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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

VERIZON VIRGINIA, LLC and)	
VERIZON SOUTH, INC.,)	
)	
<i>Complainants,</i>)	Docket No. 15-190
)	
v.)	File No. EB-15-MD-006
)	
VIRGINIA ELECTRIC AND POWER COMPANY)	
d/b/a DOMINION VIRGINIA POWER,)	
)	
<i>Respondent.</i>)	

RESPONSE TO POLE ATTACHMENT COMPLAINT

Virginia Electric and Power Company d/b/a Dominion Virginia Power (the “Respondent” or “Dominion”), through its undersigned counsel, and pursuant to the rules and regulations of the Federal Communications Commission (“Commission” or “FCC”) governing pole attachments, 47 C.F.R. §§ 1.1401 et seq. (“Pole Attachment Rules”), submits this Response to the above-captioned complaint of Verizon Virginia, LLC and Verizon South, Inc. (collectively, the “Complainants” or “Verizon”).

I. INTRODUCTION AND SUMMARY

The Complaint now before the Commission originated simply with Verizon’s demand that Dominion reduce, *going forward*, the agreed upon rate that Dominion charges Verizon to install and maintain communications cables and associated equipment on Dominion’s poles. Under the auspices of the *2011 Pole Attachment*, Verizon initially claimed that it must be charged a rate equal to that Dominion charges to its competitors within the parties’ shared service area. However, after reviewing the rates, terms, and conditions that Dominion provides to pole licensees, subject to the requirements of Sections 224(d) and (e), Verizon proposed, at random, an annual pole rental rate

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VERIZON VIRGINIA, LLC and)	
VERIZON SOUTH, INC.,)	
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<i>Complainants,</i>)	Docket No. 15-90
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The Complaint now before the Commission originated simply with Verizon’s demand that Dominion reduce, *going forward*, the agreed upon rate that Dominion charges Verizon to install and maintain communications cables and associated equipment on Dominion’s poles. Under the auspices of the *2011 Pole Attachment*, Verizon initially claimed that it must be charged a rate equal to that Dominion charges to its competitors within the parties’ shared service area. However, after reviewing the rates, terms, and conditions that Dominion provides to pole licensees, subject to the requirements of Sections 224(d) and (e), Verizon proposed, at random, an annual pole rental rate

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of [REDACTED], that in fact was much *lower* than the annual pole attachment rate that Dominion charged to CLECs for the same calendar year. Verizon also asserted in subsequent letters to Dominion that the annual pole rental rates calculated pursuant to the parties' joint use agreements are unjust and unreasonable. Nevertheless, Verizon ignored Dominion's repeated requests for rate calculations, pole data, or any information that would support its legal claim. Exasperated that Dominion would not readily accede to its demand, Verizon resorted to the Commission's complaint process, now claiming the right to be refunded annual pole rental fees paid in full over four years, and never disputed. For the 2015 calendar year, Verizon breached its pole rental fee obligation, withholding [REDACTED] that Dominion properly invoiced pursuant to the parties' joint use agreements

The Commission's pole attachment complaint rules place on Verizon the substantial burden of demonstrating that the annual pole rental rates charged by Dominion are unjust and unreasonable in light of the benefits that Verizon enjoys pursuant to its joint use agreements with Dominion, and as compared to the regulated rates charged to Verizon's competitors that attach to Dominion's poles. Verizon fails to meet that burden here, as the Complaint overlooks the value of the vast number of general and specific benefits that Verizon has received, and continues to receive through its joint use arrangement with Dominion. Moreover, Verizon fails to demonstrate either that the annual pole rental rates calculated pursuant to the parties' joint use agreements are unjust and reasonable, or that the "pre-existing" and "new" pole attachment rates calculated by Dominion pursuant to Section 224(e) are not accurate for purposes of the Commission's review. The relief demanded in Verizon's Complaint therefore must be denied.

II. JURISDICTION AND THE PARTIES

Dominion is a corporation formed under the laws of the Commonwealth of Virginia, having its headquarters at 120 Tredgar Street, Richmond, VA 23219. The principal business of Dominion is providing electric transmission and distribution services throughout Virginia, and

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Dominion owns and operates wires, poles and other infrastructure within Virginia for that purpose. Dominion is a “utility,” as that term is defined in Section 224 of the Pole Attachment Act, 47 U.S.C. § 224(a)(1).

Upon information and belief, Verizon Virginia, LLC is a limited liability company formed under the laws of the Commonwealth of Virginia, and Verizon South, Inc. is a corporation formed under the laws of the Commonwealth of Virginia. The Complainants maintain their principal place of business at 22201 Loudoun County Parkway, Ashburn, VA 20147. Each of the Complainants is an “incumbent local exchange carrier” (“ILEC”), as that term is defined in Section 251 of the Communications Act of 1934, as amended, 47 U.S.C. § 251(h), and as such, is subject to all rights and exclusions of the Pole Attachment Act.¹

The Commission determined that it may exercise jurisdiction over certain pole attachment complaints arising under Section 224(b)(1) alleging that rates, terms, or conditions imposed on an ILEC are unjust and unreasonable.² Complaints filed pursuant to the Pole Attachment Rules must meet all requirements set forth in 47 C.F.R. § 1.1404, including certification that the complainant, in good faith, engaged in, or attempted to engage in executive-level discussions for the purpose of resolving the dispute.³

The Commonwealth of Virginia has not certified to the Commission that it regulates rates, terms and conditions for pole attachments in the manner established pursuant to Section 224, such that the Commission’s jurisdiction over pole attachments within Virginia is pre-empted.⁴

¹ See 47 U.S.C. § 224 (“Pole Attachment Act”)

² *In the Matter of Implementation of Section 224 of the Act* (WC Docket No. 07-245); *A National Broadband Plan for Our Future* (GN 09-51), Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011), *aff’d*, *American Elec. Power Serv. Co. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013) (“2011 Pole Attachment Order”) at ¶ 203.

³ 47 C.F.R. § 1.1404(k).

⁴ See 47 C.F.R. § 224(c).

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III. BACKGROUND AND FACTS

A. The Parties' Historic Joint Use Relationship.

This dispute arises from the decades-old relationship between Dominion and Verizon as joint users of poles owned by one another in the Commonwealth of Virginia. Pursuant to a succession of agreements dating back over seventy (70) years, Dominion maintained the right to attach its facilities to poles owned by Verizon, and in turn, Verizon maintained the reciprocal right to attach its facilities to poles owned by Dominion. The agreed-upon terms and conditions of joint use were negotiated at arms-length, and have varied little over time.⁵ In short, the joint use arrangement between Dominion and Verizon entitles each: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁶ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷

The balance of pole ownership between Dominion and Verizon has been consistent over time as well, with Dominion owning approximately sixty-five (65%) of all poles designated for the

⁵ Declaration of Michael A. Graf in support of Response to Pole Attachment Complaint, appended hereto as Exhibit A ("Graf Declaration") ¶¶ 10, 14. See also General Joint-Use Agreement Between Verizon Virginia Inc. and Virginia Electric and Power Company d/b/a Dominion Virginia Power (Jan. 1, 2011) and General Joint Use Agreement Between Verizon South Inc. and Virginia Electric and Power Company d/b/a Dominion Virginia Power (Jan. 1, 2011) (together, "Joint Use Agreements") (appended to Complaint as Exhibits 1-2, respectively), and other shared infrastructure agreements between Dominion and Verizon, and predecessors (appended to Complaint as Exhibit 5-8).

⁶ See, e.g., Joint Use Agreements, Art. 19-20.

⁷ See *id.*, Art. 33, and Exhibits A-F.

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parties' joint use, and Verizon owning approximately thirty-five percent (35%) of such poles.⁸ The parties' proportional ownership of joint use poles never was considered in negotiating the terms of the joint use relationship, nor did Verizon communicate to Dominion in negotiations any desire to increase its share of pole ownership.⁹ [REDACTED]

[REDACTED],¹⁰ Verizon relied on Dominion to set new joint use poles in most cases.¹¹ The parties' joint use relationship, therefore, provided, and continues to provide Verizon limitless access to poles throughout its service area, and the economic benefit of avoided costs that would have been associated with designing, constructing, operating, and maintaining its own complete pole network.¹²

B. The Joint Use Agreements.

The joint use relationship between Dominion and Verizon currently is governed by separate, but identical agreements executed in 2011.¹³ The Joint Use Agreements resulted from negotiations that spanned four (4) years, and significantly, that were concurrent with the rulemaking proceeding culminating in the *2011 Pole Attachment Order*.¹⁴ The parties concluded negotiations in late 2010, but Verizon did not execute the Joint Use Agreements until August 2011 – at least four (4) months after the date on which the *2011 Pole Attachment Order* was released.¹⁵ However, as the parties mutually agreed, the Joint Use Agreements reflect an Effective Date of January 1, 2011.¹⁶ But for

⁸ Graf Declaration ¶ 4.

