PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held December 3, 2020

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
David W. Sweet, Vice Chairman
John F. Coleman, Jr.
Ralph V. Yanora

Verizon Pennsylvania LLC and
Verizon North LLC

C-2020-3019347

v.

Metropolitan Edison Company, Pennsylvania
Electric Company and Pennsylvania Power Company

OPINION AND ORDER
NON-PROPRIETARY VERSION

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BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Metropolitan Edison Company (Met-Ed), Pennsylvania Electric Company (Penelec), and Pennsylvania Power Company (Penn Power) (collectively, FirstEnergy or the Companies) and Verizon Pennsylvania LLC and Verizon North LLC (collectively, Verizon) filed on September 22, 2020, to the Recommended Decision (R.D.) of Deputy Chief Administrative Law Judge (ALJ) Joel H. Cheskis, issued September 15, 2020, relative to the above-captioned proceeding. Replies to Exceptions were filed by FirstEnergy and Verizon on September 28, 2020.

For the reasons stated, *infra*, we shall: (1) grant, in part, and deny, in part, the Exceptions filed by FirstEnergy and Verizon; and (2) adopt the ALJ's Recommended Decision, as modified, consistent with this Opinion and Order.

I. Background

A. Pole Attachment Agreements

This proceeding involves a dispute over the rates paid by a Pennsylvania incumbent local exchange carrier (ILEC) attaching its physical facilities to poles owned by a jurisdictional electric distribution company (EDC). ILECs, which are also pole owners, historically have attached to electric utility poles by way of Joint Use Agreements (JUAs), while cable companies, competitive local exchange carriers

(CLECs) and other third-party non-pole-owning entities have attached to electric utility poles by way of third-party attachment agreements.[1]

There are ten JUAs executed between FirstEnergy and Verizon (*i.e.*, Verizon's predecessors) at issue in this case. *See* FirstEnergy St. No. 1-R at 7; Verizon St. No. 1.0, Exh. SCM-2. Specifically, Met-Ed and Verizon executed five agreements between 1967 and 1973, Penelec and Verizon executed four agreements between 1958 through 1988, and in 1979, Penn Power and Verizon executed one agreement. FirstEnergy St. No. 1-R at 7-8.

Under each of the JUAs, the parties are charged reciprocal rates per pole, which are netted during each invoice period based on the number of poles owned by each party. Under the Penelec and Penn Power JUAs, each party pays a per pole rate for use of the other party's poles.[2] In contrast, under the Met-Ed JUA, Met-Ed charges Verizon an "annual Deficiency Rate rental fee" for so-called "deficiency poles," which is the difference between the number of joint use poles Verizon owns (19%) and the higher number of joint use poles Verizon would own if Verizon owned 45% of the joint use poles.[3] For comparative purposes, the annual Deficiency Rate rental fee Met-Ed charges can be converted into "reciprocal" per-pole rental rates, based on the assumption that

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[1] The term "pole attachment" in the context of the Telecommunications Act of 1996 (TA96) is a term of art used to describe the physical facilities employed to support or protect cabling, transponders, or similar facilities used in outside communications plants. Federal law defines a "pole attachment" as any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit or right-of-way owned or controlled by a utility. 47 U.S.C. § 224(a)(4). The definition extends to utility structures above and below ground and encompasses utility property rights.

[2] *See* Verizon St. No. 1.0, Exh. SCM-3 at VZ00542-547.

[3] *See* Verizon St. No. 1.0, Exh. SCM-3 at VZ00532-541 and Exh. SCM-2 at VZ00298, VZ00301, VZ00304, VZ00306, VZ00309, VZ00311, VZ00314, VZ00316 (Memoranda of Understandings (MOUs)).

both parties charge the same per-pole rental rate for use of the other party's poles. *See* Verizon St. No. 1.1, Exh. SCM-8 at 3.

The Parties negotiated an MOU to amend the Penn Power JUA in 1999. FirstEnergy St. No. 1-R at 8. In 2009, Met-Ed and Penelec and Verizon negotiated an MOU for each of their JUAs. *Id*. In 2009, the Parties renegotiated the rates under the JUAs. *Id.* at 10.

B. History of Pole Attachment Regulation

In 1978, the United States Congress passed the Pole Attachment Act (PAA), which added Section 224 to the Communications Act of 1934. Under Section 224, the FCC was provided the authority to regulate the rates, terms and conditions of pole attachment agreements involving cable television providers. However, neither the PAA nor the formula rate established thereunder (*i.e.*, the "cable rate formula") was applicable to the rates charged under the JUAs between ILECs and electric utilities.

Congress thereafter passed the Telecommunications Act of 1996 (TA96)[4] and granted providers of telecommunications services (other than the ILECs) with non-discriminatory access to poles, conduit and rights-of-way owned or controlled by electric utilities and the ILECs. FirstEnergy St. No. 2-R at 5. Such providers were known as CLECs. However, neither TA96 nor the CLEC formula rate (*i.e.*, the "old telecom rate") established thereunder was applicable to the JUAs between the ILECs and electric utilities. From 1996 through this year, the Commission deferred to the Federal

[4] The PAA section of TA96 may be found at Section 224 of Title 47 of the United States Code (U.S.C.) (47 U.S.C. § 224), and the attendant FCC regulations pertaining to pole attachment complaint procedures may be found at Title 47 of the Code of Federal Regulations (C.F.R.), Chapter I, Subchapter A, Part 1, Subpart J (47 C.F.R. §§ 1.1401-1.1415).

Communications Commission (FCC) for the regulation and rates governing pole attachments following TA-96.

In 2011, the FCC issued the *2011 Pole Attachment Order*,[5] which: (1) created the "new telecom rate" by reducing the apportionment of common pole costs included in the "old telecom rate" formula, such that it was based on incremental costs rather than fully allocated costs; and (2) reinterpreted Section 224 and concluded that the ILECs "are entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)." FirstEnergy St. No. 2-R at 9-10 (citing *2011 Pole Attachment Order* at ¶¶ 149, 202, 207, and 216). Importantly, the FCC undertook these actions as a policy matter to reduce pole attachment rates for CLECs (i.e., non-pole-owning entities) in order to spur greater broadband deployment. *See 2011 Pole Attachment Order* at ¶¶ 133-134.

In 2018, the FCC issued further guidance regarding its review of the JUAs between the ILECs and electric utilities. *In the Matter of Accelerating Wireline Broadband Deployment*, 33 FCC Rcd 7705 (Third Report and Order and Declaratory Ruling dated August 3, 2018) (*2018 Pole Attachment Order*). Therein, it distinguished between "new," "newly-renewed" and "newly-negotiated" agreements and existing agreements and established certain rebuttal presumptions regarding the rates, terms and conditions for the former. As previously stated, the governance of pole attachments was controlled by the FCC, given the Commission's deference to the FCC on pole attachments in 1996.

On July 13, 2018, the Commission issued a Notice of Proposed Rulemaking to begin the assertion of Commission jurisdiction over pole attachments

[5] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, 5331 (Report and Order and Order on Reconsideration dated April 7, 2011) (*2011 Pole Attachment Order*).

pursuant to TA96. *Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission -- Notice of Proposed Rulemaking*, Docket No. L-2018-3002672 (Order entered July 13, 2018) (*NPRM Order*). TA96 provides that the FCC regulates pole attachments by default but contains procedures by which states may reverse preempt FCC jurisdiction over pole attachments. As the Commission stated in the opening of the *NPRM Order*, recent public demand for ubiquitous access to wireline and wireless data technology has increased the need for more streamlined pole attachment procedures in Pennsylvania.

On September 3, 2019, the Commission entered its Final Rulemaking Order in *Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission*, Docket No. L-2018-3002672 (Order entered September 3, 2019) (*2019 Final Rulemaking Order*). Therein the Commission reverse preempted the FCC's regulation of pole attachments (including the JUAs between the ILECs and electric utilities), in order to better balance the interests of attachers, electric utilities and electric utility ratepayers in Pennsylvania while furthering broadband deployment in Pennsylvania.

On March 18, 2020, pursuant to its *2019 Final Rulemaking Order*, the Commission certified to the FCC that pursuant to 47 U.S.C. § 224(c) and to the extent authorized by the Code, 66 Pa. C.S. § 101, *et seq.*, the Commission has assumed jurisdiction over disputes addressing the rates, terms, and conditions of pole attachments. The Commission's pole attachment regulations are in 52 Pa. Code Chapter 77.

II. History of Proceeding

A. Before the FCC

Verizon initially filed proprietary and non-proprietary versions of its Formal Complaint (Complaint) against FirstEnergy with the FCC on November 20, 2019.[6] In its Complaint Verizon asserted that the negotiated rates charged by FirstEnergy under their several JUAs are "unjust and unreasonable" under Section 224 of the PAA, 47 U.S.C. § 224. The Complaint further asserted that the rates in the JUAs should be similar to the rate charged by FirstEnergy to cable companies and CLECs under pole attachment license agreements (*i.e.*, the "new telecom rate"), and that Verizon is entitled to refunds reflecting the difference between this rate and the amount charged by FirstEnergy to Verizon under the JUAs since the July 12, 2011 effective date of the *2011 Pole Attachment Order*, plus interest. Complaint at 1.

On February 3, 2020, FirstEnergy filed proprietary and non-proprietary versions of its Answer to Verizon's Complaint, arguing that Verizon's Complaint is unfounded, and should either be dismissed or the relief requested should be denied. FirstEnergy argued, among other things, that Verizon was required to terminate its existing JUAs with FirstEnergy before filing the Complaint but failed to do so. FirstEnergy also argued that Verizon has misinterpreted FCC rulings and that failed negotiations with FirstEnergy led to the Complaint being filed. FirstEnergy also argued that Verizon has misconstrued the relevant facts, including whether one party has bargaining leverage over another. FirstEnergy added that, to the extent the case moves forward, any analysis of the rates between FirstEnergy and Verizon should be prospective

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[6] The Complaint was docketed by the FCC at Proceeding Number 19-354, Bureau ID No. EB-19-MD-008.

in effect only. FirstEnergy averred multiple affirmative defenses in its answer and provided specific responses to the averments made by Verizon in its Complaint.

On March 3, 2020, Verizon filed proprietary and non-proprietary versions of its Reply to FirstEnergy's Answer and a denial of FirstEnergy's affirmative defenses, maintaining its contention that Verizon is entitled to just and reasonable pole attachment rates and that it is entitled to a refund of what it believes it has been overcharged by FirstEnergy.

On March 18, 2020, the Parties submitted a Joint Statement in the FCC proceeding. The Joint Statement included certain stipulated facts, which were reproduced in the appendix to FirstEnergy's Main Brief. *See* FirstEnergy M.B., Appendix A at ¶¶ 2-10.

During the pendency of the Complaint proceeding before the FCC, the Commission, as indicated above, reassumed jurisdiction over the rates set forth in the JUAs. On March 23, 2020, the FCC transferred the Complaint to the Commission. *In the Matter of Verizon Pennsylvania LLC and Verizon North LLC v. Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company*, Proceeding Number 19-354; Bureau ID Number EB-19-MD-008 (Order dated March 23, 2020) (*Transfer Order*). Thereafter, the matter was transferred to the Commission and referred to the Office of Administrative Law Judge for adjudication. ALJ Cheskis was assigned as the presiding officer.

B. Before the Commission

As a result of the ongoing COVID-19 pandemic and in recognition of the time constraints on pole attachment cases articulated in Chapter 77 of the Commission's Regulations, an informal, off-the-record conference call was held on March 26, 2020

with the attorneys for Verizon and FirstEnergy, as well as from the Commission's Mediation Unit, to discuss procedural issues related to this case. During the call, a discussion was held regarding when the regulatory time constraint for this case starts given that the formal complaint was filed by Verizon in November 2019 at the FCC, but the Commission did not establish jurisdiction over pole attachment issues until March 2020.

A scheduling order was issued on April 14, 2020 (*Scheduling Order*), memorializing the resolution of the procedural disagreements between Verizon and FirstEnergy and establishing a procedural schedule for this case. Of note, it was determined that the Complaint would be considered filed as of March 23, 2020 for purposes of commencing the time frame within which the Commission must act on this case and that good cause existed for this case to be concluded within 270 days, as allowed for in Chapter 77 of the Commission's Regulations. 52 Pa. Code § 77.5(c). A litigation schedule was established so that the case would be completed within 270 days. [7]

In light of the continued interruption of normal operations as a result of the COVID-19 pandemic, additional informal, off-the-record conference calls with the Parties, the mediation unit and the presiding officer were held on June 2, 2020 and June 5, 2020 to discuss logistics for the evidentiary hearings scheduled for June 15-19, 2020. As a result of those conversations, the Parties agreed to various modifications to the original scheduling order. Most significantly, the Parties agreed that the in-person hearings scheduled would be cancelled and the proceeding would become

[7] We note there is an apparent discrepancy in the dates which the Complaint is considered filed with the Commission. According to the *Scheduling Order*, the ALJ determined that the filing date for purposes of establishing the time frame for Commission action is *March 25, 2020*. *Scheduling Order* at 4. However, the Recommended Decision states that this filing date is *March 23, 2020*. R.D. at 4. This Opinion and Order will issue to meet any 270-day deadline arising under either of the apparent dates.

"paper-only," meaning that, in addition to other agreed upon modifications, additional rounds of pre-served testimony would be allowed, the pre-served written testimony would be admitted into the record of the proceeding via stipulation and cross examination would be waived. Next, the Parties would submit briefs in support of their legal arguments. The Parties confirmed their agreement via email dated June 8, 2020. R.D. at 5.

A second scheduling order was issued on June 8, 2020 memorializing the Parties' agreement to the revised procedural schedule and other procedural matters.

On July 7, 2020, the Parties submitted a joint motion to admit stipulated items into the record. The Recommended Decision granted that motion, and the Parties were directed to ensure that the Commission's Secretary's Bureau has the necessary hard copies of the documents for inclusion in the Commission's file. R.D. at 6.

Pursuant to the second scheduling order, proprietary and non-proprietary versions of Main Briefs and Reply Briefs were filed by both Verizon and FirstEnergy on July 28, 2020 and August 14, 2020, respectively. The record in this case closed on August 14, 2020, the date Reply Briefs were filed.

On September 15, 2020, the Commission issued the ALJ's Recommended Decision, in which ALJ Cheskis found that Verizon satisfied its burden of proof to demonstrate that it is entitled to a rebuttable presumption to have its rates to attach to the utility poles set by the "new telecom rate" methodology under the FCC's regulations recently adopted by the Commission and FirstEnergy has not satisfied its burden to rebut that presumption. Therefore, the ALJ recommended that: (1) the Complaint be granted to the extent that the rates paid by Verizon to FirstEnergy to attach to FirstEnergy's poles will be set going forward based on the "new telecom rate" methodology; (2) the Complaint be denied with regard to Verizon's request for refunds going back to

July 2011 for the amounts overpaid to FirstEnergy; but rather (3) Verizon be awarded a refund for rates it overpaid to FirstEnergy dating back to March 11, 2019, the effective date of the rates established under the new telecom rate methodology; and (4) the Parties be given a 60-day compliance period following the entry of a final Commission order to resolve any differences that arise in establishing the specific rates and the refund based on the determinations made in the Recommended Decision and, to the extent that such differences cannot be resolved, to afford the Parties of the Commission's mediation unit for mediation review or request a further expedited evidentiary hearing on the remaining disputed issues. R.D. at 1, 69-70.

As previously noted, FirstEnergy and Verizon filed proprietary and non-proprietary versions of their Exceptions on September 22, 2020. Proprietary and non-proprietary versions of Reply Exceptions were filed by FirstEnergy and Verizon on September 28, 2020.

On October 15, 2020, FirstEnergy filed a Motion to Unseal Certain Proprietary Information and Request for Expedited Consideration (Motion). In its Motion, FirstEnergy requested the unsealing of certain proprietary information contained in the testimony, Briefs, Exceptions, and Reply Exceptions submitted by FirstEnergy and by Verizon in this proceeding. On October 27, 2020, Verizon filed its Answer in opposition to the Motion. By Order entered December 3, 2020, the Commission denied the Motion.

III. Discussion

Before addressing the Exceptions, we note that any issue or Exception that we do not specifically address shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v.*

Pa. PUC, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).[8] We also adopt the disposition of the ALJ set forth in the Recommended Decision except for the modifications to the following issues: Legal Standard – Burden of Proof; Entitlement to the New Telecom Rate – Whether the JUAs were renewed after the effective date of FCC's "new telecom rate" methodology; Entitlement to the New Telecom Rate – Whether Verizon receives material advantages under the JUAs; Inserting the New Telecom Rate into the Existing Agreements – Current Cost of Capital in Computing Rates under the Agreement, Rulings of the Correct Rates Going Forward and 60-Day Compliance Period to Calculate New Rates; and Refunds – Calculation of the Refund Period and Accrued Interest as set forth in this Opinion and Order.

