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.	)	

ORDER ON RECONSIDERATION

Adopted: March 30, 2022 **Released: March 31, 2022**

By the Commission:

I. INTRODUCTION

1. Verizon Maryland LLC (Verizon), an incumbent local exchange carrier (LEC), and The Potomac Edison Company (Potomac Edison), an electric utility, ask the Commission to reconsider various aspects of its November 23, 2020 Memorandum Opinion and Order, which granted in part a formal complaint that Verizon filed against Potomac Edison under sections 208 and 224 of the Communications Act of 1934, as amended (Act).[1] Verizon alleged in the Complaint that the pole attachment rates it pays Potomac Edison under the parties' joint use agreement are unjust and unreasonable under section 224 of the Act and the Commission's rules and orders.[2] Based on our review of the record, we concluded that the rates Potomac Edison charged Verizon for attachments to Potomac Edison's utility poles were unjust and unreasonable and prescribed a maximum pole attachment rate Potomac Edison may charge Verizon.[3] Verizon and Potomac Edison each filed a Petition for Reconsideration under section 1.106 of the Commission's rules, and Verizon sought clarification on two points.[4] For the reasons explained below, we dismiss in part Verizon's Petition for Reconsideration on

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[1] *Verizon Maryland LLC v. The Potomac Edison Company*, Memorandum Opinion and Order, 35 FCC Rcd 13607 (2020) (*Order)*; Formal Complaint of Verizon Maryland LLC, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (filed Nov. 21, 2019) (Complaint). 47 U.S.C. §§ 208, 224; 47 CFR § 1.1413.

[2] *See Order*, 35 FCC Rcd at 13612, para. 13; *see also* Complaint at 1, 5-6, para. 10.

[3] *See Order*, 35 FCC Rcd at 13612, para. 14, 13625, para. 38.

[4] 47 CFR § 1.106. *See* Verizon's Petition for Reconsideration and Clarification, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (filed Dec 23, 2020) (Verizon Petition); Petition for Reconsideration of The Potomac Edison Company, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (filed Dec. 23, 2020) (Potomac Edison Petition). *See also* Opposition of The Potomac Edison Company to Verizon's Petition for Reconsideration and Clarification, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (filed Jan. 4, 2021) (Potomac Edison Opposition); Verizon's Opposition to Potomac Edison's Petition for Reconsideration, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (filed Jan. 4, 2021) (Verizon Opposition); Verizon's Reply in Further Support of its Petition for Reconsideration and Clarification, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (filed Jan. 11, 2021) (Verizon Reply); The

(continued….)

procedural grounds and, as an independent and alternative basis, deny it on the merits. We grant Verizon's request for clarification in part, however, as set forth below. We also grant in part Potomac Edison's Petition as set forth below, but deny the remainder of the Petition.

II. BACKGROUND

2. The *Order* recites the facts underlying this dispute.[5] To summarize, 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's utility poles.[6] Under the JUA, Potomac Edison charges Verizon rates that are significantly higher than the rates that Potomac Edison charges competitive local exchange carriers (LECs) and cable providers to attach to the same poles.[7] Verizon alleged that these rates are "unjust and unreasonable" under section 224 and the Commission's *2011* and *2018 Orders* and sought a rate equivalent to the New Telecom Rate (which is applicable to competing attachers).[8] Based on the record in the case, the Commission found that the rates charged by Potomac Edison were unreasonable.[9] At the same time, the Commission concluded that the JUA provides Verizon with benefits that materially advantage it compared to other attachers on the same poles.[10] As a result, the Commission concluded that Verizon was entitled to a pole attachment rate that does not exceed the Old Telecom Rate.[11] At Verizon's request, the Commission calculated the maximum just and reasonable rate Potomac Edison could charge Verizon based upon record evidence on various inputs and directed the parties to negotiate a new reciprocal joint use agreement that was consistent with that rate and reflected proportional reciprocal rates for Potomac Edison's attachments to Verizon's poles.[12] The Commission also found that Verizon was entitled to a refund for a period of three years prior to the Complaint filing date and directed the parties to negotiate an agreement on the amount of Verizon's refund consistent with the *Order*.[13]

III. DISCUSSION

A. We Dismiss in Part Verizon's Petition for Reconsideration on Procedural Grounds

3. Verizon's Petition for Reconsideration requests the deletion of certain findings it contends are factually and legally incorrect, based on arguments about those findings that the Commission already considered and rejected. Specifically, Verizon argues that the JUA space allocation provision is unenforceable, and therefore not beneficial to Verizon.[14] Verizon's Petition does not identify

(Continued from previous page)
Potomac Edison Company's Reply to Verizon's Opposition to Petition for Reconsideration, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (filed Jan. 11, 2021) (Potomac Edison Reply).

[5] *See Order*, 35 FCC Rcd at 13611-25, paras. 9-38.

[6] *See Order*, 35 FCC Rcd at 13611, para. 9.

[7] *See Order*, 35 FCC Rcd at 13611, para. 12.

[8] *See Order*, 35 FCC Rcd at 13612, para. 13. *See also Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (*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 Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) (*2018 Order*).

[9] *See Order*, 35 FCC Rcd at 13611-20, paras. 14-32.

[10] *See id.* at 13614-16, paras. 19-20.

[11] *See id.* at 13616, para. 21.

[12] *See* Complaint at 38, para. 60. *See also Order*, 35 FCC Rcd at 13620-25, paras. 33-38, 13630, para. 52(a) & (b).

[13] *See Order*, 35 FCC Rcd at 13630, para. 52(c), (d).

[14] *Compare* Complaint at 27-28, para. 43 and n.145; Verizon Reply at 38-39, paras. 31, 33, 52-53, para. 49; Verizon Petition at 5-7; Verizon Reply at 6-8 *with Order*, 35 FCC Rcd at 13615, para. 20.

any new, different, or distinct argument on this issue, and its repetition of an argument we previously rejected does not provide grounds for reconsideration. We therefore dismiss the space allocation argument in Verizon's Petition for Reconsideration.[15]

B. We Deny Verizon's Petition for Reconsideration on the Merits

4. As an independent and alternative basis for our decision, we also deny Verizon's Petition for Reconsideration on the merits. As detailed below, Verizon offers no valid basis to delete the findings requested in its Petition. However, we grant in part its request for clarification.