⁹ Graf Declaration ¶ 9.

¹⁰ Joint Use Agreements, Art. 19.05.

¹¹ Graf Declaration ¶ 15, 28.

¹²

[REDACTED] Graf Declaration, Exhibit MAG-1.

¹³ See Joint Use Agreements (appended to Complaint at Exhibits 1-2).

¹⁴ Graf Declaration ¶ 10.

¹⁵ See Graf Declaration ¶ 16. The Commission released the *2011 Pole Attachment Order* on April 7, 2011.

¹⁶ See Joint Use Agreements, Recitals.

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the fact that Dominion owns a larger share of poles subject to the Joint Use Agreements, Verizon conceded that the negotiation process was fair.¹⁷

[REDACTED]

[REDACTED]

[REDACTED]¹⁸ [REDACTED]

[REDACTED]¹⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁰ Under the rate framework set forth in the Joint Use Agreements, as compared to the parties' predecessor agreements, the annual pole rental rate for Verizon South was reduced from [REDACTED], and the annual pole rental rate for Verizon Virginia was reduced [REDACTED]

[REDACTED]: collectively, a reduction to Verizon's total pole rental fee obligation of [REDACTED] over one year.²¹

[REDACTED]

[REDACTED]²²

¹⁷ Letter from Steve Mills, Verizon Network Engineering to Arlie A. Hahn, Jr., Dominion Virginia Power (Mar. 25, 2014) (appended to Complaint as Exhibit 18).

¹⁸ Joint Use Agreements, Art. 33.02 and Exhibits A-D.

¹⁹ Joint Use Agreements, Art. 33.07 and Exhibit E.

²⁰ See Joint Use Agreements, Exhibits A and D.

²¹ See Graf Declaration ¶ 15. See also Complaint ¶ 20. Verizon concedes that the Joint Use Agreements provided substantial reductions to its annual pole rental rate, but nevertheless complains that its *net* fee obligation – the total fee amount that Verizon remits to Dominion each year – was insignificant. As explained in Section IV(B)(2)(a) below, and in the Zarakas Declaration, the Joint Use Agreements resulted in proportionate rental rate reductions for both parties, based largely on the parties' application the same "Cost Factor" used to calculation rates under Section 224(e).

²² Joint Use Agreements, Art. 33.08.

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In addition, the parties each are entitled to terminate the Joint Use Agreements [REDACTED], and in that event, the Joint Use Agreements remain in full force and effect as negotiations for new rates, terms, and conditions are ongoing.²³ The Joint Use Agreements were eligible for termination beginning on January 1, 2015, but to date, Verizon has not terminated the Joint Use Agreements, and all terms and conditions set forth therein remain in full force and effect.²⁴

C. The Parties' Dispute.

The dispute began on October 8, 2013, when Verizon requested readjustment of its annual pole rental rates *going forward*, pursuant to the Joint Use Agreements.²⁵ Verizon also requested, and Dominion promptly provided documentation of pole attachment rates, terms, and conditions that Dominion offers to telecommunications carriers subject to Section 224(e).²⁶ After considering those materials, Verizon proposed an annual pole rental rate of [REDACTED] for each Dominion-owned joint use pole to which Verizon is attached.²⁷ This proposed rate was notably lower than the rate of [REDACTED] per licensed attachment that Dominion invoiced to Verizon's competitors for that same calendar year.²⁸ Without further explanation, Verizon stated that its rate proposal was appropriate

²³ Joint Use Agreements, Art. 11.01.

²⁴ Graf Declaration ¶ 17.

²⁵ See Letter from Stephen Mills, Verizon Network Engineering, Verizon to Arlie A. Hahn, Jr., Dominion Virginia Power (Re: Rental Rate Readjustment for Joint-Use Agreements between Virginia Electric and Power Company, Verizon Virginia, LLC and Verizon South, Inc. (Oct. 8, 2013). (appended to Complaint as Exhibit 13)

²⁶ *Id.* See also Letter from Steve Mills, Verizon Network Engineering to Arlie A. Hahn, Jr., Dominion Virginia Power (Re: Rental Rate Readjustment for the Joint-Use Agreements Between Virginia Electric and Power Company, Verizon Virginia, LLC and Verizon South, Inc. (Dec. 6, 2013) (acknowledging receipt of Dominion's boilerplate pole attachment agreement and 2014 rates) (appended to Complaint as Exhibit 14). As Dominion communicated to Verizon at the time of its request, license agreements that Dominion maintains with individual attachers are confidential, and cannot be disclosed to other telecommunications carriers. See Graf Declaration ¶ 20. See also Facilities License Agreement for Non-Wireless Overhead Attachments, Art. 25 (appended to Complaint as Exhibit 4).

²⁷ *Id.*

²⁸ See email from Arlie A. Hahn, Jr. to Steve Mills (Oct. 30, 2013) (transmitting Dominion's boilerplate pole attachment license agreement (which is hereinafter referred to as the "Standard Agreement") and 2014 rates) (appended to Complaint as Exhibit 4).

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because Verizon is comparably situated to its competitors within the same service area with respect to the terms and conditions of attachment that Dominion provides.²⁹

Over the course of the next year, the parties exchanged letters in which Verizon proclaimed that it is entitled to the equivalent of a regulated pole attachment rate.³⁰ Dominion, in its responses to Verizon, repeatedly requested documentation of the calculation from which the proposed annual pole rental rate of ██████ was derived.³¹ Verizon provided no such documentation,³² and in fact, prior to filing its Complaint, also failed to offer Dominion any assessment of the material benefits that it receives under the Joint Use Agreements, or any legal basis for demanding an annual pole rental rate that is *lower* than the attachment rate that Dominion charges to Verizon's competitors.³³ Moreover, Verizon never questioned whether Dominion properly calculates those rates charged to other telecommunications carriers under Section 224(e).³⁴

Dominion and Verizon participated in dispute resolution discussions, on July 8, 2014 (face-to-face), and on October 23, 2014 (via teleconference). For settlement purposes, Dominion offered to Verizon prospective adjustments to the annual pole rental rate calculations set forth in the Joint Use Agreements that would have yielded immediate and substantial rate reductions for Verizon.³⁵ Verizon, on the other hand, did not make any offer of settlement to Dominion.³⁶ On November 14, 2014, Verizon demanded alternative dispute resolution in accordance with the process set forth in

²⁹ *Id.*

³⁰ Copies of various letters exchanged between Dominion and Verizon over time period of October 8, 2013 through March 25, 2014 are appended to the Complaint as Exhibits 13-19.

³¹ *See, e.g.*, Letter from Arlie A. Hahn, Jr., Dominion Customer Solutions System – Joint Use to Steve Mills, Verizon Network Engineering (Feb. 20, 2014).

³² Graf Declaration ¶¶ 21-23.

³³ *See supra* n. 31.

³⁴ *See supra* n. 31.

³⁵ *See* email from Arlie A. Hahn, Jr. to Steve Mills (Oct. 21, 2014) (transmitting Dominion's proposal for prospective settlement of the annual pole rental rates required under the Joint Use Agreements)(appended to Complaint as Exhibit 21). *See also* Affidavit of Stephen C. Mills (appended to the Complaint as Exhibit B) (Mills Affidavit) ¶ 36.

³⁶ *Id.*

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the Joint Use Agreements.³⁷ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³⁸

As the parties never reached agreement as to any readjustment of the annual pole rental rate framework, Dominion has continued to invoice pole rental fees to Verizon in accordance with the Joint Use Agreements, and the parties' well-established practice.³⁹ For calendar year 2014, Verizon paid all annual pole rental fees due under the Joint Use Agreements four months after the due date specified on the invoices.⁴⁰ For calendar year 2015, Verizon paid only 11% of the total annual pole rental fee amounts invoiced pursuant to the Joint Use Agreements, two (2) full months after the date on which those amounts were due.⁴¹

IV. ARGUMENT

A. Verizon is Not Entitled to a Regulated Pole Attachment Rate.

The Commission already rejected Verizon's claim that a regulated pole attachment rate, or its equivalent, is required for ILECs under Section 224(b). Most recently, in *Verizon Florida LLC v. Florida Power and Light Co.*, the Enforcement Bureau reiterated the Commission's conclusion that "just and reasonable" joint use rates for ILECs are not bound by the same formulas applicable

³⁷ Letter from Steve Mills, Verizon Network Engineering to Arlie A. Hahn, Jr., Dominion Virginia Power (Re: Dominion Power's Proposed Readjustment of Annual Pole Rental Rates) (Nov. 14, 2014). (appended to Complaint as Exhibit 22).

³⁸ See email from John G. Douglass to Brett Heather Freedson, counsel to Dominion Virginia Power, and Christopher Huther, counsel to Verizon (Re: Conclusion of Mediation) (June 2, 2015).