A. Application of Appropriate Legal Standards

1. Recommended Decision

In his Recommended Decision, the ALJ noted that Verizon and FirstEnergy each contend that the other Party bears the burden of proof in this case. However, the ALJ found that Verizon has the initial burden of proof as the complainant. Next, the ALJ

[8] As a preliminary matter, we note two misstatements in the Recommended Decision. First, the reference that Chapter 30 "deregulated" telecommunications rates is erroneous. R.D. at 13. Some rates were detariffed, and a process was established to determine others to be competitive. However, rates were not and are not deregulated, including just and reasonable rate determinations. *See* Act 67 of 1993, 66 Pa. C.S. §§ 3001-3009, repealed and reenacted by Act 183 of 2004, 66 Pa. C.S. §§ 3011-3019. Second, in the discussion of the cost of capital applicable to pole attachment rates, the Recommended Decision referred to First Energy's "guaranteed rate of return." R.D. at 48. Utilities are not guaranteed rates of return. Rather, through the traditional rate base/rate of return ratemaking formula, they are provided opportunities to earn rates of return, which permit relief when underearning or may incur liability when overearning based on a determined rate of return. Accordingly, we shall modify the Recommended Decision to correct these misstatements.

explained that FirstEnergy has the burden to rebut Verizon's burden of proof. The ALJ reasoned that when determining whether pole attachment rates are just and reasonable and in accordance with the provisions of the Code, the Commission has indicated that it will use the rules and regulations set forth by the FCC. Both the FCC's and Commission's standards to be applied to pole attachment cases exist mutually and not exclusively. R.D. at 18.

Citing to Chapter 77 of the Commission's Regulations, the ALJ noted:

> (a) This chapter adopts the rates, terms and conditions of access to and use of utility poles, ducts, conduits and rights-of-way to the full extent provided for in 47 U.S.C. § 224 and 47 CFR Chapter I, Subchapter A, Part 1, Subpart J (relating to pole attachment complaint procedures), inclusive of future changes as those regulations may be amended.

52 Pa. Code § 77.4(a). In reverse pre-empting the FCC on pole attachment issues, the ALJ emphasized that the Commission has also determined that "persons and entities subject to this chapter may utilize the mediation, formal complaint and adjudicative procedures under 52 Pa. Code Chapters 1, 3 and 5 ... of the Commission's regulations to resolve disputes or terminate controversies." R.D. at 18 (quoting 52 Pa. Code § 77.5(a)). Additionally, the Commission has also determined that "[w]hen exercising authority under this chapter the Commission will consider Federal Communications Commission orders promulgating and interpreting Federal pole attachment rules and Federal court decisions reviewing those rules and interpretations as persuasive authority . . . ." *Id*. (quoting 52 Pa. Code § 77.5(c)).

As a result, the ALJ determined that the procedural rules to be followed in this case are set forth in Chapters 1, 3 and 5 of our Regulations, 52 Pa. Code Chps. 1, 3 and 5. However, the ALJ reasoned that for purposes of determining the substantive issues in a pole attachment case such as in this proceeding, the FCC's regulations coexist

with the Code. In support, the ALJ referenced our *2019 Final Rulemaking Order* in which we incorporated the FCC's rules and regulations governing pole attachment cases, with federal court decisions reviewing those rules and interpretations being persuasive, when making such determinations. R.D. at 19.

The ALJ cited to our rationale in asserting jurisdiction over pole attachments as follows:

> Prior to this determination today, the Commission provided an Annex to its [Notice of Proposed Rulemaking] to establish Chapter 77, *Pole Attachments*, to Title 52 of the Pennsylvania Code. In our initial assertion of jurisdiction over pole attachments, **the Commission will adopt, in whole, the FCC's regulatory regime for pole attachment complaint procedures at Subject J as of the effective date of Chapter 77**. This will avoid a multi-year delay in claiming jurisdiction and will uphold the status quo, which will avoid regulatory uncertainty and will promote broadband investment across Pennsylvania.
>
> In response to IRRC's suggested language change regarding the reference to the FCC's rules, and for reasons elaborated below, the Commission will amend 52 Pa. Code § 77.1 to reference Subpart J. **This will allow the Commission's regulations to exist in parity with the FCC's regulations** and will provide greater certainty to the public about the scope and application of the federal rules.

R.D. at 19 (quoting *2019 Final Rulemaking Order* at 10 (emphasis added by the ALJ)). Similarly, in discussing the adoption of FCC regulations in Section 77.4 of our Regulations and the possibility of cases reverting back to the FCC if the Commission does not act on them in a timely manner, the ALJ noted our explanation that, "[w]hile the Commission does not anticipate losing jurisdiction over specific complaints in this manner, should it occur, parties will apply the same substantive rules in either venue.

This is yet another reason why parity between the Pennsylvania and federal rules benefits stakeholders." R.D. at 19 (quoting *2019 Final Rulemaking Order* at 25).

The ALJ further highlighted the Commission's intent to coordinate with the federal standards:

> In any event, adopting the FCC's regulations provides certainty that Pennsylvania's pole attachment regulations conform to the base-line federal standards required to retain state authority over pole attachments. Adoption of the federal rules, including the proposed mechanism for adopting future changes to those rules, supports the cooperative state-federal goal of deployment of broadband across the Commonwealth, while also considering the safety, adequacy, and reliability of electric service in a manner that is consistent with due process... [I]f the Commission deems it appropriate to diverge from the federal regulations, it would initiate a rulemaking that would be subject to public comment.

R.D. at 20 (quoting *2019 Final Rulemaking Order* at 27-28).

Applying this analysis, the ALJ determined that both Verizon and FirstEnergy are correct in their arguments regarding the legal standard to be applied to this case. The Commission's Regulations at Chapter 77 incorporate the FCC's regulations in 47 C.F.R. Chapter I, Subchapter A, Part 1, Subpart J. These regulations, the ALJ continued, exist in addition to, not in place of, the Commission's existing Regulations and the Code, where relevant. He also noted that in the *2019 Final Rulemaking Order*, the Commission could have reiterated verbatim the FCC's rules and regulations on pole attachments that it was adopting but, instead, chose to incorporate those rules and regulations by reference. R.D. at 20.

Therefore, in this case, the ALJ found that Verizon, as the Complainant, has the initial burden of proof. To meet its initial burden of proof, Verizon has argued that

"the Commission's regulations presume Verizon must be charged the following properly calculated new telecom rates," citing to Section 1.1413(b) in support of its position. Section 1.1413 of the FCC's regulations provides:

> **§ 1.1413 Complaints by incumbent local exchange carriers.**
>
> (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 that an incumbent local exchange carrier (or an association of incumbent local exchange carriers) is similarly situated to an attached that is a telecommunications carrier (as defined in 47 U.S.C. § 251(a)(5)) or a cable television system providing telecommunications services for purposes of obtaining comparable rates, terms or conditions. In such complaint proceedings challenging pole attachment rates, there is a presumption that incumbent local exchange carriers (or an association of incumbent local exchange carriers) may be charged no higher than the rate determined in accordance with § 1.1406(d)(2). A utility can rebut either or both of the two presumptions in this paragraph (b) with clear and convincing evidence that the incumbent local exchange carrier receives benefits under its pole attachment agreement with a utility that materially advantages the incumbent local exchange carrier over other telecommunications carriers or cable television systems providing telecommunications services on the same poles.

47 C.F.R. § 1.1413(b).[9]

[9] On October 9, 2020, the FCC promulgated an amendment to Section 1.1413(b) to revise an incorrect listing of a cross-reference citation. *See Accelerating Wireline and Wireless Broadband Development by Removing Barriers to Infrastructure Investment*, 85 F.R. 64061-01 (October 9, 2020). Here, we quote from the updated, corrected version of the FCC regulation.

Section 1.1406(d)(2) provides a complicated formula that will be applied for determining the maximum just and reasonable rate. With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate is the higher of rates set by two formulas. 47 C.F.R. § 1.1406(d)(2). The formula in § 1.1406(d)(2)(i) is:

Rate = Space Factor x Cost

Where Cost

in Service Areas where the number of Attaching Entities is 5 = 0.66 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 4 = 0.56 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 3 = 0.44 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 2 = 0.31 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is not a whole number = N x (Net Cost of a Bare Pole x Carrying Charge Rate), where N is interpolated from the cost allocator associated with the nearest whole numbers above and below the number of Attaching Entities.

$$\text{Where Space Factor} = \left[\frac{\left(\frac{\text{Space}}{\text{Occupied}} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right]$$

The formula in § 1.1406(d)(2)(ii) is:

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[\text{Maintenance and Administrative Carrying Charge Rate} \right]$$

$$\text{Where Space Factor} = \left[\frac{\left(\text{Space Occupied} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right]$$

In applying the initial burden of proof in this case to Verizon, the ALJ stated that the Complaint proceeds under Section 1.1413 which gives Verizon the burden of proof to demonstrate that the joint use agreements are renewed or entered into after the effective date of Section 1.1413. To the extent that Verizon can satisfy this burden, the burden then shifts to FirstEnergy to prove that Verizon has received material advantages as a result of the joint use agreements. R.D. at 22.

The ALJ found this approach to be consistent with Section 332(a) of the Code that provides that the party seeking relief from the Commission has the burden of proof. 66 Pa. C.S. § 332(a). As with most complaint cases, as a matter of law, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. P.U.C. 196 (1990). The ALJ reiterated the burden of proof requirements which means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). The ALJ emphasized that the offense must be a violation of the Code, the Commission's Regulations or an outstanding order of the Commission. R.D. at 22-23 (citing 66 Pa. C.S. § 701).

The ALJ further emphasized that with all complaint cases, if a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. R.D. at 23 (citing in part *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001) (*Milkie*)). The ALJ explained that the decisions of the Commission must be supported by substantial evidence, which is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. R.D. at 23 (citing in part *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980)).

The ALJ also found that FirstEnergy is correct in its assertion that other provisions of the Code apply to this proceeding. Specifically, FirstEnergy argued that the Companies' pole attachment rates charged to Verizon must also be consistent with Sections 508, 1301, 1304, 1309 and 1312 of the Code. The ALJ agreed that these sections of the Code coexist with the FCC's pole attachment regulations that the Commission has adopted, and the outcome of this proceeding must also be examined with these statutes in mind. Thus, the ALJ determined that the pole attachment rates FirstEnergy charges Verizon must be both consistent with the FCC's pole attachment regulations as adopted by the Commission, and the relevant provisions of the Code such as Sections 1301 and 1309 that require that "every rate made, demanded or received by any public utility, or by any two or more public utilities, shall be just and reasonable, and in conformity with regulations or orders of the Commission." R.D. at 23-24 (quoting 66 Pa. C.S. § 1301(a)).

In summary, the ALJ ruled that Verizon bears the initial burden of proof in this proceeding. Verizon must demonstrate that FirstEnergy's pole attachment rates violate the Code, a Commission order or Regulation or a Commission-approved tariff of FirstEnergy. The ALJ emphasized that this includes not only Chapter 13 of the Code, but also Chapter 77 of the Commission's Regulations, which incorporates by reference the FCC's pole attachment regulations. The ALJ stated that Verizon can meet its initial burden under Section 1.1413 of the FCC's regulations by showing that the joint use agreements were renewed or entered into after the effective date of that Section. If Verizon can demonstrate that the joint use agreements were renewed after the effective date of Section 1.1413, the burden then shifts to FirstEnergy to determine that its rates are just and reasonable because Verizon receives material advantages under the joint use agreements. R.D. at 24.

2. Exceptions and Replies (FirstEnergy Exception Nos. 1-3)

In its first three Exceptions, FirstEnergy contends that the Recommended Decision failed to apply the correct legal standards.[10] As to Exception No. 1, FirstEnergy argues that the ALJ failed to apply the Code and controlling Pennsylvania appellate precedent to Verizon's Complaint by improperly determining that FCC regulations are controlling. FirstEnergy asserts that the Recommended Decision unlawfully holds that the Commission prejudged the determination of just and reasonable rates in the *2019 Final Rulemaking Order*. FirstEnergy also contends that the R.D. applies the FCC's regulations in a manner that exceeds the Commission's statutory authority.

[10] The arguments set forth in FirstEnergy's Exceptions No. 1-3 overlap with assertions contained in its other Exceptions. In this section, we address the Companies' contentions that the ALJ failed to apply the correct legal standards in evaluating and issuing a Recommended Decision as to Verizon's Complaint. To the extent that we do not specifically address the additional arguments set forth in these and the remaining Exceptions, they are denied, and we shall adopt the ALJ's well-reasoned discussion with respect to each of them.

Additionally, it argues that the statutory authority under Chapter 13 of the Code and appellate caselaw require application of cost of service standards and that the Commission cannot simply defer to FCC regulations. FirstEnergy Exc. at 9-12.

In response to Exception No. 1, Verizon argues that FirstEnergy's arguments are at odds with the plain language of the R.D. and that the ALJ resolved the case under the Code, the Commission's Regulations, and judicial precedent. Verizon asserts that it is an attempt to relitigate the proper *2019 Final Rulemaking Order* which was grounded in undisputed statutory authority. Verizon R. Exc. at 2-4.

In its Exception No. 2, FirstEnergy argues that the ALJ improperly declined to conduct any analysis of the rates Verizon currently pays or the new telecom rate under traditional ratemaking standards pursuant to the Code or Pennsylvania precedent. It contends that the ALJ rejected as irrelevant evidence pertaining to whether rates are unjust and unreasonable because the requirement does not appear in the FCC's regulations adopted by the Commission. FirstEnergy Exc. at 13-14.

Verizon responds that the Commission's Regulations regarding pole attachments are binding law and that the Commission cannot adopt FirstEnergy's alternate ratemaking methodology without a new rulemaking. Verizon also asserts that FirstEnergy's approach would frustrate the Commission's efforts, through the asserted jurisdiction over pole attachments, to lower and unify pole attachment rates to promote broadband deployment. Verizon also contends it offered evidence pertaining to the cost of common equity for use in calculating pole attachment rates. Verizon R. Exc. at 4-5.

In FirstEnergy Exception No. 3, the Companies argue that the ALJ's finding disregards the interests of its electric ratepayers. FirstEnergy contends that any rate reductions under the JUAs will go directly to Verizon's shareholders without any assurance that the reduction will actually benefit broadband services in Pennsylvania.

Also, FirstEnergy proffers that any associated loss of revenue will impact the rates paid by its electric ratepayers. FirstEnergy Exc. at 14-15.

In response, Verizon argues that the R.D. correctly enforces the federal rules which are now the Commission's Regulations and provides a balanced approach among pole owners, attachers, and the telecommunications, electric and cable industries in a predictable manner. Verizon also argues that the amount of the revenue loss when compared with FirstEnergy's annual operating revenues would not trigger a base rate proceeding. According to Verizon, the new telecom rate will fully compensate FirstEnergy while ensuring low, uniform and cost-based rates to advance the Commission's deployment objectives. Verizon R. Exc. at 5-7.

3. Disposition

Regarding the applicable burden of proof, we do not believe it is accurate to state that Verizon has the "initial" burden of proof in this case that shifts to First Energy if that initial burden is met. Pennsylvania law is clear that as the complaining party, Verizon has the burden of proof in this case. *See* 66 Pa. C.S. § 332(a) (providing that the party seeking relief from the Commission has the burden of proof). Pennsylvania law is equally clear that the burden of proof stays with Verizon, as the burden of proof in a case never shifts. Rather, it is the burden of production or going forward with the evidence that can shift in a case.[11]

Regarding the burden of production, Section 1.1413(b) of the FCC's pole attachment rules adopted by this Commission establishes that for pole attachment

[11] While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2004) (*Milkie*).

agreements entered into or renewed after March 11, 2019, an ILEC receives a rebuttable presumption that the FCC's "new telecom rate" methodology applies. A utility can then rebut this presumption by providing clear and convincing evidence that new rates materially advantage the ILEC over other telecommunications carriers or cable television systems providing telecommunications services on the same poles. 47 C.F.R. § 1.1413(b)

Applying these rules to this case, Verizon has the burden of proof that FirstEnergy's existing pole attachment rates warrant a refund because they are unjust and unreasonable in violation of applicable law. For Verizon to receive the benefit of the rebuttable presumption that the FCC's new, lower pole attachment rates apply, Verizon must show that the JUAs were entered into or renewed after March 11, 2019. If Verizon meets this evidentiary burden, the burden of production then switches to FirstEnergy to produce clear and convincing evidence that Verizon has received material advantages from the JUAs. Thus, we shall modify the Recommended Decision on these issues to provide clarity going forward.

