Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	Proceeding No. 19-355
	)	Bureau ID No. EB-19-MD-009
Verizon Maryland LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
The Potomac Edison Company,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: November 23, 2020 **Released: November 23, 2020**

By the Commission

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Heading Paragraph #

I. INTRODUCTION

1. In the Commission's recent pole attachment orders,[1] we affirmed our commitment to reviewing the agreements under which incumbent local exchange carriers (LECs) attach their facilities to electric utility poles to ensure that their rates, terms, and conditions are "just and reasonable" under section 224 of the Communications Act of 1934, as amended (Act).[2] In this case, we grant in part a complaint filed by Verizon Maryland LLC (Verizon), an incumbent LEC, against The Potomac Edison Company (Potomac Edison), an electric utility, alleging that the rates Verizon pays Potomac Edison to attach facilities to Potomac Edison's poles are unjust and unreasonable under section 224 and the Commission's rules and orders.[3] Based on our review of the record, we conclude that the rates Potomac Edison charges Verizon for attachments to Potomac Edison's utility poles are unjust and unreasonable. In taking this action, we prescribe herein the maximum pole attachment rate Potomac Edison may charge Verizon based on the relevant pole attachment rate formula.

II. BACKGROUND

A. Legal Framework

2. Section 224(b)(1) of the Act requires the Commission to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable."[4] Prior to 2011, the Commission construed the "just and reasonable" requirement of section 224(b)(1) to apply to attachments by cable companies and competitive LECs, but not to attachments by incumbent LECs, like Verizon.[5] Sections 224(d) and (e), respectively, establish separate formulas for calculating the maximum attachment rate that may be paid by cable systems and by competitive LECs.[6]

3. In the *2011 Pole Attachment Order*, the Commission reexamined the formula for calculating the section 224(e) attachment rate applicable to competitive LECs. That reexamination

[1] *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (*2011 Pole Attachment Order* or *2011 Order*), *aff'd, Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 940 (2013); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Development*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) (*2018 Pole Attachment Order* or *2018 Order*).

[2] 47 U.S.C. § 224(b)(1).

[3] *See* Pole Attachment Complaint of Verizon Maryland LLC (filed Nov. 21, 2019) (Complaint); *see also* The Potomac Edison Company's Corrected Answer to the Pole Attachment Complaint of Verizon Maryland LLC (filed June 10, 2020) (Answer); Verizon's Denials of Potomac Edison's Affirmative Defenses and Reply to Potomac Edison's Answer (filed March 5, 2020) (Reply); Reply Legal Analysis in Support of Verizon's Pole Attachment Complaint (filed March 5, 2020) (Reply Legal Analysis). Verizon's Pennsylvania affiliates, Verizon Pennsylvania LLC and Verizon North LLC, filed with the Commission a related pole attachment proceeding against Potomac Edison's Pennsylvania affiliates, Metropolitan Edison Co., Pennsylvania Electric Co., and Penn Power Co. On March 25, 2020, the Commission transferred the proceeding to the Pennsylvania Public Utility Commission (PUC), based on the PUC's certification that it regulates the rates, terms, and conditions for pole attachments and has reverse-preempted the Commission's jurisdiction under 47 U.S.C. § 224(c). *See* Revised Joint Statement at 3, Stipulated Fact No. 8 (citing FCC Proceeding No. 19-354, Bureau ID No. EB-19-MD-008 (filed Nov. 20, 2019); PA PUC C-2020-3019347 (transferred and filed Mar. 25, 2020). Because the State of Maryland has not reverse-preempted this Commission's jurisdiction under 47 U.S.C. § 224(c), the Commission has retained jurisdiction of this proceeding. *See* Revised Joint Statement at 3, Stipulated Fact No. 9.

[4] 47 U.S.C. § 224(b)(1).

[5] *Implementation of Section 224; A National Broadband Plan for our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5328, para. 205 & n.614 (2011) (*Pole Attachment Order*), *aff'd sub nom. Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013).

[6] *See* 47 U.S.C. § 224(d) (applicable to "cable television system[s] solely to provide cable service"), (e) (applicable to "telecommunications carriers to provide telecommunications services").

resulted in a revised pole attachment rate (the New Telecom Rate) that is lower than the pre-existing competitive LEC rate (the Old Telecom Rate) and more closely approximates the rate that cable operators pay (the Cable Rate).[7] The Commission also concluded for the first time that section 224 authorized it to regulate the rates, terms, and conditions of incumbent LEC pole attachments.[8] The Commission explained that, while in the past, incumbent LECs were positioned to negotiate just and reasonable attachment agreements because they owned roughly as many poles as the electric utilities, incumbent LEC pole ownership had declined over time and "may have left incumbent LECs in an inferior bargaining position."[9] The Commission noted that incumbent LEC attachment rates were, in aggregate, significantly higher than cable and competitive LEC rates, so that incumbent LECs were at a competitive disadvantage, particularly with respect to broadband and other advanced service offerings.[10] Therefore, the Commission determined that oversight of incumbent LEC attachment rates would promote broadband deployment, given that "the rates charged for pole access are likely to affect deployment decisions for all telecommunications carriers, including incumbent LECs."[11]

4. Having determined that section 224(b) authorized it to regulate incumbent LEC pole attachment rates, terms, and conditions, the Commission sought to do so "in a manner that accounts for the potential differences between incumbent LECs and [competitive LEC] or cable operator attachers."[12] The Commission noted that incumbent LECs frequently obtain access to electric utility poles through joint use agreements, which differ from cable and competitive LEC attachment agreements in that they are typically "structured as cost-sharing arrangements" and provide incumbent LECs advantages not found in competitive LEC and cable company agreements.[13] Thus, the Commission stated that it "question[ed] the need to second guess" such arrangements and opined that it would be "unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable."[14] Nonetheless, if an incumbent LEC demonstrated that it "genuinely lacks the ability to terminate an existing agreement [i.e., one entered into before the *2011 Order*] and obtain a new arrangement[,]" the Commission concluded that it could take such evidence into consideration in a complaint proceeding examining the rates, terms, and conditions in that agreement.[15]

5. Regarding new agreements, the Commission concluded that if an incumbent LEC could show that such a "new" agreement is "comparable to" or does not "provide a material advantage [over]" competitive LEC or cable company agreements with the same electric utility, "competitive neutrality

[7] *See 2011 Order*, 26 FCC Rcd at 5244, para. 8. The Commission took further steps in 2015 to harmonize the Old Telecom Rate and the Cable Rate. *See Implementation of Section 224 of the Act*, Order on Reconsideration, 30 FCC Rcd 13731 (2015); *Erratum*, FCC 15-151 (Feb. 8, 2016).

[8] *See 2011 Order*, 26 FCC Rcd at 5331, para. 209 ("incumbent LECs are entitled to pole attachment rates, terms and conditions that are just and reasonable pursuant to Section 224(b)(1)"); *see also id.* at 5243-44, 5327-28, 5330, paras. 8, 202, 208. Unlike cable and competitive LEC attachers, however, incumbent LECs have no right of access to utilities' poles pursuant to section 224(f)(1). *Id.* at 5328, 5329-30, 5332-33, paras. 202, 207, 212 & n.643.

[9] *2011 Order*, 26 FCC Rcd at 5327, para. 199.

[10] *See 2011 Order*, 26 FCC Rcd at 5330-31, para. 208.

[11] *See 2011 Order*, 26 FCC Rcd at 5330, para. 208; *see also id*. at 5241, para. 1 (revising the pole attachment rules will "promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers . . .").

[12] *2011 Order*, 26 FCC Rcd at 5333, para. 214. The Commission did not establish a specific rate formula for incumbent LEC attachers, choosing instead to resolve incumbent LEC complaints "on a case-by-case basis." *Id.* at 5334, para. 216.

[13] *2011 Order*, 26 FCC Rcd at 5334, para. 216 & n.651.

[14] *2011 Order*, 26 FCC Rcd at 5334, para. 216.

[15] *2011 Order*, 26 FCC Rcd at 5334, para. 216.

counsels in favor of affording the incumbent LEC the same rate as the comparable attacher."[16] Conversely, if a new agreement "materially advantage[s]" the incumbent LEC in relation to competitive LEC or cable company attachers, the Commission found it "reasonable to look to the [Old Telecom Rate] as a reference point" in resolving such complaint proceedings.[17]

6. In the *2018 Pole Attachment Order*, the Commission observed that incumbent LECs' "bargaining power vis-à-vis utilities has eroded since 2011."[18] Citing evidence that "incumbent LEC pole ownership has declined and incumbent LEC pole attachment rates have increased (while pole attachment rates for cable and telecommunications attachers have decreased)[,]" the Commission reconsidered the basis for its original presumption—that incumbent LECs differ from and have superior bargaining power vis-a-vis other attachers.[19]

7. In view of declining levels of incumbent LEC pole ownership and a widening disparity in pole attachment rates, the Commission adopted a new rebuttable presumption that, "for new and newly-renewed pole attachment agreements"[20] between incumbent LECs and electric utilities, incumbent LECs "are similarly situated" to "telecommunications attachers" and thus are entitled to "comparable" rates that are no higher than the New Telecom Rate.[21] The Commission held that a utility can rebut this presumption "with clear and convincing evidence that [an] incumbent LEC receives net benefits under its pole attachment agreement with the utility that materially advantage the incumbent LEC over other telecommunications attachers."[22]

8. In cases where a utility rebuts this presumption, the Commission designated the Old Telecom Rate as "the maximum rate that the utility and incumbent LEC may negotiate."[23] Thus, whereas the *2011 Order* had instructed that the Old Telecom Rate be used as a "reference point" in complaint proceedings involving an incumbent LEC attacher that is not similarly situated to other attachers on a utility's poles,[24] the *2018 Order* made this rate a "hard cap" in order to "provide further certainty within

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[16] *2011 Order*, 26 FCC Rcd at 5336, para. 217.

[17] *2011 Order*, 26 FCC Rcd 5336, para. 218.

[18] *See 2018 Order*, 33 FCC Rcd at 7768-69, para. 125; *see also* 33 FCC Rcd at 7769, para. 126 ("We therefore conclude that incumbent LEC bargaining power vis-à-vis utilities has continued to decline.").

[19] *2018 Order*, 33 FCC Rcd at 7769, para. 126 at 7769; *id.* at 7768-69, para. 125 (citing "recent survey" showing that incumbent LECs' average rate increased from $26.00 to $26.12 per year since 2008, while cable and competitive LEC provider payments to incumbent LECs, which were averaging $3.00 and $3.75 per year, respectively, had decreased from their 2008 levels of $3.26 and $4.45, respectively) (internal citation omitted).

[20] A "new or newly-renewed" agreement is "one entered into, renewed, or in evergreen status after the effective date of [the *2018 Order*], and renewal includes agreements that are automatically renewed, extended, or placed in evergreen status." *See 2018 Order*, para. 127 n.475.