³⁹ See Joint Use Agreements, Art. 33.07, 33.08.

⁴⁰ See Graf Declaration ¶ 26. [REDACTED]

[REDACTED]. See also email from Arlie A. Hahn, Jr. to Michael D. Tysinger (Re: Delinquent 2014 Pole Rent) (Dec. 30, 2014), appended hereto as Exhibit 1.

⁴¹ See Letter from Steve Mills, Network Operations & Engineering to Mike Roberts, Dominion Virginia Power (Re: Payment of 2015 Verizon Virginia and Verizon South Rental Invoices) (Sept. 8, 2015), and related invoices, appended hereto as Exhibit 2. [REDACTED]

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to attachment rates for cable service providers and CLECs.⁴² Further, the Enforcement Bureau rejected Verizon's claim that a joint use rate exceeding the "old" Telecom Rate is *per se* unjust and unreasonable, stating that the Commission suggested this rate only as a "reference point" for its review, and "not a rule."⁴³ Consistent with the case-specific approach that the Commission has applied pursuant to the *2011 Pole Attachment Order*, the merits of Verizon's Complaint must be reviewed in consideration of all benefits that Verizon has historically received, and continues to enjoy through its joint use arrangement, and voluntary contractual relationship with Dominion, as compared to its competitors within the same service area.⁴⁴ The determination of whether the rates prescribed in the Joint Use Agreements are just and reasonable cannot rest solely on numerical deviations from regulated rates to which Verizon is not entitled.⁴⁵

B. Verizon Fails to Meet its Burden of Proof.

In pole attachment complaint proceedings before the Commission, the ILEC complainant bears the formidable burden of demonstrating *first*, that rates charged pursuant to its existing joint use agreement are unjust and unreasonable; and *second*, that a reduced joint use rate is appropriate based on the parties' agreed-upon attachment terms, and other benefits that the ILEC complainant enjoys pursuant to the joint use relationship.⁴⁶ Verizon may be entitled to the equivalent of the pole attachment rate charged to similarly situated telecommunications carriers only if this burden

⁴² *Verizon Florida LLC v. Florida Power and Light Co.*, File No. EB-14-MD-003, Memorandum Opinion and Order, DA-187 (2015) ¶¶ 6, 23 ("[T]he Commission specifically found in the [2011] *Pole Attachment Order* that "just and reasonable" pole attachment rates for incumbent LECs are not bound by the formulas in sections 224(d) and (e).") (citing *2011 Pole Attachment Order* at ¶ 217). See also *American Elec. Power Serv. Co. v. FCC*, 708 F.3d 183, 186 (D.C. Cir. 2013) ("[T]o make clear what the Commission has not done, that it has not purported to bring ILECs under the new telecom rate adopted under [Section] 224(e)(1).").

⁴³ *Verizon Florida* ¶ 20.

⁴⁴ *2011 Pole Attachment Order* ¶¶ 217-219.

⁴⁵ *Id.*

⁴⁶ *Id.*

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is fully satisfied. The Complaint, however, falls short of validating that any reduction of the pole rental rates provided in the Joint Use Agreements is warranted under the Pole Attachment Act.

1. The Joint Use Agreements are Binding and Enforceable, and Should Not Be Disturbed

The Commission repeatedly stated its intent to defer to the negotiated terms and conditions of historic joint use agreements, such as those governing the relationship between Dominion and Verizon.⁴⁷ Recognizing that joint use arrangements generally were negotiated between parties of balanced bargaining power, the Commission declared that the rates, terms, and conditions found in existing agreements would not likely be found unjust and unreasonable.⁴⁸ In fact, historic joint use agreements of the nature described in the *2011 Pole Attachment Order* may be found unlawful only if the ILEC complainant demonstrates: (1) inferior bargaining power during negotiations with its joint use counterpart; *and* (2) that it is unable to terminate the joint use agreement, and to obtain new arrangements.⁴⁹ Verizon fails to demonstrate either of these circumstances in its Complaint.

a. The Joint Use Agreements Pre-Date the *2011 Pole Attachment Order*.

The *2011 Pole Attachment Order*, and subsequent orders of the Enforcement Bureau draw a clear distinction between historic joint use agreements (termed “existing agreements” in the *2011 Pole Attachment Order*), and agreements between electric utilities and ILECs that are entered into following the adoption of the *2011 Pole Attachment Order* (termed “new agreements” in the *2011 Pole Attachment Order*). This distinction is critical to the Commission’s review, as the *2011 Pole Attachment Order* requires far narrower evaluation criteria for agreements between electric utilities

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

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and ILECs reflecting longstanding joint use relationships.⁵⁰ Verizon argues, without explanation, and against the weight of undisputed facts alleged in its Complaint, that the Joint Use Agreements should be subject to analysis as “new” agreements under the *2011 Pole Attachment Order*.⁵¹ Thus, much of Verizon’s Complaint is predicated on a legal framework that is not even applicable in the present case.

In considering the merits of Verizon’s Complaint, the Commission must treat the Joint Use Agreements as “existing” agreements, entitled to the presumption of having resulted from balanced arms-length negotiations between Dominion and Verizon. The parties do not dispute that the Joint Use Agreements took effect on January 1, 2011 – several months prior to the Commission adopting the *2011 Pole Attachment Order*.⁵² The parties also do not dispute that the Joint Use Agreements were negotiated over the (4) years preceding the *2011 Pole Attachment Order*, or that all terms and conditions incorporated in the Joint Use Agreements, including the pole rental rate framework, were settled before November 2010.⁵³ Indeed, the facts presented in Verizon’s Complaint belie its claim that the Joint Use Agreements are “new” agreements for purposes of the Commission’s review.

b. Verizon Does Not Lack Bargaining Power Relative to Dominion.

The fact that Verizon owns the lesser share of all poles subject to the Joint Use Agreements does not in itself demonstrate unequal bargaining power between the parties, or otherwise validate Verizon’s claim that Dominion wielded its superior negotiating position to extort pole rental rates in excess of what the law allows. In the *2011 Pole Attachment Order*, the Commission expressed

⁵⁰ *Id.*

⁵¹ Complaint ¶ 32-33. Verizon acknowledges that the Joint Use Agreements “took effect on January 1, 2011 – about six months before the effective date of the [2011] *Pole Attachment Order*,” and yet assumes that the Joint Use Agreements are “new” agreements for purposes of the Commission’s analysis. The *2011 Pole Attachment Order*, however, defines “new” agreements as those agreements “entered into following the adoption of [the *2011 Pole Attachment Order*].” *2011 Pole Attachment Order* ¶ 216.

⁵² *Id.* Graf Declaration ¶ 16.

⁵³ Complaint ¶ 16, Mills Affidavit, ¶ 10. *See also* Graf Declaration ¶ 14.

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the specific concern that ILECs' diminishing pole ownership, as compared to electric utilities, may in some cases favor electric utilities during the process of negotiating *new* joint use agreements.⁵⁴ However, the parties agree that the balance of pole ownership between Dominion and Verizon has not varied over the last several decades of their joint use relationship.⁵⁵ Indeed, Verizon currently receives the same benefits under the Joint Use Agreements as it did under predecessor agreements dating back to 1978, at far lower pole rental rates.⁵⁶

The Joint Use Agreements granted Verizon immediate and substantial reductions to its pole rental rates, further undermining Verizon's claim that the parties' negotiations were overshadowed by an imbalance of bargaining power. The annual pole rental rate formula incorporated into the Joint Use Agreements applies the identical cost factor calculation that each of the parties uses to develop annual pole attachment rates for telecommunications carriers subject to Section 224(e).⁵⁷ The baseline pole rental rate calculation under the Joint Use Agreements reduced the rate for Verizon South [REDACTED]; and the rate for Verizon Virginia [REDACTED]; collectively, a reduction to Verizon's total pole rental fee obligation of [REDACTED].⁵⁸ Dominion realized a proportionate reduction to its annual pole rental rate from calendar year 2010 to calendar year 2011, but did not enjoy *greater* rate relief relative to Verizon, as the Complaint asserts.⁵⁹

Also misleading is the suggestion that Dominion declined Verizon's offer to purchase poles as a means of preserving its own superior bargaining position during negotiation of the Joint Use

⁵⁴ 2011 Pole Attachment Order ¶ 216 and n. 652.

⁵⁵ Graf Declaration ¶ 4.

⁵⁶ See Complaint ¶ 88.

⁵⁷ Graf Declaration ¶ 6.

⁵⁸ See *supra* n. 22.

⁵⁹ See *infra* Section (C)(1).