Other than these clarifying modifications as to the applicable burden of proof, we find no error in the ALJ's discussion of the appropriate legal standards to be applied in this proceeding as set forth on pages 18-24 of the Recommended Decision. Accordingly, we shall deny FirstEnergy's Exception Nos. 1-3 which attribute error to the legal standards discussion.

B. Verizon's Entitlement to the New Telecom Rate Under the Code, Commission and FCC Regulations and Precedent

1. Recommended Decision

In his Recommended Decision, ALJ Cheskis found that the record evidence demonstrated that the current pole attachment rates FirstEnergy is charging Verizon under the JUAs are unjust and unreasonable and are therefore in violation of the Code and the Commission's orders and Regulations because they were not set using the new telecom rate presumption in the Commission's Regulations, adopting Section 1.1406(d)(2) of the FCC's regulations.[12] R.D. at 50.

As an initial matter, the ALJ explained that through the addition of Chapter 77 to the Commission's Regulations, the Commission has adopted "the rates, terms, and conditions of access to and use of utility poles, ducts, and conduits and rights-of-way to the full extent provided for in 47 U.S.C. § 224 and 47 C.F.R. Chapter I, Subchapter A, Part 1, Subpart J (relating to pole attachment complaint procedures), inclusive of future changes as those regulations may be amended." R.D. at 41. As such, the ALJ reasoned that, through the Commission's *2019 Final Rulemaking Order*, 47 C.F.R. § 1.1413 is now Pennsylvania law; and therefore, the fact that Verizon's Complaint does not allege any violation of the Code or Commission order or Regulation, as FirstEnergy argued, is without merit. R.D. at 46-47. As explained above, by adopting Section 1.1413 of the FCC's regulations the ALJ reasoned that the Commission has determined that pole attachment rates that satisfy Section 1.1413 are both just and reasonable and non-discriminatory as provided for under Sections 1301 and 1304 of the Code, respectively. R.D. at 47 (citing 66 Pa. C.S. §§ 1301 and 1304). Therefore, by

[12] 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.").

averring in its Complaint filed with the FCC that FirstEnergy's pole attachment rates violate Section 1.1413 of the FCC's regulations, Verizon did aver a violation of the Commission's Regulation. *Id.*

The ALJ found that the Parties' arguments tendered two main questions: (1) whether the JUAs between Verizon and FirstEnergy were "entered into or renewed" after the effective date of the FCC's implementing regulation, 47 C.F.R. § 1.1413(b), which was March 11, 2019; and, if so, (2) whether the JUAs provide Verizon material advantages over other similarly situated providers. R.D. at 41-42. Pages twenty-four through fifty of the ALJ's Recommended Decision contain his discussion and findings concerning these issues.

The ALJ agreed with Verizon's contention that 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.[13]

The ALJ supplemented his discussion of the issue by acknowledging arguments presented by FirstEnergy; however, the ALJ ultimately agreed with Verizon's opposing arguments. Specifically, the ALJ agreed with Verizon's contention that the

[13] With respect to newly negotiated and newly renewed pole attachment agreements between ILECs and other utilities, there is a presumption that the ILEC will receive similar rates, terms, and conditions to those received by similarly situated telecommunications carriers (as defined by 47 U.S.C. 251(a)(5)) or a cable television system providing telecommunications service. There also exists a presumption for such agreements that ILECs may be charged no higher than the rate determined in accordance with 47 C.F.R. § 1.1406(d)(2) for telecommunications attachers. The utility may rebut one or both of these presumptions by demonstrating through clear and convincing evidence that the ILEC receives net benefits under its pole attachment agreement that give the ILEC a material advantage over other telecommunications carriers or cable television systems on the same poles. *2018 Pole Attachment Order* at 7767-71; 47 C.F.R. § 1.1413(b); 47 C.F.R. § 1.1406(d)(2).

automatic renewal provision of the JUAs complies with the "entered into or renewed" requirement of 47 C.F.R. § 1.1413; and therefore, to the extent that an agreement continues until terminated after an initial term, as is the case here, the agreement is automatically renewed and eligible for the new telecom rate presumption.[14]
R.D. at 42-43.

Having found that the JUAs at issue in this proceeding are eligible for the new telecom rate presumption, the ALJ moved on to answer the second main question of whether FirstEnergy has rebutted that presumption by demonstrating that Verizon receives "material advantages" under those agreements that benefit Verizon compared to other telecommunications carriers or cable television systems providing telecommunications service on the same poles.[15]

The ALJ concluded that the record evidence demonstrated that FirstEnergy has failed to prove by a preponderance of the evidence that it has rebutted the presumption that Verizon has demonstrated it is entitled to by showing that the JUAs provide Verizon material advantages under 47 C.F.R. § 1.1413. The ALJ found that the advantages FirstEnergy claims materially benefit Verizon are outweighed by the disadvantages that Verizon has demonstrated it faces as a result of the JUAs. Most notably:(1) the terms and conditions in the JUAs are reciprocal, meaning Verizon must provide FirstEnergy access to approximately 110,000 of Verizon's joint use poles under

[14] Verizon noted that the initial term of each JUA has expired, and the agreements automatically extended and will continue to do so until terminated. Verizon added that "each joint use agreement states that, after an initial term, the agreement 'shall continue in force thereafter until terminated by either party at any time' upon advance written notice." Verizon M.B. at 24 (citing Verizon St. No. 1, Exh. SCM-2).

[15] The ALJ noted that, although 47 C.F.R. § 1.1413 does not use the term "net," the ALJ evaluated this case as if the term "net material advantage" were included in Section 1.1413, determining whether the JUAs entered into between Verizon and FirstEnergy provide Verizon more material advantages than material disadvantages. R.D. at 44.

the same terms and conditions that apply to Verizon's use of FirstEnergy's poles (Verizon must maintain these poles as its competitors do not); and (2) Verizon has no statutory right to nondiscriminatory pole access, as its competitors do. R.D. at 44-45.

Additionally, the ALJ found that the concepts of cost of common equity, cost of service and fully allocated cost-based rates are secondary to the FCC's pole attachment regulations adopted by this Commission; and therefore, any loss of revenue FirstEnergy experiences as a result of charging Verizon the new telecom rate must be recouped elsewhere. The ALJ explained that such issues can be addressed in FirstEnergy's next base rate proceeding where these additional concepts and case precedent can be fully vetted. R.D. at 48.

The ALJ noted the additional issues raised by the Parties, not relevant to the key issues in this case, unnecessarily complicate the issues and take the focus away from whether the requirements in Section 1.1413, as adopted by the Commission have been satisfied. For example, Verizon's argument that FirstEnergy's three-to-one pole ownership advantage provides superior bargaining power simply complicates the issues, and is meritless, since the purpose of the JUAs is to ensure Verizon and FirstEnergy work together to provide safe and adequate utility services and just and reasonable rates to as many Pennsylvanians as possible while deploying broadband services. Therefore, it cannot be said that one has leverage over the other based on the number of poles each own. R.D. at 49.

The ALJ further supported his discussion and findings with the following statements, aligning his recommendation with the Commission's goals:

> This determination is consistent with the Commission's goal in its Final Rulemaking Order that reverse pre-empting the FCC's pole attachment authority will help to promote the deployment of broadband services in Pennsylvania. As

> discussed above, the Commission has noted that reverse pre-empting the FCC's jurisdiction over pole attachments "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" and that "its assertion of jurisdiction over pole attachments will assist in spurring investment in, and access to, physical infrastructure used to deliver essential broadband access service to end-user customers." The use of the new telecom rate will help to achieve these goals and, with lower pole attachment rates ordered through this decision, help Verizon increase its deployment of broadband services throughout Pennsylvania.

R.D. at 50.

2. Exceptions and Replies (FirstEnergy Exception Nos. 4-6)

FirstEnergy's second set of Exceptions challenges the ALJ's determination that the new telecom rate is the just and reasonable competitively neutral rate because: (1) the JUAs were renewed after the effective date of the FCC's implementing regulation, 47 C.F.R. § 1.1413(b), which was March 11, 2019; and (2) FirstEnergy does not provide Verizon a net material advantage under the JUAs as compared to the terms and conditions it provides Verizon's competitors. R.D. at 9 (Finding of Fact No. 15) and 42; FirstEnergy Exc. at 15-27.

a. Did the ALJ Err by Ignoring FCC Precedent in the Resolution of this Proceeding? (FirstEnergy Exception No. 4)

In its fourth Exception, FirstEnergy argues that the ALJ ignored FCC precedent, which it claims has "repeatedly [ ] rejected the relief sought by Verizon." FirstEnergy cites to three specific FCC decisions: (1) *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Proceeding No. 19-187;

Bureau ID No. EB-19-MD-006 (Memorandum Opinion and Order adopted May 20, 2020) (*FPL 2020 Order*); (2) *Verizon Virginia, LLC and Verizon South, Inc. v. Virginia Electric and Power Company d/b/a Dominion Virginia Power*, Proceeding No. 15-190; Bureau ID No. EB-15-MD-006, 32 FCC Rcd 3750, 2017 FCC LEXIS 1304 (2017) *(Dominion Order*); and (3) *Verizon Florida LLC v. Florida Power and Light Company*, Proceeding No. 14-216, Bureau ID No. EB-14-MD-003, 2015 LEXIS 441, 30 FCC Rcd 1140 (*FPL 2015 Order*). FirstEnergy Exc. at 16. FirstEnergy contends that in each of these three cases, regarding rates an ILEC pays an electric utility under the JUAs, the FCC has rejected the ILEC's requests to insert the new telecom rate into a JUA that was not a new agreement. FirstEnergy argues that the ALJ failed to distinguish or even cite to these decisions in his disposition of this case, and in doing so ignored the fact that the relief that Verizon seeks is completely unsupported by any prior FCC decision. FirstEnergy Exc. at 16-17.

In its Reply Exceptions, Verizon retorts that the ALJ has not ignored these FCC decisions, as FirstEnergy has claimed, but considered them and provided recommendations consistent with them, and that FirstEnergy's attempts to prove otherwise misrepresent FCC precedent. Verizon R. Exc. at 7-8. Specifically, Verizon asserts that since the date the Commission assumed jurisdiction over pole attachments, March 11, 2019, the effective date of the FCC's implementing regulation, 47 C.F.R. § 1.1413(b), the FCC has not yet decided a case under the new telecom rate presumption. Verizon R. Exc. at 7.

Secondly, Verizon contends that the three decisions, upon which FirstEnergy's argument relies, are interim decisions, for which a final decision was not (or has not yet been) issued. Verizon R. Exc. at 8. Furthermore, Verizon asserts that

FirstEnergy presented a conflicting argument in its Briefs;[16] however, despite FirstEnergy's sudden "about-face," the ALJ nonetheless discussed the cases and FirstEnergy's arguments about them. *Id.* (citing R.D. at 30 ("First Energy argued that even if the Commission relies on FCC precedent…"), 34 ("Verizon also refuted FirstEnergy's argument about a different electric utility's agreement with a different ILEC" in a different FCC pole attachment complaint proceeding)). Verizon posits that FirstEnergy's conflicting argument in its Briefs arose based on the following reason:

> Two of the decisions expressly invalidate joint use agreement rates as "unjust and unreasonable" and all three emphasize that "competitive neutrality counsels in favor of affording [I]LECs *the same rate* as the comparable [broadband] provider,' *i.e., the New Telecom Rate*" where, as here, "FirstEnergy does not provide Verizon a net material competitive advantage under the joint use agreements."

Verizon R. Exc. at 8 (citations omitted).

b. Did the ALJ Err by Concluding that the Joint Use Agreements were "Entered into or Renewed" After the Effective Date of 47 C.F.R. § 1.1413? (FirstEnergy Exception No. 5)

In its fifth Exception, FirstEnergy excepts to the ALJ's determination that the JUAs at issue were "entered into or renewed" after the effective date of 47 C.F.R. § 1.1413(b). As such, FirstEnergy contends that the ALJ "erroneously concludes that 'the new telecom rate presumption in the Commission's [R]egulations, adopting the FCC's regulations, applies' to the Joint Use Agreements at issue." FirstEnergy Exc. at 17-18 (citing R.D. at 40-43).

[16] FirstEnergy argued in its Briefs that the Recommended Decision should not consider these three prior FCC decisions "controlling precedent" and should find they "are distinguishable from this case." *See* R.D. at 15 (citing FirstEnergy M.B. at 16), 17 (citing FirstEnergy R.B. at 7-8), 28 (citing FirstEnergy M.B. at 36-39), 40 (citing FirstEnergy R.B. at 48).

FirstEnergy disagrees with the ALJ's reasoning that although the initial terms of the JUAs all expired in 1993,[17] the provision stating the agreements "shall continue"[18] thereafter means each JUA "automatically renews and extends" the agreement, rendering them subject to the *2018 Pole Attachment Order*'s presumption.[19] FirstEnergy Exc. at 18-19.

First Energy's main argument in excepting to the ALJ's conclusion on this issue opposes the idea that the JUAs should be considered "newly renewed" because they allegedly contain an automatic renewal provision and asserts that the *2018 Pole Attachment Order*'s presumption should only apply if FirstEnergy chooses to take "some action" after March 11, 2019 to "trigger" the presumption, which FirstEnergy asserted it has not. FirstEnergy Exc. at 17-18; FirstEnergy M.B. at 64-65.

FirstEnergy maintains that the ALJ's interpretation simply attempts to read the word "continue" out of the JUAs and replace it with the term "renew." In a similar manner, FirstEnergy argues that the ALJ's interpretation attempts to read additional words into Section 1.1413(b) of the FCC's regulations, as the word "continue" does not appear, but clearly states that the presumptions set forth only apply to agreements that

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[17] The initial term of the JUAs varies from one to five years, but the initial term for all of the JUAs had expired by January 1, 1993. *See*, *e.g.*, Verizon St. No. 1, Exh. SCM-2 at VZ00180 (Art. XX) (1-year initial term), VZ00333 (Art. XXI) (5-year initial term), VZ00449 (Art. XXI) (stating that initial term would expire "five (5) years from the [January 1, 1988] effective date hereof" meaning that the initial term expired on January 1, 1993).

[18] Each JUA states that, after an initial term, the agreement "*shall continue* in force thereafter until terminated by either Party at any time" upon advance written notice. See Complaint at ¶ 16.

[19] The *2018 Pole Attachment Order* explained that the presumption applies to a broad set of JUAs – specifically, all agreements "entered into, renewed, or in evergreen status after [March 11, 2019]," including all "agreements that are automatically renewed, extended or placed in evergreen status." *2018 Pole Attachment Order*, 33 FCC Rcd at 7770.

were "entered into or renewed after the effective date" of this regulation. FirstEnergy contends that the ALJ's interpretation effectively tries to revise language to achieve a specific result. FirstEnergy Exc. at 18.

In its Reply Exceptions, Verizon notes that FirstEnergy's argument is undermined by the rulemaking comments it filed with the Commission, where it stated:

> The FCC's regulations provide new lower rates for [ILECs] – primarily traditional telephone utility companies -- that extend not only to new pole attachment agreements but also to existing agreements that are "renewed" after the effective date of the new regulations. **Since the initial term of most existing joint use agreements have expired and are operating on year-to-year renewals, this means that within a year most joint use agreements will be subject to the new rate rules.** For any such new and "renewed" agreements, the ILEC would be presumed to get the FCC's new lower rate…

Verizon R. Exc. at 9 (citing FirstEnergy Rulemaking Comments at 8). Verizon notes that the JUAs at issue fall squarely within this category of agreements. *Id*.

Verizon supports the ALJ's findings, asserting that the Recommended Decision correctly determined that the presumption applies since the JUAs automatically renewed in the last year because they "continued" to govern, absent termination. Verizon R. Exc. at 10. Verizon reiterates the ALJ's conclusions:

> FirstEnergy's contrary arguments are "overly technical and formalistic" and would render the presumption incapable of achieving its purpose. As the RD explains, the presumption "was designed to eliminate outdated rate disparities in the existing agreements in an effort to promote broadband deployment and the deployment of other advanced technologies." And so the presumption must apply to the many joint use agreements that automatically renew

following an initial term, because they are the agreements that contain the outdated rate disparities.