1. The Commission Reasonably Determined that the JUA Provides Verizon With Benefits that Materially Advantage It Compared to Other Attachers

5. Verizon asks the Commission to delete the Commission's findings that the JUA provides Verizon with benefits that materially advantage it over other attachers on the same poles. Specifically, Verizon disputes the findings that the JUA materially advantages Verizon by guaranteeing Verizon space on Potomac Edison's poles, allowing Verizon to maintain existing attachments following termination of the JUA, and allocating [{ }] of space on the poles for Verizon's exclusive use.[16] Verizon argues that the Commission's findings regarding these benefits are factually and legally incorrect.[17] We disagree.

6. Verizon argues that the *Order* incorrectly concluded that its guaranteed space on poles under the JUA and its right to remain on the poles after termination of the JUA materially advantages Verizon relative to other attachers.[18] Verizon maintains that its contractual access to Potomac Edison's poles under the JUA sets it at a disadvantage as compared to its competitors' statutory right to access under section 224(f).[19] Specifically, Verizon contends that "[b]ecause [its] access is a matter of contract, it is more limited and can be revoked at any time,"[20] whereas its competitors' statutory right to access "may not be defeated" by contract.[21] According to Verizon, the termination provisions in Potomac Edison's license agreements that require Verizon's competitors to remove all attachments upon termination of the agreements are unenforceable and cannot support a finding of Verizon's competitive advantage.[22] In addition, Verizon asserts that the statutory access rights of its competitors are less restrictive than a provision in the JUA that allows Potomac Edison to deny Verizon access to poles which

[15] *See* 47 CFR § 1.106(p)(3) (providing that petitions for reconsideration of a Commission action that "[r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding" are among those that "plainly do not warrant consideration by the Commission" and that a bureau may therefore dismiss). *See also Qwest Commc'ns Co. v. N. Valley Commc'ns, LLC*, Order on Reconsideration, 26 FCC Rcd 14520, 14522–23, paras. 5–6 (2011) ("It is 'settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected.'") (citing *S&L Teen Hosp. Shuttle*, Order on Reconsideration, 17 FCC Rcd 7899, 7900, para. 3 (2002) (citations omitted)); *All American v. AT&T*, Order on Reconsideration, 28 FCC Rcd 3469, 3471–72, para. 6 (same). *See also* 47 CFR §§ 1.106(c)(1), (p)(1)-(2). *Cf. Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, Order on Reconsideration, 35 FCC Rcd 6223, 6229, para. 17 (2020), *review denied, Great Lakes Communication Corp. v. FCC*, 3 F.4th 470 (D.C. Cir. 2021).

[16] Verizon Petition at 1-2; Verizon Reply at 3, 6-8.

[17] Verizon Petition at 3; Verizon Reply at 2.

[18] Verizon Petition at 3-5; Verizon Reply at 3-6.

[19] *See* Verizon Petition at 4; Verizon Reply at 3, 6.

[20] Verizon Petition at 4; Verizon Reply at 6.

[21] *See* Verizon Petition at 5; *see also* Verizon Reply at 6.

[22] *See* Verizon Petition at 4-5; *see also* Verizon Reply at 6.

"Potomac Edison considers 'undesirable' for joint use."[23] Verizon also argues it is disadvantaged under the JUA because Potomac Edison is not obligated to provide Verizon the timely access to poles required by the Commission's regulations for its competitors.[24] Finally, Verizon states that in the event the JUA is terminated, Potomac Edison can deny Verizon access to all new pole lines, while its competitors have a statutory right to access.[25]

7. Verizon's challenge is *not* based on a comparison of the terms of the JUA and Potomac Edison's license agreements with other attachers. Rather, in disputing the Commission's finding that the JUA provides Verizon with material advantages over other attachers, Verizon compares the terms of the JUA with the statutory or regulatory rights of Verizon and other attachers. This approach is contrary to the policy set forth in the *2018* and *2011 Orders.* In the *2018 Order*, the Commission considered competitive attachers' statutory access rights and, in doing so, understood that incumbent LECs and their competitors both obtain a basic right of access to utility poles—the former by joint use agreement and the latter by virtue of section 224(f).[26] The Commission nevertheless held that utilities must demonstrate that the incumbent LEC "receives significant material benefits *beyond basic pole attachment* or other rights given to another telecommunications attacher."[27] While the Commission considered the basic right of access—whether contractually or statutorily provided—and other statutory rights "*given to [other] telecommunications attacher[s]*," it made clear that an analysis of material benefits afforded the incumbent LEC should focus only on benefits "beyond basic pole attachment" and without regard to other statutory rights given to competitive attachers.[28]

8. Thus, for example, the *2018 Order* discusses material benefits, such as rights-of-way obtained by the utility, guaranteed space on the pole, and preferential locations on the pole, that are only provided by contract and not by statute or the Commission's rules.[29] An approach that focuses on a comparison of agreement terms is similarly supported by the *2011 Order*, which discusses whether an incumbent LEC attaches to a utility's poles on terms and conditions that are comparable to those that apply to other attachers.[30] In order to facilitate this analysis, the *2011 Order* modified the pole

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[23] *See* Verizon Petition at 4 and Complaint Exh. 1 at VZ00109, Art. I(b); *see also* Verizon Reply at 4. The precise language in the JUA referenced by Verizon allows either party to "{[}" and poles "{ }." Complaint Exh 1 at VZ00109, Art. I(b). Verizon offered no evidence that the JUA provision allowing the exclusion of certain types of poles from joint use has been or is likely to be, invoked to Verizon's detriment. Indeed, that possibility appears remote because the right to exclude poles from joint use is reciprocal, giving both parties an incentive not to interpret the right broadly. In any event, some of the Potomac Edison poles subject to Article I(b) may also qualify as poles to which the utility could reasonably deny access to competitive LECs and cable providers under section 224(f)(2). *See* 47 U.S.C. § 224(f)(2) (utility may deny access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes").

[24] Verizon Petition at 4 (citing 47 CFR § 1.1411(a)(2)); *see also* Verizon Reply at 5-6.

[25] Verizon Petition at 4-5; *see also* Verizon Reply at 4.

[26] *2018 Order*, 33 FCC Rcd at 7771, para. 128 (acknowledging that both incumbent LECs and their competitors have basic pole attachment rights).

[27] *2018 Order*, 33 FCC Rcd at 7771, para. 128 (emphasis added).