[21] *2018 Order*, 33 FCC Rcd at 7769, para. 126 (establishing a rebuttable presumption that an incumbent LEC that is a party to a new or "newly-renewed" agreement is "similarly situated" to competitive LEC attachers and therefore entitled to the same rate (i.e., the New Telecom Rate)); *see* 47 CFR § 1.1413(b). This presumption became effective on March 11, 2019. *See Accelerating Broadband Deployment by Removing Barriers to Infrastructure Investment*, 84 Fed. Reg. 2460-01 (Feb. 7, 2019) (establishing effective date of rate presumption rule revisions). A separate effective date of May 20, 2019 applied to 2018 rule revisions governing pole attachment access and "one-touch-make-ready" requirements, which are not at issue here. *See Accelerating Wireline Deployment by Removing Barriers to Infrastructure Investment*, 84 Fed. Reg. 16412, 16413 (Apr. 19, 2019) (establishing effective date of pole attachment access rule revisions). For ease of reference, our use of the phrase "*2018 Order* effective date," or similar formulations, refers to the March 11, 2019, effective date of the rate presumption rule revisions.

[22] *2018 Order*, 33 FCC Rcd at 7768, para. 123; *see* 47 CFR § 1.1413(b).

[23] *2018 Order*, 33 FCC Rcd at 7771, para. 129.

[24] *2011 Order*, 26 FCC Rcd at 5337, para. 218.

the pole attachment marketplace," and "limit pole attachment litigation."[25] In complaint proceedings regarding agreements that materially advantage an incumbent LEC and that were entered into *after* the *2011 Order* but *before* the effective date of the *2018 Order* (March 11, 2019), the Commission determined that the Old Telecom Rate will continue to serve as a reference point.[26]

B. The Parties' Joint Use Agreement

9. Verizon and Potomac Edison are parties to a Joint Use Agreement (JUA) that contains the rates, terms, and conditions for each party's use of the other party's utility poles.[27] The JUA was entered into with Verizon's predecessor company in 1959 and was amended in 1998 to include the currently operative pole attachment rate provision.[28] The initial term of the JUA was just under four years and expired on January 1, 1963.[29]

10. Article XXI of the JUA states that, after its initial term, the JUA "shall continue in force thereafter until terminated by either party at any time upon one year's notice in writing to the other party."[30] Article XXI also contains an evergreen clause, however, which provides that, if terminated, the JUA "shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination."[31] The JUA remains in full force and effect.[32]

11. The JUA also sets forth the process for adjusting the parties' respective rental rates. In particular, Article XII states that, at the expiration of the JUA's initial two years, "and at the end of every 1-year period thereafter, the rental [rate] hereunder may be readjusted by the mutual agreement . . . of the parties hereto, at the request of either party. . . ."[33]

12. Under the JUA, Potomac Edison charges Verizon pole attachment rates that are significantly higher than the rates that Potomac Edison charges competitive LECs and cable providers to attach to the same poles. In 2017, 2018, and 2019, Potomac Edison charged Verizon {[ ]}[34] per pole for attachments.[35] In contrast, the per-pole rates Potomac Edison charged competitive LECs and cable attachers for attachments were between {[ ]} in 2017,[36] between {[ ]} in 2018,[37] and between {[ ]} in 2019.[38] Verizon thus pays at least {[ ]} times what its competitors pay.

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[25] *2018 Order*, 33 FCC Rcd at 7771, para. 129.

[26] *Compare 2018 Order*, 33 FCC Rcd at 7770, para. 127 n.475, *with id.*, 33 FCC Rcd, para. 127 n.479 (noting that "for existing agreements, the [*2011 Order*'s] guidance regarding review of incumbent LEC pole attachment complaints will continue to apply") (citing *2011 Order*, 26 FCC Rcd at 5333-38, paras. 214-19).

[27] *See* Complaint Exh. 1 (Agreement between Potomac Edison and The Chesapeake and Potomac Tel. Co. of Md. (1959), amended in 1998 (JUA)); Revised Joint Statement at 4, Stipulated Fact No. 10.

[28] *See* Revised Joint Statement at 4, Stipulated Fact No. 11.

[29] *See* Revised Joint Statement at 4, Stipulated Fact Nos. 13, 14.

[30] *See* Complaint Exh. 1 (JUA, Art. XXI).

[31] *See* Complaint Exh. 1 (JUA, Article XXI); *see also* Revised Joint Statement at 4, Stipulated Fact No. 17.

[32] *See* Revised Joint Statement at 4-5; Stipulated Fact Nos. 12, 19.

[33] *See* JUA, Article XII.

[34] Material set off by double brackets {[ ]} is confidential and is redacted from the public version of this document.

[35] Revised Joint Statement at 7, Stipulated Fact No. 40.

[36] Potomac Edison's Second Interrogatory Responses at 2, Response to Interrogatory No. 4. *See* Revised Joint Statement at 69, Potomac Edison Disputed Fact No. 119.

[37] Potomac Edison's Second Interrogatory Responses at 2, Response to Interrogatory No. 4. *See* Revised Joint Statement at 69, Potomac Edison Disputed Fact No. 119.

C. The Complaint

13. Verizon alleges that the pole attachment rates in the JUA are "unjust and unreasonable" under section 224 and the Commission's *2011* and *2018 Orders*.[39] Verizon argues that these *Orders* prohibit Potomac Edison from charging Verizon rates that exceed the New Telecom Rate—i.e., the rate that Potomac Edison charges "Verizon's competitors."[40] Verizon contends that Potomac Edison has used its "four-to-one pole ownership advantage" to charge Verizon rates that are {[ ]} the New Telecom Rate.[41] Verizon therefore asks the Commission to (1) find that the rates in the JUA are "unjust and unreasonable;" (2) require Potomac Edison to charge Verizon the New Telecom Rate (and, in any event, no more than the Old Telecom Rate) prospectively; and (3) order Potomac Edison to refund any amounts collected in excess of the rate that it is authorized to charge, consistent with the relevant statute of limitations.[42]

III. DISCUSSION

14. Based on our review of the JUA rates under the Commission's pole attachment rules and orders, we conclude that the pole attachment rates Potomac Edison charges Verizon are unjust and unreasonable. In reaching this conclusion, we find that (1) the JUA automatically renewed and extended on January 1, 2020, which was after the effective date of the *2018 Order*, and, thus, the JUA rates are subject to review under the *2018 Order* for the period starting January 1, 2020; and (2) the JUA rates are subject to review for the prior period under the *2011 Order*. Having determined that the JUA rates are unjust and unreasonable under the Commission's rules and orders, particularly when compared with the rates Potomac Edison has charged competitive LECs and cable companies to attach to the same poles, we conclude that Verizon is entitled to a pole attachment rate, covering both timeframes at issue, that does not exceed the Old Telecom Rate.[43] We find that Verizon is not entitled to the New Telecom Rate because Verizon receives benefits under the JUA that materially advantage it over other attachers.

A. The JUA Was "Newly-Renewed" and Is Thus Subject to Review Under the Framework of the *2018 Order* for the Period Beginning January 1, 2020

15. We conclude that the JUA is reviewable under the framework of the *2018 Order* because the JUA was newly-renewed after the rules adopted in the *2018 Order* went into effect on March 11, 2019. Under the *2018 Order*, a "new or newly-renewed" agreement is "one entered into, renewed, or in evergreen status after the effective date of [the *2018 Order*], and renewal includes agreements that are automatically renewed, extended, or placed in evergreen status."[44] Here, the nearly four-year initial term

(Continued from previous page)

[38] Revised Joint Statement at 7, Stipulated Fact No. 42.

[39] *See* Complaint at 1, 5-6, para. 10. Verizon's Complaint seeks a refund "for the 2017 to 2019 rental years." Complaint at 8, para. 14, 36-37, paras. 56-57.

[40] Complaint at 1, 33, para. 50. If the Commission determines that Verizon is not entitled to the New Telecom Rate, Verizon argues that "the just and reasonable rate cannot exceed the [Old Telecom Rate]." Complaint at 33, para. 50.

[41] Complaint at 1-2, 4, 23, paras. 4, 14.

[42] Complaint at 3, 37-38, paras. 58-61.

[43] We reject Potomac Edison's assertion that the Commission lacks authority to regulate the pole attachment rates of incumbent LECs to utility poles under the Pole Attachment Act. *See* Answer at 64-65. The Commission's interpretation that it has authority under section 224 to set just and reasonable rates for all telecommunications carriers, including incumbent LECs, has been upheld on appeal. *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020). *See American Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183, 188 (*American Elec. Power v. FCC*); *see also Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335-36 (2002) (Section 224(e)(1) "work[s] no limitation" on the FCC's more general ratemaking authority under section 224(b)(1)).

[44] *See 2018 Order*, 33 FCC Rcd at 7770, para. 127 n.475.

of the JUA expired on January 1, 1963,[45] and the JUA continued indefinitely after that date under JUA Article XXI, which states that the JUA "shall continue in force thereafter until terminated by either party . . . upon one year's notice."[46] We agree with Verizon that, under this provision, the JUA "automatically renewed [and] extended" after its initial term and continued to do so after the *2018 Order* took effect.[47] Given that the JUA states that it "shall continue in force" until terminated, and because "continue" and "extend" are synonymous in this context, we find that the JUA has been automatically renewed and extended after the effective date of the *2018 Order*.[48]

16. We also find that for the purposes of our rules, the JUA is automatically renewed each year on January 1, and thus that the *2018 Order* provides the relevant standard for reviewing the JUA as of January 1, 2020, the first automatic renewal date after the effective date of the Order. Article XXI of the JUA contains a one-year notice of termination provision, and we view that provision as effectively creating a series of one-year contracts that have automatically renewed and extended the JUA since the JUA's initial term expired on January 1, 1963. We are not bound by state law in our application of the Commission's rules to pole attachment agreements, including the construction and application of terms in our rules such as "newly-renewed," as our rules are intended to determine the scope and applicability of rights and obligations under section 224 of the Communications Act, not rights under the contract itself. We nevertheless note that our interpretation of the term "newly renewed" is consistent with a state court decision that Verizon cites, in which the court held that a 120-day notice provision for terminating an agreement that included no express renewal or termination date effectively created a series of 120-day contracts that continuously renew unless terminated.[49] Thus, we reject Verizon's claim that by continuing indefinitely without a specific renewal or termination date, the JUA renewed and extended on a day-to-day basis.[50]

17. Potomac Edison disputes Verizon's claim that the JUA was "newly-renewed" and that the *2018 Order* therefore governs any part of this proceeding. In particular, Potomac Edison asserts that "some action by the parties or a triggering event is required" for the JUA to be "automatically renewed"

[45] *See* Revised Joint Statement at 4, Stipulated Fact Nos. 13, 14.

[46] *See* JUA, Article XXI.

[47] *See* Complaint at 9-10, paras. 15-16.

[48] *See* Complaint at 9, para. 16 & n.43 (internal citations omitted). The JUA also contains an evergreen provision, which provides that termination of the agreement does not affect existing attachments, which continue to be subject to the terms of the JUA. For these attachments, the terms and conditions of the JUA also extend and renew automatically.