Verizon R. Exc. at 9-10 (citing R.D. at 42-43).

c. Did the ALJ Err by Concluding that FirstEnergy Failed to Demonstrate that Verizon Receives Quantifiable Material Advantages Under the Joint Use Agreements? (FirstEnergy Exception No. 6)

In its sixth Exception, FirstEnergy maintains that it has demonstrated that Verizon receives substantial material advantages under the JUAs, and therefore, is not entitled to the presumptions that it is similarly situated to its competitors or should receive the new telecom rate. FirstEnergy Exc. at 21.

FirstEnergy contends that the ALJ's finding on this issue warrants reversal for four specific reasons. To begin, FirstEnergy argues that a contributing factor inhibiting it from meeting its burden of proof on this issue was the limited discovery available in this proceeding, making it impossible to quantify the value of net material competitive benefits FirstEnergy provides Verizon under the JUAs. FirstEnergy claims the only way for it to demonstrate that Verizon experiences cost-savings or revenue benefits in comparison to its competitors is by obtaining information that is exclusively within Verizon's control. FirstEnergy Exc. at 21-23.

Second, FirstEnergy contends that the ALJ erred by simply rejecting all of the material advantages identified by FirstEnergy. FirstEnergy argues that the evidentiary record demonstrates that Verizon receives numerous material benefits including obtaining a speed-to-market advantage, not paying certain up-front work costs, avoiding attachment application fees, occupying better locations on the Companies' poles. FirstEnergy Exc. at 23-24 (citing FirstEnergy R.B. at 34-35). According to

FirstEnergy, these benefits are not available to its competitors and the ALJ acknowledged that FirstEnergy "is giving Verizon the benefits of a first-class airline seat at coach prices." FirstEnergy Exc. at 23 (quoting R.D. at 50). Moreover, FirstEnergy contends that the ALJ failed to conduct even a cursory analysis of the fundamental differences of the advantages Verizon receives under the JUAs compared with the third-party license agreements of competitors who attach to the Companies' poles. FirstEnergy Exc. at 24.

Third, FirstEnergy proffers that the ALJ erred in considering the alleged disadvantages that Verizon receives under the JUAs as a pole owner. Specifically, FirstEnergy references the statement that Verizon has 110,000 joint use poles of its own that it shares with the Companies which Verizon's competitors do not have to maintain. FirstEnergy Exc. at 24-25 (citing R.D. at 45). According to FirstEnergy, this purported disadvantage has nothing to do with Verizon's status as an attacher under the JUAs; it is only relevant to its status as a pole owner. FirstEnergy emphasizes that the *2018 Pole Attachment Order* makes clear that the relevant comparison is whether an ILEC as a pole attaching entity receives some material benefits under a JUA in comparison to their competitors as attaching entities under third-party agreements. FirstEnergy submits that Verizon's costs as a pole owner are irrelevant to the comparison of its costs as an attacher to other non-pole-owning attachers and, thus, the R.D. erred in concluding these costs offset the benefits Verizon receives under the JUAs. FirstEnergy Exc. at 25.

In its fourth argument, FirstEnergy asserts that the ALJ failed to consider or analyze the FCC's recent decision in the *FPL 2020 Order* which identified benefits pertinent to rebutting the presumption established under the FCC's regulations. Specifically, FirstEnergy contends that the *FPL 2020 Order* recognized the following benefits as a material advantage for an ILEC pole attacher: guaranteed access, reservation of space, ILEC not subject to inspection fees, and ILEC not subject to license preparation and administrative fees. Additionally, FirstEnergy emphasized that these benefits did not

contain or require an analysis of the quantification of an associated dollar amount for each benefit. FirstEnergy Exc. at 26-27.

In its Replies, Verizon retorts that the discovery process is not to blame for FirstEnergy's evidentiary failures, explaining that FirstEnergy has access to all the relevant evidence needed to meet its burden of proof. For instance, if FirstEnergy incurred an unreimbursed cost because it provided Verizon a net material competitive advantage under its JUAs as compared to its license agreements, FirstEnergy would have the relevant data to substantiate it. Furthermore, Verizon argues that "FirstEnergy propounded discovery when this case was pending at the FCC and was allowed to take unlimited discovery after this case was transferred to the Commission. It filed two motions to compel; each was correctly denied and neither sought the information FirstEnergy now complains about in its sixth exception." Verizon R. Exc. at 12.

Verizon also denies each of the contentions that it receives material advantages under the JUAs regarding alleged speed-to-market advantages, up-front work costs, application fees, and location and reservation space on the poles. Additionally, Verizon submits that Section 1.413(b) adopted by the Commission presumes that JUAs and license agreements are comparable and should include the same new telecom rate absent proof otherwise. Verizon asserts that FirstEnergy failed to provide such contrary proof and the ALJ correctly applied the new telecom rate. Verizon R. Exc. at 13-15.

Verizon challenges the competitive advantages proffered by FirstEnergy, arguing that FirstEnergy's efforts to justify its pole attachment rates under the standard set forth in the *2018 Pole Attachment Order* do not survive scrutiny. Verizon contends that FirstEnergy fails to distinguish Verizon from its competitors or prove that a competitive advantage justifies a substantially higher annual rate per pole. Verizon claims that FirstEnergy also failed to account for any unique disadvantages that apply to

Verizon under the JUAs as compared to license agreements, such as Verizon's unique pole ownership costs. Verizon R. Exc. at 15-16.

Furthermore, Verizon distinguishes the *FPL 2020 Order* as an interim decision and one which did not decide whether benefits were net material competitive advantages sufficient to rebut the new telecom rate presumption. Verizon R. Exc. at 16.

3. Disposition

We generally agree with the ALJ's disposition of the issues relating to his determination that the "new telecom rate" is applicable under the Code, Commission and FCC regulations, and precedent except as specifically addressed in this Opinion and Order.

Regarding FirstEnergy Exception No. 4, we reject the argument that the ALJ ignored applicable FCC precedent. In the *2019 Final Rulemaking Order*, we explained that FCC orders and court decisions interpretating those orders will be considered persuasive and not controlling precedent. We noted that such an interpretation leaves room for us to develop precedent relevant to broadband deployment throughout and applicable to the Commonwealth but in a manner that also reflects Pennsylvania law. Although we recognized the usefulness of acknowledging FCC practice and experience interpreting its pole attachment rules, we emphasized our anticipation of challenges to the federal rules that may come before us and which have yet to be adjudicated on the federal level. Similarly, we noted potential differences in interpretation by the FCC, which is responsible for developing a nationwide scheme, that may not align with Pennsylvania interests. *2019 Final Rulemaking Order* at 50.

We also note that we promulgated Section 77.5(c) of our Regulations, which provides that FCC orders promulgating and interpreting Federal pole attachment

rules and Federal court decisions reviewing those rules and interpretations will be considered as persuasive authority. 52 Pa. Code § 77.5(c). Additionally, we concluded that:

> Our language in Section 77.5(c) does not preclude the Commission from using its discretion to form separate interpretations to benefit the Commonwealth. *FCC orders are persuasive, meaning that they do not establish binding precedent that the Commission would follow regardless of whether any particular application would be rational under a set of given circumstances*.

2019 Final Rulemaking Order at 51 (emphasis added).

In the Recommended Decision, the ALJ determined that a strict reading of Section 1.1413 of the FCC regulations requires a rejection of FirstEnergy's arguments that Verizon is not entitled to the new telecom rate. The ALJ explained that such a reading of Section 1.1413 is supported by the *2019 Final Rulemaking Order* and that this interpretation of Section 1.1413 helps simplify the issues in this case. R.D. at 46, 49. Here, we find that the ALJ's recommendation was consistent with our guidance in the *2019 Final Rulemaking Order* that FCC orders would not be binding on the Commission. Moreover, considering that the three decisions upon which FirstEnergy's argument relies – *FPL 2020 Order*, *Dominion Order*, and *FPL 2015 Order* – appear to have been interim decisions and that the Companies distinguished and discounted the relevance of each of these cases,[20] we find no error in the ALJ's interpretation in Section 1.1413. Accordingly, we shall deny FirstEnergy Exception No. 4.

[20] For example, FirstEnergy highlighted our interpretation of the *2019 Final Rulemaking Order* and specifically stated that since the "three FCC orders addressing the rates to be paid by an ILEC under a joint use agreement neither resolved nor addressed the facts and issues in this proceeding, the Commission cannot and should not exclusively rely on FCC authority to determine this case." FirstEnergy R.B. at 48-49.

Upon review, we shall also deny FirstEnergy Exception No. 5 relating to whether the JUAs were renewed after the effective date of 47 C.F.R. § 1.1413. Under the FCC's regulations adopted by the Commission, in complaint proceedings challenging pole attachment rates for contracts entered into or renewed after March 11, 2019, there is a rebuttable presumption that an ILEC may be charged no higher than the rate determined in accordance with Section 1.1406(d)(2) of the FCC's rules. The Recommended Decision determined that this rebuttable presumption applies to the JUAs in this proceeding. In making this determination, the ALJ found that initial terms of each agreement have expired and that the JUAs have been automatically extended and will continue as evergreen contracts until terminated. Thus, the ALJ found that the JUAs were entered into and renewed after the effective date of Section 1.1413(b).

We agree with this disposition. A "renewed" contract as that term is used in Section 1.1413(b) of the FCC's regulations includes one that is in evergreen status after March 11, 2019. Upon review, the ten JUAs in this case are evergreen contracts.[21] As evergreen contracts, they were extended indefinitely upon the expiration of their original 1-year or 5-year terms until terminated by one of the parties, which has not occurred with any of the agreements.[22] Thus, the JUAs were evergreen contracts after March 11, 2019, which means that "new telecom rate" presumption applies in this case.

Our disposition is consistent with applicable state and federal law. The proposed resolution of this issue is consistent with the Commission's authority under

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[21] *See Joint Petition of Direct Energy Business Marketing, LLC and Community Energy, Inc. to Certify Electric Production from Ten Out-Of-State Facilities through Reporting Year 2019 as Eligible to Satisfy Tier I Solar Photovoltaic Share Alternative Energy Credits Requirements*, Docket No. P-2019-3007245 (Order entered April 30, 2020) (*DEMB*). In that case, the Commission concluded that the relevant contracts were evergreen contracts because they extended indefinitely, in one-year periods, until one of the parties terminated the agreements.

[22] According to the record evidence in this case, the initial term of the last of these contracts expired in 1993, and none of them have been terminated by either party.

Section 508 of the Code and with Commission precedent on evergreen contracts; namely, the *DEBM* decision in which the Commission concluded that contracts continuing or extending indefinitely until one of the parties terminated the agreement were evergreen contracts. Finally, the proposed resolution of this issue is consistent with federal law, including relevant FCC precedent that treats evergreen contracts as renewed contracts under Section 1.1413(b) of the FCC's rules, which triggers the application of the rebuttable presumption in favor of new, lower pole attachment rates.[23]

Regarding FirstEnergy Exception No. 6 relating to whether Verizon receives material advantages under the JUAs, we agree with the ALJ's finding that the Companies failed to rebut the presumption under Section 1.1413(b) of the FCC regulations. Specifically, the Recommended Decision determined that based on the record evidence, FirstEnergy has failed to show Verizon receives benefits under the JUAs that materially advantage it over other entities providing telecommunications services on the same poles. Thus, the ALJ concluded that FirstEnergy has failed to rebut the presumption that Verizon is entitled to the new pole attachment rates.

Based on the record evidence in this case, we agree that FirstEnergy failed to rebut the presumption that Verizon is entitled to the new, lower pole attachment rates. Here, Verizon established that the new telecom rate is the just and reasonable competitively neutral rate because FirstEnergy does not provide Verizon a net neutral advantage under the JUAs as compared to the terms and conditions it provides Verizon's competitors. The ALJ determined, and we agree, that the JUAs are comparable to

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[23] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Development*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018), para. 127, n.475; *see also Verizon Maryland LLC v. Potomac Edison Company*, Docket No. 19-355, FCC 20-167, Memorandum Opinion and Order rel. November 23, 2020, para. 7, n.20 (*Verizon Maryland*). According to the FCC, a new or newly-renewed pole attachment agreement is one entered into, renewed, or in evergreen status after March 11, 2019, and renewal includes agreements that are automatically renewed, extended, or placed in evergreen status.

FirstEnergy's license agreements with Verizon's competitors because Verizon, like its competitors, must bear the costs associated with placing, maintaining, rearranging, transferring, and removing its attachments; make a written application for space on FirstEnergy's poles; comply with FirstEnergy's construction specifications; and accommodate third parties attached to FirstEnergy's poles. See R.D. at 9 (citing Verizon St. No. 1.0, Exhs. SCM-1 and SCM-2).

Furthermore, the ALJ appropriately considered the advantages and disadvantages advanced by the Parties, but concluded that, overall, the material advantages proffered by FirstEnergy, are outweighed by the disadvantages experienced by Verizon. For example, the ALJ rejected FirstEnergy's argument that Verizon is materially advantaged because Verizon can overlash its existing facilities to reach new customers. The ALJ reasoned that any benefit received for overlashing is a result of Verizon placing its original facilities on the poles in the first place. The ALJ explained that Verizon's actions in this regard should not prevent it from obtaining the new telecom rate; rather Verizon should be commended for utilizing its existing facilities to benefit existing customers by overlashing. Additionally, the ALJ found FirstEnergy's claim that Verizon can simply "notify and attach" to FirstEnergy's poles as being insufficient to rebut Verizon's presumption to receiving the new telecom rate. The ALJ also correctly reasoned that the field audit costs that Verizon forgoes in relation to its competitors, citing the per pole yearly cost, fails to overcome the presumption under Section 1.1413. Moreover, the ALJ discounted the purported material advantage related to FirstEnergy's vegetation management program. Explaining that vegetation management around poles and wires benefits all attachers, the ALJ logically explained that such a program cannot be considered as a material advantage to one particular attacher. R.D. at 44-45.

Furthermore, the ALJ emphasized the disadvantages Verizon experiences as a result of the existing JUAs.

> The [JUAs] disadvantage Verizon as compared to its competitors because, among other things, unlike its competitors, Verizon must "at its sole expense" determine the condition of more than 110,000 joint use poles that it owns and shares with FirstEnergy, keep them "in a safe and serviceable condition," and replace or repair its poles as they become defective.

R.D. at 10 (citing Verizon St. No. 1.0, Exh. SCM-1).

In addition to the well-reasoned analysis by the ALJ, we note that Verizon has set forth sufficient evidence to show that FirstEnergy does not provide Verizon a material net advantage under the JUAs. For example, Verizon presented evidence that it does not incur fewer make-ready costs than its competitors and lacks any competitive advantage with respect to application fees because FirstEnergy does not charge application fees to Verizon or other attachers. *See* Verizon R.B. at 21-22, 25.[24] Verizon also provided evidence that the location of Verizon's facilities on the Companies' poles does not provide a competitive advantage, highlighting instead the various disadvantages such as exposure to more damage from oversized vehicles, vandalism and similar hazards. *See* Verizon M.B. at 50-51.[25] Moreover, Verizon established that it does not

[24] Citing, in part, Verizon St. No. 1.1 at 13-19, 22-23,Verizon St. No. 2.1 at 37-38, and Verizon St. No. 3.1 at 27-29.

[25] Citing, in part, Verizon St. No. 1.0, Exh. SCM-1 at VZ00030-31, Verizon St. 1.1 at 30-31, Verizon St. No. 1.2 at 18-19, and Verizon St. No. 1.1 at Exh. SCM-24.

receive reserved space on FirstEnergy's poles under the terms of the JUAs. *See* Verizon St. No. 1.1 at 29.[26]

In contrast, FirstEnergy did not attempt to rebut the presumption by entering into evidence its license agreements with Verizon's competitors and offering a comparison of their terms to those in the JUAs in this proceeding. Rather, the only evidence of FirstEnergy's license agreements was provided by Verizon. *See* Verizon St. No. 1.0, Exh. SCM-3 at VZ00505-530. Thus, the evidence in record provides support for the arguments that Verizon and its competitors attach to FirstEnergy's poles on materially comparable terms and conditions. *See* Verizon M.B. at 38-51, Verizon R.B. at 19-26.