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Agreements.⁶⁰ [REDACTED]

[REDACTED]
[REDACTED].⁶¹ As the Graf Declaration confirms, Dominion's decision was based entirely on business considerations, and demonstrates nothing more than its desire to avoid the substantial transaction costs associated with transferring ownership of its poles.⁶² [REDACTED]

[REDACTED]
[REDACTED].⁶³

Verizon does not, however, lack opportunities to ensure greater balance of pole ownership in its joint use relationship with Dominion. As the minority pole owner, [REDACTED]

[REDACTED].⁶⁴ Verizon always maintained this option to grow its ownership stake in the joint use relationship, but in most cases relied on Dominion to cover the initial expense of constructing poles for the parties' mutual benefit.⁶⁵ At bottom, the lagging number of Verizon-owned poles in the parties' shared network is the result of Verizon's business practices, and not that of Dominion's calculated efforts to dominate the joint use relationship.

c. Verizon is Able to Terminate the Joint Use Agreements Without Any Adverse Effect on its Operations.

Under the *2011 Pole Attachment Order*, the Commission may conclude that the bargaining power is unequal between joint use partners if an ILEC is genuinely unable to terminate an existing joint use agreement, and obtain new arrangements.⁶⁶ Verizon asserts such circumstances here, but

⁶⁰ Complaint ¶ 18. Mills Affidavit ¶ 17.
⁶¹ Graf Declaration ¶ 12.
⁶² *Id.* ¶ 12.
⁶³ *Id.* ¶ 9.
⁶⁴ Joint Use Agreements, Art. 19.05.
⁶⁵ Graf Declaration ¶ 4.
⁶⁶ *2011 Pole Attachment Order* ¶ 216.

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the Complaint provides no explanation of how the Joint Use Agreements have the effect of binding Verizon to terms and conditions that are unjust and reasonable.⁶⁷ Under the Joint Use Agreements,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁶⁸

Verizon alleges that it is unable to terminate the Joint Use Agreements, but in fact, made no attempt to do so.⁶⁹ [REDACTED]

[REDACTED]

[REDACTED].⁷⁰ The initial term of the Joint Use Agreements expires on December 31, 2015, and thus, Verizon could have tendered its termination notice to Dominion as soon as January 1, 2015.⁷¹ In that event, Verizon's joint use assets would remain protected under the Joint Use Agreements pending the parties' negotiation of a replacement agreement.⁷² However, Verizon has not, to date, indicated to Dominion any intention of terminating the Joint Use Agreements, and continues to maintain all of its rights thereunder.⁷³ Dominion, for its part, has not suggested that any benefits provided to Verizon under the Joint Use Agreements would be terminated, suspended, or withheld, notwithstanding Verizon's default with respect to its annual pole rental fee obligation.⁷⁴

⁶⁷ Complaint ¶¶ 5, 31.

⁶⁸ Joint Use Agreements, Arts. 11.01, 33.08.

⁶⁹ Graf Declaration ¶ 17.

⁷⁰ Joint Use Agreements, Art. 11.01.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Graf Declaration ¶ 17.

⁷⁴ See Joint Use Agreements, Art. 13.04. [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED].⁷⁵ Dominion participated in this process upon Verizon's request, engaging in good faith negotiations over the course of one full year, and then appearing in private mediation at its own expense.⁷⁶ Verizon therefore could have obtained an entirely new pole rental rate framework without the need to terminate the Joint Use Agreements, but ultimately failed to do so as the result of its obstinate demands. Indeed, Verizon is not hopelessly bound to unjust and unreasonable pole rental rates under the Joint Use Agreements, but rather is unwilling to be charged for material benefits that it receives through the parties' continuing joint use relationship.

The unique timing of the Joint Use Agreements also suggests that Verizon was not without adequate protections upon approving the pole rental rate framework that now governs its joint use relationship with Dominion. Although the Joint Use Agreements were negotiated to completion before the end of 2010, Verizon did not execute the final agreement documents until after the *2011 Pole Attachment Order* took effect.⁷⁷ Therefore, Verizon had more than sufficient time to consider whether the parties' agreed upon annual pole rental rate framework was in accordance with the Commission's new application of Section 224(b) to ILECs – and indeed, it should be presumed to have done so. Verizon did not, however, at any time between the release date of the *2011 Pole Attachment Order*, and the date on which Verizon executed the Joint Use Agreements, question whether any provision of the Joint Use Agreements is lawful.⁷⁸ If Verizon believed the pole rental rate framework to be unjust and unreasonable at that time, certainly Verizon would have demanded further negotiations before executing binding five (5) year agreements, or at least exercised its

⁷⁵ Joint Use Agreements, Art. 33.08.

⁷⁶ Graf Declaration ¶ 24-25.

⁷⁷ Graf Declaration ¶ 16.

⁷⁸ Graf Declaration ¶ 16.

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“sign and sue” right under the modified Pole Attachment Rules.⁷⁹ Verizon did neither, and now, after consuming the benefits of the Joint Use Agreements for five years, insists that it should be refunded nearly all of the undisputed pole rental fees that it paid in full.

2. The Complaint Fails to Demonstrate that the Joint Use Agreements Provide No Material Benefits to Verizon.

Where an ILEC demonstrates that it is “comparably situated” to any licensee, the ILEC may be entitled to be charged an attachment rate equal to the “new” Telecom Rate, as ordered in the *2011 Pole Attachment Order*.⁸⁰ Conversely, where an ILEC enjoys material advantages *vis-à-vis* its competitors, a higher attachment rate is just and reasonable.⁸¹ In the latter circumstances, the Commission suggested that the “pre-existing” Telecom Rate may serve as a reference point for determining if an attachment rate is just and reasonable, but that is not an upper bound.⁸² Although Verizon attempts to persuade the Commission that essential distinctions between the Joint Use Agreements, and the terms and conditions that Dominion offers to Verizon’s competitors, accord Verizon no material advantage, and relevant cost savings, Dominion’s analysis demonstrates that is not the case.

a. Verizon Received, and Continues to Receive the Value of Unfettered Access to a Seamless Network of Joint Use Poles.

The Pole Attachment Act does not entitle Verizon to access Dominion’s poles. Therefore, the simple fact of the *voluntary* infrastructure sharing relationship between Dominion and Verizon that has existed for over seventy (70) years in itself demonstrates that Verizon received substantial value that far exceeds the value of the attachment rights accorded to its competitors. Verizon

⁷⁹ See *2011 Pole Attachment Order* ¶ 216 and n. 655. Even if Verizon believed that its alleged lack of equal bargaining power would have caused further negotiations with Dominion to be fruitless, Verizon could have exercised its “sign and sue” rights, as the Commission permitted under the *2011 Pole Attachment Order*.

⁸⁰ *2011 Pole Attachment Order* ¶ 214; *Verizon Florida* ¶ 7.

⁸¹ *Id.*

⁸² *2011 Pole Attachment Order* ¶ 218; *Verizon Florida* ¶ 7.

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generally is authorized to access any pole within the seamless network of poles that was custom designed to cover its service footprint, and moreover, is entitled to do so without the cost or burden of seeking Dominion's prior consent to attach. Verizon also enjoyed the advantage of having been the first telecommunications carrier to access Dominion's poles, and now is the only entity that is guaranteed access to each Dominion-owned pole, and is provided space dedicated to its sole use. As described more fully in the Zarakas Declaration,⁸³ the benefits, and competitive advantages that Verizon receives simply through its joint use relationship with Dominion are unquestionable.

b. The Joint Use Agreements Provide Specific Tangible Benefits of Substantial Economic Value to Verizon.

In addition to the economic value that Verizon received over time, and continues to receive through its relationship with Dominion, the Joint Use Agreements also provide Verizon specific and tangible financial benefits, each of which is detailed in the following sections.

[REDACTED]

[REDACTED]

[REDACTED] 84

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 85

⁸³ Declaration of William P. Zarakas, in support of Response to Pole Attachment Complaint, appended hereto as Exhibit B ("Zarakas Declaration").

⁸⁴ See Joint Use Agreements, Art. 19.04 [REDACTED]. See Joint Use Agreements, Art. 22.01.

⁸⁵ See Standard Agreement, §§ 3.1, 3.2, 6.2; Facilities License Agreement for Non-Wireless Overhead Attachments Between MCI Network Services of Virginia, Inc. and Virginia Electric and Power Company (appended to Complaint as Exhibit 3) (hereinafter "MCI Agreement"), §§ 3.1, 3.2, 2.2(c), 6.2.

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 86 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 87 [REDACTED]

[REDACTED]

[REDACTED] 88 [REDACTED]

[REDACTED]

[REDACTED] 89 [REDACTED]

[REDACTED] 90 [REDACTED]

[REDACTED]

[REDACTED] 91 [REDACTED]

[REDACTED]

[REDACTED] 92 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

86 Joint Use Agreements, Art. 21.01.

87 *See id.* *See also* Joint Use Agreements, Art. 33.03, 33.05 and Exhibit F.

88 *See* Standard Agreement, §§ 3.1, 3.2; MCI Agreement, §§ 3.1, 3.2.

89 47 C.F.R. § 1.1403(b).

