 25 & Ex. SFS-2).

[56] Answer Attachment L at FE00161 (Guo Decl., Ex. CG-1). The Commission presumes a 37.5-foot pole can hold FirstEnergy and 4 additional attachers. *See* 47 C.F.R. §§ 1.1409(c), 1.1410.

32. FirstEnergy seeks to support its pole height claim with an analysis of make-ready costs that has no supporting documentation and compares Verizon to attachers that have incurred the *highest* make-ready costs during the last two years.[57] The Commission previously rejected this approach because it "omit[ted] the information needed to analyze whether, and, if so, the extent to which, Verizon has been advantaged relative to a typical competitor or an average of its competitors."[58] FirstEnergy's approach fails for the same reason. FirstEnergy also improperly inflated the results of its calculation by [redacted] of the licensees in its list, some of which [redacted] before the two-year study period. These new licensees are not typical of Verizon's competitors, which generally have more established networks. By including them in a [redacted], FirstEnergy significantly skewed the resulting calculation. For example, had FirstEnergy calculated a *weighted* average of the [redacted] Met-Ed licensees with the highest make-ready costs, the result would have changed from the [redacted] FirstEnergy cites to [redacted].[59] That result remains significantly inflated, but highlights just how flawed FirstEnergy's analysis is. The weighted average does not account for make-ready more than [redacted] additional licensees required. And FirstEnergy's own calculation shows licensees with the "largest number of attachment applications during the past two years"—meaning they had the most rapid buildout during the last two years—still paid the equivalent of [redacted] per pole.[60] In addition, FirstEnergy did not exclude costs for activities Verizon performs at its own cost, but that FirstEnergy performs for Verizon's competitors. FirstEnergy's approach would effectively

[57] Answer Attachment B at FE00007, FE00011 (Schafer Decl. ¶ 14 & Ex. SFS-1).

[58] *Verizon Va. v. Va. Elec. & Power Co*., 32 FCC Rcd 3750, 3759 (¶ 20) (EB 2017) ("*Dominion Order*").

[59] Answer Attachment B at FE00007, FE00011 (Schafer Decl. ¶ 14 & Ex. SFS-1).

[60] Answer Attachment B at FE00007, FE00011 (Schafer Decl. ¶ 14 & Ex. SFS-1).

double charge Verizon for the same services—once when Verizon performs the services at its own expense and again through a higher rental rate—which is directly contrary to a principle of competitive neutrality.[61]

33. FirstEnergy's second alleged advantage is just hypothetical because it is based on a field audit of FirstEnergy's network in Pennsylvania that FirstEnergy claims it may perform in the future. Even if it does perform that audit, I did not see any provision in FirstEnergy's license agreements [redacted]. FirstEnergy also failed to disclose what type of audit it suddenly, after Verizon filed its Complaint, now is considering, or documentation regarding its cost. Instead, FirstEnergy states an affiliate performed a field audit in Ohio and was able to charge attachers the equivalent of [redacted] per pole per year as a result. Field audits are not a one-price-fits-all option, however. Without documentation or information about the Ohio field audit, it is impossible to analyze the claim or show its relevance in Pennsylvania.

34. Finally, FirstEnergy alleges Verizon requires, on average, about [redacted] inches more space on a pole than Verizon's competitors.[62] This is irrelevant to an analysis of competitive neutrality because the proper question is whether Verizon enjoys a net material advantage that justifies an increase from the new telecom rental rate—and the new telecom rental rate already includes a "space occupied" input.[63] Space occupied, therefore, cannot justify an additional increase from the new telecom rate. FirstEnergy's allegation also is methodologically flawed

[61] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18) ("Where Verizon performs a particular service itself and incurs costs comparable to its competitors in performing that service, … [an electric utility] may not 'embed in Verizon's rental rate costs that [the electric utility] does not incur.").

[62] *See* FE Brief ¶ 89 (alleging Verizon occupies [redacted] inches on Met-Ed's poles, [redacted] inches on Penelec's poles, and [redacted] inches on Penn Power's poles).

[63] *See* 47 C.F.R. § 1.1406(d)(2).

because it relies on a comparison of field data (in which Verizon was assumed to occupy at least 1 foot of space) with the Commission's presumption that telecommunications providers occupy, on average, 1 foot of space. That FirstEnergy chose this comparison when its contractor collected data about the space occupied by Verizon's competitors in the same field review suggests the field data about Verizon's competitors contradicts FirstEnergy's argument.[64] FirstEnergy also fails to account for the additional space it requires on Verizon's poles; when the 3.33 feet of safety space that is "used by the electric utility" for rate-setting purposes[65] is combined with the measurements FirstEnergy's contractor reported, FirstEnergy requires far more space than the 10.5 feet assumed by the Commission's default presumptions. Adding 3.33 feet of safety space to the average "space required" values FirstEnergy reports, FirstEnergy requires [redacted] feet (Met-Ed), [redacted] feet (Penelec), and [redacted] feet (Penn Power) on Verizon's poles.[66] FirstEnergy has not identified a net advantage to Verizon.

C. My Pre-Existing Telecom Rate Calculations Are Also Correct.

35. Although I concluded in my prior Affidavit FirstEnergy would not be able to justify charging Verizon a rental rate that is higher than a properly calculated new telecom rate, I left open the possibility that FirstEnergy may seek to do so. As a result, I calculated rates using the pre-existing telecom rate formula, which the Commission set as a "hard cap" on the rental rates that FirstEnergy may charge Verizon. I conclude that my prior calculations produced the properly calculated pre-existing telecom rates for Verizon's use of FirstEnergy's poles.

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[64] *See* Answer Attachment K at FE00135 (Carlin Decl., Ex. SC-1).

[65] *Consolidated Partial Order*, 16 FCC Rcd at 12130 ("the 40-inch safety space … is usable and used by the electric utility").

[66] *See* Answer Attachment L at FE0166-167 (Guo Decl., Ex. CG-1).

36. FirstEnergy levies the same criticisms about my 2019 pre-existing telecom rate calculations as it did regarding my 2019 new telecom rate calculations. The arguments fail for the same reasons detailed in Section A above. The methodological errors in FirstEnergy's calculations are more apparent, however, in the pre-existing telecom rates it calculates. A properly calculated new telecom rate is 0.66 times the pre-existing telecom rate in FirstEnergy's service area, which means that a properly calculated pre-existing telecom rate is about 1.51 times a properly calculated new telecom rate (1 / 0.66 = 1.51).[67] FirstEnergy instead purports to calculate pre-existing telecom rates that are up to [redacted] times the new telecom rates it calculated.[68]

37. The major driver of the difference is FirstEnergy's reliance on the unreliable data from its field review. To perform a more appropriate comparison, I calculated the pre-existing telecom rates that result from FirstEnergy's calculation if the presumptive inputs are used in place of the flawed field data results. The following table compares those rates to the agreement rates, the rates that result when FirstEnergy's rates for some CLECs in Pennsylvania are converted to pre-existing telecom rates, and my properly calculated pre-existing telecom rates:

[67] *See* Compl. Ex. C at VZ00108 (Tardiff Aff. ¶ 8 n.6).

[68] *See* FE Brief ¶ 110; Answer Attachment G at FE00094, FE00099, FE00104.

Comparison of 2019 Per-Pole Rates	Met-Ed	Penelec	Penn Power
Agreement rate most-recently charged Verizon[69]	[redacted]	[redacted]	[redacted]
FirstEnergy's rate for some CLECs converted into a pre-existing telecom rate[70]	[redacted]	[redacted]	[redacted]
FirstEnergy's pre-existing telecom rate calculated for Verizon, but using presumptive inputs in place of flawed field data results [71]	[redacted]	[redacted]	[redacted][72]
Properly calculated pre-existing telecom rate[73]	$20.96	$13.75	$17.88

This analysis further illustrates the unreasonableness of the agreement rates, as it shows they exceed each calculation of the pre-existing telecom rates for Verizon's use of FirstEnergy's poles for the 2019 rental year. The pre-existing telecom rate, however, is the *maximum* rate FirstEnergy could charge if it rebutted the Commission's new telecom rate presumption—and here, FirstEnergy did not attempt to do so.[74]

D. My Overpayment Calculations Are Correct and FirstEnergy Did Not Rebut Them.

38. FirstEnergy did not directly address my calculation of Verizon's overpayments or provide an alternative overpayment calculation. And, as noted above, FirstEnergy did not

[69] FE Brief ¶ 110.

[70] FE Brief ¶ 101. This number reflects the lowest in the range of rates FirstEnergy reports divided by 0.66.

[71] FE Brief ¶ 101; Answer Attachment G at FE00089-104.

[72] FirstEnergy's rate was calculated with the inflated 11.14% rate of return I addressed above. If the rate of return is corrected in FirstEnergy's calculation, the resulting pre-existing telecom rate is [redacted] per pole.

[73] Compl. Ex. B at VZ00067, VZ00077, VZ00087 (Calnon Aff., Exs. C-1, C-2, C-3).

