

**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’S OPPOSITION TO FIRSTENERGY’S<sup>1</sup>  
MOTION FOR LEAVE TO FILE RESPONSE TO REPLY**

The Commission should reject FirstEnergy’s Motion, which seeks to begin another round of briefing so FirstEnergy can revise and recast arguments in its Answer to account for Verizon’s Reply. FirstEnergy’s exceptional and unnecessary request would undermine the Commission’s longstanding goal “to promptly and efficiently address alleged violations of the Act and the Commission’s rules and orders.”<sup>2</sup> The Commission should weigh and evaluate the parties’ evidence and arguments as set forth in the three pleadings permitted by the rules—the Complaint, Answer, and Reply.<sup>3</sup>

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<sup>1</sup> In this Opposition, “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 collectively to the two complainants, Verizon Pennsylvania and Verizon North.

<sup>2</sup> See *In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enft Bureau*, 32 FCC Rcd 7155, 7155 (¶ 2) (2017); see also *In the Matter of Implementation of the Telecommunications Act of 1996*, 11 FCC Rcd 20823, 20825 (¶ 2) (1996) (“[O]ur goal ... is to facilitate faster resolution of all formal complaints ....”).

<sup>3</sup> See 47 C.F.R. §§ 1.722, 1.726, 1.728; see also *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 FCC.2d 3, 5 (¶ 5) (1978) (proposing

FirstEnergy does *not* argue that any *new* issue was raised in Verizon’s Reply that should be addressed. Instead, FirstEnergy wants to reopen the pleadings so it can revise or expand upon certain arguments,<sup>4</sup> fix evidentiary problems,<sup>5</sup> and otherwise criticize Verizon’s interpretation of the evidence<sup>6</sup> and the law.<sup>7</sup> The Commission’s rules do not permit FirstEnergy’s requested do-over.

*First*, the Commission has denied leave to file additional argument where no new issue was raised in a responsive pleading.<sup>8</sup> The Commission’s approach is consistent with court procedure, which precludes surreplies that seek “only to amplify an issue already addressed in briefing ... or to correct an opposing party’s ‘alleged mischaracterization.’”<sup>9</sup> As one court explained, “a surreply is not a vehicle for rehashing arguments that have already been raised and

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“simple and expeditious procedures to adjudicate pole attachment disputes” in which “[p]leadings are limited to a complaint, a response, and a reply.”)

<sup>4</sup> See, e.g., Motion for Leave to File a Response at 4 (recasting an argument as “refer[ring] only to determining in advance how the Commission might rule”); *id.* at 5 (arguing advantages “mentioned” during negotiations “apply” regardless of the absence of supporting evidence in its Answer).

<sup>5</sup> See, e.g., *id.* at 6 (“FirstEnergy can provide the Commission whatever additional information it would like.”); *id.* at 6 (“FirstEnergy can provide Verizon and the Commission whatever backup and itemization they would like.”); *id.* at 7 (“FirstEnergy can provide whatever further substantiation the Commission might request.”).

<sup>6</sup> See, e.g., *id.* at 7 (“This is a misinterpretation of the email at issue”); *id.* at 9 (“The field audit was not hurried at all and was totally reliable...”).

<sup>7</sup> See, e.g., *id.* at 7 (“These allegations misstate the Commission’s rate rules...”); *id.* at 11 (“Verizon ... misstates the burden of proof imposed by the Commission.”); *id.* at 11 (“Verizon misstates the law.”); *id.* at 11 (“Verizon misstates the holding...”).

<sup>8</sup> See, e.g., *In the Matter of Comcast of Potomac, LLC*, 31 FCC Rcd 3947, 3948 (¶ 6 n.15) (2016) (“Montgomery County claimed that the Surreply was needed because Petitioner raised this new issue in its Reply.... We find that this was not a new issue Petitioner raised in its Reply, but rather, Petitioner was properly responding to Montgomery County’s arguments in its Opposition .... Therefore, we deny the request for leave to file the Surreply.”).

<sup>9</sup> See *Robinson v. Panera, LLC*, No. 1:17-CV-2071 (TSC), 2019 WL 5216265, at \*3 (D.D.C. Oct. 16, 2019) (quoting *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001)).

briefed by the parties. Were that not true, briefing would become an endless pursuit.”<sup>10</sup> The same applies here. FirstEnergy’s Motion, if granted, would not mark the end of the pleadings as Verizon disputes each of FirstEnergy’s allegations, including new areas of dispute that Verizon would need to address.<sup>11</sup> The better course is to deny FirstEnergy’s Motion. Like the court, the Commission “is more than capable of ascertaining the merits of the parties’ respective positions on its own” without another Answer from FirstEnergy and another Reply from Verizon.<sup>12</sup>

*Second*, it is too late for FirstEnergy to try to add evidence it could have submitted with its Answer. The Commission’s rules required FirstEnergy to file “all supporting documents, data compilations, and tangible things ... to support all of the facts on which [its] answer relies.”<sup>13</sup> In prior pole attachment complaint proceedings, the Commission rejected belated attempts to cure evidentiary failures<sup>14</sup> and denied claims because supporting evidence was not timely filed.<sup>15</sup> FirstEnergy has provided no good reason to proceed differently here.

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<sup>10</sup> *Crummey v. Soc. Sec. Admin.*, 794 F. Supp. 2d 46, 63 (D.D.C. 2011), *aff’d*, No. 11-5231, 2012 WL 556317 (D.C. Cir. Feb. 6, 2012).

<sup>11</sup> For example, FirstEnergy states that “Verizon’s witness now indicates its inspection program began only in 2018.” Motion for Leave to File a Response at 5. In fact, Verizon’s witness described Verizon’s regular and ongoing “robust pole inspection and maintenance procedures,” which were supplemented in 2018 with an Enhanced Pole Inspection and Treatment Program. See Reply Legal Analysis, Ex. D at VZ00882-884 (Affidavit of D. Austin (Mar. 2, 2020), ¶¶ 4-9).

<sup>12</sup> See *Crummey*, 794 F. Supp. 2d at 63.

<sup>13</sup> See *In the Matter of Implementation of the Telecommunications Act of 1996*, 16 FCC Rcd 5681, 5695–96 (¶ 33) (2001).

<sup>14</sup> *Teleport Commc’ns Atlanta, Inc. v. Ga. Power Co.*, 17 FCC Rcd 19859, 19868-69 (¶ 24) (2002) (“This is the type of information that GPC should have provided in response to the complaint. We cannot condone GPC’s failure to provide the appropriate information at the required time.”).

<sup>15</sup> *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.”).

*Third*, FirstEnergy cannot now revise or recast arguments made in its Answer. Under Commission rules, FirstEnergy’s Answer already was a “comprehensive pleading containing complete factual and legal analysis, including a thorough explanation of every ground for dismissing or denying the complaint.”<sup>16</sup> And FirstEnergy had ample time to prepare a comprehensive Answer. In the Commission’s “experience, a uniform 30-day rule will allow defendants to more carefully and completely answer the complaint’s allegations.”<sup>17</sup> And with Verizon’s consent, FirstEnergy had 75 days to file its Answer<sup>18</sup>—after more than seven years of negotiations about this dispute.

*Finally*, FirstEnergy’s request would undermine the Commission’s longstanding work to promptly and efficiently resolve pole attachment complaints.<sup>19</sup> The rules are designed to “promote a fully developed record in each case, foster disposition of formal complaints in a timely manner” within a 270-day shot clock set by regulation, “and conserve resources of the parties and the Commission.”<sup>20</sup> FirstEnergy already had 2.5 times the 30 days allotted to

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<sup>16</sup> *In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enft Bureau*, 33 FCC Rcd 7178 (¶ 13) (2018).

<sup>17</sup> *In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enft Bureau*, 32 FCC Rcd 7155, 7157 (¶ 8) (2017).


<sup>18</sup> See Unopposed Motion for Adjustment of Deadlines at 4 (Dec. 4, 2019); Letter Ruling Granting Extension (Dec. 9, 2019).

<sup>19</sup> *In the Matter of Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 8 FCC Rcd 2614 (¶ 1) (1993) (“With the goal of expediting resolution of formal complaints, we presented for public comment rules which would ... eliminate unnecessary or redundant pleadings...”); see also *In the Matter of Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 7 FCC Rcd 2042 (¶ 1) (1992) (“Our goal ... is to facilitate timelier resolution of formal complaints by eliminating procedures and pleading requirements that have caused unintended and unnecessary delays”).

<sup>20</sup> *In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enft Bureau*, 33 F.C.C. Rcd. 7178 (¶ 1) (2018).

develop its record and state “fully and completely of the nature of any defense.”<sup>21</sup> The Commission should reject its request to further delay resolution and increase costs through further rounds of unnecessary briefing.

Respectfully submitted,

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Dated: March 17, 2020

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<sup>21</sup> 47 C.F.R. § 1.726(b); see also *In the Matter of Implementation of the Telecommunications Act of 1996*, 16 FCC Rcd 5681, 5690 (¶ 19) (2001) (“We find that requiring a defendant to respond specifically to all averments in a complaint ... will enhance the ability of Commission staff to resolve complaints more efficiently.”).

## CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2020, I caused a copy of the foregoing Verizon' s Opposition to FirstEnergy' s Motion for Leave to File Response to Reply to be served on the following (service method indicated):

Marlene H. Dortch, Secretary  
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