[28] *See id.* at 7771, para. 128.

[29] *2018 Order*, 33 FCC Rcd at 7771, para. 128; *see id.* at 7768, para. 124 (juxtaposing the benefits of joint use agreements compared to other pole attachment agreements in noting that "joint use agreements may provide benefits to the incumbent LECs that are not typically found in pole attachment agreements between utilities and other telecommunications attachers, such as lower make-ready costs, the right to attach without advance utility approval, and use of the rights-of-way obtained by the utility, among other benefits").

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

attachment complaint rules to require that a defendant utility's agreements with third party attachers be filed in the complaint proceeding.[31] The *2011 Order* does not discuss a comparison of rights provided by agreement with those provided by statute. Based on the forgoing, we find that the *Order* correctly considered benefits other than basic pole attachment rights and focused exclusively on a comparison of agreement terms rather than statutory rights.[32] We further find that the *Order* properly analyzed whether Verizon's rights under the JUA give it a material advantage relative to the contractual rights of other attachers and correctly found that it did.

9. Even if it were appropriate to compare the statutory access rights of Verizon's competitors' against Verizon's contractual rights, such a comparison would show those statutory rights do not materially advantage Verizon's competitors and do not collectively outweigh the advantages Verizon enjoys under the JUA. For example, notwithstanding Verizon's claim that Potomac Edison's licensees enjoy "guaranteed statutory access," as the *Order* notes, the right of access that section 224(f)(1) provides competitive LECs and cable companies has important limitations that allow a utility to deny access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[33] Thus while section 224(f)(2) allows Potomac Edison to deny access to a pole that is not tall enough or strong enough to accommodate a new attachment, the JUA contains no such restrictions on Verizon's right of access to Potomac Edison's poles and includes a provision {[ ]}.[34] We find no merit in Verizon's assertion that its right to remain on poles following termination of the JUA is not a comparative material advantage. While Verizon claims that its competitors' licensing agreements requiring removal of facilities from Potomac Edison poles upon termination are unenforceable because of the licensees' statutory right of access, it fails to cite any Commission authority supporting this proposition.[35] Nor are we persuaded that Verizon is disadvantaged by a provision in the JUA allowing either party to deny the other access to new pole lines upon termination of the agreement.[36] Because Potomac Edison needs to attach to Verizon's new

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

[32] *See Order*, 35 FCC Rcd at 13614-16, para. 20. Indeed, contrary to the position it now takes, Verizon previously acknowledged in this proceeding that comparing the JUA with Potomac Edison's license agreements is the proper comparison to determine whether the JUA provides Verizon with benefits that materially advantage it compared to other attachers. *See* Reply Legal Analysis in Support of Verizon's Pole Attachment Complaint, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 at 29 (filed Mar. 5, 2020) (Reply Legal Analysis) (arguing against discovery on the basis that the relevant evidence for determining benefits is a comparison of the JUA with Potomac Edison's license agreements).

[33] *Order*, 35 FCC Rcd at 13614-16, para. 20. *See* 47 U.S.C. § 224(f)(2) ("a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles . . . where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes"); *see also* 47 CFR § 1.1403(a).

[34] *See Order*, 35 FCC Rcd at 13615, para. 20; *see also* Potomac Edison Opposition at 3; Complaint Exh. 1 at VZ00111, Art. IV(b) {

]}; *see also id.* at Art. V(a).

[35] *See* Verizon Petition at 5; Verizon Reply at 6. The outcome of any proceeding challenging the enforcement of such a provision would, of course, depend on the particular facts and circumstances of the case. *See generally* 47 CFR § 1.1403(c)(1). Similarly, we reject Verizon's argument that it is disadvantaged under the JUA because Potomac Edison is not obligated to provide the timely access to poles required by the Commission's regulations applicable to its competitors. *See* Verizon Petition at 4 (citing 47 CFR § 1.1411(a)(2)). Verizon cites no evidence showing that the access to Potomac Edison poles that it receives under the JUA is any less timely than the access provided other attachers under Commission rule 1.1411.

[36] Complaint Exh. 1 at VZ00118, Art. XXI

poles, it is unlikely to terminate the JUA and deny Verizon access to new poles and has, in fact, refrained from doing so for more than 60 years.

10. Verizon also argues that the JUA space allocation provision is unenforceable, and therefore not beneficial to Verizon.[37] The JUA allocates {[ ]} of space on the parties' joint use poles for Verizon's exclusive use whereas licensing agreements restrict other attachers to {[ ]}.[38] The *Order* found that this provision afforded Verizon the ability to add new attachments without additional expense.[39] Verizon contends that this provision is unenforceable because the Commission invalidated reservations of space in the 1996 *Local Competition Order*.[40] The cited passage from the *Local Competition Order*, however, precludes an incumbent LEC from reserving excess capacity on its own poles for its own use to the detriment of competitive attachers who may later seek access to the poles.[41] It does not apply to a pole owner reserving space for other entities, as is the case here.[42] Indeed, the cited passage did not prevent the Commission from recognizing in the *2018 Order* that guaranteed space on a pole can be an advantage.[43] Thus, the Commission correctly concluded that the JUA space allocation provision provided a benefit that materially advantages Verizon because it gives Verizon the necessary space to add new attachments without additional expense.[44]

2. We Grant in Part Verizon's Request for Clarification

11. Verizon asks that the Commission clarify the *Order* to: (1) expressly state that Potomac Edison cannot lawfully "embed in Verizon's rental rates costs that [Potomac Edison] does not incur,"[45] and (2) require the negotiation of only "a new rate provision, but not a new agreement."[46] Potomac Edison opposes Verizon's first request, but not the second.[47] We grant Verizon's second request and clarify that the *Order* only requires the parties to modify the JUA to conform with the rulings in the *Order* and does not require the parties to otherwise negotiate a completely new agreement.[48] In response to Verizon's first request, we clarify the *Order* as stated below.[49]

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[37] Verizon Petition at 5-7; *see also* Verizon Reply at 3. As noted above, Verizon repeats this argument, which the Commission rejected, and repetition of it here does not provide grounds for reconsideration. *See supra* para. 3 & note 15.

[38] *See Order*, 35 FCC Rcd at 13614-16, para. 20.