[49] *John Deere Constr. & Forestry Co. v. Reliable Tractor, Inc.*, 957 A.2d 595, 600-602 (citing *Northshore Cycles v. Yamaha Motor Corp*., 919 F.2d 1041, 1043 (5th Cir. 1990). The state court decision in *John Deere* provides persuasive but not controlling authority in a regulatory proceeding such as this one. *Cf. Citibank, N.A. v. Graphic Scanning Corp.*, 618 F.2d 222, 225 (2d Cir. 1980) (state court judgment that contract was not void for illegality under state law was not preclusive on state court party's claim before FCC that contract was illegal under Communications Act, nor was state court decision binding on FCC); *see* Answer at 13, para. 25 (challenging Verizon's reliance on Maryland state court decision in the present proceeding because "the Commission has decided on its own how to determine whether an agreement has been 'newly-renewed'"). Potomac Edison argues that the JUA could not be deemed to have automatically renewed because, unlike the agreement in *John Deere*, the JUA has a "fixed term"—the initial, four-year term—and thus is not an "open-ended agreement." *See* Answer at 13, para. 25 & n.32. Even if the *John Deere* decision were binding here (which it is not), this argument would fail because the JUA includes no termination date and "continues in force" indefinitely after the expiration of its initial term and is therefore "open-ended." It is thus comparable in this respect to the agreement deemed to have automatically renewed in *John Deere*, which also continued indefinitely albeit without an initial term.

[50] *See, e.g.*, Reply Legal Analysis at 11.

or "extended" within the meaning of the *2018 Order*.[51] But this argument ignores the Commission's express decision to apply the *2018 Order* to existing agreements that "are automatically renewed, extended, or placed in evergreen status"[52] without requiring further action by the parties. Potomac Edison also does not account for the impact of Article XXI, which effectively renews and extends the JUA each year, absent notice of termination by a party.

18. Potomac Edison mistakenly claims that Verizon's reading of the *2018 Order* would permit any JUA in effect as of the *2018 Order*'s effective date to be deemed "new or newly-renewed" on that date, even if it were subject to an express renewal term scheduled to occur at a later date.[53] Thus, it asserts that a JUA with an unexpired five-year renewal term would "nonsensically" be deemed newly-renewed on the March 11, 2019, effective date, rather than on the expiration of the pending five-year term, simply by continuing to exist on March 11, 2019.[54] But that is not this case. The JUA was not subject to an express renewal term after January 1, 1963, and is, therefore, open-ended. Read as a whole—particularly in light of the one-year termination notice provision—the JUA created a series of one-year contracts that have automatically renewed each year since 1963. Because automatic renewal and extension has occurred since the *2018 Order*'s effective date, the JUA is "newly-renewed" within the meaning of the *2018 Order*.[55]

B. Verizon is Entitled to Relief Under the *2018 Order*

19. Having determined that the *2018 Order* provides the relevant standard for review of the JUA for the period starting January 1, 2020, we conclude that Verizon is entitled to a rate, as of January 1, 2020, that does not exceed the Old Telecom Rate. The *2018 Order* established a presumption that Verizon may be charged no higher than the New Telecom Rate for agreements entered into or renewed after March 11, 2019, unless Potomac Edison demonstrates "with clear and convincing evidence that [Verizon] receives benefits under [the JUA] that materially advantages [it] over other telecommunications carriers or cable television systems providing telecommunications services on the same poles."[56] Where Potomac Edison makes that showing, the Old Telecom Rate is the maximum permissible rate.[57]

20. The record demonstrates that the JUA provides Verizon with material advantages over competitive LEC and cable attachers on the same poles. We therefore find that Potomac Edison has rebutted the presumption in the *2018 Order* that Verizon should be charged no higher than the New

[51] Answer at 12, para. 24. For example, had the current parties decided to extend the JUA following the effective date of the *2018 Order*, then Potomac Edison suggests that the JUA would be "extended." Likewise, if the JUA "called for automatic renewal at a future date certain," then it would become "automatically renewed," according to Potomac Edison. *See id.*

[52] *See 2018 Order*, 33 FCC Rcd at 7770, para. 127 n.475 (emphasis added).

[53] *See* Answer at 14, para. 27.

[54] *Id.*

[55] *See 2018 Order*, 33 FCC Rcd at 7770, para. 127 n.475 ("renewal includes agreements that are automatically renewed").

[56] *See* 47 CFR § 1.1413(b); *see also 2018 Order*, 33 FCC Rcd at 7769-70, paras. 126-128.

[57] *2018 Order*, 33 FCC Rcd at 7771, para. 129 (where the presumption is rebutted "the pre-*2011 Pole Attachment Order* telecommunications carrier rate [i.e., the Old Telecom Rate] is the maximum rate"); *Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 83 Fed. Reg. 46812-01, 46828 (Sept. 14, 2018).

Telecom Rate.[58] Specifically, the record clearly demonstrates that Verizon receives the following material advantages over competitive LEC and cable attachers on the same poles:[59]

- *Guaranteed access.* The JUA guarantees Verizon space on Potomac Edison's poles, including "new poles," and Potomac Edison cannot deny attachment on the grounds that a pole is not strong or tall enough.[60] Verizon's competitors are not guaranteed space on any pole to which they are not already attached and can be denied access "where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes."[61]
- *Space Allocation.* Under the JUA, Verizon pays for and is permitted to use {[ ]} of space on Potomac Edison's poles;[62] other attachers are restricted to {[ ]} and are required to pay to use additional space above {[ ]}.[63] Thus, Verizon has the necessary space to add new attachments without additional expense.
- *Termination.* Upon termination of the JUA, the agreement remains in full force and effect with respect to Verizon's attachments on all poles jointly used by the parties at the time of termination.[64] Verizon's competitors, however, are required to remove all attachments prior to any specified termination date.[65]

[58] *See* 47 CFR § 1.1413(b) (The utility can rebut the presumption with clear and convincing evidence.).

[59] We disagree with Verizon's contention that Potomac Edison "abandoned" its prior list of 24 advantages it claimed Verizon received in its JUA. *See* Reply Legal Analysis at 27. Both parties identified the advantages that Potomac Edison asserted during the negotiations that preceded the filing of Verizon's complaint. *See* Complaint Exh. 18; *see also* Answer Attach. J. Potomac Edison also produced 20 competitive LEC and cable attacher license agreements in the record that reflect these benefits, and it spelled out the advantages Verizon allegedly received in the Revised Joint Statement. *See* The Potomac Edison Company's Second Set of Responses to Complainant's First Set of Interrogatories, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (filed Feb. 10, 2020) at 2, Response to Interrogatory No. 4 (Potomac Edison's Second Interrogatory Responses); *see also* Revised Joint Statement at 56-70, Potomac Edison Disputed Facts Nos. 63-120. Potomac Edison has requested that the identity of its CLEC and cable attacher licensees and the specific terms and conditions of their individual license agreements with Potomac Edison be treated as confidential. Appendix A lists those agreements along with their public designation.

[60] *See* JUA, Articles IV(a), IV(b), and V(a).

[61] 47 CFR § 1.1403(a) (a utility may deny . . . access to its poles . . . where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes"). *See* CATV-1, CATV-2, CATV-3, CATV-4, CATV-5, CATV-6, CATV-7, CATV-8, CATV-9 at sections 1, 3; CATV-10, CATV-11, CLEC-1, CLEC-2, CLEC-4 at section 3; CLEC-5, CLEC-6, CLEC-7, CLEC-8, CLEC-9 at sections 1, 2; CLEC-3 at sections 2, 3(a). *See also* CLEC-7 at section 3(b); CLEC-5 at para. 3; CLEC-6 at para. 3; CLEC-9 at para. 3; CLEC-8 at para. 3; CLEC-3 at section 3(a).

[62] *See* JUA, Article II(2).

[63] *See* CATV-1, CATV-2, CATV-3, CATV-4, CATV-5, CATV-6, CATV-7, CATV-8, CATV-9 at sections 2, 9; CATV-10, CATV-11, CLEC-1, CLEC-2, CLEC-4 at section 7(a); CLEC-3 at section 7(a).

[64] *See* JUA, Article XXI.

[65] *See* CATV-1, CATV-2, CATV-3, CATV-4, CATV-5, CATV-6, CATV-7, CATV-8, CATV-9 at section 22; CATV-10, CATV-11, CLEC-1, CLEC-2, CLEC-4 at sections 23, 25; CLEC-5, CLEC-6, CLEC-7, CLEC-8, CLEC-9 at section 31; CLEC-3 at section 24.

- *Make-ready work and timelines.* There are no explicit make-ready provisions in the JUA, whereas several of Verizon's competitors have explicit make-ready obligations in their license agreements.[66]
- *No additional fees, charges, or advance payment.* Verizon does not pay any fees for post-attachment inspections, safety violations or unauthorized attachments; administrative or application fees; or additional charges for anchors or guy wires. Its competitors must pay these fees and charges.[67] Verizon also pays its annual rental fee in arrears,[68] while many of its competitors are required to pay in advance or semi-annually.[69]

21. Accordingly, under the facts of this case, we find that Verizon is entitled to a rate no greater than the Old Telecom Rate for the timeframe covered by the *2018 Order*, i.e., from January 1, 2020, forward.

C. The JUA is Subject to Review Under the *2011 Order* for the Period Prior to 2020.

22. The *2011 Order* provides the relevant standard for reviewing the JUA rates for the period prior to the JUA's renewal on January 1, 2020. In the *2011 Order*, the Commission held that, in determining the need to review the rates, terms, and conditions of "existing" joint use agreements, it could take into consideration whether an incumbent LEC has demonstrated that it lacks the ability to terminate an existing agreement and obtain a new arrangement.[70] Verizon has met that threshold for review here.

23. *First*, the JUA has no fixed termination date and, even if terminated, would require Verizon to continue paying the JUA rate indefinitely for all existing attachments. Article XXI of the JUA ensures that termination only affects the future granting of joint use, stating that, if terminated, the JUA "shall remain in full force and effect with respect to all poles jointly used by the parties at the time of such termination."[71] Given that termination of the JUA, in its entirety, would require the consent of both parties, Verizon "may not unilaterally terminate it or simply wait for it to expire in order to 'obtain a different arrangement.'"[72] *Second*, Verizon may not obtain a lower attachment rate without Potomac

[66] *See* CATV-1, CATV-2, CATV-3, CATV-4, CATV-5, CATV-6, CATV-7, CATV-8, CATV-9 at section 6; CATV-10, CATV-11, CLEC-1, CLEC-2, CLEC-4 at section 14; CATV-11 at section 29; CLEC-7 at section 3(c); CLEC-5, CLEC-6, CLEC-7, CLEC-8, CLEC-9 at section 3; CLEC-3 at section 3(b).