90 *See* Standard Agreement, § 3.2; MCI Agreement, § 3.2.

91 Graf Declaration ¶ 6 [REDACTED]

92 Graf Declaration ¶ 12.

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[REDACTED]

[REDACTED] 93

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 94

[REDACTED]

[REDACTED] 95

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 97 [REDACTED]

[REDACTED]

[REDACTED] 98

93 See Standard Agreement, §§ 3.2, 4.1, 4.2, 4.3; MCI Agreement, §§ 3.2, 4.1, 4.2, 4.3.
94 See Standard Agreement, §§ 3.2, 4.1, 7.2, 7.3; MCI Agreement, §§ 3.2, 4.1, 7.2, 7.3
95 Graf Declaration at ¶ 28.
96 *Id.*
97 *Id.*
98 Graf Declaration at ¶ 28.

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 99 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 100 [REDACTED]

[REDACTED] 101 [REDACTED]

[REDACTED]

[REDACTED] 102 [REDACTED]

[REDACTED] 103 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 104 [REDACTED]

[REDACTED]

[REDACTED] 105 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 106 [REDACTED]

99 Joint Use Agreements, Art. 19.06.
100 Graf Declaration ¶ 28; See Standard Agreement, § 8.1(a); MCI Agreement, § 8.1(a).
101 Graf Declaration ¶ 28; See Standard Agreement, § 8.1(a); MCI Agreement § 8.1(a).
102 Graf Declaration ¶ 28.
103 Graf Declaration ¶ 28.
104 See Affidavit of Mark S. Calnon, Ph.D., appended to Complaint as Exhibit A ("Calnon Affidavit") ¶ 53.
105 Standard Agreement, § 5.4; MCI Agreement, § 5.4. [REDACTED]
106 Joint Use Agreements, Art. 28.

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[REDACTED]

[REDACTED] 107 [REDACTED]

[REDACTED]

[REDACTED] 108

[REDACTED]

[REDACTED] 109 [REDACTED]

[REDACTED] 110 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 111

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 112 [REDACTED]

[REDACTED]

[REDACTED] 113 [REDACTED]

¹⁰⁷ Standard Agreement, § 8.1(c); MCI Agreement, § 8.1(c).

¹⁰⁸ Graf Declaration at ¶ 28. The process of undergrounding attachments implicates costs related to obtaining rights-of-way, obtaining state and/local construction permits, and engineering and constructing the new facilities.

¹⁰⁹ Graf Declaration ¶ 28. *See also* Complaint ¶ 67). (indicating that Verizon relies exclusively on the positioning of its attachment lowest on the pole for identification purposes

¹¹⁰ Graf Declaration ¶ 28; *See* Standard Agreement, § 2.4; MCI Agreement, § 2.4.

¹¹¹ [REDACTED]

¹¹² *See* Standard Agreement, § 6.6; MCI Agreement, § 6.6.

¹¹³ Complaint ¶ 51; Calnon Affidavit ¶ 66.

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 114 [REDACTED]

[REDACTED]

[REDACTED] 115 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 116 [REDACTED]

[REDACTED]

[REDACTED] 117

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹¹⁴ Graf Affidavit ¶ 28.

¹¹⁵ *Id.* Dominion did not consent to Verizon’s delinquent payment of the annual pole rental fees invoiced for calendar year 2014, and Verizon present no evidence of such consent.

¹¹⁶ See Standard Agreement, § 6.6(b). [REDACTED]

¹¹⁷ A “negligent licensee,” as described in the Complaint, is an entity that regularly incurs late payment surcharges. Verizon’s conduct here does not differ from that of a “negligent licensee.” Rather, Verizon has avoided penalties and interest on past due amounts only because Verizon is not subject to such penalties and interest under the Joint Use Agreements.

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[REDACTED] 118 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 119

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 120 [REDACTED]

[REDACTED]

[REDACTED] 121 [REDACTED]

[REDACTED]

[REDACTED] 122 [REDACTED]

[REDACTED] 123 [REDACTED]

[REDACTED]

[REDACTED]

118 Graf Declaration ¶ 28; Standard Agreement, § 6.1, 6.4; MCI Agreement, § 6.1, 6.4. [REDACTED]
[REDACTED]

119 *Id.*

120 Joint Use Agreements, Art. 21.01.

121 Graf Declaration ¶ 28. *See also* Joint Use Agreements, Art. 33.03, 33.05 and Exhibit F.

122 *See* Joint Use Agreements, Exhibit F.

123 Graf Declaration ¶ 28.

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[REDACTED] 124 [REDACTED]

[REDACTED] 125

[REDACTED]

[REDACTED]

[REDACTED] 126 [REDACTED]

[REDACTED] 127 [REDACTED]

[REDACTED]

[REDACTED] 128 [REDACTED]

[REDACTED]

[REDACTED] 129

[REDACTED]

[REDACTED] 130 [REDACTED]

[REDACTED] 131 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 132 [REDACTED]

124 Standard Agreement, § 6.5(a); MCI Agreement § 6.5(a).
125 See Standard Agreement, § 6.5. Because Verizon is not obligated to obtain a new permit for each attachment to Dominion's pole, penalties associated with unauthorized attachments are not applicable to Verizon.
126 Graf Declaration ¶ 28.
127 Graf Declaration ¶ 28.
128 See Standard Agreement, § 4.1(c); See MCI Agreement, § 4.1(b).
129 Graf Declaration ¶ 28.
130 Complaint ¶ 64 (alleging that Verizon's attachments have been damaged from gaffs, ladders, and bucket trucks, in addition to other damage).
131 Graf Declaration ¶ 28. See also subsection xv below. If [REDACTED]
132 See Complaint ¶ 67.

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[REDACTED]

[REDACTED] 133

[REDACTED]

[REDACTED]

[REDACTED] 134 [REDACTED]

[REDACTED]

[REDACTED] 135 [REDACTED]

[REDACTED]

[REDACTED] 136 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 137 [REDACTED]

[REDACTED] 138 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 139 [REDACTED]

[REDACTED]

133 See subsection xi above.
134 See Joint Use Agreements, Art. 21.05.
135 *Id.*
136 Graf Declaration ¶ 28.
137 Graf Declaration ¶ 28.
138 Graf Declaration ¶ 28.
139 Joint Use Agreements, Art. 27.01.

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[REDACTED]¹⁴⁰ [REDACTED]
[REDACTED]
[REDACTED].

C. The Annual Pole Rental Rates Calculated Pursuant to the Joint Use Agreements are Just and Reasonable.

The annual pole rental rate charged to Verizon under the Joint Use Agreements cannot be found unjust and unreasonable solely because that rate deviates from the Telecom Rate charged to Verizon's competitors in the same calendar year. As the rate charged to Verizon in any joint use relationship is not bound by the formulas established pursuant to Sections 224(d) and (e), it follows that Verizon is free to negotiate with Dominion any annual pole rental rate formula, and data inputs that it deems appropriate in consideration of all aspects of the parties' joint use relationship.¹⁴¹ Prior to filing its Complaint, Verizon never challenged [REDACTED]

[REDACTED]
[REDACTED]¹⁴² [REDACTED]
[REDACTED]
[REDACTED].

1. The Joint Use Agreements Ensure Proportionate Pole Rental Rates.

The Commission expressed that it would view with great skepticism an ILEC's demand to be charged a proportionately lower rate than its joint use counterpart for the right to attach to shared poles.¹⁴³ Although the Joint Use Agreements require that the annual pole rental rate for Dominion, and that for Verizon be calculated in precisely the same manner, Verizon nevertheless alleges that

¹⁴⁰ *Id.*
¹⁴¹ *See supra* n. 42.
¹⁴² Graf Declaration ¶¶ 18-19.
¹⁴³ *2011 Pole Attachment Order* ¶ 219.

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its higher annual fee obligation relative to Dominion is unfair. In fact, the annual pole rental rates yielded under the Joint Use Agreements reflect [REDACTED]

[REDACTED].¹⁴⁴ The simplistic comparison of annual pole rental rates presented in support of Verizon's Complaint ignores that the parties divide costs associated with their combined pole network in direct proportion to the benefits that each derives from the joint use arrangement.¹⁴⁵

Verizon also misses the critical point that the annual pole rental rate that Dominion charges to Verizon, whether calculated pursuant to the Joint Use Agreements, or the formula directed under Section 224(e), is in substantial part based on Dominion's bare pole cost. As explained more fully in the Zarakas Declaration, greater investment in Dominion's poles, and the resulting higher cost of Dominion's poles, as compared to Verizon's poles, is the cause of Verizon's greater pole rental fee obligation under the Joint Use Agreements.¹⁴⁶ [REDACTED]

[REDACTED].¹⁴⁷

2. The Annual Pole Rental Rates Calculated Under the Joint Use Agreements

Under the Joint Agreements, the parties' respective annual pole rental rates are determined based on: [REDACTED]

[REDACTED].¹⁴⁸

¹⁴⁴ Joint Use Agreements, Exhibit A.
¹⁴⁵ See Calnon Affidavit ¶¶ 30-35.
¹⁴⁶ See generally Zarakas Declaration ¶¶ 8-9, 13.
¹⁴⁷ See Joint Use Agreements, Exhibit A.
¹⁴⁸ Joint Use Agreements, Article 33.02 and Exhibits A-D.