[39] *See Order*, 35 FCC Rcd at 13615, para. 20. The fact that Potomac Edison may allow others to attach within the space allocated to Verizon does not address the key issue here, i.e., whether the relevant provision of the JUA gives Verizon a benefit relative to competitive LEC and cable company attachers on the same poles. *See* Verizon Petition at 6; Verizon Reply at 7.

[40] Verizon Petition at 5-6 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16079, para. 1170 (1996) (*Local Competition Order*).

[41] *Local Competition Order*, 11 FCC Rcd at 16078, paras. 1168-70.

[42] *See id.* at 16079, para. 1170 ("Allowing the pole or conduit owner to favor itself or its affiliate with respect to the provision of telecommunications or video services would nullify . . . the nondiscrimination that Congress required.").

[43] *See 2018 Order*, 33 FCC Rcd at 7771, para. 128 ("material benefits may include . . . [g]uaranteed space on the pole").

[44] *See Order*, 35 FCC Rcd at 13614-16, para. 20.

[45] Verizon Petition at 7-9; Verizon Reply at 8-9.

[46] Verizon Petition at 9-10.

[47] Potomac Edison Opposition at 13-16. *See* Verizon Reply at 8, n.46.

[48] Verizon Petition at 10 ("it makes sense that the parties would negotiate a new rate provision because the *Order* determines the maximum lawful rate"); Potomac Edison Opposition at 13-16 (stating that "Potomac Edison believes

(continued….)

12. Verizon's first request faults the *Order* for not "expressly reaffirm[ing]" that pole attachment rates must be cost based.[50] From this general principle, Verizon reasons that the Old Telecom Rate—which the *Orde*r found to be a just and reasonable rate—is nevertheless *not* a rate Potomac Edison may charge.[51] Rather, Verizon asserts that if Potomac Edison wants to impose a charge that exceeds the New Telecom Rate, "it must justify the differential" in its negotiations with Verizon.[52] Far from a "request for clarification," this is an attempt to re-argue its position that the New Telecom Rate should apply.[53] Indeed, the *Order* expressly found that "Verizon is not entitled to the New Telecom Rate because Verizon receives benefits under the JUA that materially advantage it over other attachers."[54]

13. We clarify that the *Order* does not condition Potomac Edison's right to charge a maximum rate equal to the Old Telecom Rate on its submission of information about the cost of providing the advantages Verizon receives under the JUA. Notably, the rate formula the Commission used to calculate the Old Telecom Rate largely used inputs consisting of Potomac Edison's costs.[55] Neither the *2018 Order* nor the *2011 Order* require a utility to "justify a rate higher than the new telecom rate with quantified costs it incurs" as Verizon advocates.[56] Similarly, Commission rule 1.1413 governing Verizon's Complaint does not require a monetization of benefits.[57] We agree with Potomac Edison that requiring such quantification would be "time-intensive, often unverifiable, often subjective . . . and always contentious" and would "prevent parties from reaching negotiated resolutions."[58]

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the [*Order*] should require the parties to modify the Joint Use Agreement to conform with the rate rulings in the [*Order*], but that the parties should not otherwise be required to renegotiate the entire agreement").

[49] We also deny Potomac Edison's Motion Requesting Refund Computation Method or Formula, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (filed Oct. 8, 2021) (Motion). *See* Verizon's Opposition to Potomac Edison's Motion Requesting Refund Computation Method or Formula, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (filed Oct. 19, 2021); *see also* Reply to Opposition Requesting Refund Computation Method or Formula, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (filed Oct. 25, 2021). The Motion is an untimely request for clarification or reconsideration of the relief granted in the *Order*. *See* 47 CFR § 1.106(f) (a petition for reconsideration shall be filed within 30 days from the date of public notice of the final Commission action). Potomac Edison's Motion was filed more than nine months after the deadline for petitions for reconsideration of the *Order*. The Motion is also untimely under rule 1.723(g). *See* 47 CFR § 1.723(g). To the extent rule 1.723(g) applies here, it required the parties to submit a "statement detailing the bases" for any dispute concerning the computation of a refund within 30 days of the release of the *Order*. Finally, Potomac Edison's reliance on rule 1.41 is misplaced because that rule allows informal requests for action "[e]xcept where formal procedures are required." *See* 47 CFR § 1.41. Because the Commission's formal complaint and pole attachment complaint rules govern this proceeding, rule 1.41 does not apply.

[50] Verizon Petition at 7.

[51] *Id*. at 7-9; Verizon Reply at 8-10.

[52] Verizon Reply at 9-10.

[53] *See e.g.*, Complaint at 8-13, paras. 14-22.

[54] *Order*, 35 FCC Rcd at 13612, para. 14.

[55] *See Order*, 35 FCC Rcd at 13620-25, paras. 33-38; *see id*. at 13630, para. 52(a). The Commission's pole attachment rate orders make it clear that the Commission's pole attachment rate formulas take account of the utility's costs. *See generally 2011 Order*, *2018 Order*, and *Implementation of Section 224 of the Act*, Order on Reconsideration, 30 FCC Rcd 13731 (2015).

[56] Verizon Reply Petition at 9.

[57] *See* 47 CFR § 1.1413.

[58] Potomac Edison Opposition at 15.

14. Verizon's reliance on the interim division-level order in *Dominion*[59] and the Enforcement Bureau's order in *Verizon Florida*[60] to support its assertion that Potomac Edison must justify a rate higher than the New Telecom Rate with quantified evidence of its costs is unavailing.[61] The *2018 Order*—which was adopted after the *Dominion* and *Verizon Florida* orders—does not discuss or require the quantification Verizon advocates. Further, because no party sought full Commission review of the *Dominion* or *Verizon Florida* orders, we have not previously had an opportunity to consider their holdings.[62] To the extent these orders can be read to require a party in a pole attachment complaint proceeding under rule 1.1413 to quantify the value of individual benefits an incumbent LEC receives under a joint use agreement, we reject that interpretation as impracticable, especially in the absence of any rules prescribing a methodology for valuing such benefits.[63]

15. In further support of its argument, Verizon points to paragraph 32 of the *Order*, where the Commission indicated that the material advantages the JUA provides Verizon did not justify the rates Potomac Edison was charging—which exceeded both the Old and New Telecom Rates.[64] Verizon construes this to mean that Potomac Edison cannot charge a rate higher than the New Telecom Rate unless it quantifies the costs it incurs in providing each competitive advantage accorded Verizon under the JUA.[65] Verizon misreads the *Order*. The Commission—based on reasoning found in both the *2011* and *2018 Orders*—found that the Old Telecom Rate best accomplished the goals of compensating utilities for advantages provided to incumbent LECs under JUAs, while keeping the rates just and reasonable based on costs, as reflected in the Commission's rate formula. For that reason the Commission set the Old Telecom Rate as a maximum rate to be used in the parties' negotiations; it did not require the quantification of benefits and costs that Verizon advocates.