[67] *See* CATV-1, CATV-2, CATV-3, CATV-4, CATV-5, CATV-6, CATV-7, CATV-8, CATV-9 at sections 2, 4, 10; CATV-10, CATV-11, CLEC-1, CLEC-2, CLEC-4 at sections 13(a), 18, 22; CLEC-5, CLEC-6, CLEC-7, CLEC-8, CLEC-9 at sections 2, 9, 14, 24; CLEC-3 at sections 3(b)(2), 13, 17, 21, 28.

[68] *See* JUA, Article XI(c).

[69] *See* CATV-1, CATV-2, CATV-3, CATV-4, CATV-5, CATV-6, CATV-7, CATV-8, CATV-9 at section 2; CATV-10, CATV-11, CLEC-1, CLEC-2, CLEC-4 at section 13(a); CLEC-3 at 13(a).

[70] *See 2011 Order*, 26 FCC Rcd at 5335-36, para. 216 ("To the extent that an incumbent LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement, the Commission can consider that as appropriate in a complaint proceeding."); *see also 2018 Order*, 33 FCC Rcd at 7770, para. 127 n. 478 (citing *2011 Order*, 26 FCC Rcd at 5333-38, paras. 214-19 (noting that, pending renewal of an existing agreement, "the [*2011 Order*'s] guidance regarding review of incumbent LEC pole attachment complaints will continue to apply"). Although we determined in Part III.A above that the JUA was "newly-renewed" for purposes of establishing Verizon's right to review under the *2018 Order*, it is not a "new" agreement for purposes of establishing a right to review under the *2011 Order*. *See 2011 Order*, 26 FCC Rcd at 5291, para. 114 (referring to "new agreements" as those "executed after the effective date of this Order"). Even assuming the JUA is deemed to be a "new agreement" each year, the *2011 Order* would still apply for the period prior to January 1, 2020.

[71] *See* JUA, Article XXI.

[72] *See BellSouth Telecomms, LLC D/B/A AT&T Florida, v. Florida Power and Light Co.*, Memorandum Opinion and Order, 35 FCC Rcd 5321, 5326, para. 11 (EB 2020).

Edison's concurrence, which has effectively locked in an unreasonable rate for existing attachments due to Potomac Edison's refusal to offer meaningful rate reductions for existing attachments.[73] *Third*, the fact that Potomac Edison has a four-to-one pole ownership advantage likely places Verizon in "an inferior bargaining position."[74] *Finally*, the record reflects that protracted negotiations between the parties have failed to yield a mutually agreeable, just and reasonable rate.[75]

24. Accordingly, Verizon has *demonstrated* that it "genuinely lacks the ability to terminate [the JUA] and obtain a new arrangement."[76]

25. Potomac Edison disputes Verizon's claim that it lacks the ability to terminate the JUA and enter into a new agreement because of its inferior bargaining position relative to Potomac Edison.[77] While conceding its nearly four-to-one pole ownership advantage in Maryland, Potomac Edison nevertheless claims that it is not in a superior bargaining position to Verizon.[78] We disagree. The Commission has previously expressed concern that an incumbent LEC's minority pole ownership status may reflect a lack of bargaining power to negotiate just and reasonable pole attachment rates, thus leading the Commission to conclude that "market forces and independent negotiations may not be alone sufficient to ensure just and reasonable rates."[79] More recently, the Enforcement Bureau held that a utility's two-to-one pole ownership advantage, paired with a relatively high attachment rate, "constitutes probative evidence" of the incumbent LEC's inferior bargaining position relative to the utility.[80] Consistent with these assessments, we conclude that Potomac Edison's substantial pole ownership advantage, combined with its relatively high attachment rate (as discussed below) supports an inference of Verizon's inferior bargaining position relative to Potomac Edison, and thus supports our decision to review the JUA rates.

26. Potomac Edison argues that it has no bargaining leverage over Verizon because the terms of the JUA prevent it from removing Verizon's facilities from Potomac Edison's poles without the parties' mutual agreement[81] and because legal and financial impediments make it difficult for Potomac Edison to remove its facilities from Verizon's poles and redeploy them elsewhere.[82] Thus, Potomac Edison suggests that, despite its majority pole ownership, these considerations leave it unable, as a practical matter, to wield any bargaining leverage over Verizon. As Verizon notes, however, "[t]he far higher cost to relocate Verizon's facilities as compared to the cost of staying on the poles—Verizon's best

[73] *See* JUA, Article XII (stating that the per pole rental rate "may be readjusted by the mutual agreement . . . of the parties").

[74] *See 2011 Order*, 26 FCC Rcd at 5327, para. 199. *See* Revised Joint Statement at 6, Stipulation of Fact No. 32.

[75] *See* Revised Joint Statement at 8-10; *see also* Reply Legal Analysis at 20; Reply at 3, 14.

[76] *See 2011 Order*, 26 FCC Rcd at 5336, para. 216.

[77] Answer at 15-21, paras. 29-40. Verizon notes that, in the related Pennsylvania complaint proceeding, Potomac Edison admitted that its parent company, FirstEnergy, has a nearly three-to-one pole ownership advantage over Verizon Pennsylvania. *See* Reply Legal Analysis at 21 n.96 (citing Response to Pennsylvania Complaint, para. 4).

[78] *See* Revised Joint Statement at 6, Stipulated Fact Nos. 30-32; *see also* Reply Legal Analysis at 21 ("Potomac Edison does not dispute it has owned most of the joint use poles at all relevant times, including 79% of the poles the parties currently share in Maryland.").

[79] *See 2011 Order*, 26 FCC Rcd at 5327, para. 199 (noting potential impact of disparate pole ownership on parties' relative bargaining power); *id.* at 5329, para. 206 & n.618 (expressing concern that, because electric utilities, in the aggregate, own approximately 65-70 % of all poles today, "incumbent LECs . . . may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations in some cases").

[80] *See Dominion Order*, 32 FCC Rcd at 3756-57, para. 13.

[81] Answer at 18, paras. 34-35.

[82] Answer at 19-27, paras. 36-54.

alternative to a negotiated rate agreement—also provides Potomac Edison's bargaining power."[83] In particular, if both parties were to extract themselves from the JUA and redeploy their facilities under an alternative arrangement, Verizon would be required to relocate four times the facilities as Potomac Edison by virtue of the four-to-one disparity in the parties' pole ownership, making Verizon's alternative to the JUA far costlier.[84] We therefore agree with Verizon that the disparity in pole ownership reinforces Potomac Edison's ability "to perpetuate the status quo and refuse reductions to its unjust and unreasonable rates."[85]

27. Potomac Edison also argues that any bargaining leverage it may have was mitigated by its offer to replace the JUA rates and terms for Verizon's new and existing attachments with the rates and terms that Potomac Edison offers competitive LEC attachers to Potomac Edison's poles.[86] But the fact that Potomac Edison conditioned this offer on Verizon agreeing to relinquish its joint use poles—an event that would further diminish Verizon's bargaining power—hardly mitigates the effect of Potomac Edison's superior bargaining power.[87]

28. Finally, we reject Potomac Edison's argument that Verizon may not obtain review of an "existing" joint use agreement and, instead, must terminate the JUA before seeking rate relief.[88] As Potomac Edison concedes, however, Commission review of rates in an existing agreement is justified "'[t]o the extent that an incumbent LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement,'"[89] and Verizon *has* demonstrated that it genuinely lacks the ability to terminate the JUA and obtain a new arrangement. By expressly stating that the Commission may consider the rates, terms, and conditions of an agreement in a complaint proceeding where an incumbent LEC has demonstrated its inability to terminate, the *2011 Order* plainly provides for Commission review of an existing agreement in that circumstance. Further, although Potomac Edison claims that "Verizon easily could have terminated the [JUA] while preserving its right to take future action . . . pursuant to the Commission's 'sign and sue' option for incumbent LECs[,]" there is no requirement for it to have done so as a precondition for obtaining review of the rates it pays to Potomac Edison.[90]

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[83] Reply Legal Analysis at 23 (internal quotations and brackets omitted).

[84] *See* Reply Legal Analysis at 22-23.

[85] *See* Reply Legal Analysis at 22-23.

[86] *See* Answer at 28-29, para. 60.

[87] *See* Answer at 29, para. 60. We also find unpersuasive Potomac Edison's reliance on a comment that a Verizon Pennsylvania employee made following negotiations with Potomac Edison's Pennsylvania affiliates in 2009. Potomac Edison argues that the employee's comment that the new rates in the Pennsylvania joint use agreement were "fair and equitable" and had been "amiably resolved" demonstrates that the parties to this proceeding have equal bargaining power. *See* Answer at 6-11, paras. 12-20. Putting aside the questionable relevance of the 2009 comment, which involved different parties and different facts, the comment in no way proves that Potomac Edison's Pennsylvania affiliates (and by extension, Potomac Edison) lacked superior bargaining power.

[88] Answer at 2, para. 2 ("the Commission is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable" and "[n]othing in the record suggests that existing agreements between incumbent LECs and electric utilities were entered into with the expectation that their provisions would be subject to Commission review") (quoting *2011 Order*, 26 FCC Rcd at 5335-36, para. 216 & n.654).

[89] Answer at 4-5, para. 8.

[90] Answer at i. Under the "sign and sue" rule, "an attacher may execute a pole attachment agreement with a utility, and then later file a complaint challenging the lawfulness of a provision of that agreement." *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11905, para. 99 (2010) (the "sign and sue" rule "allows an attacher to seek relief where it claims that a utility has coerced it to accept unreasonable or discriminatory contract terms to gain access to utility poles") (cited in *2011 Order*, 26 FCC Rcd at 5292, para. 119).

D. Verizon is Entitled to Relief under the *2011 Order*.

29. Having determined that the *2011 Order* provides the proper framework for review of the JUA for the period prior to January 1, 2020, we conclude that Verizon is entitled to a rate for that period that does not exceed the Old Telecom Rate.

30. The *2011 Order* does not specify the rate that applies when an incumbent LEC has shown, as Verizon has here, that it is unable to terminate an "existing" agreement and obtain a new arrangement. But the *2011 Order* indicates that the Commission would look to the Old Telecom Rate in complaint proceedings involving a new agreement between an incumbent LEC and pole owner when the incumbent LEC is not "similarly situated" to competitive LECs or cable attachers on the same poles.[91] Applying this guidance under the facts of this case, we find that Verizon is not "similarly situated" to competitive LEC or cable attachers because Verizon receives material advantages over competitive LEC and cable attachers on the same poles.[92] Thus, we find that Verizon is entitled to a rate no greater than the Old Telecom Rate for the period prior to January 1, 2020, which is the timeframe in this case covered by the *2011 Order*.