[74] *See Third Report and Order*, 33 FCC Rcd at 7770-71 (¶¶ 127-29); *see also* FE Brief ¶¶ 21-28 (arguing only that the presumption does not apply).

analyze or criticize the rental rates I calculated for the 2011 through 2018 rental years. As a result, my overpayment calculations and the underlying rental rates for the 2011 through 2018 rental years are unopposed.[75] I also calculated the overpayment to Penn Power for the 2019 rental year. Although FirstEnergy challenges my calculation of 2019 rates, that dispute impacts a very small portion of Verizon's total overpayment. Verizon's 2019 overpayment to Penn Power was [redacted] at proportional new telecom rates and [redacted] at proportional pre-existing telecom rates, reflecting [redacted] and [redacted] of the total amount Verizon has overpaid to FirstEnergy at proportional new telecom rates [redacted]) and pre-existing telecom rates [redacted]), respectively.[76]

39. FirstEnergy, however, does criticize the proportional new and pre-existing telecom rates I calculated for FirstEnergy's use of Verizon's poles for the 2019 rental year, which would apply if Verizon is charged properly calculated new and pre-existing telecom rates.[77]

40. First, FirstEnergy questions my calculation of rates for Met-Ed's, Penelec's, and Penn Power's use of Verizon's poles based on the totals reported for the following four study areas: Verizon North LLC – Contel Pennsylvania (COPA), Verizon North LLC – Contel Quaker State (COQS), Verizon North LLC – Pennsylvania (GTPA), and Verizon Pennsylvania LLC – Pennsylvania (PAPA). Without support, FirstEnergy states "Verizon is required to develop different rates for each study area."[78] My approach was proper and consistent with the [redacted]

[75] Compl. Ex. B at VZ00102-103 (Calnon Aff., Ex. C-6).

[76] Compl. Ex. B at VZ00102-103 (Calnon Aff., Ex. C-6).

[77] FE Brief ¶ 107.

[78] FE Brief ¶ 107.

[redacted] rate calculations FirstEnergy offered during the parties' negotiations.[79] My approach was also consistent with the parties' past practice; in 2009, the parties agreed to reduce the number of disparate rate structures in Pennsylvania to ease the administrative difficulties associated the payment of different rates to the same company based on the location of the pole. FirstEnergy shows how the parties would return to that scenario if Verizon calculated different rates for FirstEnergy's use of its poles based on the location of a pole: each FirstEnergy operating company would have up to four different rates depending on where Verizon's pole is located with respect to legacy service boundaries.[80]

41. Second, FirstEnergy argues Verizon's 2019 rates did not explain how they comport with Commission rules by "increas[ing] or decreas[ing] its GAAP-based rates by the 'Implementation Rate Difference.'"[81] But I did explain my "calculation of the proportional rate for the 2019 rental year reflects Verizon's transition to generally accepted accounting principles (GAAP) and includes the implementation rate difference referenced at 47 C.F.R. § 1.1406(e)."[82] My calculation of the 2019 rate then shows the [redacted] Implementation Rate Difference and uses that Implementation Rate Difference to *reduce* the proportional rate for FirstEnergy's use of Verizon's poles.[83]

42. Third, FirstEnergy challenges my use of the Commission's presumptive inputs for pole height, space occupied by FirstEnergy, and usable space when calculating the space factor.[84]

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[79] *See* Compl. Ex. 28 at VZ00686 ([redacted]).

[80] *See* Answer Attachment G at FE00105.

[81] FE Brief ¶ 107.

[82] Compl. Ex. B at VZ00047-48 (Calnon Aff. ¶ 25 & n.26).

[83] Compl. Ex. B at VZ00100 (Calnon Aff., Ex. C-5).

[84] FE Brief ¶ 107.

But I had to use the presumptions because there is no reliable data that could rebut the presumptions. FirstEnergy's recent field survey did not produce that data for reasons detailed above, and even if it were accurate, it would only apply prospectively and increase the amount of space occupied by FirstEnergy in my calculations. The proportional rates I calculated for FirstEnergy's use of Verizon's poles were properly calculated.

E. FirstEnergy's Claims About Bargaining Power Do Not Justify the Joint Use Agreement Rates.

43. FirstEnergy has identified no legitimate economic reason to charge Verizon a rate higher than the properly calculated new telecom rate guaranteed Verizon's competitors. FirstEnergy nonetheless argues it should be able to continue charging the higher joint use agreement rates based on a false assertion that FirstEnergy lacks bargaining power. This claim is refuted by the substantial pole ownership imbalance, FirstEnergy's conduct throughout its negotiations with Verizon, and the discrimination reflected in the rates FirstEnergy says it charges CLEC and cable attachers.

44. FirstEnergy has significant bargaining power as a result of the nearly three-to-one pole ownership imbalance with Verizon based on "standard economic theories" the Commission has already recognized.[85] FirstEnergy's behavior during its negotiations with Verizon and in its dealings with cable and CLEC attachers demonstrates FirstEnergy's willingness and ability to exercise that bargaining power by (a) perpetuating rates for Verizon that are more than [redacted] the proper rates FirstEnergy *should be* charging cable and CLEC attachers, and (b) price discriminating among cable and CLEC attachers despite the fact these attachers are similarly

[85] *See 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, 5329 (¶ 206 n.618) (2011) ("*Pole Attachment Order*").

situated and entitled by statute and regulation to a properly calculated new telecom rate. These abuses of market power by an owner of an essential input (poles) distorts competition in the downstream market (cable, broadband and communications services).

45. In the Complaint, Verizon detailed FirstEnergy's exercise of its bargaining power to perpetuate the agreement rates during negotiations. FirstEnergy does not rebut the facts Verizon presented and confirms a pattern of behavior consistent with the ongoing exercise of bargaining power. FirstEnergy agrees it owns three joint use poles for every one Verizon owns.[86] FirstEnergy admits it refused to sell Verizon poles, which allowed it to preserve its pole ownership majority.[87] FirstEnergy admits it engaged in protracted negotiations, and now asserts for the first time "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."[88] FirstEnergy relies on a *framework* it proposed for *potential* rate reforms that tied the possibility of rate relief to Verizon's agreement to transfer its poles to FirstEnergy[89]—a scheme that would have increased FirstEnergy's bargaining power and, given its self-admitted practice of price discrimination, *not* guarantee Verizon a just and reasonable properly calculated new telecom rate.

46. FirstEnergy's Answer confirms it has been willing to exercise its superior bargaining power with respect to other attachers as well. It documents significant variations in the rates it charges CLEC and cable attachers.[90] Without support, it states "[t]hese fees are

[86] Response to Compl. ¶ 4.

[87] Response to Compl. ¶¶ 23, 31.

[88] FE Brief ¶ 121.

[89] *See* FE Brief ¶ 97.

[90] *See* FE Brief ¶ 101.

appropriate, as they were agreed to by FirstEnergy and its attachers along with other bargained-for rates, terms and conditions."[91] At the same time, it admits its license agreements with several cable and CLEC providers "all contain nearly identical provisions."[92]

47. I reviewed the redacted license agreements FirstEnergy produced, and so was able to compare the non-rental rate terms and conditions for FirstEnergy's licensees. [redacted] Instead, I agree with FirstEnergy's statement that its license agreements tend to contain "nearly identical provisions."[93] In my review, I did identify several license agreements that [redacted] Rates calculated under such [redacted] would not tend to have a relationship to rates properly calculated under the Commission's rate formula in terms of their rate level or year-over-year change. There was nothing about the non-rental rate terms and conditions in these license agreements, however, that appeared to [redacted] FirstEnergy may charge using that methodology.

48. Despite this evidence of FirstEnergy's bargaining power, FirstEnergy attempts to deny that bargaining power with four arguments: (a) that Verizon rejected a less-costly alternative from FirstEnergy, (b) that FirstEnergy would suffer harm if it were unable to connect to Verizon's poles, (c) that it would be expensive for FirstEnergy to construct a parallel pole

[91] *See* FE Brief ¶ 102.

[92] *See* FE Brief ¶ 103 n.117.

[93] *See* FE Brief ¶ 103 n.117.

network, and (d) that evergreen provisions prevent FirstEnergy from disconnecting Verizon's existing attachments. These arguments do not negate FirstEnergy's bargaining power.

49. The first claim that Verizon rejected a less-costly alternative fails to recognize that FirstEnergy's "offer" lacked the details necessary for Verizon to conduct a proper business case evaluation considering all relevant costs and benefits of a transition of pole ownership to FirstEnergy. The analysis is also flawed in that it collapses a potential settlement framework—which would require multiple transactions, a multi-year (if not multi-decade) implementation, and a complex set of commercial and legal agreements—into a single statement regarding the potential for a change in rental payment. Nothing about the proposed "offer" was definite or even likely given FirstEnergy's insistence on [redacted] "telecom" rates during the parties' negotiations than it calculated in its Answer.[94]

50. FirstEnergy's three remaining arguments *confirm* FirstEnergy's bargaining power. For example, Mr. Zarakas establishes a false "strawman" alternative to the current joint use agreement rates, which would require establishing stand-alone networks for Verizon and FirstEnergy. FirstEnergy cites this alternative's prohibitive costs to FirstEnergy, but fails to recognize that under the alternative, Verizon would incur roughly three times FirstEnergy's cost because FirstEnergy owns three times the poles. When the alternatives to the current agreement rates are significantly more costly for one party to the negotiation than to the other, the party that would suffer the least is in the strongest bargaining position.