16. We further clarify that the *Order* left the parties free to negotiate tradeoffs under which Potomac Edison could agree to charge Verizon less than the full Old Telecom Rate.[66] Our clarification is consistent with the guidance the Commission provided in the *2018 Order*. There, the Commission stated that where, as here, the utility demonstrates in a complaint proceeding that the incumbent LEC receives benefits under an agreement that materially advantage the incumbent LEC, "we leave it to the parties to negotiate the appropriate rate or tradeoffs to account for such additional benefits."[67] The Commission established the Old Telecom Rate as "an upper bound" limit for such negotiations.[68] In doing so, it relied

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[59] *Verizon Va. v. VA. Elec. & Power Co.*, Memorandum Opinion and Order, 32 FCC Rcd 3750, 3758-59, paras. 18, 20 (EB-MDRD 2017) (*Dominion*).

[60] *Verizon Florida LLC v. Florida Power and Light Company*, Memorandum Opinion and Order, 30 FCC Rcd 1140 (EB 2015) (*Verizon Florida*).

[61] Verizon Petition at 7; Verizon Reply at 8-9.

[62] Verizon's reliance on *Verizon Florida* is also unavailing because that order addresses the incumbent LEC's burden in a complaint proceeding under the *2011 Order* to show that the rates in a joint use agreement are unjust and unreasonable. *See Verizon Florida*, 30 FCC Rcd at 1147-50, paras. 20-24. Conversely, in this case, Verizon's Petition is addressing Potomac Edison's burden of showing material benefits to Verizon under the JUA (vis-a-vis its competitors) pursuant to the *2018 Order* and rule 1.1413.

[63] *SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021, 1037 (D.C. Cir. 2017) ("a 'lower component of a government agency' does not bind the agency as a whole"); *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) ("an agency is not bound by the actions of its staff if the agency has not endorsed those actions").

[64] Verizon Petition at 8.

[65] *See id*.

[66] *See 2018 Order*, 33 FCC Rcd at 7771, para. 128. Potomac Edison could, for example, agree to charge Verizon less than the full Old Telecom Rate in exchange for incentives that Verizon may offer.

[67] *2018 Order*, 33 FCC Rcd at 7771, para. 128.

[68] *Id.* at 7771, para. 129 & n.484 (quoting USTelecom Wireline NPRM Comments at 11).

on the *2011 Order*'s conclusion that the Old Telecom Rate "accounted for 'particular arrangements that provide net advantages to incumbent LECs.'"[69] Although the Commission made the Old Telecom Rate a "hard cap,"[70] it did not direct the substance of the parties' negotiations.[71] Nor did the Commission require either party to calculate the dollar value of specific advantages provided under a JUA or prescribe a methodology for such valuations. In leaving it to parties to negotiate a "rate or tradeoffs" to account for incumbent LEC advantages, the Commission recognized that parties could account for the value of advantages with "tradeoffs" that did not necessarily involve a dollar valuation of each advantage with a corresponding adjustment to the rate.

C. We Grant in Part and Deny in Part Potomac Edison's Petition

17. Potomac Edison requests that the Commission modify four rate elements in its calculation of the Old Telecom Rate, the maximum rate it may charge Verizon under the JUA. In particular, Potomac Edison disputes the *Order*'s findings concerning (1) the percentage of Potomac Edison's pole investment tied to appurtenances rather than pole elements that attachers use or require; (2) the rate of return to be used for calculating carrying charges; (3) the space occupied on its poles by Verizon's attachments; and (4) the average number of entities attaching to its poles. Potomac Edison's requested changes each would increase the calculated rate.[72] Verizon opposes each of these requests, which we address below, on procedural and substantive grounds.[73]

1. The Commission Reasonably Decided that the Correct Appurtenance Factor is 85%

18. Potomac Edison first challenges the *Order*'s appurtenance factor finding.[74] In calculating the net cost of a bare pole in the pole attachment rate formula, the Commission uses the utility's Federal Energy Regulatory Commission Account 364 filing but presumes that 15% of that account is composed of so-called "appurtenances," and thus applies a presumptive appurtenance factor of 85%.[75] Potomac Edison asserts that it has rebutted this presumption and that the appurtenance factor is {[ ]} when only "unitized" Account 364 property records are included.[76]

19. We deny Potomac Edison's request as procedurally defective and hold that the 85% appurtenance presumption is properly applied. In its Answer, Potomac Edison failed to explain its claim to have rebutted the 85% presumption.[77] While Potomac Edison pointed to an attachment to the Answer,

[69] *2018 Order*, 33 FCC Rcd at 7771, para. 129 & n.483.

[70] *2018 Order*, 33 FCC Rcd at 7771, para. 129.

[71] *Id*.

[72] *See* Potomac Edison Petition at 17-18, para. 37.

[73] *See generally* Verizon Opposition.

[74] Potomac Edison Petition at 2-5, paras. 2-10.

[75] *See Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12161, para. 121 (2001) (*Consolidated Partial Order on Reconsideration*). For electric utility poles, Account 364 (poles, towers, and fixtures) is used to determine pole investment. *See id.* at 12161, para. 121, 12156, para. 109. Non-pole appurtenances such as crossarms, which do not benefit the attacher, reduce the Account 364 total. *See id.* at 12161, para. 121.

[76] Potomac Edison Petition at 2, paras. 2-3. Potomac Edison contrasts "unitized" Account 364 dollar figures with "non-unitized" Account 364 dollar figures that have not yet been placed into an Account 364 retirement unit. *See id.* at 4, para. 5.

[77] *See* The Potomac Edison Company's Corrected Answer to the Pole Attachment Complaint of Verizon Maryland LLC, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009 (filed June 10, 2020) (Answer) at 49, para. 105.

that eight-page attachment nakedly listed an "Appurtenance Factor" of {[ ]} and an "Appurtenance Factor" of {[ ]} among inscrutable calculations, unsupported by any testimony or narrative explanation.[78] In fact, Potomac Edison did not refer to the term "unitized" anywhere in its Answer,[79] even though it now claims that the appurtenance factor calculation should exclude {[ ]} in Account 364 dollars because they are "non-unitized."[80] Potomac Edison thus failed to present its argument as required,[81] and further fails even to allege that the public interest requires that we consider its untimely argument on reconsideration.[82] We deny the request as procedurally flawed.