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[REDACTED]¹⁴⁹ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁵⁰ The baseline annual pole rental rate charged to Verizon pursuant to the Joint Use Agreements is [REDACTED]
[REDACTED]¹⁵¹

a. Dominion's Bare Pole Cost.

[REDACTED]
[REDACTED]
[REDACTED]¹⁵² [REDACTED]
[REDACTED]
[REDACTED]¹⁵³ Based on the Complaint, it appears that Verizon disputes only that Dominion [REDACTED]
[REDACTED] for purposes of the formula set forth in the Joint Use Agreements.

Because the parties are not required to calculate annual pole rental rates pursuant to Section 224(e), the Commission must affirm Dominion's application of an agreed upon rate of return that is just and reasonable. [REDACTED]
[REDACTED]

¹⁴⁹ Joint Use Agreements, Article 33.07 and Exhibit E.

¹⁵⁰ See Agreements, Exhibit A.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *In the Matter of Cavalier Tel., LLC v. Virginia Electric and Power Co.*, File No. PA 99-005, Order, DA 00-2119 (Sept. 18, 2000).

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[REDACTED].¹⁵⁴ It is not unreasonable that Dominion and Verizon agreed to [REDACTED]

[REDACTED]. Moreover, ARMIS data that Verizon recently supplied to Dominion reveals that Verizon itself [REDACTED]

[REDACTED].¹⁵⁵ Thus, Verizon's claim that [REDACTED]

b. Allocation of Pole Space.

The Joint Use Agreements [REDACTED]

[REDACTED].¹⁵⁶ Dominion and Verizon each [REDACTED]

[REDACTED].¹⁵⁷ Unlike its competitors, which are licensed for each strand attached to Dominion's poles, Verizon maintains an ownership stake in the parties' joint use network that includes unfettered access to any joint use pole. Based on this critical distinction, [REDACTED]

¹⁵⁴ See, e.g., *In the Matter of Commission's Rules and Policies Governing Pole Attachments* (CS Docket No. 97-98), *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996* (CS Docket No. 97-151), Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, FCC -1-170 (rel. May 25, 2001), *aff'd*, *Southern Co. Services, Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002) ("*Consolidated Order*") at Exhibit E-2.

¹⁵⁵ See email from Steve Mills to Mike Roberts (Oct. 8, 2015) (summarizing and appending Verizon's ARMIS data over five years, [REDACTED]), appended hereto as Exhibit 3. [REDACTED]

¹⁵⁶ Joint Use Agreements, Exhibit D.

¹⁵⁷ Declaration of Michael C. Roberts in support of Response to Pole Attachment Complaint, appended hereto as Exhibit C ("*Roberts Declaration*") ¶ 9.

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The focus of Verizon's Complaint appears to be that the Joint Use Agreements [REDACTED], whereas less space is actually occupied by Verizon's attachments. The space allocation agreed at the time that the Joint Use Agreements were negotiated reflects Verizon's own projections of its business needs, and throughout the time that the Joint Use Agreements have been in effect, each new joint use pole was custom designed to [REDACTED].¹⁵⁸ Verizon now argues that it cannot be charged for pole space dedicated to its exclusive use, unless such space is fully occupied on each joint use pole. In other words, it is Verizon's position that it cannot be charged for a distinct benefit that it specifically negotiated for, and already received under the Joint Use Agreements.

Verizon also alleges, without credible support, that the annual pole rental rate framework set forth in the Joint Use Agreements is unjust and unreasonable in failing to use the presumption that each of Verizon's attachments occupies one (1) foot of pole space.¹⁵⁹ This presumption is not applicable here, as the annual pole rental rates that Dominion charges to Verizon under the Joint Use Agreements are not subject to Section 224(e). Moreover, even if applied, this presumption was rebutted countless times with Verizon's own statements regarding the space that it occupies on Dominion-owned joint use poles. For example, prior to filing its Complaint, Verizon stated in communications to Dominion that it occupies [REDACTED].¹⁶⁰ The Complaint asserts, however, that Verizon occupies [REDACTED], based on audits that Verizon conducted *in other service areas*.¹⁶¹ At

¹⁵⁸ Graf Declaration ¶ 14.

¹⁵⁹ Complaint ¶ 96.

¹⁶⁰ Letter from Steve Mills, Verizon Network Engineering to Arlie A. Hahn, Jr., Dominion Virginia Power (Mar. 25, 2014) (appended to Complaint as Exhibit 18); Letter from Steve Mills, Verizon Network Engineering to Arlie Hahn, Jr. (Jan. 22, 2014) (appended to Complaint as Exhibit 16).

¹⁶¹ Mills Affidavit ¶ 19.

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bottom, whether the correct measure of Verizon-occupied space is [REDACTED] – as Dominion and Verizon agreed – each is sufficient to rebut the presumption that Verizon asserts.

D. Dominion’s Telecom Rate and Pre-Existing Telecom Rate are Properly Calculated, and are Appropriate Benchmarks for Review of the Complaint.

Even if the Commission is persuaded that Verizon attaches to Dominion’s poles on terms and conditions that are comparable to its competitors within the same service area, Verizon is at best entitled to be charged the same rate that Dominion charges to telecommunications carriers under Section 224(e) of the Pole Attachment Act.¹⁶² The Telecom Rate, as Dominion calculated in accordance with the Section 224(e) formula is: [REDACTED]

[REDACTED].¹⁶³ Prior to filing its Complaint, Verizon refused to accept any prospective adjustment that would yield an annual pole rental rate higher than [REDACTED] per pole.¹⁶⁴ Now, Verizon demands an annual pole rental rate that is less the attachment rate paid by providers of only cable television service, subject to Section 224(d). The annual pole rental rates proposed in the Complaint are at odds with Verizon’s own demands for competitive neutrality.

1. Verizon is Not Entitled to an Attachment Rate Less Than the Rate Charged to its Competitors.

For attachments within its Virginia service area, Dominion charges all telecommunications carriers the same annual attachment rate, calculated in accordance with the formula required under Section 224(e), [REDACTED].¹⁶⁵ [REDACTED]

¹⁶² See 2011 Pole Attachment Order ¶ 217.

¹⁶³ For reference purposes, of Dominion’s Telecom Rate and pre-existing Telecom Rate calculations are appended to the Roberts Declaration as Exhibit MCR-1.

¹⁶⁴ Letter from Steve Mills, Verizon Network Engineering to Arlie A. Hahn, Jr., Dominion Virginia Power (Mar. 25, 2014) (appended to Complaint as Exhibit 18).

¹⁶⁵ Graf Affidavit ¶ 6. [REDACTED]

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[REDACTED]

[REDACTED].¹⁶⁶ Therefore, if the Commission were to order the annual pole rental rates demanded in Verizon's Complaint, [REDACTED]

[REDACTED].¹⁶⁷ Surely the Commission did not intend such a windfall under the *2011 Pole Attachment Order*.

2. Dominion Properly Calculated the Telecom Rate for Each of the Years that Verizon Disputes.

[REDACTED]

[REDACTED]

[REDACTED].¹⁶⁸ The Complaint alleges that the Telecom Rate charged by Dominion for calendar years 2011, 2012, 2013, and 2014 exceeded the lawful rates calculated pursuant to Section 224(e) as the result of Dominion's incorrect application of three (3) specific formula inputs: *first*, the space occupied per attachment; *second*, the average number of attaching entities per pole; and *third*, the rate of return used to calculate the carrying charge.¹⁶⁹ Each of these allegations is addressed in turn.

a. Feet of Space Occupied.

For purposes of calculating its annual Telecom Rate calculation, Dominion applies the presumption that each attachment occupies one (1) foot of space on its pole.¹⁷⁰ Verizon appears to agree that use of this Commission-ordered presumption is appropriate for pole attachment rates

¹⁶⁶ See also Roberts Declaration ¶ 22.

¹⁶⁷ See Roberts Declaration, Exhibit MCR-1.

¹⁶⁸ See supra n. 151.

¹⁶⁹ Calnon Affidavit ¶¶ 12-24.

¹⁷⁰ Roberts Declaration ¶ 21.

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calculated pursuant to Section 224(e).¹⁷¹ The parties mutually agreed to [REDACTED]

[REDACTED]¹⁷²

b. Average Number of Attaching Entities.