51. FirstEnergy also relies on a Declaration Dr. Mitchell filed in 2014 in an unrelated case, which argues the joint use agreements share costs of a pole network and can "be

[94] *See, e.g.*, Compl. Ex. 28 at VZ00652-685.

understood to be the solution to a cooperative game."[95] Dr. Mitchell is silent about how the relative bargaining power of the parties influences the outcome of that game. He also fails to recognize that games have rules, referees, and constraints.

52. The law and the competitive telecommunications marketplace have fundamentally changed since the joint use agreements were signed. FirstEnergy's Answer confirms it has bargaining power and has exercised it to postpone and avoid the rental rate changes that would eliminate the outdated, artificial, and non-cost-based rate differences between Verizon and its competitors.

Mark S. Calnon, Ph.D.

Sworn to before me on
this 2nd day of March, 2020

Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
KEVIN DAVID MOONEY, Notary Public
Quakertown Borough, Bucks County
My Comm. Expires October 07, 2020

[95] *See* Answer Attachment E at FE00047 (Mitchell Decl. ¶ 8).

Reply Exhibit C

Before the
Federal Communications Commission
Washington, DC 20554

VERIZON PENNSYLVANIA LLC and VERIZON NORTH LLC, Complainants, v. METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, and PENNSYLVANIA POWER COMPANY, Defendants.	)	Docket No. 19-354 File No. EB-19-MD-008

REPLY AFFIDAVIT OF TIMOTHY J. TARDIFF, PH.D.

COMMONWEALTH OF MASSACHUSETTS)
) ss.
COUNTY OF SUFFOLK)

I, TIMOTHY J. TARDIFF, being sworn, depose and say:

I. Introduction

1. My name is Timothy J. Tardiff. My business address is 112 Water Street, Boston, MA 02109. I submitted an affidavit in this matter on November 20, 2019 ("Tardiff Opening Affidavit"). My qualifications are described therein.

2. In my Opening Affidavit, I concluded that the rental rates that FirstEnergy has demanded from Verizon Pennsylvania under the parties' joint use agreements are unjust and unreasonable. FirstEnergy had not (and still has not) provided clear and convincing evidence that the terms and conditions in the joint use agreements are materially advantageous relative to FirstEnergy's third-party license agreements, let alone so materially advantageous as to justify rates over [redacted] times the rate that results from a proper application of the Commission's new telecom rate formula. FirstEnergy's imposition and continued charging of these rental rates in spite of the FCC's Orders reflects FirstEnergy's exercise of the

superior bargaining power it possesses as a result of its owning about 73 percent of the joint use poles in the service territories at issue in this matter.

3. I have since evaluated FirstEnergy's February 3, 2020 Answer and supporting affidavits along with FirstEnergy's interrogatory responses and subsequent production of third-party license agreements.[1] My review has confirmed and strengthened my prior conclusions, as detailed in this affidavit. Section II provides a summary of my findings regarding FirstEnergy's exercise of bargaining power in its efforts to keep annual rental rates well above just and reasonable levels, its failure to identify terms and conditions that would justify rental rates higher than what it may lawfully charge cable companies and competing telecommunications providers, and its unwarranted criticism of Verizon's proper calculation and application of the FCC's rental rate formulas. Section III responds in greater detail to FirstEnergy's erroneous claim that it lacks bargaining power, explaining, among other points, that FirstEnergy's pole ownership, in conjunction with its not offering meaningful negotiated rates approaching just and reasonable levels, follows a pattern similar to those in which the FCC has found the exercise of bargaining power in previous disputes. Section IV evaluates further FirstEnergy's incorrect claim that the joint use agreements provide Verizon with competitive advantages. Finally, Section V responds to FirstEnergy's disagreement with Verizon's appropriate calculation and application of the FCC's rate formulas for the 2019 rental year (based on 2018 cost data).

II. Summary

4. The FCC's 2018 Third Report and Order[2] is built on the FCC's 2011 Pole Attachment Order,[3] which provided a process for Incumbent Local Exchange Carriers (ILECs) to obtain

[1] 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, February 3, 2020 ("FirstEnergy's Answer").

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

[3] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245; GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 ("2011 Report and Order").

just and reasonable annual rental rates for attaching to poles owned by electric utilities. In the 2011 Pole Attachment Order, the Commission provided that, when entering into a new agreement or in situations in which an ILEC is unable to terminate an existing agreement and enter into a new agreement, ILECs can file complaints challenging rates as being uneconomically high and thus not "just and reasonable" as required by the Pole Attachment Act. In 2011, the FCC also provided guidance to encourage the negotiation of "just and reasonable" rates. In particular, the FCC established the parameters for evaluating whether the rates in dispute were just and reasonable: if the terms and conditions (other than rental rates) in the agreement under consideration were comparable to those in the electric utility's agreements with cable companies and competitive local exchange carriers (CLECs), the just and reasonable rate for the ILEC would be the new telecom rate used to establish the maximum rate for CLEC attachments (which approximates the cable rate used to establish the maximum rate for cable companies providing cable services). Alternatively, if the agreement between the electric utility and the ILEC provided the ILEC net material benefits relative to its competitors, the higher "old" or "pre-existing" telecom rate would be a reference point for the just and reasonable rate.

5. Notwithstanding the Commission's 2011 Pole Attachment Order, electric utilities denied ILECs the rate relief to which they were entitled and "continued to charge pole attachment rates significantly higher than the rates charged similarly situated telecommunications attachers."[4] Consequently, in the 2018 Third Report and Order, the FCC updated the dispute resolution process to (among other things) (1) establish a rebuttable presumption that the non-rate terms and conditions in "new and newly renewed" joint use agreements and license agreements are sufficiently comparable so that the new telecom rate is the just and reasonable rate for ILEC attachments, (2) shift the burden to the electric utility to provide clear and convincing evidence of net material advantages provided the ILEC as compared to cable and CLEC attachers that would justify a rate higher than the new telecom rate, and (3) set the pre-existing telecom rate as a hard cap, i.e., the maximum annual rental rate that an electric utility may lawfully charge an ILEC.

[4] 2018 Report and Order, ¶ 123.

6. The FCC's rationale for taking these steps included the recognition that economic access to utility poles is an essential input into the deployment of and competition for broadband services, data showing electric utilities continued to charge ILECs rates averaging $26.12 per pole per year,[5] as well as a concern that electric utilities have superior bargaining power by virtue of their ownership of far more utility poles which could prevent ILECs from eliminating outdated rates and from negotiating new just and reasonable rates.
7. The FCC's 2011 and 2018 Orders, as well as 2015 and 2017 decisions in pole attachment complaint proceedings brought by ILECs against electric utilities, provide a framework for reviewing the rates FirstEnergy charges Verizon under the joint use agreements. Under this framework, I have identified three major economic issues regarding the rates in the joint use agreements between Verizon and FirstEnergy that lead me to conclude the rates are not just and reasonable.
8. First, the facts contradict FirstEnergy's claim that it lacks bargaining power and that, as a result, the rates it has demanded from Verizon are just and reasonable. In particular, (1) FirstEnergy's ownership of three-quarters of the joint use poles provides FirstEnergy the ability to exercise bargaining power, (2) the demanded rates indicate an exercise of bargaining power because they are [redacted] multiples of the maximum rate FirstEnergy may lawfully charge third party cable and CLEC attachers, and (3) FirstEnergy's negotiations over several years confirm its bargaining power because it failed to move its rate offer within striking distance of just and reasonable rates—which signifies that negotiations with FirstEnergy have not produced, and were not able to produce, just and reasonable rates.
9. Second, the facts contradict FirstEnergy's claim that an annual rental rate for Verizon's attachments higher than that charged to Verizon's competitors—cable companies and CLECs—is economic and otherwise just and reasonable. The FCC's framework asks the question of whether cable companies and CLECs pay an electric utility for items addressed in the non-annual rental rate terms of their license agreements that Verizon also requires of the electric utility but does not pay it for. That is, do the terms of the joint use agreements between FirstEnergy and Verizon provide for activities specified in FirstEnergy's third-party license agreements that FirstEnergy performs to accommodate Verizon's attachments but for

[5] 2018 Report and Order, ¶ 125.

which Verizon does not pay with a cash payment to FirstEnergy, by performing the activity and incurring the cost itself, and/or by performing similar activities at its own cost to accommodate FirstEnergy's attachments to Verizon's poles.[6] FirstEnergy's claims regarding the existence and magnitude of alleged advantages provided in the current joint use agreements relative to third-party license agreements are not only unsupported, but include fundamental defects the FCC has rejected in similar attempts to justify higher rental rates, including (1) a failure to recognize that Verizon performs at its own cost some of the activities that FirstEnergy performs for third parties, (2) the use of incorrect statistics to produce unrepresentative and unrealistically high amounts for any one-time charges associated with installing new attachments, and (3) an overstatement of the frequency of any such one-time charges.