31. Verizon claims that it is instead entitled to the New Telecom Rate because, in its view, the JUA "does not provide Verizon a net material advantage over its competitors that supports a rate higher than the [N]ew [T]elecom [R]ate."[93] Under the *2011 Order*, Verizon bears the burden of demonstrating that it is similarly situated to competitive LEC or cable attachers with respect to the terms and conditions of its attachments.[94] We find, however, that Verizon cannot demonstrate that it is similarly situated to competitive LEC or cable attachers on the same poles because Verizon receives material advantages relative to such other attachers.[95]

32. At the same time, we reject Potomac Edison's suggestion that the material advantages the JUA provides Verizon justify the JUA rates—which greatly exceed the Old and New Telecom Rates.[96] Potomac Edison argues that the value of Verizon's guaranteed access is the cost to Potomac Edison of building poles tall and strong enough to accommodate Verizon's attachments.[97] Yet Potomac Edison considers neither the cost Verizon bears to build poles tall and strong enough to accommodate Potomac Edison's attachments,[98] nor the JUA's reservation of more pole space for Potomac Edison {[ ]} than for Verizon {[ ]}.[99] What is more, Potomac Edison did not build its poles simply to

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[91] *See 2011 Order*, 26 FCC Rcd at 5336, para. 217-18 (describing the Old Telecom Rate as a reasonable "reference point" when the incumbent LEC is not similarly situated to competitive LEC and cable attachers). *A National Broadband Plan for Our Future*, 76 Fed. Reg. 26620-02, 26630 May 9, 2011). While the *2011 Order* identifies the Old Telecom Rate as a "reference point" rather than a hard cap, neither party proposed any rate other than the Old Telecom Rate as a relevant measure in cases where the rate in a JUA is found to be unjust and unreasonable under the *2011 Order*, and the incumbent LEC has failed to show that it is similarly situated to cable or telecommunications attachers.

[92] *See supra* Part III.B (listing material advantages that Verizon receives under the JUA relative to competitive LEC and cable attachers on the same poles).

[93] *See* Complaint at 12, para. 20.

[94] *See 2011 Order*, 26 FCC Rcd at 5336-37, paras. 217-18 (an incumbent LEC can demonstrate that it obtains access to poles on terms and conditions that are the same as a telecommunications carrier or cable operator); at 5350, Appx. A; *see also A National Broadband Plan for Our Future*, 76 Fed. Reg. 26620-02, 26630 (May 9, 2011).

[95] *See supra* Part III.B (listing material advantages).

[96] *See* Answer at 32-43.

[97] Answer at 32-35.

[98] Reply Legal Analysis at 31-32.

[99] JUA, Article II(1).

accommodate Verizon. By 1978, cable attachments were so common that Congress saw fit to regulate their rates and, by 1996, amended section 224 of the Act to provide cable and competitive LECs a statutory right of access.[100] Although Verizon avoids some of the charges Potomac Edison assesses on other attachers, Verizon nevertheless incurs a portion of these costs in undertaking the work itself.[101] Thus, Verizon still must perform some of the same engineering and make ready work as other attachers before it can attach.[102] Many of the terms in the JUA also are reciprocal, so Verizon must give Potomac Edison the same advantages that Potomac Edison provides Verizon.[103] Finally, Potomac Edison's "speed to market" and overlashing advantages relate to the date the JUA was entered into and not to any specific terms and conditions in the JUA.[104] For all of these reasons, the JUA rates cannot be justified under the *2011 Order*.

E. Calculating the Old Telecom Rate

33. The parties disagree about how the Old Telecom Rate should be calculated.[105] The record reflects that the 2019 JUA rate is between]} higher than the Old Telecom Rate, depending on which party's calculation is credited.[106] Relying primarily on the rebuttable presumptions for the formula inputs in the Commission's rules,[107] Verizon contends that the properly-calculated Old Telecom Rate for the 2017, 2018, and 2019 rental years is $9.04, $9.20, and $9.17, respectively.[108] In contrast, Potomac Edison maintains that the properly-calculated Old Telecom Rate for 2019 is $16.07 based in part upon inputs derived from a field study it conducted in response to Verizon's complaint.[109] The inputs derived from this study, Potomac Edison asserts, should be used in lieu of the Commission's rebuttable presumptions.[110] In determining our selected inputs, we consider both parties' proposals.

34. As an initial matter, we reject Verizon's procedural objections to Potomac Edison's submission. Verizon urges us to give no weight to Potomac Edison's field study and associated inputs because, although Potomac Edison discussed the scope, methodology, and results of the survey in its

[100] *See Pole Attachment Order*, 26 FCC Rcd at 5245, paras. 9-10; *Third Report and Order*, 33 FCC Rcd at 7707, para. 5.

[101] Reply Legal Analysis at 44-47.

[102] Reply Exh. A, Reply Affidavit of Stephen C. Mills at 4, para. 7 (Mills Reply Aff.).

[103] Complaint at 22-23, 25-27, 31-33; Reply Legal Analysis at 44-47.

[104] Answer at 33-39, paras. 70-83.

[105] *See* Complaint at 33-36, paras. 50-53; Complaint Exh. B, Affidavit of Mark S. Calnon, Ph.D. at 13-15, paras. 27-32 (Calnon Complaint Aff.); Complaint Exh. C, Affidavit of Timothy C. Tardiff, Ph.D. at 5-10, paras. 10-14 (Tardiff Complaint Aff.); Answer at 48-52, paras. 104-112; Answer Exh. G; Reply Legal Analysis at 47-52; Reply Exh. B, Mark S. Calnon, Ph.D. at 2-15, paras. 4-27 (Calnon Reply Aff.); Reply Exh. C, Reply Affidavit of Timothy J. Tardiff, Ph.D. at 16-22, paras. 30-42 (Tardiff Reply Aff.). *See also* Revised Joint Statement at 13, 36, Verizon Disputed Facts 4-6, 150-155.

[106] *Compare* Revised Joint Statement at 7, Stipulated Fact No. 40, *with* Revised Joint Statement at 10, Stipulated Fact No. 58.

[107] 47 CFR §§ 1.1409, 1.1410.

[108] Revised Joint Statement at 10, Stipulated Fact No. 58; Calnon Complaint Aff. at 13-14, paras. 27.

[109] Revised Joint Statement at 10, Stipulated Fact No. 58, Revised Joint Statement at 44-45, Potomac Edison Disputed Facts Nos. 8-9; Answer at 49-51, paras. 105-110. *See* Answer Exh. K Decl. of Scott Carlin (Carlin Answer Decl.) and Answer Exh. L, Decl. of Clark Guo (Guo Answer Decl.). Potomac Edison has not calculated the Old Telecom Rate for the 2017 and 2018 rental years, reserving its right to perform further analysis if necessary. *Id.*

[110] Answer at 51-52; Answer Attach. B, Declaration of Stephen B. Schafer, at 4, para. 27 (Schafer Answer Decl.). *See* Revised Joint Statement at 44, Potomac Edison Disputed Fact No. 6.

Answer, it did not attach the survey's underlying field data.[111] Verizon argues that this omission violated the Commission's pleading rules and hampered Verizon's ability to confirm the study's accuracy and reliability.[112] Commission staff, however, did not find that Potomac Edison violated the formal complaint rules when it filed its Answer and supporting materials.[113] We note that Verizon bears some responsibility for the fact that Potomac Edison's underlying data never made it into the record. When Potomac Edison sought leave to supplement its Answer to include the underlying data in the record after Verizon called the survey's conclusions into question,[114] Verizon opposed Potomac Edison's motion,[115] even though Verizon had served a discovery request seeking the same information[116] and the discovery period had not yet closed.[117] And Verizon did not identify the survey data as an outstanding discovery

[111] Verizon's Opposition to Potomac Edison's Motion for Leave to Supplement and Correct Answer, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (filed Mar. 17, 2020) (Verizon Opposition to Motion for Leave) (citing *In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, Report and Order, 33 FCC Rcd 7178, para. 13 (2018) (*Formal Complaint Rules Order*), *see also, e.g., In the Matter of Implementation of the Telecommunications Act of 1996*, Order on Reconsideration, 16 FCC Rcd 5681 at 5690, para. 19 (2001) (*Formal Complaint Rules Recon Order*).

[112] Reply Legal Analysis at 50-51. According to Verizon, Potomac Edison violated the Commission's pleading rules by not including a "comprehensive pleading containing complete factual and legal analysis," which would ensure the timely and efficient resolution of this dispute. Verizon's Opposition to Potomac Edison's Motion for Leave to Supplement and Correct Answer, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (filed Mar. 17, 2020) (Verizon Opposition to Motion for Leave) (citing *In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, Report and Order, 33 FCC Rcd 7178, para. 13 (2018) (*Formal Complaint Rules Order*), *see also, e.g., In the Matter of Implementation of the Telecommunications Act of 1996*, Order on Reconsideration, 16 FCC Rcd 5681 at 5690, para. 19 (2001) (*Formal Complaint Rules Recon Order*).

[113] While the Commission's formal complaint process favors the disclosure of all evidence relied upon by the parties in the proceeding, the Commission's formal complaint rules do not specifically require that every document be attached to the Answer. *Compare* Formal Complaint Recon Order, 16 FCC Rcd at 5695-96, paras. 32-33 with 47 CFR § 1.726. Other formal complaint rules provide the parties with a process to obtain, exchange, or stipulate to relevant information. *See* 47 CFR §§ 1.729, 1.730, 1.733.

[114] *See* Reply Legal Analysis at 49-51.

[115] *See supra* note 111. Verizon's reliance upon *Teleport v. Georgia Power* in opposition to Potomac's motion to supplement the record is unpersuasive. Opposition to Motion for Leave at 5 (citing *Teleport Communications Atlanta, Inc. v. Georgia Power Company*, Application for Review, 17 FCC Rcd 19859, 19866, para. 18 (2002) (*Teleport v. Georgia Power*). The timing of the request in *Teleport v. Georgia Power* differs significantly from the facts in this case. The Commission held that the information at issue in *Teleport* was provided for the first time in Teleport's reply to its application for review and that the information was not consistent with what Teleport argued in response to the complaint. *Teleport*, 17 FCC Rcd at 19869, para. 25. Here, Potomac Edison explained in its Answer the scope and methodology of its field survey and provided the results of that survey. *See supra* note 110.

[116] *See* Verizon's First Set of Interrogatories to Potomac Edison, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (filed Nov. 21, 2019) at 8-9 (interrogatory no. 10 asking Potomac Edison to identify all data regarding jointly used poles, including all survey data, when the data was collected, by whom, and the guidelines for collection); *see also* Verizon Opposition to Motion for Leave at 1.

[117] Staff had advised the parties that they should expect discovery and briefing to be completed by April 17, 2020. *See* Letter from Rosemary McEnery, Chief, Market Disputes Resolution Division, Enforcement Bureau, to Curtis L. Groves, Counsel for Verizon, and Thomas B. Magee, Counsel for Potomac Edison, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 at 2 (Dec. 9, 2019) (December 9, 2019 Letter Ruling). Verizon complains that Potomac Edison did not respond to its discovery request seeking the field study data (*see* Verizon Opposition at 1), but Potomac Edison gave Verizon what it said it would provide in response to Verizon's discovery request (*see* The Potomac Edison Company's Responses to Complainant's First Set of Interrogatories, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (filed Jan. 22, 2020) at 7, Response to Interrogatory No. 10 (Potomac Edison's First Interrogatory Responses)).

issue in the parties' Revised Joint Statement or move to compel its production.[118] The Commission's formal complaint rules contemplate that parties will work together to narrow the relevant factual and legal issues and expedite the Commission's resolution of disputes.[119] It is unclear why the parties could not reach an agreement regarding the exchange of the field survey data given that both parties agree that the information is helpful to verify the accuracy and reliability of the survey inputs,[120] and both bear some responsibility for the information not finding its way into the record.[121] Potomac Edison offered to produce this evidence before the close of discovery, and we do not believe accepting it into the record would have delayed the timely resolution of this dispute. Thus, as a procedural matter and to avoid any further delay in this proceeding,[122] we decline to exclude consideration of Potomac Edison's suggested inputs, as supported by its survey results.

35. We also reject Verizon's substantive objections to our reliance on the survey. Verizon contends that the survey is flawed because its sample size is insufficient, it includes poles that are not part of the joint use network, and it relies too heavily on information about Potomac Edison's (as opposed to Verizon's) poles.[123] We disagree. We find that Potomac Edison's description of the scope and methodology of its survey reflects a statistically valid survey,[124] that the sample size is adequate,[125] that the poles included in the sample are part of the joint use network,[126] and that the information collected about Potomac Edison's poles was relevant.[127] Moreover, we conclude that the survey is direct probative

[118] Staff directed the parties to file a revised joint statement that complied with the Commission's rules and indicated that any discovery issues would be addressed once the parties complied with that obligation. Letter from Rosemary McEnery, Chief, Market Disputes Resolution Division, Enforcement Bureau, to Curtis L. Groves, Counsel for Verizon, and Thomas B. Magee, Counsel for Potomac Edison, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 at 2 (Apr. 13, 2020). *See* 47 CFR § 1.733(b)(1)-(2) (requiring the parties to meet and confer and to submit a joint statement that describes any remaining disputes as to discovery and other issues).

[119] *See Formal Complaint Rules Recon Order*, 16 FCC Rcd at 5696-97, para. 35.

[120] Motion for Leave at 2; Potomac Edison asked for guidance in its Motion for Leave regarding how best to provide the field survey data. *See* Motion for Leave at 2. *See also* Reply Legal Analysis at 19-20, paras. 38-39.

[121] Among other things, the parties could have included this information or stipulated to aspects of this information in their Revised Joint Statement.

[122] Staff adjusted the initial schedule in this proceeding at the request of the parties. *See* December 9, 2019 Letter Ruling at 1-3. This action, as well as the parties' failure to comply with the Commission's rules regarding the filing of their joint statement, resulted in extending the shot clock.

[123] Reply Legal Analysis at 48-52.

[124] *See* Answer at 49-51, paras. 105-110; *see also* Carlin Answer Decl. and Guo Answer Decl. Indeed, Potomac Edison's description of the scope and methodology of its field survey largely corresponds to Verizon's assessment of what an appropriate statistically valid survey should entail. *See* Tardiff Reply Aff. at 19, para. 38.

[125] *See* Reply Legal Analysis at 49-52. Verizon's reliance upon *Nevada State Cable v. Nevada Bell* to challenge the adequacy of Potomac Edison's sample size is unavailing. *Id.* (citing *Nevada State Cable Television Association v. Nevada Bell*, Order, 13 FCC Rcd 16774, paras. 12-13 (Cable Bur. 1998)). Contrary to Verizon's characterization, the Commission did not find that Nevada Bell's information was insufficient based upon the percentage of poles included in the survey. Rather, the Commission found that the data submitted by Nevada Bell was incomplete because Nevada Bell did not explain how it arrived at the number of poles in its survey and because it used the information from its survey inappropriately. Here, Potomac Edison has explained how it arrived at the poles in its survey and submitted its survey conclusions.

[126] For Potomac Edison, the universe includes 28 fewer poles than the number of invoiced poles, 79,264, a difference of approximately .04%. For Verizon, the universe includes 29 more poles than the number of invoiced poles, 21,634, a difference of approximately .13%. *See* Tariff Reply Aff. at 20. We find that this difference is not significant enough to warrant dismissing the survey in its entirety.

[127] Verizon contends that the collection of different information about poles owned by Potomac Edison and Verizon constitutes a flaw in the survey. *See* Reply Legal Analysis at 52. However, we find that it is the information

(continued….)

evidence regarding the inputs into the Old Telecom Rate formula.[128] Indeed, as Verizon's experts note, some of the survey input results are close to the inputs suggested by Verizon.[129]

36. At the same time, despite Potomac Edison's challenges, we find that aspects of Verizon's suggested inputs also are helpful. We will therefore consider and weigh the probative value of all of the rate-related information that the parties have advocated to calculate the Old Telecom Rate.[130]

37. The parties dispute the following inputs into the Commission's Old Telecom Rate formula: allocator for deferred income taxes to calculate net cost of a bare pole, appurtenance factor, number of poles, allocator for deferred income taxes to calculate maintenance factor, depreciation rate for gross pole investment, rate-of-return, occupied space, unusable space, average number of attachers, and pole height.[131] Based upon our consideration of the record, we accept the following inputs into the Commission's Old Telecom Rate formula:

- Allocator for Deferred Income Taxes to Calculate Net Cost of a Bare Pole: We accept Potomac Edison's allocator because it is consistent with the Commission's decision to use a gross investment allocator for accumulated deferred taxes relative to development of a conduit rate.[132]
- Appurtenance Factor: We accept Verizon's input which reflects the Commission's default factor (0.85). As Verizon's expert Tardiff points out, Potomac Edison's own documentation lists non-appurtenance investment of approximately $197.4 million in FERC Form 1 account 364, which is approximately 84.43% of (or .8443 times) the total gross investment (non-appurtenance plus appurtenance investment) in account

(Continued from previous page)
collected about Potomac Edison's poles, not Verizon's, that is relevant to determine the appropriate inputs into the Commission's rate formula.

[128] The Commission permits parties to rebut its pole attachment presumptions with actual data or statistically valid surveys, which are both considered to be direct probative evidence about the appropriate inputs. *See Amendment of the Commission's Rules and Policies Concerning Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12139, para. 70 (2001) (*Consolidated Partial Order on Reconsideration*). *See also Teleport v. Georgia Power*, 17 FCC Rcd at 19866, para. 18.

[129] *See* Calnon Reply Aff. at 4, para. 7; Tardiff Reply Aff. at 21-22 para. 41.

[130] We caution future litigants in pole attachment complaint proceedings to exchange all relevant information relating to claims and defenses. The Commission's formal complaint rules strongly encourage the parties to work cooperatively to ensure an accurate and complete record. *See Formal Complaints Recon Order*, 16 FCC Rcd at 5696-97, para. 35.

[131] *See* Complaint at 35-36, para. 53; Calnon Complaint Aff. at 3-8, paras. 5-15; Tardiff Complaint Aff. at 5-10, paras. 10-14; Answer at 49-52, paras. 105-112; Reply Legal Analysis at 47-52; Calnon Reply Aff. at 4-15, paras. 8-27; Tardiff Reply Aff. at 16-22, paras. 30-42.

[132] *See Consolidated Partial Order on Reconsideration*, 16 FCC Rcd at 12153-54, paras. 101-04; 12177 (App. F-1, Formula for Determining Maximum Rate for Use of LEC Utility Conduit Using FCC ARMIS Accounts). We give no weight to Verizon's argument that allocating accumulated deferred taxes based on net investment is equivalent to how states that do not account for deferred taxes in the rate base calculation adjust the rate of return applied to rate base. *See* Tardiff Complaint Aff. at 7-8, n.18. This argument confuses the math that could be used to adjust the rate of return applied to rate base (net investment in assets used to provide a service) to account for a given amount of accumulated deferred taxes (a zero-cost source of capital) allocated to a service with the allocator used to determine that given amount of accumulated deferred taxes. The issue here is how to determine the allocator. That is, we need to determine the allocator to be used to allocate accumulated deferred taxes to poles to know the amount of accumulated deferred taxes to subtract from pole investment to calculate the net cost of a bare pole. Likewise, we need to determine the allocator to be used to allocate accumulated deferred taxes to pole and certain other distribution plant to know the amount of deferred taxes to subtract from pole and certain other distribution plant investment to calculate the maintenance element.

364, approximately $233.9 million (a figure upon which both parties agree), from which appurtenance investment must be removed to calculate the net cost of a bare pole. This percentage implies a factor of .8443, a figure that is slightly lower than the Commission's default factor and that would produce a slightly lower pole attachment rate if applied to total gross pole investment instead of the default.[133]

- Number of Poles: We accept Potomac Edison's input, which is based on the company's books.[134] In addition, as Verizon notes, the use of Potomac Edison's number produces a marginally lower rate than what Verizon calculated due to the modest increase in the number of Potomac Edison's distribution poles.[135]
- Allocator for Deferred Income Taxes to Calculate Maintenance Factor: We accept Potomac Edison's allocator because it is consistent with the Commission's decision to use a gross investment allocator for accumulated deferred taxes relative to development of a conduit rate.
- Depreciation Rate for Gross Pole Investment: We accept Potomac Edison's input, which Verizon acknowledges but does not challenge and according to Verizon is the Maryland value.[136]
- Rate-of-Return: The correct rate-of-return in Maryland is 7.15%.[137]
- Occupied Space: We accept Verizon's input because the survey methodology unjustifiably assumes that six inches of clearance space is required both above and below the attachment.[138] Potomac Edison contends that Verizon always occupies the lowest space on each pole,[139] which, if correct, would not require the addition of six inches below any of Verizon's attachments.[140] Adjusting the survey methodology to subtract the six inches brings the survey conclusion within the Commission's default input.[141]

[133] *See* Answer at 49, para. 105, Attach. G.

[134] Answer Attach. B, Schafer Answer Decl. at 4, para. 28.

[135] *See* Tardiff Reply Aff. at 17, para. 34; Calnon Reply Aff. at 5, para. 9. *See also* Revised Joint Statement at 33, Verizon Disputed Fact No. 137.

[136] *See* Tariff Reply Aff. at 18, n.56 ("the new rates [provided by Potomac Edison] use only the Maryland value"); Calnon Complaint Aff., Exh. C-2 (2019 Per-Pole Rate for Verizon's Use of Potomac Edison's poles (VZ00042), line 13 (2.89%); Answer Attach. G, Potomac Edison Annual Pole Cost Calculation (Year End 2018) (PE00087), line 43 (.0238).

[137] *See* Tardiff Complaint Aff. at 9, para. 13 (citing Maryland Public Service Commission, Order No. 89072, Case No. 9490, March 22, 2019 at p.77). Potomac Edison did not provide any support for its contention that the rate-of-return in Maryland is 9.68%. *See* Answer at 49, para. 105.

[138] Carlin Answer Decl. at PE00122 (noting that each attacher is deemed to occupy six inches of space above its highest attachment and six inches below its lowest attachment).