Pursuant to well-settled Commission precedent, electric utilities are directed to calculate an annual rate for telecommunications attachments applying the “average number of attaching entities” per pole identified within the geographic service area for which the Telecom Rate is calculated.¹⁷³ This Telecom Rate formula input is intended by the Commission to be a reasonable estimate of the allocation of unusable pole space, based on the data made available to the electric utility through its regular business operations.¹⁷⁴ To the extent an electric utility has exercised good faith in determining the average number of attaching entities among which to allocate the costs of providing unusable pole space, the Commission explicitly places the burden on an attacher disputing the Telecom Rate calculation to demonstrate that such costs are being unjustly apportioned.¹⁷⁵ The Commission never has required that electric utilities apply its presumptions where, as here, those presumptions have been rebutted by actual pole data supporting the average number of attaching entities on which the Telecom Rate is based.¹⁷⁶

In accordance with this Commission-ordered process, Dominion accurately calculated its annual Telecom Rate for calendar years 2011, 2012, 2013, and 2014 on the basis of a statistically

¹⁷¹ Calnon Affidavit ¶ 22.

¹⁷² Joint Use Agreements, Exhibit D.

¹⁷³ Consolidated Order ¶ 66 and n. 227.

¹⁷⁴ Consolidated Order at ¶ 67 (“We emphasize that our preference that each utility use the data it has available in its corporate and regulatory records, and not go to extraordinary lengths to be precise when reasonable estimates will generally provide an equitable process.”).

¹⁷⁵ *Id.* at ¶ 68.

¹⁷⁶ See *id.* at ¶¶ 69-70. Indeed, the FCC’s established its presumptions for the convenience of the pole owner, to be applied at the pole owner’s sole discretion. (“This gives both small and large utilities the option of not conducting a potentially costly and burdensome exercise necessary to develop averages based on their company specific records.”) *Id.* at ¶ 70.

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valid survey indicating an average of [REDACTED] attaching entities per pole.¹⁷⁷ Dominion has applied this figure since it was developed in the 2001-2002 time frame, and the figure never was questioned or disputed by VCTA, or any individual service provider operating within its service footprint.¹⁷⁸ As explained more fully in the Zarakas Declaration, current service provider data filed with the Commission confirms that Dominion's survey results are valid to date. Dominion has rebutted the presumption of five (5) attaching entities per pole within its urbanized service area,¹⁷⁹ and no evidence to the contrary is presented in Verizon's Complaint. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

c. Rate of Return

For purposes of calculating the Telecom Rate pursuant to Section 224(e), the lawful "rate of return" may be either the state commission or state court ordered rate of return applicable to the pole owner's intrastate services, or the default rate of return that the Commission has consistently approved in its orders governing pole attachments.¹⁸⁰ In pole attachment complaint proceedings, it is the complainant's burden to present to the Commission any order on which it relies to establish a rate of return other than the default rate of 11.25%. Verizon failed to meet that burden here.

In support of its Complaint, Verizon offers the written statements of two experts endorsing a specific "weighted" rate of return, based on Dominion's particular capital structure.¹⁸¹ However, the rates of return indicated in the Complaint for each of the 2011-2012, 2013-2014, and 2015-

¹⁷⁷ *Consolidated Order* ¶ 63. ("Where the number of poles is too large, and/or complete inspection impractical, we found that a statistically sound survey could be substituted.")

¹⁷⁸ Roberts Declaration ¶ 23.

¹⁷⁹ Declaration of William P. Zarakas ("Zarakas Declaration") (appended to Response as Exhibit C) ¶ 30.

¹⁸⁰ 47 C.F.R. § 1.1404(g)(1)(x).

¹⁸¹ See Calnon Affidavit ¶¶ 18-21; Affidavit of Timothy J. Tardiff, Ph.D. (appended to Complaint as Exhibit D) ¶¶ 8-18.

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2016 pole rental periods do not square with the orders of the VSCC in its biennial review of Dominion's rates, terms, and conditions of intrastate service for the same time periods. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹⁸² [REDACTED]

[REDACTED].¹⁸³ Therefore, based on the VSCC's orders, it is unclear at best which rate of return, if any, is legally required for purposes of calculating pole attachment rates under Section 224(e).¹⁸⁴ [REDACTED]

[REDACTED]

[REDACTED].¹⁸⁵ the Commission should not order a different rate of return here.

E. The Commission Must Reject Verizon's Demand for Relief.

The relief that Verizon demands is astonishing. The Joint Use Agreements took effect five (5) years ago, and since that time, Verizon enjoyed the benefits an arrangement far superior to that between Dominion and Verizon's competitors, subject to annual pole rental rates that are just and reasonable in consideration of the rights that Verizon receives. Verizon disputed no pole rental fee invoice until September 8, 2015, *after* filing its Complaint, but now insists that the Commission should order Dominion to refund four (4) annual fee payments, [REDACTED].¹⁸⁶

Compounding this offense, Verizon breached the Joint Use Agreements, remitting to Dominion only

¹⁸² Application of Virginia Electric and Power Company For a Biennial Review of the Rates, Terms and Conditions for the Provision of Generation, Distribution, and Transmission Services Pursuant to § 56-585.1A of the Code of Virginia, Case No. PUE-2013-0020, Final Order (2013) (appended to Complaint as Exhibit 25). For purposes of calculating rates pursuant to Section 224(e), the 2013-2014 biennial review period would correspond to the 2015 and 2016 pole rental years, if applicable.

¹⁸³ *Id* at 4. For purposes of calculating rates pursuant to Section 224(e), the 2011-2012 biennial review period would correspond to the 2013 and 2014 pole rental years, if applicable.

¹⁸⁴ Significantly, 47 C.F.R. § 1.1404(g)(1)(x) provides no guidance as to whether "rate of return" element must reflect the utility's individual capital structure, as Verizon suggests.

¹⁸⁵ Roberts Declaration ¶¶ 16-17. [REDACTED]

¹⁸⁶ Complaint ¶ 100.

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██████████ of the pole rental fees invoiced for calendar year 2015, and withholding ██████████.¹⁸⁷ In addition, Verizon flouted its obligation to participate in the pre-complaint dispute resolution process that the Pole Attachment Rules require, refusing on several occasions to document any calculation of what it believes is a just and reasonable annual pole rental rate.¹⁸⁸ Indeed, Verizon's conduct in itself has been unjust and unreasonable, and Verizon's acts should not be tolerated by the Commission.

1. Verizon Did Not Dispute Any Annual Pole Rental Fee Invoice Before Filing its Complaint.

This dispute relates solely to Verizon's request that annual pole rental rates charged under the Joint Use Agreements be prospectively readjusted to reflect the *2011 Pole Attachment Order*.¹⁸⁹ In fact, Verizon's October 8, 2013 letter to Dominion initiating the parties' discussions expressly states Verizon's intention of establishing new annual pole rental rates for calendar year 2014 and beyond, but makes no claim that annual pole rental rates previously charged under the Joint Use Agreements were unlawful.¹⁹⁰ Verizon paid in full all annual fees that Dominion invoiced under the Joint Use Agreements for the 2011, 2012, 2013, and 2014 calendar years, and did not dispute even one of Dominion's invoices during that time.¹⁹¹ Indeed, Dominion had no expectation that Verizon would demand to be refunded annual pole rental fee amounts paid in full before receiving Verizon's Complaint. This demand is patently unfair, and should not be granted.

¹⁸⁷ See *supra* n. 41.

¹⁸⁸ Graf Declaration ¶¶ 21-23.

¹⁸⁹ See Letter from Steve Mills, Verizon Network Engineering to Arlie A. Hahn, Jr., Re: Rental Rate Readjustment for the Joint Use Agreements between Virginia Electric and Power Company, Verizon Virginia, LLC and Verizon South, Inc. (referring to Section 33.08 of the Joint Use Agreements, and requesting that annual pole rental rates be readjusted for 2014 and beyond) (appended to Complaint as Exhibit 13).

¹⁹⁰ *Id.*

¹⁹¹ Graf Declaration ¶ 17.

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2. **Verizon Did Not Engage in the Pre-Complaint Dispute Resolution Processes Required Under Rule 1.1404(k).**

Rule 1.1404(k) requires that all pole attachment complainants, in good faith, engage in, or attempt to engage in pre-complaint executive-level discussions for purposes of settling issues that form the basis of an anticipated complaint.¹⁹² Of further importance, the rule also incorporates an “advance notice” requirement, to ensure that the respondent is provided meaningful information about the allegations that form the basis of the anticipated complaint, and reasonable time within which to respond.¹⁹³ Pursuant to R. 1.1404(k), each pole attachment complaint must include the complainant’s certification that all pre-complaint dispute resolution requirements were met before the complainant resorted to the formal complaint process.¹⁹⁴ That Verizon’s Complaint lacks such certification is not surprising, as Verizon, for eighteen months, ignored Dominion’s repeated requests for an explanation of its demand to be charged an annual pole rental rate lower than the Telecom Rate that Dominion charges to Verizon’s competitors subject to Section 224(e). Indeed, just as the Complaint revealed for the first time Verizon’s demand to be refunded four (4) years’ annual pole rental fees, the Complaint also detailed for the first time Verizon’s specific challenges to the baseline pole rental rates set forth in the Joint Use Agreements, and to Dominion’s Telecom Rate calculation.¹⁹⁵ Based on these new allegations, Verizon now asserts that it must be charged an annual pole rental rate substantially lower than that asserted in pre-complaint communications. Dominion was deprived the chance to engage in meaningful pre-complaint settlement discussions as Verizon withheld critical allegations set forth in its Complaint throughout that process.

¹⁹² 47 C.F.R. § 1.1404(k).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Graf Declaration ¶¶ 17, 21-23.

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Based on the Mills Affidavit, it appears that the letter from Mr. Mills to Dominion, dated March 25, 2014, is proclaimed to fulfill the requirements of Rule 1.1404(k).¹⁹⁶ That letter, titled “Request for Readjustment of Annual Pole Rental Rates”, makes specific reference to provisions of Joint Use Agreements [REDACTED], but makes no mention of Dominion refunding annual pole rental fees that Verizon already paid in full.¹⁹⁷ Moreover, the March 25, 2014 letter does not detail any component of Verizon’s claim that the annual pole rental rates charged under the Joint Use Agreements violate the *2011 Pole Attachment Order*.¹⁹⁸ In particular, because the letter offers no explanation of how Verizon is similarly situated to its competitors within the parties’ overlapping service area, it is unclear that any element of the annual pole rental rate framework set forth in the Joint Use Agreements could be found unlawful solely because it deviates from the formula required under Section 224(b).¹⁹⁹ Verizon also does not challenge Dominion’s rate calculations pursuant to Section 224(e), and in fact concedes that Dominion’s Telecom Rate and pre-existing Telecom Rate should serve as the primary benchmarks for the Commission’s review of the parties agreed upon annual pole rental rates.²⁰⁰ Indeed, Verizon’s proposed annual pole rental rate of [REDACTED] per pole was derived from the regulated pole attachment rates that Dominion charged for calendar year 2014.²⁰¹

¹⁹⁶ Mills Affidavit ¶ 30.

¹⁹⁷ See Letter from Steve Mills, Verizon Network Engineering to Arlie A. Hahn, Jr., Dominion Virginia Power (Mar. 25, 2014) (appended to Complaint as Exhibit 18).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ In the March 25, 2014 letter, Mr. Mills first asserts that the *2011 Pole Attachment Order* requires a lower bound of the Commission’s new Telecom Rate, and upper bound of the Commission’s “old” Telecom Rate for all ILEC attachments. In the same letter, Mr. Mills also claims that Verizon’s annual pole rental rate should fall between [REDACTED] (the attachment rate that Dominion charged to cable service providers in 2013), and [REDACTED] (the attachment rate that Dominion charged to CLECs in 2013). Verizon did not, however, question whether either of those rates was properly calculated under Sections 224(d) and (e).

²⁰¹ *Id.*

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Pursuant to Rule 1.1404(k), Verizon's refusal to engage in pre-complaint executive-level discussions in the manner that the Pole Attachment Rules require should be regarded as an unjust and unreasonable practice, and as grounds for dismissing the Complaint.²⁰² Notwithstanding its clear obligation to provide to Dominion advance written notice of the allegations now set forth in the Complaint, Verizon also ignored Dominion's repeated requests for further detail that would have informed the pre-complaint dispute resolution process, including Verizon's analysis of the benefits that it receives pursuant to Joint Use Agreements, and calculations supporting Verizon's proposed annual pole rental rate. Thus, in lieu of settlement negotiations, Dominion now must dedicate its resources to the formal complaint process.

3. The Commission Should Not Validate Verizon's "Self-Help" Practices.

The Commission, and federal courts alike have repeatedly determined that the practice of common carriers such as Verizon withholding disputed fee amounts for services provided is unjust and unreasonable, and is prohibited under Section 201(b) of the Communications Act.²⁰³ Verizon engaged, and continues to engage in unlawful self-help of the precise character that has long been admonished in federal jurisprudence, withholding from Dominion annual pole rental fees due under the Joint Use Agreements in the total amount of [REDACTED].²⁰⁴ Pursuant to the Joint Use Agreements, annual pole rental fees must be paid in full without exception.²⁰⁵ Verizon, however,

²⁰² 47 C.F.R. § 1.1404(k).

²⁰³ *MGC Commc'ns, Inc.*, 14 FCC Rcd. 11647 (1999), *aff'd*, *MGC Commc'ns, Inc. v. AT&T Corp.*, Mem. Op. and Order, 15 FCC Rcd. 308 (1999); *Nat'l Commc'ns Ass'n v. AT&T*, 2001 WL 99856 (S.D.N.Y. Feb. 5, 2001); *MCI Telecomms. Corp.*, Mem. Op. and Order, 62 F.C.C. 2d 703 (1976); *Communique Telecomms, Inc. d/b/a LOGICALL*, Declaratory Ruling and Order, 10 FCC Rcd. 10399 (1995), *aff'd*, 14 FCC Rcd. 13635 (1999); *Level 3 v. Tel. Operating Co. of Vermont, LLC*, 2011 WL 6291959 (D. Vt. 2011); *Line Sys., Inc. v. Sprint Nextel Corp.*, 2012 WL 3024015, *6 (E.D. Pa. 2012).

²⁰⁴ See *supra* n. 41.

²⁰⁵ Joint Use Agreements, Art. 33.08 ("If six months after the receipt of such [rate readjustment] request by either Party from the other, the Parties have not agreed to a readjustment, then the annual payment rate set forth in Article 33.07 shall be applied until otherwise agreed.")

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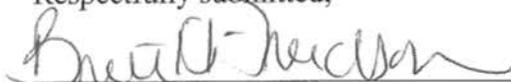
paid only [REDACTED] of the annual pole rental fees that Dominion invoiced for calendar year 2015, in breach of the Joint Use Agreements, and in violation of federal law.

Verizon does not dispute that the Joint Use Agreements remain in full force and effect, or that the 2015 annual pole rental rate due under the Joint Use Agreements for Verizon's attachments to Dominion-owned joint use poles is [REDACTED]. Verizon also does not dispute that the parties never reached agreement regarding Verizon's request for a readjustment of its annual pole rental fee obligation, or that the pole rental rate framework set forth in the Joint Use Agreements was never amended. Verizon nevertheless short paid its annual pole rental fee invoice in the amount of [REDACTED], based solely on its unilateral determination that the annual rate to which it otherwise agreed is unjust and unreasonable.²⁰⁶ The Commission should not grant the substantial relief that Verizon demands where, as here, Verizon itself acted in a manner that is patently unlawful.

V. CONCLUSION

For the reasons set forth herein, Dominion requests that the Commission dismiss Verizon's complaint, with prejudice. In the alternative, Dominion requests that the Commission enter an order declaring the rate framework set forth in the Joint Use Agreements to be just, reasonable, and lawful under Section 224(b) of the Communications Act, as amended, and denying Verizon's demand for relief in its entirety.

Respectfully submitted,



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²⁰⁶ *Id.*

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Dated: November 18, 2015

Counsel to Dominion Virginia Power

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2015, I caused a copy of the foregoing Response to Pole Attachment Complaint to be served on the following (service method indicated):

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554
(via ECFS and hand delivery)

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Lia Royle
Rosemary McEnery
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Kimberly D. Bose, Secretary
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PUBLIC VERSION

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

VERIZON VIRGINIA, LLC and)	
VERIZON SOUTH, INC.,)	
)	
<i>Complainants,</i>)	Docket No. 15-190
)	
v.)	File No. EB-15-MD-006
)	
VIRGINIA ELECTRIC AND POWER COMPANY)	
d/b/a DOMINION VIRGINIA POWER,)	
)	
<i>Respondent.</i>)	

DECLARATIONS

- A. Declaration of Michael A. Graf (Nov. 18, 2015)
- B. Declaration of William P. Zarakas (Nov. 18, 2015)
- C. Declaration of Michael C. Roberts (Nov. 18, 2015)

EXHIBITS

- 1. Email from Arlie A. Hahn to Michael D. Tysinger, Re: Verizon Virginia 2014 Pole Rent) (Dec. 30, 2014), and annual pole rental fee invoices appended thereto.
- 2. Letter from Steve Mills, Network Operations and Engineering, Verizon to Mike Roberts Re: Payment of 2015 Verizon Virginia and Verizon South Rental Invoices (Sept. 8, 2015), and annual pole rental fee invoices appended thereto.
- 3. Email from Steve Mills to Mike Roberts, Re: FERC Data – 5 Year Average (Oct. 8, 2014), and appended spreadsheets.