10. Third, despite FirstEnergy's claim that Verizon's Complaint presented incorrect annual rental rates produced by the FCC's new telecom formula, the new telecom rates calculated by FirstEnergy are very close to the rates Verizon properly calculated, providing additional evidence that the rates FirstEnergy has charged and continues to charge Verizon are well above a just and reasonable level. The new telecom rates FirstEnergy calculated based on 2018 cost data differ slightly from the rates Verizon calculated using the same cost data, but the differences are based on pole counts FirstEnergy did not previously provide to Verizon and the use of new and unsupported results from an inadequately documented field review about [redacted] FirstEnergy poles ([redacted] total poles)[7] conducted earlier this year in place of

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

[7] The number of poles in the field review is not clear because of unexplained inconsistent pole counts across FirstEnergy's documents. FirstEnergy's contractor Precision Consulting stated [redacted]. Attachment L at Table 2. FirstEnergy's contractor Davey Resource Group defined the scope in accordance with this "@95%" recommendation, but stated 1,519 Verizon-owned poles and 1,519 FirstEnergy-owned poles would be in the scope of the project. Attachment K

default inputs to the FCC's rate formula. Despite the lack of underlying data, let alone sufficient validations of the results from the field review, it is apparent from FirstEnergy's description that the results are flawed and unreliable. For example, the poles that were reviewed likely include poles that are not jointly used by FirstEnergy and Verizon, rendering the averages it proposes to use in rate calculations suspect. I also address FirstEnergy's claim that, despite the rates it calculates under the new telecom formula, and although its agreements with cable companies and CLECs have nearly identical terms and conditions as the joint use agreements with Verizon, FirstEnergy would be justified in charging Verizon rates several multiples of the new telecom rate because it is charging some CLECs rates well above the maximum rate permitted by law. Not only does this admission evidence FirstEnergy's exercise of superior bargaining power over the affected CLECs, but validates the FCC's work to ensure just and reasonable rates. FirstEnergy's decision to charge widely disparate rates for admittedly the same service is price discrimination, which in the case of utility poles—an essential input for the provision of broadband services—distorts efficient competition for broadband services.

III. Bargaining Power

11. FirstEnergy and its declarants offer a number of erroneous and/or unsupported arguments for the claim that the rental rates it has continued to demand of Verizon are just and reasonable because FirstEnergy claims it does not have bargaining power that is superior to Verizon's. Contrary to these allegations, (1) FirstEnergy's ownership of almost three-quarters of the joint use poles, in *combination with* its not negotiating reductions in rental rates (and net rental payments) sufficient to close the wide gap between the current rates and just and reasonable rates (including FirstEnergy's tying an offer to discuss rate parity with third parties if Verizon transferred its poles to FirstEnergy) closely parallels the pattern that the FCC has found to demonstrate bargaining power and (2) FirstEnergy's claim that both parties lack bargaining power because neither could economically replace the other's joint use poles is fundamentally a request to perpetuate the status quo of rental rates that substantially favors

at Project Scope. Precision Consulting then provided results for, at most, [redacted] FirstEnergy poles and [redacted] Verizon poles. Attachment L at Tables 3, 4.

FirstEnergy to the detriment of Verizon, third parties, and the efficient deployment of broadband.

12. FirstEnergy relies on the contemporaneous declarations of Messrs. Zarakas[8] and Coleman[9] and Dr. Mitchell's 2014 declaration[10] to support its erroneous claim that FirstEnergy lacks bargaining power over Verizon. Mr. Zarakas' main arguments are (1) Verizon's analysis of bargaining power was based on a cursory review of relative pole ownership levels,[11] (2) FirstEnergy's allegation that Verizon rejected an offer that required Verizon to transfer its poles to FirstEnergy is inconsistent with FirstEnergy possessing bargaining power,[12] (3) since imbalanced pole ownership levels between the parties have been stable, bargaining power was not a factor in the negotiations that led to the 2009 rates Met-Ed and Penelec charge and which are at issue in this proceeding,[13] and (4) it would be prohibitively expensive for FirstEnergy to replace the Verizon poles to which FirstEnergy now attaches.[14] Each argument is mistaken and fails to "reduce" or "negate" FirstEnergy's bargaining power as Mr. Zarakas concludes.[15]

13. *First*, contrary to Mr. Zarakas' characterization that Verizon's discussion of bargaining power only focused on ownership levels, Verizon's analysis of bargaining power closely paralleled the FCC's analysis of the electric utility's bargaining power in a prior pole attachment complaint proceeding. In the *Verizon v. Dominion* proceeding, the *combination* of Dominion's ownership of two-thirds of the joint use poles and Verizon's lack of success in negotiating meaningful rate reductions were the bases for the FCC's bargaining power determination.[16] Verizon's Complaint described similar conditions. FirstEnergy owns an

[8] Attachment C to FirstEnergy's Answer.

[9] Attachment F to FirstEnergy's Answer.

[10] Attachment E to FirstEnergy's Answer.

[11] Zarakas Declaration, ¶ 2.

[12] Zarakas Declaration, ¶ 12.

[13] Zarakas Declaration, ¶ 10.

[14] Zarakas Declaration, ¶¶ 16-20.

[15] Zarakas Declaration, §§ III, V.

[16] *Verizon Virginia, LLC and Verizon South, Inc., Complainant v. Virginia Electric and Power Company d/b/a Dominion Virginia Power, Respondent*, Proceeding No. 15-190, Bureau ID No. EB-15-MD-006, Order, 30 FCC Rcd 1140, ¶ 13 ("Dominion Order").

even higher share of joint use poles (three of four) than does Dominion (two of three) and more than seven years of negotiations failed to produce an offer for more than very modest reductions of the net rental payment FirstEnergy would accept from Verizon.[17]

14. *Second*, Mr. Zarakas provided no support for his claim that FirstEnergy's "transition[ing] Verizon out of the pole attachment business in FirstEnergy service territories" and then offering Verizon an agreement comparable to third-party agreements would result in costs lower than under current joint use rates, nor did he provide any estimate of whether or how such an arrangement would produce savings for Verizon. Evaluating an offer that Verizon transition ownership of its poles to FirstEnergy as a condition for discussing reducing the contract rates to the new telecom rate[18] requires information on the specific details of the transition being offered, including the timetable for transfer,[19] the cost of the poles and the precise rental rates FirstEnergy would, in fact, charge Verizon. When FirstEnergy raised the suggestion of a pole ownership transition, it also insisted that any new rate require Verizon to pay for 3 feet of space on a pole.[20] FirstEnergy now admits it should not calculate new telecom rates for Verizon that assign 3 feet of space because there is no data showing Verizon uses 3 feet of space on FirstEnergy's poles.[21] FirstEnergy's statement that it would

[17] Verizon Complaint, ¶¶ 27 and 32-33. Mr. Schafer stated that FirstEnergy offered to reduce rates in Pennsylvania and Maryland by more than [redacted] per year (Schafer Declaration, ¶ 11). To put this amount in perspective, Verizon's net payments to FirstEnergy, which are currently about [redacted] per year, would fall to about [redacted] under the new telecom rates calculated by Verizon and to about [redacted] under the pre-existing telecom rates. Thus, the reduction Mr. Schafer reports would leave net payments at about [redacted] per year—[redacted] times the level under just and reasonable rates and [redacted] times the level produced by the pre-existing telecom rate.

[18] As explained by Mr. Schafer, it does not appear that FirstEnergy intended to pay for Verizon's poles, but instead to take ownership each time a pole required a replacement. Schafer Declaration, ¶ 10; *see also* Exhibit 28 to Pennsylvania Complaint & Exhibit 17 to Maryland Complaint (Email from S. Schafer to J. Slavin (May 2, 2018)) (offering to "transition Verizon out of the pole-owning business" "[i]nstead of FirstEnergy buying all of Verizon's poles"). Further, transferring poles, and then paying annual attachment rents based on a license agreement would place Verizon in an inferior position relative to its competitors, which are entitled to mandatory access to FirstEnergy's poles under 47 C.F.R. § 224(f), while Verizon's access is voluntary.

[19] The May 2, 2018 email from Mr. Schafer to Mr. Slavin describes Verizon "eventually transition[ing]…out of the pole-owning business." Left unsaid is how long the transition would take (which could be a considerable number of years, depending on the rate at which Verizon's poles need replacing), what rates would be charged to Verizon for attachments to existing and transitioned poles in the meantime, and what rate FirstEnergy would offer Verizon when the transition was completed.

[20] Exhibit 28 to Pennsylvania Complaint & Exhibit 17 to Maryland Complaint (Email from S. Schafer to J. Slavin (May 2, 2018)).

[21] Pennsylvania Attachment G.

discuss a new telecom rate, therefore, was not the same as agreeing to discuss the properly calculated new telecom rate required by law. This is further confirmed by FirstEnergy's Answer in which it states that it in fact imposes rates far higher than the properly calculated new telecom rate (rates as high as [redacted] per pole) on CLECs that are entitled by statute and regulation to a properly calculated new telecom rate.[22] FirstEnergy's offer, therefore, did not guarantee properly calculated new telecom rates, compensation for Verizon's poles that would be transferred, or any recurring net savings for Verizon. It would, however, ensure FirstEnergy had additional pole assets and additional rental revenue from the third parties attached to Verizon's poles. Because FirstEnergy charges higher rates to attach to its poles than does Verizon – in some cases almost [redacted] times the rate Verizon charges, *i.e.*, for 2019, FirstEnergy charges as high as [redacted] per pole compared to Verizon's CLEC annual rental rate, which has ranged from [redacted] per pole during the applicable statute of limitations[23] – FirstEnergy appears to be the only attacher that would have benefited from its pole transition offer.