Accordingly, we agree with the ALJ that FirstEnergy has failed to demonstrate by a preponderance of the evidence that Verizon receives material advantages under the JUAs sufficient to rebut Verizon's demonstration that it is entitled to the new telecom rates when attaching to the Companies' poles. However, we do not agree with the dictum in the Recommended Decision, which is contrary to the conclusion therein, that by applying the FCC's new pole attachments rates "the Commission is giving Verizon the benefits of a first-class airline seat at coach prices." *See* R.D. at 50. In this Opinion and Order, we are applying applicable law and in accordance with that

[26] We note that in *Verizon Maryland*, *supra*, the FCC recently determined that the JUA in that proceeding provided Verizon Maryland with material advantages over CLEC and cable attachers on the same poles. However, we emphasize our reasoning above that the Commission is not bound by FCC orders interpreting FCC regulations but that we consider such rulings only as persuasive authority. Additionally, it appears that the record in *Verizon Maryland* contains distinguishing features from the evidence in this proceeding. For example, the JUA in *Verizon Maryland* guaranteed Verizon Maryland space on Potomac Edison's poles and contained no explicit make-ready provisions whereas some of Verizon Maryland's competitors have explicit make-ready obligations in their license agreements. Also, it appears that no application fees were charged to Verizon Maryland but that its competitors must pay such charges. *Verizon Maryland*, Docket No. 19-355, FCC 20-167, para. 20.

law, determining resulting rates. Therefore, we reject this unnecessary and unsupported statement and shall modify the Recommended Decision to remove this reference.

Lastly, as discussed in more detail blow, we conclude that the Recommended Decision properly dismissed Verizon's argument that FirstEnergy has superior bargaining power because of the three-to-one pole ownership advantage.

C. Lawful Rates Going Forward Under Existing Joint Use Agreements.

1. Recommended Decision

As discussed in the previous section, the ALJ concluded that substantial record evidence exists demonstrating that the current pole attachment rates that FirstEnergy charges Verizon are unjust and unreasonable under the JUAs because they are not determined using the new telecom rate, pursuant to Sections 1.1413(b) and 1.1406(d)(2) of the FCC's regulations, as adopted by the Commission in Section 77.4 of the Commission's Regulations. Consistent with this finding and recognition that the new telecom rate formula sets fully compensatory per-pole rates using a pole owner's prior-year reported cost data and presumptive inputs that are in the Commission's Regulations (*See* 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. §§ 1.1406(d)(2), 1.1409, 1.1410)), the ALJ found that the "properly calculated new telecom rates for Verizon's use of FirstEnergy's poles" during the years for which relevant cost data is available are:

New Telecom Rates for Verizon's Use of FirstEnergy's Poles (per pole)									
Rental Year	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Met-Ed poles	$8.29	$9.87	$10.07	$5.02	$9.35	$8.79	$9.55	$12.20	$13.83
Penelec poles	$6.43	$6.79	$7.18	$5.21	$6.96	$7.18	$7.49	$10.49	$9.07
Penn Power	$7.30	$8.47	$8.51	$8.21	$8.94	$9.40	$9.08	$11.18	$11.80

R.D. at 8-9 (Finding of Fact No. 11).

The Recommended Decision then provided that "the rates going forward" will be "the same" (meaning they will be calculated in the same manner when the relevant cost data becomes available[27]). R.D. at 66, 69 ("The rates that Verizon pays FirstEnergy to attach to its poles will be determined using the new telecom rate methodology going forward."); R.D. at 56 ("[G]oing forward, the rates that First Energy charges Verizon to attach to its poles should be determined based on the new telecom rates."). The ALJ explained that doing so would be consistent with Section 1.1407(a)(2) of the FCC's regulations adopted by the Commission through the *2019 Final Rulemaking Order*.[28] The ALJ concluded that the new telecom rate should therefore be substituted into the JUAs and govern Verizon's attachment to FirstEnergy's poles going forward. R.D. at 56-57.

The ALJ added that since FirstEnergy should have been charging Verizon the new telecom rate as of March 11, 2019, Verizon will be entitled to refunds beginning

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[27] The ALJ stated on page 57 of his Recommended Decision "to the extent required in the new telecom rate formula, factors such as the cost of capital should be current." Finding that the new telecom rate was effective March 11, 2019, the ALJ explained that "the cost of capital used in determining the new telecom rate should be the cost of capital as of March 11, 2019." R.D. at 57.

[28] Section 1.1407(a)(2) provides that:

> **§ 1.1407 Remedies.**
>
> (a) If the Commission determines that the rate, term or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term or condition and may:
>
> * * *
>
> (2) Substitute in the pole attachment agreement the just and reasonable rate, term or condition established by the Commission.

See 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1407(a)(2).

with that date, as discussed below. The ALJ stated that to the extent that FirstEnergy wishes to defer and record as a regulatory asset the difference between the existing rates and the new rates and recover the difference in its next base rate case, FirstEnergy is free to make such an argument during its next base rate proceeding. R.D. at 59.

2. Exceptions and Replies (FirstEnergy Exception Nos. 7-10)

a. Did the ALJ Err by Inserting the New Telecom Rates into the Joint Use Agreements? (FirstEnergy Exception No. 7)

In its third set of Exceptions, FirstEnergy again cites to previously postulated arguments delineated in its testimony and briefs and opines that the ALJ simply ignored its argument that the JUAs are fundamentally different from FirstEnergy's pole attachment license agreements and, therefore, it is not appropriate to use the new telecom rate formula to determine the rates Verizon pays FirstEnergy under the JUAs going forward. FirstEnergy posits that the ALJ compounded this error through his: (1) rejection of FirstEnergy's calculated inputs in favor of less credible calculations offered by Verizon, and (2) inconsistent rulings on the correct rates going forward. FirstEnergy Exc. at 27-31.

In its Exception No. 7, FirstEnergy explains that the JUAs are fundamentally cost-sharing agreements that were negotiated on the basis of Verizon and FirstEnergy sharing in the fully allocated costs of owning a given pole. The new telecom rate, however, is an incremental cost-based rate, which eliminates the allocation of common costs associated with common space; it is not a fully allocated cost-based rate. FirstEnergy maintains that the problem with Verizon's request is that it inserts an incremental cost-based rate into agreements that are fundamentally not designed around the sharing of incremental costs. Thus, FirstEnergy contends that to the extent that the Commission seeks to replace the existing cost-sharing agreement and impose the new

telecom rate in the pole attachment agreements between Verizon and FirstEnergy for reasons of "competitive neutrality," it should order the Parties to use FirstEnergy's standard third-party attacher license agreement for Verizon's attachments to FirstEnergy's poles. In this regard, FirstEnergy argues Verizon would receive the new telecom rate (*i.e.*, the same rate Verizon's competitors pay FirstEnergy to attach to FirstEnergy's poles) under truly comparable terms and conditions to its competitors. FirstEnergy Exc. at 27 (citing FirstEnergy M.B. at 81-82 (describing the purported fundamental differences between the JUAs and third-party attacher license agreements); FirstEnergy R.B. at 16).

In reply, Verizon cites to Section 77.4(a) of the Commission's Regulations, which it argues presumes the lawful rate under the existing JUAs is the new telecom rate. Verizon argues that FirstEnergy previously admitted that the FCC "explicitly stated" the new telecom rate presumption in its regulations will apply "to existing contracts," and since the Commission already decided that Verizon can be "in no worse position…than if the Commission did not assume jurisdiction," the new telecom rate presumption is correctly applied to the JUAs. Therefore, Verizon asserts that FirstEnergy's seventh Exception, based on the contention that the new telecom rate cannot be obtained through the existing JUAs simply because they are different from license agreements, should be rejected. Verizon R. Exc. at 17-18.

b. Did the ALJ Err by Rejecting the Unrebutted Actual Inputs into the FCC Rate Formulas Prepared by FirstEnergy? (FirstEnergy Exception No. 8)

In its eighth Exception, FirstEnergy maintains its argument that the Commission should forgo the FCC's presumed inputs in favor of FirstEnergy's calculated inputs for purposes of establishing a new rate, in part because the actual

conditions in FirstEnergy's service territories significantly differ from the FCC's presumed inputs. FirstEnergy Exc. at 28.

First Energy argues that the ALJ erred by rejecting its rebuttal of the FCC's presumptive inputs for use in calculating rates, such as pole height, space occupied, unusable space, and average number of attaching entities.[29] Specifically, FirstEnergy notes that, contrary to the ALJ's findings, it has successfully rebutted the FCC's presumptions that the average number of attaching entities is 5 (demonstrating rather that there are approximately 3 attachments on each of its poles) and that Verizon occupies on average 1 foot of space (demonstrating that each attachment occupies approximately 1.3 feet of space). *Id.* FirstEnergy excepts to the ALJ's adoption of Verizon's position that FirstEnergy's study was motivated by, and prepared during the course of, litigation and is not reliable due to the small sample size and certain alleged errors. FirstEnergy Exc. at 28-29.

FirstEnergy argues that the fact that its study was prepared during the course of litigation is irrelevant and should not invalidate its credibility. FirstEnergy Exc. at 29. Further, FirstEnergy contends that the size of the sample used is likewise irrelevant because the "incontrovertible fact is that the validity of the sample, including

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[29] The FCC's new telecom rate formula assigns annual pole costs as follows:

$$Space\ Factor = \frac{Space\ Occupied\ +\ \frac{2}{3}\ \frac{Unusable\ Space}{Average\ Number\ of\ Attachers}}{Pole\ Height}$$

See 47 C.F.R. § 1.1406(d)(2)(i). The FCC's rules include presumptions for these inputs, as adopted by the Commission's Regulations. 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. §§ 1.1409 (presumptive average of 5 attaching entities), 1.1410 (presumptions that space occupied by a communications provider is 1foot, unusable space is 24 feet, and pole height is 37.5 feet)). Using these presumptions, the space factor is 11.2 percent, which is the value Verizon used when calculating new telecom rates for use of FirstEnergy's poles.

all attributes verified, is substantially above the industry-accepted standard for accuracy," and that "even after counting the actual alleged errors identified by Verizon, the sample still has a *99.30% accuracy rate*." FirstEnergy Exc. at 28 (citing FirstEnergy St. No. 6-RJ at 4-5).

In response, Verizon supports the ALJ's finding, stating that FirstEnergy's inputs were not rejected by the ALJ based solely on the fact that they were produced during litigation, but because FirstEnergy did not provide "probative direct evidence."[30] Verizon explains that FirstEnergy had not entered any data into evidence, only a summary of the results of its hurried and litigation-motivated review of, at most, *****BEGIN PROPRIETARY*** ***END PROPRIETARY***** percent of the poles shared by the Parties in Pennsylvania, including poles to which Verizon is not attached. Moreover, Verizon adds that FirstEnergy's hurried review produced data with so many admitted errors that FirstEnergy conceded they reduce the "confidence level" of the reported results. Verizon R. Exc. at 18 (citing Verizon St. No. 1.1 at 50-59; Verizon St. No. 1.2 at 34-42; Verizon St. No. 2.1 at 23-30; Verizon St. No. 2.2 at 18-19; Verizon St. No. 3.1 at 35-42; Verizon St. No. 3.2 at 16-17). Therefore, Verizon asserts that since FirstEnergy's study should not be considered sufficient evidence to rebut the FCC's presumptions, the properly calculated new telecom rates must use the FCC's presumptive inputs.

[30] Inputs that vary from the regulations must be supported by valid and "probative direct evidence" about the poles for which rates are being set. *See, e.g., In the Matter of Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387, 4394, para. 52, n.27 (1987) (*Attachment of Cable Television Hardware to Utility Poles*); *see also In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996, Consolidated Partial Order on Reconsideration*, 16 FCC Rcd 12103, 12139, para. 70 (2001) (*Consolidated Partial Order on Reconsideration*).

c. Did the ALJ Err by Failing to Determine the Current Cost of Capital in Computing the Rates Under the Joint Use Agreements? (FirstEnergy Exception No. 9)

In addition to FirstEnergy's objections to the ALJ's reliance on the FCC's presumptive inputs, FirstEnergy argues that the ALJ should have denied Verizon's Complaint due to its complete failure to present any evidence regarding the current cost of capital in computing the rates under the JUAs. FirstEnergy excepts to the ALJ's recommendation on this issue, which is delineated in its Exception No. 9. FirstEnergy Exc. at 29-30.

FirstEnergy maintains that Verizon presented no evidence regarding the cost of capital, including the cost of common equity. *Id.* As explained by FirstEnergy, the determination of the cost of common equity capital is a fundamental element of ratemaking and provides the standard for determining whether current rates are just and reasonable. FirstEnergy Exc. at 29 (citing FirstEnergy M.B. at 41-43). The FCC's rate formulas (set forth on pages 21-22 of the R.D.) necessarily require the cost of capital to be known in order to calculate a rate. FirstEnergy explains that, although the ALJ acknowledges the utter lack of evidence presented by Verizon regarding the current cost of capital, he accepted Verizon's argument that the cost of capital factor used in the FCC rate formula should be current, erroneously rejecting FirstEnergy's arguments. FirstEnergy argues that the ALJ's findings on this issue are arbitrary, capricious, and violate FirstEnergy's due process rights. FirstEnergy Exc. at 29-30.

Verizon retorts that FirstEnergy's ninth Exception, arguing that Verizon "complete[ly] fail[ed] to present any evidence regarding the current cost of capital," is confusing and wrong. Verizon R. Exc. at 19 (citing FirstEnergy Exc. at 29). Verizon explains that in developing its new telecom rates, it used the most current information available, which it offered into evidence, as opposed to outdated cost of capital values set

in 2007, 1988 and possibly earlier, as suggested by FirstEnergy. Verizon maintains that FirstEnergy's approach ignores the Companies' current rate of return, in particular, its cost of equity component. Verizon R. Exc. at 19. Therefore, Verizon asserts that the ALJ correctly found Verizon's rate calculations are correct under the Commission's Regulations and "agree[s] with Verizon that…the cost of capital should be current." *Id*. (citing R.D. at 8-9, 57).

d. Did the ALJ Err by Making Inconsistent Rulings on the Correct Rates Going Forward? (FirstEnergy Exception No. 10)

In its Exception No. 10, FirstEnergy contends that the ALJ "render[ed] contradictory findings and conclusions regarding the new rate [he] recommend[ed] Verizon should pay going forward." FirstEnergy Exc. at 30.

FirstEnergy explains that the ALJ set forth the properly calculated new telecom rates for Verizon's use of FirstEnergy's poles in Finding of Fact No. 11, yet subsequently accepts Verizon's argument that factors used in calculating the new telecom rate going forward, such as the cost of capital, should be current, which lead to the ALJ recommending a compliance period during which time a larger investigation should be conducted to properly determine all inputs when establishing the specific rates going forward. FirstEnergy contends that Verizon's rate calculations cannot credibly be found to be the appropriate rate going forward, where the ALJ simultaneously concluded that additional investigation into the new telecom rate formula inputs is necessary. FirstEnergy Exc. at 30-31 (citing R.D. at 8-9, 57). Therefore, based on this inconsistency, *inter alia*, FirstEnergy asserts that Verizon's calculations of the new telecom rates going forward should be rejected and the Recommended Decision should be reversed on this issue. FirstEnergy Exc. at 31.

Contrary to FirstEnergy's assertions, Verizon argues that there are no inconsistencies in the ALJ's findings. The ALJ simply correctly determined the "properly calculated new telecom rate for Verizon's use of FirstEnergy's poles" for the 2011 through 2019 rental years, based on the available cost data, and required new telecom rates going forward to be calculated in "the same" manner using "current" data. Verizon R. Exc. at 19-20 (citing R.D. at 8-9, 57, 66). Verizon explains that the ALJ's recommendation on this matter is consistent with the Commission's Regulations, which require FirstEnergy to charge Verizon's competitors annually calculated new telecom rates using FirstEnergy's prior-year reported cost data. Verizon R. Exc. at 20.

3. Disposition

In considering the record evidence and arguments before us, along with the Exceptions and Reply Exceptions of the Parties, regarding FirstEnergy Exception No. 7 relating to insertion of the "new telecom rate" into the existing JUAs, we shall adopt the ALJ's recommendation that the just and reasonable rate for Verizon's use of FirstEnergy's poles, under the JUAs, is the competitively neutral new telecom rate required by the Commission's Regulations. As previously explained, Verizon has demonstrated that it is entitled to the new telecom rate under the FCC's regulations that the Commission has adopted because the JUAs were renewed after March 11, 2019 and because First Energy failed to rebut this presumption by showing that the joint use agreements provide Verizon material advantages.

Accordingly, we shall deny FirstEnergy Exception No. 7.

Regarding FirstEnergy Exception No. 8 relating to FirstEnergy's proposed rate inputs, we find that the ALJ properly rejected the Companies' attempt to rebut the use of the FCC's presumptive inputs in calculating the new telecom rates. Specifically, the ALJ found the data used to calculate the new telecom rates should not be data quickly

gathered during a review of a small set of poles in response to litigation. R.D. at 57.[31] We agree with the findings of the ALJ that FirstEnergy did not provide probative direct evidence sufficient to forgo the rate calculation inputs in the FCC regulations. Indeed, FirstEnergy's calculations, based on outdated rates of return and a limited, flawed, and skewed data set, are insufficient to rebut the FCC's presumptions and substitute for the default inputs required by the regulations. Accordingly, we shall deny FirstEnergy Exception No. 8.