20. The request to change the appurtenance factor also fails on the merits. Account 364 investment is the source of cost data Potomac Edison used to calculate the appurtenance factor, and the Commission has never distinguished between "unitized" or "non-unitized" costs in Account 364. Moreover, Potomac Edison fails to name or describe the non-unitized investment[83] or explain why it has not yet done so, as the rules governing its uniform system of accounts require.[84] Potomac Edison claims that rejecting its proposed appurtenance factor gives Verizon "a discount for nonexistent utility investment."[85] But by excluding certain dollar amounts from Account 364, Potomac Edison is seeking to modify the appurtenance factor based on unidentified and unexplained utility investment. Potomac Edison may not unilaterally exclude a subset of Account 364 property records, by calling it non-unitized.

2. We Grant in Part Potomac Edison's Challenge to the Rate of Return Input

21. Potomac Edison requests a change to the rate of return for carrying charges used in the pole attachment rate formula.[86] In the *Order*, the Commission used a 7.15% rate of return for carrying charges in calculating the Old Telecom Rate. Potomac Edison asserts that 9.68% is the proper rate, since that was the rate in effect in Maryland at year-end 2018, and the inputs the Commission used in its rate calculation were based on year-end 2018 data.[87]

22. Potomac Edison's request fails on the merits.[88] It is undisputed that the rate of return for carrying charges in Maryland was 9.68% on December 31, 2018,[89] and that it became 7.15% on

[78] *See* Answer, Attach. G at PE00087-94.

[79] *See* Answer, Attach. G at PE00092 (referencing only the word "non-unitized" on a single page across a 600-cell, untitled spreadsheet printout).

[80] *See* Potomac Edison Petition at 4-5, paras. 5-8.

[81] *See* 47 CFR § 1.726(b).

[82] *See* 47 CFR § 1.106(b)(2), (c).

[83] *See* Answer, Attach. G at PE00092-93.

[84] *See* 18 CFR Part 101, "Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act," (Uniform System of Accounts) Electric Plant Instructions 10A, 10B; Uniform System of Accounts, Definitions 8.

[85] Potomac Edison Petition at 5, para. 10.

[86] *Id.* at 6-7, paras. 11-14.

[87] *Id.*

[88] We deny Verizon's procedural challenge to reconsider the applicable rate of return to be used in calculating carrying charges. Potomac Edison Petition at 6-7, paras. 11-14; *see* Verizon Opposition at 5. Verizon acknowledges that Potomac Edison introduced the 9.68% figure in its Answer but claims it failed to "provide an argument for its use" and thus forfeited the right to do so on reconsideration. Verizon Opposition at 5. We disagree. Potomac Edison asserted that "Verizon used an incorrect rate of return" and that "the proper rate of return [for calculation of year-end 2018 rates] is the rate most recently approved by the [Maryland Public Service Commission], which is 9.68%." *See* Answer at 49, para. 105. Potomac Edison attached to its Answer an exhibit that calculated a pole attachment rate using the 9.68% rate of return with Potomac Edison's year-end 2018 cost data. *See* Answer, Attach. G at PE00087. *Compare id. with* Potomac Edison Petition at 7, para. 14. *See also Order*, 35

(continued….)

March 22, 2019.[90] The year-end 2018 rate of return need not be applied once the state prescribes a new rate, even though other cost-related inputs to the rate formula are drawn from year-end 2018 data.[91] The carrying charges calculation is an attempt to estimate the annual cost of pole ownership and maintenance and to compensate the pole owner for these costs for the rate period going forward. Year-end cost data from the Federal Energy Regulatory Commission Form 1 accounts for the most recent calendar year are used to calculate the carrying charge elements, *other* than the rate-of-return element, because of the burden and uncertainty that would be associated with projecting future costs.[92] The state-prescribed rate of return, on the other hand, is known and reflects the state regulator's measure of just compensation for investor-supplied capital going forward from the time that rate takes effect. Its use as the rate-of-return element in the overall carrying charge rate provides certainty and administrative simplicity.

23. While we reject Potomac Edison's request to adopt 9.68% as the rate for the entire period at issue,[93] we find that the 9.68% rate should apply from the beginning of the damages period through the end of 2018. For 2019, the rate to be used is 7.70%, which is a weighted-average rate based on the relative number of days in 2019 for which each of 9.68% and 7.15% was the applicable rate. From 2020 forward, until Maryland prescribes a new rate, the rate to be used is 7.15%. Therefore, applying the 2018 year-end financial data, the Old Telecom Rate referenced in paragraphs 38 and 52(a) of the *Order* should be {[ ]} for 2019 and {[ ]} for 2020 and beyond.[94]

3. Potomac Edison's Challenge to the Commission's Space-Occupied Input is Unfounded

24. In its Petition, Potomac Edison asks the Commission for the first time to assign {]} feet as the space-occupied input to the pole attachment rate formula, replacing the one foot value assigned in the *Order*.[95] In its Answer, Potomac Edison argued that the space occupied figure was {[ ]} feet. Potomac Edison arrives at the {[ ]} feet figure by asserting that Verizon occupies {[ ]} feet of pole space below its attachments, in addition to {[ ]} feet for the space between Verizon's lowest and highest attachments and 0.5 feet above the highest.[96]

25. We reject Potomac Edison's requested change because "a petition for reconsideration which relies on facts or arguments not previously presented to the Commission" may be granted only in

(Continued from previous page)
FCC Rcd at 13624, n.137. Potomac Edison thus explained its argument sufficiently to permit Verizon to address the question. We also disagree with Verizon's assertion that "Potomac Edison's prior representation was knowingly and demonstrably false," Verizon Opposition at 5, since Potomac Edison expressly associated the proposed 9.68% rate of return with calculation of pole attachment rates at the end of 2018, when that rate of return was still in effect. *See* Answer at 49, para. 105.

[89] *See* Potomac Edison Petition at 6-7, paras. 12, 14; Complaint Exh. C, Aff. of Timothy J. Tardiff, Ph.D. at 8-9, n.20.