15. *Third*, the fact that Verizon agreed in 2009 to Met-Ed's and Penelec's current rates says nothing about whether those rates are free from the exercise of bargaining power. The record shows Verizon agreed to the 2009 amendments to achieve the efficiencies associated with a common rate structure for each operating company and because it understood FirstEnergy would sell Verizon poles, which would reduce Verizon's annual net rental payment and address the pole ownership disparity going forward.[24] FirstEnergy does not dispute that it refused to sell Verizon any poles.[25] And, in any event, the fact that Verizon accepted the rates in the *Dominion* matter did not persuade the FCC that they were just and reasonable. To the contrary, the fact that Verizon was unable to obtain meaningful rate reductions through negotiations was a major reason why the FCC determined that Verizon was in an inferior bargaining position.
16. *Fourth*, regardless of how expensive it would be for FirstEnergy to install new poles in place of Verizon's joint use poles, Verizon would need to install three times the poles in place of

[22] FirstEnergy's Pennsylvania Answer, ¶ 101.

[23] FirstEnergy's Pennsylvania Answer, ¶ 101; Mills Pennsylvania Opening Affidavit ¶ 11.

[24] Mills Reply Affidavit ¶¶ 15-19.

[25] FirstEnergy's Answer, Response to Complaint Allegations, Verizon 31.

FirstEnergy's joint use poles. Moreover, FirstEnergy's utility pole infrastructure is an essential input for broadband deployment and competition, which in turn is facilitated by just and reasonable rates for both Verizon and its competitors. FirstEnergy, Mr. Zarakas, and Dr. Mitchell's 2014 declaration claim that FirstEnergy lacks bargaining power because finding replacement infrastructure for facilities attached to Verizon's joint use poles would be prohibitively expensive for FirstEnergy.[26] In fact, the claim that both parties' lack bargaining power suggests that, left to its own devices, FirstEnergy would never negotiate an agreement that moved rates towards the FCC's just and reasonable range. Dr. Mitchell's statement is telling in this regard:

> 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.[27]

Dr. Mitchell's conclusion is based on his understanding that electric utilities and ILECs have no alternatives to the other party's joint use poles because they are prohibited by regulators from constructing stand-alone poles and/or to do so would be too expensive.[28]

17. Taken to its logical conclusion, Dr. Mitchell's reasoning would render the FCC's determination that ILECs are entitled to just and reasonable rates completely meaningless. FirstEnergy equates bargaining power with having a feasible option to an existing agreement. So, regardless of whether the rates in that agreement are reasonable, FirstEnergy's definition of "lack of bargaining power" would preclude an evaluation of rates being demanded, and there would be no recourse under the FCC's guidance to dispute a refusal to negotiate seriously towards reasonable rates. In other words, the status quo would prevail and the status quo vis-a-vis rental rates substantially favors FirstEnergy to the detriment of efficient deployment of broadband.

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[26] Mr. Zarakas makes a somewhat similar argument with respect to evergreen provisions: because it cannot remove Verizon's attachments, it cannot exercise whatever bargaining power it has (Zarakas Declaration, ¶ 20). However, when bargaining power has been previously exercised, as reflected in rates well in excess of just and reasonable level, "evergreen provisions have been used to perpetuate the imbalance in rental payments and are an important contributor to Verizon's inability to terminate existing rental rate provisions and secure new just and reasonable rates." Tardiff Opening Affidavit (¶ 28).

[27] Mitchell Declaration, ¶ 12 (emphasis added).

[28] Mitchell Declaration, ¶ 12.

18. In fact, the FCC explained that its decision to evaluate whether pole attachment rates charged to ILECs were just and reasonable was based on two considerations: (1) that pole ownership proportions were or had shifted to a degree that may have placed ILECs in an inferior bargaining position[29] and (2) reducing rates for ILEC pole attachments would promote broadband competition.[30] Maintaining FirstEnergy's invoiced rates in perpetuity would frustrate the FCC's competition objective because the rates are several times higher than the rates charged to broadband competitors.

19. If, as FirstEnergy, Dr. Mitchell, and Mr. Zarakas claim, electric utilities and ILECs have no alternative to continued use of each other's poles, each party has a monopoly over its own poles. Each party's poles are a necessary input into the production of its respective retail services. Further ILEC attachments to electric utility poles are a necessary input in the provision of broadband services.[31] Viewed in this light, the FCC's concern is well-founded that negotiations (or lack thereof) between electric utilities and ILECs may not produce *results* that facilitate broadband competition.

    - The understandings of Mr. Zarakas, Dr. Mitchell, and FirstEnergy that there is no alternative to continued use of Verizon's poles appear to be informed by Mr. Coleman's declaration, which offers the minimally supported conclusion: "From an economic perspective, it makes no sense whatsoever for FirstEnergy to incur a minimum initial cost [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

[29] 2011 Report and Order, ¶ 199:

> The record demonstrates that incumbent LECs own fewer poles now than in the past, and this relative change in pole ownership may have left incumbent LECs in an inferior bargaining position to other utilities. As a result, at least in some circumstances, market forces and independent negotiations may not be alone sufficient to ensure just and reasonable rates, terms and conditions for incumbent LECs pole attachments.

The FCC further explained that average ownership levels have shifted from rough parity to today's situation in which electric utilities own 65 percent to 70 percent of joint use poles. 2011 Report and Order, ¶ 206. FirstEnergy's overall ownership percentage of about 75 percent is substantially larger than 65 percent to 70 percent. Tardiff Opening Affidavit, ¶ 20.

[30] The FCC cited a letter from USTA describing problematically high ratios between rates charged to ILECs and cable companies. 2011 Report and Order, ¶ 208, note 630 (citing letter from Walter B. McCormick, Jr., USTelecom, to Hon. Julius Genachowski, Chairman, FCC, WC Docket No. 07-245, GN Docket No. 09-51 at 5 (filed Mar. 31, 2011)).

[31] Tardiff Opening Affidavit, ¶ 26.

line at a per mile cost of [redacted] per year."[32] These costs are unsupported and as explained in the next bullet point, over [redacted] times as high as FirstEnergy's investment in its distribution poles.

- Attachment RC-3 simply lists the results of Mr. Coleman's calculations, with very little information on inputs, data sources, and assumptions. Based on Mr. Coleman's assumption of 30 poles per mile,[33] [redacted] per mile is equivalent to about [redacted] per pole. No detail is provided on the particular items that Mr. Coleman used to produce this result.[34]
- There is no explanation for the [redacted] per mile annual cost.

20. Though unsupported, FirstEnergy's analysis confirms the basis for FirstEnergy's bargaining power. Because the alternative to paying the rates FirstEnergy demands is so high, FirstEnergy has leverage to impose and maintain uneconomically high rates on Verizon so long as they are less than Verizon's far costlier alternatives.

IV. Make-Ready Costs

21. This section describes how FirstEnergy's claim that the terms in the joint use agreements provide Verizon advantages sufficient to justify FirstEnergy's rental rate demands is incorrect. FirstEnergy's quantification of advantages from certain activities for which it claims third parties pay, but Verizon does not (1) fails to credit Verizon for the fact that Verizon pays for the same activities,[35] (2) uses improper statistical methods to calculate how much third-parties have paid for one-time activities such as make-ready costs, and (3) overstates the frequency with which Verizon requires such activities.
22. FirstEnergy's Answer alleges that the current joint use agreements provide Verizon with a substantial make-ready advantage relative to third-party attachers. While relying on a few

[32] Coleman Declaration, ¶ 29.

[33] Coleman Declaration, ¶18.

[34] An average of [redacted] can be compared to a weighted average gross pole investment of about [redacted] that can be calculated from FirstEnergy's Attachment G. An "apples-to-apples" comparison to Mr. Coleman's figure would need to (1) account for the fact that current pole costs are higher than average original cost and (2) add reasonable amounts for the cost of transferring facilities from joint use poles to new pole lines.

[35] See, for example, Mills Opening Affidavit, ¶¶ 55-56.

flawed analyses, e.g., Mr. Schafer's unreliable estimates of the alleged advantage in one-time make-ready costs and the Answer's "back-of the-envelope" estimate of an alleged speed-to-market advantage, FirstEnergy has not provided a reliable quantitative calculation of how much higher (if at all) Verizon's make-ready charges are as compared to its competitors.

23. My Opening Affidavit provided a framework and several principles for analyzing alleged advantages and disadvantages in joint use agreements relative to third-party agreements.[36] Focusing on make-ready costs, the only item for which FirstEnergy has alleged information about third parties, the important considerations in my framework are the following.

24. First, comparing the charges to third parties for make-ready work to what FirstEnergy charged Verizon is incorrect when (1) Verizon performs comparable make ready work when FirstEnergy attaches to Verizon's poles (when the joint use agreement does not include rates for such work)[37] or (2) Verizon performs some or all of the make-ready work for its attachment to FirstEnergy's poles.[38] The proper starting point reduces the amounts FirstEnergy charges third parties per third party new attachment by the reciprocal and in-kind costs Verizon incurs per each of its new attachments.

25. Second, once the net charges per new attachment are calculated, that amount should be multiplied by the rate at which Verizon is adding new attachments. This step recognizes the likelihood that third parties are adding new attachments to their installed bases of attachments at different (typically higher) rates than Verizon. That is, these parties are

[36] Tardiff Opening Affidavit, ¶ 28.

[37] The FCC addressed this issue in its order that the rates Dominion Virginia Power had been charging Verizon were not just and reasonable. "By identifying as alleged 'benefits' to Verizon services that Verizon is likewise required to extend to Dominion under the Joint Use Agreements, Dominion has failed to show that Verizon receives a disproportionate benefit…", Dominion Order ¶ 21. FirstEnergy has ignored the FCC's observations on such reciprocal costs and instead claimed that Verizon does not need to be compensated for reciprocal activities because of the annual cost of Verizon's poles is alleged low, which is an irrelevant distraction (FirstEnergy's Answer, ¶ 95). The issue is whether the cost Verizon imposes on FirstEnergy for activities such as make-ready activities, net of any monetary payments, reciprocal activities performed for FirstEnergy, and in-kind payments are less than what third parties are charged for comparable activities. The annual costs of Verizon's poles are irrelevant to this determination. Further, Verizon's rate calculations produce an annual pole cost for 2018 of $103.55, which is several times as high as the current rates for FirstEnergy's attachment to Verizon's poles of [redacted] for Met-Ed, [redacted] for Penelec, and [redacted] for Penn Power, as well as Verizon's proposed rate of $18.28. Calnon Opening Affidavit, Exhibit C-5, p. VZ 00100.

[38] "When Verizon performs a particular service and incurs costs comparable to its competitors, we agree with Verizon that Dominion may not 'include in Verizon's rental rates costs that Dominion does not incur.'" Dominion Order, ¶ 18.

incurring up-front charges that Verizon incurred in the past, and more than paid for in the form of rates substantially higher than rates set at just and reasonable levels.

26. Third, the data used to calculate make-ready (and other one-time items) must be properly collected and the correct statistical methods need to be applied to the data. Although the FCC's rules have not addressed the type of data necessary to constitute clear and convincing evidence, the same considerations that apply to evaluating data and calculations supporting challenges to the Commission's default space factor presumptive inputs necessarily also apply here. In particular, the data must either include the universe of attachments with make-ready activities or a scientific sample from that universe and the statistics applied to that data must produce reliable and representative measures of make ready charges.

27. In addition to the fact that FirstEnergy made no attempt to address the reciprocal and in-kind costs Verizon incurs, there are fundamental errors in Mr. Schafer's selection of data and calculation of alleged annual advantages. Mr. Schafer reported results for [redacted] third-parties for each of its three operating utilities based on "competitors…which submitted the largest number of attachment applications during the past two years for each of the FirstEnergy operating utilities."[39] This selection criterion by design produces substantially upwardly biased estimates of the make-ready activities and charges for third-parties in much the same way as a survey of hospital visits and associated medical expenses for a sample of the most frequently admitted patients would produce a unrealistically high estimate of hospital visits and medical expenses for the general population.[40]

28. Mr. Schafer's calculations compound the problem. In particular, the "averages" reported (per new and previously-installed pole) are not representative of third-party experience, and even less representative of Verizon. In particular, he [redacted]

[39] Schafer Declaration, ¶ 14 and Exhibit SFS-1 (Attachment B to FirstEnergy's Answer).

[40] The [redacted] third parties in Exhibit SFS-1 made [redacted] attachment requests during 2018 and 2019 and were on [redacted] poles, while the comparable amounts for Verizon were 476 attachment requests and a base of 305,897 poles, i.e., the third parties' attachment request rate was [redacted] times Verizon's rate.

[redacted].[41] Mr. Schafer even [redacted].[42]

29. Finally, the development of competition for broadband and voice service is inconsistent with Mr. Zarakas' and FirstEnergy's claim that Verizon enjoys an enduring speed-to-market advantage that justifies higher annual rental rates. In particular, FirstEnergy's Answer relies on Mr. Zarakas' incorrect claim that "[s]eamless access to a pole network in the era before implementation of the Telecommunications Act of 1996" has allowed Verizon to "maintain a strong market share in the evolving market" to support its claim the Verizon enjoys a speed-to-market advantage.[43] Data provided by the FCC demonstrate that there is no such advantage. Cable companies—Verizon's largest broadband competitors—had the benefit of regulated rates long before the 1996 Telecommunications Act, and Verizon has never been the incumbent nor dominant in the provision of broadband services.[44] As of December 2017, cable modem service accounted for 64% of Pennsylvania's wireline broadband connections.[45] Further, Pennsylvania's ILECs' share of wired switched and VoIP lines had fallen to 49 percent by December 2017[46]—a figure that does not even account for the fact that 43.4 percent of Pennsylvania's households do not even have a wired phone and another 17.7 percent are mostly wireless.[47]

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[41] Mr. Schafer's calculation, [redacted].

[42] [redacted]. Schafer Declaration, Exhibit SFS-1 (Attachment B to FirstEnergy's Answer).

[43] FirstEnergy Answer, ¶ 71, citing Zarakas Declaration, ¶ 14.

[44] The FCC's earliest available broadband internet access report shows cable modem services with almost 50 percent or more of subscribers, both in Pennsylvania and throughout the U.S. *High-Speed Services for Internet Access: Subscribership as of June 30, 2000*; Industry Analysis Division, Common Carrier Bureau, October 2000, Tables 1, 2, and 5 (available at https://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd1000.pdf).

[45] *Internet Access Services: Status as of December 31, 2017*; Industry Analysis and Technology Division, Office of Economics and Analytics, August 2019, p. 33 (available at https://docs.fcc.gov/public/attachments/DOC-359342A1.pdf).

[46] FCC, Voices Services Report, Supplemental Table 1, available at https://www.fcc.gov/voice-telephone-services-report.

[47] https://www.cdc.gov/nchs/data/nhis/earlyrelease/Wireless_state_201912-508.pdf

V. FirstEnergy's Rate Calculations

30. FirstEnergy's Answer presents its calculations of the FCC's new telecom rate, but only for the 2019 rental year (using 2018 costs). At the same time, FirstEnergy argues that higher rates it states it charges to certain third-parties can be properly charged to Verizon as well. This section explains that (1) FirstEnergy's calculated new telecom rates are quite close to Verizon's calculations, providing additional corroboration that FirstEnergy's rate demands remain well above just and reasonable levels, (2) FirstEnergy's field review of pole characteristics it uses in place of certain default inputs to the FCC's rate formulas has not been validated to the extent necessary to replace the FCC's default inputs, and (3) FirstEnergy's admission that it obtains rental rates several times higher than the maximum allowed by the FCC's rate formulas from certain CLECs demonstrates its exercise of uneconomic price discrimination that, if applied to rental rates charged to Verizon, would compound FirstEnergy's uneconomic price discrimination for an essential input for broadband deployment.

A. FCC's Rate Formulas

31. FirstEnergy's Answer, without support from its witnesses' declarations, asserts that Verizon made errors in its 2019 rate calculations.[48] To the contrary, the 2011 through 2019 rate calculations in Verizon's Complaint are correct as I explained in my Opening Affidavit. FirstEnergy's Answer did not discuss, let alone rebut, the economic rationale for Verizon's rate calculations that I previously provided.

32. FirstEnergy complains about (1) Verizon's assignment of accumulated deferred taxes, which are in an account that is less granular than gross investment accounts, (2) Verizon's input for the number of distribution poles in FirstEnergy's service territories, (3) Verizon's rate of return inputs, and (4) Verizon's use of default inputs to assign annual pole cost in calculating the new and pre-existing telecom rates (space factor inputs). In the case of Verizon's assignment of the accumulated deferred taxes and the rate of return input (which differs substantially from FirstEnergy's input for Penn Power), my Opening Affidavit explained the rationale for Verizon's calculations for each of these items. FirstEnergy's claim that the pole count and space factor inputs represent errors is inaccurate for the simple reason that these

[48] FirstEnergy's Answer, ¶ 104.

inputs were included in FirstEnergy's February 2020 filing, over two months *after* Verizon submitted the Complaint presenting the rate calculations. The claim is incorrect for other reasons I will next explain.

33. Before addressing the individual items, it is important to note that for the most part FirstEnergy's new telecom rate calculations for Verizon's use of FirstEnergy's poles produce rates very close to Verizon's proposed new telecom rates for use of FirstEnergy's poles, as shown in Table 1.

Table 1: Annual Per-Pole Rental Rates

	Met-Ed	Penelec	Penn Power
Current Rate	[redacted]	[redacted]	[redacted]
New Telecom Rate (Verizon)	$13.83	$9.07	$11.80
New Telecom Rate (FirstEnergy)	[redacted]	[redacted]	[redacted]

The first row lists the rates for Verizon's use of FirstEnergy's poles under the current agreements.[49] In all cases, whether calculated by Verizon or FirstEnergy, the new telecom rates for Verizon's use of FirstEnergy's poles are less than [redacted] of the current rates. As discussed elsewhere, Mr. Schafer's attempt to quantify purported advantages in the joint use agreements (relative to third party agreement) is incorrect and unreliable and thus falls far short of the clear and convincing evidence necessary to justify a rate in excess of the properly calculated new telecom rate.