[139] *See* Answer at 28-29, para. 60; 39-40, n.100; 42, para. 90; 93-94, paras. 44-45. *See also* Revised Joint Statement at 23-24, Verizon Disputed Facts Nos. 69, 75; 65-67, Potomac Edison's Disputed Facts Nos. 109-110.

[140] *See* Reply Legal Analysis at 41-42.

[141] *Id*.

- Unusable Space: We accept Potomac Edison's input because it is only marginally higher than and generally consistent with the Commission's default.[142]
- Average Number of Attachers: The survey demonstrates that the average number of attachers is less than the Commission's presumptive input of five.[143] We accept Potomac Edison's input rounded up to three to account for the issues raised by Verizon and the lack of the field survey data to verify the accuracy of the survey results.[144]
- Pole Height: We accept Potomac Edison's input, which is supported by its field survey and is consistent with the pole height required in the JUA.[145] Although Verizon challenges the survey conclusion about the pole height because it was unable to verify the accuracy of the survey, it acknowledges that Potomac Edison's poles are taller than the Commission's default height.[146]

38. Applying these inputs along with the inputs the parties do not dispute, we calculate that the Old Telecom Rate, which we find is the maximum rate Potomac Edison may charge Verizon under the JUA, is $12.12 per year.[147]

F. Verizon is Entitled to a Refund Consistent with the Statute of Limitations.

39. Under section 1.1407 of the Commission's rules, where, as here, the Commission determines that a rate is not just and reasonable, it "may prescribe a just and reasonable rate" and "order a refund." The refund "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."[148] Having found that the rate Potomac Edison charges Verizon under the JUA is not just and reasonable, and having prescribed the Old Telecom Rate as the maximum permissible rate, we direct the parties to calculate a refund amount consistent with this ruling and the applicable statute of limitations.

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[142] Potomac Edison's survey concluded that unusable space equaled 24.02 feet compared to the Commission's default of 24 feet. *See* Guo Answer Decl., Exhibit CG-1 at PE00151; Calnon Complaint Aff. at 5, para. 9.

[143] *See* Guo Answer Decl., Exh. CG-1 at PE00151.

[144] *See*, *e.g.*, Calnon Reply Aff. at 9-15, paras. 16-26. Verizon does not dispute that the average number of attachers is less than five. Verizon's challenge to Potomac Edison's assertion about the average number of attachers is based upon its contention that Potomac Edison does not have sufficiently reliable or credible data to rebut the Commission's presumption input. *See id*. at 8, para. 15. Verizon could have obtained the underlying data in discovery if it had pressed the issue, and it could then have attempted to refute the data.

[145] *See* JUA, Article II ("A Normal Joint Pole under this agreement shall be a 40-foot class 4 wood pole.").

[146] *See* Reply Legal Analysis at 32 ("Potomac Edison's poles are taller [than a 37.5-foot pole]."). *See also* Mills Reply Aff. at 3, para. 5 (questioning Potomac Edison's assertion that pole height is an advantage but not its assertion about the pole height).

[147] *See* Appendix B (Old Telecom Rate Calculation). This rate reflects year-end 2018 financial data reported on FERC Form 1, the most recent financial data submitted into the record of this proceeding. Verizon argues that the Commission should accept its 2017 and 2018 rate calculations as uncontested because Potomac did not specifically challenge them. *See* Reply Legal Analysis at 48; Revised Joint Statement at 10, Stipulated Fact No. 58. However, Verizon has provided no basis to conclude that inputs such as the average number of attachers, unusable space, or the height of poles would have been different in 2017 and 2018 as compared with 2019. The parties thus should use the inputs identified in this order and the year-end financial data reported on the relevant FERC Form 1 to calculate the rate for each year of the applicable statute of limitations.

[148] 47 CFR § 1.1407(a) (The Commission may order a refund "consistent with the applicable statute of limitations.").

1. The Applicable Statute of Limitations is Three Years.

40. Neither section 224 nor the Commission's pole attachment rules specify a limitations period for pole attachment complaints. Section 1.1407(a) of the rules thus leaves the Commission to determine the "applicable statute of limitations" in each complaint proceeding. As explained below, the applicable statute of limitations is the three-year limitations period for contract actions under Maryland law.

41. In similar circumstances, federal courts adjudicating a claim under a federal statute with no applicable statute of limitations will, as a "general rule," borrow "the most closely analogous statute of limitations under state law" and apply it to the federal claim.[149] Under a narrow exception to the general rule, a federal court may look to a limitations period from an analogous federal law "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking."[150]

42. We think a similar "borrowing" rule should apply in pole attachment complaint proceedings before the Commission. A general rule favoring the application of a state limitations period is particularly appropriate in the context of Commission pole attachment complaints because they involve utility poles affixed to real property located in particular states. Such poles are subject to laws and regulations at the state and local level, even where a state has not exercised its "reverse preemption" option under section 224(c) of the Act.[151]

43. Verizon argues that because this is a dispute about the rental rates Potomac Edison may lawfully impose under a contract, the most closely analogous state limitations period is Maryland's three-year statute of limitations governing civil actions, including breach of contract actions.[152] We agree. The Commission has long recognized that pole attachment agreements between utilities and attachers are individually negotiated contracts[153] that may be subject to claims for breach of contract under local

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[149] *Reed v. Transportation Union*, 488 U.S. 319, 323-34 (1989) (citing cases). *See also, e.g.*, *Graham Cty. Soil & Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 414-15 (2005); *North Star Steel Co. v. Thomas*, 515 U.S. 29, 33–34 (1995).

[150] *North Star Steel*, 515 U.S. at 35 (quoting *Reed*, 488 U.S. at 324, which in turn was quoting *DelCostello v. Teamsters*, 462 U.S. 151, 172 (1983) (internal quotation marks omitted)).

[151] Section 224(c). *See 2011 Pole Order*, 26 FCC Rcd 5240, 5292, para. 116 (a utility may bring an action in state court for trespass where an attacher who has made unauthorized attachments without any contract with the utility refuses to enter into a pole attachment agreement); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16072-73, para. 1154 (1996) ("even where a state has not asserted preemptive authority in accordance with section 224(c), state and local requirements affecting pole attachments remain applicable, unless a complainant can show a direct conflict with federal policy"). *See also* Answer, Attach. C, Zarakas Decl. at 8, para. 19 (stating that constructing poles "requires gaining and perfecting rights-of-ways, [and] involves procuring approvals and permits from local governments . . .").

[152] Complaint at 35, para. 52 n.191; Reply Legal Analysis at 55-56. *See* Md. Code Ann. Cts. & Jud. Proc. § 5-101 ("A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced."). *See Baltimore Scrap Corp. v. Executive Risk Specialty Ins. Co.*, 388 F. Supp.3d 574, 588 (D. Md. 2019) (actions for breach of contract in Maryland "are generally governed by Maryland's three-year statute of limitations" in § 5-101); *Chevron U.S.A., Inc. v. Apex Oil Co.*, 113 F.Supp.3d 807, 819 (D. Md. 2015) (applying three-year limitations period in § 5-101 to breach of contract claims). The three-year limitations period in Md. Code Ann. Cts. & Jud. Proc. § 5-101 is the only state statute of limitations that either party proposed for application in this proceeding.

[153] S*ee 2018 Order*, 33 FCC Rcd at 7711, para. 13 ("we recognize that [our rules] cannot account for every distinct situation and encourage parties to seek superior solutions for themselves through voluntary privately-negotiated solutions."); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling, 35 FCC Rcd 7936, 7944, para. 15 (WCB July 29, 2020) (clarifying that while "parties have

(continued….)

jurisdictions.[154] The Commission has observed that "certain remedies for breach of contract may be pursued in forums other than the Commission" although the Commission "has primary jurisdiction over issues about the reasonableness of rates, terms and conditions concerning pole attachments."[155]

44. Potomac Edison opposes application of the Maryland's three-year statute, arguing that this is not an action for breach of contract, and the Commission does not resolve contract disputes or enforce existing agreements.[156] Notably, Potomac Edison does not contend that application of the Maryland statute would conflict with any federal law or policy. It argues only that because this action challenges a rate as unjust and unreasonable, the two-year limitations period in section 415(b) of the Act is the most "relevant" provision under the Act and should apply here.[157] We are not persuaded.

45. Section 415(b) is a statute of limitations covering complaints against a "carrier" for the recovery of damages.[158] Potomac Edison is not a carrier under the Act, and it is not subject to the various rights and obligations of carriers specified in the Act and the Commission's rules. Rather, Potomac Edison is subject to this pole attachment complaint proceeding because it is a "utility" under section 224(a)(1) of the Act that has entered into an agreement with a provider of telecommunications service (Verizon) concerning the rates, terms, and conditions of attachment to its poles.[159]

46. Because this action requires an examination of that agreement, we believe that the Maryland statute of limitations, rather than section 415(b) of the Act, covers disputes that are more closely analogous to this one. Further, application of Maryland's three-year limitations period here poses no apparent conflict with any federal law or policy. We therefore find that the "applicable statute of

(Continued from previous page)
flexibility to negotiate 'superior solutions' to pole attachment issues in their agreements" "any deviations from the Commission's rules must be mutually beneficial").

[154] *See Marcus Cable Associates, L.P. v. Texas Utilities Electric Co.*, 18 FCC Rcd 15932, 15935, para. 6 (2003)("The Commission's authority does not supplant that of the local jurisdiction when the issue between the parties is limited to a breach of contract claim that does ***not*** include an allegation of unjust or unreasonable contractual rates, terms, or conditions.") (emphasis in original); *Kansas City Cable Partners v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599, 11601-02, para. 5 (Cable Serv. Bur. 1999) (same). *See also MAW Communications, Inc. v. PPL Electric Utilities Corp.*, Memorandum Opinion and Order, 34 FCC Rcd 7145, 7152, para. 17 (EB 2019) ("To the extent PPL contends that MAW has failed to pay monies in dispute to PPL under the terms of the Agreement . . . PPL should seek relief from the Court presiding over PPL's pending action for breach of contract and trespass.").

[155] *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, Order, 16 FCC Rcd 12209, 12217, para. 18 (2001).

[156] Answer at 53, para. 115.

[157] Answer at 52-53, paras. 115-16; 99, para. 51.

[158] Answer at 52-53, paras. 115-16; 99, para. 51. *See* 47 U.S.C. § 415(b) (providing that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after . . ."). The Act defines "carrier" in pertinent part as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy . . . ." 47 U.S.C. § 153(11).

[159] *See* 47 U.S.C. § 224(a)(1)(defining "utility"); *id*. at § 224(a)(4)(defining "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;" *id*. at § 224(b)(1)(providing in part that the Commission "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions").

limitations" under section 1.1407(a)(3) of the Commission's rules is the three-year statute of limitations for contract actions under Maryland law.[160]

2. Potomac Edison's Argument That Relief Should Be Prospective Only Lacks Merit

47. We reject Potomac Edison's assertion that only prospective relief may be granted in this case because it would violate the prohibition on retroactive ratemaking and due process for the Commission to hold the parties to a rate that was impossible to calculate in advance due to the lack of guidance provided in the Commission's rules.[161] First, contrary to Potomac Edison's contention, the remedies available under the *2011* and the *2018 Orders* do not apply retroactively and are only available after the effective date of those orders.[162] Second, retroactivity is the "norm in agency adjudications no less than in judicial adjudications,"[163] and thus the Commission is permitted to apply its determination that Potomac Edison's rates were unjust and unreasonable to the period at issue here, which is after the effective dates of the *2011* and *2018 Orders*. In general, "retroactive effect is appropriate for new applications of existing law, clarifications, and additions."[164] Because Potomac Edison cannot point to a "settled rule on which it reasonably relied" and that the Commission changed, [165] the determination of a just and reasonable rate under the application of the Commission's rules in a formal complaint proceeding is properly presumed retroactive.[166]

48. Similarly, there is no failure of notice and no violation of due process in applying regulations as they are written.[167] Section 224 of the Act affords the Commission the authority to regulate the rates, terms, and conditions for pole attachments to ensure that such rates are just and reasonable.[168] Potomac Edison is subject to the requirements of section 224. Pursuant to that statutory authority, the Commission has adopted rules and provided guidance on how to calculate "just and reasonable" rates, and provided for a case-by-case approach to incumbent LEC pole attachment complaints challenging rates as "unjust and unreasonable."[169] The Commission's rules and orders also provide guidance on what facts are relevant in evaluating the justness and reasonableness of pole attachment rates in complaint

[160] Md. Code Ann. Cts. & Jud. Proc. § 5-101.

[161] *See* Answer at 52-64, paras. 113-142.

[162] *See* Answer at 61, para. 136; Reply Legal Analysis at 59-62; *see also 2011 Order*, 26 FCC Rcd at 5291, para. 114, 5343-4, para. 243; *2018 Order*, 33 FCC Rcd at 7773-4, para. 136; 47 CFR § 1.1413(b).

[163] *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006).

[164] *Verizon v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001).

[165] *AT&T v. FCC*, 454 F.3d at 332.

[166] *See Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007) ("Clarifying the law and applying that clarification to past behavior are routine functions of adjudication."). Potomac Edison's reliance on *FCC v. Fox* and other cases involving the imposition of penalties and fines is unpersuasive. Answer at 61-63, paras. 137-141 (citing *FCC v Fox Television*, 567 U.S. 239 (2012), *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987), and *Radio Athens, Inc. v. FCC*, 401 F.2d 398 (D.C. Cir. 1968). An order requiring a party to refund amounts it charged in excess of just and reasonable rates is compensatory and does not amount to a penalty on the party responsible for the overcharge. Here the Commission implemented rules to calculate and enforce just and reasonable pole attachment rates pursuant to a rulemaking proceeding, and this proceeding relates to the timeframe after the effective date of those rules. Further, unlike the parties in the cases cited by Potomac Edison, it had actual notice of the rules and guidance relating to them during the relevant timeframe.

[167] Answer at 61-64, paras. 136-142. *See NetworkIP, LLC v. FCC*, 548 F.3d 116, 123 (D.C. Cir. 2008); *see also AT&T Corp. v. FCC*, 967 F.3d 840, 846, n.2.

[168] 28 U.S.C. § 224(b)(1).

[169] *2011 Order*, 26 FCC Rcd at 5334, para. 214.

proceedings.[170] Clarifying the law and applying that clarification to past behavior are routine functions of adjudication and properly retroactive in application.[171] The fact that this proceeding may be the first application of existing rules that govern the relevant time period does not constitute a prohibited retroactive application of those rules.[172]

49. Potomac Edison maintains that it is unclear which rate formula may apply in any given situation,[173] but the Commission's rules make clear that for pole attachment agreements entered into or renewed after March 11, 2019, there is a presumption that an incumbent LEC is similarly situated to other attachers for purposes of obtaining comparable rates.[174] In those situations, the Commission's rules specify that incumbent LECs may be charged no higher than the New Telecom Rate specified in section 1.1406(e)(2) of the Commission's rules, and where that presumption is rebutted, the Old Telecom Rate is the maximum permissible rate.[175]

50. Potomac Edison also asserts that the Commission's rate regulations specifically exclude ILECs and that the space occupied rebuttable presumption was never established for ILECs.[176] Neither assertion has merit.[177] The D.C. Circuit upheld the Commission's finding that section 224(b)(1) applies to incumbent LECs,[178] and section 1.1413(a) of the Commission's rules make clear that an incumbent LEC may challenge a utility's pole attachment rates by filing a complaint at the Commission.[179] In addition, the Commission's pole attachment complaint rules specify the presumptive inputs to be used in the Commission's pole attachment rate calculations unless rebutted by a utility consistent with those rules.[180] The Commission's rules further provide the remedies available in complaint proceedings, to include, among other things, refunds of the difference of amounts paid and the just and reasonable rate established by the Commission.[181]

51. Finally, we disagree that it would be improper to calculate a rate Verizon should be charged for each year of the relevant statute of limitations unless the Commission also calculates the reciprocal rate that Potomac Edison should have paid Verizon during that timeframe.[182] Identifying the rate Verizon pays will enable better informed negotiations between the parties to resolve their dispute.[183]

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[170] *See* 47 CFR §§ 1.1406, 1.1409, 1.1410, 1.1413; *2011 Order*, 26 FCC Rcd at 5295-5315, paras. 126-171, 5327-5338, paras. 199-220; *2018 Order*, 33 FCC Rcd at 7767-71, paras. 123-29. *See also supra* paras. 19, 30, 33-38.

[171] *Qwest v. FCC*, 509 F3d at 540. As Potomac Edison acknowledges, "[a] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved." *See* Answer at 62, para. 139 (citing *FCC v. Fox Television, et al.*, 567 U.S. 239, 253 (2012)).

[172] *See* Answer at 63, para. 140.

[173] Answer at 54-58, paras. 118-128.

[174] 47 CFR § 1.1413(b).

[175] *See supra* para. 19.

[176] Answer at 56-58, paras. 124-128.

[177] Contrary to Potomac Edison's contention, the Commission's presumptions apply to incumbent LECs under the Commission's rules. *See* 47 CFR § 1.1413(a).

[178] *See American Elec. Power v. FCC*, 708 F.3d at 188.

[179] 47 CFR § 1.1413(a).

[180] 47 CFR §§ 1.1409, 1.1410.

[181] 47 CFR § 1.1407(a).

[182] *See* Answer at 59-61, paras. 129-135. Potomac Edison deferred providing any information about what it considered an appropriate proportionate rate. *See* Answer at 60, para. 132.

[183] *See 2011 Order*, 26 FCC Rcd at 5337, para. 218.

The Commission made clear that it "would be skeptical of a complaint by an incumbent LEC seeking a proportionately lower rate to attach to an electric utility's poles than the rate the incumbent LEC is charging the electric utility to attach it its poles."[184] Verizon acknowledges that Potomac Edison is entitled to a proportional reduction in its rate and has indicated its willingness to negotiate a proportionate rate that Potomac Edison should pay Verizon upon determination of a just and reasonable rate for Verizon under the JUA.[185] In light of this and to assist with determining the amount of any refund to which Verizon may be entitled, we order the parties to negotiate a new reciprocal joint use agreement consistent with this Order that reflects proportional reciprocal rates for Potomac Edison's attachments to Verizon's poles.[186]

IV. ORDERING CLAUSES

52. Accordingly, **IT IS ORDERED** that, pursuant to sections 4(i), 4(j), 201, 202, 208, and 224 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201, 202, 208, and 224 and sections 1.720 - 1.740, and 1.1401-1.1415 of the Commission's rules, 47 CFR §§ 1.720 -1.740, and 1.140 -1.1415, and for the reasons explained above, Verizon's Complaint **IS GRANTED IN PART** as follows:

(a) The maximum rate Potomac Edison may charge Verizon for attachments to Potomac Edison's poles under the JUA is the Old Telecom Rate, calculated to be $12.12 per year;

(b) Verizon and Potomac Edison are directed to negotiate a new reciprocal joint use agreement consistent with (a) above that reflects proportional reciprocal rates for Potomac Edison's attachments to Verizon's poles under the JUA;

(c) Consistent with the applicable statute of limitations and as determined under the JUA after the parties negotiate proportional reciprocal rates, Verizon is entitled to a refund and interest extending for a period of three years prior to the filing of the Complaint; and

(d) Verizon and Potomac Edison are directed to negotiate in good faith to reach an agreement on the amount of Verizon's refund consistent with this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[184] *Id.*

[185] *See* Complaint at 33, para. 50, n.186, 37, para. 57, n.204; Complaint Exh. B, Calnon Decl. at 9-10, paras. 18-20, 14-15, paras. 30-31; Reply Legal Analysis at 58-59, 62. We make no determination about the validity or accuracy of Verizon's calculation of an appropriate proportionate rate. *See* Complaint Exh. B, Calnon Aff. at 8-11, paras. 16-21, 14-15, paras. 29-32; Complaint Exh. B, C-2, C-3. Potomac Edison challenges Verizon's calculation noting, among other things, that many of the inputs Verizon uses are not Commission presumptions or defaults as alleged by Verizon. *See* Answer at 59, para. 129.

[186] The Commission "may in its discretion end adjudication of damages by adopting a damages computation method or formula." *See* 47 CFR § 1.723(g).

Appendix A

Confidential License Agreement Designations

CATV-1	{[ ]}
CATV-2	{[ ]}
CATV-3	{[ ]}
CATV-4	{[ ]}
CATV-5	{[ ]}
CATV-6	{[ ]}
CATV-7	{[ ]}
CATV-8	{[ ]}
CATV-9	{[ ]}
CATV-10	{[ ]}
CATV-11	{[ ]}
CLEC-1	{[ ]}
CLEC-2	{[ ]}
CLEC-3	{[ ]}
CLEC-4	{[ ]}
CLEC-5	{[ ]}
CLEC-6	{[ ]}
CLEC-7	{[ ]}
CLEC-8	{[ ]}
CLEC-9	{[ ]}

Appendix B

Old Telecom Rate Calculation

Line #	Description	Value
	Space Factor	
1	Space Occupied	1
2	Unusable Pole Space	24.02
3	Number of Attaching Entities	3
4	Pole Height	40.23
5	Space Factor [(Ln 1 + 2/3*Ln 2/Ln 3)/Ln 4]	0.1575
	Net Cost of a Bare Pole	
6	Net Pole Investment	$117,898,851
7	Number of Poles	337,043
8	Accounting Adjustment Factor	0.85
9	Net Cost of a Bare Pole [Ln 6/Ln 7*Ln 8]	$297.33
	Carrying Charge Rate	
10	Depreciation Element	0.0472
11	Maintenance Element	0.0550
12	Administrative Element	0.0332
13	Taxes Element	0.0519
14	Return Element - MD	0.0715
15	Carrying Charge Rate [Ln 10 + Ln 11 + L12 +L13 + L14]	0.2588
16	**Old Telecom Rate [Ln 5*Ln 9*Ln 15]**	$12.12