[90] Complaint Exh. 25 at VZ00381 (Excerpt from Order No. 89072, Case No. 9490 (Md. PSC Mar. 22, 2019)).

[91] *See generally* Answer at 48, para. 104; Potomac Edison Petition at 6-7, para. 13.

[92] *See Consolidated Partial Order on Reconsideration*, 16 FCC Rcd at 12176, App. E-2.

[93] *See* Potomac Edison Petition at 7, para. 14.

[94] The parties should use the inputs identified herein and in the *Order* and the year-end financial data reported on the relevant FERC Form 1 to calculate the Old Telecom Rate for each prior year within the applicable statute of limitations. *See Order*, 35 FCC Rcd at 13625, para. 38 n.147.

[95] Potomac Edison Petition at 7-14, paras. 15-31.

[96] *Id*. *Compare* Answer at 41, para. 89 *with* Potomac Edison Petition at 14, para. 30.

limited circumstances, which are not present here.[97] In its Answer, Potomac Edison urged the Commission to assign {[ ]} feet to the space occupied input,[98] based on a field audit Potomac Edison's parent company performed.[99] Potomac Edison now asserts that the {[ ]} feet number is "more accurate,"[100] but does not justify its failure to advocate use of this number during the Complaint proceeding.[101] We therefore reject Potomac Edison's request that we reconsider the space occupied input.

26. Potomac's Edison's request is also defective because its proposed {[ ]} figure is based in part on an undocumented calculation of sag in Verizon's facilities. A key component of the proposed {[ ]} feet is the {[ ]} feet Potomac Edison asserts that Verizon occupies below its lowest attachment.[102] Potomac Edison cites data showing that Verizon's lowest attachments are located an average of {[ ]} feet above ground level, asserts that the Commission's rules deem all of the space above 18 feet to be usable space;[103] and calculates that the difference between these two heights is {[ ]} feet. Potomac Edison alleges that Verizon attaches at {[ ]} feet to maintain mid-span clearance above ground as required by the National Electrical Safety Code and Potomac Edison's engineering standards, and supports this allegation by a declarant who asserts that he "calculated the weight and sag corresponding to Verizon's facilities."[104] Those calculations are not in the record, however. Thus, Potomac Edison's request to define Verizon's space occupied on the pole as {[ ]} feet fails for this additional reason.

27. We also reject Potomac Edison's assertion that the *Order* advantages incumbent LECs and will "result in two different rates for the exact same attachments."[105] To the extent that Potomac Edison is asking the Commission to clarify that the lowest attacher on a pole remains subject to the one-foot presumption of space occupied,[106] we do so. Potomac Edison misreads the Commission's prior rulings as imposing a presumption of six inches above the attachment and six inches below it.[107] But

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[97] *See* 47 CFR § 1.106(c) (emphasis added); *see also id.* at § 1.106(b)(2). Potomac Edison's request does not fall within one of the categories set forth in 47 CFR § 1.106(b)(2), nor does the public interest require its consideration. *See id*; *see also infra* note 101.

[98] *See* Answer at 41, para. 89; *see also id*., Attach. G at PE00089.

[99] *See* Answer at 50, para. 107; *see also id*., Attach. L, Exh. CG-1 at 8, 10-11 (reporting {]} inches, which is {]} feet).

[100] Potomac Edison Petition at 14, para. 30.

[101] Potomac Edison's argument that this increase in the space-occupied input was "required" by the Commission's alleged ruling that the lowest attacher requires no space below its attachments for clearance is a *non sequitur*. *See* Potomac Edison Reply at 3. Moreover, as discussed below, the lowest attacher on a pole remains subject to the one-foot presumption of space occupied.

[102] *See* Potomac Edison Petition at 12-14, paras. 26-30.

[103] *See* Potomac Edison Petition at 11-12, paras. 25-26 & n.29 (citing 47 CFR § 1.1410 and *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, 72 FCC 2d. 59, 69, para. 22 (1979) (*Second Report and Order*); Answer, Attach. L, Exh. CG-1 at 10-11 (note that {]} inches equates to {[ ]} feet).

[104] *See* Potomac Edison Petition at 12-13, para. 27; Answer, Attach. F at 5-6, paras. 33-34 (PE00052-PE00053).

[105] Potomac Edison Petition at 10-11, paras. 21-22.

[106] *See id*. at 14, para. 29.

[107] *See* Potomac Edison Petition at 14, paras. 29-30. *But see Consolidated Partial Order on Reconsideration*, 16 FCC Rcd at 12129, para. 47; *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6815, para. 84 (1998) (*Report & Order*); *Second Report and Order*, 72 FCC 2d at 70-71, para. 24; S. Rep. No. 95-580, at 20 (1977), reprinted in 1978 U.S.C.C.A.N. 109, 128.

because the presumption to account for attachments and clearances is one foot of space, undivided, an incumbent LEC's position as the lowest attacher is irrelevant to the calculation.[108]

4. The Commission Reasonably Found that the Average Number of Attaching Entities is Three

28. Finally, Potomac Edison challenges the Commission's use of three as the average number of attachers in the rate formula.[109] Potomac Edison asserts it was improper for the Commission to modify its proposal of {[ ]} attachers, because that number was based on statistically valid survey results and because Verizon kept the underlying data from being in the record.[110] The *Order* rounded that number up to three to account for the lack of the underlying survey data.[111]

29. We reject Potomac Edison's request on the merits.[112] Verizon was not solely responsible for the underlying data's omission from the record, and we reject Potomac Edison's suggestion that it was. The *Order* noted "the lack of [ ] field survey data to verify the accuracy of the survey results" Potomac Edison put in the record[113] and concluded that both parties bore responsibility for this absence of underlying data from the record.[114] Potomac Edison's Petition ignores its own role in omitting that data from the record.[115] In addition to demonstrating that its survey methodology reflected a statistically valid survey, Potomac Edison had the burden to demonstrate the accuracy and reliability of the underlying survey data, and it could have submitted the data along with the survey results when it filed its Answer.[116]

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[108] *See generally* Potomac Edison Petition at 14, paras. 29-30. *But see Consolidated Partial Order on Reconsideration*, 16 FCC Rcd at 12129, para. 47; *Report & Order*, 13 FCC Rcd at 6815, para. 84; *Second Report and Order*, 72 FCC 2d at 70-71, para. 24; S. Rep. No. 95-580, at 20 (1977), reprinted in 1978 U.S.C.C.A.N. 109, 128.