Next, we shall address FirstEnergy Exception Nos. 9 and 10 addressing the cost of capital in computing the rates and the proper rates going forward. The Parties claim that there are errors in the specific calculations, and they dispute what date should apply if the rebuttable presumption regarding the new pole attachment rates is determined to apply to this dispute. The Recommended Decision on these matters determines that the cost of capital used in determining the new pole attachment rate should be the cost of capital as of March 19, 2019, ostensibly because of the effective date of the FCC's "new telecom rate" methodology. The Recommended Decision on these issues further recommends a 60-day compliance phase during which a further investigation would be conducted to properly address determine all inputs when establishing rate going forward and a refund created through the use of the "new telecom rate" methodology for pole attachments.

Upon review, we adopt Verizon's pole attachments rate inputs to calculate the "new telecom rate." We believe the record is sufficient to determine the correct pole attachment rates going forward. The record shows that Verizon relied upon the Commission's Quarterly Earnings Report from the 2nd quarter of 2017 to propose a 9.55%

[31] Here, under the facts and circumstances of this proceeding, we recognize as persuasive the FCC determinations in *Attachment of Cable Television Hardware to Utility Poles* and *Consolidated Partial Order on Reconsideration*, *supra* n.30, that inputs varying from the regulations must be supported by valid and probative direct evidence about the poles for which rates are being set.

rate of return as the basis for its cost of capital. The Commission's Quarterly Earnings Reports are reasonable, and in this case, persuasive vehicles to establish a cost of capital. In this case, a reasonable proposed rate of return is already in the record and should be used.[32]

FirstEnergy argued that Verizon's rate calculations should be rejected because they contain several notable errors such as: (1) an incorrect allocation of accumulated deferred taxes; (2) incorrect pole counts; (3) incorrect rates of return; and (4) incorrect pole heights. See R.D. at 54 (citing FirstEnergy M.B. at 89). We reject these arguments.

First, FirstEnergy argued that Verizon erred in its allocation of accumulated deferred income taxes. Verizon allocates accumulated deferred income taxes in proportion to depreciated investment (gross investment less accumulated depreciation), while FirstEnergy allocates in proportion to original (gross) investment. Verizon's approach is consistent with similar regulatory approaches. Furthermore, use of original (gross) investment produces a difference in rates measured only in pennies.

Second, FirstEnergy argued that Verizon used an incorrect pole count. Verizon explained that it calculated rates using pole count information provided by FirstEnergy in May 2018. *See* Complaint, Exh. 28. FirstEnergy challenged the use of these pole counts, proposing that slightly higher distribution pole count values be used as follows:

[32] As a check to its reasonableness as a proxy, we note that the 2017 2nd quarter rate of return proposed by Verizon compares favorably to the Commission's 2020 2nd quarter rate of return of 9.45%, as set forth in the Commission's most recent Quarterly Earnings Report.

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See Complaint, Exh. B at VZ00067, VZ00077, and VZ00087; Answer, Attachment G at FE00090, FE00095, and FE00100.

Upon review, the use of Verizon's values appears to be reasonable and favors FirstEnergy, given that FirstEnergy's new numbers would produce a marginally lower rate than Verizon calculated, due to the modest increase FirstEnergy proposes in the number of poles. For example, as shown above, Verizon used *****BEGIN PROPRIETARY*** ***END PROPRIETARY***** total distribution poles when calculating rates for use of Met-Ed's poles and FirstEnergy used *****BEGIN PROPRIETARY*** ***END PROPRIETARY*****. Because relevant investment is divided by total distribution poles, the use of Verizon's lower value for total distribution poles results in a higher net investment per pole and a higher new telecom rental rate for use of Met-Ed's poles. Verizon's input is therefore conservative and generally favors FirstEnergy by increasing the resulting new telecom rate Verizon would pay FirstEnergy.

Next, FirstEnergy argued that Verizon used an incorrect rate of return, advocating for the use of older rate of return values last approved by the Commission in 2007 and 1988. FirstEnergy relies on rates of return set in 2007 for Met-Ed (7.53%) and Penelec (7.92%) and in 1988 for Penn Power (11.14 %) simply because they are the rates of return most recently approved by the Commission. The following compares

FirstEnergy's requested rates of return to the rates of return utilized in Verizon's calculations:

	Verizon's Calculated ROR for Rental Year 2019 (Ref. Verizon Exh. C-4)	FirstEnergy's Proposed ROR (Ref. Answer, Attachment G at FE00090, FE00095 FE00100)	FirstEnergy's Requested ROR in its 2016 Base Rate Cases
Met-Ed	7.45%	7.53% (R-00061366) (2007)	8.14%
Penelec	7.66%	7.92% (R-00061367) (2007)	8.58%
Penn Power	7.72%	11.14% (R-870732) (1988)	8.70%

However, as previously discussed, Verizon relied on the Commission's Quarterly Earnings Reports from the 2nd Quarter 2017 in proposing a 9.55% rate of return as the basis for its cost of capital. In contrast, FirstEnergy's proposed rate of return values are outdated and would inappropriately allow FirstEnergy to recover at a higher rate of return on its poles than we believe is reasonable under the circumstances. Therefore, in our view, Verizon's rate of return input in the rate formula is reasonable.[33]

[33] We note that the Recommended Decision determined that the cost of capital used in determining the new pole attachment rate should be the cost of capital as of March 11, 2019, ostensibly because of the effective date of the FCC's "new telecom rate" methodology. Although, the ALJ found, in Finding of Fact No. 11, that the "properly calculated new telecom rates for Verizon's use of FirstEnergy's poles" during the years for which relevant cost data is available are the values calculated by Verizon, he then clarified that "the rates going forward" will be "the same" (meaning they will be calculated in the same manner when the relevant cost data becomes available). R.D at 66, 69 ("The rates that Verizon pays FirstEnergy to attach to its poles will be determined using the new telecom rate methodology going forward."); R.D. at 56 ("[G]oing forward, the rates that First Energy charges Verizon to attach to its poles should be determined based on the new telecom rates."). The ALJ explained that doing so would be consistent with Section 1.1407(a)(2) of the FCC's regulations adopted by the Commission through the *2019 Final Rulemaking Order*. The ALJ concluded that the new telecom rate should therefore be substituted into the JUAs and govern Verizon's attachment to FirstEnergy's poles going forward. R.D. at 56-57.

Last, FirstEnergy argued that Verizon used an incorrect pole height, contending that a departure from the FCC's presumptive inputs for average number of attaching entities, space occupied, unusable space, and pole height is justified because FirstEnergy claimed the conditions in its service territory are significantly different from the FCC's presumed inputs. However, we agree with Verizon that FirstEnergy has not provided "probative direct evidence" sufficient to rebut the FCC's presumptions regarding pole height. Moreover, to the extent that deployment of advanced networks for voice and broadband services may trigger the need for additional or higher poles, the FCC's conclusions properly reflect consideration of that probability.

Finally, we do not believe that a compliance period is necessary or relevant here, given the sufficiency of the evidentiary record to determine the correct pole attachment rates and our rejection of FirstEnergy's criticisms of the Verizon rate inputs and calculation. Accordingly, we shall deny FirstEnergy's Exception Nos. 9 and 10 to the extent that FirstEnergy objects to Verizon's calculations of the new telecom rates going forward and the ALJ's acceptance and approval of such calculations, including his recommendation that the new telecom rates, as calculated by Verizon, should be substituted into the existing JUAs and govern Verizon's attachment to FirstEnergy's poles going forward.

D. Appropriateness of Refunds/Refund Period

1. Recommended Decision

Having found that (1) the pole attachment rates that FirstEnergy is currently charging Verizon under the JUAs are unjust and unreasonable, and (2) the pole attachment rates that FirstEnergy charges Verizon going forward should be set using the new telecom rate methodology, the ALJ then next determined whether the Commission should award refunds to Verizon and, if so, how much. Pages sixty through sixty-nine of

the ALJ's Recommended Decision contain his discussion and findings concerning the issuance and appropriate level of refunds that should be granted to Verizon.

The ALJ found that the record evidence in this proceeding demonstrates that Verizon is entitled to a refund of amounts Verizon paid FirstEnergy in excess of the new telecom rates from March 11, 2019 to the present, or approximately 18 months ago (March 2019 to September 2020). The ALJ noted that as of September 2020, this amount is approximately *****BEGIN PROPRIETARY*** ***END PROPRIETARY*****[34] with an additional *****BEGIN PROPRIETARY*** ***END PROPRIETARY*****[35] due per month beyond September 2020 until the refund is paid. The ALJ found this level of refund appropriate, in lieu of that requested by Verizon, by prorating the *****BEGIN PROPRIETARY*** ***END PROPRIETARY***** that Verizon claimed it is owed since July 2011, or approximately 112 months ago (July 2011 to September 2020). R.D. at 66.

In determining the appropriate level of refunds due to Verizon, the ALJ rejected Verizon's argument that it is entitled to refunds from July 12, 2011 (the effective date of the FCC's *2011 Pole Attachment Order* and found that Verizon is instead entitled to refunds from March 11, 2019 (the effective date of Section 1.1413) because Verizon was not entitled to the lower rates under the Commission's Regulations until March 11, 2019. The ALJ noted that under a strict reading of the FCC's regulations as adopted by the Commission in the *2019 Final Rulemaking Order* and considering the Commission's determination that the FCC's *2011 Pole Attachment Order* as only persuasive authority, not mandatory authority, the appropriate effective date of the new telecom rate is March 11, 2019. R.D. at 65-67.

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[34] *****BEGIN PROPRIETARY*** ***END PROPRIETARY***** R.D. at 66.

[35] *****BEGIN PROPRIETARY*** ***END PROPRIETARY***** R.D. at 66.

Similarly, the ALJ rejected FirstEnergy's argument that Verizon is not entitled to any refund associated with the rates it pays under the JUAs because doing so would grant refunds based on a contract revision, not a tariff rate, which is impermissible under Section 508 of the Code, 66 Pa. C.S. § 508. R.D. at 67. FirstEnergy contended that the Commission can only reform contracts, such as the JUAs, on a prospective basis. FirstEnergy M.B. at 91-93. The ALJ noted that providing a refund in this case is consistent with Section 1.1407 of the FCC's regulations, as adopted by the Commission through the *2019 Final Rulemaking Order*, which is not limited to tariffed rates only, and Section 1312 of the Code, allowing refunds within four years of filing a complaint, [36] which provide:

> **§ 1.1407 Remedies.**
>
> (a) If the Commission determines that the rate, term or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term or condition and may:
>
> (1) Terminate the unjust and/or unreasonable rate, term or condition;
>
> (2) Substitute in the pole attachment agreement the just and reasonable rate, term or condition established by the Commission; and/or
>
> (3) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term or condition, and the amount that would have been paid under the rate, term or condition established by the Commission, plus interest, consistent with the applicable statute of limitations.

See 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1407(a)(1)-(3)).

[36] *See* R.D. at 67-68.

> **§ 1312 Refunds.**
>
> **(a)** ***General rule.* —** If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. . . .

66 Pa. C.S. § 1312(a).

2. Exceptions and Replies (FirstEnergy Exception Nos. 12-13; Verizon Exception No. 1)

In its twelfth Exception, FirstEnergy maintains that Section 508 of the Code precludes the Commission from granting any refunds in this case, arguing that Section 508 is the only provision of the Code which provides the Commission with the authority to revise a public utility contract, such as the JUAs, and that such revisions can only be applied prospectively. Therefore, FirstEnergy submits that the ALJ erroneously recommended refunds back from March 11, 2019 (*i.e.*, the effective date of 47 C.F.R. § 1.1413) by failing to explain how the FCC's regulations can be given precedence over the plain language of the Code. FirstEnergy Exc. at 33-34.

In reply, Verizon asserts that the Commission's Regulations provide for refunds of all amounts unlawfully collected during the applicable statute of limitations, plus interest. Verizon maintains the following argument:

> Under its pole attachment regulations, the Commission may "[t]erminate the unjust and/or unreasonable rate," "[s]ubstitute in the pole attachment agreement the just and reasonable rate…established by the Commission," *and* "[o]rder a refund." Under the Public Utility Code, the Commission may "determine and prescribe, by findings and order, the just, reasonable, and equitable obligations, terms, and conditions" of contracts *and* refund "the amount of any excess paid…together with interest…" in " any proceeding involving rates." Section 1312 is not limited to tariffed rates; it applies to "any rate received by a public utility" that was "unjust or unreasonable" or in violation of a Commission "regulation."

Verizon R. Exc. at 21-22 (citing 52 Pa. Code § 77.4 (a); 66 Pa. C.S. §§ 508, 1312(a)).

FirstEnergy's thirteenth Exception submits that the ALJ has compounded his fundamental error of awarding Verizon refunds by failing to make a final determination as to the new rate going forward, but simply accepted and prorated Verizon's requested refund amount of *****BEGIN PROPRIETARY*** ***END PROPRIETARY*****. FirstEnergy Exc. at 34-36.

FirstEnergy notes that Section 1312(a) of the Code states that "[t]he [C]ommission shall state in any refund order *the exact amount to be paid*, the reasonable time within which payment shall be made, and *shall make findings upon pertinent questions of fact*." FirstEnergy Exc. at 35 (citing 66 Pa. C.S. § 1312(a) (emphasis added)). FirstEnergy argues that the ALJ's refund recommendation fails to satisfy the requirements of Section 1312(a) in three ways: (1) through the imposition of a 60-day compliance period to discuss the calculation of new telecom rates and overpayments, the ALJ failed to actually establish a new rate that Verizon must pay going forward; (2) because the ALJ focused solely on the rates paid by Verizon to attach to FirstEnergy's poles, overlooking the nature of a reciprocal rate, no refund amount can be calculated based upon the record in this proceeding; and (3) the inclusion of a 60-day compliance

period, throughout which FirstEnergy will continue to accrue interest on the refunds it may be ordered to pay,[37] produces an unreasonable result by allowing Verizon an additional opportunity and incentive to "stonewall" rate negotiations, and as a result, extract a greater refund amount than it would otherwise receive without the compliance period. FirstEnergy Exc. at 35-36.

Contrary to FirstEnergy's assertions, Verizon contends that, although the exact new telecom rate for a future year cannot yet be calculated, the ALJ set prospective new telecom rate as they must be set – by requiring compliance with the Commission's cost-based new telecom rate formula. Verizon R. Exc. at 23 (citing R.D. at 75-76 (Ordering Paragraph No. 5)). As Verizon notes, FirstEnergy's draft license agreement states that future rates will be determined using the "FCC annual rate formula" and FirstEnergy, in fact, charges many of Verizon's competitors pole attachment rates that change each year as its pole costs change. Verizon R. Exc. at 23 (citing Verizon St. No. 1, Exh. SCM-3 at VZ00498 (FCC Exh. 13); Verizon Exh. MSC-20 (rates charged by FirstEnergy)).

Furthermore, Verizon argues that the refund amount was calculated using properly calculated new telecom rates for both Verizon's use of FirstEnergy's poles and for FirstEnergy's use of Verizon's poles; as such, FirstEnergy's claim that Verizon's refund calculation does not consider modifying the rate FirstEnergy pays is unfounded. Verizon R. Exc. at 22-23 (citing Verizon R.B. at 39-40). Verizon, however, adds that it agrees with FirstEnergy that the final order should expressly provide that the refund "will be calculated 'together with interest at the legal rate.'" Verizon R. Exc. at 23 (citing FirstEnergy Exc. at 36 (quoting 66 Pa. C.S. § 1312(a))).

[37] *See* 66 Pa. C.S. § 1312(a) (a refund amount will be calculated "together with interest at the legal rate from the date of each such excessive payment").

Verizon adds, in its first Exception, that not only should the ALJ's recommendation be corrected to award interest associated with the overpayment amount at the legal rate of six percent, but the ALJ incorrectly limited the principal refund amount to *****BEGIN PROPRIETARY*** ***END PROPRIETARY***** in lieu of Verizon's requested *****BEGIN PROPRIETARY*** ***END PROPRIETARY***** by neglecting to apply the applicable statute of limitations, which extends back to the effective date of the *2011 Pole Attachment Order*. Verizon Exc. at 6-11.

Verizon contends that the ALJ limited the refund period, recommending relief only as of March 11, 2019, instead of July 12, 2011, based on the following legal error.

> [I]t incorrectly reads the Commission's [R]egulations to require FirstEnergy to charge Verizon competitively neutral pole attachment rates only beginning March 11, 2019. But applicable law required those just and reasonable rates as of July 12, 2011. The Commission's [R]egulations incorporate "the full extent" of the rate requirements of 47 U.S.C. § 224, and the Commission has pledged to enforce that statute. The Commission, the RD, Verizon, and FirstEnergy all agree that, as of mid-2011, "ILECs [we]er entitled to rates, terms and conditions that are 'just and reasonable' in accordance with section 224(b)(1)."
>
> The March 2019 date cited in the RD is the effective date of a subsequent regulation that sought to accelerate the realization of the just and reasonable rate mandated nearly eight years earlier by making a procedural change.
>
> * * *
>
> But the March 2019 regulation left the remedy in place for prior unlawful conduct: refunds "will normally be the difference between the amount paid under the unjust and/or unreasonable rate ... and the amount that would have been

> paid under the rate ... established by the Commission, plus interest, *consistent with the applicable statute of limitations.*"

Verizon Exc. at 7 (citations omitted).

Verizon argues that the JUAs are within Pennsylvania's continuing contract doctrine and, as such, damages are available for all time periods covered by the JUAs, plus a four-year period following their termination. Therefore, the continuing contract doctrine extends the refund period under the applicable statute of limitations back to July 12, 2011 because the Parties' contracts govern today because they are continuing contracts. Furthermore, Verizon adds that the FCC previously found Verizon "entitled to a refund of overpayments made" under an unjust and unreasonable pole attachment provision "dating back as far as the July 12, 2011 effective date" of the *2011 Pole Attachment Order*, and since the Commission already decided that Verizon can be "in no worse position…than if the Commission did not assume jurisdiction," Pennsylvanians deserve the same remedy. Verizon Exc. at 8-9 (citing *Dominion Order*, 32 FCC Rcd at 3761-64; *2019 Final Rulemaking Order* at 25).

Although Verizon maintains its position that all time periods since the July 12, 2011, effective date of the *2011 Pole Attachment Order* are covered by the applicable statute of limitations in this case, Verizon acknowledges the ALJ's reliance on Section 1312(a) of the Code, which establishes a four-year statute of limitations that terminates a party's right to seek refunds beyond four years prior to the date of the filing of a complaint. Therefore, Verizon contends that at a minimum, the Recommended Decision should be revised for internal consistency to require a four-year refund period back to November 2015 instead of cutting them off at March 11, 2019, under which

FirstEnergy would refund *****BEGIN PROPRIETARY*** ***END PROPRIETARY*****[38] Verizon Exc. at 9-10.

In response, FirstEnergy maintains that Verizon's claim that the Commission should award refunds reaching back to July 2011 is completely contrary to the Code. FirstEnergy R. Exc. at 9-10 (citing 66 Pa. C.S. §§ 508, 1312(a)). FirstEnergy argues that the general contract principles that Verizon asserts apply and govern the Commission's calculations of refunds in this case, conflict with Section 508 of the Code, under which changes to contracts can only be applied prospectively.[39] Moreover, FirstEnergy asserts that, a "general contract" is not at issue here, but rather, what is at issue is a contract under which a public utility charges a "rate" for a "service" which affects the public interest. FirstEnergy R. Exc. at 10.

FirstEnergy renews its argument that the FCC has never held that an ILEC is entitled to the new telecom rate under an existing joint use agreement, such as the JUAs at issue here. FirstEnergy reiterates its interpretation of the principle of "competitive neutrality" in the context of this proceeding, and contends that Verizon's assertion that an award of refunds is necessary to "remove the incentive for similarly

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[38] Since Verizon's Complaint was filed on November 20, 2019, under 66 Pa. C.S. § 1312(a), Verizon contends that refunds are at least justified back to November 2015. Therefore, since the Complaint has been pending for ten months, as of September 2020, a refund based on Section 1312(a) would total *****BEGIN PROPRIETARY*** ***END PROPRIETARY***** using the ALJ's monthly overpayment amount (48 months (November 2015 – November 2019) + 10 months (November 2019 – September 2020) x *****BEGIN PROPRIETARY*** ***END PROPRIETARY***** per month) = *****BEGIN PROPRIETARY*** ***END PROPRIETARY*****).

[39] In regards to Verizon's claim that "the R.D. should be revised for internal consistency to require a four-year refund period," FirstEnergy argues that this argument should likewise be rejected because it ignores fundamental principles of statutory construction, which dictate that the special provision of Section 508 should prevail over the general provision of Section 1312 of the Code. FirstEnergy R. Exc. at 10.

situated protracted and costly disputes will encourage the industry to comply with the Commission's regulations" does not demonstrate that refunds should be awarded in this proceeding, since, as FirstEnergy claims, Verizon attaches to FirstEnergy's poles under terms and conditions that are not materially comparable to the terms and conditions in FirstEnergy's license agreements. FirstEnergy R. Exc. at 7-8.

FirstEnergy's Reply Exceptions further maintain that the Commission should not award rate relief because Verizon did not make a good faith effort to resolve this dispute prior to seeking relief from the Commission, and therefore, FirstEnergy should not be penalized for Verizon's delay filing a complaint. FirstEnergy R. Exc. at 8-9.

Lastly, FirstEnergy argues that Verizon's claim that "[a] full and complete award is critical to achieve the Commission's objectives" is meritless because the rate relief that Verizon seeks will only benefit the Commission's objectives to accelerate and expand broadband deployment, if Verizon uses the refunded amounts for incremental investments in broadband deployment. FirstEnergy R. Exc. at 10-11.

3. Disposition

As an initial matter, we note that in FirstEnergy's Exception No. 12 relating to refunds, the Companies object to the ALJ's rejection of the argument that Verizon is not entitled to any refund because under Section 508 of the Code, the Commission can only reform contracts on a prospective basis. According to FirstEnergy, the rates contained in the JUAs are contained in a contract and not in any FirstEnergy tariff and

that sidestepping the Section 508 limitations by awarding refunds would be an unlawful and constitutional error.[40] We agree with the ALJ's resolution of this issue.

We find that the ALJ applied the correct legal standard for evaluating whether a refund is appropriate in this proceeding. Here, the Commission adopted Section 1.1407 of the FCC's rules, which authorizes the termination of unjust and unreasonable rates and permits the ordering of refunds for such rates. In his disposition, the ALJ explained that Section 1.1407 of the FCC regulations is not limited to tariff rates only. Rather, Section 1.1407 refers generally to "the rate, term or condition complained of" and does not require that the rate be a tariffed rate. R.D. at 67. The ALJ also explained that providing a refund is consistent with Section 1312 of the Code, which is not limited to tariffed rates. R.D. at 64-65.

The ALJ properly rejected FirstEnergy's argument that Verizon is not entitled to any refund under Section 508 of the Code. Again, the ALJ appropriately explained that Section 1.1407 of the FCC regulations expansively refers to "the rate, term or condition complained of" and does not require that the rate be a tariffed rate. By relying on Section 1.1407 and emphasizing the consistency of this FCC regulation with Section 1312 of the Code, the ALJ acknowledged that the Commission has the authority

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[40] Section 508 of the Code provides, in pertinent part:

> The commission shall have power to vary, reform, or revise, upon a fair, reasonable and equitable basis, any obligations, terms or conditions of any contract heretofore or hereafter entered into between any public utility and any person, corporation, or municipal corporation, which embrace or concern a public right, benefit, privilege, duty or franchise, or the grant therefore, or are otherwise affected or concerned with the public interest and the general well-being of this Commonwealth[.]

66 Pa. C.S. § 508.

to award refunds of amounts previously collected in violation of law. Thus, we find no error in the ALJ's recommendation and shall deny FirstEnergy Exception No. 12.

Next, we address FirstEnergy Exception No. 13 and Verizon Exc. No. 1 relating to the refund period and the applicability of interest. The Recommended Decision calculated the refund award by prorating the amount sought in Verizon's Complaint from the effective date of the relevant FCC regulations on March 11, 2019, to the time of the issuance of the R.D. The Recommended Decision further recommended that to the extent the Parties disagree with the refund calculations, such issues could be raised during the recommended 60-day compliance period. At the same time, the Recommended Decision determined that Verizon is entitled to a refund of the amounts Verizon paid FirstEnergy in excess of the "new telecom rate" from March 11, 2019, to the present, but denied Verizon's Complaint to the extent that it requests earlier refunds. R.D. at 69.

The Parties dispute what date, if any, should be used to apply the new, lower pole attachment rates and calculate the refund owed in this case. Verizon alleges that the FCC's new, lower pole attachment rates apply under its existing JUAs with FirstEnergy and that it should have the benefit of the lower pole attachment rates going back to 2011. First Energy alleges that the FCC's new pole attachment rates do not apply to its existing JUAs with Verizon and that FirstEnergy is entitled to receive compensation in accordance with existing, higher pole attachment rates.[41]

[41] The revenue impact on both Verizon and FirstEnergy is proprietary and is discussed elsewhere in this Opinion and Order. It is worth noting, however, that the FCC has indicated that pole attachments are a major impediment to deploying advanced networks that can provide broadband service. We would hope that providers who benefit considerably from any pole attachment rate reductions commit a portion of those savings to making broadband available and affordable in Pennsylvania.

We agree with the decision to direct a refund to Verizon but believe the refund should be prorated from November 20, 2019, which was the date Verizon filed its Complaint at the FCC. As such, we shall establish November 20, 2019, as the effective date on which the new pole attachment rates were applicable under the ten evergreen JUAs between Verizon and FirstEnergy. In addition, we direct that the refund include interest.[42] Moreover, as discussed below, we do not agree that a 60-day compliance period is necessary as the Parties may apply inputs that result from this Opinion and Order to develop appropriate rates.

The alternative dates for the application of a lower pole attachment rate are July 2011, November 2015, or March 11, 2019. However, we find it is inappropriate to direct a refund in this case back to 2011 or 2015 when considering that the relevant FCC regulation was not effective until March 11, 2019. By the same token, the March 11, 2019, effective date is not the appropriate refund date either, given that Verizon never formally challenged those rates until November 20, 2019. Using a prior effective date other than November 20, 2019, would mean applying the new rates during a period when the Parties were still engaged in good-faith efforts to negotiate the applicability of the rebuttable presumption and the new rates. Moreover, the March 11, 2019, date controls whether an ILEC has a rebuttable presumption that the FCC's new pole attachment rates apply under an existing contract or, in other words, *whether* the new rates apply. However, the March 11, 2019, date does not necessarily control *when* the new rates are effective.

[42] Under the Commission's pole attachment regulations, refunds are "normally the difference between the amount paid under the unjust and/or unreasonable rate … and the amount that would have been paid under the rate … established by the Commission, plus interest …" 52 Pa. Code § 77.4(a) (incorporating 47 C.F.R. § 1.1407(a)(3)). Under Section 1312 of the Public Utility Code, the interest rate to be used with a refund is the legal rate. As with the effective date of the new rates, the effective date for the interest calculation arising from this dispute is November 20, 2019.

Accordingly, we shall grant, in part, and deny, in part, FirstEnergy Exception No. 12 and Verizon Exception No. 1 and shall modify the Recommended Decision consistent with this Opinion and Order.

E. ALJ's Recommended 60-Day Compliance Period

1. Recommended Decision

As part of the ALJ's Recommended Decision, he recommended the Parties be given a 60-day compliance period following the entry of a final Commission order in this case during which time a larger investigation should be conducted to properly determine all inputs when establishing the specific rates going forward and refund created through the use of the new telecom methodology based on the determinations made in the Recommended Decision. Additionally, to the extent that such difference cannot be resolved, the ALJ recommended the Parties afford themselves of the Commission's mediation unit for mediation review or request a further expedited evidentiary hearing on the remaining disputed issues. R.D. at 57, 59-60, 66, 68-70.

2. Exceptions and Replies (FirstEnergy Exception No. 11; Verizon Exception No. 2)

Both FirstEnergy and Verizon agree that the ALJ's inclusion of a 60-day compliance period to discuss the calculation of new telecom rates and overpayments is not necessary or proper but disagree about the reasons why. *See* FirstEnergy Exc. at 32-33; Verizon Exc. at 11-14.

Both Parties contend that the Commission should decide this case based on the actual record evidence presented, and neither Party should be able "to present additional evidence and additional arguments regarding the inputs into the FCC's new

telecom formula rate that it could have, and should have, presented during the course of this proceeding." Verizon R. Exc. at 20 (citing FirstEnergy Exc. at 32). In its eleventh Exception, FirstEnergy argues that the deferred issues, those which the 60-day compliance period would provide for "further investigation" of, arose where Verizon, the party with the ultimate burden of proof, failed to present sufficient evidence; therefore, rather than providing additional time for investigation of these factors, FirstEnergy contends that the ALJ should have denied the Complaint because "without such evidence it is impossible for Verizon to prove that FirstEnergy's current pole attachment rates are unjust and unreasonable and that Verizon's calculations of the new telecom rates are just and reasonable under the Public Utility Code and Pennsylvania law." FirstEnergy Exc. at 32; FirstEnergy R. Exc. at 12. FirstEnergy adds that, should Verizon's Complaint not be denied in its entirety, the Commission should use the inputs presented by FirstEnergy in its calculation of rates.[43]

In contrast, Verizon argues that FirstEnergy is wrong when it argues the compliance period would be used to remedy some deficiency in Verizon's rate calculations, as the ALJ already found Verizon's rate calculations to be the "properly calculated new telecom rates for Verizon's use of FirstEnergy's poles" and set the refund amount using those rates. Verizon Exc. at 11-12 (citing R.D. at 8-10, Findings of Fact No. 11, 19). Verizon contends that its new telecom rate and overpayment calculations are the only rate calculations in evidence that comply with the Commission's Regulations and are supported by direct, surrebuttal, and surrejoinder testimony. Verizon Exc. at 12 (citing Verizon St. No. 2.0 at 4, Exh. MSC-1; Verizon St. No. 2.1 at 8-31; Verizon St. No. 2.2 at 18-19). In contrast, Verizon indicated that FirstEnergy summarily stated that slightly different (and at times lower) new telecom rates should apply; however,

[43] Specifically, FirstEnergy asserts that it presented actual data regarding the calculation of the "space factor" (*i.e.*, (1) the space occupied by an attachment: (2) the amount of usable space on a pole; (3) the amount of unusable space on a pole is presumed to be 24 feet; and (4) the pole height) and the number of attaching entities to FirstEnergy's poles. FirstEnergy Exc. at 32; FirstEnergy R. Exc. at 12.

FirstEnergy did not enter its calculations into evidence, fully address Verizon's calculations, or respond to much of Verizon's testimony explaining the consistency of Verizon's rate calculations with the Commission's Regulations. Verizon Exc. at 12; Verizon R. Exc. at 20-21.

Verizon continues by asserting that the ALJ's recommended compliance period would violate the Commission's Regulations, which require "final action" by December 2020. Verizon Exc. at 13-14 (citing R.D. at 1 ("The Commission must act on this Recommended Decision no later than its Public Meeting on December 17, 2020."); *see also* 52 Pa. Code § 77.5(d); 47 U.S.C. § 224(c)(3)(b)(ii)). Verizon contends that it would also give FirstEnergy another opportunity, after nearly a decade of delay, to stall the required pole attachment rate reductions and add costs and burdens to this litigation contrary to the Commission's efforts to streamline, simplify, and reduce the costs of pole attachment litigation. Verizon Exc. at 12-13 (citing *2019 Final Rulemaking Order* at 26 ("The Commission acknowledges how critical it is to provide regulatory certainty rather than additional burdens and expenses where broadband investment is contemplated and desired."); *2019 Final Rulemaking Order* at 6 ("The Commission believes its assertion of jurisdiction over pole attachments will assist in spurring investment in, and access to, physical infrastructure used to deliver essential broadband access service to end-user customers by reducing the time and resources spent on disputes ... as compared to the FCC.")).

FirstEnergy concludes its exception to the ALJ's recommendation by arguing that 60-days is simply an unrealistic timeframe to expect both Parties to complete comprehensive reviews and reach a determination regarding the actual cost of capital to be used in the FCC's new telecom rate formula. FirstEnergy Exc. at 33.

3. Disposition

The ALJ recommended a 60-day compliance phase during which a further investigation would be conducted to properly determine all inputs when establishing rates going forward and a refund created through the use of the "new telecom rate" methodology for pole attachments. We see no need for a 60-day compliance period for the reasons set out above and reject the ALJ's recommendation to that effect. Accordingly, we shall grant FirstEnergy Exception No. 11 and Verizon Exception No. 2 to the extent that the Parties object to the ALJ's inclusion of a 60-day compliance period to discuss the calculations of new telecom rates and overpayments because such a compliance period is simply unnecessary.

F. FirstEnergy's Alternative Proposal to Use the Old Telecom Rate, Should the Commission Deem it Necessary to Revise the Joint Use Agreements

1. Recommended Decision

The ALJ rejected FirstEnergy's alternative proposal to adopt the FCC's "old telecom rate" instead of the "new telecom rate," if the Commission decides that the existing rates under the JUAs are not just and reasonable. R.D. at 57. FirstEnergy argued, that to the extent that the Commission determines the current rates are unjust and unreasonable, or sets new rates on policy grounds, the Commission should not simply insert the incremental-cost-based new telecom rate into the existing JUAs, but should adopt the "old telecom rates," as calculated by FirstEnergy, which it describes as a "middle ground" between the existing rates and the new telecom rates. FirstEnergy M.B. at 83-84. The "old telecom rate" is established using the following formula:

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left(\text{Maintenance and Administrative Carrying Charge Rate}\right)$$

$$\text{Where Space Factor} = \frac{\left(\text{Space Occupied}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}$$

FirstEnergy M.B. at 84.

The ALJ reiterated his finding that the new telecom rate methodology set forth in Section 1.1406(d)(2) of the FCC's regulations, and adopted by the Commission in Section 77.4 of the Commission's Regulations, is the just and reasonable rate that should be used when determining the rate Verizon pays FirstEnergy to attach to its poles. Therefore, the ALJ explained that to use the old telecom rate because FirstEnergy believes that it constitutes a middle ground between the existing rates and the new telecom rate, is not reasonable when it is the new telecom rate that is the just and reasonable rate. R.D. at 58-59.

2. Exceptions and Replies (FirstEnergy Exception No. 14)

In FirstEnergy's fourteenth Exception, it reiterates its argument that Verizon has failed to demonstrate that it is entitled to the new telecom rate, and as such, "consistent with the 2018 Pole Attachment Order, the R.D. should have left it 'to the parties to negotiate the appropriate rate or tradeoffs to account for such additional benefits,' with the maximum rate being no more than the old telecom rate." FirstEnergy Exc. at 37 (citing FirstEnergy M.B. at 52; *2018 Pole Attachment Order* at ¶¶ 128-129).

In reply, Verizon maintains that, should the Commission decide to revise the rates Verizon pays under the JUAs, the Commission does not have the option, under its binding Regulations to require Verizon to pay a higher rate than the new telecom rate

(the so-called "old telecom" rate) as a "compromise result." Verizon adds that it would be unwise to do so and would perpetuate the non-cost-based rate differences that deter infrastructure investment in Pennsylvania. Therefore, Verizon contends that the new telecom rate must apply. Verizon R. Exc. at 23-24.

3. Disposition

Upon review, we find that the ALJ correctly determined that the old telecom rate cannot be used because the new telecom rate is the just and reasonable rate under Chapter 77 of our Regulations which incorporates the FCC regulations. Specifically, as discussed above, the record evidence demonstrates that the ALJ properly utilized the new telecom rate because FirstEnergy did not rebut the presumption under Section 1.1413(b) of the FCC regulations. Accordingly, we shall deny FirstEnergy Exception No. 14.

G. FirstEnergy's Deferral Proposal

1. Recommended Decision

As previously noted, the ALJ recommended that FirstEnergy's base rate arguments be deferred for its next base rate proceeding. R.D. at 59. The ALJ explained that although the rate base/rate of return form of regulation that FirstEnergy relies on must be viewed in light of the alternative form of regulation which Verizon operates under and through (the FCC's pole attachment regulations adopted by the Commission through its *2019 Final Rulemaking Order*), this is not to say that FirstEnergy should suffer a lower return on its investment or not receive its guaranteed rate of return as a result of using the new telecom rate methodology to determine the rates FirstEnergy can charge Verizon to attach to its poles. Therefore, the ALJ reasoned that FirstEnergy was free to make the argument that it should be permitted to "record as a regulatory asset the

difference between the existing rates and the new rates and recover the difference in its next base rate case" as a part of its next base rate proceeding, "where these additional concepts and case precedent can be fully vetted." R.D. at 48, 59.

2. Exceptions and Replies (FirstEnergy Exception No. 15)

In its fifteenth Exception, FirstEnergy excepts to the ALJ's recommendation based on the allegation that he overlooked FirstEnergy's proposal to defer and record as a regulatory asset the difference in revenues produced from new rates and existing rates plus carrying charges and permit the Companies to claim and recover this deferred amount in their next base rate case. FirstEnergy contends that in order to compensate for the negative impact Verizon's proposed rate reduction would have on the Companies' opportunity to earn a fair rate of return on their investment in the joint-use poles, the Recommended Decision should be modified to clearly reflect FirstEnergy's deferral proposal. FirstEnergy Exc. at 38-39.

In reply, Verizon contends that there is no need to prematurely resolve an issue that has nothing to do with the lawful pole attachment rates required by the Commission's Regulations, especially when it has been shown that the ALJ's recommendation would have a nominal impact on base rates, since the overpayments at issue only average about *****BEGIN PROPRIETARY*** ***END PROPRIETARY***** percent of FirstEnergy's annual operating revenues. Verizon R. Exc. at 24-25. However, if FirstEnergy finds that, as a result of using the new telecom rate methodology to determine the rates FirstEnergy can charge Verizon to attach to its poles, an increase in base rates is warranted, the Recommended Decision "still gives FirstEnergy the opportunity to argue about whether it may recover the difference between its unlawful rates and the lawful rates 'in First Energy's next base rate proceeding where these additional concepts and case precedent can be fully vetted.'" Verizon R. Exc. at 24 (citing R.D. at 48).

3. Disposition

In the Recommended Decision, the ALJ determined that FirstEnergy should have been charging Verizon the new telecom rate and that the Companies are free to make the argument that they should be permitted to record as a regulatory asset the difference in revenues produced from the existing rates and the new rates and recover the difference in their next base rate cases. We find no error in the ALJ's statement that FirstEnergy's base rate arguments can be deferred to the Companies' next base rate proceedings where the issues can be fully vetted. Moreover, it is not clear from the evidence of record whether our decision in this Opinion and Order would necessarily trigger a base rate proceeding or a rate increase for any of the Companies. Thus, we shall not prejudge this issue in this proceeding. Accordingly, we shall deny FirstEnergy Exception No. 15.

H. ALJ's Determination that FirstEnergy Does Not Possess and Did Not Leverage Bargaining Power Over Verizon During Rate Negotiations

1. Recommended Decision

As previously noted, the Parties introduced additional issues as part of this proceeding, which the ALJ deemed not relevant to the key issues in this case. One of these being Verizon's argument that FirstEnergy's three-to-one pole ownership advantage provides superior bargaining power to impose and continue charging unreasonably high pole attachment rates. R.D. at 49. The ALJ found that ILECs do not need to prove an electric utility has superior bargaining power to obtain just and reasonable rates. As the ALJ explained, the Commission's Regulations "simplify [ ] the issues in this case" by presuming the just and reasonable rate is the new telecom rate regardless of an inquiry into bargaining power. *Id*. The ALJ stated that "[s]ince both Verizon and FirstEnergy own poles and provide access to the other through separate pole

attachment agreements, it cannot be said that one has bargaining power or leverage over the other based on the number of poles each owns." The ALJ goes on to explain that "[t]he purpose of the pole attachment agreement is to ensure Verizon and First Energy work together to provide safe and adequate utility services and just and reasonable rates to as many Pennsylvanians as possible while deploying broadband services. Either party losing the opportunity to do this would be unfortunate. Considering bargaining power of one party over the other unnecessarily complicates the issues in this case and takes the focus away from whether the requirements in Section 1.1413, as adopted by the Commission, have been satisfied." *Id*.

2. Exceptions and Replies (Verizon Exception No. 3)

Verizon agrees with the Recommended Decision to the extent that the ALJ found that ILECs do not need to prove an electric utility has superior bargaining power to obtain just and reasonable rates; however, Verizon argues that the Recommended Decision goes too far in reaching its conclusion, by stating that "First Energy does not possess or leverage bargaining power during rate negotiations because, among other things, owning more poles than Verizon does not give First Energy bargaining power and Verizon has less costly alternatives." Verizon Exc. at 14-15 (citing R.D. at 49). Therefore, Verizon submits that, since the Commission need not take a position on bargaining power in this case,[44] the Commission should delete the contrary and incorrect conclusion from its final order. Verizon Exc. at 17.

As an overarching argument, FirstEnergy claimed that its pole ownership majority does not show bargaining power because, absent joint use, it would be

[44] In 2018, the FCC 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." *2018 Pole Attachment Order*, 33 FCC Rcd at 7770, para. 127.

economically and legally difficult for FirstEnergy to deploy its facilities elsewhere. FirstEnergy M.B. at 71-72. Verizon notes that the FCC has rejected this argument based on "standard economic theories." In its *2011 Pole Attachment Order*, the FCC stated that "[s]tandard economic theories of bargaining predict that each party will consider its best alternative to a negotiated agreement when negotiating." Verizon Exc. at 15 (citing *2011 Pole Attachment Order*, 26 FCC Rcd at 5329, para. 206, n.618). Therefore, Verizon contends that 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. Verizon Exc. at 15-16.

Verizon further indicates that FirstEnergy has owned most of the joint use poles at all relevant times, including 73 percent of the poles the Parties currently share in Pennsylvania. Verizon Exc. at 15. Verizon points to FCC orders, which it claims have repeatedly found this pole ownership disparity reflects a lack of ILEC bargaining power to negotiate just and reasonable rates.[45, 46] Verizon asserts that FirstEnergy is no exception to the rule; its unlawfully high rates (many multiples of the maximum rate FirstEnergy may lawfully charge third party cable and CLEC attachers) and negotiations with Verizon confirm FirstEnergy has used its superior bargaining power to preserve unjust and unreasonable rates. Verizon Exc. at 15-16.

Contrary to Verizon's assertions, FirstEnergy contends that the ALJ correctly found that FirstEnergy lacks bargaining leverage over Verizon. FirstEnergy

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[45] In 2011, the FCC recognized that ILECs "often may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations" because "electric utilities appear to own approximately 65-70 percent of poles." Verizon Exc. at 15 (citing *2011 Pole Attachment Order*, 26 FCC Rcd at 5329, para. 206).

[46] Since 2011, the FCC found ILECs entitled to rate reductions where the electric utilities owned about 65 percent of the shared utility poles – for a "nearly two-to-one pole ownership advantage." Verizon Exc. at 15 (citing *Dominion Order*, 32 FCC Rcd at 3756-57, para. 13 (electric utility owned 65%); *FPL 2020 Order* at *8, para. 16 (electric utility owned 66%)).

maintains its argument that Verizon is not entitled to the new telecom rate under the JUAs because Verizon is not intitled to the presumptions set forth in the *2018 Pole Attachment Order*, as FirstEnergy does not possess or leverage bargaining power during the rate negotiations. FirstEnergy R. Exc. at 14.

FirstEnergy further contends that, not only do Verizon's less costly alternatives undermine any bargaining power FirstEnergy allegedly possessed, but also, FirstEnergy could not have had bargaining power or leverage in negotiating the JUAs in 2009 because those rates and agreements were subject to regulation by the Commission and Verizon could have filed a complaint with the Commission had it believed the rates were unfair, unjust and unreasonable. FirstEnergy adds that it does not possess bargaining power because it owns more poles than Verizon, as Verizon had indicated after the negotiations that led to the 2009 JUAs that it was satisfied with the negotiations. FirstEnergy R. Exc. at 14-15 (citing FirstEnergy M.B. at 67-72; FirstEnergy R.B. at 41-42).

Lastly, FirstEnergy argues Verizon could have negotiated new rates, but "declined to consider any offer other than the new telecom rate." FirstEnergy R. Exc. at 15 (citing FirstEnergy M.B. at 61-62; FirstEnergy R.B. at 37).[47]

[47] Verizon argued, and FirstEnergy admitted in its Answer, that Verizon repeatedly asked FirstEnergy to negotiate within the range of rates " between the new telecom rate and the old [or pre-existing] telecom rate" and asked FirstEnergy for copies of its license agreements to see whether their terms and conditions justify a rate higher than the new telecom rate. Verizon R.B. at 29 (citing FirstEnergy Answer to Complaint at ¶ 14; Verizon St. No. 1, Exh. SCM-1 at VZ0016-17; Verizon St. No. 1.1 at 41-42; Verizon Exh. SCM-5 at VZ00593, VZ00692).

3. Disposition

The Recommended Decision notes that Verizon and FirstEnergy raised issues that are not relevant to the key issues in this proceeding, one of which was Verizon's argument that FirstEnergy has superior bargaining power because of its three-to-one pole ownership advantage. The Decision then addresses the merits of the issue. We believe the ALJ properly dismissed claims of bargaining power inequities. However, we see no need to address the merits of the bargaining power issue. Based on the facts and circumstances in this case, that issue is not relevant to resolving this particular contractual dispute involving an evergreen agreement about when, if ever, a new, lower rate arising from a rebuttable presumption is applicable. Thus, we shall deny Verizon Exception No. 3.

IV. Conclusion

We have reviewed the record as developed in this proceeding, including the ALJ's Recommended Decision and the Exceptions and Replies filed thereto. Based upon our review, evaluation and analysis of the record evidence, we shall grant, in part, and deny, in part, the Exceptions filed by FirstEnergy and Verizon, and adopt the ALJ's Recommended Decision, as modified, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company, filed on September 22, 2020, are granted, in part, and denied, in part, consistent with this Opinion and Order.

2. That the Exceptions of Verizon Pennsylvania LLC and Verizon North LLC, filed on September 22, 2020, are granted, in part, and denied, in part, consistent with this Opinion and Order.

3. That the Recommended Decision of Deputy Chief Administrative Law Judge Joel H. Cheskis, issued on September 15, 2020, is adopted, as modified, consistent with this Opinion and Order.

4. That the Formal Complaint filed by Verizon Pennsylvania LLC and Verizon North LLC against Metropolitan Edison Company, Pennsylvania Electric Company and Penn Power Company at docket number C-2020-3019347 is hereby granted in part and denied in part.

5. That the Formal Complaint filed by Verizon Pennsylvania LLC and Verizon North LLC against Metropolitan Edison Company, Pennsylvania Electric Company and Penn Power Company at docket number C-2020-3019347 is granted to the extent that Verizon Pennsylvania LLC and Verizon North LLC are charged by Metropolitan Edison Company, Pennsylvania Electric Company and Penn Power Company to attach to their utility poles using a rate other than the new telecom rate since November 20, 2019.

6. That the Formal Complaint filed by Verizon Pennsylvania LLC and Verizon North LLC against Metropolitan Edison Company, Pennsylvania Electric Company and Penn Power Company at docket number C-2020-3019347 is denied to the extent that Verizon Pennsylvania LLC and Verizon North LLC seek refunds dating back beyond November 20, 2019.

7. That the rates charged by Metropolitan Edison Company, Pennsylvania Electric Company and Penn Power Company to Verizon Pennsylvania LLC

and Verizon North LLC to attach to their utility poles will be established from the effective date of November 20, 2019, using the "new telecom rate" methodology as set forth in 47 C.F.R. § 1.1406(d)(2) as adopted by the Commission in 52 Pa. Code § 77.4(d).

8. That the effective date for calculating the refund for past amounts owed by Metropolitan Edison Company, Pennsylvania Electric Company and Penn Power Company to Verizon Pennsylvania LLC and Verizon North LLC plus applicable interest is November 20, 2019.

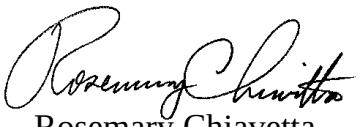
9. That within ninety (90) days of entry of this Opinion and Order, the Parties are to determine the refund amounts owed to Verizon Pennsylvania LLC and Verizon North LLC consistent with this Opinion and Order and Metropolitan Edison Company, Pennsylvania Electric Company and Penn Power Company are to pay Verizon Pennsylvania LLC and Verizon North LLC the amount of the determined refund plus the applicable interest owed on the refund amount.

10. That the Parties are to substitute in their respective pole attachment agreements at issue in this proceeding the just and reasonable rate established by the Commission and dating back to November 20, 2019, consistent with this Opinion and Order.

11. That upon payment of the refund amount set forth in Ordering Paragraph No. 9, above, the Parties shall file a certification with the Commission's Secretary's Bureau.

12. That upon filing of the certification set forth in Ordering Paragraph No. 11, above, this matter shall be marked closed.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: December 3, 2020

ORDER ENTERED: December 18, 2020