34. *Pole counts.* Verizon calculated rates using pole count information provided by Mr. Schafer and attached to Verizon's Complaint as Exhibit 28. FirstEnergy asserts a different number is appropriate, but did not verify that number or support it with a declaration as noted above. In any event, use of the new number would produce a marginally lower rate than Verizon calculated, due to a modest increase in the number of FirstEnergy's distribution poles.[50] Verizon's approach is reasonable and favors FirstEnergy.

[49] For the Met-Ed agreement, which charges Verizon a rate of [redacted] per pole for poles between its current ownership share of 18.8 percent and 45 percent, the rate in Table 1 is net payment per net pole (total payments from Verizon to FirstEnergy divided by the difference between FirstEnergy- and Verizon-owned poles), which is described in Table 1 of my Opening Affidavit.

[50] The rates calculated with the new FirstEnergy pole counts, which correspond to the second row of Table 1, are $13.74, $9.05, and $11.71, respectively.

35. *Accumulated deferred taxes.* As I explained in my Opening Affidavit,[51] because (1) FERC Form 1 reports accumulated deferred taxes for electric operations, with no breakdown into accounts such as poles (Account 364) and overhead lines (Accounts 364, 365, and 369), it is necessary to assign portions of the total deferred taxes to specific accounts when calculating the net cost of a bare pole and the maintenance carrying charge factor, which requires the net investment in overhead lines. Verizon allocates accumulated deferred taxes in proportion to depreciated investment (gross investment less accumulated depreciation), while FirstEnergy allocates in proportion to original (gross) investment. As I explained previously,[52] Verizon's approach is consistent with similar regulatory approaches and is clearly not an error, since the FCC has provided no specific guidance on how accumulated deferred taxes should be assigned to specific accounts. Perhaps, more important, use of original (gross) investment in place of depreciated investment produces very little difference in rates: allocating based on gross investment produces rates of $13.85, $9.09, and $11.74 per pole for Met-Ed, Penelec, and Penn Power respectively, instead of the $13.83, $9.07, and $11.80 per pole Verizon-calculated rates in Table 1.
36. *Rate of return.* Although FirstEnergy apparently bases its inputs on rates of return adopted in 2007 despite the two rate proceedings each company has had since then, there is very little difference between Verizon's and FirstEnergy's inputs for Met-Ed's and Penelec's rate of return.[53] For Penn Power, the difference is much greater because FirstEnergy uses a more than three decades old rate of return adopted by the Pennsylvania Public Utility Commission. As I explained in my Opening Affidavit,[54] FirstEnergy continues to use this outdated input, despite the fact that it reported much lower costs of debt and equity in a recent rate case than it reported in the 1988 proceeding that adopted the outdated rate of return. Adjusting for the difference in FirstEnergy's recent and 1980s debt and equity costs produces a rate of return that is within the range of the rates of return presented in the most recent rate case that

[51] Tardiff Opening Affidavit, ¶ 13.

[52] Tardiff Opening Affidavit, note 18.

[53] Calnon Opening Affidavit, Ex. C-4.

[54] Tardiff Opening Affidavit, ¶ 13.

resulted in a Commissioned-approved settlement,[55] reflects the economic costs in investing in poles and other assets, and is also very close to the rate of return Verizon uses in its rate calculations.

37. *Space factor inputs*. FirstEnergy's rate calculations use the results of a field review of [redacted] FirstEnergy poles and [redacted] Verizon poles that was designed to produce certain space factor inputs as replacements for the FCC's default inputs. While the FCC's pole attachment rules allow pole owners such as FirstEnergy to use alternative space factor inputs, there are certain reliability and substantiation requirements for the effort.[56]

38. In order to evaluate the results of FirstEnergy's field review, access to the methodology and information requires more than the summary FirstEnergy provides through Precision Consulting's report (Attachment L). The most accurate measures of pole characteristics would be the result of starting with a list of joint use poles (in sampling terms, the universe we want to characterize), identifying the characteristics of interest, implementing a process for obtaining accurate measures, and implementing a process to validate those measures to ensure measurement errors are within an acceptable range. Participation of both owners of the joint use poles would contribute to the reliability of the results, e.g., establishing the correct list of joint use poles and in validating the pole characteristics are properly identified.

39. Validation thus requires access to the identity of and actual results for each of the approximately [redacted] FirstEnergy and Verizon poles measured in FirstEnergy's field review, which FirstEnergy chose not to provide as required.[57] These data would permit the inspection of the results, e.g., a follow-up field review to assess accuracy, a review of the information collected to identify possible outlier values and or anomalous results (such as unusable space coded as being larger than the pole height), validation of the calculations

[55] Pennsylvania Public Utility Commission, Opinion and Order in Case Nos. R-2016-2537349, R-2016-2537352, R-2016-2537355, and R-2016-2537359, January 17, 2017, p. 19 (available at http://www.puc.state.pa.us/about_puc/search_results.aspx).

[56] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CS Docket No. 86-212, Report and Order, ¶ 52 note 27 (1987) ("probative direct evidence"); *Teleport Communications Atlanta, Inc. Complainant v. Georgia Power Company, Respondent*, File No. PA 00-005, Order on Review, 17 FCC Rcd 19859, ¶ 18 (2002) ("statistically valid survey or actual data").

[57] In Teleport v. Georgia Power (¶ 16), the Commission explained the "statistically sound survey should be submitted." FirstEnergy did not submit its data. It also did not produce the data in response to Verizon's November 20, 2019 Interrogatory 10, which requested any data relevant to determining space factor inputs for the joint use poles at issue in this proceeding.

presented in Precision's summary, and the ability to implement corrections and/or perform alternative statistical analysis on the underlying data.

40. Despite FirstEnergy's failure to provide the requested data needed to test FirstEnergy's recommended space factor inputs, Precision's summary reveals that the sampling was not properly conducted and the results are unreliable. First, presumptive averages for space factor inputs should pertain to the joint use poles at issue in this proceeding. In sampling terminology, this means that the universe from which the sample of joint use poles is drawn should be the 513,615 joint use poles owned by FirstEnergy and Verizon at issue in this and the parallel Maryland proceeding. In fact, Precision described a substantially larger universe of poles, as shown in Table 2.

Table 2: Comparison of FirstEnergy and Verizon Pole Counts

	Met-Ed	Penelec	Penn Power	Potomac Edison	Total
Field Review Pole Counts Universe					
FirstEnergy	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Verizon	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Total	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Invoiced Pole Counts					
FirstEnergy	129,421	146,859	25,595	79,264	381,139
Verizon	30,027	73,400	7,415	21,634	132,476
Total	159,448	220,259	33,010	100,898	513,615
Difference in Pole Counts					
FirstEnergy	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Verizon	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Total	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

The upper block of Table 2 lists the universe from which Precision drew samples of poles, the middle block lists the joint use poles included in the most recent invoices which FirstEnergy agrees with, and the last block lists the differences. For the three Pennsylvania territories, Precision's universe includes approximately [redacted] FirstEnergy poles and [redacted] Verizon poles that did not appear on the most recent invoices. This could be explained by Precision's universe including poles outside the joint use territories, e.g., pole in other ILEC

territories and/or poles within the joint use territory to which Verizon does not attach.[58] For Potomac Edison, Precision's universe includes [redacted]. This last observation suggests that Precision's data mistakenly identified some FirstEnergy poles as being owned by Verizon. In any event, the mismatch between the universe of poles reported in the Precision report and the joint use poles at issue here violates a fundamental sampling principle that in order to extrapolate a sampling statistic to its underlying population, the sample must be drawn from that population.

41. Despite the fact that FirstEnergy's field review and methodology have yet to be properly supported or vetted, some of the results reported by Precision tend to corroborate Verizon's inputs and/or undermine inputs previously used by FirstEnergy. These results are reported in Table 3.[59]

Table 3: FirstEnergy's Calculated Average Space Factor Inputs

	Attaching Entities	Pole Height	Unusable Space	Verizon Space	FirstEnergy Space Occupied	FirstEnergy Space Needed
Met-Ed Penelec Penn Power Potomac	[redacted]					
Default	5	37.5	24	1	10.5	

In particular, although FirstEnergy reports a number of attaching entities close to [redacted] (in contrast to the default value of 5 for urbanized areas), it also reports values for unusable space, space occupied by Verizon, and space occupied by FirstEnergy that are generally close to the default values used in Verizon's calculations. Significantly, the survey averages for Verizon's space are much closer to the default of 1 foot than to the three feet that

[58] The likelihood that Precision's sample includes poles to which Verizon is not attached is suggested by the sample sizes reported in Table 3 of Exhibit L. In all cases, the number of poles used to calculate the space occupied by Verizon is less than the number for other inputs, such as pole length and number of attaching entities.

[59] Values reported in inches in Precision's report are converted to feet.

FirstEnergy used in its prior rate calculations provided to Verizon,[60] which it claimed as an advantage for Verizon relative to third-party agreements.[61] In addition, because the field review was designed to assign 1 foot of space to Verizon on every pole, the values produced for space occupied by Verizon are necessarily overstated.[62] In contrast, the field review was not designed with any minimum amount of space assigned to FirstEnergy and did not assign FirstEnergy 3.33 feet of safety space that is assigned to the electric utility under Commission precedent. As a result, Verizon's use of a 10.5-foot value for space occupied by FirstEnergy is conservative and trends low.

B. FirstEnergy's Third-Party Rental Rates

42. FirstEnergy's Answer reports a range of third-party rental rates and then erroneously claims that the entire range provides benchmark rates for Verizon's attachments.[63] For example, in 2019 the third party paying the highest rate ([redacted] per pole) paid [redacted] percent more than the lowest rate ([redacted] per pole) in the Met-Ed territory, [redacted] percent more in the Penelec territory ([redacted] per pole vs. [redacted] per pole), and [redacted] percent more in the Penn Power territory ([redacted] per pole vs. [redacted] per pole).

43. As a fundamental initial economic matter, because, as FirstEnergy observes, "the agreements at issue predominantly share the same common non-rate provisions,"[64] rather than justifying charging Verizon high attachment rates, the widely differing rate ranges are FirstEnergy's acknowledging price discrimination—charging different prices for essentially the same service on essentially the same terms and conditions. In unregulated markets, price discrimination manifests differences in market power, which the FCC's pole attachment regulations have been explicitly designed to prevent.[65]

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[60] See, for example, Exhibit 25 to Verizon's Complaint, p. VZ00588. See, also, Exhibit 28 to Verizon Complaint, p. VZ 00654.

[61] Tardiff Opening Affidavit, ¶ 28. Because the FCC's telecom rate formulas charge attaching parties for the space they actually occupy, the amount of that occupied space itself confers no advantage to any party.

[62] Attachment K, Exhibit SC-1 at FE00135 ("Space Occupied") and Mills Reply Affidavit, ¶ 12.

[63] FirstEnergy's Answer, ¶¶ 101-103.

[64] FirstEnergy's Answer, ¶ 102.

[65] For example, in its order implementing the pole attachment provisions of the 1996 Telecommunications Act, the FCC stated:

44. In addition, FirstEnergy charges some cable and CLECs rates that are in line with the FCC's cable and new telecom rate formulas. FirstEnergy states the license agreements attached to its Answer "contain nearly identical provisions" and FirstEnergy's document production [redacted][66] FirstEnergy has identified no legitimate basis for charging some third parties rates as high as [redacted] times the rate charged other third parties despite similar and sometimes nearly identical language in the respective agreements. In light of the absence of [redacted], charging Verizon the anomalous and highly discriminatory rates FirstEnergy admits it obtains from certain CLECs would compound FirstEnergy's uneconomic price discrimination for an essential input for broadband deployment.

By: _____
Timothy J. Tardiff
Dated: March 3, 2020

Sworn to before me this 3rd day of March, 2020.

_____
Notary Public

On March 3 | 2020 Timothy TardiFF came and signed in Front OF me, and presented a valid Form OF identification.

MARTA A. LONDONO
Notary Public Commonwealth of Massachusetts
My Commission Expires August 22, 2025

Section 703 requires the Commission to prescribe regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services. Section 703 also requires that the Commission's regulations ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.
Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777 (1998), ¶ 1.

[66] CLEC and CATV Agreements (redacted to exclude rates and licensee names).

Reply Exhibit D

Before the
Federal Communications Commission
Washington, DC 20554

VERIZON PENNSYLVANIA LLC and VERIZON NORTH LLC, Complainants, v. METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, and PENN POWER COMPANY, Defendants.	Proceeding No. 19-354 Bureau ID No. EB-19-MD-008
VERIZON MARYLAND LLC, Complainant, v. THE POTOMAC EDISON COMPANY, Defendant.	Proceeding No. 19-355 Bureau ID No. EB-19-MD-009

REPLY AFFIDAVIT OF DONALD M. AUSTIN JR.

COMMONWEALTH OF VIRGINIA)
) ss.
COUNTY OF CULPEPER)

I, DONALD M. AUSTIN JR., being sworn, depose and say:

1. I am a Manager-Construction – Program Management in the Wireline Network Operations Division of Verizon Services Corporation. I am executing this Reply Affidavit to respond to false and unsubstantiated allegations in FirstEnergy's Answers to Verizon's Pole Attachment Complaints. Defendants Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company in Pennsylvania, and Potomac Edison Company in

Maryland (collectively, "FirstEnergy") allege Verizon does not properly inspect and maintain its pole plant in Pennsylvania and Maryland. I know the following of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

2. I have worked for Verizon for more than 23 years, during which I obtained executive education in business administration and executive leadership and management from Saint Leo University and University of Notre Dame Mendoza College of Business. I began my career at Verizon as an installer and repairman. I have since been promoted into management roles responsible for installing and maintaining Verizon's network infrastructure. These roles have given me significant experience with Verizon's and industry best practices for safely deploying and maintaining joint use infrastructure, including utility poles and utility pole attachments.

3. In my current role as Manager-Construction – Program Management, I am familiar with and responsible for Verizon's pole inspection and maintenance practices and programs in Pennsylvania and Maryland, including in Verizon's overlapping service territory with FirstEnergy. I reviewed the parts of FirstEnergy's Answers, including the Declarations of Stephen F. Schafer dated February 2, 2020 and February 4, 2020, alleging Verizon does not properly inspect and maintain its pole plant.[1] FirstEnergy's allegations are false.

[1] *See* FirstEnergy's Pennsylvania Brief ¶¶ 95, 98 n.112; FirstEnergy's Response to Verizon's Pennsylvania Complaint ¶ 23; FirstEnergy's Maryland Brief ¶ 95; FirstEnergy's Response to Verizon's Maryland Complaint ¶ 26; Attachment B to Pennsylvania and Maryland Answers (Schafer Declarations); Attachment M to Pennsylvania and Maryland Answers (Petitions of Communications Workers of America).

4. Verizon regularly inspects its poles in the course of normal work operations (for example, during pole replacements, maintenance, and service installations) and at least once every ten years (per industry standards). Verizon performs pole inspections regardless of the grade or class of the pole as experience has shown to be necessary. Inspections must be performed in accordance with safety procedures specified in Verizon's employee manuals and training courses.

5. Verizon has robust pole inspection and maintenance procedures in place in Pennsylvania and Maryland that include ongoing inspections during work operations and an Enhanced Inspection and Treatment Program. Verizon's ongoing pole inspection process during work operations involves the following standards. Before a pole can be accessed by climbing, ladder, or aerial lift (such as a bucket truck), the pole must be tested using a variety of visual, sound, and instrument tests. First, the Verizon employee or authorized contractor must perform a visual pre-survey of the pole and surrounding area, including associated poles in that lead or line. Next, the employee or authorized contractor must validate that the pole is set at proper depth by verifying the pole brand, or "birthmark," confirming that it resembles a "cat face" and is six feet or less above ground. After that, the employee or authorized contractor is required to conduct a series of tests on the pole itself. These tests include: (a) prod testing using a screwdriver with a shaft of five inches or longer and inserting the tool into the pole at a 45 degree angle below ground line to identify if wood decay exists; (b) sound testing by striking the pole with a hammer on all sides from the ground line as high as can be reached to identify if wood decay exists; (c) hand-line testing on poles where power is not attached by pulling a rope at right angles to the strand to test and ensure the additional load from the work operation can be performed safely; and (d) pike testing on poles where power is not attached by pushing the pole

at right angles to the strand to test and ensure the additional load from the work operation can be performed safely. Poles that do not pass these tests must be tagged and escalated to a field supervisor.

6. In addition, Verizon inspects its pole plant every ten years, consistent with industry standards. In 2018, Verizon implemented the Enhanced Pole Inspection and Treatment Program across its ten-state footprint detailing standards for pole inspections, replacements, and remediations throughout its pole network, including in Pennsylvania and Maryland.

7. Verizon's Enhanced Inspection and Treatment Program incorporates guidelines and recommendations provided by the National Electrical Safety Code ("NESC"), U.S. Department of Agriculture Rural Utilities Services, and Telcordia Blue Book Manual of Construction Procedures with respect to the inspection and treatment of utility poles. The Program's inspections meet or exceed industry standards regarding excavation below ground, boring, shell thickness testing, and circumference testing as required to determine the remaining strength of a pole in Verizon's pole network. Verizon's Enhanced Inspection and Treatment Program also includes reinforcing poles when needed and replacing poles when necessary. It follows NESC-recommended criteria for determining when a pole should be replaced or remediated because of deterioration, decay, or any other safety or reliability concern. Based on the results of the inspections, Verizon's Enhanced Inspection and Treatment Program provides for applicable pole replacement, remedial treatment to interrupt degradation and extend the useful life of utility poles, or other pole restoration effort, such as trussing.

8. Verizon contracted with Osmose Utilities Services, Inc. ("Osmose") to perform the work required by its Enhanced Inspection and Treatment Program. Osmose is an industry-leading engineering firm that provides a variety of services to help pole owners increase the

safety, reliability, and resiliency of their pole network. I lead the management team overseeing Osmose's work for Verizon's Enhanced Inspection and Treatment Program.

9. Verizon's Enhanced Inspection and Treatment Program has not uncovered major systemic issues with Verizon's pole network in Pennsylvania and Maryland that would support the unsubstantiated allegations by FirstEnergy in these proceedings.

Donald M. Austin Jr.

Sworn to before me on
this 2nd day of March, 2020

Notary Public