[109] *See* Potomac Edison Petition at 15-17, paras. 32-36.

[110] *Id*. The survey that is the source for Potomac Edison's asserted inputs was prepared in early 2019 for its parent entity, FirstEnergy, and reported statistics for Potomac Edison and several related utilities. *See* Answer, Attach. L, Exh. CG-1 at 1-2.

[111] *See Order*, 35 FCC Rcd at 13625, para. 37.

[112] We also reject Verizon's argument that Potomac Edison's petition is procedurally defective because it is based on facts or arguments not previously presented to the Commission. *See* Verizon Opposition at 3 & n.10 (citing 47 CFR § 1.106(c)), 4, 6. Potomac Edison proposed the same number of attaching entities in the Complaint proceeding (*see* Answer, Attach. G (PE00089); *see also id*., Attach. L, Exh. CG-1 at 10-11 (PE00150-PE00151)) as it did on reconsideration, (*see* Potomac Edison Petition at 15, para. 32, 17, para. 36; *see also id*., Exh. B at PE00235, PE00237) and thus is not asserting new fundamental facts. *See* 47 CFR § 1.106(p)(2). Further, Verizon's argument that the Commission should reject Potomac Edison's survey results because Potomac Edison did not produce the data underlying the survey merely recapitulates its argument from the Complaint proceeding, and we reject it on reconsideration for the reasons given in the *Order*. *See Order*, 35 FCC Rcd at 13621-22, para. 34. Verizon argues, as it did during the Complaint proceeding, that the "Commission should not assume the accuracy of data it has not seen, . . . where Potomac Edison had the obligation and ample opportunity to provide the data, but did not." Verizon Opposition at 6. *See* Reply Legal Analysis at 49-52. As the *Order* stated, however, Verizon resisted Potomac Edison's efforts to supplement its Answer to include the data in the record and "did not identify the survey data as an outstanding discovery issue in the parties' Revised Joint Statement or move to compel its production," and it "bears some responsibility" for the fact that the data never made it into the record. *See Order*, 35 FCC Rcd at 13621-22, para. 34. Because the survey data is not in the record of this proceeding—a circumstance for which Verizon is partly responsible—we reject Verizon's assertion that the data was shown to be flawed in a separate proceeding before the Pennsylvania Public Utility Commission. Verizon's Opposition at 14-15.

[113] *See Order*, 35 FCC Rcd at 13625, para. 37.

[114] *See id.* at 13620-21, para. 34.

[115] *See* Potomac Edison Petition at 15-17.

[116] *See Order*, 35 FCC Rcd at 13620-21, para. 34.

30. In the *Order*, the Commission generally credited the survey's methodology and statistical validity, along with its relevance to several rate formula inputs. [117] On balance, the Commission considered Potomac Edison's suggested survey-based inputs, but did not fully endorse them. [118] The Commission has broad discretion to structure its proceedings to maximize fairness, promote efficiency, and conserve the resources of the parties and the Commission. [119] To avoid any further delays in the proceeding, [120] the Commission reasonably decided to consider and weigh the probative value of all of the rate-related information in the record to calculate a just and reasonable rate. [121]

31. The Commission therefore pursued a reasonable approach with respect to determining the average number of attachers. The *Order* notes that Verizon did not dispute that the average number of attachers is fewer than five, which is the rebuttable presumptive average number of attaching entities for Potomac Edison's urbanized service area. [122] The Commission therefore rounded Potomac Edison's input of {[ ]} up to the nearest whole number—a rounded value that fairly takes into account the survey results and the uncertainty concerning the accuracy and reliability of the underlying survey data. We therefore affirm our determination in the *Order*.

IV. ORDERING CLAUSES

32. Accordingly, **IT IS HEREBY ORDERED**, pursuant to sections 4(i), 4(j), 208, 224, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, 224, and 405, and section 1.106 of the Commission's rules, 47 CFR § 1.106, that Verizon's Petition for Reconsideration is **DISMISSED IN PART** on procedural grounds for the reasons and to the extent stated herein, and, as an independent and alternative basis for this decision, Verizon's Petition for Reconsideration is **DENIED** for the reasons stated herein.

33. **IT IS FURTHER ORDERED**, pursuant to sections 4(i), 4(j), 208, 224, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, 224, 405, and section 1.106 of the Commission's rules, 47 CFR § 1.106, that Verizon's Petition for Clarification is **GRANTED IN PART** for the reasons and to the extent stated herein.

34. **IT IS FURTHER ORDERED**, pursuant to sections 4(i), 4(j), 208, 224, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, 224, and 405, and section 1.106 of the Commission's rules, 47 CFR § 1.106, that Potomac Edison's Petition for Reconsideration is **GRANTED AND DENIED IN PART** for the reasons and to the extent stated herein.

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[117] *Order*, 35 FCC Rcd at 13622-23, para. 35 (internal citations omitted).

[118] *Id.* at 13620-22, para. 34.

[119] *See* 47 U.S.C. §§ 4(i), 4(j), 208 ("[I]t shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."); *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22501, para. 5 (1997) ("Commission staff retains considerable discretion under the new rules to, and is indeed encouraged to, explore and use alternative approaches to complaint adjudication designed to ensure the prompt discovery of relevant information and the full and fair resolution of disputes in the most expeditious manner possible."); *see also id.* at 22510, n.68 ("We emphasize again that the staff retains considerable discretion to use alternative approaches and techniques designed to promote fair and expeditious resolution of complaints.").

[120] Commission staff adjusted the initial schedule in this proceeding at the request of the parties, and the *Order* notes that this extension and the parties' failure to comply with the Commission's rules resulted in a further extension of the shot clock in this proceeding. *See Order*, 35 FCC Rcd at 13622, para. 34 n.122.

[121] *See Order*, 35 FCC Rcd at 13623, para. 36.

[122] *See* 47 CFR § 1.1409(c).

35. **IT IS FURTHER ORDERED**, pursuant to sections 4(i), 4(j), 208, 224, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, 224, and 405, and section 1.106 of the Commission's rules, 47 CFR § 1.106, that the Old Telecom Rate referenced in paragraphs 38 and 52(a) of the *Order* should be {[ ]} for 2019 and {[ ]} for 2020 and beyond.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary